

Western New England Law Review

Volume 33 33 (2011)

Issue 2 SYMPOSIUM: FIDUCIARY DUTIES IN
THE CLOSELY HELD FIRM 35 YEARS AFTER
WILKES V. SPRINGSIDE NURSING HOME

Article 7

1-1-2011

DONAHUE'S FILS AINE: REFLECTIONS ON WILKES AND THE LEGITIMATE RIGHTS OF SELFISH OWNERSHIP

Daniel S. Kleinberger, William Mitchell College of Law

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Daniel S. Kleinberger, William Mitchell College of Law, *DONAHUE'S FILS AINE: REFLECTIONS ON WILKES AND THE LEGITIMATE RIGHTS OF SELFISH OWNERSHIP*, 33 W. New Eng. L. Rev. 405 (2011), <http://digitalcommons.law.wne.edu/lawreview/vol33/iss2/7>

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

DONAHUE'S FILS AÎNÉ: REFLECTIONS ON WILKES AND THE LEGITIMATE RIGHTS OF SELFISH OWNERSHIP

DANIEL S. KLEINBERGER*

INTRODUCTION

Judging from frequency of citations, *Wilkes v. Springside Nursing Home, Inc.*¹ is at best the “oldest son” of the “great man” that is *Donahue v. Rodd Electrotpe Co.*² A recent Westlaw search shows that the latter has been cited more than twice as many times as the former,³ and *Donahue*'s pronouncement “that stockholders in the close corporation owe one another . . . the utmost good faith and loyalty”⁴ seems the modern analog to Cardozo's “punctilio of an

* Professor of Law, William Mitchell College of Law; A.B., Harvard University; J.D., Yale Law School.

1. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

2. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505 (Mass. 1975). The phrase “*filis aîné*” means literally “oldest son” but in earlier times also connoted the offspring expected to carry on the traditions of the family. E-mail from F. R. P. (Ron) Akehurst, Emeritus Professor of French, University of Minnesota, to Daniel Kleinberger, Professor of Law, William Mitchell College of Law (Oct. 1, 2010, 3:31 PM CST) (on file with the author). According to Professor Akehurst:

In the customary law areas (northern France) and until the fourteenth century the southern half of the country, the eldest son had preferential treatment. In many places he got two thirds of his father's (real) estate, while the other siblings shared the rest between them. He also got the title, if there was one, and the principal fortified place or castle, itf [sic] there was one or more.

Id.; see also PHILIPPE DE REMI BEAUMANOIR, *THE Coutumes de Beauvaisis* of Philippe de Beaumanoir 465 (F. R. P. Akehurst trans., 1992).

3. As of February 4, 2011, *Donahue* had been cited 1,554 times. KEYCITE CITING REFERENCES: *Donahue v. Rodd Electrotpe Co.*, Westlaw, www.westlaw.com (search for *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505 and following the “Citing References” link) (last visited Feb. 4, 2011). However, as of February 4, 2011, *Wilkes* had only been cited 779 times. KEYCITE CITING REFERENCES: *Wilkes v. Springside Nursing Home, Inc.*, Westlaw, www.westlaw.com (search for *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 and following the “Citing References” link) (last visited Feb. 4, 2011).

4. *Donahue*, 328 N.E.2d at 515 (footnote omitted) (quoting *DeCotis v. D'Antona*, 214 N.E.2d 21, 23 (Mass. 1966); *Cardullo v. Landau*, 105 N.E.2d 843, 845 (Mass. 1952)) (internal quotation marks omitted).

honor the most sensitive.”⁵

Wilkes, in contrast, does not appear seminal. Courts outside Massachusetts cite it only occasionally, and often in support of the *Donahue* rule of “utmost good faith.”⁶ Casebooks treat *Donahue* more often than *Wilkes*,⁷ and one of the articles in this symposium is entitled *The Vacuity of Wilkes*.⁸

This Article, in contrast, asserts that *Wilkes* should be at least as memorable as *Donahue*, and is, in a practical sense, substantially more important. The assertion rests on two propositions: first, that *Donahue*, like *Meinhard v. Salmon*,⁹ announces admirable sentiments but provides little practical guidance; second, that *Wilkes* provides the best practical rule for adjudicating “oppression”¹⁰

5. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Indeed, *Donahue* sees its approach as an extrapolation of Cardozo’s ruling. *Donahue*, 328 N.E.2d at 516.

6. *E.g.*, *Moore v. Maine Indus. Servs., Inc.*, 645 A.2d 626, 628 (Me. 1994); *Tomaino v. Concord Oil of Newport, Inc.*, 709 A.2d 1016, 1021 (R.I. 1998); *Solomon v. Atlantis Dev., Inc.*, 516 A.2d 132, 136 (Vt. 1986).

7. *E.g.*, WILLIAM T. ALLEN & REINIER H. KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 338-43 (1st ed. 2003) (excerpting *Donahue*; never citing or discussing *Wilkes*); ALFRED F. CONARD ET AL., ENTERPRISE ORGANIZATION 803-13 (3rd ed. 1981) (excerpting *Donahue*; never discussing *Wilkes*, citing *Wilkes* only as a “Reference[] on Oppression in Close Corporations,” a list found after excerpted cases in the section); J.S. COVINGTON, JR., BASIC LAW OF CORPORATIONS 369-78 (1989) (excerpting *Donahue*; never citing or discussing *Wilkes*); DAVID G. EPSTEIN ET AL., BUSINESS STRUCTURES 586-97 (2002) (excerpting *Donahue*; never discussing *Wilkes*, only citing *Wilkes* for an unrelated proposition in a different chapter); STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS 298-310 (2005) (excerpting *Donahue*; never discussing *Wilkes*, only citing *Wilkes* in reference to a single question posed in a “Notes & Questions” section); LARRY E. RIBSTEIN, BUSINESS ASSOCIATIONS 276-85 (2d ed. 1990) (excerpting *Donahue*; never citing or discussing *Wilkes*); LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 203-11 (4th ed. 2003) (excerpting *Donahue*; very briefly mentioning *Wilkes* in the “Notes & Questions” section); LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, UNINCORPORATED BUSINESS ENTITIES 313 (4th ed. 2009) (discussing *Donahue*; never citing or discussing *Wilkes*). When *Wilkes* does appear as a principal case, it is almost always a tag along with *Donahue*. *E.g.*, DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE, AND POLICY 311-22 (2009) (excerpting both *Donahue* and *Wilkes*; but beginning with *Donahue*, including a much shorter excerpt of *Wilkes*, and extensively discussing *Donahue*, nearly to the exclusion of *Wilkes*, in the “Notes” section following the cases); THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES 305-16 (2d ed. 2006) (excerpting *Donahue*; only briefly discussing *Wilkes* in the “Notes” section following the excerpt of *Donahue*).

8. Benjamin Means, *The Vacuity of Wilkes*, 33 W. NEW ENG. L. REV. 433 (2011).

9. *Meinhard*, 164 N.E. at 546-47.

10. This Article uses “oppression” to represent all the various labels jurisdictions use to denominate shareholder versus shareholder claims within close corporations, including “unfairly prejudicial,” “loyalty,” and “reasonable expectations.” *See, e.g.*, *McCauley v. Tom McCauley & Son, Inc.*, 724 P.2d 232, 236 (N.M. Ct. App. 1986) (referring

claims when the alleged victim is also a miscreant or for some other reason the dispute is grey rather than black and white.¹¹ In particular, this Article asserts that *Wilkes*'s multistep, burden-shifting rule is a nuanced and effective method for accommodating both a victim's claim of majoritarian wrongdoing and the majority's claim of legitimate motive and even business necessity.

Because this symposium is for *Wilkes* rather than *Donahue*, description and praise of *Wilkes* occupies most of this Article. We begin, however, by putting *Donahue* in its place. Part I describes the role of *Donahue*—then (i.e. when decided) and now. Part II describes the “schizoid fiduciary duties”¹² among owners within closely held businesses, states the *Wilkes* test, and explains that test's genius for dealing with complex disputes among co-owners. Part III further delineates and explains the *Wilkes* test. Part IV notes that, structurally and conceptually, *Wilkes* succeeded in putting new wine in old bottles, giving the *Wilkes* rule a familiar feel despite its novel approach. Part V uses two cases in which “oppressed” shareholders were also miscreants and shows how application of the *Wilkes* rule would have produced a more nuanced analysis and a better result. This Article concludes with some thoughts on the influence of *Wilkes* in Massachusetts and elsewhere.

I. DONAHUE, THEN AND NOW

Donahue was indubitably important when decided. In 1975, it was far from a foregone conclusion that close corporations should be analogized to partnerships for the purposes of recognizing owner-to-owner fiduciary duties.¹³ Today, however, except in aber-

to “[o]ppressive conduct” as “an expansive term that is used to cover a multitude of situations dealing with improper conduct”); *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1018 (Sup. Ct. 1984) (discussing the “[t]wo definitions [of oppression which] have gained currency in New York and in the numerous reported decisions across the country”).

11. See *infra* Part V.

12. See *infra* notes 28 and 39 and accompanying text.

13. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 704 (1993) (stating that “[i]n recent years, legislatures and courts have recognized the different characteristics of the close corporation and have modified the statutory and fiduciary norm” (emphasis added)); Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) From Close Corporation History*, 40 WAKE FOREST L. REV. 883, 894 (2005) (referring to “the seminal decision of *Donahue v. Rodd Electrotype Co.*”). It can be argued that the label “seminal” more properly belongs to a different case, *Schwartz v. Marien*, 335 N.E.2d 334 (N.Y. 1975), a case

rant jurisdictions such as Delaware¹⁴ and Louisiana,¹⁵ the notion of an “incorporated partnership”¹⁶ is a given, and the cases applying shareholder-to-shareholder fiduciary duties are easily as important as cases detailing the partner-to-partner duties within general partnerships.¹⁷

cited by *Wilkes*. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1970). *Schwartz* contains the following pivotal passage:

Departure from precisely uniform treatment of stockholders may be justified, of course, where a bona fide business purpose indicates that the best interests of the corporation would be served by such departure. The burden of coming forward with proof of such justification shifts to the directors where, as here, a prima facie case of unequal stockholder treatment is made out. Particularly is this so when it appears that members of the board of directors favored themselves individually over the complaining shareholder. Additionally, disturbance of equality of stock ownership in a corporation closely held for several years by the members of two families calls for special justification in the corporate interest; not only must it be shown that it was sought to achieve a bona fide independent business objective, but as well that such objective could not have been accomplished substantially as effectively by other means which would not have disturbed proportionate stock ownership.

Id. Note, however, that the *Donahue* rule applies more broadly than the *Schwartz* rule. Moreover, *Donahue* has been cited approximately six times more often than *Schwartz*. See *supra* note 3 and KEYCITE CITING REFERENCES: *Schwartz v. Marien*, WESTLAW, www.westlaw.com (search for *Schwartz v. Marien*, 37 N.Y.2d 487 and following the “Citing References” link) (last visited Feb. 4, 2011) (listing 248 documents).

14. *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39 & n.2 (Del. 1996) (rejecting special shareholder-to-shareholder duties under Delaware law, where the corporation had not elected to be governed by the close corporation statute).

15. *Dunbar v. Williams*, 554 So. 2d 56, 69 (La. Ct. App. 1988) (citing *Wilkes* to “note that some states protect minority shareholders in closely held corporations from termination without cause” but deciding that Louisiana law gives no such protection).

16. See, e.g., *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 512 (Mass. 1975).

17. See generally Thompson, *supra* note 13. The pioneer in this area of law was F. Hodge O’Neal. See e.g. F. Hodge O’Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121 (1987) (“Unfair treatment of holders of minority interests in family companies and other closely held corporations by persons in control of those corporations is so widespread that it is a national business scandal.”). Indeed, it is possible to argue that the Revised Uniform Partnership Act (RUPA) overlooks partner-to-partner duties. See generally REVISED UNIF. P’SHIP ACT (1997) [hereinafter RUPA]. RUPA § 404 purports to exhaustively codify all fiduciary duties owed by partners and thereby “cabin in” the danger that courts might use fiduciary duty to undercut partnership agreements. See *id.* § 404. However, the specified duties each serve to protect the entity, rather than the partners. *Id.* “The ‘cabin in’ approach ignores the implicit fiduciary or fiduciary-like duty of members to avoid oppressing fellow members, produces great difficulty in dealing with member-to-member disclosure obligations in member-to-member buy-sell transactions, and puts inordinate pressure on the concept of ‘good faith and fair dealing.’” Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515, 522-23 (2007) (footnotes omitted) (explaining why the drafters of Re-ULLCA decided to un-cabin fiduciary duties).

R

R

Granted, *Donahue* did more than make the partnership analogy. As noted above, the case made “utmost good faith” prominent in the close corporation lexicon.¹⁸ But that label is so vague as to be almost meaningless, except in circumstances in which the majority has committed the close corporation equivalent of a “back alley mugging.”¹⁹ “[R]ecognizing the fiduciary nature of a relationship does not give it content in any given context.”²⁰

At first glance, the following pronouncement from *Donahue* might seem to provide guidance: “Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.”²¹ Careful reading, however, reveals ambiguity: i.e., is self-interest per se in derogation of the duty of loyalty, or is self-interest wrongful only to the extent that it derogates the loyalty duty? *Donahue* provides no answer.²²

18. *Donahue*, 328 N.E.2d at 515; see *supra* note 6 and accompanying text.

19. Fine phrasing and practical guidance often fail to align. For example, Charles E. Clark praised the judicial careers and personal attributes of two cousins, Learned and Augustus Hand, who both served on the Second Circuit, noting that “Learned Hand’s brilliant and volatile nature, coupled with his unusual stylistic gifts, has served to render him better known to the general public than his cousin.” Charles E. Clark, *Augustus Noble Hand*, 68 HARV. L. REV. 1113, 1114 (1957). Clark, however, quoted “Justice Jackson’s classic barb uttered in an evening of general acclaim: ‘In short, just a word of advice to you district judges here present: Always quote Learned and follow Gus.’” *Id.* Out of filial respect, I note that I first learned this aphorism from my father, a member of the New York bar.

20. *Walta v. Gallegos Law Firm, P.C.*, 40 P.3d 449, 457 (N.M. Ct. App. 2001).

21. *Donahue*, 328 N.E.2d at 515.

22. The same criticism applies to Cardozo’s beautiful phrasings:

Cardozo’s words are quite vague. It is one thing to say in general, “be your brother’s keeper,” but how does the principle apply when, for instance, your brother wants to watch the opera, you want to watch the football game, and your house has only one TV and no TiVo, DVR, or VCR? What does “the punctilio of an honor the most sensitive” mean when the two partners in an at-will partnership are discussing a change in profit shares because one partner believes she is bringing in most of the business?

DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS AND LLCs: EXAMPLES AND EXPLANATIONS § 9.8.1, at 285-86 (3d ed. 2008) (footnote omitted) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)). A controversial provision in the Revised Uniform Partnership Act recognizes this problem. RUPA provides: “A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.” RUPA § 404(e). The Official Comment explains:

Subsection (e) is new and deals expressly with a very basic issue on which the UPA is silent. A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection (e) makes clear that a partner’s con-

Donahue does contain one practical, operational holding—the so-called “equal opportunity” rule:

When [a] corporation reacquiring its own stock is a close corporation, the purchase is subject to the . . . requirement, in the light of our holding in this opinion, that the stockholders, who, as directors or controlling stockholders, caused the corporation to enter into the stock purchase agreement, must have acted with the utmost good faith and loyalty to the other stockholders.

To meet this test, if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price.²³

For a while, this rule generated interesting jurisprudential ripples—both as to the per se rule itself²⁴ and to the definition of “the controlling group.”²⁵ Today, however, the per se rule has few (if

duct is not deemed to be improper merely because it serves the partner’s own individual interest.

That admonition has particular application to the duty of loyalty and the obligation of good faith and fair dealing. It underscores the partner’s rights as an owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, with consent, owns a shopping center may, under subsection (e), legitimately vote against a proposal by the partnership to open a competing shopping center.

RUPA § 404 cmt. 5. The provision was replicated in the Uniform Limited Partnership Act § 305(c) (2001), but omitted from the Revised Uniform Limited Liability Company Act. “This language is inappropriate in the complex and variegated world of LLCs. As a proposition of contract law, the language is axiomatic and therefore unnecessary. In the context of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing.” REVISED UNIF. LTD. LIAB. CO. ACT § 409 cmt. to subsection e (1996).

23. *Donahue*, 328 N.E.2d at 518 (footnote omitted).

24. *E.g.*, *Toner v. Baltimore Envelope Co.*, 498 A.2d 642, 652-53 (Md. 1985) (rejecting a per se equal opportunity rule; finding no harm where the plaintiff did not lose any voting power because she was and remained a minority shareholder); *Sundberg v. Lampert Lumber Co.*, 390 N.W.2d 352, 356-57 (Minn. Ct. App. 1986) (declining to consider equal opportunity rule; interpreting relevant statute to limit buyout remedy to corporations with thirty-five or fewer shareholders), *superseded by statute*, Minn. Stat. § 302A.751 (1994), *as recognized in* *Berreman v. West Publ’g Co.*, 615 N.W.2d 362 (Minn. Ct. App. 2000); *Estate of Schroer v. Stamco Supply, Inc.*, 482 N.E.2d 975, 981 (Ohio Ct. App. 1984) (adopting the equal opportunity rule because the duty of the “controlling shareholder group . . . [was] substantially akin to that fiduciary duty owed by one partner to another, to deal *inter sese* in the utmost good faith”).

25. *Donahue*, 328 N.E.2d at 518-19; *see e.g.*, *Schroer*, 482 N.E.2d at 977 n.1 (describing the complex capital structure that created a family control group); *Demoulas v. Demoulas Super Mkts., Inc.*, No. 90-2927(B), 1995 WL 476772, at *81 (Mass.

any) adherents (not even Massachusetts),²⁶ and the most interesting questions as to control with close corporations pertain to power exercised by minority shareholders, or more pointedly, issue-specific control.²⁷

In sum, today *Donahue* is most interesting as a matter of history and fine language. As a practical guide to conduct, it has little relevance.

II. THE CONTINUING RELEVANCE OF *WILKES*

Wilkes, in contrast, has significant continuing relevance. To appreciate that relevance requires an understanding of what I have elsewhere termed “schizoid fiduciary duty.”²⁸ In a classic fiduciary relationship, the fiduciary owes undivided loyalty to the party protected by the fiduciary’s duty.²⁹ Strict rules prohibit competition,

Super. Ct. Aug. 2, 1995) (finding a control group comprised of “closely-knit” individuals who had common interests and acted in concert to manage the companies).

26. See *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 464 (Minn. Ct. App. 2001) (noting “that the Massachusetts Supreme Court later retreated from the *Donahue* holding in [*Wilkes*] because legitimate business reasons may exist for treating different shareholders differently” (citation omitted)). Even with the *Donahue* facts, a Massachusetts court would allow the majority shareholders to assert a legitimate business purpose, thereby circumventing a categorical breach of duty. See *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976); see also *infra* note 44 and accompanying text. R

27. *E.g.*, *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 7 (1st Cir. 1997) (considering a minority shareholder’s threat to sell his stock to someone ineligible to own stock in a S corporation and stating “because [the would-be seller’s] actions will determine whether the Company retains its advantageous S status, he unquestionably has control over that issue”); *Zimmerman v. Bogoff*, 524 N.E.2d 849, 853-54 (Mass. 1988) (holding that control can exist within a minority block); *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798, 802 (Mass. App. Ct. 1981) (“The 80% [supermajority approval] provision [applicable to declaring dividends] may have substantially the effect of reversing the usual roles of the majority and the minority shareholders. The minority, under that provision, becomes an ad hoc controlling interest.”). R

28. *Kleinberger & Bishop*, *supra* note 17, at 526; see also *KLEINBERGER*, *supra* note 22, § 9.8.5, at 293 (noting that in “Partner-to-partner transactions (when partners engage each other in partnership-related financial transactions) . . . [and in a] Partners’ exercise of discretion vis-à-vis copartners . . . one partner’s interests will inevitably be adverse to another’s”). R

29. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989) (“[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and ‘inflexible’ rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” (citations omitted)); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 16 P.3d 574, 581 n.2 (Wash. 2001) (“The duty of a fiduciary to his beneficiary is essentially that of a trustee. A fiduciary ‘is bound to act in the highest good faith toward his beneficiary’ and he may never seek to gain an advantage over his beneficiary by any means. A fiduciary

usurpation of opportunity, and self-dealing, and self-interest is permissible only with informed consent.³⁰

Within a closely held business, however, the situation is different. When an owner functions as an entity manager, standard duties do apply.³¹ But when oppression is alleged, the construct changes; in that context, the co-owners are not classic fiduciaries.³² For one thing, each co-owner is simultaneously both a fiduciary obligee and a fiduciary obligor.³³ For another, each co-owner has some right to pursue self interest.³⁴ For example, when a compensation committee decides bonuses for all the firms' owners, the situation certainly requires more exacting standards than "morals of

must give priority to his beneficiary's best interest whenever he acts on the beneficiary's behalf. A fiduciary owes his beneficiary a duty of undivided loyalty, meaning that a fiduciary cannot abandon or stray from this relationship to further his own interests." (quoting Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 KY. L.J. 1, 2 (2000))).

30. See *Guth v. Loft, Inc.*, 5 A.2d 503, 510-11 (Del. 1939) (discussing unauthorized acts of a corporate officer and doctrines relating to "self-interest," corporate opportunity, and anti-competition); RESTATEMENT (THIRD) OF AGENCY §§ 8.02-.04 (2006); AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE §§ 5.02, 5.04-.06 (1994).

31. MODEL BUS. CORP. ACT §§ 8.30 and 8.31 (2008) (stating conduct and liability standards for all directors and making no reference to any exclusion or different rule for directors of close corporations); see also MODEL BUS. CORP. ACT § 8.30 cmt. 1 (stating that "Section 8.30(a) establishes the basic standards of conduct for all directors" and that "[i]ts command is to be understood as peremptory—its obligations are to be observed by every director" (emphasis added)); Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in Closely Held Corporations*, 16 WM. MITCHELL L. REV. 1143, 1145 (1990). The situation is more complicated when controlling shareholders damage or despoil the company in order to expropriate the value due to a minority shareholder. Those situations are beyond the scope of this Article, and essentially raise questions of the distinction between direct and derivative lawsuits. See Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 BAYLOR L. REV. 63, 121-25 (2006); Daniel S. Kleinberger & Imanta Bergmanis, *Direct vs. Derivative, or "What's a Lawsuit Between Friends in an 'Incorporated Partnership?'"*, 22 WM. MITCHELL L. REV. 1203, 1270-71 (1996).

32. See *Daniels v. Thomas, Dean & Hoskins, Inc.*, 804 P.2d 359, 365-66 (Mont. 1990) (distinguishing cases relied on by the trial court because, although those cases concerned fiduciary duty (agency law and an executor's trusteeship over the assets of the decedent's estate), they did not involve "the unique relationship between shareholders of a close corporation").

33. This situation is comparable to the situation of mutual agency among general partners in a non-LLP general partnership. Each partner is simultaneously an agent of the other partners and one of the principals comprising the partnership. RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958) (stating that, in "usual" circumstances, "a partner is a general agent for the other members of the group").

34. RUPA § 404 cmt. 1 (1997) ("Arguably, the term 'fiduciary' is inappropriate when used to describe the duties of a partner because a partner may legitimately pursue self-interest . . .").

the market place.”³⁵ But just as certainly, classic fiduciary rules do not make sense. Likewise, what does selflessness mean when a majority of owners exercise a “guillotine” expulsion provision, permitting them to oust a fellow owner without cause and without even an opportunity for a hearing?³⁶ Or what does it mean when controlling shareholders determine what to do with a shareholder employee who is engaging in sexual harassment?³⁷ “[E]ven if [co-owners] are never fully at arm’s length, they are nonetheless occasionally on opposite sides of the negotiating table. In such circumstances, self interest is inherent and inevitable.”³⁸

To use the term “schizoid” to describe the resulting obligations may seem pejorative. One dictionary defines the word as “an offensive term describing a personality that suggests inner conflicts and exhibits outer contradictions.”³⁹ But pejorative or not, the definition is apt in the context of owner-to-owner duties. Without a proper lens, the relationship and the duties appear in conflict and in contradiction. For example, what does “utmost good faith” mean when an employer-shareholder is terminated for, among other things, assaulting a fellow shareholder and doing criminal damage to a customer’s property?⁴⁰ What does “utmost good faith” require when an employer-shareholder is terminated for misusing company funds and intimidating both customers and employees?⁴¹

For such situations *Wilkes* makes two substantial contributions. The first is conceptual. *Wilkes* expressly recognizes the schizoid reality:

[W]e are concerned that untempered application of the strict good faith standard enunciated in *Donahue* . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effec-

35. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

36. *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 191 (Minn. Ct. App. 2001); *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at *2 (Tenn. Ct. App. Nov. 21, 2003); *P.F. Jurgs & Co. v. O'Brien*, 629 A.2d 325, 327 (Vt. 1993); *Holman v. Coie*, 522 P.2d 515, 518-19 (Wash. Ct. App. 1974).

37. See *Royals v. Piedmont Elec. Repair Co.*, 529 S.E.2d 515, 517-18 (N.C. Ct. App. 2000).

38. KLEINBERGER, *supra* note 22, § 9.8.5, at 292.

39. *Schizoid Definition*, MSN ENCARTA DICTIONARY, <http://encarta.msn.com/encnet/features/dictionary/dictionaryresults.aspx?lextype=3&search=schizoid> (last visited Jan. 9, 2011).

40. See *infra* notes 113-120 and accompanying text for a discussion of *Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834 (Minn. App. 1994).

41. See *infra* notes 84-111 and accompanying text for a discussion of *Edenbaum v. Schwarcz-Osztreicherne*, 885 A.2d 365 (Md. Ct. Spec. App. 2005).

R

R

R

tiveness in managing the corporation in the best interests of all concerned. The majority, concededly, have certain rights to what has been termed “selfish ownership” in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.⁴²

The second contribution is practical. *Wilkes* provides an operational rule for determining whether a particular act or course of conduct breaches the majority’s “fiduciary obligation to the minority” or instead reflects the legitimate rights of selfish ownership.⁴³

[W]hen minority stockholders in a close corporation bring suit against the majority alleging a breach of the strict good faith duty owed to them by the majority, . . . [i]t must be asked whether the controlling group can demonstrate a legitimate business purpose for its action.

When an asserted business purpose for their action is advanced by the majority, however, we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority’s interest. If called on to settle a dispute, our courts must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.⁴⁴

III. DETAILING AND UNDERSTANDING THE *WILKES* TEST

The “*Wilkes* test” has four steps, although the first is actually assumed in the *Wilkes* opinion (and therefore I label it step zero). *Step zero* begins with the complaining minority shareholder making a plausible claim that the majority’s conduct has affected an arguably protected right of the complainant.⁴⁵ Without such a showing, the defendants should not be required to justify their conduct. Any other approach would encourage nuisance suits, which would itself ignore “the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation.”⁴⁶ The cases do not linger on this point.

42. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

43. *Id.*

44. *Id.* (citations omitted).

45. *Id.* (noting that “when minority stockholders in a close corporation bring suit against the majority alleging a breach of . . . duty . . . [the court] must carefully analyze the action taken by the controlling stockholders . . . ask[ing] whether the controlling group can demonstrate a legitimate business purpose”—thereby, implying Step Zero of this analysis).

46. *Id.*

When loss of employment is at issue, the showing is made almost automatically.⁴⁷ For less dramatic employment-related claims, useful authority is available from the sometimes analogous realm of discrimination law. “An adverse employment action is not a trivial offense or petty slight.”⁴⁸ For example, a claim that one’s office has been relocated or repainted⁴⁹ should not trigger the next step of the *Wilkes* analysis.

Assuming the plaintiff surmounts step zero, *step one* provides that the majority is obliged to demonstrate a legitimate business purpose.⁵⁰ In many cases, the analysis stops here.⁵¹ In a classic situation of aggression and expropriation, the defendants cannot meet their burden of proof. Thus, in the close corporation version of a “back alley mugging,” the multi-step *Wilkes* test is unnecessary, but its application is benign and speedy.

If the defendants surmount step one, *step two* requires the complainant to prove a less harmful alternative for addressing the demonstrated legitimate business purpose.⁵² This step is the genius of the *Wilkes* test, recognizing that neither the apparent infringement of complainant’s rights nor the legitimate rationale of those running the business should be automatically dispositive.⁵³ If each side is in part right and in part wrong, then an all-or-nothing rule will routinely produce bad results. This step allows the court a limited role in second-guessing the business judgment of the majority and therefore conduces majorities toward special care in dealing with the interests of minority shareholders. This step also imposes

47. The majority of oppression claims involve loss of employment. See Kathleen L. Kuhlman, *Beyond Crosby v. Beam: Ohio Courts Extend Protection of Minority Stockholders of Close Corporations*, 27 AKRON L. REV. 477, 479 (1994); Peter A. Mahler, *Twenty Years of Court Decisions Have Clarified Shareholder Rights Under BCL §§ 1104-a and 1118*, 71 N.Y. ST. B.J. 28, 31 (1999).

48. *Quinn v. St. Louis Cnty.*, No. 09-1372 ADM/LIB, 2010 WL 3733970, at *5 (D. Minn. Sept. 20, 2010) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

49. *Id.* at *1. The *Wilkes* analysis is also powerful in cases involving non-employee shareholders, but such cases are beyond the scope of this Article.

50. *Wilkes*, 353 N.E.2d at 663.

51. See, e.g., *id.* Exactly this result occurred in *Wilkes*. “Applying this approach to the instant case it is apparent that the majority stockholders in Springside have not shown a legitimate business purpose for severing Wilkes from the payroll of the corporation or for refusing to reelect [sic] him as a salaried officer and director.” *Id.*; see also *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 8 (1st Cir. 1997); *Glydon v. Conway*, No. 01-P-1414, 2003 WL 21665004, at *2 (Mass. App. Ct. July 16, 2003); *Beers v. Tisdale*, 603 N.E.2d 239, 241 (Mass. App. Ct. 1992).

52. *Wilkes*, 353 N.E.2d at 663.

53. *Id.*

on the complainant the task of explaining how—accepting the majority’s legitimate purpose—the majority used needlessly harmful means, thereby requiring the complainant to consider the practical problems caused by the complainant’s own conduct. This proposition follows ineffectually from the structure of the *Wilkes* approach. If the majority’s legitimate purpose involves responding to the complainant’s misconduct, the complainant will have to demonstrate a better way of dealing with that misconduct.

Most cases that reach this stage end here with a decision for the defendants.⁵⁴ In addition, step two provides guidance to lawyers seeking a compromise resolution—i.e., a structure for discourse.⁵⁵

If the analysis reaches *step three*, the court balances the competing claims of the parties, “weigh[ing] the legitimate business purpose . . . against the practicability of a less harmful alternative.”⁵⁶ Few, if any cases, reach this stage.⁵⁷ The balancing would presumably involve: (i) the importance of the business purpose; (ii) the

54. *E.g.*, *Med. Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 20-22 (1st Cir. 2002) (holding that a legitimate business purpose existed where the shareholders had justifiable reasons to vote against a merger); *Holland v. Burke*, No. BACV200500122A, 2008 WL 4514664, at *8 (Mass. Super. Ct. June 18, 2008) (finding a legitimate business purpose of “preserv[ing] and continu[ing] the successful operation of the” company); *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353-54 (Minn. Ct. App. 1988) (holding that termination of employment due to poor performance was a legitimate business purpose). *But see* *Pointer v. Castellani*, 918 N.E.2d 805, 818 n.23 (Mass. 2009) (“We take the judge’s conclusion that the allegations against Pointer were not grounds for his termination to mean that the defendants have not established a legitimate business purpose for the termination. . . . In the one area where the judge found that Pointer engaged in any misconduct, his political contributions, we agree with the judge that termination was not necessary; a simple discussion would have been enough. In any event, Pointer reimbursed FGC.”).

55. *See* *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798, 802-03 (Mass. App. Ct. 1981) (referring to “[t]he . . . pertinent guidance . . . found in the *Wilkes* case, essentially to the effect that in any judicial intervention in such a situation there must be a weighing of the business interests advanced as reasons for their action (a) by the majority or controlling group and (b) by the rival persons or group” and stating that “[i]t would obviously be appropriate, before a court-ordered solution is sought or imposed, for both sides to attempt to reach a sensible solution of any incipient impasse in the interest of all concerned after consideration of all relevant circumstances” (internal citations omitted)).

56. *Wilkes*, 353 N.E.2d at 663.

57. *See* *Alder Food Distribs., Inc. v. Keating*, No. 0000748, 2000 WL 33170823, at *5-6 (Mass. Super. Ct. June 6, 2000) (contemplating alternative remedial actions; holding that there were less harmful alternatives to an indefinite suspension without pay in response to a minority shareholder’s improper management techniques; recognizing that the majority shareholder had reasonable grounds to impose punishment, but the chosen disciplinary actions were “far too harmful a means of achieving a legitimate business objective”).

question of acceptable “margin of error” risk in devising a method to serve that purpose;⁵⁸ and (iii) any demerits in the proffered alternative—especially issues as to practicality and concerns as to whether the alternative would serve the business purpose equally as well as the majority’s chosen course of action.

IV. APPRECIATING THE *WILKES* TEST AS A LEGAL CONSTRUCT

As will be seen below, the *Wilkes* test can work remarkably well in resolving schizoid issues.⁵⁹ But *Wilkes* is also remarkable from a purely conceptual perspective. Although the *Wilkes* test was novel when announced, its structure and components were not. The *Wilkes* rule takes its structure from *McDonnell Douglas Corp. v. Green*,⁶⁰ a famous case in an adjacent area of law. The rule’s content is a variation on the business judgment rule, a major theme of corporate law.⁶¹ These borrowings are *sub silentio* but nonetheless apparent.

Legal authorities differ on the virtues of putting new wine in old bottles,⁶² but *Wilkes* did well to do so. Appropriate borrowing

58. For example, a purpose might be both very important and very fragile—i.e., with little margin for error in effectuating the purpose. In that case, the balance would tilt against the plaintiff.

59. See *infra* Part V.

60. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792 (1973).

61. See *Bender v. Swartz*, 917 A.2d 142, 152-53 (Md. Ct. Spec. App. 2007); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1372-73 (Del. 1995).

62. See, e.g., *Cumberland Corp. v. E. I. DuPont de Nemours & Co.*, 383 F. Supp. 595, 599 n.1 (W.D. Tenn. 1973) (“The repeated difficulties encountered with limitations issues in products liability cases in Tennessee is illustrative of the need for careful and thorough legislative revision in this area of the law. . . . Instead of making a re-evaluation of the interests of the plaintiff, of the defendant and of the public, and developing a rational system of limitations in the light of the developing law of products liability, there has been a seesaw judicial and legislative attempt in Tennessee to fill old bottles with new wine. The inevitable result of this approach has been some cracking of the bottles. This cracking will no doubt continue until there has been an appropriate legislative revision of the law in this area.”); *United States v. Silvia*, 28 F.2d 73, 74 (D. Wyo. 1928) (quoting Mark 2:22: “And no man putteth new wine into old bottles; else the new wine doth burst the bottles, and the wine is spilled, and the bottles will be marred; but new wine must be put into new bottles”); cf. *Williams v. Emp’rs Liab. Assur. Corp.*, 296 F.2d 569, 580 (5th Cir. 1961) (discussing Louisiana law: “In civilian jurisdictions new wine in old bottles is not a deceitful trick. It is inherent in the evolutive construction that is essential to making a code live and work.”); *Marshak v. Marshak*, No. 088766, 1992 WL 11168, at *9 (Conn. Super. Ct. Jan. 16, 1992) (“[T]he pouring of new wine into old bottles is a technique well known to the common law.”), *rev’d*, 628 A.2d 964 (Conn. 1993), *overruled by* *State v. Vakilzaden*, 742 A.2d 767 (Conn. 1999); Winton D. Woods, *Burnham v. Superior Court: New Wine, Old Bottles*, 13 GEO. MASON U. L. REV. 199, 205 (1990) (citing *De Lima v. Bidwell*, 182 U.S. 1, 45 (1901)). I thank Professor J. Mark Ramseyer (a self-described minister’s son) for pointing out that the saying

reduces the learning curves for lawyers and the cognitive burden for courts. Analogy, extrapolation, and comparison remain fundamental tenets of legal reasoning; the common law grew by analogy in part because lawyers are accustomed to using customary conceptual tools.⁶³ Thus, to create a new rule out of familiar parts can be to increase the tool's utility to its users.

Certainly the structure of the *Wilkes* rule is user-friendly, even though the rule itself is quite complex. The burden-shifting approach both creates and makes manageable much of that complexity, while creating a rule that allows for nuanced analysis. *Wilkes* was decided only two years after the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, which established a burden-shifting analysis for Title VII disparate impact claims⁶⁴ and quickly became one of the most important burden-

makes better sense when the words refer to putting old wine into new wineskins. See, e.g., *The Gospel of Thomas* 47 (Thomas O. Lambdin trans., Forgotten Books 2007), available at <http://www.gnosis.org/naghamm/gthlamb.html> (stating that "new wine is not put into old wineskins, lest they burst"); *Luke* 5:37 (Revised Standard Version) ("And no one puts new wine into old wineskins; if he does, the new wine will burst the skins and it will be spilled, and the skins will be destroyed"). But see *Luke* 5:36-39 (King James) ("And no man putteth new wine into old bottles; else the new wine will burst the bottles, and be spilled, and the bottles shall perish.").

63. See *Marshak*, 1992 WL 11168, at *9; Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 65 VAND. L. REV. 1543, 1552 (2010) ("In the common law, . . . [c]ourts extrapolate rules and principles from their prior decisions, applying them to the specific dispute at hand. In the process, the court fashions a new rule or exception by drawing from disparate areas of tort, contract, restitution, and property law—relying entirely on logic and experience."); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 45 (1998) ("There is nothing inherently surprising about a judicial turn to analogy as a tool for making sense of a novel form of evidence. Analogical reasoning is a legal mainstay, or as Cass Sunstein put it, legal culture's 'most characteristic way of proceeding.' Judges' particular expertise is in reasoning through comparison; this process is at the very heart of the common law. When confronting a novel form of evidence, then, why not compare the new to the known?" (footnotes omitted)); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1188 (1999) ("[T]he practice of analogical reasoning from past decisions has procedural benefits that go beyond the rational force it carries in any particular case. It produces a habit, a method, that will lead judges to do the intellectual work of study and comparison."); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of The American Law of Libel*, 132 U. PA. L. REV. 1, 68 (1983) (stating that "[t]he 'context public figure' concept is an attempt to extrapolate from the traditional common law privileges").

64. *McDonnell Douglas Corp.*, 411 U.S. at 792. As the District Court for the District of Connecticut recently summarized:

The Supreme Court has established a three-part, burden-shifting test for evaluating the evidence in an employment discrimination case. First, the plaintiff bears a "minimal" burden of establishing a prima facie discrimination case. The plaintiff can generally establish a prima facie case by demonstrating: (1)

shifting case in U.S. law.⁶⁵ *Wilkes* does not cite *McDonnell Douglas*, but the parallel is inescapable.

Of course, the parallelism does not extend to what must be shown at each stage of the analysis, because the elements of the legal rules are quite different. Moreover, the burdens are not the same. For example, step one of the *Wilkes* test requires the majority shareholder to prove a legitimate business purpose,⁶⁶ while under the second step of *McDonnell Douglas* “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.”⁶⁷ Nonetheless, the structural similarity makes *Wilkes* easy for neophytes to grasp—“ah, a multistep burden shifting test, just like *McDonnell Douglas*.”

Substantively, the *Wilkes* test feels familiar as a variation on the business judgment rule. Although jurisdictions differ on how they state and apply that venerable rule, essentially the rule: (i) obliges those with ultimate management authority to comply with the duties of loyalty and care;⁶⁸ (ii) recognizes that the duty of care

membership in the protected group; (2) satisfactory performance in the position; (3) termination; and (4) replacement, or attempted replacement, of the plaintiff with an employee whose qualifications do not exceed those of the plaintiff. Second, the defendant bears the burden of rebutting the presumption of discrimination by proffering a “legitimate, nondiscriminatory reason” for the adverse employment action. Third, once the aforementioned presumption has been rebutted, the plaintiff must prove that the employer’s proffered reason was a pretext for discrimination.

Hyde v. Beverly Hills Suites, LLC, 265 F.R.D. 61, 63 (D. Conn. 2010) (citations omitted).

65. See, e.g., *Fox v. Giaccia*, 424 F. Supp. 2d 1, 7 (D.D.C. 2006) (referring to “the familiar burden-shifting test articulated in the seminal case of *McDonnell Douglas Corp. v. Green*”). In the first eighteen months following its announcement by the Court, *McDonnell Douglas* was cited in at least 114 cases on the issue of burden shifting. ALLCASES: MCDONNELL DOUGLAS CORP. V. GREEN, www.westlaw.com (search for (mcdonnell douglas corp. /s green) & (burden /s shift!) & date(before 1976) % ti(mcdonnell)) (last visited Nov. 15, 2010).

66. See *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

67. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (citation omitted). For those with an ear to constitutional jurisprudence, step three of *Wilkes* might sound as if cribbed from constitutional jurisprudence involving fundamental interests. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973) (“[W]here state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.”). The *Wilkes* burden is considerably milder, however.

68. 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1036, at 36-37 (rev. perm. ed. 2002).

has both a process aspect and a substantive (or outcome) aspect, but in ordinary circumstances accords minimal importance to the outcome aspect;⁶⁹ and (iii) presumes that those with management authority have met their duties, thereby placing the burden of proof on plaintiffs.⁷⁰

For extraordinary circumstances, courts have tweaked or twisted this basic formulation. For example, both *Unocal Corp. v. Mesa Petroleum Co.*⁷¹ and *Zapata Corp. v. Maldonado*⁷² make serious use of the substantive aspect of the duty of care. Under *Unocal*, “outcome” due care appears as the requirement that “a defensive measure . . . be reasonable in relation to the threat posed.”⁷³ *Zapata* (in)famously subjects a special litigation committee’s good faith and reasonable investigation to a substantive review under the rubric of the court’s “own independent business judgment” in situations where pre-suit demand is excused as futile.⁷⁴ Extraordinary circumstances also affect the burden of proof. For example, if a plaintiff successfully rebuts the presumption of loyalty, the burden shifts to the defendant to prove “entire fairness.”⁷⁵

Wilkes recognizes that the close corporation is itself an extraordinary circumstance and revises the business judgment in two

69. Thus it is almost impossible to find an ordinary duty of care case in which the directors used acceptable process but were found wanting for having nonetheless achieved an unreasonably bad outcome. “When applying the duty of care, courts focus their inquiry on management’s efforts in arriving at the decision rather than on the wisdom of the decision itself.” 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1036, at 39-40.

70. *Id.* § 1036, at 36, 39.

71. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

72. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981).

73. *Unocal Corp.*, 493 A.2d at 955.

74. *Zapata Corp.*, 430 A.2d at 789. Although *Zapata* characterizes this “second step” as “the essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation’s best interests as expressed by an independent investigating committee,” subsequent case law backs off from the two-step in several ways. *Id.*; e.g., *Spiegel v. Buntrock*, 571 A.2d 767, 774-75 (Del. 1990) (holding that derivative plaintiffs who make a demand admit that demand is not futile); *Kaplan v. Wyatt*, 499 A.2d 1184, 1192 (Del. 1985) (holding that, even when demand has been excused as futile, the trial court is not obligated to engage in the second step under *Zapata*); *Aronson v. Lewis*, 473 A.2d 805, 813-15 (Del. 1984) (setting high barriers to a demand futility claim and thereby restricting the circumstances in which *Zapata* applies).

75. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (citation omitted); *accord Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159, 180 (Mass. 1997).

important ways. First, the defendants' loyalty is not presumed.⁷⁶ They must demonstrate a legitimate business purpose.⁷⁷ Second, *Wilkes* gives meaning to the outcome aspect of the duty of care.⁷⁸ Although the plaintiff has the burden of proof, the court will at least consider whether the defendants might have achieved their goals through different methods.⁷⁹

V. APPRECIATING THE POWER OF *WILKES*

Wilkes is most important when both sides can justifiably point fingers at each other. Most oppression cases involve a claimed expectation of continued employment,⁸⁰ and when the majority accuses the terminated shareholder-employee of misconduct, the ordinary analytic tools work poorly. Many cases use the "reasonable expectations" approach, asking whether the terminated em-

76. See *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

77. *Id.*

78. *Id.*

79. *Daniels v. Thomas, Dean & Hoskins, Inc.*, 804 P.2d 359, 367 (Mont. 1990) (applying *Wilkes* and stating "[t]his Court is not in a position to make a corporation's business decision when the controlling group can demonstrate a legitimate business purpose for its decision and the minority shareholder cannot demonstrate the practicability of a less harmful alternative"). Note that sometimes the outcome of a decision making process can be a decision to implement a process. *E.g.*, *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009) (discussing the so-called *Revlon* duties applicable when a Delaware corporation is "up for sale" and holding that the board must consider an acceptable process but not necessarily follow the particular process laid out in *Revlon, Inc. v. MacAndres & Forbes Holdings, Inc.*). For example, a close corporation with a shareholder-employee who has a drinking problem might deliberate on what to do and then require the employee to comply with a process of alcohol education and treatment as a condition to retaining his or her job. *Heiser v. Heiser & Jesko*, No. 2004-L-006, 2005 WL 2211130, at *1 (Ohio Ct. App. Sept. 9, 2005) (quoting a letter that provided: "As a direct result of your unacceptable actions, behavior and conduct we will proceed with the terms of expulsion pursuant to the provisions of the Close Corporation Agreement dated December 5, 1997 unless you agree to enter an accredited "Substance Abuse Program" that is agreeable to a majority of the shareholders and that you thereafter conform in all respects to the program's requisites"). In the terminology used in the text, requiring that process of education and treatment would be an outcome—subject to the outcome aspect of the duty of care.

80. Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 46 n.141 (1982) ("Many would argue that the denial of employment [to a shareholder] is a classic example of oppression."); Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 755 (2000) ("[N]umerous litigated cases involve shareholders challenging their terminations as oppressive . . .").

ployee reasonably expected continuing employment.⁸¹ While this approach has been effective in determining circumstances in which a well-behaving, well-performing co-owner might reasonably expect a job,⁸² the approach does little to handle situations in which the co-owner has performed poorly. In such circumstances, a court has a Hobson's Choice.⁸³ Finding a reasonable expectation of continued employment despite the misconduct subjects the company to liability for lost wages, plus either compelled dividends or a buyout.⁸⁴ To find that the misconduct undercuts any reasonable expectation of employment is to sentence the miscreant to a frozen-in investment.

Two cases will illustrate the problem. In 2005, the Maryland Court of Appeals determined that a forced buyout might be necessary even where the minority's misconduct was egregious.⁸⁵ *Edenbaum v. Schwarcz-Osztreicherne* involved a corporation that owned and operated an assisted living facility.⁸⁶ The corporation had two shareholders: Edenbaum, the majority shareholder (51%) and Schwarcz-Osztreicherne, the minority shareholder (49%) referred to in the opinion as Schwarcz.⁸⁷ At the outset, both shareholders worked in the business, and both received a salary.⁸⁸ Eventually, however, Edenbaum determined that Schwarcz was be-

81. *E.g.*, *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 190 (Minn. Ct. App. 2001) (“[T]he threshold question in the context of a claim of shareholder oppression based on the termination of employment is whether a minority shareholder’s expectation of continuing employment is reasonable.”); *In re Topper*, 433 N.Y.S.2d 359, 365 (Sup. Ct. 1980) (holding that the “reasonable expectations [of continued participation in company operations] constitute the bargain of the parties in light of which subsequent conduct must be appraised”); *Kortum v. Johnson*, 755 N.W.2d 432, 443 (N.D. 2008) (holding that “[t]he threshold issue” when reviewing a claim of shareholder oppression arising from termination of employment “is whether the minority shareholder had a reasonable expectation of continued employment” (citation omitted) (quotation marks omitted)).

82. *E.g.*, *Pointer v. Castellani*, 918 N.E.2d 805, 817 (Mass. 2009) (finding that minority shareholder who was innocent of wrong-doing had a reasonable expectation of continued employment as president of the company, and that expectation was frustrated when majority owners secretly hired his replacement and fired him as president); *Pedro v. Pedro*, 489 N.W.2d 798, 803 (Minn. Ct. App. 1992) (finding that minority shareholder had a reasonable expectation of lifetime employment that was violated after he was fired by his brothers for investigating accounting discrepancies).

83. *Hobson's Choice*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/hobsons-choice.html> (last visited Dec. 8, 2010) (A Hobson's choice is “[n]o real choice at all—the only options being to either accept or refuse the offer that is given to you”).

84. *See, e.g.*, *Edenbaum v. Schwarcz-Osztreicherne*, 885 A.2d 365, 380-81 (Md. Ct. Spec. App. 2005).

85. *Id.* at 381.

86. *Id.* at 367.

87. *Id.* at 368.

88. *Id.* at 368-69.

having improperly toward the business in general and vulnerable patients in particular.⁸⁹ After seeking unsuccessfully either to sell his stock to Schwarcz or buy her out, Edenbaum terminated Schwarcz's employment and caused the corporation to stop paying her salary.⁹⁰ The company had no profits and thus no dividends were paid.⁹¹

Schwarcz sued, claiming oppression and seeking dissolution.⁹² At trial, Edenbaum provided substantial testimony of Schwarcz's misconduct, including her failing to provide receipts for petty cash and grocery shopping, buying gourmet and Hungarian food for herself with company money, "transcribing medications from doctors' orders" even though she did not know how; and breaching patient confidentiality by faxing incident reports to her daughter for translation.⁹³ In addition, witnesses stated that Schwarcz "had been 'rough' with a patient . . . had 'pick[ed]' [a] patient 'up by the diaper' and had called another patient 'ugly.'"⁹⁴

According to Edenbaum, Schwarcz also had a poor relationship with the staff.⁹⁵ He stated that she "frighten[ed] and 'de-mean[ed]' them" and "treated them as slaves."⁹⁶ In addition, she allowed her violent son to live at the facility.⁹⁷ The son had allegedly scared the patients and threatened Edenbaum's life.⁹⁸

The circuit court held that "Edenbaum had the right, granted him by the shareholders' agreement, to discharge Schwarcz from her position with the company"⁹⁹ and reversed a trial court ruling that awarded Schwarcz back pay.¹⁰⁰ However, the Court of Special Appeals held that terminating Schwarcz constituted oppression:

The "reasonable expectations" view of oppressive conduct "[r]ecogniz[es] that a minority shareholder who reasonably expects that ownership in the corporation would entitle him to a job, a share of the corporate earnings, and a place in corporate

89. *Id.* at 370.

90. *Id.* at 369.

91. *Id.* at 370-71.

92. *Id.* at 369. She made other claims as well, but they are not relevant here. *Id.* at 371.

93. *Id.* at 370.

94. *Id.* (alterations in original).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 374.

100. *Id.* at 375.

management would be ‘oppressed’ in a very real sense [sic] when the majority seeks to defeat those expectations and there exists no effective means of salvaging the investment.”¹⁰¹

At the inception of her relationship with Edenbaum, Schwarcz signed an agreement (the same one that authorized her dismissal).¹⁰²

[The agreement] provided that she would be employed as its Director of Operations with specified duties and at a salary equal to Edenbaum’s. Moreover, as an officer and director of Liberty, she expected to continue to participate in shareholders’ meetings and receive company reports. All that apparently ended when she was terminated from her position as Director of Operations. Her termination substantially defeated her reasonable expectations that she would be employed by the corporation, receive a salary, and take part in its management.¹⁰³

Even though “the circuit court did not find Edenbaum acted in bad faith,”¹⁰⁴ Edenbaum had committed actionable oppression.¹⁰⁵ The relevant statute specified dissolution as the remedy, but the Maryland court joined courts of other states in interpreting the statutory language to permit less draconian remedies.¹⁰⁶ Relying on a West Virginia case for a lengthy list of alternatives, the court of appeals remanded the case for a determination as to whether some outcome short of dissolution might remedy the harm inflicted on Schwarcz.¹⁰⁷

The list included both forced dividends and a forced buyout,¹⁰⁸ but neither of those remedies would have been fair to Edenbaum or to the corporation.¹⁰⁹ The corporation had essentially no profits,¹¹⁰ and Schwarcz’s conduct had probably damaged the business.¹¹¹ Should the corporation have been required to borrow money in order to pay dividends to a shareholder whose misconduct disqualified her from employment?

101. *Id.* at 379 (quoting *Balvik v. Sylvester*, 411 N.W.2d 383, 387 (N.D. 1987)).

102. *Id.* at 368.

103. *Id.* at 379.

104. *Id.* at 381.

105. *Id.* at 379-80.

106. *Id.* at 380.

107. *Id.* at 380-81 (citing *Masinter v. WEBCO Co.*, 262 S.E.2d 433, 441 n.12 (W.Va. 1980)).

108. *Id.*

109. *See id.*

110. *Id.* at 370.

111. *Id.*

A forced buyout would have been even worse, requiring the corporation (or its remaining owner) to go into debt in order to make liquid the miscreant's ownership interest. In essence, the court would be creating a "put" right for the miscreant.¹¹²

A Minnesota case provides another example of this "miscreant put right." *Pooley v. Mankato Iron & Metal, Inc.* involved an "unfair prejudice" claim by a shareholder employee whose employment had been terminated.¹¹³ The corporation had three shareholders, each named Pooley, and each owned one-third of the stock.¹¹⁴ "The trial court . . . did conclude that respondents [two of the three shareholders], as directors of Mankato's board, unfairly prejudiced appellant by freezing him out of a business in which he reasonably expected to participate."¹¹⁵

However, the appellant was hardly a model employee:

In the early 1980's, appellant pleaded guilty to assaulting someone in the scope of his employment. In 1989, appellant assaulted respondent Gregory Pooley. He also damaged a customer's truck. As a result, a jury convicted appellant of assault and criminal damage to property. Following this conviction, Mankato terminated appellant's employment.¹¹⁶

Nonetheless, the trial court ordered a buyout,¹¹⁷ and the court of appeals left that order in place.¹¹⁸ The result: (i) a shareholder employee repeatedly engages in criminal conduct on the job,¹¹⁹ doubtlessly disrupting and probably damaging the business; (ii) the other shareholders, seeking to protect the business, terminate the

112. A "put" is "[a]n option to sell something (esp. securities) at a fixed price even if the market declines; the right to require another to buy." BLACK'S LAW DICTIONARY 1204 (9th ed. 2009). Here, the analogy to such "put" is created when a court creates a right held by the minority shareholder to require that majority shareholders buyout the interest of the minority shareholder in a forced buyout.

113. *Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834, 836 (Minn. Ct. App. 1994). Under Minnesota law, "unfair prejudice" rather than "oppression" is the term of art. MINN. STAT. § 302A.751, subdiv. 1(b)(3) (2010). Another subdivision infuses "reasonable expectations" into the concept of unfair prejudice. MINN. STAT. § 302A.751, subdiv. 3a.

114. *Pooley*, 513 N.W.2d at 836.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 838. In fairness to the court of appeals, I note that its hands were tied. The respondents did not appeal the ruling on unfair prejudice, seeking instead to get a discount on the buyout price due to appellant's misconduct. *Id.* at 836. The court of appeals rejected the discount argument and affirmed the trial court's ruling. *Id.* at 838.

119. *Id.* at 836.

miscreant's employment;¹²⁰ and (iii) the court turns the sequence into a "fist in your face" put right.

Now re-consider each of these cases under the *Wilkes* rule. The question ceases to be the "all or nothing" one of oppression *vel non*. Instead, the plaintiffs assert their expectations of continued employment (step zero), triggering the majority's burden of proving a legitimate business purpose (step one).¹²¹ In each of the two cases, proof was abundantly available to pass these first two steps.¹²² The burden would then shift to the plaintiff to show a less harmful alternative. Each plaintiff would be hard pressed to do so. Each corporation acted to protect its business;¹²³ it seems imprudent to continue the employment of someone who abuses vulnerable patients or commits criminal damage to customer's property. Perhaps plaintiff Schwarz could have argued that her conduct did not disqualify her from continuing to serve as a director of the corporation, and plaintiff Pooley could have argued that the corporation should have sent him to anger management classes. Even assuming success with these arguments, the remedy would have been far less intrusive and unfair than creating a put right for the miscreant.¹²⁴

Also under *Wilkes*'s step two, either plaintiff could have argued for paying dividends in lieu of salary, but each would have had the burden of proving such dividends practicable. The testimony in *Edenbaum v. Osztreicherne* indicated that the corporation lacked the resources to declare dividends.¹²⁵ *Pooley* does not discuss the issue, because once the trial court ordered a forced buyout, financial practicality was irrelevant.

Wilkes is not alone in attempting to counterpoise the rights of an evident miscreant and an allegedly overreacting majority. For example, *Gimpel v. Bolstein* dealt with the alleged oppression of a

120. *Id.*

121. *See supra* Part III.

122. *See Edenbaum v. Schwarcz-Osztreicherne*, 885 A.2d 365, 370 (Md. Ct. Spec. App. 2005); *Pooley*, 513 N.W.2d at 836. The analysis here assumes genuine claims of misconduct against the disgruntled shareholder. For a case in which a court found misconduct claims to be trumped up, see *Cooke v. Fresh Express Foods Corp.*, 7 P.3d 717, 723-24 (Or. Ct. App. 2000).

123. *See Edenbaum*, 885 A.2d at 370; *Pooley*, 513 N.W.2d at 836.

124. Serving as a director would not have brought Schwarz any return on her investment but might have allowed her to discern when (if ever) the corporation had the wherewithal to distribute profits. Even then, however, the decision whether to make a distribution would lie within the business judgment of the majority. *Zidell v. Zidell, Inc.*, 560 P.2d 1086, 1089 (Or. 1977).

125. *Edenbaum*, 885 A.2d at 370.

shareholder, Robert, who “was, in fact, a thief, [who] . . . stole from the family company, and was discharged from all company employment when his theft became known.”¹²⁶ The ostracism was essentially total:

Since [the firing], Robert has received no benefits from his ownership position with this obviously profitable company. The company has continued to adhere to its policy of not paying dividends and, while the other shareholders have received substantial sums as salary, benefits and perquisites, Robert has received not a penny. Not surprisingly, he has also been excluded from all managerial decisions (there have been no formal shareholders’ meetings) and has received the barest minimum of information concerning company affairs.¹²⁷

At one point in his opinion, the judge seems almost ready to take an “all or nothing” view of Robert’s lot:

[I]t must be recognized that “reasonable expectations” do not run only one way. To the extent that Robert may have entertained “reasonable expectations” of profit in 1975, the other shareholders also entertained “reasonable expectations” of fidelity and honesty from him. All such expectations were shattered when Robert stole from the corporation. *His own acts broke all bargains. Since then, the only expectations he could reasonably entertain were those of a discovered thief: ostracism and prosecution.* To the extent that the majority has refrained from prosecuting him, they have dealt with him more kindly than he had reason to expect, not less.¹²⁸

In the very next paragraph, however, the judge puts a limit to the permissible ostracism: “[e]ven though Robert may not lay claim to the reasonable expectation of any specific benefits, it does not necessarily follow that the majority shareholders may treat him as shabbily as they please.”¹²⁹ Shifting from “reasonable expectations” to the question of “whether [the majority’s] conduct was inherently oppressive,” the court holds that “[a]lthough a minority shareholder may be in the position of a stranger to them, the majority must still act with ‘probity and fair dealing,’ and if their conduct

126. *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1017 (Sup. Ct. 1984).

127. *Id.* (footnote omitted).

128. *Id.* at 1019-20 (emphasis added) (citation omitted).

129. *Id.* at 1020.

becomes ‘burdensome, harsh and wrongful,’ they may be found to have been guilty of oppression.”¹³⁰

Invoking a most venerable authority, the court then gets down to the nitty-gritty:

Robert cannot be forever compelled to remain an outcast. Even Cain was granted protection from the perpetual vengefulness of his fellow man. (Genesis 4:12-15.) While his past misdeeds provided sufficient justification for the majority’s acts to date, there is a limit to what he can be forced to bear, and that limit has been reached. The other shareholders need not allow him to return to employment with the corporation, but they must by some means allow him to share in the profits.¹³¹

In sum, although the court details a lengthy list of possible remedies, the bottom line is simple: “the majority must make an election: they must either alter the corporate financial structure so as to commence payment of dividends, or else make a reasonable offer to buy out Robert’s interest.”¹³²

Given the profitability of the corporation involved in *Gimpel*, the court’s order might well have been proper—despite “a no-dividend policy” that already “was firmly established when the present majority came into control of the corporation.”¹³³ *Gimpel* falls short of *Wilkes*, however, on the question of burden shifting. *Gimpel* obliges the majority to fashion a concession to the thief. The genius of *Wilkes*, in contrast, is to place on the miscreant the burden of fashioning a practical, non-simplistic solution to the problems created by the mischief.

CONCLUSION

Wilkes is alive and well in Massachusetts,¹³⁴ and has influenced the law in several other states as well. For example, Montana specifically adopted *Wilkes* in 1990:

130. *Id.* (quoting *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 393 (Or. 1973)).

131. *Id.* at 1021.

132. *Id.* at 1022.

133. *Id.* at 1020.

134. *Pointer v. Castellani*, 918 N.E.2d 805, 816-17 (Mass. 2009) (applying *Wilkes* and upholding the trial court’s determination “that Pointer’s actions did not require his termination because less harmful alternatives outweighed ‘any of the asserted business purposes for the actions that Castellani and Woodberry [the controlling shareholders] took in secretly engaging Maurer [Pointer’s replacement]’” (quoting trial court)).

We determine that the reasoning of the Massachusetts court is persuasive and also hold that the fiduciary duty between stockholders of a close corporation is one of the “utmost good faith and loyalty.” However, the controlling group should not be stymied by a minority stockholder’s grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative.¹³⁵

In 2000, the Minnesota Court of Appeals discussed *Wilkes* in approving tones, but the discussion was dicta.¹³⁶ The court determined as a matter of law that the defendants had not infringed any protected interest of the plaintiff.¹³⁷ The next year, however, another Minnesota court explained that “[e]xpectations of continuing employment must also be balanced against the controlling shareholder’s need for flexibility to run the business in a productive manner,” citing *Wilkes*’s “concern [in] the ‘untempered application of the strict good-faith standard.’”¹³⁸

A 2001 New Mexico decision seemed likewise to embrace *Wilkes*. *Walta v. Gallegos Law Firm, P.C.* praised *Wilkes* as having a “common sense approach [that] alleviated the court’s concern that ‘untempered application of the strict good faith standard’ could unduly hamper corporate management. This approach provides equilibrium to the majority’s need to pursue legitimate business actions and the minority’s vulnerability to oppression in a close corporation.”¹³⁹ *Walta*, however, did not apply *Wilkes*’ multistep

135. *Daniels v. Thomas, Dean & Hoskins, Inc.*, 804 P.2d 359, 366 (Mont. 1990).

136. *Berreman v. West Publ’g Co.*, 615 N.W.2d 362, 370 (Minn. Ct. App. 2000).

137. *Id.* at 375 (“As a matter of law West did not breach a fiduciary duty, unfairly prejudice Berreman within the meaning of [the statute], or commit fraud.”); *see also* *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353 (Minn. Ct. App. 1988) (invoking the legitimate business purpose prong of *Wilkes* but ignoring steps two and three).

138. *Gunderson v. Alliance of Computer Prof’ls, Inc.*, 628 N.W.2d 173, 191 (Minn. Ct. App. 2001) (quoting *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (1976)). It is not clear, however, whether *Gunderson* adopts the *Wilkes* test. The opinion can be read instead as adopting an all-or-nothing rule for miscreants that tends to favor the majority. “[A]n expectation of continuing employment is not reasonable and oppression liability does not arise when the shareholder-employee’s own misconduct or incompetence causes the termination of employment.” *Id.* at 192. Nonetheless, the decision appears to leave open through remand the possibility of *Gunderson* pursuing damages in his capacity as a shareholder-employee. *See id.* at 193.

139. *Walta v. Gallegos Law Firm, P.C.*, 40 P.3d 449, 457 (N.M. Ct. App. 2001) (quoting *Wilkes*, 353 N.E.2d at 663).

analysis, because the defendant could not establish a legitimate business purpose for his behavior.¹⁴⁰

Meanwhile, the spirit of *Wilkes* has pushed Massachusetts law even further away from the “miscreant put right.” In 2006, *Brodie v. Jordan* essentially eliminated the forced buyout as a remedy in oppression cases, even when the complainant is blameless.¹⁴¹ Noting that Massachusetts statutes do not provide for dissolution as an oppression remedy and therefore do not implicitly authorize the lesser remedy of a buyout,¹⁴² *Brodie* holds that “[t]he remedy [for oppression] should neither grant the minority a windfall nor excessively penalize the majority. Rather, it should attempt to reset the proper balance between the majority’s ‘concede[d] . . . rights to what has been termed selfish ownership,’ and the minority’s reasonable expectations of benefit from its shares.”¹⁴³

Brodie rejects the buyout remedy because that remedy involves a put right that is at odds with the very nature of a close corporation:

In ordering the defendants to purchase the plaintiff’s stock at the price of her share of the company, the judge created an artificial market for the plaintiff’s minority share of a close corporation—an asset that, by definition, has little or no market

140. *Id.* at 460. Several states have also cited *Wilkes* to help support the notion that the majority has legitimate rights of selfish ownership. *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 240 (Ind. 2001) (quoting *Wilkes* to show that “there must be a balance struck between the majority’s fiduciary obligations and its rights,” but holding that majority shareholder’s actions in strong-arming out minority shareholder went beyond his rights and caused a breach of fiduciary duty); *Connolly v. Bain*, 484 N.W.2d 207, 211 (Iowa Ct. App. 1992) (citing *Wilkes* to show that majority shareholders have the right to make management decisions, including the selection, retention, and dismissal of officers and employees); *Kortum v. Johnson*, 755 N.W.2d 432, 446 (N.D. 2008) (quoting *Wilkes* when determining that minority shareholder’s expectation of continued employment must be balanced against majority’s “need for flexibility to run the business in a productive manner”); *Zidell v. Zidell, Inc.*, 560 P.2d 1086, 1089 (Or. 1977) (citing *Wilkes* for the proposition that the majority owners have a right to make business decisions which favor their own interests as long as the decisions are not made in bad faith when the majority refused to declare additional dividends demanded by minority owner who voluntarily left his position); *Nelson v. Martin*, 958 S.W.2d 643, 649 (Tenn. 1997) (quoting *Wilkes* to show “that the controlling group in a close corporation must have some room to maneuver” after majority forced out minority owner who they felt had not been serving customers appropriately); *McLaughlin v. Schenck*, 220 P.3d 146, 157 (Utah 2009) (quoting *Wilkes* for “the importance of balancing a shareholders’ expectations with the reasonable and legitimate business interests of the other shareholders”).

141. *Brodie v. Jordan*, 857 N.E.2d 1076, 1080 (Mass. 2006).

142. *Id.* at 1082 n.7.

143. *Id.* at 1080 (internal citation omitted).

value. Thus, the remedy had the perverse effect of placing the plaintiff in a position superior to that which she would have enjoyed had there been no wrongdoing.

The remedy of a forced buyout may be an appealing one for a court of equity in that it results in a “clean break” between acrimonious parties. Yet this rationale would require a forced share purchase in virtually every freeze-out case, given that resort to litigation is itself an indication of the inability of shareholders to work together. In any event, no matter how expedient a forced buyout may be as a solution, the remedy for a breach of fiduciary duty must be proportional to the breach. Other remedies are available to compensate and protect minority shareholders without radically transforming the nature of their asset or arbitrarily increasing its value.¹⁴⁴

Whether *Brodie* goes too far in restricting oppression remedies is a question for another Symposium, or at least another article. For the purposes of this symposium, it should now be clear that *Wilkes* has a commendable legacy. By recognizing the legitimate rights of selfish ownership and disfavoring all-or-nothing approaches to oppression analysis, *Wilkes* has made significant conceptual and practical contributions to the law of closely held businesses.

144. *Id.* at 1081-82 (footnotes omitted) (citation omitted).