# Definition in the Criminal Law

ANDREW HALPIN

# Definition in the Criminal Law

ANDREW HALPIN


OXFORD AND PORTLAND OREGON
2004

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA



Hart Publishing is a specialist legal publisher based in Oxford, England. To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, Salters Boatyard, Folly Bridge, Abingdon Rd,
Oxford, OX1 4LB Telephone: +44 (0)1865 245533
Fax: +44 (0)1865 794882
email: mail@hartpub.co.uk
WEBSITE: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1-84113-071-0 (hardback)

Typeset by Olympus Infotech Pvt Ltd, India, in Palatino 10/12 pt.
Printed and bound in Great Britain by
MPG Books Ltd, Bodmin, Cornwall

# DEFINITION IN THE CRIMINAL LAW

In recent years, a number of key terms of the criminal law have seemed to defy definition. Scepticism over the possibility of defining basic concepts and identifying general principles has been voiced by both judges and academic commentators. The condition of the criminal law raises broad issues of theoretical interest, but also touches on practical concerns such as proposals for reform made by the Law Commission, the campaign for codification, and the requirement of legality under Article 7 of the ECHR, given greater prominence since the implementation of the Human Rights Act 1998.

This book undertakes an investigation of the role and scope of definition within the criminal law set within a wider examination of the nature of legal materials and the diversity of perspectives on law. It offers a fascinating account of how the rules and principles found within legal materials provide practical opportunities for responding to, rather than merely following the law. This opens up a richer notion of legal doctrine than has been acknowledged in earlier representations of the workings of legal rules and principles. It also leads to a rejection of some of the established views on the roles of judges and academics, and provides the incentive for a more rigorous assessment of the serious challenge made by a 'critical' perspective on the criminal law.

The intimate connection between the use of legal materials and the practice of definition is explored through a number of detailed studies. These deal with some of the apparently intractable problems concerning the definition of theft, and changes to the definition of recklessness culminating in the recent decision of the House of Lords in *R v G*. Theoretical insights on the different features of the process of definition and a remodelling of culpability issues are combined to question the conventional intellectual apparatus of the criminal law. The approach developed within the book offers a more realistic appraisal of the feasibility of reform, and of expectations for the principle of legality within the criminal law.

# *Preface*

Some books are organised like a Teutonic banquet. This book adopts the more modest organising principles of a Russian zakouski, spreading out on the table such a variety of hors d'oeuvres that everyone will find something to their taste. I hope that anyone with an interest in the law, whether or not they are concerned particularly with the criminal law, whether or not they have reflected previously on the process of legal definition, will find something of interest in its pages.

My own interests in writing this book have been advanced and broadened by the kindnesses of a number of persons. I am grateful for the encouraging comments offered by Andrew Ashworth, Stanley Yeo and Jeremy Horder, when the project was at an early stage. Progress was assisted by comments from, or discussions with, Kit Barker, Charles Debattista, Peter Sparkes, Oren Ben-Dor, Stuart Macdonald, Neil Duxbury, Jim Evans, Dennis Patterson, William Twining, Andrew Jefferies and Alan Newman. I am grateful to them all.

I am particularly happy to acknowledge the support provided by the British Academy and Leverhulme Trust in the award of a Senior Research Fellowship for the academic year 2002–03 during which most of the work on the book was undertaken.

Richard Hart, Jane Parker and Mel Hamill at Hart Publishing have provided the friendly, intelligent and efficient support which continues to distinguish the Hart publishing enterprise. I am also grateful for the support provided in numerous other ways by Ken Emond at the British Academy, Joy Caisley in the Hartley Library, and Aloma Hack in the School of Law.

I remain grateful to Dorit, Rafael, Daniel and Avital for helping me to focus on more important issues, and to Sergei and Rachel Tarassenko for combining Russian insights with French hospitality.

I have used in chapters 3 and 4 material previously published in the following articles: 'The Appropriate Appropriation' [1991] *Criminal Law Review* 426; 'The Test for Dishonesty' [1996] *Criminal Law Review* 283; and 'Definitions and directions: recklessness unheeded' (1998) 18 *Legal Studies* 294.

# *Contents*

# 1

# *The Use of Legal Materials*

## INTRODUCTION

THE CONDITION OF the law attracts the attention of a number of parties, and arouses their passions in different ways. If we permit some caricature, the judge charged with applying the law complains about the difficult state of the law which makes the judicial role so burdensome, but considers that only the judicial mind, honed by practical experience, is capable of dealing effectively with the complexities faced in the law. The orthodox academic commentator bemoans the incoherent state of the law, to which unreflective judicial responses have made a major contribution, and considers that only a rigorous application of rational principle can redeem the law. The reformer acknowledges the historical mess that the law is in, and even-handedly recognises both judicial and academic disagreements that have contributed to this state, but optimistically believes that through an iterative process of draft and discussion a consensus can eventually be reached so as to provide a stable foundation for the law.[1] The heterodox academic commentator, on the other hand, views the state of the law with pessimism, seeing within its failings an indictment of the conventional premises of the law, and offers in their place a radical reassessment of the directions the law should take.

In juxtaposition to the pessimism of the heterodox commentator, there exists a natural alliance between the middle two perspectives. Both the orthodox academic commentator and the reformer share what Ian Dennis, borrowing from William Twining, has referred to as 'optimistic rationalism'.[2] Perhaps the only impediment to the steady flow from

[1] With regard to this, consider the Law Commission's abandonment of their project for reforming the law of consent on the ground that 'no consensus emerged'—Law Commission No 274 (HC 227, 2001), *Eighth Programme of Law Reform* 44. For discussion, see Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001) 5 *Buffalo Criminal Law Review* 173, 209ff. Roberts notes (at 187 n23) the Law Commission's avoidance of 'political' issues.

[2] Ian Dennis, 'The Critical Condition of Criminal Law' (1997) *Current Legal Problems* 213, 214. A particularly strong manifestation of this condition is to be found in EC Clark, *An Analysis of Criminal Liability* (Cambridge, Cambridge University Press, 1880; reprinted, Littleton, CO, Fred B Rothman & Co, 1983) 110: 'A time may, it is hoped, be coming, when such legal rules

commentary to reform is the additional dimension of optimism required by the latter. The commentator need only be optimistic about his or her own powers of rationality. The reformer needs to be optimistic about the ability of rational discussion among a number of participants to reach a consensus on the desired state of the law.

There also exists a less obvious alliance between the first and last of these perspectives, those of the judge and the heterodox scholar. Both of these display scepticism towards the enterprise of producing a formal scheme of law as academic treatise (or reforming code). To a certain extent the divergence of perspective is as much about focusing one's scepticism on different targets as it is about focusing one's attention on different aspects of the subject matter. Nevertheless, the complexity of the subject matter may, in part at least, account for the condition that the law is in, and for the variety of perspectives taken on it. Certainly, the condition of the law is a product of the nature of legal materials and the use that has been made of them. In this chapter I shall attempt to show that these materials are more complex in nature than has been acknowledged, and their corresponding use more varied. As a way into the subject I shall concentrate on the perspectives of orthodox academic commentators and the judiciary, though only as a means of arriving at a more general picture of legal materials.

## THE RESORT TO PRINCIPLE

It is easy enough for academics to be sceptical about the condition of the law and the part played by judges in bringing it about. The English criminal law provides a particularly glaring example. Peter Glazebrook came to the conclusion that it has deteriorated significantly in the hundred years between the ends of the nineteenth and twentieth centuries.[3] Adrian Briggs, in his comment on the House of Lords decision in *Moloney*, extended the time frame to a thousand years in his acerbic assessment of the level of sophistication reached by the common law.[4] Whereas Briggs

may be brought into a form as exhaustive as we believe their mathematical congeners to be; and when criminal law generally will receive little, if any, addition from later cases, because a new point can scarcely arise.'

[3] Peter Glazebrook, 'Still No Code! English Criminal Law 1894–1994' in Martin Dockray (ed), *City University Centenary Lectures in Law* (London, Blackstone Press, 1996). Judicial efforts within the criminal law in the United States do not receive a better press. George Fletcher, 'The Fall and Rise of Criminal Theory' (1998) 1 *Buffalo Criminal Law Review* 275, 282, unfavourably contrasts these with judicial achievements in tort law: 'The fact is that stripped of their power and their judicial robes, these authors of opinions in the criminal law have very little to say. They stand to Cardozo's reflections on risk in *Palsgraf* as doggerel stands to poetry.'

[4] Adrian Briggs, 'Judges, juries and the meaning of words' (1985) 5 *Legal Studies* 314, 319.

pointed to the refusal of the judges to define basic terms,[5] others have condemned the readiness of the judiciary to redefine basic terms, a criticism captured in Andrew Ashworth's evocative image of the appellate judges playing a piano accordion.[6]

The scepticism expressed by the judges themselves seems in part defensive. Judges cannot be blamed for a failure to consistently define the basic terms of the criminal law if it is in the nature of those terms to defy comprehensive definition. More interestingly, this scepticism goes on the offensive in suggesting that the nature of the basic terms of the criminal law is such as to require a specialist function to be performed by the judiciary in applying these terms to specific cases. Lord Goff has refined this judicial scepticism in his stimulating attempt to present a demarcation of academic and judicial roles in developing the law, delivered as the 1983 Maccabaean Lecture.[7] Although other judges have not addressed the topic with the dedication of Lord Goff, the view he expresses clearly springs from a common judicial sentiment that the job to be done in judging particular cases cannot be performed by the simple reliance on a body of legal materials, no matter how much academic endeavour has been expended on their formulation and arrangement.

Sir Robert Megarry, for example, had in 1969[8] previously provided the core of Goff's position in stating what Basil Markesinis describes as 'the prevalent position ... that judges and academics were performing *entirely* different tasks.'[9] In relation to the criminal law in particular, the entrenched view of a specialist judicial function is evident in the judicial hostility of the nineteenth century towards the proposals for codifying the criminal law.[10] More recently, it is a straightforward matter to find

[5] *Ibid* at 318.

[6] Andrew Ashworth, Editorial [1986] *Criminal Law Review* 1, 1–2. Glazebrook, above n 3, at 7, refers to the 'seven conflicting and confusing House of Lords decisions' on intention (to which could be added several from the Court of Appeal); and, at 9–10, comments on the need for three House of Lords cases to settle a point on the law of theft. Dennis, above n 2, at 226, points to three legal meanings for recklessness in the aftermath of *Caldwell* ((i) *Cunningham*, (ii) *Caldwell*, (iii) modified *Caldwell* for rape), which multiplied subsequently to include (iv) recklessness as gross negligence in *Adomako* and (v) a softer form of *Caldwell* in *Reid* contrary to the hardline approach in *Elliott v C*—prior to the House of Lords' decision in *R v G* (for detailed discussion, see ch 3 below).

[7] Robert Goff, 'The Search for Principle' (1983) 69 *Proceedings of the British Academy* 169.

[8] *Cordell v Second Clanfield Properties* [1969] 2 Ch D 9, 16–17. Megarry's analysis of the difference stresses the susceptibility of the author (academic) to preconceptions, and the advantage conferred on the judge by his having to deal with the detailed facts of a contested case. The strict demarcation between functions of author/academic and judge is all the more marked for being made in relation to one person performing both functions, himself.

[9] Basil Markesinis, *Comparative Law in the Courtroom and in the Classroom: The Story of the Last Thirty-Five Years* (Oxford, Hart Publishing, 2003) 36. Markesinis himself argues for a cooperative venture between judges and academics.

[10] See Keith Smith, *Lawyers, Legislators and Theorists* (Oxford, Clarendon Press, 1998) 138, 147, 171–72, 368. Goff, above n 7, at 172–74, shows scepticism towards the value of codification, concluding that 'the best code is one which is not binding in law.'

judicial dicta reinforcing the role of making a judgment on the particular facts of the case, at the expense of developing a general understanding of the law.[11]

Given the strength of this judicial sentiment, it is worth considering in detail the arguments that Lord Goff provides in expounding his view of the specialist judicial function. Even if the current trend is for judges to be more appreciative of academic sources,[12] a study of Goff's demarcation of academic and judicial roles is capable of illuminating both roles, as well as how they might interrelate. Central to Goff's thesis is the distinction between general ideas and specific judgments. Crudely put, academics deal with ideas and judges provide judgments on particular facts.[13] However, in order to elaborate his view of the judicial function, Goff

[11] We can restrict ourselves to examples taken from the topics mentioned in n 6 above. On intention, see Lord Scarman in *Hancock and Shankland* [1986] 2 WLR 357, 364–65: 'I am, however, not persuaded that guidelines of general application, albeit within a limited class of case, are wise or desirable. ... Guidelines, if given, are not to be treated as rules of law but as a guide indicating the sort of approach the jury may properly adopt to the evidence when coming to their decision on the facts.' On appropriation in theft, see Lord Keith in *Gomez* [1992] 3 WLR 1067, 1080: 'The actual decision in *Morris* was correct, but it was erroneous, in addition to being unnecessary for the decision, to indicate that an act expressly or impliedly authorised by the owner could never amount to an appropriation.' On recklessness (or gross negligence), see Lord Mackay in *Adomako* [1994] 3 WLR 288, 297: 'Personally I would not wish to state the law more elaborately than I have done. In particular I think it is difficult to take expressions used in particular cases out of the context of the cases in which they were used and enunciate them as if applying generally.'

[12] For a general picture, see Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford, Hart Publishing, 2001) ch 5. Duxbury (at 104–05) sees Goff's Maccabaean Lecture as being a welcome break with the past, including the position of Megarry, but this is based mainly on the aspect of Goff's lecture which allows room for academic involvement, rather than the aspect which demarcates how far that involvement should go. Duxbury hints at grounds for scepticism on this (at 105) and indicates it may fall to the receptivity of the individual judge (at 105–06). More than this, it may depend on the receptivity of the individual judge to particular academic sources in a particular case. Contrast Goff's own responses in *Kleinwort Benson v Lincoln City Council* [1998] 4 All ER 513, 541–43 (which Duxbury cites) and in *Hunter v Canary Wharf* [1997] 2 WLR 684, 697 (which contrasts sharply with the response of Lord Cooke in the same case). Some indication of the continuing increase in judicial openness to academic sources is given in a Westlaw search of 2001–2 cases in UK-RPTS-ALL DataBase for 'academic writing' or 'academic literature'. This reveals 29 cases (discounting multiple citations and false positives where the sources are not providing academic views of the state of the relevant law), ranging across a wide variety of subject matter, where the academic sources are treated without denigration or qualification, often in the same breath as judicial sources. The significance of the total is enhanced by the fact that the search does not include references to individual academic authors. This possibly shows an improvement on the picture presented from 1999 materials by Michael Zander, 'What precedents and other source materials do the courts use?' (2000) 150 *New Law Journal* 1790, though without reaching the greater use of academic sources in America and Germany that Zander reports. For a wider survey, including discussion of the deterioration of judicial-academic relations in the United States, see William Twining, Ward Farnsworth, Stefan Vogenauer and Fernando Tesón, 'The Role of Academics in the Legal System' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, OUP, 2003).

[13] Goff, above n 7, at 170–71.

weaves around this crude distinction the development of legal principle. Both judge and academic may contribute to the development of principle, but do so in a manner reflecting their own preoccupations: the judge by reacting to fact-situations and then generalising from those reactions; the academic by ruminating on fundamental ideas so as to provide a coherent framework or philosophy into which the particular fact-situations can be fitted.[14] Although Goff sees the two roles as complementary, he stresses the dominance of the judicial role, so as to remain open to assessing unforeseen fact-situations unrestricted by theoretical preconceptions.[15]

There is a danger of this view of the judicial function degenerating into an apologetic for the judicial hunch. Indeed, Goff's application of his view of the judicial function to the problems of defining murder,[16] cited not only his Maccabaean Lecture but also his subsequent dictum epitomising the judicial function as 'an educated reflex to facts'.[17] It was this latter remark that fuelled Glanville William's response in suggesting that it would be necessary to separate those judges with correct hunches from those that suffered from 'defective hunching abilities'.[18] However, in the Maccabaean Lecture itself Lord Goff takes some pains to avoid the suggestion that he is licensing judicial discretion.

Goff's more careful argument turns on his view of principle. Legal principles are taken to avoid the rigidity of rules on the one side, and the dangers of untrammelled discretion on the other side.[19] In tackling the first evil, Goff identifies four pitfalls that may befall the exposition of legal

[14] *Ibid* at 184–87.

[15] *Ibid* at 186–87. For contrary arguments advancing the priority of the academic, see generally, RC van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge, Cambridge University Press, 1987) 53–65, 96–101; and more particularly regarding the criminal law, Finbarr McAuley and J Paul McCutcheon, *Criminal Liability: A Grammar* (Dublin, Round Hall Sweet & Maxwell, 2000) xii. A somewhat softer approach to the judicial-academic relationship is apparent in a lecture given by Lord Goff three years after his Maccabaean Lecture, 'Judge, Jurist and Legislature' (1987) 2 *Denning Law Journal* 79, 92–94—in part due to the jurist being coopted on the side of the judge against the dangers of codification, and in part due to Goff taking a cooperative line on the uses of comparative law such as espoused by Markesinis, above n 9. A completely different insight on the contrast between academic and judicial approaches to the criminal law, respectively tending to adopt liberal or social values to the same fact situation, is offered by Andrew Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 *Law Quarterly Review* 419, 447. Ashworth's recognition that 'values of both kinds do and should form part of criminal law doctrine' is made as a step to insisting that the judicial choices that will be required should be made in a transparent manner—a view endorsed by Lord Hutton in *B v DPP* [2000] 2 WLR 452, 473.

[16] Robert Goff, 'The Mental Element in the Crime of Murder' (1988) 104 *Law Quarterly Review* 30.

[17] *Ibid* at 30–31. The dictum is taken from *Smith v Littlewood's Organisation Ltd* [1987] AC 241, 280. Cp 'informed and educated judgment' in Goff, above n 7, at 183.

[18] Glanville Williams, 'The *Mens Rea* for Murder: Leave It Alone' (1989) 105 *Law Quarterly Review* 387, 391–92.

[19] Goff, above n 7, at 181.

principle: seeking elegance at the cost of recognising an untidy complexity of qualifications and exceptions; aiming for completeness at the cost of allowing for future developments; embracing universals at the cost of recognising the nuances of context; and (what may be regarded as the culmination of these errors) 'the dogmatic fallacy' in seeing law in terms of rules rather than principles.[20] In tackling the evil of untrammelled discretion, Goff invokes the qualities of 'clearly recognizable principles', of 'systematic legal principle'.[21] However, Goff's position between these two perils is made more complex, and less secure, due to the fact that within his Maccabaean Lecture he uses the word principle in four distinct ways.[22]

## THE USES OF PRINCIPLE

### (i) Principle as a Weak Formula of General but not Universal Application

It is this use which is employed by Goff, in the passages noted above, to distinguish the tentative scope of principle from the rigid application of rule. Principle here is taken to express an important consideration which, all other things being equal, will govern the outcome of the case. However, since all things are not always equal, it may be that the case in question will throw up a further consideration which will make the principle inapplicable. The same tentative connotation is found in the phrase, 'agreement in principle', and is exemplified in the abstract quality of human rights principles.[23]

[20] *Ibid* at 174–77.
[21] *Ibid* at 182, 184.
[22] The four uses of principle are not peculiar to Goff, as I hope the discussion that follows indicates. Each of them may be discerned, though not fully articulated, in Neil MacCormick's discussion of principles, *Legal Reasoning and Legal Theory* (rev edn, Oxford, Clarendon Press, 1994) ch VII. MacCormick focuses on use (ii) (eg, at 156–57), but not without being aware of the contestability of principles used in this way (eg, at xi).
[23] See Andrew Halpin, *Rights and Law – Analysis and Theory* (Oxford, Hart Publishing, 1997) 116–23, 159–74. There is not agreement within the literature on what is meant by principle, nor on how principle is to be distinguished from rule. Some variations are discussed in John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 50–52. Part of the problem may be the failure to recognise the different uses of principle, and the different combinations of those uses that may arise in practice, which I seek to discuss in the present chapter. Braithwaite (at 47 & 78 n104) clarifies his own characterisation of principles, as 'unspecific or vague prescriptions', to make the point that for him the key feature of principle is not found in a contrast between specific and general, but between specific and vague; ie, it is possible for general prescriptions to be either precise or vague. I make a similar point (*op cit*) in distinguishing abstract rights from both particular concrete rights *and* general concrete rights. However, in stressing the tentative feature of principle in use (i), and in taking the abstract quality of human rights principles as a paradigm, I hope to avoid the suggestion that the vagueness of principle is simply a matter of semantic vagueness (we may know what freedom of expression means in a particular case,

### (ii) Principle as the Underlying Rationale for Requiring Particular Conduct

This use of principle produces a different contrast with rule in that the principle is now seen as the rationale for the rule, so that, as Goff indicates, we may 'seek behind the rule for the principle'.[24] Treating rules as the rougher practical formulations of principle provides an explanation for why the need to make an exception to a rule is sometimes overwhelming.[25] Sir James Fitzjames Stephen went so far as to suggest that the basic technique for reforming the criminal law was to identify places in the law where an existing rule failed to give effect to the underlying principle and then to change the rule to avoid the dislocation with principle.[26] Goff himself seems to be open to such an approach, in suggesting that 'the principle when identified can surely be formulated in such a mannner as to avoid the worst injustices flowing from the rule.'[27]

Although this use of principle may seem to account for particular instances of exceptions to rules, it cannot provide a comprehensive underpinning for the law, nor the basis for a programme of law reform, for a number of reasons. First, it is not always clear and uncontroversial just what principle a rule serves. The history of the law is peppered with instances of laws being enacted as a result of political compromise, expediency, and even inattentiveness; rather than through univocal assent to a single principle.[28]

Secondly, even where there is agreement on the underlying principle for a particular rule, effective law reform has often been achieved by blatantly ignoring that principle through the use of fiction,[29] or even boldly rejecting both rule and any underlying principle together.[30]

yet still decline to recognise the instantiation of the right there). I consider below how semantic vagueness may affect rules as much as principles. I hope also to avoid confusing the tentative feature of principle in use (i) with the potentially contestable nature of value in use (iii) or even of rationale in use (ii), although, as we shall see, in certain combinations of the use of principle there may be a connection between these phenomena.

[24] Goff, above n 7, at 177.

[25] For some classic examples, see Fernando Atria, *On Law and Legal Reasoning* (Oxford, Hart Publishing, 2001) 12–13.

[26] Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, III (London, Macmillan & Co, 1883; reprinted New York, NY, Burt Franklin, 1973) 347–48.

[27] Goff, above n 7, at 177.

[28] A point discussed in Andrew Halpin, *Reasoning with Law* (Oxford, Hart Publishing, 2001) 68–70 and n 35, in relation to legislative intent, and more generally by NE Simmonds, 'Bluntness and Bricolage' in Hyman Gross and Ross Harrison (eds), *Jurisprudence: Cambridge Essays* (Oxford, Clarendon Press, 1992) 12–20.

[29] Sir Henry Maine, *Ancient Law* (10th edn with Introduction and Notes by Sir Frederick Pollock, London, John Murray, 1920) ch II; Lon Fuller, *Legal Fictions* (Stanford, CA, Stanford University Press, 1967).

[30] A possibility recognised by Goff, above n 7, at 177–78, though somewhat tempered by his describing the rejection of exisiting legal principle as a process of 'reformulation' or 'development' of principles by the judges. Excessive judicial reformulation of principle is strongly criticised by Hobhouse LJ in *Perret v Collins* [1998] 2 Lloyd's Rep 255, 258 (see further n 73 below).

Thirdly, again assuming general recognition of what the underlying principle might be, there still remain problems in relying on principle as rationale, as a basis for developing the law, due to the characteristic of principle as a weak general formula, noted in use (i) above. In particular, the relatively easy process of recognising the *absence of any rationale* for the application of a rule in a given case (there could be no reason for applying a rule designed to prevent violence accompanied by bloodshed to a barber who accidentally nicks his client's throat[31]), is not symmetrical to the difficulty in ascertaining whether the *presence of a rationale* should be determinative of a particular case. For example, the promotion of freedom of expression is a reason to allow publication of an article criticising a politician, but this still leaves open the issue of whether the damage to the politician's reputation is a strong countervailing reason to prohibit it. How do we decide on whether the existing fair comment rule of the law of defamation is too harsh or too lenient by reference to its underlying principle? The picture is complicated further when it is recognised that a single abstract principle, such as the principle of freedom of expression, is itself capable of being supported by a variety of potentially conflicting and contestable rationales.[32]

Fourthly, the indeterminate and contestable nature of principle just noted leads to the recognition of a distinct role for rules in the law, which is not exhausted by any link to an underlying principle. Although the precise nature and scope of legal rules may themselves be controversial matters, it is clear that the rigidity of legal rules is perceived as a virtue. Even if rules are formulated in a crude and overbroad manner, this may be just what is required in order to ensure clarity and efficacy in attaining some social objective, which would be diminished by a requirement to implement principle.[33] For example, a law prohibiting the possession of handguns by members of the public seeks to reduce the use of guns in

[31] Following Pufendorf, as cited by Atria, above n 25, *loc cit*. Pufendorf's hypothetical dealt with blood-letting for medical purposes, but was based on an original case involving shaving a judge. For the history, see Jim Evans, 'Questioning the Dogmas of Realism' [2001] *New Zealand Law Review* 145, 155.

[32] See Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Aldershot, Dartmouth, 1994), discussed in Halpin, above n 23, at 169. The recognition of multiple and potentially conflicting rationales for a principle undermines the primary role given to a monolithic principle in the work of Ronald Dworkin. See, eg, his 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* 353, 356: 'one principle or another provides a better justification of some part of legal practice.'

[33] See, eg, Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford, Clarendon Press, 1991), and Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Durham, NC, Duke University Press, 2001). The 'semantic autonomy' of rules proposed by Frederick Schauer as a means of accounting for the way rules work has been criticised by Mark Tushnet, Review of Schauer's *Playing with the Rules* (1992) 90 *Michigan Law Review* 1560, and by Timothy Endicott, *Vagueness in Law* (Oxford, OUP, 2000) 18–19, for placing too heavy a reliance on the language used by rules divorced from the realities of the lives of rule users. Alexander and

committing crimes, not by relying on a principle requiring gun owners to behave responsibly in the use and storage of their weapons but by enacting a strict rule which prohibits any use of the guns by private individuals. In such circumstances the ideal practice of the law cannot be determined by reference to its underlying rationale.[34] The explicit purpose of the rule is to prevent all possession of handguns by members of the public. If this is achieved, it will encompass but exceed the rationale of reducing the use of guns in committing crimes. This quality of ruleness has to be recognised as governing the appropriate scope of a rule, alongside the rationale that might be identified as the reason for having the rule in the first place.[35]

### (iii) Principle as the Expression of Value Rather than Personal Preference

This use of principle carries connotations of objectivity and authority, as opposed to subjective inclination and self-interest. It is found in the phrases 'a man of principle', and 'a matter of principle'. It is this use that Goff draws on to argue against the view that judges are developing the law through personal whim or discretion. So Goff opposes 'clearly recognizable principles' to discretionary relief,[36] and 'systematic legal

Sherwin take a more modest view of what can be achieved by rules, but still emphasise their key characteristic of bluntness as a practical response to the imperfections of the human condition.

[34] See Firearms (Amendment) Act 1997, amending Firearms Act 1968, s 5. For another example, see the requirement that a contract for the sale of land has to be in writing under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. When the details of this provision came to be interpreted in *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, the rule was interpreted as requiring 'a greater degree of formality' (per Stuart-Smith LJ at 287E), rather than by reference to the underlying rationale of preventing fraud or avoiding ambiguity (which in certain circumstances might be met *without* such a high degree of formality).

[35] The virtue of rigidity is not absolute. The quality of ruleness may be overdone, where it does not simply exceed the desired rationale but overrides other pertinent considerations. This was held to have occurred in s 41 of the Youth Justice and Criminal Evidence Act 1999, by the House of Lords in *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45: the provision in s 41 amounted to a rule prohibiting reference to a complainant's sexual history in rape trials that failed to allow for the defendant's right to a fair trial protected by Article 6 of the European Convention on Human Rights. Empowered by the Human Rights Act 1988, s 3(1), the House of Lords read into s 41(3)(c) a discretion for the trial judge to permit evidence of previous sexual history where the fairness of the trial required it. The rigidity of s 41 has also been taken to have overridden relevant general principles of the law of evidence. For further discussion, see Di Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531. For a contrary view, arguing that a rigid rule excluding sexual history evidence in most cases is required to avoid the use of unacceptable sexual stereotypes influencing the exercise of judicial discretion, see Jennifer Temkin, 'Sexual History Evidence—Beware the Backlash' [2003] *Criminal Law Review* 217. The debate is continued by Di Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] *Criminal Law Review* 370.

[36] Goff, above n 7, at 182.

principle' to personal judgement.[37] Similar appeals to this use of principle have been made more recently by Sir John Laws,[38] among others.[39]

### (iv) Principle as a Broad Synthesising Conception

This use of principle serves to create an open category permitting a general issue (or a cluster of issues) to be raised across a wide variety of factual situations. The use of such broad synthesising conceptions may be regarded as a mark of progression to modern sophisticated legal systems, from the more concrete provisions of primitive law. They enable a vast array of complex factual situations to be governed by a single legal provision, and provide opportunity for the law to develop in ways not initially contemplated at the point the synthesising conception is introduced into the law.[40] Goff applies this use of principle to two major developments in English law, the recognition of general principles of negligence and unjust enrichment.[41] In relation to the second example, Goff demonstrates how this use of principle allows for the avoidance of technicalities associated with separate heads of recovery and opens up a 'cross-fertilization of ideas'.[42]

[37] *Ibid* at 183–84.

[38] In the Ganz Lecture in Public Law delivered at Southampton University in November 1997, 'The Limitations of Human Rights' (subsequently published in [1998] *Public Law* 254) Sir John Laws argued that judges may be trusted to interpret the rights of the ECHR, because in so doing they are only performing their traditional function of dealing with objective principles of law. In his 'Judicial Review and the Meaning of Law' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000), delivered as a paper at a conference in May 1999 at the Cambridge Centre for Public Law, Laws develops a detailed view of legal principle which 'confines the judge's own views in a strict and objective context' (at 189). For comment on Laws' views, see Halpin, above n 28, at 58 nn76 & 79.

[39] For an example of this use of principle by an American judge to defend collegiate development of the law, see Harry Edwards, 'Collegiality and Decision Making on the D.C. Circuit' (1998) 84 *Virginia Law Review* 1335. A response to Edwards is made by Richard Revesz, 'Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards' (1999) 85 *Virginia Law Review* 805. For historical precursors, see the discussion of the approach to principle taken by Sir Frederick Pollock, and the influence of Lord Mansfield, in ch 4 of Neil Duxbury, *Frederick Pollock and the English Juristic Tradition*, forthcoming (Oxford, OUP, 2005). A strong antidote to the reassuring blandishments of principle is provided by Stanley Fish, *The Trouble with Principle* (Cambridge, MA, Harvard University Press, 1999): 'the vocabulary of neutral principle can be used to disguise substance so that it appears to be the inevitable and nonengineered product of an impersonal logic' (at 4).

[40] See Peter Birks, 'The Early History of Iniuria' (1969) 37 *Tijdschrift voor Rechtsgeschiedenis* 163, 164–65, for discussion of the development of the Roman delict *iniuria* from a specific provision on assault to an 'abstract organising principle'. For further discussion of how such an abstract organising principle assists in the development of both the classical Roman law and modern common law, see his *Harassment and Hubris: The Right to an Equality of Respect*, the Second John Maurice Kelly Memorial Lecture (Dublin, Faculty of Law, University College Dublin, 1996).

[41] Goff, above n 7, at 179–80.

[42] *Ibid* at 180. For recent discussion of this use of the principle of unjust enrichment, see Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the