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A PRIMER ON THE THEORY, PRACTICE, AND PEDAGOGY UNDERPINNING A SCHOOL OF THOUGHT ON LAW AND BUSINESS

James E. Holloway*

Recent policyless and lawless business decisions have prompted the judiciary and legislature to erode managerial discretion and judgment. This Article is a primer on the theoretical, practical, and pedagogical requirements for a legal-managerial school of thought to measure the business losses created by these judicial and legislative responses. A legal-managerial school must provide a theoretical evaluation of law and public policy, a practical integration of legal analysis and business methodology, and a pedagogical expansion of legal thinking to include business information. This Article initiates the debate on how a legal-managerial school of thought can further the study, practice, and teaching of jurisprudence and business disciplines, and ultimately provide lawyers and managers with tools for business decision making.

I. INTRODUCTION

Jurisprudence and business disciplines are more than specific fact patterns and isolated public policy concerns.¹ Business disciplines have a body of theory and principles² with strong predictive

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1. See Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 *RUTGERS L. REV.* 269, 269-70 (1999) (describing the interrelated conflicts between business and public interests in American law and public policy).

2. See, e.g., THOMAS E. COPELAND & J. FRED WESTON, *FINANCIAL THEORY AND CORPORATE POLICY* (3d ed. 1988); ELDON S. HENDRIKSEN, *ACCOUNTING THEORY* (1992); SHELBY D. HUNT, *MODERN MARKETING THEORY: CRITICAL ISSUES IN THE PHILOSOPHY OF MARKETING SCIENCE* (1991); LESLIE W. RUE & LLOYD L. BYARS, *MANAGEMENT: THEORY AND APPLICATION* (1986). Business law and legal environment textbooks are as plentiful as business textbooks. See, e.g., A. JAMES BARNES, TERRY MOREHEAD DWARKIN & ERIC L. RICHARDS, *LAW FOR BUSINESS* (8th ed. 2003); HENRY R. CHEESEMAN, *BUSINESS LAW: ETHICAL, INTERNATIONAL & E-COMMERCE ENVIRONMENT* (4th ed. 2001); ROGER LEROY MILLER & FRANK B. CROSS, *WEST'S LEGAL ENVIRONMENT OF BUSINESS: TEXT, CASES, ETHICAL, INTERNATIONAL AND E-COMMERCE ISSUES* (5th ed. 2003).

and explanatory value.³ These disciplines also have an established business decision making methodology that provides for the use and integration of business and other discipline-specific knowledge and tools.⁴

Despite this, in the last three decades, much of business has lacked a rudimentary analytical framework to identify and examine public policy concerns. Those examining the impact of law and public policy on business decision making only refer to specific factual patterns, ignoring or grossly undervaluing the theory and methodology behind jurisprudence⁵ and business disciplines.⁶ Business disciplines have not developed an analytical approach to incorporate public policy into business decision making. Nor have they used business theory to evaluate public policy principles,⁷ evidenced by management's lack of understanding of the deleterious, disruptive effects of business decisions on markets and public policy. Recent policyless and lawless business decisions have prompted the judiciary and legislature to respond.⁸

Business executives cannot afford to make policyless decisions.⁹ Undervaluing public policy, ignoring law in business thinking, and avoiding legal analysis in business decision making will lead to more regulation and litigation. In turn, corporations attempt to influence this regulation through lobbying and the establishment

3. Clayton M. Christensen & Michael E. Raynor, *Why Hard-Nosed Executives Should Care About Management Theory*, HARV. BUS. REV., Sept. 2003, at 72 (arguing that managers can "bring predictable success to the world of management" only when they forgo one-size-fits-all recommendations and insist that a theory describes the circumstances under which it does and does not work).

4. See Earnest R. Archer, *How To Make a Business Decision: An Analysis of Theory and Practice*, 69 MGMT. REV. 54, 54-61 (1980).

5. See Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMPLE L. REV. 393, 393-94 (1997) [hereinafter Cappalli, *Legal Method*] ("The strength of the Anglo-American legal tradition is found in its methodology: the 'legal science' by which it creates, elaborates, and applies law."); see also RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* (1997) [hereinafter CAPPALLI, *COMMON LAW*].

6. See Christensen & Raynor, *supra* note 3, at 66; Archer, *supra* note 4, at 54.

7. See generally LOUIS GALAMBOS & JOSEPH PRATT, *THE RISE OF THE CORPORATE COMMONWEALTH: U.S. BUSINESS AND PUBLIC POLICY IN THE TWENTIETH CENTURY* (1988).

8. See, e.g., Christine Dugas, *CEOs may be liable for losses in 401(k)s*, USA TODAY, Sept. 30, 2002, at 1A ("[T]he federal government issued a court brief . . . sa[ying] former Chief Executive Officer Ken Lay and other top executives could be personally liable for millions of dollars in retirement plan losses."); Charles Gasparino, *NASD Is Preparing Civil Charges Against Salmon and Ex-Analyst*, WALL ST. J., Sept. 20, 2002, at A1; Charles Gasparino & Jerry Markon, *Merrill Aide Will Plead Guilty, Cooperate on Martha Stewart*, WALL ST. J., Sept. 26, 2002, at A1; Carol Hymowitz, *How to Fix A Broken System*, WALL ST. J., Feb. 24, 2003, at R1 (discussing the Sarbanes-Oxley legislation enacted by Congress).

9. See John T. Dunlop et al., *Business and Public Policy*, HARV. BUS. REV., Nov.-Dec. 1979, at 98 (stating that the role of government involvement in industry is pervasive and unlikely to cease in the future).

of think tanks and other groups.¹⁰ Business leaders can ease this abrasive government-business relationship if they are well informed on issues and advocate not only what is good for the company, but also what is best for the broader public interest.¹¹

A legal-managerial analysis would allow business decision makers and planners to weigh their decisions against the public policy of how their decisions and plans affect society's stability, growth, and direction.¹² Such analysis uses business theory to explain and predict the impact of law and public policy on business thinking, and integrates business decision making methodology and legal analysis to use law to make managerial choices.

By examining theoretical, practical, and pedagogical concerns, this article argues for the creation of a legal-managerial school of thought that studies, practices, and teaches the value of theory and the role of methodology in the integration of jurisprudence and business disciplines. A legal-managerial analysis addresses fundamental questions in the aftermath of corporate failures such as Enron and Worldcom.¹³ First, assuming that legal and policy analyses are not self-executing, how does legal information accompanied by legal analysis enter the process of business decision making in a precise and timely manner? Second, assuming that law and public policy are not self-directing, how does legal information not accompanied by any business-specific analysis move within the process of business decision making to fit the unique analytical and informational needs of various decisional steps? Third, assuming that business intellectuals and decision makers do not use legal analysis and reasoning routinely, how does legal information accompanied by legal analysis affect the managerial analysis of other discipline-specific information and analyses entering the process of decision making? Fourth, assuming that business decision makers correctly inform lawyers of the most appropriate steps to enter legal and policy information, how can the delivery and acceptance of this information avoid neutralizing innovative business thinking?

Parts I-III discuss the use of law and public policy by business and legal intellectuals and practitioners. Part I emphasizes the

10. Kim McQuaid, *Big Business and Public Policy in Contemporary United States*, 20 Q. REV. ECON. & FIN. 57 (1980) (recognizing that businesses use advisory groups and lobbyists to gain access to government policy makers).

11. Dunlop et al., *supra* note 9, at 93-97.

12. See ROBERT E. SCHELLENBERGER, *MANAGERIAL ANALYSIS* 8 (1969) ("Managerial analysis is the systematic investigation, compilation, manipulation, and presentation of information to a decision maker in order to aid the decision making process.")

13. See, e.g., Dugas, *supra* note 8, at 1A (discussing the Enron managerial failure).

absence of an understanding of the theory and methodology underlying jurisprudence and business disciplines. Part II discusses the current managerial shortfall of legal and economic analyses, and the need for a legal-managerial analytical approach to evaluate and use law and public policy effectively in business decisions. Part III discusses the inadequacies of a purely legal analytical approach and the need for analytical mechanisms to enter, move, and use law and public policy.

Parts IV–VI explain considerations underlying scholarly efforts to establish the theoretical existence, analytical power, managerial utility, and educational benefits of a legal-managerial school of thought. Part IV explores important theoretical considerations in evaluating the effects of law and public policy on business thinking. Part V explains practical considerations in using a legal-managerial analysis, and Part VI explores the pedagogical considerations inherent in teaching a legal-managerial analysis.

Finally, Part VII examines the benefits a legal-managerial school of thought provides to the study, practice, and teaching of law and business by forming an analytical mechanism that brings law and public policy into business decision making.

A. *Eroding Managerial Discretion and Judgment*

Without fail, a few business executives of each generation needlessly breed public discontent,¹⁴ continuously eroding respect for managerial discretion and judgment,¹⁵ foreclosing consideration of a wide range of decisional alternatives, and prohibiting reflection

14. See, e.g., *id.* at 1A; Hymowitz, *supra* note 8, at R1.

15. See Douglas Brownlie & Jason Christopher Spender, *Managerial Judgement in Strategic Marketing: Some Preliminary Thoughts*, MGMT. DECISION, No. 6, July 1995, at 39, 40–42 (“Judgement is what the decision maker adds to cope with the uncertainty which exists in the situation he/she confronts. . . . Judgment differs from analysis.”); Susan Key, *Perceived Managerial Discretion: An Analysis of Individual Ethical Intentions*, 14 J. MANAGERIAL ISSUES 218, 218 (“The abuse of managerial discretion and the failure of managers to exercise discretion can be very costly to organizations.”); Sim B. Sitkin & Robert J. Bies, *The Legalistic Organization: Definitions, Dimensions, and Dilemmas*, 4 ORG. SCI. 345, 348 (1993) (recognizing that the impact of law and the judicial process creates a “rationality paradox” that harms the decision making abilities of managers within business organizations); see also John C. Mowen & Gary J. Gaeth, *The Evaluation Stage in Marketing Decision Making*, 20 J. ACAD. MARKETING SCI. 177, 177–88 (1992) (discussing the use of activities such as training and learning to eliminate or reduce bias in decision making). See generally Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS, 371 (L. L. Cummings & Barry M. Staw eds., 1987) (defining managerial discretion as the “latitude of managerial action”).

on particular alternatives.¹⁶ Undergirding lost managerial discretion and judgment is business theory that should predict and explain many policyless and lawless decisions, along with business decision making methodology that should produce fewer policyless and lawless decisions.¹⁷ But when business theory and methodology are routinely sacrificed to theoretical indifference or abandoned in favor of practical fortuity,¹⁸ business disciplines and jurisprudence cannot be totally reluctant to set forth a paradigm for evaluating and using law and public policy. All that remains are unanswered questions regarding the effects of jurisprudence on the nature of business theory and methodology.¹⁹

The operational and analytical nature of jurisprudence and business disciplines do not justify the steady erosion of managerial discretion and judgment due to a lack of knowledge and understanding of future business events. Both jurisprudence and business disciplines operate through factual patterns of law and theory, respectively. However, business theory contains an infinite number of alternatives in any given factual pattern, thus permitting predictions and explanations about many factual occurrences to abound. Unlike business theory, legal rules and principles govern a finite number of factual alternatives within business theory, thus leaving some factual decisions solely to the managerial discretion of executives and directors. In addition, business theory can predict and explain the type of factual decisions likely to offend the law and principles of public policy, and can aid in identifying and classifying factual patterns likely to be considered illegal or cause public harm in the business environment.²⁰ By integrating legal and business knowledge and methodology, a legal-managerial school can assist in evaluating legal and public policy concerns and recognizing legal and public policy issues within business decision making.

16. See Hymowitz, *supra* note 8, at R1 ("Shareholders and regulators, faced with a spate of business scandals, have made it clear that the old way of doing business—of directors acquiescing to top management or simply asking perfunctory questions—hasn't worked."); see also Key, *supra* note 15, at 218 ("Discretion is based on the belief that one has responses available with which to influence the environment.")

17. See generally *infra* Part II.C (discussing the use of an efficient markets hypothesis to predict and explain unlawful decisions involving the use of insider information).

18. See *infra* Part II.B (discussing the lack of a school of thought to evaluate and use common law, regulation, and public policy).

19. See generally *infra* Part II.C (discussing the need for a school of thought to evaluate and use common law, regulation, and public policy).

20. See generally ARTHUR A. THOMPSON, *ECONOMICS OF THE FIRM: THEORY AND PRACTICE* 11 (4th ed. 1985) (discussing how the making of economic theory allows one to conclude that business theory can predict and explain business decisions).

B. Sharing Blame: Losses in Business and Failures in Jurisprudence

A legal-managerial school of thought has two conceptual levels. A macroanalysis ascertains the impact of law and public policy on the theoretical foundation of the business disciplines, and evaluates the nature of factual patterns arising under business theory. A microanalysis brings legal information and methodology into the decisional steps of business decision makers, and uses legal analysis to find, analyze, and think about legal or policy issues. A legal-managerial analysis integrates the theory and methodology of jurisprudence and business disciplines to affect business thinking and decisions.

Business executives and directors must not bear all of the blame for policyless and lawless decisions, though these decisions often had few, if any, grounds in business theory or business methodology, and may appear inexplicable at times.²¹ Within jurisprudence and business disciplines, both business and legal intellectuals are not beyond reproach for their failure to integrate legal and business methodologies.²² These intellectuals seldom use established business methodology to challenge the subtle, restrictive effects of law and public policy on the validity of business theory and dynamics of business decision making.²³ In explaining and illustrating the

21. See Richard Langone, *The Science of Sociological Jurisprudence as a Methodology for Legal Analysis*, 17 *TOURO L. REV.* 769, 770 (2001) ("Legal Methods class trained us how to *find* the law using the law library, Westlaw, etc., and how to *write* memoranda in conformity with the Harvard Blue Book. However, it offered little formal training in 'theoretical' decision-making."); Hymowitz, *supra* note 8, at R1 ("[D]irectors acquiescing to top management or simply asking perfunctory questions—hasn't worked."). See generally George Bain, *A Degree of Business Change*, *MGMT. TODAY*, Feb. 1993, at 5 (recognizing the European reliance on American business theory and Japanese practices); Christensen & Raynor, *supra* note 3, at 66 (suggesting that business theories can aid in planning future actions and give confidence to decision makers); *In Defence of the Guru*, *ECONOMIST*, Feb. 26, 1994, at 18 (recognizing that management gurus recycle business theory in giving consulting advice).

22. See generally James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework Without the Economic Analysis of Law*, 24 *CAMPBELL L. REV.* 131, 133 (2002) (arguing that there is no theoretical, analytical, or pedagogical framework for the integration of law and business); Diane L. Swanson, *Toward an Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance*, 24 *ACAD. MGMT. REV.* 506 (1999) (discussing the integration of normative and descriptive approaches to the theory of business and society and the variables, such as business decision making, that must be considered).

23. See *infra* Part II.C (discussing the need for a managerial analysis with law); see also Albert A. Foer, *The Third Leg of the Antitrust Stool: What the Business Schools Have to Offer to Antitrust*, 47 *N.Y.L. SCH. L. REV.* 21, 21-49 (2003); Spencer Weber Waller, *What Should Antitrust Learn from the Business Schools?: The Use of Business Theory in Antitrust*, 47 *N.Y.L. SCH. L. REV.* 119, 122 (2003) ("Business theory is more accessible than its industrial organization equivalent to most judges, jurors and the public in assessing antitrust policy and specific decisions and cases.").

impact of law and public policy on the business system, these intellectuals often fail to weigh the intellectual risk of ignoring established business theory,²⁴ and the practical threat of using irrational business decision making.²⁵ They set forth too little theoretical explanation, practical exploration, and pedagogical knowledge of the impact legal and public policy concerns have on business thinking and business methodology.²⁶ Theoryless and policyless decisions are costly to business in practice, and business disciplines in theory, when government regulation endlessly imposes legal and public obligations on business organizations,²⁷ eventually diminishing the validity of business theory.

This lack of theoretical explanation and practical understanding is notable. The field of business law lacks a model or school explaining how business theory and methodology behave when integrated with legal information and analysis. Additionally, business and legal intellectuals do not study adequately the impact of law and public policy on business thinking, nor do they adequately examine the effect of legal analysis on business methodology through a school of thought using both law and business.²⁸ An integrated school of thought would provide unifying benefits and insights to jurisprudence and business disciplines.²⁹

Law and business can no longer wait for the courts to unravel the legal-managerial complexities. Business decisions and practices create the need to use common law, regulation, and public policy in the business system and society. Therefore, business should have

24. See Hymowitz, *supra* note 8, at R1.

25. *Id.*

26. See Holloway, *supra* note 22, at 133.

27. For example, the Sarbanes-Oxley Act of 2002 affects the legal advice corporate attorneys can give and increases the risks of decision making. See, e.g., Michael Dailey, *Officer and Director Bars: Who Is Substantially Unfit to Serve after Sarbanes-Oxley?*, 40 Hous. L. Rev. 837, 863 (2003) (discussing the new requirements imposed on barring directors from serving on future boards); Chi Soo Kim & Elizabeth Laffitte, *The Potential Effects of SEC Regulation of Attorney Conduct Under the Sarbanes-Oxley Act*, 16 GEO. J. LEGAL ETHICS 707, 708–09 (2003) (analyzing the imposition of disclosure obligations on lawyers who give legal advice in decision making); Jeannie Nelson, *New Corporate Responsibility Law Increases Liabilities for Directors, Officers, and Attorneys, but Does It Increase Protections for Investors?*, 34 TEX. TECH L. REV. 1165, 1166–67 (2003) (listing the corporate obligations imposed on officers, directors, and executives to increase accountability); Majed Zeineddine, *Piercing the Corporate Attorney's Veil: The Impact of the Sarbanes-Oxley Act on the Attorney-Client Privilege*, 20 T.M. COOLEY L. REV. 131, 132–33 (2003) (describing the obligations imposed on general counsel and their impact on the attorney-client privilege).

28. See Holloway, *supra* note 22, at 133.

29. THOMPSON, *supra* note 20, at 13–14 (“[T]he goal is to develop a tool that presents simply and accurately the major variables and relationships of an inadequately understood system . . . provid[ing] a logical framework or skeleton in which the complexities of the real world can be understood with greater insight.”).

its own unique model or paradigm for explaining and predicting the impact of law and public policy on business thinking and methodology. Abstraction and assumptions are part of the process of theory and model building,³⁰ and abstraction based on various rational factors or realistic assumptions could be no worse than the theoryless, lawless, and policyless decisions defying both logic and rationality during the latter decades of the Twentieth Century.

C. The Scope of the Primer and the Need for a School of Thought

Developing a legal-managerial analysis may be an enormous undertaking that would exceed the lifetime of any one man or woman, but it would be the beginning of a scholarly legacy to jurisprudence and business disciplines. Business intellectuals complacently watch business theory slowly erode as regulation to protect public interests expands, and legal scholars watch law, public policy, and ethical considerations steadily demoralize business decisions that are indefensible by business interests. A legal-managerial school of thought primes legal and business scholars to debate on the lack of business theory in legal reform, the absence of legal-analytical tools in business decision making methodology, and the lack of a law-business analytical approach within the field of business law. Hopefully, business disciplines will come to grips with theoretical and methodological losses that go unnoticed and unanswered by business disciplines as business intellectuals and practitioners rely on other disciplines, namely law and economics, to explain the impact of common law trends, state regulation, and public policy concerns on business thinking and methodology.

Business intellectuals need to examine and address the theoretical, practical and pedagogical impact of transnational jurisprudence on business disciplines, specifically when operating among different cultures in the global economy. The primer initiates debate on the nature of the theoretical existence, practical utility, and pedagogical benefits of a legal-managerial school of thought. This school of thought must contain valid, interdisciplinary thinking, with two levels of integration between jurisprudence and business disciplines: the theoretical integration of business theory and legal rules and the analytical integration of legal and business methodologies. This school of thought uses business thinking to evaluate the law's impact on business organizations and

30. *Id.* at 4-5.

decision makers, enhances the utility of legal and policy information, and expands the power of legal and policy analyses for business decision makers.

The primer initiates debate on how a legal-managerial school of thought furthers the study, practice, and teaching of jurisprudence and business disciplines. In the study of law and business, a legal-managerial analysis or evaluation applies business theory to evaluate the impact of law and public policy on managerial discretion and judgment, and thus identifies and classifies factual patterns which create legal risks and public policy threats for business practices, operations, and decisions. In the practice of law and business, a legal-managerial analysis integrates discrete legal-analytical methods and unique business considerations to form a new system of analysis, employing unique legal-managerial tools to accompany the use of legal and policy information in the process of business decision making.

II. ABSENCE OF A LEGAL-MANAGERIAL ANALYSIS

The lack of a school of thought using both law and business is undeniably obvious when one considers the multitude of theoryless, policyless, and lawless decisions in the business community. These decisions primarily rely on fact-based business arguments, devoid of any business theory to challenge the regulation or expansion of public policy limitations and the subsequent decline of common law. Law and regulation often ignore business theory or place little weight on it, though established theory should predict and explain how law and regulation might limit business practices, operations, and strategies. Business theory is not, and has never been, a means of explaining the relationship between law and business. Too often, lawyers, lobbyists, executives, and other practitioners inadequately explain and predict the impact of law and public policy limitations on business thinking and methodology, using little or no knowledge of business theory. However, business thinking is the key substance and methodology the key process of business disciplines. Against a backdrop of theoryless and policyless business decisions and an overly broad reliance on legal, economic, and business practitioners to defend business thinking, one must ask why the study of business disciplines and jurisprudence remain without a school of thought that integrates law and business.

A. The Dominant Analyses in Law and Business

Lawyers and economists often do not use business thinking and methodology to study, teach, or practice in their respective fields. Yet lawyers and economists constantly stress the study and use of law and public policy considerations in law and business.³¹ Notwithstanding the dominant presence of law and economics, corporations and their directors and executives are still losing much of their managerial discretion to government regulation.³² These losses impose severe restrictions on the effectiveness of business decision making methodology to implement corporate objectives.³³

Law and public policy considerations have serious effects on business decision makers and planners. Therefore, several reasons justify the creation of a legal-managerial analysis to guide these efforts and explain their post-implementation effects. Law and public policy considerations limit business thinking by invalidating or restricting the utility of business theory to support and justify business decisions and planning.³⁴ Law and public policy also affect, or perhaps limit, the use of key steps in business decision making methodology, often eliminating and restricting feasible alternatives.³⁵ Finally, legal and policy analyses often grapple with business theory, which unexpectedly arises in legal disputes and policy debates as an unseen, or perhaps unknown, touchstone of business decisions.³⁶ Nevertheless, legal and economic analyses still address both the effects of economics on law and public policy, and the impact of law and public policy on economics. There is an even greater irony: legal and economic scholars and practitioners unwittingly contribute to the erosion of managerial discretion and judgment through the use of economic or legal analysis. Simply put, there is no legal-managerial school of thought to assist them in ascertaining the impact of law and public policy on business de-

31. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (2d ed. 1996); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

32. See *supra* note 27 and accompanying text.

33. See Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 *AM. BUS. L.J.* 417, 420–21 (2003) (discussing the shortcomings of law and economics and the impact on policy-making for business).

34. See Holloway, *supra* note 22, at 173–80; Sitkin & Bies, *supra* note 15, at 345.

35. See Holloway, *supra* note 22, at 173–80; Sitkin & Bies, *supra* note 15, at 345–46.

36. See, e.g., James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 *T. MARSHALL L. REV.* 27 (1994) (discussing the impact of regulations and judicial decisions on business thinking).

cision makers' responses, either on an individual or organizational level.

1. *The Absence of a Legal-Managerial Approach to Law and Policy*—Lawyers and economists do not routinely use business thinking and methodology in the study and practice of law and economics. Lawyers and economists have their own discipline-specific thinking and methodologies. Moreover, they share an interdisciplinary study of law and economics, namely an economic analysis of law.³⁷ The economic analysis of law remains a dominant analytical paradigm for using and studying law and public policy in business thinking and methodology. Business is neither completely law nor totally economics. It is imperative that business scholars develop a managerial analysis with law to evaluate systematic influences and effects of law and public policy on business thinking and methodology that will prevent the erosion of managerial discretion and judgment.³⁸

Business and legal intellectuals and practitioners normally do not apply business thinking or methodology to common law problems, including those dealing with regulation and public policy concerns. They do not use an interdisciplinary business-specific approach to evaluate the effects of law on business thinking or to fuse law and policy into business methodology. This absence of a business-specific interdisciplinary approach with distinct analytical mechanisms and tools is a critical problem. There is a dire need for an interdisciplinary approach to evaluate the broader impact of law and public policy on business theory, and lawyers and economist gravely need an analytical mechanism that includes business decision making methodology to assist them in examining decisions which affect business disciplines. The theoretical existence, managerial utility, and analytical power of a managerial analysis when it is combined with other discipline-specific approaches, such as operations management, finance, or statistics, has been well established and documented in other areas.³⁹

37. See, e.g., COOTER & ULEN, *supra* note 31, at 1–4; POSNER, *supra* note 31, at 1–2, 21–25. Seminal writings contributed greatly to the development of the law and economics movements. POSNER, *supra* note 31, at 21 (citing Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)). *But see* Prentice, *supra* note 33, at 420–27 (discussing the shortcomings of law and economics and the resulting impact on policy-making for business).

38. See generally Hymowitz, *supra* note 8 (noting the shift in power from CEOs to directors created by Sarbanes-Oxley).

39. SCHELLENBERGER, *supra* note 12, at 14 (“Certain general analytical tools such as operations research, management science, statistical analysis, economic analysis, econometrics, systems analysis, and others are used as approaches to managerial analysis.”). *But cf.* Hymowitz, *supra* note 8 (discussing how business schools do not teach about the legal violations and public policy harms that have brought the wrath of government on industries).

2. *Overreliance on Legal Analysis by Lawyers in Business*—Judges, legislators, and other policy-makers use different analyses to address legal issues and public policy concerns, but each group possesses only one view of the relationship between law and business. They do not have a legal-managerial analysis to evaluate the managerial impact of law and public policy on business thinking. The application of business theories and principles would identify and classify factual patterns that must withstand more than deferential scrutiny under legal analysis.⁴⁰ Likewise, there is no legal-managerial analysis for managers to use when following the legal advice they receive. There is no integrated analytical mechanism to help guide law and public policy concerns when they enter the process of business decision making. However, the outcomes of the business decision making process must produce rational results and withstand the analytically intrusive scrutiny of legal analysis.⁴¹ Some forthcoming analytical change should be almost self-evident. Common law, legal regulation, and public policy implementation go far beyond the substance of a particular rule of law or the factual bounds of a legal dispute governing the legal relation of two parties and alters or invalidates business methodology and theory underpinning managerial discretion and judgment. Business is not exempt or immune to the effects of jurisprudence on business theory and methodology. The managerial impact of jurisprudence on business has been, and always will be, an erosion of business theory and a complication of business decision making methodology when jurisprudence extends far beyond the facts of any

40. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112–13 (1989) (applying an arbitrary and capricious standard of review to fiduciary management decisions interpreting benefit plans).

41. See *Varity Corp. v. Howe*, 516 U.S. 489, 495–98 (1996) (holding that Varity acted as a plan fiduciary under ERISA when it terminated employee welfare benefits to reduce its financial liabilities); see also Paul M. Barrett, *Did a Restructuring Mislead Workers on Benefits?*, WALL ST. J., Oct. 24, 1995, at B1 (discussing the court decisions that found Varity misled its employees); Ellen E. Schultz, *Retirees Found Varity Untruthful*, WALL ST. J., Nov. 6, 2000, at C1 (discussing Varity's attempts to cut medical benefits).

Howe illustrates how rational business decisions relying on business theory must survive the logic of legal analysis and reasoning. The business theory was well within the rationality permitted by ERISA, but the business decision making methodology was flawed. Corporate executives invalidated a lawful decision during its implementation by miscommunicating their findings and methodology. As a result, the Court invalidated and narrowed finance and accounting theories, and left one fewer decisional alternative for managing employee benefits and other financial liabilities. See generally Julie M. Edmond & Howard R. Rubin, *When Talk Isn't Cheap: Scrutinizing Fiduciaries' Communications to ERISA Plan Participants*, 23 J. PENSION PLAN. & COMPLIANCE 1 (1997) (discussing the distinction between plan administrator and employer/executive); Frank P. VanderPloeg, *Role-Playing under ERISA: The Company as 'Employer' and 'Fiduciary'*, 9 DEPAUL BUS. L.J. 259 (1997) (discussing the Court's decision in *Howe*).

dispute,⁴² and where the effects of such a decision on business leaders is not always pointed out to the court or policy-maker.

*B. The Effects Stemming from the Absence of an Inclusive
Legal-Managerial Analysis*

The near universal impact of jurisprudence beyond any one factual pattern is enough to prime more intense thinking on the theory, practice and pedagogy underlying the integration of jurisprudence and business disciplines. The legal-managerial school adds interdisciplinary analytics and logic to the study, practice and pedagogy of law and business by legal and business intellectuals and practitioners. This school rests on the theory that jurisprudence underpins common law, regulation, and public policy concerns, and extends well into the making of business decisions and plans.⁴³ The nature of jurisprudence affects the interdisciplinary existence and power of business theory, and affects the interdisciplinary utility and power of business methodology. Therefore, the legal-managerial school cannot be built solely on an economic analysis of law, rely entirely on legal analysis, or look only to the lessons of business thinking and methodology. A legal-managerial school must include an integration of legal and business knowledge and methodologies, and must rest solidly on an analysis that examines and uses the law and reflects prudently on business alternatives.

1. Lack of Order Between Jurisprudence and Business Disciplines— The absence of a legal-managerial school leaves a substantial void when attempting to study, practice, and teach an integrated approach to jurisprudence and business disciplines.⁴⁴ To integrate the thinking of both disciplines, this school of thought must use business' rational theories and principles to predict and explain the managerial impact of law and public policy on managerial discretion and judgment.⁴⁵ This school of thought thus provides

42. See generally Wesley N. Hohfeld, *Some Fundamental Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16 (1913) (explaining the eight basic legal relationships and their effects on legal decision making).

43. See generally *id.* Business involves relationships between competitors, labor, management, and other entities, and is governed by common law, statutes, and public policy.

44. See Holloway, *supra* note 22, at 133 (recognizing the absence of an analytical framework); see also Sitkin & Bies, *supra* note 15, at 345, 348 (finding a strong reliance on the legal process by business decision makers).

45. See Holloway, *supra* note 22, at 174–97; Sitkin & Bies, *supra* note 15, at 345–46. Business decision makers are not necessarily rational actors, and thus it is not always safe to

intellectuals an evaluation of law and public policy affecting both business thinking and interests.⁴⁶ To integrate both disciplines' methodologies, the legal-managerial school of thought must form a legal-managerial analysis to accompany the entry, movement, and use of law and public policy by business decision makers.⁴⁷ In short, a legal-managerial analysis evaluates the impact of law and public policy on business and analyzes the use of law and public policy in business decision making.

2. *Creating a Legal-Managerial Analysis*—The legal-managerial school recognizes that the impact of common law, regulation, and public policy can be best understood by examining the validity of business theory and methodology and its ability to predict factual patterns and produce findings for effective business decisions. Ineffective decision making may violate the law, undermine public policy, and cause an invalidation of business theory,⁴⁸ leading to procedural restrictions of business methodology.⁴⁹ This, in turn, may cause the gradual erosion of managerial discretion and judgment through enacting new and interpreting old law.

A legal-managerial school adds intellectual order and practical stability to the integration of methodologies and thinking within law and business. On one hand, making legal and public policy decisions that limit or invalidate business theories and principles is part of the public will. Such regulation may not do significant damage to any theoretical ground or conceptual reasoning behind business decisions aimed at implementing rational business objectives, but it may in fact still erode managerial discretion and judgment on a social or political level. On the other hand, creating business thinking and methodology to circumvent and invalidate law and public policy is lawless decision making. Permitting too many decisions lacking any grounding in business theories or prin-

rely on an economic analysis of law and its actors. See RICKY W. GRIFFIN, *MANAGEMENT* 274 (6th ed. 1999) (observing that American business organizations use rational decision making approximately 20 percent of the time); Prentice, *supra* note 33, at 423 (recognizing that decision makers possess bias, emotions, and other shortcuts); Lynn A. Stout, *On the Proper Motives of Corporate Directors or, Why You Don't Want to Invite Homo Economicus to Join Your Board*, 28 DEL. J. CORP. L. 1, 1-2 (2003) (finding that the rational actor model of behavior may not describe directors and other decision makers who are fundamentally self-interested).

46. See THOMPSON, *supra* note 20, at 11 ("The explanatory power of a theory arises from its ability to account logically for cause-effect relationships, its capacity to illuminate why the variables are related in the manner which evidence suggest, and its compatibility with or generally accepted knowledge . . ."); *infra* Part IV and accompanying notes.

47. See Archer, *supra* note 4, at 54-61.

48. See Holloway, *supra* note 22, at 183-88 (suggesting an impact on decision theory of disclosure obligations under ERISA); Sitkin & Bies, *supra* note 15, at 345-46.

49. Holloway, *supra* note 22, at 173-83 (discussing procedural obligations on the business decision making process imposed by ERISA).

ciples to further wealth maximizing goals condones lawless thinking and illegitimate methodology.⁵⁰ Therefore, a legal-managerial school would offer a way of distinguishing between illegal or theoryless decisions, and lawful and rational business thinking by integrating the legal and business disciplines.⁵¹

Jurisprudence permeates so much business thinking and methodology that organizations, planners and decision makers must demand a better understanding of the effects of law and public policy on business concepts and methods. Business organizations must eventually demand, if not require, from business intellectuals a more precise legal-managerial analysis to accompany the entrance and use of legal information within the process of business decision making. If law uses a law-specific analysis to find and produce legal advice, it seems completely logical when accepting legal advice that business decisionmakers have a rational way of interpreting the business effects of that advice.

Business organizations must also demand a more systematic use of business theories and principles when formulating legal and policy advice, so that lawyers and economists can ascertain the erosive effects that advice may have on business methodology and thinking. If business theory predicts, and law prescribes what ought not to happen, it seems logical that business theory could predict and explain a range of responses under factual patterns that may offend law and public policy under a positive analysis. Law and business need a legal-managerial analysis or evaluation to create a macroanalysis of the law's impact on business decision making and a microanalysis of law's analytical effects on business methodology.

C. The Need for a Legal-Managerial Analysis in Business

Despite the numerous managerial losses, business disciplines have not agreed on a theoretical, discipline-specific characterization of managerial losses caused by common law, regulation, and public policy concerns on the operations of corporations and their

50. See generally Hymowitz, *supra* note 8, at R1 ("Shareholders and regulators, faced with a spate of business scandals, have made it clear that the old way of doing business—of directors acquiescing to top management or simply asking perfunctory questions—hasn't worked.")

51. See Foer, *supra* note 23, at 21 (arguing that colleges and schools of business have been excluded from antitrust analysis and should be included); Waller, *supra* note 23, at 129 ("[U]sing business theory to interpret and evaluate the legal consequences of important business decisions . . . more closely reflects and better explains the real world in which those decisions are being implemented."); see also SCHELLENBERGER, *supra* note 12, at 7–8.

decision makers and planners. A legal-managerial school recognizes that law and public policy concerns inherently limit the range of managerial discretion and reduce the sphere of managerial judgment. Limiting this range and reducing this sphere permit fewer viable alternatives and curtail the effectiveness of business decisions to further internal and external objectives.⁵² Managerial discretion and judgment can indicate the potential effectiveness and utility of decisional alternatives to further business objectives. When law and public policy restrict or limit decisional alternatives by constraining their utility under established business theory, both law and public policy limit the effectiveness of business decisions to further company objectives under particular factual patterns of business theory. Fewer alternatives and ineffective decisions totally or partially invalidate business theories and principles that predict and explain the rationality and significance of factual patterns protecting corporate and business interests, such as corporate governance and profitability.⁵³ The end result is less managerial discretion and judgment to exercise in business decision making and planning.

1. *Using the Theoretical Eyes of Business to See Law and Policy*—A legal-managerial analysis provides a theoretical and analytical lens that predicts and explains managerial losses caused by an invalidation of business theory. Finance theory illustrates the potential usefulness of a legal-managerial analysis in the realm of securities, banking and financial market regulation.⁵⁴ Finance and law use distinct discipline-specific analyses and principles, and financial analysis and principles are a type of managerial analysis for business decision making.⁵⁵ Most importantly, a legal-managerial evaluation or analysis would use finance theory to evaluate the impact of insider trading and other securities regulation in a given set of factual circumstances more likely to violate the law. It would identify and classify, in terms of managerial discretion and judgment, results from a managerial assessment that may be permanent. To illustrate this point, an examination of the efficient-

52. See *supra* note 27 and accompanying text.

53. See Holloway, *supra* note 22, at 183–88 (noting the impact of ERISA disclosure obligations on the process of business decision making); Sitkin & Bies, *supra* note 15, at 345 (recognizing that decision making focuses too heavily on the least significant business interests in efforts to comply with legal rules and processes).

54. See, e.g., Cheng F. Lee & Joan C. Junkus, *Financial Analysis and Planning: An Overview*, 35 J. ECON. & BUS. 259, 259 (1983) (discussing the use of finance theory and analysis in the management methodology of financial analysis and planning).

55. See, e.g., SCHELLENBERGER, *supra* note 12, at 7, 14; Lee & Junkus, *supra* note 54, at 275.

market hypothesis in finance theory is helpful.⁵⁶ A legal-managerial evaluation of securities regulation by the efficient-market hypothesis would show much of the impact of securities regulation on managerial discretion and judgment, including the impact on a decision makers' use of corporate financial information not available to financial markets.⁵⁷ This theory "holds (1) that stocks are always in equilibrium and (2) that it is impossible for an investor to consistently 'beat the market.'"⁵⁸ The efficient-market hypothesis predicts and explains how business decision makers can gain advantages by using undisclosed, nonpublic information in securities transactions if such information is not available to financial markets.⁵⁹ Factual patterns showing abnormal gains or profits in trading securities will get closer scrutiny under insider trading law,⁶⁰ and factual patterns with large gains will be fewer under the theory's market equilibrium. In a given set of insider trading transactions, only insider trading transactions where corporate officers and directors possessed inside or nonpublic information will receive direct scrutiny under insider trading law.⁶¹ Here, insider trading law does not permit corporate officials to trade stocks before financial markets reach equilibrium and removes any advantage contrary to the efficient-market hypothesis.⁶² The legal-managerial evaluation of a specific statute by business theory shows predictable and explanatory limits that this statute can impose on a group of feasible decisional alternatives.

By providing such an analytical lens, a legal-managerial analysis would bring business principles to bear on insider-trading law and policy, including actual legal advice, accepted for use in the process of decision making. Financial and nonpublic information enter business decision making to make insider-trading decisions that lead to personal benefits. These decisions are still business decisions and subject to insider trading law throughout the decision making process. A legal-managerial analysis aids in recognizing

56. See J. FRED WESTON & EUGENE F. BRIGHAM, *ESSENTIALS OF MANAGERIAL FINANCE* 204-05 (8th ed. 1987).

57. *Id.*

58. *Id.* at 204.

59. *Id.*

60. See 15 U.S.C. § 78j (2003).

61. *Id.*

62. See Donald Eric Remensperger, *Causation in Fraud-on-the-Market Actions—Investors' Insurance in the Second Circuit?*, 49 *BROOK. L. REV.* 1291, 1293 n.9 (1983) ("The goal of Congress in mandating full disclosure, was to promote the optimal allocation of capital by providing an efficient market."). Finance is a good starting point for a legal-managerial analysis because the use of finance theory in business methodology is well settled in law, economics, and business.

and defining the decisional situations that eventually lead to the decision to engage in insider trading. The lack of a legal-managerial analysis leads to an analytical failure that is part of the illegal activity of insider trading. To illustrate, business executives make one of three choices, with or without legal advice, when they fail to comply with insider trading law. They choose to ignore legal advice, to avoid seeking legal advice, or to operate in a gray area with uncertain legal advice. This is a legal-managerial or analytical failure. The absence of legal advice means that a lawyer's delivery and decision maker's acceptance never took place prior to decision making. An analytical failure occurs when a legal-managerial analysis is either not present or not used by business decision makers to enter, move and use legal advice in the process of decision making. The entry, movement, and use of legal advice accompanied by a legal-financial analysis would be consistent with an earlier legal-managerial evaluation, which applied the efficient-market hypothesis to insider trading law. Decision makers can use a legal-managerial analysis to acquire information, identify factual patterns, and recognize legal and policy issues. Further, they can use the legal-managerial analysis to help resolve concerns identified by other analytical approaches in the decision making process. Both sets of issues require a thorough examination and conclusive decision when they occur, and business managers are swayed by the risk and uncertainty of ambiguous law, incomplete factual information and uncertain findings. However, legal advice understood in terms of legal methodology, if delivered to and accepted by business decision makers, can also be ineffective if it fails to be properly viewed in light of other concerns raised by independent analytical processes. Within the decision making process, changes in corporate policies and circumstances regarding the use and disclosure of inside information could arise and may not conform to a given set of factual circumstances. The inability to recognize these changes is an analytical failure, and because of this failure good legal advice could be rendered ineffective in one or more of the business decision making steps. The decision maker actually uses legal advice in one decisional step, but in subsequent steps, these decision makers could fail to use this legal advice or request new legal advice. Alternatively, legal advice given in an earlier decisional step or for a similar situation in the past was not available because the decision makers did not recognize the need to use it in the present decision making process. When legal advice is unaccompanied by a legal-managerial analysis and results in an unlawful decision that attracts new regulation or an unfavorable interpretation of law, that legal

advice can do great harm.⁶³ Thereafter, business decision making will have fewer problems and alternatives, will be reluctant to rely on or use uncertain findings, or it will find innovative, creative, and possibly illegal approaches to further reoccurring business objectives.

2. *Preserving Managerial and Analytical Validity of Law*—The decline of common law and proliferation of regulation erode managerial discretion and judgment, leaving business decision makers with fewer business alternatives and rote acceptance of those that remain. Fewer acceptable alternatives mean that a broader set of factual circumstances are uncomfortably grouped together under any line of business theory. Common law approaches reserved extensive rights and powers for managerial discretion and judgment,⁶⁴ and such legal relations can be consistent with business theory. However, informing business thinkers and decision makers about the effects of common law has been left primarily to legal and economic analyses.⁶⁵ As managerial discretion and judgment continue to erode under the force of law and public policy concerns, lawyers and economists see losses of justice and efficiency. Business is more than the equity of social welfare, expansion of justice, and efficiency of economics. Business disciplines include business theory and methodology, and business disciplines need to explain managerial losses in terms of the effectiveness of a decision, or the appropriate latitude they should leave to the decision maker when attempting to further a lawful objective. For this reason alone, business and business law intellectuals should rethink the need for a school of thought using both law and business, specifically where this school addresses the theoretical, practical and pedagogical effects of law and public policy concerns on business theory and methodology.

63. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 504–05 (1996) (suggesting that the movement of the legal advice from alternative selection to decision implementation caused the ERISA violation).

64. See, e.g., Matthew D. Caudill, *Piercing the Corporate Veil of a New York Not-for-Profit Corporation*, 8 *FORDHAM J. CORP. & FIN. L.* 449, 460 (2003) (recognizing that the business judgment rule permits corporate officers and directors to take reasonable risks); Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, *MONTHLY LAB. REV.*, Jan. 2001, at 3 (finding that at-will employment gives benefits both to employees and employers, but advantages employers); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule*, 96 *Nw. U. L. REV.* 675, 675–77 (2003) (recognizing that the business judgment rule permits the decisions of corporate officers and directors to be judged on a lenient standard).

65. See COOTER & ULEN, *supra* note 31, at 3–4; POSNER, *supra* note 31, at 3; Coase, *supra* note 37, at 1–3.

A legal-managerial school of thought should focus on managerial losses that negatively affect thinking and methodology within business disciplines. It should specifically focus on those losses caused by breaches of ethical, legal, and policy obligations held by business decision makers. These losses should be of concern to colleges and schools of business. Colleges and schools of business are the institutions that teach decision makers who often violate or misuse finance, accounting and other theories when breaching ethical, legal, and policy obligations. When they ignore business theory and methods they cause managerial losses to business disciplines, and then attempt to justify their breaches and concomitant managerial losses with a legal argument. Business disciplines should not judge these managerial losses kindly, recognizing the practical role of business theory in bringing about these losses. Consequently, business and law professors in these colleges must point out how regulation and precedents brought on by the resolution of legal, ethical and public policy issues cause managerial losses to business disciplines. Although policy-makers and courts determine how breaches of legal, ethical and policy obligations affect society, they do not address intellectual harm or managerial losses to business disciplines and thus do not justify or protect the underlying methodology. If business disciplines leave the policing of business theory and methodology to policy-makers and courts, business disciplines may lose their theoretical and methodological validity, and eventually they will become a body of procedural and substantive knowledge without any independent use.⁶⁶

III. EXAMINING BUSINESS METHODOLOGY AND THEORY IN A LEGAL CONTEXT

A legal-managerial school examines the theoretical, practical, and pedagogical effects of law and public policy on business theory and methodology. Integrating legal and business methodologies to form a unique analysis requires a legal-managerial analysis that uses law and public policy to ascertain and minimize exposure to legal risks and public policy threats. Using business theory, a legal-managerial analysis can ascertain the impact of law and public policy on business thinking, and can evaluate the impact of business on law and public policy concerns as the law changes and adapts. A legal-managerial school predicts and explains how the common

66. See Sitkin & Bies, *supra* note 15, at 345–46.

law, regulation, and public policy concerns impact business thinking and can identify and classify factual patterns that cause managerial losses, particularly to managerial discretion and judgment. In short, a legal-managerial school of thought weighs both the actual and potential effects of law and public policy on business thinking and methodology, notably where the cumulative effects of numerous legal violations could lead to regulation.

*A. Establishing an Analytical Approach for
Business Within the Law*

Intellectuals, decision makers and practitioners must know the effects of law and public policy concerns on business theory and methodology. Jurisprudence and business disciplines can work together to illustrate the use of legal analysis and information in business thinking and methodology.⁶⁷ Finally, courts often do not use a legal-managerial analysis, but they can greatly benefit from understanding the analytical operation of business methodology and its yearning for rationality.

1. *The Roles of Disciplines in an Integration of Law and Business*—A legal-managerial school or managerial analysis with law makes several distinctions regarding the relationship between jurisprudence and business disciplines. First, a legal-managerial school recognizes that legal and policy information is not self-implementing in the business decision making process. It stops where it is delivered by lawyers and accepted by decision makers. Management, finance and other business disciplines must explain how business decision makers accept delivery and then use information accompanied by an analytical mechanism in the process of business decision making.⁶⁸ Second, a legal-managerial school recognizes that business decisions must be rationally related to the furtherance of organizational objectives. It recognizes that business theories and principles can explain and support business interests and objectives that must be furthered legally and consistently with public policy concerns. Finance and other business disciplines contain enough business theory to evaluate law and then show courts the logic and

67. See, e.g., RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1989); STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (2d ed. 1995). Judicial decisions provide legal analysis and reasoning, see Beckerman-Rodau, *supra* note 1, at 297–98, but they do not automatically provide legal-analytical methods for process-specific needs of business decision making.

68. See Archer, *supra* note 4, at 54–61.

rationality of business decisions.⁶⁹ Jurisprudence and business disciplines must develop a theoretical framework for the use of law and public policy concerns by applying business theories and principles. Third, a legal-managerial school includes the integration of legal-analytical methods and decisional steps. Decision science and other disciplines can help describe, for example, the integration of point/issue recognition and the evaluation of decisional alternatives to recognize or find legal issues and public policy concerns in evaluating alternatives or potential courses of action in business decision making.⁷⁰ Business disciplines and jurisprudence must jointly illustrate how legal and policy analyses accompanying legal and policy information affect business methodology and thinking.

2. *The Role of Courts in a Legal-Managerial Analysis*—Traditionally common law courts did not use business thinking and methodology to create precedents, and most common law courts still do not do so. These common law courts apply law but do not apply business theory to the law. Common law courts do not use a legal-managerial analysis, though they often show the managerial refusal, inability, or incompetence to use the appropriate law and public policy concern in the process of business decision making. Only lawyers and business decision makers know when legal advice is accepted for use in business decision making. Normally, business decision makers do not use legal analysis and give legal advice. Likewise, lawyers do not use managerial analysis and make business decisions. The delivery of legal advice by lawyers and acceptance of this advice by business decision makers is the initial entry and remains, at best, a superficial or cursory use of the law and public policy. This delivery and acceptance process still requires the business decision maker to utilize the advice, including the use of an appropriate analytical mechanism to evaluate its business effects, precisely and timely.

Courts often illustrate how ignoring law, misusing law, and other analytical failures in business decision making demonstrate the need for a legal-managerial analysis.⁷¹ There are no analytical mechanisms in business disciplines for requesting legal advice, applying the law, and deciding to utilize law in the process of business decision making. These and other analytical absences indicate two practical effects that an integration of legal and business methodologies would have on the legal system. Foremost, the integration

69. See *supra* Part II.C and accompanying notes.

70. See *infra* Part III.B and accompanying notes.

71. See *Varity Corp. v. Howe*, 516 U.S. 489, 498–99 (1996) (illustrating a lawful selection of the best alternative but a breach of duty in the implementation of the decision).

can assist lawyers and legal decision makers in understanding how legal advice accompanied by legal analysis at the time of delivery and acceptance can assist the process of business decision making. Next, the integration can aid business and legal decision makers in understanding how legal advice needs to be accompanied by an appropriate understanding of an analytical, legal-managerial mechanism or tool guiding its accurate use and proper transfer to another decisional step. Finally, the integration of jurisprudence and business disciplines creates a legal-managerial analysis or evaluation theoretically revealing the logic and rational underpinning business decisions that often appear to be informed by intuition, greed, or selfishness, devoid of corporate objectives properly informed by corporate plans and policies or advancement of any established business interests. Integration gives analysts and policy-makers an analytical framework to ascertain when, where, and what analytical tool needs to be used by business decisionmakers after the initial legal advice is received. Therefore, integration is an analytical framework that permits policy-makers and legal actors to examine both the roles of the lawyer and business decision maker in an analytical failure that violated the law or harmed public policy concerns.

*B. Redefining the Field: Finding an Integrated
Use of Law and Business*

Currently there is no unified school of thought when it comes to studying the managerial impact of law and public policy concerns on business thinking and methodology. Business law is a field of law that includes the practice and study of law in the business system, including its transactions and practices. However, it is not an analytical school of thought for several reasons. First, business law is not an analytical approach that appropriately weighs business thinking and business methodology when studying and teaching about law and public policy concerns. Second, business law does not evaluate the impact of law and public policy concerns on business theory in order to measure theoretical and practical losses of managerial discretion and judgment. Third, business law does not provide unique analytical mechanisms to accompany legal and policy information when used by business decision makers. Business law has yet to set forth any unifying macro-analytical approach to integrate business principles and legal rules, or any micro-analytical approach to integrate legal and business methods.

Business law lacks a systematic managerial evaluation of law and public policy as well as a systematic formation of analytical mechanisms to accompany legal and policy information in the business decision making process. Therefore, the field and discipline of business law fails to address the role of business theory and the nature of business methodology beyond the lawyer's delivery and decision maker's acceptance of legal advice.

1. *The Logic and Analytics of Law as a Complement to Business*—The logic and analytics of legal reasoning and analysis accompanying legal and policy information complement the legal-managerial analysis for business decision making. On one hand, business intellectuals and practitioners must always weigh law and public policy concerns, and therefore must accept the use of legal and policy information on some level when applying business theory and using business methodology. When business intellectuals and practitioners use law and public policy in business thinking and methodology, they engage in a managerial analysis to address legal restraints imposed on the use of business and other discipline-specific information. On the other hand, lawyers and policy analysts use legal and policy analyses and do not work with a legal-managerial analysis. When a discipline-specific analysis cannot operate with business thinking or within business methodology, this analysis will not recognize the rational, analytical, and informational needs of business decision makers, and will fail to respond with the most appropriate analytical mechanism to acquire information and produce rational findings and thinking.⁷² Legal analysis is no different, but getting law and public policy concerns into business thinking and methodology goes far beyond just asking for legal advice. Consequently, legal and business intellectuals and practitioners need a positive analysis of the theoretical impact of law on business thinking and the analytical use of legal analysis in business methodology.⁷³

72. See POSNER, *supra* note 31, at 3 (discussing the need for a positive analysis of law to explain the effects of common law, regulation, and public policy on social science and other disciplines). Ignoring these effects can lead to managerial failures, and if these failures are massive enough, they trigger regulations that create managerial losses. See *supra* note 27 and accompanying text.

73. See POSNER, *supra* note 31, at 26 ("Anthropologists, sociologists, psychologists, political scientists and other social scientists . . . make positive analyses of the legal system . . ."). Positive analysis also exists in one discipline in colleges of business. Namely, finance includes a positive analysis of trust law that governs the investment of trust funds in financial, government securities, real estate, and other investment markets. See, e.g., Robert J. Aalberts & Percy S. Noon, *The New Prudent Investor Rule and The Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 48–54 (1996); Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 28–31 (1999); Paul G. Haskell, *The Prudent Person Rule for Trustee*

Lawyers always use legal methodology to provide legal advice, but an understanding of that same legal methodology is severely limited in business decision making because legal methodology is a complex, bundled analytical approach beyond the skills of the average business decisionmaker.⁷⁴ Unbundling legal methodology into discrete, legal-analytical methods would aid business decision makers and intellectuals in making practical decisions and theoretical evaluations. Because a one-method-fits-all analytical bundle is not practical for business decision makers, it must be unbundled into several analytically precise methods to accompany the entry, movement, and use of legal and public policy information within the process of business decision making. Bundled legal analysis is an inherent, systematic approach, but it is too imprecise in the hands of a novice to ascertain the need for and the usefulness of a particular legal-managerial analysis at a specific step or point within the process of business decision making. Unbundling legal analysis still, however, creates entrance and mobility problems for legal and policy information accompanied by analytical mechanisms within and across the several steps of the process of business decision making.

2. *The Initial Delivery of Information and the "One Method Fits All" Approach After Acceptance*—The initial delivery of legal advice by lawyers and its acceptance and initial entry into the decision making process at the hands of business decision makers are process-general tasks. However, the nature of business decision making methodology creates a more daunting challenge when business decision makers must use law and public policy information with an analytical mechanism sensitive to law and business. Business decision making methodology consists of several steps⁷⁵ with interactive and recursive relationships.⁷⁶ It does not, however, inherently enter or move legal and policy information unaccompanied by an analytical mechanism across this process, and may not move it if this mechanism is entirely unknown or completely foreign to business decision makers. These steps include recognizing and defining the decisional situation,

Investment and Modern Portfolio Theory, 69 N.C. L. REV. 87, 87–89 (1990); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 645–47 (1996). A positive analysis recognizes managerial failures but protects against managerial losses by using finance and other business theories to justify and support business decisions and plans.

74. See Beckerman-Rodau, *supra* note 1, at 297–98 (“This multi-layer, bi-polar continuum approach to legal analysis is rarely expressed explicitly by a judicial decision. Nevertheless, it is implicit in many decisions.”).

75. See Archer, *supra* note 4, at 54–61 (discussing a model of business decision making consisting of nine steps).

76. *Id.*

identifying alternatives, evaluating alternatives, selecting the best alternative, implementing the chosen alternative, and the follow-up to the results.⁷⁷ Moreover, not taking liberty with management methodology, these steps are sequential single-purpose mechanisms that are analytical entry and observation points in the process of decision making. Obviously, the one-method fits all bundled legal analysis cannot simultaneously ascertain the methodological or analytical functions of a decisional step, examine the informational and analytical contents entering and moving through the same step within the process of business decision making, and also project information further into the next step of the decision making process.

Beyond the initial entry of legal and policy advice, legal analysis must transform itself into a legal-managerial analysis for a selective analytical use by the novice decision maker. This one-method-fits-all legal analysis cannot adequately assist the novice decision maker when attempting to identify and implement the decision, and cannot provide a meaningful assessment of the decisional alternatives.⁷⁸ Each step in the process of business decision making methodology includes a unique methodological nature and some unique analytical and informational functions. Bundled legal methodology informs the use of legal and policy information in a legal-managerial analysis. A legal-managerial analysis is also dependent on an unbundled legal methodology with discrete legal-analytical methods capable of merging with decisional steps to form new analytical tools or mechanisms for use by business decision makers. Only unbundled legal-analytical methods will work

77. GRIFFIN, *supra* note 45, at 269–70. Griffin lists six steps in the classical model for decision making. First, *recognizing and defining the decision situation* includes “the need to define precisely what the problem is. The manager must develop a complete understanding of the problem, its causes, and its relationship to other factors.” *Id.* at 270. Second, *identifying alternatives* involves “identifying alternative courses of effective action,” including “obvious, standard alternatives and creative, innovative alternatives . . .” *Id.* at 271. Third, *evaluating alternatives* involves an evaluation of each alternative “in terms of its feasibility, its satisfactoriness, and its consequences.” *Id.* at 272. Fourth, *selecting the best alternative* is generally “choos[ing] the alternative with the highest combined level of feasibility, satisfactoriness and affordable consequences.” *Id.* at 273. Fifth, *implementing the chosen alternative* is simply putting it in effect, “consider[ing] people’s resistance to change” and other potential resistance. *Id.* Sixth, *following up and evaluating results* “requires the managers to evaluate the effectiveness of their decisions—that is, they should make sure that the chosen alternative has served its original purpose.” *Id.* at 274. Griffin notes that a “[f]ailure to evaluate decision effectiveness may have serious consequences.” *Id.*

78. See Archer, *supra* note 4, at 57–61 (recognizing the analytical and informational needs of the process of business decision making). There are other approaches to business decision making. See Richard Allan Norman, *Business Decision Making: A Phenomenological Approach*, 10 CAL. MGMT. REV. 59, 59 (1967) (discussing a phenomenological approach to business decision making by focusing on what the decision makers see).

within the single-purpose decisional steps of business methodology to aid decision makers in ascertaining the need for, and use of, legal advice. In the process of business decision making, an unbundled legal analysis accompanying legal and policy information achieves a more precise informational and analytical fit with the decisional steps where the analytical entry, movement, and use of financial, statistical, and other findings and thinking take place.

*C. Forming a Legal-Managerial Analysis to
Use in Decision Making*

A managerial analysis with discipline-specific approaches has always required the integration of business and other methodologies, such as business decision making and statistical methods.⁷⁹ Business education teaches managerial analysis with finance, statistics, economics, accounting, and other discipline-specific approaches. Each analytical approach consists of using analytical tools and methods to produce findings and thinking. Each discipline-specific approach uses its analytical methods both to inform the use of its information, accompanied by analytical mechanisms, and to produce findings and thinking in the process of business decision making.⁸⁰ Law and policy should not be any different. A legal-managerial school relies on the unbundling of legal analysis to form a legal-managerial analysis that accompanies legal advice in the process of decision making and that weighs and considers the legality of findings and thinking in this process.⁸¹ A legal-managerial school includes a methodological analysis to accompany the entry, movement, and use of legal and policy information within the process of business decision making. Moreover, a legal-managerial analysis affects a single decisional step by accompanying and furthering: (1) the entry of legal and policy information into this step, (2) the movement of legal and policy information between these steps, and (3) the use of legal and policy information within any step within the process of business decision making. Simply, a legal-managerial analysis includes step-specific legal-managerial mechanisms to assist the use of law and public policy within the process of business decision making. It is worth repeating that legal advice includes legal information

79. See SCHELLENBERGER, *supra* note 12, at 14.

80. See *id.*

81. See *supra* Part II.C and accompanying notes (discussing an efficient markets hypothesis to demonstrate a managerial analysis with law).

accompanied by legal analysis that initially enters the process of business decision making after delivery and acceptance by a business decision maker, but that decision maker still needs analytical mechanisms to continue assisting the movement and use of that information.

1. Integrating Methodologies to Form Micro-Analytical Tools— Lawyers and managers analyze and reason within the methodologies of their respective disciplines, but the effects of law and public policy concerns on business thinking and methodology justify the need for an integrated analysis of law and business usable by business decision makers. The integration of legal and business methodologies form a legal-managerial analysis when the acceptance of legal advice includes the introduction of analytical tools that assist in the decisional making. Any further entry of legal and policy information takes place with a discrete legal-analytical method already in place to assist the decision maker when using this information within a decisional step. This legal-managerial analysis also accompanies the entry and aids use and movement of legal and policy information in each additional decisional step. Using the most appropriate legal-managerial analysis in a particular decisional step produces specific legal-managerial findings and thinking. Forming this analysis requires an understanding of the nature of legal methodology. This nature includes an interactive, sequential series of single-purpose methods: situational/factual analysis, issue/question recognition, gathering/analyzing information, consistent/continuous thinking, and applying/using law and public policy information.⁸² These single-purpose, legal-analytical methods accompany legal information and guide it to the place where it is needed most: by decision makers within the single-purpose, decisional steps of the process of business decision making.⁸³ For example, factual/situational analysis is a legal-analytical

82. Analysis of a judicial decision is the most fundamental source of legal-analytical methodology taught in law schools. See Cappalli, *Legal Method*, *supra* note 5, at 399–400; see also CAPPALLI, *COMMON LAW*, *supra* note 5, at 98 (explaining the values of teaching legal methods in law schools); Langone, *supra* note 21, at 770 (discussing the need to teach legal methods in law schools). Other legal methodologies exist. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 389–91 (1994) (applying a means-ends analysis to measure the relationship between a regulation and its impact on community development); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112–13 (1989) (applying an arbitrary and capricious standard of review to management decisions in interpreting benefit plans).

Unlike law school, business education is replete with analytical methods to support the business decision making process. See SCHELLENBERGER, *supra* note 12, at 14.

83. The modification of legal principles would enable the use of legal methodology in non-legal applications, such as business decision making methodology. For example, the means-ends test of constitutional and trust laws could scrutinize the relationship between an executive's decision and the corporation's objectives.

method that assists in examining and identifying factual patterns, situations and environments. This method of analysis accompanies legal and policy information to the first, or subsequent, decisional step displaying a factual nature or calling for factual analysis to examine or understand relevant circumstances.⁸⁴ This single-purpose, decisional step is the recognition and definition of the decision situation. The decision situation may contain broad legal issues and public policy concerns under broad principles or a field of law. Bringing a factual/situation analysis into the definition of the decision situation forms a definitional analysis.

This definitional step is part of a legal-managerial analysis aimed at assisting the use of law and policy information accompanied by legal analysis in the first step of the process of business decision making. A definitional analysis uses law and public policy information consistent with the nature of the decisional step from which it was formed, namely the recognition and definition of the decision situation. This definitional analysis assists the use of law and public policy information, also positioning law and public policy information for movement to the next decisional step,⁸⁵ such as recognizing feasible alternatives, and prepares it for use with a new legal-managerial mechanism. A legal-managerial analysis uses discrete legal-analytical methods to aid in performing analytical and informational functions that are consistent with analytical functions or analysis already taking place or operating within a single-purpose step of the process of business decision making. Consequently, integrating legal and business methodologies forms a legal-managerial analysis to accompany legal information beyond the initial entry into the process of business decision making.

2. *Distinct Methodologies Possessing Similar Qualitative Properties*—The logic of legal methods and rationality of decisional steps of legal and business methodologies are not so incongruent that integration is flawed by joining two unique discipline-specific processes for decision making. Both methodologies possess and share enough qualitative analytical properties to form an integrated legal-managerial analysis to meaningfully assist the use of legal and policy information delivered to, and accepted by, business decision

84. See Cappalli, *Legal Method*, *supra* note 5, at 399 (“Along the way students acquire time-honored techniques for extracting law from cases, determining the weight of authority, forming issues, distinguishing law and fact, understanding the materiality of fact, reading statutes with sophistication, and so forth.”).

85. See *infra* Part III.C.2 and accompanying text (discussing the formation and utility of a definitional analysis and other legal-managerial tools).

makers.⁸⁶ These steps and methods share at least three types of qualitative analytical properties: (1) analysis-based, (2) coordination-based, and (3) decision-based properties. These properties perform broad analytical and informational functions. The delivery of legal information includes legal analysis, and legal information is inherently susceptible to manipulation by legal analysis. However, legal analysis is not usable by most business decision makers. Legal analysis is legal-analytical methodology that performs analytical manipulations of facts and legal information such as finding issues and examining facts.⁸⁷ When a legal method enters a decisional step, it forms a functional legal-managerial analysis to accompany legal information and further its use in the most appropriate step and other steps in the process of business decision making. To illustrate, in the earliest step of the process of business decision making, the analysis-based methodology includes, at least, one decisional step and one legal-analytical method. When this legal method enters this particular decisional step, this step and method then form a legal-managerial analysis. The particular analysis accompanies legal information to aid its use and movement in decision making. The function of a particular legal-managerial analysis depends on the nature of the legal method and decisional step. Moreover, this newly formed analysis accompanies legal information when it produces findings and thinking. The analysis-based methods of legal methodology include gathering/analyzing information, factual/situational analysis and point/issue recognition. The analysis-based decisional steps of business decision making methodology include the recognition and definition of the decision situation and the identification of feasible alternatives. The analysis-based methods of legal methodology and steps of business methodology share analytical properties that examine factual patterns, find information, and find the question or point. Both sets of analytical properties recognize and define the nature of the problem, recognize and determine the need for information with analysis, and initiate a resolution consistent with the relevant information, findings and thinking.

A method and step may share similar analytical properties, but these similarities do not always mean that this particular method must always be used with this particular step to form a legal-managerial analysis. The steps and methods are interactive and

86. See Holloway, *supra* note 22, at 200 (using an illustration to show the nature and role of analytics in legal and business methodologies).

87. See Cappalli, *Legal Method*, *supra* note 5, at 399–400.

recursive, and thus the nature of old and new findings within a decisional step, the analytical needs of a decisional step regarding facts and information, and analytical limits on the decisional effects of each legal method will determine the specific legal-analytical method entering a decisional step. This, in turn, determines the type of legal-managerial analysis formed to accompany legal information and produce findings and thinking in this particular step. To illustrate this point, consider how a point/issue recognition analysis might not be appropriate in the follow-up step to the decision if the decision maker is looking for factual business results consistent with company needs, and if the decision maker needs only to examine the situation-specific factual patterns to find these results. However, a point/issue recognition would be necessary if a factual/situational analysis reveals unexpected findings that are substantially different from any expected results, such as a massive layoff affecting only females or minorities, that could raise substantial legal issues or public policy concerns. A legal-managerial analysis enters, moves, and uses legal and policy information. This integration gives business decision makers access to usable legal information and an integrated analysis to seek more exact and timely legal information.⁸⁸

IV. THE THEORY BEHIND EXPLAINING LAW'S IMPACT ON BUSINESS

A theoretical framework shows the existence and power of a legal-managerial analysis. The theoretical framework is the intellectual or theoretical validity of an evaluation of law with business disciplines, and the power is the ability to predict and explain how *factual patterns* under a *theory or principle* affect managerial discretion and judgment under legal or policy principles. Theoretical existence and power establish that rational business theories do not inherently undermine either the logic of law or rationality of public policy concerns. Business theory evaluates law and public policy by ascertaining and assessing the impact of law and public policy on the erosion of managerial discretion and judgment evidenced by the loss of reactive and proactive responses. This erosion is the partial or total loss of a set or line of factual patterns,

88. A definitional analysis helps managers consider the broad impact of law and public policy on organizational needs, business relations, and public interests. An issue-alternative analysis ascertains the most likely legal issue and policy concerns of each alternative.

such as employment at will practices. Some factual patterns may have been justified by established business practices and once lawful alternatives in business decision making, such as sexual and racial discrimination, but now lack any managerial justification under established business thinking. This theoretical or legal-managerial evaluation complements the analytical power and managerial utility of integrating legal and business methodologies to enhance the use of business decision making methodology. The qualitative analytical properties of these methodologies underpin newly formed legal-managerial mechanisms that dismiss factual patterns in violation of the law or harmful to public policy and subsequently aid in using legal and policy information more precisely in business decision making methodology. Under a legal-managerial school of thought, a theoretical framework establishes the value of using established business theory to evaluate law, and the value of integrating qualitative analytical properties of legal and business methodologies to form analytical mechanisms to accompany legal information.

A. The Theory of Evaluating Law with Business Theory

A legal-managerial school relies on the use of business principles and theories to explain and predict the use and effects of law and public policy concerns on business thinking and methodology. A theoretical framework demonstrates that business thinking can evaluate law and public policy when an established business theory is applied to a law or public policy, such as applying organizational flexibility to employment law or employee welfare policy. Business theories and principles, such as risk-return theory⁸⁹ and organizational flexibility, are logical and rational business thinking that should have been tested for a lawful and rational use by business organizations and decision makers.⁹⁰ Yet legal and public policy concerns may render some established business principles ineffective or invalid, thereby restricting managerial discretion and judgment if the factual patterns underlying these principles are unlawful decisions and practices. Obviously, employment regula-

89. See COPELAND & WESTON, *supra* note 2, at 145-53.

90. See, e.g., Nicholas R. Aquino, *The Organization of the Future*, BUS. & ECON., Apr.-Jun. 1990, at 14-17; Charles S. Englehardt & Peter R. Simmons, *Organizational Flexibility for a Changing World*, 23 LEADERSHIP & ORG. DEV. J. 113, 119 (2002); Brian Mascarenhas, *Flexibility: Its Relationship to Environmental Dynamism and Complexity*, INT'L STUD. MGMT. & ORG., Winter 1984, at 107.

tion and policy place limitations on organizational behavior, human resources, and other principles, such as organizational flexibility and employee termination. The regulation and policy protect social welfare interests, such as employee welfare, that were harmed by business decisions affecting employees. These decisions created at-will employment practices, such as racial and sexual discrimination, that lacked any rational business purposes in the allocation of labor and other resources.

*1. Establishing a Managerial Evaluation Before the Use of Law—*Business decisions should have plausible business, economic, or social bases and not rely solely on intuition, greed, and other theoryless grounds. Using business thinking to evaluate law and public policy concerns identifies the operational latitude and managerial reflection to be used when evaluating both impermissible and permissible factual patterns restrained by common law, regulation and public policy concerns within business and business organizations. A legal-managerial analysis or evaluation also indicates how business theory affects law and public policy and how policy-makers might respond to widespread occurrences of harmful factual patterns in business organizations and markets. Waiting for policy-makers and courts to respond causes managerial losses that permeate the whole business system. Therefore, the application of a legal-managerial analysis using established business theory must always precede the delivery and acceptance of legal information for the process of business decision making methodology.

A legal-managerial analysis evaluates common law, regulation and public policy to predict and explain the total or partial loss of managerial discretion and judgment under particular business theories and principles. Business theories include financial, accounting, and other theories that predict and explain the substance and process of business thinking. These theories explain the managerial discretion and judgment of business decision makers, such as corporate finance executives and bank executives. The application of business theory to law is a managerial evaluation that takes place before or during the use of law and public policy concerns in business decision making. This takes on even greater significance in dynamic, global institutions where sudden changes in the decisional situation, business environment, or economic markets may render past legal advice useless and require new legal advice on the same or different issues.

A pre-decisional legal-managerial analysis or evaluation reduces legal risks and policy threats to business decisions, and thus would affect both delivery by lawyers and acceptance by decision makers.

Both decision makers and lawyers, who conduct pre-decisional evaluations and then perform under these evaluations, should know more about a particular statute or law. Specifically, they should be more knowledgeable of factual patterns that create greater legal risks and public policy threats, thus helping to identify and focus on situations and factual patterns that are legally accepted. A pre-decisional managerial evaluation provides knowledge of the factual coverage and impact of the law and public policy concerns on business thinking before a particular statute or common law rule ever enters the process of business decision making.

2. *Illustrating Business Theory in Responses by Corporations*—A legal-managerial school of thought is an evaluation of law and public policy by management, finance, or other business principles before any law or public policy enters the process of business decision making. One example of a legal-managerial analysis with business theory is the use of organizational flexibility⁹¹ to predict or explain the impact of employment law and policy on the use of contingent work relationships by corporations.⁹² Organizational flexibility is a business principle⁹³ that supports flexible, immediate responses to changes in markets and politics in the global economy.⁹⁴ In providing organizational flexibility, contingent work relationships provide human resource flexibility through contingent workers, such as temporary and contract employees.⁹⁵ Temporary, part-time and

91. See Englehardt & Simmons, *supra* note 90, at 113 (“The need for organizational flexibility to accommodate a changing world is well understood. Today’s high-velocity and competitive markets apply added pressure to adapt rapidly and perform at high levels.”).

92. See Steven Hipple, *Contingent Work in the Late-1990s*, MONTHLY LAB. REV., Mar. 2001 at 3, 35 (discussing Freedman’s coinage of the term “contingent employment” to refer to conditional and transitory employment initiated by a need for labor (citing *Rising Use of Part-Time and Temporary Workers: Who Benefits and Who Loses?: Hearing Before the Employment and Hous. Subcomm. of the House Comm. on Gov’t Operations*, 100th Cong. 35–40 (1988) (testimony of Audrey Freedman))).

93. See Englehardt & Simmons, *supra* note 90, at 113 (discussing the need to build flexibility in business organizations to adapt to change in the global economy); Sharon A. Lobel et al., *The Future of Work and Family: Critical Trends for Policy, Practice, and Research*, 38 HUM. RESOURCE MGMT. 243, 246 (1999) (finding that many organizations are developing new organizational structures and practices to adjust to new business and environmental trends).

94. See Englehardt & Simmons, *supra* note 90, at 113 (“These trends are recognized in strategic management theories that focus on constant change and speed.”).

95. See, e.g., Richard S. Belous, *Human Resource Flexibility and Equity: Difficult Questions for Business, Labor, and Government*, 10 J. LAB. RES. 67, 67–68 (1989) (suggesting that the United States welfare system and labor markets can be more flexible); Andrew Templer, *The HRM Response to Global Changes in Employment Relationships*, 23 MGMT. RES. NEWS 2, 2–3 (2000) (finding that long-term contracts are declining in the global economy); Greg Ip & Russell Gold, *Lessons of Expansion Are Helping Economy Beat Recession, Too: New Flexibility in Inventory, Debt and the Work Force May Soften Booms, Busts—The Critical Role of Temps*, WALL ST.

other contingent work relationships create organizational flexibility by establishing easily terminable employment relationships not within the traditional scope of the employer-employee relationship.⁹⁶ A legal-managerial analysis or evaluation would use organizational flexibility to evaluate employment and labor regulation and policy governing contingent work relationships. Foremost, contingent work relationships are normally outside the coverage of employment regulation and policy because the employment relationship between the corporation and contingent worker is not a traditional employer-employee relationship. The absence of the employer-employee relationship exposes the contingent worker to employment decisions and practices that employment regulation would normally prohibit. Contingent work relationships that expose these workers to such practices may be lawful, but they may still receive more than normal scrutiny by federal policy-makers and create credible policy threats to traditional managerial discretion and judgment. If these relationships threaten to undermine employment policy, new employment regulation may be necessary to protect established public interests. This regulation would eliminate or restrict other contingent work relationships and thus invalidate, in part, the theory of organizational flexibility dependent on contingent work relationships.⁹⁷ This invalidation renders organizational flexibility theoretically incomplete or useless to support the business objective of a quick response to economic conditions, and is strong evidence of a loss of managerial discretion and judgment in the use of human resources to further a business objective.

A legal-managerial analysis or evaluation applies organizational flexibility to employment law and policy to determine how newly enacted employment law and policy could affect decisional alternatives relying on contingent work relationships and their attributes of flexibility. A legal-managerial analysis identifies and weighs the impact of law and public policy on managerial discretion and

J., Mar. 4, 2002, at A1 (finding that the manufacturing sector uses a large number of contingent workers whom the downturn in the economy greatly affected).

96. See Hipple, *supra* note 92, at 4.

97. See generally Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003) (examining the contingent work relationship and proposing a legal reform); Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799 (1995) (finding that the long-term costs of contingent work do not justify the short-term benefits and proposing state labor regulations); Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731 (1995) (recognizing a disparity in the treatment of contingent workers and recommending federal legislative intervention).

judgment by identifying lines or groups of factual patterns that could violate the law or undermine public policy if these patterns were decisional alternatives or other findings anywhere in the process of business decision making.⁹⁸

B. The Theory Behind Integrating Discipline-Specific Methodologies

Information for use in a discipline-specific methodology is useless unless this information is accompanied by an analytical mechanism to assist in recognizing when it should be used. Evidence of these mechanisms and their uses by business decision makers is plentiful, except when law and public policy concerns are evident in business decision making methodology.⁹⁹ Business and other disciplines provide discipline-specific analyses and information for the process of business decision making.¹⁰⁰ These analyses and information produce precise findings and thinking for each step in the process of decision making. To illustrate, statistics provide statistical methods and findings, such as a mean and probability, to evaluate alternatives and select the best alternative or decision.¹⁰¹ Statistical methods affect one or more steps in the process of decision making and move statistical findings among the steps based on analytical and information needs, such as the probability of the occurrence of an event. Law and public policy concerns affect the process of business decision making, such as determining the legality and feasibility of an alternative, in a similar manner and impose limits on the decision maker's discretion and judgment. A legal-managerial analysis affects business decision making in the same manner as other discipline-specific approaches, but uses an integrated or legal-managerial analysis to produce precise findings and thinking in the process of business decision making.

1. Legal-Analytical Mechanisms to Accompany Law and Policy—A legal-managerial analysis integrates legal and business methodologies and forms a type of analysis to govern the use of such information in the process of business decision making. Business

98. See Holloway, *supra* note 22, at 152-59 (suggesting that ERISA affects the use of business decision making by imposing procedures); Sitkin & Bies, *supra* note 15, at 345 (recognizing that business interests are giving way to social interests in the process of business decision making).

99. See, e.g., SCHELLENBERGER, *supra* note 12, at 14.

100. *Id.*

101. See Archer, *supra* note 4, at 55-61.

decision making methodology uses the analysis and information of business and other disciplines¹⁰² and is an analytical portal within legal analysis for business and other discipline-specific approaches.¹⁰³ These approaches provide business-related methods that carry analysis and information to affect each decisional step of business decision making.¹⁰⁴ Operating in a manner similar to these approaches, a legal-managerial analysis uses legal-analytical methods that are unbundled legal analysis to affect each decisional step. These methods accompany the delivery of legal information to effect analytical and informational functions taking place within a decisional step. They ascertain the legality or policy effects of all information and findings entering the process of business decision making at any decisional step. A single-purpose, unbundled legal analysis enters a single-purpose decisional step to form one type of integrated single purpose legal-managerial mechanism to accompany legal and policy information. As other discipline-specific analyses and information enter this decisional step, this single purpose legal-managerial analysis aids executives in ascertaining the legality of findings and thinking of a decisional step utilizing present legal advice while assessing the need for additional legal advice.

2. *Establishing the Theoretical Power of Analytical Mechanisms*—A legal-managerial analysis treats legal information as fact- or situation-sensitive, and treats policy information as interest- or norm-sensitive for business purposes. It also recognizes that any form of analysis accompanying legal and policy information must possess a distinct set of analytical mechanisms with the capability for use in any decisional step of the process. Using legal-analytical methods to produce findings, such as recognizing the issue before this method is needed to aid in decision making, helping define the decision situation, or finding the problem step, is analyzing law in an inappropriate manner. Applying a legal-analytical method to find the issue before finding the business problem just might recognize or find a legal question or policy concern that might not be the quintessential issue or concern of this particular problem, even though it may be relevant in some fashion. Moreover, using a point/issue recognition method to apply the law or public policy in an evaluation of the alternatives would not give an outcome or conclusion of legality for any alternative. A legal-managerial analysis accompanies the entry, movement and use of legal information

102. See SCHELLENBERGER, *supra* note 12, at 14; Archer, *supra* note 4, at 55–56.

103. See Archer, *supra* note 4, at 55–61.

104. See SCHELLENBERGER, *supra* note 12, at 14; Archer, *supra* note 4, at 55–56.

in business decision making and uses an unbundled legal-analytical methodology consistent with analytical and informational needs of the decisional step. In addition, when a factual or situational analysis finds that recently produced findings and thinking could be substantially inconsistent with earlier legal advice already entered in an earlier decisional step, a point/issue recognition aids business decision makers in recognizing new issues and then requesting and using additional legal and policy advice. A point/issue recognition method produces a question of law or fact from information accompanying analysis, and not the legality of the alternative. Therefore, a legal-managerial analysis relies on the use of legal analysis by lawyers to deliver legal information and depends on business decision makers to accept this information and use business thinking and methodology to assess it. Thereafter these decision makers will enter legal and policy information in the appropriate decisional step and then move and use this information and policy with an appropriate legal-managerial analysis to produce better findings.

*C. A Theory for Forming a Legal-Managerial Analysis
in a Decisional Step*

A legal-managerial analysis affects the entry, movement, and use of business and other discipline-specific analyses and information in the process of business decision making.¹⁰⁵ Lawyers use legal analysis to deliver legal information, but legal analysis is a bundled legal methodology that appears to be distinct from business methodology. Obviously, lawyers are not using a managerial analysis. Once lawyers deliver legal advice, business decision makers accept legal advice produced by legal reasoning and analysis of legal methodology. A legal-managerial analysis uses legal-managerial tools to aid decision makers in entering legal advice or information more precisely into the process of decision making.

In this process, the decisional step is the precise place where the impact of legal and policy advice accompanied by a legal-managerial analysis has the most far reaching effects. Each decisional step is a single-purpose analytical mechanism that is an observation and entry portal for legal, business and other disci-

105. See generally E. RAYMOND COREY, *THE USE OF CASES IN MANAGEMENT EDUCATION* 2-3 (rev. ed. 1996) (using business analysis and question formulation to create business cases).

pline-specific analyses and information, and it is a production point for findings about this particular information and analyses.¹⁰⁶ A few steps are recognizing and defining the situation, evaluating the alternative, and selecting the best alternative.¹⁰⁷ Each step is an analytical entry point and production unit that can and often does affect the next step, as well as previous steps in the process.¹⁰⁸ In each step, a managerial analysis with law must detect and weigh new business and other findings and thinking to determine if these findings and thinking would significantly alter the earlier situation and raise a new or additional issue.

*1. Analytical Mechanisms for Entry and Productivity in These Steps—*Legal issues, ethical dilemmas and public policy concerns arise in places other than the recognition and definition of the decision situation or the selection of the best alternative. Consequently, a legal-managerial analysis includes the fluid movement of analysis across the process of business decision making.¹⁰⁹ A legal-managerial analysis must ascertain the legality of any findings and thinking anywhere in the process of decision making to avoid making a clearly lawless or policyless decision. In determining the legality of business and other findings, the common law, regulation, and public policy concerns rely on a bundled legal methodology or analysis to accompany the provision of legal and policy information. Legal methodology systemically finds facts, gathers legal information, examines circumstances, promotes consistent thinking, and uses legal information. As stated above, it can be unbundled as single-purpose legal-analytical methods, such as situational/factual analysis and issue/point recognition.¹¹⁰ Unbundled legal analysis is more analytically manageable for a business decision maker who uses it as a series of analytical tools for the precise entry, movement and use of legal and policy information. Precisely, these tools accompany legal and policy information to test the legality of business and other information accompanying findings within a decisional step. Examples of this information and facts include, among others, factual changes in the definition of the decision situation or unanticipated findings in evaluating the more feasible alternative. A legal-managerial analysis uses legal

106. See Archer, *supra* note 4, at 55–56 (discussing recursive and interactive decisional steps).

107. See *id.*

108. See *id.*

109. Cf. *Varity Corp. v. Howe*, 516 U.S. 489, 503 (1996) (suggesting that an unlawful act occurred during the employer's communication of its decision during the implementation of the decision, not in the decision making process).

110. See *supra* note 82 and accompanying text.

information accompanied by unbundled legal-analytical methods and thus is analytically more sensitive to the information and analyses entered into, and findings produced by, decision makers in each decisional step.

The analytical properties of an unbundled legal analysis create the opportunity to form analytical mechanisms easily manipulated by business decision makers to better understand and use legal advice.¹¹¹ A legal-managerial analysis recognizes that legal and business methodologies possess similar qualitative analytical properties. These methodologies share three types of qualitative analytical properties: analysis-, coordination-, and decision-based properties. One type of property is present in one or more decisional steps of business decision making, and is also present in one or more legal-analytical methods of legal methodology. Legal advice delivers pure law accompanied by a sophisticated legal analysis to business decision makers who must accept this advice before they can enter it into the decision making process. However, beyond acceptance and initial entry, the formation of a discrete legal-managerial analysis accompanies further entry of legal information into the decision making process. Business decision makers accept legal advice accompanied by a legal analysis, but further use of this advice and the recognition of the need for more advice are legal-managerial analysis. Although law is obligatory, legal analysis is not self-executing.

2. *Establishing the Managerial Utility of Analytical Mechanisms*—As legal-analytical methods operate within decisional steps of the process of business decision making, they begin their entry with the delivery of legal advice to the business decision makers, and upon entry into a decisional step, they form various types of legal-managerial analysis to accompany entry, movement and use of legal information. Although legal-analytical methods lose their legal identity, they contribute important, but less sophisticated, analytical qualities to legal-managerial analysis for business decision makers. A legal-managerial school rests on the assumption that business decision makers know and understand business decision

111. See generally DAVID R. ANDERSON, DENNIS J. SWEENEY & THOMAS A. WILLIAMS, AN INTRODUCTION TO MANAGEMENT SCIENCE: QUANTITATIVE APPROACHES TO DECISION-MAKING 4 (7th ed. 1994) ("Qualitative analysis is based primarily on the manager's judgment and experience; it includes the manager's intuitive 'feel' for the problem and is more an art than a science."); Amy George, *Qualitative Analysis: Evaluating A Borrower's Management and Business Risks*, J. COM. BANK LENDING, Aug. 1991, at 6-16 (using qualitative analysis in financial credit analysis); Keith Howard & John Peters, *Managing Management Research: Analyzing Data*, MGMT. DECISION, No. 5, 1990, at 33-42 (using qualitative analysis in management research).

making methodology and can inform lawyers of the specific decisional step being manipulated in the process of decision making. Likewise, a legal-managerial school rests on the assumption that lawyers can explain to business decision makers the importance of facts, laws and their role in legal-analytical methodology. In a legal-managerial analysis, a consistent analysis accompanies legal and policy information beyond delivery and acceptance and initial entry to the decision making process. In fact, the legal-managerial analysis guides the further entry of this information into the appropriate decisional step for use, and then guides it out this step for movement to the next step in the process. To illustrate, the business decision maker must recognize and define the decision situation and seek legal or policy information relevant to the situation. Fact-sensitive law and need-driven policy require a thorough examination of the transactions, practices, relationships and circumstances of the decision situation. In such an instance, a legal-managerial analysis uses a factual/situational analysis to accompany legal and policy information entering the recognition and definition of the decision situation and consequently forms a definitional analysis to aid in examining and understanding factual patterns of the decision situation.¹¹² A definitional analysis gives decision makers a more precise use of legal and policy information by attaching a specific legal-analytical method, such as factual/situational analysis. Theoretically, a legal-managerial analysis integrates unbundled legal analysis with management methodology to enter, move, and use the most appropriate legal and policy information more precisely within the process of business decision making, and gives business decision makers more analytical power and managerial utility in the practice of the business disciplines.

V. THE BENEFITS OF A LEGAL-MANAGERIAL SCHOOL FOR PRACTITIONERS

To be worth its weight, a legal-managerial school must demonstrate that it has both the managerial utility and analytical strength to benefit business decision makers. This framework must demonstrate that a legal-managerial analysis aids business by utilizing business theory to assist business decision makers in their attempt to produce and justify rational business decisions. In addition, this framework must demonstrate that legal-managerial analysis aids

112. See *supra* Part III.C and accompanying notes.

business decision makers by attaching analytical mechanisms or tools to legal and policy information entering the business decision making process.¹¹³ In business and professional practices, a legal-managerial school assumes that decision makers know and can disclose to lawyers and other experts the exact decisional step where the legal advice and analysis will enter the process of business decision making.¹¹⁴ Moreover, business decision makers must determine whether lawful business decisions are still good business actions consistent with organizational or corporate objectives and policies. They must assess and appraise decisional alternatives to ascertain their relative fit to organizational goals and objectives,¹¹⁵ though the decision does not violate law and is consistent with public policy initiatives. Therefore, to show its strength as a practical framework, the legal-managerial school must establish that clear and successful business decision making depends upon the formation of a legal-managerial analysis to accompany legal and policy information. A legal-managerial school must illustrate how good business decisionmaking relies heavily on the application of business theory to law and public policy to support the selection of the best alternative.

A. The Practical Utility of Integrating Legal and Business Methodologies

A legal-managerial analysis adds both law and legal methodology to business decision making by bringing legal-analytical methods accessible to business decision makers into the steps of the process of decision making. A legal-managerial analysis enhances the analysis of business methodology, such as defining the problem or examining alternatives, by utilizing legal and policy information more precisely within decisional steps.

On the nature of business decision making, a managerial analysis with law draws a sharp distinction between compliance and

113. Law and other disciplines have used legal-analytical methods. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 9-10 (1988) ("Legal analytic methods (which centered on the careful reading of legal texts against a background of comprehensive knowledge of legal doctrines and institutions, and heavily emphasized logical reasoning), deployed entirely on legal texts and problems, seemed adequate equipment for a law professor.")

114. See *Howe*, 516 U.S. at 505 (concluding that the decision selected was lawful under termination procedures, but finding that the implementation of the decision was unlawful under fiduciary standards).

115. See GRIFFIN, *supra* note 45, at 271-72; Archer, *supra* note 4, at 55-56.

general decision making and thus helps lawyers and managers recognize the difference between decision making to implement business objectives and decision making to comply with public obligations. On one hand, compliance decision making does not implement business objectives to affect productivity, revenues and other business interests. It may or may not have any rational grounds in business theories and principles. It complies with particular public obligations, such as environmental regulation and employment discrimination law. Compliance decisions should result in compliance with law or conformance with public policy. A managerial analysis with law ascertains the actual and potential impact of law on business practices and transactions and thus can avoid unnecessary litigation regarding past practices and transactions. On the other hand, general business decision making uses business thinking, such as principles and theories, to further business plans, objectives, and goals. General decisions primarily implement business objectives, but must conform to common law, regulation, and public policy. These decisions comply with law, but only as required in making the decision. General decisions can result in litigation, negotiation, or compliance. Law and public policy can invalidate business thinking underpinning general decision making and planning. This invalidation complicates decision making and alters plans. A managerial analysis with law ascertains the actual and potential impact of law and public policy on general decisions and thus can avoid some litigation and negotiation that are not necessary to implement business objectives and further business interests.

1. Defining and Using Analytical Power and Managerial Utility—

Analytical power is the ability to use precisely legal-analytical methodology to recognize and examine situations, to examine and select alternatives, and to determine the implications of the decision.¹¹⁶ Combining these legal-analytic methods with finance, economic, and other information can produce findings and thinking that are entirely new and may affect existing factual circumstances or transform previous findings and thinking concerning a prior decisional step. Any new factual changes that were a result of new findings and thinking, but were not a part of the original decision or any prior decisional steps, create the need to ascertain whether the gravity of these changes to the earlier findings is substantial enough to effect the utility of prior legal advice. For example, the analysis of business methodology can be

116. See Cappalli, *Legal Method*, *supra* note 5, at 399–400; see also Holloway, *supra* note 22, at 156–61.

enhanced through the use of a factual/situational analysis to determine if new findings and thinking create the need for completely new legal information concerning changes to the original factual pattern or definition of the decisional situation. A factual/situational analysis aids in examining changes in events or circumstances surrounding the situation when a decision was made, and can assist in assessing recent changes in economic, political and social forces within the business environment. The analytical power of a legal-managerial analysis includes acquiring and using legal and policy advice and analysis, examining the decision situation and subsequent findings, and recognizing and addressing legal issues and public policy concerns arising in the process of business decision making.¹¹⁷

More complex legal-analytical methodology complements business methodology by permitting business decision makers to identify legal issues and expose policy threats to the business system. Both complex and simple methodologies add managerial utility. This utility includes the use of legal-analytical methods to evaluate responses and relations among individuals, organizations, and government arising under business thinking or in the use of business methodology. To illustrate this point, consider how legal-analytical and business methodologies contain coordination-based properties that can evaluate the proportionality of the response to the problem. In business methodology, the decisional step of evaluating feasible alternatives determines if an alternative can further company objectives or is proportional to company needs, therefore containing a coordination-based property.¹¹⁸ Evaluating alternatives includes assessing a decisional alternative to determine its connection to relevant organizational objectives, such as determining whether a profitable short-term decision furthers the short-term objectives that had been established for a short-term decision. In legal-analytical methodology, a consistency/coordination analysis evaluates the fit or relationship between regulation and the public policy motivations underlying legislative decisions requiring a measured response to community needs.¹¹⁹ Courts fashion and ap-

117. Other scholars have recognized a special relationship between law and business decision making. *E.g.*, John Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 239, 239 (1991); Debra Dobray & David Steinman, *The Application of Case Method Teaching to Graduate Business Law Courses*, 11 J. LEGAL STUD. EDUC. 81, 86 (1993).

118. See GRIFFIN, *supra* note 45, at 271-72; Archer, *supra* note 4, at 55-56.

119. See, *e.g.*, James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit under Takings Provisions of State Constitutions*, 8 DICK. J. ENVTL. L. & POL'Y 143, 146-50 (1999).

ply a means-ends analysis¹²⁰ to determine whether a government regulation can further its declared public purpose¹²¹ and is justified by or proportional to the impact of a situation or problem on the community.¹²²

2. *Illustrating How Complex Methods Add to Managerial Utility*—Consistency/coordination analysis includes an analytical test that is sensitive to the means-ends relationship and similar factual patterns. The analytical test should exist before bringing this method into the process of business decision making. It contains legal, public policy, profit, employee welfare, public image and other standards to measure a relationship or other factual pattern. Such standards should underlie corporate policies for accomplishing corporate objectives, such as profits, market share, productivity, and compliance with legal, public policy, and ethical standards. This consistency/coordination analysis enters, where appropriate, a decisional step and forms a legal-managerial analysis to measure the relationship between the decision maker's alternative and an organization's objectives. For example, the consistency/coordination analysis enters the evaluation of the alternatives to monitor the continuity and consistency between an executive's best alternative and organization's objective reason for needing this alternative. The connection between this objective reason and chosen alternative must sufficiently comply with the analytical test that includes legal, ethical, policy, economic, and business standards and policies. This newly formed legal-managerial analysis would be an evaluation-coordination framework. Business analysts apply the evaluation-coordination framework to an executive's decision to determine whether a decision relates or connects directly to its declared corporate objective. If the corporate objective is to enhance employee welfare, then a decision that increases profits by denying employee benefits would be questionable. Obviously, an unlawful business decision cannot further a lawful objective. When an unlawful decision furthers a lawful objective, the corporation exposes itself to litigation and exposes the business to regulation. Likewise, a lawful decision cannot further an unlawful objective, such as recruiting a

120. See *Dolan v. City of Tigard*, 512 U.S. 374, 390–91 (1994) (establishing a rough proportionality test using means-end analysis to measure the fit between a land dedication condition and the impact of development on the community); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112–13 (1989) (applying an arbitrary and capricious standard of review to fiduciary management decisions interpreting benefit plans).

121. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (fashioning a means-ends analysis to measure the relationship between a regulation and its declared purpose under the Fifth Amendment's Takings Clause).

122. See, e.g., *Dolan*, 512 U.S. at 390–91; *Nollan*, 483 U.S. at 837.

competitor's employees to acquire trade secrets. Therefore, the evaluation-coordination framework examines the rationality or reasonableness of business decisions affecting business organizations and public needs affecting business interests.

Business decision makers can use an evaluation-coordination framework to examine the relationship between a business alternative and corporate objectives, and when public needs impose heavy public obligations, the evaluation-coordination framework assesses the relationship between public needs and business interests. On one hand, the relationship between a public need and business interest is an evaluation of the amount of managerial losses under regulation, namely the sum of the erosion of managerial discretion and judgment. Imposing regulatory restrictions means that public needs outweigh the freedom that once protected business interests underpinning managerial discretion and judgment in particular business practices, operations, and decisions. On the other hand, the relationship between an executive's decision and corporate objectives is a measure of the level of organization authority, and decision makers use this authority to respond to the need for a business decision. It represents the managerial discretion and judgment a corporate executive can exercise in making a decision to achieve the corporation's objectives. Demanding a close connection between the decision and objectives means that the corporation wants greater consistency, coordination and continuity in choosing among feasible alternatives and actually imposes limits on responses to corporate needs that may be out of line with distinct priorities.¹²³ This close connection may mean less managerial discretion and judgment in business decision making, which, in turn, includes more rational decisions, such as compliance with corporate policies governing ethics, law, and public policy. A legal-managerial analysis includes the use of legal-managerial analytical methods to make business decision makers more sensitive to organizational and institutional relationships and their impact and implications for corporate and public needs.

123. See generally GRIFFIN, *supra* note 45, at 274 (explaining that managers need to determine if a decision accomplishes its objectives).

*B. The Practical Utility of Applying Business
Theory to Law and Policy*

A legal-managerial analysis or evaluation applies business theory to law and public policy to evaluate the impact of law and public policy on managerial discretion and judgment overlain by trusted factual patterns of established business theories and principles. Practically speaking, this predictive and explanatory evaluation should take place before the use of any law and public policy in business decision making. This evaluation indicates how much theory survives scrutiny under legal analysis and reasoning when the survival of this theory must withstand the expansion of legal obligations and a continuous stream of public needs. The rate of survival of business theory depends on the magnitude of managerial discretion and judgment prevailing before judicial scrutiny or legislative intervention, particularly where managerial discretion and judgment have been gradually eroding with the passage of each regulation and the creation of new legal precedent.¹²⁴

*1. Business Theory as a Touchstone for Rational Business Decisions—*Sustaining and protecting a substantial level of managerial discretion and judgment requires decision makers to use established business theory to justify rational business decisions and plans. Established business theory should be in compliance with law and in conformance with public policy. This theory may play the greatest role in business thinking when the legality of the best alternative is uncertain due to ambiguity within the law or uncertainty surrounding policy determinations. The theory needs to play a role when legal risk and policy threat analysis unexpectedly lead to major violations of law or substantial injuries to public policy concerns in furtherance of business decisions, plans, and operations. Business theory gives rationality to business decisions by placing a decision in a line of factual patterns where the set complies with the law and conforms to public policy. However, a business decision, within a set of unknown and known factual patterns, may clearly fall into an uncertain or gray area requiring legal and policy analyses. Yet the extent of response or practices in the gray area may be unknown until the court or legislature speaks. Once the court makes a judicial decision, and if its judicial decision establishes liability, the court's compensatory and equitable remedies may not necessarily exceed profits, market share and other benefits that could have

124. See Sitkin & Bies, *supra* note 15, at 348 (recognizing that law imposes limits on decision making).

been gained by a business decision under certainty of law and public policy. When policy-makers or judges declare that a set or class of business decisions within a specific factual pattern are hereafter unlawful, the theory or principle underpinning these unlawful decisions, and their underlying managerial discretion and judgment, are not entirely rational and thus are partially or totally invalid under business thinking. Therefore, a legal-managerial analysis or evaluation gives practical insight into the roles of business theory and methodology in the risk and threat analyses of business decisions in the midst of uncertainty surrounding law and public policy.

A legal-managerial analysis or evaluation relies on business principles and theories, such as organizational flexibility and risk-return theory, to guide and produce rational business decisions.¹²⁵ As stated immediately above, law and public policy may render established business theories and principles ineffective. For example, organizational flexibility is a business principle that recognizes the need of business organizations to respond and react to unexpected economic conditions, political events, and social developments in the domestic and global economies.¹²⁶ Many business organizations are employing one form or another of contingent work relationships, such as part-time and temporary employment, to gain a type of organizational flexibility.¹²⁷ Any change in employment and labor policies may affect contingent work relationships and could render organizational flexibility, as a business principle, invalid or less effective to further business objectives. Thus a legal-managerial analysis applies business theory to law and public policy in order to ascertain the likely impact of law and public policy on the managerial discretion and judgment traditionally associated with established factual patterns, namely business theory.¹²⁸ A legal-managerial evaluation identifies and classifies factual patterns or alternatives, and leads to the recognition of practices and operations that could be lawful, unlawful, or of uncertain legality in business decision making.¹²⁹

125. See *supra* Part IV.A and accompanying notes.

126. See generally Befort, *supra* note 97, at 172-77 (examining the contingent work relationship and proposing legal reforms to address social welfare problems); Holloway, *supra* note 36, at 27 (discussing the effects of government intervention on the use of contingent work by business organizations).

127. See Hipple, *supra* note 92, at 4.

128. See Sitkin & Bies, *supra* note 15, at 348 (recognizing that the law's impact on the decision making process can interfere with organizational flexibility).

129. See *supra* Part II.C and accompanying notes (discussing an efficient market hypothesis to demonstrate the application of business theory to law).

2. *The Proper Role for Business Decision Makers*—A legal-managerial analysis recognizes that business decision makers accept the delivery of legal and public policy information from lawyers and policy analysts. This delivery and acceptance process of legal advice includes legal analysis that possesses complicated techniques and methodology foreign to business managers. A legal-managerial analysis does not consider the lawyer to be an inherent part of the decision making process. Lawyers and policy analysts must be invited to participate by business decision makers and then must be given access to enough facts, findings and thinking to give sound legal and policy advice. From a practical perspective, a legal-managerial analysis includes the lawyer's delivery of legal advice accompanied by legal analysis. Next, the business decision makers accept legal advice with legal analysis for inclusion in the decision making process. Thereafter the decision maker must recognize the need for a particular legal-analytical method to form the appropriate legal-managerial tool. This tool assists the use of law and public policy in this decisional step of business decision making. Legal-managerial tools accompany the entry, movement and use of a particular statutory provision, common law rule, or public policy principle and simultaneously operate with other information and analytical tools to produce the outcome within each decisional step in the process of business decision making.¹³⁰

C. The Practical Utility of a Legal-Managerial Analysis

A legal-managerial analysis includes management-driven, law-specific analytics that attach analysis to legal and policy information entering decisional steps of the process of business decision making. As mentioned above, bundled legal analysis is not normally accessible for laypersons, including business decision makers. When lawyers deliver legal information to business decision makers, it is accompanied by a bundled legal analysis that is often beyond the decision makers' understanding. If these decision makers seek to manipulate the law in decision making, they do so without using legal methodology to understand the impact, implications and consequences of using legal and policy advice. A legal-managerial analysis integrates legal-analytical methods within the

130. See Holloway, *supra* note 22, at 173–88 (discussing the impact of ERISA's disclosure and procedural obligations on the decision making process).

decisional steps of business decision making to give decision makers more analytical control over legal and policy advice. This legal-managerial analysis provides precise analytical mechanisms to enhance a decision maker's use of legal and policy advice in business decision making, but remains cognizant of the need for lawyers to provide new legal advice. Within the decision making process, a legal-managerial analysis attaches to legal advice and gives business decision makers a group of precise legal-managerial tools, such as a definitional analysis, to use law and public policy in each decisional step of business decision making.

1. The Need to Complement the Inherent Nature of Decision Making—

The recursive and interactive nature of business decision making does not make the information and methodology of any discipline self-executing or self-fulfilling, especially fact-sensitive law and interest-driven public policy such as securities regulation and investment security. Consequently, legal advice needs an analytical methodology to assist within the process of business decision making. The lack of an analytical mechanism within business decision making to accompany legal and policy information creates an obvious but dangerous condition when business decision makers use legal and policy advice. Business information such as finance, statistics, and data alter the definition of the decisional step. Consequently, any prior legal advice not accompanied by an analytical mechanism that is usable by business decision makers is normally not specific enough to aid these decision makers in recognizing the need for new legal and policy advice. New business information and analyses often create the need for revised or entirely new legal information. A legal-managerial analysis overcomes this lack of an analytical mechanism in business decision making methodology by integrating legal and business methodologies to form legal-managerial tools capable of aiding the business decision maker in recognizing the need for new legal and policy information in the business decision making.

*2. Using Evaluation and Analysis to Overcome the Inherent Failures Within the Decision Making Process—*Business, economics, statistics and other disciplines lack an inherent analytical methodology to ascertain the need for legal or policy information and engage in the legal analysis needed to understand the usefulness of legal information within the process of business decision making. Lawyers deliver legal advice with legal analysis and business decision makers accept this advice and analysis for use in business decision making. There seems to be no introduction of any legal or business analytical mechanism to assist with the use of legal and policy advice in

business decision making. A legal-managerial analysis attacks the lack of an inherent business analytical approach by attaching legal-managerial tools that can be understood by business decision makers to help them use this legal advice in their business endeavors.

Business organizations operate in dynamic global markets and environments that are subject to managerial, political, economic, and social changes. The initial decision making step and other decisional steps may require a substantial change when new economic, political, managerial, or other information and analyses enter the fray. Thereafter, the decisional reliance on any prior legal information accompanied by legal analysis, which had been delivered and accepted earlier, may render the decision making process less effective or the decision ineffective if the decision maker ignores or fails to recognize the need for new legal advice accompanied by a legal-managerial analysis. A thorough examination of the decision and each decisional step is necessary to find and recognize legal risks and public policy threats. These risks and threats could lead to regulation, and this regulation invalidates or undermines established business theory and restricts managerial discretion and judgment.¹³¹ A legal-managerial analysis does not alter legal information accompanied by legal analysis but adds legal-managerial tools to the practice of business, actually making business decisions requiring legal advice easier to handle. Legal-managerial tools are not self-evident or self-executing. Therefore, the legal education of managers includes educating them on the managerial evaluation of law and public policy and the use of legal-analytical methods to form legal-managerial tools.

VI. THE EDUCATIONAL PEDAGOGY OF A MANAGERIAL ANALYSIS

A pedagogical framework must teach the analytical power, managerial utility, and theoretical existence¹³² of a legal-managerial school of thought consistent with the mission and objectives of business education. This framework relies on traditional legal analysis and reasoning but offers a discrete legal-managerial analysis to accompany legal information, and includes business theory

131. See Hambrick & Finkelstein, *supra* note 15, at 382–83 (“For example, executives in heavily regulated industries typically have a relatively limited set of options for their existing businesses and face prohibitions against entering new businesses.”).

132. See THOMPSON, *supra* note 20, at 11–12 (concluding that theory must possess some rational predictive and explanatory powers that show an understanding of the real world or business system).

in legal studies for business decision makers. Traditionally, legal text and judicial decisions teach the application of rules and principles accompanied by legal analysis and reasoning. This teaching of legal studies bundles legal methodology attached to legal and policy information. Unlike traditional teaching of legal studies, the pedagogical framework adds the use of business decision making methodology and application of business theory to the traditional teaching of legal studies. The framework teaches students to eliminate totally unlawful factual patterns before engaging in decision making, and helps them identify and assess factual patterns creating severe legal risks and public policy threats, and then assists them in the use of these analytical mechanisms in the process of business decision making. Business cases teach the use of legal-managerial tools and analysis in business decision making and planning. Using legal-managerial analysis and evaluations of law and public policy teach a more precise use of analysis, reasoning, and writing. A legal-managerial school includes the legal education of managers that must be taught during a short period but must be used for an extremely long period. Such an education relies on the use of decisional and legal-analytical methods, the creation of discrete legal-managerial tools, and the demonstration of analytic writing, reasoning and learning skills for business decision making and planning.

A. Pedagogical Benefits of Integrating Methodology in Business Education

The pedagogy of a legal-managerial school teaches an application of business theory to principles and rules of law in an evaluation of law and public policy in order to identify and classify factual patterns. It also teaches an integration of legal and business methodologies to form analytical tools enhancing the entry, movement, and use of legal and policy information in the business decision making process.

1. Teaching Evaluation and Analysis in Legal Studies Courses—First, the application of business theory to law provides a pre-decisional evaluation of law and public policy in a managerial context and thus gives insight into the macro effects of law and public policy on business. This legal-managerial evaluation predicts and explains the factual impact of a particular law or public policy by identifying and classifying factual patterns eventually arising in a business deci-

sion or practice affecting managerial discretion and judgment of business decision makers. This evaluation identifies the invalidation of business theory, which is the loss of managerial discretion and judgment, through the invalidation of part of a known line of legal and supportable factual patterns. Teaching a managerial evaluation creates a link between the theory of business disciplines and jurisprudential logic and rationality. A legal-managerial evaluation teaches students the impact of law and public policy on business theory through identifying and classifying factual patterns occurring in business situations and environment.

Second, an integration of legal and business methodologies forms various types of legal-managerial analyses to accompany legal and policy information during the process of business decision making, and thus creates a microanalysis for business decision making. A specific type of legal-managerial analysis is the analytical product of the integration of a decisional step and legal-analytical method.¹³³ Both legal and business decision making processes have similar analysis-, coordination-, and decision-based qualitative properties. Each property or methodology contains one or more decisional steps and legal-analytical methods with supportive or similar analytical functions.¹³⁴ To illustrate this point, consider that analysis-based property includes point/issue recognition to find the legal issue and public policy concern. This property also includes the decisional step of evaluating alternatives to determine whether these alternatives can further objectives or solve the problem.¹³⁵ Entering point/issue recognition into evaluating feasible alternatives creates a discrete type of legal-managerial analysis. This discrete analysis is an issue-alternative evaluation that accompanies legal information and affects its entry, movement, and use in evaluating feasible alternatives.¹³⁶ A legal-managerial analysis

133. See *supra* Part III.C and accompanying notes (explaining the formation and use of a definitional analysis to examine factual situations in a business context).

134. See Archer, *supra* note 4, at 54–61 (examining the nature of methodology within business decision making steps); Cappalli, *Legal Method*, *supra* note 5, at 399–400 (discussing the legal methodology of American law); *supra* Part III.C and accompanying notes. For the time being, we recognize three types of qualitative methodological properties: analysis-based, coordination-based, and decision-based methodologies. Analysis-based methodology examines factual patterns and decision situations, ascertaining legal issues and public policy concerns of business situations; coordinate-based methodology identifies and evaluates alternatives under corporate objectives, business interests and managerial criteria; and decision-based methodology explains the impact of law and public policy on decision selections.

135. See GRIFFIN, *supra* note 45, at 272 (discussing the need to evaluate each alternative by its feasibility, satisfactoriness, and consequences).

136. See generally Cappalli, *Legal Method*, *supra* note 5, at 398–99 (noting that legal methodology includes “a meta-law by which the legal system itself may be analyzed and evaluated”

teaches an integrated methodology to accompany the entry, use, and movement of legal and policy information in business decision making.

2. *Using Business Cases to Teach Evaluation and Analysis*—Business cases demonstrate a legal-managerial analysis by permitting students to integrate legal and business methodologies in graduate and perhaps undergraduate education.¹³⁷ Each business case uses at least one or more legal-analytical methods and decisional steps and thus may not try to teach the whole bundle of legal methodology or entire process of decision making. As a legal-managerial analysis enters and then moves information from one decisional step to another, business cases demonstrate the interdependency of legal-analytical methods and the interactive, recursive nature of the decisional steps of business decision making. The legal-analytical methods of analysis-based methodology are necessary to examine facts, gather law, and frame issues. One class of qualitative methodological properties is dependent on one or more properties of another class, and are thus recursive and interactive. Analysis-based methods are necessary in the use of coordination-based properties to test the coordination, consistency, and continuity of decisions under organizational objectives. This decision should comply with the law, conform with public policy, and directly relate to corporate objectives. To illustrate, a business case teaching analysis-based properties would use a factual/situational analysis to accompany legal and policy information in the definition of the decision situation and evaluating feasible alternatives. Business cases require the examination of factual patterns within or influencing the decision situation and affecting an evaluation of feasible alternatives. A coordination-based case relies on analysis-based findings in an evaluation of the relationship between the manager's best alternatives and the company's objectives. Business cases show the need for the managerial utility and analytical power of a legal-managerial analysis in teaching various types of legal-managerial tools and mechanisms to accompany legal information in business decision making.¹³⁸

(citing Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 441 (1996)).

137. Judicial decisions demonstrate the use of legal-analytical methodology by making legal and factual findings, recognizing and defining issues, and forming logical and rational decisions. See Cappalli, *Legal Method*, *supra* note 5, at 399–400. Business cases demonstrate the use of business decision making methodology by using discipline-specific analyses and information. See COREY, *supra* note 105, at 2–3.

138. It has long been recognized that law requires highly integrated thinking. See, e.g., Jordan H. Leibman, *Legal Studies in Business Should Be Taught By Academicians Trained In Law*,

*B. Pedagogical Benefits of an Integrated Analysis
on Written Communication*

The pedagogy of a legal-managerial school relies heavily on writing to illustrate the analytical power and managerial utility of identifying the legal risks and policy threats of factual patterns. Legal-managerial analysis allows a manager to enter, move or use legal and policy information in producing analytical findings and thinking in business decision making. Specific types of writings can illustrate the use of a particular qualitative analysis and thinking.

1. *Using Writings Consistent with Findings and Thinking*—Depending on findings and thinking, different types of writings use different types of reasoning, analysis, and information.¹³⁹ One example is an interoffice memorandum that is practical writing and relies on information accompanied by analysis to produce findings and thinking to explain a position, justify an action, or support a recommendation. This writing uses the application of law and policy in the selection of the decision to form a legal-managerial analysis, namely an application/selection analysis, to produce a business decision using two outcome-based properties.¹⁴⁰ This writing shows how a legal-managerial analysis accompanies legal and policy information in initiating and performing informal or routine analysis and thinking. Business cases require practical, technical and other types of writings to address the implications and effects of law and public policy on business theory and decision making.

2. *Using Practical Writing to Communicate Practical Findings and Thinking*—The practical writing and analysis of the memorandum permit decision makers to use legal, business, and other information accompanied by analyses to generate findings and thinking in communicating the selection of the best alternative and its justifications. The memorandum uses the legal-managerial analysis of an integration of legal and business methodologies and an evaluation

10 J. LEGAL. STUD. EDUC. 137, 137 (1992) ("All its facets are connected so that the examination of any issue inevitably demands analysis of related issues upon which the outcome of the matter will depend . . . mak[ing] 'thinking like a lawyer' quite different from thinking like an expert in finance, marketing, or management science.").

139. See generally Stephen D. Gladis, *Are You The Write Type?*, TRAINING & DEV., July 1993, at 34–36 (describing four types of writers: correspondent, technical, creative, and analytical). The teaching strategy can use technical/analytical writing to describe analytical findings, creative writing to build conceptual and analytical frameworks, and correspondent/analytical writing to make informal recommendations and decisions.

140. See *supra* Part III.C and accompanying notes (discussing the nature of outcome-based properties in legal and business decision making methodology).

of the law by business theory near the end of the process of decision making. Specifically, a memorandum communicates whether a business organization should engage in a certain business practice or operation, such as hiring temporary workers to promote organizational flexibility. Foremost, the memorandum permits the decision makers to use business, statistics, and other information and analyses to produce findings and thinking. It also uses legal-managerial tools and allows the use of law and policy to accompany the entry of legal and policy information in the decision. Next, the memorandum includes a managerial evaluation that explains whether a relevant business principle and any of its factual patterns raise particular legal risks and policy threats. It uses the most relevant business principles and law to consider justifications and support for the most appropriate decision. This memorandum permits the decision makers to arrive at a rational business decision. The decision maker uses law and public policy accompanied by a legal-managerial tool to ascertain the legality of findings and thinking in making a decision or performing another decisional step.¹⁴¹

Writing in the pedagogical framework enhances the decision maker's writing skills and illustrates the use of business theory to evaluate law and public policy and the use of an analytical mechanism to accompany legal and policy information in business decision making.

C. Pedagogical Benefits of an Integrated Analysis in Learning and Reasoning

Learning objectives demonstrate the managerial utility and analytical power of a legal-managerial school in the legal education of managers within business education. The learning objectives include knowledge, comprehension, analysis, application, synthesis, and evaluation.¹⁴² A legal-managerial analysis relies on business

141. See generally Barbara E. Behr, *The Positive Effectiveness of Controlled Student Writing Activity: A Statistical Analysis*, 3 J. LEGAL STUD. EDUC. 46 (1985) (suggesting that writing improves studying and thinking skills); Karla H. Fox & Madelyn M. Huffmire, *The Use of Court Reports and Other Writing Assignments in the Business Law Curriculum*, 9 J. LEGAL STUD. EDUC. 117 (1990) (finding that writing assignments permit students to further their analytical and communication skills).

142. See TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS 201-07 (Benjamin S. Bloom ed., 1956).

cases and judicial decisions to teach students to develop and then use legal-managerial analytical tools.

1. *Using a Legal-Managerial Analysis to Teach Learning Objectives and Skills*—The legal-managerial analysis teaches the acquisition and understanding of facts, legal information, and legal-managerial tools for the process of decision making.¹⁴³ This framework requires an evaluation and use of law in a business context and requires business decision makers to see law and public policy through their business eyes—an analytical look through law and public policy using theory-based business thinking.¹⁴⁴ This framework also requires synthesis and evaluation of findings and thinking to further coordination, continuity, and consistency among internal and external relationships in business decision making.¹⁴⁵ Moreover, a legal-managerial analysis is straightforward and adds to conceptual thinking, helping students actually grasp the big picture in the legal education of managers by teaching prospective managers to build and use analytical tests and conceptual frameworks to evaluate relationships. The pedagogy of a legal-managerial analysis advances learning objectives by using legal-managerial tools to build analytical and learning skills in business education.¹⁴⁶

2. *Using a Legal-Managerial Analysis to Teach Reasoning*—A legal-managerial analysis furthers the use of methods of reasoning including analogy, deductive reasoning, and inductive reasoning. The pedagogical framework uses business cases to teach reasoning. These cases require the production of analytical findings and performance of logical thinking, such as building analytical tests and conducting legal research, by using analogy and deductive and inductive reasoning. Together legal and business methodologies teach reasoning for business decision making. To illustrate, this pedagogy emphasizes the use of decision/outcome-based properties in the decisional steps of selecting the best alternative and implementing the chosen decision. The use of these properties demonstrates deductive reasoning and analogy. This methodology applies law and public policy to resolve legal issues and public

143. See discussion *supra* Parts III.B, III.C.

144. See *supra* Part I.C and accompanying notes (discussing analyzing law from a totally business perspective).

145. See *supra* Part V.A and accompanying notes (discussing the building and use of an analytical framework to conduct a decision-objective analysis of alternatives).

146. See generally Samuel S. Paschall, *Expanding Educational Objectives Through the Undergraduate Business Law Course*, 19 AKRON L. REV. 615 (1986) (discussing how legal studies further learning objectives).

policy concerns in decisional steps and thus illustrates deductive reasoning and analogy.¹⁴⁷

This pedagogy also uses coordination-based methodology to demonstrate inductive reasoning and conceptual thinking. It uses the construction and application of an analytical test or framework to scrutinize two relationships: executive decisions and corporate objectives, and public needs and business interests. The analytical test or framework contains criteria such as economic, managerial, and societal, which permits students to select one or more elements of these criteria to examine the nature and extent of public and private relationships within business organizations. Coordination-based methodology enhances conceptual skills by requiring inductive reasoning to find a general proposition and inductive analysis to grasp the big picture among numerous standards.¹⁴⁸ A legal-managerial analysis integrates and uses legal and business methodologies to teach rational and logical reasoning, and to examine and solve business problems with concomitant legal issues and policy concerns arising anywhere in business decision making.

The pedagogical framework of a legal-managerial school teaches learning, reasoning, and writing skills in resolving narrow legal issues, addressing broad public policy concerns, and examining diverse situations and relationships facing graduate business students in business decision making and planning.

VII. CONCLUSION

Business and jurisprudence lack an interdisciplinary school of thought on law and business. Priming the debate on a legal-managerial school of thought that relies on a legal-managerial analysis and evaluation necessarily raises theoretical, practical, and pedagogical considerations. These considerations raise almost insurmountable questions, but lawless and theoryless decisions should be the impetus to prime the debate about a legal-managerial school of thought. Such decisions have been more effective in causing regulation to advance public interests than in using business principle and theory to further corporate objectives and business interests.

147. See *supra* Part I.C and accompanying notes (discussing the need for a legal-managerial analysis in business).

148. See *supra* Part V.A and accompanying notes (discussing the use of a framework to analyze the relationship between a government regulation and a business interest).

Finance, accounting, marketing, and other business analyses provide business theories, principles and other information for use in the decision making process and produce findings and thinking within each decisional step. Economics, statistics, and other analytical approaches include both information and analysis, and produce findings and thinking. Business and other approaches include analytical mechanisms that permit intellectuals and decision makers to exercise control over the entry, movement, and use of information, production of findings, thinking in business decision making, and, in some instances, to form, examine, and evaluate business thinking, namely business theory and principles, in guiding business systems. Law and public policy are not among those analytical approaches.

A legal-managerial school of thought includes a law-managerial approach that operates similar to other analytical approaches. It integrates legal and business methodologies to create unique legal-managerial tools that accompany and enhance the use of legal and policy information in decision making. Note that lawyers use legal analysis to give legal advice, but lawyers are not within the decision making process. Business decision makers still need an analytical mechanism to effectively use legal advice because legal advice is neither self-executing nor self-directing. Business decision makers must use it.

The opportunities for ignoring law and public policy are greatly reduced if analytical mechanisms exist to assist the use of legal and policy information in business decision making and planning. A legal-managerial analysis gives business decision makers access to an unbundled legal analysis that can enter the process of decision making and join with a decisional step. However, the decision making process needs to weigh legal and policy advice rather than relegate it to one, and only one, decisional step. Strangely, the confidentiality attached to legal advice in business decision making does not permit the study of this one-step-fits-all use of legal advice, and shields the legal and policy risk analysis taking place in business decision making from close scrutiny. A legal-managerial analysis permits executives to use legal advice more precisely in decision making, and it permits executives to be more sensitive to factual and environmental changes affecting the viability of legal and policy advice in making and executing business decisions.

A legal-managerial school of thought or managerial analysis with law expands legal practitioners and jurists' understanding of business methodology and theory. It ascertains how executives should see legal advice in a business context and as a managerial analysis.

On one hand, it provides a microanalysis to examine the effects of law and public policy in each decisional step and thus weighs any new findings and thinking that could affect legal advice provided earlier. Lawyers should be hesitant to give legal advice until business decision makers identify exactly where they are in the process of business decision making. On the other hand, the use of business theory to evaluate law and public policy gives lawyers and jurists greater insight into the actual and potential impact of law and public policy on business and business interests. It provides a macroanalysis to examine the impact of law and public policy on business thinking and thus predicts and explains how law and public policy could influence or affect the business system. Such predictions and explanations permit lawyers to consider more than facts of the most immediate decision situation but to see a line of factual patterns that could definitely affect law or public policy. Lawyers need to find and weigh the potential legal risks and policy threats that relate to, or emanate from, particular business theories and principles employed in business situations and environments.

If business executives are not using business theories and principles, then they may not be engaging in logical or rational decision making. Lawyers need to point out the enormous ethical dangers, legal risks, and public policy threats of making decisions based solely on intuition, emotions, or instincts. Most importantly, legal experts, policy analysts, and business decision makers must understand that legal and policy risk analysis will not always pass for mere unethical acts when unsuccessful legal and policy risk analysis results in breaches of civil laws and violations of criminal laws. Such unsuccessful risk analysis may actually lead to an invalidation of business thinking or theory. When the law becomes too infinite, any concomitant business theory would become so finite that the line of factual patterns of this law would cover this entire business theory. Consequently, this law invalidates business theory, and the making of a business decision under this theory is tantamount to taking private-social action.

Theoretical, pedagogical, and practical frameworks must demonstrate the theoretical existence, managerial utility, and analytical power of a managerial analysis with law or legal-managerial school of thought for jurisprudence and business disciplines. A theoretical framework must demonstrate the theoretical existence and power of using business theory to evaluate the impact of the law and public policy. This framework must identify and classify factual patterns that tend to expose managerial discretion and judgment to enormous legal risks and policy threats culminating in regulation. Next,

a practical framework must demonstrate the managerial utility and analytical power of using unbundled legal-analytical methodology to accompany the entry, movement, and use of law and public policy in the process of business decision making. Finally, a pedagogical framework must demonstrate the analytical power and managerial utility of integrating legal and business methodology in teaching knowledge and comprehension of law and policy information, and enhancing qualitative analysis and reasoning with law and public policy in business education. In concluding, a managerial analysis with law evaluates, operates, and educates using business thinking and methodology to examine, explain, and teach the managerial effects of common law, regulation, and public policy on managerial discretion and judgment. A legal-managerial school provides a short but effective legal and policy education for business decision makers who can never ignore legal, public policy, and ethical considerations.

