



5-2020

The Place of Empirical Studies

F.H. Buckley

Antonin Scalia Law School, George Mason University

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Family Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

95 Notre Dame L. Rev. 1491 (2020).

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE PLACE OF EMPIRICAL STUDIES

*F.H. Buckley**

There is a moment in my favorite film, *Jules et Jim*, when Jim explains why he became a journalist:

Prof Albert Sorel taught me the little I know. What do you want to be, he asked. "A diplomat." Are you rich? "No." Can you through legitimate means add a famous name to your own name? "No." Then renounce diplomacy. "But what'll I become?" Curious. "Curious, that's not a profession." It's not yet a profession. Travel, write, translate. The future belongs to the curious.¹

It was chance that brought Peg to George Mason University School of Law, and curiosity that took her to a law-and-economics and then to empirical research. She realized that Sorel was right, that only the curious would be able to keep up to new things, and that law teaching, not journalism, was the profession of the curious.

We all need nudges to change directions, and in Peg's case the nudge had a name. The name was Henry Manne. Peg had arrived at George Mason under the ancient regime, but in 1986 Manne arrived as the law school's new dean. He was brilliant, and he knew it. I was once in his office with another colleague, Henry Butler, when Manne remarked that a third colleague of ours was pretty smart. "Of course, he's not Henry Manne," he said. "But then who here is a Henry Manne," he added. I looked at Butler across the room and we both rolled our eyes. Neither of us is given to flattery, but we knew that Henry was right. Or at least that it wasn't worth arguing the point.

Henry arrived at George Mason after bouncing around several law schools. Early in the 1960s, he found himself at UCLA, and took to having lunch on a regular basis with economist Armen Alchian. Over their sandwiches, Armen taught Henry price theory, and at the end of the year Henry told Armen, that what he had been teaching him had some application to the law. "Aw, get out of here," replied Armen. At that moment, Henry told me, "I was law and economics."

© 2020 F.H. Buckley. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Professor of Law, Antonin Scalia Law School, George Mason University.

1 *JULES ET JIM* (Les Films du Carrosse & Sédif Productions 1962).

Once at George Mason, Henry proceeded to cannibalize the faculty. Older members who did not want to sign on to the new regime were curtly shown the door. The former dean found that his office had been moved to the building's fourth floor. We did not know that it had a fourth floor. It turned out that Henry had moved his predecessor into a storage closet.

Peg was naturally curious and did not need much persuasion to sign on to law and economics. Henry made it easier by offering to pay for her tuition in the Ph.D. program in the university's economics department. There, she learned the methods of econometrics from the department's David Levy and began to apply them in her scholarship. Very quickly, she made a name for herself as a leading scholar in the economic analysis of family law.

At the time, it took not only curiosity, but also a certain measure of courage to embark on law and economics. Traditional legal scholars correctly surmised that it would shake up the discipline, and that is never a pleasant experience. Conservatives who were fond of saying things like, "But I see it from a moral point of view," did not want to be told that their moralism might be assisted with an injection of price theory. Manne himself had been condemned for what one reviewer called "his rather ostentatious amorality,"² and for his failure to consider "such noneconomic goals as fairness, just rewards and integrity."³ On the left, critical legal scholars agreed with law-and-economics academics that law was not an autonomous discipline, that legal rules could only be justified from outside the law, but recognized that law and economics would bolster conservative, free market principles, and wanted no part of it.

The resistance to law and economics was especially strong in the area of family law, in which Peg would specialize. Even people who were sympathetic to the economic analysis of tort and contract law turned up their noses when family structures were analyzed from an economic perspective by Gary Becker. Is nothing sacred? they asked. "Marriage is more than a contract," they said, "it is a covenant." The marriage bond would necessarily be threatened, were it subjected to the morals of the marketplace. But on the closer analysis Peg gave it, it became clear that the economic analysis of family law served to strengthen conservative intuitions about the family.

I. RINGS AND PROMISES

Marriage is more than a covenant. It is also a contract. Or rather, it is less than a contract, since in all but three states the parties cannot waive their right to a no-fault divorce.⁴ In contract law, by contrast, there is no such thing as a unilateral exit option. That is called breach of contract. But in

2 Norman S. Poser, *Henry G. Manne's Insider Trading and the Stock Market*, 53 VA. L. REV. 753, 756 (1967) (book review).

3 Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne*, *Insider Trading and the Stock Market*, 53 VA. L. REV. 1425, 1439 (1967).

4 Even in those states a party might exit a no-exit "covenant" marriage through an out-of-state, no-fault divorce. Peter Hay, *The American "Covenant Marriage" in the Conflict of Laws*, 64 LA. L. REV. 43 (2003).

marriage covenants, it is what happens when one party simply wants out, for whatever reason.

In contract law, the remedy of damages on breach encourages parties to rely on each other's promise of performance. Take that away, and the parties will try to find other ways to reassure each other of their trustworthiness. How they might do so, was the subject of important earlier work by Jon Elster⁵ and Anthony Kronman.⁶ But academic lawyers had been slow to apply these ideas to the contours of private law, and in her article *Rings and Promises* Peg was the first person to do so in family law.⁷

What Peg noted was how the decline in the old action for breach of promise, the stuff of a good many nineteenth-century novels, had made it easier to break off an engagement.⁸ Formerly, a man who promised to marry a lady could be sued for damages if he called it off. The lady would have suffered a reputational loss if she were thought to be at fault (like Natasha in *War and Peace*), and even perhaps if she was not.⁹ With an action for damages, however, she might be compensated for her loss, and the prospect of a lawsuit would serve to deter false promisors.

The action, however, gave rise to vexed problems. What was a court to do if the plaintiff seemed more at fault, as Natasha did? Moreover, just how should damages be assessed, when it came to measuring the reputational loss? Was a court to seek out evidence about what used to be called the lady's lost virtue? It was all very messy, and no one much lamented the demise of the remedy for breach of promise.

The problem, however, was that promises to marry now became less credible. As a response, a promisor might try to persuade the other party to believe him by signaling that he was deeply in love and would be emotionally crushed if the marriage was abandoned, but somehow promises still were broken. When the parties had wealthy parents, a promise to settle money on the couple upon their marriage would continue to be enforceable and this would give the otherwise faithless promisor the incentive to marry. Or the parties might decide to marry quickly, since long engagements were more likely to be broken.

What Peg came up with was an ingenious trust-building device: the engagement ring. She found that men started to give rings to their betrothed at about the same time that the action for breach of promise was lost, and suggested that rings served as the kind of hands-tying device that the legal remedy formerly supplied. If the lady was jilted, she got to keep the ring.¹⁰

5 JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

6 Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985).

7 Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON & ORG. 203 (1990).

8 *Id.* at 207–08.

9 *Id.* at 204.

10 *Id.* at 213.

Between two men of equal wealth, the bigger the ring, the more credible the promise. A man who was not quite sure about his intentions would offer a smaller ring or no ring at all, while the man who knew he would be faithful and who wholly discounted the possibility of breach of promise could give a larger one. Thus, the ring provided the nonmimicry constraint necessary for a separating equilibrium that reveals trustworthiness to the intended bride.

II. EMPIRICAL STUDIES: INTERSTATE MIGRATION

With *Rings and Promises*, the American academy took notice of a new legal star. Bringing the insights of law and economics to family law was remarkable enough, but what really drew attention to the paper was how it was backed by solid empirical evidence on the spike in the demand for diamonds on the repeal of the action for breach of promise.

Clearly, empirical research was the coming thing, but there was one great hurdle. To do it, one needed to copy onto a spreadsheet a mass of evidence from places like the Statistical Abstract. Nowadays such evidences can be easily downloaded or purchased from someone who has done the hard slogging and reasonably wants to be paid for it, but those options were not available twenty-five years ago. One person would have to read out the data while a second person would mindlessly copy them onto the spreadsheet. Imagine doing this for twenty-odd variables for each year in the Statistical Abstract, for a dozen years. Clearly, this required the cooperation of a tiresome drudge.

That's when Peg suggested that the two of us collaborate.

Frankly, I enjoyed the work. It freed me from the horrible burden of time that pins us to the earth, while offering the promise that something useful would come of it. And it did. With our data set in hand, we wrote seven empirical papers over the next five years. In some cases, all we had to do was pick a different dependent (or predicted) variable and come up with a new theory to explain things. But then it is always easy to come up with a new theory.

Our first work was on migration flows within the United States and how states might compete for people.¹¹ There was an existing literature on how states compete for corporations, and on international migration across national borders, but not on jurisdictional competition for people. Not at least since the pioneering work of Frederick Jackson Turner with his 1893 frontier thesis.¹²

Turner argued that the frontier was the key to understanding American history.¹³ There was always a frontier, from our earliest days, and always an

11 Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201 (1996); F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141 (1997).

12 See generally Frederick Jackson Turner, *The Significance of the Frontier in American History*, reprinted in REREADING FREDERICK JACKSON TURNER 31 (Yale Univ. Press 1998) (1994).

13 See *id.* at 31.

incentive for people to move from hierarchical, illiberal eastern states to the more liberal states in the West. Think of Wyoming, the Equality State: the first jurisdiction to give women the vote, in an effort to tempt eastern schoolmarms to move west and civilize the cowpokes. Losing people to the West, eastern states were forced to liberalize in turn, lest everyone pull up stakes and move west. The effect, said Turner, worked all the way back to the old world, which was losing population to the new world and was forced to liberalize itself.¹⁴ The movement was always to the frontier, and with his frontier thesis, Turner became one of our greatest historians as well as an unacknowledged founder of public-choice theory.

The frontier thesis was the dominant school of American historiography for the next forty years and replaced the earlier germ theory. Under this theory, political freedom was a Germanic creation and rooted in the supposed democratic traditions of the Germanic tribes beyond the borders of the Roman Empire.¹⁵ If America was free, this was because at its origins it was Germanic, Anglo-Saxon, and Protestant, and not a servile Catholic country. In an era of massive immigration from southern and eastern Europe, the political uses to which the germ theory could be put were not lost on the immigration restrictionists of the day, but its explicit racism and bigotry were at odds with America's liberal traditions, and this helped explain why the frontier thesis supplanted it. Ironically, the frontier thesis has today been supplanted by a new set of racist explanations of American history, such as the *New York Times*' 1619 theory that would explain American history as a story of slavery and an imperfect emancipation of black people.¹⁶

If there is a touchstone to American history, we are offered a choice: either liberalism or racism, either a search for liberty and self-advancement or back to the blood. Peg and I were inclined to an unfashionable liberalism, and we thought that this could be tested empirically. But to do so we had to break out three different things that might be going on.

The frontier thesis was our first hypothesis. It is a race-for-the-top story and assumes that states that adopt efficient policies to attract value-increasing migrants will make natives in the state better off. That was the insight behind the argument that Delaware became the home for corporate charters by making a credible commitment that its corporate laws are and will remain efficient.¹⁷ It is also what successful immigration countries such as Canada and Australia do in screening for valuable immigrants.¹⁸

14 See *id.* at 54.

15 See, e.g., Gilman M. Ostrander, *Turner and the Germ Theory*, 32 *AGRIC. HIST.* 258, 259 (1958).

16 See, e.g., Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, *N.Y. TIMES MAG.*, Aug. 14, 2019, at 14.

17 See Roberta Romano, *The State Competition Debate in Corporate Law*, 8 *CARDOZO L. REV.* 709 (1987).

18 See Leslyanne Hawthorne, *A Comparison of Skilled Migration Policy: Australia, Canada and New Zealand* (Oct. 16, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2808881>.

Race-to-the-top theories explain familiar international migration patterns. The movement of people is from Cuba to the United States, after all, and not the other way around. When it came to internal migration within the United States, a person who left Alabama for Illinois was not moving to a much freer society—at least for the period we were examining. But there were other differences that mattered, and for the period we studied there were tax revolts in many states.

Contrariwise, one might tell a race-to-the-bottom story, in which states compete for otherwise undesirable migrants who will support a dominant political party. “For example, a pro-welfare [government] might seek to attract pro-welfare migrants through the promise of wealth transfers from wealthy natives.”¹⁹

The third explanation for location decisions was a deadbeat story.

We define[d] a deadbeat as one who crosses state lines to avoid repayment of a debt. . . . Given collection costs, moving to another state increases the probability that the creditor will write off the debt as a bad debt. The debtor might also reduce the probability of repayment by moving to a state with pro-debtor insolvency laws[, and] the prospect of deadbeat migration might lead a state to adopt pro-debtor laws.²⁰

The debtor would be offered a fresh start in his new state, and the cost would be exported to creditors in the state he had left. Because there is a national bankruptcy law, deadbeat theories have more purchase when they try to explain international migration patterns, but even within the United States there are marked differences in how states treat the assets debtors might shelter as exempt from bankruptcy. Deadbeat dads might also be able to stiff their families by moving to another state and making it harder to enforce support obligations.

Migration is costly, and that might lead one to think that such costs would make it impossible to attract people from out of state. But more than forty percent of Americans live in a state other than the one in which they were born.²¹ For such people, the choice was not whether but whither they would move.

Our empirical work required a study of population gains and losses, state by state, shorn of international migration. To measure this, we examined state population changes between 1985 and 1990, looking at both pushes and pulls, what made people leave one state and attracted them to another. This took some work, and the independent variables were no easier to come by. To predict migration flows, we looked at temperature data, on the assumption that the move would be to warmer (and air-conditioned) states. We also looked at the over-sixty-five population, to take retirement prompted moves into account. As a measure of economic dynamism, we looked at commercial and residential construction contracts for new structures and the percentage

19 Brinig & Buckely, *supra* note 11, at 201.

20 *Id.* at 202.

21 *Id.* at 203–04.

change in nonfarm employment. To test deadbeat theories, we looked at welfare payments under the old Aid to Families with Dependent Children (AFDC) program, which varied greatly from state to state. We also looked at per capita state and municipal tax receipts and outstanding state indebtedness. Finally, our predictors included Chapter 7 consumer bankruptcy petitions and in-state child support collection rates. Once the data was at hand, we could do something with it.²²

Econometric research of the kind we conducted was enormously assisted by statistical software programs that permitted scholars to run ordinary least squares and two-state least square regressions. That was twenty-five years ago, and even with the user-unfriendly SHAZAM software we could do work that would have proven an impossible challenge for economists twenty-five years before that. More recent statistical programs have greatly increased the ability of scholars to conduct econometric research as well as the ease of doing so.

What we found was consistent with the idea that states competed for migrants on the basis of expected voting patterns through their tax and welfare policies.²³ States appeared to settle into a Jack Sprat equilibrium, in which conservative legislators compete for migrants seeking low taxes, while high welfare legislators would compete for welfare seekers. That's not a revolutionary suggestion. There never was a time when America's immigration policies weren't influenced by the way in which immigrants were expected to vote. The same idea was cynically expressed by Berthold Brecht in 1954. If the East German communist regime had lost the confidence of the electorate, it might of course try to enact better policies. But wouldn't it be simpler to dissolve the electorate and elect a new one?

Were these regressions to be conducted with more current data, I expect we would find even stronger results. Recall that we were looking at the period between 1985 and 1990, and that today there is a sizable shift in population from states like California that place relatively large regulatory burdens on their citizens to more business-friendly states such as Texas.²⁴ Those differences were smaller in the past. For example, the governors of California during the period we studied included the Republicans Ronald Reagan and George Dukmejian (1982–90) and the moderate Democrat Jerry Brown (1974–82).

Our findings, which we presented in *The Market for Deadbeats*, represented a rejection of the then-dominant school of thought about welfare policies and competitive federalism. Until then, it was thought that states would cut welfare benefits down to nothing in order to force welfare recipients to move to another state. This was called a race to the bottom, and it was

22 See *id.* at 209–22.

23 See *id.* at 232.

24 See Mark Calvey, *Latest Census Data Shows Californians Continue to Flock to Texas*, WFAA (Nov. 9, 2019), <https://www.wfaa.com/article/money/economy/latest-census-data-shows-californians-continue-to-flock-to-texas/287-8991ef8d-6184-4637-957f-313f25d1b724>.

advanced by scholars such as Harvard's Paul Peterson.²⁵ We also had a race-to-the-bottom story, but it worked in quite the other direction. Some states, we argued, would increase welfare payouts to attract deadbeat voters.²⁶

We followed this up with a constitutional essay entitled *Welfare Magnets: The Race for the Top*. The federal government had recently enacted welfare reform legislation, and we asked whether, in devolving welfare responsibilities to the states, the federal government might reasonably prescribe spending ceilings to prevent state overspending on welfare by welfare magnet states. We rejected this hypothesis, in part because such problems might less intrusively be addressed through two-tier residency requirements.²⁷ But the next year, sadly, the Supreme Court rejected such requirements in *Saenz v. Roe*.²⁸

III. EMPIRICAL STUDIES: BANKRUPTCY

Our next study looked at the run-up in U.S. consumer bankruptcy filing rates, which tripled from 1984 to 1991.²⁹ This did not appear to be a consequence of legal changes since the increase coincided with Bankruptcy Code amendments designed to reduce filing rates by rejecting opportunistic petitions. The run-up also coincided with a major economic boom and crested with the 1991 recession.³⁰

Evidently, something else was going on, and we found that much of the variation in district filing rates was attributable to differences in social variables.³¹ Some people were going into bankruptcy who in the past would have struggled to pay off their debts. This challenged what we regarded as the tendentious arguments of Teresa Sullivan, Elizabeth Warren, and Jay Westbrook,³² who argued that debtor misbehavior concerns are minimal. We found that a quarter of the petitioning "wage-earning debtors had a debt/income ratio of 70 percent or less, and a nonmortgage debt/income ratio of 40 percent or less, suggesting that many of them could have repaid a substantial amount of their debt under a Chapter 13 plan."³³

By adopting an ex post perspective, the Sullivan, Westbrook, and Warren study also ignore[d] moral hazard concerns. From an ex ante perspective, a shift in good-faith norms will lead debtors to alter their investment strate-

25 See, e.g., Paul E. Peterson & Frederick M. Hess, *Keeping an Eye on State Standards: A Race to the Bottom?*, EDUC. NEXT, Summer 2006, at 28, 28–29.

26 Brinig & Buckley, *supra* note 11, at 227.

27 *Id.* at 141.

28 526 U.S. 489, 498 (1999).

29 F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187 (1998).

30 *Id.* at 187.

31 *Id.*

32 See TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (Beard Books 1999) (1989).

33 Buckley & Brinig, *supra* note 29, at 190 (footnote omitted) (citing SULLIVAN ET AL., *supra* note 32).

gies, and this will affect filing rates. Investments that were rejected as too risky will be taken up on a shift to laxer good-faith norms since the debtors will have less to fear from default. They will also borrow more heavily. When their financial gambles produce a blank, they will truly be strapped for money. Because their strategic behavior will be unobservable *ex post*, they will escape close good-faith scrutiny and will resemble the ordinary Americans the Sullivan, Westbrook, and Warren study claim[ed] they are. But from an *ex ante* perspective, the incentive effects of a shift to laxer good-faith norms will have resulted in increased filing levels.³⁴

By focusing on the contribution of social variables, we were bucking the way in which the previous literature had discounted moral factors. Unlike prior studies, we were looking for social root causes, not economic ones. Ours was a social capital study, which posited that behavior depends importantly on nonmaterial factors, such as a sense of personal responsibility, religious sentiments, and the praise or opprobrium of one's neighbors. All such things go to the social sanctions for promise breaking and the loss of a sense of shame one feels when such values are internalized. We also recognized, however, that higher bankruptcy filing rates might reflect a shift to a more entrepreneurial, risk-taking society rather than to a more pathological one.³⁵

To estimate state-by-state bankruptcy filing rates, we employed several different independent variables we thought would help explain social attitudes to default. To measure the strength of social networks, we looked at how urbanized the state was. It is said that "city air is free air," and we thought that included the sense of freedom from past obligations. We also looked at migration patterns, since a social network would be weaker in high migration states in which people are more anonymous. As a proxy for conservative and old-fashioned attitudes about debt, we employed the percent Catholic and the percent of over-sixty-five people as variables. We also employed a divorce variable as a proxy for the social stigma for promise breaking. Because causation might work both ways, we employed a two-stage least squares estimation technique for some of these variables. We also recognized that, for some of the variables, lower bankruptcy rates might reflect more conservative attitudes to the risk taking that lands people in default.³⁶

We found that our model's economic variables had a mixed success in predicting bankruptcy filing rates.³⁷ By contrast, our model's social variables were more successful. High migration states were high bankruptcy states, which is consistent with the hypothesis that filing rates are higher in regions where social networks are weaker.³⁸ The Catholic and over-sixty-five coefficients were generally negative and significant, consistent with the hypothesis that filing rates are lower in socially conservative states.³⁹ Further, high

34 *Id.*

35 *Id.* at 194.

36 *See id.* at 200–02.

37 *Id.* at 205.

38 *Id.*

39 *Id.*

divorce states were also high bankruptcy states, consistent with the hypothesis that filing rates are higher when social sanctions for promise breaking are weak.⁴⁰

IV. EMPIRICAL STUDIES: FAMILY LAW

We next turned to the question of how no-fault laws affected the decision to divorce.⁴¹ For the period we studied, every state had adopted no-fault laws in which divorces are granted without regard to who was at fault.⁴² What Peg discovered, however, was that fault did matter in the court's decision about the division of assets or award of alimony. We could therefore partition fault versus no-fault states in our study.

When we did so, we found that, over 1988 to 1991,

no-fault divorce laws [were] associated with higher divorce levels. Prior studies failed to detect a significant no-fault predictor of long-term divorce rates because they defined "no fault" solely in terms of the dissolution of the marriage and ignored the financial penalty that a court might impose on an at-fault party.⁴³

Not surprisingly, we also found that no-fault laws were associated with higher levels of women in the work force.⁴⁴ If women thought that they might be divorced and left high and dry in the property settlement, they would have a greater incentive to find a job for themselves.

We concluded with a recommendation that all states should weigh matrimonial fault in property settlements on divorce. "The consequences of divorce are troubling," we argued.⁴⁵ "Children are harmed by it, and no-fault laws have impoverished many women. More broadly, the move to no-fault may have contributed to a coarsening of American society."⁴⁶ If the right to divorce is not to be conditioned on proof of fault, "matrimonial fault still might be penalized at the stage when assets are divided and spousal support is awarded."⁴⁷ Our findings suggest that this would lower divorce rates, and we thought that would be a good thing.⁴⁸ Needless to say, these were deeply unfashionable beliefs.

Our paper argued that studies that purported to find that no-fault laws had no effect on the divorce decision were empirically flawed because they failed to take the division of assets into account.⁴⁹ In addition, we took issue

40 *Id.* at 205–06.

41 Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325 (1998).

42 *Id.* at 325, 327.

43 *Id.* at 340.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

with the claim that our argument was inconsistent with the Coase Theorem, which held that

parties can always bargain around legal rules In a fault regime, when a husband wants a divorce more than his wife wants to preserve the marriage, he can bribe her to consent to the divorce; in a no-fault regime, when a wife wants to preserve a marriage more than her husband wants a divorce, she can bribe him to stay married. . . .

There are, however, two reasons why Coasean irrelevance might not hold. First, the wife might be unwilling to bribe the husband to stay married because a promise not to seek a divorce is unenforceable at law. The husband might pocket the bribe and bring a petition the next day in a no-fault regime.⁵⁰

Besides, it is difficult to see how such a bribe would work, if the husband controls all the assets.

Second, the preferences of the parties might be endogenous and affected by the divorce law regime. . . . When matrimonial fault is not penalized, there will be more of it, and more straying or outraged spouses who seek a divorce. There will be more grievous faults, and trivial breaches will be forgiven less readily. The slight offense that is quickly forgotten in a fault regime, where divorce is not seen as an option, might be felt to oppress in a no-fault one. With a greater probability of divorce, the parties also will invest less in marriage-specific assets such as children, and this will further increase divorce levels. As well, the social stigma of divorce might weaken when no-fault laws are passed and divorce levels increase. When relaxed social norms are internalized, the transgressor will no longer be policed by a sense of guilt.⁵¹

One interesting finding in our paper was our discovery of a frontier effect on divorce rates.⁵² The longer the period of time a state had been admitted to the union, the lower its divorce rates. The Ronald Reagans were getting divorced, not the Tip O'Neills. In part, this likely reflected the weakened social sanctions in anonymous high mobility states. But perhaps there was something else going on, such as the greater desire to shake off restrictive bonds seen in Frederick Jackson Turner's frontier thesis. The high divorce states were also the high bankruptcy states, an L-shaped pattern from the Pacific Northwest down to California, and then across through the Sunbelt. It was as if, in people's attitudes, there was some connection between political, matrimonial, and financial libertarianism.

We next looked at the rise in the unwed birth rate, and found that it was significantly and positively correlated with the size of welfare payments for unwed mothers under the AFDC program.⁵³ Between 1980 and 1990, illegitimate white births nearly doubled, from 11% to 20% as a percent of total white births.⁵⁴ "During the same period, black illegitimacy rates increased

50 *Id.* at 328–29.

51 *Id.* at 329–30 (footnotes omitted).

52 *See id.* at 335 (discussing the frontier effect).

53 Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, 98 *PUB. CHOICE* 111 (1999).

54 *Id.* at 112.

from 55 to 65%. For all Americans, the increase was from 18 to 28%. Over a longer time horizon, the increase was even sharper.”⁵⁵

Our study regressed illegitimacy rates on AFDC payouts, economic and social predictors, as well as a time trend. Our most noteworthy result was that the AFDC coefficient was significantly and positively correlated with increased illegitimacy rates for both whites and blacks.⁵⁶ The range in AFDC payouts across states was striking. In 1989, for example, real monthly payouts per family in 1983 dollars ranged from \$92 to \$556. Moreover, AFDC recipients were almost automatically eligible for Food Stamps and Medicaid. As such, “AFDC [was] in many ways the key to the welfare system for the single parent.”⁵⁷

One would have thought that our findings would seem banal. Subsidize something and you get more of it. That was simply the obverse of what we had found about divorce rates: reduce the cost and you get more of it. Nevertheless, both findings cut against the grain amongst feminists and liberals who supported divorce rights and welfare payouts and who were unwilling to accept more nuanced views about social policies and the mounting evidence that increased illegitimacy rates are pathological.

Illegitimate children are more likely to be born at a very low birth weight and to have lower cognitive scores. Involved natural fathers provide strong role models and a dependable source of income. Without these benefits, children do much less well than those from married families. Illegitimate boys are more aggressive and are more likely to break the law. Moreover, the pathologies appear to be passed on to succeeding generations, since illegitimate children are more likely to become unwed parents.⁵⁸

The AFDC program was replaced by the Temporary Aid for Needy Families (TANF) program by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁵⁹ TANF grants have a maximum benefit of two consecutive years and a five-year lifetime limit and require that all recipients of welfare aid must find work within two years of receiving aid. States have a great deal of latitude in complying with these rules, but the law was nevertheless highly unpopular in liberal circles, and our implicit support for welfare reform laws that took illegitimacy pathologies into account made our paper controversial.

Peg and I collaborated on two other papers. In one, we looked at how divorce laws that favored awarding joint custody of children to divorcing par-

55 *Id.*

56 *Id.* at 121.

57 *Id.* at 118 (quoting STUART M. BUTLER & ANNA KONDRATAS, *OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM* 138 (1987)).

58 *Id.* at 112.

59 CONG. RESEARCH SERV., R44668, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY* 9 (2019).

ents affected divorce rates.⁶⁰ Joint custody arrangements seemed to us good in themselves, since they eased the pain of divorce for children.

For the child, sole custody may seem like the death of the noncustodial parent, and in many respects it is just that. The child will lose his guidance and emotional support, and not infrequently his financial support as well. Joint custody, though by no means as beneficial for the child as a continued marriage, eases these burdens, and better prepares the child for life as an adult.⁶¹

We also thought that “fathers [would] permit themselves to grow more attached to children when they did not fear a complete break with them on divorce. With the increased emotional ties, divorce becomes less likely.” This is what we found.⁶²

Our last joint paper examined the likelihood of child abuse from the victim’s perspective.⁶³ Most of the existing literature focused on the adult abuser: “Was there abuse in the adult’s family? Were appropriate social services provided? Did the police respond appropriately? Was the correct level of due process provided? Can the adult be reunited successfully with the child? How closely does abuse correlate with poverty?”⁶⁴

We thought that these were important questions, since a parent must be in some or many ways abnormal to abuse his own child. But we wanted to ask a different question.

“Why are particular children picked on? What makes them less attractive in the eyes of the [caretaking] adults . . . ?”⁶⁵ If we could answer these questions, we would sharpen the ways in which social services might choose to step in to protect a child.

What we found is that disabled children were more likely to be abused. The presence of a stepparent or other romantic interest in the home is also significantly related to parental abuse.⁶⁶ The child from a previous family may be seen in direct competition with the children of the new relationship. Stories about wicked stepparents are not just fairytales.

V. THE ROLE OF EMPIRICAL SCHOLARSHIP

As this is a symposium at Notre Dame, the empirical point of view shown in these papers should be contrasted with the natural law traditions associated with this university. Our papers served to highlight various social pathologies, such as divorce and unwed births. Had we adopted a natural rights perspective, we might have saved ourselves some time. None of our

60 Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998).

61 *Id.* at 393.

62 *Id.*

63 Margaret F. Brinig & F.H. Buckley, *Parental Rights and the Ugly Duckling*, 1 J.L. & FAM. STUD. 41 (1999).

64 *Id.* at 42.

65 *Id.*

66 *Id.* at 43.

tedious empirical work would have been necessary if such things were wrong per se on natural law theories.

Did we at least provide some evidence in favor of the conclusions of natural law theorists? I should not have thought so. They did not need us. It is unnatural, ergo it is bad. But two can play at that game. Natural lawyers tend to be antiabortion, but in 2019 a scholarly Kansas Supreme Court found a right to abortion in the inalienable natural rights guaranteed by the state's bill of rights.⁶⁷

Besides, the pretended link between nature and goodness was demolished by David Hume nearly 300 years ago. From a statement about what *is* the case, he said, you can never derive a proposition about what *ought* to be the case.⁶⁸ Some moralists write that some thing or other “is” so, and that therefore you “ought” to do it. They try to slip that in, but one thing does not follow from the other. We have natural inclinations, to which attention must be paid, but they are not always worth following. So, if something is natural, that does not tell us whether we should yield to it. In *Principia Ethica* (1903), philosopher G.E. Moore gave a name to the attempt to define the good in terms of what is natural.⁶⁹ He called this the “naturalistic fallacy.”⁷⁰

Let me offer some examples of the naturalistic fallacy at work. For some people, pedophilia is natural, but I still think it wrong. What is natural to man, thought arch-reactionary Joseph de Maistre, is the desire to offer sacrifices to appease an angry God, and not just sacrifices but human sacrifices too.⁷¹ The greater the victim, the greater the sacrifice. Revolting as this might be, human sacrifice was everywhere a custom in primitive societies, and it required the sanction of religion, in the story of the binding of Isaac, to bring an end to it.⁷²

In truth, we are a bit of a mess, neither wholly good nor bad, and we cannot pick and choose one set of benign impulses and pretend that that is our nature. The more introspective we are, the more we will see how our characters are composed of a congeries of inconsistent impulses. The French essayist, Michel de Montaigne, held himself to a mirror and reported that: “Every sort of contradiction can be found in me, depending on some twist or attribute: timid, insolent; chaste, lecherous; talkative, taciturn; tough, sickly; clever, dull; brooding, affable; lying, truthful; learned, ignorant; generous,

67 *Hodes v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (per curiam).

68 See DAVID HUME, *A TREATISE OF HUMAN NATURE* 458 (L.A. Selby-Bigge ed., Oxford, Clarendon Press, 1888).

69 GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* (1903).

70 *Id.* at xiv.

71 See 2 JOSEPH DE MAISTRE, *LES SOIRÉES DE SAINT-PÉTERSBOURG* 415 (Paris, Librairie Grecque, Latine et Française 1821).

72 The idea that sacrifice is natural to man has been taken up by many recent writers. See, e.g., RENÉ GIRARD, *LE BOUC ÉMISSAIRE* (1978); JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* (Routledge 2018) (1973).

miserly and then prodigal.”⁷³ The honest person will recognize himself in this.

If all you mean by calling something natural is that it is a good thing to do, I would go along with it. In that case, however, labels like “natural” and “unnatural” are wheels that turn nothing. They are shorthand for deeper beliefs about what is good for us, and you could dispense with them and simply cut to what you think is good or bad. In particular, the conceit that moral discourse assumes a natural law foundation must be rejected. The opposite of natural law is not moral relativism. It is revealed law, or else the ordinary intuitions, backed by the kind of evidence we amassed, about good and evil.

I expect I have not persuaded everyone at Notre Dame about the primacy of empirical research. But then I never intended to do so. Many people have legitimate reservations about “economism,” and how economists have shortsightedly ignored the broader consequences of the policies they propose. For example, they have supported free trade as dogma without taking into account how this might affect social inequalities within the United States. Or they have ignored the social pathologies their favorite policies might foster. But while they have rightly been faulted for this, the papers that Peg and I wrote, which looked to the link between economic incentives and social behavior, were an attempt to correct this bias in the profession. We agreed with John Ruskin about the limits of empirical research, and that

[a]mong the delusions which at different periods have possessed themselves of the minds of large masses of the human race, perhaps the most curious—certainly the least creditable—is the modern *soi-disant* science of political economy, based on the idea that an advantageous code of social action may be determined irrespectively of the influence of social affection.⁷⁴

73 See MICHEL DE MONTAIGNE, OF THE INCONSTANCY OF OUR ACTIONS, *reprinted in* 2 THE ESSAYS OF MICHAEL DE MONTAIGNE 1, 5–6 (William Carew Hazlitt ed., Charles Cotton trans., London, Reeves & Turner 1877).

74 JOHN RUSKIN, *The Roots of Honour, in* UNTO THIS LAST: FOUR ESSAYS ON THE FIRST PRINCIPLES OF POLITICAL ECONOMY 17, 17 (New York, John Wiley & Sons 1881).

