Introduction

In his paper, Neil MacCormick returns to the analysis of easy cases, in the light of recent work in informatics which has applied expert systems techniques to the law. A notable recent example is a system which allows practitioners to produce answers to complicated problems of limitation of actions under the English Latent Damage Act of 1986. Such a system could not be used if deductive logic were not used in the determination of easy cases (ones where both the law and the facts are determined). MacCormick argues (and I shall not contest) that the form of logic applicable to easy cases is that of predicate rather than propositional logic. Amongst the claims made in his paper which appear to me to be, in varying degrees, contestable on semiotic grounds are the following: (a) legal deduction is possible despite the Kelsenian objection to the non-deducibility of norms; (b) legal deduction is possible despite the argument that (the factual) determination of the predicate involves a decision; (c) legal deduction is possible despite the need to make non-deductive, evaluative judgments within the same universe of truth-certifying procedures; (d) legal deduction is possible despite the argument that matching of the predicate to the outside world involves interpretation (in semiotic terms, this raises the question of reference); (e) deployment of legal deduction, properly understood, involves justification within the universe of truth-certifying procedures represented by the legal process.

Claims (a)-(c) are closely related and semiotic considerations do little more than gloss or translate the more traditional objections within legal philosophy and the philosophy of language; claims (d)-(e) call for more substantial semiotic discussion, at the level of the nature of justification (normative or communicational) and its
relationship to the variety of different discursive practices which make up the law, rather than that of the logical formalisation of the processes involved.

(a) The Kelsenian Objection

MacCormick takes note of and affirms the view of the later Kelsen, that legal decisions are not deduced from norms (or from anything else), because they are acts of volition, not cognition: "Decisions are made, not deduced." But he claims this to be "entirely irrelevant to the issue whether or not the legal justifiability of the act of deciding in a certain way can or cannot be established by ... deductive reasoning".

But this begs the question of what we mean by "legal justifiability", and Kelsen himself took different views of this at different times. If "legal justifiability" means doctrinal justifiability, then clearly MacCormick is right. The classical Kelsen might well agree, insofar as he regarded (what Stanley Paulson has described as) material authorisation as a necessary condition of legal validity. But in his later work — to which MacCormick here refers — Kelsen increasingly came to doubt this position. He came to see legal validity exclusively in terms of formal authorisation, the operation of authorised acts of will. He would say, in short, that justification (in MacCormick's sense) belongs to the sphere of doctrine, and is not a necessary condition for the legal validity of decisions. He also said — even in Pure Theory, using the doctrine of "normative alternatives" — that an unjustified decision made by an authorised judge (as in some of his examples of legal errata) is legally valid until and unless overturned by higher authority. It will always, of course, be possible to stipulate a pure doctrinal meaning of "legal justifiability", and thus to claim that the logical status of justification is irrelevant to decision-making. But if — as arguably with the later Kelsen — legal validity is identified with "legal justifiability", and if the criterion for it remains (even in part) the operation of authorised acts of will, then the non-logical status of decision-making cannot be regarded as "entirely irrelevant to the issue whether or not the legal justifiability of the act of deciding in a certain way can or cannot be established by ... deductive reasoning".

The question of the nature of "legal justifiability", which at this