

Michigan Law Review

Volume 78 | Issue 5

1980

Philosophy and Law: Some Observations on MacCormick's *Legal Reasoning and Legal Theory*

Patricia D. White
Georgetown University Law Center

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Philosophy Commons](#)

Recommended Citation

Patricia D. White, *Philosophy and Law: Some Observations on MacCormick's Legal Reasoning and Legal Theory*, 78 MICH. L. REV. 737 (1980).

Available at: <https://repository.law.umich.edu/mlr/vol78/iss5/6>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

**PHILOSOPHY AND LAW: SOME
OBSERVATIONS ON MacCORMICK'S
*LEGAL REASONING AND LEGAL
THEORY***

*Patricia D. White**

LEGAL REASONING AND LEGAL THEORY. By *Neil MacCormick*.
Oxford: Oxford University Press. 1978. Pp. xi, 298. \$14.95.

There are at least two reasons why any book on the philosophy of law that seeks to interest both nonlawyer philosophers and nonphilosopher lawyers runs the serious risk of interesting no one. On the one hand, the effort not to alienate either group, either by using the other group's jargon or by presuming some general sophistication in the other field, can easily produce a work that seems tedious to those readers who are fairly well versed in one field or the other. And on the other hand, the very effort to say something interesting to each group may nonetheless require that some substantial background in each subject be presumed, thus causing the alienation sought to be prevented. The irony, of course, is that the one class of people that might reasonably be expected to be very interested in the subject — lawyer philosophers — is doubly alienated, yet the total class of interested readers is increased only slightly, if at all. As a general proposition it is more effective, I suspect, to eschew any temptation to increase one's readership and instead to adopt the tone best suited for one's most natural audience.

Professor MacCormick's book should be of interest to serious philosophers of law, but it is so critically flawed by MacCormick's attempt to "write it in such a way that it will be comprehensible to non-philosophical lawyers and to non-lawyer philosophers" (p. v) that many may not have the patience to read it through. MacCormick falls into both of the traps described above. Long stretches of the book, especially early on, are so tedious as to be virtually unreadable by anyone with a modicum of philosophical sophistication; yet much of the later discussion assumes to quite a remarkable degree, given the purported aim of the book, that the reader is familiar with the work of H.L.A. Hart and Ronald Dworkin. Without that familiarity and without a more general background in moral

* Associate Professor, Georgetown University Law Center. B.A. 1971, M.A., J.D. 1974, University of Michigan. —Ed.

philosophy, it would be difficult indeed to understand MacCormick's motivation and to appreciate the interest of what he has to say.

MacCormick wants to explain the nature of legal argument and its role in legal theory. However, he regards that project as crucially linked to a broader inquiry into the role of reason in the determination of human action. The fact that much "practical reasoning" in the legal sphere occurs publicly during the process of legal adjudication seems to MacCormick to make the study of legal argument an especially important vehicle for gaining insight into the nature of practical reason in general (pp. 19, 272-74).¹

In rough and oversimplified outline, MacCormick's thesis is that although some legal decisions are logically implied by the conjunction of general legal rules with particular findings of fact,² very often (perhaps even most often?) no set of commonly accepted general legal rules is sufficiently clear, either in terms or in scope, to compel any particular decision (pp. 65-72).³ When this happens, a judge must frame his own justificatory general legal rule: one that *would* have compelled the actual decision in the case and that *will* compel a similar decision in any indistinguishable future case (pp. 74-76, 81-

1. MacCormick seems to regard practical reasoning as the method by which people determine at any time and in any context what they ought to do. He makes no attempt to distinguish among the various senses of "ought" that might be distinguished (e.g., "I ought to put on my sweater (because I feel chilly)," "I ought to drive on the right hand side of the road (because the traffic laws require me to)," "I ought to apologize to my mother (because I broke her favorite vase)," "I ought," said the judge, "to sentence this man to jail for the maximum term (because he is particularly despicable and I am the person required to pronounce his sentence)"). Instead he speaks of "any mode of evaluative argument" (p. 5).

An account of practical reasoning might *not* be thought to apply equally well to moral thinking. For an interesting discussion of whether Aristotle, for example, intended his theory of the practical syllogism to apply to moral reasoning, see J. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 1-88 (1975). See generally the essays collected in PRACTICAL REASONING (J. Raz ed. 1978). An account of practical thinking might instead be intended as a description of *how* we decide upon any action and/or as a theory whereby our actions may be justified. MacCormick is never fully clear about the role he attributes to practical reason.

2. "[I]t is therefore sometimes the case that a legal conclusion can be validly derived by deductive logic from the proposition of law and the proposition of fact which serve as premises" (pp. 36-37).

3. MacCormick describes two general sorts of problems that prevent rules from compelling any particular decision even when the facts are not in issue. The first of these, "the problem of interpretation," occurs when a rule is in some respect ambiguous. For example, a revenue statute that directs "All scholarships shall be excluded from taxable income," is, in and of itself, ambiguous since no meaning is ascribed to "scholarship." This problem arises because general terms tend to have fuzzy edges — borderlines where applicability of the term to the circumstances is not clear. The effect of this fact on the law was at least suggested by Plato, see PLATO, REPUBLIC IV, 425 b-e, and was explicitly developed by Aristotle, see ARISTOTLE, NICOMACHEAN ETHICS V, 1137 b 11-24. It has been developed in a modern context by H.L.A. Hart. See H. HART, THE CONCEPT OF LAW 123-32 (1961).

MacCormick denominates his second sort of problem "the problem of relevancy." Here the question is whether, for some given set of facts "p" and for some remedy "q" sought by one of the parties, there is a relevant general legal rule "If p then q." When an American court entertains a motion for summary judgment it must answer exactly this kind of question.

83).⁴ Sometimes judges self-consciously try to frame such a general rule before rendering a decision, and sometimes they render the particular decision first and the rule must be supplied later (pp. 83-85).⁵ The order of proceeding does not change the logical relationship between rules, facts, and decisions. Yet the observation that judges create general legal rules through their decisions does not mean that judges have unfettered discretion to make whatever decisions they wish. Even though at the outset a judge may not be logically compelled by any legal rule to render a particular decision, his choice of general legal rules is circumscribed by the requirements that (1) his particular decision be logically consistent with the body of general rules that compose the legal system (pp. 106, 196) and that (2) the general rule join the set of all other general rules to form a "coherent" legal system. Coherency is a fairly vague notion requiring, at least, that the policies and purposes that apparently underlie the individual rules not controvert one another (pp. 106-07, 152-53). Within these constraints, however, a judge is free to ground either his choice of general rule or his particular decision on his judgment about the generalized consequences of his choice or decision (pp. 163-66). His "consequentialist arguments" (MacCormick is careful to distinguish his rather broad and imprecise use of this phrase from utilitarianism) may take into account a variety of considerations, including justice, common sense, public benefit, and convenience (pp. 105-06, 115-19). Thus his "final judgment [is] passed in summation of the cumulating or competing results of evaluation by reference to a number of criteria of value . . ." (p. 115).⁶ Reason, concludes

4. I have stated this element of his thesis rather differently from MacCormick, but I think that it is an accurate representation. He appeals to the importance of "formal justice" — the principle that we treat like cases alike — in the justification of any legal decision, to argue that any decision entails that any like case would be identically decided.

5. See R. WASSERSTROM, *THE JUDICIAL DECISION* 19-20 (1961).

6. MacCormick calls this process of justifying a choice between possible rulings "second-order justification." He notes that it is importantly like the theory of the justification of the choice between rival scientific hypotheses that has been set forth by Sir Karl Popper, Thomas Kuhn, and others. In both contexts, the choice of general principle is made within, and is constrained by, the system within which it occurs. He does not observe, however, that this same "mode of argument" has been advanced, as well, in both moral and legal philosophy. Joel Feinberg, in a review of John Rawls's *A Theory of Justice*, describes the view particularly clearly:

Rawls shares a conception of the modes of argument available to the moral philosopher with a growing number of other writers. [Here Feinberg cites, among others, Aristotle, William James, Morton White, Israel Scheffler, Rolf Sartorius, and himself]. Perhaps the least misleading label for the conception would be "the coherence theory." The writers to whom I refer have been disillusioned with various traditional modes of argument in moral philosophy. They do not believe it possible to base an ethical system on self-evident moral first principles, or on direct intuitive insight into, or rational apprehension of, a uniquely moral realm of truth. Nor do they think it possible to deduce moral first principles from statements of facts, making no challengeable moral assumptions along the way. On the other hand, these writers are not willing to deprive general principles of their usual role in arguments for relatively specific maxims and judgments. General principles and factual premises do entail specific moral judgments they admit,

MacCormick, may not determine, but it does strictly limit the general legal rules that together can constitute a legal system. "Thus, it is that we can have rationally structured but not rationally determined legal systems, and indeed 'systems' or 'theories' of morality (as distinct from theories *about* morality)" (p. 271).

To anyone familiar with the literature of contemporary philosophy of law, this summary should make it apparent that MacCormick is in part attempting to develop, within an essentially Hartian framework,⁷ a response to Dworkin's challenge to modern positivism.⁸ It should also be apparent that MacCormick's account of the structure of legal reasoning is at least reminiscent of — if not inspired by — Richard Wasserstrom's study of the subject published nineteen years ago.⁹ MacCormick acknowledges, of course, his debts to Hart (p. 231) and Wasserstrom (p. 116) and the fact that, in response to Dworkin, he hopes to extend the "ambit" of the positivists' inquiry from an excessive concentration on legal rules to a fuller explanation of other normative standards in the law (p. 239). Yet MacCormick's accounts of Hart's and Dworkin's views are so sketchy that, in the case of Hart, only a reader exceedingly familiar with *The Concept of Law* could make much of a beginning at laying out the parameters of this positivism whose "ambit" is being extended and, that in the case of Dworkin (whose arguments receive their principal summary on one page — p. 230), no one relying on this book alone would fully understand its motivation or point. MacCormick's explicit discussion of Hart and Dworkin is expansive, however, when compared to the few lines that he devotes to Wasserstrom's "brilliant pioneering study" (p. 116).

Despite MacCormick's parsimonious description of the work of others, his style is by no means generally terse. Quite the contrary. After a brief introductory chapter, the book is launched by a 34-page chapter on deductive justification. The point of the chapter is vari-

but the most suitable general principles, they insist, are those that summarize and are supported by the specific moral judgments in which we have the most confidence. We justify specific moral judgments, on their view, by deriving them from general principles, and the latter are supported in turn by a demonstration that the right moral judgments (other moral judgments) follow from them. This may be circular, but it is unavoidably and non-viciously so.

Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004, 1019 (1972).

See Scheffler, *On Justification and Commitment*, 51 J. PHIL. 180 (1954), and Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171 (1968).

7. See generally H.L.A. HART, *supra* note 3.

8. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (paperback ed. 1978), which is a collection of Dworkin's articles. It includes as an appendix a revised version of Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977), Dworkin's response to critics of the hardbound edition of his book.

For a sympathetic account of some of Dworkin's views, which is in certain respects substantially clearer and more convincing than anything Dworkin himself has published, see Regan, *Glosses on Dworkin*, 76 MICH. L. REV. 1213 (1978).

9. R. WASSERSTROM, *supra* note 5.

ously described as being “[t]o demonstrate the *possibility* of [a] purely deductive justification” (p. 19)¹⁰ of a legal decision and to answer “those who deny that deductive logic is relevant to the justification of legal decisions . . .” (p. 45).¹¹ Under either description, the project is hardly controversial; it merely analyzes the logical structure of the opinion in *Daniels and Daniels v. R. White & Sons and Tarbard* ([1938] 4 All E.R. 258), a very straightforward products liability case in which neither the law nor the facts were at issue.¹² MacCormick analyzes the few paragraphs of Justice Lewis’s opinion at an excruciatingly slow pace, punctuating his analysis with what is supposed to be a lesson in elementary logic. Sadly, the lesson is marred by its inaccuracy. Nothing very much hinges on MacCormick’s mistakes, but under the circumstances the patient reader ought at least to be able to rely on MacCormick to get the story right.¹³

MacCormick wants to show that some legal arguments take the form:

- | | |
|-------------------|---------------|
| 1) $p \supset q$ | (If p then q) |
| 2) p | (p) |
| 3) $\therefore q$ | (Therefore q) |

To this end, he takes the language of Justice Lewis in *Daniels*, expands it to fill in all the unstated (because obvious) premises, and expresses each statement symbolically (p. 30). Surprisingly, he translates sentences like “If [any] one person transfers the property in goods to another person for a money consideration, then a contract

10. See also pp. 21, 37, and 52.

11. See also p. 52.

12. There is a long tradition, particularly in American jurisprudence, of legal philosophers and jurists who have argued either that judges do not in fact decide cases by means of a deductive procedure, that they should not, or that their decisions cannot in fact be so justified. E.g., J. FRANK, *LAW AND THE MODERN MIND* (1948); O.W. HOLMES, *THE COMMON LAW* (1881); E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1961). The claims have taken various forms, but I have never seen it seriously contended that a judge could never set forth an account of his decision which was purely deductive in form. MacCormick cites no one. For a very clear discussion of the distinctions that should be drawn in this area, see R. WASSERSTROM, *supra* note 5, at 12-38.

13. For example, MacCormick writes:

At least since the time of Aristotle, it has been recognized that an argument of the form ‘If p then q, p, therefore q’ is a valid deductive argument; the logicians of the Stoic school who came after him gave that form of valid inference the name ‘modus ponens.’ But full understanding of propositional logic did not come until the present century, when Russell and Whitehead and others [and here MacCormick cites Wittgenstein] worked out a systematic account of the ‘calculus of propositions’ [p. 24].

The use of “modus ponens” in argument predated Aristotle, but he did not acknowledge the logical principles upon which he relied. Nevertheless, Aristotle *was* the first clearly to distinguish arguments from the conditional propositions that appear in them and to recognize certain inference patterns — such as “if p then q, p, therefore q” — as valid without proof. See J. ŁUKASIEWICZ, *ARISTOTLE’S SYLLOGISTIC FROM THE STANDPOINT OF MODERN FORMAL LOGIC* 1-3 (2d ed. 1957); B. MATES, *STOIC LOGIC* 1-4 (1961); Mueller, *An Introduction to Stoic Logic*, in *THE STOICS* 1-8 (J. Rist ed. 1978). Nor were Russell and Whitehead the first to systematize the propositional calculus. It was fully systematized by Frege more than 30 years earlier in his *BEGRIFFSSCHRIFT* (1879).

of sale of those goods exists as between those parties" as " $p \supset q$," rather than as some kind of universally quantified conditional (*i.e.*, "For all people, if one person transfers the property etc., then a contract of sale exists" or, symbolically, $(x) (If Fx then Gx)$). This failure to employ universal quantifiers makes MacCormick's symbolization of the argument misleading. The second sentence of the argument is "In the instant case, one person [*i.e.*, Mrs. Tarbard] transferred the property in goods to another person for a money consideration." This is represented by MacCormick simply as " p ," when in fact it is *not* identical with the premise " p " in the sentence that he translated as " $p \supset q$." MacCormick has left out the step, sometimes called "universal instantiation," whereby the assertion that *for all cases* some proposition holds ($(x) (If Fx then Gx)$) leads to the assertion that *in some particular* circumstance the same proposition holds ($If Fa then Ga$). Here, to adopt MacCormick's language, the second sentence should be, "If, in the instant case, one person [*i.e.*, Mrs. Tarbard] transferred the property in goods to another person for a money consideration, then a contract of sale of goods existed between Mrs. Tarbard and that person." MacCormick's second sentence would then serve as the third sentence in the argument. It might be symbolized as " Fa ." His conclusion to this part of the argument is *then* warranted by the premises: "In the instant case a contract of sale of those goods existed as between those parties" (Ga).

The lack of precision which characterizes the chapter on deductive justification is characteristic of much of the general argument of the book.¹⁴ Nonetheless, this is a book with one great virtue. It is a book that almost passionately sets forth an insight — perhaps correct and certainly interesting — about the role of reason in practical decision making. Reason does not determine the content of our normative principles (legal or moral) but it does limit it. Human beings, as a species, simply do strive to be rational (pp. 268-70) and thus they select and frame normative principles which are consistent with one another and which together are "coherent" (pp. 265-71). This insight is hardly original with MacCormick,¹⁵ but its full-scale, self-conscious application to legal theory is his contribution. I wish that he had done a better and more careful job.

14. See notes 1, 3, 4, 6 & 12 *supra*.

15. Cf. note 6 *supra*. I would argue, contrary to the standard interpretation adopted by MacCormick, that Hume had much this same insight about the role of reason in normative thought. See also Frankena, "Ought" and "Is" *Once More*, 2 *MAN AND WORLD* 515 (1969), reprinted in *PERSPECTIVES ON MORALITY* (K. Goodpaster ed. 1976).