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## Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea

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## **Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea**

Dan Priel†

### ABSTRACT

According to a familiar adage the legal realists equated law with what the judge had for breakfast. As this is sometimes used to ridicule the realists, prominent defenders of legal realism have countered that none of the realists ever entertained any such idea. In this Essay I show that this is inaccurate. References to this idea are found in the work of Karl Llewellyn and Jerome Frank, as well as in the works of their contemporaries, both friends and foes. However, the Essay also shows that the idea is improperly attributed to the legal realists, as there are many references to it, in legal and non-legal sources, from long before the advent of legal realism. This suggests that the phrase has long reflected something of a received wisdom about adjudication. Tracing the question of the significance of digestion to one's health, I argue that what we today take to be a humorous claim, may have been a much more serious one. For much of the nineteenth century it was widely believed that one's health depended on one's digestive health. Interestingly, this view is now once again taken seriously by scientists, which suggests that rather than scorn, the realists deserve credit for suggesting that the question be studied seriously.

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Now I really do see that judges and governors ought to be and need to be made of bronze, so as not to be worn out by all the pestering from these folks who come on business and expect you to be listening to them and dealing with them at all hours of the day and night, and attending only to their affairs, come what may . . . . So, all you fools and idiots coming on business: don't be in such a hurry, wait until the proper time, don't come when it's time for me to be eating or sleeping, because judges are made of flesh and blood, and must give to nature what nature naturally needs . . . .<sup>1</sup>

### I. DID THE REALISTS EVER SAY THIS?

The nineteenth-century English judge Charles Bowen once said, “the state of a man’s mind is as much a fact as the state of his digestion.”<sup>2</sup> This may be so, but the connection between mind and digestion has proven contentious. For decades it has been said that the legal realists believed that law is determined by what the judge had for breakfast, an idea that, naturally enough, has not endeared itself to some judges. When Judge Alex Kozinski wanted to make fun of the legal realists, and perhaps legal academics more generally, this was his prime example.<sup>3</sup> For him, this idea showed just how ridiculous some legal scholars’ ideas could be, how unmoored from reality, and perhaps even how irresponsible.<sup>4</sup>

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1. MIGUEL DE CERVANTES, *DON QUIXOTE* 812 (John Rutherford trans., Penguin Classics 2000) (1615).

2. *Edgington v. Fitzmaurice*, 29 Ch D 459, 483 (C.A. 1885) (Eng.) (Bowen L.J.).

3. See Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 *LOY. L.A. L. REV.* 993, 993 (1993).

4. See *id.* at 998 (the realists told judges “they can follow their leanings with abandon and everything will be all right . . . . If the public should become convinced—as many academicians apparently are—that judges are reaching results not based on principle but to serve a political agenda, . . . that will affect our way of life for years to come, perhaps permanently.”). In an interview he gave shortly after his retirement from the Supreme Court, Potter Stewart described Yale Law School of his student days in the late 1930s as dominated by “judicial realism.” It paid no attention to legal rules, but explained decisions on the basis of a judge’s biographical background, and, of course, “what the judge had for

In a rare show of bipartisan alliance, liberal stalwart Ronald Dworkin was in agreement with conservative Kozinski, for he too objected to the “disastrous,” “catch-phrase . . . that some of the realists themselves encouraged,” that “law is . . . *only* a matter of what the judges eat for breakfast.”<sup>5</sup>

Neither Kozinski nor Dworkin mentioned by name any legal realist who actually used this expression. By the time they were writing, the attribution of this phrase to the legal realists (or its close equivalent, that the law depends on the state of a judge’s digestion), became so much part of legal lore that even fastidious law-review editors let it stand without a citation. But did any legal realist ever say it? In his sympathetic reconstruction of legal realism Brian Leiter denied the charge.<sup>6</sup> Frederick Schauer has also failed to identify any clear source for the idea, suggesting instead that Jerome Frank only made this as an “offhand oral quip,” or that he was wrongly saddled with what others had said, and only “in jest.”<sup>7</sup> Charles Yablon reported that he tried to trace the attribution of the phrase to the legal realists but admitted failure.<sup>8</sup> And yet, despite the supposed lack of supporting evidence, the attribution of this expression to the legal realists lives on, appearing regularly in both academic

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breakfast.” See Samuel G. Freedman, *Ex-Justice Stewart Relives the Eli Life*, N.Y. TIMES, Apr. 30, 1982, at B1.

5. Ronald Dworkin, *Dissent on Douglas*, N.Y. REV. BOOKS, Feb. 19, 1981, at 4 (emphasis added).

6. See BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 62 (2007) (arguing that even the few realists who believed that the judge’s personality determined the decision did not think that the judge’s breakfast determine the outcome of cases).

7. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 129 n.15 (2009); see also Giovanni Tuzet, *A Short Note on Digestive Realism*, 25 REVUS 11, 11 (2015) (stating it is “unclear whether any of the American realists really claimed anything of that sort”). In his essay Tuzet discussed two early invocations of the relationship between adjudication and digestion in the work of eighteenth-century thinkers Julien Offray de la Mettrie and Cesare Beccaria. In fact, two legal realists cited these authors in relation to this idea. See notes 37 and 62, *infra*.

8. Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 n.16 (1990).

literature and newspapers, invariably without any reference.<sup>9</sup> At times it is described as a “caricature” of legal realism,<sup>10</sup> possibly just a vivid exaggeration of what the legal realists had actually said; at other times, the phrase is said to reflect the actual views of the realists.<sup>11</sup> Is there any truth to the claim that the legal realists believed that law has anything to do with what the judge had for breakfast, or is this just an urban legend?

As the examples of Kozinski and Dworkin illustrate, it is the critics of realism who may be most responsible for keeping alive both the phrase and its connection to legal realism. Of those, there is one in particular that deserves a special mention. Walter Kennedy, described as “perhaps the most widely respected Catholic legal scholar”<sup>12</sup> in America of

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9. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 18 (1997); John F. Duffy, *Why Business Methods Patents?*, 63 *STAN. L. REV.* 1247, 1284 (2011); Gary Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151, 1220 (1985); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 14 (2001). This is but a small sampling. For a recent reference, showing the idea lives on beyond the legal academy, and that its association with legal realism has crossed the Atlantic, see David Pannick, *Why No Offender Wants to Face a Judge Who Is Tired, Hungry or Disappointed*, *TIMES* (London) (Jan. 19, 2017), <http://www.the-times.co.uk/article/why-no-offender-wants-to-face-a-judge-who-is-tired-hungry-or-disappointed-6bdxbm2w0>.

10. See, e.g., John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 *WASH. U. J.L. & POL'Y* 131, 136 (2008).

11. See RONALD DWORKIN, *LAW'S EMPIRE* 36, 153 (1986) (“Some of [the realists] took great satisfaction in provocative statements of their position” such as that “law is only what the judge had for breakfast”); see also *supra* notes 3–5 and accompanying text. For an even more extreme example of false attribution see PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 24 (1994) (“The most famous description of the new realism was by Professor Robert Hutchins: ‘What the judge has for breakfast is more important than any principle of law.’”). Howard provided no citation for this quotation, which I could not locate. It seems extremely unlikely, as in Hutchins’s only reference to the expression that I found, he called it an “absurdity” and a “horrid possibilit[y].” Robert Maynard Hutchins, *The Autobiography of an Ex-Law Student*, 1 *U. CHI. L. REV.* 511, 514 (1934).

12. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC*

his generation, was part of a group of Catholic law professors who repeatedly attacked the legal realists during the 1930s and 1940s.<sup>13</sup> Kennedy was by far the most committed to the cause, penning over fifteen articles dedicated to realism bashing.<sup>14</sup>

For Kennedy, just as it would be for Kozinski half a century later, the what-the-judge-had-for-breakfast trope served as a *reductio ad absurdum*, a distillation of everything wrong with legal realism. Kennedy never tired of making mocking references to this idea, telling his readers the realists believed lawyers should become “stomach specialists,”<sup>15</sup> that they thought “gastronomical disturbances,”<sup>16</sup> affected the outcomes of cases, that they claimed lawyers should not bother with “dust-laden volumes,” but investigate instead “how [the judge or legislator’s] digestive tract is functioning.”<sup>17</sup> In one place, he called the idea that judgments were influenced by the judges’ digestion as the “so-called ‘wheatie-explanation’ of judicial decisions.”<sup>18</sup>

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NATURALISM & THE PROBLEM OF VALUE 165 (1973).

13. For the most comprehensive discussion of the Catholic critique of legal realism see John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought’s Response to Legal Realism*, 98 MARQ. L. REV. 1203 (2015). Breen and Strang list fourteen Catholic scholars who wrote critically about legal realism. *See id.* at 1258 n.416.

14. *See id.* at 1230 n.200 for a list of seventeen essays by him containing a substantial critique of legal realism. Even this list is incomplete as it does not include critical book reviews, *see, e.g., infra* note 18.

15. Walter B. Kennedy, *Another Job for Jurisprudence*, 8 MOD. L. REV. 18, 21 (1945).

16. Walter B. Kennedy, *Law Reviews “as Usual”?: A War Program*, 12 FORDHAM L. REV. 50, 55 (1943); *accord* Walter B. Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362, 366 (1940) (attributing to the legal realists “the gastronomical approach which urges the advocate to take a sly glance at the judge’s breakfast menu.”).

17. Walter B. Kennedy, *Men or Laws*, 2 BROOK. L. REV. 11, 13 (1932).

18. Walter B. Kennedy, Book Review, 89 U. PA. L. REV. 995, 996 n.6 (1941) (reviewing EDWIN N. GARLAN, *LEGAL REALISM AND JUSTICE* (1941)); *see also* Hutchins, *supra* note 11, at 514 (referring to the “slogan for Shredded Wheat, ‘Tell me what you eat and I’ll tell you what you are.’”).

It would be tempting to dismiss the charge as a case of false attribution, if it were not for the fact that it was not just critics that drew a connection between realism and judicial digestion. During the 1930s Charles Clark was a professor and later dean at Yale Law School, where many of the realists were based, and he is usually considered one of their ranks.<sup>19</sup> In a lecture he gave in 1941, by then a federal appeals judge, Clark made it clear to his audience that he thought the legal realists had an important message, and that their ideas should not be ignored.<sup>20</sup> But Clark distanced himself from those “who are said to belong to the ‘gastronomical school’ of jurisprudence, to which the most important thing in a law case is the temporary state of the judge’s digestion.”<sup>21</sup> Yet he too named no members of this supposed school; and so the puzzle remains. Is this just negative advertising that caught on?

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19. Clark appeared in Llewellyn’s list of legal realists found in Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226 n.17 (1931); see also LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 105 (1986) (Clark was a “committed legal realist[.]”).

20. Charles E. Clark, *The Function of Law in a Democratic Society*, 9 U. CHI. L. REV. 393, 395 (1941).

21. Charles E. Clark, Book Review, 23 YALE REV. 424, 426 (1934) (reviewing MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* (1933)); accord Clark, *supra* note 20, at 394 (“the legal realists have acquired the name—or frame—of the ‘gastronomical school of jurisprudence,’ since they are supposed to attribute judicial opinion primarily to what the judge had for breakfast.”).

## II. YES, THEY DID

These early attributions to legal realists of a link between adjudication and digestion, by both allies and critics, show that the association between judicial digestion and legal realism started early. This only makes the question of the origins of this idea even more intriguing: Where did it come from? As far as I could find, the first appearance of something resembling this idea in the published work of an American legal academic appeared in a 1905 essay by Roscoe Pound. He wrote there that judges should not be like, “the oriental *cadi* administering justice at the city gate by the light of nature tempered by the state of his digestion for the time being.”<sup>22</sup>

Whether Pound belongs in the ranks of the legal realists is a topic best left for another place.<sup>23</sup> He is not usually considered one, though, because he is the author of the first sustained attack on legal realism.<sup>24</sup> Be that as it may, Pound used the idea that judges may decide cases based on the state of their digestion, perhaps facetiously, as a contrast to his ideal of principled adjudication, not as a description of reality. His view was thus quite the opposite of the alleged realist view. And in any event, neither Kennedy nor Clark mentioned Pound in their essays. Clark, in fact, did not cite anyone who held this view. But Kennedy did: His source was an article by Karl Llewellyn, entitled *On Reading and Using*

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22. Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 21 (1905). This passage is quoted in Jerome Frank, *Are Judges Human? Part One: The Effects on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 24 n.17 (1931) [hereinafter Frank, *Are Judges Human?*]. Frank, however, criticized Pound's legal orientalism. See *id.* at 24–25; see also Jerome Frank, Book Review, 56 YALE L.J. 589, 591 n.5 (1947).

23. On the realists' complicated relationship with Pound (and vice versa) see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 2, *passim* (1997).

24. See Roscoe Pound, *The Call for Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

*the Newer Jurisprudence*.<sup>25</sup> The essay was a critical survey of ideas that had been percolating in the legal academy in the previous decade. Its main goal was to show that the questions and problems that “jurisprudes” were discussing at the time were relevant and useful even for the most practically-oriented lawyers. Llewellyn, at the time a professor at Columbia, clearly thought the message important enough for legal practitioners that, in addition to publishing it in his home law review, he arranged to have it published in the American Bar Association’s journal as well.

Llewellyn’s essay covers a lot of ground with about two pages of it dedicated to, “the Jurisprudence of advocacy.”<sup>26</sup> It was important for lawyers to consider judges’ personalities, he wrote there, as those may affect the outcome of cases. Such a study should “not ignore the facts of life,” which include the possibility that, “[i]n the case of a particular judge subject to dyspepsia, the unfortunate effects of a particular ill-advised breakfast do alter the advocate’s practical problem.”<sup>27</sup> Such happenstances, as well as ailments of a more permanent nature, he said, are plainly relevant for litigators’ work, and are probably familiar to all of them. He therefore “confess[ed] to total inability to understand why” discussing such matters should be considered “unilluminating or indecent.”<sup>28</sup> Nevertheless, Llewellyn qualified these remarks by saying that he never studied any “judge’s breakfast, or headache,” and he did not think either “a peculiarly fruitful line of study.”<sup>29</sup>

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25. The article was published in two parts in 26 A.B.A. J. 300, 418 (1940) and in one part in 40 COLUM. L. REV. 581 (1940). Further citations are to the *Columbia Law Review* version. See Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940).

26. *Id.* at 594.

27. *Id.* at 592.

28. *Id.*

29. *Id.* at 593.

Though Llewellyn made no reference to any previous scholarship, the apologetic tone of his remarks on the subject suggests that he was responding to already-existing associations between legal realism and judicial breakfasts. And Kennedy had in fact tied the realists to judicial digestion already in 1932, almost a decade before the publication of Llewellyn's essay.<sup>30</sup> Similarly, Clark's first reference to gastronomic jurisprudence, in 1934, suggests that by then the link between realism and indigestion was familiar.<sup>31</sup>

And indeed there is an earlier, and much clearer, discussion of the relationship between adjudication and digestion in a well-known realist tract. Jerome Frank's *Law and the Modern Mind* was published in 1930 and immediately caused a stir.<sup>32</sup> Here was a book written by a practitioner who did away with many of the self-

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30. See Kennedy, *supra* note 17.

31. Clark, *supra* note 21. By the mid-1930s, the term "gastronomic jurisprudence" was familiar enough that it was mentioned without explanation or citation. See Frederick K. Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169, 190 (1934); George W. Goble, *Law as a Science*, 9 IND. L.J. 294, 302 (1934); Orvill C. Snyder, *The Corporate Person and the Fourteenth Amendment*, 8 BROOK. L. REV. 4, 20 (1938); see also *Proceedings of the Thirty-Seventh Annual Meeting Held at Chicago, December 28, 29, and 30, 1939*, 9 AM. L. SCH. REV. 647, 662 (1940) (comments by Professor William L. Prosser); Harold Gill Reuschlein, *Some Books about the Constitution, Its Makers and Its Interpreters*, 27 GEO. L.J. 1149, 1165 (1939) (book review); Franklin F. Russell, Book Review, 9 BROOK. L. REV. 104, 111 (1939) (reviewing JEROME HALL, READINGS IN JURISPRUDENCE (1938)).

32. See JEROME FRANK, LAW AND THE MODERN MIND (1930). Several newspapers reported the book was a bestseller. See *Best Seller*, PITTSBURGH PRESS, Feb 1, 1931, § 6, at 5; S.F. EXAMINER, Mar. 29, 1931, § 3, at 12 ("Crashing the best seller lists"); DAILY PLAINSMAN (Huron, S.D.), Jan. 31, 1931, at 7; *Literary Notes*, ST. JOSEPH GAZETTE, Feb. 15, 1931, at A14. In addition to numerous reviews in legal journals, the book was widely reviewed in newspapers and magazines. See, e.g., Thurman W. Arnold, *Law and Men*, SATURDAY REV. LITERATURE, March 7, 1931, at 644; Morris R. Cohen, *Change and Fixity in the Law*, NATION, Sep. 9, 1931, at 259; Walton H. Hamilton, *The Legalism of Law*, NEW REPUBLIC, Jan. 21, 1931, at 277; Robert von Moschzisker, "Law and the Modern Mind": A Lively Controversial Volume, PHILA. INQUIRER, Jan. 31, 1931, at 10; Max Radin, *Giving Away the Legal Show*, N.Y. HERALD TRIB. BOOKS, Dec. 21, 1930, at 5; Chester Rohrich, *The Legal Mind Psychoanalyzed*, N.Y. TIMES BOOK REV., Dec. 7, 1930, at 22.

congratulatory pieties of his profession and presented to the world a thoroughly unvarnished account of the law. To this day the book enjoys a rather notorious reputation,<sup>33</sup> not entirely deserved. Though not without its faults (which Frank later acknowledged),<sup>34</sup> the book is reformist and humanist in spirit, and not at all cynical or nihilist.<sup>35</sup>

One of the many topics the book addresses is the view that legal outcomes are primarily governed by legal rules. Frank did not deny the existence and significance of legal rules to adjudication, but he insisted that they were only part of the story. Another important element, Frank argued, and one that lawyers tended to underplay, was the personality of the judge. One piece of evidence Frank relied on was an obscure 1869 decision by the Alabama Supreme Court. He quoted approvingly (and italicized for extra effect) the court's proclamation that:

[I]t can not safely be denied that mere judicial discretion is sometimes very much interfered with by prejudice, which may be swayed and controlled by the merest trifles such as the toothache, the rheumatism, the gout, or a fit of indigestion, or even through the very means by which indigestion is frequently sought to be avoided.<sup>36</sup>

This, then, is the smoking gun. Legal realism's single most famous book suggested a clear link between the state of judge's mind and the state of his digestion. And it is not

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33. Dworkin called it "a bible of the crudest form of [legal] realism." Dworkin, *supra* note 5.

34. See Jerome Frank, *Legal Thinking in Three Dimensions*, 1 SYRACUSE L. REV. 9, 9–10 (1949).

35. See Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFF. L. REV. 1127 (2010); cf. Helmut Coing, *Tendencies in Modern American Legal Philosophy: A Survey*, 40 GEO. L.J. 523, 537 (1952) ("It was by no means Frank's intention to say that prejudices, indigestion, etc., were the bases of law; he made use of them only to point out what uncertain factors play a part in the true life of the law.").

36. *Ex Parte Chase*, 43 Ala. 303, 310–11 (1869), quoted in FRANK, *supra* note 32, at 137. Frank did not forget this case and quoted from it again in JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 414 (1949).

the only one. In an article published the following year, in part in response to the reactions to *Law and the Modern Mind*, Frank mentioned that the eighteenth-century French author Julien Offray de La Mettrie wrote of a person “who ‘was when fasting, the most upright and merciful judge, but woe to the wretch who came before him when he had made a hearty dinner; he was then disposed to hang everybody, the innocent as well as the guilty.’”<sup>37</sup>

It is not entirely clear why Kennedy chose to cite Llewellyn and not Frank, even though Frank’s endorsement of the idea was far more forthright. Kennedy knew *Law and the Modern Mind* and though not an admirer,<sup>38</sup> he acknowledged its “lively and attractive style.”<sup>39</sup> Maybe it is the fact Frank quoted a case in support of his contention that made him a less congenial target. Coming from what even then was an old judicial decision from a state Supreme Court gave the idea the kind of respectability, even authority, that the ramblings of an out-of-touch Ivy League academic could never have.<sup>40</sup>

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37. Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 247 (1931) (quoting JOSEPH NEEDHAM, *THE SCEPTICAL BIOLOGIST* 176 (1930) (quoting MAN A MACHINE 12–13 (London, W. Owen 1749))); see also FRANK, *supra* note 32, at 162.

38. See Walter B. Kennedy, *A Required Course in Jurisprudence*, 9 AM. L. SCH. REV. 593, 594–95 (1940).

39. Walter B. Kennedy, *The Cult of the Robe: A Dissent*, 14 FORDHAM L. REV. 192, 192 (1945).

40. A more mundane reason is that by the early 1940s Frank and Kennedy were engaged in an amicable exchange of letters (which make reference to lunches together as well, as both were then based in New York). In one of the letters Kennedy wrote to Frank, “I have enjoyed immensely reading your letters.” Letter from Walter B. Kennedy to Jerome Frank (Nov. 5, 1941) at 3. They considered writing an article together for the sake of “eliminating needless word-quarrels.” Letter from Jerome Frank to Walter B. Kennedy (Nov. 6, 1941). Kennedy even drafted an outline for this article, but the article never materialized. See Walter B. Kennedy, “*Realism And/Or Scholasticism?*” (Nov. 12, 1941) (unpublished manuscript). (All materials cited in this note are available at Yale University Library, Manuscripts and Archives, Jerome New Frank Papers, Box 58, Folder 480.).

The decision and its author are interesting enough to be worthy of a closer look. The case involved a petition by one John W. Chase, a white man accused of murdering a black man, to have his trial removed from Montgomery County. Chase alleged that due to a concerted effort to vilify him, public opinion in Montgomery and neighboring counties, where black population was substantial, was set against him and for this reason he would not get a fair trial. The specific question the court had to address was the scope of discretion available to the trial court in deciding whether to remove the case: The statute in question said that a defendant “may have his trial removed to another county,” and the prosecution argued that this meant the trial court enjoyed wide discretion, which should not be interfered with, on whether to allow or refuse the motion. The Alabama Supreme Court, however, sided with the defendant.

The author of the decision was Justice Thomas Minott Peters (1810–1888), who would later serve briefly as Chief Justice of Alabama. He was a man of considerable abilities and achievements, who “distinguished himself as a lawyer, a judge, a state assemblyman, a teacher, a schoolmaster, a newspaper editor, and as a scientist with a national reputation who was elected to the American Scientific Association.”<sup>41</sup> A committed Unionist, Peters argued after the Civil War for the application of the Civil Rights Act of 1866 as a challenge to Black Codes, and even successfully defended an interracial marriage from a legal challenge.<sup>42</sup> After he was elected to the Alabama Supreme Court, Justice Peters issued a series of decisions that affirmed his opposition to the secession and his commitment to the civil rights of newly enfranchised former slaves.<sup>43</sup>

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41. Paul Horton, *Lightning Rod Scalawag: The Unlikely Political Career of Thomas Minott Peters*, 64 ALA. REV. 116, 119 (2011).

42. *Id.* at 129.

43. *See id.* at 133–35. All this apparently made Peters “one of the most hated jurists in Alabama history.” *Id.* at 116.

Justice Peters's *Chase* decision consisted of two steps. He first explained that the right to a trial heard by a "fair and impartial jury" was a fundamental right that could never be infringed. The strength of this right, he argued, affected the scope of the discretion. Consequently, Peters argued that the word "may" in the relevant statute should be read as "must," assuming the facts regarding the impediments to a fair trial are shown to be true. As something of a rhetorical flourish Justice Peters then considered the dangers of wide discretion. The full passage from which some words have already been quoted reads as follows:

The writer of this opinion has known a popular judicial officer grow quite angry with a suitor in his court, and threaten him with imprisonment, for no ostensible reason, save the fact, that he wore an overcoat made of wolf skins! Moreover, it cannot safely be denied, that mere judicial discretion is sometimes very much interfered with by prejudice, which may be swayed and controlled by the merest trifles—such as the tooth ache, the rheumatism, the gout, or a fit of indigestion, or even through the very means by which indigestion is frequently sought to be avoided.<sup>44</sup>

Peters then added:

Whatever may have been the construction of this important statute heretofore, it is *now* evidently unwise longer to keep so indispensable [sic] a right as that of "a fair and impartial trial,["] in a criminal case, under the uncertain security of a power, so uncontrollable and liable to error as mere judicial discretion—a power that may possibly be misdirected by a fit of temporary sickness, an extra mint julep, or the smell or looks of a peculiar overcoat, or things more trivial than these, which may imperil the due course of justice in the administration of the law. Trifles, however ridiculous, cease to be trifles when they potentially interfere with the safe administration of the law.<sup>45</sup>

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44. *Ex Parte Chase*, 43 Ala. 303, 310–11 (1869).

45. *Id.* at 311.

Discretion, then, was dangerous, because it is likely to lead judges to rely on their unconscious prejudices and biases. This is by now a familiar idea.<sup>46</sup>

For Frank, this was just an illustration of the fact that judges were affected by the same unconscious influences that affected everyone else; or, more simply, that judges were human.<sup>47</sup> Nevertheless, Frank did not follow Justice Peters's reasoning all the way through. Frank thought the discretionary element in adjudication was ineliminable and therefore it was better openly disclosed and discussed than concealed and ignored. And like many other legal realists, he thought that some uncertainty in the law was positive as it gave the law its vitality and ability to adapt to changing circumstances.<sup>48</sup> But it is clear why he focused on this issue more than other legal realists: Frank had a life-long obsession with trials. In his mind, other legal scholars (including most legal realists) suffered from a malady he called "appellate-court-itis," the excessive focus on appellate courts.<sup>49</sup> He thought trials were far more important than appellate decisions and deserved much greater attention than they received, not least because their outcomes were far less predictable.

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46. In this sense, the expression "what the judge had for breakfast" (without reference to the legal realists) has appeared in more recent court decisions, including one Supreme Court dissent. See *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (Breyer J., dissenting) (arguing that with indeterminate sentences "[t]he length of time a person spent in prison appeared to depend on what 'what the judge had for breakfast' on the day of sentencing."); see also *Corder v. Corder*, 34 Cal. Rptr.3d 294, 323 (Ct. App. 2005), *rev'd*, 161 P.3d 172 (Cal. 2007).

47. See Frank, *Are Judges Human?*, *supra* note 22; Frank, *supra* note 37.

48. See FRANK, *supra* note 32, at 98. For other realists expressing this view see, for example, William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948); Joseph C. Hutcheson, Jr., *The Glorious Uncertainty of Our Lady of the Law*, 23 J. AM. JUDICATURE SOC'Y 73 (1939); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 397 (1950).

49. Frank, *supra* note 34, at 23. Frank's target here is only Benjamin Cardozo. Elsewhere Frank led a more general charge against what he called "the upper court myth, the myth that upper courts are the heart of court-house government." FRANK, *supra* note 36, at 222–24.

Contrary to his image as someone who dismissed legal rules and legal reasoning, Frank insisted that they mattered a great deal.<sup>50</sup> He went so far as to say that the much-derided Langdellian method was a “signal success” with respect to teaching and preparing for appellate litigation.<sup>51</sup> By contrast, trials largely turned on the determination of facts, and facts, as Frank memorably put it, “are guesses.”<sup>52</sup> This interest in the trial may explain his willingness to discuss the gastronomical idea more openly than others. Appellate decisions are less often decided on the spot and are typically decided by a multi-member panel. These factors reduce the odds that the fleeting discomforts that afflict us all on occasion will affect the outcome of a given case.<sup>53</sup> Their potential for influence is more significant, however, in the many quick, reasons-free decisions that are part of every trial.<sup>54</sup>

Though Frank is sometimes said to have softened in his later years, especially after his appointment to the federal Court of Appeal for the Second Circuit,<sup>55</sup> his 1949 book *Courts on Trial* retains the vigor of his earlier offerings. In it, Frank returned to the topic of the hidden influences on judicial decision making and once again did not shy from

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50. See FRANK, *supra* note 36, at 196.

51. Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 22 (1951).

52. See FRANK, *supra* note 34, at 14.

53. Cf. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 35–37 (2007) (more time and written judgments can undercut intuitive judgment); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1314, 1324–27 (2008) (writing increases deliberation and undermines intuitive judgment).

54. At times Frank recognized that the “personal element” affects appellate judges as well. See Frank, *Are Judges Human?*, *supra* note 22, at 29. But it seems he acknowledged that this element is more significant in explaining the outcomes of trials. See *id.* at 29–30.

55. See Edgar Bodenheimer, *Cardozo’s Views on Law and Adjudication Revisited*, 22 U.C. DAVIS L. REV. 1095, 1117 (1989); R.H. Graveson, Book Review, 32 J. COMP. LEGIS. & INT’L L. 110, 110 (1950).

making a reference to judges' stomachs. As he put it, though "no one, except jocularly, has ever proposed explaining all or most decisions in terms of the judges' digestive disturbances,"<sup>56</sup> such effects could not be ignored. "Out of my experience as a trial lawyer," he wrote, "I can testify that a trial judge, because of overeating at lunch, may be so somnolent in the afternoon court-session that he fails to hear an important item of testimony and so disregards it when deciding the case."<sup>57</sup>

There is a further twist to the story, for the attitude toward the judge's indigestion reveals something about an important divide among the legal realists. Elsewhere, I have argued that what we now call "legal realism" consisted of two very distinct groups of scholars, who on a series of issues held very different views. One realist group was realistic in the sense that it wanted to make the academic study of law more oriented toward legal practice. It saw the real danger in what it perceived as an excessively theoretical approach to the study of law, one that did not adequately reflect law as it was found in the real world. The other realist strand wanted to push the academic study of law in the opposite direction, away from legal practice and in the direction of greater ties with the rest of the university, and especially with the natural sciences. Those who belong to this group were realist in the sense that they considered the study of law continuous with scientific realism.<sup>58</sup> Llewellyn and Frank were the most notable members of the first group, and as such were willing to say that these psychological factors were part of the law, or (if it's any different) part of legal practice.<sup>59</sup> On the other

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56. FRANK, *supra* note 32, at 162.

57. *Id.*

58. See Dan Priel, *The Return of Legal Realism*, in THE OXFORD HANDBOOK OF LEGAL HISTORY 457, 464–69 (Markus D. Dubber & Christopher Tomlins eds., 2018); see also ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 68, 195–96 (1993).

59. See Frank, *Are Judges Human?*, *supra* note 22, at 31–39; Karl N. Llewellyn, *How Appellate Courts Decide Cases* (pt. 1), 16 PA. B. ASS'N Q. 220, 227

hand, perhaps because of their resistance to the application of scientific method to the law, they did not seek to examine the matter empirically.

Because the practice-oriented realists looked at law from the perspective of the practitioner, they tended to focus on the individual case, and considered the subjective, human aspect of the law as inevitable and ineradicable. Instead of ignoring it, or futilely seeking to eliminate it, they thought lawyers should acknowledge it and to some extent even embrace it as a source of law's vitality.<sup>60</sup> The idea that judicial decisions were on occasion influenced by the judge's state of digestion fit right into this view and from this perspective may not even look like an unmitigated evil. It was a vivid illustration that law was an intuitive human art, not an exact science. The scientific realists, on the other hand, were more interested in identifying general patterns. Like the natural scientists who were their models, they wanted to discover order underneath the messiness of surface-level reality. And unlike the practice-oriented realists, they tended to think that uncertainty in the law was a hindrance to social progress.<sup>61</sup> Felix Cohen thus criticized "certain advocates of realistic jurisprudence" for their "willing[ness] to look upon decisions as simple unanalyzable products of judicial hunches or indigestion." "Law," he

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(1945).

60. See sources cited at *supra* note 48, all of which are from practice-oriented realists. This moderate embrace of uncertainty should not be mistaken for the view that judges were free to decide cases any way they wanted. Contrary to prevailing views on the realists, they believed legal doctrine was usually fairly determinate and capable of constraining judges. See Llewellyn, *supra* note 25, at 599 ("Do rules do a one hundred percent job of deciding cases with predictable certainty? They do not . . . . But what that does is only to show that one particular half-true formulation never should have had currency as being a whole truth. It does not show 'uncertainty' in the law, and in any sense of coin-flipping chanciness.").

61. See, e.g., Felix S. Cohen, Book Review, 17 A.B.A. J. 111, 112 (1931) (reviewing FRANK, *supra* note 32) ("Uncertainty . . . is adventure, but adventure is hunger and thirst and heart-ache and death. Civilization rests upon a vast, intricate complex of expectations and prophecies.").

countered, “is not a mass of unrelated decisions nor a product of judicial bellyaches.” With the right scientific methods one can discover that law was grounded in “predictable, social determinants that govern the course of judicial decision.”<sup>62</sup>

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62. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935); see also Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 261 (1950) (criticizing Beccaria’s “breakfast theory’ of judicial behavior” for failing to reveal “any correlation between bananas or dyspepsia and the law of sales”).

## III. BUT OTHERS SAID THIS BEFORE

When Frank wrote about judicial indigestion in *Courts on Trial*, he added illustrative quotations from Alexander Pope, Charles Dickens, Lord Campbell, and Michel de Montaigne, all drawing some link between adjudication and digestion.<sup>63</sup> That these remarks came mostly from non-lawyers may have served to show that lawyers, perhaps out of excessive protectiveness to the image of their profession, were hiding something that others have long known. If we follow Frank's lead and look at pre-realist writings, especially outside traditional legal sources, we find that the idea that judges' rulings may be influenced by what they ate is older than the legal realists. In nineteenth-century bar journals there were multiple complaints about how a judge's disposition, including the state of his digestion, affected a convicted criminal's punishment.<sup>64</sup> The idea was seemingly familiar enough that as early as the late nineteenth century one finds casual references to it in newspapers. For example, in 1899 a Minnesota newspaper reported on a lecture by a pastor named Samuel G. Smith, in which he declared that "the administration of justice in the police courts depends largely upon the digestion of the judges."<sup>65</sup> A few years into the twentieth century, a letter to the editor to the *Sunday Oregonian* stated that "[t]he same Judge might, in accordance with the condition of his digestion at the time, rule favorably today and unfavorably tomorrow."<sup>66</sup> Nor was

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63. See FRANK, *supra* note 32, at 162–63.

64. See, e.g., F.M.C., *Inequality of Sentences*, 10 WEEKLY CIN. L. BULL. 27, 27 (1883) ("A bad digestion has no doubt caused many a man to spend years in the penitentiary, while a sunny disposition has allowed many an infamous rascal to escape well-deserved punishment."); *Punishment of Crime*, 1 OHIO L.J. 108, 108 (1880).

65. *Slums in Life of Cities*, ST. PAUL GLOBE, Nov. 18, 1899, at 8.

66. W.V. Lance, letter to the editor, *Dilatory Moves in Law: Some Judges' Decision Shown to Be Matters of Digestion*, SUNDAY OREGONIAN (Portland), Mar. 7, 1909, § 3 at 10. Some years later the same newspaper summarized an early empirical study on sentencing, and concluded that "the length of sentences imposed by the same judge over a period of time varied for the same offense,

this idea, as its present-day association with American legal realism would suggest, uniquely American, as one finds it in British newspapers as well.<sup>67</sup> The earliest newspaper reference to the connection between adjudication and digestion that I have been able to find appears in a news report on the oral argument in a case heard before the Court of Common Pleas in London. This litigation arose out of a contempt of court order to jail a litigant who had insulted the judge. The plaintiff then sued the judge and various court officers for trespass to the person claiming that the order was invalid. One of his lawyer's arguments in court was that the warrant was invalid because it was insufficiently specified. Among other problems, it did not explain the nature of the insult, making it impossible for a superior court to examine whether it was of a kind that warranted a contempt order. According to the report, the lawyer explained that without a clear definition of the insult, "a man's liberty might depend upon the state of a judge's digestion, and whether or not his supper on the previous night had agreed with him."<sup>68</sup> Despite this and other valiant efforts, he lost the case.<sup>69</sup>

Evidently, then, long before the legal realists, there was a kind of received wisdom among cynical (or perhaps, realistic) observers of the operation of law that personal and psychological factors affected adjudication. Probably the most prominent person before the legal realists to suggest judicial decision making was influenced by such factors, and to treat it as a serious and persistent topic for discussion, was

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depending, perhaps, upon the judge's digestion and the state of public opinion, but the variance was still greater as between jurists." *MORNING OREGONIAN* (Portland), Oct. 21, 1932, at 8.

67. See *Occasional Notes*, *PALL MALL GAZETTE* (London), Jan. 20, 1890, at 2; *Summary of News*, *MANCHESTER GUARDIAN*, June 1, 1905, at 6.

68. *Court of Common Pleas*, *MORNING CHRON.* (London), Apr. 25, 1850, at 7.

69. The decision in the case is reported in *Levy v. Moylan*, S.C. 1 L.M. & P. 307, 14 Jurist 983, 138 Eng. Rep. 78 (C.P. 1850). Though these reports all contain slightly different summaries of the oral argument, see S.C. 1 L.M. & P. at 308–11, 14 Jurist at 984, 138 Eng. Rep. at 82–84, which are all consistent with the newspaper report, none of them mentions judicial digestion.

Charlton T. Lewis (1834–1904). Lewis had a wide-ranging career as a scholar and a lawyer. He wrote a history of Germany, compiled a Latin dictionary, and in the course of his life lectured on a remarkably diverse range of topics, including mathematics, Greek, and insurance. In addition to all that, he served as counsel for the Mutual Insurance Company, and for a short time served as the managing editor of the New York *Evening Post*.<sup>70</sup> Another issue that preoccupied Lewis was prison reform, and late in his life he served as president of the New York State Prison Association. In this capacity he gave a lecture entitled “The Principles Underlying the Problems of Crime,” which according to a contemporaneous newspaper report criticized the wide variance in punishment for a similar crime in the different states, as well as within a single state: “You have but to look at the sentences inflicted by the different judges of this city for similar offences [sic] to see how far [the] administration [of justice] in one State attains its ends. The term of imprisonment which is fixed for a particular convict depends far more upon the temper and digestion of the judge than upon considerations of vital justice.”<sup>71</sup> A few weeks later, a brief note with an identical title and with Lewis’s byline, appeared in some regional newspapers (see Figure 1).<sup>72</sup>

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70. The information in the text is based on *Charlton T. Lewis Dead*, SUN (New York), May 27, 1904, at 3; *C.T. Lewis Dead*, N.Y. TRIB., May 27, 1904, at 9; *Charlton Thomas Lewis*, in OBITUARY RECORD OF GRADUATES OF YALE UNIVERSITY (5th ser.) 324 (1904).

71. See *Justice to Criminals*, N.Y. TRIB., July 19, 1902, at 5.

72. See Charlton T. Lewis, *Justice to Criminals*, RIVER PRESS (Fort Benton), Sep. 3, 1902, at 8; BISBEE DAILY REV., Sep. 6, 1902, at 5.

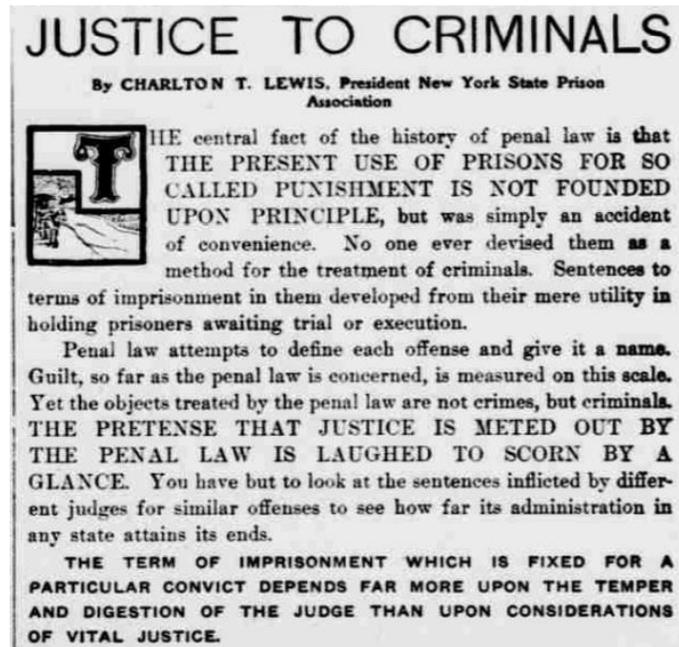


Figure 1: Charlton Lewis on criminal justice reform, *Bisbee Daily Review* (Sep. 6, 1902).

I have not been able to locate the full text of this address either as a published article, or among Lewis's archived papers which are now kept at Yale University. Many of his published lectures from the same period convey a very similar message, although none mentions the judge's digestion.<sup>73</sup> For example, in a 1904 address before the Annual Congress of the National Prison Association, Lewis contended that "[c]onscientious, careful and humane as judges almost always are in performing this terrible duty, no one can attend our criminal courts without observing the

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73. Charlton Lewis, like the scientific legal realists a generation later, was committed to the application of scientific method to legal reform on the basis of welfarist principles. See Lewis, *Principles*, *infra* note 74, at 77; see also *The Reform of Penal Law*, N.Y. TIMES, May 16, 1903, at 5.

multitudes of instances in which sentences are passed of surprising severity or mildness, because of some characteristic or even some passing mood of the judge himself.”<sup>74</sup> Though the sentiment is the same, it is possible that the reference to the state of a judge’s digestion was added extemporaneously.

All these references to the idea outside academic writing explain why when a few scholars finally decided to study empirically the question of divergence among judges in punishment, a colleague told them the study was pointless, because “everyone knew that what the judge had for breakfast frequently determined the length or kind of sentence he gave.”<sup>75</sup> Exploring the idea was not worth the

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74. Charlton T. Lewis, *False Sentiment the Bane of Penal Law*, in PROCEEDINGS OF THE ANNUAL CONGRESS OF THE NATIONAL PRISON ASSOCIATION OF THE UNITED STATES 155, 159 (1904). For other expressions of the same idea see Charlton T. Lewis, *Annual Report of the Executive Committee*, in FIFTY-NINTH ANNUAL REPORT OF THE PRISON ASSOCIATION OF NEW YORK 11, 12 (1904) (criticizing the “inequality of sentences arising from differences in the views and disposition of judges.”); Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 18 (1899) (retributive justice “requires of every criminal judge an utter impossibility, and results in gross and startling inequalities whenever an attempt is made to apply it.”); Charlton T. Lewis, *The Interest of Society in Penal Reform*, at 2–3 (undated) (available at Yale University Library, Manuscripts and Archives, Charlton T. Lewis Papers, Series I, Box 2, Folder 33); cf. Charlton T. Lewis, *Principles of Reform in Penal Law*, 21 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 81–82 (1903) (noting differences in maximum penalties of similar crimes) [hereinafter Lewis, *Principles*]; *Calls Prisons Crime Schools*, N.Y. TRIB., Apr. 15, 1901, at 2 (reporting on an address by Charlton Lewis on penal law reform). It is interesting that Lewis advocated for indeterminate sentences, because he thought they removed the element of judicial arbitrariness from sentencing and put “the key of his prison in [the prisoner’s] pocket.” Lewis, *The Indeterminate Sentence*, *supra*, at 19; see also *Ohio Judges Denounce Repeal of the Indeterminate Sentence*, DAYTON DAILY NEWS, Feb. 28, 1915, at 8 (quoting appellate judge Charles E. Chittenden saying that “[t]he length of a prisoner’s term should rest with an intelligent person at the prison who is able to say whether sufficient corrective measures have been exercised . . . . The term should not depend on what the judge had for breakfast.”). Contrast this with Justice Breyer who used the “what the judge had for breakfast” trope for the exact opposite sentiment. See his words quoted in *supra* note 46.

75. Frederick J. Gaudet et al., *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 811, 812 (1933). The conclusion of this early study was that sentencing outcomes are actually

bother, not because it was too heretical, but because it was too obvious.

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“fairly well determined” by factors to which the judge was exposed before becoming a judge. *Id.* at 814.

## IV. LEGAL REALISM NOW

What are we to make of all this? For some, the information in Part III may be yet another illustration of the fact that the legal realists were less original and less important than they have been made out to be.<sup>76</sup> For my part, I think some legal realists' willingness to take the idea seriously, to consider the question of judicial decision making as a worthy subject of study and not a mere topic for off-the-record remarks, is enough to explain part of the realists' lasting influence. In the end, however, none of the realists ever suggested that adjudication is primarily, let alone exclusively, determined by judges' passing ailments. And none of the realists, of whatever stripe, ever put the question to any kind of empirical examination. This may be because, while not dismissing it, they treated it more as a humorous way of conveying the broader point, that the personality of the judge affects the outcome of cases. But it is possible that when they encountered what we now know was a nineteenth-century expression, they (like most of us today) missed the full significance it used to have a few generations before.

As historians now tell us, nineteenth-century writers often placed the stomach at the center of human health and drew direct links between gastric and mental health.<sup>77</sup> "Considering the enormous influence the human stomach has exercised on the history of world and of individuals," as one book put it without a hint of irony, "it is astonishing that people are so little careful how they treat it, and what they

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76. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 67–90 (2010) (arguing that many of the ideas attributed to the legal realists predate them).

77. See IAN MILLER, *A MODERN HISTORY OF THE STOMACH: GASTRIC ILLNESS, MEDICINE AND BRITISH SOCIETY 1800–1950*, at 10–25 (2011); Emilie Taylor-Brown, *Being "Hangry": Gastrointestinal Health and Emotional Well-Being in the Long Nineteenth Century*, in *GUT FEELING AND DIGESTIVE HEALTH IN NINETEENTH-CENTURY LITERATURE, HISTORY AND CULTURE* 109 (Manon Mathias & Alison M. Moore ed., 2018) [hereinafter *GUT FEELING*]; Steven Shapin, *Gutted*, *LONDON REV. BOOKS*, June 30, 2011, at 15 (reviewing MILLER, *supra*).

put into it.”<sup>78</sup> Another book noted that the “mental faculties always suffer” as a result of various stomach ailments, noting specifically that they lead to a “cynical and fault-finding spirit.”<sup>79</sup> Books from earlier in the nineteenth century went even further, one going so far as to assert that seven-eighths of human illnesses, including insanity, originate in indigestion.<sup>80</sup> Against this background to say that the outcome of a case, or the severity of punishment, depends on a judge’s digestion was not simply an amusing way of saying that the outcomes of cases were unpredictable and depended on more than legal rules. It may have been taken more literally, meaning that a judge’s personality or mental health affect the judicial decisions. If this is true, it is possible that the two expressions we take to be largely interchangeable (what the judge had for breakfast, and references to the state of the judge’s digestion) may have been understood differently in the nineteenth century. The state of one’s digestion both reflected and influenced who one was.<sup>81</sup> The transient influence of a particular meal is a different thing.

By the 1920s, when the legal realists began gaining prominence, the stomach was losing its status as the site and source of humans’ mental health. By then a host of new psychological theories vied for lawyers’ attention. For some of the scientific legal realists it was behaviorism, with its focus on observation and precise measurement, that proved attractive;<sup>82</sup> for Frank, whose outlook was more humanistic,

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78. JOHN H. CLARKE, *INDIGESTION: ITS CAUSES AND CURE*, at v (London, James Epps & Co. 1888).

79. ADOLPHUS E. BRIDGER, *THE DEMON OF DYSPEPSIA OR DIGESTION PERFECT AND IMPERFECT* 127 (London, Swan Sonnenschein, Lowery & Co. 1888).

80. See THOMAS J. GRAHAM, *A TREATISE ON INDIGESTION: WITH OBSERVATIONS ON SOME PAINFUL COMPLAINTS CONSEQUENT ON INDIGESTION, ESPECIALLY NERVOUS AFFECTIONS* 183 (London, Simpkin and Marshall, 4th ed. 1838).

81. See Steven Shapin, ‘*You Are What You Eat*’: *Historical Changes in Ideas about Food and Identity*, 87 *HIST. RES.* 377 (2014).

82. See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457, 475 (1924) (“we as lawyers, like the physical scientists,

Freudian ideas were the route to greater understanding.<sup>83</sup> All that remained of the concern over a judge's digestion was a little joke.

Both behaviorism and psychoanalysis are now largely historical curiosities. These days lawyers turn to cognitive and brain science for insights on the human mind. And in an ironic turn of history, thanks to this closer attention to the brain, the stomach has made something of a comeback. One strand of this old-new idea is now called "the gut-brain axis," and it has been the subject of "an explosion of scientific research" in recent years.<sup>84</sup> This research has shown surprising relationships, still not fully understood, between the state of the human digestive system, as well as the microbiome that lives in it, and cognitive and emotional health.<sup>85</sup>

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are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms, or planets, however, we are dealing with the behavior of human beings."); Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 609-10 (1923); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 76 (1928).

83. See FRANK, *supra* note 32, at 18 ("To the child the father is the Infallible Judge . . . The Law . . . inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge."). Though passages such as this explain the book's notoriety, they are far less significant than often assumed for the book's overall argument. For a more direct attempt to apply psychoanalysis to the law see Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918). It is notable that Frank criticized Schroeder for thinking that with the aid of psychology, discovering the hidden causes of legal decisions would be easy. See FRANK, *supra* note 32, at 113-15.

84. See Manon Mathias & Alison M. Moore, *The Gut Feelings of Medical Culture*, in GUT FEELING, *supra* note 77, at 1, 2.

85. See generally EMERAN MAYER, THE MIND-GUT CONNECTION: HOW THE HIDDEN CONVERSATION WITHIN OUR BODIES IMPACTS OUR MOOD, OUR CHOICES, AND OUR OVERALL HEALTH (2016); Emeran A. Mayer, *Gut Feelings: The Emerging Biology of Gut-Brain Communication*, 12 NATURE REV. NEUROSCIENCE 453 (2011). The new research suggests there may be some basis for "gut feeling" decision making. See *id.* at 461.

A different strand of research grows out of cognitive psychology's obsession with decision making. If much of the first generation of decision-making studies focused on the influence of cognitive biases and heuristics that most humans are prone to,<sup>86</sup> newer research pays more attention to the impact of environmental conditions on decisions. Studies exploring this question have shown that hunger and other kinds of physical discomfort affect cognitive abilities and decision making.<sup>87</sup> One recent study that generated considerable attention and is particularly pertinent to this Essay picked up the examination of the influence of judicial digestion where the realists left it. It examined the decisions of a parole board in Israel and found that prisoners whose case was heard early in the morning were more likely to have their petition granted than those whose cases were heard just before lunch. The board became sympathetic again after the lunch break with rates of release declining again afterwards, leading the study's authors to conclude that hunger and tiredness were the most likely explanation of their findings.<sup>88</sup> These conclusions remain controversial, as others suggested alternative explanations for these findings, including the impact of legal representation or the possibility that the cases were not heard in random order.<sup>89</sup>

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86. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2012).

87. See ROY Y. BAUMEISTER & JOHN TIERNEY, WILLPOWER: REDISCOVERING THE GREATEST HUMAN STRENGTH 22–23, 225–26 (2011) (hunger diminishes willpower); SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 5–8 (2013) (extreme hunger affecting interests and cognitive abilities); cf. George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 272 (1996) (visceral factors, including hunger, affect behavior in ways that cannot be explained in terms of standard decision models). It is worth noting that the judge mentioned by La Mettrie behaved in the opposite way, being harsher when sated. See *supra* note 37 and accompanying text.

88. See Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (2011).

89. See Keren Weinshall-Margel & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions*, 108 PROC. NAT'L ACAD. SCI. E833 (2011); but see Shai Danziger et al., *Reply to Weinshall-Margel and Shapard: Extraneous Factors in Judicial Decisions Persist*, 108 PROC. NAT'L ACAD. SCI. E834 (2011) (reaffirming

A controlled experimental setting, despite its limitations, might shed further light on the question. To test it, subjects would be given the task of adjudicating an identical sequence of cases over several hours. The cases would either be based exclusively on written materials or on videotaped “trial(s)” that will ensure that all subjects are given identical evidence, presented in exactly the same way. Subjects will have to decide whether to convict the defendants, and if they convict, to decide on the appropriate punishment. Some of the subjects will be given access to food throughout the process while others kept hungry. For extra flavor, one could further examine whether different kinds of food (sweet versus salty, spicy versus mild) have any discernable effect on the decision made. Until such a study is undertaken it looks like we are in the same place Llewellyn was in when writing in 1940—with a plausible hypothesis, but no decisive answer.

As for historians, they may have another question in store. The April and May 1914 issues of several Christian magazines carried a short advertisement that looks at first like a genuine news report (see

Figure 2). This early example of native advertising tells of an unnamed member of New York’s state Prison Commission who is “reported to have said” in a public address that “[t]he whole system of sentencing is absurd. The length of a man’s sentence sometimes depends upon the judge’s digestion.”<sup>90</sup> The copywriter did not find this

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original conclusions).

90. *Judges and Digestion*, 89 CHRISTIAN ADVOC. 551 (1914); 109 CHURCHMAN 517 (1914); 99 CONGREGATIONALIST & CHRISTIAN WORLD 538 (1914); 45 CONTINENT 521 (1914); 20 ASSEMBLY HERALD 285 (1914). Though not identified in the ad, the reference is to Thomas Mott Osborne, who at the time was chair of the New York State Commission on Prison Reform. See *Digestion Factor in Prison Terms, Malefactors Hear*, BUFF. COURIER, Mar. 2, 1914, at 7, according to which Osborne’s view was that “[t]he whole system of sentencing is absurd. The length of a man’s sentence sometimes depends upon the judge’s digestion.” These are the exact words attributed to the prison commissioner in the ad. Like Lewis before him, Osborne advocated the indeterminate sentence as a solution to this problem, and as an incentive for rehabilitation. See *id.*

suggestion too alarming. After all, “[j]udges are only human beings,” and there is no doubt that a “disordered or impaired digestion” will get in the way of “thinking clearly, fairly, judiciously.”<sup>91</sup> But the ad went on to suggest a more intriguing link between indigestion and the law: “it is a fact that a well-balanced ration, such as shredded wheat biscuit, with fresh fruits, develops an evenness of disposition and a vigor and equilibrium in the bodily functions.” The wrong kind of food, one with “an excess of proteid,” can lead to “the accumulation of toxins in the body.” Persist with such a diet, and the body will eventually not be able to rid itself of this “poison.” The ad remains conveniently non-committal on the question whether the “more heinous crimes can be traced to indigestion,”<sup>92</sup> but this suggestion is enough for students of gastro-juridical history to wonder whether it was here that the Twinkie defense was born.

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91. *Judges and Digestion*, 89 CHRISTIAN ADVOC. 551 (1914).

92. *Id.*

## JUDGES AND DIGESTION

### A Prominent Prison Reformer Declares that Many Prison Sentences are the Results of Bad Digestions

A well-known member of the State Prison Commission of New York, in a recent address in Buffalo, is reported to have said: "The whole system of sentencing is absurd. The length of a man's sentence sometimes depends upon the Judge's digestion."

There may be some difference of opinion as to the correctness of this assertion when applied to Judges, but if this prison reformer had gone a little further and declared that many crimes may be traced to bad digestion he would have stated a truth universally recognized and upon which there is little room for controversy. Of course Judges are only human beings and to say that their dispositions are sometimes affected by their digestions is simply another way of affirming the fact that they are human. No man who has disordered or impaired digestion is capable of thinking clearly, fairly, judiciously.

So far as crimes are concerned, it would not be possible to compile statistics showing the intimate relation between crime and indigestion. Indigestion disturbs mental equilibrium, poisons the blood and leads to acts which could never be committed by a man whose digestive powers are in good working order. A quarrelsome temperament is aggravated and quite often developed by an excess of high proteid foods.

Whether the more heinous crimes can be traced to indigestion or not, it is a fact that a well-balanced ration, such as shredded wheat biscuit, with fresh fruits, develops an evenness of disposition and a vigor and equilibrium in the bodily functions that brings not only the greatest happiness, but the highest working efficiency. No man can work well or think well if his mind is embittered by prejudices and resentments that come from disordered digestion. Where there is an excess of proteid in the diet there is an accumulation of toxins in the body, and if this diet be persisted in there comes a time when the eliminating functions of the body refuse to throw off the poison.

In shredded wheat biscuit you have all the tissue-building elements needed by the body, prepared in such a form as to be easily and quickly digested, not only supplying nutrition to every part of the body, but keeping the bowels healthy and active. Two shredded wheat biscuits, with hot milk and a little cream, will supply all the nourishment needed for a half day's work, costs much less than meat or any other high-proteid food and will keep mind and body in top-notch working condition.—Advt.

Figure 2: One version of  
the ad mentioned in the  
text (this one from  
*The Christian Advocate*)