



Parliamentary Commissioner for Standards

Between Love and Law – The Rise of Ethics¹

When Professor Humfress and Professor Hudson were first kind enough to invite me to visit the University of Saint Andrews' Institute of Legal and Constitutional Research, I confess – and confess is the correct word – to having been mildly amused to discover that it forms no part of a regular law faculty but is approached, in a somewhat Narnian way, through a slightly obscure-looking doorway that promises to lead to the Department of Mediaeval History.

This, of course, is where the cunning protective camouflage begins: and I further confess to have been deceived not only by the door, but also in the very early days of my acquaintance, by those who live behind it. While neither Caroline nor John styles themselves a lawyer – and unhappily one can think of only too many strong reasons why they might wish that to be clearly understood – as their colleagues and students rapidly discover, behind the initially convincing façade lies a centre of legal excellence and a depth of knowledge and understanding of the law that one could seek in vain in many a department of law.

I would venture to suggest, however, that putting aside the undoubted benefits of protective camouflage, the depth and innovation of the legal thinking of the

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Parliamentary Commissioner for Standards

Institute has developed not in spite of John and Caroline's primary and formative academic interests lying elsewhere, but because of them. It is only a historian, and preferably one who assesses developments in centuries rather than in years or even decades, who has the height of vision to be able to see with greater clarity than those who practice the law, how it has developed, is developing and needs to develop.

So it is a particular delight and honour to have been asked by John and Caroline to assist at this commemoration of the 10th anniversary of the founding of the Institute. Having the honour to serve on its Advisory Board, I have had occasion to interact from time to time with its students, and no one can be in that position for more than a few moments without remarking the extraordinary and entirely justified regard in which the Institute's Directors are held by all those who have the privilege of studying under them; not merely learning from their wisdom but also benefiting from the expert care and individual concern that they lavish on each of their students. It is a remarkable institution and on this auspicious occasion we wish everyone of its faculty and students continued success in all your endeavours for the next 10 years and beyond.

It is fitting that, while speaking in honour of a Scottish university and a unit overseen by eminent historians, I should focus on remarks made in a Scottish case of some antiquity, that has shaped the developing law of the whole of the United Kingdom at least as much as any other. In the famous case arising from the unfortunate immersion of a snail in a bottle of ginger beer – *Donoghue v*

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Parliamentary Commissioner for Standards

Stevenson – the justly-celebrated judge Lord Atkin made the following statement which has become one of the cornerstones of the legal policy of the law of negligence throughout the United Kingdom and far beyond. He said:

“But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply.”

My understanding of this aphorism has always been as expressing a division of responsibility in societal terms between the general concept of morality, and religious morality in particular, on the one hand, and the role of law, or if you will the rule of law, on the other hand. In particular, Lord Atkin was saying that the two contexts permit and require different kinds of proposition expressed in different forms of language. Morality expresses itself in general principles that are designed to guide, while the law (whether framed by judges or by the legislature) has to restrict itself to propositions that provide clarity and certainty to all sides of any particular situation.

The question I would invite us to consider for just a few moments this evening is whether that distinction requires further qualification today.

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Parliamentary Commissioner for Standards

In particular, I remind us that Lord Atkin was speaking in 1932, at a time when the concept of morality, and the concept of deference to the fundamental principles of Biblical morality in particular, had a different role in society in the United Kingdom at large than they do today. An appeal to well-known passages from the Bible resonated in those times as an expression of consensual norms in a way that it would not do today. Irrespective of whether adherence to moral principles *per se* was more widespread in those times – which having regard to the unchanging qualities of human nature it probably was not – Lord Atkin could with confidence propound a proposition from the Bible and expect it to be taken without contradiction as, at the very least, an expression of a generally-accepted cultural norm, drawn from a religious work commanding at the very least general respect and, more importantly, a degree of undisputed authority arising both from the established nature of the Church and from the number and proportion of its adherents.

An appeal to Biblical notions of morality from the Bench would resonate rather differently today. In particular, the specifically Christian morality to which Lord Atkin was appealing is in some senses now a minority perspective, given that in the England and Wales census of 2021, for the first time, fewer than half of the population described themselves as “Christian”².

² 46.2% (27.5 million people) – a 13.1 percentage point decrease from 59.3% (33.3 million) in 2011 – [Religion, England and Wales - Office for National Statistics](#).



Parliamentary Commissioner for Standards

I pause here briefly to note that from a constitutional perspective, although some people within the Church of England doubt its continued right to play the role of the single established religious body, for my own part the established Church retains a vital role and I have published recently to that effect³.

But this evening I am talking not about the constitutional authority of any particular religious body but about the role of religiously-founded morality in society as a whole and the changing perspective on shared cultural moral values. And what I want to ask is this: if there is less shared morality today, at least in the limited sense of less consensus around one particular expression of moral values, is there a gap between morality and the law of a kind that was not apparent, or not so apparent, in Lord Atkin's time? And if there is, does it need to be filled, and what might fill it?

It is worth noting here the distinction that Lord Atkin appeared to draw between the purpose of morality and the purpose of the law: he talked about "censure" in the case of the former and "relief" and "remedy" in the case of the latter. And he was speaking at a time when perhaps the very notion of moral censure had a different role in society than it does today. Certainly our general impression of past generations is that they were in one sense more censorious than we are today, and the Victorian approach to public morality was neatly expressed by Dickens' recurring theme of the verdict of society in *Our Mutual Friend*, with

³ *Voice in the Wilderness – Why should we listen to the Church of England?*, Ed. Joshua Hordern, Graham Tomlin, SCM Press, ISBN: 9780334066989, 2026.



Parliamentary Commissioner for Standards

there being a shared idea that certain acts take a person beyond the pale of society's countenance, but no single shared understanding of where the parameters of society lay for that purpose; indeed he closes the book with the meek Twemlow finally and firmly confronting the odious Lady Tippins with his quietly articulated notions of what core society should and should not care about. Similarly, Trollope in *The Way We Live Now* deploys the idea that "there are certain things one just can't do", not least in a brief but powerful reference towards the end of the book to Felix Carbury's finally falling off the edge of being publicly recognisable. Lord Atkin of course considerably post-dated that era, but he still felt able to assert a purposive connection between morality and law in terms that—

"Liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."

I somehow doubt whether it would be possible to articulate the same kind of tessellation between morality and law today. Certainly, recent judgments that go deeply to the heart of society have been at great pains to make clear that it is no part of the judges' role either to make moral judgments, or to give effect through the law to the claims of morality. The Supreme Court judgment about the nature of gender would be one good example, but there are many others.

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Parliamentary Commissioner for Standards

Certainly, commendable advances in liberty in recent decades have made it less possible than it once was to assert certain positions about behaviour as being a matter of generally accepted morality. The emphasis of the modern age is on individual choice, which inevitably leaves a wider gap between those things which remain clearly understood by all as reprehensible and those things which are forbidden by law.

Also certainly, we cannot look to the law itself to expand its influence so as to occupy any space that might be created by the retreating role of personal morality. The law has done very well to adapt to the twists and turns of human endeavour and to reinvent itself (or, as Lady Hale in the second *Miller* Brexit case would prefer us to have it, rediscover itself) so as to continue to serve as an arbiter between competing interests. But if morality has in any sense fallen out of fashion in terms of commanding general consensual respect and reliance, the law undoubtedly has done the same long ago. When Jerome K Jerome observed that if a man approached him in the street and threatened to take his watch by force, he would do his best to resist, but if a man approached him and threatened to sue him for his watch he would take it out of his pocket, give it to him and reckon that he got off cheap in the bargain, he was, with the true perspicacity of the satirist, expressing a deep and troubling contempt for the legal system which has certainly not eased over time. If the abuses of Chancery and exploitation of imprisonment for debt received something of a check due to the revelations of Dickens and others, in our own time, respect for the law as an impartial and fair adjuster of balances has taken immense hits as a result of a

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Parliamentary Commissioner for Standards

chain of circumstance including the egregious wickednesses of the Horizon scandal in the Post Office and the cynical abuse of the legal system in relation to SLAPP litigation, and in terms of trust the law as an institution perhaps stands at as low as ever.

But even were it better trusted, we could not profitably look to the law to expand its influence into what might previously have been recognised as the space occupied by morality. Legislation is a tool of control – by creating rights and imposing duties it regulates societal behaviour: but it cannot change attitudes and when it tries to do that it generally fails. We passed the Sex Discrimination Act over fifty years ago, and I am not conscious of sex discrimination having ceased to be a problem in the real world. We passed the Race Relations Act sixty years ago, and I am not conscious of racial discrimination having ceased to be a problem in the real world. That is not to say that we do not need to legislate and regulate in areas of core societal problems: of course we do, but we must be aware that by doing so we are not solving the problem but merely addressing the symptoms. Law can force people to behave or not behave in specified ways, but it cannot change their thoughts and attitudes, and as a coercive tool it is more likely than not to entrench the very attitudes that it seeks to address.

So if consensual morality is retreating, and law cannot be relied upon to prevent a vacuum, what can fill the gap?

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Parliamentary Commissioner for Standards

The *Nolan Principles of Standards in Public Life* are remarkable in a number of ways. They were summoned out of the ether by the Committee on Standards in Public Life, presided over by Lord Nolan, in its First Report published in May 1995. The Committee was established in October 1994 by Prime Minister John Major in response to the “cash-for-questions” scandal and other events that had significantly eroded public trust in political life in various ways. I do not think it would be unfair to say that those events had exacerbated a general public perception of what might be described as a lack of moral integrity on the part of the government of the day in particular, but of the political class in general.

Much could be said about the gestation of the Committee and its role in the politics of the time, but I wish to focus simply on two aspects of the Nolan principles as articulated by the Committee in its first Report: first, their emergence from the past; and, secondly, their durability for the present and future.

Simply from the perspective of someone who has been involved in public life in one way or another before, during and after the establishment of the Committee standards in public life, I offer the perspective that the principles set out in that Report – openness, accountability, honesty, integrity, objectivity, selflessness and leadership – were and are accepted with a remarkable degree of consensus and for all practical purposes have been accepted by all, without the kind of discussion and contention that normally attends even the most unambitious attempt to state the obvious in terms of constitutional imperatives.

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Parliamentary Commissioner for Standards

And they have stood the test of time: a cynic might say that they have proved as uncontentious in principle as the Biblical precepts to which Lord Atkin was referring simply because their generality and breadth makes them easy to affirm in the abstract without requiring anything particularly burdensome in the form of practical observance. But having daily opportunities to see the reality of the influence of the Nolan principles on those who perform the functions of public life, I would prefer to say that, while inevitably being honoured as often in the breach as the observance as any other moral or ethical code, they remain as relevant in terms of providing practical principles as they ever were.

I pause again briefly to note that I have occasionally wondered during my time as Parliamentary Commissioner for Standards whether the Nolan principles could benefit from being supplemented by a new principle of respect. At present, respect is mentioned in the standard explanations of the Nolan principles as an incidental to the principle of Leadership. But I do think that its elevation into a free-standing eighth principle is something that would be worthy of consideration, now that the dialogue that is so essential to the carrying out of constructive dialogue which is the lifeblood of politics in a liberal democracy has become threatened by the apparent collapse in basic standards of courtesy and reason in public discourse, largely fuelled by the excesses of social media. But that is a question that I leave to the Committee on Standards in Public Life, or rather to its successor body the Ethics and Integrity Commission, which although in one sense under government control and

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Parliamentary Commissioner for Standards

bearing a name that brings perhaps slightly sinister misgivings to devotees of Orwell's *1984*, will I hope and believe continue to be mandated and motivated to think about the standards of public life in an independent way.

Leaving aside the question of whether an additional standard of respect would be useful, the existing seven principles have stood the test of time of their first 30 years and remain, so far as my experience goes, unchallenged as consensual expressions of what the public expect of those in public life in general.

But I think it goes beyond that: when I have had the opportunity to discuss the Nolan principles with mixed gatherings of leaders from private sector, public sector and third sector, I have always explored the utility of the Nolan principles in private, as well as in public administration, and I have found universal acceptance that as building blocks of confidence they are of as great utility between consumer and supplier as they are between politicians and the public.

And really, the whole purpose of my remarks this evening is to draw attention to the utility to the Nolan principles, not simply as an expression of ethical principles or values which are morally neutral, at least in a religious sense, but as an ethical code which appears able to command the consensual affirmation and adherence of, I venture to suggest, the generality of those living in the United Kingdom today.

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Parliamentary Commissioner for Standards

Being a fractured and fragile society in many different ways, anything that can speak to the public as a consensual articulation of values that can hopefully guide, if not necessarily control, the regulation of public administration and private commerce, and perhaps matters beyond, should be celebrated and deployed to the full.

The entire concept of sectoral regulation through quasi-legislation in the form of guidance, codes and other normative principles, outside the spheres both of private morality and of directly enforceable legal rights and duties, is relatively recent. Search for powers to give guidance in UK legislation before the year 2000 and you will find a few; search from that time onwards and you will find a plethora, with scarcely a single Act that does not confer power to issue statutory guidance or some other kind of quasi-legislation, and any Act of significant size generally contains several.

The growth of professional and industrial regulation, with regulators sometimes enforcing law but always promulgating ethical codes, is probably owed to a range of factors, legal and societal. But whatever the causes of this proliferation, the one shared factor between all regulatory contexts is their aim to create and maintain trust. And it is in that context that the Nolan principles can always contribute.

Trust needs to be based on expectations of standards that inspire confidence, irrespective of the political, professional, commercial, industrial or other

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Parliamentary Commissioner for Standards

context. And having become a regulator myself at the end of my career, I have observed that one is much more likely to have an impact on trust in any particular sector by focusing at least as much on supporting good behaviour as on investigating and punishing the bad. And in order to do this one has to be able to articulate aspirational principles of a kind that lack the clarity and certainty required for legislative or other legal propositions, but which can inspire and influence good practice along clear and consensual lines. And here, the Nolan principles really come into their own, for the reasons that I have already adumbrated.

Openness, in particular, while not being more important than the other six principles is definitely the founding prerequisite for any body, public or private, that wishes to command confidence and deserve respect. In the House of Commons, an accurate register of interests of Members is the necessary precursor to the implementation of all the other Nolan principles. Without openness one cannot establish any kind of accountability, and it is on accountability that fundamental public confidence has to be based.

Accountability in the sense of a mechanism for monitoring compliance and being required to face infractions, with the potential for public real-world consequences, is ultimately what enables those in whom any kind of trust is reposed – political, commercial or other – to face their public in whatever context and say if you are troubled that my behaviour is falling short of the

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Parliamentary Commissioner for Standards

ethical standards that justify the power that is vested in me, you have somewhere to go to have your concerns addressed.

Honesty is perhaps the one Nolan principle that is most redolent of some kind of religious or other personal morality, going beyond an obviously utilitarian secular ethical principle. But one only has to watch the gruesome spectacle of the public inquiry into the Post Office Scandal – and although it is a truly gruesome spectacle it is a cautionary tale that should be compulsory viewing for all regulators and all regulated – to see that once scrupulous attention to honesty is allowed to slip, there are no reliable barriers on the road to complete corruption and ethical collapse.

Coupled with integrity, the two principles add a purely secular but fundamental flavour to inspiring confidence and retaining respect: in essence, as a regulator I interpret the requirement for integrity as something along the lines of holistic consistency. For example, Members of Parliament are entitled to respect for their privacy and that is rightly encoded in the Code of Conduct which states expressly that it does not seek to regulate what Members do in their “purely private and personal lives”. It is therefore entirely a matter for a Member’s personal moral code whether he or she chooses to indulge in an extra-marital affair, for example: but a Member who chooses to pursue an extra-marital affair in the morning and to stand up in the Chamber in the afternoon and give a stirring speech about the importance of the marital bond and the sanctity of family life as the fundamental bedrock of society, is exhibiting a lack of integrity

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Parliamentary Commissioner for Standards

that might reasonably cause their constituents and other members of the public to treat the sum of their pronouncements with less seriousness than might otherwise be the case.

Objectivity and selflessness play very much the same kind of role. The common complaint that Members of Parliament are all in “it for themselves” always seems to me to be a slightly curious perspective. I always encourage Members not to refute the proposition, but to contextualise it by affirming that as professionals – since we decided several decades ago that controlling public policy should not be the exclusive preserve of rich amateurs – Members of Parliament are in it for themselves precisely no less and no more than any other member of a profession or trade who is motivated by the entirely reasonable aim of earning a livelihood. But the choice of a particular line of business, and the way in which one pursues it, with a degree of objectivity and selflessness having in mind not merely one’s own financial betterment but the good of the people one serves, is the core reason why a person attracts and maintains the trust of the public for whom they work, whether the person be a car mechanic, a plumber, a teacher or a Member of Parliament. And a practitioner of any trade or profession who clearly directs themselves not by reference to their own enrichment but by reference to the good of those whom they serve in a professional or commercial capacity, is demonstrating not merely objectivity and selflessness within the meaning and expectation of the Nolan principles, but also the final principle of leadership, by providing a clear example of how

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Parliamentary Commissioner for Standards

any undertaking can be pursued for the public good in a manner that commands confidence and respect.

I would argue that ethical principles – of a kind of which the Nolan principles provide a useful example that is capable of serving in a wide range of contexts extending far beyond the public service for which they were originally designed – are capable of filling the gap that I identified at the start of my remarks between public law and personal morality.

In the first place, it is possible to articulate ethical principles in a way that captures a consensus that commands respect and adherence. The Nolan principles appear to command general acceptance and to my knowledge have never been seriously challenged as proper expressions of values and principles that can be regarded as common to a liberal democracy operating in accordance with the rule of law.

Secondly, unlike the law for the reasons I gave earlier, an ethical code is not a blunt tool of compulsion, and it is capable of influencing attitudes and changing patterns of behaviour. The Nolan principles require to be contextualised in each regulatory regime in which they are deployed, with a set of explanations of the application to that context of each of the seven principles. And they can be contextualised in a way that makes them a source of inspiration towards and support of good practice, not merely a precursor to punishment of the bad. Each of the Nolan principles as set out in the original Report of the Committee is

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Parliamentary Commissioner for Standards

accompanied by a brief explanation designed to contextualise it for the public service in general, and a number of settings, including for example the House of Commons Code of Conduct, adopt those explanations in their standard form. But it is open to any individual public, commercial or private setting to adopt the principles with their own explanations designed to reflect the practical application of those principles in a particular context. These can be used to expound the relevance of the principles to each setting in a way that, instead of simply creating appetite for avoidance as hard-letter law tends to do, can hopefully inspire a commitment to best practice incorporating and illustrating those principles. Like every regulator, I would prefer to support best practice than to punish bad practice, and a shared set of ethical principles drawn up with relevant consultation can provide a consensus of what good practice looks like in a way that enhances respect for the profession or other body adopting it and creates and maintains trust between the professional or other body and its constituents, clients or other stakeholders.

But I would also take the argument one stage beyond urging the ability of ethical principles to fill the gap between law and morality, and suggest that it is possible to identify certain ethical principles as common and basic themes both of personal morality and substantive propositions of law, so that more than ethics simply filling a gap between law and morality, as those two fields separate they in effect reveal underpinning ethical principles that provide a holistic consistency to the wider rules of society, using rules in the broadest sense of the term (and remembering that when I first mentioned to John Hudson that I find

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Parliamentary Commissioner for Standards

Trollope's *Orley Farm* one of his most fascinating expositions of law, focusing as it does on inheritance and perjury, he countered that it is much more fascinating when one takes the early passages between the brilliantly-named Moulder, Dockwarth and Kantwise from the perspective of the ontology of law as a demonstration of how conventions developed by users of commercial rooms at inns can turn into a system of rules that can both be relied upon in the form of an appeal to compliance on quasi-moral grounds and to some extent even enforced in a quasi-legal or paralegal manner).

Certainly in the case of personal morality based on one of the Abrahamic religions, and I would not be surprised to learn that the point extends to many other religions too if not to most or all religions, there are fundamental values that underpin ritual and other specific observances. In the case of Judaism, for example, the early rabbis developed the aphorism that “the ways of the world come before the law of the Torah”, deriving in part from a key Biblical passage where Moses requires the Jewish people, immediately before returning from Egyptian exile to the land of their ancestors to establish their first nation state, to condemn publicly a short list of already forbidden practices, ranging from misleading the visually-impaired, through moving boundary stones, to certain forms of forbidden relationship – and the common denominator between this slightly incongruous list is the dissimulative exploitation of weakness or vulnerability. Translated into what we might recognise today as secular or value-neutral consensual ethical principles, in each of these reprehensible behaviours there is an obvious lack of honesty, integrity, objectivity,

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Parliamentary Commissioner for Standards

selflessness, transparency or accountability in a person's relationship with others. Society can function when people have property disputes or even physical fights – but it cannot function if they attempt to rearrange property boundaries by stealth, or if they attack secretly and hide their identity. In this respect regulatory micro-environments such as the House of Commons or a regulated profession or trade are microcosms reflecting societal truths more generally: we can function if a Member of Parliament accepts an improper influence in a system that exposes it and provides for accountability, but take away effective openness requirements and the entire system collapses.

In the case of law too, treating law and equity as a single branch of societal regulation that has now been formally merged, there are ethical underpinnings that are not specifically normative but against which any aspect of law can and should be tested. As Lord Nottingham said in the Duke of Norfolk's Case in 1680⁴: "Pray let us resolve cases here that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides?"; or Lord Mansfield in 1774⁵: "The question then is, whether this wager is against principles? If it be contrary to any, it must be contrary either to principles of morality; for the law of England prohibits every thing which is *contra bonos mores*; or, it must be against

⁴ 3 Ch. Ca. 33.

⁵ *Jones v Randall* (1774) 1 Cowper 37, 98 E.R. 954; recorded in a possibly suspect but more extreme form in Lofft (Capel Lofft (1751-1824)) as "Whatever is contrary, bonos mores est decorum, the principles of our law prohibit, and the King's Court, as the general censor and guardian of the public manners, is bound to restrain and punish" – Lofft. 386.



Parliamentary Commissioner for Standards

principles of sound policy; for many contracts which are not against morality, are still void as being against the maxims of sound policy.”; and⁶ “Never trust any note cited, when not consonant with the general principles of law, justice and equity. It must be wrong.”; or Lord Justice Lindley in 1894⁷: “I confess that when I am sought to be driven to a conclusion which appears to me unreasonable and unjust, I at once suspect the validity of the premises, even if I can detect no flaw in the reasoning from them”.

These statements have an archaic ring and might not be made in quite those forms as representations of legal practice today; and, as I mentioned at the beginning of my remarks, courts today are careful to distinguish themselves from being courts of morality in any sense, and the liberalism of the modern age emphasises the moral-neutrality of public policy and the law that gives it effect. But the essence of these older statements of the fundamental basis of the law continues to resonate in the sense that general principles of justice continue to underpin the law even in its most technical manifestations – and perhaps it will suffice for that purpose to remind us that the Civil Procedure Rules in their most modern post-Wolf Reform expression contain an overriding objective⁸ instructing the courts to ensure that they “deal with cases justly” and “fairly” without attempting a technical definition of either term: none is required or apt, as it would be trying to tie down into the letter of the law the kind of natural

⁶ Lofft. 610.

⁷ *In re Holford* (1894) L. R. 3 Ch. 45.

⁸ Civil Procedure Rules 1998 (S.I. 1998/3132) – Rule 1.1 – The overriding objective.



Parliamentary Commissioner for Standards

principles that have always underpinned it as a consensual understanding of basic human decency.

Taking all of which together I would argue that the emergence of ethics as a separate field of public regulation is not merely a modern construct to fill a gap that has undoubtedly arisen, but serves as a fundamental restatement of principles and ideas that provide holistic consistency to the entirety of the social contract or of societal regulation. The time of recognition of ethics as capable of fulfilling this role has very much arrived, and I hope and expect that they can be deployed more widely and more openly as providing much-needed guidance and indeed leadership at a time of general need.

So with gratitude for your patience and indulgence thus far, let me finish with this. At a time of rampant and destructive division it is common for leaders of all kinds to protest that we have much more in common than that which divides us, and to assure us that therein lies our hope of reconciliation and tranquillity. I am not actually sure that we do have as much in common in the society of the United Kingdom today as we have sometimes had: and I am reasonably confident that the simplicity of the context in which Lord Atkin was able to propound his straightforward division between religious morality and the requirements of law no longer helpfully represents the entire backdrop against which public lives are played out today, in political, commercial and other arenas. But we do need to look for common ground in order to heal division in a constructive way. And I have ventured to suggest this evening for

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Parliamentary Commissioner for Standards

your consideration, that in some senses value-neutral ethical standards, including those embodied by the seven Nolan principles which have been so useful in their first 30 years to date, are capable of bearing additional weight and playing an increasingly constructive role not merely in the conduct of public life, but in relation to our society as a whole.

I close by thanking you for your patience and attention and inviting you to join with me in once more congratulating Professor Humfress, Professor Hudson, and all those who have contributed to the excellence of the Institute in its first ten years, and wishing them success and prosperity in all their endeavours for the future.

Thank you.

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