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Book Reviews

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Book Reviews

LEGAL REASONING AND LEGAL THEORY By *N. MacCormick*
Clarendon Press, Oxford (1978). 298 pp.

A study of the judicial process is the study of law — not law as a collection of precepts, but law in its overarching and necessary concern with consistency, predictability, and growth to meet the demands of changing social conditions. Critics and scholars have given little formal attention to this meaning of the law, yet, for judges, it is the law's most difficult aspect, and one which we must face every day.

Although the study of law embraces many meanings of law, the study of the judicial process begins with a specialized definition. Generally, when we speak of the study of law, we really mean the study of *laws*. We are talking about a number of legal precepts, more or less defined, coming within the rubric of Jeremy Bentham's notion of law as an aggregate of standards of conduct, "the sum total of a number of individual laws taken together."¹ The study of the judicial process is not founded on Bentham's view, however, nor does it contemplate the law as embodied in the phrase "law and order" — the sense of adjusting relations and the orderly application of the force of a politically organized society. Nor does the definition I advance regard law as a body of philosophical, political, and ethical ideals as to the ends-in-view of law, the ideals that form the basis of courses in jurisprudence.

Rather, law as perceived in the study of the judicial process is what Roscoe Pound described as "a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice."² In this sense law involves choosing the starting points for legal reasoning, evaluating the intrinsic merits of competing legal principles, and selecting among various interpretations of statute or judicial precept. In this sense the legal scholar ex-

1. Quoted in Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 644 (1923).

2. Pound, *supra* note 1, at 645.

amines the ideals to which the courts refer as they decide to extend one precept by analogy but to restrict another to the bounds of its four corners. A study of the judicial process is also a study of how courts resolve the yang and yin of the law: the law must be stable, yet it cannot stand still. And it is a study of dispute resolution—judicial decision making as it actually takes place, and as it ought to take place.

Although it is basic to a study of government at any time, an examination of the inner workings of judicial decision making seems especially pertinent today. More than ever in our history, the third branch of government has assumed an important, if not dominant, role in the governing scheme. Americans have become a litigious people. The number of cases at trial and appellate levels, in both the state and federal systems, has soared to an all time high.³ Where once the major work of the courts was in "lawyer's law," developed in the common law tradition as private parties sought redress for private wrongs, more and more the courts are called upon to decide questions of public law, the effect of which transcends the rights and obligations of the specific parties. The subjects of today's judicial disputes are polycentric problems that formerly would have been resolved in the private sector or by other branches of government.

Society's current penchant for judicial testing of even the most mundane statute or administrative regulation brings to mind the well known fable that has three baseball umpires arguing about how they distinguish balls and strikes. The first one says: "It's simple. I call 'em as I see 'em." The second snorts: "Huh! I call 'em as they are!" And the third one ends the debate with: "They ain't nothin' 'til I call 'em!" American society seems to have opted for a jurisprudential philosophy that makes the third umpire the very embodiment of our system of laws. The courts not only determine when the ball comes within the strike zone—one plate wide, between the knees and the shoulders—but they also reserve the right to move the plate and shift the zone from time to time in the middle of the game.

Notwithstanding its importance, few authors have examined the

3. The statistics are staggering. While the population of the country increased 17 per cent between 1960 and 1974, the number of federal appellate court filings increased fourfold. In the Illinois, Michigan, and New Jersey state court systems the increases were more than 100 per cent. Similarly huge increases affected most populous states. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 4-5 (1976).

process of judicial umpiring. Little guidance is offered to the bench, bar, or law student, or to political science departments, or to the general public. The subject also seems to fall through the cracks that exist in orthodox law school offerings such as jurisprudence (or legal philosophy) or legal process (a kind of orientation digest of civil and criminal procedure). Although I do not know the reason for the paucity of literature on the judicial process, my guess is that the professoriat, perhaps believing that the subject can be addressed confidently only by those with actual experience in it, is simply not comfortable in this field. Adding to this hesitancy may be the formidable intimidation caused by the knowledge that the previous authoritative work in this field is the great Cardozo's literary and legal classic, *The Nature of the Judicial Process*.

Nevertheless, a very thoughtful Scottish professor has come forward with a treatment of an important aspect of the process. Professor Neil MacCormick, Regius Professor of Public Law at the University of Edinburgh, has distilled a series of his lectures, and has written a gem of a book, *Legal Reasoning and Legal Theory*. Written, as he says, for nonphilosophical lawyers and for nonlawyer philosophers, his work reveals the deft touch of a skilled writer who obviously has thoroughly examined the processes of legal reasoning and legal methods. Indeed, he has thought a lot about thinking. His object was to describe and explain the elements of legal arguments advanced by judges in justification of their decisions and by lawyers for claims and defenses put to the courts for decisions; to set forth an anatomy of an important aspect of the judicial process. He has done this well.

I must quickly emphasize that most of Professor MacCormick's discussion does not generally apply to the mine run case that presently clogs the docket: where the law and its application alike are plain, or where the law is certain and the only question concerns its application to the facts found by the fact finder. As early as a half century ago, Cardozo estimated that ninety per cent of the cases coming to the New York Court of Appeals fell into these categories. In this respect, it is my experience that the cases have changed little since Cardozo's day.⁴

4. In 1961, Judge Henry Friendly wrote, "Indeed, Cardozo's nine-tenths estimate probably should be read as referring to the first category alone. Thus reading it, Professor Harry W. Jones finds it 'surprisingly' on the high side. . . ."

MacCormick's analysis applies primarily to that remaining ten per cent or so of the cases wherein the court works for the future: cases not controlled by specific statute or constitutional provision, not on all fours with a respectable precedent. These are cases whose resolution implicates the first two categories described in Roscoe Pound's classic trichotomy:

Supposing the facts to have been ascertained, decision of a controversy according to law involves (1) selection of the legal material on which to ground the decision, or as we commonly say, finding the law; (2) development of the grounds of decision from the material selected, or interpretation in the stricter sense of that term; (3) application of the abstract grounds of decision to the facts of the case.⁵

MacCormick has a kindred view of these same three elements. What Pound calls finding the law, MacCormick terms "relevancy of analogy"; both use "interpretation" for the second category; and what Pound calls "application," MacCormick refers to as "classification."

In this review I shall concentrate on the most difficult aspect of judicial decision making: the choice between competing legal principles where no constitutional provision, statute, or judicial precedent unerringly controls the disposition. From such a case the law may develop and grow in one of many directions, in a manner described by Cardozo in characteristic elegance: "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."⁶

What MacCormick has done is to suggest the necessary factors which a court should consider when it is faced with the choice of legal precepts under a novel fact situation, and thus must make a value judgment about the direction which the law should take. Needless to say, given the polycentric problems of the day, both

So would I. If it includes both categories, I would not." Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 222 n.23 (1961) (quoting Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803 n.16 (1961)).

5. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 945 (1923).

6. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 31 (1921).

courts and lawyers need all the help we can get. MacCormick's book gives us some.

Before he discusses legal theory, however, MacCormick synthesizes some extremely valuable teachings about legal reasoning. In his introduction, he reminds us of "the difference between processes of justification and processes of discovery"⁷—what some of us have called the difference between making the decision and justifying it publicly⁸—and then renders a charming chapter entitled "Deductive Justification." He reminds us that

[a] deductive argument is an argument which purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the "premisses" of the argument. A deductive argument is valid if, whatever may be the content of the premisses and the conclusion, its form is such that its premisses do in fact imply (or entail) the conclusion.⁹

From this he develops the very pragmatic formula which goes to the heart of the common law tradition of deciding cases. He uses as an example the case of *Daniels and Daniels v. R. White & Sons and Tarbard*.¹⁰ Daniels went to a pub and bought a bottle of lemonade which he shared with his wife when he got home. The lemonade had been contaminated with carbolic acid. From these facts came Daniels' successful argument:

The lemonade bought contained carbolic acid. Lemonade that contains defects is not merchantable. Therefore the lemonade was not of merchantable quality.

MacCormick develops this into logical propositions which should be familiar to any law student:

(A) In any case, if goods sold by one person to another have defects unfitting them for their only proper use but not apparent on ordinary examination, then the goods sold are not of merchantable quality.

....

(B) In the instant case, goods sold by one person to another had

7. N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 15 (1978).

8. See R. ALDISERT, *THE JUDICIAL PROCESS* ch. III, *Making the Decision*; ch. IV, *Justifying the Decision* (1976).

9. MACCORMICK, *supra* note 7, at 21.

10. [1938] 4 All E.R. 258.

defects unfitting them for their only proper use but not apparent on ordinary examination.

....

- (C) Therefore, in the instant case, the goods sold are not of merchantable quality.¹¹

The charm of MacCormick's presentation is his reduction of these specific legal propositions to a very useful formula for abstract legal reasoning.

- (A) In any case, if p then q .
 (B) In the instant case p .
 (C) Therefore, in the instant case, q .¹²

It seems to be a neat formula for expressing the syllogism utilized in the common law decisional process: Let p constitute the factual content and q the legal consequences attached thereto. Thus *if p then q* expresses a rule of law in the Poundian sense: definite legal consequences attach to a definite, detailed set of facts.¹³

The constantly recurring problem of judicial decision making is to decide if, given the valid rule *if p then q* , is r , s , or t equivalent to p ? If so, then, *if r , s , or t , then q* .¹⁴ Professor Edward H. Levi has noted:

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between the cases; next the rule of law inherent in the first case is an-

11. MACCORMICK, *supra* note 7, at 22.

12. *Id.* at 24.

13. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

14. MacCormick makes the point that accepting this methodology of the common law decisional process is an example of a "valid rule" of our legal system.

It is that shared "validity thesis", which is presupposed when we treat deductive justification of legal decisions as sufficient and conclusive: given a valid rule *if p then q* , and given that an instance of p has occurred, a legal decision which gives effect to q (which expresses a legal consequence) is a justified decision.

MACCORMICK, *supra* note 7, at 62.

nounced; then the rule of law is made applicable to the second case.¹⁵

Inherent in this process is the obligation of the court to ascertain what facts in the succeeding case are truly relevant in the putative precedent. What are the "relevant facts" in any case? One judge may say they are facts *a*, *b*, and *c*. According to Jerome Frank, it may well be that most other judges would agree that there could be but one proper decision if they agreed that *a*, *b*, and *c* were the relevant facts. But Judge Frank asks us to suppose that another judge holds that the evidence also discloses fact *d* and that fact *d* is "relevant." "On that basis," says Frank, "he may reach a different decision, which most other judges would concede to be correct *if* they agreed but *a*, *b*, *c*, and *d* were the relevant facts."¹⁶

I sense that MacCormick shares Frank's concern, as he emphasizes that the logical validity of an argument does not guarantee the truth of its conclusion; that the argument is valid entails "that if the premisses are true, the conclusion must be true; but logic itself cannot establish or guarantee the truth of the premisses."¹⁷ I make the same point in teaching law students as well as appellate judges: advocates and courts must avoid material fallacies if their arguments are to be persuasive, but logical consistencies and the absence of material fallacies do not of themselves make law.

MacCormick, a Scotsman, suggests that because Scotland is more influenced by Roman and civilian lawyering than is its southern neighbor, there is more logic in Scottish decision making than in English. I think he may overstate the case. For example, he suggests that the civilian lawyer naturally reasons from principle to instances and the common law lawyer from instances to principle; that while the civilian lawyer puts his faith in syl-

15. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501-02 (1948) (footnote omitted).

16. J. FRANK, *LAW AND THE MODERN MIND* 134-35 (1930). Dennis Lloyd has put the same proposition in this form: "It may, in a given case, be conceded that X is liable in set of circumstances, 'A', but what the judge will usually have to decide, without an exact precedent to guide him, is whether X is also liable if 'A' obtains, plus or minus circumstance 'B'." Lloyd, *Reason and Logic in the Common Law*, 64 LAW Q. REV. 468, 475 (1948).

17. MACCORMICK, *supra* note 7, at 25.

logisms, the common law lawyer trusts in precedents.¹⁸ But I do not agree. The observation confuses the *source* of law with its *application*. The common law has been described as the "byzantine beauty," a method of reaching what instinctively seems the right result in a series of cases, and only later (if at all) enunciating the principle that explains the pattern—a sort of connect-the-dots exercise.¹⁹ As described so far, this is pure inductive reasoning, but if and when a principle is established or a rule of law (in the narrow sense) appears, then the common law lawyer employs the same sort of deductive reasoning as his civilian law counterpart to reach the result.²⁰ I perceive the common law tradition as a constant ebb and flow, from facts to precept, and from application of precept to new facts to reach the result in the new case.

I do agree with the author that "there is a possibility that some precedents contain relatively clear rulings on fairly sharply defined points of law, and that others contain implicit rulings of similar, but perhaps less, relative clarity."²¹ The unclear ruling makes trouble for lawyers and the courts. I believe that the true controlling precedent is a relatively clear ruling on a sharply defined point of law limited to a detailed set of facts.²²

MacCormick makes this important point:

[A]ppreciation of the necessary universality of justifying reasons for the decision of particular cases can enable us clearly to explain otherwise puzzling features of the doctrine of precedent. It does so by focusing on the way in which, quite apart from any doctrine of precedent in any official or binding sense, the constraints of formal justice obligate a court to attend to the need for generic rul-

18. *Id.* at 40 (quoting Lord Cooper, *The Common and the Civil Law—A Scot's View*, 63 HARV. L. REV. 468, 471 (1950)).

19. *Romeo v. Youngberg*, 644 F.2d 147, 182 (3d Cir. 1980) (Aldisert, J., concurring).

20. See, e.g., Lord Diplock's speech in *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004, 1058-59 (excellent description of the process of deductive reasoning).

21. MACCORMICK, *supra* note 7, at 84.

22.

A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts arising in the same court or in a lower court in the judicial hierarchy.

Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979).

ings on points of law and their acceptability as generic rulings, as essential to the justification of particular decisions.²³

This observation seems to be the bridge between his examination of legal reasoning and his discussion of legal theory *per se*.

I perceive MacCormick's most important point to concern "the problem of relevancy"—what Cardozo described as extending a precept to novel fact situations, and what Pound described as "finding the law" by choosing between competing principles. It implicates the most serious problem facing our courts in hard cases:

[C]hoosing between rival possible rulings in a given case involves choosing between what are to be conceived as rival models for, rival patterns of, human conduct in this society.²⁴

Judge Joseph C. Hutcheson, Jr. once asserted that decisions may emerge from any of four separate processes: "first, the cogitative, of and by reflection and logomachy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or 'hunching;' and fourth, asinine, of and by an ass."²⁵ To say that the decision must be the result of cogitative reflective thinking, or "reasoned elaboration" is simply the beginning point. Judges are not automats, and it should come as no surprise that a degree of subjectivity, if not emotion, is extant in judicial decision making in cases where there is no precedent to command a particular decision. Often the sole source of a decision is a judge's intuition or hunch about the right result.

Hunching may be an emotive experience in which principles and logic play a secondary role. Thomas Carlyle said that the healthy understanding is not the logical, argumentative, but the intuitive; for the end of understanding is not to prove and find reasons, but to know and believe.²⁶ Hunching may be far more

23. MACCORMICK, *supra* note 7, at 86.

24. *Id.* at 104.

25. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275-76 (1924).

26. There is another side to the "mere feeling or emotion" coin. Sigmund Freud reported:

When making a decision of minor importance I have always found it advantageous to consider all the pros and cons. In vital matters, however, such as the choice of a mate or a profession, the decision should come from the unconscious, from somewhere within ourselves. In the important decisions of our personal life, we should be governed, I think, by the deep

respectable than it initially appears, for it embodies something not easily defined, a quality found in certain experienced judges said to possess a "trained intuition" for the right result; what Karl Llewellyn would call "good hunching power . . . a resultant of good sense, imagination, and much knowledge."²⁷ Perhaps this was what Oliver Wendell Holmes, master of the epigram, had in mind in his historic dissent in *Lochner v. New York*: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."²⁸

Judge Hutcheson confessed that

when the case is difficult or involved, and turns upon a hairs-breadth of law or of fact, . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.²⁹

Can we not agree with Judge Henry J. Friendly that "the conclusion which flashes before the shaving mirror in the morning does not differ in intellectual quality from that matured from study in chambers the night before"?³⁰ If so, that which often passes as intuition may be in reality an extremely swift reasoning process, a lightning human computer operation.

MacCormick is too much a formalist, too much a logician to dally with this. Although he recognizes that value judgments inhere in the process, he would cast aside as totally unacceptable any decision that was not genuinely principled; moreover, he has formulated standards for use in choosing the principles. His thesis is that every decision (and likewise all contentions of counsel) must be supported by some justificatory argument. He contends that the test of analogy is not enough, that the legal

inner needs of our nature.

Quoted in Heilbroner, *How to Make an Intelligent Decision*, in H. LAZARUS, *THE PROGRESS OF MANAGEMENT; PROCESS, BEHAVIOR, AND OPERATIONS RESEARCH* 199 (1968). See generally L. FESTINGER, *CONFLICT, DECISION AND DISSONANCE* (1964).

27. K. LLEWELLYN, *THE BRAMBLE BUSH* 98 (1960).

28. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

29. Hutcheson, *supra* note 25, at 278.

30. Friendly, *supra* note 4, at 230.

argument must be tested by what he calls the "consequentialist argument," as well as by an argument of consistency demonstrating that the proposed ruling does not contravene any established rule of law, and an argument showing coherence to principle and analogy. I find MacCormick's analysis not only legitimate and instructive, but of great practical benefit to judges and lawyers alike. If for no other reason (although there are many other reasons) I recommend that they read his book.

According to MacCormick, in a properly reasoned decision the court will employ a consequentialist argument: a consideration of the consequences of ruling one way or another. I think this process is necessary and perfectly legitimate in the 1980's, although at one time it was labeled with the pejorative "result-oriented jurisprudence." There were those who believed that "[o]bviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results,"³¹ but the modern approach reflects a rejection of conceptual jurisprudence, and manifests a disinclination to follow "a maxim or a definition with relentless disregard of consequences to a dryly logical extreme."³² Today's view owes much to Holmes, Pound, and Cardozo who decades ago trumpeted the theme that courts should consider the social consequences of their decisions.³³ The rigid *Begriffs-jurisprudenz*, the mechanical operation of legal rules, fell out of favor in all but a few areas of static law. By 1974 Professor Harry W. Jones could elegantly state the new spirit of legal purpose: "A legal rule is a good rule . . . to the extent that it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."³⁴

Achieving law's utilitarian purpose within a framework of reasonable predictability and stability is our ultimate, if sometimes elusive, objective. MacCormick's formula of decision making

31. *Gluck v. Baltimore*, 81 Md. 315, 325, 32 A. 515, 517 (1895).

32. *Hynes v. New York Cent. R.R. Co.*, 231 N.Y. 229, 235, 131 N.E. 898, 900 (1921) (Cardozo, J.).

33. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30-31 (1921); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468-74 (1897); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 8 BAYLOR L. REV. 1 (1956).

34. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1030 (1974).

seems completely congruent with this objective. Certainly, implementation of the consequentialist argument implicates evaluative and subjective considerations in that it contemplates the acceptability or unacceptability of a decision's consequences:

Judges evaluating consequences of rival possible rulings may give different weight to different criteria of evaluation, differ as to the degree of perceived injustice, or of predicted inconvenience which will arise from adoption or rejection of a given ruling. Not surprisingly, they differ, sometimes sharply and even passionately in relation to their final judgement of the acceptability or unacceptability all things considered of a ruling under scrutiny. At this point we reach the bedrock of the value preferences which inform our reasoning but which are not demonstrable by it. At this level there can simply be irresolvable differences of opinion between people of goodwill and reason.³⁵

Abundant evidence of this difference in value judgments may be found in the classic 5 to 4 division of the United States Supreme Court and the similar divisions in many of our state supreme court decisions.

But in order for there to be what Holmes called "predictability," and Llewellyn called "reckonability" in the law, MacCormick argues that there should not be open-ended value judgments and insists that a rule of consistency be applied: a given ruling may not be adopted if it is contradictory of some valid and binding rule of the system. Justice Frankfurter once observed that a court is "not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."³⁶ Earlier, Holmes had warned, "A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."³⁷

The other element in the triad is "coherence" which MacCormick defines in a loose sense: "One can imagine a random set of norms none of which contradict each other but which taken together involve the pursuit of no intelligible value or policy." The author gives a hypothetical example which I commend to your

35. MACCORMICK, *supra* note 7, at 105-06.

36. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

37. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (Holmes, J., dissenting).

reading,³⁸ but I add this real one: A few years ago Italian officials could not agree upon a speed limit for Italy's superhighway, the *autostrada*. They compromised on regulations that set speed limits according to automobile engine size. Thus a small Fiat was limited to 80 k.p.h., a larger car to 100 k.p.h., and so on. Each car owner was required to post on the rear of his vehicle a decal showing the car's assigned speed limit. If the desired goal was road safety, the regulations seem absurd. Though internally consistent, they had no coherence. In practice no problems have resulted, however, because neither car owners nor police have paid any attention to the regulations.

MacCormick says that there are limits to the ambit of legitimate judicial activity; judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society.

Although this does not and cannot mean that they are only to give decisions directly authorized by deduction from established and valid rules of law, it does and must mean that in some sense and in some degree every decision, however acceptable or desirable on consequentialist grounds, must also be warranted by the law as it is. To the extent that the existing detailed rules are or can be rationalized in terms of more general principles, principles whose tenor goes beyond the ambit of already settled rules, a sufficient and sufficiently legal warrant exists to justify as a *legal* decision some novel ruling and the particular decision governed by it.³⁹

As my discussion reflects, MacCormick deals with heavy concepts, but the reader's going is made pleasant by the author's clear prose and ability to reduce sophisticated notions to clearly expressed declarations. Thus he tells us that we judges are constantly looking forward and backward as we decide: forward to consider the consequences of the decision; backward to test proposed rulings for consistency and coherence within the existing system.⁴⁰

MacCormick also illustrates his points with generous references to several leading cases of the House of Lords. We share a favorite (which I included in my book, *The Judicial Process*), the

38. MACCORMICK, *supra* note 7, at 106.

39. *Id.* at 107.

40. *Id.* at 250.

1932 case of *Donohue v. Stevenson*.⁴¹ I discuss it and another House of Lords case at some length because, taken together, they illustrate an operation which both MacCormick and I believe reflects the functioning of the judicial process at its best. In *Donohue*, plaintiff's friend bought a bottle of defendant manufacturer's ginger beer from a retailer and gave it to plaintiff. The bottle contained the decomposed remains of a snail which could not be detected until plaintiff had consumed the greater part of the bottle's contents. Shock and severe gastroenteritis resulted. Their lordships had to choose between two competing precepts: no one other than a party to a contract can complain of its breach; and negligence, apart from a contract, gives a right of action to a party injured by a duty owed and neglected. In a 3 to 2 decision, they permitted recovery. The year, I emphasize, was 1932, and the questions raised in following years concerned the level of generality to which the *Donohue* rule of law could be extended. Facing succeeding courts was the universal question:

What, if any, limits can govern the judicial choice of rulings to test, and how, in any event, can judges begin to frame any ruling appropriate to fit the concrete case when so vast a range of possibilities is open?⁴²

Thus in 1970, the House of Lords in *Home Office v. Dorset Yacht Co. Ltd.*⁴³ was presented with the question of whether the Home Office owed any duty of care to a member of the public whose property was damaged by a party of boys who escaped from a youth corrections facility. For an unreconstructed common law lawyer like me, reading the excerpts of this case in MacCormick's book, and later in the complete text, was a sheer delight. Their lordships, unencumbered by the present American fetish for civilian law codes—i.e., the American Law Institute's *Restatement of Torts*—had to go to the foundations of the common law tradition. They noted that Lord Denning had posed the critical question when the case was in the Court of Appeal:

It is, I think, at bottom a matter of public policy which we as judges must resolve What then is the right policy for the judges to adopt?⁴⁴

41. [1932] A.C. 562.

42. MACCORMICK, *supra* note 7, at 119.

43. [1970] A.C. 1004.

44. [1969] 2 Q.B. 426.

Each lord referred to Lord Atkin's speech in *Donohue*:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour?⁴⁵

But it is the speech of Lord Diplock, which MacCormick describes as "a masterly exposition of the methodology of analogical extension of law,"⁴⁶ that illustrates the heart of MacCormick's teaching: "the relevance of the analogy [appropriate choice of competing precepts] is dependent upon perceiving a rational principle within which the two items compared can both be contained—together, as it may be, with other related-type situations."⁴⁷

Lord Diplock's speech is more than a discussion of tort law; it is a demonstration of the classical methodology in judicial decision making where no statute, constitutional precept, or precedent unerringly commands the result. His development from the first stage, which he calls "analytical and inductive," to the next stage, "deductive and analytical," should be required reading for all law students and judges. But his prefatory comment is equally important in justifying judicial lawmaking, a process inherent in the common law tradition, but battered about today by the pejorative "judicial activism":

The justification of the court's role in giving effect of law to the judges' conceptions of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances.⁴⁸

Although this passage deals with the law of torts, it is equally applicable to other legal disciplines.

A fine teacher as well as a clear writer, MacCormick summarizes his thesis. He discusses the easy case, refers to the less imposing problems presented by classification (application), but focuses again on the troublesome instance when a choice must be made between equally respectable competing legal principles or between various interpretations of a given precept:

45. [1932] A.C. at 580.

46. MACCORMICK, *supra* note 7, at 160.

47. *Id.* at 163.

48. [1970] A.C. at 1058.

The justification of decisions when such problems are raised must look beyond "rules" as defined by the validity thesis to principles of the law. Principles of law certainly authorize decisions: if there is no relevant principle or analogy to support a decision, that decision lacks legal justification; and if there is a relevant principle or analogy the decision supported thereby is a justifiable decision—but the adduction of the principle or analogy although necessary to is not sufficient for a complete justification of the decision. The ruling which directly governs the case must be tested by consequentialist argument as well as by the argument from "coherence" involved in the appeal to principle and analogy. And just as the absence of any supporting principle or analogy renders a decision impermissible, so the test for consistency must be applied: it must be shown that the ruling in question does not controvert any established rule of law, given a "proper" interpretation or explanation of such a rule in the light of principle and policy.⁴⁹

Professor MacCormick's impressive little book sends an important message. Although it is more sophisticated and builds more on the *type* of principle to be applied in the hard case, the book reminds me of remarks Professor Herbert Wechsler made as he closed a presentation before a seminar of United States circuit judges:

A decision may, in short, be wholly principled and wrong. All I was saying is that it cannot be unprincipled and right.⁵⁰

*Ruggero J. Aldisert**

49. MACCORMICK, *supra* note 7, at 250.

50. Wechsler, *Toward Neutral Principles: Revisited* (1975), in R. ALDISERT, *THE JUDICIAL PROCESS* 545 (1976).

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ON JUSTICE. By *J. R. Lucas*. The Clarendon Press, Oxford; Oxford University Press, New York, 1980. 264 pp.; index.

Many writers have noted that law commands a certain course of conduct because it is considered as being just; that justice is a virtue unlike courage, temperance, piety, and the like, in that it regards other persons and confers rights upon them; that therefore coercive constraint is proper, and law calls for enforcement and realization in the external world. Developing similar themes, Lucas's philosophical discussion concerning justice should accordingly be of interest to lawyers, just as the works of previous writers (beginning with Plato and Aristotle) such as Pound, Hart, Fuller, Rawls, Dworkin, and others, have found readers among members of the legal profession. In particular, chapters five through seven deal with "Justice and the Law," "Punishment," and "Administrative Justice," while chapter four treats natural justice or due process, discussing rules such as *audi et alteram partem*, *nemo iudex in re sua*, due deliberation, precedent, and finality.

Lucas's main thesis is that no one shall be subjected to unfair treatment, which Lucas calls being "done down."¹ Recognizing the unavoidability of adverse decisions in a just society, a disappointed party must understand that the adverse decision was reached upon adequate grounds the appropriateness of which he can appreciate.² Hence he does not feel that the adverse decision evidences an indifference toward him on the part of society. Since a just society imposes adversity on an individual only with reluctance, the individual accepts the adverse decision because he is able to understand the reason giving rise to the result. "[A]s Plato observed, his propensity to anger and righteous indignation is assuaged by the decision's being rational, rather than antagonized by its being adverse."³

Justice, says Lucas, "is impartially partial to all parties" and "favours each man as much as is possible to do without being unfair to others," giving each man his due, not reluctantly, but being reluctant only to "have to disappoint the expectations of any

1. J.R. LUCAS, ON JUSTICE 5 (1980).

2. *Id.* at 6-7.

3. *Id.* at 11 (quoting PLATO, THE REPUBLIC BOOK IV, line 440c).

man by arriving at a decision which is adverse to him."⁴ Hence, "justice is the bond of society." The individual identifies with the actions of a just society, even though the actions may be adverse, because they are taken only for reasons "whose force he cannot, if he is reasonable, help acknowledging."⁵

However, Lucas recognizes that some types of decisions are exercises of liberty or discretion and are not subject to criteria of justice to others. "My choice of a holiday or a new hat is to be made on the grounds of what pleases me, not what would be profitable to travel agents or hat shops."⁶

Subsequent chapters deal with distributive justice, "contributive justice" (Lucas's new term for allocation of burdens such as taxation),⁷ economic justice, international justice, and distinguish justice from equality, liberty, and morality. Chapter ten⁸ is devoted to a criticism of Rawls as being unduly concerned with the welfare of the underdog.

Lucas believes that the function of the law is to uphold justice. "We cannot merely identify law and justice: yet we cannot, if we are honest, simply divorce them as the positivists sought to do."⁹ By concentrating solely upon the aspect of external enforcement, and disregarding the internal obligation of obedience, the positivists have failed to portray accurately the essence of law.¹⁰ But justice involves convention as well as reason, as in determining what portion of an intestate's estate should go to his widow or to other descendants. Just as there are various languages through which one may express truth, so are there various positive laws through which one may do justice.¹¹ "It is somewhat easier for the courts to set aside very unjust contracts than to acknowledge the invalidity of very unjust laws,"¹² says Lucas; but, although unwilling to accept the medieval maxim *lex injusta non est lex*, he believes that "grave and gross injustice

4. LUCAS, *supra* note 1, at 18.

5. *Id.*

6. *Id.* at 23.

7. *Id.* at 235.

8. *Id.* at 185.

9. *Id.* at 99.

10. *Id.* at 102.

11. *Id.* at 104.

12. *Id.* at 213.

strikes at the *raison d'être* of law, and hence that *lex injustissima non est lex.*"¹³

Throughout his system Lucas develops the application of his main thesis that the interests of all parties must be implicated in decision-making so that those who are losers shall feel that they have been fairly treated and that they have not been considered as worthless in the eyes of society. Those engaged in any capacity in the administration of law should find it helpful to ruminate upon the philosophical reflections expounded in this book.

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13. *Id.* at 123.

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