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5-7-2019

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Recommended Citation

Paul Horwitz, *Honor, Oath, and Office*, (2019).
Available at: https://scholarship.law.ua.edu/fac_working_papers/549

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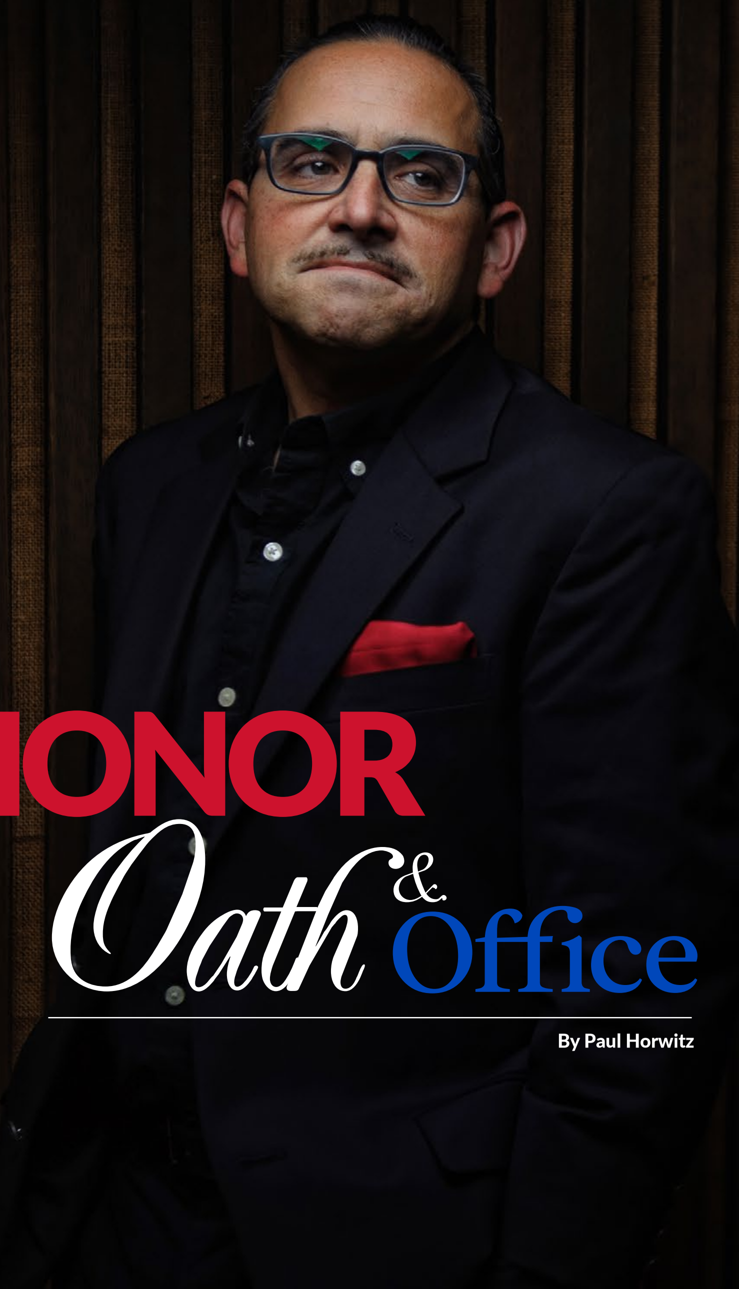

HONOR, Oath & Office

By Paul Horwitz

In his famous article "On the Obsolescence of the Concept of Honor," sociologist Peter Berger wrote in 1970 that the idea of honor had long since passed into obscurity in our culture, replaced by the concept of equal dignity. Berger was describing, not prescribing, and his article thoughtfully examined the costs *and* benefits of this shift. But he made clear that it was mostly a lost concept. Few, especially in the academy, mourned its loss.

Much has changed since then. There is no doubt that dignity has become more important in our legal, political, and social culture. It has played a key role in decisions like *Obergefell v. Hodges*, which constitutionalized same-sex marriage. Nevertheless, scholars and others, moved by a variety of factors—and impelled most recently by concerns about the behavior of our current president and his apparent indifference to the traditional norms of his office—are increasingly reconsidering honor: its meaning, its value, and the costs of treating it as "obsolete." Across a wide range of scholarly fields, we have seen an an explosion of what we might call "honor studies." In books like Sharon Krause's 2002 classic *Liberalism With Honor* and Tamlyn Sommers's *Why Honor Matters*, published just this year, scholars are exploring the possibility of a "liberal honor" that does not just coexist with, but could actually enhance, contemporary politics and culture. It's no surprise that a growing number of legal scholars, too, have made the "turn to honor."

Not all these scholars invoke honor explicitly, although their work is still closely connected to that concept. Some legal scholars, drawing on virtue ethics, have argued that we should focus more on the *character* of judges and other office holders. Others have argued that various offices, including that of the judge, are best understood as fiduciary obligations, and have applied "fiduciary theories of law" to various subjects, including constitutional law.

Whatever one thinks of the virtues and vices of President Donald Trump, there is no doubt that his election has given added impetus to such developments. Scholars who long took other approaches to law have rather suddenly "discovered" an interest in questions of character and virtue, and argued for the importance of "norms" of conduct by presidents and other office-holders. Honor is a growth stock in legal scholarship.

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Inaugural ceremonies, with their public character, serve as perfect examples of the connection between office, oath, and honor.

For me, this subject has been of interest since at least 2008, when the inauguration and famously bungled oath-taking of President Barack Obama gave us a chance to think about the role of oaths and honor in office-holding and in constitutional law more generally. This interest thus long predates our current president, and extends across our constitutional past, present, and future. It has famously been said that ours is "a government of laws, and not of men." Important as that idea is to the rule of law, it has always been incomplete. As those who first invoked the phrase understood, the rule of law is strengthened or betrayed by men and women—office holders, certainly, but also every citizen. Character and virtue have always been a necessary element of the American legal and political project. The people who occupy our offices, the promises they make, and their ability to keep them, firmly and *honorably*, matter. As Anthony Cunningham has written, "We can ignore or banish honor only at our peril."

How does this relate to the Constitution? Three interrelated elements, each fitting into the other like the pieces of a puzzle, help us answer this question: Office, honor, and oath.

Office

As law professor Steve Sheppard writes, "The building blocks of a modern legal system are offices." He defines legal officials as "the individuals in whom all of the powers of the state are allocated, divided among many roles." Each officer is "both empowered and limited by the law."

Over time, an officer has come to be seen merely as whichever person happens to fill that office at the moment. Moreover, in thinking about particular offices, we have become accustomed to thinking mostly about their *power*. But English and American law have long asserted that the key feature of office is not power, but *duty*. The officer is defined as much by the limits of his or her power as by its exercise. Thus, the English judge Richard Hutton asked: "What are the highest places, but obligations of the greatest dewties?"

This is as true of judges as of other officials. A focus on judicial *duty*, and the limitations it imposes on the performance of one's office as a judge, encourages us to think differently about the judicial role and the relationships of individual judges to that role and its obligations.

"These three elements—office, oath, and honor—encourage the sound and faithful performance of one's duties in a democratic constitutional republic. They shift our attention away from substance and doctrine, from rights as opposed to duties, and from the mere exercise of power."

— Paul Horwitz
Gorden Rosen Professor of law

Honor

Of course, holding an office does not magically confer wisdom on the officer or divest that person of human frailty. The character of the men and women who occupy offices remains an essential element of our political and constitutional system.

Even if we choose virtuous individuals for important offices, however, they will not maintain those virtues without powerful motivations. Ambition and a desire for glory comprise one such motivation: "the love of fame," which Hamilton called "the ruling passion of the noblest minds." But such a motivation is not a virtue in itself, and is as likely to lead one astray as to keep one on the path of virtue. It must be channeled productively.

The institution that does so is the love *of honor*. Honor, properly understood, is not the mere desire for fame. It is the desire to be thought well of by those whose opinion ought to matter, and the desire to *deserve* to be thought well of by those individuals. As anthropologist Julian Pitt-Rivers defined it, "Honor is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognized by society, his right to pride."

The person who values honor seeks regard in the eyes of individuals who are worthy to confer it: what Cicero called "the agreed approval of good men." Crucially,

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this desire is *internalized*, so that the office holder wants to exemplify the virtues that accompany *earned* honor, whether those virtues are publicly recognized or not. As Adam Smith wrote, honor involves not just a desire for approval, but "a desire of being what *ought* to be approved of." Sharon Krause speaks in terms of "a quality of character, the ambitious desire to live up to one's code and to be publicly recognized for doing so." Honor, thus understood, is both less and more than a virtue. It is a spur to virtuous conduct, but one that is experienced internally as the desire to earn honor properly and virtuously, and externally in one's desire to be recognized as honorable by worthy peers.

This conception of honor may be *more* rather than *less* urgent in our contemporary, egalitarian democratic society. A strong motivation is needed for office-holders—including judges—to exhibit qualities of virtue and excellence. That motivation must be especially strong where doing so might conflict with their own substantive views of law or justice, or deprive them of opportunities to put their own stamp on the law and gain some measure of personal glory. Honor fills that role. It supplies the basis for the personal agency that can bring out these qualities in the individual and give him or her the strength of character to maintain them in the face of contrary pressures. It is far from obsolete.

The Oath

In our constitutional system, the device that ties individual honor to the ostensibly "impersonal" office, and that encourages honor properly understood and internalized, rather than the mere love of fame, is the oath. Every official takes an oath to support the Constitution. Judges take specific oaths committing to a particular vision of justice and judicial duty. Their importance was famously noted by Chief Justice Marshall in *Marbury v. Madison*, in which he exclaimed that if judges were not allowed to read and interpret the Constitution consistently with their oaths, it would be "worse than solemn mockery."

The oath serves multiple functions. It is a prerequisite to and a performative act for taking office. It solemnizes the act of taking office and commits the oath-taker to act faithfully to fulfill the duties, and observe the limits, of that office. And it is *publicly* performed, tying the oath-taker to public regard and calling on him or her to maintain the approval of both his or her peers—or "honor group"—and the wider public community he or she serves.

The oath is no more magical a device than office itself. But it can be—or *ought* to be—a powerful, even transformative, device. It serves as a linchpin. It connects the individual to the office and the office-holder to the commitment to act honorably. It is tied to both an internalized personal sense of honor and a desire to be *seen* by one's peers and others as having acted honorably. To be sure, these qualities, and the oath that serves to connect them to the individual and the office, are aspirational and rarely completely fulfilled. The oath is imperfect. But that does not make it unimportant or a mere fiction.

These three elements—office, oath, and honor—encourage the sound and faithful performance of one's duties in a democratic constitutional republic. They shift our attention away from substance and doctrine, from rights as opposed to duties, and from the mere exercise of power. This more character- and honor-based vision is imperfect, and raises at least as many questions as it answers. But it is—in our time, certainly, but at all times—a useful and perhaps essential way of thinking differently about our constitutional system. It suggests that the impersonality inherent in the idea of "a government of laws and not of men" is and must be powerfully and ineluctably personal. And it calls on us, and our culture, to revisit, perhaps to revise, but most vitally to *recommit* ourselves to the importance, even in our contemporary egalitarian and dignitarian culture, of virtue, honor, office, and the oath.

Paul Horwitz is Gordon Rosen Professor at the Hugh F. Culverhouse Jr. School of Law. He has taught courses in constitutional law, law and religion, legislation and regulation, legal ethics, and law and public policy. He is the author of The Agnostic Age *and* First Amendment Institutions *and is at work on a book on oaths and the Constitution. This article draws on the Coxford Lecture delivered by Professor Horwitz at the University of Western Ontario Faculty of Law in 2016, and on a piece published in 2018 in* Constitutional Commentary.

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