The Law of Bank Setoff in Massachusetts
by Cornelius J. Chapman

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Bank setoff is both ancient in its origins and current in its applications. While the right of setoff was unobtrusively imported into Massachusetts decisions from English common law, it has more recently been considered to be a sufficiently powerful creditor’s remedy to warrant statutory regulation in Massachusetts regardless of whether the debtor against whom it is exercised is an individual or a commercial enterprise.

This article will examine the legal history of bank setoff and the Massachusetts statutes and case law that govern it; the method of exercising it in the circumstances in which it may be used, and limitations on its use; and the extent to which the right prevails over competing third-party claims to monies held in deposit accounts.

A word about what this article does not attempt is also in order. This article does not cover cancellation of mutual debts by assent or judicial action, nor does it cover setoffs by borrowers of amounts due to banks. It also does not attempt to explicate a bank’s lien on securities or instruments in its possession (except for comparative purposes), although the case law governing the two remedies overlaps. Finally, this article does not treat, except peripherally, the effect of the federal Bankruptcy Code on a bank’s right of setoff, since the legal literature on this topic is extensive.

I. LEGAL NATURE OF BANK’S RIGHT OF SETOFF

The right of a commercial bank to set off to a customer’s deposit balance against that customer’s debts to the bank is based on the legal relationship that arises between a bank and its customer upon the customer’s deposit of money with the bank. Absent an expressed intention to the contrary, the bank’s relation to a depositor with respect to the balance in a deposit account is that of debtor and creditor, the bank being the debtor and the depositor its creditor, “not of agent and principal, or trustee and cestui que trust.”

Money deposited with a bank “does not remain the property of the depositor, upon which the bank has a lien only.” Instead, it becomes the bank’s property; such funds “belong to the bank, become part of its general funds, and can be loaned by it as other moneys.” Accordingly, the exercise of a right of setoff amounts to a cancellation (in whole or in part) of a debt owed by the depositor to the bank by applying, i.e., crediting, to the debt the amount of the funds owed by the bank to the depositor. In the court’s words in National Mahaiwe Bank:

The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account.

The Supreme Court explained its operation in the business world in Studley v. Boylston National Bank of Boston, saying:

a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another.


2. Few issues have been litigated so frequently under the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 et seq. (hereinafter the “Bankruptcy Code”), as whether a bank’s denying a debtor access to deposited funds subsequent to the commencement of a case under the Bankruptcy Code constitutes a violation of the automatic stay of creditor action imposed by 11 U.S.C. §362(a)(7). One of the first such cases was Kenney’s Franchise Corp. v. Central Fidelity Bank NA, 22 B.R. 747 (W.D. Va. 1982).

3. The first English case to recognize a right of setoff appears to be Anonymous, 1 Mod. 215 (1676); see also Chapman v. Derby, 2 Vernon 117 (1689). The first Massachusetts decision to recognize a bank’s common law right of setoff appears to be Nat’l Mahaiwe Bank v. Peck, 127 Mass. 298 (1879).


11. Id. at 528.
Because the common law right of setoff is recognized as a necessary consequence of the legal relation of a bank to its depositor, a bank’s claim to a right of setoff need not be based on contract. Cases have upheld its exercise absent an agreement between bank and depositor conferring the right on the bank. Thus in Sisk v. Saugus Bank and Trust Company (In re Saugus General Hospital), the court noted that the bank’s “claim to the legal right of set-off . . . is based entirely upon its common law right. There are no contractual rights to set-off in the loan documents.”

A right of setoff is not and does not create a security interest, In fact, rights of setoff are expressly excluded from Article 9 of the Uniform Commercial Code, although a depositor may grant a security interest in a deposit account. A right of setoff does resemble a security interest in that both can be employed to reduce a debtor’s liabilities to a creditor, however. The difference is that the funds in a deposit account are the bank’s property prior to the exercise of the right of setoff, while property subject to a security interest is the debtor’s property that must be collected (as in the case of accounts receivable), disposed of by public or private sale, or applied in satisfaction of a debt before it (or its proceeds) becomes the secured creditor’s property. The essential difference between a lien and a bank’s right of setoff may usefully be characterized as the difference between a security interest and an entire interest.

Bank setoff is accordingly distinguishable from a “banker’s lien” on instruments or securities of a borrower that are in the bank’s possession, although the two are confused at times. A banker’s lien on property of a depositor was first recognized in Massachusetts in Nemouet v. Leland, although in dicta. The subsequent case of Wood v. Boylston National Bank cited as settled that “a banker who has advanced money to another has a general lien on all securities of the latter which are in his [the banker’s] hands.” While the two remedies are thus distinct, they coincide when an instrument or security subject to a banker’s lien is liquidated by collection or sale and the cash proceeds generated are applied to a debtor’s obligations.

Bank setoff is subject to an automatic stay upon the filing by the bank’s debtor of a case under the Bankruptcy Code, and a setoff during the 90-day period preceding the commencement of a case under the Bankruptcy Code may be recovered if it results in an improvement in the bank’s position. The validity of a pre-petition setoff is beyond the scope of bankruptcy law jurisdiction, however.

As the Supreme Court noted in Studley v. Boylston National Bank of Boston, federal bankruptcy laws did not create the right of set-off, but recognized its existence . . . . What the old books called a right of stoppage — what businessmen call set-off — is a right given or recognized by the commercial law of each of the states.

II. Bank Setoff: How and When It May Be Exercised

In Massachusetts, the form by which a bank exercises its right of setoff has been held to be immaterial to its validity. It may take the form of a book entry, cancelling an obligation to which the deposit is applied (by stamping a note “paid,” for example), debiting a borrower’s deposit account and crediting the bank’s treasurer’s account, or charging the depositor’s account and issuing a draft drawn either by the bank or the depositor. Given this latitude among possible methods, the First Circuit has held that a setoff is legally effective when three events have occurred: first, a decision

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13. Id. at 349.
15. An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor’s interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim.
17. In order for a security interest to be enforceable against a debtor, a debtor must have “rights in the collateral or the power to transfer rights in the collateral to the secured party.” U.C.C. §9-203(b)(2). Technically speaking, when a debtor grants a security interest in a deposit account, it does not grant a security interest in money deposited in the account, but rather in its rights in the account. Thus, a security interest in money can be perfected only by possession of the money, U.C.C. §9-312(b)(3), while a security interest in a deposit account is perfected by control of the account, U.C.C. §9-312(b)(1).
18. 46 Mass. (5 Met.) (1842).
20. Id. at 359-60 (reversing a judgment against a bank that had collected and applied the proceeds of a note against debts owed by an attorney who had deposited the note “without his own [endorsement], and with nothing to indicate he “actually pledged, or intended to pledge” the note). In the absence of instructions by the attorney who deposited the note “that it was sent for collection only, or that anyone else had any interest in it, . . . [or] instructions as to application of its proceeds,” the bank receiving the note was free to credit the payments on it to the attorney’s “general account, to be availed of in that way as security to the bank.” Id. at 359.
21. See Boston-Continental Nat. Bank v. Hub Fruit Co., 285 Mass. 187, 190 (1934) (“The ordinary right of a bank to set off a deposited negotiable instrument or its proceeds against a debt due or to become due from a customer, sometimes referred to as a ‘banker’s lien,’ may be changed or eliminated by a contract between bank and customer.”).
23. Bankruptcy Code §553(b).
25. 229 U.S. 523 (1913).
26. Id. at 528. See also Bankruptcy Code §553(a).
28. Id. at 202.
A bank may exercise its setoff right only against obligations that were incurred in a mutual capacity by its depositor; that is, the deposit must be owed by the bank to the depositor in the same capacity that the depositor owes money to the bank.34 This principle was discussed extensively in Kitaeff v. Vappi & Company Inc.,35 although in the context of an attempted setoff by an insurance company (Hartford) of amounts owed to a party (BSY) in its capacity as subcontractor, against debts owed by BSY to Hartford on another, unrelated bond as general contractor. The constituent elements of mutuality are that the debts to be set off must be "in the same right and between the same parties, standing in the same capacity," and "the mutuality requirement is strictly construed against the claimant."36 Hartford was found to have established liability to BSY on the former bond, and a claim against BSY on the latter, and thus to have satisfied the requirement that the parties stand "in the same right and capacity to each other."37

The "same right" prong of the test is "often obscured in the case law,"38 and has meant different things in different cases. For example, it was not applied to permit joint obligations to be set off against the debts of one joint obligor in bankruptcy on the grounds that to do so would result in injustice to third parties.39 The First Circuit has noted that "[l]ittle has been written regarding the 'same right' requirement for mutuality, other than the recognition that a prepetition debt cannot offset a post-petition debt."40 One economical statement that may harmonize these apparently divergent cases is that even though the same debtor and creditor are present on the two debts to be offset, no other parties may be involved, and these two parties, i.e., the debtor and creditor, must be able to assert the claim based on those debts.41 The commencement of a case under the Bankruptcy Code creates an "estate" that is legally distinct from the debtor that is the subject of the case,42 and this legal transubstantiation may bar an otherwise-eligible claimant from asserting a claim its predecessor could have made, since the Bankruptcy Code leaves unimpaired only the right of a creditor to offset "a mutual debt owing by such creditor to the debtor that arose before the commencement" of a bankruptcy case.

The second element of mutuality is that the debts must be between the same parties. While similar to the requirement that the debts offset be in the same right, it is more straightforward. The debts offset must be between the same parties and mutuality is lacking where, for example, "a partnership has a claim against an individual, but that individual has a claim against only one of the partners."43

Finally, in order for debts to be considered mutual, the parties must stand in the same capacity to each other. For example, a deposit account held by a bank as trustee of an individual retirement account may not be set off against the personal liability of the depositor who is the beneficiary of the retirement account, since the bank holds the deposit not as a general debtor of the depositor but as trustee.44

The issue of mutuality has arisen most frequently in Massachusetts with regard to deposits made in a savings bank or the savings department of a trust company, which is the Massachusetts form of entity for a commercial bank. For such institutions, "the legal relation between bank and depositor is substantially that of trustee and cestui que trust. The depositors all have a common interest in the invested funds, and each is entitled to his proportionate share of the profits."45 The rule's rationale is sometimes explained in terms of the capital structure of a mutual savings bank, namely, that it has "no capital stock, properly so called," because:

all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. The idea was, and still is, the corner-stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depositors.46

32. Sisk, 608 F.2d at 47.
33. See id. (citing Baker v. Nat’l City Bank, 511 F.2d 1016 (6th Cir. 1975)).
36. Id. at 613. In the context of a bankruptcy, however, allowance or disclaimer of a setoff “is a decision that rests in the sound discretion of the bankruptcy court.” Id. at 613 (citing Cumberland Glass Mfg. Co. v. DeWitt & Co., 237 U.S. 447 (1915)).
37. Id. at 615.
38. See 4 Collier on Bankruptcy supra note 34, at § 553.03[3][d].
41. In WJM Inc. v. Mass. Dept. of Pub. Welfare, the First Circuit stated that the three-pronged test of mutuality is “hornbook law,” 840 F.2d 996, 1011-12 (1st Cir. 1988) (citing 4 Collier on Bankruptcy ¶ 553.04, at 553-18 (L. King, 15th ed. 1987)). See also 4 Collier on Bankruptcy supra note 34 at ¶ 553.03[3].
42. Bankruptcy Code § 541(a).
43. Kitaeff, 140 B.R. at 614 (citing Gray v. Rollo, 85 U.S. 629, 629 (1873) (emphasis original)). While it is difficult to imagine how it could occur in the context of a deposit account, the requirement that setoff occur between the same parties has also been held to bar so-called “triangular” setoffs among three parties. Sherman v. First City Bank of Dallas (In re United Sciences of Am. Inc.), 893 F.2d 720, 723 (5th Cir. 1990).
44. Kitaeff, 140 B.R. at 614 (citing In re Mastroeni, 57 Bankr. 191 (S.D.N.Y. 1986); In re McDaniel, 41 Bankr. 132 (Bankr. W.D. Tex. 1984)).
46. Lewis, 148 Mass. at 243-44.
Thus the obligation of a savings bank to its depositors is to pay each “in full, with his dividends, provided the assets are sufficient; and if they are not sufficient, then to pay to each one his proportionate share”; it is not, as in the case of a commercial bank, “an absolute promise to repay to any depositor the full amount of his deposit, at all events,” because that would “imply that in the case of loss [a savings depositor] should be repaid out of the deposits of others.”

The same savings bank rule applies to deposits made in the savings department of commercial banks. Such deposits shall be appropriated solely to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full. The accounts and transactions of said savings department shall be kept separate and distinct from the general business of the corporation.

As a result, savings deposits are distinguished from commercial bank deposits as “not mere choses in action” since they are evidenced by passbooks or other forms of receipt that “partake of the nature of money securities.”

The issue of mutuality frequently arises when a bank tries to set off against a joint deposit account a loan made to only one of the depositors. The only Massachusetts decision to have addressed this issue is Mungin v. Valley Bank and Trust Company. In Mungin, a woman added a man to her savings account for her convenience so that he could pay her bills, not intending him to have any ownership interest in the account balances, but the woman did not advise the bank of her intent. The man had been convicted of stealing checks from the bank and cashing them, and was ordered to make restitution to the bank. Shortly after the account was opened, the bank exercised its right of setoff, withdrew the entire balance, applied it to the man’s obligations and closed the account.

The Appellate Division of the District Court Department held that the setoff was proper. Because the woman added the man’s name to her account by a joint account card that identified the two individuals as owners, the court concluded that the card constituted a contract between them and the bank, “irrespective of the interest either of them may have had in the account and whatever rights therein they might have had between themselves.”

**Maturity**

To be subject to a bank’s right of setoff, the depositor’s obligation to the bank must have matured; otherwise no setoff can occur because until maturity, there is no amount due from the depositor to the bank to which the bank can apply the deposit. Historically, in Massachusetts, a cause of action accrues on a demand note upon its date or, if undated, on the date of issuance, and a suit could thus be commenced on such a note without demand. It was thus possible to set off a deposit against a demand obligation without formal demand, although the practice was to set off simultaneously with or as soon as possible after making demand. The continued vitality of this rule is now questionable since the adoption in Massachusetts of the 1990 Revision of Uniform Commercial Code Article 3, which repealed it and established the rule that the statute of limitations begins to run on a note payable on demand when demand is made.

A bank may not by acceleration or the passage of time set off a deposit against a time instrument until the day after its maturity, since no cause of action accrues to the bank on such an instrument until maturity. While there is language in at least one case that suggests that setoff may be exercised against a time obligation not yet due, the doctrine of equitable setoff under which a present liability may be set off against an unmatured debt of an insolvent debtor is not followed in Massachusetts.

If the debt must have matured, must the deposit also have matured? In other words, must there be mutuality of maturity? While there is no Massachusetts case law on the point, federal bankruptcy law cases indicate that the requirement of maturity is applicable only to the liability of the depositor and not that of the bank.

While the depositor’s obligation to the bank must have matured for a bank to exercise its right of setoff against the obligation, a bank may nonetheless by agreement obtain a pledge of monies deposited by a borrower. For example, in Jordan v. Lavin, a bank held a note payable on a date certain that contained the following language:

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any moneys or other property at any time in the possession of the (Pilgrim Trust) Company belonging to any of the parties liable hereon to the Company, as maker or endorser or guarantor, and any deposits, balance of deposits, or other sums at any time credited by or due from the Company to any of said parties, may at all times at the option of the Company, be held and treated as collateral security for the payment of this note or any other liability of the maker hereof to the Company, whether due or not due, and the Company may at any time at its option set off the amount due or to become due hereon against any claim of any said parties against the Company.\textsuperscript{65}

Prior to the note’s maturity, the bank was served with a writ in trustee process in a contract action against one Lavin. Upon receipt of the writ, the bank drew a check payable to itself for the balance of Lavin’s account, marking the check “holding it for Mr. Jordan,” that is, the plaintiff in the action. The plaintiff conceded that under the terms of the note, the bank had the right to hold the deposit as additional security, but claimed that the bank relinquished that right by drawing a check payable to itself and noting on the check the plaintiff’s interest. The court recognized the bank’s right to hold the deposit under the note’s terms even though the note had not matured. The bank’s right to hold the deposit was not impaired by its notation on the check, in the absence of evidence that the bank intended by its notation to waive its interest in the deposit. Jordan v. Lavin was decided before Massachusetts adopted the Uniform Commercial Code in 1957, but the same result would obtain under the current version of Uniform Commercial Code Article 9, which recognizes security interests in deposit accounts.\textsuperscript{66}

\textbf{Special purpose deposits}

Not all deposits are subject to a bank’s setoff right. Where a deposit is made for a special purpose that is known to a bank, the money is held as a trust fund and the bank is “without lawful right to appropriate the deposit to its own use as a set-off.”\textsuperscript{67} As the Supreme Judicial Court noted in \textit{Furber v. Dane},\textsuperscript{68} this right of detention, or banker’s lien, as it is sometimes called, attaches upon the securities and money of the customer deposited in the usual course of business. . . . But the right to detain for the general balance of the account may be controlled by any special agreement which shows that it was not intended by the parties, nor does it exist where the circumstances or the particular modes of dealing are inconsistent with its existence.\textsuperscript{69}

The ability of a depositor to limit the range of application of bank deposits, and thus insulate them from the right of setoff, was first recognized in Massachusetts in \textit{Clark v. Northampton National Bank}.\textsuperscript{70} In that case, decided under the now-repealed Massachusetts insolvency statute,\textsuperscript{71} the assignee in insolvency of a company that was indebted to the defendant bank on overdue promissory notes sought to recover money deposited prior to the filing of the insolvency petition.\textsuperscript{72} The assignee requested a ruling that the circumstances under which the deposits were received by the bank either made them subject to an implied or constructive trust for the benefit of the depositor’s creditors, or that there existed an implied contract that modified the normal debtor-creditor relationship between bank and depositor.\textsuperscript{73} The ruling request was based on evidence that the bank understood that checks were to be drawn on the company’s account only to “pay the help.”\textsuperscript{74} Other evidence that checks had been drawn for different purposes suggested instead that deposits were made on “the understanding that the relation of the parties continue to be the ordinary one of a depositor with a bank.”\textsuperscript{75} The conflicting evidence supported the trial court’s finding that no special trust attached to the deposits, and the bank was permitted to set off the deposits against the balance owed to it on the company’s overdue promissory notes.

The rule implicit in the holding of \textit{Clark} was subsequently made explicit in \textit{Mohan v. Woburn National Bank}.\textsuperscript{76} That case held that there could be no question as to a depositor’s right to direct the manner in which a deposit could be used:

[The depositor] must have the right to say what he will do with his own money, and we know of no rule that requires a bank to accept a deposit unless it wishes. We think that, if money or its equivalent is offered to a bank by way of deposit with specific directions as to what shall be done with it, the bank is under an obligation to comply with those directions if it accepts the deposit.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{65} \textit{Id.} at 363. \textit{See also} \textit{Boston-Continental Nat’l Bank, 285 Mass. at 190, and Harding \textit{v. Broadway Nat’l Bank, 294 Mass. 13, 18 (1936). Statements in these cases that the right of setoff extends to debts either “due or to become due” should be read either as dicta (since in neither case was setoff attempted against an unmatured debt), or to mean that a deposit may be applied to a debt that becomes due after the deposit is made.}
\item \textsuperscript{66} \textit{See text at note 15, supra.}
\item \textsuperscript{67} \textit{Collier on Bankruptcy, supra note 34, at ¶ 68.16}
\item \textsuperscript{68} \textit{203 Mass. 108 (1909).}
\item \textsuperscript{69} \textit{Id.} at 117. The use of the verb “detain” and the noun “detention” to refer to a banker’s lien and right of setoff in \textit{Furber v. Dane} has not been widely followed. \textit{See 1 Morse, A TREATISE ON THE LAW OF BANKS AND BANKING} §337 at 569 (Little, Brown & Co. ed. 1888) (“Setoff cannot confer a right to detain property the title to which is in another, but only to set one money claim against another.”). \textit{See also} \textit{Connecticut General Statutes} §37-2 (2012) (“No borrower of money shall be permitted to set off or recover back, by any proceeding in court, any sum of money paid by way of interest, discount or damages, for the detention of money, in excess of the rate of six per cent a year.”). \textit{160 Mass. 26 (1893). For earlier cases that reached similar holdings with respect to banker’s liens, see President, Dirs. of Neponset Bank \textit{v. Leland, 46 Mass. 259 (1842); Wood \textit{v. Boylston Nat’l Bank, 129 Mass. 358 (1880); Hathaway \textit{v. Fall River Nat’l Bank, 131 Mass. 14 (1881); Brown \textit{v. New Bedford Inst. for Sav., 137 Mass. 262 (1884).}}}
\item \textsuperscript{71} \textit{Clark, 160 Mass. at 31-32.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id. at 31.}
\item \textsuperscript{74} \textit{Id. at 32.}
\item \textsuperscript{75} \textit{313 Mass. 306 (1943).}
\item \textsuperscript{76} \textit{Id. at 310.}
\end{itemize}
The court sustained exceptions to a directed verdict for the defendant bank, where the jury could have found that the depositor’s president had the authority to direct the bank to apply the deposit to pay in full an overdue note of a corporation, and that the bank failed to comply with that direction and instead set off the balance in the president’s wife’s savings account against her liability to the bank as endorser of the corporation’s note.80

If a deposit is made for a special purpose, such as for payment of payroll or taxes, or is subject to a direction by the depositor to be applied — for example, to a pre-existing debt, to stand as security only for a certain obligation, or to be paid to a third person — the relationship of bank to depositor for that deposit is no longer that of debtor to creditor. Rather, the legal obligation of the bank in such circumstances has been described as a trust or an implied contract of setoff because the funds are not the bank’s property.79

Adequate security

The final limitation on the right of bank setoff in Massachusetts is that a deposit may not be set off if the bank holds other collateral that is adequate to provide for repayment of the debt. The first Massachusetts decision to invoke this principle, although in dicta, was Furber v. Dane.80 In Furber, a firm of stockbrokers deposited with and pledged to the bank United Shoe Machinery Company stock (“Shoe Machinery stock”) to satisfy the bank’s margin requirements for an outstanding loan to the brokerage firm.81 The brokerage firm subsequently made an assignment for the benefit of creditors, and the owners of the Shoe Machinery stock requested that the bank “sell and apply upon its note the other collateral security which it held,” comprised of other stock and a deposit account before resorting to the pledged shares.82 The bank sold the other stock, leaving a balance due on the note only slightly larger than the balance in the insolvent firm’s deposit account; the Shoe Machinery stock was, on the other hand, worth considerably more than the amount due the bank.83 The firm’s assignee in insolvency had sought to sell the Shoe Machinery stock to satisfy the brokerage firm’s debt to the bank, thereby making the bank deposit available for distribution to other creditors.84

The court recognized the existence under Massachusetts law of a bank’s right of setoff, but noted that it could be controlled by “any special agreement which shows that it was not intended by the parties,” and that it could be overridden “where the circumstances or the particular modes of dealing are inconsistent with its existence.”85 The plaintiffs, who owned the Shoe Machinery stock, were not party to an agreement with the bank, since they were not owners of the deposit account; the deposit account was opened in the name of the insolvent brokerage firm.86 The case accordingly turns on the circumstances in which setoff is sought to be exercised, and not on the agreement between bank and depositor.

The court concluded that the facts created a circumstance in which the right of setoff would be limited, namely, where securities “pledged to the bank to secure a specified demand cannot be held for other demands though against the same debtor.”87 It then added that, “[a]ccordingly, the right of a bank to apply the deposit of its debtor to the payment of his matured indebtedness has been denied if that indebtedness is fully protected by other collateral security . . . In our opinion, this is the proper rule.”88

That the proposition expressed by the quoted sentences does not follow from the fact that under Massachusetts law, a depositor may limit the use of a deposit by its direction to a bank is, at this late date, irrelevant; the notion that a bank’s right of setoff could not be exercised against a debt that was fully secured had made its first appearance in a Massachusetts case. The request by the owners of the Shoe Machinery stock to compel the bank to apply the debtor’s deposit amount so as to preserve their rights in the stock was denied because, in the court’s view, the bank’s right of setoff was not a lien that could be marshaled to benefit a surety.89 The bank’s ability to set off the account while it held adequate security was thus not at issue in the case.

The dicta of the court in Furber v. Dane was followed in Prudential Realty Co. v. Commissioner of Banks.90 In that case, an insolvent trust company held a $40,000 note of Prudential Realty Co., secured by a third mortgage and a $20,177.89 deposit.91 The note came due several months after the trust company became insolvent.92 The maker of the note, Prudential Realty Co., demanded that its deposit be set off against the debt due, which the Commissioner of Banks first assented to, then reversing its position.93 The Commissioner foreclosed on the third mortgage and reserved from the sale proceeds in an amount sufficient to satisfy the entire amount due on the note.94 The reservation of proceeds was held without prejudice to Prudential Realty Co.’s right to assert a setoff pending resolution of its claims.95

The court, citing Furber v. Dane, denied Prudential Realty Co.’s demand for a setoff, noting that this would give it “a preference over the other creditors in liquidation of the insolvent trust company,” since Prudential Realty Co. would, by virtue of the setoff, receive payment in full of its deposit, while other depositors would only be entitled to dividends in the regular course of liquidation. Noting that “[t]here would be no equity in such a proceeding,”96 the court upheld the commissioner’s refusal to allow the setoff.

78. For a banker’s lien case following this rule, see Hathaway v. Fall River Nat’l Bank, 131 Mass. 14 (1881).
81. Id. at 113-14.
82. Id. at 114.
83. Id.
84. Id.
85. Id.
87. Id. at 117.
88. Id.
89. Id. at 118.
90. 241 Mass. 277 (1922).
91. Id. at 277.
92. Id.
93. Id. at 278.
94. Id.
95. Id.
The Prudential Realty Co. case offers an additional legal rationale for the denial of a setoff claim where a bank takes separate security for a debt: a bank that extends credit on the basis of specific security is not presumed to rely on the debtor’s general deposits, but instead on the bargained-for collateral. The understanding of the parties, noted the court, “was that the mortgage became security for a particular debt; and in the absence of an agreement to the contrary, the general accounts between the parties were entirely outside that transaction and could neither increase nor diminish the amount of the debt secured.”

The Forber v. Dane dicta adopted in Prudential Realty Co. is inconsistent with certain older principles of Massachusetts law, one of which — that a secured creditor may pursue all of its remedies without prejudice — was invoked later in Forastiere v. Springfield Institution for Savings. In Forastiere, a savings bank sought to set off a deposit against the amount due on a demand note that was secured by the mortgage. The plaintiff in the action was the assignee of the note. The plaintiff sued to recover the deposit, and the trial court found in his favor. The court reconciled the apparent inconsistency by fashioning a rule that where a debt is secured, “the burden to show that the security was inadequate.” Having noted the court, “was that the mortgage became security for a particular debt; and in the absence of an agreement to the contrary, the general accounts between the parties were entirely outside that transaction and could neither increase nor diminish the amount of the debt secured.”

The court held that the bank was not required to apply its other collateral to Thompson’s loans under either the language of his pledge agreements or any principle of law or equity. The court held that since Thompson’s collateral was pledged as security for all loans which had been, or might thereafter be, obtained, Washington Bank was not bound “to appropriate the moneys collected on the collateral security to the payment of one loan rather than another.”

The Richardson case thus recognized the practice of pledging collateral as security for multiple obligations without preference as to payment, and confirmed its enforceability. While a debtor and creditor may agree upon a special pledge of collateral, that is, a pledge that imposes no obligation on “the party holding the security first to apply it to the payment of the loan obtained when the security was given.” The creditor is free “to apply the proceeds of the security as he saw fit.”

Given this dubious heritage, it is not surprising that the supposed rule of the Furber v. Dane dicta and its progeny was viewed with skepticism in Sisk v. Saugus Bank and Trust Co. (In re Saugus General Hospital Inc.). In that case, the Bankruptcy Court for the District of Massachusetts criticized the Forastiere court for characterizing Furber v. Dane and Prudential Realty Co. as providing a rule that a “bank may resort to a set-off of a deposit only for any balance of the debt beyond the value of the security . . . . Neither of the latter two cases reached such a holding, even in dicta.” According to Bankruptcy Judge Gabriel, “They held simply that if the indebtedness is fully protected by collateral security, no right of set-off funds on deposit would accrue.”

97. Id. at 278.
99. Id. at 101-02.
100. Id. at 102.
101. Id.
102. Id.
103. Id. at 104 (citing Furber v. Dane, 203 Mass. 108, 117 (1909); Prudential Realty Co. v. Comm’r of Banks, 241 Mass. 277, 279 (1922))
105. Id.
106. Id. at 102.
107. 44 Mass. (3 Met.) 536 (1842).
108. Id. at 539.
109. Id.
110. Id. at 540.
113. Id.
115. Id. at 350.
Whether the Bankruptcy Court’s formulation provides any more clarity than the Massachusetts cases it criticizes is doubtful. However, the United States Supreme Court has held that a bank may refuse to honor checks drawn on the account of a debtor subject to a federal bankruptcy proceeding without violating the Bankruptcy Code’s automatic stay under section 362, so long as it does not permanently effect a setoff by applying the balance on deposit to the debtor’s loan amount. Thus, a bank may place an administrative hold on a borrower’s account while it awaits a determination as to whether it is entitled to relief from the automatic stay because its non-cash collateral is inadequate.

Statutory restrictions

Statutory provisions also restrict or govern a bank’s right of setoff. Massachusetts General Laws chapter 167D, section 16, requires state-chartered banks that set off depositors’ funds to notify their customers forthwith of such transfer by written notice by first class mail to their last known address. A depositor who is not sent such notice is entitled to recover actual damages. The statute does not indicate whether a bank that complies with the statute is thereby absolved from liability for actual damages arising out of its setoff, although this would seem to follow by implication, assuming setoff was properly exercised.

The requirement of chapter 167D, section 16, is applicable to the setoff of a depositor’s obligation to its bank regardless of whether the depositor is a natural person or a business organization and the purpose for which the obligation was incurred.

The Massachusetts consumer credit cost disclosure statute, chapter 140D of the General Laws, prohibits banks or credit unions from setting off a deposit of a borrower unless the depositor has been provided with a written notice, prior to the time of the offset, stating that the lender may transfer funds of the depositor in reduction or extinguishment of debts. This statutory provision applies only to consumer credit and not to credit transactions “primarily for business, commercial or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.” It also applies to “closed-end credit,” that is, credit not extended pursuant to an “open-end-credit” plan under which the borrower and lender contemplate repeated transactions. A comparable provision applicable to open-end credit is found in General Laws chapter 140D, section 21, which permits credit card issuers to set off deposited funds against debts arising out of the use of a credit card if the setoff “was previously authorized by the cardholder in a separately signed agreement whereby the cardholder agrees to pay debts incurred in his open-end-credit account by permitting the card issuer to deduct periodically all or a portion of such debt from the cardholder’s deposit account.” The cited section goes on to provide that such action shall not be taken with respect to a disputed item if the cardholder so requests.

Limitations subject to modification

The common law right of setoff may be “changed or eliminated by a contract between bank and customer,” and accordingly the limitations discussed above are subject to modification. In Neponset Bank v. Leland, the court denied a bank’s claim to a general lien upon certain promissory notes that were pledged to it as security for a specific obligation. The court held that the bank could not retain the notes (and consequently apply the proceeds when collected) for obligations of the borrower incurred prior to the date of the pledge, where the notes were deposited under special circumstances and “not pledged generally, but specifically.”

The subsequent case of Wood v. Boylston National Bank similarly held that a claim to a general lien on securities in a bank’s possession (and their cash proceeds) was subject to the terms of “a particular agreement limiting their application.” Similar results were reached in the cases of Furer v. Dane, Boston-Continental National Bank v. Hub Fruit Co., and Harding v. Broadway National Bank of Chelsea. While all of these cases have found that the parties’ agreement to override the common law of setoff favored the depositor, cases in other jurisdictions have upheld agreements between a bank and its depositor that favor the bank, upholding (for example) provisions found in a bank brochure that expanded the right of setoff to debts owed by any payee named on a certificate of deposit, and not just to the party whose funds had been used to purchase it, and permitting a bank to set off funds deposited to a joint account by a father against defaulted loans of his son.

III. Bank Setoff vs. Rights of Third Parties

This article has thus far focused primarily on the relationship between a bank and its depositor, considered in isolation from potential claims by third parties that are likely to be asserted at the same time and for the same reasons that a bank exercises its right of setoff; namely, the deteriorating financial condition of the depositor, and a desire to reach its most liquid asset — cash — and thereby improve a creditor’s prospects for repayment. This section will examine a bank’s right of setoff in relation to the rights of parties with competing claims against the depositor.

122. Id.
124. 46 Mass. (5 Met.) 259 (1842).
125. Id. at 263.
126. Id.
127. 129 Mass. 358 (1880).
128. Id. at 360.
Sureties

Where a depositor has multiple obligations to a bank and a surety is liable on one but not all of them, must the bank exercise its right of setoff in a manner that benefits the surety? Under suretyship law, a creditor holding both a guaranty and collateral from the principal obligor is required to enforce its security interest if its failure to do so “will result in unusual hardship to the secondary obligor and enforcing the security interest [in the collateral] will not materially prejudice or burden” the creditor.134 The law governing bank setoff is not governed by this rule, however, since, as noted above, a right of setoff is not a security interest. As the first Massachusetts bank setoff case ruled, a bank “holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation.”135 Subsequent cases have uniformly followed this rule.136

Payees of Checks

Under Article 4 of the Uniform Commercial Code, a bank to whom a check is presented for payment has a limited period of time in which to dishonor it, the outer boundary of which is generally determined by the bank’s “midnight deadline,” which is the next banking day following the banking day on which it receives the check or notice, or time otherwise begins to run.137 If a bank wishes to exercise its right of setoff after this period has expired, can it do so?

In Raymer v. Bay State National Bank,138 a company nearing insolvency drew 26 checks on its account with a bank that had extended it a line of credit.139 The company’s account contained sufficient available funds to pay the checks, and the bank posted the checks on the day following the date they were received.140 While representatives of the company were meeting with the bank to review earnings projections, the company’s loan officer took possession of the company’s property.141 Later that day, the bank set off the balance in the company’s account and returned the 26 deposited checks for insufficient funds.142

The Superior Court held that the bank’s setoff was improper, and the Supreme Judicial Court affirmed.143 The bank had exercised a setoff after the midnight deadline for the checks had passed. The bank had therefore become “accountable” for the checks under Uniform Commercial Code section 4-303, which provides that a setoff exercised by a payor bank “comes too late to terminate” a bank’s duty to pay an item if it is exercised after the earliest to occur of its midnight deadline or certain actions that it may take.144

Trustee Process Plaintiffs

Trustee process is the method under Massachusetts law by which a plaintiff can attach goods, effects and credits due from a third party (the “trustee”) to a defendant, including balances held in a bank account other than a payroll account.145 The trustee is entitled to retain or deduct from the “credits in his hands all liquidated demands or judgments against the defendant of which, had he not been summoned as trustee, he might have availed himself upon a trial or by set-off of judgments or executions,” and is liable only for the balance due after all mutual demands have been adjusted.146 Moneys due from a bank to a defendant must be “due absolutely and without any contingency” in order to be subject to trustee process. Amounts due absolutely and without any contingency, but not yet payable, may be attached before they have become payable, but the trustee is not required to pay them before the time due by contract.147 The former description would apply to demand deposits, the latter to time deposits.

A bank summoned as a trustee may set off amounts due “on any contract entered into before the service of the writ.”148 Setoff may be exercised after service but before final answer. In Sternheimer v. Harris,149 a bank made demand on notes of its borrower-depositor after service, but before it answered. The Superior Court ordered the bank to be charged as trustee, but the Supreme Judicial Court sustained the bank’s exceptions, stating that it was entitled to exercise its right of setoff under the statute so as “not to be placed in a worse situation that he would be in, if the principal had sued him for the debt.”150

The depositor’s notes that were offset in Sternheimer were “all payable on demand, and thus were due at the time of the service of the writ. The bank made timely demand after service of the trustee writ and then applied the defendant’s deposit.”151 Where a depositor is obligated to a bank on a time note, it is necessary to accelerate the maturity of the principal in order to be able to set off a deposit against the full balance due, and for this reason it has become customary to include among the events that will give rise to such a right the service on the bank of a summons seeking to attach deposit accounts by trustee process.

139. Id. at 312.
140. Id. at 312.
141. Id. at 312-13.
142. Id. at 313.
143. Id.
150. Id. at 171.
151. Id. at 170.
Holders of security interests in bank accounts

As noted earlier, rights of setoff are excluded from Article 9 of the Uniform Commercial Code. However, since revised Article 9 provides for security interests in deposit accounts, it was necessary for the drafters of Article 9 to include rules to resolve conflicts between one bank’s right of setoff and another bank’s security interest in a deposit account maintained at the first bank. Those rules are spelled out in U.C.C. §9-340 as follows:

i. As between a bank’s right to setoff an account it holds based on a claim against the debtor/depositor and another party’s security interest in the account, the deposit bank’s right of setoff prevails unless the secured party perfected by “control” under U.C.C. §9-104(a)(3), namely, by becoming the bank’s customer as to the account.153

ii. If the secured party perfected its interest in the account under U.C.C. §9-104(a)(3), the setoff of the account based on a claim against the debtor/depositor is ineffective and the secured party prevails.154

The foregoing rules do not apply to deposit accounts evidenced by an instrument, namely, a certificate of deposit, because they are excluded from the definition of “deposit account.”155 Cases in other jurisdictions are split as to whether the issuer of a certificate of deposit prevails in a conflict with the pledge of such an instrument;156 there are no reported Massachusetts cases on this point.

CONCLUSION

Borrowers view deposited funds as their money in the bank, while lenders view the balances as theirs to use when prospects of payment from other sources decline. The truth of the matter lies somewhere in between these two poles; the funds do belong to the bank, but not to do with entirely as it wishes. Setoff, like other creditor remedies, is hedged by limitations designed to balance the rights of depositors — and their other creditors — against those of the banks who hold their money, and lend to them in part on the security it provides.

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A bipartisan consensus against mandatory minimum sentencing appears to be emerging across this country. Even some law enforcement officers and corrections officials now admit publicly that our nation’s harsh sentencing practices have resulted in over-incarceration and are ineffective at reducing recidivism. Many judges — including the Chief Justice of our state’s Supreme Judicial Court — favor repeal of these laws because they limit and sometimes eliminate judicial discretion. While numerous bills have been introduced in the Massachusetts Legislature to abolish some current mandatory penalties, for reasons discussed below these bills have mostly languished. This essay highlights one potential route out of the legislative logjam.

The rise in mandatory minimum penalties in the early 1980s reflected, in part, a lack of trust in judges. When a high-profile case ends with a result that is widely criticized, or the danger to the public by certain threatened criminal behavior intensifies, the community tends to become less hospitable to judicial discretion in sentencing. Fear of “liberal judges” letting off violent criminals looms large in the public consciousness. Yet when crime rates are low and incarceration rates (and resulting financial costs) are high, the public appears to be more receptive to increased judicial discretion in sentencing. The current national swing away from mandatory minimum sentencing toward guided judicial discretion is one end of an “arc” that tends to repeat itself over time.

Various sentencing schemes have flourished in our society throughout history — from open-ended discretion capped at a maximum sentence, to discretion bounded by sentencing guidelines, to mandatory sentencing. In Massachusetts, dozens of crimes carry mandatory minimum sentences (most notably murder, some sex offenses, most drug trafficking crimes, certain robbery and firearms charges, and repeat offender DUI). But for most crimes, the legislature has set only a maximum sentence by statute, and the judge has discretion to sentence the convicted offender to probation or any term of years below that maximum amount.

Massachusetts established a state Sentencing Commission in 1994 as part of the “truth in sentencing” law. The Sentencing Commission published sentencing guidelines for most crimes back in 1998, but these now dusty guidelines are advisory only; they do not have the force of law because they were never formally adopted by the legislature.

The General Court’s reluctance to approve sentencing guidelines has occurred during a time of significant changes in the constitutional law of sentencing. In 2000, the United States Supreme Court in Apprendi v. New Jersey held that the Sixth Amendment to the Federal Constitution required any fact “[o]ther than the fact of a prior conviction” to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum. In 2004, the Supreme Court specifically found that the State of Washington’s determinate sentencing scheme violated the Sixth Amendment because it permitted a trial judge to increase a sentence based upon a fact found by the judge by a preponderance of the evidence. Applying this principle one year later in United States v. Booker, the Supreme Court invalidated the mandatory nature of the United States Sentencing Guidelines and made the guidelines advisory.

In the decade since Booker, the Massachusetts General Court has not enacted advisory sentencing guidelines. Accordingly, judges in Massachusetts are not required to follow the 1998 state sentencing guidelines, and they do not have to state their reasons for imposing a sentence out of conformity with the guidelines.

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3. See, e.g., S. 64; H. 1429; H.R. No. 1620 (Mass. 2015).
5. In a 1977 poll, 74 percent of all respondents said that the courts are “too lenient.” Lawrence Friedman, Crime and Punishment in America (1994) (citing Louis, Harris, “The Harris Survey” and Sourcebook of Criminal Justice Statistics, Department of Justice (G.P.O. 1979)).
13. Id. at 490. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court made clear that the “statutory maximum” for Apprendi purposes is the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Id. at 303 (emphasis original). Because a trial judge was required under Washington law to find additional facts in order to impose a sentence above the mandated “standard” sentence, the court determined that the state sentencing procedures violated the defendant’s Sixth Amendment right to have the jury find beyond a reasonable doubt the existence of “any particular fact” that the law made essential to his punishment. Id. at 301.
14. Blakely, 542 U.S. at 301-03.
16. Booker, 543 U.S. at 245.
The Massachusetts Sentencing Commission’s task until recently has been to collect, analyze and update data about sentencing. Governor Deval Patrick reconstituted the 15-member Sentencing Commission in 2014. Many had hoped that this new and revitalized commission would update the guidelines, address more fully intermediate sanctions and reentry practices, and help shape a consensus among judges, prosecutors and the defense bar that could lead to formal legislative adoption of Massachusetts’s long dormant guidelines system. To date, however, that has not happened. The new Sentencing Commission seems to have focused its attention primarily on the mandatory minimum debate to the exclusion of other issues regarding judicial discretion. In order to break a legislative logjam around mandatory minimum sentencing, the commission is now considering recommending a “safety valve” to allow judges to deviate from certain mandatory sentences after making findings of special circumstances, similar to the Federal Drug Safety Valve.

The debate over the repeal of mandatory minimum sentences (or “safety valve” relief therefrom) is important. But it appears to have stalled in the current legislative session, primarily because many influential district attorneys and law enforcement officers in Massachusetts are opposed to returning to the days when judges had unbridled sentencing discretion. They point to lower crime rates in Massachusetts as evidence that our current sentencing laws are working. Not wanting to appear soft on crime, the legislature applies broken. Without the support of the district attorneys, pending crime bills are unlikely to gain legislative momentum.

We see at least one potential way out of the legislative impasse on repealing mandatory minimum sentences. If judges were required to publicly state the reasons for their sentences in all felony cases, this critical phase of the criminal justice system would become more transparent. Legislators, those involved in criminal cases, and the public would better understand some sentences which at first blush may appear too lenient or too harsh. In addition, appellate review of these sentences, while remaining highly deferential, would become more meaningful.

The legislature already requires judges to give reasons for certain felony sentences, but only for some crimes and only under very limited circumstances. Pursuant to Massachusetts General Laws chapter 265, section 41, judges sitting in the Superior Court and the District Court jury of six session are required to state their reasons for imposing a sentence whenever a conviction for a felony under chapter 265 does not result in incarceration.

The statute does not apply, however, to the many serious offenses penalized in other chapters of the general laws, such as arson, armed entry into a dwelling at night, witness intimidation, illegal sale of large-capacity weapons and violation of a domestic abuse restraining order, not to mention hundreds of so-called “white collar” felonies. Second, the statute only applies if the judge does not sentence the defendant to any incarceration. Even one day in the house of correction relieves the judge of any obligation to state the reasons for his or her decision. Finally, the statute does not apply to district court judges sitting in jury-waived sessions, who impose sentences in thousands of criminal cases each year.

We believe that Massachusetts General Laws chapter 265, section 41 should be expanded to apply to all felony cases regardless of whether jail time is imposed, and irrespective of whether they fall under the ambit of chapter 265. The requirement that judges state their reasons for imposing sentences in all felony cases should apply initially only in superior court, but ultimately, this requirement

18. 18 U.S.C. §3553(f); see also U.S. Sentencing Guidelines Manual §5K2.1 (2015) (setting forth the corresponding safety valve exception in the now-advisory federal sentencing guidelines). To qualify for relief from the applicability of statutory minimum sentences in certain federal cases, five factors must be present: (1) the defendant must have no criminal record or a relatively minor one; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise; and (5) the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude his/her safety valve eligibility. Id. The Supreme Judicial Court has also taken direct appellate review of a case raising the issue of whether a judge has the power to sentence a narcotics offender below the mandatory minimum term required by statute. See Commonwealth v. Laltaprasad, Supreme Judicial Court No. SJC-11970.
22. The statute provides: “In sentencing a person for a violation of any provision of this chapter, the penalty for which includes imprisonment, a judge sitting in superior court or in a jury of six session who does not impose such sentence of imprisonment shall include in the record of the case specific reasons for not imposing a sentence of imprisonment. Notwithstanding any general or special law to the contrary, the record of such reasons shall be a public record.” Mass. Gen. Laws ch. 265, §41.
23. Chapter 265 of the Massachusetts General Laws sets forth various felony and misdemeanor offenses for crimes committed against the person. These offenses range from murder ($1), to rape ($22), to kidnapping ($26), to simple assault and battery ($15A).
27. See Mass. Gen. Laws ch. 269, §10F.
29. See, e.g., Mass. Gen. Laws ch. 266, §30 (larceny), §35A (mortgage fraud); §53 (embezzlement by bank officer or employee); §56 (embezzlement by broker or agent); §58 (embezzlement from voluntary association); §67 (false entry in corporate records); §67B (false claims to commonwealth); §5 (uttering forged instrument); Mass. Gen. Laws ch. 268A, §2 (bribery of public official).
should apply to all felony cases in all courts. Given the much higher volume of district court felony cases, and the fact that the most serious crimes are prosecuted in superior court, limiting the requirement initially to superior court seems sensible. The legislature recently has taken this approach with regard to attorney-conducted voir dire.

Sentencing is one of the most profound powers bestowed upon a public official. The primary reasons why judges should explain how they exercise this awesome power — promoting transparency in government and preventing the arbitrary or discriminatory exercise of governmental authority — seem compelling to us. Defendants who will be spending years of their lives behind prison walls, victims who fear the day when the perpetrators will be back on the street and citizens concerned about public safety all deserve an explanation for the particular sentence that a judge will impose.

Sentencing is a very difficult and emotion-laden task. It requires balancing multiple considerations and sometimes contradictory interests. The Massachusetts Sentencing Commission’s Report to the General Court in 1996 recognized four primary purposes to be achieved in criminal sentencing: retribution (“just desserts”), deterrence, incapacitation and rehabilitation. The enabling statute of the Federal Sentencing Commission recognizes the same penological objectives. While one or more of these goals has gained scholarly prominence at different points in our nation’s history, many observers believe that each has a valid role to play in fashioning an appropriate sentence. What “mix” of considerations will be appropriate in a given case may vary with the circumstances of the offense, the criminal history of the defendant, and the interests of the victims and the public.

It is anomalous that judges sitting in Massachusetts criminal cases do not already have to give reasons for the sentences that they impose. Massachusetts judges are required to give reasons on the record for many of their most significant decisions, including holding a defendant without bail based on dangerousness grounds, expanding the time before trial under the Speedy Trial Act in the interest of justice and revoking probation. It is thus surprising that judges can exercise their most sweeping authority — the power to deprive a convicted defendant of his or her liberty for an extended period of time — without any explanation for their decisions.

For those judges who routinely state on the record their reasons for imposing a sentence, our proposed amendment to chapter 265, section 41 would result in little or no change. For the many other judges who sometimes give reasons for their sentences, an expanded statute would require that they more routinely perform a task that already intuitively makes sense to them. Of course, for those judges who rarely if ever explain the reasons for their sentences, an expanded statute would be an unwelcome sea change.

Judges who refrain from publicly announcing the reasons for their sentences offer two principal explanations for that practice. First, sentencing is a complex and nuanced task. For experienced judges, sentencing involves a complex set of factors honed over many years that includes comparison to a large number of similar previous cases. Asking these judges to give reasons for their sentences is like asking an experienced artist to explain the placement of each brush stroke on a canvas. But even the most skillfully and carefully crafted sentence fails to satisfy the important public goals of transparency and ensuring non-arbitrary decision-making if no reasons are given for the sentence. Moreover, the very process of forcing oneself to articulate the most important reasons for a decision helps ensure that the decision is being made for valid reasons that can withstand public scrutiny. Highly regarded judges tell us that the process of writing down their reasons for imposing a sentence has on occasion caused them to revise their thinking and fashion a better sentence.

The other reason frequently offered by judges for not publicly announcing the reasons for their sentences is that the net effect of this process will be wasted judicial resources on meritless appeals in which the failure to mention one valid reason for sentencing, or taking out of context one phrase uttered by the judge, will invalidate the sentence. These judges envision spending countless hours carefully choosing each word, time that could better be spent on the scores of other important matters that judges handle each day. We have two responses to this objection.

First, we are not advocating that the Appellate Division change its highly deferential approach toward reviewing superior court sentences. Second, in decades of superior court judges giving reasons for their sentences in thousands of cases, only a handful of

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30. Federally, District Court judges are mandated by statute to state in open court their reasons for imposing a particular sentence. See 18 U.S.C. §3553(c) (“[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence...”). Federal trial judges also must reduce their statement of sentencing reasons to writing and attach it to the judgment and conviction. 18 U.S.C. §3553(c)(2).


33. Id. at 4.

34. 18 U.S.C. §3533(a).


38. Upon petition of the defendant, Superior Court sentences are subject to review by the Superior Court’s Appellate Division, which consists of three judges appointed by the chief justice of the Superior Court. Mass. Gen. Laws ch. 278, §§28A-28C. However, this statute does not require that either the sentencing judges or the Appellate Division give reasons for their decisions, and the statute contains no standard of appellate review. In fiscal year 2015, 295 defendants appealed 676 sentences to the Appellate Division, resulting in 11 sentences being reduced and four sentences being increased. Trial Court Statistics, FY 15.
comments have led to reversals, and these comments usually reflect reasons for imposing a sentence that should not have been part of the sentencing process.\(^{39}\) In those few instances where the line between proper and improper comment seems nebulous, judges will simply have to avoid disfavored phrases.\(^{40}\)

In most public opinion polls, the judiciary scores higher in public trust than the other two branches of government.\(^{41}\) Yet public distrust over judicial discretion in sentencing persists. We are confident that this state’s conscientious judges take sentencing seriously, and that there are compelling, valid reasons for most sentences they impose. Forcing those reasons “out into the open” will increase not only transparency and public understanding of the sentencing process, but also public trust. Over time, as public understanding increases, the legislature’s resistance to repealing mandatory minimums may erode. Even if expanding chapter 265, section 41 to cover all felony cases fails to achieve this lofty goal, it will have been the right thing to do.

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\(^{39}\) See, e.g., Commonwealth v. Coleman, 390 Mass. 797, 806 (1984) (trial judge “may not consider a defendant’s alleged perjury on the witness stand in determining the punishment...”); Commonwealth v. White, 48 Mass. App. Ct. 658, 663 (2000) (remanding case for resentencing where judge increased sentence because he believed past sentences were inadequate); Commonwealth v. Howard, 42 Mass. App. Ct. 322, 327 (1997) (remanding for re-sentencing where judge gave as one reason for sentence that “Athol area seems to have more than its share of child abuse cases and a large number of young shiftless men who have little or no regard for the personal or property rights of others”).

\(^{40}\) We do not fully understand why it is improper to impose a sentence in part to “send a message” to a particular community, see Commonwealth v. Mills, 436 Mass. 387, 402 (2002), when deterring criminal conduct by others is a valid goal of sentencing, see Commonwealth v. Donahue 452 Mass. 256, 264 (2008). However, it seems easy enough to avoid that disfavored phrase.

The Elusive Interactive Process

_EEOC v. Kohl’s Department Stores Inc., 774 F.3d 127 (1st Cir. 2014)_

_EEOC v. Kohl’s Department Stores Inc._ is remarkable not only for its “court’s eye view” of the elusive “interactive process” under the Americans with Disabilities Act (ADA), but for the tension between the majority and the dissent over the application of the summary judgment standard to the facts of the case.

The Equal Employment Opportunity Commission (EEOC) brought the case on behalf of Patricia Manning (Manning), a sales associate at Kohl’s Department Store (Kohl’s). Manning suffered from type 1 diabetes. After a nationwide restructuring that resulted in a reduction of hours for Manning’s department, Kohl’s assigned Manning, who previously had worked predictable shifts starting no earlier than 9 a.m. and ending no later than 7 p.m., to more “swing shifts,” i.e., a night shift followed by an early shift the next day. Manning approached her direct supervisor, who recommended that she obtain a note from her treating physician. Thereafter, Manning’s endocrinologist wrote a note to the store manager, explaining that the erratic hours were adversely affecting his patient’s glucose levels and requesting that Manning’s hours be restructured to a “predictable day shift” so she could manage her stress, glucose levels and insulin therapy.

The manager conferred with the Human Resources department, which advised that Manning would have to continue to work night shifts, but that Kohl’s would work with her to avoid swing shifts. Manning’s store manager and her immediate supervisor then met with Ms. Manning to discuss her health concerns. Manning asked for a midday shift and the hours she had before the restructuring. The store manager told Manning that she had spoken with the “higher-ups” and could not provide a consistently steady 9 to 5 schedule. In response, Manning became upset, told her superiors she had no choice but to quit, predicted that she would succumb to ketoacidosis or a coma if she had to continue working unpredictable hours, put her store key on the table, and slammed the door to the office where the three were meeting. The store manager followed her to the break room, tried to calm her and asked her to reconsider her resignation and to discuss other accommodations. Manning responded, “Well, you just told me corporate wouldn’t do anything for me.” About a week later, after Manning already had contacted the EEOC seeking to file a disability claim, the store manager called her to ask her to reconsider and discuss alternative accommodations, which they would need to clear with the corporate office. (It was not clear from the opinion whether Kohl’s knew about Manning’s contact with the EEOC.) After the phone call, Manning had no further contact with anyone at Kohl’s. The EEOC filed a claim on Manning’s behalf in the United States District Court for the District of Maine.

The district court granted summary judgment in favor of Kohl’s, based on its view that Manning had failed to engage in an interactive process. On appeal, the First Circuit, rejecting the defendant’s argument that Manning was not qualified to perform the essential functions of her job, leapt to the third stage of analysis of her disability discrimination claim under the Americans with Disabilities Act (ADA), i.e., a determination as to whether Kohl’s, despite knowing of its employee’s disability, failed to reasonably accommodate her.

In advance of its ruling, the court offered the following admonition to employers and employees:

_We must emphasize that it is imperative that both the employer and the employee have a duty to engage in good faith, and that empty gestures on the part of the employer will not satisfy the good faith standard. If an employer engages in an interactive process with the employee, in good faith, for the purpose of discussing alternative reasonable accommodations, but the employee fails to cooperate in the process, then the employer cannot be held liable under the ADA . . . “if it makes ‘reasonable efforts both to communicate with the employee and provide accommodation based on the information it possessed.”_

1. 774 F.3d 127 (1st Cir. 2014).
2. Id. at 129.
3. Id.
4. Id.
5. Id.
6. _EEOC v. Kohl’s Dep’t Stores_, 774 F.3d 127, 129 (1st Cir. 2014).
7. Id. at 129-30.
8. Id. at 130.
9. Id.
10. Id.
11. Id.
12. _EEOC v. Kohl’s Dep’t Stores_, 774 F.3d 127, 130-31 (1st Cir. 2014).
13. Id. at 131.
14. Id.
15. Id.
16. Id.
17. Id.
18. _EEOC v. Kohl’s Dep’t Stores_, 774 F.3d 127, 131 (1st Cir. 2014).
19. Id. at 132.
20. Id. (quoting Enica v. Principi, 544 F.3d 328, 339 (1st Cir. 2008) (quoting Phelps v. Optima Health Inc., 251 F.3d 21, 28 (1st Cir. 2001))).
The First Circuit majority was persuaded, primarily by the efforts of the Kohl’s store manager after Manning left her office in anger, that it was Manning, not Kohl’s, who thwarted the interactive process. While acknowledging that Kohl’s response to the original accommodation request “may well have been ham-handed,” the majority ultimately concluded, “Kohl’s acted in good faith when it initiated an interactive process and displayed its willingness to cooperate with Manning, not once but twice, to no effect.” In a footnote, the majority noted, “This court does not regard an employer’s participation in the interactive process as an absolute requirement under the ADA,” preferring to “resolve the issue on a case-by-case basis.” The court further criticized the EEOC for giving Manning poor legal advice to stop participating in the process that Kohl’s initiated by cutting short the store manager’s follow up telephone call and not contacting her employer again.

The majority, in addition to upholding summary judgment on Manning’s failure to accommodate claim, also rejected her constructive discharge claim. The court assumed, for the purposes of its decision, that Manning’s concerns about the consequences of working unpredictable hours (ketoacidosis or a coma) were reasonable, but found that her choice to resign was “grossly premature, as it was based entirely on [her] own worst-case scenario assumption’ that Kohl’s would not provide her with accommodations.”

In a dissent strongly critical of the majority’s reasoning, Judge Kayatta reframed the facts to demonstrate how a “reasonably competent” plaintiff’s lawyer might present the case to a jury. In Judge Kayatta’s scenario, based on other facts in evidence, the supervisor and the store manager hid from Manning the fact that Human Resources had authorized them to help Manning avoid swing shifts and instead led Manning to believe that they could not make accommodations that were unavailable to other full-time employees, or that conflicted with Kohl’s business need to have fluctuating shifts. He also pointed out that Kohl’s “flatly rejected” Manning’s proposed accommodation, supported by her doctor’s note, and failed to propose any alternative accommodations of its own, either when Manning first approached her supervisor, during the initial conversation in the store manager’s office, or in any of the two follow up conversations between the store manager and Manning in the break room and over the telephone. He felt that a jury could find that, after failing four times to procure a specific counteroffer, it was reasonable for Manning to give up and resign based on her doctor’s note confirming that an unpredictable schedule was adversely affecting her ability to manage her diabetes.

As best as I can tell, this is the first time that any circuit court has held that an employer can reject an accommodation request backed up by a doctor’s note, refuse to offer an accommodation that it has determined it can make, falsely claim that any accommodation must be offered to all workers whether disabled or not, and then declare the employee’s ADA rights forfeited when she gives up. Such a holding demands too much resilience and persistence on the part of a disabled and stressed out employee and takes away from jurors a task they are well suited to perform.

The Kohl’s case, including the debate between the majority and the dissent, illustrates the ambiguous state of the law on accommodating an employee with a disability and how harshly the court may judge the party who walks away from the negotiating table first. Most management side and plaintiff lawyers have always assumed an interactive process is required in each instance, yet the First Circuit in this opinion, citing previous decisions, held that such a process may not be required in all circumstances, and that courts should evaluate, on a case-to-case basis, whether or not an interactive dialogue should have been initiated. The state court has also indicated that the interactive process may not be required in

21. Kohl’s, 774 F.3d at 133.
22. Id.
23. Id. at 132 n.5 (quoting Kvorjak v. Maine, 259 F.3d 48, 52 (1st Cir. 2001)).
24. EEOC v. Kohl’s Dep’t Stores, 774 F.3d 127, 132 n.6 (1st Cir. 2014).
25. Id. at 134-35.
26. Id. at 134 (quoting Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 50 (1st Cir. 2008)).
27. Kohl’s, 774 F.3d at 135 (Kayatta, J., dissenting).
28. Id. at 136.
29. Id. at 136.
30. EEOC v. Kohl’s Dep’t Stores, 774 F.3d 127, 135-37 (1st Cir. 2014).
31. Id. at 137.
32. Id. (citations omitted).
33. Id. at 132.
34. Id. at 140 (Kayatta, J., dissenting).
every case under Massachusetts General Laws chapter 151B, section 1(16), the state disability discrimination statute, and, further, has demonstrated that it would affirm summary judgment where it appears from the record that the plaintiff was inflexible about the accommodation requested. In Tompson v. Dep’t of Mental Health, the Appeals Court, in dicta, suggested that the employer may not have been required to engage in an interactive process, but, assuming such a process was required, the plaintiff, a supervisor with the Department of Mental Health’s residential treatment program, was at fault for refusing to consider part-time positions in other programs and insisting only upon her own proposed accommodation of a four hour work day. The Appeals Court held, “By its very nature, interaction envisions mutual exploration, not a process in which one side is required to serve up possible solutions while the other side simply awaits the arrival of an offer to its liking.” Ironically, according to Judge Kayatta’s recounting of the facts in Kohl’s, that is what the store manager did in response to Manning’s request for accommodation, in that she asked the plaintiff twice to reconsider and serve up other alternatives, but did not suggest any solution on behalf of Kohl’s. Perhaps Manning may have survived summary judgment in state court.

There are still lessons to be learned from these cases, notwithstanding the lack of clear guidance as to when an interactive process may be required, and how far the process must proceed before the parties reach an end point. It is always the better part of valor for the employer to initiate an interactive process, even if a court or administrative tribunal ultimately may decide one was not required under the circumstances. The employee should never walk away from the discussion and must be prepared to discuss other alternatives besides the one recommended by her physician in the first instance. “[T]he law requires only that ‘employers [] offer a reasonable accommodation, not necessarily the accommodation sought.’” It is critical to understand that, at all times, “the employer retains ‘the ultimate discretion to choose between effective accommodations.’” As Judge Kayatta observed in his dissent in Kohl’s, plaintiffs with disabilities are in a vulnerable state, particularly when business decisions impose changes to their responsibilities or change the hours of employment. But they nevertheless must be prepared to continue a dialogue with employers to find options consistent with medical and business needs, and not walk away in anger or frustration.

— Jessica Block

36. Id. at 597.
37. Administrative tribunals may be more sympathetic to employees in Manning’s position, as reflected by the EEOC’s decision to bring the case on her behalf.
39. Id. (citation omitted).
Everything scholarship has taught us about the New Deal’s sudden break in constitutional interpretation is wrong. That is the message of John Compton, an assistant professor of political science at Chapman University in Orange, California. In recent decades, scholars have generally accepted the view that New Deal progressives abruptly re-wrote the Constitution in the 1930s. For example, Richard Epstein has argued that progressive reformers fought to remove property rights and principles of federalism from constitutional interpretation so that “their vision of the managed economy [would] take precedence in all areas of life.”

Compton challenges the idea of a sudden jurisprudential shift. Rather, he maintains that the basis for the “living Constitution” developed long before the New Deal, going well back into the early 19th century. Impetus for the change originated with evangelical religious groups. In carefully reasoned fashion with extensive discussion of the case law, Compton traces the history of “morals” regulation, primarily the anti-lottery and prohibition movements, in the state and federal courts. He notes how popular mores clashed with the constitutional views of the Supreme Court under Chief Justice John Marshall, particularly with respect to federal control over public health and morals (with these matters left to the state legislatures to modify existing agreements and applying the contract clause in the Constitution to corporate charters). Thus, the New Hampshire Legislature’s attempt to amend Dartmouth’s existing charter (granted by the King in 1769) was unconstitutional (in the absence of a reservation of the right to amend the charter). Likewise, in Fletcher v. Peck, the court held that the contract clause applied to all kinds of contracts, including legislative grants procured by bribery. As a result, Georgia could not overturn a land grant made by a prior legislature, notwithstanding that the original legislation was allegedly procured by the grantee’s promise to some legislators of a share in the land at issue. At the same time, the court rebuffed attempts by states to interfere with or regulate interstate commerce, including the unimpeded movement of goods from one state to another.

For its part, the federal government lacked authority over public health and morals (with these matters left to the states). However, these rulings of the Marshall Court soon ran into conflict with public opinion. In Compton’s telling, as the Second Great Awakening gathered strength and spread across the country in the early 1800s, evangelical reformers attacked traditional forms of property and activities they deemed immoral. Slavery may be the best known example, but Compton focuses on “demon rum,” and gambling in the form of state-authorized lotteries. Reformers roused the public and convinced legislators to outlaw, or at least regulate, these perceived evils. Post-Civil War reform groups such as the Women’s Christian Temperance Union and Anti-Saloon League continued the crusade. As morals legislation was adopted, it faced judicial challenges from manufacturers and purveyors of alcohol and from holders of lottery grants. As Compton shows, the courts’ response evolved over time as reasoning and outcomes adapted to popular sentiment.

2. “The Congress shall have the Power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.” U.S. Const. Art. 1, §8 cl. 3.
4. “No person shall be . . . deprived of . . . property without due process of law.” Id. amend. V; see also id. amend. XIV, §1.
5. Compton, supra note 1, at 19-20.
7. Id. at 654; see also id. at 712 (Story, J., concurring).
8. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Compton, supra note 1, at 40.
9. See Fletcher, 10 U.S. (6 Cranch) at 129-30, 139.
12. The Second Great Awakening was a period of great evangelical religious fervor resulting in a tremendous expansion of membership in Protestant churches, especially new denominations. See Gordon S. Wood, Empire of Liberty, 576-619 (Oxford Univ. Press 2009) (discussing religion in the early Republic). Professor Wood notes that the various denominations, though in competition, saw themselves as equal members of a larger community, and this outlook helped “unify the popular culture.” Id. at 582.
Initially, cases were brought in state courts, which gradually moved away from Marshall Court doctrine. By the latter part of the 19th century, litigation had reached the lower federal courts and eventually the United States Supreme Court. The judicial response tried to justify morals legislation as exceptions to traditional constitutional protections. However, the reasoning of these early decisions was subject to much criticism, and by the time of the New Deal, it was recognized by many legal commentators and academics that the courts’ logic could not be limited in any principled fashion to morals. Far from being a sudden break with Marshall Court precedents, Compton argues that New Deal jurisprudence was the natural outcome of trends developing over the prior century. In other words, the Constitution had evolved to fit popular views of “the times” for decades before the New Deal came along. Courts abandoned “original intent” early on.

This process is well illustrated by the fate of state-authorized lotteries, which presaged the ultimate subordination of the contract clause to police power regulation. During the early years of the Republic and indeed dating from colonial days, lotteries were well-established ways to raise money for a host of public improvements and charitable causes. Legislatures typically granted the right to run a lottery for a set term of years. This began to change in the early 19th century when the revival of evangelical fervor led to the denunciation of lotteries as public evils. The fractured nature of American Protestantism at first hampered opposition to lotteries (and other “secular evils”), but, by the 1830s, many different denominations had come together in advocating for their prohibition.

The constitutional system as interpreted by the Marshall Court, however, posed an obstacle. Thus, the contract clause prevented the repeal of legislative grants of lotteries. Moreover, although most states abolished lotteries during the antebellum period by failing to renew charters or grant new ones, commerce clause doctrine prevented them from outlawing the sale of lottery tickets from those states where this “common nuisance” remained legal. By the same token, however, lack of congressional police powers precluded national legislation to ban lotteries. Compton shows how pressure from anti-lottery advocates drove Congress to use commerce and postal powers in the absence of police power and this, in turn, undermined the distinction between traditional police (state) and commerce (federal) powers, thereby eroding federalism.

Eventually, lotteries decreased as charters expired, but following the Civil War, the contract clause issue resurfaced. Desperate for revenue, Louisiana granted a 25-year charter in 1869 to the Louisiana Lottery Company. Within a decade, the company was the last legal lottery in the country and its profits soared due, in part, to numerous out-of-state sales. Despite public anger and congressional investigations, Louisiana had sole control over the company’s business. However, in 1879, a new Louisiana state legislature voted to revoke the charter. This action was challenged in court, and United States District Court Judge Edward Billings, relying on the concept of vested property rights, enjoined the legislature. Adhering to precedent, he maintained that states, like individuals, may not avoid their contracts, notwithstanding the desirability of protecting public and private morals. States have a duty under the Constitution to protect vested rights and obligations to which they have lent their own sanction.

But Judge Billings’s view would soon give way. Shortly after this decision, the Supreme Court determined that a state’s police power could override the contract clause in certain instances. involved a challenge to a state statute criminalizing lotteries. A corporation, which had been given the right to hold lotteries for a 25-year period, claimed this statute violated its contractual rights. Unimpressed, the court held that governments could suppress immoral activities “at their discretion.” Although Stone tried to limit the “inalienable police power” doctrine, Compton notes that the decision began the dismantling of the traditional view of the contract clause, which eventually came to full fruition with the New Deal Court. Compton argues that the Stone Court was influenced by the controversy of the Louisiana Lottery, widely viewed as a corrupt and immoral organization. In Compton’s view, if Stone had rejected the state’s attempt to revoke a lottery grant in Mississippi, then the Louisiana Lottery likewise would have been protected for the remaining term of its charter (as Judge Billings had held). In fact, the court’s opinion in Stone emphasizes that the popular will with respect to lotteries had been “authoritatively expressed.” The decision further points out that having one state-authorized lottery endangered morals in the rest of the country, perhaps suggesting the need for national police powers.

Prohibition cases followed a similar trajectory. However, they typically implicated due process rather than the contract clause. Compton traces alcohol’s journey from a widely-accepted form of property and an appropriate item of commerce, albeit one subject

13. Compton, supra note 1, at 33; see also John Samuel Ezell, Fortune’s Merry Wheel: The Lottery in America (HARVARD UNIV. PRESS 1960).
14. Id. at 34-35.
15. Id. at 39-43.
16. Id. at 50.
17. Id. at 50-51.
18. Id. at 51, 97.
19. See Ezell, supra note 13, at 242-70 (providing a history of the Louisiana Lottery).
20. Compton, supra note 1, at 97-98.
22. Id. at 921. In Abdow v. Attorney General, 468 Mass. 478 (2014), the Massachusetts Supreme Judicial Court relied on Stone to allow an initiative petition to repeal the Expanded Gaming Act of 2011 to go to the voters. Casino supporters argued that if a licensee obtains a gaming license, it may conduct gambling without risk that the commonwealth will revoke the license. The court “reject[ed] this argument as wholly inconsistent with the long standing principle that the Legislature cannot surrender its broad authority to regulate matters within its core police power.” Id. at 487.
23. Compton, supra note 1, at 96, 99-104. Courts continued to protect corporations from changes to their charters in many cases, but also struck them down in others. Id. at 96. See also Boyd v. Alabama, 94 U.S. 645, 650 (1877) (state legislature may not by contract “restrain the power of a subsequent legislature to legislate for the public welfare”) (dicta) discussed in Compton, supra, at 95.
24. Compton, supra note 1, at 98.
25. A new Louisiana state constitution ratified in 1879 protected lotteries until 1894. In return, the Louisiana Lottery paid an annual tax to the state. See Ezell, supra note 13, at 248.
27. Id. at 98-99.
to regulation, to a public nuisance. This change in public attitudes led to tension between the states’ right to protect public health and morals with economic due process principles, and the commerce clause’s emphasis on a national market.

Massachusetts’s experience is illustrative. Local governments in the colony and the early Commonwealth licensed taverns to forestall public disorder from alcohol consumption. However, there was no question that a licensed innkeeper was engaged in a legitimate business and that alcohol was property. In the early 1800s, alcohol opponents began to attack these assumptions with “no license” campaigns, by which county officials denied all liquor license applications, both new and renewals. This, in turn, sparked a state constitutional challenge to the entire licensing statute as violating the right to acquire property. The Supreme Judicial Court, in an opinion by Chief Justice Lemuel Shaw, rejected this claim in Commonwealth v. Blackington, but did not reach the question of whether withholding all licenses was within the local officials’ discretion. Shaw’s opinion emphasized that liquor licensing was consistent with the long-standing, traditional regulatory approach. Commonwealth v. Kimball, decided at the same time, upheld the licensing statute against a commerce clause claim. Kimball also addressed federalism, noting that the states, not the national government, regulate morals and the health of the community. Subsequently, in Commonwealth v. Alger, also authored by Shaw, the court went further, declaring that all property is always subject to reasonable limitations as the legislature may deem appropriate. Compton acknowledges that these early cases suggest a receptiveness to liquor regulation, but he argues that the court was swayed by the traditional nature of the licensing scheme, and did not believe it was creating new restrictions on property. This insight may be a useful means of explaining why cases, which in the early part of the 19th century seemed hostile to liquor manufacturers and retailers, actually were consistent with the recognized constitutional order, but does not fully account for the breadth of Shaw’s language, especially in Alger.

Next came the so-called “15-gallon law.” This statute, adopted in 1838, barred the sale of “spiritous liquors” in containers smaller than 15 gallons and required that all purchases be taken off the premises. Although the statute was repealed before legal challenges made it through the courts, the arguments of alcohol supporters are instructive. As Compton explains, advocates of repeal asserted (like the defendant in Blackington) that, since alcohol always had been considered a form of property, it fell within the state constitutional right of “acquiring, possessing and protecting property.” This right, it was argued, precluded a complete prohibition of liquor, even if it were deemed to be especially harmful to public health and morals. Its status as property gave it constitutional protection. Whether these arguments were persuasive is unknown, but the law was repealed.

Anti-alcohol activists also tried “local option” legislation by which each county decided whether to allow the sale of alcohol. Most state courts struck down these laws as improperly delegating legislative authority to the electorate and trampling on the rights of property owners. Litigation involving the Massachusetts local option statute (as well as those from two other states) reached the United States Supreme Court in 1847. In the so-called License Cases, the court, with no single majority opinion, rejected commerce clause challenges to the local option laws. The challengers claimed that the statutes interfered with exclusive federal control of interstate and foreign commerce. However, the justices believed them similar enough to traditional licensing schemes so as not to run afoul of the commerce clause. Therefore, the court was willing to defer to local licensing authorities. Nevertheless, the justices agreed that alcohol was property subject to the commerce clause, and at least some of the opinions warned against local interference with the importation of liquor. In essence, the License Cases suggested separate zones of commercial regulation depending on whether the matter was of

28. Id. at 43–44, 55. Compton argues that a liquor license itself was considered property. Id. at 44.
30. Commonwealth v. Blackington, 41 Mass. (24 Pick.) 352 (1837). Blackington was indicted for selling liquor without a license. Because he was in a “no license” county, no license was available.
32. Commonwealth v. Kimball, 41 Mass. (24 Pick.) 359 (1833) (holding that liquor licensing not unconstitutional, but was firmly based in tradition and history).
33. Id. at 363, 365.
35. Compton, supra note 1, at 54-55.
38. Compton, supra note 1 at 45. Opponents also denounced the law as a class-based enactment violating the constitutional requirement that statutes should apply equally to everyone. In particular, the law was said to discriminate against the poor who, unlike the rich, could not buy large quantities of alcohol. It also destroyed livelihoods of some individuals at the behest of others. Id. at 45–46; see id. at 105, for a similar class-based argument under the federal Constitution.
40. Compton, supra note 1, at 69-70. In the Massachusetts case, Thurlow v. Massachusetts, 46 U.S. 504 (1847), the court reviewed, on a writ of error, the constitutionality of the Revised Statutes of Massachusetts ch. 47 and 1837 Mass. Acts, ch. 242 p. 279. Together, these laws established criminal penalties for violations of the licensing system and set forth who may get licenses, but did not require individual counties to issue any specific number of licenses, or any at all.
41. Compton supra note 1, at 70. As Compton points out, the decision in the License Cases foreshadowed Cooley v. Bd. of Wardens, 53 U.S. 299 (1852). In Cooley, the court rejected a commerce clause challenge to a Pennsylvania statute that required the use of local pilots by ships traversing Philadelphia harbor. The majority of the court held that the commerce clause did not deprive states of the power to regulate pilots in the absence of Congressional action to the contrary. Id. at 320. The case is generally seen as establishing the proposition that states may regulate commercial matters of purely local concern, at least in the absence of Congressional action. See Gerald Gunther, Cases and Materials on Constitutional Law, 291-92 (Foundation Press 2nd ed. 1975).
local or national concern.41

In the 1850s, Massachusetts waded into the so-called “Maine Law” controversy. Maine laws rejected both licensing and local option. Instead, they typically outlawed the manufacture and sale of alcohol statewide, with exceptions for medicinal and certain other purposes, authorized its summary destruction, and imposed criminal penalties.42 Massachusetts adopted its version in 1852,43 and litigation promptly ensued. In Fisher v. McGirr,44 the Supreme Judicial Court struck down the law as unconstitutional at the behest of the owner of alcohol that had been seized by a constable. The statute acted both in rem, against the alcohol, and in personam, against the owner. In rem cases historically had involved illegal or dangerous substances, whose very character made them a nuisance or harmful.45 However, the Maine law, while treating liquor as a lawful form of property, allowed its seizure based on the owner’s intent to sell it for drinking. This determination of intent, the court held, required a criminal trial and implicated state constitutional protections against unreasonable searches and other procedural rights.46

According to Compton, Fisher was consistent with other state and federal cases striking down Maine laws in the early 1850s.

[Without question, the judicial consensus in the early 1850s held that because liquor — unlike diseased goods, counterfeiters tools, or obscene prints — had been recognized as a valid form of property from time immemorial, and because it was undeniably capable of beneficial uses, a law that stripped liquor owners of basic procedural protections could only be characterized as an “arbitrary” invasion of private rights.47

However, state court decisions began to change in the latter part of the decade as opinions employed a new approach or, as Compton puts it, “a dynamic understanding of the social compact” developed.48 Compton attributes this development to changes in the political system occurring in the 1850s, notably the rise of the Republican Party and its support for prohibition. Indeed, he notes that prohibition was a big issue in many state judicial elections in this time period.49 Compton tracks cases across the state appellate courts that the right to property without due process of law, and the social changes brought by increasing industrialization. Courts confronting novel labor, industrial and other economic legislation, as well as morals regulation, questioned whether these spheres could be kept separate. Rejecting what he calls “the reigning conventional wisdom” that courts found it easy to uphold liquor prohibition based on historical licensing systems, Compton argues that, in the wake of the Fourteenth Amendment, such legislation was very controversial. In fact, he claims, prohibition cases involving uncompensated destruction of immensely valuable property raised stark questions of how to reconcile these statutes with economic due process.50

The Supreme Court acknowledged the question when it declared in the 1873 case of Bartemeyer v. Iowa,51 that the absolute prohibition of the sale of existing supplies of liquor would pose significant constitutional issues under the Fourteenth Amendment, regarding deprivation of property without due process.52 The lower federal courts during this period held that due process required compensation for the property made valueless by prohibition, and rejected the view that regulation of the uses of property was not the same as confiscation.53

But then, 13 years after Bartemeyer, the Supreme Court altered course and affirmed a state’s right to use its police power to ban the sale or manufacture of alcohol without compensation. In Mugler v. Kansas,54 a brewer challenged Kansas’s prohibition statute as violating due process. The court upheld the law in its entirety and distinguished police regulation from the taking of property for public use. According to the court, the police power applied to noxious uses of property only, and was exempt from the Fourteenth Amendment. As a result, compensation was not required.55 While unoffending property may not be taken away from an innocent owner, a nuisance may be abated. The court had no difficulty in holding that regulation — even prohibition — of alcohol was a proper concern of the police power because of its inherently harmful nature. Compton attributes the court’s decision to its deference to renewed efforts to outlaw alcohol throughout much of the country, and recognition that for many years states had allowed individual counties to be “dry.” On the other hand, after Bartemeyer, the lower courts had emphasized economic due process concerns raised by prohibition and the difficulty of restricting an expanded police power to one type of property. In Mugler, the Supreme Court signaled that industrial regulation was still suspect because it affected innocent property.56 Justice Field’s dissent, however, pointed out that

42. Compton, supra note 1, at 63.
44. 67 Mass. (1 Gray) 1 (1854).
45. Id. at 26-27.
46. The right to jury trial, protection against unreasonable searches and seizures, the right to sue in court, and the right to confront an accuser.
47. Compton, supra note 1, at 67. Massachusetts also played a role in post-Civil War Supreme Court alcohol jurisprudence involving the contract clause. Beer Co. v. Massachusetts, 97 U.S. 25 (1878), addresses a brewery’s claim that a Massachusetts prohibition law (1869 Mass. Acts. ch. 415 p. 706) violated rights under its corporate charter (1827 Mass. Acts. ch. 32 p. 637). The court rejected this claim because the legislature had reserved its right to repeal the charter (1808 Mass. Acts. ch. 65 p. 464). Nevertheless, in dictum, the court declared that the state “cannot, by any contract, divest itself of the power to provide for [‘the preservation of good order and the public morals’]” Beer Company, 97 U.S. at 33 (quoted in Compton, supra at 95). To Compton, this was a significant change from prior jurisprudence.
48. Compton, supra note 1, at 74.
49. Id. at 77.
50. Id. at 104-05.
51. 85 U.S. 129 (1873).
52. Id. at 133, quoted in Compton, supra note 1 at 107.
53. Compton, supra note 1, at 111.
55. Id. at 667-68.
56. See Compton, supra note 1, at 114-15.
alcohol was not inherently noxious and that, in fact, Kansas's law allowed exemptions for medicinal and scientific use. Many academic commentators at the time agreed with the dissent and accused the court of arbitrariness.

With interpretation of the contract and due process clauses modified to accommodate morals regulation, the last bastion of traditional federalism was the commerce clause/police power distinction. Cases in both the liquor and lottery spheres led to its demise. As the court tried to carve out exceptions for “immoral” products from traditional commerce clause jurisprudence, it undermined the established understanding of what powers were entrusted to each sphere of government.

Compton sees In re Rahrer, an 1891 decision, as a turning point, because it allowed Congress to determine what matters were commercial and hence subject to federal regulation. Rahrer upheld the Wilson Act, a federal statute that allowed each state to regulate liquor entering its territory under the police power. On its face, the statute worked against the Constitution’s goal of uniform national rules governing commercial markets. Compton explains that the court’s opinion rejected the traditional view that a product’s commercial or noncommercial status was inherent in its nature. Rather, Congress could change the subjects of commercial regulation at whim. If Congress could move an item from commerce to police, Compton asks, why could it not also expand the definition of commerce to cover matters traditionally considered as under the police power?

Commentary at the time recognized the significance of the change. Compton quotes an 1897 article from the American Lawyer to the effect that “[exclusive ‘state and federal power’] had been overthrown by allowing Congress to subject the ‘established . . . [and] legitimate articles of commerce to state regulation.” Accordingly, products no longer were inherently commercial, but could be made subject to the state’s police power notwithstanding that this flew in the face of the goal of a uniform national market with consistent commercial regulations.

Likewise, in 1895, in reaction to the Louisiana Lottery, Congress adopted legislation under the commerce power, making it a crime for anyone to transport lottery tickets or lottery-related materials in interstate commerce. Thus, Congress used the commerce power to advance morals regulation, blurring the police/commerce distinction. The court upheld the statute in Champion v. Ames, a five to four decision. While the majority stressed that the interstate nature of the activity made it commercial and that Congressional motives were irrelevant, it clearly was swayed by public opinion condemning this “evil.” In contrast, the dissent observed that lottery tickets had never been considered items of commerce and, in any event, the Congressional goal was clearly to eliminate lotteries (a police power objective), not to regulate commerce.

Traditional doctrine was giving way. Ultimately, despite the court’s intention to the contrary, the exceptions introduced for morals regulation could not be contained. Compton follows the court’s subsequent efforts to address industrial and labor regulation under traditional concepts, and its inability to come up with a reasonable way to determine which public health, safety, or morals legislation was permissible and which was not. The decisions now appear contradictory because the court was grasping for a way to maintain the traditional system, while at the same time allowing morals regulation.

These inconsistencies were noted by contemporary commentators, and both academic and popular criticism of the court mounted throughout the decades preceding the New Deal.

Compton has advanced a convincing thesis. His book is well written and cogently argued. It carefully examines the evolution of constitutional interpretation from the state and lower federal courts to the United States Supreme Court, and lets the reader see how the “living constitution” developed. Although one can quibble with his treatment of some individual cases, Compton’s overall analysis appears strong. By describing political and social developments, Compton puts the court decisions in context and shows the judiciary’s struggle to accommodate changing public mores while simultaneously attempting to maintain the traditional understanding of the nation’s constitutional framework. This helps explain what, to modern eyes, seem to be glaring inconsistencies in the Supreme Court’s late 19th century jurisprudence. The court was ultimately unable to maintain the exceptions it tried to create for “morals” issues and this led to major constitutional restructuring at the time of the New Deal. Compton has provided a valuable perspective on how this change came about.

— Victor N. Baltera

57. Mugler, 123 U.S. at 678 (Field, J. dissenting), discussed in Compton at 116.
58. See Compton, supra note 1, at 117-18.
61. Compton, supra note 1, at 124.
62. Id.
63. Id. at 125.
64. Id. at 125 & 231 n.134 (quoting Robert Mather, “Constitutional Construction and The Commerce Clause,” 5 American Lawyer, Dec. 1897, at 568, 571).
67. Id. at 362-63.
68. Id. at 364-65, 371 (Fuller, C.J., dissenting), discussed in Compton, supra note 1, at 129.
69. Id.
70. Compton, supra note 1, at 98-99.
71. Id. at 100-01.
72. Thus, the prominent legal scholar Thomas Cooley, in commenting on the Louisiana Lottery drama, observed that states could not curb interstate traffic in lottery tickets, but Congress lacked constitutional “jurisdiction to act upon the subject.” Cooley recognized that Congress’s use of its powers to go indirectly against the lottery would destabilize federalism, but believed it was a necessary approach to deal with the evils of the lottery. Compton emphasizes that Cooley, the leading legal commentator of his day, was arguing, contrary to his other writings, that federal morals legislation should be adopted, notwithstanding his doubts about its constitutionality. In other words, reflecting the general public view, Cooley apparently believed the threat from the lottery was such that traditional federalism principles should be overridden. Compton, supra note 1, at 126-27.