

# Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin

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Paul Mishkin was a colleague and a teacher to us, and we each esteem him as a master craftsman of the law: learned, wise, and farsighted. To reread his publications is to enter a world of clarity and integrity, in which no word is wasted and insight is deep.

Early in his career Mishkin saw that the law could be apprehended from two distinct and in part incompatible perspectives: from the internal perspective of a faithful practitioner and from the external perspective of the general public. If the social legitimacy of the law as a public institution resides in the latter, the legal legitimacy of the law as a principled unfolding of professional reason inheres in the former.<sup>1</sup> Mishkin came to

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† David Boies Professor of Law, Yale Law School. One of the irreparable losses of my recent move to Yale has been the loss of the everyday companionship of Paul Mishkin.

†† Associate Professor of Law and Political Science, Duke Law School. I am indebted to Paul Mishkin for his profound teaching. When I would leave the Court to catch the last train home, I would often look at the awesome building against the night sky and reflect on my experiences that day, whether inspiring or disillusioning. During those times, I would think of Paul.

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1. See, for example, the distinction between “legal” and “sociological” legitimacy in Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790-91 (2005) (“When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . , insofar as it is otherwise acquiesced in.”). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) (“[T]he work of constitutional judges must have both ‘legal’ and ‘social’ legitimacy. Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks

believe that although the law required both forms of legitimacy, there was nevertheless serious tension between them, and he dedicated his scholarly career to attempting to theorize this persistent but necessary tension, which he conceived almost as a form of antinomy.

In this article we pay tribute to Mishkin's quest for understanding. We argue that the tension identified by Mishkin is significant and unavoidable, but that it is also exaggerated. It presupposes an unduly stringent separation between professional reason and popular values. In our view the law/politics distinction is both real and suffused with ambiguity and uncertainty. The existence of the law/politics distinction creates the possibility of the rule of law, but the ragged and blurred boundaries of that distinction vivify the law by infusing it with the commitments and ideals of those whom the law purports to govern.

## I

### THE LEGITIMATION OF LAW: ELISIONS IN LEGAL PROCESS JURISPRUDENCE

Mishkin (b. 1927) came of age in the era of what we would now call legal process jurisprudence, which was dominated by giants like Henry M. Hart, Jr. (1905-1969) and Herbert Wechsler (1909-2000). As a young professor, Mishkin taught from, and was influenced by, the manuscript which would eventually become Hart and Wechsler's "masterful"<sup>2</sup> *The Federal Courts and the Federal System*. In time Mishkin would become a coauthor of the second and third editions of the book.

For Hart and Wechsler, "reason" was "the life of the law."<sup>3</sup> They insisted that the Supreme Court should "be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law."<sup>4</sup> "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."<sup>5</sup> They regarded reason and principle as distinguishing legal decision from mere "willfulness or will,"<sup>6</sup> as separating a court from a mere "naked power organ."<sup>7</sup>

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whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered." (footnote omitted)).

2. Paul J. Mishkin, *Book Review*, 21 U. CHI. L. REV. 776, 776 (1954) (reviewing HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953)).

3. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 125 (1959).

4. *Id.* at 99.

5. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

6. *Id.* at 11.

7. *Id.* at 12.

Hart and Wechsler did not insist on reason and principle because they would render courts more accountable, or because they were necessary to ensure fairness to litigants. They believed instead that reason and principle would endow law with legitimacy. If courts engaged in merely “*ad hoc* evaluation,”<sup>8</sup> deciding each case simply on the basis of its desired outcome without reference to “reasons that in their generality and their neutrality transcend any immediate result that is involved,”<sup>9</sup> there would be no reason for persons to submit to judicial authority whenever they lost a lawsuit. Courts claim authority not because their decisions are agreeable—every case has a losing party as well as a winning one—but because their decisions are “asserted to have . . . legal quality,” which inheres in the obligation “to be . . . entirely principled.”<sup>10</sup> It is thus not sufficient in criticizing a court’s decision to complain that it has reached a wrong outcome; one must also assign “reasons that should have prevailed with the tribunal.”<sup>11</sup> In the view of Hart and Wechsler, “[o]nly opinions which are grounded in reason,” which possess “the underpinning of principle,” can “carry the weight which has to be carried by the opinions of a tribunal which, after all, does not in the end have the power either in theory or in practice to ram its own personal preferences down other people’s throats.”<sup>12</sup>

In truth, Hart and Wechsler were not particularly clear about what they meant by “reason” or “principle.” They knew full well that reason and principle were “inescapably ‘political’ . . . in that they involve a choice among competing values or desires.”<sup>13</sup> And they were also aware that neither reason nor principle could transform law into a set of “rules” whose meaning could be fully and determinately specified in advance. Hart had in fact written that much law must necessarily come in the form of “standards” whose meaning could be known only at “the point of

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8. *Id.*

9. *Id.* at 19.

10. Wechsler, *supra* note 5, at 19.

11. *Id.* at 11. Thus Henry Hart complained that

[m]any even of the professional critics of the Court’s work seem to have little more to say, in substance, than that they do not like some of the results and yearn for *ipse dixit* their way instead of the Court’s way. Meanwhile, the principal vocal accompaniment of the Court’s labors is provided by the shrill voices of even more shallow-minded lay commentators, crying, “One up (or one down) for subversion,” “One up (or one down) for civil liberties,” “One up (or one down) for states’ rights.” But the time must come when it is understood again, inside the profession as well as outside, that reason is the life of the law and not just votes for your side. When that time comes, and the country gathers its resources for the realization of this life principle, the principle will be more completely realized than it now seems to be.

Hart, *supra* note 3, at 125.

12. *Id.* at 99.

13. Wechsler, *supra* note 5, at 15.

application” in the context of a “particular situation.”<sup>14</sup> For Hart and Wechsler, therefore, “reason” and “principle” entailed neither value neutrality nor outcome determinativeness.

What, then, did their emphasis on “reason” and “principle” signify? It seemed to suggest a fundamental commitment to a “type of reasoned explanation that . . . is intrinsic to judicial action.”<sup>15</sup> It meant a commitment to act only in virtue of articulated reasons and to be bound by such articulated reasons wherever applicable. But this thin commitment left unanswered many hard questions. For example, what values should articulated reasons embody? How abstractly or concretely should principles be formulated? How is the appropriate scope of a principle’s application to be ascertained? The answers to these questions were fundamental, yet in essence Hart and Wechsler simply remitted them to the actual practice of the ongoing norms of the legal profession. In effect, therefore, the affirmation of “principle” and “reason” in legal process jurisprudence signified the importance of fidelity to the professional practices that comprised “good lawyering.”<sup>16</sup>

There is a strange elision at the core of this account of law. It is implausible to imagine that the authority of courts can be sustained in the context of serious controversies merely because judges offer reasons or principles for their decisions, even when they do so in ways that comply with the best professional norms of practice. To understand how Hart and Wechsler might have advanced such a position, we might conceive them as making two distinct points. First, professional norms, including norms of reason-giving, are essential to law; second, law, qua law, carries authority and legitimacy.

The first point invokes the plausible idea that requiring judges to articulate the principles that drive their decisions would contribute toward the fulfillment of a major function of law, which is to provide “a justification *in principle* for official coercion.”<sup>17</sup> Treating reasons as authoritative would discipline courts to decide future cases according to articulated reasons, and it would also provide reliable guidance to the public about the future path of the law. “Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgment rendered on one set of facts and decide how it should be applied to a cognate but still

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14. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 140 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Hart and Sacks discuss the distinction between rules and standards at 139-41.

15. Wechsler, *supra* note 5, at 15-16.

16. Hart, *supra* note 3, at 100.

17. RONALD DWORKIN, *LAW'S EMPIRE* 110 (1986).

different set of facts.”<sup>18</sup> Hart and Wechsler’s celebration of reason and principle, understood in the context of an affirmation of professional norms of practice, would thus seem intimately connected to achieving the goods of consistency, stability, predictability, and transparency that are essential to the rule of law.<sup>19</sup>

Hart and Wechsler’s second point seems largely unexamined. All would no doubt agree that the rule of law is of enormous social value. But there are other important social ideals, and these ideals can sometimes conflict with the value of legality.<sup>20</sup> Such conflicts are in fact endemic to moments of high controversy. When rule-of-law values conflict with other important social goods, it may be inaccurate to assume that judicial decision making gains authority merely by remaining faithful to rule-of-law virtues. Adherence to *Lochner* precedents of substantive due process may well have been consistent with the rule of law, and in sustaining *Lochner*-type norms of substantive due process the Court may have been keeping faith with established norms of professional practice, including norms of reason-giving. But such fidelity in no way contributed to the authority of the Court during the crisis of the New Deal, and in fact it likely undermined the legitimacy of the Court.<sup>21</sup>

Neither Hart nor Wechsler, however, theorized situations of this kind. They emphasized instead “the professional respect of first-rate lawyers for the incumbent Justices of the Court,”<sup>22</sup> implying that the craft of “good lawyering”<sup>23</sup> was freestanding and self-validating. Professional reason appeared in their work as an unquestioned source of authority and legitimacy.

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18. Hart, *supra* note 3, at 99.

19. See, e.g., Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015-16 (2005); Robert C. Post, Theories of Constitutional Interpretation, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 30-32 (1995).

20. Post, *supra* note 19, at 40-41; Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 228 (1979) (“Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values.”); *id.* at 229 (noting that “the rule of law is meant to enable the law to promote social good” and cautioning that “[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty”); Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, 15 L. & SOC. INQUIRY 633, 645 (1990) (“There is also room for argument that the rule of law is not all we should want and for recognition that, in case of conflict of values, we need not assume that only maintenance of the rule of law matters, or that any think in what are fancied to be its formalistic preconditions spells its doom.” (footnote omitted)).

21. See Friedman, *supra* note 1, at 1387 (“The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.”).

22. Hart, *supra* note 3, at 101.

23. *Id.* at 100.

## II

## THE GAP BETWEEN PROFESSIONAL REASON AND POPULAR LEGITIMATION

Mishkin deeply internalized the focus of legal process jurisprudence on “analytical considerations.”<sup>24</sup> He prized the integrity of professional craft and rigor. He dedicated his first book to the proposition that although “Legal Realism’s major battle has been won,”<sup>25</sup> it must also be affirmed “that judicial action functions within limits of both power and propriety—limits that are rarely narrow or rigid, but important limits nonetheless. These bounds are found in the judicial institution and its processes, in the conception of the judge’s task and how it is properly done.”<sup>26</sup> In an early article he insisted that “professional commentators on the Court’s work should begin to focus more on the objective resolution and analysis of the issues before the court and less on the personalities or politics.” Mishkin hoped that this change of focus would break the “self-fulfilling prophecy” of a crude legal realism “that decisions of Supreme Court Justices are always wholly matters of personal politics and predilection.”<sup>27</sup> Three decades later, he was still affirming that “[i]n theory, at least, the Court—as distinguished from other agencies of government—must rest its decision on an analytically sound principle.”<sup>28</sup>

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24. Paul J. Mishkin, *The Variousness of “Federal Law”*: Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797, 833 (1957).

25. PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW, at v (1965) (“Nowadays only the most professional naïve believe that courts mechanically apply prefixed law to simon-pure facts.”).

26. *Id.* Mishkin believed that “unfortunately,”

the lesson taught by the realists is sometimes over-learned. The recognition of judges’ humanness and the rejection of mechanical theories of the judicial process is then seen as implying that judicial choices range entirely free and that courts are seldom, if ever, hampered in doing just precisely as they wish. Moreover, this view is often coupled with the implicit assumption that this is as things must be—that there can be no effective limits on the power of judges. . . .

We think these latter inferences wrong.

*Id. See id.* at 39 (“Understanding, training and tradition combine to enforce judicial allegiance to the principles, doctrines and precedents which constitute the official inheritance. As Professor Llewellyn has put it, judges feel a duty to both justice and the law.”); *Id.* at 40 (“Judges are, on the whole, decent and honorable men who seek to live up to their conceptions of the proper role of the judge. . . . Moreover, their ideas of what the proper role of a judge is—of what the obligations of the position are—are substantially shaped by their own professional training and experience, and by the expectations and conceptions of the legal profession.”); *Id.* at 191 (“The ordinary judicial decision is closely related to an existing body of doctrines and precedents bearing on the issue before the court. The court has an obligation to line up these ordinary decisions with those authorities. This is the obligation of consistency. Some significant options are open to courts deciding routine cases, but the range within which there is this freedom of choice is usually . . . limited . . .”).

27. Paul J. Mishkin, *Prophecy, Realism and the Supreme Court: The Development of Institutional Unity*, 40 A.B.A. J. 680, 682-83 (August 1954).

28. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 930 (1983). By “principle,” Mishkin meant opinion writing that meets basic “demands of generality and fidelity—requiring sincere efforts to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms.” *Id.* at 909. Principle “transcends the particular case, is

But Mishkin also perceived the elision at the heart of legal process jurisprudence. While he wholeheartedly affirmed the importance of rule-of-law virtues, he recognized that professional reason was not unambiguously self-validating. It is striking that Mishkin and his almost exact contemporary Alexander Bickel (1924-1974) were each drawn to study “the intersection of principle and politics,” to theorize those situations where “the demands of a wise or politic result may be in tension with the dictates of principle.”<sup>29</sup> Although each believed in the value of professional craft, each also sought to understand circumstances in which, paradoxically, the single-minded pursuit of professional craft could undermine the authority of the Court.<sup>30</sup>

In his profound analysis of *United States v. Nixon*,<sup>31</sup> for example, Mishkin flayed the Court on the ground that “its major pronouncements are essentially *ex cathedra*, its analysis of the major issues simplistic, and its doctrines supported far more by the fiat of the Justices’ commissions than by the weight of either learning or reasoning.”<sup>32</sup> In the context both of President Nixon’s assertion that no Executive Branch official could invoke compulsory judicial process against him and of the ultimate issue of executive privilege, Mishkin traced a repeated pattern in the Court’s opinion “of a gratuitous non-consequence-bearing declaration favoring a position taken by the President, followed by a somewhat off-the-mark rationale supporting a holding squarely against him.”<sup>33</sup> So, for example, the Court unnecessarily asserted that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case,”<sup>34</sup> even though the special prosecutor in the case “was undoubtedly in the

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rationally defensible in those general terms, and is analytically adequate to support the result.” *Id.* at 929. Mishkin distinguished his conception of principle from Wechsler’s “neutral principles” thesis. *See id.* at 908-909 (citing Wechsler, *supra* note 5).

29. *Id.* at 907.

30. Alexander Bickel put the point this way:

But Mr. Wechsler, I believe, is not right.

No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line. . . . Most often, . . . and as often as not in matters of the widest and deepest concern, such as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency. And it is a potent role.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 64 (1962).

31. 418 U.S. 683 (1974).

32. Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 *UCLA L. REV.* 76, 76 (1974).

33. *Id.* at 83.

34. *Nixon*, 418 U.S. at 693.

Executive Branch,”<sup>35</sup> and “[t]he issue had been—and remains—a very live and important one in the context of whether Congress can establish an independent special prosecutor appointed and removable by judges.”<sup>36</sup> The Court nevertheless flatly rejected the President’s contention that no Executive Branch official could invoke judicial process against him, ignoring “the line of authority [and] history (represented, *e.g.*, by *Myers v. United States*) which asserts with great strength the inherent power of the President to control and to remove subordinate policy-level officials in the Executive Branch despite even congressional legislation seeking to limit it.”<sup>37</sup>

The peculiar pattern in the Court’s opinion, Mishkin explained, was due to the fact that the case involved “the great public issue” of “whether the President was above or under the law,”<sup>38</sup> and that the Court, in confronting the President, had primarily “to take into account the Court’s own institutional position” in order to conserve its “stature, prestige, and future effectiveness.”<sup>39</sup> Mishkin argued that the analytical failures of the *Nixon* opinion were caused by the Court’s desire to avert the twin dangers that the President “might defy the Court’s order” and that “the Court might become the focus of animus or partisan attack by the President’s supporters.”<sup>40</sup> Mishkin recognized that fidelity to principle was in tension

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35. Mishkin, *supra* note 32, at 81.

36. *Id.*

37. *Id.* at 82-83 (footnote omitted) (referencing *Myers v. United States*, 272 U.S. 52 (1926)). Mishkin saw the same pattern “in the Court’s handling of the ultimate issue of executive privilege.” *Id.* at 83. In “firmly pronounc[ing] not only the existence of a presidential executive privilege based on a general need for confidentiality, but explicitly that it rests on a constitutional base,” the Court used only “generalized a priori reasoning” and ignored “[t]he substantial body of scholarly learning on the subject, which includes careful historical and analytical treatments.” *Id.* at 83-84. The Court’s declaration that the privilege was of constitutional (as opposed to common law) moment “carried no real consequences in the case,” for the Court then held that the privilege “must nevertheless yield to the need for complete evidence in criminal prosecutions.” *Id.* at 84. The Court was unconcerned with “the nature of the criminal prosecution,” even though the special prosecutor “had strongly urged” the narrower limitation “that the privilege would be overcome only on a showing that there was substantial basis for belief that the participants in the conversation were probably involved in criminal activities.” Mishkin, *supra* note 32, at 84. Although “one expects the Supreme Court to resolve a difficult issue, and particularly one with constitutional dimensions, on the narrowest available grounds,” the *Nixon* Court “certainly” did not choose that “route.” *Id.* at 85.

38. *Id.* at 86.

39. *Id.*

40. *Id.* To meet the first danger, the Court had to “close ranks” around a “single opinion,” which empowered any Justice to “demand, as the price of his not writing separately, the inclusion (or exclusion) . . . of any language or ideas to which he assigns sufficient importance.” *Id.* at 87. The second danger “could not be totally avoided,” but “it would certainly be exacerbated by any language or position which made reference to the possible personal involvement of the President; it might be minimized by scrupulous maintenance of an apparently totally neutral stance—not only with regard to the facts but in the selection of abstract and highly generalized principles as the rationale of any adverse holding.” Mishkin, *supra* note 32, at 88. Mishkin accounted for “the gratuitous, overbroad statements in favor of presidential positions” in terms of “[t]he negotiated nature of the unanimous opinion” and “[t]he drive to present a totally neutral appearance.” *Id.* at 88. “But the principal impact of the need for



with the competing value of the Court's own institutional legitimacy, and he was prepared to conclude:

If the price of preservation of the Court's effectiveness and prestige is the handing down of such unsatisfactory opinions, then even an institution whose authority is premised upon adherence to principle and to reason may be forgiven in seeing such defective opinion-writing as a reasonable cost to pay. The misleading nature of what is written can be corrected by the Court later, and with relative ease. Damage to the Court's stature, prestige, or credibility is not so easily repaired.<sup>41</sup>

In Mishkin's view, a pure exercise of professional reason would have been insufficient to endow the Court's opinion with authority in *United States v. Nixon*. Hart and Wechsler neither conceived nor theorized the possibility of this tension between principle and legitimacy. At the root of the tension is the fact that rule-of-law virtues can unambiguously establish authority only within a community that is primarily dedicated to the rule of the law, which is to say within a community of legal professionals. But the legitimacy of courts does not depend merely upon this community, but instead most directly upon the polity in its widest political sense. Mishkin understood the importance of maintaining "that public confidence which is the ultimate foundation of the Court's authority."<sup>42</sup> Throughout his career Mishkin would remain exquisitely attuned to public perceptions of the Court. It was characteristic for him to identify the contradiction within the *Nixon* decision as flowing from the fact that it was "addressed almost entirely to the present and to the current American public," but that it failed to "speak with anything like the same strength to the law and the future."<sup>43</sup>

Over and over again, Mishkin would demonstrate the difficulties accruing to constitutional adjudication because of the fundamental disparity between professional and popular beliefs. This disparity was not easily mediated. Although Mishkin approved "the wisdom and propriety of the Court's" opting to preserve its institutional legitimacy over its fidelity to rule-of-law virtues, he nevertheless acknowledged that the choice posed "a most difficult and fundamental problem."<sup>44</sup> He was "sufficiently conscious of the dangers of simply concluding that short term success is its

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a starkly neutral stance appears in the selection of the rationales asserted in support of the holdings against Mr. Nixon." *Id.* By operating at a high level of abstraction and focusing "on the simple pendency of a criminal prosecution," the Court avoided "the slightest reference or allusion to possible implication of the President himself." *Id.* at 89.

41. *Id.* at 90. Mishkin did not explain why he considered it of paramount importance to preserve the "effectiveness and prestige" of the Court.

42. Mishkin, *supra* note 27, at 683.

43. Mishkin, *supra* note 32, at 76. It should be noted in this regard that Karl Llewellyn was a major influence on Mishkin during his law student days at Columbia. *See, e.g., supra* note 26 (noting Mishkin's invocation of Llewellyn).

44. Mishkin, *supra* note 32, at 91.

own proof of right to know that I hold this position only with tentativeness and subject to reexamination with greater perspective.”<sup>45</sup> What he regarded as a fierce, indissoluble tension between the demands of professional craft and the requirements of public legitimacy led him to a brooding uncertainty.

### III

#### CONFRONTING THE GAP: HABEAS CORPUS AND AN EARLY SUCCESS

Mishkin recognized the structure of the problem early in his career, when he identified the weakness in the easy confidence with which Hart and Wechsler assumed that professional reason could be self-legitimizing. This was the theme of his remarkable 1965 *Foreword* to the *Harvard Law Review*,<sup>46</sup> in which he discussed the Court’s assertion in *Linkletter v. Walker*<sup>47</sup> that it possessed a “general power . . . to decide ‘in each case’ whether a rule should be given retroactive effect.”<sup>48</sup>

Mishkin attacked *Linkletter* for breaking sharply with the “declaratory theory” of the common law associated with Blackstone, which holds that “courts simply ‘find’ or declare a preexisting law and do not exercise any creative function.”<sup>49</sup> “Prospective lawmaking,” Mishkin argued, is associated with the creation of new law and hence “is generally equated with legislation.”<sup>50</sup> To claim the power to engage in “[p]rospective limitation of judicial decisions”<sup>51</sup> is to endanger “the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance.”<sup>52</sup> The stakes were high because the “declaratory theory” at the

45. *Id.*

46. Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

47. 381 U.S. 618 (1965).

48. Mishkin, *supra* note 46, at 58 (footnote omitted).

49. *Id.* at 59.

50. *Id.* at 65.

51. *Id.* at 64.

52. *Id.* at 62. Justice Scalia has in recent years attacked prospective lawmaking in quite similar terms—indeed even by citing Mishkin’s *Foreword*:

That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power “not delegated to pronounce a new law, but to maintain and expound the old one.” 1 W. BLACKSTONE, COMMENTARIES 69 (1765). Even when a “former determination is most evidently contrary to reason . . . [or] contrary to the divine law,” a judge overruling that decision would “not pretend to make a new law, but to vindicate the old one from misrepresentation.” *Id.* at 69-70. “For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.” *Id.* at 70 (emphasis in original). Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: “[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing

root of “the Blackstonian concept of court law” expressed “a symbolic concept of the judicial process on which much of the courts’ prestige and power depend.”<sup>53</sup> This “symbolic view of courts” is “a major factor in securing respect for, and obedience to, judicial decisions,”<sup>54</sup> bolstering “faith in, and commitment to, a regime of ‘law and order.’”<sup>55</sup> “[T]he establishment and application of a power of prospective limitation produces sharp and recurrent conflict with the symbolic ideal reflected in the Blackstonian concept and with the emotional loyalties it commands.”<sup>56</sup>

Mishkin did not believe, however, that the Blackstonian concept of law was entirely true. He was of course aware that “[t]he insights of ‘legal realism,’” which were “increasingly pervasive,” were inconsistent with that concept of law. Although he sometimes objected to the “oversimplification” of some applications of legal realism, he conceded that “the approach has a core of soundness”<sup>57</sup> (while nevertheless lamenting the “corrosive effect” of legal realism upon the Blackstonian concept of courts).<sup>58</sup> And of course Mishkin also knew full well that all

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thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.” T. COOLEY CONSTITUTIONAL LIMITATIONS \*91. . . .

Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*. In the eyes of its enemies, the doctrine “smack[ed] of the legislative process,” Mishkin, 79 HARV. L. REV., at 65. . . .

Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 107-108 (1993) (Scalia, J., concurring). See also *id.* at 103 (citing, *inter alia*, Mishkin, *supra* note 46, at 58-72, in noting that “commentary, of course, has . . . regarded the issue of retroactivity as a general problem of jurisprudence”).

53. Mishkin, *supra* note 46, at 62.

54. *Id.*

55. *Id.* at 64.

56. *Id.* at 66. See *id.* at 69 (“[T]he assertion of a general power of prospective limitation . . . will tend to generate more frequent arguments for the exercise of such power and the necessity to respond thereto, with concomitant spotlighting of the fact of change and strong overtones of legislative rather than judicial process.”). See also *Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167 (1990) (Scalia, J., concurring in judgment):

[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall “apply” retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of “the judicial Power,” U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, see *Marbury v. Madison*, 1 Cranch 137 (1803)—the very exercise of judicial power asserted in *Scheiner*. To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours “applies” in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

*Id.* at 201.

57. Mishkin, *supra* note 46, at 68.

58. *Id.* at 68.

law, including judge-made law, “must in fact change,”<sup>59</sup> and that it would be stultifying and undesirable if judges merely applied pre-existing law. The image of transparent and passive courts that were mere mouthpieces of preexisting law was in significant respects sheer fantasy.<sup>60</sup>

Mishkin thus understood law to straddle an essential contradiction between the truth of its own application and the preconditions of its public legitimation. Boldly seizing this contradiction, Mishkin insisted that if the Blackstonian concept was “in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost.”<sup>61</sup> The Blackstonian concept, after all, sustained the legitimacy of the legal system itself. Were that concept to be weakened, so also would the effectiveness and prestige of courts. But this meant that the legitimacy of adjudication, and of the craft that made adjudication possible, depended upon myths circulating in a realm of popular “symbols” that “constitute an important element in any societal structure.”<sup>62</sup>

For Mishkin, therefore, “symbolism provides substantial emotional support for basic truths important to proper functioning of the legal system.”<sup>63</sup> Myth and symbolism are necessary for the maintenance of the “rule of law” itself.<sup>64</sup> So long as the “ultimate foundation of the Court’s power” lay in its “public support,”<sup>65</sup> that support would not come from fidelity to professional reason, but rather from a cultural world of symbols

59. *Id.* at 66. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (Scalia, J., concurring in judgment):

“[T]he judicial Power of the United States” conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forbears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses “difficulties of a ... practical sort,” *ante*, at 536, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to “make new law,” and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.

*Id.* at 549. We thank Phil Frickey for the references to Justice Scalia’s opinions here and *supra* in notes 52 and 56.

60. See also, e.g., BICKEL, *supra* note 30, at 74 (“Judges and lawyers recurrently come to feel that they find law rather than make it. Many otherwise painful problems seem to solve themselves with ease when this feeling envelops people.”).

61. Mishkin, *supra* note 46, at 63. “[C]onsider, for example, the loss involved if judges could not appeal to the idea that it is ‘the law’ or ‘the Constitution’—and not they personally—who command a given result.” *Id.*

62. *Id.* at 62.

63. *Id.* at 63.

64. Mishkin regarded “the Blackstonian concept” as “an important source of the moral force that gives substance not only to the felt obligation to obey, but to other pervasive attitudes toward the Court that are essential to the Court’s effective operation.” *Id.* at 67. Mishkin provides a full discussion of this point in MISHKIN & MORRIS, *supra* note 25, at 80-81.

65. Mishkin, *supra* note 46, at 67.

and myths that aroused emotions of loyalty and allegiance. Mishkin believed that “the general habits of reliance on the law and obedience to judicial decision” depended “only in small part” on “ratiocination”:

Much more strongly operative are the symbolic values attached to courts and the law. Herein lies the emotional strength which is the real foundation of the “habit” of obedience—in the symbol of the law as a fixed, certain body of authoritative rules which courts mechanically (and thus impartially) “apply” or “find.” The symbol of a “government of laws and not of men” is a potent force in society.<sup>66</sup>

The undoubted success of Mishkin’s *Foreword* lay in its ability to deploy professional reason to fashion legal rules that would reinforce the symbolism necessary to maintain the rule of law. By drawing important distinctions between appellate review and collateral review, Mishkin sought to create a principled structure of decision making that would give the Court the necessary freedom to adjudicate prospectively and yet that would not seem to endow the Court with symbolic power to engage in prospective lawmaking. He proposed an analytic framework for defining the scope of collateral habeas review that would enormously influence the future development of the doctrine<sup>67</sup> and that would liberate the Court to develop constitutional principles of criminal procedure in ways that would have only prospective effect. The task, as Mishkin defined it, was to use professional reason to construct principles that would “reinforce—or at least not . . . weaken further—the general conception of the Court as a court,” and that would “strengthen rather than . . . undermine the symbols that help it to gain and maintain the support on which it depends.”<sup>68</sup>

Mishkin’s *Foreword* successfully deployed professional reason in order to refashion the law in ways that would fortify the social preconditions of the rule of law. But underlying this success lay dangerous conceptual instabilities. Mishkin associated popular beliefs with an emotional regime of symbols that could be reconciled with actual legal principles only through careful manipulation and management.<sup>69</sup> The social

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66. MISHKIN & MORRIS, *supra* note 25, at 81.

67. *Teague v. Lane*, 489 U.S. 288, 300 (1989). See Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 975-76, 986-87 (2006); A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 34 n.204 (2002); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 236-38 (1998); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1123 (1999); Casenote, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1646-47 (2005).

68. Mishkin, *supra* note 46, at 69.

69. In response to the objection that “attempts to preserve” the symbolic view of law “involve elements of deception,” Mishkin wrote:

I hold no brief for obscuring truth from any one who wishes to learn and who will “take the trouble to understand.” At the same time, I see no affirmative virtue in the destruction of

symbols evoked in the *Foreword* seemed immune from rational persuasion; they were susceptible to influence, if at all, only by the dumb weight of inarticulate experience, by what Mishkin, quoting Felix Cohen, characterized as “the normative power of the actual.”<sup>70</sup> By manipulating the inarticulate experience of actual practices, the legal system could reinforce or undermine the social symbols upon which the legitimacy of the rule of law rested.<sup>71</sup>

Mishkin believed that only symbols possessed the power to sustain essential shared political values, like the rule of law. A society could change only if its symbols could evolve. In the *Foreword*, and for his entire career as a scholar and a teacher, Mishkin was thus powerfully drawn to Alfred North Whitehead’s observation that

[t]he art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purpose which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.<sup>72</sup>

In truth, however, Mishkin offered little or no account of how “enlightened reason” could alter the symbol of the “Blackstonian concept.” Instead Mishkin’s concern was to protect the strength of that symbol by structuring law so as to reduce the “appearance” that the law was in conflict with it.<sup>73</sup> Mishkin essentially conceived symbols as receptive to the shock of experience but not to the force of rational persuasion. For Mishkin, therefore, a deep and impassible divide separated the principled analytics of professional reason from the emotional and experiential logic

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essentially sound and valuable symbols in order to promulgate a part of a more sophisticated—and indeed over-all more accurate—general view. Such partial truths do not necessarily represent a gain in wisdom over the more elementary general view, and the destruction of the symbol does involve real loss.

*Id.* at 63 n.29.

70. *Id.* at 71. As Mishkin put it, “that which is law tends by its very existence to generate a sense of being also that which ought to be the law.” *Id.* See also Mishkin, *supra* note 27, at 681 n.6 (“To be sure, an individual is frequently enough influenced . . . by an idea of what his job ought to be. But that, in turn, is most often molded in large part by his impression of what the position in fact is.”). For a use of this insight in teaching constitutional law that is indebted to Mishkin’s own teaching, see Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law*, 56 J. LEGAL EDUC. 201 (2006).

71. In MISHKIN & MORRIS, *supra* note 25, at 79-87, Mishkin applied virtually the same analysis to the question of *stare decisis*. Mishkin stressed the importance of preserving “an appearance of continuity in doctrine.” *Id.* at 87. Mishkin noted that the importance of this appearance was as significant “for members of the legal profession” as for the general public. *Id.*

72. Mishkin, *supra* note 46, at 62 n.26 (quoting ALFRED NORTH WHITEHEAD: SYMBOLISM: ITS MEANING AND EFFECT (1927)). See MISHKIN & MORRIS, *supra* note 25, at iii, 81-84.

73. See *supra* note 71.

of symbols, upon which the authority and legitimacy of the Court necessarily depended.

The fierce dilemma uncovered by Mishkin in his article analyzing the *Nixon* decision is thus already implicit in his *Foreword*, written nine years before. In his discussion of *Nixon*, Mishkin conceived the Court as having to choose between following the dictates of professional reason and following the symbolic logic of legitimacy. Although Mishkin's *Foreword* had deftly solved this dilemma by postulating ways that professional reason could be drafted into the service of symbolic logic, *Nixon* illustrated that there were important circumstances where no such ingenious solution was available. In *Nixon*, the Court was put to a tragic choice between the substance of law and the appearance of law, between the logic of professional reason and the emotional logic of symbolism. The only possible option was to choose in a manner designed to minimize the overall damage, a choice that plainly left Mishkin deflated and unsatisfied at the end of his article.

There are elements in the *Foreword* that point in a quite different direction. In one passage Mishkin observed that part of the truth in the Blackstonian concept was that courts articulated "particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law."<sup>74</sup> He also argued that principles of judicial decision-making ought to be formulated so as to moderate "the possibility that judge-made law may move too far away from community-held values."<sup>75</sup> In these observations Mishkin did not postulate a logical opposition between reason and symbols, but instead seemed to imagine a dialectic between professional reason and popular beliefs, a dialectic that could sustain the legitimation of legal institutions.

Alexander Bickel dedicated his career to exploring the possible structures of such a dialectical interaction between professional reason and popular values.<sup>76</sup> But the cost of this approach was to loosen the autonomy of professional reason by assimilating it to frankly political elements like statesmanship and expediency.<sup>77</sup> Mishkin refused to pay this price. He

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74. Mishkin, *supra* note 46, at 60 (footnote omitted).

75. *Id.* at 72.

76. See generally BICKEL, *supra* note 30; ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975).

77. This was the tack taken by Bickel primarily in his later work, in *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 76, and in *THE MORALITY OF CONSENT*, *supra* note 76. In Bickel's earlier work, like *THE LEAST DANGEROUS BRANCH*, *supra* note 30, he advocated that the Court deploy "the passive virtues," such as standing doctrine, in order to protect legal principles from being warped by the need to maintain public legitimation. In an early article Mishkin himself anticipated and advocated this use of the passive virtues. See Mishkin, *supra* note 27. For a recent example of scholarship stressing the Court's use of avoidance techniques to preserve principle during a period of anti-Communist hysteria, see Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401-402 (2005).

insisted on maintaining the highest professional standards of craft, with the consequence that his imagination persistently gravitated toward an ineluctable tension between professional reason and popular myth. When, fifteen years after his *Foreword*, he sought to understand the Court's attempt to conceive and remedy sex discrimination, he viewed the Court's decisions as "efforts to eradicate not only real sexual inequality but symbolic stereotypes as well."<sup>78</sup> Mishkin of course added that it "is not only inevitable but necessary and proper" for the Court to exercise this kind of "political sensitivity," in part to maintain "the Court's legitimacy and capacity to make . . . choices for society."<sup>79</sup>

The implicit opposition between reality and appearance, between reason and symbolism, lay at the root of Mishkin's very conceptualization of the problem. He would recur time and again to the dilemma he had uncovered in the *Nixon* decision: How ought the Court act when fidelity to the norms of professional reason essential to its "proper"<sup>80</sup> functioning would undermine the conditions of its own legitimation?

#### IV

##### BELEAGUERED BY THE GAP:

##### AFFIRMATIVE ACTION AND A HEARTFELT *CRI DU COEUR*

Mishkin's unblinking appreciation of the potential antinomy between professional and popular beliefs led him to remarkable insights about the nature of American judicial practice. This was nowhere more sublimely illustrated than in his discussion of *Regents of the University of California v. Bakke*,<sup>81</sup> the decision in which the Supreme Court first established constitutional standards for affirmative action in higher education. The case involved a challenge to the affirmative action program of the medical school of the University of California, Davis. The program explicitly set aside sixteen places for minority students out of a class of one hundred.<sup>82</sup> Mishkin had drafted the primary brief for the University, arguing that even though the University used race as a criterion of admission, "the standard of strict judicial scrutiny" did not apply<sup>83</sup> in the context of efforts to "counteract [the] effects of generations of pervasive discrimination against

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78. Paul J. Mishkin, *Equality*, 43 LAW & CONTEMP. PROBS. 51, 62 (Summer 1980). "Though this may appear to stress form over substance, the form in this instance is not trivial." *Id.* at 61.

79. *Id.* at 63-64. As with the issue of self-legitimation, see *supra* note 41, Mishkin did not explain why the Court should make fundamental value choices for American society. Instead, he seemed to accept as given that it is the "function of the Court" to be "arbiter of our nation's most significant disputes." Mishkin, *supra* note 27, at 680.

80. MISHKIN & MORRIS, *supra* note 25, at v.

81. 438 U.S. 265 (1978).

82. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 279 (1978) (opinion of Powell, J.).

83. Brief for Petitioner, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76- 811) [hereinafter University of California Brief in *Bakke*], 1977 WL 189474, at \*12.



discrete and insular minorities.”<sup>84</sup> The Supreme Court fractured three ways, with the dispositive opinion authored by Justice Powell for himself alone.

Powell rejected Mishkin’s argument that racial classifications in the context of affirmative action should be immune from strict scrutiny. He concluded that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”<sup>85</sup> He also declined Mishkin’s invitation to justify affirmative action in higher education in terms of the remedial logic of past discrimination.<sup>86</sup> Powell instead offered a unique and highly innovative rationale that turned on the “academic freedom” of universities to choose a student body that would ensure “‘wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples,” so that universities could fulfill their “mission” of selecting “those students who will contribute the most to the ‘robust exchange of ideas.’”<sup>87</sup> He conceptualized diversity as serving a compelling educational interest.

84. *Id.* at \*2.

85. *Bakke*, 438 U.S. at 291 (opinion of Powell, J.).

86. The first sentence of Mishkin’s brief for the University of California in *Bakke* frames the issue precisely: “The outcome of this controversy will decide for future decades whether blacks, Chicanos and other insular minorities are to have meaningful access to higher education and real opportunities to enter the learned professions, or are to be penalized indefinitely by the disadvantages flowing from previous pervasive discrimination.” University of California Brief in *Bakke*, at \*13. In its Summary of Argument, the University of California describes the historical growth of this remedial perspective:

One of the things in which the nation may take great pride since the end of World War II has been its willingness to address in actions, rather than simply words, the racial injustices that are the unhappier parts of our legacy. . . . The commitment to relegate the lingering burdens of the past to the past has run deeply and widely throughout the country, among a great many of its institutions.

... [T]oward the end of the last decade, many governmental and private institutions, including this Court, came concurrently to the realization that a real effort to deal with many of the facets of the legacy of past racial discrimination unavoidably requires remedies that are attentive to race, that color is relevant today if it is to be irrelevant tomorrow. This discovery and response was found in many sectors of society; the school desegregation area was a major arena, but the same phenomenon was found in employment, housing, and many other areas, including professional education.

*Id.* at \*8-\*10.

87. *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.). In his brief Mishkin had in passing proposed a similar argument sounding in diversity and academic freedom:

The relevant point is that the citizens of the state have chosen the University as the entity with responsibility for grappling with the intractable problems of choosing the optimum mix of students for the maximum benefit of education in the school, of contribution to the profession, and ultimately to the society. Intrusive judicial review interferes drastically with that process of democratic government. Such interference should be reserved for the comparatively rare instances when circumstances compel it, and such circumstances are not presented by this case. An effort by the judiciary, under the rubric of strict judicial scrutiny, to fashion admissions standards is very likely to lead to the kinds of mistakes made by the court below. In this instance, it would also gravely harm the healthy “federalism” now presented by a system under which universities across the country are permitted to fashion their own programs without any stultifying central controls.

University of California Brief in *Bakke*, at \*76. See also *id.* at \*76 n.74 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (“... It is the business of a

Powell offered a special definition of diversity. He argued that within the context of education, diversity did not imply “simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>88</sup>

Powell concluded that universities could create admissions criteria in which “race or ethnic background” was a “‘plus’ in a particular applicant’s file,”<sup>89</sup> but not admissions criteria in which race would “insulate the individual from comparison with all other candidates for the available seats.”<sup>90</sup> The latter would deny each applicant their “right to individualized consideration without regard to . . . race.”<sup>91</sup> Powell was explicit that “[s]o long as the university proceeds on an individualized, case-by-case basis,

university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” (internal quotation marks omitted).

88. *Bakke*, 438 U.S. at 315.

89. *Id.* at 317.

90. *Id.* Powell explained:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class.

*Id.* at 317-18.

91. *Id.* at 318 n.52. Powell argued that a program that merely gives individuals a “plus” for their race

treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.

*Id.* at 318 (footnote omitted).

there is no warrant for judicial interference in the academic process.”<sup>92</sup> Affirmative action programs would be protected even if a university, in awarding applicants a “plus” based on their race, paid “some attention” to the number of minority students they admitted.<sup>93</sup> Because the affirmative action program at the U.C. Davis Medical School did not purport to give applicants individualized consideration, but instead explicitly set aside sixteen slots dedicated to the admission of racial minorities, the program created “the functional equivalent of a quota system.”<sup>94</sup> For this reason, Powell deemed the Davis program unconstitutional.

Although Mishkin lost on both major arguments he had advanced to the Court, he understood almost at once that Powell’s opinion in *Bakke* “preserved” affirmative action programs in higher education, and that “this outcome could be anticipated, and I think it was the outcome intended by the Court.”<sup>95</sup> The Court had not “giv[en] each party an equal half of the loaf”; on the contrary, because most affirmative action programs did not (or did not need to) use the features Justice Powell found fatal, *Bakke*’s primary effect, “by far, was to sustain race-conscious special admissions programs throughout the nation.”<sup>96</sup> Mishkin had lost the battle, but he had won the war.

Yet Mishkin was troubled because he believed that Powell’s opinion rested on an obvious fallacy. Powell asserted that an affirmative action program that awarded candidates merely a “plus” for race was “a facially nondiscriminatory admissions policy,”<sup>97</sup> so that “an applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background . . . would have no basis to complain of unequal treatment under the Fourteenth Amendment.”<sup>98</sup> But Mishkin immediately realized that this assertion could not be true. How could “the reasoning and ‘principle’ [it] contained . . . be applied generally”?<sup>99</sup> If the University of California, Berkeley were to decide that there were too many Asian-American students on campus, so that to promote diversity it would award each Asian-American applicant a “minus” in their application, it could not be doubted that disadvantaged Asian-American applicants would have a “basis” on which to claim that their rights under the Equal

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92. *Bakke*, 438 U.S. at 319 n.53.

93. *Id.* at 323.

94. *Id.* at 318.

95. Mishkin, *supra* note 78, at 58.

96. Mishkin, *supra* note 28, at 921-22.

97. *Bakke*, 438 U.S. at 318 (opinion of Powell, J.).

98. *Id.* The question of whether so-called “benign” racial classifications ought to count as racial classifications was in fact hotly debated in the decades before *Bakke*. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1524-25 (2004).

99. Mishkin, *supra* note 28, at 925.

Protection Clause had been violated, and it was plain that the Court, Justice Powell included, would so declare.<sup>100</sup>

From the perspective of legal principle, the constitutionality of the “plus” could be distinguished from the almost certain unconstitutionality of the “minus” only on the ground that the “plus” was necessary to redress the present effects of past discrimination. This is the argument that Mishkin had advanced in his brief, but Powell in his opinion went out of his way to repudiate it. Powell therefore wrote an opinion offering reasons that could not apply to future cases. His opinion appeared to exemplify the kind of “*ad hoc* evaluation”<sup>101</sup> that Hart and Wechsler deplored as contrary to the very life of the law.<sup>102</sup> The question that fascinated Mishkin was why Powell had deliberately constructed an opinion that was “to the largest degree a matter of form rather than substance.”<sup>103</sup>

Mishkin used the antinomy between professional reason and popular perception to construct his answer. At the time of *Bakke*, affirmative action “was one of the most heated and polarized issues in the nation.”<sup>104</sup> Powell’s “proclamation of ambivalence”<sup>105</sup> was remarkable because it “both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides.”<sup>106</sup> It “expressed clear support for the view that racial or ethnic lines are inherently constitutionally suspect,”<sup>107</sup> while simultaneously declaring that affirmative action programs “might generally continue.”<sup>108</sup> By genuinely reaching out to both sides of the controversy, “[t]he Court took what was one of the most heated and polarized issues in the nation, and by its handling defused much of that heat.”<sup>109</sup> It avoided the “legislative backlash”<sup>110</sup> that likely would have occurred had the Court completely rejected “the claim advanced by Mr. Bakke and his supporters,”<sup>111</sup> and yet it also provided a charter by which affirmative action programs could continue to function in higher education. In thematizing how *Bakke* could alter the terms of public debate by fashioning a compromise moving between two poles of intense constitutional

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100. *Id.*

101. Wechsler, *supra* note 5, at 12.

102. Cf. Sandra Day O’Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396 (1987) (“Indeed, at times, I think he may have been willing to sacrifice a little consistency in legal theory in order to reach for justice in a particular case.”).

103. Mishkin, *supra* note 28, at 926.

104. *Id.* at 929.

105. *Id.* at 917.

106. *Id.* at 922.

107. *Id.* at 923.

108. *Id.* at 922.

109. Mishkin, *supra* note 28, at 929. In light of subsequent disputes about Proposition 209 in California and similar controversies elsewhere, it is questionable how much heat was actually defused, and for how long.

110. *Id.*

111. *Id.*

controversy, Mishkin anticipated the work of later constitutional theorists who have sought to demonstrate how the Court has in the past intervened in just this way to establish constitutional legitimacy in the midst of intense constitutional controversy.<sup>112</sup>

Most puzzlingly, Powell's opinion in *Bakke* struggled to construct a constitutional rationale that would validate affirmative action programs only if they deployed a complex, "destabilizing,"<sup>113</sup> and largely fictional system of "individualized consideration," even though it was apparent upon inspection that such a system would produce virtually the same "net operative results" as the explicit "set-aside" plan of U.C. Davis.<sup>114</sup> Mishkin explained this seemingly strange feature of Powell's opinion by suggesting that "[t]he indirectness of the less explicitly numerical systems may have significant advantages . . . in terms of . . . the felt impact of their operation over time."<sup>115</sup>

Even when the net operative results may be the same, the use of euphemisms may serve valuable purposes; as do legal fictions, they may facilitate the acceptance of needed measures. . . .

Indirectness may also have significant advantages in muting public reactions to, and possible resentment of, the granting of

112. See, e.g., Siegel, *supra* note 98, at 1544-46; Reva B. Siegel, *Constitutional Culture. Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

113. Robert Post, *Introduction: After Bakke*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 16-17 (Robert Post & Michael Rogin eds., 1998).

114. Mishkin, *supra* note 28, at 928. Mishkin was surely correct to observe that "in the vast majority of cases" the "plus"-type system . . . will inevitably work . . . without significant difference from the 'set-aside' format." *Id.* at 927 n.73. He explained why:

There is, after all, no objective way to compute the "edge" to be given to race or ethnic background as compared to any other factor. If an admissions committee is allowed to give a "plus" for race as a means of achieving diversity in the student body, the "plus" must be large enough to make a difference in the outcome in some cases. But if that is so, isn't it clear that the size of the "plus" will determine the number of minority students admitted? In those circumstances, it is virtually inevitable that the authorities that determine the size of the "plus" will set that size in terms of the number of minority students likely to be produced at the level set. Since that is so, the use of a "plus" may simply be a slightly less precise, and less direct, method of determining the proportion of minority students who will be given preferential admission.

*Id.* at 926.

115. *Id.* at 928. Mishkin wrote:

The description of race as simply "another factor" among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect. These perceptions can have important consequences for the schools and their students, both majority and minority. They can facilitate or hamper the development of relationships among individuals and groups; they can advance or retard the educational process for all—including, particularly, minority students whose self-image is most crucially involved.

*Id.* Mishkin conceded that set-aside programs like the one at U.C. Davis are "most likely to re-arouse and maintain awareness of distinctions based on race, thus having potential to retard achievement of the objective of eliminating race-consciousness itself." Mishkin, *supra* note 78, at 59.

preference on racial lines. The use of overt numbers, whether stated as literal quotas or as “set-asides” for qualified applicants, greatly tends to trigger the symbolism of the infamous “*numerus clausus*” and other exclusionary devices of past invidious religious, ethnic, and racial discrimination. The incorporation of such features in an institutional admissions program continuing indefinitely from year to year, tends continually to keep alive consciousness of the program and the relevance of race therein; it tends to maintain and exacerbate latent and overt hostility to these efforts to overcome the effects of past racial discrimination. A program formulated along the lines Justice Powell’s opinion approves would, by the very lack of “sharp edges,” avoid such visibility in its operations and tend to enhance the acceptability of the program.<sup>116</sup>

This discussion of the symbolic and cultural effects of different forms of affirmative action programs closely tracks Mishkin’s earlier analysis of the symbolic effects of the claimed judicial power to engage in prospective lawmaking. Although the issue in *Bakke* concerned social attitudes toward race, as distinct from the social perceptions of judicial legitimacy at issue in *Linkletter*, Mishkin’s treatment of the question was nevertheless structurally analogous. His point was that differently designed affirmative action programs with otherwise identical “net operative results” would differentially affect preexisting social beliefs.<sup>117</sup>

Mishkin’s scrutiny of this issue is nothing short of brilliant. His insight explains why, a quarter century later, the Court would simultaneously uphold affirmative action programs for higher education and constitutionally bar universities from revealing the precise extent of the “plus” that they actually award on the basis of race.<sup>118</sup> It elucidates why in dealing with questions involving the intersection of race and electoral design the Court has explicitly concluded that “appearances do matter.”<sup>119</sup>

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116. Mishkin, *supra* note 28, at 927-28 (footnote omitted).

117. Accord John C. Jeffries, Jr., *Bakke Revisited*, 55 SUP. CT. REV. 1, 20 (2003) (“The burying of racial preferences in ‘plus’ factors for certain individuals obscures and softens the sense of injury that even the most dedicated proponents of affirmative action must acknowledge will be felt by those who are disadvantaged for reasons they cannot control.”).

118. Compare *Grutter v. Bollinger*, 539 U.S. 306 (2003), with *Gratz v. Bollinger*, 539 U.S. 244 (2003). For a discussion, see Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 68-76 (2003).

119. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). The tension between the appearance and the reality of the law was a topic that was much discussed in the two decades after *Brown*. See, e.g., John Kaplan, *Equal Justice in an Unequal World: Inequality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966):

We are constantly forced to compromise the strong moral claims of the Negro, because the structure of the institutions of our society interfere[s] with the implementation of what otherwise might appear to be a just result. Moreover, the necessity of considering not only the reality of governmental action, but also its appearance, may justify the belief that in this area we cannot afford complete openness and frankness on the part of the legislature, executive or judiciary. Though this may shock some, it perhaps is an inevitable consequence of our

It anticipates the work of a later generation of scholars who interpret the Court's equal protection decisions as driven by the necessity of shaping interventions to an expressive form that will allay "the fear of racial 'balkanization'"<sup>120</sup> while simultaneously sustaining the constitutionality of legislative redress for the present effects of past discrimination.<sup>121</sup>

Mishkin demonstrated that the eccentric and slippery logic of Powell's distinction between constitutional and unconstitutional affirmative action programs played an important role in Powell's effort to achieve "a wise and politic resolution of an exceedingly difficult problem."<sup>122</sup> It allowed Justice Powell "to equate race with other variables" that "do not carry the same emotional freight as racial or ethnic lines."<sup>123</sup> In the end Mishkin recognized that Powell had imposed constitutional requirements on affirmative action programs that would significantly diminish their potential to "exacerbate latent and overt" racial "hostility."<sup>124</sup>

In many dimensions, therefore, Powell's opinion represented "a major, successful accomplishment."<sup>125</sup> Yet Mishkin was not satisfied. On the contrary, he asked, "if I cannot find an analytically sound principle to support [the] result, what justification do I have to support such action by the Supreme Court?"<sup>126</sup> The question led Mishkin to conclude his analysis with a heartfelt *cri du coeur*:

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history. One should not expect to find within what would be our traditional morality a just cure for three hundred years of immorality.

*Id.* at 410.

120. Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 691 (1998).

121. See Post, *supra* note 118, at 74-76; see also Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1236 (2002) ("The Court prefers that, when states consider race, their actions are ambiguous enough to be explained in other ways."); Issacharoff, *supra* note 120, at 693 ("[W]here the racial considerations in student selection and assignment are too central, too visible, and too at odds with longstanding community practices, they are almost certain to fail."); Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1601 (2002); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

122. Mishkin, *supra* note 28, at 929.

123. *Id.* at 924.

124. *Id.* at 928.

125. *Id.* at 930. "I take the view that special admissions programs advance the cause of racial equality in this country. Without them, the channels of upward mobility for racial minorities would remain constricted; the nation's medical schools, top law schools, and status professions generally would remain virtually all-white. The resolution of the 'American Dilemma' would be retarded, in the present and for the future. The *Bakke* decision preserved those programs." Mishkin, *supra* note 78, at 57.

126. Mishkin, *supra* note 28, at 930. See Jeffries, *supra* note 117, at 2 ("And throughout, his argument seemed devoid of any broad consistency that might be called principle. . . . Considered purely as a matter of craft—of consistency with precedent, coherency as doctrine, and clarity of result—Powell's *Bakke* opinion must be judged a failure.").

I am not so absolute or so unworldly as to say that results may not at times be a sufficient justification. . . . That is in one sense an essential element in successful government. But it is at the same time an exceedingly dangerous one. Unless cabined, it is an argument that will always justify desired social outcomes regardless of principled justifications.

But how could it be cabined here? I cannot assert that I believe the safety of the United States depended on one outcome or the other in *Bakke*. I can say that the case was an extraordinary one, in terms of public awareness and concern as well as in terms of the importance and difficulty of the issues. But such "extraordinary" cases are not so uncommon on the dockets of the United States Supreme Court, and the line between them and the run of other cases is by no means easily demarcated or maintained. It is true that in *Bakke* racial relations were importantly under stress. It is also true that race relations are our most durable domestic crisis. Is it therefore sufficient to limit the "exception" to racial matters? Is it justifiable?

. . . I have tried but I have not been able to come to resolution.

That may be an unorthodox way to conclude a formal lecture. But that is how I must, and do, conclude this one.<sup>127</sup>

Even more acutely than in his earlier discussion of *United States v. Nixon*, which he explicitly invoked,<sup>128</sup> Mishkin ended his *Bakke* lecture on a note of solemn uncertainty in the face of unspeakable indeterminacy. He affirmed the importance of maintaining the integrity of professional reason, and he also affirmed that the social consequences of court decisions in particular cases could outweigh a single-minded pursuit of that integrity. Because there was no meta-principle to determine which objective a court should pursue, Mishkin evidently regarded these two affirmations as incompatible. His professed attitude toward *Bakke* was therefore one of unresolved ambivalence. Unqualified praise for Powell's choice to achieve an optimal social outcome at the sacrifice of "principled justifications" would contribute to the self-fulfilling prophecy of legal realism and would encourage courts to disregard the principles that in Mishkin's view constituted the spine of the law.<sup>129</sup> Yet rigid fidelity to principle, regardless of consequences, would risk intolerable social costs, ranging from the delegitimation of the Court to catastrophic racial tension.<sup>130</sup> Viewing this

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127. Mishkin, *supra* note 28, at 930-31.

128. *Id.* at 931 n.82.

129. In 1954 Mishkin had scored "commentaries on the work of the Court" for carrying "an oversimplified 'realist' flavor" and suggesting that "decisions were in fact exclusively the product of each individual's politics and sympathies." Mishkin, *supra* note 27, at 682. Such commentary, he argued, "helped to bring about a judiciary much closer to" the portrait presented by legal realism. *Id.*

130. Mishkin wrote that rejecting all use of race "would have produced a disastrous setback in race and other relations in our society." Mishkin, *supra* note 28, at 929 n.78. Two decades later, John



tension as unresolvable, and perhaps concluding that further scholarly attention could only make matters worse, Mishkin assumed a disciplined and stoic silence.

## V

### THE TENSION BETWEEN PROFESSIONAL REASON AND POPULAR LEGITIMACY: A WEAK FORM OF THE DILEMMA

Underlying this silence was the sharp antinomy that Mishkin postulated between professional reason and public perception. In his discussion of *Nixon*, Mishkin saw that because the legitimacy of the Court depends upon public perception, and because public perception follows the logic of symbolism rather than professional reason, the very legitimacy of the Court could depend upon its acting in ways that were inconsistent with professional reason. Mishkin expanded this insight in his evaluation of *Bakke*. He saw that the capacity of law to achieve socially desirable outcomes could depend upon its following a logic of symbolism rather than professional reason. But because Mishkin also questioned whether the Court could “be justified in acting” unless it was able to advance “a principled basis which would support acceptance” of its decision,<sup>131</sup> he faced a seemingly insoluble dilemma.

This dilemma can assume two distinct forms—a weak and a strong form. The weak form of the dilemma arises whenever courts are tempted to decide cases in ways that are responsive to the logic of popular values rather than to norms of professional practice like reason-giving or applying previously articulated reasons. The strong form of the dilemma arises whenever courts are tempted to adopt the logic of popular values in a manner that affirmatively contradicts or undermines norms of professional practice. In this section, we argue that the weak form of the dilemma should not, when properly conceived, be viewed as a dilemma; it merely illustrates that norms of professional craft are not autonomous, but are constantly and properly in dialogue with popular beliefs. In the section that follows, we argue that although the strong form of the dilemma can sometimes force courts to confront genuinely difficult choices, it does not so much reflect an antimony between professional reason and popular beliefs as it illustrates unresolved tensions concerning the purposes of law itself.

The weak form of the dilemma assumes that adjudicative law, qua law, *requires* the articulation of reason and principle, so that court decisions that do not justify their judgments by reasons are not properly

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Jeffries would record similar views, Jeffries, *supra* note 117, at 6-7, though it was easier for him openly to approve Powell’s “sacrifice of cogency for wisdom.” *Id.* at 21.

131. Mishkin, *supra* note 28, at 909.

legal.<sup>132</sup> This assumption, however, is questionable. No less a jurist than Oliver Wendell Holmes once famously remarked that

[i]t is the merit of the common law that it decides the case first and determines the principle afterwards. . . . [L]awyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*. In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts.<sup>133</sup>

If it can intelligibly be said that a decision is "right" although its reasons are "wrong," then it is at a minimum intelligible to say that a decision can be justified even though its author has neither the wits nor the will to articulate the principle for which it stands. And if judges commonly and properly make decisions without being aware of the principles for which they stand, then not only does the professional practice of judging go beyond mere reason-giving, but the law itself must perform functions that do not require reason-giving.<sup>134</sup> Holmes and Mansfield suggest that a judge's most fundamental responsibility is to get a decision right, rather than to decide it according to principles.

Whether a decision can be "right" even though it cannot be justified by an articulable principle depends upon the purposes of law. A decision can be "right" if it satisfies a proper purpose of the law, so long as that purpose can be fulfilled without the necessity of articulating a principle. Mishkin hints at such a purpose in his *Foreword* when he suggests that a fundamental object of law is to give expression to the "particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law."<sup>135</sup> In this passage, Mishkin does not conceive popular beliefs as an intrinsically irrational universe of symbols, but instead as a meaningful world of social values.

It is very frequently said that a major purpose of law is to lend official state sanction to "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious."<sup>136</sup> This conception of law has been common at least since the work of

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132. For a recent forceful statement of this view, see Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1478 (2005).

133. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870).

134. Cf. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 659 (1995) ("[W]hen context, case-by-case decisionmaking, and flexibility are thought important, the benefits of requiring decisionmakers to give reasons do not come without a price.")

135. Mishkin, *supra* note 46, at 60 (footnote omitted). See *supra* text accompanying note 74.

136. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

Friedrich Karl von Savigny.<sup>137</sup> Sometimes social values take the form of standards, with “contextual”<sup>138</sup> meanings that can fully be known only in their application. Sometimes, however, they take the form of intuitive “concrete understandings”<sup>139</sup> that do not rise even to the level of generalizations, much less rules. Holmes and Mansfield acknowledge that judges can properly decide cases based on just such inarticulate intuitions. They apparently believe that this is necessary for law to serve its function of enforcing social values.<sup>140</sup>

Of course it is unusual for law to integrate social values in the form of such inarticulate intuitions. Far more frequently courts enforce social values by transforming them into legal standards—like privacy or offensiveness—which routinely count as legal reasons or principles. Because the exact meaning of a standard is indeterminate until the circumstances of its concrete application, a standard always incorporates considerations that cannot be fully articulated or made explicit. These considerations come from outside the law, so that law which uses standards necessarily renders itself permeable to the influence of implicit social norms.<sup>141</sup> Standards are thus always situated at the nexus of professional reason and popular beliefs.

This silent incorporation of implicit social values does not undermine the capacity of standards, or even necessarily of inarticulate intuitions, to fulfill rule-of-law values like consistency, predictability, stability, reliance, and transparency. Although compliance with explicit principles is one way of realizing these values, so also is compliance with widely shared social norms.<sup>142</sup> Certainly the common law operates on this premise when it

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137. See, e.g., FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 27 (Abraham Hayward trans., Arno Press 1975) (1831). Savigny stresses the “organic connection of law with the being and character” of a people, so that law “is subject to the same movement and development as every other popular tendency.” *Id.* For a modern version of this position, see PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 10 (1965).

138. Philip Selznick, *Foundations of Communitarian Liberalism*, RESPONSIVE COMMUNITY, 16, 21 (Fall 1994).

139. PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 323 (1992).

140. This function of law is captured by Paul Bohannon’s notion of “double institutionalization,” by which he meant that law must reinstitutionalize general social norms. See Paul Bohannon, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33, 35-36 (1965). Cf. Schauer, *supra* note 134, at 650 (“The argument for the nonexistence of commitment to reasons in legal practice likely stems from a common law tradition of particularity. Law is not about generality, the tradition holds, but about particular situations and decisions in cases that the infinite variety of human experience ensues will never repeat themselves.”).

141. For a discussion, see Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 494-98 (1994).

142. See Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1666 (2005) (reviewing GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WAR TIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004)) (“[C]lear rules [are] insufficient. We also require a strong sense of what counts as the relevant category—for example, what conduct our legal culture signifies by use of the term ‘torture.’ That meaning must be so deeply shared that it resolutely resists

expects persons to have the capacity to guide their behavior on the basis of indeterminate standards like "reasonableness,"<sup>143</sup> whose meaning derives from innumerable implicit considerations. Many legal standards of conduct seek to guide behavior in this way,<sup>144</sup> and in some contexts standards may be more effective at achieving rule-of-law values than explicit legal rules.<sup>145</sup> The latter may be opaque to persons who do not possess the expertise of legal professionals.

It follows that judges who justify their decisions by reference to contextual and shared social values may more effectively subject themselves to the discipline of popular scrutiny than judges who justify their decisions by reference to the dictates of technical professional reason. Because the public may be unable to ascertain whether judges are in fact applying professional reasons articulated in past decisions, but are able to ascertain whether judges are accurately applying social values, the incorporation of contextual and shared social values into the law may advance the goal of disciplining judges to the virtue of consistency. It may also more immediately and powerfully justify state coercion than appeals to professional reason and principle.<sup>146</sup>

This suggests that the weak form of the dilemma postulated by Mishkin may be no dilemma at all. If the notion that adjudicative law should act according to reasons and principles means that judges should act only on the basis of reasons and principles that are explicit and determinate, the requirement is false to actual practice and unnecessary to the fulfillment of rule-of-law values and the justification of state coercion. If, on the other hand, the requirement that adjudicative law should act according to reasons and principles means that judges should act only on the basis of reasons and principles that derive from the logic of professional practice, as distinct from the logic of general social values, the requirement is also false to actual practice and unnecessary to the

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collapse into underlying rationales or hijacking for extrinsic rationalizations. The repressive forces Professor Stone means to control are so powerful and pernicious precisely because they tend to undermine that shared sense of meaning." (footnote omitted).

143. See Post, *supra* note 141, at 499-503.

144. See Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989).

145. As one of us has written:

Nor is it self-evident as a general matter (the conventional wisdom notwithstanding) that rules constrain behavior more than standards. Rules, which lack the chilling effect imposed by standards, may free individuals to pursue counter-purposive advantage right up to the line demarcated by the rule. Further, rules often leave gaps or generate conflicts, rendering mechanical application difficult or impossible; ostensibly vague standards, by contrast, may resonate with the constraining effect of social norms. As it becomes increasingly apparent that rules generate unfair results that turn on technicalities, moreover, the pressure on regulators and the regulated to circumvent a rule-bound regime will increase. A clear rule constrains less insofar as judges become less prepared to enforce it.

Siegcl, *supra* note 142, at 1664-65 (footnotes omitted).

146. See *supra* text accompanying note 17.

fulfillment of rule-of-law virtues and the justification of state coercion. The first interpretation of the demand for principled adjudication stresses the need for law to be transparently explicit and determinate; the second emphasizes the need for law to separate itself from politics. While transparency and professionalism are no doubt important values in the law, it is simply fantasy to imagine that law can be fully determinate or fully autonomous from popular beliefs.

It is especially important to resist the lure of this fantasy in the context of constitutional law. The authority of the Constitution flows not only from its status as law, but also from its status as the repository of our “fundamental nature as a people,” which “is sacred and demands our respectful acknowledgement.”<sup>147</sup> When Woodrow Wilson argued that “the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age,”<sup>148</sup> his point was that the Constitution must be understood as an expression of the deepest values of the nation. The Constitution has always veered between a document owned and articulated by professional lawyers,<sup>149</sup> and, in Franklin Roosevelt’s words, a “layman’s charter” owned and articulated by the People themselves.<sup>150</sup> As a charter of national governance, the Constitution has always outrun the narrow confines of professional legal reason.<sup>151</sup>

Constitutional law shares this instability, vibrating constantly between the professional logic of reason and principle and the intuitive, implicit, and contextual logic of fundamental social values. This is evident throughout the Court’s decisions, whether one looks at the instability of legal concepts like “classifications based upon race,”<sup>152</sup> or the

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147. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167-69 (1987).

148. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908).

149. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (1997) (“[I]nterpretation of the Constitution . . . is . . . essentially lawyers’ work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth.”). According to Justice Scalia, only “principle and logic” should determine “the decisions of this Court.” *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). It is thus unsurprising that Scalia lambasted Powell’s opinion in *Bakke* for being “thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.” Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 148.

150. *The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract* (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 367 (Samuel I. Rosenman ed., 1941). See *id.* at 353: “[F]or one hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman’s instrument of government and those who would shrivel the Constitution into a lawyer’s contract.”

151. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

152. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 14-28 (2003).

determination in federalism doctrine of whether an activity is a “traditional subject of state concern,”<sup>153</sup> or the determination in First Amendment jurisprudence of whether expression should be regarded as a “matter of public concern”<sup>154</sup> or classified as “commercial speech.”<sup>155</sup> Every Court decision that “balances” or “weighs” incommensurate and potentially incompatible values depends upon contextual interpretations that are deeply influenced by implicit and inarticulate considerations characteristic of social values.<sup>156</sup> If such decisions are proper—and they are pervasive in the life of our constitutional law—it is because constitutional law draws authority from its expression of popular ideals.<sup>157</sup>

This implies that the Court, as the oracle of the Constitution, must always be caught between the demand to interpret the Constitution on behalf of the professional legal reason exemplified by “first-rate lawyers,”<sup>158</sup> and the need to interpret the Constitution so as to “speak before all others” about the nation’s “constitutional ideals.”<sup>159</sup> This tension has characterized constitutional law almost since the beginning of the Republic. The Court has always been torn between defining its audience as

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153. See Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Neil S. Siegel, *Dole's Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming 2008).

154. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 679-82 (1990).

155. Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 17-18 (2000).

156. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

157. Lower court decisions in the Court’s most recent encounter with race-conscious state action are quite explicit about the constitutional pertinence of these ideals to questions of equal protection jurisprudence. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005) (en banc) (Kozinski, J., concurring in result) (“Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities cannot help but foster the live-and-let-live spirit that is the essence of the American experience.”), cert. granted, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) (“Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger described as ‘nothing short of a reconsecration of American ideals.’ What Kluger and others have articulated is that *Brown*’s symbolic, moral and now historic significance may now far exceed its strictly legal importance. . . . *Brown*’s original moral and constitutional declaration has survived to become a mainstream value of American education and . . . the [School] Board’s interests are entirely consistent with these traditional American values. They reinforce our intuitive sense that education is about a lot more than just the ‘three-R’s.’” (referencing RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 710 (1975))), aff’d, 416 F.3d 513 (6th Cir. 2005), cert. granted, *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-915). For analysis of some of the equal protection issues implicated in these cases, see generally Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

158. Hart, *supra* note 3, at 101.

159. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992).

the community of professional lawyers, and defining its audience as the general American public. In this tension lies the strength and legitimacy of our constitutional law. Much would be lost were the Court to abandon that tension in a quixotic quest for an adjudicatory process fashioned solely from the stuff of autonomous, explicit, professional reason.<sup>160</sup>

## VI

### THE TENSION BETWEEN PROFESSIONAL REASON AND POPULAR LEGITIMACY: A STRONG FORM OF THE DILEMMA

The strong form of the dilemma identified by Mishkin can not be so satisfactorily resolved. It arises whenever courts are tempted to decide cases in a manner that affirmatively contradicts or undermines the norms of professional reason. Mishkin argues that a strong dilemma arose in *Bakke* because the Court could achieve the value of reducing social tension over affirmative action only if it could assert that affirmative action programs awarding every applicant “individualized consideration” did not employ facial racial distinctions, which was false.

It is helpful to ask at the outset why such a strong dilemma arises at all. Assuming that reducing tension over affirmative action is a proper constitutional value, why could not the Court in *Bakke* simply have announced that it was distinguishing among affirmative action programs in a manner designed to achieve that value, and so entirely have avoided any strong dilemma? The Court could have said, for example, that for constitutional purposes the difference in appearance between affirmative action programs that give individualized consideration and affirmative action programs that perpetuate quotas is constitutionally significant because the latter contribute far more substantially to racial balkanization and are consequently more controversial.<sup>161</sup> Of course the plausibility of this principle would depend upon its underlying empirics, but the essential point is that there is nothing about this principle that would contradict professional norms. Hence this justification for the *Bakke* opinion would not have created a strong dilemma. Why, by contrast, was it thought necessary to announce a false legal principle in the context of the claim that affirmative action programs awarding every applicant “individualized

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160. For a discussion, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). Cf. Jeffries, *supra* note 117, at 23 (“[I]t is startling to note how little either the insight or the impact of Powell’s opinion in *Bakke* depended on his abilities as a lawyer. . . . [H]is achievement in *Bakke* came despite, not because of, the constraints of legal reasoning.”).

161. In the context of affirmative action in government contracting, for example, the Court has explicitly crafted constitutional principles that distinguish among programs on the basis of their capacity to achieve “[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989).

consideration” did not employ facial racial distinctions? The answer illuminates an essential but neglected function of our legal system, a function that Mishkin’s focus on the logic of popular symbolism invites us to theorize.

This function is clarified by J.L. Austin’s insight about the different functions of speech.<sup>162</sup> Speaking performs a *locutionary* act, which is to say that it “utter[s] a sentence that has a particular meaning.”<sup>163</sup> Speaking also performs an *illocutionary* act, which is to say that in asserting a particular meaning it enacts a particular kind of action, like promising, marrying, deciding, etc. And speaking performs a *perlocutionary* act, which is to say that it causes contingent effects in the world. Austin observes that the “perlocutionary” force of speech turns on “what we bring about or achieve by saying something, such as convincing, persuading, [or] deterring.”<sup>164</sup>

The locutionary aspect of speech is what makes it intelligible, the illocutionary aspect is what it accomplishes *in* being spoken, and the perlocutionary aspect is what it accomplishes *by* being spoken. Note that because these are all *aspects* of speech rather than *categories* of speech, the same utterance can have all three dimensions. Thus the locutionary aspect of “I promise” makes the promise intelligible as a promise; the illocutionary aspect produces the promise itself; and the perlocutionary aspect produces effects in the listener, such as reassurance or trust.<sup>165</sup>

When legal process jurisprudence celebrates the need for principles, it conceives principles as having illocutionary force. The principles announced by a judicial opinion have legal force merely by virtue of the fact that they have been articulated as reasons for judicial action. If the Court in *Bakke* were explicitly to state that the constitutionality of affirmative action programs depended upon the extent to which they contribute to racial balkanization, the statement would possess the illocutionary force of a new principle of constitutional law.<sup>166</sup> There would be no strong dilemma.

Notice, however, that the illocutionary force of such a legal principle can not by itself reduce tension over affirmative action. The question of whether the words of a court opinion have any particular empirical effect depends upon their *perlocutionary* force. The perlocutionary force of a court opinion is a matter of contingent causality that very much depends upon exactly how a court speaks (among other things).<sup>167</sup> Were the Court

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162. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 95-109 (2d ed. 1999).

163. Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 295 (1993).

164. Austin, *supra* note 162, at 109.

165. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 869 n.554 (2002) (citation omitted).

166. For development of this point, see Siegel, *supra* note 157.

167. It is not necessary to assume that the public carefully parses Supreme Court opinions. It is necessary to assume only that the content of the Court’s speech is relevant to the perlocutionary effect



explicitly to announce that it was classifying affirmative action programs with an eye to reducing tension over affirmative action, the Court's very announcement might significantly affect whether its decision could achieve its desired impact: It is at least as likely that the announcement would undermine the intended perlocutionary effect of the opinion as enhance it.<sup>168</sup>

Mishkin interpreted *Bakke* as written for the purpose of achieving the perlocutionary goal of reducing social controversy over affirmative action. He believed that this goal could be attained only if the Court's opinion "both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides."<sup>169</sup> To acknowledge the moral claims of those urging color blindness, it was necessary to assert that all state programs based upon race would be constitutionally disfavored and subject to strict scrutiny. Actually to apply this principle, however, would undermine all affirmative action programs. To sustain the moral claims of those who saw affirmative action as necessary to overcome centuries of discrimination, Powell (in Mishkin's view) believed it necessary to assert that affirmative action programs giving applicants "individualized consideration" were not based upon race. Because this latter assertion could not be squared with the dictates of professional reason, a strong dilemma arose.<sup>170</sup>

Mishkin thus argued that the strong dilemma in Powell's *Bakke* opinion came about because the only way the Court could achieve its desired perlocutionary effect of reducing tension over affirmative action was to assert illocutionary meanings that were inconsistent with professional principles.<sup>171</sup> This suggests that strong dilemmas arise when the Court seeks to fulfill a social value by creating a perlocutionary effect

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of its holding. We acknowledge that the meaning of Court opinions is conveyed to the public in complex, highly mediated ways.

168. This is why Mishkin, while "recogniz[ing] that wise and effective government may at times require such indirection and less-than-full candor," did not see how one could "proceed by proclaiming in a Supreme Court opinion that this is what is happening." Mishkin, *supra* note 28, at 928. In other contexts, however, the explicit announcement of a perlocutionary objective might not have a self-undermining effect. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995); *Croson*, 488 U.S. 469 (1989).

169. Mishkin, *supra* note 28, at 922.

170. A quarter century later, Justice O'Connor sought to resolve this same strong dilemma in a different way. Like Powell, she wished to authorize institutions of higher education to engage in affirmative action. But, in contrast to Powell, she was willing to acknowledge that such programs were based upon race. She nevertheless sought to vindicate and protect these programs by applying the test of strict scrutiny in a manner that was so deferential as to be inconsistent with the generally accepted meaning of the test. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); Post, *supra* note 118, at 57-58 and n.257.

171. From the perspective of perlocutionary effect, the general public was for Mishkin merely the object of the Court's benevolent manipulation. He did not seem concerned that manipulation in law could corrode the integrity of the Court's conversations with the country. See *supra* note 69. This was perhaps because he did not perceive much value in the Court's attempting to converse with a public whose symbolic commitments were largely impervious to rational persuasion.

attainable only by illocutionary meanings that contradict professional reason.<sup>172</sup> This is exactly the structure of the strong dilemma that Mishkin identified in his analysis of *United States v. Nixon*. He argued that the Court in *Nixon* sought to achieve the perlocutionary effect of maintaining its own legitimacy, which the Court believed could be accomplished only by illocutionary meanings that were inconsistent with defensible principles of separation of powers.<sup>173</sup> Because the Court's legitimacy is an empirically contingent fact, it can not simply be decreed though the illocutionary force of the Court's principles; it must be causally produced through the impact of the Court's words.

Mishkin's concern with strong dilemmas, in other words, evidences his focus on the potential tension between perlocutionary effect and illocutionary force. This focus is immensely illuminating. Many modern theorists seek to understand the dialogue provoked by the opinions of the Court; they conceive the relationship between the Court and the public as a matter of rational conversation.<sup>174</sup> Mishkin, by contrast, invites us to imagine the full perlocutionary force of the Court's decisions, which goes far beyond their rational content.<sup>175</sup> He is concerned with how the structure and language of Court decisions affect public opinion. Modern scholars might explore this question with the tools of anthropology, cultural theory, or economics. Although Mishkin used a relatively unsophisticated methodology that emphasized irrational symbolism, the question he invites us to analyze is essential to the legitimation of the legal system.

Most precisely formulated, Mishkin's work focuses our attention on dilemmas that arise when the Court seeks to attain a perlocutionary impact that can be achieved only through the articulation of illocutionary meanings that are inconsistent with the dictates of professional reason. Strong dilemmas have bite because, despite claims to the contrary,<sup>176</sup> courts must pay attention to the perlocutionary effects of their opinions. This is because the legal system exists to serve purposes for society at large—"to regulate behavior and to maintain social cohesion as

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172. Cf. Jeffries, *supra* note 117, at 25 ("Sometimes, there is indeed a wide gulf between legal reasoning and political wisdom. Sometimes, the gap between the conventional criteria of judging . . . and a politically far-sighted decision is unbridgeably large. Where that is true, there is no easy melding of legal craft and political insight. The judge must choose between them." (internal quotation marks omitted)).

173. See *supra* Part II.

174. See *infra* note 200.

175. For a contemporary example of scholarly analysis of perlocutionary effects, see Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1658-59 (2004).

176. See, e.g., *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 920 (2004) (memorandum of Scalia, J.) ("To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.")

circumstances change.”<sup>177</sup> In order to accomplish these purposes, a court must “anticipate[] the disputants’—or a community’s—reactions to [its] behaviour.”<sup>178</sup> The legitimation of the legal system, like the legitimation of any government institution, “is constituted by its collective acceptance,”<sup>179</sup> and this acceptance depends upon public perception.<sup>180</sup> That perception, in turn, is a result of the perlocutionary effect, rather than the illocutionary force, of judicial opinions.<sup>181</sup> This is all so clear that we might pose the opposite inquiry: If the perlocutionary effects of an opinion are consistent with, or required by, overarching goals of the legal system, why should it matter whether the opinion is inconsistent with professional reason?

One possible answer is that the legitimacy of the legal system also depends, as Mishkin observed in his *Foreword*, on the popular belief that courts decide cases based upon law, which means based upon the logic of professional reason. In his recent confirmation hearings Chief Justice John Roberts masterfully appealed to this belief: “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire.”<sup>182</sup> It is in part because much of the public believes that judges are merely umpires who apply preexisting principles that judicial decisions have legitimacy

177. Alec Stone Sweet, *Judicialization and the Construction of Governance*, in MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 63 (2002).

178. *Id.*

179. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 117 (1995). “Institutions survive on acceptance.” *Id.* at 118. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283, 307 (2003) (“Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.”); Oscar Schachter, *Towards a Theory of International Obligation*, 8 *V.A. J. INT’L L.* 300, 309 (1968) (“[W]hether a designated requirement is to be regarded as obligatory will depend in part on whether those who have made that designation are regarded by those to whom the requirement is addressed (the target audience) as endowed with the requisite competence or authority for that role.”).

180. Alexis de Tocqueville remarked that the “power” of Justices of the Supreme Court is immense, but it is power springing from opinion. [Justices] are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.

The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 150-51 (J.P. Mayer ed., George Lawrence Trans., 1969).

181. See, e.g., SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 77 (1960) (“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”).

182. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.).

with litigants who lose as well as with litigants who win.<sup>183</sup> On this view, courts legitimate the legal system when they construct their opinions according to the dictates of professional reason.

This is of course the central premise of legal process jurisprudence. The basic idea is that faithful compliance with professional norms is in the long run the best hope for legitimating the legal system. This idea is hotly debated within the political science literature.<sup>184</sup> But even if we accept its basic thrust, as Mishkin plainly did, there is nevertheless much to be said about it. We shall confine ourselves to two observations. First, the assumption that compliance with professional norms legitimates courts in the long run does not necessarily imply that courts ought to ignore the perlocutionary force of particular decisions. Mishkin was drawn to the contemplation of strong dilemmas because he recognized that desirable perlocutionary impact might in particular cases outweigh the general effect of routine adherence to principles of professional craft. He also believed, however, that if breaches of professional norms were to become common enough, the public might come to lose its "trust"<sup>185</sup> that courts are indeed impartial legal decision makers.<sup>186</sup> No single case would likely undermine public confidence in norms of professional practice,<sup>187</sup> but every *publicly apparent* violation of such norms would increase the risk of public disillusionment.<sup>188</sup> And, as Mishkin had observed early in his career,

183. For a theoretical account of this point, see Sweet, *supra* note 177.

184. See, e.g., TERRI J. PERETTI, IN DEFENSE OF A POLITICAL COURT 161-88 (1999) (arguing that the legitimacy of the Supreme Court depends upon the results of its opinions, not upon its legal reasoning).

185. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 204-08 (2002); Carla Hesse & Robert Post, *Introduction*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 20 (Carla Hesse & Robert Post eds., 1999).

186. "Law depends for its existence on a *reciprocity of expectations* between the governed and the governors, expectations that survive only when there is adherence to the rule of law." Martin P. Golding, *Transitional Regimes and the Rule of Law*, 19 *RATIO JURIS* 387, 390 (1996).

187. For musing on the distrust of legality that a single decision can cause, see Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

188. Martin Shapiro theorized this dilemma with perfect clarity:

If the Court is to be successful as a political actor, it must have the authority and public acceptance which the principled, reasoned opinion brings.

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... To put it bluntly, the real problem is how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of "neutrality" which are an important factor in our legal tradition and a principal source of the Supreme Court's prestige. It is in these terms, and not in terms of the philosophic, jurisprudential, or historical correctness of the concept of neutral principles, that the debate should now proceed.

Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 *GEO. WASH. L. REV.* 587, 603, 605-06 (1963). Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992):

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court

repudiating the constraints of professional standards in order to achieve desirable perlocutionary effects would also contribute to a “self-fulfilling” prophecy in which the constraints of professional norms would grow inexorably weaker.<sup>189</sup>

Legal process jurisprudence arose in order to defend law from the charge that it was merely a mystified form of politics. It was born out of an intense concern for the vulnerability of professional norms of craft, which it conceived as perpetually at risk from the temptation to deform law by demeaning it into a species of political action.<sup>190</sup> Mishkin had so deeply internalized this concern that it left him literally speechless before what he perceived to be the tragic choice of strong dilemmas. As he wrote at the conclusion of his analysis of *Nixon*, he could approve the Court’s focus on the perlocutionary effects of its decision “only with tentativeness and subject to reexamination with greater perspective,” because he was “sufficiently conscious of the dangers of simply concluding that short term success is its own proof of right.”<sup>191</sup> At the end of his *Bakke* lecture, he did not deem it appropriate to go even that far.

Strong dilemmas were unspeakable for Mishkin because they threatened to undermine the professional norms that made possible the rule of law. Mishkin was especially sensitive to the possibility of strong dilemmas because, like many involved in legal process jurisprudence who sought to repel the challenge of legal realism, he was concerned to stress the determinate integrity of professional norms.<sup>192</sup> He therefore imagined that violations of “good lawyering”<sup>193</sup> potentially caused by strong dilemmas would be immediately obvious and demoralizing. Underlying Mishkin’s apprehension of the tragedy of strong dilemmas, in other words,

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cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court’s decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court’s opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

*Id.* at 865-66.

189. See generally Mishkin, *supra* note 27.

190. See *supra* note 11.

191. Mishkin, *supra* note 32, at 91.

192. See *supra* note 26.

193. Hart, *supra* note 3, at 100.

lay a particular picture of the autonomy and thus the vulnerability of professional principles.

The force of strong dilemmas might well change, however, if professional norms were defined differently. Our second observation goes to this point: The more that professional norms are conceptualized in ways that are impervious to the achievement of perlocutionary goals and that seem to require determinate outcomes, the more likely strong dilemmas are to arise. Conversely, the more that professional norms are conceptualized as supple and indeterminate, the more likely it is that the various perlocutionary ends that courts might otherwise seek to achieve can be rendered consistent with professional reason, and the less likely it is that strong dilemmas will arise.

Professional reason ought to be framed so as to achieve the purposes of the legal system. No doubt these purposes include the fair, just, and efficient resolution of disputes.<sup>194</sup> But if, as we have argued in Part V, these purposes also include the expression of fundamental social values, norms of professional reason should also be defined so as to facilitate the capacity of the legal order “to bring the public administration of justice into touch with changed moral, social, or political conditions.”<sup>195</sup> This dimension of professional craft is what Brandeis<sup>196</sup> and Frankfurter<sup>197</sup> called judicial “statesmanship.”<sup>198</sup> Infusing craft norms with considerations of statesmanship would not only enhance the law’s ability to achieve the important function of expressing social ideals, it would also reduce the

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194. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

195. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 445 (1906).

196. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 314.

197. Felix Frankfurter, *The Court and Statesmanship*, in LAW AND POLITICS 34 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939). See Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 702 (1999) (For Frankfurter the Court was “a forum for ‘statesmanship’ . . . . In that new role, the Court had to recognize the nondeterminative nature of the Constitution’s vague provisions, the wisdom and propriety of deferring to legislative judgments, and the unavoidable need ‘to gather meaning not from reading the Constitution but from reading life.’” (citation omitted)).

198. For de Tocqueville’s views on judicial statesmanship, see *supra* note 180. Chief Justice Taft agreed on this point. In a letter congratulating George Sutherland on his appointment to the Supreme Court, Taft wrote:

I do not minimize at all the importance of having Judges of learning in the law on the Supreme Bench, but the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State. A Supreme Judge must needs keep abreast of the actual situation in the country so as to understand all the phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions.

Letter from William Howard Taft to George Sutherland (Sept. 10, 1922), *microformed on* William H. Taft Papers, Reel 245 (Library of Cong., 1969).

likelihood that achieving desirable perlocutionary effects would conflict with principles of professional reason. This suggests that by stressing the distinction between the professional logic of legal reason and the emotional logic of cultural symbolism, Mishkin was actually conceptualizing professional norms in ways that would enhance the likelihood of strong dilemmas. How professional norms ought to be constructed ultimately turns on the appropriate jurisprudential balance between fidelity to social values and faithfulness to the autonomous requirements of professional reason.

Contemporary scholars, taking their lead from Bickel,<sup>199</sup> have not tended to focus on the issue of strong dilemmas. This is not because such dilemmas do not exist, but instead because contemporary scholars have conceived professional reason as effectively in dialogue with public values.<sup>200</sup> This dialogue renders strong dilemmas less likely to arise. Mishkin's work reminds us, however, that this approach risks potential danger. If professional norms are rendered too permeable to social values, the autonomous integrity of legal reason may be diluted and compromised, so that the practice of professional reason may in the public mind begin to merge with the exercise of merely political power. A veteran of the battles over legal realism, Mishkin might well regard contemporary scholarship as foolishly complacent about this potential vulnerability of professional reason. Yet it would be ironic indeed if Mishkin's efforts to shore up professional craft by emphasizing its autonomy were to have the ultimate effect of rendering legal reasoning more fragile, because more susceptible to the recurring corrosion of strong dilemmas.

## VII

### MISHKIN AS A COLLEAGUE AND TEACHER: AN APPRECIATION

Mishkin's reserve about strong dilemmas has fortunately not extended to his activities as a colleague and a teacher. In those capacities, he has been an unending source of wisdom and insight.<sup>201</sup> As a teacher, Mishkin has pursued the antinomy of professional reason and popular belief.

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199. See, e.g., BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 76, at 91 ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.").

200. See, e.g., Post, *supra* note 118, at 107-12; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). For a recent overview and assessment of such work, see Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006).

201. See, e.g., Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 n.1A (1960) ("It would be dishonest or very naïve not to recognize the heavy debt the author owes to Professor Paul Mishkin. He cannot be charged with any of the ideas this Note contains, nor can his reaction to them be anticipated. But the impression remains that so much of it as is intellectually satisfying derives from perspectives—or from methods of developing perspectives—which are held on loan from him.").

Regardless of which side of the divide his students might select, Mishkin has never allowed them to rest easy with their choice. He applied this method to a range of subjects, from Chief Justice Marshall's performance in *Marbury v. Madison*,<sup>202</sup> to the passive-virtues debate,<sup>203</sup> to the Court's controversial disposition of *Naim v. Naim*.<sup>204</sup>

Mishkin characteristically impressed on his students and colleagues the potentially acute tradeoff between legal principle and wise politics; the normative power of the actual;<sup>205</sup> the subtle yet profound importance of symbols and appearances, from columns to robes;<sup>206</sup> and the critical distinction between dishonesty and less than full candor.<sup>207</sup> The tough antinomies that Mishkin identified in his writing unleashed magical discussions for all of us lucky enough to know him well, discussions we

202. 5 U.S. (1 Cranch) 137 (1803).

203. Compare BICKEL, *supra* note 30, at 111-98, with PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO, & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 660-62 (2d ed. 1973), and Gerald Gunther, *The Subtle Vices of the "Passive Virtues" A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 11-12 (1964). See *supra* note 77.

204. See 350 U.S. 985 (1956) (dismissing for want of a substantial federal question a challenge to Virginia's antimiscegenation statute despite the statute's incompatibility with the equal protection principles first articulated in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). See, e.g., Siegel, *supra* note 19, at 2017 ("*Naim* [did not] exemplify how the Court should go about its daily business. Rather, it constituted a rare accommodation that principle made with pragmatism for the ultimate purpose of vindicating *Brown*'s promise. Principle lost the battle for a few more years, a significant—and perhaps intolerable—cost, but at least principle put itself in a position not to lose the war." (footnotes omitted)). When the legitimacy of *Brown* was more secure, the Court unanimously invalidated Virginia's antimiscegenation statute as a violation of equal protection and due process. *Loving v. Virginia*, 388 U.S. 1 (1967).

205. During the litigation over *Miranda v. Arizona*, 384 U.S. 436 (1966), Mishkin coauthored an *amicus* brief on behalf of the American Civil Liberties Union in which he argued that the rule requiring certain procedural protections should be deemed prophylactically necessary. See Brief of the American Civil Liberties Union, *Amicus Curiae, Miranda*, 384 U.S. 436, 1966 WL 100516, at \*21 ("The Inherently Compelling Nature of Police Custodial Interrogation Requires That a Confession Obtained During Such Interrogation Be Excluded Unless the State Shows That There Were Present Adequate Devices to Protect the Subject's Privilege Against Self-Incrimination."). He did not believe that the Court was prepared to hold that the Constitution required such warnings. Mishkin proved correct, and the Court adopted his unusual rationale. *Miranda*, 384 U.S. at 478-79 ("[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege."); see also *id.* at 463 (noting "both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself"). Yet thirty-four years after *Miranda* changes on the ground in actual police practices prepared the Court to decide in *Dickerson v. United States*, 530 U.S. 428 (2000), that "*Miranda* is constitutionally based." *Id.* at 440. The change could be interpreted as illustrating what Mishkin would call the normative power of the actual.

206. See, e.g., Mishkin, *supra* note 46, at 63 n.29 ("Though I know that judges are human and quite distinct individuals, I am not in favor of their doffing their robes, for I think there is value in stressing, for themselves and for others, the quite real striving for an impersonality I know can never be fully achieved.").

207. The difference between using the Constitution as a shield and using it as a sword also comes to mind. So does the distinction between finality and infallibility.



will never forget. His students and his colleagues cannot help but read high-profile, recent decisions—like those involving homosexuality<sup>208</sup> and symbolic endorsements of religion<sup>209</sup>—in light of the perennial tension between the general obligation to conform to professional standards and the perlocutionary effects of a singular opinion.

As a teacher and as a colleague, Mishkin has always been the master of legal craft. He has implacably pursued the goal of legal excellence. A consummate professional, he has given generously of his insight and experience. To his students, Mishkin has continuously emphasized the kind of mid-level theorizing characteristic of first-rate lawyers. He has proven a hard taskmaster, with no affection for lazy or sentimental thinking. But over the years he has been as demanding of himself as he has been of others, and he has inspired fierce loyalty and affection.

Mishkin is particularly fond of the declaration of a Talmudic rabbi who said: “And especially from my students did I learn!” The rabbi’s profession of gratitude struck Mishkin some time ago, and it has resonated with him ever since. We, too, have a debt to declare. We count ourselves very fortunate to have learned from Paul Mishkin in his role as a colleague, teacher, and dear friend. His insight and his rigor have guided us, and his scholarly humility has reminded us that at most we can aspire to form part of an ongoing conversation about the nature of our indispensable and yet ultimately mysterious Constitution. If we are lucky, we can at times have interlocutors as deep, as challenging, and as far-seeing as Mishkin.

And especially from Paul have we learned.

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208. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court dramatically overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), announcing a right of sexual privacy in the home that extends to homosexuals. Yet the Court appeared ambivalent about whether the right sounded in liberty or equality, see 539 U.S. at 575, avoided the language of fundamental rights or strict scrutiny, *id.* at 578, and suggested that the issue of gay marriage was distinguishable without explaining why or how, *id.* If the Court followed to its logical conclusion its defense of the dignity of intimate homosexual relationships and the state’s lack of authority to demean homosexuals, *id.* at 560, 567, 575, and 578, prohibitions of gay marriage would almost certainly violate equal protection. Yet the Court explicitly avoided this conclusion. *Id.* at 578.

209. In *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court held 5-4 that the *McCreary County* Ten Commandments display violated the Establishment Clause but that the *Van Orden* monument did not. Only Justice Breyer was in the majority in both cases, and his narrow concurrence in the judgment was decisive in *Van Orden*. Breyer declared that he was acting explicitly to reduce the “divisiveness” that Ten Commandments cases generate. 545 U.S. at 698 (Breyer, J., concurring in judgment). He sent a strong signal that advocates of church-state separation should not challenge longstanding displays and that their adversaries should not build new ones. *Id.* at 703-04.

