ARTICLES

ALL MIXED UP ABOUT STATUTES: DISTINGUISHING INTERPRETATION FROM APPLICATION

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I. INTRODUCTION

There's been a lot of talk about statutory interpretation. Maybe too much talk.[1] While most of it is about *how* to interpret statutes—what methods to use, what authorities to consult, how to discern meaning—the question that weighs on me is: *Who?* Who decides whether a statute applies to the circumstances of a particular case, the judge or the trier of fact? The question matters because, as a trial judge, I must decide which questions go to the jury and which I will rule on. And it mattered in my prior life as an appellate lawyer because the answer to that question determines the standard of review.

The textbook answer is that statutory interpretation is always a question of law. True enough, but it ducks the question: When does applying a statute to facts constitute statutory interpretation? Some courts routinely say the application of a statute to facts is always a question of law.[2] Others say it is a mixed question of law and fact reviewed de novo.[3] But there are many cases in which the trier of fact applies a statutory term or definition to

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1. Apologies to Bono. U2, LIVE UNDER A BLOOD RED SKY (Island Records 1983).

2. *See infra* notes 12–16 and accompanying text.

3. *See infra* notes 22, 24 and accompanying text.

unique circumstances without interpreting the statute, and the decision is reviewed on appeal with deference.[4]

This happens, for example, every time a jury is instructed on the statutory elements of a crime and decides whether they are proven. Sometimes a statute requires something concrete, like whether the defendant's blood alcohol level was .08 or above.[5] Sometimes a jury must make a value judgment, like whether a defendant claiming self-defense had a reasonable fear of bodily harm.[6] Sometimes a jury must apply a statutory term, like whether an implement was a "deadly weapon" as defined in the statute.[7]

It happens in bench trials too. In a juvenile dependency case, for example, the judge might have to decide whether a parent "neglected" their child within the meaning of that statutory term. The judge hears the evidence, decides what the facts are, and applies those facts to the statutory definition of "neglect."[8]

Yet sometimes deciding whether a statute applies to the facts clarifies or refines the statute in way that will apply to other cases.[9] That is statutory interpretation. Professor De Sloovére described the distinction almost a century ago: "Interpretation may be defined as the process of reducing the statute applicable to a single, sensible meaning—the making of a choice from several possible meanings. Application, on the other hand, is the

4. *See infra* notes 30–42 and accompanying text.

5. *See, e.g.*, State v. Latham, No. COA11-1304, 2012 WL 1514760, at *2 (N.C. App. May 1, 2012); Lemond v. Commonwealth, 454 S.E.2d 31, 36 (Va. App. 1995).

6. *See, e.g.*, State v. Coley, 846 S.E.2d 455, 460 (N.C. 2020); Elder v. State, 296 So. 3d 440, 444 (Fla. Dist. Ct. App. 2020).

7. *See, e.g.*, McCain v. State, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (en banc) (deciding whether butcher knife was a deadly weapon); People in Int. of J.R., 867 P.2d 125, 127 (Colo. App. 1993) (deciding whether BB gun was a deadly weapon).

8. *See, e.g.*, Idaho Dep't of Health & Welfare v. Doe, No. 39167, 2011 WL 11067228, at *6–10 (Idaho Ct. App. Dec. 19, 2011).

9. *See infra* notes 43–46.

process of determining whether the facts of the case come within the meaning so chosen."[10]

In some cases, "Does the statute apply here?" is effectively, "What does the statute mean?" In others, it is case specific and says nothing about what the statute means for other cases.

The thesis of this article is that applying a statute to facts can be one of two things. One is statutory interpretation because it involves defining or refining a statutory term. The other is more properly called statutory application because it involves deciding whether the statute so defined applies on the facts of a particular case. That usually is and ought to be a question for the trier of fact. Distinguishing the two is not always easy, and this article proposes a standard for doing so: Can the statute can be further refined in a way that is generally applicable to other cases?

This is no theoretical question. It matters to appellate lawyers arguing about the standard of review, and to appellate judges who decide it. And it matters to trial judges deciding motions, settling jury instructions, and ruling on bench trials.

This article builds on my prior article about the law-fact distinction: *All Mixed Up About Mixed Questions*.[11] There I argued that what courts call "mixed questions of law and fact" are actually several different kinds of questions and that determining who decides the issue (and the appropriate standard of review) requires understanding the differences. This article explores a similar question: When is the application of a statute to facts a legal question of statutory interpretation, and when is a question for the trier of fact?

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10. Frederick J. De Sloovére, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086, 1095 (1933).

11. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005). In a subsequent article, I applied the same analysis to contract interpretation, arguing that the meaning of some kinds of contract language is done by the court, others by the trier of fact. *See* Randall H. Warner, *All Mixed Up About Contract: When Is Contract Interpretation A Legal Question and When Is It A Fact Question?*, 5 VA. L. & BUS. REV. 81 (2010).

II. STATUTORY APPLICATION—LAW OR FACT?

A. What Courts Say

Before looking at how courts treat statutory application, let's look at what they say. Because when it comes to standard of review, what courts do and what they say are not always the same.

Many, many cases recite as black letter law that the application of a statute to facts is a legal question reviewed de novo. For example:

- "We review de novo the interpretation and application of a statute."[12]
- "The proper interpretation of a statute and its application to the facts present questions of law reviewed de novo."[13]
- "We have long recognized that the application of a statute to undisputed facts is a question of law."[14]
- "We independently review the application of the statute to undisputed facts."[15]
- "The standard of review applicable here is that we defer to factual findings made by the trial court, if they are supported by competent substantial evidence, but we review de novo the trial court's application of the statute to those facts."[16]

Contrast those with the following:

- "[W]e review the court's findings of fact for clear error and its application of the statute

12. Rogone v. Correia, 335 P.3d 1122, 1128 (Ariz. Ct. App. 2014).

13. Bronson Health Care Grp., Inc. v. Titan Ins. Co., 887 N.W.2d 205, 207 (Mich. Ct. App. 2016).

14. State v. Zwiefelhofer, No. 2020AP843-CR, 2021 WL 4073658, at *3 (Wis. Ct. App. Sep. 8, 2021).

15. Sonoma Cty. Emps.' Ret. Ass'n. v. Superior Court, 130 Cal. Rptr. 3d 540, 544 (Ct. App. 2011).

16. Derossett v. State, 294 So.3d 984, 989 (Fla. Dist. Ct. App. 2020).

to those findings for abuse of discretion . . . ."[17]

- "[W]hen it is the circuit court's application of a statute to the facts before it, our standard of review is clearly erroneous."[18]
- "[W]e review the court's application of the statute to the facts for clear error."[19]
- "[T]his court has held that the issue of whether Smith was stabilized as defined by the statute is a question of fact to be decided by the factfinders.[20]
- "[W]e must first determine whether section 474.150.1 applies to IRA accounts before determining whether the trial court's application of the statute to Husband's IRA was supported by substantial evidence."[21]

Still other cases label statutory application a "mixed question of law and fact." And of these, some say it is a mixed question reviewed de novo while others say it is a mixed question reviewed with deference:

- "Application of these statutes to the facts here presents mixed questions of law and fact. . . . We elect to review these mixed questions of law and fact de novo."[22]
- "[The bankruptcy court's] application of the statute to the particular facts of this case poses a mixed question of law and fact, subject to the clearly erroneous standard, unless the bankruptcy court's analysis was 'infected by legal error.'"[23]

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17. Volk v. Vecchi, 467 P.3d 872, 875 (Utah Ct. App. 2020).

18. Noble v. Mayes *ex rel.* MM, No. CV-20-118, 2020 WL 6757782, at *11 (Ark. Ct. App. Nov. 18, 2020).

19. First Nat'l Bank of Manitowoc v. Cincinnati Ins. Co., 485 F.3d 971, 981 (7th Cir. 2007).

20. Smith v. Janes, 895 F. Supp. 875, 883 (S.D. Miss. 1995).

21. Carmack v. Carmack, 603 S.W.3d 900, 905 (Mo. Ct. App. 2020).

22. Colorado Republican Party v. Benefield, 337 P.3d 1199, 1204 (Colo. App. 2011).

23. *In re* Winthrop Old Farm Nurseries, Inc., 50 F.3d 72, 73 (1st Cir. 1995) (quoting Williams v. Poulos, 11 F.3d 271, 278 (1st Cir. 1993)).

- "[W]e are presented with a mixed question of law and fact—the application of the IDEA's statutory and regulatory definitions to the particular facts of Treena's medical and educational history. Accordingly, our review of the district court's conclusions is de novo."[24]
- "The application of Labor Code section 3352, subdivision (f) to the stipulated facts is a mixed question of law and fact, which is predominantly factual and 'requires application of experience with human affairs;' therefore, it is governed by the substantial evidence test."[25]

What are we to make of these differences? How do we explain the fact that some cases say statutory application is a question of law while others say it is a question of fact?

One possibility is that there a split of authority. Maybe over time, a substantive disagreement developed among jurisdictions about how to treat statutory application. But there are two problems with this hypothesis. First, there is no evidence of any substantive disagreement in the case law. There is no discussion about why some courts pick one approach while others pick the opposite, as you see when there is a real disagreement about what the law should be.

Second, there are lots of instances within the same jurisdiction in which some cases say statutory application is reviewed de novo while others say it is reviewed deferentially.[26] Pennsylvania's Supreme Court, for

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24. Muller *ex rel.* Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist., 145 F.3d 95, 102 (2d Cir. 1998).

25. Vine v. Bear Valley Ski Co., 13 Cal. Rptr. 3d 370, 376 (Ct. App. 2004) (quoting Crocker Nat'l Bank v. Cy. & Cty. of San Francisco, 49 Cal. 3d 881, 888 (1989)).

26. *Compare, e.g.*, Barnum v. State, 614 S.W.3d 453, 462 (Ark. App. 2020) ("The interpretation and application of an Arkansas statute is a question of law that this court decides de novo."), Canales v. Wells Fargo Bank, N.A., 234 Cal. Rptr. 3d 816, 821 (Ct. App. 2018) (concluding that a statute's application to undisputed facts presents a question of law subject to de novo review), *and* Hertzske v. Snyder, 390 P.3d 307, 310 (Utah 2017) (concluding that whether a statute applies presents a question of law reviewed de novo), *with In re* Adoption

example, recently cited the "well-settled" principle that "determining whether an activity, entity, or object falls within the meaning of a statutory definition is a matter of statutory interpretation, and thus is a question of law for the court to decide."[27] Yet it said exactly the opposite just a few years earlier:

> A question involving whether a petitioner fits the definition of mental retardation is fact intensive as it will primarily be based upon the testimony of experts and involve multiple credibility determinations. Accordingly, our standard of review is whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous.[28]

Did the Pennsylvania Supreme Court change its mind from one case to the other about the proper standard of review for statutory application? No. It was talking about two different things.[29]

B. *Application of Statutory Terms as a Fact Question*

The most common example of statutory application by the trier of fact happens in criminal cases. The prosecution charges the defendant with specified crimes, the elements of which are prescribed by statute. The judge instructs the jury on the statutory elements of each charge. And the jury decides based on the evidence

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of Baby Boy B., 394 S.W.3d 837, 839 (Ark. 2012) (concluding that the standard of review of a trial court's application of a statute to the facts before it is clearly erroneous), *Vine*, 13 Cal. Rptr. 3d at 376 (apply statute to stipulated facts is a mixed question of law and fact governed by the substantial evidence test), *and* Volk v. Vecchi, 467 P.3d 872, 875 (Utah Ct. App. 2020) (concluding that the trial court's application of statute to its findings of fact is reviewed for abuse of discretion).

27. Gilbert v. Synagro Cent., LLC, 131 A.3d 1, 17 (Pa. 2015).

28. Commonwealth v. Crawley, 924 A.2d 612, 616 (Pa. 2007).

29. *Compare, e.g.*, Commonwealth v. Smith, 221 A.3d 631, 640 (Pa. 2019) (reviewing defendant's conviction for possessing a firearm with an altered manufacturer's number; interpreting the meaning of "altered" under the statute), *with* Commonwealth v. Lisby, No. 1042 EDA 2017, 2018 WL 2173525, at *3 (Pa. Super. Ct. 2018) (reviewing defendant's conviction for possessing a firearm with an altered manufacturer's number; sufficient evidence existed to support conviction).

whether the elements are proven. The jury is applying law to facts. As my own standard jury instruction says: "You will hear the evidence, decide the facts, and then apply the law I will give you to those facts."[30]

People v. Curtis, an Illinois case, is a good example.[31] The defendant there was convicted of stalking, which the statute defined to include placing a person "under surveillance."[32] The statute further defined "under surveillance" as "remaining present outside the person's school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant."[33] So we have a statutory term, a definition of that term, and the trier of fact assessing evidence to decide whether the definition has been satisfied. Affirming the conviction, the court concluded that "the question of whether a particular set of circumstances constitutes 'surveillance' as defined in the statute is a question of fact for the jury."[34]

In the Colorado case of *People in Interest of J.R.*, a juvenile shot another with a BB gun, and the jury found him guilty of acts that would constitute third-degree assault.[35] The statute defined third-degree assault to include injuring someone "by means of a deadly weapon."[36] And it defined "deadly weapon" to include a weapon "which in the manner it is used or intended to be used is capable of producing death or serious bodily injury."[37] The court affirmed the verdict, noting that it was "for the jury to determine whether, under the circumstances of this case, the BB gun can be a 'deadly weapon' within the meaning of the statute."[38]

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30. *Preliminary 1—Duty of Jurors*, RAJI (CIVIL) 7th; *Preliminary 2—Duty of Jurors*, RAJI (CRIMINAL) 5th.

31. 820 N.E.2d 1116 (Ill. App. Ct. 2004).

32. *Id.* at 1120, 1123.

33. *Id.* at 1123.

34. *Id.* at 1124.

35. 867 P.2d 125, 126 (Colo. App. 1993).

36. *Id.* at 127.

37. *Id.*

38. *Id.*

In *State v. Allbaugh*, a Wisconsin court affirmed the defendant's conviction for possessing marijuana.[39] The defendant argued that he did not "possess" the marijuana, which was found in the house where he lived.[40] The court noted that possession may be imputed when contraband is subject to a defendant's "exclusive or joint dominion and control."[41] It then recited the facts supported by the evidence, and held that the jury could infer from those facts that the marijuana was subject to the defendant's and his roommate's joint dominion and control.[42]

In other areas of the law as well, it is common for the trier of fact to find facts and apply them to a statutory term, definition, or standard. In the Arizona case of *Paul V. v. Department of Child Safety*, for example, a parent appealed the termination of her parental rights.[43] One of the requirements for termination was that the State make "diligent efforts" to provide reunification services, and the parent argued that the State had not done so.[44] The appellate court said that the application of a statute is reviewed de novo, but it did not conduct de novo review.[45] Rather, it reviewed deferentially the trial judge's finding of "diligent efforts."[46] After surveying case law on what "diligent efforts" means, the court concluded: "Reasonable evidence supports the court's finding that DCS made a diligent effort to provide Mother appropriate reunification services."[47]

In *Spahr v. Ferber Resorts, LLC*, the jury found for the plaintiff on a loss of consortium claim arising from her husband's injury.[48] To recover for loss of consortium under Utah's statute, the primary plaintiff must have

39. 436 N.W.2d 898, 899 (Wis. Ct. App. 1989).

40. *Id.* at 901.

41. *Id.* at 902 (quoting Schmidt v. State, 253 N.W.2d 204, 208 (Wis. 1977)).

42. *Id.*

43. No. 1 CA-JV 16-0467, 2017 WL 2438053, at *1 (Ariz. Ct. App. June 6, 2017).

44. *Id.* at *7.

45. *See id.* at *5, *7.

46. *See id.* at *7.

47. *Id.*

48. 419 F. App'x 796, 798 (10th Cir. 2011).

suffered "a significant permanent injury that substantially changes that person's lifestyle."[49] The Tenth Circuit upheld the verdict, finding "evidence from which a reasonable jury could conclude that Mr. Spahr suffered a 'significant permanent injury' that 'substantially change[d] [his] lifestyle.'"[50]

Each of these cases involves the application of a statute to facts. Statutes specify the consequence—a defendant is guilty, a party is liable, a parent loses their parental rights—if certain facts or circumstances exist. And the trier of fact decides whether those facts or circumstances existed. There are many other examples, including whether an investment was a "security,"[51] whether a trailer constituted a "dwelling,"[52] whether a parent committed "family violence,"[53] whether a patient was "stabilized,"[54] whether a securities seller's conduct was "manipulative,"[55] and whether a defendant was a "drug-dependent person."[56]

Even when there is no dispute about the basic facts, statutory application can be a question for the trier of fact. For example, in *In re Danielle D.*, a California case, the trial judge found that a juvenile committed battery resulting in "serious bodily injury."[57] The appellate court found the facts undisputed: the victim's eye was swollen, she could not see out of it for two days, her vision was blurred for two weeks, and bruising could still be seen three months later.[58] The juvenile argued that these facts did not show "serious bodily injury," but the appellate court affirmed.[59] It found the issue a "close call," but

49. *Id.* at 803.

50. *Id.* at 804.

51. People v. Cole, 67 Cal. Rptr. 3d 526, 546–47 (Ct. App. 2007).

52. People v. Sindone, No. 340328, 2019 WL 1574747, at *1–2 (Mich. Ct. App. Apr. 11, 2019).

53. G.S. v. T.S., 900 So. 2d 1088, 1091 (La. Ct. App. 2005).

54. Smith v. Janes, 895 F. Supp. 875, 883 (S.D. Miss. 1995).

55. United States v. Gilbertson, 970 F.3d 939, 950 (8th Cir. 2020).

56. State v. Holloway, 982 A.2d 231, 234–37 (Conn. App. Ct. 2009).

57. No. F053577, 2008 WL 863345, *1 (Cal. Ct. App. Apr. 2, 2008).

58. *Id.*

59. *Id.* at *1–3.

deferred to the trial judge due to "the limited standard of review by which we are bound."[60]

C. *Application of Statutes as Statutory Interpretation*

Yet there are other cases in which the application of a statute to the facts of a case is deemed a legal issue and reviewed de novo. When this happens, the result is usually a decision about what the statute means that can be generalized to other cases. It is, in substance, statutory interpretation.

In *Street v. Commonwealth*, for example, a Virginia court reversed the defendant's conviction for possession of a firearm by a convicted felon.[61] The defendant robbed a restaurant by pointing an object that appeared to be a gun.[62] He argued that the object could not be a "firearm" under the statute because there was no evidence it was actually a gun.[63] The court stated that it "review[s] a trial court's application of a statute de novo."[64] It then concluded that, in contrast with other statutes that can apply if a fake gun is used, the statute at issue required the object to be "designed, made, and intended to expel a projectile by means of an explosion."[65] Without evidence the object used was a real gun, the defendant could not be convicted of possessing a firearm.[66]

May v. Petersen, a Colorado negligence case, involved a crosswalk collision between the defendant's vehicle and the plaintiff in a wheelchair.[67] The applicable statutes gave pedestrians the right of way unless the vehicle was already in the crosswalk when the pedestrian

60. *Id.* at *3.

61. No. 1537–10–2, 2011 WL 6034775, at *1 (Va. App. Dec. 6, 2011).

62. *Id.* at *2.

63. *See id.* at *1.

64. *Id.*

65. *Id.*

66. *Id.* at *3. Not before the court were the defendant's convictions of two counts of attempted robbery and two counts of use of a firearm in the commission of a felony. *Id.* at 1 n.1.

67. 465 P.3d 589, 590 (Colo. App. 2020).

left the curb and entered it.[68] The trial judge found for the defendant after a bench trial, and the plaintiff argued on appeal that the statutory term "crosswalk" included the ramp leading to it such that he had the right of way.[69] The appellate court disagreed.[70] Noting that it reviews the "application of a statute" de novo, the court analyzed statutory language and held as a matter of law that a ramp adjacent to a crosswalk is not part of the crosswalk.[71]

In the Ohio case of *Board of Brimfield Township Trustees v. Bush*, the trial court enjoined a dog rescue as a violation of township zoning.[72] On appeal, the court considered whether the rescue operation was an "agricultural use," which by statute was outside the township's zoning authority.[73] Noting that "the interpretation and application of a statute is a question of law," the court held that a dog rescue is an agricultural use as defined in the statute.[74] In deciding the issue, the court utilized tools of statutory construction, relying on both the statutory definition of agriculture, which included "animal husbandry," and case law holding that boarding animals constitutes "animal husbandry."[75]

State v. Trepanier, a Wisconsin case, concerned a convicted defendant's presentence incarceration credit.[76] Under the applicable statute, the defendant was entitled to credit for "all days spent in custody in connection with the course of conduct for which sentence was imposed."[77] The defendant had been in custody for 171 days when he was sentenced to prison, but 161 of those were for a civil commitment.[78] This application of the statute to

68. *Id.* at 594.
69. *Id.*
70. *Id.*
71. *Id.* at 592, 594–95.
72. No. 2005-P-0022, 2007 WL 2759495, at *1 (Ohio Ct. App. Sept. 11, 2007).
73. *Id.* at *2.
74. *Id.* at *2, *5.
75. *Id.* at *4–5.
76. 855 N.W.2d 465, 466 (Wis. Ct. App. 2014).
77. *Id.* at 467–68.
78. *Id.* at 468.

undisputed facts, the court held, was a question of law.[79] Based on case law interpreting the statute, the court concluded that the defendant was entitled to credit for the time he spent in custody under a civil commitment.[80]

In a broad sense, these cases are all applying statutes to facts, just like the cases in the prior section. But they are really doing something different. The courts in *Street*, *May*, *Bush*, and *Trepanier* are doing what Professor De Sloovére described as "the making of a choice from several possible meanings," rather than "determining whether the facts of the case come within the meaning so chosen."[81] They are engaged in statutory interpretation, even when they call it statutory application.

D. Deciding Whether an Issue Is Interpretation or Application

When you examine cases like those discussed in the two prior sections, it is fairly easy to see when the court is interpreting a statute and when it is engaging in case-specific application. What is less clear is why. Is there a principle we can discern or prescribe for when to treat a statutory issue as interpretation or application?

There are easy cases, like *In re Danielle D.*, in which the question was whether the victim suffered "serious bodily injury."[82] Every victim's injury is different, and one can imagine an infinite spectrum of injuries ranging from mild to life threatening. So it makes sense that the issue is decided case-by-case by the trier of fact.[83]

Another easy case is *Bush*, in which the question was whether a dog rescue was an "agricultural use."[84] One would expect all dog rescues to be treated the same under the statute, so it makes sense that the issue was

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79. *Id.* at 467.

80. *Id.* at 471.

81. De Sloovére, *supra* note 10, at 1095.

82. No. F053577, 2008 WL 863345, *1 (Cal. Ct. App. Apr. 2, 2008).

83. *Id.* at *3.

84. Bd. of Brimfield Twp. Trustees v. Bush, No. 2005-P-0022, 2007 WL 2759495, at *2 (Ohio Ct. App. Sept. 11, 2007).

decided as a matter of statutory interpretation.[85] The issue is whether dog rescues are agricultural uses, not whether this particular dog rescue was.

There are closer cases, in which the court must decide whether to treat application of a statute as legal or factual. Take *May*, for example, the crosswalk collision case.[86] The court held as a legal matter that a ramp leading to a crosswalk is not part of the crosswalk.[87] But it could have treated the issue as a question for the trier of fact. It could have ruled that whether structures adjacent to a crosswalk are themselves part of the crosswalk is a case-by-case determination reviewed only for clear error. And, in making that decision, it might have provided factors for the trier of fact to consider when deciding what is part of the crosswalk.

Or take *J.R.*, which addressed whether a BB gun was a deadly weapon.[88] The court ruled that a BB gun can be a deadly weapon depending on how it is used.[89] But it could have chosen to rule as a matter of statutory interpretation that BB guns are either always or never deadly weapons.[90]

Why would a court treat a statutory issue one way or the other? We might cynically say it is outcome driven, that appellate courts looking to reverse find a way to treat an issue as a question of law, and other times prefer to hide behind a deferential standard of review. That surely happens sometimes, but let's presume courts are trying to get it right, which in my experience they usually are.

There should be a standard for deciding when to treat a statutory question as interpretation or application. And if we look at the case law, the dividing line becomes clear, even if courts do not articulate it. Courts tend to treat an issue as interpretation when they can

85. *Id.* at *5.

86. May v. Petersen, 465 P.3d 589 (Colo. App. 2020).

87. *Id.* at 594–95.

88. People in Int. of J.R., 867 P.2d 125, 127 (Colo. App. 1993).

89. *Id.*

90. *Id.*

make a ruling about the statute's meaning that can be generalized to other cases. They tend to treat it as a fact question when it is fact specific enough that a reasonable generalization cannot be made.

We will return later to this standard, but first a detour to discuss how decision-making authority is divided generally between judges and juries in our justice system. We also need to define some terms because not all statutory requirements are the same, and courts tend to treat different kinds of requirements differently, even when they do not recognize that they are doing so.

III. THE DIVISION OF LABOR BETWEEN JUDGES AND JURIES[91]

A. The Law–Fact Distinction

A basic premise of the American justice system is that juries decide facts while judges decide law. Things aren't exactly that simple because judges also decide facts in bench trials and in connection with many non-trial decisions. But that is the basic paradigm.

There are two main reasons why we have juries. One is to judge the veracity and accuracy of witness testimony, physical evidence, and documentary evidence to determine what the facts are. The other is to judge people's conduct according to community standards, as happens in negligence cases. The main reason we have judges is to make legal decisions and to make any number of discretionary decisions to manage cases and trials.[92]

We call this the "law–fact distinction" although, as we will see, it is an imperfect dichotomy because many things decided in court are neither law nor fact. In a jury

91. This section draws heavily on Warner, *All Mixed Up About Mixed Questions*, *supra* note 11. The illustrative cases in this article largely exclude cases reviewing administrative decisions. The law-fact distinction is often applied differently in that setting, and I chose not to complicate the discussion here with the running debate about judicial deference to agencies.

92. *Id.* at 104–05.

trial, the judge applies the law to decide which claims or counts go to the jury, and then instructs the jury on the law. Having been told what the law is, the jury applies those instructions, decides the facts, and renders a verdict. If the verdict is appealed, the appellate court reviews the judge's rulings de novo or for abuse of discretion depending on the issue and reviews the jury's findings with deference.

The same principle applies in a bench trial, and to some decisions a trial judge makes outside of trial, like whether to award attorneys' fees. Things can get muddied when the fact-finder and law-decider are the same person, but on appeal the distinction between factual findings and legal decisions is all-important because it determines the standard of review.

B. Basic Facts

Every court case and every legal dispute has underlying facts: the things that happened or the circumstances that exist which give rise to a lawsuit or a prosecution or some other kind of case. These facts—the who, what, where, when, and how that underly the case—are called "basic facts," or sometimes "historical facts."[93] The term "basic facts" is needed to distinguish these facts from other issues courts call "questions of fact" that are really something else.

To illustrate, let's take a simple automobile accident case. The jury might have to decide things like: How fast was the defendant driving? Was the defendant looking at their phone? Was the light red when the defendant entered the intersection? Was the plaintiff wearing a seatbelt? These are basic facts. Then, based on the basic facts as the jury finds they existed, it will have to decide the ultimate question (sometimes called an "inference" or "conclusion"): Did the defendant exercise reasonable care?

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93. *Id.* at 115–17.

The latter is not a question of basic fact, although courts tend to call it a "question of fact" because the jury decides it. It is not a who, what, where, when, or how question. It is an evaluative determination that asks jurors to use their collective wisdom and experience to judge the parties' conduct. We will discuss evaluative determinations in the next section.[94]

Many statutes require findings of basic fact. For example, a Colorado statute makes it a crime to "possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use such product as an immediate precursor in the manufacture of any controlled substance."[95] In the trial of someone charged with this crime, the jury might have to decide whether the substance in the defendant's pocket was, in fact, pseudoephedrine. This is a basic fact. The jury would also have to look inside the defendant's mind and make a finding about their mental state, which is also a kind of basic fact, as we will discuss later.[96]

We tend not to think about this kind of fact-finding as statutory application. We just say the jury must find facts or must find the elements of the crime. But it really is statutory application because it involves applying a statute to the facts.

Another example. One statutory ground for terminating parental rights under Nebraska law is that a child "has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months."[97] If the issue is disputed, the trial judge will hear evidence and decide whether the child was placed out of the home for 15 or more months. And, like all questions of basic fact, the court's finding will be reviewed on appeal for clear or plain error.[98]

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94. *See infra* notes 100–117 and accompanying text.

95. COLO. REV. STAT. ANN. § 18-18-412.5 (2013).

96. *See infra* at notes 118–125 and accompanying text.

97. NEB. REV. STAT. ANN. § 43-292 (West 2009).

98. *In re* Int. of Lizabella R., 907 N.W.2d 745, 751 (Neb. Ct. App. 2018) (concluding that the trial court's finding that child was placed out of the home for 15 months was plain error).

Trial courts also make findings of basic fact when deciding statutory issues outside of trial. A Minnesota statute, for example, authorizes an attorneys' fees award in condemnation cases if the final award "is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition."[99] To decide a fee application after a condemnation trial, the judge has to find what the "last written offer of compensation" was.

C. Evaluative Determinations

If every "question of fact" were a question of basic fact, the law–fact distinction would be nice and clean. We could easily discern which questions are fact and which are law, and there would be no need for the term "mixed question of law and fact." But that is not the way things are. A significant amount of law, both statutory and common law, requires judges and juries to exercise judgment.

Reasonable care in a negligence case, which we have discussed, is the most common example. Even if the basic facts are undisputed—everyone agrees on how fast the two cars were going, who turned when, who hit whom, etc.—the jury still decides the ultimate question of whether the defendant drove with reasonable care. Its decision is grounded in the basic facts, but the ultimate decision is a judgment or opinion about the nature of the defendant's conduct. Applying a community standard of reasonableness as they see it, jurors decide whether the defendant drove as a reasonably careful driver would in the same circumstances.

Issues like this are evaluative determinations.[100] That term—evaluative determination—is not used by courts often, but it is the best way to distinguish basic facts from the judgments or conclusions made based on

99. MINN. STAT. ANN. § 117.031 (West 2006).
100. Warner, *All Mixed Up About Mixed Questions*, *supra* note 11, at 119–21.

them.[101] And while there are many evaluative determinations in common law, there are many more in statutes.

Criminal self-defense statutes are a good example. The self-defense statute in *State v. Amschler* allowed someone to use force when "he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force."[102] The defendant there testified that he used a weapon because he feared for his safety, but the jury was not given a self-defense instruction and the defendant was convicted.[103] The appellate court reversed the conviction, ruling that the jury should be allowed to decide the issue of self-defense.[104] "[I]t is up to a jury," the court noted, "to decide which evidence they find credible and whether Defendant's fear was reasonable."[105]

Another example is *Missouri Bank & Trust Co. of Kansas City v. OneBeacon Insurance Co.*, a suit against an insurance company for vexatious failure to pay a claim.[106] The statute at issue made an insurer liable if it refused to pay on a policy and "the refusal was vexatious and without reasonable cause."[107] The trial court heard evidence and found reasonable cause for the insurer's failure to pay.[108] On appeal the plaintiff argued for de novo review because the issue was "the application of a

101. *See, e.g.*, Bodeau v. State, 239 A.3d 865, 878 (Md. Ct. Spec. App. 2020) ("A circuit court's decision about whether the doctrine of laches bars a petition for coram nobis relief is an evaluative determination involving the application of law to fact."); Nationwide Mut. Fire Ins. Co. v. Mod. Gas, 143 A.3d 412, 416 (Pa. Super. Ct. 2016) ("[If] application of a legal concept (such as a 'substantial factor' formulation) is an evaluative determination as to which reasonable persons might differ, the issue is submitted to the jury . . . .") (quoting William Lloyd Prosser, THE LAW OF TORTS § 45 (5th ed. 1984)); Springer v. Seaman, 821 F.2d 871, 876 (1st Cir.1987) (explaining that when there is a reasonable difference of opinion as to evaluative determinations, the jury decides the issue).

102. MO. ANN. STAT. § 563.031 (West 2016).

103. State v. Amschler, 477 S.W.3d 10, 11 (Mo. Ct. App. 2015).

104. *Id.* at 15–16.

105. *Id.* at 15.

106. 688 F.3d 943, 945 (8th Cir. 2012).

107. MO. ANN. STAT. § 375.296 (West 1967).

108. *Missouri Bank & Tr. Co. of Kansas City*, 688 F.3d at 946.

statute to the facts of the case."[109] The court disagreed and affirmed, noting that "questions of reasonableness are questions of fact, not law."[110]

Countless statutes contain evaluative determinations. Here are a few examples:

- Whether termination of parental rights is in a child's "best interests."[111]
- Whether a custodian of public records "promptly" responded to a public records request.[112]
- Whether a cemetery owner failed to take "prompt and reasonable actions" to correct a trust fund violation.[113]
- The amount of "reasonable attorney's fees" to award.[114]

Whenever a statute uses words like "reasonable," "prompt," or "necessary," it probably requires an evaluative determination.

Most evaluative determinations are treated as questions of fact or, more precisely, questions for the trier of fact. There are good reasons for this. Evaluative determinations tend to be fact intensive, which makes it easy to collapse the findings of basic fact and the evaluative determination into a single conclusory finding.[115] For example, in automobile negligence cases, we rarely ask the jury to expressly find all the predicate basic facts and then separately decide whether, based on them, the defendant drove with reasonable care. Rather, we ask the

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109. *Id.* at 949.

110. *Id.* (quoting Shirkey v. Guarantee Tr. & Life Ins. Co., 258 S.W.3d 885, 889 (Mo. Ct. App. 2008)).

111. ALASKA STAT. ANN. § 47.10.088 (West 2008); *see, e.g.*, Sherman B. v. State, Dep't of Health & Soc. Servs., 310 P.3d 943, 948–49 (Alaska 2013) (concluding that whether termination is in a child's best interests is a question of fact).

112. N.C. GEN. STAT. ANN. § 132-6.2 (West 2004).

113. KY. REV. STAT. ANN. § 367.968 (West 1984).

114. N.H. REV. STAT. ANN. § 357-D:10 (1991).

115. *See* Warner, *All Mixed Up About Mixed Questions*, *supra* note 11, at 120–21.

ultimate question—Was the defendant negligent?—and allow that to subsume the predicate basic facts.

This is also a very natural way of thinking. Most of us, when we drive down the street making our silent judgments about who is driving safely and who is not, do not separate the basic facts from the value judgment. We go straight to the conclusion.

In addition, evaluative determinations tend to be case specific and, therefore, tend to have little precedential value. Every automobile accident is different. Every self-defense case is different. It would be impossible to articulate a set of rules that would tell you, for every case, whether the specific conduct at issue was reasonable.

Finally, evaluative determinations often require the application of a community standard. When a jury decides whether a civil litigant exercised reasonable care or a criminal defendant reasonably believed they needed to defend themselves, the decision is made by ordinary people based on their collective experience. That is by design. Juries do not just evaluate witness credibility and decide what is true. They exercise collective judgment in those cases in which the law calls for it.

While most evaluative determinations are treated as questions of fact, a few are treated as questions of law. The most common of these are probable cause and reasonable suspicion in criminal cases. When deciding whether probable cause existed for a search or seizure or reasonable suspicion existed for a stop, the trial court's findings of basic fact are reviewed with deference, but the ultimate conclusion is deemed a legal question.[116] Analytically, probable cause and reasonable suspicion are just like reasonable care. They require someone's conduct to be judged against a standard of

116. Ornelas v. United States, 517 U.S. 690, 699 (1996); *see also, e.g.*, United States v. Washington, 670 F.3d 1321, 1324 (D.C. Cir. 2012) ("This court reviews the determination of probable cause *de novo*, while reviewing historical facts for clear error and giving due weight to inferences drawn by the district court and the police."); Rosenbaum v. Cy. & Cty. of San Francisco, 484 F.3d 1142, 1161 n.14 (9th Cir. 2007) ("We review the district court's finding of probable cause de novo; however, historical facts are reviewed for clear error.") (citations omitted).

reasonableness. But to ensure consistent application of constitutional rights, the Supreme Court has deemed probable cause and reasonable suspicion to be legal questions.[117]

D. Mental and Predictive Facts

Many statutes require discerning someone's state of mind, and this is typically a question of fact. For example, criminal statutes routinely require proof that the accused acted knowingly, intentionally, or with premeditation, which are questions of fact for the jury.[118] Similarly, whether someone acted with intent to defraud under a fraudulent transfer statute is question of fact.[119] Whether a parent "willfully intended" to abandon their child is a question of fact.[120] Whether a person acted knowingly within the meaning of any statute that prescribes consequences for a knowing violation is a question of fact.[121]

Is a person's mental state truly a "fact"? That is an interesting question for neuroscientists and moral philosophers, but it need not bother us lawyers. Though you cannot touch or hear what is in someone's mind, mental state is treated as a basic fact.[122]

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117. *Ornelas*, 517 U.S. at 696–97.

118. *See, e.g.*, Burrell v. State, No. 09-19-00452-CR, 2021 WL 1991266, at *5 (Tex. App. 2021) (concluding that whether a defendant who caused another's death did so "intentionally or knowingly" is a question of fact); State v. Bahr, 414 P.3d 707, 710 (Idaho Ct. App. 2018) ("The intent of the accused is a question of fact for the jury to determine."); State v. Rimmer, 623 S.W.3d 235, 273 (Tenn. 2021) ("[W]hether a defendant acted with premeditation is a question of fact for the jury . . . .").

119. Shri Rukmani Balaji Mandir Tr. v. Michigan Cy., 170 N.E.3d 247, 253 (Ind. Ct. App. 2021).

120. Matter of N.M.H., 849 S.E.2d 870, 874 (N.C. 2020).

121. Gross v. Parson, 624 S.W.3d 877, 892 (Mo. 2021).

122. *See, e.g.*, United States v. Dollar Bank Money Mkt. Acct. No. 1591768456, 980 F.2d 233, 240 (3d Cir. 1992) ("[A] party's mental state is inherently a question of fact which turns on credibility."); People v. Bostic, 503 N.Y.S.2d 421, 422 (N.Y. App. Div. 1986) ("[T]he issue of the defendant's mental state at the time of the crime presented a question of fact for the jury . . . .").

Some statutes require courts to make predictions about the future. A child welfare statute, for example, might require a finding that the child is likely to be harmed if returned to their parent.[123] Or a tenants' rights statute might require a finding that the landlord's actions "may endanger or materially impair the health, safety, or well-being" of the tenant.[124] Although not quite the same as a finding of basic fact, predictive facts are also treated as questions of fact.[125]

E. Application of Statutory Terms, or "Definition Application"

In the prior sections, we identified statutes that require findings of basic fact, including mental facts and predictive facts, and statutes that require evaluative determinations. Such statutes typically operate in an if–then fashion: if X circumstances exist, then Y result obtains. If the defendant possessed pseudoephedrine with intent to use it in the manufacture of a controlled substance, then the defendant is guilty.[126] If termination is in the child's best interests (and other requirements for termination are met), then the court may terminate parental rights.[127] If a lawsuit was brought without

123. *See, e.g.*, 25 U.S.C.A. § 1912 (West 1978) (in Indian Child Welfare Act cases, parental rights may not be terminated unless "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."); Jude M. v. Dep't of Health & Soc. Servs., 394 P.3d 543, 550 (Alaska 2017) (concluding that whether a child would likely suffer serious harm if returned to the parent is a question of fact).

124. MASS. GEN. LAWS ANN. ch. 111, § 127C (West 1992); *see, e.g.*, Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831, 839 (Mass. 1973) (noting that the provision requires a finding by the court).

125. *See, e.g.*, Walker E. v. Dep't of Health & Soc. Servs., 480 P.3d 598, 606 (Alaska 2021) (concluding that whether returning a child to a parent likely would cause harm is a fact question); Hui Lin Huang v. Holder, 677 F.3d 130, 134 (2d Cir. 2012) (finding that a future event will occur is a finding of fact); People v. Clark, 136 Cal. Rptr. 3d 10, 18 (App. 2011) ("Whether the injury is inflicted under circumstances or conditions likely to produce great bodily injury is a question for the trier of fact.").

126. COLO. REV. STAT. ANN. § 18-18-412.5 (West 2013).

127. ALASKA STAT. ANN. § 47.10.088 (West 2008).

substantial justification, then the court may award attorneys' fees.[128]

Not all statutes operate this way. Some are commands, some are prohibitions, and some specify powers or procedures. But if a case comes to court involving a statute, it is usually because someone wants a judicial result based on a determination that statutory requirements do or do not apply.

Some such requirements are neither basic facts nor evaluative determinations, but rather a statutory term or definition that must be applied to the facts. Some examples we have already seen are:

- Whether a defendant accused of stalking placed a person "under surveillance."[129]
- Whether a person suffered a "significant permanent injury" that "substantially changed" their lifestyle.[130]
- Whether a parent committed "family violence."[131]
- Whether a fake gun is a "firearm."[132]
- Whether a dog rescue is an "agricultural use."[133]

Deciding whether statutory terms like these apply to the facts of a case is what courts usually mean by "statutory application."

Note the difference between deciding the basic facts and deciding whether a statutory term applies to those facts. In a stalking case like *People v. Curtis*, for example, the jury might have to decide whether the defendant was outside of the victim's residence, how long they remained outside, how close to the residence they were, and how many times they came to the victim's home. Then, to

128. N.H. REV. STAT. ANN. § 357-D:10 (1991).

129. People v. Curtis, 820 N.E.2d 1116, 1124 (Ill. App. Ct. 2004).

130. Spahr v. Ferber Resorts, LLC, 419 F. App'x 796, 804 (10th Cir. 2011).

131. G.S. v. T.S., 900 So. 2d 1088, 1091 (La. Ct. App. 2005).

132. Street v. Commonwealth, No. 1537–10–2, 2011 WL 6034775, at *3 (Va. App. Dec. 6, 2011).

133. Bd. of Brimfield Twp. Trustees v. Bush, No. 2005-P-0022, 2007 WL 2759495, at *4–5 (Ohio Ct. App. Sept. 11, 2007).

decide guilt, it would follow the judge's instructions on the definition of "stalking" and apply the facts found to the statutory definition.[134] Or at the bench trial in *May v. Petersen*, the judge would have to decide where the plaintiff's wheelchair was when the defendant's vehicle entered the crosswalk. That is a question of basic fact. Having decided that the plaintiff was on the adjacent ramp, the judge would then have to decide whether, under the statute, the term "crosswalk" includes the adjacent ramp.[135]

In both examples, we could ask the decision-maker to segregate the findings of basic fact from the application of those findings to the statutory term. We tend not to do that in jury trials, instead instructing the jury on the statutory elements and directing it to make one decision that incorporates both basic facts and statutory application. In bench trials, though, courts often make separate findings of fact and conclusions of law.

I will refer to the application of a statutory term or standard to the facts as "definition application," a clunky name, but useful as a subcategory of "statutory application." We can think of "statutory application" as a broad category that includes all instances when a court applies a statute to facts. Its subcategories include basic facts (including mental facts and predictive facts), evaluative determinations, and questions of definition application.

F. Statutes with Multiple Issue-Types

Many statutes contain more than one issue-type. To illustrate, consider the following Georgia statute, which allows family members to seek court-ordered visitation:

> Upon the filing of an original action or upon intervention in an existing proceeding under subsection (b) of this Code section, the court may grant any family member of the child reasonable visitation rights if the court finds by clear and convincing evidence

134. *Curtis*, 820 N.E.2d at 1124.
135. May v. Petersen, 465 P.3d 589, 594–95 (Colo. App. 2020).

> that the health or welfare of the child would be harmed unless such visitation is granted and if the best interests of the child would be served by such visitation. The mere absence of an opportunity for a child to develop a relationship with a family member shall not be considered as harming the health or welfare of the child when there is no substantial preexisting relationship between the child and such family member. In considering whether the health or welfare of the child would be harmed without such visitation, the court shall consider and may find that harm to the child is reasonably likely to result when, prior to the original action or intervention:
>
> (A) The minor child resided with the family member for six months or more;
>
> (B) The family member provided financial support for the basic needs of the child for at least one year;
>
> (C) There was an established pattern of regular visitation or child care by the family member with the child; or
>
> (D) Any other circumstance exists indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted.
>
> The court shall make specific written findings of fact in support of its rulings.[136]

Presented with a petition for family visitation, the trial judge will engage in statutory application in the broad sense by applying this statute to the facts. But there will be sub-issues. The judge will decide questions of basic fact, like whether the child lived with the family member for six months, or whether the family member provided childcare. The judge will make evaluative determinations like whether visitation would be in the child's best interests. They will make predictive facts about the likelihood of future harm to the child. And they will engage in definition application by, for example, deciding whether there was an "established pattern of

136. GA. CODE ANN. § 19-7-3(c)(1).

regular visitation" or a "substantial preexisting relationship."

Let's assume a case comes under this statute and the judge finds the child and the family member have seen each other once a year on Christmas for the past six years. The judge then applies that basic fact to the statute, finding the child and family member have a "substantial preexisting relationship." How is the latter question reviewed on appeal? Is it case-specific statutory application that should be treated as a question of fact and reviewed with deference? Or is the question whether once a year for six years constitutes a "substantial preexisting relationship" a legal question of statutory interpretation?

We can imagine an appellate court doing one or the other. Maybe it rules that whether there is a "substantial preexisting relationship" is for the trier of fact to decide based on the totality of circumstances. Maybe it holds as a matter of law that a family member must see the child more than once a year to have a substantial preexisting relationship. Maybe it articulates factors for the trial court to consider in deciding whether there is a substantial preexisting relationship, and then remands for the trial court to apply those factors.

This discussion suggests three points. First, courts should stop making blanket statements like "the application of a statute to the facts is a question of law" or "a trial court's application of a statute to the facts is reviewed for clear error." Neither statement is true because sometimes it is one, sometimes the other.

Second, there should be a standard by which to decide who—judge or jury—applies the statutory term to the facts. The standard may not be perfectly predictive, but it should at least provide guidance and consistency.

Third, no matter what the standard, there will be close cases for lawyers to argue about and courts to decide.

G. Mixed Questions of Law and Fact

To now, we have discussed questions of law, questions of fact, and issues that do not fall neatly into either category. Let's now talk about how "mixed questions of law and fact" fit into all this.

The short answer is that "mixed question" is not a type of issue at all. It is a category courts use when they do not know what kind of issue they are dealing with.[137] It is—to borrow Professor Friedman's term—a cop-out for when no other label seems to fit.[138] The fact that the cases are all over the map about whether mixed questions are reviewed de novo or deferentially tells you how useful the label is.[139]

Courts typically use the term "mixed question" in two circumstances. One is when referring to an evaluative determination[140] or a question of definition application.[141] It is perhaps understandable that they use the term in this setting because neither evaluative

137. Warner, *All Mixed Up About Mixed Questions*, *supra* note 11, at 107–12.

138. Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 922 (1992).

139. *See* Warner, *All Mixed Up About Mixed Questions*, *supra* note 11, at 107–12. Black's Law Dictionary defines a mixed question of law and fact as "[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." *Mixed Question of Law and Fact*, BLACK'S LAW DICTIONARY (6th ed. 1990). If you wanted to create an unhelpful, circular definition, you could hardly do better.

140. Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 444 (S.D.N.Y. 2013) ("[W]hether a plaintiff's belief was objectively reasonable is a 'mixed question of law and fact,' meaning that it should be decided by the Court only if there is no genuine issue of material fact as to the belief's reasonableness."); Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1122 (10th Cir. 2004) ("Whether an accommodation is reasonable under the ADA is a mixed question of law and fact."); *In re* Paternity of T.R.B., 467 N.W.2d 553, 554 (Wis. Ct. App. 1991) ("What is in a child's best interests is a mixed question of law and fact.").

141. *See, e.g.*, Candelaria v. Karandikar, 475 P.3d 548, 551 (Wyo. 2020) (concluding that the application of a statute of limitations is a mixed question if the material facts are in dispute, and otherwise it is a question of law); White v. Gordon, 558 B.R. 15, 19 (Bankr. D.N.H. 2016) (bankruptcy court's application of statute to the facts of the case presents a mixed question reviewed for clear error unless it is "infected by legal error"); Widdison v. Widdison, 336 P.3d 1106, 1110 (Utah Ct. App. 2014) (concluding that applying a statute to the facts presents a "mixed question of fact and law").

determinations nor questions of definition application fall neatly into the categories of law or fact. They are fact intensive but law guided.

For example, in *Harbor Tug & Barge Co. v. Papai*, the United States Supreme Court addressed whether a maritime employee was a "seaman" under the Jones Act.[142] Noting that "[t]he seaman inquiry is a mixed question of law and fact," the Court discussed the legal standard for whether someone is a seaman and ruled that the evidence did not support a finding that the employee was a "seaman" as used in the statute.[143] Although the Court called the question "mixed," there is nothing mixed about it. It is a question of definition application. And in reviewing that question, the Court clarified the meaning of "seaman," thus interpreting the statute.[144]

Another example is *Annette H. v. Department of Health & Social. Services*, a parental termination case.[145] The applicable Alaska statute required the Office of Children's Services to "make timely, reasonable efforts to provide family support services to the child and to the parents . . . that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home."[146] The court noted that "[w]hether OCS made reasonable efforts to reunify the family is a mixed question of law and fact."[147] It then reviewed the evidence and found that it supported a finding of reasonable efforts.[148] Here, too, the issue is not

142. 520 U.S. 548, 550 (1997).

143. *Id.* at 554.

144. *See also, e.g.*, Prima U.S., Inc. v. Panalpina, Inc., 223 F.3d 126, 129 (2d Cir. 2000) (concluding that whether entity is a "freight forwarder" under the Carriage of Goods by Sea Act is a mixed question reviewed de novo); Campbell v. Merit Systems Protection Bd., 27 F.3d 1560, 1567 (Fed. Cir. 1994) (concluding that whether someone is an "independent candidate" within the meaning of the Hatch Act is a mixed question reviewed deferentially).

145. 450 P.3d 259 (Alaska 2019).

146. *Id.* at 267.

147. *Id.* at 265.

148. *Id.*

really mixed. It is a question of definition application, or arguably an evaluative determination.

These are just two examples. The case books are full of instances in which courts label evaluative determinations or questions of definition application mixed questions of law and fact.

The other time courts used the term "mixed question" is when dealing with a compound question: an ultimate question made up of component sub-questions, which may be of different varieties. For example, in *People In Interest of L.M*, the court reviewed a decision to terminate parental rights.[149] That issue, the court said, "presents a mixed question of fact and law because it involves application of the termination statute to evidentiary facts."[150] It then explained that the trial court's factual findings would be reviewed deferentially, but it would "review the legal conclusions de novo when deciding mixed questions of fact and law."[151]

But a trial court's decision to terminate parental rights is not mixed at all. It is an ultimate decision premised on a number of sub-decisions.[152] Some of them are findings of basic fact: What did the parent do or not do? Did the parent engage in substance abuse treatment? Has the parent recently used substances? Some involve applying a statutory term to those basic facts, like whether the parent is "unfit." Some are evaluative determinations, like what is in the child's "best interests." And in the process of making these decisions, the court might also have to interpret statutory language.

You would not necessarily apply the same standard of review to each sub-issue. You might have to parse them and decide the standard of review for each. It tells you little to say that, when deciding a mixed question, the factual findings are reviewed deferentially and the legal conclusions are reviewed de novo. The hard

149. 433 P.3d 114 (Colo. App. 2018).

150. *Id.* at 118.

151. *Id.*

152. *See* COLO. REV. STAT. ANN. § 19-3-604 (West 2018).

question is which sub-decisions to treat as factual findings and which as legal conclusions.

As another illustration, take a case under the Georgia family member visitation statute discussed above. The trial judge hears the evidence, makes findings and conclusions, and decides to either grant or deny family member visitation. On appeal, you could say: "Whether the trial court properly granted family member visitation is a mixed question of law and fact." But you would not be saying anything useful. What is useful is to identify which of the trial judge's determinations are findings of basic fact, which are evaluative determinations, which are legal questions about the meaning of statutory terms, and which are questions of definition application that involve applying those terms to the unique facts of the case.

Compare those examples, involving statutes applied by judges, with a criminal statute applied by juries. In *State v. Perebeynos*,[153] the defendant was convicted of hit and run under a statute that said: "A driver of any vehicle involved in an accident resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible . . . ."[154] We can see that the statute requires both findings of basic fact (whether the defendant was driving a vehicle, whether someone was injured) and questions of definition application (whether the vehicle was "involved in an accident," whether it stopped "as close thereto as possible"). Given all these issues mixed together, an appellate court reviewing the verdict might say it involved a mixed question. But courts rarely use that term for the review of a jury verdict.

The issue in *Perebeynos* was "mixed" in another sense. The defendant argued that the evidence was insufficient to support a finding that he was "involved in an accident."[155] The court noted that its standard of

153. 87 P.3d 1216, 1217 (Wash. Ct. App. 2004).

154. WASH. REV. CODE ANN. § 46.52.020 (West 2002).

155. *Perebeynos*, 87 P.3d at 1217.

review was whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[156] But it then decided a legal issue. The defendant argued that he was not involved in an accident because he did not make contact with another vehicle.[157] Interpreting the statute, the court held that physical contact is not required to be "involved in an accident."[158] It then concluded: "[T]here is sufficient evidence that Perebeynos was, at the very least, a participant in the events leading up to the accident."[159]

The time-worn[160] expression "mixed question of law and fact" is confusing and its use should be discontinued. When confronting a statutory issue, it is more helpful to parse which kinds of questions really are at issue in the case. And when the issue involves definition application, it helpful to ask whether a generalizable legal determination can be made, or the statute's application is case specific.

Which brings us to back to a standard. Now that we have a vocabulary for the different kinds of issues statutes include, we can better articulate how to divide the legal ones from those decided by the trier of fact.

IV. DISTINGUISHING INTERPRETATION FROM APPLICATION

A. Proposed Standard

Let's start with the low-hanging fruit. When a statutory requirement is a basic fact, the application of that statute to the evidence is always a question of fact. Deciding whether something occurred in time or space is

156. *Id.* at 1218.

157. *Id.* at 1219.

158. *Id.*

159. *Id.* at 1218–19.

160. The earliest reference to "mixed question of law and fact" I could find was in the 1803 South Carolina case of *Booth v. Moret*, 3 S.C.L. (1 Brev.) 216, 220 (S.C.L. 1803), but that expression shows up often enough in nineteenth-century cases that it probably has an earlier origin.

textbook fact-finding, and it makes no difference that the requirement comes from a statute. Following are the kinds of statutory requirements that would always be questions of fact:

- Did a DUI defendant have a blood alcohol content in excess of .08?
- Did a motorist come to a complete stop before turning right on a red?
- Did someone act with intent to harm?

The latter is a mental fact but, as we have seen, mental facts are always treated like basic facts.

Second, when a statute requires an evaluative determination, that too is a question for the trier of fact. For example, if a statute requires deciding whether someone acted reasonably, exercised diligence, or held a reasonable belief about something, the trier of fact makes the determination and it is reviewed on appeal with deference. As discussed above, this is overwhelmingly how courts treat evaluative determinations.

The notable exceptions are probable cause and reasonable suspicion in criminal cases, which courts hold to be questions of law.[161] There is no analytical reason why this is so—"reasonable suspicion" is analytically no different from "reasonable care." Rather, the treatment of these questions as legal is for policy reasons having mostly to do with the need to uniformly apply the Fourth Amendment.[162] So, while evaluative determinations are usually for the trier of fact, we need to leave room for an "unless." Evaluative determinations are for the trier of fact unless an appellate court decides for policy reasons that a particular statutory evaluative determination must always be decided by the court.

Third, for questions of definition application, the dividing line between interpretation and application is generality. If a statute can be further explained or

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161. Ornelas v. United States, 517 U.S. 690, 691 (1996) ("We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*.").

162. *Id.* at 697–98.

refined in a way that is generally applicable to other circumstances, then explaining it or refining it is statutory interpretation. When a statute has been defined as far as it reasonably can and the only question is whether it applies on the unique facts of this case, applying it is statutory application for the trier of fact.

To illustrate, let's look at some cases.

In *Tilkov v. Duncan*, a lawsuit between neighbors, one issue was whether stands of poplar and cypress trees were "spite structures" in violation of a statute.[163] The statute said: "An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor."[164] Interpreting the statute, the court held that trees can be a structure within the meaning of the statute "when in artificially arranged configurations."[165] It then reviewed with deference the trial court's application of the statute, concluding that the evidence supported the trial court's finding that the poplar grove was not a spite structure, but the cypress grove was.[166]

State v. Bodoh involved whether a rottweiler was a "dangerous weapon" within the meaning of a criminal statute.[167] This issue was one of interpretation, the court noted, and "[s]tatutory interpretation and applying a statute to a set of facts are both questions of law which this court reviews de novo."[168] The court reviewed the statutory definition of "dangerous weapon" as including any instrumentality "which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm."[169] It also reviewed legislative history and case law, and concluded that a dog can be a dangerous weapon: "A dog is an instrumentality

163. Nos. 69615-7-I, 70092-8-I, 2014 WL 3741629, at *1 (Wash. Ct. App. July 28, 2014).

164. WASH. REV. CODE ANN. § 7.40.030 (West 1883).

165. *Tilkov*, 2014 WL 3741629, at *8.

166. *Id.* at *10–11.

167. 595 N.W.2d 330, 332 (Wis. 1999).

168. *Id.* at 333.

169. WIS. STAT. ANN. § 939.22(10) (1987).

which can be used or intended to be used to cause death or great bodily harm. It is the manner in which the dog is used and the nature of the act that is determinative of whether the dog is a dangerous weapon."[170]

The court then considered whether the evidence supported the defendant's conviction.[171] Reviewing the evidence, it concluded that the jury "had to have found that Bodoh used or intended to use his dogs in a manner to cause death or great bodily harm," and that this was a reasonable inference.[172]

The courts in *Tilkov* and *Bodoh* both treated application of the statutory term as a question for the trier of fact, even if *Bodoh*'s recitation of the standard of review suggests otherwise. But they both found a need to define or refine the statutory term first—*Tilkov* by explaining when trees can be a "spite structure,"[173] *Bodoh* by explaining when a dog can be a "dangerous weapon."[174] Implicitly, each found that the statutory term could be explained or refined in a way that would apply to other cases.[175] Then, having refined the respective statutes, they deferred to the trier of fact's application of them.[176]

Perhaps a better articulation of this standard was stated by the Federal Circuit when describing what it called a "fact-intensive mixed question." Such a question, the court said, involves "the straight application of a rule in need of no further elaboration to highly particularized facts."[177] Unsurprisingly, the "mixed question" in that case was really a question of definition application: Was a federal employee running for local office an "independent candidate" within the meaning of Hatch Act regulations? The court ruled that the case-specific application

170. *Bodoh*, 595 N.W.2d at 333–34.
171. *Id.* at 334–35.
172. *Id.* at 335.
173. 2014 WL 3741629, at *8.
174. 595 N.W.2d at 333–34.
175. *See id.*; *Tilkov*, 2014 WL 3741629, at *8.
176. *Bodoh*, 595 N.W.2d at 334; *Tilkov*, 2014 WL 3741629, at *8.
177. Campbell v. Merit Sys. Prot. Bd., 27 F.3d 1560, 1566 (Fed. Cir. 1994).

of that term would be for the trier of fact.[178] The rule needed no further elaboration.

How do we know if a statute needs further elaboration? There is no formula. Rather, it is a matter of judgment, and where there is judgment, there is advocacy. Sometimes it is obvious that a statute needs clarifying. Sometimes it is clear that no further explanation of a statutory term will be useful. And sometimes there are close calls such that one side will argue for a legal interpretation while the other argues for deference to a case-specific application. Good lawyers already do this.

As do courts, even if they do not articulate (or are even aware of) the distinction they are making between interpretation and application. I am not suggesting courts treat statutory issues differently from how they do now, only that they recognize when there is a choice to make between treating an issue as interpretation or application, and that they be explicit about their choice.

B. Analog and Digital Statutes

When we look at when courts treat a statutory issue as interpretation and when they treat it as case-specific application, we notice that some statutory language is more easily susceptible to one approach or the other. Some statutes involve a finite number of possible scenarios, so deciding which of them falls within the statute is typically a question of interpretation. Others involve a near-infinite array of outcomes such that a ruling in one is unlikely to have precedential value for other cases. One way to think about this distinction is that some statutes are more digital and others are more analog. The application of a digital statute is much more likely to involve interpretation than the application of an analog statute.

Take, for example, whether someone "regularly" collects a debt within the meaning of the Fair Debt Collection Practices Act. How often does one have to engage in

178. *Id.* at 1567.

debt collection before it becomes "regular"? Once a week? Every day? What if they do debt collection one day a year, but contact 10,000 debtors in that day? The possibilities are endless.

The Second Circuit considered this question in *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*. Instead of ruling as a matter of law that the defendant did or did not regularly engage in debt collection, it held that the issue is one for the trier of fact, though it did refine the meaning of "regularly" by specifying factors for the trier of fact to consider.[179] Whether a lawyer "'regularly' engages in debt collection activity," the court held, "must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity."[180]

Contrast that with *Lewis v. Commonwealth*, in which the issue was whether the defendant was a "prisoner" under a statute that prohibited "an incarcerated prisoner" from possessing a cellular phone.[181] The defendant was serving a jail sentence at a city farm which, he argued, is not a prison.[182] The court disagreed. Interpreting the statute de novo, it held that the term "prisoner" encompassed anyone incarcerated in a state or local correctional facility.[183]

Unlike "regularly" collecting debt, which might encompass countless scenarios, the universe of places in which one could be a "prisoner" is finite. The issue need not be decided by the trier of fact because the court can determine, as a matter of law, that confinement in certain facilities makes one a prisoner and confinement in other facilities does not. In fact, leaving the decision to the trier of fact would risk inconsistent rulings in identical situations.

To further illustrate, the following can be thought of as involving digital statutes:

179. Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 63 (2d Cir. 2004).

180. *Id.* at 62.

181. No. 0478-12-1, 2012 WL 6571291, at *1 (Va. Ct. App. Dec. 18, 2012).

182. *Id.*

183. *Id.* at *2.

- What kinds of remuneration constitute "wages" under a statute that penalizes failure to promptly pay wages?[184]
- What jobs make one a "classroom teacher" within the meaning of a statute that provides certain entitlements to classroom teachers?[185]
- Whether a state court conviction constitutes an "aggravated felony" for purposes of federal immigration law?[186]

Unsurprisingly, the courts in these cases treated the application of the statute as a question of law. Contrast these with the following, which can be thought of as involving analog statutes:

- Whether a defendant is "drug-dependent" under a statute that provides lesser penalties if they are.[187]
- Whether a parent has a history of "family violence" as defined by a statute creating a presumption against sole custody if they do.[188]
- Whether a patient was "stabilized" within the meaning of the Emergency Medical Treatment and Active Labor Act, which requires hospitals to "stabilize" certain emergency room patients.[189]

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184. Kvidera v. Rotation Eng'g & Mrg. Co., 705 N.W.2d 416, 422 (Minn. Ct. App. 2005) (concluding that whether a bonus constitutes "wages" under the statute presented a question of law).

185. Monongalia Cty. Bd. of Educ. v. Am. Fed'n of Teachers–W. Va., 792 S.E.2d 645, 650 (W. Va. 2016) (concluding that whether educational interventionists were "classroom teachers" under statute was a question of law).

186. Magasouba v. Mukasey, 543 F.3d 13, 14 (1st Cir. 2008) ("Whether petitioner's state-court conviction actually constitutes an aggravated felony, as defined in 8 U.S.C. § 1101(a)(43), is a question of law over which this court has jurisdiction.").

187. State v. Holloway, 982 A.2d 231, 234 n.2 (Conn. App. Ct. 2009) (concluding that whether defendant is "drug-dependent" is a question of fact).

188. G.S. v. T.S., 900 So. 2d 1088, 1091 (La. Ct. App. 2005) ("Whether a spouse /parent has committed acts of 'family violence' as defined in the statute is a question of fact.").

189. Smith v. Janes, 895 F. Supp. 875, 883 (S.D. Miss. 1995) ("[W]hether Smith was stabilized as defined by the statute is a question of fact . . . .").

The application of terms like these is typically treated as a question for the trier of fact.

But not always. Even with a more analog statute, there sometimes is a need to clarify or refine its meaning before it can be applied by the trier of fact. So a court might engage in statutory interpretation by providing a test or factors for the trier of fact to consider when applying the facts to the statute.[190] Or it might rule as a matter of law that the circumstances of this case do or do not fall within the statute.[191]

Conversely, the application of a digital statute may require fact-finding because the underlying basic facts may be disputed. In that situation, the court might submit the issue to a jury with instructions like: "If you find these facts to be true, then you must find that the statute applies." Or the jury could answer special interrogatories that allow the court to decide as a legal matter whether the statute applies. Or, in a bench trial, the court would decide both the basic facts and whether the statute applies.

Distinguishing between digital and analog statutes does not result in any hard and fast rules, and the distinction itself is more of a continuum than a binary choice. But it is helpful when thinking about whether the application of a statute in any given case should be treated as a question of law or a question for the trier of fact.

C. Reasons to Treat Statutory Application as a Legal or Fact Question

The standard set forth above is both descriptive and prescriptive. It tries to explain the cases that equate statutory application with statutory interpretation and those that treat application as a question for the trier of fact, and suggests an explicit basis for doing one or the other.

190. *See, e.g.*, Tilkov v. Duncan, Nos. 69615-7-I, 70092-8-I, 2014 WL 3741629, at *8–9 (2014) (explaining the circumstances in which trees can constitute a "spite structure," then deferring to trial court's application of the statute).

191. *See infra* notes 193–196 and accompanying text.

But let's now consider why statutory application should ever be decided by a jury.

The first reason is that it jibes with the law–fact distinction. The law–fact distinction allocates to judges decisions that require legal expertise, and when there is a need for uniformity and consistency from case to case. This is most instances of statutory interpretation. It allocates to juries those decisions that are case specific and fact intensive. Since statutory application tends to involve a mix of basic facts and definition application (or evaluative determinations), it makes sense that courts consider it factual. As we have discussed, it is natural for fact-finders to think in terms of the ultimate conclusion, rather than separating basic facts from their application to a statutory term.

Second, in many instances it would be impractical to have a jury decide the basic facts and a judge apply those facts to the statutory term. Consider, for example, a trial over whether someone "regularly" engaged in debt collection as defined by the Fair Debt Collection Practices Act. The jury would presumably get a large set of special interrogatories asking things like: "How many times did the defendant send a debt collection letter in the past year?" "How many times did the defendant make a debt collection phone call last year?" "How many of defendant's employees devote more than 25% of their time to debt collection?" And so on. The judge would then have to apply those answers to the statutory standard. It is much easier to instruct the jury on the meaning of "regularly," and then subsume the jury's findings of basic fact into an ultimate finding of whether the defendant "regularly" engaged in debt collection.

Another example is self-defense in a criminal case. We ask juries to decide things like whether "a reasonable person would believe that physical force is immediately necessary to protect himself."[192] That standard contains both evaluative determinations (What is reasonable to believe under the circumstances? What is immediately

192. ARIZ. REV. STAT. ANN. § 13-404(A) (1977).

necessary?) and definition application (What is physical force?). Imagine how many special interrogatories would be needed if the jury only found the basic facts while the judge decided the ultimate question of applying the statute to those facts.

Third, such decisions would not have much precedential value. A finding, for example, that this particular defendant reasonably believed they needed to protect themselves with physical force says little about what the next defendant claiming self-defense reasonably believed. When an analog statute like this is involved, a court's decision that it applies or does not apply in any particular case is unlikely to create law.

That said, there may be statutes which, for policy reasons, should always be applied by the judge instead of the jury. I am not talking here about interpreting the statute. I am talking about case-by-case application conducted by the court. A common example is when a statute requires a determination of probable cause. We have already seen that, under Fourth Amendment law, probable cause and reasonable suspicion are legal questions,[193] and courts have extended that idea to statutes that require a finding of probable cause.[194]

There are a few reasons why a court might deem the application of a particular statute to always be a legal issue. It may be that applying the statute requires legal expertise, as with a privilege statute.[195] Or there may be an especial need for uniformity of application, as in Fourth Amendment cases.[196] Or perhaps the legislature

193. Ornelas v. United States, 517 U.S. 690, 699 (1996).

194. *See, e.g.*, State v. Goss, 806 N.W.2d 918, 921 (Wis. 2011) (concluding that whether the facts satisfy the statutory standard of probable cause is a question of law based on the totality of the circumstances); *In re* Det. Of Mead, 790 N.W.2d 104, 110 (Iowa 2010) (concluding that probable cause under sexually violent predator statute is a mixed question of law and fact reviewed de novo).

195. *See, e.g.*, State v. Harris, 855 S.E.2d 510, 512 (N.C. Ct. App. 2021) ("Whether a statement is 'a privileged confidential communication' as defined by North Carolina General Statute § 8-57 'is a question of law' which this Court reviews de novo.").

196. *See also, e.g.*, Flavel v. Scottsdale Ins. Co., No. C19-82 TSZ, 2019 WL 1875375, at *4 (W.D. Wash. Apr. 26, 2019) ("Whether conduct constitutes an

specifies that determinations under a statute are always to be done by the judge.

But if a court is going to do that, it should do it for every case involving that statute, and it should articulate a reason. The tendency of many courts is to make overly broad statements like: "The application of a statute to the facts is always a question of law." Instead, they should acknowledge that statutory application is typically done by the trier of fact if it does not involve interpreting the statute, and then explain why this particular statute should be treated differently.

D. Statutory Application and Sufficiency of Evidence

Many (perhaps most) of the cases discussed in this article arose from a sufficiency of evidence determination, whether on appellate review of a jury verdict or bench trial, or on a motion for summary judgment or for judgment as a matter of law. A sufficiency of evidence question asks whether the evidence supports a particular finding or, stated differently, whether based on the evidence a reasonable trier of fact could find in favor of one side or the other.

Some sufficiency of evidence questions involve only basic facts, and in that instance the court's role is to review the quality and quantity of evidence offered. For example, if the underlying fact question is whether the defendant punched the victim, the court looks at the evidence and decides whether a reasonable trier of fact could find that the defendant punched the victim. Because decisions like this pertain only to the evidence in one case, they often have no precedential value even though sufficiency of evidence decisions are questions of law.

But things are different when the underlying question is one of definition application. When a court rules that a reasonable trier of fact could, could not, or would

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unfair or deceptive trade practice within the meaning of the CPA constitutes a question of law.").

have to find that a statute applies, it is doing more than judging the evidence. It is illustrating the kinds of situations that either do or do not fall within a statute.

Brungart v. Pullen[197] illustrates this. The plaintiff there obtained an injunction for protection against dating violence against her ex-boyfriend, who appealed.[198] The statute allowed such an injunction when someone "has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence," including stalking.[199] The evidence showed that, after their breakup, the defendant sent text messages calling the plaintiff names, went to her apartment, posed as a delivery person to get information about her, contacted her son about her whereabouts, and texted explicit videos to her ex-husband.[200] This, the court held, was insufficient to constitute stalking within the meaning of the statute.[201] It emphasized that the conduct occurred over the course of "only a few days immediately following the breakup," and distinguished another case in which an ex-boyfriend sent messages for three months after being told to stop.[202]

Brungart involved sufficiency of evidence review of a question of definition application: Could the trier of fact find that the plaintiff had reasonable cause to believe she was in imminent danger of dating violence, including stalking?[203] The court did not announce any broad principle about what "stalking" means. But it did make law just by holding that the conduct in that case was insufficient to constitute stalking.[204]

Another example is *State v. Cathers*.[205] The defendant there was convicted after a bench trial of failing to

197. 296 So. 3d 973, 976 (Fla. Dist. Ct. App. 2020).

198. *Id.* at 975.

199. FLA. STAT. ANN. § 784.046(1)(a), (2)(b).

200. *Brungart*, 296 So. 3d at 975–76.

201. *Id.* at 977–78.

202. *Id.* at 978–79 (citing Khan v. Deutschman, 282 So. 3d 965, 968 (Fla. Dist. Ct. App. 2019)).

203. *See id.* at 977.

204. *Id.* at 978–79.

205. 461 P.3d 375 (Wash. Ct. App. 2020).

register as a sex offender.[206] The statute required registered sex offenders to notify the sheriff "within three business days after ceasing to have a fixed residence," and the trial court based the conviction on a finding that the defendant was gone from his residence for between 7 and 12 days.[207] On appeal, the defendant did not challenge this finding of basic fact.[208] Rather, he argued that it was insufficient to constitute "ceasing to have a fixed residence" within the meaning of the statute.[209] The appellate court agreed and reversed the conviction.[210] Relying on the statutory definition of "fixed residence," it concluded that a 7- to 12-day absence was "insufficient to establish that Cathers ceased having a fixed residence."[211]

One could argue that this is not statutory application at all, but rather statutory interpretation. But that is exactly the point. Deciding whether a trier of fact could find that a statute applies in certain circumstances is akin to statutory interpretation because it helps define the statute's boundaries.

Does this mean statutory interpretation and statutory application are really the same thing after all? No, but it does help explain why the line between them is blurry. There are many cases in which a determination that the evidence does or does not support a finding that the statute applies has little value for other cases. And there are others in which the decision helps explain what the statute means.

V. CONCLUSION

I have tried to prove three things in this article. The first—which is far from original but frequently ignored—is that there is a difference between interpreting a

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206. *Id.* at 376.
207. *Id.*
208. *Id.*
209. *Id.* at 377.
210. *Id.*
211. *Id.*

statute and applying it to the unique circumstances of a case. Although all statutory interpretation arises from the application of a statute to facts, not all statutory application is interpretation. Courts that simply recite "the interpretation and application of a statute is a question of law" are glossing over this distinction.

Second, statutory application that does not involve interpreting a statute usually is and should be done by the trier of fact. This is, of course, true if the statute to be applied only requires findings of basic fact, as we see with many criminal statutes. But it is also true for statutes that include evaluative determinations and questions of definition application.

Third, the distinction between application and interpretation turns on whether the statute can reasonably be defined, refined, or clarified in a way that would apply to other cases. If it cannot—if the statute is as defined as it reasonably can be and the only issue is whether it applies on the unique facts of a case—the question is one of statutory application.

The cases I have cited in this article are, for the most part, just illustrations. They are not the leading cases on the difference between interpretation and application, and most of them do not even mention the distinction. I have tried to cite cases and statutes from a variety of jurisdictions because the lack of clarity about statutory application and statutory interpretation is not limited to a few jurisdictions. If I have done my job right, you should be able to take any case involving a statute from any jurisdiction, apply the principles discussed here, and determine whether it is engaging in interpretation, application, or both.

There has been a lot of talk about statutory interpretation. As important as that discussion is, it is also important to have a principled way of deciding whether a statutory question even calls for interpretation.