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SOME REALISM ABOUT EMPIRICISM

Carl Tobias*

I. INTRODUCTION

The 1983 revision to Rule 11 of the Federal Rules of Civil Procedure proved to be the most controversial amendment to the Federal Rules since their adoption a half-century ago. In the years following the revision's adoption, however, an absence of empirical data on the Rule's application complicated assessment of its precise consequences. The 1992 publication of *The Use and Impact of Rule 11* ("the article"), by Lawrence Marshall, Herbert Kritzer, and Frances Kahn Zemans, ameliorated this empirical deficiency.¹ The article set forth many important findings from the most comprehensive empirical study of Rule 11 ever performed. The study, conducted under the auspices of the American Judicature Society (AJS), affords insights that implicate federal civil procedure, the Federal Rules revision process, and federal court legal culture.² The study's effect on the 1993 revision to Rule 11 warrants particular attention. The lessons derived from this recent revision process will inform future efforts to revise Rule 11 and other Federal Rules of Civil Procedure.

The Marshall-Kritzer-Zemans study, therefore, should be of compelling interest to a broad spectrum of individuals and entities that are concerned about the federal courts. These include persons involved in the courts' day-to-day activities, such as federal judges who apply the Federal Rules and attorneys who must practice under the provisions. The study should also be of value to individuals, such as students of modern disputing and observers of the three-year process of Federal

* Professor of Law, University of Montana. I wish to thank Sally Johnson and Peggy Sanner for their valuable suggestions; Cecelia Palmer and Charlotte Wilmerton for processing this piece; and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992).

2. The article is a significant component of a larger study. The authors have discussed some of the findings in the article elsewhere. See, e.g., Herbert M. Kritzer et al., *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269 (1992). See generally Marshall, *supra* note 1, at 943.

Rules revision, as well as institutions, such as the Judicial Conference and the Rand Corporation, which evaluate the efficacy of federal court procedures.³ Finally, policymaking bodies, such as the Advisory Committee on the Civil Rules (Advisory Committee), which evaluate the rules and propose suggestions for their improvement, have relied on the study's findings.

Because the Marshall-Kritzer-Zemans study has been quite significant and will probably continue to be influential, their article warrants close analysis. This Essay is primarily a respectful critique, which emphasizes the authors' assertions regarding empirical data. The Essay briefly describes the article and then assesses certain of its claims that principally implicate empirical information.

II. DESCRIPTION OF THE ARTICLE

The article's introduction expresses concern about "dramatically conflicting accounts" of the actual effects of Rule 11, as amended in 1983, on federal civil practice and about the failure of much academic literature to address this problem.⁴ Because those responsible for rule revision were at the time developing a proposal to modify Rule 11 and needed systematic empirical data on which to premise decisionmaking,⁵ Marshall, Kritzer, and Zemans found particularly significant the lack of pertinent material on the rule's use and impact. The authors, accordingly, intended that their findings afford a "foundation for further scholarly analysis in this area, as well as necessary information for those . . . considering Rule 11 reforms."⁶

The authors initially explored the background of Rule 11's 1983 amendment, examining certain purposes the rule revisers sought to achieve.⁷

3. See, e.g., Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(c)(3), 104 Stat. 5089, 5096 (1990) (requiring Judicial Conference to "prepare a report on the plans developed and implemented by the Early Implementation District Courts" under the Civil Justice Reform Act of 1990); *id.* § 105(c), 104 Stat. 5098 (requiring that study of ten pilot courts implementing Civil Justice Reform Act of 1990 be performed by "an independent organization with expertise in the area of Federal court management").

4. Marshall, *supra* note 1, at 943-44. The authors explained that the analysis of judicial opinions—the mainstay of traditional legal scholarship—had not facilitated evaluation of Rule 11 activity in the courtroom, much less outside of it. *Id.* at 944.

5. *Id.* at 944. The 1993 amendment of Rule 11 became effective on December 1, 1993. See Notice Concerning Amendments to Federal Rules, 151 F.R.D. 145 (1993); see also Supreme Court of the United States, Amendment to Federal Rule of Civil Procedure 11, 146 F.R.D. 401, 419-24 (1993).

6. Marshall, *supra* note 1, at 946.

7. *Id.* at 946-49.

The authors correctly concluded that the drafters meant to reduce litigation abuse by requiring lawyers to conduct reasonable legal and factual inquiries before filing papers and by mandating that judges sanction attorneys who violated the Rule.⁸

The authors next explained the methodology of their study.⁹ The study was conducted in the Fifth, Seventh, and Ninth Circuits, thereby affording geographical diversity and variability in the perceived incidence of Rule 11 activity.¹⁰ The authors sought to guarantee variation within the circuits by choosing several districts: one with a metropolitan city; a second including middle-sized urban communities; and a third having a predominantly non-urban population.¹¹ They asked 4,500 federal court litigators questions regarding their personal experiences with Rule 11 and how the provision had affected their practices and conduct.¹² The response rate was seventy-five percent, a figure considered to be very high.¹³

The authors examined the study's general findings concerning the Rule's use.¹⁴ They considered significant the frequency of formal Rule 11 activity, both in terms of the motions filed and the sanctions imposed.¹⁵ The authors determined that counsel for plaintiffs were the target of Rule 11 activity much more frequently than defense attorneys.¹⁶ The authors concomitantly ascertained that there was considerable informal Rule 11 activity and that lawyers for plaintiffs were again "far more likely to be the target."¹⁷ The authors concluded that ninety-five percent of the sanctions imposed were monetary but asserted that this amount was smaller than "many media accounts of sensational

8. *Id.* at 947-48. See also FED. R. CIV. P. 11, reprinted in 97 F.R.D. 165, 196-97 (1983).

9. Marshall, *supra* note 1, at 949-51.

10. *Id.* at 949-50; see also *infra* notes 30-34 and accompanying text.

11. The districts surveyed within the Fifth Circuit included the Western District of Louisiana, the Northern District of Mississippi, and the Southern District of Texas; the districts within the Seventh Circuit included the Northern District of Illinois, the Southern District of Indiana, and the Western District of Wisconsin; the districts within the Ninth Circuit included the District of Arizona, the District of Montana, the Eastern District of California, the District of Oregon, and the Central District of California. Marshall, *supra* note 1, at 950. The authors selected two additional districts in the Ninth Circuit "because of its unique size and diversity." *Id.*

12. *Id.*

13. *Id.* This figure evidenced lawyers' keen interest in Rule 11. *Id.* at 945.

14. *Id.* at 951-60.

15. *Id.* at 951-52. Formal activity includes proposals to sanction through counsel's motion or a judge's show cause order. *Id.* at 951.

16. For example, counsel for plaintiffs were the target in 70 percent of the cases in which courts imposed sanctions. *Id.* at 953.

17. *Id.* at 956.

cases may lead some to imagine."¹⁸

The authors also explored the Rule's impact on the practice of law.¹⁹ The greatest effect was on the amount of factual investigation attorneys undertook before asserting claims or defenses.²⁰ Nearly twenty percent of the lawyers surveyed had refused to present a claim or defense which they believed had merit out of concern about Rule 11.²¹ The authors correspondingly considered variables in the nature of the case and practice.²² They determined that nearly twenty-three percent of the suits in which courts levied sanctions involved civil rights, although those cases constituted only 11.4 percent of the actions filed.²³ The authors characterized as "surprising" the finding that judges imposed sanctions in an identical ratio for a different classification of lawsuits labelled "other commercial cases," which involve, for example, antitrust claims, corporations and banking law, and securities issues.²⁴ Nonetheless, the authors described as "unique" the substantial discrepancy in the effect the Rule has had on the practices of counsel who represent civil rights plaintiffs and defendants.²⁵

The study explored numerous additional factors regarding attorneys' practice environment and experience to ascertain their relevance.²⁶ Environmental considerations, including law firm size, community size, and district size, seemed to have little effect.²⁷ As to experiential factors, the authors concluded that attorneys with prior Rule 11 experience were more likely to have modified their conduct.²⁸

The authors also evaluated variations in the Rule's employment and effects in the three circuits surveyed.²⁹ The results were consistent with the reputations of the circuits: the Seventh Circuit was found to be the most aggressive enforcer; the Ninth Circuit was the most lenient;

18. *Id.* at 956-57. The median sanction was \$2,500. *Id.* at 957.

19. *Id.* at 960-65.

20. *Id.* at 960, 964.

21. *Id.* at 961. Sixty and sixth-tenths percent of the respondents had taken some important action during the prior year in response to Rule 11. *Id.* at 961.

22. *Id.* at 965-75.

23. *Id.* at 965-66.

24. *Id.* at 966-67. The authors posited several explanations for this finding, none of which they seemed to consider satisfactory. *See id.* at 966-68.

25. *Id.* at 971-75. "[C]ivil rights defense lawyers appear to be disproportionately *unaffected* by Rule 11." *Id.* at 971.

26. *Id.* at 975-80.

27. *Id.* at 975-79.

28. *Id.* at 980.

29. *Id.* at 981-85.

and the Fifth Circuit occupied the middle ground.³⁰ The incidence of cases in which courts imposed sanctions was considerably higher in the Seventh Circuit.³¹ Nonetheless, lawyers in the Fifth Circuit were most responsive to Rule 11,³² although the authors ultimately found "no dispositive explanation for the high level of reaction."³³

The article concludes with several general propositions that the authors deemed worthy of repetition.³⁴ Even though the authors ascertained that plaintiffs had been the targets of Rule 11 activity considerably more often than defendants, lawyers who typically represent either plaintiffs or defendants responded similarly to the Rule, with the significant exception of civil rights attorneys.³⁵ Moreover, the authors found that the experiences of those polled strongly suggested that much of the portrayal of the impact of Rule 11 was "significantly skewed."³⁶ The authors did not purport to resolve the ultimate normative issue of whether the 1983 Rule's benefits had outweighed its disadvantages but asserted that the study had afforded systematic evidence regarding the reality of the provision in operation.³⁷ The article closes by impugning decisionmakers and scholars to premise their judgments about Rule 11's imminent revision on "evidence—not conjecture or anecdotes—about" the Rule's employment and effects, because policymaking that was not based on empirical reality would be ineffective and produce unintended consequences.³⁸

Marshall, Kritzer, and Zemans made a substantial contribution. They carefully collected, analyzed and synthesized an enormous quantity of invaluable empirical data on Rule 11's use and impact. It is difficult to overstate the importance of the type of endeavor they undertook. The development of questionnaires, their circulation, the compilation of responses, the interpretation of statistical information, and the derivation of conclusions from that data are relatively unglamorous and onerous

30. *Id.* at 981.

31. Courts in the Seventh Circuit imposed sanctions in 24.5% of the cases as compared with courts in the Fifth and Ninth Circuits that did so in 14.6% and 14.4% respectively. *Id.*

32. *Id.* at 982.

33. *Id.* at 985.

34. *Id.* at 985-86.

35. The other general ideas are that geographic setting is strikingly important to Rule 11 activity and that more than 80% of the respondents stated that the Rule had affected their practices. *Id.* at 985.

36. *Id.* For example, the authors stated that lawyers devote little time to Rule 11, that sanctions' imposition has been limited, and that most sanctions are modest. *Id.*

37. *Id.* at 985-86.

38. *Id.* at 986.

tasks, yet they are vital. The authors' efforts elevated the level of debate over Rule 11, a debate that had generated more heat than light.

There was a compelling need for the type of "real world" data on Rule 11 gathered by the authors. Although much can be learned from the collection of empirical evidence on Rule 11's formal invocation, the overwhelming majority of Rule 11 activity since 1983 has been informal. Empirical data on the Rule's informal use was, therefore, critical to the work of public policymakers, such as the Advisory Committee on the Civil Rules, in formulating the most effective proposal to amend the Rule. Much of the Rule 11 activity that had been most controversial, such as informal threats to invoke Rule 11 against civil rights plaintiffs, could have chilled civil rights plaintiffs' enthusiasm. The authors reported, for example, that Rule 11 had led civil rights attorneys to advise clients not to pursue potentially meritorious claims and even forego suit.³⁹

In short, Marshall, Kritzer, and Zemans compiled, evaluated and synthesized a wealth of essential information on the employment and effects of the 1983 amendment of Rule 11. This material yielded informative insights which implicated propositions principally related to the theory and practice of, and institutions involved in, Federal Rules revision. Several of the issues raised by their study warrant additional consideration. The following section briefly attempts to explore one of the most important issues and to show how it was addressed in the most recent Federal Rules amendment process.

III. ANALYSIS OF THE ARTICLE

As stated above, very little empirical data on the impact of Rule 11 had been assembled before Marshall, Kritzer, and Zemans published their study. There was, accordingly, a compelling need for the type of experiential data provided by the authors. There was also a need to interpret and analyze the empirical information collected, so that public policymakers could transform the data into effective proposals for rule revision. Unfortunately, the authors drew comparatively few conclusions from much of the data they reported. Moreover, the material on which the authors premised the conclusions that they did reach is open to varying interpretation. Furthermore, the authors seemed to understate the significance of certain information they gathered, leaving readers with the impression that important inferences should not be derived from

39. *Id.* at 973.

some of the data.

The civil rights area is illustrative. Considerable raw data that Marshall, Kritzer, and Zemans assembled lent empirical support to the informal observations of numerous judges and writers that the 1983 Rule had disadvantaged civil rights plaintiffs.⁴⁰ The authors, however, did not so state and seemed to draw different conclusions from certain relevant information. For example, the authors found that courts imposed monetary sanctions pursuant to Rule 11 even more often (ninety-five percent of the cases) than was believed but asserted that the amount of the sanctions was apparently much lower than many had assumed.⁴¹ The authors characterized as "relatively modest [the] amount of money involved in the majority of sanctions cases" and noted that the median sanction was \$2,500. They remarked that the "bar's reaction to Rule 11 ha[d] been fueled by the horror stories of the extremely unusual sanctions that exceed \$1,000,000."⁴² I would suggest, although the authors did not, that significant inferences for civil rights plaintiffs can be derived from these statements and the information on which they are premised. For instance, a single parent, who believes that she has suffered employment discrimination and pursues litigation to vindicate substantive rights to be free from discrimination, will not consider modest a \$2,500 sanction.

Judicial imposition of substantial sanctions on Julius Chambers, Director-Counsel of the NAACP Legal Defense Fund, and William Kunstler, the renowned civil rights attorney, in separate civil rights cases,⁴³ also chilled civil rights lawyers who were understandably concerned when courts penalized the ablest among them.⁴⁴ Shockwaves have reverberated as well through the public interest law community

40. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., dissenting), *cert. dismissed*, 485 U.S. 90 (1988); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89). See generally Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

41. Marshall, *supra* note 1, at 946.

42. *Id.* at 957.

43. See *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991).

44. See, e.g., Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988); Stephen Labaton, *Solution to Wasteful Lawsuits Becomes a Problem*, N.Y. TIMES, June 14, 1992, at E2.

since 1989 when a judge levied a \$1,000,000 sanction on public interest litigants.⁴⁵

The experience with Rule 11's impact on civil rights plaintiffs, accordingly, demonstrates that empirical data alone, even once interpreted, will not suffice to support the public policy determinations that are so critical to the revision of a controversial rule of civil procedure. Some considerations important to efficacious decisionmaking cannot be empirically measured. Certain factors may resist quantification or verification. Others will require value judgments. It is legitimate and indeed imperative to consult, integrate, and apply additional relevant sources in formulating the best public policy decisions on rule revision. The most pertinent inquiry becomes ascertaining which sources are appropriate.

As to these propositions, the efforts to develop an effective proposal that led to Rule 11's amendment are highly instructive.⁴⁶ The Advisory Committee first commissioned the Federal Judicial Center (FJC) to conduct a comprehensive Rule 11 study, which was similar to that performed by Marshall, Kritzer, and Zemans. The committee also issued a call for comment, soliciting public input on the Rule's possible revision.⁴⁷ The committee diligently reviewed the FJC's findings and the public's suggestions. The panel circulated a preliminary draft proposal for public comment;⁴⁸ received written and oral public input; and significantly revised this draft during May 1991.

In June 1992, the Advisory Committee presented a new proposal to the Judicial Conference Committee on Rules of Practice and Procedure which adopted most of the Advisory Committee's recommendations, with the important exception of leaving to judicial discretion the imposition of sanctions.⁴⁹ Many features included in that proposal, which

45. See *Avirgan v. Hull*, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

46. In this paragraph I rely substantially on Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 858-97 (1992) [hereinafter *Reconsidering*] and on Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992) [hereinafter *Proposed*]. These sources include citations to all of the relevant primary sources, a few of which I include here.

47. See FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991) [hereinafter FJC REPORT]; Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 344, 345 (1990). This was important, as the Committee inverted the normal sequence of initially developing a proposal and then seeking public comment.

48. See Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendment to Federal Rule of Civil Procedure 11, 137 F.R.D. 53, 74-82 (1991). See generally *Reconsidering*, *supra* note 46, at 865-97.

49. See Randall Samborn, *Key Panel Votes Shift in Rule 11*, NAT'L L.J., July 6, 1992, at 13.

eventually became the amended Federal Rule 11, are solicitous of the needs of civil rights plaintiffs. The Federal Rule amendment, therefore, substantially improved the 1983 Rule and was considerably better than the May 1991 draft.⁵⁰

Most relevant was the apparent willingness of both committees to consult, integrate, and apply information from sources other than empirical data. Each committee, of course, relied substantially on the material generated by the FJC and Marshall-Kritzer-Zemans studies. Had the committees depended exclusively or even primarily on this information, however, they would not have adopted proposals which appear so solicitous of civil rights plaintiffs. For instance, neither the FJC study nor the Marshall-Kritzer-Zemans article left the impression that Rule 11 had substantially disadvantaged, much less disproportionately affected, civil rights plaintiffs.⁵¹ Rather than rely solely on the empirical studies, the two committees participated in the type of rule revision process that Congress expressly prescribed in the Judicial Improvements and Access to Justice Act of 1988.⁵² They carefully drafted proposals, sought and seriously considered public comment, modified the drafts in light of that input, and hammered out workable proposals in the crucible of public debate. The committees listened closely to all segments of the organized bar: plaintiffs, defense, civil rights, and public interest, as well as corporations, government representatives, and the public.

Members of both committees apparently found that empirical information alone was insufficient and therefore consulted additional sources. More specifically, they seemingly heard the "Call of Stories" involving Rule 11.⁵³ Many of these incidents were neither reported in the advance sheets nor retrievable on computerized services. However, a num-

In September, the Judicial Conference approved without change the proposal formulated in June. In April 1993, the Supreme Court transmitted to Congress the amendment of Federal Rule 11 which became effective on December 1, 1993. See *supra* note 5. Bills that would have postponed the amendment's effective date for one year were introduced, but the legislation did not pass. See S. 1382, 103d Cong., 1st Sess. (1993); H.R. 2979, 103d Cong., 1st Sess. (1993).

50. See generally *Proposed*, *supra* note 46; *Reconsidering*, *supra* note 46.

51. See, e.g., FJC REPORT, *supra* note 47, §§ 1A-1C; Marshall, *supra* note 1, at 946, 957; see also *supra* notes 40-45 and accompanying text. But see Marshall, *supra* note 1, at 973; *supra* notes 23-25 and accompanying text.

52. PUB. L. NO. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §§ 2071-78 (1988)). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 854 (1991).

53. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); see also Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 901 (1992) (the story of *In re Kunstler*); cf. Kritzer, *supra* note 2 (characterizing much Rule 11 debate as consisting of cosmic anecdotes). See generally *Symposium on Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

ber of these cases were reported or were available on computerized services, and a few of them were sensational, especially in terms of the size of the sanctions levied.⁵⁴ Perhaps the rule revisers understood that data regarding some of this Rule 11 activity was notoriously difficult to collect, evaluate, and synthesize; that chilling effects were not reducible to precise empirical validation; and that the Rule's impact on civil rights plaintiffs may have been obscured by the way that certain empirical information was presented.⁵⁵ They might also have appreciated that a modest sanction could bankrupt impecunious litigants or that news travels fast in the public interest law and civil rights communities, particularly when judges impose large sanctions on their foremost advocates.⁵⁶

Indeed, a telling moment in the rule revision process came during the May 1991 meeting at which the Advisory Committee crafted its preliminary draft proposal.⁵⁷ One lengthy discussion in which most committee members participated indicated that they believed the perception that Rule 11 was chilling civil rights plaintiffs was sufficient to warrant possible amendment, even if that fact could not be empirically verified. This decision was appropriate, given congressional intent clearly expressed in many civil rights statutes that the judiciary facilitate plaintiffs' vindication of their substantive rights.⁵⁸

I am neither criticizing the outstanding contribution made by Marshall, Kritzer, and Zemans nor denigrating the value of empirical data. Both are immensely important. I do believe, however, that the material assembled must be interpreted to inform public policy choices that are ultimately made. Concomitantly, the significance of certain findings, such as the meaning for civil rights plaintiffs of even a few substantial sanctions or a larger number of modest ones, should not be under-

54. See *supra* notes 43 & 45 and accompanying text.

55. For example, reliance on the median, rather than the mean, sanctioning amounts can understate the importance for civil rights plaintiffs of even a small number of large sanctions. See Marshall, *supra* note 1, at 957; see also *supra* notes 43-45 and accompanying text; *infra* note 59 and accompanying text.

56. See *supra* notes 43 & 45 and accompanying text.

57. I rely substantially in this paragraph on notes that I took while attending the Advisory Committee meeting. See generally *Reconsidering*, *supra* note 46, at 857 n.2.

58. See, e.g., Civil Rights Act of 1991, PUB. L. NO. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981-2000 (Supp. IV 1992)). See generally Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992); Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992).

stated.⁵⁹

There must be more and better information and increased and refined analysis of all sorts that will improve important public policymaking. We need systematically collected empirical data, but we also must hear the Call of Stories. Researchers might even closely analyze case files in high profile civil rights cases or interview the lawyers, litigants, and judges involved in those suits.⁶⁰ Decisionmakers must listen to all interests affected by rule revision and draft changes that are as responsive as possible to those interests while remembering congressional intent expressed in substantive statutes, such as civil rights legislation.

IV. CONCLUSION

Marshall, Kritzer, and Zemans significantly advanced the highly controversial debate over the 1983 amendment of Federal Rule 11. Public policymakers properly relied on the valuable empirical data that the authors collected, analyzed, and synthesized. They were also correct to consult, evaluate, and integrate relevant material apart from empirical information that could be found in other sources, such as stories involving the imposition of significant Rule 11 sanctions in civil rights cases. When decisionmakers consider and apply all of this available material, they are able to formulate the most efficacious proposals for rule revision.

59. See *supra* notes 43-45, 53-56 and accompanying text.

60. The Center for Constitutional Rights proposed to undertake such a study but discontinued this effort once the Call for Comments issued. See Tobias, *supra* note 40, at 525 n.151.