Foreword

The Klein Criteria Project

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It is an honor and a pleasure to write the Foreword to the Klein Criteria Project Volume. Professor William Klein, for as long as many of us can remember, has been one of the giants in the field of business law. His academic articles span the spectrum from tax law to the study of corporate bonds all the way to the theory of the firm. And each one of those articles is a finely crafted gem, blending insights from practice and theory in a way that few others have been able to do.¹ Bill was not only a pioneer in introducing concepts from financial economics to legal analysis; but was also one of the first in the legal academy to reach out to colleagues in economics departments and business schools to introduce scholars there to the questions legal scholars found pressing. We have only heard stories of those early days at UCLA, but those conversations that occurred among Bill, Ben Klein, Armen Alchian, Harold Demsetz, and Jack Hirshleifer must have been terribly exciting because they resulted in articles that are among the foundation stones for much of our current thinking about business law and organizational economics.

Moving to a different front, Bill’s teaching materials have been nothing short of revolutionary. These days, it is not fashionable to talk about intellectual innovations made through casebooks and courses, but we will do so regardless. Bill innovated in two ways that had a tremendous impact on students at both UCLA and elsewhere. First, there was the “deals” course, where Bill collaborated with colleagues at the Business School to set up a course where students would not just read appellate cases, but would work through actual deals and see how the documents for those deals were created.² That course for many years was not only one of the most popular courses at UCLA, but was one of the few that students, years after graduation, reported as having taught them useful skills for entering the practice of corporate law. Second, there was the Business Associations casebook that Bill created with Mark Ramseyer (they

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‡ Professor, Georgetown Law Center. The authors are grateful to Steve Choi, Kim Krawiec, and Ed Kitch for conversations about this piece.
¹ On occasion, these gems have been muddied when Bill has had less-than-capable co-authors such as Gulati.
² Versions of this course were also created independently at the law schools at Columbia and Vanderbilt.
were subsequently joined by Steve Bainbridge). At the time they created their book and the accompanying teacher’s manual, corporate law teaching materials were characterized by what appeared to be a bizarre competition to make the books as complex, confusing, and heavy as possible. Bill and his co-authors decided to do the opposite. Armed with the principle of “less is more,” they sought to demystify corporate law by breaking down the most complex of concepts into their simple building blocks. Bill’s goal was to create teaching materials that would enable even the least interested of students to enjoy the material. The irony here is that the teaching materials, while achieving the goals of simplicity and clarity in spades, also ended up setting out a highly sophisticated conception of the relationship between business organizations and organizational law, a conception that has inspired innumerable academic articles.3

Bill’s contributions have been consistently characterized by a level of freshness, curiosity, and energy that most of us would love to have characterized even a small fraction of our papers. One of the many special things about Bill is that his projects always start with a puzzle (and the Klein Criteria Project exemplifies this). There will be some phenomenon that puzzles him and he will set about studying it. The process of study can take years. But academic work for Bill has never been about stating and restating what he already knows. Rather, it is about asking questions to which he does not know the answers and then reporting on where his explorations led him. He is and has always been an academic in the truest sense of the word. In other words, his perspective has always been that of the eager and curious student. This volume puts together a unique set of tributes to this giant. The tributes are unique in that they do not, as many tributes do, simply praise Bill’s past scholarship. Instead, they take one of his most provocative ideas—one that he had on his desk as an incomplete manuscript—and, each in their own way, complete it. What we have then is a volume of contributions from some of the most interesting thinkers in the legal academy that comes together as a single manuscript—a single manuscript that asks the question: what are the criteria for good corporate law? Alternatively: Why don’t corporate law academics specify the criteria that they are applying in proposing their particular reform proposals?

Everyone who has been part of the corporate law contingent of the UCLA faculty at any time over the last two decades has likely engaged the Klein Criteria Project. One might think then that the end result of these two decades of intellectual debate would be some gargantuan document with hundreds of footnotes that purports to explain how to understand and solve all of corporate

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3. And this is to say nothing of BUSINESS ORGANIZATIONS AND FINANCE (co-authored with Jack Coffee) that many law teachers and students got their introduction to the relationship between finance theory and organizational law from or of the tax casebook (co-authored with Joe Bankman) and so on.
law's problems. But, in Kleinian fashion, the end result of many years of thinking and writing is a short memorandum of a couple dozen pages. Instead of adding pages with the passages of years, Bill has deleted them, keeping nothing but the bare essence of his idea. Given that making law reform proposals are so central to what we do as legal scholars, he asks: why don't we make clear what the criteria are for measuring the quality of these particular proposals? Why is it okay for scholars to put forward proposals with little more than some vague assertion that their proposals maximize welfare? He wants specificity; he wants to us explain what the criteria are and what the tradeoffs are.

On its face, Bill's question may seem to be a simple one with an obvious answer. But, as the papers in this volume reveal, the answer is neither obvious nor easy. Further, exploring the reasons for why that answer is not obvious results, for at least some of us, in uncomfortable conclusions about the state of corporate law scholarship. Throughout his career, Bill has always had the ability to ask that seemingly innocent question that, when one thinks about it, suggests that the emperor has no clothes. Mark Ramseyer's paper suggests that Bill has done that again. Mark, in a wonderfully funny and cynical essay, points out that much of corporate law scholarship and, particularly scholarship involving reform proposals, boils down to the same set of standard arguments and assertions (the same assertions included in Bill's short memorandum). We scholars simply mix and match those different arguments as we please, but we rarely say anything new that goes beyond the short list of arguments in Bill's list. Mark's reading of the Klein Criteria Project is that to take it seriously is to understand why no one in the field will listen to Bill's pleas for explicit discussions of criteria. Why? Because to do so would be to reveal that few of us are saying anything new in our papers.

Mark's interpretation of Bill's memorandum may sound provocative, but there are more than a few others whose essays echo his view. Ed Kitch, in his delightful essay, goes directly for corporate law scholarship's jugular in pointing out that the subjects that are considered the heart of corporate law—that is, the question of what are the appropriate default (and sometime mandatory) rules for the internal governance of the corporation—raise neither very deep nor interesting questions (and are certainly not worth as much hand wringing and tree killing as goes on). The most interesting questions about corporate behavior are not in the field that we know of as "corporate law," but rather are in related areas such as securities regulation, intellectual property,
and employment law. Ed would probably do away with corporate law as a separate subject and simply have it be seen as a subset of contract law.

The reader will see that the essays in response to Bill’s provocative memorandum have largely taken on a particular flavor. They ask the question: why is Bill, after four decades or more of watching the field evolve, asking the rest of us to consider this particular question? Tomotaka Fujita, a wonderful thinker whose work most U.S. academics have not been exposed to, asks the question of what Bill was thinking somewhat differently.\(^7\) He asks the positive question: why don’t corporate law academics specify their criteria? Putting this in the more cynical terms of the two authors of this Foreword, the question is: are legal academics hiding something by not specifying their criteria? Mark, as we noted earlier, suggests that the reason for not specifying is that it would reveal that most of us are not saying anything new. But, it may also be that revealing these criteria would make the proposals too easy to attack and demolish. If the end goal is to push the proposal rather than engage in serious academic debate, then it probably makes sense that people would not reveal their criteria. By attempting to change the norms of the profession to one where it would be unacceptable to issue a proposal without specifying one’s criteria, perhaps Bill is trying to force his colleagues to reveal information that many of them don’t want to.\(^8\)

Indeed, if one looks at Bill’s own work and especially his most recent projects, one realizes that he himself is not a big pusher of reform proposals for corporate law. Instead, his most substantial work in recent years has been almost entirely positive. Bill has spent countless hours studying how commercial actors structure their deals so as to understand why they care about the things that they do. And he thinks it interesting to describe, deconstruct and analyze why the actors behave as they do. But the one thing that Bill has never felt compelled to do is to end every article with a law reform proposal or a statute. That move, that many of us (especially when we are under the tenure gun) feel compelled to make, is one that he has always decried. Most of us simply don’t know enough to make law reform proposals, we have often heard him say. So, maybe Bill’s Criteria Project is an exercise in trying to push us away from our tendency to make law reform proposals in everything we write.

Consequently, one of us (Paul Edwards) urges in this volume that the criteria be used first for empirical rather than normative work.\(^9\) The spirit of the Criteria Project could be usefully employed not simply to get scholars to

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8. This particularly cynical interpretation of Bill’s project came from a conversation that one of us had with Steve Choi and Jesse Fried, the two Berkeley faculty members and then advisers to the Berkeley Business Law Journal who helped set up this conference.

disclose their underlying Criteria, but to help identify cause and effect of various regimes and practices. Some of Bill’s empirical research provides an example of how to approach such scholarship. Consistent with his Wisconsin roots, Bill takes a socio-legal approach to the study of business associations. And that means that one has to explore the real world of private governance structure, the actual political economy of business associations, and the impact of business association law in facilitating entrepreneurship. In other words, Bill seems to want us to get our hands dirty by going out there and actually talking to people and collecting data.

Like Paul, Bill Bratton also seeks to reframe the Klein project. And he does it in classic Bratton style, where history, economics, and corporate law are woven together beautifully. Bratton asks us to reframe the Klein Criteria Project so that the criteria are put into broader and somewhat different categories. Bratton suggests that identifying categories of debate will help us to weigh and prioritize the criteria against what is actually of import to the practice of corporate law. So, Bratton suggests characterizing the criteria as live debates and then categorizing together debates over the scope of regulation, over the objectives of regulation, over the boundaries of the firm, and over the terms of the corporate agency relationship and the allocation of authority within the firm. And Bratton presents a persuasive case for the importance of making bare the dialectic nature of the criteria. Using an exposition of the specific reforms suggested by Berle and Means as his starting point, Bratton illustrates how the bulk of their recommendations did not make it into practice, in part because they were inattentive to the dialectic which they faced.

Another one of Bill Klein’s longtime co-authors, Steve Bainbridge, takes Bill’s project to task by suggesting that a different threshold question needs to be addressed before one can meaningfully talk about the criteria for good corporate law. One of the greatest pleasures of being a junior faculty member at UCLA (for Mitu Gulati) was watching the heated debates between Steve and Bill—two dear friends whose political leanings could not be more different—over everything from corporate law to the Lakers and religion. As was the case with those debates, where either Bill or Steve would say something provocative that the other would reject right away as outrageous and misguided, Steve begins his response to Bill on the offensive. He asserts right away that the Criteria Project should be rejected. But, to dig deeper into the source of Steve’s disagreement with Bill, is to see that Steve not only shares the same goals as Bill, but that he also wants the nature of corporate law scholarship to change. He differs from Bill in that he wants all corporate law

scholarship to discuss a different set of threshold issues, ones that he thinks are more important to the end goal of engendering meaningful debate among scholars. The first step that scholars should take, Steve says, is to be clear on theories of the firm and the normative positions one is starting from. Since Steve also has a cynical streak, we suspect that he does not expect anyone to actually be willing to be honest about either their theories or their normative commitments. That level of honesty, we suspect Steve would say, would produce a level of vulnerability to which most of us are not willing to subject ourselves.

On the other side of the spectrum from Steve is Bob Thompson. One of the most careful and thoughtful scholars in corporate law, Bob not only applauds Bill’s suggestion that criteria that should be specified, but adds to the set of criteria. Corporate law scholars need to be more modest in their claims and need to specify the extent to which their claims about law and its efficacy can supplement nonlegal mechanisms. One cannot understand the value of a law to society without understanding the extent to which it crowds out or otherwise interferes with extralegal enforcement mechanisms. The relative efficacy measurement, for Bob, is a crucial metric by which every corporate law proposal should be measured.

Bill, we suspect, on listening to this speculation about what he might have been thinking about when he wrote his Criteria memorandum, is chuckling. His goal, he says in his memorandum, is simply to get people to specify their criteria so that there can be better engagement between the different sides in the corporate law debate. And the question that he had been hoping that his colleagues would tackle at this conference was that of what criteria they had used in their own articles over the years. But, of all the participants, only two—Tomotaka Fujita and David Skeel—engaged the question that was put to all of the participants about their own work. And looking to their papers reveals perhaps why the rest of the participants did not do the same: figuring out the set of criteria one uses is very difficult. Having worked through the exercise, though, neither David nor Tomotaka conclude that they would have come out any differently on their proposals had they started by specifying criteria. But the unanswered question that remains is whether the quality of debate that would have resulted had criteria been specified would have improved significantly.

Bill’s corporate law scholarship has always connected and contextualized itself with other facets of business law, such as taxation, commercial paper and contracts. Stewart Macaulay begins his essay by asking why a contracts scholar

was invited to a corporate law scholars’ party. His essay implicitly provides the answers, and they are clear and compelling. First, Stewart provides us with an important piece of the intellectual genealogy for Bill’s insatiable curiosity about American business law by noting the role played by Willard Hurst in identifying and mentoring Bill’s talent as a young law professor at Wisconsin. Second, he brings a complementary framework from the study of contracts into dialogue with Bill’s Criteria. But most importantly, Stewart chides us all for our tendency towards formalism. He suspects that in corporate law, as in contract law, the “law in action” will only partially and incompletely reflect any legislative policy or carefully considered judicial reasoning. We must carefully consider the social context of the parties involved and not pretend that the law of corporations applies uniformly to a garage-based start-up and a multinational publicly traded behemoth. “Attempting to carry out any policy by creating individual, or corporate, rights and duties is too close to trying to empty Lake Mendota in Madison with a spoon.”

The scope of the Criteria Project had the catalyzing effect of encouraging some participants to engage in some powerful meta-analysis and critique of corporate law generally. In this regard, without any coordination, the project has produced an intellectually rich colloquy between some of the most innovative minds in the field. Consider, for example, how the contributions of Randall Thomas, Ronald Gilson, and Lawrence Mitchell fit together to provide a skeptical account of what corporate law can and should do.

Randall Thomas’s essay counsels against relying too heavily on corporate law to promote broad social goals. Randall, one of the few in the legal academy who brings a careful micro-development perspective to the table, is more interested in the role that corporate law should play in promoting good microeconomics and the concomitant social benefit derived from getting the micro-institutional details right. And when we get to the micro level, we have to deal with problems of limited cognition or bounded rationality. Addressing those micro realities pushes towards at least the possibility that corporate law might need to be more interventionist in order to correct for systematic cognitive biases or lack of full information.

But Ron Gilson, like Bill, never hesitant to ask the tough question and to point out the lack of clothing on the emperor, cautions us about the limits of this behavioralist turn. Ron suggests that we need to parse any analysis of corporate law between corporations with and without liquid trading markets in

their common equity. Why? Because where there are viable markets for corporate control and organizational form, markets will function to overcome cognitive biases. So the only arena in which we might seek for a legislative or judicial corrective to cognitive bias will be the close corporation. And even here, Ron is skeptical about the ability of default rules or dispute resolvers to somehow correct for bias, in part because of how poorly we understand how and when cognitive bias is involved in the underlying problem.

Ron’s essay provides a foil for Larry Mitchell’s piece. Although both pieces begin with a discussion of maximizing shareholder wealth, Ron and Larry strongly disagree about the usefulness of that concept. Ron finds maximization of shareholder wealth an unproblematic objective function for the corporate law of publicly traded corporations, whereas Larry finds the concept vacuous at best and potentially deleterious to good corporate management. At the session in San Francisco, Ron pushed Larry hard on the bottom line results of his proposal. Giving increased discretionary power to the (typically) middle-aged white men at the top of the corporate hierarchy seems to be the end result of Larry’s proposals. The interests of that group of people though, Ron pointed out in San Francisco, are not likely to be aligned with the progressive goals that Larry purports to care about. Larry responded that his proposal also was assuming that those at the top of the corporate hierarchy would behave better if they were trusted more; in other words, the constraints of having to constantly pursue stock price maximization are what are pushing them towards bad behavior. Ironically, Ron and Larry end up with about the same prescriptive position, which is to be highly skeptical of what corporate law can actually do to improve upon well-functioning markets.

Larry’s essay, in similar fashion to Randall’s, begins with a microeconomic frame, highlighting as criteria for good corporate law (1) the efficient production of goods and services, and (2) the protection of the vulnerable from the externalities of production. Larry examines two legal doctrines where corporate law ought to make a difference for his chosen criteria. For efficient production of goods and services he looks at the business judgment rule, and for the protection of the vulnerable he looks at shareholder protection. Instead of empowering managers with entrepreneurial latitude to add long-term value to corporate stakeholders, the business judgment rules have, according to Larry, been eviscerated by the concept of wealth maximization. Why? Because using wealth maximization as a proxy for how managers employ their judgment has reduced the nuance involved in value-added entrepreneurship into a fetish for the quantifiable share price. And by looking after the rights of shareholders through concepts of yeoman-like shareholder self-protection instead of through

fiduciary duty, courts have ignored the structural impediments to actual protection of atomized shareholders.

Bill’s memorandum spurred similar, although less skeptical, meta-analysis from one of the most systematic scholars of American corporate law, Melvin Eisenberg.\textsuperscript{18} Mel took the comprehensive nature of the Criteria Project as an opportunity to outline for us what he sees as the basic architecture of corporate law. Mel devotes special attention to how the law for publicly held corporations (1) facilitates non-conflictual transactions, and (2) regulates conflicts of interest between shareholders and top managers. He pours icy water on the idea that market processes alone might mitigate these potential conflicts. Mel then goes on to identify four major sources of corporate law (state legislation, state common law, federal law, and the “soft law” of exchange listing rules, etc.), and discusses their respective strengths and weaknesses in addressing the challenge of facilitating exchange on the one hand, and regulating serious conflicts on the other.

Lynn Stout, always original and provocative, sees Bill’s project as being about metrics of measurement. Unlike some of the others at the symposium, Lynn doesn’t see Bill as trying to force corporate law scholars to come clean about their underlying criteria. Instead, she thinks that he is challenging the single metric that the entire field uses as the appropriate measure of quality for a corporate law proposal: that is, share price. Bill’s articulation of the panoply of other possible criteria and his failure to mention share price anywhere is an indication, Lynn says, of the faultiness of that metric.

Before we conclude, a note on how this conference got set up. Bill, though in better physical shape than 95% of us, is in his 70s and had been talking about it being time to cut back on teaching and writing. It was hard for us to believe that he would really give up research and teaching—he simply loves them too much—but, on the off chance that he was even somewhat serious about cutting back, we wanted to organize something that would show him how much the rest of us in the field had learned from his work over the years. There was a problem though. There was no way that we were going to be able to get him to attend some conference that was in his honor and had a bunch of papers talking about his many contributions to the field. Mark, however, had an idea. We could get this to work if we had a conference about a puzzle that he was interested in but had not worked out the answers to—and what better for this than his radical idea that corporate law scholars identify their criteria; an idea that others were likely to challenge.

The next step was more complicated. Bill himself was not sure of the value of the Criteria Project; that’s why he had been struggling with it for two

decades and had not yet converted it into an article. We had to persuade him to give us the memo that we knew he had so that we could organize the conference around a set of responses. Bill’s dear friends at UCLA, Eric Zolt, Steve Bainbridge, and Lynn Stout, said they would do whatever necessary to help us—and one of us then went to Los Angeles for a day to chat with Bill. The plan was to ask Bill what his ideal criteria conference would be and to then attempt to put it into action. After at least a couple of hours of gnashing of teeth about whether it was even worth getting people to think about the matter of criteria, Bill started to articulate a vision for a conference. It would be a gathering of a set of scholars who each had a significant body of work behind him or her. And these scholars would reflect on the criteria for good law that underlay their work; they would make explicit what was otherwise implicit.

It was a wonderful list and it reflected Bill’s views about corporate law. He doesn’t see corporate law as just being about the relationship between Boards of Directors and Managers. It is also about all the other things that have to happen for a corporation to work—in other words, it is about the entire gamut of commercial contracts. For Bill, it makes little sense to talk about corporate law as distinct from commercial or contract law. So, he sees scholars such as Bob Scott, Joe Bankman, Ed Kitch, and Stewart Macaulay, who some might not think of as corporate law scholars, as doing the kind of research that is integral to the inquiry into how corporate law should operate. We took down the names of the people Bill listed, emailed Mark, and began sending out requests. The Berkeley Business Law Journal and the Mercatus Center at George Mason University had, under the guidance of Steve Choi and Jesse Fried, hosted a wonderful symposium on corporate law the year before. Bill had done an article for the symposium and the student editors enjoyed working with Bill. Unlike many of us who have learned that the best strategy in dealing with law review editors is to agree to what they want and then proceed to do exactly what we want, Bill takes them seriously and engages their comments—and, rightly, they appreciated that for the rare thing that it is. So, we contacted the Berkeley Business Law Journal, their advisers, Jesse Fried and Steve Choi, and they all said yes almost immediately.

The Mercatus Center was also interested in continuing in this partnership. With its tradition of engaging top scholars in symposia to better understand what makes for effective and peaceful institutions, Mercatus was excited to further address the role of the corporation in organizing contemporary economic activity. Mercatus provided the capacity to organize and execute an excellent conference. But the funds for the direct costs of a conference were scarce. There simply were not the funds to do the usual conference festivities, paying for plane tickets, hotels, honoraria, etc., on short notice.

Nevertheless, we moved forward on a wing and a prayer. We took Bill’s list and contacted all of those on the list who we knew well enough that we knew
that they would not delete our messages right away. We explained that we wanted them to fly across the country to a conference in San Francisco (many of them were on the East Coast), but that we were unlikely to be able to pay for anything. Almost everyone replied immediately. A few of our invitees could not make it because they had family or other commitments that conflicted with our proposed dates. But of those who could not make it, a number of them offered us financial contributions if we needed them to help make the conference a success. And, of the rest, not one even batted an eyelid at the fact that we couldn’t provide any of the usual conference goodies.

This generosity is the product of the enormous goodwill that Bill has built up over the years as not only a wonderfully creative and provocative scholar, but also as a truly decent human being. Our thanks go out to all of the participants and organizers, especially Courtney Knapp at the Mercatus Center, who were so very generous with their time and energy in helping to make this happen. It is a fitting tribute to Bill because (like Bill’s work itself) the contributions in this volume have already pushed the envelope on traditional modes of thinking in corporate law.