

Judge Hill's Rule

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Back in the 1950's I lived in Bloomington, Indiana which was then a town of 10,000 people with a university of the same size. Bloomington was the county seat and the county judge was a man named Nat U. Hill. Judge Hill had a rule that was followed in his court, and that rule required that in argument or briefing in the Monroe County Circuit Court no lawyer could cite any case or other authority that could not be found in the county law library located in the courthouse. The rule had a certain pragmatic value. Indeed, I understand that other county courts in other parts of Indiana and many parts of the United States for years followed a similar unwritten practice. In the case of the Monroe County circuit court, however, there was a certain tension. The Indiana University law library, at that time one of the most highly regarded law libraries in the midwest, was located less than a mile down the street from the Monroe County courthouse. Judge Hill didn't have a law clerk, however, and he could not be expected to run out to the University at every whipstitch in order to check on some exotic citation that a clever lawyer had come up with. And, as far as the country lawyers from the rest of the county were concerned, appearance at the University law library would have been an affront to their dignity.

I am told that on occasion Judge Hill would vary his rule,¹ but by and large all of the matters that came before the Monroe County court were decided on the basis of the Indiana Reports, the Northeastern Reporter, Burns Indiana Statutes, Corpus Juris and an assorted few other books that I cannot now remember.

Twenty five years ago I walked the mile from the town square out to the University law school and enrolled. While I was there I learned what an anathema Judge Hill's Rule was. For there in the myriad books of the law library were answers to what had seemed simple questions that transcended the Burns Indiana Statutes and the Northeastern Reports. I came to know even Corpus Juris Secundum as nothing more than a

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1. Indeed I remember one particularly stunning argument where the famous civil rights lawyer Leonard Boudin came down from New York to argue a motion to suppress evidence in the prosecution of the Young Socialist Alliance in the early 1960's. Leonard Boudin was, as expected, brilliant. What he did not expect, but soon came to know, was that the country judge before whom he was appearing had a pretty fair grasp of constitutional law himself. It was quite a show and one that left an indelible impression upon this then young lawyer.

research tool and not the source of the answers themselves. Answers were to be found through a process of legal reasoning that involved research and careful analysis of the existing case law. Law review articles that had plowed similar ground were to be consulted, as well as treatises written by eminent authorities who had spent many years thinking about the problem at hand. Once one had completed this careful research the conclusions were to be written down and drafted and redrafted and finally crafted into a written document that in itself was a free standing piece of legal art. Most of my colleagues at the University law school did not enjoy that process nearly as much as I did. Where they found pedantry I found poetry. Most of them went on to become highly successful lawyers. I became a professor.

Over the last quarter century I have had the rare opportunity to consort with some of the finest legal minds in the country. I have taught at a first rate university law school and I have practiced in front of some of the outstanding courts in the United States. I have worked with eminent lawyers trained at the finest law schools in the land. I have been challenged by students and colleagues to explore the minutia of the law and I believe I have been relatively competent in both the classroom and the courtroom.

In spite of all of that I have come in recent years to appreciate the beauty of Judge Hill's Rule. Computerized research and word processing coupled with desktop printing technologies have revolutionized the practice of law. Our access to information is orders of magnitude greater than it was only a short time ago. We have almost instantaneously available to us every decision of every court in the land and the mechanical ability to turn a brief into a book. I am not at all sure that those things have improved the quality or the administration of justice.

From the time of Blackstone until the end of the 1950's the practice of law was relatively simple and oriented toward the resolution of disputes between real clients. For example, from its beginning in 1877 until 1957 the Federal Reporter system occupies 84 feet of shelf space. From 1957 until today the Federal Reporter has more than doubled to 195 feet of girth, and the other elements of the National Reporter system have grown in similar ways. The number of pages published in the law reviews has increased dramatically, and there are horn books, practice books, treatise books, and all manner of other books dealing with every conceivable aspect of law. Most of them are instantly accessible at the touch of a button. In short, we now know more than we ever wanted to about the law, and we know it with insidious detail. For each case in point there is a counterpoint. For each permutation of a holding we can find a distinction. There is no apparent end.

These changes in the information base upon which law practice is predicated have had a dramatic impact on the way disputes are decided

in many courtrooms. A substantial percentage of modern litigation involves a highly complex processing of all of this information and a sophisticated form of argumentation based upon that information processing. The judging of such litigation involves in substantial part the management of the information processing.²

In Judge Hill's courtroom, however, the focus was not on processing disputes, but upon resolving them. The law was thought to be comparatively simple and whatever facts developed in that courtroom context dictated the outcome of the case. The poor lawyer from the outlying part of the county had as good a shot as the wealthy lawyer who resided in Bloomington. Judge Hill's Rule made the practice fair and simple in a fundamental kind of way.

I am not sure that the quality of justice that emerged from Judge Hill's courtroom was any less than the quality of justice that emerges from our information processing courtrooms of today. Indeed, as an information processing lawyer, I am relatively sure that the opposite is true. Without doubt the lawyers who practiced in Judge Hill's courtroom gave up something. They were allowed by Judge Hill's Rule to make only a limited, but credible, case. Their clients, however, gained a great deal. They had access to lawyers at a reasonable price and their disputes got resolved and put behind them. They went on with their lives without having sold the farm to pay their legal fees. They had access to justice, not just the courts.

Much modern dispute resolution theory is premised on a recognition that the quality of justice that emerged from Judge Hill's courtroom wasn't so bad after all. At least I'm sure that those who refer to arbitration, mediation, mini trials, and the like as "second class justice" never saw Judge Hill's courtroom. There is nothing second class about the speedy, inexpensive and fair resolution of conflict. Judge Hill taught us that. We just forgot the lesson.

Judge Hill's courtroom embodied the basic policies underlying the Federal Rules of Civil Procedure far better than most of our information processing courtrooms of today. The overwhelming characteristic of Judge Hill's courtroom was "the just, speedy and inexpensive determination of every action" described in Rule 1.³ The primary reason for the attainment of those lofty goals was Judge Hill's Rule. By limiting the scope and amount of information to be processed, Judge Hill's Rule allowed reason and a sense of justice to play a primary role in the

2. A kind of academic subspecialty is beginning to emerge in which particularly skilled members of law faculties have undertaken the management of enormously complex judicial matters as special masters. See, e.g., McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986)

3. FED. R. CIV. P. 1.

resolution of disputes. By the same token, the rule reduced the amount of time spent in the courtroom as well as the office, thereby greatly reducing the expense of dispute resolution.

The modern mini-trial concept is founded upon a recognition of many of the same principles that obtained in Judge Hill's courtroom. Experience with the mini-trial has taught us that complex cases can be boiled down to their essentials and tried with efficiency and dispatch if we impose an absolute limit upon pretrial proceedings and trial time. The mini-trial has also taught us that information processing lawyers can live with truncated discovery and the absence of a jury.⁴

Anyone who has endured a modern civil trial in a typical jury case must be struck by the inefficiency and waste of time that has come to be an accepted part of the process. Anyone who has participated in the pretrial aspects of a civil case is aware of the inefficiencies that abound there. One of the hallmarks of modern pretrial litigation is the fact that it is by and large managed by the lawyers who are processing the dispute without reference to any outside authority. In the ideal world, the lawyers involved in that process have a high sense of professionalism and a profound dedication to the ideals expressed in Rule 1. All too often the reality is that the process is characterized by a lack of cooperation and unconscionable delay. Indeed, one of the most remarked about characteristics of modern litigation is the degree of sloppiness and dishonor that has infected the process. Frivolous and dilatory objections to discovery have become commonplace.⁵ Misrepresentations regarding scheduling conflicts and the like are probably far more common than we can imagine. Frivolous legal argumentation is accepted, and our bloated appellate systems show only the tip of the iceberg.⁶

During the last decade we have become preoccupied with a system that determines the reasonableness of a fee by reference to the number of hours the attorney puts in the case. As a result we have seen the number of hours invested in litigation expand enormously. Indeed, from the perspective of the law school one of the most remarkable indicators of a system out of control is the assiduous seeking of newly minted litigators who are capable of billing 2500, or even 3000, hours during their introductory year by playing the information processing game. We have come to accept all of these things and have closed our eyes to a

4. The mini-trial is discussed in more detail in Woods, *The Mini Trial*, *Arizona Attorney*, Nov. 1988, p. 25 and in a great deal more detail in Green, *Recent Developments in Alternative Forms of Dispute Resolution*, 100 F.R.D. 512 (1983).

5. See, e.g., *Herbert v. Laudo*, 441 U.S. 113, 179 (1979); Brazil, *Civil Discovery: How Bad are the Problems?* 67 A.B.A.J. 450 (1981).

6. See, Hellman, *Courting Disaster* (Book Review) 39 STAN. L. REV. 297 (1986) (reviewing R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM*).

system that is approaching self-destruction. We have closed the doors of the civil justice system to the ordinary litigant in our unthinking demand to give each case all the process that is due. In so doing we have debased the currency of our profession and find ourselves despised by our former clients most of whom say they will never seek a lawyer's "help" again.⁷

I have another vision of the world, however. It is a vision that I learned in Judge Hill's courtroom before I went to law school and learned how to be an information processing lawyer. I see a modern version of Judge Hill's Rule that builds upon our experience with the mini-trial but applies across the board to disputes where the amount of money actually at stake cannot possibly justify an information processing system of dispute resolution. I see a world where lawyers try lawsuits in the old fashioned way, using their skills to illuminate dark corners of a dispute and fashion a special justice for the individual case. I wonder if the Republic would fail if we sent every case under \$100,000 to a modern version of Judge Hill's courtroom where we severely limited discovery, motion practice, time for presentation of the case and appeal. What would happen if we put lawyers back in the courtroom and took information processing out? Would the quality of our existence be severely diminished by the prospect of trying the modern civil case without the bells and whistles of modern litigation? More importantly, would the quality of justice be strained by the speedy and inexpensive resolution of ordinary disputes?⁸ I would not replace the courts which resolve large and difficult disputes. We must have courts that can handle the WPPS', the Texaco's, the Bhopals and the Manvilles. We must have courts that can deal with the special and complex problems that arise in the interface between the Constitution and the society. But those cases ought to be the special cases and the procedures adapted to their resolution peculiar to the nature of the problem to be solved.

Judge Hill's Rule was designed to keep matters simple and efficient. He understood that the marginal benefit of "total law" was, like total war, slight. Indeed, implicit in his rule was the notion that the quantity of law was in many cases inversely proportional to the quality of justice. We don't put people into intensive care for a common cold though some marginal benefit might accrue from such action. Total law might bring similar benefits though there comes a point, to borrow an observation from Mark Twain, where "the work of many antiquitarians

7. Post, *On the Popular Image of Lawyers: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379 (1987).

8. See, e.g., Greene, "Try It, Settle It or Dismiss It," FORBES, May 30, 1988, p. 266.

has thrown much darkness on the subject and, if they continue, we shall soon know nothing at all."⁹ Judge Hill was skeptical about the benefit of total law and so am I. Total war may be justified by high principle and human rights, and total adjudication should be limited to similar matters of great import. It is one thing to have a full scale jury trial with all of its modern entanglements when the issues are important matters of deep concern to the litigants. It is quite a different matter to start up the engine of litigation when the problems are mundane and predictable. Yet every day in the courtrooms of America we see such trials over bent fenders and burned garages, minor slips and simple falls, that might be avoided by some equivalent of Judge Hill's Rule. A few of the possibilities follow.

Computer technology may provide one avenue for changing the way we litigate recurring cases. By building a large enough database we are already able to predict with increasingly high levels of precision the range of possible outcomes.¹⁰ Once we are comfortable with the predictive capacity of such programs it is a small step to use that capability to increase the efficiency of the system. Let us assume that the program produces a prediction that a jury would likely award between \$25,000 and \$35,000 in a particular case with 90% certainty. If we are willing to say to the plaintiff that if your recovery is less than \$30,000 you must pay all of the defendant's expenses including attorney's fees and if your recovery is less than \$35,000 you may not recover your own costs of suit, the effect upon settlement is self-evident. Other incentive changes can be implemented such as limitation of attorney's fees beyond those for simple processing of the claim to a percentage of the amount recovered in excess of the amount that would have been awarded pursuant to the program.¹¹ Thus we might say that even if the plaintiff recovered in excess of \$35,000 that the attorney's fees would be limited to a percentage of the excess recovery. The percentage of course would likely be higher than an ordinary contingent fee, but the imposition of such a rule would recognize the reality that it is the lawyer who has superior knowledge about this particular process and would put the burden where it belongs.

Such proposals will bring forth the wrath of the militants who view total adjudication as a fundamental right even when the issue is a bent

9. The paraphrase is from memory. My apologies to Mr. Clemens.

10. At the University of Arizona Professor William Boyd and I are attempting to develop appropriate procedures for the development of such databases with the help of Larry Boyd a quantitative research methodologist.

11. Experience with this kind of a limitation has been less than satisfactory. Knopf, *"It's Indefensible to Deny Veterans Legal Counsel in Hearing Before the VA,"* L.A. Times, Metro, Pt. 2, p. 7, col. 1 (Op-Ed). See also Senate Bill 2292 discussed in BNA, Daily Report for Executives, April 26, 1988.

fender. "So what if we spend \$10,000 in fees and costs to recover \$5000 at the margin," they will say, "matters of principle are beyond value." Judge Hill would have sent those folks up the road to Chicago where total adjudication was an emerging artform.

Judges in civil law countries already have a rough version of my computer based vision. A recent article describes the so-called "Frankfurt List" which prescribes a series of percentage of cost recoveries for the various effronteries that occur to vacation travelers.¹² Thus if an unhappy German camper complains about the condition of his hotel room or bad food he is entitled to receive a damage award calculated on a percentage of the price he paid for his trip. Other "lists" deal with other problems that are brought before the civil courts. The "list" serves an important economizing function and reduces disputation. In small cases the list undoubtedly provides recompense in circumstances in which the cost of recovery under common law models would not allow any recovery at all. Small medical malpractice cases are an excellent example.¹³ Where the malpractice injury is unlikely to produce a recovery in excess of \$100,000 it is difficult to find a competent lawyer who will take the case. From the lawyer's point of view, such cases are so expensive to prepare and try that projected costs may equal or exceed the potential recovery. Such cases are also very hard to settle since the lawyers for the defendants are aware of the plaintiff's predicament.

The presence of a "list" would provide recovery at a low cost. Such lists actually exist. The Social Security Administration uses a list to calculate disability benefits.¹⁴ We have used a "list" for years with Workers Compensation. Some "no fault" plans use lists. Child support "guidelines" have also become common. The airlines pay negotiated, but structured, benefits for so-called "denied boarding" compensation. The American Society of Composers and Producers have a copyright infringement "list."

In all of the above cases courts, legislators, business persons and regulators have made the judgment that the marginal benefit of total adjudication is less than benefit of certain and simple compensation for wrongs. The systems they have set up comprise an alternative model of dispute resolution that is not unlike Judge Hill's Rule. In each case a simple economic analysis produces a common sense answer that maximizes the values implicit in any system of dispute resolution.

12. Cary, *What All Germans Take on Their Vacation: Snapshots, Sunscreen—Their Lawyer*, Wall Street Journal, February 9, 1989, at B1.

13. The problem is not limited to malpractice cases however. See *The Dog Case*, Litigation, No. 3, Spring 1984.

14. See DOBBS, *TORTS AND COMPENSATION*, p. 798, n.3-4; 20 C.F.R. 404, Appendix 1 to Subpart P (1989).

We are in danger of losing the judicial system that provides us with protection of our rights and compensates us for our losses. We have created that danger by forgetting that simplicity can be a virtue and that common sense is not nonsense. That was Judge Hill's belief and it is mine.