

## A SHORT NOTE ON DIGESTIVE REALISM

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The most extreme form of legal realism says that judicial decisions depend on what judges had for breakfast. It is unclear whether any of the American realists really claimed anything of that sort<sup>1</sup>. Sometimes Jerome Frank is charged with that extreme view, which is not surprising given that Frank is generally considered to be the most radical, skeptical and cynic among those realists. It has been said in fact that critics of American legal realism have promoted a "Frankification" of this movement just to make it wholly implausible and easily rebuttable<sup>2</sup>.

The purpose of this short note is to remark that that view has some illustrious predecessors, and to discuss what follows from it 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.

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.

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 research I am not able to perform. Nor will I dwell on the subtle differences between *digestive* realism (judicial decisions depend on digestive processes) and *gourmet* realism (judicial decisions depend on breakfast quality). Digestive realism writ large covers both issues. Nor will I embark in neuroscience to discover the connections between digestive processes, cerebral states and judicial decisions. My aim 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?

Before going into that, let me point out a couple of preliminary things (maybe too obvious). First, remember that the claim in itself is purely descriptive: digestive realism doesn't say that it is good (or bad) to decide upon a good (or bad) breakfast; it simply says 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 doesn't want judges to decide like that! But a critical stance doesn't change the descriptive status of the basic claim. Second thing, 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 a good digestive process, assuming that the causal claim is true? This is a point I've been always puzzled about. To my knowledge, the literature on digestive realism is surprisingly silent on this. You may wonder whether, in a criminal case, a *good* breakfast will determine a decision for the defendant. Yes, it 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 them

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<sup>1</sup> But a reference to "digestive disturbances" is made by F.S. Cohen, *The Problems of a Functional Jurisprudence*, in "The Modern Law Review", vol. 1, 1937, pp. 5-26, p. 9.

<sup>2</sup> See B. Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in "Texas Law Review", vol. 76, 1997, pp. 267-315, especially p. 269 (now in his *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford University Press, Oxford, 2007, Ch. 1).

sympathetic with it. So breakfast and digestion are insufficient to explain and predict decision. Suppose that the judge had a large, nice and completely satisfying breakfast: he would be in a good mood, but this is insufficient to predict his decision. You need to know in addition his attitudes towards defendants and prosecutors. It might be that when he's in a good mood he decides for the defendant. But it might also be that in those conditions he decides for the prosecutor. It would depend on whether he has a bias in favor of defendants, or rather in favor of prosecutors. That would explain the difference filling in a crucial chain in the causal connection.

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

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: he would be in a bad mood, but this is insufficient to predict his decision if you don't know his attitudes towards defendants and prosecutors. Would he decide in favor of the prosecutor? Well, if he has a general bias against prosecutors (for he thinks they are sadistic inquisitors), or if he has a particular bias against the prosecutor of the case (for he's gay, or Jew, or whatever), his bad mood would determine a decision in favor of the defendant through the arousing of that bias. On the contrary, if he has a general bias against defendants (for he thinks they are all guilty and deserve the most severe sentence), or if he has a particular bias against the defendant of the case (because he's black, or catholic, or whatever), his bad mood would determine a decision for the prosecutor through the arousing of that bias.

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 trials. 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.

So, if someone wants to ascertain the truth of digestive realism, he 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 he must establish to what extent these biases remain causally inert without such digestive processes.