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ARTICLES

ALL MIXED UP ABOUT MIXED QUESTIONS*

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I. INTRODUCTION

"Elusive abominations."[1] Among the countless opinions that wrestle with so-called "mixed questions of law and fact," one from the Court of Claims best summed up the problem with these two words. The Ninth Circuit was more direct, if less poetic, when it said that mixed question jurisprudence "lacks clarity and coherence."[2] And as if to punctuate the point, Black's Law Dictionary offers a definition that is perfectly clear and perfectly circular: "A question depending for solution on questions of both law and fact, but is really a question of either law or fact to be decided by either judge or jury."[3]

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1. *S & E Contractors, Inc. v. U.S.*, 433 F.2d 1373, 1378 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972).

2. *U.S. v. McConney*, 728 F.2d 1195, 1200 (9th Cir. 1984), *abrogated on other grounds by Pierce v. Underwood*, 487 U.S. 552 (1988).

3. *Black's Law Dictionary* 904 (5th ed. West 1979).

"Mixed question" is, like "question of fact" and "question of law," a label given to issues on appeal for purposes of determining the standard of review. But unlike those well-defined categories, "mixed" has become a sort of catch-all, an amorphous box into which courts place any issue or combination of issues that cannot neatly be labeled law or fact.[4] Hence, the lack of clarity and coherence. The mix-up about mixed questions exists because courts try to apply a single "mixed question" standard of review to a variety of issues that are analytically quite different from one another.

Some questions courts call "mixed" involve determining whether a given set of facts falls within a known legal standard or definition, an exercise often described as "law application."[5] Some involve judging a person's conduct by determining whether it was "fair" or "reasonable."[6] Still other questions are considered mixed because they consist of two or more different issues jumbled together.[7] Courts have been unable to agree on a single standard by which to review all mixed questions because the term means too many different things.[8] The mixed question label, while convenient, fails to advance the standard-of-review ball very far.[9]

This article is an attempt to unmix the mixed questions and discern a set of principles by which courts can consistently categorize and review questions that are neither purely law nor

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4. As one commentator notes, the mixed question label is a potential "cop out" because "it can obscure the complexity of what occurs." Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 Nw. L. Rev. 916, 922 (1992).

5. *See infra* at Section V(C). As discussed below, "law application" is an ambiguous term that is not very helpful in discerning the proper standard of review. *See infra* at text accompanying nn. 114-16.

6. *See infra* at Section V(B).

7. *See infra* at Section V(D).

8. *See* Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 So. Cal. L. Rev. 235, 238-47 (1991). Lee discusses at great length the division in authority among federal courts regarding how to treat mixed questions.

9. The category helps so little that one court expressed a preference for avoiding it altogether: "We prefer to consider issues either as matters of fact or of law, avoiding the unhelpful category of 'mixed questions of law and fact.' That phrase usually conceals the existence of both a question of fact and a question of law and does not aid in identifying the appropriate standard of appellate review." *ASCAP v. Showtime/Movie Channel, Inc.*, 912 F.2d 563, 569 n. 11 (2d Cir. 1990) (citations omitted).

purely fact.[10] While others have recently argued that there is no analytical distinction between the categories of law and fact,[11] I maintain that there are several distinct categories of judicial issues,[12] each of which must be approached differently on appeal. As to some of these categories, there is little controversy about the standard of review. Others require more in-depth analysis and, in some instances, a policy choice about which judicial actor is best equipped to decide them. And when two or more different issue-types are intermingled, they must be distinguished and analyzed separately. Lumping them together under the "mixed question" label, and then ascribing a standard of review based solely on that label, is a recipe for confusion.

This can sometimes be a complex undertaking, certainly more complex than calling "mixed" any issue or group of issues that is neither purely legal nor purely factual. But if a little complexity is the price of clarity and consistency, it is a price worth paying.

II. STANDARD OF REVIEW AND THE LAW/FACT DISTINCTION

The whole reason for labeling a question "law," "fact," or "mixed" is to determine the standard of review on appeal; thus, any attempt to understand mixed questions must begin with standard of review. Standard of review is best understood as a principle of judicial management. It is about dividing decisionmaking authority among different parts of the judiciary.[13] For a variety of reasons, our system leaves some decisions in the hands of juries, others with trial judges and still others with appellate judges. Of course, appellate courts have the last word on all issues. But the standard by which they

10. This article concerns only judicial decisions. It does not tackle the review of administrative decisions, although its methodology may turn out to be useful in that area as well.

11. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1769, 1800 (2003).

12. *See infra* at text accompanying nn. 48-117.

13. *See* 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, 997 (1986) ("Scope of review, therefore, is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.").

review each issue—the degree of deference they will give to another decisionmaker's resolution—varies depending on the nature of the issue.

The bedrock principle is that questions of fact are best determined by a jury of lay people. There are several reasons for this. First, juries are in the best position to discern the truth, having heard testimony first-hand along with all the eye-twitches, sweaty brows, pregnant pauses and other non-verbal cues that accompany it. Juries also get to see the physical evidence in person. All the appellate court gets is a cold record.[14] Accompanying these concerns is the notion that twelve lay people are better qualified to determine whether their peers are telling the truth than are legal professionals.[15]

There is also a deeply-rooted tradition holding that we are entitled to have our conduct judged by peers. Note that this idea has nothing to do with fact-finding or truth-determining. Even if we could invent an error-proof lie detector test, we still would use juries to judge things like whether a party exercised due care or was reasonable in relying on a representation. When the jury makes such a determination, it is not being asked to decide what happened, though it may make that determination as well. It is being asked to judge another person's conduct or decisions according to community standards. We often call such determinations "questions of fact," even though they involve a much different mental exercise.[16]

Next, there is a concern for managerial efficiency. Even if we thought three-judge appellate panels were better equipped to determine the truth than a trial judge or a jury, we might still relegate that task to lower courts because there simply are not enough appellate judges to go around. And if there were, why would we even bother having a lower court? We could have just one level of court that would decide all issues: law, fact, or otherwise.

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14. The advent of video trial records is undermining this assumption somewhat, though the technology has far to go before the recording is anywhere near as good as being there.

15. Whether this is true as an empirical matter, I leave to others. Indeed, were the only concern deciding who is telling the truth, we might well leave fact-finding to a specialized group of psychologists trained for that purpose.

16. *See infra* Section IV(E).

Primarily for these reasons, our system leaves fact-finding and certain conduct-judging to juries. Those same decisions are relegated to the trial judge in bench trials even though, of the considerations discussed above, only efficiency and the ability to see and hear evidence first-hand applies equally to juries and trial judges. Those considerations are strong enough that findings of fact are reviewed with deference regardless of whether they were made by a trial judge or a jury.

In contrast to these factual matters are questions of law, which appellate courts review without deference, or "de novo." Questions of law involve the creation of rules or the interpretation of existing rules (arguably an act of rule-creation in itself). Appellate judges have the ultimate authority over these issues for a number of reasons. For one, judges are more expert in the law than juries, because knowing and understanding law is what they are trained to do. Appellate judges presumably are selected for their legal expertise, and deciding legal questions is what they do all day. Appellate judges also review a wide range of cases and so have the advantage of a broad perspective. And in contrast to trial court judges, who make lots of decisions each day, often without time for extended reflection, appellate courts have a greater opportunity to research, analyze, discuss, and debate important legal issues.

Standard of review is therefore the legal principle that makes our tiered system of courts work. Those tasks that are relegated to appellate judges are reviewed de novo. Tasks relegated to juries and trial judges are reviewed deferentially, meaning that an appellate court will override the decision only if it is very, very wrong. Courts use various terms to describe a deferential standard of review: clearly erroneous, manifest error, unsupported by substantial evidence, abuse of discretion, to name a few. In some instances, there are subtle differences among these standards, but those differences are not material here.

There is nothing inherent or immutable about the way our system divides decisionmaking authority. The idea that judges and juries should perform separate functions owes more to bureaucratic principles than to moral or political philosophy. But

pragmatic does not equal unprincipled.[17] Though our judicial system divides decisionmaking authority for practical reasons, it still must do so based on a set of rules that can be consistently applied.[18] This is why mixed question jurisprudence can be so maddening. The lack of clarity and consistency regarding mixed questions leaves the impression that courts can choose whatever standard of review they want depending on the outcome they wish to achieve.[19]

In a 2003 article, Allen and Pardo argue that the law/fact distinction is a myth.[20] They claim that there is no reasoned analytical distinction between law and fact because legal issues involve a factual determination of what the law is.[21] As should be clear from Section IV below, I disagree with this proposition; there are real differences among the various issues courts confront, and these differences are consistent and discernable enough that courts can formulate different standard of review rules to govern different categories of issues.[22] But the disagreement may turn out not to matter much. Allen and Pardo concede that there may be good practical reasons to maintain the "legal fiction" of the law/fact distinction.[23] If that is what it takes to derive a consistent set of rules to govern standard of review, it's good enough for me.

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17. *Cf.* Allen & Pardo, *supra* n. 11, at 1778 (suggesting that the law/fact distinction reflects pragmatic choices made "under the guise of principled analysis"). A set of rules governing standard of review, which can be consistently applied in a manner such that like cases are treated alike, is eminently practical. Put another way, we should seek a principled way to determine standard of review precisely because failing to do so would result in haphazard decisionmaking.

18. As Justice Frankfurter well put it, "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

19. *See e.g. In re Computer Engr. Assocs.*, 337 F.3d 38, 45 (1st Cir. 2003) (mixed questions are reviewed "on a sliding scale . . . depending on how fact dominated the question"); *Charter Commun., Inc. v. County of Santa Cruz*, 304 F.3d 927, 930 (9th Cir. 2002), *cert. denied*, 540 U.S. 1140 (2004) (deciding to review mixed question de novo because it was not "essentially factual").

20. Allen & Pardo, *supra* n. 11, at 1790-1806.

21. *Id.*

22. *See infra* at Section IV.

23. Allen & Pardo, *supra* n. 11, at 1807.

III. THE PROBLEM OF MIXED QUESTIONS

Noting the "vexing nature of the distinction between questions of fact and questions of law," the Supreme Court in *Pullman-Standard v. Swint*[24] found substantial disagreement among circuit courts on whether mixed questions are reviewed de novo or deferentially.[25] State courts have fared no better. One can find cases from all over holding that mixed questions are reviewed de novo,[26] and others holding that they are reviewed deferentially.[27] A split in authority alone would be no cause for alarm, for jurisdictions divide all the time on important legal issues. But this is not a division based on jurisprudential differences. We do not find significant philosophical differences among jurisdictions about the division of labor between judge and jury. There seems to be no rhyme or reason why some courts claim mixed questions are reviewed de novo while others claim they are reviewed deferentially.

Many courts have tried to resolve the mixed question conundrum by holding that the standard by which they are reviewed depends on whether they are "primarily" or "essentially" factual or legal. For example: "We review mixed questions of law and fact either under the clearly erroneous standard or de novo, depending on whether the mixed question is primarily factual or legal."[28] And similarly,

> [i]f application of the rule of law to the facts requires an inquiry that is "essentially factual," . . . the district court's

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24. 456 U.S. 273, 288 (1982).

25. *Id.* at 289 n. 19; *see also* Lee, *supra* n. 8, at 238-47.

26. *See e.g. Baker v. Clover*, 864 P.2d 1069, 1069 (Ariz. App. Div. 2 1993) ("Because the issue presents a mixed question of fact and law, our review is de novo."); *Littrice v. State*, 75 P.3d 292, 294 (Kan. App. 2003) ("The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact on appeal, requiring de novo review."); *State v. Marcum*, 109 S.W.3d 300, 302 (Tenn. 2003) ("The standard of review for mixed questions of law and fact is de novo with no presumption of correctness.").

27. *See e.g. Deguio v. U.S.*, 920 F.2d 103, 105 (1st Cir. 1990) ("We review questions of fact and mixed questions of fact and law under the clearly erroneous standard."); *Cerilli v. Newport Offshore, Ltd.*, 612 A.2d 35, 39 (R.I. 1992) ("The determination by a trial justice of mixed questions of law and fact is entitled to the same deference as his or her factual findings."); *Phillips v. Fox*, 458 S.E.2d 327, 332 (W.Va. 1995) ("[W]e review the trial court's findings of fact following a bench trial, including mixed fact/law findings, under the clearly erroneous standard.").

28. *Anderson v. Commr.*, 62 F.3d 1266, 1270 (10th Cir. 1995).

> determination should be classified as one of fact reviewable under the clearly erroneous standard.[29]

This approach implies that there is a continuum of issues ranging from purely legal to purely factual, and all you have to do is pinpoint your issue on the continuum to determine the right standard of review. As one commentator described it: "[L]aw and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience."[30]

This approach is attractive in its simplicity, but there are three problems with it. First, it is a fallacy that mixed questions lie in the middle of a continuum with law and fact on either side. Some questions are simply outside the continuum. For example, in a negligence case involving stipulated historical facts—that is, the parties agree about what happened, but disagree about whether the defendant's conduct was reasonable—the jury's reasonableness determination is neither factual nor legal. It is not deciding what happened, since that is stipulated. And it is not deciding rules that apply for all similarly situated people. It is just deciding whether one person's conduct was reasonable in a specific circumstance.

Similarly, a jury's decision to award $1 million in damages for pain and suffering is neither fact nor law, nor anything in between. It is a different kind of decision altogether, one in which the jury is neither determining what happened (a question of fact) nor fixing a generally applicable rule (a question of law), but is prescribing the appropriate result in one specific case.[31]

Second, what is it that makes a mixed question more factual or legal? Is it the number of factual disputes that must be resolved in order to also resolve the mixed question? Take, for example, the question of whether an employee was acting within the course and scope of his employment, the dispositive issue for respondeat superior liability. Is it a question of law if only one factual issue is in dispute (say, whether the road the

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29. *McConney*, 728 F.2d at 1202.

30. Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 233 (1985); *see also e.g. U.S. v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("On mixed questions of fact and law, there is no bright-line standard but rather a sliding scale depending on the 'mix' of the mixed question."); *State v. Waldrop*, 7 S.W.3d 836, 838 (Tex. App. 3d Dist. 1999) (review of a mixed question is deferential if its resolution turns on an evaluation of credibility and demeanor).

31. *See infra* at Section IV(G).

defendant was driving on was on a work-related route)? It cannot be that deciding whether review is de novo or deferential—the single most important factor in determining whether an appeal will succeed—simply requires adding up the facts in dispute and determining whether legal or factual issues predominate.

This suggests a third problem with this approach: It permits the standard of review for an issue to change from case to case. To use the example of negligence, under the primarily legal or factual approach, negligence would be reviewed deferentially in a slip and fall case in which the parties dispute whether there was a crack in the sidewalk, but de novo in the same case if the defendant concedes there was a crack but disputes that reasonable care required him to warn of it. This makes no sense. Though the standard of review can vary from issue to issue, it ought to be the same for one issue from case to case.

The Supreme Court has in recent years employed what might be termed a "policy" approach to mixed questions.[32] "The fact/law distinction," the Supreme Court wrote in *Miller v. Fenton*, "at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is in a better position than another to decide the issue in question."[33]

In *Ornelas*, for example, the Court held that probable cause and reasonable suspicion are reviewed de novo. These issues, the Court noted, are "commonsense, nontechnical conceptions" dealing with the factual and practical considerations on which reasonable people act.[34] So characterized, probable cause looks a lot like negligence, a classic jury question. Nonetheless, because of the need to "unify precedent" and ensure consistent application of a constitutional requirement, the Court held that those issues must be reviewed de novo.[35]

The policy approach make some sense because it allocates decisionmaking authority over questions that are neither legal nor factual using the same principles that underlie the law/fact distinction. You just ask whether, as a matter of judicial policy,

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32. *See e.g. Ornelas v. U.S.*, 517 U.S. 690 (1996); *Miller v. Fenton*, 474 U.S. 104 (1985).

33. *Miller*, 474 U.S. at 114.

34. *Ornelas*, 517 U.S. at 695.

35. *Id.* at 697.

that question should be allocated to the fact-finder or to the court. This approach works well for issues that, like probable cause or negligence, require the decision-maker to make judgments about a person's conduct. But it only works if the policy decision on standard of review is made on an issue-by-issue basis. The policy approach provides no guidance or predictability if, for example, the reviewing court could decide whether the particular probable cause issue before it was better suited for de novo or deferential review.

There are other kinds of "mixed" questions, however, for which the policy approach does not work. The first of these involves questions that are deemed mixed because they contain multiple parts. Consider the following:

> The trial court found Husband's income in 1994 was $131,000.00. Husband claims the court erred in attributing a one-time capital gain of $99,760.00 as part of his 1994 income. This issue presents mixed questions of fact and law, and we will accept the trial court's findings of fact unless clearly erroneous and draw our own legal conclusions based on those facts.[36]

This issue of whether the trial court properly determined the husband's income is not mixed in the same sense that probable cause or negligence is. It is more properly called "compound" because that single dispositive issue contains sub-issues, some of which are purely factual, others of which are legal. To reach its determination of income, the trial court would have to find that certain financial transactions took place at certain times (e.g., husband received cash on November 1, paid for services with a credit card on August 23, transferred ownership of an asset on October 9, etc.). These matters are purely factual. Then the court would have to make some conclusions about the legal effect of each transaction (i.e., does it give rise to or offset income?).

Proper review of this issue depends not on policy considerations, but on appropriately parsing the sub-issues. The standard of review for each sub-issue is already known: The factual issues are reviewed deferentially and the legal issues are reviewed de novo. So there is no need to employ policy

36. *Muchesko v. Muchesko*, 955 P.2d 21, 27-28 (Ariz. App. Div. 1 1997).

considerations to determine an overarching standard of review for this particular mix of sub-issues. The standard for reviewing purely factual and purely legal issues should not differ simply because they are joined.[37]

The policy approach also does not fit very well—or, rather, does not completely fit—with another kind of "mixed question," one that involves applying facts to a legal standard. It is often said that when the facts are undisputed and the only issue involves applying those facts to the law, the question is reviewed de novo.[38] But this is not entirely true. There are many questions of law application that are left to the jury and reviewed deferentially.

For example, the question of whether an employee was acting within the course and scope of his job involves applying a set of facts to the legal standard for course and scope. This is usually a determination the jury makes, sometimes by applying undisputed facts to the legal standard, sometimes by finding facts and then applying the facts found to the legal standard.[39] But in some cases, the real issue is not whether the facts of the case bring it within an undisputed legal definition, but rather one that involves defining the standard itself. That is a question of law. While there are some policy considerations at work here—at some point, a court determined that juries generally are best equipped to decide whether an employee was acting within the course and scope of her employment—there is a principle of generality as well. Whether the standard of review is de novo or deferential in large part depends on whether the court is being asked to rule on a question of law concerning the meaning of

37. The issue becomes more difficult when the trial court has reached its ultimate conclusion without separating the various sub-issues. Determining the standard of review in such circumstances is discussed *infra* in Section V(D).

38. *See e.g. U.S. v. Graef*, 31 F.3d 362, 363 (6th Cir. 1994) ("because the relevant facts are not in dispute, we review the district court's application of the FSTA *de novo*"); *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 345-46 (Minn. App. 2001) ("When, as in this case, the material facts are not in dispute, we review de novo the district court's application of the law.").

39. *See e.g. Nichols v. U.S.*, 796 F.2d 361, 365 (10th Cir. 1986) ("Whether an employee's conduct is within the course and scope of his employment is a question of fact."); *Burkett v. Welborn*, 42 S.W.3d 282, 287 (Tex. App. 6th Dist. 2001) ("The question of whether an employee was acting in the course and scope of employment when he was injured is ordinarily a question of fact.").

"course and scope," or whether the issue is simply whether the facts of this case fall within already-established meaning.

All of this is an oversimplification, and we will return to these issues later.[40] For present purposes, the point is simply that the policy approach advocated by the Supreme Court in *Miller* and *Ornelas* works for some kinds of mixed questions but not others. Later in this article, I advocate an approach to mixed questions that both assimilates and adds to the policy approach,[41] but we are getting ahead of ourselves. Before we can construct an approach to mixed questions, we need to know what the building blocks are.

IV. SORTING OUT THE ISSUE-TYPES

A. What Is an Issue-Type?

Courts often divide the kinds of issues they confront into two categories (law and fact), or three (law, fact, and mixed).[42] There are, however, many more than three of what, for lack of a better term, I will call "issue-types." Each of these issue-types requires the decision-maker to undertake a somewhat different mental exercise, and each implicates different considerations when it comes to deciding what the standard of review should be.

B. Questions of Law

Let us start with the most basic issue-type and the one we lawyers are most adept at identifying: questions of law. Questions of law involve the establishment, disestablishment, modification, or interpretation of legal rules. Some easy examples are:

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40. *See infra* at Section V(C).

41. *See infra* at Section V.

42. Courts also sometimes refer to an additional category that includes questions of judicial administration. *See infra* at Section IV(H).

- What statute of limitations applies to a particular tort?[43]

- Can a plaintiff who suffered no physical injury recover future medical-monitoring expenses for negligent infliction of emotional distress?[44]

- Does a statute violate the Equal Protection Clause?[45]

The legal rules that courts interpret come from many sources: constitutions, statutes, administrative regulations, court rules, and common law. Even contracts are often said to contain "private law."[46] Questions of law are always for judges to decide and always reviewed de novo on appeal. But courts sometimes confuse the label with its consequence when they refer to any issue reviewed de novo as a "question of law." While all questions of law are reviewed de novo, not all issues reviewed de novo are true questions of law.[47]

Cases often equate law interpretation with the application of fact to law, and therefore conclude that law application is a question of law.[48] This is sometimes true, but not always. When there are undisputed historical facts and the question is whether a statute applies on those facts, the question may well involve interpreting a term in the statute or deciding as a matter of law whether the statute applies to certain recurring circumstances. In these examples, law application is the same as law interpretation. But law application may just involve taking an established, undisputed legal standard and deciding whether the undisputed facts of this case fall within the standard. This latter

43. *See Mendez v. Ishikawajima-Harima Heavy Indus. Co.*, 52 F.3d 799 (9th Cir. 1995).

44. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).

45. *See Austin v. Berryman*, 955 F.2d 223 (4th Cir. 1992).

46. *See e.g. Barrera v. Ciolino*, 636 So. 2d 218, 222 n. 15 (La. 1994) (referring to contracts as "the private law of the parties"). Contracts present a unique thorny problem. In one sense, they can be understood as private law, i.e., a set of agreed-upon rules governing relations between two or more parties. But contract interpretation often involves determining what the parties intended, which is a question of historical fact. The problem of contract interpretation is discussed *infra* in Section VI(C).

47. *See e.g. infra* at Section V(B).

48. *See e.g. LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997).

exercise does not involve law interpretation. It is something different.

To illustrate, take *McDermott International, Inc. v. Wilander*,[49] which involved whether an injured worker on an ocean vessel who was not involved in its navigation was a "seaman" entitled to recover under the Jones Act. The Supreme Court held that a plaintiff need not be involved in navigating to be a seaman, as long as he was connected to a vessel in navigation.[50] It noted that seaman status under the Jones Act is generally a question of fact, but "[i]t is for the court to define the statutory standard."[51] The issue in *McDermott* was therefore clearly one of law: The Court was interpreting the meaning of "seaman" under a statute. While the Court suggested it was engaged in law application, it was only doing so in the sense that every question of law interpretation requires applying the law to the facts of the case at issue.

But what if the issue were not whether one must be involved in navigation to be a seaman, but whether the plaintiff was, in fact, "connected to a vessel in navigation"? That question would involve applying two established terms—"connected to" and "vessel in navigation"—to the specific facts of a case. The question would be one for the jury, and this would be true regardless of whether the underlying historical facts (e.g., where the plaintiff worked, what tasks he performed, etc.) were disputed.[52] If they were undisputed, the jury would apply those facts to the law. If they were disputed, the jury would engage in a two-part exercise of finding the facts and then applying the legal standard.[53]

McDermott illustrates that what we often call law application can either involve rule interpretation, which is a pure question of law, or a different exercise that may be better suited

49. 498 U.S. 337 (1991).

50. *Id.* at 353-55.

51. *Id.* at 356.

52. *Id.* at 355 (noting that "seaman status under the Jones Act is a question of fact for the jury").

53. The jury might not even be conscious of the dual nature of its decision, and the jury instructions might not even separate the pure fact-finding from the application of law to fact. Because both questions are for the jury, and are therefore reviewed deferentially, there is little need to separate them. Separation is essential, however, when the question of law application is reviewed de novo. *See infra* at Section V(D).

for the trier of fact.[54] We will get to that exercise later. The important point here is that a question is only a question of law if it asks the court to make, revoke, interpret, or change legal rules in a manner that will apply to other cases.[55]

Certain questions of statutory interpretation require the court to discern what the legislature intended. This is in many ways a fact-finding exercise because the court reviews legislative text, legislative history, and a variety of other such materials to determine what the legislature intended its enactment to mean.[56] But determining such questions of legislative intent—which courts sometimes refer to as "legislative fact"—is considered part of law interpretation and is not treated as a question of fact.[57]

C. Questions of Historical Fact

Pure questions of fact are also fairly easy to identify. They are the who, what, when, where, and how of every legal dispute: Did the blue car stop at the stop sign? Whose signature is on the contract? What words did the speaker utter? Courts and commentators call these "historical facts"[58] or "basic facts."[59] They are the predicate facts upon which every legal decision is

54. Because of this ambiguity, I argue later that the term "law application" is not very helpful in determining the standard of review. *See infra* at text accompanying nn. 114-17.

55. That is not to say that courts only make legal rulings when they issue published opinions. Even an unpublished opinion can decide questions of law if those questions are of the kind that have general applicability.

56. *See* Allen & Pardo, *supra* n. 11, at 1792-93.

57. *See e.g. Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 657 (1977) (Rehnquist, Powell & Stevens, JJ., dissenting) ("the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts"). Use of the term "legislative fact" in this sense can be confusing, of course, because the Rules of Evidence use it in a different way. Fed. R. Evid. 201 advisory comm. nn. (referring to legislative facts in the context of judicial notice as "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body") (available at http://uscode.house.gov).

58. *See e.g. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *superseded by statute*, 28 U.S.C. § 1658(a). *See also* Monaghan, *supra* n. 30, at 235 (discussing "fact identification").

59. *See e.g. Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

ultimately based. Historical facts are almost always reviewed deferentially.[60]

Things get more confusing when historical facts are not separated from the conclusions and judgments all of us naturally make based on the events we experience. For example, one who witnessed a bar fight might say that one person brutally and unnecessarily beat another. That seems factual enough, but it contains an element of evaluation. The pure historical facts are that one person hit the other twice with his fist and once with his elbow, kicked him in the ribs, and boxed his ears. The evaluative judgment is that such a beating was brutal and unnecessary.

It is not always easy or possible to separate historical facts from the judgments that follow. We often remember our judgments about what we witness more clearly than we do the predicate facts. For example, we might remember that a car we encountered on the way to work was driving in an unsafe manner, but we might not recall exactly what the car was doing that gave us that impression.

Sometimes it does not matter whether we analytically separate the historical facts from the conclusions we draw or the judgments we make. In negligence cases, for example, the jury decides both what the defendant did and whether what she did was reasonable. But sometimes it makes a difference. For example, in malicious prosecution cases, the jury decides what happened, and the judge determines whether those facts amounted to probable cause.[61] When reviewing such cases, appellate courts must distinguish between the historical facts and the conclusions to be drawn from those facts.[62]

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60. There are narrow circumstances in which the Supreme Court has held that findings of historical fact that are dispositive of a constitutional issue are reviewed de novo, or at least with a tempered degree of deference. *See e.g. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (indicating that actual malice in defamation cases is reviewed de novo).

61. *See e.g. In re Est. of Shumway*, 9 P.3d 1062, 1065 (Ariz. 2000) ("In malicious prosecution and false imprisonment cases, whether probable cause existed in a particular case is a question of law to be determined by the court after the factual basis is determined by the trier of fact.").

62. We sometimes use the word "inference" to describe a conclusion drawn from historical facts. I have avoided using this term, however, because it has another, more specific meaning. As discussed *infra* in Section VI(A), "inference" is more properly used to describe the reasoning that allows a jury to find historical facts based on circumstantial evidence.

Historical facts include not only hard, physical facts, but also a person's subjective mental state.[63] Whether a person intended to strike another is a question of historical fact. Whether a person acted with good faith is a question of historical fact. What a person knew is a question of historical fact. Because the only direct evidence of a person's mental state is her own testimony, however, circumstantial evidence is almost always necessary to prove such historical facts.[64]

By contrast, objective mental states are not historical facts. Deciding whether a person's knowledge or belief was reasonable does not require the decision-maker to determine what happened, but rather to make a judgment about that belief according to unarticulated and often inarticulable community standards. I refer to this kind of judgment call, which might be made by judge or jury depending on the specific issue, as an "evaluative determination." Evaluative determinations are discussed more fully below.[65]

D. Predictive Facts

Sometimes judges and juries are called upon to make predictions. In a personal injury case, the jury might be asked to predict what the plaintiff's future medical needs will be.[66] In a contract case involving lost-profit damages, the jury might have to predict what the plaintiff's business would have earned but for the breach.[67] The former example is a prediction of actual fact: The jury is being asked to determine what is likely to occur in the future. The latter is a hypothetical prediction of what

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63. *See* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1870 (1966); *see e.g. Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 748 (2d Cir. 1998) (indicating that whether parties intended memorandum to be a contract is a question of fact); *In re Kennedy*, 108 F.3d 1015, 1018 (9th Cir. 1997) (holding that intent to defraud is a question of fact); *McCoy v. Mitsuboshi Cutlery, Inc.*, 67 F.3d 917, 924 (Fed. Cir. 1995) (suggesting that whether a party acted in good faith is a question of fact).

64. Weiner, *supra* n. 63, at 1870.

65. *See infra* at Section IV(E).

66. *See e.g. O'Brien v. Thomas Steel Corp.*, 538 N.E.2d 1162, 1166 (Ill. App. 3d Dist. 1989), *overruled on other grounds*, *Voykin v. Est. of DeBoer*, 733 N.E.2d 1275 (Ill. 2000) (characterizing such a prediction as a question of fact).

67. *See e.g. State Off. Sys., Inc. v. Olivetti Corp. of Am.*, 762 F.2d 843, 846 (10th Cir. 1985) (approving lost-profits evidence as presented to jury).

would have happened had the historical facts been different (i.e., the defendant did not breach). Though analytically different from pure questions of historical fact, courts treat predictive issues of both the actual and hypothetical varieties as questions of fact.[68]

But just because an issue appears, by its verbal formulation, to be a question of predictive fact does not mean that it is. In trademark law, for example, "likelihood of confusion" is the critical determination in an infringement claim.[69] On the surface, that issue looks like a question of predictive fact: It asks the jury to predict whether consumers are likely to be confused. For this reason, some courts have considered likelihood of confusion a question of pure fact.[70]

Other circuits call likelihood of confusion a mixed question of law and fact, and among those, some say that it is a mixed question reviewed de novo,[71] while others say that it is a mixed question reviewed deferentially.[72] Under this view, likelihood of confusion does not call for a true prediction of what will or would happen. Rather it is a judgment call regarding whether one mark so closely resembles another that it violates the policies of trademark law. "Likelihood of confusion" is, under that formulation, a shorthand expression for those policy considerations.

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68. *E.g. Tarin v. County of Los Angeles*, 123 F.3d 1259, 1267 (9th Cir. 1997), *superseded by statute*, 38 U.S.C. § 4301 *et seq.* (whether plaintiff would have been promoted "but for" her military service is a question of fact); *State Off. Sys.*, 762 F.2d at 846; *O'Brien*, 538 N.E.2d at 1166; *see also Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 459 (1996) (referring to actual damages as presenting a question of historical or predictive fact).

69. For a discussion about the proper standard of review for likelihood of confusion determinations, *see* Patricia J. Kaeding, *Clearly Erroneous Review of Mixed Questions of Law and Fact: The Likelihood of Confusion Determination in Trademark Law*, 59 U. Chi. L. Rev. 1291 (1992).

70. *See e.g. Keds Corp. v. Renee Intl. Trading Corp.*, 888 F.2d 215, 222 (1st Cir. 1989) (noting application of clearly erroneous standard); *Am. Home Prods. Corp v. Barr Laboratories, Inc.*, 834 F.2d 368, 370 (3d Cir. 1987) (same); *see also* Kaeding, *supra* n. 68, at 1297-98.

71. *See e.g. Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 599 (6th Cir. 1991); *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 715 (Fed. Cir. 1992); *see also* Kaeding, *supra* n. 69, at 1299-1301.

72. *See e.g. E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327, 1338 (9th Cir. 1992), *amended and superseded by* 967 F.2d 1280 (9th Cir. 1992); *see also* Kaeding, *supra* n. 69, at 1297.

E. Evaluative Determinations

To this point, I have alluded to issues that require the decision-maker to exercise judgment and evaluate a person's conduct or a set of circumstances. The most common example is reasonable care in a negligence case. While universally considered a jury question and often labeled a question of fact, it is utterly unlike a question of historical fact.[73] The jury is not being asked to determine what happened or what the defendant did. It is being asked to determine whether the defendant's conduct was reasonable or fell below the invisible line of due care.[74] Of course, the jury may be asked to decide questions of historical fact at the same time it determines whether the defendant acted reasonably, and typically it would not even separate out these very different intellectual exercises.

Two similar issues, which we have already discussed, are probable cause and reasonable suspicion in Fourth Amendment cases.[75] Like negligence, these questions ask the decision-maker to judge a person's actions or decisions according to a community standard.[76] The standard for probable cause, for example, is whether "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[77] But despite their similarity to negligence, the Supreme Court has held that probable cause and reasonable suspicion are reviewed de novo, though it has emphasized that the underlying historical facts are to be reviewed deferentially.[78]

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73. *See* Monaghan, *supra* n. 30, at 232 n. 22 ("In deciding questions of negligence, the jury is called upon to exercise its judgment to formulate a more precise standard by which to evaluate some particular act or omission. Strictly speaking, this task is neither factfinding nor law declaration.").

74. *See* Friedman, *supra* n. 4, at 922:

> Courts might speak of a standard such as "reasonable" as a question of fact. We 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. In a real sense, it makes law—but inarticulate law that is good for one case only.

75. *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996) (holding that a determination of either should be reviewed de novo).

76. *Id.* at 695 ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible.").

77. *Id.* at 696.

78. *Id.* at 699.

This article uses the term "evaluative determination" for issues that—like negligence, probable cause, and reasonable suspicion—require a decision-maker to exercise judgment. Evaluative determinations are found everywhere in the law. Almost any time an issue uses words like "reasonable" or "fair," it calls for an evaluative determination.

For example, one issue in common-law fraud cases is whether the plaintiff reasonably relied on the defendant's misrepresentation.[79] This asks the jury to take a set of historical facts concerning what the plaintiff knew (e.g., the defendant was a known swindler or a used-car salesperson), and then judge the plaintiff's decision to rely on the defendant's representation according to a community standard of reasonableness. Note, however, that reasonable reliance, which is an evaluative determination, is different from actual reliance. Whether the plaintiff actually made a decision to act in a certain way (e.g., buy the car) based on the defendant's misrepresentation is a question of historical fact involving the plaintiff's mental state.

Other examples of evaluative determinations include reasonable accommodation under the Americans with Disabilities Act,[80] materiality in securities fraud cases,[81] proximate causation in tort cases,[82] fair use in copyright cases,[83] and comparative fault in tort cases.[84]

One characteristic of an evaluative determination is that it cannot be refined into a neat set of legal rules. It may be possible to establish rules that apply to certain recurring circumstances; for example, it is negligence per se to run a red light. But the

79. *See e.g. In re Rovell*, 194 F.3d 867, 870-71 (7th Cir. 1999).

80. *See e.g. Wood v. Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994) (pointing out that district court's conclusion regarding whether accommodations are reasonable is reviewed de novo because it involves application of law to undisputed facts).

81. *See e.g. Ieradi v. Mylan Laboratories, Inc.*, 230 F.3d 594, 599 (3d Cir. 2000) (calling materiality a mixed question).

82. *See e.g. Piper v. Bear Med. Sys., Inc.*, 883 P.2d 407, 411 (Ariz. App. Div. 1 1994) ("[P]roximate cause is not merely a finding that there is a connection between defendant's conduct and the injury. It is a legal determination that certain conduct is significant or important enough that the defendant should be legally responsible.").

83. *See e.g. Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994).

84. *See e.g. Williams v. Maritime, Inc.*, 889 So. 2d 1055, 1058 (La. App. 5th Cir. 2004), *writ denied*, 896 So. 2d 72 (La. 2005) ("Like all factual findings the standard of review of comparative fault allocations is that of manifest error.").

infinite variety of circumstances make it necessary that evaluative determinations be made on a case-by-case basis.

When courts speak of mixed questions, they often are referring to evaluative determinations.[85] But the term "mixed" has a double meaning when used in this way. When a court calls an evaluative determination "mixed," it may simply mean that question does not fall neatly into the categories of law or fact. Or it may be referring to the mixture of an evaluative determination with a pure question of fact, such as when the jury must determine what the defendant did, then whether what he did was reasonable. The latter example, while some courts would call it mixed, is more properly called a "compound question" consisting of both a question of historical fact and an evaluative determination.

F. Definition Application

Closely related to evaluative determinations are those issues in which the decision-maker applies a set of historical facts to a term or phrase with legal consequences. Take, for example, the question of whether a suspect was "in custody" so as to be entitled to *Miranda* warnings.[86] Case law has established what it means to be "in custody." While there may be cases in which the definition of "in custody" is an issue that would involve a question of law, in most cases the question is whether the circumstances of a particular suspect's encounter with the police come within the definition of "in custody."[87]

Another example is whether a person is "domiciled" in a given state for purposes of determining diversity jurisdiction.[88] This question naturally turns on a number of historical facts: Where does the person live? Does she live there full-time? Does she work there? What is her subjective mental state with respect

85. *See e.g. Ornelas*, 517 U.S. at 696-97 (addressing probable cause and reasonable suspicion); *Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849, 850 (9th Cir. 1991) (indicating that determination of negligence from established facts is "an exception to the general rule that mixed questions are reviewed *de novo*").

86. *See e.g. U.S. v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003) (whether suspect is in custody is a mixed question reviewed de novo).

87. *See id.* at 528-29.

88. *See e.g. Lew v. Moss*, 797 F.2d 747, 749-50 (9th Cir. 1986) (discussing standard of review for the issue of domicile).

to where she is domiciled? But the ultimate decision requires applying these historical facts to the definition of domicile: the location where the person has established a fixed habitation or abode and where she intends to remain permanently or indefinitely.[89]

I call such issues "questions of definition application" because they require the decision-maker to determine whether a particular set of facts falls within a legal definition. As the domicile example shows, definition application often goes hand in hand with questions of historical fact. But this is not always the case. If the historical facts concerning a person's domicile are undisputed, but a decision still must be made about whether those facts fall within the legal definition of domicile, the question involves only definition application.

Questions of definition application are often confused with questions of legal interpretation,[90] for good reason. There is a fine line between interpreting a statute and asking whether a statute applies to a certain set of facts. But the two types of decisions are different, or, rather, there is a species of definition application that does not involve interpreting the statute. Pure legal interpretation involves refining a legal definition in a way that is generally applicable to all like cases. Definition application involves taking a definition that is already established and applying it to the facts of a specific case.[91]

Take, for example, a trial court's decision, under federal sentencing guidelines, that the defendant's sentence should be enhanced because the victim was "physically restrained."[92] If the issue on appeal is whether the trial court applied the proper standard for what constitutes being physically restrained, then the question involves interpreting the sentencing guidelines, a legal question. But if there is no dispute about the meaning of the term, and the only question is whether the facts of the case

89. *Id.*

90. *See infra* at Section V(C).

91. Of course, both types of issues might be present in the same case. For example, in *Campbell v. Merit Systems Protection Board*, 27 F.3d 1560 (Fed. Cir. 1994), the issue was whether a federal employee who ran for public office was an "independent candidate" within the meaning of the Hatch Act. The court first addressed legal issues raised concerning what "independent" means. It then considered whether the evidence supported the inference that the candidate was not "independent." *Id.* at 1567-69.

92. *See e.g. U.S. v. Stokley*, 881 F.2d 114 (4th Cir. 1989).

fall within the definition, it is a question of definition application.[93]

Questions of definition application arise only where a legal term cannot be refined to the point where the consequence follows automatically from the historical facts. Two separate elements of the tort of negligent infliction of emotional distress illustrate this point. In some jurisdictions, negligent infliction only applies where one person witnesses death or injury to a closely related person and is also within the "zone of danger" such that he might himself have been injured.[94] The definition of "closely related person" can be refined to the point where there is no ambiguity: Courts could hold, for example, that a sibling is a closely related person, but a friend is not.[95] As to this issue, there is no need for definition application. Once the jury determines that the plaintiff was not a sibling of the injured person, a question of historical fact, the legal consequence follows automatically. The same cannot be said of "zone of danger." No matter how many cases attempt to define "zone of danger," there will always be a need to apply that definition to a set of facts unless a court was so obsessed with bright line rules that it required the plaintiff to be within, say, ten feet of the injured person to be deemed within the zone of danger.

The number of questions involving definition application is virtually without limit.[96] Whenever a rule in common or statutory law contains a term or phrase that cannot be mechanically applied based on the historical facts, there is a question of definition application.

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93. The court in *Stokley* framed the issue as a legal question, although it is not clear that this is the case. *See* 881 F.2d at 116.

94. *See e.g. Duke v. Cochise County*, 938 P.2d 84, 87 (Ariz. App. Div. 2 1996) (noting also that the person raising the claim must have suffered physical injury resulting from the shock of seeing the other person injured).

95. *See e.g. Hislop v. Salt River Project Agric. Improvement & Power Dist.*, 5 P.3d 267, 272 (Ariz. App. Div. 1 2000) (plaintiffs could not assert negligent infliction claim for witnessing injury to friend and co-worker).

96. Following are just a few examples: *Prima U.S., Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000) (whether an entity is a "freight forwarder"); *Standard Off. Bldg.*, 819 F.2d at 1373-74 (whether activities amount to "service in connection with" rail transportation); *Melvin v. Commr.*, 894 F.2d 1072, 1074 (9th Cir. 1990) (whether a taxpayer is "at risk"); *Hanes v. Okla.*, 973 P.2d 330, 332 (Okla. Crim. App. 1998) (whether a riverbed is in Indian country).

Questions of definition application are similar to evaluative determinations in that both require applying a term or standard to a set of historical facts. But unlike evaluative determinations, which call on the decision-maker to apply unstated (and sometimes inarticulable) notions of fairness or reasonableness, questions of definition application require the decision-maker to disregard her own notions about what is right and apply the law as it has been defined. For example, a juror deciding a negligent infliction of emotional distress case might well think that a mother who witnessed her son's death from a safe distance is just as deserving of recovery as one who witnesses it from two feet away. But she must apply the term "zone of danger" as the cases have defined it.

Many of the questions courts call mixed are questions of definition application.[97] But the term suffers from the same ambiguity in this context as it does with respect to evaluative determinations. A court might label such a question mixed because it does not qualify easily as either law or fact, or it might label the question mixed because it is inextricably intertwined with other issues.

G. Prescriptive Determinations

Up to this point, we have discussed questions concerning what happened (historical facts), what will happen (predictive facts) and what would have happened (also predictive facts), as well as much different questions concerning how to evaluate or categorize what happened. The next category consists of decisions about what should happen.

Prescriptive determinations require the decision-maker to prescribe some future result. Such questions are often remedial, such as when a judge crafts an injunction or fixes the terms of a divorce decree, or when a jury determines the amount of emotional distress damages the defendant must pay the plaintiff. They may also be retributive, such as when a jury assesses punitive damages or a judge sentences a criminal defendant.

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97. *See e.g. Standard Off. Bldg.*, 819 F.2d at 1374 (indicating that whether a party's activities constitute service "in connection with" rail transportation is a mixed question); *Campbell v. Merit System*, 27 F.3d at 1565 (indicating that whether person was an "independent candidate" under the Hatch Act considered a mixed question).

Although always grounded on findings of historical fact, prescriptive determinations are not themselves empirical. Anytime the court is being asked to do something rather than to find something, the issue is prescriptive.

While many damages determinations are prescriptive, not all are. When the jury determines the amount of an injured person's medical expenses, it is making a determination of historical fact as to which the law prescribes the result that the liable defendant shall pay those damages.[98] But when the jury decides the amount of pain and suffering damages, the question is prescriptive since it involves only a determination of what the defendant should pay the plaintiff.

The law concerning who makes what prescriptive determinations is fairly well established, and consequently, review of prescriptive determinations generates little controversy. Judges issue injunctions, and their decisions are reviewed for abuse of discretion.[99] Juries award emotional distress damages, and their decisions are reviewed deferentially.[100] One prescriptive determination that has recently caused controversy, however, is punitive damages. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[101] a divided Supreme Court held that the constitutionality of punitive damages awards would be reviewed de novo.[102]

A prescriptive determination can depend on predicate questions of historical fact, evaluative determinations, or questions of definition application. For example, a jury deciding how much to award for pain and suffering must first decide questions such as whether the plaintiff really hurts as much as she says, or can still go bowling like she used to. Or a judge deciding whether to grant a preliminary injunction must first decide whether the applicant will suffer irreparable injury, a question that is both predictive (will there be injury?) and evaluative (will the injury be irreparable?).

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98. This question of historical fact is usually accompanied by an evaluative determination concerning whether the medical expenses incurred were reasonable.

99. *See e.g. S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001).

100. *See e.g. Adkins v. Asbestos Corp.*, 18 F.3d 1349, 1351 (6th Cir. 1994).

101. 532 U.S. 424 (2001).

102. *Id.* at 440.

H. Questions of Judicial Administration

The next issue-type includes the countless decisions judges make in the administration of a case. These range from ministerial matters like whether to grant a trial continuance or permit a party to exceed the page limit,[103] to more meaty decisions like whether to grant leave to amend or whether to order a new trial based on juror misconduct.[104] The defining characteristic of questions of judicial administration is that they involve a balancing of efficiency and fairness considerations. For this reason, the trial court has substantial discretion over such matters.

Questions of judicial administration can depend on findings of historical fact or questions of legal interpretation. For example, a court deciding whether to grant a new trial for jury misconduct would first have to determine exactly what the juror did.[105] Or a court deciding whether to grant a motion to amend might have to determine whether the amendment would be futile because the proposed new claims are legally insufficient.[106] Of course, whether the trial court properly interpreted the law in making such a discretionary determination is a question of law.[107]

Evidentiary issues are usually questions of judicial administration because they involve a balancing of probative value and prejudice, as well as efficiency considerations.[108]

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103. *See e.g. Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (granting of a trial continuance is within the trial court's discretion); *FDIC v. Schreiner*, 892 F. Supp. 848, 851 (W.D. Tex. 1995) (extending page limit is within the trial court's discretion).

104. *See e.g. Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999) (whether to permit amendment is reviewed for abuse of discretion); *State v. Gabalis*, 924 P.2d 534, 539 (Haw. 1996) (whether to grant a new trial for juror misconduct is reviewed for abuse of discretion).

105. *See e.g. Gabalis*, 924 P.2d at 540.

106. *See e.g. Gohier*, 186 F.3d at 1218 (whether amendment would be futile is reviewed de novo).

107. *See e.g. Curtis v. Shalala*, 12 F.3d 97, 99 (7th Cir. 1993).

108. *See e.g. U.S. v. Blue Bird*, 372 F.3d 989, 991 (8th Cir. 2004) ("Some rules require a balancing of how particular evidence might affect the jury, and we properly accord deference to the trial judge on such questions.").

Again, however, if the evidentiary question turns on the proper interpretation of a rule, that legal ruling is reviewed de novo.[109]

I. Sufficiency Review

The final category, sufficiency review, requires a sort of mental gymnastics unique to judicial decision-making. When a trial court decides a motion for summary judgment or for judgment as a matter of law, it often must decide whether the evidence is sufficient to allow the jury to make a particular finding. The unspoken assumption is that if the jury made a finding that is not supported by the evidence, it either was acting irrationally or made its decision based on something other than the evidence properly considered on that point.

Questions of sufficiency review are made by the trial court in the first instance and reviewed de novo by appellate courts, meaning that the appellate court decides the question exactly the same way the trial court did.[110] But sufficiency review is itself a deferential task: The question is whether any reasonable jury could find for the party opposing the motion.[111] Thus, an appellate court reviewing the denial of a motion for judgment as a matter of law technically reviews it de novo, but is engaging in a deferential exercise, since the underlying question calls for deference to the trier of fact.

Frequently, a motion for summary judgment or judgment as a matter of law will raise both questions of sufficiency review and questions of law. Such motions require the court to engage in a two-part exercise. First, it makes a ruling on the legal issue. Then, applying the appropriate legal standard, the court

109. *See id.* ("But a district court's interpretation and application of most rules of evidence are matters of law.").

110. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1252-54 (11th Cir. 2003), *cert. denied*, 540 U.S. 1182 (2004). For more on the constitutional limits of sufficiency review in federal court, see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), and *Hetzel v. Prince William County*, 523 U.S. 208 (1998).

111. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that a fact dispute is genuine if the evidence is such that a reasonable jury could find for the non-moving party).

determines whether the evidence is sufficient to allow the jury to find for the non-movant under that standard.[112]

Sufficiency review becomes tricky when the underlying jury issue is an evaluative determination or a question of definition application. The basic question is the same: Could a reasonable jury answer the question in favor of the party opposing the motion? But the distinction between sufficiency review and a pure question of law starts to blur. When a judge rules that no reasonable juror could find that the undisputed historical facts (or the historical facts that reasonably could be found) meet a certain statutory standard, she is effectively making a legal determination concerning the meaning of that standard.[113]

V. UNMIXING THE MIXED QUESTIONS

A. What Is a Mixed Question?

It is admittedly odd to ask what a mixed question is this far into an article supposedly about mixed questions. But only now that we have picked apart and sorted through various issue-types that judges and juries confront are we ready to answer the question. The vast majority of times when courts call a question "mixed" they are referring to either: (1) an evaluative determination, (2) a question of definition application, (3) a pure question of law involving the interpretation of a legal standard or (4) a compound question. Each of these so-called "mixed

112. The dual nature of this exercise is reflected in the standard for summary judgment. *See* Fed. R. Civ. P. 56(c) (available at http://uscode.house.gov) (summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law).

113. Holmes described this as follows:

> The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should.

Oliver Wendell Holmes, *The Common Law* 120-21 (Little, Brown & Co. 1923).

questions" warrants different treatment on appeal. Each is discussed below.

But what about "application of law to fact," which is how many cases and commentators describe mixed questions?[114] I prefer to avoid that term because it is ambiguous. Sometimes it refers to an evaluative determination.[115] Sometimes it refers to a question of definition application.[116] And sometimes it refers to a pure question of law involving legal interpretation.[117] The ambiguity of the term "law application" only contributes to the confusion surrounding mixed questions.

B. Evaluative Determinations

As we have seen, evaluative determinations involve the judging of a person's conduct or belief. This is typically done by applying a standard like "reasonable" or "fair" that conveys to the decision-maker that he or she is judging according to a community standard.[118] What is confusing about evaluative determinations, however, is that they are sometimes reviewed deferentially, as in the case of negligence, and sometimes de novo, as in the case of probable cause. Yet there is no analytical way to distinguish between these categories. For example, it cannot be said that negligence is "more factual" than probable cause or that fact issues are more predominant in deciding questions of negligence. Negligence is reviewed deferentially

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114. *See e.g. Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982) (describing mixed questions as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated"); *Melvin v. Commr.*, 894 F.2d 1072, 1074 (9th Cir. 1990) ("The application of the law to the undisputed facts is reviewed de novo."); Monaghan, *supra* n. 30, at 234.

115. *See e.g. U.S. v. Townsend*, 305 F.3d 537, 541 (6th Cir. 2002) (application of legal principles surrounding the nature of reasonable suspicion to the facts observed by an officer is a mixed question reviewed de novo).

116. *See e.g. U.S. v. Browne*, 318 F.3d 261, 266 (1st Cir. 2003), *cert. denied*, 540 U.S. 901 (2003) (application of the term "obstruction of justice" to the facts of the case is a mixed question).

117. *See e.g. U.S. v. Doremus*, 888 F.2d 630, 632 (9th Cir. 1989) ("The questions presented involve the construction of federal law and its application to essentially undisputed facts, and therefore they are reviewed *de novo*.").

118. This often means the community in general, as in a negligence case. Or it can mean the standard of a more specifically defined community, as in a professional malpractice case.

even when the facts are undisputed, and probable cause is reviewed de novo even when the police evaluated a large number of facts in determining that they had probable cause.

The rule could have been that all evaluative determinations are reviewed deferentially, or all reviewed de novo. But that is not the path our courts have taken. Rather, the Supreme Court's "policy approach"[119] prevails: Review of an evaluative determination is based on a policy choice concerning the judicial actor better positioned to decide a particular issue.[120] We have already seen how this approach plays out with respect to negligence and probable cause. Now let's look at some other examples.

In *Pierce v. Underwood*,[121] the Supreme Court considered the proper standard of review for a trial court's award of attorneys' fees under the Equal Access to Justice Act. The relevant provision says that fees shall be awarded "unless the court finds that the position of the United States was substantially justified."[122] This is a classic evaluative determination requiring the trial judge to decide whether the government's position was justified. To be sure, the trial court might also have to find facts (e.g., what did the government know when it took that position?), and might have to decide what the prevailing law is. But its ultimate decision is whether the government's position was reasonable to take. The Supreme Court in *Pierce* reviewed the reasons why a trial judge or appellate court might be best equipped to make that particular judgment, and held that review would be deferential:

> We think that the question whether the Government's litigating position has been "substantially justified" is precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop.[123]

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119. *See supra* at text accompanying nn. 32-39. *See also e.g. Miller v. Fenton*, 474 U.S. 104 (1985).

120. *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991).

121. 487 U.S. 552 (1988).

122. 28 U.S.C. § 2412(d)(1)(A) (available at http://uscode.house.gov).

123. 487 U.S. at 562.

"Reasonable accommodation" under the Americans with Disabilities Act offers another example.[124] In determining whether an accommodation is reasonable, the court considers, among other things, its cost and the availability of alternatives. This makes it an evaluative determination. While some courts have determined that this decision is best made by the trier of fact,[125] others conclude that it should be reviewed de novo.[126] The basis for this choice, though courts rarely express it, is a policy conclusion that the purposes of the ADA are best served by having the issue decided by one judicial actor (the jury) or another (the appellate court).

"Fair use" in copyright law is an evaluative determination that requires application of the four factors set forth in 17 U.S.C. § 107,[127] which provide guidance, but are themselves subject to judgment and interpretation. They are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[128] The Supreme Court has made clear that fair use must be determined based on the unique circumstances in each case.[129] Nonetheless, that determination is reviewed de novo.[130] This suggests a policy choice that judges are better equipped than juries to decide whether a use is fair.

Happily, most evaluative determinations are recurring. Thus, once the standard by which they are reviewed is established, there is no need to undertake a policy analysis each time the issue comes up. In fact, re-determining the standard of review on a case-by-case basis would rob standard-of-review

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124. *See e.g. Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994); *Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994).

125. *E.g. Wood*, 25 F.3d at 669.

126. *E.g. Pandazides*, 13 F.3d at 833.

127. *Acuff-Rose*, 510 U.S. at 577-78.

128. 17 U.S.C. § 107 (available at http://uscode.house.gov).

129. *Acuff-Rose*, 510 U.S. at 578 n. 10.

130. *New Era Publications Intl. ApS v. Carol Publg. Group*, 904 F.2d 152, 155-56 (2d Cir. 1990) (characterizing appropriate standard of review as "wide-ranging"); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).

jurisprudence of any semblance of consistence or objectivity. The only way the policy approach makes sense is if standard of review is determined on an issue-by-issue basis.

C. Questions of Definition Application, and Distinguishing Them from Questions of Law

Questions of definition application are similar in that some are reviewed deferentially and some de novo. But the confusion concerning these questions usually has more to do with what question is being asked than with how that question is reviewed. The critical and first inquiry is whether the issue is a true question of definition application that involves applying historical facts to a known legal standard, or a question of law concerning the interpretation of that standard.

The example we discussed above concerning negligent infliction of emotional distress illustrates this distinction.[131] The "zone of danger" element is about as refined as it can get, so that whether a particular person was in the zone of danger is going to depend on the facts and circumstances of that case. A court might rule as a matter of law that someone in the next county can never be within the zone of danger, but there will always be close calls for the jury to decide. This is a true question of definition application because it involves applying known facts to a known standard that cannot be further refined.

Contrast this with the requirement that the plaintiff be related to the injured person. It is quite possible to draw bright lines as to this element: e.g., brothers are related, friends are not; spouses are related (perhaps fiancés too), but girlfriends and boyfriends are not. A true question of definition application likely would not arise with respect to this element. The question would almost always be one of law.

Let's take some other examples from the case law. In *Harris v. Forklift Systems, Inc.*,[132] the Supreme Court was asked to review a trial court's determination that an employer's conduct did not amount to an "abusive work environment" under Title VII. This typically would be a question of definition

131. *See supra* at text accompanying nn. 94-95.

132. 510 U.S. 17 (1993).

application because it involves applying historical facts (i.e., what did the employee's supervisors do?) to the legal standard of what constitutes an "abusive work environment." But the question in *Harris* was not just whether the trial court reached the right result under an established standard; it was whether the trial court applied the right standard in the first place.[133] The Court held that it did not, and therefore reversed.[134]

Though the Court did not expressly state the standard of review, its review was clearly de novo. But the Court did not itself determine whether the work environment in that case was abusive, as it would have if the underlying question of definition application were reviewed de novo. Instead, the Court remanded the case to the trial court.[135] It did this because, while clarifying the meaning of "abusive work environment" was a question of law, deciding whether the proper standard applies on the facts of the case is for the trier of fact.[136]

In the Second Circuit's *Panalpina* case,[137] the court reviewed a trial court's determination after a bench trial that a party was a "freight forwarder" under the Carriage of Goods by Sea Act. "We apply a de novo standard in this case," the court noted, "because the question whether an entity is a freight forwarder is a mixed question of law and fact."[138] But there is nothing mixed about the court's analysis:

> Unlike a carrier, a freight forwarder does not issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped. . . . As long as the freight forwarder limits its role to arranging for transportation, it will not be held liable to the shipper. . . . Panalpina did not issue a bill of lading and it did not consolidate cargo. It was hired by Westinghouse simply as a freight forwarder.[139]

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133. *Id.* at 21-23.

134. *Id.* at 23.

135. *Id.*

136. *See Harris v. Parker College of Chiropractic*, 286 F.3d 790, 794 (5th Cir. 2002) ("Challenges to a district court's finding of hostile work environment and constructive discharge are typically treated as factual questions, subject to a 'clearly erroneous' standard of review.").

137. *Prima U.S., Inc. v. Panalpina, Inc.*, 223 F.3d 126 (2d Cir. 2000).

138. *Id.* at 129.

139. *Id.* (citations omitted).

This passage involves the purely legal exercise of defining the term "freight forwarder." Once the court defined the term, there was no real question that it did not apply.

The issue in *Campbell v. Merit Systems Protection Board*[140] was whether a federal employee who ran for public office was an "independent candidate" within the meaning of the Hatch Act. The employee raised a purely legal issue: whether her registration as an independent automatically made her "independent" under the Act. The court held that it did not.[141] Having disposed of the legal issue, the court then held that whether any particular candidate qualifies as independent is a case-specific question on which it will defer to the trier of fact.[142] This latter issue is a question of definition application.

A final example is *Standard Office Building Corp. v. U.S.*,[143] which concerned whether, for tax purposes, a company performed services "in connection with" rail transportation. That question, the court noted, "is the kind of 'mixed' question of fact and law (really, the application of a legal standard to facts) that, in this circuit at least, is governed by the clearly-erroneous standard."[144] It thus characterized the issue as one of definition application. Having done that, however, the court proceeded to review the issue de novo on the ground that the parties had all asked the court to do so, and therefore waived their right to jury trial on the issue.[145]

From these cases, it is apparent that the most important task in reviewing a question of definition application is to ask what is being asked. Is the issue whether to adopt a rule of law that will refine the definition in a way generally applicable to other cases? Or is it simply whether the facts of a particular case fall within the definition? If the former, it is a pure question of law and calling it "mixed" simply confuses the issue.

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140. 27 F.3d 1560 (Fed. Cir. 1994).

141. *Id.* at 1568.

142. *Id.* at 1567 ("[W]e hold that the mixed question of 'independent candidate' must be placed in the category of fact for purposes of judicial review.").

143. 819 F.2d 1371 (7th Cir. 1987).

144. *Id.* at 1374.

145. *Id.* The idea that the parties can change the standard of review by stipulation (or waiver) is a strange one. Waiver of a jury trial typically means that the trial judge resolves the issue; it does not necessarily mean that the appellate court reviews that resolution de novo.

If the issue is a true question of definition application, the court then must decide how that issue is reviewed. In this respect, questions of definition application are like evaluative determinations; the standard of review depends on a policy choice concerning which judicial actor is best equipped to decide the issue. The D.C. Circuit has suggested that the "mine run of mixed questions" should be reviewed deferentially, and this makes sense for questions of definition application.[146] The Seventh Circuit reached a similar conclusion, noting that such questions are reviewed for clear error "except in those few, mainly constitutional cases in which the Supreme Court has decreed plenary review."[147] This is both because case-specific questions of definition application are unlikely to recur, thus not implicating appellate courts' role in ensuring the law's uniformity and consistency,[148] and because "the court that finds the facts will know them better than the reviewing court will, and so its application of the law to the facts is likely to be more accurate."[149]

This approach is sound. Only in the rare case, where strong countervailing policy considerations exist, should a question of definition application be reviewed de novo. More critically, the standard of review should, as with evaluative determinations, be made on an issue-by-issue basis, rather than case by case.

One final issue needs to be addressed in connection with questions of definition application, and that is the relationship among that type of issue, pure questions of law, and sufficiency review. Where a trial court (or jury) has resolved a question of definition application and the issue is whether the evidence is sufficient to support that resolution, the line between sufficiency review and a question of law is thin. To illustrate, take the question of whether a company has performed services "in connection with" railroad transportation, which is a question for

146. *Barbour v. Browner*, 181 F.3d 1342, 1345 (D.C. Cir. 1999).

147. *Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002).

148. *Mucha v. King*, 792 F.2d 602, 606 (7th Cir. 1986); *see also Campbell v. Merit Sys. Protection Board*, 27 F.3d 1560, 1566 (Fed. Cir. 1994) ("[M]ost of the Hatch Act cases will be sui generis, presenting unique combinations of numerous specific episodes. . . . Such case-specificity severely limits the scope of any one decision's precedential relevance.").

149. *Thomas*, 288 F.3d at 307-08.

the trier of fact.[150] Assuming the facts are undisputed (or construing the facts in a light most favorable to sustaining the trial court's resolution), the appellate court's task is to decide whether a reasonable finder of fact could conclude that the company's services were "in connection with" railroad transportation. In making that determination, however, the appellate court will rule that certain historical facts do or do not satisfy the "in connection with" standard as a matter of law. Should another similar case come along, that decision (assuming it is published) will have precedential value. In engaging in sufficiency review of a question of definition application, the court has created law.

D. Compound Questions

Evaluative determinations and questions of definition application are mixed in the same sense: They are single issues that are neither questions of historical fact nor questions of law. Compound questions, however, are completely different. They are mixed because they consist of multiple sub-issues which may be questions of law, fact, or otherwise.

The simplest example is in a negligence case when the jury must determine both what happened and whether, in light of the facts it found, the defendant exercised reasonable care. Since both questions are reviewed deferentially, the compound nature of this question never causes any difficulty.[151] The same cannot be said about probable cause, which is reviewed de novo, but which is based on historical facts that should be reviewed with deference.[152] As to this issue, it is critically important to separate the evaluative determination from the underlying historical facts.

The problem with labeling a compound question "mixed" is that there is a tendency to slap on a single label—"this court reviews mixed questions de novo"—and then proceed to review

150. *Standard Off. Bldg. Corp.*, 819 F.2d at 1373-74.

151. *See* Holmes, *supra* n. 113, at 129: "The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination."

152. *See e.g. U.S. v. Perkins*, 348 F.3d 965, 969 (11th Cir. 2003) (when reviewing a motion to suppress, the court reviews findings of fact under the clearly erroneous standard and the determination of probable cause de novo).

the entire case according to that standard even if there are various sub-issues subject to a different standard of review. The following quotation illustrates this mistake:

> Most of the trial court's findings are mixed questions of law and fact or are legal conclusions which we are free to evaluate unrestricted by the rule compelling us to construe the evidence most favorably to support the judgment. . . . [I]f the facts are undisputed, we may ignore the trial court's findings and substitute our own analysis of the record. This principle applies whether the record consists of pleadings, documents, affidavits and stipulations. . . . or the testimony of parties and witnesses.[153]

The suggestion that labeling a question mixed eliminates the need to defer to the trial court's findings is wrong. Just because the question before the court involves some legal questions does not mean the standard of review changes as to issues that would otherwise be reviewed deferentially.

This problem usually arises because the various sub-issues that make up the compound question are not separated from one another. Take, for example, a copyright case in which the trial court held that the defendant's use of copyrighted material did not constitute "fair use," but did not make any express findings of historical fact to support that determination. Fair use is an evaluative determination reviewed de novo,[154] but the underlying findings of fact are reviewed deferentially. Assuming that the evidence was conflicting—that is, the parties disputed the manner in which the defendant was using copyrighted material—how would an appellate court review the determination?

The court could review the determination of fair use de novo while viewing the historical facts in a light most favorable to sustaining the ruling and assuming that the trial court found all historical facts necessary to its decision.[155] Alternatively, the

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153. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 412 P.2d 47, 51 (Ariz. 1966) (citations omitted); *see also e.g. Phillips v. Fox*, 458 S.E.2d 327, 332 (W. Va. 1995) ("[W]e review the trial court's findings of fact following a bench trial, including mixed fact/law findings, under the clearly erroneous standard. If the trial court makes no findings . . . no deference attaches to such an application.").

154. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).

155. *See e.g. U.S. v. Ins. Consultants of Knox, Inc.*, 187 F.3d 755, 759 (7th Cir. 1999) ("Whether enforcement of the summons would violate Miller's Fifth Amendment privilege

court could hold that the trial court erred by failing to make explicit findings of historical fact and remand the case so that the trial court could make those findings.[156] The latter route would essentially be a legal ruling that, as to that issue, express findings of historical fact are required in order to permit adequate de novo review of the fair use determination.[157] What the court should not do is review the entire fair use question de novo, historical facts and all, simply because the trial court did not adequately separate the sub-issues from one another.

To illustrate, let's take the *Tovrea Land and Cattle* case,[158] which is quoted above.[159] After a bench trial, the trial court issued findings and conclusions in which it ruled that directors of a corporation breached their fiduciary duties by utilizing corporate opportunities for their own benefit. Finding the issues on appeal to be "mixed," the appellate court felt free to review the whole thing de novo.[160] It then engaged in an extensive review of the facts and reached its own conclusion—contrary to the trial court's finding—that the directors did not improperly compete with the corporation.[161] By characterizing the dispositive question as mixed, the court was able to

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against compelled self-incrimination is a mixed question of law and fact. . . . We review the district court's factual findings for clear error and the application of law to those facts de novo.") (citation omitted); *Josey v. State*, 981 S.W.2d 831, 837 (Tex. App., 14th Dist. 1998) ("If the trial court does not file findings of fact and conclusions of law, an appellate court presumes the trial court made findings necessary to support its ruling so long as those implied findings are supported by the record.").

156. *See e.g. U.S. v. Osum*, 943 F.2d 1394, 1401-02 (5th Cir. 1991) (when reviewing evidentiary decision under Federal Rule of Evidence 404(b), court may make a limited remand to allow trial court to make express findings in support of its ruling); *Cadle Co. v. McKernan*, 207 B.R. 971, 974-75 (D. Mass. 1997) ("[I]f the record does not disclose the reasoned basis for the [discretionary] sanction, this court may remand for a statement of reasons sufficient to enable this court to review the decision under the applicable standard of review.").

157. *See e.g.* Fed. R. Civ. P. 52(a) (available at http://uscode.house.gov). Some, but not all, determinations by a trial court require findings of fact to be express. *See e.g. Frame v. S-H, Inc.*, 967 F.2d 194, 203-04 (5th Cir. 1992); *Tex. Instruments, Inc. v. Hyundai Elec. Indus. Co.*, 50 F. Supp. 2d 619, 622 (E.D. Tex. 1999).

158. 412 P.2d 47 (Ariz. 1966).

159. *See* text accompanying n. 153.

160. *Tovrea Land & Cattle Co.*, 412 P.2d at 51.

161. *Id.* at 52-59.

talismanically cite the rule that mixed questions are reviewed de novo and so avoid any deferential review.[162]

What the court should have done was parse the larger issue—Did the directors seize business opportunities of the corporation for their own benefit?—into its component sub-issues. The first sub-issue would involve historical facts, i.e., what was the trial court's finding about what the directors did? Assuming that the evidence was conflicting, the court would have to resolve all other issues while viewing the historical facts in the light most favorable to sustaining the trial court's ruling. Second, the court might have to make a legal determination of what it takes to prove that a director improperly seized a corporate opportunity. In this case, it held that "[t]he 'business opportunity' doctrine holds that a director or officer may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities in which it has an interest or prior claim."[163] The court might also ask whether the case involved any questions about what terms like "detriment of the company" or "business opportunities" mean, which would be legal issues. Finally, assuming that those terms are as defined as they can get, the court would ask whether their application to the facts of the case—a question of definition application—is something that the trial court or the appellate court is better positioned to do.

This seems like a cumbersome exercise, but it need not be. Assuming that the application of "business opportunities" is reviewed deferentially, the court would simply ask whether the evidence, viewed in a light most favorable to sustaining the judgment, supports the trial court's determination that a certain transaction amounted to a business opportunity. Or if the court ruled that the application of that term is reviewed de novo, it would determine itself whether the facts showed a business opportunity, again viewing the facts in a light most favorable to sustaining the judgment. What the court should not do is use the "mixed question" label as a justification for de novo review of what would otherwise be questions for the trier of fact.

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162. It may be that the court just found the evidence in the record insufficient to justify the trial court's findings. But its analysis and citation of the standard of review suggests the court was not deferring to the trial court's findings.

163. *Id.* at 57 (citation omitted).

The Seventh Circuit case of *Maynard v. Nygren*[164] illustrates the proper handling of a compound question. The issue there was whether the trial court properly dismissed a lawsuit as a discovery sanction. The court noted that discovery sanctions are typically reviewed for abuse of discretion, which makes the issue (to use the vocabulary of this article) a question of judicial administration.[165] But the court went on to note that the trial court's factual findings—what the party did to warrant sanctions—are reviewed for clear error, while plenary review is warranted to the extent that the court made a legal error in applying its discretion.[166] Holding that the trial court applied the wrong legal standard in entering discovery sanctions, the court remanded for a re-determination under the proper standard.[167] Had the court held that the trial court utilized the correct standard, it would have reviewed the trial court's decision for abuse of discretion, viewing the historical facts in a light most favorable to sustaining the decision.

When, as in *Maynard*, the court holds that the trial court's ruling was "tainted" or "infected" by legal error,[168] it means (1) that the trial court made a decision on a question that usually would be reviewed deferentially—possibly an evaluative determination, a question of definition application, a prescriptive determination, or a question of judicial administration—and (2) that it is apparent from the record that the trial court applied an erroneous legal principle in making that decision.[169] Courts occasionally suggest that, when the trial court makes factual findings under an erroneous view of the law, the appellate court can review the whole thing de novo.[170] Again, this is wrong. The proper remedy is to reverse, issue an opinion that enunciates the

164. 332 F.3d 462 (7th Cir. 2003), *cert. denied*, ___ U.S. ___, 125 S. Ct. 865 (2005).

165. *See supra* at Section IV(H).

166. *Maynard*, 332 F.3d at 468.

167. *Id.* at 469.

168. *Id.* at 468; *see also e.g. Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 94 F.3d 376, 380 (7th Cir. 1996) (court reviews the trial court's findings and conclusions for signs that its application of the law was infected with legal error).

169. *Maynard*, 332 F.3d at 468.

170. *See e.g. In re Auclair*, 961 F.2d 65, 69 n. 7 (5th Cir. 1992) ("Factual findings made under an erroneous view of the law are not binding on the appellate court."); *Valley Improvement Assn., Inc. v. U.S. Fidelity & Guar. Corp.*, 129 F.3d 1108, 1123 (10th Cir. 1997) ("The reviewing court is not bound by the clearly erroneous standard when the trial court has based its findings on an erroneous view of the law.") (citations omitted).

correct legal standard, and remand to the trial court to make a new determination in light of the correction.[171]

VI. SPECIAL PROBLEMS

A. Terms That Confuse: Inferences, Ultimate Facts, and Conclusions

By now, it should be clear that the term "mixed question" often serves more to confuse than to clarify.[172] There are other terms as well that cause confusion when used in connection with mixed questions. One such term is "inference," which is sometimes used to describe an evaluative determination or question of definition application.[173] For example, in a negligence case, the court might distinguish between the jury's findings of historical fact (e.g., the driver was exceeding the speed limit and changed lanes twice) and the "inference," based on those facts, that the driver was negligent.

The term "inference" should be avoided in this context because it confuses what is clearly an evaluative determination with another use of the term. Inference more properly refers to the finding of a historical fact based on circumstantial evidence. To use our automobile accident example, the jury might have evidence of skid marks and automobile damage and from that evidence draw an inference that the driver exceeded the speed limit. This is different from the evaluative determination—

171. *See e.g. Himes v. Safeway Ins. Co.*, 66 P.3d 74, 84 (Ariz. App. Div. 1 2003) (where trial court applied the wrong legal standard, remand for new findings was necessary). This is true unless the court of appeals determines that, under a correct interpretation of law, the evidence would not support the trial court's determination. *See e.g. Dorr-Oliver*, 94 F.3d at 384. Ironically, when express findings are not required, the trial court best insulates itself from appellate review by saying as little as possible, because the appellate court will presume that it made all reasonable findings necessary to its disposition. If the trial court makes express findings and conclusions, but is not required to, a clearly erroneous finding or an incorrect conclusion of law will be cause for reversal.

172. *See ASCAP v. Showtime/Movie Channel, Inc.*, 912 F.2d 562, 569 n. 11 (2d Cir. 1990) (noting that the phrase mixed question "does not aid in identifying the appropriate standard of appellate review").

173. *See e.g. Suzy's Zoo v. Commr.*, 273 F.3d 875, 878 (9th Cir. 2001) ("The Tax Court's finding that Appellant is a 'producer' under I.R.C. § 263A is an ultimate inference from undisputed facts and is thus a mixed question of law and fact reviewed de novo.").

which might also be called an "inference"—that the driver's excessive speed breached the duty of due care.

The term "conclusion" is sometimes used in the same way. For example:

> None of the underlying facts in this case are in dispute. Rather, the parties' dispute relates to the conclusion that should be drawn from the underlying facts—"whether the facts satisfy the statutory standard" for self-employment tax.... This is a mixed question of law and fact, reviewable de novo.[174]

In this quote, "conclusion" refers to a question of definition application. But that term is ambiguous as well. It can mean the conclusion a jury reaches when it finds historical facts. Or it can mean the conclusion a court reaches when, applying principles of statutory construction, it decides the proper interpretation of a statute. This term, too, should be avoided.

Also confusing is the term "ultimate fact," which is sometimes used to refer to an evaluative determination that is dispositive in the case. For example:

> The final logical step in the adjudicative decisional process is found in the application of the relevant general legal principles to the historical facts found. This process produces findings of ultimate fact, such as the determinations that defendant's employee was negligent and was acting within the scope of his or her employment. Ultimate facts, because they combine elements of law and fact, do not fit nicely within the law/fact dichotomy.[175]

The problem with using "ultimate fact" in this sense is that it is not the ultimate quality of the issue that dictates the standard of review, but its nature.[176] An evaluative determination may

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174. *Milligan v. Commr.*, 38 F.3d 1094, 1097 (9th Cir. 1994) (citation omitted).

175. Louis, *supra* n. 13, at 994 (footnote omitted); *see also e.g. Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003) ("A district court's findings of ultimate facts, based upon the application of legal principles to subsidiary facts, are also subject to *de novo* review.") (citation omitted); *Colo. St. Bd. of Dental Examiners v. Major*, 996 P.2d 246, 248 (Colo. App. Div. 2 1999) ("Ultimate facts are 'conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties.' As a general rule, ultimate facts are phrased in the language of the controlling statute or legal standard.") (citation omitted).

176. *See e.g. Miller v. Fenton*, 474 U.S. 104, 113 (1985) (an issue does not lose its factual character merely because it is the ultimate constitutional issue). The *Miller* Court cites *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979), for the proposition that

well be the ultimate issue in a case, as it is in negligence cases. But there are evaluative determinations that are not ultimate, like reasonable reliance in a fraud case. And there are ultimate issues that are not evaluative, such as intent to discriminate in an equal protection case.[177] Even a question of historical fact may be the ultimate issue in a case if that fact is dispositive.

B. Constitutional Facts

Much has been written about "constitutional facts," or those issues that normally would be reviewed deferentially but which, because of their constitutional implications, are reviewed de novo.[178] There is no need to repeat that discussion here except to point out how constitutional facts fit into the framework set forth in this article. When we look at so-called questions of constitutional fact we see that they are, for the most part, either evaluative determinations or questions of definition application. As discussed above, these issue-types are sometimes reviewed deferentially, sometimes de novo. Questions of constitutional fact are just evaluative determinations or questions of definition application that the Supreme Court has decided, for reasons of constitutional policy, should be reviewed de novo.

This explains probable cause and reasonable suspicion, which the Supreme Court held in *Ornelas v. U.S.*[179] to be questions for the court. The Court pointed out that probable cause and reasonable suspicion cannot be reduced to a neat set of rules, but rather "are fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."[180] This makes them evaluative determinations, very much like reasonable care in a negligence case. But unlike negligence, probable cause and reasonable suspicion are constitutional terms that define the scope of a suspect's Fourth

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intent to discriminate—clearly a question of historical fact—is reviewed deferentially even though it is the ultimate issue in an equal protection claim.

177. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

178. For more detailed discussions of constitutional facts, see, for example, Monaghan, *supra* n. 30, and Louis, *supra* n. 13, at 1029-32.

179. 517 U.S. 690, 691 (1996).

180. *Id.* at 696 (citations omitted).

Amendment rights. "Independent review," the court concluded, "is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[181] It is also necessary to ensure, as much as possible, uniformity of application.[182] In other words, if juries decided probable cause and reasonable suspicion, then the extent of one's constitutional rights could vary according to the whims of any given group of twelve citizens.

Obscenity offers another example. In *Jacobellis v. Ohio*,[183] the Supreme Court held that courts must review de novo whether materials are "obscene" and so exempt from First Amendment protection.[184] The case is less famous for that holding, however, than for Justice Stewart's "I know it when I see it" description of obscenity:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[185]

So described, obscenity is a question of definition application. It is a term that cannot be defined with perfect specificity, but must be applied case by case. Such a question would normally be for the jury.[186] But just like probable cause, the need to ensure uniform application of constitutional rights justified making the question one for the court.[187]

These cases make perfect sense. They stand for the unremarkable proposition that certain evaluative determinations and questions of definition application are, due to their constitutional dimension, better left to judges than juries.[188] But

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181. *Id.* at 697 (citation omitted).

182. *Id.* at 697-98.

183. 378 U.S. 184 (1964).

184. *Id.* at 190.

185. *Id.* at 197 (Stewart, J., concurring).

186. This is exactly what Chief Justice Warren thought. *See id.* at 199-203 (Warren, C.J, & Clark, J., dissenting).

187. *Id.* at 190.

188. *Miller v. Fenton*, which holds that the voluntariness of a confession is reviewed de novo, is in accord. 474 U.S. at 109-11. While voluntariness might seem to be a question of historical fact involving the defendant's mental state (i.e., whether the defendant knowingly agreed to incriminate himself), the Court interpreted the provision to include

the Court went a giant step further when, in *Bose Corporation v. Consumers Union of United States, Inc.*,[189] it held that "actual malice" in a defamation case must be reviewed de novo. Actual malice means knowledge that the defamatory statement was false or that it was made with a reckless disregard for its truth.[190] As such, it clearly involves a question of historical fact concerning the defendant's subjective mental state. The Court acknowledged as much in *Bose*: "It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'"[191] Nonetheless, the Court deemed the constitutional importance of that finding—"this Court's role in marking out the limits of the standard through the process of case-by-case adjudication"—sufficient to justify de novo review.[192]

Recently, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[193] the Court toed this line again. It held that a finding of whether a punitive damages award is sufficiently excessive or disproportional as to violate due process is reviewed de novo.[194] While *Cooper Industries* might be criticized on the ground that it, like *Bose*, authorizes de novo review of a question of fact, there are two critical differences between the cases. First, whether a person knew that his statement was false (the actual malice question in *Bose*) is a question of historical fact, whereas the amount of punitive damages to award is a prescriptive determination, albeit one traditionally given to juries.[195] Second, *Cooper Industries* does not require punitive damages to be fixed by courts of appeal de novo; it only holds that the constitutional issue of excessiveness

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more than that simple question. "Although sometimes framed as an issue of 'psychological fact,'" the Court wrote, "the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." *Id.* at 115-16. So defined, "voluntariness" is an evaluative determination.

189. 466 U.S. 485 (1984).

190. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

191. *Bose*, 466 U.S. at 498 (footnote omitted).

192. *Id.* at 503. This is not true of all questions of historical fact that have constitutional significance. For example, the question of intent to discriminate—the key question in equal protection cases—is reviewed deferentially. *Brinkman*, 443 U.S. at 534.

193. 532 U.S. 424 (2001).

194. *Id.* at 440.

195. *Id.* at 437.

is reviewed de novo.[196] This proportionality review is not a true de novo review, but rather a sort of stepped-up sufficiency review.

C. Contract Interpretation

Another trouble area is contract interpretation. It is often said that interpreting a contract is a question of law, or at least a mixed question, that appellate courts review de novo.[197] Construing contracts often involves interpreting legal terms and phrases that were crafted by lawyers to have a specific legal effect. It therefore makes sense that judges trained in the law would be better equipped to interpret them than lay jurors. This is especially true for standardized contracts like insurance policies or technical contract provisions like indemnity clauses.[198] There is also a strain in the case law suggesting that contracts are "private law"[199] because, like statutes, they set forth rules to govern particular circumstances. The difference, of course, is that contractually established rules apply only to those who agree upon them, unlike statutes, which are agreed to by a limited group of people (legislators) and applicable to the general public.

But there is an opposing strain of authority holding that the jury determines what the parties intended.[200] There is sense to this view as well because the critical issue in any question of contract interpretation is what the parties agreed to and what they intended their words to mean.[201] These are clearly questions

196. *Id.* at 441-43.

197. *See e.g. APC Operating Partn. v. Mackey*, 841 F.2d 1031, 1033 (10th Cir. 1988) (noting that the construction of a contract is ordinarily a question of law for the court).

198. *See e.g. Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1388 (5th Cir. 1986) (interpreting indemnity provisions is a matter for the court); *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 774 (11th Cir. 2000) (interpretation of insurance contract is a question of law reviewed de novo).

199. *See e.g. Barrera v. Ciolino*, 636 So. 2d 218, 222 n. 15 (La. 1994) (citing a statutory comment that refers to contracts as "the private law of the parties").

200. *See e.g. Einhorn v. Fleming Foods of Pa., Inc.*, 258 F.3d 192, 195 (3d Cir. 2001) (recognizing that where contract is ambiguous, its interpretation is a question of fact).

201. *See e.g. Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate*, 733 F.2d 195, 199 (2d Cir. 1984) (in insurance dispute, the dispositive issue was the parties' mutual understanding); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1138 (Ariz.

of historical fact. They are also the sort of questions juries are best qualified to answer because they involve listening to testimony, reviewing evidence, and determining whose version of reality is true.[202]

How do we reconcile these two conflicting rules? Some cases hold that contract interpretation is a question for the jury when the contract is ambiguous, but a question for the court when the contract is unambiguous.[203] Other cases similarly hold that contract interpretation is a question of law unless the question turns on the credibility of extrinsic evidence.[204] This is a strange rule, since the need for contract interpretation almost inherently suggests ambiguity. The rule may simply mean, however, that where a court determines the contract to be unambiguous—that is, where it only has one reasonable interpretation—it can enforce that interpretation without submitting the question to the jury or considering extrinsic evidence.

One problem with this approach is that does not account for many questions of contract interpretation that involve ambiguous provisions but which are nonetheless for the court to interpret. For example, in a dispute over the meaning of language in an insurance policy, the language may well be ambiguous—that is, reasonably susceptible of more than one meaning—but the question is nonetheless one for the court.[205] This approach also does not account for disputes over the meaning of contracts as to which there is no extrinsic evidence, but which still require a jury to decide what the parties intended.

Other cases suggest that contract "interpretation" is a question for the jury, while contract "construction," which

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1993) (the main purpose of contract interpretation is to discover and effect the parties' intent).

202. *See e.g. U.S. v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000) (issue of contract formation "turned primarily on factual determinations regarding the history of the parties' settlement negotiations, their intent, and the nature and amount of settlement offer ultimately intended").

203. *Stinnett v. Colo. Interstate Gas Co.*, 227 F.3d 247, 254 (5th Cir. 2000).

204. *See e.g. Thor Seafood Corp. v. Supply Mgt. Servs.*, 352 F. Supp. 2d 1128, 1131 (C.D. Cal. 2005); *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (2005).

205. *See e.g. Utica Mut. Ins. Co. v. Weathermark Invs., Inc.*, 292 F.3d 77, 80 (1st Cir. 2002).

involves the legal operation of words, is for the court.[206] The latter includes determining what effect an agreement will have on circumstances the parties did not foresee.[207] This, too, is an odd rule. It assumes there is a distinction between the meaning and a contract and its effect, but what effect could a contract have other than that the parties meant it to have? Moreover, what is it about the effect of a contract—even a contract that did not contemplate certain circumstances—that makes judicial interpretation appropriate?

An alternative to both these approaches might be to determine on a case-by-case basis whether an issue of contract interpretation is more fact-like or more law-like. If the issue turns on the construction of legal terms or standard contract provisions, it is decided by the court and reviewed de novo. If it turns on a question of what the parties intended or agreed to, it is a question for the jury and reviewed deferentially. This solution is unsatisfactory, however, because its consequence is results-oriented decision-making. An appeals court that thinks the appellant is in the right need only find the issue more law-like, and therefore review it de novo. Or a court that preferred the appellee's view could hide behind deferential review simply by finding that the issue turns more on what the parties intended.

Another approach is to let the jury have the first crack at the issue by asking whether the parties had any specific intent with respect to a disputed provision. If they did, then that intent would be enforced. Only if the jury found that the parties did not have any specific intent would the court have to undertake the task of interpreting the provision. The problem with this approach, however, is that there are many provisions that are negotiated and as to which the parties had a specific intent, but which are probably best interpreted by a court. In a construction contract, for example, the parties may have specifically negotiated indemnity language, but they probably did so with an eye on the case law and with the expectation that a judge rather than a jury would be the one interpreting the provision should the relationship go south.

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206. *Ram Constr. Co., Inc. v. Am. Sts. Ins. Co.*, 749 F.2d 1049, 1052-53 (3d Cir. 1984).

207. *Id.* at 1053 (citing Arthur L. Corbin, *Corbin on Contracts*, vol. 3, § 534 (West 1950)).

From this brief discussion, it is clear that the unique problem of how to treat questions of contract interpretation on appeal is complex enough that trying to tackle it here would take us very far afield. This thorny problem will have to be deferred to another day.

VII. CONCLUSION—A METHODOLOGY FOR MIXED QUESTIONS

At the start of this article, I quoted the Court of Claims's description of mixed questions as "elusive abominations." By properly recognizing and parsing the issues on appeal, however, the questions we are accustomed to giving the ambiguous label "mixed" can become less elusive, though one might cynically suggest that having to go through this exercise just to determine the standard of review makes mixed questions even more abominable than before.

The first step is to recognize whether the mixed question is a single issue or a compound question. If it is compound, then the issue needs to be separated into its sub-issues and each sub-issue needs to be reviewed under the appropriate standard. Any issue that is reviewed deferentially, but which the trial court did not expressly decide, will be deemed resolved in a manner supporting the lower court's disposition, unless the law requires the finding to be express, in which case a remand is appropriate. Only if there is no already-established standard of review for an issue—if, for example, it is an evaluative determination or a question of definition application as to which there is no prior decision—does the court need to engage in a policy analysis to determine the standard of review for that issue.

This exercise seems pretty cumbersome, I admit, but the cases in which a court will have to go through the whole rigmarole will be rare. Most standard-of-review questions are straightforward, and a little clear thinking about what the issues on appeal really are will go a long way. But when the court does need to go through this exercise, the complexity it adds is preferable to the confusion—the "lack of clarity and coherence"—that otherwise would ensue.