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Value Judgments in Judicial Reasoning, and the Instability of the Fact-Law Distinction

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I. INTRODUCTION

A characteristic feature of adjudication is the close attention paid to the distinctions between different types of questions. Familiar examples include the distinction between issues of liability and damages in civil disputes, and between the guilt and sentencing phases of criminal prosecutions. Perhaps no distinction is more basic to adjudication than that between issues of fact and issues of law,[1] as it arises in virtually all types of litigation, no matter the doctrinal area or the substantive nature of the dispute. For instance, questions of fact are typically decided by juries and reviewed deferentially by appellate courts, while questions of law are decided by judges and reviewed de novo. Given these practical consequences, questions about how the distinction is to be drawn take on great significance. Thus, it is hardly surprising that the distinction has been a major subject of litigation[2] and scholarly debate.[3]

Yet courts have struggled to apply the distinction in a coherent manner, giving rise to a puzzle. On the one hand, the fact-law distinction is not only familiar, but highly intuitive. It comes naturally to us and presents itself with strong facial plausibility. At least pre-reflectively, we often draw on the distinction without necessarily noticing anything problematic about it. At the same time, the articulation of guidelines for drawing the distinction has proven extraordinarily difficult, and courts have struggled to apply the distinction in a consistent manner. The more intently one reflects on the nature of the distinction, the more that the barriers purporting to separate the two concepts appear permeable. A classification that initially seemed almost too obvious to require an explanation ends up threatening to resist any coherent explanation at all. As a result, common sense conflicts with the counsel of our more considered reflection.

Two approaches to the fact-law distinction have gained prominence. A traditional approach embraces society's pre-reflective assumptions about the distinction's validity, while an opposing view repudiates the

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1. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003).

2. *E.g.*, Pullman-Standard, Inc. v. Swint, 456 U.S. 273, 274, 293 (1982) (addressing the appropriate standard of review on appeal for trial court findings of discriminatory intent); Markman & Positek, Inc. v. Westview Instruments, Inc., 517 U.S. 370 (1996) (addressing whether questions relating to a patent infringement action fell within the scope of the Seventh Amendment's guarantee that in civil cases). The Seventh Amendment states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. XVII.

3. *E.g.*, G. Alexander Nunn, *Law, Fact, and Procedural Justice*, 70 EMORY L.J. 1273, 1279 (2021); Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of Ring*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 47 (2018).

distinction, instead viewing legal questions as a subset within the larger class of factual questions.[4] Both responses are inadequate. The traditional distinction is undermined by the pervasiveness of normative judgments in judicial reasoning.[5] On the other hand, simply treating legal questions as a species of factual ones fails to capture the essential reasons why the distinction does not hold up to scrutiny.[6]

This Article proposes an alternative approach, rooted in recognition of the pervasive role that normative judgments play in judicial reasoning. Attention to the value-laden character of decision-making enables us to understand why the traditional distinction fails despite its intuitive appeal. This alternative approach also suggests that courts could bring greater cogency to the distribution of decision-making authority in adjudication by resting determinations directly on the underlying values that purport to justify the fact-law distinction in the first place. Section II of the Article discusses the significant impact that the fact-law distinction exerts on adjudication. Section III examines the two approaches to the fact-law distinction that dominate contemporary legal thought. Section IV critiques both of these approaches and proposes an alternative that stresses the pervasively value-laden character of judicial reasoning. Section V considers potential implications of a value-laden approach for judicial treatment of the fact-law distinction.

II. THE FACT-LAW DISTINCTION IN ADJUDICATION

The distinction between questions of fact and questions of law figures significantly in American law, from the text of the U.S. Constitution to various doctrines that shape the contours of everyday litigation. The Constitution references this distinction in Article III, which provides that "the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[7] The distinction is critical not only in establishing judicial power, but also in defining the scope of individual rights in adjudication. The Seventh Amendment guarantees: "In 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."[8] Since the jury's decision-making

4. *See infra* Section III.
5. *See infra* Section IV.
6. *See infra* Section IV.
7. U.S. CONST. art. III, § 2.
8. U.S. CONST. amend. VII.

authority is delineated by understandings of what count as factual issues, the fact-law distinction is also implicated by the Sixth Amendment's guarantee of "the right to a speedy and public trial, by an impartial jury."[9] Beyond matters explicitly referenced in the Constitution, the fact-law distinction shapes the conduct of litigation in any number of other ways, ranging from evidentiary rules to burdens of proof.[10] In analyzing its practical import, we will focus on three particular roles of the fact-law distinction in adjudication.

First, as noted, the Seventh Amendment's protections are built around the distinction between factual and legal questions. Consistent with the Amendment's roots in concern about the prospect of federal court interference with state court verdicts favoring debtors,[11] courts have interpreted it as applying only to state court actions (not lower federal court or administrative proceedings).[12] Since the Amendment governs the jury's role at both the trial and appellate stages, its scope of application takes on great significance. In discerning which issues fall within the Seventh Amendment's protection, the Justices have consulted a variety of factors.[13] Given that the text of the Amendment begins and ends with references to the common law,[14] it is not surprising that the Court's analysis has relied heavily on history. In their analyses, the Justices have considered both the general cause of action involved in the case and the specific nature of any individual question in the dispute to determine if traditional common law understandings would have required decision making by a jury.[15] Due to dramatic changes in the law since the Founding era—including considerable expansion of the recognized causes of action—many questions about the scope of the Amendment's application cannot be answered by reference to early common law cases alone. In cases where research into the early common law yields no "exact antecedent,"[16] the Court has found that the "best hope lies in comparing

9. U.S. CONST. amend. VI.

10. Allen & Pardo, *supra* note 1, at 1769.

11. Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1132 (2003).

12. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 n.26 (1964).

13. Even with respect to issues held subject to the Amendment's requirements, appellate courts retain authority to find as a matter of law that a trial court's findings fell outside the range of issues on "which reasonable men may differ." Gasperini v. Ctr. for Humans., 518 U.S. 415, 435 (1996).

14. The Amendment begins by stating that it applies to "Suits at common law," and ends by stating that federal courts may not reexamine facts tried to a jury "[other] than according to the rules of the common law." U.S. CONST. amend. VII.

15. Markman & Positek, Inc. v. Westview Instruments, Inc., 517 U.S. 370, 377-79 (1996). In identifying the content of the common law, this historical analysis has placed the greatest relevance on English cases prior to the American Founding, and to American judicial practices around the time of the Founding. *Id.*

16. *Id.* at 378.

the modern practice to earlier ones whose allocation to court or jury we do know, seeking the best analogy we can draw between an old and the new."[17] If even this kind of reasoning by analogy proves unavailing, the Justices look to more recent precedents.[18]

In cases where precedents of any era fail to provide guidance, the Justices have employed a frankly functionalist methodology focusing on the relative competencies of juries and judges, paying special attention to the purposes of the relevant statutory provisions.[19] For instance, due to the confidence that the American legal system places in ordinary citizens to evaluate witness credibility, the more a question turns on such assessments, the more it favors jury determination.[20] On the other hand, the more a judge's training, expertise, and experience enhance judicial reasoning, the more it favors determination by the court.[21] It also counts in favor of determination by judges if there is a need for the kind of uniformity that is promoted by the elaboration of principles in published opinions.[22] For example, relying on functionalist considerations of this kind, the Court has found that it did not violate the Seventh Amendment for a judge to decide issues of patent construction,[23] or for an appellate court to exercise de novo review over a jury's award of punitive damages.[24]

Beyond the Seventh Amendment, the fact-law distinction also directs the assignment of decision making at the trial level. This role traces to sixteenth-century England,[25] where, in general, the presiding judge decided issues of law, and the jury made factual determinations.[26] Although doctrines on the subject have evolved,[27] it remains the case that deciding issues of law is a crucial responsibility of the court, while juries are assigned fact-finding duties.[28] A number of rationales purport to justify the division of decision-making tasks between judges and juries.[29]

17. *Id.* (citations omitted).

18. *Id.*

19. *Id.* at 384.

20. *Id.* at 389.

21. *Id.* at 388-89.

22. *Id.* at 390.

23. *Id.* at 391.

24. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

25. Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1867 (1966).

26. George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 15 (1992).

27. Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 378-79.

28. Kirgis, *supra* note 11, at 1131; Weiner, *supra* note 25, at 1868.

29. These rationales are widely accepted within the American legal system. However, outside the U.S., many legal systems historically have not relied on juries as decision makers at all. Elisabetta Grande,

Ordinary citizens are thought to be particularly adept at assessing the credibility of witness testimony.[30] Furthermore, it may contribute to the reliability of a determination when people from diverse backgrounds reason toward a common conclusion.[31] In addition, the American system of justice cherishes the right to be judged by one's peers.[32] Based on considerations of this kind, a wide range of questions have been assigned to juries, including whether civil defendants acted negligently,[33] and whether criminal defendants committed acts that would "increase[] the penalty for a crime beyond the prescribed statutory maximum."[34]

Courts have recognized other factors as militating in favor of decision making by judges, including whether determinations require the application of precedent or the elaboration of new legal standards,[35] and whether there is a need for uniformity and predictability with respect to the issue at hand.[36] Questions assigned to judges range from the interpretation of statutes[37] to the voluntariness of a confession,[38] and whether law enforcement had probable cause to conduct a search in criminal cases.[39]

The fact-law distinction also governs the appropriate standard of appellate review. Generally, appellate courts afford a great deal of deference to a lower court's findings of fact.[40] By contrast, appellate courts exercise de novo review with respect to legal questions, showing no deference.[41] Since both contexts implicate the relative advantages of judges and juries, the rationales for the assignment of review standards overlap with those for the division of labor at the trial level. For instance, the dependence of a determination on witnesses' credibility favors a standard of review that defers to the jurors' impressions at the trial.[42] On

Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe, 64 AM. J. COMP. L. 583, 587 (2016).

30. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 104 (2005).

31. Sioux City & P. R. Co. v. Stout, 84 U.S. 657, 663-64 (1873).

32. Hana Financial, Inc. v. Hana Bank, 574 U.S. 418, 422-24 (2015); *Sioux City & P. R. Co*., 84 U.S. at 663-64. *See also* Warner, *supra* note 30, at 104.

33. *Sioux City & P. R. Co*., 84 U.S. at 665.

34. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

35. *Hana Financial, Inc.*, 574 U.S. at 424-25.

36. Allen & Pardo, *supra* note 1, at 1782-83.

37. King v. Burwell, 576 U.S. 473, 484-85 (2015).

38. Miller v. Fenton, 474 U.S. 104, 115-16 (1985).

39. Nunn, *supra* note 3, at 1283-84. It has also been deemed appropriate for courts to render decisions where the evidence, and necessary inferences from it, leave no doubt as to a proper answer. *Sioux City & P. .R.*, 84 U.S. at 663. *See also* Richmond & D.R. Co. v. Powers, 149 U.S. 43, 45 (1893).

40. *See, e.g.*, R.R. Co. v. Fralof, 100 U.S. 24, 31 (1879). Even under a deferential standard, the appellate court may intervene if it determines that egregious mistakes of fact were made at the trial. *Id.*

41. Warner, *supra* note 30, at 105.

42. Patton v. Yount, 467 U.S. 1025, 1038 (1984).

the other hand, de novo review provides a more appropriate standard if the judges' special training and experience are especially salient.[43] Moreover, a larger role for appellate courts is favored when there is a need for uniformity and predictability in the applicable standards, which can provide more concrete guidance to judges, litigants, and law enforcement officers.[44] Relatedly, de novo review is warranted if the standards governing the assessment of a question can only receive meaningful content through their application in particular cases.[45] In this vein, the Court has observed that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[46] Thus, the constitutionality of searches has faced independent review, since the Fourth Amendment's "probable cause" requirement[47] is a commonsense concept concerning practical realities that could not be set forth in advance as precise, formalistic rules.[48] The appropriate standard of review may also depend on pragmatic considerations, such as conserving the time and resources of appellate judges.[49] Based on factors like those noted, appellate courts have shown deference to trial courts regarding a wide range of subjects, including whether civil defendants acted with discriminatory intent[50] and whether a juror was able to render impartial judgments.[51] At the same time, appellate courts have applied de novo review in cases reviewing the award of punitive damages in civil cases,[52] and the effectiveness of counsel in a criminal trial.[53]

The far-reaching impact of the fact-law distinction on litigation places great importance on the classification . However, courts have struggled to provide consistent standards for drawing the distinction. Judicial decisions at all levels have evinced substantial disagreement.[54] The

43. Warner, *supra* note 30, at 105.

44. Miller v. Fenton, 474 U.S. 104, 114 (1985).

45. Ornelas v. United States, 517 U.S. 690, 697 (1996).

46. *Id.*

47. U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

48. *Ornelas*, 517 U.S. at 695-96.

49. Warner, *supra* note 30, at 104.

50. Pullman-Standard, Inc. v. Swint, 456 U.S. 273, 287-88 (1982); Anderson v. Besemer City, 470 U.S. 564, 574 (1985); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979).

51. Patton v. Yount, 467 U.S. 1025, 1036 (1984); Wainwright v. Witt, 469 U.S. 412, 429 (1985). *See also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (showing deference in reviewing the imposition of sanctions for baseless filings under Rule 11 of the Federal Rules of Civil Procedure).

52. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001).

53. Strickland v. Washington, 466 U.S. 668, 698-99 (1984). *See also Ornelas*, 517 U.S. at 699-700 (independently reviewing whether police had probable cause to conduct a search); Miller v. Fenton, 474 U.S. 104, 115-17 (1985) (independently reviewing the voluntariness of a confession).

54. Christie, *supra* note 26, at 14; Stephen. A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1022-23 (1967).

Supreme Court, too, has acknowledged the difficulty of the task, characterizing it as "vexing"[55] and "elusive,"[56] and noting that it has "generated some not insubstantial differences of opinion . . ."[57]

The judiciary's struggle with the fact-law distinction has not gone unnoticed by commentators. Addressing the subject generally, one commentator observed that the "appellate decisions present . . . a remarkable crazy quilt of contradiction."[58] With respect to the Supreme Court, in particular, he continued, "[w]hat is law to one Justice is fact to another, and perhaps vice versa when the next case comes along."[59] Another commentator complained that "[w]hat emerges" from the "jurisprudential turbulence" is "doctrinal limbo, contradictory and inconsistent opinions fueled by fundamentally irreconcilable conceptions of the law-fact distinction."[60]

Scholars have also leveled more pointed attacks at specific inconsistencies in the existing case law. On the one hand, courts assign negligence determinations to juries on the grounds that they involve assessments of whether individuals acted reasonably according to community standards.[61] However, judges often make determinations involving similar assessments, as when they interpret contracts, or decide whether police officers used excessive force in § 1983 civil claims.[62]

Cases establishing standards of appellate review have similar inconsistencies. Given the commonalities in the sorts of reasoning required, it is not clear why appellate courts have drawn the distinctions that they have. For instance, appellate courts deferentially review whether civil defendants acted with discriminatory intent, yet apply de novo review to the unconscionability of contracts.[63] Worse, some observers charge that the Justices have failed to even meaningfully analyze or explain the manner in which they have divided decision-making responsibilities.[64] Others allege that even when the Justices have

55. Pullman-Standard, Inc. v. Swint, 456 U.S. at 288.

56. Miller v. Fenton, 474 U.S. at 113.

57. Williams v. Taylor, 529 U.S. 362, 385 (2000). *See also* Nunn, *supra* note 3, at 1293 (noting that the "law-fact distinction has floundered in a state of uncertainty for most of its existence").

58. Randolph E. Paul, Dobson v. Commissioner*: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 810 (1944).

59. *Id.* at 812.

60. Nunn, *supra* note 3, at 1280-81.

61. Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 663-64 (1873).

62. *Id.* at 1284-86; Allen & Pardo, *supra* note 1, at 1782-83.

63. Nunn, *supra* note 3, at 1277-78. Particularly curious is the treatment of voluntariness as a factual question with respect to whether an individual granted consent to a search, but as a legal question with respect to whether a confession was coerced. *Id.* at 1283-86.

64. *E.g.*, *id.* at 1277-78; J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. Rev. 483, 486 (1985).

suggested rationales for their judgments on the fact-law distinction, these have, in fact, served as mere pretense for outcome-driven conclusions.[65]

III. PROMINENT APPROACHES TO THE FACT-LAW DISTINCTION

Recognizing that existing case law appears to lack adequate justification, some scholars have developed models that aim to rationalize the Court's classifications.[66] In this vein, Emad H. Atiq proposes a model centered on the "distinction between two kinds of normative questions: essentially convention-dependent and convention-*independent* normative questions."[67] In Atiq's model, factual questions are convention-independent in that they turn on matters of fundamental morality, while legal questions are convention-dependent because they turn on local customs or the behavior of specific actors.[68] Atiq maintains that this classification provides a rationale for juries to make negligence determinations because they turn on fundamental moral judgments about the proper balance between individual freedom and the threats posed to other people's vital interests.[69] Meanwhile, judges make determinations about the meaning of contracts because they rest on local practices, such as those concerning market transactions and expectations regarding the prices of particular goods.[70]

Another scholar, G. Alexander Nunn, offers a "procedural justice model" that views fact-law classifications as rooted in "a desire to see questions delegated to the most legitimate decision maker."[71] In contrast with Atiq, Nunn denies that the fact-law distinction stems from "any particular quality" inherent to factual or legal questions. Instead, he contends that the Court's classifications are driven by concerns with the allocation of decision-making responsibilities that best serves the ends of

65. Nunn, *supra* note 3, at 1280-81; Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001); Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 724-25 (1996); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1002-03 (1986); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234-35 (1985); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 55 (1927).

66. *See, e.g.*, Atiq, *supra* note 3; Nunn, *supra* note 3.

67. Atiq, *supra* note 3, at 51-52.

68. *Id.*

69. *Id.* at 88.

70. *Id.* at 90-96.

71. Nunn, *supra* note 3, at 1280.

"legitimacy and fairness . . . by delegating issues to the appropriate institutional adjudicator."[72]

Scholars interested in identifying some kind of internal logic in the case law surrounding the fact-law distinction have not generally suggested that any particular model closely fits the Supreme Court's jurisprudence as a whole.[73] Rather, models of this kind are aspirational in seeking to recover appealing principles that could plausibly explain substantial portions of the case law. As Atiq clarifies, his methodology articulates a "rational reconstruction or charitable interpretation."[74] The approach aims "to interpret judicial behavior in a way that casts judges and their decision-making in the best possible light."[75] Thus, while proposing a model that hopes to "unify[] under relatively simple general principles a disparate body of case law," he acknowledges that these principles are "not entirely faithful to the actual intentions of all parties involved."[76]

Having seen that the existing precedents fail to provide clear or consistent guidance on the fact-law distinction,[77] we shift our focus from the treatment of fact and law in judicial opinions to a question about the nature of the distinction itself: namely, whether the idea that there is a fundamental distinction between fact and law has a basis in reality. The remainder of this Section discusses two prominent responses to that question, and the next Section proposes an alternative approach to the problem.

This Section begins with an approach that embraces commonly accepted views associated with society's pre-reflective assumptions about the validity of a fundamental distinction between factual and legal questions (referred to for convenience as the "traditional approach").[78] On this traditional model, questions about facts—sometimes characterized as "historical" or "basic" facts—are understood as questions about events, acts, and circumstances.[79] Answers to factual questions "respond to

72. *Id.*

73. *Id.* at 1280-81; Atiq, *supra* note 3, at 84.

74. Atiq, *supra* note 3, at 51 n.24.

75. *Id.*

76. *Id.*

77. There is not necessarily anything unusual or surprising about this. For one thing, judicial power in the American system is fragmented. Even with respect to issues where the Supreme Court has the final word, it only hears a tiny percentage of litigated disputes. Moreover, when the Court speaks it does not do so in the voice of singular mind. As a multi-member body with changing composition, the Court over time often generates inconsistent and shifting rulings. Thus, the observation that the jurisprudence on the fact-law distinction is far from pellucid hardly establishes anything definitive about the true nature of the underlying distinction itself.

78. *See* Nunn, *supra* note 3, at 1288 (characterizing acceptance of the distinction as "traditional," though not endorsing that view).

79. Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 11 (2009); Weiner, *supra*

inquiries about who, when, what, and where,"[80] and may be thought of collectively as amounting to the "description of a phenomenon."[81] Questions of this kind are specific in that they concern individual affairs. Events occur at particular times in particular locations. Thus, descriptions of factual matters are written in the language of particulars, not abstracta or universals. They provide a case-specific account of what happened here.[82]

In this view, questions about an individual's state of mind (such as the intent to commit a crime, or the good faith to comply with a contract) count as factual. Mental phenomena fall within the factual realm since they concern happenings—including the formation of an intention or the rendering of a decision—and they are effected by individuals at particular times.[83] Although one cannot directly observe the contents of a person's mind, the treatment of mental state as a matter of fact does not pose a problem for the conduct of litigation, because parties can present evidence bearing on mental states, as when witnesses testify about an individual's speech or behavior.[84]

The traditional view expands the factual realm beyond matters that can be directly observed in another significant way: by including questions involving probabilities,[85] predictions, counterfactuals, and hypotheticals.[86] Examples include questions about future harms a person is likely to suffer as the result of past events, and conjectures about what would likely have occurred if some past event had been prevented. While questions of this kind encompass matters beyond events that have actually taken place, they nevertheless concern specific happenings (albeit from the perspective of the likelihood that particular occurrences might transpire under particular circumstances).[87]

It is an important element of the traditional view that the analysis of factual questions can be isolated from that of legal ones. As one scholar expressed the point: "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect."[88] It follows that there is no impediment to

note 25, at 1870; Francis, H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 113 (1924).

80. Monaghan, *supra* note 65, at 235; *see also* Warner, *supra* note 30, at 115-16.

81. Louis L. Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 242 (1955).

82. *Id.*

83. Warner, *supra* note 30, at 117; Paul, *supra* note 58, at 819-21; Bohlen, *supra* note 79, at 112.

84. Adamson, *supra* note 79, at 11; Weiner, *supra* note 25, at 1870.

85. Kirgis, *supra* note 11, at 1157.

86. Warner, *supra* note 30, at 117-18; Jaffe, *supra* note 81, at 241.

87. Warner, *supra* note 30, at 117; Jaffe, *supra* note 81, at 242.

88. Jaffe, *supra* note 81, at 241.

a factual finding being "made by a person who is ignorant of the applicable law."[89]

What, then, are questions of law? According to the traditional view, their subject matter differs fundamentally from that of factual questions. Law is not composed of events, but, rather, of standards or rules.[90] In contrast with facts, laws are general in nature. A single standard can encompass many different kinds of situations within its scope of application.[91] Thus, the answer to a legal question may take the form of a "general statement . . . [that] applies to all particular instances."[92]

Despite its recognition of a fundamental distinction between fact and law, the traditional view holds that courts must make certain determinations that depend on questions of both fact and law. From this perspective, litigation can be seen as comprising different phases. One phase answers questions about the case facts, another identifies the governing law, and a third applies the law to the facts. This last phase, often referred to as addressing mixed questions of fact and law[93]—"involves relating the legal standard of conduct to the facts established by the evidence."[94] In applying the law to facts, courts pronounce "what ought to be done under the circumstances of that particular case."[95] The application of law to facts represents the conclusory phase of adjudication.

While the Court's treatment of the fact-law distinction has, for the most part, been relatively superficial, its statements on the subject have been concordant with the traditional view.[96] Thus, in describing the purview of factual questions, the Justices have used phrases like "what actually happened,"[97] "the events which occurred,"[98] and "the crude historical

89. *Id.*

90. Monaghan, *supra* note 65, at 235; Paul, *supra* note 58, at 819-21; Bohlen, *supra* note 79, at 112.

91. Warner, *supra* note 30, at 117; William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Contracts*, 2001 WIS. L. REV. 931, 932; Louis, *supra* note 60, at 1017; Monaghan, *supra* note 65, at 235; Robert L. Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 94 (1944).

92. Jerome Michael & Mortimer J. Adler, *The Trial of an Issue of Fact: I*, 34 COLUM. L. REV. 1224, 1241-43 (1934).

93. Louis, *supra* note 94, at 1002. Other terms have also been used to refer to this category of questions, such as "intermediate questions," or questions of "ultimate fact." *Id.*

94. Monaghan, *supra* note 65, at 236.

95. Bohlen, *supra* note 79, at 114. *See also* Warner, *supra* note 30, at 121-22; Weiner, *supra* note 54, at 1020.

96. *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 112 (1995); Miller v. Fenton, 474 U.S. 104, 114 (1985). Patton v. Yount, 467 U.S. 1025, 1036 (1984); Marshall v. Lonberger, 459 U.S. 422, 431-32 (1983).

97. Gallegos v. Nebraska, 342 U.S. 55, 61 (1951).

98. Ornelas v. United States, 517 U.S. 690, 695-96 (1996).

facts, the external, 'phenomenological' occurrences and events."[99] Once determinations on factual questions have been reached, "the scene is set and the players' lines and actions are reconstructed."[100] By contrast, questions of law concern the standards and rules governing cases.[101]

The Court has also recognized the application of law to the facts as a distinct stage of adjudication,[102] involving "mixed questions" whose resolution typically concludes the case.[103] Since law application involves measuring the circumstances and events of a particular dispute against the relevant general principles, it requires simultaneous consideration of both legal and factual issues. With respect to these mixed questions of fact and law, "the issue is whether the facts satisfy the [legal] . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[104] Such inquiries are ultimate in the sense that they answer the case's foundational questions. They resolve whether the parties shall receive the judgments and remedies sought.[105]

99. Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

100. Thompson v. Keohane, 516 U.S. at 111-12. Also in alignment with the traditional view, the Justices have made clear that questions about mental states fall within the realm of the factual. Miller v. Fenton, 474 U.S. at 113 ("[T]hat an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact.").

101. *See* Patton v. Yount, 467 U.S. at 1038; Marshall v. Lonberger, 459 U.S. at 431.

102. *E.g.*, Baumgartner v. United States, 322 U.S. 665, 670-71 (1944).

103. Pullman-Standard, Inc. v. Swint, 456 U.S. 273, 290 n.19 (1982); Townsend v. Sain, 372 U.S. 293, 310 n.6 (1963); Watts v. Indiana, 338 U.S. 49, 51 (1949).

104. Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (quoting Pullman-Standard, Inc. v. Swint, 456 U.S. at 289 n.19).

105. Pullman-Standard, Inc. v. Swint, 456 U.S. at 289 n.19; Townsend v. Sain, 372 U.S. at 310 n.6; *Watts*, 338 U.S. at 51. Since mixed questions of fact and law are, by definition, neither purely factual nor purely legal, courts need doctrines for determining whether such questions should be decided by juries or judges. While the Court's treatment of this issue, like its jurisprudence on the fact-law distinction generally, has been far from pellucid or consistent, we can nevertheless make some general points about its approach. If applicable statutes or precedents fail to provide sufficient guidance, *see, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 560 (1988), the Court has relied on factors identified as favoring treating mixed questions as factual (and, thus, to be decided by the jury and reviewed deferentially on appeal) or legal (and, thus, to be decided by judges and reviewed de novo on appeal). For instance, it counts in favor of treating a mixed question as factual if its resolution hinges on assessments of witnesses' credibility, *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 962 (2018), or if deeming the question legal would unduly tax judicial resources, *Pierce*, 487 U.S. at 560. On the other hand, it counts in favor of treating a question as legal if it involves "multifarious, fleeting, special, narrow facts that utterly resist generalization," and, accordingly, requires the court to elaborate additional legal principles in the course of reaching a disposition of the case. *Id.* at 561-62. Employing factors of this kind, for instance, the Court has classified as factual the question of whether to treat a creditor in a bankruptcy case as a non-statutory insider, stressing that it turned on "a raft of case-specific historical facts," involving assessments of witness credibility, rather than the further elaboration of legal principles. *U.S. Bank National Ass'n*, 138 S. Ct. at 968. The Court also classed as factual a determination of a child's "habitual residence" under the Hague Convention on Civil Aspects of International Child Abduction, since it concerned whether the child was "at home in the particular country at issue," and a deferential standard would "speed[] up appeals and thus serves the Convention's premium on expedition." Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020).

Opposing the traditional view, another prominent approach denies that there really is any underlying basis for drawing a fundamental distinction between factual and legal questions. While one might reject the fact-law distinction for a variety of reasons, this Section focuses on an influential version of the position: namely, one that subsumes legal questions within the larger classification of factual questions.[106] According to this view (referred to for convenience as "only-facts rejectionism"), what are commonly called legal questions really constitute a subset of the overarching category of factual questions. There is not a fundamental distinction between factual and legal questions. From this vantage point, one might say, it is facts all the way down.

Advocates of this approach have claimed that there is no "ontological or epistemological distinction . . . between what is 'law' and what is 'fact.'"[107] Thus, they deny that a basis for the distinction lies in either the existential character of facts and law, or in the ways that we know when we have identified truths about them. Since ontology and epistemology are the most elemental types of philosophical inquiry, if neither can distinguish fact from law, there is no reason to recognize any "qualitative" or "essential" contrasts,[108] and "it becomes doubtful whether a coherent, analytic law-fact distinction exists."[109] Scholars denying the distinction's basis in an underlying reality have tended to view it as "purely a creature of convention."[110]

Scholars in this camp have sometimes explicitly aligned themselves with legal positivism.[111] They endorse a larger jurisprudential theory which views claims about law as ultimately reducible to social facts, or to claims about the acts, attitudes, and intentions of particular individuals and communities.[112] In connecting their views on the fact-law distinction with legal positivist assumptions, for instance, John O. McGinnis and Charles W. Mulaney stated that "it is ultimately difficult to understand

106. *See, e.g.*, Nunn, *supra* note 3, at 1291; John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 93-94 (2008); Ronald J. Allen & Michael S. Pardo, *Facts in Law and Facts of Law*, 7 INT'L J. EVIDENCE & PROOF 153, 171 (2003); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 868 (1992); Weiner, *supra* note 25, at 1873.

107. McGinnis & Mulaney, *supra* note 106, at 93.

108. Allen & Pardo, *supra* note 1, at 1770.

109. *Id.* at 1800.

110. Lawson, *supra* note 105, at 863. *See also* Nunn, *supra* note 3, at 1279.

111. In his seminal work in legal theory, *The Concept of Law* (initially published in 1961), the influential legal positivist HLA Hart famously characterized his account as one of "descriptive sociology." H.L.A. HART, THE CONCEPT OF LAW vi (3d ed. 2012). Debate over the extent to which law reduces to social facts remains central within jurisprudential discourse today. *See, e.g.*, Dan Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 987, 989 (2015) (noting that a mark of the "extraordinary influence" of Hart's *The Concept of Law* "is that most defenses of legal positivism in the last fifty years have adopted []his conceptualist approach," while advancing a critique of Hart's views).

112. *E.g.*, McGinnis & Mulaney, *supra* note 106.

what it would mean to adhere to a metaphysical or epistemological distinction between legal interpretations and social facts since law itself is a social fact."[113] Elaborating on the point, the authors contended that litigants who were engaged in debates over the meaning of legal terms inevitably relied on matters of social fact in supporting their positions.[114] This would be the case regardless of their favored interpretive methodologies. For example, an originalist "would be investigating social facts about the world," such as "various bits of evidence from the time of the Framing," or "an eighteenth-century dictionary,"[115] while a consequentialist "might focus on how . . . various [legal and political actors] would interact" as the result of a ruling. [116]

At the same time, other scholars have stressed that only-facts rejectionism does not depend on particular positions regarding the fundamental nature of law because the position follows straightforwardly from the character of factual claims in general.[117] In particular, they have emphasized that questions about facts concern propositions that may be true or false, and whose truth may be tested against the consideration of evidence.[118] With that understanding of facts in hand, one may readily recognize claims about law as a type of factual proposition. After all, claims about the content of the law, too, are advanced as true or false, and can be supported by the presentation of evidence. In this vein, Gary Lawson maintained that "[p]ositive propositions about the law" may be understood as "a species of factual claims,"[119] and, moreover, that this claim itself represented merely "a statement about propositions, not a statement about law."[120] As a result, Lawson insisted, one "does not commit to any particular theory of law by acknowledging the epistemological equivalence of factual and legal propositions—apart from the theory that statements about law can indeed be propositions."[121]

Another pair of only-facts rejectionists—Ronald J. Allen and Michael S. Pardo—have likewise emphasized the linguistic character of facts and law.[122] For Allen and Pardo, factual claims attempt to characterize reality in a way that could be supported by substantiating evidence or arguments. Given this understanding, legal claims do not differ fundamentally from factual claims. Rather, they simply represent one region within the

113. *Id.* at 93-94.
114. *Id.* at 93.
115. *Id.*
116. *Id.*
117. *See, e.g.*, Lawson, *supra* note 105, at 863.
118. *See, e.g.*, Allen & Pardo, *supra* note 1.
119. Lawson, *supra* note 105, at 867.
120. *Id.* at 863.
121. *Id.*
122. *See* Allen & Pardo, *supra* note 1.

sprawling landscape of factual matters.[123] In Allen and Pardo's words, "our linguistic practices indicate a strong belief in the factual nature of the law."[124] When "faced with legal questions," they noted, "the practice is commonplace . . . to make statements like 'it is a fact that Y is law.'"[125] Deeply embedded social practices—including the assertion of legal propositions by counsel in advising clients, and the ordinary citizen's compliance with everyday legal requirements, like traffic regulations—are premised on the simple belief that laws exist.[126] Together, the assumptions that laws exist and that our claims about them purport to accurately describe an aspect of reality, refute assertions of a fundamental distinction between factual and legal questions. In their telling, to "say that legal issues are factual issues . . . is merely to say that there is such a thing in the world referred to as 'the law' . . . or that a given answer to a legal question 'is true.'"[127] No less than other things in the world, laws exist, and as with respect to propositions about other things in the world that we call "factual," we assert propositions about the law, present evidence bearing on their correctness, and can know that some of them are true.[128] From this perspective, the position that there is a fundamental distinction between fact and law collapses upon the realization that, like other factual questions, legal questions are propositional statements with truth value.[129]

Only-facts rejectionists do not deny the existence of certain differences between what the traditional view refers to as factual and legal questions. However, their crucial claim is that these differences are not a reflection of any fundamental distinction between the categories of fact and law. For example, Allen and Pardo have noted one such difference concerning whether particular claims are "bivalent."[130] A bivalent claim is one that could only either be true or false, with no third possibility.[131] In their view, claims regarding particular events and natural kinds "such as volcanoes, lions, zebras, and so on," are bivalent.[132] After all, "[e]ither the defendant killed the victim or he did not; either there once were dinosaurs in Chicago or there were not."[133] By contrast, since claims about law involve "human

123. *Id.* at 1791-92.
124. *Id.* at 1792.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1791.
129. *Id.*
130. *Id.* at 1794.
131. *Id.*
132. *Id.*
133. *Id.* at 1794-95.

constructs,"[134] some questions about them—like questions about literature, another form of human construct—might not have determinate answers. Bivalence does not necessarily characterize legal questions, because "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."[135]

Another potential difference that Allen and Pardo recognized between what have traditionally been called factual and legal claims concern the kinds of evidence that could be brought to bear on their truth value.[136] The evidence supporting a claim about whether an individual had been present at a particular location might include things like fingerprints or DNA analysis, while "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."[137] Only-facts rejectionists see no problem in acknowledging differences between legal claims and certain other kinds of factual claims, because their position is simply that legal claims are a species of factual claim. Their central assertion is that there is no basis in reality for drawing a fundamental distinction between legal claims, on the one hand, and factual claims, on the other.

The key to only-facts rejectionism of this kind is an expansive understanding of what makes a claim factual in character. What unites factual claims—what makes them all part of the same overarching category—is that they characterize a certain aspect of reality and that we may know something about them through the consideration of evidence. Since this is also the case for claims about law, there can be no fundamental distinction between factual and legal claims. Consequently, to the extent that adjudicative practices distinguish between factual and legal questions, that differentiation can only ultimately be based in pragmatic concerns.[138] Perhaps there is something to be gained from drawing a distinction between factual and legal questions. If this is the case, it is not because the language referring to such a distinction tracks some underlying, intrinsic difference. To the contrary, from an only-facts rejectionist standpoint, it is only because there might be practical reasons for preferring one manner of assigning adjudicative decision-making responsibilities over another.[139]

134. *Id.* at 1795.
135. *Id.*
136. *Id.* at 1792-94.
137. *Id.* at 1793.
138. *Id.* at 1770.
139. *Id.* at 1806.

IV. A VALUE-LADEN APPROACH TO THE FACT-LAW DISTINCTION

Recall the puzzle with which we began: the distinction between fact and law is highly intuitive, yet, as is reflected in the confused case law on the matter,[140] resists articulation in a form that generates consistent classifications.[141] Common sense is in tension with our considered reflection. The previous Section discussed two prominent responses to the problem: the traditional and only-facts rejectionist approaches, respectively. This Section contends that both responses are inadequate, and proposes an alternative that accounts for the pervasively value-laden character of judicial reasoning.

It is important to note at the outset that we are using the term "value" here in its broadest sense, referring to all of the different reasons that things might matter to us,[142] including because they are beautiful, useful, funny, inspirational, or joyous.[143] People sometimes speak of value in a narrower sense, as when they use the term, "value judgment," to indicate condemnatory attitudes toward immoral behavior. However, this Article uses the idea of making judgments about value more capaciously. All moral judgments are about value, but not all value judgments are about morality. Understood as reasons for things mattering or being worth caring about, the idea of value encompasses the motivations for the actions and the standards that we use to assess behavior.[144]

This Article has noted that the traditional approach recognizes that courts confront issues requiring them to combine consideration of both

140. *See supra* Section II.

141. *See supra* Section I.

142. Given our focus on legal institutions, the discussion is focused on value as it pertains to human beings. Within the broader field of axiology—broadly, the study of value—interesting questions beyond the present scope arise, such as, for example, whether value can exist apart from any particular thing for which it might be valuable, and which types of entities possess value. My own intuition is that value can only pertain to something that is sentient, or, at least, alive, but nothing in the present discussion turns on issues of that kind.

143. Some of the most intriguing philosophical debates concern the boundaries and relations between these categories of value. *See generally* THE OXFORD HANDBOOK OF VALUE THEORY (Iwao Hirose & Jonas Olson eds., 2015). Nevertheless, the proper classification of different types of value is not pivotal for the present discussion. The important point here is that the scope of value is extraordinarily broad, as there are many reasons that the answer to a question might matter to us.

144. To be sure, the manner in which we are employing the idea of value as "mattering" is less a definition of value than it is simply another way of gesturing toward the same broad notion. In this respect, the idea of value is so fundamental that it resists attempts to capture its meaning without either using closely related terms that are to a significant degree synonymous—such as, for example, "worth," or "merit"—or enumerating examples of things commonly held to be valuable. This is hardly unique to the idea of value. For example, another vital philosophical concept—that of consciousness—similarly resists description except through the use of closely related, essentially overlapping terms, such as "awareness." Yet, this is no hindrance to analysis because no concept could be more immediately familiar to us than that of things mattering to us.

factual and legal questions.[145] Nevertheless, the interplay between legal and factual questions remains relatively superficial under the traditional model. While the traditional approach acknowledges that mixed questions require determinations about questions of both fact and law, the two categories remain conceptually distinct. The judicial decision maker may address the factual questions at one stage, the legal questions at another, and then, finally, consider their interaction at the stage of applying general standards to the relevant events.[146] However, as this Section will argue, the interrelation between the various questions raised in adjudication is deeper than the traditional picture suggests. Factual and legal questions are never fully distinct in the first place.

Understanding this phenomenon begins with recognizing the extent to which determinations on questions traditionally classed as purely factual inherently involve normative judgments.[147] The central reason is that deciding factual questions depends at various stages on making value-laden choices among alternatives. Of course, even before the judicial decision maker is faced with a particular factual question for adjudication, numerous value-laden choices have already been made by the parties themselves in the course of submitting information to the court. Since they do not have first-hand knowledge of the circumstances underlying the dispute, triers of fact depend on the litigants to present them with accounts of the relevant events. Any set of circumstances could be communicated in an indefinite number of different ways.[148] Consequently, litigants—as well as witnesses and other actors connected with disputes—must choose what to include in the information that they furnish to the court, and how best to package that information. These choices are inevitably driven in large part by the ends and interests that the actors involved are pursuing.

Although it may not be as immediately obvious, judicial decision makers must also make many value-laden choices when answering

145. *See supra* Section III.

146. Some commentators who accept the fact-law distinction in something like its traditional form have characterized questions as lying on a spectrum with purely factual questions at one end and purely legal questions at the other. *See, e.g.*, Monaghan, *supra* note 65, at 233 (maintaining "that any distinction posited between 'law' and 'fact' does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience"). Nevertheless, the recognition that questions might be placed on such a spectrum remains consistent with a relatively superficial manner of characterizing the relation between factual and legal questions. After all, this sort of fact-law spectrum may be conceived in terms that still view factual and legal questions as essentially separable, while locating mixed questions on the spectrum according to the relative attention that must be paid to factual and legal questions in the course of deciding them.

147. The term "normative" here refers to judgments resting on assessments of value in the broadest sense.

148. Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 920 (1992).

factual questions. Triers of fact cannot pay equal attention to all information presented by the parties. They must assemble the various circumstances that form the backdrop for the litigation into a manageable narrative of events that serve as a basis of analysis and decision making.[149] In doing so, they make determinations about which circumstantial elements to select for further attention, and what language to use in characterizing them. Throughout this process, they give meaning to the language chosen by the actors involved in the litigation. The task is necessarily interpretive in that the decision maker considers an array of terms lacking a precise meaning. In addition, there are questions about which claims by participants in the litigation should be believed. Thus, numerous choices must be made about things like which portions of a witness's testimony to credit, and which accounts of events offered by the litigants seem most plausible.

Decision making on the substantive issues arising in litigation, then, depends on an array of subsidiary choices inherent to the analysis. In rendering these determinations, decision makers must have some basis for making one selection over the alternatives.[150] Without a basis or motivation, the decision maker would be left either immobilized—like a sailboat dead in the water on a windless sea—or forced into arbitrary action, which is unacceptable in adjudication. Motivation, at its core, concerns why something matters, and is, thus, a fundamentally value-laden notion.

The natural source of the motivation for the various choices confronting judicial decision makers is the context of the dispute in which they have arisen. Courts do not encounter free-floating questions about events. The rudimental interconnection between context and motivation in making important choices while answering questions is not confined to adjudication. Like courts, people in the course of their lives do not encounter questions in splendid isolation. Without knowledge of the context—or what we might think of as the stage setting—one faced with a question has no basis for making the various choices that arise.

As a mundane illustration, suppose an employee at a home improvement store receives a phone call inquiring how many doors the store has. If the caller is a customer interested in the options for installing a door in a new house, then "doors" might be best understood to indicate the different styles of doors in the store available for purchase. However,

149. Emmet T. Flood, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1807-11 (1991).

150. Although it is true, of course, that factual determinations entail too many choices for anyone to make each one of them in a highly deliberate, conscious, and explicit manner, the chain of reasoning through which decision makers reach determinations nevertheless rests on an understanding of why they matter. The argument presented here does not depend on all of the choices being articulated in a detailed or explicit manner.

if the caller is a city official responsible for enforcing fire codes, then "doors" might be better understood to indicate the number of places where one could quickly exit the store in an emergency. Indeed, tweaking the details of this illustration can yield many different understandings of "doors" that would be most appropriate to particular contexts. Making choices about even the most quotidian matters depends on the context for the choices, and especially why those choices might matter to anyone.

In adjudication, the context for the choices includes how they might impact the case's outcome. The very fact that a dispute has landed in court means that it affects particular people. All the choices made by judicial decision makers potentially give rise to prescriptions, or actions by the court that determine what shall be done next. The relevance of context to the multitude of choices on which factual determinations depend makes the reasoning about them pervasively normative.

As noted, choices about the description of factual scenarios cannot be expressed without normative implications, and such choices permeate judicial reasoning.[151] For example, consider litigation that considers whether an individual received a benefit as a result of engaging in a particular action (perhaps in a case involving allegations of commercial fraud or political corruption). Since choices about the meaning of "benefit" can only be made through reference to their context—including how they might impact the outcome of the case—analysis of whether an individual received a benefit will fan out into consideration of other details of the dispute. The idea of a benefit might be connected with the idea of influence, but what would likely influence an indigent individual might not influence a billionaire. Whether to deem something a benefit might also depend on the decision maker's beliefs about what kinds of influence are normatively acceptable. For example, expecting to receive a hand-crafted gift as the result of an act might be considered an illegitimate gain in some circumstances, but not in others, and this depends on numerous factors including the economic value of the gift and the identity of the recipient.

Another reason for the pervasiveness of normative judgments in judicial reasoning concerns the role of probabilities in analyzing events. Extensive academic debate persists over many topics relating to probabilities. Scholars disagree about when inferences from existing beliefs are justified, and how existing beliefs should be revised in light of new evidence.[152] These controversies highlight the lack of neutral

151. Descriptions of events at issue in litigation cannot, for instance, be reduced simply to the terms of mathematics or quantifiable formulas of physics. *See* Friedman, *supra* note 148, at 920 ("[T]he limits of language and of the human mind mean inevitably that articulated factual findings will be evaluative categorizations.").

152. *See generally* Peter Tillers, *The Value of Evidence in Law*, 39 N. IR. LEGAL Q. 167, 170 (1988).

grounds for adopting one theory of probability over another. The choice is inevitably an expression of values.[153]

These questions are not only salient for experts in the field. Most of the population, though lacking training on the topic, unavoidably faces questions about how to deal with probabilities in their thinking. After all, uncertainty complicates the task of constructing a narrative of events that can serve as the basis of adjudicative decision making.[154] Confronted with alternative characterizations of reality, selections must be made about the conditions for adopting a particular account as the basis of decision. Case outcomes depend on value judgments about matters such as when to grant a witness the benefit of doubt, or how to weigh the relative costs to different parties of an erroneous judgment. The very nature of judicial reasoning brings into play a range of normative judgments relating to the most suitable way of handling uncertainty in making determinations.

Thus far, we have emphasized the pervasiveness of normative judgments in deciding factual questions. This point has been worth foregrounding because the normativity of factual determinations may be less evident to many observers, especially since it has been common for people to think of facts and values as radically distinct from one another.[155] By contrast, legal questions have a more readily apparent and widely recognized interrelation with normative judgments. Laws are prescriptive norms, speaking explicitly to what is to be done as the result of a case's outcome, and they flow from the decisions of political and legal actors who are obviously motivated by normative ends. As the Supreme Court has noted, laws reflect judgments about the rights and duties of government and those subject to its power.[156]

Not surprisingly, the application of the laws necessarily entails normative judgments, incorporating such matters as the values expressed through the law's prescriptions, and the manner in which different

153. *Id.*

154. *See* Friedman, *supra* note 148, at 918.

155. See Stephen W. Ball, *Facts, Values, and Interpretation in Law: Jurisprudence from Perspectives in Ethics and Philosophy of Science*, 38 AM. J. JURIS. 15, 15 (1993) ("Historically, the distinction [between facts and values] may be regarded as perhaps the central feature characterizing moral philosophy in modern times."). To be sure, the relation between fact and value has been the subject of considerable debate, *see generally* FACTS AND VALUES: THE ETHICS AND METAPHYSICS OF NORMATIVITY (Giancarlo Marchetti & Sarin Marchetti eds., 2017), and prominent theorists have pushed back against the traditional understanding of a separation between the two. *See, e.g.*, HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY, AND OTHER ESSAYS (2002). Nevertheless, an approach embracing a separation between facts and values remains influential across a wide range of fields, *see* Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387, 387 (2008) (noting that "[t]he fact-value distinction is alive and well in many quarters"), including economics and philosophy of law, as well as in the popular imagination. Against this common view, then, it is important to recognize the extent to which reasoning about facts inevitably brings normative judgments into play.

156. Baumgartner v. United States, 322 U.S. 665, 671 (1944).

interpretations might impact the outcome of the particular case before the court. The need for interpretation is especially obvious with respect to the application of laws, which are written in terms that are typically general and vague. Just as judicial decision makers must arrive at a narrative of events as a basis for judgment, they must also adopt meanings of the applicable legal provisions. That process, too, depends on numerous choices. Much like the choices underlying factual determinations, the choices underlying legal determinations require motivation, which is naturally sourced by the context of the particular dispute. That context is wrapped up with how the answers to subsidiary questions might impact the outcome of the litigation. Ripped away from any connection to why the meaning of the law might matter, there would not be a sufficient basis for selecting one understanding of the law over another. To avoid arbitrariness, choices about meaning must be considered in terms of people to whom those choices matter.[157]

Whether beginning with factual or legal questions, we find that the interrelation between context and the motivation underlying subsidiary questions renders judicial reasoning intrinsically normative. One can now appreciate why the value-laden character of judicial reasoning entails the convergence of factual and legal questions: the choices underlying factual and legal determinations are mutually interdependent. The subsidiary choices needed for factual determinations take on significance because of their interrelation to questions of practical import, including what the court shall prescribe, and what is to be done as a final result of the court's action. Consequently, reasoning about factual questions implicates choices to be made in giving meaning to the applicable law. The converse is also the case: the choices to be made in giving meaning to the legal provisions must be motivated by the difference they could make to the

157. It must be stressed that recognizing the inevitable role of normative reasoning in interpreting legal provisions does not depend on one's views regarding the great jurisprudential debates over the nature of law. One of the longest standing debates in the philosophy of law revolves around the relation between law and morality. Legal positivists have famously maintained that identifying the content of law does not necessarily hinge on rendering one's own fresh moral judgments, *see, e.g.*, HART, *supra* note 111, while their opponents have argued that discerning the law's content inescapably involves moral reasoning. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (Frank Kermode ed. 1986). Though my own sympathies are with the latter camp, the arguments presented here do not hinge on a defense of that position, which would be beyond the scope of this Article. Crucially, even legal positivists—including Hart, the most prominent of the twentieth century—typically allow that judicial decision makers sometimes engage in moral reasoning. *See, e.g.*, HART, *supra* note 111, at 130-32. The controversy often centers on the extent to which moral reasoning by judicial decision makers should be understood as generating new law, as legal positivists maintain, or, rather, as drawing out principles already present in the law, as held by antipositivists, like Dworkin. S*ee, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). This Article does not express a position on the extent to which judicial decisions produce new law. The important point for present purposes is that interpreting law entails normative reasoning, regardless of how one wishes to frame the relation between that normative reasoning and the already existing legal rules.

parties (and possibly others), which will depend on the context of a particular case, including the facts most relevant to the dispute before the court. This deep interconnection between the choices needed to address factual and legal questions subverts the traditional distinction between them.

To illustrate, consider a civil case in which the plaintiff alleges damages resulting from the defendant's negligence. Although negligence findings have long been assigned to juries,[158] the determination has been recognized as a mixed question, combining factual and legal questions.[159] In negligence cases, juries are instructed that the applicable legal standard is whether the defendant acted with "reasonable care,"[160] described as the manner in which a reasonably prudent person would behave.[161] Reaching a conclusion on negligence necessarily rests on numerous subsidiary determinations. Whether presented on a special verdict form or simply arising in the course of deliberations, jurors confront questions such as whether an individual was traveling rapidly or was paying attention at the time of a collision. The traditional approach treats these sorts of questions as quintessentially factual since they concern specific events and acts carried out by particular people. From the viewpoint of the traditional approach, one might characterize the decision maker's task as first arriving at a picture of historical reality that most accurately describes what occurred, and then, in a separate exercise, applying the legal standard to arrive at a conclusion. That is, with a reconstructed image of the past reality in hand, one then determines whether, given that series of events, it can be said that the defendant acted with reasonable care.

However, addressing questions like those noted will involve decision makers in a normative analysis that intertwines their assessment of what occurred with reflection on the meaning of the applicable standard. An example is the assessment of whether a party was traveling rapidly at the time of a collision. There is no absolute standard against which to declare whether a specific speed qualifies as "rapid." No matter how much evidence is presented during the litigation on the matter, the decision maker must give meaning to the term "rapid." What basis or frame could one have for making such an interpretation? It is the context of the dispute that furnishes reasons why that choice matters, including especially how it may impact the outcome of the litigation through application of the relevant legal standards. This means that assessing whether a party was traveling rapidly involves reflecting more broadly on whether the

158. *See, e.g.*, Jesionowski v. Bos. & M. R. R., 329 U.S. 452, 457 (1947).

159. Sioux City & P. R. Co. v. Stout, 84 U.S. 657, 665 (1873).

160. Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 151 (2011).

161. *Id.*

defendant acted with "reasonable care," and that reflection in turn requires the decision maker to give meaning to that legal phrase.

Similarly, there is no pre-existing, off-the-shelf, or absolute standard against which to assess whether a person was paying attention at a particular moment. What counts as paying attention, too, requires interpretation, which entails normative judgments including the extent to which an individual might be excused for, say, attending to a child's demand at the cost of a small and momentary diminishment in attention to the road. Again, the process through which judicial reasoning gives meaning to a phrase associated with a factual question is intertwined with the meaning given to concepts embedded in the applicable legal standard, such as reasonableness and prudence.

The weaving together of factual and legal questions is no less evident if we approach the scenario from the other direction, beginning with the legal standards. To determine if the defendant acted negligently, the decision maker must give meaning to the phrase, "reasonable care." However, that task of interpretation will once again require choices that are inherently normative in nature. The motivation for those choices will be furnished by the specific context of the dispute, including characterizations of the relevant acts and events. Thus, the analysis that gives meaning to "reasonable care" will involve the decision maker in making the normative assessments needed to arrive at a particular descriptive account of what happened. Regardless of the starting point, the kinds of questions traditionally classed as factual or legal converge, undermining the traditional distinction.

We have criticized the traditional approach for failing to recognize the extent to which the value-laden character of judicial reasoning subverts the distinction between factual and legal questions. The other prominent approach to the fact-law distinction that we have examined—only-facts rejectionism—is not subject to that criticism, since it denies the existence of a fundamental distinction between factual and legal questions. Instead, only-facts rejectionism assimilates legal questions within the larger category of factual questions, largely by defining a fact as a proposition that purports to make true claims that might be supported with evidence. Since claims about the law qualify under this definition, they are brought within the factual realm. Questions about laws, then, are also questions about facts, and the traditional distinction is erased.

While only-facts rejectionism rightly challenges the traditional approach, it misapprehends the source of the fact-law distinction's instability. What undercuts the distinction is not rooted in a highly general identification of the factual realm with truth-apt propositions. Rather, it is based in the nature of judicial reasoning.

The intuitiveness of the fact-law distinction draws us to the notion of a fundamental separation between factual and legal questions. However, the dynamic activity of judicial reasoning ultimately undermines that notion. Adjudication initiates from parties' requests that courts take particular actions (generally in the form of official orders and pronouncements). The disposition of a case consists of the extent to which a court grants or denies the demands placed on it by litigating parties. That disposition affects parties (and often many others) in ways that matter to them. That the outcome of cases matters in this way imbues the choices made by decision makers with normativity. In the course of litigation, there may be a relatively small number of questions that are explicitly presented to the court for adjudication, with some traditionally classed as factual and others as legal. This might foster a surface impression that the total number of choices being made by decision makers is quite limited, while making it easier to overlook the hermeneutic dynamic that erodes the fact-law distinction. However, as we have seen, each of the questions explicitly presented to the court for resolution requires the decision maker to make choices on countless subsidiary matters that are imbued with value judgments. The pervasiveness of these value judgments upsets the traditional separation between factual and legal questions because the choices ostensibly serving one kind of question are inevitably intertwined with those serving the other.

Only-facts rejectionists rightly challenge the traditional fact-law distinction, and they rightly maintain that the untenability of the distinction can be recognized and defended without necessarily staking positions on highly contentious claims of first philosophy or debates in legal philosophy over the nature of law. Nevertheless, this Article urges an importantly different perspective from which to understand the inadequacy of the traditional fact-law distinction. Only-facts rejectionists have essentially relied on a linguistic understanding of factual propositions so unspecific and sweeping that it cannot help but bring legal propositions within it. However, noting that people purport to make true and defensible claims about law does little to elucidate the dynamic that ultimate leads to the undermining of the fact-law distinction. This Article has argued, instead, that the heart of the matter concerns the manner in which the pervasiveness of value judgments vitiates the boundary that the traditional view envisions between factual and legal questions.

V. CONCLUSION

The fact-law distinction plays vitally important roles in the structuring of decision making in litigated disputes,[162] which places great significance on how the distinction is to be drawn. Yet courts have struggled to articulate and apply the distinction in a consistent and coherent manner.[163] Our inquiry into the subject began with a puzzle: that the distinction between factual and legal questions presents itself to us with intuitive force, yet seems cast into doubt by critical reflection.[164] We considered two prominent responses to the problem: a traditional approach that accepts our pre-reflective assumptions about the distinction's validity; and an only-facts rejectionist view that repudiated the distinction, instead subsuming legal questions within the larger class of factual questions.[165]

The Article has opposed both responses. The traditional approach fails, because the pervasiveness of normative judgments in judicial reasoning undermines its conception of the fact-law distinction.[166] Although only-facts rejectionism rightly challenges the traditional distinction, it is inadequate for a different reason: it does not capture the essential reasons why the traditional distinction ultimately proves untenable.[167] In the place of only-facts rejectionism's concentration on the broadly encompassing scope of the factual realm, the last Section proposed an approach focused on the nature of reasoning that judicial actors must rely on in deciding particular cases. The argument particularly emphasized the pervasive role that assessments of value play in making the innumerable subsidiary choices needed to support the decision makers' reasoned analysis.[168]

By focusing on the hermeneutical dynamics of judicial reasoning, a value-laden approach explains why the traditional fact-law distinction breaks down in the activity of judicial decision making. In addressing puzzles like those presented by the fact-law distinction, we would like to understand not only why our pre-reflective assumptions do not hold up to scrutiny, but also why they nevertheless continue to exert a hold on our intuitions. A value-laden approach brings into view a potential explanation of the traditional distinction's stickiness in our consciousness. According to this approach, it is the pervasiveness of value judgments that breaches the putative border between factual and legal

162. *See supra* Section II.
163. *See supra* Section II.
164. *See supra* Section I.
165. *See supra* Section III.
166. *See supra* Section IV.
167. *See supra* Section IV.
168. *Supra* Section IV.

questions. This dynamic is easily obscured, because normative judgments may guide decision makers' choices in a relatively subtle manner that is not always made explicit. The force exerted on judicial reasoning by other factors—such as tangible pieces of evidence or witnesses' statements on the record—is often more evident even to the decision makers themselves than the influence of the deeply held values motivating the countless subsidiary choices needed to reach an ultimate disposition.

A value-laden approach offers a means of understanding the powerful appeal behind our pre-reflective assumptions, which is based in the different kinds of values commonly associated with factual and legal claims. That is, certain values tend to cluster around answers to what have traditionally been thought of as factual questions. These values include, for example: specificity in the use of descriptive terms; clarity regarding excluded possibilities; conformity with other beliefs held with a high degree of certainty; and the ease of alteration based on new evidence. At the same time, other values cluster around answers to what have traditionally been thought of as legal questions. These values include, for example: articulation in widely understandable terms; the use of concepts resonant within the relevant community; and the avoidance of excessive change over time. Accordingly, we may tend to think of questions as factual or legal based on the values that apply in the context of a particular question presented for judicial determination. Since values often guide our surface-level impressions in ways that are not immediately transparent, we do not always make the connection between the underlying values and our immediate, intuitive impression that a question is factual or legal.

Nevertheless, upon reflection, we can recognize reasons for the instability of the fact-law distinction. As discussed above,[169] analyzing ostensibly factual and legal questions hinges on choices and reasoning that breach the boundary between the classifications. As a result, values that might initially be associated with one classification cannot be kept apart from the other.

The implications of a value-laden approach for the treatment by courts of the fact-law distinction are complicated by questions regarding the value of continuity in adjudication. Even if significant changes to fact-law jurisprudence in the short run were feasible, they would entail substantial costs due to the wide-scale unsettling of expectations. This is especially so given the range of ways in which the fact-law distinction impacts the conduct of litigation.[170] Nevertheless, attention to the values deeply underlying our thinking about the relation between fact and laws

169. *See supra* Section IV.

170. *See supra* Section II.

counsels a jurisprudence that makes a more consistent practice of directly appealing to those values as the basis of determinations.

As we have seen, the Supreme Court's jurisprudence reflects traditional assumptions about the fact-law distinction.[171] However, when difficulties arise in applying the distinction, the Justices have resorted to frankly functional considerations. As the Court observed in *Miller v. Fenton*:

> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis . . . [I]n those instances in which . . . the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.[172]

In using phrases such as the "practical truth," "allocation," and "a matter of the sound administration of justice," the Court acknowledged that when the traditional distinction fails to provide guidance,[173] the Justices avert directly to the values that their determinations serve.

The Court's overarching methodology has combined a number of elements in a manner that has generated confusion. First, the Court draws a distinction between factual and legal questions. Second, it distributes decision making authority based on certain values thought generally to be associated with factual and legal questions, respectively. For instance, juries are generally assigned the task of deciding factual questions, because they often involve the assessment of witnesses' credibility, something at which the community members populating juries are thought to excel. However, a third component of the Court's approach recognizes that for a variety of complicated reasons the traditional distinction often breaks down, as when values normally associated with jury determinations of factual questions do not fit well within the context of a particular case. In these cases, then, the Court frankly acknowledges that attaching the label of factual or legal to a question does not effectively serve the ultimate aims of their determinations.

From the standpoint of a value-laden approach, it should come as no surprise that the traditional fact-law distinction so often fails to furnish answers to allocative determinations in a satisfying manner. Indeed, a value-laden approach explains why the breakdown of the traditional distinction is not an exception, but the rule. Accordingly, it counsels

171. *Supra* Section II.

172. 474 U.S. 104, 113-14 (1985).

173. *Id.*

viewing direct reliance on the underlying values as a sound general practice, rather than as a suboptimal alternative to which one resorts only when unavoidable. Such an approach would clarify jurisprudence on the assignment of decision making authority in adjudication by cutting out the mediating function currently played by the untenable traditional distinction between factual and legal questions.