

## MINNESOTA JUDICIAL TRAINING UPDATE



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### JUDICIAL DECISION-MAKING FATIGUE Can Hunger & Fatigue Affect Judicial Fairness? YES



#### THE PROBLEM

In a perfect world judges make decisions by applying legal analysis to the facts of a case in a rational, fair and deliberate manner. But in the real world, judges, despite their best efforts, are often subject to the same foibles, biases and imperfections that affect everything humans do.

We would love to believe that a judge's rulings are based solely on rational decisions and written laws. In reality, they can be influenced by a variety of non-relevant factors that may be so subtle that they go mostly unnoticed by attorneys, the parties and most importantly judges themselves. One of those rarely discussed factors that every judge and attorney should be aware of is referred to as **JUDICIAL DECISION FATIGUE**.

#### WHAT IS JUDICIAL DECISION FATIGUE?

**Judicial Decision Fatigue** refers to the deteriorating quality of decisions made by a judge after a long session of decision-making. For instance, judges in court have been shown to make less favorable decisions later in the day than early in the day. Why? Judges, being human, were worn down by a day full of mental work. They had, as social psychologist Roy F. Baumeister states, fallen victim to decision fatigue. In other words, if judges don't learn to manage their reservoir of mental energy, they won't be able to effectively manage their judicial decisions.

That was a lesson learned from a 2011 study on extraneous factors in judicial decisions, published in the *"Proceedings of the National Academy of Sciences"* ([www.pnas.org/cgi/doi/10.1073/pnas.1018033108](http://www.pnas.org/cgi/doi/10.1073/pnas.1018033108)). Jonathan Levav of Columbia University and his colleagues analyzed 1,112 parole hearings for inmates of four Israeli prisons, made by eight experienced judges over a ten-month period. Prisoners who appeared early in the day or right after a food break received parole about 70% of the time, while those that came late in the day or long after scheduled food breaks or lunch had less than a 10% chance at landing parole. This pattern is readily evident in the following 2011 graph published in the study.

The vertical axis reflects the cases where judges granted parole. The horizontal axis shows the order in which cases were heard. Dotted lines represent the points where judges left for a morning snack and their lunch break.



### THE GRAPH IS DRAMATIC

The odds that prisoners will be successfully paroled start off fairly high at around 65% and quickly plummet to nothing over a few hours. After the judges returned from their breaks, the odds abruptly climb back up to 65%, before resuming their downward slide. These rulings were made by eight Jewish-Israeli judges (two females), with an average of 22 years of judging behind them. Their verdicts represented 40% of all parole requests in the country during the ten months. Every day, each judge considered between 14 and 35 cases. They took two food breaks (a morning snack and lunch) that divided their day into three sessions. Judges had no control over the scheduling of cases.

The study found that the three prisoners seen at the start of each “session” were more likely to be paroled than the three who are seen at the end. That was true regardless of the length of their sentence, or whether they had been incarcerated before.

There are 4 lessons that judges, attorneys (and everyone else) can learn from this study:

#### 1. All repetitive decision-making tasks drain our mental resources

When we start suffering from “choice overload” we start opting for the easiest choice. For example, when it comes to parole hearings, the default or easy choice is to deny the prisoner’s request. The more decisions a judge has made, the more drained they are, and the more likely they are to make the easy choice. Taking a break replenishes them.

#### 2. Judges are vulnerable to the same psychological biases as everyone else

Judges can deliver different rulings in similar cases while under the influence of something as trivial as a food break. Their training, experience and the weighty nature of their decisions do not insulate them from the sort of problems that plague our everyday mental abilities.

**3. Ruling on case after case can mentally wear down any judge – even the best ones**

This sort of decision fatigue routinely warps the judgment of everyone; executive and non-executive, rich and poor, etc. Yet few people (including judges) are even aware of it, and researchers are only beginning to understand why it happens and how to counteract it.

**4. You can't make decision after decision without paying a biological price**

No matter how rational and high-minded you try to be, you can't make decision after decision without paying a biological price. It's different from ordinary physical fatigue because you're not consciously aware of being low on mental energy (i.e. mentally tired). The more choices you make throughout the day, the harder each one becomes for your brain, and eventually it looks for shortcuts, usually in one of two ways.

- a. **You become reckless:** You act impulsively instead of expending the energy to first think through the consequences. (e.g. Sure, tweet that photo! What could go wrong?);
- b. **The ultimate energy saver: do nothing or opt for the easiest choice.** Instead of agonizing over decisions, you avoid or delay making the choice or you opt for the easy choice (thus avoiding the more difficult choice). Delaying a decision often creates bigger problems in the long run, but for the moment, it eases the mental strain. As you run low on mental energy you start to resist any change, any potentially risky move — like releasing a prisoner who might commit a crime. So, the mentally fatigued judge on a parole board takes the easy way out, and the prisoner keeps doing time.

**BEST JUDICIAL PRACTICE:** The main purpose for this update is to promote awareness of the increasing body of research that supports the view that all repetitive decision-making tasks drain our mental resources. Thus, when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo (whatever that may be).

- Research suggests that this tendency can be overcome by taking a break to eat a meal, or from other benefits derived from a short break, such as rest, physical movement and increased positive mood, all of which promote mental resource replenishment.
- However, because none of these studies are definitive, perhaps the best judicial practice is for each individual judge to develop a sense of how much their decisions have fatigued them and to do whatever works best for them to bolster their mental energy supplies.

**REFERENCES:** Danziger, Leva and Avnaim-Pesso. 2011. Extraneous factors in judicial decisions. PNAS <http://dx.doi.org/10.1073/pnas.1018033108>; "Willpower: Rediscovering the Greatest Human Strength," Roy F. Baumeister and John Tierney.