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***DIGESTIVE JURISPRUDENCE RESTATED:  
ON BREAKFAST AND DIGESTION AS BIAS-AROUSERS\*\****

*“Digestive Jurisprudence” is the view that judicial decisions depend on what judges had for breakfast. The view is usually associated with Frank’s version of Legal Realism. The paper shows that, disputable as it is, that view comes from the philosophical background of Peirce’s pragmatism and the legal background of Holmes’ prediction theory. Peirce’s pragmatism was an account of concepts in terms of their predictable consequences. Holmes’ prediction theory was an account of law in terms of predictions of what judges will do. And*

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*Legal Realism focused on judicial behavior as determined by various factors including, in its most extreme and provocative version, breakfast quality and digestive processes. The paper does not ascertain whether the digestive view is true (to some extent); rather, it makes the working hypothesis that breakfast quality, or digestion quality, is not a sufficient condition of a certain outcome but, most likely, a bias-arouser.*

**Key words:** *Digestive Jurisprudence. – Frank. – Holmes. – Legal Realism. – Pragmatism.*

## 1. INTRODUCTION

“Digestive jurisprudence” is the view that judicial decisions depend on what judges had for breakfast. It is understandably meant as a descriptive account of judicial decision-making, on the premise that judges are human beings subject to various influences including their digestive process.

If the focus is on the digestive process of judges, then “digestive jurisprudence” is an appropriate name; or, more specifically, “digestive realism” would refer to the movement the idea belongs to in the context of American jurisprudence in the twentieth century. If the focus is on food, instead, “gastronomical jurisprudence” would be a better descriptor. In any case, it was and still is a provocative idea, and I think we need to look at its background before we dismiss it too quickly. My suggestion is to start from philosophical pragmatism, then move to predictive accounts of law, and finally address digestive jurisprudence.

Peirce’s pragmatism is in the background of predictive accounts of law. It was a philosophical account of concepts in terms of their predictable consequences. The filiation I see is from this view (Peirce) to the prediction theory of law (Holmes) and to the view of judicial decision being determined by non-legal factors such as digestion (Legal Realism). Holmes’ account of law was in terms of predictions of what judges will do. And Legal Realism focused on judicial behavior as determined by various factors including – in its most extreme and provocative version – the quality of judicial breakfast or the quality of judicial digestion. If the digestive view is true, those who want to predict judicial behavior must take into consideration the digestive factors that contribute to it.

I will not try to ascertain whether the digestive view is true and to what extent it is so. I will try instead to state the conceptual and inferential conditions for carrying out such an ascertainment. Or, to put it differently,

what one would expect to find on the assumption that the digestive view is correct.<sup>1</sup> My main point will be that breakfast quality, or digestion quality, is not a predictor of judicial outcome but, most likely, a bias-arouser.

The paper proceeds as follows: I will sketch the philosophical background of American pragmatism taken in Peirce's seminal version (Section 2); then I will move to Holmes' prediction theory of law (Section 3), and will consider the most extreme version of Legal Realism, namely the view, usually attributed to Frank, that judicial decisions depend on what judges had for breakfast (Section 4). As a conclusion (Section 5) my restatement of the digestive jurisprudence view will look at it as an attempt to identify some bias-arousers in judicial decision-making, premised on an empirical account of the law.

That is not meant to disregard the many and significant differences between Peirce's philosophical views, Holmes' account of law, and the agenda of the American Realists. It is a way of presenting the filiation of certain ideas and discussing their most extreme offshoots.

Additionally, one should not forget that the American version of Legal Realism was not the only one: there have been forms of Legal Realism in Europe, notably Scandinavian, Italian, and French,<sup>2</sup> though this is not the place to discuss them. All my references to "Legal Realism" will be to the American movement. Another terminological caveat is needed before one goes into the argument: I will use "digestive realism" as a specification of "digestive jurisprudence", as already pointed out, and will use "digestive factors" to capture a broad category of elements affecting judicial decision, a category including not only digestive processes but also hunger.

## 2. PEIRCE'S PHILOSOPHICAL PRAGMATISM

Charles Sanders Peirce (1839–1914) was the founder of American pragmatism, whose birth is generally linked to the statement of the so-called *pragmatic maxim*. The elaboration of the maxim took place thanks to the work of Peirce within the *Metaphysical Club*, an intellectual circle active in Cambridge (Massachusetts) in the years immediately following 1870, consisting of scientists and lawyers who were brought together by a keen

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<sup>1</sup> Whether the purpose of philosophy is to make discoveries is a debatable point; certainly one of its virtues is to prefigure them, to provoke them, to let others make them, by preparing the terrain with critical analysis.

<sup>2</sup> See, in particular, Ross 1958; Olivecrona 1971; Guastini 2011; and Troper 2022.

interest in philosophy.<sup>3</sup> The pragmatic maxim and the pragmatism of which it is an expression were born, therefore, from an encounter between scientific and legal sensibilities, framed by a common philosophical reflection.

In that context, Peirce elaborated a *method* of conceptual clarification, or a logical method capable of determining the conceptual content of our claims (or the real meaning of our “conceptions”, as he put it); such a method discriminates genuine distinctions from purely verbal ones. The *pragmatic maxim* recommends the following at length (from a classical 1878 article):

Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.<sup>4</sup>

Peirce’s pragmatic maxim calls for an objective criterion of content or meaning; such practical “effects” provide the content of our conceptions. Once those effects are pointed out, one can also proceed to the empirical testing of the claims that pass the maxim’s test.

An attentive reading of the maxim involves in fact the discussion of a series of problems that we cannot address here.<sup>5</sup> Let me just anticipate that the maxim’s scope can be generalized from effects to consequences, including the expected ones that are conditional on certain happenings or operations performed on the “object of our conception”. The maxim predicts not only what will be the case, but also what *would be* the case under certain circumstances.

The maxim is applied, primarily, to concepts that express properties like fragility or hardness. To state of an object that it is fragile, is to identify certain effects that will follow certain happenings or operations performed on the object. For example: if the object is dropped, it will break. To conceive of an object as fragile is to predict that it will break if dropped, that it will not resist a certain amount of pressure, etc. And, in the subjunctive form, one can state that it would break if dropped, etc.

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<sup>3</sup> Cf. Fisch 1964 and Menand 2001. For a description of classical and contemporary pragmatism, see Haack 2006.

<sup>4</sup> CP 5.402. That is not the only version of the maxim, but this is not the proper venue to examine the relevant differences. Cf. among others CP 5.3, 5.412, 5.426–427, 5.438, 5.457, 5.464–467, 5.527–528. See Misak 2013, 29–32 and 2016, 12–17 (claiming that the maxim does not amount to a totalizing account of meaning).

<sup>5</sup> Cf. at least Almeder 1979 and Quine 1981.

As a consequence, the maxim can be applied to entire beliefs that include concepts that are so defined. Take the belief that a certain vase is fragile: if I believe that the vase is fragile, I also believe that it will break if dropped. This connects to our practical attitudes: if I do not want it to break, I will not be disposed to intentionally drop it, I will exercise due care in handling it, etc. Compare the following examples along these lines, taking into consideration the different empirical and behavioral consequences that differentiate them:

- (i) This vase is fragile.
- (ii) This rock is hard.
- (iii) That water is clean.
- (iv) That water is polluted.
- (v) Boris drank a bottle of water.
- (vi) Boris drank a bottle of vodka.
- (vii) Boris had a good digestion.
- (viii) Boris had a bad digestion.

If Boris had a bad digestion and the typical effects of this consist of his bad mood, irritability, and dismissal of requests, then I will reasonably postpone a delicate request to him; if he had a good digestion and this typically results in good mood, it will be the right time for that request. As a further example, if I believe that Boris drank a bottle of vodka, then I can anticipate some effects on his behavior and I will not be disposed to accept a ride from him in his car, something that I would have no motives to refuse if, *ceteris paribus*, he had drunk a bottle of water. If I believe that some water is polluted, I will not be disposed to drink it given the harmful effects it would have on my body. But if you want to poison the evil monarch you might want to use that water. And so on. Now, we can say that the pragmatic maxim presents these advantages:

- (1) it brings to light the operations or investigations that we must perform in order to verify or falsify our beliefs;
- (2) it distinguishes, among our beliefs, those that can be verified or falsified from those that cannot, and that thus, in spite of appearances, are devoid of real meaning;
- (3) it identifies questions that are merely verbal: if, from two beliefs, different consequences cannot be drawn, then those beliefs are equivalent;

- (4) it offers empirical and public criteria for the determination of meaning.

With reference to the second advantage, Italian pragmatists Giovanni Vailati and Mario Calderoni provided various examples of nonsense in their work “Pragmatism and the Various Ways of Saying Nothing” (1909).<sup>6</sup> They exemplified certain claims that are incapable of passing the test of the pragmatic maxim. For example, certain wild generalizations like “Everything is an illusion”. No operation or investigation can empirically fix the meaning of this by showing some publicly detectable effects of the belief that everything is an illusion. On the other hand, we can empirically test the belief that that water is polluted, and the harmful effects of pollution are the very meaning or content of it.<sup>7</sup>

There can be, of course, perplexing cases. One example are beliefs that seem senseless but produce very serious effects. Consider the belief expressed by the sentence “Westerners are infidels.” One can doubt that it passes the test of the pragmatic maxim: what are the operations or investigations that we would have to perform in order to verify or falsify it? With what empirical and public criteria can we determine its meaning? Yet it is a belief that provokes very serious practical consequences.<sup>8</sup>

Furthermore, the advantages offered by the pragmatic maxim must not cause us to overlook its ambiguities and problems. The main ambiguity of the maxim consists in the fact that there can be two readings of it:

- a) a *practical* reading, according to which meaning lies in the practical consequences of the application of a concept;
- b) an *observational* reading, according to which meaning lies in the observable consequences of the application of a concept.

Each of these readings presents specific problems. If, for example, we espouse the practical reading, then we encounter the problem of establishing the meaning of historical beliefs. In fact, what practical consequences would

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<sup>6</sup> Now Ch. 19 of Vailati 2010.

<sup>7</sup> One may ask whether the pragmatic maxim is about the consequences of a concept or the consequences of the object the concept is about. Being forced to choose, I would say the former (in an inferentialist way), but the spirit of the maxim is empirical (it recommends to link concepts and empirical or practical consequences).

<sup>8</sup> We could say that it provokes emotive reactions, though it is devoid of a cognitive, empirically detectable meaning.

historical beliefs have? What specific consequences would the belief that Brutus stabbed Caesar have on our conduct? It seems difficult to identify such consequences and, on the other hand, it seems absurd to conclude that such a belief is devoid of meaning.<sup>9</sup> Therefore, historical beliefs at least constitute a problem for the practical reading of the maxim. If, instead, we espouse its observational reading, then we encounter problems such as: How can we distinguish beliefs about creatures endowed with consciousness from those about automata? Given that Boris is our fellow creature, what does it mean to believe that he feels pain? If, in fact, the meaning of a belief lies exclusively in its observable consequences, it seems impossible to distinguish a belief about Boris' pain from one about an automaton that behaves in an identical way. Still, for our purposes, we would know that something like Boris' digestion is going to have an impact on how he will behave, on what he will decide, and so on.<sup>10</sup> So we could still appreciate the difference between (vii) and (viii) above, namely good and bad digestion.

Now, coming here, to things that interest us more closely here, we can ask whether the pragmatic maxim can be applied to *normative concepts*. This is an important and subtle question, which we will address after having delineated the legal pragmatism of Holmes.

### 3. HOLMES' LEGAL PRAGMATISM

The name of Oliver Wendell Holmes (1841–1935) stands out among the legal scholars of the *Metaphysical Club*. As is well known, his writings came to have great importance for American legal theory and philosophy, and his study of law and its history went hand in hand with his judicial activity (he later served as a Justice of the United States Supreme Court). Although Holmes never called himself a pragmatist, his work and his thought certainly reveal a pragmatist spirit in many respects.<sup>11</sup> One of his most renowned and controversial conceptions is that of *law as prophecy*, namely prophecy of what courts will do on certain conditions. What does it mean, in fact, to have a legal obligation? It means to be (likely) sanctioned by a court in case of failure to fulfill the obligation. For example, to have a debt means to

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<sup>9</sup> On this point, see Quine 1981, 156. A way out consists in reading the maxim in observational terms and making reference, counterfactually, to the experiences that one would have had in such past circumstances.

<sup>10</sup> In *Twilight of the Idols – The Four Great Errors*, 6 – Nietzsche said that good conscience might be the outcome of good digestion.

<sup>11</sup> See Haack 2005. On the legacy of Holmes cf. Grey 1989.

be (likely) sanctioned by a court if the creditor sues the debtor in order to obtain payment. Legal rights, Holmes adds, can be defined by means of the same method.

Holmes did not go as far as to claim that prophecies can be based on what judges had for breakfast. The digestive process did not enter his picture. He was concerned with the content of *legal* rights and duties. In this respect he was quite close to Peirce's concerns on conceptual clarification. But notice that one can follow Holmes' lead in a significantly different direction and be concerned with the causal factors of judicial decisions; if so, the prophecies of what courts will do could be based on non-legal factors such as digestion. If so, our story departs from the conceptual concerns of the beginnings and becomes decidedly empirical.

Holmes' conception is often named a *prediction theory of law*. In order to grasp its meaning, Holmes says, it is necessary to assume the point of view of a "bad man", who does not care about the moral value of his actions, but only about their material consequences.<sup>12</sup> This allows us to distinguish morality from law: the *consequences* of violating their precepts are different.

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>13</sup>

Legal conceptions are often confused by moral or theoretical considerations that do not touch upon the *real life* of the law.

Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to *know* what the Massachusetts or English courts are

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<sup>12</sup> "A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can" (Holmes 1897, 459).

<sup>13</sup> Holmes 1897, 459.



likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.<sup>14</sup>

Scholars of pragmatism have compared Holmes's prediction theory with Peirce's pragmatic maxim, wondering if one of the two, and which one, was influenced by the other.<sup>15</sup> Now, in my opinion, establishing the priority of one over the other is both historically difficult and of little theoretical importance. What seems to be certain is the affinity between the two. They share the basic pragmatist principle by which anyone wanting to understand the meaning of something must consider its consequences. If the constructions and distinctions of legal doctrine do not correspond to distinct practical consequences, then they are devoid of meaning. Analogously to our earlier illustrations regarding the pragmatic maxim, we can compare the following examples and consider the different consequences that distinguish the legal concepts used in them:

- (i) This is a rental contract.
- (ii) This is a contract of sale.
- (iii) Boris committed murder.
- (iv) Boris committed manslaughter.

Applying the concept of murder to a given case carries different legal consequences than those related to the concept of manslaughter. It is precisely by virtue of these different consequences that the concepts in question are different.<sup>16</sup> This seems beyond doubt; however, regardless of the underlying affinity, the prediction theory presents some specific problems that are distinct from those of the pragmatic maxim.

First of all, there is an ambiguity in the predictive theory: do the successful predictions of judicial decisions constitute our *knowledge of the law* or *the law*? Holmes's writings seem to suggest first one interpretation, then the

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<sup>14</sup> Holmes 1897, 460–461.

<sup>15</sup> Fisch 1942 maintains that philosophical pragmatism generalized certain ideas of legal pragmatism. *Contra* see Miller 1975.

<sup>16</sup> In addition to the consequences, which inferentially diversify the concepts, the antecedent circumstances to which the concepts are applicable also diversify them. See Brandom 1994 and 2000.

other.<sup>17</sup> But regardless of Holmes's intentions, the more plausible claim is certainly that knowledge of the law is constituted *inter alia* by predictions; that the law itself is constituted by a set of predictions seems rather counterintuitive.

There is indeed a serious objection to the prediction theory (if it is understood as definitional of what law is): law mainly consists of *prescriptions*, not of predictions. As is well known, if the predictive theory was meant to reduce prescriptions to predictions, it would propose something fallacious inasmuch as it is fallacious to reduce "what ought to be" to "what is", namely the normative to the factual. H.L.A. Hart in particular addressed this criticism to the predictive theory: we cannot reduce having an obligation to the prediction of punishment. Judges, in fact, when punishing a transgressor, do not determine the consequences that *follow* the antecedent circumstances, but those that *ought to follow* them: they assume the law as the guide to decision and the violation of the law as a reason to punish the transgressor.<sup>18</sup> Furthermore, the normative criticism of judicial decisions would be senseless if the law were only a matter of prediction from causal factors, and not a set of normative rules and standards of conduct. This does not rule out the possibility that digestion plays a causal role in the determination of judicial decisions, but it makes no sense to consider this as part of a conceptual account of law.

In Holmes's defense, Morton White replied that the prediction theory is not a semantic account of "law", but an empirical theory about the connection between obligation and judicial decision.<sup>19</sup> White tries to defend Holmes from the equation of obligation and prediction, placing the emphasis on the role of judicial decisions in the life of the law. If so, Holmes did not want to establish that "having an obligation" and "being punished" are synonyms (as he is often accused to have meant, in the wake of Hart's criticism); rather, his claims pointed to the empirical connection between having an obligation and being (likely) punished by a court in case of failure to fulfill the obligation.

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<sup>17</sup> On the ontological interpretation see Schauer 2009, 126 (ascribing to Holmes the idea that "the essence of law was the *prediction* of judicial reaction to some set of factual circumstances.") On the knowledge interpretation see Tuzet 2013; in a similar perspective, see Dahlman 2004.

<sup>18</sup> Hart 1994, 10–11.

<sup>19</sup> White 2004. See also Leiter 2007, 18, 60.

This is what happens in the “life of the law”, which is the expression used by Holmes himself in the well-known opening of his book on the common law: *the life of the law has not been logic, it has been experience.*<sup>20</sup>

White’s response is certainly consonant with the pragmatist spirit of Holmes, but there remains an underlying problem: can we apply the spirit of the pragmatic maxim to normative concepts and norms? The problem is that, in the observational reading, the maxim presents itself as a method of conceptual clarification, according to which the meaning of a concept lies in the empirically detectable effects that follow its application. Now, with respect to a non-normative concept like fragility, we can easily detect the effects that follow certain preceding circumstances and constitute the meaning of the concept. Is the same true with respect to normative concepts? Let us take the concept of manslaughter: the consequences that identify its content are *not* those that *follow* its application, but those that *ought to follow* it. It’s a normative, legal concept. Not a factual one. A person who commits manslaughter is not punished in a certain way in accordance with a law of nature, but they *ought to be* punished in a certain way given a legal norm.

Of course it may be the case that judicial outcomes are determined by non-legal factors, such as digestion, but in order to claim this we must have a concept of what is legal and what is not, and this concept cannot be reduced to a set of predictable effects. The digestive view has no conceptual import. Similarly, judges can be corrupted, threatened, biased; but the prediction of the decisions of such judges cannot be taken as a conceptual account of legal rights and duties.

Therefore, the problem is this: if we want to maintain the empirical approach of the maxim, then there is no way of capturing normative consequences as such. The only detectable empirical consequences are, in fact, the decisions of the courts. In this sense, Holmes was perfectly in line with the spirit of Peirce’s pragmatic maxim, but at the cost of a problematic reduction of the normative dimension of law to the factual and empirically detectable dimension of judicial decisions. If, instead, we want to fully capture such normative consequences, then we can devise a form of “conceptual pragmatism” that specifies, for each normative concept, the normative consequences that constitute its content. But this also has a price – the risk of giving up the empirical dimension of the “life of the law.”

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<sup>20</sup> Holmes 1881, 5 (ed. 1963). On the idea of experience along these lines, see Tuzet 2018.

Perhaps the above dilemma is more theoretical than practical, since legal pragmatists can do both things: (A) establish the application conditions of a concept and its normative consequences (conceptual pragmatism or inferentialism);<sup>21</sup> and (B) consider the judicial decisions about the application of a concept and make some predictions on future decisions (empirical pragmatism). In any case, I will not try to solve the dilemma in the following. I will rather consider its empirical horn and focus on legal realism and digestive jurisprudence.

#### 4. LEGAL REALISM AND DIGESTIVE JURISPRUDENCE

What if legal categories and legal doctrine are not especially effective predictors of judicial decisions? This is a genuine problem that highlights the need for empirical research to identify the true factors of judicial decisions.<sup>22</sup>

As is well known, American Legal Realism was a movement of legal scholars that flourished in the US in the 1930s. Among their fathers, the Legal Realists counted some pragmatist philosophers and some legal scholars, such as Holmes (for his prediction theory in particular) and the early Roscoe Pound (for his critique of “mechanical jurisprudence”<sup>23</sup>). The Realists focused on the process of judicial decision-making and tried to point out, in particular, the non-legal factors that determine judicial outcomes.<sup>24</sup> Such factors help observers make predictions about those outcomes.

Brian Leiter has claimed that the Realists “laid the foundation for a jurisprudence distinguished by two novel philosophical commitments: *naturalism* and *pragmatism*.”<sup>25</sup>

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<sup>21</sup> See Canale and Tuzet 2007.

<sup>22</sup> The point is well made in Schauer 2009, 127, 132ff. As examples of empirical research on the heuristics and biases of judicial decision, see Guthrie, Rachlinski, Wistrich 2001 and 2007.

<sup>23</sup> See Pound 1908.

<sup>24</sup> See Leiter 2007, 16. Cf. Haines 1922.

<sup>25</sup> Leiter 2007, 21.

According to Naturalism a satisfactory theory of adjudication must be continuous with empirical inquiry in the natural and social sciences. According to Pragmatism, a satisfactory theory of adjudication *for lawyers* must enable lawyers to predict what courts will do.<sup>26</sup>

This picture of pragmatism applied to law is disputable, since enabling lawyers to predict what courts will do<sup>27</sup> is just a part of the story. However, for Leiter the Realists did not provide a theory of law, for they were basically positivists.<sup>28</sup> Undoubtedly, the Realists provided an account of adjudication.

Now, the most extreme form of realism about adjudication states that it depends on what judges had for breakfast. It is disputed whether any of the American Realists actually claimed anything of that sort.<sup>29</sup> Sometimes Jerome Frank is charged with that extreme view, which is unsurprising given that Frank is generally considered to have been the most radical, skeptical and cynical among the Realists.<sup>30</sup> It has been said in fact that critics of American Legal Realism have promoted a “Frankification” of the movement just to make it wholly implausible and easily rebuttable.<sup>31</sup>

Dan Priel has shown that references to the digestion idea can indeed be found in the works of prominent Realists, such as Karl Llewellyn and Frank, as well as in the works of their contemporaries, both friends and foes, as well as in earlier works.<sup>32</sup> Frank, in particular, insisted on his fact-skepticism as a distinctive feature of his views: the variety of factors and biases that

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<sup>26</sup> Leiter 2007, 30–31.

<sup>27</sup> See Leiter 2007, 52. As a standard objection, see Schauer 2009, 143: “It may be important for lawyers and their clients to predict judicial decisions, but a lawyer arguing to a court can hardly adopt the posture that the law is the prediction of that court’s decisions.”

<sup>28</sup> On Leiter’s view of the Realists as positivists, and some ambiguities in Leiter’s position, see Priel 2008. Among other things, Priel (2008, 335) points out the futility of the debate over positivism (hard or soft) for pragmatists who think that theorizing should make a difference to practice (or to experience).

<sup>29</sup> But a reference to “digestive disturbances” is made in Cohen 1937, 9. Cf. Frank 1949, 161–162 and Schauer 2009, 129 (claiming also that Frank’s serious point was that “a large number of other less frivolous but still nonlegal factors typically determined judicial decisions”).

<sup>30</sup> See in particular Frank 1930 and 1949.

<sup>31</sup> See Leiter 1997, 269 (now Ch. 1 of Leiter 2007).

<sup>32</sup> Priel 2020. Additionally, Priel (2020, 928) suggests how the view might be tested with a controlled experimental setting.

influence the fact-finding process of judges and jurors (notably when confronted with conflicting testimony) makes their factual determinations hard to predict.<sup>33</sup> Digestive factors are a part of this story.

In fact, the digestive jurisprudence view has some illustrious predecessors. I will mention two of them and then discuss what follows from this view if we assume it to be true. The view has at least a couple of noble forerunners from the age of Enlightenment; one is Julien Offray de La Mettrie, the other is Cesare Beccaria.

In his work *L'homme machine* (1747) La Mettrie tells us of a Swiss judge, Mr. Steiguer from Wittighofen, who was the most upright and even indulgent of judges when fasting but was capable of hanging the innocent as well as the guilty when he had feasted.<sup>34</sup>

Surprising as it may sound, Beccaria too held a form of digestive realism in one passage of *Dei delitti e delle pene* (1764). The passage is in chapter IV (on statutory interpretation) and contends that it is extremely dangerous to let criminal judges deviate from the literal meaning of statutes and speculate about the “spirit” of the law: when they do this they become prone to the most various opinions, biases and influences, including the quality of their digestive process. The spirit of the law, in the judges’ mouth, can be the result of a good or bad digestion.<sup>35</sup>

Notice that it is not my intention to inquire whether the view of digestive realism is true or is false. This would require a highly sophisticated empirical study, which I am unable to perform. Nor will I dwell on the subtle differences between *digestive* realism (judicial decisions depend on digestive processes) and *gastronomical* or *gourmet* realism (judicial decisions depend on breakfast quality). Digestive realism writ large covers both issues. Nor will I embark on neuroscience to discover the connections between digestive processes, cerebral states and judicial decisions. My aim here is to wonder about the *consequences of that disputed view on the assumption of its being true*. What does it plausibly follow from the fact that the judge had a good breakfast? And what is the difference with a bad one? What is the conceivable process that empirical researchers should test? Notice also that

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<sup>33</sup> Cf. Frank 1930, 105–108, 133–143, 177–180; and Frank 1949 16–22, 73ff, 147ff, 181–182. Frank insists on the “personal element” of fact-finding, which is different from the contextual and background factors affecting decision (as one reviewer correctly observes).

<sup>34</sup> Now in La Mettrie 1996, 7–8. Frank 1949, 162 refers to La Mettrie’s point.

<sup>35</sup> Compare this with the 19<sup>th</sup> century judicial opinion quoted by Priel 2020, 909 (an Alabama case where the judge’s concern was the association of judicial discretion with biases triggered by “trifles”, such as indigestion).

this advice is in tune with the pragmatic maxim, for we want to conceive the consequences of certain views. And in so doing we make predictions about what will be the case if a given view is correct.

Before delving into that, let me recall a couple of assumptions (perhaps too obvious) of the digestive view. First, remember that the claim is descriptive, not normative. Digestive realism does not claim that it is good (or bad) to decide upon a good (or bad) breakfast; it simply states that judges are led to some decisions because of what they had for breakfast. More specifically, Beccaria claims that this happens when they are free to speculate about the spirit of the law, and his point is critical: he does not want judges to decide like that! The basic claim is descriptive and Beccaria develops a critical stance on this issue. Second, the descriptive claim is causal: it causally connects breakfast and decision. But the causal process is a bit more complex. It is likely to go from the quality of the breakfast to the judge's mood, and from this to the outcome of the case.

Now, what is the predicable outcome of a good breakfast, or of a good digestive process, assuming that the causal claim is true? This is a point I always found puzzling. To my knowledge, the literature on digestive realism is surprisingly silent on this.<sup>36</sup> You may wonder whether, in a criminal case, a *good* breakfast will determine a decision for the defendant. This might be the case when decision-makers feel positive about the defendant because of their breakfast. But it might also happen that a good breakfast determines a decision for the prosecution, when breakfast makes decision-makers sympathetic to it. Therefore, breakfast and digestion are insufficient to explain and predict decision.

Suppose that the judge had a large, nice and completely satisfying breakfast: they would be in a good mood, but this is insufficient to predict their decision. You need to additionally know their attitudes towards defendants and prosecutors. It might be that, when they are in a good mood, judges decide for the defendant. But it might also be that in those conditions they decide for the prosecutor. It would depend on whether they have a bias in favor of defendants, or rather in favor of prosecutors. That would explain the difference filling a crucial link in the causal connection.

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<sup>36</sup> Cf. Derham 1957, 644 and Schauer 2009, 129–131 (especially fn. 15). As an exception see Kozinski 1993 (criticizing the idea of the judge favoring the party they most identify with, or disfavoring the party they least identify with: for Kozinski the constraints on judicial decisions are too many to make that idea credible, let alone acceptable). Still, as one reviewer suggests, a “good breakfast” might be correlated with a “good outcome”, but then an account of what a “good outcome” is would be needed; similarly for a “bad breakfast”.

If that is correct, the breakfast or digestive process is not sufficient to explain and predict an outcome. *Digestive processes* (writ large) are what I propose to call *bias-arousers*, to restate the view of digestive jurisprudence: they trigger a process of bias-arousing in which decision-makers let their biases determine the outcome of the case at hand.<sup>37</sup>

To better illustrate how that works, imagine now the case of a *bad* breakfast. Suppose that the judge had a small, sad and gravely unsatisfying breakfast: they would be in a bad mood, but this is insufficient to predict their decision if you do not know their attitudes towards defendants and prosecutors. Would they decide in favor of the prosecutor? Well, if they have a general bias against prosecutors (because they think they are sadistic inquisitors), or if they have a particular bias against the prosecutor of the case (because the prosecutor is black, or Jewish, or whatever), then their bad mood would determine a decision in favor of the defendant through the arousing of that bias. On the other hand, if they have a general bias against defendants (because they think they are generally guilty and deserve the most severe sentence), or if they have a particular bias against the defendant of the case (because the defendant is black, or Catholic, or whatever), then their bad mood would determine a decision for the prosecutor through the arousing of that bias. Apparently, that was the case of Mr. Steiguer from Wittighofen.

Assuming that the descriptive causal claim of digestive realism is correct, the same would be generally true of judicial biases towards plaintiffs and defendants in civil cases. Suppose a judge has, for some reason, a bias against a mining company.<sup>38</sup> That judge is inclined to think, or act to the effect, that a mining company should (not) prevail just because it is a mining company. Digestive processes might arouse that bias. And the same would be true of jury decisions, both civil and criminal. Of course, some of the biases would be different; for instance, a bias against prosecutors would be pointless in a civil lawsuit, unless the decision-maker feels an analogy between prosecutors and plaintiffs. But the basic mechanism would be the same: digestive processes would be bias-arousers.

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<sup>37</sup> Analytically, as one reviewer observes, that may call for a distinction between “bias-arousers” and “inhibitory-control-defeaters”.

<sup>38</sup> I take the example from Schauer 2009, 131–132.



Therefore, if someone wants to ascertain the truth of digestive realism, they must inquire not only into the digestive processes of judges and jurors but also (and more importantly) into the biases that such processes arouse, and they must establish to what extent these biases remain causally inert without such digestive processes.

In short, digestive jurisprudence restated is the view that digestive processes are not sufficient to explain and predict judicial decisions but might be significant as bias-arousers.<sup>39</sup>

To capture additional factors, one can also consider the role of hunger or, more generally, of mental fatigue. An Israeli study that attracted some recent interest has it that, on sequential parole decisions, judges are statistically more inclined to favorable outcomes after a food break (late morning snack or lunch).<sup>40</sup> This calls for an explanation. One possibility is that, contrary to Mr. Steiguer from Wittighofen, food makes them less harsh and hunger makes them harsher. But one should be careful about projecting the results of a study like that to more complex litigation and decision-making. In a parole decision, judges have to establish whether the conditions for a favorable outcome are satisfied by the person (a prisoner) making the request. Here judges do not deal with different parties developing arguments and counterarguments. In a case with two parties making claims and counterclaims on probatory, interpretive and other issues, it becomes more difficult to predict what the decision will be before or after lunch. If the judge is hungry, will that determine a decision against the plaintiff in a civil case? Or a decision against the defendant? What will happen after lunch? If the judge has a bad digestion will this penalize the plaintiff or the defendant? And what will happen in a criminal case? If digestive factors (including hunger) are bias-arousers, perhaps predictions will be less uncertain.

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<sup>39</sup> In other words, digestive processes can be contributory conditions of judicial decisions. Frank (1949, 162) was aware of this: "Of course, no one, except jocularly, has ever proposed explaining all or most decisions in terms of the judges' digestive disturbances. Yet, at times, a judge's physical or emotional condition has marked effect."

<sup>40</sup> Danziger *et al.* 2011. Cf. Glöckner 2016 (claiming that the magnitude of the relevant effect is overestimated in the Israeli experiment).

Assuming to have a measurement technique, the measurement of some such biases and distortions is harder when decision has to do with complex litigation. The greater the number of claims and arguments, the less predictable the outcome. Additionally, written opinions and the public justification of decisions hardly depend on food or digestive processes.<sup>41</sup>

Two variations on the bias-arousing hypothesis can be added at this point, to make the picture richer. A possibility is that digestive factors play the same role with respect to the party which has an *argumentative burden*. The effect of this will be an acceptance of the status quo. The idea might go like this: when hungry or tired, judges have depleted mental resources and are less attentive to the arguments provided, which implies that it is harder for a party to discharge their argumentative burden. This will equally play against plaintiffs and prosecutors, which on the contrary will all be in a more favorable position after lunch. In sum, according to this hypothesis, mental fatigue generates or triggers a status quo bias (note that the Israeli experiment mentioned above, using control variables, denies other biases such as toward sex and ethnicity). But again, I suspect that this would play together with some more specific biases: if the judge has a bias against criminal defendants and the prosecutor argues shortly before lunch, we might expect that the latter will be in a more favorable position since the less attentive judge will not focus on the possible weaknesses in the argument of the prosecution. The more attentive judge, after lunch, will not miss the deficiencies in the prosecution's argument.

In a similar account, the idea would be that bad breakfast, bad digestion, or hunger can make judges less attentive to arguments that go against a *prima facie solution* of the case. Therefore, the case with a *prima facie solution* would win when the judge had a bad breakfast, bad digestion, or is hungry or tired. On the contrary, judges who had a good breakfast, good digestion, or enough food, would be more disposed to consider argumentation going against a *prima facie solution*. A remedy might be to give more food to judges, or more often, as food is an attention-arouser. Mental fatigue will be

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<sup>41</sup> Still, one can focus on predictable outcomes, in favor of Legal Realism as an empirical position. "At the core of the Realist claim is the view that judicial decisions are predictable but that the key to prediction of legal outcomes lies neither in the consultation of formal legal authorities nor in the internal understanding or self-reports of judges themselves. Rather, predicting legal outcomes is best accomplished through the enterprise of discovering through systematic empirical (and external) study just what makes a difference in deciding cases." (Schauer 2009, 134) The usual rejoinder is that when a decision has to be justified, it cannot be justified by extra-legal reasons. Then comes the Realist reply (usually attributed to Llewellyn) that for any decision there are possible interpretive canons, etc. (see Schauer 2009, 138).

minimized, but too much food will generate other problems. After a heavy lunch the party with an argumentative burden may be disfavored. This is an eventuality that Frank reported as actual in his own experience.<sup>42</sup>

If we care about the rationality and legality of judicial decisions, we should not dismiss those hypotheses too quickly, not only for the purpose of an adequate description of actual decision-making but also for the purpose of amending it by eliminating such biases and improprieties. As Frank pointed out, awareness of this works as an antiseptic. “The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices.”<sup>43</sup>

## 5. CONCLUSION

Let us take stock by recalling the episodes of our story. Peirce provided a maxim aimed at determining meaning with reference to operational conditions and practical effects. For Peirce’s pragmatic maxim, concept application results in conceivable practical effects. Holmes extended the idea to legal concepts. For Holmes’ prediction theory, the application of legal concepts consists of predictions of what the courts will do given certain conditions. In the extreme version of Legal Realism (attributed to Frank) the digestive process enters the picture, insofar as it has an explanatory and predictive role with respect to judicial decision-making. Empirical findings about judicial digestion would therefore contribute to the understanding of legal adjudication (and even of law if those findings have a role in the conceptual shaping of legal issues).

This is not to deny the differences in the episodes of this story. With Peirce the argument was conceptual, in terms of conceivable practical effects. With the digestive realists, it was empirical.

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<sup>42</sup> “Out of my own experience as a trial lawyer, 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.” (Frank 1949, 162). Additionally, Miodrag Jovanović has told me of a medieval Montenegro rule according to which witnesses had to be heard before noon, because we better function in the morning.

<sup>43</sup> Frank 1949, 414. Cf. Frank 1948, 936–943.

On the basis of this, digestive jurisprudence restated is the claim that digestive processes are not sufficient to explain and predict judicial decisions, but might be significant as bias-arousers. This claim is empirical rather than conceptual. It is a descriptive and explanatory claim about judicial decision-making. But, as I have said, it requires various conceptual refinements that differentiate it from the too quick claim that decisions depend on what judges had for breakfast.

In addition, the restated claim of digestive jurisprudence does not exclude that other factors and other biases play a role in adjudication, as Frank pointed out, among others. Historical circumstances, political preferences, religious inclinations, economic needs, psychological traits, personal experiences, etc., are all potential factors in judicial decision-making, notwithstanding the fact that they are extra-legal factors (according to a standard account of what we mean by “law”). We should not neglect them even if they are hard to identify and disentangle. And we need further empirical work to test the restated hypothesis of digestive realism.

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