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PARADOXES IN LEGAL THOUGHT

*George P. Fletcher**

Traditional legal thought has generated few anomalies, antinomies, and paradoxes. These factual and logical tensions arise only when theorists press for a complete and comprehensive body of thought. Discrete, unconnected solutions to problems and particularized precedents spare us the logical tensions that have troubled scientific inquiry.

Anomalies arise from data that do not fit the prevailing scientific theory.¹ Paradoxes and antinomies, on the other hand, reflect problems of logical rather than factual consistency. To follow Quine's definitions,² paradoxes are contradictions that result from overlooking an accepted canon of consistent thought. They are resolved by pointing to the fallacy³ that generates them. When we confront the special form of paradox called an antinomy,⁴ however, we have no such easy way out. The resolution of these more troubling contradictions requires reexamination of our fundamental premises. The solution typically represents a conceptual innovation,⁵ a new way of looking at the field of life that generates the contradiction.

For these factual and logical puzzles to become significant in a body of thought, theorists must be committed both to the completeness and to the consistency of their theoretical accounts. The impulse toward completeness renders anomalies disturbing. Confronted by data not explainable by the prevailing theory, theorists must either confess the incompleteness and inadequacy of their system or revise their tools

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1. See T. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970) [hereinafter cited as T. Kuhn, *Scientific Revolutions*]. Kuhn defines the discovery of an anomaly as the recognition "that nature has somehow violated the paradigm-induced expectations that govern normal science." *Id.* at 52-53. For example, the data on the orbits of the planets, later shown to be elliptical by Kepler, were anomalous under the Copernican theory of circular orbits. See T. Kuhn, *The Copernican Revolution* 212 (1957).

2. Quine defines a paradox approximately as a "conclusion that at first sounds absurd but that has an argument to sustain it." W. Quine, *The Ways of Paradox and Other Essays* 1 (1966). That seeming absurd conclusion "packs a surprise, but it is seen as a false alarm when we solve the underlying fallacy." *Id.* at 11.

3. A fallacy is simply an invalid form of argument. For a detailed analysis and classification of recognized fallacies, see Mackie, *Fallacies*, in 3 *Encyclopedia of Philosophy* 169 (1972).

4. "An antinomy produces a self-contradiction by accepted ways of reasoning. It establishes that some tacit and trusted pattern of reasoning must be made explicit and henceforward be avoided or revised." W. Quine, *supra* note 2, at 7.

5. "An antinomy . . . can be accommodated by nothing less than a repudiation of part of our conceptual heritage." *Id.* at 11.

of analysis to accommodate the anomaly. For example, those committed to the economic analysis of law initially regarded comparative negligence as anomalous under their system.⁶ The criteria of crime, criminal responsibility, and punishment have yet to receive an adequate account in the literature of law and economics.⁷ If anomalies like these accumulate, they can, as Kuhn has taught us, overthrow the theory that causes them to stand out.⁸ Until that overthrow occurs, the recognition of anomalies bears witness to the importance of the theoretical enterprise. That anomalies are troubling reflects a shared commitment to the development of a complete theory, not merely the accumulation of discrete formulae for unrelated factual data.

The commitment to the consistency of logical structures—as contrasted with the completeness of their theories—drives theorists to grapple with paradoxes and antinomies. This drive has been evident, as we shall see,⁹ in the philosophical tradition. Oddly, the commitment to consistency has generated little progress in legal theory. The Holmesian belief that “the life of the law has been experience rather than logic”¹⁰ provides a good excuse for ignoring seeming contradictions in the structures of legal argument. This aversion to logical thought is buttressed by the ubiquitous misreading of Emerson’s branding consistency as the “hobgoblin of little minds.”¹¹ What Emerson deplored is the “foolish consistency”¹² of those unwilling to change their views over time. Yet criticizing inflexibility provides no excuse for accepting contradictory positions. In some circles of supposedly critical thought, it is even fashionable to tolerate contradictions as an inescapable feature of legal thought.¹³ These antitheoretical and antirational strains in legal thought discourage dialogue and preclude advances in our understanding of legal phenomena.

This Article commits itself to logical consistency as the indispensable foundation for effective dialogue and coherent criticism. Only if we

6. See, e.g., R. Posner, *Economic Analysis of Law* 124 (2d ed. 1977). For a response to Posner, see Haddock & Curran, *An Economic Theory of Comparative Negligence*, 14 *J. Legal Stud.* 49 (1985); see also Rose-Ackerman, *The Simple Economics of Tort Law* (Sept. 1985) (unpublished manuscript) (on file at the offices of the Columbia Law Review).

7. For efforts to come to grip with these issues, see Fletcher, *A Transaction Theory of Crime*, 85 *Colum. L. Rev.* 921 (1985); Klevorick, *Legal Theory and the Economic Analysis of Law*, 85 *Colum. L. Rev.* 905 (1985); Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193 (1985).

8. See T. Kuhn, *Scientific Revolutions*, *supra* note 1, at 52–65.

9. See *infra* text accompanying notes 15–21.

10. O. Holmes, *The Common Law* 1 (1881).

11. R. Emerson, *Self Reliance*, in *Essays and Other Writings of R. Emerson* 152 (1940).

12. The full quote is: “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.” *Id.*

13. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1712–13 (1976) (describing his “method of contradictions”).

accept consistency as an overriding legal value will we be troubled by the paradoxes and antinomies that lie latent in our undeveloped systems of legal thought. Grappling with uncovered paradoxes and antinomies will impel us toward consistent theoretical structures. None of this, I submit, requires us to suppress our sensitivities to policies, principles, or other questions of value.

I. PARADOXES AND ANTINOMIES IN THE PHILOSOPHICAL TRADITION

I begin by briefly examining paradoxes and then antinomies in mathematics and philosophy. This survey of logical puzzles will help identify analogous problems in legal thought.

To start with an arithmetic paradox, consider the nominally correct proof that $2 = 1$. The proof goes like this. Let $x = 1$. Multiplying by x , $x^2 = x$. If we subtract 1 from both sides, we get: $x^2 - 1 = x - 1$. By factoring $x^2 - 1$ into $(x + 1)(x - 1)$, we can divide both sides of the equation by $(x - 1)$, and thus: $x + 1 = 1$. Recalling the premise that $x = 1$, and substituting 1 for x , it follows that $2 = 1$. We could as easily show that $2 = 3$, $3 = 4$, and so on. These conclusions illustrate the inference of a contradiction from seemingly acceptable premises. On the one hand, we know that 1 does not equal 2. On the other, there seems to be nothing wrong with assuming that $x = 1$ and proceeding with the other steps of the proof. If this contradiction were allowed to stand, arithmetic would obviously collapse. Something is wrong somewhere, but where?

The fallacy in the proof comes in dividing both sides of the equation by $x - 1$. This move is not fallacious in the abstract. But when $x = 1$, as it does in this proof, the step is tantamount to dividing by zero. That we are not allowed to divide by zero is a rule fundamental to the arithmetic system. Sometimes we say that dividing by zero yields infinity, a notion beyond ordinary arithmetic rules. We know today that if one is doing arithmetic, one can neither divide by zero nor attempt to apply arithmetic operations to infinity. For the arithmetic or any logical system to flourish, theorists must identify and avoid steps, like dividing by zero, that generate contradictions.

Zeno's paradox of the race illustrates a more subtle puzzle.¹⁴ If a tortoise starts ten feet ahead of Achilles and the latter runs ten times as fast, we know, as a matter of elementary common sense, that Achilles will soon pass the tortoise. The paradox arises from the logic of infinite division of the interval between the two. As Achilles runs the first ten feet, the tortoise will run one foot. As Achilles runs the next one foot and catches up, the tortoise will run yet another .1 foot. As Achilles

14. We owe our knowledge of Zeno as a person to Plato, *Parmenides* 127a-128e. The example of the racecourse is attributed to Zeno in Aristotle, *Physics* 239b. For a general discussion of Zeno, see Vlastos, *Zeno of Elea*, in *8 Encyclopedia of Philosophy* 369 (1972).

bounds the .1 foot between them, the tortoise will advance another .01 foot. The division goes on indefinitely. As a matter of pure logic, Achilles can never reach the point that the tortoise then holds. If he cannot come equal with the tortoise, he can obviously never pass him. Experience tells us that Achilles will pass the tortoise, and rather quickly: logic tells us that he never will. Unless we are willing to live with contradictions, we must reject either the lessons of experience or the form of logic that generates the contradiction.

If a paradox can be neutralized by invoking a recognized fallacy, such as dividing by zero, no change is required in our rules of consistent thought. But Zeno's paradox was not so easily resolved. At the time that it was formulated, the paradox of infinite division was a genuine antinomy. From the perspective of our more evolved system of thought, we can now identify a conceptual refinement that the paradox overlooks. The infinite division of the interval between Achilles and the tortoise tends toward the limit of zero. The concept of the limit permits us to treat the infinitesimal as equivalent to nothing: an infinite series converges at a finite sum. Thus we have no difficulty explaining today how Achilles catches up with the tortoise. Using the tools of the limit and of converging series, we can establish that the two will occupy the same position after the tortoise has travelled precisely 1 and 1/9 feet. At that point Achilles passes the tortoise and wins the race. Of course, we did not need the concept of the limit to tell us that Achilles would actually win. But perhaps we did need Zeno's paradox, and others like it, to drive mathematicians to the theory of the limit.¹⁵ Applying the notions of the limit and converging series, we can claim that Zeno's never-ending race is but a simple paradox.¹⁶

Another family of puzzles derives from varieties of self-reference. The most famous example of self-reference in modern logic is Russell's antinomy of classes that belong to themselves.¹⁷ For any property, we can define a class whose members possess the specified property. If the property is simply "being a physical object," there is a class consisting of all physical objects. If the property is defined as "being a class," then there is also a class all of whose members have the property "being a class." This would be a class of all classes. Suppose, however, that the property is specified as "being a class that is not a member of itself." The class of all physical objects is not a member of itself (a class is not a physical object). But the class of all classes is a member of

15. On the origins of the limit and convergent series in the history of calculus, see M. Kline, *Mathematics: The Loss of Certainty 174-75* (1980) (discussed in connection with the problem of infinitesimal quantities, but not explicitly linked to Zeno's paradox).

16. Quine argues that the paradox of the race must have seemed like an antinomy to Zeno, but that "in our latter day smugness [we] point to a fallacy." W. Quine, *supra* note 2, at 11.

17. On the historical context of Russell's paradox, see I. Copi, *The Theory of Logical Types 7-9* (1971).

itself. Could there be, Russell asked, a class consisting of all classes that are not members of themselves? This question generates an antinomy. Let R represent the class that we are trying to build. Something is a member of this class R only if it is itself a class, but not a member of itself. That is, for each class x , x is in R , if and only if x is not in x . So far, there is no contradiction. But since R is a class, let us ask the question whether R is a member of R . If we substitute R for x in the above formulation, we get the following: R is in R , if and only if R is not in R . The contradiction is obvious.¹⁸

When he heard of this paradox, Gottlob Frege said that the foundations of arithmetic, as he conceived them, had collapsed.¹⁹ That a logical contradiction could bring the field of inquiry to a standstill testifies to its scientific vitality. The commitment to consistency drives the inquiry forward by focusing attention on the basic premises that generate the contradiction. The process of reexamining premises can generate significant contributions to the field. Russell's discovery, for example, has yielded a rich literature on the theory of types and the foundations of arithmetic.²⁰

A successful conceptual innovation, like the theory of the limit or Russell's theory of types, requires acceptance by the theoretical community. Not all proposals for resolving antinomies gain this acceptance, and it is a matter of some subtlety to develop criteria for assessing whether this acceptance is both warranted and rational. In the *Critique of Pure Reason*, for example, Kant identifies the antinomy of freedom and determinism as the fundamental contradiction of human action.²¹ One way of thinking about action leads us to the conclusion of freedom; another way leads us to the conclusion that human action, like natural phenomena, is determined by natural laws. To resolve this antinomy, Kant suggests that we view freedom as existing exclusively in a separate noumenal realm abstracted from the physical universe; the determining influence of natural laws is limited to the phenomenal world and therefore operates without restricting human freedom. This conceptual innovation requires that we think of two worlds—the noumenal and the phenomenal—as existing side by side. Whether this is an adequate solution to the antinomy of freedom and determinism is still subject to debate.²² In another line of inquiry, Roberto Unger identifies

18. For a popular discussion of this paradox, see D. Hofstadter, Gödel, Escher, Bach: an Eternal Golden Braid 18–24 (1979).

19. See I. G. Frege, *Grundgesetze der Arithmetik* 253 (1893).

20. See generally I. Copi, *supra* note 17, at 19–20 (“[P]aradoxes revealed that the intuitive set theory underlying mathematics required a radical reconstruction”); M. Kline, *supra* note 15, at 254 (discussing efforts to formalize set theory and overcome paradoxes).

21. See I. Kant, *Critique of Pure Reason* 270–75 (J. Meiklejohn trans. 1934).

22. See R. Wolff, *The Autonomy of Reason* 208–09 (1973) (discussing various strategies for resolving the antinomy of freedom and determinism within the Kantian system).

three antinomies of liberal thought: those of reason and desire, of rules and values, and of theory and fact.²³ Whether his method of total criticism²⁴ resolves these antinomies (assuming that is what they are) is far from clear. It may be that as with paradigmatic change in the history of science,²⁵ acceptance is simply a sociological fact of the scientific or philosophical culture.

II. PARADOXES IN LEGAL THOUGHT

Let us distinguish in the law, as well, between paradoxes and antinomies. Simple paradoxes are resolved by invoking some well-established canon of legal thought that dissolves the problem. Antinomies, in contrast, pose a challenge to the fundamental assumptions of both legal theory and practice. By confronting these paradoxes, we become mindful of the implicit canons of legal thought that enable us to construct consistent explanations of legal phenomena. In this Part, I shall illustrate the way in which simple paradoxes in legal argument can lead us to these fundamental assumptions. In Parts III and IV, I shall turn to two troubling antinomies that should, in the fashion of Russell's discovery, bring at least two small corners of legal analysis to a temporary standstill.

To begin with an easy paradox, consider the problem posed by the crime of bigamy. The crime is defined, typically, as marrying while one is already married.²⁶ Yet as the accepted rule of family law tells us, the second marriage is void.²⁷ How, then, can one marry while being married? Perhaps one cannot, but as a matter of common sense, we know that people do in fact marry twice and thus commit bigamy. If so, we have a paradox: the second marriage is bigamous, but logically, it cannot be. The paradox is resolved by invoking an accepted canon for constructing social reality: the distinction between form and substance. The crime consists not in validly contracting a second marriage, but in purporting to do so, in going through the forms of a marriage ceremony while already married. The common sense view and the criminal law, therefore, attach to the form of the transaction; the rule of family law, to the substance. If we did not have the distinction between form

23. See R. Unger, *Knowledge and Politics* 51-55 (1975) (reason and desire); *id.* at 88-100 (rules and values); *id.* at 31-36 (theory and fact).

24. The core of Unger's argument lies in the elaboration of a theory of the self. See *id.* at 191-235.

25. See T. Kuhn, *Scientific Revolutions*, *supra* note 1, at 166-70 (discussing sociological basis for acceptance of a new scientific paradigm).

26. See Cal. Penal Code § 281 (West 1970) ("[e]very person having a husband or wife living, who marries any other person"); N.Y. Penal Law § 255.15 (McKinney 1980) (sufficient that defendant "purports to contract a marriage with another person at a time when he has a living spouse").

27. See, e.g., N.Y. Dom. Rel. Law § 6 (McKinney Supp. 1984) (second marriage void).

and substance, I suppose we would be genuinely confounded. As it is, the paradox of bigamy represents little more than a teasing puzzle.

An analogous paradox bedeviled thinking about contracts and consideration for about thirty years at the turn of the century. Suppose an obligor enters into an agreement to do an act that he is already bound by a prior contract to do. Is there sufficient consideration to render the second contract binding? The paradox arose from Langdell's attempt to resolve this problem consistently with the then prevailing view that consideration requires the obligor to incur a detriment.²⁸ It does not appear that there is a detriment, for the obligor does not incur a new obligation. "But," Langdell reasoned, "he does incur a detriment by giving another person the right to compel him to do it."²⁹ The paradox resides in the claim that the detriment, required for the validity of the second contract, derives from that very contract, which gives the obligee the right to compel performance. The detriment generates the contract, and the contract generates the detriment.³⁰

Langdell's unwitting paradox generated a rich debate on the theory and structure of consideration.³¹ The strategy for developing a solution traded on the distinction between a lay understanding and the legal interpretation of promising. After several forays by others, Williston approached the problem by conceptualizing the obligor's second promise as a natural rather than legal event. Williston called the second promise to perform "consideration in fact," which could be sufficient to uphold the contract and thereby render the promise binding.³² The same distinction provides an alternative and perhaps superior account of bigamous marriage. Though void in law, the second marriage is effective as a lay phenomenon.

When a paradox is uncovered, we can restore consistency in our legal structures in one of two ways: (1) by finding or constructing a distinction—like that between form and substance—that dissolves the paradox or (2) by abstaining from the legal practice that leads us into contradiction. We can think of these as the theoretical and legislative alternatives. Consistency requires either that we change theory to conform to practice, or change practice to conform to theory. Neither of

28. This doctrinal point is assumed in Williston, *Successive Promises of the Same Performance*, 8 Harv. L. Rev. 27 (1894). This view of consideration enjoys little support today. See E. Farnsworth, *Contracts* 46 (1982) ("benefit and detriment irrelevant" to the bargain theory of consideration); see also *id.* at 273 (critique of "pre-existing duty rule" as ground for denying consideration).

29. Langdell, *Summary of the Law of Contract* 105 (1880).

30. This is an example of circular reasoning, the fallacy of *petitio principii* or "begging the question." It is not, strictly speaking, a paradox that, as Quine says, "packs a surprise." See W. Quine, *supra* note 2, at 11.

31. For a survey and analysis of this literature, see Bronaugh, *A Secret Paradox of the Common Law*, 2 *Law & Phil.* 193 (1983).

32. Williston, *Consideration in Bilateral Contracts*, 27 Harv. L. Rev. 503, 503-05 (1914).

these polar alternatives seems satisfactory. If we manipulate theory in order to conform to practices that seem sound to us, theory becomes nothing more than a pliable tool of rationalization. Yet it seems difficult to abandon a practice like punishing bigamy or defining consideration as incurring a detriment simply because we have not yet found the proper distinction for resolving the paradox at the level of theory.

To illustrate this conflict peculiar to paradoxes in the law, I will consider two puzzles that have prompted at least some theorists, perhaps for inadequate reasons, to favor the legislative alternative and to argue that the legal system should abandon an appealing practical innovation. In referring to these innovations as appealing or sound, I mean that regardless of consistency with existing theory, considerations of principle and of policy argue forcefully for the innovation.

The first example is the defense of mistake of law which, though recognized in some foreign legal systems,³³ has long taxed the thinking of common-law jurists. We know that the maxim "ignorance of the law is no excuse" is riddled by formalistic exceptions.³⁴ Yet scholars and courts are reluctant, as a matter of policy, to encourage ignorance of the law by openly recognizing the defense. The impulse to acquit mistaken defendants remains strong, however, for it seems unjust to punish somebody who acts in good faith and in reasonable reliance on legal advice that her conduct conforms to the law.

Jerome Hall rests his case against recognizing the defense of mistake of law on a paradox supposedly generated by acquitting someone who believed that he was acting legally.³⁵ Hall reasons that if an individual is acquitted on the basis of his subjective perception of legality, it follows that the individual's view of the law becomes tantamount to the law itself. We are committed to the view, however, that legal norms are external and objective; they cannot be displaced simply by a personal opinion about what the law is. We cannot maintain this premise of objectivity and at the same time treat as "the law . . . what defendants or their lawyers believed it to be."³⁶ To avoid this paradox, Hall concludes that we must reject the defense.³⁷

The same argument shaped the opinion of the Maryland court in the widely-read *Hopkins* case.³⁸ A clergyman was prosecuted for the offense of posting signs to solicit marriages. He maintained that he acted

33. See StGB § 17 (W. Ger.); StGB § 9(1) (Aust.); H. Jescheck, *Lehrbuch des Strafrechts* 378 (1978) (noting the tendency toward recognizing the defense in Spanish and Dutch law as well as Austrian, Swiss, and West German law).

34. For a detailed listing of these exceptions, see Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625, 646 (1984).

35. See J. Hall, *General Principles of Criminal Law* 382-83 (2d ed. 1960).

36. *Id.* at 383.

37. Hall's view is further defended in Hall, *Comment on Error Juris*, 24 *Am. J. Comp. L.* 680, 683 (1976).

38. *Hopkins v. State*, 193 Md. 489, 69 A.2d 456 (1950).

solely on the advice of the state attorney general that the signs in question did not violate the statute. The court disagreed with the attorney general and held that the signs were illegal. The clergyman relied, finally, on the reasonableness of his following official advice. Rejecting the defense of mistake, the court wrote: "If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law."³⁹ The implicit paradox prevailed.

This paradox illustrates the way in which the commitment to consistency can, improperly, preclude a desirable change in practice. The contradiction of the defendant's false belief becoming "paramount to the law" convinces some that the courts should not acquit defendants on the basis of good faith and reasonable mistakes of law. This unfortunate conclusion stands as a warning against surrendering too quickly to the power of a paradox. There may always be an acceptable way of resolving the contradiction and proceeding with the desirable change in practice.

To resolve this particular paradox, we need only recognize the distinction between the law as a norm of behavior and the distinct question whether someone is personally to blame for violating that norm. A mistake about the norm cannot legitimate violating the norm; it can merely negate the mistaken individual's blameworthiness for violating the norm. Similarly, acquitting on the latter grounds of personal blamelessness does not forge an exception to the norm; it merely denies that it is just to hold the particular defendant liable for violating the norm. Mistake of law comes into focus, therefore, as a doctrine analogous to insanity. No one would contend that to acquit on grounds of insanity is to treat insane beliefs as tantamount to the law. It is equally implausible to treat excusing a faultless mistake about the norm as displacing the norm itself.

The critical distinction for resolving Hall's conundrum is the distinction between wrongdoing and responsibility, the wrong of violating the norm and the blameworthiness of not controlling one's actions and abstaining from the violation. His paradox of subjectivity dissolves readily once we see that the impact of subjective opinion is limited to the sphere of personal blameworthiness. This distinction has not always been known to legal theorists. It emerged in nineteenth century German thought,⁴⁰ and as Hall's argument and other confusions about mistakes in the criminal law indicate,⁴¹ it has yet to become entrenched

39. *Id.* at 498, 69 A.2d at 460.

40. The distinction, as formulated in Germany theory, dates back to the discussion in R. Jhering, *Das Schuldmoment im Römischen Privatrecht* 4 (1867) (distinguishing between the consequences of objectively wrongful and subjectively culpable possession of another's property). See Eser, *Justification and Excuse*, 24 *Am. J. Comp. Law* 621, 624-25 (1976).

41. See Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949, 971-80

in American legal thought.

A second example poses a more difficult tension between a paradox, on the one hand, and the impulse toward innovation, on the other. The legal innovation at stake is the prospective overruling of precedents, both in private and in constitutional litigation. When a court overrules prospectively, it limits the benefits of the new interpretation of the law to the instant case and to some selected group of litigants. The cut-off point might be litigants whose trials have not yet begun,⁴² or it might be criminal defendants whose state court convictions have not become final.⁴³ Whatever the time of prospective application, there will be some litigants and convicted defendants who must accept the application, in their case, of a rejected rule of law.

There are sound administrative reasons for limiting the impact of innovative rulings, particularly in constitutional cases. Making the fourth amendment exclusionary rule applicable, by way of collateral relief, to all state court convictions arguably would "tax the administration of justice to the utmost."⁴⁴ Every convicted prisoner could secure a hearing on the allegedly unconstitutional seizure of evidence used against him. Even if we disapprove of prospective overruling, we cannot deny the administrative considerations that make it desirable.

That only future litigants should receive the benefit of a legal innovation is not necessarily inconsistent or discriminatory. This is precisely what happens when legislatures change the law or the amendment process culminates in a change of the Constitution. These modes of legal change apply retrospectively only in exceptional situations.⁴⁵ Why should the principle of retroactivity be different when courts change the prevailing interpretation either of private law or of the Constitution? The question requires that we clarify the difference between legislation, on one hand, and the practice of adjudicating cases and interpreting the law, on the other.

The notion of interpreting the law, whether it is a common law rule, statute, or constitutional provision, presupposes a distinction be-

(1985) (criticizing confusion of putative and actual self-defense as an example of general failure to recognize the distinction between norms of law and excuses for violating these norms).

42. See *Li v. Yellow Cab Co. of Cal.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975) (opinion not applicable to any case in which trial began before "this decision becomes final in this court"); *Johnson v. New Jersey*, 384 U.S. 719 (1966) (*Miranda* limited to trials begun after *Miranda* decision became final).

43. See *Linkletter v. Walker*, 381 U.S. 618 (1964) (*Mapp* not applicable to convictions that had become final prior to the decision).

44. *Id.* at 637.

45. Whether the repeal of a criminal statute applies retroactively and abates pending prosecutions, remains controversial. The matter is supposedly resolved on the basis of legislative intent. Compare *People v. Rossi*, 18 Cal. 3d 295, 555 P.2d 1313, 134 Cal. Rptr. 64 (1976) (repeal of offense of oral copulation abated prosecution, although conviction not yet final), with *State v. Fenter*, 89 Wash. 2d 57, 569 P.2d 67 (1977) (second-degree forgery indictment upheld despite repeal of applicable statute).

tween the external object of interpretation—the law itself—and the interpretation by a particular court.⁴⁶ In the case of the fourth and fourteenth amendments, the bare words of the provisions—in the context of the entire constitutional system—are the objects of interpretation. In deriving the exclusionary rule from these words-in-context, the court performs an interpretative act and renders a judgment about the remedies that the constitutional order implicitly authorizes. The external object of interpretation must be kept distinct from subjective and changing interpretations by the courts.

In contrast, enacting new laws and constitutional amendments are not interpretative acts. These processes bring new laws into being. Of course, legislatures may seek to promote the common good or to rectify social injustice. But judgments about these matters do not purport to be readings or renditions of the meaning implicit in some independently existing, external object.

Judicial interpretation and legislation are inherently different processes. Interpretations can be right or wrong. In searching for the meaning of the external object, one can simply be mistaken about the object's meaning and significance.⁴⁷ In legislating, however, one might make bad policy judgments, but one cannot make a mistake about meaning. Because there is nothing external to be interpreted, there is nothing to be mistaken about.

Enacted laws change from time to time, and therefore there is nothing untoward about a legislature's declaring that a new law should apply prospectively only. The legislature can consistently acknowledge that in the past certain conduct constituted a crime, but declare that in the future, it should not be a crime. There is no contradiction in requiring those already convicted of the crime to serve out their terms.

Interpretations of the law also change over time. There is no contradiction in an observer's⁴⁸ saying that in *Wolf*⁴⁹ the Supreme Court

46. The view that even common law adjudication consists in interpreting unwritten norms is often attributed to Blackstone, but falsely labelled the declaratory theory of law. See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 623 n.7 (1964) (describing Blackstone as the "foremost exponent of the declaratory theory"); 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, 58 (1965). This is a very unfortunate twist in jurisprudential labelling. First, Blackstone himself does not describe his view as "declaratory" or use the phrase "declare law" in describing the judicial elaboration of the common law. See 1 W. Blackstone, *Commentaries* *68–71. Further, the sense of the word "declare" is just the opposite of the Blackstonian view that precedents are but evidence of the common law. See *id.* at *69. Declaring law is not what courts, but what legislatures do.

47. For an excellent exposition of this view of interpretation, see Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985).

48. On the distinction between "detached observation" and "committed argument" as modes of legal discourse, see Fletcher, *Two Modes of Legal Thought*, 90 Yale L.J. 970, 984–86 (1981).

49. *Wolf v. Colorado*, 338 U.S. 25 (1949).

rejected, and in *Mapp*⁵⁰ it accepted, the fourth amendment exclusionary rule as applicable to the states. This is simply a descriptive account of how the Court has read the Constitution at different moments of time. It is problematic, however, for a court to assert⁵¹ that in 1961 the fourteenth amendment requires state courts to exclude unconstitutionally seized evidence, but that as to cases decided before 1961, the Constitution does not require the same protection. Of course, the Court can recognize that in 1949, when *Wolf* was decided, another (or, hypothetically, even the same) group of justices interpreted the Constitution differently. But the Court cannot consistently claim that both the new and the old interpretations are correct readings of the same document. As a revisionist historian cannot claim that a rejected view of an historical event is right, a revisionist Court cannot claim that a rejected reading of the Constitution is also right.

Prospective overruling, therefore, poses a contradiction in our assumptions about the legal order. We are committed to the view that the law to be interpreted is objective and singular. It follows that the effort to interpret the law purports to capture that single, correct meaning. But prospective overruling expresses the Court's recognition that the Constitution requires one decision for one group of litigants, and something quite different for another group.

Again we are confronted with the possibility that a logical inconsistency might preclude a seemingly desirable practical innovation. Before we conclude, however, that prospective overruling violates the premises of adjudication, we must explore every possible means of reconciling the practice with our theoretical assumptions.

Three techniques of reconciliation come to mind. The first I shall call the realist tack. Legal realism has left us with the cliché that when courts innovate, they, in fact, make law. They act as do legislatures in devising new rules of law. If we accept this view, the paradox of prospective overruling dissolves. There is no inconsistency in a legislature's recognizing one rule as valid for the past, and another, for the future. If courts did in fact legislate, there would be no paradox in their making a rule of law applicable only in the instant and future cases.⁵²

The realist tack bears a structural resemblance to Hall's claim that a mistake of law, when recognized as a defense, becomes equivalent to the law itself. It seems intolerable that an individual's view of the law should displace the law itself.⁵³ Yet the realist tack proposes precisely that interpretations of a particular court should be treated as equivalent

50. *Mapp v. Ohio*, 367 U.S. 643 (1961).

51. On the implications of asserting an interpretation in the mode of "committed argument," see Fletcher, *supra* note 48, at 972-75.

52. See Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960).

53. See *supra* text accompanying notes 35-37.

to the law itself.⁵⁴ If an individual's view of the law cannot count as law, why should a court's subjective interpretation of the law count as legislation?

Realists might defend their position by distinguishing interpretation by courts from subjective views of the law by private individuals. Only the former, as the expression of official state power, warrants respect. Further, realists argue that there really is no external, stable body of law to be interpreted. The traditional view about law as external and binding on the courts is, on this view, an illusion.⁵⁵ Therefore, the courts must be creating law as they announce their putative interpretations.

Realism is more properly called nominalism, for it denies the reality of legal norms existing independently and prior to judicial action. This nominalist view is expressed in Holmes' inveighing against federal common law as "a brooding omnipresence in the sky."⁵⁶ Many lawyers seem to share this nominalist view of common law rules and principles; few go so far as to claim that statutory law and the Constitution are illusory in the same sense. If the nominalist view were correct across the board, one could imagine the havoc unleashed in the criminal law. Every subjective interpretation of the law—by court or by individual—would be entitled to equal credence. Criminals could not violate the law, for there would be no pre-existing, uninterpreted norm to violate. The realist (nominalist) view may have done us a service in highlighting uncertainties at the fringes of legal norms, but this suggestive view hardly displaces our assumption that the law is an external body of norms subject to interpretation by the courts.

Yet no one would claim that courts, however much power they may have, really are legislatures, that they are entitled to enact new laws and repeal laws passed by elected, duly constituted legislative bodies. It would be even more absurd to suggest that in constitutional adjudication, the court actually amends the Constitution. The phrases "judicial lawmaking" and "judicial legislation" are but metaphors designed to capture the phenomenon of innovation in the case law. These metaphors hardly undermine our implicit commitment to the view that in fact courts interpret common law principles, legislative rules, and constitutional provisions. The paradox of prospective overruling is rooted

54. See, e.g., Levy, *supra* note 52, at 5 ("[T]he real lawgiver is the one who has the final authority to say what the law is . . .").

55. Note the pejorative description of the traditional view by Justice Cardozo in *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 (1932) ("the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration").

56. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). The point of this remark is not necessarily to support the nominalist position but rather to ridicule alternatives to the positive view of law. The passage concludes: The common law is "the articulate voice of some sovereign or quasi-sovereign that can be identified." *Id.*

in the logic of interpretation. If it is self-contradictory to avow inconsistent interpretations of a legal norm, then the paradox remains unresolved. The realist tack fails as a mode of resolution.

A second technique of neutralizing the paradox of prospective overruling invokes a principle of fairness. In civil litigation, in particular, one might argue that litigants are entitled to rely upon the interpretation of the law that prevailed at the time that the cause of action arose. If an interpretation now rejected provides a basis for a complaint or the framework for a trial in progress, the reinterpretation of the law arguably should not lead to a redefinition of the issues under litigation. In this sense, the parties should be able to rely on the interpretation of the law in force either at the time the action arose or at the time that their trial began.

These considerations guided the reasoning of the California Supreme Court in *Li v. Yellow Cab*,⁵⁷ a decision introducing comparative in place of contributory negligence. The court ruled that its decision should apply only to trials that had not begun as of the date that the court's decision became final.

The argument of reliance does, however, produce one serious anomaly. Why should the new interpretation apply on behalf of the litigant who brings the appeal resulting in the innovative precedent? After all, Li's trial also began prior to the introduction of the rule of comparative negligence. Why should his adversary not be able to rely on the rule of contributory negligence then in force? The justification for favoring the litigant in the instant case presumably is that those who seize the initiative should be rewarded. Although this argument shifts the focus from the merits of the case to the fairness of rewarding someone who brings an innovative appeal, it at least provides some argument for favoring the party in the instant case over others who in all other relevant respects are equally situated.

When the argument of reliance is applied in constitutional cases, however, the anomaly of favoring the instant defendant is more difficult to reconcile with our standards of fairness and equal treatment. In *Stovall v. Denno*,⁵⁸ the United States Supreme Court held that one of the three factors bearing on retroactivity is "the extent of the reliance by law enforcement authorities on the old standards."⁵⁹ The argument of reliance rationalizes decisions like *Johnson v. New Jersey*,⁶⁰ which held the *Miranda* warnings applicable only to trials that began after the date the warnings were "announced."⁶¹ *Miranda* himself received the benefit of

57. *Li v. Yellow Cab Co. of Cal.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975) (stressing "reliance" as primary reason for prospective overruling).

58. 388 U.S. 293 (1967).

59. *Id.* at 297.

60. 384 U.S. 719 (1966).

61. *Id.* at 733.

the constitutional innovation, but other defendants whose cases were still pending on appeal suffered convictions on the "old standards." The argument that *Miranda* should be rewarded for seizing the initiative rings hollow, for it was a matter of chance that the Supreme Court chose his case among the many candidates for review.⁶²

There are two interrelated difficulties with the use of the reliance argument in the constitutional context. First, it is not clear why law enforcement officials should be able to assert any reliance interest at all as a basis for prospective overruling. In the field of private law, parties acquire plausible claims of right against each other on the basis of interpretations of law prevailing when their dispute crystallizes.⁶³ But a criminal prosecution does not depend on the police's claim of right against their adversary, the criminal suspect. The question under *Miranda*⁶⁴ and later cases on proper police conduct⁶⁵ is not whether the police receive fair treatment in the prosecution of the defendant. The question, obviously, is whether the defendant's rights have received due constitutional protection. Furthermore, law enforcement officials cannot rely on United States Supreme Court precedents in the face of a state supreme court's granting more extensive protection to the defendant under the local state's constitution.⁶⁶ This asymmetry is built into the Constitution. The fourth, fifth, and sixth amendments do not grant rights to the people as a whole or to their prosecutorial representatives; they grant rights solely to those affected by state prosecutorial power. It is a basic mistake in constitutional theory to treat a more extensive interpretation of these rights by either the United States or a state supreme court as an act depriving the police of legitimate expectations based on a seemingly settled interpretation of the law.

Second, so far as law enforcement officials are able to assert a reliance interest, the implications in the analysis of prospective overruling always produce an uneasy sense of discrimination against some equally situated criminal defendants. If police reliance is the guide, the proper

62. See *Desist v. United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting).

63. The term "crystallizes" is purposefully ambiguous. It is not clear whether, say in an automobile accident case, the relevant moment of reliance is (1) when the accident occurs, (2) when the complaint is filed, (3) when the trial begins, or (4) when the case is sent to the jury.

64. *Miranda v. Arizona*, 384 U.S. 436 (1966).

65. The troubling case is *Edwards v. Arizona*, 451 U.S. 477 (1981) (interpreting *Miranda* to preclude questioning after the suspect once refuses). The case is a plausible and arguably expectable extension of *Miranda*, but in *Solem v. Stumes*, 104 S. Ct. 1338 (1984), the Court held *Edwards* to be inapplicable to a case in which the state court conviction had become final.

66. See, e.g., *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (holding that the California constitution provides more extensive protection against search and seizure than does the United States Supreme Court's interpretation of the federal fourth amendment); *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974) (also holding that state provision is broader than federal fourth amendment).

sphere of the *Miranda* warnings would be only those cases in which the arrest—not the trial—occurs after the date of the Supreme Court decision. Yet if this were the rule, the favoring of *Miranda* himself would seem to be an even more egregious windfall. Perhaps we can tolerate financial windfalls to tort plaintiffs like *Li* who bring innovative appeals. But no one deserves constitutional protection simply because his case was decided at the right time, in the right sequence. If constitutional principles have any objectivity at all, we cannot tolerate the random distribution of constitutional rights.

Dissenting in *Desist*⁶⁷ and then concurring in *Mackey*,⁶⁸ Justice Harlan first cultivated the critical significance of equal treatment in the analysis of prospective overruling. If prospective overruling was to work at all, it had to adhere to principles of rational classification of affected criminal defendants. As evidenced by the Supreme Court's recent decision in *Shea v. Louisiana*,⁶⁹ Justice Harlan's views have finally gained a persuasive edge. The Court now recognizes, though by a slim majority,⁷⁰ that fortuitous timing cannot generate a rational distinction among defendants asserting constitutional claims. The very minimum that the Constitution requires is that the new interpretation should apply on behalf of all defendants whose cases are still pending on direct review. What the Court has yet to recognize, however, is that it is precisely the reliance argument that leads us to think that it might be proper to make a ruling applicable only to events that occur after the date of decision. The argument of reliance by state officials should be rejected as unsound in principle and discriminatory in its impact.

A third technique for resolving the paradox shifts the focus from substantive principles to procedural options. Even if we concede that the Constitution is singular and that a new interpretation of the fourteenth amendment captures the true meaning of the constitutional system, it does not follow that prisoners whose cases have already become final should be able to invoke the new interpretation by way of habeus corpus. This view has come to the fore in the most recent decisions of the Supreme Court.⁷¹

Denying collateral relief in cases of prospective overruling does not commit the Court to the view that the rejected interpretation of the Constitution is still valid. This procedural technique sidesteps the paradox, but it raises problems of its own. In right-to-counsel cases, for example, the Court *does* permit the reopening of convictions based

67. *Desist v. United States*, 394 U.S. 244 (1969).

68. *Mackey v. United States*, 401 U.S. 667 (1971)

69. 105 S. Ct. 1065 (1985).

70. The *Shea* Court split five to four, with Justices Blackmun, Brennan, Marshall, Powell, and Stevens in the majority.

71. See *Shea*, 105 S. Ct. 1065 (*Edwards* held applicable to cases pending on direct appeal); *Solem v. Stumes*, 104 S. Ct. 1338 (1984) (holding limited to the rejection of retroactivity in case of collateral relief).

upon an interpretation of the sixth amendment rendered after the conviction has become final.⁷² Yet the Court denies this relief in claims based upon new interpretations of the law of search-and-seizure⁷³ and the privilege against self-incrimination.⁷⁴ The Court argues that constitutional rights, like the right to counsel, that bear upon the "integrity of the fact-finding process"⁷⁵ differ from those that serve other values, such as the protection of privacy and human dignity. If the issue is the moral status of the constitutional right, one could as well argue the opposite.⁷⁶ Yet if the purpose of collateral relief is only to insure the accuracy of criminal convictions, there may be some merit in distinguishing sixth amendment cases from those posing issues under the fourth and fifth amendments.⁷⁷

Whether prospective overruling is consistent with our basic commitments in the constitutional system requires more critical reflection. It is no accident that the Court cannot adhere consistently to a particular cut-off point in prospective application. It is too soon to conclude that the recurrent anomalies and unresolved contradictions should preclude the practice, but it is also too soon to accept a practice that poses so many inconsistencies with our structures of constitutional legitimation.

If we look back at the range of paradoxes discussed in this section, we see that the primary technique for resolving them is to elaborate distinctions.⁷⁸ The problem of bigamous marriage is resolved by distinguishing between the form and substance of wedding ceremonies. The problem posed by a preexisting debt as consideration is resolved by distinguishing promising as a natural fact and contracting as a legal phenomenon. The paradox posed by mistake of law as a ground for acquittal is resolved by distinguishing between the objective norms of the law and the subjective criteria of personal responsibility. The distinction between substantive principle and procedural relief might pro-

72. See *Linkletter v. Walker*, 381 U.S. 618, 628 & n.13 (1964).

73. See *Desist*, 394 U.S. 244.

74. See *Johnson v. New Jersey*, 384 U.S. 719 (1966).

75. *Linkletter*, 381 U.S. at 639.

76. See Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. Chi. L. Rev. 719 (1966).

77. See Mishkin, *supra* note 46, at 85-87 (arguing that the function of habeus corpus should be to protect "the reliability of the guilt-determining process"). For another view, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 258-61 (arguing that constitutional decisions based on forward-looking policies, such as disciplining the police, may be applied prospectively only; the complication would be that all decisions based on deontological principles should apply retrospectively, regardless of impact of these principles on the accuracy of fact-finding at trial).

78. Apparently, this is a rather common technique for dealing with contradictions. Note the comment by William James: "Whenever you meet a contradiction you must make a distinction." M. Kline, *supra* note 15, at 206 (quoting James).

vide the key for working out an acceptable theory of prospective overruling.

The method of distinctions seems to be the fundamental way we cope with paradoxes in the structures of legal thought. The question always remains, however, whether the proposed distinctions carry sufficient plausibility to warrant our critical acceptance. Our methods for resolving contradiction are put to the test in wrestling with the two antinomies to which I shall now turn.

III. THE ANTINOMY OF SELF-CONSCIOUSNESS

The criteria of voluntariness affect the legal significance of acts in every branch of the legal system. If contracts or wills are made under undue influence, they are not regarded as sufficiently voluntary to be valid. Consent to a police search is not effective if given under too much implicit pressure. Confessions are inadmissible in criminal cases if procured by police techniques of intimidation or deception. Entrapment is a defense because seductive police practices render the commission of the act involuntary. If the actor is "predisposed" to commit the offense, however, the defense does not apply, since someone already inclined to commit the offense is not effectively "seduced" by the inducement. In these and in many other areas of private, criminal, and constitutional law, the primary question is whether an act is performed voluntarily.

The criteria of involuntariness differ in these various contexts. The payment of a fee that would render a confession involuntary would be routine in a voluntary contract for services. The police pressure that would invalidate consent to a search might not be sufficient to taint a confession. Though we do not have a general theory about the criteria of voluntariness in differing contexts, we can say safely that the minimal requirement for challenging the nominal voluntariness of an act is that the actor be aware of the pressure, inducement, or deception directed against him. Self-consciousness and inner conflict lie at the foundation of involuntary responses.⁷⁹

The self-consciousness that concerns us is the expectation of legal consequences flowing from the pressured or induced act. The expectation that the act will be treated as legally invalid generates an antinomy in the self-consciousness of those who claim that their acts are involuntary. I shall illustrate this antinomy by concentrating on the problem of voluntariness that arises in claims of duress and personal necessity in criminal prosecutions.

This antinomy came to my attention in contemplating the proper

79. The notion of "involuntariness" is used here in the moral or normative rather than in the physical sense. For clarification of this distinction as it bears upon the defense of duress, see G. Fletcher, *Rethinking Criminal Law* § 10.4.3, at 833-34 (1978).

construction of these defenses in prison-break cases.⁸⁰ When prisoners escape in the face of threatened, otherwise unavoidable homosexual rapes, the courts have been inclined, at least in the last ten years, to recognize some defense against the liability triggered by the offense of escape.⁸¹ Sometimes the argument is that the prisoner's act is justified on the ground that the escape is the lesser evil.⁸² This rationale, as we shall see later, poses great difficulties of its own.⁸³ Sometimes the rationale for the defense is that the escape is an excusable, involuntary response to external pressure.⁸⁴ Arguably, the prisoner cannot fairly be blamed for violating the law as a reaction to an unavoidable threat of serious physical violence. The latter perspective, as we shall see, generates an antinomy in the self-consciousness of those who surrender to pressure.

The analysis of involuntariness requires an assessment of numerous factors that generate sympathy for the actor's dilemma.⁸⁵ The level of threatened violence against her obviously weighs heavily in the analysis. For our purposes, the significant factor is her possible expectation of acquittal after escaping in response to the threatened violence. Suppose that under a certain set of facts, prisoner D_1 escapes and subsequently is acquitted on grounds of involuntary conduct (labelled either duress or necessity). Prisoner D_2 , confronting an analogous situation

80. The antinomy first came to my attention as I was delivering a lecture in Erlangen, West Germany on June 21, 1984. In the discussion session after the lecture, a student pointed out that the actor's consciousness that his reliance would hurt him would undercut the negative effect of his reliance on the precedent. Playing out the implications of this comment generates the antinomy. For my initial reflections on the differential significance of reliance in cases of justification and of excuse, see Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269, 1303-04 (1974).

81. The first cases that initiated the new trend were *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), and *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974).

82. See *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977).

83. See *infra* Part IV.

84. See, e.g., *People v. Lovercamp*, 43 Cal. App. 3d at 827, 118 Cal. Rptr. at 112 (stressing the "individual dilemma").

85. The three most important factors that bear upon the actor's involuntariness are (1) the degree of pressure on the actor, (2) the moral evil of engaging in the particular act, and (3) the legal consequences connected to the commission of the act. It is obvious that as the first factor, the degree of pressure, increases, we would be more likely to regard an act as involuntary. The problem posed by the second and third factors is that they point in opposite directions. As the intrinsic moral gravity of the act increases, for instance, if the actor is asked to kill rather than merely steal, we should be more inclined to regard his act as morally inexcusable, and we would express this conclusion by saying that it was relatively more voluntary. In contrast, as the threatened consequences of committing the act increase and the actor is willing, despite the threatened terror, to submit to external threats, we would be more inclined to regard his act as a reaction to pressure and therefore properly labelled as involuntary. I am indebted to Zsuzsa Berend for convincing me that the proper analysis of involuntariness requires two distinct matrices, one involving the moral evil and the other involving the legal consequences of the act.

and aware of the decision in D_1 's case, decides that if she escapes she too will be acquitted. D_2 's reliance on the precedent generates an expectation of acquittal. If D_1 expected conviction and escaped nonetheless, D_2 's expectation of acquittal would make her conduct seem relatively more calculating and controlled. It would appear, incrementally, to be less of an unthinking response to danger. We would presumably have less sympathy⁸⁶ for her plight and therefore be less willing to deny the blameworthiness of her offense. Thus it seems that although D_2 acts under exactly the same objective circumstances as did D_1 , D_2 would have a weaker case for acquittal. The reliance on the precedent pro tanto undermines her claim of involuntariness. It does not follow that D_2 will be convicted, but merely that she has a less compelling case for negating the blameworthiness of her act.

So far the argument seems supportable. If we think further about the counterproductive effect of reliance, however, we fall into the disabling antinomy of self-consciousness. To state the antinomy, let us consider various states of consciousness of someone contemplating a prohibited course of conduct. Let K_1 represent the knowledge that the individual is faced with a serious threat, say, of rape and has no way to avoid the rape but to escape from prison. K_1 provides a good basis for a defense of duress or necessity. Let K_2 represent the knowledge that in the prior case a defendant under apparently identical circumstances was acquitted. We have already shown that K_2 harms the defendant. It may not defeat her alleged defense, but it will undercut her claim of involuntary response by, say, the quantum Q . If the degree of involuntariness under K_1 is V , then that degree falls to $(V - Q)$ under K_2 .

The antinomy arises when we consider a further state of consciousness, K_3 , at which level the actor is aware of the damaging effect of K_2 . He knows that as a result of relying on the precedent his level of involuntariness is reduced and therefore, if he escapes, he would have a lesser chance than the prior defendant of securing an acquittal. If he escapes despite the reduced chance of an acquittal, then K_3 cancels the negative effect of K_2 , and our reassessment of the degree of involuntariness in his act would return to the level V or to something close to it.

The levels of reasoning and the resulting regress are summarized as follows:

86. Elsewhere I have argued that the proper sentiment expressed in excusing conditions is compassion rather than sympathy. See G. Fletcher, *supra* note 79, § 10.3.3. In this context, the notion of sympathy seems appropriate.

| <u>state</u> | <u>knowledge</u> | <u>legal effect</u> |
|--------------|---|--|
| K_1 | threat | renders conduct involuntary to the level V |
| K_2 | expectation of acquittal | reduces V by Q |
| K_3 | knowledge that K_2 reduces V to $(V - Q)$ | eliminates the negative Q |
| K_4 | expectation of acquittal on the basis of V | reintroduces Q |
| K_5 | knowledge that V is reduced to $(V - Q)$ | eliminates Q |

There is no simple way of eliminating the regress. As soon as the actor begins to think about the legal evaluation of her act, she moves to K_2 . The ascent to K_3 then seems unavoidable. The only way to avoid the regress is for the actor not to think about the legal characterization of her conduct, or at least not to think about relying on precedents in analogous circumstances.

It is not clear that this feature of the infinite regress invites a solution. How should we eliminate the step up to K_2 ? Obviously, we cannot tell citizens in a democratic society to ignore legal precedents relative to their situation. The most citizens can do is to disregard the self-consciousness generated by reading and relying upon precedents in analogous cases. We are left with the problem of whether it would be intellectually defensible for a court to ignore a factor of self-consciousness that obviously bears upon the voluntariness of the defendant's act.

I confess that I have no solution to this antinomy. It would not be so disturbing if its impact were limited to prison break cases. Unfortunately, the same antinomy arises in every case in which the criteria of involuntariness affect liability for a criminal act or undermine the validity of a private legal transaction. Consider the problem of involuntary confessions. Suppose that the person confessing knows that under the precise circumstances of his case, the confession will not be admissible at trial. It would seem that his knowledge that the confession could not hurt him would make the act incrementally less a response to police pressure. The same would be true in the analysis of "predisposition" as an exception to the defense of entrapment. If the actor knows that under the circumstances of his case, he has a good claim of entrapment, I should think that his relying upon that expectation would strengthen the argument that he chooses freely to commit the offense. Similarly, in cases of undue influence and duress as a basis for negating the valid-

ity of a contract, the contracting party's expectation that the contract will be invalid seems to make his submitting to pressure less a matter of his will being overborne and more a matter of choosing a convenient and harmless way of avoiding pressure. In all of these cases, the actor's knowledge that his expectation hurts him will generate the antinomy of self-consciousness. As in the prison break case, his reasoning invariably moves from K_2 to K_3 and beyond, without limit.

The structure of the antinomy bears some resemblance to Langdell's paradox of consideration.⁸⁷ Both problems involve the integration of subsequent legal assessment in the analysis of legally relevant acts prior to judicial interpretation. In the case of involuntariness, the problem is the *expectation* of a particular judicial response (it does not matter whether that expectation is rational or not). In Langdell's paradox, the problem is the *actual* determination that the second promise generates a detriment. In view of this and other differences, the solution of Langdell's paradox—the distinction between lay and legal events—offers us little guidance in the resolution of the antinomy of self-consciousness.

Admittedly, the antinomy of self-consciousness has primarily theoretical significance. Even in its unresolved form, it is unlikely to affect the outcome of particular cases. Nonetheless, it poses a challenge to legal theory that we cannot ignore. If we are committed to the consistency of our legal principles, we shall someday have to devise a construct or a theory that will resolve this antinomy.

IV. THE ANTIMONY OF DESTABILIZATION

Another antinomy derives from two different ways in which cost/benefit analysis has entered legal thought in the last several decades. Utilitarians and economic analysts argue that in making decisions in particular cases, courts should weigh the future costs and benefits of their decisions and render the judgment that is most useful, the most efficient, for society as a whole. The relevant costs and benefits depend, of course, not on what actually happens in the future (the court cannot know that), but on the reasonably expected consequences of the legal decision. Under this approach, decisionmaking is prospective or *ex ante*; the controlling perspective is the future, not the past. The situation of the actual litigants, arguing about some past event, matters only in so far as the court considers the impact of the decision on similarly situated litigants in the future.

In addition to guiding judicial decisions in general, cost/benefit analysis shapes the application of legal standards in particular cases. The best example is the claim of necessity as a justification, which, to avoid confusion,⁸⁸ I shall call "lesser evils." This defense, as used in

87. See *supra* text accompanying notes 28–32.

88. The term "necessity" refers both to claims of justification and of excuse. The

both criminal and tort cases, requires a balancing of the expected costs and benefits, as they reasonably appear from the actor's point of view. If the actor sacrifices a lesser expected cost (driving through a red light) in order to preserve a higher potential benefit (getting a sick person to the hospital), contemporary legal systems will treat his nominal violation of the law as justified, as compatible with his basic obligations under the legal system. The same test generates the prevailing interpretation of negligence as a basis for criminal and tort liability. Under the test first suggested by Learned Hand,⁸⁹ a risk is negligent only if the expected costs exceed the expected benefits. The court's or jury's assessment of these expected values is retrospective or *ex post* in the sense that the question is how the risks should have appeared to the actor at the time of his acting.

The rationale for employing these tests in the retrospective assessment of particular cases might be utilitarian or economic, at least so far as the court invokes the tests in an effort to guide the behavior of similarly situated parties in the future. But the retrospective assessment of the actor's behavior might simply reflect a commitment to favoring those whose conduct conforms to accepted norms—whether the judicial decision shapes future behavior or not.

To keep these two uses of cost/benefit analysis distinct, I shall distinguish between the *ex ante* justification of legal decisions, and the *ex post* justification of a specific litigant's behavior. The problem that concerns us is the interweaving of these two types of decisionmaking. The interweaving generates an antinomy, which I shall call the antinomy of destabilization.

To illustrate the antinomy, consider the standard of negligence in tort cases. According to the Learned Hand test, if the expected benefits of an act or omission (the money a defendant saves by not acting to prevent an accident) exceed its expected costs (the risk of injury), the act or omission is regarded as reasonable and therefore nonnegligent. Suppose that the costs of a hotel's not keeping a lifeguard at its pool are 50. This figure represents the risks of drowning and other injury that might be avoided if the guard were present. Suppose the benefits of taking this risk—saving money and keeping down room costs—are 40. Given these figures, the risk should be judged as unreasonable, and under the standard of negligence, the hotel should be liable for injuries that a guard could have prevented. This seems like a straightforward analysis of a negligence problem.

The contemporary literature of tort law, however, stresses a number of benefits that flow directly from the decision to impose liability. These are the benefits of compensation, risk distribution, and de-

distinction is reflected in two provisions of the German Criminal Code. See StGB § 34 (W. Ger.) (necessity as a justification); *id.* § 35 (necessity as an excuse).

89. The test originates in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

terrence.⁹⁰ If hotel keepers in the future expect the pattern of liability to continue, they will either hire lifeguards, or they will routinely provide compensation for victims injured when no lifeguard is present. If they regard compensation as the cheaper alternative, they will in effect provide insurance for those persons injured in their pools. Presumably, they would raise rates and charge guests "a premium" to cover the risk of drowning on their premises. This form of "compulsory insurance" generates the benefit known in the tort literature as loss or risk distribution. The benefit of insurance, whether voluntary or compulsory, is that it prevents catastrophic losses from falling on particular individuals and families.⁹¹

Let us estimate this additional benefit of imposing liability as 20. Let us see what happens if we allow this additional benefit to bear upon the analysis of a particular case. The starting point for the argument is that the hotel is negligent; the overall costs of taking the risk and not hiring a guard exceed the benefits 50 to 40. A rational court would reason as follows:

1. The conduct is negligent and therefore we impose liability.
2. If we impose liability, we generate an additional benefit of 20, and therefore, *ex ante*, the benefits of the actor's taking the risk (and being held liable) are 60. If the benefits exceed the costs, the conduct appears, overall, to be reasonable. If it is reasonable, there is no liability.
3. If there is no liability, we do not incur the benefit of risk distribution, and therefore the costs exceed the benefits 50 to 40. The conduct is negligent and we should impose liability.
4. Same as 2.
5. Same as 3.

Interweaving the benefits of liability with the retrospective analysis of the risk generates this infinite regress. I refer to this puzzle as the antinomy of destabilization, for the inclusion of the consequences of the decision invariably destabilizes the results of the retrospective assessment of the risk.

The same antinomy of destabilization arises in the analysis of lesser evils as a defense, both in criminal and in tort cases. To take a routine problem of justification, suppose that the cost of running a red light—represented by the risk of an accident—is 40; the benefit of getting a sick person to the hospital is 50. On these numbers, the cost-efficient act is obviously to violate the traffic laws by running the red light.

In looking at the problem *ex ante* from the time of decision, a court might sensibly conclude that additional social costs would accrue

90. See G. Calabresi, *The Costs of Accidents* 39-67 (1970).

91. *Id.* at 39, 86.

from acquitting someone who intentionally runs a red light. The acquittal might encourage other people to be lax in their observance of traffic rules. Hasty calculations by other drivers that their acts were justified might endanger public safety. Let us represent the expected social cost of acquitting this particular driver as 20. This cost will not arise if the driver is convicted and fined.

If the costs and benefits of running the red light are assessed purely retrospectively, it seems clear that the act is justified. If, however, the court considers the consequences of its decision to acquit, then we end up in the same antinomy of destabilization. The reasoning of a rational court would go like this:

1. The costs of running the red light are 40; the benefits are 50. Therefore we should regard the act as justified and acquit the defendant.
2. If we acquit, we will encourage lax observance of the law, thereby incurring, *ex ante*, an additional cost of 20. The overall costs of running the red light (and not being held liable) will therefore exceed the benefits, 60 to 50. Therefore the conduct is not justified and we should convict.
3. If we convict, we will not incur the cost of 20. Therefore, the benefits of running the red light exceed the costs, 50 to 40. We should acquit.

The circle goes on endlessly. If the court concludes that it should acquit, it generates a conclusive argument for conviction; if it concludes that it should convict, it cannot escape the conclusion that the act is justified and therefore the defendant should be acquitted. The destabilization results from interweaving the consequences of the decision itself with the retrospective assessment of the act.

The same antinomy arises whenever there is a cost or a benefit from a judicial decision that the court seeks to integrate in the retrospective assessment of the actor's balancing the competing interests at stake.⁹² It is easy to illustrate, as well, that the antinomy arises not only from the court's perspective, but from that of an actor trying to decide, say, whether to run a red light or to hire a swimming pool guard. If the actor considers the consequences of the court's evaluation of her conduct, she will slip into the same infinite regress that prevents courts from reaching a stable conclusion.⁹³

The efforts to resolve this antinomy fall into certain patterns. The three most common suggested solutions are: (1) the effort to convert

92. This conclusion assumes that the additional cost or benefit produced by a decision exceeds the *difference* between the *ex post* costs and benefits considered by the court in reaching the decision. If there is no excess, a court's consideration of the impact of its own decision will not alter an outcome based on the *ex post* costs and benefits. For discussion of another implication of this condition, see *infra* text accompanying note 94.

93. See *supra* pp. 1282-83.

the judicial decision entirely into an ex ante assessment of prospective costs and benefits; (2) the resort to a statistical assessment of the costs and benefits of the legal decision; and (3) the bifurcation of the decision into an ex ante phase of devising the proper rule and an ex post phase of applying the rule to a particular case.

A. *Ex Ante Decisionmaking*

The antinomy arises from interweaving ex ante and ex post considerations in the same matrix of analysis. One way of trying to resolve the antinomy is to ignore the ex post considerations and treat the legal decision exclusively as an ex ante evaluation of future costs and benefits. If a court proceeded in this manner in the running-the-light case, it might be most concerned about the negative costs of acquittal, namely the 20 that represents the acquittal's inducing other people to run red lights. If the court's reasoning stops here, it will invariably find against the defendant. No paradox will result. This means that drivers on the way to the hospital and, by like analysis, hotel owners in the preceding tort example, will always be found liable. This is inefficient and unfair, for some of these defendants would be acting reasonably. The prospective benefits of their actions would exceed the prospective costs. We should pause to consider how a court might render a more refined ex ante judgment.

One approach to this problem would be to acquit the class of future defendants in whose cases the incremental benefit of their conduct (the excess of benefits over costs) exceeds 20, the cost of acquittal. Acquitting just this class of defendants would generate a net benefit in the future. This way of resolving the problem resembles, in structure, a well-known utilitarian approach to resolving the problem of compensation in inverse-condemnation cases.⁹⁴

Balancing the incremental benefit resulting from future acts against the costs of decision would resolve the paradox, but again at the price of unfairness and inefficiency. Defendants like our hypothetical actors—the traffic violator and the hotel owner—would be liable. The incremental benefits in their cases is only 10. Requiring that each favored defendant generate sufficient benefits to outweigh the costs of finding in his favor would disqualify a range of actors whose actions considered in themselves (apart from the effect of the court's decision) maximize utility.

If the policy of the court is both to reward and encourage efficient conduct, it should find for defendants in all cases in which the incremental benefit of the act is greater than zero. The signal it would want to transmit is that those who further the greater good would be exempt from all liability. Let us refer to all cases in which the benefits of an act

94. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214-15 (1967).

exceed its costs (regardless of the consequences of the court's decision) as cost-efficient actions. Obviously, the court should impose liability in all cases in which an action is not cost efficient. Problems arise, however, in resolving the cases in which an action is cost efficient. A rational court would reason as follows:

1. This type of case is cost efficient, and therefore we should incline toward acquitting this defendant and future defendants like him. If we do acquit, however, this will be one of those decisions that generates the additional cost of 20. Considering these additional costs of our own decision, we should find against the defendant.
2. If we find against the defendant, this will not be one of those cases that generates the additional cost of 20, and therefore we should not consider that cost as a factor bearing upon the analysis of cost-efficient cases. It follows that if this is a cost-efficient case we should find for the defendant.
3. If we find for the defendant, however, this will be one of those cases that generates the additional cost of 20, etc.

Voila! The paradox reemerges. As soon as we try to develop a more refined treatment of cost-efficient cases and allocate the costs of decision only to cases of liability, we generate the same analysis that resulted from mixing *ex post* and *ex ante* assessments of utility.

This analysis demonstrates the conflict between two utilitarian approaches to legal decisionmaking. If the inquiry is directed to the most efficient decision in light of all the costs and benefits, a court would presumably favor the first proposed formula: the incremental benefit of the activity must exceed the costs of acquittal in encouraging others to violate the law. This approach, as I have noted, does not generate the antinomy of destabilization.⁹⁵ If, however, efficiency requires the court to promote all cost-efficient actions, then it must refine its judgments, and it will slip into the contradiction of interweaving the general costs of acquittal with the specific costs and benefits tied to cost-efficient conduct.

The first approach admittedly solves the antinomy, but only by sacrificing one of the premises of case-by-case adjudication. The system of hearing and resolving discrete disputes commits the court to focusing on the merits of the case before it. If it resolves the dispute by rendering the decision that, all things considered, appears to be the most efficient, it sidesteps the particularities of the specific dispute. The second approach, which does generate the antinomy, bears a close resemblance to traditional modes of judicial thought. Admittedly, the court focuses on the general type of activity, rather than on the specific act

95. See *supra* note 92.

that occurred in the past. Gearing decisions to the costs and benefits of activities rather than to the costs and benefits of decisionmaking, however, is precisely the shift in focus that invariably interweaves the costs of decision with the costs of acting. Attempting to adjudicate the merits of the case—or of the type of case—recreates the conditions for the antinomy of destabilization.

B. *A Statistical Analysis of Predicted Judicial Decisions*

If we try to consider the question from the actor's point of view—should I run this red light or not?—we get the following repetition of the antinomy:

1. The benefits of my act exceed the costs 50 to 40 and therefore my act will be regarded as justified and I will be acquitted.
2. If I am acquitted, the court's decision will have a negative effect on other drivers, thereby generating an additional cost of 20. As a result the costs of my act (and my acquittal) will outweigh the benefits, 60 to 50. My conduct will not be justified, and I will be convicted.
3. If I am convicted, the additional costs of 20 will not arise. The benefits of my act will exceed the costs 50 to 40, etc.

The antinomy reemerges if we assume a court would rationally assess the costs and benefits precisely as the actor does. If the benefits exceed the costs, the court will acquit; conversely, it will convict. This assumption is not self-evident, and it might be the case that courts would respond to the actor's decision in predictable, but less than fully rational ways. The actor might think that regardless of the array of costs and benefits, the probability of an acquittal is only twenty-five percent. If that is the case, the actor might properly reason that the expected cost resulting from an acquittal would be twenty-five percent of 20, or 5. This would mean that the benefits of running the red light would be 50 and the costs would be 45 (40 + 5). On balance, it would still be justifiable for the driver to run the red light. If, therefore, the driver can rely upon a statistical assessment of his likely acquittal—regardless of the costs and benefits in his particular case—he can reason to a successful conclusion about what those costs and benefits actually are.

This statistical technique seems to resolve the antinomy from the actor's point of view by making the expected costs of an acquittal a stable factor in every calculation. It does not assist the court, however, in deciding how to integrate the consequences of its own decision into the actor's assessment of expected costs and benefits. After all, it is the court that decides. The costs of its own decision cannot be dismissed as a statistical probability beyond its rational control.

C. A Two-Stage Decision Process

The root of the antinomy lies in the attempt to integrate into one calculus of decision (1) the ex ante expected costs and benefits of deciding the case and (2) the ex post assessment of the expected costs and benefits of the act in question. Any solution of the antinomy, it seems, would have to keep these two levels of utility distinct in the process of decision. One way to achieve this result would be to invoke the distinction between rulemaking and rule application that has crystallized in the philosophical literature. The distinction finds elaboration in the work of Wasserstrom,⁹⁶ Rawls,⁹⁷ and Hart.⁹⁸ Rulemaking addresses itself ex ante to a general category of cases; rule application focuses ex post on the fitting of the rule to a particular set of facts. In the philosophical literature, this distinction illuminates the difference between the purposes of a system of sanctions in general and the meaning of the sanction as applied in a particular case. At the level of the system as a whole, punishment may have a deterrent, rehabilitative, or retributive purpose; in the particular case, it has the significance of sanctioning the wrong done.⁹⁹ The purposes of tort law include compensation, deterrence, and risk distribution. In the particular case, however, the significance of the tort remedy is that it provides compensation for either a wrong done or an unexcused harm to the plaintiff.

For our purposes, the advantage of this fundamental distinction is that it keeps distinct (1) the costs and benefits of the rule as a whole and (2) the costs and benefits of the act assessed in a particular case. The formation of the rule of lesser evils, for example, would include all the considerations of fairness and utility that might make this rule sound. The costs of inducing others to be lax in their cost/benefit analysis (represented as 20 in our discussion) would bear on the contours of this general rule. If these costs were too high, the court might adopt a narrow rule of lesser evils. Similarly, the benefits of risk distribution would bear upon the design of the general tort remedy. These systemic costs and benefits would not intrude into the analysis of whether a particular act fell under the rule being applied.

The major difficulty with this two-stage decision process is that it induces the court to exercise a rulemaking or legislative function. It might be possible for a court to develop the applicable rule on the basis of general principles implicit in the legal system. Yet a court that overtly assessed the costs and benefits of a proposed rule would be functioning as a legislature. As we noted in discussing the paradox of prospective overruling, the creative role of courts in refining and devel-

96. See R. Wasserstrom, *The Judicial Decision* 138-71 (1961).

97. See Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955).

98. See H. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility* 1, 19-23 (1968).

99. See H. Hart, *supra* note 98; Rawls, *supra* note 97.

oping the law remains problematic.¹⁰⁰ In a democratic society based upon the separation of powers, we shall continue to be troubled by the fine line between judicial development of the law and the courts' displacing elected officials.

A more radical approach to the antinomy of destabilization would require the courts to disregard the consequences of their decisions altogether. The classical theories of private¹⁰¹ and criminal law support the view that courts should focus exclusively on the merits of the case before them. The retributive theory of punishment holds that punishment is justified solely on the basis of retrospective assessment of the actor's wrongdoing and culpability.¹⁰² Rational, self-interested litigants and criminal defendants would want the court to focus on their case and their case alone. No committed litigant would choose a judge who would decide against her position in order to avoid costs generated by the decision itself. Perhaps the classical assumptions of adjudication are right after all. We may require the antinomy of destabilization to drive us back to traditional assumptions about the distinction between the *ex ante* efficiency concerns of legislation and the atomized attention in adjudication to the merits of the particular case.

CONCLUSION

The paradox of prospective overruling and the antinomy of destabilization take us to the heartland of jurisprudential controversy. This is not at all surprising. One would expect that unless we properly address the questions that lie at the foundation of our legal system, we will generate paradoxes and antinomies. Now that we know more precisely what these puzzles and contradictions are, we should be impelled to attack the basic jurisprudential questions with a greater sense of urgency. If we wish to avoid disabling contradictions, we must reach a deeper understanding of the legal premises that guide our thinking.

100. See *supra* notes 42-77 and accompanying text.

101. The paradigm of reciprocity represents an effort to state this classical view of private law. See Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 543-56 (1972).

102. For modern statements of the retributive view, see generally W. Moberly, *The Ethics of Punishment* (1968); H. Morris, *Persons and Punishment*, *in* *On Guilt and Innocence* 31 (1976).