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## Conformity and Dissent

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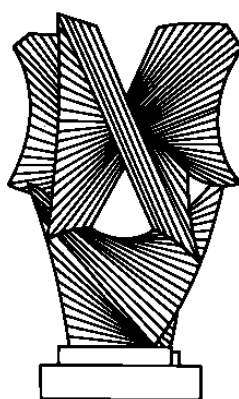
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## Conformity and Dissent

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**THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO**

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# Conformity and Dissent

Cass R. Sunstein\*

## Abstract

*Much of the time, human beings do what others do. This is perfectly sensible, because the actions and statements of other people convey valuable information about what should be done. In addition, most people want the good opinion of others, and this desire promotes conformity. But conformity can lead both groups and institutions in unfortunate and even catastrophic directions. The most serious problem is that by following others, people fail to disclose what they know and believe, thus depriving society of important information. Those who dissent, and who reject the pressures imposed by others, perform valuable social functions, often at their own expense, material or nonmaterial. These points are illustrated by reference to theoretical and empirical work on conformity, cascades, and group polarization. An understanding of the role of conformity and dissent casts new light on a variety of legal issues, including the expressive function of law; the institutions of the American constitution; the functions of free speech in wartime; the debate over the composition of the federal judiciary; and affirmative action in higher education.*

“If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.”<sup>1</sup>

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<sup>1</sup> Joseph Raz, *Ethics in the Public Domain* 39 (1994).

“As soon as a person is in the midst of a group he is no longer indifferent to it. He may stand in a wholly unequivocal relation to an object when alone; but as soon as a group and its direction are present he ceases to be determined solely by his own coordinates. In some way he refers the group to himself and himself to the group. He might react to the group in many different ways; he might adopt its direction, compromise with it, or oppose it; he might even decide to disregard it. But even in the latter instance (which superficially seems to be an ‘absence of group influence’) there is a clear and determined reference to the group as fully as in the preceding cases.”<sup>2</sup>

“Justice Marshall brought a special perspective. . . . His was the mouth of a man who knew the anguish of the silenced and gave them a voice. . . . I have been perhaps most personally affected by Justice Marshall as a raconteur . . . . Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.”<sup>3</sup>

“A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage. ‘The Emperor is naked,’ he said.”<sup>4</sup>

“[W]hile individual ideology and panel composition both have important effects on a judge’s vote, the ideology of one’s colleagues is a better predictor of one’s vote than one’s own ideology.”<sup>5</sup>

## **I. Introduction**

How do people influence each other? What are the social functions of dissenters, malcontents, and skeptics? How do the answers to these questions bear on law and policy, and on the design of private and public institutions?

Consider some clues:

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<sup>2</sup> Solomon Asch, *Social Psychology* 483 (1952).

<sup>3</sup> See Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 *Stan. L. Rev.* 1217, 1217, 1220 (1992).

<sup>4</sup> See Hans Christian Anderson, *The Emperor’s New Suit*, in Hans Christian Anderson, *Shorter Tales* (Jean Hersholt trans. 1948; originally published 1837).

<sup>5</sup> Richard L. Revesz, *Environmental Regulation, Ideology, and the DC Circuit*, 83 *Va L Rev* 1717, 1764 (1997).

—A large number of judicial votes and decisions were investigated to see if it matters whether a panel, on a federal court of appeals, includes two judges, or instead three, appointed by a President of the same party.<sup>6</sup> It is tempting to suggest that this should not matter at all; two judges, after all, are able to produce a majority decision. But this suggestion turns out to be wrong. A panel with three judges appointed by Republican presidents is much more likely than a panel with two to reverse an environmental decision at the behest of an industry challenger.<sup>7</sup> A group of three like-minded judges behaves very differently from a group with more diverse views. No less remarkably, a single Democratic judge, sitting with two Republicans, turns out to be more likely to vote in favor of an industry challenge to a regulation than a single Republican, sitting with two Democrats.<sup>8</sup> It is not entirely wrong to conclude that when sitting with Republicans, Democratic judges vote like Republicans, and that when sitting with Democrats, Republican judges vote like Democrats. But this conclusion is itself misleading, because how Democrats vote, and how Republicans vote, is very much dependent on whether they are sitting with one or two judges appointed by presidents of the same party.<sup>9</sup>

—Ordinary citizens were asked to say, as individuals, how much a defendant should be punished for specified misconduct.<sup>10</sup> Their responses were measured on a scale of 0 to 8, where 0 meant no punishment at all and 8 meant “extremely severe” punishment.<sup>11</sup> After recording their individual judgments, people were sorted into six-person juries, which were asked to deliberate and to reach unanimous verdicts. When the individual jurors favored little punishment, the group showed a “leniency shift,” meaning a rating that was systematically lower than the median rating of individual members before they started to talk

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<sup>6</sup> The statements in this paragraph are based on my independent research, presented below, and on Richard L. Revesz, *Environmental Regulation, Ideology, and the DC Circuit*, 83 Va L Rev 1717, 1755 (1997). To the same effect, see Frank Cross and Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 Yale LJ 2155 (1998) (finding that a panel of three Republican judges is far more likely to reject agency action, in order to reach a conclusion that would be predicted of that panel on political grounds, than a panel of two Republicans and one Democrat).

<sup>7</sup> See the data discussed below; see also Revesz, *supra* note, at 1754-55 (also finding that a panel of three judges appointed by the president of the same party behaves differently from a panel with judges appointed by presidents of different parties).

<sup>8</sup> See *id.* at 1752.

<sup>9</sup> *Id.* at 1752, 1754.

<sup>10</sup> See David Schkade, Cass R. Sunstein, and Daniel Kahneman, *Deliberating About Dollars*, 100 Colum L Rev 1139 (2001).

<sup>11</sup> *Id.* at 1150.

with one another.<sup>12</sup> But when individual jurors favored strong punishment, the group as a whole produced a "severity shift," meaning a rating that was systematically higher than the median rating of individual members before they started to talk.<sup>13</sup> The direction and the extent of the shift were determined by the median ranking of individual jurors, and because one or two dissenters from the majority view could shift the median, they could make a significant difference.

My principal claim in this Article is that for each of us, conformity is often a rational course of action, but when all or most of us conform, society can end up making large mistakes. One reason we conform is that we often lack much information of our own, and the decisions of others provide the best available information about what should be done.<sup>14</sup> The central problem is that widespread conformity deprives the public of information that it needs to have. Conformists are often thought to be protective of social interests, keeping quiet for the sake of the group, while dissenters tend to be seen as selfish individualists, embarking on projects of their own. But in an important sense, the opposite is closer to the truth. In many situations, dissenters benefit others, while conformists benefit themselves.

In a well-functioning democracy, institutions reduce the risks that accompany conformity, in part because they meet conformity with dissent, and hence increase the likelihood that more information will emerge, to the benefit of all. A high-level official during World War II attributed the successes of the Allies, and the failures of Hitler and the other Axis powers, to the greater ability of citizens in democracies to scrutinize and dissent, and hence to improve past and proposed courses of action.<sup>15</sup> Dissent and scrutiny were possible because skeptics were not punished by the law and because informal punishments, in the form of social pressures, were relatively weak. I will suggest that an understanding of group influences, and their potentially harmful effects, casts new light on a wide range of issues, including the nature of the American

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<sup>12</sup> Id. at 1152, 1154-55.

<sup>13</sup> Id.

<sup>14</sup> See the discussion of imitation as a fast and frugal heuristic in Joseph Henrich et al., What Is the Role of Culture in Bounded Rationality, in *Bounded Rationality: The Adaptive Toolbox* 343, 344 (Gerd Gigerenzer and Richard Selten eds. 2002) ("Cultural transmission capacities allow individuals to shortcut the costs of search, experimentation, and data processing algorithms, and instead benefit from the cumulative experience stored in the minds (and observed in the behavior) of others.").

<sup>15</sup> See Luther Gulick, *Administrative Reflections from World War II* (1948). Irving Janis, *Groupthink* (2d ed. 1985), can be seen as a generalization of this theme.

constitutional structure; the functions of bicameralism; the sources of ethnic hostility and political radicalism; the importance of civil liberties in wartime and during social panics and witch-hunts; the performance of juries; the effects of diversity on the federal judiciary; affirmative action in higher education; and the potentially large consequences of law even when it is never enforced.

Throughout I focus on two influences on individual belief and behavior. The first involves the information conveyed by the actions and statements of other people. If a number of people seem to believe that some proposition is true, there is reason to believe that that proposition is in fact true. Most of what we think—about facts, morality, and law—is a product not of first-hand knowledge, but of what we learn from what others do and think. This is true even though they too may be merely following the crowd. As we shall see, this phenomenon can create serious problems for the system of precedent, as when courts of appeals follow previous courts that are in turn following their predecessors, creating a danger of widespread, self-perpetuating error. And of course some people have more influence than others, simply because the decisions of those people convey more information; we are especially likely to follow those who have special expertise, those who seem most like us, those who fare best, or those whom we otherwise have reason to trust.<sup>16</sup>

The second influence is the pervasive human desire to have and to retain the good opinion of others. If a number of people seem to believe something, there is reason not to disagree with them, at least not in public. The desire to maintain the good opinion of others breeds conformity and squelches dissent, especially but not only in groups that are connected by bonds of affection, which can therefore impair group performance. We shall see that close-knit groups, discouraging conflict and disagreement, often do badly for that very reason. In any case much of human behavior is a product of social influences. For example, employees are far more likely to file suit if members of the same workgroup have also done so<sup>17</sup>; teenage girls who see that other teenagers are having children are more likely to become pregnant themselves<sup>18</sup>; the perceived behavior of others

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<sup>16</sup> See Daniel Goldstein et al., *Why and When Do Simple Heuristics Work?*, in *Bounded Rationality*, note supra, at 174–76; Robert Boyd and Peter Richerson, *Norms and Bounded Rationality*, in *id.* at 284–87.

<sup>17</sup> See Harold H. Gardner, Nathan L. Kleinman, and Richard J. Butler, *Workers' Compensation and Family and Medical Leave Act Claim Contagion*, 20 *J Risk and Uncertainty* 89, 101–110 (2000)

<sup>18</sup> See, e.g., George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 *Q.J. Econ.* 277 (1996).

has a large effect on the level of violent crime<sup>19</sup>; broadcasters mimic one another, producing otherwise inexplicable fads in programming<sup>20</sup>; lower courts sometimes do the same, especially in highly technical areas, and hence judicial mistakes may never be corrected.<sup>21</sup>

We should not lament social influences or wish them away. Much of the time, people do better when they take close account of what others do. Some of the time, we even do best to follow others blindly. But social influences also diminish the total level of information within any group, and they threaten, much of the time, to lead individuals and institutions in the wrong directions. Dissent can be an important corrective; many groups and institutions have too little of it.<sup>22</sup> As we shall see, conformists are free-riders, whereas dissenters often confer benefits on others; and it is tempting to free-ride. As we shall also see, social pressures are likely to lead groups of like-minded people to extreme positions. When groups become caught up in hatred and violence, it is rarely because of economic deprivation<sup>23</sup> or primordial suspicions<sup>24</sup>; it is far more often a product of the informational and reputational influences discussed here.<sup>25</sup> Indeed, unjustified extremism frequently results from a “crippled epistemology,” in which extremists react to a small subset of relevant information, coming mostly from one another.<sup>26</sup>

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<sup>19</sup> See Edward Glaeser, E. Sacerdote, and Jose Scheinkman, *Crime and Social Interactions*, 111 *Quarterly Journal of Economics* 507 (1996).

<sup>20</sup> See Robert Kennedy, *Strategy Fads and Strategic Positioning: An Empirical Test for Herd Behavior in Prime-Time Television Programming*, *J. Industrial Economics* (2002).

<sup>21</sup> See Andrew F. Daughtety and Jennifer F. Reinganum, *Stampede to Judgment*, 1 *Am Law and Ec. Rev.* 158 (1999).

<sup>22</sup> Hence Mill’s claim that “the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.” John Stuart Mill, *On Liberty*, in John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* 85 (H.B. Acton ed. 1972)

<sup>23</sup> See Alan B. Krueger and Jitka Maleckova, *Education, Poverty, Political Violence and Terrorism: Is There a Causal Connection?* (unpublished manuscript 2002).

<sup>24</sup> See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 *J Legal Stud* 623, 648 (1998).

<sup>25</sup> See Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 *Harv J Law and Public Policy* 429 (2002).

<sup>26</sup> See Russell Hardin, *The Crippled Epistemology of Extremism*, in *Political Rationality and Extremism* 3, 16 (Albert Breton et al. eds. 2002).



Similar processes occur in less dramatic forms. Many large-scale shifts within legislatures, bureaucracies, and courts are best explained by reference to social influences. When a legislature suddenly shows concern with some formerly neglected problem—for example, hazardous waste dumps or corporate misconduct—the concern is often a product of conformity effects, not of real engagement with the problem. Of course the new concern might be justified. But if social influences are encouraging people to conceal information that they have, or if the blind are leading the blind, serious problems are likely. There is a further point. With relatively small "shocks," similar groups can be lead, by social pressures, to dramatically different beliefs and actions. When societies differ, or when large-scale changes occur over time, the reason often lies not where we usually look, but in small and sometimes elusive factors.<sup>27</sup>

An appreciation of informational influences, and of people's concern for the good opinion of others, helps to show how, and when, law can alter behavior without being enforced—and merely by virtue of the signal that it provides.<sup>28</sup> The central point here is that law can provide reliable evidence both about what should be done and about what most people think should be done. In either case, it can convey a great deal of relevant information.<sup>29</sup> Consider bans on public smoking and on sexual harassment. If people think that the law is speaking for the view of most or all, potential violators are less likely to engage in smoke or to engage in sexual harassment. Potential victims are also more likely to take the steps to enforce the law privately, as, for example, through reminding people of their legal responsibilities, and insisting that violators come into compliance. In this light we can better understand the much-disputed claim that the law has an "expressive function."<sup>30</sup> By virtue of that function, law can even stop or

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<sup>27</sup> See Joseph Henrich, *What is the Role of Culture in Bounded Rationality?*, in *Bounded Rationality: The Adaptive Toolbox* 353-54 (2001), for an entertaining outline in connection with food choice decisions. For example: "Many Germans believe that drinking water after eating cherries is deadly; they also believe that putting ice in soft drinks is unhealthy. The English, however, rather enjoy a cold drink of water after some cherries; and Americans love icy refreshments." *Id.* at 353. See also Paul Omerod, *Butterfly Economics* (1993), for a popular account.

<sup>28</sup> See Robert Kagan and Jerome Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *Smoking Policy* (Robert Rabin and Stephen Sugarman eds.) (New York: Oxford University Press, 1993).

<sup>29</sup> See Richard McAdams, *Norms Theory: An Attitudinal Theory of Expressive Law*, 79 *Oregon L. Rev.* 339 (2000).

<sup>30</sup> Mathew Adler, *Expressivist Theories of Law: A Skeptical Overview*, 148 *U Pa L Rev* 1363 (2000); Symposium, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, 60 *Maryland L. Rev.* 465 (2001).

accelerate a social cascade.<sup>31</sup> Here too the areas of cigarette smoking and sexual harassment are relevant examples. But if would-be violators are part of a dissident subcommunity, they might well be able to resist law's expressive effect; fellow dissidents can band together and encourage one another to violate the law. Indeed, informational and reputational factors can even encourage widespread noncompliance, as, for example, in drug use and failure to comply with the tax laws.<sup>32</sup> The law's expressive power is partly a function of its moral authority, and when law lacks that authority within a subcommunity, its signal may be irrelevant or even counterproductive.

This Article is divided into seven parts. Parts II, III, and IV investigate social science evidence involving, respectively, conformity, cascades, and group polarization. A unifying theme is that in all three contexts, individuals are suppressing their private signals—about what is true and what is right—and that this suppression can cause significant social harm. Groups of like-minded people are especially vulnerable on this count. Part V focuses on the expressive function of law and in particular on the phenomenon of “compliance without enforcement.” Part VI catalogues some implications of social influences for constitutionalism, judicial confirmations, and affirmative action in higher education. Here I urge that the principal contribution of the framers of the American Constitution lay not in their endorsement of deliberative democracy, but in their insistence that diversity is an affirmative good, likely to improve deliberation. This enthusiasm for diversity helps account for the systems of checks and balances and federalism. I also suggest that it is important to attempt to provide a mix of views on the federal bench; indeed, consideration should be given to increasing the likelihood that panels, on courts of appeals, contain judges appointed by president of different parties. I urge as well that in those cases in which racial diversity will improve discussion, it is entirely legitimate for colleges and universities to attempt to promote racial diversity. Part VII is a brief conclusion.

## **II. Conformity and Independence**

Why, and when, do people do what others do? To answer this question, we need to distinguish between hard questions and easy ones. Intuition suggests

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<sup>31</sup> See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev 607 (2000).

<sup>32</sup> See Robert Kagan and Jerome Skolnick, in *Banning Smoking: Compliance Without Enforcement*, in *Smoking Policy: Law, Politics, and Culture* 78 (Robert Radin ed. 1999).

that when people are confident that they are right, they will be more willing to do what they think best and to reject the views of the crowd. Several sets of experiments confirm this intuition, but they also offer some significant twists. Most important, they suggest three points that I will emphasize throughout:

1. Those who are confident and firm will have particular influence, and can lead otherwise identical groups in dramatically different directions.<sup>33</sup>
2. People are extremely vulnerable to the unanimous views of others and hence a single dissenter, or voice of sanity, is likely to have a huge impact.<sup>34</sup>
3. If people are, by our lights, from some kind of “out group,” they are far less likely to influence us, even on the simplest questions.<sup>35</sup> And if people are part of a group to which we also belong, they are far more likely to influence us, on both easy and hard questions.<sup>36</sup>

My ultimate goal is to see how these points bear on the behavior of those involved in making, enforcing, and interpreting law. But let us begin by reviewing some classic studies.

### **A. Hard Questions**

In the 1930s, the psychologist Muzafer Sherif conducted some simple experiments on sensory perception.<sup>37</sup> Subjects were placed in a very dark room and a small pinpoint of light was positioned at some distance in front of them. Because of a perceptual illusion, the light, which was actually stationary, appeared to move. On each of several trials, Sherif asked people to estimate the distance that the light had moved. When polled individually, subjects did not agree with one another, and their answers varied from one trial to another. This is not surprising; because the light did not move, any judgment about distance was a stab in the dark. But Sherif found some striking results when subjects were

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<sup>33</sup> See p. below.

<sup>34</sup> See p. below. Note a parallel finding: A minority is especially likely to have influence if it consists of more than one person and if all members of the minority group are in basic agreement. See Robert Baron et al., *Group Process, Group Decision, Group Action* 81-82 (1999).

<sup>35</sup> Dominic Abrams et al., *Knowing What to think By Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity, and Group Polarization*, 29 *British J. Soc. Psych.* 97 (1990). Group membership and self-categorization are emphasized in John Turner et al., *Rediscovering the Social Group: A Self-Categorization Theory* 42-67 (1987).

<sup>36</sup> Dominic Abrams et al., *supra* note, at 97-110.

<sup>37</sup> Muzafer Sherif, *An Experimental Approach to the Study of Attitudes*, 1 *Sociometry* 90 (1937). A good outline can be found in Lee Ross and Richard Nisbet, *The Person and the Situation* 28-30 (1991).

asked to act in small groups. Here the individual judgments converged and a group norm, establishing the right distance, quickly developed. Indeed, the norm remained stable within groups across different trials, thus leading to a situation in which different groups made, and were committed to, quite different judgments.<sup>38</sup> There is an important clue here about how similar groups, indeed similar nations, can converge on very different beliefs and actions simply because of modest and even arbitrary variations in starting points.

When Sherif added a confederate—his own ally, unbeknownst to subjects—something else happened.<sup>39</sup> The judgment of the confederate, typically much higher or much lower than those made by individual subjects, helped produced correspondingly higher or lower judgments within the group. The large lesson is that at least in cases involving difficult questions of fact, judgments “could be imposed by an individual who had no coercive power and no special claim to expertise, only a willingness to be consistent and unwavering in the face of others’ uncertainty.”<sup>40</sup> Perhaps more remarkable still, the group’s judgments became thoroughly internalized, so that subjects would adhere to them even when reporting on their own, even a year later, and even when participating in new groups whose members offered different judgments.<sup>41</sup> The initial judgments were also found to have effects across “generations.” In an experiment in which fresh subjects were introduced and others retired, so that eventually all participants were new to the situation, the original group judgment tended to stick, even after the person who was originally responsible for it had been long gone.<sup>42</sup>

What accounts for these results? The most obvious answer points to the informational influences produced by other people’s judgments. After all, the apparent movements are a perceptual illusion, and the system of perception does not readily assign distances to those movements. In those circumstances, people are especially likely to be swayed by a confident and consistent group member. This finding has implications outside of the laboratory and for classrooms, courtrooms, bureaucracies, and legislatures. If uninformed people are trying to decide whether global warming is a serious problem, or whether they should be

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<sup>38</sup> Id. at 29.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at 29-30.

concerned about existing levels of arsenic in drinking water, they are likely to be responsive to the views of confident and consistent others.<sup>43</sup>

What is true for factual issues is true for moral, political, and legal issues as well. Suppose that a group of legislators is trying to decide how to handle a highly technical issue. If a “confederate” is planted among the group, showing considerable confidence, she is highly likely to be able to move the group in his preferred direction. So too if she is not a confederate at all, but simply an ordinary legislator with great confidence on the issue at hand. If judges are trying to resolve a complex issue on which they lack certainty, they too are vulnerable to conformity effects.<sup>44</sup> And for judicial panels as well, Sherif-type effects can be expected on technical matters if one judge is confident and seems expert. The problem is that the so-called specialists may have biases and agendas of their own, leading to large errors. Note that there is an important qualification to these claims, to which I will return: Sherif’s conformity findings significantly decrease if the experimenter uses a confederate whose membership in a different social group is made salient to subjects.<sup>45</sup>

## **B. Easy Questions**

But what if perception does provide reliable guidance? What if people have good reason to know the right answer? The leading experiments, conducted by Solomon Asch, explored whether people would be willing to overlook the apparently unambiguous evidence of their own senses.<sup>46</sup> In these experiments, the subject was placed into a group of seven to nine people who seemed to be other subjects in the experiment but who were actually Asch’s confederates. The simple task was to “match” a particular line, shown on a large white card, to one of the three “comparison lines” that was identical to it in length. The two non-matching lines were substantially different, with the differential varying from an inch and three quarters to three quarters of an inch.

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<sup>43</sup> See the discussion of authority in Robert Cialdini, *Influence: The Psychology of Persuasion* 208-36 (1993). For evidence that minority views can be influential if they are held by consistent, confident people, see Robert Bray et al., *Social Influence By Group Members With Minority Opinions*, 43 *J Personality and Social Psych.* 78 (1982).

<sup>44</sup> See section below.

<sup>45</sup> Abrams, *supra* note, at 99-104.

<sup>46</sup> See the overview in Solomon Asch, *Opinions and Social Pressure*, in *Readings About the Social Animal* 13 (Elliott Aronson ed. 1995).

In the first two rounds of the Asch experiments, everyone agrees about the right answer. “The discriminations are simple; each individual monotonously calls out the same judgment.”<sup>47</sup> But “suddenly this harmony is disturbed at the third round.”<sup>48</sup> All other group members make what is obviously, to the subject and to any reasonable person, a clear error, matching the line at issue to one that is conspicuously longer or shorter. In these circumstances, the subject, in all cases showing initial confusion and disbelief at the apparent mistakes of others, has a choice: He can maintain his independent judgment or instead accept the view of the unanimous majority. A large number of people end up yielding at least once in a series of trials. When asked to decide on their own, subjects erred less than 1% of the time; but in rounds in which group pressure supported the incorrect answer, subjects erred 36.8% of the time.<sup>49</sup> Indeed, in a series of twelve questions, no less than 70% of subjects went along with the group, and defied the evidence of their own senses, at least once.<sup>50</sup> Conformity experiments of this kind have now produced 133 total sets of results from seventeen countries, including Zaire, Germany, France, Japan, Lebanon, and Kuwait.<sup>51</sup> A meta-analysis of these studies uncovers a variety of refinements on Asch’s basic findings, but his basic conclusion has held up. For all results, the mean percentage error is 29%.<sup>52</sup> People in some nations, with “conformist” cultures, do err more than people in other nations, with more “individualist” cultures.<sup>53</sup> The variations are real, but the overall pattern of errors—with subjects conforming between 20% and 40% of the time—does not show huge differences across nations.

Note that Asch’s findings contain two conflicting lessons. First, a significant number of people are independent all or much of the time. About 25% of people are consistently independent,<sup>54</sup> and about two-thirds of total individual answers do not conform. Hence “there is evidence of extreme individual differences” in susceptibility to group influences, with some subjects remaining completely independent, and others “going with the majority without exception.”<sup>55</sup> While independent subjects “present a striking spectacle to an

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<sup>47</sup> Solomon Asch, *Social Psychology* 453 (1952).

<sup>48</sup> Asch, *Opinion and Social Pressures*, *supra* note, at 13.

<sup>49</sup> *Id.* at 16.

<sup>50</sup> *Id.*

<sup>51</sup> See Rod Bond and Peter Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch’s Line Judgment Task*, 119 *Psych. Bulletin* 111, 116 (1996).

<sup>52</sup> *Id.* at 118.

<sup>53</sup> *Id.* at 128.

<sup>54</sup> Ronald Friend et al., *A Puzzling Misinterpretation of the Asch “Conformity” Study*, 20 *European J of Social Psych* 29, 37 (1990).

<sup>55</sup> Solomon Asch, *Social Psychology*, *supra* note, at 457-58.

observer,” giving “the appearance of being unshakable,”<sup>56</sup> other people show a great deal of anxiety and confusion.<sup>57</sup> Second, most subjects, at least some of the time, are willing to yield to the group even on an apparently easy question on which they have direct and unambiguous evidence. For present purposes, the latter finding is the most important.

### C. Reasons and Blunders

Why do people sometimes ignore the evidence of their own senses? The two principal explanations involve information and peer pressure. Some of Asch’s subjects seem to have thought that the unanimous confederates must be right; but other people, though believing that group members were unaccountably mistaken, were unwilling to make, in public, what those members would see as an error. In Asch’s own studies, several conformists said, in private interviews, that their own opinions must have been wrong<sup>58</sup>—a point that suggests that information, rather than peer pressure, is what was moving them.<sup>59</sup> This informational account is strengthened by one study in which people recorded their answers anonymously but gave nearly as many wrong answers as they had under Asch’s own conditions.<sup>60</sup> A similar study finds that conformity is not lower when the subject’s response is unavailable to the majority.<sup>61</sup> On the other hand, these are unusual results, and experimenters generally find significantly reduced error, in the same basic circumstances as Asch’s experiments, when the subject is asked to give a purely private answer.<sup>62</sup> In the same way, easily identifiable conformity or deviation has been found to produce higher conformity.<sup>63</sup> These findings suggest that peer pressure matters as well.

Asch’s own conclusion was that his results raised the possibility that “the social process is polluted” by the “dominance of conformity.”<sup>64</sup> He added, “That we have found the tendency to conformity in our society so strong that reasonably intelligent and well-meaning young people are willing to call white

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<sup>56</sup> Id. at 466.

<sup>57</sup> Id. at 470.

<sup>58</sup> See Asch, *supra*.

<sup>59</sup> It would be possible to question this explanation, however, on the ground that some of these conformists might have been embarrassed to admit that they were vulnerable to peer influence, entirely apart from a belief that the peers might have been right.

<sup>60</sup> See Robert Shiller, *Irrational Exuberance* 149-50 (2000).

<sup>61</sup> Bond and Smith, *supra* note, at 124.

<sup>62</sup> See Aronson, *supra* note, at 23-24.

<sup>63</sup> See Robert Baron et al., *Group Process, Group Decision, Group Action* 66 (1999).

<sup>64</sup> Asch, *supra* note, at 21.

black is a matter of concern.”<sup>65</sup> As I have noted, Asch’s experiments produce broadly similar findings across nations, and so in Asch’s sentence just quoted, the word “society” could well be replaced with the word “world.” But I want to stress another point here: Many people are not willing to disclose their own information to the group, even though it is in the group’s interest, most of the time, to learn what it is known or thought by individual members. To see this point, imagine a group almost all of whose members believe something to be true even though it is false. Imagine too that one member of the group, or a very few members of the group, know the truth. Are they likely to correct the dominant view? If Asch’s findings generalize, the answer is that they may not be. They are not reticent because they are irrational. They are making a perfectly sensible response to the simple fact that the dominant view is otherwise—a fact that suggests either that the small minority is wrong or that they are likely to risk their own reputations if they insist that they are right. As we shall see, Asch’s findings help explain why groups can end up making unfortunate and even self-destructive decisions.

Would those findings apply to judgments about morality, policy, and law? It seems jarring to think that people would yield to a unanimous group when the question involves a moral, political, or legal issue on which they have great confidence. But if Asch is correct, such yielding should be expected, at least some of the time. We will find powerful evidence that this happens within federal courts of appeals.<sup>66</sup> The deadening effect of public opinion was of course a central concern of John Stuart Mill, who insisted that protection “against the tyranny of the magistrate is not enough,” and that it was also important to protect “against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . .”<sup>67</sup> Mill’s focus here is on the adverse effects of coerced conformity not only on the individuals who are thus tyrannized, but also on society itself, which is deprived of important information.<sup>68</sup>

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<sup>65</sup> Id.

<sup>66</sup> See below.

<sup>67</sup> John Stuart Mill, *On Liberty*, in John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* 73 (H.B. Acton ed. 1972).

<sup>68</sup> See id. at 72-76.



## D. How To Increase (or Decrease) Conformity

What factors increase or decrease conformity? Consistent with Sherif's findings, people are less likely to conform if they have high social status or are extremely confident about their own views.<sup>69</sup> They are more likely to conform if the task is difficult or if they are frightened.<sup>70</sup> Consider also the following:

1. Financial rewards for correct answers affect performance, and in two different ways.<sup>71</sup> When people stand to make money if they are right, the rate of conformity is significantly decreased in the same basic condition as the Asch experiments, if the task is easy. People are less willing to follow group members when they stand to profit from a correct answer. But there is a striking difference when the experiments are altered to make the underlying task difficult. In that event, a financial incentive, rewarding correct answers, actually increases conformity. People are more willing to follow to crowd when they stand to profit from a correct answer if the question is hard. Perhaps most strikingly, the level of conformity is about the same, when financial incentives were absent, in low-difficulty and high-difficulty tasks—but the introduction of financial rewards splits the results on those tasks dramatically apart, with significantly decreased conformity for low-difficulty tasks and significantly-increased conformity for high-difficulty tasks.<sup>72</sup>

These results have simple explanations. A certain number of people, in the Asch experiments, actually know the right answer, and give conforming answers only because it is not worthwhile to reject the shared view of others in public. But when a financial incentive is offered, peer pressure is outweighed by the possibility of material gain. The simple lesson here is that an economic reward can counteract the effects of social pressures. By contrast, difficult tasks leave people with a great deal of uncertainty about whether they are right. In such circumstances, people are all the more likely to give weight to the views of others, simply because those views are the most reliable source of information. Consider in this regard the parallel finding that people's confidence in their own judgments is directly related to the confidence shown by the experimenter's confederates.<sup>73</sup> When the confederates act with confidence and enthusiasm,

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<sup>69</sup> See Robert Baron et al., *Group Process, Group Decision, Group Action* 66 (1999).

<sup>70</sup> *Id.*

<sup>71</sup> See Robert Baron et al., *The Forgotten Variable in Conformity Research: Impact of Task Importance on Social Influence*, 71 *J Personality and Social Psych.* 915 (1996).

<sup>72</sup> *Id.* at 923.

<sup>73</sup> *Id.*

subjects also show heightened confidence in their judgments, even when they were simply following the crowd. Consider also the general claim that imitation of most other people can operate as a kind of fast and frugal heuristic, one that works well for many creatures, including human beings, in a wide variety of settings.<sup>74</sup> Like most heuristics, the imitation heuristic, while generally sensible and often the best available, also produces errors in many situations.<sup>75</sup>

There is a disturbing implication. A “majority consensus” is “often capable of misleading individuals into inaccurate, irrational, or unjustified judgments.” Such a consensus “can also produce heightened confidence in such judgments as well.”<sup>76</sup> It follows that “so long as the judgments are difficult or ambiguous, and the influencing agents are united and confident, increasing the importance of accuracy will heighten confidence as well as conformity—a dangerous combination.”<sup>77</sup> The point very much bears on the sources of unjustified extremism, especially under circumstances in which countervailing information is unavailable.<sup>78</sup> The same point helps explain group influences within the federal courts.<sup>79</sup>

2. Asch’s original studies found that varying the size of the group of confederates, unanimously making the erroneous decision, mattered only up to a number of three; increases from that point had little effect.<sup>80</sup> Using one confederate did not increase subjects’ errors at all; using two confederates increased errors to 13.6%; and using from three confederates increased error to 31.8%, not substantially different from the level that emerged from further increases in group size. But Asch’s own findings appear unusual on this count. Subsequent studies have found that, contrary to Asch’s own findings, increases in the size of the group of confederates usually do increase conformity.<sup>81</sup>

More significantly, a modest variation in the experimental conditions made all the difference: the existence of at least one compatriot, or voice of sanity, dramatically reduced both conformity and error. When one confederate

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<sup>74</sup> See Daniel Goldstein et al., *Why and When Do Simple Heuristics Work?*, in *Bounded Rationality*, supra note, at 174.

<sup>75</sup> See id.

<sup>76</sup> Baron et al., supra note, at 925.

<sup>77</sup> Id. at 925.

<sup>78</sup> See Hardin, supra note.

<sup>79</sup> See below.

<sup>80</sup> Asch, supra note.

<sup>81</sup> Baron, supra note, at 119-20.

made a correct match, errors were reduced by three-quarters, even if there was a strong majority the other way.<sup>82</sup> There is a clear implication here: If a group is embarking on an unfortunate course of action, a single dissenter might be able to turn it around, by energizing ambivalent group members who would otherwise follow the crowd. It follows that affective ties among members, making even a single dissent less likely, might well undermine the performance of groups and institutions. Consider here a study of the performance of investment clubs—small groups of people who pool their money to make joint decisions about stock market investments.<sup>83</sup> The worst-performing clubs were built on affective ties and primarily social; the best-performing clubs limited social connections and were focused on increasing returns. Dissent was far more frequent in the high-performing clubs. The low performers usually had unanimous votes, with little open debate. The problem is that the votes in low performing groups were “cast to build social cohesion rather than to make the best financial choice.”<sup>84</sup> In short, conformity resulted in significantly lower returns.

3. Much depends on the subject’s perceived relationship to the experimenters’ confederates and in particular on whether the subject considers himself part of the same group in which those confederates fall. If the subject identified himself as a member of a different group from the majority, the conformity effect is greatly reduced.<sup>85</sup> People are especially likely to conform when the group consists of people whom subjects like or admire, or otherwise identify with.<sup>86</sup> The general point explains why group membership is often emphasized by those who seek to increase or decrease the influence of a certain point of view. Perhaps an advocate can be discredited, without the relevant group, by showing that he is a “conservative” or a “liberal,” prone to offer unacceptable views.

Thus conformity—and hence error—is dramatically increased, in public statements, when the subject perceives himself as part of a reasonably discrete

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<sup>82</sup> Id. at 18. The finding here is reminiscent of the tale of The Emperor’s New Clothes, in which a single voice of sanity was necessary and sufficient to expose the truth. See Hans Christian Anderson, The Emperor’s New Suit, in Hans Christian Anderson, Shorter Tales (Jean Hersholt trans. 1948; originally published 1837).

<sup>83</sup> Brooke Harrington, Cohesion, Conflict and Group Demography (unpublished manuscript 2000),

<sup>84</sup> Id.

<sup>85</sup> Dominic Abrams et al., Knowing What To Think By Knowing Who You Are, 29 Brit J Soc Psych 97, 104-110 (1990).

<sup>86</sup> Baron et al., supra, at 66. The point is stressed at various places in Turner, supra note; see, e.g., pp. 151-170.

group that includes the experimenter's confederates (all, like himself, psychology majors, for example).<sup>87</sup> By contrast, conformity is dramatically decreased, and hence error is also dramatically decreased, in public statements when the subject perceives himself as in a different group from the experimenter's confederates (all but himself ancient history majors, for example).<sup>88</sup> Notably, private opinions, expressed anonymously afterwards, were about the same whether or not the subject perceived himself as a member of the same group as others in the experiment. And people who thought that they were members of the same group as the experimenter's confederates gave far more accurate answers, and far less conforming answers, when they were speaking privately.<sup>89</sup> In the real world, would-be dissenters might silence themselves partly when and because they trust group members to be right, partly because they do not want to risk the opprobrium of like-minded others, and partly because they fear that they will, through their dissent, weaken the effectiveness and reputation of the group to which they belong. There is a large lesson here. Publicly expressed statements, showing agreement with a majority view, may be both wrong and insincere, especially when relevant speakers identify themselves as members of the same group as the majority.<sup>90</sup> The finding of heightened conformity is linked with evidence of poor performance by groups whose members are connected by

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<sup>87</sup> Dominic Abrams et al., *Knowing What To Think By Knowing Who You Are*, 29 *Brit J Soc Psych* 97, 106-08 (1990).

<sup>88</sup> *Id.*

<sup>89</sup> See Abrams et al., *supra* note, at 108. By contrast, people who thought that they were members of a different group actually gave more accurate, nonconforming answers when speaking publicly, which creates an interesting puzzle: Why was there more accuracy in public than in private statements? The puzzle is solved if we consider the likelihood that subjects could consider it an affirmative good to disagree with people from another group (even if they secretly suspected that those people might be right). In the real world, this effect may well be heightened when people are asked whether they agree with opponents or antagonists; they might well say "no" even when the answer is "yes," simply because agreement carries costs, either to reputation or to self-conception.

There is a noteworthy finding about the nature of minority influences: They have a larger impact on people's privately expressed views than on their publicly expressed views. See Baron et al., *supra* note, at 79-80. For example, minority members who express enthusiasm for gay rights, or opposition to gay rights, affect anonymous opinions more than publicly stated opinions. See *id.* at 80. This point has obvious implications for the effects of secret votes and ballots.

<sup>90</sup> Consider the fact that the least conformity, and the greatest accuracy, was found when people who thought of themselves in a different group were speaking publicly. At the same time, the largest number of conforming, inaccurate responses came when people thought of themselves in the same group and were speaking publicly -- even though the number of inaccurate private responses in that experimental condition was not notably higher than in other conditions. See Abrams et al., *supra* note, at 108.

affective ties; in such groups, people are less likely to say what they know and more likely to suppress disagreement. A system of checks and balances, attempting to ensure that ambition will check ambition,<sup>91</sup> can be understood as a way of increasing the likelihood of dissent, and of decreasing the likelihood that members of any particular group, or institution, will be reluctant to disclose what they think and know.<sup>92</sup>

### **E. Shocks, Authority, and Expertise**

In the Sherif and Asch experiments, no particular person has special expertise. No member of the group shows unusual measurement abilities or wonderful eyesight. But we might safely predict that subjects would be even more inclined to blunder if they had reason to believe that one or more of the experimenters' confederates was particularly likely to be correct. This hypothesis receives support from a possible interpretation of one of the most alarming findings in modern social science, involving conformity not to the judgments of peers, but to the will of an experimenter.<sup>93</sup> These experiments are of independent interest, because they have implications for social influences on judgments of morality, not merely facts.

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<sup>91</sup> THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

<sup>92</sup> There are other noteworthy findings about the Asch experiments. For example, cultures that are traditionally described as collectivist show greater conformity effects than cultures that are traditionally described as individualist. "On the basis of our discussion, we would expect differences in susceptibility to social influence between individualist and collectivist cultures to be even greater when the task was, for example, an opinion issue." Bond and Smith, *supra* note, at 128. Since the 1950s, there has been a linear reduction in conformity, suggesting that over time people have become more willing to reject the views of the majority. *Id.* at 129. Women are more likely to conform than men. *Id.* at 130. The latter finding is worth emphasizing; it fits well with the general finding that members of low-status groups are less likely to speak out within heterogeneous organizations. See Caryn Christenson and Ann Abbott, *Team Medical Decision Making*, in *Decision Making in Health Care* (Gretchen Chapman and Frank Sonnenberg eds. 2000), at 267, 273-76. This last point suggests the importance of creating mechanisms to ensure that low-status people speak and are heard. See Cass R. Sunstein, *Deliberative Trouble: Why Groups Go To Extremes*, 110 *Yale L.J.* 71 (2000).

<sup>93</sup> This unconventional interpretation is set out in Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, in *Obedience to Authority: Critical Perspectives on the Milgram Paradigm* 35, 38-44 (Thomas Blass ed. 1999). Shiller, *supra* note, at 150-51.

The experiments, conducted by the psychologist Stanley Milgram, ask people to administer electric shocks to a person sitting in an adjacent room.<sup>94</sup> Subjects are told, falsely, that the purpose of the experiment is to test the effects of punishment on memory. Unbeknownst to the subject, the victim of the electric shocks is a confederate and there are no real shocks. The apparent shocks are delivered by a simulated shock generator, offering thirty clearly delineated voltage levels, ranging from 15 to 450 volts, accompanied by verbal descriptions ranging from “Slight Shock” to “Danger: Severe Shock.”<sup>95</sup> As the experiment unfolds, the subject is asked to administer increasingly severe shocks for incorrect answers, to and past the “Danger: Severe Shock” level, which begins at 400 volts.

In Milgram’s original experiments, the subjects included forty men between the ages of 20 and 50. They came from a range of occupations, including engineers, high school teachers, and postal clerks.<sup>96</sup> They were paid \$4.50 for their participation—and also told that they could keep the money no matter how the experiment went. The “memory test” involved remembering word pairs; every mistake, by the confederate/victim, was to be met by an electric shock and a movement to one higher level on the shock generator. To ensure that everything seems authentic, the subject is, at the beginning of the experiment, given an actual sample shock at the lowest level. But the subject is also assured that the shocks are not dangerous, with the experimenter declaring, in response to a prearranged question from the confederate, “Although the shocks can be extremely painful, they cause no permanent tissue damage.”<sup>97</sup>

In the original experiments, the victim does not make any protest until the 300-volt shock, which produces a loud kick, by the victim, on the wall of the room where he is bound to the electric chair. After that point, the victim does not answer further questions, and is heard from only after the 315-volt shock, when he pounds on the wall again—and is not heard from thereafter, even with increases in shocks to and past the 400-volt level. If the subject indicates an unwillingness to continue, the experimenter offers prods of increasing firmness, from “Please go on” to “You have no other choice; you must go on.”<sup>98</sup> But the experimenter has no power to impose sanctions on subjects.

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<sup>94</sup> See Stanley Milgram, Behavioral Study of Obedience, in Readings About the Social Animal 23 (7<sup>th</sup> ed. 1995).

<sup>95</sup> Id. at 24.

<sup>96</sup> Id. at 25.

<sup>97</sup> Id. at 27.

<sup>98</sup> Id. at 29.

Most people predict that in such studies, over 95% of subjects would refuse to proceed to the end of the series of shocks. When people are asked to make predictions about what people would do, the expected breakoff point is “Very Strong Shock,”<sup>99</sup> of 195 volts. But in Milgram’s experiment, every one of the forty subjects went beyond 300 volts. The mean maximum shock level was 405 volts; and a strong majority—26 of 40, or 65%—went to the full 450-volt shock, two steps beyond “Danger: Severe Shock.”<sup>100</sup>

Later variations on the original experiments produced even more remarkable results. In those experiments, the victim expresses a growing level of pain and distress as the voltage increases.<sup>101</sup> Small grunts are heard from 75 volts to 105 volts, and at 120 volts, the subject shouts, to the experimenter, that the shocks were starting to become painful. At 150 volts, the victims cries out, “Experimenter, get me out of here! I won’t be in the experiment any more! I refuse to go on!”<sup>102</sup> At 180 volts, the victim says, “I can’t stand the pain.” At 270 volts he responds with an agonized scream. At 300 volts he shouts that he will no longer answer the questions. At 315 volts he screams violently. At 330 volts and after, he is not heard. In this version of the experiment, there is no significant change in Milgram’s results: 25 of 40 participants went to the maximum level, and the mean maximum level was over 360 volts. In a somewhat gruesome variation, the victim says, before the experiment begins, that he has a heart condition, and his pleas to discontinue the experiment include repeated reference to the fact his heart is “bothering” him as the shocks continue.<sup>103</sup> This too did not lead subjects to behave differently.<sup>104</sup>

Milgram himself explains his results as showing obedience to authority, in a way reminiscent of the behavior Germans under Nazi rule; and indeed Milgram was partly motivated by the goal of understanding how the Holocaust could have happened.<sup>105</sup> Milgram concluded that ordinary people will follow orders even if the result is to produce great suffering in innocent others. Undoubtedly simple obedience is part of the picture. But there is another

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<sup>99</sup> Id. at 30.

<sup>100</sup> See Stanley Milgram, *Obedience to Authority* 35 (1974).

<sup>101</sup> Id. at 23 (1974).

<sup>102</sup> Id.

<sup>103</sup> Id. at 55-57.

<sup>104</sup> Id. at 58.

<sup>105</sup> Id. at 34.

explanation.<sup>106</sup> Subjects who are invited to an academic setting, to participate in an experiment run by an apparently experienced scientist, might well defer to the experimenters' instructions in the belief that the experimenter is likely to know what should be done, all things considered. If the experimenter asks subjects to proceed, most subjects might believe, not unreasonably, that the harm apparently done to the victims is not serious and that the experiment actually has significant benefits for society. On this account, the experimenter has special expertise. If this is right, then the participants in the Milgram experiments might be seen as similar to those in the Asch experiments, with the experimenter having a greatly amplified voice. And on this account, many of the subjects might have put their moral qualms to one side, not because of blind obedience, but because of a judgment that those qualms are likely to have been ill-founded. That judgment might be based in turn on a belief that the experimenter is not likely to ask subjects to proceed if the experiment is truly objectionable.

In short, Milgram's subjects might be responding to an especially loud informational signal—the sort of signal sent by a specialist or a crowd. And on this view, Milgram was wrong to draw an analogy between the behavior of his subjects and the behavior of Germans under Hitler. His subjects were not simply obeying a leader, but responding to someone whose credentials and good faith they thought they could trust. Of course it is not simple, in theory or in practice, to distinguish between obeying a leader and accepting the beliefs of an expert. The only suggestion is that the obedience of subjects was hardly baseless; it involved a setting in which subjects had some reason to think that the experimenter was not asking them to produce serious physical harm out of sadism or for no reason at all.

A subsequent study, exploring the grounds of obedience, offers support for this claim.<sup>107</sup> In that study, a large number of subjects watched the tapes of the Milgram experiments, and were asked to rank possible explanations for compliance with the experimenter's request. Deference to expertise was the highest-rank option. This is not definitive, of course, but an illuminating variation on the basic experiment, by Milgram himself, provides further support.<sup>108</sup> In this variation, the subject is among three people asked to administer the shocks, and two of those people, actually confederates, refuse to go past a certain level (150 volts for one and 210 volts for the other). In such

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<sup>106</sup> See Blass, *supra* note; Shiller, *supra* note.

<sup>107</sup> Blass, *supra* note, at 42-44.

<sup>108</sup> Milgram *supra* note, at 113-122.



cases, the overwhelming majority of subjects, 92.5%, defy the experimenter.<sup>109</sup> This was by far the most effective of Milgram's many variations on his basic study, all designed to reduce the level of obedience.<sup>110</sup>

Why was the defiance of peers so potent? I suggest that the subjects, in this variation, were very much like those subjects who had at least one supportive confederate in Asch's experiments. One such confederate led Asch's subjects to say what they saw; so too, peers who acted on the basis of conscience freed Milgram's subject to follow their consciences as well. Milgram himself established, in yet another variation, that without any advice from the experimenter, and without any external influences at all, the subject's moral judgment was clear: do not administer shocks above a very low level.<sup>111</sup> Indeed that moral judgment had nearly the same degree of clarity, to Milgram's subjects, as the clear and correct factual judgments made by Asch's subjects when they were deciding about the length of lines on their own (and hence not confronted with Asch's confederates). In Milgram's experiments, it was the experimenter's own position—that the shocks should continue and that no permanent damage would be done—that had a high degree of influence, akin to the influence of the Asch's unanimous confederates. But when the subject's peers rejected the position of Milgram's experimenter, the informational content of that position was effectively negated by the information presented by the refusals of peers. Hence subjects could rely on their own moral judgments, or even follow the moral signals indicated by the peers' refusals.

The general lessons are not obscure. When the morality of a situation is not clear, people might well be influenced by someone who seems to be an expert, able to weigh the risks involved. But when the expert's questionable moral judgment is countered by reasonable people, who bring their own moral judgments to bear, most people are unlikely to follow experts. They are far more likely to do as their conscience dictates. As we shall see, compliance with law has similar features. A legal pronouncement about what should be done will often operate in the same way as an expert judgment about what should be done. It follows that people will follow the law even when it is hardly ever enforced—and even if they would otherwise be inclined to question the judgment that the law embodies. But if peers are willing to violate the law, violations may become widespread, especially but not only if people think that the law is enjoining them

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<sup>109</sup> Id. at 119.

<sup>110</sup> Id. at 118.

<sup>111</sup> Id.

from doing something that they wish to do, either for selfish reasons or for reasons of principle. In this way, Milgram's experiments offer some lessons about when law will be ineffective unless vigorously enforced—and also about the preconditions for civil disobedience.

### III. Cascades

I now examine how informational and reputational influences can produce social cascades—large-scale social movements in which many people end up thinking something, or doing something, because of the beliefs or actions of a few early movers. As in the case of conformity, participation in cascades is fueled by social influences. But where the idea of conformity helps to explain social stability, an understanding of cascades helps to explain social and legal movements, which can be stunningly rapid, and which can also produce situations that are highly unstable.

Cascades can involve judgments about facts or values. They operate within legislatures and the judicial system as well as within groups of citizens. And when people have affective connections with one another, the likelihood of cascades increases. In the area of social risks, cascades are especially common, with people coming to fear certain products and processes not because of private knowledge, but because of the apparent fears of others.<sup>112</sup> The system of legal precedent also produces cascades, as early decisions lead later courts to a certain result, and eventually most or all courts come into line, not because of independent judgments, but because of a decision to follow the apparently informed decisions of others.<sup>113</sup> The sheer level of agreement will be misleading if most courts have been influenced, even decisively influenced, by their predecessors, especially in highly technical areas.

By themselves cascades are neither good nor bad. It is possible that the underlying processes will lead people to sound decisions about risks, morality, or law. The problem, a serious one, is that people may well converge, through the same processes, on erroneous or insufficiently justified outcomes. But to say this is to get ahead of the story; let us begin with the mechanics.

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<sup>112</sup> See Timur Kuran and Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *Stan L Rev* 683, 703-05 (1999).

<sup>113</sup> See Andrew F. Daughterty and Jennifer F. Reinganum, *Stampede to Judgment*, 1 *Am Law and Ec. Rev.* 158 (1999).

## A. Informational Cascades: The Basic Phenomenon

In an informational cascade, people cease relying, at a certain point, on their private information or opinions. They decide instead on the basis of the signals conveyed by others. Once this happens, the subsequent actions, made by few or many others, add no new information. It follows that the behavior of the first few actors can, in theory, produce similar behavior from countless followers. A particular problem arises if people think that the large number of people who say or do something are acting on independent knowledge; this can make it very hard to stop the cascade.

1. A simple illustration. Begin with a stylized example, and suppose that doctors are deciding whether to prescribe hormone therapy for menopausal women. If hormone therapy creates significant risks of heart disease, its net value, let us assume, is  $-1$ ; if it does not create such risks, its net value is  $+1$ .<sup>114</sup> Let us also assume that the doctors are in a temporal queue, and each doctor knows his place on that queue. From his own experience, each doctor has some private information about what should be done. But each doctor also cares, rationally, about the judgments of others. Anderson is the first to decide, and prescribes hormone therapy if his judgment is low risk but declines if his judgment is high risk. Suppose that Anderson prescribes. Barber now knows that Anderson's judgment was low risk and that she too should certainly urge hormone therapy if she makes that independent judgment. But if her independent judgment is that the risk is high, she would—if she trusts Anderson no more and no less than she trusts herself—be indifferent about whether to prescribe, and might simply flip a coin.

Now turn to a third doctor, Carlton. Suppose that both Anderson and Barber have prescribed hormone therapy, but that Carlton's own information suggests that the risk is high. In that event, Carlton might well ignore what he knows and prescribe the therapy. It is likely, in these circumstances, that both Anderson and Barber saw a low risk, and unless Carlton thinks that his own information is better than theirs, he should follow their lead. If he does, Carlton is in a cascade. To the extent that Carlton is not acting on the basis of his own information, and to the extent that subsequent doctors know what others have done and why, they will do exactly what Carlton did: prescribe hormone therapy regardless of their private information. "Since opposing information remains

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<sup>114</sup> I draw here on David Hirschleifer, *The Blind Leading the Blind*, in *The New Economics of Human Behavior* 188, 193-94 (Marianno Tommasi and Kathryn Ierulli eds., 1995);

hidden, even a mistaken cascade lasts forever. An early preponderance toward either adoption or rejection, which may have occurred by mere coincidence or for trivial reasons, can feed upon itself . . .”<sup>115</sup>

Notice that the serious problem here lies in the fact that for those in a cascade, actions do not disclose privately held information. In the example just given, doctors’ actions will not reflect the overall knowledge, or the aggregate knowledge, of the health consequences of hormone therapy—even if the information held by individual doctors, if actually revealed and aggregated, would give a quite accurate picture of the situation. The reason for the problem is that individual doctors are following the lead of those who came before. As noted, this problem is aggravated if subsequent doctors overestimate the extent to which their predecessors relied on private information and did not merely follow those who came before. If this is so, subsequent doctors might fail to rely on, and fail to reveal, private information that actually exceeds the information collectively held by those who started the cascade. The problem here is that the medical profession generally will lack information that it needs to have. Participants in cascades act rationally in suppressing their private information, whose disclosure would benefit the group more than the individual who has it.<sup>116</sup> The failure to disclose private information therefore presents a free-rider problem. To overcome that problem, some kind of institutional reform seems to be necessary.

Of course cascades do not always develop, and of course they usually do not last forever. Often people have, or think that they have, enough private information to reject the accumulated wisdom of others. Medical specialists sometimes fall in this category. When cascades develop, they might be broken by corrective information, as has apparently happened in the case of hormone replacement therapy itself.<sup>117</sup> In the domain of science, peer-reviewed work provides a valuable safeguard. But even among specialists and indeed doctors, cascades are common. “Most doctors are not at the cutting edge of research; their inevitable reliance upon what colleagues have done and are doing leads to numerous surgical fads and treatment-caused illnesses.”<sup>118</sup> Thus an article in the prestigious *New England Journal of Medicine* explores “bandwagon diseases” in which doctors act like “lemmings, episodically and with a blind infectious

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<sup>115</sup> Id. at 195.

<sup>116</sup> See

<sup>117</sup> Gina Kolata, “Risk of Breast Cancer Halts Hormone Replacement Study,” *New York Times*, at <http://site.mumsweb.com/article.php?sid=759> (July 11, 2002).

<sup>118</sup> Hirshleifer, *supra* note, at 204.

enthusiasm pushing certain diseases and treatments primarily because everyone else is doing the same.”<sup>119</sup> Some medical practices, including tonsillectomy, “seem to have been adopted initially based on weak information,” and extreme differences in tonsillectomy frequencies (and other procedures) provide good evidence that cascades are at work.<sup>120</sup> And once several doctors join the cascade, it is liable to spread. There is a link here with Sherif’s experiments, showing the development of divergent but entrenched norms, based on group processes in areas in which individuals lack authoritative information. In fact, prescriptions of hormone replacement therapy were fueled by cascade-like processes.<sup>121</sup>

What is true for doctors is highly likely to be true for lawyers, engineers, legislators, bureaucrats, judges, investors,<sup>122</sup> and academics<sup>123</sup> as well. It is easy to see how cascades might develop among groups of citizens, especially but not only if those groups are small, insulated, and connected by affective ties. If Barry does not know whether global warming is a serious problem, and if Alberta insists that it is, Barry might well be persuaded, and their friend Charles is likely to go along, making it unlikely that Danielle will be willing to reject the shared judgment of the developing group. When small communities of like-minded people end up fearing a certain risk, or fearing and hating another group, cascades are often responsible.

2. Precedential cascades. Consider a legal analogue<sup>124</sup>: There is a disputed issue under the Endangered Species Act. The first court of appeals to decide the question finds the issue genuinely difficult, but resolves the issue favorably to the government. The second court of appeals favors, very slightly, the view that the government is wrong, but the holding of another circuit is enough to tip the scales in the government’s favor. A third court of appeals is also slightly predisposed to rule against the government, but it lacks the confidence to reject the shared view of two circuits. Eventually all circuits come into line, with the final few feeling the great weight of the unanimous position of others, and perhaps insufficiently appreciating the extent to which that weight is a product

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<sup>119</sup> John F. Burnham, 317 *New England Journal of Medicine* 1220, 1201 (1987).

<sup>120</sup> See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 *J Econ Persp* 151, 167 (1998).

<sup>121</sup> Tim O’Shea, “The Creation of a Market: How Did the Whole HRT Thing Get Started in the First Place?” at [www.mercola.com/2001/jul/4/hrt5.htm](http://www.mercola.com/2001/jul/4/hrt5.htm) (July 2001).

<sup>122</sup> See Hirshleifer, *supra* note, at 205; Shiller, *supra* note.

<sup>123</sup> See Cass R. Sunstein, *On Academic Fads and Fashions*, 99 *Mich. L. Rev.* 1251 (2001).

<sup>124</sup> Cf. Andrew F. Daughterty and Jennifer F. Reinganum, *Stampede to Judgment*, 1 *Am Law and Ec. Rev.* 158 (1999).

of an early and somewhat idiosyncratic judgment. Because the courts of appeals are in agreement, the Supreme Court denies certiorari.

To be sure, precedential cascades do not always happen, and splits among courts of appeals are common.<sup>125</sup> One reason is that subsequent courts often have sufficient confidence to conclude that predecessor courts have erred. But it is inevitable that cascades will sometimes develop, especially in highly technical areas, and it will be hard to detect them after they have occurred. The prescriptive implication is clear: Judicial panels should be cautious about giving a great deal of weight to the shared view of two or more courts of appeals. A patient who seeks a second opinion does well not to disclose the first opinion to his new doctor, so as to ensure independence; so too, a court of appeals should be alert to the possibility that the unanimity of previous courts does not reflect independent agreement. And when the Supreme Court rejects the unanimous view of a large number of courts of appeals, a precedential cascade might well have been responsible for the unanimity.<sup>126</sup> For the legal system, the danger is that a cascade, producing agreement among the lower courts, might prove self-insulating as well as self-reinforcing. Unless there is clear error, why should the Supreme Court become involved?

3. Rationality and error. In informational cascades as discussed thus far, each participant is being entirely rational; they are acting as they should in the face of limited information. But as I have suggested, it is possible that participants in the cascade will fail to see the extent to which the decisions of their predecessors carry little independent information. If most scientists think that global warming is a serious problem, can they really be wrong? A possible answer is that they might indeed be wrong, especially if they are not relying on their private information and are following the signals sent by other people. And people often seem to mistake a cascade for a series of separate and independent judgments. In 2001, for example, hundreds of law professors signed a statement condemning, on constitutional grounds, President Bush's decision to permit military tribunals to try suspected terrorists.<sup>127</sup> The sheer number of signatures seems extremely impressive. But it is perhaps less so if we consider the likelihood that most signatories lacked reliable information on the esoteric legal issue in question, and were simply following the apparently reliable but actually uninformative judgment of numerous others.

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<sup>125</sup> See Eric Talley, *Precedential Cascades: An Appraisal*, 73 *So. Cal. L. Rev.* 87 (1999).

<sup>126</sup> See Daughety and Reinganum, *supra* note, at 161-65.

<sup>127</sup> See XX

Despite the rationality of those who participate in informational cascades, there is a serious risk of error. People might easily converge on an erroneous, damaging, or dangerous path, simply because they are failing to disclose and to act on the basis of all the information that they have.<sup>128</sup>

4. Laboratory evidence. Cascades are easy to create in laboratory settings. Some of the experiments are detailed and a bit technical, but four general lessons are clear. First, people will often neglect their own private information and defer to the information provided by their predecessors. Second, people are alert to whether their predecessors are especially informed; more informed people can shatter a cascade. Third, and perhaps most intriguingly, cascade effects are greatly reduced if people are rewarded not for correct individual decisions, but for correct decisions by a majority of the group to which they belong. Fourth, cascade effects, and blunders, are significantly increased if people are rewarded not for correct decisions, but for decisions that conform to the decisions made by most people. As we shall see, these general lessons have implications for institutional design. They suggest that errors are most likely when people are

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<sup>128</sup> See Hirschleifer, *supra* note, at 204-05 (discussing evidence from medicine and science). This suggestion does not mean that when people participate in cascades, they do worse than they would do if they did not see the decisions of their predecessors. In some cases, they do better. Imagine if the early movers have relatively good information, or are lucky, and if the later decisionmakers have little information, or are systematically confused. In such situations, cascades will make the situation better than it would be if prior decisions were not observed. Lisa Anderson and Charles Holt, *Information Cascades in the Laboratory*, 87 *Am Econ Rev* 847, 852 (1997), showing four sessions in which people did better because they did not rely on their private information. But we could also imagine situations in which the early movers do not have especially good information, or are unlucky, and in which later decisionmakers have fairly good information. In those situations, independent judgments would produce far better outcomes than cascade behavior. See *id.*, showing a session in which a cascade produced more errors than would have resulted from reliance on private information. As compared with non-observation, cascades systematically produce greater variance, simply because the early movers have so much influence. See Edward Parson, Richard Zeckhauser, and Cary Coglianese, *Collective Silence and Individual Voice: The Logic of Information Games*, forthcoming in *Collective Choice: Essays in Honor of Mancur Olson* (J. Heckelman and D. Coates eds. 2003); Eric Posner, *Four Economic Perspectives on American Labor Law and the Problem of Social Conflict*, *J. of Institutional and Theoretical Economics* (forthcoming 2003). But it cannot be said, in the abstract, that cascades produce greater inaccuracy than non-observation.

In short, the basic claim is not that those who participate in cascades generally do worse than those who cannot observe the choices of others. The claim is instead that those who participate in cascades fail to disclose information that they have, and that as a result, they produce worse outcomes than would result if people revealed that information.

rewarded for conforming, and least likely when people are rewarding for helping groups and institutions to decide correctly.

The simplest experiment asked subjects to guess whether the experiment was using Urn A, which contained two red balls and one white, or Urn B, which contained two white balls and one red.<sup>129</sup> In each period, the contents of the chosen urn were emptied in a container. A randomly selected subject was asked to make one (and only one) private draw of a ball. After that draw, the subject recorded, on an answer sheet, the color of the draw and his own decision about the urn. The subject's draw is not announced to the group, but the subject's decision about the urn is disclosed. Then the urn is passed to the next subject for his own private draw, which is not disclosed, and his own decision about the urn, which is disclosed. This process continued until all subjects had made decisions, and at that time the experimenter announced the actual urn used. Subjects could earn \$2 for a correct decision.

In this experiment, cascades often developed. After a number of individual judgments were revealed, people sometimes announced decisions that were inconsistent with their private draw, but that fit with the majority of previous announcements.<sup>130</sup> Over 77% of "rounds" resulted in cascades, and 15% of private announcements did not reveal a "private signal," that is, the information provided by people's own draw. Consider cases in which one person's draw (say, red) contradicted the announcement of his predecessor (say, Urn B). In such cases, the second announcement nonetheless matched the first about 11% of the time—far less than a majority, but enough to ensure occasional cascades. And when one person's draw contradicted the announcement of two or more predecessors, the second announcement was likely to follow those who went before. Notably, the majority of decisions followed Bayes' rule, and hence were rationally based on available information<sup>131</sup>—but erroneous cascades were

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<sup>129</sup> See Lisa Anderson and Charles Holt, *Information Cascades in the Laboratory*, 87 *Am Econ Rev* 847 (1997).

<sup>130</sup> See Angela Hung and Charles Plott, *Information Cascades: Replication and an Extension to Majority Rule and Conformity-Rewarding Institutions*, 91 *Am Econ Rev* 1508, 1515 (2001).

<sup>131</sup> Thus 72% of subjects followed Bayes' rule in the Anderson/Holt experiment, and 64% in Marc Willinger and Anthony Ziegelmeyer, *Are More Informed Agents Able To Shatter Information Cascades in the Lab*, in *The Economics of Networks: Interaction and Behaviours* 291, 304 (Patrick Cohendet et al. eds. 1996).



nonetheless found. Here is an actual example of a cascade producing an entertainingly inaccurate outcome (the urn used was B)<sup>132</sup>:

	1	2	3	4	5	6
<b>Private Draw</b>	a	a	b	b	b	b
<b>Decision</b>	A	A	A	A	A	A

What is noteworthy here, of course, is that the total amount of private information —four whites and two reds—justified the correct judgment, in favor of Urn B. But the existence of two early signals, producing rational but incorrect judgments, led all others to fall in line. “[I]nitial misrepresentative signals start a chain of incorrect decisions that is not broken by more representative signals received later.”<sup>133</sup> It should be simple to see how this result might map onto real-world assessments of factual, moral, and legal issues, especially in insulated groups, where external correction is less likely.

## B. How To Make and Break Cascades

Is the likelihood of cascades affected by institutional arrangements and social norms? Can legal arrangements diminish or increase the risk of erroneous cascades, inadvertently or through conscious decision<sup>134</sup>? A central point here is that in an informational cascade, everyone is equal; people are simply trying to get the right answer; and people pay attention to the views and acts of others only because they want to be right. But it is easy to imagine slight alterations of the situation, so that some participants know more than others, or so that people do not only care whether they are right. How would these alterations affect outcomes?

1. Fashion leaders and informed cascade-breakers. In the real world of cascades, “fashion leaders” have unusual importance.<sup>135</sup> A prominent scientist might declare that global warming is a serious problem; a well-respected political leader might urge that war should be made against Iraq; a lawyer with

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<sup>132</sup> See Marc Willinger and Anthony Ziegelmeyer, Are More Informed Agents Able To Shatter Information Cascades in the Lab, in *The Economics of Networks: Interaction and Behaviours* 291 (Patrick Cohendet et al. eds. 1996).

<sup>133</sup> Anderson and Holt, *supra* note, at 859.

<sup>134</sup> See Talley, *supra* note, for a suggestion that certain features of the legal system, including long judicial tenures and non-opaque decisions, reduce the likelihood of bad cascades. Talley persuasively shows that the likelihood is reduced – but not eliminated.

<sup>135</sup> Hirshleifer, *supra* note, at 197-98.

particular credibility might conclude that recent antiterrorist legislation violates the Constitution. In any of these cases, the speaker provides an especially loud informational signal, perhaps sufficient to start or to stop a cascade.

Now turn to the actions of followers. In the hormone therapy case, no doctor is assumed to have, or to believe that she has, more information than her predecessors. But in many cases, people know, or think that they know, a great deal. It is obvious that such people are far less likely to follow those who came before. Whether they will do so should depend on a comparison between the amount of information provided by the behavior of predecessors and the amount of private information that they have. And in principle, more informed people will shatter cascades, possibly initiating new and better ones. Whether this will happen, in practice, depends on whether the people who come later know, or believe, that the deviant agent was actually well-informed. If so, the more informed people operate as fashion leaders.

A simple study attempts to test the question whether more informed people actually shatter cascades.<sup>136</sup> The study was essentially the same as the urn experiment just described, except that players had a special option after any sequence of two identical decisions (for example, two “Urn A” decisions): They could make not one but two independent draws before deciding. The other subjects were informed of every case in which a player was making two draws. The simplest finding is that this “shattering mechanism” did indeed reduce the number of cascades—and thus significantly improved decisions.<sup>137</sup> But the mechanism did not work perfectly. In some cases, cascades were nonetheless found. And in some cases, people who were permitted to draw twice, and saw two different balls (say, one red and one white), concluded, irrationally, that the cascade should be broken. The remarkable and somewhat disturbing outcome is that they initiated an inaccurate cascade. Consider this evidence, in a case in which the actual urn was A:

	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>
<b>Private Draw</b>	a	a	b, a	b	a	b
<b>Decision</b>	A	A	B	B	B	B

This disturbing pattern undoubtedly has real-world analogues, in which people sometimes give excessive weight to their own information, even if that

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<sup>136</sup> Willinger and Ziegelmevet, supra.

<sup>137</sup> Id. at 305.

information is ambiguous and in which it makes sense to follow the crowd. But the larger point is the simple one: More informed people are less influenced by the signals of others, and they also carry more influence themselves.

But what about cases in which fashion leaders are not necessarily more informed, or in which they are seen by others as having more information, or more wisdom, than they actually have? We can imagine self-styled experts—on diets, or herbal foods, or alternative medicine, or economic trends—who successfully initiate cascades. The risk here is that the views of fashion leaders will be wrongly taken as authoritative. The result can be to lead people to errors and even to illness and death. How can society protect itself? The answers lie in good institutional arrangements, civil liberties, free markets, and good social norms, encouraging people to be skeptical of supposed experts. In systems with freedom of speech and free markets, it is always possible to debunk supposedly authoritative sources. And within groups, it is possible to structure decisionmaking so as to reduce the relevant risks. Votes might, for example, be taken in reverse order of seniority, so as to ensure that less experienced people will not be unduly influenced by the judgments of their predecessors; this is in fact the practice on the United States Supreme Court.

2. Majority rule: rewarding correct outcomes by groups rather than by individuals. How would the development of cascades be affected by an institution that rewards correct answers not by individuals, but by the majority of the group? In an intriguing variation on the urn experiment, subjects were paid \$2 for a correct group decision, and penalized \$2 for an incorrect group decision, with the group decision determined by majority rule.<sup>138</sup> People were neither rewarded nor punished for a correct individual decision. The result was that only 39% of rounds saw cascades. In 92% of cases, people's announcement matched their private draw.<sup>139</sup> And because people revealed their private signals, the system of majority rule produced a substantial increase in fully informed decisions—that is, the outcomes that someone would reach if he were somehow able to see all private information in the system. A simple way to understand this point is to assume that a group has a large number of members and that each member makes an announcement that matches his private draw. As a statistical matter, it is overwhelmingly likely that the majority's position will be correct. As

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<sup>138</sup> Id. at 1511.

<sup>139</sup> Id. at 1517.

an example, consider this period from the majority rule experiment<sup>140</sup> (the actual urn was A):

	1	2	3	4	5	6	7	8	9
<b>Private Draw</b>	a	a	a	a	b	a	a	a	b
<b>Decision</b>	A	A	A	A	B	A	A	A	B

What is the explanation for this significantly reduced level of cascade behavior in a system of majority rule? The answer lies in the fact that the individual knows that he has nothing to gain from a correct individual decision and everything to gain from a correct group decision. As a result, it is in the individual's interest to say exactly what he sees, because it is the accurate announcement, from each person, that is most likely to promote an accurate group decision.<sup>141</sup>

Note that to explain the effect of majority rule in producing better outcomes, it is not necessary or even helpful to say that when the group decision counts, people are altruistic or less concerned with their self-interest. On the contrary, self-interest provides a fully adequate explanation of the people's behavior. In the individual condition, it is sensible to care little about the accuracy of one's signal to others; that is an informational externality<sup>142</sup>—affecting others, for better or for worse, but not affecting one's own likelihood of gain. If a subject's individual signal misleads others, the subject has no reason to care. But under the majority rule condition that I have just described, the subject should care a great deal about producing an accurate signal, simply because an inaccurate signal will reduce the likelihood that the group will get it right. And here the subject need not care about the accuracy of his individual decision except insofar as that decision provides a helpful signal to the group. Hence it is only to be expected that cascades are reduced, and correct outcomes are increased, when people are rewarded for good group decisions.

There is a general point here. It is individually rational, under plausible assumptions, to participate in a cascade; participants benefit themselves at the same time that they fail to benefit others (by failing to disclose privately held

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<sup>140</sup> Id. at 1515.

<sup>141</sup> Note that it takes quite sophisticated participants to see this point.

<sup>142</sup> See Andrew Caplin & John Leahy, *Miracle on Sixth Avenue: Information Externalities and Search*, 108 *Econ. J.* 60, 61 (1998).

information) or affirmatively harm others (by giving them the wrong signal). This claim holds even if conformity is not rewarded as such. By contrast, it is not rational, under plausible assumptions, to disclose or act upon private information, even though the disclosure or action will actually benefit others. The upshot is that dissenters, disclosing their own private information, need to be encouraged, simply because they confer benefits on those who observe them. If the point is put together with an emphasis on the risk of cascades on courts, there is fresh reason to appreciate judicial dissents, if only because they increase the likelihood that majority decisions will receive critical scrutiny. Note here that within the Supreme Court alone, dissenting opinions have frequently become the law, indeed have become the law on well over 130 occasions<sup>143</sup>—a point to which I will return.

The upshot is that dissenters and nonconformists, disclosing their own private information, should be encouraged, simply because they confer benefits on those who observe them. Now let us put this point together with a recognition of the risk of cascades on courts. We can readily see a new reason to appreciate judicial dissents, if only because they increase the likelihood that majority decisions will receive critical scrutiny. Note here that within the Supreme Court alone, dissenting opinions have frequently become the law, indeed have become the law on well over 130 occasions<sup>144</sup>—a point to which I will return.

This claim has an implication for appropriate institutional arrangements: Any system that creates incentives for individuals to reveal information to the group is likely to produce better outcomes. A system of majority rule, in which individuals know that their well-being will be promoted (or not) depending on the group's decision, therefore has significant advantages. Well-functioning organizations, public as well as private, are likely to benefit from this insight. In this light, we might even offer a suggestion about the nature of civic responsibility: In case of doubt, citizens should reveal their private signal, rather than disguising that signal and agreeing with the crowd. Perhaps counterintuitively, this kind of behavior is not optimal from the point of view of the individual who seeks to get things right, but it is best from the point of view of a group or nation that seeks to use all relevant information.

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<sup>143</sup> Calculated on the basis of the list of overruled decisions in <http://www.access.gpo.gov/congress/senate/constitution/scourt.html>.

<sup>144</sup> Calculated on the basis of the list of overruled decisions in <http://www.access.gpo.gov/congress/senate/constitution/scourt.html>.

3. Disclosers, dissenters, and contrarians. It is important to make some distinctions here. The majority-rewarding variation on the urn experiment gives people an incentive to disclose accurate, privately-held information. This is the information from which the group benefits, and this is the information that does not emerge if people are rewarded for correct individual decisions. Full disclosure of accurate information is a central goal of institutional design.<sup>145</sup> But the experiment does not suggest that a group is better off if people always disagree, or even if they always say what they think. In the tale of the Emperor's New Clothes, the boy is not a skeptic or a malcontent. On the contrary, he is a particular kind of dissenter; he is a discloser, revealing the information that he actually holds. The majority-rewarding variation of the urn experiment encourages subjects to act like that boy.

By contrast, we can imagine a different kind of person, a contrarian, who feels that he will be rewarded, financially or otherwise, simply for disagreeing with others. There is no reason to celebrate the contrarian. In many cases, contrarians are most unlikely to give any help to the group. If the contrarian is known as such, his signal will be very noisy and not very informative. If the contrarian is not known as such, he is still failing to disclose accurate information, and in that sense he is not helping the group to arrive at correct decisions. We could imagine a variation on the urn experiment in which a contrarian-confederate regularly announced the opposite of what his predecessor announced. It is safe to predict that such behavior would reduce cascades, but it would not reduce errors by individuals or groups. On the contrary, it would increase them.

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<sup>145</sup> I do not explore the possibility that institutions might encourage or discourage people to **obtain** information, which can then be disclosed to the group. Obviously a group will benefit if its members are provided with good incentives to provide valuable information. Such incentives are especially important if those who acquire information would otherwise incur all of the costs of search but only a fraction of the benefits. And since it can be costly to obtain information, there are tradeoffs to be made, for both individuals and groups, between the costs and benefits of search. Throughout the discussion I emphasize the simplest situations, in which conformity and cascades (along with group polarization) suppress accurate information that individuals already hold. So long as that information is valuable to the group, full disclosure is generally the ideal. I offer a brief discussion, see pp. infra, of the possibility that disclosure of accurate information will harm the group, perhaps because it introduces tension, perhaps because it produces embarrassment or worse. Much work remains to be done on the complex cases in which institutions seek to promote either the optimal level of search or the optimal level of disclosure when disclosure produces both benefits and harms.

Dissenters who are disclosers, then, are to be prized. This is certainly if they are disclosing the full truth about the issue at hand, and also if they are revealing accurate information, bearing on that issue, that they actually hold. By contrast, dissenters who are contrarians are at best a mixed blessing. And we can also imagine dissenters who do not disclose a missing fact, but instead simply state a point of view that would otherwise be missing from group discussion. Such dissenters might urge, for example, that animals should have rights, or that school prayer should be permitted, or that the law should allow homosexual marriage, or that capital punishment should be banned. In the domains of politics and law, cascade-type behavior typically leads people to be silent not about facts, but about points of view. It is obvious that a group needs relevant facts; does it need to know about privately held opinions as well?

There are two reasons that it does. First, those opinions are of independent interest. If most or many people favor school prayer, or believe that capital punishment is morally unacceptable, it is valuable to know that fact. Other things being equal, both individuals and governments do better if they know what their fellow citizens really think. Second, people with dissenting opinions might well have good arguments. It is important for those who conform, or fall into a cascade, or independently concur to hear those arguments. This is a standard Millian point,<sup>146</sup> to which I will shortly return. Judge Richard Posner suggests that judges often offer a “go along concurrence,”<sup>147</sup> joining the majority though they privately disagree. Such judges give a false signal about their actual opinions and, very possibly, their future votes.

4. Conformity and reputation. Suppose that people are rewarded not only or not mostly for being correct, but also or mostly for doing what other people do. The reward might be material, in the form of more cash or improved prospects, or it might be non-material, in the form of more and better relationships. In the real world, people are often punished for nonconformity and rewarded for conformity. Someone who rejects the views of leaders or of the majority, might well find himself less likely to be promoted and more likely to be disliked. Organizations, groups, and governments often prize harmony, and nonconformists tend to introduce disharmony. Sometimes it is more important to be “on the team” than to be right. “Sometimes cultural groups adopt very high levels of norm enforcement that severely suppress the individual variations,

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<sup>146</sup> See John Stuart Mill, On Liberty, supra note.

<sup>147</sup> See Richard Posner.

innovations, and ‘errors’ that innate cultural transmission mechanisms require to generate adaptive evolutionary processes within groups.”<sup>148</sup>

The likely result should be clear. If rewards come to those who conform, cascade-like behavior will increase, simply because the incentive to be correct is strengthened or replaced by the incentive to do what others do. The extent of this effect will depend on the extent of the incentive to conform. But whenever the incentive is positive, people will be all the more likely to ignore their private information and to follow others. The opposite result should be expected if people are penalized for following others or rewarded for independence; if so, cascade-like behavior should be reduced or even eliminated. I am now emphasizing the incentive to conform, but in some settings independence is prized, and I will offer a few remarks on that possibility below.

If conformity is rewarded, the problem is especially severe for the earliest disclosers or dissenters, who “may bear especially high costs because they are conspicuous, individually identified, and easy to isolate for reprisals.”<sup>149</sup> And if the earliest dissenters are successfully deterred, dissent is likely to be exceedingly rare. But once the number of disclosers or dissenters reaches a certain level, there may be a tipping point, producing a massive change in behavior.<sup>150</sup> Indeed a single discloser, or a single skeptic, might be able to initiate a chain of events by which a myth is shattered. Return to the tale of the Emperor’s New Clothes: “A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage. ‘The Emperor is naked,’ he said. . . . [T]he boy’s remark, which had been heard by the bystanders, was repeated over and over again until everyone cried: ‘The boy is right! The Emperor is naked! It’s true!’”<sup>151</sup> But it might be very difficult to initiate this process, especially if early disclosers are subject to social or legal sanctions. Here we can see a potentially beneficial role of misfits and malcontents, who should perform a valuable function in getting otherwise neglected material and perspectives to others. Consider the suggestion that extremely harmful cultural effects result from a “social structure” that eliminates “valuable innovators, experimenters, and error-

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<sup>148</sup> Joseph Henrich et al., *supra* note, at 356.

<sup>149</sup> Parson, Zeckhauser, and Coglianese, *supra* note, at 31.

<sup>150</sup> See Kuran, *supra* note; Christina Bicchieri and Yoshitaka Fukui, *The Great Illusion: Ignorance, Informational Cascades, and the Persistence of Unpopular Norms*, in *Experience, Reality, and Scientific Explanation* 89, 108-114 (M.C. Galavotti and A. Pagnini eds. 1999). For an engaging discussion, see Malcolm Gladwell, *The Tipping Point* (1999).

<sup>151</sup> See Hans Christian Anderson, *The Emperor’s New Suit*, in Hans Christian Anderson, *Shorter Tales* (Jean Hersholt trans. 1948; originally published 1837).



makers from being viewed as people to copy.”<sup>152</sup> The qualification, noted above, is that regular contrarians might reduce cascades without reducing errors.<sup>153</sup>

a. An experiment. With respect to conformity, these speculations are supported by an ingenious variation on the urn experiment mentioned above.<sup>154</sup> In this experiment, people were paid twenty-five cents for a correct decision, but seventy-five cents for a decision that matched the decision of the majority of the group. There were punishments for incorrect and nonconforming answers as well. If people made an incorrect decision, they lost twenty-five cents; if their decision failed to match the group’s decision, they lost seventy-five cents.

In this experiment, cascades appeared almost all of the time. No fewer than 96.7% of rounds resulted in cascades,<sup>155</sup> and 35.3% of announcements did not match the announcer’s private signal, that is, the signal given by his own draw.<sup>156</sup> And when the draw of a subsequent person contradicted the announcement of the predecessor, 72.2% of people matched the first announcement. Consider, as a dramatic illustration, this period of the experiment<sup>157</sup> (the actual urn for this period was B):

### Conformity Experiment

	1	2	3	4	5	6	7	8	9	10
<b>Private Draw</b>	a	b	b	b	a	b	b	b	a	b
<b>Decision</b>	A	A	A	A	A	A	A	A	A	A

b. Affective ties and stifled dissent. The lesson is that institutions that reward conformity, and punish deviance, are far more likely to produce worse decisions and to reveal less in the way of private information. And here there is a link to the earlier suggestion that serious mistakes are committed by groups whose members are connected by bonds of affection, friendship, and

<sup>152</sup> See Henrich et al., in *Bounded Rationality*, supra note, at 357.

<sup>153</sup> See H. Henry Cao and David Hirshleifer, *Misfits and Social Progress* (unpublished manuscript 2002).

<sup>154</sup> See Hung and Plott, supra note, at 1515-1517.

<sup>155</sup> Hung and Plott, supra note, at 1517.

<sup>156</sup> Id. at 1518.

<sup>157</sup> Id. at 1516.

solidarity.<sup>158</sup> In such groups, members are usually less willing, or even unwilling, to state objections and counterarguments, for fear that these will violate generally held norms. Cascades and bad decisions are likely; return to the investment clubs discussed above.<sup>159</sup> We can see here that an organization that depends on affective ties is likely to stifle dissent and to minimize the disclosure of private information and belief; some religious and political organizations are obvious illustrations. A socially destructive norm of conformity aggravates people's tendency to ignore their private information and to say and do what others do.

If an organization wants to avoid error, it should make clear that it welcomes the disclosure private signals, simply because that is in the organization's own general interest. This point might seem counterintuitive, because in most well-functioning societies, conformity to the majority's view seems to be the civil thing to do. What I am suggesting here is that from the social standpoint, it is better to behave in the way that one would if being right were all that mattered, and better still to behave as one would if a correct group decision were all that mattered.

Of course the normative issues are not simple. Bonds of affection and solidarity are often important to group members, and many people do not appreciate dissent and disagreement. Perhaps the real point of the relevant group or organization is not to perform well, but to foster good relationships. Conformists avoid creating the difficulties that come from contestation, but at the expense, often, of a good outcome; dissenters tend to increase contestation while also improving performance.<sup>160</sup> In the abstract, it is hard to specify the optimal tradeoffs between the various goods. If the central goal of group members is to maintain and improve social bonds and not to carry out some task, conformity might be encouraged, at least if nonconformists introduce tension and hostility. Or consider the question of dissent in wartime. It is important for those who wage war to know what citizens really think and also to have a sense of actual and potential errors. But it is also important, especially in wartime, for citizens to have a degree of solidarity and to believe that they are involved in a common endeavor; this belief can help solve collective action problems that otherwise threaten success. Some forms of dissent might correct mistakes while also undermining social bonds. Of course freedom of speech should be the rule, but

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<sup>158</sup> See Harrington, *supra* note.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

there is no simple solution to this dilemma. We might simply notice that those who are inclined to dissent must decide whether it is worthwhile to create the disruption that comes from expressing their views.<sup>161</sup>

c. When silence is golden. I have been stressing cases in which disclosure is in the group's interest, but the immediately preceding discussion suggests the opposite possibility.<sup>162</sup> If group members reveal information that is embarrassing or worse, they might assist a competitor or an adversary. They might also make it harder for the group to have candid discussions in the future, simply because everyone knows that whatever is said might be made public. Strong norms against "leaking" are a natural corrective. And if some members of the group have engaged in wrongdoing, revelation of that fact might injure many or all group members. Anyone who has ever attended a faculty meeting is aware of the possibility that speakers receive the full benefits of the time they use, while inflicting costs on others; this unfortunate state of affairs can lead to unduly long meetings. The same problem can inflict the deliberations of both legislatures and courts. Conformity to a group norm, involving silence or informal time constraints, can be extremely valuable.

It is important to acknowledge that the problem I am emphasizing—the failure to disclose accurate information that will benefit the public—is closely paralleled by the problems raised in many cases in which silence, not revelation, is a collective good.<sup>163</sup> And if disclosure will spread inaccurate information, it is

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<sup>161</sup> It is also possible that dissenters will be wrong, especially but not only if they are contrarians -- and if they are wrong, they might spread errors through the same processes discussed here. Nothing in the discussion thus far shows that conformity and cascades are bad as such. The only suggestions have been that the underlying mechanisms increase the likelihood that people will not reveal what they know or believe, and that this failure to disclose can produce social harm. It would not be difficult to generate experiments in which informational and reputational influences produce fewer mistakes than independence – if, for example, the task is especially difficult, and if the experimenter introduces confident confederates equipped with the correct answer. When specialists have authority, and when people listen carefully to them, it is generally because errors are minimized through this route. But reputational influences carry serious risks insofar as they lead people, including specialists, not to disclose what they actually know. Indeed, this is the most troublesome implication of the conformity experiment.

<sup>162</sup> See Edward Parson, Richard Zeckhauser, and Cary Coglianese, *Collective Silence and Individual Voice: The Logic of Information Games*, forthcoming in *Collective Choice: Essays in Honor of Mancur Olson* (J. Heckelman and D. Coates eds. 2003).

<sup>163</sup> *Id.*

unlikely to be beneficial,<sup>164</sup> especially if it negates the beneficial effects of previous decisions or produces a cascade of its own. Because my focus is on the failure to disclose information, I will not devote attention to situations in which silence is golden, except to note that the basic analysis of those situations is not so different from the analysis here.<sup>165</sup>

d. Variations and the real world. The conformity experiment could itself be varied in many ways, with predictable results. If financial rewards were solely or almost solely for conformity, cascade behavior would be increased; if the seventy-five cent reward were cut in half, cascade behavior should decline. Of course it is possible to imagine many mixed systems. An obvious example is a system of majority rule in which people are also rewarded for conformity or punished for nonconformity. Will cascades develop in such cases? The answer will depend on the size of the various incentives. If the accuracy of the group's decision will greatly affect individual well-being—if their lives depend on good results—cascades are less likely. But if the ultimate outcome has little effect, and if conformity will carry high rewards, cascades are inevitable. A system in which individuals receive \$2 for a correct majority decision, and \$.25 for conforming, will produce different (and better) results from a system in which individuals receive \$.25 for a correct majority decision, and \$2 for conformity.

The real world of groups and democracy offers countless variations on these rewards, and often the rewards are highly indeterminate; people do not know what they are or have a hard time in quantifying them. But there can be little doubt that conformity pressures actually result in less disclosure of information. Consider the suggestion of a medical researcher who questions a number of Lyme disease diagnoses: "Doctors can't say what they think anymore. . . . If you quote me as saying these things, I'm as good as dead."<sup>166</sup> When privately interviewed, gang members express considerable discomfort about their antisocial behavior, but their own conduct suggests a full commitment, leading to a widespread belief that most people approve of what is being done.<sup>167</sup> Or consider the remarks of a sociologist who has publicly raised questions about the health threats posed by mad-cow disease, suggesting that if you raise those

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<sup>164</sup> This statement is qualified because inaccurate disclosures might, in fortunate circumstances, be corrected, leading to a greater appreciation of what is true. See Mill, *supra*, for a classic discussion of the possibly valuable role of falsehoods.

<sup>165</sup> See Parson et al., *supra*, for helpful discussion.

<sup>166</sup> David Grann, *Stalking Dr. Steere*, N.Y. Times, July 17, 2001 (Magazine), at 52.

<sup>167</sup> Bicchieri and Fukui, *supra* note, at 93.

doubts publicly, “You get made to feel like a pedophile.”<sup>168</sup> Tocqueville explained the decline of the French church, in the mid-eighteenth century, in these terms: “Those who retained their beliefs in the doctrines of the Church . . . dreading isolation more than error, professed to share the sentiments of the majority. So what was in reality the opinion of only a part . . . of the nation came to be regarded as the will of all and for this reason seemed irresistible, even to those who had given it this false appearance.”<sup>169</sup> Or consider, as a chilling example, the suggestion from a killer of Mostar, during the Bosnian war, that his actions were not a product of his convictions about the evil character of those he was killing. On the contrary, many of them were his former friends. His explanation was that he had to do what he did to remain a part of his Serbian community.<sup>170</sup>

There is a final wrinkle. In the settings discussed thus far, dissenters proceed at their peril and nonconformity is punished. This will be my emphasis throughout. But in some contexts, dissenters might be attempting to improve their own prospects, and dissenting might be a sensible way of doing that. A political dissenter, challenging some widespread practice, sometimes becomes more prominent and more successful as a result. A judge who dissents in a high-profile case might not greatly fear that her reputation will be harmed; on the contrary, she might think that the dissent will redound to her benefit. The point is strengthened once we consider the fact that a society consists of countless communities with a wide range of values and beliefs. A public dissenter might impair his reputation in one group but simultaneously strengthen it in another. Of course, some people say and do exactly what they think and do not greatly care about their reputations; for them, informational influences are far more important. The only suggestions are that much of the time, people do not want to lose the good opinion of relevant others, and that the result of this desire is to reduce the information that the public is able to have.

e. Beyond information. Often people lack much information, strictly speaking, but they do have preferences and values. They might believe that the words “under God” should not be included in the pledge of allegiance. They might want to discontinue affirmative action. But in either case they might not reveal what they want, simply because of the pressure to conform. I have

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<sup>168</sup> Andrew Higgins, *It's a Mad, Mad, Mad-Cow World*, *Wall St. J.*, Mar. 12, 2001, at A13 (internal quotation marks omitted).

<sup>169</sup> Alexis de Tocqueville, *The Old Regime and the French Revolution* 155 (1955).

<sup>170</sup> See Russell Hardin, *The Crippled Epistemology of Extremism*, in *Political Rationality and Extremism* 3, 16 (Albert Breton et al. eds. 2002).

suggested that from the standpoint of democratic practice, this is a problem as well. Most of the time, it is valuable for people to disclose what they want and what they value. The basic findings as in the urn experiments would undoubtedly be the same for preferences and values as well as facts, with rewards for conformity greatly increasing the apparent (not real) degree of agreement.

This point helps explain why “[u]npopular or dysfunctional norms may survive even in the presence of a huge, silent majority of dissenters.”<sup>171</sup> Fearing the wrath of others, people might not publicly contest practices and values that they privately abhor. The practice of sexual harassment long predated the idea of sexual harassment, and the innumerable women who were subject to harassment did not like it.<sup>172</sup> But much of the time they were silent, largely because they feared the consequences of public complaint. It is interesting to speculate about the possibility that many current practices fall in the same general category: those that produce harm, and are known to produce harm, but that persist because most of those who are harmed believe that they will suffer if they object in public.

### C. Reputational Cascades

If conformity pressures are taken seriously, we can see the possibility of reputational cascades, parallel to their informational sibling.<sup>173</sup> In a reputational cascade, people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd. Even the most confident people sometimes fall prey to this process, silencing themselves in the process. In fact the conformity-rewarding version of the urn experiment is an elegant example of a reputational cascade. It is thus possible to exploit the influence of peer pressure, found in the conformity experiments, to show how many social movements become possible.

1. Mechanics. Suppose that Albert suggests that global warming is a serious problem, and that Barbara concurs with Albert, not because she actually agrees with Albert, but because she does not wish to seem, to Albert, to be ignorant or indifferent to human suffering and environmental protection. If Albert and Barbara agree that global warming is a serious problem, Cynthia

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<sup>171</sup> Bicchieri and Fukui, *supra* note, at 114.

<sup>172</sup> See Catharine MacKinnon, *Feminism Unmodified* (1987).

<sup>173</sup> See Timur Kuran, *Public Lies and Private Truths* (1997).

might not contradict them publicly, and might even seem to share their judgment, not because she believes the judgment to be correct, but because she does not want to face the hostility or lose the good opinion of others. It is easy to see how this process might generate a cascade. Once Albert, Barbara, and Cynthia offer a united front on the issue, their friend David might be most reluctant to contradict them even if he thinks that they are wrong. In the actual world of group decisions, people are of course uncertain whether publicly expressed statements are a product of independent knowledge, participation in an informational cascade, or reputational pressure. It is reasonable to think that much of the time, listeners and observers overstate the extent to which the actions of others are based on independent information.

Reputational cascades occur within all branches of government. Of course legislators are vulnerable to reputational pressures; that is part of their job. When elected representatives suddenly support legislation to deal with an apparent (sometimes not real) crisis, they are involved in a reputational cascade.<sup>174</sup> Consider, for example, the rush, in July 2002, to enact measures to deal with corporate corruption.<sup>175</sup> Undoubtedly many legislators had private qualms about the very legislation that they supported, and some of them probably disapproved of measures for which they nonetheless voted. So too with the unanimous (!) disapproval, by members of the United States Senate, of the court of appeals decision to strike down the use of the words “under God” in the pledge of allegiance.<sup>176</sup> In both cases, some legislators were involved in a reputational cascade, repressing their private doubts in order to avoid injury to their reputations.

2. Pluralistic ignorance and self-censorship. I have emphasized that in an informational cascade, the most serious problem is that the group fails to receive privately held information. Exactly the same problem arises in a reputational cascade, where the public, for a very different reason, is unable to learn what many people know and think. Here people silence themselves not because they believe that they are wrong but because they do not want to face the disapproval that, they think, would follow from expressing the view that they believe to be correct. The underlying problem here is pluralistic ignorance: ignorance, on the

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<sup>174</sup> See Kuran and Sunstein, *supra* note.

<sup>175</sup> Citations.

<sup>176</sup> Judge Puts Pledge Of Allegiance Decision On Hold, *The Bulletin's Frontrunner* June 28, 2002, available at [http://www.lexis.com/research/retrieve?\\_m=df9aaf96788a47ff6292885b470099ed&docnum=3&\\_f\\_mtstr=FULL&\\_startdoc=1&wchp=dGLbVtb-ISIIA&\\_md5=2018b6610c1a11b9487087a8ea477ec4](http://www.lexis.com/research/retrieve?_m=df9aaf96788a47ff6292885b470099ed&docnum=3&_f_mtstr=FULL&_startdoc=1&wchp=dGLbVtb-ISIIA&_md5=2018b6610c1a11b9487087a8ea477ec4)

part of most or all, of what most people actually think.<sup>177</sup> In the face of pluralistic ignorance, people can assume, wrongly, that others have a certain view, and they alter their statements and actions accordingly.

Under certain conditions, this self-censorship is an extremely serious social loss. For example, Communism was able to sustain itself in Eastern Europe, not only because of force, but because people believed, wrongly, that most people supported the existing regime.<sup>178</sup> The fall of Communism was made possible only by the disclosure of privately held views, which turned pluralistic ignorance into something closer to pluralistic knowledge.<sup>179</sup> As we shall see, self-censoring can undermine success during war.<sup>180</sup> Reputational pressures also help fuel ethnic identifications, sometimes producing high levels of hostility among groups for which, merely a generation before, such identifications were unimportant and hostility was barely imaginable.<sup>181</sup> And if certain views are punished, it is possible that unpopular views will eventually be lost to public debate, so that what was once “unthinkable” is now “unthought.”<sup>182</sup> Views that were originally taboo, and offered rarely or not at all, become excised entirely, simply because they have not been heard. Here too those who do not care about their reputation, and who say what they really think, perform a valuable public service, often at their own expense.<sup>183</sup>

Various civil liberties, including freedom of speech, can be seen as an effort to insulate people from the pressure to conform, and the reason is not only to protect private rights, but also to protect the public against the risk of self-silencing. A striking claim by Joseph Raz clarifies the point: “If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by

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<sup>177</sup> For a good discussion, see Kuran, *supra* note.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*; see also Suzanne Lohmann, *Dynamics of Informational Cascades: The Monday Demonstrations in Leipzig, East Germany, 1989-1991*, 47 *World Politics* 42 (1994).

<sup>180</sup> See below.

<sup>181</sup> See Kuran, *Ethnification*, *supra* note.

<sup>182</sup> Kuran, *supra* note.

<sup>183</sup> Of course self-censorship is not always bad. The norms held by the public can have a “laundering effect,” one that is quite healthy. See Robert E. Goodin, *Laundering Preferences*, in *Foundations of Social Choice Theory* 75 (Jon Elster & Aanund Hylland eds., 1986). The basic idea here is that there are strong social norms against certain kinds of public statements, such as racist statements, and those norms can have a good effect on public discussion. See *id.*



the first option.”<sup>184</sup> The claim makes sense in light of the fact that a system of free speech confers countless benefits on people who do not much care about exercising that right. Consider the fact that in the history of the world, no society with democratic elections and free speech has ever experienced a famine<sup>185</sup>—a demonstration of the extent in which political liberty protects people who do not exercise it. Freedom of association is especially noteworthy here, because it allows people to band together in groups in which the ordinary incentive to conform might be absent or even reversed. Society in general might punish certain political views, but associations can be found in which those views are tolerated or even encouraged. The secret ballot can be seen in related terms.<sup>186</sup> One advantage of the secret ballot is that it reduces informational pressures, leading the voter to express his own preference and to be less influenced by the views of others. (Recall the majority-rewarding version of the urn experiment.) But the more obvious advantage is that the voter can act anonymously and thus cast his ballot without fear of opprobrium.

Just as informational cascades may be limited in their reach, there can be *local reputational cascades*—ones that reshape the public pronouncements of particular subgroups without affecting those of the broader society. When certain subgroups believe that nonexistent risks are actually quite serious, or that some hopeless medical treatment produces miracle cures, reputational cascades might well be involved, simply because skeptics do not speak out. Of course informational influences interact with reputational ones. South Africa, for example, has experienced the literally deadly phenomenon of “AIDS denial,” with prominent leaders suggesting that AIDS is not a real disease, but instead a conspiracy to sell certain drugs to poor people. In that case, a cascade did develop, but it was based mostly on transmission of alleged facts, not on fear of reputational harm.<sup>187</sup> But if we emphasize reputational pressures, we can identify an important reason for unusual beliefs—about facts and values—among various communities of like-minded people. It is often tempting to attribute such differences to deep historical or cultural factors, but the real source, much of the time, is reputational pressure.

Of course political leaders often play an important role in building those pressures.<sup>188</sup> If leaders insist that something is true, or that the nation should

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<sup>184</sup> Joseph Raz, *Ethics in the Public Domain* 39 (1994).

<sup>185</sup> See Amartya Sen, *Poverty and Famines* (1983).

<sup>186</sup> See Kuran, *supra* note.

<sup>187</sup> See Edwin Cameron, *AIDS Denial in South Africa*, 5 *The Green Bag* 415, 416-19 (2002).

<sup>188</sup> See *id.* at 416-19.

pursue a certain course of action, some citizens might well be reluctant to dissent, if only because of a fear of public disapproval. Here as elsewhere, the result can be a serious social loss. And here again a strong system of civil liberties, and an insistence on making safe space for enclaves of dissenters, can be justified not as an effort to protect individual rights, but as a safeguard against social blunders. A market system aggregates and spreads information better than any planner could possibly do.<sup>189</sup> In the same way, a system of free expression and dissent protects against the false confidence and the inevitable mistakes of planners, both private and public.

It would make little sense to say that cascades, in general, are good or bad. Sometimes cascade effects will overcome group or public torpor, by generating concern about serious though previously ignored problems. Sometimes cascade effects will make people far more worried than they would otherwise be and produce large-scale distortions in private judgments, public policy, and law. It is reasonable to speculate that the antislavery movement had distinctive cascade-like features, as did the environmental movement in the United States, the fall of Communism,<sup>190</sup> and the anti-apartheid movement in South Africa; so too with Mao's Cultural Revolution and the rise of Nazism in Germany. Typically cascades are quite fragile, precisely because people's commitments are based on little private information. What I have emphasized here is the serious risk that social cascades can lead to widespread errors, factual or otherwise.

#### **D. Boundedly Rational Cascades**

Thus far the discussion has assumed that people are largely rational—that they take account, rationally, of the information provided by the statements and actions of others, and that they care, sensibly enough, about their reputation. The principal exception, suggested above, is that people may mistake a cascade for a large number of independent decisions. But it is well-known that human beings are “boundedly rational.” In most domains, people use heuristics, or mental short-cuts, and they also show identifiable biases.<sup>191</sup> Indeed, following others can itself be seen as a heuristic, one that usually works well, but that also misfires in

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<sup>189</sup> See F.A. Hayek, *The Use of Knowledge in Society*, 35 *American Economic Review* 519 (1945).

<sup>190</sup> See Kuran, *supra* note; Suzanne Lohmann, *Dynamics of Informational Cascades: The Monday Demonstrations in Leipzig, East Germany, 1989-1991*, 47 *World Politics* 42 (1994).

<sup>191</sup> For an overview, see *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich et al. eds. 2002); for a summary, see Cass R. Sunstein, *Hazardous Heuristics*, *U Chi L Rev*(forthcoming 2003).

some cases.<sup>192</sup> And for other heuristics and for every bias, there is a corresponding possibility of a cascade.

Consider, for example, the availability heuristic, which has probably become the most well-known in law.<sup>193</sup> When people use the availability heuristic, they answer a hard question about probability by asking whether examples come readily to mind.<sup>194</sup> How likely is a flood, an earthquake, an airplane crash, a traffic jam, a terrorist attack, or a disaster at a nuclear power plant? Lacking statistical knowledge, people try to think of illustrations.<sup>195</sup> For people without statistical knowledge—which is to say most people—it is hardly irrational to use the availability heuristic. The problem is that this heuristic can lead to serious errors of fact, in the form of excessive fear of small risks and neglect of large ones.<sup>196</sup> And indeed both surveys and actual behavior show extensive use of the availability heuristic. Whether people will buy insurance for natural disasters is greatly affected by recent experiences.<sup>197</sup> If floods have not occurred in the immediate past, people who live on flood plains are far less likely to purchase insurance.<sup>198</sup> In the aftermath of an earthquake, insurance for earthquakes rises sharply—but it declines steadily from that point, as vivid memories recede.<sup>199</sup>

For present purposes, the key point is that the availability heuristic does not operate in a social vacuum. Whether an incident is “available” is a function of social interactions. These interactions rapidly spread salient illustrations within relevant communities, making those illustrations available to many or most. Should swimmers worry about shark attacks?<sup>200</sup> Are young girls likely to

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<sup>192</sup> See Henrich, *supra* note, at 356; Goldstein et al., *supra* note, at 174.

<sup>193</sup> See, e.g., Roger Noll and James Krier, Some Implications of Cognitive Psychology for Risk Regulation, 19 J. Legal Stud 747 (1991).

<sup>194</sup> See Amos Tversky and Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty: Heuristics and Biases, *supra* note 7, at 3, 11-14.

<sup>195</sup> *Id.*

<sup>196</sup> See Roger Noll and James Krier, Some Implications of Cognitive Psychology for Risk Regulation, 19 J. Legal Stud 747 (1991); Timur Kuran and Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan L Rev 683, 703-05 (1999).

<sup>197</sup> For a vivid demonstration in the context of catastrophes, see Jacob Gersen, Strategy and Cognition: Regulatory Catastrophic Risk (unpublished manuscript 2001). See also Paul Slovic, The Perception of Risk 40 (2000).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See the discussion of the shark attack cascade in Cass R. Sunstein, Risk and Reason: Safety, Law, and the Environment (2002).

be abducted?<sup>201</sup> In both cases, the United States has recently seen “availability cascades,”<sup>202</sup> in which salient examples were rapidly spread from one person to the next. Note that this process typically involves information. If some people use a recent assault to show that there is a serious risk of crime ten blocks north, or a recent airplane accident to show that it is unsafe to fly, their statements carry a certain authority, leading others to believe that they are true. And in the case of shark attacks and abduction of young girls, the media spread a few gripping examples, apparently providing information that was rapidly transmitted to millions of people. But reputational forces play a role as well. Much of the time, people are reluctant to say that an example is misleading and hence that others’ fears are groundless. Efforts at correction may suggest stupidity or callousness, and a desire to avoid public opprobrium may produce a form of silencing.

Availability cascades are ubiquitous. Vivid examples, alongside social interactions, help account for decisions to purchase insurance against natural disasters.<sup>203</sup> Cascade effects explain the existence of widespread public concern about abandoned hazardous waste dumps (a relatively trivial environmental hazard).<sup>204</sup> In more recent years, availability cascades spurred public fears not only of shark attacks and abductions of girls, but also of the pesticide Alar, of plane crashes, and of shootings in schools in the aftermath of the murders in Littleton, Colorado.<sup>205</sup> Such effects helped produce massive dislocations in beef production in Europe in connection with “mad cow disease”<sup>206</sup>; they help also to account for the outpouring of enthusiasm for regulation of accounting practices in the aftermath of the 2001 scandal involving Enron and other corporations.<sup>207</sup> My suggestion is not that in all or most of these cases, availability cascades led to excessive or inappropriate reactions. On the contrary, such cascades sometimes have the valuable effect of promoting public attention to serious but neglected problems. The suggestion is only that the intensity of public reactions is best understood by seeing the interaction between the availability heuristic and the

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<sup>201</sup> See Howard Kurtz, The ‘Crime Wave’ Against Girls, available at <http://www.washingtonpost.com/wp-dyn/articles/A35380-2002Aug2.html>: “Could the saturation coverage be painting a distorted picture, like the great shark scare last summer? . . . [T]ake these much-hyped abductions, add in the half dozen other cases mentioned by the national media since the first of the year . . . [it] still doesn't qualify as a new crime wave.”

<sup>202</sup> See Kuran and Sunstein, *supra* note.

<sup>203</sup> See Jacob Gersen, Strategy and Cognition: Regulating Catastrophic Risk (unpublished manuscript 2001).

<sup>204</sup> See Kuran and Sunstein, *supra* note.

<sup>205</sup> *Id.*

<sup>206</sup> Andrew Higgins, It's a Mad, Mad, Mad-Cow World, *Wall St. J.*, Mar. 12, 2001, at A13.

<sup>207</sup> See note *supra*.

cascade effects I have been emphasizing.<sup>208</sup> The problem is that those interactions make some errors inevitable, simply because a heuristic, even if generally helpful, is bound to misfire in many cases. Here as elsewhere, dissent can be an important corrective. For organizations and governments, the question is how to make dissent less costly, or even to reward it, especially when dissenters benefit not themselves, but others.

#### IV. Group Polarization

Thus far I have been exploring how informational and reputational influences produce conformity and cascades. I have also identified factors that can increase or reduce the likelihood of both of these. When people are not bound by affective ties, the magnitude of both influences diminishes. When people define themselves as opposed to the relevant others, the direction of the influence might even shift. Greater information of course reduces the effects, and when people know that certain people are more informed, cascades are shattered. With these points in view, let us now turn to the phenomenon of group polarization, a phenomenon that contains large lessons about the behavior of interest groups, religious organizations, political parties, juries, legislatures, judicial panels, and even nations.<sup>209</sup>

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<sup>208</sup> There is an interesting puzzle for those interested in the real-world uses of availability heuristic: In many contexts, multiple images are literally “available.” Consider the problem of gun violence. It is not hard to find cases in which the presence of guns led to many deaths, and also cases in which the presence of guns allowed law-abiding citizens to protect themselves against criminals. See Donald Braman and Dan M. Kahan, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions* (unpublished manuscript 2002). In the face of conflicting instances, which cases are especially available, and to whom? The same question can be raised in the environmental setting. We can find cases in which serious harm resulted from a failure to heed early warnings, suggesting the need for aggressive regulatory protection against risks that cannot yet be shown to be serious; but we can also find cases in which the government expended a great deal to reduce risks that turned out, on reflection, to be small or illusory. The former cases are available to some people and the latter to others. Why should one or another kind of case be available? The behavior of the media, and of relevant interest groups, is undoubtedly important here, but it does not provide all of the picture. Beliefs and orientations are a product of availability, to be sure; but what is available is also a product of beliefs and orientations. In other words, availability may be endogenous to individual predispositions. People are often predisposed to take one or another case as an illustration of a general phenomenon, and predispositions matter a great deal in determining what is available. A great deal of work remains to be done on this topic.

<sup>209</sup> I have discussed group polarization in more detail elsewhere, see Sunstein, *Deliberative Trouble*, *supra* note, and stress here those aspects of group polarization that are most important for an understanding of the importance of dissent.

## A. The Basic Phenomenon

What happens within deliberating bodies? Do groups compromise? Do they move toward the middle of the tendencies of their individual members? The answer is now clear, and it is perhaps not what intuition would suggest: Members of a deliberating group end up in a more extreme position in line with their tendencies before deliberation began.<sup>210</sup> This is the phenomenon known as group polarization. Group polarization is the typical pattern with deliberating groups, having been found in hundreds of studies involving over a dozen countries, including the United States, France, and Germany.<sup>211</sup>

It follows that a group of people who think that global warming is a serious problem will, after discussion, think that global warming is a very serious problem; that those who approve of an ongoing war effort will, as a result of discussion, become still more enthusiastic about that effort; that people who dislike the Rehnquist Court will dislike it quite intensely after talking with one another; that people who disapprove of the United States, and are suspicious of its intentions, will increase their disapproval and suspicion if they exchange points of view. Indeed, there is specific evidence of the latter phenomenon among citizens of France.<sup>212</sup> When like-minded people talk with one another, they usually end up thinking a more extreme version of what they thought before they started to talk. It should be readily apparent that enclaves of people, inclined to rebellion or even violence, might move sharply in that direction as a

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<sup>210</sup> See Roger Brown, *Social Psychology: The Second Edition* 203-226 (1985). At first glance, group polarization might be seen to be in tension with the Condorcet Jury Theorem, which holds that when people are answering a common question with two answers, one false and one true, and when the average probability that each voter will answer correctly exceeds 50%, the probability of a correct answers, by a majority of the group, increases to certainty as the size of the group increases. For a good overview, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J Legal Stud.* 327, 329-334 (2002). The importance of the theorem lies in the demonstration that groups are likely to do better than individuals, and large groups better than small ones, if majority rule is used and if each person is more likely than not to be correct. But when group polarization is involved, individuals do not make judgments on their own; they are influenced by the judgments of others. When interdependent judgments are being made, and when some people are wrong, it is not at all clear that groups will do better than individuals. For empirical evidence, see Norbert Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 *Psych. Rev.* 687 (1996). On some of the theoretical issues, see David Austen-Smith, and J.S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 *American Political Science Review* 34 (1996).

<sup>211</sup> See *id.* at 204.

<sup>212</sup> *Id.* at 224.

consequence of internal deliberations. Political extremism is often a product of group polarization.<sup>213</sup>

There is a close relationship between group polarization and cascade effects. Both of these are a product of informational and reputational influences. A key difference is that group polarization refers to the effects of deliberation,<sup>214</sup> and cascades typically do not involve discussion at all. In addition, group polarization does not necessarily involve a cascade-like process. Polarization can result simply from simultaneous independent decisions, by all or most individuals, to move toward a more extreme point in line with the tendencies of group members.

To see the operation of group polarization in a legal context, let us explore in more detail the study of punitive intentions and punitive damage awards, referred to above.<sup>215</sup> The study involved about 3000 jury-eligible citizens; its major purpose was to determine how individuals would be influenced by seeing and discussing the punitive intentions of others. Hence subjects were asked to record, in advance of deliberation, a “punishment judgment” on a scale of 0 to 8, where 0 indicated that the defendant should not be punished at all, and 8 indicated that the defendant should be punished extremely severely. After the individual judgments were recorded, jurors were sorted into six-person groups and asked to deliberate to a unanimous “punishment verdict.” It would be reasonable to predict that the verdicts of juries would be the median of punishment judgments of jurors; but the prediction would be badly wrong.

Instead the effect of deliberation was to create both a severity shift for high-punishment jurors and a leniency shift for low-punishment jurors.<sup>216</sup> When the median judgment of individual jurors was four or more on the eight-point scale, the jury’s verdict was above that median judgment.<sup>217</sup> Consider, for example, a case involving a man who nearly drowned on a defectively constructed yacht. Jurors tended to be outraged by the idea of a defectively built yacht, and groups were significantly more outraged than their median

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<sup>213</sup> See Albert Breton and Silvana Dalmazzone, Information Control, Loss of Autonomy, and the Emergence of Political Extremism 53-55 (Albert Breton et al. eds. 2002).

<sup>214</sup> Group polarization can occur, however, as a result of mere exposure to the views of others. See Robert Baron et al., *supra* note, at 74.

<sup>215</sup> See Schkade et al., *supra* note.

<sup>216</sup> *Id.* at 1152, 1154-55.

<sup>217</sup> *Id.*

members.<sup>218</sup> But when the median judgment of individual jurors was below four, the jury's verdict was typically below that median judgment.<sup>219</sup> Consider a case involving a shopper who was injured in a fall when an escalator suddenly stopped.<sup>220</sup> Individual jurors were not greatly bothered by the incident, seeing it as a genuine accident rather than a case of serious wrongdoing; and jurors were more lenient than individual jurors.<sup>221</sup> Here, then, is a clear example of group polarization in action. Groups whose members were antecedently inclined to impose large punishments become inclined toward larger punishments. The opposite effect was found with groups whose members were inclined toward small punishments.

## **B. Outrage**

When we consider the ingredients of punishment judgments, this finding has a large implication for people's behavior both inside and outside the courtroom. Punishment judgments are rooted in outrage,<sup>222</sup> and a group's outrage, on a bounded scale, is an excellent predictor of the same group's punishment judgments, on the same scale.<sup>223</sup> Apparently people who begin with a high level of outrage become still more outraged as a result of group discussion. Moreover, the degree of the shift depends on the antecedent level of outrage; the higher the original level, the greater the shift as a result of internal deliberations.<sup>224</sup> There is a point here about the well-springs of not only of severe punishment by jurors, mobs, and governments, but also of rebellion and violence.<sup>225</sup> If like-minded people, predisposed to be outraged, are put together with one another, significant changes are to be expected.

It should be easy to see that group polarization is inevitably at work in feuds, ethnic and international strife, and war. One of the characteristic features

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<sup>218</sup> Id. at 1151, 1152.

<sup>219</sup> Id.

<sup>220</sup> Id.

<sup>221</sup> Id.

<sup>222</sup> See Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* 32-33 (2002).

<sup>223</sup> Id. at 36.

<sup>224</sup> See Schkade et al., *supra*, at 1152, showing that in the top five outrage cases, the mean shift was 11%, higher than in any other class of cases. The effect is more dramatic still for dollars, see *id.*, where high dollar awards shifted upwards by a significant margin. This finding is closely connected to another one: Extremists are most likely to shift, and likely to shift most, as a result of discussions with one another. See John Turner et al., *Rediscovering the Social Group* 154-59 (1987).

<sup>225</sup> See Hardin, *supra* note; Breton, *supra* note, at 53-55.



of feuds is that members of feuding groups tend to talk only to one another, fueling and amplifying their outrage, and solidifying their impression of the relevant events. Group polarization occurs every day within Israel and among the Palestinian Authority. Many social movements, both good and bad, become possible through the heightened effects of outrage<sup>226</sup>; consider the movement for rights for deaf people, which was greatly enhanced by the fact that the deaf have a degree of geographical isolation.<sup>227</sup>

### **C. Hidden Profiles and Self-Silencing in Groups**

The tendency toward extreme movement is the most noteworthy finding in the literature on group polarization.<sup>228</sup> But there is a neglected point, of special importance for my argument here: In a deliberating group, those with a minority position often silence themselves or otherwise have disproportionately little weight. The result can be “hidden profiles”—important information that is not shared within the group.<sup>229</sup> Group members often have information but do not discuss it, and the result is to produce inferior decisions.

Consider a study of serious errors within working groups, both face-to-face and online.<sup>230</sup> The purpose of the study was to see how groups might collaborate to make personnel decisions. Resumes for three candidates, applying for a marketing manager position, were placed before the groups. The attributes of the candidates were rigged by the experimenters so that one applicant was clearly the best for the job described. Packets of information were given to subjects, each containing a subset of information from the resumes, so that each group member had only part of the relevant information. The groups consisted of three people, some operating face-to-face, some operating on-line. Two results were especially striking. First, group polarization was common, as groups ended up in a more extreme position in accordance with the original thinking of their members. Second, almost none of the deliberating groups made what was conspicuously the right choice, because they failed to share information in a way

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<sup>226</sup> See Edna Ullmann-Margalit and Cass R. Sunstein, *Inequality and Indignation*, Phil & Pub. Affairs (forthcoming 2002).

<sup>227</sup> See Sharon Groch, *Free Spaces: Creating Oppositional Spaces in the Disability Rights Movement*, in *Oppositional Consciousness* 65, 67-72 (Jane Mansbridge and Aldon Morris eds. 2001).

<sup>228</sup> See *id.*

<sup>229</sup> See Robert Baron et al., *Group Process, Group Decision, Group Action* 77 (2d ed. 1999).

<sup>230</sup> See R. Hightower and L. Sayeed, *The Impact of Computer-Mediated Communication Systems on Biased Group Discussion*, 11 *Computers in Human Behavior* 33 (1995).

that would permit the group to make an objective decision. Members tended to share positive information about the winning candidate and negative information about the losers, while also suppressing negative information about the winner and positive information about the losers. Their statements served to “reinforce the march toward group consensus rather than add complications and fuel debate.”<sup>231</sup>

This finding is in line with the more general suggestion that groups tend to dwell on shared information and to neglect information that is held by few members. It should be unnecessary to emphasize that this tendency can lead to large errors.<sup>232</sup> To understand this particular point, it is necessary to explore the mechanisms that produce group polarization.

#### **D. Why Polarization? Some Explanations**

Why do like-minded people go to extremes? There are several reasons.<sup>233</sup>

1. Information. The most important, involving informational influences, is similar to what we have found in connection with conformity and cascades. The simple idea here is that people respond to the arguments made by other people—and the “argument pool,” in any group with some initial disposition in one direction, will inevitably be skewed toward that disposition.<sup>234</sup> A group whose members tend to think that Israel is the real aggressor in the Mideast conflict will tend to hear many arguments to that effect, and relatively few opposing views. It is inevitable that the group’s members will have heard some, but not all, of the arguments that emerge from the discussion. Having heard all of what is said, there is likely to be further movement in the anti-Israel direction. So too with a group whose members tend to oppose affirmative action: Group members will hear a large number of arguments against affirmative action and a fewer number of arguments on its behalf. If people are listening, they will have a stronger conviction, in the same direction from which they began, as a result of deliberation. An emphasis on limited argument pools also helps to explain the problem of “hidden profiles” and the greater discussion of shared information during group discussion. It is simply a statistical fact that when more people have a piece of information, there is a greater probability that it will be

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<sup>231</sup> Wallace, *supra* note, at 82.

<sup>232</sup> See Baron et al., *supra* note, at 77.

<sup>233</sup> See Brown, *supra* note, at 200-45; Sunstein, *supra* note.

<sup>234</sup> Brown, *supra* note, at 217-22.

mentioned.<sup>235</sup> Hidden profiles are a predictable result, to the detriment of the ultimate decision.

2. Confidence and corroboration. The second explanation begins by noting that people with extreme views tend to have more confidence that they are right, and that as people gain confidence, they become more extreme in their beliefs.<sup>236</sup> The intuition here is simple: People who lack confidence, and who are unsure what they should think, tend to moderate their views. It is for this reason that cautious people, not knowing what to do, are likely to choose the midpoint between relevant extremes.<sup>237</sup> But if other people seem to share your view, you are likely to become more confident that you are correct—and hence to move in a more extreme direction. In a wide variety of experimental contexts, people's opinions have been shown to become more extreme simply because their view has been corroborated, and because they have been more confident after learning of the shared views of others.<sup>238</sup> Note that there is an obvious connection between this explanation and the finding, mentioned above, that a panel of three judges of the same party is likely to behave quite differently from a panel with only two such judges. The existence of unanimous confirmation, from two others, will strengthen confidence and hence strengthen extremity.<sup>239</sup>

3. Social comparison. A third explanation, involving social comparison, begins with the claim that people want to be perceived favorably by other group members, and also to perceive themselves favorably.<sup>240</sup> Their views may, to a greater or lesser extent, be a function of how they want to present themselves. Once people hear what others believe, they adjust their positions in the direction of the dominant position, to hold onto their preserved self-presentation. They may want to signal, for example, that they are not cowardly or cautious, especially in an entrepreneurial group that disparages these characteristics, and hence they will frame their position so that they do not appear as such by

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<sup>235</sup> See Caryn Christensen and Ann Abbott, Team Medical Decision Making, in *Decision Making in Health Care* 271 (Gretchen Chapman and Frank A. Sonnenberg eds. 2000).

<sup>236</sup> See Robert Baron et al., Social Corroboration and Opinion Extremity, 32 *J Experimental Soc. Psych.* 537 (1996).

<sup>237</sup> See Mark Kelman et al., Context-Dependence in Legal Decision Making, 25 *J. Legal Stud.* 287, 287-88 (1996).

<sup>238</sup> Baron et al., *supra* note.

<sup>239</sup> See Chip Heath and Richard Gonzales, Interaction With Others Increases Decision Confidence But Not Decision Quality: Evidence Against Information Collection Views Of Interactive Decision Making, 61 *Organizational Behavior and Human Decision Processes* 305-326 (1997).

<sup>240</sup> See Brown, *supra* note, at 213-217.

comparison to other group members.<sup>241</sup> And when they hear what other people think, they might find that they occupy a somewhat different position, in relation to the group, from what they hoped; and they shift accordingly.<sup>242</sup>

For example, if people believe that they are somewhat more opposed to capital punishment than most people, they might shift a bit after finding themselves in a group of people who are strongly opposed to capital punishment, to maintain their preferred self-presentation. The phenomenon appears to occur in many contexts.<sup>243</sup> People may wish, for example, not to seem too enthusiastic, or too restrained in their enthusiasm for, affirmative action, feminism, or an increase in national defense; hence their views may shift when they see what other group members think. The result is to press the group's position toward one or another extreme, and also to induce shifts in individual members. There is a great deal of support for this account of group polarization.<sup>244</sup>

Note that an emphasis on social comparison gives a new and perhaps better explanation for the existence of hidden profiles and the failure to share certain information within a group. People might emphasize shared views and information, and downplay unusual perspectives and new evidence, simply from a fear of group rejection and a desire for general approval.<sup>245</sup> In political and legal institutions, there is an unfortunate implication: Group members who care about one another's approval, or who depend upon one another for material or nonmaterial benefits, might well suppress highly relevant information. Hence this account of group polarization is connected with the idea of reputational cascades, where blunders are highly probable.

## **E. Skewed Debates**

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<sup>241</sup> *Id.* at 213-14.

<sup>242</sup> *Id.* It has similarly been suggested that majorities are especially potent because people do not want to incur the wrath, or lose the favor, of large numbers of people, and that when minorities have influence, it is because they produce genuine attitudinal change. See Baron et al., *supra* note, at 82. The demonstrated fact that minorities influence privately held views, on such contested issues as gay rights and abortion, see *id.* at 80, attests to the value of creating institutions that allow room for diverse voices. See pp. *infra*.

<sup>243</sup> See *id.*; see also John Turner, *Rediscovering the Social Group: A Self-Categorization Theory* (1987).

<sup>244</sup> See Baron, *supra* note, at 74.

<sup>245</sup> *Id.* at 77.

In the context of punitive damage awards by juries, a particular finding deserves emphasis.<sup>246</sup> Thus far my discussion of the relevant study has stressed how deliberation affected punitive intentions, measured on a bounded numerical scale. But jurors were also asked to record their dollar judgments, in advance of deliberation, and then to deliberate to dollar verdicts. Did high awards go up and low awards go down, as the idea of group polarization might predict? Not quite. The principal effect was make all awards go up, in the sense that the jury's dollar award typically exceeded the median award of individual jurors.<sup>247</sup> Indeed, the effect was so pronounced that in 27% of cases, the jury's verdict was as high as, or higher than, the highest predeliberation judgment of jurors!<sup>248</sup> There is a further point. The effect of deliberation, in increasing dollar awards, was most pronounced in the case of high awards. For example, the median individual judgment, in the case involving the defective yacht, was \$450,000, whereas the median jury judgment, in that same case, was \$1,000,000.<sup>249</sup> But awards shifted upwards for low awards as well.<sup>250</sup>

Why did this happen? A possible explanation, consistent with group polarization, is that any positive median award suggests a predeliberation tendency to punish, and deliberation aggravates that tendency by increasing awards. But even if it is right, this explanation seems insufficiently specific. The striking fact is that those arguing for higher awards seem to have an automatic rhetorical advantage over those arguing for lower awards. A subsequent study of law students supports this finding, suggesting that given existing social norms, people find it easy, in the abstract, to defend higher punitive awards against corporations, and harder to defend lower awards.<sup>251</sup> Findings of rhetorical advantage have been made in seemingly distant areas. Suppose that doctors are deciding what steps to take to resuscitate patients. Are individuals less likely to support heroic efforts than groups? Evidence suggests that as individuals, doctors are less likely to do so than groups, apparently because those who favor such efforts have a rhetorical advantage over those who do not.<sup>252</sup>

Or consider the difference between individual behavior and team behavior in the Dictator Game, used by social scientists to study selfishness and

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<sup>246</sup> See note supra.

<sup>247</sup> See Schkade et al., supra note, at 1152, 1155-56.

<sup>248</sup> Id. at 1140.

<sup>249</sup> Schkade et al., supra note, at 1152.

<sup>250</sup> Id.

<sup>251</sup> Id. at 1161-62.

<sup>252</sup> See Christenen and Abbott, supra note, at 269.

altruism.<sup>253</sup> In this game, a subject is told that she can allocate a sum of money, say \$10, between herself and some stranger. The standard economic prediction is that most subjects will keep all or almost all of the money for themselves; why should we share money with strangers? But the standard prediction is wrong. Most people choose to keep somewhere between \$6 and \$8 and to share the rest.<sup>254</sup> The question here, however, is how is individual behavior is affected once people are placed in teams. The answer is that team members choose still more equal divisions.<sup>255</sup> This result seems best explained by reference to a rhetorical advantage, disfavoring selfishness, even within a group that stands to benefit.<sup>256</sup> Apparently people do not want to appear to be greedy. Of course this outcome, and the effect of group influence, would change if the team in the Dictator Game had some reason to be hostile to the beneficiaries of their generosity. We can easily imagine a variation of the dictator game in which, for example, people of a relatively poor religious group were deciding how much to allocate to another religious group that was thought to be both hostile and far wealthier. In this variation, the rhetorical advantage might favor greater selfishness.

But what produces a rhetorical advantage? The simplest answer points to prevailing social norms, which of course vary across time and place. Among most Americans, current norms make it easier to argue, other things equal, for higher penalties against corporations for egregious misconduct, But it is possible to imagine subcommunities (corporate headquarters?) in which the rhetorical advantage runs the other way. In any case it is easy to envisage many other contexts in which one or another side has an automatic rhetorical advantage. Consider, as possible examples, debates over whether there should be higher penalties for those convicted of drug offenses, or whether tax rates should be reduced; in modern political debates, those favoring higher penalties and lower taxes have the upper hand. Of course there are limits on the feasible level of change. But when a rhetorical advantage is involved, group deliberation will produce significant shifts in individual judgments. Undoubtedly legislative behavior is affected by mechanisms of this sort, and it is likely that many movements within judicial panels can be explained in similar terms.

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<sup>253</sup> Timothy Cason & Vai-Lam Mui, A Laboratory Study of Group Polarisation in the Team Dictator Game, 107 *Econ. J.* 1465 (1997)

<sup>254</sup> See *id.*

<sup>255</sup> *Id.* at 1468-72.

<sup>256</sup> Cason and Mui themselves explain the outcome in terms of social comparison, a closely related account. See *id.*

Are rhetorical advantages unhelpful or damaging? In the abstract, this is an impossible question to answer, because shifts have to be evaluated on their merits.<sup>257</sup> Perhaps the higher punitive awards that follow deliberation are simply better. So too, perhaps, for the movements by doctors, taking more heroic measures, and by groups deciding how equally to spread funds. The only point is that such advantages exist; and it would be most surprising if they were always benign.

## **F. More Extremism, Less Extremism**

Group polarization is not a social constant. It can be increased or decreased, and even eliminated, by certain features of group members or their situation.

1. Antecedent extremism. Extremists are especially prone to polarization. It is more probable that they will shift and it is probable that they will shift more. When they start out an extreme point and are placed in a group of like-minded people, they are likely to go especially far in the direction with which they started.<sup>258</sup> There is a lesson here about the sources of terrorism and political violence in general.<sup>259</sup> And because there is a link between confidence and extremism, the confidence of particular members also plays an important role; confident people are more prone to polarization.<sup>260</sup>

2. Solidarity and affective ties. If members of the group think that they have a shared identity, and a high degree of solidarity, there will be heightened polarization.<sup>261</sup> One reason is that if people feel united by some factor (for example, politics or religious convictions), dissent will be dampened. If individual members tend to perceive one another as friendly, likable, and similar to them, the size and likelihood of the shift will increase.<sup>262</sup> The existence of

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<sup>257</sup> I offer some qualifications to this claim below.

<sup>258</sup> This is a lesson of the study of punitive damage awards, where groups with extreme medians showed the largest shifts, see Schkade et al., *supra* note, at 1152. For other evidence, see Turner et al., *supra* note, at 158.

<sup>259</sup> See Breton et al., *supra* note; Sunstein, *supra* note.

<sup>260</sup> See Maryla Zaleska, *The Stability of Extreme and Moderate Responses in Different Situations*, in *Group Decision Making*, *supra*, at 163, 164.

<sup>261</sup> Dominic Abrams et al., *Knowing What To Think By Knowing Who You Are*, 29 *British J Soc. Psych.* 97, 112 (1990)

<sup>262</sup> See Hans Brandstatter, *Social Emotions in Discussion Groups*, in *Dynamics of Group Decisions* (Hans Brandstatter et al. ed. 1978). John Turner et al., *Rediscovering the Social Group* 154-59

affective ties reduces the number of diverse arguments and also intensifies social influences on choice.<sup>263</sup> One implication, noted above, is that mistakes are likely to be increased when group members are united mostly through bonds of affection and not through concentration on a particular task; it is in the former case that alternative views will less likely find expression.<sup>264</sup> Hence people are less likely to shift if the direction advocated is being pushed by unfriendly group members.<sup>265</sup> A sense of “group belongingness” affects the extent of polarization.<sup>266</sup> In the same vein, physical spacing tends to reduce polarization; a sense of common fate and intragroup similarity tend to increase it, as does the introduction of a rival “outgroup.”<sup>267</sup>

An interesting experiment attempted to investigate the effects of group identification.<sup>268</sup> Some subjects were given instructions in which group membership was made salient (the “group immersion” condition), whereas others were not (the “individual” condition). For example, subjects in the group immersion condition were told that their group consisted solely of first-year psychology students, and that they were being tested as group members rather than as individuals. The relevant issues involved affirmative action, government subsidies for the theatre, privatization of nationalized industries, and phasing out nuclear power plants. The results were quite striking.<sup>269</sup> Polarization generally occurred. But there was the least polarization in the individual condition; polarization was greater in the group immersion condition, when group identity was emphasized. This experiment strongly suggests that polarization is highly likely to occur, and to be most extreme, when group membership is made salient.

3. Exit. Over time, group polarization can be fortified because of “exit,” as members leave the group because they reject the direction in which things are

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(1987), attempt to use this evidence as a basis for a new synthesis, one that they call “a self-categorization theory of group polarization,” *id.* at 154.

<sup>263</sup> See Brooke Harrington, *The Pervasive Effects of Embeddedness in Organizations* 24 (unpublished manuscript 2000).

<sup>264</sup> See Harrington, *supra* note, at 220-26.

<sup>265</sup> See Hans Brandstatter, *Social Emotions in Discussion Groups*, in *Dynamics of Group Decisions* (Hans Brandstatter et al. ed. 1978). See, Turner et al., *supra* note, at 154-59, for the especially interesting implication that a group of comparative extremists will show a comparatively greater shift toward extremism. See *id.* at 158.

<sup>266</sup> *Id.* at 151.

<sup>267</sup> *Id.*

<sup>268</sup> Spears, *supra*, at 123-4.

<sup>269</sup> *id.*



heading.<sup>270</sup> If exit is pervasive, the tendency to extremism will be greatly aggravated. The group will end up smaller, but its members will be both more like-minded and more willing to take extreme measures; and that very fact will mean that internal discussions will produce more extremism still. If only loyalists stay, the group's median member will be more extreme, and deliberation will produce increasingly extreme movements.

4. Informed members and facts. When one or more people in a group know the right answer to a factual question, the group is likely to shift in the direction of accuracy.<sup>271</sup> If the question is how many people were on the earth in 1940, or the number of home runs hit by Hank Aaron, or the distance between Chicago and New York, and if one or a few people know the right answer, the group is likely not to polarize, but to converge on that answer. The reason is simple: The person who knows the answer will speak with confidence and authority, and is likely to be convincing for that very reason. Of course this is not inevitable; Asch's conformity experiments show that social pressures can lead to errors even with respect to simple factual claims. But in many cases, group members who are ignorant will be tentative, and members who are informed will speak confidently. This is enough to ensure convergence on truth rather than polarization. Here there is a link between what prevents polarization and what shatters cascades: A person who knows, and is known to know, the truth.

In this light it becomes easier to understand the outcomes of experiments that show a potential advantage of groups over individuals.<sup>272</sup> One set of experiments involved two analytic tasks. The first involved a statistical problem, requiring subjects to guess the composition of an urn containing blue balls and red balls. (This experiment involved team decision-making and was not a test for cascade effects.) The other involved a problem in monetary policy, asking participants to manipulate the interest rate to steer the economy. People were asked to perform as individuals and in groups. The basic results for the two experiments were similar. Groups significantly outperformed individuals (and they did not, on balance, take longer to make decision). Perhaps most surprisingly, there were no differences between group decisions made with a unanimity requirement and group decisions made by majority rule. How can these results be explained? The experimenters do not have a complete account.

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<sup>270</sup> See Hardin, *supra* note.

<sup>271</sup> See James Fishkin and Robert Luskin, *Bringing Deliberation to the Democratic Dialogue*, in *The Poll With A Human Face* 3, 29-31 (Maxwell McCombs and Amy Reynolds eds. 1999).

<sup>272</sup> Alan Blinder and John Morgan, *Are Two Heads Better Than One? An Experimental Analysis of Group Vs. Individual Decisionmaking*, NBER Working Paper 7909 (2000).

An obvious possibility is that each group contained one or more strong analysts, who are able to move the group in the right direction. But a series of regressions, comparing the performance of the best individual players offers only mixed support for this hypothesis.<sup>273</sup> It seems that in these experiments, group results were driven by the best points and arguments, which would be spread among the various individual players. Here we find a tribute to Aristotle's suggestion that groups can do much better than individuals.<sup>274</sup>

5. Equally opposed subgroups. Depolarization, rather than polarization, will be found when the relevant group consists of individuals drawn equally from two extremes.<sup>275</sup> Thus if people who initially favor caution are put together with people who initially favor risk-taking, the group judgment will move toward the middle. Consider a study<sup>276</sup> consisting of six-member groups specifically designed to contain two subgroups (of three persons each) initially committed to opposed extremes; the effect of discussion was to produce movement toward the center. One reason may be the existence of partially shared persuasive arguments in both directions.<sup>277</sup> Interestingly, this study of equally opposed subgroups found the greatest depolarization with obscure matters of fact (e.g., the population of the United States in 1900)—and the least depolarization with highly visible public questions (e.g., whether capital punishment is justified). Matters of personal taste depolarized a moderate amount (e.g., preference for basketball or football, or for colors for painting a room).<sup>278</sup> Hence "familiar and long-debated issues do not depolarize easily."<sup>279</sup> With respect to such issues, people are simply less likely to shift at all, in part "because the total pool of arguments has long been familiar to all,"<sup>280</sup> and nothing new will emerge from discussion.

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<sup>273</sup> Id. at 44-46.

<sup>274</sup> See note supra. As I have suggested, the overall evidence on this point is mixed. See Kerr et al., supra note.

<sup>275</sup> See H. Burnstein, Persuasion As Argument Processing, in Group Decision Making (H. Brandstetter, J.H. Davis, and G. Stocker-Kreichgauer eds., 1982).

<sup>276</sup> Brown, supra, at 225.

<sup>277</sup> Amiram Vinokur and Eugene Burnstein, The Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts, 29 J Personality & Social Psych. 305 (1974).

<sup>278</sup> Amiram Vinokur and Eugene Burnstein, supra, at 884.

<sup>279</sup> Brown, supra, at 226.

<sup>280</sup> Id.

Compare in this regard an experiment designed to see how group polarization might be dampened.<sup>281</sup> The experiment involved the creation of four-person groups, which, on the basis of pretesting, were known to include equal numbers of persons on two sides of political issues (whether smoking should be banned in public places, whether sex discrimination is a thing of the past, whether censorship of material for adults infringes on human liberties). Judgments were registered on a scale running from +4 (strong agreement) to 0 (neutral) to -4 (strong disagreement). In half of the cases (the “uncategorized condition”), subjects were not made aware that the group consisted of equally divided subgroups in pretests. In the other half (the “categorized condition”), subjects were told that they would find a sharp division in their group, which consisted of equally divided subgroups. They were also informed who was in which group and told that they should sit around the table so that one subgroup was on one side facing the other group. In the uncategorized condition, discussion generally led to a dramatic reduction in the mean gap between the two sides, thus producing a convergence of opinion toward the middle of the two opposing positions (a mean of 3.40 scale points, on the scale of +4 to -4). But things were very different in the categorized condition. Here the shift toward the median was much less pronounced, and frequently there was barely any shift at all (a mean of 1.68 scale points). In short, calling attention to group membership made people far less likely to shift in directions urged by people from different groups.

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My discussion of group influences—of conformity, cascades, and polarization—is now complete. I have emphasized many findings from social science, but I have tried at the same time to give a sense of how those findings bear on issues in law and politics. It should be clear that there is a long list of potential applications, and any set of selections, from that list, is inevitably arbitrary. In the discussion that follows, I emphasize four areas in which an understanding of group influences helps to illuminate legal problems. The first involves law’s expressive function—the circumstances in which a mere statement, made by the law, is likely to affect people’s behavior. I draw a link among legal pronouncements, Milgram’s experimenter, and Asch’s unanimous confederates. The second involves the institutions of the American Constitution, based on the founding enthusiasm for the expression of diverse and dissenting

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<sup>281</sup> Dominic Abrams et al., *Knowing What To Think By Knowing Who You Are*, 29 *British J Soc. Psych.* 97, 112 (1990)

views. I suggest that the American Constitution creates a deliberative democracy of a distinctive kind—a deliberative democracy that prizes heterogeneity. The third area involves the value of dissent in a place not always thought to benefit from it: the federal judiciary. Because judges are subject to conformity and cascade effects as well as group polarization, it is exceedingly important to promote ideological diversity within the federal courts. The fourth and final area involves affirmative action in higher education. Here I offer an ambivalent lesson, suggesting that racial diversity is, in some domains, unimportant for the exchange of (relevant) ideas, but that it is important in other domains, usually involved in both undergraduate and law school education.

## V. The Expressive Function of Law

In recent years, there has been a great deal of discussion of law's expressive function—of the role of law in “making statements,” as opposed to regulating conduct directly through actual punishments for violations.<sup>282</sup> In this Part, I make three suggestions. First, we can better understand the expressive function of law if we see certain legal enactments as offering signals about what it is right to do and about what other people think it is right to do. Second, a legal expression is most likely to be effective if violations are highly visible; visibility matters because people do not want to incur the wrath of others. Third, a legal expression is most likely to be ineffective if violators are part of a deviant subcommunity which rewards, or at least does not punish, noncompliance. In such cases, behavior within the subcommunity can counteract the effects of law. Each of these points can be closely connected with an understanding of conformity, cascades, and group polarization. We can thus use that understanding to see when government might bring about compliance without relying on public enforcement—and also when enforcement is likely to be indispensable.

### A. Law As Signal

Sometimes law is infrequently enforced, but there is automatic or near-automatic compliance.<sup>283</sup> It is in this sense that law seems to have an expressive function, making statements and having effects merely by virtue of those statements. When effects occur, it is because the law offers signals on both the

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<sup>282</sup> See Adler, *supra* note.

<sup>283</sup> See Robert Kagan and Jerome Skolnick, in *Banning Smoking: Compliance Without Enforcement*, in *Smoking Policy: Law, Politics, and Culture* (Robert Radin ed. 1999).

informational and reputational sides. If law is made by sensible people, and if law bans certain conduct, there is a good reason to presume that the conduct should be banned. And when law bans certain conduct, there is good reason to presume that other people think that the conduct should be banned. In either case, sensible people have fresh reason to do what the law asks them to do. Of course the presumptions can be rebutted. Informed people might know that the law is asking people to do something senseless, or not to do something sensible. They might also know that most people, or most relevant people, actually reject the law. But if these cases are the exception rather than the rule, we can have a better understanding of why law will produce movement even if no one is enforcing it.

Consider, for example, an empirical study of bans on smoking in public places.<sup>284</sup> The simplest lesson is that people comply with those bans even though they are hardly ever enforced. The study finds that in three cities in California—Berkeley, Richmond, and Oakland—there were very few complaints about violations. In Berkeley, the responsible health department officials found it unnecessary to issue even a single formal citation, and no cases were referred for prosecution.<sup>285</sup> In restaurants in Richmond, compliance was nearly 100%, with workplace compliance hovering between 75%–85%.<sup>286</sup> The level of compliance was also extremely high in Oakland, with the exception of “certain restaurants in the Asian community where nearly all the patrons are smokers.”<sup>287</sup> High levels of compliance were also found in workplaces, high schools, and fast-food restaurants.<sup>288</sup> Other studies, involving as Cambridge and Winnipeg, Manitoba, similarly find that bans on public smoking are almost entirely self-enforcing.<sup>289</sup>

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<sup>284</sup> Id.

<sup>285</sup> Id. at 71.

<sup>286</sup> Id.

<sup>287</sup> Id. at 72.

<sup>288</sup> Id. at 73-75.

<sup>289</sup> Id. at 72-73.

This evidence suggests that a legal pronouncement can have the same effect as Asch's unanimous confederates. When a law bans smoking in public places, the pronouncement carries information to the effect that it is wrong, all things considered, to smoke in public places. Equally important, the law suggests that most people believe that it is wrong to smoke in public places. And if most people think that it is wrong to smoke in public places, would-be smokers are less likely to smoke, in part because they do not want to be criticized or reprimanded. It follows that when law is effective when unenforced, an important reason is the possibility of private enforcement. If violations have a high degree of visibility, and risk the wrath of private enforcers, compliance might well become widespread. "In contrast to violations of laws against driving and drinking, narcotics use, and tax evasion, infractions of no-smoking rules in public places are relatively visible . . . to an almost omnipresent army of self-interested, highly motivated private enforcement agents—nonsmokers who resist exposure to tobacco smoke."<sup>290</sup> In some cases, the law might even be equivalent to Milgram's experimenter, with a significant degree of authority even if no sanctions will be imposed. To the extent that the experimenter's authority comes from a perception of expertise, the law is closely analogous.

We might think of the underlying laws as exercises in norm management—and extremely inexpensive ones at that. They are inexpensive in the sense that taxpayer resources are unnecessary to produce compliance. And in the best cases, expressive law might even start, shatter, or fuel a cascade. Once compliance begins, and is widely seen as such (especially from "fashion leaders"), there might well be compliance cascades, spurred by both informational and reputational influences. In the context of sexual harassment and smoking, law does seem to have caught a wave—and to have enlarged it significantly.<sup>291</sup> A key point here is that the law was ahead, but not too far ahead, of the public at large. If the law were not ahead of the public, it would add nothing, and in that sense have no effect at all. But if the law moved too far ahead of the public, it could not be effective without aggressive enforcement activity.<sup>292</sup> And a law that is too far ahead of the public is unlikely, for that very reason, to be aggressively enforced: Prosecutors and jurors are unlikely to punish people when the public does not support punishment.<sup>293</sup> Law is most effective when it goes somewhat, but not too far, beyond people's existing values.

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<sup>290</sup> Id. at 78.

<sup>291</sup> See Kahan, *supra* note.

<sup>292</sup> See *id.*

<sup>293</sup> Id.

Thus far I have emphasized the situation from the point of view of the would-be violator. But a law has effects on private enforcers as well. In the absence of a legal ban, people who object to smoking in public places might well be timid about complaining, even if they find cigarette smoke irritating or worse. The same people are likely to be energized by a supportive enactment, which suggests both that they are right and that their beliefs are generally shared. With law on their side, they are less likely to appear to be noisy intermeddlers invoking a parochial norm. Someone who complains about speeding, or drunk driving, or smoking in public is far more likely to feel, or to be perceived as, having a legitimate complaint if the law requires the behavior they seek. Now of course this is not all of the picture. Among some people, the law has a high degree of moral authority, greatly exceeding the shared but unenacted view of many people.<sup>294</sup> If this is the case, the law's authority will extend well beyond that of Asch's unanimous confederates, and probably beyond that of Milgram's experimenter as well. But we cannot fully appreciate law's moral authority without seeing it as intertwined with the informational and reputational factors that I have been emphasizing.

## **B. The Preconditions of Norm Management**

When will norm management work without significant enforcement activity? When will it fail? Begin with the case of a rational person who is considering whether to comply with the law. Among the relevant considerations are a) the likelihood of enforcement, b) the magnitude of the punishment in the event of enforcement, c) the reputational costs of violation, d) the reputational benefits of violation, e) the intrinsic benefits of compliance (perhaps a refusal to smoke will have health benefits), and f) the intrinsic costs of compliance (perhaps it is extremely pleasant to smoke, and extremely unpleasant not to smoke). By varying any of these variables, government might be able to achieve greater compliance. For present purposes, my emphasis is on c) and d).

To know whether a legal pronouncement will be effective, a key point involves the nature and extent of private enforcement. Recall that in the Asch experiments, the level of error is significantly decreased when people's answers are given anonymously, and also when people are given a financial incentive to answer correctly. These findings suggest that seemingly modest changes in social

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<sup>294</sup> Law might well lack moral authority too, in which case the informational and reputational signals will be diminished. See Edna Ullmann-Margalit and Cass R. Sunstein, *Inequality and Indignation*, *Phil & Pub Aff* (forthcoming 2002). I discuss this point below.

context can counteract the pressure to conform. Consider in this light the close empirical association between visibility and compliance without enforcement. Parking in places reserved for the handicapped, and smoking in public, are easy to see and in both cases private enforcement is likely.<sup>295</sup> By contrast, tax violations and sex offenses tend to be invisible, and hence violators need not worry so much, at the time of violation, about the risk of public opprobrium.

At the same time, law's expressive function can be reduced or even counteracted if there is private support for violations. "People will defy dominant norms or laws, despite considerable risks of punishment, when they enjoy the social support of a 'deviant subculture' that continues to endorse the validity of condemned behavior."<sup>296</sup> In such cases, prospective violators are roughly in the position of peer-supported subjects in the Milgram experiment—at least if they have strong reason, based on principle or self-interest, not to comply. And if the law is perceived as senseless, private support for violations can operate in the same way as a voice of reason in the Asch experiments. Hence it is possible to find "deviant subcultures" in which violations of law are effectively rewarded, through admiration and even a general increase in statute. It is also possible to find subcultures in which those who comply with the law can be heavily "taxed," through ridicule, ostracism, or even violence. Drug use in the most obvious example; gang violence sometimes occurs simply because it is expected and rewarded by peers. Laws that are infrequently enforced will, in such communities, be highly ineffective, because private enforcement is lacking, and indeed private forces push hard against compliance. It is even possible to imagine noncompliance cascades; such cascades can involve information, as people see the violations of others, perhaps including dissident "fashion leaders." They can also involve reputation, as people learn that in the relevant

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<sup>295</sup> To know whether there will be compliance, it is important to specify the signal sent by compliance and noncompliance. The mere enactment of law can alter that signal. For example, an infrequently enforced law might make an actor's conduct ambiguous where it formerly provided a socially damaging signal. Consider, for example, a teenager who wants to buckle his seatbelt, but who fails to do so because he does not want to signal his cowardice. A law that requires people to buckle their belt can make a decision to buckle a reflection of compliance with law, rather than a generalized fear. Thus the existence of the law can alter the "meaning" of compliance, to suggest that those who comply are simply law-abiders. Similarly, those who violate the law, under the new circumstances, are not merely courageous, but also (technically) criminals. We can imagine circumstances in which this shift actually increases the level of violations. But in most communities most of the time, the change will tend to bring behavior in line.

<sup>296</sup> Kagan and Skolnick, *supra* note, at 78.



community, there will be no loss in the good opinion of others, and possibly some gain, for violations.

In this light it is easy to see why there is a great deal of compliance with legal bans on parking in handicapped spaces and on smoking in public places, whereas there is far less compliance with legal bans on certain sexual behavior and (in certain domains) the Internal Revenue Code.<sup>297</sup> And it is also possible to understand the phenomenon of civil disobedience. When those engaged in civil disobedience are able to reach a critical mass, the law loses its authority, both as evidence of what should be done and as evidence of what (reasonable) people think should be done. The authority of the law is overcome by the authority of those engaged in disobeying the law. Here conformity pressures, cascade effects, and group polarization strongly favor disobedience.

How might government handle the troublesome situations in which violations are both invisible and widespread? One possible remedy would be to let people know (if it is true) of the high current levels of voluntary compliance. Because people like to do what others do, large effects can come from reminders that most people obey the law or avoid harmful conduct. In fact there is evidence that taxpayers are far more likely to comply with the tax law if they believe that most people pay their taxes voluntarily, and far less likely to do so if they believe that noncompliance is widespread.<sup>298</sup> A similar example may be drawn from college campuses. Students with a penchant for “binge drinking” tend to believe that the number of binge drinkers is higher than it is in fact. When informed of the actual numbers, they are less likely to persist in their behavior.<sup>299</sup> These examples suggest that an understanding of group influences, and of the information conveyed by the acts of others, might be enlisted in efforts to reduce conduct that is unlawful or otherwise dangerous to self and others.

## VI. Institutions and Diversity

I now turn to issues of institutional design. As we have seen, the likelihood and consequences of conformity, cascades, and group polarization very much

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<sup>297</sup> See *id.*

<sup>298</sup> Stephen Coleman, Minn. Dep't of Revenue, *The Minnesota Income Tax Compliance Experiment* State Tax Results 1, 5-6, 18-19 (1996), <http://www.state.mn.us/ebranch/mdor/reports/compliance/pdf>.

<sup>299</sup> See H. Wesley Perkins, *College Student Misperceptions of Alcohol and Other Drug Norms Among Peers*, in *Designing Alcohol and Other Drug Prevention Programs in Higher Education* 177-206 (1997).

depend on institutional choices. Recall in particular that people are far more likely to reveal their own information if they are rewarded for a correct group decision rather than for a correct individual decision. In this Part, I begin with a brief note on the relationship between dissent and war, with the suggestion that conformity, and suppression of dissent, can undermine military preparedness. I also explore some of the institutions of the American Constitution, suggesting that the founders' largest theoretical contribution consisted in their enthusiasm for diversity and the "jarring" of diverse views in government. Turning to contemporary issues, I discuss the role of group influences on federal judges and the dispute over "diversity" as a justification for affirmative action in higher education.

### A. Dissent and War

I have suggested that an understanding of social influences increases appreciation of the social role of whistleblowers and dissenters, many of whom sacrifice their own self-interest and simultaneously benefit the public. Perhaps the most general point here involves the role of diversity and dissent within democratic institutions. Consider the account of Luther Gulick, a high-level official in the Roosevelt Administration during World War II. In 1948, shortly after the Allied victory, Gulick delivered a series of lectures, unimaginatively titled Administrative Reflections from World War II, which offered, in some detail, a set of observations about bureaucratic structure and administrative reform.<sup>300</sup> In a brief epilogue, Gulick set out to compare the warmaking capacities of democracies with those of their Fascist adversaries.

Gulick began by noting that the initial evaluation of the United States, among the leaders of Germany and Japan, was "not flattering."<sup>301</sup> We were, in their view, "incapable of quick or effective national action even in our own defense because under democracy we were divided by our polyglot society and under capitalism deadlocked by our conflicting private interests."<sup>302</sup> Our adversaries said that we could not fight, and they believed what they said. And dictatorships did seem to have real advantages. They were free of delays, inertia, and sharp internal divisions. They did not have to reckon with the opinions of a mass of citizens, some with little education and little intelligence. Dictatorships could also rely on a single leader and an integrated hierarchy, making it easier to

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<sup>300</sup> Gulick, *supra* note, at 120-125.

<sup>301</sup> *Id.* at 120.

<sup>302</sup> *Id.* at 121.

develop national unity and enthusiasm, to master surprise, and to act vigorously and with dispatch. But these claims, about the advantages of totalitarian regimes, turned out to be “bogus.”<sup>303</sup>

The United States and its allies performed far better than Germany, Italy, and Japan. Gulick linked their superiority directly to democracy itself, and in particular “to the kind of review and criticism which democracy alone affords.”<sup>304</sup> In a totalitarian regime, plans “are hatched in secret by a small group of partially informed men and then enforced through dictatorial authority.”<sup>305</sup> Such plans are likely to contain fatal weaknesses. By contrast, a democracy allows wide criticism and debate, thus avoiding “many a disaster.” In a totalitarian system, criticisms and suggestions are neither wanted nor heeded. “Even the leaders tend to believe their own propaganda. All of the stream of authority and information is from the top down,” so that when change is needed, the high command never learns of that need. But in a democracy, “the public and the press have no hesitation in observing and criticizing the first evidence of failure once a program has been put into operation.”<sup>306</sup> In a democracy, information flows within the government—between the lowest and highest ranks—and via public opinion. Of course dissent can be muted in wartime, and for reasons I have discussed, this muting is a mixed blessing. If everyone seems to be on the same page, morale may be strengthened; but if disagreement is reduced, beneficial ideas—involving the nature, scope, justice, and wisdom of war—may be absent.

With a combination of melancholy and surprise, Gulick noted that the United States and its allies did not show more unity than Germany, Japan, and Italy. “The gregarious social impulses of men around the world are apparently much the same, giving rise to the same reactions of group loyalty when men are subjected to the same true or imagined group threats.”<sup>307</sup> Top-down management of mass morale, by the German and Japanese leaders, actually worked. Dictatorships were less successful in war, not because of less loyalty or more distrust from the public, but because leaders did not receive the checks and corrections that come from democratic processes.

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<sup>303</sup> Id.

<sup>304</sup> Id. at 125.

<sup>305</sup> Id.

<sup>306</sup> Id. See also Janis, *Groupthink*, for a set of examples of errors within democracies, when relevant institutions do not encourage dissent.

<sup>307</sup> Id.

Gulick is offering a claim here about how institutions perform better when challenges are frequent, when people do not stifle themselves, and when information flows freely.<sup>308</sup> Of course Gulick is providing his personal account of a particular set of events, and we do not really know if success in war is a product of democratic institutions.<sup>309</sup> The Soviet Union, for example, fought valiantly and well, even under the tyranny of Stalin. But Gulick's general theme contains a great deal of truth. Institutions are far more likely to succeed if they contain mechanisms that subject leaders to critical scrutiny and if they ensure that courses of action will be subject to continuing monitoring and review from outsiders<sup>310</sup>—if, in short, they use diversity and dissent to reduce the risks of error that come from social influences.

## B. Constitutional Design

These points very much bears on the design of the American Constitution, which attempts to create a deliberative democracy, that is, a system that combines accountability to the people with a measure of reflection and reason-giving.<sup>311</sup> In recent years, many people have discussed the aspiration to deliberative democracy. Their goal has been to show that a well-functioning system attempts to ensure not merely electoral responsiveness, but also an

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<sup>308</sup> In a less impressionistic vein but to the same effect, see Harrington, *supra* note; Janis, *supra* note.

<sup>309</sup> Compare one of the most striking findings in the last half-century of social science: In the history of the world, no society with democratic elections and a free press has ever experienced a famine. See Amartya Sen, *Poverty and Famines* (1983). Famines are a product not merely of food scarcity, but of social responses to food scarcity. A democratic government, checked by the press, is likely to take all reasonable measures to prevent mass starvation, if only because it needs to do so to stay in office. At the same time, a free society, facing the risk of famine, is likely to have a great deal of information, at every stage, about the level of the emerging problem and the effectiveness of current or possible responses. If famine relief efforts plans “are hatched in secret by a small group of partially informed men and then enforced through dictatorial authority,” failure is far more likely. Or consider the problem of “witch-hunts” – mass movements, led by political leaders, against internal conspiracies. As the McCarthy period demonstrates, witch-hunts are hardly impossible in democracies. But they are far more likely in a system in which the public is able to check the leaders' claims about internal disloyalty. If civil liberties are protected, and if information is permitted to flow, witch-hunts should be both less frequent and less damaging. See Vai-Lam Mui, *Information, Civil Liberties, and the Political Economy of Witch-hunts*, 15 *J Law, Economics, and Org.* 503 (1999).

<sup>310</sup> See Bradley C. Karkkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 *Colum L Rev* 903, 948-62 (2002) (emphasizing need for and value of continuing monitoring of environmental performance).

<sup>311</sup> The best treatment is William Bessette, *The Mild Voice of Reason* (1998).

exchange of reasons in the public sphere.<sup>312</sup> In a deliberative democracy, the exercise of public power must be justified by reasons, not merely by the will of some segment of society, and indeed not merely by the will of the majority. Both the opponents and the advocates of the Constitution were firmly committed to political deliberation. They also considered themselves “republicans,” committed to a high degree of self-government.<sup>313</sup> But deliberative democracies can come in many different forms. The framers’ greatest innovation consisted not in their belief in deliberation, which was uncontested at the time, but in their fear of homogeneity, their enthusiasm for diversity, and their effort to accommodate and to structure that diversity. In the founding period, a large part of the nation’s discussion turned on the possibility of having that form of government in a nation with its heterogeneous citizenry.

The antifederalists, opponents of the proposed Constitution, thought that this was impossible. Thus Brutus, an especially articulate advocate of the antifederalist view, spoke for the classical tradition when he urged: “In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be constant clashing of opinions; and the representatives of one part will be continually striving against those of the other.”<sup>314</sup> The advocates of the Constitution believed that Brutus had it exactly backwards. They welcomed the diversity and the “constantly clashing of opinions” and affirmatively sought a situation in which “the representatives of one part will be continually striving against those of the other.” Alexander Hamilton spoke most clearly on the point, urging that the “differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of the majority.”<sup>315</sup> From the standpoint of political

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<sup>312</sup> See, e.g., Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (1999).

<sup>313</sup> See Bessette, *supra* note.

<sup>314</sup> 2 *The Complete Antifederalist* 269 (H. Storing ed. 1980).

<sup>315</sup> *The Federalist* No. 70, at 426-37 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Compare Asch’s claim: “The clash of views generates events of far-reaching importance. I am induced to take up a particular standpoint, to view my own action as another views it . . . Now I have within me two standpoints, my own and that of the other; both are now part of my way of thinking. In this way the limitations of my individual thinking are transcended by including the thoughts of others. I am now open to more alternatives than my own unaided comprehension would make possible. Disagreements, when their causes are intelligible, can enrich and strengthen, rather than injure, our sense of objectivity.” Solomon Asch, *Social Psychology* 131-32 (1952). From a quite different discipline, John Rawls writes in similar terms: “In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from the standpoint of others and the limits of our vision are brought home to us. . . . The benefits from

deliberation, the central problem is that widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences. A Constitution that ensures the “jarring of parties” and “differences of opinion” will provide safeguards against unjustified movements of view.

A similar point emerges from one of the most illuminating early debates, raising the question whether the bill of rights should include a “right to instruct” representatives. That right was defended with the claim that citizens of a particular region ought to have the authority to bind their representatives about how to vote. This defense might seem plausible as a way of improving the political accountability of representatives—and so it seemed to many at the time. But there is a problem with this view, especially in an era in which political interest was closely aligned with geography. In such an era, it is likely that the citizens of a particular region, influenced by one another’s views, might end up with indefensible positions, very possibly as a result of its own insularity, leading to cascade effects and group polarization. In rejecting the right to instruct, Roger Sherman gave the decisive argument:

“[T]he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them on such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.”<sup>316</sup>

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discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.” John Rawls, *A Theory of Justice* 358-59 (1971). The idea can be traced to Aristotle, suggesting that when diverse groups “all come together . . . they may surpass – collectively and as a body, although not individually – the quality of the few best. . . . When there are many who contribute to the process of deliberation, each can bring his share of goodness and moral prudence; . . . some appreciate one part, some another, and all together appreciate all.” Aristotle, *Politics* 123 (E. Barker trans. 1972). Much of my discussion here has been devoted to showing why and under what circumstances this view might or might not be true.

<sup>316</sup> 1 *Annals of Cong.* 733-45 (Joseph Gale ed. 1789).

Sherman's words reflect the founders' general receptivity to deliberation among people who are quite diverse and who disagree on issues both large and small. Indeed, it was through deliberation among such persons that "such acts as are for the general benefit of the whole community" would emerge.

Most important, the institutions of the Constitution reflect a fear of group influences, cascade effects, and polarization, creating a range of checks on ill-considered judgments that emerge from those processes. The most obvious example is bicameralism, designed as a safeguard against a situation in which one house—in the framers' view, most likely the House of Representatives—would be overcome by short-term passions and even group polarization. This was the point made by Hamilton in endorsing a "jarring of parties" within the legislature. James Wilson's great lectures on law spoke of bicameralism very much in these terms, referring to "instances, in which the people have become the miserable victims of passions, operating on their government without restraint," and seeing a "single legislature" as prone to "sudden and violent fits of despotism, injustice, and cruelty."<sup>317</sup> To be sure, a cascade can cross the boundaries that separate the Senate from the House; such crossings do occur. But their different compositions and cultures provide a significant safeguard against warrantless cascades. Here the Senate was thought to be especially important. Consider the widely reported story that on his return from France, Jefferson called Washington to account at the breakfast-table for having agreed to a second chamber. "Why, asked Washington, "did you pour that coffee into your saucer?" "To cool it," quoth Jefferson. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it."<sup>318</sup>

We can understand many aspects of the system of checks and balances in the same general terms. The duty to present legislation to the President protects against cascade effects within the legislative branch.<sup>319</sup> Because law cannot operate against citizens without the concurrence of the legislative and executive

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<sup>317</sup> James Wilson, Lectures on Law, in 1 *The Works of James Wilson* 291 (Robert Green McCloskey ed., 1967).

<sup>318</sup> 3 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., rev. ed. 1966) 359.

<sup>319</sup> See *The Pocket Veto Case*, 279 U.S. 655, 678 (1929) (contending that it is an "essential... part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President... should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress"); 1 *The Works of James Wilson*, supra note 290, at 432 (urging that the President's qualified veto will "secure an additional degree of accuracy and circumspection in the manner of passing the laws").

branches, enacting and then enforcing the law, there is a further safeguard against oppression. Federalism itself was, and remains, an engine of diversity, creating “circuit breakers” in the form of a variety of sovereigns with separate cultures. In the federal system, social influences may produce error in some states, and states can certainly fall into cascades.<sup>320</sup> But the existence of separate systems creates some check on the diffusion of error.<sup>321</sup>

Judicial power itself was understood in related terms, quite outside of the context of constitutional review; consider Hamilton’s account<sup>322</sup>:

“But it is not with a view to infractions of the Constitution only that the independence of judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they mediate, to qualify their attempts.”

Of course the Constitution’s explicit protection of freedom of speech, and its implicit protection of freedom of association,<sup>323</sup> help to ensure spaces for diversity and dissent. In that way, they counteract some of the risks of mistake that stem from group influences. For present purposes, the analysis of free speech is straightforward, but it is worth emphasizing that freedom of expression diminishes the gap between a nation’s leaders and its citizens, and for that reason promotes monitoring of the former by the latter.<sup>324</sup> James Madison, the author of the first amendment, used this point to object to the whole idea of a “Sedition Act,” criminalizing certain forms of criticism of public officials. Madison urged that “the right of electing the members of the Government constitutes . . . the essence of a free and responsible government,” and that the “value and efficacy of this right depends on the knowledge of the comparative

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<sup>320</sup> See Kuran and Sunstein, *supra* note.

<sup>321</sup> See Michael McConnell, *Evaluating the Founders’ Design*, U. Chi. L. Rev.; Lynn Baker and Ernest Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke LJ 75 (1999).

<sup>322</sup> *The Federalist* No. 78, at 528 (J. Cooke ed. 1961).

<sup>323</sup> See *NAACP v. Alabama*, 357 US 449 (1958).

<sup>324</sup> For a technical discussion, see Mui, *supra* note.



merits and demerits of the candidates for the public trust.”<sup>325</sup> If group influences are kept in mind, one implication is that government might in some settings have a legitimate interest in introducing diversity of opinion into domains that otherwise consist of like-minded people. The reason is simply to diminish the risks of error. If modern technologies allow people to sort themselves into congenial communities, there is a risk that people will be insulated from competing views.<sup>326</sup> Perhaps government should be entitled to respond. Of course any such efforts, on government’s part, will introduce first amendment problems of its own.<sup>327</sup>

Freedom of association presents some important wrinkles. An understanding of group polarization suggests that associational freedom can produce significant risks, above all because like-minded people might, by the laws of social interactions, end up in unjustifiably extreme directions. Society might well become fragmented as a result of “iterated polarization games,” in which groups of like-minded people—initially different, but not terribly different, from one another—drive their members toward increasingly diverse positions. Small differences in initial views might well be magnified, through social interactions, into very large ones.<sup>328</sup> An advantage of this process is that serves to increase society’s stock of “argument pools”; but it also increases the likelihood of mutual suspicion, misunderstanding, and even hatred. At the same time, freedom of association helps to counteract the informational and reputational influences that might well lead people to fail to disclose information, preferences, and values. By allowing a wide diversity of communities, imposing pressures of quite different kinds, freedom of association increases the likelihood that at some point, important information will be disclosed and eventually spread.<sup>329</sup>

Nothing in this brief account means that the American Constitution, as originally ratified or as now understood, contains the ideal institutions and rights for balancing diversity with other goals, including stability. Some people,

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<sup>325</sup> James Madison, Report of 1800, January 7, 1800, in 17 Papers of James Madison (David Mattern et al. eds., 1991), at 346, 344.

<sup>326</sup> See Cass R. Sunstein, Republic.com (2002), for general discussion.

<sup>327</sup> See *Miami Herald Publishing Co. v. Tornillo*, 418 US 241 (1974) (striking down a right-of-reply law).

<sup>328</sup> See Henrich et al., *supra* note, at 353, for some entertaining examples in the context of food choice.

<sup>329</sup> This is one reading of Holmes’ great dissenting opinion in *Abrams v. United States*, 250 US 616, 624 (1919) (Holmes, J., dissenting).

for example, argue on behalf of proportional representation,<sup>330</sup> either of demographic groups or of a large number of parties, and it is possible to understand those arguments as responsive to the goal of guaranteeing a wide range of ideas in government. Efforts to ensure that disadvantaged groups are represented as such might be urged on this ground.<sup>331</sup> In some nations, there have been serious attempts to ensure equal representation for women, in large part on the ground that without such representation, important points of view will be absent. There is much to be said about this large topic.<sup>332</sup> But to anchor the discussion, I now turn to two more particular issues, both of considerable contemporary concern: diversity on the federal judiciary and affirmative action in higher education.

### C. Judges

1. Data. Are judges subject to conformity effects? Are they likely to cascade? Do like-minded judges move to extremes? What is the effect of anticipated and actual dissents? For obvious reasons this is not an easy topic to investigate. But consider judicial behavior on the D.C. Circuit.<sup>333</sup> A panel of three Republican judges is far more likely to strike down agency action, at the behest of industry, than a panel of two Republicans and one Democrat. At the individual level, group influences are at least equally striking: When sitting with two Republicans, a Democratic judge is more likely to vote to strike down agency action than is a Republican when sitting with two Democrats. It does not much matter whether the judge of a single party is actually persuaded or instead decides that it is simply not worthwhile to dissent publicly. In either case, the vote reflects social influences, in a process that is not entirely different from what is observed in the Asch experiments.<sup>334</sup>

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<sup>330</sup> See Anne Phillips, *The Politics of Presence* (1995); Iris Young, *Justice and the Politics of Difference* 183-91 (1994).

<sup>331</sup> See *id.*; Sunstein, *Deliberative Trouble*, *supra* note.

<sup>332</sup> See note *supra*.

<sup>333</sup> See Richard L. Revesz, *Environmental Regulation, Ideology, and the DC Circuit*, 83 *Va L Rev* 1717 (1997); Frank Cross and Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 *Yale LJ* 2155 (1998).

<sup>334</sup> It is not identical, of course. A public dissent takes considerable time and effort, and it might also strain collegial relations. Neither of these is involved in the same way in the Asch experiments.

Several studies find a strong tendency toward more extreme results when a panel consists of judges from a single political party.<sup>335</sup> The background fact is that when industry challenges an environmental regulation, there is an extraordinary difference between the behavior of a Republican majority and that of a Democratic majority. Republican majorities reverse agencies over 50% of the time; Democratic majorities do so less than 15% of the time.<sup>336</sup> There are also significant findings of group influence. Judges' votes are greatly affected by whether there is another judge, on that panel, appointed by a president from the same political party. A Republican judge is much more likely to accept an industry challenge if she has a Republican colleague on the panel. A Democratic judge is far less likely to accept such a challenge if she has a Democratic colleague on the panel.<sup>337</sup> Hence a single Democratic judge, accompanied by two Republicans, votes in favor of industry challenges over 40% of the time; but when joined by one or more Democrats, the Democratic judge votes in favor of such challenges less than 30% of the time.<sup>338</sup>

By contrast, a single Republican votes in favor of industry challenges less than 20% of the time.<sup>339</sup> Remarkably, a single Republican, accompanied by two Democrats, is less likely to accept an industry challenge than a single Democrat, accompanied by two Republicans. This is a real testimony to the strength of group influences (and also judicial reluctance to dissent publicly, either because it can be difficult and time-consuming to produce a dissent or because dissenting can seem an antisocial act). It might seem reasonable to say that a Democrat, sitting with two Republicans, votes like a Republican, whereas a Republican, sitting with two Democrats, votes like a Democrat. This view is not entirely wrong, but it is misleading. The problem is that how a Democrat votes, and how a Republican votes, is very much a function of whether they are accompanied by one or two people from their own party, or none at all.<sup>340</sup> For this reason, there is no single way, independent of group influences, that either a Republican or Democrat tends to vote—at least in the context of industry challenges to agency regulations.

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<sup>335</sup> See my own data, described below, and Richard L. Revesz, *Ideology, Collegiality, and the DC Circuit*, 85 Va L Rev 805, 808 (1999).

<sup>336</sup> Richard L. Revesz, *Ideology, Collegiality, and the DC Circuit*, 85 Va L Rev 805, 808 (1999).

<sup>337</sup> See *id.* at 808 (1999).

<sup>338</sup> Calculated from Revesz, *supra* note, at 1752.

<sup>339</sup> *Id.* at 1754.

<sup>340</sup> *Id.*

In a testimonial to group polarization, a panel of three Republican judges is far more likely than a panel of two Republicans and one Democrat to reverse an environmental decision when industry challenges that decision.<sup>341</sup> In one period (1995 to 2002), 71% of Republican votes, on all-Republican panels, accepted industry challenges.<sup>342</sup> By contrast, 45% of Republican votes, on two-to-one Republican panels, accepted such challenges—and 37.5% of such votes did so on two-to-one Republican panels.<sup>343</sup> In an earlier period (1986-1994), the corresponding numbers were 80%, 48%, and 14%.<sup>344</sup> In a still earlier period (1970-1982), 100% of Republican votes, on all-Republican panels, were in favor of industry challenges. By contrast, only 45% of Republican votes, on two-to-one Republican panels, were in favor of industry challenges—and only 26% of Republican votes, on Democratic-dominated panels, were in favor of such challenges.<sup>345</sup>

Aggregating this data, we can produce a broadly representative and nearly complete account of votes, within the D.C. Circuit, in environmental cases between 1979 and 2002. A simple calculation shows that in all-Republican panels, Republicans voted to accept industry challenges 80% of the time; that in two-to-one Republican panels, Republicans voted to accept such challenges 48% of the time; and that in two-to-one Democratic panels, Republicans voted to accept industry challenges only 27.5 of the time. And group polarization is hardly limited to Republican judges; it occurs among Democratic judges as well. When an environmental group is challenging agency action, a panel of three Democrats is more likely to accept the challenge than a panel of two Democrats and one Republican.<sup>346</sup> The likelihood that a Democrat will vote in favor of an

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<sup>341</sup> See my own unpublished data (on file); Revesz, *supra* note, at 1754.

<sup>342</sup> Unpublished data (on file).

<sup>343</sup> *Id.*

<sup>344</sup> Revesz, *supra*, at 1754. Two findings that I have emphasized might seem in tension with one another. Democratic judges, sitting without fellow Democrats, are highly likely to be influenced by two Republican colleagues; but Democratic judges, in such cases, also have a powerful restraining effect on their colleagues. The explanation appears to be that in such cases, the influence of the two Republicans on the single Democrat produces a substantial number of unanimous panel decisions in favor of reversal, while at the same time, the prospect of a Democratic dissent, also in a significant percentage of cases, dramatically cuts the total percentage of Republican votes in favor of industry. A reasonable speculation is that if the single Democrat does not feel strongly, he will yield to group pressure, and the panel is likely to reverse; but if the Democrat feels strongly, and the Republicans do not, the Republicans will shift, and the agency will be upheld.

<sup>345</sup> *Id.* at 1754.

<sup>346</sup> *Id.* at 1753.

environmentalist challenge is highest when three Democrats are on the panel—and lowest when the panel has two Republicans.<sup>347</sup>

A third study is more complicated.<sup>348</sup> Under the Supreme Court’s decision in Chevron v. NRDC,<sup>349</sup> courts are supposed to uphold agency interpretations of law so long as the interpretations are “reasonable.” But when do courts actually uphold such interpretations? The doctrine allows judges considerable room to maneuver, so that courts that are inclined to invalidate agency action usually can find a plausible basis for doing so. The real question is when they will claim to have found that plausible basis. The second study strongly suggests that group influences play a role and that the potential for a dissent, from a Democratic judge, is a strong deterrent to Republican judges who are inclined to invalidate agency action. As a background fact, note that the study finds an exceedingly strong influence, within the influential court of appeals for the District of Columbia Circuit, of party affiliation on outcomes. If observers were to code cases very crudely, by taking account of whether industry or a public interest group is bringing the challenge, they would find that a majority of Republicans reach a conservative judgment 54% of the time, whereas a majority of Democrats reach such a judgment merely 32% of the time.<sup>350</sup>

For present purposes, the most important finding is that there is a dramatic difference between politically diverse panels, with judges appointed by Presidents of more than one party, and politically unified panels, with judges appointed by Presidents of only one party. On divided panels in which a Republican majority of the court might be expected, on broadly speaking political grounds, to be hostile to the agency, the court nonetheless deferred to the agency 62% of the time. But on unified panels in which an all-Republican panel might be expected to be hostile to the agency, the court upheld the agency’s interpretation only 33% of the time. Note that this was the only such finding in the data. When Democratic majority courts were expected to uphold the agency’s decision on political grounds, they did so over 70% of the time, whether unified (71% of the time) or divided (86% of the time). Consider the results in tabular form<sup>351</sup>:

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<sup>347</sup> Id.

<sup>348</sup> Frank Cross and Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 *Yale LJ* 2155 (1998).

<sup>349</sup> See 467 US 837 (1984).

<sup>350</sup> Cross and Tiller, *supra* note, at 2169.

<sup>351</sup> Constructed on the basis of data in Cross and Tiller, *supra* note, at 2172-2173.

	<b>3-0 Republican Panel</b>	<b>2-1 Republican Panel</b>	<b>3-0 Democratic Panel</b>	<b>2-1 Democratic Panel</b>
<b>Uphold Agency Action</b>	33%	62%	71%	86%
<b>Invalidate Agency Action</b>	67%	38%	29%	14%

It seems reasonable to speculate that the seemingly bizarre result—a 67% invalidation rate when Republican judges are unified—reflects group influences and in particular group polarization. A group of all-Republican judges might well take the relatively unusual step of rejecting an agency’s interpretation, whereas a divided panel, with a built-in check on any tendency toward the unusual or extreme outcome, is more likely to take the conventional route. A likely reason is that the single Democratic judge acts as a “whistleblower,” discouraging the other judges from making a decision that is in tension with the Supreme Court’s command to uphold agency interpretations of ambiguous statutes.<sup>352</sup> And other factors are involved. When a court consists of a panel of judges with the same basic orientation, the median view, before deliberation begins, will be significantly different from what it would be with a panel of diverse judges. The argument pool will be very different as well. For example, a panel of three Republican judges, tentatively inclined to invalidate the action of the Environmental Protection Agency (EPA), will offer a range of arguments in support of invalidation and relatively few in the other direction—even if the law, properly interpreted, favors validation. If the panel contains a judge who is inclined to uphold the EPA, the arguments that favor validation are far more likely to emerge and to be pressed. Indeed, the very fact that the judge is a Democrat increases the likelihood that this will occur, since that judge might not think of himself as being part of the same “group” as the other panel members. (Recall that when people are connected by ties of solidarity, disagreement is all the less likely.) And because corroboration of opinion leads to greater confidence and hence extremity, it is not surprising that a panel of three like-minded judges would lead to unusual and extreme results.

In this context, the effect is fortified by the possibility that the sole judge, finding himself outnumbered, might produce a dissenting opinion in public. To

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<sup>352</sup> See *id.* at 2174-76.

be sure, Supreme Court review is rare and in the general run of cases, the prospect of such review probably does not have much of a deterrent effect on courts of appeals. But judges who write majority opinions are usually not enthusiastic about having to see and to respond to dissenting opinions. And if the law actually favors the dissenting view, two judges, even if they would like to reverse the Environmental Protection Agency, might be influenced to adopt the easier course of validation. The evidence so suggests.<sup>353</sup>

A glance at the table immediately above offers some countervailing data: A panel of three Democrats is not more likely than a panel with two Democrats to uphold agency action in cases in which Democrats might be expected to want to uphold the agency. And in the context of a challenge from an environmental group, a Republican judge is not likely to vote differently if he is accompanied by two Democrats, one Republican, or two Republicans.<sup>354</sup> But in some important domains, at least, a panel of three like-minded judges will indeed behave differently from a panel with two. It would be most interesting to learn what pattern would be observed in other contexts. What does the evidence show if, in criminal cases, we compare panels of three Democratic judges with panels containing two Democrats and one Republican? Are the three Democrats far more inclined to reverse a criminal conviction than a panel with one Republican? In any case the basic claim here can generate hypotheses about a wide range of areas. We might hypothesize, for example, that all-Republican panels would not be enthusiastic about sex discrimination claims, and that all-Democratic panels show far more sympathy for such claims. Perhaps all-Democratic panels would be particularly skeptical about claims that government regulation amounts to an unconstitutional taking of private property without just compensation. Perhaps all-Republican panels would show unusual enthusiasm for such claims.

At this point a skeptic might note that lawyers make adversarial presentations before judges. Such a skeptic might insist that the size of the “argument pool” is determined by those presentations, not only and not even mostly by what members of the panel are inclined to say and to do. And undoubtedly the inclinations of judges are shaped, some of the time, by the contributions of advocates. But even if this is so, what matters, for purposes of the outcomes, is the inclinations of judges, whatever they are based on; and it is here that the existence of a single dissenter can make all the difference. In the punitive damage study discussed above, mock juries were presented with

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<sup>353</sup> See *id.*

<sup>354</sup> See Revesz, *supra* note, at 1755.

arguments from both sides, and polarization followed this presentation, as it has elsewhere.<sup>355</sup> Notice in this regard that for polarization hypothesis to hold, it is not necessary to know whether judges spend a great deal of time offering reasons to one another. Mere exposure to a conclusion is enough.<sup>356</sup> A system of simple votes, unaccompanied by reasons, should incline judges to polarize. Of course reasons, if they are good ones, are likely to make those votes especially persuasive.

2. The normative issue. It remains to investigate the normative issues. If like-minded judges go to extremes, should we be troubled? Is it good if a large effect is found from a single judge from a different party? More generally: Is there reason to attempt to ensure diversity on the federal courts? To promote a degree of diversity on panels? There is a widespread view that judges appointed by presidents of different political parties are not fundamentally different and that once on the bench, judges frequently surprise those who nominated them.<sup>357</sup> The view is not entirely baseless, but it is misleading. Some appointees do disappoint the Presidents who nominated them, but the availability heuristic should not fool us into thinking that these examples are typical. Judges appointed by Republican presidents are quite different from judges appointed by Democratic presidents. “Partisanship clearly affects how appellate courts review agency discretion.”<sup>358</sup>

But it seems difficult to evaluate the underlying issues without taking a stand on the merits—without knowing what we want judges to do. Suppose that three Republican judges are especially likely to uphold criminal convictions, and that three Democratic judges are especially likely to reverse those convictions. At first glance, one or the other is troubling only if we know whether we approve of one or another set of results. In the punitive damage study discussed above, the movement toward increased awards might be something to celebrate, not to deplore, if we conclude that the median of predeliberation awards is too low and that the increase, produced by group discussion, ensures more sensible awards. And if a view about what judges should do is the only possible basis for evaluation, we might conclude that those who prefer judges of a particular party should seek judges of that party, and that group influences are essentially beside the point.

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<sup>355</sup> Schkade, *supra* note, at 1150 and 1150 n. 44.

<sup>356</sup> See Robert Baron et al., *supra* note, at 74.

<sup>357</sup> See, e.g., Jeffrey Rosen, *New York Times Magazine*; others.

<sup>358</sup> See Revesz, *supra* note, at 2175.



But the conclusion is too strong. In some cases, the law, properly interpreted, really does argue strongly for one or another view. The existence of diversity on a panel is likely to bring that fact to light and perhaps to move the panel's decision in the direction of what the law requires. The existence of politically diverse judges, and of a potential dissent, increases the probability that the law will be followed. The Chevron study, referred to above, strongly supports this point.<sup>359</sup> The presence of a potential dissenter—in the form of a judge appointed by a president from another political party—creates a possible whistleblower who can reduce the likelihood of an incorrect or lawless decision.<sup>360</sup> Through an appreciation of the nature of group influences, we can see the wisdom in an old idea: A decision is more likely to be right, and less likely to be political in a pejorative sense, if it is supported by judges with different predilections.

There is a further point. Suppose that in many areas, it is not clear, in advance, whether the appointees of Democratic or Republican presidents are correct. Suppose that we are genuinely uncertain. If so, there is reason to favor a situation in which the legal system has both, simply on the ground that through that route, more (reasonable) opinions are likely to be heard. And if we are genuinely uncertain, there is reason to favor a mix of views merely by virtue of its moderating effect. In the face of uncertainty, sensible people choose between the poles.<sup>361</sup>

3. An analogy. Consider an analogy. Modern law and policy is often made by independent regulatory commissions, such as the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission. Much of the time, such agencies act through adjudication. They function in the same fashion as federal courts. And under federal statutes, Congress has attempted to ensure that these agencies are not monopolized by either Democrats or Republicans. The law requires that no more than a bare majority of agency members may be from a single party.<sup>362</sup> An understanding of group influences helps explain this requirement. An independent agency that is all-Democratic, or all-Republican, might move toward an extreme position, indeed a position that is more extreme than that of

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<sup>359</sup> See Cross and Tiller, *supra* note.

<sup>360</sup> This is the explanation in Cross and Tiller, *supra* note, at 2173.

<sup>361</sup> For evidence, see Mark Kelman et al., Context-Independence in Legal Decisionmaking, in *Behavioral Law and Economics* (Cass R. Sunstein ed. 2000).

<sup>362</sup> See, e.g., 15 U.S.C. § 78d (1994).

the median Democrat or Republican, and possibly more extreme than that of any agency official standing alone. A requirement of bipartisan membership can operate as a check against movements of this kind. Congress was apparently aware of this general point. Closely attuned to the policymaking functions of the relevant institutions, it was careful to provide a safeguard against extreme movements.

Why do we fail to create similar safeguards for courts? Part of the answer must lie in a belief that unlike heads of independent regulatory commissions, judges are not policymakers. Their duty is to follow the law, not to make policy. An attempt to ensure bipartisan composition would seem inconsistent with the commitment to this belief. But the evidence I have discussed shows judges are policymakers of an important kind, and that their political commitments very much influence their votes. In principle, there is good reason to attempt to ensure a mix of perspectives within courts of appeals.

Of course the idea of diversity, or of a mix of perspectives, is hardly self-defining. It would not be appropriate to say that the federal judges should include people who refuse to obey the Constitution, or who refuse to exercise the power of judicial review, or who think that the Constitution allows suppression of political dissent and racial segregation. Here as elsewhere, the domain of appropriate diversity is limited. What is necessary is reasonable diversity, or diversity of reasonable views, and not diversity as such. People can certainly disagree about what reasonable diversity entails in this context. All that I am suggesting here is that there is such a thing as reasonable diversity, and that it is important to ensure that judges, no less than anyone else, are exposed to it, and not merely through the arguments of advocates.

4. The Senate's role. These points cast fresh light on a much disputed issue: the legitimate role of the Senate in giving "advice and consent" to presidential appointments to the federal judiciary. Above all, an understanding of social influences suggests that the Senate has a responsibility to exercise its constitutional authority in order to ensure a reasonable diversity of view. The Constitution's history fully contemplates an independent role for the Senate in the selection of Supreme Court Justices.<sup>363</sup> That independent role certainly authorizes the Senate to consider the general approach, and likely pattern of votes, of potential judges. There can be no doubt that the President considers the

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<sup>363</sup> See David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *Yale L.J.* 1491 (1992).

general approach of his nominees; the Senate is entitled to do so as well. Under good conditions, these simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. Indeed, that system is part and parcel of social deliberation about the direction of the federal judiciary.

Why might this view be rejected? It could be urged that there is only one legitimate approach to constitutional or statutory interpretation—that, for example, some version of originalism or textualism is the only such approach, and that anyone who rejects that view is unreasonable. For true believers, it is pointless to argue for diverse views.<sup>364</sup> Diversity is not necessary, or even valuable, if we already know what should be done, and if competing views would simply cloud the issue. (In a scientific dispute, it is not helpful to include those who believe that the earth is flat.) Or it might be urged that a deferential role for the Senate, combined with natural political competition and cycles, will produce a sensible mix over time. I do not deny this possibility. My only suggestions are that a high degree of diversity on the federal judiciary is desirable, that the Senate is entitled to pursue diversity, and that without such diversity, judicial panels are will inevitably go in unjustified directions.

#### **D. Affirmative Action in Higher Education**

Countless educational institutions pursue the goal of diversity. Most of America's large private and public institutions seek a wide range of views, faculty, and students. There are some prominent exceptions; some institutions pride themselves on a high degree of homogeneity.<sup>365</sup> And here as elsewhere, the idea of diversity needs to be clarified. Colleges and universities do not make special efforts to include students who collect Britney Spears memorabilia, hate America, smell bad, or have low SAT's. Such institutions are committed to diversity, but only to a certain degree and of a certain kind. It remains possible to urge, as many do, that they give excessive attention to diversity of some kinds and insufficient attention to diversity of other kinds. The only point I am making here is that they tend to be committed to diversity of a recognizable sort.

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<sup>364</sup> Note, however, that even if it would be appropriate for all judges to share a certain approach, it is also desirable to have diversity with respect to the application of that approach. Textualists do not all agree with one another; there is internal diversity in the world of originalism. Diversity is appropriate here to ensure an airing of reasonable views.

<sup>365</sup> See the discussion of Brigham Young University in Martha Nussbaum, *Cultivating Humanity* (1999).

There are many reasons for this commitment. One involves simple market pressures; a school that has different sorts of students is more likely to be able to attract good faculty and good students.<sup>366</sup> Of course people's preferences and values vary, and some people want to go to places that are relatively homogeneous. But this seems to be the exception rather than the rule.<sup>367</sup> And there is another justification for diversity, one that has received considerable attention within courts<sup>368</sup> and that is closely related to my topic here. The idea is that education is simply likely to be better if the school has people with different views, perspectives, and experiences. In the context of affirmative action, this justification was approved in Justice Powell's decisive opinion in the Bakke case,<sup>369</sup> an opinion that has the unusual distinction of having settled, for a period of decades, the constitutionality of affirmative action in higher education without having been embraced by any other justice on the Supreme Court. My goal here is to offer a qualified defense of Justice Powell's view. I urge that in some educational settings, racial diversity is important for ensuring a broad array of experiences and ideas, and that in those settings, narrowly tailored affirmative action programs should be constitutionally permissible.

Justice Powell insisted that a diverse student body is a constitutionally acceptable goal for higher education.<sup>370</sup> The central reason is that universities should be allowed to ensure a "robust exchange of ideas," an interest connected with the first amendment itself.<sup>371</sup> Justice Powell acknowledged that this interest seemed strongest in the context of undergraduate education, where views are formed on a large number of topics. But even in a medical school, "the contribution of diversity is substantial."<sup>372</sup> A medical student having a particular background, including a particular ethnic background, "may bring to a

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<sup>366</sup> Note that this justification is most unlikely to be legitimate as a constitutional matter. A public institution is not permitted to justify discrimination by claiming, or even showing, that many of its constituents call for it. *Brown v. Bd. of Education* itself requires that conclusion; see also *Palmore v. Sadoti*, 466 US 429, 441 (1984), suggesting that private "biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

<sup>367</sup> Recall the prior qualifications about the definition of diversity. Even apparently diverse institutions are homogenous in certain ways and along certain dimensions, and this is what students and faculty seem to prefer.

<sup>368</sup> See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

<sup>369</sup> See 438 US 265 (1978 (opinion of Powell, J.)).

<sup>370</sup> 438 US at 311-12.

<sup>371</sup> *Id.* at 313.

<sup>372</sup> *Id.*

professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”<sup>373</sup> Justice Powell also emphasized that doctors “serve a heterogeneous population,” and suggested that graduate admissions decisions are concerned with contributions that follow formal education.<sup>374</sup>

Thus Justice Powell concluded that the crucial question was whether a race-conscious admission program, giving benefits to people because they are members of racial minority groups, was a necessary means of promoting the legitimate goal of diversity. Here he reached his famous conclusion that racial or ethnic background could be a “plus” in the admissions decision, though quotas would not be allowed.<sup>375</sup> For Justice Powell, a legitimate admissions program should be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of the applicant, and to place them on the same footing for consideration, although not necessarily according to them the same weight.”<sup>376</sup> Thus it would be acceptable to promote “beneficial educational pluralism” by considering a range of factors, including “demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”<sup>377</sup>

My central concern here is the principal<sup>378</sup> basis for Justice Powell’s conclusion: the value of ensuring a “robust exchange of ideas” in the classroom, and the legitimacy of promoting racial diversity in order to ensure that exchange. To understand the contemporary relevance of Justice Powell’s opinion, it is necessary to outline the recent developments in the constitutional principles governing affirmative action programs. The Court has now settled on the view that affirmative action programs, like all other programs embodying racial discrimination, should be subject to “strict scrutiny” from courts, and invalidated unless they are the least restrictive means of achieving a compelling state

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<sup>373</sup> Id. at 314.

<sup>374</sup> Id.

<sup>375</sup> Id. at 316-320.

<sup>376</sup> Id. at 317.

<sup>377</sup> Id.

<sup>378</sup> This is not the exclusive basis for Justice Powell’s opinion; he was also concerned with what will happen after graduation – with the possibility that members of minority groups will serve their communities, in a way that confers significant social benefits on populations that might otherwise be underserved. Id. For evidence that this does happen, see John Bowen and Derek Bok, *The Shape of the River* (1998).

interest.<sup>379</sup> It is also clear that past “societal discrimination,” meaning discrimination in the nation’s past, is not a legitimate basis for discrimination against whites.<sup>380</sup> It is equally clear that narrow, remedial affirmative action programs are acceptable if they are specifically designed to correct for proven past discrimination by the institution that is acting affirmatively.<sup>381</sup>

What remains unclear is when, if ever, a public institution is permitted to justify affirmative action by reference to “forward-looking” justifications, not involving a remedy for past discrimination.<sup>382</sup> A state might, for example, try to defend affirmative action in hiring police by urging that a police force will simply be more effective if it contains African-Americans among others—especially in a community that contains people of multiple races.<sup>383</sup> Justice Powell was really offering a similar claim about higher education: Whether or not a college or university has itself discriminated against African-Americans or others, it should be permitted to discriminate in favor of them if it is doing so as a means of ensuring a “robust exchange of ideas.” But current justices have given conflicting signals about the legitimacy and strength of forward-looking justifications.<sup>384</sup>

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<sup>379</sup> See, e.g., *City of Richmond v. Croson*, 488 US 469 (1989); *Adarand Constructors v. Peña*, 515 US 200 (1995).

<sup>380</sup> *City of Richmond v. Croson*, 488 US 469, 477 (1989).

<sup>381</sup> *United States v. Paradise*, 480 US 149 (1987); *Local No. 93, International Association of Firefighters v. Cleveland*, 478 US 616 (1987).

<sup>382</sup> For general discussion, see Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 96 (1986): “Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson -- whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'”

<sup>383</sup> *Id.*

<sup>384</sup> For one view, see *Johnson v. Transportation Agency*, 480 U.S. 616, 647 (1987) (Stevens, concurring): “Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program -- or indeed, any particular affirmative-action decision -- in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups. Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.” For a contrasting view, see Justice O'Connor, in *Metro*

There can be no doubt that universities are permitted to promote diversity and dissent by seeking a mix of faculty and students. Efforts of this kind are pervasive; this is what most admissions offices try to do. To be sure, some serious free speech issues might be raised if an admissions office discriminates in favor of, or against, particular points of view.<sup>385</sup> But even if public institutions are barred from pursuing diversity of ideas by discriminating directly against some points of view, such institutions are surely permitted, without offending the first amendment, to seek a variety of backgrounds and experiences, in the hope that better discussions will result. If Justice Powell is right, affirmative action programs can be similarly justified. The simple idea here is that diverse populations are likely to increase the range of thoughts and perspectives, and to reduce the risks of conformity, cascades, and polarization associated with group influences.<sup>386</sup> We have seen that on the judiciary, judges with diverse views can act as “whistleblowers,” correcting ill-considered views of the law. In educational institutions, a high degree of diversity, including racial diversity, often has the same effect. A racially uniform class is all too likely to polarize to an unjustified position, simply because students’ antecedent views are not subject to critical scrutiny.

For example, we can easily imagine all-white classrooms, discussing the issue of racial profiling, in which the absence of racial diversity is a serious problem. Those who have not had bad experiences, as a result of such profiling, will lack crucial information. Return here to Justice O’Connor’s comments on Justice Marshall: “Justice Marshall brought a special perspective. . . . His was the mouth of a man who knew the anguish of the silenced and gave them a voice. . . .

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Broadcasting v. FCC, 497 US 547, 612 (1990), joined by Justices Rehnquist, Scalia, and Kennedy: “Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”

<sup>385</sup> I am unaware of any first amendment challenge to a university’s efforts to promote diversity by promoting a range of views, even though such efforts would necessarily involve discrimination against some views and in favor of others. But there are some hard questions lurking here. One set of questions involve the sheer difficulty of proof: In a case in which a student is or is not denied admission, the applicant’s political view will undoubtedly be one of a range of factors, and it will be hard to isolate, in a challenge, point of view as the decisive factor. In a case of discharge or suspension as a result of political view, there would indeed be a constitutional problem. See *Pickering v. Bd. of Educ.*, 391 US 563, 568 (1968).

<sup>386</sup> For supportive evidence, see Patricia Gurin, Reports Submitted on Behalf of the University of Michigan: the Compelling Need for Diversity in Higher Education, 5 Mich J Race & Law 363 (1999).

I have been perhaps most personally affected by Justice Marshall as a raconteur . . . . Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."<sup>387</sup> What was true for Justice O'Connor is true for white students in many educational settings. In the context of racial profiling, and in many other imaginable cases, a degree of racial diversity is likely to bring to bear valuable information and perspectives. These may change how the group sees the world, whether or not it leads to a different conclusion on the merits.

To say this is of course not to make the absurd claim that white people all agree with one another about racial profiling, or that African-Americans have the same experiences and opinions about that complex issue. And in light of the fact that members of all races contain people with a range of both favorable and unfavorable views about racial profiling, it would be possible to respond that any problem, if it exists, is not because the group is all-white, but if and because its members begin with a uniform view of racial profiling. And if this is so, what, if anything, is added by promoting diversity not of views but of racial background? The answer must be that African-Americans, by virtue of their experience, are able to add something to the discussion as such. And this seems far from implausible. If students need to know something about the magnitude and the experience of racial profiling, those who have been subject to such profiling will be able to offer novel insights. And if African-Americans do, in fact, have an unusually high degree of hostility to racial profiling, that is by itself a point worthwhile to know and to try to understand. So too if they do not show such hostility. Of course supplemental readings could be used to expose people to diverse views. The value of diversity lies not simply in learning about facts, but also in seeing a range of perspectives, including the emotions attached to them—and in being in the actual physical presence of those who have those perspectives, and perhaps cannot be easily dismissed.

These points might be used by a purportedly nondiscriminatory institution to defend a set of policies designed to ensure a reasonable diversity of view in classroom discussions. Because of the importance of a wide range of ideas to the educational enterprise, the goal seems both legitimate and compelling. Are affirmative action programs the least restrictive means of promoting that goal? The answer depends on the nature of those programs. It is easy to imagine

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<sup>387</sup> See Sandra Day O'Connor, Thurgood Marshall: The Influence of a Reconteur, 44 *Stan. L. Rev.* 1217, 1217, 1220 (1992).



cautious efforts, using race as a factor, in which the “least restrictive means” test is indeed satisfied.<sup>388</sup> And that point is sufficient to suggest that Justice Powell’s approach is essentially correct.

To be sure, the same arguments about the importance of diverse views might be enlisted very broadly, and in circumstances that might seem unattractive. Imagine, for example, an effort, by a mostly African-American university, to point to the need for diversity as a way of defending discrimination against African-Americans and in favor of whites. Such a university might claim that it wants significant representation by whites in order to reduce the risks from group influences and to improve the quality of discussion. It does indeed follow, from what I have said thus far, that this argument is legitimate. A classroom that is entirely African-American might well suffer from conformity effects and polarization; and an educational institution might want to correct the situation. If courts should be suspicious of the argument in this context, it is because they do not trust the sincerity of those who make it. Courts might believe that the reference to diversity is actually a pretext for an illicit discriminatory motive. But it is easy to imagine cases in which diversity is the real concern and no pretext is involved.

There is a further complexity. Suppose that a university claims that it is pursuing the goal of high-quality education. Suppose that it insists that its admissions policies, which place a premium on many forms of diversity, are a legitimate means of pursuing that goal. Such a university might well be willing to discriminate in favor of members of racial minorities—and might well claim that this form of discrimination is part of the neutral pursuit of high-quality education. Is this illegitimate? Outside the context of affirmative action, the Court has come very close to holding that it is.<sup>389</sup> In making decisions about child custody, courts are prohibited from taking account of the possible prejudice to be faced by children of racially mixed couples. The prohibition applies even if it is defended as part of a neutral mechanism for promoting the welfare of the child.<sup>390</sup> A racially-based system of child custody cannot be justified on the ground that in light of existing social values, children do better in a family that is all-white or all-African-American. This decision suggests that an institution is not permitted to defend otherwise illegitimate discrimination by suggesting that it is

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<sup>388</sup> This was the conclusion of the court of appeals about the program used by the University of Michigan Law School. See *Grutter v. Bollinger*, 288 F.3d 732 (6<sup>th</sup> Cir. 2002).

<sup>389</sup> See *Palmore v. Sadoti*, 466 US 429 (1984).

<sup>390</sup> See *id.*

neutrally pursuing a more abstract goal.<sup>391</sup> But I am not claiming here that affirmative action fails to count as discrimination. I am urging instead that affirmative action can be adequately justified, in some contexts, as a way of ensuring that educational institutions do what they are supposed to do.

It is important to emphasize the narrowness of the argument I am making. In some cases, racial diversity is important for improving the educational process within the relevant school. But in some cases, the claim seems extremely weak. Would a mathematics class, or a course in physics, be improved if it contained a degree of racial diversity? This seems unlikely. In principle, I do not believe that courts should use the Constitution to scrutinize affirmative action programs with great care.<sup>392</sup> But the law is otherwise, and if courts are going to do so, they should not offer a blanket ruling for or against a diversity rationale in higher education. They should accept that rationale in the context of undergraduate education, but not for programs for which racial diversity is not necessary to promote a “robust exchange of ideas.” In the context of law school, the centrality of racial issues to important aspects of legal education should be enough to allow narrowly tailored affirmative action programs to survive constitutional scrutiny.<sup>393</sup>

## **Conclusion**

Human beings pay close attention to the informational and reputational signals sent by others. These signals produce conformity, even in cases in which many people have reason to believe, on the basis of their private information, that others are mistaken or worse. Informational and reputational influences also produce cascades, in which people do not rely on, and fail to disclose, the information that they themselves have. Cascades and errors occur spontaneously when people rationally take account of the decisions and statements of their predecessors. Errors are magnified when people are rewarded for conformity—and minimized when people are rewarded, not for correct individual decisions, but for correct decisions at the group level.

Cascades, like conformity, are not a problem in themselves. Sometimes cascades produce good outcomes, at least compared to a situation in which

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<sup>391</sup> On some of the complexities here, see David A. Strauss, *The Myth of Colorblindness*, 1986 *Supreme Court Review* 99.

<sup>392</sup> See Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (2002).

<sup>393</sup> See *Grutter v. Bollinger*, 288 F.3d 732 (6<sup>th</sup> Cir. 2002).

people rely solely on their own information. The real problem is that when cascades are occurring, people do not disclose information from which others would benefit. The result is that both individuals and groups can blunder, sometimes catastrophically. Institutions involved in making, enforcing, and interpreting the law are subject to conformity and cascade effects. The executive branch has been shown to blunder as a result.<sup>394</sup> We have seen that within courts, precedential cascades are highly likely, especially in complex areas; and in such areas, cascades tend to be both self-perpetuating and self-insulating.

The general lesson is clear. It is extremely important to devise institutions that attempt to promote disclosure of private views and private information. Institutions that reward conformity are prone to failure to the extent that they do not do that; institutions are far more likely to prosper if they create a norm of openness and dissent. The point very much bears on the risks of group polarization. Groups of like-minded people are likely to go to extremes, simply because of limited argument pools and reputational considerations. The danger is that the resulting movements in opinion will be unjustified. It is extremely important to create “circuit breakers”<sup>395</sup> and to devise institutional arrangements that will serve to counteract movements that could not be supported if people had a wider range of information.

These points have implications for numerous issues in law and policy. I have focused on a small subset of those issues here. We have seen that an appreciation of social influences casts new light on the expressive function of law. Simply by virtue of what it says, and even if it is rarely enforced, law can affect the behavior of those who are unsure whether to engage in certain conduct—and also the behavior of those who are unsure whether to challenge those who engage in that conduct. Bans on smoking in public and on sexual harassment are cases in point. Law’s effectiveness, in this regard, lies in its power to give a signal about what it is right to do, and also to dissipate pluralistic ignorance, by providing information about what other people think that it is right to do. A legal enactment can operate in the same fashion as Asch’s confederates and Milgram’s experimenter. Because people care about the reactions of others, law’s expressive function will be heightened if the relevant conduct is visible; bans on smoking in public places are an obvious example. For the same reason, that function will be weakened if prospective law-breakers live in a supportive subcommunity; consider bans on the use of narcotics. With an

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<sup>394</sup> See Janis, *Groupthink*, *supra* note, for a collection of examples.

<sup>395</sup> See Eric Posner, *supra* note.

understanding of social influences, we can therefore make some predictions about when law is likely to be effective merely by virtue of what it says—and about when law will be ineffective unless it is accompanied by vigorous enforcement activity.

I have suggested that many of the Constitution’s institutions serve to reduce the likelihood of bad consequences from conformity, cascades, and group polarization. Such institutions increase the likelihood that important information, and alternative points of view, will receive a public airing. The system of bicameralism is the most obvious example, producing a system in which lawmaking is done by two institutions with different cultures, thus creating a potential check on unjustified movements. I have also urged that the framers’ most distinctive contribution consisted not in their endorsement of deliberative democracy, which was uncontroversial, but in their commitment to heterogeneity in government, seeing (in Hamilton’s words) the “jarring of parties” as a method for “promoting deliberation.”

More controversially, I have suggested that an understanding of social influences suggests the importance of ensuring a high degree of diversity on the federal bench. It is foolish to pretend that Republican appointees do not, as a class, differ from Democratic appointees; and we have reason to appreciate the value, on any panel, of having a potential “whistleblower,” in the form of one judge of a different party from the other two. Of course judges are rarely lawless, but a group of like-minded judges is prone to go to extremes. An appreciation of social influences on belief and behavior also supports the legitimacy of efforts to promote racial diversity in higher education, at least where such diversity is likely to improve learning.

Even if occasionally alarming, much of the behavior discussed here attests to the reasonableness and good sense of ordinary people. In the face of doubt, we do well to pay attention to the views of others.<sup>396</sup> After all, they might know better than we do. It is prudent to be cautious about challenging other people, not only because they might be right, but also because people do not always like to be challenged. Even in the most freedom-loving societies, people dissent at their peril. A reluctance to disagree is not merely prudent; it is often courteous too. But conformity creates serious dangers. Behavior that is sensible, prudent,

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<sup>396</sup> Note the suggestion, in Goldstein et al., *supra* note, at 174, that conformity operates as a sensible heuristic, one that often works well but that sometimes misfires, see Henrich et al., *supra* note, at 356–57.

and courteous is likely to lead individuals and societies to blunder, simply because people fail to learn about facts or opinions from which they would benefit.

It is usual to think that those who conform are serving the general interest and that dissenters are antisocial, even selfish. In a way this is true. In some settings, conformists strengthen social bonds, whereas dissenters imperil them, or at least introduce tension. But in an important respect, the usual thought has things backwards. Much of the time, it is in the individual's interest to follow the crowd, but in the social interest for the individual to say and do what he thinks best. Well-functioning systems of law and politics take steps to discourage conformity and to promote dissent, partly to protect the rights of dissenters, but mostly to protect interests of their own.

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