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Law, Management, and Strategy: Collapsing Boundaries and Managing the Interstices

Conference Paper · August 2017

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Law, Management, and Strategy: Collapsing Boundaries and Managing the Interstices

An All Academy Panel Symposium Proposal

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Panelists

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<td>Assistant Professor of Law</td>
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Abstract:

Law undergirds the capitalist system and is “at the interface” of business and social relationships but remains largely walled off from many traditional approaches to management education, scholarship, and practice. Although a simple definition of law is “enforceable rules between individuals and individuals and society,” law is also a medium by which relationships among and obligations between management and internal and external stakeholders are negotiated and formalized. Law can also drive (or impede) innovation by creating new rights (or burdening new business models with undue regulation) and promote (or prevent) social change by setting the boundaries for acceptable corporate actions. Legal rules for disclosure and corporate governance can and have changed the rules of engagement between organizations and their internal and external stakeholders. Environmental regulations, complemented by responsible corporate decision-making, can profoundly affect the long-term viability of industries and of humans’ ability to coexist with the natural environment. Law, and management of legal dimensions of business, should be seen as inseparable from strategy, ethics, stakeholder engagement, and sustainability. This interdisciplinary panel includes both legal and management scholars who focus in their teaching and research on these topics. As a matter of execution, this panel will also be at the interface: roughly half the time is budgeted for Q&A and conversation with attendees, moderated with a clear goal in mind. The goal is to stimulate awareness and actionable “take-away” ideas that (1) involve law and (2) relate to the teaching, research, and practice of strategy, business ethics, stakeholder engagement, and sustainability.
SECTION ONE: WHY THIS PANEL SYMPOSIUM FITS THE ALL-ACADEMY THEME

Law is squarely “at the interface” of business and its internal and external environment. Law establishes the “rules of the game” for business (North, 1990:3) and is a critical aspect of the “ecosystem” within which firms operate (Teece, 2007: 1320). Law both constrains and enables the disruptions (Schumpeter, 1934) that reshape markets and relationships within and across firms (Bagley, 2010). At the outer bounds, laws governing climate change may ultimately determine our ability as a species to coexist with the natural order.

“R&D [is] carried out in a virtual Cambrian explosion of organizational forms” (Gilson, 2010: 887), with strategically astute lawyers (Bagley, 2016) functioning as “transaction cost engineers” (Gilson, 1984: 255) and “enterprise architects” (Dent, 2009: 279). “Legally astute” managers (Bagley, 2008) can work with counsel to craft complex licensing and technology transfers and alliances, such as pharmaceutical public-private partnerships (Bagley and Tvarnø, 2015, 2014), to upgrade relevant skills and facilitate active learning (Branzei and Vertinsky, 2006). Such arrangements enhance firms’ absorptive capacity and their ability to identify and control “‘bottleneck assets’ or ‘choke points’ in the value chain from invention through to market” (Teece, 2007: 1331) (internal citations omitted).

Legally astute managers recognize that “there is an inherently interactive and symbiotic relationship between the private business organization and the larger society that constitutes its host environment” (Preston & Post, 2012: 12). Accordingly, business pursuits must satisfy the firm’s financial, economic, legal, and ethical obligations, as well as changing societal expectations (Bagley, Roellig & Massameno, 2016; Bagley & Page, 1999). By practicing “strategic compliance management” (Bagley, 2005, 2016), managers can not only reduce the incidence of legal violations but also convert seeming constraints into opportunities. Thus, the ability of legally astute top
management teams to work effectively with strategically astute counsel who deliberate with them as to both means and ends (Kronman, 1993), is a valuable dynamic capability (Bagley, 2016).

Law is not static. By defining the property rights of inventors, courts help “determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives” (Diamond v. Chakrabarty, 1980) (upholding the patentability of human-made micro-organisms). The distinctions ultimately drawn between employees and independent contractors will help define the value propositions for firms like Uber and other companies in the “gig” economy (Scott, 2017).

Top management teams can also help shape the law, as Airbnb has tried to do in California and as Federal Express did when it worked with regulators to expand an air carrier’s right to operate a hub-and-spoke distribution system (Bagley, 2016). Many firms are using political contributions in the post-Citizens United world (Citizens United v. FEC, 2010) to help shape the rules governing their operations (Bagley et al., 2015). Non-government organizations, such as Transparency International and the Fair Labor Association, can create “soft law” that transcends national borders to combat bribery and the use of child labor and to promote “livable wages” and worker safety (Henn, 2016). Soft law and enlightened self-regulation and restraint are likely to become even more important to ensuring protection of the environment, workers, investors, and customers if, as promised, the Trump administration and Congress roll back many of the existing U.S. laws and regulations governing such matters. Thus, this topic is related to all the potential questions raised in the All Academy theme description and promises to be of interest to members of all divisions and interest groups.

Law can illuminate and reinforce social norms by codifying common expectations of behavior, yet it can also drive social change by creating new civil rights, protecting environmental resources, and creating new boundaries on acceptable corporate actions. Legal rules for disclosure
and corporate governance, such as Sarbanes-Oxley and Dodd-Frank, can and have changed the rules of engagement for organizations and their investors and other stakeholders. In a time of social upheaval and change, law can protect vulnerable members of society—including perhaps the Earth itself and all its inhabitants—even as it facilitates the growth of capital and the creation of wealth. Law should be seen—in terms of the classroom, scholarship, and practice—as inseparable from strategy, ethics, stakeholder engagement, and sustainability. AACSB International recognized these interfaces when it amended the accreditation requirements in 2013 to explicitly require coverage of the legal, regulatory, and societal aspects of business as well as ethics and sustainability (AACSB, 2013), yet there appears to have been less progress adding courses in law and sustainability than courses in ethics (Bird & Hiller, 2016; Bagley et al., 2016). We hope this panel will help reinforce the importance of law and sustainability to business education.

**This panel will seek to be “at the interface” in terms of being interdisciplinary.** This interdisciplinary panel includes both legal and management scholars who, by virtue of teaching and researching law, sustainability and strategy at business schools, reach across the aisle to their legal and non-legal colleagues to better understand the intersections of law, management, ethics and sustainability and how they affect firm strategy and practice.

**It will also – as a matter of execution – be at the interface.** Roughly half the time is budgeted for Q&A and conversation with attendees, moderated with a clear goal in mind. The goal is to stimulate awareness and actionable “take-away” ideas that (1) involve law and (2) relate to the teaching, research, strategy, and practice of stakeholder engagement and sustainability.

Avenues for fruitful conversation among panelists and with attendees involve the following themes:
- Are there myths about law that ought to be dispelled? For example, is shareholder primacy legally mandated, that is, are managers and board required to maximize shareholder value? If not, how can firms ensure that actions not directly tied to enhancing profits are not covered by the fig leaf of being a responsible corporate citizen?

- What principles are underappreciated, implied, nascent, or needed-but-not-yet-articulated, that would allow for human systems to thrive indefinitely? For example, do intergenerational rights and duties exist? Do ecosystems – our natural life support systems – have standing or rights, absent a connection to a human representative?

- Can lawyers help managers and regulators better understand the economic and social effects of externalities and effective ways to internalize them? For example, the SEC recognizes that environmental risk can be highly material to major industries and the firms that finance them (Sulkowski, 2016; Sulkowski & Waddock 2014). This is true especially in the context of informing investors, but that is just the most obvious manifestation. Can lawyers help convince managers that what was seen as peripheral is actually core and must be a part of an organization’s strategy? That fiduciary duty, viewed correctly, obligates considering, discussing, and making commitments to manage these non-financial impacts?

- Would lawyers agree with, and how could they advance, the assertion that the CSR pyramid ought to be re-ordered or flipped, such that “first, do no harm” to stakeholders and “obey the law” are actually fundamental, and could be seen as logical preconditions for an organization’s license to generate profits through corporations and other forms of business organizations that limit the investors’ liability for harm caused by the entity?

This panel symposium will be “at the interface” in another way: we will be mindful and inclusive regarding the concerns and questions of all divisions and interest groups. Because
law is the medium and the means for negotiating and formalizing relations and obligations between management and internal and external stakeholders of the firm, all issues of interest to all Academy of Management divisions and interest groups, and any solutions to any key challenges, are potentially related to law. In particular, by raising awareness of law in strategically and sustainably managing relationships with stakeholders and the environment, this panel symposium most obviously relates to the domains of Business Policy and Strategy (BPS), Social Issues in Management (SIM), Organizations and Natural Environment (ONE), and Strategizing Activities and Practices (SAP). Given the role of law in resolving disagreements, it also relates to Conflict Management (CM). Panelists are willing to share observations on integrating legal perspectives into teaching and research, thereby addressing the domains of Management Education and Development (MED) and Research Methods (RM). Given the role of law as an expression of both values and power, it tends to attract attention from those interested in Management Spirituality and Religion (MSR) and Critical Management Studies (CMS). Regardless of whether an activity in any specific context is allowed or restricted and the rights and benefits conferred and the costs and impacts imposed on others, the panelists believe that, in any domain, law is often underappreciated and underleveraged in management education, scholarship, and practice.

The symposium format, as mentioned above, will aim to be “at the interface” by endeavoring to catalyze a conversation between and among participants and panelists:

(1) WELCOME AND INTRODUCTION OF SYMPOSIUM PURPOSE AND FORMAT (5 minutes): Adam J. Sulkowski will introduce the panelists and welcome the audience. He will briefly describe the format of the symposium and will point out its purpose and context (i.e., the theme of the 2017 Academy meeting)
DISCUSSION BY PANELISTS (40 minutes): The main part of the panel symposium will be comprised of five initial panelist comments. Each of the speakers has developed specific ideas about the role of law, which s/he will share briefly (about 5-7 minutes each). Each panelist will summarize what s/he feels is underappreciated and underleveraged in terms of law in the context of education, research, and practice related to strategy, management, and sustainability. The panelists will briefly offer responses to others’ ideas and then the conversation will be turned over to the audience for their engagement with the questions and initial comments. The balance of the 90 minutes will be dedicated to a moderated Q&A conversation with attendees, focused upon generating awareness and actionable ideas for teaching, research, and practice.

Q&A SESSION/DISCUSSION WITH AUDIENCE (40 minutes): To start a wider discussion, members of the audience can ask specific questions aimed at comments made by any of the panelists. Adam J. Sulkowski will moderate this Q&A session.

DEBRIEFING (5 minutes): Finally, Adam J. Sulkowski will summarize three key takeaways from the symposium.

SECTION TWO: SUMMARY OF THE PANELISTS’ DISCUSSION

Constance E. Bagley of the Yale School of Management will speak about Legal Astuteness as a Valuable Dynamic Capability. “Legal astuteness” is “the ability of managers to communicate effectively with counsel and to work together to solve complex problems and leverage the resource advantages of the firm” (Bagley 2010: 592). Legal astuteness
requires (1) a set of value-laden attitudes about the importance of law and ethical behavior to firm success, (2) a proactive approach to regulation and risk, (3) the ability to exercise informed judgment when managing the legal and business aspects of the firm, and (4) context-specific knowledge of the law and the appropriate use of legal tools. (Bagley, 2008).

For example, aided by strategically astute counsel (Bagley et al., 2016), pharmaceutical firms can work with research universities to craft pharmaceutical public–private partnerships (PPPs) (Bagley and Tvarnø, 2014) that bridge the so-called “Valley of Death,” which separates (1) “upstream research on promising genes, proteins, and biological pathways” by academic researchers funded by the government from (2) “downstream drug candidates” for-profit firms are willing to fund in hopes of commercializing the academic discoveries (Rai et al., 2008). When coupled with relational governance and properly aligned incentives (Bagley & Tvarnø, 2014), as well as the appropriate protection and allocation of intellectual property rights (Bagley and Tvarnø, 2015), public-private partnerships facilitate the transfer of tacit knowledge and the more efficient use of public and private resources.

Inara Scott of Oregon State University will speak about Law and Business at the Forefront of a New Stakeholder Engagement Model. Amid the pressing danger of global climate change, business is uniquely positioned to be a positive force for good (Winston, 2014). More nimble than government, able to leverage vast economic resources, and having the potential to be long-sighted and to make decisions that cross state and country lines, business may in fact be the only sector capable of pivoting the world to a more sustainable, renewable future. But to be successful, business must partner with a variety of stakeholders, including government entities, community members, and activists (Van Huijstee, 2007).
Law and business must work together to engage stakeholders in positive ways and develop new ways of doing business. The opportunities abound, but often go unrecognized. Antitrust law provides a compelling example: while businesses increasingly look to collaboration to solve challenges and become more sustainable (Nidumolu et al., 2014), outdated legal rules may impede collaboration and inhibit businesses’ ability to work together (Scott, 2016). Uniquely successful collaborations engage third parties and a variety of stakeholders to provide legitimacy to corporate actions and avoid antitrust prohibitions, but with legal reform, even greater collaboration is possible (Scott, 2016). In the new sharing economy, business leaders, workers, government, and lawyers, must work closely to craft regulations that facilitate innovate new business models while still protecting consumers and employees (Scott, 2017). Working together, law and business can create new paradigms to facilitate stakeholder engagement, while removing outdated regulatory barriers and misplaced incentives.

**Josephine Sandler Nelson** of Stanford University and the University of Pennsylvania (Wharton) will speak about **Myth-Busting in Legal Business Ethics**. Today’s business world seems to produce more than its share of scandals (Matthews & Heimer, 2016). Cover stories reporting indictments, prosecutions, and penalties imposed for unethical business conduct appear almost daily. Wells Fargo recently admitted opening 2 million fraudulent accounts and firing 5,300 employees for unethical behavior (Nelson, 2016). The costs of large-scale coordinated wrongdoing are beginning to mount from US $22 trillion in the 2007 to 2008 financial crisis (Melendez, 2013) to impacts on US $300 trillion in loans from wide-scale 2015-2016 LIBOR manipulation (McBride, Alessi, & Sergie, 2015). Meanwhile, intense competition and reliance on “pay for performance” incentives have only increased the pressure for individuals and organizations to act
unethically (Dayen, 2016; Asch, 1956; Bettenhausen & Murnighan, 1985; Ehrhart & Naumann, 2004; Sherif, 1936).

Unethical business conduct has triggered at least two reactions. First, lawmakers and regulators have passed new regulatory requirements, imposed new penalties, and pursued high-profile indictments and prosecutions (Apuzzo & Protess, 2015). As a result, businesspeople worry that their conduct might cross some line that puts their wealth and reputations at risk (Gellerman, 1986). Organizations face pressure to design and implement effective ethics and compliance programs (O’Mara, 2016).

Second, because of the number of recent high-profile cases in which business school graduates have been convicted of crimes—even graduates of top schools like Harvard and Stanford—business schools are scrambling to add classes on business ethics (Zingales, 2012). April 2013 business-school accreditation guidelines put specific pressure on schools to describe how they address business ethics (AACSB, 2013). Because business schools are accredited in staggered five-year cycles, every business school that is a member of the international accreditation agency will have to adopt ethics in its curriculum by next year.

Missing in what business-school graduates need to know about ethics is an understanding of their legal obligations in their profession, who they serve, and even what a corporation is (Stout & Nelson, in press). Let’s have this conversation to better inform our teaching and to better prepare our graduates as they enter a new world of both basic compliance and broader ethical duties.

Sandra Waddock of Boston College will speak about A Systematic Perspective on Law at the Interface. A recent book by the great physicist and social thinker Fritjof Capra and legal expert Ugo Mattei called The Ecology of Law: Toward a Legal System in Tune with Nature and Community deftly articulated the importance of law at the interfaces that systemically exist among
businesses, societies, communities, and the natural environment. ‘Western jurisprudence, together with science, has contributed significantly to the mechanistic modern world view…that lies at the root of today’s global ecological, social, and economic crisis’ (Capra & Mattei, 2015, sections 58-59). US law appears to support the notion that the purpose of business is to maximize shareholder wealth (alternatively, Stout, 2008, 2012; Greenfield, 2005). Recently, this interpretation has resulted in businesses (and other institutions) exploiting nature and humans in the pursuit of profitability and growth at virtually any cost. Costs include human-induced climate change, growing inequality, and collapsing ecosystems (Jackson, 2011; Ehrenfeld & Hoffman, 2013; IPCC, 2014; Francis, 2015). Such systemic exploitation is built on property rights and a neoliberal economic agenda (Waddock, 2016, section 278) with a ‘short-term, reductionist, linear, and quantitative bias typical of traditional scientific thought, a consequence of the mechanistic paradigm’ (Capra & Mattei, 2015) The systemic consequences of current legal support for economic and other institutional activities with this short-term exploitive orientation suggests a clear need for large system change (Waddell, Waddock, Cornell, Dentoni, McLachlanb & Meszoely, 2015) to avoid the two existential threats to civilization (Diamond, 2005): growing inequality and pushing ecological resources beyond their capacities.

**Dr. Paul Shrivastava**, Executive Director, Future Earth, and Professor of Management, Concordia University, will make the following key points about **Proactive Law & Planetary Intergenerational Risks.** First, the context: Post-1950s, the world has entered a period of “great acceleration” in population, social and ecological trends placing undue pressures on earth systems. This has pushed the earth to what scientists are calling “planetary boundaries” that are disturbing the earth’s carbon, water, nitrogen cycles and threatening earth’s ability to support life (Rockstrom, 2009). Second, the current challenge: Huge wealth inequalities, growing population, and
aspirations for modern living for all make “sustainability” a central challenge of our time. We are entering a new epoch some call the “Anthropocene” in which human activities and systems determine the health and viability of life supporting natural systems (Steffen, 2015). Human-nature relations need to be managed in this new context. Third, environmental treaties and conventions have been a response. Numerous conventions have been built since the 1970s, and several new global treaties signed in 2015 and 2016, including the COP21 Paris Climate Treaty and the Sustainable Development Goals (Stafford Smith et al. 2016). Yet the implementation of treaties and conventions is plagued with policy incoherence and lack of funds. Fourth, modern law evolved to solve problems or pre-Anthropocene societies, and often does not have doctrines and precedents to deal with novel challenges of the Anthropocene. Dealing with now emerging existential risks at the planetary scale requires anticipatory management and legal actions. Proactive law approaches can help address some of these risks to sustainability (Berger-Walliser et al, 2016). Fifth, an example of the need for clear and codified legal interface for improving sustainability is the area of “Intergenerational Responsibility” – Intergenerational responsibilities are part of the value system in many cultures, but there are few legal mandates or codified provisions. For example, legal infrastructure is needed to build intergenerational financial structures in the energy sector.

Adam J. Sulkowski, Babson College, will serve as introducer, moderator, and general shepherd of the symposium to ensure that panelists stick to time limits so that there is sufficient time for audience engagement and interaction.
References


U.S. Department of Justice. 2015, July 2. Statement by Attorney General Loretta E. Lynch on the agreement in principle with BP to settle civil claims for the Deepwater Horizon oil spill [Press