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*Self-Conscious Common Law*

## I. INTRODUCTION

What happens when the law must answer questions about itself? That is—was law X *clearly established*? Did lawyer Y *misrepresent* law X? Would court Z have *accepted* law X had the issue been raised? Statements about statements (“higher-order statements”) have long bothered logicians, *see* W.V. Quine, *Philosophy of Logic* 66–68 (2d ed. 1986), so it is not surprising that they would make trouble for judges as well. But law-about-law is not just a theoretical curiosity. Untangling it matters, for example, to judges who must decide whether to submit such “legal facts” to juries. And, as shown below, the way law “talks about law” can affect the substance of legal rights.

This essay surveys how courts have dealt with law-about-law in three discrete and seemingly unrelated areas. The purpose is to demonstrate that all of these issues are actually the same—namely, how law talks about itself.

## II. DISCUSSION

### A. Legal Malpractice

In a legal malpractice case stemming from litigation, the former client accuses the lawyer of having litigated the case wrong. To recover damages, the plaintiff must prove causation: had the lawyer acted correctly, the outcome would have been more favorable. ??? The causation element is, therefore, law-about-law: how would another court (or jury) behaved differently had it been presented with the correct litigation strategy? ???

B. Insurer-Insured

C. *FTC v. Actavis*

III. CONCLUSION