I. INTRODUCTION

Managing the legal process efficiently provides firms with a competitive advantage. It is not surprising, therefore, that firms routinely bring law and lawyers into the strategic planning mix. \(^1\) Today legal strategies are often institutionalized in corporate compliance programs complete with legal audits, educational activities, and monitoring systems designed to control wayward employees. \(^2\) Many firms routinely seek to influence \(^3\) changes in the law through the lobbying process. \(^3\) In addition, the impact of legal strategies can be found in a myriad of precautionary actions taken in anticipation of legal claims, such as the implementation of a document retention (and destruction) policy \(^4\) and the design of corporate form contracts that address legal issues such as the choice of forum and the use of arbitration. \(^5\) Of course, corporate legal strategies can also be found in decisions taken after a claim has been filed, such as the decision to settle or to litigate in court. \(^6\)
Although efficient management of the legal process can enhance firm profitability, using the law for private gain raises a number of potentially thorny ethical issues. This article examines two. Part II examines issues posed by "underenforced laws," asking under what circumstances a firm may justifiably adopt a strategy to intentionally violate a law that is not effectively enforced. The analysis begins with situations in which the lack of enforcement is independent of any actions taken by the firm and then turns to situations where a firm's actions affect the likelihood that its legal violation is detected and successfully prosecuted. Part III examines issues posed by imperfections in legal texts. More particularly, it focuses on "legal loopholes," carefully defining the term, and then asking whether there is anything ethically wrong with a decision to abide by a literal interpretation of a legal rule while knowingly violating the rule's underlying purposes. The discussion closes with an ethical assessment of a corporate legal strategy to affirmatively create legal loopholes through the strategic lobbying of public officials. A brief conclusion follows.

Taken collectively, this analysis contributes to a growing body of literature addressing the use of corporate legal strategy to enhance firm profitability. In particular, it emphasizes ethical concerns that caution against overly aggressive uses of some strategies in some contexts. For some, the article may also prompt a change in paradigm. Too often, corporate exploitation of imperfections in the law may be accepted uncritically, with either explicit or implicit blame being placed on those who write or implement the law. The present analysis, by contrast, focuses directly on the corporate executive, asking under what circumstances the opportunistic exploitation of legal imperfections must be tempered with self restraint. The article also offers a detailed discussion of legal loopholes not heretofore present in the literature. Although the notion of a loophole enjoys widespread colloquial use, the term is typically used quite loosely and without critical reflection. This article seeks to address that void.

II. UNDERENFORCED (OR UNENFORCEABLE) LAWS

The analysis begins with the ethical obligation to obey laws that are not effectively enforced. It starts with a few definitions and then turns to various business settings in which the question of underenforced law arises. For each setting, both economic and ethical considerations are examined.

A. Definitions

As used in this article, the term "corporate legal strategy" refers to a collection of decisions taken by corporate executives in anticipation of or in response to legal claims faced by the firm. The analysis assumes that these decisions are driven, at least in large measure, by economic motives. For example, executives routinely use legal strategies defensively to reduce the likelihood and severity of the firm's fines and civil liabilities. Legal strategies can also be employed offensively to build a war chest useful against one's trading partners, customers, and other corporate stakeholders.

In discussing corporate legal strategies, the word "law" will typically be used in its strict formal sense, essentially equating law with the legal rules embodied in judicial precedents, statutes, regulations, and other formal legal texts together with the formal reasoning techniques needed to interpret those rules. Strict formalists argue that proper legal reasoning involves the application of legal rules to facts with the outcome implicit in the logic of the formal rules themselves. The formal view acknowledges that the law includes flexible standards that may require an inquiry into public policy and legislative purpose; yet, the view also has faith in the principles of legal reasoning to guide a definitively correct legal result. In short, as used in this article, the law reflects an objective affair, defined by legal texts and the application of legal reasoning techniques.

Armed with the above definitions, it becomes possible to define "underenforced law." As used in this article, a law is said to be underenforced when, given the firm's legal strategies, it becomes cost effective for the firm to directly violate, evade, or breach the dictates of that law. This definition is essentially an economic one. The law appears underenforced because there is no economic incentive to abide by its prescriptions. One may obey underenforced law
simply out of habit or because one feels morally obligated, but it is not cost effective to obey. In essence, the notion of underenforced law poses a tension between the ethical obligation to obey law and the economic incentive to breach.

[*491] The following sections focus on various corporate legal strategies potentially used to exploit underenforced law. The first addresses the strategic choice to "breach and pay." This strategy embodies an intentional decision to violate law coupled with a willingness to pay the penalty associated with that breach. Other strategies divide between those taken in anticipation of legal claims such as the strategic use of a document retention policy and strategies taken in response to legal claims such as the strategic use of cost and delay to enhance settlement power. Clarification and discussion of these strategies will be offered in due course. The discussion begins with the strategic decision to breach and pay.

B. The Strategic Decision to Breach and Pay

Sometimes a firm surveys its legal environment and discovers legal rules that can be violated with relatively little cost. Perhaps the penalty associated with the violation is simply too light in comparison to the economic gains that can be achieved through violation. It may also be the case that the government has elected not to enforce its own rules. In either scenario, the firm must decide to nonetheless abide by the legal rule or, alternatively, to breach the rule and pay the fine.

1. Illustrative Cases: Overtime Pay and Undocumented Workers

The strategic opportunity to breach and pay comes up more often than one might think. For example, an expose in the *Wall Street Journal* documents the lack of enforcement with regard to overtime pay. n12 Labor regulations require that certain classes of workers must be paid at overtime rates when their work week extends beyond forty hours. n13 Notwithstanding this law, noncompliance appears widespread. Sometimes the noncompliance is coupled with a legal strategy to redefine hourly workers as salaried and then to require them to do more work than can be accomplished in forty hours. In other cases, the firms simply do not pay the time-and-one-half rate required for work beyond the forty-hour limit. n14

[*492] The widespread instance of overtime pay violations illustrates what happens when legal penalties are too low. The liability for violating the regulation is limited to back pay plus interest. n15 Punitive damages or fines in excess of strict compensation are not available. Given these limitations on damages, there appears to be little or no economic incentive to abide by the regulations, and the strategy of breach and pay becomes cost effective.

The strategic choice to breach and pay may also be seen in the hiring of undocumented workers. In a 2007 presidential debate, candidate Barack Obama quipped: "[A]n employer has more of a chance of getting hit by lightning than being prosecuted for hiring an undocumented worker." n16 If this is true, it is not due to a lack of law. The Immigration Reform and Control Act of 1986 states that employers may hire only people who may legally work in the United States (citizens and authorized visitors) and requires employers to verify the identity and employment eligibility of anyone hired. n17 Apparently the rule is underenforced. At the close of 2004, an estimated 10.5 million unauthorized immigrants lived in the United States. n18 In that year, sixty-six firms were indicted for illegal hiring, paying a total of $45,480 in administrative fines. n19 The numbers suggest widespread willingness to hire illegal immigrants, notwithstanding the law.

The underenforcement with regard to illegal workers has little or nothing to do with the fines being too low. The underenforcement stems from a lack of governmental will to enforce the immigration laws on the books. n20 Sometimes the lack of will to enforce law reflects the politics of the current administration. For example, one administration may have a stronger proclivity to enforce immigration laws than another. The formal law does not change, but the economics of violating the law change with the change of enforcement philosophy. Yet, regardless of whether the fines are too low or if enforcement is lacking, sometimes it is cost effective to violate law.
2. Scholarly Debate: Is a Legal Rule a "Price" or a "Prohibition"

The strategic choice to breach and pay has caused significant controversy in the academic literature, with opinion splitting into three camps: those who largely condemn the strategy as unethical, those who are largely sympathetic to it, and those who seek a middle ground. Cynthia Williams articulates the critical view.\[^{21}\] She argues that most, if not all, business regulations deserve obedience even if the regulation is underenforced. She fears that an alternative view that encourages firms to pick and choose between which regulations to obey and which to breach erodes social cohesion and ultimately misinterprets the social obligations that firms owe in a democratic society.\[^{22}\] For Williams, economic regulations establish law as a prohibition. She argues that one may not ethically violate a business regulation unless one has a sufficient moral reason to do so, and maximizing profit does not constitute a sufficient moral reason.\[^{23}\]

In contrast, economists and legal writers influenced by economic reasoning tend to be more sympathetic to the idea that legal obedience, at least with regard to some types of laws, is a matter of choice. For instance, with regard to contract law, writers from the law-and-economics tradition have articulated the notion of "efficient breach," which has garnered widespread, if not unanimous, support from the legal community.\[^{24}\] According to the notion of efficient breach, there is nothing unethical about deliberately breaching a contract so long as the breaching party compensates the aggrieved. In fact, breaching a contract when a more valuable alternative use of the committed resources becomes apparent is socially desirable. All parties can be made better off with the breach than without it.\[^{25}\]

Some within the law-and-economics camp have extended this notion of efficient breach to other areas of law, particularly with regard to civil torts and various areas of economic regulatory laws. For example, Frank Easterbrook and Daniel Fischel pointedly defend the breach-and-pay strategy in regulatory settings.\[^{26}\] They write that business executives "do not have an ethical duty to obey economic regulatory laws just because the laws exist, [and executives] should violate the rules when it is profitable to do so."\[^{27}\] Such commentators find nothing wrong with deliberately violating economic regulations and then paying the penalty. In fact, from an economic perspective, the practice appears socially desirable.

Other commentators find themselves somewhere in between the polar positions taken by those who condemn the breach-and-pay strategy as unethical and the most staunch defenders of the economic view. For example, Stephen Pepper examines the professional ethics of a lawyer who provides a client with information that the lawyer has reason to believe will lead to unlawful behavior by the client.\[^{28}\] The client could be asking for information on the substance of the law, such as the limited sanctions assessed for failure to comply with overtime pay regulations. Alternatively, the client could be asking for the enforcement proclivities of the current administration on hiring undocumented workers. Either type of knowledge could expose the law as underenforced from the client's economic perspective.

\[^{495}\] In assessing the lawyer's professional obligations in such settings, Pepper sees a conflict. The lawyer has an ethical duty to provide information about the law to the client, but the lawyer also has a societal duty to help support respect for substantive law.\[^{29}\] In resolving this conflict, Pepper suggests that the lawyer should be influenced by the type of law in question.\[^{30}\] He offers a continuum with lesser violations, such as civil liability for an intentional breach of contract, at one end, and criminal conduct involving physical harm to others on the other.\[^{31}\] Civil law rules, rules that constitute malum prohibitum, and rules that are not actively enforced by public officials are matters that are relatively less serious. A lawyer has a professional obligation to give information to the client in such settings. By contrast, when the rules in question involve criminal conduct, pertain to matters that constitute malum in se, are actively enforced by officials, and are deemed "morally reprehensible" by a clear social consensus, then the lawyer must be more circumspect.\[^{32}\]

For Pepper, much of regulatory law, including tort liability for negligence, can be found on the more permissive end of the continuum where law constitutes a price to be paid rather than a direct prohibition. With regard to the law of negligence, Pepper writes: "One is free to be negligent so long as one is willing to pay compensatory damages to persons injured by that negligence."\[^{33}\] He illustrates with the example of a hotel owner who has a collection of aging water heaters. As the heaters fail, they sporadically spurt scalding water without warning. The owner does not have the
financial ability to replace the heaters all at once, so he elects to replace them in sequence and to pay damages in the event that a guest is injured. Pepper does not condemn the owner’s decision as immoral, suggesting that at times it is socially acceptable to breach a duty of due care so long as one compensates the injured party. n34

Nor does Pepper condemn a business decision to intentionally exceed an Environmental Protection Agency regulation regarding the level of effluent discharged in a rural stream. n35 Pepper suggests that in some circumstances this violation can be viewed as malum prohibitum, not malum in se. For Pepper, the dichotomy between in se and prohibitum helps to distinguish "between law as true prohibition (that is, the identification of conduct not to be tolerated) and law as cost (that is, the identification of conduct to be penalized in some legal fashion, but which a citizen is still free to choose to do)." n36 The law presents a hierarchy, some rules demand obedience even if underenforced; others do not.

A similar continuum or hierarchy of law has been identified by other writers. For example, although Easterbrook and Fischel advocate the efficient breach of "economic regulatory laws," they recognize limits: laws concerning violence or matters of malum in se are to be obeyed even if it were profitable to breach. n37 Here law constitutes a prohibition not a price. Judge Douglas Ginsburg, also writing from an economics perspective, draws a similar distinction, suggesting that social obligations can be met equally by conforming with law or by violating it and paying the consequences, except when a moral or criminal norm is concerned. n38 John Coffee has also emphasized the crime/tort distinction, arguing the former requires legal compliance while the latter may permit an ethical breach-and-pay strategy. n39 Robert Cooter has parsed the criminal/tort distinction, suggesting that business regulations that pertain to productive activities, such as pollution controls on manufacturing processes, should be seen as prices, while regulation of nonproductive activities should not. n40

In sum, one finds a divide within the academic literature with regard to the breach-and-pay strategy. Some condemn it outright; others suggest that the ethical assessment of the strategy depends, in part, on the legal issue in question. There is general consensus that committing acts that are malum in se cannot be ethically defended with a simple willingness to pay the price. Rules rooted in morality are not enforced solely with economic incentives, and even if they are underenforced in economic terms, they must be obeyed. When, however, the legal rules establish matters that are malum prohibitum, a strategy of breach-and-pay might be ethically defensible.

3. Ethical Assessment: Overtime Pay and Undocumented Workers Revisited

Ultimately, the ethics of the breach-and-pay strategy may depend on how one interprets the law in question. Suppose that the legal rule says: If one does X, one will have to pay Y. How does one interpret this rule? If law is seen as a price, then it means one may choose to do X, but if one does, one will pay Y. Here legal obedience reflects a matter of choice and one may do X or not do X depending on the economics of the situation. But if law constitutes a prohibition, then the law reads: One may not do X, and if one does, then one must pay Y. Here, legal obedience reflects a moral requirement, and doing X becomes morally indefensible.

Drawing from the scholarly literature, it would seem that, with regard to most criminal law matters, one may not do X even if one is willing to pay the price. One cannot ethically commit assault and battery, even if one were willing to go to prison. The violation of some civil rules, however, could be justified by paying the price. For example, willingly breaching a contract can often be morally defensible. n41 Much of economic regulatory law seems to be in the middle ground that may need to be addressed on a case-by-case basis. On close inspection, many business regulations seem not so easy to interpret demonstrably as a prohibition or as a price. n42

Recall the immigration regulation regarding the hiring of undocumented workers. The rule states that if the firm hires an undocumented worker then the firm must pay a fine. If the firm interprets this fine as a price of doing business, then the firm simply does a cost–benefit analysis and follows economic incentives. But should the rule be interpreted as a price or a prohibition? Several factors suggest price. First, note that this regulation seems to be a matter of malum prohibitum, not malum in se. There appears nothing inherently wrongful with entering into an employment contract
with a willing worker. Second, the underlying activity is both lawful and productive. A voluntary working relationship benefits employer and employee and presumably benefits society as well. Third, the lack of active enforcement by the government implies a lack of social consensus regarding the wrongfulness of the act. This seems to suggest that a willful violation coupled with a willingness to pay the consequences may be morally defensible. In fact, some might even suggest that a degree of civil disobedience could be defended with regard to a rule that seems to deny an immigrant the opportunity to support his or her family. In this light, absent effective enforcement, widespread violation of the undocumented worker rule should be expected.

A similar ambiguity may pertain to the regulation addressing overtime pay. This regulation, like the one regarding undocumented workers, addresses a matter that constitutes malum prohibitum, not malum in se. In the absence of fraud, duress, or undue influence, there appears nothing inherently wrongful with a contractual agreement to work at a particular rate of pay. Second, the regulation addresses a civil matter, not criminal. In fact, the matter pertains to a breach of contract, an arena in which the notion of law as price has its most traction. And, finally, the law provides for very limited remedies in the event of breach, back pay and interest. The limited nature of these remedies suggests that violations do not carry strong moral disapprobation. In such a light, the fact that many firms seem to willfully breach the regulation may be somewhat morally tainted but nonetheless expected.

C. Strategies Taken in Anticipation of Legal Claims

Employing the breach-and-pay strategy, a firm remains relatively passive: it merely reacts to the lack of governmental enforcement activities or to the limited nature of legal penalties rather than creating those conditions itself. Strategies taken in anticipation of legal claims, by contrast, envision a more active stance by the firm. Anticipatory strategies often work in conjunction with the firm's decision to breach and pay by reducing the likelihood that the firm's breach will be detected, by reducing the chance of conviction, or by reducing the fine if a conviction is forthcoming. Such strategies may cause the law to be underenforced and provide an economic incentive for breach. Anticipatory strategies may also be used to increase the firm's bargaining power in the event that it chooses to sue one of its trading partners. For example, a firm may include favorable choice of forum, arbitration, and indemnification clauses in its form contracts to gain strategic leverage over employees, customers, and other contractual partners. The economic and ethical dimensions of various types of anticipatory strategies are examined below. The discussion begins with the strategic use of legal compliance programs.

1. Strategic Compliance

Legal compliance programs have a variety of components including legal assessments, legal training, and monitoring systems. Legal assessment involves a survey of the legal threats facing the firm. Because law touches virtually all aspects of the business, the list of legal issues can be quite long. The firm must decide how best to use its resources to address the most serious threats. Most commonly this means establishing an efficient and effective system for informing the firm's agents of the legal issues the firm faces and teaching them how best to proceed. For this training to be effective, employee incentives need to be tied to the firm's goals and an effective monitoring system needs to be in place.

In setting the goals of compliance, a strategic choice must be made. Establishing and managing a compliance program entails costs. Presumably, as more resources are committed to compliance efforts, the chances of employee malfeasance diminish. If economics drives the corporate decision, then resources will be employed only up to a point where the marginal cost of compliance equals the marginal benefit resulting from fewer instances of unlawful behavior, but not beyond. In other words, there may be "efficient" breaches even when the firm is committed to "compliance." Recognizing this strategic choice, the firm's executive officers must determine when the firm will go beyond the economically desirable limit and continue to spend resources to reduce instances of legal violations even when it is not cost effective to do so.
A fairly large "compliance industry" has arisen to help firms set up efficient compliance programs. The technical aspects of compliance can be quite complex. For example, scores of scholarly articles advocate building a "compliance culture" within firms. These articles emphasize notions of personal integrity in corporate training, corporate mission statements, and corporate codes of conduct so that the need for direct monitoring is reduced. But the potency of ethical training remains a contested point and aggressive legal monitoring remains the norm for most compliance programs. Monitoring also involves technical choices. In various settings, monitoring is done by direct supervisor observation, through ombudsman reporting by coworkers or through third-party auditors and other compliance professionals.

Ironically, the compliance industry got a huge boost by the passage of the Federal Sentencing Guidelines. The Guidelines identify aggravating and mitigating factors for corporate sentencing. A legal compliance program appears as a mitigating factor; hence, once convicted of a crime, if a firm has a compliance program in place at the time of the offense, the fine is reduced. Prior to the Guidelines, about forty percent of the largest five hundred firms in the United States had compliance programs; within a few years after passage, they all did. The irony, of course, resides in the fact that adopting a compliance program appears consistent both with a strategy of compliance, where the firm seeks to maximize profits subject to law and with a strategy of breach and pay, where the firm intentionally violates law because the reduction of fines has rendered the law underenforced. The adoption of a compliance program renders the law underenforced in an economic sense. Whether the firm nonetheless complies becomes a matter of ethics.

2. Strategic Concealment

Incumbent in the breach-and-pay strategy is that in some circumstances deliberately violating the law can be morally defensible so long as one is willing to pay the penalty. In practice, however, the phrase "willing to risk the penalty" may be more apt. As Professor Williams observes:

There is probably not a single example in modern history in which a firm decided to discharge pollutants over regulated levels, for instance, and then immediately wrote a polite letter to the Environmental Protection Agency enclosing a check for the penalties due ... Part of the calculation to violate the law includes a calculation of the probability that the violation will go undetected; or if detected, that it will go unpunished for any one of a plethora of reasons; or if prosecuted, that liability will not be established.

Each of the probabilities identified by Williams can be affected by actions taken by corporate executives and their lawyers, that is, by the firm's corporate legal strategy. The question becomes, is there anything ethically wrong with taking actions in anticipation of legal claims with the intent to conceal the firm's misdeeds or to make it more likely that the firm will prevail at trial once sued.

Perhaps the most notorious instance of a legal strategy affecting the likelihood of detection and conviction involves the destruction of documents, e-mails, and electronic records through corporate retention policies. Of course, there are a variety of legitimate reasons to destroy documents, including the protection of trade secrets, concerns with customer or patient privacy, the prevention of corporate espionage, and the reduction of identity theft. But document destruction can also eliminate evidence of corporate malfeasance, reducing both the risk of detection and the likelihood of conviction associated with a breach-and-pay strategy. If the latter logic is pushed too far, an obstruction of justice charge may be forthcoming.

Ultimately, the corollary question of concealment may depend, at least in part, on the ethics of committing the underlying offense itself. Destroying documents to conceal a morally reprehensible offense cannot be defended. But if the underlying offense involves a civil breach of contract, an act of justifiable negligence, or a violation of a morally neutral regulatory offense then concealment may become ethically acceptable. In these latter situations, the rules concerning obstruction of justice and similar crimes provide the guide.
The crime of obstruction has received significant public attention in recent years, with high-profile convictions forthcoming in both the Martha Stewart and Arthur Andersen cases. Stewart's obstruction of justice case involved insider trading; Andersen was convicted in conjunction with the Enron frauds. Comparing the ethics in the two cases, note that for many commentators insider trading provides a classic example of malum prohibitum, that is, it is wrong only because the law says it is wrong. When the underlying crime is highly technical and does not carry a strong moral taint, concealment to avoid a penalty may be expected and possibly even excused. Although Stewart was convicted of obstruction, the degree of public condemnation remains a bit unclear. The underlying crimes in the Enron case, by contrast, involved criminal fraud, a matter that is typically classified as malum in se. Strategic concealment in Andersen was much more difficult to defend on ethical grounds, and public moral condemnation contributed to the demise of Andersen as a viable organization.

In sum, the strategy of concealment is to be expected and may be morally defensible in many business settings. One would not expect a firm operating on the fringes of an antitrust regulation or pushing the envelope of an international trade quota to broadcast potential violations to regulatory officials. In addition, in a litigious society, destroying documents that might encourage one's trading partners to bring questionable civil suits makes sense, both economically and ethically. Nevertheless, care must be taken not to run afoul of laws pertaining to obstruction of justice, particularly if the underlying offense carries a strong moral disapprobation.

3. Strategic Contracting

Thus far, the discussion has focused on defensive strategies used to reduce the likelihood that a legal violation occurs, to reduce the costs associated with violations, or to reduce the chances that the violation will be detected and successfully prosecuted. Strategies in anticipation of legal claims can also be used offensively to improve the legal standing of the firm in the event that it chooses to sue one of its contractual partners. Examples include contractual provisions that specify the choice of forum in the event of a dispute, that exculpate the firm from its tort liabilities or that indemnify the firm against third-party claims. Sometimes such clauses are negotiated between parties of equal bargaining power, such as a major manufacturer and its workers' union. More commonly, such contracts appear in non-negotiable forms drafted by the firm's lawyers and presented to the firm's customers or employees.

Given the vagaries incumbent in the legal process, the power to specify the dispute-resolution forum can be critical. A firm that can shift customer complaints to an arbitration panel that is likely to be friendly to industry concerns has a distinct economic advantage. Similarly, although not all exculpatory clauses are enforceable, the presence of a liability waiver can significantly increase the firm's bargaining power in settlement negotiations. In addition, indemnification clauses can be quite complex and abstract, suggesting that less sophisticated trading partners may not fully understand the effect of such clauses.

The question is whether the strategic use of form contracts to improve the firm's legal standing through non-negotiated and potentially misunderstood clauses is ethical. For the most part, contract law permits such strategies. Care must be taken to avoid claims of fraud, duress, undue influence, and unconscionability, but otherwise, even seemingly one-sided contractual provisions are commonly permitted under a common law animated by a freedom-of-contract policy. Of course, just because a corporate strategy is economically efficient and legally permissible does not mean that the firm should do it. Ideally, contracts are based on meaningful agreements between autonomous actors. Contract law may compromise this ideal and in the name of expediency enforce contracts that are not fully understood. Such compromises are common in the implementation of law in practice. A firm can certainly take unfair advantage of such compromises. The ethical executive exercises professional restraint in such settings.

D. Strategies in Response to Legal Claims

Once the firm is sued, either criminally or civilly, a new set of strategic issues presents itself. Litigation requires cooperation between corporate executives and the firm's legal counsel to plan pretrial tactics, including settlement
strategies. Given the adversarial system, the primary lodestar must be winning. But winning at all costs is not a responsible strategy. Rather, executives working closely with their lawyers must strike a balance between aggressive profit seeking and ethical self-restraint. The following sections consider these issues with regard to the strategic use of pretrial delay and expense as a settlement tactic. The economic logic of the strategy is followed by an ethical assessment.

1. Strategic Use of Expense and Delay

In an ideal world, legal disputes are determined with sole reference to the rule of law. Unfortunately, the world often strays from ideal. Judges and juries are not always unbiased and the true facts surrounding a dispute cannot always be established. Sometimes a party with a meritorious claim may drop a case due to a lack of funds with which to finance the lawsuit. Sometimes a party cannot afford to wait for the process to work, prompting a settlement at a significantly reduced and potentially unfair amount. Such factors present the opportunity to exploit expense and delay to advance the firm’s economic interests. n59

Consider first the issue of cost. Litigation can be expensive and can be made more so through corporate legal strategies. n60 For example, expanding the list of issues in the pleadings increases both the scope of discovery and the opportunities for expert opinion. Depositions can be taken in remote locations and the use of experts by one party often requires the use of experts by the other. Costs can also be driven up by expanding interrogatories, contesting discovery motions, asserting interlocutory appeals, and employing a host of other procedural devices. Ultimately, the rising costs may cause the opposing party to abandon a claim altogether. More commonly, the threat of costs provides a bargaining chip in settlement negotiations, potentially causing the less well financed to take less. n61 In short, the strategic exploitation of litigation costs can be economically effective.

Litigation also takes time, and strategic decisions can affect the amount of time it takes. n62 Delay can affect the chances of winning a claim, as evidence can be lost and memories fade. In addition, some parties may be able to withstand delay better than others. For example, a delay in paying a reasonable insurance claim may disrupt a small company, threatening to run it out of business while waiting for the claim to be settled. Damages for closing the business may not be fully recovered due to the speculative nature of potential lost profits. The closing may have collateral effects on the owner's family, placing additional pressure on the claimant to reduce the settlement demand. n63 Yet, opportunities for tactical delay are plentiful, including the exploitation of various pretrial motions, such as change of judge, change of venue, challenges to jurisdiction, each of which could delay the legal process. Discovery procedures can also drag on for extensive periods of time. The question for present purposes is whether there is anything ethically wrong with strategically using delay as an economic weapon.

Addressing the strategic use of delay, Lynn LoPucki and Walter Weyrauch write: "The fact that delay affects case outcomes is widely recognized. What is not widely recognized is the capacity of legal strategy to manipulate the extent of delay." n63 Yet, opportunities for tactical delay are plentiful, including the exploitation of various pretrial motions, such as change of judge, change of venue, challenges to jurisdiction, each of which could delay the legal process. Discovery procedures can also drag on for extensive periods of time. The question for present purposes is whether there is anything ethically wrong with strategically using delay as an economic weapon.

2. Ethical Assessment

In many cases an aggressive use of legal strategies such as the exploitation of expense and delay can cause a law to be underenforced or even unenforceable. The ethics question involves how aggressively to push the envelope. Once litigation is commenced, these decisions are made in an adversarial context in which winning is the ultimate goal. But winning must be tempered with professional self-restraint.

The ABA Model Rules of Professional Conduct addresses the use of delay as a legal strategy. Rule 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." n64 The comment provides: "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest," n65 In practice, it would seem that much weight is placed on the "good faith" of the lawyer, as a clever advocate could argue for a "substantial purpose other than delay" in most, if not all, cases.
Ultimately, the responsibility to set a firm's legal strategy falls on the firm's executive officers. Of course, executives owe fiduciary obligations of fidelity to shareholders, and presumably, shareholders are primarily interested in maximizing the economic returns to the firm. Yet, shareholders have no authority to authorize executives to engage in unethical or socially irresponsible actions. Because unethical and irresponsible actions can prove economically profitable, the firm's economic drives must be tempered. Notwithstanding the adversarial process, this remains as true in the arena of legal strategy as in any other arena. In short, the executive cannot simply defer judgment to an obligation to serve the economic interests of the shareholders.

Nor may the executive defer responsibility for the corporation's legal strategies to the firm's lawyers. Lawyers owe a duty of zealous advocacy in pursuing the client's interests. Yet, it is for the client to determine and communicate exactly what those interests are. The lawyer provides advice, explaining the substance of the law and outlining the consequences of alternative actions. The ultimate decision regarding the firm's legal strategies must rest with the executive.

What then, should the executive decide when strategies of expense and delay prove profitable? The answer resides in the social and political duties owed by all citizens who live in a reasonably just society. The duty is to support legal institutions and to respect the rule of law. Sometimes these duties are enforced by economic pressures. But when law is underenforced from an economic perspective, it becomes the ethical responsibility of corporate executives and others in power to exercise self-restraint from their positions of advantage. This means that in many circumstances an executive should refrain from using a strategy of expense and delay even when it is cost effective to do so.

Part II of this article inquires into the ethical dimensions of certain corporate legal strategies. The analysis focuses on situations in which aggressive exploitation of underenforced law is cost effective and then asks whether the firm should nonetheless restrain itself. It also offers some answers. With regard to the strategic decision to breach and pay, the corporate decision maker should inquire into the moral basis of the law in question. Intentional breaches of certain civil laws and regulatory provisions may be defensible. Laws with a strong moral content, however, demand obedience even if underenforced. For anticipatory and responsive strategies that render law underenforced, such as aggressive document destruction and exploitation of delay to frustrate legal claims, the executive must temper the firm's thirst for economic gain with due respect for the rule of law and the institutions of public justice.

Thus far, the analysis has focused on situations where the law in question was relatively clear and precise, but nonetheless underenforced. The analysis now examines how the ethics of legal strategy change in the face of linguistic ambiguities in formal legal texts. In particular, the following sections ask whether there is anything ethically wrong with exploiting loopholes in legal texts when it is cost effective to do so. As above, to clarify this question we need definitions; to answer it we need background, context, and illustrations. The analysis begins with definitions.

In discussing corporate legal strategies we have been using the term "law" in its formal sense, largely equating law with the rules embodied in statutes, regulations, judicial precedents, and other legal texts. This definition of law acknowledges that legal texts need to be interpreted, but it also assumes that the principles of legal reasoning, properly applied, provide definitively correct interpretations. Proper legal interpretation begins with a literal reading of the text in question and then resolves any ambiguities in that text with reference to legislative intent, general public purposes, prior interpretations, and maxims of construction. The view of law used in this article assumes that a good-faith application of this interpretive process will generate a single best interpretation. This "best interpretation" is what is meant by law.
Armed with this definition of law, it becomes possible to define a legal loophole. As used in this article, the term "legal loophole" refers to an imperfection in the linguistic formulation of a legal text whereby a literal interpretation of that text does not conform to the definitive interpretation dictated by a good-faith application of formal legal reasoning techniques. Most often the literal interpretation pays insufficient deference to the role of legislative intent and public purpose in interpretive reasoning. One often speaks of a loophole as a means of living to the letter of the law while simultaneously violating its spirit, or as an elevation of legal form over substance. More properly, a loophole provides a rhetorical device that self-interested parties may be tempted to use to rationalize breaches of formal law properly interpreted.

Judicial attitudes toward the exploitation of legal loopholes can be somewhat ambivalent. Typically, exploiting a legal loophole carries moral disapprobation. For loophole, Roget's Thesaurus lists "excuse, pretense, pretext, evasion, escape, and subterfuge" as synonyms. But at times the clever use of a legal loophole might be applauded as a smart and effective business tactic. Occasionally a court will compliment a lawyer for a crafty maneuver, denounce the legislature for sloppy draftsmanship, and the party asserting the loophole will prevail. More commonly, however, courts will condemn arguments based on loopholes as shams, frauds, and violations of law. Courts speak of looking through form to substance, closing loopholes, and effectuating legislative intent. In the extreme, a court can order legal sanctions against both lawyer and client who press loopholes too far. In short, sometimes arguments based on legal loopholes work; sometimes they do not.

Given the ambivalence of the courts, a firm may find it cost effective to live up to a literal interpretation of a legal text rather than to abide by a good-faith interpretation of what that text requires. The economic value of a loophole derives from the fact that sometimes an argument based on the literal interpretation of a rule succeeds directly. At a minimum, uncertainty in the judicial response to loophole-style arguments enhances the firm’s bargaining power in plea negotiations over criminal fines and settlement negotiations over civil liabilities. In other words, exploiting loopholes often pays.

The present question is whether there is anything morally wrong with a corporate legal strategy to seek out and exploit legal loopholes. The following sections examine this question, first in the context of business planning and then in the context of litigation. The analysis closes by addressing the role of corporate power in creating legal loopholes through the lobbying process. For each context, both ethical and economic aspects posed by loopholes are examined. The analysis is followed by a brief summary.

B. Strategic Use of Legal Loopholes in Business Planning

The discussion begins with the strategic use of legal loopholes in business planning, looking specifically at three illustrative cases. In each case, an executive wants to achieve a particular purpose, but the means proposed appear contrary to the spirit of applicable regulations. Within the linguistic formulation of the regulations, however, the firm’s lawyers can craft an argument that seemingly permits the executive to achieve the business purpose consistent with a literal interpretation of the rules. The executive suspects that the literal interpretation, or loophole, may not be the best good-faith interpretation of the law, but the literal interpretation has economic value because it supports the desired action while providing a legal defense in the event that the action is challenged. The question becomes, is there anything wrong with living to the letter of the law while simultaneously violating its spirit?

1. Illustrative Cases

The strategic use of legal loopholes in business planning arises more often than one might think. Consider, for example, a mining regulation that expressly prohibits the release of compounds X and Y into the aquifer. A mining firm's engineering department finds a way to transform compounds X and Y into compound XY, which has the same effect on the aquifer as either X or Y standing alone, but XY is not mentioned in the regulation. Upon conferring with legal counsel, the firm's executives conclude that, after accounting for potential regulatory fines, civil liabilities, and
possible economic harms to the firm's business reputation, emitting compound XY appears cost effective. It seems that the letter of the regulation permits XY, while the spirit probably prohibits it. What should the executives do?

The loophole in this first example derives from the narrow language employed by the legal text, coupled with a change in technology. Note that the regulation could have been more broadly drawn, perhaps prohibiting all emissions that unreasonably or unjustifiably harmed the aquifer rather than listing specific compounds. The choice of narrow language eliminates some of the ambiguities created by less precise formulations, but the narrow language also creates gaps. The present gap becomes apparent through a change in technology. Presumably, the regulation initially listed all known dangerous compounds, including X and Y, but at the time that the regulation was drafted the potential for XY was unknown.

The loophole in the mining regulation provides the firm with a means to create the conditions of its own defense. Absent the loophole, there would be no reason for the firm to transform X and Y into XY. The various emissions have the same substantive effect on the aquifer, only the form of the emission changes. The transformation, however, appears to have economic value for the firm. If the firm emits XY and the emission is challenged, the firm would have no doubt argue for a literal interpretation of the regulation in question. Whether the court would look beyond form to substance and impose a penalty on the firm seems unclear, and this legal ambiguity, in turn, makes emission of XY potentially cost effective for the firm.

[*513] A similar loophole appears in the overtime pay situation discussed previously. Recall that labor regulations require certain classes of workers to be paid overtime rates for work in excess of forty hours per week. To circumvent this requirement, some firms reclassify workers as salaried and then require more weekly work than can be accomplished within forty hours. The reclassification exploits regulatory language that defines the protected class of worker with reference to a malleable business form. The firm renames the relationship, but the substance remains the same. Again, the firm has created the conditions of its own defense by emphasizing a literal interpretation of legal text at the expense of a purposeful one.

Although loopholes arise in any legal setting, perhaps they are most notorious in the area of tax. As a third illustrative case, consider the "gift-loan-back" strategy. Suppose that a businessperson plans to pay medical school tuition for her son at $20,000 per year over four years. Understandably, the tax code does not permit the businessperson to take a business deduction for gifts made to her children. Working with her lawyer, the businessperson concocts a legal strategy. She first takes $200,000 from her business and gives it to her son as a gift. Sometime later, the son loans the $200,000 back to his mother's business at ten percent annual interest over four years. Being in a relatively low tax bracket, the son pays a modest income tax on the interest income and uses the balance for tuition. The mother deducts the interest payments on the business loan for each of the four years of his schooling. A few years after graduation, the grateful son extinguishes the promissory note, effectively returning the principal to his mother.

This gift-loan-back arrangement illustrates a so-called "step transaction." Each individual step is beyond reproach, but taken collectively the steps achieve an outcome that is contrary to law. There is nothing wrong with giving gifts, making loans, paying interest, deducting the interest paid on business loans, or extinguishing promissory notes. But taken collectively, the combination of these literally correct actions seemingly enables the mother to claim a tax deduction for tuition paid. Yet, according to the spirit of the law, tuition payments are not supposed to be deductible as a business expense. The question is whether the courts will connect the dots and declare the tax deduction scheme a sham.

Because this particular plan is relatively simple and the connection between the mother and son is so transparent, a tax court might invalidate this transaction and make the mother pay back taxes. Step transactions, however, can be much more complex and multilayered. An imaginative lawyer intent on exploiting loopholes can often embed a transaction in a series of legal steps that obfuscate the applicability of legal rules, minimize the likelihood of detection, and provide a literal defense in the event that the overall scheme is challenged. These schemes can be cost effective for the firm. The question is whether there is anything wrong with such strategies, either in tax law or elsewhere.
2. Ethical Assessment

This discussion of ethical obligations with regard to legal loopholes begins with the proposition that business executives owe a general social responsibility \[^*515\] to obey the law. Most thoughtful commentators readily admit such a responsibility. \[^n93\] The devil, of course, is in the details. Given the imperfections in legal texts, including but not limited to legal loopholes, executives working with legal counsel first must identify applicable legal rules and then interpret these rules as they relate to the corporate action in question. Alternative constructions become possible. May the firm emit compound XY without a penalty? May the firm reclassify workers so as to avoid overtime pay? Does the tax code permit the entrepreneurial mother to deduct the interest paid to her son?

To resolve the uncertainty incumbent in the construction of legal obligation, the executive must choose between two distinct orientations. First, the executive can take the relatively aggressive perspective of the \textit{practical advocate}. This orientation directs attention to the likely consequences of the proposed action. The practical advocate asks: If the firm adopts a literal, self-serving interpretation of the law, what is likely to happen? Relevant to this inquiry are problems of proof, for example, whether the mother’s mens rea can be proven in the gift-loan-back transaction. \[^n94\] Also relevant are the political leanings of the judge (where does the judge in the compound XY case stand on environmental issues?) and the financial resources of the potential litigants (can an employee financially afford to pursue a claim for overtime pay?). \[^n95\] With reference to these and other practical factors, the firm’s lawyers predict the likelihood that the loophole-style argument will succeed in court. If the executive adopts the practical-advocate orientation, this prediction serves as the interpretation of law to which this firm owes allegiance. In essence, the firm does whatever it can get away with. \[^n96\]

\[^*516\] The alternative orientation to legal interpretation directs attention away from the practical advocate to the \textit{ideal judge}. Here, the executive and corporate counsel no longer seek to predict legal outcomes; rather, they ask what a good-faith interpretation of the legal rule would require in an ideal world without problems of proof, political bias, or unequal wealth. To answer this question, the executive together with counsel must adopt the perspective of an unbiased, well-informed judge. That judge would consider the arguments of the advocates and interpret legal rules with a good-faith application of formal legal-reasoning techniques, properly applied. \[^n97\]

To fix the difference between the practical advocate and the ideal judge, recall the compound XY case. The firm’s engineering department proposes to transform X and Y into XY. The regulation omits any mention of XY; so, is it legal? In interpreting the law, the practical advocate would try to defend a legal interpretation that would advance the economic interests of the firm. The advocate begins by noting that environmental regulations strike a compromise between the need for economic productivity and the need for a pristine water supply. \[^n98\] The advocate argues that the omission in this regulation indicates a realm where economic productivity concerns should prevail. In other words, if the regulation does not specifically mention the compound, then it is permitted. The advocate emphasizes that general public policies favor market decisions over legislative fiat and that maxims of construction provide that in regulatory matters one \[^*517\] should interpret ambiguities in law in favor of the accused. In short, an advocate advances an interpretation of this regulation that would permit XY. \[^n99\] Such a position would be well within the norms of reasonable advocacy. \[^n100\] The executive who adopts this advocacy view of the law and concludes that the emission of XY is cost effective would see the firm as ethically free to follow its economic interests and emit XY.

The ideal-judge orientation, by contrast, would not seek to advance a particular point of view. The ideal judge would listen to arguments advanced by both sides of the bar and weigh those arguments based on a balanced jurisprudential view. \[^n101\] An executive who adopted the ideal-judge orientation would not allow the firm to emit XY just because a practical advocate could defend the action. Rather, the executive would follow the dictates of the best, good-faith interpretation of that law. Because XY has the same effect on the environment as either X or Y standing alone and because XY became apparent only due to a change in technology, an ideal judge would almost certainly close the loophole and penalize deliberate attempts to exploit it. An executive who adopted the ideal-judge construction of law would voluntarily restrain the economic prerogatives of the firm and would not emit XY even if it were cost
effective to do so.

Comparing the practical-advocate view of law with that of the ideal judge, it would seem that, at least in business planning, the social obligation of a firm must run to the latter, rather than to the former. The practical-advocate interpretation of law is simply too permissive. It invites firms to exploit problems of proof, the political leanings of the judge, and limited prosecutorial resources. The advocacy view also invites the firm to interpret the law as anything that it can get away with. The ideal-judge view, by contrast, asks corporate executives to cooperate with the regulatory process and to exercise restraint in the face of economic advantage. The good-faith interpretation incumbent in the ideal-judge view requires firms to both comply with the letter of the law and to cooperate with its underlying purposes. In the context of planning, these requirements appear both reasonable and workable. Ultimately, this requires restraint in the face of legal loopholes.

C. Strategic Use of Loopholes During Litigation: The Relevance of the Adversarial System

Thus far the discussion has focused on the strategic use of loopholes during business planning. In planning, one might reasonably hold a business-person to the ideal-judge standard. The lodestar becomes a good-faith interpretation of the legal text with full deference to each step of formal legal reasoning. Of course, loopholes also become apparent once litigation commences. Litigation introduces an adversarial context and the ethics of advocacy. Comparing litigation with business planning, a more vigorous assertion of a loophole-style argument during litigation would seem acceptable.

Legal loopholes can arise throughout litigation, including pretrial discovery disputes, arguments in trial briefs over proposed jury instructions, and in appellate briefs that seek to transform law. In each context, a legal argument overemphasizing a literal interpretation of a legal text could be advanced. The question becomes, is there anything ethically wrong with playing the role of practical advocate and arguing in favor of a loophole during litigation, even when one believes that a good-faith, best interpretation of the law in question would reject that argument? The answer to this query resides in the ethics of the adversarial system.

The judicial system is unabashedly adversarial. The system provides for an attorney acting the part of zealous advocate on both sides of the issue at hand. The attorney is ethically remiss if he or she falters even slightly in the dogged pursuit of the client's interests. The system has been crafted to achieve a legitimate synthesis of views. All parties argue before an impartial judge and/or jury, putting forth evidence and challenging the evidence put forth by their adversaries. A record is kept and an appeal is possible. Ex parte communications with either judge or jury are strictly forbidden. Cumulatively, the system represents an ethical and civilized way to handle disputes and controversies. It provides a mechanism for defending the rights and interests of all parties and typically provides reasonably just results. Given the fairness of the process, zealous advocacy of self-interest appears entirely appropriate.

The ethics of the adversarial setting can be seen in the compound XY example. Suppose the firm emits compound XY, a trial ensues, and the judge asks each party to submit proposed jury instructions. The canons of legal ethics require the firm's lawyers to offer their client the best possible legal defense. In litigation, the adversaries play the role of practical advocate, not ideal judge. Adopting the practical-advocate orientation to legal interpretation, the firm argues in favor of the legal loophole, suggesting jury instructions that emphasize the letter of the regulation. Balance, of course, comes from the advocates on the other side who argue just as strenuously in favor of closing the loophole. These opposing parties emphasize that the loophole derives from an unforeseeable change in technology that should not be exploited by the firm. They also argue that the overarching purpose of the mining regulation is to protect the water supply and that to achieve this purpose the judge should close the loophole. The judge considers both views and selects jury instructions that conform to the ideal-judge vision of law.

Although the adversarial system embraces the aggressive norms of practical advocacy, there are ethical limits to that advocacy, including prohibitions against bribery, perjury, fraud, and the falsification of evidence. Each of these rules, in turn, can have loopholes and ambiguities. To illustrate, suppose that the step transaction in the gift-loan-back
example is challenged in court. At issue is whether the various steps were part of a common plan or scheme. If they were, then the inoculating steps collapse and both back taxes and a fine are owed. Tax officials propound interrogatories to both the mother and son regarding discussions prior to the initial gift, and they subpoena personal correspondence between the two. The mother's lawyers must interpret the discovery requests. Perhaps the mother could assert a constitutional right against self-incrimination with regard to some of these requests. She might also be able to justify literal interpretations of interrogatories so as to limit her duty to respond. Either of these arguments would be well within the norms of reasonable advocacy. Outright falsification of documents or perjury, of course, would be beyond the pale.

In sum, given the relatively aggressive ethics of the adversarial process, arguing in favor of strained interpretations of law appears much more permissible during litigation than during business planning. In an adversarial system, it is for the judge to distinguish between which loophole-motivated scheme to permit and which to denounce. Of course, the ethics of advocacy can be pushed too far. Interpretations of law must not be advanced through bribery, concealment of evidence, or deliberate falsehoods that undermine the judicial process. Even if these activities are cost effective, the executive must exercise self-restraint.

D. Creating Loopholes Through Lobbying

I close this discussion of legal strategy with an inquiry into the lobbying process, asking whether there is anything ethically wrong with a corporate strategy to implement changes in the law so as to further the firm's economic objectives, narrowly defined. The discussion begins with a brief overview of the lobbying process and then turns to the question of ethics. The analysis once again highlights the relevance of the adversarial process and the need for self-restraint in the face of economic advantage. We begin with the overview.

1. Lobbying: An Overview

Lobbying can be defined as a deliberate attempt to effect or to resist changes in the law through direct communication with public policy makers including legislators, legislative staff, and executive branch officials. Policy makers often rely on the expertise and knowledge of lobbyists to guide legal reforms. Lobbyists can supply data that inform legal change and can explain complicated and technical matters in language that the policy maker can both understand and use. In a society where representation is based on geographical boundaries rather than on technological expertise, the lobbyist can play a useful, if not essential, role.

Notwithstanding the virtues of proper lobbying, today the term "lobbyist" is often taken as a pejorative. In a recent poll, only twenty-one percent of respondents said they trusted government "to do the right thing most or all of the time," with about half lamenting that the federal government was "controlled by lobbyists and special interests." The respondents expressed concern not just with unsavory tactics employed by paid lobbyists in Washington, but more fundamentally with the ability of the well-heeled to direct the content of law to suit private interests rather than the common good. Lobbyists themselves have also expressed disquiet. In one recent study, fifty practicing lobbyists reflected on the ethical challenges posed by the strategic use of lobbying. Most expressed deep concerns about the corrupting influence of money and the unequal access that money buys in our political system.

Although it is difficult to get an exact count, there certainly are many lobbyists in both Washington, D.C. and state capitals around the country. Some of the most visible lobbyists work for high-powered law firms, which employ senior partners with marquee names who represent multiple clients, each for a fee. More commonly, however, lobbyists are employed in-house, working on salary for a single client. Most of the nation's largest business corporations and labor unions maintain permanent public relations offices complete with in-house lobbyists.

Today, sophisticated lobbying typically occurs within the context of a public relations team. In the parlance of the public relations industry, the lobbyist is the contact person responsible for cultivating and maintaining personal relationships of trust with policy makers. Other team members include a public relations strategist who
coordinates team activities, a media person who manages advertising efforts, a grassroots organizer responsible for fundraising and mass mailings, and a legislative lawyer who analyzes and drafts proposed legislation. Overall, the team seeks to insert changes into the law and to resist changes proposed by others.

A properly coordinated public relations team can be quite effective for a number of reasons. First, the contact person is often chosen because of his or her close professional ties to the relevant policy maker. These ties help assure that the firm's views will get a full airing. One study shows that more than half of all top committee aides leaving Congress become engaged as lobbyists. Second, both the media person and the grassroots organizer can often show the policy maker that there is political support for the firm's point of view. Policy makers who see political gain in supporting a legal change are more likely to act than those that do not. Finally, the firm's legislative lawyer often drafts the proposed regulation. This provides the firm with a strategic opportunity to draft language favorable to the firm, including the intentional insertion of legal loopholes.

As a form of political speech, lobbying enjoys First Amendment protections; hence, it is constitutionally difficult to regulate lobbying. At least two regulations, however, have been permitted. The Lobbying Disclosure Act of 1995 requires paid lobbyists to publicly register and to disclose their lobbying activities. The statute seeks to reduce corruption and the perception of corruption by shedding light on lobbying activities. The Ethics Reform Act of 1989 (ERA) addresses the so-called revolving door between government service and lobbying, requiring a cooling-off period during which former government employees are prohibited from certain lobbying contacts. Lobbying one's former colleagues accentuates the perception that Washington is an insider's game from which ordinary citizens are excluded. The practice also suggests influence peddling. Government officials who know that they may soon leave government have an economic incentive to give favors to potential employers. The ERA seeks to mitigate this conflict of interest so as to improve the integrity of the regulatory process.

Notwithstanding disclosure requirements and postgovernment employment restrictions, lobbyists enjoy wide latitude in determining who, what, where, when, and how to lobby. This freedom corresponds with and reflects the societal value placed on politically motivated speech. Whether one characterizes lobbying as a free speech right, as a right to petition government, or as an amalgam of the two, it is clear that lobbyists must be given broad access to policy makers. The question for present purposes is whether there is anything ethically wrong with a strategy that takes advantage of these political prerogatives to tailor the law to suit private needs.

2. Ethical Assessment of Strategic Lobbying

In assessing the ethical dimensions of lobbying, I begin with the general proposition that in most business contexts an aggressive pursuit of self-interest is a good thing, not a bad thing. In the marketplace, private interest channeled through a framework of vigorous competition tends to reduce prices and to improve quality. As such, public policy typically embraces competition, encouraging buyers to buy low and sellers to sell dear. The question, however, is whether there is anything unique about the act of lobbying that suggests that the pursuit of private gain is somehow inappropriate. In other words, is lobbying an arena in which each firm is free to compete vigorously to shape the law for private gain, or does the act of lobbying require a degree of self-restraint?

Reflecting on the nature of lobbying, there does seem to be something of ethical significance afoot. In particular, note that successful lobbying implicates the use of force. In the marketplace, when a firm offers wares for sale, its trading partner is free to accept or to decline. With lobbying, however, there is no choice. If one disobeys changes in the law, then ultimately the police may arrive armed with both revolver and cuffs. Lobbyists seek to change the law; hence, they appeal to force, not to choice. Moreover, in a free society, forcing others to do something or to refrain from doing something requires moral justification. The pursuit of material self-interest seems unlikely to suffice. To justify the use of force against another, one needs a higher principle than one's own self-interest.

To illustrate the ethics of lobbying, suppose a legislative body is considering modifying the licensing requirements for morticians. The morticians, represented by a trade association, find that they are the only ones lobbying the
government. The press and the public have no interest, and legislative staff members have relatively little information or expertise. Given this setting, the morticians enjoy a strategic opportunity to modify the licensing requirements so as to restrict entry to the profession and to generate monopoly profits for existing members. In other words, it is in the economic interest of the trade association to set standards at a higher level than would be dictated with reference solely to health and safety.

Ideally, changes in regulatory law, including licensing requirements, are justified by the public interest. Sometimes the public interest is identified by government experts who skillfully craft laws with the public policy goals in mind. More commonly, the parties themselves participate, providing information, data, and rhetorical argument. When all parties are heard, lobbying approximates an adversarial setting with the various lobbyists playing the roles of competing advocates and the government officials playing the role of judges. Although a definitive view of the public interest may prove illusive and ill defined, so long as all voices are heard and everyone acts in good faith, reasonable reforms can be advanced and strategic lobbying can be justified.

Of course, the problem with lobbying is that in some settings not all voices will be heard. Given the economic logic of collective action, relatively small groups with concentrated interests find it easier to organize than do relatively large groups with diffuse interests. This economic logic suggests that some perspectives will be given greater venting than others. In fact, in some settings, some voices may not be heard at all. This gives firms with acute interests a strategic opportunity to shape the law for their own private gain, with little or no reference to the common good.

Returning to the mortician example, the question is whether there is any ethical reason for the morticians to exercise self-restraint. The answer, of course, is "yes." Notwithstanding economic incentives to the contrary, justification for lobbying has only one of two sources--either a good-faith belief in substantive justice incumbent in the legal change itself or the legitimacy conferred by the democratic process. Substantively, using the law to generate monopoly profits seems hard to defend. Freedom of occupational choice is a public good, and restrictions on that freedom can be justified only with reference to another public good such as public health, not with reference to monopoly profits of the vested interests. Procedurally, the lobbying process in the mortician example seems tainted as well. Effective democracy requires active participation. In this example, only the trade association is providing input to legislators. Hence, because this sort of lobbying is suspect both substantively and procedurally, it would seem that the morticians must exercise a modicum of self-restraint.

How then is the responsible business executive to lobby ethically? Ultimately, the answer depends on context. So long as all stakeholders are represented in the lobbying process, then a vigorous advocacy of self-interest may be completely justified and there would seem to be no need to promote the public interest directly. A firm lobbying in an effectively adversarial system similar to a court of law would seem free to zealously seek its own economic interests. In situations of advantage, however, the firm must exercise self-restraint. This becomes particularly true when there are no voices providing information to counterbalance the view offered by the firm. In such settings, the strategic use of lobbying to advance the firm's narrow objectives is likely to be ethically indefensible.

E. Summary

Part III of this article explores strategic opportunities posed by legal loopholes. It asks whether there is anything ethically wrong with an economic decision to assert a literal interpretation of a legal text at the expense of a more balanced interpretation dictated by a good-faith application of legal reasoning techniques. Part III suggests that the answer depends on context. In the context of planning, the general societal obligation to obey law typically means abiding by a good-faith interpretation of a text, not a self-serving literal interpretation. In the context of litigation, by contrast, a more self-serving interpretation becomes both expected and permitted. A similar dichotomy appears with regard to strategic lobbying. So long as all voices are heard in the public policy process, then self-serving advocacy seems perfectly acceptable. In situations of advantage, however, the firm must exercise self-restraint.

IV. CONCLUSION
This article emphasizes the tension between economic and ethical motivations in the formulation of corporate legal strategies. The discussion begins with underenforced laws, turns to loopholes, and closes with lobbying. In each arena, aggressive uses of legal strategies often prove cost effective and the question becomes how aggressively to push the envelope of advantage. Ultimately, the strategic decision must be answered by the firm's executives. Although executives owe fiduciary duties to stockholders and stockholders typically want to maximize the firm's economic returns, stockholders cannot authorize executives to act in unethical ways. Both stockholders and executives have general ethical obligations to obey reasonably just laws, and this often means abiding by laws that are not effectively enforced, living up to ideal interpretations of the law even when self-serving interpretations are available, and exercising self-restraint in lobbying activities.

[*529] The primary contributions of this article reside in the definitions offered and in the articulation of questions not commonly asked. Much of the analysis turns on the assumption that law has a definitive interpretation that is neither dependent on a prediction of what will happen in a court of law nor distracted by the various strained interpretations of law that an advocate might offer. Once one assumes that a definitively correct interpretation of law can be found, then the twin notions of underenforced laws and legal loopholes come into relief. A law is said to be underenforced when, given the firm's legal strategy, it becomes cost effective to violate that law. A legal loophole refers to a linguistic imperfection in a legal text whereby a literal interpretation of that text does not conform to the definitive interpretation. These definitions prompt further discussion. When firms exploit imperfections in the law for competitive advantage, should we blame those who wrote the law or those who engaged in the opportunistic behavior? In particular, is there anything ethically wrong with exploiting underenforced laws and legal loopholes? The present analysis offers a nuanced response, suggesting that aggressive legal strategies are often defensible in adversarial settings, but in business planning, lobbying, and other nonadversarial settings ethical self-restraint is typically required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewCriminal Law & ProcedureSentencingExcessive FinesTortsBusinessTorts General Overview

FOOTNOTES:

n1 The prevalence of legal concerns in business planning reflects both the litigious nature of American society and the proliferation of business regulations. See GEORGE J. SEIDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 136 (2002) (“In a world where law touches every aspect of business operations and decision making, you need high-quality legal resources to seize competitive advantage.”); Antonia Handler Chayes, et al., MANAGING OUR LAWYERS, HARV. BUS. REV. Jan.-Feb 1983, at 84, 84 (“The complexity of government regulation has catapulted attorneys into daily business operations [and the] rise in consumer, shareholder, employee, and competitor litigation has forced prudent managers to include legal advice as an essential element of business planning and decision making.”).

n3 See infra notes 108-29 and accompanying text (discussing some ethical dimensions of lobbying).


n5 See infra notes 57-59 and accompanying text.

n6 See SEIDEL, supra note 1, at 6-11 (discussing the strategic business considerations that affect the decision to litigate rather than settle a legal dispute). See also infra notes 59-64 and accompanying text.

n7 The social responsibilities of corporate executives and the professional responsibilities of corporate counsel intertwine. Although a lawyer must be a zealous advocate for the client, a lawyer cannot authorize the client to engage in unethical conduct and the ultimate responsibility for legal strategy rests with the client. Interestingly, the Model Rules of Professional Conduct does not have a specific rule calling for "zealous" advocacy; however, the word zealous appears three places within the preamble to the rules. MODEL RULES OF PROF'L CONDUCT, Preamble paras. 2, 8 & 9 (2007), available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. The first two references condition the duty of zealousness on the effective working of the adversarial system; the third indicates that the duty to be zealous pertains only to legitimate client interests. See infra notes 64-67 and accompanying text (discussing the interaction between corporate executives and corporate counsel).

n8 See Lynn M. LoPucki & Walter O. Weyrauch, A Theory of Legal Strategy, 49 DUKE L.J. 1405, 1407-08 (2000) (describing the formal vision of law and labeling it the "conventional view").

n9 Id. at 1407 ("In the strict, formalist version of the conventional view, the law consists principally of rules in which the outcomes of the cases are already implicit.").

n10 Id. at 1408 n.4 (noting that "[n]early all academics subscribe to one or the other version of the conventional view").
n11 By equating law with a good-faith interpretation of formal legal rules, the analysis avoids the terminological muddle that could be created by equating law with a "prediction" of court actions. The present article focuses on underenforced law, and in some definitions of law associated with certain strands of legal realism, underenforced law is not law at all. See generally Daniel T. Ostash, Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory, 38 AM. BUS. L.J. 261, 264-77 (2001) (discussing the "prediction" theory of law and contrasting it with the formal view). Adopting the formal vision of law is not meant to disparage the useful insights offered by legal realism, but rather to add clarity to the current discussion.


n13 Id.

n14 Id.


n17 Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a(b) (2009) (setting forth detailed employment verification system). "It is unlawful for a person or other entity to hire ... an alien knowing the alien is an unauthorized alien." Id. § 1324a(a)(1)(A).


n22 Addressing the relationship between legal obedience and corporate responsibility, Williams writes:

   If we cannot expect corporations to comply with the minimum standards of responsible behavior set forth in positive law when violations would be profitable, nor expect them to orient their law compliance programs towards the substantive standards of the law notwithstanding penalties that are low or even trivial, then more refined discussions of corporate responsibility seem relatively pointless.

   *Id.* at 1276.

n23 *Id.* at 1278 n.43 (citing M. B. E. Smith, *Is There a Prima Facie Duty to Obey the Law?*, 82 YALE L.J. 950, 951 (1973), for the proposition that a person has a prima facie obligation to obey law, which can only be overridden by a moral reason not to obey that is at least as strong).


n25 *Id.*

n27  *Id.* at 1177 n.57.


n29  *See id.* at 1547.

n30  *See id.* at 1586. The substance of the law is one among seven factors that Pepper identifies as relevant. Other factors include whether the client is likely to act on the information and whether the information is widely available from other sources. *Id.*

n31  *Id.* at 1576-77 (listing seven factors useful in assessing the moral gravity of a given law).

n32  *Id.* at 1578.

n33  *Id.* at 1562.

n34  *Id*

n35  *Id.* at 1576-77.
n36  Id. But see David Luban, The Lysistratation Prerogative: A Response to Stephen Pepper, 1986 Au. B. FOUND. RES. J. 637, 647 (suggesting that advising a client on how to violate an environmental mandate is no different than explaining how to commit murder without detection).

n37  See Easterbrook & Fischel, supra note 26, at 1168 n.36.

n38  See Williams, supra note 21, at 1317-24 (discussing Judge Ginsburg's jurisprudence).


n40  See Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984) (arguing that legal rules that regulate productive activities that generate social costs, such as pollution emissions from industrial facilities, should be viewed as prices, while most other types of regulations constitute prohibitions).

n41  The "efficient breach" concept of contract law constitutes a normative proposition. According to that concept "one party should breach a contract and pay damages if that party finds another economic opportunity so profitable that she will still profit after breaching, paying damages to the first promisee, and entering into a contract with the second promisee." Williams, supra note 21, at 1267 n.3 (emphasis added).

n42  See Stuart P. Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1574-76 (1997) (noting that, in a regulatory context, it becomes difficult to distinguish between matters that are malum in se and those that are malum prohibitum and arguing that there are relatively few "morally neutral" laws).

n44 See William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 Vand. L. Rev. 1343 (1999) (arguing that a strategic use of compliance programs can shift liability to the firm’s subordinates and shield both the firm and upper executives from liability). Laufer writes: “Firms have been extraordinarily successful in shifting both the locus of liability risk and the enforcement function down the corporate hierarchy ... Crimes once imputed to the firm remain with 'wayward' agents.” Id. at 1350. He continues: “Many corporations simply purchase only the amount of compliance necessary to effectively shift liability away from the firm. After risk of liability and loss is transferred, the firm’s incentive to maintain high levels of care decreases.” Id. The suggestion is that compliance is driven by economics, not by ethics, and it appears to be a rather crass economic calculation at that.

n45 See Donald C. Langevoort, Monitoring: The Behavior Economics of Corporate Compliance with Law, 2002 Colum. Bus. L. Rev. 71 (providing citation to “compliance culture” literature).

n46 Id. at 104.

n47 Id. at 72.

n48 Id. at 81-82.


n51 See id. at 107-08 (discussing the strategic use of the sentencing guidelines to render legal breach efficient).
n52 Williams, supra note 21, at 1279-80 (parenthetical omitted).

n53 See Spalding & Morrison, supra note 4, at 647-48 (discussing the legitimate business reasons underlying corporate retention policies).

n54 Detailed discussion of these cases is beyond the scope of this article. They are offered here to illustrate the proposition that the morality of concealment depends in part on what type of offense is being concealed. For an excellent discussion of the obstruction charges in the Andersen case, see Spalding & Morrison, supra note 4. For a useful summary of the Stewart case, see Christine Hurt, The Undercivilization of Corporate Law, 331 Con. L. 361, 417-22 (2008).

n55 The Andersen conviction for obstruction was appealed to the U.S. Supreme Court, which overturned the decision due to improper jury instructions. See United States v. Arthur Anderson, LLP, 374 F.3d 281 (5th Cir. 2004), rev’d, Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

n56 See Green, supra note 42, at 1578 (documenting a scholarly dispute with regard to the ethics of insider trading). See also Robert A. Prentice & Dain C. Donelson, Insider Trading as a Signaling Device, 47 AM. BUS. L.J. (forthcoming Feb. 2010) (critically evaluating arguments for and against blanket legalization of insider trading).

n57 See LoPucki & Weyrauch, supra note 8, at 1462.


n59 See, e.g., JONATHAN HARR, A CIVIL. ACTION (1995) (documenting the strategic use of expense and delay to frustrate plaintiffs' attempts to litigate a class action lawsuit for harms allegedly caused by the defendants' dumping toxic waste).
n60  See LoPucki & Weyrauch, supra note 8, at 1457-58 (discussing various ways that costs can escalate).

n61  See id.

n62  See id. at 1459-60 (discussing the strategic use of delay).

n63  Id. at 1460 (citation omitted). The lack of recognition seems more likely in the academic world rather than in the world of the practicing attorney.


n65  Id. cmt. 1 (emphasis added).


n68  See discussion supra note 7 and accompanying text.
n69 See JOHN RAWLS, A THEORY OF JUSTICE 334-37 & 350-62 (1971) (arguing that people have a "natural duty" to support just public institutions).

n70 Identifying an overarching ethical principle, or a set of principles, with which to guide corporate legal strategies in their various manifestations is beyond the scope of this and perhaps any single article. Rawls's notion of a natural duty to support reasonably just institutions provides one guide. See generally id. The principle of "integrity" offers another. See generally Peter A. French, Integrity, Intentions, and Corporations, 34 AM. BUS. L.J. 141 (1996) (discussing alternative conceptions of integrity as applied in a business context); Deborah L. Rhode, If Integrity is the Answer What is the Question?, 72 FORDHAM L. REV. 333,335-36 (2003) (defining integrity as the "willingness to adhere to values that reflect some reasoned deliberation, based on logical assessment of relevant evidence and competing views"). Other ethical frameworks, such as utilitarianism, egoism, and Kantianism, are available as well. The present article remains content to carefully define underenforced laws, to note that underenforced laws are more common than might be expected, to suggest guidelines in the face of certain underenforced laws, and to counsel corporate executives to engage in good-faith moral reflection before implementing corporate legal strategies aimed at exploiting underenforced laws. The topic, no doubt, deserves further discussion.

n71 See supra notes 8-11 and accompanying text.

n72 See generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) (providing a concise and classic introduction to the logic of case law reasoning, statutory construction, and constitutional interpretation).

n73 The assumption that there is a single best interpretation of legal texts conforms to a modern, as opposed to a postmodern, view of law. See GARY MINDA, POSTMODERN LEGAL MOVEMENTS 2-6 (distinguishing "modern" from "postmodern" jurisprudence). Minda equates legal modernism with the proposition that a "lone author could discover right answers for even the most difficult and controversial problems in the law." Id. at 5. In a postmodern world, no single interpretation is forthcoming because the phenomenon interpreted cannot be divorced from the observer.


n77 See LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW x-xi (1996) (arguing without citation that courts are ambivalent with regard to loopholes).

n78 The "substance-over-form" doctrine is only one of several doctrines that courts use to address argument based on overly literal interpretations of law, particularly tax law. See Martin J. McMahon, Jr., Random Thoughts on Applying judicial Doctrines to Interpret the Internal Revenue Code, 54 SMU L. REV. 195, 195 (2001). Related doctrines include the business purpose, sham transaction, and economic reality doctrines. Id.

n79 See KATZ, supra note 77, at x-xi.

n80 Punctuating the courts’ ambivalence regarding loophole-style arguments and the tax code, Professor McMahon quips that, in a battle between form and substance, "substance controls over form, except, of course, in those cases in which form controls." McMahon, supra note 78, at 195 (illustrating this ambivalence in various contexts and with numerous examples).


n82 Broad language offers its own problems. See generally Timothy Endicott, Law is Necessarily Vague, 7 LEGAL THEORY 379, 384 (Dec. 2001) (arguing that terms such as "reasonable" and "substantial" are inherently imprecise, rendering law "vague" and interpretation problematic, at least in "borderline" cases).

n83 Imprecise language suffers from the “sorites paradox” (from the Greek word soros, meaning heap) or “slippery slope fallacy.” If a pile of n + 1 grains of wheat is a "heap," then a pile of n grains is also a "heap." Following this logic, one grain standing alone is also a heap, but this is obviously false. Defining when the pile is no longer a heap remains unclear given the binary definition of the term. See generally James Cargile, The Sorites Paradox, 20 BRIT J. FOR PHIL. SCI. 193 (1969) (discussing the nature of vague language).
n84 Under the "economic substance" test, courts facing a loophole-style argument often ask if the actions were prompted with sole reference to the law or whether there was an economic motive beyond law. Actions without outside economic motive are more likely to be condemned. The test is problematic because regulatory law abounds with provisions that not only influence economic behavior, but that are intended to influence economic behavior. See Daniel J. Glassman, Note, "It's Not a Lie if You Believe It": Tax Shelters and the Economic Substance Doctrine, 58 FLA. L. REV. 665, 679-83 (2006) (discussing several inconsistencies and anomalies associated with the economic substance test).

n85 See supra notes 12-14 and accompanying text.

n86 See KATZ, supra note 77, at 4-5 ("The problem [of loopholes] has its natural habitat in tax law [and] the most celebrated tax cases are chiefly about this problem.").

n87 This hypothetical is adapted from a similar one offered by Professor Katz. Id. at 5-6 (discussing the case of the "generous shoemaker").

n88 In a step transaction, a party seeks to accomplish a goal indirectly that would be contrary to law if done directly. See McMahon, supra note 78, at 197-200 (using two classic cases to illustrate alternative and conflicting judicial reactions to step transactions).

n89 See generally Brion D. Graber, Comment, Can the Battle be Won? COMPAQ The Sham Transaction Doctrine, and a Critique of Proposals to Combat the Corporate Tax Shelter Dragon, 149 U. PA. L. REV. 355, 360-64 (2000) (discussing sham transactions). Addressing the malleability of the sham transactions doctrine, Graber notes that "a taxpayer can generally obtain a more-likely-than-not opinion for any corporate tax shelter transaction. As a result, corporate tax shelter [o]pinions are like pasties and G-strings. They attempt to obscure what is really going on but do not succeed." Id. at 390 (quoting Lee A. Sheppard, Shelter Opinions: The 'Tax Equivalent of Pasties, 87 TAX NOTES 17, 20 (2000)).

n90 Although the mother might be required to pay back taxes, the tax code would be unlikely to evoke a penalty in this situation unless there were no "realistic possibility" that the interpretation advanced by the mother would be upheld. See Treas. Reg. § 1.6694-2 (1991) (defining a realistic possibility as a "one-in-three-chance" that the argument will prevail in court).

(providing a primer on the history of tax schemes and the various means used to keep them in check).

n92 See generally Sheldon D. Pollack & Jay A. Soled, Tax Professionals Behaving Badly, 105 TAX NOTES 201 (2004) (illustrating the complexity incumbent in various improper tax shelters and attributing the proliferation of shelters to greed).

n93 For a collection of philosophical works addressing legal obedience, see THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS (William A. Edmundson ed., 1999).

n94 The mother's step transaction is more likely to be called a sham and the deduction disallowed if there is evidence that mother and son pre-planned the steps to achieve the forbidden purposes. If there is no evidence of a plan (no proof of mens rea), then the gift-loan-back transaction is more likely to succeed in court. See generally McMahon, supra note 78, at 197-200 (discussing step transactions).

n95 As stated previously, in an ideal world legal disputes would be decided with sole reference to the rule of law. Unfortunately, problems of proof (including the potential for perjury), the political bias of the judge, and the relative wealth of the parties too often play a role. See supra note 58 and accompanying text.

n96 Expressing the view of the practical advocate, Oliver Wendell Holmes, Jr. wrote: “The prophecies of courts will do in fact, and nothing more pretentious, are what I mean by law.” Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 461 (1897). Drawing on Holmes’ prediction theory, Professor Stephen Pepper describes a distinctively positive view of law that employs legal predictions as an instrument of private planning. Pepper argues that this vision of law as prediction is the “dominant American understanding of law” taught in law schools. See Pepper, supra note 28, at 1552.

n97 Of course, the notion of an “ideal judge” is politically laden. For an interesting description of an ideal judge, written by a member of the federal bench, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990). Judge Posner explains that judges should exercise “practical reason” to achieve “reasonable” answers to contentious legal questions. Id. at 73. Practical reason includes a “grab bag [of] anecdote, introspection, imagination, common sense . . . empathy, metaphor, analogy, precedent, custom, memory, experience, intuition and induction.” Id. The ideal judge should weigh competing arguments, giving preference to those that are forward looking, nondogmatic, and empirical. See id. at 4-7.

n98 If one wanted to be absolutely certain to protect the water supply from mining activities, one could simply ban mining altogether. The self-interested advocate adjusts the frame of reference, reminding the decision maker that mining is a good, not a bad, thing. See generally
n99 Statutory interpretation involves appeals to plain meaning, legislative intent, general public policies, prior interpretations, and maxims of construction. See LEVI, supra note 72 and accompanying text. The practical advocate casts each appeal in the light most favorable to the conclusion sought. In essence, the reasoning begins with the desired conclusion and then constructs justifications for that conclusion.

n100 Of course, not every interpretation is reasonable. Rules of professional conduct provide that an advocate "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) available at http://www.abanet.org/cpr/mrpc/rule_3_1.html. Arguing that compound XY is not prohibited by a regulation prohibiting compound X and compound Y may not be the best interpretation of the law, but it is not frivolous.

n101 See supra note 97 and accompanying text.

n102 This intuition derives, in part, from the fundamental reasons that firms obey law in the first place. Some scholars ground the duty to obey law to the norms of reciprocity. Reciprocal obligation derives from the benefit the firm receives from the voluntary legal obedience of others and from society itself. Other scholars link the duty of legal obedience to a hypothetical social contract that includes voluntary compliance with law. Still others see a fundamental duty to support reasonably just public institutions. Under each of the views, the duty to obey law must refer to a good-faith interpretation of what that law requires. See M. B. E. Smith, Is There a Prima Facie Duty to Obey the Law?, 82 YALE L.J. 950 (1973) (assessing each view).

n103 Addressing the allocation of responsibilities between lawyer and client, the Model Rules of Professional Conduct provide that a lawyer "may assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007), available at http://www.abanet.org/cpr/mrpc/rule_1_2.html.

n104 The distinction between business planning and litigation is also reflected in the preamble to the Model Rules of Professional Conduct. "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Id. at Preamble para. 2, available at http://www.abanet.org/cpr/mrpc/preamble.html. Rule 2.1 addresses the ethics of the lawyer as "advisor." It states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Id. at R. 2.1. available at http://www.abanet.org/cpr/mrpc/rule_2_1.html. This suggests that in business planning, the ethical obligation to interpret the law in a fair and balanced way may carry more weight than in a context of advocacy where the zealous pursuit of the client's interests may provide the norm.
n105 As noted previously, see supra note 7, the Module Rules of Professional Conduct do not contain a specific rule requiring zealously; however, the word "zealous" appears three times within the preamble, each in conjunction with the lawyer's role as advocate. Model Rules of Prof'l Conduct Preamble paras. 2 & 8-9 (2007).

n106 As a zealous advocate, a lawyer may advance the interpretation of law that is most favorable to his or her client even if the lawyer believes the interpretation will not prevail, provided that the attorney has a good-faith belief that success of the interpretation is a "realistic possibility." See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985) (reconsidering a prior opinion regarding a lawyer's advice on reporting on a tax return).


n109 See David L. Boren, A Recipe for the Reform of Congress, 21 Okla. City U. L. Rev. 1, 1 (1996). The poll was conducted by the Center of Political Studies at the University of Michigan. The key question was: "How much of the time do you think you can trust the government in Washington to do what is right--just about always, most of the time, or only some of the time." Id. at 1 n.1.

n110 Id.


n112 The comments were gathered through a series of interviews and focus group sessions and quotes were published verbatim with the
promise of anonymity. *Id.* at 1 (discussing the method used to collect the comments).

n113 The enactment of federal lobbying disclosure laws in 1995 has made it easier to count. By 1996, 15,000 lobbyists had registered under the new law. See BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS: HOW THE SYSTEM WORKS 7 (2d ed. 1996).

n114 *Id.* at 1-4.

n115 Most professional associations, such as the American Medical Association, and business associations, such as the Business Roundtable, hire lobbyists as well. In addition, many lobbyists work for so-called "public interest groups." Today, these groups span the political spectrum, with conservative groups having surpassed in membership and influence those associated with the political left. *Id.* at 2-4.

n116 See Michelle Grant, Note, Legislative Lawyers and the Model Rules, 14 GEO. J. LEGAL ETHICS 823, 823-24 (2001) (asserting that an effective legislative campaign requires the combined efforts of a professional, well-coordinated, and specialized team).

n117 See James M. Demarco, Note, Lobbying the Legislature in the Republic: Why Lobby Reform is Unimportant, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 599, 613 (1994) (noting that the term "contact person" is a term of art within the lobbying industry).

n118 See Grant, *supra* note 116, at 823-24 (identifying the roles on a public relations team as that of "strategist, lobbyist, legislative lawyer, grassroots organizer, and media person" and then focusing on the role of the legislative lawyer).


n120 See generally Demarco, *supra* note 117, at 614-15 (discussing the roles played by the grassroots organizers and media persons).
Although the Supreme Court has never directly stated that there is a constitutional right to lobby, established doctrines that protect business speech, both political and commercial, have much the same effect. See Andrew P Thomas, *Easing the Pressure on Pressure Groups: A Constitutional Right to Lobby*, 16 HARV. J. L. & PUB. POL’Y 149 (1993) (arguing that there is, or at least should be, a strong First Amendment right to lobby). Hence, the government finds itself constitutionally constrained in any attempt to regulate lobbying.


From a jurisprudential perspective, the notion of “public interest” could have either a moral or a secular base. In natural law jurisprudence, the public interest essentially equates to the “common good.” See generally Daniel P. Sulmasy, *Four Basic Notions of the Common Good*, 75 ST. JOHN’S L. REV. 303, 304-09 (2001) (outlining the essential features of alternative conceptions of the common good in moral reasoning). Natural law jurisprudence justifies business regulations with reference to morality. Ambiguous regulations are to be interpreted to promote moral outcomes and morally indefensible regulations must be reformed to promote the “common good.” See generally JEFFRIE G. MURPHY & JULES C. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 13-22 (1984) (providing a useful orientation to natural law reasoning). Secular references to the public interest typically refer to the social norms that generate laws or, alternatively, to policy goals that explain the law’s underlying purposes. See generally STEPHEN BREYER, REGULATION AND ITS REFORM 1-11 (1982) (equating the public interest with democratically determined policy goals). In this light, lobbying efforts that seek to promote morality, to support extant social norms, or to achieve democratically determined policy goals can all be defended as legitimate attempts to pursue the public interest.


The idea that competition between private interest groups can lead to good results reflects the “Pluralist Theory” of regulation prominent in the 1950s. See Croley, *supra* note 125, at 31-32 (describing the theory). Croley notes that under the Pluralist Theory “interest groups do not seek to promote public or general interests, [rather] groups struggle--with other competing groups organized to pursue different interests--for policy outcomes that benefit them most.” Id. at 32. He continues: “Policy outcomes that advantaged no specific interest group in particular, but rather reflected an equilibrium among all interests, were considered desirable.” Id.
n127 Beginning in the 1960s, political scientists developed the theory of Public Choice explaining how the logic of collective action leads to the systematic overrepresentation of some interests groups in favor of others. Lobbying has costs and these costs will be worthwhile only to an individual or group if the benefits of lobbying are direct and substantial to that individual or group. According to the theory of Public Choice, this economic logic results in a set of regulations that systematically favors the politically well organized with narrow interests at the cost of the common good. Seminal works of Public Choice Theory include MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) and JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962). See generally Croley, supra note 125, at 34-40 (providing citations to the Public Choice literature). Croley notes that Public Theory arose as an alternative to Pluralist Theory, exposing the latter as overly optimistic and somewhat "naïve." Id. at 33.

n128 Economists offer a particularly cynical view of lobbying under the so-called "Capture Theory" of regulation. The seminal work in this area is George J. Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Pursuant to economic reasoning, firms use lobbying to secure private advantage, most notably through the erection of barriers to entry that generate monopoly profits. See Richard A. Posner, The Social Costs of Monopoly and Regulation, 83 J. POL. ECON. 807 (1975) (explaining how regulations can create barriers to entry and generate anticompetitive returns). See also Richard A. Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI. 335, 344 (1974) (explaining how lobbying advantages can result in a set of regulations—rate controls, licensing requirements, product standards—that mimic those created by economic cartels). Of course, the Capture Theory offers a positive description of how lobbying operates under economic assumptions of self-interest, not a normative description of how it ought to operate.