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# Law as Symbol: Appearances in the Regulation of Investment Advisers and Attorneys

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# ARTICLES

## LAW AS SYMBOL: APPEARANCES IN THE REGULATION OF INVESTMENT ADVISERS AND ATTORNEYS

LARRY D. BARNETT\*

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### I. SYMBOLS IN LAW AND SOCIETY

Institutions, as intermediaries between a society and individuals, serve as the vehicles through which social life is conducted, and they are therefore integral to the development and operation of every society.<sup>1</sup> Indeed, institutions are the basic components of a society.<sup>2</sup> Moreover, because a society is a *system*, each institution can affect and be affected by every other institution. Law, the family, and religion are institutions, for example, and able to influence one another.

To function smoothly, a society must, of course, be comprised of institutions that contribute to it in positive ways. These contributions occur to the extent that institutions fulfill the recognized needs and embody the paramount values of their

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<sup>1</sup>Donald N. Levine, *Introduction, in* GEORG SIMMEL: ON INDIVIDUALITY AND SOCIAL FORMS: SELECTED WRITINGS xv-xvii, xxvi (Donald N. Levine ed. 1971).

<sup>2</sup>In this article, the word “institution” refers to a general pattern of interpersonal behavior that exists in a society and that is central to the operation of the society. An institution is thus “an established . . . custom, usage, practice . . . or other element in the political or social life of a people; a regulative principle or convention subservient to the needs of an organized community or the general ends of civilization.” 7 OXFORD ENGLISH DICTIONARY 1047 (2<sup>nd</sup> ed. 1989).

society. Indeed, if an institution does not aid the operation of the system in which it exists, the institution will change so that its doctrines and practices do so. Sociological imperatives, not individual personalities, ultimately mold the character of institutions.<sup>3</sup>

Unfortunately, the preceding principles of macrosociology seem rarely to be the concern of research on the institution of law. With few exceptions, scholarship in law simply takes for granted the institutional character of law, and the societal foundation of the institution is, therefore, generally ignored. However, law must be understood in its societal context, for law would not be an institution unless it was a sociological necessity. Law, that is, *does* something for society that is vital. But what? The answer, in part, seems to be that law allows each participant in a potential interpersonal relationship to expect certain behavior from the other participant(s).<sup>4</sup> This function is important sociologically because reliance on expectations of others' behavior is at the foundation of interpersonal relationships, and the fulfillment of such expectations is necessary for a viable social order. But while law helps to make possible interpersonal relationships and hence a social system,<sup>5</sup> *how* it performs this function has yet to be established. The particular mechanisms involved, and the exact role and relative importance of each mechanism, have not been widely agreed upon by social scientists and scholars who study law.

The present article focuses on one mechanism that has been of interest to researchers—viz., symbols. Students of the institution of law have long contended that law has a symbolic character<sup>6</sup> and that the symbols of the institution can strengthen the fabric of social life and promote the cohesion of society.<sup>7</sup> Although a social system will, over time, change its specific symbols of law and the prominence given to such symbols generally, law-related symbols may be attracting more attention from the average American now than in the past. Indeed, one scholar has suggested that a central characteristic of the United States is “the development of public reverence for the symbols of law.”<sup>8</sup>

While the particular symbols of law in a society may shift over time and may be less important at some points in history than at others, symbols of law are probably never completely absent from a society and never completely unimportant. Societies uniformly seem to develop and use symbols<sup>9</sup> because “[s]ymbols help citizens organize their beliefs, reinforce core values, and provide a rallying point for those

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<sup>3</sup>LARRY D. BARNETT, *LEGAL CONSTRUCT, SOCIAL CONCEPT* 14-19 (1993).

<sup>4</sup>Larry D. Barnett, *Social Productivity, Law, and the Regulation of Conflicts of Interest in the Investment Industry*, 3 *CARDOZO PUB. L., POL'Y & ETHICS J.* 793, 794-95 (2006).

<sup>5</sup>*Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1237 (6<sup>th</sup> Cir. 1981) (stating that “[s]ocial order is based on law, . . .”).

<sup>6</sup>*E.g.*, THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

<sup>7</sup>*E.g.*, John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 *AM. INDIAN L. REV.* 393, 423 (1998).

<sup>8</sup>Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 *AKRON L. REV.* 77, 78-79 (1994).

<sup>9</sup>KAREN A. CERULO, *IDENTITY DESIGNS: THE SIGHTS AND SOUNDS OF A NATION* 12 (1995).

who believe in them, thus reducing the costs of organization.”<sup>10</sup> Symbols from the institution of law seem to be beneficial, and are probably indispensable, for sustaining a social system. The societal importance of symbols of law is indicated by the diversity of these symbols,<sup>11</sup> which include far more than the well-known blindfolded female figure holding balanced scales and a sword.<sup>12</sup> Indeed, a symbol of the institution of law may be drawn from another institution in the society,<sup>13</sup> and under certain conditions, a symbol of the institution may be an individual who has intentionally violated a statute and committed a felony.<sup>14</sup>

The present article focuses on symbolic concepts and doctrines in statutes and in court rules and opinions.<sup>15</sup> Symbolism has been noted in statutes that define behavior as criminal;<sup>16</sup> in legislation that recognizes marriage and specifies the sex composition of the married couple;<sup>17</sup> and in the Securities Act of 1933,<sup>18</sup> the original (and still a fundamental) federal statute dealing with securities.<sup>19</sup> Accordingly, it is logical to assume that there is symbolism in the concepts and doctrines of other statutes and in the concepts and doctrines of rules adopted by regulatory bodies. Part III of this article illustrates the assumption with the federal Investment Advisers Act.<sup>20</sup> Part IV pursues the assumption further with a very different subject, namely, the appearance-of-impropriety standard for assessing attorney behavior. Specifically, Part IV employs the standard in an attempt to isolate some of the

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<sup>10</sup>Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 34 (2001).

<sup>11</sup>Barnett, *supra* note 4, at 821-24.

<sup>12</sup>*E.g.*, *Glover v. State*, 386 S.E.2d 699, 702 (Ga. Ct. App. 1989) (Benham, J., concurring).

<sup>13</sup>Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 882 (1988).

<sup>14</sup>Paul Kooistra, *Criminals as Heroes: Linking Symbol to Structure*, 13 SYMBOLIC INTERACTION 217 (1990).

<sup>15</sup>Concepts and doctrines in the Constitution of the United States, and in court decisions interpreting the Constitution, can also be symbols. Calabresi, *supra* note 10, at 34; *see* Gene R. Nichol, *Toward a People's Constitution*, 91 CALIF. L. REV. 621, 621 (2003) (book review) (“The Constitution is not quite as potent a symbol to us as the flag, but it occupies a close second.”). Indeed, since the Constitution is the charter of the nation as a sovereign entity, the clauses in it that express cultural ideals are inescapably symbolic, and the document as a whole is, too. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L. J. 1290, 1299-1300 (1937); *see* *Dennis v. United States*, 341 U.S. 494, 523 (1950).

<sup>16</sup>*E.g.*, V. F. Nourse, *Twenty-five Years of George P. Fletcher's Rethinking Criminal Law: Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 934 (2004) (“[C]rime legislation is a powerful symbol of public and political order and stability.”).

<sup>17</sup>Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 LAW & SOC. INQUIRY 629, 638 (2003).

<sup>18</sup>Securities Act of 1933, 15 U.S.C. §§ 77a-77z-3 (1997 & Supp. 2005).

<sup>19</sup>Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 142 (2005).

<sup>20</sup>Investment Advisers Act, 15 U.S.C. §§ 80b-1- 80b -21 (2000 & Supp. II 2002).

societal conditions that contribute to symbolism in the doctrines of law. The attempt will advance the understanding of law provided by the discipline of sociology, which rests on the assumption that the properties of a society have broad effects on the institutions of the society.

Unfortunately, while scholars trained in the discipline of law have understood that law has a symbolic nature, they have not undertaken, or joined with sociologists in undertaking, rigorous quantitative research on the circumstances in which, the variations in the degree to which, and the paths by which law as symbol affects and is affected by the social order. These questions must be answered, however, if a useful body of knowledge is to be developed on law as an institution. Key questions regarding law that involves symbolism, therefore, have not been studied with the research tools offering the greatest power and precision. The situation exists partly because few scholars trained in law appreciate that numeric information can be used to investigate the questions and that quantitative data can be analyzed with statistical techniques to obtain estimates of the answers to the questions.<sup>21</sup> The situation is probably compounded by a resistance on the part of law school faculty-scholars to acknowledging that the content of law is closely tied to—indeed, that the content of law directly results from—the character of the society in which law is embedded.<sup>22</sup> Nonetheless, well-designed research on questions of law and symbolism is missing not just from the professional output of law-trained scholars. Even sociologists, many of whom are highly skilled in measurement and data analysis, have undertaken few quantitative studies of symbols relevant to law and of the role of these symbols in social life.<sup>23</sup> The situation in sociology is notable given the existence in the discipline of a school whose very name—symbolic interaction—directs attention to symbols.<sup>24</sup> The rudimentary state of present knowledge regarding symbols in law and society thus cannot be explained solely by the work of scholars educated in law, but is attributable also to researchers educated in sociology.

Because symbols are central to this article, their defining characteristics need to be identified. In doing so, the concept of “symbol” must be juxtaposed with the concept of “sign,” and the similarities as well as the differences between symbols

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<sup>21</sup>Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J.L. & SOC'Y 163, 185, 192 (2004). Moreover, scholars in the field of law who conduct empirical studies typically do so without employing the rules of scientific inference. Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002). Therefore, these studies supply “considerably less accurate information about the empirical world than the studies’ stridently stated, but overly confident, conclusions suggest.” *Id.* at 6-7.

<sup>22</sup>Edward L. Rubin, *Social Movements and Law Reform: Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 78-80 (2001).

<sup>23</sup>The studies that have been conducted are: CERULO, *supra* note 9; Karen A. Cerulo, *Sociopolitical Control and the Structure of National Symbols: An Empirical Analysis of National Anthems*, 68 SOC. FORCES 76 (1989); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

<sup>24</sup>*Cf.* Fred Davis, *On the ‘Symbolic’ in Symbolic Interaction*, 5 SYMBOLIC INTERACTION 111 (1982) (contending that symbolic interaction as an approach has focused on interaction and ignored symbols).

and signs must be identified. In terms of similarities, neither symbols nor signs on their own have intrinsic meanings. Instead, symbols and signs represent other things, which may be tangible or intangible, and they produce responses because their referents have been learned. Symbols and signs, consequently, are alike in the societal function they perform—each transmits meaning and, in doing so, is integral to the development and operation of societies.<sup>25</sup> Without symbols and signs, a society is probably incapable of having an economy of even modest complexity, a population of even modest size, or technology of even modest sophistication.

What distinguishes symbols from signs? Collectively, signs form a, or the, language employed in a society,<sup>26</sup> i.e., the signs in a group are the vehicles that make possible mutual understanding and interpersonal coordination.<sup>27</sup> To be effective in a language, of course, a sign (which can be verbal or nonverbal) must have a specific referent; a sign whose meaning is ambiguous impedes rather than facilitates social interaction. A symbol, on the other hand, possesses meanings that are of greater complexity. Thus, a symbol communicates a message in the society using the symbol that is broader and more complicated than the message communicated by a sign. Moreover, a symbol is more likely than a sign to have an impact on individuals that is emotional in nature<sup>28</sup> and that, for neurological reasons, occurs partly at a subconscious level.<sup>29</sup> For instance, the word “flag” is a sign whose referent is immediately intelligible and readily explained, but a flag in cloth or other tangible form is a symbol with a complex meaning that is, by comparison to its sign, less easily comprehended through oral or written descriptions.<sup>30</sup> The importance to a group of the referent of a symbol, furthermore, confers importance on the symbol; thus, the cloth flag of a nation is socially significant in its own right as a symbol of the nation.<sup>31</sup>

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<sup>25</sup>See Benjamin Lee Whorf, *The Relation of Habitual Thought and Behavior to Language*, in LANGUAGE, CULTURE, AND PERSONALITY: ESSAYS IN MEMORY OF EDWARD SAPIR 75 (Leslie Spier ed., 1941), reprinted in LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 134, 154, 156, 159 (John B. Carroll ed., 1956); INO ROSSI, FROM THE SOCIOLOGY OF SYMBOLS TO THE SOCIOLOGY OF SIGNS 23, 52-53 (1983).

<sup>26</sup>ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS 4 (1988).

<sup>27</sup>GARTH GILLAN, FROM SIGN TO SYMBOL 7 (1982).

<sup>28</sup>Ute Krudewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT'L & COMP. L. 679, 679, 681-683 (2002).

<sup>29</sup>David D. Franks, *Mutual Interests, Different Lenses: Current Neuroscience and Symbolic Interaction*, 26 SYMBOLIC INTERACTION 613 (2003).

<sup>30</sup>See J. STEVEN OTT, THE ORGANIZATIONAL CULTURE PERSPECTIVE 21-22 (1989).

<sup>31</sup>For this reason, statutes have prohibited intentional damage to tangible forms of the national flag of the United States. As applied to individuals who have deliberately damaged U.S. flags that they owned and who did so for the purpose of communicating a political message, the statutes have been judicially invalidated under the First Amendment to the Constitution. *United States v. Eichman*, 496 U.S. 310, 313, 315-316 (1990). However, First Amendment case law does not deny the meaning attached to physical forms of the flag; rather, case law is an indicator of the greater weight placed by society on the cultural value(s) protected by the Amendment.

The preceding explanation of the nature of symbols may be aided by a dictionary definition of the word “symbol.” Although dictionaries vary in the way they define the word, an illuminating definition depicts a symbol as:

5. an object or act that represents a repressed complex through unconscious association rather than through objective resemblance or conscious substitution[;] 6. an act, sound, or material object having cultural significance and the capacity to excite or objectify a response.<sup>32</sup>

A symbol, then, carries a broad, intricate meaning in standing for something else and is visible, audible, and/or touchable. A visible, touchable symbol includes the fabric flag of a country and a metal or wood religious artifact such as the Latin cross. An audible symbol is exemplified by a musical composition that has been formally adopted by a government as the official anthem of the country—the “Star Spangled Banner” in the case of the United States<sup>33</sup>—or that is closely but informally identified with the country, e.g., the song “God Bless America” by the composer Irving Berlin. However, an item cannot be a symbol for a group unless the participants in the group recognize the referent(s) of the item. That is, a particular item is symbolic only if the meaning of the item is apprehended. The intention of the producer of the item is insufficient by itself to make the item a symbol.

What is the function of symbols for society?<sup>34</sup> Macrosociology defines a society as a human group that operates through and is maintained by institutions. Consequently, if an institution begins to damage its society, the institution will change—although possibly with a substantial time lag—so that it ceases to do so and, instead, supports the social order.<sup>35</sup> Thus, as an institution, law in all of its forms—including statutes, administrative agency and court rules, and court decisions—manifests the acknowledged needs<sup>36</sup> and represents the prevailing values of society, and in the long run, the concepts and doctrines of law act as the sociological equivalent of a magnet, attracting participants to their society rather than driving them away. Law promotes the overall functioning of society by, in part, supplying symbols that solidify social life,<sup>37</sup> and because law as an institution must

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<sup>32</sup>WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2316 (unabridged ed. 1993).

<sup>33</sup>36 U.S.C. § 301 (2000).

<sup>34</sup>To the extent that symbols perform the function subtly—which may happen often—measurement of the function is difficult.

<sup>35</sup>See Larry D. Barnett, *When Is a Mutual Fund Director Independent? The Unexplored Role of Professional Relationships Under Section 2(a)(19) of the Investment Company Act*, 4 DEPAUL BUS. & COMM. L.J. 155, 155-160 (2006).

<sup>36</sup>A societal need is any condition that is required for a society to be workable and that results in institutional change. The concept of “societal need” is discussed in Larry D. Barnett, *The Roots of Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 613, 672-77 (2007).

<sup>37</sup>Three justices of the United States Supreme Court recognized the symbolic aspect of law, but seem to have underestimated its societal importance, when they wrote: “We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.” *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (Stevens, Marshall, and Brennan, JJ., dissenting). For the social system, however, the utility of law stems partially from the symbols generated by law. Furthermore, in some situations, the utility of the symbolic aspect of law probably equals or surpasses other benefits to society furnished by the institution of law. Law, for

not weaken the bond between a social system and its participants,<sup>38</sup> the symbols of law will change as large-scale forces alter the properties of society.

But how do we know when law is operating as a symbol? Otherwise expressed, by what observable measure(s) can we determine whether a particular concept or doctrine is a symbol? Unless the question is answered, quantitative research cannot be undertaken on the societal role of symbols of law, for such research requires that the presence—and, when appropriate, the magnitude—of every relevant variable be accurately identified. Whether a particular concept or doctrine of law is a symbol or is not a symbol involves a variable, because there are two mutually exclusive states one of which logically must exist. Moreover, for law that has become a symbol, the strength or importance of the symbol is a variable because strength/importance, by definition, is characterized by gradations; strength/importance can differ between symbols at any given point in time and can differ over time for any particular symbol. Consequently, the symbolic aspect of law unavoidably involves at least one variable—viz., whether or not law is a symbol—and law that is a symbol will involve a second variable—viz., the intensity or salience of the symbol.

The concern of this article is with the first variable: How can an investigator decide when a given concept or doctrine of law is a symbol? The decision can probably be made using a number of alternative criteria, and given the limited state of social science knowledge regarding symbols, it would be presumptuous to believe that the criteria can be definitively and exhaustively listed at this time. Nonetheless, one criterion can be suggested.

## II. APPEARANCES AND SYMBOLISM IN LAW

Social science research will someday determine whether the comment that “[t]he world is governed more by appearances than realities”<sup>39</sup> is correct and whether the characterization of the 1980s and 1990s as “an Age of Appearances” in the United States<sup>40</sup> is apt. Should these claims be proven wrong, however, they are likely to have erred merely in degree. If most of social life is not influenced by appearances, much undoubtedly is.

How do appearances achieve such influence? A social order, by definition, requires predictability in the behavior of individuals and groups, and even in groups with relatively few members, differentiated statuses and roles evidently emerge.<sup>41</sup> The attributes of individuals and groups, consequently, are important in social life. However, attributes can be socially relevant only when they are perceived, and perception unavoidably entails interpretation. Indeed, the inherent character of

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example, furnishes a social system with symbols that express cultural ideals, and these symbols, “by creating a realm . . . where all our dreams of justice in an unjust world come true,” in the long run promote the equilibrium of the system. Arnold, *supra* note 6, at 34-35.

<sup>38</sup>See CERULO, *supra* note 9, at 120-121, 164, 168.

<sup>39</sup>Daniel Webster, *quoted in* MICHAEL MONCUR’S (CYNICAL) QUOTATIONS, The Quotations Page, <http://www.quotationspage.com> (last visited Nov. 7, 2006).

<sup>40</sup>PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY 2* (1997).

<sup>41</sup>See John M. Levine & Richard L. Moreland, *Small Groups*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 415, 425-427 (Daniel T. Gilbert et al. eds., 4<sup>th</sup> ed. 1998) [hereinafter *HANDBOOK OF SOCIAL PSYCHOLOGY*].



attributes may be less significant to a society than the perception and interpretation of the attributes. Research has found that the manner in which the attributes of individuals and groups are perceived, as well as the context in which they are perceived, affects the treatment of and responses to the individuals and groups involved.<sup>42</sup> In short, appearances—“the action or state of appearing or seeming to be (to eyes or mind); semblance; looking like”<sup>43</sup>—are an inherent and unavoidable aspect of life in a society.<sup>44</sup>

Two illustrations may help at this point. First, almost all parents give each of their children a name that their culture associates with the biological sex of the child.<sup>45</sup> Sociologically, the name of an individual is not merely a label. Where gender distinctions are deeply entrenched in the social fabric, as they are in the United States,<sup>46</sup> sex-appropriate names for individuals facilitate social interaction by contributing to the appearance of the named individuals. To be exact, sex-linked names assist a society in placing individuals in gender roles, and like all social roles, gender roles involve conventions regarding appropriate behavior towards, as well as by, the occupants of the roles.<sup>47</sup> In the context of gender, then, the names of individuals shape appearances and, in doing so, aid the functioning of society. Second, evaluations of the physical features of an individual affect judgments that others make of the individual.<sup>48</sup> Thus, student beliefs about the physical attractiveness of their college professors markedly influence the students' ratings of

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<sup>42</sup>Theodore N. Greenstein & J. David Knottnerus, *The Effects of Differential Evaluations on Status Generalization*, 43 SOC. PSYCHOL. Q. 147 (1980); Jolanda Jetten et al., *Group Distinctiveness and Intergroup Discrimination*, in SOCIAL IDENTITY: CONTEXT, COMMITMENT, CONTENT 107 (Naomi Ellemers et al., eds., 1999).

<sup>43</sup>1 OXFORD ENGLISH DICTIONARY 566 (2<sup>nd</sup> ed. 1989).

<sup>44</sup>To employ a colloquialism, “[r]eality’ is the only word in the English language that should always be used in quotes.” Author unknown, *quoted in* COLE’S QUOTABLES, The Quotations Page, <http://www.quotationspage.com> (last visited Nov. 7, 2006).

<sup>45</sup>Stanley Lieberman et al., *The Instability of Androgynous Names: The Symbolic Maintenance of Gender Boundaries*, 105 AM. J. SOC. 1249, 1260-1261, 1274 (2000).

<sup>46</sup>The degree to which Americans at the present time are committed to traditional sex roles is indicated by responses to a question included in a national sample survey of adults who resided in the United States in 1990. Gallup Organization accession no. 237354 (May-June 1990), *available at* LEXIS, News and Business, RPOLL file. The question began by mentioning change in sex roles and then asked interviewees to express their agreement or disagreement with the statement that “A job is alright but what most women really want is a home and children.” *Id.* Exactly half of all respondents agreed with the statement, while just two out of five respondents disagreed with it. *Id.* The percentages agreeing and disagreeing differed little between women and men. *Id.*

<sup>47</sup>See Mary R. Jackman & Mary Scheuer Senter, *Images of Social Groups: Categorical or Qualified?*, 44 PUB. OPINION Q. 341, 355, 358 (1980); Tom Langford & Neil J. Mackinnon, *The Affective Bases for the Gendering of Traits: Comparing the United States and Canada*, 63 SOC. PSYCHOL. Q. 34 (2000).

<sup>48</sup>Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 41, at 151, 174.

the teaching quality of the professors;<sup>49</sup> judgments of the relative competence of opposing candidates for Congress that are based on the candidates' faces evidently have a major bearing on the outcome of elections;<sup>50</sup> and the degree to which the facial traits of cadets at a military academy indicate dominance (rather than submissiveness) affects the rank achieved by the cadets at the academy.<sup>51</sup> In short, the appearance of an individual has an impact on responses to the individual by others.

My concern, however, is not with appearances qua appearances but with appearances as symbols. What is responsible for infusing appearances with symbolism? The question encompasses appearances in many contexts, but I will consider just one, namely, law. Law acts as a symbol when, *inter alia*, it addresses (e.g., regulates) appearances of a phenomenon that is significant to society,<sup>52</sup> and law that is explicitly directed at protecting (or eliminating) a recognized symbol of a socially significant phenomenon is symbolic, too. The symbolism of such law results from stimulus generalization, a phenomenon identified in the 1920s by the noted scientist Ivan Pavlov that has come to be regarded by psychologists as an

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<sup>49</sup>James Felton et al., *Web-based Student Evaluations of Professors: The Relations Between Perceived Quality, Easiness, and Sexiness*, 29 ASSESSMENT & EVALUATION IN HIGHER EDUC. 91, 100-101, 106 (2004).

The heavy reliance that colleges and universities place on student-completed teaching evaluation questionnaires is illustrative of the importance of appearances, even in organizations that are ostensibly committed to rationality and empirically grounded knowledge. Research indicates that the questionnaires are not highly accurate measures of the degree to which students master assigned material. Larry D. Barnett, *Are Teaching Evaluation Questionnaires Valid? Assessing the Evidence*, 25 J. COLLECTIVE NEGOTIATIONS 335 (1996). Moreover, relatively little is known about the negative effects of the questionnaires on faculty members and students. *Id.* at 343. Appearances, therefore, are the primary basis for the use of the questionnaires in personnel decisions by organizations of higher education.

<sup>50</sup>Alexander Todorov et al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1623 (2005).

<sup>51</sup>Allan Mazur et al., *Military Rank Attainment of a West Point Class: Effects of Cadets' Physical Features*, 90 AM. J. SOC. 125, 140 (1984).

<sup>52</sup>If law is symbolic when it deals with appearances of activities that are significant to society, empirical research must be able to distinguish activities that are "significant" from activities that are not. Unfortunately, theory in the sociology of law currently seems to be of little or no help to researchers who are seeking to measure societal significance, which is potentially ascertained from objective measures, from subjective measures, or from both. Objectively, societal significance might be determined from quantitative data on conditions in the society; such data on the United States are found *inter alia* in studies of the population of the country undertaken by federal government agencies. Subjectively, societal significance might be determined from the attitudes and values of the participants in society; data on attitudes and values are available from surveys conducted by organizations in the private sector using samples drawn from the population. The study of symbols in law will be limited until sociological theory aids researchers in selecting both the most suitable approach to societal significance—objective, subjective, or an objective-subjective combination—and the most appropriate data within the approach.

“undeniable characteristic” of human learning.<sup>53</sup> Stimulus generalization, simply described, involves a stimulus to which individuals learn a particular response and which is subsequently joined by at least one additional stimulus that spontaneously produces the response. Thus, stimulus generalization begins with the establishment of a link between an initial stimulus and a certain reaction through positive and/or negative reinforcement, i.e., reward and/or punishment; after the connection between the initial stimulus and the reaction has been created, one or more other stimuli generate the reaction without any reinforcement.<sup>54</sup> In the context of the present article, the initial stimulus would be appearances, the second stimulus would be law that deals with appearances, and the response to each stimulus would be the social meaning that constitutes a symbol.<sup>55</sup>

By way of illustration, the national flag of the United States, as a tangible representation (i.e., appearance) of the country, is an acknowledged symbol.<sup>56</sup> The symbolism of the flag exists because the referent of the flag—the Nation—is socially significant, and to promote and preserve this symbolism, federal statutes specify the settings, circumstances, and manner in which the flag is to be displayed.<sup>57</sup> Thus, a federal statute seeks to preserve the symbolism of the flag by explicitly providing, *inter alia*, that “[n]o disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing.”<sup>58</sup> Through stimulus generalization, statutes such as these acquire symbolism from the symbolism of the flag.

Stimulus generalization has been employed in theoretical analyses to explain social phenomena<sup>59</sup> and in empirical research to account for symbolism in a law-based government program.<sup>60</sup> If it is widespread in social life, stimulus generalization can be expected to occur with law that deals with appearances of socially important phenomena, and the learned reaction that confers symbolism on such appearances will be transferred to law focusing on these appearances. The present article specifically assumes that stimulus generalization does so, although the assumption has not been tested empirically by social scientists. Under the thesis of

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<sup>53</sup>David I. Mostofsky, *Introduction*, in *STIMULUS GENERALIZATION* 1, 1-2 (David I. Mostofsky ed., 1965).

<sup>54</sup>*Id.* at 1.

<sup>55</sup>*See supra* text accompanying notes 28 to 33. In terms of strength and salience, the symbolism of particular appearances is probably never less than, and in most cases probably exceeds, the symbolism of law concerned with these appearances.

<sup>56</sup>*E.g.*, *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

<sup>57</sup>4 U.S.C. §§ 6, 7 (2000).

<sup>58</sup>*Id.* § 8.

<sup>59</sup>Robert A. LeVine, *The Role of Family in Authority Systems: A Cross-Cultural Application of Stimulus-Generalization Theory*, 5 *BEHAV. SCI.* 291 (1960); Richard M. Merelman, *Learning and Legitimacy*, 60 *AM. POL. SCI. REV.* 548, 558 (1966); Robert Frank Weiss, *Defection from Social Movements and Subsequent Recruitment to New Movements*, 26 *SOCIOMETRY* 1 (1963).

<sup>60</sup>David O. Sears et al., *Whites' Opposition to "Busing": Self-Interest or Symbolic Politics?*, 73 *AM. POL. SCI. REV.* 369, 381 (1979).

the article, then, dress codes for students imposed by public schools are symbolic. The symbolism of dress codes arises because the codes target physical appearances that have social meaning; through stimulus generalization, the meaning of the physical appearances attaches to the dress codes applicable to the appearances and makes the codes symbolic.<sup>61</sup>

While tangential to the article, law that does not focus on appearances may also be symbolic. Specifically, law can serve as a symbol when it applies directly to or reflects the particular phenomenon for which it was formulated. At least two types of law in a society are in this category. They are symbolic because their function “is not so much to guide society, as to comfort it.”<sup>62</sup>

The first type of law that is symbolic, even though it does not focus on appearances, is law that is designed to regulate a socially significant activity.<sup>63</sup> Law of this type is expected by participants in the society that adopts it to be effective in substantially altering the frequency of the activity, but, in fact, the law has little or no influence on the incidence of the activity. Illustrations of such law include: (i) state statutes that authorize the death penalty for individuals who commit the crime of murder, (ii) state legislation that bars employment policies requiring union

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<sup>61</sup>In a survey conducted during 2002, a nationwide sample of adults in the United States was asked whether “[s]etting dress codes in public schools that stop students from wearing clothes that are too revealing or sloppy” would be “an effective solution for improving people’s behavior.” In answering the question, respondents selected one of the following: “very effective,” “somewhat effective,” “not too effective,” “not effective at all.” More than half (55%) of the respondents thought dress codes would be “very effective.” Public Agenda Foundation accession no. 401631 (Jan. 2-23, 2002), *available at* LEXIS, News and Business, RPOLL File. *Accord*, Public Agenda Foundation accession no. 456449 (March 11-18, 2004), *available at* LEXIS, News and Business, RPOLL File (national sample of adult parents of public school students who were in grades 5-12). Because the personal attire under consideration breached accepted social standards (i.e., because the attire was “too revealing or sloppy”), the behavior that would be “improved” by dress codes presumably violated social standards, too. The belief that dress codes are a means of reducing socially unacceptable behavior links attire to the character of social life. This link—which confers meaning on personal attire and, in turn, dress codes—is evidently well-entrenched and widespread in the United States inasmuch as most respondents believed that dress codes would be highly effective in enhancing social behavior. School codes that bar grooming that deviates from social norms seem to have been generally favored by Americans since at least the mid-1960s. *See* Gallup Organization accession no. 39949 (Sept. 16-21, 1965), *available at* LEXIS, News and Business, RPOLL File.

Under my thesis, most if not all of the physical appearances targeted by dress codes are symbolic even if the individuals affected by the codes have no intent to communicate a political or social message through their physical appearance. My thesis, therefore, is broader than existing case law on the constitutionality of government-decreed dress codes. *See* Wendy Mahling, Note, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715 (1996). Furthermore, my thesis contends that the dress codes themselves are symbolic when they address physical appearances characterized by symbolism.

<sup>62</sup>ARNOLD, *supra* note 6, at 34.

<sup>63</sup>The regulatory law discussed in this paragraph is not concerned with appearances, but regulation is the goal of much, if not most, of the law that focuses on appearances. Regulatory law dealing with appearances is the subject of Parts III and IV of this article.

membership or requiring abstention from union membership, and (iii) statutes that on their face are intended to prohibit abortion. In spite of the widespread, relatively intense feelings that have accompanied each of these topics<sup>64</sup>—feelings that have undoubtedly helped to instill symbolism into law on the topics—such law has evidently not had an appreciable impact on the murder rate,<sup>65</sup> on the percentage of

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<sup>64</sup>Surveys of national samples of adults in the United States found that, from the mid-1980s to the mid-1990s, between 53% and 67% of all respondents either “strongly” endorsed or “strongly” opposed capital punishment. Center for Political Studies accession no. 259987 (Nov. 9, 1994-Jan. 9, 1995), *available at* LEXIS, News and Business, RPOLL File; General Social Survey accession no. 192100 (Feb.-Apr. 1991), *available at* LEXIS, News and Business, RPOLL File; Center for Political Studies accession no. 211923 (Nov. 8, 1988-Jan. 30, 1989), *available at* LEXIS, News and Business, RPOLL File; Gallup Organization accession no. 25761 (Jan. 10-13, 1986), *available at* LEXIS, News and Business, RPOLL File.

A survey of a national sample of adults in the United States in 1965 measured the strength of attitudes toward state legislation that allows employees to choose whether to join a union (popularly labeled “right-to-work” legislation). Only one in four Americans was neutral on the issue — just 15% of the respondents expressed “little or no concern” with such legislation, and an additional 11% had “no opinion” on the legislation. On the other hand, “very strong concern” with the legislation was expressed by 38%, and “a fair amount of concern” was expressed by an additional 36%. Opinion Research Corp. accession no. 101530 (Nov. 22-Dec. 10, 1965), *available at* LEXIS, News and Business, RPOLL File. Right-to-work legislation, given the number of questions asked about it in public opinion polls, was evidently a salient subject to Americans during most of the last half of the twentieth century. *See* Public Opinion Online, *available at* LEXIS, News and Business, RPOLL File. The legislation is viewed as having been accompanied by important economic change. Eric Tucker, “*Great Expectations Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA*,” 26 COMP. LAB. L. & POL’Y J. 97, 106 (2004).

Approximately two-thirds of all adults in the United States in 2001 felt “strongly” about the decision of the U.S. Supreme Court in *Roe v. Wade*, i.e., either “strongly” favored or “strongly” opposed the decision, which established for women a constitutional right to an abortion. Los Angeles Times accession no. 381074 (March 3-5, 2001), *available at* LEXIS, News and Business, RPOLL File; *Roe v. Wade*, 410 U.S. 113 (1973).

These topics, in short, are significant to society. As a result, they can be expected to spawn important social products — in particular, symbols. *See* Barnett, *supra* note 4, at 821-24.

<sup>65</sup>Kevin B. Smith, *Explaining Variation in State-Level Homicide Rates: Does Crime Policy Pay?*, 59 J. POL. 350, 355, 360-61 (1997). The most recent rigorous study of the death penalty, which used annual data on counties for the period 1977 through 1996, found that the impact of capital punishment differed between states and that executions, while reducing the number of murders in some states, increased the number of murders or had no effect in other states. When the effects in all of the states were aggregated, the net number of murders that executions were estimated to have prevented in 1977-1996 was roughly 1,672. Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 232 (2005). During the twenty years covered by the study, however, the number of murders in the United States totaled 427,600. Calculated from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1988, at table 263 (108<sup>th</sup> ed. 1987), *available at* <http://www.census.gov/prod/www/abs/statab.html>; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at table 335 (108<sup>th</sup> ed. 1998), *available at* <http://www.census.gov/prod/www/abs/statab.html>. Consequently, executions between 1977 and 1996 reduced the number of murders that would have occurred

nonagricultural workers who are union members,<sup>66</sup> or on the percentage of pregnancies that women choose to terminate.<sup>67</sup>

The second type of law that does not emphasize appearances but is symbolic is law that merely expresses dominant values of the society. Law of this type does not directly regulate activity but, rather, affirms salient social ideals, and it is illustrated by the federal Defense of Marriage Act. The pertinent provision of the Act permits states and other U.S. jurisdictions (territories, possessions and Indian tribes) to deny recognition to same-sex marriages from another jurisdiction even though the marriages are lawful in the latter.<sup>68</sup> The Act endorses both the traditional conception of marriage (and its associated gender roles<sup>69</sup>) and the longstanding authority of

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in these years by  $1,672/(427,600 + 1,672) = 1,672/429,272 = 0.00389 \times 100 = 0.389\%$ , i.e., by approximately four-tenths of one percent.

In addition, statutes establishing prison sentences for criminal conduct have a negligible influence on the overall rate of major crimes. Tomislav V. Kovandzic, *The Impact of Florida's Habitual Offender Law on Crime*, 39 CRIMINOLOGY 179 (2001); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 CRIMINOLOGY 247 (1995); Lisa Stolzenberg & Stewart J. D'Alessio, "Three Strikes and You're Out": *The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates*, 43 CRIME & DELINQ. 457 (1997); Tamasak Witayapanyanon, *Criminal Justice Policy in the United States: A Pooled Time-Series Analysis of Sentencing Reform Acts 211-212, 223-224* (1989) (unpublished Ph.D. dissertation, Southern Illinois University) (on file with Widener University Library).

<sup>66</sup>Keith Lumsden & Craig Petersen, *The Effect of Right-to-Work Laws on Unionization in the United States*, 83 J. POL. ECON. 1237 (1975). Because union membership in a state is not materially affected by whether a right-to-work statute has been adopted in the state, such statutes and their political precursors are "symbol rather than substance." *Id.* at 1248.

<sup>67</sup>Social science research has found that the legalization of abortion in the United States had no more than a small impact on the aggregate number of births in the nation as a whole and in individual states. Timothy D. Hogan, *An Intervention Analysis of the Effects of Legalized Abortion Upon U.S. Fertility*, 3 POPULATION RES. & POL'Y REV. 201, 214-215 (1984). The legalization of abortion is also estimated to have had a small effect on the average number of lifetime births per woman. Jacob Alex Klerman, *U.S. Abortion Policy and Fertility*, 89 AM. ECON. REV., May 1999, at 261, 264. Among white women, the reduction in lifetime fertility was found to be less than 3.0%. Calculated from *id.* at table 1. The absence of a major impact on white women is notable because white women comprised the vast majority of all women who were in their childbearing years during and following the period when abortion law changed. In 1970 and 1980, for example, white females were approximately 87% and 85%, respectively, of all females residing in the United States who were age 15 to 44. Calculated from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83 (103<sup>rd</sup> ed. 1982), at table 31, available at <http://www.census.gov/prod/www/abs/statab1951-1994.htm>.

The preceding studies, in supporting the conclusion that U.S. law on abortion has minimally influenced the proportion of pregnancies that are intentionally interrupted, suggest that such law serves chiefly as a symbol.

<sup>68</sup>28 U.S.C. § 1738C (2000).

<sup>69</sup>See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196.

states to define marriage.<sup>70</sup> Indeed, an express purpose of the Act was to affirm state sovereignty over marriage so that a state can, if it chooses, exclude from the status of marriage couples comprised of individuals of the same sex.<sup>71</sup> Because the Act merely recognizes the existing authority of states to regulate marriage rather than altering that authority, the Act is purely symbolic.<sup>72</sup>

In the present article, however, I concentrate on appearances that a phenomenon is present, and I contend that law dealing with appearances of a socially salient phenomenon is symbolic. Although not all law applies to such appearances, some law probably must do so. Why do these appearances become the subject of law? The answer is that attitudes and behaviors toward a group (including an institution)<sup>73</sup> are shaped by beliefs regarding whether the group acts in a just manner,<sup>74</sup> and these beliefs are molded by appearances. Thus, although jurisprudence and scholarship on it have long distinguished “substance” from “form”<sup>75</sup> and often expressed a preference for substance over form,<sup>76</sup> the appearances generated by the form of judicial proceedings have been recognized as a factor that affects the trust of the public in the institution of law.<sup>77</sup>

In sum, appearances of phenomena that are important to a social system give symbolism to law addressing the appearances, and the symbols of law aid a society in securing the commitment of its participants.<sup>78</sup> For every group, of course, the commitment of its participants is vital, because to the extent that participant commitment is lacking, the ability of a group to operate smoothly and effectively will be hampered.<sup>79</sup> If a society is to benefit from an institution, moreover, the

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<sup>70</sup>H.R. Rep. No. 104-664, at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

<sup>71</sup>*Id.*, at 2-3, 25, 27, as reprinted in 1996 U.S.C.C.A.N. 2905, 2906, 2907, 2929, 2931.

<sup>72</sup>Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1385 (2005).

<sup>73</sup>Since the word “group” is employed here to refer to an organized set of individuals, an institution is a type of group.

<sup>74</sup>Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements*, in HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 41, at 595, 595, 606, 611-612.

<sup>75</sup>*E.g.*, *Holmes v. Jennison*, 39 U.S. 540, 573 (1840).

<sup>76</sup>*E.g.*, John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 462 (1999); Ronald H. Jensen, *Of Form and Substance: Tax-Free Incorporations and Other Transactions Under Section 351*, 11 VA. TAX REV. 349, 372 (1991).

<sup>77</sup>*United States v. Lastra*, 973 F.2d 952, 956 (D.C. Cir. 1992).

<sup>78</sup>*See CERULO, supra* note 9, at 15-27. The promotion of societal cohesion is among the goals sought to be achieved by government in regulating the physical appearance of individuals. *See Miller v. School Dist. No. 167*, 495 F.2d 658, 664 (7<sup>th</sup> Cir. 1974). Government regulation of individuals’ physical appearance is discussed earlier in this article. *See supra* note 61 and accompanying text.

<sup>79</sup>Levine & Moreland, *supra* note 41, at 428; Charles A. O’Reilly III et al., *Work Group Demography, Social Integration, and Turnover*, 34 ADMIN. SCI. Q. 21, 33-34 (1989). *See* Wayne Busby, *Social Integration and Community Health* 79-81, 86 (1985) (unpublished Ph.D. dissertation, Univ. of Oklahoma); Sung-Soon Clara Kim, *Dimensions of Social Integration: Solidarity and Deviance in American Cities* 142-148 (1985) (unpublished Ph.D. dissertation,

institution must be perceived as fair, i.e., as just. The institution of law has acknowledged the necessity of perceptions of fairness: in the words of the United States Supreme Court, “justice must satisfy the appearance of justice.”<sup>80</sup>

As defined in this article, a symbol is a stimulus that is visible, audible, or touchable and that represents a thing that is of significance to society; such stimuli include appearances that society deems important. Two illustrations of the symbolism of appearances and of pertinent law may be helpful. First, American ideals require a substantial distance between the institution of government and the institution of religion,<sup>81</sup> a requirement that is embodied in the Religion Clauses of the First Amendment to the United States Constitution.<sup>82</sup> Consequently, appearances that powers of government are being shared with religious entities have been found by the United States Supreme Court to constitute symbols that implicate (and violate) the First Amendment.<sup>83</sup> As a second illustration, certain physical attributes of individuals generate reactions by others,<sup>84</sup> and one of the attributes that does so is body hair. Numerous cultures specify the manner of dealing with body hair,<sup>85</sup> and in the United States, the social definition of females and males involves unequivocal sex-based differences as to the management of hair. For instance, “[t]he gender norm that says that women’s skin should be smooth and bare (and the social opprobrium that accordingly rains down on any woman who goes unshaven)” contribute to sex-based differences in grooming.<sup>86</sup> Body hair, being a factor in the appearances of gender, is symbolic because it is linked to social roles and thus is

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University of Virginia) (on file with Widener University Library); Thorolfur Thorlindsson & Jón Gunnar Bernburg, *Durkheim’s Theory of Social Order and Deviance: a Multi-level Test*, 20 EUR. SOC. REV. 271 (2004). See also Uberto Gatti et al., *Civic Community and Juvenile Delinquency*, 43 BRIT. J. CRIMINOLOGY 22 (2003) (data analysis consistent with an inverse relationship between degree of social integration and incidence of the most serious violent crimes). Cf. Thomas A. Petee et al., *Levels of Social Integration in Group Contexts and the Effects of Informal Sanction Threat on Deviance*, 32 CRIMINOLOGY 85 (1994) (concluding that the ability of informal sanctions to prevent illegal behavior rises with the degree of social integration in a group).

<sup>80</sup>*Offutt v. United States*, 348 U.S. 11, 14 (1954); *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>81</sup>In 2002, for example, a survey of a national sample of adults in the United States found that eight out of ten respondents “completely” or “mostly” agreed with the statement that “Religion is a matter of personal faith and should be kept separate from government policy.” Pew Research Center accession no. 431836 (Aug. 19-Sept. 8, 2002), available at LEXIS, News and Business, RPOLL File.

<sup>82</sup>“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. These provisions also apply to the states and their subdivisions. *Elk Grove Unified Sch. Dist. v. Gordon*, 542 U.S. 1, 8 & n.4 (2004).

<sup>83</sup>*Bd. of Educ. v. Grumet*, 512 U.S. 687, 696-97 (1994). See also *Doe v. Shenandoah County Sch. Bd.*, 737 F. Supp. 913, 918 (W.D. Va. 1990).

<sup>84</sup>See *supra* notes 48-51 and accompanying text.

<sup>85</sup>Deborah Pergament, *It’s Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 CHI.-KENT L. REV. 41 (1999).

<sup>86</sup>Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1, 7 (1998).



significant to society. In terms of law, constitutional and statutory doctrines have arisen from sex distinctions in the policies of government entities and private employers regarding the length of head hair,<sup>87</sup> and through stimulus generalization, these doctrines have become symbols.

In concluding part II, let me identify the key points that underlie the macrosociological perspective I am proposing. A society, to operate effectively, must have the commitment of its participants generally, but such commitment requires that the participants trust the institutions of their society and regard the institutions as fair.<sup>88</sup> Otherwise expressed, a society will be viable to the extent its participants believe that the institutions of the society provide social justice.<sup>89</sup> Given that the content of law is a response to the recognized needs and dominant values of society,<sup>90</sup> the concepts and doctrines of law, and the definitions of social justice that they advance,<sup>91</sup> undergo change when societal conditions are altered.<sup>92</sup>

The present article, in focusing on concepts and doctrines of law that operate as symbols, contends that the bond between a society and its participants is strengthened by law that is symbolic. The symbols of law strengthen the bond because they incorporate established notions of social justice and “[a]pppearance—symbolism—is critical in any system of justice.”<sup>93</sup> The concepts and doctrines of law, then, aid society by their symbolism, and they are symbolic when, *inter alia*, they are applied to appearances of socially significant phenomena because the symbolism of the latter is, through stimulus generalization, acquired by law.

From a macrosociological perspective, then, the fact that law is an institution of society is not attributable to the efforts of particular individuals or due to mere

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<sup>87</sup>Pergament, *supra* note 85, at 52-54, 56. See also Stacey S. Baron, Note, *(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty*, 46 B.C. L. REV. 359 (2005) (discussing sex-based head hair grooming policies as part of “appearance discrimination” generally and labeling court decisions and statutes on appearance discrimination as “appearance law”).

<sup>88</sup>See Joel Brockner et al., *The Influence of Prior Commitment to an Institution on Reactions to Perceived Unfairness: The Higher They Are, The Harder They Fall*, 37 ADMIN. SCI. Q. 241 (1992) [hereinafter Brockner I]; Joel Brockner et al., *When Trust Matters: The Moderating Effect of Outcome Favorability*, 42 ADMIN. SCI. Q. 558 (1997).

<sup>89</sup>Instances of perceived social injustice evidently reduce commitment to a group among participants who are strongly committed, but instances of perceived social justice do not seem to increase commitment among participants who are weakly committed. Consequently, “it may be much easier to break, rather than build[,] . . . organizational commitment.” Brockner I, *supra* note 88, at 260.

<sup>90</sup>BARNETT, *supra* note 3, at 16-19.

<sup>91</sup>In this regard, the English jurist William Blackstone was correct in his observation that “[l]aw is the embodiment of the moral sentiment of the people.” CLASSIC QUOTES, The Quotations Page, <http://www.quotationspage.com> (last visited Nov. 7, 2006).

<sup>92</sup>*Collins v. United Mine Workers of Am. Welfare & Ret. Fund*, 298 F. Supp. 964, 968 (D. D.C. 1969), *aff'd*, 439 F.2d 494 (D.C. Cir. 1970); *Hay v. Med. Ctr. Hosp.*, 496 A.2d 939, 944 (Vt. 1985); *Semler v. Oregon State Bd. of Dental Exam'rs*, 34 P.2d 311, 313 (Or. 1934).

<sup>93</sup>Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125, 132 (1989).

coincidence. Instead, law is an institution because, as a servant rather than a master of society,<sup>94</sup> it benefits the social system. This benefit is supplied partially through symbols, a mechanism that permits the existence of widespread interpersonal relationships and, hence, social life.

### III. THE STATUTORY DEFINITION OF THE OCCUPATION OF INVESTMENT ADVISER

A statute enacted by a legislature may not on its face encompass appearances, but through interpretation by courts and administrative agencies, it may be extended to appearances. The application of law to appearances, therefore, may not be obvious and easily ascertained; instead, whether appearances have been brought within the scope of a statute may be determinable only from documents construing the statute. To illustrate this point, I will use the occupation of investment adviser and, in particular, the definition of the occupation under federal law. The topic demonstrates the often-subtle role of appearances in law.<sup>95</sup>

Congress has defined the occupation of “investment adviser” in both the Investment Company Act and the Investment Advisers Act (“Advisers Act”), but the definition in the former Act is concerned exclusively with the parties furnishing recommendations to investment companies regarding the acquisition and/or disposition of securities by the companies.<sup>96</sup> The definition in the Advisers Act contains no such limitation. Specifically, section 202(a)(11) of the Advisers Act declares an investment adviser to be

[A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.<sup>97</sup>

Subject to certain exceptions, a person satisfying this definition (“Advisers Act definition”) must register with, and conform to applicable rules of, the Securities and Exchange Commission if the person uses the mail system or any channel of interstate commerce in the United States to engage in business as an investment adviser.<sup>98</sup>

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<sup>94</sup>See *George v. Jordan Marsh Co.*, 268 N.E.2d 915, 918 (Mass. 1971) (referring to the “ever changing conditions of the society which the law is intended to serve.”).

<sup>95</sup>See *Greenberg v. Kimmelman*, 494 A.2d 294, 299 (N.J. 1985) (state statute regulating employment in casinos must be “concerned not only with impropriety, but also with its appearance, which is always more subtle than impropriety itself.”).

<sup>96</sup>15 U.S.C. § 80a-2(a)(20) (2000). A party supplying securities advice will not be an investment adviser under the Investment Company Act unless the entity receiving the advice qualifies as an investment company. The statutory criteria for an investment company are in section 3 of the Act. 15 U.S.C. § 80a-3.

<sup>97</sup>15 U.S.C. § 80b-2(a)(11). A “person” is either “a natural person or a company”; a company includes “a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not . . . .” *Id.* §§ 80b-2(a)(5), 80b-2(a)(16).

<sup>98</sup>15 U.S.C. § 80b-3(a).

The discussion below will focus solely on the Advisers Act definition, because this definition is applicable to a much larger number of persons—and is therefore of much greater practical importance—than the definition of investment adviser in the Investment Company Act. Any investment adviser under the latter Act will be an investment adviser under the Advisers Act,<sup>99</sup> but an investment adviser under the Advisers Act may not be an investment adviser under the Investment Company Act because a person meeting the Advisers Act definition of investment adviser can serve clients that are not investment companies. As a result, investment advisers under the Advisers Act are responsible for the securities portfolios of not just investment companies (e.g., mutual funds) but of other clients as well, and all of the securities portfolios they manage have a combined market value that far exceeds the market value of the securities portfolios of investment companies.<sup>100</sup>

Why is the occupation of investment adviser of *social* significance in the United States? The answer may not be immediately obvious inasmuch as the products with which investment advisers work (viz., securities) are, on the surface, economic in character. Nonetheless, the occupation of investment adviser has important implications for American society. Economic matters can have major social consequences,<sup>101</sup> and in the case of investment advisers, such consequences are unavoidable because the occupation directly affects a large portion of the public. Specifically, in 2005, close to one-half (47.5%) of all households in the United States owned shares of at least one mutual fund (the most common form of investment company); the households that owned mutual fund shares had an investment in a median of four funds and had a median of 47% of their financial assets in the funds.<sup>102</sup>

An examination of the definition of investment adviser in the Advisers Act reveals that the definition encompasses more than a single type of activity. Specifically, the definition designates as an investment adviser “any person *who*” (italics added), employs the word “who” not once but twice, and precedes the second “who” with the word “or.” Each “who” is accompanied by a description of a set of activities, moreover, and the descriptions differ markedly in their wording. Given

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<sup>99</sup>15 U.S.C. § 80b-3(b)(3); Cornelius C. Rose Associates, Inc., SEC No-Action Letter, 1978 SEC No-Act. LEXIS 360, at \*2 (Jan. 6, 1978).

<sup>100</sup>See Proxy Voting by Investment Advisers, Investment Advisers Act Release No. IA-2059, 67 Fed. Reg. 60,841 (Sept. 26, 2002). The Release estimates the market value of portfolios over which investment advisers under the Advisers Act have discretionary authority to be approximately \$19 trillion. *Id.* The Release also reports the market value of the portfolios of mutual funds, i.e., of open-end management investment companies. 15 U.S.C. §§ 80a-4, 80a-5 (2000). Data are evidently for the end of 2001. At that time, the net assets of mutual funds amounted to \$6.97 trillion, while the other common forms of investment companies—closed-end funds, exchange-traded funds, and unit investment trusts—had assets worth, respectively, \$141 billion, \$83 billion, and \$49 billion. INVESTMENT COMPANY INSTITUTE, 2006 INVESTMENT COMPANY FACT BOOK 71, 81-83 (46<sup>th</sup> ed. 2006), available at [http://www.icifactbook.org/pdf/2006\\_factbook.pdf](http://www.icifactbook.org/pdf/2006_factbook.pdf).

<sup>101</sup>Caroline Hodges Persell, *The Interdependence of Social Justice and Civil Society*, 12 Soc. F. 149 (1997).

<sup>102</sup>INVESTMENT COMPANY INSTITUTE, *supra* note 100, at 47-48.

the significance of individual words in a statute,<sup>103</sup> two separate classes of activity are within the scope of the definition of investment adviser in section 202(a)(11). The subject of both classes, however, is conduct that is business in nature.

Although one class of activity under the Advisers Act definition involves a “business” and the other class involves a “regular business,” the Division of Investment Management (“Division”) of the Securities and Exchange Commission has taken the position that the business element of the definition has the same character in each of the two classes of activity comprising the occupation of investment adviser as defined in section 202(a)(11).<sup>104</sup> Regardless of whether the Division is correct in this regard, the concept of “business” is basic to the definition. Accordingly, there must be a “business” that supplies investment advice, or furnishes reports or analyses, regarding securities, and the fundamental attributes of a business inhere in every type of advisory service provided. But what are these attributes?

One of the attributes that can place a person in the investment advisory business, according to the Division, is “hold[ing] himself out as an investment adviser or as one who provides investment advice.”<sup>105</sup> Notably, the “[h]olding oneself out” attribute also has a bearing at other points in the definition of investment adviser in section 202(a)(11). For example, the section excludes lawyers, accountants, engineers, and teachers from the definition of investment adviser when their investment advice “is solely incidental to the practice of [their] profession,”<sup>106</sup> and the staff has concluded that the exclusion is unavailable to any of the designated professionals who holds herself/himself out publicly as an investment adviser.<sup>107</sup> Similarly, section 202(a)(11) excludes brokers and dealers from the definition of investment adviser if *inter alia* they supply investment advice in a manner that is “solely incidental” to their broker-dealer business.<sup>108</sup> This exclusion, under a Commission rule, is unavailable when a broker or dealer, in furnishing advice that is a component of a financial plan or that is related to financial planning, “holds itself out generally to the public as a financial planner or as providing financial planning services.”<sup>109</sup> Brokers and dealers that, in the context of a comprehensive analysis of

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<sup>103</sup>2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (6<sup>th</sup> ed. 2000).

<sup>104</sup>Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. IA-1092, 52 Fed. Reg. 38,400, 38,402 (Oct. 16, 1987) [hereinafter Release No. IA-1092].

<sup>105</sup>*Id.* Investment advising is not the only occupation of which an individual can be deemed a member when the individual holds himself or herself out as being in the occupation. Thus, the ethical rules governing attorneys have been applied to an individual who, although not admitted to the bar, presented himself as an attorney. *Triffin v. DiSalvo*, 643 A.2d 118 (Pa. Super. Ct. 1994), *appeal denied*, 661 A.2d 874 (Pa. 1995).

<sup>106</sup>15 U.S.C. § 80b-2(a)(11)(B) (2000).

<sup>107</sup>Release No. IA-1092, *supra* note 104, at 38,403. *Accord*, Hungerford, Aldrin, Nichols & Carter, SEC No-Action Letter, 1991 SEC No-Act. LEXIS 1420, at \*2-3 (Dec. 10, 1991).

<sup>108</sup>15 U.S.C. § 80b-2(a)(11)(C) (2000).

<sup>109</sup>Certain Broker-Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Release No. IA-2376, 70 Fed. Reg. 20,424, 20,454 (April 19, 2005) (to be codified at 17

the long-term financial requirements of a client, supply advice about securities to the client will not be doing so in connection with their brokerage business when they have portrayed themselves as engaged in investment advising.<sup>110</sup> Any appearance of being an investment adviser, accordingly, renders these brokers and dealers ineligible for the statutory exclusion from the definition of investment adviser and triggers the status of investment adviser.

In short, the “hold oneself out” standard is a recurring aspect of section 202(a)(11). That the standard is not uncommon in the definition of investment adviser may be traceable to section 203 of the Advisers Act. Paragraph (a) of section 203 mandates registration with the Securities and Exchange Commission of an investment adviser that employs mail or interstate commerce “in connection with his or its business.”<sup>111</sup> However, paragraph (b)(3) of the section exempts from registration *inter alia* an investment adviser who has had no more than fourteen clients in the prior twelve months, who is not an investment adviser to an investment company that is registered with the Commission under the Investment Company Act, and who does not “hold[] himself out generally to the public as an investment adviser.”<sup>112</sup> Thus, the “hold oneself out” standard is explicitly embedded in the Advisers Act.

To hold out a thing as existing, of course, generates appearances of the thing.<sup>113</sup> For investment advisory services, a wide range of actions can hold out an entity or individual as an investment adviser and produce appearances that the services are offered by a business. For example, an entity will evidently be deemed to have held itself out publicly as being in the investment advisory business if the entity has an office in a building whose directory not only lists the name of the entity but also identifies the entity as an “investment adviser.”<sup>114</sup> Furthermore, an entity that

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C.F.R. § 275.202(a)(11)-1(b)); Certain Broker-Dealers Deemed Not To Be Investment Advisers, Extension of Compliance Date, Investment Advisers Act Release No. IA-2426, 2005 SEC LEXIS 2343 (Sept. 12, 2005).

<sup>110</sup>Sec. Indus. Ass’n, SEC No-Action Letter, 2005 SEC No-Act. LEXIS 853, at \*2-3 (Dec. 16, 2005).

<sup>111</sup>15 U.S.C. § 80b-3(a) (2000).

<sup>112</sup>15 U.S.C. § 80b-3(b)(3). Section 203(b)(3) does not exclude a person from the definition of investment adviser but permits a person qualifying as an investment adviser to conduct an investment advisory business through mail and interstate commerce without registering with the Commission.

<sup>113</sup>*See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 27 (1958) (creation of apparent authority); *Andrews v. John E. Smith’s Sons Co.*, 369 So.2d 781, 785 (Ala. 1979) (imposition of liability on successor corporations for acts of their predecessor corporations).

<sup>114</sup>Mr. Bate, SEC No-Action Letter, 1988 SEC No-Act. LEXIS 847, at \*2 (June 28, 1988). The reply of the staff in this case dealt with section 203(b)(3) of the Advisers Act, the pertinent portion of which is discussed in the prior paragraph in the text. The staff seems to consider the activities that comprise “holding out” under section 203(b)(3) to be the same activities that comprise “holding out” under the exclusions from the definition of investment adviser in section 202(a)(11). *See* George J. Dippold, SEC No-Action Letter, 1990 SEC No-Act. LEXIS 748, at \*4 (May 7, 1990). It is logical to presume, therefore, that these activities are also applicable to and determinative of the business element in the definition of investment adviser in section 202(a)(11).

furnishes recommendations to a bank regarding securities for the portfolio of a common fund operated by the bank as a trustee, executor, administrator or guardian will be holding itself out publicly as an investment adviser if (i) current or prospective participants in the fund are supplied with information they request about the entity and its significant personnel and investment strategies, (ii) meetings to discuss these matters are conducted with the officers of the entity at the request of current and prospective participants, and (iii) even one or two conferences, attended by representatives of the entity, are arranged each year by the bank for current and prospective participants.<sup>115</sup> In short, persons recommending securities for purchase and/or sale will hold themselves out as investment advisers unless investment-pertinent information about and from them is restricted.<sup>116</sup> If these persons are not circumspect in making available such information, they may appear to be offering investment advice to potential clients and, therefore, may be required to register with the Commission as investment advisers.

Let me return to a point made earlier. Section 202(a)(11) of the Advisers Act encompasses two types of activity, each of which involves a business. According to the section as written, however, one type of activity entails just a “business” while the other type entails a “regular business.” The Division of Investment Management perceives no difference between a “business” and a “regular business,”<sup>117</sup> but in terms of appearances, there seems to be a significant distinction.

The terms “business” and “regular business” are found not only in the Advisers Act but also in the Securities Exchange Act (“Exchange Act”), and their presence in the latter Act is instructive. Specifically, the Exchange Act designates as a “dealer” any party involved in a “business” of acquiring and disposing of securities for the personal account of the party, but the Act explicitly excludes a party from the status of dealer when the securities transactions do not comprise a “regular business” of the party.<sup>118</sup> The word “business” by itself—i.e., even when unaccompanied by the word “regular”—“connotes a certain regularity of participation in purchasing and selling activities rather than a few isolated transactions.”<sup>119</sup> Accordingly, a business comes into existence when, *inter alia*, an activity that is motivated largely by economic factors recurs with a frequency that surpasses a threshold—a threshold that is determined by judgment and not merely by numbers.<sup>120</sup> However, Congress chose to include in two securities statutes not only the term “business” but also the term “regular business,” and it placed the terms in close proximity to one another. Congress must be presumed to have viewed the terms as having different referents

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<sup>115</sup>Resource Bank & Trust, SEC No-Action Letter, 1991 SEC No-Act. LEXIS 624 (Mar. 29, 1991).

<sup>116</sup>*See* Thomson Financial, Inc., SEC No-Action Letter, [2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,318, at 78,517 (July 9, 2002), *available at* 2002 SEC No-Act. LEXIS 635.

<sup>117</sup>Release No. IA-1092, *supra* note 104.

<sup>118</sup>15 U.S.C. §§ 78c(a)(5)(A)-(B) (2000 & Supp. II 2002).

<sup>119</sup>LOUIS LOSS & JOEL SELIGMAN, 6 SECURITIES REGULATION 2980 (3d ed. 1990).

<sup>120</sup>InTouch Global, LLC, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 846, at \*6 (Nov. 14, 1995). The differences between a business and a profession are discussed in Barnett, *supra* note 35, at 170-171, 173-178.

and wanted them distinguished, because in construing a securities statute, “we must give effect to every word that Congress used.”<sup>121</sup>

What differentiates a “business” from a “regular business”? Since the terms are not defined in either Act, they were evidently intended by Congress to convey the meanings they possess in everyday discourse.<sup>122</sup> The obvious difference between the terms, of course, is that a “regular business” occurs more often than a “business,” and this difference has ramifications for appearances. Specifically, a business that appears to be regular would generally be viewed as entailing activity of greater frequency than a business that lacks the appearance of regularity, and inaccurate appearances seem more likely to be due to malevolent intent or gross negligence when their referent is a “regular” business than when it is a “mere” business.

What is the implication of this point for the Advisers Act? The Act was designed to protect the public from fraud and manipulation<sup>123</sup> and thus requires advisers to disclose conflicts of interest so that the public will believe securities markets are fair and will make the investments necessary for economic growth.<sup>124</sup> The Securities and Exchange Commission may advance these goals more effectively if it distinguishes a regular business from a business that is not regular and, when dealing with appearances of them, focuses more on inaccurate appearances of a regular business. Inaccurate appearances of any activity are capable of injuring the public, of course, but some types of inaccurate appearances undoubtedly can harm the social fabric more frequently and more severely than other types. Appearances influence the operation of the society in which they are found, and all else being equal, appearances that are erroneous may reduce trust and undermine social life more when they are associated with an activity (business) that is perceived as regular than when they are associated with an activity (business) that is perceived as not regular, because the exploitation of others is probably the principal motivation for inaccurate appearances of a regular activity.<sup>125</sup>

Additionally, as the Advisers Act definition makes plain, securities are at the heart of the occupation of investment advising. Appearances of a regular investment advisory business are likely to entail a larger number of explicit references to securities in communications with potential investors than appearances of a non-regular investment advisory business. At the same time, whether an instrument constitutes a security as a matter of law depends in part on its characterization by the promoter or seller, and an instrument is more likely to be deemed a security if it has

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<sup>121</sup>Lowe v. Sec. & Exch. Comm’n, 472 U.S. 181, 208 n.53 (1985). This principle is discussed in Singer, *supra* note 103.

<sup>122</sup>Smith v. United States, 508 U.S. 223, 228 (1993).

<sup>123</sup>15 U.S.C. § 80b-6 (2000); Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 189-191 (1963).

<sup>124</sup>Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc., 375 U.S. at 201.

<sup>125</sup>*Cf.* In re Paul K. Peers, Inc., 42 S.E.C. 539 (1965), available at 1965 SEC LEXIS 792 (registration of corporate investment adviser revoked because adviser inter alia had willfully and erroneously implied in advertising material that it was a long-established organization and that it possessed a substantial staff with extensive experience in investment securities).

been presented to investors as a security.<sup>126</sup> Logically, therefore, characterizations of an instrument as a security that are incorrect due to recklessness or fraud will occur most commonly with an investment adviser whose business appears to be regular. The cumulative impact of such incorrect characterizations can only impair trust in the financial sector of the economy and weaken the cohesiveness of society.

#### IV. THE APPEARANCE-OF-IMPROPRIETY STANDARD FOR ATTORNEY CONDUCT

This article rests on the macrosociological proposition that the concepts and doctrines of law, partly if not chiefly by being symbols, in the long run promote participants' commitment to, and hence strengthen, the social order. Like all scientific propositions, the proposition that law furnishes symbols supporting the social system is empirically testable, albeit indirectly. The proposition is based on the related assumptions that concepts and doctrines of law are responses to identifiable properties of society; that, being responses to societal properties, concepts and doctrines of law are suitable for the properties responsible for them; and that the responses are manifested in measurable relationships between the concepts and doctrines, on the one hand, and the societal properties, on the other.<sup>127</sup> The proposition and the assumptions behind it necessarily follow from the conceptualization of a society as a *system*.<sup>128</sup> By definition, a system is organized, and organization is the antithesis of randomness.<sup>129</sup> Therefore, the concepts and doctrines of law as an institution of society can be expected not to occur randomly but to be tied to conditions in the system. I report below the results of a study that examines whether societal properties predict the use by states of a specific symbolic concept and doctrine in defining ethical standards for attorneys.

##### A. Model Ethical Standards Promulgated by the American Bar Association

Explicit standards for the behavior of attorneys were initially adopted by the American Bar Association ("ABA") during the first decade of the twentieth century.<sup>130</sup> However, not until the third decade of the twentieth century do any ABA documents exhibit a concern with the appearances that the actions of attorneys

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<sup>126</sup>Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943); *Reves v. Ernst & Young*, 494 U.S. 56, 66, 68-69 (1990). In law, even an instrument that does not exist may be regarded as a security if its promoters have portrayed it as a security. In re Euro-Atlantic Securities, Inc., Sec. & Exch. Comm'n, Admin. Proceeding File No. 3-9402 (Feb. 25, 2000), 2000 SEC LEXIS 326, at \*52-53.

<sup>127</sup>See John W. Mohr, *Measuring Meaning Structures*, 24 ANN. REV. SOC. 345 (1998).

<sup>128</sup>See JOHN SCOTT, *SOCIOLOGICAL THEORY* 138-139 (1995); Kim, *supra* note 79, at 9-28, 142-151.

<sup>129</sup>Dictionary definitions of the word "system" include "[a] set or assemblage of things connected, associated, or interdependent, so as to form a complex unity; a whole composed of parts in orderly arrangement according to some scheme or plan." 17 OXFORD ENGLISH DICTIONARY 496 (2<sup>nd</sup> ed. 1989).

<sup>130</sup>James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003).



generate, and the focus at this time was on attorneys in limited types of situations.<sup>131</sup> In 1969, the ABA promulgated the Model Code of Professional Responsibility (“Model Code”),<sup>132</sup> and under the Code, all attorneys were instructed to “avoid even the appearance of impropriety.”<sup>133</sup> The admonition was evidently intended to build trust in the institution of law<sup>134</sup> and to promote a belief in the fairness of the institution.<sup>135</sup> Being an institution, law is by definition of major social significance, and given the prominence of law among the professions,<sup>136</sup> so is the work of attorneys and judges. Accordingly, the ethical standards applied by the institution to appearances generated by its professionals operate as symbols in society.<sup>137</sup>

In specifying ethical requirements for attorneys, the Model Rules of Professional Conduct (“Model Rules”), which were released by the ABA in 1982,<sup>138</sup> omitted the appearance-of-impropriety standard<sup>139</sup> on the ground that the standard was ambiguous.<sup>140</sup> Nonetheless, the ABA applies the standard to judges—and has done so since 1924 when it approved the Canons of Judicial Ethics. Canon 4 in the 1924 formulation required, *inter alia*, that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety.”<sup>141</sup> In 1972, this canon became the

<sup>131</sup>Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the “Appearance of Impropriety” Disappear*, 39 IDAHO L. REV. 321, 323-24 (2003).

<sup>132</sup>*Id.* at 324.

<sup>133</sup>MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (1981).

<sup>134</sup>Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 595 (1992).

<sup>135</sup>*Brown v. Eighth Jud. Dist. Ct.*, 14 P.3d 1266, 1269 n.4 (Nev. 2000).

<sup>136</sup>A measure of the relative importance to society of law as a profession is the number of Juris Doctor and/or Bachelor of Laws degrees in relation to the total number of first-professional degrees. Degrees in law comprised between roughly four and five out of every ten first-professional degrees awarded from the 1965-66 academic year to the 2000-01 academic year. Calculated at five-year intervals from 1965-66 to 2000-01 using data in the following sources: Am. Bar Ass’n, *Legal Education and Bar Admission Statistics, 1963-2005*, available at [http://www.abanet.org/legaled/statistics/le\\_bastats.html](http://www.abanet.org/legaled/statistics/le_bastats.html) (last visited Nov. 7, 2006); NAT’L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS: 2003*, at table 249 (2004), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2005025> [hereinafter *DIGEST OF EDUCATION STATISTICS: 2003*].

<sup>137</sup>See William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 619-621 (1995).

<sup>138</sup>Brewer, *supra* note 131, at 324.

<sup>139</sup>However, the Model Rules explicitly bar attorneys from publicly holding themselves out as admitted to practice in jurisdictions where they are not members of the Bar. MODEL RULES OF PROF’L CONDUCT R. 5.5(b) (2003). The Rules, therefore, continue to prohibit appearances of one type.

<sup>140</sup>Brewer, *supra* note 131, at 324-25.

<sup>141</sup>AM. BAR ASS’N, *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND THE CANONS OF JUDICIAL ETHICS ANNOTATED* 29, 30 (1936).

basis of Canon 2 of the Model Code of Judicial Conduct.<sup>142</sup> Canon 2 stated that “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities,” and the same wording was employed in the 1990 version of the Model Code of Judicial Conduct.<sup>143</sup> The persistence over eight decades of the appearance-of-impropriety standard for judges is notable, for it is an implicit concession that appearances mold the public’s view of the institution of law. Indeed, the importance to the institution of appearances does not seem to have been disputed in formulating the Model Rules. The appearance-of-impropriety standard was abandoned in the Model Rules because it was thought to be incapable of consistent, non-invidious application rather than because appearances are irrelevant to the social standing of the institution of law.<sup>144</sup>

Even though the most recent paradigm of ethical standards for attorneys promulgated by the American Bar Association does not include an explicit appearance-of-impropriety test, an indicator of the importance to society of appearances of ethical behavior is that, during the last two decades of the twentieth century, a widespread concern with appearances of unethical conduct existed in the United States.<sup>145</sup> The concern cannot be dismissed as a sociological fortuity. On the contrary, the concern may be unavoidable in a society that possesses a large population and a complex economy, because complete information about others is difficult to procure in such a setting.<sup>146</sup> Accordingly, appearances of ethical conduct and appearances of unethical conduct by participants in a group are commonly understood to affect the degree of trust that prevails in the group.<sup>147</sup> Moreover, appearances have been acknowledged as a factor that shapes the reputation of the judiciary and the police,<sup>148</sup> and appearances thus affect the reputation of the institution of law itself. Because trust and reputation—two social outputs that are critical to every group<sup>149</sup>—are influenced by appearances of ethical behavior and appearances of unethical behavior, American society places considerable emphasis on these appearances.

To ascertain whether symbolic concepts and doctrines of law are reactions to societal conditions, I report below the results of a study that examined the use by states of the appearance-of-impropriety standard for the conduct of attorneys. The Model Code, which incorporated the standard, and the Model Rules, which omitted

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<sup>142</sup>LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 13 (1992).

<sup>143</sup>AM. BAR ASS’N, *ANNOTATED MODEL CODE OF JUDICIAL CONDUCT* 29 (2004).

<sup>144</sup>See Morgan, *supra* note 134, at 602-03, 616-17.

<sup>145</sup>MORGAN & REYNOLDS, *supra* note 40, at 2-5.

<sup>146</sup>See DENNIS F. THOMPSON, *ETHICS IN CONGRESS* 126 (1995) (“[A]pppearances are usually the only window that citizens have on official conduct.”).

<sup>147</sup>E.g., Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1108, 1126 (1995); Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 177 (2003).

<sup>148</sup>E.g., *In re Complaint of Fadeley*, 802 P.2d 31, 40 (Ore. 1990) (judiciary); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 902 (1<sup>st</sup> Cir. 1993) (law enforcement officers and associations).

<sup>149</sup>Barnett, *supra* note 4, at 814-21, 825-27.

the standard, are simply proposals of the American Bar Association. The standards of ethics that govern an attorney are set and enforced by the particular state in which the attorney practices. Moreover, a state that declines to formulate its own standards but bases its ethical standards on the Model Code or Model Rules is not obligated to adopt verbatim the content of either; states have often modified the Model Code and Model Rules.<sup>150</sup> In addition, the courts in a state through case law can alter the ethical standards of the state without revising the wording of the standards. Consequently, although by 2005 the Model Rules were in effect (albeit with modifications) in 45 states and the District of Columbia,<sup>151</sup> neither the Model Rules nor the Model Code by themselves can be assumed to disclose accurately the current ethical standards that are applied to attorneys in a jurisdiction. Rather, both the codified standards of a state and the opinions of the highest court of the state determine whether the appearance-of-impropriety standard is being used.

### B. Research Design

In mid-2005, I undertook a state-by-state review to ascertain whether, as of that time, the appearance-of-impropriety standard for attorneys either was an explicit provision of the written ethical requirements of the state or had been employed by the highest court of the state after the Model Rules (or modified version thereof) were adopted by the state. Given that the purpose of my research was to identify societal properties that generally foster or hinder acceptance of the standard by states, I wanted to minimize the possibility that properties unique to a state could influence the findings, and I therefore did not include the two states (Alaska and Hawaii) that are geographically distant from the coterminous United States. Of the remaining 48 states, four were excluded because I was unable to determine with certainty whether they currently utilized the appearance-of-impropriety standard.<sup>152</sup> The data analysis reported below is thus limited to 44 states.<sup>153</sup> Twenty-six of the states were found to be applying the standard to attorneys as of mid-2005,<sup>154</sup> and eighteen of the states were found not to be applying the standard to attorneys.<sup>155</sup>

Four system-level properties were identified *a priori* as potential influences on whether the appearance-of-impropriety standard would be employed by a state. The properties were cultural heterogeneity, population concentration, social system

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<sup>150</sup>STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 4 (7<sup>th</sup> ed. 2005).

<sup>151</sup>*Id.*

<sup>152</sup>The four states excluded for this reason were Connecticut, Maine, New Jersey, and Washington.

<sup>153</sup>In order to confine the study to states, the District of Columbia was omitted from the statistical analysis.

<sup>154</sup>The twenty-six states applying the standard were Arizona, Arkansas, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>155</sup>The eighteen states not applying the standard were Alabama, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Virginia.

rationality, and societal stability. The level of each property seemed, on logical grounds, to be capable of affecting the likelihood that a state would accept the standard, as I explain below. The explanation is based on the assumption that, as to each property, all else is equal.

*Cultural heterogeneity.* Logically, a culture characterized by diversity could be inhospitable to explicit prohibitions on appearances of impropriety because the culture may lack a prerequisite for these prohibitions. That prerequisite is a substantial body of common values, which may be needed for general agreement on conduct that is to be regarded as improper. Without such agreement, bans on appearances of impropriety may not be adopted. However, an alternative and opposing prediction is possible. Specifically, a high level of cultural heterogeneity could facilitate the adoption of an explicit ban on appearances of impropriety and make such bans more frequent, because the ban can provide culturally diverse groups with a common focal point and thereby promote their commitment to the social system.

*Population concentration.* A high level of population concentration could increase the frequency of an express ban on appearances of impropriety. Logic suggests that, when population density is high, appearances of improper conduct will be noticed by a larger percentage of the population. On this reasoning, a densely populated society will benefit more than a sparsely populated society from an explicit ban on such appearances and is more likely to accept the appearance-of-impropriety standard. Alternatively, however, a high level of population concentration logically can reduce the need for, and the incidence of, explicit prohibitions on appearances of impropriety because informal, interpersonal pressures may be more common as population density rises. In settings where numerous people are present, appearances of impropriety may be suppressed informally and an official proscription may be unnecessary.

*Social system rationality.* Logically, an express ban on appearances of impropriety is not required to the extent a population recognizes the importance of avoiding such appearances. Such recognition presumably results from rationality. A high level of rationality in a society,<sup>156</sup> then, could reduce the need for the appearance-of-impropriety standard and make the standard less likely. On the other hand, the opposite could happen. Specifically, insofar as rationality in a society fosters awareness of the social problems created by appearances of impropriety, explicit bans on these appearances could become more acceptable and, in turn, more frequent.

*Societal stability.* On logical grounds, a stable social system could require fewer symbols because commitment to the system is high, and law that explicitly bans appearances of impropriety could therefore be needed less in a stable than in an unstable system. However, the opposite is logically possible, too. A stable social system could have a larger number and variety of symbols than an unstable system because social values, including those that underlie the symbols, do not change as much and/or as often in a stable system. Therefore, with greater societal stability, law may more often prohibit appearances of impropriety.

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<sup>156</sup>The level of rationality in a society is probably an effect of the degree to which the society produces and uses sophisticated knowledge and disseminates that knowledge to its participants through the education institution.

In short, logic furnishes a basis for linking all four system-level properties to the appearance-of-impropriety standard; i.e., in principle, each property is capable of affecting the likelihood the standard will be present in a state. However, as the preceding discussion reveals, a prediction cannot be made as to whether this likelihood is raised or lowered by growth or intensification of a given property.

The necessity of relying on logic, and the inability to predict the direction of change in the likelihood of the appearance-of-impropriety standard, stem from the current, inadequate level of social science knowledge of law as an institution. The study reported here attempts to contribute to a research-based sociological theory that deals with the existence and nature of the links between the system-level properties identified above, on the one hand, and doctrines of law, on the other. If a society is a system—i.e., if the components of society do not operate haphazardly—the symbols of law do not develop fortuitously, and a relationship can be expected to exist between one or more of the properties discussed above and the appearance-of-impropriety standard for attorneys.

In order to ascertain the relationship, if any, between the properties and the adoption by states of the appearance-of-impropriety standard, the properties must be empirically measured. Because the properties are potential building blocks for a sociological theory of law, their conceptualization is necessarily abstract, and each property must be represented in the statistical analysis by a variable that quantitatively and accurately captures the property. Table 1 provides descriptions, as well as the mnemonic labels, of the variables that were utilized in the regression model as indicators of the properties. The indicator variable corresponding to each property was as follows:

<u>System-level property</u>	<u>Indicator (mnemonic label)</u>
Cultural heterogeneity	FOREIGNPOP
Population concentration	METROPOP
Social system rationality	COLLEGERATE
Societal stability	CRIMERATE

For cultural heterogeneity in a state, an obvious indicator is the percentage of the population of the state that was born outside the United States, and for population concentration in a state, an obvious indicator is the percentage of inhabitants of the state who reside in a metropolitan area. Accordingly, these indicators need no justification. For societal stability in a state, the indicator employed is the state crime rate, because crime reduces interpersonal contacts<sup>157</sup> and hence impairs the ability of a social system to function smoothly. For social system rationality in a state, the indicator is the percentage of adults who were enrolled in college (either part-time or full-time) in the state.<sup>158</sup> While this indicator may not seem useful on its

<sup>157</sup>Allen E. Liska & Barbara D. Warner, *Functions of Crime: A Paradoxical Process*, 96 AM. J. SOC. 1441, 1460-61 (1991).

<sup>158</sup>The college enrollment rate for each state was calculated for this study from the sources of data for COLLEGERATE identified in note 160 *infra*. The denominator for the calculation was the number of inhabitants of each state in 1980 who were at least 18 years old; the numerator was the number of individuals (male and female) who were enrolled in college in the state in Fall 1980. Some enrollees, however, were younger than 18. While data on the age

face, an analysis of data for males 14 to 24 years old concluded that differences between states in proportions attending college are partly attributable to state differences in rationality.<sup>159</sup>

Table 1. Variables in Regression Model<sup>160</sup>

Variable (mnemonic label)	Description of variable
APPEARIMPROP	Each state was coded 0 or 1. 0 = the appearance-of-impropriety standard is not explicit in the enumerated ethical standards for lawyer conduct that are in force in the state and has not been used by the highest court of the state while the current enumerated standards have been in force; 1 = the appearance-of-impropriety standard is explicit in the enumerated ethical standards for lawyer conduct that are in force in the state or, if not explicit in the current enumerated standards, has been used by the highest court of the state while the current enumerated standards have been in force.

distribution of college students was not available for each state, approximately two percent of all college students nationally in 1980 were under 18 years of age. Computed from NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 1994, at table 171 (1994), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94115> [hereinafter DIGEST OF EDUCATION STATISTICS: 1994]. On average, therefore, the state college enrollment rates in this study differ slightly from the actual percentages of the adult populations of the states that were enrolled in college.

<sup>159</sup>Michael B. Tannen, *The Investment Motive for Attending College*, 31 INDUS. & LAB. REL. REV. 489 (1978).

<sup>160</sup>The data for the variables were obtained or computed from the following sources:

APPEARIMPROP: Search of Lexis databases conducted by the author in mid-2005.

COLLEGERATE: DIGEST OF EDUCATION STATISTICS: 1994, *supra* note 158, at table 186; U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK: 1994, at table A (12th ed. 1994); U.S. BUREAU OF THE CENSUS, STATE AND METROPOLITAN AREA DATA BOOK: 1997-98, at table A-3 (5th ed. 1998).

CRIMERATE: U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, at table 3 (1981); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at table 32 (103<sup>rd</sup> ed. 1982).

FOREIGNPOP: Campbell J. Gibson & Emily Lennon, U.S. Census Bureau, Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990 (Feb. 1999), at table 13: Nativity of the Population, for Regions, Divisions, and States: 1850 to 1990, <http://www.census.gov/population/www/documentation/twps0029/twps0029.html> (last visited Nov. 7, 2006).

METROPOP: U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at table 41 (113<sup>th</sup> ed. 1993), available at <http://www.census.gov/prod/www/abs/statab1951-1994.htm> [hereinafter STATISTICAL ABSTRACT: 1993].

COLLEGERATE	Persons enrolled (part-time or full-time) in college in each state in Fall 1980 as a percentage of the population age 18 or older in the state.
CRIMERATE	The number of Crime Index crimes in each state in 1980 per 1000 state residents who were at least 15 years of age. Crime Index crimes are murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor-vehicle theft.
FOREIGNPOP	The percentage of all inhabitants of each state in 1980 who were born outside the United States.
METROPOP	The percentage of all inhabitants of each state in 1980 who resided in a "metropolitan area," as defined by the U.S. Census Bureau. A "metropolitan area" encompassed (i) a core area that had a substantial population and (ii) communities adjoining the core that were integrated, economically as well as socially, with the core. Every metropolitan area included either: <ul style="list-style-type: none"> <li>■ At least one city with a population of not less than 50,000; or</li> <li>■ Both (i) an urbanized area, as determined by Census Bureau criteria, with a population of not less than 50,000 and (ii) a total metropolitan area population of not less than 100,000 (75,000 in New England).<sup>161</sup></li> </ul>

For every indicator variable, data were obtained on each of the 44 states that were included in the study. The variables are measured as of 1980. The year 1980 was chosen for two reasons. First, data on all of the indicator variables were available for that year.<sup>162</sup> Second, 1980 preceded the introduction of the Model Rules<sup>163</sup>, and by

<sup>161</sup>STATISTICAL ABSTRACT: 1993, *supra* note 160, at 916-17.

<sup>162</sup>An effort was made to include, as an indicator of social system stability, the state divorce and annulment rate in 1980, i.e., the number of divorces and annulments granted in 1980 in each state per 1000 inhabitants who were at least 15 years of age. However, data on divorces and annulments in 1980 were incomplete for one of the 44 states. Sally C. Clarke, Nat'l Ctr. for Health Statistics, *Advance Report of Final Divorce Statistics, 1989 and 1990*, MONTHLY VITAL STATISTICS REPORT, March 22, 1995, 11, table 2, available at <http://www.cdc.gov/nchs/mardiv.htm>. As a result, the divorce-annulment rate was omitted from the statistical analysis. For the 43 states for which the divorce-annulment rate in 1980 was determinable, a zero-order product-moment correlation coefficient of 0.4347 existed between the divorce-annulment rate and the crime rate (denominated CRIMERATE in Table 1). Therefore, approximately one-fifth of the variation in each rate is linked to variation in the other ( $r^2 = (.4347)^2 = .189 \times 100 = 18.9\%$ ), and although the two rates are to some extent overlapping indicators of societal stability, they are for the most part independent.

<sup>163</sup>The Model Rules were promulgated in 1982. Brewer, *supra* note 131, at 324-25.

1980 all of the 44 states in the study had endorsed the appearance-of-impropriety standard for attorneys.<sup>164</sup> Since the Model Rules rejected the standard, 1980 is a useful temporal point (i) for marking the start of the period in history during which many states abandoned the standard and (ii) for ascertaining whether and how the four system-level properties predict state retention or rejection of the standard.

A final but important matter involving the research design requires discussion. The findings of the study do not furnish a basis for definitive conclusions regarding the impact of the properties. Caution in interpreting the findings is necessary for at least two reasons. First, the system-level properties under consideration are poorly understood because they have not been extensively researched by social scientists. Future research may reveal that each property possesses multiple aspects and that each aspect requires a different indicator. Accordingly, the selection of indicator variables was grounded on logic and supposition, not substantial empirical research, and the indicator variable chosen for a property may not fully capture the property. Second, the relationship of the four properties to the presence or absence of the appearance-of-impropriety standard was not assessed with repeated and regular (e.g., annual) measures of the properties over time. Such data, especially when they cover both points in time prior and points in time subsequent to the occurrence or disappearance of the effect being investigated, are the most appropriate for identifying causal relationships that involve state-level phenomena.<sup>165</sup>

### C. Data Analysis

The preceding limitations of the research design did not directly affect the data analysis, but another aspect of the study did. Specifically, the number of observations (i.e., states) reduced the precision with which the indicator variables could be measured in analyzing the data. Because there were a total of 44 observations, many cells had no observations—i.e., a frequency of zero—when APPEARIMPROP was cross-tabulated with the exact percentage or rate of an indicator variable for a state, i.e., when the measures of the indicator variables were continuous. However, the data analysis technique that the study employed — viz., maximum-likelihood logistic regression—is problematic when there are cells with

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<sup>164</sup>Canon 9 of the Model Code of Professional Responsibility, which was issued by the ABA in 1969, provided that “a lawyer should avoid even the appearance of impropriety.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (1980); Brewer, *supra* note 131, at 324. By 1980, according to a survey by the ABA, Canon 9 had been adopted in all states with the possible exception of California, Delaware, Georgia, Maine, Montana, and New Mexico. ABA NAT’L CTR. FOR PROF’L RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE x (1980). Of these six states, Maine was not included in the data. See, *supra*, note 152. The remaining five states had adopted, no later than 1980, either Canon 9 or a common-law appearance-of-impropriety standard for attorneys. Comden v. Superior Court, 576 P.2d 971, 973 (Cal. 1978) (California); DEL. CODE ANN., vol. 16, at 562, 589 (1974) (Canon 9 adopted in 1971) (Delaware); GA. CODE ANN. tit. 9 App. Rule 3-109 (Harrison 1973) (Canon 9 in effect in 1973) (Georgia); *In re Estate of Sauter*, 615 P.2d 875, 878 (Mont. 1980) (Montana); John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 36 n.209 (2001) (finding that Canon 9 was adopted by the Supreme Court of New Mexico in 1974) (New Mexico).

<sup>165</sup>Shepherd, *supra* note 65, at 213-14.



zero observations.<sup>166</sup> As a result, three categories with approximately equal numbers of observations (i.e., equal numbers of states) were created for each indicator variable. When APPEARIMPROP was tabulated by the categories of each indicator variable, no cell in any of the resulting six-cell tables had fewer than four observations (states).

Table 2 presents the range of percentages or rates for each of the three categories of each of the indicator variables. The table also shows the number of states in every category.

Table 2. Range of Percentages or Rates, and Number of States, in Categories of the Indicator Variables

Variable	Range of percentages or rates, <u>and number of states, by category</u>		
	Low	Medium	High
COLLEGERATE	4.8 to 6.4 N = 14	6.5 to 7.4 N = 15	7.6 to 10.6 N = 15
CRIMERATE	32.9 to 62.1 N = 15	64.3 to 74.4 N = 15	76.2 to 113.2 N = 14
FOREIGNPOP	0.9 to 1.7 N = 12	1.9 to 3.5 N = 16	3.9 to 15.1 N = 16
METROPOP	24.0 to 51.8 N = 14	57.0 to 77.2 N = 15	80.5 to 96.8 N = 15

<sup>166</sup>DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 135-38 (2d ed. 2000).

In principle, each indicator variable in the instant study is measured with data that constitute a ratio scale, and because such a measure is continuous, the data for each indicator variable are usable in logistic regression without being collapsed into a few categories. *Id.* at 136. In practice, however, the data for the indicator variables are more prudently treated as ordinal scales, because on the variables, the states tended to concentrate at certain numerical values rather than to be spread evenly across the range of values observed. For example, the distributions of three of the four indicator variables were at least as peaked as the normal distribution, and thus were far from flat. The kurtosis coefficient for the individual (uncollapsed) values of each indicator variable was 3.3 for COLLEGERATE, 2.9 for CRIMERATE, 6.1 for FOREIGNPOP, and 2.0 for METROPOP. The kurtosis coefficient for the normal distribution is 3.0. STATA CORP., 4 STATA REFERENCE MANUAL: RELEASE 8, at 150 (2003).

The concentration of states at particular numerical values on an indicator variable is probably not due to the relatively small number of cases supplying the data but, rather, is likely to inhere in the nature of social systems. To operate effectively, a social system probably requires that important variables be present in certain amounts or at certain levels; thus, it is likely that a social system changes when thresholds are reached on one or more causal variables. If so, in most social science research on states, a relatively few categories seem to be the most appropriate way to measure an independent variable characterized by gradations in magnitude.

The number of states (observations) in the study necessitates consideration of a further question. Researchers have devoted scant attention to the question of the minimum number of observations needed for the accurate calculation of statistical significance by maximum-likelihood logistic regression,<sup>167</sup> and hence the number is uncertain. Nevertheless, some guidelines are available, and they suggest that the number of observations in the instant study is substantially fewer than the number that is required<sup>168</sup> to generate reliable, unbiased estimates of the characteristics of a larger universe.<sup>169</sup> With these guidelines, accordingly, there is no support for using tests of statistical significance in the study.

If statistical significance cannot be computed accurately, do the odds ratios estimated by logistic regression for the current data have any utility? The answer is that they do, because the odds ratios for the four indicator variables can stand on their own. Indeed, little if anything has been lost in the instant study from the inability to know the statistical significance of the odds ratios. To understand why, the role in research of tests of statistical significance needs to be explained. As I hope to convey in the explanation that follows, measures of statistical significance are unnecessary in the instant study even though they are justifiable in much, if not most, quantitative social science research. The odds ratios themselves can be the basis for identifying relationships to the appearance-of-impropriety standard of the system-level properties posited as antecedents of the standard.

The goal of the social and behavioral sciences is to ascertain conditions in and characteristics of *populations* (i.e., universes) of human beings or human organizations. However, data cannot be acquired from all of the members of most populations due to the economic cost and/or time that would be expended. As a result, a sample must typically be drawn from the population that is under investigation, and conclusions about the population must be reached from data supplied by the sample. The function of tests of statistical significance is to allow such data to be employed to reach one type of conclusion regarding the population with knowledge of the likelihood that the conclusion is wrong. Specifically, a test of significance whose assumptions (e.g., as to sampling procedure) are satisfied

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<sup>167</sup>*Id.*, at 339.

<sup>168</sup>A minimum of 100 observations has been suggested for tests of significance calculated by maximum-likelihood logistic regression. J. SCOTT LONG, *REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES* 53-54 (1997). The present study, of course, has just 44 observations.

The conclusion that the study lacked sufficient observations for tests of statistical significance is also reached using the approach proposed by HOSMER & LEMESHOW, *supra* note 166, at 346-47, for maximum-likelihood logistic regression. The appearance-of-impropriety standard is employed by twenty-six states and not employed by eighteen. See *supra* notes 154-55. Since the least-frequent outcome is eighteen, the regression model in the instant study would be limited to just a single indicator variable (parameter) under the Hosmer-Lemeshow approach, and the inclusion of four such variables is excessive. The number of states with the least-frequent outcome, of course, is partly a function of the total number of states.

<sup>169</sup>Peter Peduzzi et al., *A Simulation Study of the Number of Events per Variable in Logistic Regression Analysis*, 49 *J. CLINICAL EPIDEMIOLOGY* 1373 (1996).

identifies the probability of error when deciding to reject the “null hypothesis”—the hypothesis that, in the population, no relationship exists between two variables or no difference exists between two groups on a particular attribute. In what percentage of samples from the population would a particular relationship between variables or a particular difference between groups be found if there is actually no relationship or no difference in the population, i.e., if the null hypothesis correctly portrays the population? The answer is the level of statistical significance. The level of statistical significance thus discloses the probability of erring when the null hypothesis is rejected on the basis of data garnered from a relatively small number of members of a population who have been selected with a probability (e.g., random) sampling procedure.

In short, information on the statistical significance of an odds ratio presupposes that a *sample* has furnished the data from which the odds ratio and its statistical significance have been estimated. If the data used in a study to compute the odds ratio come from the entire universe of interest, however, statistical significance is irrelevant. That is the situation in the instant study. The universe for the study is the states in the continental United States whose acceptance or nonacceptance of the appearance-of-impropriety standard for attorneys could be determined as of 2005. Because the data for the study include *all* states in the continental United States that had an ascertainable position on the standard in 2005, the data do not result from sampling, and a test of statistical significance is inappropriate.

However, skepticism of conclusions—especially conclusions regarding causal relationships—is not eliminated simply because the data underlying the conclusions cover the entire universe under investigation. While estimates of statistical significance (even if based on an adequate number of observations) contribute little or nothing to the instant study,<sup>170</sup> the study has potentially major limitations that arise from the two problems discussed in the last paragraph of part IV-B *supra* of this article, namely, possible defects in the measurement of the system-level properties posited as antecedents of the appearance-of-impropriety standard and the lack of time-series data on the indicator variables for these properties.

With this background, I turn to the results of the data analysis.<sup>171</sup> Table 3 presents the odds ratios from the regression of the appearance-of-impropriety standard (APPEARIMPROP) on the four indicator variables. In addition, the table supplies the two-tailed level of statistical significance of the odds ratios for readers who prefer to ground decisions regarding a regression model on this information.

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<sup>170</sup>Tests of statistical significance, even though common in social science research, have fundamental limitations that are often unrecognized or ignored, and use of the tests may be unjustified even for samples containing an adequate number of observations. LANCELOT HOGBEN, *STATISTICAL THEORY: THE RELATIONSHIP OF PROBABILITY, CREDIBILITY AND ERROR* 332-44 (1957).

<sup>171</sup>All analyses of the data in this study were conducted with Stata (Release 8.2). The Stata command LOGISTIC generated the results in table 3 as well as the results in table 4.

Table 3. Odds Ratios and Two-tailed Significance Levels  
for Regression of APPEARIMPROP on Indicator Variables: 44 States

Variable	Standard			
	Odds ratio	Error	z	$p >  z $
COLLEGERATE	0.730	.252	-0.91	0.360
CRIMERATE	1.004	.023	0.16	0.873
FOREIGNPOP	1.491	.616	0.97	0.334
METROPOP	0.976	.018	-1.32	0.186
<u>Regression model</u>				
Number of observations	= 44			
Log likelihood	= -28.504			
Likelihood ratio chi-squared(4)	= 2.53			
Probability > chi-square	= 0.640			
Pseudo R <sup>2</sup> (McFadden's R <sup>2</sup> )	= 0.042			

Inherent in the odds ratios reported in table 3 are a number of assumptions regarding the statistical attributes of the data, and the accuracy of these assumptions must be probed before the odds ratios are used to draw conclusions regarding relationships between the indicator variables and APPEARIMPROP. The first assumption is that outliers did not affect the odds ratios. Outliers are cases (here, states) characterized by a substantial disparity between the actual (i.e., observed) outcome on the dependent variable (APPEARIMPROP) and the outcome predicted by the regression equation. Cook's Statistic, a measure used to identify influential outliers,<sup>172</sup> was 0.3 or higher for twenty-one states.<sup>173</sup> Consequently, the odds ratios for the regression model in table 3 were re-estimated by omitting each of these states

<sup>172</sup>J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 128 (rev. ed. 2003).

<sup>173</sup>One recommendation that has been made by statisticians is to treat Cook's Statistic as generally small in magnitude when it is less than 1.0. HOSMER & LEMESHOW, *supra* note 166, at 180. Another recommendation is to regard Cook's statistic as small when it is less than the result obtained from dividing the number 2 by the square root of the number of observations — here,  $2/\sqrt{44} = 0.3$ . DAVID A. BELSLEY ET AL., REGRESSION DIAGNOSTICS 28 (2004). As is evident from the different recommendations, there are no generally accepted quantitative criteria for identifying outliers whose influence may be undermining regression results; the process of determining such influence is acknowledged to be subjective. HOSMER & LEMESHOW, *supra* note 166, at 176; LONG & FREESE, *supra* note 172, at 126.

one at a time. When the odds ratios from the resulting twenty-one regression equations (each based on 43 states) were compared to the odds ratios in table 3, the exclusion of New Mexico proved notable. Moreover, New Mexico had the largest standardized residual of the 44 states in the study. Accordingly, New Mexico was omitted from the data analysis, and APPEARIMPROP was regressed on the indicator variables using 43 states. The results from the regression equation without New Mexico are reported in table 4.

Table 4. Odds Ratios and Two-tailed Significance Levels for Regression of APPEARIMPROP on Indicator Variables: 43 States

Variable	Odds ratio	Standard Error	<i>z</i>	$p >  z $
COLLEGERATE	0.623	.235	-1.25	0.210
CRIMERATE	1.013	.025	0.54	0.590
FOREIGNPOP	2.089	.982	1.57	0.117
METROPOP	0.955	.022	-2.01	0.045
<u>Regression model</u>				
Number of observations	= 43			
Log likelihood	= -25.973			
Likelihood ratio chi-squared(4)	= 5.77			
Probability > chi-square	= 0.217			
Pseudo R <sup>2</sup> (McFadden's R <sup>2</sup> )	= 0.100			

The second assumption requiring examination prior to accepting the results in table 3 and/or table 4 is that variation in one independent variable in the regression model does not correspond exactly to variation in any other independent variable. The assumption is important because a correlation (i.e., collinearity) between two independent variables, if sufficiently strong, can prevent multiple regression from computing a reliable estimate of the odds ratio and coefficient for either of these independent variables. Multiple regression supplies an estimate of the change in the dependent variable (denominated Y) that is associated with a unit of change in a particular independent variable ( $X_1$ ), but in order to estimate accurately the change in the dependent variable that is attributable to that independent variable ( $X_1$ ) rather than to another independent variable ( $X_2$ ), multiple regression must be able to remove the statistical influence of the latter independent variable ( $X_2$ ). If a strong relationship exists between independent variables  $X_1$  and  $X_2$ , however, multiple regression may be unable to separate the change in the dependent variable

attributable to independent variable  $X_1$  from the change in the dependent variable attributable to independent variable  $X_2$ . When two independent variables are highly correlated with each other, in short, multiple regression may not generate reliable estimates of the change that takes place in the dependent variable when a unit of change occurs in either of these correlated independent variables.<sup>174</sup>

A reason to believe that collinearity might preclude the reliable estimation of odds ratios in the instant study is found in the nontrivial zero-order rank correlation coefficient (Spearman's rho) for the relationships between pairs of the independent variables. The independent variables in tables 3 and 4 are the indicator variables for the system-level properties that have been proposed as possible antecedents of the appearance-of-impropriety standard (the dependent variable). In the 44-state data set and in the 43-state data set, the smallest rank correlation coefficient was 0.28. In the 44-state data set, four of the six rank correlation coefficients were 0.57 or higher; in the 43-state data set, four of the six coefficients were 0.60 or higher. However, the logistic regression program employed in the data analysis automatically notifies the investigator when an unacceptable level of collinearity is present,<sup>175</sup> and it did not do so for the results reported either in table 3 or in table 4.<sup>176</sup> Accordingly, collinearity was evidently not a problem, and the second assumption was accepted.

I turn now to the third assumption of the regression model that needs to be tested. The assumption is that the nature and strength of the relationship between each independent variable and the dependent variable is not conditional on any other independent variable. If the assumption is incorrect, the relationship of independent variable  $X_1$  to the dependent variable differs across the levels or categories of independent variable  $X_2$ .<sup>177</sup> Such a conditional relationship, in statistical terminology, involves "interaction" between  $X_1$  and  $X_2$ . Interaction can occur when the two independent variables are related to each another. As pointed out above in the discussion of collinearity, the four indicator (independent) variables in the instant study were characterized by nontrivial rank correlation coefficients in their relationships to one another. Accordingly, some of the indicator variables may interact, and the assumption that no interaction is present may be incorrect.

To ascertain interaction between independent variables in a data set, any pair of the independent variables can be used to create a new variable ("interaction variable") that will serve as an additional independent variable. In the instant study, the numerical values of an interaction variable can be obtained by multiplying, for each state, the numerical values that start the range of the categories in which the state falls on the two indicator variables comprising the interaction variable.<sup>178</sup> However, if the objective of research is to build theory, the choice of independent

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<sup>174</sup>WILLIAM D. BERRY, UNDERSTANDING REGRESSION ASSUMPTIONS 24-27 (1993).

<sup>175</sup>STATA CORP., 2 STATA BASE REFERENCE MANUAL: RELEASE 8, at 331 (2003) [hereinafter 2 STATA MANUAL].

<sup>176</sup>Excessive collinearity is evidenced by very large standard errors. BERRY, *supra* note 174, at 27; HOSMER & LEMESHOW, *supra* note 166, at 141. Visual inspection of table 3 and table 4 indicates that the standard errors are not abnormal in size.

<sup>177</sup>JAMES JACCARD & ROBERT TURRISI, INTERACTION EFFECTS IN MULTIPLE REGRESSION 3 (2d ed. 2003).

<sup>178</sup>The numerical values for the categories are given in table 2.

variables to examine for potential interaction should be based on existing or proposed theory. That is, theory on a subject should guide the selection of the independent variables that can be expected to interact and whose interaction should be investigated.<sup>179</sup> Current macrosociological theory addresses two of the independent variables in the instant study. Specifically, theory suggests that cultural heterogeneity and population density reinforce one another.<sup>180</sup> Thus, there is reason to include in the regression model the interaction variable from these properties and to ascertain whether this interaction variable is related to APPEARIMPROP. If the interaction variable is related to APPEARIMPROP, the relationship to APPEARIMPROP of each of its component variables is conditional on the other.<sup>181</sup>

Differences between states in the level of cultural heterogeneity are captured by FOREIGNPOP, and differences between states in population density are captured by METROPOP. Consequently, the numerical values that begin the range of the categories of FOREIGNPOP and of METROPOP for each state were multiplied to generate a new variable, and this interaction variable was included as an independent variable in a regression equation together with the original four independent (indicator) variables. The equation was applied to the data set that contained all 44 states and to the data set that contained 43 states (i.e., the data set omitting New Mexico). The odds ratios for the interaction variable in both data sets departed no more than  $\pm .012$  from 1.000 and thus furnished no evidence that there was a relationship between the interaction variable and APPEARIMPROP—or at least a relationship of any practical utility.<sup>182</sup> Moreover, because the interaction variable was created from ordinal-level components that deviated considerably from interval-level measures, inclusion of the interaction variable in the regression equation is dubious.<sup>183</sup> As a result, the interaction variable is not considered further.

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<sup>179</sup>See JAMES JACCARD, INTERACTION EFFECTS IN FACTORIAL ANALYSIS OF VARIANCE 5 (1998); BERRY, *supra* note 174, at 30-31.

<sup>180</sup>Claude S. Fischer, *The Subcultural Theory of Urbanism: A Twentieth-Year Assessment*, 101 AM. J. SOC. 543, 552 (1995).

Other potential interactions in the instant study lack a theoretical foundation and, therefore, are not considered. The possibility of an interaction between CRIMERATE and METROPOP nevertheless deserves mention, because urban areas are evidently characterized by higher rates of crime overall than are rural locations. Edward L. Glaeser & Bruce Sacerdote, *Why Is There More Crime in Cities?*, 107 J. POL. ECON. S225 (1999). Certain types of major crime, however, are not more frequent in urban settings. Fischer, *supra*, at 560-65. Since urban size is not related to all types of serious crime, the role of the former in the latter is unclear, and the interaction variable based on CRIMERATE and METROPOP was omitted from the regression model.

<sup>181</sup>JACCARD & TURRISI, *supra* note 177, at 18-20.

<sup>182</sup>In sample surveys, interactions—especially interactions of large magnitude—are infrequently found because of the distributions of the independent variables that comprise the interaction variables. Gary H. McClelland & Charles M. Judd, *Statistical Difficulties of Detecting Interactions and Moderator Effects*, 114 PSYCHOL. BULL. 376, 377, 386 (1993).

<sup>183</sup>JACCARD & TURRISI, *supra* note 177, at 70-72.

#### D. Discussion of Findings

How well did the regression model in table 3 and in table 4 predict whether the appearance-of-impropriety standard for attorneys is present in a state? The model as a whole—i.e., all four indicator variables together—accurately predicted the presence or absence of the standard in 59% of the states in table 3 and in 60% of the states in table 4.<sup>184</sup> If the predictions had been made randomly, 50.0% of the states would have been correctly identified. Consequently, the overall model somewhat aids prediction. However, the benefit of the model was not uniform. Specifically, the model was very accurate in predicting the states that adopted the standard, but its accuracy was quite poor in identifying the states that rejected the standard.<sup>185</sup>

If the goal of research is to build theory, the most important question confronting an investigator is not the regression model per se but the particular independent variables in the model.<sup>186</sup> Theory is constructed from independent variables that are related to the dependent variable, and advances in theory depend on uncovering these variables. Thus, I turn to the question of whether and how each independent variable in the regression model under consideration is related to state differences in the presence/absence of the appearance-of-impropriety standard. Since the odds ratios in tables 3 and 4 reveal a substantial relationship to the standard on the part of two indicator variables—viz., COLLEGERATE and FOREIGNPOP—these variables merit further examination. In discussing them, an explanation of three statistical concepts—probability, odds, and odds ratio—will be helpful.

The *probability* of occurrence of a phenomenon is the proportion of the combined number of occurrences and nonoccurrences that are occurrences, while the probability of nonoccurrence of a phenomenon is the proportion of the combined number of occurrences and nonoccurrences that are nonoccurrences. In the instant data, the probability that the appearance-of-impropriety standard for attorneys was being used in a state is calculated through the division of 26, the number of states employing the standard, by 44, the total number of states. Thus, the probability of occurrence of the standard was  $26/44 = .59$ . Conversely, the probability that the standard was not being used in a state is calculated through the division of 18, the number of states not employing the standard, by 44. The probability of nonoccurrence, therefore, is  $18/44 = .41$ .

The probability of a phenomenon, however, differs from the *odds* of the phenomenon. When the probability of occurrence of a phenomenon is divided by the probability of its nonoccurrence, the result is the odds of occurrence, and when the probability of nonoccurrence of a phenomenon is divided by the probability of occurrence, the result is the odds of nonoccurrence. In the instant data, the odds that the appearance-of-impropriety standard for attorneys was being employed in a state

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<sup>184</sup>The calculation was performed by the Stata command LSTAT. 2 STATA MANUAL, *supra* note 175, at 309. The calculation used the default predicted probability of the dependent variable, namely,  $\geq 0.5$ . *Id.* at 299. The LSTAT output includes the percentages for the “sensitivity” and the “specificity” of the model, which terms are defined in *id.* at 323.

<sup>185</sup>Among the states having the standard, the percentage of correct predictions was 88% for the states in table 3 and 81% for the states in table 4. Among the states not having the standard, the percentage of correct predictions was 17% for the states in table 3 and 29% for the states in table 4.

<sup>186</sup>LONG & FREESE, *supra* note 172, at 88.



is the ratio of .59 (the probability of occurrence) to .41 (the probability of nonoccurrence), while the odds that a state was not employing the standard is the ratio of .41 to .59. Thus, the odds that a state was utilizing the standard is  $.59/.41 = 1.44$  (alternatively expressed as 1.44 to 1), while the odds that a state was not utilizing the standard is  $.41/.59 = 0.69$  (or 0.69 to 1).

The third statistical concept is the *odds ratio*, i.e., a ratio of two odds. The numerator in the odds ratio in logistic regression is the odds of the *dependent* variable for a category of the *independent* variable; the denominator is the odds of the dependent variable for a different category of the same independent variable, namely, the category that, in terms of numerical score, is immediately below the category used in the numerator. In the instant study, the odds ratio for an indicator (independent) variable is the ratio of the odds that the appearance-of-impropriety standard was being used by a state in one category of the indicator variable relative to the odds that the standard was being used by a state in the category with the next-lower score. (The categories of each of the indicator variables are given in table 2.) Thus, the odds ratio for an independent variable specifies the factor by which the odds of the dependent variable are multiplied when the independent variable increases by one category,<sup>187</sup> and the independent variable is related to the dependent variable to the degree that its odds ratio deviates from 1.000.

The odds ratios in tables 3 and 4 indicate that relationships of practical importance existed between COLLEGERATE and FOREIGNPOP, on the one hand, and APPEARIMPROP, on the other, but the relationships of COLLEGERATE and FOREIGNPOP to APPEARIMPROP are weaker in table 3 than in table 4. In order to portray the magnitude of the relationships conservatively, the discussion below will confine itself to the odds ratios in table 3.

With the other independent variables held constant, the odds that the appearance-of-impropriety standard was used in a state (i) declined by a factor of 0.730 for each category increase in the percentage of the adult population in the state attending college, and (ii) rose by a factor of 1.491 for each category increase in the percentage of the population in the state that was born outside the United States. That is, removing the effects of the other independent variables, the odds of employing the standard are multiplied by 0.730 when a state moves up one category in college attendance and by 1.491 when a state moves up one category in foreign-born population. The two variables thus work in opposite directions with regard to whether a state uses the appearance-of-impropriety standard. Expressed in percentages, each rise in category of college attendance was associated with a 27% *reduction*, and each rise in category of foreign-born population was associated with a 49% *increase*, in the odds that the standard was present in a state.<sup>188</sup>

The percentage changes (-27% and +49%) for the indicator variables suggest that cultural heterogeneity had a somewhat stronger relationship to the appearance-of-impropriety standard than did social system rationality. This conclusion is buttressed by standardized regression coefficients for the indicator variables.<sup>189</sup> For the model

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<sup>187</sup>FRED C. PAMPEL, LOGISTIC REGRESSION 11-13, 36-37 (2000).

<sup>188</sup>Factor changes (here, 0.730 and 1.491) are translated into percentages by subtracting 1.000 from each factor change and multiplying the remainders by 100.

<sup>189</sup>Each coefficient was standardized on the variance of both the dependent variable and the independent variable. The “fully standardized” coefficients were obtained from the

in table 3, the standardized coefficients were  $-0.32$  for COLLEGERATE and  $+0.44$  for FOREIGNPOP.<sup>190</sup>

Part IV of the instant article is based on the thesis that research can identify the system-level properties that predict the use of symbols of law, and the discussion to this point has therefore focused on whether the appearance-of-impropriety standard was *present* in states. However, the converse of the above approach merits consideration, too. Specifically, what is the relationship of the independent variables to whether the standard was *absent* from states? The answer to the question is obtained from the inverse of each odds ratio in table 3, and is 1.371 for COLLEGERATE and 0.671 for FOREIGNPOP.<sup>191</sup> Thus, the odds of the standard being discontinued by a state are multiplied by a factor of 1.371 for each category increase in college attendance and by a factor of 0.671 for each category increase in foreign-born population. The (rounded) percentages corresponding to these odds ratios are, respectively, 37% and  $-33\%$ .<sup>192</sup>

In sum, the data analysis suggests that the appearance-of-impropriety standard for attorneys is not a randomly occurring doctrine of law and that the presence or absence of the standard is tied to specific system-level properties. Although indicators rather than direct measures of hypothesized antecedents were employed in the data analysis, social system rationality and cultural heterogeneity evidently contribute to whether a state adopts or rejects the standard. This conclusion is buttressed by trends over time (discussed in Part V below) in indicators of social system rationality and cultural heterogeneity. The conclusion is also buttressed by the potential utility of these properties in a sociological theory of law.<sup>193</sup>

## V. CONCLUSION

This article, adopting the perspective of macrosociology, has deemed law to be an institution of society and has accordingly considered law to be a component of a system. If law is embedded in a system, the concepts and doctrines of law are shaped by conditions in that system and facilitate the operation of the system. In this regard, the article contended that symbols are among the products of law, that symbols are responses to societal circumstances, and that symbols promote societal cohesion in the long run. Specifically, the article examined concepts and doctrines of law that are concerned with the appearance to society that certain things are

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LISTCOEF command for Stata and its STD option. LONG & FREESE, *supra* note 172, at 320-21. However, while standardized coefficients in ordinary least-squares regression furnish a meaningful basis for ascertaining the relative magnitude of the relationship to the dependent variable of each independent variable, standardized coefficients in logistic regression seem to allow just a rough comparison of the independent variables, because statisticians have been unable to devise a standardization procedure for logistic regression that is free of limitations. See PAMPEL, *supra* note 187, at 32-34.

<sup>190</sup>For table 4, the standardized coefficients were  $-0.42$  for COLLEGERATE and  $+0.70$  for FOREIGNPOP.

<sup>191</sup>LONG & FREESE, *supra* note 172, at 147, 320-21.

<sup>192</sup>For table 4, the inverse of the odds ratios is 1.605 for COLLEGERATE and 0.479 for FOREIGNPOP.

<sup>193</sup>See HOSMER & LEMESHOW, *supra* note 166, at 184 (stressing the importance of developing useful theory).

present. The article hypothesized that, through stimulus generalization, these concepts and doctrines become symbols when the things to which the concepts and doctrines refer are socially significant. Because lawyering as an occupation is important in the United States and generates appearances to which the public is attentive,<sup>194</sup> the appearance-of-impropriety standard in ethical rules for attorneys is among the concepts and doctrines of law that are symbolic.

If macrosociology is correct in treating a society as a *system*—i.e., as a set of interacting, interdependent parts—symbolic concepts and doctrines are not random but, instead, are responses to identifiable aspects of the society in which they exist. Accordingly, an analysis was undertaken, with logistic regression, of state-level quantitative measures of four system-level properties—cultural heterogeneity, population concentration, social system rationality, and societal stability—to determine whether any of the four properties predicted the odds that the appearance-of-impropriety standard for attorneys would be present in, rather than absent from, a state. Two of the properties were found to have substantial predictive power. Specifically, higher cultural heterogeneity and lower social system rationality raised the odds that the standard was in use in a state. For each state, the two properties were measured respectively by categories (ranges) of percentages of inhabitants who were born outside the United States and by categories (ranges) of percentages of adults who were enrolled in college.

If social, demographic, and/or economic conditions outside the institution of law are responsible for concepts and doctrines inside the institution, law is not a self-contained component of society that operates independently of other components. Instead, law as an institution is inextricably tied to the social system in which it exists, and the border between law and other institutions is porous. Unfortunately, a judgment regarding the utility of the macrosociological approach to law that has been developed here will not be possible until an appreciable body of well-designed quantitative research that is pertinent to the approach has accumulated.<sup>195</sup> However, the approach receives support from not just the instant study but from other studies as well.<sup>196</sup> In finding that cultural heterogeneity and social system rationality were related to whether the appearance-of-impropriety standard for attorneys was

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<sup>194</sup>For example, a survey conducted in 1995 of a sample of adults in the United States found that fully nine out of ten respondents had a definite opinion of attorneys; only 9% of the respondents either lacked an opinion of attorneys or declined to disclose their opinion. Most respondents viewed attorneys unfavorably: the perception that “lawyers use the legal system to protect the powerful and get rich” characterized 56% of the respondents, while the perception that “[l]awyers have an important role to play in holding wrongdoers accountable and helping the injured” existed among just 35% of the respondents. Tarrance Group & Mellman, Lazarus & Lake accession no. 230752 (Jan. 13-15, 1995). *available at* LEXIS, News and Business, RPOLL File.

<sup>195</sup>See Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 824 (2002); Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. ILL. L. REV. 1167, 1173-76 (2002).

<sup>196</sup>Karen Smith Conway & Michael R. Butler, *State Abortion Legislation as a Public Good—Before and After Roe v. Wade*, 30 ECON. INQUIRY 609 (1992); Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women’s Rights*, 92 AM. ECON. REV. 1079 (2002); Barnett, *supra* note 36, at 637-68.

maintained or discontinued by states, the instant study strengthens the thesis that law is a sociological phenomenon and that the concepts and doctrines of law can be understood only by placing them in their societal context.

In order to explore more fully the implications of the study, I will assume that social system rationality and cultural heterogeneity operated as causes of state acceptance or rejection of the appearance-of-impropriety standard. If these properties are adequately captured by their indicator variables, the juxtaposition of table 3 and table 5 suggests that the two properties, and the forces behind them, worked concurrently over time. With regard to table 5, the top panel (panel A) shows, for each specified point in time, the percentage of the civilian non-institutionalized population 16 years of age and older in the United States as a whole that was enrolled in college. As measured by this percentage, social system rationality reached a plateau around 1980 after rising steadily for three decades. The bottom panel (panel B) shows, for each specified year, the percentage of the total population of the United States that was born outside the United States. As measured by this percentage, cultural heterogeneity declined moderately from the middle of the twentieth century until about 1970 and then increased substantially over the next three decades.

All of the states in the study had adopted an appearance-of-impropriety standard for attorneys by 1980,<sup>197</sup> and the states without the standard in 2005 had dropped it after 1980. Given the shift from universal acceptance to partial acceptance of the standard, what conclusions can be drawn from bringing together the findings in table 3 and the time-series data in table 5? First, social system rationality, by increasing until about 1980, eroded support for the appearance-of-impropriety standard before the start of the period when an appreciable number of states discarded the standard, and after the period began, the inclination to end the standard was stronger in states that were relatively high in rationality. Second, cultural heterogeneity, by growing during the period in which many states discontinued the standard, worked against the abandonment of the standard, and it promoted retention of the standard in direct proportion to the degree to which a state was heterogeneous.

Third, the importance of cultural heterogeneity to continuation of the appearance-of-impropriety standard was modestly greater than was the importance of social system rationality to the abandonment of the standard. However, the effects of both properties were substantial; i.e., much if not most of the movement away from the standard after 1980 is evidently attributable to heightened social system rationality, and much if not most of the resistance to this movement is evidently attributable to increased cultural heterogeneity. Notably, the relative magnitude of the impact of each property is roughly consistent with the relative number of states having and not having the appearance-of-impropriety standard: greater cultural heterogeneity was associated somewhat more strongly with retention of the standard than greater social system rationality was associated with termination of the standard, and the number of states preserving the standard was modestly larger than the number of states eliminating it.

In short, the retention of the appearance-of-impropriety standard for attorneys was not due to inertia, and the abandonment of the standard was not due to chance. Instead, two system-level properties were evidently major contributors to whether a

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<sup>197</sup>See *supra* note 164 and accompanying text.

state accepted or rejected the standard during the time period covered by the study, and they helped to shape the decision on the standard by the courts and committees in the state that made the decision. Because the appearance-of-impropriety standard for attorneys is symbolic, the two properties affected whether symbolism developed in law.

Table 5. College Enrollment and Foreign-Born Population: United States

Panel A <sup>198</sup>	1949-1950	Fall 1959	Fall 1970	Fall 1980	Fall 1990	Fall 2000
Percent of population age 16+ enrolled in college	2.6	3.1	6.2	7.2	7.3	7.2
Panel B <sup>199</sup>	1950	1960	1970	1980	1990	2000
Percent of U.S. population born outside U.S.	6.9	5.4	4.7	6.2	7.9	11.1

Before leaving the appearance-of-impropriety standard, a comment on investment advisers is in order. Investment advisers, like attorneys, work in a government-regulated occupation: an attorney must abide by requirements imposed by the judiciary of the state(s) in which the attorney is licensed to practice law; an investment adviser must be registered either with the Securities and Exchange

<sup>198</sup>Panel A shows, for each specified point in time, the percentage of the civilian noninstitutionalized population 16 years of age and older in the United States that was enrolled in college. The percentages in Panel A were calculated from data in the following sources: DIGEST OF EDUCATION STATISTICS: 2003, *supra* note 136, at table 3; U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey. Table A-1: Employment Status of the Civilian Population by Sex and Age (civilian noninstitutional population), *available at* <http://www.bls.gov/webapps/legacy/cpsatab1.htm> (last visited Nov. 7, 2006). The denominator for the calculation was the number of persons 16 years of age and older in the civilian noninstitutionalized population of the United States as of September of the year specified; the denominator for 1949-1950 was as of September 1949.

<sup>199</sup>Panel B shows, for each specified year, the percentage of the total population of the United States that was born outside the United States. The percentages in Panel B are from the following sources: Gibson & Lennon, *supra* note 160; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at table 42 (124<sup>th</sup> ed. 2004), *available at* <http://www.census.gov/prod/www/abs/statab.html>.

Commission (“Commission”) or with a regulatory body of the state in which the adviser has its main office and business site, and must conform to applicable statutes and agency rules.<sup>200</sup> In two cases, the Commission has expressed concern with appearances of impropriety in the conduct of investment advisers.<sup>201</sup> Notably, however, such cases are not found after the early 1980s, precisely the point in time when the prevalence of the appearance-of-impropriety standard for attorneys began to decline in the United States. It is unlikely to be coincidence that, since the early 1980s, the Commission has not mentioned appearances of impropriety in the context of the duty owed by investment advisers to their clients. Because the movement away from the appearance-of-impropriety standard was not confined to one occupation, logic suggests that the movement was not fortuitous. Its explanation, instead, is presumably found in broadly operating forces.

A final, but controversial, point should be made regarding the macrosociological approach to law on which this article rests. Specifically, the approach offers the possibility of predicting, far in advance, the existence and emergence of law on socially significant topics. To the extent that system-level properties determine the concepts and doctrines of law, information on the level of and change in pertinent properties can be used to forecast the law that a society will possess a decade or more in the future. Predictions will not be uniformly correct, of course, but if the predictions are grounded on well-designed quantitative research, they will be accurate more often than they are flawed. At the present time, however, rigorous quantitative research on the macrosociological aspects of law is scarce, and the existence and emergence of law on a wide variety of topics cannot be predicted with confidence.

Why is prediction possible? From a macrosociological perspective, particular personalities—no matter how charismatic or colorful they might be—are merely the vehicles through which the properties of society, and the large-scale forces that determine them, mold the fundamental content of law and generate fundamental shifts in this content. The negligible importance of individuals in shaping law is evidenced, *inter alia*, by the similarity of concepts and doctrines of state law across the country,<sup>202</sup> because the legislators, judges and government-agency officials promulgating law in one state are not the individuals who are the legislators, judges

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<sup>200</sup>15 U.S.C. §§ 80b-3, 80b-3a (2000). An investment adviser, even though registered with a state and not with the Commission, remains subject to the prohibition against fraud imposed by section 206 of the federal Investment Advisers Act and implementing rules adopted by the Commission. Rules Implementing Amendments to the Investment Advisers Act of 1940 Release No. IA-1601, 61 Fed. Reg. 68,480, 68,490 (Dec. 27, 1996); Investment Advisers Act Release No. IA-1633, 62 Fed. Reg. 28,112, 28,127, 28,128 (May 22, 1997).

<sup>201</sup>*In re Steadman Security Corp.*, Sec. & Exch. Comm’n Admin. Proc. File No. 3-3101, 1974 SEC LEXIS 3639, at \*103, \*104 (Dec. 20, 1974); Report of Investigation in the Matter of Bull & Bear Management Corp., Investment Advisers Act Release No. 769, 1981 SEC LEXIS 931, at \*8 (Aug. 7, 1981).

<sup>202</sup>The commonality of law in the United States is illustrated by “model” statutes and rules. The large number of, and wide range of subjects covered by, such statutes and rules is indicated by the contents of the “Model Acts & Uniform Laws” database in LEXIS (category ID 3002030). While the statutes and rules as adopted undoubtedly differ in some ways between states, they necessarily possess an underlying similarity.

and government-agency officials promulgating law in another state.<sup>203</sup> Societal-level properties, on the other hand, have broad effects and are likely to be at work throughout the United States (although their level/intensity may differ between states). In addition, societal-level properties generally seem to develop at a gradual pace, not abruptly. As a result, the ideas of law whose emergence, modification and abandonment are due to such properties and the forces behind them can in principle be anticipated well in advance. In the study reported in the instant article, differences between states in the level/intensity of two particular system-level properties were found to predict use of the appearance-of-impropriety standard for attorneys a quarter of a century later.

Given the potential predictability of law, let me revisit and assess a prediction I made in a publication in 1993.<sup>204</sup> Specifically, I contended that, as the result of societal changes, law in the United States was likely “in the next two decades” explicitly to authorize physicians to assist in terminating the life of mentally competent individuals who requested assistance to end their suffering from physically stressful, incurable medical conditions that were expected to be fatal.<sup>205</sup> In the years since this prediction was made, the state of Oregon has adopted a statute allowing physician-assisted suicide under such conditions,<sup>206</sup> and the United States Supreme Court has rejected an attempt by the executive branch of the federal government to prohibit physicians from using federally regulated medications to aid individuals in ending their lives in accordance with the requirements and procedures of a state statute.<sup>207</sup> On the other hand, Oregon is the only U.S. state to date that has legalized physician-assisted suicide,<sup>208</sup> and the Supreme Court has ruled that statutes barring physician-assisted suicide do not violate either the due process guarantee<sup>209</sup> or the equal protection guarantee<sup>210</sup> of the national Constitution.

Statutes on physician-assisted suicide are a type of symbolic law<sup>211</sup> because physician-assisted suicide is a socially important topic and is unlikely, if legalized, to

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<sup>203</sup>In the macrosociological approach I am advocating, the rate of replacement of—i.e., the rate of personnel turnover among—the individuals who are legislators, judges and government-agency officials may affect the *timing* of a basic change in law but does not determine *whether* the change occurs.

<sup>204</sup>BARNETT, *supra* note 3, at ch. 6.

<sup>205</sup>*Id.* at 140.

<sup>206</sup>Death with Dignity Act, 13 OR. REV. STAT. § 127.800-995 (2006). The history of the Act is reviewed in OREGON DEP’T OF HUMAN SERVICES, EIGHTH ANNUAL REPORT ON OREGON’S DEATH WITH DIGNITY ACT 6-7 (March 9, 2006), *available at* <http://www.oregon.gov/DHS/ph/pas/ar-index.shtml>. For a summary of the specific requirements of the Act, see *id.* at 7-8.

<sup>207</sup>*Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>208</sup>The legal status of physician-assisted suicide worldwide is reviewed by Emily Wada, Note, *A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide*, 27 LOY. L.A. INT’L & COMP. L. REV. 275 (2005).

<sup>209</sup>*Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>210</sup>*Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>211</sup>See *supra* notes 62, 64-67 and accompanying text.

alter existing practices. As to the social importance of the topic, more than three out of five adults in the United States reject the conclusion of the Supreme Court that statutory prohibitions on physician-assisted suicide are constitutional<sup>212</sup> and thus believe that they possess an inherent right under certain conditions to end their lives with the aid of a physician. At the same time, a majority of adults in the country as a whole consider the enactment of a statute legalizing physician-assisted suicide to be important.<sup>213</sup> As to the impact of legalizing physician-assisted suicide, fewer than 4 in 1000 deaths in Oregon have resulted from a lethal dose of medication obtained under the terms of the state statute allowing physician-assisted suicide.<sup>214</sup> Therefore, like law generally that deals with social issues,<sup>215</sup> law on physician-assisted suicide does not substantially alter a society but, instead, manifests the existing attributes of the society and serves as a symbol.

My 1993 prediction that physician-assisted suicide would be explicitly and widely legalized in the United States over the course of the following two decades will almost certainly prove wrong in terms of timing. Formal approval of the practice continues to be likely—e.g., through legislation and/or written interpretations of existing statutes by state attorneys general—but it will involve a much longer period of time than I anticipated. Probably the main cause of the delay is that physician-aided suicide has been largely legalized de facto. That is, a substantial number of physicians in the United States evidently help terminally ill patients to end their lives,<sup>216</sup> and even though the practice is not authorized by statute, physicians are rarely prosecuted for it.<sup>217</sup> Because the practice has been legalized de facto, there is less pressure on society to revise existing statutes that ban the practice.

Nonetheless, physician-assisted suicide is likely to be expressly and widely authorized by state law in the future. Legalization de jure of physician-assisted suicide can be expected because of social values—Americans accept the practice and want statutes that allow it. For example, in national sample surveys of adults in the United States conducted from 1994 to 2005, no less than three out of five respondents preferred that their state adopt a statute allowing physician-aided suicide

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<sup>212</sup>Louis Harris & Assoc. accession no. 282134 (July 9-14, 1997), *available at* LEXIS, News and Business, RPOLL File; Harris Interactive accession no. 395078 (Dec. 14-19, 2001), *available at* LEXIS, News and Business, RPOLL File.

<sup>213</sup>International Communications Research accession no. 394148 (April 25-May 20, 2001), *available at* LEXIS, News and Business, RPOLL File. The findings of this survey are presented *infra* note 220 and its accompanying text.

<sup>214</sup>OREGON DEP'T OF HUMAN SERVICES, *supra* note 206, at 21.

<sup>215</sup>BARNETT, *supra* note 3, at 162.

<sup>216</sup>Timothy E. Quill, *Risk Taking by Physicians in Legally Gray Areas*, 57 ALB. L. REV. 693, 699 (1994); Brief for American College of Legal Medicine as Amicus Curiae, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858) and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 U.S. S. Ct. Briefs LEXIS 674, at \*44 (Nov. 12, 1996).

<sup>217</sup>Stephen J. Ziegler, *Physician-Assisted Suicide and Criminal Prosecution: Are Physicians at Risk?*, 33 J.L. MED. & ETHICS 349, 355 (2005) (noting that “the number of physicians prosecuted for participating in [physician-assisted suicide] is virtually non-existent.”).



with conditions and requirements comparable to those in the Oregon act.<sup>218</sup> Further, legalization of physician-aided suicide is an issue that seems to be of more than minimal concern to most Americans. In a sample survey of adults in the United States conducted during 2001, almost three out of five respondents believed that passage “within the next year” of a federal statute allowing physician-assisted suicide<sup>219</sup> in cases of terminal illness was “important,” “very important,” or “extremely important,” while somewhat less than two out of five respondents thought such a statute either was “not important” or should not be adopted.<sup>220</sup> Notably, broad support for the legalization of physician assistance to end the lives of terminally ill patients is not recent—legalization has been favored by a majority of Americans since the mid-1980s.<sup>221</sup> Over time, furthermore, support for legalization will become stronger in the United States as the older generation, which is less inclined than the younger generation to endorse legalization, is removed from the population by death.<sup>222</sup> Law formally permitting physician-assisted suicide can thus be expected to emerge in most if not all states in the future.

Why are social values supportive of a change in law on this topic? Probably the most important factor in current social values is social system rationality. Rationality seems to have reached the point where most participants in U.S. society want the option of selecting the manner and timing of their deaths from a progressive, terminal illness.<sup>223</sup> As the United States has added to its stock of knowledge, reason and individualism have increased.<sup>224</sup> The result has been an

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<sup>218</sup>Louis Harris & Assoc. accession no. 229233 (1994), *available at* LEXIS, News and Business, RPOLL File; Louis Harris & Assoc. accession no. 282136 (July 9-July 14, 1997), *available at* LEXIS, News and Business, RPOLL File; Harris Interactive accession no. 395079 (Dec. 14-19, 2001), *available at* LEXIS, News and Business, RPOLL File; Harris Interactive accession no. 1623473 (Apr. 5-10, 2005), *available at* LEXIS, News and Business, RPOLL File.

<sup>219</sup>Under current U.S. Supreme Court jurisprudence, a federal statute that authorizes physician-assisted suicide in contravention of state law probably exceeds the power of Congress under the Commerce Clause. *See* Brian Boyle, Comment, *The Oregon Death with Dignity Act: A Successful Model or a Legal Anomaly Vulnerable to Attack?*, 40 HOUS. L. REV. 1387, 1400-06 (2004).

<sup>220</sup>International Communications Research accession no. 394148 (Apr. 25-May 20, 2001), *available at* LEXIS, News and Business, RPOLL File. The alternatives “important,” “very important” and “extremely important” were chosen by 21%, 23%, and 13% of the respondents, respectively.

<sup>221</sup>O. D. Duncan & L. F. Parmelee, *Trends in Public Approval of Euthanasia and Suicide in the US, 1947-2003*, 32 J. MED. ETHICS 266, 267 (2006).

<sup>222</sup>*Id.* at 269; BARNETT, *supra* note 3, at 145-46, 148-52.

<sup>223</sup>This contention is supported by the education gradient in the use of physician-assisted suicide in Oregon: the rate of physician-assisted suicide in the state rises rapidly with level of schooling completed. OREGON DEP’T OF HUMAN SERVICES, *supra* note 206, at 21.

<sup>224</sup>The level of knowledge in a society is manifested in the efficiency and effectiveness of its technology. Change in the level of knowledge in the United States, therefore, can be measured by the annual number of patents issued for inventions. Barnett, *supra* note 36, at 628-31.

erosion of public acceptance of rules that deny personal choice. Heightened social system rationality was found to be related to the abandonment by states of the appearance-of-impropriety standard for attorneys, and it is likely to contribute as well to the elimination of law that prohibits individuals with a terminal illness from opting for physician assistance to end their lives.<sup>225</sup>

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The growth of knowledge promoted reason and individualism through a two-step process. In the first step, advances in technology raised enrollments in primary and secondary schools. Richard Rubinson & John Ralph, *Technical Change and the Expansion of Schooling in the United States, 1890-1970*, 57 SOC. EDUC. 134 (1984). The number of students was boosted by the higher personal income that schooling generates. Kathryn Wilson, *The Determinants of Educational Attainment: Modeling and Estimating the Human Capital Model and Education Production Functions*, 67 S. ECON. J. 518, 545 (2001). In the second step, higher personal income increased individualism. Ron Lesthaeghe, *A Century of Demographic and Cultural Change in Western Europe: An Exploration of Underlying Dimensions*, 9 POPULATION & DEV. REV. 411, 429-30 (1983). By definition, individualism is characterized by rationality: individualism entails "a mode of life in which the individual . . . follows out his own ideas; free and independent individual . . . thought." 7 OXFORD ENGLISH DICTIONARY 880 (2<sup>nd</sup> ed. 1989).

<sup>225</sup>If increased social system rationality will be a major force behind the de jure legalization of physician-assisted suicide, such legalization will in general occur the earliest in states characterized by the highest level of rationality. The fifteen states that were in the highest category of COLLEGERATE in table 2, and by this measure were highest in social system rationality, were (in alphabetical order) Arizona, California, Colorado, Delaware, Illinois, Kansas, Massachusetts, Michigan, Nebraska, New York, Oregon, Rhode Island, Utah, Vermont, and Wisconsin.