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Essay

THE MYTH OF THE LAW-FACT DISTINCTION

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INTRODUCTION

The importance of the law-fact distinction is surpassed only by its mysteriousness. On the one hand, it is the legal system's fundamental and critical distinction. Significant consequences attach to whether an issue is labeled "legal" or "factual"—whether a judge or jury will decide the issue; if, and under what standard, there will be appellate review; whether the issue is subject to evidence and discovery rules; whether procedural devices such as burdens of proof apply; and whether the decision has precedential value. On the other hand, the distinction continues to bedevil courts and commentators alike. In recent times, the Supreme Court has referred to the distinction as "elusive,"[1] "slippery,"[2] and as having a "vexing nature"[3]—while acknowledging that its decisions have "not charted an entirely clear course"[4] and that no rule or principle will "unerringly distinguish a factual finding from a legal conclusion."[5]

There is a short explanation for this state of affairs, and an even shorter explanation. The short explanation is that the law-fact distinction in practice is derived from three related and largely continuous variables, which, like the three-body problem in gravitational physics, create enormous com-

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[1] Miller v. Fenton, 474 U.S. 104, 113 (1985).

[2] Thompson v. Keohane, 516 U.S. 99, 111 (1995).

[3] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[4] Williams v. Taylor, 529 U.S. 362, 385 (2000); *Thompson*, 516 U.S. at 110–11; *Miller*, 474 U.S. at 113.

[5] *Pullman-Standard*, 456 U.S. at 288.

plexity. These three variables are (1) standard conventions concerning the meaning of "law" and "fact," (2) the judge-jury relationship[6], and (3) the distinction between matters of general import and highly specific and localized phenomena. As each of the first sides of these three dichotomies is more fully realized, and the second is minimized, the probability rises that some issue will be labeled "law." If an issue is conventionally regarded as legal, is usually decided by the judge, and involves highly general matters like appropriate standards of conduct, it will likely be thought of as a "legal" question. And the reverse is true.

The even shorter explanation for the chaotic legal landscape is that much of the effort to properly delineate matters as questions of law or fact is animated by the belief that the two terms, "law" and "fact," specify different kinds of entities, that there is a qualitative or ontological distinction between them. This belief is false. Thus, the quest to find "the" essential difference between the two that can control subsequent classifications of questions as legal or factual is doomed from the start, as there is no essential difference. There are only pragmatic differences, which are reflected in the three dichotomies of the conventional meaning of the terms, the judge-jury relationship, and the general-specific spectrum.

This Article demonstrates that the concepts "law" and "fact" do not denote distinct ontological categories; rather, legal questions are part of the more general category of factual questions. Nor are there significant epistemological or analytical differences between the concepts. By discarding the false notion that "law" and "fact" are fundamentally different, the haziness surrounding the distinction evaporates, and it becomes clear that functional considerations underlie the decision to label any given issue "legal" or "factual." In passing, we clarify other related matters as well. For example, some considerable confusion is introduced into this area because of the obvious point that judges on occasion make new law. If judges "make new law," rather plainly it would be odd to speak of that presently nonexisting law as a "fact." To be sure, but it is equally odd to talk of the crater that may be made by the explosion of a volcano as a "fact." It is not; it is just a possibility; same, too, with the law. Just because there are unpredictable creative forces in nature does not drive us away from naive realism (*i.e.*, the well-grounded belief that the world exists independently of our senses and is "factual" in just that sense) as our best explanation of the universe[7], so too acts of law creation do not negate that preexisting law really

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[6] The pragmatic decision of whether a judge or jury should decide a particular issue is a primary reason for, and consequence of, classifying the issue as legal or factual. For more in general on the judge-jury relationship and the allocation of decision-making authority see John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987 (1978); Fleming James, Jr., *Sufficiency of the Evidence and Jury—Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

[7] This view (sometimes called "direct realism" or "commonsense realism") is, as its name suggests, not a complicated metaphysical theory; rather, "it is our implicit and everyday conviction that in experience we are immediately aware of such common objects as trees and buildings, not to mention other

does, in fact, "preexist," and its existence once created is a matter of fact.

Part I of this Article discusses the legal doctrine surrounding the law-fact distinction. By surveying an array of areas where the distinction serves a key analytical role, we demonstrate the distinction's pervasiveness, doctrinal importance, and at the same time the analytical disarray that attends it. We begin with a discussion of the Supreme Court's recent case, *Cooper v. Leatherman*.[8] The *Cooper* decision provides a recent and paradigmatic example of the Court's use of the distinction in a putatively coherent manner. The Court's law-fact analysis, however, quickly becomes problematic when viewed against the fabric of law-fact doctrine in general. After using the *Cooper* decision as a jumping-off point, we turn to the distinction's doctrinal role in a number of diverse areas—for example, recent cases involving punitive and compensatory damages, patents, the First Amendment, and criminal law, as well as traditional areas such as negligence, contracts, and appellate review. The ubiquitous distinction, despite playing many key doctrinal roles, is muddled to the point of being conceptually meaningless.

Part II explains the reason for the doctrinal confusion. The doctrine does not, as is assumed by courts and commentators, identify different types of questions. Rather, legal questions are also factual questions, and are not ontologically distinct. A particular issue cannot be usefully analyzed for whether the issue is "legal" or "factual" in nature, and the effort to do so results in just the difficulties demonstrated in Part I. We explain the sense in which legal and factual issues are both ontologically and epistemologically similar. Finally, we discuss the possibility of a coherent, analytical distinction, and conclude that no useful analytical distinction exists; the decision to label an issue "law" or "fact" is a functional one based on who should decide it under what standard, and is not based on the nature of the issue.

I. THE LAW-FACT DISTINCTION

A. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

In *Cooper*, the Supreme Court held that appellate courts must use a de novo standard of review when reviewing constitutional challenges to punitive-damage awards. The Court's reasoning well exemplifies how courts typically use the law-fact distinction, and also the problematic nature of that use. We begin with the background to *Cooper* and then turn to the Court's law-fact analysis.

1. The Precursors to Cooper.—In early summer of 1996, within the space of about a month,[9] the Supreme Court decided *BMW of North Amer-*

people." Hilary Putnam, *Pragmatism and Realism*, 18 CARDOZO L. REV. 153, 153 (1996).

[8] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

[9] *BMW* was decided on May 20, 1996 and *Gasperini* was decided on June 24, 1996.

ica, Inc. v. Gore[10] and *Gasperini v. Center for Humanities, Inc.*[11] In *BMW*, the Court held that a punitive-damage award may be so excessive as to violate due process.[12] Then, in *Gasperini*, the Court held that federal appellate courts could, consistent with the Seventh Amendment, review challenges to excessive compensatory-damage awards so long as such review was limited to an abuse-of-discretion standard.[13] In *Cooper*, the holdings of these two cases essentially collided.

In *BMW*, the Court reviewed a state-court judgment and held that the punitive-damage award was "grossly excessive" and, therefore, in violation of the due process clause of the Fourteenth Amendment.[14] To determine whether a particular award is "grossly excessive" in violation of due process, the Court instructed trial courts to examine the following three factors: (1) the degree of reprehensibility of the conduct;[15] (2) the disparity between the actual or potential harm and the punitive-damage award; and (3) the difference between this remedy and comparable sanctions.[16] This safeguard provides a layer of protection from arbitrary awards, particularly if state law does not allow for review of awards under some type of reasonableness standard. The holding in *BMW*, however, did not clarify exactly how it added to the procedural regime in federal court, which already gives district courts the power to reduce irrational awards.[17] If any particular award is irrational then it will be reduced, and if an award is rational there is no constitutional problem. Consistent with this point, every Justice on the Court, while dividing into three opinions, recognized that the proper inquiry for excessiveness had to do with the reasonableness of the award.[18]

Gasperini arose out of a federal diversity case in which the district court denied a challenge to compensatory damages under a state standard for excessiveness and the federal appellate court reviewed the denial for

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[10] 517 U.S. 559 (1996).

[11] 518 U.S. 415 (1996).

[12] 517 U.S. at 574–75.

[13] 518 U.S. at 435.

[14] 517 U.S. at 574–75.

[15] The Court explained that this was the most important of the three factors. *See id.* at 575.

[16] *See id.*

[17] *See* Dimick v. Schiedt, 293 U.S. 474, 486–87 (1935) (holding that remittitur is consistent with the Seventh Amendment).

[18] The majority acknowledged that no bright line or formula determined what is excessive, but that the inquiry involved a "general concer[n] of reasonableness." *BMW*, 517 U.S. at 582–83. The concurrence explained that review was necessary for "protection against purely arbitrary behavior." *Id.* at 588 (Breyer, J., concurring). The dissenting opinions contended that the only process due was that a state procedure give the jury the decision of whether to impose punitive damages and the amount required, along with some type of judicial review for reasonableness. *See id.* at 598 (Scalia, J., dissenting); *id.* at 610–11 (Ginsburg, J., dissenting). Also, in a recent state-law case applying the *BMW* factors, a majority of the Court again emphasized that an award was grossly excessive because it was unreasonable. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1526 (2003).

abuse of discretion.[19] The Court examined whether any review violated the Reexamination Clause of the Seventh Amendment, which controls not only the allocation of decision-making authority between judges and juries but also controls the relationship between trial and appellate courts.[20] The Court held that, when the Seventh Amendment applies, challenges to excessive compensatory damages may be reviewed "as a control necessary and proper to the fair administration of justice" but only if review is limited to an abuse-of-discretion inquiry.[21] In doing so, the majority relied on punitive-damage cases and the entire Court treated punitive- and compensatory-damage awards as indistinguishable for purposes of the Seventh Amendment.[22] This holding, coupled with *BMW*, raised the question: under what standard should federal appellate courts review constitutional challenges to punitive-damage awards? The Court attempted to clarify in *Cooper*.

2. The Cooper *Decision.*—Leatherman Tool Group, Inc., a tool manufacturer, sued its competitor, Cooper Industries, Inc., for unfair competition, false advertising, and trademark infringement after Cooper passed off a Leatherman product as its own in advertisements.[23] The jury ruled in favor of Leatherman, and awarded $50,000 in compensatory damages and $4.5 million in punitive damages.[24] Before being instructed that it could award punitive damages, the jury first had to answer in the affirmative the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?[25]

Following the jury's verdict and damage award, Cooper asked the district court to reduce the award, arguing that it was unconstitutionally excessive. The district court, following the *BMW* factors, denied the challenge.

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[19] 518 U.S. at 418–19.

[20] *See id.* at 432. This question arose because the Seventh Amendment applies to federal courts but not state courts, and the issue of review is considered procedural under the *Erie* doctrine. *See id.*

[21] *Id.* at 435.

[22] The *Gasperini* majority, in discussing abuse-of-discretion review in a punitive-damages case, Browning-Ferris, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), states, "[w]e agree with the Second Circuit, however, that '. . . the question of whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law.'" 518 U.S. at 435 n.18 (quoting Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1012 (2d Cir. 1995)). In his dissent, Justice Stevens expressed the view that the Seventh Amendment did not constrain review of either compensatory or punitive awards. *See id.* at 439. In a separate dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, expressed the contrary view that the Seventh Amendment constrains review of both compensatory and punitive awards. *See id.* at 461.

[23] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 426–27 (2001).

[24] *See id.* at 426.

[25] *See id.* at 429.

Cooper appealed the decision, and the Ninth Circuit affirmed the award on the ground that the district court did not abuse its discretion.[26] Cooper then filed a petition for writ of certiorari, arguing that the Ninth Circuit should have conducted a de novo review of the district court's decision and that the award should be reduced for being grossly excessive. The Supreme Court granted certiorari, held that the Ninth Circuit should have conducted a de novo review, and remanded the case.[27] The Court's opinion is a wonderful example of the complex operation of the three dichotomies that determine the results of law-fact questions. The Court dealt explicitly with conventional understandings of "law" and "fact," discussed the judge-jury relationship (and the relationship between trial and appellate courts), and analyzed the "fact intensive" nature of the questions at issue.

With the law-fact distinction providing the foundation and animating principle for its analysis, the majority offered three arguments to support its decision: (1) punitive damages are not "facts" tried to a jury; (2) excessiveness resembles other "fact sensitive," fluid concepts such as reasonable suspicion and probable cause that only gain content through application in particular contexts; and (3) appellate courts are just as institutionally competent as trial courts to decide whether particular awards are excessive.[28]

a. The not-a-fact argument.—The Court distinguished compensatory from punitive damages, arguing that the former are factual in nature, whereas the latter are not. This distinction allowed the Court to bypass *Gasperini* and, despite the fact that punitive-damage assessments have always been a traditional jury function,[29] remove the issue from Seventh Amendment strictures. The Court argued that punitive damages do not, like compensatory damages, involve questions of historical or predictive facts.[30] The Court did not explain why "facts tried by a jury" in the Seventh Amendment refers only to historical or predictive facts. Moreover, as Justice Ginsburg noted in dissent, it is not clear why $1 million in pain and suffering is a "fact" in the world while the same amount in punitive damages is not.[31] Nevertheless, the Court took the issue outside the Seventh Amend-

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[26] *See* Leatherman Tool Group, Inc. v. Cooper Indus., Inc., Nos. 98-35147, 98-35415, 1999 U.S. App. LEXIS 33657 (9th Cir. Dec. 17, 1999).

[27] *See Cooper*, 532 U.S. at 443.

[28] *See id.* at 431–41.

[29] *See* Barry v. Edmunds, 116 U.S. 550, 565 (1886); Day v. Woodworth, 54 U.S. 363, 371 (1852).

[30] *Cooper*, 532 U.S. at 437 ("Unlike the measure of actual damages suffered, which presents a question of historical . . . fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury."). What a "fact" is was also at the heart of the *Gasperini* case (from which the *Cooper* majority borrowed some of the language above). Indeed, in *Cooper*, the majority purports to defend its conclusions about what is a fact by its analysis of relative institutional competencies of juries and judges, not the other way around. Moreover, juries may, and do, decide facts that are not necessarily historical or predictive; for example, psychological facts, facts relating to whether a defendant is currently injured, or facts relating to the current capabilities or limitations of a party.

[31] *See id.* at 446 (Ginsburg, J., dissenting).

ment by arguing that punitive damages, unlike compensatory damages, are not factual.

In arguing that punitive damages are not "facts tried by a jury," the Court focused on two justifications given for punitive damages: moral condemnation and deterrence. Unlike compensatory damages, the Court argued, punitive damages involve acts of moral condemnation. But it is difficult to see how this argument supports de novo appellate review. Moral condemnation is one of the traditional, historical justifications for giving this function to juries—jurors as representatives of the community, rather than judges, are better equipped to make these decisions.[32] If these determinations really do involve acts of moral condemnation, what makes appellate judges looking at a cold record better situated to make them?

Next, the Court focused on the deterrence aspect of punitive damages. The Court acknowledged that this aspect could make the determinations factual if one could calculate an optimal deterrence amount, but rejected this contention because "juries do not normally engage in such a finely tuned exercise of deterrence calibration . . . ."[33] Even granting that this is true, it is difficult to see how factuality rests on whether the analysis is "finely tuned." Whether or not the cat is on the mat is a fact regardless of whether one answers it by looking at the mat, asking someone who is looking at the mat, guessing, or flipping a coin.[34]

b. The analogous-cases argument.—Once punitive damages were shorn from the Seventh Amendment, the Court could consider whether claims of excessive punitive damages warranted de novo appellate review. The Court argued that they do because the excessiveness question resembles other issues that receive de novo review such as reasonable suspicion, probable cause, and excessive criminal fines.[35] The concept of "excessiveness," the Court argued, like "reasonable suspicion" and "probable cause," is a dynamic, fluid concept that only gains substantive content from particular contexts (*i.e.*, *the facts*).[36] Therefore, the Court acknowledged

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[32] *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting).

[33] *Cooper*, 532 U.S. at 439.

[34] If punitive damages are to function as an award-correcting tool in a system that suffers from drawbacks in law enforcement, they plainly involve questions of fact. In such a system, if D is the actual damage and q is the (factually known) probability of law enforcement, then a losing defendant should pay the claimant $1/qD$, that is, D/q. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 870 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 192, 193–94 (Peter Newman ed., 1998).

[35] *See Cooper*, 532 U.S. at 433–37 (discussing United States v. Bajakajian, 524 U.S. 321 (1998) and Ornelas v. United States, 517 U.S. 690 (1996)). While these areas are analogous in this respect, there are obvious and important differences. These areas arise in the criminal context, and therefore arise outside of the Seventh Amendment and also do not involve the reexamination of jury findings. In these other contexts, appellate courts are examining judicial and legislative decisions.

[36] *See id.* at 436.

that these "fact-sensitive" legal concepts will only take shape from application in specific contexts.[37] Moreover, the Court emphasized that de novo appellate review will unify precedent and stabilize the law arising from these particular applications.

This argument is troubling for a number of reasons. It is plainly inconsistent with the Court's argument, discussed above, that the question of excessive punitive damages is not factual. If the concept is so fact specific or fact intensive that it only gains content and shape from particular contexts, how can one consistently maintain that the issue is not factual? If the concept takes its shape from particular contexts, then altering the concept in a particular case is necessarily reexamining or reinterpreting the particular underlying context. The Court, however, maintained that appellate courts must still defer to the factual findings of jurors when deciding whether punitive damages are excessive,[38] yet it is difficult to see how this is possible. Assume that a jury, like the jury in *Cooper*, finds that the defendant acted with malice and attaches a punitive-damage amount to reflect this finding. Because the award is a reflection of the jury's assessment of the level of malice, to reduce the award would appear to also reexamine and reduce the jury's assessment of the malicious nature of the defendant's conduct.[39]

As with the Court's other arguments, its suggestion that de novo review is warranted because the issue is context specific and depends on application for its shape is unconvincing. Aside from concerns about whether context dependence makes an issue factual, there are many other legal concepts that are context specific, tied to application, and not reviewed de novo (*e.g.*, reasonable care,[40] discrimination,[41] and Rule 11 sanctions[42]). Indeed, any inquiry into a person's motivation or mental state (such as intent or knowledge) is necessarily complex, context specific, and depends on application for its shape. The Court relies on specific examples that require de novo review, while ignoring analogous concepts that require deferential review of their applications.

Finally, the Court's concern for uniformity and stability is likewise problematic. The Court seeks to ensure "the uniform general treatment of similarly situated persons . . . ."[43] The desire for uniformity and sta-

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[37] *See id.*; *see also id.* at 437 n.11 (punitive-damages determination "is a fact sensitive undertaking").

[38] *See id.* at 440 nn.12 & 14. Also, if juries do not answer interrogatories, it is unclear how appellate courts will have access to the specific factual findings.

[39] The only way this would not be accurate is if the appellate judges somehow knew how malicious the jurors found the defendant's conduct and also knew that the jurors were mistaken *about their own malice assessment* in awarding an amount.

[40] *See infra* at pp. 1781–83.

[41] Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

[42] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

[43] *Cooper*, 532 U.S. at 436 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (Breyer, J., concurring)).

bility, though, can be recited for any legal concept, and the Court does not explain why this concept warrants de novo review while others do not. Moreover, the Court's procrustean approach seems to beg the question. If the concept is, as the Court conceded, dependent on particular contexts, how can it be clear that appellate courts are treating similar contexts the same rather than treating dissimilar contexts the same when reexamining awards?[44]

c. The institutional-competence argument.—The Court also examined whether appellate or trial courts are better situated to decide the issue.[45] In fact, we think this approach—pragmatically allocating responsibility—is the only sensible one; nonetheless, the Court's discussion is not satisfactory, perhaps in part because of its failure to see that allocation is the only relevant issue.

The Court discussed the relative competence of trial and appellate tribunals in applying the three *BMW* factors. The first factor—the degree of reprehensibility—favors deferential review because trial courts observe testimony and evidence firsthand and can evaluate issues of credibility and demeanor.[46] District and appellate courts can both competently evaluate the second factor—the ratio between compensatory and punitive damages.[47] Appellate courts can better evaluate the third factor—comparable sanctions—because it calls for a broad legal comparison.[48] From this discussion the Court, without discussing the *BMW* directive that the first factor was the most important factor, concluded tersely that "[c]onsiderations of institutional competence therefore fail to tip the balance in favor of deferential appellate review."[49] Accordingly, the Court, relying on the law-fact distinction, held that appellate courts must review these challenges with a de novo standard,[50] and in the proc-

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[44] *See* Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002) ("The application of a legal rule or standard to the particular facts of particular cases will yield different outcomes from case to case depending on the facts of the individual case. So uniformity of outcome is unattainable; and as divergent *applications* of law to fact do not unsettle the law—doctrine is unaffected—a heavy appellate hand in these cases is unnecessary to assure the law's clarity and coherence.").

[45] *See Cooper*, 532 U.S. at 438–41.

[46] *See id* at 441.

[47] *See id.* at 441–42.

[48] *See id* at 442–43.

[49] *Id.* at 440. This statement also seems to suggest a presumption in favor of de novo review, and that the burden is on those wanting deferential review to show it is warranted. In other words, that when the issue is in equipoise, de novo review wins out.

[50] Our focus here is on the Court's use of the law-fact distinction to justify the outcome and not on whether de novo appellate review is warranted from a practical standpoint. Moreover, it is not clear whether the decision will have much impact from a practical standpoint as recent empirical evidence suggests that judges and juries do not differ much in setting punitive-damage amounts. *See* Theodore Eisenberg et al., *Judge, Juries, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); *see also* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002); Theodore Eisenberg et al., *Reconciling Experimental Incoherence with Real World Coherence in*

ess, with nary a mention, apparently substantially revises *BMW*.[51]

We do not claim that anything of lasting value comes from either the *Cooper* case or our critique of it. Quite the opposite, it is merely the latest in a series of pragmatic decisions masquerading as necessary analytical outcomes vesting responsibility for a particular decision in one locale rather than another. The Court employed each of the three dichotomies of conventional meanings of "fact" and "law," the judge-jury relationship, and the level of specificity of the inquiry. Perhaps most interesting, the Court used the third *BMW* factor of comparable sanctions to support its outcome, even though most commentators think the key analytical distinction between questions of law and questions of fact is the generality of the relevant inquiry.[52] This shows the manipulability of the concepts at play.

B. Law-Fact Doctrine: Vagaries and Vicissitudes

The law-fact distinction appears in the Constitution[53] and has traditionally helped to allocate decision-making authority.[54] Given the distinction's pedigree and usefulness, one might suppose that courts utilizing the distinction (such as the Court in *Cooper*) were appealing to a relatively secure foundation. However, this has not been the case, for what is now a familiar reason: the legal system makes pragmatic allocative choices in the guise of principled analysis.

Under the conventional view, legal issues concern the applicable rules and standards; factual issues involve the underlying transaction or events, in other words, "who did what, where, when, how, why, with what motive or intent."[55] But even these simple platitudes do not map onto the cases—the line between law and fact is not clear, and so decision-making authority does not divide cleanly along these lines. Moreover, the lack of a discerni-

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Punitive Damages, 54 STAN. L. REV. 1239 (2002). Since the decision, the Court has vacated and remanded state court appellate decisions that gave deference in evaluating punitive-damage awards. *See* Time Warner Entm't Co. v. Six Flags Over Georgia, LLC, 537 S.E.2d 397 (Ga. Ct. App. 2000), *vacated by* 534 U.S. 801 (2001); Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., No. G020323, 2002 Cal. App. Unpub. LEXIS 6131 (June 28, 2002), *vacated by* 534 U.S. 947 (Oct. 9, 2001) (original Jan. 29, 2001 lower court decision not available).

[51] On remand, the Court's holding did have a significant impact. The Ninth Circuit, having originally upheld the punitive-damage amount under a deferential standard, reduced the amount from $4.5 million to $500,000 after conducting de novo review. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1146 (9th Cir. 2002).

[52] *See infra* pp. 1797–1806.

[53] *See* U.S. CONST. art. III, § 2 ("the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact"); U.S. CONST. amend. VII ("no fact tried by a jury shall be otherwise re-examined").

[54] Lord Coke often invoked the maxim, *ad quaestionem facti non respondent jurisperiti, ad quaestionem juris non respondent juratores,* that is, judges do not answer a question of fact, juries do not answer a question of law. *See* ROSCOE POUND, JURISPRUDENCE 547 (1959) (citing Co. Lit. 155b (1628); Isack v. Clark, 1 Rolle 125, 132 (1613)); *see also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

[55] RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 10.5, at 732 (4th ed. 2002).

ble pattern increases significantly when courts are faced with so-called "mixed" issues, which involve the application of the rules or standards to the underlying events. The juxtaposition of these diverse areas demonstrates the distinction's importance and its unruly nature.

1. The Seventh Amendment.—The Seventh Amendment provides the right to a jury in civil cases.[56] By its language the Amendment does not create a new right but preserves an existing one.[57] The amendment preserves the right to have "facts" tried by jury and protects those facts from reexamination. While this leaves "fact" undefined, the amendment has been interpreted to extend only to those factual issues preserved under the common law. By contrast, no right exists to have a jury try the legal issues in civil cases.[58]

The word "preserved" in the Seventh Amendment plainly implies that its referent is whatever right existed at the time the amendment was adopted, and therefore that historical inquiry is critical to determining its scope.[59] Times have changed, however, and history does not always supply an answer. Accordingly, the Supreme Court adopted a two-prong inquiry into the relevant history and the nature of the remedy sought to determine whether the amendment applies to a particular issue.[60] The historical component asks whether the particular issue (or an analogous one) was tried by a jury at the common law in 1791 when the amendment was ratified.[61] Because at common law juries were only available at law and not in equity, the remedial analysis inquires into whether the remedy sought is legal or equitable.[62] If these two inquiries do not establish an answer, explicitly pragmatic considerations determine the issue, such as the practical abilities and limitations of juries.[63] In conducting these inquiries, the Court has recognized the importance of protecting the right to a jury and that, all else be-

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[56] Specifically, the Amendment declares, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

[57] *See id.* At the common law, juries made punitive-damage determinations. *See* Barry v. Edmunds, 116 U.S. 550, 565 (1886); Day v. Woodworth, 54 U.S. 363, 371 (1852).

[58] Or alternatively, it may suggest that if a jury does decide a "legal" issue it may nevertheless be reexamined. This may be one way of interpreting what the Court did in *Cooper*.

[59] *See* Chauffeurs Local 391 v. Terry, 494 U.S. 558, 564 (1990).

[60] *See* Tull v. United States, 481 U.S. 412, 417–18 (1990).

[61] *See id.*

[62] *See id.*

[63] *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). This type of pragmatic assessment may even give rise to a "complexity exception" to the Seventh Amendment. *See* In re Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976) (holding that the cases may be so complex as to exceed the ability of jurors to decide facts in an informed and capable manner, and therefore the Seventh-Amendment right is outweighed by a due process right if the jury cannot render a rational decision with a reasonable understanding of the evidence); In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). *But see* In re U.S. Finan. Sec. Litig., 609 F.2d 411 (9th Cir. 1979).

ing equal, a strong presumption exists in favor of trial by jury.[64] For example, the Court has held that the Seventh Amendment forbids the trying of equity claims by a judge in cases with both legal and equitable claims if doing so deprives a party from having the legal claims tried by a jury.[65] The Court has also held that in diversity cases, despite a contrary state practice, the Seventh Amendment and the policies favoring a jury require that the disputed factual issues be submitted to a jury.[66]

While the Court's doctrine for determining when the amendment applies is relatively clear, its application has proved to be difficult.[67] The first inquiry—historical analysis—puts courts in the difficult role of amateur historian, often with no clear analogs between recently created statutory rights and common-law causes of action.[68] In addition, many traditional issues could have been tried at both law and equity courts.[69] The second inquiry—whether the remedy sought is legal or equitable—has also been difficult to implement. Not only is the line between legal and equitable remedies not always clear,[70] but the Court's own cases have confounded matters by explaining that some remedies (such as restitution) are both legal and equitable[71] and some (such as declaratory judgments) are neither.[72]

Despite these difficulties, the Seventh Amendment relies on the law-fact distinction to demarcate decision-making authority. Namely, the amendment provides a bright-line constitutional mandate: if an issue is factual and falls within the scope of the amendment, then it must be submitted to a jury and cannot be reexamined.[73] We see in these cases two of the three dichotomies at work: the Supreme Court has constitutionalized conven-

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[64] *See Ross*, 396 U.S. at 539–40.

[65] *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[66] *See* Simler v. Conner, 372 U.S. 221, 222 (1963); Byrd v. Blue Ridge Elec. Co-Op, 356 U.S. 525 (1958).

[67] *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 284 (1988) ("Experience since the merger of law and equity, however, has shown that both questions are frequently difficult and sometimes insoluble. Suits that involve diverse claims and request diverse forms of relief often are not easily classified as equitable or legal.").

[68] On this difficulty see Crocker v. Piedmont Aviation, Inc. 49 F.3d 735, 745 (D.C. Cir. 1995) ("Given the radical difference between mid-20th-century American ideas of the proper role of the state and the ideas prevailing in 18th-century England, this difficulty is hardly surprising.").

[69] *See id.* at 745–46 (discussing this and other problems associated with historical analysis in this context); *see also* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212–14 (2002) ("In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity.").

[70] *See Crocker*, 49 F.3d at 746–49 (discussing the difficulties in determining whether an award of back pay is a legal or equitable remedy).

[71] *See Great-West*, 534 U.S. at 212–15.

[72] *See Gulfstream*, 485 U.S. at 284 ("Actions for declaratory judgment are neither legal nor equitable.").

[73] District courts, however, retain the power to enter judgments as a matter of law, grant new trials, and lower irrationally high awards. *See* FED. R. CIV. P. 50, 59.

tional views of the late 18th Century regarding the judge-jury relationship, but has also added the pragmatic issue of institutional competence. Thus, in order for a judge to decide an issue or for an appellate court to reexamine it, courts must remove the issue from the auspices of the amendment by arguing that it is either not "factual" or it does not fall under the scope of the amendment. The *Cooper* majority opted for the former.

2. Negligence vs. Contracts: Two Views of the Distinction.—The law-fact distinction plays a critical role in allocating decision-making authority between judge and jury in both negligence and contract-law doctrine; however, it does so in quite unpredictable ways.[74] While there is no constitutional right under the Seventh Amendment to have a jury decide whether the conduct in a negligence case was reasonable (due to a lack of historical practice in 1791), it is a firmly entrenched rule that juries shall decide both the underlying facts and whether those facts constitute negligence. As early as 1873, the Supreme Court held in *Sioux City v. Stout* that juries should decide the negligence issue even if the underlying facts are not in dispute:

> Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that law commits to the decisions of a jury.[75]

The Court in *Stout* identified the following reasons for allocating the reasonableness question to the jury: (1) jurors are more in tune with community sentiment; (2) juries are composed of a cross-section of the community; (3) jurors represent the viewpoint of the common man; (4) jurors have lay expertise; and (5) twelve heads are better than one.[76] The only excep-

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[74] For an interesting discussion stimulated by the differing roles of juries in tort and contract litigation, see Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORD. L. REV. 407 (1999).

[75] R.R. Co. v. Stout, 84 U.S. 657 (1873).

[76] *See id.* This view has not been without its critics, most notably Justice Holmes. He argued that judges, not juries, should decide negligence issues. *See* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899); *see also* Loper v. Morrison, 145 P.2d 1, 6–7 (Cal. 1944) (Traynor, J., dissenting) ("If the facts are undisputed it is a question of law whether liability arises from such facts."). Judge Richard Posner, on the other hand, explains that negligence may be reduced to a pure question of fact. Posner relies on Learned Hand's negligence formula in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), explaining that all three components (likelihood of injury, magnitude of injury, cost of avoidance) and their relations concern pure factual questions. *See* Thomas v. Gen. Motor Acceptance Corp., 288 F.3d 305, 308 (7th Cir. 2002); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 379 (2001). Judge Posner may be right that negligence involves fact finding, but he is wrong that it reduces to the Learned Hand formula. *See, e.g.*, Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI. KENT L. REV. 683 (2002).

tions to this general rule occur when appellate courts have already established what is reasonable under the same circumstances, or when a legislature, usually in the form of penal statutes, establishes a standard of care under the circumstances.[77]

While negligence doctrine allocates a great deal of decision-making authority to juries, contract law, relying on the law-fact distinction, does not. In general, judges apply law to fact and also decide issues concerning the construction and meaning of contracts.[78] Despite the fact that the inferences drawn in answering these questions relate to the underlying factual occurrence and not to what is conventionally thought of as law, judges retain decision-making authority—often under the misleading rubric that these issues are ones of law.[79] The rationales for this practice are usually historical and administrative. While courts often rely on the historical practice,[80] the primary reason for the historical practice is usually omitted—juror illiteracy.[81] Although that is a pretty good reason to remove an issue from the jury, it bears no relationship at all to whether the issue is "legal" or "factual," which is just our point—the labels are applied after the pragmatic allocative decision is made. Moreover, these questions often ask for a determination of what a reasonable person in the position of the parties would understand by the language in the contract, and juries often decide issues relating to reasonableness and state of mind.

The second rationale for this rule—administrative concerns—involves the need for uniformity and predictability with frequently reoccurring fact patterns. Once again, the third dichotomy appears—the desire for a general rule that applies across a range of cases makes the issue "legal." No justification has been given, however, as to why this only applies to contracts and not to other areas such as negligence, or any other area for that matter. In any event, this rationale justifies the rule only when there is a high likeli-

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[77] *See, e.g.*, Geier v. Am. Honda, 529 U.S. 861 (2000) (holding that statutory compliance preempts actions for negligence); Weiner, *supra* note 54 at 1885. Weiner shows that despite the tendency to allow juries to decide reasonable care in negligence cases, courts often treat "reasonable time" in commercial cases and "reasonable cause" in malicious prosecution and false-imprisonment cases as questions of law for the court. *See id.* at 1876. Accordingly, Weiner questions this inconsistency by pointing out that whatever advantages there are in having juries decide reasonableness are just as present in these types of cases as with negligence. *See id.* at 1914.

[78] CHARLES ALAN WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 603. The exception to this rule occurs when extrinsic or parol evidence is admitted, in which case juries generally decide the issues. *See id*; West v. Smith, 101 U.S. 263, 270 (1879). *See generally* Williams C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931; Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

[79] *See* WRIGHT & MILLER, *supra* note 78, at 601. Thayer identified this phenomenon as one of the "conspicuous illustrations" of when judges retain decision-making power for questions of fact. *See* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 148 (1890).

[80] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 381–82 (1996).

[81] Thayer, *supra* note 79, at 161.

hood of reoccurrence. Absent this showing, there does not seem to be a compelling reason for not allowing juries to decide these factual questions, and we are aware of no such showing distinguishing contract questions from other legal matters.[82]

A further, and curious, use of the law-fact distinction in contract law occurs in commercial cases involving the doctrine of unconscionability. The Uniform Commercial Code declares that unconscionability is a matter of law for the courts.[83] This declaration allocates judges even more decision-making authority than the basic contract rule that judges decide questions of construction and meaning unless questions involve extrinsic evidence. These questions often involve inferences drawn from extrinsic evidence such as bargaining power, available alternatives, and education of the parties. The U.C.C. itself admits as much in allowing parties the opportunity to present evidence.[84] Thus, unlike negligence doctrine, which gives juries both the fact-finding and application functions, contract law in general, and the U.C.C. even more so, deny jury participation on what one would think are obviously basic fact-finding functions.[85]

The extent to which pragmatic considerations determine the allocative question is plain in these areas. Perhaps judges are better fact-finders in commercial litigation—because of complexity, their knowledge of the Code or commercial practices, or the desire for uniformity and predictability—but this does not make "legal" issues out of factual issues unless the term simply refers to those issues better decided by one decision maker than another (which, actually, is our view).[86]

3. Patents.—In *Markman v. Westview Instruments, Inc.*, the Supreme Court held that the scope of claims in patents—a decision that had been made by juries for years—should now be decided by judges.[87] Specifically,

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[82] Moreover, if uniformity and predictability are desired, this need not be accomplished only by removing the issue from the jury. As Weiner suggests, and Holmes employed while he was a state judge, jury verdicts could be given precedential value in cases of frequently occurring fact patterns. *See* Weiner, *supra* note 54 at 1924; Commonwealth v. Wright, 137 Mass. 250 (1884); Commonwealth v. Sullivan, 146 Mass. 142, 145 (1888).

[83] U.C.C. § 2-302(1) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract.").

[84] U.C.C. § 2-302(2) ("When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.").

[85] Indeed, courts have held it to be reversible error to even instruct on, and allow a jury to decide, this issue. *See, e.g.*, Landsman Packing Co. v. Cont'l Can Co., 864 F.2d 721, 729 (11th Cir. 1989) (jury instructed on reasonableness of warranty time limitation); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec., 844 F.2d 1174, 1184 (5th Cir. 1988); Martin v. Joseph Harris Co., Inc., 767 F.2d 296, 299 (6th Cir. 1985).

[86] There are other ways to deal with these problems, like directed verdicts. *See* Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems in—and Solutions for—the Uniform Commercial Code*, 1984 DUKE L.J. 92, 104–05.

[87] 517 U.S. 370 (1996). For this reason, the case can also be seen as a precursor to *Cooper*.

the Court held that judges should interpret the terms in patents and that these determinations are questions of law.[88] The Court explained that historical analysis reveals that a Seventh Amendment right to a jury applies in patent-infringement cases, but that the specific issue of construing patents was less clear. Because historical analysis did not provide a clear answer to this narrow question, the Court engaged in a functional analysis of the capabilities of judges and juries and concluded that judges are "better suited to find the acquired meaning of patent terms."[89] First, the Court referred to the general contract principle that judges traditionally have construed documents.[90] The Court then provided a litany of reasons why judges should perform this function: (1) judges are trained in exegesis; (2) judges will be better at preserving internal coherence; (3) patents require technical and sophisticated analysis; and (4) the desire for uniformity in the treatment of patents.[91]

The *Markman* decision provides yet another demonstration of the analytically empty but pragmatically important concept of "questions of law." Like the common law's treatment of contracts generally, the Court labeled the issue "legal" even though it involved the drawing of factual inferences from extrinsic evidence. Moreover, like with contracts generally, the third dichotomy appears in the Court's reliance on the oft-cited need for uniformity. Unlike traditional contracts doctrine, however, this issue had long been within the jury's domain. Perhaps the Court's reasons provide an adequate rationale for the decision, but the rationale is not limited to the patent context and has nothing to do with the law-fact distinction as conventionally understood. In this case, the label "legal" simply means "judge decides."[92] In any event, the remarkable ease with which a traditional factual question can transmute into a legal question at the drop of a lawsuit casts further doubt on the proposition that we are dealing here with ontologically distinct species. We suppose it is possible to confuse lions with zebras, even when staring at them for a couple of centuries, but it is unlikely.

4. Appellate Review.—Along with the relationship between judges and juries, the law-fact distinction also plays a significant role in the relationship between trial and appellate courts.[93] Appellate courts use the distinction to determine whether to review issues de novo or under the

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[88] *See id.* at 388–91.

[89] *Id.* at 377 (citing Bramah v. Hardcastle, 1 Carp. P.C. 168 (K.B. 1789)).

[90] *Id.* at 382 n.7. The Court does not provide the original rationale for this rule, *viz.*, juror illiteracy. *See* Thayer, *supra* note 79 at 161.

[91] *See Markman*, 517 U.S. at 388–91.

[92] And if "legal" just means "judge decides" (in other words, that "legal" is the conclusion to the pragmatic allocation decision), then an argument that judges should decide a particular issue because it is a "legal" issue merely begs the question.

[93] As was the case in *Cooper*.

deferential "clearly erroneous" standard.[94] Legal issues receive de novo review and factual issues receive deferential review.[95] The label placed on an issue by district courts is not decisive and appellate courts will often review de novo an issue the lower court classified as factual.[96] Moreover, like the distinction in general, the most problematic area concerns law application or so-called "mixed" questions. Wright and Miller report substantial authority for the contrary propositions that mixed questions are reviewed both de novo and under the clear-error standard.[97] For example, mixed questions in the following areas have been reviewed de novo: antitrust violations, bankruptcy, contracts, tax, the First Amendment, and administrative law.[98] By contrast, courts have reviewed mixed questions deferentially in the following (sometimes same) areas: tax, agency, contracts, naturalization, trademarks, fraud, and jurisdiction.[99] By relying on the law-fact distinction, appellate-review doctrine simply mirrors the problematic nature of the distinction itself.

5. Constitutional Facts.—The constitutional-fact doctrine allows courts to review de novo the underlying factual conclusions in cases involving constitutional rights. The doctrine emerged from the jurisdictional-fact doctrine announced in *Crowell v. Benson*.[100] *Crowell* arose in the administrative context and involved a claim for workers' compensation. The award turned on a factual finding of whether an injured plaintiff was employed at the time of injury. The statute at issue—the Longshoremens' and Harbor Workers' Compensation Act—declared that agency findings of fact were final.[101] The Court nevertheless reviewed de novo the factual question of employment, arguing that the issue warranted de novo review because it was a "jurisdictional fact" and was, therefore, a condition precedent to the operation of the statute.[102] The Court also emphasized that the facts essential to constitutional rights warrant de novo review.[103]

The doctrine became a tool for courts to use to reexamine the facts in

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[94] *See* FED. R. CIV. P. 52(a); United States v. Gypsum, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the firm conviction that a mistake has been committed.").

[95] *See* WRIGHT & MILLER, *supra* note 78, at 608. Federal appellate courts also review district court decisions on state law de novo. *See* Salve Regina College v. Russell, 499 U.S. 225 (1991).

[96] *See* WRIGHT & MILLER, *supra* note 78, at 567–68 (collecting 22 examples).

[97] *See id.* at 608.

[98] *See id.* (citations omitted).

[99] *See id.* (citations omitted).

[100] 285 U.S. 22 (1932).

[101] *Id.* at 36–37.

[102] *Id.* at 54 ("A different question is presented where the determinations of fact are fundamental or 'jurisdictional.'").

[103] *Id.* at 58 ("None of the decisions [limiting review] touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limits.") (footnote omitted).

constitutional cases. At a high point for the doctrine, the Court declared in a case involving racial discrimination in state jury selection:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. . . . If this requires an examination of evidence, that examination must be made. . . . whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the later controls the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.[104]

Despite such strong language, the Court has employed the doctrine in only select areas, with varying rationales,[105] often in an ad hoc, standardless manner. In practice, the Court has elected to apply the doctrine in the areas of coerced confessions, jury discrimination, and free speech, but has declined to invoke the doctrine in areas involving schools and voting.[106] As such, the doctrine does not appear to place any duty on appellate courts to review all "constitutional facts."[107] Rather, under the rubric of the doctrine, the Court has the discretionary power to do so when it, pragmatically we suspect, thinks it a good idea.[108] The next section examines one area where the Court has invoked this power.

6. The First Amendment.—Under the auspices of constitutional-fact review, appellate courts must review de novo the "actual malice" element in defamation suits.[109] In *New York Times Co. v. Sullivan*, the Court declared that the actual-malice element, despite its dependence on factual inferences drawn from evidence, was a question of law.[110] Moreover, *Sullivan* required that actual malice be proven to the higher clear-and-convincing-evidence

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[104] Norris v. Alabama, 294 U.S. 587, 589–91 (1935).

[105] These rationales include: (1) courts have the power to review mixed questions; (2) the legal conclusions and facts are "intermingled"; (3) the need to review the evidence to see that the right was not denied in substance; and (4) to determine if sufficient evidence existed. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 261–62 (1985).

[106] *See id.* at 261, 266 (collecting cases).

[107] *See id.* at 239 ("Law declaration, not law application, is the appellate courts' only constitutionally mandated duty.").

[108] Because the factual nature of the issues is explicit in this context, pragmatic considerations become more transparent in justifying the classification. For example, in a recent opinion, Judge Frank Easterbrook explicitly relied on pragmatic considerations (the generality of the issue) in concluding that a district court's finding based on empirical studies that a state abortion law will create an "undue burden" was a constitutional fact requiring de novo review. A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002) ("That admixture of fact and law, sometimes called an issue of 'constitutional fact,' is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects."). In other contexts, however, the supposed ontological distinction reemerges, Wright v. Walls, 288 F.3d 937, 953 (7th Cir. 2002) (Easterbrook, J., dissenting) ("What the state judge thought about the extent of his discretion is a proposition about the state of the world, not about the state of the law.").

[109] *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

[110] 376 U.S. 254, 285 (1964) ("[W]e must also . . . review the evidence to make certain that these principles have been constitutionally applied.").

standard instead of the conventional civil standard of preponderance of the evidence.[111] Relying on *Sullivan, Bose Corp. v. Consumers Union of United States, Inc.*, the Court held that district court findings on this element may not be reviewed for clear error; rather, appellate courts must undertake a de novo review of the record to ensure that the element was proven with the requisite convincing clarity.[112] The Court recited the constitutional-fact rationale that the important constitutional values at stake, those protected by the actual-malice rule, warranted de novo review.[113] Therefore, in this context both district and appellate courts must undertake an independent review of the record.[114]

While *Bose* emphasized the constitutional importance of the issue—and that the "vexing nature" of the law-fact distinction did not diminish the importance—the Court did not explain why the "importance" does not extend to all constitutional issues. For example, two years before *Bose*, the Court reversed an appellate court that reviewed de novo the intent issue in a racial discrimination claim.[115] The Court of Appeals reasoned that the intent issue was an "ultimate fact" regarding an important constitutional right.[116] Nevertheless, the Court held that independent review violated Rule 52(a) because the intent issue constituted a pure question of fact.[117] Why this is so is unclear.

7. Other Contexts.—The areas discussed above focus on only a few of the more salient areas where the law-fact distinction plays a significant role. Because the distinction is one of the law's primary and fundamental distinctions, it arises in virtually every area of the law, often with the same opaqueness as in the areas discussed above. For example, in the criminal-law context the following determinations are considered ones of "law" requiring independent appellate review: voluntariness of a confession,[118] rea-

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[111] *Id.* at 285–86.

[112] 466 U.S. at 510–11.

[113] *Id.* at 502–08.

[114] At least one appellate court has pointed out the tension between *Bose*'s command to review factual findings de novo and the strictures of the Seventh Amendment. *See* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 701 (7th Cir. 2001), *rev'd on other grounds*, 123 S. Ct. 1057 (2003). But the fact that *Bose* involved findings by the district court rather than a jury may not explain the Court's willingness to review the issue de novo. Within the First Amendment context, but outside the Seventh Amendment context, the Court also has reviewed jury findings de novo. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 159–61 (1974) (reviewing de novo, and reversing, a unanimous jury determination that the movie *Carnal Knowledge* was patently offensive while recognizing that the "patently offensive" determination was one of fact).

[115] *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[116] *See id.* at 286.

[117] *See id* at 287–88.

[118] Miller v. Fenton, 474 U.S. 104, 115–17 (1985). This case arose in the habeas corpus context, where the law-fact distinction has taken on less significance since Congress passed the Antiterrorism and Effective Death Penalty Act. Pre-AEDPA, the distinction was used to decide which standard of review applied, but now the inquiry has switched to whether the state court's decision was "contrary to, or

sonable suspicion and probable cause,[119] effectiveness of counsel,[120] and waiver of right to counsel;[121] meanwhile, the following are not: consent to a warrantless search,[122] discriminatory use of peremptory challenges,[123] and juror bias.[124] As these lists indicate, disagreements among judges concerning the law-fact distinction are plentiful.[125] Moreover, the law-fact status of "trustworthiness" of out-of-court statements for assessing potential violations of the Confrontation Clause provides an even less certain example: in a recent opinion, a plurality of the Court declared it a legal issue requiring independent review, a three-Justice concurrence explained that it is a factual determination requiring deference, and two Justices did not mention the issue.[126] A few areas, however, avoid some of the problems created by the distinction by treating legal and factual questions similarly.[127] For example, issue preclusion now applies to both issues of law and fact,[128] and administrative law, while applying ostensibly different standards for legal and factual determinations, gives deference to both legal and factual interpretations.[129]

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involved an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1) (2000); Williams v. Taylor, 529 U.S. 362 (2000).

[119] Ornelas v. United States, 517 U.S. 690, 699 (1996).

[120] Strickland v. Washington, 466 U.S. 668, 698–99 (1984).

[121] Brewer v. Williams, 430 U.S. 387, 397 n.4 (1977).

[122] Ohio v. Robinette, 519 U.S. 33, 40 (1996).

[123] Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986).

[124] Wainwright v. Witt, 469 U.S. 412, 428 (1985).

[125] *See, e.g.*, Wright v. Walls, 288 F.3d 937 (7th Cir. 2002), in which Judge Easterbrook in dissent remarks that "[w]hat the state judge thought about the extent of his discretion is a proposition about the state of the world, not about the state of the law." *Id.* at 953. Propositions about the state of the law are also about the state of the world.

[126] Lilly v. Virginia, 527 U.S. 116, 136 (1999) (issue involves a "fact-intensive, mixed" question); *id.* at 148 (Rehnquist, C.J., concurring) ("but the mix weighs heavily of the 'fact' side").

[127] And sometimes the same "legal" result obtains regardless whether the issue under review is conceived of as factual or legal. *See, e.g.*, Wainwright v. Goode, 464 U.S. 78, 83 (1983) ("Whether the asserted reliance by the sentencing court on a non-statutory aggravating circumstance is considered to be an issue of law or one of fact, we are quite sure that the Court of Appeals gave insufficient deference to the Florida Supreme Court's resolution of that issue.").

[128] RESTATEMENT (SECOND) OF JUDGMENTS § 27–28; *see also* Arizona v. California, 530 U.S. 392, 414 (2000); Burlington N. R.R. Co. v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227 (3d Cir. 1995) (applying offensive, non-mutual issue preclusion to a legal question).

[129] Factual questions are reviewed under the "substantial evidence" standard. Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (2000) (stating factual decisions will be set aside only if "unsupported by substantial evidence . . . on the record"). This standard is somewhere between the deference given to juries and the clearly erroneous standard of FED. R. CIV. P. 52(a). *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Legal questions are reviewed based on the doctrine announced in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Under this doctrine, courts examine whether Congress has expressed a clear intent on the issue; if Congress has not, then agency decisions are reviewed deferentially and will stand so long as they involve a reasonable interpretation. *Id.* at 842–43. Therefore, while both types of questions are reviewed under different standards, the significance of the law-fact distinction is diminished because both types receive deferential review.

Finally, two examples push the distinction to the point of the absurdity. The first example arises in the context of judicial notice under Federal Rule of Evidence 201. Like many of the areas discussed above, judicial-notice doctrine at times relies on the law-fact distinction to determine which issues are subject to Rule 201's requirements—namely, the rule governs "adjudicative facts" only and does not apply to questions of law.[130] Sometimes, however, courts take judicial notice of legal matters *as a matter of fact*. In other words, "not as a rule governing the case before it but as a social fact with evidential consequences."[131] Wright and Graham provide the example of a case involving an employer's insurance policy where the court took judicial notice that certain acts by an employee constituted burglary or larceny as a matter of fact so as to infer that the employer had notice that the employee had committed a "fraudulent or dishonest act," and was thereby excluded from the policy's coverage.[132] The irony is evident: the court took judicial notice of, and thus treated as adjudicatory facts, (1) what the current law was for burglary and larceny, and (2) that the particular conduct amounted to burglary or larceny—both of which are classic examples of "legal" issues (law declaration and law application).

The second example providing a *reductio ad absurdum* for the distinction concerns foreign law. Until recently, foreign-law determinations were labeled as ones of fact but now are treated as legal questions.[133] These examples demonstrate that the law-fact distinction can be manipulated from either direction: facts can be law and law can be factual. Of course, if the distinction does not really exist, this is not a surprise. The recognition of this point effectively undermines the notion that the law is operating with a coherent law-fact distinction and strongly suggests that the supposed dualism in types of adjudication questions is false. We now turn directly to that question.

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[130] FED. R. EVID. 201; *see also* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5103, at 473 (1977) ("Lamentably, the Advisory Committee provided no guidance on how to determine whether the matter noticed is law or fact; they simply excluded judicial notice of law from Rule 201 without considering this difficulty."). Also excluded from Rule 201 are "non-adjudicative" facts and "legislative" facts. Like the law-fact distinction, the distinctions between these types of facts and adjudicative facts are also not clear. *See generally*, *id.* at 474–82. The distinction between adjudicative and legislative facts also relies on the general-specific spectrum. For example, a common category of legislative facts are those relating to empirical data, which courts freely review de novo. *See, e.g.*, Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); A Woman's Choice—East Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002).

[131] *See* WRIGHT & GRAHAM, *supra* note 130, at 473.

[132] *See id.* (discussing Ritchie Grocer Co. v. Aetna Casualty & Surety Co., 426 F.2d 499, 503 (8th Cir. 1970)).

[133] *See* FED. R. CIV. P. 44.1. Until Rule 44.1 was adopted, questions of foreign law were treated as factual questions that were submitted to juries and were limited to evidence presented by the parties. The questions now are treated similar to domestic legal questions in that they are made by judges and the judges are not limited to evidence submitted by the parties but may instead conduct their own research.

II. THE LAW-FACT DISTINCTION: DEFLATED AND EXPLAINED

The law-fact distinction is, to say the least, muddled. The apparent confusion stems from a false assumption (namely that legal and factual issues constitute discrete ontological categories) compounded by the enormous complexity of the variables affecting the pragmatic allocative decision. Here we demonstrate this assumption to be false. The falseness of this assumption has been overlooked not only by legal doctrine but also by the legal scholarship attempting to make sense of the distinction. This may be a symptom of the law's general failure to think of legal questions in epistemic terms.[134]

We first discuss the ontological status of legal and factual issues, explaining why, and in what sense, most legal issues are factual. We then turn to the epistemological context in which legal and factual issues arise and examine in particular whether, despite a deep ontological equivalence, legal and factual issues differ from an epistemological viewpoint, and whether this difference provides a useful way to distinguish legal and factual issues. They do not and there is not. Finally, we examine whether, despite ontological and epistemological equivalences between legal and factual issues, a coherent analytic distinction exists between the concepts "law" and "fact." We find no useful analytical distinction and thus conclude that the only distinction is a functional one: namely, that the concepts "law" and "fact" refer to which body does or should decide an issue or under what standard the issue is or should be reviewed.

A. The Ontology of Legal and Factual Issues

First, a clarification. An unnecessary distraction has been imported into the law-fact scholarship concerning law creation. Some claim that plainly the law is not "factual" because it emanates from norms of various kinds and often does not preexist the decision; the "law" only comes into being as a consequence of the decision itself.[135] To say that an entity that does not yet exist is a "fact" is a bit strange, we admit. A bit strange, perhaps, but not entirely so, and here a further distinction must be made. Suppose that "negligence" means the violation of community standards. Those standards either preexist a decision or they do not. If they do, then what

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[134] *See* William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, 40 S. TEX. L. REV. 351 (1999); Ronald J. Allen, *Truth and its Rivals*, 49 HASTINGS L.J. 309 (1998); Peter Tillers, *The Value of Evidence in Law*, 39 N. IRELAND LEGAL Q. 167 (1988). All three note the law's general failure to conceive of legal issues in epistemic terms. Not surprisingly, all are evidence scholars and therefore sensitive to law's epistemological dimension. Hart's rule of recognition and Kelsen's "grundnorm" do conceive of propositions of law in epistemic terms, but these jurisprudential matters have not much impacted the actual operation of the legal system in the United States, nor the scholarship about it.

[135] Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 918–23 (1992); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863–65 (1992); Tillers, *supra* note 134, at 172–74.

"negligence" means is indeed a fact; it is the fact of the matter of what relevant community standards are. Suppose there really is no fact of the matter until after the case is decided. Even we agree that it would be strange to refer to this nonexistent entity as a "fact," but it would be no more strange than saying that it is a "fact" that if a hurricane hits Miami much damage will be done. This is a prediction about the future, but that does not detract from its "factual" nature, just like predictions of what the law will become do not necessarily detract from their "factual" nature.

Well, suppose they do. Suppose those who distinguish retrodiction from prediction are correct that there is some ontological distinction between the two.[136] In that case, it would be inappropriate to talk about the fact of the matter concerning law yet to come into being, damage in Miami, or craters to be left by volcanoes (to refer to the earlier example). So be it, but once the hurricane has hit, the volcano has blown, and negligence has been found, there is a fact of the matter. And so at worst, we would simply have to grant that it may not be useful to talk about the fact of the matter concerning law that has yet to come into existence (whether common, statutory, or constitutional). We thus put aside the ontological status of law yet to come into being and grant that it is unlike a volcano that presently exists.[137] Plainly, much law presently exists, is knowable, and determines outcomes in a straightforward way. Moreover, virtually none of the uses to which the legal system puts the law-fact distinction involve difficult questions of law creation. For example, whether contract interpretation transmutes from a question of law to a question of fact because of the relevance of parol evidence or whether unconscionability is a question of law or fact do not involve gaps or ambiguity in the law. Thus, putting aside law creation simply removes an unnecessary distraction, and we now move to the question of whether the law that exists is like a volcano in virtue of their shared factual nature.

The law-fact distinction, as it is often invoked, presupposes that there are two distinct kinds of adjudication questions: factual questions such as "what happened at *X*" and legal questions such as "what are the applicable

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[136] Friedman, *supra* note 135, at 863–65; Lawson, *supra* note 135, at 863–65; Tillers, *supra* note 134, at 172–74.

[137] There are vigorous jurisprudential debates concerning whether the law has gaps. The "right answer" thesis may imply that it does not. *See* RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *in* A MATTER OF PRINCIPLE 119 (1985). The "discretion" thesis of H.L.A. HART, THE CONCEPT OF LAW (1961) implies that it does. If a hard version of the "right answer" thesis is correct, law is a fact in every sense of the word; if the law has real gaps, then maybe, and probably, it is not. Nonetheless, we see no reason to enter this thicket and simply stipulate away law creation as nonfactual. Moreover, to refer to existing law as a collection of "norms" is misleading. The law commands one to stop at stop signs, permits specified activity such as adults voluntarily contracting, and attaches consequences; the law does not recommend a "norm" that one "ought" to stop, to contract, or whatever. Whether you "ought" to stop is pretty much up to you; whether you face consequences if you do not stop is not up to you. Philosophers and others may see in the command interesting things to say about the nature of obligation, but that is irrelevant to the nature of law.

legal rules for situations like *X*" or "does legal rule *Y* apply to situation *X*." Note, though, that our linguistic practices indicate a strong belief in the factual nature of the law. In particular, the practice is commonplace when faced with legal questions to make statements like "it is a fact that *Y* is law," "it is a fact that rule *Y* rather than rule *Z* applies in situations like *X*," or "it is a fact that the law proscribes conduct *X*." Much of the lawyer's day is spent answering such common questions. Anterior to legal advice, much of everyday lay activity is spent maneuvering around the factual content of the law by, say, stopping at stop signs, not committing murder, and the like. To say that legal issues are factual issues, in this sense, then, is merely to say that there is such a thing in the world referred to as "the law," that the law "exists," "is," "is one way rather than another," or that a given answer to a legal question "is true" or "is the case." The point is fundamental, yet often overlooked: to the extent one can say that "the law is *Y*" or "rule *Y* applies" one can also say *"it is a fact that* the law is *Y*" or "*it is a fact that* rule *Y* applies." In short, the answers to legal questions are propositional statements with truth value and are therefore, like other propositions with truth value, factual.[138]

Or at least so all sane people believe. But, are these linguistic practices misinformed? We need to press more deeply into the question. The sense in which legal issues are factual can be demonstrated by comparing legal issues with traditional "factual" issues in the law. Traditional issues of fact involve a judge or jury attempting to infer or reconstruct some segment of reality based on proffered evidence. But legal issues also involve inference

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[138] Both Lawson and Tillers have also recognized that the propositional nature of legal statements suggests they are factual. *See* Lawson, *supra* note 135, at 863; Tillers, *supra* note 134, at 167–69. Both Lawson and Tillers assume, however, that law is "factual" in a very broad sense. Lawson, for example, notes that the sense in which he means law is factual accommodates even a "hard-core legal realist" view of law—namely, that even if one believes that the law is only whatever Judge J does then the law is the fact of whatever Judge J did. *See* Lawson, *supra* note 135, at 864. Tillers likewise recognizes this point but explains that even acts of *creating* law may also be factual in that they depend on sound beliefs about the world and may rest on evidence. *See* Tillers, *supra* note 134, at 173–76. In other words, Lawson and Tillers assume that there are true propositions about the world, but there may not be true propositions of law. By contrast, we are assuming that if true propositions exist, some of them may refer to the law—namely, that there is such a thing in the world denoted by "the law," that we can have knowledge of it, and that this knowledge comprises the legal facts. (Of course, if there are no true propositions about the world, then law and fact are once again in an identical position.)

To be clear, we are not weighing in on the familiar jurisprudential debates between positivists, natural-law theorists, Dworkinians, and others who offer detailed explanations or narratives as to *why* certain propositions of law are true. Our concern is not with the source of law but what has been produced. *See* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1083–96 (1997). We also need not weigh in on whether moral propositions have truth value. But we will stipulate that they do not. *See, e.g.*, ALFRED JULES AYER, LANGUAGE, TRUTH, AND LOGIC (2d ed. 1946). If that stipulation is false, further support for the thesis of the ontological similarity of "law" and "fact" is provided, obviously. Dworkin may believe that moral propositions have truth value. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986). So might Michael Moore. *See* Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

from evidence, and the attempt to reconstruct some segment of reality.[139] The difference is that the legal issues involve legal evidence such as the Constitution, statutes, judicial opinions, and regulations, and the segment of reality that must be inferred or reconstructed has to do with the law. Sometimes this process can be quite simple. For example, consider some of the areas of law discussed in Part I (because the question of whether a particular issue is "legal" or "factual" is itself a legal question). Based on *Cooper*, it is now a fact that appellate courts must apply a de novo standard when reviewing challenges to punitive damages under *BMW v. Gore*.[140] After *Markman*, it is a fact that the meaning of terms in a patent is a legal question.[141] Under the U.C.C., it is a fact that questions of unconscionability are questions of law.[142] Like factual issues in general, what the facts *are* in a given case depends on the way the world *is*, and how easy or difficult it is to determine what the facts are depends on the available evidence, as well as whether that evidence exists, is conflicting, or is ambiguous. In other words, to say that the law is factual is just to say that the law exists in the world—like volcanoes or chairs—and that our knowledge of facts about law depends on the available evidence.[143]

Even if one concedes that law is factual in the sense that it exists in the world, one might argue that legal and traditional factual issues are still distinguishable from an ontological standpoint. Judge Richard Posner, for example, argues that historical facts about Richard III and questions of law about the scope and meaning of the Fourteenth Amendment have a different "ontological status."[144] The supposed ontological distinction arises from the fact that historical facts often refer to natural kinds ("whether Richard III ordered the little princes killed"); whereas legal facts refer to human-made, linguistic creations such as statutes, judicial opinions, and regulations ("whether the Fourteenth Amendment forbids racial segregation of public schools").[145]

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[139] *See* Tillers, *supra* note 134, at 168–69.

[140] *See supra* pp. 1771–78.

[141] *See supra* pp. 1783–84.

[142] *See supra* p. 1783.

[143] Tillers, *supra* note 134, at 168–69. Although we are in fact naïve realists, our use of the term "fact" here and throughout the Article does not assume, nor should it suggest, an impossibly naïve one-to-one correspondence between statement and the world. Rather, "fact" is meant in a broader, more sterile, sense, recognizing the theory dependence of facts. Nor do we assume or suggest that the "facts" are purely matters of subjective construction or purely out there in the world and independent of speakers. Rather, the "facts," whatever they may be, involve the active intelligence of the decision-maker, society, and the world. In a different context, one author asserts but does not develop that law is factual. Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 551–54 (1993). Another likewise asserts that mistakes of law are factual mistakes about what the law is. Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes*, 12 LAW & PHIL. 33, 37–38 (1993).

[144] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 198 (1990) ("The law is not the same kind of entity as the events of Richard III's reign.").

[145] *Id.*

Even if this distinction were correct (which it is not, as we will soon show), it would not undermine the claim that legal issues are factual in the sense described above, and it would not provide a coherent way to distinguish legal and factual issues. Even though the law is made of human-made, linguistic constructs, this does not render legal issues necessarily any less objective than questions of historical fact.[146] One can be objectively right or wrong about the rules of basketball or chess even though these are also human-made, linguistic constructs. Similarly, one can be objectively right or wrong about what the law is or how it is to be applied.

Judge Posner is thus wrong that, merely because "facts" often refers to natural kinds, this usefully distinguishes historical facts from the law. What matters is that both may be described by propositions with truth value. He is also wrong that what passes for "historical facts" is captured by the concept of a natural kind. Historical facts, whether in a legal setting or not, clearly do involve natural kinds such as volcanoes, lions, zebras, and so on, and we cheerily concede that these are indeed natural kinds. But the "factual" subject matter of the law extends much more widely than this and encompasses such things as consideration in contract, substantial performance, various estates in land, various matrimonial states, fiduciary obligations, and so on. These are human-made, linguistic constructs and they are at the same time very much facts of the matter. Judge Posner is thus wrong on both sides of his argument.

Let us press the matter more deeply still. The significance of the purported ontological distinction between historical facts and legal facts is, as Posner recognizes, whether a particular issue could be indeterminate. Some questions, those involving natural kinds, we can speak of as being bivalent.[147] All this means is that a particular answer, regardless of whether anyone ever discovers the answer, must be either true or false (*i.e.*, no third category). Either the defendant killed the victim or he did not; either there once were dinosaurs in Chicago or there were not. By contrast, for questions involving human constructs, such as the law, it is not the case that a given answer or its negation must be true—these claims may be true, false, or indeterminate based on the relevant information or evidence. Either the

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[146] For more on this issue see Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 356–63 (2001); Andrei Marmor, *An Essay on the Objectivity of Law, in* ANALYZING LAW 3, 9–11 (Brian Bix ed., 1998); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 594–635 (1993); Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187 (1993) (reviewing KENT GREENAWALT, LAW AND OBJECTIVITY (1992)).

[147] Bivalence is also known as the law of excluded middle, and it arises in contemporary philosophical discussions in philosophy of language, epistemology, and philosophy of science regarding realism vs. anti-realism. *Compare* Donald Davidson, *The Structure and Content of Truth*, 87 J. PHIL. 279 (1990) *with* MICHAEL DUMMETT, TRUTH AND OTHER ENIGMAS 1–24 (1978). For a recent discussion in philosophy of science see ARTHUR FINE, THE SHAKY GAME: EINSTEIN REALISM AND THE QUANTUM THEORY 112–50 (2d ed. 1996). *See also* HILARY PUTNAM, THE MANY FACES OF REALISM (1987). For discussions in jurisprudence see DENNIS PATTERSON, LAW & TRUTH 3–21 (1996); Leiter, *supra* note 146.

law proscribes certain conduct, or it does not, or the answer is unclear due to conflicting or a paucity of evidence.

Because questions about literary texts also involve drawing inferences from linguistic constructs, legal texts are often analogized to literary texts in this respect.[148] Similar to legal texts such as statutes or judicial opinions, literary texts may not provide readers with enough information to resolve certain issues.[149] For some issues, however, it is possible to make factual statements about the text; one can determine whether certain statements are true or false. Take, for example, the novel *Ulysses*. Not only can one make factual assertions such as that it was written by James Joyce, that it is divided into eighteen episodes, or that the first letter is 'S.' One can also make factual statements about the text such as that, in the novel, Leopold and Molly Bloom live at 7 Eccles Street, and that the action takes place on Thursday June 16, 1904 (and the early morning of June 17).[150] Someone who asserted that the action takes place on a different date would be wrong; their statement would not be factually true.[151] Moreover, even if not explicitly stated in a literary text, a reader may infer answers to certain questions (*e.g.*, time period, location, climate) from the information presented (*e.g.*, technology used, landmarks or streets, clothing worn). For some questions, however, there may be no evidence from which to infer a conclusion, the evidence may be conflicting, or the language may be ambiguous. Therefore, unlike the question of whether dinosaurs once lived in Chicago, which must be true or false (and implies that truth is evidence transcendent and the whole community of speakers can go wrong), the facts about texts (legal or literary) are limited to what has been created, and the answer to a particular question may not exist due to gaps, conflicts, or ambiguities in what does exist.[152]

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[148] *See, e.g.*, POSNER, *supra* note 144, at 202.

[149] Posner gives the example of whether the MacBeths in Shakespeare's play had children as an indeterminate question due to conflicting evidence. *See id.* at 200. Bernard Williams has recently relied on this same example to make the point that even though the question of how many children Lady MacBeth has is indeterminate, "this does not mean . . . that she is represented in the play as a woman with no determinate number of children." BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 53–54 (2002). In other words, there are some true and false statements to be made about even the indeterminate situations.

[150] The distinction between facts about the work and facts in the work is obviously important in the copyright context. Castle Rock Entm't, Inc. v. Carol Publ'n Group, Inc., 150 F.3d 132, 139 (2d Cir. 1998) ("each 'fact' tested by *The* [Seinfeld Aptitude Test] is in reality fictitious expression created by *Seinfeld's* authors. The SAT does not quiz such true facts as the identity of the actors . . . .").

[151] More evidence for the fact that the action takes place on June 16 is the many Joyce fans around the world who celebrate Bloomsday on June 16.

[152] It is this conclusion, and not that law and historical facts are ontologically distinct, that is motivating Posner's discussion as it provides a powerful critique of Ronald Dworkin's one-right-answer thesis. *See* POSNER, *supra* note 144, at 197–203. For more detailed discussions of ontological and other philosophical issues pertaining to literary texts see WILLIAM H. GASS, *The Nature of Narrative and Its Philosophical Implications, in* TESTS OF TIME 3 (2002); WILLIAM H. GASS, *Philosophy and the Form of Fiction, in* FICTION AND THE FIGURES OF LIFE 3 (1971); WILLIAM H. GASS, *Carrots, Noses, Snow, Rose, Roses, in* THE WORLD WITHIN THE WORD 280–307 (1978).

Even though some questions of historical fact must be true or false, the questions of fact that arise in a legal setting plainly do so in a similar true-false-indeterminate position.[153] The factual decisions involving natural kinds are limited to the available evidence and determined based on the prescribed standard of persuasion, with indeterminate situations favoring the defendant.[154] But this point does not really address Posner's argument. What does is the recognition that not all factual questions in the law are questions of historical fact that relate to natural kinds; often the traditional factual questions themselves involve inferring facts from linguistic documents such as contracts, business records, correspondences, or even, in a copyright case, literary texts. We would not say, after decision, that a contract does not "mean" what it has been found to mean (whether involving extrinsic evidence—and thus juries—or not), or that it is not a "fact" that it has that "meaning." Much of the legal universe is composed of facts indistinguishable from standard law interpretation (creation). Given the creative nature of this enterprise, perhaps it would be wrong to say that this "fact finding" involves preexisting "facts," but the critical point is that it would be wrong to say that "fact finding" of this sort is ontologically different from "legal interpretation."

Plainly, therefore, that law determination involves human-made, linguistic creations rather than natural kinds does not provide a useful ontological distinction between questions of law and questions of fact, because much fact finding involves precisely the same thing. This disposes of the final argument that "law" is of a different ontological kind than "fact." That the law may be indeterminate on occasion does not change that the rest of the law exists in the world and that knowledge of it is factual—just as some "facts" may be indeterminate on occasion while the rest of the facts exist in the world and are knowable. Quite the contrary, in every relevant respect "facts" and "law" are ontological equivalents rather than distinct kinds. While it is possible that the law on some legal issues may be uncertain, indeterminate, or ambiguous, this does not mean that all legal issues are uncertain, indeterminate, or ambiguous. It means that, like all factual issues, it is an empirical question that depends on the particulars of the issue and the available evidence or information from which to infer a conclusion. Moreover, if the law is uncertain, indeterminate, or ambiguous, it is just like the damage that has not yet been done to Miami. One would hardly claim that the impending storm is not a matter of fact just because its outcome is not yet clear. Eventually physical processes will take their course and the lay of the

[153] Another difference between how the law treats legal and factual issues is how it resolves indeterminacy. Factual indeterminacy is dealt with by giving one party a burden of persuasion; whereas, legal issues do not have an explicit burden. For a more detailed discussion of this issue see Lawson, *supra* note 135. In criminal law, however, the rule of lenity provides that indeterminacies in the law be resolved in favor of the defendant.

[154] Consider the favorite hypothetical example in civil procedure classes where the evidence is 50-50 for both parties and therefore favors the defendant under a preponderance-of-the-evidence standard.

land will be observable. Same, too, with the law. It may be unclear in some particular manner now, but it will eventually clarify into a state that may be described factually accurately. More importantly, there is no ontological difference between ambiguous law and an ambiguous document from which factual inferences concerning its meaning or import will be inferred.

B. The Epistemology of Legal and Factual Issues

The insight that legal issues are factual and, just like other factual issues, based on evidence and inference means that legal issues are in an inexorable epistemic situation. Legal decisions, in other words, arise in a social practice where not only the outcomes but the reasons for the outcomes (and the reasons for those reasons) matter a great deal. The law's concomitant concerns for accuracy and reasoned argument, then, place legal questions in the larger category of factual decision-making with the intertwined epistemological goals of accurate decision-making, the justification of decisions, and the separation of knowledge from mere belief, caprice, or arbitrariness.

Broadly conceived, epistemology is largely evaluative.[155] It examines how we ought to arrive at beliefs or decisions, and the extent to which agents deviate from ideal epistemic practices. Beliefs and decisions are tied to actions: "[t]ruth-seeking agents ought to comport themselves in a certain manner" and a particular belief is justified to the extent that the agent comports.[156] Epistemic practices involve evidence gathering and reasoning.[157] A primary focus in contemporary epistemology concerns the reliability of certain epistemic practices in producing true beliefs or knowledge.[158] For example, Alvin Goldman distinguishes intellectual virtues (*e.g.*, sense data,

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[155] The exception is the purely descriptive project of "replacement" naturalized epistemology that is sometimes attributed to W.V. Quine. *See* Jaegwon Kim, *What is "Naturalized Epistemology"?*, *in* NATURALIZING EPISTEMOLOGY 33 (Hilary Kornblith ed., 2d ed. 1994); W.V. QUINE, *Epistemology Naturalized*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69 (1969).

[156] Hilary Kornblith, *Justified Belief and Epistemically Responsible Action*, 92 PHIL. REV. 33, 47 (1983) ("Justified belief is belief which is the product of epistemically responsible action; epistemically responsible action is action guided by a desire to have true beliefs.").

[157] Kornblith points out the tendency in epistemology to hold evidence constant and focus on reasoning. *Id.* at 35. Twining discusses these two aspects in the context of evidence law and scholarship. *See* Twining, *supra* note 134.

[158] The concept of knowledge itself is the subject of much debate. The classical tripartite conception of knowledge defined knowledge as justified, true, belief. Edmund Gettier's seminal paper showed that in certain cases even these three conditions are not enough to establish knowledge. *See* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963). Gettier showed that truth and justification are logically independent, that the two can be fulfilled coincidentally. In other words, we can always believe something that happens to be true for the wrong reasons. *See also* Fred I. Dretske, *Précis of Knowledge and the Flow of Information*, *in* NATURALIZING EPISTEMOLOGY, *supra* note 155, at 217, 218 (defining knowledge as "information-produced belief."). Nevertheless, it seems clear that the difference between knowledge and mere true belief depends upon the factors that produced the belief, or how the decision was generated. *See* Philip Kitcher, *A Priori Knowledge*, *in* NATURALIZING EPISTEMOLOGY, *supra* note 155, at 147, 150.

memory, reason) from intellectual vices (*e.g.*, guessing, ignoring evidence, wishful thinking).[159] Yet, while there are ideals for reasoning and evidence gathering, failure to reach these ideals does not constitute epistemic irresponsibility.[160] Each decision must be evaluated in the context in which it arises, taking account of the various constraints on decision-making.

The notion of epistemic responsibility concerns the extent to which an agent considered the evidence available to her and reasoned as best she could from that evidence.[161] Hilary Kornblith explains that the failure to employ the reliable epistemic practices available in the context of a particular decision results in epistemically culpable ignorance.[162] Accordingly, just as "[a]ctions which are the product of malice display a morally bad character; beliefs which are the product of epistemically irresponsible action display an epistemically bad character."[163] Questions of law and fact both require epistemically responsible decision-making.[164]

Even though legal and factual issues are not ontologically distinct and arise in epistemic situations, the epistemic situations themselves may differ in a way that provides a useful method to distinguish legal and factual issues. Geoffrey Hazard has made such an argument in discussing issue preclusion (collateral estoppel).[165] Professor Hazard argues that issue preclusion should apply to legal but not factual issues because "[t]he epistemological grounds for preclusion as to issues of law are stronger than those for preclusion as to issues of fact."[166] In Hazard's view, questions of law are resolved "through direct judicial perception," while questions of fact are resolved "through the medium of informants" where "the court endeavors to portray for itself a historical transaction in the outside world of events . . . from conflicting evidence."[167] Hazard views the difference be-

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[159] Alvin I. Goldman, *Epistemic Folkways and Scientific Epistemology*, *in* NATURALIZING EPISTEMOLOGY, *supra* note 155, at 291, 293.

[160] *See* Kornblith, *supra* note 156, at 48.

[161] *Id.*

[162] *Id.* at 41.

[163] *Id.* at 38.

[164] There are significant normative reasons for thinking of legal issues in epistemic terms. *See* Tillers, *supra* note 134, at 170 ("In matters of law, just as in matters of fact, it is very important to us that we get the *right answer* . . . . [A] commitment to the ideal of the rule of law implies that reliable law-finding is desirable."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 360 (1978) (referring to adjudication's burden of rationality as the "rational core" that provides our legal institutions with constancy and direction); Thayer, *supra* note 79, at 167 ("Reason is not so much a part of the law, as it is the element which it breathes; those who have to administer the law can neither see nor move without it.").

[165] *See* Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 88 (1984). Hazard's article challenged the old rule that issue preclusion applied only to fact issues but not legal issues. Hazard suggests that the rule should be reversed. Instead, it has been extended to cover both types of issues. *See supra* note 128.

[166] Hazard, *supra* note 165, at 88.

[167] *Id.*

tween issues of law and fact in the following way:

> In deciding fact questions the court necessarily works through the medium of extrajudicial resources, for example, evidence from witnesses. That dependency on outside resources entails a possible discrepancy between what the court believes was the fact and what actually was the fact. By contrast, in the resolution of issues of law the court constructs a verbal formulation from materials of which the court has direct knowledge.[168]

Hazard, however, qualifies his claim of "direct judicial perception" with "[o]f course, different judges have different world views, which is why they often disagree on what the law is."[169]

Hazard's argument is interesting but wrong in suggesting that the epistemological status of legal and factual issues is distinct. The above-quoted statement about different judges reaching different results indicates the reason why. If two judges can look at legal documents and reach different conclusions, they obviously do not have "direct access" to anything—rather, they are engaged in inference from the legal evidence. Moreover, any legal issue that has been litigated to the point where a decision is necessary suggests the presence of some conflicting materials or conflicting interpretations of the same materials. Hazard does not explain how this situation differs from a factual question with conflicting evidence or conflicting interpretations of the same evidence. While a judge has direct access to the legal materials, she also has direct access to the physical evidence and testimony. With both legal and factual issues the judge has direct access to the evidence and must construct a verbal formulation from that evidence. Hazard's argument shows only that the kinds of evidence may differ for some legal and factual issues, and that in some cases judges may be better at gathering the relevant evidence for legal issues than parties are with factual issues.[170] But legal and factual issues remain epistemologically equivalent in that both involve inferring conclusions from the relevant evidence.[171]

Once again the distinction between law creation and law identification becomes important. One reason judges may disagree about the relevant law is because it does not preexist decision, and thus the judges are predicting what their judicial superiors will do. We have already stipulated that law creation may not be factual in any interesting sense. Judges disagree for other reasons, however, such as the advocates failing to draw a judge's at-

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[168] *Id.*

[169] *Id.* For these reasons, Hazard suggests that issues of law, not issues of fact, should be given preclusive effect.

[170] But this seems like it would depend on the details of the case.

[171] This is the main point of Tillers, *supra* note 134, who develops it in greater detail. Thayer recognized this epistemological equivalence coming from the other direction. *See* Thayer, *supra* note 79, at 153–54 ("[F]or as regards reasoning the judges have no exclusive office; the jury also must reason at every step.").

tention to relevant cases or statutes. When a judge misconstrues the law because of ignorance of a pertinent precedent or statute, the judge has made a factual error. Missing or relying on pertinent cases and statutes to determine the law of the case plainly involves drawing inferences from evidence to propositions with truth value.

C. An Analytical Distinction?

If legal and factual issues do not form ontologically distinct categories, and arise in similar epistemological situations, then it becomes doubtful whether a coherent, analytic law-fact distinction exists. If legal questions are factual questions, then a method to distinguish a legal from a factual adjudication question cannot, in a non-circular way, turn on whether the question is "legal" or "factual." Both Henry Monaghan and Richard Friedman, however, contend that there is such an analytical distinction between legal and factual issues.[172]

Professor Monaghan argues that conceptual confusion arises with the law-fact distinction because "law" and "fact" do not "imply the existence of static, polar opposites."[173] Instead, Monaghan maintains, they "have a nodal quality; they are points of rest and relative stability on a continuum of experience."[174] In other words, the labels are clear at the edges and blur in the middle, and the middle questions (*i.e.*, the so-called "mixed" issues, or questions of law application, or relating the rule or standard to "the facts") cause the conceptual difficulty.[175] Courts get into trouble, according to Monaghan, when they try to analyze these middle cases of law application by reducing them to issues of "law declaration" or "fact identification" (*i.e.*, the coherent edges of the continuum).[176] In the middle cases, "[t]he real is-

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[172] *See* Monaghan, *supra* note 105, at 232–39; Friedman, *supra* note 135, at 917–19. Although there are considerable complexities here, as we understand the way in which the term is being used, a single counterexample disconfirms an analytical distinction. If the statement "All swans are white" is considered as an "analytic statement," presumably the spotting of a black swan would disconfirm it. Disconfirming a purported analytical distinction says nothing about the usefulness of the distinction for other purposes, such as pragmatic ones. Nor does it say anything about its utility to express conventional views or beliefs. Obviously, we think the law-fact distinction has pragmatic usefulness, and clearly expresses conventional beliefs; it does not, however, capture analytically separate categories. Also, we note that what is *not* meant in this context by an "analytic statement" is one that is true solely in virtue of its meaning (*e.g.*, "All bachelors are unmarried."), a notion attacked in W.V. QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20 (1953).

[173] Monaghan, *supra* note 105, at 233.

[174] *Id.* Monaghan cites an earlier work presenting the notion of a continuum between law and fact. *See id.* at n.24 (quoting J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) ("Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.")).

[175] *See id.* at 233–37.

[176] *Id.* at 234–35 ("The difficulty comes when the judges seek to force such allocation decisions into the conventional categories of law and fact. Distortions in the analytic content of the categories occur.").

sue is not analytic, but allocative: what decisionmaker should decide the issue?"[177]

While Monaghan correctly argues that the distinction may form a continuum, the continuum does not have legal issues at one end and factual issues at the other. The issues of law declaration remain factual issues. These legal facts might form one end of a continuum between legal and non-legal facts. One might even think that there is an analytically distinct subset of "legal facts," or the facts that the legal system, by its own conventions, calls "law" (but, as we discuss shortly, even this is not so). But the law declaration issues are still factual. Monaghan also correctly argues that the real issue is allocative and not analytic; however, this is the case not only for the "mixed" questions that are neither clearly "law" nor "fact," but for all adjudication issues. One end of Monaghan's continuum is "law" because these issues are the ones often labeled "law" by the legal system's own conventions, so the issue usually never arises whether these issues are "legal" or "factual." But the issues are still factual. That is why, as Monaghan notes, courts get into trouble when determining whether the mixed questions, those without a clear label under the law's internal standards, are "law" or "fact"—there is no analytical distinction between the two. Thus, there is no test that works. And it should also not be surprising that issues of law declaration are allocated to judges because they are the ones, after all, with the legal training. But this does not mean that judges are not identifying facts when they are identifying the law. This point becomes clearer when examining Professor Friedman's views on the distinction's putative coherence.

Friedman, similar to Monaghan, cautiously argues that the law-fact distinction is not just conventional because, he asserts, "an analytic difference" exists between legal issues and "ordinary factual" issues.[178] Friedman recognizes that legal issues may at times be factual but contends that if so they are "factual matters of a very particular type and usually can be distinguished from ordinary factual questions."[179] The ordinary factual issues relate to constructing some aspect of reality; whereas, the legal issues relate to prescribing the norms that apply and consequences that attach to that constructed reality.[180] Therefore, Friedman maintains we can distinguish a "fact-finding function" (determining part of reality) from a "law-determining function" (prescribing norms and consequences).[181] This looks similar to the ends of Monaghan's continuum. Unlike Monaghan, however,

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[177] *Id.* at 237 (footnote omitted); *see also* Miller v. Fenton, 474 U.S. 104, 113–14 (1985) (explaining that sometimes law-fact classification turns on whether one decision-making body "is better positioned than another to decide the issue").

[178] Friedman, *supra* note 135, at 917. Friedman's article is a response to Lawson, *supra* note 135.

[179] Friedman, *supra* note 135, at 917.

[180] *See id.* at 917–19.

[181] *Id.* at 918.

who maintains that the distinction becomes blurry in the mixed issues or in cases of law application, for Friedman the mixed issues are all legal because they apply the norms to, or prescribe consequences for, the ordinary facts.[182]

Friedman does notice, however, that such a distinction does not map onto the caselaw. In a negligence case, for example, a jury's determination of "reasonableness" is considered to be a question of fact.[183] Friedman asserts that, even if courts speak that way, "[w]e should not be fooled. The jury in such a case does more than determine an aspect of reality. It also determines the norms that will be applied in that case."[184] Therefore, like Monaghan, Friedman distinguishes an allocation function from a conceptual one. He agrees that the allocation of decision-making authority in the caselaw may be a matter of convention, but argues that there is "a clear analytical distinction between law and fact."[185]

While Friedman correctly argues that there is a difference between what is conventionally called "law" and "fact," the distinction Friedman has in mind is not an analytical one between law and fact; rather, it is between legal facts and non-legal (what he calls "ordinary") facts. In other words, under this view legal facts form a subset of a larger category of factual questions. Friedman, like Monaghan, tries to distinguish "the facts" as describing some aspect of reality and "factual" issues as involving the reconstruction of that reality; however, "the law" also describes some aspect of reality and the law-declaration function also involves the process of reconstructing reality. The law is something in the world, some part of reality—just like the reality being described by traditional factual questions. When Friedman contends that law relates to the norms and consequences applying to the reconstructed reality, it is often the case that *it is a fact* what the norms and consequences are for the constructed reality. Of course, at times there may not be any law on a particular issue, in which case a court (or even a jury in a negligence case) may *create* law, may create a new rule, but this is a different function. Yet once this rule is created, then it is a fact that this new rule is law.[186]

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[182] *See id.* at 917–19.

[183] *See supra* at pp. 1781–83. Moreover, in a contracts case, the court will construe the terms in a contract even though this relates to the "ordinary facts" rather than the norms and consequences. *See supra* at pp. 1781–83.

[184] *See* Friedman, *supra* note 135, at 922. His view on the "reasonableness" issue is similar to that of Justice Holmes. *See supra* note 76.

[185] Friedman, *supra* note 135, at 925. Friedman does not suggest that decision-making authority should be allocated based on this distinction, but that it is "presumptively desirable." *Id.* at 925. The only other argument that Friedman advances for a conceptual difference conflates law identification with law creation. He notes that various legal actors "prescribe norms," and that "[c]reating those norms . . . is clearly a different matter from determining what happened at State and Liberty." *Id.* at 918. True enough, just as a crater about to be created by a volcano is different from the volcano, but that does not tell us anything interesting about the nature of either. Law creation is a distraction that has muddled virtually all scholarship on the law-fact distinction.

[186] For example, following *Cooper* appellate courts must now apply a de novo standard when re-

Professor Friedman may very well agree with this, perhaps indicated by his point that legal matters "may well be deemed to be aspects of reality . . . and so factual. But these are factual matters of a very particular type."[187] Thus, perhaps the reference to an "analytical" distinction should be understood as specifying a defined subset of facts rather than something altogether different. The difference apparently lies in the distance between "the past and prospective conduct of legal officials in determining legal norms that may be applied in this litigation" and determining "[w]hat happened at the intersection of State and Liberty."[188] But this example is inadequate to sustain the point. It implicitly depends upon the general-specific dichotomy,[189] but that dichotomy is insufficient to sustain the weight it is being asked to bear.[190]

We can all agree that precisely what the parties did to each other is specific to the parties (using the terms in reasonable conventional ways), but whether what they did occurred at "State and Liberty" is not specific to them; geography is a quite general fact that is universal across all parties. Still, it is not a norm even if it is general, might be the response, but the response would be in error in a critical way. The place where the action took place typically determines the parties' rights and obligations, and there is thus an unavoidable territorial aspect to the exercise of jurisdiction, venue, and choice of law. The location of the event is truly part of the "norms" that control the outcome of the case. Is, then, it a question of fact whether an altercation took place at State and Liberty, or is it a question of law? Perhaps it is a question of law for purposes of jurisdiction, venue, and choice of law, but a question of fact for purposes of settling the litigated dispute. Such an ability to transmute so efficiently makes our point effectively: whatever kind of decision it is, it is the same decision put to different uses. And if a geographical location does not entail a question of fact, we are at a loss as to what might.[191]

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viewing constitutional challenges to punitive-damage awards. *See supra* at pp. 1771–78.

[187] Friedman, *supra* note 135, at 917.

[188] *Id.* at 917–18.

[189] *See, e.g.*, Whitford, *supra* note 78, at 932 ("The most important standard for distinguishing questions of fact from questions of law is the general/particular distinction.").

[190] *See* Monaghan, *supra* note 105, at 235 ("The important point about law is that it yields a proposition that is *general* in character.").

[191] Sometimes the issue of geography is even more complicated and is treated as a hybrid question for both the judge and jury. *See* United States v. Roberts, 185 F.3d 1125, 1140 (10th Cir. 1999) ("[T]he district court can find, as a matter of law, a geographic area or particular location is Indian Country, and then instruct the jury to determine factually whether the offense occurred there."); United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir. 1995) ("[W]e accordingly rule that the district court was entitled to determine that Raybrook falls within the special maritime and territorial jurisdiction of the United States, and to remove that issue from consideration by the jury."). *But see* United States v. Stands, 105 F.3d 1565, 1574 (8th Cir. 1997) ("[T]he jury thus was entitled to infer that the map accurately represented the state of title at the time of the crime. Accordingly, the jury had a reasonable basis for finding that the crime occurred in Indian country.").

Friedman's argument has difficulties from the other side as well. Much of what passes for factual findings looks like legal conclusions. He recognizes this problem with findings of reasonableness (presumably he has something like negligence in mind), but its extension is considerably wider, including such things as good faith dealing, business conventions, and the like. Friedman's response to findings of reasonableness (that this really is a question of law masquerading as a question of fact) must then apply over a large swath of jury findings, suggesting the "analytical" distinction between the two, if it exists, is not terribly helpful. More troubling, Friedman's argument also gives no good reason to believe that a jury's finding of reasonableness, or any of the related concepts, is a question of law in the sense that it "determines the norms that will be applied in that case."[192] If reasonableness is not what the jury thinks, but rather the jury's conclusion about what the community thinks, then the jury is not "determining" the norm, just as it does not in obscenity cases.[193]

Moreover, findings of "reasonableness" or "good faith" or "conventions of the trade" emanate from a multi-party conversation that includes not only the juror's common sense and experience but also prior authoritative judicial decisions. What a community believes to be reasonable must in part reflect authoritative adjudications of reasonableness, a process that is explicit in unconscionability holdings. Thus, the jury finding may very well reflect the jurors' assessment of community beliefs filtered through the jurors' own experience, and flavored with the consequences of prior litigation. We do not see any useful analytical point that emerges from this complexity, save one: some of what a decision maker does may be determined by actual preexisting states of the world, in which case it is factual, or it is not so determined, in which case it is law creation. The useful analytical distinction is thus not between law and fact (even if law is a peculiar kind of fact); rather, it is between law creation and fact finding.

This point can be pressed even more deeply. Consider the argument that findings of "reasonableness" are not really determinations of "aspects of reality," but also determinations of "the norms that will be applied in that case." The jury, thus, "makes law—but inarticulate law that is good for the one case."[194] This is true of all jury determinations.[195] Virtually

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[192] Friedman, *supra* note 135, at 922.

[193] *See* Ashcroft v. ACLU, 535 U.S. 564 (2002); Miller v. California, 413 U.S. 15 (1973).

[194] Friedman, *supra* note 135, at 922.

[195] For an argument suggesting this conclusion, see Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487 (1986). In a response to that article, Prof. Friedman apparently agreed with the more general proposition that all conclusions of ultimate fact are "legal":

> For virtually every general rule of law, there comes a point when the responsibility for determining what the rule prescribes in a specific case must be taken up by the jury, either because the jury is deemed the most appropriate body for the task, or because the jury is at least deemed adequate and the ordinary lawmakers are unwilling or unable to articulate a more particular rule of decision.

never (probably truly never) does the jury observe firsthand an element of a cause of action. It observes evidence of those causes of actions, and its factual findings are determinations of "the norms that will be applied in that case,"—for example, that the evidence of the element of intent is sufficient to conclude that intent actually existed. Any fact a juror infers from the evidence presented will depend on whatever general or specific norms the juror possesses or creates (tacitly or explicitly) about what is sufficient to trigger the inference.[196] Indeed, many features of the proof process at trial (*e.g.*, judicial comment, presumptions, expert testimony, closing arguments) can be seen as trying to provide the jury with just those norms. Thus, what began as a defense of an "analytical" distinction between law and fact becomes a dissolving of any difference, for all fact finding is implicit norm determination, and thus, in that sense, legal.[197]

We cannot easily prove the negative that there is no analytical distinction between law and fact, but as we have shown, the purported distinction is ephemeral. What Friedman and Monaghan maintain is a coherent distinction is not one between law and fact; it is one between the facts that the law, by its own conventions, calls "law" and the ones it calls "facts."[198] The issues they see to be analytically legal are the factual issues that are usually labeled "legal"—namely, cases of law identification. Moreover, the purported distinction does not explain or prescribe the allocation of decision-making authority—the distinction's primary doctrinal function—or its other doctrinal functions for that matter. Monaghan is correct that the real issue

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Richard D. Friedman, *Generalized Inferences, Individual Merits, and Jury Discretion*, 66 B.U. L. REV. 509, 511 (1986).

[196] Sometimes these implicit norm determinations can be quite general, such as whether DNA, fingerprints, radar, or drug tests are reliable, yet they still relate to the facts. *But see* Michael J. Saks, *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS J. 229, 235 (2000) ("The soundness of scientific theories and general applications are comparable to matters of law; the soundness of specific applications are matters of fact."). Professor Saks relies on the work of Monahan and Walker, who have attempted to distinguish case-specific from more general matters. *See, e.g.*, Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988). Another unfortunate distraction in the law-fact scholarship is the misconception that facts and norms are unconnected phenomena. They are related; norms govern the inferences involved in fact determinations, and facts about those norms, whatever they may be, are facts like any other.

[197] In fact, the implicit norm-determination process applies to firsthand observations as well. A person's conclusions about firsthand observations will depend on that person's beliefs about the observation conditions as well as beliefs about the reliability of her sensory capabilities, although the point is not necessary for our argument. *See* Michael S. Pardo, Comment, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 NW. U. L. REV. 399, 422–37 (2000).

[198] Stephen Weiner's lament from almost 40 years ago is still relevant.

> When faced with a dispute as to whether a specific issue should be resolved by the judge or the jury, the typical appellate opinion today does no more than label the question as one of law or fact, perhaps citing some authorities which are equally devoid of any more detailed consideration of the point.

Weiner, *supra* note 54, at 1868.

is allocative not analytic—but this is the case for all adjudication questions, not just for cases of law application, as he argues.

CONCLUSIONS AND CLARIFICATIONS

Putting aside law creation, there are not two (or three, *viz.*, law application) types or kinds of adjudication questions. There are only facts: some for the judge to decide and some for the jury to decide, some for appellate courts to review de novo and others deferentially. This does not mean that there is not something called the "law." It means the opposite, that the law exists in the world and that one can have knowledge of it. Actual courts resolving actual legal issues do so with reasoned explanations of what the law already is. In doing so, they are engaged in an ineluctable epistemic practice. They are determining what is true, what is the case, what are the legal facts. And most of the "law" has its application outside of courtrooms, where people stop at stop signs, pay their bills, and negotiate with rather than murder their neighbors, all of which is behavior constrained by clear, knowable "facts" known as the law.

This does not mean that the doctrinal distinction between "law" and "fact" is unimportant; it merely means that it must be decided functionally rather than by reference to purported ontological, epistemological, or analytical differences between the concepts. This is precisely why the cases on the distinction are so apparently haphazard rather than orderly: there is no algorithm for generating correct conclusions about which is which, and so the courts muddle along attempting to rationalize a process whose primary purpose is allocative in terms of the nature of the entities. There is thus a mismatch between the task and the tool, leading to the perfectly predictable sense of chaos surrounding the matter.[199]

Collectively, the work product of the commentators makes the same point. Tillers and Lawson argue, but tentatively, that "law" and "fact" are quite similar, maybe identical;[200] Monaghan and Friedman argue, but tentatively, that "law" and "fact" are quite distinct, separate categories[201]—but

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[199] For another example of the chaotic consequences of a mismatch between the tool and the task see Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998). Our argument is in some respects exactly the opposite of Professor Monaghan's and in other respects quite similar. He recognizes that allocation decisions are, and should be, made by reference to other variables than just the meaning of "law" and "fact," as we obviously do as well, but then goes on to argue:

> The difficulty comes when the judges seek to force such allocation decisions into the conventional categories of law and fact. Distortions in the analytic content of the categories occur. These distortions are wholly unnecessary *if we separate the allocative uses from the analytic content of these categories*.

Monaghan, *supra* note 105, at 234–35. For the reasons we have given, we disagree entirely with this. Indeed, we think it is the belief that there are separate categories that has caused a considerable portion of the problem.

[200] Tillers, *supra* note 134; Lawson, *supra* note 135.

[201] Monaghan, *supra* note 105; Friedman, *supra* note 135.

everyone hedges their bets.[202] We suggest that this is because the strong conventions of the law run up against the equally strong sense that something is amiss in the legal system's treatment of the issue. This leads Tillers and Lawson to make arguments that should lead to the conclusion that law is just a species of fact, but at critical moments they withdraw from the enormity of their confrontation with legal conventions. Monaghan and Friedman make arguments defending the conventions as analytically justifiable, but at critical moments withdraw from the enormity of their confrontation with their own observations.

Should the legal system just scrap the pretense that "law" is conceptually distinct from "fact"? That is hard to say. Legal fictions can play important roles,[203] and perhaps the Constitution requires that the fiction be maintained. Moreover, there is surely a set of useful allocative conventions distinguishing the "law" from the "facts." Our point here is not to reform legal practice; it is to contribute to legal analysis.

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[202] Tillers, *supra* note 134; Lawson, *supra* note 135; Monaghan, *supra* note 105; Friedman, *supra* note 135.

[203] *See generally* Lon L. Fuller, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 877 (1930–31). For a recent discussion, see Note, *Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228 (2002).