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# Unspoken Questions in the Rule 32.1 Debate: Precedent and Psychology in Judging

David E. Klein\*

## I. Introduction

The legal community's debate over the seemingly esoteric Proposed Federal Rule of Appellate Procedure 32.1 might be expected to draw little more than yawns from people who do not sit on a bench, practice law, or spend much time in law schools. But, as quickly becomes apparent from the papers in this symposium and the literature upon which they draw, the debate can be highly instructive, even fascinating, to nonlawyers who want to understand judges and the law they produce. Part of the fascination is in seeing how passionate many members of the legal community are about the issue and how impressively each side marshals normative arguments for its position. But an equally valuable aspect of the debate, from a social scientist's perspective, is how well it highlights gaps in our knowledge about what judges do and how they think.

The purpose of this short essay is to direct attention to several empirical questions that are raised by but not answered in the debate. Naturally, there are many such questions. Some of those relating most closely to the proposed rule—such as how unpublished dispositions are produced and how they are used and regarded by lawyers and judges—are already receiving systematic scrutiny.<sup>1</sup> This Article focuses on questions that transcend the debate over Rule 32.1, implicating fundamental issues of why judges act as they do and how the law emerges, and that have not been the subject of a broad and sustained research program in law schools. These issues fall into two main areas:

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1. In addition to the interview and survey evidence discussed by Professor Barnett in this symposium, there is related evidence in the Federal Judicial Center's recently completed report, TIM REAGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT (Apr. 14, 2005), available at <http://nonpublication.com/fjc.pdf>. See generally Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

judges' use of precedent and the workings of the judicial mind. In discussing what we do and do not know about these issues and some potentially fruitful areas of inquiry, I will draw on work from political science and psychology. A secondary but still important aim of this Article is to argue for the value of greater crossfertilization across disciplinary boundaries.

## *II. The Use of Precedent*

### *A. How Much and Why?*

Consider a pair of unconnected claims, one from opponents of Rule 32.1 and one from proponents. Some opponents claim that allowing citation of unpublished opinions would inevitably result in those opinions being given undue weight by lawyers and lower court judges. In his letter opposing the rule, Judge Kozinski writes:

[L]ower court judges, whose rulings will be appealed to the circuit, are extremely reluctant to ignore fine nuances of wording that they believe reflect the views of three court of appeals judges. Unlike law review articles, opinions of district courts and other nonbinding authorities, unpublished dispositions of the circuit are seldom dismissed as inconsequential, yet they should be.<sup>2</sup>

According to another opponent, "Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist."<sup>3</sup>

The concern raised by the Rule's proponents is that disallowing citation robs lawyers and judges of a valuable set of precedents. In the words of a judge writing in support of the Rule:

Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. . . . We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an

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2. Letter from Judge Kozinski, U.S. Circuit Judge for the Ninth Circuit, to Judge Alito, U.S. Circuit Judge for the Third Circuit, (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf>.

3. Memorandum from Patrick J. Schiltz, Reporter, to Advisory Committee on Appellate Rules 45 (Mar. 18, 2004) (quoting Letter from E. Vaughn Dunnigan to Peter G. McCabe, Secretary for Committee on Rules of Practice and Procedure 1 (Feb. 8, 2004), available at [http://www.secretjustice.org/pdf\\_files/comments/03-AP-322](http://www.secretjustice.org/pdf_files/comments/03-AP-322)).

unpublished order. I see no reason why we ought not be allowed to consider such material.<sup>4</sup>

What the claims have in common is an assumption that judges take precedents very seriously even when they are not technically required to. Perhaps this assumption could have been accepted without demur a few generations ago. But today we must approach it with at least some skepticism.

It has been many years since legal realists like Frank, Llewellyn, and Pound first argued that precedents are far less constraining than they are sometimes made out to be, in that "a court can usually find earlier decisions which can be made to appear to justify almost any conclusion"<sup>5</sup> and will frequently be tempted to do so. Applying empirical tests to realists' logic, political scientists have gathered a great deal of evidence suggesting that judges' individual beliefs about right and wrong and what is good or bad policy exert a substantial influence on their decisions. There is still a lively debate over the "attitudinal model"<sup>6</sup> in political science, but the debate focuses on how much room judges' personal attitudes leave for other influences to act; few would contest the claim that personal attitudes play an important role in their decisions. Indeed, the belief that judges' attitudes are important is so well and so long entrenched among political scientists that it would be a challenge to find a single political science study of judges' decisionmaking published in the last thirty years, whether of supreme, intermediate appellate, or trial courts, that did not include a variable intended to measure judges' ideology.<sup>7</sup> It would probably be impossible to get such a piece published today.

Of course, the legal community knows the realist/attitudinalist position well, and it is commonly cited by legal academics and judges. Some of the public comments on Rule 32.1, such as this one from an opponent, have a distinctly realist flavor:

Facts drive cases. It doesn't help to add authorities. It's a waste of time and paper for a litigator in the Ninth Circuit to add a "persuasive" cite from

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4. Schiltz, *supra* note 3, at 47–48 (quoting Letter from Judge Ripple, U.S. Circuit Judge for the Seventh Circuit, to Judge Alito, U.S. Circuit Judge for the Third Circuit 1 (Feb. 12, 2004), available at [http://www.secretjustice.org/pdf\\_files/comments/03-AP-335.pdf](http://www.secretjustice.org/pdf_files/comments/03-AP-335.pdf)).

5. JEROME FRANK, *LAW AND THE MODERN MIND* 163 (Peter Smith Publ'g 1970) (1930).

6. The term comes from the most prominent proponents of the realist view in contemporary political science. See JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (describing the "attitudinal model" as a theory stating that Supreme Court Justices decide cases by evaluating the facts and by considering their own ideological values).

7. See generally LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997) for a valuable overview of the literature.

the Southern District of Florida or the Middle District of Pennsylvania. The same would be true of nonbinding cites from the circuit itself.<sup>8</sup>

Nevertheless, the debate over Rule 32.1 illustrates what I believe to be a general truth—that the implications of the realist position are not always taken as seriously as they might be in thinking about the law and judging.

Let us assume for the moment that a strong version of realism accurately describes judging: Judges are powerfully swayed by their personal values and reactions to the facts of a case, and precedents can usually be evaded or manipulated to permit desired outcomes. In this world, even binding precedents might have only a weak effect. Precedent with less normative force should have very little influence. In the most exhaustive study to date of stare decisis at the United States Supreme Court, Spaeth and Segal found that Justices who dissented from a decision were rarely willing to adhere to that decision as a precedent in later cases.<sup>9</sup> Unpublished dispositions are typically thought to possess little, if any, normative force. It is easy to imagine circuit judges in the realist world citing unpublished opinions to help justify positions already reached, but hard to imagine them relying on unpublished opinions to reach a position that they otherwise would have rejected.

Lower court compliance with superior courts' precedents is less of an anomaly in the strong legal realist world: Lower court judges may follow precedent simply to avoid being reversed. However, it is not yet settled how much judges actually worry about reversal.<sup>10</sup> Even if they are greatly concerned about reversal, judges are well aware that unpublished opinions are not considered binding by circuit judges and usually were not even written by them. Knowing these facts, only a highly risk-averse judge could feel much constrained by an unpublished circuit court decision. Perhaps many district judges are that risk-averse, but I do not see any reason to assume so without proof.

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8. Letter from Judge John Noonan, United States Circuit Judge for the Ninth Circuit, to Peter G. McCabe, Secretary for Committee on Rules of Practice and Procedure (Dec. 16, 2003), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-052.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-052.pdf).

9. See generally HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

10. For conflicting positions on the importance of reversal, compare Charles M. Cameron, *New Avenues for Modeling Judicial Politics*, presented at the 2nd Annual Conference of the W. Allen Wallis Institute of Political Economy (Oct. 1993) and McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995), with David E. Klein & Robert J. Hume, *Fear of Reversal as An Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003), and Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. OF EMP. LEGAL STUD. 369 (2005). Unfortunately, these pieces and others focus largely on circuit court–Supreme Court interactions. There has been even less systematic attention to the importance of reversal for trial judges.

Because it is difficult to reconcile the assumption that judges give substantial weight to nonbinding precedents with a strong realist view of judging, we should be reluctant to accept it unless we are confident that the strong realist position is wrong. Like many legal scholars, I believe that that position is at least partly wrong. But empirical researchers have had a far easier time identifying attitudinal influences on judges' decisionmaking than more traditionally "legal" influences.<sup>11</sup> Much more work must be done before those who doubt the strong realist position can justifiably disregard it.

Even assuming the realist picture of decisionmaking is indeed incomplete, what other important influences are at work? This is another difficult empirical question that emerges from but is not directly confronted in the Rule 32.1 debate. Proponents' emphasis on the importance of access to other judges' thinking suggests that they believe that judges look to the legal views of other judges who have confronted similar cases in the past because they care about getting the law right. Opponents seem to have in mind less laudable influences, such as unthinking adherence to norms when they are not applicable or the desire to reach a decision without too much effort. I do not have space to defend this claim, but at the logical level it seems clear that none of these three possibilities is either implausible or self-evidently more important than the others. Nor does the empirical literature offer much help in determining why and when each of these influences operates on judges or which has the greatest impact.

Although difficult to address, these questions matter. If we could answer them confidently, we would have a better chance of agreeing about whether the adoption of Rule 32.1 would add to or detract from the quality of judges' decisionmaking. More broadly, we would be in a better position to understand how and how well judges make law when they have the opportunity or responsibility to do so—why an approach taken or rule announced in one opinion is taken up, ignored, or rejected by other judges—and whether the results for society are beneficial or not. Such an understanding would in turn help us to evaluate other possible judicial reforms.

### *B. How?*

The debate over Rule 32.1 raises questions not just about how much and why judges rely on nonbinding precedents, but also about how they use them.

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11. For interesting evidence of the influence of precedents and a helpful discussion of other efforts to find it, see Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

There are probably several that are worthy of discussion, but I will focus on the question of how much influence a single precedential case is allowed to exert over decisions in subsequent cases. Put another way, do judges tend to look to a body of precedent for help in deciding a case that necessarily differs from each prior case, if only in a small way, or do they typically rely on a general rule announced in a single opinion to resolve any case that falls into a broadly related set?

A closely related question is whether "words chosen by judges for their opinion have some controlling future force, just like a statute," or later judges "give force only to the ideas expressed in a judicial opinion, ideas that can be expressed using a variety of words and phrases."<sup>12</sup> Under traditional understandings of legal reasoning, judges are normally expected to do the latter, piecing together a general rule from a set of similar cases and disregarding as dicta overly broad statements in any one opinion. If they depart from this approach and accept a previous court's language as binding, they grant it more influence than it otherwise might have.

The consequences of adopting Rule 32.1 would depend partly on which type of practice is more common. As Judge Kozinski points out, overloaded appellate judges "don't have the time to consider how the language of [an unpublished] disposition might be construed (or misconstrued) when applied to future cases."<sup>13</sup> Hence, to the extent that lawyers and district judges are guided by the language of circuit court opinions, we must take seriously the argument of Rule 32.1's opponents that the Rule could lead to the codification of language that would be better left in obscurity. On the other hand, insofar as lawyers and judges focus on the ideas underlying earlier decisions rather than the language expressing them, Rule 32.1 proponents are right to emphasize that even routine applications of established rules have potential value for elucidating and testing the logic of those rules.

Forceful scholarly objections to practices that give great weight to single precedents,<sup>14</sup> such as deference to language, point to implications

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12. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 784 (2003).

13. Kozinski, *supra* note 2, at 5.

14. See, e.g., Cappalli, *supra* note 12, at 784 (arguing precedential value should not hang on word choice); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Joan M. Shaughnessy, *Commentary: Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597, 1603 (2005) ("The concern with resolving every future permutation of any opinion before it has been completed may have gone too far."). Apparently, the issue is not entirely new. Jerome Frank reported concerns "that courts have been paying too much attention to the language of prior

that go well beyond Rule 32.1. Part of what seems to concern critics is the very fact that these practices appear to be inconsistent with traditional understandings of what common law judges do. But their objections go deeper than that. An idea-oriented, case-by-case approach to precedent is more cautious and, at least from the perspective of the court deciding the initial precedent, more humble. An idea-oriented approach recognizes that the first court may be unable to foresee all possible circumstances in which its intended rule might apply, and it leaves later courts more freedom to adapt the rule or limit its reach as necessary. On the other hand, there is something to be said for a system in which the first court can announce a general rule and expect other courts to respect it—most importantly, that such a system might provide greater clarity and consistency to litigants, lawyers, and lower court judges.

So how do judges use precedents? I do not think we know yet. Scholars' impressions that judges today expect the language in their published opinions to bear a heavy burden is reinforced by some statements from judges themselves.<sup>15</sup> But I am not aware of any systematic empirical evidence demonstrating that these impressions are correct. And even if they are, that does not mean that judges in subsequent cases treat the earlier opinions as their authors intended. Nor do logic and assumptions about judges' motivations yield a confident answer. On the one hand, we might expect later courts to resist giving too much weight to earlier judges' statement of a rule, because doing so cedes some of their own power to shape the law. On the other hand, being able to rely on a single source for the statement of a rule can make judges' lives easier. In addition, judges might appreciate the greater predictability offered by this approach to precedent, and they might feel an obligation not to undermine that predictability by taking a different approach.

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cases and . . . should . . . pay more attention to what judges in earlier cases have *decided* as against what they have *said* in their opinions." FRANK, *supra* note 5, at 162–63.

15. In her public comment on the rule, Judge Cynthia Holcomb Hall writes:

To the extent there is any possibility that an "unpublished disposition" might serve as even persuasive authority in a future case, conscientious judges will refrain from preparing anything but the most fully vetted opinion out of the concern that imprecise language might later be manipulated by a clever attorney to support a proposition that the judges never intended.

Letter from Judge Hall, United States Circuit Judge, to Peter G. McCabe, Secretary for the Committee on Rules of Practice and Procedure (Jan. 12, 2004), at 2, *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-133.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-133.pdf); *see also* Kozinski, *supra* note 2, at 2 (noting published opinions "set the law of the circuit").



### III. Psychology and Accountability

In its emphasis up to now on Rule 32.1's implications for the use of precedents, this paper reflects the larger debate on the Rule. But the Rule's effects may not be limited to what happens after an unpublished decision is handed down; it also may affect the reasoning that goes into that decision. The word "accountability" crops up fairly often in arguments for the Rule, including in the symposium comments of Professors Cravens and Pether.<sup>16</sup> Sometimes the term is used to refer to citizens' ability to maintain some awareness of, and control over, the actions of public officials in a democracy. But, it is also sometimes used in a different context to suggest that a judge may be encouraged to exert more effort in order to write a better opinion, if the judge knows the opinion will be associated with him or her and read by others. As Professor Carpenter puts it, "[W]ritten opinions encourage judges to produce well-reasoned, well-written decisions because they subject judges' conclusions to public scrutiny. This leads to better, more consistent opinions because it holds judges accountable to the public which they serve."<sup>17</sup>

Pushing this notion just a bit further, we might suppose that when one is accountable for a decision, not only will the opinion justifying it be written with greater care, but the very reasoning that goes into the decision before any attempt is made to justify it in writing might be of higher quality. The general proposition that people who know that their decisions will be scrutinized will reason more soundly has received a good deal of systematic attention from social psychologists. In this section, I will give a brief overview of some central theories and findings from the psychology literature and raise questions about how well these apply to judges.

If we were to ask members of the legal community to describe the kind of reasoning that an ideal judge would employ to decide cases, the details would differ from one respondent to another. It seems likely, however, that all would agree on some fundamental desiderata: for instance, that the judge take into account all and only truly relevant evidence, weigh the evidence appropriately, be aware of the considerations that are playing a role in his or her decision, and not allow emotion to rule reason. Unfortunately for a would-be ideal judge, one of the most consistent findings in social and cognitive psychology from the past few decades is that human beings often do not succeed in thinking like

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16. See also Pether, *supra* note 14, at 1483 (noting lack of accountability as a cost of unpublished opinions).

17. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C.L. REV. 235, 248 (1998).

this. Researchers have amassed mountains of evidence regarding various cognitive shortcomings. To name just a few, stereotypes come to mind unbidden and sometimes affect our thinking whether we want them to or not;<sup>18</sup> moods and emotions influence our thinking and behavior;<sup>19</sup> we often reach moral judgments almost instantly through intuitions, with logic providing only post hoc rationalizations;<sup>20</sup> we rely on hindsight to overestimate the predictability of past events;<sup>21</sup> and we exhibit "confirmatory bias" by paying more attention to evidence that supports our favored hypotheses than evidence that contradicts them.<sup>22</sup> Furthermore, many of these influences on our thinking and behavior occur automatically and undetected.<sup>23</sup>

Judges' minds may not work the same way as those of the ordinary people or college students who are the subjects of most research in social psychology. Law school and experience in practice and on the bench provide judges with intensive training in reasoning, and training makes a difference. "Formal education, particularly in statistics and economics, and even short training sessions on the use of normative reasoning principles can improve performance on a number of judgment and decisionmaking tasks."<sup>24</sup> Still, judges are human, and it is hard to imagine that they escape all the cognitive pitfalls that other people stumble into. Important support for this intuition comes from a study by Guthrie et al.,<sup>25</sup> which shows that judges are prone to several biases in their reasoning, hindsight bias among them. Similarly, psychologists have found

18. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–6 (1989) (considering the "inevitability of prejudice" perspective on automatic activation of stereotypes) (citing E.R. Smith & N.R. Branscombe, *Stereotype Traits can be Processed Automatically* (1985) (unpublished manuscript, Purdue University)).

19. See Joseph P. Forgas & Jennifer M. George, *Affective Influences on Judgments and Behavior in Organizations: An Information Processing Perspective*, 86 ORG. BEHAV. & HUM. DECISION PROCESSES 3, 4 (2001) (reviewing recent research demonstrating the influence of moods on judgment).

20. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001).

21. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 799 (2001).

22. Angela M. Pfeiffer et al., *Decision-Making Bias in Psychotherapy: Effects of Hypothesis Source and Accountability*, 47 J. COUNS. PSYCHOL. 429, 429 (2000) (citing Mark Snyder et al., *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, J. PERSONALITY & SOC. PSYCHOL. 656, 657–59 (1977)).

23. See John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY. & SOC. PSYCHOL. 230, 230 (1996) (discussing automaticity).

24. Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 87 (2002).

25. Guthrie et al., *supra* note 21, at 799.

that trained therapists do not avoid all cognitive pitfalls; for instance, they "attend to hypothesis-consistent information about their clients more readily than hypothesis-inconsistent information."<sup>26</sup>

So while it is an open question how susceptible judges are to shortcomings in reasoning, it seems reasonable to proceed on the assumption that they are not immune to them. And although they may engage in faulty reasoning less often than other people, the costs when they do so may be much higher. Unrecognized stereotypes can infect factfinding, verdicts, and sentencing. Intuitive moral judgments can inspire decisions that are inconsistent with precedent or statutory or constitutional language. Confirmatory bias can cause judges to misweigh the evidence in individual cases or to overestimate the wisdom or value of a rule they favor by tilting the sample of hypothetical cases they bring to mind toward those where the rule would work well.

Because judicial reasoning errors can be so consequential, it behooves those of us who care about judging to ask how the risk of such errors can be reduced. Here psychology is not quite as helpful: psychologists know far more about the incidence of reasoning problems than about how they can be avoided or overcome. But a large body of evidence points to the effectiveness of one ameliorative technique—accountability. It seems clear that people often make fewer reasoning mistakes when they know that their decision will have to be justified to an audience. This holds for a wide range of reasoning problems.<sup>27</sup>

The implications for citability rules are unmistakable. In an era when most "unpublished" opinions are readily available online, choosing not to publish in a reporter offers no real assurance that an opinion will not be read closely by lawyers and by the judges receiving their briefs. Rules banning citation offer much greater assurance. Because judges are aware of this, such rules almost certainly reduce their feelings of accountability to a professional audience. Given the psychological evidence, it is reasonable to suspect that reduced feelings of accountability lead to more errors in judges' reasoning.

Before awarding the point to proponents of Rule 32.1, it is important to note that accountability is not a panacea; it has only been found to counter some types of cognitive errors, and even for those, it does not work in all circumstances.<sup>28</sup> Still, if we consider the conditions under which accountability has the best chance of reducing cognitive errors, they appear to be satisfied by the typical judging experience. According to Lerner and Tetlock,

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26. Pfeiffer et al., *supra* note 22, at 430.

27. For a comprehensive overview, see generally Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999).

28. *Id.* at 263; see also Pfeiffer et al., *supra* note 22 (noting that accountability has little effect on the confirmatory bias of therapists).

accountability is most likely to work where "(a) suboptimal performance result[s] from lack of self-critical attention to the judgment process and (b) improvement require[s] no special training in formal decision rules, only greater attention to the information provided."<sup>29</sup> The requisite

[s]elf-critical and effortful thinking is most likely to be activated when decision makers learn prior to forming any opinions that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well-informed, and (e) who has a legitimate reason for inquiring into the reasons behind participants' judgments.<sup>30</sup>

Judges already have special training in decisionmaking, and the characteristics listed above would seem to describe the primary audiences for judges' opinions—bench and bar—quite well.

Ultimately, then, it appears that we have good reason to suppose that judges will be less prone to cognitive errors if they know that their opinions can be cited. And if accountability really enhances the quality of judicial decisionmaking, then our interest in it should go well beyond Rule 32.1 to other procedures and rules that might affect levels of accountability. Does nonpublication lessen accountability even where unpublished opinions are citable? Does making decisions in panels rather than alone (as most trial judges do), meaningfully increase feelings of accountability? What about requirements that opinion drafts be circulated to all judges in a circuit? Are there other policies or institutional arrangements that might enhance accountability?

Still, we cannot be sure that greater accountability would affect judicial reasoning. Nor do we have a clear idea of how great the decrease in errors would be, which specific types of suboptimal thinking would occur less frequently, or even how much of a problem deficient judicial reasoning is in the first place. All of these are open empirical questions. And for anyone who cares about the quality of judging, they are quite important.

#### IV. Conclusion

I have tried in this Article to focus attention on some questions about judges' reasoning and use of precedent that scholars are a long way from answering satisfactorily. I do not insist that these questions must be answered

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29. Lerner & Tetlock, *supra* note 27, at 263.

30. *Id.* at 259.

for someone to reach a position on Rule 32.1, though the position would be easier to defend if we knew the answers to them. What is more important is that we can think of many other questions, similar and dissimilar, that would be easier to address if we had a fuller understanding of how judges actually think and act. These questions range from narrower technical ones—about publication, research practices, and the role of clerks and staff attorneys—to the weightiest questions about why the law moves in certain directions and at what pace, who benefits from the directions the law takes, how well real judicial decisionmaking measures up to the profession's and the public's ideals, and to what degree policy making by judges is legitimate in a democracy.

I do not imagine that the empirical questions highlighted here will be new to many readers, but because so many issues compete for our attention, it is helpful at times to remind ourselves of fundamental issues that we still do not adequately understand. Nor do I mean to imply that all of these questions have been neglected in empirical work. The cursory discussion in this essay does not begin to do justice to the vast literature on judicial behavior in political science or the vibrant and growing literature on the subject in law journals. I feel confident, however, that few scholars active in the field would contest my basic premise that we do not know as much about these matters as we would like. And it seems impossible to deny that the study of what judges actually do (as opposed to what they should do) occupies only a small fraction of the academic legal community's attention.

To a social scientist studying courts, this last point is both puzzling and disappointing. It is puzzling because, as the Rule 32.1 debate illustrates, legal academics care a great deal about the practical implications of judges' behavior. It is disappointing because we would almost certainly make faster progress toward understanding judging if more legal academics studied the issue and scholars from various disciplines were more familiar with each other's work. It is true that social scientists typically have the advantage of more experience designing and analyzing empirical studies and greater familiarity with theories of human behavior and institutions from fields outside of law. But legal academics usually possess a deeper and more nuanced understanding of the judicial phenomena under study and of the contexts in which they occur, have a more reliable sense of what theories are likely to work well when applied to judging, and are able to identify important and intriguing real-world questions—such as how noncitation rules affect the process of judging—that will often escape scholars focused on broader theoretical debates.

The field of law and economics demonstrates how fruitful collaboration across disciplinary boundaries can be. If this kind of collaboration could be extended to the study of what judges do and how they think, the next time a

procedural change like Rule 32.1 is under discussion, arguments for and against might be able to rely less on speculation. More importantly, it would help us better understand the law itself.

