DEDUCTION, LEGAL REASONING, AND THE RULE OF LAW

RHETORIC AND THE RULE OF LAW. A THEORY OF LEGAL REASONING. By Neil MacCormick.[1] Oxford: Oxford University Press, 2005. Pp. xvi + 287. $74.00.

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I. INTRODUCTION

Neil MacCormick first put forward his thoughts on legal reasoning in a book entitled *Legal Reasoning and Legal Theory* (hereinafter *Legal Reasoning*).[3] MacCormick's aim in *Legal Reasoning* was to explain the nature of legal argumentation as it manifests itself in court decisions.[4] He focused on the legal systems of the United Kingdom, specifically English and Scots law, although he suggested that the claims he made about UK law deserve to be tested with respect to other legal systems, at least insofar as they are grounded in more general philosophical premises.[5]

Focusing on the *process of justification*, MacCormick argued that in the final analysis legal reasoning is about giving good justifying reasons for decisions.[6] He explained that legal reasoning is essentially about applying *rules* to facts: "The simple but often criticized formula 'R + F = C', or 'Rule plus facts yields conclusion' is the essential truth."[7] Accordingly, he took *deductive* reasoning in the form of a *practical syllogism* to be of central impor-

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3. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (2d ed. 1994) [hereinafter, MACCORMICK, LRLT].

4. *Id.* at 7.

5. *Id.* at 8.

6. *Id.* at 15.

7. *Id.* at x.

tance in legal reasoning: To justify a decision is to apply a pertinent rule to the facts of the case.[8] He was, however, careful to point out that there is more to legal reasoning than deduction and that the *non-deductive* elements, such as the weighing of arguments in difficult cases of statutory interpretation, are the ones most in need of study.[9]

MacCormick also stressed the importance of *universalizability* in legal reasoning. He actually spoke of "formal justice," not of "universalizability," but the idea appears to be essentially the same in both cases, namely that the judge "must decide today's case on grounds which [he is] willing to adopt for the decision of future similar cases, just as . . . [he] must today have regard to his earlier decisions in past similar cases."[10] We might say that on this count, MacCormick follows in the footsteps of Herbert Wechsler.[11]

Since any ruling can be universalized, the judge must be able to decide which of two or more universalized rulings he should choose. MacCormick called this the *problem of second-order justification* and explained that it must involve two distinct types of interpretive argument, namely (i) arguments from consistency and coherence, and (ii) consequentialist arguments.[12] For, he explained, any ruling must make sense both in the legal system and in the world. A given ruling meets the consistency requirement if, and only if, it does not contradict any other norm in the legal system; it meets the coherence requirement if, and only if, it makes sense in the legal system.[13] Consequentialist arguments, on the other hand, ask the judge to choose the ruling that yields the best consequences. This type of argument comes into play only if the arguments from consistency and coherence do not yield an answer to the interpretive question.

In *Rhetoric and the Rule of Law* (hereinafter "*Rhetoric*"), MacCormick sums up the developments of his views on legal reasoning since the publication of *Legal Reasoning*. Here he maintains, inter alia, the following: in the case of statutory (and constitutional) interpretation, the judge should begin with a tex-

8. *Id.* at 19–52.
9. *Id.* at ix.
10. *Id.* at 75–76.
11. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
12. MACCORMICK, LRLT, *supra* note 3, at 103–08.
13. MacCormick suggests that a set of *rules* is coherent if and to the extent that the rules can be thought of as pursuing some intelligible *value* or *policy* or can be subsumed under one or more legal *principles*. *Id.* at 106–07.

tual analysis of the relevant provision; if a textual analysis does not yield a determinate result, he should proceed to consider systemic arguments; and if neither textual nor systemic arguments nor any combination of these arguments yields a determinate result, he should resort to teleological (or purposive) arguments (pp. 121-42). As should be clear, this normative claim is a refined version of MacCormick's earlier claim that the judge should begin with arguments of consistency and coherence and, if necessary, proceed to consider consequentialist arguments.

The central question in *Rhetoric*, however, is whether we can square a belief in the Rule of Law, which entails a belief in legal certainty, with a belief in (what MacCormick refers to as) the Arguable Character of Law, that is, the notion that the content of law depends on argumentation:

> Argument from commonplace propositions or starting points (*topoi*) [In this case the possibility and value of the Rule of Law, and the notion that the content of law depends on argumentation] is common in rhetoric, but the commonplace truths of everyday thinking may sometimes appear to be in flat mutual contradiction .... The idea of the arguable character of law seems to pour cold water on any idea of legal certainty or security. If there can be no legal certainty, how can the Rule of Law be of such value as is claimed? What prospect can there be of reconciling these two? (p. 13)

MacCormick offers an affirmative, albeit qualified, answer to this question: although we can usually rule out some proposed solutions to a legal problem as being clearly wrong, there is usually more than one correct solution to any given legal problem; legal certainty under the Rule of Law is defeasible legal certainty; and the right to argue one's case within this framework is grounded in respect for the Rule of Law (pp. 28, 277-80).

He points out that his *reconciliation claim*, as I shall refer to it, depends on the assumption that the *orthodox view about legal reasoning*—according to which "laws do constrain adjudicators, because they are relatively determinate, and can be applied within a framework of justifying arguments that lead to reasonable predictability of the uses of state coercion" (p. 30)—is tenable, and he therefore sets himself the task of showing that the "orthodox view" really is tenable (pp. 30-31). To do that, he devotes the rest of the book to a discussion of various aspects of legal reasoning, including the role of deductive reasoning, the requirement of universalizability, the nature and importance of consequentialist arguments, the ranking of the various interpre-

tive arguments, the use and weight of precedents, the idea of reasonableness, the concepts of coherence and defeasibility, and the possibility of judicial mistakes. As one might expect, he arrives at the conclusion that the orthodox view about legal reasoning is indeed tenable.

I appreciate MacCormick's efforts to put (the theory and practice of) legal reasoning in the larger scheme of things, and I like the fact that MacCormick has an actual court case for every occasion—no matter what the issue is, MacCormick has a case that illustrates it. I am not, however, convinced by MacCormick's reconciliation claim. The main problem, as shall be argued, is that the notion of what is *rationally arguable* is rather more indeterminate than MacCormick thinks. I also point to some difficulties in MacCormick's accounts of deductive reasoning, universalization, and consequentialist reasoning in law.

I begin with a consideration of MacCormick's accounts of the role of deduction in legal reasoning (Section 2), the idea of universalization (Section 3), and the nature and role of consequentialist arguments (Section 4). I then turn to a consideration of MacCormick's reconciliation claim (Section 5).

II. DEDUCTIVE REASONING

MacCormick maintains that deduction plays an important part in legal reasoning and he devotes two chapters to elaborating and defending this view. He does not explain what, exactly, deduction is, but we may say that a valid deductive argument is an argument in which the premises entail the conclusion: If the premises are true, then the conclusion *must* be true.[14]

MacCormick's basic claim is that legal reasoning has deductive, specifically syllogistic, structure (p. 43):

> (Premise 1) If OF [Operative facts], then NC [Normative Consequences]
>
> (Premise 2) OF
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>
> (Conclusion) NC

14. For more on logical validity, see, for example, MARK SAINSBURY, LOGICAL FORMS: AN INTRODUCTION TO PHILOSOPHICAL LOGIC ch. 1 (2d ed. 2001).

He explains that the legal syllogism plays an important *structuring role* in legal thought because it is within the syllogistic framework that arguments make sense *as legal arguments*:

> We go back to the point about what could possibly count as applying a statute at all. We go back to the issue of a conceivable procedure for raising a case with a view to implementing a statute. That has an intrinsic logic of its own within which it is clear why the interpretative points and arguments have a real bearing as legal arguments. Moreover, this helps to remind us why it is so important for a lawyer to be meticulous in sifting through every one of the universals or concepts deployed in a statute, and figuring out their relevant ordering and mutual interaction or super- and subordination. Cases are won and lost through meticulous care—or its lack—in following through every concept that counts, and testing rigorously for each one what particulars will count as an instance of that concept (p. 42).

Although he does not say so, it is clear that MacCormick is concerned with the process of *justification*, which (obviously) concerns the justification of a legal decision, not the process of discovery, which concerns the person's mental processes in arriving at the decision.[15] As should be clear, the actual thoughts of a judge in arriving at a decision need not be reported in the opinion he writes. For all we know, he might "see" the conclusion in a clear white light; even so he must write the opinion, that is, adduce arguments in support of the conclusion. The question, then, is whether those arguments are good justifying arguments, not whether they really *motivated* him. In *Legal Reasoning* MacCormick emphasized that he was concerned with the process of justification, not the process of discovery,[16] so one may wonder about his reasons for not stating it clearly that he is still concerned with the process of justification.

MacCormick insists that, contrary to what many appear to believe, deduction is as important in common law systems as it is in code systems (pp. 43-47). More specifically, he maintains that case law rules, no less than statutory rules, may constitute the major premise of the legal syllogism:

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15. For more on this distinction, see RICHARD A. WASSERSTROM, THE JUDICIAL DECISION; TOWARD A THEORY OF LEGAL JUSTIFICATION 25–30 (1961).

16. MACCORMICK, LRLT, *supra* note 3, at 13–18. Indeed, he even said that "[t]he process which is worth studying is the process of argumentation as a process of justification." *Id.* at 15.

> In the nature of the case, the premises of any syllogism we start from in common law adjudication are weaker and more tentative or defeasible than in reasoning with statutes. But it is no less true that we aim towards a concluding syllogism whose premises have the full solidity that a good legal argument can secure. The elements of such interpretative arguments are not essentially different as between common law cases and statute-based cases within common law systems. It would be quite extraordinary if anything else were the case (p. 47).

We see that MacCormick's claim is not that the *extraction* of the *ratio decidendi* from case *A* is a matter of deductive reasoning, but that the *application* of the *ratio decidendi* (thus extracted from case *A*) to the facts of case *B* is a matter of deductive reasoning. So although the process of extracting the *ratio decidendi* from a precedent (or a series of precedents) is very different from the process of finding the pertinent statute (or statutes), the judge will proceed to apply a legal norm in both cases—the *ratio decidendi* or the statutory provision, as the case may be—to the facts of the case at bar.

It should be noted that MacCormick's belief in the importance of deductive reasoning does not mean he believes that the judge is an automaton or that legal reasoning is easy. In other words, MacCormick is *not* a *formalist* who conceives of the law as a closed and complete system of legal norms and the judge as someone who decides the case before him in a mechanical way by applying a legal norm to the facts.[17] On the formalist view, textual interpretation is the only type of interpretation involved, and deductive justification from pre-determined premises is the normal mode of justification. But a belief in formalism is by no means necessitated by the belief that deductive reasoning plays a central role in legal reasoning. As Kent Sinclair explains, "[a]ll deductive arguments entail, or demand, their conclusions, but nothing inherent in the use of the deductive mode of reasoning guarantees that premises will be available that permit deduction of a conclusion requiring a given legal rule or settling all controversy about it."[18]

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17. As MacCormick puts it in the chapter on defeasibility, "[t]he deductive element is rarely sufficient to conclude any contentious matter in law" (p. 237). For more on formalism, see H. L. A. HART, THE CONCEPT OF LAW 126–27 (1961); NEIL MACCORMICK, H. L. A. HART 121–24 (1981); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

18. Kent Sinclair, Comment, *Legal Reasoning: In Search of an Adequate Theory of Argument*, 59 CAL. L. REV. 821, 837 (1971).

I believe MacCormick's claim that deductive justification plays an important role in legal reasoning is sound and that his account of deductive justification is essentially correct. But there is a problem concerning the applicability of the laws of logic to norms and value judgments that is worth mentioning in this context. A valid deductive argument, as we have seen, is one in which the *truth* of the premises necessitates the *truth* of the conclusion. Accordingly, it has been argued that the laws of logic may not apply to entities, such as norms, that *cannot* be true or false, and that therefore—contrary to what most of us assume—inferences involving norms, such as the legal syllogism, cannot be logically valid.[19] But while the applicability of the laws of logic to norms is an important foundational issue in deontic logic,[20] MacCormick is clearly allowed to disregard it in a book on legal reasoning aimed at legal scholars. After all, it does seem reasonable to assume that the legal syllogism simply must be logically valid, even though it is hard to see precisely how.

III. UNIVERSALIZATION

MacCormick believes, as we have seen, that the requirement of *universalizability* is central to legal reasoning. In Chapter 5 of the book, he contrasts universalism with particularism and maintains that universalization must be involved in legal justification.

MacCormick considers the case of King Solomon, who faced the problem of deciding who of two women was the mother of a certain child (pp. 79-80). Solomon asked for a sword and said he would cut the child in two and give each woman one half of the child. But one of the women objected immediately, saying that she would rather give the child to the other woman, who in turn insisted that Soloman should go ahead and cut the child in two. Solomon wisely concluded that the woman who protested was the mother and should therefore be given the

19. *See, e.g.*, Alf Ross, *Imperatives and Logic*, 7 THEORIA 53 (1941). Like many other philosophers, Ross believes that norms or value judgments differ in this regard from statements (or propositions), such as "It is raining in Minneapolis now" or "Two plus two equals four." The underlying idea is that unlike statements or propositions, norms do not assert anything about anything, but only express the speaker's feelings or attitudes. For more on this underlying idea, see, for example, ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT ch. 1 (1990).

20. For an illuminating discussion of this difficult issue, see Carlos E. Alchourrón & Antonio A. Martino, *Logic Without Truth*, 3 RATIO JURIS 46 (1990).

child—the real mother would of course never agree to have the child cut in two.

This case is interesting, MacCormick explains, because it might be thought to illustrate a *particularistic* approach to moral, or, more generally, practical, reasoning. The idea would be that Solomon had a certain faculty of moral (or practical) intuition with the help of which he could arrive at the right answer to difficult moral (or practical) problems on the merits of the case, as it were. But, MacCormick objects, on closer inspection we see that Solomon was really making use of a *universalistic* approach to moral (or practical) reasoning, because he used his clever device only to figure out who was the mother of the child, and then ruled that she should get the child *because* she was the mother. MacCormick points out that the Bible's use of the word "because" indicates that when deciding this case Solomon was really saying that *any* mother should have her child. He puts it as follows:

> Once you know who is a baby's mother, you know who ought to be looking after the baby, into whose care she or he should be restored if in some untoward way they have become parted. If that were not so, it would be difficult to see what the 'because' amounts to. For the motherhood relationship to be a justifying reason, a 'because-reason' in this case before Solomon, it must be understood to be equally a because-reason in any other case. In that sense, reasons are, and have to be, *universalizable*. To rationalize one's response by stating it as a reason in an objective sense . . . is explicitly or implicitly to state it in universal terms. 'X being the mother of Y' is a relationship that is a logical universal. It is instantiated in every case of this most basic process of animal life. If in any case one can with good reason say, 'Well, X ought to look after and nurture Y, because X is Y's mother' then one must be able to say so in every case (p. 88 (emphasis added)).

MacCormick maintains that universalization thus conceived is part of the concept of legal *justification*. Although considerations that *motivate* the agent may be particular, considerations that *justify* the agent's decision must be universal:

> There is, I submit, no justification without universalization; motivation needs no universalization; but explanation requires generalization. For particular facts—or particular motives—to be *justifying reasons* they have to be subsumable under a relevant principle of action universally stated, even if the universal is acknowledged to be defeasible. This applies to

> practical reasoning quite generally, and to legal reasoning as one department of practical reasoning (p. 99).

We see, then, that the requirement of universalizability entails that a person claiming that *p* shall do *X* in *C* must say the same about any *relevantly similar situation*, or, if you will, must treat the case at bar as a member of a *class* of cases, and decide that case in the same way that he decides the other cases in that class. If, for example, you argue that it is legally right for a person to perform a certain action in a certain situation, then you must argue that it is legally right for anyone else to perform such an action in such a situation. This means that universalizability is a matter of *form*, not content, and that, strictly speaking, it is a property not of norms but of *rulings* based on norms. That is to say, the universalizability requirement requires that the judge apply the norm to all those cases that are similar to the case at bar in relevant respects and only to those cases. Moreover, unlike *generality* and *specificity*, universalizability is not a matter of degree: A ruling based on a norm is either universalized, or it is not.[21]

On this analysis, the judge may not treat the case at bar differently from the other cases in the same class, unless he can produce a *principled justification* for doing so. If, for example, he wants to apply the rule of lenity to fraud cases because they are criminal cases, he must apply it to drug cases, too, since they are also criminal cases, unless he can produce a principled justification for applying it to fraud but not to drug cases. This means that one way to challenge a universalized holding is to point to the consequences (in a broad sense) of accepting it. If the consequences are absurd, the holding must be rejected or modified. In other words, *reductio ad absurdum* arguments play an important role when we are concerned with a universalized holding.[22]

MacCormick conceives of the requirement of universalizability as a *substantive* moral requirement, in the sense that he takes it to be grounded in a conception of rational impartiality (p. 91). This is worth pointing out because some argue that universalizability is rather a *logical feature* of moral words such as "ought" and "must," so that anyone who violates the require-

21. For a discussion of the difference(s) between universality and generality, see R. M. Hare, *Principles*, 73 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1, 2–5 (1972–73).

22. This has been emphasized by Martin Golding. *See* M. P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 41–42 (1963).

ment of universalizability must be contradicting himself.[23] Either way, this requirement is at home in the field of *law* as well as morality. As Henry Sidgwick has pointed out, the idea that the application of the law "must affect equally all the individuals belonging to any of the classes specified in the law," is "involved in the very notion of a law, if it be couched in general terms."[24]

The requirement of universalizability is not without its problems, however. The main problem is to determine when two situations are *relevantly similar* since any two situations are similar in some and dissimilar in other respects. Here John Mackie's distinction between the *three stages of universalization* may be helpful.[25] The *first* stage simply amounts to a rejection of numerical differences; any norm will be acceptable as long as it is being consistently applied. But, as a moral requirement, this is too weak to be of much interest. The *second* stage requires that the agent put himself in the position of the other person, in the sense that he imagines sharing the other's mental, physical, and economic status, etc. That is, the agent must consider whether he would accept the proposed norm if he were in the other person's position with respect to race, sex, intelligence, wealth, etc. This is the form that universalization takes in ordinary moral argument. The *third* stage requires that the agent put himself in the position of the other person, in the stronger sense that he imagines sharing not only his mental, physical, and economic status, but also his convictions, ideals, etc.

As I see it, universalization in law may come in either of Mackie's first two stages, but typically involves only the first stage. Since in easy cases the relevant properties are specified in the legal norm in question, the judge's task is simply to apply the norm to all the cases covered by the norm and only to those cases. But in hard cases he ought to proceed to the second stage of universalization. If, for example, the question is whether a prohibition of racial discrimination in the workplace rules out voluntary affirmative action plans in the private sector,[26] and if we assume, for the sake of argument, that the term "discrimination" is sufficiently vague not to determine the issue, the judge

23. R. M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT chs. 1 & 6 (1981).

24. HENRY SIDGWICK, THE METHODS OF ETHICS 267 (7th ed. 1981) (1907). For a similar view, see H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623–24 (1958).

25. J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG ch. 4 (1977).

26. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979).

ought to ask himself how he would feel about affirmative action if the plaintiff were black instead of white (or white instead of black). This, I believe, is necessary to do justice according to the law. But it would be unreasonable to ask a judge who approves of affirmative action to contemplate a situation in which he disapproves of affirmative action, and vice versa, and take such a preference into account.

I conclude that universalization in law is a necessary, not a sufficient, condition for legal justification. This means that the universalizability requirement must be supplemented with a theory telling the judge how to make the choice between two or more universalized rulings. Let us therefore turn to consider MacCormick's thoughts on this subject.

IV. CONSEQUENTIALISM IN THE LAW

We have seen that MacCormick maintained in *Legal Reasoning* that second-order justification must involve two distinct types of interpretive argument, namely (i) arguments from consistency and coherence, and (ii) consequentialist arguments. As we have also seen, he defends a similar position in *Rhetoric*. His use of the term "consequences" is somewhat unusual, however.

Consequentialism, as understood by moral philosophers, is a structural theory that holds that the moral value of actions, laws, practices, etc. lie *solely* in their consequences and that a person's moral duty is to bring about as good consequences as possible.[27] The best-known version of consequentialism is *utilitarianism*, which requires the agent to maximize utility. We may distinguish between *act* utilitarianism, which requires the agent to perform the act that maximizes utility, and *rule* utilitarianism, which requires the agent to act in accordance with the set of rules that would maximize utility if adopted. We may also distinguish between *hedonistic* utilitarianism, which conceives of goodness in terms of happiness (pleasure minus pain), and *ideal* utilitarianism, which operates with a more complex concept of the good that involves other things besides happiness.[28] Since MacCormick emphasizes—in keeping with his insistence on universalization—that the evaluation of the consequences must fo-

27. *See, e.g.*, Samuel Scheffler, *Introduction* to CONSEQUENTIALISM AND ITS CRITICS 1, 1 (Samuel Scheffler ed., 1988).

28. For an analysis of this distinction, see J. J. C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J. J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 1, 12–27 (1973).

cus on the consequences of the *universalized ruling*,[29] and since he takes "consequences" to cover a diverse set of considerations such as justice, expedience, the needs of civilized society, etc.,[30] we might say with MacCormick that his theory resembles a form of *ideal rule* utilitarianism.

Consequentialist theories may be contrasted with *non-consequentialist* theories, which find moral value not only in consequences but also in, for example, rule-following. A non-consequentialist may hold, for example, that a person is morally obligated to keep a promise to a friend, even though he could do more good by breaking his promise and helping a stranger. Kantian ethics is a form of non-consequentialism, and so is existentialism.

In *Rhetoric* MacCormick maintains that consequentialist arguments are focused "not so much on estimating the probability of behavioral changes, as on possible conduct and its certain normative status in the light of the ruling under scrutiny" (p. 110). In other words, he maintains that the judge is, and should be, concerned not with the probability that certain consequences will occur, but with the *normative status* of those consequences should they occur. He illustrates the said with the help of *Regina v. Dudley & Stephens*[31] (pp. 104-11), in which two shipwrecked seamen were charged with murder for killing and eating the cabin boy, having been out of food and water for about a week. The defense argued that a man might be justified in killing another in order to save his own life but the Court rejected that claim, pointing to the awful danger of accepting a principle that "once admitted might be made the legal cloak for unbridled passion and atrocious crime" (p. 105).[32] MacCormick takes the Court to have been concerned not with the likelihood that this type of crime would increase as a result of an acquittal, but with the moral value of an acquittal. He seems to be saying that in acquitting the seamen the Court would have *sanctioned an immoral act.*

But I doubt that judges are primarily concerned with the normative status of consequences. Consider, for example, the case of *London Tramways* (discussed by MacCormick in *Legal Reasoning*). I find it difficult to believe that Lord Halsbury was

29. MACCORMICK, LRLT, *supra* note 3, at 115–16.
30. *Id.* at 105.
31. (1884) 14 Q.B.D. 273.
32. P. 105 (quoting *Regina*, 14 Q.B.D. at 287–88).

concerned with the "normative" rather than the "behavioral" consequences of adopting a strict doctrine of precedent when he pointed to the "the disastrous inconvenience of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal[.]"[33] If I am right, MacCormick's claim about the nature of the consequences considered by courts is not true without qualification.

Finally, it is worth noting that consequentialist arguments as explained by MacCormick are related to the teleological (or purposive) approach to statutory interpretation as the general is related to the particular (p. 134). Whereas MacCormick asks the judge to choose the universalized ruling that yields the best consequences on the *whole*, the teleological approach asks the judge to choose the universalized ruling that yields the best consequences in light of the statutory *purpose*. The consequentialist argument is thus essentially a moral argument, which is less determinate than the teleological argument.

V. THE RECONCILIATION CLAIM

I said at the beginning of this review that I am unconvinced by MacCormick's reconciliation claim, and I shall now explain why.

MacCormick begins by arguing that the two commonplaces about the Rule of Law and the Arguable Character of Law are not really that far apart to begin with.

In regard to the commonplace about the Arguable Character of Law, he explains that he accepts "a fundamental constraint on the process of legal argumentation," namely the *special case thesis* put forward by Robert Alexy, which states that legal reasoning is a special case of general practical reasoning and must meet the same requirements of rationality and reasonableness that apply to all forms of practical reasoning (p. 17). This means, inter alia, that there may not be assertions without reasons. As MacCormick puts it, "whatever is asserted may be challenged, and, upon challenge, a reason must be offered for whatever is asserted, whether the assertion is of some normative claim or a claim about some state of affairs, some 'matter of fact'" (p. 17). MacCormick believes that if we accept this constraint, we con-

33. London St. Tramways Co. v. London County Council, [1898] A.C. 375, 380.

cern ourselves only with what is *rationally arguable*, in the sense that we "distinguish between the use of words as mere weapons of intellectual coercion or deceit, and their use as instruments of reasonable persuasion, where coercion appears only in the sense of the compelling force of an argument" (p. 17).

In an effort to give more content to the notion of what is rationally arguable, MacCormick points to discourse theories, such as those advanced by Jürgen Habermas and Robert Alexy.[34] Under this type of theory, we test a proposed solution to a problem by reference to an *ideal speech situation*, in which "all forms of coercion or interpersonal power or domination are put aside for the purposes of conducting . . . interpersonal discourse" (p. 21).[35] MacCormick believes, as I understand him, that the discourse theory approach entails that although we can usually rule out certain proposed solutions to a legal problem as being clearly wrong, there is usually more than one correct solution to that problem (pp. 277-80). He therefore concludes that legal certainty under the Rule of Law can only be legal certainty within a framework that allows more than one correct solution to the legal problem in question (p. 280).

In regard to the commonplace about the Rule of Law, MacCormick explains that although legal certainty is an important rule of law value, claims about the law by courts are always *defeasible* in that they may be qualified or overridden in unusual circumstances (pp. 28, 237-53). Accordingly, he maintains that we should conceive of legal certainty under the Rule of Law as *defeasible* legal certainty:

> All the care in the world may be devoted to preparing the source materials of law by legislators, drafters, or judges writing opinions that attempt to state a holding or *ratio* with exemplary character. Whatever care is taken, the rule-statements these yield as warrants for governmental action aimed at vindicating public or private right are always defeasible, and sometimes defeated under challenge by the defence. Law's certainty is then defeasible certainty (p. 28).

As MacCormick sees it, legal certainty, conceived of as defeasible legal certainty, is *part* of the Rule of Law, not a threat to

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34. *See* ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION: DIE THEORIE DES RATIONALEN DISKURSES ALS THEORIE DER JURISTISCHEN BEGRÜNDUNG (2d ed. 1991).

35. P. 21 (citing JÜRGEN HABERMAS, LEGITIMATION CRISIS 109–12 (Thomas McCarthy trans.) (1988)).

it. His argument in support of this claim appears to be that defeasible legal certainty fits other aspects of the Rule of Law (such as the right of the parties to a trial to challenge every claim about law or facts put forward by the other party) better than non-defeasible legal certainty. He puts it as follows:

> The idea of the Rule of Law that has been suggested here insists on the right of the defence to challenge and rebut the case made against it. . . .
>
> After hearing evidence and argument, the court must decide. In deciding about problematic matters . . . the court may find it necessary and proper to develop a new understanding of the law, and thus set a new precedent, that may confirm or qualify prior understandings. At the end, the case is either dismissed as inconclusive, the defendant being absolved, or some order is made by the court and justified in the light of law as clarified through resolution of the problems posed. And then there is in effect a concluding syllogism. But it is rarely if ever identical with the starting syllogism. It is a new defeasible certainty that has emerged from posing problems about the old defeasible certainty and resolving them by rational argument (p. 27-28 (footnote omitted)).

I have doubts about MacCormick's reconciliation claim, however, because I have doubts about his claim that legal argumentation, conceived of as conforming to the special case thesis, is a matter of what is rationally arguable in the strong sense that MacCormick has in mind. In my view, the notion of what is rationally arguable is rather more indeterminate than MacCormick thinks, and this means that the framework within which MacCormick believes that the citizens can have legal certainty is rather more spacious than he thinks. This means, of course, that legal certainty within this framework can't be very certain. Let me explain why this is so.

I agree with MacCormick that there will usually be more than one correct solution to a legal problem because I believe that both statutory interpretation and case law analysis depend on moral values, or at least morally relevant values,[36] and that moral judgments can only lay a claim to *relative* truth or validity.[37] Since there is no such thing as a moral judgment that is true

36. For more on this topic, see Torben Spaak, *Legal Positivism and the Objectivity of Law*, *in* ANALISI E DIRITTO 253, 259–63 (Paolo Commanducci & Riccardo Guastini eds., 2004)

37. As Gilbert Harman puts it, "moral right and wrong (good and bad, justice and

or valid *simpliciter* in this analysis, there can be no such thing as an interpretation of a statute that is true or valid *simpliciter*; instead, an interpretation of a statute can only be true or valid relative to a given moral framework. In my view, this is one important reason—perhaps *the* reason—why there usually is more than one correct solution to a legal problem.[38]

MacCormick does not accept such meta-ethical relativism, however (pp. 1-2). Although he doesn't pay much attention to meta-ethical questions in *Rhetoric*, he does say that he no longer accepts the non-cognitivism derived from David Hume that he accepted at the time of *Legal Reasoning*. He "remain[s] attached to the prospect of marrying in some way (yet to be fully explored) Adam Smith's account of moral sentiments with a Kantian universalistic moral philosophy modified to allow of defeasible universalism . . . ." (p. 30). Why, then, does he believe that there is usually more than one correct solution to a legal problem? His position seems to be that this is just how it is:

> Just as it is notorious that practical reasoning proceeds in roughly the way I have been suggesting, it is also obvious that our practical reasonings and disputations are not infrequently inconclusive. When we think about how to argue over matters of practice, morality as much as law, we do notice that, while on some points we can hold quite conclusively that 'that view is wrong', on many other points there remain open questions where, so far as we can judge in practical terms, both views, or more than one view, is reasonable. Robert Alexy, on whose theses I draw here, argues that in our practical discourse and practical reasoning we can and do exclude many approaches to a question as being impossible because unreasonable. But among the surviving reasonable or 'discursively possible', answers there can be a plurality of apparently open possibilities. There can be inconclusiveness not because reasonableness and rightness cannot be objective, but because it can be actually inconclusive among rival opinions (pp. 277-78).[39]

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injustice, virtue and vice, etc.) are always relative to a choice of moral framework. What is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework. And no moral framework is objectively privileged as the one true morality." Gilbert Harman, *Moral Relativism*, *in* GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY 3, 3 (1996).

38. One might, of course, object to this line of reasoning that even if moral judgments *can* be true or valid in a non-relative manner, we are still faced with the problem of *finding out* which moral judgments are true or valid and which are false or invalid in a non-relative manner. I myself find rather implausible the existence of objective moral values and standards about which we cannot have knowledge.

39. P. 278 (citing ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE

But in the absence of a reasoned justification of the claim that there is usually more than one correct answer to a legal problem, one may have doubts about its precise import and, therefore, about its validity. More specifically, one may object that MacCormick does not give us a sufficiently good reason to believe that the framework within which (according to MacCormick) we can have legal certainty is only as spacious as he suggests, and not *more* spacious. That is to say, one may reasonably ask why one should accept MacCormick's rather *modest* claim that there is usually more than one correct solution to a legal problem, instead of the more *radical* claim that there are usually a large number of correct solutions to a legal problem.[40]

As I have said, I am not convinced by MacCormick's reconciliation claim. While I am inclined to accept the claim that legal certainty under the Rule of Law is defeasible legal certainty, I find less convincing MacCormick's claim that legal argumentation concerns what is rationally arguable (in the sense outlined by MacCormick). My view, then, is that on MacCormick's analysis, legal reasoning is too indeterminate to guarantee legal certainty, even defeasible legal certainty.

Let me state in conclusion that although I am unconvinced by MacCormick's reconciliation claim, and although I have raised some minor objections to MacCormick's accounts of deduction, universalization, and consequentialist reasoning, I warmly recommend this book to anyone interested in the methods and techniques of legal reasoning in general, or, more specifically, in the question of the dependence of the ideal of the Rule of Law on the methods and techniques of legal reasoning. MacCormick is an engaging writer who knows his trade, and his works on legal reasoning in particular always repay serious study. His efforts to put legal reasoning in the larger scheme of things in the way illustrated in this book are commendable and will, I hope, inspire others to continue working on this difficult but very important subject.

THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 207 & 287–89 (Ruth Adler & Neil MacCormick trans.) (1989)).

40. It is worth noting that MacCormick does not seriously consider the claim about radical indeterminacy of law put forward in the 1980s and 1990s by critical legal scholars such as David Kairys and Gary Peller. *See* David Kairys, *Law and Politics*, 52 GEO.WASH. L. REV. 243 (1984); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985). MacCormick is, however, well aware of the CLS critique of legal indeterminacy. *See* Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539 (1990).