Gaining the Advantage in Close-Corporation Disputes: Examining Key Differences between Massachusetts and Delaware Fiduciary Duty Law
By Ethan Z. Davis and Kurt S. Kusiak

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GAINING THE ADVANTAGE IN CLOSE-CORPORATION DISPUTES: EXAMINING KEY DIFFERENCES BETWEEN MASSACHUSETTS AND DELAWARE FIDUCIARY DUTY LAW

By Ethan Z. Davis and Kurt S. Kusiak

I. INTRODUCTION

The situations leading to disputes between shareholders in close corporations are becoming increasingly predictable. Majority shareholders sometimes use the power afforded by their control over employees, salary and profit distributions to “freeze-out” minority shareholders, often with the goal of forcing them to sell or otherwise give up their equity at far below its value. Minority shareholders sometimes frustrate the legitimate business endeavors of the majority shareholders by failing to pull their weight as employees or by engaging in competitive business activities in breach of their fiduciary duties. This article outlines six common disputes that arise among shareholders in close corporations. It is meant to be a practical guide for attorneys who have limited experience in this area of the law.

Further, because: (i) Massachusetts law often differs from Delaware law in regard to many of these disputes; (ii) many close corporations in Massachusetts are incorporated in Delaware; and (iii) Delaware close corporations operating in Massachusetts apply Delaware law to internal disputes, this article will also outline important differences between Massachusetts and Delaware law governing the rights and remedies available to both majority and minority stockholders. While the typical scenarios that arise across state lines are often similar, Massachusetts and Delaware law often treat minority shareholders very differently, by applying different standards to breaches of fiduciary duty and giving claimants varied opportunities for recovery.

II. DIFFERENCES BETWEEN MASSACHUSETTS AND DELAWARE LAW

A. Substantive Differences Between Massachusetts and Delaware Law

1. How Close Corporations Are Defined

Massachusetts and Delaware define close corporations differently. In Massachusetts, a close corporation is a corporation with “(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation.”3 In Delaware, “close corporation” status is given only to a corporation that is specifically designated as a “close corporation” in its certificate of incorporation, and that meets Delaware’s statutory requirements, including: (1) a limitation of no more than 30 shareholders; (2) that all classes of stock have at least one restriction on transfer; and (3) that there be no “public offering.”4 Unless a corporation elects to become a close corporation in the manner prescribed by the Delaware statute, the corporation will not be afforded the statutory protections of a close corporation regardless of its characteristics. Instead, it will be subject to general Delaware corporate law principles.5

The Delaware close corporation statute, Delaware Code Title 8, protects certain shareholder interests by imposing various restrictions on corporate activity.6 For example, Title 8, section 350 enables a majority of stockholders to restrict the discretion of the board

1. The authors would like to thank Kristen Hughes, a 2013 summer associate at Sally & Fitch LLP, for her assistance with researching and writing this article.
5. Nixon, 626 A.2d at 1380.
6. E.g., 8 Del. C. §342 (restricting close corporation from making any public offering).
of directors of a close corporation.” The most important provision protecting minority interests in Delaware close corporations is the requirement in section 342(a)(2) to maintain at least one of the five statutorily-permitted restrictions on the transfer of stock outlined in section 202. As the Delaware close corporation statute makes clear, the duties shareholders owe each other are highly dependent upon their written agreements.

2. The Duties of Shareholders

The duties close corporation shareholders owe under Massachusetts versus Delaware law differ significantly. Under Massachusetts law, all shareholders in close corporations owe each other the duty of “utmost good faith and loyalty.” The Massachusetts Supreme Judicial Court imposed this heightened duty in the seminal case of Donahue v. Rodd Electrotype Co. of New England, decided in 1975. This heightened fiduciary duty places significant limitations on how majority shareholders can treat minority shareholders, especially when the minority shareholder is also an employee of the company. Nevertheless, Massachusetts courts recognize that the majority owners must be able to run the business effectively. Accordingly, majority shareholders can defeat a claim brought by a minority shareholder if they can demonstrate a “legitimate business purpose” for the conduct giving rise to the minority’s claim. Once the majority demonstrates a legitimate business purpose for its actions, the burden shifts back to the minority shareholder to demonstrate that the same goal could have been accomplished by a less oppressive or restrictive alternative. A Donahue claim, therefore, is a balancing test where the court is called on to “weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.”

In contrast, status as a “close corporation” under Delaware law does not alone impose partner-like fiduciary duties between shareholders. Rather, under section 354 of Delaware’s close corporations statute, the majority of shareholders of a statutory close corporation may impose heightened fiduciary duties on the directors or shareholders by agreeing to treat the corporation as a partnership. Further, under Delaware general corporate law principles, a shareholder will owe a fiduciary duty to minority shareholders if he or she is a majority owner or part of a control group “that exerts its will over the enterprise in the manner of the board itself.” The “business judgment rule” is presumed to apply to any action taken by directors that affects the rights and interests of the minority shareholders. Under that rule, the board of directors is presumed to be independent, disinterested, informed and acting in good faith, and the burden is on the minority shareholder to defeat that presumption.

Because the premise for imposing fiduciary duties on controlling shareholders is that the controller exerts its will in the manner of a board of directors, the controlling shareholder is likely entitled to at least the same level of deferential review as the board.

The presumption of the business judgment rule is not applicable, however, if the plaintiff can show that the majority shareholders acting as directors “are on both sides of a transaction.” In that circumstance, the business judgment rule is discarded in favor of the “entire fairness test,” which requires the majority shareholders “to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.” The entire fairness test is “Delaware’s...
most onerous standard and requires the board of directors to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.23

Delaware and Massachusetts law, then, apply different initial presumptions. The requirement of acting with “utmost good faith” towards other shareholders presumptively applies in Massachusetts, but shareholders will have the opportunity to demonstrate a legitimate business purpose for any conduct alleged to be a breach of fiduciary duty. In contrast, under Delaware law, the “utmost good faith” standard only applies to shareholders in a statutory close corporation that has specifically elected to be treated as a partnership, or where the shareholder exerts control over the company in the manner of a director and stands on both sides of a challenged transaction. Otherwise, the business judgment rule applies.

B. Procedural Differences Between Massachusetts and Delaware Law

1. Statute of Limitations

Both Massachusetts and Delaware have statutes imposing a three-year limitations period on claims for breach of fiduciary duty,24 but application of the limitations period and opportunities for tolling differ, depending on the circumstances.25

a. Massachusetts Law

A direct claim for breach of fiduciary duty accrues in Massachusetts when the shareholder has notice of the breach.26 For a derivative claim, the statute of limitations is tolled for the period that “the culpable directors (or officers) completely and exclusively controlled the corporation.”27 This is known as the “complete domination test.”28 Under this approach, the statute of limitations is tolled unless the shareholder or board member who knows of the breach “can induce herself (as a representative of the corporation) to sue.”29 “To determine this, a judge must explore the ability and willingness of the party to bring suit . . . including the party’s financial wherewithal to sue, the extent of the party’s interest or investment, and, perhaps, any emotional and physical intimidation on the part of the culpable officers or directors.”30

b. Delaware Law

Because many claims for breach of fiduciary duty in the context of close corporations seek some form of equitable relief, such claims in Delaware are subject to the jurisdiction of the Delaware Court of Chancery.31 The statute of limitations at law is not binding on the Court of Chancery,32 but the Chancery Court may apply the statute of limitations to equity claims by analogy.33 Alternatively, the Chancery Court may apply the doctrine of laches to determine if a claim is timely.34 Laches is “an affirmative defense that the plaintiff unreasonably delayed in bringing suit after the plaintiff knew of an infringement of his rights, thereby resulting in material prejudice to the defendant.”35 The timeliness of a claim is determined more by the reasons for the delay than its length.36 For these reasons, “an important question is which claims will be treated under which doctrine” when a complaint is made up of both legal and equitable

23. Reis v. Hazellett Strip-Casting Corp., 28 A.3d 442, 459 (Del. Ch. 2011). There are two characteristics that demonstrate “entire fairness”: fair dealing and fair price. Nixon, 626 A.2d at 1376 (citing Weinberger, 457 A.2d at 711). Although there are two components, “the test for fairness is not a bifurcated one as between fair dealing and price.” Weinberger, 457 A.2d at 711. Rather, the court determines the entire fairness of the transaction taking all aspects of the transaction into account. Id. The burden of proof on the entire fairness of a particular transaction can be shifted to the plaintiff if the majority or controlling shareholders take certain steps discussed infra. See text accompanying notes 215-21.


28. Id. at 400-01. The complete domination test is one of two tests that different states commonly apply under the “doctrine of adverse domination.” The other test is known as the “disinterested majority test.” Id. at 400 (citing Demoulas, 424 Mass. at 523-24). Under the disinterested majority test, the limitations period is tolled until a majority of the board of directors are disinterested and the board is therefore able to act on behalf of the corporation against the wrongdoer. Id. Massachusetts has adopted the complete domination test because “the mere presence of a majority of culpable directors should not lead to a presumption that a corporate plaintiff is unable to discover or redress the wrongs perpetrated by such directors.” Id. at 403.

29. Id. at 405-406.

30. Id. at 406.

31. In Delaware, the Superior Court is the court of general jurisdiction with jurisdiction over criminal and civil cases except equity cases. The Court of Chancery is a separate trial-level court with jurisdiction over all matters relating to equity. The official website of the Delaware Judiciary has a helpful chart that illustrates the interrelationship among the Delaware Court system. See Delaware State Courts, http://courts.delaware.gov/overview.stm (last visited Oct. 22, 2014).


34. Whittington v. Dragon Grp. LLC, 991 A.2d 1, 7 (Del. 2009) (citations omitted).


36. Whittington, 991 A.2d at 8. Thus, the doctrine of laches permits a court to hold a plaintiff to a shorter period than the statute of limitations if, in terms of equity, the plaintiff should have acted sooner and the resulting delay prejudiced the defendant. Territory of U.S.V.I. v. Goldman, Sachs & Co., 937 A.2d 760, 808 (Del. Ch. 2007) (citing CertainTeed Corp. v. Celotex Corp., No. CIV. A. 471, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005)).

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claims.\textsuperscript{37} The rule is that the Chancery Court will apply the statute of limitations rather than the equitable doctrine of laches when the relief sought is legal in nature (\textit{i.e.}, an award of damages of the sort that courts of law will grant).\textsuperscript{38}

2. Standing To Assert A Claim

Disputes in the close corporation context often involve questions of whether claims of wrongdoing against majority shareholder directors should be brought on behalf of the corporation (derivative claims)\textsuperscript{39} or on behalf of the individual shareholder (direct claims). Rule 23.1 of the Delaware and Massachusetts Rules of Civil Procedure set forth the requirements that a plaintiff must follow to proceed with a derivative claim.\textsuperscript{40} Massachusetts and Delaware law governing a plaintiff’s standing to bring either a direct or derivative claim are similar.

a. Derivative Actions

i) The Demand Requirement

In both Massachusetts and Delaware, to have standing to bring a derivative claim a shareholder must first make a demand on the board of directors\textsuperscript{41} of the corporation or explain why such a demand would be futile.\textsuperscript{42} If the plaintiff chooses to make a demand, and the board of directors, the majority of whom are disinterested, refuses to initiate litigation, the plaintiff may pursue litigation only by showing that the demand was wrongly refused. This is known as a “demand refused” case.\textsuperscript{43} Where a disinterested board of directors refuses the demand, the board is entitled to the protection of the business judgment rule.\textsuperscript{44} In that situation, a plaintiff will only be able to proceed with a derivative suit if the plaintiff can show that the board of directors’ refusal to initiate a lawsuit was because the board of directors acted in bad faith, or failed to investigate the claims adequately.\textsuperscript{45}

If a majority of the directors are alleged to have participated in wrongdoing, or are otherwise interested, the plaintiff may seek to have the demand requirement excused as futile.\textsuperscript{46} In both Massachusetts and Delaware, a derivative plaintiff must show some reason to doubt that the board will exercise its discretion impartially and in good faith. The review is a factual one and rests solely on the allegations in the complaint.\textsuperscript{47} To establish demand futility in Massachusetts, the stockholder must allege facts to show that a majority of the board members participated in the wrongdoing or are otherwise interested.\textsuperscript{48}

A key difference between Massachusetts and Delaware law involves the requirements imposed on a prospective plaintiff once a board of directors rejects a demand to initiate a lawsuit. In Massachusetts, if the board of directors rejects a shareholder’s demand, the shareholder is generally required to present the demand to other shareholders before initiating a lawsuit.\textsuperscript{49} Previously, Massachusetts courts had adopted an exception to the shareholder demand requirement if it was clear that a demand would be futile, but that exception was later eliminated.\textsuperscript{50} Of course, in the context of disputes in a close corporation, the majority of shareholders are likely to be interested.\textsuperscript{51} In Delaware and many other states, there is no requirement to make a demand on other shareholders.\textsuperscript{52}

ii) The Ownership Requirement

In addition to the demand requirements, stockholders bringing a derivative claim in both Massachusetts and Delaware must own stock throughout the litigation\textsuperscript{53} and must have owned stock at the time of the alleged harm.\textsuperscript{54} The continuous stock ownership requirement applies even where the plaintiff involuntarily loses his stock,

\begin{refnotes}
\item[38] Id. at 274 (citing Bokat v. Getty Oil Co., 262 A.2d 246, 250 (Del. 1970)). Even when the statute of limitations is applied by analogy, the Court of Chancery may apply the doctrines of fraudulent concealment or equitable tolling to toll the statute of limitations. Weiss v. Swanson, 948 A.2d 433, 451 (Del. Ch. 2008). Fraudulent concealment requires that the plaintiff show an affirmative act of concealment by the defendant that prevents the plaintiff from knowing the facts necessary to bring suit. Id. Under the theory of equitable tolling, "the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." Id. Kahn, 625 A.2d at 276 (discussing Bokat, 262 A.2d at 246). Under either theory of tolling, the action is only tolled until the plaintiff knows or should have known through reasonable diligence of the injury or alleged wrong. Weiss, 948 A.2d at 451.
\item[39] Briefly, a derivative suit is a claim that allows a stockholder to sue on behalf of the corporation for damages to the corporation. In a derivative suit, the recovery goes to the corporation. A stockholder who is directly injured still has the right to bring an individual action for injuries affecting his or her legal rights as a stockholder. In a direct suit, the recovery or other relief goes directly to the stockholder. See Tookey v. Donaldson, Lufkin & Jenrette Inc., 845 A.2d 1031, 1033 (Del. 2004)(discussing the difference between direct and derivative claims).
\item[41] Throughout this article the term “board of directors” is intended to refer to either the board of directors or the comparable authority where the corporation or entity does not have a board of directors.
\item[43] In re INFOUSA Inc. S’holders Litig., 953 A.2d 963, 986 (Del. Ch. 2007);
\item[44] Harhen, 431 Mass. at 844.
\item[45] In re INFOUSA, 953 A.2d at 986; Harhen, 431 Mass. at 846.
\item[46] Harhen, 431 Mass. at 847.
\item[47] Id. at 844; In re INFOUSA, 953 A.2d at 986 (holding that the relevant test for demand futility (known as the Rules test) is whether, “as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to demand”) (quoting Rules v. Blasband, 634 A.2d 927, 934 (Del. 1993)). See also Aronson, 473 A.2d at 814.
\item[48] Aronson, 473 A.2d at 814.
\item[50] Id. at 848.
\item[52] For this reason, at least one commentator has argued that the pre-suit demand requirement should be eliminated as futile for cases involving close corporations. Michael L. Mason, Mass. Bar Association Lawyers Journal, Vol. 94, No.2 (March 2012).
\item[53] Harhen, 431 Mass. at 848 (noting that California, Delaware and New York have eliminated the requirement of presenting a demand to other shareholders after the board of directors rejects a shareholder demand).
\end{refnotes}
for example, in a merger.55 The only way to retain derivative standing in that scenario is to assert that the merger itself was fraudulent or designed to deprive minority stockholders of their stock ownership, i.e., a freeze-out merger,56 which will be discussed in greater detail below.

b. Direct Actions

Shareholders in both Massachusetts and Delaware have standing to bring a direct action if the shareholder: (i) suffered the harm individually; and (ii) will individually receive the benefit of any recovery or other remedy.57 While this two-part test seems simple enough, it is important to note that in both Massachusetts and Delaware, claims are not always exclusively direct or derivative. In Delaware, for example, some allegations may give rise to both a derivative and a direct claim.58

In Massachusetts, where both direct and derivative relief are available, courts will look to whether recovery by the corporation would provide a just measure of relief to the complaining shareholder. In Crowley v. Communications for Hospitals, Inc.,59 the Massachusetts Appeals Court noted that the Supreme Judicial Court’s decisions in Besette v. Besette60 and Schaeffer v. Cohen, Raenenthal, Price, Mirkin, Jennings & Berg PC,61 appear to stand for the proposition that: where corporate recovery for misdeeds by a corporate fiduciary is available under traditional corporate law, and such recovery provides a just measure of relief to the complaining stockholder, resort to a direct, personal action against miscreant fiduciaries may not be available even when the acts complained of may be seen as a freeze-out scheme.62

This suggests that, even where the circumstances could give rise to a direct claim for a “freeze out,” if the individual shareholder would be adequately compensated by means of a derivative lawsuit, then direct relief is not available.63

3. Remedies

Because Massachusetts recognizes a broader range of actions that could constitute a breach of fiduciary duty in the close corporation context than Delaware, Massachusetts courts also offer a broader range of remedies. Indeed, it has been noted that “[n]owhere has Massachusetts’ time-honored equity practice been more creatively employed, and nowhere does it enjoy greater continued vitality, than in the area of intertekine disputes, in closely-held corporations.”64

The remedy for any breach of fiduciary duty is to put the minority shareholders in the same position they would have been in had the breach not occurred, taking into account the reasonable expectations of the minority.65 The reasonable expectation standard helps balance the need for broad equitable relief with the potential that such relief will overextend judicial oversight of private corporate conduct.66

In addition to providing monetary damages, Massachusetts courts have “broad equitable powers to fashion remedies for breaches of fiduciary duty in a close corporation.”67 For example, parties have been ordered to return shares to the corporation to restore the balance between shareholders when the court determined that the aggrieved shareholder had an expectation of 50 percent ownership and depriving him of that was a breach of fiduciary duty.68 Courts have also required the corporation to begin to declare dividends69 and reinstate a director where the breach deprived him of information about the management and operations of the company.70 In contrast, the remedy for a breach of fiduciary duty most commonly applied in Delaware is damages.71 It is important to note that, although it may be the most obvious remedy, neither Delaware nor Massachusetts courts can force the company or majority shareholders to buy out the minority shareholders.72

In both Massachusetts and Delaware, the remedy for a freeze-out where the minority owner was also an employee (a scenario discussed below) is most often damages.73 In Massachusetts, equitable relief can theoretically include reinstatement to the employee’s previously held position.74 But, as the Massachusetts Superior Court has noted, that is an extreme remedy75 and one that is often unworkable in light of the poisoned feelings between the minority and the majority.76

58. Gentile v. Rosette, 906 A.2d 91, 99–100 (Del. 2006) (noting the existence of a type of corporate overpayment claim that Delaware case law “recognizes as both derivative and direct in character”); Carsanaro v. Bloodhound Techs Inc., 65 A.3d 618, 655 (Del. Ch. 2013) (“Although each question is framed in terms of exclusive alternatives (either the corporation or the stockholders), some injuries affect both the corporation and the stockholders.” (emphasis in original)).
60. 385 Mass. 806 (1982).
63. Id. at 764–65.
72. Brodie v. Jordan, 447 Mass. 866, 872 (2006); Ueltzhoffer, 1991 WL 271584, at *8. In Massachusetts, the court can ask the parties to try to come to a buy-out agreement as part of the remedy, but it cannot force such a buy-back. Goode v. Ryan, 397 Mass. 85, 92 (1986) ("It is not the proper function of this court to reallocate the risks inherent in the ownership of corporate stock in the absence of corporate or majority shareholder misconduct.").
74. Id.
C. Choice of Law Issues

For more than two decades after the Donahue decision imposed fiduciary duties on shareholders of a Massachusetts close corporation, it was not entirely clear how or whether those duties applied to corporations incorporated outside of Massachusetts. In Harrison v. NetCentric Corp., the Supreme Judicial Court clarified this issue by holding that “the state of incorporation governs claims concerning the internal affairs of a corporation.” Presently, both Massachusetts and Delaware apply the “internal affairs doctrine,” which “recognizes that only one state should have authority to regulate a corporation’s internal affairs — matters peculiar to the relationship among or between the corporation and its current officers, directors and shareholders — because otherwise a corporation could be faced with conflicting demands.” In 1987, the Supreme Court of Delaware completed a thorough analysis of the internal affairs doctrine and found that, in all but a handful of cases in the prior 26 years, “the law of the state of incorporation was applied without any discussion.” In contrast, when the dispute concerns an ordinary contract breach unrelated to a corporation’s internal affairs, the internal affairs doctrine is inapplicable. As in Massachusetts, “[w]hen deciding a claim based on a contract with no express governing law provision, Delaware courts follow the restatement approach and apply the law of the jurisdiction with the ‘most significant relationship.’”

III. SIX COMMON DISPUTES

Below are descriptions of six of the most common types of disputes among shareholders in close corporations and the applicable law in both Massachusetts and Delaware.

Common Dispute 1: The Majority Owners Want to Sell Their Stock at a Premium and Exclude the Minority Owners

One hallmark of a close corporation is that there is no ready market for the company’s stock. Although minority owners can theoretically sell their stock to third parties, few buyers are willing to put themselves in the position of having little or no control over corporate decisions while also having few options for selling their shares in the future. Typically, new investors in close corporations seek majority control, and there is often the risk that some or all of the minority owners will be left out in the cold when there is a change in ownership. Two scenarios are common: (i) sale of stock by the majority to a third party; and (ii) sale of stock by the majority back to the corporation.

a. Majority Sells to an Independent Third Party

In both Massachusetts and Delaware close corporations, the shareholder agreement, articles of incorporation, or by-laws can govern the terms by which stock can be sold to third parties. Those agreements often impose limitations and conditions on how, when, and to whom a shareholder may sell his or her stock, often including provisions giving the company the right of first refusal. Where such written agreements address the sale of stock to a third party, a cause of action for breach of fiduciary duty can usually exist only for conduct not directly governed by the terms of such agreements.

In Delaware, however, if a corporation elects to be a close corporation under the statute, the certificate of incorporation must include some mechanism regulating stock transfer, which can include a right of first refusal by the corporation. In either a statutory close corporation, or a de facto close corporation in Delaware, the articles of incorporation are the main vehicle for restricting the sale of stock by either the majority or the minority. Any challenge to a stock transfer will be governed by the terms of the certificate of incorporation or any other agreement between the shareholders and, thus, be subject to contract law principles. Because the majority typically does not owe any fiduciary duty to minority shareholders under Delaware law, any claim that the majority has a fiduciary duty to repurchase a minority shareholder’s shares at a fair price will necessarily fail.

b. Majority Sells To The Corporation

In Massachusetts, the seminal case setting forth the fiduciary duties shareholders owe one another in close corporations is Donahue v. Rodd Electrotype, a case that arose from a majority shareholder’s decision to sell his shares back to the corporation. Harry Rodd, one of the controlling shareholders, was 77 years old and not in...
good health. At the urging of the other controlling shareholders, Rodd agreed to retire as president of the company, provided that some financial arrangements were made with respect to the shares that he owned. A purchase price was negotiated, Rodd resigned his directorship, and the remaining directors caused the company to execute an agreement with Rodd in which the company would purchase slightly more than half of his shares. The minority shareholder claimed that the corporation breached its fiduciary duty to her when it bought Rodd’s stock without offering the same buy-out option to her. The Massachusetts Supreme Judicial Court held that “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.” The decision is based on the rationale that the majority cannot “utilize its control of the corporation to obtain special advantages and disproportionate benefit from its share ownership.”

In Delaware, the landscape is quite different. In Nixon v. Blackwell, the Delaware Supreme Court expressly rejected the rationale applied in Donahue. Minority shareholders in Delaware cannot base a breach of fiduciary duty claim on the corporation’s failure to offer to buy back their stock even if the company offers a buy-back opportunity to another shareholder. As the Nixon court put it, even under the entire fairness test, which was applicable because the defendants were on both sides of the transaction, “stockholders need not always be treated equally for all purposes.”

A brief review of the facts in the Nixon case clarifies the Delaware approach. In Nixon, minority shareholders (holding Class B stock) sued the majority shareholders (holding Class A stock). The minority claimed that the majority breached their fiduciary duty by establishing stock repurchase plans in the form of an employee stock ownership plan (“ESOP”) and key-man life insurance policies for Class A shareholders, where no such policies existed for Class B shareholders. The ESOP allowed employees who retired or were terminated to “receive their interest in the ESOP by taking Class B stock or cash in lieu of stock.” The key-man life insurance policies provided funds to the corporation to buy back the Class A stock of a director of the corporation upon his death. The Chancery Court found that, by instituting these programs, the company breached its fiduciary duty to the Class B shareholders because they did not provide a “comparable method by which [plaintiffs] may liquidate their stock at a fair value” when that opportunity existed for employees and Class A shareholders. The Delaware Supreme Court reversed, holding that forcing corporations to provide all shareholders with equal access to liquidity would “do violence to normal corporate practice and our corporation law [because it would] fashion an ad hoc ruling which would result in a court-imposed stockholders buy-out for which the parties had not contracted.” While the court recognized the “basic dilemma” of minority shareholders in closely held corporations, it was sympathetic only in the abstract, noting that the shareholder who decides to own stock in a closely-held corporation can “make a business judgment whether to buy into such a minority position, and if so on what terms.”

Common Dispute 2: Majority Terminates Minority Shareholder’s Employment

Minority shareholders in close corporations are sometimes employees whose salaries are often the main benefit they receive from their ownership interest. This is especially so when the majority shareholder(s) decide not to make distributions. “A guaranty of employment with the corporation may have been one of the ‘basic reason(s) why a minority owner has invested capital in the firm.”

Under these circumstances, termination of a minority shareholder’s employment typically results in a breach of fiduciary duty claim against the majority shareholder directors.

a. Massachusetts Law

Under Massachusetts law, a minority shareholder whose employment is terminated must allege a material connection between stock ownership and employment in order to state a claim for breach of fiduciary duty. Merely alleging minority shareholder status in conjunction with employment termination is not sufficient. Massachusetts courts have considered a variety of factors to determine whether a breach of fiduciary duty may have occurred. The most important factor is whether termination of the stockholder’s

92. Id. at 582.
93. Id. at 583.
94. Id.
95. Id. at 584-85.
96. Id. at 598.
98. 626 A.2d 1366, 1377 (Del. 1993).
100. Id. at 1373.
102. Id.
103. Id. at 1379–80.
104. Wilkes v. Springside Nursing Home Inc., 370 Mass. 842, 849–50 (1976) (citing 1 F. H. O’Neil, CLOSE CORPORATIONS §1.07 (1971) (“The minority stockholder typically depends on his salary as the principal return on his investment, since the ‘earnings of a close corporation . . . are distributed in major part in salaries, bonuses and retirement benefits.’”).
105. Id. at 582.
106. Id. at 583.
107. Id.
108. Id. at 1369–70.
109. Id. at 1369–70.
110. Id. at 1369–70.
111. Id. at 1371.
112. A key-man life insurance policy is a policy bought by a company, usually a small business, on the life of a key executive, with the company as beneficiary. See Barron’s Dictionary of Finance and Investment Terms (5th ed. 1998).
employment would cut him or her off from all benefit of stock ownership, especially where the company has never paid a dividend.\textsuperscript{113}

In \textit{Wilkes v. Springside Nursing Home, Inc.}, four individuals started a company, each investing $1,000 and receiving 10 shares in return.\textsuperscript{114} Starting in 1952, each shareholder took a weekly salary from the company.\textsuperscript{115} The corporation never paid dividends or made other distributions.\textsuperscript{116} In 1967, Wilkes was voted out of his position as a director and officer of the corporation, and the other shareholders voted to eliminate his salary from the budget.\textsuperscript{117} The Supreme Judicial Court determined that this was a freeze-out and a breach of fiduciary duty, relying on the facts that: (i) there was no legitimate business purpose for Wilkes’s termination; (ii) Wilkes reasonably expected that “employment with the corporation would go hand in hand with stock ownership,” (iii) Wilkes was a founding member of the corporation; and (iv) he expected to be able to continue to participate in corporate decisions.\textsuperscript{118}

Since \textit{Wilkes}, Massachusetts courts have considered additional factors when considering whether terminating a minority shareholder’s employment constituted a breach of fiduciary duty, including whether: (i) others in the corporation had the expectation that purchasing stock would assure employment;\textsuperscript{119} (ii) the shareholder was required to buy stock as a condition of employment;\textsuperscript{120} (iii) the shareholder was fairly compensated for his or her stock upon termination;\textsuperscript{121} and (iv) the shareholder relied on the employment for his or her livelihood.\textsuperscript{122}

It is important to note that Massachusetts courts recognize that “the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation [and] a large measure of discretion, for example, in . . . hiring and firing employees.”\textsuperscript{123} Thus, as in all cases alleging breach of fiduciary duty, majority shareholders can refute a claim that termination of a minority shareholder constituted a breach of fiduciary duty by advancing a legitimate business purpose for the action.\textsuperscript{124} This is a highly fact-intensive inquiry. For example, in \textit{Holland v. Burke}, the court found that the termination of a minority shareholder and director was not a breach of fiduciary duty because there was a legitimate business purpose for his termination.\textsuperscript{125} When the relationship among the four directors soured, Holland presented several options to his fellow shareholders: purchase or sale of his shares, revision of the operating agreements or dividing up the businesses.\textsuperscript{126} The three other shareholders rejected these options and terminated Holland’s employment.\textsuperscript{127} The court found that: (i) keeping the businesses together and operating smoothly was a legitimate business purpose for terminating Holland in the face of his disruptive proposals; and (ii) Holland had not established that he had a reasonable expectation of continued employment.\textsuperscript{128}

\textit{Leslie v. Boston Software Collaborative, Inc.} provides a good example of a breach of fiduciary duty, even when there may have been a legitimate business purpose for the termination.\textsuperscript{129} The \textit{Leslie} court found that the “blunt course” followed by the majority shareholders in terminating Leslie, an employee who was also a director and shareholder, was a breach of fiduciary duty because there were other options available that would have been less harmful to Leslie.\textsuperscript{130} The majority shareholders, fed up with threats\textsuperscript{31} and perceived underperformance, held a shareholders meeting, where Leslie was present by proxy.\textsuperscript{132} They voted to remove him as the company’s 401(k) administrator and director.\textsuperscript{133} Before the shareholders meeting, a board of directors meeting was also held, without notifying Leslie, at which the directors voted to remove Leslie as treasurer.\textsuperscript{134} While noting that Leslie was not a model employee, the court found that terminating him “so completely, fully and abruptly” was a breach of fiduciary duty because there were less restrictive alternatives.\textsuperscript{135} The court noted that the directors’ efforts to remedy the situation, including offering 10 weeks’ severance pay and the remote possibility of doing some consulting work, were not good faith attempts to find a less harmful solution.\textsuperscript{136}

Importantly, if the majority can show that the termination was not fueled by animus or for personal financial gain, a claim for

\begin{footnotes}
\item[113] Wilkes, 370 Mass. at 853; cf. Holland v. Burke, No. BACV200500122A, 24 Mass. L. Rptr. 5551, at *7 (Mass. Super. June 18, 2008) (unreported) (rejecting freeze-out claim where the plaintiff’s primary motivation in joining the enterprise was to invest in the land, which he retained when he was terminated as a manager and officer).
\item[114] Id.
\item[116] Id. at 853.
\item[117] Id. at 847.
\item[118] Id. at 852-53.
\item[120] Id. (Merola purchased stock when the company made periodic offerings to its employees between1982 and 1983).
\item[123] Id. at 852 (holding that there was no showing that plaintiff had engaged in the sort of misconduct that would lead the court to approve defendants’ decision to terminate him as “a legitimate response to the disruptive nature of an undesirable individual bent on injuring or destroying the corporation”).
\item[124] 24 Mass. L. Rptr. 5551, at *8.
\item[125] Id. at *4.
\item[126] Id. at *4-5.
\item[127] Id. at *4-5.
\item[128] Holland v. Burke, No. BACV200500122A, 24 Mass. L. Rptr. 5551, at *7-8 (Mass. Super. June 18, 2008) (the decision in this case also rested on the court’s determination that employment was not the primary purpose for Holland’s investment in the company).
\item[130] Id. at *8.
\item[131] Id. at *3-4. The threats included speaking abusively to employees, insisting on bringing his gun to company meetings, and threatening that his wife “reserves the right” to shoot the majority shareholders.
\item[132] Id. at *5.
\item[133] Id.
\item[134] Id.
\item[136] Id. at *8. Similarly, in Keating v. Keating, another Superior Court case where a shareholder-director was terminated, the court found that there were many other less harmful alternatives that the majority should have tried. Nos. 00749, 00748, 17 Mass. L. Rptr. 241, at *17 (Mass. Super. Oct. 3, 2003). “Whether or not [such alternatives] would have been satisfactory over time to [the plaintiff] is not germane to the Court’s analysis here. If it were a fair and reasonable attempt to deal with the situation in a non-oppressive manner, then there would not have been a breach of [defendant’s] fiduciary relationship to [plaintiff],” Id.
\end{footnotes}
breach of fiduciary duty may be defeated, even when there is no legitimate business purpose for the minority shareholder/employee’s termination.\(^\text{137}\) In *Merola v. Exergen Corp.*, the Supreme Judicial Court found that, while there was no legitimate business purpose for Merola’s termination, the termination was not for the financial gain of the majority shareholder, since there was no evidence that the corporation distributed all profits as salaries.\(^\text{138}\) In particular, the court noted that there was “no general policy regarding stock ownership and employment, and there was no evidence that any other stockholders had expectations of continuing employment because they purchased stock.”\(^\text{139}\)

Notably, in *Keating v. Keating*, the Superior Court suggested that the *Merola* test revised, or at least complicated, the Wilkes “legitimate business purpose” test in employment termination cases.\(^\text{140}\) The Supreme Judicial Court, however, has not addressed the apparent differences in the practical application of the Wilkes and *Merola* tests. For example, in *Pointer v. Castellani*,\(^\text{141}\) discussed below, the Supreme Judicial Court cites both Wilkes and *Merola* with approval, but does not address how the two cases either complement or complicate each other.

Where there is an employment agreement clearly setting forth the terms of employment and procedures for the purchase of an employee/shareholder’s equity, then termination of a minority shareholder is governed by the contract rather than by principles of fiduciary duty.\(^\text{142}\) In Massachusetts, such agreements are governed by the covenant of good faith and fair dealing.\(^\text{143}\) Thus, questions of fiduciary duty do not arise when the parties’ conduct is governed wholly by the contract.\(^\text{144}\) The parties are bound, however, by their fiduciary duties to each other in the conduct leading up to and during the termination.\(^\text{145}\) If the terminated shareholder can demonstrate a breach of fiduciary duty leading up to the termination, a tort claim may, at least theoretically, arise even if the termination itself is within the bounds of a contract.\(^\text{146}\) For example, in *Pointer v. Castellani*, Pointer, the president of the corporation and a minority shareholder, was fired by the other two corporate shareholders and directors.\(^\text{147}\) The directors secretly made a decision in late 2003 to fire Pointer and began looking for his replacement.\(^\text{148}\) At the same time, they extended Pointer’s employment contract to March 2006.\(^\text{149}\) The directors hired a new CEO, Maurer, in January 2004.\(^\text{150}\) Maurer then fired Pointer in March 2004.\(^\text{151}\) The Supreme Judicial Court found that both the conduct preceding Pointer’s termination and the termination itself frustrated Pointer’s reasonable expectations and constituted breaches of fiduciary duty (rejecting the directors’ assertion that there could be no breach of fiduciary duty because there was an employment contract).\(^\text{152}\)

### b. Delaware Law

In Delaware, the law with respect to terminated minority shareholder employees is much simpler. “[A]lthough majority stockholders have fiduciary duties to minority stockholders qua stockholders, those duties are not implicated when the issue involves the rights of the minority stockholder qua employee under an employment contract.”\(^\text{153}\) Accordingly, in Delaware, a breach of fiduciary duty claim cannot arise from the same facts giving rise to a breach of contract claim.\(^\text{154}\)

In *Riblet Prods. Corp. v. Nagy*, the Supreme Court of Delaware resolved a question of Delaware law certified by the United States Court of Appeals for the Seventh Circuit.\(^\text{155}\) The question in *Riblet* was whether a majority stockholder of a closely-held Delaware corporation can be found to have breached a fiduciary duty owing to a minority stockholder who is also an employee of the corporation under written contract when the dispute arises solely with respect to that contract.\(^\text{156}\) The Supreme Court of Delaware held that a minority shareholder’s termination could not give rise to a breach of fiduciary duty claim when the termination is governed by an employment contract.\(^\text{157}\) The court left the door open for a claim in which a minority shareholder alleges a breach of fiduciary duty with respect to his minority share ownership.\(^\text{158}\) However, the authors could find no such case decided by a Delaware court. Instead, reported cases addressing claims of termination as a breach of fiduciary duty are commonly decided based on the terms of the employment contract under contract law principles.\(^\text{159}\)

Nevertheless, in *Clemmer v. Cullinane*, the Massachusetts

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\(^{138}\) *Id.* (“Not every discharge of an at-will employee of a close corporation who happens to own stock in the corporation gives rise to a successful breach of fiduciary duty claim.”).

\(^{139}\) *Id.* at 465 (the court also found that the shares had a fair value independent of compensation the shareholder received from employment).


\(^{141}\) 455 Mass. 537 (2009). *See also* Selmark Assocs. Inc. v. Ehrlich, 467 Mass. 525, 546-48 (2014) (in which the Supreme Judicial Court affirms the Wilkes test, holding that the jury should consider whether the majority shareholders had a legitimate business purpose for their decision to terminate).


\(^{143}\) Blank, 420 Mass. at 407 (citing Anthony’s Pier Four Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991)).

\(^{144}\) Blank, 420 Mass. at 408.

\(^{145}\) *Id.* at 408–09; King v. Driscoll, 418 Mass. 576, 586 (1994) (“[T]he existence of a buy back agreement [does not] completely relieve[] shareholders of the high duty owed to one another in all dealings among them.”).

\(^{146}\) King, 418 Mass. at 585–87.


\(^{148}\) *Id.*

\(^{149}\) *Id.*

\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) *Id.* at 552, 554.


\(^{154}\) Blue Chip Capital Fund II Ltd. P’ship v. Tubergan, 906 A.2d. 827, 833 (Del. Ch. 2006).

\(^{155}\) *Riblet*, 683 A.2d at 37.

\(^{156}\) *Id.* at 40.

\(^{157}\) *Id.*

\(^{158}\) *Id.* (holding that the plaintiff’s claims were governed by an employment contract and noting that the plaintiff did not allege “that his termination amounted to a wrongful freeze out of his stock interest [or] . . . that he was harmed as a stockholder by being terminated.”)

Appellate Court, applying Delaware law, denied the majority shareholder’s motion to dismiss because the complaint alleged that the only benefit the plaintiff received from stock ownership was his salary as an employee and that the only purpose of his termination was to deprive him of the benefit of his stock ownership. Despite the Delaware Supreme Court’s rejection of the Riblet decision in Riblet, as well as the “sweeping dicta” in the Nixon v. Blackwell decision—which expressly rejects the heightened fiduciary duty of utmost good faith and loyalty applicable to close corporation shareholders in Massachusetts—the Massachusetts Appeals Court allowed the claim to proceed, stating that the shareholder might be able to make out his case under the “entire fairness” standard applied in Delaware. This interpretation of the Riblet and Nixon decisions seems to bring Delaware law much more in line with Massachusetts law, at least from the point of view of the Massachusetts courts. But, it is difficult to imagine that the dismissal order that was vacated by the Massachusetts Appeals Court in Clemmer v. Callinane would have met the same fate in a Delaware Court, or in any other state applying Delaware law.

As no Delaware court has confronted a case where a terminated, at-will employee shareholder alleges breach of fiduciary duty, the exact state of the law remains unclear. However, as it now stands, stating a claim for breach of fiduciary duty as a result of employment termination appears to be an uphill battle in Delaware.

Common Dispute 3. Majority Shareholders Pay Themselves Higher Salaries, Thereby Decreasing Distributions to Minority Shareholders

Disputes among shareholders in close corporations often arise as a result of majority shareholders paying themselves what minority shareholders consider to be excessive salaries or otherwise diverting money away from corporate profits that could be paid out to shareholders through distributions. The law in Massachusetts and Delaware regarding this type of dispute is similar.

a. Massachusetts Law

Paying excessive compensation to officers and directors of a close corporation is a freeze-out method originally discussed by the Massachusetts Supreme Judicial Court in Donahue. Excessive compensation claims have taken the form of both direct and derivative claims, but recent case law suggests that such claims are derivative.

Whether an executive’s compensation is reasonable is a question of fact. To determine whether the compensation is excessive, Massachusetts courts consider whether the compensation is commensurate with the executive’s ability, his performance on the job, the difficulty of the job and whether the compensation is reasonable in light of the corporation’s profits.

If a court determines that the compensation was excessive, the majority shareholders will be required to return the excessive amount to the corporation. The court can also require the corporation to declare dividends to compensate the shareholders.

b. Delaware Law

In Delaware, like Massachusetts, claims of excessive compensation are normally treated as causing harm solely to the corporation and are regarded as derivative. The case of Akins v. Cobb provides an instructive example. In Akins, minority shareholders claimed that the majority shareholders and directors received excessive compensation in connection with the liquidation of the corporation. The minority shareholders claimed that the directors mismanaged the company, forcing it into liquidation, and then received generous benefits packages to induce them to help facilitate the liquidation process. The shareholders attempted to state a direct claim for breach of fiduciary duty claiming that the compensation payments would reduce the amount of the distribution to individual shareholders from the liquidation. The Chancery Court, however, ruled that the claim was derivative and granted defendants’ motion to dismiss, noting that the plaintiffs did not persuade the court that the corporation’s decision to liquidate “transforms a garden-variety derivative claim of excessive compensation into an individual claim.”


161. Id.

162. More recently, in Shalaby v. Arctic Sand Technologies Inc., No. MICV201403621, 2014 WL 4655035 (Mass. Super. Sept. 3, 2014), a Massachusetts Superior Court dismissed a terminated minority shareholder’s claims for unlawful freeze-out and breach of fiduciary duty under Delaware law. The court considered both claims together and focused on the fact that plaintiff was subsumed as an employee shareholder alleging breach of fiduciary duty where the claim is essentially an employment dispute. Here, a closely held corporation who is also an employee cannot recover for breach of fiduciary duty. While the claim in Clemmer was dismissed because the plaintiff lacked standing under Delaware law, most or all of his allegations of breach of fiduciary duty would be barred by the so-called ‘Business Judgment Rule.’ Id. at *8 n.5.

163. See Wall Street Sys., Inc. v. Lemence, No. 04 Civ. 5299(JSR), 2005 WL 2143330, at *8 (S.D.N.Y. Sept. 2, 2005) (“Under Delaware law, a shareholder of a closely held corporation who is also an employee cannot recover for breach of fiduciary duty where the claim is essentially an employment dispute. . . . Here, all of Lemence’s claims of breach of fiduciary duty reduce to disputes over what he was due by way of salary and incentive compensation. As such, they are essentially employment disputes that cannot sustain a claim of fiduciary breach under Delaware law.” (internal citation omitted)). The court goes on to state in a footnote that “[i]t may also be noted that, even if defendant had a cognizable claim under Delaware law, most or all of his allegations of breach of fiduciary duty would be barred by the so-called ‘Business Judgment Rule.’” Id. at *8 n.5.


172. Id. at *6.

173. Id. at *4–5.

174. Id. at *5–6.

175. Id. at *6.
Delaware courts take a number of factors into consideration when deciding if compensation is excessive, including: (i) compensation of other executives in similar industries; (ii) whether increases in salary are proportionate to the corporation’s profits; (iii) the skill and ability of the executive; and (iv) what the executive has previously received as salary.\(^\text{176}\)

The remedy for a claim of excessive compensation, similar to Massachusetts, would be returning the excessive compensation to the corporation, assuming the corporation still exists.\(^\text{177}\)

**Common Dispute 4. Dilution of Stock Value**

Another common breach of fiduciary duty claim brought by minority shareholders is that the majority has caused the company to enter into a merger or some other transaction that has decreased the value of the minority’s equity. These claims are typically, but not always, regarded as derivative in Delaware, as they are considered to cause harm mainly to the corporation.\(^\text{178}\) In contrast, Massachusetts courts are more likely to recognize circumstances in which a challenged transaction can cause injury to both the corporation and the shareholders, thus giving rise to a direct claim by a minority shareholder.\(^\text{179}\)

For example, in the Massachusetts case of Horton v. Benjamin, the complaint alleged that the majority shareholders twice acted to dilute the minority’s ownership interest.\(^\text{180}\) Specifically, the majority allegedly breached their fiduciary duty to the minority by converting a joint venture into a limited partnership, thereby diluting the share of the minority’s stock from 50 percent of the joint venture to 25 percent of the limited partnership.\(^\text{181}\) The court held that the allegations gave the minority a direct cause of action.\(^\text{182}\) While noting that, in some circumstances, a derivative claim “provides a just measure of relief”\(^\text{183}\) and, therefore, precludes a claim for direct relief, the court observed that, in this case, the dilution in the minority’s share value could not be reversed by restoring the portion of the corporation’s stake that had been misappropriated by the majority.\(^\text{184}\) As a result, the court held that relief required “increasing plaintiffs’ percentage holdings of [the corporation] so that their indirect share in the limited partnership is equal to their indirect share of the joint venture prior to the [majority’s reorganization of the close corporation’s ownership structure].”\(^\text{185}\) Because such relief could only be achieved through a direct action by the plaintiffs for breach of fiduciary duty, the court held that the minority shareholder had standing to bring such a claim.\(^\text{186}\)

Though claims of stock dilution are typically regarded as derivative under Delaware law, in Gentile v. Rosette, the Delaware Supreme Court also recognized that certain types of dilution claims can be both derivative and direct.\(^\text{187}\) Carsanaro v. Bloodhound Technologies, Inc. gives a good example of this tension between direct and derivative claims and, as the Delaware Chancery Court put it, the difficulty interpreting Gentile “and its potential to undercut the traditional characterization of stock dilution claims as derivative.”\(^\text{188}\) In Carsanaro, a venture capitalist firm that had gained control of the board of directors pushed out the founding members of the company.\(^\text{189}\) After the founding members were removed from the board, the venture capitalists engaged in a series of stock issuances that benefited themselves and their various other companies.\(^\text{190}\) Those stock issuances diluted the value of the founding members’ stock to less than 1 percent of the company.\(^\text{191}\) The founders challenged the stock issuances as breaches of fiduciary duty through redistribution of their stock value and voting power to the majority shareholders, which would subject the transactions to entire fairness review.\(^\text{192}\) The Chancery Court examined the Delaware Supreme Court’s post-Gentile decisions and held that the founders could pursue direct claims for breach of fiduciary duty.\(^\text{193}\)

The Chancery Court interpreted the Supreme Court’s decisions on standing to mean that there is no direct standing “when stock is issued to an unaffiliated third party, as part of an employee compensation plan, or when a majority of disinterested and independent directors approves the terms,” because those facts do not give rise to an inference of disloyal expropriation.\(^\text{194}\) However, where the defendant fiduciaries “had the ability to use the levers of corporate control to benefit themselves and (ii) took advantage of the opportunity,” the aggrieved shareholders can sue directly.\(^\text{195}\)

Under both Massachusetts and Delaware law, the remedy in a successful dilution claim can be either damages for the overpayment to the majority shareholders or a redistribution of the shares to restore the minority shareholders to their previous percentage of ownership.\(^\text{196}\) Often, dilution of stock value is alleged as part of a breach of fiduciary duty in a merger,\(^\text{197}\) which will be addressed in the next section.

177. Id. at 616 (ordering return of portion of executive’s salary for prior fiscal years); see also Gentile v. Rosette, 906 A.2d 91, 103 (Del. 2006) (noting that because the corporation no longer existed, there were no shares to cancel nor any corporate entity to which a recovery of the fair value of those shares could be paid).
181. Id. at *23.
182. Id. at *22 (citing Donahue v. Rodd Electrotype Co., 367 Mass. 578 (1975)).
184. Id. at *23.
186. Id.
188. 65 A.3d 618, 657 (Del. Ch. 2013).
189. Id. at 629.
190. Id. at 629–634.
191. Id. at 634.
192. Id. at 659–660.
193. Id. at 661.
195. Id. at 658-59. The Chancery Court held that standing to bring a direct claim for dilution exists where “a controlling stockholder stood on both sides of the transaction,” or if “the board that effectuated the transaction lacked a disinterested and independent majority.” Id. at 658. As such, the transaction at issue in a direct dilution claim would necessarily be considered a self-interested transaction subject to entire fairness review. Id. at 660 (citing Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1240 (Del. 2012)).
Common Dispute 5. Majority Shareholders Agree to a Merger that “Freezes Out” the Minority Shareholders

A “freeze-out” merger, sometimes called a “cash-out” merger, occurs when the majority shareholder decides to eliminate minority ownership in the corporation, often by merging it with a second corporation owned or controlled by the majority shareholder. In both Massachusetts and Delaware, such merger attempts can often give rise to a breach of fiduciary duty claim.\(^{198}\)

a. Massachusetts Law

In Massachusetts, a “freeze-out” merger does not necessarily breach any fiduciary duty if: (i) it was for a legitimate business purpose; and (ii) it is fair to the minority as judged by the totality of the circumstances of the merger.\(^{200}\) The fairness inquiry only occurs if a court determines that the merger was for a legitimate business purpose.\(^{201}\) As outlined in the introduction to this article and discussed more fully below, this fairness inquiry appears to be very similar to the dual-pronged entire fairness review in Delaware, as articulated in *Weinberger v. UOP*.\(^{202}\)

For example, in *Gut v. MacDonough*, the Massachusetts Superior Court denied a request for a preliminary injunction blocking a merger after conducting a fairness inquiry examining both the dealing between the parties and the price paid.\(^{203}\) Plaintiffs, shareholders of Westboro Financial Services, challenged the proposed merger of Westboro Bank into Assabet Valley Bank.\(^{204}\) The Superior Court carefully examined the process the board followed leading up to the merger and concluded that it appeared fair to the minority shareholders.\(^{205}\) Because the board’s decision to negotiate with only one party was based on the independent judgment of financial and legal consultants, the Superior Court rejected plaintiffs’ contention that it was unfair.\(^{206}\) The Superior Court also noted that the board chose Assabet Valley Bank only after “a thorough evaluation and ranking of seven potential partners.”\(^{207}\) Finally, the Superior Court noted that the cash-out price of the company’s stock was “significantly higher than the trading price of the [company’s] stock on the open market on the day prior to public announcement of the merger agreement.”\(^{208}\)

b. Delaware Law

In Delaware, once a minority shareholder is found to have standing to maintain a claim,\(^{209}\) Delaware courts, with one narrow exception described below, apply the “entire fairness review” to freeze-out mergers.\(^{210}\) Under the entire fairness standard, majority shareholders carry the burden of establishing fair dealing and fair price.\(^{211}\)

Under the “entire fairness” review, to ensure fair dealing, the court will take into consideration “the board’s composition and independence; the timing, structure and negotiation of the transaction; how the board and shareholder approval were obtained; and the extent to which the board and the shareholders were accurately informed about the transaction.”\(^{212}\) Not every factor is relevant in every transaction, but the court must examine all relevant factors in


199. If the minority shareholder only wants to challenge the price per share received in the merger, an appraisal action is also available in both Massachusetts and Delaware. E.g., *Spelhain v. Spencer Press Inc.*, 81 Mass. App. Ct. 56, 57 (2011) (applying Mass. Gen. Laws ch. 156D §13.30); *Weinberger*, 457 A.2d at 703-04 (applying 8 Del. C. §262).


201. In *Coggins*, the Supreme Judicial Court determined that the motivation for the merger at issue was “to effectuate a restructuring of the Patriots that would enable the repayment of the [personal] indebtedness” of the majority owner. 397 Mass. at 535. It was therefore self-interested. Because the merger was not for a legitimate business purpose, the court held that the majority breached its fiduciary duty to the minority and did not go on to conduct a fairness analysis. *Id.*


203. 23 Mass. L. Rptr. 110 at *13.

204. *Id.* at *1.

205. *Id.* at *13.

206. *Id.*

207. *Id.*

208. *Id.* at *15

209. In Delaware, courts considering a claim for breach of fiduciary duty in the context of a freeze-out merger first conduct a threshold inquiry regarding whether the minority shareholder has standing to sue. *See*, e.g., *Kramer v. Western Pac. Indus.*, 546 A.2d 348, 351 (Del. 1988). A second preliminary matter concerns different types of mergers in Delaware. Delaware law authorizes two types of mergers: short-form mergers and long-form mergers. A short-form merger is a merger between a subsidiary and its parent company. In the absence of fraud or misrepresentation, a minority shareholder facing a short-form freeze-out merger can only seek an appraisal remedy. Glassman v. Unocal Exploration Corp., 777 A.2d. 242, 248 (Del. 2001). If the claim is a derivative claim that does not directly attack the merger and the merger has been completed, the shareholder loses standing. *Kramer*, 546 A.2d at 349 (dismissing derivative claims because plaintiff was no longer a shareholder as a result of the merger and therefore did not have standing to sue). To maintain standing, the minority shareholder must state a direct claim attacking the fairness of the merger itself. *Parnes v. Bally Entm’t Corp.*, 722 A.2d 1243, 1245 (Del. 1999). Minority shareholders usually do this by “charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price.” *Id.*

210. Kahn v. Lynch Commcn’ Sys. Inc., 638 A.2d 1110, 1117 (Del. 1994) (“All entire fairness analysis is the only proper standard of judicial review.”).


the entire fairness review. Delaware courts presume that directors are independent unless a plaintiff can show otherwise. To show that a director is not independent, a plaintiff must demonstrate that the director is ‘beheld’ to the controlling party or so under [the controller’s] influence that [the director’s] discretion would be sterilized.

To establish fair price, the court must be satisfied that the price was one “that a reasonable seller, under all of the circumstances, would regard as within a range of fair value.” Delaware courts rely heavily on expert testimony at trial to determine the fair value of stock, often using multiple accounting methods to arrive at a fair price per share.

Even when procedural protections are in place to guard minority shareholder rights, such as an independent committee of directors or an informed majority of minority directors to approve the transaction, entire fairness review is still the standard of review. When such procedural protections are in place, however, the burden of proof on the issue of fairness shifts “to the challenging shareholder plaintiff.” Recently, in In re MFW Shareholders Litigation, the Delaware Court of Chancery addressed the propriety of the “entire fairness” review when both a special committee and a majority of the minority vote are required for the merger to be approved. The Chancery Court held that the deferential business judgment rule (as opposed to the “entire fairness” review) applies only when the following six conditions are met:

(i) the controller conditions the process of the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee meets its duty of care; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

The Chancery Court spent considerable time discussing the third prong: the ability of the committee to say no (i.e., reject the merger). It found, for example, that there must be “an upfront promise not to bypass the special committee or the majority-of-the-minority condition” by proceeding with a tender offer directly to shareholders. This removed any possibility that the “controller could engage in retribution” and unfairly effectuate the merger. The MFW Shareholders Litigation decision has tempered the seemingly-broad language in Kahn v. Lynch requiring “entire fairness” review of all “freeze-out” mergers (referred to as the “Lynch Doctrine”). If the majority puts these procedural protections in place, the deferential business judgment rule will ultimately apply unless the minority can show that at least one of the six factors above is not present.

In Massachusetts, the remedy for a breach of fiduciary duty in a “freeze-out” merger can be rescission of the merger or, if rescission is not feasible, rescissory damages (damages based on the value of the stock at the time of judgment). In Delaware, rescissory damages is an exception to the traditional award of compensatory damages (which are based on the plaintiff’s loss as measured by the fair value of the corporation at the time of the merger, less the price per share that they actually received). Rescissory damages are considered exceptional because they “are measured as of a point in time after the transaction” and therefore could “include post-transaction incremental value elements that would not be captured in an ‘out-of-pocket’ recovery.” Due to the potential for rescissory damages to generate a windfall for the plaintiff, and even provide an incentive for an aggrieved minority to delay filing a lawsuit to first see “how the transaction plays out,” Delaware courts have established boundaries to “define more clearly the circumstances afforded minority shareholders by the business purpose requirement.

Accordingly, such requirement shall no longer be of any force or effect.” Indeed, the majority can effectuate a merger with the sole purpose of eliminating the minority shareholders, Del. Open MRI Radiology Assocs. v. Kessler, 898 A.2d 290, 312 (Del. Ch. 2006) (that “the [majority] decided to use its power to cash-out the [minority] does not mean, in itself, that it acted unfairly.”)


Kahn v. Lynch Comm’n Sys. Inc., 638 A.2d 1110, 1117 (Del. 1994) (courts also scrutinize a special committee’s bargaining power to determine if it was truly independent before shifting the burden of proof on the issue of fairness).

213. Id. at 691. Sealy Mattress Co. of N.J. v. Sealy Inc., 532 A.2d 1324, 1335 (Del. Ch. 1987), provides a good example of a court’s considering the elements of fair dealing. In Sealy, which the Chancery Court described as a good model for “a textbook study on how one might violate as many fiduciary precepts as possible in the course of a single merger transaction,” the companies involved in the merger were also involved in extensive antitrust litigation. Id. at 1327. The defendants refused to permit post-trial review of the antitrust judgments to go forward, which made valuation of the company being acquired extremely difficult “if not impossible.” Id. at 1336. Additionally, the defendants used the antitrust judgments and took other steps “to manipulate Sealy’s values for their own advantage.”


215. Id. (quoting Rales v. Blasband, 624 A.2d 927, 936 (Del. 1993)) (alterations in original). Notably, the majority shareholders do not have to allege a legitimate business purpose for the merger. Weinberger v. UOP Inc., 457 A.2d 701, 715 (Del. 1983) (“[W]e do not believe that any additional meaningful protection is

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where [rescissory damages] would be deemed equitably appropriate."229 Rescission of a merger is rare, usually because the resolution of litigation occurs long after the merger is complete and is often “too complex to unscramble.”230

Common Dispute 6. Fiduciary Duty Breaches by Minority Shareholders

The vast majority of cases addressing fiduciary duties and shareholder oppression are concerned with the majority’s actions. Minority shareholders, however, can also breach their fiduciary duties and cause damage to majority shareholders in a close corporation. This section analyzes the fiduciary duties the minority owes to the majority in Massachusetts and Delaware.

a. Massachusetts Law

In a Massachusetts close corporation, all shareholders owe each other the same fiduciary duties.231 The minority owes the majority the same duty of “utmost good faith and loyalty” that the majority owes the minority.232 The case of Smith v. Atlantic Properties, Inc.233 provides an instructive example. In Smith, four individuals started a real estate investment company, each receiving 25 shares of stock.234 The articles of incorporation and by-laws included provisions that required any action by the corporation to be approved by 80 percent of the “capital stock issued outstanding and entitled to vote.”235 As the Appeals Court noted, this provision gave each of the four shareholders veto power over any corporate decision.236 Unfortunately, as often happens, the relationship among the four shareholders deteriorated as time passed. Three of the four shareholders wanted to declare dividends while the fourth shareholder, Wolfson, wanted to use the profits from the corporation to repair and improve existing buildings owned by the corporation.237 Wolfson refused to vote for any dividends, which caused the corporation to be assessed a tax penalty each year from 1962 to 1968.238

Relying on Donahue and Wilkes, the Appeals Court found that Wolfson’s refusal to vote in favor of dividends was unreasonable and breached his fiduciary duty to the majority.239 The court noted that Wolfson never developed a program of necessary or desirable repairs and improvements to the corporation’s properties to justify his refusal to allow the company to declare dividends and avoid a tax penalty.240 Accordingly, the Appeals Court affirmed the lower court’s holding that Wolfson breached his fiduciary duty to the other owners because “he recklessly ran serious and unjustified risks of precisely the penalty taxes eventually assessed, which were inconsistent with any reasonable interpretation of a duty of ‘utmost good faith and loyalty.’”241

More recently, the Massachusetts Supreme Judicial Court has addressed whether a minority shareholder’s fiduciary duty remains even after being frozen out by the majority. In Selmark Associates, Inc. v. Ehrlich,242 a frozen-out shareholder joined a competing company and solicited clients to follow him to the new company. The Supreme Judicial Court rejected the minority shareholder’s argument that any fiduciary duty not to compete was automatically extinguished when he was terminated.243 It then held that allowing a frozen-out shareholder to “seek retribution by disregarding its own duties” would undermine long-standing fiduciary principles.244 The logic of Selmark would also seem to apply to a situation where a frozen-out shareholder acquires or diverts a corporate opportunity.245 As a fiduciary, the frozen-out minority shareholder cannot take a corporate opportunity unless there has been a full disclosure to the corporation and the corporation is “unable to avail itself of the opportunity.”246

b. Delaware Law

In Delaware, the landscape is quite different. Under Delaware corporate law, a shareholder can owe a fiduciary duty “only if it owns a majority interest in or exercises control over the business affairs of the corporation.”247 There is no absolute percentage of voting power that is required for there to be a finding that a controlling

229. Strausburger, 752 A.2d at 580. Rescissory damages are supported by (i) principles of restitution and (ii) principles of trust law. Id. (citing Cinerama Inc. v. Technicolor Inc., 663 A.2d 1135 (Del. Ch. 1994)). “Under the restitutory theory . . . rescissory damages may be awarded against a fiduciary who becomes unjustly enriched as a result of his wrongdoing.” Id. at 580–81. In those circumstances, the amount of damages is the amount of the unjust enrichment. Id. at 581. Under the trust theory, however, rescissory damages are only considered appropriate where the fiduciary (or trustee) has engaged in self-dealing and therefore should bear “the risk of future fluctuations in the market value of the asset.” Id. (quoting Cinerama, Inc., 663 A.2d at 1146). Based on these theories, rescissory damages are equitably appropriate only to “redress an adjudicated breach of the duty of loyalty, specifically, cases that involve self dealing or where the board puts its conflicting personal interests ahead of the interests of shareholders.” Id. at 580–81.

230. In re Sunbelt S’holder Litig., No. 16089-CC, 2010 WL 26539, at *14 (Del. Ch. Jan. 5, 2010). “The passage of time of course plays a role in the availability of rescissory damages, but less so for rescissory damages than with true rescission. This is because the passage of time may be what renders rescission impractical and requires the deployment of rescissory damages as the functional equivalent.” In re Orchard Enters., 88 A.3d at 41. Often, the calculation of rescissory damages mirrors that of a statutory appraisal in that the methods the court uses to calculate the fair value of the corporation are similar to the methods available to the court in an appraisal action. The difference is that, while appraisal values the company immediately before the merger, rescissory damages are based on the present value of the corporation. See 8 Del. C. §262(h) (2013). In Delaware, after Weinberger, the “Delaware Block” method is no longer the exclusive method to determine value and courts must take “all relevant factors” into account. Weinberger, 457 A.2d at 712–13.


232. See id. at 593.


234. Id.

235. Id.

236. Id.

237. Id. at 203.

238. Id. at 203–04 (The IRS imposed the penalty under Internal Revenue Code § 532 et seq. for “unreasonable accumulation of corporate earnings and profits.”).


240. Id. at 209.

241. Id.


243. Id. at 552-53.

244. Id.


stockholder exists.\textsuperscript{248} Rather, if a “control group” of minority shareholders forms and gains control of the corporation, each member of the group owes fiduciary duties to shareholders in the corporation.\textsuperscript{249} Otherwise, a minority shareholder does not owe fiduciary duties to other shareholders in the corporation.\textsuperscript{250}

If a complaint alleges only “that a group of shareholders have ‘parallel interests,’ such allegations are insufficient as a matter of law to support the inference that the shareholders were part of a control group.”\textsuperscript{251} To be considered a “control group,” the shareholders must be “connected in some legally significant way — e.g., by contract, common ownership, agreement, or other arrangement to work together toward a shared goal.”\textsuperscript{252} For example, in \textit{Frank v. Elgamal}, the Chancery Court found that minority shareholders may have formed a control group because they entered into various agreements and then voted to approve the challenged transaction.\textsuperscript{253}

Interestingly, familial relationships alone, without some evidence of dominance, are not sufficient to establish a control group.\textsuperscript{254} Delaware courts have noted that establishing that a group of minority shareholders exercises control is not easy to do,\textsuperscript{255} and various courts’ analyses of this issue reveals it is highly fact-intensive.\textsuperscript{256} For example, in \textit{PNB Holdings Co. Shareholders Litigation}, the Chancery Court refused to find that over twenty family members constituted a control group merely because they were related to each other.\textsuperscript{257} In contrast, the Chancery Court found in \textit{Cysive Inc. Shareholders Litigation},\textsuperscript{258} that the defendant was a controlling shareholder because he served as the CEO of the company and exerted control over the shareholders who were members of his family or subordinates that were beholden to him for their employment.\textsuperscript{259} It was that managerial influence, in addition to the familial tie and the defendant’s heavy involvement in the affairs of the corporation, that led the court to find that he exerted control over those shareholders and their votes, even though he did not own a majority of the corporation’s stock.\textsuperscript{260}

IV. CONCLUSION

The differences between Massachusetts and Delaware law in the close corporation context can make the initial decision of where to incorporate and what law to apply to disputes among shareholders a far-reaching one. Generally speaking, majority shareholders gain certain, definite advantages under Delaware law as opposed to Massachusetts law. Minority shareholders in Delaware are obliged to protect themselves by negotiating safeguards into whatever contract governs the relationship between the shareholders (e.g., corporate by-laws or an LLC agreement). Further, depending on the type of claim, minority shareholders in Delaware are more likely to be required to make derivative, as opposed to direct claims against majority shareholder defendants, adding a layer of complexity and potential difficulty to bringing such claims.

In contrast, minority shareholders in Massachusetts are protected by the common law, under which all shareholders owe each other strict fiduciary duties, unless such duties are modified by contract. The main disadvantage to minority shareholder status under Massachusetts law is that they also owe common law fiduciary duties to the majority. Under Delaware law, minority shareholders owe fiduciary duties to other shareholders only to the extent that they exercise control over the business affairs of the corporation. Massachusetts law, on the other hand, prevents minority shareholders from starting a new, competitive business, even if the majority has frozen them out. In essence, they are stuck until they either resolve their dispute with the majority owners or give up their equity in the company. This can often force minority shareholders in Massachusetts who either lack the funds to maintain a lawsuit or need to take a new job in a competitive company to sell their shares at a deep discount or accept aggressive non-competition restrictions in return for damages.

These important differences between Massachusetts and Delaware law governing close corporations make it clear that individuals who are contemplating going into business together need to think very carefully about what law they want to govern their relationship and the terms of any contracts between them that modify the duties imposed (or not imposed) by the applicable statutes and common law.

248. \textit{In re PNB Holdings Co. S’holders Litig.}, No. Civ. A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) (noting that “it is clear that there is no absolute percentage of voting power that is required in order for there to be a finding that a controlling stockholder exists”) (\textit{citing Kahn v. Lynch Comm’ns Sys. Inc.}, 638 A.2d 1110, 1112 (Del. 1994)).


250. \textit{Iwanhoe}, 535 A.2d at 1344; \textit{see also Gatz v. Ponsoldt}, 925 A.2d 1265, 1275 (Del. 2007).


255. \textit{Id.} at *9 (noting that “stockholders with very potent clout” have been found not to exercise control).

256. \textit{See, e.g., Dubroff}, 2009 WL 1478697, at *3–5 (evaluating the factual allegations in the complaint and the documents attached as exhibits, and holding that they could not support an inference that the defendants had joined to form a control group).


258. 836 A.2d 531 (Del. Ch. 2003).

259. \textit{Id.} at 551–53.

260. \textit{Id.} at 553.
Gregory Diatchenko was 17 years old when he was convicted in 1981 of stabbing Thomas Wharf nine times as Wharf sat in his vehicle near Kenmore Square.1 The young Diatchenko was sentenced to a mandatory term of life imprisonment without the possibility of parole, as required by Massachusetts General Laws chapter 265, section 2.2 On appeal a year later, the Supreme Judicial Court rejected his argument that the sentence of mandatory life in prison without the possibility of parole violated the Eighth and 14th Amendments to the United States Constitution and article 26 of the Massachusetts Declaration of Rights’ prohibition against cruel and unusual punishments.3 Diatchenko, now 50, and dozens of other Massachusetts inmates sentenced to life in prison without parole for crimes committed when they were juveniles, may now get a second chance at freedom.

In 2012, the United States Supreme Court, in Miller v. Alabama, ruled that imposition of a mandatory sentence of life without the possibility of parole for a juvenile convicted of murder violates the Eighth Amendment’s protection of “cruel and unusual punishments.”4 Following the decision in Miller, Diatchenko filed a petition with the Supreme Judicial Court of Massachusetts (SJC) for review of his sentence and continued confinement.5 The SJC, in ruling on this petition, broadened the scope of Miller’s principles, holding that under the Massachusetts Declaration of Rights, any life sentence for a juvenile that does not provide for the possibility of parole is unconstitutional.6

In Miller, which merges two cases (one from Arkansas and one from Alabama), two 14-year-olds were convicted of murder and sentenced to life without the possibility of parole.7 As in Diatchenko’s case, state law mandated that each juvenile die in prison because the sentencing authority lacked any discretion to impose a different punishment that took into consideration their youth.8 Both state appellate courts upheld the mandatory sentences as not unduly harsh or violative of the Eighth Amendment.9

In its landmark ruling in Miller, the United States Supreme Court reversed these decisions, holding that mandatory life sentences without parole for juveniles under 18 years of age were unconstitutional.10 Justice Kagan, writing for the majority, emphasized that juvenile offenders, by the very nature of their youth, bear less culpability and also have a greater capacity for rehabilitation than their adult counterparts:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.11

A CHANGING PERSPECTIVE

Before addressing Diatchenko’s claims, the SJC reviewed several key decisions issued by the United States Supreme Court prior to Miller. The opinions, which constitute a relatively fast-paced reassessment of the punishment of juveniles and the mentally disabled over a period of 20 years, reflect a distinctly progressive change in how the court classifies such defendants. The conclusion: juveniles and the mentally disabled are constitutionally different from other offenders due to distinctive limitations in developmental and cognitive functioning.

In 1989, in Stanford vs. Kentucky, the Supreme Court had held that executions of 16 and 17 year-olds were not constitutionally barred.12 Sixteen years later, in 2005, the court struck down the death penalty for juveniles in Roper v. Simmons, emphasizing “the evolving standards of decency that mark the progress of a maturing society” as a reason for changing its own determination of when a punishment may be viewed as cruel and unusual.13 The court pointed to a national trend against the practice of juvenile executions, noting that a majority of states have rejected the death penalty for juveniles, and the rare use of such executions in states where they are allowed.14

Similarly, in 1989, the Supreme Court refused to exempt “mentally retarded” offenders from capital punishment.15 In 2002, however, in Atkins v. Virginia, the court ruled that the execution of “mentally retarded” criminals constitutes “cruel and unusual punishiment.”16

5. Diatchenko, 466 Mass. at 657.
6. Id. at 658.
8. Id.
9. Id. at 2461-63.
11. Id. at 2468.
14. Id. at 568.
punishments,” due to the cognitive and developmental limitations of such offenders.\textsuperscript{16}

In 2010, citing \textit{Roper}, the court emphasized its earlier finding that juveniles are less culpable than adults, and held that it was unconstitutional for a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime.\textsuperscript{17}

\textbf{RETOACTIVITY}

Against this backdrop, the SJC turned to Diatchenko’s claims. The first question the court had to answer in assessing Diatchenko’s challenge to his sentence was whether the rule announced in \textit{Miller} would even apply to Diatchenko, whose conviction had become final 30 years earlier.\textsuperscript{18} The court first reviewed decisions of the United States Supreme Court to determine whether \textit{Miller} announced a “new rule” of constitutional law, and if so, whether it would apply to cases on collateral review.\textsuperscript{19}

Although \textit{Miller’s} review of the Supreme Court’s death penalty cases reflected an increased concern with how juveniles should be treated by the justice system, a mandatory sentence of life without parole — the default punishment in all those cases — had not previously been viewed as constitutionally suspect. Indeed, where the Supreme Court had vacated a juvenile’s death sentence as violative of the Eighth Amendment, the court had permitted a life sentence without parole to stand.\textsuperscript{20} Likewise, where the Supreme Court held sentences of life without parole unconstitutional for juveniles, it was only where the juveniles had not committed homicide.\textsuperscript{21} The SJC, after reviewing these precedents, held in \textit{Diatchenko} that \textit{Miller’s} holding was inconsistent with judicial precedent on the subject of juvenile sentencing, thus creating a “new rule.”\textsuperscript{22}

The court then assessed whether the rule announced in \textit{Miller} fell within either of two exceptions to the general rule that new rules of constitutional law do not apply on collateral review.\textsuperscript{23} A “decision that announces a ‘new’ constitutional rule will have retroactive application where the rule is substantive.”\textsuperscript{24} That is, it “places a class of private conduct beyond the power of the state to proscribe, . . . or addresses a constitutional determination ‘prohibiting a certain category of punishment for a class of defendants because of their status or offense.’”\textsuperscript{25} Alternatively, a new rule will apply on collateral review where “it requires the observance of procedures that are ‘implicit in the concept of ordered liberty.’”\textsuperscript{26}

The SJC, in its analysis of the retroactivity of the \textit{Miller} decision, held that the new rule was “substantive” and met the criteria for retroactive application to cases on collateral review in Massachusetts, because the decision categorically banned a certain type of punishment for a specific class of defendants based on their status — in this case, youth.\textsuperscript{27}

\textbf{SIGNIFICANCE OF MILLER AND DIATCHENKO}

Having determined that the rule announced in \textit{Miller} applied to \textit{Diatchenko}, the SJC turned to the question of discretionary, rather than mandatory, life without parole for juveniles.\textsuperscript{28} \textit{Miller} did not ban a sentence of life in prison without the possibility of parole for juveniles, just the mandatory imposition of such a sentence.\textsuperscript{29} However, in \textit{Diatchenko}, the SJC rejected even the discretionary imposition of such a sentence for juveniles, finding it inconsistent with the prohibition against “cruel or unusual punishment” set forth in article 26 of the Massachusetts Declaration of Rights.\textsuperscript{30}

In \textit{Miller}, the Supreme Court had acknowledged the evolving state of the adolescent brain, noting that a sentencing judge should consider the unique nature of juveniles’ psychological development, their propensity towards impulsivity, lack of maturity, home situations and lack of control over their environments.\textsuperscript{31} Furthermore, the court held that sentencing should include consideration of the juvenile’s role in the crime and his or her potential for rehabilitation.\textsuperscript{32}

In \textit{Diatchenko}, the SJC concluded that in light of the overall jurisprudence imparted regarding the tenuous and transitory state of adolescents’ mental and behavioral development, a sentencing authority cannot reliably determine whether a juvenile is “irretrievably deprived,” and whether the “most severe punishment” is warranted for that juvenile.\textsuperscript{33} “When considered in the context of the offender’s age and the wholesale forfeiture of all liberties, the imposition of a sentence of life without parole on a juvenile homicide offender is strikingly similar, in many respects, to the death penalty, which this court has determined is unconstitutional under article 26.”\textsuperscript{34}

Key to the SJC’s broader application of \textit{Miller} is its focus on contemporary moral standards and concepts of decency. Relying on the burgeoning information regarding adolescent brain development and the distinctive psychological nature of juveniles and their life circumstances — emphasized in recent opinions of the Supreme Court — the SJC concluded that life in prison without the possibility of parole for juveniles is disproportionate not to the crime, but to the offender: “The unconstitutionality of this punishment arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole. Given the unique characteristics of juvenile offenders, they should be afforded, in appropriate circumstances, the opportunity to be considered for parole suitability.”\textsuperscript{35}

Collectively, recent cases reflect an acceptance of recent advancements in scientific research revealing that “the normal adolescent’s brain (the frontal lobes in particular) is still developing in those areas that regulate self-control, emotions, judgment and identity.”\textsuperscript{36} As

\begin{itemize}
  \item \textsuperscript{16} 536 U.S. 304, 318-21 (2002).
  \item \textsuperscript{17} Graham v. Florida, 560 U.S. 48 (2010).
  \item \textsuperscript{18} Diatchenko v. Dist. Attorney for the Suffolk Dist., 466 Mass. 655, 657-58 (2013).
  \item \textsuperscript{19} \textit{Id.} at 661-67.
  \item \textsuperscript{20} \textit{Id.} at 662-63 (citing \textit{Roper} v. Simmons, 543 U.S. 551, 578 (2005)).
  \item \textsuperscript{21} \textit{Id.} at 663 (citing Graham v. Florida, 560 U.S. at 63, 69, 82).
  \item \textsuperscript{22} \textit{Id.} at 664.
  \item \textsuperscript{23} \textit{Id.} at 664-66.
  \item \textsuperscript{24} Diatchenko v. Dist. Attorney for the Suffolk Dist., 466 Mass. 655, 665 (2013) (quoting Saffle v. Parks, 494 U.S. 484, 494 (1990)).
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.} (quoting \textit{Teague} v. Lane, 489 U.S. 288, 311 (1989)).
  \item \textsuperscript{27} \textit{Id.} at 666.
  \item \textsuperscript{28} \textit{Id.} at 668.
  \item \textsuperscript{29} Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012).
  \item \textsuperscript{31} Miller, 132 S.Ct. at 2468.
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} \textit{Diatchenko}, 466 Mass. at 670.
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} \textit{Id.} at 669.
  \item \textsuperscript{36} Diatchenko v. Dist. Attorney for the Suffolk Dist., 466 Mass. 655, 671 (2013).
another example of this recognition, in Commonwealth v. Walczak, the SJC, prior to its ruling in Diatchenko, found that the failure to factor a defendant’s youth into the murder indictment process contravenes the importance of juvenile status recognized in Graham, Roper, and later, Miller.47 Pursuant to Walczak, a prosecutor seeking to indict a juvenile for murder is now required to instruct the grand jury on the law as well as the significance of mitigating circumstances or defenses which may impact the juvenile’s criminal liability.48

**SENTENCING CHANGES POST-DIATCHENKO**

The Diatchenko decision triggered the filing of legislation, 2013 Massachusetts House Bill 4307 — “An Act Relative to Juvenile Life Sentences for First Degree Murder” — which established a three-tiered system of parole eligibility. Under the new law, juveniles convicted of first-degree felony murder become parole-eligible after serving 20 to 30 years.49 Juveniles convicted of first-degree murder with premeditation become parole-eligible in 25 to 30 years, and those who acted with extreme atrocity or cruelty become parole eligible in 30 years.50 Other than those statutorily set dates, the precise eligibility date will be set by the sentencing judge.51 Because the new law is not retroactive, those former juveniles who are already serving life without parole — some 60 individuals — now become eligible for parole after having served 15 years.

The new law also created a commission to study and evaluate all first-degree murders committed by juveniles for the purpose of developing an evaluation process.52 Additionally, the law created avenues to less restrictive custody for juveniles, such as allowing for placement in a minimum security setting, and specifically instructed the Department of Correction not to limit access to programming and treatment, including education, substance abuse, anger management and vocational training for these juveniles.53

In light of these developments, lawyers, advocates and judges involved in any proceeding where a juvenile faces an enhanced penalty must be mindful of the distinguishing features of the juvenile offender in contemplating the defense, prosecution, sentencing or parole of such an individual. It is imperative that relevant mitigating factors such as the juvenile’s chronological age, level of maturity, failure to appreciate risk and consequences, family and home environment, peer pressures, and intellect all be considered during grand jury proceedings where the juvenile is being considered for sentencing enhancements such as indictment as a youthful offender,54 or in transfer hearings.55 It is incumbent upon counsel for juveniles to investigate and gather all evidence for purposes of arguing and effectively presenting mitigating factors relating to the juvenile’s alleged crime.

The practical effect of the Diatchenko decision is the case by case parole eligibility review process currently implemented by the Massachusetts Parole Board for those individuals who were under 18 when they committed their crimes, who were later convicted of first-degree murder, and who have served at least 15 years of their sentences.46 Recently, in the matter of Anthony Rolon, who had a parole eligibility hearing on July 22, 2014, the Parole Board considered factors such as the nature of the underlying offense and the age of the juvenile at the time of offense, and concluded that the inmate was suitable for parole.49 The Parole Board found Rolon’s conduct at the age of 17 “was presumably affected by the underdeveloped thought process and decision making abilities of a juvenile.”50 It further found that 18 years of imprisonment constituted a “long and meaningful punishment.”51 Diatchenko’s application for parole was later granted as well.52

**A REORIENTATION**

For Massachusetts, Diatchenko signals an important shift in the state’s approach to all forms of juvenile criminal proceedings, a shift which echoes back to the historic theory of juvenile justice proceedings in this state, that of parens patriae. Until the middle of the 20th century, the primary goal of the juvenile court was, in essence, to assume the role of the parent and provide rehabilitation and supervision to juveniles.53 The court’s role was to treat juvenile offenders as children needing direction and guidance, rather than to inflict punishment upon them similar to their adult counterparts. Despite receiving accolades as a national model for juvenile justice, with notably low recidivism rates, Massachusetts moved away from the parens patriae model with the enactment of the Juvenile Justice Reform Act of 1996, which criminalized serious juvenile delinquency.54

Defenders of juveniles may argue that the opportunity for parole for Diatchenko and others like him is indeed an historic and hopeful change for a class of individuals whom experienced practitioners have historically argued were unique. The Diatchenko and Miller decisions could have a broader impact on the way judges and juries assess the culpability of juveniles in criminal cases, reflecting societal acceptance of the view that with appropriate sentences and rehabilitation programs, many youthful offenders can indeed become productive law-abiding adults.

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39. Id. at 811-12, 832-36.
41. Id.
42. Id.
44. St. 2014, ch. 189, §7.
46. Id.
48. In 2015, in Diatchenko v. Dist. Attorney for the Suffolk Dist. (Diatchenko II), 471 Mass. 12 (2015), the SJC held that defendants who committed first-degree murder as juveniles are entitled, at their first parole hearings, to appointed counsel, funds for experts and judicial review of decisions denying parole, to give them a “meaningful opportunity” for parole. Id. at 21, 26–30.
50. Id at 8.
51. Id.
53. See Mass. Gen. Laws ch. 119, §§53 (stating that the relevant sections of the general laws “shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.”).
In 2013, the Supreme Judicial Court in Diatchenko v. District Attorney for the Suffolk District (Diatchenko I)\(^1\) ruled that a juvenile homicide offender who is convicted of murder in the first degree and receives a mandatory sentence of life in prison must be afforded a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,”\(^2\) and this opportunity must come in the form of consideration for release on parole. It went even further than Miller v. Alabama,\(^3\) where the United States Supreme Court ruled that laws dictating an inflexible automatic sentence of life without the possibility of parole for a juvenile convicted of first degree murder violated the United States Constitution’s Eighth Amendment ban on the infliction of “cruel and unusual punishment.” Diatchenko I established that, in Massachusetts, a term of life without the possibility of parole for a juvenile convicted of murder, even if imposed as a discretionary sentence, is constitutionally impermissible.\(^4\)

These cases recognized an increasing body of scientific research suggesting that children are different than adults — their very brains are fundamentally different — and, as Justice Kagan wrote in Miller, that “[b]ecause juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments.”\(^5\)

While Diatchenko I, of course, gave no guarantee of eventual release, it did, without elaboration, guarantee a “meaningful opportunity” for attempting to achieve that release. It was in search of those details of what would, in fact, constitute a “meaningful opportunity” that Gregory Diatchenko, along with another offender convicted of murder in the first degree also at the age of 17, Jeffrey S. Roberio, sought clarification and specific relief from the courts.

After a full hearing where Diatchenko and Roberio were opposed by the District Attorney of Suffolk County, the chair of the Massachusetts Parole Board and the Commissioner of Correction, a single justice of the Supreme Judicial Court (SJC) reported the following questions to the full court:

1. Whether, in order to ensure that the petitioner and other similarly situated juvenile homicide offenders receive the “meaningful opportunity to obtain release” that is required by the court’s opinion [in Diatchenko I], they must be afforded:
   a. the right to assistance of counsel at their parole hearings, including the right to have counsel appointed if they are indigent; and
   b. the right to public funds, if they are indigent, in order to secure reasonably necessary expert assistance at the hearings.

2. Whether, in order to ensure that the petitioner and other similarly situated juvenile homicide offenders receive the “meaningful opportunity to obtain release” that is required by the court’s opinion, there must be an opportunity for the petitioner or a similarly situated individual who is denied parole to obtain judicial review of the parole board’s decision, and if so, what form the judicial review will take.\(^6\)

In a decision written by Justice Margot Botsford in Diatchenko v. District Attorney for the Suffolk District (Diatchenko II), a five to two majority of the court agreed with the juveniles, holding that: (1) the procedural protections of representation by court-appointed counsel, and the opportunity to obtain a psychologist or other expert assistance in connection with an initial parole hearing, are necessary for juvenile homicide offenders serving life sentences; and (2) such offenders are entitled to limited judicial review, in the nature of certiorari in the superior court, of a parole board decision denying initial parole.\(^7\)

The crux of the court’s rationale in Diatchenko II is that presentations to the parole board in juvenile homicide cases will often involve complex questions of law and fact, and deal with sophisticated expert testimony, particularly in the area of cognitive brain science. The court said that a juvenile murderer without counsel or experts will likely not have the ability and wherewithal to muster the crucial psychological evidence and efficaciously present it to the parole board.\(^8\)

THE RIGHT TO COUNSEL

A central tenet of the Eighth Amendment is the fundamental “precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.”\(^9\) In

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2. Id. at 24, 27–28, 30–32.
3. Id. at 24, 23–24.
4. Id. at 24, 27–28, 30–32.
5. Id. at 17 (quoting Diatchenko I, 466 Mass. 655, 669 (2013)).
Diatchenko I, the court acknowledged this proportional sentencing of youth in its observation that “children are constitutionally different from adults for purposes of sentencing,” due to the limited brain development and cognitive functioning that make them less culpable than adults and more amenable to rehabilitation.10

One way that this distinction surfaces is that, although there is no constitutionally-protected liberty interest in the granting of parole for adult offenders since the state does not even have an obligation to provide a parole system,11 juvenile homicide offenders cannot be sentenced to life without the possibility of parole.12 As the SJC held, “parole eligibility is an essential component of a constitutional sentence under Article 26 for a juvenile homicide offender subject to mandatory life in prison.”13

In the court’s view, the “unique characteristics” of youth make the initial parole suitability determination a “far more complex” task than in the case of adult offenders.14 As Justice Botsford explained:

A potentially massive amount of information bears on these issues, including legal, medical, disciplinary, educational and work-related evidence. In addition, although a parole hearing is unlike a traditional trial in that it does not involve direct and cross-examination of witnesses by attorneys, because the inmate's parole application may well be opposed by both the victim’s family and public officials, it would be difficult to characterize this as an uncontested proceeding.15

In other words, “a parole hearing for a juvenile homicide offender serving a mandatory life sentence involves complex and multifaceted issues that require the potential marshalling, presentation and rebuttal of information derived from many sources.”16 A juvenile homicide offender without funds for an attorney would likely lack the ability or means to amass and offer up such critical information.17 “An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately.”18 Without counsel, then, a juvenile homicide offender would not have the “meaningful opportunity” promised in Diatchenko I to obtain release on parole that is critical to the constitutionality of the sentence.19

THE RIGHT TO EXPERT WITNESS FUNDS

Similar to its rationale for the need for access to counsel, the court stated that access to funds for experts may be imperative in some cases to meet a juvenile offender’s constitutional right to a meaningful opportunity for release through parole.20 As the court acknowledged earlier in Diatchenko I, scientific research on adolescent brain development has revealed “myriad significant ways that . . . development impacts a juvenile’s personality and behavior,” some of which suggest decreased moral culpability for certain juvenile homicide offenders, or indicate a greater potential for them to mature to a point where they no longer engage in the behaviors that led to their crimes.21 Experts may be required at parole hearings to explain “the effects of the individual’s neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual’s present capacity and future risk of reoffending.”22

The court acknowledged that, typically, the statutory provisions authorizing the payment of public funds to cover the costs and fees of indigent litigants apply to court proceedings, not to proceedings before administrative or executive agencies like the parole board.23 However, a parole hearing for a juvenile homicide offender is an exception, as it is constitutionally mandated to ensure that the offender’s life sentence conforms to proportionality requirements.24 A judge may therefore exercise discretion to grant funds for an expert at an initial parole hearing when the judge concludes that the expert’s assistance “is reasonably necessary to protect the juvenile homicide offender’s meaningful opportunity for release.”25

THE RIGHT TO JUDICIAL REVIEW

The SJC in Diatchenko II rejected arguments that a juvenile homicide offender denied parole had no recourse in the courts, due to the separation of powers that would block the judiciary from overruling an executive decision.26 Although the court agreed that it would never attempt to substitute its discretion for the parole board’s discretion, it has always had the power to make sure that the constitutional requirements of an administrative hearing are met.27

In this particular context, judicial review of a parole decision is available solely to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner, meaning that the Article 26 right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated.28

14. Id. at 23.
15. Id.
16. Id.
20. Id. at 25.
22. Diatchenko II, 471 Mass. at 27.
26. See id. at 28.
27. Id. at 28-29.
28. Id. at 29.
On review of a parole board decision, the courts will step in only if the board does not adequately deliberate upon and address the unique attributes of a juvenile homicide offender, including considering the cognitive abilities of an adolescent brain, and giving the offender a chance to demonstrate his evolved maturity and rehabilitation. Justice Botsford writes:

The purpose of judicial review here is not to substitute a judge’s or an appellate court’s opinion for the board’s judgment on whether a particular juvenile homicide offender merits parole, because this would usurp impossibly the role of the board . . . . The question for the reviewing judge will be whether the board abused its discretion in the manner in which it considered and dealt with “the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders,” as they relate to the particular circumstances of the juvenile homicide offender seeking parole . . . . In this context, a denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take these factors into account, or did so in a cursory way.

The court further ruled that judicial review in this context should be in the nature of certiorari, as described in Massachusetts General Laws chapter 249, section 4, rather than through an action for declaratory relief under Massachusetts General Laws chapter 231A. It reasoned that declaratory relief is generally sought when testing the validity of regulations or practices frequently repeated, rather than merely questioning the validity of an individual adjudication. Because “the type of limited judicial review contemplated would focus on the parole determinations relating to a particular juvenile homicide offender . . . [it thus falls into the category of cases appropriate for certiorari review].”

In a sharp and lengthy dissent, Justice Francis Spina, joined by Justice Robert Cordy, asserted that the court majority had “misconstrued” its own ruling in Diatchenko I, which had granted the new requirement of a “meaningful opportunity to obtain release” in the form of a parole hearing for juveniles convicted of first degree murder. “After Diatchenko I,” Spina wrote, “a juvenile convicted of murder in the first degree, like every juvenile who is sentenced to incarceration, is eligible for parole, whereas before such a juvenile was not. The thrust of Diatchenko I was an expectation of parole eligibility, and no more.”

In other words, Justice Spina argues that the new right to seek parole for juveniles convicted of murder is, in and of itself, the meaningful opportunity for release. Extra components such as the services of legal counsel and experts are not required to achieve this newly-permitted meaningful opportunity. Just getting the right to seek parole sufficiently qualifies as a meaningful opportunity.

Spina notes that the rest of the statutory scheme was left otherwise unaltered in Diatchenko II. He writes that the court in Diatchenko II has misinterpreted its previous ruling by not only granting the right to a parole hearing, but also taking an unauthorized leap that grants, as a right, a pathway that exists for no other offenders seeking parole — access to counsel, funds for expert witnesses, and, if denied parole, judicial review of the decision of the parole board. This, despite that “there has been no suggestion that the parole hearing others receive falls short of a meaningful opportunity.”

This, according to the dissent, raises a separation of powers issue because parole is an executive function separate and distinct from a judicial sentence. The judiciary must, accordingly, maintain a hands-off stance when members of the executive branch deliberate without interference on the granting of parole.

By imposing today these additional procedural protections, the court reaches beyond the judicial function of sentencing to regulate the conduct of the initial parole hearing itself, the manifestation of the executive prerogative to execute the sentence. In so doing, the court transforms the conduct of the parole hearing into part of the sentencing process, at least for juveniles convicted of murder in the first degree, and implicates the action of the board in the sentence itself. The Legislature never intended such a relationship between sentence and parole.

Spina notes that, since parole is not part of the sentencing process, the parole board does not have to recognize the dichotomy between children and adults. He points out that the court in Diatchenko I stated that “children are constitutionally different from adults for purposes of sentencing,” not for the purposes of parole, and elaborates that courts have long said that the possibility of release under parole grants no liberty interest in parole. There is never a presumption or expectation of release. “If we had intended to create an entirely new liberty interest in parole where there had been none previously, we would have explicitly said so.”

As Justice Spina challenges the three new rights afforded juvenile homicide offenders by the majority, he first states that, until now, courts have consistently rejected claims to a right to counsel based in the Sixth Amendment to the United States Constitution or Article 12 of the Massachusetts Declaration of Rights at any hearings concerning post-conviction collateral consequences, including

29. Id. at 31.
32. Id. at 30 (citing Averett v. Commissioner of Correction, 25 Mass. App. Ct. 280, 287 (1988)).
33. Diatchenko II, 471 Mass. at 31. The court also stated that review should be obtained from the superior court, not from a single justice of the SJC. Id. at 32.
34. Id. at 34 (Spina, J., dissenting).
35. Id. (emphasis in original).
36. Id. at 34, 37-38.
38. Id.
39. Id. at 35-36.
42. Id.
parole hearings. He adds that inmates without lawyers have still, nevertheless, managed to obtain parole.

Secondly, he writes that there is no right to expert witnesses because, once again, they are not needed to meet the requirement of providing a “meaningful opportunity” for release. He notes that, regardless, the mandated composition of the parole board, which now dictates the inclusion of at least one member with experience in forensic psychology, satisfies the need for a retained expert to evaluate and assist an individual.

Finally, he argues that judicial review of a parole board decision through certiorari conflicts with separation of powers principles. Spina maintains that certiorari is available only when there has been a judicial or quasi-judicial proceeding where a substantial injury or injustice occurred, for which no other remedy is available. In his view, because a discretionary act of the parole board is an executive function, the judiciary may not interfere, and the only available review of decisions of the board would be through an action for declaratory relief under Massachusetts General Laws chapter 231A. Under chapter 231A, juveniles “may contest the board’s practices that fail to consider the unique characteristics of juvenile offenders as well as displayed growth and change from adolescence, as required by Diatchenko I.”

Justice Cordy, while in complete agreement with Spina’s dissent, wrote his own dissent simply “to underscore [his] strongly held view that the judicial branch should not intrude on what is plainly an executive branch function in the absence of a showing that that branch has failed to fulfill its legal or constitutional obligations.” As Cordy noted, there was “not a hint of such a showing in this case.” Indeed, Gregory Diatchenko had been granted parole prior to the issuance of the court’s opinion.

The majority directly addressed the separation of powers argument that is the cornerstone of the dissent. It agreed that, generally speaking, the decision whether to grant parole is an executive function:

However, as we have noted, the right of the executive branch to exercise this power without intervention from the judiciary is subject to the provision that the power must be “constitutionally exercised” . . . . Thus, this court has never held that Article 30 precludes any type of judicial review of parole board decisions. In fact, Massachusetts courts have engaged in limited review of parole proceedings, consistently if not frequently.

In the majority’s view, the parole hearing takes on a “constitutional dimension” for a juvenile homicide offender “because the availability of a meaningful opportunity for release on parole is what makes the juvenile’s mandatory life sentence constitutionally proportionate.” Judicial review would then be appropriate with the singular goal of ensuring that the parole board uses its discretionary authority to give the juvenile homicide offender a constitutionally-proportionate sentence.

The majority ruled that the constitutional requirements are met only if a meaningful opportunity for release — “based on demonstrated maturity and rehabilitation” — has been provided by the board. “That entitlement arises directly from the recognition that children are constitutionally different from adults, with ‘diminished culpability and greater prospects for reform,’ based on their ‘distinctive attributes’ of youth.”

Again, the court cannot commandeer the parole board’s decision-making by dismissively replacing the board’s decree with its own conclusion. “Rather, judicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors just described in making its decision.”

In this framework, an unsuccessful bid for parole would be characterized as an abuse of discretion only if these elements were not adequately considered by the board. Additionally, the judiciary cannot overturn a decision of the board and itself grant parole to a juvenile homicide offender. Instead, when the court makes a determination that the parole board did not appropriately contemplate the parole applicant’s status as a juvenile when committing the crime, and the distinguishing characteristics of his or her youth, the remedy is to remand the matter back to the parole board for rehearing.

It is inarguable that the majority in the Diatchenko II case has followed the recent trend in both federal and state cases to treat juvenile offenders quite differently than other offenders, not just as if they are miniature adults. To give due consideration to the complex issues surrounding how offenders have evolved since their youth, the court determined that a real chance for parole goes beyond the privilege of just being accorded the hearing itself. Without assistance in evaluating and arguing these inordinately complicated, often scientific, concerns, the resulting application for parole would fall short of a “meaningful opportunity.”

Peter T. Elikann

50. Id.
51. Id. (citing Indeck v. Clients’ Sec. Bd., 450 Mass. 379, 385 (2008)).
54. Id. at 48 (Cordy, J., dissenting).
56. Id. at 49 n.1.
59. Id.
60. Id. at 29–30 (citing Diatchenko I, 466 Mass. 655, 674 (2013)).
63. Id. at 31.
64. Id.
BOOK REVIEW

The Great Dissent: How Oliver Wendell Holmes Changed His Mind — and Changed the History of Free Speech in America

by Thomas Healy (Henry Holt and Company, 2013), 322 pages

On the evening of November 7, 1919, three members of the United States Supreme Court showed up unexpectedly on the steps of a private home a few streets away from the White House. They were allowed inside and trudged up the stairs to the second floor where they entered the private study of their colleague on the bench, 78-year old Oliver Wendell Holmes Jr. — thrice-wounded Civil War veteran, former Harvard professor and a venerable patriarch, possessing a regal bearing with his Rushmore-like head, waxed mustache and a “voice old-fashioned and plummy like that of an English poet.”

In those days, the justices did not have offices at the Supreme Court. Instead, they worked out of their homes, staying in contact and sharing drafts with one another through messengers, with occasional meetings at the Supreme Court. One had already been scheduled for the very next day. This made their visit all the more unusual.

After making small talk and exchanging pleasantries, the reason for their unusual visit was announced. They noted that, earlier that day, Holmes had sent them a draft of a dissenting opinion he intended to file in Abrams v. United States, a case in which the court’s majority intended to uphold convictions and 10- to 20-year sentences for political activists who had thrown leaflets out of their window to the street below, denouncing America’s involvement in World War I and its lack of support for the Russian Revolution.

The majority decision was routine and not unexpected. The court had never previously ruled in favor of a free speech claim as it censored books, silenced street corner speakers, thwarted labor advocates and even prohibited criticism of public officials as a threat against the public order. This, despite the fact that the Constitution protects almost all speech and expression, except for the rare occurrence that could be shown to create an immediate and unambiguous danger.

Almost as bewildering to the justices as Holmes’s dissent was the fact that he, in particular, was its author. Holmes was considered the least likely to take such a position. Not only had he never before championed free speech, but he had almost never supported any individual rights at all, including the expression of political views. Contrary to his later reputation, he had never been a civil libertarian. Additionally, until that time, he had never even been much of a dissenter.

Yet the justices were both prescient and nervous that this old man, who had arrived at “the foothills of 80,” would, through his remarkably stirring prose, not only undergo a personal transformation, but precipitate a national transformation as well.

As Thomas Healy recounts in The Great Dissent: How Oliver Wendell Holmes Changed His Mind — and Changed the History of Free Speech in America, the justices on that autumn night almost a century ago marshaled every argument they could come up with to politely and respectfully cajole Holmes into withdrawing his dissent. Healy writes:

Although the war had ended a year earlier, the country was still in a fragile state . . . A dissent like this from a figure as venerable as Holmes might weaken the country’s resolve and give comfort to the enemy. The nation’s security was at stake the justices told Holmes. As an old soldier, he should close ranks and set aside his personal views.

Not only did Holmes refuse to relent, but several days later he engaged in the rare act of publicly reading his dissent from the bench. As expected, “these 12 paragraphs that would change the history of free speech” caused a sensation across the United States. As legal scholar Roscoe Pound effusively termed it, it was “a profane, scurrilous or [in] abusive language” about the government.

This was the backdrop for Justice Holmes’s powerful dissent that radically reinterpreted the First Amendment into a shield that protected almost all speech and expression, except for the rare occurrence that could be shown to create an immediate and unambiguous danger.

2. Id. at 213.
6. The Great Dissent, at 106.
7. Id. at 5.
8. Id. at 198.
document of human liberty to keep up the succession from the *Apol-
ogy of Socrates*, the *Areopagitica* and *Mill on Liberty*.9

While the story of this great canonical affirmation of free speech and its impact on the Republic is not new, Healy breaks new ground in answering the question and unraveling the great mystery that has long perplexed historians — why, indeed, did Holmes change his mind? In this, Healy’s intellectual detective work reads like a fast-paced suspense novel. It is scholarly, yet a page-turner that avoids academic jargon.

The issue of Holmes’s drastic change in position is all the more mystifying in light of the fact that, earlier that year, the Supreme Court had ruled on several cases arising out of the Espionage Act of 191710 that limited free speech in time of war and, each time, Holmes had led the majority in the stifling of free expression.

In *Schenck v. United States*,11 the defendant was convicted of passing out flyers urging resistance to the military draft. It was this case where the prolific and verbally facile Justice Holmes created two phrases that were to become among the most famous in the legal lexicon. He wrote that urging people not to register for the draft was tantamount to encouraging those individuals to violate the law and commit a crime, and therefore such speech constituted a “clear and present danger.”12

It was also in the *Schenck* case that Holmes underscored the principle that freedom of expression is not unconditional with his iconic phrase, “The most stringent protection of free speech would not pro-
tect a man in falsely shouting fire in a theater and causing a panic.”13

In *Debs v. United States*,14 labor leader and five-time Socialist can-
didate for President of the United States, Eugene Debs, had given an anti-war speech in Ohio. Holmes wrote in the majority opinion affirming Debs’s conviction for a violation of the Espionage Act “that its natural and intended effect would be to obstruct recruiting,”15 even though no evidence of overt acts existed. (The 10-year sentence for Debs, old and in ill health, was enormously unpopular with the public and, in fact, President Harding commuted the sentence in 1921 and hosted Debs at the White House the day after his release.)

In the third case, *Frohwerk v. United States*,16 Holmes again wrote the majority opinion, this time upholding the conviction and 10-year prison sentence of a newspaperman who generally criticized the involvement of the United States in foreign wars. The Missouri newspaper had a very small circulation and its commentary here was relatively mild. It noted that, even though it disagreed with the conscription law, young men should nevertheless adhere to it unless it was ever, in the future, overturned by the courts. The newspaper went so far as to explicitly disassociate itself from draft resisters, stating that it “did not endorse their action in any manner.”17 However, such disclaimers had little effect on the prosecution since it asserted that the newspaper, nonetheless, did sympathize with all the recruits.

In leading the court in its affirmation of these convictions and the upholding of the long prison sentences, Holmes continued to borrow the long-held view from British law known as the Blackstone approach.18 The Blackstone approach did not allow prior restraint of speech, but allowed for fines or jail terms for the most innocuous comments once they were made. This approach had begun to beg the most obvious question — what is the point of not blocking someone in advance of expressing their right of free speech if the subject knew there would be harsh sanctions levied after the fact? A palpable chilling effect would, undoubtedly, exist.

So what caused Oliver Wendell Holmes Jr., to give birth, apparently without warning, to an argument that dramatically expressed the opposite of everything he had previously stood for?

According to Healy, much of the explanation lies in Holmes’s in-
tellectual relationships with a number of extraordinary young legal scholars who genuinely befriended and respected him, but did not hesitate, during the course of their seemingly endless conversations and correspondence, in their attempts to influence him. He and his wife Fanny were childless and, perhaps, some of these were his surrogate sons.

Today, in retrospect, the practice of outside acquaintances trying to directly influence Supreme Court decisions by arranging meet-
ings with a Supreme Court justice would likely be roundly criti-
cized. But what appears to inappropriately verge on the unethical when viewed through a modern prism was, in that era, apparently permissible.

Chief among those in influence was the fiercely brilliant Harold Laski, a Harvard professor in his twenties who, later in life, returned to his native England and eventually became chair of the British Labour Party and that country’s most prominent Socialist spokes-
person. As Healy relates it, the wheels of Holmes’s metamorphosis were set in motion by Laski’s initiative in capitalizing on a chance encounter that Holmes had with someone else on a train.

Holmes and his wife were traveling from Washington, D.C., to their summer home in Beverly Farms, Massachusetts when he ran into a young federal district court judge from New York, Learned Hand. Hand, who eventually came to be regarded as one of the iconic figures in all American judicial history was, ironically, a ner-
vous, anxious, unconfident person haunted by self-doubt all his life. So it was particularly out of character for Hand, when he gathered up his nerve, to not only steer the conversation with his idol Holmes to a contentious issue, but, indeed, to pick a fight with him.

Hand had recently ruled in a civil matter in favor of Max East-
man, the prominent editor of the leftist journal, *The Masses*, who among other things, denounced the military draft and was therefore banned from using the mail to distribute the journal.19 Hand inter-
preted the law to mean that Congress had intended to ban only ex-

cplicit incitement to actually break the law. Hand suggested that we should be tolerant of differences of opinion not just because of some lofty notion of the natural right of expression, but rather because of

9. Id. at 221.
12. Id. at 52.
13. Id. at 52.
15. Id. at 215.
17. *The Great Dissent*, at 85.
ford: Clarendon Press, 1765–69); see also Patterson v. People of State of Colo-
rado, 205 U.S. 454 (1907).
the more pragmatic rationale that there is the chance that we might be wrong and others might be right.\textsuperscript{20} Hand anticipated that, by doing so, he probably forfeited an upcoming opening on the federal appeals court bench and also that, as did come to pass, he would be overturned on appeal, since he knew Holmes and his colleagues had made it clear that mere criticism of the war was unconstitutional.\textsuperscript{21}

Holmes, as always, was not offended and, indeed, was rather invigorated by being intellectually challenged. He delighted in the back-and-forth between himself and Hand, both on the train and in a follow-up exchange of letters. He did not change his mind yet, but when Holmes shared the exchange with Laski, the young protégé saw his opening. For the next several months, while he and his own family summered in nearby Rockport, Massachusetts, Laski frequently met with Holmes and gently and diplomatically peppered him with a steady diet of progressive literature and guests.

Perhaps the most influential of these guests was Harvard Law Professor Zechariah Chafee Jr., described as “possibly the most important First Amendment scholar of the first half of the 20th century.”\textsuperscript{22} Chafee had recently published an article in the Harvard Law Review entitled, “Freedom of Speech in Wartime,”\textsuperscript{23} where he argued that the Supreme Court had erroneously interpreted the First Amendment as protecting the “use” of speech but not its “abuse.” Chafee argued that it was wrong to punish speech that had only a remote possibility of causing harm. In doing so, the court chilled criticism of government and focused too much on the dangers of speech and not enough on its social benefits.\textsuperscript{24}

Chafee had specifically targeted Holmes, stating that his free speech opinions had never clarified the law because they went for easy targets such as the man who falsely shouts fire in a crowded theater and causes a panic. “How about a man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked?” wrote Chafee. “He is a much closer parallel to Schenck or Debs.”\textsuperscript{25}

In examining Holmes’s correspondence and conversations such as the one with Chafee, Healy shows the evolution of Holmes’s thinking as he wrestled with the issue, and frequently vacillated and contradicted himself as he got closer and closer to a momentous decision.

Perhaps the tipping point for Holmes was when his beloved Laski ran afoul of those who would suppress free speech at Harvard, where Laski taught. Word got out that Laski had taken part in a strike\textsuperscript{26} at the Lowell textile mills, backed a variety of leftist causes, and even supported the Boston police strike. Laski and Professor Felix Frankfurter — who eventually sat on the United States Supreme Court himself — were two of only several Jews at Harvard and, in addition to being the targets of criticism of their progressive views, were also the subject of anti-Semitic attacks.\textsuperscript{27}

It was in this milieu that Holmes stunned the country with his dissent, which changed the definition of free speech in the United States by stating that citizens should not be made to suffer “but for the creed they avow.”\textsuperscript{28} He distinguished advocacy from incitement by stating that a “silly leaflet by an unknown man”\textsuperscript{29} could not be construed as constituting a danger to the government.

At a public session of the Supreme Court, Holmes read his dissent — written in his typically powerfully, elegant, matchless prose — that has been quoted ever since:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.\textsuperscript{30}

Later on, in self-deprecating language, he explained that when he wrote his earlier opinions, “I simply was ignorant.”\textsuperscript{31} Yet, he also tried to justify them in convoluted contradictory ways, stating that his earlier decisions were also correct. As Healy explains it:

Through the intervention of his friends and his own willingness to adapt, he had come to see free speech from a different, more personal perspective. And from that moment forward, he became the champion of the First Amendment we know him as today, writing passionate dissents on behalf of radicals and subversives throughout the rest of his career.\textsuperscript{32}

Over time, his dissents eventually seeped into the judicial consciousness and evolved into the majority view — that expression cannot be curtailed unless it threatens imminent violence. His phrases “the marketplace of ideas” and “a clear and present danger” are today prosaic.

Healy successfully captures the overarching drama of these momentous times. He recounts what lesser writers might have related as dry arcane legal principles in a way that creates a sense of excitement. Even a reader without background in the law would find this tale such a compelling read that he or she would not initially realize its value as a first rate education in constitutional law.

The three Supreme Court justices who had broken tradition by showing up at Holmes’s house on that November evening almost a century ago to vainly attempt to dissuade him from issuing his minority opinion were likely prescient. Perhaps they realized what was to come — that they were, at that fixed moment in time, winning a battle, but they were, inevitably, going to lose the war.

Peter T. Elikann

\textsuperscript{20} The Great Dissent, at 16–24.
\textsuperscript{21} Masses Pub. Co., 244 F. at 535.
\textsuperscript{24} The Great Dissent, at 155.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 119–21, 127–29, 184–87, 193–97, 230–33.
\textsuperscript{27} Id. at 126–27.
\textsuperscript{28} Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).
\textsuperscript{29} Id. at 628.
\textsuperscript{30} Id. at 630.
\textsuperscript{31} The Great Dissent, at 243.
\textsuperscript{32} Id. at 244.