EMORY | LAW

Emory Law Journal

Volume 70 | Issue 6

2021

# Law, Fact, and Procedural Justice

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# LAW, FACT, AND PROCEDURAL JUSTICE

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ABSTRACT

*The distinction between questions of law and questions of fact is deceptively complex. Although any first-year law student could properly classify those issues that fall at the polar ends of the law-fact continuum, the Supreme Court has itself acknowledged that the exact dividing line between law and fact—the point where legal inquiries end and factual ones begin—is "slippery," "elusive," and "vexing." But identifying that line is crucially important. Whether an issue is deemed a question of law or a question of fact often influences the appointment of a courtroom decision maker, the scope of appellate review, the administration of certain evidentiary rules, and the application of preclusive or precedential weight to its resolution.*

*This Article seeks to bring theoretical coherence and analytical clarity to the law-fact distinction. It pushes back against the formal view that questions of law and questions of fact are categorically distinct. Instead, drawing on legal process principles, this Article argues that an issue is typically deemed a question of law or a question of fact because legitimacy concerns demand its resolution by a particular decision maker. Through that reconceptualization, this Article's legal process model offers a number of significant contributions. First, as a descriptive matter, it explains the cause of the jurisprudential turbulence surrounding the law-fact distinction. Second, normatively, it highlights the weaknesses of traditional law-fact model, which enables institutional aggregations of power. Finally, it promises to transform the process of classifying issues, turning that analysis into a simple transparent effort to allocate decision-making authority in a manner that will best optimize the legitimacy of adjudication—that will best achieve procedural justice.*

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[*] Assistant Professor, University of Arkansas School of Law; Ph.D. Candidate, Yale Law School. Many thanks to Ronald Allen, Ian Ayres, Dwayne Betts, Ed Cheng, Abbe Gluck, Samantha Godwin, Thomas Kadri, Paul Khan, Al Klevorick, Daniel Markovits, Michael Pardo, Clare Ryan, Laurent Sacharoff, Alan Trammell, Tom Tyler, and Jordan Woods for providing insightful comments on earlier versions of this Article. I would also like to thank the many participants both at a Yale Law School graduate workshop and a University of Arkansas faculty workshop for helpful questions and suggestions. Finally, I owe an immense debt of gratitude to the wonderful editors at the *Emory Law Journal* for their fantastic work on this Article.

## INTRODUCTION

*Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores*;[1] judges do not decide questions of fact, juries do not resolve questions of law.[2] For centuries, this oft-repeated maxim has purported to offer a general division of decision-making authority within the courtroom.[3] With equal fervor, courts have championed their responsibility to "say what the law is"[4] while fiercely protecting the jury's right to decide certain factual issues, particularly in criminal cases.[5] Corresponding doctrines have also embraced the law-fact distinction. For example, scholars have rightly emphasized that an issue's classification as a question of law or a question of fact often influences the appointment of a courtroom decision maker, the scope of appellate review, the administration of certain evidentiary rules, and the application of preclusive or precedential weight to its resolution.[6]

But despite the law-fact distinction's prominent place in the American juridical system—despite its residence in the Constitution itself[7]—case law fails to provide an answer to a seemingly simple yet critically important question: what distinguishes questions of law from questions of fact?[8]

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[1] *See, e.g.*, 1 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 155b (1629); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999); 5 ROSCOE POUND, JURISPRUDENCE 547 (1959). As a descriptive matter, it fails to fully account for the historical American practice, which saw juries deciding certain questions of law well into the nineteenth century and, of course, included bench trials. Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44 ("For much of the century following ratification of the Amendment, federal civil juries were told that they were responsible for deciding law as well as fact, giving such attention as they might choose to the judge's instructions on the law."); *see also* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377 (1999). Nonetheless, it is now a generally accepted rule of thumb for the division of decision-making authority at criminal trials, and it helps establish the division of power between bench trial judges (serving as a proxy for the jury) and appellate courts. *See* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 565 (2001).

[2] *See. e.g.*, Moses, *supra* note 1 ("The general rule, therefore, is that in cases where there is a jury, the jury's function is to decide questions of fact. The judge, on the other hand, will determine matters of law."). *But see* Carrington, *supra* note 1.

[3] *See* Moses, *supra* note 1.

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 29 (D.C. Cir. 2016) ("Let the word go forth: for however much the judiciary has emboldened [another decision maker], *we* 'say what the law is.'" (quoting *Marbury*, 5 U.S. at 177)).

[5] *See Del Monte Dunes*, 526 U.S. at 720 ("In actions at law predominantly factual issues are in most cases allocated to the jury." (internal citation omitted)).

[6] Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003); *see also* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 586–93 (2017) (critiquing the law-fact distinction as having little explanatory power for distinguishing precedent and preclusion).

[7] *See* U.S. CONST. art. III, § 2.

[8] *See* Williams v. Taylor, 529 U.S. 362, 385 (2000) (recognizing courts have "not charted an entirely

At first, the distinction between legal and factual inquiries might seem elementary. Determining whether it was indeed Clarence Earl Gideon who robbed the Bay Harbor Pool Room on the morning of June 3, 1961, is a question of fact.[9] Whether the Sixth Amendment entitled Mr. Gideon to the right to counsel at his subsequent criminal trial is a question of law.[10]

But as one works in from those polar extremes, the task of delineating law from fact becomes, to borrow the understated opinion of Supreme Court Justice Byron White, "vexing."[11]

Consider, for example, the issue of "voluntariness" as it arose in *United States v. Barbour*.[12] In January 1994, Ronald Barbour drove to Washington, D.C., to assassinate the President of the United States.[13] After catching wind of his plot, Secret Service agents intercepted Mr. Barbour at his hotel, where they extracted a confession from him in exchange for a promise of mental health treatment.[14] The following day, the agents again visited Mr. Barbour, who was now involuntarily confined at a private mental health facility.[15] During that second meeting, Mr. Barbour agreed to allow the agents to search his apartment and car.[16] Given Mr. Barbour's at-risk mental state, was either his confession or his consent to search "voluntary"? And, more to the point here, is "voluntariness" a question of law or a question of fact?

For the *Barbour* court it was both. And neither. The Eleventh Circuit, following Supreme Court precedent, gamely declared the voluntariness of a search to be a question of fact;[17] two sentences later, it declared the voluntariness

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clear course" when classifying questions as factual or legal in nature (quoting Thompson v. Keohane, 516 U.S. 99, 110–11 (1995))).

[9] *See* Gideon v. Wainwright, 372 U.S. 335, 336 (1963); Brief for Respondent at 2, 20, *Gideon*, 372 U.S. 335 (No. 155), 1963 WL 105476.

[10] *Gideon*, 372 U.S. at 337–38.

[11] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); *see* Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of* Ring, 32 NOTRE DAME J.L., ETHICS & PUB. POL'Y 47, 49 (2018). Indeed, the Supreme Court has noted that "the proper characterization of a question as one of fact or law is sometimes slippery," *Thompson*, 516 U.S. at 110–11, while further acknowledging that, institutionally, it has "not charted an entirely clear course" when attempting to pinpoint the law-fact line of demarcation. *Williams*, 529 U.S. at 385 (quoting *Thompson*, 516 U.S. at 110–11).

[12] United States v. Barbour, 70 F.3d 580, 584 (11th Cir. 1995).

[13] *Id.* at 583.

[14] *Id.* at 583–84.

[15] *Id.* at 584.

[16] *Id.*

[17] *Id.*; *see also* Ohio v. Robinette, 519 U.S. 33, 40 (1996) ("The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" (quoting Schneckloth v. Bustamante, 412 U.S. 218, 248–49 (1973))).

of a confession to be a question of law.[18] Curiously absent from the *Barbour* opinion is any explanation for the differing classifications.

Yet *Barbour* is far from anomalous in its mystifying approach to law and fact. In truth, it is merely the tip of the iceberg. The Supreme Court itself, for example, has considered reasonability a question of fact in the personal tort context but a question of law in the policing context.[19] It has insisted that issues involving considerations of morality or deterrence value are factual in the criminal arena but legal in the context of assessing punitive damages.[20] Without any attempt to reconcile or even recognize its differing treatment, the Court has determined that the unconscionability of a contract,[21] the appropriateness of an implied price term,[22] "actual malice" in a defamation suit,[23] probable cause,[24] the "obscene" or "patently offensive" nature of a publication,[25] and the effectiveness of counsel[26] are to be treated like questions of law subject to de novo review, but issues including malicious prosecution,[27] aggravating and

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[18] *Barbour*, 70 F.3d at 584; *see also* Miller v. Fenton, 474 U.S. 104, 115–16 (1985) ("'[V]oluntariness' is a legal question . . . . Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." (internal citation omitted)).

[19] *Compare* Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 664 (1873) ("[A]lthough the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."), *with* Scott v. Harris, 550 U.S. 372, 381 n.8 (2007) ("[T]he reasonableness of [an officer's] actions—or . . . '[w]hether [respondent's] actions have risen to a level warranting deadly force'—is a pure question of law." (internal citation omitted)). Those who attempt to make sense of the law-fact distinction often utilize reasonableness in the personal tort and contract contexts to advance their frameworks. *See, e.g.*, Allen & Pardo, *supra* note 6, at 1781–83; Thomas v. Gen. Motors Acceptance, Corp., 288 F.3d 305, 308 (7th Cir. 2002); Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 922–24 (1992); Atiq, *supra* note 11, at 59, 61.

[20] *See* Wheeler v. Nesbitt, 65 U.S. 544, 552 (1860); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432–33 (2001).

[21] *See* Marathon Petroleum Co. v. Chronister Oil Co., 687 F. Supp. 437, 439 (C.D. Ill. 1988) ("Whether the contract is reasonable or contrary to public policy is ultimately a question of law." (internal citation omitted)); U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2002) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract[.]"); Atiq, *supra* note 11, at 62.

[22] *See* U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2002); Atiq, *supra* note 11, at 61.

[23] *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501–02 (1984).

[24] *See* Ornelas v. United States, 517 U.S. 690, 699 (1996); Allen & Pardo, *supra* note 6, at 1787–88.

[25] *See* Jenkins v. Georgia, 418 U.S. 153, 159–61 (1974); Miller v. California, 413 U.S. 15, 25 (1973); Atiq, *supra* note 11, at 98.

[26] *See* Strickland v. Washington, 466 U.S. 668, 698–99 (1984); Allen & Pardo, *supra* note 6, at 1787–88.

[27] *See* Wheeler v. Nesbitt, 65 U.S. 544, 552 (1860) ("Whether the prosecution was or was not commenced from malicious motives, was a question of fact[.]").

mitigating sentencing factors,[28] ordinary care,[29] discriminatory intent,[30] and proximate causation[31] are quasi-factual issues warranting deferential review.[32]

At best, then, a holistic examination of the case law leaves one with the impression that varying conceptualizations of the law-fact distinction have become balkanized within different subject matter groupings. Although there is perhaps a discernible test for distinguishing legal issues from their factual cousins within the narrow confines of a specific doctrine, these intra-doctrinal tests are seen to be highly contradictory when viewed in the aggregate. And the conspicuous absence of a trans-substantive framework for distinguishing questions of law from questions of fact ultimately leads one to wonder whether the law-fact distinction actually encapsulates some immutable truth about different types of adjudicative issues or if it is instead, as some scholars suggest, simply a legal fiction.[33]

This Article explores the theoretical roots of that question. As is likely now evident, the orthodox, preeminent, and perhaps intuitive understanding sees the law-fact distinction as differentiating between conceptual kinds.[34] That is, questions of law are believed to possess certain inherent qualities that are separate and distinguishable from those exhibited by questions of fact[35]—legal inquiries are as different from factual inquiries as apples are from oranges. And just as one can easily distinguish apples from oranges by relying on a class of certain reference points (*e.g.*, the fruit's color, taste, and density), one too can

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[28] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Woodward v. Alabama, 571 U.S. 1045, 1047–48 (2013) (Sotomayor, J., dissenting).

[29] *See* Allen & Pardo, *supra* note 6, at 1781.

[30] *See* Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986); Allen & Pardo, *supra* note 6, at 1787–88.

[31] *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 57 (1991).

[32] The format of the preceding list has been adopted from Allen & Pardo, *supra* note 6, at 1787–88.

[33] *See, e.g.*, *id.* at 1787–88, 1807; Kathleen L. Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341*, 28 S. ILL. U. L.J. 13, 31–32 (2003) ("Both analytically and in practice . . . the distinction between 'fact' and 'law' is far from clear cut."); Thompson v. Keohane, 516 U.S. 99, 110–11 (1995); Miller v. Fenton, 474 U.S. 104, 113 (1985).

[34] In line with this approach, a number of scholars have proposed different theoretical frameworks for distinguishing law from fact. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 198 (1990); Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81 (1984); Friedman, *supra* note 19. However, no one ground of distinction has yet taken hold with a persuasive level of descriptive and prescriptive force.

[35] As will be discussed in detail below, *see infra* Part II.A, the traditional conceptualization of the law-fact distinction seems largely to be a vestige of a formalist period when the law was considered autonomous and self-justifying. During this time, even vague constitutional questions were deemed non-legal. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 34 (1983) ("To the legal science mentality such open-ended questions were political, not legal, and the courts abandoned any scientific role in trying to answer them.").

easily distinguish law from fact, so long as the law-fact classifier is also using the correct reference points. So, on this view, the classification process should be a relatively easy endeavor. To classify an issue, one must simply identify the intrinsic nature or epistemological demands of that issue and, based on that assessment, categorize it as a question of law or a question of fact.

In recent years, however, Professors Ronald Allen and Michael Pardo have led a group of scholars who are increasingly pushing back against the traditional, orthodox notion of the law-fact distinction.[36] This new wave of scholarship suggests that the emperor has no clothes; the law fact-distinction is, ultimately, just a façade. Rather than relying on a theoretical line of demarcation to contrast law from fact, courts and lawyers classify issues in a functionalist fashion to achieve certain instrumental ends.[37]

Until now, most of this consequentialist scholarship has focused primarily on deconstructing the traditional law-fact model.[38] If one accepts Allen and Pardo's core notion of law-fact indeterminacy, however, scholarship should also explore novel law-fact models to rival the orthodox accounts. Case law suggests that, rather than ad hoc proclamations in a sea of uncertainty, some constellation of factors *is* motivating and constraining the classification process.[39] And if classification constraints do not emanate from immutable truths regarding differences between legal and factual questions, pinpointing that which actually drives (or, that which should drive) classification is of central importance. If the classification of issues is not an end in itself, what does it serve as a means for?

This Article contributes to a growing body of literature by suggesting that the answer lies in principles of procedural justice. Relying on process theory, this Article joins the consequentialist school and argues that the law-fact distinction is indeed best conceptualized as a tool to a greater end.[40] Rather than

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[36] *See* Allen & Pardo, *supra* note 6; *see also* Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 314 (2019) (pushing back on the law-fact distinction in the context of fair use); Amanda Reid, *Deciding Fair Use*, 2019 MICH. ST. L. REV. 601, 601–02 (2019) (arguing that the question of whether copyright fair use is a jury or legal question is a matter of pure policy); *cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985) (suggesting that, for difficult issues, "[t]he real issue is not analytic, but allocative: what [decision maker] should decide the issue?" (footnote omitted)).

[37] *See* Allen & Pardo, *supra* note 6, at 1806 ("[T]he doctrinal distinction between 'law' and 'fact' . . . must be decided functionally rather than by reference to purported ontological, epistemological, or analytical differences between the concepts.").

[38] *See id.* at 1790–1806.

[39] *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001) (classifying an issue based on "[d]ifferences in the institutional competence of trial judges and appellate judges").

[40] As will be discussed in Part II.B, the legal process conceptualization of the law-fact distinction advanced by this Article accepts and builds on Ronald Allen & Michael Pardo's previous work dismantling

finding the label "question of law" and "question of fact" solely contingent on the intrinsic nature of an issue, this Article's procedural justice model sees the classification of an issue as motivated and constrained by a desire to see questions delegated to the most legitimate decision maker.[41] Stated differently, an issue is deemed a question of fact or a question of law not because it exhibits any particular quality, but instead because legitimacy and fairness concerns—concerns of procedural justice—demand its resolution by a particular institution.[42] An issue is a question of fact not merely because it requires some level of historical reconstruction, but instead because the empirical literature demonstrates that a jury is best positioned to provide a socially acceptable resolution. An issue is deemed a question of law not solely because it demands normative considerations regarding rules and consequences, but because legitimacy concerns favor de novo review by appellate courts. The classification of questions thus serves as a means of optimizing the legitimacy of the juridical system—a means of achieving procedural justice—by delegating issues to the appropriate institutional adjudicator.[43]

The procedural justice law-fact model here proposed has significant doctrinal and normative implications.

First, the model has descriptive, explanatory power in how it helps inform the jurisprudential turbulence introduced above. In many ways, the contradictory and muddled case law seems to be a surface-level manifestation of a deeper theoretical struggle between competing classification frameworks.[44] Although courts nominally champion the traditional conceptualization of the law-fact distinction, their reasoning increasingly betrays that endorsement by exhibiting significant reliance on considerations of institutional competence when classifying issues—considerations that lie at the heart of the legitimacy-based procedural justice model.[45] What emerges from this underappreciated theoretical

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formal conceptualizations of the same. *See* Allen & Pardo, *supra* note 6.

[41] *See infra* Part II.A.

[42] That is, the labeling of issues is a task constrained not by immutable differences between law and fact, but instead by the legitimating potential of various decision makers.

[43] *See* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1149–50 (2005) ("[L]aw should allocate decisionmaking to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion.").

[44] *See infra* Part II.B.

[45] *See id.*; *see also* Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 664 (1873) (deeming negligence a question of fact because, *inter alia*, "twelve men know more of the common affairs of life than does one man, [so] they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge"); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001) ("Considerations of *institutional competence* . . . fail to tip the balance in favor of deferential appellate review." (emphasis added)).

wrestling match is doctrinal limbo, contradictory and inconsistent opinions fueled by fundamentally irreconcilable conceptions of the law-fact distinction.

But the procedural justice model's implications are not confined to the realm of descriptive theory or doctrinal explanation. Rather, in pinning the law-fact distinction to notions of fairness and legitimacy, the model offers significant real-world reform. For one, the procedural justice law-fact model prevents institutional self-aggrandizement.[46] Because the traditional conception of the law-fact distinction rests on shaky theoretical foundations, it is vulnerable (and historically subject) to abuse as a means of enlarging one institutional decision maker's sphere of influence to the detriment of another's.[47] Transitioning to the process-based framework would enable decision-making authority to be delegated transparently and issues to be classified in furtherance of a clear end—procedural justice. Second, the procedural justice model also seeks to bolster the legitimacy of substantive outcomes themselves by making procedure as fair as possible.[48] With principles of legitimacy as its guiding light, the model sees previously irrelevant questions of institutional accountability become centrally important. Which institution can most legitimately decide whether police use of force is excessive? Which institution can most fairly determine if a defendant offered information to investigators freely? Granular examination of the legitimating implications of certain allocations of decision-making authority drive classification.

This Article has two parts. Following this introduction, Part I delves into case law to demonstrate the doctrinal incoherence surrounding the distinction between questions of law and questions of fact. Although courts have articulated various tests for distinguishing between legal and factual issues, those tests are often isolated within a particular subject matter area and fail to descriptively account for contradictory tests elsewhere.[49] A survey of the varying treatment of law and fact demonstrates how the absence of a clear trans-substantive law-fact line of demarcation gives rise to an unclear and turbulent legal landscape. Part I then turns from case law to theory, highlighting the two existing predominant

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[46] *See infra* Part II.C.

[47] *See, e.g.*, JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 449 (2009) ("From the seventeenth century onward, English judges used the granting of new trial nominally to enforce, but in reality to redraw, the fact/law line, thereby steadily reducing the sphere of the jury.").

[48] *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV.: J. AM. JUDGES ASS'N 26 (2007) [hereinafter Tyler, *Procedural Justice and the Courts*]; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) [hereinafter Tyler, *Procedural Justice, Legitimacy*].

[49] *Compare Stout*, 84 U.S. at 664 (deeming reasonableness in the tort context a question of fact), *with* Scott v. Harris, 550 U.S. 372, 381 n.8 (2007) (deeming reasonableness in the policing context a question of law).

models of the law-fact distinction. The traditional and intuitive model sees the classification of issues driven entirely by the inherent, immutable characteristics of an issue.[50] Legal and factual issues are as different as apples and oranges. The classification of an issue is therefore a simple exercise in identifying an issue's inner nature. But recent years have seen the rise of a competing law-fact framework. Some scholars now suggest that the law-fact distinction is illusory.[51] This consequentialist model suggests that there is no theoretically sound basis for distinguishing legal and factual issues. Instead, courts simply apply labels to achieve functional ends.

Part II provides this Article's major contribution by identifying a procedural-justice-based approach to the law-fact distinction. Rather than pinning the "question of law" and "question of fact" labels to issues' inherent qualities alone, the procedural justice model sees the issue classification process primarily as a method of allocating questions to the institutions best suited to provide a legitimate resolution. To build out the model, Part II begins with a survey of the procedural justice literature, demonstrating how empirical studies and modern court decisions reflect the increasing importance of procedural justice. It then explains how a procedural justice model would actually operate in practice, explaining why the law-fact labels should perhaps remain even after one embraces law-fact indeterminacy. From there, Part II discusses the implications of the procedural justice law-fact model, offering an account of how it both informs existing case law and promises significant beneficial reform in our legal system. Finally, a brief conclusion provides a summation of this Article's core arguments.

## I. WHAT IS LAW? WHAT IS FACT?

The law-fact distinction is among the oldest of legal puzzles. For centuries, judges, practitioners, and academics have struggled to identify the seemingly simple yet stubbornly elusive difference between legal and factual inquiries. As the long-standing interest in and exploration of the law-fact distinction yet endures, this Part seeks to trace the current contours of the debate surrounding law and fact. Namely, the pages below highlight existing law-fact incoherence in case law and offer an overview of law-fact models in the academic literature.

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[50] *See infra* Part I.B.1.

[51] *See infra* Part I.B.2.

### *A. The Turbulent Legal Landscape*

The law-fact distinction is deceptively complex. After all, any first-year law student could properly classify those issues that fall at the polar ends of the continuum:[52] whether a defendant punched a victim is a question of fact;[53] how one should interpret "established by the State," as used in the Patient Protection and Affordable Care Act, is a question of law.[54] Yet as one approaches *the* dividing line between law and fact, identifying where factual inquiries end and legal ones begin proves exceedingly difficult.[55]

Consider, first, an example introduced above—the issue of voluntariness.[56] In a majority of jurisdictions, judges are tasked with determining whether a confession is voluntary.[57] That is, courts consider the voluntariness of a confession to be a pure a question of law, resolved by judges and subject to de novo review.[58] For a confession to be voluntary, it must be "the product of a free

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[52] Henry Monaghan notably described the law-fact distinction as a continuum rather than two orthogonal categories: "[The] distinction posited between 'law' and 'fact' does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience." Monaghan, *supra* note 36, at 233, 234–37.

[53] *Cf.* United States v. Wolf, 813 F.2d 970, 975 (9th Cir. 1987) ("Whether [an official] in fact ever verbally threatened [a defendant] during interrogation is a question of historical fact[.]").

[54] *See* King v. Burwell, 576 U.S. 473, 484–85 (2015).

[55] *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law." (citation omitted)).

[56] *See supra* notes 12–18.

[57] *See, e.g.*, United States v. Feliz, 794 F.3d 123, 130 (1st Cir. 2015) ("[I]n federal courts, trial judges are tasked with determining the voluntariness of a conviction before trial." (citations omitted)); Green v. Scully, 850 F.2d 894, 900 (2d Cir. 1988) ("Whether Green waived his Fifth Amendment privilege against self-incrimination presents a question of law that we review *de novo* in order to make an independent determination of whether his confession is voluntary." (citations omitted)); Correll v. Thompson, 63 F.3d 1279, 1290 (4th Cir. 1995) ("[W]hether a confession ha[s] been made freely, voluntarily and without compulsion or inducement of any sort . . . is [a question] of law subject to de novo review." (quoting Withrow v. Williams, 507 U.S. 680, 689 (1993))); United States v. Garcia Abrego, 141 F.3d 142, 170 (5th Cir. 1998) ("[T]he ultimate determination of voluntariness is a question of law reviewed de novo[.]" (citation omitted)); Jones v. Davis, 820 F.2d 405 (6th Cir. 1987) ("When *Miller* was decided, it resolved a split in the circuits as to whether in habeas proceedings the question of the voluntariness of a confession was a question of fact, a mixed question of fact and law, or a question of law. The *Miller* Court . . . decid[ed] it was a question of law[.]"); United States v. Wildes, 910 F.2d 1484, 1485 (7th Cir. 1990) ("[V]oluntariness is a question of 'law'[.]" (citation omitted)); United States v. Estey, 595 F.3d 836, 839 (8th Cir. 2010) ("Whether a confession was voluntary is a question of law subject to *de novo* review[.]" (citation omitted)); Griffin v. Strong, 983 F.2d 1540, 1541 (10th Cir. 1993) ("The ultimate determination of whether a confession is voluntary is a question of law reviewable by this court de novo." (citation omitted)); United States v. Barbour, 70 F.3d 580, 584 (11th Cir. 1995) ("[W]e review the district court's application of the law to the facts de novo." (citations omitted)).

[58] *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 115–16 (1985) ("'[V]oluntariness' is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." (internal citation omitted)).

and deliberate choice rather than intimidation, coercion, or deception on the part of the police."[59] But labeling "voluntariness" *in vacuo* a question of law is neither intuitive nor demanded by an obvious trans-substantive line of law-fact demarcation. In fact, courts deem voluntariness a question of fact in a number of different subject matter areas. The voluntariness of consenting to a search, for example, is a pure question of fact;[60] the voluntariness of a waiver, too, shares that label.[61] But the voluntariness of entering into a plea deal is a so-called mixed question of law and fact.[62] And the voluntariness of a confession is a pure question of law?

The mystery of the law-fact distinction remains puzzling when it arises in other subject matter areas. The issue of reasonableness, for instance, serves as a favorite example for scholars trying to make sense of the law-fact distinction.[63] First, consider how courts have treated reasonability in the personal tort context. In a negligence case, a decision maker must determine if a defendant acted with the standard of conduct attributable to a reasonably prudent person.[64] Importantly, this inquiry requires both reconstructive empirical analysis and evaluative judgment—the decision maker must reconstruct the segment of historical reality relevant to the issue at hand, but must also make a normative judgment based on that reconstructed reality as to whether the defendant acted according to a certain communal standard.[65] For example, in a case in which a

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[59] United States v. Luckey, No. 98-4089, 1998 WL 736448, at *1 (4th Cir. Oct. 19, 1998) (per curiam) (quoting Poyner v. Murray, 964 F.2d 1404, 1413 (4th Cir.1992)).

[60] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."); *accord* United States v. Kimball, 741 F.2d 471, 474 (1st Cir. 1984); United States v. Garcia, 339 F.3d 116, 119 (2d Cir. 2003); United States v. Songlin, 697 Fed. App'x 226, 227 (4th Cir. 2017) (per curiam); United States v. Troutman, 590 F.2d 604, 606 (5th Cir. 1979); United States v. Worley, 193 F.3d 380, 384 (6th Cir. 1999); United States v. Chan, 136 F.3d 1158, 1159 (7th Cir. 1998); United States v. Jones, 254 F.3d 692, 696 (8th Cir. 2001); United States v. Agosto, 502 F.2d 612, 614 (9th Cir. 1974); United States v. Carbajal-Iriarte, 586 F.3d 795, 799 (10th Cir. 2009); *Barbour*, 70 F.3d at 584.

[61] *See, e.g.*, Clark v. Stinson, 214 F.3d 315, 325 (2d Cir. 2000) ("The issue of voluntariness is a question of fact which should not be resolved by per se formulations." (quoting People v. Epps, 37 N.Y.2d 343, 350 (1975))).

[62] *See, e.g.*, United States v. Sherman, 11 Fed. App'x 653, 654–55 (8th Cir. 2001) (per curiam) ("Whether a plea of guilty is made knowingly and voluntarily is a mixed question of fact and law that is reviewed de novo." (citing United States v. Gray, 152 F.3d 816, 819 (8th Cir.1998))).

[63] *See, e.g.*, Allen & Pardo, *supra* note 6, at 1781–82; Thomas v. Gen. Motors Acceptance, Corp., 288 F.3d 305, 308 (7th Cir. 2002); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 379 (2001); Atiq, *supra* note 11, at 48; Friedman, *supra* note 19, at 922–23.

[64] *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 6 FORDHAM L. REV. 407, 424 (1999).

[65] *See, e.g.*, *id.*

barge sinks after an unintentional unmooring,[66] the decision maker must not only reconstruct the events of the day in question, but must also ascertain if the defendant acted unreasonably in a way that caused the damage.[67] Nonetheless, the consistent rule is "that juries shall decide both the underlying facts and whether those facts constitute negligence,"[68] because both components of the negligence inquiry—reconstruction of historical reality and normative judgment about that reconstructed past—are questions of fact.[69]

So, reasonability is a question of fact? Not necessarily.

Curiously, courts have reached the opposite conclusion when evaluating reasonableness in the context of policing or, more specifically, § 1983 civil lawsuits against officers for the use of excessive force.[70] To succeed in such a § 1983 excessive force suit, a plaintiff must demonstrate, *inter alia*, that an officer's actions were unreasonable or that the plaintiff's action did not rise to a level warranting deadly force.[71] In many instances, the factual issues implicated by § 1983 civil cases are decided by juries rather than judges.[72] The Seventh Amendment enshrines the right to a jury trial in "suits at common law," which includes a § 1983 action seeking damages for excessive force.[73] But, of course, judges are still tasked with resolving pure questions of law, even in the § 1983 context.[74] And, pursuant to the Supreme Court's recent decision in *Scott v. Harris*, "[i]f all material facts are undisputed, the reasonableness of officer conduct in an excessive-force claim is a question of law that a court may

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[66] This fact pattern was, of course, the basis for Learned Hand's "BPL" formula of negligence. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[67] *See id.*

[68] Allen & Pardo, *supra* note 6, at 1781.

[69] Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 663–64 (1873) ("Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that law commits to the decision of a jury.").

[70] Scott v. Harris, 550 U.S. 372, 375–76, 386 (2007).

[71] *Id.* at 381 n.8.

[72] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707–11, 718–22 (1999); *see* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661–64 (2006).

[73] *Del Monte Dunes*, 526 U.S. at 708 ("[W]e have recognized that 'suits at common law' include 'not merely suits, which the *common* law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830))).

[74] *Scott*, 550 U.S. at 381 n.8.

decide."[75] That is, determining whether a police officer's actions constitute reasonable force is, according to the Supreme Court, a "pure question of law."[76]

Labeling the excessive force inquiry a question of law, though, again seems analytically nonessential. As is often the case when distinguishing legal and factual issues, it is not initially clear what is driving the Supreme Court's classification. Is it merely a formal insistence that reasonable force, taken in the abstract, has the theoretical or epistemological qualities of law? But, if so, then why is the reasonableness of a tortfeasor's actions a question of fact?[77]

The same conundrum arises in the contractual context.[78] In general, courts assume responsibility for determining the proper construction and interpretation of contracts.[79] Within this role, courts are occasionally called upon to backfill missing elements into a contract by establishing a "reasonable" implied term.[80] As with the determination of negligence, this inquiry requires a decision maker to consider "community standards of fairness and policy."[81] But unlike with negligence, the reasonableness of an implied term is universally accepted as a question of law.[82]

The classification of questions related to damages suffers from much the same inconsistency.[83] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court considered whether the issue of proportionality in the assessment of punitive damages was a question of law or fact.[84] Despite a century of precedent considering proportionality to be a question of fact,[85] the

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[75] Stricker v. Twp. of Cambridge, 710 F.3d 350, 364 (6th Cir. 2013) (citing *Scott*, 550 U.S. at 381 n.8).

[76] *Scott*, 550 U.S. at 381 n.8.

[77] As noted, those who attempt to make sense of the law-fact distinction often utilize reasonableness in the personal tort or contract contexts to advance their frameworks. *See supra* notes 19, 63, and accompanying text.

[78] *See* Atiq, *supra* note 11, at 48; RESTATEMENT (SECOND) OF CONTRACTS § 204 cmts. a, c (AM. L. INST. 1981); U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2002).

[79] *See* Atiq, *supra* note 11, at 48; Boatmen's Ark., Inc. v. Farmer, 989 S.W.2d 557, 558 (Ark. Ct. App. 1999) ("A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction." (citation omitted)).

[80] *See* Atiq, *supra* note 11, at 90; Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

[81] Atiq, *supra* note 11, at 61 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. L. INST. 1981)).

[82] *See* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 298 (1997) ("The reasonable person, either under the banner of sanctity of contract or that of fairness, is used to fill gaps in otherwise inchoate contracts.").

[83] *See* Allen & Pardo, *supra* note 6, at 1771–75.

[84] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001).

[85] *See* Barry v. Edmunds, 116 U.S. 550, 565 (1886); Allen & Pardo, *supra* note 6, at 1771–73.

*Cooper* Court took a different approach.[86] It noted, *inter alia*, that compensatory damages necessitate a wholly reconstructive analysis that sees a decision maker assessing "the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[87] The calculation of compensatory damages was therefore rightly classified as a question of fact.[88] Punitive damages, in contrast, necessitate normative judgments in that they require consideration of "moral condemnation" and deterrence value.[89] The Court therefore deemed the appropriate level of punitive damages to be a question worthy of de novo review.[90] The *Cooper* Court's purported rationale, however, fails to square with the classification of negligence examined above. Recall that, just as with an assessment of punitive damages, determinations regarding the reasonableness of a defendant's actions in a negligence case require normative, moral judgments reaching far beyond reconstructive inquiries about the historical past.[91]

The inconsistency evident in the personal tort, policing, contract, and damages contexts is merely the tip of the iceberg.[92] Taken together, a holistic examination of the jurisprudence surrounding the law-fact distinction leaves one seeking the key differentiating factor between legal and factual issues with more questions than answers.

### *B. (Attempting to) Make Sense of Law-Fact Jurisprudence*

Making sense of law-fact jurisprudence is no mean feat. Minimally, the survey of case law above makes that abundantly clear. Attempts to classify issues as legal or factual seem to be driven more by judicial handwaving than principled reasoning. Courts often appear to advance various grounds that promise to serve as the key differentiator between legal and factual inquiries. Those grounds, in turn, initially appear to be a somewhat settled and sensical understanding of law and fact within the narrow confines of, say, the personal tort or contract contexts. As demonstrated by the preceding section, however, those two conceptualizations (and others elsewhere) are proven highly

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86 *Cooper Indus.*, 532 U.S. at 437.

87 *Id.* at 432 (citation omitted).

88 *Id.*

89 *Id.* (citation omitted).

90 *Id.* at 436.

91 In fact, highlighting this inconsistency was a major focus of Justice Ginsburg's dissent. *See id.* at 446–48 (Ginsburg, J., dissenting).

92 Just consider the extensive discussion of the law-fact distinction in the intellectual property space. *See, e.g.*, Snow, *supra* note 36; Reid, *supra* note 36; Patricia J. Kaeding, Comment, *Clearly Erroneous Review of Mixed Questions of Law and Fact: The Likelihood of Confusion Determination in Trademark Law*, 59 U. CHI. L. REV. 1291, 1292 (1992).

contradictory when viewed in the aggregate. What results is jurisprudential turbulence—the balkanization of varying notions of legal and factual questions within different subject matter groupings. And the conspicuous absence of a trans-substantive framework for distinguishing questions of law from questions of fact leads one to wonder whether a deeper problem lies beneath the turbulent surface.

To explore that possibility, this section turns from case law to theory. The pages that follow seek to offer a general sense of the law-fact literature and, through that overview, to highlight a growing debate between those who would see the law-fact distinction as formally meaningful or illusory.

As is likely now evident, the traditional and perhaps intuitive understanding sees the law-fact distinction as a difference in intrinsic kinds; legal inquiries are as different from factual inquiries as apples are from oranges.[93] And just as one can easily distinguish apples from oranges by examining a fruit's inherent qualities, one can easily distinguish law from fact based on inherent reference points. So, on this view, the classification process should be a relatively simple endeavor—courts need only identify an issue's intrinsic qualities to recognize it as a legal or factual question.

In recent years, however, prominent scholars have increasingly pushed back against traditional, orthodox notions of the law-fact distinction.[94] Instead, this new wave of scholarship suggests that the law fact-distinction is just a façade. Rather than relying on a theoretical line of demarcation to contrast law from fact, this realist or consequentialist approach suggests that courts and lawyers classify issues in an ad hoc fashion to achieve certain functional ends.

### *1. The Traditional Model*

As traditionally understood, questions of law and questions of fact are conceptually distinct.[95] That is, questions of law are believed to possess certain inherent qualities that are separate and distinguishable from those exhibited by questions of fact. The task of differentiating between legal and factual inquiries therefore involves a seemingly simple process—one must first identify the unique, intrinsic nature of an issue and, based on that assessment, categorize it as a question of law or a question of fact. In this way, the classification of issues

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[93] *See infra* Part I.B.1.

[94] *See infra* Part I.B.2.

[95] *See, e.g.*, POSNER, *supra* note 34, at 198 (suggesting that legal and factual inquiries have different "ontological status[es]").

is seen as an end in itself. When declaring a question to be legal or factual, the court's goal is simply to reveal the question's inherent, formal structure. It is not attempting to use the classification process to delegate issues to an appropriate decision maker or subject issues to a particular standard of review; instead, the court is merely recognizing an issue for what it is—it is calling a spade a spade—regardless of the institutional consequences that may follow.

In many ways, this conception of the theoretical distinction between questions of law and questions of fact is perhaps best perceived as the natural product of an early era when the law was seen as autonomous and self-justifying.[96] Classic legal orthodoxy advanced the notion of law as a science, with specific legal rules constituting nothing more than derivations from a natural law system based on self-evident moral axioms.[97] Law was seen as structurally analogous to geometry.[98] Just as Euclid's axioms were believed to "not merely [be] human constructs, but rather obvious and indubitable physical truths about the structure of space, from which nonobvious truths (like the Pythagorean theorem) [could] be proved by sequences of indubitable deductive steps,"[99] the "fundamental principles of the common law were discerned by induction from cases; rules of law were then derived from principles conceptually; and finally, cases were decided, also conceptually, from rules."[100] The law was therefore conceptualized as an internal system—a comprehensive and complete set of rules and principles to be explicated and applied by actors wholly working within the system.[101] Christopher Langdell, the former dean of Harvard Law School and a noted formalist, aptly summarized this position: "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer."[102] Early formalists who embraced the conception of law as an autonomous science necessarily deemed questions of law theoretically distinct from questions of fact. Either an issue was within the sphere of legal science or

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[96] C. C. LANGDELL, 1 SELECTION CASES ON THE LAW OF CONTRACTS, at vii–xi (1879).

[97] *See id*.; Grey, *supra* note 35, at 16.

[98] Grey, *supra* note 35, at 16 ("The aspiration of classical orthodoxy toward a conceptually ordered and universally formal legal system readily suggests a structural analogy with Euclidean geometry.").

[99] *Id.* at 17.

[100] *Id.* at 19.

[101] *Id.* at 5 ("Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover.").

[102] LANGDELL, *supra* note 96, at viii.

it was not; either it could be resolved through deduction from higher-order principles or its answer required some other epistemological approach.[103]

Over the last century, the conception of law as an autonomous, self-justifying science has waned, yet the conception of questions of law as fundamentally distinct from questions of fact remains preeminent. Indeed, a number of modern accounts continue to search for *the* ground for distinguishing legal and factual issues, *the* dividing line that hermetically seals off legal questions from their factual cousins.

Consider, first, a position recently advanced by Emad Atiq.[104] In his compelling article, Atiq argues that the classification of normative issues hinges, in large part, on whether their resolution is dependent on social conventions or independent moral principles.[105] Normative questions that are convention-dependent[106]—*i.e.*, those questions that require recognition and application of the practices of, say, merchants, legislators, or judges—are more likely to earn the label "legal."[107] Assessing the reasonability of an implied price term in a contract, for instance, requires reference to merchant and regulatory conventions (rather than any pre-conventional moral norms); reasonability in the contract context is therefore rightly classified as a question of law.[108] In contrast, those normative questions that are convention-independent—*i.e.*, those questions that are not resolved by reference to any social framework—are more likely to be classified as questions of fact.[109]

Relatedly, Judge Richard Posner has insisted that questions of law and questions of fact have different "ontological status[es]."[110] Judge Posner suggests that factual issues, such as whether Richard III ordered certain princes to be murdered, are questions for which there is an empirically correct answer: "[T]here is no reasonable doubt that Richard III and the little princes were real people and that the princes were killed by someone . . . the question [is] 'by

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103 Grey, *supra* note 35, at 34 ("To the legal science mentality such open-ended questions were political, not legal, and the courts abandoned any scientific role in trying to answer them.").

104 *See* Atiq, *supra* note 11.

105 *See id.* at 75.

106 Atiq notes that, under his framework, convention-dependent evaluative questions "(1) concern the distribution of those benefits and burdens that do not implicate matters of fundamental right; (2) solve moral problems that require large-scale collective action; and (3) arise in contexts where a paramount concern is respecting the expectations of participants in a convention." *Id.*

107 *Id.* at 51–52.

108 *Id.* at 54.

109 *Id.* at 52.

110 POSNER, *supra* note 34, at 198.

whom?'"[111] In contrast to the reconstructive historical analysis demanded by factual issues, legal issues, such as whether the Sixth Amendment affords a defendant the right to counsel, center around indeterminate normative issues regarding the proper interpretation or application of the Constitution, statutes, or judicial opinions.[112] Here, Posner sees a relatively clear line of demarcation between questions of law and questions of fact.

Notably, Atiq and Posner are merely two examples taken from an entire school striving for the theoretical holy grail.[113] What unifies each account is a perpetual insistence that there exists an intrinsic distinction between questions of law and questions of fact and, therefore, a court need not look beyond the nature or demands of an issue to properly label it. Classifying issues is a simple process of identification; it is the end to be pursued.

### *2. The Consequentialist Model*

Despite the continued prominence of the traditional belief that the categorization of issues is driven by theoretical differences between questions of law and questions of fact, there is a conceptually distinct way of considering the classification process. Rather than seeing the labels "question of law" and "question of fact" as entirely dependent on the intrinsic nature of the issue at hand, we can instead conceive of the labels as means to a greater end.[114]

Leading the way on this front, Ronald Allen and Michael Pardo have suggested that the law-fact distinction is nothing more than an instrumental tool.[115] In particular, Allen and Pardo insist that there exists no ontological, epistemological, or analytical basis for distinguishing questions of law from questions of fact.[116] The law-fact distinction is simply a façade. The pursuit of "legal facts" instead constitutes a narrower type of factual inquiry.[117] In all cases, the answer to the issue at hand will be a proposition with truth value, meaning that the "law-fact distinction . . . is purely a creature of convention."[118] When classifying issues, therefore, judges are functionally deciding on an appropriate

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111 *Id.*

112 *Id.*

113 *See, e.g.*, Hazard, *supra* note 34, at 82; Friedman, *supra* note 19, at 918.

114 *See* Allen & Pardo, *supra* note 6, at 1771.

115 *Id.* ("[T]he decision to label an issue 'law' or 'fact' is a functional one based on who should decide it under what standard, and is not based on the nature of the issue.").

116 *Id.* at 1790–1806.

117 *Id.* at 1801.

118 Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992).

allocation of authority—they are *using* the law-fact distinction to achieve some greater end.[119]

Although the traditional law-fact model finds its support in formalist legal theory, this new approach is more easily associated with consequentialist notions of legal realism. Legal realist theory directly challenges formalism's core tenets, rejecting the belief that law has a logical, formal structure that renders legal answers merely derivative of some higher-order system of fundamental principles.[120] That is, for the realist, answers to legal questions cannot be deduced by mechanically applying some authoritative legal doctrine to a case. And attempting to divine the objectively correct answer to a legal issue by deriving rules from higher-order principles is, to the realist, transcendental nonsense.[121] Using words that could equally apply to the current state of law-fact case law, realist Karl Llewellyn argued that legal systems generally are composed of nothing more than "ill-disguised inconsistency" because each contains "a variety of strands, only partly consistent with one another, exist[ing] side by side."[122] How, then, does the realist decide legal issues? Having abandoned the conception of law as a formal, logical system, legal realists instead adopt an external perspective and consider the instrumental potential of the law.[123] That is, as seen in the consequentialist approach to the law-fact distinction, realists look not for some objectively correct answer deducible from high-order legal principles, but instead import external metrics and focus on the normative tradeoffs tied to the potential outcomes of a given case.[124] Realists therefore submit that law often requires an interdisciplinary consequentialist approach.[125]

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119 *See* Allen & Pardo, *supra* note 6, at 1771.

120 *See* O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

121 *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

122 KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 45 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

123 *See Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) ("It is the merit of the common law that it decides the case first and determines the principle afterwards.").

124 *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 510 (1912).

125 *See id.* Roscoe Pound, for example, argued that courts should use social sciences to evaluate "the actual social effects of legal institutions and legal doctrines" and determine the preferable path forward based on the potential consequences of their decisions. *See id.* at 513. Felix Cohen endorsed a similar approach, noting that a departure from classic formalism sees law as becoming a study of human motivations and social interactions, emphasizing concrete human values, desires, and feelings. *See Cohen*, *supra* note 121, at 830–34. Summarizing the realist position with a broad stroke, Oliver Wendell Holmes famously wrote, "[t]he life of the law has not been logic: it has been experience." O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

Legal realism's core notion of indeterminacy has profound implications for its perception of the law-fact distinction. Rather than seeing law and fact as being delineated by some inherent theoretical line, the realist perspective (much like Allen's and Pardo's) sees the law-fact distinction as another tool to achieve some instrumental purpose.[126] Stated differently, the natural extension of realist thought is the conclusion that issue classification, too, hinges predominately on a functional consideration of the implications of each would-be label rather than reference to a higher-order rule of division.

But of course, deconstructing the traditional law-fact model is only half the battle. Allen and Pardo themselves recognize that courts are surely constrained to some degree when classifying issues[127] and, if their constraints do not emanate from immutable truths regarding differences between legal and factual questions, pinpointing that which actually drives classification is of central importance. If the classification of issues is not an end in itself, what does it serve as a means for?

## II. THE PROCEDURAL JUSTICE MODEL

Taking stock, the law-fact distinction has floundered in a state of uncertainty for most of its existence. To be sure, there are issues for which the classification process is a simple endeavor. No headache manifests if one simply has to recognize that the identity of an assailant is a question of fact and the correct meaning of a constitutional provision is a question of law.[128] But in the twilight zone[129]—the "vexing" and "slippery"[130] middle ground between questions of law and questions of fact—a principled distinction between law and fact is seemingly unidentifiable. It is in this twilight zone that traditional accounts of

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[126] *See* Lawson, *supra* note 118 (suggesting that the "law-fact distinction . . . is purely a creature of convention"); Snow, *supra* note 36; Reid, *supra* note 36, at 601.

[127] Allen & Pardo, *supra* note 6, at 1806.

[128] *See, e.g.*, United States v. Wolf, 813 F.2d 970, 975 (9th Cir. 1987) ("Whether [an official] in fact ever verbally threatened [a defendant] during interrogation is a question of historical fact[.]"); Gideon v. Wainwright, 372 U.S. 335, 338 (1963) (noting that whether the federal constitutional right to counsel was violated is a question of law).

[129] Professor Walter Wheeler Cook used this moniker—"twilight zone"—to describe the similarly muddled middle ground between substance and procedure. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 334 (1933); *see also* Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3251 (2014).

[130] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law." (citation omitted)); Thompson v. Keohane, 516 U.S. 99, 110–11 (1995) ("[T]he proper characterization of a question as one of fact or law is sometimes slippery." (citations omitted)); *see* Williams v. Taylor, 529 U.S. 362, 385 (2000).

the law-fact distinction struggle. In a vacuum, it is perhaps plausible to insist that certain normative questions are factual (and others legal) based on some essentialist line of demarcation, but those formalist theories have, to this point, failed to demonstrate descriptive power when reconciled with case law.

At its core, then, the law-fact distinction seems mythical, as Allen and Pardo have suggested.[131] Decades of formalist attempts to pinpoint the law-fact line of demarcation demonstrate that a precise, rather than general, description of the boundary delineating legal and factual issues is unlikely to emerge. Yet case law suggests (and scholars recognize) that some constellation of factors *is* motivating and constraining the classification process, even within the murky twilight zone.[132] Rather than giving ad hoc proclamations in a sea of indeterminacy, courts are consistently distinguishing law from fact using a discrete set of reference points.

This Article seeks to demonstrate that the law-fact distinction is driven, ultimately, by principles of procedural justice. Without a formalist anchor to grab hold of when classifying traditionally difficult issues, courts cling to institutional considerations of competency, legitimacy, neutrality, and trust when declaring an issue factual or legal—issues that lie at the heart of the procedural justice movement.[133] That is, when it comes to hard issues, most courts forgo metaphysical analyses, preferring instead deep consideration of the institutional consequences of each potential label. Note, though, that unmooring the law-fact distinction from an illusory essentialist theory and tying it to principles of procedural justice is not a surrender to indeterminacy. It is far from an invitation for ad hoc assessment. Rather, as this section seeks to show, it requires a deeply contextual analysis that frankly evaluates the shifting sands of public perception of legitimacy and fairness.[134]

In three sections, the following pages seek to explain the procedural justice law-fact model, demonstrate how it informs our understanding of existing law-

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131 Allen & Pardo, *supra* note 6, at 1806.

132 *See id.* at 1790 (suggesting that an "enormous complexity of the variables affect[s] the pragmatic allocative decision"); Monaghan, *supra* note 36, at 261–62 (encouraging greater consideration of the allocation of decision-making authority in the classification of issues).

133 For an introduction to the procedural justice literature, see Tyler, *Procedural Justice and the Courts*, *supra* note 48; Tyler, *Procedural Justice, Legitimacy*, *supra* note 48; Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745, 766 (2017) ("Experiences of procedural justice are shaped by whether parties are afforded a voice and an opportunity to be heard, whether they are afforded a neutral and trustworthy decision maker, and whether they are treated with dignity.").

134 *See infra* Part II.A.2 (demonstrating how the procedural justice model changes the process of classifying issues).

fact case law, and suggest that a more candid endorsement of the model could lead to normatively desirable reform.

### *A. Explaining the Model*

A law-fact model premised on procedural justice sees issue classification as a method—indeed, the central means—of allocating questions to the institutions best suited to provide a resolution that the public will see as fair and legitimate.[135] On this view, an issue is not deemed a question of law or a question of fact solely because, in a vacuum, it exhibits a particular quality; issue classification requires more than the quixotic essentialist endeavor that has mired the law-fact debate for decades. Instead, concerns of legitimacy and procedural fairness drive discussion about the appropriate label to apply to a particular question. The classification of issues thus serves as a means of optimizing the legitimacy of the juridical system by delegating issues to the appropriate institutional adjudicator.[136]

Pinning the law-fact distinction to procedural justice is an intuitive move, yet one that is undergirded by a robust infrastructure of empirical and theoretical support. Procedural justice, and legal process theory more broadly, offers a compelling account of courtroom legitimacy and decisional acceptance.[137] Appreciating the theory is central to understanding the symbiotic relationship between the law-fact distinction and procedural justice.

#### *1. What Is Procedural Justice?*

Everyday across the nation, thousands of individuals appear in courtrooms hoping to resolve disagreements and disputes.[138] The people entering courtroom doors are diverse, shaped by a wide array of different life experiences and backgrounds.[139] Amid this rich diversity, how can courts ensure that parties respect case outcomes, even in those instances when they disagree with a particular decision?

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[135] As I detail below, therefore, the procedural justice model closely tracks legal process theory and its core tenet of institutional settlement. *See* Young, *supra* note 43, at 1149–50.

[136] *See id.* ("[L]aw should allocate decisionmaking to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion.").

[137] *See* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988).

[138] *See* Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 26.

[139] *See id.*

Broadly stated, the procedural justice school suggests that individuals' subjective beliefs about the legitimacy of judicial proceedings are shaped, primarily, by courtroom process rather than substantive outcomes.[140] That is, when it comes to courtroom disputes, the manner in which courts handle proceedings plays a central role in participants' willingness to accept decisions.[141] Indeed, the procedural justice movement posits that people's willingness to accept outcomes is motivated more readily by their perceptions of how fairly they were treated throughout the process rather than their opinions about the court's decision.[142] "[H]ow people and their problems are managed when they are dealing with the courts has more influence than the outcome of the case" in legitimate decision making.[143] Now, that is of course not to say that people enjoy facing adverse decisions in the courtroom. But rather that they "accept 'losing' more willingly if the court procedures used to handle their case are fair."[144] Ultimately, then, when it comes to making assessments of fairness and legitimacy, individuals' desire to see justice done outweighs their self-interest in winning a case.

Although this Article primarily examines procedural justice as it manifests in the psychological and empirical literature, it is worth noting at the outset that procedural justice has deep and nuanced normative roots. Professor Lawrence Solum's leading article, for example, explores the rich theoretical relationship between procedural justice and legitimacy.[145] In accordance with the broad definition of procedural justice outlined above, Solum's compelling account details how adjudication is legitimized not solely through substantive decision making but also through procedural norms such as party participation.[146] Relatedly, those readers familiar with the legal process school will quickly

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[140] *See* Tyler, *supra* note 137 ("[A] key determinant of citizen reactions to encounters with legal authorities is the respondents' assessment of the fairness of the procedures used in that contact."); Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 26; Tyler, *Procedural Justice, Legitimacy*, *supra* note 48, at 284.

[141] *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) ("[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms."); Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV.: J. AM. JUDGES ASS'N 4, 6 (2007) ("[P]eople view fair procedures as a mechanism through which to obtain equitable outcomes[.]" (quoting TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 75 (1997))).

[142] Tyler, *supra* note 137.

[143] Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 26.

[144] *See id.* ("[N]o one likes to lose. However, people recognize that they cannot always win when they have conflicts with others.").

[145] *See* Solum, *supra* note 141.

[146] *Id.*

recognize its close ties to notions of procedural justice.[147] Rising to prominence in the second half of the twentieth century, the legal process school sees the rule of law's claims of authority legitimated by institutional design and procedure. That is, the legitimacy of the rule of law flows from the structural composition and procedural features of the juridical system rather than the substantive decisions it produces.[148] Indeed, one of the central tenets of the legal process school—the principle of "institutional settlement"—suggests that "[l]aw should allocate decisionmaking to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion."[149] By pinning legitimacy to procedure and institutional structure, the rule of law's authority is preserved despite disagreements about the law's substance that are all but inevitable in a morally pluralistic society.

Consider, for example, how the legal process framework operates in the context of adjudication. In adjudication, "the legal process legitimates the application of political power through the affective engagements it requires of the parties to legal disputes, in particular by penetrating the ideals and preferences of these parties."[150] Within the courtroom, parties actively participate and transform their brute demands into claims of right based on reason; in so acting, they implicitly recognize the conditions for their ultimate victory or defeat and take ownership over their ability to influence the outcome.[151] "In this way, the legal process legitimates disputes not by reaching

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147 *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC MATERIALS ON THE MAKING AND APPLICATION OF LAW (1958).

148 The foundation of this claim runs deep. The legal process school emphasizes the necessity of cooperation in the pursuit of societal goals or "wants." *Id.* at 3–4. Given the inescapable interdependence of human beings, people chose to live together in groups—societies—in an effort to "maximize the total satisfactions of valid human wants." *Id.* at 113. Therefore, the society must possess a common set of "understandings or arrangements" outlining what types of conduct will be tolerated. *Id.* at 3. However, because there is bound to be some indeterminacy regarding a society's common understandings, there must also be a means for clarifying societal requirements. *Id.* at 3–4. That is, a society must establish procedural methods for resolving uncertainty about its shared substantive agreements—collectively, these substantive agreements and procedural methods constitute "law." *Id.* at 113–14. And because the law exists to "maximize the total satisfactions of valid human wants," *id.* at 113, citizens have a moral obligation to accept legal "decisions which are the duly arrived at result of duly established procedures of this kind . . . until they are duly changed." *Id.* at 4. For an excellent survey of Hart and Sacks, which greatly contributed to this short summary, see Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 20–25 (2013).

149 Young, *supra* note 43, at 1149–50.

150 Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1384 (2006).

151 *Id.* at 1385 ("And at the deepest level, an engagement with the legal process does not just translate or test disputants' claims but fundamentally reconstitutes them, specifically by transforming brute demands into assertions of right, which depend on reasons and therefore by their nature implicitly recognize the conditions of

settlements that the participants would have accepted before going through the process, but by transforming the participants (through engaging them) so that they come to take authorship of the resolutions that the process produces."[152]

What sets the procedural justice movement apart from some theoretical and normative accounts of juridical legitimacy is direct support from both a rich empirical literature and courts themselves. Procedural justice is not just a whimsical idea backed by complex legal process norms; it is reflected and endorsed by judges, lawyers, and litigants alike.

Consider, first, the long litany of empirical studies supporting the core tenets of the procedural justice movement. In a pioneering 1975 study, John Thibaut and Laurens Walker conducted a series of simulated trials to assess whether participants would rather adjudicate claims against them in an adversarial or inquisitorial tribunal.[153] On the whole, the study participants viewed the adversarial system as the fairer—and more preferable—option.[154] Notably, though, participant perceptions of the fairness of the adjudicatory model (adversarial or inquisitorial) significantly affected their perceptions of the fairness of verdicts, even in instances when the verdict was unfavorable to the participant.[155] The outcomes of the adversarial model were more legitimate (and the outcomes of the inquisitorial model less so) because of perceptions that it was the fairer process.[156]

Building on Thibault and Walker's early work, more recent empirical studies have demonstrated the importance of procedural justice in real-world settings. For example, in a seminal 2002 study, Tom Tyler and Yuen Huo examined public willingness to accept decisions made by judges and police offers in Oakland and Los Angeles.[157] Tyler and Huo conducted wide-ranging interviews with 1,656 individuals who had recent personal experiences (both positive and negative) with legal authorities.[158] Their study found that individuals' willingness to accept decisions as legitimate—as opposed to mere willingness to comply with decisions—is primarily shaped by process.[159] To a statistically

their own failure (namely that the reasons do not support the claims in the case at hand).").

[152] *Id.* at 1384.

[153] JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

[154] *See* Tyler, *Procedural Justice, Legitimacy*, *supra* note 48, at 293 (summarizing the central findings of Thibaut and Walker).

[155] *See id.*

[156] *See id.*

[157] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 28–45 (2002).

[158] *Id.* at 30.

[159] *Id.* at 42–45.

significant level, Tyler and Hou's study found that "the primary factor shaping the willingness to accept decisions was the fairness of court procedures."[160] Additionally, procedural justice also played a statistically significant role in shaping overall views about the legitimacy of the judicial system.[161]

Still other studies have detailed additional real-world manifestations of procedural justice. In a 1993 project, for instance, Allan Lind, Carol Kulik, Maureen Ambrose, and Maria de Vera Park found that the willingness of parties in federal court to defer to the findings and conclusions of a mediator directly depended on the parties' perceptions of the fairness of the mediator's procedures.[162] Katherine Kitzmann and Robert Emery likewise found that the fairness of procedures used in child custody disputes directly affected parties' opinions on substantive outcomes.[163]

The above summaries merely constitute a fraction of a rich literature of empirical studies that have found, and continue to find, that procedural justice norms drive people's thoughts on adjudicative fairness and, ultimately, decisional legitimacy.

Beyond academia, recent years have also seen the judiciary itself increasingly embracing procedural justice. In its 2019 decision in *Rosales-Mireles v. United States*, for example, the Supreme Court expressly embraced the motivating importance of procedural justice and, in particular, the role that procedural justice plays in legitimating decisions.[164] Justice Sotomayor's majority opinion acknowledges that "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair.'"[165] Public legitimacy, for the Court, is inextricably intertwined with procedural fairness.[166] And, as relevant here, the Court frankly acknowledged that, often, determining correct legal outcomes requires external considerations. Justice Sotomayor wrote that in assessing outcomes, the Court must be attuned

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160 Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 28.

161 *See id.*

162 E. Allan Lind, Carol T. Kulik, Maureen Ambrose & Maria V. de Vera Park, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

163 Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553 (1993).

164 *See* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908, 1910 (2018).

165 *Id.* at 1908 (quoting Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215–16 (2012)).

166 *See id.*

to procedural fairness, asking whether legal decisions might lead to a "diminished view of the judicial process and its integrity."[167]

Of course, the Supreme Court is not alone on this front. Other judicial actors have similarly acknowledged the real-world import of procedural justice. In a 2005 study, for example, a survey commissioned by the Administrative Office of the Courts of California asked citizens about their perceptions of the California court system.[168] The analysis of the study's underlying data suggested that "[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts."[169] Similarly, in a 2007 article, Judges Kevin Burke and Steve Leben acknowledged the importance of procedural justice in promoting decisional acceptance in their courts.[170]

Taking stock, then, judges and scholars alike increasingly recognize the centrality of procedural justice. In a morally pluralistic society, there will inevitably be disputes about outcomes in specific cases; tying legitimacy to process and procedure is not only necessary but effective for decisional acceptance.

### 2. *A Procedural Justice Law-Fact Model*

Procedural justice has become more than a mere academic model seeking to explain juridical legitimacy. Recent decades have demonstrated its wide-reaching import, from empirical studies that validate many of its theoretical hypotheses,[171] to Supreme Court opinions that use its tenets to motivate decisions,[172] to state court systems that rely on its principles to drive reform efforts.[173] Recognizing that decisional acceptance and adjudicative legitimacy are closely correlated with perceptions of fairness, traditional accounts that would see principled legal decision making as the sole basis of juridical legitimacy no longer carry the same relative weight as they did a century ago.[174]

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167 *Id.*

168 *See* Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 29.

169 *Id.* (quoting DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 6 (2005)).

170 *See* Burke & Leben, *supra* note 141, at 4–7.

171 *See* TYLER & HUO, *supra* note 157; Lind et al., *supra* note 162; Kitzmann & Emery, *supra* note 163.

172 *See Rosales-Mireles*, 138 S. Ct. at 1908 (reflecting on the extent to which the public legitimacy of the judiciary is reliant on fair and neutral procedures).

173 *See* Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 29 (describing reform efforts pursued by the California state court system.).

174 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169–99 (1992) (describing the decline of legal formalism in the United States); José A. Cabranes, *The Foreign Policy of Our Government's "Least Dangerous Branch"*, 41 YALE J. INT'L L. 469, 480

And with the perspective that procedural justice provides comes a new lens with which to examine old legal puzzles—including the law-fact distinction.

Recall again that, for decades, theoretical accounts of the law-fact distinction have been frustrated by the inability to descriptively account for the state of the case law or, alternatively, the inability to normatively prescribe a classification process beyond ad hoc proclamations from judges. Formalist accounts that offer a trans-substantive basis for delineating law from fact are conceptually sound in the abstract, but often fail to account for the real-world practice of courts. Conversely, existing consequentialist approaches dissatisfy in their inability to prescribe a principled, normatively sound basis for classifying issues across subject matter areas.

But approaching the law-fact distinction from a procedural justice perspective offers a new and compelling account both for describing the law-fact case law and for prescribing how the classification of issues (*i.e.*, the application of the law-fact distinction) can serve normatively desirable ends.

At the foundational level, procedural justice sees the competency and reputation of the institution tasked with resolving an adjudicative dispute of central importance in ensuring that process—rather than substantive outcomes—can serve as the basis for legitimizing outcomes.[175] That is, procedural justice demands that parties share an acknowledgment that the tribunal in which they will present their arguments is competent and fair. If an adjudicative dispute is to be resolved by an inappropriate institution, mere participation or procedures will fail to sufficiently spur the parties on to accept as legitimate the outcome that the legal process recommends.[176] Importantly,

(2016) ("There were certainly a number of contributing causes including the decline of legal 'formalism,' the rise of legal 'realism,' the evolution of the modern regulatory state, and the desire to coordinate legal regimes in an increasingly interconnected and interdependent world.").

[175] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion) (recognizing that court's legitimacy is "a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands"); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 73 (1990) ("People may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still continue to support the court if they respect it as an institution that is generally impartial, just and competent." (quoting Walter Murphy & Joseph F. Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, *in* FRONTIERS OF JUDICIAL RESEARCH 275 (Joel B. Grossman & Joseph Tanenhaus eds., 1969))).

[176] Indeed, one can catch glimpses of this phenomenon by observing that state courts have long been deemed inappropriate institutions to resolve certain disputes between in-state citizens and an out-of-state defendants given the outsized risk that the in-state citizens' interests will be unfairly prioritized. Congress responded to the risk of illegitimate dispute resolution in state courts by enabling out-of-state defendants to remove certain cases to federal court. 28 U.S.C. § 1441.

then, ensuring that parties have the ability to present their claims and defenses before a competent institution is central to preserving the legitimacy of adjudication.[177] And as suggested, the classification of issues is the means to achieve that end. Certain issues might demand resolution by a jury of one's peers, others might see resolution via judicial pronouncement as preferable; certain issues might demand deferential appellate oversight, others might require de novo review. In recognition of this phenomenon, courts can use the classification process—the categorization of an issue as either a question of law or a question of fact—to ensure that issues are delegated to the institution best suited to provide a response that will be accepted as legitimate by the parties and public at large. Whereas the traditional law-fact model would see the classification of issues as internal, in that the appropriate categorization is entirely dependent on the inherent qualities of the question at hand, the procedural justice model sees classification as an external process, primarily dependent on and constrained by the legitimating strengths of the would-be decision makers. Stated simply, procedural justice principles can and should motivate the law-fact distinction.

But how does it actually work? How does the issue classification process operate if procedural justice is indeed its driving force? The answer is intuitive in the abstract, yet deeply substantive in application.

To begin, procedural justice demands that classification commence with antecedent knowledge of the relative strengths and legitimating potential of would-be decision makers. Because the overarching goal of the procedural justice framework is to use labels as a means of facilitating juridical legitimacy, a classifier must possess deep appreciation for the legitimating competencies of potential decision makers to ensure that the vesting of decision-making authority with a particular institution will foster, rather than inhibit, the fairness of an issue's resolution. To be sure, legitimacy is itself a nuanced concept with numerous potential manifestations. But in the procedural justice space, preeminent scholars speak of verdict legitimacy in terms of popular social acceptability.[178] Professor Charles Nesson suggests, for instance, that legitimacy is not wholly tied to decisional accuracy (although accuracy, of course, plays

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[177] *See* Tyler, *Procedural Justice and the Courts*, *supra* note 48, at 30 ("People bring their disputes to the court because they view judges as neutral, principled decision makers who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases.").

[178] *See, e.g.*, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). This form of legitimacy aims to achieve "verdicts that the public will view as statements about what actually happened, which the legal system can then use as predicates for imposing sanctions without further considering the evidence on which the verdicts were based." *Id.* at 1358.

into the social acceptability of a verdict) but is instead primarily dependent on the "appearance of justice."[179] This perception of legitimacy accords with procedural justice scholar Tom Tyler, who sees legitimacy tied to perceived fairness in the manner in which cases are decided.[180] So, stated simply, classifiers must know what the public sees as fair in the context of adjudication. In which institutions (and to what degree) do litigants see an ability to adequately voice their concerns? In which contexts do institutions benefit from perceptions of neutrality, respect, and public trust? Answering these questions requires deep familiarity with the existing normative and empirical literature. Of course, a legal institution's decision-making legitimacy—its ability to produce fair outcomes—is context-dependent, varying widely based on the demands of different questions and evolving over time.[181] Yet procedural justice demands familiarity with these shifting sands.

With the requisite institutional familiarity in hand, issue classification then requires something akin to a sorting or matching process. That is, the epistemological, moral, and societal demands of particular issues must be assessed against the competencies and legitimating potential of would-be decision makers. For certain issues, fairness and legitimacy might depend primarily on decision-maker status. In the criminal context, for instance, resolution of issues by a cross-section of the community is often preferable to judicial resolution, even if courts might be able to reach more principled, uniform, or even factually accurate decisions.[182] The fairness and legitimacy of resolutions to other issues, though, might depend not on status, but on a decision maker's ability to persuade or on its ability to distribute justice evenly across a wide range of alike cases.[183] Still other issues might demand a hybrid of these

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[179] *Id.* at 1391.

[180] *See* TYLER, *supra* note 175. Tyler notes that "[p]eople may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still continue to support the court if they respect it as an institution that is generally impartial, just and competent." *Id.* (quoting Murphy & Tanenhaus, *supra* note 108).

[181] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion); *see also* THE FEDERALIST No. 22 (Alexander Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE . . . that pure, original fountain of all legitimate authority.").

[182] *See* Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 267 (2008) ("A unanimous criminal jury verdict affixes a stamp of legitimacy to the outcome of the criminal process.").

[183] The relationship between coherence and the legitimacy of the rule of law has deep roots, meaning that judicial decision making might not just be preferable but essential in certain instances. Aristotle first identified the principle as central to the notion of justice, and many contemporary theorists and legal philosophers, including Ronald Dworkin, Lon Fuller, H.L.A. Hart, and John Rawls, have recognized that coherence (or a like principle) is an essential component for preserving the legitimacy of legal actors' decisions. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 80–101 (David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.); H.L.A. HART,

factors, as occurs in the administrative and intellectual property space where legitimate resolution requires persuasive reasoning from subject matter experts.[184] Because the overarching goal of the procedural justice framework is to use labels to facilitate adjudicative legitimacy, classifying issues requires appreciation for both the institutional consequences that will follow from the application of a label *and* the legitimating potential of that institutional treatment when reconciled with public norms of fairness—norms that lie at the heart of the procedural justice movement.

Consider an animating example by returning to the issue of "reasonability" as it manifests in the policing context. Recall that, in § 1983 civil lawsuits against officers for the use of excessive force, the Supreme Court has held that the reasonability of an officer's actions, or whether an alleged victim's actions rise to a level warranting deadly force, is a "pure question of law."[185] Importantly, though, *Scott v. Harris*, the Supreme Court decision declaring reasonability in the policing context a question of law, provides no support for that particular classification.[186] It neither relies on an articulated trans-substantive law-fact line of demarcation that plainly sees policing reasonableness a question of law, nor does it seek to reconcile its classification with *Sioux City & Pacific Railroad v. Stout*'s earlier holding that reasonability

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THE CONCEPT OF LAW 6–25 (1961) (identifying the principle within the Nicomachean Ethics); RONALD DWORKIN, LAW'S EMPIRE 164–67 (1986); LON L. FULLER, THE MORALITY OF LAW 64–90 (1964); JOHN RAWLS, A THEORY OF JUSTICE 235 (1971). As suggested, then, "[t]he fact that coherence cannot be taken for granted has significant implications for institutional design. It suggests, in some domains, a possible reason to favor judicial decisions over jury decisions, because judges are more likely to have a menu of cases before them." Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritova, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1156–57 (2002). Whereas the judiciary is able to achieve coherent and socially acceptable decisions by engaging in reasoned elaboration aimed at achieving a balance of "consistency and coherence," juries largely deliberate in isolation, a practice susceptible to producing "a pattern of outcomes that they would themselves reject, if only they could see that pattern as a whole." *Id.* at 1153, 1155.

[184] For example, modern criminal courtrooms increasingly see defendants charged with crimes that reference technical elements that overlap with the competencies of administrative agencies. For example, 18 U.S.C. § 2339B criminalizes the act of "provid[ing] material support and resources to a foreign terrorist organization." Rather than delegating the responsibility of determining whether the recipient of aid was indeed a foreign terrorist organization to the judge or jury, courts have largely deferred to the judgment of the Secretary of State, noting that only the "the fact of an organization's designation as an FTO is an element of § 2339B," but neither judge nor jury could make an inquest into the "validity of the designation." United States v. Hammoud, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) (emphasis omitted), *vacated on other grounds*, 543 U.S. 1097 (2005). Where technical questions present epistemological demands that fall squarely within the core competencies of administrative agencies, the legitimacy of those agencies as adjudicators seems to be increasing.

[185] *See* Scott v. Harris, 550 U.S. 372, 381 n.8 (2007) ("[T]he reasonableness of [an officer's] actions—or . . . '[w]hether [respondent's] actions have risen to a level warranting deadly force'—is a pure question of law." (internal citation omitted)).

[186] *See id.* (providing no support for the classification of reasonableness in the policing context as a question of law).

in the tort context is a pure question of fact.[187] Rather, mere *ipse dixit* supports the Court's classification. Such ad hoc classification, especially for such an important societal issue, invites skepticism.[188] Yet, in the murky twilight zone of the law-fact binary, there is little more the Court can do.

The procedural justice classification model, though, changes the debate. Rather than limiting argumentation to metaphysical claims about the inherent legal or factual nature of "reasonability" in its various manifestations, notions of fairness and legitimacy become the currency of the realm. The shift pushes litigants to ground their briefs in practical and pragmatic arguments. For example, in this context, one might first turn to a robust empirical literature detailing the relationship between procedural fairness and legitimate policing.[189] This literature demonstrates that, in the policing context, "legitimacy develops from and is maintained by the fair exercise of authority on the part of the police when they deal with the public—that is, through the provision of procedural justice."[190] Stated differently, legitimate policing requires a public perception that the conduct regulations guiding officers are fair.[191] Scholars have in turn recognized that one important factor (among others) in ensuring that policing guidelines are indeed seen as "fair" is the existence of a robust accountability system.[192] "Effective accountability procedures are essential if the police are to achieve their goals of lawfulness and legitimacy[.]"[193] And, increasingly, there's a public demand for accountability that flows not from internal sources—not from some actor within the legal system—but from the community itself. That is, "[a]n important and very relevant aspect of public accountability is whether

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[187] *See* Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 664 (1873).

[188] When the judiciary fails to satisfy its "obligation to succeed" and "a serious gap between persuasion and authority emerges, there can be genuine political crisis." PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 39 (2016) (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 239 (2d ed. 1986)); *see* BICKEL, *supra*, at 71.

[189] *See* Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople View Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297 (2016).

[190] ROBERT E. WORDEN & SARAH J. MCLEAN, MIRAGE OF POLICE REFORM: PROCEDURAL JUSTICE AND POLICE LEGITIMACY 44 (2017) (quoting Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. PUB. INT. 75, 75 (2015)).

[191] *See* Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 92 (2004) ("[P]eople's willingness to buy into and voluntarily accept decisions that may require them to accept outcomes that they do not want, or to engage in self-control over their actions, is enhanced by the judgment that one has been treated fairly by the police.").

[192] *See* SAMUEL WALKER, POLICE ACCOUNTABILITY: CURRENT ISSUES AND RESEARCH NEEDS 1–2 (2006), https://www.ojp.gov/pdffiles1/nij/grants/218583.pdf.

[193] *Id.* at 1.

there is an element of representation."[194] For example, over the last fifty years, there's emerged a growing chorus of citizen oversight agencies "demand[ing] external procedures for reviewing citizen complaints, arguing that they will be more effective than internal police complaint review procedures."[195] In 1970, there was only 1 such oversight agency nationwide; that number grew to 38 by 1990 and over 100 by 2001.[196] Despite these efforts, however, surveys demonstrate that the empirical ideal has not yet been actualized: "No [existing] external citizen oversight agency has the power to impose discipline of officers against whom complaints are sustained."[197]

Given this empirical landscape, the classification of the policing reasonability issue carries added weight. As a "question of fact," the reasonability question can be handed to the jury, an institution that—again according to empirical studies—benefits from a public perception of trust given its status as a proxy for community sentiment. As a "question of law," however, the reasonability issue is of course handed to judges to decide. Delegating authority over assessing police actions to a governmental actor, instead of a cross-section of the community, seems to counteract the pursuit of optimal procedural justice by limiting participation in accountability.

The initial insight gleaned from empirical studies also seems supported by the normative side of the procedural justice literature. Beginning, first, at the most intuitive level, consider an illustrative example of the normative dimensions of procedural justice offered by Lawrence Solum's aforementioned article.[198] Imagine that two individuals decide to share a dessert, but they first want to agree on a fair means of dividing the treat.[199] So, the two individuals create a rule—one will slice the dessert into two pieces, but the other will have first choice of which piece she receives. Both parties accept the outcome as legitimate because they perceive the process that actualized it as fair. But what exactly rendered the process fair? One might say that the rule is designed to ensure accuracy, or perhaps the rule strikes a fair compromise between accuracy and the cost that would accompany trying to precisely divide the dessert.[200] Or, perhaps still, the division of the treat was fair because each party *participated* in

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194 U.N. OFFICE ON DRUGS & CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT AND INTEGRITY 103 (2011); *cf.* Solum, *supra* note 141, at 275 ("[A] right of participation is essential for the legitimacy of a final and binding civil proceeding.").

195 *See* WALKER, *supra* note 192, at 3.

196 *Id.*

197 *Id.* at 20.

198 *See* Solum, *supra* note 141.

199 As noted, Lawrence Solum advances this example in his excellent article. *Id.* at 238–39.

200 *Id.* at 238.

final outcome—the slicer cannot complain about receiving a smaller share since she did the dividing; the chooser cannot complain about selecting the smaller piece.[201] Scholars have examined each of these different models when explaining the relationship between procedural justice and legitimacy.[202] But the final model—the participation model—is especially salient in the policing context. Solum suggests that "[p]rocedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate."[203] As relevant here, then, affording procedural participation rights to those within the policed jurisdiction is perhaps an essential step toward greater procedural justice and, in turn, police legitimacy.[204] Policed communities are increasingly demanding that police misbehavior be checked by external accountability systems—systems that include members of the public.[205] That is, policed communities seek participation in the mechanisms that will hold misbehaving officers accountable. Norms of procedural justice seem to support this move, even as the legitimating participation in this context comes not from the aggrieved individual directly but rather from her community acting as a proxy for her interests.[206] Mirroring Solum's dessert example, greater community participation in the review of claims of police misconduct would create beneficial incentives for all actors. Police become directly accountable to the citizens they serve; citizens, in turn, should more readily accept police action as legitimate if it is sanctioned by members of their own community. Adopting Lon Fuller's assessment of adjudicative legitimacy, public participation in police accountability mechanisms offers the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[207]

Again, deeming the reasonability issue in the § 1983 context a question of fact furthers this end. With the excessive force question delegated to the jury, the community becomes the arbiter of what constitutes reasonable police action. While judicial pronouncement invites skepticism from traditional out-groups

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[201] *Id.* at 238–39.

[202] *See id.* at 239. The first two responses would roughly correspond to what Solum (and Rawls before him) describe as "perfect" and "imperfect" procedural justice. *Id.* at 242–73.

[203] *Id.* at 274.

[204] In fact, at an instinctual level, the desire for such rights is readily observable in modern debates around policing.

[205] U.N. OFFICE ON DRUGS & CRIME, *supra* note 194 ("An important and very relevant aspect of public accountability is whether there is an element of representation.").

[206] *See* Solum, *supra* note 141, at 236 n.137.

[207] Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971); *see* Markovits, *supra* note 150, at 1395.

facing an adverse substantive decision, jury decisions place the decision-making authority in the hands of the plaintiff's own community.[208]

Ultimately, despite the advocacy above, the goal of this exercise is not to offer a firm declaration that the reasonability question must be deemed factual or legal. One could also likely find empirical and normative arguments as to why vesting the excessive force question with the judiciary better facilitates procedural justice. For example, as hinted above, the legitimating participatory potential of jury oversight in the § 1983 context heavily depends on how well the aggrieved sees the jury as "participating" in the system on her behalf.[209] But the exercise does illustrate how the classification debate benefits by pinning the law-fact distinction to principles of procedural justice. Argumentation over the appropriate label, and intentional consideration of the implications of that decision, becomes principled and accessible. Despite the law-fact indeterminacy, the classification process remains bounded and motivated by a clear, normative end.

Taking stock, then, in its operationalized form, the procedural justice classification model expects a fundamental shift in the debate surrounding the classification of issues. Rather than requiring metaphysical arguments over the makeup of an issue's existential substance, the model expects classification driven by pragmatic, practical considerations of institutional competency and perceptions of legitimacy. Hereto, courts have been loath to affirmatively endorse consideration of the consequences of classification as a component of the classification process itself.[210] And, if one accepts traditional accounts of the law-fact distinction, this judicial reluctance perhaps makes sense. After all, it would be odd to classify a fruit as an apple or an orange by considering where it would be placed in a store were either label applied. An apple is an apple because of its inherent nature, regardless of what happens to the fruit once appropriately classified. So, too, it would make little sense for a traditionalist, believing in a firm law-fact line of demarcation, to look past the four corners of an issue when classifying it. Yet, when trust in those formalist accounts begins to wane—when confidence in the existence of a theoretical law-fact line of demarcation begins to slip—a legal system generally opposed to one-off, ad hoc declarations

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[208] *See* Allen & Pardo, *supra* note 6, at 1775 ("[J]urors as representatives of the community, rather than judges, are better equipped to make [reasonableness] decisions.").

[209] The primary focus of the existing normative literature examines how *individual* participation, not proxy participation by community members, fosters legitimacy. *See* Solum, *supra* note 141; Fuller, *supra* note 207; Markovits, *supra* note 150, at 1395.

[210] Although, Part II.B demonstrates that courts have already operationalized considerations of procedural justice as a central component of the issue classification process.

requires a principled trans-substantive basis for issue classification and allocation. The procedural justice model provides just that. It constrains and motivates issue classification by seeing classification as a means—indeed, a central driver—for achieving the normative ends pursued by the procedural justice school.

Of course, by now, one might fairly wonder—if the law-fact distinction is illusory, why retain the existing classification regime at all? Why not abandon the "question of fact" and "question of law" labels entirely and instead shift to a regime that offers bespoke institutional treatment to individual issues depending on their unique demands?

Admittedly, if path dependency and existing legal infrastructure were no obstacle, reinventing the classification regime anew—transforming it into a transparent delegation regime—is perhaps preferable. But law does not develop in a vacuum. This Article offers not an ideal solution, but a second-best path forward given the non-ideal reality.

Even if courts recognize that adopting the procedural justice model for classifying issues is normatively desirable, fully abandoning the labels "question of law" and "question of fact" might not constitute the best path forward. In fact, much of courtroom practice in the modern legal system is not the product of an invariable pursuit of optimal institutional design.[211] The jury system did not gain mainstream acceptance because of a persistent belief that, relative to its alternatives, jury deliberation in its modern form constitutes the most accurate or effective form of truth-seeking.[212] Likewise, the modern emphasis on witness-centric testimony in the courtroom does not necessarily depend on some notion that it will always constitute the best means of exploring evidentiary claims at trial.[213] Rather, these courtroom practices continue to occupy a prominent place at trial because they are products of history,[214] vestiges of the past that have become entrenched in the Anglo-American juridical system.[215] Centuries of use have bred a deep social familiarity with these cornerstones of the courtroom, and there exists a form of institutional path dependency that best explains the

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211 *See, e.g.*, Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077 (2019).

212 Indeed, empirical studies suggest that skepticism about the epistemological ability of juries lingers even today. *See* JOHN A. MURLEY & SEAN D. SUTTON, THE SUPREME COURT AGAINST THE CRIMINAL JURY: SOCIAL SCIENCE AND THE PALLADIUM OF LIBERTY (2014).

213 *See* Cheng & Nunn, *supra* note 211, at 1083–84.

214 *Id.* at 1084

215 *See* LANGBEIN ET AL., *supra* note 47.

continued viability of many institutional mechanisms within the modern legal system.[216]

Importantly, institutional entrenchment does not negate the possibility of radical change in the courtroom. It does, however, alter the means by which change can be most easily effected. In a juridical system in which legitimacy is often tied to centuries-old practices, institutional restructuring is most easily implemented when the nominal form of a practice is preserved, but its function is gradually evolved to achieve some superior purpose. Where accomplished, evolutionary development strikes an ideal balance, capturing the instrumental gains made possible by the internal reorientation without fully sacrificing the legitimating force of the vestigial practice.

Consider, for example, the evolutionary development of the jury system. As initially constituted, the early jury was a radically different institution than its modern descendant. Pursuant to the Assize of Clarendon in 1166, the original twelfth-century jury was a self-informed group, composed of members living in the same close-knit agrarian community as the accused.[217] Although, by modern standards, juror pre-knowledge of adjudicative facts is anathema, close proximity of jury members and the accused was initially seen as normatively desirable—early jurors' position in the community offered practical efficiency gains as they were the individuals in the best position to uncover the necessary facts.[218] Thus, unlike its modern passive role, the "early jury was expected to have pre-trial knowledge of the events at issue and come 'upon oath' to trials to speak as to whether anyone in their area was 'accused' or 'notoriously suspect[ed]' of certain serious offenses—including murder, robbery, theft, or harboring."[219] Effectively, then, the early jury operated in both a prosecutorial and adjudicative role.[220] But the following centuries would demand a radical reinvention of this early model. The Black Death rendered open-field agriculture nonviable as a drastic drop in population pushed communal workers toward a new era of independent, enclosure-based farming.[221] Communal life within the vill, the essential predicate for the self-informing jury, gradually faded.[222] The

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216 *See id.*

217 *See id.* at 244; Cheng & Nunn, *supra* note 211, at 1084.

218 *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1169–72 (1996); C.S. & C.S. ORWIN, THE OPEN FIELDS 36–62 (1938) (describing the socioeconomic conditions into which the jury system was born).

219 Cheng & Nunn, *supra* note 211, at 1084 (quoting 2 ENGLISH HISTORICAL DOCUMENTS: 1042–1189, at 440–41 (David C. Douglas & G.W. Greenaway eds., 2d ed. 1981)).

220 *See* LANGBEIN ET AL., *supra* note 47, at 224; Langbein, *supra* note 218, at 1170.

221 *See* LANGBEIN ET AL., *supra* note 47, at 224–27.

222 Cheng & Nunn, *supra* note 211, at 1084.

original jury was in danger of extinction, as "[w]ithout the village, the jury, as contemporaries knew it, would have been impossible."[223] Yet, evolution prevented obsolescence. Beginning in the fourteenth century, juries began to undergo significant changes with respect to their composition, responsibilities, and purpose.[224] The jury's initial proactive, self-informing prosecutorial function faded away as passive, evaluative responsibilities became the new norm. It became ignorant and instructional, receiving indictments from career prosecutors who assumed responsibility over pre-trial investigations.[225] Importantly, though, the jury itself survived, presumably because the benefits of preserving the vestigial legitimacy associated with the institution outweighed any instrumental gains to be had from entirely reworking the dispute resolution system. The jury's function evolved but its form remained.[226]

The law-fact distinction is ripe for a similar evolution. The turbulent case law demonstrates that the continual attempts to identify a formal ground for distinguishing questions of law from questions of fact are futile errands.[227] That said, the purported division between legal and factual inquiries continues to have instrumental value given its prevalence—indeed entrenchment—in our legal system. For centuries, judges have delegated issues and applied standards of review on the basis of an issue being a "question of fact" or "question of law."[228] Rather than completely reinventing the classification system, courts might therefore determine that the best path forward is to preserve the existing labels but to assign them using the procedural justice framework here advanced. The law-fact distinction's form would remain, but its function would be reimagined.

Pulling these threads together, this evolutionary approach to implementation of the procedural justice model ultimately asks a classifier to discern which existing label—"question of law" or "question of fact"—will most closely afford an issue the optimal institutional treatment (measured against norms of procedural justice). Of course, given the rigidity of the traditional classification system, there will be instances in which the institutional treatment offered by the

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223 R.B. Goheen, *Peasant Politics? Village Community and the Crown in Fifteenth Century England*, 96 AM. HIST. REV. 42, 53 (1991).

224 *See* LANGBEIN ET AL., *supra* note 47, at 208.

225 *See id.*; Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 124 (2003).

226 Justice Oliver Wendell Holmes described a similar process with respect to the substance of the law itself, noting "the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view." Holmes, *supra* note 120, at 469.

227 *See supra* Part I.

228 *E.g.*, Isack v. Clark, 1 ROLLE 127, 132 (1613) ("[A]d questionem facti non respondent jurisperiti, ad questionem juris non respondent juratores . . . .").

question of law and question of fact labels falls short of achieving the identified optimum. But this is the tradeoff of the evolutionary system. On the margins, the importance of ensuring that each issue is afforded the optimal institutional treatment is outweighed by the instrumental and legitimating value reaped from preserving the traditional labels. In a variant of Justice Holmes' famous words, it can be said that "[t]he social end which is aimed at by [the evolutionary approach to implementing the procedural justice model] is obscured and only partially attained in consequence of the fact that the [evolutionary approach commits] its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view."[229] The goals of facilitating procedural justice and maximizing the legitimacy of the rule of law still drive the classification of issues, but their complete fulfillment is marginally sacrificed to ease implementation and administration of the model.

### *B. How the Model Informs*

The procedural justice model offers an intuitive yet robust theoretical account for the motivation of and constraints on the law-fact distinction. Yet, in contrast to many traditional accounts, the model is not merely isolated within the realm of theory. Rather, case law demonstrates that courts have already been turning to principles of institutional competency and legitimacy—principles at the heart of the procedural justice model—when classifying hard issues.[230] Even without candidly endorsing the model, they often use its core tenets to drive their opinions.

At the same time, case law also demonstrates that courts still cling (at least nominally) to the traditional conception of the law-fact distinction as a distinction in theoretical kinds. In some cases, for example, issues are deemed factual because they involve historical reconstruction; issues are deemed legal because they involve normative or moral calculations.[231] The Supreme Court's recent decision in *U.S. Bank National Ass'n v. Village at Lakeridge, LLC* reiterates the Court's purported endorsement of a classification system that sees questions of fact encompassing "questions of who did what, when or where, how or why," and the "unalloyed" category of questions of law encompassing issues that require establishing more normative societal rules.[232]

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[229] Holmes, *supra* note 120, at 469.

[230] *See* Allen & Pardo, *supra* note 6, at 1778–89 (identifying threads of pragmatic reasoning throughout law-fact case law).

[231] *See, e.g.*, U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 965–68 (2018).

[232] *Id.* at 965–66 (citation omitted).

But in other cases, the classification analysis is imbued with discussion about the relative legitimating strengths of certain institutions and would-be decision makers. Indeed, some opinions classify issues as questions of fact or questions of law by *exclusively* relying on considerations of legitimacy and institutional competence, completely forgoing any attempt to discern a theoretical distinction between the two.

For an example of this latter phenomenon, return again to a favorite of scholars—the Supreme Court's decision in *Sioux City & Pacific Railroad v. Stout*.[233] The *Stout* Court determined that reasonableness in the negligence context was a question of fact to be resolved by a jury.[234] As scholars have recognized, however, discussion about the theoretical differences between questions of law and questions of fact is conspicuously absent from the Supreme Court's opinion.[235] There is no claim that reasonableness should be deemed a factual inquiry because it primarily involves reconstructive analysis of historical events or because the evaluative components of reasonableness (at least, reasonableness in the negligence context) lack some sort of legal tinge. Instead, the Supreme Court's classification of reasonableness is entirely dependent on considerations of procedural fairness. Speaking the praises of the jury, the Court noted that "twelve men know more of the common affairs of life than does one man[;] . . . they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."[236] Contrary to the judiciary, the jury is composed of an "average [cross-section] of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer."[237] The Supreme Court thus deemed the jury better positioned to "apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion" regarding the reasonability of the defendant's actions.[238] In essence, then, the Supreme Court saw resolution through jury decision making as a fairer procedure for litigants, especially given the jury's unique status.

Although *Stout* is an early case, it provides a clear window into how the traditional conception of the law-fact distinction, despite its generally accepted nature, often fails to drive the classification of issues. Of course, if there did exist

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233 *See* Sioux City & Pac. R.R. v. Stout, 84 U.S. 657 (1873).

234 *Id.* at 665.

235 *See, e.g.*, Allen & Pardo, *supra* note 6, at 1778–89; Atiq, *supra* note 11.

236 *See Stout*, 84 U.S. at 664.

237 *Id.*

238 *Id.*

a controlling formal ground for distinguishing questions of law from questions of fact, we would expect *Stout*'s consideration of the relative legitimating strengths of the jury to be largely irrelevant (or, at least only relevant insofar as it confirms the conclusion that the traditional model would reach). But *Stout* sees considerations of procedural justice and legitimacy as not only driving the classification of reasonableness, but also serving as the exclusive basis for deeming it a question of fact.[239]

To be sure, *Stout* is something of an exception. Most cases do not completely forgo any attempt to distinguish legal and factual issues on theoretical grounds, but instead couple a theoretical account with a complementary procedural justice focus. For example, consider again another favorite case of scholars (particularly Allen and Pardo)—*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[240] As noted, in *Cooper*, the Supreme Court determined that constitutional challenges to punitive damages awards should be reviewed by appellate courts akin to legal inquiries subject to a de novo standard.[241] In reaching this conclusion, the *Cooper* Court first noted that, unlike factual questions that involve "historical or predictive fact[s]," such as an assessment of "the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," the calculation of punitive damages has a legal character, in that, it constitutes "an expression of . . . moral condemnation" and is "intended to punish the defendant and to deter future wrongdoing."[242] Stated differently, then, *Cooper* seems to draw a law-fact line of theoretical demarcation between those issues that require pure historical reconstruction and those that involve moral or normative judgments. In so acting, however, the Court seems to trample (or at least create an inconsistency with) a number of its previous decisions.[243] Noting that a "jury's verdict on punitive damages is fundamentally dependent on determinations [that the Court] characterize[s] as factfindings," Justice Ginsburg's dissent questioned how the *Cooper* rationale could explain the classification of so-called questions of fact, including "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, [and] whether the defendant behaved negligently, recklessly, or maliciously."[244] Indeed, applying the *Cooper* framework would

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239 *See id.*

240 *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001); Allen & Pardo, *supra* note 6, at 1773–78.

241 *Cooper*, 532 U.S. at 431 ("We . . . conclude that the constitutional issue merits *de novo* review.").

242 *Id.* at 432, 437 (citations omitted).

243 *See id.* at 446 (Ginsburg, J., dissenting); Allen & Pardo, *supra* note 6, at 1774.

244 *Cooper*, 532 U.S. at 446 (Ginsburg, J., dissenting).

lead to a contrary decision in *Stout*, as assessments of the reasonability of a defendant's actions rely more heavily on "an expression of . . . moral condemnation" designed to "punish the defendant and to deter future wrongdoing" than any "historical or predictive" assessment of "concrete facts."[245]

Perhaps given the muddled nature of this purported theoretical distinction, the *Cooper* Court then turned to consider how the calculation of punitive damages should be classified in light of "[d]ifferences in the institutional competence of trial judges and appellate judges."[246] Balancing the relative legitimating strengths of the potential decision makers, the Court noted that trial courts only possess a "somewhat superior" position (relative to appellate courts) in assessing "the degree or reprehensibility of the defendant's misconduct."[247] Conversely, appellate courts were deemed "more suited" to determine "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[248] The Supreme Court therefore determined that principles of procedural and distributive justice warranted the classification of the calculation of punitive damages as a quasi-legal inquiry deserving of de novo appellate review.[249] Thus, although *Cooper* differs from *Stout* in at least attempting to advance a theoretical ground for distinguishing questions of law from questions of fact, it seems apparent that procedural fairness considerations weighed most heavily on its analysis. Of the two rationales given to justify the Court's classification, one directly contradicted past cases; the other contributed to a growing trend of classification as a means of facilitating adjudicative legitimacy.

The tug-of-war between the traditional and procedural justice conceptualizations of the law-fact distinction is further evinced by a series of cases in which questions once deemed factual were reclassified as legal. Consider, for instance, the Supreme Court's decision in *Baltimore & Ohio Railroad v. Goodman*,[250] in which Justice Oliver Wendell Holmes articulated his well-known "stop, look, and listen" standard of care.[251] *Goodman* required the Court to examine a jury verdict in favor of a truck driver who was hit by a

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245 *Id.* at 432, 437 (majority opinion) (citations omitted).

246 *Id.* at 440.

247 *Id.*

248 *Id.* (citation omitted).

249 *See id.*

250 Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

251 Jason M. Solomon, *Juries, Social Norms, and Civil Justice*, 65 ALA. L. REV. 1125, 1154 (2014) ("Holmes formulated what would be known as the 'stop, look, and listen' rule.").

train at a railway crossing.[252] As noted, determinations of reasonable care and contributory negligence had been historically classified as factual matters for resolution by the jury.[253] But in *Goodman*, Justice Holmes stepped in and reversed course, declaring, as a matter of law, that the driver could not recover because he failed to "stop and look" at the intersection.[254] Effectively, Justice Holmes relabeled a factual issue bound for the jury a legal issue properly resolved by a judge.[255] As in *Stout* and *Cooper*, however, the impetus for relabeling the question was emphatically not a suggestion that the Court had achieved better insight regarding the true nature or intrinsic qualities of the negligence question; instead, *Goodman* demonstrates that the reclassification was driven almost entirely by concerns of procedural justice and legitimacy. Justice Holmes insisted that the negligence issue should be deemed a question of law because of a pressing need for a clear standard, a standard that could only be "laid down once for all by the Courts."[256] The focus was not on whether the intrinsic nature of the appropriate care inquiry primarily required historical reconstructive analysis—whether it was primarily a "question[] of who did what, when or where, how or why"[257] or instead required some other epistemological approach—but instead on considerations of the procedural fairness implicated by delegation to different would-be decision makers.

In many ways, the Court's reluctance to candidly embrace a procedural justice classification regime might also explain the rise of mixed questions of law and fact. As detailed by the Supreme Court, a mixed question of law and fact requires a decision maker to determine how a law or legal doctrine applies to a specific universe of facts.[258] Categorically, it is somewhat unclear how mixed questions of law and fact fit within the traditional law-fact paradigm. On one view, mixed questions might present an epistemologically distinct type of issue that sits between pure questions of law and pure questions of fact in a triadic model. Case law, however, fails to demonstrate that bright lines, or any other formal ground, exist between pure questions of law and mixed questions of law and fact. As discussed, the reasonability of a police officer's use of force

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252 *Goodman*, 275 U.S. at 69.

253 Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 664 (1873) (deeming negligence a question of fact because, *inter alia*, "twelve men know more of the common affairs of life than does one man, [so] they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge").

254 *Goodman*, 275 U.S. at 70.

255 *See id.*

256 *Id.* (citation omitted)

257 U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 966 (2018) (citation omitted).

258 *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (A mixed question asks whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

is entirely dependent on the factual contours of an underlying incident—that is, it requires a decision maker to apply the concept of reasonability to a factual conflict—yet is deemed a "pure question of law."[259] On a second view, then, perhaps mixed questions of law and fact might be distinguished from pure questions of law (or fact) not based on their epistemological differences, but instead based on the proximity of the factual and legal questions. Mixed questions of law and fact might simply constitute issues for which pure questions of law can only be answered by first establishing a necessary factual predicate. Again, however, this alternative conceptualization fails to square with case law, as issues such as maliciousness and recklessness reside at junctures where normative and factual inquiries overlap, yet are deemed pure questions of fact.[260]

Under the procedural justice approach to classification, however, a more plausible explanation for the initial emergence and modern prominence of the mixed question category emerges. Mixed questions are simply an outgrowth of the traditional model's failure to advance a coherent distinction. As the two traditional categories—pure questions of law and pure questions of fact—failed to encapsulate the entire universe of adjudicative issues within their scope, the mixed question category arose to capture those issues that fell within that murky middle ground—the aforementioned law-fact twilight zone.[261] At the same time, the mixed question label also offers an attractive opportunity for courts seeking to delegate issues to the institutional decision maker best able to provide a legitimate resolution. For example, in *U.S. Bank National Ass'n*, the Supreme Court expressly recognized that mixed questions are malleable enough to be utilized as a means of delegating decision-making authority over an issue to an appropriate institution.[262] Noting that "[m]ixed questions are not all alike," the Court determined that "appellate courts [as opposed to trial courts] should typically review a decision" that requires "courts to expound on the law,

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[259] *See* Scott v. Harris, 550 U.S. 372, 381 n.8 (2007).

[260] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 446 (2001) (Ginsburg, J., dissenting) (noting that, under Supreme Court precedent, "whether the defendant behaved negligently, recklessly, or maliciously" is a form of "factfinding[]").

[261] *See supra* notes 129–30 and accompanying text.

[262] *See U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 966–69. In *U.S. Bank National Ass'n*, the Court summarily noted that the issue of whether a creditor qualifies as a "non-statutory" insider for the purpose of Chapter 11 bankruptcy proceedings is a mixed question of law and fact. *Id.* at 965–66. The short discussion regarding the proper classification of the issue again demonstrated a purported reliance on the traditional conceptualization of the law-fact distinction. *See id.* Justice Kagan, writing for the majority, noted that a question of fact involves "questions of who did what, when or where, how or why." *Id.* at 966 (citation omitted). Conversely, she noted that the "unalloyed" category of questions of law includes those issues that require establishing more normative societal rules, such as discerning the appropriate test for "determin[ing] whether someone is a non-statutory insider." *Id.* at 965. Finally, Justice Kagan briefly introduced the mixed question category, but failed to distinguish it from the other categories in any formal way. *See id.* at 966.

particularly by amplifying or elaborating on a broad legal standard," given their superior ability in "developing auxiliary legal principles of use in other cases."[263] Conversely, the Court determined that "appellate courts should usually review a decision with deference" if a mixed question involves issues "compelling [a factfinder] to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[264] As demonstrated by *U.S. Bank National Ass'n*, then, mixed questions of law and fact constitute an emerging pocket of procedural justice reasoning; they offer a classification not based on any firm formal distinction that sets them apart from the question of law or question of fact categories, but instead one seemingly purposed at allowing courts to expressly and directly consider procedural fairness in delegating decision-making authority.

As one's exploration of case law runs deeper, one's recognition of the theoretical wrestling match between the traditional and procedural justice models grows ever stronger. As demonstrated by *Stout*, *Cooper*, and other key cases, the turbulent case law surrounding the law-fact distinction can be seen as a surface-level manifestation of a deeper struggle between two competing classification frameworks. Although courts nominally champion the traditional conception of questions of law and questions of fact as theoretically distinct, their reasoning increasingly betrays that endorsement by exhibiting significant reliance on considerations of institutional legitimacy.[265] What emerges from this underappreciated theoretical jostling is jurisprudential limbo, a contradictory and largely incoherent doctrine fueled by fundamentally irreconcilable conceptions of the law-fact distinction.

### *C. How the Model Reforms*

There is a simple and elegant explanation for why courts infuse procedural justice reasoning into the law-fact case law—procedural justice provides a more principled and desirable framework for classifying issues than does elusive (and perhaps illusory) formal reasoning. Not only does the procedural justice law-fact model seek to achieve normatively sound ends by orienting the classification process toward achieving systematic fairness and legitimacy, it also grounds and clarifies argumentation surrounding the legal and factual issues. Rather than requiring judges and lawyers to engage in the metaphysical exercise of parsing

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263 *Id.* at 967 (citation omitted).

264 *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)).

265 *See Cooper Indus.*, 532 U.S. 424; Sioux City & Pac. R.R. v. Stout, 84 U.S. 657 (1873).

abstract notions of law and fact, classification inquiries simply become about procedural fairness.

But the procedural justice model does not merely seek an academic victory. Its implications are not confined to the realm of theory. Rather, in pinning the law-fact distinction to notions of fairness and legitimacy, the procedural justice model offers significant real-world reform.

Consider, first, how the procedural justice model protects against institutional self-aggrandizement. Despite its nominal claims of ex post ignorance, the traditional law-fact model has historically served as an instrumental tool for shifting the balance of power in the courtroom. Tracing its path through Anglo-American history, the use of the law-fact distinction as a judicial means of controlling juries is conspicuous: "From the seventeenth century onward, English judges used the granting of new trial nominally to enforce, but in reality to redraw, the fact/law line, thereby steadily reducing the sphere of the jury."[266] While outwardly committing to an insistence that legal and factual inquiries were separated by some theoretical barrier, English common law judges simultaneously used the classification process to effect a "progressive dethronement of the jury."[267] Take, for example, the development of contract law. Before the nineteenth century, contractual issues were almost exclusively left for resolution by the jury.[268] Thereafter, however, "questions that were previously left to common sense became the subject of legal doctrine."[269] In 1818, *Adams v. Lindsell* articulated the mailbox rule;[270] in 1892, *Carlill v. Carbolic Smoke Ball Co.* set forth doctrine for public offers.[271] Practically speaking, commentators widely agree that this legalization of adjudicative questions was purposed at enlarging judicial influence: "It was the judges . . . who decided what was law, and they used the device of ever more detailed jury instructions, reinforced by the new trial system in cases of jury resistance, to recast as law matters that had previously been left to jury discretion."[272]

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266 LANGBEIN ET AL., *supra* note 47, at 449.

267 A.W.B. Simpson, *The Horowitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 600 (1979).

268 *See id.*

269 A.W. Brian Simpson, *The Elusive Truth About Holmes*, 95 MICH. L. REV. 2027, 2038 (1980) (book review).

270 Adams v. Lindsell (1818) 106 Eng. Rep. 250, 251; *see* LANGBEIN ET AL., *supra* note 47, at 450.

271 Carlill v. Carbolic Smoke Ball Co. [1892] 1 QB 256 (Eng.); *see* LANGBEIN ET AL., *supra* note 47, at 450.

272 LANGBEIN ET AL., *supra* note 47.

Of course, the law-fact distinction was only capable of such manipulation because of stark theoretical infirmities in the traditional model. The judicial power grab that marked the nineteenth and twentieth centuries was only possible because there did not exist any trans-substantive framework that defined a question of law and a question of fact, no firm and obvious law-fact barrier over which activist judges could not cross. The judiciary relied on that illusory theoretical distinction to enlarge its sphere of influence.[273] Yet, even from this early era when the classification process was used for questionable ends, one can recognize its potential to achieve a normatively desirable goal—optimal allocation of decision-making authority to facilitate procedural justice and legitimate the rule of law.[274]

The procedural justice classification framework offers that reform. Doing away with quixotic search for the "slippery"[275] and "vexing"[276] theoretical distinction between questions of law and questions of fact, the alternative framework here advanced sees classification transparently driven by an overarching desire to see ultimate decision-making authority placed in the hands of the institution best suited to provide a fair, legitimate resolution. Far from acting as an opaque concept vulnerable to manipulation, full-scale adoption of the procedural justice classification framework enables the law-fact distinction to serve as a centrally important juncture of accessible argument. Its indeterminacy is its strength in that classification becomes an exercise of optimizing institutional legitimacy rather than a philosophical endeavor to determine an issue's hidden nature.[277]

The reform offered by the procedural justice model, though, extends far beyond mere improvements to the classification process itself. Indeed, at the core of the procedural justice model is the hope that classifying issues based on considerations of fairness will ultimately help legitimize the substantive outcomes. That is, by seeking to make adjudicative procedure as just as possible, the model facilitates the legitimacy of outcomes in a morally pluralistic society that will inevitably disagree about substance. Of course, with that purpose, the

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273 *See id.*

274 Functionally, then, the law-fact distinction becomes a legal fiction. Lon Fuller noted that legal fictions are lies that are not meant to deceive. LON L. FULLER, LEGAL FICTIONS 6 (1967). Instead, many legal fictions are simply "false statement[s] recognized as having utility"; they are means of achieving a normatively desirable result in legal system marked by undertheorization. *Id.* at 9. Blackstone, too, was of this mind, noting that legal fictions can sometimes be "highly beneficial and useful." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 43 (1768).

275 Thompson v. Keohane, 516 U.S. 99, 110–11 (1995).

276 Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

277 *See supra* Part II.A.

procedural justice model requires continual institutional introspection. If we are truly committed to achieving a fair and just legal system, what changes to the allocation of decision-making authority are necessary? Which issues currently resolved by, say, judges should be delegated to juries (and vice versa)? Which issues currently reviewed de novo warrant more deferential treatment?

Even a brief survey demonstrates potential benefits of this exercise. As discussed above, courts currently hold decision-making authority to determine the reasonability of police force in a § 1983 lawsuit. Does procedural justice demand that a cross-section of the community make these determinations instead, especially given the recent outcry for greater police accountability?[278] Judges similarly possess decision-making authority over assessments of the voluntariness of a suspect's confession under police interrogation.[279] Should it instead be a jury—individuals from outside the legal system—deciding what information a defendant offered freely and what she offered under duress? Determining discriminatory intent is currently a question of fact delegated to juries to decide.[280] But in jurisdictions in which juries historically served as an instrument of oppression against marginalized communities, would this issue have been better handled by courts?[281] Questions surrounding effective assistance of counsel, probable cause for a search, and whether speech is obscene are ripe for similar examination. Of course, the traditional law-fact model would pay no attention to these considerations, instead grasping for a theoretical foothold to distinguish each issue as factual or legal. The procedural justice model, in contrast, sees these considerations of fairness and legitimacy as driving classification.

Finally, in its truest form, the procedural justice model improves the legal system by breaking free of the restraints imposed by the traditional law-fact

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[278] *See, e.g.*, The Editorial Board, Opinion, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html.

[279] *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 115–16 (1985) ("'[V]oluntariness' is a legal question . . . . Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." (internal citation omitted)).

[280] *See, e.g.*, Edwards v. Occidental Chem. Corp., 892 F.2d 1442, 1447 (9th Cir. 1990) ("A finding of discriminatory intent in a Title VII case is a question of fact and will not be overturned unless clearly erroneous." (citation omitted)).

[281] *See* Peter Arenella, *The Perils of TV Legal Punditry*, 1998 U. CHI. LEGAL F. 25, 36 n.16 ("Classic examples of bad faith jury nullification occurred throughout the South during the civil rights movement in the sixties where all-white juries acquitted white defendants of crimes committed against black and white civil rights workers."); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 86 (1990) ("Following the second World War, all-white juries continued to acquit white southerners who engaged in interracial violence.").

binary. It pushes adjudication toward optimal delegation of decision-making authority, even where that delegation would be unorthodox (and therefore largely unavailable) under the traditional system.[282]

Glimpses of this revolutionary approach are already emerging in our legal system. Consider, first, the rise of the so-called constitutional facts doctrine.[283] The constitutional facts doctrine targets evaluative issues closely tied to constitutional rights, such as whether speech was motivated by "actual malice"[284] or whether an abortion restriction constitutes an "undue burden."[285] Traditionally, one might think these issues would be classified as questions of fact (although, under the traditional regime, that is hard to say for certain[286]) and subjected to the traditional corresponding treatment—juries would make determinations about the existence *vel non* of these factors and appellate courts would then deferentially review those findings. In recent decades, however, courts broke free from that traditional allocative mold. Constitutional facts were deemed to be so essential, so closely tied to one's fundamental rights, that a departure from the traditional classification regime became imperative. To create a uniform and predictable system for defining substantive constitutional rights—to achieve procedural justice—courts carved out an exception to the traditional treatment afforded to questions of fact and instead determined that constitutional facts are to be reviewed de novo "to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects."[287] Again, considerations of procedural justice, rather than adherence to the traditional law-fact regime, drove this change.

The emergence of the *Chevron* doctrine also presents a radical departure from the traditional treatment regime.[288] Under the *Chevron* doctrine, an administrative agency's interpretation of certain ambiguous statutes is granted deference by appellate courts due to the fact that "[j]udges are not experts in"

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[282] *See* Monaghan, *supra* note 36, at 234 ("To be sure, the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decision makers in the legal system. But there is no imperative that a properly affixed characterization necessarily controls allocation of functions." (internal footnote omitted)).

[283] For an excellent survey of the constitutional facts doctrine, see Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001).

[284] *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 487 (1984).

[285] *See, e.g.*, A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002).

[286] *See supra* Part I.

[287] *A Woman's Choice-E. Side Women's Clinic*, 305 F.3d at 689.

[288] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001) ("The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.* dramatically expanded the circumstances in which courts must defer to agency interpretations of statutes." (internal footnote omitted)).

parsing out statutory language associated with a regulatory regime that is "technical and complex."[289] There is no serious attempt to argue that these issues of statutory interpretation fall outside the "question of law" category; instead, the deviation from default treatment is driven by a recognition that, in this sphere, the legitimacy gains to be achieved by fully realizing optimal allocation of decision-making authority outweigh those gained from adherence to the traditional model.[290] Again, then, the traditional law-fact regime cracks, giving way to change that pushes the legal system toward procedural justice.

Ultimately, the procedural justice model promises beneficial change. Beyond theory and case law, embracing considerations of fairness when classifying issues ultimately bolsters the legitimacy of adjudication itself. Trading a vestigial insistence on the existence of an illusory theoretical distinction for real-world improvements to courtroom decision making is a worthwhile exchange.

## CONCLUSION

The distinction between law and fact has bedeviled judges, practitioners, and scholars alike. Justice Oliver Wendell Holmes famously recognized: "From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact."[291] Justice Holmes's observation highlights the oddity that is the law-fact distinction. Turning away from that oddity, this Article imagines a classification system driven entirely by principles of procedural justice. Where the categorization of issues is primarily contingent on the most desirable allocation of decision-making authority, adjudicative legitimacy can reach its optimum.

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[289] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); *see also* King v. Burwell, 135 S. Ct. 2480, 2488 (2015) ("When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable.") (internal citations omitted).

[290] *See Chevron*, 467 U.S.at 865; Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 (1985); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2084 (1990).

[291] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899).