IN THIS ISSUE

A Tricky Issue for Employers: Ensuring Compliance with the Massachusetts Tips Act
by Robert M. Kaitz 1

Synonyms in the Massachusetts Constitution
by Kenneth Bresler 7

Case Comment
Criminal Law: Stalking Through Social Media

Book Review
Reading Law: The Interpretation of Legal Texts 13
It is not often that a customer’s generosity creates a legal headache for businesses, but Massachusetts employers, both large and small alike, are facing increasing litigation challenging their policies relating to the distribution of gratuities among their employees. The Massachusetts Tips Act, seeks to ensure that a patron’s gratuities are distributed among intended service employees and based on the patron’s reasonable expectations. However, the complexities of the Tips Act have created a fertile ground for litigation since the statute’s inception in its current form in 2004. The statute mandates that a prevailing party is entitled to mandatory treble damages, attorney’s fees and costs, which means that an employer’s gratuity policy that is promulgated in good faith, yet in violation of the Tips Act, can lead to protracted and costly litigation.

Massachusetts employers must understand the statute to ensure full compliance with the Tips Act and its nuances. This article provides a detailed analysis of General Laws chapter 149, section 152A (Tips Act) in its current form and state and federal case law interpreting the statute, a discussion of how an employer’s “no tipping” policies for its business can comply with the mandates of section 152A, and practical recommendations for employers to ensure compliance with the Tips Act.

1. **MASSACHUSETTS TIPS ACT**

The Massachusetts legislature revamped General Laws chapter 149, section 152A in 2004, with the amendments coming into effect on September 8, 2004. The revised statute generally prohibits the siphoning of tips and gratuities away from wait staff and other service employees to those employees with managerial responsibilities.

The statute provides definitions for each of the terms used within the statute. An “employer” under the Tips Act is “any person or entity having employees in its service, including an owner or officer of an establishment employing wait staff employees, service employees, or service bartenders, or any person whose primary responsibility is the management or supervision of wait staff employees, service employees, or service bartenders.” The definitions of “wait staff employee” and “service bartender” are fairly straightforward. A “wait staff” employee “includes [es] a waiter, waitress, bus person and counter staff, who: (1) serves beverages or prepared food directly to patrons, or who clears patrons’ tables; (2) works in a restaurant, banquet facility or other place where prepared food or beverages are served; and (3) who has no managerial responsibility.” A “service bartender,” similarly, “prepares alcoholic or nonalcoholic beverages for patrons to be served by another employee.” The Tips Act broadly defines a “service employee” as one “who works in an occupation in which employees customarily receive tips or gratuities, and who provides service directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility.”

The statute next defines a “patron” as any person served “any place where such employees perform work,” or as an individual “who pays a tip or service charge to any wait staff employee, service employee, or service bartender.” A “tip” is defined as any “sum of money including any amount designated by a credit card patron, a gift or a gratuity, given as an acknowledgement of any service performed by a wait staff employee, service employee, or service bartender.” A “service charge” is defined as a “fee charged by an employer to a patron in lieu of a tip . . . or a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip.”

---

2. Id.
3. Id. (emphasis added).
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.

---

Ensuring Compliance with the Massachusetts Tips Act / 1
Under the statute, employers are prohibited from retaining, demanding, requesting, or accepting any tip or service charge given to a wait staff employee, service employee, or service bartender by a patron. Likewise, employers are prohibited from permitting wait staff employees, service employees, or service bartenders to participate in a “tip pool” where any portion of tips, gratuities, or service charges is distributed to any person who is not a wait staff employee, service employee, or service bartender. When a patron pays a service charge or tip as part of a bill or invoice, “the total proceeds of that service charge or tip shall be remitted only to the wait staff employees, service employees, or service bartenders in proportion to the service provided by those employees.” A “house or administrative fee” is carved out as an exception to this prohibition, as long as the employer “informs the patron that the fee does not represent a tip or service charge.”

The Tips Act imposes stiff financial penalties for violations. An employer who violates section 152A is liable for restitution of tips, “together with interest thereon at the rate of 12 percent per annum.” A prevailing employee also is entitled to treble damages, litigation costs, and reasonable attorneys’ fees. An employer may not exempt itself from the mandates of section 152A by contract with any employee.

II. ILLUSTRATIVE CASE LAW

Since 2004, employers’ policies regarding the distribution of tips, gratuities and service charges have been vigorously challenged in various lawsuits brought in Massachusetts state and federal courts. It is evident from the case law that employers have had difficulty ensuring that good faith policies pertaining to fees and gratuities are in complete compliance with the Tips Act. Four categories of employers who have faced Tips Act challenges — airlines, special function venues, food service providers and employers with “no tipping” policies — illustrate the complexities in complying with section 152A.

A. Airlines

The first series of lawsuits under the Tips Act arose against airlines for their curbside check-in programs with the use of “skycaps.” As any frequent flyer of several years ago would know, passengers could typically avoid lines inside the terminal and check baggage with skycaps providing curbside service, and the passengers would customarily leave a gratuity. When airlines began charging a fee for the curbside service, the skycaps sued, arguing that patrons had stopped providing gratuities in addition to the newly imposed baggage fees, which essentially deprived the skycaps of their customary gratuities. While the United States Court of Appeals for the First Circuit ultimately ruled that federal law (the Airline Deregulation Act) preempted section 152A and precluded the enforcement of the statute, an earlier jury verdict in favor of the employees served as a warning to employers in other industries about the mandates of the Tips Act.

The first skycaps lawsuit, DiFiore v. American Airlines, Inc., was brought in the United States District Court for the District of Massachusetts after American Airlines (AA) began charging a $2 fee for curbside service at Boston’s Logan Airport in 2005. Previously, skycaps would provide curbside baggage services for passengers free of charge, though passengers customarily left gratuities for the skycaps. After the $2 fee was instituted, several skycaps sued AA, arguing that the passengers who would pay the fee mistook it for, in essence, a mandatory gratuity, with the skycaps pocketing the money. Discovery revealed that AA profited from the newly-implemented fee, as it offset the costs of providing the skycaps, with surplus revenue going directly to AA. Despite the imposition of the baggage fee, AA still permitted the skycaps to accept gratuities, and the skycaps could even inform passengers, if they asked, that the $2 fee was not a gratuity. The skycaps’ income from gratuities dropped significantly after the new charge began. In their lawsuit, the skycaps claimed that the $2 fee was a “service charge” under the Tips Act that patrons “reasonably expect[ed]” to go to the skycaps only.

A federal jury awarded nine skycaps more than $325,000 and the judge awarded prejudgment interest. After the trial, the federal district court rejected AA’s argument that the statute was preempted by the Airline Deregulation Act and awarded an additional $8,000 for fees collected during the pendency of the trial.
court declined to award treble damages to the skycaps under the old version of General Laws chapter 149, section 150, which only permitted treble damages where there was evidence of “outrageous” conduct by the employer.

On appeal, however, the First Circuit Court of Appeals held that the Airline Deregulation Act preempted the Tips Act and vacated the jury verdict for the skycaps. It found that “the tips law as applied here directly regulates how an airline service is performed and how its price is displayed to customers — not merely how the airline behaves as an employer or proprietor.” The enforcement of the state statute, therefore, would require changes to the service provided by AA and encroach on an area that had been preempted by the federal scheme. This ruling brought an end to lawsuits brought by skycaps employed by other airlines. Although the plaintiffs did not prevail in the skycaps cases, they serve as an illustrative example of the need for employers’ vigilance over policies regarding service fees and tips to ensure compliance with the Tips Act.

B. Special Function Venues

Section 152A has created problems for hotels and other venues that hold large private functions and charge food and beverage fees to private customers for hosting events. Even prior to the 2004 amendments to section 152A, there were challenges to the imposition of administrative fees that were based on a percentage of the total expense of the function. In Cooney v. Compass Group Foodservice, which arose under the pre-2004 version of section 152A, Northeastern University provided a conference facility for certain functions, and it imposed an administrative fee (starting at 5 percent in 1994 and increasing to 18 percent by 1992), called a “service charge,” that was calculated as a percentage of the total food and beverages charges. Wait staff and bartenders employed by a subcontractor of Northeastern sued both Northeastern and their employer, claiming that the service charges violated section 152A. Northeastern contended that it used the “service charge” for the upkeep of the venue and never represented to patrons that the “service charge” was intended as a gratuity or in lieu of a gratuity. The Appeals Court nevertheless held that the “service charge” on Northeastern’s invoice was a “service charge” under section 152A(d), finding that “the statutory language reflects legislative intent to regard any fee that the invoicing entity chooses to call a ‘service charge’ on an invoice for food or beverage service as being the functional equivalent of a tip or gratuity, thereby subjecting the fee to the statute.” While recognizing that such an interpretation of section 152A could lead to the imposition of liability on an entity for its innocuous billing, it held that the statute compelled such a result. Although the Appeals Court ruled against Northeastern, it affirmed summary judgment in favor of the plaintiffs’ employer because, unlike Northeastern, it did not financially benefit from the proceeds of the “service charge.”

Two cases involving hotels indicate the significance of distinguishing between “service” and “administrative” charges. In Bednark v. Catania Hospitality Group Inc., a hotel added an “administrative fee” of 18 to 19 percent of the total amount of food and beverages charged to customers for functions. The plaintiffs argued that the “administrative fee” was in reality a “service charge” under the Tips Act, which was required to be distributed to the wait staff and service bartenders. The trial court granted summary judgment in favor of the hotel, ruling that the “administrative fee” fell within the section 152A(d) provision permitting a “house or administrative fee in addition to or instead of a service charge or tip, if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge.”

The Appeals Court reversed, holding that there were material issues of fact in dispute. First, the Appeals Court noted that employers could superficially designate any fee as “administrative” to avoid the purview of section 152A. Second, the Appeals Court relied on the second clause of section 152A(d), which required the employer to inform the patron that the charge was not a tip or service charge. It noted that an “administrative fee” did not have a uniform meaning that would permit a patron to understand that this was not a gratuity or service charge for the wait staff employees and service bartenders. This was particularly true where the “administrative fee” of 18 to 19 percent fell within the range of an amount customarily designated for gratuities. The Appeals Court held that section 152A(d) “requires an employer to do something more than simply label a fee as ‘house’ or ‘administrative’ in order to dispel the possibility that a patron would reasonably believe that the fee is a gratuity.”

At the summary judgment stage, it was unclear if the “administrative fee” was not a “service charge” as a matter of law, precluding the entry of summary judgment.

28. Id. at 26-29.
29. DiFiore, 646 F.3d at 85-89.
31. Id.
34. Id. at 635-36.
35. Id. at 633.
36. Id.
37. Id. at 636.
38. Id. at 637.
40. Id. at 641.
42. Id. at 810 (quoting Mass. GEN. LAWS ch. 149, §152A(d)).
44. Id. at 813.
45. Id. at 815.
46. Id.
48. Id. at 816.
In contrast, in *Masiello v. Marriott Int’l Inc.*, a hotel successfully insulated itself from liability. There, the defendant hotel had made changes to its banquet event order form in January 2006. The revised form included the following:

**NON-TAXABLE SERVICE CHARGE:** 14 percent of the food and beverage total will be added to your account and will be distributed to wait staff employees and bartenders engaged in the days (sic) events.

**TAXABLE ADMINISTRATIVE FEE:** 8 percent of the food and beverage total will be added to your account. The administrative fee or any portion thereof does not represent a tip, gratuity, or service charge for the wait staff, bartenders or other service employees engaged in the days (sic) events.

**TAXABLE ATTENDANT FEE:** Fees for station attendants, carvers and bartenders do not represent a tip, gratuity, or service charge for the wait staff, bartenders or other service employees engaged in the days (sic) events.

The Superior Court found that “stating these items separately and distinctly from the percentage based service charge, meets the statutory requirement.” Accordingly, it entered summary judgment in favor of the hotel.

C. Food Service Providers

Restaurants and other food service providers have found themselves vulnerable to lawsuits under the Tips Act. For example, Starbucks found itself in hot water with its baristas for the manner in which it distributed gratuities to shift supervisors, conduct which resulted in a judgment of over $14,000,000 against it.

Starbucks generally placed its store employees into four categories — store managers, assistant managers, shift supervisors and baristas, with shift supervisors and baristas receiving hourly wages.

Shift supervisors performed functions overlapping with baristas for serving food and beverages, but shift supervisors also oversaw the work of baristas. According to Starbucks’s policy, customers’ tips would be left in containers adjacent to the cash registers and the tips would be proportionally distributed to baristas and shift supervisors at the end of each week based on the hours worked by each individual. The baristas alleged that distributing tips to shift supervisors violated the Tips Act. The United States District Court for the District of Massachusetts agreed with the baristas, certifying their class and granting partial summary judgment on the grounds that the Starbucks policy violated section 152A. It awarded damages based on the amount taken by shift supervisors, then trebled part of the total amount of damages that had been incurred after General Laws chapter 149, section 150 was amended for mandatory trebling of damages, for a total that exceeded $14,000,000.

The First Circuit Court of Appeals affirmed the lower court’s decision in its entirety, relying on the statute’s definition of wait staff employee as one “who has no managerial responsibility.” While Starbucks denied that shift supervisors had managerial responsibilities, the court noted that the restrictiveness of “no managerial responsibility” under the statute meant “not any.” It also found support in an Advisory from the Massachusetts Attorney General’s Fair Labor and Business Practices Division that “[w]orkers with limited managerial responsibility, such as shift supervisors . . . do not qualify as wait staff employees.” Here, Starbucks’s shift supervisors would open and close stores, handle cash and coordinate baristas’ breaks. Starbucks, interestingly, argued that customers would provide gratuities to shift supervisors for services the shift supervisors directly provided, so any such gratuity could not be designated a “tip” for purposes of the Tips Act. The court rejected this argument, noting that customers intended to leave tips for wait staff and service employees as anticipated under the statute. It held that because shift supervisors were not “wait staff employees,” Starbucks’s tip pooling policy violated section 152A, and the baristas were entitled to substantial damages for the violation.

Domino’s faced a potential class action from a driver as a result of “delivery charges” that it imposed on customers but did not share with its delivery drivers. The driver conceded that Domino’s notified customers that the “delivery charge” was not a tip and that customers should leave drivers additional gratuities, but argued that the notice was insufficient. For example, a customer ordering online or through a smartphone would see that the “delivery charge”...

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*


59. *Matamoros*, 699 F.3d at 133.


61. *Id.* at 134.


63. *Id.* at 136.

64. *Id.*

65. *Id.*

66. *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 137 (1st Cir. 2012). The First Circuit also held that the class of baristas had been properly certified and that the baristas were entitled to treble damages for all amounts after July 12, 2008, when *Mass. Gen. Laws* ch. 149, §150 was amended to provide for the mandatory award of treble damages for all violations of the Tips Act. *Id.* at 138.


68. *Id.* at 271-72.
was not a gratuity, and Domino’s encouraged the customers to tip the drivers, but that was after the “delivery charge” had been included in the subtotal cost for the customer’s order. The driver argued that the “delivery charge” was a “service charge” under section 152A. Alternatively, the driver argued that the sufficiency of the notice provided by Domino’s to its customers regarding tipping and the “delivery charge” was a question of fact to be resolved at a trial. The federal district court focused on whether “a reasonable customer would understand that the employer did not distribute the fee amongst employees.” It relied heavily on DiFiore, where the same court held that whether AA sufficiently notified passengers that the baggage charge of $2.00 was not a gratuity was a question of fact for the jury to resolve. The court found that❎

Domino’s webpage automatically displays the amount due including the delivery charge, but does not permit the customer to add a tip. This system, coupled with the fact that $2.50 is an amount comparable to what an average customer might pay as a tip, makes it plausible that a reasonable customer would interpret the delivery charge as a tip.

Accordingly, it refused to dismiss the driver’s claim under section 152A.

D. “No Tipping” Policies

In Meshna v. Scrivanos, the Massachusetts Supreme Judicial Court (SJC) held that an employer could promulgate and enforce a “no tipping” policy without violating the statute, but that it had to clearly communicate that to patrons or, if not, had to ensure that the gratuities left despite the policy were shared among wait staff employees, service bartenders and service employees only, as required by the Tips Act.

The lawsuit arose from a “no tipping” policy developed by a Dunkin Donuts franchisee at several of the franchisee’s stores. Under the policy, “an employee is not permitted to accept a tip from a customer, even if the customer wants to leave a tip, and is required to inform a customer who attempts to leave a tip of the policy.” Each store had its own manner of communicating the policy to patrons, including through signs of various sizes and locations. When a patron would leave a tip in contravention of the policy, however, the franchisee required the employees to place the tips in the register.

Interestingly, after the commencement of the lawsuit, the franchisee treated the tips as “abandoned change” and had them placed in cups to be used as a discount for future patrons’ purchases. The plaintiffs, a class of employees of the franchisee, filed suit alleging that the franchisee would take money that was left for them as a gratuity by patrons in violation of section 152A. The employees challenged the legality of both the pre-lawsuit and the post-lawsuit policies. The Superior Court held that “no tipping” policies were permitted under section 152A, but initially declined to dismiss the case because if patrons left tips intended for employees, those tips belonged to the employees and not the employers. Following discovery, the Superior Court ruled that the policy did not violate the statute, but that the franchisee was not entitled to summary judgment; the court reported the questions raised by the lawsuit to the appellate courts.

The SJC held that a “no tipping” policy did not violate the statute. It noted that the Tips Act “addresses circumstances in which tipping is permitted and wait staff employees have been given tips, directly or indirectly,” which has no bearing on whether an employer can limit or prohibit patrons from giving tips. Turning to an employer’s liability where tips are left in contravention of the employer’s policy, the SJC distinguished between employers who communicated the no-tipping policy “clearly” to customers and those who did not. The SJC ruled that under section 152A(d), an employer charging a patron a service charge must “inform[] the patron that the fee does not represent a tip or service charge.” As a result, the SJC construed the statute as requiring that an employer must similarly convey to patrons in a clear manner “that money they leave when paying their bills does not represent a tip for wait staff employees.” In the absence of clear communication from the employer, “it is readily conceivable that customers will have the reasonable expectation that the money they leave will be given to the wait staff employees,” which required the money left to be provided to covered employees, only. In contrast, where an employer clearly communicated the “no tipping” policy, the patron would not have had a reasonable expectation that the money would be given to employees. Therefore, an employer does not violate section 152A where the “no tipping” policy is clearly communicated to patrons. The SJC remanded the case to the Superior Court for further proceedings based on its guidance.

69. Id. at 172. Where a customer phoned in an order, the customer would not be informed that the “delivery charge” was not a tip. However, upon delivery, one side of the pizza box would contain similar information regarding the “delivery charge” not constituting a tip, as would be found online and on a smartphone order. See id.

70. Id. at 272.

71. Id. at 274.


74. The driver ultimately accepted an offer of judgment for the full amount of his requested damages ($19,500), and the federal district court awarded to the driver’s counsel attorneys’ fees and costs in excess of $43,000. Carpaneda v. Domino’s Pizza Inc., 89 F.Supp.3d 219, 231 (D. Mass. 2015).


76. Id. at 170-71.

77. Id. at 171.

78. Id. at 171-72.

79. Id.

80. Id.


84. Id. at 175-76.

85. Id. at 177.

86. Id.


88. Id. at 178.

89. Id.
III. PRACTICAL TIPS FOR EMPLOYERS

Since the 2004 amendments, the Tips Act has undoubtedly created angst among Massachusetts businesses, large and small, sometimes resulting in large adverse judgments due to an employer’s innocuous business practices. However, a conscientious and careful employer, with a thorough understanding of section 152A, can avoid incurring liability. First, an employer must know how each class of its employees is designated under the statute. Any class of employees that involves supervisory or managerial responsibilities must be prevented from taking any portion of gratuities or tips left by patrons as part of a tip pooling policy, even if that employee may serve food and/or beverages. Tip pooling policies are a useful manner of equitably distributing gratuities when left by customers in a “tip jar.” Both state and federal trial courts, however, have adopted exceedingly restrictive definitions of “wait staff employees” and “service employees,” and an employer not mindful of this can risk incurring liability under the statute when tips are distributed to an employee with some managerial responsibilities. By ensuring that a class of employee with managerial responsibilities does not share in tip pools, employers will protect themselves from one practice that has created multimillion-dollar headaches for employers with careless, yet innocuous, tip-pooling policies.

Second, employers who seek to charge patrons “administrative” or “house” fees for events must reasonably describe the purpose of the fee to ensure it cannot be deemed a “service charge.” Marriott’s charge in _Masiello_ prevailed at the summary judgment stage because of its clear adherence to the mandates of section 152A through a detailed description of the purpose of all fees it charged customers for use of a banquet hall. An employer who simply charges a blanket “administrative fee” as a percentage of a total invoice will likely face a costly legal challenge and will be unable to extricate itself from the lawsuit by dispositive motion, as courts have held that this is typically a question of fact for a jury to resolve. However, by outlining the purpose of the fee, the employer essentially preempts any future claim that the patron could have reasonably believed that the fee was in fact a gratuity or tip intended for wait staff, bartenders or other service employees.

Tip pooling in food service establishments can frequently involve these types of employees and others, such as barbacks, who may not directly serve food and/or beverages to patrons to fit within the definition of “wait staff employee.” They should review their position descriptions, as described in an employee handbook or otherwise, to ensure that those who share in tip pooling directly serve patrons with food and/or beverages. It is clear that food service establishments should ensure that no back-of-the-house employees are permitted to share in tip pooling with front-of-the-house employees.

Companies based on developing technologies are likewise seeing their business models challenged under the Tips Act. Uber, for example, is currently defending itself in at least two lawsuits that are based, in part, on the Tips Act and whether Uber is violating the Tips Act by taking a portion of fees charged that its customers may believe are intended for the drivers. Discovery is progressing in these actions, and employers, particularly those that employ independent contractors (as Uber classifies its drivers), should watch carefully as the courts further interpret the confines of the Tips Act.

With proper counsel, employers can ensure that their policies are in full compliance with the Tips Act. Experienced employment counsel can assist employers with the nuances of section 152A and the case law interpreting the statute. Paying some money up front to evaluate the legality of a policy under the Tips Act may not be ideal for an employer, particularly one with limited resources, but ensuring clear compliance with this complex statute can potentially save the employer huge exposure or the legal headache of fully litigating a case under the Tips Act.

90. See _Yucesoy v. Uber Techs., Inc._, 109 F.Supp.3d 1259 (N.D. Cal. Jun. 12, 2015) (holding that putative class of drivers stated claim under Tips Act that they were service employees and the fees were considered tips by the customer); _but see_ _Yucesoy v. Uber Techs., Inc._, 2015 WL 6955140 (N.D. Cal. Nov. 10, 2015) (dismissing without prejudice Tips Act claim in an amended pleading for failure to state allegations of misrepresentation with specific particularity); _Lavitman v. Uber Techs., Inc._, No. SUCV 2012-04490, 2015 WL 728187 (Mass. Super. Jan. 26, 2015) (holding that complaint sufficiently alleged that Uber driver was “service employee” under Tips Act).
Although no language in the Massachusetts Constitution should be considered superfluous, the use of one word over another is not necessarily significant. The state constitution runs rampant with synonyms and uses them for no discernible reason.

The Declaration of Rights (Part 1 of the Massachusetts Constitution) variously refers to “the legislature,” “the legislative department,” “the legislative body,” and, in one article, “the representative body of the people” and the “Constitutional representative body.” The Frame of Government (Part 2 of the Massachusetts Constitution) goes on to refer to “the General Court,” “the General Assembly” and “the two Houses of Assembly.”

Legislators are called “lawgivers” and “Representatives” in one article, “representatives” in the next article, “Representatives in the legislature” in a third article and legislative officers in a fourth. No indication exists that by “representatives,” the Constitution intends to distinguish between representatives and senators; “representatives” means “legislators.”

The original Declaration of Rights variously refers to “the citizen,” “the person,” “the persons,” “the man,” “all men,” “the people,” “the people of this Commonwealth,” “all the inhabitants of this Commonwealth,” [each individual of the society], and, in one article, “every individual,” “every citizen” and “the people.”

The Preamble refers to “every man,” “individuals” (twice), “each Citizen” (twice), “the people” (four times) and “the whole people.”

In addition to referring to the citizens, inhabitants, individuals and so on, the Declaration of Rights refers several times to subjects, which is anomalous. After all, the Massachusetts Constitution was enacted in 1780, and Massachusetts residents had been in armed revolt against the British monarchy since April 18, 1775. The original oath in the Massachusetts Constitution for “any person appointed or commissioned to any judicial, executive, military, or other office” included these words: “I do renounce and abjure all allegiance, subjection and obedience to the King, Queen or Government of Great Britain . . . .”
Some terms apparently signal that rights are individual or collective, such as “person” versus “the people.” But even that explanation does not account for all the differences.

No indication exists that the Massachusetts Constitution intends a distinction between “shall,” which appears in the Declaration of Rights fifteen times, and “ought,” which appears twelve times. Article XVII and Amendment Article XVI use both “shall” and “ought.”

I suspect that John Adams, the author of the Massachusetts Constitution, engaged in what Theodore M. Bernstein centuries later called “synonymomania,” and what H.W. Fowler called “elegant variation.” With various word choices, Adams may also have been alluding to the English Petition of Right of 1628 or the English Bill of Rights, both of which use both “shall” and “ought.”

Lawyers, judges, and scholars can look for significance in the Massachusetts Constitution’s synonyms, but they will generally look in vain. Sometimes a synonym is just a synonym.

26. In Mass. Const. pt. 1, art. XVII, which states in part, “The people have a right to keep and to bear arms for the common defence,” the “people” refers to a collective body with a common purpose. Article XIX, which states in part, “The people have a right, in an orderly and peaceable manner, to assemble…,” also refers to a collectivity. It is difficult, if not impossible, to assemble as an individual. In contrast, Article XVIII states, “No person can in any case be subject to law martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature,” and reflects an individual right. Similarly, “No man” in Article VI refers to an individual as distinguished from “an association of men.”

27. Mass. Const. pt. 1, arts. II, IV, VIII, IX, X, XII (four times), XV, XVII, XXVI, XXX (three times); see also Mass. CONST. pmbl., amend. XI (four times).


31. Compare Mass. Const. pt. 1, art. XXVI (“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”), with English Bill of Rights of 1869 (“excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”); English Petition of Right of 1628 art. VII (“no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament”).
CASE COMMENT

Criminal Law: Stalking Through Social Media


Ever-evolving new technology has provided a rich and verdant landscape upon which stalkers can monitor, harass and terrorize victims in ways never previously imagined.1 In particular, the internet has been used by some perpetrators in the belief that bullying a victim by conjuring up fear and annoyance through the seemingly-distant buffer of online communications, such as websites and social media, is, unlike a more direct or in-person contact, consequence-free and impervious to prosecution. Such offenders assume that they can “laundry their harassment of the [victims] through the internet to escape liability . . . .”2 In Commonwealth v. Walters, the Supreme Judicial Court (SJC) confronted the question of whether posting on the website Facebook may possibly, depending on its content, constitute a threat within the meaning of the Massachusetts stalking statute, Massachusetts General Laws chapter 265, section 43(a).3

In a very lengthy and detailed presentation of facts, the court in Walters ruled that a reasonable jury could not find that the particular postings by the defendant on his Facebook page were sufficient to qualify as a threat.4 The nonetheless troubling actions of the defendant fell short of constituting a crime, where there remained a lack of sufficient proof of both the defendant’s intent and the reasonableness of the victim’s fear.5

Although it ruled that the facts in this particular case did not support the charge of stalking,6 the SJC, in addressing the much larger issue, found that postings to Facebook or other sites on the internet may very well run afoul of the Massachusetts harassment statute.7 In other words, when it comes to the interplay of the First Amendment and threats of violence, there is no difference between online and offline speech.

Parenthetically, the defendant in Walters was not roundly exonerated because, although his stalking conviction was vacated, all the other charges of which he was convicted were upheld, including criminal harassment,8 two counts of violation of a restraining order9 and two counts of perjury.10 Importantly, since the decision in Walters is so fact specific, the court gave a voluminous and exhaustive recitation of the series of actions and statements that culminated in the defendant’s eventual indictment.

The defendant, Michael Walters, and the victim began dating, bought a home together in Rhode Island, became engaged and then, in 2006, bought a new home in Seekonk, Massachusetts.11 At a family party, the defendant was involved in a physical altercation with the victim’s son, who lived with them, and she broke the engagement and ended all romantic involvement with the defendant.12 However, the victim continued to live in the same home with the defendant, as she purportedly had nowhere else to go, their money was commingled, and her dog and belongings were there.13

The defendant refused to accept the breakup and a pattern of harassment ensued.14 He said there would be “repercussions” if she left him, including claiming that he would take her dog and she would

---

3. The stalking statute, Mass. Gen. Laws ch. 265, §43(a) (2014), provides: Whoever: (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished . . . . The conduct or acts described in this subsection shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signals, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.
5. Id. at 689-97.
never see it again.15 He continually told her that he was “keeping a file” on her, and he would follow her and wait for her wherever she went, whether it be to the gym or to work.16 He would have guns around the home and would often hold one of them as he said the words, “One shot, one kill.”17

One day, when the defendant was brandishing a firearm, the victim was so fearful that she ran to her car, and drove to a store where she sat in her automobile making a phone call.18 The defendant arrived on the scene, jumped into her vehicle and, while cursing her, wrestled the phone out of her hands.19 He left when another car pulled up, but when she returned to the home, she found he had locked her out.20 She obtained a restraining order pursuant to Massachusetts General Laws chapter 209A, and he was ordered to stay away from the victim.21 However, since the defendant had a construction business and kept heavy equipment on the property, a district court judge modified the order to permit him access to the garage area during the daytime, Monday through Friday.22

Eventually, the victim started dating a sergeant in a Rhode Island police department whom the court, in its written ruling, named “Stephen.”23 The defendant continually confronted the victim and her new partner, falsely complaining that the romance must have begun well before they split up.24 The harassment then escalated. The defendant would park his heavy equipment so that it blocked the victim’s access, first to a shed and then to the entrance to the driveway.25 He screwed and hammered shut various doors and then, since the victim was forced to drive across her lawn because she was blocked from the driveway, the defendant had massive boulders placed in a way that blocked her from even driving across her lawn to the home.26 He put his heavy equipment in the garage so that she couldn’t park in it, and he unscrewed the light bulbs on the exterior of the property so that it was in absolute darkness at night.27

When the Seekonk property was put up for sale and featured on the real estate website Zillow, the defendant, who had access to the site, placed on it the affidavit the victim had submitted in support of her application for the restraining order.28 The defendant even created additions to it, such as her admitting that she had “mixed thyroid medication and wine.”29

The defendant had a female friend enter the house and view it while the defendant waited outside, purportedly so that she might rent it for her disabled mother.30 The SJC, however, noted that the four-bedroom home with stairs was an “improbable” living space for the mother who was, instead, placed in a nursing home.31 Therefore, the woman’s entering the home as a surrogate for the defendant was an apparent end run around a restraining order that otherwise barred the defendant’s entry.32

The original restraining order barring all access to the property was reinstated,33 and the defendant was granted seven business days to remove property from the house in the presence of police.34 When the victim returned, she saw that numerous pieces of her property had been taken away, including the refrigerator and stove.35 The water for the whole house had been shut off, there were feces and urine in the toilet which could not be flushed because the water had been shut off, her food had been taken out of the refrigerator and placed in the sink, and when the water was turned back on it began shooting out of a pipe.36

Three years later, after the defendant filed a series of complaints against Stephen with his employer (the police department), and even with a city councilman, the victim and Stephen learned that the defendant had placed a smiling photo of himself holding a large gun on his lap on the defendant’s own Facebook page.37 On the same page, under a box titled “Favorite Quotations,” were the words, “Make no mistake of my will to succeed in bringing you two idiots to justice.”38 The victim claimed that when she saw this, she was filled with terror; she pursued criminal charges.39 Additionally, the Facebook page noted that the defendant was a member of the “Governors [sic] Task Force on Police Corruption,” which was assumed to be a subtle pejorative swipe at Stephen.40

Michael Walters was indicted in 2011 on charges of stalking, harassment, violation of a restraining order and perjury and, in 2012, was found guilty on all counts.41 He appealed and the appeal was transferred to the SJC on its own motion.42

15. Id.
16. Id.
18. Id.
19. Id. at 684.
20. Id.
21. Id.
22. Id.
24. Id.
25. Id. at 685.
26. Id.
27. Id.
28. Id. at 686.
30. Id. at 687.
31. Id. at 699.
32. Id. at 687.
33. Id. at 686.
34. Id. at 687.
36. Id.
37. Id. at 688.
38. Id.
39. Id.
40. Id.
42. Id. at 688-89.
There was intense public interest in the potential outcome of Commonwealth v. Walters, as indicated by the fact that nearly twenty civil liberties and victims’ rights groups submitted amicus briefs. As will be seen, the interest was deserved. The court first looked at the requirement of the Massachusetts stalking statute that a person may be guilty of stalking if he or she:

“(1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury”; the conduct, acts or threats may be accomplished by means of electronic communication.

The court, in a unanimous opinion written by Justice Margot Botsford, focused mainly on the threat component. The court ultimately agreed with the defendant’s argument that the allegedly threatening content on the Facebook page was ambiguous. Indeed, the page and its content had been posted several years after most of the previously-alleged harassment took place. In the court’s view, this fact weighed against a finding that the conduct constituted stalking, rather than protected speech.

The SJC acknowledged that laws proscribing free speech and attempting to criminalize it are generally regarded as presumptively invalid on their face. However, it is well settled that “true threats” do not merit such constitutional protection.

True threats are intended to place another person in reasonable fear of physical violence even if the perpetrator doesn’t actually intend to carry out the threat. The purpose of the law is to protect the victim from the fear itself, and not solely from the actual physical harm.

Similar to the law of assault, defined as placing a person in reasonable fear of imminent bodily injury, to make a case of threats the government must show that the defendant put the victim in imminent fear that physical harm is likely to occur, and that such fear is reasonable. The subtle distinction between an assault and a threat is that, for assault, one must be put in fear of “imminent death or bodily injury.” For a threat, one must be placed in “imminent fear of death or bodily injury.” In other words, in a stalking case, simply being put in fear is the primary requirement.

Additionally, actually communicating the threat to a victim is not required as long as it can be proved that the perpetrator had an intent to communicate the threat to the victim either by direct or indirect means. Conversely, if a perpetrator communicated a threat to a third party, not realizing that this message would then be relayed to the intended victim, a perpetrator has not committed the offense.

After consideration of these legal tenets, the court in Walters analyzed the facts. Initially, the court considered the photograph on the Facebook page and could not discern from it an intent to commit violence. The defendant was smiling, the gun was on his lap, and there was no caption below it alluding to violence. Further, the court reasoned that although there was evidence that Walters might have implied an intent to use guns in the past, he never actually used a gun violently in the victim’s presence, pointed it at her, or directly threatened her with it. Also, the court noted that it had been three years since the other incidents or since the victim had last seen the defendant with a gun. He was doing nothing unlawful with the lawfully possessed firearm and, with his military background and known interest in guns, the court could not say that the photograph was anything other than guileless. Indeed, even though another page on the defendant’s Facebook site carried the quote, “Make no mistake of my will to succeed in bringing you two idiots to justice,” the SJC determined that making a connection between the photograph and the quote was merely “speculative.”

In response to the commonwealth’s argument that the totality of the postings constituted a threat — including the fact that there was so little other content on the defendant’s Facebook page other than the quotation about justice, the photograph, the reference to the Governor’s [sic] Task Force on Police Corruption and a photograph

43. Amicus briefs were submitted by the Domestic & Sexual Violence Council Inc., Foley Hoag Domestic Violence and Sexual Assault Prevention Project, Massachusetts Law Reform Institute, Victim Rights Law Center, Community Legal Services and Counseling Center, Greater Boston Legal Services, Domestic Violence Institute at Northeastern University School of Law, Family Advocacy Clinic of Suffolk University Law School, Justice Center of Southeast Massachusetts, Community Legal Aid, Jane Doe Inc., the Women’s Bar Association of Massachusetts, the Bar Foundation, the National Network to End Domestic Violence, the National Center for Victims of Crime, the Anti-Defamation League and the American Civil Liberties Union of Massachusetts.


45. Walters, 472 Mass. at 688-701.

46. Id. at 694.


50. Walters, 472 Mass. at 690.


52. Walters, 472 Mass. at 689.


56. Id. at 694.

57. Id. at 688, 694.

58. Id. at 694.


60. Id. at 694-95.

61. Id. at 695.
of the popular singer Rihanna, a well-known victim of domestic violence — the SJC conceded that these elements, when viewed together, were “vaguely ominous and disturbing.” 62 Ultimately, though, the court ruled that the commonwealth had not met its burden to demonstrate the existence of a threat or the reasonableness of the victims’ fear. 63

In an almost passing mention, the court rapidly discussed the defendant’s other convictions, all of which were upheld. 64 Concerning the charge of criminal harassment, defined as “willfully and maliciously engaging in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress,” 65 the court found the requisite three incidents of harassment of the victim, even though each one, taken alone, might appear innocuous. 66 Proof of violation of a restraining order was also undeniably sufficient, despite the defendant’s argument that the order ceased to be a true order to vacate and stay away from the premises when it was modified to permit him to use the garage for his contracting business during the daytime business hours. 67 The court dismissed this argument, stating that the most natural reading of the order would still find that there was nothing in it that removed his obligation to vacate and stay away from the home and the rest of the property. 68

The court also upheld the defendant’s two perjury convictions. 69 They had been charged after the defendant testified at a 2008 hearing concerning his violation of a restraining order. 70 The defendant denied to the judge that he had ever taken any of the victim’s possessions from the house. 71 In fact, he explicitly answered the judge’s questions with the assertion that, “Your Honor, you are being lied to like you wouldn’t believe,” as he told the court that the victim’s items were not in the house, when evidence in fact showed that he had taken them. 72 This constituted perjury, which occurs when, during a judicial proceeding, one “willfully swears or affirms falsely in a matter material to the issue or point in question.” 73

It is to the stalking law, however, that the court in Walters dedicates the lion’s share of its opinion. The important conclusion reached by the SJC is that, despite that the commonwealth’s evidence in this case was insufficient to prove stalking, where intimidating communications of ill will alone may not necessarily meet the criteria, communications posted on internet websites, including social media, are illegal if they meet the elements of the Massachusetts stalking statute. These elements are met when one intentionally engages in a series of acts or statements over time, which are so alarming and annoying as to cause a reasonable person to suffer substantial emotional distress, along with a threat that puts the victim in imminent fear of death or bodily injury.

Peter T. Elikann

62. Id. at 695.
63. Id. at 696.
64. Id. at 696-703.
67. Id. at 700-01.
68. In Commonwealth v. Silva, a father unsuccessfully advanced a similar argument when he asserted that the fact that he was permitted brief incidental contact with his wife when he was allowed to telephone the house to speak to his children meant that the entire no-contact order was vacated. 431 Mass. 194, 198-99 (2000). The court affirmed that the abusive and threatening language the defendant used toward his wife was not excused from the no-contact order, simply because some minimal contact to assist the children in receiving his phone calls was permitted. 69. Walters, 472 Mass. at 702-03.
70. Id. at 701.
71. Id.
72. Id. at 701-03.
United States Supreme Court Justice Antonin Scalia and noted lexicographer and law professor Bryan A. Garner, the authors of *Reading Law: The Interpretation of Legal Texts*, make an interesting pair. Justice Scalia was a textualist, whom the authors define as one who “look[s] for meaning in the governing text, ascribe[s] to that text the meaning that it has borne from its inception and reject[s] judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.” Justice Scalia has written extensively on textualism in his judicial opinions, articles, and books. As he described it:

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. Garner writes prolifically on language usage and style, particularly for lawyers and judges. Technically, Garner is, in philosophy, a prescriptivist, or one who focuses on how language should be used. Textualists attempt to insulate the law from the fickle whims of society; prescriptivists do the same with language. The textualist, Scalia, and prescriptivist, Garner, are, therefore, quite similar.

In contrast to the textualist-prescriptivist notion of interpretation are the doctrines of purposivism and the “Living Constitution” theory. In the authors’ view, these non-textual doctrines free “the judge from interpretive scruple.” Purposivism is an interpretive theory that allows departure from text and “goes around or behind the words of the controlling text to achieve what [the interpreter] believes to be the provision’s purpose.” Its most destructive feature is its manipulability. The opposite of non-textual interpretive theory is the notion that the constitution is a “living document” whose meaning evolves as the times require. The authors criticize this theory as equally manipulable: “[o]nly in the theater of the absurd does an aristocratic, life-tenured, unelected council of elders set aside laws enacted by the people’s chosen representatives on the ground that the people do not want those laws.” Scalia and Garner explain that they collaborated on *Reading Law* to “remove a facile excuse for judicial overreaching . . . [by demonstrating that] most interpretive questions have a right answer.”

In *Reading Law*, Scalia and Garner propose fifty-seven canons of interpretation and thirteen “exposed falsities.” The authors define a canon of construction as “[a] principle that guides the interpreter of a text on some phase of the interpretive process.” Notwithstanding that the authors use “construction . . . essentially as a synonym of interpretation,” they contend that canons are not rules of interpretation but “presumptions about what an intelligently produced text conveys.” The canons are divided into three groups: (1) principles that apply to all texts (Fundamental Principles, Semantic Canons, Syntactic Canons and Contextual Canons); (2) principles that apply to governmental prescripts (Expected-Meaning Canons, Government-Structuring Canons, Private-Right Canons and Stabilizing Canons); and (3) exposed falsehoods. Exposed falsehoods include the false notion that the spirit of a statute should prevail over its letter, that the quest in statutory interpretation is to do justice, that words should be strictly construed, that the plain language of a statute is the “best evidence of legislative intent, and nine other falsehoods.” One example of a canon in the Syntactic Canons section is the Series-Qualifier Canon, which is the fundamental principle that “when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.” For example, in the phrase “charitable institutions or societies,” “charitable” modifies both “institutions” and “societies.” The authors note that this...
particular canon is highly sensitive to context, seemingly in contradiction to their premise. The authors also note that “[o]ften the sense of the matter prevails.” 19 For example, “He went forth and wept bitterly” does not suggest that he went forth bitterly. 20 All of the canons and their usage are interesting, instructive, and well worth readers keeping Reading Law close at hand when writing legal arguments or opinions.

The interesting jurisprudential issue in Reading Law is the authors’ statement that “most interpretive questions have a right answer.” 21 In seeming contrast, the authors also include a chapter called the “Principle of Interrelating Canons,” and they concede that no canon of interpretation is absolute because “[e]ach may be overcome by the strength of differing principles that point in other directions.” 22 Criticizing Professor Karl Llewellyn’s law review article that proposed that “there are two opposing canons on almost every point,” 23 the authors contend that Llewellyn’s thesis merely demonstrates that some of the canons are “silly . . . judicial statements that are so far from having acquired canonical status that most lawyers have never heard of them,” and some are not canons of interpretation at all because they “reject textual interpretation as the basis of decision.” 24

However, Llewellyn’s conflicting canons are acutely highlighted in the stark contrast between the majority opinion and Justice Scalia’s dissent in the recent Supreme Court decision in King v. Burwell. 25 The case provides an interesting showcase for several canons of construction and exactly illustrates Llewellyn’s point that canons may be contradictory and also may be wholly self-serving. The canons relied upon by the majority are the same valid, enduring canons found in Reading Law, and, indeed, they are the same canons relied upon by Justice Scalia in dissent for his own version of “interpretive jiggery-pokery.” 26

For example, both the majority and the dissent rely upon Reading Law’s Canon 24: that the text must be construed as a whole. In Reading Law, Canon 24 postulates that principle: “Perhaps no

interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” 27 In his dissent, Justice Scalia concludes “that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.” 28 Similarly, reliance upon context was the overriding theme of the majority opinion in reaching the opposite conclusion: because the particular section of the Affordable Care Act was ambiguous in isolation, the majority considered the provision in the context of the whole statute: “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” 29 Reliance on context, reasoned the majority, was “appropriate in this case.” 30

Justice Scalia’s disdain for the majority opinion pervades his entire dissent:

The somersaults of statutory interpretation they have performed . . . will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites. 31

His antipathy is evidenced by his repeated satirical take-off on “Frailty, thy name is woman,” 32 “Understatement, thy name is an opinion on the Affordable Care Act,” 33 “Impossible possibility, thy name is an opinion on the Affordable Care Act” 34 “Contrivance, thy name is an opinion on the Affordable Care Act” 35 And yet the authors of Reading Law contend that “[i]t is a rare case in which

19. Id. at 150.

20. Id.


22. Id. at 59.

23. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About how Statutes are to be Constructed, 3 VAND. L. REV. 395, 401 (1949-50) (analyzing conflicting canons of construction); see also Lawrence D. Shubow, Statutory Construction in Massachusetts, 79 MASS. L. REV. 114 (1994) (reviewing the conflicting canons identified by Professor Llewellyn and citing Massachusetts cases in which they have been applied).


25. 135 S.Ct. 2480 (2015) (Scalia, J., dissenting). In King, the Supreme Court upheld the Affordable Care Act against the challenge to subsidies issued by the IRS on behalf of states that used the federal health insurance exchange and thus did not set up their own exchange. Id. at 2492-93. The challenge hinged on the meaning of four words in the Affordable Care Act, “established by the state,” and the plaintiffs’ argument was that only states where exchanges were “established by the state” could issue subsidies, but states which used the federal health insurance exchange could not. Id. at 2493.

26. Id. at 2500 (Scalia, J., dissenting). In his dissent, Justice Scalia ruthlessly accuses the majority of manipulating the rules of interpretation to “yield to the overriding principle of the present Court: The Affordable Care Act must be saved.” Id. at 2497 (Scalia, J., dissenting). And, “Today’s opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act.” Id. at 2506 (Scalia, J., dissenting). For a humorous discussion and definition of the term “jiggery-pokery,” see Kevin Underhill, “The Argle-Bargle Over This Jiggery-Pokery Is Pure Applesauce,” LOWERING THE BAR (June 25, 2015), http://www.loweringthebar.net/2015/06/pure-applesauce.html.

27. Scalia & Garner, supra note 1, at 167.

28. King, 135 S. Ct. at 2497 (Scalia, J., dissenting).


32. William Shakespeare, Hamlet, act 1, sc. 2.

33. King, 135 S. Ct. at 2497 (Scalia, J., dissenting).

34. Id. (Scalia, J., dissenting).

35. Id. at 2499 (Scalia, J., dissenting).
each side does not appeal to a different canon to suggest its desired outcome.”36 Justice Scalia’s dissent even concedes that at 900 pages, “it would be amazing if [the Affordable Care Act’s] provisions all lined up perfectly with each other.”37 The fact that both the majority and the dissent relied upon several of the canons set out in Reading Law validates Llewellyn’s poignant conclusion that “[i]n the field of statutory construction . . . there are ‘correct,’ unchallengeable rules of ‘how to read’ which lead in happily [or, in the case of the dissent in King v. Burwell, unhappily] variant directions.”38 As has been pointed out by Justice Richard Posner of the Seventh Circuit Court of Appeals, there is no canon for resolving conflicts among the canons.39

Interestingly, after the publication of Reading Law, a media feud began between Justices Posner and Scalia. In his review of Reading Law in The New Republic, Judge Posner took direct aim at Justice’s Scalia’s expressed view of the judicial role.40 Judge Posner identified as problematic the authors’ “lack of a consistent commitment to textual originalism.”41 According to Judge Posner, the fifty-seven canons of construction provide “all the room needed to generate the death penalty and guns.”42 Using as an example the case of Disorders as abortion, homosexuality, illegal immigration, states’ rights, service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home).43

43. District of Columbia v. Heller, 554 U.S. 570, 627-29 (2008) (Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home).

44. Posner, supra note 40, at 19.

45. Scalia & Garner, supra note 1, at 171.

46. U.S. CONST. amend. II.

47. Scalia & Garner, supra note 1, at 218 (quoting 1 Joseph Story, Commentaries on the Constitution of the United States, §459, at 326 (2d. ed. 1851)).


Massachusetts Law Review seeks submissions

The Massachusetts Bar Association is seeking submissions for its quarterly publication, the Massachusetts Law Review, the longest continually run law review in the country. A scholarly journal of the MBA, the Massachusetts Law Review is circulated around the world and contains comprehensive analyses of Massachusetts law and commentary on groundbreaking cases and legislation. To submit articles or proposals for articles, email jscally@massbar.org, mail to Massachusetts Law Review, 20 West St., Boston, MA 02111 or call (617) 338-0682.
To find out how the MBA Insurance Agency can help you with your malpractice and other coverage needs, contact us:

Boston (617) 338-0581 • Springfield (413) 788-7878
E-mail: Insurance@MassBar.org

Unequalled insurance, ensuring Massachusetts Bar Association members are protected with comprehensive coverage in today’s marketplace.

Underwritten by the nation’s largest provider of malpractice insurance, MBA Insurance provides expert, customer-focused staff.

Designed by lawyers for lawyers.
The *Massachusetts Law Review* is the longest continually published law review in the nation. Now, MBA members can view every issue, starting with the *Massachusetts Law Quarterly* (the original name of the *Massachusetts Law Review*) Vol. 1, No. 1, from November 1915, through the most recent *Massachusetts Law Review*, Vol. 98, No. 1. Using the HeinOnline search function, users can type in a search term (e.g., “eminent domain”) to find all of the *Massachusetts Law Review* articles over the past 100 years, where that term has appeared.

Previously, the MBA website included only the most recent issues of *Massachusetts Law Review*, and older issues had to be looked up on microfiche. There was also no way to search past issues by keyword.

Log in under the “Publications” tab on www.MassBar.org for easy access to the law review’s articles, case comments and book reviews, using an online, searchable database. This service is provided to MBA members as a free member benefit.

The *Massachusetts Law Review* archive on HeinOnline also works seamlessly with the MBA’s recently introduced Fastcase benefit. In many cases, citations to Massachusetts appellate court opinions that appear in the law review articles will hyperlink directly to the opinion itself.