

ACCOUNTABLE INSTITUTIONS,
TRUSTWORTHY CULTURES

ONORA O'NEILL

Second Annual
T.M.C. Asser Lecture



ASSER PRESS

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by

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The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. The Annual Lecture builds on his vision and mission, it invites distinguished international scholars to take inspiration from Asser’s idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today. It is the T.M.C. Asser Instituut’s flagship lecture and its date commemorates the foundation of the Institute in December 1965.

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FOREWORD

On the occasion of its 50th anniversary, the Asser Institute inaugurated an annual series of lectures in memory of the – so far only – Dutch Nobel Peace Prize recipient, Tobias Asser (1838–1913), the scholar and diplomat whose name is proudly and gratefully carried by the T.M.C. Asser Institute, the interuniversity institute for international and European Law in The Hague maintained by the University of Amsterdam on behalf of the Dutch Law Schools.

Tensions and the threat of war were looming over Europe when Tobias Asser worked with the aim of maintaining sensible and peaceful relations between nations and their governments. In the 51st year of its existence, the Asser Institute focused its academic research on international and European Law as a source of trust in a hyper-connected world. Trust, which in international relations, but also within societies is increasingly under pressure. That is an additional reason to deepen our understanding of the sources of distrust and fear.

The annual T.M.C. Asser Lecture provides a moment for reflection outside of the established framework of legal research. New approaches and a better understanding of the realities of international and European Law should be encouraged and provoked by the lecture. Starting with the first lecture in 2015, delivered by Joseph Weiler, each year the institute invites a scholar of distinctive excellence to hold this lecture. The institute is very grateful to Baroness O'Neill of Belgrave for accepting the invitation to at the end of 2016 give the second T.M.C. Asser Lecture, in this instance on *trust and trustworthiness*, a subject crucial to her academic work but also to that of the institute. Onora O'Neill has articulated the true sources of trustworthiness throughout her academic work and her contributions to politics. Trust is destroyed by deception, but can be reinforced when it is brought to life in the struggle for the rule of law and human rights, both domestically and in international relations.

FOREWORD

This view also guides our research and teaching at the Asser Institute. Onora O'Neill's lecture made a lasting impression on us and we are proud to present it as the first publication in the *T.M.C. Asser Lectures Series*.

ERNST HIRSCH BALLIN

President of the T.M.C. Asser Instituut, The Hague

ACCOUNTABLE INSTITUTIONS, TRUSTWORTHY CULTURES

ONORA O'NEILL

A CHANGING LANDSCAPE

Across the last fifty years there have been huge efforts to construct more just and accountable institutions at every level from international organisations to state bureaucracies, from transnational corporations and NGOs with global reach to small businesses and local charities. This has been done both by extending law and other forms of regulation at every level from the international to the local, and by increasing second-order requirements that hold individuals and institutions to account for living up to the relevant laws and regulations. Yet increases in law and regulation, even when backed by demanding systems of accountability, have often disappointed.

Rules matter: they are needed for the rule of law, for the protection of human rights, for democracy, and for social and commercial life. However, rules are always and unavoidably incomplete and indeterminate. As both Kant and Wittgenstein showed, indeterminacy cannot be eliminated by adding further and more detailed rules that go 'all the way down'. Deficiencies in the way institutions and individuals act therefore cannot be remedied just by setting *additional* requirements, for example by providing *more* law, *more* regulation and *more* accountability; indeed doing so can be counterproductive. Those subjected to excessive and often excessively complex requirements may feel under pressure, may put all their efforts into compliance, may miss the larger picture, and at worst may lapse into cynicism or into 'gaming the system'. A telling illustration of these difficulties was given me by a midwife, whose evidence to an inquiry into the safety of maternity services in England and Wales stated that it took longer to do the paperwork than to deliver the baby! Similarly critical com-

ments on excessively detailed or complex legislation, regulation and accountability are constantly made, all the way from financial services to discussions of university league tables.

A more adequate approach to institutional life would recognise that rules that constrain action are not enough, and that imposing additional law, regulation and accountability can be counterproductive. The ways in which rules and standards are embedded and lived in institutional life also demand *cultures* that can discipline and shape the interpretation and enactment of rules and standards, and provide the means for participants to judge one another's claims and proposals, and their trustworthiness. Trustworthy cultures that permit, shape and foster good judgement and thereby support the identification of plausible ways of judging situations and feasible proposals for action are required if law and regulation are to work well.

LAW AND PROGRESS?

T.M.C. Asser's¹ work on international private law and on international conventions on armed conflict is now over a century old. During that century much has been done in many jurisdictions to extend the rule of law, and to secure compliance with human rights standards, treaty obligations and other important objectives, often by instituting additional law, regulation and accountability. However, progress has been uneven.

Asser died in 1913, just before the start of WWI, so just before a period of catastrophic disregard of international law, and more generally of legal order. A simplified history of our chequered times might see the catastrophe of WWI as followed by the brief optimism of 1920s and the founding of the League of Nations, followed in turn by the collapse of hopes in the 1930s and the disasters of WWII, with progress resumed from the 1940s with the Universal Declaration of Human Rights and the founding of the UN. Many now assume that further

¹ Arthur Eyffinger, *Dreaming the Ideal, Living the Attainable. T.M.C. Asser [1838–1913] Founder of The Hague Tradition* <http://www.asser.nl/media/1554/eyff_asser-100_book_lr.pdf>. T.M.C. Asser Press, The Hague.

progress should be based on further efforts to construct additional national and international institutions, including national and international courts and tribunals, that meet required standards, thereby extending the rule of law and specifically of human rights compliant law, and securing its enforcement in more jurisdictions. But can extending law, regulation and accountability in these and related ways keep institutional life on the right trajectory? I think that may be too simple a view.

NARROWED PERSPECTIVES

This schematic narrative about advance, retreat and resumed progress is remarkably reticent about ethical and cultural issues, about the justification of ethical and legal requirements, and about the various sorts of judgement that those requirements need. I am uneasy not because the story is entirely false, but because it is silent about so much that may matter in extending justice.

European and other ethical traditions have long seen certain standards holding for all, but for the most part saw universal standards as bearing in the first place on *duty* and *virtue*, rather than (more narrowly) on *rights*. Rights, if discussed at all, were seen as corollaries of some duties, but other duties were not thought of as having counterpart rights. Although many so-called *perfect* (= *complete*) duties were taken to have counterpart rights, that specified who had a right to their performance, others, including all *imperfect* (= *incomplete*) duties, were not.² Discussions that begin with duty therefore offer a wider ethical perspective than those that begin with rights, and the triumph of human rights discourse in many areas of life can at *most* restore a subset of claims that used to be made about standards with universal scope.

² Some supposedly perfect duties, including duties to self, are not thought of as having counterpart right holders (we can hardly have rights against ourselves!). For an exploration of some of the issues see my 'Enactable and Enforceable: Kant's Criteria for Right and Virtue'. *Kant-Studien* 107.1. (2016):111–125.

Moreover, the widespread assumption that rights, and in particular human rights, offer the correct (or on some current views the only) starting point for shaping law, regulation and accountability is not the only respect in which contemporary discussions are narrower than earlier ones. In my view, an even more fundamental issue is that deeper questions of justification are widely avoided. All too often the only justification offered is an appeal to authority – typically the authority of states and their legislation and of international instruments, including human rights declarations and treaties.

The abrogation of argument in favour of appeals to authority did not, of course, begin with the human rights declarations of the second half of the twentieth century. It has long been present in realist political thought, in some theological and ethical positions, including some forms of secularism and scepticism. Scepticism about ethical claims took an extreme form with the rise of logical positivism in the 1930s, with the claim that ethics (along with metaphysics, theology and aesthetics) was *literally meaningless*, and that ethical or political justification were consequently impossible. Although the arguments put forward by logical positivists were soon found wanting, their conclusions remained influential after the appeal of their arguments faded. Their conclusions live on in much contemporary thought, and are perhaps most evident in the continuing widespread reliance on versions of *legal positivism* and of *subjectivism* in discussions of ethical and political standards. Both types of position follow logical positivism in shying away from deeper questions of justification.

Versions of *legal positivism* marginalise or reject demands for deeper justification in favour of appeals to authority, but avoid the flamboyant claims about the very meaning of ethical claims that the logical positivists had advanced. Today versions of legal positivism permeate many discussions of UDHR and of other human rights conventions and instruments, which assume that these instruments and the relevant supporting and adjudicating structures can be justified by the authority of state agreement and ratification.

A second, more popular and broader, contemporary approach to these issues, which also sets aside deeper questions of justification, sees normative standards as subjective. For example, it is often said that certain legal or constitutional standards, or certain human rights, and other ethical claims, incorporate ‘our values’, with the suggestions that this is all the justification they need or can have. This popular move to subjectivism about standards offers no reasons for those who do not accept a given ‘value’ to reconsider, let alone revise, their views.

I think there are good reasons to hesitate about treating the *fact* that people hold certain ‘values’ as justifying those values. Doing so amounts to treating some empirical facts as having normative, indeed specifically, ethical weight. Not only does subjectivism seek to derive an *ought* from an *is*, but it inevitably treats many highly contentious matters as ‘values’. Many people are deeply wedded to ‘values’ such as control, power and domination over others, or enriching themselves and injuring others. Some – especially those writing on economics and on consumer affairs – explicitly equate ‘values’ with individuals’ preferences. Subjectivist positions simply assume that we can do no more than reject others’ ‘values’ and affirm and promote our ‘values’, thereby in effect endorsing positivist views of ethics (without using or endorsing any of such as logical and legal positivists have favoured). Like positivism, subjectivism about ethical or political claims does not take either ‘values’ or their broader justification seriously. Both types of position leave it unclear why we should speak of whatever authorities proclaim, or whatever individuals or societies happen to prefer, or whatever international bodies and tribunals endorse, as *values* in a serious, non-subjective sense of the term, and offer no reason for others who disagree about what matters to reconsider their positions.

Yet I suspect that support for forms of positivism and subjectivism is in fact not nearly as widespread as one might imagine from the frequency with which these positions are put forward. Despite widespread reticence about deeper questions of justification, I believe that many people who set store by human rights and international law, and more broadly by law, regulation and accountability, assume that *some* deep-

er sort of justification is possible – although for everyday purposes they are content to appeal to authority (UDHR, ECHR, treaties and law) or to individuals' subjective preferences, and do not address deeper questions about justification. More serious justification of ethical claims and principles is not, in my view, a lost cause – but it cannot be summarised in a few words.³

LAW, TRUST AND TRUSTWORTHINESS

T.M.C. Asser took a distinctive and promising view of the purpose of law and claimed that 'law serves primarily to cultivate trust'.⁴ It is not hard to see *some* truth in this claim, in that trust is likely to be damaged where lawlessness rides high. Without the rule of law, those who seek to injure or deceive may have their way with impunity.

Yet curiously the very years during which so much effort has gone into extending law and regulation at every level, and into backing their requirements by strengthening accountability, have coincided with ubiquitous claims that trust has declined, and even that there is a 'crisis of trust'. It seems that the very institutions and office holders now subject to *more* law and regulation, and held to *more* detailed account, are now *less* trusted. On the surface this seems paradoxical.

However, the most commonly cited evidence for this supposed 'crisis of trust' is less compelling than many assume. Those who think there is a 'crisis' often point to the findings of public opinion polls, which typically ask members of the public whether they trust institutions or office-holders of certain types, and in particular whether they trust them to tell the truth. Typical polls ask: "Do you trust doctors, or bankers, or judges, or nurses, or politicians, or journalists, or the man or woman in the street, to tell the truth?" Some institutions and professions receive low trust scores, which are then cited as evidence

³ I offer an account of what I believe can be provided in the papers in Onora O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy*, Cambridge University Press, January 2016.

⁴ Asser's *Inaugural Address* is included in Ernst Hirsch Ballin (ed. and intro.), *A Mission for his Time. Tobias Asser's Inaugural Address on Commercial Law and Commerce, Amsterdam 1862* (The Hague: T.M.C. Asser Press, 2012), p. 18.

of declining trust – and are often seen as reasons for imposing additional law, more (supposedly better!) regulation and stronger forms of accountability.

However, polls usually provide little evidence of *decline* in reported trust levels. This is partly because we often lack time series that allow comparison of past and present trust levels, and so can seldom show that there has been a decline. And it is partly because the evidence often shows that the public have been pretty consistent in their reported attitudes of trust and mistrust. For example, in the UK the public expressed little trust in politicians or journalists twenty years ago, but high trust in nurses and judges; and that remains the case.

Secondly, and in my view more fundamentally, opinion polls can in any case provide only limited evidence about trust, and even less evidence about trustworthiness. They can provide evidence about *generic attitudes* to *types* of institution or *types* of office holder, such as trusting or mistrustful attitudes. But they offer no evidence about the judgements that people make when they decide to trust or refuse trust to particular individuals or institutions for particular matters, in which they often differentiate cases with some care. When we make *judgements* about *whom* or *what* to trust for *which* purposes we do not simply adopt or express attitudes: we seek and judge the relevant evidence. All intelligent placing and refusal of trust uses evidence to judge the *trustworthiness* or *untrustworthiness* of specific institutions or office holders for specific sorts of action, and judging the trustworthiness of particular office-holders or institutions is not a matter of having some generic attitude towards them types of office-holder or types of institution. It demands *judgement* of the *honesty* and the *competence* of particularly agents and of the *reliability* with which they manifest that honesty and competence in specific matters.

So it is foolish to assume that we should always, or indeed generally, seek to ‘restore trust’ or to ‘build more trust’. Where we have to deal with untrustworthy persons or institutions it would be a bad idea to aim for more trust. It would have been unfortunate if the well-known Mr Madoff, who made off with many people’s money, had been more

trusted, a good thing if people had trusted him less, and even better if he had been more trustworthy. It is others' trustworthiness that matters for practical purposes, to which generic attitudes of trust or mistrust are a response

So the central questions that we need to answer are not about trusting or mistrusting *attitudes*, but about *judging others' trustworthiness* in specific matters. How can we judge others' trustworthiness? Does law help us to do so? Many currently fashionable answers echo Asser's thought that 'law serves to cultivate trust'. Some even think that what is known by the ugly phrase 'the autonomisation of law' in international matters, combined with more and more detailed legislation and regulation, and more effective forms of accountability (including the much lauded but rather limited demand for (more) transparency) can support and increase trust. I think that while law matters, imposing more law, more regulation and more accountability does not help and indeed can make it harder for people to place or refuse trust with discrimination.⁵

TRUST AND CULTURE

To show why too heavy a reliance on law and regulation can be problematic, it is useful to think about the cultural contexts in which judgements about others' trustworthiness in particular matters are made. Here we repeatedly find discussions of culture and communication, and claims that they offer an indispensable context in which judgements can be reached and indeterminacy resolved. This is not new. Adam Smith provides a classical account of the importance of culture for judging trustworthiness in his *Theory of Moral Sentiments*, where he wrote:

Frankness and openness conciliate confidence. We trust the man who seems willing to trust us. We see clearly, we think, the road by which he

⁵ For a more detailed version of these points and examples see my 'Trust, Trustworthiness and Accountability'. In: Nick Morris and David Vines, eds., *Market Failure: Restoring Trust in Financial Services*, (Oxford: Oxford University Press, 2014), 172–189.

means to conduct us, and we abandon ourselves with pleasure to his guidance and direction. ... The great pleasure of conversation and society, besides, arises from a certain correspondence of sentiments and opinions, from a certain harmony of minds, which like so many musical instruments, coincide and keep time with one another. ... We all desire, upon this account, to feel how each other is affected, to penetrate into each other's bosoms, and to observe the sentiments and affections which really subsist there. The man who indulges us in this natural passion, who invites us into his heart, who, as it were, sets open the gates of his breast to us, seems to exercise a species of hospitality more delightful than any other. No man, who is in ordinary good temper, can fail of pleasing, if he has the courage to utter his real sentiments as he feels them, and because he feels them.⁶

I choose this passage not merely because it articulates a classical alternative to the idea that law, regulation and accountability are the keys to securing trustworthiness, but because Smith saw well-placed trust as supported not by securing compliance with specific rules, but by communication and culture, by sharing sentiments and opinions, in ways that can support judgment about the situations we encounter and the action to be taken. In conversation and communication we can grasp others' suggestions and test our own, improve our judgement of the situations we encounter and of the action that can be taken.

The most compelling evidence of the indispensability of culture for shaping judgement, action and communication, emerges when cultures fail to do so adequately. The cultures that fail are typically not broad civilizations, that include sufficient variation and communication to ensure that judgement is exposed to disagreement and debate, and to the disciplines of challenge and correction that can support good judgement of situations and of action to be taken. Cultural failure is however quite often found in enclaves or silos within which narrower political, institutional, professional or commercial cultures or subcultures prevent or prohibit control, or limit discussion and communication, for example by imposing rigid hierarchical structures,

⁶ Adam Smith (1759) *Theory of Moral Sentiments*. The 6th Edition is republished by Dover Publications, Mineola NY 2006, p 337.

by creating and maintaining firewalls, or by imposing excessive or unintelligent forms of control, or by requirements for secrecy.

Cultural failure can occur where institutions fragment, leaving some agents isolated, insulated, dominated or coerced, and consequently unable to participate in communication that would expose them to check or challenge, require them to explore options, or encourage a search for agreement on the ways situations should be interpreted, or on the lines of action that should be pursued. Enclave cultures can block or stifle the vital contribution that less inward looking cultures – including those we most naturally think of as civilizations – routinely make to judgement and action.

Unfortunately there are many cultural enclaves. They can be found within many institutions, including political parties and sects, businesses and banks, professions and bureaucracies. They can distort or undermine the possibility of exploring or testing, accepting or rejecting, varied ways of understanding situations and meeting relevant requirements. By contrast, cultures that allow for some pluralism and variety can support more informed and critical judgement of cases and the identification of feasible lines of action in ways that cultural isolation cannot, even (or perhaps especially?) when reinforced with proliferating requirements imposed by law, regulation and systems of accountability.

Cultural failure – and at the limit cultural corruption – has been very widely documented. Such failure can undermine the prospect of shared understanding of situations and coordination of action. Agreement on principles and rules is not enough to resolve indeterminacy, which also needs discussion and communication, which can be enabled by cultures that support effective understanding of others' views and proposals. Fortunately the contributions of cultures to practical deliberation and action have been well documented, particularly by social anthropologists and by some journalists, who have attended to the discourse and practices actually used within specific institutions, and to ways in which participants seek understanding, and if possible

agreement, both about the situations they face and about what is to be done.

The study of cultures that are failing or being subjected to excess requirements, or have been corrupted, is often revealing. For example, Michael Power's *The Audit Society*⁷ looks at the proliferation of law, regulation and accountability in contemporary institutional practice. The journalist Joris Luyendijk has explored what actually went on in the silos of banks that spread risk across society by imposing fierce incentives, high secrecy and rigid compartmentalisation on their staff.⁸

The journalist and social anthropologist Gillian Tett has written about commercial and public sector cultures that stifle internal and external communication by constructing segregated silos.⁹ The social anthropologist Douglas Holmes has looked specifically at the cultures of central bankers, and offers interesting international comparisons on the communicative practices of central banks.¹⁰ Such discussions illuminate the practical task of securing and judging matters within the frameworks provided by complex, highly regulated institutional settings, and show where and how judgment, and with it much else, can fail. Cultures and their norms as well as law are needed to provide 'the cement of society'.¹¹

CASE STUDY: LAW AND CULTURAL SILOS

Most interestingly, as I see it, some of those most deeply committed to enforcing law and regulation, even in highly technical domains where trustworthiness is of great importance, have concluded that it

⁷ Michael Power, *The Audit Society: Rituals of Verification*, Oxford University Press, Oxford 1997, and *The Risk Management of Everything*, Demos, London, 2004.

⁸ Since the financial crash of 2008 there has often been a great deal of publication on deviant cultures and their effects in financial services, John Kay and Joris Luyendijk.

⁹ Gillian Tett, *The Silo Effect: Why Every Organisation Needs to Disrupt Itself to Survive*, Little, Brown, London, 2015.

¹⁰ Douglas R Holmes, *Economy of Words: Communicative Imperatives in Central Banks*, University of Chicago Press, Chicago, 2013.

¹¹ See Jon Elster, *The Cement of Society: A Survey of Social Order*, Columbia University, New York.

is essential to take culture seriously. In the autumn of 2016 I was at a meeting at the NY Fed – so among the bankers – and heard Preet Bharara, United States Attorney for the Southern District of New York speak to an audience that included many bankers. Bharara is responsible for decisions on prosecuting financial crime and was profiled by *The New Yorker* under the arresting title ‘The Man who Terrifies Wall Street’.¹² At the NY Fed he spoke under the title *Criminal Accountability and Culture* and stated bluntly that *even in areas that are saturated with law, regulation and accountability*, culture is needed to secure and to judge trustworthiness and lack of trustworthiness. He said:

We spend our time talking about the big picture and talking about culture because you're not going to fix a hedge fund that has a problem with criminality or misconduct. You're not going to fix a jail for that matter that has a problem with criminality or misconduct, unless you're talking about the big picture issue of culture...¹³

He illustrated problems that law (even when extended with detailed regulation and complex forms of accountability) has in dealing with failure in the financial sphere. His examples included the following:

... someone provides the easy comfort of a professional opinion that nudges up against the edge of legitimacy, or someone aggressively exploits a vagueness in the tax code that pushes up against the bounds of proprietary, or someone creatively manipulates the numbers under an accounting theory, that strains the laws of mathematics. It happens every day.

Someone pushes the envelope or looks the other way or just fails to do his job as a professional. And time goes by and eventually the envelope pushing gets more and more aggressive, and the controls get less and less strict, and then finally the bad stuff really hits the fan.

The firm collapses or there are charges and then the firm collapses, or there is serious reputational damage....Unfortunately, with the eco-

¹² *The New Yorker*, May 2016, <<http://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street>>.

¹³ See <<https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/PreetBharara-Remarks-Culture-Conference>>.

conomic pressure to perform higher than ever, and with resources taxed to their limit, I can tell you that ... cultures conducive to corruption can develop with relative ease.¹⁴

These examples of ways in which cultures can go wrong, and can even undermine the basic purposes of the institutions in which they are embedded, show clearly why we need to take account of culture and not only of law, regulation and accountability if we aim for trustworthy action that enables others to place and refuse trust and mistrust intelligently.

CULTURES, PRINCIPLES AND JUDGEMENT

What exactly do cultures provide that law, regulation and accountability alone cannot offer? A full answer to this question would be complex, and here I offer only brief comments. As I see it, culture provides ways of addressing the *indeterminacy* of principles and rules that the extension or proliferation of law, regulation and accountability by themselves cannot provide. Indeterminacy cannot be eliminated by imposing more rules, by demanding greater diligence or more rigorous compliance, or by devising smarter processes or imposing more detailed monitoring. Rules are *in principle* indeterminate or incomplete.

Rules may seem to be enough for the sorts of judgements we make in classifying cases under rules or concepts (variously called *subsumptive* or *determinant judgement*). Yet even this type of judgement is incompletely rule governed, and not strictly algorithmic. This can be illustrated by two commonplace realities. First, the concepts or rules used in judgements that classify are often *vague*, so leave borderline cases unresolved. Second, in many cases *lack of evidence* about features of actual cases and situations hampers or undermines attempts to judge whether they fall under a given rule or concept.

However, not all judgements aim to classify. When rules are used in making judgements that do not seek to subsume or classify cases there

¹⁴ Ibid.

are deeper problems than those of vagueness and lack of evidence. When judgement is used to *interpret* rules or propositions (for example laws, regulations or texts) the aim is not to subsume cases under a given rule or concept, and no particular case need be under consideration. Here indeterminacy is more obviously ineliminable, judgement may go in many directions, and there will be no unique or optimal answers. And when judgement is used for *practical* purposes, as when we aim to *enact* or *instantiate* some rule or standard, or a plurality of rules or standards, indeterminacy is evidently ineliminable and rules cannot offer wholly determinate or (a fortiori) optimal answers.

Those who hope that introducing additional requirements – more law, more regulation, more accountability – will resolve the problems that indeterminacy creates are, I think, mistaken. Additional procedures for deploying and applying rules have their place, for example in the procedures of courts and tribunals, of arbitration and administration. But these processes do not and cannot wholly fix what is to be done, and take a limited approach to showing what ought to be done. Such processes they are used by established authorities in deciding how to proceed, and the limited justifications they offer show only that a decision was reached by a duly constituted authority using appropriate procedures. This falls far short of a fundamental, or an ethical, justification, not to mention that it may be costly and leave much unresolved – and some of those most affected disillusioned or bitter.

Shared cultures also do not provide unique or wholly determinate answers, but they can supply a formative discipline by enabling proposals for interpreting and understanding claims and positions, and for action, to be made available, intelligible and assessable to others, and thereby open to their check and challenge, and to adjustment and moderation.

So while cultural norms too do not provide algorithms for those who live with them, they provide intelligible ways for interrogating and for seeking agreement about understanding situations and about pro-

posals for action, while respecting the relevant framework of indeterminate rules. When we communicate and interact we come to share categories and concepts, and that can be useful in working towards ways of *understanding* and *interpreting* what is at stake. It can support (but not guarantee) convergence on *feasible* proposals for what can and cannot be done. The convergence that cultures secure is achieved not by inventing or imposing additional authoritative rules and decisions, but by drawing on the plurality of views that arise within a culture. Securing convergence can be easier and more readily accepted than securing conformity with authoritative rulings using only formal procedures and requirements, such as those provided by courts, tribunals and administrative processes. A shared culture need not undermine or threaten, indeed has reason to respect, the rule of law and institutional probity, but it can go beyond law in supporting convergence on specific ways of respecting law and on specific ways of considering and shaping proposals for action, which additional proliferation of law, regulation and accountability may be unable to provide.

However if we rely on culture to resolve the indeterminacy of law, regulation and measures of accountability, we will also need to take questions of ethical justification seriously. As the proponents of law, regulation and accountability often point out, some cultures and many subcultures are corrupt or destructive, divisive or dishonest, and some undermine or restrict the capacity of those who live or work within them to engage and communicate with others. But other cultures do not fail in these ways. The insouciant marginalisation of ethical justification that both positivist and subjectivist views of ethics have endorsed – and often celebrated – across many decades must be challenged if we are to articulate when and why some cultures and subcultures are to be protected and taken seriously but others challenged.

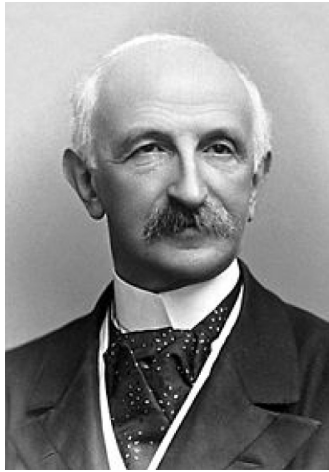
Equally the attempt to divide normative claims exhaustively into those imposed by authority and those that are merely matters of individual choice or preference, needs reconsideration, challenge and (as I see it) revision. Many versions of modern liberalism, including those popular among some supporters of human rights, those that follow the

later writings of John Rawls and espouse forms of (merely) 'political' liberalism, and those that propose varieties of libertarianism, have set aside or ignore wider questions of ethical justification, or claim that such justifications are no more than subjective and private opinions.

So, legislation, regulation and systems of accountability are not enough. They need the support of trustworthy and effective cultures and subcultures that enable those who inhabit them to explore, share and consider ethical as well as institutional standards to the tasks of understanding what is at stake and working out what to do. For nearly a century some of the public discourse of liberal societies has turned away demands for ethical justification, suggested that law, regulation and accountability are enough for the public domain, and have been content to see everything else as a matter of subjective preference or choice. I think there are good reasons to query this division of labour.

THE ANNUAL T.M.C. ASSER LECTURE ON THE
DEVELOPMENT OF INTERNATIONAL LAW

A Mission for Our Time



INTRODUCTION

The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

MISSION

Tobias Asser was a man with a vision. A man who kept his finger on the pulse of his time, and who managed to shape the legal develop-

ments during his days.¹ In his Inaugural Address upon the acceptance of his professorship at the University of Amsterdam in 1862, Asser explained that it was his ‘vocation’ to reflect on commercial law and its ‘import’, while ‘taking into consideration the condition of society in [his] century’.² What we learn from his lecture extends beyond the field of commercial law; it shows Asser’s view of the law more generally: ‘law serves primarily to cultivate trust’.³

For its mission statement, the Annual T.M.C. Asser Lecture builds on the vision and mission of the man who has lent it his name. It invites distinguished international lawyers to take inspiration from Asser’s idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today.

Current legal scholarship has uncovered the complications of Asser’s mission, and of his internationalist friends and colleagues.⁴ It has pointed to the downside of how the international legal order took shape in spite of the good intentions of these late 19th and early 20th century liberal-humanitarian internationalists. Asser himself was well aware of the dangers of utopian idealism⁵ on the one hand, and the dangers of a nationalistic conservative attitude towards international law on the other. Every age has different needs and pitfalls and hence, sailing between commitment and cynicism,⁶ every age requires a different course.

¹ A Eyffinger, *T.M.C. Asser [1838–1913] Founder of The Hague Tradition* (The Hague: Asser Press, 2011), p. 11.

² The Inaugural Address is included in E.M.H. Hirsch Ballin (ed. and intro.), *A Mission for his Time. Tobias Asser’s Inaugural Address on Commercial Law and Commerce, Amsterdam 1862* (The Hague: Asser Press, 2012), p. 18.

³ *Ibid.*, p. 22.

⁴ See below ‘Tobias Asser in context: One of the ‘Men of 1873’.

⁵ At the Second Hague Peace Conference, Asser himself said ‘you know I am not a Utopian’, Eyffinger, p. 5, n. 45.

⁶ M Koskenniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’, in *Collection of Essays by Legal Advisors of States, Legal Adviser of International Organizations and Practitioners in the field of International Law* (United Nations, NY, 1999), pp. 495–523; also available online.

Our time, too, is in dire need of reflection. It is marked by the politics of fear, domestically as well as globally. In different ways ‘fear operates directly as a constitutive element of international law and the international ordering and decision-making processes.’⁷ Taking note of Tobias Asser’s legacy in this context, a reorientation of the international order towards an order based on respect and trust urges itself upon us.⁸

Today, with international lawyers perhaps sadder and wiser, it seems more than ever to be an international lawyer’s task to examine – as Asser did in his day – how to respond to ‘the condition of society’. Mutual trust and respect are crucial to the health of any heterogeneous society, whether it is the international society or one of the rapidly growing cities across the globe. A (research) question which Tobias Asser bequeathed to us is ‘how can law serve this aim?’

In spite of well-known complications and dark sides,⁹ in this context the Rule of Law and the principles of human rights are paramount. These may provide direction in our considerations about trust and respect in relation to challenges brought by, for example, globalisation, urbanisation, (global) migration, the atomisation of society, climate change, environmental degradation, the complexity of the traditional North-South divide, the dangers of a renewed international arms race, and the dilemmas of new global actors such as the EU.

Against this backdrop, the Annual T.M.C. Asser Lecture aspires to be a platform for a constructive, critical reflection on the role of law in dealing with the challenges and (potentially radical) changes of the global society of the 21st century.

⁷ D. Joyce & A. Mills, ‘Fear and International Law’, *Cambridge Review of International Affairs*, 19:2 (2006), pp. 309–310.

⁸ A. Carty, ‘New Philosophical Foundations for International Law: From an Order of Fear to One of Respect’, *Cambridge Review of International Affairs*, 19:2 (2006), pp. 311–330; also, J.E. Nijman, ‘Paul Ricoeur and International Law: Beyond ‘The End of the Subject’. Towards a Reconceptualization of International Legal Personality’, *Leiden Journal of International Law*, 20 (2007), pp. 25–64.

⁹ D. Kennedy, *The Dark Sides of Virtue* (Princeton: PUP 2004); also, M. Koskenniemi, *The Gentle Civilizer*, infra note 21, and *The Politics of International Law* (Oxford: Hart 2011).

BACKGROUND

In Asser's time, the cultivation of trust and respect in international relations was indeed an urgent matter. Asser's professional life spans from the second half of 'the long 19th century'¹⁰ up to the eve of the First World War. It was a time of rising nationalism and mounting 'distrust and despair'¹¹ in Europe. The 19th century Eurocentric world order was to collapse only a few years after Asser's death.

In Asser's lifetime America had experienced the Civil War (1861–65) and slavery was abolished after a slow struggle. In Europe, the Crimean War (1853–56) and the Franco-Prussian War (1870–71) brought decades of peace in Europe to an end. With these wars the horrors of industrial warfare began and forever changed the destructive scale and intensity of armed conflict. In Asia, Britain and France forced China, by military means, to open up its markets for opium, on the basis of what they argued to be their sovereign right to free trade, even against the imperial government's desperate attempt to protect its dwindling population from opium addiction. A socialisation into international society and law that was to leave its mark on China's approach to international law well into our time.¹² In the latter days of his career, Asser actively supported the International Opium Conference (1912) to end the opium enslavement of the Chinese people.¹³

With the economic policies of the late 19th century the European empires spurred on the process of modern globalisation in the industrial era. Asser had a keen interest in economics and as the head of a (commercial) law practice for most of his life,¹⁴ he is likely to have been especially sensitive to the process. In his view, transnational trade and commerce were crucial for societies to thrive and develop peace-

¹⁰ Eric Hobsbawm's term for the period 1789–1917.

¹¹ Eyffinger, p. 67.

¹² S. Suzuki, 'China's Perceptions of International Society in the Nineteenth Century: Learning more about Power Politics?', 28 *Asian Perspective* (2004), pp. 115–144.

¹³ Eyffinger, p. 79.

¹⁴ Among his clients, though, were the heirs of King Leopold in the Congo heritance.

fully. In that sense, his perspective on free trade and commerce was utilitarian – in the service of ‘public welfare’.¹⁵ Hence, his stance was not uncritical; transnational trade and commerce facilitated by law and legal institutions were to serve peace and justice, but not to exploit or violate ‘the inalienable rights of a free people’.¹⁶

The urbanisation of 19th century Europe prefigures that of today; it basically put much of the current global city system in place. Asser was outspoken about his love for the ‘distinguished mercantile city’ of Amsterdam: ‘[u]nder any circumstances, wherever my place of domicile, I will forever remain an Amsterdammer!’¹⁷ His love of Amsterdam, however, not only sprung from the city’s tradition of international trade and commerce, but also and even more so from its tradition of openness to strangers and providing a refuge for the expelled. Being a Dutch citizen of Jewish descent, the exclusion and violence brought about by anti-Semitism in European (urban) societies must have been a matter of personal concern for someone so eager to participate in the public sphere. Nationalism, a growing sentiment in Europe, was completely alien to Asser. With his urban cosmopolitan mind-set, his thinking was transnational by nature. His vision of international and personal relations did not hinge upon fear and othering, but rather upon respect and trust.

For Asser, the role of law was vital to the emancipation of the Jewish minorities in Europe, as was the case for any minority. He worked with an integral view of the Rule of Law, to be strengthened as much in the domestic as in the international society. Asser’s dedication to citizens’ rights and the principle of legal equality is visible, for example, in his advocacy of equal voting rights for women.¹⁸

While Asser’s vision of law and legal institutions was all about the ideals of peace, prosperity and justice, he was concrete and prag-

¹⁵ Hirsch Ballin, p. 19.

¹⁶ *Ibid.*, p. 33.

¹⁷ Eyffinger, p. 13.

¹⁸ Hirsch Ballin, p. 13.

matic when aiming to shape developments in private and public international law.

Asser's commitment to international trade and commerce as a means to achieve peace and international solidarity inspired his efforts to deal with 'conflict of laws' and to promote a unification and codification of the rules of private international law. In his view, the demands of international life went beyond economic relations only, and so, being the pragmatic lawyer that he was, Asser presided over the Four Hague Conferences on Private International Law (1893–1904) which managed to produce six conventions ranging from procedural law to family law issues.

While international tensions intensified and an arms race was looming, Asser moved into the realm of public international law – albeit with a good share of realism about state conduct and the pursuit of self-interest. Together with Feodor Martens, Asser stood at the helm of the Hague Peace Conferences (1899 and 1907), which focused on international humanitarian law and the peaceful settlement of disputes. The First Conference resulted in the constitution of a Permanent Court of Arbitration (PCA). Being a prominent arbiter himself, Asser participated in the first case before the PCA. Thanks to Andrew Carnegie, who wanted to ensure a 'wise distribution' of his wealth, the Peace Palace was built and The Hague was thus granted its role of *City of Peace and Justice*.

T.M.C. Asser's mission of peace, liberty and justice defined both his academic and diplomatic work. He intended to listen to 'the voice of the conscience of [his] century' and tirelessly applied his legal genius to develop public and private international law. After decades of neutrality, he would moreover steer the Netherlands back into the diplomatic arena and towards a more prominent international position.

Tobias Asser's legacy is almost too vast for one man. No wonder his role was recognised by the Nobel Prize Committee in 1911. The

Committee portrayed Asser as ‘the Hugo Grotius of his day’.¹⁹ Certainly they both aimed to strengthen the Rule of Law in a global society.²⁰

In contemporary international legal scholarship, Professor T.M.C. Asser was one of the international lawyers which Martti Koskenniemi has famously called the ‘Men of 1873’: twenty to thirty European men who were actively engaged in the development of international law and who, thanks to among others Asser and his dear friend Rolin, established the *Institut de Droit International* in 1873.²¹ They were interested in ‘extending the mores of an *esprit d’internationalité* within and beyond Europe. ... [they were the] “founders” of the modern international law profession.’²²

For the men of 1873, international law was to be social and cultural in a deep sense: not as a mere succession of treaties or wars but as part of the political progress of European societies. They each read individual freedoms and the distinction between the private and the public into constructive parts of their law. If they welcomed the increasing interdependence of civilized nations, this was not only to make a point about the basis of the law’s binding force but to see international law as part of the progress of modernity that was leading societies into increasingly rational and humanitarian avenues.²³

Their liberal project was a project of reform, human rights, freedom of trade, and ‘civilization’. In their view, ‘jurists should not remain in the scholar’s chamber but were to contribute to social progress.’²⁴ Koskenniemi further cites Asser to explain the *esprit d’internationalité*:

For Asser, for instance, the tasks of the *jurisconsulte* in the codification of private international law followed “from the necessity to subordinate

¹⁹ See for the Nobel Peace Prize 1911 speech: <http://www.nobelprize.org/nobel_prizes/peace/laureates/1911/press.html>.

²⁰ See Asser’s Address at the Delft Grotius Memorial Ceremony July 4, 1899, p. 41.

²¹ Eyffinger; M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP 2002).

²² *Ibid.*, p. 92.

²³ Koskenniemi, pp. 93–94.

²⁴ *Ibid.*, p. 57.

interest to justice – in preparation of general rules for the acceptance of governments to be used in their external relations”²⁵.

BUILDING ON TOBIAS ASSER’S VISION AND MISSION

The institution of this Annual Lecture is inspired by these ‘Men of 1873’ in general and by Asser’s social progressive, ‘principled’ pragmatism, liberalism, and ‘emancipation from legal traditionalism’ in particular.²⁶

Drawing inspiration from the ‘Men of 1873’ is however not without complications. Part of their project was the ‘civilizing mission’, with all its consequences. On the one hand, in the early decades of the 20th century these scholars may have been hopeful about decolonisation and lifting developing countries out of poverty. Asser’s own involvement in attempts to end a most ‘embarrassing chapter of Western history’, the Opium Wars, may also be mentioned. On the other hand, international law as an instrument of civilisation has surely shown its dark sides. Today, more than ever before, we are aware of how internationalism and the Rule of Law have been the handmaidens of (economic, legal) imperialism.²⁷ Scholars have pointed to the ‘double standards’ as ‘an integral part of the ideology of democracy and the rule of law’ so visible in the application of international law even today.²⁸

The rich and somewhat complex heritage of internationalism does not leave room for naïve ideas about international law as an instrument only for the good of liberal-humanitarian reform; if ‘[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology... [and i]f there is no perspective-

²⁵ Ibid., pp. 57–58.

²⁶ Hirsch Ballin, pp. 12 and 2.

²⁷ E.g. A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: CUP, 2005).

²⁸ A. Carty, ‘The terrors of freedom: the sovereignty of states and the freedom to fear’, in J. Strawson (Ed.) *Law after Ground Zero* (London: Glasshouse Press, 2002), pp. 44–56.

independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?'²⁹

While for some this rhetorical question marks the end-point of possible legal endeavours, the Annual T.M.C. Asser Lecture hopes to be a place for reflecting critically on what lies *beyond* this question. As Koskenniemi points out, '[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before.'³⁰ And so, since '[i]nternational law's energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded', we ask: What does the *esprit d'internationalité* mean today and what could it mean in and for the future?

JANNE NIJMAN

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²⁹ Koskenniemi, p. 513.

³⁰ *Ibid.*, p. 516.

INTERNATIONAL & EUROPEAN LAW AS A SOURCE OF TRUST IN A HYPER-CONNECTED WORLD

Contours of the Asser Strategic Research Agenda 2016–2020

INTRODUCTION

The T.M.C. Asser Instituut was founded in 1965 as an interuniversity institute for international law in The Hague. Over the past 50 years, the institute has developed into an internationally renowned centre of expertise in the fields of public international law, private international law and European law.

Located in The Hague, the ‘International City of Peace and Justice’, the Asser Institute is the established location where critical and constructive reflection on international and European legal developments takes place. In the vicinity of the many Hague international (legal) institutions, diplomatic missions, and government ministries, the institute exercises strong convening power and attracts legal scholars from around the world to present and test cutting-edge ideas in their respective fields of expertise.

The Asser Institute has a strong tradition in pursuing independent research. The coming years will see the institute build on this research expertise and further strengthen its academic profile whilst fostering its orientation towards fundamental and independent policy-oriented research.

In doing so, the Asser Institute will continue to fulfil the following roles:

- A facilitator for all Dutch Law Schools that wish to collaborate with Asser in research networks and projects and/or in knowledge disseminating activities.

- A vanguard institute for the University of Amsterdam (UvA) in The Hague (for the UvA Law School in general and the Amsterdam Center for International Law (ACIL) in particular).

MISSION

The T.M.C. Asser Instituut aims to further the development of international and European law in such a way that it serves a cultivation of trust and respect in the global, regional, national and local societies in which the law operates.

CONTOURS OF THE ASSER STRATEGIC RESEARCH AGENDA 2016–2020

Pursuant to the institute's mission, the Asser Strategic Research Agenda (ASRA) 'International & European law as a source of trust in a hyper-connected world' aims to examine how law as one of the social institutions can contribute to the construction and cultivation of trust and trusting relations needed for cooperation in this large and hyper-connected world.

It will guide the further development of the institute's research capacity and it will contribute to further strengthening Asser's intellectual identity and its position at the interface of the world of legal academia and legal practice.

In the ASRA, the Asser Institute's research is structured along three research strands and an architrave. The latter deals with more general conceptual questions about trust, trustworthiness, and trust-building effects of international and European law fostering the overarching, more abstract and loosely defined normative framework. The three strands are separate but mutually interlinked:

- Human Dignity and Human Security in International and European Law
- Advancing Public Interests in International and European Law

- Adequate Dispute Settlement and Adjudication in International and European Law

HUMAN DIGNITY AND HUMAN SECURITY IN INTERNATIONAL
AND EUROPEAN LAW

If law cannot provide a sense of human dignity and security, it falls short of the cultivation of trust. Upholding the Rule of Law and a generally high level of human rights protection contributes to the development of trust (and, arguably, vice versa). The research strand Human Dignity and Human Security in International and European Law adopts as its normative framework a human rights approach to contemporary global challenges, inter alia in the field of counter-terrorism, international criminal law, international humanitarian law, international trade, environmental protection, European private international law, and the law of EU external relations. It examines what it means to safeguard human dignity – also in relation to human security – in these areas.

ADVANCING PUBLIC INTERESTS IN INTERNATIONAL
AND EUROPEAN LAW

Both at the European and international level, the dual impact of globalisation and fragmentation has complicated the use of legislation and regulation in safeguarding public interests. Advancing Public Interests in International and European law aims to critically examine how international and European law may further protection of public interests in different areas, ranging from the governance of sports and media in Europe to natural resources, trade, and environmental protection at the international level. Research within this strand will engage with a large set of questions centred on the potential synergies and trade-offs between different public interests and private interests. Possible normative frameworks for reconciling conflicting values are, for example, the principle of proportionality and variants of the constitutional approach.

ADEQUATE DISPUTE SETTLEMENT AND ADJUDICATION
IN INTERNATIONAL AND EUROPEAN LAW

By effectuating the law – and thus upholding the Rule of Law –, courts, tribunals and other dispute settlement mechanisms provide fairness, security, stability and predictability. All of them values conducive to trust. Courts, tribunals and other dispute settlement mechanisms can perform this function adequately only if they, in turn, are perceived as trustworthy in speaking and enforcing the law. The research strand Adequate Dispute Settlement and Adjudication in International and European Law examines the adequacy of dispute settlement and adjudication in various areas, as diverse as foreign investment and transnational civil and commercial disputes, doping and sports more generally, cross-border civil disputes, international crimes, and classic inter-state relations.

LOOKING AHEAD

Over the period of this research agenda, the institute will:

- Conduct high-quality independent research – both fundamental research and policy-oriented research –, in order to contribute to current academic and policy debates within the scope of the aforementioned research strands.
- Increase its research capacity, especially through the promotion and fostering of PhD research in international and European law.
- Deliver research-based, cutting-edge, high-level policy-oriented meetings, (professional) education modules and public events of knowledge dissemination.
- Intensify – in areas where the institute’s research expertise can be brought to bear – its cooperation and engagement in European and international academic networks, as well as in the national, European and international arenas of policy formation and legal practice.

More information about the Asser Institute's research & activities can be found on the website: <www.asser.nl>.

ABOUT THE AUTHOR



Onora O'Neill combines writing on political philosophy and ethics with a range of public activities. Born in Northern Ireland, she has worked mainly in the United Kingdom and the United States of America. She was Principal of Newnham College, Cambridge from 1992–2006 and Honorary Professor of philosophy at the University of Cambridge. She chaired the Nuffield Foundation from 1998–2010 and was President of the British Academy from 2005–2009. She has been a cross-bench member of the House of Lords since 2000 (Baroness O'Neill of Bengarve). The Norwegian Holberg Prize 2017 was awarded to Onora O'Neill for her influential work in the field of moral and political philosophy. She is particularly well known for her work on Kant, bioethics, human rights, trust and communication ethics.

Onora O'Neill on her lecture *Accountable Institutions, Trustworthy Cultures*:

'Across the last fifty years there have been huge efforts to construct more accountable institutions at every level from international organisations to state bureaucracies, from giant corporations and NGOs to small businesses and local charities.

A principal instrument in seeking greater accountability has been an extension of law and regulation: more enforceable rules constraining more institutions and their office holders in more of their activities. Yet accountability by regulation has often disappointed. I shall argue that the principal problem is not that rules do not matter: they are evidently needed for the rule of law, and hence also for the protection of human rights, for democracy, and for commercial life.

However rules are always and unavoidably incomplete and indeterminate. Their use is always a matter of judgement, and it is an illusion to imagine the rules can go 'all the way down'. Yet contemporary regulation often appears to ignore this well established point. Small wonder that those working in the institutions are so often reduced either to putting excessive efforts into mere compliance – or to cynicism and gaming the system. A more adequate approach to institutional life would recognise the importance of institutional cultures that acknowledge the importance of institutional life being guided by purposes, standards and cultures that require and foster the exercise judgement in the use of rules.'



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