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Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction

Pierre Schlag*

At the annual meeting of the Association of American Law Schools in 1927, the President, Herman Oliphant, sounded the alarm:

Our part in shaping the future of legal scholarship . . . makes this an appropriate time and gathering to consider what seems to be a most profound change which has been slowly and imperceptibly creeping into our treatment of problems in Anglo-American law, a fundamental change which merits careful study in order that we may recognize its presence, measure its extent, and judge its consequences.1

Oliphant's words were hardly minced. His tone was sinister: There was something big, probably reptilian in origin, slowly but surely creeping into the body of Anglo-American law. Oliphant was kind enough to forewarn his audience of the nature of this dread development. Said Oliphant: “Let me anticipate my conclusions by asserting that we are well on our way toward a shift from following decisions to following so-called principles, from stare decisis to what I shall call stare dictis.”

Today, Oliphant’s words seem . . . well, they seem quaint. In part, that is because he was right: The august and disciplined practice of stare decisis is now quite dead.3 What has replaced this great engine of Anglo-American law is by no means settled. A cursory examination of

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For their help with this article, I wish to thank Eric Chiapenelli, Connie Dillon, Deborah Maranville, Bob Menanteaux, John Mitchell, Michael Newcity, Chris Rideout, John Schlegel, David Skover, and Jeff West.

2. Id. at 72.
3. In fact, stare decisis (in the sense that only the decision on its facts is binding) is so dead that it is hard to conceive that it could once have been the subject of raging controversy among elite legal scholars. But it was—early in this century. Indeed, numerous articles debated with great passion the meaning, significance, and virtues and vices of the rule of precedent and stare decisis.

the authoritative sources on the received, immanent vision of law suggests, however, that the most successful candidates for "engine of the law" status are doctrine, policy, and principle. But quite obviously, there are any number of other contenders, such as microeconomics, class struggle, grand theory, and so on. Disputes about which of these is truly the moving force in law are typically characterized as "substantive." In this article, I want to discuss an aspect of this "substantive" dispute that is typically called "form."

Accompanying the ascendance of the rule of doctrine, policy, and principle (as well as the other contenders), there has been a rise in the status of the legal distinction. Once a rather homely accessory for the interpretation of case law, the legal distinction has now come into its own. In fact, it's on the rise. Contemporary legal consciousness has transformed (and is still transforming) the legal distinction into something more imposing, more unsettling—something that might be called "the splits." This article traces the conceptual metamorphoses of the legal distinction, its evolution into the splits. I begin fairly late in the conceptual genealogy of the legal distinction, in part because I want to get fairly quickly to a description of our own situation and our own future. The reason for this urgency will soon be apparent. In the later stages of the splits, reason furnishes a series of cannibal moves—moves which seem to consume our visions of law, of reason, and perhaps of the splits themselves.

I don't mean to overstate the case; precedent and stare decisis remain important in our legal culture. See, e.g., Schauer, Precedent, 39 STAN. L. REV. 571 (1987). But even a cursory review of the literature above will show how much the contemporary practice of adjudication and modern theories of adjudication depart from a system "truly" based upon stare decisis and the rule of precedent.

4. These authorities on the received, immanent vision of law, of course, are Barron's, Emmanuel's, and Gilbert's outlines. 5. See text accompanying notes 23-28 infra.

6. I use this seemingly vacuous term, "contemporary legal consciousness," precisely because I do not want to locate the subject of these developments in the author or in the reader. By the end of this essay, the reasons for this choice will be apparent.

7. Besides, this approach leaves room for a different (more historical and less conceptual) inquiry into the genealogy of the legal distinction. For instance, it is no small wonder how legal scholarship could move from a sustained preoccupation with precedent and stare decisis in the '30s and '40s to wrestling with paradigms, models, antinomies, dualities, and contradictions in the '70s and '80s. Compare note 3 supra and accompanying text (1930s and 1940s) with notes 11-17 infra and accompanying text (1970s and 1980s).

A true genealogy of the rise of the legal distinction would have to begin much earlier. I start from the premise that legal distinctions are currently seen as an important aspect of law and legal discourse. Distinctions such as invitee and trespasser, and conditions precedent and conditions subsequent, are seen as essential aspects not only of our statutory and constitutional law but of our common law as well. It is not clear, however, that the legal distinction always played such a crucial role. Throughout the '30s and '40s, for instance, legal commentary eclipsed the legal distinction in favor of a closely related subject, namely, the meaning and uses of precedent and stare decisis. See note 3 supra.
The legal distinction. Perhaps the surest sign that the legal distinction has assumed an important role in legal discourse is the increasingly stylized character of the attacks that legal distinctions invite. In this first stage, the techniques for attacking legal distinctions assume an almost routine, stereotyped quality. First, a legal distinction can be attacked because its categories are fuzzy at the border (imprecision). Second, one can attack a legal distinction because some of the stuff in one category also belongs in the other—and vice versa (overlapping opposition). A third way of impeaching a legal distinction is to argue that some stuff does not belong in either category (false dichotomy). Fourth, one can argue that the two categories are not categories at all but rather an inept attempt to divide a spectrum (discontinuity). Fifth, one can show that the legal distinction is mapped on the wrong axes, that the dichotomy does not capture the true gist of the opposition (idiosyncratic definition). Sixth, it even seems possible with certain legal distinctions to argue that each category is totally the other (incoherence).8

As the formal means of attacking legal distinctions become routine, a sense arises that all legal distinctions are vulnerable to such attacks.


For a satirical look at Duncan Kennedy's piece, see Shapiro, The Death of the Up-Down Distinction, 36 Stan. L. Rev. 465 (1984). Shapiro very amusingly uses the up/down distinction (and its permutations) to highlight the absurdity of Kennedy's work. In this way Shapiro attempts to show how silly it is to think that legal discourse could be subordinate to deep splits such as the up/down distinction. Indeed, it's quite clear that law is a far loftier enterprise exempt from such lowly metaphors as the up/down distinction and that Kennedy's work can only be considered subversive.

Okay, I'll stop with the puns. Anyone who still thinks that legal discourse is not shaped by the rhetorical force of the up/down distinction should reconsider Marbury v. Madison and the role that the up/down distinction served in establishing this basic icon of judicial review: [W]hether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States . . . . That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected . . . . The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) (emphasis added). Next, Chief Justice Marshall questioned whether the Constitution controls legislative acts repugnant to it or whether the legislature may alter the Constitution by ordinary act:

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it . . . .

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void . . . .

If an act of the legislature, repugnant to the constitution, is void, does it,
With this recognition, legal distinctions are no longer merely the careful technical demarcations of differences within the case law. Rather, they become weak points, vulnerabilities in the corpus of the law—the points where rules, doctrine, policy, and theory can be unhinged should the need or the interest arise. Of course, this does not establish that distinctions lack coherence or value. Granted that things may not look too clean at the edges, but then again, law was never meant to be the realm of perfection. Pragmatism, good judgment, and a serious commitment to craft are sufficient to plug the gaps and keep the enterprise secure.

Splits. The second stage in the evolution of the legal distinction entails a sudden and sweeping reversal. The unflattering picture of legal distinctions as signs of weakness in the corpus of the law dissipates. Instead, the legal distinction emerges as an organizing principle. Retrieved from the exile of embarrassing border phenomena, the legal distinction now occupies a central position—it is treated as a crucial determinant or decision point in the production of law and legal discourse. No longer a mere distinction, the dominance of the new creature is confirmed with power names such as “contradictions” and

9. For example, at this stage, one can still claim that, even if legal distinctions are fuzzy at the periphery, they are nonetheless clear and determinate at their core. See H.L.A. Hart, THE CONCEPT OF LAW 119-37 (1961) (arguing against the indeterminacy of legal directives on the basis of a core/periphery distinction). But see Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985) (suggesting that the determinacy and certainty of legal directives depends upon the context and arguing that the context is itself dependent upon a prior formalization or interpretation).

10. As one commentator puts it:

[A] workable method of legal interpretation can be conceived in recognition of the fact of widespread agreement among members of the legal community on what law permits or requires in a wide range of cases. Uncertainty persists, and legal reasoning proceeds in relation to the conventions of an interpretive community.

S. Burton, AN INTRODUCTION TO LAW AND LEGAL REASONING 98 (1985); see also id. at 199-215.
"schisms,"11 or "alternative models" and "competing paradigms."12 At this point, the legal distinction is generally infused with some arguably sur-legal content: the stuff of ethics, epistemology, and social theory. This is the golden stage of the legal distinction. Its sweep is broad, its power virtually limitless, its significance relatively uncontested, and everybody who's anybody is doing the splits.13 It is no

11. Now, it is important to choose the right sort of distinction. One cannot expect to explain much about legal discourse if one chooses the invitee/licensee distinction as the organizing principle. Better to pick something a bit more sweeping, say, the reason/desire dichotomy, or the self/other schism, or the public/private distinction.

12. Before CLS emerged on the scene and popularized words like "dualism," "contradiction," and "schism," there were a host of more centrist legal scholars who were (and continue to be) fond of "competing models," "alternative paradigms," and so on. See, e.g., B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 72-104 (1984) (describing and advocating a shift from the traditional common law paradigm that focuses on individual cases to the more sweeping social engineering paradigm of economics); P.S. ATTIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 189-209 (1979) (arguing that there has been a shift in contract law from the paradigm of individual autonomy to a paradigm based on collective moral ideas, customary practice, and redistributive ideologies); Damaśka, Structures of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480 (1975) (comparing a "Hierarchical Model" of criminal procedure, which places a premium on certainty of decisionmaking and uniformity across cases, with the "Coordinate Model," which aims at reaching the decision most appropriate in the circumstances); Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972) (counterpoising a neo-Kantian "paradigm of reciprocity" against an instrumentalist "paradigm of reasonableness"); Packer, Two Models of the Criminal Process, 113 U. PA. L. REV. 1 (1964) (describing the "Crime Control Model," which claims that repression of crime is the most important function of the criminal law system, and the "Due Process Model," which asserts the primacy of the individual and seeks to implement anti-authoritarian values); Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 544-50 (1986) (counterpoising a "modern paradigm" of atomism, autonomy, and separation with a "classical paradigm" that recognizes connection and an inter-subjective vision of the self).

13. This fondness of centrist scholars for dichotomous visions was manifested not only in fantastic theoretical work but in doctrinal work as well. For instance, in the '60s there was a raging controversy over the meaning and content of state and private action in constitutional law. See Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 70 (1967) (asserting that state action "is the most important problem in American law"); Chemerinsky, Rethinking State Action, 80 NW. U.L. REV. 503, 503 (1985) (suggesting that in the '50s and '60s, "probably no topic attracted more attention in law reviews than 'state action' ").

The one major school of thought that still resists dualism is the law and economics school, which revels in the monism of the dollar. But it too has a few contradictions to deal with. See Schlag, An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left, 1986 WIS. L. REV. 919.

13. Both CLS scholars and more centrist scholars attempted to make these splits tractable—though to quite different ends and in quite different ways. The very fact that centrist legal scholars could conceive the legal distinction as an organizing principle suggests that this dualism does not necessarily threaten law or legal discourse. And in some senses, it doesn’t. Even as the center embraced dualism under the rubrics of "competing models" or "alternative paradigms," it offered the possibility of resolving this dualism in a satisfactory manner. I cannot possibly document here all of the strategies used, but I can suggest a few of the main ones. For instance, a description of two competing paradigms would often be accompanied
longer two-bit distinctions that occupy attention, but major splits, such as:

- deontological versus consequentialist ethics, 14
- judicial review versus democracy, 15
- private versus public, 16 or
- self versus other. 17

The split has got the law by the tail.

More Splits. What comes next is therefore something of a rude shock. The splits multiply and displace each other. Ruling paradigms remain split, but they are no longer so ruling and no longer so paradigmatic. Fundamental contradictions remain split, but they are no longer so fundamental. To be sure, some splits, such as subject/object, fact/value, and private/public, remain more important than others, but nonetheless their dominance becomes relative and contingent. Gone is the belief in some “top split” that dutifully serves to organize the others into a tractable order. What remains is a view of law and legal discourse as the relatively fluid interaction of sundry splits. And if one assembles enough splits, it may even be possible to come up with a fairly cogent account of law and legal discourse. 18 Since splits can be

by the normative suggestion that one was right and the other wrong. See, e.g., Fletcher, supra note 12, at 564, 569-73. In other cases, the thrust of the argument seemed to be that we were in the process of moving from one paradigm to the other, thus explaining the present (but soon to be overcome) mess: This is Kuhn’s (by now) ubiquitous Kuhnian “paradigm shift.” See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 66, 150 (2d ed. 1970); see also Packer, supra note 12 (the trend is from the “Crime Control Model” to the “Due Process Model”). Another common strategy (particularly among courts) was to suggest that one could harmonize opposed interests or values through “sensitive adjustment of the competing considerations in light of all the surrounding circumstances.” In a word: balancing. For criticism of this approach, see Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).

All this suggests that the use of the distinction as an organizing principle does not necessarily threaten law or legal discourse. But while some centrist scholars did their best to defuse dualism of its potential for disruption (with the kinds of strategies described above), some CLS scholars did the opposite. The latter presented dualisms as challenges to the coherence of law and the integrity of legal discourse and sought to trace the manifestations of the dualisms in concrete doctrine. See, e.g., Feinman, Promissory Estoppel and Judicial Method, 97 HARV. L. REV. 678 (1984).

14. See, e.g., Fletcher, supra note 12.
15. Scholarly debates seeking to reconcile judicial review with democracy have occupied many constitutional law scholars in the late seventies and early eighties. Rather than cite ad nauseam the works that constitute this debate, I will simply cite one work which seeks to achieve closure on this issue. See Chemerinsky, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, 62 TEX. L. REV. 1207 (1984) (questioning the validity, fairness, and usefulness of the terms upon which the debate has been based).
16. The public/private distinction has been a powerful, long playing split in the work of some CLS scholars. For what may be its culminating glory, see Symposium on the Public/Private Distinction, supra note 11. In a prior life, during the ‘60s, the public/private distinction featured mightily (albeit less visibly) in more centrist debates about the state action doctrine. See Chemerinsky, supra note 12.
17. For a statement of this “fundamental contradiction,” see Kennedy, supra note 11, at 211-13.
18. This assumes that one can come up with 90 or so seemingly distinct splits—a task which hardly taxes the imagination. See generally Appendix 1 infra.
readily combined with each other (through merger or by succession), the binary quality of the splits does not require an overly reductionist account of law and legal discourse.\footnote{On the contrary, a modest number of distinctions of form (and substance) can yield a great deal of fragmentation.}

At this point, I think the splits become threatening to a variety of "substantive" intellectual and legal projects. Now that the idea of the split is taken seriously, a hierarchy or ordering of splits no longer seems credible. The implications for "substantive" projects in law or legal discourse are significant. Scholarly talk of models or paradigms or fundamental contradictions becomes vulnerable. The foundationalist pretensions of these formal concepts are now evident, and therefore no longer credible. And the possibility of isolating any particular split for discussion begins to seem naive.\footnote{See Schlag, \textit{The Brilliant, the Curious, and the Wrong}, 39 \textit{Stan. L. Rev.} 917, 918, 926-27 (1987) (describing the problems attending formal delimitation of subject matter in legal scholarship).}

It no longer seems possible to trace the ostensible incoherence of legal liberalism to a fundamental contradiction such as self/other or public/private.\footnote{See Gabel \& Kennedy, \textit{Roll Over Beethoven}, 36 \textit{Stan. L. Rev.} 1, 36-37 (1984) (suggesting that the fundamental contradiction—self/other—is too easily reified and thus must be displaced); Peller, \textit{The Metaphysics of American Law}, 73 \textit{Calif. L. Rev.} 1152, 1274-90 (1985) (arguing that law and legal discourse consist of a multiplicity of reified, but otherwise socially contingent, metaphors).} Similarly, what first seemed to be manageable (albeit ambitious) inquiries about how to reconcile judicial review with democracy now seem wholly unmanageable, posing endless confrontations with a barrage of other splits.\footnote{See text accompanying notes 53-58 infra; see also Appendices 1 \& 4 infra.}

On a more practical level, the rule of law seems threatened. If the splits can arrange and rearrange themselves without reason and in no apparent order, regulative ideals such as neutrality, consistency, or fairness become weak, if not suspect.\footnote{For the classic accounts of the rule-of-law virtues, see L. Fuller, \textit{The Morality of Law} 33-94 (1964), and F. Hayek, \textit{The Road to Serfdom} (1944). For a more recent articulation (and revision), see Moore, \textit{A Natural Law Theory of Interpretation}, 58 \textit{S. Cal. L. Rev.} 277, 313-20 (1985).} It becomes exceedingly difficult to give a rational account of the legal enterprise. And it becomes very difficult to give an account of the legal enterprise in which reason plays a leading role.

Now, it is important not to overstate the implications of these challenges. Even if reason cannot rule, this hardly means that the law will be bereft of order or regularity. Nor does it establish that the legal enterprise is therefore necessarily illegitimate. What the emergence of the splits does indicate, however, is that the regularity and the legitimacy of the legal system will depend upon something less like reason . . . and more like interpretive communities,\footnote{See S. Fish, \textit{Is There a Text in This Class?} (1980); Fish, \textit{Fish v. Fiss}, 36 \textit{Stan. L. Rev.} 1325 (1984). Fish's concept of "interpretive communities" is deliberately elusive—allowing readers of varied degrees of sophistication (and from many different disciplines) to}
tute,\textsuperscript{25} the good sense of the legal community,\textsuperscript{26} class relations,\textsuperscript{27} the invisible hand of the market,\textsuperscript{28} and so on.

Each of these contenders has some intellectual appeal; each offers the possibility of situating law in some greater and grander context that will then lend the legal enterprise some stability, or at the very least, some regularity. And this will be true so long as the greater and grander contexts (the interpretive communities, the cultural values, etc.) are not themselves subject to the splits. Currently, there is no reason requiring us to view interpretive communities or cultural values as ruled by splits. By the same token, however, there is no reason to suppose that interpretive communities or cultural practices are any more immune to the splits than is the legal enterprise itself. So the question remains (or rather resurfaces): Is there any way to stabilize or contain the splits?

Law and legal discourse are ongoing enterprises, so it is not easy to tell. But currently, legal consciousness is entranced by a series of cannibal moves that seem to frustrate even the most sophisticated attempts to contain the splits. In what follows I describe four of these moves which contemporary legal consciousness cannot seem to shake. I have called them\textit{ infinite regress, split proliferation, catch-22, and overkill}. These moves are related, and my presentation shows each of the moves as collapsing into the next.

Some preliminary observations on the status of my own discourse are warranted. First, these moves are already part of our legal consciousness—part of the third stage in the rise of the legal distinction described above.\textsuperscript{29} Second, these moves have not yet been\textit{ explicitly} recognized as formal aspects of legal reasoning. While the moves are used

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\textit{project their own meaning} into the concept. With that caution, one can nonetheless read Fish as arguing that judges, literary critics, and other professionals perform their interpretive work \textit{from within} sets of professional strategies, techniques, and purposes. These (inarticulable) bundles of strategies, techniques, and purposes constitute what Fish calls “interpretive communities.” And it is these interpretive communities (not the text, not the author’s intent, not the individual reader) which enable and legitimate certain interpretations (legal or otherwise) while preventing and disabling other interpretations.

This is one reading of Fish—probably the most common to his legal audience. But as the words of caution above indicate, there are obviously other readings of Fish’s work. For elaboration, see Schlag, \textit{Fish v. Zappi/\textit{The Case of the Relatively Autonomous Self}, \textit{76 Geo. L.J. 1} (1987) (forthcoming).} \textit{See also note 40 infra.}

\textsuperscript{25.} \textit{See J.B. White, \textit{Heracles’ Bow: Essays on the Rhetoric and Politics of Law} (1985); J.B. White, \textit{When Words Lose Their Meaning} (1984).} White champions the critical reading of classic texts—philosophical, literary, and political—as sources for the transformation of our culture, our law, and ourselves. White attempts to demonstrate how the values drawn from these classic texts can inform legal choices such as appropriate rationales for criminal punishment.

\textsuperscript{26.} \textit{See S. Burton, supra note 10, at 199-215.} Burton argues that adjudication is legitimate if the legal community provides a legal and political system that merits and enjoys the allegiance of the people.

\textsuperscript{27.} \textit{See M. Horwitz, \textit{The Transformation of American Law}, 1780-1860 (1977).}


\textsuperscript{29.} Moreover, each move has been used frequently in the legal literature. \textit{See notes 45, 47 & 64 infra; see also Appendices 2 & 3 infra.}
frequently in the legal literature to attack or establish this or that position, there has not yet been any general, formal discussion of the moves or any formal recognition that these moves are always available across a wide variety of legal contexts. Third, while these moves are produced by reason, they bite the hand that feeds them. They repeatedly consume the contributions of reason to the organization of law and legal discourse. In short, they are cannibal moves. Now, given these observations, it is a cinch that I will have some difficulty finding an appropriate language in which to talk about these moves. This difficulty explains why my argument sometimes employs seemingly fuzzy terms, like "legal discourse," and why my arguments seem to turn on themselves. By the end of this essay, the reason for this approach will be apparent.

Infinite regress. This move is associated with turtles which are usually found in footnotes to law review articles. Recently, however, the turtles have climbed out of the footnotes and into the text. One version of the turtle story goes like this:

A prominent scientist had just given a brilliant lecture on the foundations of the universe. During the question period an elderly woman suggested that there was a problem with the professor's analysis. "What is that?" asked the professor cautiously. "It's all wrong," the woman replied, "because the universe actually rests on the back of a giant turtle." The professor, taken aback, forced a smile and then countered: "If that's the case there is still the question, what is that turtle standing on?" The audience tittered, but the woman, undaunted, replied: "Another, much larger turtle." "But . . ." objected the professor. "I'm sorry, Professor, it's turtles all the way down."

30. See notes 45, 47 & 64 infra; see also Appendices 2 & 3 infra.
31. They are also instrumental in the evolution and change of law and legal discourse. See notes 109-111 infra and accompanying text.
32. I cannot use the language of the second stage, because the discourse generated by that stage would provide a false picture of the third stage. On the other hand, I can't exactly pretend that the implications of these moves for legal discourse are already well known (otherwise I would have nothing further to say).
33. One last note: These moves are generally more explicit in legal scholarship than in the positive law (i.e., judicial opinions). In part, this reflects the different rhetorical situation of judges (who are deeply implicated in the legal enterprise) and legal scholars (who can afford to take a less partisan perspective). These moves are sufficiently challenging to the legal enterprise that one would not expect judges to make frequent explicit use of these moves in their opinions. (These are, after all, cannibal moves.) None of this, however, is intended to suggest that these moves are limited to legal scholarship. On the contrary, I think that the moves form and inform the development of the positive law.
36. Cramton, supra note 35, at 1-2. For an early version of the story, albeit one grounded in rocks, not turtles, see W. James, The Will to Believe and Other Essays in Popular Philosophy 104 (1897).
No doubt there are many interpretations of the turtle story.\textsuperscript{37} One interpretation suggests that the turtle story is the legal scholar’s equivalent of the three-year-old’s persistent and annoying inquiry, “Why?” The three-year-old never stops asking why, no matter what the answer is. If only she could read Wittgenstein, she would realize that the point of the turtle story is that the giving of reasons must come to an end because all thought is ultimately situated in a form of life.\textsuperscript{38} She would understand that the point of the turtle story is that certain questions only make sense within certain language games, and that apart from those language games some questions simply do not make sense. They only yield turtles.\textsuperscript{39} But, if the three-year-old were a truly committed, paradigmatic three-year-old, she would not be satisfied with this response. And if we turned the tables on her and asked her, “Why not?” she would undoubtedly reply that all Wittgenstein has done is simply to produce a bigger and better turtle—one that doesn’t look like a turtle at all but does precisely what one wants a turtle to do, namely, ground the universe.

In contemporary legal discourse, Stanley Fish plays (or at least seemed to play) the part of Wittgenstein.\textsuperscript{40} Fish argues quite cogently that the turtle problem is not really a problem at all because we are “always already” sitting on a turtle and things could not be any other

\begin{itemize}
\item \textsuperscript{37} As one interpretation of the story indicates, it is not (and could not) ever be clear what a turtle really is. Disregarding this cautionary note, a hopelessly inadequate definition might go like this: A turtle is an explicit or implicit attempt to ground intellectual, professional, or cultural discourses in a stable foundation.
\item \textsuperscript{38} “‘So you are saying that human agreement decides what is true and what is false?’—It is what humans say that is true or false; and they agree in the language they use. That is not agreement in opinions but in form of life.” L. \textsc{Wittgenstein}, \textsc{Philosophical Investigations} ¶ 241, at 88e (G. \textsc{Anscombe} trans. 2d ed. 1958) (emphasis in original).
\item \textsuperscript{39} See \textit{ibid.} ¶ 50, at 25e (inquiring into whether the platinum meter bar in the Paris Museum is really one meter).
\item \textsuperscript{40} Fish systematically deconstructs foundationalist, formalist, and essentialist accounts of legal practice. See Fish, \textit{Anti-Professionalism}, 7 \textsc{Cardozo L. Rev.} 645, 655-61 (1986); Fish, \textit{supra} note 24; Fish, \textit{Working on the Chain Gang: Interpretation in Law and Literature}, 60 \textsc{Tex. L. Rev.} 551 (1982). On the connection between Fish’s enterprise and Wittgenstein’s work, see \textsc{Cornell}, “\textit{Convention}” and Critique, 7 \textsc{Cardozo L. Rev.} 679 (1986). Cornell argues that, in \textit{Anti-Professionalism}, Fish departs from Wittgenstein’s insight in two ways. First, Fish inappropriately argues that professional contexts place determinate constraints on the critique of those contexts. Second, Fish claims (again inappropriately) that critiques of professional contexts rest on an essentialist view of meaning or a transcendental subject.
\item But it’s not really clear that Fish ever meant to play the part of Wittgenstein. Indeed, at times, his arguments seem steeped in Kant—as when Fish argues (against Mark Kelman) that we can never be self-conscious of our interpretive constructs because those interpretive constructs are themselves a condition of consciousness. Fish, \textit{Dennis Martines and the Uses of Theory}, 96 \textsc{Yale L.J.} 1773 (1987) [hereinafter \textit{Dennis Martines}].
\item There is also the view that Fish is not engaged in a philosophical enterprise at all, but a rhetorical one. According to this view, Fish simply borrows the philosophical style for persuasive clout. See Rosmarin, \textit{On the Theory of “Against Theory,”} in \textit{Against Theory} 80, 86 (W.J.T. \textsc{Mitchell} ed. 1985).
\item There is much to be said for this view. After all, it is probably philosophers who are most likely to see Fish as engaging in a philosophical enterprise. Literary critics, by contrast, are more likely to see Fish as revising and perfecting “reader response theory.” Legal pragmatists, anti-theorists, and anti-intellectuals are likely to see Fish and his interpretive
CANNIBAL MOVES

way. Fish's solution is immensely appealing because it plays upon our intuitive sense that we will never be able to get around the turtle problem. So we might as well make peace with our turtle and give it a comfortable name such as, say, oh I don't know, . . . Satan? No, . . . How about . . . "interpretive communities"? Yeah, that's the ticket. At some point, however, our three-year-old is going to get fed up, perhaps even angry—in which case she might turn to Nietzsche, who gives voice to the suspicion that the history of Western philosophy has just been one fat turtle after another.

community thesis as a sustained vindication of their dearest insights. As for postmodernists, they are likely to see Fish as a (lapsed) deconstructionist.

The very possibility of projecting into Fish's text so many obviously professional readings, in one sense, serves to buttress Fish's own interpretive community thesis: that one is always interpreting and operating within an interpretive community. For an elaboration of these points and a critical appraisal of Fish's rhetoric, see Schlag, supra note 24.

41. Fish, supra note 24, at 1345. As Fish puts it:

To put the matter baldly, already-in-place interpretive constructs are a condition of consciousness. It may be . . . that the thinking that goes on within them is biased (which means no more than that it has direction) but without them (a pun seriously intended) there would be no thinking at all. It follows then that the one thing you can't do in relation to interpretive constructs is choose them, and it follows too that you can't be faulted either for not having chosen them or for having chosen the wrong ones; moreover, it follows that it makes no sense to condemn as "non-rational" the reasoning that proceeds within interpretive constructs because that's the only kind of rationality there is. Finally, by the same reasoning, if you can't choose your interpretive constructs, then neither can you know them (in the sense of holding them in your hand for inspection), and if you can't know them, you can hardly be expected to take them into account when you come to explain the process by which you reached your conclusions.

Dennis Martinez, supra note 40, 1795-96 (footnote omitted). For Fish, the problem is that theory has imperialist ambitions and is constantly trying to govern, control, or explain practice by coming up with better and more powerful turtles. But theory is always already sitting on a turtle of its own, and therefore, the ambitions of theory will never be realized. See Fish, Consequences, in AGAINST THEORY, supra note 40, at 106.

42. S. Fish, supra note 24. I cannot give a full account here of my reasons for thinking that Fish has not surmounted the turtle problem. For a brief discussion of the rhetorical appeal of Fish's account of interpretation, see Schlag, supra note 24.

43. Other comforting options include the positivist contribution of the rule of recognition (H.L.A. Hart) and the "grundnorm" (Hans Kelsen), both of which underlie the entire legal system even though presently we do not know much about what they look like. See H.L.A. Hart, supra note 9, at 92-93, 97-103, 112-15, 141-42 (discussing the ultimate rule of recognition); H. Kelsen, Pure Theory of Law 193-214 (1967) (discussing the nature and role of the grundnorm, or the basic norm, in relation to the legal order). For a provocative and critical attempt to discern the rule of recognition of the United States, see Greenwalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621 (1987).

Another option is the natural law suggestion that reason is the key. This view offers the promise that when all the turtles are heard from, we will be able to tell which one is really on the bottom because it will be the "best" one. See Moore, supra note 23, at 325-26 (arguing that judges should evaluate competing theories of death to determine which one most closely approximates its "true nature"). Or the advocate of natural law can simply bite the bullet and declare that it is quite "self-evident" which turtle is on the bottom. See J. Finnis, Natural Law and Natural Rights 64-70 (1980). Then, too, there is Dworkin's suggestion that there are, not just one, but three turtles underneath it all: moral philosophy, positive law, and aesthetics. R. Dworkin, Law's Empire (1986). According to this view, the task of the judge is to try to establish the best conversation possible among the three turtles.

44. Consider Nietzsche's summation of Kant's work:
Many of us in the legal community do not take Nietzsche or Wittgenstein seriously, but we do deal quite a bit in turtles. And this is something of an embarrassment, if only because our concern with turtles greatly resembles the plight of the three-year-old, who always wonders, “Why?” Indeed, that is why it was so tempting to talk of turtles in the context of three-year-olds: The obvious strategy is to degrade the problem by likening it to infantile consciousness. But that move is obviously just another turtle, and besides, who would dare suggest that eminent scholars like Fish, Fiss, and Dworkin are producing turtles?

And yet, turtles are nothing to sneer at. We could do far worse, after all, than situate law and legal discourse on the back of a turtle. Many of us will be quite content to do so as long as it works: Pragmatism has no axe to grind with turtles. And since it is law and legal discourse we are after, not perfection, why begrudge the enterprise a turtle or two here and there, as the need arises? So turtles are okay, at least for some purposes.

The relevant question, however, is whether they will help with the splits. Is there a way to stabilize these things? After all, it will simply

But let us reflect; it is high time to do so. “How are synthetic judgments a priori possible?” Kant asked himself—and what really is his answer? “By virtue of a faculty”—but unfortunately not in five words, but so circumstantially, venerably, and with such a display of German profundity and curlicues that people simply failed to note the comical niaisserie allemande involved in such an answer. People were actually beside themselves with delight over this new faculty, and the jubilation reached its climax when Kant further discovered a moral faculty in man—for at that time the Germans were still moral and not yet addicted to Realpolitik.

...A time came when people scratched their heads, and they still scratch them today. One had been dreaming, and first and foremost—old Kant. “By virtue of a faculty”—he had said, or at least meant. But is that—an answer? An explanation? Or is it not rather merely a repetition of the question? How does opium induce sleep? “By virtue of a faculty,” namely the virtus dormitiva, replies the doctor in Molière . . .


45. For discussions of the infinite regress in various legal contexts, see, e.g., S. BURTON, supra note 10, at 182-83 (deploying the infinite regress against legal formalism by demonstrating that it is incapable of sustaining a legitimating foundation), Boyle, Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power and Essentialism, 135 U. PA. L. REV. 383, 421, 425 (1987) (deploying the infinite regress against essentialist, conventionalist, and purposive accounts of law), Burton, Comment on “Empty Ideas”: Logical Positivist Analyses of Equality and Rules, 91 YALE L.J. 1136, 1139-47 (1982) (using the infinite regress against the logical positivist analysis of the legal concepts of equality and rules), Moore, Moral Reality, 1982 Wis. L. REV. 1061, 1075-76 (using the infinite regress to attack subjectivist accounts of moral statements), Weisberg, Commercial Morality, the Merchant Character, and the History of Voidable Preferences, 39 STAN. L. REV. 3, 44, 51, 90 (1986) (noting the infinite regress associated with the attempt to tailor the preference law of bankruptcy to the moral or economic “fact” of bankruptcy), Peller, Book Review, 98 HARV. L. REV. 863, 876 (1985) (arguing that cost-benefit analysis invites an infinite regress because what counts as a cost or a benefit will be determined in part by the cost-benefit calculus), and Wilcox, Book Review, 68 CORNELL L. REV. 408, 411-12 (1983) (suggesting that coherence theories of justification may be a more attractive response to the infinite regress problem than skepticism or the assertion of self-evident principles).
not do to send people to jail or foreclose mortgages merely because some splits have been left free to roam through law's empire without reason. Now, as I mentioned before, there is no reason to conclude that these splits are running amok. Still, one would like to know that they're not.\textsuperscript{46}

This desire to know has yielded the very popular epistemological infinite regress. Very simply, it goes like this:\textsuperscript{47} When we say, for instance, that some standard in tort law is objective, do we know this in an objective way? The answer is yes, we do, because we have objective norms to govern legal interpretation. The question then is, how do we know that we have objective norms of interpretation? The predictable answer is that these objective norms are supported by objective institutional practices. The question then becomes \ldots{} and the answer is that those institutional practices are objective because \ldots{} (and here we get various answers):

- because we are always already within these interpretive practices and could not be without them (pun seriously intended).\textsuperscript{48}
- because there is a grundnorm or master rule of recognition (which, admittedly, we know little about but are quite certain exists).\textsuperscript{49}
- because there are disciplining rules which serve to monitor the institutional practices.\textsuperscript{50}
- because there are formal and normative constraints on the institutional practices.\textsuperscript{51}

This list by no means exhausts the answers, but it is unseemly to add more: As the number of divergent answers to the question increases so does the embarrassment to the legal enterprise. The whole point of the

\textsuperscript{46} And one might like to know for all sorts of reasons. Preserving the rule of law is one reason. \textit{See} note 23 \textit{supra}. A slightly more modest reason might be a desire to maintain the distinction between law and violence. And even if that distinction breaks down, it remains important to know that the splits are under control—if only to assure that the violence of law remains effective and does not lapse into the random. \textit{Cover, Violence and the Word}, \textit{95 YALE L.J.} 1601, 1628-29 (1986). Obviously, the listing of reasons could go on and on.

\textsuperscript{47} Or like this, for instance: Consider the claim that constitutional interpretation requires recourse to the original understanding. Starting from that claim, one might ask how one discovers the original understanding—what procedures should be followed, what evidentiary rules should be used? \textit{See} Brest, \textit{The Misconceived Quest for the Original Understanding}, \textit{60 B.U.L. REV.} 204, 209-22 (1980); Dworkin, \textit{The Forum of Principle}, \textit{56 N.Y.U. L. REV.} 469, 498-500 (1981); Powell, \textit{Rules for Originalists}, \textit{73 VA. L. REV.} 659 (1987); Tushnet, \textit{supra} note 34, at 794-97. As one pursues this inquiry, the infinite regress invites another question: What conception of the Framers' intent should inform the construction of these procedures, these evidentiary rules? \textit{See} Brest, \textit{supra}, at 222-24; Dworkin, \textit{supra}, at 476-97; Tushnet, \textit{supra} note 34, at 798-804. And as one ponders that question, another surfaces: How does one know that the Constitution requires a recourse to the original understanding at all? \textit{See} Brest, \textit{supra}, at 225-38.

For a brief discussion of the adventures of the infinite regress in normative constitutional scholarship, see Schlag, \textit{Book Review, 2 CONST. COMMENTARY} 519, 521-22 (1985). \textit{See also} Appendix 4 \textit{infra}.

\textsuperscript{48} \textit{See} Dennis Martinez, \textit{supra} note 40.

\textsuperscript{49} This is the classic answer offered by legal positivism. \textit{See} note 43 \textit{supra}.

\textsuperscript{50} \textit{See generally} Fiss, \textit{Objectivity and Interpretation}, \textit{34 STAN. L. REV.} 739 (1982).

epistemological infinite regress is that the stabilization of the split on one level depends upon our knowing that it has been stabilized on the previous level, and so on and so forth all the way down. And the farther down we go, the greater the urgency; the stakes are greater, and still we do not encounter doctrine sufficiently awesome, or theory sufficiently grand, to stop the infinite regress.52

Split proliferation. One problem with the discussion above is that my use of the terms “subjective” and “objective” was hopelessly vague and loose—perhaps even to the point of error. If this is true, then one way to clean up the mess above would be to clarify at each step of the regress the sense in which I was using the terms “subjective” and “objective.” The hope is that precision and clarity could show that each step in the argument entailed a different and intelligible use of the terms. If this were true, and my presentation were indeed sloppy and flawed, then there really would be no infinite regress.

I think that this suggestion is correct. So let me revise the last section to get rid of the sloppiness: When we say, for instance, that some standard in tort law is objective, we mean that it is objective in the sense that it refers to the defendant’s actual behavior and that it generally disregards the particular characteristics of the defendant. How do we know that this standard is objective? The answer is that we have objective norms to govern legal interpretation, and by objective here we usually mean stable or neutral. How do we know we have objective norms of interpretation? The predictable answer is that these objective norms are reflected in objective institutional practices—and here, objective typically means demonstrable or shared. The question then becomes . . . and the answer is that those institutional practices are objective because . . . (and here we get various answers):

because we are always already within these interpretive practices and could not be without them (pun seriously intended) (objective as shared and general).53

because there is a grundnorm or master rule of recognition (which, admittedly, we know little about but are quite certain exists) (objective as general and demonstrable).

52. At this point, one can regret sneering at the turtles. Indeed, it is very tempting at this point to resurrect some notion of pragmatism, the sense that even if a few epistemological screws are loose, nonetheless the legal machinery works fairly well. Lawyers do know how to draw up security agreements and judges do decide cases in fairly predictable ways—certainly, far more predictably than this vertiginous description of the infinite regress would suggest. Indeed, they do.

The interesting question, however, is whether this predictability is attributable to something that we would want to call law or to something that is (even) harder to locate, identify, and justify? Once one asks about the turtles, it’s very hard to believe that the answer does not matter. But achieving closure becomes a matter of rhetoric. And rhetoric is a matter of persuasion, power, authority, audience, and everything that they depend upon, not to mention . . . .

53. With apologies to Stanley Fish, who would quite correctly object to the characterization of his approach as objective. See S. Fish, supra note 24, at 14-15.
because there are disciplining rules which serve to monitor the institutional practices (objective as *shared* and *stable* and *neutral*).

because there are formal and normative constraints on the institutional practices (objective as . . . ?).

One may quibble with my characterization of the various uses of the term "objective" above. (I wouldn't have it any other way.) The point, however, is that the subjective/objective split is used in legal discourse in many different senses. So it is simply false to assume that each time one encounters at different levels in the argument what seem to be the same terms (i.e. "subjective" or "objective"), they always mean the same thing. Thus, one is not entitled to conclude, as I did above, that splits necessarily yield a linear infinite regress.

I think this revised view is correct. There is no reason to suppose that a split like subjective/objective always has the same meaning. Indeed, we know that the split refers to a variety of distinctions:

- particular/general
- mental/physical
- unprovable/demonstrable
- individual/shared
- changeable/stable
- biased/neutral
- opinion/fact.

And in some sense, this variety of meanings should not be surprising. If the subjective/objective distinction is truly a split, it should not stand still. And if legal discourse is composed of a variety of splits each of which is related to the others in different ways and in different contexts, then this sort of multi-referential meaning of the split is exactly what one should expect.

Clarifying the ways in which splits are used may be a helpful exercise. But it will surely not help to stabilize them; on the contrary, just as subjective/objective can refer us to another split, such as biased/neutral, it must surely be the case that biased/neutral in turn refers to other splits. Hence, the attempt to stabilize the split through careful definition of terms has generated a proliferation of splits—each with infinite regresses of its own. So even though the gravitational pull of the linear infinite regress has been reduced, things have been made worse. Indeed, combining the linear infinite regress with split proliferation, we get a proliferation of infinite regresses.

This last thought requires some further modification of the previous section. The infinite regress is not simply an *epistemological* regress. It is not simply the cipher produced by asking how we (can) know something. On the contrary, there are many kinds of infinite regresses. There is, for instance, the *normative* infinite regress which requires that
each moral justification be justified in turn.\textsuperscript{54} There is the \textit{explanatory} infinite regress which requires that each explanatory norm be explained as well. And there are \textit{meta} infinite regresses as well, which allow us to move from explanation to normativity to epistemology to linguistics and back again.

So let me clarify further. The infinite regress implied that it is not possible to find some foundational level for a particular split. Split proliferation adds the suggestion that it is impossible to isolate or stabilize any discrete linear regress of splits. On the contrary, each split sends us to another one. What we appear to get from these moves is a sort of free play of splits.\textsuperscript{55}

Split proliferation complicates the attempt to present the legal enterprise as stable or coherent. How does one tell, for instance, when "objective," at any given level in the analysis, means objective-as-neutral or, instead, objective-as-general? The answer is that the craft of law entails being able to distinguish one turtle from another.\textsuperscript{56} One wonders, though, whether craft is sufficiently powerful to keep the turtles separate and distinct, or whether, sooner or later, we will see them evolve into one huge, unruly reptile.\textsuperscript{57} But craft is nothing to sneer at. By facilitating the proliferation of splits, the craft of law makes them less visible. The sustained proliferation of splits, in turn, makes it much more difficult to track the infinite regress. Who has the time or the energy to recognize, much less trace, all these infinite regresses? So in a sense, the greater the split proliferation, the more difficult it becomes to trace the turtle tracks. In part, this explains the attraction and appeal of contextualization for different political constituencies. Contextualization recognizes and embraces split proliferation. In fact, contextualization takes split proliferation to the extreme. And in doing so, contextualization leaves us in the same situation as other approaches: There still seems to be no way to stabilize one split with another.\textsuperscript{58}

\textit{Catch-22}. Now, one objection to the presentation above is that it rests upon the supposition that the only way to stabilize a split, to give it a fixed meaning in some context, is to use another split. In turn, this supposition presumes that there is nothing in law or legal discourse but splits. And this last supposition seems absurd. Quite clearly, some as-

\textsuperscript{54} For an exploration of the classic moves in response to the normative infinite regress, see Leff, Book Review, 29 \textit{Stan. L. Rev.} 879 (1977) (reviewing R. Unger, \textit{supra} note 11).

\textsuperscript{55} The play of splits is so free that the possibility that one split may achieve dominance (total or partial) cannot be ruled out. Indeed, the concept of the split itself cannot be foundational for otherwise it would have to displace itself.

\textsuperscript{56} This answer is just the craft turtle—a close relative of interpretive convention and pragmatism.

\textsuperscript{57} Say, a lizard, as some irrationalists would have it.

\textsuperscript{58} For other attempts to show that splits cannot be used to stabilize each other, see David Kennedy, \textit{The Turn to Interpretation}, 58 \textit{S. Cal. L. Rev.} 251 (1985) (elaborately demonstrating the ways in which legal scholars privilege one pole of a split then another by subtly shifting contexts), and Schlag, \textit{supra} note 9 (showing how the form of the rule/standard dichotomy undermines the ability to link the rule/standard form to substantive concerns).
pects of law and legal discourse do not seem like splits: norms such as craft, for instance, or tradition, consensus, custom, or authorial intent. To be sure one may quibble with interpretations or applications of these norms, but that is beside the point: The norms are there to be consulted. They seem to be whole, to have integrity, to have substance—they deserve the name, "norm." Presumably, then, they can be invoked to stabilize the splits.

This seems correct and points to a deficiency in the two previous sections. Both the infinite regress argument and split proliferation present difficulties for stabilizing splits, but only if we assume that there is nothing in legal discourse that does not split. And as it is obvious that there are certain norms which do not appear as splits, it seems unreasonable to presume that legal discourse is all splits. Of course, just because a norm seems to have a presence, an integrity, in short, a name, doesn't necessarily mean that it is not split. For instance, it is well known, according to one World War II novel, that American combat personnel can be reprieved from flying missions if they are crazy.59 The military norm is clear and, in appearance at least, unequivocal: Anyone who's crazy must be grounded.60 And yet anyone who claims to be crazy and asks to be grounded can't be—he can't be crazy and he can't be grounded—because a concern for one's safety in time of war is . . . well, perfectly sane. And so on.61 A recent article by George Fletcher suggests that this sort of catch-22 has found its way into the law.62

Fletcher recently noted that courts sometimes excuse prisoners who escape in the face of threatened homosexual rape. Sometimes the doctrinal rationale for excuse is that the escape is an involuntary, unblameworthy response to a threat of violence. Fletcher asks us to suppose that the relevant doctrinal considerations include the defendant's expectation of acquittal at the time of escape.63 Thus, the greater a defendant's expectation of conviction, the easier the inference that his escape was truly lacking in voluntariness or blame.

In one case, as Fletcher notes, prisoner D1 escapes to avoid rape and is acquitted on grounds of involuntariness. (Apparently, the absence of any expectation of acquittal was crucial to the decision in D1's

60. See id.
61. There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.
63. Id. at 1281.
case.) If prisoner D2 at some later time faces the same situation and escapes, he too will be acquitted. Suppose, however, that prior to his escape, D2 learns of the decision in D1’s case. This bit of knowledge will lead D2 to conclude that his case is analogous and that an escape will lead to acquittal. But as soon as D2 makes this realization, he recognizes that his planned escape will seem more voluntary than D1’s escape: D2 apparently expects acquittal, whereas D1 did not. Hence, the chances are that D2 will be convicted. But things do not stop here: D2’s newly formed expectation of conviction leads D2 to the happier conclusion that his escape is involuntary after all and that therefore he will be acquitted, and so on ad infinitum.64

This occurrence seems bizarre. Fletcher’s hypothetical sends the reader (as well as the prisoner) down an infinite hall of mirrors perversely constructed to reflect the opposite of the previous mirror: Self-consciousness of guilt leads to acquittal and self-consciousness of acquittal leads to guilt. What makes D2’s predicament interesting here is that it is not just the result of some inartful articulation of explicitly conflicting doctrinal requirements.65 On the contrary, the doctrine in Fletcher’s hypothetical seems clear, whole, and coherent: Prison escapes can be excused upon some showing that the defendant’s conduct was not blameworthy.

Clarity can be deceptive, as the Cretans warned: “One of themselves, even a prophet of their own, said, the Cretans are always liars, evil beasts, slow bellies. This witness is true.”66 Like the doctrine in Fletcher’s hypothetical, this warning at first seems clear and whole. Yet upon further examination, the Cretans’ message (like Fletcher’s hypo-

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64. Id. at 1280-84. Several authors have addressed this paradox. Dan-Cohen discusses the paradox as a broader phenomenon stemming from the dual function of single legal directives as decision rules and conduct rules. Decision rules are directed to decisionmakers, whereas conduct rules are directed to the public. The catch-22 arises when a single legal directive functions both as a decision rule and a conduct rule and the two carry discordant meanings. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law, 97 Harv. L. Rev. 625 (1984). Hicks applies the catch-22 to three legal problems: the problem of parliamentary entrenchment (no court may question the binding authority of an act of Parliament; but what if Parliament enacts some legislation changing that principle with respect to future legislation?), the problem of whether a declaration by the House of Lords no longer to treat its decisions as binding is itself binding, and the problem of the rule of renvoi when it applies to the conflicts laws of a foreign country that are identical. Hicks, The Liar Paradox in Legal Reasoning, 29 Cambridge L.J. 275 (1971). Miller discusses the catch-22 in the context of statements that are inconsistent with an authentic self, e.g. Marx as a member of the bourgeois class could not advocate that beliefs were class determined. Miller, Book Review, 84 Mich. L. Rev. 880, 896-99 (1986).


66. Anderson, St. Paul’s Epistle to Titus, in The Paradox of the Liar I (R. Martin ed. 1970) (recounting the early history of the paradox of the liar). If the prophet’s testimony is true, then he, as a Cretan, must be a liar. Therefore, his testimony is false . . . in which case it is true . . . and so on.
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Cannibal moves (theoretical) yields an infinite alternation of opposite conclusions, "the liar's paradox." Apparently, this paradox has now wound its way into the criminal law—or at least into Fletcher's hypothetical.

The doctrine in Fletcher's hypothetical puzzles us in the same manner as the liar's paradox: Both statements have a seemingly straightforward and unified appearance that nonetheless somehow manages to yield two contradictory conclusions each entailing the other. How is it that a straightforward, unified statement could produce such a bizarre hall of mirrors? Yet Fletcher's hypothetical, like the liar's paradox, undeniably does. The doctrine speaks out of both sides of its text to say opposite things: (1) The doctrine specifies that blameworthiness is a predicate for conviction and the absence of blameworthiness is a predicate for acquittal. (2) The doctrine also specifies that knowledge of a likely conviction negates a blameworthy state of mind whereas knowledge of a likely acquittal will yield a blameworthy state of mind. How does the doctrine accomplish this tour de force? I think it internalizes a split which we have momentarily forgotten.

This internalized but suppressed split might be described as a difference between what the doctrine means and what the doctrine does. Or, to be more precise, I will use J. L. Austin's categories of constative and performative utterances. A constative utterance ("the sun is out today") simply describes a state of affairs and is either true or false. A performative utterance (like the words "I do" at a marriage ceremony), by contrast, has some operative significance; it functions as an action and is neither true nor false. Instead, it is, roughly speaking, (more or less) effective. Making liberal use of these categories, it is possible to speak of the constative and performative significance of a statement. For instance, in Fletcher's hypothetical, the doctrine has both constative and performative significance with respect to the defendant's state of mind. The constative significance of the doctrine is that if D2 can truthfully say, "I have a clean state of mind," then D2 should not be convicted. The performative significance of D2's articulation of the doctrine, however, is the converse; the expectation of acquittal reduces (or even negates) D2's involuntariness—and thus yields a guilty state of mind. The paradox arises because we forget about the performative significance of the doctrine and yet the performative significance of the doctrine works to reverse the meaning of its constative significance.

67. The terms are borrowed from J. L. Austin, How To Do Things With Words 1-15 (1975). Ultimately, Austin rejects the possibility of locating or identifying the distinction between performative and constative utterances. Id. at 55-91, 144-45; see also note 70 infra.

68. Id. at 1-15.

69. Id. at 14.

70. Austin does not do this but instead rejects the distinction between performative and constative utterances in favor of more refined distinctions between locutionary, illocutionary, and perlocutionary acts. Id. at 55-91, 144-45.

71. For further discussion of the catch-22 in terms of constative and performative significance, see Appendix 2 infra.
The puzzle arises because the doctrine looks clear, whole, and coherent, yet nonetheless internalizes a split we have partially forgotten.

This account, of course, does not resolve Fletcher's hypothetical.\(^7\) In fact, it's not even a very good explanation: As previously suggested, \textit{split proliferation} casts serious doubt upon the possibility of using one split to stabilize another, for there will always be another way to draw the distinction. And indeed, this is true here as well.\(^{73}\) Instead of using Austin's categories of constative and performative significance, it's also possible to say that we tend to think of the doctrine as symbolic meaning, content, proposition, while forgetting that the doctrine is also causal force, textuality, action.\(^74\)

In short, what is crucial is that the doctrine should operate in two modes (though these two modes can be described in various ways). The paradox arises because the mode we have forgotten about is structured so as to reverse the meaning or effect of the one we remember. We have quite literally forgotten about the splits, while they mercilessly wreak havoc on our consciousness by sending it in opposite directions.\(^75\)

From a legal perspective, however, the interesting question posed by Fletcher's hypothetical is whether a catch-22 between what law \textit{means} (i.e. constative significance) and what law \textit{does} (i.e. performative significance) can be stabilized. One classic move to stabilize this split is to suggest that, in law at least, meaning governs consequence, so the latter need not be considered at all. This amusing strategy, which was championed by the legal formalists, basically privileges one prong of the split, meaning, by sending the other prong, consequence, into ex-

\(^{72}\) Indeed, as one commentator notes, the paradox of the liar is not generally deemed resolved. See Kaye, \textit{A First Look at "Second-Order Evidence,"} 66 B.U.L. Rev. 701, 706 (1986). For a sample of recent literature on the paradox, see \textit{Recent Essays on Truth and the Liar Paradox} (R. Martin ed. 1984). The solutions offered in set theory that depend upon banishing self-referential statements (like the liar's paradox) do not seem to be available in less formal discourses such as law. Cf. D. Hofstadter, \textit{Godel, Escher, Bach: An Eternal Golden Braid} 22 (1979).

\(^{73}\) Compare, for instance, Fletcher's account of the catch-22, which locates it in the antinomy of self-consciousness, with Dan-Cohen's account, which locates the paradox in the attempt of doctrine to address two different audiences at once, the decisionmakers and the lay public. See note 64 \textit{supra}.

\(^{74}\) At other times, we will remember the causal force, textuality, and action of law and will forget its symbolic meaning, content, and propositional character.

\(^{75}\) Consciousness can mean and consciousness can cause. But it is not in control of all the consequences that stem from its act of meaning nor does it always mean everything that its meaning causes. See F. Dostoevsky, \textit{Notes from Underground} (1974) (depicting the unhappy state of self-consciousness).
The predictable response was to bring consequence back to the center of legal discourse and send the formalists into exile—which is precisely what the legal realists did. They too, however, made some amusing contributions to the control of the split: Some of them argued that the meaning of a legal decision is its consequence—so let’s not worry too much about what the words mean. The problem with this approach is that legal decisions continue to mean despite their consequences. Another time-honored favorite is the view that in law, meaning and consequence are one and the same. This view was a real hit in the early “illegal advocacy” prosecutions in the United States at the beginning of the twentieth century: The courts proceeded on the assumption that intent proves meaning, which proves effect (and of course vice versa).

In legal discourse, catch-22s generally trace the types of splits mentioned above. The history of these intellectual moves to stabilize the

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76. This banishment of consequence fits with the formalist view of law as a closed, self-sufficient, and structured deductive system. See, e.g., Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 CORNELL L. REV. 861, 866-68 (1981); see also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 617 (2d ed. 1985) (labeling Langdell’s science of law “geology without rocks,” and “astronomy without stars”).


78. Perhaps it was just the exuberance of novelty and iconoclasm, but Felix Cohen, for one, did at times seem to go this far in advocating a consequentialist theory of legal meaning. “[T]he problem of the judge is not whether a legal rule or concept actually exists but whether it ought to exist.” Id. at 841 (emphasis in original).

79. Summers notes that consequentialists view the realization of values in causal terms. Summers points out that law is not merely causal and that one of the ways it serves to realize values is simply by being in accordance with the norms of right behavior. See Summers, supra note 76, at 945.

80. Thus, in Abrams v. United States, 250 U.S. 616 (1919), the text of the “illegal advocacy” served both to show the likely effect of the speech and the intent of the defendants. Effect served to demonstrate intent and, of course, vice versa. The defendants argued that they only intended to prevent injury to the cause of the Russian Revolution. The Court disposed of this argument by noting, on the basis of the “illegal” circulars printed by the defendants, that the “plan of action which they adopted necessarily involved . . . defeat of the war program of the United States.” Id. at 621. Thus the text of the circulars established, not merely the likely, but the necessary effect of the plan. If “[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce,” then certainly it seems legitimate to conclude that, here, they acted “for the purpose of embarrassing and if possible defeating the military plans of the [United States] government in Europe.” Id. at 621, 623; cf. A. KOESTLER, DARKNESS AT NOON (1941) (a work of fiction in which Stalinist interrogators assume that an objective counterrevolutionary must have subjectively intended to be counterrevolutionary).

81. One pattern of catch-22 is so prevalent in law that it warrants special mention. Legal directives often aim to affect certain behavior in some way. In order to accomplish its aim, the legal directive must describe that behavior. A problem arises, however, because persons subject to the legal directive retain a freedom to alter their behavior so as to avoid, neutralize, or minimize the intended effect of the legal directive. Bankruptcy law provides a good example: Because it remains within the power of the potentially bankrupt individual to precipitate or delay the technical act of bankruptcy, it is difficult (if not impossible) for the law to define acts of bankruptcy that correspond to the moral or economic “state” of bankruptcy. See Weisberg, supra note 45, at 44, 51, 90. For further examples and discussion of this “feedback loop,” see Schlag, supra note 12, at 957-62. This catch-22 can lead to a stereotypical form of argument
split between what the law does and what it means does not give cause for optimism. Consider, then, the extremely pessimistic hypothesis that Fletcher’s hypothetical, rather than presenting a special case, states the general rule. One reason this might be is that law is both what it means and what it does. And the two are rarely (if ever) consonant. On the other hand, rarely are the meanings and structures of legal discourse sufficiently rigid to produce the incoherence achieved in Fletcher’s hypothetical. To achieve such perfect incoherence would entail locating a split that could be stabilized so as to always yield perfect contradiction. Both split proliferation and the infinite regress make such rigidity unlikely. In fact, it would be surprising if the split between what law does and what law means always caused a perfect catch-22. The reason is simple: It would mean that the realm of meaning and interpretation would be so systematically weak that we could never interpret our way out of these types of paradoxes. And, this is not true—neither generally, nor in Fletcher’s hypothetical. By relying on interpretive techniques, we can clearly avoid the paradox in Fletcher’s hypothetical—we can, for instance, interpret the doctrine so that the defendant’s expectation of acquittal is irrelevant to his state of mind. Indeed, the only reason it is a paradox for us is that we are willing to entertain it as such simply for the intellectual pleasure of confronting the possibility. (I doubt that many trial lawyers or trial court judges would spend sleepless nights worrying about the paradox.)

More typical of legal discourse, then, is an attenuated version of the catch-22—where each side of the split antagonizes (rather than annihilates) the other. The description of affirmative action offered by its opponents provides an example. Suppose that doctrine states that affirmative action can be used to remedy past discrimination. One of the predicates for allowing affirmative action is some showing that the group has suffered discrimination. The better one can show that the group has been discriminated against, the more likely it is that an affirmative action program will be established. But here’s the catch. The very demonstration of the fact of discrimination can yield a perverse implication: Namely, some will think that because the group has been discriminated against, it has sustained discriminatory harm and is less qualified. This perverse implication can be seen to perpetuate discriminating the virtues of “the bright line rule” against “the flexible standard.” See generally M. Kelman, A Guide to Critical Legal Studies 15-63 (1987); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Schlag, supra note 9.

82. Thus, a perfect catch-22 requires that a legal directive be susceptible to only those interpretations that render it perfectly contradictory. And rarely is it the case, in law, that there are such strictures on interpretation—especially given that a premium is placed on avoiding self-contradictory interpretations. See Appendix 2 infra.

83. See Fletcher, supra note 62, at 1284 (noting that the significance of the paradox is primarily theoretical, as opposed to practical).

nation. To avoid this result, the decisionmaker should refrain from demonstrating that a group has sustained discriminatory harm. But if the decisionmaker follows this tack, then the predicate for granting affirmative action may not be satisfied. And so on.

Now, if the double role of legal texts such as

constative yet performative,
symbolic yet causal,
content yet textual, and
propositions yet actions,

can yield catch-22s, then the integrity and wholeness of purportedly stable norms such as craft, consensus, custom, or authorial intent must be reconsidered. It turns out that these norms speak out of both sides of their text.

For instance, consider the significance and implications of a possible adoption of constitutional intentionalism by the Supreme Court. The constative significance of this position, most simply, is that the Constitution means whatever the Framers intended; yet its performative significance is to free contemporary Justices from existing case law and existing interpretive procedures to refashion the Constitution in their own image. The symbolic significance of a call for constitutional intentionalism in constitutional interpretation can be described as a conservative return to the intellectual roots of the republic; yet its causal significance would be a radical (perhaps adventuristic) exercise in constitutional reconstruction. The content of constitutional intentionalism is to require that constitutional decisions conform with the intent of the Framers; yet its textual significance is to exclude any but legal-historical arguments about the meaning of the Constitution. As a proposition, intentionalism simply states a position on what the Constitution means; yet as action, this proposition essentially transfers power to those (narrow) political and academic interests that are committed to the legal-historical interpretation of the text.

Now, certainly, one can disagree with this description of the character of the intentionalist position. And I think such disagreement would be justified: The intentionalist stance cannot be said to have, for instance, just one constative meaning or just one performative significance. And that’s precisely the point: Stable norms such as authorial intent (or consensus or tradition) are not terribly stable. On the contrary, they internalize the types of splits described above (e.g. constative versus performative).

What is more, these purportedly stable norms can crumble under

85. See T. Sowell, Black Education: Myths and Tragedies 292 (1972). This catch-22 hardly presents a killer argument against affirmative action. For one thing, it is not so much an argument against affirmative action, as an argument against ever finding that stigmatized groups have sustained discriminatory harm. For other responses, see R. Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1330-31 (1986).
86. See Appendix 2 infra.
scrutiny because each of them in its own way reproduces the world of turtles and split proliferation. Thus, within a convention, one would expect to find certain assertions not just about substance, but about interpretation and epistemology and ontology and so on: the usual line-up of turtles with, of course, the proliferation of ways to describe the little animals.87

The Overkill. Now, one could object that this presentation of the catch-22, while interesting, is nonetheless quite flawed in one respect. Granted that there may be some reason to think that Fletcher's paradox is more common and more sweeping than he suggests, nonetheless, the account above of the catch-22 is simply too extreme. It goes too far in suggesting that legal doctrine and legal theory are at war (or in tension) with themselves.

Once one realizes that, indeed, the account exaggerates, one immediately recognizes why this should have happened. The section above on the catch-22 seems to privilege the idea of contradiction. Thus, any time some actual distinction between the meaning of a doctrine and its consequences emerges, the previous section immediately seizes upon the difference to suggest that there is a contradiction. But difference does not necessarily signify contradiction—unless some master rule says it does. But I have not offered any grounds for thinking that such a master rule exists. Indeed, if it did, then the strong version of the catch-22 would be correct, and the master rule would automatically destabilize itself.

I think that these objections are correct. At most, then, the catch-22 merely states that stable norms are susceptible to internal disruption. (It does not, and indeed could not, say that stable norms are always disrupted.) This weaker version of the catch-22 seems much more consistent with how lawyers experience legal doctrine, norms, and concepts: These legal artifacts do not invariably shatter as soon as they are used—far from it. And any theory or approach which suggests that they do invariably shatter would suffer from overkill. Indeed, the erroneous suggestion that legal discourse always entails a perfect catch-22 suffers from overkill. That suggestion seems implausible—for the reason that most of us do not experience norms such as convention or custom shattering every time we refer to them. Moreover, the strong version of the catch-22 transforms every difference into a contradiction. This makes contradiction a foundational principle—which is absurd precisely because contradiction would have to unseat itself every time it became foundational. So to repeat, a theory that suggests that legal concepts or norms invariably shatter suffers from overkill.

87. For an example of a clever deployment of the catch-22 within the structure of the purportedly stable norm of "the Framers' intent," see Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not intend that the Court interpret the Constitution in terms of the Framers' intent).
By the same token, any theory that suggests that there are legal concepts or norms that are not susceptible to destabilization also suffers from overkill. That sort of theory would privilege the wholeness, the coherence, and the integrity of certain legal concepts—and we still have no reason to do that. The splits are still free.

One of the reasons that they remain free is precisely because of the overkill. Indeed, the catch-22 is only one of the ways by which an internalized split will erupt—the overkill is another. Like the catch-22, the overkill works with our studied inattention. The overkill occurs when some stable norm is extended to a domain where it has no business being.

When Posner, for instance, starts to explain marital love in terms of efficiency and the reduction of transaction costs, we sense overkill. Love, after all, does not easily reduce to transaction-cost avoidance. With this thought, we begin to wonder what is wrong with Posner's attempts to extend microeconomics to this domain. And with that question the mechanics of the Posnerian enterprise begin to surface. We realize that it does not matter at all what part of social life Posner reviews; his economic mechanics will always be the same. The microeconomic concepts are always related in the same structured way and can be applied to any aspect of life. Why? We find the answer by thinking about love in connection with transaction costs. What has Posner suppressed? By thinking about Posner's treatment of love, one begins to realize that throughout his enterprise, Posner's enterprise suppresses the realm of significance and aesthetics that supports and is supported by the reciprocal construction of social life and social meaning.

Legal discourse is pregnant with possibilities for overkill. Tremendous harm can go unredressed at the very whisper of the concept of "free choice." Cruelty can be perpetrated with the supposition that men are capable of protecting their own interests in a free market. Each of these statements describes a situation where the economics of concepts such as choice or free-market ordering are stretched to their limits. Over time, this conceptual strain can generate the emergence of the splits. Indeed, the overkill works by overextending one part of the submerged split to such an extent that the split surfaces and the inter-

89. Schlag, supra note 12, at 933-45 (discussing the mechanical structure of Posner's brand of law and economics).
90. Id. at 933-62.
91. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (asserting that the "badge of inferiority" associated with enforced separation of the races is simply a "construction" chosen by blacks).
92. See, e.g., Lochner v. New York, 198 U.S. 45, 57 (1905) (asserting that bakery employees are perfectly capable of asserting their rights and taking care of themselves without the protecting arm of the state).
nalization or suppression of the split is revealed—all down the line.93

Summary. There is something very strange about these four moves. If one takes them seriously, one is left with an utterly bizarre conception of law and legal discourse—one that goes like this: Splits are not subject to control. There is no place outside the splits. And there is no top split. All that’s left is the interpenetrated free play of splits. There is neither foundation nor rational order in law or legal discourse. As for legal doctrine, it is the record of failed attempts to control the splits.

This, of course, seems to be an impossible vision of law and legal discourse. The very articulation of this view invites a search for the wrong turn. What is wrong with the four moves? One possibility is that they only threaten legal rationality if one assumes the existence of splits. The account of the four moves itself depends upon the presence of contradiction. And if there is no contradiction, then the four moves are relatively powerless.

There is much to be said for this view. Simply because legal discourse exhibits a passion for distinction and difference hardly means that it is riddled with contradiction. A distinction is not necessarily a contradiction. There is a difference in constitutional law between private and state action. Does this difference state a contradiction? The question is how can we tell? And the answer, typically, is that we have to examine the uses made of the distinction, as well as the ends which it is designed to serve. But, this procedure will not work, for it simply invites the infinite regress. The very possibility of developing a rule of recognition that would enable us to distinguish a mere distinction from a split is in question.

One wonders then whether this constant questioning is not the product of a commitment to a perverse hyperrationalism—a demand for a reason so pure that no system of discourse could possibly fulfill its requirements. Indeed, the account of the four moves above seems to demand a foundationalist grounding of legal discourse in reason. And each time reason fails, the splits re-emerge. Surely something is wrong with posing the issue in this way. After all, it is possible that a reason anchored in experience or interpretive convention or institutional history might allow the splits to be stabilized.94

93. Moreover, it is quite possible that the experience of constant overkill in legal discourse (the constant abuse and overuse of legal concepts and doctrine) could itself lead to the rejection of the view that law is based upon a set of integrated wholes such as concepts, rules, and principles. Instead, this constant overkill could lead to a view of law as a field of constantly rearranging splits—each never fully present to the other. But obviously one can only stretch the concept of overkill so far. For an attempt to demonstrate this sort of strain on philosophical concepts and to precipitate this sense of systemic overkill, see J. DERRIDA, White Mythology: Metaphor in the Text of Philosophy, in MARGINS OF PHILOSOPHY 207-29 (1982) (suggesting that the language of philosophy is on loan and that the loan is both usurious and used up).

94. Obviously, there are many other metaphors (besides “anchor”) by which one might describe the pragmatic insistence on a connection between reason and experience: reason embedded in or immanent in experience; reason permeating experience; the reason of experi-
I think that this suggestion is correct. The problem is that even though the suggestion is correct, it doesn’t help. All it suggests is that so long as our experience, our interpretive conventions, and our institutional history are stable, the splits can be stabilized. The suggestion can make no claims about the stability of experience, interpretive convention, or institutional history. These are not (and on this account could not be) governed by any reason we could know about. What is more, once reason is referred to experience, culture, or interpretive convention, the question becomes whether these are themselves experienced as split.

Now, none of this establishes that a more pragmatic conception of reason cannot be invoked to stabilize the splits. But, it does show that an appeal to a more pragmatic conception of reason will not suffice to demonstrate that the splits are or can be stabilized. Even if experience, interpretive convention, or institutional history could support reason in stabilizing the splits, we could not know it. Now, one might answer that this epistemological demand is itself a symptom of the dreaded hyperrationalism. And one could add that it is not necessary to know that a stabilizing solution is correct. Now, one could say all of these things, but it is difficult to see how they would help.

Who has the burden of proof? Have we any reason to suppose that context, convention, or experience helps reason to stabilize the splits? Well, actually, we do. When we examine the case law, we do not often have the impression that judges are rendering totally unpredictable decisions or offering totally off-the-wall arguments. This observation doesn’t help, of course, for the same observation could well be true even if reason dropped out entirely. It proves too much—overkill.

Is this hyperrationalism again? Well, yes. But the problem is that it is not possible to find a rationalism that is at once (a) not hyper and (b) not supported by the uncertain twists and turns of experience, culture, convention, etc. As soon as one attempts to reacquaint reason with the practical, the capacity of reason to stabilize the splits is again placed in question.

One wonders whether this account does not establish a burden for reason that it could not possibly meet. I think in some sense this account does do precisely that. Perhaps, then the burden should be placed elsewhere. Perhaps we should demand, as John Stick recently did, that any attempt to demonstrate the irrationality (or arationality) of legal discourse should show that law cannot possibly be rational.95 The

95. Stick argues that the efforts of Singer to demonstrate the irrationalist dimension of legal discourse fail because Singer invokes Cartesian standards of rationality that are external to law (and which most of us do not believe in any case). Stick then argues that Singer’s arguments miss their mark because the legal community rejects Cartesian rationality in favor...
problem with this stance, however, is that we just showed that reason is incapable of making such demonstrations. Stick’s burden is impossible to satisfy as well. If neither side can meet the ideal burden of persuasion, then where should the burden be set?

This sounds like an impossible question. It suggests that we should not be asking about burdens of persuasion at all. What is the point when it seems that no one does (or could) know what’s going on? Of course, this is precisely the situation where burdens of persuasion are necessary: when the evidence or the argument itself cannot meet the ideal of certainty. If it were so clear that the partisans of pragmatism are right, that reason anchored in experience can stabilize the splits, then there would be no need for them to appeal to a burden of persuasion.

Where should the burden be set, then? Perhaps this is the wrong question—a symptom of, rather than a cure for, the four moves. Indeed, this epistemological preoccupation with burdens of persuasion suggests that the mistake is not so much a demand for hyperrationalism but something broader, more fundamental. Perhaps the mistake was in the turn towards epistemology? I think this suggestion has some merit. After all, the four moves above depend upon our desire to know that the splits can be or are stabilized. But why should we care whether we know? Why should one care whether it is reason or experience that


Even if Stick were right that Singer has missed his mark (and from a pragmatic standpoint, that depends upon the practices of, not just the iconography invoked by, the legal community), it is not clear that Stick has established his point: Two questions remain.

The first question is one that pits substance against form. It’s all fine and well to champion a pragmatic, contextual, shared view of rationality that stresses analogy, principles, practical reasoning, and coherence theories of truth. Make no mistake; as reasoning goes, this is great substance. There remains, however, that small question of form: Is this view of rationality itself held, used, and practiced in a pragmatic, contextual way that stresses principles and all that other good stuff? Or are pragmatism, contextualism, principles, etc., simply a new altar to which one pays the same old formalistic, ritualistic homage? My point, quite simply, is that what matters from a pragmatic perspective is not just what is believed, but how it is believed and how those beliefs are used.

The second question goes to the nature of this pragmatic, contextual, shared view of rationality that stresses principles and so forth: Does this conception of rationality exhibit the characteristics of something we would want to call rationality? See note 96 infra.

And this question does matter quite a bit—for our faith (if any) that the legal system “works” and produces just results seems to depend upon a demonstration that it is indeed “rational.” Now, the fact that it may not be rational is hardly a killer argument against the legitimacy or effectiveness of the legal system. One could, for instance, attempt to defend the legitimacy of the legal system on the grounds that it’s good literature. And there are certainly some very provocative works which explore this possibility. See, e.g., J.B. White, Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law (1985); Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983). But for most people (within and without the legal academy), poetic excellence is generally not the first thing that comes to mind in answering the question, “What makes law effective or legitimate?” By contrast, rationality will often be invoked in answering that question.
controls the splits so long as something keeps them in line?\textsuperscript{96} Perhaps this epistemological demand is superfluous and objectionable. Stick certainly thinks it is when he suggests that the epistemological turn prevents the discussion of what really matters: politics.\textsuperscript{97} But, his argument depends upon a burden of persuasion which he establishes for those who argue that, in law, reason is not exactly in the driver's seat.\textsuperscript{98} Indeed, Stick seems to want a rational demonstration that law could not possibly be rational.\textsuperscript{99} This is somewhat ironic. First, it is ironic because the burden he establishes is precisely the mirror image of the hyperrationalism we discussed above, which he roundly condemns.\textsuperscript{100} Second, it is ironic because we just decided that burdens are established here because epistemology is not decisive on the issue. Indeed, burdens are established precisely because we do not know what is going on and yet we want to win the argument. That sort of enterprise might well be called politics.

So, let's recapitulate. The search for the wrong turn in the account of the four moves led to an inquiry about whether it was improper to privilege the splits. And it was decided that, indeed, it is improper to privilege splits—just as it's improper to privilege coherence. Next, the inquiry turned to a question about whether the account does not depend upon an unappealing image of rationality—namely, hyperrationalism. And the answer was yes—this all depends upon a sustained commitment to a particular vision of rationality as hyperrationalism. Of course, it is not possible to identify a rationalism that is neither (a) hyper nor (b) related to the support/treachery of experience, culture, or convention. Next, it was asked whether the account does not, by requiring reasons to rise to hyperrationalism, establish a burden of

\textsuperscript{96} There are obviously lots of reasons to care about the answer. One reason is that most of us think that the legitimacy and effectiveness of the legal enterprise require that it be demonstrably rational. Another reason is that "experience," "convention," "common sense," "good judgment," etc., are inadequate constraints upon the splits unless they do something more than assert that they can fill the gaps and harmonize the contradictions.

Appeals to common sense, to practical reason, to pragmatism, or to the like, tend to come at the last moments of the debate—when it is evident that there is no other way to make sense of the contradictions that have emerged. In prior centuries, people would use the term "God" at the same point in the debate. And this parallel is apt, for appeals to "pragmatism" and constructs of that ilk in explaining or validating the legal enterprise have an uncanny tendency to lapse into mysticism. The most "pragmatic" aspect of pragmatism is its negative stance towards conceptualism, essentialism, and claims of absolute knowledge. See R. Rorty, \textit{Consequences of Pragmatism} 162-66 (1982).

\textsuperscript{97} Stick, supra note 95, at 389-401. Stick's argument is puzzling: Epistemology is political. And his own arguments confirm this. His impassioned plea for a scholarly turn away from epistemology and towards politics is supported, not by "political" arguments, but by arguments that are epistemological from beginning to end.

\textsuperscript{98} "As such, irrationalists must show that the legal predictability stems from either a consciously duplicitous system or one in which lawyers rely unconsciously on arguments that cannot be explicitly stated and still be followed." \textit{Id.} at 358.

\textsuperscript{99} If one were actually to succeed in making such a demonstration, however, one would have failed—another example of the catch-22.

\textsuperscript{100} See Stick, supra note 95, at 356-62; note 95 supra.
persuasion for reason that it cannot possibly meet. And the answer was, yes it does. The next question, then, was where the burden of persuasion should be set. And the answer is that this question itself depends upon a resolution of the issue which the burden of persuasion is itself supposed to help resolve. Now, one could no doubt go on and on looking for the wrong turn. But that would be overkill and would only yield split proliferation at best. And if reason cannibalizes itself (as I have suggested), then surely it invites the catch-22 and the infinite regress to enlist reason in the fight against cannibalism.

Conclusion. What I have tried to do here is describe some moves of reasoning that seem to sway contemporary legal consciousness. At its most simple, this article is a presentation of some legal reasoning moves that have become common in contemporary legal discourse. I have tried to show that these moves are already at work shaping law and legal discourse. They cannot be blamed upon some foreign philosophical intervention in the text of law. They are, in a very real sense, our moves.

Not surprisingly, they are rather widespread in legal discourse. The infinite regress, for instance, is not just the persistent repetition of the question, "How do we know that?," but also the structure of some common patterns in the development of the positive law: It describes, for instance, the repeated efforts of the Court to find a baseline for the articulation of constitutional rights. Sometimes, one can even see glimmers of the infinite regress within a single judicial opinion. The baseline problem, for instance, was raised by Justice Brennan to question means/ends analysis in free speech cases where the government seeks to justify regulation on aesthetic grounds. There must be some baseline to delimit and verify the substantiality of governmental ends, because if there isn’t then means/ends analysis becomes an exercise in circularity. Determination of the baseline, of course, refers to all sorts of other inquiries about the substance of constitutional entitlements, institutional merits, interpretive considerations, and other inquiries opened by the infinite regress. Split proliferation is not simply the multiplicity of possible meanings that can be attributed to the dichotomies found within a text. It also describes what has happened in the past sixty years to a fairly simple legal directive that provides, "Congress shall make no law abridging the freedom of speech . . . ." The

102. This will not happen often because the infinite regress tends to undermine the rhetoric of judicial self-presentation in opinions.
104. See Sunstein, *supra* note 101. One can even question whether there should be a baseline at all. *Id.* at 918. For further discussion, see Appendix 4 infra.
catch-22 is not just the liar's paradox applied to a hypothetical case of parliamentary entrenchment in England. It is the problem of the multiplication and the internal fragmentation of individual rights and the corresponding breakdown of the political community that sustains these rights.\textsuperscript{106} And overkill is not simply the exuberance of exaggeration. It is the revenge of dualism against the temptations of the monistic form—regardless of whether that monism bears the name of the Absolute, reason, convention, pragmatism, or good judgment.\textsuperscript{107}

I have laid out these moves in an abstract (hence visible) manner so that they might be recognizable across a wide array of substantive contexts. My thought is that it is helpful to understand these patterns of legal reasoning because so much of our “substantive” disagreements inhabit these patterns of form.\textsuperscript{108} Much as we like to think that form follows substance, there may well be more truth to the view that it is the other way around.\textsuperscript{109}

In part, this is because of the reflexive character of legal argument. Law and legal discourse (like other forms of symbolic activity) have a reflexive quality. In other words, the language we use in legal discourse to justify our positions, to state our goals, to announce our intentions has a tendency to circle back and alter the very statements we make. The cannibal moves show how this reflexive character can produce rather bizarre results.

Now, it could be objected that this article establishes nothing of the sort. Nowhere are my first principles clearly laid out (a failure of justification). Moreover, my terms have not been clearly defined (a lack of precision). The perspective I bring to bear seems to keep shifting (a failure to present an articulate perspective). And there seems to be an absence of a recognizable order in my account (a lack of coherence). Well, maybe. But then again, consider that the search for first principles triggers the infinite regress; the insistence on precision begets split proliferation; the announcement of a privileged perspective on the meaning or function of a discourse invites the catch-22; and as for the demand for coherence, this drive to subsume more and more of the world (or law) into an acceptable order—well, that might be called overkill.

So it turns out that there's another point: The virtues that we demand of legal discourse (justification, precision, articulate perspective, and coherence) have their other (often unintended) side. Respectively, these might be called infinite regress, split proliferation, catch-22, and overkill. Accordingly, this article might be read as a demonstration of the results produced when an individual or an entire community insists too much on justification, precision, articulate perspective, and coher-

\textsuperscript{106} Schlag, supra note 12, at 957-59.  
\textsuperscript{107} For a demonstration of how the moves can be used as an entry point into the understanding of the ideological dimensions of law and legal discourse, see Appendix 3 infra.  
\textsuperscript{108} See Appendix 3 infra.  
\textsuperscript{109} See Schlag, supra note 9.
ence in a discourse (like law) that regulates social life: Just about anything can happen.

Perhaps this is the right conclusion. But it seems overstated. Perhaps the problem is simply that legal reasoning produces these bizarre results when it is not turned to a real object, but encounters only itself. This article could be read as a demonstration of this point as well. The point has obvious implications for the legal community: As members of a service industry devoted to the manipulation of endless webs of intricately intertwined texts, it may be doubted whether many of us often encounter anything (professionally) that might actually qualify as a real object.110

Ironically, there is a sense in which everybody already knows all this. Indeed, a number of strategies have already emerged in (conscious, or less than conscious) response to the situation I have described in this article. In fact, the responses have already been voiced by contemporary legal scholars:

a) One approach is to conclude that it is inappropriate to insist too much on justification, precision, articulate perspective, and coherence. These virtues are the aesthetics of a text (a theoretical text). Law, however, is a practical activity, not just a text. This sort of claim can be advanced under the banner of pragmatism, conventionalism, or professionalism. This seems to be a strategy championed (not surprisingly) by the political center.

b) Another approach is denial. None of this is really happening—it's just a bunch of intellectual loonies (like me) who are painting these absurd pictures for God knows what purpose. The real problem is that we have lost our way; we are not insisting hard enough on the traditional virtues. We should all return to (or adopt) one or another of the available fundamental, precise, articulate, and coherent texts and follow it rigorously. Authorial intent or microeconomics, for instance, might fit this bill. This is an approach which seems rather popular on the right.

c) A third approach is to try (as I have) to point all this out. This strategy entails pointing out the limits and implications of the state of affairs just described.111 Many of the people who adopt this approach seem to be on the left.

To end on a speculative, indeed cannibalistic note, I want to say a few things about what is missing from this article. I started out to write an article about legal form. So at the outset, I dismissed substance from the scene.112 I also buried history in a footnote very near the beginning.113 Seemingly missing from this article is a sense of how these

110. See notes 112-120 infra and accompanying text.
111. For another example of this approach (within the pages of this issue), see Frug, Argument as Character, 40 STAN. L. REV. 869 (1988).
112. See text accompanying notes 4-5 supra.
113. See note 7 supra.
cannibal moves relate to current social practice. I think there is a reason for that—one which is reflected in my summary dismissals—and I think it has to do with the form that dominates current social practice: namely, bureaucracy. Increasingly, life and work experiences occur within this or that consumer or producer bureaucracy. Increasingly, the objects of work consist of servicing bureaucratically defined objectives, according to bureaucratically sanctioned procedures. The refinement, expansion, and increasing rationalization of the bureaucratic form is not socially (or intellectually) weightless: Over time, it yields the accelerating mutability of meaning,\(^{114}\) the increased insularity and specialization of knowledges,\(^{115}\) the heightened instrumentalization of cultural symbols and values,\(^{116}\) the fetishism of instrumentalism,\(^{117}\) and the proliferation of complexity and fragmentation.\(^{118}\) In this sort of world,\(^{119}\) it should not be surprising to find that substance offers little (if any) resistance to form. And it should also not be surprising that form becomes cannibalistic.\(^{120}\)

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114. Hence, the current crisis of epistemology and interpretation in legal scholarship. Hence, also, the appeal and plausibility of deconstruction.

115. Hence, the turn among academics toward theory and the turn of theory against itself.

116. Hence, the gradual erasure of substantive boundaries between law, philosophy, literature, economics, etc., as well as the erosion of stable meaning systems. The formal boundaries, however, seem to have more staying power. For instance, even though legal academics use economic or philosophical texts, nonetheless these are often used in distinctly legal ways (i.e., to serve as authority or to prescribe (rather incredibly) solutions to concrete legal problems).

At its most simple, the instrumentalization of cultural values and symbols means that these values and symbols are redefined and recombined in accordance with the instrumental needs of the institution or the enterprise. The result is a devaluation of the linguistic and cultural currency.

117. Hence, the dominance of prescriptive or normative modes of thought in legal scholarship.

118. Hence, the difficulty of saying anything true, appealing, useful, or good that is also general.


120. For a discussion of some of these ideas on the terrain of the "self," see Schlag, *supra* note 24.
APPENDIX I: A LIST OF SPLITS

slavery  freedom
constraint choice
coercion consent
necessity rational
determinism free will
other self

public private
other-regarding self-regarding
visible intimate
collective individual
official non-governmental

objective subjective
physical mental
demonstrable unprovable
shared individual
neutral biased
fact opinion
general particular
stable changeable

absolute conditional
categorical balancing
strong weak

substantial insubstantial
direct indirect
core peripheral
essential formality

substance procedure
outcome process
content form

This list is by no means a complete catalog of the major splits in legal discourse. Nonetheless, it illustrates how this encyclopedic project might be undertaken.

There are several ways to read this list. First, and most simply, one can read it from left to right and then down, in which case it is simply a list of some common splits in legal discourse.

Second, one can take note that the splits are grouped into clusters. The clusters form groups of splits that are closely related. This reading suggests that each element in one cluster can be redefined by opposing it to any element on the opposite side of the same cluster. Thus, rather than opposing slavery to freedom, one might oppose it to consent or choice or free will. This recombination of the elements of splits is one of the ways in which legal meaning is produced.

Third, one could disregard the clusters entirely and read the list as one continuous whole. In this case, each new split represents a slight
variation on the previous one. This reading would show how splits mediate in the production of legal meaning. It also shows how each of the splits can be related to all others.

Fourth, one can read the list the same way but start at the end, in which case a decision to privilege content over form ends with the privileging of slavery over freedom.¹²¹

¹²¹ I am not suggesting that there is anything inexorable to such a conclusion. Quite the contrary, my point is that it is important to focus on the ways in which splits are presented in legal discourse, lest the conclusion in the text accompanying this footnote be the one adopted.
The structure of the catch-22 can help to explain the ideological dimensions of legal discourse. As suggested in the main text, we often treat doctrine as if it were unified or coherent because we focus, for instance, upon the constative meaning of the doctrine and suppress its performative significance. Sometimes, we do the reverse. By way of illustration, consider Arlington Heights v. Metropolitan Housing Development Corp., a case where the Supreme Court held that proof of racially discriminatory purpose or intent is generally required to establish a claim of unconstitutional race discrimination. The Court there drew an ostensibly non-exhaustive list of the ways this racial animus could be demonstrated. Below is a series of statements expressing the significance of the Arlington Heights doctrine. My purpose is to show how each successive statement shifts the focus farther from the constative significance of the doctrine to its performative significance.

<table>
<thead>
<tr>
<th>Constative Significance</th>
<th>Performative Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>The doctrine states that proof of racial animus is generally (though not necessarily) required to make out a claim of race discrimination under the Equal Protection Clause.</td>
<td>Because proof of racially discriminatory animus is rather hard to come by (since it is produced by the defendants), plaintiffs will have to work very hard to obtain such proof or bring fewer claims of race discrimination.</td>
</tr>
</tbody>
</table>


123. In other words, statements on the left of the page tend to focus on the constative significance of the doctrine, while statements on the right of the page tend to focus on the performative significance of the doctrine. (Obviously, it's possible to disagree with the distribution I have made—but then again, that's one of the points: The split between constative and performative is unstable.)

In order to avoid confusion, it is important to understand that the chart does not attempt to map the constative or performative character of the statements themselves. Indeed, each of these statements has some constative significance inasmuch as each claims to offer true propositions about the significance of Arlington Heights. And each statement, as scholarly endeavor, has some performative significance in that each ratifies and furthers some vision of what law really is and how it should be interpreted.


Constatic Significance  Performative Significance

Given that the Supreme Court has made things so difficult for race discrimination plaintiffs (when it clearly did not have to), this decision will greatly reduce the number of successful discrimination suits. Because *Arlington Heights* places a premium upon evidence of intent, it effectively allows defendants not to worry about the Equal Protection Clause so long as they avoid manufacturing evidence of racial animus.

This decision operates to legitimate existing patterns of racial oppression.


This Term, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court reaffirmed the *Davis* requirement of discriminatory purpose and discussed the kinds of evidence which would establish discriminatory purpose.

. . . .

. . . The Court noted that proof of disproportionate racial impact is probative of discriminatory purpose and did not exclude the possibility that such an impact could by itself be sufficient in some cases.

*Id.* at 740-41, 743 (footnotes omitted).


*Arlington Heights* demonstrated much more vividly than *Davis* just how difficult it will be to prove purposeful discrimination, particularly if the challenge is to essentially passive or indifferent state action that perpetuates de facto segregation and if that action involves the exercise of substantial governmental discretion.

*Id.* at 1034.

126. The primary difficulty, of course, is that improper purpose is hard to prove, and *Davis, Arlington Heights*, and *Castaneda* all demonstrate that an equal protection claimant will be hard pressed to establish the necessary discriminatory racial purpose. The effect, if not the actual purpose, of these decisions will be to reduce the number of meritorious civil rights claims that can be successfully brought under the equal protection clause.

*Id.* at 1050-51.
The same distinction between constative and performative significance also helps to explain why some people consider law and economics scholarship to be a serious intellectual pursuit while others dismiss it as mere ideological noise. The catch-22 explains how it is possible for law and economics scholarship to be both at once.129


[Statements in the public record of discriminatory intent on the part of officials engaged in policies with disproportionate racial impact are rare. Thus, Arlington Heights requires plaintiffs to prove discriminatory intent without acknowledging that public officials will rarely provide plaintiffs with the requisite evidence.

Id. at 509-10.


129. See Appendix 3 infra.
APPENDIX 3: THE FOUR MOVES AND THE IDEOLOGY OF LEGAL DISCOURSE

The four moves I have described are useful in uncovering hidden foundationalist assumptions or implicit formalizations of issues, problems, doctrines, or theories. By way of illustration, consider what the application of the four moves to Posner's brand of law and economics might reveal.\footnote{130}

The infinite regress, for instance, impeaches the foundationalist attempt to ground law. The significance of this foundationalist move is not just that it allows some edifice to be built. There is also significance in what the foundationalist strategy excludes. For instance, the supposition of consumer rationality in law and economics produces all sorts of significant conclusions for the explanation and fashioning of legal doctrine.\footnote{131} But the significance of this foundationalist assumption is also to be found in all of the claims it precludes. The infinite regress turns the assumption of consumer rationality upon itself: Is it rational to make this assumption or not?

The infinite regress gives a special urgency to this question precisely because there are some situations in which it would not be rational to assume that human beings are rational. Why then should the premise of rationality have the weight that it does? Why is it framed as an epistemological burden of persuasion: "In the absence of any information to the contrary, we will assume that human beings act rationally in the market."?\footnote{132} And why is the assumption susceptible to defeat only if one can proffer "information to the contrary"? Why, in other words, is

\footnote{130. I choose Posner's law and economics work as an example because it has a highly visible and, in appearance at least, a relatively rigid structure. See Schlag, supra note 12, at 933-43. These characteristics of his work make it easier to apply the four moves and to reveal the ideological aspects of the work. I have thus chosen a relatively easy example. A less formalized, less transparent theory than Posner's would present a greater challenge because of the complexity involved. One should not surmise, however, that so-called "more complex," "more sophisticated," or "more sensitive" theories are immune to the four moves. There is, after all, a certain ideological aspect to the construction of theories that are so complex and intricate that their structures are not readily visible.}

\footnote{131. See R. POSNER, supra note 28, at 4 (discussing the fundamental assumption of rationality). In his comments on the work of Ronald Coase and Aaron Director, Harold Demsetz succinctly described these conclusions:

Although they [Coase & Director] seem to be different and to address different problems, there was a common theme, and that was to assume that people try to maximize and that really there is competition in the attempt to maximize, and to use those working assumptions to try to explain lots of things, like why you have firms, why you have particular pricing practices. All the conclusions derive from the attempt of maximizers to overcome certain kinds of costs impediments to maximizing which we now subsume under the name of transaction costs. These things become readily explainable—readily, that is, looking backward—if you take those two assumptions and keep pushing them.


132. For an interesting attempt to translate these epistemological assumptions into a formal regime for antitrust law, see Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984).}
the assumption only subject to defeasance by "scientific" or "empirical" evidence? Are any of these choices rational?

One answer to this line of questions is that one assumes that human beings are rational (absent contrary information) because that is what the integrity of microeconomic theory requires and there are reasons to adhere to the theory. Again, one can use the infinite regress to question this position. Why is the integrity of theory a first premise? Why must the integrity of the theory take precedence over other needs, interests, and knowledges? The infinite regress even allows the tables to be turned completely: Do the law and economics scholars adhere to the assumption of rationality for the sake of the theory (as they claim) or do they adhere to the theory and its products in order to vindicate the assumption of rationality and the political implications they believe it yields? Put concretely, do the prodigious theoretical efforts of law and economics scholars serve to explain and predict the development of law or do they serve, instead, to validate the politics associated with the assumption of rationality? The first possibility implies that they are engaged in serious scholarship. The second one suggests that such work is an ideological enterprise. It is quite possible, of course, that both implications are true—a possibility suggested by the catch-22.

The answer to the question about whether it is rational to assume that human beings are rational arguably depends upon what one wants to accomplish with this assumption. And now, here comes the proliferation of splits. Posner's answer to this question is that economics provides the best explanation of human behavior. Posner makes no claim that economics is the best interpretation of human behavior (a seemingly untenable claim); he merely claims that it is best able to predict human behavior (by comparison with, say, psychoanalysis).134

Pressing on the infinite regress, the question arises: Why is it rational to pursue explanation at the expense of interpretation, as Posner's law and economics appears to do? Answer: Because explanation has predictive value whereas interpretation does not. And why should one be interested in the predictive value of theory? Presumably, because a theory that can be used to predict human behavior can be used to control human behavior. In short, predictive theories are powerful.135 One can see how split proliferation works. The assumption of rationality is justified and defined by a series of mediations: The assumption allows explanation,
prediction,

133. One can then question whether the role of law and economics scholarship is indeed to provide an explanation for law or is instead to serve the ideological aim of eliminating certain types of claims and arguments about law and social life.
135. For a brief discussion of the role of aesthetic criteria in the evaluation of theoretical work, see Schlag, supra note 20, at 921-22.
control, power.

Now, these mediations which attempt to stabilize and redeem the assumption of rationality are really poles of some splits. In each case, there is another pole which has been rejected. The rejected poles might (though need not) be described as follows:

<table>
<thead>
<tr>
<th>Rejected</th>
<th>Adopted</th>
</tr>
</thead>
<tbody>
<tr>
<td>interpretation</td>
<td>explanation</td>
</tr>
<tr>
<td>edification</td>
<td>prediction</td>
</tr>
<tr>
<td>understanding</td>
<td>control</td>
</tr>
<tr>
<td>liberation</td>
<td>power</td>
</tr>
</tbody>
</table>

Now, it hardly seems self-evident that rationality should be associated with the right hand and not with the left hand terms. And when we reach the final split (power versus liberation), it seems downright strange to associate rationality with power rather than liberation.

My point quite simply is that the attempt to stabilize or redeem the assumption of rationality is dependent upon a series of splits. Once those splits are revealed, several problems become evident. First, the split proliferation shows the vulnerability of formalist confinement. If one is interested in a rational theory of human behavior, it truly stretches the imagination that one would exclude that part of the human condition which calls for interpretation, edification, understanding, and liberation as legitimate fields of inquiry. Second, the split proliferation above reveals that the mediations actually deployed by Posner are at least in part ideological ones—they have no more grounding in rationality than the rejected choices.

The catch-22 also helps to explain the ideological aspects of legal discourse by locating the contradictions intrinsic to positions and the assumptions that seem to have coherence and integrity. Consider, for instance, the significance of positing that human beings are rational maximizers of self-interest. On one level, the position means that, in a given social-legal context, human beings will adjust their behavior to get the most of what they want. On another level, however, the assumption ratifies the existing distribution of entitlements by suggesting that what people actually want is in their self-interest and that what they get is what they chose—to maximize their self-interest. This last implication of the assumption of rationality allows the lawyer-economists to look at what people in fact do to ascertain their self-interest. The assumption has a dual function: It serves as a prediction about human behavior, and it also functions as a heuristic device to allow the derivation of a psychological state (namely, want) from people's actual behavior.

It is thus somewhat of a mystery, as Arthur Leff once pointed out, why the social-legal context is not always perfectly attuned to give
human beings what they want.\textsuperscript{136} The lawyer-economists have answers to this question largely based on transaction cost analysis and third-party effects.\textsuperscript{137} But these answers collapse in a catch-22: People do not always do what they want, and they do not always want what they do. The lawyer-economists, of course, have special ways of finding this out (independently of what people do . . . and by implication, of what they want). Again, the point is that the catch-22 is a useful technique for uncovering the ideological twists of legal discourse.

The overkill is likewise a useful entry point into the ideology of legal discourse. By focusing on the extreme applications of doctrines, assumptions, and theories, one can uncover fault lines that lie submerged throughout the entire edifice. Consider, for instance, Posner's application of microeconomic analysis to marital love. He considers marital love a convenient and efficient substitute for formal contracting. To Posner, love is a way of avoiding transaction costs. This is an extraordinarily bizarre account of love. But what precisely is wrong with it? One answer is that if Posner is right, love is hardly what it's cracked up to be. Another answer is that Posner seems to have missed the point of what we want from an account of love. His explanation makes no sense of the experience. The overkill implicit in extending microeconomic categories to love triggers the realization that Posner's microeconomic survey of law and social life has suppressed interpretation, edification, understanding, liberation (and everything else in life that does not reduce to mechanics).

In sum, the four moves are helpful entry points into the exploration of the ideological structure and content of legal discourse.


\textsuperscript{137} See Schlag, supra note 12, at 933-45.
APPENDIX 4: THE INFINITE REGRESS OF CONSTITUTIONAL THEORY

Two hundred years later, the infinite regress provides many distinct (and competitive) vantage points from which to approach the constitutional text. And there is no agreement about which perspective is primary or most important. Indeed, it is staggering how many different credible endings can be attached to the phrase, "The first and paramount question for normative constitutional theory is...

1. What is the appropriate role of the Supreme Court among the political branches? (a theory of judicial review)\textsuperscript{138} or

2. What is the function of the Constitution or any of its parts? (a political theory)\textsuperscript{139} or

3. What type of reasoning should the Court use in its decisions? (a theory of legal reasoning)\textsuperscript{140} or

4. What types of questions are best suited to decisionmaking by adjudication rather than by legislation or management? (a theory of institutional competence)\textsuperscript{141} or

5. What minimal entitlements must a just and legitimate state guarantee? (a political philosophy)\textsuperscript{142} or

6. What does the Constitution mean? (a theory of interpretation).\textsuperscript{143}

The mere listing of these various approaches suggests another step into the infinite regress of constitutional contexts within contexts. One obvious move, for instance, is to argue that none of the six questions is primary and that instead we should pursue a sort of "enlightened" muddle-through approach. Another step is to disagree with the way I have framed the dilemma of normative constitutional theory. (But unless I am \textit{totally} wrong, this disagreement would only serve to support my point.)

In this context of intellectual disarray, the sober advice (yet another move) that we should stop all these gyrations and get back to the text can seem very appealing.\textsuperscript{144} And yet such invitations resolve nothing at all. On the contrary, a firm and steadfast commitment to any one of the six ways of reading the text might well lead to the adoption of any of the five others as one proceeds in the reading.

\textsuperscript{138} See, e.g., M. Perry, \textit{The Constitution, the Courts and Human Rights} (1982).


\textsuperscript{140} See, e.g., Dworkin, \textit{supra} note 47, at 516-18; Dworkin, \textit{Law as Interpretation}, 60 TEX. L. REV. 527, 548-49 (1982).


\textsuperscript{144} Id.
Thus, one might begin with authentic commitment to a "strict textualist" approach, read through articles I and II without difficulty, but recognize upon reaching article III and those words "cases" and "controversies"\textsuperscript{145} that indeed the Constitution requires the articulation of a theory of judicial review. One can read the rest of the document accordingly, and realize by the time one gets to the fourteenth amendment (and those vague but majestic words, "equal protection of the laws"\textsuperscript{146}) that the Constitution (and a theory of judicial review) requires the articulation of a full-fledged political theory. By the time one reaches the end, one might decide to read the document again.

Rereading the document, from the perspective of political theory, one might begin to grasp that the grants of power in the first three articles have some logic—something akin to a theory of separation of powers, or even institutional competence. This in turn could well yield the conclusion that only certain types of cases, those amenable to judicial reason, are within the article III power. And so on . . . .

\textsuperscript{145} U.S. Const. art. III, \S 2, cl. 1.

\textsuperscript{146} Id. amend. XIV, \S 1.