

Economizing Legal D-B8

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Abstract: Implicitly extending Stigler (1977), William Klein proposes a lexicon of twenty-eight generic arguments for normative corporate law scholarship in *Criteria for Good Laws of Business Association*. He suggests that adopting the lexicon would enhance the efficiency and precision of legal debate.

Workable? Hardly. Since when, after all, do we select our colleagues for their communicative efficiency or precision? Yet perhaps *Criteria* is not about communicative efficiency at all. Perhaps it is about content—and the vacuum at the heart of most legal scholarship—instead.

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For what did George Stigler win the Nobel prize?

Not for building a systematic theory of regulation. Neither did he win it for explaining the informational logic to advertising, the inefficiency of securities disclosure rules, or the inherently unstable nature of cartels.

No, Stigler won it for enhancing the efficiency and precision of debates at economics conferences. In a terse article in 1977, he reduced the introductory remarks at conference panels to eight and the substantive comments to thirty-two.¹ After Stigler, rather than explain that

“The paper admirably solves the problem which it sets for itself; unfortunately, this was the wrong problem,”

a panelist could simply declare “B.”² Rather than ask

“Have you tried two-stage least squares?”

he could say “eight.”³ And rather than complain that

“The residuals are clearly nonnormal and the specification of the model is incorrect,”

he could say “three.”⁴ After Stigler, rather than talk for fifteen minutes, a respondent could stand up, announce “C, nine, thirteen, twenty-two, and eight,” and sit down. The presenter could respond, “F, twelve, eleven, and six.” Having confirmed their respective brilliance, they could safely retire to the bar.

I. THE KLEINIAN PROJECT

Leave it to Bill Klein to cut to the chase. Never mind what we do with our time—we law professors are busy people. And for busy people (indeed, even for the indolent among us), law review articles are long. They start with an abstract, but the abstract typically extends beyond a page. They include a one- or two-page table of contents (remember your shock when you first saw a table of contents for an *article*?).⁵ After an introductory five pages that claim far more than the article can hope to prove, they turn to a few road map paragraphs that duplicate the table of contents. Ten pages into the piece, they proceed to a seventy-page summary of everything the author read over the summer, and

1. George J. Stigler, *The Conference Handbook*, 85 J. POL. ECON. 441, 441-43 (1977).

2. *See id.* at 441.

3. *See id.* at 442.

4. *See id.*

5. You wondered why there was a table of contents to this seven-page article? Well, this is a law review article, isn't it?

conclude with a twenty-page D-B8 over their normative proposal.⁶

None of this complaint is news. Yet what Klein purports to offer as a remedy in *Criteria for Good Laws of Business Association*⁷ is. "Trust me," writes Klein. I will systematize those twenty-page normative proposals. For those proposals, most authors use a series of pre-packaged arguments. Some select one set of arguments rather than another, and some order the arguments one way rather than another. But for the component claims, most use only generic, off-the-rack arguments. If they would but make explicit the standardization, suggests Klein, they could greatly clarify the debate and economize on communication costs.

Rather than write three pages telling courts to enforce private bargains, an author could just announce:

I(A).

But to urge them to disregard the bargains instead, he could declare:

I(B).

To claim legislatures should promote individual autonomy, he could write:

I(H).

But to claim they should impose community norms instead, he could write:

I(D).

And to urge more public involvement in the ends of "legitimacy," he could spare us the usual francophilic polysyllabic turgidity and declare simply:

*III(A).*⁸

Think of the Kleinian project, in short, as double-Chicago. Not just does Klein transpose Stigler⁹ from economics to law, he transposes Easterbrook & Fischel¹⁰ from the market for corporate law to the market for corporate scholarship. Explained Easterbrook & Fischel, "corporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting."¹¹ What Delaware offers investors, Klein offers scholars: a set of arguments available off-the-rack so that participants in law-school ventures can save the cost of reading.

6. Commented one reader, your law review editors will "have a huge bluebook debate over whether D-B8 differs from D-b8 or db8 or Dee-be-eight, and whether any of that should be italicized. Then, to make things clear, you'll have to drop a footnote to state the rule every time you said D-B8, and they'll require you to cite somebody besides just Klein." Consider this the required footnote, and this the required reference (albeit anonymous) to the non-Klein source [editor's note: no such debate actually ensued].

7. William Klein, *Criteria for Good Laws of Business Association*, 2 BERKELEY BUS. L.J. 13 (2005).

8. *See id.* at 18-22.

9. Stigler, *supra* note 1.

10. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

11. *Id.* at 34.

II. MARKETS WORK

For better or for worse,¹² economic logic dominates modern corporate law scholarship. As one ex-corporate lawyer declared in the 1970s (R.M. Nixon, 1971):

We're all Coasians now.

Well, a famous British economist anyway. And by that basic Coasian logic, most participants to the corporate enterprise try rationally to promote their private best interests. Necessarily, by enforcing the arrangements they negotiate, courts promote the collective economic welfare. Even when some participants cut careless deals, by enforcing *ex post* the deals they do cut, courts give other potential participants *ex ante* the incentive to take cost-justified levels of care.

The point is basic, and Klein includes several variations:

I(A): Enforce bargains people make.

I(D): Enforce expectations created by the government.

I(H): Limit constraints on corporate organization.

II(A): Minimize intrusions on freedom of contract.

*II(G): Enforce caveat emptor.*¹³

All follow from the principle that courts promote the public good by enforcing private bargains. To Klein's credit, "I(A), I(D), I(H), II(A), and II(G)" does take less space than twenty pages. But Stigler boiled it down even farther. All of Klein's market five, after all, just restate Stigler's number fifteen:

*That follows from the Coase theorem.*¹⁴

III. NO, THEY DON'T

If markets work, courts do best if they enforce deals—but what if markets don't? The answer is obvious: courts should enforce the professorial agenda instead. But which agenda? Ever ecumenical, Klein offers us the world as our oyster. Perhaps some of us, he suggests, might want to urge "fairness" on courts. Others may advocate less power to shareholders and more to managers. Or was it less power to managers and more to shareholders? And in any case, some of us may advocate less power to both. Taking no position on the matters, Klein offers arguments for all.

a. *Fairness.* Suppose, for example, that an author posits "bounded rationality." According to Klein, he can urge courts to enforce "fairness":

I(C): Enforce general rules of fair dealing, even when they contradict the

12. Waffling is obligatory to law-review writing. I actually think it's better. Probably.

13. See Klein, *supra* note 7, at 18-22.

14. Stigler, *supra* note 1, at 442.

*express terms of the bargain.*¹⁵

Never mind what those “rules of fair dealing” might be. True, the disciplinary polyglots among us may want to reach beyond economics to:

*All I really need to know I learned in kindergarten,*¹⁶

but my kindergarten teacher never published in law reviews. Never mind either why such rules (whatever they might be) would make anyone better off. Posit that people do not promote their own best interests, and we can safely advance our own private visions of a brave new world.

For economists, Stigler included an analogue to Klein’s “bounded rationality.” He wrote before Williamson, of course, but a similar point appears in his number twenty-three:

*The motivation of the agents in this theory is so narrowly egotistic (sic) that it cannot possibly explain the behavior of real people.*¹⁷

b. *Less power to shareholders.* Some among us would increase the power of managers and decrease that of shareholders. Apparently, they worry that shareholders might expropriate the investments senior employees make in skills specific to the firm. Once senior employees make these non-transferable investments, the investments are sunk—and firms can potentially exploit the employees (never mind how such a firm could recruit new employees thereafter). For them, Stigler offered argument number sixteen:

*Of course, if you allow for the investment in human capital, the entire picture changes.*¹⁸

c. *Less power to managers.* Others among us would increase the power of shareholders and decrease the power of managers. Klein includes at least two claims for them:

III(F): Limit the power of managers.

*III(B): Promote shareholder control.*¹⁹

Indeed, if the readers would just consider shareholders “weak,” the we-need-stronger-shareholders-crowd could add:

*I(F): Protect the weak.*²⁰

d. *Less power to both.* And some among us would slash the power of shareholders and managers both. They can turn to Klein’s—

III(C): Promote public involvement in corporate governance.

*III(D): Limit corporate actions that threaten “public” values.*²¹

15. See Klein, *supra* note 7, at 18.

16. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (15th rev. ed., 2004).

17. Stigler, *supra* note 1, at 443.

18. *Id.* at 442.

19. See Klein, *supra* note 7, at 22-23.

20. See *id.* at 19.

21. See *id.* at 22-23.

Apparently, we law professors remember the political science we read as undergraduates, for as Klein notes some among us invoke “legitimacy” for all this. They need not have crossed disciplinary bounds. For them, Stigler trotted out two workhorses that accomplish the same purpose. They could assert argument thirteen:

*The market cannot, of course, deal satisfactorily with that externality.*²²

Or they could ask question fourteen:

*But what if transactions costs are not zero?*²³

Picture a world with sufficient negative spillovers to what a corporation does, and assume a government that can eliminate them capably, and we can advocate tying the hands of shareholders and managers both. Of course, do real world governments actually fix many such spillovers? Stigler never thought so, and for the skeptics among us, Klein offers:

IV(B): Rely on private rather than government enforcement.

IV(C): Cut existing regulatory burdens.

*IV(D): Avoid new regulatory burdens.*²⁴

Corporate law scholars rarely acknowledge that they want courts to redistribute wealth, but Klein notes that they advocate redistribution *sub rosa* anyway. Make it explicit, he urges. Forthrightly declare “I(E)” —for he includes as that entry:

*I(E): Reduce the inequality of income and wealth associated with capitalism.*²⁵

Actually shifting the wealth through corporate law would entail, of course, massive inefficiency. Governments redistribute through voluntary contractual relations (which is what a firm is) only at enormous costs to the body politic. Rent control illustrates those costs clearly enough but so do minimum wage laws and usury bans. No matter. It may be bad economics, but it often presents good electoral politics. As G.B. Shaw (somewhere) put it:

[Anyone who] robs Peter to pay Paul can always depend on the support of Paul.

f. *Market confidence.* Might investors choose whether to invest in corporate stock on the basis of a general confidence in the market as a whole? Posit the importance of that “market confidence,” and the corporate scholar can return to Stigler’s externality workhorse number thirteen. After all, by this market-confidence hypothesis the actions each firm takes affect not just the willingness of an investor to buy that firm’s stock but his willingness to buy any stock at all. For those with a taste for such arguments, Klein offers:

22. Stigler, *supra* note 1, at 442.

23. *Id.*

24. See Klein, *supra* note 7, at 23-24.

25. See *id.* at 19.

*II(D): Promote liquidity.*²⁶

What's more, investors want—indeed, need—information about the firms in which they invest. Absent the information by which to evaluate firms, they cannot intelligently choose among them. Absent information, perhaps the market simply does not work. Absent information, the interventionists among us can thus adopt the Kleinian:

*I(J): Disclose everything.*²⁷

And yet, and yet. Information is a good, to be sure. But few goods are free, and as Stigler himself showed, information is not free. Rational investors will not want firms that disclose all relevant information. They will prefer those that disclose only cost-justified information. Essentially, Criterion I(J) is a plea for a free lunch. The less interventionistically inclined among us can cite instead the Stiglerian 28:

*The speaker apparently believes that there is still one free lunch.*²⁸

IV. YES, MARKETS DO TOO WORK

In theory, as scholars we would not just swap rival normative arguments. In theory, if the right policy depended on whether markets worked, we might actually check whether they worked. In theory, but only in theory. In practice, we have Stigler's proposition number twenty-seven:

*That is alright in theory, but it doesn't work out in practice.*²⁹

Stigler urges us to use number twenty-seven "sparingly," but Y. Berra (n.d.) actually put the point better anyway:

In theory there is no difference between theory and practice; in practice there is.

At a workshop presentation in early 2004, I argued that a widely asserted market anomaly did not exist. Bill Klein was always supportive when I made these claims. But few workshop participants are so generous. How does one show that market anomalies do not occur? How does one prove that UFOs do not fly, and that nothing bigger than a fish lives in Loch Ness? My co-author and I had done our best, and had run scores of regressions that yielded coefficients that were statistically significant at the 5% level in only twenty-three (7%) of the 340 results.

When I presented these regressions, however, listeners did not take our overwhelmingly insignificant coefficients as evidence of market-clearing competition. Instead, they urged us to "put a spin" on the few significant coefficients we did obtain. Rather than focus on the insignificant results, they

26. *See id.* at 21.

27. *See id.* at 20.

28. Stigler, *supra* note 1, at 443.

29. *Id.*

insisted that we explain the significant ones. Rather than focus on the 317 coefficients suggesting market competition, they focused on the twenty-three (seven more than the number predicted purely randomly) that predicted the anomaly. A few weeks later, a journal editor added the *coup d' grace*:

Sorry. We just don't publish insignificant results.

Maybe empirical work would resolve the debate. And maybe not.

V. ECONOMIZING LEGAL D-B8

Klein styles his *Criteria* project as an exercise in communicative clarity and efficiency. Acknowledge your normative proposal as a composite of off-the-rack arguments, implies he, and you both clarify the issues and communicate more cost-effectively. No doubt if we did so, we would indeed both promote clarity and cut communications costs. But would the proposal work? When I broached the issue with one of my colleagues, he sneered:

Huh? Stop talking? Do you really think M, S*, M*, and T* aren't head-over-heels in love with themselves?*

Well, I suppose I do not. But then, why would any of us want to acknowledge to the lateral appointments committees “out there” that our article was a mix-and-match collage anyway?

So maybe all this misses the point. Klein is not a man to propose patently unworkable ideas. Maybe, then, to take him at his word is to read Swift’s “modest proposal” as a solution to the Irish population explosion or West as a study in soccer statistics.³⁰ “There are two things wrong with almost all legal writing,” famously explained decades ago. “One is its style. The other is its content.”³¹ Klein superficially presents *Criteria* as an essay on style. Perhaps, however, it is really an essay on content.

Enough already. This response to Klein may be only seven pages, but that is surely six and one-half too many. Perhaps the best way to close this response is to note a ubiquitous argument Klein—probably due to his own modesty—actually missed; ubiquitous because, after all, the only law-review articles (other than those by Klein) that do not cite other articles by the same author are the first articles by the respective authors ever wrote. Never modest himself, Stigler did not miss the argument. It appears in virtually every normative proposal, and constitutes Stigler’s number eleven:

*I proved the main results in a paper published years ago.*³²

30. Mark D. West, *Legal Determinants of World Cup Success* (Univ. of Mich. John M. Olin Ctr. for Law & Econ., Research Paper No. 02-009, 2002), available at <http://www.law.umich.edu/centersandprograms/olin/abstracts/02-009.htm>.

31. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

32. Stigler, *supra* note 1, at 442.

