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## THE PUBLIC-PRIVATE DICHOTOMY IN MORALITY AND LAW

*Larry D. Barnett\**

“When they discover the center of the universe,  
a lot of people will be disappointed to discover  
they are not it.” Bernard Bailey<sup>1</sup>

### OVERVIEW

The article advances the thesis that the doctrines and concepts of law are attributable to the properties of society and to the forces molding these properties. The thesis, after being illustrated with the federal Investment Advisers Act, is assessed quantitatively using data from a survey of a national sample of adults in U.S. households. The survey, which was conducted in 1991, ascertained whether interviewees classified morality as a private matter or as a public issue. The public or private nature

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<sup>1</sup> Michael Moncur's Cynical Quotations, The Quotations Page, [http://www.quotationspage.com/quotes/Bernard\\_Bailey](http://www.quotationspage.com/quotes/Bernard_Bailey) \*last visited Feb. 15, 2010).

of morality in social values was the dependent variable in a study that assumed (i) law does not attempt to regulate an activity, or explicitly protects the activity from regulation, when society designates the activity as private, and (ii) the doctrines of law designed to regulate activities that are designated public embody the doctrines of prevailing morality.

Because social values on whether morality is private or public comprised the dependent variable, the factors that mold these values have the potential to prevent or permit law designed to regulate socially significant activities. Logistic regression was used to estimate the relationship to the dependent variable of two sets of factors that may influence whether morality is designated private or public. One set was factors that structure (e.g., stratify) a society and that have important societal correlates and consequences. The other set was comprised of modes of thought and conduct that are cultural dimensions of a society. Notable relationships to the dependent variable were found for the structural factors of gender and, among women, educational attainment. In terms of gender, the odds that morality would be considered a private matter were approximately three-and-a-half times higher among women than among men. In terms of education, the odds that morality would be considered private were approximately three-fourths lower among women with thirteen or more years of schooling than among women with twelve or fewer years of schooling. The article suggests that, because the odds of placing morality in the private sphere are appreciably greater among women, gains in the status of women may help to explain U.S. Supreme Court decisions that construed the Constitution to restrict government regulation of sexual activity and its incidents.

## I. THE RULE AND ROLE OF LAW IN SOCIETY

### *A. The Rule of Law*

The concept underlying the phrase “the rule of law” conveys a specific image both of the nature of law and of the role of law

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in society. The concept is pertinent to the instant article because it is embedded in Anglo-Saxon jurisprudence<sup>2</sup> and is generally believed to be a key to the success of modern societies.<sup>3</sup> In the United States, the concept enjoys widespread support,<sup>4</sup> and if this support accurately gauges the prevalence of the concept and of the image of law linked to the concept, a large fraction of Americans believe law to be a significant aspect of their country. Not surprisingly, persons in law-related occupations share that belief, and they may assign even greater importance than the public to “the rule of law.” In their view, both the structure and operation of U.S. society depend on law.<sup>5</sup> Thus, the concept of “the rule of law” has been employed to suggest that the existence<sup>6</sup> and equilibrium<sup>7</sup> of a society are impossible without law. According to this view, “we have survived and prospered as a free nation because we have adhered to the rule of law.”<sup>8</sup>

What, however, is “the rule of law”? When does “the rule of law” exist? A concept, to be useful, must have an identifiable

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<sup>2</sup> Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 753 (2001) (referring to “the rule of law” as “the bedrock of western law”).

<sup>3</sup> See, e.g., Martin Krygier & Whit Mason, *Violence, Development and the Rule of Law 2* (Univ. of N.S.W., Research Paper No. 2008-8, 2008) (“The rule of law is so popular these days that there is little it is not called upon to do or to fix.”).

<sup>4</sup> James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 603–05 (2007).

<sup>5</sup> *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1223 (Utah 1999) (Stewart, J. concurring) (contending that the rule of law and the protections it affords are necessary for a capitalist economy and personal safety).

<sup>6</sup> See *Port Auth. of New York & New Jersey v. SST Concorde Alert Program*, 394 N.Y.S.2d 364, 367 (Sup. Ct. 1977) (“History proves that our society can survive only by law or else be consumed and destroyed by man . . .”).

<sup>7</sup> See *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972) (Douglas, J., dissenting in part) (“The rule of law is important in the stability of society.”).

<sup>8</sup> *Gore v. Harris*, 772 So.2d 1243, 1272 (Fla. 2000) (Harding, J., dissenting).

referent, but the concept of “the rule of law” has no generally accepted referent or set of referents.<sup>9</sup> Nonetheless, “the rule of law” would seem to be associated with the presence of at least four conditions:<sup>10</sup> (i) the law of the society has unambiguous standards; (ii) the standards are the same for, and are applied in the same way to, all members of a category of human beings or entities; (iii) the categories that are used by law to differentiate human beings and entities, and the standards of each category, are accepted by the society; and (iv) the standards for a given category are manifested in the behavior and activities of the members of the category. The preceding list of attributes of “the rule of law” is consistent with conclusions regarding law that courts and scholars have reached—that law must be fair<sup>11</sup> in content,<sup>12</sup> appearance,<sup>13</sup> and application.<sup>14</sup> However, despite its

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<sup>9</sup> See Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN'S L. REV. 573, 576 (2008) (explaining the difficulty in defining the rule of law).

<sup>10</sup> The elements of the rule of law that have been enumerated in “leading modern accounts” of the concept are summarized in Richard H. Fallon, Jr., *The Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9 (1997). Professor Fallon indicates that the concept of “the rule of law” is an ideal but points out that agreement has not been reached on the elements of the ideal. *Id.* at 10, 55.

<sup>11</sup> See *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (noting that the enforcement of law is unconstitutional when it fails to “comport with traditional ideas of fair play and decency”); see also *People ex. rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985) (noting that law cannot be useful “[W]ithout a belief by the people that the system [of law] is just and impartial”).

<sup>12</sup> See David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2640 (2006) (“[L]aws on the books play an essential role in the fair and just exercise of legal force.”).

<sup>13</sup> *Wheat v. United States*, 486 U.S. 153, 160 (1988) (pointing out the importance that “legal proceedings appear fair to all who observe them”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (remarking that the judiciary must provide “the appearance and reality of fairness” in order to “‘generat[e] the feeling, so important to a popular government, that justice has been done’”).

<sup>14</sup> *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (observing that law in the United States demands equality in its development and execution).

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importance to maintaining cohesion in a society,<sup>15</sup> fairness does not seem to be the primary focus of the concept of “the rule of law.” Instead, the concept by its very name highlights the idea of *rule*. With this emphasis, the concept of “the rule of law” suggests that the law of a society controls,<sup>16</sup> and thus is followed by, the individuals and entities in the society.<sup>17</sup> Indeed, the concept means literally that, in a society characterized by the rule of law, there is obedience to law.<sup>18</sup> Law, in a word, regulates.

*B. Law as a Regulator*

In the United States, then, law is believed to be at the heart of society, and the belief seems to rest heavily on the assumption that, in a society whose structure is complex and whose population is large and diverse, law is a highly effective means of guiding the behavior of individuals and the activities of groups. But is law successful when it seeks to regulate, i.e., control, important aspects of social life? An explicit or implicit intent to regulate, directly or indirectly, is embedded in law as an institution<sup>19</sup>—to the degree that a society deems behavior X to

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<sup>15</sup> See Joel Brockner et al., *The Influence on Prior Commitment to an Institution on Reactions to Perceived Unfairness: The Higher They Are, the Harder They Fall*, 37 ADMIN. SCI. Q. 241 (1992).

<sup>16</sup> *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 (1983) (referring to the United States as “a society *governed* by the rule of law” (emphasis added)). The word “rule” is defined to include “[a] principle, regulation, or maxim *governing* individual conduct.” 14 OXFORD ENGLISH DICTIONARY 228 (2d ed. 1989) (emphasis added). The word “govern” has among its definitions “to direct and control the actions and affairs of (a people, a state or its members).” 6 OXFORD ENGLISH DICTIONARY 709 (2d ed. 1989).

<sup>17</sup> ROGER COTTERRELL, *LAW’S COMMUNITY* 259–60 (1995); see Gibson, *supra* note 4, at 597 (“[T]he essential ingredient of the rule of law is universalism—the law should be universally heeded.” (emphasis omitted)).

<sup>18</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 213 (1979).

<sup>19</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 75 (1919); Elie Mischel, Note, “*Thou Shalt Not Go About as a Talebearer Among Thy People*”: *Jewish Law and the*

be desirable and public in nature, the law of the society will seek to increase the frequency of X, and to the extent that a society deems behavior Y to be undesirable and public, the law of the society will be designed to eliminate (or at least reduce) the occurrence of Y. However, if law does not fulfill its regulatory goal, i.e., if law does not appreciably affect the behaviors and activities it targets, the contention that law is critical to a society must either be abandoned or, if retained, justified on other grounds.

Unfortunately for the advocates of the contention that law is an effective regulatory mechanism, a substantial body of well-designed quantitative research has found that law does not appreciably and permanently alter social patterns. Briefly stated, the research indicates that the impact on targeted social behavior of law-based regulation is generally just minimal in the long term, and if and when the impact is substantial, it is short-lived.<sup>20</sup> Moreover, regulation can have effects that are unwanted by or harmful to society.<sup>21</sup> Accordingly, the center of the

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*Private Facts Tort*, 24 CARDOZO ARTS & ENT. L.J. 811, 821 (2006).

<sup>20</sup> Notable studies are cited and summarized in Larry D. Barnett, *Law as Symbol: Appearances in the Regulation of Investment Advisers and Attorneys*, 55 CLEV. ST. L. REV. 289, 300–01 nn.65–67 (2007) [hereinafter *Law as Symbol*] and in Larry D. Barnett, *The Regulation of Mutual Fund Boards of Directors: Financial Protection or Social Productivity?*, 16 J.L. & POL'Y 489, 528–29 nn.163–66, 530 n.168 (2008) [hereinafter *Regulation of Mutual Fund Boards of Directors*]. Further supporting evidence, in conjunction with an exceptional discussion of the research design needed to assess accurately the impact of law, can be found in Chester L. Britt et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 L. & SOC'Y REV. 361 (1996).

<sup>21</sup> See, e.g., Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89 (2001) (finding a substantial rise in homicides from the enactment of state statutes that require individuals, upon a third conviction for a violent crime, to be sentenced to a lengthy prison term without possibility of parole); David Neumark & Wendy A. Stock, *The Labor Market Effects of Sex and Race Discrimination Laws*, 44 ECON. INQUIRY 385, 411 (2006) (finding that the earnings of employed white women and of employed black women are reduced in the short term, though raised in the long term, by state statutes banning sex-based differentials in

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universe is unlikely to be either law as a set of ideas or the individuals who write and apply the doctrines of law. If the universe has a sociological center, it is evidently not a particular institution but society itself.<sup>22</sup>

*C. Law in a Macrosociological Framework*

The thesis of the present article is that the concepts and doctrines of law are macrosociological phenomena. Law is thus treated in the article as a component of a larger social system, i.e., of a society. In this framework, law as a societal component is deemed to be an institution—i.e., a pattern of human interaction that is common in, and a contributor to the functioning of, the society in which it exists.<sup>23</sup> The concepts and doctrines of the institution of law are assumed by the framework to result from the properties of society and the forces that mold these properties. In the United States, however, such a framework contradicts conventional thinking because the framework considers individual human beings, including those who are prominent in politics and those who are charismatic, to have no long-term impact on the core content of law in a democracy.<sup>24</sup> Although my framework recognizes that an individual can trigger a lasting change in the doctrines of law in a democracy, it contends that an individual can do so only when

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pay and that employment in these groups is reduced by such statutes in the short term).

<sup>22</sup> See Larry D. Barnett, *Mutual Funds, Hedge Funds, and the Public-Private Dichotomy in a Macrosociological Framework for Law* 38–39 (Interuniversity Ctr. for Research on the Sociology of Law, Info. and Legal Insts., Working Paper No. 34, 2008), available at <http://www.cirsdig.it/Pubblicazioni/barnett.pdf> [hereinafter *Public-Private Dichotomy in a Macrosociological Framework*].

<sup>23</sup> Sociologically, an institution is a set of statuses and roles (i) that a society defines and endorses and (ii) that involve interpersonal relationships through which a socially approved type of activity takes place in the society. Howard B. Kaplan, *The Concept of Institution: A Review, Evaluation, and Suggested Research Procedure*, 39 SOC. FORCES 176, 179 (1960).

<sup>24</sup> Individualism is a dominant theme in the culture and law of the United States. See *infra* notes 79–85 and accompanying text.

society-level properties and forces create the trigger. A particular individual who triggers such a change is not essential to the change, however, because other individuals could and would also have done so. In my macrosociological framework, then, explanations of non-ephemeral change in the central ideas of law in a democracy are wrong when they attribute the change to specific individuals, because the process that shapes these ideas involves fungible individuals.

While quantitative research bearing on this framework is in its infancy, the findings of currently available studies are consistent with it. What does existing research suggest are the most important societal properties that produce concepts and doctrines of law?<sup>25</sup> In answering the question, I will also touch on the key societal forces that seem to be responsible for changing the societal properties pertinent to law. The discussion of the properties and forces will inform the analyses undertaken in subsequent parts of the instant article.

One property that evidently affects the law of a society is the educational attainment of the members of the society. The importance of education may arise from the relationship that exists between educational level and rationality. Specifically, education is at least a concomitant, and is probably a cause, of the extent of rationality in a society. As a societal property, educational attainment is likely to result from one large-scale force in particular—the quantity and quality of knowledge that is being used by a society.<sup>26</sup>

A second property that apparently has a bearing on the content of law in a society is the degree of urbanization in the society or, more precisely, the proportion of the inhabitants of the society who are exposed to high population density. Rationality is heightened among individuals who live and/or work in large cities, theory suggests, because these individuals

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<sup>25</sup> The most persuasive of these studies are reviewed in *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 11–13. That review is the basis for the discussion which follows in the text.

<sup>26</sup> *Id.* at 25–26; Larry D. Barnett, *The Roots of Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 613, 630–32, 677–79 (2007) [hereinafter *The Roots of Law*].

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are exposed to a wide range of changing stimuli.<sup>27</sup> The density of population in a society, of course, results from the rates of fertility and mortality in the society, from the pace and patterns of migration within the society, and from the rates of immigration into and emigration out of the society.

A third property that may shape the content of law in a society is the extent and severity of social, cultural, and economic divisions within the population of the society. The law of a society results from conditions that have an impact on the society, and a plausible argument can be made that law can be affected by social, cultural, and economic fractures in the population of the society, e.g., by cleavages on the basis of race,<sup>28</sup> national origin, and/or income. For example, as the population of a society becomes more heterogeneous in terms of national origin, the law of the society is more likely to incorporate doctrines that are symbols<sup>29</sup> in order to counteract the reduction in social cohesion caused by the heterogeneity.<sup>30</sup>

A further aspect of divisions within a society merits a brief discussion here. Given a split in a society, law can be formulated to pursue one of two objectives. First, law may accept the continuation of the division but concern itself with curbing unwanted activities (e.g., crime) to which the division is believed to be a contributor.<sup>31</sup> Second, law may be concerned with erasing the division, as in the case of statutes banning discrimination in employment. Unfortunately, the societal conditions producing law that has the former concern rather than

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<sup>27</sup> GEORG SIMMEL, *The Metropolis and Mental Life*, in *THE SOCIOLOGY OF GEORG SIMMEL* 409, 409–10 (Kurt H. Wolff ed. & trans., Free Press 1950).

<sup>28</sup> See Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 *J. POL.* 397, 415–16 (2003) (finding with cross-sectional data that, among Caucasians, approval of the death penalty for individuals convicted of murder varies with, inter alia, prejudice toward blacks).

<sup>29</sup> *Law as Symbol*, *supra* note 20, at 315, 324, 328–29.

<sup>30</sup> Hilde Coffé & Benny Geys, *Community Heterogeneity: A Burden for the Creation of Social Capital?*, 87 *SOC. SCI. Q.* 1053, 1065, 1068 (2006).

<sup>31</sup> David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 *AM. SOCIOLOGICAL REV.* 109, 111 (2002).

the latter concern have yet to be identified,<sup>32</sup> but the existence of one concern rather than the other may depend, *inter alia*, on the degree to which the division creates friction between the different sides of the division. Whatever the reason, the doctrines of law do not occur by accident; rather, they are adopted in response to, and are designed to improve, the conditions of social life.

However, if law exists to benefit society, the question is *why* law acts in the interests of society. What explains the subservience of law to the society in which the law exists? In my framework, a society is a system, and a system, by definition, is organized.<sup>33</sup> Being organized, a system is more than the simple combination of its components, and a society, therefore, is a discrete entity with distinct properties of its own. Alternatively expressed, a society is comprised of structured networks of interaction between members of a population, and

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<sup>32</sup> One study has found that certain indicators of state-level social and economic divisions predict whether states have statutes that authorize the death penalty. *Id.* at 121–22. However, the study did not include a control for, and thus did not remove, state differences in knowledge use and, hence, in rationality. *Id.* For example, differences between states in the educational attainment and occupational composition of their inhabitants were not controlled by the study with data on, respectively, the percentage of state inhabitants that had completed four (or more) years of college and the percentage of state inhabitants employed in white-collar occupations. *Id.* Differences between education levels as well as differences between occupations result from differences in quantity and quality of knowledge. *The Roots of Law*, *supra* note 26, at 630–31, 678. Support for the death penalty is affected by educational level. Soss et al., *supra* note 28, at 408, 415; Steven F. Messner et al., *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC'Y REV. 559, 576 (2006). Support for the death penalty probably varies by occupation, too, because occupations differ in the amount and type of knowledge required for their duties. Thus, state differences in knowledge use could account for the relationship between social and economic divisions in states, on the one hand, and the existence of state death-penalty statutes, on the other.

<sup>33</sup> A system is “[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 (2d ed. 1989).

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both the network structure and the population possess properties that their members do not have.<sup>34</sup>

If a system comprised of institutions—i.e., a society—has an existence that is independent of its components (institutions), as a macrosociological framework contends, the system will tend to persist. A society, being a system, will normally be supported by its institutions, according to the framework, and it will therefore generally be characterized by inertia and by a propensity for self-preservation. This reasoning, if correct, permits the question posed in the prior paragraph to be answered tentatively—a society develops and utilizes particular concepts and doctrines of law because it is, and the concepts and doctrines of law help to make it, a self-sustaining entity.

A related, and important, macrosociological proposition is that, being a system composed of institutions, a society is independent of the individual human beings in it even though, at a given time, the society operates through these human beings. From a macrosociological perspective, individuals are irrelevant. As a result, the particular individuals who populate a society are believed to have no direct, enduring influence on the institution of law. In the macrosociological framework of this article, the content of law in a society, and the impact of law on patterns of social activity, are thus expected to be affected no more than temporarily by the individuals who write and enforce statutes, administrative agency rules, and court decisions.

Why are individuals unable to have a substantial, permanent impact on law—at least in a society such as the United States that has a large, heterogeneous population and a complex set of institutions? The chief reason is probably that individuals live their lives in a *system* and the system changes in response to system-level forces. Furthermore, individuals have, in historical terms, just a relatively brief presence in the system, i.e., in a society.<sup>35</sup> A society, on the other hand, lasts to the extent that it

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<sup>34</sup> Bruce H. Mayhew, *Structuralism Versus Individualism: Part I, Shadowboxing in the Dark*, 59 SOC. FORCES 335, 338–39 (1980).

<sup>35</sup> In 2006, life expectancy at birth in the United States was 77.7 years. Melonie Heron et al., *Deaths: Final Data for 2006*, NAT'L VITAL STATISTICS REP., Apr. 17, 2009, at 26 tbl. 7 (combining both sexes and all races) (vol.

is supported by its institutions, and a society will normally have this support because it possesses a built-in tendency to persist. Over the long run, accordingly, the institution of law responds to, and helps to fulfill, the needs of the system, not the wishes of the individuals in the system.<sup>36</sup>

#### *D. The Role of Law*

On the surface, the framework I am proposing may seem to imply that law is merely a puppet of the society in which it exists and that law performs no significant role in social life. The framework, however, warrants no such conclusion. If law were unimportant to society, law would not have lasted. Since the United States was founded, major changes have occurred in the concepts and doctrines of law, of course, but notably the institution of law was not abandoned. Instead, the institution of law continued to be used, although with revisions to its content, and it persisted because law was an instrument that had utility to society.

The durability of law in the United States,<sup>37</sup> in short, is evidence that law *does* something for society and that the societal benefits of law are not trivial. Because concepts of law (including the concept of “the rule of law”) and doctrines applying these concepts operate within a larger social system, their sociological functions must be understood in terms of that system.<sup>38</sup> However, if my framework is helpful in understanding law, the societal contributions made by the concepts and

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57, no. 14), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_14.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf).

<sup>36</sup> The needs of the system, however, are likely to be manifested typically in the expressed wishes of individuals. The concept of societal need is explained in *The Roots of Law*, *supra* note 26, at 672–77.

<sup>37</sup> An indicator of the durability of law in England and the United States is the commonly used phrase “the Western legal *tradition*.” As used in the phrase, the word “tradition” is an activity that has persisted over a considerable period of time. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2422 (3d ed. 1993).

<sup>38</sup> Krygier & Mason, *supra* note 3, at 9–10.

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doctrines of law in the United States differ appreciably from the contributions that these concepts and doctrines are widely believed to make. In my framework, the concept of “the rule of law” is useful to a society as an ideal,<sup>39</sup> but the present meaning of the concept<sup>40</sup> gives the concept undeserved importance because current assumptions regarding the societal functions of law are incorrect. A reassessment of the concept is thus required, even though the reassessment may prove uncomfortable and will lead to much less emphasis on the “rule of law.”

What are the societal contributions of law? The contributions are probably the same in the United States and in other countries with similar sociological, economic, and demographic characteristics. At present, unfortunately, the sociology of law has an insufficient body of empirically grounded knowledge to provide a definitive list of the contributions that law makes to society. Nonetheless, a society possessing characteristics similar to those of the United States seems likely to benefit from law in at least three important ways: (i) law provides symbols that endorse prevailing social values, (ii) law contributes to preserving or improving the reputation of socially and economically important segments of society, and (iii) law assists in maintaining trust and perceptions of fairness or, when trust and perceptions of fairness have been damaged, in rebuilding them.<sup>41</sup> Through these contributions, law strengthens the ties that individuals have to their society.

Under the above line of reasoning, the function of law in a complex, heterogeneous society is primarily sociological rather than economic. This conclusion, if correct, has important ramifications for understanding the societal bases of law. More precisely, assuming that law exists mainly for sociological reasons, the origin and evolution of law can be expected to

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<sup>39</sup> COTTERRELL, *supra* note 17, at 271.

<sup>40</sup> See *supra* notes 16–18 and accompanying text.

<sup>41</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, 812, 814–27 (2006) [hereinafter *Social Productivity*]; *Regulation of Mutual Fund Boards of Directors*, *supra* note 20, at 535–36.

develop and change in response to sociological factors, i.e., system-level properties and forces that are social in character. To illustrate, I next consider investment advisers and their regulation by the federal government.

## II. INVESTMENT ADVISERS

What is an investment adviser? Broadly defined, investment advisers supply investment advice, i.e., guidance on a potential or an existing commitment of economic resources to any type of property from which monetary profit is sought. In this article, however, investment advice is construed more narrowly, and investment advice, while obviously involving investment,<sup>42</sup> is deemed to be rendered only when the subject of the advice is a security.<sup>43</sup> Investment advisers, then, are concerned with, and only with, securities.

As will be explained in Part II.B. *infra*, Congress has adopted a statute that defines the occupation of “investment adviser” and authorizes the Securities and Exchange Commission to regulate the members of the occupation. The statute is the Investment Advisers Act (“Act”),<sup>44</sup> but before turning to its provisions, I describe the importance of investment advisers in the United States.

### A. Investment Advisers in the Economy

In general terms, an investment adviser is a party (i.e., individual or entity) that makes or recommends decisions to acquire and dispose of securities for particular clients.<sup>45</sup> To be

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<sup>42</sup> In the present context, the word “investment” refers to “[t]he conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business.” 8 OXFORD ENGLISH DICTIONARY 48 (2d ed. 1989).

<sup>43</sup> The elements of a security are discussed in *Social Productivity*, *supra* note 41, at 829–32.

<sup>44</sup> 15 U.S.C. §§ 80b-1 to -21 (2006).

<sup>45</sup> JEFFREY J. HAAS & STEVEN R. HOWARD, INVESTMENT ADVISER REGULATION IN A NUTSHELL 11–12 (2008).

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within the statutory definition, the decisions and recommendations, which may involve specific securities (e.g., the common stock of corporation X) or a specific type of security (e.g., common stock in general), must have been reached through the exercise of judgment.<sup>46</sup> Thus, decisions and recommendations are not investment advice if they arise mechanically (e.g., from a computer program) and if the human inputs into the mechanical process are disregarded. However, the decisions and recommendations that constitute investment advice are not entirely unfettered because the securities involved in the advice are, or are to be, owned by another party. An adviser is an agent for a client who is investing in securities and, as agent, must act in line with restrictions that the client has imposed on the type(s) of securities that can be bought and sold.<sup>47</sup>

In this regard, it is important to keep in mind that the instruments being purchased and sold are *securities*. Federal securities statutes do not identify the elements of a security but only list types of securities.<sup>48</sup> Unfortunately, the referent of the word “security” is neither certain nor constant. Whether or not an instrument is a security is context-dependent, can differ between societies at a given point in time, and can change within a society over time.<sup>49</sup> Nonetheless, widespread agreement seems to exist regarding one element of a security. In particular, the concept of a security connotes profit,<sup>50</sup> and as a result, the decisions and recommendations of an investment adviser are primarily, if not solely, aimed at producing economic gain for

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<sup>46</sup> *Id.*

<sup>47</sup> See Deborah A. DeMott, *The Mechanisms of Control*, 13 CONN. J. INT’L L. 233, 233–34 (1999).

<sup>48</sup> In the Advisers Act, the list of securities is in section 202(a)(18). 15 U.S.C. § 80b-2(a)(18) (2006).

<sup>49</sup> *Social Productivity*, *supra* note 41, at 829–31.

<sup>50</sup> See *Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990) (concluding that one criterion for whether an instrument is a security is whether the motivation for acquiring the instrument is profit); *United Hous. Found, Inc. v. Forman*, 421 U.S. 837, 852–53 (1975) (reasoning that profit has been an element in “all of the Court’s decisions defining a security”).

the clients of the adviser rather than change in social policies.

How important are investment advisers in the economy of the United States? Surprisingly, hardly any data exist, but the Securities and Exchange Commission (“Commission”) has estimated that, in 2001, investment advisers in the United States had discretionary authority over client assets<sup>51</sup> totaling nearly \$19 trillion.<sup>52</sup> This amount is large in absolute terms, of course, and it is large in relative terms, too.

The relative size of the assets entrusted to investment

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<sup>51</sup> An investment adviser has discretion with regard to the account of a client (i) if the adviser has been authorized by the client to make decisions on the securities that are to be purchased and sold for the account of the client or (ii) if the adviser has been authorized by the client to employ the investment adviser(s) that will make these decisions. Securities & Exchange Commission, Uniform Application for Investment Advisor Registration, Form ADV, Glossary 2, <http://www.sec.gov/about/forms/formadv-instructions.pdf>.

<sup>52</sup> Proxy Voting by Investment Advisers, 67 Fed. Reg. 60,841, 60,841 (Sept. 26, 2002). The estimate by the Commission is given only as a whole number, i.e., \$19 trillion. In addition, the estimate is not explicitly stated to be for investment advisers registered with the Commission. *Id.* If the estimate omits advisers registered with states, the total assets being managed by all investment advisers nationwide would, of course, be larger. An investment adviser is required to register with the Commission if its “principal office and place of business” is in a state that does not regulate advisers *or* if it has as a client an investment company that is registered with the Commission. Any other investment adviser cannot register with the Commission unless it manages assets worth at least \$25 million. 15 U.S.C. § 80b-3a(a) (2006). An investment adviser in a state that regulates advisers has the option of registering with the Commission if it manages assets of at least \$25 million but less than \$30 million, and such an investment adviser must register with the Commission if it manages assets worth \$30 million or more. 17 C.F.R. § 275.203A-1(a) (2009).

Of the approximately \$19 trillion being managed by investment advisers on a discretionary basis, according to the Release, roughly \$7 trillion was in mutual funds. Proxy Voting by Investment Advisers, 67 Fed. Reg. at 60,841 n.2. The estimate of \$19 trillion is presumably for 2001 (the calendar year prior to the Release), because at the end of 2001, the total net assets of mutual funds were \$6.975 trillion. INV. CO. INST., 2009 INVESTMENT COMPANY FACT BOOK 110 tbl.1 (49th ed. 2009), *available at* [http://www.icifactbook.org/pdf/2009\\_factbook.pdf](http://www.icifactbook.org/pdf/2009_factbook.pdf). The total net assets of mutual funds in 2001 were thus very close to the figure for those assets (*viz.*, \$7 trillion) that is given in the Release.

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advisers is illustrated by two economic yardsticks. The first is the gross domestic product (GDP) of the United States.<sup>53</sup> In 2001, the year for which the Commission estimated the assets managed by investment advisers, the United States domestically produced goods and services worth over \$10.1 trillion.<sup>54</sup> Consequently, the wealth controlled by investment advisers during 2001 was, in amount, more than 1.8 times the size of the GDP of the United States economy. Otherwise stated, the economy of the United States would have needed about 1.8 years to generate the wealth over which investment advisers had discretionary management authority in 2001.

GDP, however, may not be the most appropriate gauge of the relative importance of investment advisers in the economy of the United States. While the assets controlled by investment advisers and GDP are both monetary in nature, the former is a measure of financial resources that the United States has accumulated—in a sense, a nest egg of the country. GDP, on the other hand, is a measure of the output of the economy of a country in a single year from labor and property situated in the country. Comparing the two measures may be juxtaposing apples and oranges.

One measure that may be more suitable for judging the societal significance of investment advisers is the current monetary value of fixed assets in the United States. Fixed assets are buildings (residential and non-residential), equipment, and

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<sup>53</sup> Gross domestic product (GDP) is “the total output of goods and services produced by labor and property located in the United States, valued at market prices.” U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008 425 (127th ed. 2007). Gross national product (GNP), on the other hand, is “the output attributable to all labor and property supplied by United States residents.” *Id.* at 426. GDP is the output of labor and property that are within the United States; the labor and property may be that of residents of the United States or residents of other countries. Carol S. Carson, *Replacing GNP: The Updated System of National Economic Accounts*, BUS. ECON., July, 1992, at 44, 46. GNP is the output of the labor and property of residents of the United States, but the labor and property may be situated in any country. *Id.* at 46. GDP has replaced GNP as the chief measure of economic production in the United States. *Id.* at 44.

<sup>54</sup> U.S. CENSUS BUREAU, *supra* note 53, at 429 tbl.645.

software of private parties and governments.<sup>55</sup> Like assets managed by investment advisers, fixed assets constitute accumulated wealth, and a comparison of the two is thus likely to be more appropriate than a comparison of the assets managed by investment advisers and GDP. Moreover, the two measures do not overlap in the wealth they capture because they are different forms of wealth. Assets managed by investment advisers represent financial wealth; fixed assets represent nonfinancial wealth.

In 2001, the market value of fixed assets in the United States was approximately \$28.6 trillion.<sup>56</sup> The wealth being managed on a discretionary basis by investment advisers was thus equal to about two-thirds of the wealth in fixed assets. Because fixed assets are composed of all buildings, equipment and software, they are central components of the level of affluence in the United States, and for every three dollars of fixed assets, there were two additional dollars under the discretionary management of investment advisers.

Whichever yardstick is preferred—gross domestic product or fixed assets—it is clear that the occupation of investment adviser has become an important component of the financial sector of the United States. As the Commission has noted, “investment advisers play a key role in the economic life of America today.”<sup>57</sup> However, securities and the society in which they trade are inextricably linked, and although the point is not often made explicitly, the occupation of investment adviser cannot be divorced from the society in which the occupation functions. As a result, the occupation has been a topic of legislation by

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<sup>55</sup> BUREAU OF ECONOMIC ANALYSIS, U.S. DEP’T OF COMMERCE, FIXED ASSETS AND CONSUMER DURABLE GOODS IN THE UNITED STATES, 1925-97 M-5 (2003), *available at* [http://www.bea.gov/national/pdf/Fixed\\_Assets\\_1925\\_97.pdf](http://www.bea.gov/national/pdf/Fixed_Assets_1925_97.pdf).

<sup>56</sup> Bureau of Economic Analysis, Table 1.1. Current-Cost Net Stock of Fixed Assets and Consumer Durable Goods, <http://www.bea.gov/national/FA2004/SelectTable.asp> (follow “Table 1.1 Current-Cost Net Stock of Fixed Assets and Consumer Durable Goods” hyperlink) (last visited Feb. 13, 2010).

<sup>57</sup> Investment Adviser Year 2000 Reports, 1998 SEC LEXIS 1339, at \*4.

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Congress and, pursuant to the legislation, subject to oversight by the Commission.

*B. Investment Advisers Act*

Important federal legislation dealing with securities was not enacted in the United States until the economic depression of the 1930s.<sup>58</sup> In 1933, Congress passed the first piece of legislation, the Securities Act,<sup>59</sup> and a year later adopted the Securities Exchange Act.<sup>60</sup> In 1940, Congress approved the Investment Advisers Act<sup>61</sup> and the Investment Company Act.<sup>62</sup> These four statutes supply most of the foundation for the regulation of securities and the securities industry in the United States today. Of the four statutes, however, we will be concerned with just one—the Investment Advisers Act (“Advisers Act”).

As shown above,<sup>63</sup> the occupation of investment adviser is currently of major significance to the financial sector in the United States, but the salience of the occupation is not recent. Investment advisers became a noticeable feature of the sector initially during the 1930s.<sup>64</sup> The expansion of the occupation at this time has been attributed to the volatility of stock prices that started in the latter half of 1929<sup>65</sup> and that caused investors to be

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<sup>58</sup> Mindy Olson, Note, *The Securities Fraud Deterrence and Investor Restitution Act: More Effective Than Current Regulation?*, 30 IOWA J. CORP. L. 425, 427–28 (2005).

<sup>59</sup> Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a to 77z-3 (2006)).

<sup>60</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a to 78oo (2006)).

<sup>61</sup> Investment Advisers Act, ch. 686, title II, 54 Stat. 847 (1940) (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21 (2006)). The Investment Advisers Act took effect on November 1, 1940. *Id.* at title II, § 221, 54 Stat. 857 (codified at 15 U.S.C. § 80b-21 (2006)).

<sup>62</sup> Investment Company Act, ch. 686, title I, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. §§ 80a-1 to 80a-64 (2006)).

<sup>63</sup> See *supra* Part II.A.

<sup>64</sup> S. REP. NO. 76-1775, at 21 (1940); H.R. REP. NO. 76-2639, at 27 (1940).

<sup>65</sup> A chart of the Dow Jones Industrial Average on each trading day from

wary of long-term commitments to constant sets of securities.<sup>66</sup> Although the exact monetary value of assets managed by investment advisers in the 1930s is unknown, the amount under management was believed by Congress to be sufficiently large to warrant enactment of a statute—the Advisers Act—authorizing regulation of the occupation by the federal government.<sup>67</sup> In writing the Act, therefore, Congress not surprisingly incorporated an explicit statement that the impact of the occupation on the economy in general and the financial sector in particular had been nationwide in scope and material in degree.<sup>68</sup>

### 1. Statutory Definition

Section 202(a)(11) of the Advisers Act, stripped of its statutory exclusions,<sup>69</sup> defines an investment adviser as:

any 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

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January 1920 through December 1939 is available at <http://stockcharts.com/charts/historical/djia19201940.html>.

<sup>66</sup> H.R. DOC. NO. 76-477, at 5 (1939); *Investment Trusts and Investment Companies, Hearings on S. 3580 Before a Subcomm. of the Sen. Comm. on Banking & Currency*, 76th Cong. 1004 (1940) (statement of Research Dep't, Ill. Legis. Council), available at HeinOnline, U.S. Federal Legislative History Library. A study of financial markets has ascribed the shift from passive to active management of securities portfolios, and the adoption of the techniques currently used to reduce risk in securities portfolios, to the volatility of stock prices during the 1970s and to the investment in securities of large sums by entities at that time. PETER L. BERNSTEIN, *CAPITAL IDEAS: THE IMPROBABLE ORIGINS OF MODERN WALL STREET* 7–9 (1992). A chart of the Dow Jones Industrial Average on each trading day from January 1960 through December 1980 is available at <http://stockcharts.com/charts/historical/djia19601980.html>.

<sup>67</sup> S. REP. NO. 76-1775, at 21 (1940); H.R. REP. NO. 76-2639, at 27 (1940).

<sup>68</sup> Investment Advisers Act, 15 U.S.C. § 80b-1 (2006).

<sup>69</sup> *Id.* § 80b-2(a)(11)(A)-(G).

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of a regular business, issues or promulgates analyses or reports concerning securities.<sup>70</sup>

The above definition (“statutory definition”), like any law that is designed to achieve breadth, employs concepts of general application. Given this generality and the resulting ambiguities in the statutory definition, the staff of the Commission has found it necessary to publish two interpretations of the definition.<sup>71</sup> The initial interpretation appeared in 1981,<sup>72</sup> but a second interpretation—Release No. IA-1092—superseded it in 1987, i.e., just six years later.<sup>73</sup> Because Release No. IA-1092 is important to understanding the statutory definition of investment adviser, a review of pertinent portions of the Release is warranted.

*2. Release No. IA-1092*

According to Release IA-1092, a person is an investment advisor for purposes of the Advisers Act if all of the following conditions exist:

- (i) The person furnishes advice, reports, or analyses that deal with securities;

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<sup>70</sup> *Id.* § 80b-2(a)(11). A “person” can be a human being or an entity. *Id.* § 80b-2(a)(5), -2(a)(16).

<sup>71</sup> The interpretations are those of the staff of the Division of Investment Management. *Id.* The current structure of the Commission includes five Divisions and eighteen Offices. Sec. & Exch. Comm’n, Division and Offices Homepages, <http://www.sec.gov/divisions.shtml> (last visited Jan. 27, 2010). The Division of Investment Management is responsible for construing the Investment Advisers Act and the Investment Company Act. *See* Sec. & Exch. Comm’n, Division of Investment Management, <http://www.sec.gov/divisions/investment.shtml> (last visited Jan. 27, 2010).

<sup>72</sup> Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financial Related Services, 46 Fed. Reg. 41,771 (Aug. 18, 1981).

<sup>73</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, 52 Fed. Reg. 38,400 (Oct. 16, 1987).

- (ii) The services in (i) constitute a business;<sup>74</sup> and
- (iii) The services in (i) are supplied for compensation.<sup>75</sup>

An additional condition, however, is embedded in (i). While the additional condition is not expressly addressed by the Release, it is basic to the statutory definition of investment adviser. The condition, which arises from the construction of the Advisers Act by the United States Supreme Court,<sup>76</sup> recognizes that advice, reports, and analyses regarding securities—the services in (i)—can be of different types. For a person to qualify as an investment adviser under the Advisers Act, however, the person needs to provide a particular type of service. Specifically,

- (iv) The services in (i) must involve individualized treatment of the recipient of the services.

Thus, if the services do not take into account the financial and psychological profile of the person receiving the services—i.e., if the services are not tailored to the recipient—the person delivering the advice, reports or analyses will not be an investment adviser.<sup>77</sup>

It is unfortunate that condition (iv) is not discussed in

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<sup>74</sup> The statutory definition, which is reproduced in the text accompanying note 70 *supra*, seems to cover two distinct types of business activity that differ in, *inter alia*, frequency. HAAS & HOWARD, *supra* note 45, at 13. One type entails a “business” of providing advice on securities; the other type entails a “regular business” of providing analyses or reports on securities. 15 U.S.C. § 80b-2(a)(11). However, the staff has taken the position that the two references to business in section 202(a)(11) apply to just a single type of activity. 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, 52 Fed. Reg. at 38,402.

<sup>75</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, 52 Fed. Reg. at 38,402.

<sup>76</sup> *Lowe v. SEC*, 472 U.S. 181 (1985).

<sup>77</sup> *Id.* at 207–08 (“The Act was designed to apply to those persons . . . who provide personalized advice attuned to a client’s concerns, whether by written or verbal communication.”).

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Release IA-1092.<sup>78</sup> An in-depth discussion of this condition would have probably suggested indicators of the presence or absence of individualized treatment under the Advisers Act. In doing so, the discussion would have underscored the prominence of individualism in the culture of the United States.<sup>79</sup> Individualism, often a concomitant or component of privacy, is manifested in doctrines of U.S. law on a variety of topics, including employment discrimination,<sup>80</sup> immigration,<sup>81</sup> pornography,<sup>82</sup> sexuality and reproduction,<sup>83</sup> and violent crime.<sup>84</sup> Individualism also forms a cornerstone of U.S. law on securities,<sup>85</sup> and its appearance in the Advisers Act, therefore, should not be unexpected.

Condition (iv), however, is not alone in having relevance to the macrosociological framework of this article. Conditions (ii) and (iii) are pertinent, too. With regard to (ii)—which focuses on the business element of the statutory definition—the Release concludes that a person is engaged in the business of being an investment adviser if the person makes public representations that the person is an investment adviser, if the person receives identifiable compensation that is linked to furnishing advice on securities, or if the person other than sporadically provides clients with recommendations, analyses or

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<sup>78</sup> The Release, in answering question (i), refers to a recipient of the services as a *client*. 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, 52 Fed. Reg. 38,400, 38,402 (Oct. 16, 1987). The Release, accordingly, may have implicitly recognized question (iv) and incorporated the position of the U.S. Supreme Court in *Lowe*.

<sup>79</sup> Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1526 (2005) (finding with data from the World Values Survey that, among twenty-five countries, the United States had the highest level of individualism).

<sup>80</sup> See *The Roots of Law*, *supra* note 26, at 631–35.

<sup>81</sup> *E.g.*, *McLeod v. Peterson*, 283 F.2d 180, 183 (3d Cir. 1960).

<sup>82</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>83</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 452–53 (1972).

<sup>84</sup> *E.g.*, *Winston v. Lee*, 470 U.S. 753 (1985).

<sup>85</sup> Barbara Black & Jill I. Gross, *Economic Suicide: The Collision of Ethics and Risk in Securities Law*, 64 U. PITT. L. REV. 483, 486 (2003).

reports focusing on particular securities or particular types of securities.<sup>86</sup> Because the Release separates these conditions with the word “or,” it contemplates that any one of the conditions will suffice to create a business under the Advisers Act.<sup>87</sup>

The Release, of course, is an interpretation of a statute by an administrative agency, and as such, it is not binding on the judiciary.<sup>88</sup> If Congress has not defined a word in a statute, federal courts rather than federal executive-branch agencies are the ultimate arbiters of the meaning of the word.<sup>89</sup> Notably, neither the Advisers Act itself<sup>90</sup> nor the legislative history of the Act<sup>91</sup> supplies a definition of the word “business.” To date, moreover, no federal court seems to have departed from the Release when interpreting the word “business” in the Advisers Act definition of investment adviser, but inasmuch as the judiciary is not compelled to follow the Release, the judiciary may eventually assign to the word “business” the meaning that was generally accepted in the United States when the Advisers Act was adopted.<sup>92</sup> Indeed, the meaning of the word “business” to the public at the time the statutory definition was incorporated into the Advisers Act may be preferred by the judiciary<sup>93</sup> inasmuch as Congress has not altered the definition since

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<sup>86</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, 52 Fed. Reg. at 38,402.

<sup>87</sup> *Id.*

<sup>88</sup> Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 97 (1983).

<sup>89</sup> See *Bedroc Ltd. v. United States*, 541 U.S. 176, 182–84 (2004).

<sup>90</sup> 15 U.S.C. § 80b-2(a) (2006).

<sup>91</sup> S. REP. NO. 76-1775, at 20-22 (1940); H.R. REP. NO. 76-2639, at 27–28 (1940).

<sup>92</sup> See *Smith v. United States*, 508 U.S. 223, 228 (1993); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 123–24 (6th ed. 2000).

<sup>93</sup> *Bedroc Ltd.*, 541 U.S. at 184. In ascertaining the referents of three words in a section of the Securities Exchange Act, the U.S. Supreme Court has relied on a dictionary published in the year the Act was adopted by Congress. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 nn.20, 21 (1976).

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formulating it in 1940.<sup>94</sup>

A reason for believing that the general understanding of the word “business” in 1940 comports more fully with congressional intent than the criteria for the existence of a business<sup>95</sup> that were developed by the staff of the Commission is that the two Releases were issued by the staff in the 1980s. The Advisers Act, however, was adopted by Congress in 1940, four decades earlier. Because the Releases reflect social and economic conditions at the time they were written, their criteria for a business cannot be blindly accepted. On the contrary, their criteria should be approached with some skepticism.

If the judiciary were to construe the word “business” in accordance with the way the word was employed in public discourse when Congress approved the Advisers Act, what would be the meaning of the word? According to two dictionaries published in the first half of the 1930s, a period close to the year (1940) in which the Act was adopted, “business” includes:

“Any particular occupation or employment habitually engaged in, esp. for livelihood or gain.”<sup>96</sup>

“12. A person’s official or professional duties as a whole; stated occupation, profession, or trade. 13. In general sense: Action which occupies time, demands attention and labour; *esp.* serious occupation, work, as opposed to pleasure or recreation . . . . 14.b. A

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<sup>94</sup> Compare Investment Advisers Act of 1940, ch. 686, title II, § 202(a)(11), 54 Stat. 847, 848 (1940) with 15 U.S.C. § 80b-2(a)(11) (2006).

<sup>95</sup> The criteria can be found in Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financial Related Services, 46 Fed. Reg. 41,771, 41,772–73 (Aug. 18, 1981) and in 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, 52 Fed. Reg. 38,400, 38,402–03 (Oct. 16, 1987).

<sup>96</sup> WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 296–97 (1932) (def. 2.b).

particular occupation; a trade or profession.”<sup>97</sup>

To combine the above, a business is a recurring,<sup>98</sup> profit-seeking activity of a person (human being or entity). In addition, the society in which the activity occurs must identify the activity as a business rather than as a form of relaxation or a means of amusement. A business, consequently, has the purpose of obtaining an economic return and is an activity that society classifies as a business.

The preceding composite of the dictionary meanings (“composite”), however, is at variance with the position taken by the Release. In this regard, two of the factors listed in the Release are pertinent. First, public representations by a person that the person is an investment adviser suffice to put the person into business as an investment adviser.<sup>99</sup> Second, the receipt of compensation for furnishing advice on securities is enough to cause a person to be in business as an investment adviser.<sup>100</sup> According to the Release, either factor by itself creates a business.<sup>101</sup>

Unlike the Release, the composite of the dictionary definitions does not allow any one factor to cause an activity to be a business. Under the composite, a person would be in the business of being an investment adviser only if the person actually furnished clients with advice, reports, or analyses dealing with securities; if the person did so repeatedly (i.e., on a regular basis); *and* if the person expected or accepted a monetary payment for these activities. To illustrate the composite, a company that publicly portrays itself as an investment adviser would not be in the investment adviser business unless it actually has clients and serves them as an investment adviser. Similarly, an individual would not be in the

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<sup>97</sup> 1 OXFORD ENGLISH DICTIONARY 1205 (1933).

<sup>98</sup> Sec. & Exch. Comm’n v. Fifth Ave. Coach Lines, Inc., 289 F. Supp. 3, 31 (S.D.N.Y. 1968) (defining words in a section of the Investment Company Act and observing that the word “‘Business’ implies continued activity”), *aff’d*, 435 F.2d 510 (2d Cir. 1970).

<sup>99</sup> *Supra* note 86 and accompanying text.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

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investment adviser business under the composite simply because he or she is paid, or expects to be paid, a sum of money for acting as an investment adviser to a single client on a single occasion. If the position adopted in the Release is used, on the other hand, both the company and the individual would be in the investment adviser business.

Before leaving the composite, a final point merits emphasis. Under the composite, a necessary condition for an activity to be designated a business is that the society in which the activity takes place must label the activity as a business rather than as entertainment. However, a society has latitude in how it classifies and deals with phenomena. Thus, a society may consider a particular activity to be unacceptable, as in the case of prostitution, and when it does so, it will attempt to eliminate the activity through informal means and/or through law.<sup>102</sup> On the other hand, a society may not be cognizant of or concerned with the impact of a phenomenon that is materially affecting it. An illustration is the size and continuing growth of population, a topic that is relevant to the content of law because population density shapes law.<sup>103</sup> In recent decades, the population of the world has been increasing by more than three-quarters of a billion people every ten years,<sup>104</sup> but the ramifications of population growth in the United States<sup>105</sup> and elsewhere for

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<sup>102</sup> As of 2006, prostitution was unlawful in every state of the United States except in certain counties of Nevada and except in certain circumstances in Rhode Island. Lauren M. Davis, *Prostitution*, 7 *GEO. J. GENDER & L.* 835, 836–37 (2006).

<sup>103</sup> *E.g.*, Kenneth D. Wald et al., *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, 40 *AM. J. POL. SCI.* 1152 (1996).

<sup>104</sup> *See* U.S. CENSUS BUREAU, TOTAL MIDYEAR POPULATION FOR THE WORLD: 1950–2050 (2009), <http://www.census.gov/ipc/www/idb/worldpop.php>. The U.S. Census Bureau estimates that the population of the world was 4.3 billion in 1978 and 6.7 billion in 2008. *Id.*

<sup>105</sup> The resident population of the United States, according to the decennial census, was 151.3 million in April 1950 and 281.4 million in April 2000. U.S. CENSUS BUREAU, *supra* note 53, at 7 tbl.1. The U.S. resident population is estimated to have been 307.0 million on July 1, 2009. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR

economic prosperity and social stability<sup>106</sup> are not currently attracting much attention among Americans.<sup>107</sup>

The way in which a phenomenon is perceived by a society, in short, does not depend solely on the nature of the phenomenon. It is also a function of societal conditions, including the cultural dimensions of social life, and in this sense, the problems that confront a society are socially constructed.<sup>108</sup> For the Advisers Act, the social character of societal designations means that whether a particular undertaking is deemed to be a “business”—and, as discussed *infra*, whether the undertaking is “for compensation” and whether an item *is* compensation—depends on circumstances in the society that hosts the undertaking. Unfortunately, the sociological variables bearing on whether an activity is considered to be the business of investment advising are unknown and will remain so until they have been the subject of rigorous research.

Finally, we consider condition (iii)—the compensation element—in the statutory definition of investment adviser. While the condition does not require a lengthy exploration, two points should be made. First, insofar as compensation is economic in nature—a position that seems to be taken by the Release<sup>109</sup>—it is

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THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2009 (2009), <http://www.census.gov/popest/states/NST-ann-est.html>.

<sup>106</sup> JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 6–7 (2005) (finding that human population growth was a factor causing the disappearance of societies in the past).

<sup>107</sup> Derek Seabury Hoff, Are We Too Many? The Population Debate and Policymaking in the Twentieth-Century United States 10–12 (Jan. 2006) (unpublished Ph.D. dissertation, University of Virginia) (on file with Widener University Library). The present failure to address the problem of U.S. population growth also characterizes scholarship on law. A notable exception is Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1 (2007).

<sup>108</sup> Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. SOC. 209, 210–12 (1985) (examining social problems as societal constructs).

<sup>109</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, 52 Fed. Reg. 38,400, 38,403 (Oct. 16, 1987); HAAS & HOWARD, *supra* note 45, at 16.

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a component of a business, which is condition (ii).<sup>110</sup> Thus, when compensation is economic, its treatment as a separate element is unnecessary.<sup>111</sup>

The second point involves the matter of whether all compensation is economic. In this regard, it is pertinent that section 17(e)(1) of the Investment Company Act forbids a person who is affiliated with a Commission-registered investment company from accepting non-salary or non-wage compensation for selling property to, or buying property from, the investment company if, in the transaction, the affiliated person is an agent.<sup>112</sup> Notably, section 17(e)(1) is part of a statute that was a companion to the Advisers Act,<sup>113</sup> and both in section 17(e)(1) and in section 202(a)(11) of the Advisers Act, Congress

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<sup>110</sup> *Supra* note 86 and accompanying text.

<sup>111</sup> The Release raises a further point when, in discussing the compensation element, it refers to “the receipt of any economic benefit,” to whether a “fee is charged,” and to whether compensation is “paid.” 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, 52 Fed. Reg. at 38,403. The statutory definition of investment adviser requires only that covered activities be “for compensation.” 15 U.S.C. § 80b-2(a)(11) (2006) (emphasis added). Consequently, the compensation element of the statutory definition is probably satisfied not only by a receipt/payment of compensation but also by an expectation of compensation. Whether such an expectation is present in a situation undoubtedly depends in part on social convention and culture.

<sup>112</sup> 15 U.S.C. § 80a-17(e)(1) (2006). The wording of section 17(e)(1) has not been amended since the Investment Company Act was adopted in 1940. *Compare* Investment Company Act, ch. 686, title I, § 17(e)(1), 54 Stat. 789, 816 (1940) *with* 15 U.S.C. § 17(e)(1) (2006). Section 17(e)(1) covers both a “first-tier” affiliated person (i.e., a person affiliated with a registered investment company) and a “second-tier” affiliated person (i.e., a person affiliated with a first-tier affiliated person). 15 U.S.C. § 80a-17(e)(1). “Affiliated person” is defined in section 2(a)(3) of the Investment Company Act. *Id.* § 80a-2(a)(3) (2006).

<sup>113</sup> The Investment Company Act and the Advisers Act were included in Public Law No. 76-768. Investment Company Act of 1940, ch. 686, tit. I, 54 Stat. 789 (1940); Investment Advisers Act of 1940, ch. 686, tit. II, 54 Stat. 847 (1940). The stated purpose of Public Law No. 76-768 was inter alia “[t]o provide for the registration and regulation of investment companies and investment advisers . . . .” 54 Stat. at 789.

incorporated compensation as an element. Neither piece of legislation defines the word “compensation,” but inasmuch as the two statutes were adopted together, Congress is unlikely to have wanted the word to be defined in one way in the Investment Company Act and in a different way in the Advisers Act.

Because an affiliate of an investment company includes the investment adviser to the company,<sup>114</sup> section 17(e)(1) covers investment advisers to registered investment companies.<sup>115</sup> Under existing case law, an item is compensation under section 17(e)(1) as long as the item is *thought* to be a benefit by the person accepting it,<sup>116</sup> i.e., the attractiveness of an item to a person determines whether, for that person, the item constitutes compensation. Of course, while an item may be attractive for an economic reason, it may also be attractive for a reason that is not economic. Therefore, an item would apparently qualify as compensation under section 17(e)(1) even if it has no significant economic (e.g., monetary) value as long as it has significant psychological (e.g., emotional) value or significant social (e.g., reputational) value to the person who wants or receives it.<sup>117</sup>

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<sup>114</sup> 15 U.S.C. § 80a-2(a)(3)(E) (2006). The adviser is a first-tier affiliated person of the investment company. *Id.*

<sup>115</sup> Officers, employees, and directors of an investment adviser are affiliated with the investment adviser. *Id.* § 80a-2(a)(3)(D) (2006). As first-tier affiliated persons of the investment adviser, they are second-tier affiliated persons of an investment company that is served by the adviser. Section 17(e)(1) covers both first-tier and second-tier affiliated persons of a registered investment company. *Supra* note 112. Consequently, if an investment company is registered with the Commission, section 17(e)(1) applies not only to its investment adviser but also to the officers, employees, and directors of the adviser. 15 U.S.C. § 80a-17(e)(1).

<sup>116</sup> *United States v. Ostrander*, 999 F.2d 27, 31 (2d Cir. 1993).

<sup>117</sup> *Ostrander*, 999 F.2d at 31. This conclusion, which is derived from case law, is consistent with definitions of “compensation” in dictionaries published shortly before the Investment Company Act was adopted. The Investment Company Act was enacted in 1940, as was the Advisers Act. Ch. 686, title I, 54 Stat. 789 & title II, 54 Stat. 847 (1940). Definitions in a contemporary dictionary are evidence of the meaning of words in a statute. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 & nn.20, 21 (1976).

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Assuming that Congress wanted the word “compensation” to have the same meaning in section 202(a)(11) of the Advisers Act as it has in section 17(e)(1) of the Investment Company Act, a person could become an investment adviser either from compensation that is economic or from compensation that is not economic. If this conclusion is correct—i.e., if compensation under section 202(a)(11) can be economic or non-economic—the statutory definition of investment adviser fits comfortably within a macrosociological framework. For example, the relative appeal of money versus an item other than money evidently varies across subcultures within a society,<sup>118</sup> and the relative appeal of one type of non-money item versus another is almost certainly a function of culture, too.<sup>119</sup> If these propositions are correct, the

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LANGUAGE 455, 1784 (1932) defines “compensation” to include “[t]hat which constitutes, or is regarded as, an equivalent or recompense,” and defines “recompense” as a noun to encompass “[a]n equivalent returned for anything done, suffered, or given.” A synonym listed for “compensation” and for “recompense” is “reward.” *Id. Accord*, 2 OXFORD ENGLISH DICTIONARY 717 (1933) (definitions 1 and 2 of “compensation”); 8 OXFORD ENGLISH DICTIONARY 259 (1933) (definition 3 of “recompense” in its substantive sense). Under the foregoing definitions, compensation can be non-economic.

<sup>118</sup> See R. L. Stirrat, *Money, Men and Women*, in MONEY AND THE MORALITY OF EXCHANGE 94, 98–99 (J. Parry & M. Bloch eds., 1989) (describing differences between women and men in money-related views and behavior in a village in Sri Lanka). Cf. Celia J. Falicov, *The Cultural Meanings of Money: The Case of Latinos and Anglo-Americans*, 45 AM. BEHAV. SCIENTIST 313, 314, 321, 326 (2001) (contending that social considerations, especially ties within nuclear and extended families, are more important as incentives to working-class Latinos in the United States than to middle-class Anglo-Americans and that the uses of money accordingly differ between the two subcultures). See generally Maurice Bloch & Jonathan Parry, *Introduction: Money and the Morality of Exchange*, in MONEY AND THE MORALITY OF EXCHANGE, *supra*, at 1, 1 (concluding from anthropological studies that the way money is viewed and used is not the same in all cultures); Viviana A. Zelizer, *The Social Meaning of Money: “Special Monies,”* 95 AM. J. SOCIOL. 342, 351 (1989) (contending that the uses, users, allocation, and sources of money in a society are affected by culture and social structure).

<sup>119</sup> Cf. Stacey Menzel Baker et al., *From Despicable to Collectible: The Evolution of Collective Memories for and the Value of Black Advertising*

issue of whether a person satisfies the compensation element (as well as other elements) of the statutory definition of investment adviser is not determined by factors internal to the institution of law but by factors external to the institution. The latter factors can be expected to include mainly macrosociological variables.

### III. AN EMPIRICAL STUDY OF ANTECEDENTS OF LAW

A premise of this article is that law does not arise randomly but is anchored in society. Under this view, the concepts and doctrines of law that are central to a society are not attributable to individuals and personalities, but are explained instead by sociological, demographic, and/or economic conditions in the society. However, the premise requires appreciably more empirical support than it currently possesses.<sup>120</sup> Relevant evidence seems likely to be produced by research on the societal factors that may lie behind the conditions that are the immediate antecedents shaping regulatory law (i.e., law designed to suppress or encourage a particular type of activity). If a factor that potentially affects an immediate antecedent of regulatory law can be measured quantitatively, a multivariate statistical test

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*Memorabilia*, 33 J. ADVERTISING 37 (2004) (describing a type of item whose appeal changed over time in the United States). See generally Geert Hofstede & Robert R. McCrae, *Personality and Culture Revisited: Linking Traits and Dimensions of Culture*, 38 CROSS-CULTURAL RES. 52, 62–64, 79 (2004) (finding that differences in culture are associated with differences in personality and hypothesizing that the former produce the latter).

<sup>120</sup> The most persuasive of the empirical studies that support the premise are summarized in *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 11–13. A recently published study has found that higher rates of homicide in U.S. counties lower the probability that defendants charged with homicide will be convicted; for defendants who are convicted, higher rates of homicide shorten the prison terms imposed. Mark Cooney & Callie Harbin Burt, *Less Crime, More Punishment*, 114 AM. J. SOCIOL. 491 (2008). Homicide, accordingly, seems to be undeterred by punishment through the institution of law, i.e., by conviction and imprisonment. *Id.* at 494–95, 514. This finding is consistent with the evidence from social science research that, in a society, patterns of social activity materially affect, but are not materially affected by, the institution of law. *Supra* note 20.

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can ascertain whether the factor is related to the antecedent and can estimate the strength of any relationship found.

In Part II *supra*, I examined federal law on the occupation of investment adviser as an example of regulation by government. This law and the occupation it regulates were intended to be a case study, and the regulation of investment advisers was reviewed on the assumption that law concerned with one type of activity can lead to an understanding of the antecedents of regulatory law on multiple types of activity that are important to society. Notably, the Advisers Act embodies a concern with morality,<sup>121</sup> a concern whose presence in the Act should not be surprising since law generally is grounded in morality.<sup>122</sup> Any factor that molds morality, therefore, is likely to help in explaining the development and disappearance of law-based regulation directed at the many activities in a society that are tied to morality.

In this Part of the article, I present an analysis of quantitative data that was undertaken to identify factors that may affect whether morality is classified by adults in the United States as a public issue or a private matter. Because law in a democracy eventually incorporates prevailing morality, law and morality cannot be divorced. However, the assignment of a morality-linked form of behavior to the public sphere or to the private sphere is critical to the presence or absence of regulatory law addressing such behavior. The factors that are responsible for defining morally relevant behavior as public or private thus potentially account for whether law exists to regulate the behavior.

The data that I analyzed are from the General Social Survey ("GSS"). The GSS, which began in 1972, annually or biennially samples adults residing in the United States and, through face-to-face interviews, gathers information on a wide range of topics. The topics covered by the GSS, however, are not identical in every survey. The data for the instant study are

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<sup>121</sup> Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186–87 (1963).

<sup>122</sup> Don Welch, *The State As a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540, 542–43, 549 (1988).

from the GSS that was conducted in 1991 because of the set of variables measured in that year. The 1991 GSS used multi-stage cluster sampling to choose blocks of dwelling units and then, within chosen blocks, quota sampling to select individuals. In 1991, the GSS was confined to English-speaking residents.<sup>123</sup>

### A. Variables

The dependent variable—the phenomenon that I sought to explain—was derived from responses to two questions in the 1991 GSS that focus on a fundamental dimension of social life, and I therefore regard the responses as measures of values rather than of opinions.<sup>124</sup> The GSS assigns mnemonic labels to its variables, and the labels for the two questions that formed the basis of the dependent variable in my study were PERRIGHT and SOCRIGHT. The wording of each question is reproduced in Table 1, and as is evident from their wording, both questions dealt with morality. In the sociology of law, morality and the factors that affect it are important subjects for research because different views of morality are central to divisive issues facing government<sup>125</sup> and because law will not usually regulate an activity in a democratic society unless the society considers the activity to be immoral<sup>126</sup> and public.<sup>127</sup> Although PERRIGHT and

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<sup>123</sup> NAT'L OPINION RESEARCH CTR., GENERAL SOCIAL SURVEYS, 1972–2008: CUMULATIVE CODEBOOK 2188 (2009), <http://www.norc.org/GSS+Website/Documentation> (follow “Final 2008 GSS Codebook” hyperlink).

<sup>124</sup> Social values and opinions are defined and distinguished as concepts in *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 14.

<sup>125</sup> Christopher Z. Mooney & Richard G. Schuldt, *Does Morality Policy Exist? Testing a Basic Assumption*, 36 POL'Y STUD. J. 199, 204 tbl.1, 209 tbl.5, 210 & tbl.6 (2008).

<sup>126</sup> The United States Supreme Court has observed that “[t]he law . . . is constantly based on notions of morality.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The holding in *Bowers*—that a statute prohibiting private same-sex sexual relations is not unconstitutional—was overruled seventeen years later in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). However, the Court in *Bowers* was not incorrect in writing that the substance of morality shapes the doctrines of law. Following the decision in *Bowers* in 1986, the

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SOCRIGHT concentrated on morality in general rather than on the morality of a specific type of behavior, the general is likely to inform the specific, and the antecedents of morality in its generic form can be expected to offer insight into the content of law at a particular time and change in law over time.

Respondents who agreed with PERRIGHT and disagreed with SOCRIGHT were assumed to consider morality a private matter; conversely, respondents who disagreed with PERRIGHT and agreed with SOCRIGHT were assumed to view morality as a public issue.<sup>128</sup> To capture the dimension that links PERRIGHT and SOCRIGHT, a new variable was created, and on the new variable, the former respondents were coded 1 and the latter respondents were coded 0. The new variable was labeled MORALITY and was used in the regression model as the dependent variable. Respondents who could not be coded 1 or 0 on MORALITY—e.g., respondents who agreed both with PERRIGHT and with SOCRIGHT—were omitted from the analysis. As a result, the use of MORALITY as the dependent variable imposed on the data

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belief that “homosexuality should be considered an acceptable alternative lifestyle” became increasingly frequent among adults in the United States, and by 1999, a slight majority held this belief. Public Agenda, *Acceptance of Homosexuality Has Grown Significantly*, <http://www.publicagenda.org/charts/acceptance-homosexuality-has-grown-significantly-0> (last visited Feb. 14, 2010). Morality has been defined as the “conduct conforming to the customs or accepted standards of a particular culture or group.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1469 (3d ed. 1993). As so defined, the state of morality at the time of *Lawrence* forms a foundation of the holding of the Supreme Court in the case.

<sup>127</sup> See *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 15–18.

<sup>128</sup> Interviewees whose response was “strongly agree” or “agree” were classified as having agreed; interviewees whose response was “disagree” or “strongly disagree” were classified as having disagreed.

PERRIGHT was answered by 1,287 interviewees, 315 of whom stated that they “neither agree nor disagree” or that they “don’t know.” SOCRIGHT was answered by 1,282 interviewees, 368 of whom stated that they “neither agree nor disagree” or that they “don’t know.” Calculated from NAT’L OPINION RESEARCH CTR., *supra* note 123, at 1812. A total of 638 interviewees gave one of the foregoing answers to PERRIGHT and/or to SOCRIGHT. These 638 interviewees were not included in the data analysis.

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analysis a ceiling of 305 respondents, of whom 145 were coded 1 and 160 were coded 0.

*Table 1. Variables in Regression Model<sup>129</sup>*

Mnemonic label of GSS question	Measurement of variable
<p><u>Dependent variable:</u> MORALITY</p> <p><u>Components of MORALITY:</u> PERRIGHT</p> <p>SOCRIGHT</p>	<p>MORALITY was measured as a dummy variable (i.e., respondents were coded 0 or 1) based on the answers to PERRIGHT and SOCRIGHT. Respondents who disagreed with PERRIGHT and agreed with SOCRIGHT were coded 0 on MORALITY. Respondents who agreed with PERRIGHT and disagreed with SOCRIGHT were coded 1 on MORALITY.</p> <p>“Do you agree or disagree with the following statements . . . . Right and wrong should be a matter of personal conscience.” (GSS question #1530C.)</p> <p>“Do you agree or disagree with the following statements . . . . Right and wrong should be decided by society.” (GSS question #1530B.)</p>

<sup>129</sup> The question numbers shown in the table are from NAT'L OPINION RESEARCH CTR., *supra* note 123.

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<p><u>Independent variables:</u></p> <p>AGE</p> <p>BORN</p> <p>EDUC</p> <p>FATALISM</p>	<p>Age of the respondent in years. (GSS question #13.) In the data analysis, AGE was a variable with three categories. Respondents who were eighteen to forty-four years of age were coded 1; respondents who were forty-five to sixty-four years of age were coded 2; and respondents who were sixty-five years of age or older were coded 3.</p> <p>“Were you born in this country?” (GSS question #31.) In the data analysis, BORN was a dummy variable. Respondents who answered “yes” were coded 0, and respondents who answered “no” were coded 1.</p> <p>The number of years of formal schooling that a respondent reported she or he had completed. (GSS question #15.) In the data analysis, EDUC was a dummy variable. Respondents who had finished no more than twelve years of schooling were coded 0, and respondents who had finished at least thirteen years of schooling were coded 1.</p> <p>“Do you agree or disagree with the following . . . There is little that people can do to change the course of their lives.” (GSS question #1517B.) In the data analysis, FATALISM was a dummy variable. Respondents were coded 0 if they answered “strongly agree” or “agree,” and they were coded 1 if they answered “disagree” or “strongly disagree.”</p>
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PRAYFREQ	<p>“Now thinking about the present, about how often do you pray?” (GSS question #1526.) In the data analysis, PRAYFREQ was a variable with three categories. Respondents were coded 1 if they reported praying “never,” “less than once a year,” “about once or twice a year,” or “several times a year.” Respondents were coded 2 if they reported praying “about once a month,” “two to three times a month,” “nearly every week,” “every week,” or “several times a week.” Respondents were coded 3 if they reported praying “once a day” or “several times a day.”</p>
RACE	<p>Race of the respondent as reported by the respondent. (GSS question #24.) In the data analysis, RACE was a dummy variable. Respondents who reported that they were “White” were coded 0, and respondents who reported that they were “Black” were coded 1.</p>
REALINC	<p>Family income of the respondent in constant (1986) dollars. (GSS question #1738.) In the data analysis, REALINC was a dummy variable. Respondents were coded 0 if their family income was less than \$20,000 and were coded 1 if their family income was \$20,000 or more.</p>
SEX	<p>Sex of the respondent. (GSS question #23.) In the data analysis, SEX was a dummy variable. Males were coded 0, and females were coded 1.</p>
TRUST	<p>“Generally speaking, would you say that most people can be trusted or that you can’t</p>

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XNORCSIZ	<p>be too careful in life.” (GSS question #163A.) In the data analysis, TRUST was a dummy variable. Respondents who believed that “most people can be trusted” were coded 0, and respondents who believed that “you can’t be too careful” were coded 1.</p> <p>Level of urbanization of the place of residence of the respondent. (GSS question 52B.) In the data analysis, XNORCSIZ was a variable with three categories. Respondent’s place of residence was coded 1 if it was “not within an SMSA, (within a county)” <i>and</i> was one of the following: “open country within larger civil divisions,” “an incorporated area less than 2,500 or an unincorporated area of 1,000 to 2,499,” “a town or village (2,500 to 9,999),” or “a small city (10,000 to 49,999).” Respondent’s place of residence was coded 2 if it was “within an SMSA” <i>and</i> was one of the following: “an unincorporated area of a medium central city,” “an unincorporated area of a large central city (division, township, etc.),” “a suburb of a medium size central city,” or “a suburb of a large central city.” Respondent’s place of residence was coded 3 if it was “within an SMSA” <i>and</i> was one of the following: “a medium size central city (50,000 to 250,000)” or “a large central city (over 250,000).” SMSA is the acronym for a Standard Metropolitan Statistical Area.</p>
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What variables (“independent variables”) are promising as explanations of the dependent variable in the instant study? The combination of already published research on the antecedents of

law on specific topics,<sup>130</sup> other pertinent social science research,<sup>131</sup> and existing law on investment advisers<sup>132</sup> suggest two sets of independent variables. One set structures (e.g., stratifies) a societal system, and the other set is comprised of dimensions of its culture.<sup>133</sup> Table 1 presents the variables in the two sets, the questions in the 1991 GSS that were used for the variables, and the manner in which each variable was measured in the instant study. A maximum of three categories were employed for an independent variable because, as discussed *infra* in Part III.B., the number of respondents in the data analysis was relatively small. Three-category independent variables were assumed to be interval scales.<sup>134</sup>

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<sup>130</sup> A summary of the most credible of these studies is in *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 11–13.

<sup>131</sup> JAMES A. DAVIS, BACKGROUND VARIABLES AND OPINIONS IN THE 1972-1977 NORC GENERAL SOCIAL SURVEYS: TEN GENERALIZATIONS ABOUT AGE, EDUCATION, OCCUPATIONAL PRESTIGE, RACE, RELIGION, AND SEX, AND FORTY-NINE OPINION ITEMS (1979), [http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Topical\\_Reports/TR02.pdf](http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Topical_Reports/TR02.pdf).

<sup>132</sup> *Supra* notes 118–19 and accompanying text.

<sup>133</sup> In the instant article, the word “culture” refers to the fundamental assumptions that shape the perceptions and behavior of the members of a society. Edgar H. Schein, *Culture: The Missing Concept in Organization Studies*, 41 ADMIN. SCI. Q. 229, 236 (1996).

<sup>134</sup> An explanation of scale types—nominal, ordinal, interval, and ratio—is in Anwer Khurshid & Hardeo Sahai, *Scales of Measurements: An Introduction and a Selected Bibliography*, 27 QUALITY & QUANTITY 303, 304–05, 308–10 (1993). Although the scale types have been clearly defined, universal agreement is lacking on the criteria for determining the scale type of a particular measurement procedure. *Id.* at 311–12. Moreover, evidence exists that, when three or more ordered categories are used to measure an independent variable, the advantages of treating the categories as an interval scale (rather than an ordinal scale) outweigh the disadvantages. Sanford Labovitz, *The Assignment of Numbers to Rank Order Categories*, 35 AM. SOCIOL. REV. 515 (1970); Mark Traylor, *Ordinal and Interval Scaling*, 25 J. MARKET RES. SOC’Y 297 (1983). In general, then, three or more ordered categories should be considered an interval scale unless there is a specific reason for using them as an ordinal scale.

In analyzing data, a reference category is needed for an independent variable that is measured with an ordinal scale. J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES

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For the first set of independent variables—i.e., the structural variables—the regression equation included factors that have been significant in organizing the societal system in the United States. Each of the variables, accordingly, has important social correlates and consequences. The variables were the respondent's age (AGE),<sup>135</sup> educational attainment (EDUC), national origin (BORN), race (RACE), family income (REALINC), and sex (SEX) as well as the degree of urbanization of the area where the respondent resided (XNORCSIZ). Because of their importance in society, structural features such as the foregoing have traditionally been the core of the discipline of sociology<sup>136</sup> and cannot be ignored in any effort to explain social values that differentiate private from public in morality as an antecedent of regulatory law.

The second set of independent variables in the regression

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USING STATA 415–18 (2d ed. 2006). A reference category is not required with an interval scale (or a ratio scale). In data analyses in a pair of earlier studies, I employed ordered three-category independent variables as interval scales by not having a reference category for each variable, but I incorrectly referred to the categories as ordinal scales. *Law as Symbol*, *supra* note 20, at 320 n.166; *The Roots of Law*, *supra* note 26, at 655 n.140. Especially because the categories for each of these independent variables were derived from a ratio scale, the categories were justifiably used as interval scales.

<sup>135</sup> In general, age differences in social values probably result from differences between generations in educational attainment, i.e., age itself probably has little effect on most social values. See DAVIS, *supra* note 131, at 62. *Aging*, on the other hand, can affect values. Nicholas L. Danigelis et al., *Population Aging, Intracohort Aging, and Sociopolitical Attitudes*, 72 AM. SOCIOL. REV. 812 (2007); David J. Harding & Christopher Jencks, *Changing Attitudes Toward Premarital Sex: Cohort, Period, and Aging Effects*, 67 PUB. OPINION Q. 211, 225 (2003). The effect of the aging process on values can be measured with cross-sectional data from sample surveys, but only if the surveys have been conducted in different years and cover a substantial time span. The effect of aging cannot be measured using information on age from a single survey. GSS surveys have not gathered the data required to assess the possible influence of the aging process on MORALITY. See NAT'L OPINION RESEARCH CTR., *supra* note 123, at app. U.

<sup>136</sup> Xavier Hansen, *Back to the Future: The Origins and Return of Sociology as the Scientific Study of Societal Development* (Aug. 2004) (unpublished paper presented at the 2004 annual meeting of the American Sociological Association) (on file with author).

model included modes of thought and conduct that are cultural dimensions of a society. Whether law seeks to regulate a particular activity is evidently a function in part of culture, i.e., of how the participants in a society perceive, and hence react to, their social world. For example, public support for a state law banning same-sex marriage is higher when same-sex marriage is seen as jeopardizing traditional social values regarding family and sex roles.<sup>137</sup> Because law is shaped by morality and because morality is a function of culture, the content of law can be expected to respond to and incorporate the content of culture.

The variables employed in the regression model as aspects or indicators of culture were the respondent's beliefs as to whether individuals are in control of their lives (FATALISM) and whether trust in people is warranted (TRUST). An additional cultural variable was the frequency of prayer by respondents (PRAYFREQ), which was assumed to be a measure of the more-general factor of religiousness. While no quantitative study seems to have been done on the relationship between any of these three independent variables and the dependent variable in the instant study, such relationships are suggested by logic and/or by some empirical research. The view that morality is a private issue, and thus a subject that is inappropriate for regulation by government, seemed likely to vary with inter alia (i) the belief that the participants in the society are able to manage their future,<sup>138</sup> (ii) a belief by participants in the trustworthiness of other participants,<sup>139</sup> and (iii) commitment to

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<sup>137</sup> Rory McVeigh & Maria-Elena D. Diaz, *Voting to Ban Same-Sex Marriage: Interests, Values, and Communities*, 74 AM. SOCIOLOGICAL REV. 891, 907 (2009).

<sup>138</sup> Among individuals, degree of fatalism and at least one aspect of morality depend in part on degree of self-direction. Carmi Schooler et al., *Occupational Self-Direction, Intellectual Functioning, and Self-Directed Orientation in Older Workers: Findings and Implications for Individuals and Societies*, 110 AM. J. SOCIOLOGICAL 161, 185 fig.4 (2004). Fatalism and morality, therefore, are correlated in some ways and to some extent.

<sup>139</sup> Trust among the members of a group having a subsistence economy seems to be necessary for the group to survive. See W. G. Runciman, *Stone Age Sociology*, 11 J. ROYAL ANTHROPOLOGICAL INST. 129, 134-35 (2005) (contending that during the Stone Age the survival of a group depended on

religion.<sup>140</sup>

### B. Data Analysis

In the instant study, maximum-likelihood logit coefficients were estimated for the independent variables in the regression model. Linear (least squares) regression could not be used because the dependent variable was dichotomized; a dataset with such a dependent variable requires logistic regression.<sup>141</sup> Given the use of logistic regression and the coding employed for the dependent variable, the regression coefficient and odds ratio computed for an independent variable express, for each change in category on the independent variable, the change in the odds that morality was regarded as private.<sup>142</sup> In this regard, the reader should keep two points in mind. First, the regression coefficient and odds ratio for an independent variable estimate the impact of that independent variable on MORALITY while holding constant the effects of the other independent variables in the regression model. Second, an independent variable that

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cooperation among its members and the expectation of such cooperation). Not surprisingly, therefore, research has found that trust broadly affects other types of groups, including social systems that are affluent and complex. *Social Productivity*, *supra* note 41, at 825–27. In light of this research, a relationship between trust and morality is plausible a priori.

<sup>140</sup> See Ramona Houmanfar et al., *Religion and Cultural Survival*, 51 PSYCHOL. REC. 19, 27–28 (2001) (discussing the link between religion and morality).

<sup>141</sup> FRED C. PAMPEL, LOGISTIC REGRESSION 1–10 (2000); Alfred DeMaris, *A Tutorial in Logistic Regression*, 57 J. MARRIAGE & FAM. 956, 957–58 (1995).

<sup>142</sup> An understanding of logistic regression requires that two concepts—probability and odds—be distinguished. A probability is a proportion, while odds are a ratio of two probabilities. PAMPEL, *supra* note 141, at 11–13. As explained *infra* in Part III-B of the text, the regression results reported in Table 2 and Table 3 are based on data for 162 interviewees. Of the 162, 76 were coded 1 on MORALITY and 86 were coded 0. Therefore, the probability that morality would be regarded as private by an interviewee in this group was  $76 \div 162 = .469$ , the probability that morality would be regarded as public was  $86 \div 162 = .531$ , and the odds that morality would be regarded as private was  $.469 \div .531 = .883$ .

increases the likelihood that morality will be deemed private evidently reduces the likelihood that regulatory law will be adopted. In the United States, an activity is not explicitly addressed by law, or is explicitly protected by law from regulation, when the activity is designated as private by a substantial share of the population.<sup>143</sup>

Because the GSS selected interviewees with cluster sampling—i.e., because the GSS sampled *sets* of individuals<sup>144</sup>—an adjustment was made to the standard errors that were calculated by the statistics program (Stata) in estimating the regression coefficients.<sup>145</sup> Specifically, each standard error from the estimation by Stata was multiplied by the square root of 1.42, i.e., by 1.19, in an attempt to remedy the effect of the sampling design.<sup>146</sup> Tables 2 and 3 *infra* report the regression

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<sup>143</sup> *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 15–18.

<sup>144</sup> See Wikipedia, Cluster Sampling, [http://en.wikipedia.org/wiki/Cluster\\_sampling](http://en.wikipedia.org/wiki/Cluster_sampling) (last visited Feb. 15, 2010).

<sup>145</sup> The coefficients and their unadjusted standard errors were estimated with Stata Release 10.0 using the LOGIT command. 2 STATA CORP., STATA BASE REFERENCE MANUAL: RELEASE 10 178–93 (2007) [hereinafter STATA REFERENCE MANUAL]. The estimation procedure did not employ either sampling weights or household-size weights. Sampling weights for the GSS require data on the cluster variable. STATA CORP., STATA USER'S GUIDE: RELEASE 10 § 20.17.3, at 280 (2007). Data on the cluster variable, however, were not available. The adjustment that was made to the estimated standard errors, as described in the text, is an imprecise way of compensating for the omission of sampling weights and the cluster variable.

Household-size weights were considered unnecessary because they are unlikely to alter materially the results obtained when analyzing GSS data. C. BRUCE STEPHENSON, *WEIGHTING THE GENERAL SOCIAL SURVEYS FOR BIAS RELATED TO HOUSEHOLD SIZE 1* (1978), available at [http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Methodological\\_Reports/MR003.pdf](http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Methodological_Reports/MR003.pdf). In addition, household-size weights have the disadvantage that they reduce the statistical efficiency of population parameter estimators such as regression coefficients. *Id.* at 3. Efficient estimators are preferred because they are likely to be closer to their population parameters than inefficient estimators. RONALD J. WONNACOTT & THOMAS H. WONNACOTT, *ECONOMETRICS* 58–60 (2d ed. 1979).

<sup>146</sup> The need for the adjustment, and the use of  $\sqrt{1.42}$  for the adjustment, are explained in *Public-Private Dichotomy in a Macrosociological*

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coefficients, the adjusted standard errors for the coefficients, and the two-tailed levels of statistical significance for the coefficients based on the adjusted standard errors. The tables also show the constant in the regression equation and label it  $\alpha$ .

Regression coefficients were initially estimated using data on 164 respondents.<sup>147</sup> With a significance level of .10 as the criterion for rejecting the null hypothesis,<sup>148</sup> three independent variables—educational attainment, sex, and frequency of prayer—were related to the dependent variable. The relationships can be more easily understood by converting each regression coefficient into the percentage change in the odds that a respondent will be coded 1 on MORALITY when the independent variable in question rises by a measurement category. Considered in these terms, the odds that morality would be deemed a private matter were 70% lower for respondents with thirteen or more years of schooling than for respondents with twelve or fewer years schooling, were 246% higher for females than for males, and rose by 87% for each

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*Framework*, *supra* note 22, at 33–34.

<sup>147</sup> A score (0 or 1) on MORALITY was available for 305 respondents. See the text following *supra* note 128. However, the regression results were based on no more than 164 of these respondents because data on one or more of the independent variables did not exist for 141 respondents. Two factors were primarily responsible for the inability to use the 141 respondents in the regression analysis. First, the 1991 GSS gathered data on certain variables only from subsamples of the full sample; of the independent variables in the instant study, TRUST was not measured in one of the three subsamples in the 1991 GSS. NAT'L OPINION RESEARCH CTR., *supra* note 123, at 2561, 2571. Because the full sample was not asked the question for TRUST, there were interviewees with data on MORALITY but not on TRUST. Second, some interviewees who had a score of 0 or 1 on the dependent variable and who were asked all of the questions measuring the independent variables either did not answer a question for one (or more) of the independent variables or responded to a question on an independent variable with an answer that was outside the coding employed by the instant study (which coding is described in Table 1).

<sup>148</sup> As discussed in *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 35 n.84, caution is required when relying upon tests of statistical significance.

increase in category of prayer frequency.<sup>149</sup>

To determine whether the results obtained might be misleading, a check was made for outliers, i.e., interviewees whose coding on the dependent variable differed from the coding that was predicted by the regression model. Outliers can materially distort the coefficients estimated in a regression analysis, and in order to identify influential outliers in the study, Cook's Statistic was calculated.<sup>150</sup> Unfortunately, the process of locating influential outliers is subjective,<sup>151</sup> and thus I visually examined the distribution of Cook's Statistic.<sup>152</sup> Doing so revealed that Cook's Statistic was far higher for two of the interviewees than for any of the others.<sup>153</sup> Accordingly, I omitted these interviewees and re-estimated the regression model. In re-estimating the coefficients, however, Stata dropped the variable BORN, because the code of 1 on BORN perfectly predicted the code of 0 on MORALITY and thereby prevented an estimation of maximum likelihood.<sup>154</sup>

Given the problem with BORN, the regression analysis was confined to the remaining independent variables. Tables 2 and 3 report the regression coefficients estimated for the independent variables without BORN and without the two interviewees who had the largest Cook's Statistic. The coefficients in Tables 2 and 3 are thus based on data for 162 interviewees. In addition to presenting the regression coefficients, the tables show the adjusted standard error for each coefficient, the z score obtained

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<sup>149</sup> The odds ratios for these three variables were -0.298, 3.4647, and 1.873, respectively. Percentage changes were obtained from the regression coefficients with the LISTCOEF command. LONG & FREESE, *supra* note 134, at 94-98, 464-67.

<sup>150</sup> *Id.* at 128.

<sup>151</sup> DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 175-76 (2d ed. 2000).

<sup>152</sup> A visual examination of the distribution is suggested in LONG & FREESE, *supra* note 134, at 151.

<sup>153</sup> For these two interviewees, Cook's Statistic was 0.99 and 2.16. For the other interviewees, Cook's Statistic was less than 0.60.

<sup>154</sup> A maximum-likelihood regression coefficient cannot be estimated for an independent variable that predicts the dependent variable without any error. HOSMER & LEMESHOW, *supra* note 151, at 138.

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with the adjusted standard error of the coefficient, and the two-tailed statistical significance level for the z score.<sup>155</sup>

*Table 2. Logit Coefficients and Significance Levels from Regression of MORALITY on Independent Variables*

Independent variable (mnemonic label)	Regression coefficient	Adjusted standard error	z	p >  z
<u>Structural variables</u>				
AGE	0.297	0.307	0.97	0.34
EDUC	-1.151	0.456	-2.52	0.02
RACE	-0.104	0.662	-0.16	0.88
REALINC	0.295	0.481	0.61	0.55
SEX	1.289	0.468	2.75	0.01
XNORCSIZ	0.232	0.324	0.72	0.48
<u>Cultural variables</u>				
FATALISM	-0.744	0.777	-0.96	0.34
PRAYFREQ	0.677	0.286	2.37	0.02
TRUST	0.385	0.456	0.84	0.41
$\alpha$	-2.441	1.322	-1.85	0.07

<sup>155</sup> The null hypothesis was used to compute the z scores in Table 2 and Table 3, i.e., every independent variable was assumed to be unrelated to the dependent variable in the population from which the sample was drawn. Each z score in the tables, accordingly, is the number of standard errors by which the regression coefficient obtained from the sample deviated from a regression coefficient of zero in the population that was sampled. EMILIO J. CASTILLA, *DYNAMIC ANALYSIS IN THE SOCIAL SCIENCES* 154–55 (2007).

The regression model without BORN yielded results that were similar to the regression model with BORN. The signs and magnitudes of the coefficients that were statistically significant at or below .10 did not differ materially between the two models. Based on Table 2, the odds that morality would be regarded as a private matter were 68% lower for respondents with thirteen or more years of schooling than for respondents with twelve or fewer years of schooling, were 263% higher for females than for males, and rose by 97% with each increase in category of prayer frequency.<sup>156</sup> Because the impact of an independent variable is estimated holding constant the impact of every other independent variable in the regression model, the percentage change in odds produced by a rise in category on an independent variable is net of the percentage change in odds produced by a rise in category on every other independent variable.

In considering the results reported in Table 2, a possibility that must be explored is whether interaction existed between independent variables. If the relationship of one independent variable to the dependent variable differed across categories or levels of another independent variable—i.e., if interaction was present—the results in Table 2 do not accurately explain MORALITY. The failure to uncover interaction thus would yield incorrect conclusions regarding the manner in which independent variables act on the dependent variable.

Theory rather than statistics should guide the selection of independent variables to evaluate for potential interaction.<sup>157</sup> In light of this principle, it is notable that women in general have been found by research to be more religious than men in general, and a theory has been advanced that ascribes this divergence in religiosity to sex-based differences in biology.<sup>158</sup>

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<sup>156</sup> The odds ratios were 0.316 for EDUC, 3.631 for SEX, and 1.969 for PRAYFREQ.

<sup>157</sup> JAMES JACCARD & ROBERT TURRISI, INTERACTION EFFECTS IN MULTIPLE REGRESSION 3–4 (2d ed. 2003); WILLIAM D. BERRY, UNDERSTANDING REGRESSION ASSUMPTIONS 30–31 (1993).

<sup>158</sup> Rodney Stark, *Physiology and Faith: Addressing the “Universal” Gender Difference in Religious Commitment*, 41 J. SCI. STUDY RELIGION 495, 495–500, 504 (2002).

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Consequently, I investigated the possibility that there was interaction between SEX and PRAYFREQ by estimating the regression coefficients for the independent variables (other than SEX) separately for women ( $n = 95$ ) and for men ( $n = 67$ ). The results are presented in Table 3, with the results for women in the top panel of the table and the results for men in the bottom panel.

*Table 3. Logit Coefficients and Significance Levels by Sex from Regression of MORALITY on Independent Variables*

Independent variable (mnemonic label) by sex	Regression coefficient	Adjusted standard error	z	$p >  z $
<i>Women</i>				
<u>Structural variables</u>				
AGE	0.232	0.424	0.55	0.59
EDUC	-1.318	0.592	-2.23	0.03
RACE	0.000	0.856	0.00	1.00
REALINC	0.247	0.576	0.43	0.67
XNORCSIZ	0.341	0.418	0.82	0.42
<u>Cultural Variables</u>				
FATALISM	-1.724	1.382	-1.25	0.22
PRAYFREQ	0.475	0.398	1.19	0.24
TRUST	0.377	0.571	0.66	0.51
$\alpha$	0.184	1.935	0.10	0.92

<i>Men</i>				
<u>Structural variables</u>				
AGE	0.306	0.480	0.64	0.53
EDUC	-0.936	0.798	-1.17	0.25
RACE	0.247	1.135	0.22	0.83
REALINC	0.503	0.979	0.51	0.61
XNORCSIZ	-0.001	0.571	0.00	1.00
<u>Cultural variables</u>				
FATALISM	-0.261	1.277	-0.20	0.85
PRAYFREQ	0.908	0.454	2.00	0.05
TRUST	0.418	0.805	0.52	0.61
$\alpha$	-3.276	2.318	-1.41	0.16

Perhaps the most notable finding that emerges from Table 3 is the failure of even one explanatory variable to have regression coefficients that were statistically significant both among women and among men. Among women, only education had a significant coefficient. When this coefficient is converted into an odds ratio, the odds that morality would be considered private are found to be 73% lower for women who had thirteen or more years of schooling than for women who had twelve or fewer years of schooling. Among men, frequency of prayer had the sole significant coefficient; the conversion of this coefficient into an odds ratio shows that the odds that morality would be deemed private rise 148% for each category increase in PRAYFREQ.<sup>159</sup> However, the relationships uncovered by these coefficients have no discernible logical connection to each other, and without an identifiable pattern to the relationships, the coefficients in Table

<sup>159</sup> The odds ratio for EDUC among women was 0.268; the odds ratio for PRAYFREQ among men was 2.480.

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3 for EDUC among women and PRAYFREQ among men stand on their own.

*C. Discussion*

When the regression model employed in this study is evaluated with the results in Tables 2 and 3, just one independent variable is able to claim a general relationship to whether adults in the United States regard morality as private or as public.<sup>160</sup> Net of the other independent variables in the model, gender alone had an unconditional effect on social values defining morality as private or public. The influence that gender exercised, moreover, was far from trivial: the odds that morality would be deemed private were fully three-and-a-half times greater among women than among men.<sup>161</sup>

Tables 2 and 3, however, do not exhaust the insights that can be gleaned from the data. A fuller understanding of the effect of gender can be obtained from the accuracy with which independent variables in the instant study predicted whether interviewees would view morality as private or as public. Accuracy was determined first by regressing MORALITY on just SEX (Model 1) and then by regressing MORALITY on the three independent variables—EDUC, SEX, and PRAYFREQ—whose coefficients in Table 2 were found to be statistically significant (Model 2). The regression analyses used the same 162 interviewees as Tables 2 and 3. The measure of accuracy is the percentage of all predictions by a model that were correct. The percentages are in Table 4.<sup>162</sup>

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<sup>160</sup> The reader should keep in mind that the instant study utilizes cross-sectional data and that, because change over time cannot be observed, such data produce erroneous conclusions regarding causal relationships more often than longitudinal data. *Public-Private Dichotomy in a Macrosociological Framework*, *supra* note 22, at 33.

<sup>161</sup> *Supra* note 156 and accompanying text.

<sup>162</sup> The percentages were computed in Stata with the ESTAT CLASSIFICATION command and its default probability cutoff, i.e.,  $\geq 0.5$ . STATA REFERENCE MANUAL, *supra* note 145, at 166–67.

*Table 4. Predictions by Independent Variables: Correct Predictions as a Percentage of All Predictions*

Prediction	Correct predictions from	
	Model 1: SEX	Model 2: EDUC, SEX & PRAYFREQ
Morality private or morality public	63.6%	72.2%
Morality private	59.0%	67.8%
Morality public	70.2%	77.3%

I begin with Model 1. For predictions with SEX alone, accuracy was 63.6% when considering both predictions of interviewees who would classify morality as private *and* predictions of interviewees who would classify morality as public. However, the overall percentage masks a difference: Model 1 was noticeably less successful in predicting interviewees who would view morality as a private matter (59%) than in predicting interviewees who would view morality as a public matter (70.2%).

I turn now to Model 2, which retains gender as an independent variable but adds educational attainment and prayer frequency. As Table 4 shows, the use of the three independent variables together greatly improved success in predicting the interviewees who would regard morality as private and the interviewees who would regard morality as public. Specifically, the three independent variables jointly increased the accuracy of predictions by not less than seven percentage points. Although educational attainment influences the designation of morality as private or public only among women and prayer frequency influences the designation only among men (see Table 3), the

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two variables enhance the ability of gender to identify persons in terms of their social values on the private or public nature of morality.

#### IV. CHANGE IN THE STATUS OF WOMEN AND THE CONTENT OF LAW

Perhaps it should not be surprising that women and men differ materially in their social values on whether morality is a private matter or a public issue. After all, much if not most of social life is affected to some extent by the attribute of biological sex and by the different roles in society that are attached to this attribute.<sup>163</sup> In the discussion that follows, however, I focus not on the sociology of gender but on the importance for law of the findings in Tables 2, 3, and 4 that pertain to gender. The findings, I suggest, may help to explain the change in the interpretation of the United States Constitution by the U.S. Supreme Court with respect to set of related issues that were presented in cases spanning almost forty years.<sup>164</sup> Unfortunately, the paradigm that currently dominates the legal profession is unlikely to recognize the contribution to the change that may have been made by the gender difference in social values on morality. That paradigm, by embodying the concept of “the rule of law,” assumes the primacy of law. In doing so, the paradigm ignores the subservience of law to conditions in the social system.

The law to which the findings are relevant involves sexuality. Currently, the U.S. Constitution is construed to bar government penalties for nonpublic, noncommercial sexual

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<sup>163</sup> Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 *LAW & SOC. INQUIRY* 681, 697 (1998).

<sup>164</sup> My reasoning assumes that the relationships reported in Tables 2 and 3 are not confined to 1991, the year in which the data for these tables were obtained. The assumption is plausible at least with regard to gender. As reported *supra* in note 156 and accompanying text, gender had a very large impact on whether morality is deemed to be a public issue or a private matter. An impact of this magnitude is unlikely to occur in just a single year.

activity—homosexual as well as heterosexual—between adults who consent to the activity and who are capable of giving consent.<sup>165</sup> The prohibition on penalties for such activity is based largely on a right of privacy that the U.S. Supreme Court believes emanates from the liberty guarantee that is explicit in the two due process clauses of the Constitution.<sup>166</sup> Indeed, the line of cases through which the Court announced that the Constitution protects sexual activity between adults that is consensual, nonpublic, and noncommercial began with a case decided in 1965 in which the Court explicitly employed the concept of a right of privacy.<sup>167</sup> Notably, the Court has expressed a concern with privacy even when, in invalidating government penalties for sexual activity and closely related matters, it seems to have relied on other grounds—for instance the liberty guarantee alone<sup>168</sup> or the equal protection guarantee.<sup>169</sup>

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<sup>165</sup> Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271, 271 (2005).

<sup>166</sup> Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004). The Fifth Amendment and the Fourteenth Amendment contain similarly worded liberty guarantees. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”). While the liberty guarantee in the Fifth Amendment is applicable to the federal government, the liberty guarantee in the Fourteenth Amendment covers state government. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932).

<sup>167</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). In *Griswold*, the Supreme Court inferred a right of privacy from a number of constitutional provisions. *Id.* at 485. In 1973, the Court attached the right of privacy to the liberty guarantee of due process, at least insofar as the right pertains to marriage, family, and sexuality. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

<sup>168</sup> Government penalties for nonpublic, noncommercial, consensual same-sex sexual activity were held unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003). Although the Court repeatedly refers to the liberty guarantee in the Constitution, it concludes that the state statute at issue “furthers no legitimate state interest which can justify its intrusion into *the personal and private life* of the individual.” *Id.* at 578 (emphasis added). The Court thus explicitly focused on privacy, suggesting that the constitutional right at issue is a right directed at protecting privacy. *Id.*

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By accepting privacy as an important concern, the Court implied that the right at issue was a right to privacy even though its holding was not explicitly based on privacy.

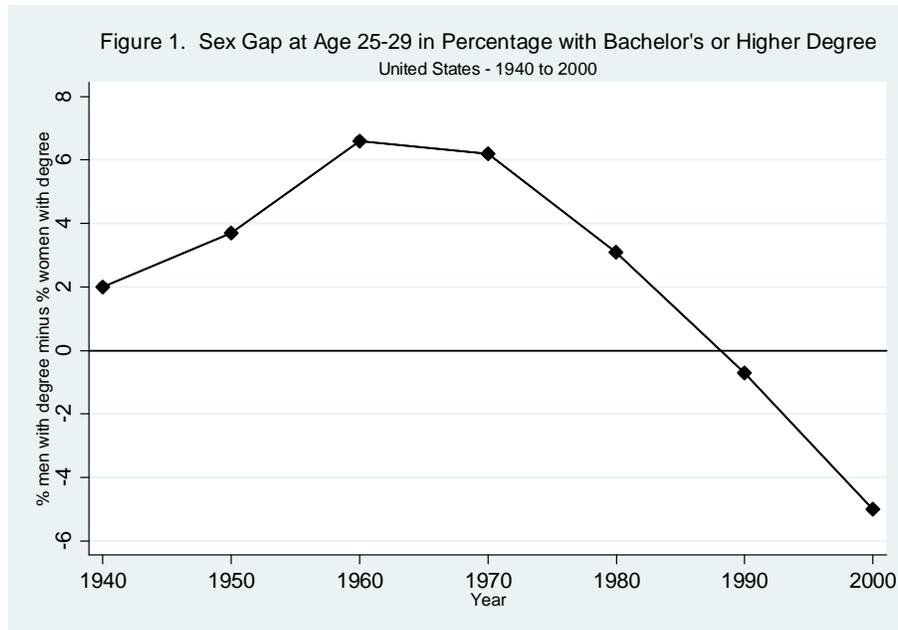
The preceding change in law, I believe, is explained partially by the findings reported in Part III of this Article. In order to develop the explanation, I turn to a quantitative indicator of the social status of men relative to the social status of women in the United States. The indicator, which is portrayed graphically in Figure 1, is the difference between the percentage of men and the percentage of women who, at age twenty-five to twenty-nine, possessed at least a Bachelor's degree in each decennial census year from 1940 to 2000.<sup>170</sup> Because the data are for seven equally spaced time points covering a total of sixty years, Figure 1 supplies a census-based measure of social status differences grounded on gender during most of the twentieth century.

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Furthermore, the Court in *Lawrence* approved a passage in an opinion it had previously authored that described sexually relevant activities as entailing “the most *intimate and personal* choices a person may make in a lifetime.” *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added). In crafting its opinion in *Lawrence*, the Court also adopted a passage from a dissenting opinion written for an earlier case; the passage stated that the “*intimate* choices by unmarried as well as married persons” were beyond the constitutional powers of government to regulate. *Id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stephens, J., dissenting)) (emphasis added). The word “intimate” connotes privacy. *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 945 (3d ed. 1992) (defining “intimate” as an adjective to include “[m]arked by informality and privacy” and “[v]ery personal; private”).

<sup>169</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws . . .”). In ruling that a state statute violated the equal protection guarantee by restricting to married persons the distribution of items to be used for preventing pregnancy, the Court emphasized the relevance of a constitutional right of privacy. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>170</sup> The data for Figure 1 are from U.S. CENSUS BUREAU, *A HALF-CENTURY OF LEARNING: HISTORICAL STATISTICS ON EDUCATIONAL ATTAINMENT IN THE UNITED STATES, 1940 TO 2000* tbl.2 (2006), <http://www.census.gov/population/www/socdemo/education/phct41.html>.



To appreciate fully the importance of the data in the figure, it is necessary to realize that the male-female difference in educational attainment in the United States for most of the century-and-a-half after the Civil War was mainly at the college level.<sup>171</sup> The difference between men and women in college completion, therefore, is a useful barometer of the relative status of each sex at a single point in time and of change in the relative status of each sex over time.<sup>172</sup> The indicator does not capture

<sup>171</sup> ANDREA ADAMS, U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: EDUCATIONAL ATTAINMENT (2008), <http://www.census.gov/population/www/pop-profile/educattn.html>; JAMES P. SMITH & MICHAEL P. WARD, WOMEN'S WAGES AND WORK IN THE TWENTIETH CENTURY 39 tbl.20 (1984), available at <http://www.rand.org/pubs/reports/2007/R3119.pdf>. In addition, see *infra* note 173 and accompanying text.

<sup>172</sup> Figure 1 provides just a measure of the magnitude of a status differential between men and women in a given year. The figure thus assumes that, at each point in time, a male-female difference in social status is correlated with the male-female difference in rates of college completion. Figure 1 makes no assumption as to whether or how the two variables (social status and college completion) are causally connected.

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every dimension of sex roles and status, of course. However, the indicator is useful because it measures an attribute of individuals early in their lives, and the attribute has the potential to affect markedly later stages of the life cycle, especially in terms of occupation and income from employment. Unfortunately, the figure cannot be extended further back in time—i.e., cannot cover years prior to 1940—because the census did not gather information on educational attainment until 1940.<sup>173</sup>

The shift in law on sexuality and related matters that the United States experienced from the mid-1960s onward is likely to be attributable partially to the shift in the status of women that Figure 1 reveals.<sup>174</sup> Understanding this link will be aided by a brief explanation of the figure. In particular, Figure 1 was constructed from the *difference* between the percentage of men twenty-five to twenty-nine years old and the percentage of women twenty-five to twenty-nine years old who, in the census year specified, possessed a Bachelor's degree or a higher degree. Because the percentage for women was subtracted from the percentage for men, a number above zero means that proportionally more men than women held a degree; conversely, a number below zero means that proportionally more women than men held a degree. The horizontal line across Figure 1 serves as a reference and marks the point at which the percentage for men is equal to the percentage for women. When the trend line—the line connecting the male-female difference in degrees in each census year—is moving *away* from the

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<sup>173</sup> ADAMS, *supra* note 171. Data from the census of 1940 have been employed in conjunction with other data to estimate years of schooling completed and degrees received by five-year cohorts born in 1866–1870 and later. SMITH & WARD, *supra* note 171, at 35 nn.6 & 7. However, the estimates are for educational attainment of each birth cohort during the lifetime of the cohort, not at a specific age.

<sup>174</sup> The data described in *supra* note 173 have been used to show that the sex gap in college-level education generally predicts U.S. Supreme Court decisions during most of the twentieth century on whether the national Constitution is violated by government policies that distinguish males and females. LARRY D. BARNETT, *LEGAL CONSTRUCT, SOCIAL CONCEPT* 50–55 (1993).

horizontal line, the gender gap in college completion is expanding, and when the trend line is moving *toward* the horizontal line, the gender gap is contracting.

Figure 1 shows that the male advantage in Bachelor's and graduate degrees at age twenty-five to twenty-nine rose substantially from 1940 to 1960, fell slightly from 1960 to 1970, and then began a steep descent. Indeed, the decline after 1970 was so large in magnitude and rapid in speed that by 1990 a slightly larger percentage of women than of men in the twenty-five to twenty-nine age group held a Bachelor's or higher degree.<sup>175</sup> In the history of a nation, alterations in social structure of this size and swiftness are probably infrequent.

The change in the gender gap that is portrayed in Figure 1 is likely to have contributed to the change that took place after the middle of the twentieth century in law on sexuality and its incidents. In evaluating the plausibility of such a link, an important point to keep in mind is that the gender gap in Figure 1 is measured by college completion among individuals who were twenty-five to twenty-nine years old. The age range that was used for the measure (i.e., age twenty-five through age twenty-nine) is important for two reasons. First, since most first-year college students in the last half of the twentieth century evidently matriculated in college shortly before or after their eighteenth birthday,<sup>176</sup> the pursuit of a Bachelor's degree by

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<sup>175</sup> It is probably not coincidence that, after removing the effects of the different choices that men and women in the United States make due to sex roles, there was only a small gender gap in compensation from employment in 2000. June O'Neill, *The Gender Gap in Wages, Circa 2000*, 93 AM. ECON. REV. 309, 313 tbl.3 (May 2003) (models 2 and 3). Because current compensation evidently involves a lengthier process than educational attainment, a gender-linked compensation differential can be expected to respond more slowly than a gender-linked education differential to the societal forces that alter the status of women vis-à-vis men.

<sup>176</sup> For example, at the time of the 1970 census (which occurred on or around April 1, 1970), 83.6% of all first-year college students (male and female) who were younger than twenty-five had been seventeen, eighteen or nineteen years old when the 1969-70 academic year started (or, more precisely, on October 1, 1969). Calculated from U.S. CENSUS BUREAU, 1970 CENSUS OF POPULATION. Vol. II. Series PC(2). 5A SUBJECT REPORTS:

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persons who hold such a degree at age twenty-five to twenty-nine started normally when these persons were much younger—specifically, an average of about nine or ten years younger. Thus, the societal changes that affected educational attainment at age twenty-five to twenty-nine, but did so differently among women than among men, happened (or at least began) approximately a decade before women and men were in this age range. Second, the societal conditions that determine the college matriculation rates of women and of men probably do not have an instantaneous effect. Rather, the conditions are likely to operate with a time lag, and although the number of years that must pass for the effect to materialize is unknown, a half-decade could be required. When the two preceding points are combined, the small contraction of the sex gap between 1960 and 1970, and the large contraction that started in 1970, must be understood as responses to societal changes that took place or that had their inception more than a decade earlier. Consequently, the societal foundation for the higher status of men relative to women was evidently beginning to erode by 1950, and in the 1960s and later, the pace of the erosion markedly increased.

What societal consequences flowed from the changes that occurred in the gender-based status differential during the last half of the twentieth century? The answer may be the following. Because the odds that morality will be treated as a private matter are much higher among women than among men, the changes in the societal foundation for the status of women vis-a-vis men during the 1950s and 1960s—the changes that altered the course of the trend line in Figure 1—probably enhanced the prominence

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SCHOOL ENROLLMENT 119 tbl.5 (1970), *available at* <http://www2.census.gov/prod2/decennial/documents/42045400v2p5a5cch01.pdf>. In late 1969, consequently, five out of six first-year college students who had not reached age twenty-five were a maximum of one year away from age 18. The proportion of these students who earned a Bachelor's degree is unknown. However, among women who are enrolled in college when they are younger than twenty, relatively few seem not to complete a Bachelor's degree before their thirtieth birthday. See Jerry A. Jacobs & Rosalind Berkowitz King, *Age and College Completion: A Life-History Analysis of Women Aged 15–44*, 75 *SOCIOL. EDUC.* 211, 219 fig.1 (2002) (cumulative completion rates estimated from figure 1).

and influence of the view that issues of morality are not appropriately handled in a public setting or by a public body. As the status of women rose, in other words, the values of women were increasingly a factor in social life and were incorporated into law. Sexuality and related matters, therefore, gradually came to be regarded as beyond the scope of government regulation. In 1965, the U.S. Supreme Court held that government prohibitions on the use by married couples of items to prevent pregnancy were inconsistent with a constitutionally based right of privacy.<sup>177</sup> This ruling may not have represented a major jurisprudential step because the law had traditionally considered the relationship between spouses to be private.<sup>178</sup> Subsequently, however, the view that sexual activity and its incidents are private rather than public matters was extended to other government restrictions on adults. Thus, complete or almost-complete bans on aborting pregnancies were held unconstitutional not only when directed at an adult female who is unmarried<sup>179</sup> but also when directed at an adult female who is married and cannot secure the consent of her husband.<sup>180</sup> Most recently, the view that sexuality is a private concern was responsible for the invalidation on constitutional grounds of government prohibitions on same-sex sexual activity between

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<sup>177</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>178</sup> Trammel v. United States, 445 U.S. 40, 43-44 (1979) (describing the purpose and historical roots of the privilege against adverse testimony by a person against her/his spouse). During the last half of the twentieth century, the privilege that allows a married person to bar testimony against the person by his or her spouse when the testimony involves confidential marital matters became less prevalent, and the conditions under which the privilege could be exercised were narrowed. *Id.* at 48-50. These changes are consistent with the evident intensification of individualism that has occurred in the United States since the middle of the century and with the equalization of the status of men and of women that accompanied or resulted from greater individualism. Individualism and gender equality are probably the result of the long-term growth of knowledge. *Law as Symbol*, *supra* note 20, at 336-37; *The Roots of Law*, *supra* note 26, at 628-32, 678-79.

<sup>179</sup> Roe v. Wade, 410 U.S. 113, 153-54, 165 n.67 (1973).

<sup>180</sup> Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70-71 (1976).

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adults that is consensual, nonpublic, and noncommercial.<sup>181</sup>

If the higher social status of women had an impact on law governing sexuality, how large was the impact? Unfortunately, an answer to the question is not possible at the present time, because the answer needs to deal with the *net* impact of the change in women's social status. The findings in Tables 2, 3, and 4—together with the data in Figure 1—suggest that there were two effects on social values bearing on whether morality is public or private and that to some degree these effects offset one another. According to the findings in Tables 2 and 3, social values that classify morality as private are affected by gender, and they are affected even more when educational attainment and prayer frequency are added to gender as causal agents. However, while the odds that morality will be considered a private issue are appreciably higher among women than men, the regression coefficient for educational attainment among women is negative in Table 3. Accordingly, social values that assign morality to the private sphere become *less* widespread as women acquire more schooling.

In short, the enhanced status of women in society, as represented by sex differences in rates of college completion, poses a problem for understanding whether and how the law was influenced by social values on whether morality is a private matter or a public issue. If the reasoning I have proposed is correct, the changing societal conditions that improved the status of women relative to the status of men magnified the effect of *sex per se*, thus expanding the prevalence and influence of social values that deem morality to be a private matter and an unacceptable subject for regulation through law. On the other hand, the societal forces that were responsible for the higher status of women resulted in more years of college-level schooling for a larger proportion of women.<sup>182</sup> The increases in

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<sup>181</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003). In addition, see *supra* note 168.

<sup>182</sup> SMITH & WARD, *supra* note 171, at 36 tbl.18 (rates of college attendance and completion among women by birth cohort); U.S. CENSUS BUREAU, *supra* note 170 (percentage of women twenty-five to twenty-nine years old who had received at least a Bachelor's degree by census year from

educational attainment among women, in turn, reduced the extent to which the social values of women designated morality as private and, presumably, the influence of these values in society.

Was the change in social values that was brought about by gender on its own neutralized by the change in social values that was brought about by gains in college attendance and completion among women? The question is important because the answer has the potential to advance our understanding of the processes involved in the shift in law on sexuality that the United States underwent starting in the mid-1960s. Regrettably, an answer is not possible with the evidence that is currently available,<sup>183</sup> and additional research is required. However, it is unlikely to be a coincidence that the odds of classifying morality as private are much higher among women than among men *and* that the status of women was rising relative to the status of men during the same period in history in which law was liberalizing on sexual activity and its incidents. Like every society, the United States is a social system, and in a system, concurrent phenomena are presumptively interconnected, not independent. Therefore, the

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1940 to 2000); *see also* U.S. Census Bureau, Table A-2: Percentage of the Population 3 Years Old and Over Enrolled in School, by Age, Sex, Race, and Hispanic Origin: October 1947 to 2008, <http://www.census.gov/population/socdemo/school/TableA-2.xls> (last visited Feb. 15, 2010) (percentages of women at age 18–19, age 20–21, age 22–24, and age 25–59 who were enrolled in school between 1947 and 2008).

<sup>183</sup> Standardized regression coefficients allow two (or more) explanatory variables to be compared for their relative impact on the dependent variable. In the instant study, the standardized regression coefficients based on the standard deviations of the explanatory variables (rather than on the standard deviation of the dependent variable) may indicate that the effect of gender outweighed the effect of increased college-level education among women. Specifically, for the results in Table 2, the coefficients standardized on the standard deviation of their respective independent variables were -0.577 for EDUC and 0.637 for SEX. The standardized coefficient for SEX was thus somewhat larger than the standardized coefficient for EDUC. However, the utility of standardized coefficients in logistic regression remains to be established, especially when the dependent variable is measured as a dummy. PAMPEL, *supra* note 141, at 32. In the instant study, the dependent variable (i.e., MORALITY) was a dummy. *See supra* tbl. 1 in the text of this article.

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proposition is at least plausible, and indeed seems probable, that the influence in society of social values treating morality as private was affected appreciably more by the sex attribute and associated social roles than by the extent to which women achieved a college-level education.

## V. CONCLUSION

The biological attribute of sex has been and remains a cornerstone of social structure in the United States,<sup>184</sup> and to the extent the societal significance of the attribute results from male-female differences in hormones that cause male-female differences in behavior,<sup>185</sup> sex-based distinctions will not be eliminated from social life even if they are prohibited by law. Notably, during the last half of the twentieth century, U.S. law incorporated a doctrine of female-male equality and disapproved various socially significant sex-based distinctions. When interpreting the Constitution, for example, the U.S. Supreme Court discarded traditional beliefs regarding the place of women in society and endorsed the view that women are entitled to go beyond the roles of wife and mother.<sup>186</sup> The same view appeared in federal statutes.<sup>187</sup>

A description of a shift in law, of course, is only a first step; an explanation of the shift and its timing is also needed. In my macrosociological framework, the shift in law on the sex attribute is presumed to have resulted from substantial change in the degree to which and/or the manner in which the attribute

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<sup>184</sup> Kathy A. Thomack, *Centering Men's Experience: Norah Vincent's Self-Made Man Complicates Feminist Legal Theorists' Views of Gender*, 15 *BUFF. WOMEN'S L.J.* 1, 30 (2006) (contending that the sex attribute is the most influential of societally defined characteristics in shaping social behavior and self-conception).

<sup>185</sup> J. Richard Udry, *Biological Limits of Gender Construction*, 65 *AM. SOCIOLOGICAL REV.* 443 (2000).

<sup>186</sup> Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 *PEPP. L. REV.* 185, 220-60 (2003).

<sup>187</sup> *The Roots of Law*, *supra* note 26, at 632-34 (federal statutes prohibiting sex-based discrimination in employment).

was organizing society. While all of the aspects of the changed sex basis of social structure are probably still unknown, Figure 1 reveals that the status of women increased relative to the status of men after 1960. However, the shift in U.S. law was not confined to female-male distinctions *per se*; as discussed in Part IV, the shift extended to sexuality.<sup>188</sup> Unless the breadth of the shift is assumed to be happenstance—which would not accord with the tenet of science that the world is orderly—it can be explained. The results of the data analysis in Part III suggest that at least a partial explanation is a sex difference in social values regarding morality as a private or public matter. If so, these values are a link in a chain of causation between women's relative status in society and law bearing on the sex attribute and sexuality.

The macrosociological framework I have proposed, however, is not limited to a single topic or to a single set of related topics. On the contrary, the framework contends that, in a democratic nation, all of the fundamental concepts and doctrines of law are attributable to their societal context. The framework thus denies that law is self-contained and self-determined, that law has primacy over other elements of the social system, and that law is permanently shaped by individual personalities. Instead, the framework maintains that the important concepts and doctrines of law found in a democracy (i) are generated by the properties of society (e.g., average educational attainment) and (ii) undergo change as the properties of society are altered by large-scale forces (e.g., the growth of knowledge). The framework also maintains that the impact of the macro-level forces on societal properties typically occurs slowly (and perhaps at an uneven pace) and that the societal properties affected by these forces normally produce new law when (and because) thresholds are reached.

Although a macrosociological framework does not accord with any paradigm that is widely accepted at the present time in scholarship on law, such a framework merits investigation. The framework not only is consistent with a considerable body of

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<sup>188</sup> *Supra* notes 165–69, 177–81.

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empirical evidence, but it can benefit social life by promoting research on the societal causes of law. In particular, research on the jurisdiction-level causes of law can be expected to lead to predictions of new law. If the proposed framework has utility, such predictions can be made well in advance of the emergence of the law being predicted, because alterations in jurisdiction-level properties usually occur over many years before generating law. Although the predictions will not always be accurate, they are likely to be correct much more often than they are incorrect. If so, quantitative studies of the jurisdiction-level conditions that shape law will allow a democratic nation to (i) prepare for new law and (ii) appreciate that important doctrines in its law do not depend in the long run on individuals, no matter how influential the individuals seem to be. Insofar as (ii) is prevalent, there will be less socially harmful conflict in a democracy over law that deviates from traditional cultural values. Especially if it involves violence and threats of violence, conflict can undermine the social order, as illustrated in the United States with regard to law on abortion and the provision of, and access to, abortion services.<sup>189</sup> Because law on important aspects of social life at a given point in history expresses the character of society rather than the idiosyncrasies of individuals, however, conflict directed at such law will not—indeed, cannot—have an enduring effect, and efforts to eliminate the law will have no more than temporary success. To the extent the foregoing is acknowledged, conflict over law that breaches social convention will be understood as futile. The probable result will be that such conflict will not occur as frequently, and when it occurs, it will not be as protracted.

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<sup>189</sup> S. REP. NO. 103-17 (1993), *available at* 1993 WL 286699. From the late 1970s to the early 1990s, “[a] nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence” in the United States was found to be “endangering the lives and well-being of the health care providers who work there and the patients who seek their services.” *Id.* at 3.