‘Stand by Your Rules’: The Problem of Rule Skepticism*

James Gordley**

Abstract

Some have thought of law as a body of rules which need no exceptions. Others have thought of rules as overgeneralizations. Eighteenth century rationalists and nineteenth century positivists went the first of these extremes. Twenty and twenty-first century skeptics went to the second. Medieval jurists saw the problem. Early modern jurists saw how it might be resolved.

Both civil and common lawyers are accustomed to regard the law as a collection of rules. For civil lawyers the rules are found primarily in codes. For common lawyers, they are found primarily in precedents: that is, the rules are inferred from the decisions in prior cases. The 19th century was an age of positivism. Civil and common lawyers believed that the rules are to be found in authoritative texts such as codes or precedents. The judge should apply these texts by logical exegesis to decide the cases that come before him. The positivist idea that judges can derive results from authoritative texts by logic alone has been criticized for over a century by both civil and common lawyers. But there is no generally accepted theory of how else should decide cases according to law.

In contrast to modern jurists, the Roman jurists and their medieval interpreters would not have agreed without severe reservations that law is a collection of rules. They thought that one could decide a case according to law without using a rule. If that is so, one might ask, what is the point of having rules? That question was asked by the Glossators in Bologna. We will begin with them and then see how modern lawyers arrived at the opposite conviction that one needs a rule in order to decide a case according to the law.

There is a rule recognized in Roman law: what belongs to no one becomes the property of the first to take possession. For example, a fish belongs to the first person to catch it.[1] But suppose one takes possession of something that cannot be owned by any person, such as a river, a free man, or, in Roman law, a

* A lecture presented at the Alma Mater Studiorum Università di Bologna, 8 March 2022.

** W.R. Irby Distinguished University Professor, Tulane Law School.

[1] I. 2.1.12.

shrine.[2] He does not own it. So, with this rule, as with nearly every other, there are exceptions. If so, how can one trust a rule? Bulgarus, one of the earliest Glossators, concluded that one could not.

> '(A) rule loses its force when it fails in a particular case. Consequently, definitions in law are dangerous (…); there are few that cannot be undermined'.[3]

He was commenting on a Roman text which said

> '(T)he law is not taken from a rule, but a rule is made according to the law. Consequently, by a rule a brief description is given of things (*res* – facts or cases), and, as Sabinus said, a rule is a connection[4] of cases (*causae*) which loses it force when it becomes defective in any way'.[5]

He cited another text in which Pomponius said, '(i)n law, every definition is dangerous. It is rarely indeed that one cannot be undermined'.[6]

It is not surprising that Paul, Sabinus, Pomponius, and other jurists of the classical period of Roman law expressed doubt the value of rules. Their method was case-oriented.[7] I have described elsewhere how they refined general concepts, not by defining them, as a Greek philosopher might have done, but by giving particular examples of their scope.[8] To explain consent, they put cases of copper sold for gold or vinegar for wine.[9] To explain negligence, they put cases of tree branches cut over public streets,[10] muleteers losing control of their animals,[11] and fires that spread when stubble is burned on a windy day.[12] To explain when possession was transferred, they put cases of goods delivered to someone's

[2] I. 2.1.8; D. 1.8.6.3.

[3] F.W.K. Beckhaus, Bulgari: Ad Digestorum Titulum De Diversis Regulis Juris Antiqui Commentarius Et Placentini Ad Eum Additiones Sive Exceptiones (Bonn: Kessinger Publishing, 1856) to D. 50.17.1.

[4] In the version of the Digest that he was using, the word was not connection – *coniectio* – but *coniunctio,* which suggests a closer union or joining. Bulgarus' opinion would actually have been more faithful to the text if his version had said *coniectio*. As Conte noted, *coniunctio* sits more easily with the view that one *causa* means one *ratio*. E. Conte, '*Ordo Iudicii et Regula Iuris* Bartolus et les origines de la culture juridique (XII^{e} siècle)', in J. Chandelier and A. Robert eds, *Frontières de savoir en Italie à l'époque des premières universités (XIII^{e} – IV^{e} siècles)* (Roma: École française de Rome, 2015), no 157, 173.

[5] D. 50.17.1.

[6] D. 50.17.202 (vulg. 203).

[7] P. Stein, *Regulae Iuris From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), 102.

[8] J. Gordley, *The Jurists A Critical History* (Oxford: Oxford University Press, 2013), 13.

[9] D. 18.1.9.

[10] ibid

[11] D. 9.2.8.1.

[12] D. 9.2.30.3.

door[13] and land viewed from a nearby tower.[14] They thought that one could tell what result was right in a particular cases without first formulating a rule or definition. They must have been correct, or they could not have developed a body of law so sophisticated that we are still using it.

Yet Justinian's compilers were instructed to finish their work with a list of 'diverse ancient rules'.[15] That list comprises the last title of the Digest.[16] Curiously, the first item on the list is the passage just quoted which tells us that the law is not to be found in rules, but rules are taken from the law.

According to Bulgarus, the application of the rule on ownership by possession did not work in the case of the shrine because of a logical fallacy. He was familiar with Aristotle's works on logic. The fallacy, he said, is that of using the middle term of a syllogism in two different senses. The rule is that what belongs to no one belongs to the person who takes possession. A shrine belongs to no one. It would seem that a shrine must belong to whoever takes possession of it. But the term 'belongs to no one' has two meanings. In the case of the fish, it refers to what belongs to no man (although it might). In the case of the shrine, it refers to what belongs not to man but to god.[17]

One might think the solution would be to formulate rules more accurately. But that solution conflicts with Bulgarus' idea of how rules are made. A rule or a definition is a collection of particular cases.

> '(A) rule is like a collection of singulars forming a universal. For example, following nature it is laid down that wild beasts which previously did not belong to anyone belong to the possessor, like birds and fish. And when this is first laid down as to singulars, afterward it is laid down in common, as a universal, that what belongs to no one goes to the possessor'.[18]

Suppose that in the first case to arise, a person captured a wild bird. In the second, he caught a fish. In both cases, the appropriate result is that he owns it. We generalize: an object unowned by anyone belongs to the first to take possession of it. But in a third case, a person takes possession of a shrine. Our rule was made to apply to a bird and a fish. To say it applies to anything that no one else owns is to overgeneralize. Consequently, to apply the rule to a new case, we first must decide whether or not that case should fall within the rule. If so, following rules is not only dangerous. It seems to be futile. What would be the point of having rules?

An answer was given by Joannes Bassianus, Azo, and Accusius. To Bulgarus,

[13] D. 9.2.28.pr.; see D. 9.2.29.pr.
[14] D. 9.2.28.pr.
[15] P. Stein, n 7 above, 114-115.
[16] D. 50.17.
[17] Bulgarus, Ad digestorum titulum De diversis regulis to D. 50.17.65. [
[18] ibid to D. 50.17.1.

the word *causa* meant a particular case. In contrast, they said that 'one *causa* means one *ratio*' – that is, one reason or rationale. '(*C*)*ausa*, indeed, is said to be *ratio*'. Azo said, in a passage that may have been written or inspired by his teacher Bassianus:[19]

> '(T)his is the force of rules: given one *causa*, to attribute to one, many other things in which the same equity is found: for example, first it was laid down for fish that they belong to the possessor because they belonged to no one; and indeed for this *ratio*, it was so also for lions and other wild animals, because they belonged to no one: wherefore it was well and generally received that what belongs to no one goes to the possessor. The origin or birth of rules thus proceeds from this general source, whose rivulets flow into the various habitations of the law which may be so expressed: where there the *ratio* is the same, the law is the same. And so the force of rules is not that they make the law: rather a rule is constituted by the law'.[20]

According to this view, the cases of fish, lions and other wild animals were not simply collected in formulating a rule, the way one might throw various objects in a bag. The result in these cases had something in common: the same *ratio*, or, as Accursius was to put it, the same 'equity'.[21] Azo, perhaps following Bassianus, said that it is difficult for a jurist to frame a rule because of

> 'the jurist's inability to discriminate among men (…) or the mutability of human affairs, the weakness of the human mind, or the variety of wrongs'.[22]

Consequently, rule should be applied carefully but they should not be distrusted. Accursius concluded that although the rules do not make law 'in the cases (in which they are) laid down', nevertheless, 'in cases in which the equity is the same, and are not established in law, they do make law'.[23] He said: 'stand firmly by rules, as the Bolognese do by their Caroccio' – their war chariot – 'lest others wrest it from their grasp'.[24]

Bulgarus might have asked them what is the point of having rules if, as they agreed, one can see what result is appropriate in a particular case without them. He also might have asked them what is meant by saying that different cases call for the same result because the 'ratio' or 'equity' is the same.

In a debate over the same questions several centuries later, the Jesuit philosopher Francisco Suárez took a very different position as to rules of natural

[19] P. Stein, n 7 above, 140-141.
[20] Azo, *Summa Codicis* (Basel, 1563) to D. 50.17 § no 4.
[21] Glossa ordinaria to D. 50.17.1 to Regula est.
[22] Azo, n 22 above, to D. 50.17 pr. no 6.
[23] 21 above, to D. 50.17.1 to *Regula est.*
[24] ibid to D. 50.17.202 [vulg. 203] to *Omnis diffinitio.*

law. They have no exceptions. Human laws are framed by people of limited foresight and wisdom – a point made by Azo. Natural law, however, is based on reason, and reason never changes. If a rule seems to have an exception, it is because the rule was not fully and correctly stated.

Suppose the owner of a sword left it in another person's custody. As a rule, the custodian should give it back when the owner asks for it. Nevertheless, Cicero and St Augustine said that he should not do so if owner has become insane or wishes to harm someone else. Augustine's opinion was quoted by Gratian in the *Decretum* which became the basis for the medieval study of Canon law.[25] According to Thomas Aquinas, this case showed that rules do have exceptions.[26] Suárez believed that Aquinas was wrong. A rule laid down by human beings might have exceptions because it could not provide for every case that might arise. A rule of natural law was based on reason itself, and therefore was invariably correct.[27] A correct statement of the rule about returning property would provide for every case. It would indicate the circumstances in which the property should be returned and those in which it should not.[28] For example, the rule might say, return the property if the owner is sane and well intentioned but not if he is insane or bent on doing harm. Consequently, for Suárez, the rules of natural law were timeless and invariably correct.

According to Aquinas, the natural law was different for a person deciding what to do under one set of circumstances than for a person deciding what to do under another. Sometimes it required return of the sword; sometimes it did not.[29] For Aquinas, a rule of natural law exists within the mind of a particular human being who is trying to do what is right in the circumstances that he is confronting. For Suárez, a rule of natural law has an existence of its own which is timeless and unchanging. It prescribes what any human being should do under any set of circumstances that could possibly arise. It would prescribe that the sword should not be returned to a lunatic even if, in the entirety of human history, no lunatic had ever asked for the return of a sword.

For Suárez and for Aquinas, natural law is based on reason. For Suárez, however, reason is an invariable connection between premises and conclusions. For Aquinas, it is practical reason which, as Aristotle had said, does not reach conclusions with certainty. Practical reason begins with ends that every human being has an inborn capacity to recognize as worthy of pursuit: for example, knowledge or community with others. Aquinas called this capacity *synderesis*.[30] Practical reason proceeds by considering how these ends may best be achieved in the circumstances a person is confronting. The circumstances that matter

[25] *Decretum Gratiani* C. 22 q. 2 c. 14.
[26] T. Aquinas, *Summa theologiae* I-II, q. 94, a, 4; II-II, q. 51 a. 4; q. 120 a. 1.
[27] F. Suárez, *Tractatus de legibus et de legislatore deo* (Coimbra, 1612), 2, 13, no 6.
[28] ibid no 9.
[29] T. Aquinas, n 29 above, I-II, q. 94, a.4.
[30] ibid I, q. 79 a. 12.

may be too numerous to take into account. As Aquinas noted, 'actions are in singular matters'[31] and 'an infinite number of singulars cannot be comprehended by human reason'.[32] In such situations, practical reason must be aided by several kindred virtues that limit the circumstances that one takes into account. 'Memory' and 'experience' which are parts of practical reason, suggest 'what is true in the majority of cases'.[33] A person can seek advice from experienced people, and, indeed, 'stands in great need of being taught by others especially old folk (...)'.[34] In doing so, he employs the related virtue of *eubolia*, which is the seeking of counsel. Another virtue, *sinesis*, enables him to apply 'common rules' which have been devised for similar situations. Nevertheless, he needs still another virtue, *gnome*, to make exceptions to the common rules and to 'judge (...) according to higher principles'. *Gnome* is necessary because 'it happens sometimes that something has to be done which is not covered by the common rules of actions'.[35] Aquinas illustrated *gnome* with the example of the return of a sword when the owner has become insane or dangerous.[36]

A person who follows practical reason is following natural law. 'Law is a dictate of practical reason'.[37] He does so by deciding what must be done in particular circumstances. Consequently, the natural law only exists in the mind of a person who is taking account of a particular set of circumstances by drawing on his own memory, experience, knowledge of common rules, and ability to make exceptions.

Aquinas' explanation outlasted the Reformation. *Synderesis* was described in the same way by Anglicans, as Robert Burton (1557-1640), Richard Carpenter (1575–1627), and Robert Sanderson (1587-1663), by Lutherans such as Friedrich Balduin (1575-1627) and Johannes Olearius (1639-1713), by Calvinists such as Iohann Andreas van der Meulen, (1635-1702), and by Puritans such as William Ames (1576-1633).[38] Aquinas' explanation did not outlast Suárez. As Leroy Loemker observed, 'Suárez's *Disputationes Metaphysicae* (became) the academic

[31] ibid II-II, q. 47, a. 3.
[32] ibid ad 2.
[33] ibid 49, a. 1.
[34] ibid a. 3.
[35] ibid q. 51, a. 4.
[36] ibid
[37] ibid I-II, q. 91, a. 3, citing q. 90, a. 1, ad 2.
[38] R. Burton, The Anatomy of Melancholy, What it is, With all the kindes, causes, symptoms, prgnostickes and several cures of it (Oxford, 1621), 42; R. Carpenter, The Conscionable Christian: Or, The Indevour or Saint Paul to have an discharge a good conscience alwayes towards God and men (London, 1623), preface, 'To the Reader', 2; R. Sanderson, De obligatione conscientiae praelectiones decem: Oxonii in schola theologica habitae anno dom. MDCXLVII (London, 1686), Praelectiones I.xxxiv-xxxvi, IV.xiv; F. Balduin, Tractatus de casibus conscientiae (Wittenberg, 1628), I, iii; J. Olearius, Introductio brevis in theologiam casisticam, usibus studiosum Lipsiensium consecrate (Leipzig, 1694), viii, 9-10; I.A. van der Meulen, Forum conscientiae seu ius poli, hoc est tractatus theologico juridicus (Utrecht, 1693), Dissertatio praeliminaris I, 3-9; G. Amesius, Conscientia et eius iure vel casibus libri quinque (Amsterdam, 1630), I, 1-3; 2-5.

standard of doctrine for Protestant and Catholic Europe alike'.[39]

Before we get to that part of the story, in which, as Etienne Gilson said, 'Suarezianism consumed Thomism',[40] let us compare Aquinas' account of law as practical reason with that of the Roman jurists and Glossators in which, at least to begin with, 'the law is not taken from a rule, but the rule is taken from the law'. At first sight, they seem different. In Aquinas' account, one begins with ultimate ends naturally known through *synderesis*. One seeks the best means to these ends. It may be by achieving ends which are subordinate: they are means to these ultimate ends either instrumentally or as component parts of a larger whole. One asks how these ends may be achieved under the circumstances that one is confronting.

The Roman jurists refined general concepts by giving examples: a person took possession of land without physically entering it when he viewed it from a nearby tower; he remained in possession even when he left it momentarily to buy grain. On the basis of such examples, they tentatively formulated rules: a fish, a bird, and a lion belonged to the first possessor: one could say tentatively, what belongs to no one else belongs to the first possessor. Bassianus, Azo and Accursius said that the reason was that in these cases, the ratio for the decision or the *aequitas* was the same.

I suggest we can see this use of examples and tentatively formulated rules by the jurists as steps toward a fuller account which explains the law as the exercise of practical reason in determining the best way in which worthwhile ends are pursued. The way the human mind works, we are able to see the right solution in a particular case even though we only glimpse the ends that explain why it is the right solution. We can see that possession should be protected although we cannot fully explain why. We can recognize, however that whatever the reason may be, it applies just as well when a person views land from a tower or leaves the land temporarily. Before we can fully explain why the first possessor should become owner of fish, we recognize that the reason is the same with a bird or a lion, and that, over some range of cases, objects that belong to no one are owned by the first possessor. We pursue ends that we do not fully understand by first identifying particular results and formulating tentative rules. To explain that process would require another lecture. It is the problem Marco Martino addressed in an excellent article about the German scholar Viehweg.[41]

In the 18th century, Suárez' account of natural law became the foundation for the rationalism of Gottfried Wilhelm Leibniz and Christian Wolff. Like Suárez, they thought that natural law is timeless and invariable. They were clearer,

[39] L.E. Loemker, 'Introduction', in Id ed, *Gottfried Wilhelm Leibnitz Philosophical Papers and Letters* (University of Chicago Press: Chicago, 1st ed, 1956), 1, 17.

[40] E. Gilson, *Being and Some Philosophers* (Toronto: Pontifical Institute of Medieval studies, 2nd ed, 1952), 118.

[41] M. Martino, 'La topica, il sistema e il diritto globalizzato: a cinquant'anni dalla pubblicazione italiana di *Topik und Jurisprudenz*' *Rivista di diritto civile*, I, 1489-1518 (2013).

however, about the way in which this law is based on reason. They thought that law is like mathematics. Conclusions are to be drawn from definitions. The definitions and consequently the conclusions are certain. Anything that cannot be demonstrated in this way is subject to doubt. Leibniz' dream was to be able to say, whenever a question of law or morals arose, 'Sir, let us sit down and calculate the answer'. He said:

> 'The doctrine of law (*doctrina iuris*) belongs to those sciences that depend on definitions and not on experience, on demonstrations of reason and not of sense, and are matters of law, one can say, and not of fact. As, indeed, justice consists in some congruity and proportionality, we can understand that something is just even if there is no one who is acting justly, or who is being treated justly, in the same way that the concepts (*rationes*) of numbers are true even if there were no one to count and nothing to be counted, and we can predict that a house will be beautiful, a machine efficient, or a commonwealth happy if it comes into being even if it should never do so. We need not wonder, therefore, that the principles of these sciences possess eternal truth'.[42]

Consequently, as Suárez said, the natural law is timeless, invariable and not subject to any exceptions. The reason, however, why it could apply to a potentially infinite number of situations was the same as in mathematics. Beginning with a few definitions, could reach a potentially infinite number of conclusions.

'Then', Gilson said, 'Suárez begat Wolff'.[43] Christian Wolff wrote a multi-volume treatise on natural law in which he attempted to demonstrate the rules of private law in the same way as mathematics. We have all but forgotten the enormous influence that his work had on European jurists. His influence in Prussia has been described by Damiano Canale.[44] According to my teacher John Dawson, it marked the beginning of 'Germany's commitment to legal science'.

> '(T)he influence of Wolff was enormous even among those who reacted against it. His admirers set themselves to perfecting his system and working out its consequences; his opponents could not escape the net it cast. Its influence reached more gradually, and, in the end, incompletely to 'half-learned' or unlearned judges and practitioners; in the abundant legal literature that still poured forth, there was much that followed older styles and gave

[42] G.W. Leibnitz, *Elementa juris naturalis* in *Philosophische Schriften Erster Band 1663-1672* (Berlin: Akademie der Wissenschaften der DDR, 1990), 459-460. Loemker notes of that this passage 'already presupposes the distinction between possibility and existence made in his later thought (…)', G.W. Leibnitz, *Philosophical Papers and Letters*, I, L.E. Loemker ed (Chicago: The University of Chicago, 1956), 138 fn 5.

[43] E. Gilson, n 40 above, 112.

[44] D. Canale, La costituzione delle differenze Giusnaturalismo e codificazione del diritto civile nella Prussia del '700 (Giappichelli: Torino, 2000), 29-78.

only a pale reflection of the Wolffian synthesis. The agents for the transmission of his ideas were overwhelmingly law professors'.[45]

While Bulgarus' position verged on rule skepticism, the path marked out by Suárez led Leibniz and Wolff to the other extreme. All one needed was the right rule. They conceived of reason as Aristotle and Aquinas had conceived of theoretical reason: conclusions follow invariably from premises. Perhaps Bulgarus did as well. He was familiar only with Aristotle's works on logic. Aristotle's *Nicomachean Ethics*, which discussed practical reason, was not then available in Europe. Bulgarus knew, however that most legal rules do have exceptions. He concluded that rules should not be trusted. One cannot draw logical conclusions from them without getting the wrong answers. In contrast to the rationalists, Bulgarus believed that one could tell the right result in a particular case without using a rule.

In the 19th century, rationalism was discredited and natural law along with it. There were no timeless and eternal principles. The source of law is the texts laid down in each jurisdiction by those in authority. We call this approach 'legal positivism'.

In France, the authoritative texts were the provisions of the French Civil Code. In much of Germany, they were still the texts of Roman law. In the common law world, they were the decisions of judges. For the French positivists, cases were to be decided by deducing the correct result from the rule in the Civil Code. For the Germans and the common lawyers, reaching conclusions from authoritative texts was a two-step process. First, one had to formulate a rule that was implicit in the texts. Then one had to apply the rule to the particular case. Suppose, in a common law jurisdiction, the facts in one case were *a*, *b*, and *c*, and the result was *x*. The facts in another case were a and b but not c and the result was *y*. One could infer the rule that if facts *a* and *b* are present, whether the result should be *x* or *y* depends on whether fact *c* is present as well.

The positivists broke with the rationalists' account of natural law by denying that there are any timeless and eternal principles. Like the rationalists, however, they claimed that one must get from starting points to conclusions by logic alone. For the rationalists, the starting points were definitions like those of mathematics. The conclusion had the same certainty as these definitions. For the positivists, the starting points were authoritative texts. The conclusions had the same authority as these texts. For the rationalists, to allow one's own sense of the right result to influence one's conclusions would destroy their certainty. For the positivists it would destroy their authority.

Toward the end of the 19th century, positivism was discredited and by the same sort of argument that David Hume had used a century earlier to discredit

[45] J.P. Dawson, *The Oracles of the Law* (University of Michigan Law School: Ann Arbor, 1968), 237.

rationalism. Definitions describe the relationships of concepts to each other. One can extract a conclusion from a definition only if one first packs it into the definition. François Gény showed that one cannot, by logic alone, get from the rules in the French Civil Code to the result in a new case.[46] The German *Freirechtschule* said the same about interpreting the German Civil Code of 1900.[47] American Legal Realists such as Karl Llewellyn made a similar claim about the interpretation of decided cases.

Imagine two cases, Llewellyn said. In one, the facts are *a*, *b*, and *c*, and the outcome is *x*; in the other, the facts are *a*, *b*, and *d*, and the outcome is *y*. 'How, now,' he asked,

> 'are you to know with any certainty whether the changed result is due in the second instance to the absence of fact *c* or to the presence of the new fact *d*?'[48]

His point can be illustrated by the cases we have described. Suppose that in the first case to be decided a person took possession of a wild bird. The result: he owns the bird. In the second case, he took possession of a river, a free man or a shrine. The result: he does not own it. Suppose a third case arose in which he took possession of a fish. Llewellyn's point is that either of two rules would be logically consistent with the results in the first two cases: the possessor can only own a bird, or the first possessor cannot own a shrine.

Suppose that in the first case to be decided, a person entrusted with a sword refused give it back to an owner who was sane. In a second case he refused to return it the owner was insane. In a third case, he refused to return a comic book to an owner who had become insane. How does one know whether the rule is not to return swords to an insane person or not to return any sort of property to them? One cannot tell by logic alone.

This observation set off a crisis in American legal thought that has yet to be resolved. In any new case, the facts will be a bit different from those of any case previously decided. The judge can reach one result by saying that the difference matters, or the opposite result by saying that it does not. Either way the result is logical. Therefore, he must decide the case by something other than logic plus the authority of previously decided cases. He may be acting arbitrarily. He may

[46] F. Gény, *Methode d'interpretation et sources en droit privé positif* (Librairie générale de droit et de jurisprudence: Paris, 1899).

[47] eg P. Heck, 'Was is diejenige Begriffsjurisprudenz, die wir bekämpfen?' *Deutsche Juristen-Zeitung*, 1457-1458 (1909); S. Rundstein, 'Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins' *Archiv für bürgerliches Recht*, 1, 5 (1910); E. Fuchs, 'Klassische Einwendungen gengen die soziologische Rechtslehre' *Monatschrift für Handelsrecht und Bankwesen*, 82, 87 (1911); M. Rumpf, *Gesetz und Richter: Versuch einer Methodik der Rechtsanwendung* (Liebmann: Berlin, 1906), 41.

[48] K.N. Llewellyn, The Bramble Bush Some Lectures on Law and its Study (New York: Hein, 1930), 52.

be acting according to his politics or the interest of a particular social class. In any event, the rule of law is impossible. That was claim the made by the more extreme Legal Realists and by the founders of the Critical Legal Studies movement in the 1970s at the Harvard Law School when I was studying there on a post-graduate fellowship.

Karl Llewellyn refused to go that far. He claimed, like Aquinas, and like Bulgarus, Azo, Bassianus and Accursius, that one could tell how to decide a case without following a rule. One could do so by what he called 'situation sense.' It was, he said, an

> 'opened, reasoned, extension, restriction or reshaping of the relevant rules (...) done in terms of the sense and reason of some significantly seen *type* of life-*situation*'.

That, at least, was how he summarized in a sentence

> 'what has cost me a 500-page book'.[49] 'Under the Grand and Only True Manner of deciding: (a) any rule that is not leading to a right result calls for rethinking and perhaps redoing; and, also and equally, (b) any result which is not comfortably fitted into a rule good for the whole significant situation type calls certainly for a cross-check and probably for more worry and still more work'.[50]

'Situation sense,' like practical reason for Aristotle and Aquinas, allows one to see the right result even though one cannot demonstrate it. The resemblance is strong enough that the organizers of a seminar for American judges once asked me to speak to them on the similarity between Lewellyn's situation sense and Aristotle's practical reason.[51]

Members of the Critical Legal Studies movement had an answer to Llewellyn. If a judge can see what result is right in a particular case, why does he need rules? They might have asked the same question of Aquinas or Aristotle. Bulgarus might have asked it of Bassianus, Azo, and Accursius.

One reason that Aristotle gave for deciding according to rules was negative:

> 'Whereas the law is passionless, passion must ever sway the heart of man. Yes, it may be replied, but then on the other hand an individual will

[49] K.N. Llewellyn, 'On the Current Recapture of the Grand Tradition', in K.N. Llewellyn ed, *Jurisprudence: Realism in Theory and Practice* (Routledge: London, 2017), 210-220, referring to K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown: Boston, 1960).

[50] ibid 221.

[51] The seminar 'Llewellyn and Aristotle on the Force of Reason' was presented at a symposium for judges on 'The Nature of the Judicial Function' sponsored by the Law and Economics Center of the School of Law, George Mason University, at Captiva, Florida, 3 December 2006.

be better able to deliberate in particular cases'.[52]

Similarly, according to Aquinas,

> 'because lawgivers judge in the abstract and about future events, while those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity, by which their judgment is perverted'.[53]

But Aquinas also gave a more positive reason for preferring government by rules to government by men. Rules are a store of wisdom and experience. As we have seen, he believed that in using practical reason, a person needed both *sinesis* which enables him to apply 'common rules' and *gnome* by which he which he 'judge(s) (...) according to higher principles' when 'something has to be done which is not covered by the common rules of actions'.[54] Similarly, he said of human law that 'it is easier for man to see what is right' when rules are made 'by taking many instances into consideration' than when 'judgment in each single case has to be pronounced as soon as it arises'.[55]

There will still need to be exceptions. Exceptions to human laws are made by exercising the virtue of 'equity' just as, by exercising that of *gnome*, a person makes an exception to 'common rules' by deciding according to higher principles. Aquinas used the example of the return of the sword to illustrate both. An exception is made when the purpose of the rule is no longer served. But equity, like *gnome*, presupposes a respect for rules. It arises from a recognition of the wisdom and experience to be found in the rules, not merely from fears about the neutrality and wisdom of judges.

If so, Llewellyn was right to say that 'any rule that is not leading to a right result calls for rethinking' and that 'any result which is not comfortably fitted into a (good) rule (…) calls certainly for a cross-check (…)'[56] Accursius was right to say that although we frame rules by looking at the results of cases, still, once framed, we can use them to decide new ones. So, as Accursius said, 'Stand by your rules' – like the *Bolognesi*.

[52] Aristotle, *Politics*, III.xv. 1286[a].
[53] *Summa theologiae* I-II, q 97, a 1, ad 2.
[54] ibid II-II, q 51, a 4.
[55] ibid I-II, q 97, a 1, ad 2.
[56] K.N. Llewellyn, n 49 above, 221.