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I. INTRODUCTION

This Article examines ethical issues posed by imperfections in legal texts. More particularly, it addresses "legal loopholes," carefully defining the term and then exploring whether there is anything wrong with exploiting loopholes for private gain. Focusing on corporate settings, the analysis considers both the obligation of a business leader to support reasonably just social institutions and the professional obligation of corporate counsel advising on such issues.

Although the notion of a legal loophole enjoys widespread colloquial use, the term is typically used quite loosely and without critical reflection. Perhaps in an adversarial system, one becomes accustomed to taking full advantage of any and all effective legal recourse, including but not limited to the exploitation of loopholes. Loopholes often generate arguments over interpretation. This Article addresses the ethics of legal interpretation head on. It examines the scope of the social obligation to abide by a good faith interpretation of a legal text, rather than to exploit inevitable imperfections in those texts to advance private interests.

The analysis proceeds in three parts followed by a conclusion. Part II portrays a loophole as a style of argument that pits a literal inter-

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pretation of a text against a more purposeful one. Because literal interpretations sometimes prevail, loopholes have economic value. Part III examines the ethics of a corporate legal strategy to construct strained interpretations of the law as guides to corporate conduct. The discussion embraces both the libertarian insights of Milton Friedman and the democratic liberalism of John Rawls, drawing useful ideas from each. Part IV considers the role of corporate counsel, concluding that in an adversarial setting, corporate counsel must argue for the legal interpretation that best suits the corporation's needs. In a transactional setting, by contrast, where advising rather than advocacy is the norm, ethics require a more balanced interpretation. The Article concludes with a brief summary.

II. LEGAL LOOPHOLES

The etymology of the term "loophole" traces to the arrow slits cut in medieval castle walls.[1] The loophole provided a crack or perforation that permitted the archer to peer through and fire his weapon.[2] In legal contexts, a loophole has come to mean an imperfection—such as an ambiguity, conflict, or gap—in a legal rule, or set of rules, that seemingly permits one to live by the letter of the rule while evading the rule's underlying purpose or intent. Sometimes loopholes are intentional, such as when a Congress purposefully exempts a favored industry from general tax legislation. More commonly, loopholes are unintended and derive from imprecision in the language of a statute, regulation, or other legal text.[3]

Linguistic imperfections are of two types.[4] Some texts are too narrowly drawn. One envisions the proverbial Philadelphia lawyer using

1. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 798 (3rd ed. 1997).

2. *Id.*

3. The present Article focuses on interpretive issues and addresses loopholes that derive from imprecise language. The intentional insertion of special exemptions into general legislation raises important questions of political legitimacy and the appropriate use of corporate power to advance or to resist changes in the law. Such issues, however, are beyond the scope of this Article.

4. The present discussion draws from and parallels the familiar jurisprudential distinction between rules and standards. Rules are narrowly drawn, under inclusive, and omit specifics that should not be omitted. Standards are broadly drawn, overly inclusive, and capture specifics that should be outside the system. The interpretive issues associated with the topic have produced a deep scholarly literature. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–64 (1987) (articulating the distinction between rules and standards and arguing that potentially irreconcilable interpretive issues are endemic to law); Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 530–31 (1999) (critiquing formalism as "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve" and arguing that law is essentially formalistic while morality is not); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414–16 (1985) (defining "easy cases" as the residual of "hard cases" that arise when a legal text is vague, ambiguous, or opaque, or when straightforward interpretation leaves one "morally uncomfortable").

a sharp pencil to find gaps in a tax regulation. If events A, B, and C are taxed, then the lawyer finds a way to achieve the benefits of A, B, and C while labeling it D and avoiding the tax. Other texts seem overly broad and ambiguous. With ambiguous texts, the lawyer pierces the castle wall, not through a crack, but through a cloudy or hazy use of language. A workplace discrimination regulation requires X, but X has a multitude of defensible interpretations, and the lawyer serving as advocate chooses the one that best suits the client's needs.

Legal loopholes, whether derived from narrow or broad language, pit a literal interpretation of a legal text against a more purposeful one. In both cases above, the regulators will likely claim foul. They will encourage the judge to look through form to substance, to close the loophole, and to enforce the underlying purpose of the regulation. The lawyers for the regulated parties, by contrast, will insist that their clients have done nothing wrong. They have simply followed the letter of the law. If the law is poorly drafted, then surely the clients are not to blame.

In deciding loophole cases, judges have significant discretion. In tax law, for example, where loophole-style arguments seem to abound, judges have access to a panoply of relevant interpretive doctrines.[5] These include: (1) substance over form; (2) business purpose doctrine; (3) sham transaction; and (4) economic reality test.[6] Each of these interpretative doctrines addresses the loophole problem. Not surprisingly, the tax arena has generated a significant body of jurisprudence directing courts how to resolve disputes between the letter and the spirit of the law. Notwithstanding this jurisprudence, predicting the outcome of individual cases can be quite problematic. As one commentator quipped: "Substance controls form, except in those cases in which form controls."[7]

Interpretive disputes about letter and spirit are not unique to tax law.[8] General principles of statutory construction begin with a literal reading of a statute and then direct the courts to fill gaps and to re-

5. *See* Christopher H. Hanna, *Introduction*, 54 SMU L. REV. 3, 4 (2001) (introducing a symposium issue addressing judicial reactions to tax shelters and similar tax avoidance schemes).

6. *See* Symposium, *Business Purpose, Economic Substance, and Corporate Tax Shelters*, 54 SMU L. REV. 3 (2001) (publishing various discussions of these interpretative doctrines); Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47 (2001) (suggesting disclosure as a means of discouraging overly aggressive tax shelters); Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. REV. 131 (2001) (noting that doctrines such as the economic substance test mediate between a desire for tax law to be both principled and rule bound).

7. Martin J. McMahon, Jr., *Random Thoughts on Applying Judicial Doctrines to Interpret the Internal Revenue Code*, 54 SMU L. REV. 195, 195 (2001).

8. *See* Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 SMU L. REV. 9, 11 (2001) (extrapolating interpretation doctrines beyond tax to a broader jurisprudence of rulemaking generally).

solve ambiguities with reference to legislative purpose, prior interpretations, and general maxims of construction.[9] Supplementing these principles, the "plain-meaning rule" purports to bar courts from relying on legislative history when the literal language of the statute is clear.[10] Yet as one scholar noted, the rule "may have been honored more in the breach than in the observance."[11] Precedents abound where courts use the plain-meaning rule to truncate the interpretive process, yet in many other cases, seemingly plain language gives way to a more purposeful interpretation.[12]

Due to the uncertain judicial reaction to loophole-style arguments, a party may find it cost effective to live up to a literal, and potentially strained, interpretation of a law rather than to cooperate with the law's underlying public purpose. If challenged, that party may find that an appeal to a legal loophole succeeds directly. At a minimum, the uncertain judicial response will aid in settlement negotiations over damages and in plea bargaining over fines. Given economic incentives, it may be tempting for parties to seek out and use loopholes for private gain. This may be particularly true in corporate settings, where the profit motive predominates.

The question, of course, is whether there is anything wrong with adopting a self-serving interpretation of one's legal obligations. The following sections address this question with reference to a corporate setting. The inquiry begins with the role of a corporate executive in setting the firm's legal strategies. It then turns to the role of corporate counsel.

III. ROLE OF THE CORPORATE EXECUTIVE

In the last decade, the topic of corporate legal strategy has gained increased attention and importance in the business literature.[13] Broadly speaking, a legal strategy involves a decision or set of deci-

9. *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) (providing a useful introduction to the methods of statutory construction and case law reasoning).

10. *See* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 39 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf.

11. *Id.*

12. *Id.* at 39 n.227 (citing illustrative cases).

13. Evidencing this trend, the *American Business Law Journal* recently published a special issue on the topic. *See* Special Issue, *Law as a Source of Strategic Advantage*, 47 AM. BUS. L.J. 575 (2010); *see also* Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L.J. 575 (2010) (reviewing the contents of the special issue); Daniel R. Cahoy, *Editor's Corner: Assembling a Special Issue on Law as a Source of Strategic Advantage*, 47 AM. BUS. L.J. v, v (2010) (explaining that the editorial board "viewed law and strategy as a topic that, while nascent, appeared to be gaining scholarly notoriety and is now ripe for a detailed treatment").

sions taken in response to or anticipation of a legal claim.[14] Responsive strategies include whether to settle or litigate, how best to argue once litigation begins, and how to present one's case to the public.[15] In anticipatory settings, the strategist surveys the firm's legal assets and potential legal liabilities and formulates plans to best meet threats and to advance corporate goals. Anticipatory strategies include: (1) influencing public policy through lobbying;[16] (2) using the law to secure market power, particularly through intellectual property regimes;[17] and (3) anticipating and forestalling legal claims through the development of legal compliance programs.[18]

Management scholars tend to view the formation of corporate legal strategy as a means of generating a competitive advantage.[19] In deciding how best to respond to or anticipate a legal claim, the strategist must first decide how to construct or interpret various legal rules that affect the corporation. This includes the decision to exploit or to not exploit strained interpretations of the law. In corporate settings, the corporate executive makes these decisions, typically under the advice of corporate counsel.

A. *Fiduciary Responsibilities to the Shareholders*

Corporate executives owe a fiduciary duty of loyalty to shareholders.[20] Presumably, shareholders like wealth. Hence, executives are likely to approach the topic of corporate legal strategy with an economic orientation. Yet, the executive's economic goals must be tempered with due respect for the law and widely-shared ethical customs. As Milton Friedman famously stated, the appropriate role for a corporate executive is "to make as much money as possible while con-

14. *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405 (2000) (cataloging various legal strategies).

15. *See id.* at 1414–25 (using an illustrative case to explore various responsive strategies, including a "media campaign" intended to affect the trial court's future rulings).

16. *See* G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL (2004) (explaining how a proactive stance on legal reform generates a competitive advantage).

17. *See* Ross D. Petty, *The Strategic Use of Legal Margins: How to Introduce an Extension to Someone Else's Brand*, *in* LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE 317 (Antoine Masson & Mary J. Shariff eds., 2010) (offering a strategic approach to trademark issues).

18. *See generally* NAT'L CTR. FOR PREVENTIVE LAW, CORPORATE COMPLIANCE PRINCIPLES (1996) (providing a useful introduction to the issues associated with implementing a corporate compliance program).

19. *See generally* GEORGE J. SIEDEL, USING LAW FOR COMPETITIVE ADVANTAGE 71–72 (2002) (explaining how a "view from the balcony" with regard to legal opportunities and threats can improve corporate performance).

20. *See generally* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavior Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1780–95 (2001) (examining empirical evidence of trust in corporate fiduciary settings).

forming to the basic rules of society, both those embodied in law and those embodied in ethical custom."[21]

Friedman's formulation, though sometimes criticized,[22] continues to be cited as seminal.[23] It also proves useful in assessing the executive's competing responsibilities in setting the corporation's legal strategies. In particular, if an executive discovers that a strained interpretation of a legal text advances the economic interests of the shareholders, then perhaps the executive must adopt that interpretation. It would seem unlikely that asserting a self-serving interpretation of a law—for example, arguing for a literal construction of a statute without reference to legislative intent—would be illegal. Hence, the only meaningful restraint on the exploitation of legal loopholes, if there is one, would come from ethics.

The ethical, legal, and economic responsibilities of an executive, as identified by Friedman, form a hierarchy. In particular, economic motives must be tertiary to ethical and legal concerns. Note that when economics and law conflict, law must prevail. Shareholders never have legal authority, and seldom have moral authority, to empower an executive to violate the law. Though less appreciated, a similar reasoning informs the relation between economics and ethics. Just as shareholders have no legal authority to empower an executive to behave illegally, they similarly have no moral authority to authorize an executive to behave unethically.[24] Hence, even though an executive is a fiduciary for the shareholders, an executive's economic responsibilities are subordinate to legal and moral obligations.

One also finds a hierarchy between an executive's legal and ethical responsibilities. Most moral and political philosophers recognize an

21. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profit*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

22. *See, e.g.*, Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals for a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 272–74 (supporting a call for triple-bottom-line accounting where management seeks to directly serve "people, profit, and planet").

23. The impact of Friedman's piece can be attributed to his fame, the placement of the piece, and its rhetorical structure. Friedman was a Nobel Prize winning economist, a leading monetarist, an author of a widely read defense of libertarian political theory, and an oft-seen commentator in documentaries and various media. He published his essay in the *New York Times Magazine*, presumably to maximize its readership among business leaders. In addition, his title refers to the social responsibilities of "business," but the essay actually discusses the less controversial topic concerning the responsibilities of an executive as an agent of shareholders. *See* CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 74–121 (1975) (recounting the early debate and providing a balanced assessment of Friedman's views).

24. *See* Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q., 53, 68 (1991); Joseph S. Spoerl, *The Social Responsibility of Business*, 42 AM. J. JURISPRUDENCE 277, 278–79 (1997).

ethical obligation to obey the law.[25] According to these philosophers, one should not obey law simply because there is a penalty associated with its violation; but more fundamentally, one should accept an ethical obligation to obey regardless of punishment or reward. Thus, a law should be followed even if it can be efficiently breached. Yet, these same moral philosophers also allow for civil disobedience in the event that a law is demonstrably unjust.[26] This suggests that although legal and ethical obligations typically coincide, when they conflict, ethics appears more fundamental. In short, law trumps economics, and ethics trumps law.

B. *Ethical Duty to Support Reasonably Just Institutions*

At first blush, the notion that ethical concerns must control a corporate executive's decision, even at the expense of shareholder profit, might seem odd. It should not. The idea is incumbent in Milton Friedman's formula suggested some forty years ago. Perhaps the sense of oddity comes from the perception that individual ethics are too idiosyncratic and personal to be of much use as a guide to business conduct.[27] It is true that people sometimes differ on ethical questions. If a lie serves the common good, then a utilitarian will lie; a deontologist will not. Yet most times, ethical assessments converge. A lie that advances only the narrow interests of the liar is universally condemned. When ethics converge, the executive is morally required to follow the widely-shared ethical custom.

In his famous treatise, *A Theory of Justice*, philosopher John Rawls explores ethical custom within the contours of a perfectly just society.[28] Rawls begins by describing a society that embraces the fundamental principles of equal liberty and equal opportunity.[29] Using the imagery of a veil of ignorance,[30] he demonstrates that in such a world, people would agree to organize production and to distribute wealth so

25. This duty to obey the law alternatively has been grounded to the social contract theories of Hobbes and Locke, to the utilitarian calculus of Bentham and Mill, and to a "natural duty to support just institutions" associated with the writings of John Rawls. *See* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, *in* THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS 75, 77–93 (William A. Edmundson ed., 1999) (providing a critique of each justification). *But see* ROBERT PAUL WOLFF, *The Conflict Between Authority and Autonomy*, *in* DEFENSE OF ANARCHISM 3–19 (1998) (denying that there is a prima facie duty to obey law).

26. *See, e.g.*, John Rawls, *The Justification for Civil Disobedience*, *in* THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS 49 (William A. Edmundson ed., 1999); Richard A. Wasserstrom, *The Obligation to Obey the Law*, 10 UCLA L. REV. 780 (1963) (drawing an oft-cited distinction between an absolute and a prima facie duty to obey the law).

27. *See* Lynn Sharp Paine, *Law, Ethics, and Managerial Judgment*, 12 J. LEGAL STUD. EDUC. 153, 154–55 (1994) (suggesting that the perception of subjectivity in ethical reasoning is overblown).

28. JOHN RAWLS, A THEORY OF JUSTICE (1971).

29. *Id.* at 60–61.

30. *Id.* at 136–41.

as to make the least well off as wealthy as possible. Because wealth redistribution can harm incentives to work, and thus reduce total wealth, Rawls's theory of justice permits redistribution but only to the extent that such redistribution would not require the impoverishment of all.[31] Hence, justice recognizes a need for differences in the distribution of goods and services. Equality of opportunity and equality of liberty, by contrast, are axiomatic.

Although Rawls's treatise focuses primarily on the topics of political economy and political philosophy, it also addresses individual ethics. In Rawls's just society, every citizen embraces a duty of civility.[32] Civility, in turn, requires the support of reasonably just social institutions, including the administration of justice.[33] As a corollary, Rawls addresses legal loopholes. He writes:

> [We] have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, not to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them.[34]

Hence, for Rawls, the corporate executive remains free to advance shareholder interests, but the executive must support the institutions of pubic justice, not erode them. This would seem to include due deference to the social policies that inform specific business regulations and cooperation with the formulation and implementation of the regulatory environment generally.[35]

IV. Role of Corporate Counsel

In setting the corporation's legal strategies, corporate executives need to communicate effectively with corporate counsel.[36] Typically, corporate counsel works in-house[37] with head counsel reporting directly to the chief executive officer and potentially to the board of directors.[38] At times, outside counsel may be retained to assist in litigation, to advise on such matters as establishing corporate compliance

31. *Id.* at 61.
32. *Id.* at 355.
33. *Id.*
34. *Id.*
35. *See* Lee E. Preston & James E. Post, Private Management and Public Policy 100 (1975) (identifying cooperation with the public policy process as the *sin qua non* of socially responsible corporate behavior).
36. *See* Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 Acad. Mgt. Rev. 378, 378 (2008).
37. The topic of in-house counsel has developed its own literature. *See, e.g.*, Symposium, *The Role of the General Counsel*, 46 Emory L.J. 1005 (1997) (providing a set of articles that discuss various managerial, ethical, and legal issues associated with in-house counsel).
38. *See* Abram Chayes & Antonia Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 277 (1985) ("The general counsel sits close to the top of the corporate hierarchy as a member of senior management.").

programs, or to conduct an internal audit. In all such capacities, corporate counselors serve as agents of the corporation and owe fiduciary duties of fidelity to their client.[39]

As professionals, corporate counselors are subject to a code of ethics, articulated most directly in the American Bar Association's *Model Rules of Professional Conduct* ("Model Rules").[40] The Preamble outlines the various roles played by lawyers. It begins: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[41] It continues:

> As a representative of clients, a lawyer performs various functions. As *advisor*, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As *advocate*, a lawyer zealously asserts the client's position under the rules of the adversary system.[42]

Drawing from the above, the following sections examine how the distinct roles of "advocate" and "advisor" may affect how corporate lawyers interpret their ethical responsibilities with regard to legal interpretation. One suspects that the norms of the adversarial system may lead to a more aggressive stance. The discussion begins with the ethics of advocacy.

A. *Corporate Counsel as Advocate*

The American legal system is unabashedly adversarial. The system envisions zealous advocates on both sides of the bar. These advocates are ethically remiss if they fail even slightly in the dogged pursuit of their client's interests. The system relies on an impartial judge to filter through the competing arguments and evidence to achieve a just result. A record is kept and appeals are possible. The process is gener-

39. *See generally* Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 244–47 (2002) (identifying several ethical issues associated with a conflict between professional and organizational duties held by in-house counsel and providing citation to the literature).

40. *See generally* MODEL RULES OF PROF'L CONDUCT (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. The American Bar Association ("ABA") has published national standards on ethics on three occasions. The current *Model Rules of Professional Conduct*, initially promulgated in 1983, replaced the *Model Code of Professional Responsibility*, first published in 1969, which replaced the *Canons of Professional Ethics*, first produced in 1908. *Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Feb. 17, 2012).

41. MODEL RULES OF PROF'L CONDUCT, Preamble (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

42. *Id.* (emphasis added).

ally perceived as fair, and it typically renders reasonable results. Given this system, zealous advocacy by counsel seems entirely appropriate.[43] In fact, once litigation begins, ethics typically require counsel to argue for that construction of law that best suits the client's needs.

Recall an example introduced above.[44] Congress taxes several productive activities, including events A, B, and C. A clever corporate accountant rearranges things, achieving the effects of A but characterizing it as D, which is not listed as a taxable event. The Internal Revenue Service challenges this practice as a fraud. It implores the court to look through form to substance, to declare the practice a sham, and to close the loophole. Serving as advocates, corporate counselors defend the loophole. The defense points out that because D was not listed as taxable, the corporation has lived up to the letter of the law. But the defense does not rest. Counsel also claims the corporate client has cooperated with the law's spirit. Legal spirit, legal purpose, and legislative intent are almost always open to debate, and the zealous advocate does not give an inch.

Determining the spirit of a law and distinguishing letter from spirit requires more subtlety than may first appear.[45] In most cases, the spirit of a law embodies a compromise. For example, the taxation of productive activities involves compromises between the need for government revenue and the need to spur economic growth. Perhaps characterizing one's productivity as "D" is simply an evasion of one's duty to pay a fair share of tax. Or, perhaps D is what Congress intended, given the fact that A, B, and C were listed and D was not.

Given the ambiguities in the notions of legal purpose and legislative intent, it becomes possible to articulate fairly aggressive and self-serving interpretations of most legal texts. Recall, however, that such interpretations do not always win. As discussed earlier, "substance controls form, except in those cases where form controls."[46] The question for present purposes is whether there is anything ethically wrong with arguing for strained interpretations of the law when the advocate fully believes that that argument should lose.

The Model Rules address the issue of good faith in advocacy. Rule 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert an issue therein, unless there is a basis in law and fact for doings so that is *not frivolous*, which includes a *good faith* argument for an ex-

43. The Model Rules do not have a specific rule calling for zealousness, but the word "zealous" appears three times in the preamble. MODEL RULES OF PROF'L CONDUCT, Preamble paras. 2, 8, & 9 (2010). The first two condition the duty of zealousness on the effective working of the adversarial system; the third states that the duty of zealousness pertains only to *legitimate* client interests. *See infra* Part III B.

44. *See supra* text following note 4.

45. *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 10–14 (1996) (examining the various tests that courts employ to decipher a law's purpose and finding each to be essentially vacuous).

46. *See supra* note 7 and accompanying text.

tension, modification or reversal."[47] Hence, a lawyer may argue any construction of the law that is not frivolous and may make a good faith argument to change the law if the precedents seem to favor the other side. The Comment to Rule 3.1 explains that "the law is not always clear and never is static [and] account must be taken of the law's ambiguities and potential for change."[48] The Comment also explains that legal "action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."[49]

A fair reading of Model Rule 3.1 suggests an aggressive approach to legal argument. The key, of course, is that one ideally finds a zealous advocate on both sides. Zealousness on one side balances zealousness on the other, and the synthesis, provided by the impartial judge, renders a reasonably fair, and potentially best, result. If the system is working effectively, the advocate should assert the interpretation, even if strained, that advances the interests of the client. The question is whether a similar ethic guides the role of lawyer as an advisor.

B. *Corporate Counsel as Advisor*

Lawyers are not always advocates; sometimes they serve in advisory capacities—structuring transactions, drafting contracts, and generally assisting the client to determine future conduct. Absent the pressure of an adversarial setting, advisors have a relatively greater opportunity to reflect upon the broader obligations of the organization. The American Bar Association's Model Rules articulate the expanded role. Under the caption "Advisor," Rule 2.1 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."[50] The Comment explains: "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[51]

Comparing the roles of advocate and advisor, note that advocacy allows for a relatively greater degree of moral agnosticism.[52] In adversarial settings, a lawyer is typically free to ignore the moral worth of the client's past actions, argue the client's perspective, and let judge and jury determine proper legal interpretations and corresponding re-

47. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010) (emphasis added).

48. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1.

49. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

50. MODEL RULES OF PROF'L CONDUCT R. 2.1.

51. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2.

52. *See* Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275, 276–78 (2011).

sults.[53] To encourage zealous representation, the American system offers a degree of non-accountability, that is, lawyers are not held accountable for who their clients are or for what their clients have done.[54] Yet, the same degree of moral agnosticism does not translate to lawyers in advisory settings.[55] In an advisory role, corporate counsel is asked to construct a proper course of future action, not to defend, and potentially rationalize, a course previously taken.

To illustrate, suppose that corporate counsel is asked to interpret a federal mandate requiring employers to make "reasonable accommodations" for "qualified individuals" with "impairments" that "limit major life activities."[56] An employee has asked for an accommodation, and counsel discovers that, notwithstanding regulatory guidelines and precedents addressing similar cases, a reasonable interpretation can be advanced both requiring and not requiring the requested accommodation. Counsel also knows that the result in a court may depend on extraneous factors such as the political leanings of the judge and the financial ability of the employee to sustain a legal action. If the corporation had already taken an action and a disgruntled employee had sued, then counsel would proceed under the norms of advocacy, taking an aggressive and self-serving interpretation with regard to each ambiguous term. But in an advisory role, zealotry for the corporate interests seems misplaced. In fact, it may be unethical.

Advisory settings call for a balanced interpretation of legal obligations. Any good lawyer can articulate a spectrum of interpretations with regard to most, if not all, legal texts. If hired by the defendant, the lawyer offers the defendant's interpretation; if hired by the plaintiff, then the lawyer offers the plaintiff's interpretation. But as an advisor, corporate counsel needs to construct and promote the single "best" interpretation. This interpretation results from a good faith application of legal reasoning techniques free from any political or self-serving bias.[57] Recognizing the value of legal predictability, the best interpretation gives due deference to the plain meaning of the statute

53. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

54. *See* McMorrow & Scheuer, *supra* note 52, at 280–81.

55. *See id.* at 294–97; *see also* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 553–55 (1994) (arguing that corporate attorneys, in their advisory role, are morally "interdependent" with their clients for the actions on which the attorney advises).

56. The reference is to the Americans with Disabilities Act ("ADA"). *See generally* 42 U.S.C. §§ 12102, 12111 (2006) (providing statutory definitions); Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Reasonable Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745 (1998) (discussing alternative interpretations of various provisions of the ADA).

57. For a discussion of judicial reasoning largely sympathetic to the one articulated here and written by a member of the federal bench, *see generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

but balances that meaning with reference to legislative intent, general public policies, prior interpretations, and maxims of construction. In essence, the advisor is not asking who *will* win if an action is taken or not taken but rather who *should* win?

Applying the idea of a best interpretation to the accommodation request, the advisor first notes that the legislation seeks a compromise between promoting firm profitability and eradicating prejudice against and enhancing work opportunities for people with disabilities.[58] In assessing the economic effects of the accommodation, the advisor considers both the short-run costs to the firm as well as the long-run benefits that the firm might enjoy through enhanced workplace morale, improved public image, and enhanced governmental relations. The advisor also considers both the economic and psychological benefits accruing to the employee and the societal benefits that derive from a fully employed citizenry. Based on a good faith assessment of these and other legitimate factors, the advisor constructs an opinion. Armed with this opinion, corporate counsel is ready to advise the corporation's executives and to suggest a course of action.

V. CONCLUSION

This Article began by directing attention to loopholes as imperfections in legal texts that afford strained and self-serving interpretations of legal obligations. Because such interpretations sometimes prevail in court, the use of a loophole-style argument typically has economic value for the firm. The Article then looked at ethics, arguing that a corporate executive has a fiduciary obligation to pursue shareholders' desires, but the means chosen must be ethical. In a reasonably just society, this includes a moral duty to not exploit the inevitable imperfections in law. The final part of the Article examines ABA Model Rules on the various roles of corporate counsel, concluding that in adversarial settings, moral agnosticism may be defensible and strained interpretations may be appropriate, but in business planning, a more balanced interpretation is required. The part closes with an example illustrating how mature legal advice can best serve the social responsibilities of the corporation.

58. *See generally* TERRY HALBERT & ELAINE INGULLI, LAW & ETHICS IN THE BUSINESS ENVIRONMENT 200–01 (3d ed. 2000) (discussing the policy goals of the Americans with Disabilities Act).