SYMPOSIUM: THE LEGAL PROFESSION: LOOKING BACKWARD: REGULATION OF LAWYERS WITHOUT THE CODE, THE RULES, OR THE RESTATEMENT: OR, WHAT DO HONOR AND SHAME HAVE TO DO WITH CIVIL DISCOVERY PRACTICE?

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LexisNexis Summary

... In keeping with this symposium's theme of intentional anachronism, I would like to consider the use of an old-fashioned concept, honor, as the basis of a system of social control for lawyers. ... Even if one has little patience for the anachronistic language of gentlemen and honor, however, or is not well disposed to virtue ethics, in its classical or modern guises, it is difficult to peruse the recent legal theory scholarship without noticing an allied trend - the dramatic increase in the amount of attention paid to social norms and other mechanisms of nonlegal regulation of some activity. ... What is even more noteworthy, in light of our project of looking back at the ethics of honor, is the extent to which reputational considerations in repeat-dealing transactions begin to approximate a full-scale honor system. ... The overlap with the ethics of honor points to a significant precondition for, and limitation on, the use of nonlegal sanctions, particularly those in which reputation is critical to the functioning of the sanction. ... The unpopularity of a lawyer, the lawyer's client, or the position asserted by the lawyer increases the risk that a judge or litigation adversary will perceive an action as unprofessional and deserving of some kind of nonlegal sanction. ...

Text

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One of the most striking things to notice when "looking back" on the regulation of the legal profession is the relative absence of enforceable legal sanctions for unethical behavior by lawyers. Before the promulgation in 1970 of the ABA's Model Code of Professional Responsibility, regulation of the legal profession was largely a matter of a fraternal body taking care of its own, and occasionally expelling miscreants. [1] Now, of course, there is a complex body of law, enforced by courts and regulatory authorities with overlapping jurisdiction, that governs a substantial amount of the day-to-day activities of lawyers. The magnitude of this change may be seen simply by comparing the scope of coverage of books such as Henry Drinker's Legal Ethics from the middle of the century [2] with the multivolume treatises, looseleaf services, and the Restatement of the Law Governing Lawyers that are available today. The change in how the profession is regulated has vastly outpaced the evolution of legal practice. Despite the frequent observation that the practice of law has changed in the last thirty years, [3] it has not changed that much - lawyers did basically the same things in 1965 as they do now, albeit not in multinational mega-firms, under the same billable hours pressures, or employing the same technological resources. Charles Wolfram has suggested several reasons for the

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1 See Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics - I. Origins, 8 U. Chi. L. Sch. Roundtable 469 (2001); Geoffrey C. Hazard, Jr., The Legal Profession: The Impact of Law and Legal Theory, 67 Fordham L. Rev. 239, 244-45 (1998).

2 Henry S. Drinker, Legal Ethics (1953).

3 For an excellent history of recent changes in large-firm practice, see Andrew L. Kaufman & David B. Wilkins, Problems in Professional Responsibility for a Changing Profession 770-76 (4th ed. 2002).

markedly increased scope of regulation that occurred around the promulgation of the Model Code: [4] including the judicial expansion of tort remedies generally, which led to a dramatic increase in the number of malpractice claims filed against lawyers (a significant **[*1568]** source of legal norms governing the practice of law); encroachment by the regulatory state on all facets of what had formerly been regarded as private activities; an ideological transformation among lawyers from public-spirited actors with significant independence from their clients (think of Brandeis's "lawyer for the situation") to agents of clients; and, finally, social changes in the profession, such as increased diversity and the growing number of law school graduates. [5] Taken together, these factors explain a sea change in public attitudes toward regulation of the legal profession. The modern attitude is summed up in Wolfram's title - the legal profession has been legalized, just as any other complex, economically significant industry in the regulatory state.

In looking back on the regulation of the profession prior to the promulgation of the ABA Model Code and Rules, the publication of the Restatement, and the tinkering of the Ethics 2000 Commission, one wonders how it was possible to maintain any semblance of control over the legal profession. Lawyers are an argumentative, cantankerous, and independent lot, so it seems unlikely that legal practice would be inherently orderly. Yet, the profession did not exist in a state of anarchy prior to 1970. The hypothesis I explore in this essay is that there are nonlegal, generally informal mechanisms available by which lawyers control one another, from within the profession, rather than relying on formal, legal, externally imposed systems of rules. Moreover, these nonlegal methods do a pretty fair job of maintaining stability and order under some circumstances. The regulation of a social group apart from the legal system can be described using a variety of terms: social capital, [6] reputational markets, [7] nonlegal sanctions, [8] noncontractual relationships, [9] "microlaw," [10] social norms, [11] and "nonlegally enforced rules and **[*1569]** standards" [12] are all explanatory concepts that crop up in the literature on "order without law." [13]

In keeping with this symposium's theme of intentional anachronism, I would like to consider the use of an old-fashioned concept, honor, as the basis of a system of social control for lawyers. It actually may be unfair to call honor old-fashioned, because there has recently been a vigorous revival of the study of honor in political theory, [14] but to most lawyers, the word would probably have fusty, aristocratic, and moralistic connotations. Indeed, the use of the term in common discourse does tend toward the sanctimonious and conservative. Lawyers are forever being exhorted to remember some past Golden Age in which gentlemanly behavior was widespread, hardball tactics and incivility

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[4] Charles W. Wolfram, Toward a History of the Legalization of the American Legal Profession - II. The Modern Era, 15 Geo. J. Legal Ethics 205 (2002).

[5] Id.

[6] Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 18-26 (2000).

[7] Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509 (1994).

[8] Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992) [hereinafter "Bernstein, Diamond"]; Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724 (2001) [hereinafter "Bernstein, Cotton"]; David Charny, Nonlegal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 373 (1990).

[9] Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963) [hereinafter "Macaulay, Non-Contractual Relations"].

[10] W. Michael Reisman, Law in Brief Encounters (1999).

[11] See, e.g., Jeffrey J. Rachlinski, The Limits of Social Norms, 74 Chi.-Kent L. Rev. 1537 (2000).

[12] Edward Rock & Michael Wachter, Meeting By Signals, Playing By Norms: Complementary Accounts of Nonlegal Cooperation in Institutions, 36 U. Rich. L. Rev. 423, 435 (2002).

[13] Cf. Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (1991).

[14] See, e.g., Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic (2001); Sharon R. Krause, Liberalism With Honor (2002). For some of the leading works that preceded the "new honor literature," see, for example, Kenneth S. Greenberg, Honor & Slavery (1996). See also William Ian Miller, Humiliation and Other Essays on Honor, Social Discomfort, and Violence (1993); Frank Henderson Stewart, Honor (1994); Bertram Wyatt-Brown, Southern Honor: Ethics and Behavior in the Old South (1982); Honour and Shame: The Values of Mediterranean Society (J.G. Peristiany ed., 1965) [hereinafter Peristiany]. There has also been a great deal of interest taken by the popular media in the subject of modern-day honor as understood in the Balkans and Southeast Asia. See, e.g., Scott Anderson, The Curse of Blood and Vengeance, N.Y. Times, Dec. 26, 1999, 6 (Magazine), at 28 (Albania); Rick Bragg, Afghan and Pakistani Tribe Lives by Its Guns and Honor, N.Y. Times, Oct. 21, 2001, at A1 (Pashtun tribe).

were unknown, and a man's word was his bond - in short, a world governed by the popular notion of honor.

In reality, however, the ethics of honor turn out to be much more complicated. In short, honor is the basis of a system of social control which places reputation at the fore, and in which public challenges to the reputation of elite individuals serve as rituals for enacting normative conflict. The central role of reputation and public acclaim or opprobrium in the social standing of public actors, such as politicians, military officers, and business leaders, is a constant theme in historical studies of honor. Although persons (almost always men) of high standing formed an elite, their actions were subject to popular control through the power of the public to diminish the standing of elite actors. [15] The result is a political ideal that "combines personal ambition with principled codes of conduct." [16] In the terms familiar **[*1570]** from legal ethics, honor might be the term given to the virtue of properly balancing the opposing obligations to be a zealous advocate for the interests of one's client, as well as an officer of the court. Honor "retains the powerful partiality of self-concern" [17] (which, in the case of actions by professionals may translate into concern for one's client) but is constrained by the public regarding ideals embodied in public principles that political leaders and professionals must respect.

Some legal ethicists have been quite candid in recommending the restoration of honor as the foundation for the regulation of the legal profession. "The morals of the gentleman are an ethic for the professions," wrote Thomas and Mary Shaffer. [18] The authority of the moral proscriptions recommended by Henry Drinker, for example, derive from his social status, which reflected his ethical sensibilities: "He was a gentleman; he knew what made a person morally unfit to practice law." [19] Even today, in a society that claims to have rejected the social role of the "gentleman," television portrayals of lawyers frequently show the resolution of moral dilemmas by a wise, generally male, elder statesman, whose experience, judgment, and craftsmanship mark him as a person of ethical probity who understands how a good person is supposed to act in practical situations. [20] The virtue of the gentleman can therefore be called "practical wisdom," giving it an Aristotelian gloss.

Talking about Aristotle and phronesis of course brings to mind The Lost Lawyer, Anthony Kronman's magisterial work on the legal profession. [21] Kronman argues that practical wisdom, which is the characteristic ethical faculty of lawyers, is not possessed equally by all. Through experience, lawyers acquire the ability to balance commitment to their clients' causes (which Kronman calls sympathy) with an appreciation for the social interest that professionals are called upon to keep in mind (detachment). There is no formula or algorithm which tells a lawyer the proportion of sympathy and detachment that a particular case demands. An unpopular client facing the full wrath and power of the state (John Walker Lindh is a recent example) deserves almost total commitment from his lawyer, **[*1571]** the interests of society be damned. But lawyers for a powerful entity with the capacity to shape the law in its own interest, such as the government or a large corporation, must recognize that they alone have the ability to align their clients' actions with the common interest; thus, a considerably greater measure of detachment is required. Appreciating the relevant facts, perceiving analogies with other cases, and fitting one's actions to the particulars of a situation are the essence of the virtue of practical wisdom.

The overlap between Kronman's work and the ethics of honor comes in Kronman's candid admission that practical wisdom is the province of an elite caste. Although any lawyer can aspire to it, and through experience gain a measure of practical wisdom, only the wisest, most virtuous lawyers deserve emulation. These exemplary figures, called "lawyer

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[15] Freeman, supra note 14, at 58-60; Krause, supra note 14, at 104. This is a major theme of Bertram Wyatt-Brown's study of southern honor as well. See, e.g., Wyatt-Brown, supra note 14, at 14, 34, 54, 67-72, 113-14, 347-48.

[16] Krause, supra note 14, at 99. Freeman similarly notes in the political rhetoric of the early Republican period an attempt to distinguish between self-serving, factional politicians and servants of the public good, and the congruence of this distinction with the notion of honor. Freeman, supra note 14, at 167-68, 170-71, 183, 186-87.

[17] Krause, supra note 14, at 108.

[18] Thomas L. Shaffer & Mary M. Shaffer, American Lawyers and Their Communities: Ethics in the Legal Profession 34 (1991).

[19] Id. at 4.

[20] Id. at 31. Even a progressive scholar like William Simon is occasionally impressed by the capacity of moral elites to prevent the degeneration of ethical standards. He notes the practice of paying "low-risk" bribes in connection with deals involving tax abatements and building inspections, and contrasts the acquiescence of low-status lawyers with the "unwillingness of elite practitioners" to facilitate these bribes. William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1130 (1988).

[21] Anthony T. Kronman, The Lost Lawyer (1993).

-statesmen" by Kronman, [22] have worked for private entities and within government, so they can see issues from the perspective of both a private client and the social interest. Moreover, their long careers have given them the financial independence to decline to take cases from undeserving clients. As a result, these lawyers and their actions provide ethical guidance for the rest of us. Something of the awe that the lawyer-statesman is supposed to inspire can be perceived from Steven Lubet's story of the day Albert Jenner came to the ordinary peoples' court. [23] As Lubet relates the story, he was a legal services lawyer with a specialization in landlord-tenant and consumer debtor cases, practicing in barely contained pandemonium on the eleventh floor of the municipal court building in Chicago. [24] No one was professional or civil to one another, the judges and court personnel treated poor litigants with undisguised contempt, and the courthouse regulars were far more concerned with pleasing the repeat-player creditors and landlords than ensuring that the defendants had a fair hearing. [25] All this changed one day when Albert Jenner, the former counsel to the Senate Watergate Committee and a name partner in Jenner & Block, with his "stern countenance, ramrod posture, piercing eyes, and signature bow tie" unexpectedly showed up to handle a case: [26]

The entire courtroom suddenly metamorphosed. The muttering plaintiffs' bar fell silent. Clerks began answering inquiries from unrepresented defendants. The judge actually asked questions about the facts and the law. It was as though we were now in a real courtroom where justice, and people, mattered. Furthermore, this effect lasted for the entire day, long after Mr. Jenner left. [27]

[*1572] Now that is honor. Jenner was not just any person with inherent human dignity and all those good liberal qualities - he was somebody. His reputation shamed the lawyers and judges around him into living up to their own ideals. When lawyers resurrect the ethics of honor, they are thinking of people such as Jenner and Kronman's lawyer-statesmen - people who change the whole atmosphere just by walking into the room. In a word, gentlemen. The goal of this essay is to explore whether it would be a good thing to have more gentlemen in the ranks of lawyers, or whether the world of honor is a world well lost.

A brief overview of the structure of this essay is in order. Part I briefly considers the ethics of honor, drawing primarily from the work of anthropologists and historians. The goal is to construct an ethic of honor for lawyers, and to imagine how the profession might be regulated in the absence of rules of professional conduct and the extensive law governing lawyers. This is not entirely fanciful, for as Joanne Freeman has shown, [28] the public behavior of federal politicians in the early Republican period was shaped by notions of honor, which served as a stability-ensuring structure in the absence of familiar modern institutions such as political parties. Even if one has little patience for the anachronistic language of gentlemen and honor, however, or is not well disposed to virtue ethics, in its classical or modern guises, it is difficult to peruse the recent legal theory scholarship without noticing an allied trend - the dramatic increase in the amount of attention paid to social norms and other mechanisms of nonlegal regulation of some activity. For this reason, part II takes a synoptic view of the literature on the nonlegal regulation of commercial relationships. I hope to persuade readers of the value of looking back at the ethics of honor, because I think the advantages and disadvantages of honor as a system of social control largely parallel the costs and benefits of nonlegal sanctions.

In order to demonstrate this claim, I rely throughout the essay on a case study, civil discovery, to explore the promise and pathologies of non-state control of a particular social activity. Discovery is a useful example because it takes place, by and large, under the judicial radar. Although discovery practice is extensively governed by rules of civil procedure, these rules largely operate as a shadow over the day-to-day interactions between lawyers. [29] I be-

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[22] Id. at 3 & passim.

[23] Steven Lubet, Professionalism Revisited, 42 Emory L.J. 197 (1993).

[24] Id. at 204-06.

[25] Id.

[26] Id. at 206.

[27] Id.

[28] Freeman, supra note 14.

[29] The shadow metaphor is from an important paper on the everyday interactions between matrimonial lawyers. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).

lieve that the real work of controlling unethical behavior is done by nonlegal regulation. Trial judges rule on motions to compel or motions for protective orders, but the vast majority of disputes that arise in the course of discovery are **[*1573]** "settled" by the parties among themselves, without judicial intervention. [30] The incentive structure that governs these negotiations is provided by nonlegal regulation: lawyers are concerned with maintaining good relationships with opposing counsel, keeping their present clients happy, attracting future business, and winning the favor of judges who preside over their cases. Because they have these concerns, lawyers are sensitive to informal sanctions such as gossip and "war stories" that might contribute to their reputations for aggressiveness or cooperativeness, retaliation by opposing counsel for uncooperative behavior, and the loss of credibility with the trial judge, which might result in losing a close call on a motion or evidentiary ruling.

Discovery practice operates within the shadow of the law, not subject to significant legal regulation. Discovery has been the object of a great deal of attention from the drafters of the rules of civil procedure, including recent comprehensive amendments, without much effect on the underlying problem of abuse. In federal courts, the rules were changed dramatically in 1993, with the adoption of compulsory disclosure, [31] mandatory discovery conferences at the outset of litigation, [32] limits on the number of depositions per case, [33] codification of the practice of providing logs for documents withheld under a claim of privilege or work product protection, [34] and modification of expert-witness discovery procedures. [35] In addition, courts around the country have adopted local rules or ad hoc orders respecting the conduct of discovery, in response to perceptions of widespread abuse of discovery. [36] Nevertheless, grumbling about **[*1574]** discovery abuse by lawyers and judges does not appear to have abated significantly. [37]

A further problem is that judges have largely withdrawn from the field, at least according to many litigators and commentators. [38] In many cases the judicial attitude toward discovery disputes is to call down a pox on the houses of both sides, [39] to give lawyers a "first bite free" and sanction only repeated or egregious abuses, [40] to split the difference by entering an order that does not strongly favor either side, [41] to assume that the dispute is just a childish squabble between disputatious lawyers, and command the parties to go off and work things out, [42] or to chastise the of-

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30 As one sociologist reported,

31 Fed. R. Civ. P. 26(a)(1), (a)(3).

32 Id., 26(f).

33 Id., 30(a)(2)(A).

34 Id., 26(b)(5).

35 Id., 26(a)(2), (b)(4).

36 See, e.g., Appendix A, Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 448 (1992); Discovery Guidelines of the United States District Court for the District of Maryland, in West's Maryland Rules of Court (2002); Guidelines to Civil Discovery Practice in the Middle District of Alabama, in West's Alabama Rules of Court (2001); Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339 (E.D.N.Y. 1984); Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

37 Compare Nelson, supra note 30, at 805, and John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84 Minn. L. Rev. 505 (2000), with Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am. B. Found. Res. J. 219 [hereinafter "Brazil, Chicago Lawyers"] (pre-amendments), and Bartlett H. McGuire, Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings, 164 F.R.D. 283, 284 (1996) (reporting events that occurred before the 1993 amendments).

38 Beckerman, supra note 37, at 561-65; Brazil, Chicago Lawyers, supra note 37, at 245-51; Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787, 824-27 passim [hereinafter, "Brazil, Civil Discovery"].

39 See, e.g., Johnson v. Sullivan, 714 F. Supp. 1476, 1486 (N.D. Ill. 1989) ("Arguably, attorneys on both sides of this lawsuit have engaged in sanctionable conduct. In light of this mutual misconduct, the court sees no point in sanctioning either of the parties."); Brazil, Chicago Lawyers, supra note 37, at 249.

40 Beckerman, supra note 37, at 574 & n.279; Brazil, Chicago Lawyers, supra note 37, at 248.

41 Nelson, supra note 30, at 797-98.

42 Beckerman, supra note 37, at 568; Brazil, Chicago Lawyers, supra note 37, at 245-46.