

REPEALING THE LAW OF UNINTENDED CONSEQUENCES? COMMENT ON WALKER (2)

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I. INTRODUCTION

IT is easy to express assent to the general thrust of Laurens Walker's article in this issue, in which he calls for avoiding unpleasant surprises in civil procedure rule making by basing rule changes on better information and more empirical study.¹ The very appeal of his proposal, however, can make it all the more important to think discriminatingly about how broadly it should apply and what costs as well as benefits it may entail. I take Walker to be saying that, with limited exceptions for amendments that merely clarify meaning or conform with judicial decisions,² changes in the Federal Rules of Civil Procedure should be made only on the basis of data and analysis meeting scientific criteria for prediction of likely effects of the changes: "[E]ven a minimal standard should require that the underlying prediction be *plausibly* true. . . . [M]inimal criteria for civil rule making should require a generalization in acceptable form, yielding a validly deduced prediction, and the generalization should be based on observations that are numerous, involve dissimilar instances, and lead to narrow generalizations. Also, these observations should be consistent with existing knowledge."³

Walker views this as a "modest standard" entailing risk that must be

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¹ See Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 *J. Legal Stud.* 569 (1994).

² See *id.* at 580 n.53.

³ *Id.* at 580 (emphasis in original).

accepted but insists, "A prediction failing to meet these criteria is not a sufficient basis for civil rule change, at least not a sufficient basis for a change that does not invite unintended consequences."⁴ Implying that his standard is not too rigorous, he emphasizes that "comparatively easy observation might yield a plausible generalization, which would . . . offer an acceptable basis for rule change."⁵ He illustrates with a reference to systematically observing experience under local rules that paralleled the 1993 Civil Rule discovery changes requiring limited automatic disclosure,⁶ to develop an "adequate generalization" based on observation of sufficiently numerous cases "involving dissimilar subject matters," and "comparing the results with existing knowledge about discovery."⁷ His criteria, Walker suggests, "would require only a scientifically plausible basis for rule making."⁸

So long as the reliable predictive information that is available or generated does not overwhelm rule makers' capacity to deal with it, by itself having more and better such information can only be a good thing. Nothing I am about to say should be taken as being against taking advantage of useful knowledge. Walker's call for almost no federal civil rule changes without scientifically plausible predictive information, though, has a troubling sweep that may take inadequate account of just how broadly his requirement should apply and also of costs that it might entail. His exceptions, for rule amendments that do no more than clarify meaning or conform to judicial decisions, appropriately recognize that his criteria should not apply to *all* types of rule changes; I will suggest that there are more such types than he acknowledges. It seems especially important to hone the applicability of his criteria because no logic confines them to federal court civil rule making; his arguments apply at least as strongly to other procedural rules, procedural enactments by Congress, state rule making, and presumably much substantive law.

Furthermore, Walker's call for, in effect, predictive cost-benefit analysis of contemplated rule changes should apply to his proposal itself. Not only would generating and assimilating data about likely effects of rule changes cost money and take time in itself, especially as serious rule changes are often multifaceted and might need studies of several aspects;

⁴ *Id.*

⁵ *Id.* at 581.

⁶ See proposed Federal Rule of Civil Procedure 26(a), 146 F.R.D. 401, 431-36 (1993) ("1993 Amendments"). The proposed changes took effect December 1, 1993.

⁷ Walker, *supra* note 1, at 581 (footnote omitted).

⁸ *Id.*

requiring such efforts before proceeding with most amendments could also delay needed changes and impose a status quo bias that might even lead to efforts at bypassing a balky process by appeals to Congress.⁹ Finally, a certain humility about how much to expect of improved empirical information in the rules process seems in order. Interest groups might gain rather than lose influence through their ability to try satisfying a requirement of predictive data (and to complicate the process with suspect data), and even careful and impartial predictive efforts may sometimes fall well short of repealing the law of unintended consequences. If we can often do no more than improve partially on flying by the seats of our pants and skirts, we should not insist too rigidly on precise navigation before we ever take off.

II. TOO MUCH OF A GOOD THING? TYPES OF RULE CHANGES AND THE APPLICABILITY OF THE WALKER PROPOSAL

It may not be feasible to classify rule changes precisely, but amendments to the Federal Rules of Civil Procedure come in several rough varieties. To some significant types, Walker's requirements of scientific prediction probably should not apply at all. He acknowledges two such categories—rule changes that “involve only the clarification of meaning or conformation with judicial decisions.”¹⁰ Each of these exceptions is, I suggest, one instance of a broader category to which his proposal should not apply. Changes clarifying meaning are a subset of the larger set of essentially stylistic amendments, a prime example of which—but one not aimed at clarifying meaning—was the elimination of gender-specific language from many rules in 1987.¹¹ Other stylistic changes that modernize or otherwise fine-tune, without necessarily clarifying, often accompany amendments making changes in the substance of the Rules.¹² Walker's requirements could presumably apply at most to the substantive aspects. Still, of course, good sense would call for looking at available experience under any existing rules whose phrasing paralleled the one under consideration, to see whether case law or commentary reflected

⁹ See Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker (1)*, 23 *J. Legal Stud.* 595, 612–13 (1994).

¹⁰ Walker, *supra* note 1, at 580 n.53.

¹¹ See *Amendments to Federal Rules of Civil Procedure*, 480 U.S. 953, 957–1022 (1987).

¹² See, for example, *Amendments to Federal Rules of Civil Procedure*, 134 F.R.D. 525, 682 (1991) (“1991 Amendments”) (replacing “prayed for” with “requested” in connection with new trial alternatives, in general rewriting of Rule 50(b) on renewal of motion for judgment as a matter of law after trial).

difficulties in interpretation that might suggest different phrasing or even abandoning a contemplated change.

Similarly, conforming the Rules to case law is one but not the only form of response to decisional developments that should go through the rules process without having to wait for scientific prediction. To illustrate first the conforming to which Walker refers, a recent instance is the 1991 addition to Rule 48 of a requirement that juries be seated with at least six jurors.¹³ The Advisory Committee's explanatory note reasoned by analogy from a Supreme Court decision in a state criminal case, which cast doubt on the constitutionality of smaller federal civil juries.¹⁴

Yet recent and earlier examples suggest that *conforming* to decisional developments is far from the only way the rules process can respond to case law without making changes of a sort calling for predictive studies. Most starkly, a 1991 amendment to Rule 15(c)¹⁵ was intended to *reverse* the result of a widely lamented 1986 Supreme Court interpretation of the earlier text of the Rule.¹⁶ The Court had held in *Schiavone v. Fortune*¹⁷ that a misnamed defendant who received notice of an action, and knew of the naming mistake, within the period allowed for service after running of the statute of limitations could nevertheless take advantage of the bar of the statute. The Court so ruled even though an action against a *rightly* named defendant would be timely if service of the complaint, albeit after the running of the limitations period, came within the time allowed for service under Rule 4. The reason given for the 1991 rule changes was "to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense."¹⁸ For amendments of such a technical nature, even though they are more than clarifying and overrule rather than conform to decisional law, it is hard to see what would be gained from predictive effect studies. Effort in connection with such changes seems better directed toward evaluating the lessons of case law and commentary, careful drafting, and eliciting comment (especially from those who will actually implement the rule—practitioners, judges, and court administrators) on likely workings of proposed drafts.

¹³ See *id.* at 678.

¹⁴ See *id.* at 678–79 ("It appears that the minimum size of a jury consistent with the Seventh Amendment is six. Cf. *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law).").

¹⁵ 1991 Amendments, *supra* note 12, 134 F.R.D. at 635–36.

¹⁶ See *id.* at 637 (para. (c)(3) of Rule 15 "has been revised to change the result in *Schiavone v. Fortune*," 477 U.S. 21 (1986)).

¹⁷ 477 U.S. 21 (1986).

¹⁸ 1991 Amendments, *supra* note 12, 134 F.R.D. at 637.

An earlier example of overcoming rather than conforming to decisional law was the 1963 amendment to Rule 56(e) on opposition to summary judgment motions.¹⁹ The amendment added language to force the maverick Third Circuit back into the herd after it had repeatedly allowed mere well-pleaded averments to defeat a summary judgment motion adequately supported by admissible material beyond the pleadings.²⁰ Other circuits had seemed to find the unamended rule amply clear,²¹ and this amendment exemplifies the possibility of rule change to eliminate lower court conflict as another type of change that might not call for predictive studies meeting Walker's criteria.

The 1963 summary judgment amendment illustrates a broader point about types of rule changes, suggesting further significant kinds that should not automatically have to clear Walker's hurdles. A Federal Rule exists in multiple settings—the context of the overall scheme of the Rules themselves; the framework of related law in federal statutes, judicial decisions, and sometimes state or foreign law; and the general social setting with its evolving norms and practices and its often especially rapidly developing communications and data-processing technologies. Rule changes may be needed for the doctrinal coherence of the procedural system or to adjust to circumstances or developments in the legal or social context. Changes made for such reasons would not automatically require the level of predictive study called for in the Walker proposal; one should ask separately whether the change is intended to affect incentives or could otherwise have significant uncertain behavioral effects, so as perhaps to warrant the Walker treatment. The Advisory Committee explained of the 1963 summary judgment amendment, for example: “The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule.”²² To be sure, no one should ignore the lessons of experience in other circuits when contemplating such a change aimed at stamping out deviant practice. At the same time, a rule amendment so oriented toward internal coherence hardly seems to call for “a generalization in acceptable form, yielding a validly deduced prediction,” with the generalization “based

¹⁹ Amendments to Rules of Civil Procedure, 31 F.R.D. 587, 603–4 (1963) (“1963 Amendments”).

²⁰ See *id.* at 648 (Advisory Committee Note).

²¹ See 6 Part 2 Moore's Federal Practice ¶ 56.22[2], at 56-768 (2d ed. 1993).

²² Advisory Committee's Note, in 1963 Amendments, *supra* note 19, 31 F.R.D. at 648.

on observations that are numerous, involve dissimilar instances, and lead to narrow generalizations” and with the observations also supposed to be “consistent with existing knowledge.”²³

Moving from the Rules’ internal coherence to their fit with the legal surroundings, an example of a rule change to improve such concordance is the addition of Rule 15(c)(1) in 1991. This new subsection allows relation back of a pleading amendment when “permitted by the law that provides the statute of limitations applicable to the action.”²⁴ Aimed mainly at avoiding possible conflict in state law cases between specific, restrictive Federal Rule language and liberal state relation back practice,²⁵ the new provision is an appropriate adjustment of a federal procedural rule to the surrounding framework of state and federal law. It did not even respond to significant changes but rather recognized a flaw in the Rules’ prior adaptation to their setting.²⁶ For the same reason that conforming to decisional developments may call for no application of the Walker criteria,²⁷ such improvements in the Rules’ fit with another aspect of the legal context could proceed without predictive effect studies as well.²⁸

The final type of adaptation to context to which I have referred is that involving social or technological developments. It may be only a laudable enthusiasm for his generally worthy proposal that has kept Walker from articulating an exception to keep his criteria from applying to some such rule changes, for I doubt that he would require unlimbering his apparatus

²³ Walker, *supra* note 1, at 580.

²⁴ Fed. R. Civ. P. 15(c)(1).

²⁵ Compare *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974) (when the language of Rule 15(c) forbade relation back allowed by state law, the Rule should not be applied to defeat state substantive rights).

²⁶ “Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.” Committee Note, in 1991 Amendments, *supra* note 12, 134 F.R.D. at 637.

²⁷ See Walker, *supra* note 1, at 580 n.53.

²⁸ Another example of such adaptation to legal context that seems to have been appropriate to make without predictive studies was the 1948 amendment to Rule 14(a) eliminating defendants’ ability to implead third parties who might be liable *directly to the plaintiff*. See Report of Proposed Amendments to Rules of Civil Procedure, 5 F.R.D. 433, 446 (1946). This direct liability impleader created tensions, both with the federal diversity jurisdiction’s complete diversity requirement if the third party was a citizen of the same state as the plaintiff, and with the substantive law of states that did not provide for contribution among joint tortfeasors. Narrow judicial interpretations to avoid these problems had rendered the provision largely ineffectual and made it clear that the original inclusion of such direct, as opposed to derivative, liability impleader had been a mistake best rectified by its simple elimination. See Thomas D. Rowe, Jr., A Comment on the Federalism of the Federal Rules, 1979 Duke L. J. 843, 850–51.

for such amendments as the one in 1991 to Rule 5(e) that allowed filing of papers with federal courts by fax.²⁹ Naturally, we need some time living with new technology before writing it into the Rules and, in particular, adequate assurance of its reliability. In this and similar instances, though, anecdote and shared experience seem enough, especially if some courts have tried the practice already, to permit amendment without predictive study, generalization, and all.³⁰

I have thus far argued not against Walker's criteria (nor shall I) but for a considerable lengthening of his short list of exceptions to their applicability. These exceptions should include essentially stylistic rule changes be they clarifying or otherwise, plus many adaptations to sociolegal contexts—whether they involve conforming to court decisions, overcoming them, improving the internal consistency of the Rules, harmonizing them with external federal or state (or for that matter, foreign or international)³¹ law, or keeping abreast with social and technological developments.

There remain changes of sorts not yet captured by this list that might not call for Walker's sort of predictive effect studies. For one thing, as in the 1983 revision of Rule 16 on pretrial conferences, rule amendments sometimes list factors to guide judicial discretion³² or provide lists of optional actions that judges or parties may take.³³ Empirically based validation of overall effectiveness of pretrial conferences could be important before considerably increasing their scope and role, but the full set of Walker requirements should ordinarily not apply to individual items on

²⁹ Fed. R. Civ. P. 5(e) ("Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States.').

³⁰ Just because a contemplated rule change would take advantage of new technology does not mean it should always be exempt from having to satisfy Walker's criteria. The Court included in the 1993 rule changes an amendment to Rule 30(b) to allow the "party taking the deposition" to "state in the notice the method by which the testimony shall be recorded" (subject to court supervision), including videotape ("sound-and-visual"). See proposed Rule 30(b)(2), 1993 Amendments, *supra* note 6, 146 F.R.D. at 450–51. In contrast to the apparently unproblematic embrace of the fax machine, the videotaping amendment was the subject of considerable argument over its cost-effectiveness that might have justified a predictive study. See Don J. DeBenedictis, *Excuse Me, Did You Get All That? Electronic v. Shorthand Reporting in the Courtroom*, 79 A.B.A. J. 84 (May 1993). No similar controversy seemed to attend new Rule 30(b)(7), 1993 Amendments, 146 F.R.D. at 452, to allow depositions "by telephone or other remote electronic means." Travel agents may be a less influential lobby in the rules amendment process than court reporters.

³¹ See proposed Federal Rule of Civil Procedure 4(f)(1), 1993 Amendments, *supra* note 6, 146 F.R.D. at 410 (authorizing foreign service "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents").

³² See Fed. R. Civ. P. 16(a).

³³ See Fed. R. Civ. P. 16(c).

laundry lists within an amendment. In addition, after all these decades of experience under the Federal Rules, people can still come up with sheer good ideas that look highly unlikely to go awry (Murphy's Law, though, reminds us to be circumspect here) and that do not lend themselves to predictive testing. I have in mind the 1991 "flex-jury" innovation of Civil Rule 48: "The court shall seat a jury of not fewer than six and not more than twelve and all jurors shall participate in the verdict unless excused from service by the court."³⁴ Nothing could be simpler to minimize alternate and incapacitated juror problems, and local experimentation with closely parallel rules does not seem an essential prerequisite if account is taken of experience with jury sizes and juror dismissals.

Even innovations of some significance, then, may not call for the full-dress Walker treatment, however beneficial it can be in appropriate cases. That leads me to suggest that general applicability of his criteria, subject to limited exceptions, may not be the best approach. Instead, it seems wiser to focus on how to identify those kinds of rule changes that *are* candidates for "Walkerization." At least the largest category of such changes appears to be that of amendments aspiring to cause or likely to effect significant changes in litigant behavior by either altering incentives (as with offer of settlement rules affecting attorney fee liability) or direct regulation (such as interrogatory limits). Such amendments ordinarily aim at improvements in efficiency (namely, earlier settlements) or at reducing the effects of interparty power imbalances (as with discovery abuse), but they can come with prices of their own such as greater court administrative involvement, satellite litigation, and even questionable fulfillment of their ostensible primary aims. It is to such changes, and there have been several, that Walker's requirements seem most applicable.

III. COSTS AND BENEFITS OF PREDICTIVE EFFECT STUDIES

Even for the types of rule changes to which I have suggested that Walker's proposal most suitably applies, his requirements entail costs as well as benefits—and the benefits are not always sure or unambiguous. Walker cites instances of unpleasant surprises from rule changes³⁵ and offers the benefit of fewer such unanticipated consequences. It is not clear how severe the problem of such surprises is,³⁶ and best efforts at prediction can go awry. Walker also sees likely benefit from less interest-

³⁴ Fed. R. Civ. P. 48.

³⁵ See Walker, *supra* note 1, at 569–71.

³⁶ See, generally, Bone, *supra* note 9, at 601–9.

group politicization of the rules process,³⁷ but the empiricism generated by entities like the Tobacco Institute serves as a reminder of how groups with enough at stake will adapt to changes calling for more empirical information.³⁸

The degree of uncertainty about the benefits of Walker's proposal, along with the existence of some costs, makes it appropriate to think of other approaches than blanket applicability. Instead, before we decide to postpone rule making for predictive effect studies, what seems called for is best efforts at making cost-benefit judgments in individual instances about how much advance effort to require. Unpleasant surprises may sometimes be worth risking to get away sooner rather than later from a malfunctioning rule, depending on how bad the devil we know and how probable unanticipated consequences may seem. Studies are likely to take time and cost money, which of course may be well spent before unleashing an untested rule on the legal world. All the same, the personal interest that some of us have in assuring full employment for legal empiricists should not blind us to the tilt toward delay and retaining present rules built into the Walker proposal.³⁹ No matter how sure we are a rule is broken, he appears to say, unless his requirements do not apply at all we should not try to fix it unless we do predictive studies first. To be sure, they sometimes *should* be done first, and Walker's call can serve as a useful corrective against damn-the-torpedoes tendencies.

There is, however, no reason why responsible rule makers could not sometimes say that on balance the case for earlier change outweighs the probable gain from costly, time-consuming study.⁴⁰ This seems especially true in light of likely difficulties in conducting successful studies in some instances. To illustrate such difficulties in connection with a contemplated amendment of questionable merit: the possible change to requiring that class representative parties and counsel be *willing* as well as able to represent class members fairly and adequately⁴¹ would have a principal application in defendant class actions, which are not unheard of but not highly frequent, either. Sheer small sample size might make it hard to meet Walker's requirement of numerous observations of dissimilar in-

³⁷ See Walker, *supra* note 1, at 581–82.

³⁸ See also Bone, *supra* note 9, at 612.

³⁹ On the need for flexibility and the danger of paralysis in the rules process, see *id.* at 606, 609.

⁴⁰ The 1991 “flex-jury” amendment to Rule 48, discussed in the text around n. 34, is a good example of such a change.

⁴¹ See Proposed Amendments to Rule 23, 15 Class Action Rep. 396, 396 (1992) (proposed amendment to Rule 23(a)(4)).

stances, making it necessary to proceed without scientifically adequate predictive studies or to shelve the amendment (which perhaps could be wise for this odd “just say no” rule that might sharply curtail otherwise appropriate defendant class actions).⁴²

The class-action rule revision proposal now under consideration brings out further grounds for caution in applying Walker’s requirements. Rule changes are sometimes extensive and multifaceted, making it important to think carefully about which aspects do and do not warrant predictive effect studies. The contemplated Rule 23 revisions, for example, include not only the willing representative requirement proposed for Rule 23(a) but also a major move away from the present Rule 23(b) subtypes. Instead, there would be a single form of class action, with the certification decision made on the basis of multiple factors including the criteria for the present subtypes. Other possible changes, major and minor, include greater flexibility in certifying partial class actions and giving notice to class members, broader court control over inclusion or exclusion of members from the class, and discretionary interlocutory appeals from class-action certification grants or denials.⁴³ (That is just to give you a sampling, not the full menu.) Undiscriminating application of Walker’s criteria could tax the ability of the rules process and the research community to support, conduct, and digest studies on all such changes. The rule makers might thus decide that studies of the willing-representative requirement as applied in defendant class actions were impractical because of small sample size; they might look for experience under state rules using single-form rather than multiple-subtype class actions; and they could rely on federal experience under the shifting law on appealability of class-certification rulings as a basis for the decision whether to expand interlocutory appeals.

With the revisions being considered to Rule 68 on offers of judgment,⁴⁴ which would add limited attorney fee entitlement and liability to the costs now affected by the Rule, Walker’s proposal for predictive effect studies appears on especially strong ground. Much uncertainty and controversy exist over the likely strength and even direction of several possible effects of a beefed-up offer of settlement rule, and some of the significant issues

⁴² See Commentary (on proposed Rule 23 amendments), *id.* at 402 (criticizing effect of willing-representative requirement in defendant class actions).

⁴³ See Proposed Amendments, *id.* at 396–98.

⁴⁴ For the text of a proposal that provides much of the basis for the unpublished draft under study by the Advisory Committee on Civil Rules, and an explanation of its rationales and provisions, see William W Schwarzer, Fee-shifting Offers of Judgment—an Approach to Reducing the Cost of Litigation, 76 *Judicature* 147 (1992).

lend themselves to empirical testing.⁴⁵ Results addressing the hypotheses generated by the considerable theoretical work that has taken place could confirm or allay concerns that have been expressed, affect the decision whether to go forward with the contemplated changes, and influence not only the core nature of any enhancements to Rule 68 sanctions but also incidentals such as the scope of judicial discretion in the Rule's application. Still, even though the possible revisions of Rule 68 are not as multifaceted as those being considered for Rule 23, the Rule 68 redraft contains several changes to which the Walker requirements should not apply. One addition, for example, would make the Rule inapplicable in class and derivative actions, a provision so supported by fairness and the internal coherence of the Rules that it should not have to clear the Walker hurdles.⁴⁶

The economic analysis underlying much current discussion of possible Rule 68 amendments⁴⁷ brings me to a final point about the applicability of Walker's criteria. In the physical and social sciences, through empirical experience analytical tools sometimes acquire considerable predictive power. Computer modeling of complex physical phenomena may, for example, with appropriate data for model verification reach a state in which some predictions of results in novel situations can be made with high degrees of confidence. If a relevant model of lawyers', clients', or analogous actors' behavior were to attain a similar state, rational rule makers might conclude that they could be sure enough of the effects of a rule change that empirical field testing was not cost justified.⁴⁸ To be sure, with economic analysis of legal rules, for most purposes the amount of empirical testing of economic models has been scant enough that the time when we can say that some significant predictions need no empirical verification remains distant. The complexity of human affairs, and the orneriness of litigation situations, may be such that at least in large measure we will never get there. Yet it would also be rash to say that none of the tools will ever be tested enough to make it possible to graduate beyond the level to which Walker is now urging us to advance.

⁴⁵ See, generally, Thomas D. Rowe, Jr., with Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 *L. & Contemp. Probs.* 13 (Autumn 1988).

⁴⁶ Settlements of class and derivative actions must "be approved by the court. To permit unapproved offers of settlement to be operative to shift fees would be prejudicial to the parties and create an irreconcilable conflict" with the rules governing such actions. Schwarzer, *supra* note 44, at 152.

⁴⁷ See the articles cited in Walker, *supra* note 1, at 583 n.64.

⁴⁸ See Bone, *supra* note 9, at 599-600.

IV. CONCLUSION

In many respects this comment has only gnawed around the edges of Walker's proposal that we do a good deal more empirical looking before we leap into amendments of the Federal Rules of Civil Procedure. I support that general suggestion but have argued that, for several reasons, his requirements for predictive effects studies should be applicable less often than he seems to imply. This sharpening of focus may be important because following Walker's prescription would have significant costs, and it would be unfortunate for his proposal either to be rejected because it seemed too sweeping or abandoned after use because it had proven too burdensome. I hope that I may, in a sense, be saving Walker from the threat of unanticipated consequences of what might be an excess of enthusiasm for his useful idea.

An experience with empirical study in an earlier round of Civil Rules amendment provides a final basis for moderation of zeal in calls for predictive studies before venturing on rule changes. Before the major 1970 rewriting of the discovery rules,⁴⁹ the Advisory Committee commissioned the premier procedure empiricist of the time, Maurice Rosenberg of Columbia, to carry out a field survey of discovery practice.⁵⁰ With complaints about excessive cost, delay, and antagonism in civil discovery ringing in our ears, the conclusions of the field survey sound a quaint and poignant note: "No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement."⁵¹ It is reasonable to hope that methodological advances and increased empirical effort may improve foresight about effects of procedural changes. The lack of foreboding after the study underpinning the 1970 discovery amendments, however, should serve to keep in check any tendencies toward hubris.

⁴⁹ See Amendments to Rules of Civil Procedure, 398 U.S. 977, 982-1006 (1970).

⁵⁰ See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 485, 489 (1970).

⁵¹ *Id.* at 489-90.