AVOIDING SURPRISE FROM FEDERAL CIVIL RULE MAKING: THE ROLE OF ECONOMIC ANALYSIS

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I. INTRODUCTION

The fifty and more years of federal civil rule making have produced some remarkable surprises. Sometimes the anticipated benefits of a rule or amendment have been accompanied by unanticipated high costs. A particularly striking example is furnished by the group of civil rules devoted to discovery. One of the most important aspects of the original Federal Rules of Civil Procedure was the inclusion of Rules 26–37, which established a variety of methods by which one party could acquire information from another party (or potential witness) before trial. According to William Glaser, "The draftsmen held a utopian combination of hopes about the gains from discovery. They expected that the exchange of information between the litigants would bring to the court more facts, better reasoned arguments, and a fuller knowledge of the merits for the suit."1 Glaser concluded in 1968 that this benefit may have been achieved—but was accompanied by a surprising cost. "The total judicial system may

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1 William A. Glaser, Pretrial Discovery and the Adversary System 234 (1968).

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be better off because of the greater amount of information before the court, but it may have acquired these gains at additional net costs in work and money.'

2 A decade later Wayne Brazil concluded that "adversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system's primary objectives." Another decade later William Schwarzer concluded, "Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules." 4

On other occasions, surprise has come from objectives achieved in astonishing abundance. The 1983 amendment to Rule 11 provides a clear example. 5 The original version of Rule 11 established the striking of pleadings and disciplinary sanctions as techniques to limit abuse in the signing of pleadings. 6 In 1983 the Rule was substantially revised, in large part to encourage the imposition of sanctions. The Advisory Committee's Note accompanying the change stated, "The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." 7 The "reluctance" to sanction was eliminated to a remarkable degree. Arthur Miller, Reporter for the Committee that drafted the 1983 change, described reported use of the original Rule 11 as follows: "Well, if you look at the cases under rule 11 . . . there is nothing under rule 11." 8 Today there are more than a thousand reported decisions involving Rule 11 sanctions, 9 and tracking the use of these

2 Id.
6 The text of the original version of Rule 11 is shown with the changes made by the amendment in id. at 196-97.
7 Id. at 198 (citation omitted).
sanctions has become a cottage industry that has produced numerous articles\textsuperscript{10} and at least one treatise discussing only Rule 11 sanctions.\textsuperscript{11}

On yet other occasions expected benefits simply never materialized. Admission practice under Rule 36 is one example. J. William Moore, who participated in drafting the original Rules,\textsuperscript{12} wrote in 1938 that ""[t]he procedure for obtaining admissions provided in Rule 36 offers great possibilities toward facilitating the proof at the trial by weeding out facts and items of proof over which there is no dispute, but which are often difficult and expensive to prove.""\textsuperscript{13} But, in fact, the Rule was at first not used and, later, misused, according to observers.\textsuperscript{14} Experience with Rule 16, the pretrial conference rule, has been similar. Edson Sunderland, also one of the drafters of the original Rules,\textsuperscript{15} predicted in 1936 that pretrial conferences ""might do much to restore the confidence of the public in litigation as a desirable method of settling disputes,""\textsuperscript{16} but by 1970 Milton Pollack had concluded, ""As applied under current rules of various courts, pretrial procedures have resulted in useless, unnecessary, unprofitable expenditure of time, effort and expense in the majority of litigation.""\textsuperscript{17}


\textsuperscript{11} Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures (1990). The origins of the 1983 change are described in Miller, supra note 8, at 11–12.

\textsuperscript{12} Moore was research assistant to Charles Clark, Reporter, during the development of the original Federal Rules of Civil Procedure. See James William Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L. J. 551, 551 (1937) (bibliographic footnote).

\textsuperscript{13} James William Moore & Joseph Friedman, 2 Moore's Federal Practice, § 36.01 (1938).

\textsuperscript{14} Michael L. Kinney, Interpretations of Federal Rule of Civil Procedure 36—Requests for Admissions, 1 Forum 55 (July 1966) (surveying majority and minority views on use and effect of Rule 36).

\textsuperscript{15} See Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 775 (1935).


Whatever the virtues of surprise may be in other realms, there is nothing commendable about surprise in procedural policy making. In this context, surprise is strong evidence that the policy-making enterprise is not functioning well. To be sure, all unanticipated consequences probably cannot be eliminated from policy making of any sort, but the persistent pattern of surprising results in civil rule making suggests that there is much opportunity for improvement. In an earlier article I suggested that civil rule making might be improved by conducting limited field experiments before implementing changes throughout the nation, and in a more recent article I proposed institutional reform for civil rule making, including a requirement that the Advisory Committee on Civil Rules prepare a cost-benefit analysis of proposed changes, with meaningful review of that analysis by the Director of the Federal Judicial Center. I remain committed to these proposals, but I recognize the possible response that field testing would require additional time and money, and institutional reform might be difficult to achieve, given the entrenched character of the current rule-making enterprise. In this article I propose a third alternative for reform, one that might cost very little in time and money and one that could be adopted by simple agreement among the members of the Advisory Committee. My proposal is that the committee itself establish criteria for action based on the use of existing research, with the objective of reducing surprising results by increasing (or acquiring) a capacity to make predictions about rule changes. I propose criteria that I have developed from a review of the logic of scientific prediction and from a review of established standards about the degree of confidence that can prudently be given to particular predictions. My current proposal is significantly different from my prior suggestions because the Advisory Committee would not ordinarily be required to conduct its own research (an aspect of my first suggestion), and the Supreme Court would not be required to change the rule-making enterprise significantly (an aspect of my second suggestion).

After developing and describing these criteria, I apply the criteria to

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consider the feasibility of using current economic analysis of civil rules as a basis for policy making. My focus is on policy making based on the economic analysis of Rule 23, governing class actions, and Rule 68, establishing an offer of judgment procedure. To date, these two rules have been the chief objects of economic research about federal civil rules. The feasibility question is timely because the Advisory Committee is currently considering important changes to Rule 23\textsuperscript{21} and Rule 68.\textsuperscript{22} The possible changes to Rule 23 overhaul the now complex certification process, which requires fitting a proposed class action into one of three distinct categories, for a process that would permit certification after judicial consideration of seven listed factors, none decisive. This change in the basic structure of the Rule necessitates change in provisions regarding “opt out,” “opt in,” and notice because, under the current Rule, these provisions are related to type of class. The possible amendment resolves this problem by leaving specific requirements to judicial discretion, subject to the requirements of due process. In addition, the possible amendments require that class representatives be “willing,” suggesting the practical end of defendant class actions where representatives are rarely “willing.” The changes being discussed also permit dispositive motions before certification and eliminate notice requirements on the dismissal of a proposed class action prior to certification. The possible changes also permit immediate appeals from the grant or denial of certification. The possible changes to Rule 68 provide that recoverable costs should include attorney’s fees incurred after a rejected offer and should permit offers by both plaintiffs and defendants under the Rule. Cost recoveries are limited to the amount of the judgment and would be reduced by the amount of any benefit the offeror receives because of the rejection of the offer.

These possible changes to Rules 23 and 68 promise to be among the most controversial issues ever addressed by the Advisory Committee. An American Bar Association (ABA) task force on class actions proposed many changes in Rule 23,\textsuperscript{23} but the proposal generated such opposition


\textsuperscript{22} Advisory Committee, Possible Amendments, \textit{supra} note 21, at 23–29. The proposal is generally the same as that published in William W. Schwarzer, Fee-shifting Offers of Judgment—an Approach to Reducing the Cost of Litigation, 76 Judicature 147, 151 (1992).

\textsuperscript{23} American Bar Association, Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195 (1986) (proposing elimination of 23(b) class categories).
that it was not approved by the ABA’s House of Delegates,\textsuperscript{24} and the current possible changes have already received a critical published review, which referred to some of the possible changes as "frankly alarming."\textsuperscript{25} Somewhat similar amendments to Rule 68 have been advanced at least twice before, in 1983\textsuperscript{26} and 1984,\textsuperscript{27} but the proposals were dropped in the face of widespread opposition.\textsuperscript{28}

II. PREDICTION

The best antidote for surprise is accurate prediction. A potentially rich source of prediction lies in the logical processes that are at the core of social science research, and well-established standards are available to suggest the degree of confidence associated with particular predictions developed from these processes. The role of prediction in policy making was described by Milton Friedman, who wrote that "any policy conclusion necessarily rests on a prediction about the consequences of doing one thing rather than another."\textsuperscript{29} But before recalling the logical sources


\textsuperscript{25} See Proposed Amendments to Rule 23, supra note 21, at 26.

\textsuperscript{26} Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 361–67 (1983) (proposing that any party may make offer of settlement and that offeree who recovers less than offer must pay postoffer costs, expenses and attorney's fees incurred by offeror).


\textsuperscript{28} The 1983 proposal was released for public comment in August 1983. Much criticism followed, in the form of letters to the Advisory Committee and testimony given at two public hearings. See Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 10–16 (1985), for review of the criticism, including details of testimony from the two hearings and the contents of letters to the Advisory Committee. The proposal was withdrawn in May 1984. See Fee Shifting Plan Sent Back to Drawing Board, Legal Times of Washington, May 28, 1984, at 4, col. 1.

When the revised proposal was released for public comment in August 1984, the Advisory Committee believed it was meeting the criticisms. Letter from Hon. Walter R. Mansfield, Chairman of Advisory Committee on Civil Rules, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Aug. 1984), printed in 102 F.R.D. 423, 424 (1984). However, the 1984 proposal was also met with overwhelming criticism, which eventually caused the Advisory Committee to table it. See Simon, supra, at 17–19, 24–25. For a discussion of the problems with the 1984 proposal, see Stephen B. Burbank, Proposals to Amend Rule 68—Time to Abandon Ship, 19 U. Mich. J. L. Ref. 425 (1986).

\textsuperscript{29} Milton Friedman, Essays in Positive Economics 5 (1953).
of scientific prediction and the established measures of confidence, I must point out that my following discussion will necessarily employ an empirical approach to the task of rule making.

A. Empirical Approach

The surprises that I have described above are surprises about the effects of procedure in the "real world," and, therefore, predictions that might help to avoid similar kinds of surprise must address that same world. Given this requirement, scientific method offers assistance because both these procedural surprises and science are concerned with experience. Abraham Kaplan wrote that "[i]t is in the empirical component that science is differentiated from fantasy. An inner coherence, even strict self-consistency, may mark a delusional system as well as a scientific one. Paraphrasing Archimedes we may each of us declare, 'Give me a premise to stand on and I will deduce a world!' But it will be a fantasy world except in so far as the premise gives it a measure of reality.'"

The empirical approach requires a strong allegiance to data. Katzer, Cook, and Crouch explained, "If the results of well-conducted studies disagree with the authorities, then the authorities may very well be wrong." They continued, "The point is that knowledge about the world is best obtained by carefully looking at the world, not by looking at someone's idea of the world." This commitment to data is also a key aspect of modern economics. Harry Kelejian and Wallace Oates wrote, "An essential activity in any science is the systematic testing of theory against fact. Economics is no exception." There are, to be sure, important normative issues about federal civil procedure, but they are not involved in the unintended consequences that are common to civil rule making. The chief practical problem seems to be learning how to make changes that will enhance established goals rather than establishing the

32 Id.
goals of federal civil courts. Any solution to this problem requires an empirical approach, which I will employ throughout the following discussion.

B. The Logic of Prediction

There are many ways to explain experience, but only one form has the capacity to predict the future—citation of a general empirical rule. If properly constructed, the general empirical rule can both achieve the scientific goal of explanation and furnish prediction. This potential exists only in statements that take a form that relates change in one type of event to change in another, under certain circumstances. The logical origin of scientific explanation and the relation between explanation and prediction can be seen by examining the following proposition:

1a. In civil litigation, if the number of cases is constant, and the complexity of the cases increases, the average time to final judgment increases.

1b. In Court A, the number of civil cases is constant, and the complexity of civil cases increased.

1c. Therefore, the average time to final judgment of civil cases increased in Court A.

As stated, the form is a common syllogism in which the conclusion is determined by affirming the antecedent premise. If the tense of the conclusion (1c) is changed from past to future (that is, to "will increase"), the deduction remains valid. This observation suggests that the deductive logic of explanation, illustrated first above, is the same as the logic of prediction. The only difference between the two is the stated time perspective of the conclusion: past or future. Thus, prediction follows logically from explanation that, in turn, can follow only from a properly stated generalization.

Kaplan accepts the argument (at least "ideally") that deductive explanation always yields prediction, but he adds that the converse is doubt-

35 The following discussion of prediction in social research is based generally on Royce Singleton, Jr., et al., Approaches to Social Research 15–64 (1988). In text I will use "Singleton" as including the joint authors.

36 This example is based on an example used by Singleton. Id. at 23.

37 Kaplan, supra note 30, at 349 ("'It might be, I suppose, that the ideal explanation from the standpoint of the philosopher of science (even if it is not a realistic ideal for the scientist himself) would be one that allowed for prediction.'").
ful, arguing that prediction can be made without the ability to explain. He wrote, "This capacity is characteristic of well-established empirical generalizations," arguing, by example, that "the course of a mental illness or the outcome of an election campaign might be predictable with far better grounds than are available for any explanation of these phenomena." Likewise, Singleton wrote, "It is also possible to predict an event on the basis of empirical generalizations without understanding the connection between generalization and prediction. Astronomical predictions of the movement of the stars were quite accurate long before satisfactory explanations for the movement existed." This brief discussion of the logic of prediction yields a useful preliminary conclusion about federal civil rule making. The sine qua non of prediction about rule making is a generalization that in form relates change in one type of event with change in another type of event, under certain conditions. Typically, such a generalization would relate a rule change to some measure of court performance such as time, cost, or outcome. Thus, simple descriptions (for example, "there is a litigation explosion; delay is a problem") may be appropriate causes for concern, but they cannot yield a prediction about the results of change because the form of the generalization is improper. Any policy-making response based directly on such a generalization invites surprise.

C. Confident Predictions

But clear understanding of the logical source of potential prediction is not sufficient to determine criteria for policy making. At least three other questions must be considered. First, the formal propriety of the principal deductive process must be considered. The steps in proceeding from generalization to prediction can be evaluated and determined to be valid or invalid. An argument is valid if the truth of both premises necessarily implies the truth of its conclusion. There are common forms of valid arguments as well as common forms of invalid arguments, both of which are relatively easy to identify. It is also important to note that analysis of the formal propriety of the deductive method yields only an answer that the argument is "valid" or "invalid." The probable truth of the

38 Id. ("The converse, however, is surely questionable; predictions can be and often are made even though we are not in a position to explain what is being predicted.")
39 Id.
40 Singleton et al., supra note 35, at 26.
41 Id. at 44-45.
argument depends on consideration of two other factors: underlying observation\textsuperscript{42} and subsequent hypothesis testing.

The first of these other factors is observation, which, presumably, led to the generalization incorporated in the first premise. The process of moving from observation to generalization in science is directed by inductive reasoning, a form of logic quite different from the deductive process that leads to explanation and prediction.\textsuperscript{43} Inductive reasoning cannot be assessed for "validity," but criteria do exist that permit estimates of the probable truth of the generalization. These criteria focus on the character of the underlying observations. Singleton explained that "[t]he strength of an inductive argument depends on how reasonable it is to suppose that the observed instances of a class . . . are representative of the entire class."\textsuperscript{44} A number of factors have been identified as relating to this judgment. For example, if the observed instances are quite similar, the probability that the instances represent the class is diminished: if limitations on discovery were observed only in antitrust cases, the probability of representative observations would be diminished. Conversely, dissimilarity among observed instances adds to the probability that the sample is representative of the whole population: observation of discovery limitations involving antitrust, personal injury, contract disputes, and other topics would add to the probability of representation of the entire population of civil cases. It is also said that "[t]he more sweeping the generalization that we seek to establish, the less is its probability relative to our evidence, and the weaker is our argument."\textsuperscript{45} For example, observations concerning "limitations on discovery" would be less reliable than observations concerning "limitations on interrogatories." Also, the number of observations should be considered, with a higher number suggesting more confidence. Data collected from 1,000 cases are ordinarily better than data collected from ten. Finally, the "fit" between the observation and previously observed events should be considered. A good fit suggests greater confidence that the instances are representative of the sample. Data suggesting that the addition of discovery opportunities diminishes the chance of settlement can be viewed as more likely representative if

\textsuperscript{42} I use the term "observation" here and elsewhere to mean the advertent measurement of events. This meaning is necessary to permit use of the standard criteria for assessing the truth of any resulting generalization. See text around notes 43-45 infra.

\textsuperscript{43} Singleton et al., supra note 35, at 45 (discussing differences between the two types of reasoning).

\textsuperscript{44} Id. at 53.

\textsuperscript{45} Stephen F. Barker, The Elements of Logic 228 (2d ed. 1974).
the relationship has been previously observed. Singleton summarized these criteria as follows: "Larger numbers of observations produce stronger inductive arguments if the observations are dissimilar or if the generalization is limited in scope and precision. And generalizations consistent with established knowledge are more probable than those that are not consistent."46

The second factor bearing on the probable truth of the generalization is the extent to which the generalization itself has been tested, a process commonly described as "hypothesis testing."47 This process involves four stages, which include, first, assuming the truth of the generalization (or stating the null hypothesis); second, properly deducing a consequence; third, collecting data about the actual consequences; and, finally, considering the implications of the data for the generalization. The criteria for confidence here are the number of tests indicating the truth of the generalization and the number of rival generalizations that have been disconfirmed. The larger the number in both cases, the greater the indicated confidence in the generalization. Hypothesis testing is an alternative (or addition) to underlying observation and is generally viewed as a strong test of confidence.

Finally, I must say a word about theory. According to Kaplan, "Theory puts things known into a system."48 One consequence, he wrote, can be "simplifying laws and introducing order into congeries of fact."49 However, Kaplan argued, "[T]his is a by-product of a more basic function: to make sense of what would otherwise be inscrutable or unmeaning empirical findings."50 At another point he wrote, "[L]aws serve to explain events and theories to explain laws; a good law allows us to predict new facts and a good theory new laws."51 These views suggest that theory can emerge only after considerable empirical investigation, indeed, only after successful hypothesis testing of generalizations yields laws that require explanation. Thus viewed, the existence of theory is not a necessary condition for policy making. Prediction is possible without the explanatory power of a theory, although, as Singleton observed, "[O]nce we have an adequate theory, which describes the causal process connecting

46 Singleton, supra note 35, at 54.
47 Id. (describing the process of testing hypotheses).
48 Kaplan, supra note 30, at 302.
49 Id.
50 Id.
51 Id. at 346.
events, we get not only a better sense of understanding but more accurate and more useful predictions."

D. Avoiding Surprise

Section II, taken as a whole, establishes a basis for civil rule-making criteria. Surprise can be avoided by employing the predictive power of scientific method: the first requirement is a generalization in a form that permits the deductive component of prediction. Ideally, the generalization can lead to explanation as well as prediction, but purely predictive generalizations are acceptable. This is the sine qua non, but justification for change ought also to require some minimal degree of confidence in the truth of the generalization. Ideally, the generalization should have been subjected to testing and have been proved true in several instances, with related tests disconfirming rival generalizations about proposed action. A theory explaining these results would not be necessary—though clearly desirable. Although this ideal may be difficult to attain, testing of this sort would provide an adequate basis for rule change. But in a practical policy-making setting, it may be necessary and acceptable to make rules with less confidence in the likely results. Nevertheless, even a minimal standard should require that the underlying prediction be plausibly true, which suggests that the character of the observation underlying the generalization ought to be assessed according to established standards. Thus, minimal 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. There is risk inherent in accepting such a modest standard, but necessity must be confronted and the risk accepted. 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.

But failing to find an adequate predictive basis for change does not mean that an old rule must remain in place forever. In this situation the Advisory Committee should encourage or conduct observation or, better yet, formulate a generalization and subject that generalization to an ade-

52 Singleton, supra note 35, at 26.

53 The criteria should not be applied to rule changes that involve only the clarification of meaning or conformation with judicial decisions. In these situations, the possibility of unintended consequences is so slight that even the cost of analysis of existing research would not be justified.
quate series of tests, perhaps involving the most powerful test method, the true experiment. Yet I wish to emphasize that comparatively easy observation might yield a plausible generalization, which would, I have suggested, offer an acceptable basis for rule change. For example, an adequate generalization about the effect of adding an automatic disclosure requirement to the discretionary provisions of Rule 26 might have been developed by systematically observing the effect of a similar local requirement in a hundred cases involving dissimilar subject matters and comparing the results with existing knowledge about discovery. The criteria I have suggested would require only a scientifically plausible basis for rule making.

E. Adopting the Criteria

To this point, I have offered no argument directed specifically to the committee proposing reasons for adopting the criteria, though I have suggested that one of the virtues of my proposal is that it “could be adopted by simple agreement among the members of the Advisory Committee.” Now that the origin and content of my criteria are established, I can propose an argument to the committee for adoption. I assume that the members of the committee seek the public interest, assuming, as does Cass Sunstein, that “through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good.” My argument to the committee for adoption begins by pointing out that since the committee’s goals were intended to benefit the public, adoption of criteria offering the opportunity to increase the probability of achieving those goals would itself be an act “in pursuit of the public good” and therefore a proper act by the committee. In short, avoiding surprise in the context of the committee’s work would serve the public interest.

I also urge the adoption of my criteria as a measure of protection.

54 See generally, Walker, Perfecting Civil Rules, supra note 18, at 67 (suggesting proposed rule changes be tested by implementing them as local rules in one jurisdiction and randomly assigning cases to them).


56 See text around note 19 supra.


58 Id.
against the work of interest groups, an influence that may often be contrary to the public interest. Virtually any government official may, from time to time, be the object of interest group pressure, and, indeed, there is evidence of the growing role of interest groups in the adoption of federal civil rules. Roy Simon, Paul Carrington, and Linda Mullenix have all recently noted evidence that the work of the Advisory Committee has provoked significant interest group activity. Thomas Schelling described the commitment tactic of “maneuvering into a status quo from which one can be dislodged only by an overt act, an act that precipitates mutual damage because the maneuvering party has relinquished the power to retreat.” Adoption of the criteria by the committee could be seen as relinquishing “the power to retreat” in the face of interest group pressure because the empirically oriented standards would not bend in particular cases. Deviation from general goals and general criteria for achieving those goals could readily be identified by observers as the result of interest group pressure. “Retreat” would be damaging to the public perception of both the committee and of the interest group that caused the change. Adoption of the criteria would thus create incentives for behavior that would tend to preserve the committee’s commitment to the public.

III. ECONOMIC ANALYSIS

In this section I assume that the committee has adopted the proposed criteria and ask whether, according to these standards, it is feasible to use current economic analysis of civil rules as a basis for policy making. The economic analysis of procedure began with the work of William Landes and Richard Posner, and there is now a considerable body of work in this category. Specific attention to the Federal Rules of Civil Procedure is much more recent, and the work to date consists of a com-


61 Id.

paratively small number of studies, though the research is well beyond the pioneer stage. Within this collection, chief attention has focused on Rule 23 and Rule 68, though a few other rules have received scattered attention. In this section I will focus on the work about Rules 23 and 68, both because there is enough material about these rules to provide a basis for discussion and because these rules are now being reviewed by the Advisory Committee for possible change.


See text around notes 21–28 supra.
A. Analysis of Civil Rules

My question in this section is whether the studies about Rules 23 and 68 constitute an adequate basis for policy making. This question is different from familiar academic questions such as whether work is novel or likely to have heuristic effects. Without exception the studies described below are novel, and most have already demonstrated heuristic power. The difficult issue is whether, according to the criteria proposed above, the Advisory Committee should rely on this work as a basis for amending the civil rules. Such a question implicates as an issue both the worth of the criteria I have suggested as well as the proper application of the criteria to the existing research. Though I have offered my defense of the criteria, the second question remains to be addressed.

B. Class Actions

The economic analysis of Rule 23 began with the work of Kenneth Dam, who examined the 1966 amendment of Rule 23. According to Dam, "Much of the confusion to be found in the judicial opinions and secondary literature on class actions can be traced to a failure to be explicit about the underlying conflicts in objectives and values created by the vast expansion in the scope and frequency of such actions." Dam stated that the 1966 amendment changed litigation by adding to the number of potentially successful plaintiffs and increasing the potential liability of defendants. He also suggested that the change posed a dilemma for judges who might be both encouraged to compensate all claimants and concerned that class actions might overcrowd dockets. Finally, Dam suggested that practice under the amended Rule 23 "raised troublesome questions about the entrepreneurial role of the representative plaintiff's counsel in bringing and settling class actions."

He examined these conflicts with respect to four concepts that, he suggested, "play a prime role in thinking about class actions: (1) efficiency; (2) compensation; (3) deterrence; and (4) conflict of interest."

Within this general framework, Dam proceeded to consider a number of policy questions, including, principally, the appropriate judicial technique for deciding to certify a proposed class. Dam also examined several

\[67\text{ Dam, supra note 63, at 47.} \]
\[68\text{ Id. at 48.} \]
\[69\text{ Id.} \]
\[70\text{ Id.} \]
\[71\text{ Id.} \]
\[72\text{ Id.} \]
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alternatives to the established class action procedure, including adoption of the "fluid class action" technique, increased use of "parens patriae actions," "improving public enforcement," and "improving private enforcement." But, the article does not contain a generalization in a form that could lead by deduction to either explanation or prediction, and thus Dam's work does not meet the threshold criteria for policy making proposed above: there is no stated relationship between one type of event and another.

John Coffee made the next major contribution to the economic analysis of class actions in a series of articles written during the 1980s, and his most comprehensive analysis of the general structure of Rule 23 was published in 1987. Coffee began by noting that proposals for reform of class actions were common. Yet, according to Coffee, "Largely lacking in this recent outpouring of commentary has been any sustained focus on the incentive effects on the plaintiff’s attorney of these proposed reforms." Coffee then discussed four "generalizations" which he described as relating "to the performance of plaintiff’s attorneys in the large class action." These include "high agency costs," "asymmetric stakes," "a cost differential," and "a common pool problem." Coffee then applied these considerations to policy issues: "Most fundamentally, if agency costs are to be reduced, the most effective monitor is likely to be the plaintiff having the largest stake in the action." This view led Coffee to two further conclusions. "First, because it is the plaintiff who has the largest stake in the action who is most likely to opt out of the class action, when we restrict the plaintiff’s ability to opt out we ensure that the most effective monitor will remain on duty. . . . Second, because the largest stakeholder in the action is more likely to control opportunistic behavior by his own attorney, this conclusion suggests in turn that, other things being relatively equal, the court should designate the attorney of one of the largest stakeholders as the lead counsel." These views led Coffee to make two specific policy proposals that would require a change in Rule 23, at least in the case of "mass tort" class actions. First, he

73 Id. at 61–73.
74 See Coffee, The Regulation of Entrepreneurial Litigation, supra note 63, at 877 n.1.
75 See Coffee, Rethinking the Class Action, supra note 63, at 625.
76 Id. at 625.
77 Id. at 626.
78 Id. at 628.
79 Id.
80 Id. at 643.
81 Id.
suggested adopting a “limited opt-out” rule that would permit a court “to certify a mandatory class action as to liability and causation issues, but permit opting out exclusively as to damage determinations.” Coffee suggested that such a rule would ensure monitoring by a well-motivated plaintiff through the settlement stage but would permit individual damage assessment for plaintiffs with serious injuries. Second, Coffee proposed “chilling the right to opt out” by compensating “plaintiff’s attorneys who opt out of the class action after its filing only to the extent they obtain a recovery in excess of the average amount awarded to plaintiffs in the same class or subclass.” Coffee explained that, in effect, this change would be a tax on the opt out, levied on the attorney. He further explained that a reduction (by opt out) of well-motivated monitoring behavior would result in a social cost that could appropriately be offset by the proposed “tax.”

Coffee’s views have significant academic merit, but does his study satisfy the proposed criteria for policy making? It is possible (with some interpretation) to identify in the work at least one generalization that meets the formal requirements for prediction. Coffee wrote, “All principal-agent relationships are said to give rise to agency costs, which by definition consist of: (1) the costs of monitoring the agent, (2) the costs the agent incurs to advertise or guarantee his fidelity (“bonding” costs), and (3) the residual level of opportunistic behavior that it is inefficient to prevent.” He also wrote, as quoted above, that “when we restrict the plaintiff’s ability to opt out we ensure that the most effective monitor will remain on duty.”

One reasonable interpretation of these observations is that a reduction of the right to opt out would be accompanied by a reduction in agency costs, other conditions remaining constant, and this generalization takes the form of the required generalization: the statement relates change in two types of events, under certain circumstances. However, there is nothing in the article suggesting that the components of this (implied) generalization are based on observation, nor is there evidence that the generalization itself has been tested. Therefore, according to the proposed criteria, there is not a sufficient basis to change Rule 23, based on Coffee’s study.

Jonathan Macey and Geoffrey Miller have published the most recent

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82 Id. at 661.
83 Id. at 662.
84 Id. at 628–29 (citation omitted).
85 Id. at 643.
economic analysis of class actions.86 Building on the foundation of both Dam's early article and the work of Coffee, Macey and Miller employed agency theory to propose both improvements in the current structure of Rule 23 and a "more fundamental change"87 that would permit an auction of plaintiffs' claims to attorneys or others who would buy the right to bring suit and claim the results of any favorable judgment. Among their proposals to modify the current structure is a suggestion to limit or eliminate the notice requirement that Federal Rule 23(c)(2) imposes in (b)(3) class actions.88 Macey and Miller argued that, at least in class actions involving numerous plaintiffs with small claims, the cost of notice produces no social benefits because class members cannot effectively monitor the behavior of their attorneys.89 Macey and Miller also proposed that the Rule 23 requirement that class actions include a named plaintiff should be eliminated, at least in cases with numerous plaintiffs having small claims.90 They explained that the requirement of a named plaintiff is embodied in the "typicality" and "adequacy" requirements of the Rule, and they contended that there are two general defects that apply in most cases to both requirements. The first defect is that enforcement of these requirements is chiefly left to defendants whose interests are actually opposed to the interests of class members.91 Second, they argued that the requirements of typicality and adequacy reduce the supply of representative plaintiffs, which, in turn, adds to transaction costs, reduces the pool of available attorneys, and destroys the viability of some suits that might be brought on behalf of groups.92 Finally, Macey and Miller discussed "a more dramatic suggestion for reform: the legal system should experiment with an auction approach to large-scale, small-claim class and derivative suits."93 According to their proposal, when an actual (or potential) class or derivative suit is filed, the court would screen the action for auction potential. If the suit appeared to be a good candidate,

86 Macey and Miller, supra note 63, at 1. The authors also address very similar issues that are involved in derivative suits brought under Rule 23.1. The discussion in the text focuses on their views of class actions, which are more widely employed than the somewhat specialized derivative actions.
87 Id. at 6.
88 Id. at 27–33.
89 Id. at 28.
90 Id. at 61.
91 Id. at 63.
92 Id. at 66.
93 Id. at 105.
the court would advertise for bidders, conduct an auction, collect the sale price, and distribute the fund to class members. The buyer would take full ownership of the claims, with the opportunity to succeed or fail in subsequent litigation—or have the action dismissed, if the defendant were the high bidder. Macey and Miller argued that the fundamental advantage of the auction approach would be the near complete elimination of agency costs since the agent would be permitted to purchase the principal’s claim. “The winning bidder becomes the owner of the claim, and therefore acts as its own agent.”

As with the work of Dam and Coffee, it is clear to me that Macey and Miller’s work is an important contribution to the academic discussion of class actions. But, I must once more ask whether their work is a sufficient basis for amendment. As with the Coffee study, it is possible to interpret the work of Macey and Miller to produce a generalization in proper form that could yield a logically valid prediction. But there is nothing in the work to suggest that such a generalization is based on observation, nor is there a report that the generalization has been tested. Once more, my proposed criteria suggest that available analysis is not a sufficient basis for amendment.

C. Offer of Judgment

George Priest began the economic analysis of Rule 68 in 1982. He wrote, “How will requiring the losing plaintiff to pay the defendant’s litigation costs affect the litigation-settlement rate? A common view is that the imposition of this greater risk on the plaintiff will encourage a relatively greater frequency of settlements.” Priest used settlement theory to refute this common view, suggesting that practice under Rule 68 “is likely to encourage litigation while enhancing the position of defendants.” Although Priest’s study could yield an appropriate generalization, there is no mention of observation or hypothesis testing, and, hence, the criteria are not met. Dale Oesterle produced the next economic analysis of Rule 68. His article focused on the 1983 proposed amendment to the offer of judgment rule that would have provided, according to

94 Id. at 108.
95 The authors “counsel caution in implementing an auction procedure” but do support “preliminary experimentation with the idea.” Id. at 116.
96 Priest, supra note 64, at 163.
97 Id. at 168.
98 Id. at 173.
99 Oesterle, supra note 64, at 11.
100 See text around note 26 supra.
Oesterle, "that when an offer of settlement, specifically denominated a rule 68 offer, is not accepted, and the final judgment is less favorable to the offeree than the offer, the offeree must pay the offeror's court costs and attorney fees from the date of the offer."\textsuperscript{101} The proposal also provided that "the claimant may recover—in addition to the judgment, costs, and attorney fees—interest on the amount of the offer from the date made less any interest for the same period included in the judgment."\textsuperscript{102} Oesterle wrote that the proposed change would add significant new complexity to the litigation process but, he suggested, might not produce the expected benefits. "[T]he proposal may not encourage settlements in all cases. Indeed in some cases the proposal may discourage settlements."\textsuperscript{103} As with Priest, there is no mention of observation or hypothesis testing.

Oesterle employed previous economic analysis of settlement to offer two illustrations of cases that would have settled under the existing Rule 68 but would not settle under the proposed regime.\textsuperscript{104} He wrote that "the counterproductive results are tied to two facts: the plaintiff's expected value of judgment is higher than the defendant's expected cost of judgment by an amount less than the combined future legal expenses; and the plaintiff's estimate of the probability that the defendant's rule 68 offer will cause the plaintiff to pay defendant's legal expenses is significantly lower than the defendant's estimate. Similar cases will not be rare."\textsuperscript{105} He concluded, with respect to the proposed change, "In sum, rule 68 will increase the likelihood of settlements in some cases but at the expense of blocking settlements in some cases, and we can only guess whether we will gain more settlements than we will lose."\textsuperscript{106}

An economic analysis of Rule 68 was next offered by Geoffrey Miller,\textsuperscript{107} who both provided an analysis of the current Rule and also considered the 1984 proposal to amend Rule 68.\textsuperscript{108} Miller noted the common supposition "that the rule encourages pretrial compromise of law suits by penalizing plaintiffs who reject reasonable settlement offers."\textsuperscript{109} But, Miller concluded, "This popular justification for the rule is based

\textsuperscript{101} Oesterle, supra note 64, at 11.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 11–12.
\textsuperscript{105} Id. at 12.
\textsuperscript{106} Id.
\textsuperscript{107} Miller, supra note 64, at 93.
\textsuperscript{108} See text around note 27 supra.
\textsuperscript{109} Miller, supra note 64, at 93.
on an obvious fallacy. It focuses only on plaintiffs’ incentives while ignoring the likely effect of the rule on the behavior of defendants.\textsuperscript{110} Miller explained that “[b]ecause plaintiffs are likely to settle for less, defendants are likely to offer less in settlement. Thus the rule does not necessarily increase the likelihood of settlement. Its primary effect is not to encourage settlement but to benefit defendants and harm plaintiffs by shifting downward the relevant settlement range.”\textsuperscript{111} Miller also considered the 1984 proposal, which would have included attorneys’ fees as an element of costs to be shifted under Rule 68. Miller concluded that including fees as an element of costs would “redistribute wealth from plaintiff to defendant”\textsuperscript{112} and “have some slight marginal effect of encouraging settlements.”\textsuperscript{113} Finally, Miller’s analysis led him to propose that both parties be permitted to make an offer of judgment. Miller suggested that this change would accomplish the same or greater benefits as the current Rule at a lower cost because a mutual offer rule would eliminate unwanted distributional effects. Miller added that “[i]ncluding attorneys’ fees in costs under a mutual offer of judgment rule would add teeth to the rule and encourage its widespread use.”\textsuperscript{114} Apparently, Miller’s research did not include observation or hypothesis testing.

In 1988 Thomas Rowe and Neil Vidmar published a report “on results from the early stages of an ongoing empirical study of the ‘offer of settlement’ or ‘offer of judgment’ device.”\textsuperscript{115} The study consisted of two simulations in which students were provided factual information and then asked, under several different rule conditions, whether they would accept an offer and, if not, to indicate whether a counteroffer would be made and the amount. The first simulation involved a hypothetical personal injury case, and the second simulation involved a hypothetical civil rights suit. According to Rowe and Vidmar, their study was intended to test “three main hypotheses about expected impacts of offer of settlement rules affecting liability for attorney fees, compared to regimes under which settlement offers and demands can have no such effect: (1) higher rates of acceptance of initial offers; (2) higher rates of plaintiffs making early counter-demands under a two-way offer rule, but not under a one-way rule, if the initial offers are not accepted; and (3) moderation of

\textsuperscript{110} Id. at 94.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 121.
\textsuperscript{113} Id. at 122.
\textsuperscript{114} Id. at 124.
\textsuperscript{115} Rowe & Vidmar, supra note 64, at 13.
amounts in counter-demands.\textsuperscript{116} Taken together, the two simulations lend some support to all three hypotheses, though support of the settlement rate hypothesis in the tort simulation is only marginally significant. Rowe and Vidmar concluded by describing their studies as "a valuable first step\textsuperscript{117}" and describing a need for further studies involving, for example, practicing attorneys as subjects and interactive settings. Thus, Rowe and Vidmar have taken a "first step" toward hypothesis testing about possible Rule 68 changes, though one test falls short of the criteria.

David Anderson has reported on recent efforts to develop a new generation of empirical work. Anderson offered a theoretical analysis of current Rule 68, a mutual offer version of the Rule, and several other alternatives including a "sincerity" rule and a final offer auction.\textsuperscript{118} Anderson's theoretical analysis indicated that none of the several variants of Rule 68 generally would encourage settlement but that a "sincerity" rule and final offer auction would promote settlement.\textsuperscript{119} In addition, Anderson has used interactive computer simulations with practicing lawyers and advanced law students as subjects to test a number of hypotheses that emerged from his theoretical analysis.\textsuperscript{120} According to Anderson, "The results support the theoretical conclusion that a two-sided fee-shifting Rule 68 is limited in its ability to encourage settlement out of court. Under the sincerity rule, which in theory will promote settlement near the expected verdict, settlement offers were found to be successful if and only if they were near or better than the expected verdict.\textsuperscript{121}" Although Anderson tested a number of hypotheses different from those tested by Rowe and Vidmar, there was one important overlap in the studies: the rate of settlement hypothesis. The Rowe and Vidmar results appear to conflict with the data Anderson reported, which suggested that a two-way feeshifting Rule 68 would not encourage settlement.\textsuperscript{122}

\textsuperscript{116} Id. at 21.
\textsuperscript{117} Id. at 31.
\textsuperscript{118} Anderson, supra note 64.
\textsuperscript{119} Id. at 16–20. A "sincerity rule" would permit offers by either party, but prohibit counter offers, allowing only acceptance or rejection of the offer, followed as required by trial with the offeror paying the offeree's postoffer fees. Id. at 17. The "final offer auction" allows the parties to bid for the right to make a final offer. Id. at 19. The proceeds of the auction go to the opposing party. Id. If the bid is refused, trial follows with each side responsible for its own fees. Id.
\textsuperscript{121} Id. at 45.
\textsuperscript{122} Compare id. at table 6 (first stated hypothesis and data) with Rowe & Vidmar, supra note 64, at 24.
All of this work about Rule 68 is clearly an academic success, but should it be the basis for an amendment of the Rule? The theoretical work of Priest, Oesterle, Miller, and Anderson offers a number of generalizations that could be stated in a form that could yield a valid prediction about change. However, none of these generalizations is based on systematic observation and, hence, does not qualify as a basis for policy making under my proposed criteria. However, the work of Rowe, Vidmar, and Anderson suggests the possibility that one or more key generalizations have been tested. The strongest candidate is the effect of Rule 68 (and versions of the Rule) on the rate of settlement. However, to this point, the tests of this generalization are in conflict, and so minimum criteria based on hypothesis testing are not satisfied. Though the research effort concerning Rule 68 is more advanced than the work on class actions, once again, there is no confident basis to predict the consequences of change.

IV. Conclusion

I have argued that the remedy for surprise from civil rule making is prediction, and I have proposed criteria that, if adopted, would likely enhance the Advisory Committee’s ability to serve the public interest in rule making. In essence, these criteria would permit change based on existing research only if that research provided a generalization in proper form (relating change in one type of event to change in another type of event, under certain circumstances), and only if that generalization were properly employed (according to principles of deductive logic) to yield a prediction about the consequences of change. Also, change would be indicated only if the generalization were based on adequate observation or, preferably, the prediction had been submitted to hypothesis testing with successful results. These criteria are modest, requiring only that there be a plausible basis for believing that a particular change will have a desired effect in courts. If these criteria were adopted and employed to assess proposals to change Rules 23 and 68, the obvious conclusion would be that existing research, at least research based on economic analysis, is not a sufficient basis to justify change. Without exception, the generalizations that have been advanced have not been based on adequate observation, and in only one case has a key generalization been subjected to hypothesis testing—with conflicting results. The economic analysis of Rules 23 and 68 is excellent, by academic standards, but the work has not matured to the point of being an adequate basis for policy making. In this situation, the committee would act imprudently if it adopted possible changes in either Rules 23 or 68—unless other materials
that met the criteria provided a basis for change. Instead, the committee should either conduct limited field experiments incorporating the proposed changes, or the committee should wait for change until private research ventures can be completed.\textsuperscript{123} Any other course of action invites yet more surprises, and possibly very major surprises, given the subjects of Rules 23 and 68, and the changes being discussed.

With respect to the economic analysts of the civil rules, the academic merit of their work is already well established. However, my argument suggests that in order to furnish a basis for policy making, researchers must either base their generalizations on adequate observation or engage in a program of hypothesis testing. In drawing this conclusion, I do not intend to echo Robert Ellickson’s suggestion that ideas from psychology and sociology should be added to the law and economics approach.\textsuperscript{124} Although I applaud the contribution of both psychology and sociology to legal scholarship, in my view, Ellickson’s proposal is an unfortunate suggestion to change the law and economics approach. Instead, I suggest that the law and economics approach must be completed, at least in the area of civil rule making, if policy making is to be improved. My narrow proposal is similar to the more general suggestion of Richard Posner, who wrote, “The object of scientific research—and the aspiration of economic analysis of law is to be scientific, whatever the achievements to date—is to increase our ability to predict and control our environment, in this case our social environment. The usual way this is done in science is by advancing hypotheses, preferably bold and counterintuitive ones, and confronting these hypotheses with data.”\textsuperscript{125} But my proposal is less demanding than Posner’s vision of the practice of law and economics. I suggest only that economic analysts could furnish an acceptable basis for civil rule making by grounding their generalizations on systematic observations, a standard less demanding than hypothesis testing. Ultimately, the higher standard may become appropriate, but for now the lesser standard would be adequate and would encourage collaboration between economic analysts and rule makers.

\textsuperscript{123} Compare Richard O. Lempert, Civil Juries and Complex Cases: Let’s Not Rush to Judgment, 80 Mich. L. Rev. 68, 68 (1981) (suggesting that Supreme Court should wait for further empirical research before deciding “whether the seventh amendment protects the right to jury trial in complex civil cases”).

