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Questions of Fact in the Practice of Law: A Response to Allen & Pardo's Facts in Law, Facts of Law

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QUESTIONS OF FACT IN THE PRACTICE OF LAW: A RESPONSE TO ALLEN & PARDO'S *FACTS IN LAW AND FACTS OF LAW*

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In their article *Facts in Law and Facts of Law*,[1] Professor Ronald Allen and Michael Pardo criticize efforts to distinguish questions of 'law' from questions of 'fact' based on the nature of the issue under consideration. In convincing fashion, they demonstrate that there is no ontological, epistemological, or analytical distinction between things in the real world that are 'facts' and things in the real world that are 'law.' Their analysis rests on several insights: that everything we think of as 'law' exists and requires proof through evidence just like all the things we think of as 'facts;' that 'fact-finding' requires the invocation of norms just like the identification of legal rules does; and that propositions of 'law' have truth values just like propositions of 'fact.' From these insights, Allen and Pardo conclude that when judges use the terms 'fact' and 'law,' they are using those terms conventionally to describe a normative conclusion that a particular matter *should* be decided by a judge (law) or *should* be decided by a jury (fact).[2]

This is a powerful critique. Allen and Pardo are certainly correct that 'law' is no different from any other real-world phenomena normally considered to be 'factual.' As they suggest, the question of what constitutes valid law in any given context is a factual question, and one that can be answered only by examining the activities of legal officials in their identification of law. Law is a social institution manifested in and constructed by the actions of legal actors. It is, therefore, thoroughly factual in nature. That is the insight underlying the social sources thesis of legal positivism. Efforts to distinguish 'laws' from 'facts' at this level—in relation to questions about the nature of law—will always fail. Allen and Pardo's analysis aptly demonstrates this important jurisprudential point.

But demonstrating that point does not do much to advance understanding of the fact-law distinction *as a practice*. Despite the truism that 'law' and 'fact' are not mutually exclusive ontological, epistemological, or analytical categories, in practice judges invoke the fact-law distinction in fundamentally consistent ways every day. As proof of this contention, consider the following two questions: 1) 'How fast was the car going?' 2) 'What was the speed limit?' We do not have to believe that 'law' and 'fact' are severable categories to recognize that any judge encountering those questions in a typical adjudicative context would label the first one a question of fact and the second a question of law. If the objective is to shed light on the fact-law distinction as it is used in the real world, the method must be to identify the circumstances under which judges use the labels 'law' and 'fact' in practice.[3]

Allen and Pardo seem to recognize the need for such a pragmatic analysis in their argument that conventional meanings of the terms 'fact' and 'law' and structural considerations about the competence of potential decision-makers inform choices about the allocation of decisional responsibility.[4] But they never explain how these factors actually operate in practice. Conventional meanings derive from usage. Speakers of a language have a shared understanding of the meanings of most words in that language based on the characteristics of the phenomena to which the words in the language are used to refer. If I say 'I am sitting in a chair,' you know what I mean because you have an idea about the characteristics of the thing that English speakers call a 'chair.' By the same token, when judges say 'This is a factual matter, so it should go to the jury,' they are evaluating the characteristics of the matter to be decided and concluding that there

is something about it that indicates it falls into the class of things that we typically assign to juries. To the extent it is possible to identify the factors judges use to make those choices, then it is also possible to give substance to the fact-law distinction. By giving primacy to the conventional meanings of the terms 'law' and 'fact,' Allen and Pardo appear to concede this and to suggest that it would be possible to identify at least some of the characteristics of the things that judges call 'fact questions' and 'law questions.' But they never do that.

Furthermore, it does not help much to say that functional considerations play an important role in the decision to label a question 'factual' or 'legal,' because the functional considerations are themselves dependent on the characteristics of the matter to be decided. If it is correct that, because of differing competencies, there is a set of questions that judges should normally decide and a set of questions that juries should normally decide, then there must be particular features about typical adjudicative questions that make them candidates for one or the other set. To understand how functional considerations operate, we need to know the characteristics of the questions that we think judges (or juries) are best suited to answer. Identifying the characteristics of the questions that judges label 'fact' and 'law' is an essential step in understanding the different structural roles of judges and juries.

In short, while Allen and Pardo have said much that is true and nothing that is false, they have not succeeded in dispelling confusion about the fact-law distinction as it is used in practice. In a forthcoming article, I attempt to dispel that confusion in at least one context by examining the fact-law distinction as it animates the right to a jury trial in civil litigation in the United

States.[5] Here, I will distill that analysis to provide a more general, if somewhat truncated, account of the fact-law distinction. In brief, I will argue that it is possible to identify consistent criteria in how the fact-law distinction has been applied in practice by focusing on two factors: 1) the purpose for which a given question is asked; and 2) the inferences required to answer that question. Judges decide questions whose purpose is to determine whether the parties have set an issue up for decision consistent with governing legal norms. Once it has been determined by the judge that an appropriate issue has been presented, the judge must decide who should resolve that issue. Judges have traditionally concluded that juries should resolve issues requiring inductive inferences about the transactions or occurrences put in dispute, while judges themselves may answer questions calling for deductive inferences or inductive inferences about matters outside the transactions or occurrences in dispute.

This is a descriptive claim, and a relatively modest descriptive claim at that. My goal is to uncover the characteristics of the questions that judges *usually* label as 'fact,' and, correspondingly, the characteristics of the questions that judges *usually* label as 'law.' I do not claim that judges explicitly rely on the understanding I suggest or that my approach explains all invocations of the fact-law distinction. I also do not, for now, claim that judges *should* use the criteria I describe. Rather, I hope to show that there is a basic underlying consistency in how the terms 'fact' and 'law' have been used in the allocation of decisional responsibility. Recognizing the basis for that consistency can help to focus thinking on the choices judges make in assigning decisions to legal actors, and thereby lead to better-reasoned decisions.

Two Contexts for the Fact-Law Terminology

As Allen and Pardo's critique persuasively shows, the key to drawing useful conclusions about the fact-law distinction is to focus not on the meanings of terms, but on the behavior of judicial actors invoking the fact-law distinction in practice. The first step in understanding how the fact-law distinction is used in practice is to understand how the decision process operates. The received wisdom holds that there is something called 'law' and something called 'fact' and when the two meet there is something called 'the application of law to fact.'[6] But that is an artificial decisional framework (for all the reasons Allen and Pardo give) and one that obfuscates rather than clarifies. To illuminate the fact-law distinction in practice, we need a better paradigm—one that is not itself dependent on the fact-law construct. At least in the Anglo-American system, such a paradigm can be found by focusing on the adversarial process.

In the Anglo-American system, the parties, through their lawyers, initiate the adjudicative process. The decision-makers—be they judges, juries, or some other kind of referee—do not have the power to seek out and resolve disputes. No adjudicative decision is made unless the parties to the dispute put an issue up for decision in an appropriate tribunal.[7] The process of raising an issue for decision begins when one of the parties invokes the power of a court. The parties then set the machinery of decision in motion by first putting before the tribunal a body of data on which a decision may be based and then submitting a question to be answered in reference to the data. This two-step process recurs throughout the litigation, first through the submission of motions and later through the introduction of evidence at trial and the submission

of jury instructions. The process of adjudication, then, consists not of the application of 'laws' to 'facts,' but of the presentation of data by the parties and the submission, again by the parties, of questions about the data.

The fact-law terminology is used in two distinctly different ways in this process.[8] First, the term 'law' is used to describe actions taken by the judge in the role of adjudicative supervisor. In this role, the judge monitors the actions of the parties to ensure that the adjudicative process unfolds in a way that comports with relevant norms. The judge makes a number of 'screening' decisions about such matters as whether the parties have chosen an appropriate forum (jurisdiction), whether they have presented appropriate data for consideration (evidence), and whether they have posed appropriate questions (stating a claim, judgment as a matter of law).

To see how this process works, assume a plaintiff in an American jurisdiction files a complaint alleging that the defendant acted negligently and thereby caused emotional suffering to the plaintiff. Assume also that it is an accepted rule of American law that damages for emotional suffering are not available for conduct that is merely negligent. If the case gets that far, the plaintiff will ultimately ask a jury or judge to answer a number of questions, including whether the defendant acted negligently and whether any such negligence caused emotional suffering in the plaintiff. Now assume that the defendant files a motion to dismiss for failure to state a claim (the traditional demurrer). In this motion, the defendant is asking for a decision on whether the plaintiff's proposed question—'Did the defendant's negligence cause the plaintiff

emotional suffering?'—is appropriate. The judge answers that question (presumably in the negative) because it is part of the judge's 'screening' role to decide whether the questions posed by the parties are appropriate.

The decisions the judge makes in this 'screening' role are frequently referred to as matters of 'law.' Yet these screening decisions frequently involve determinations about the facts of the case. To determine whether the court has jurisdiction, for example, the court must investigate and draw conclusions about the nature of the dispute and the characteristics of the parties before it.[9] To determine whether data presented by the parties is appropriate, the court must apply rules of evidence, such as the hearsay rule, that require the court to draw inferences about the events in dispute.[10] And to decide whether a question posed by the parties is appropriate on a motion for judgment as a matter of law, the court must evaluate the parties' factual allegations to determine whether a reasonable jury could find the facts to be as the parties claim. Although all of these matters involve decisions on what we think of as the facts of the case, we assign them to the judge because we believe the judge is best suited to answer them. We call them matters of law because we have assigned them to the judge. Criticisms of the fact-law distinction as 'artificial and problematic' have greatest force in this context.[11]

But the fact-law terminology also appears in a different context. Once the judge has determined that the dispute is in a proper forum, that the parties have presented appropriate data, and that the parties have posed an appropriate question, she must decide which judicial actor—judge or jury—should answer the question. Traditionally, judges have made this choice by

reference to the fact-law distinction. Questions that judges label as 'fact' go to the jury in cases in which a jury is properly demanded. Questions that judges label as 'law' sometimes go to the jury as well, but may also be decided by the judge. In civil cases in the United States, where civil jury trials still exist, this division of responsibility is constitutionally prescribed by the Seventh Amendment.[12]

For the remainder of this article, I will concentrate on the fact-law distinction as it appears in this context. Because it is at this point that the merits of the case are decided, this is the point at which the fact-law distinction carries the greatest import. It also seems to be the point at which most of the confusion surfaces. Nobody seriously thinks juries should decide questions such as whether the court has jurisdiction or whether a document offered in evidence is hearsay. But there is heated debate about matters such as whether juries should interpret the claims in a patent, to give one example to which I will return. If we are to clarify the fact-law distinction, we must be able to identify the characteristics of the questions that judges traditionally assign to juries, and of the questions that judges traditionally reserve for themselves, once the merits have been reached.

An Inferential Understanding of the Fact-Law Distinction

The persistence of the fact-law terminology in judicial decisions allocating decisional responsibility between judge and jury—despite the repeated condemnations of the fact-law distinction as chimerical—suggests that judges believe the distinction has a basis. I agree. There is something about certain questions that leads judges to conclude that those questions are

'factual' as opposed to 'legal.' While judges may not consciously recognize it, the basis for the distinction lies in the types of inferences required to answer a given question. In short, the questions that judges typically label as 'fact' are *screened questions requiring inductive inferences about the transactions or occurrences in dispute*. All other questions are typically labeled as 'law.'

Before proceeding, I should define some terms. First, I use the term 'inductive inference' broadly, to encompass all probabilistic reasoning. This means I use the term to include the Peircean concept of abduction or hypothesis,[13] a type of reasoning that has frequently been considered an independent category of inference. In effect, I lump all non-syllogistic reasoning into the category of induction.[14] Focusing on the kinds of inferences most prevalent in adjudication, then, I use the term inductive inference to encompass three basic types of inferences: 1) that an event or condition in the past or present probably has occurred or is occurring; 2) that an event or condition in the future probably will occur; and 3) that a hypothetical event or condition probably would occur given some postulated set of circumstances, a type of reasoning known as the counterfactual conditional.[15] The term 'event or condition' in these formulations includes virtually all phenomena in the world, real or hypothetical, including the identity of things or persons, the occurrence of physical events or human acts, mental states, and relations of cause and effect.

Second, I use the term 'transactions or occurrences in dispute' in the sense it has in the American law of *res judicata*.[16] This is a term of art, but its meaning is fairly straightforward. In

litigation, the plaintiff must always assert that some event or condition—defined broadly as above—occurred and impacted the plaintiff or will impact the plaintiff in a negative way. The plaintiff thus sets the terms of the debate by identifying something that happened (or in some cases, will happen) causing an injury that the plaintiff claims is remediable in a court of law. The defendant responds by challenging the plaintiff's version of the events and/or adding new events or conditions that have a logical connection to those posited by the plaintiff and that are necessary for a full understanding of the events or conditions described by the plaintiff. The 'transactions or occurrences in dispute' are simply the events or conditions that the plaintiff has pointed to as causing his injury, plus the injury itself, plus logically connected events or conditions identified by the defendant.

Last, I should emphasize again that judges routinely make decisions on fact questions as I define them, while acting in their screening role. In deciding whether data is appropriate (evidence questions) or whether a question posed by the parties is appropriate (as on motions to dismiss or for judgment as a matter of law), the judge must draw inferences about the transactions or occurrences in dispute. These sorts of questions are probably best considered fact questions decided by a judge. Unfortunately, they have traditionally been labeled questions of law, and judges seem unlikely to change that understanding. To receive the label 'fact question,' then, a question must have survived the judge's initial screening *and* require inductive inferences about the transactions or occurrences in dispute.

To demonstrate the utility of this understanding of the fact-law distinction, I will give some examples of common adjudicative questions. The most common sort of 'fact' questions in adjudication are the 'who, what, when, where' questions. These questions call for inductive inferences about past real-world events or conditions. For example, assume that in a slip-and-fall case, to show that the floor of a store was wet at the time of the accident, the plaintiff calls a witness who saw a customer spill water on the floor just before the plaintiff's fall. To reach the desired conclusion, the decision-maker must make a probabilistic inference first that the spill occurred as the witness described it and then that the spilled water was still on the floor when the plaintiff fell. This is a classic example of an inductive inference about the transactions or occurrences in dispute.

Adjudication also involves predictive inferences about future events or conditions, most often in the remedies context. For example, in deciding whether to issue an injunction, a decision-maker must decide whether the actions of the defendant will cause irreparable harm if allowed to continue. Personal injury actions often involve determinations of future lost earnings as well as future pain and suffering. Breach of contract actions may involve determinations of future lost profits. All these matters require probabilistic conjectures about events in the future. Because those events are part of the set of events or conditions that the plaintiff has identified as triggering a right to recovery, these matters also involve inductive inferences about the transactions or occurrences in dispute.

Finally, perhaps the most problematic type of inference in adjudication is the determination of causation. As H.L.A. Hart and Tony Honoré made clear in their masterful *Causation in the Law*,[17] causation is best understood in terms of expected courses of events. Their explanation of the two aspects of tort causation, 'but-for' cause and 'proximate' or 'legal' cause, is worth quoting:

> The necessity of the cause for the production of the consequence means that, in making causal statements, we must consult our knowledge of the general course of events. Under what sorts of conditions do things of this sort happen? Does this kind of thing happen without that kind of thing? The second aspect [proximate or legal cause] forces us to consider less definite issues and very often matters of degree. Although principles distinguishing between causes and mere conditions, or between factors which 'break the chain' of causation and those which do not, are to be found in ordinary thought apart from the law, their application often raises disputable questions of classification: Was this a coincidence? How likely was it? . . . In these questions the issue is not so much: 'Did *X* happen?' but rather 'Is what happened sufficiently like the standard case of an *X* to be classified with it for legal purposes?'[18]

In other words, determining whether event *A* is the but-for cause of event *B* requires postulating a likely course of events and asking whether event *B* would be likely to occur in the absence of event *A*. Determining whether event *A* is the proximate or legal cause of event *B* requires similar but more nuanced considerations. The decision-maker must decide whether event *A* is sufficiently extraordinary given the expected course of events to be designated a 'cause' rather than a 'condition' of event *B* for purposes of assigning fault.

In their dependence on likely courses of events, both questions of but-for cause and questions of proximate cause require probabilistic inferences about hypothetical conditions in the world—the events that were most likely to happen given the state of the world prior to the injury.

If the plaintiff cannot show a likely hypothetical world in which his injury would not have occurred, he cannot recover. Thus, the existence of such a hypothetical world is an aspect of the transactions or occurrences in dispute, and answering questions of causation requires drawing inductive inferences about the transactions or occurrences in dispute.

Now, note what the inferential definition of fact questions excludes. First, the definition excludes all deductive inferences, regardless of the subject matter. Where inductive inferences are used to generate new beliefs about the world, deductive inferences are used to classify or categorize existing beliefs.[19] Deductive inferences are quite common in legal reasoning.[20] Take the following syllogism as an example:

> Anyone who intentionally and unlawfully kills a human being is guilty of murder;
> A intentionally and unlawfully killed B;
> Therefore, A is guilty of murder.

Once the decisionmaker knows that murder is defined as 'the intentional and unlawful killing of a human being' and knows that a particular defendant has intentionally and unlawfully killed another, the conclusion that the defendant is guilty of murder follows without any conjecture or speculation required. A question calling for that sort of inference is always a question of law, although it is one frequently made by the jury.

Second, the definition excludes questions calling for inferences about the conduct and mental states of legislators or others in constructing standards or rules of law that are ultimately determined to have a bearing on the resolution of the dispute.[21] Questions posed in litigation may call for inductive inferences about these matters, and such inferences may be crucial to the

resolution of the dispute. But the parties will almost never assert that the conduct and mental states of legislators or others constitute the real-world events underlying their claims and defenses. In other words, plaintiffs very rarely argue that conduct undertaken by a legislative or judicial actor has caused the plaintiff an injury remediable in a court of law. Occasionally plaintiffs have attempted to tie their alleged injuries to such legislative action, and the result has usually been a determination that the plaintiff lacks standing—or in other words, that the plaintiff's proposed question is inappropriate.[22]

Another major category of inference excluded from the definition is the set of inferences about the consequences of the litigation itself, such as the effects on the parties or others of a verdict or award. Again, at various points in the litigation certain actors may consider the consequences of the litigation in deciding how to resolve the dispute. But the consequences of the litigation cannot be the events the plaintiff points to as a basis for seeking a remedy in a court of law or the defendant points to as making applicable a legal defense.

In sum, defining questions of fact in terms of inductive inferences about the transactions or occurrences in dispute leaves several important classes of questions of law. Whenever a question requires the decision-maker to label or characterize known real-world phenomena by reference to the decision-maker's pre-existing store of knowledge, it involves deductive inferences. And even if it requires the decision-maker to draw conjectural inferences exceeding the decision-maker's pre-existing store of knowledge, so that it calls for inductive inferences, it does not involve a question of fact if the inferences relate to matters such as the intentions or

purposes of a legislature or the likely actions of other people who are made aware of the outcome of the litigation.

Certain questions in adjudication do not fall neatly into either the 'law' or 'fact' category. These are usually characterized as 'mixed questions of law and fact.' Reasonableness, as in the law of negligence, is the classic example. The *Restatement (Second) of Torts*, the definitive American source on the law of civil liability for personal injury, defines the standard of conduct required to avoid being negligent as 'that of a reasonable man under like circumstances.'[23] It states further that '[n]egligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.'[24] Finally, the *Restatement* defines unreasonableness: 'Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.'[25] This is simply another way of saying that reasonableness depends on the circumstances. People might be justified in taking certain risks if taking those risks is the only way to avoid worse consequences.

This weighing of risk and utility calls for counterfactual probabilistic inferences about the transactions or occurrences in dispute. In requiring an inference as to whether other courses of conduct that the actor might have taken would have produced the same benefits at less cost, the question of reasonableness requires the decision-maker to speculate about how events might have unfolded if circumstances had been different. If other actions that could have been taken

would not have produced the same benefit at less cost, the actor's conduct was not unreasonable. Because this conclusion turns on hypothetical, probabilistic inferences about the actor's conduct—an essential component of the transaction or occurrence in dispute—it is a question of fact.

What makes the reasonableness question difficult to characterize is its invocation of community standards. The decision-maker must compare the actor's conduct against the community standards for behavior under similar circumstances. Even if the probability of an injury was low and/or the relative utility of the conduct was high, an actor might be negligent if he failed to act in ways that community standards dictate for the situation. 'If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do there is a possible inference that he is not so conforming.'[26] Thus, a decision-maker must answer the question, 'What would a person of ordinary prudence in this community do under these circumstances?' Assuming the circumstances leading to the injury have been established—by assumption, agreement, or prior determination—answering that question does not involve factual inferences. Instead of drawing inductive inferences about the specific people and events involved in the matter, the decision-maker must draw inductive inferences about how other people from the community would behave under similar circumstances. And almost inevitably, the decision-maker's own preconceived notions about how people in the community *should* behave will creep into that analysis. Thus, determining the community standards involves

inductive inferences about matters beyond the transactions or occurrences in dispute, as well as deductive inferences about those transactions or occurrences.

The fact that some questions include both factual and legal elements does not mean that the fact-law distinction is empty—it just means that the world is a complex place. And understanding the fact-law distinction in inferential terms can help judges discern the relative weight of the factual and legal components in such difficult cases. Sometimes the 'factual' components will predominate, while in other instances the 'legal' components will predominate. Courts that are aware of the traditional preference for giving those questions in the former category to the jury will, at a minimum, make more consistent and better informed decisions allocating decisional responsibility for difficult questions like reasonableness. To the extent it is possible to show that juries are *better* decision-makers for 'fact' questions, a challenge I leave on the table for now, an inferential understanding of the fact-law distinction will produce decisions that are not just more consistent and better informed, but qualitatively superior.

Caveat: Judicial Manipulation of the Fact-Law Distinction

It should be apparent that the inferential understanding of the fact-law distinction I propose does not constrain judges in any meaningful sense. Judges can always make a question into either a fact question or a law question simply by interpreting the legal rule implicated by the question to require the relevant sorts of inferences. The United States Supreme Court did exactly that in its decision in *Markman v. Westview Instruments, Inc*.,[27] which held that patent claim construction is a question of law. The plaintiff in *Markman*, who wanted the jury to

interpret the claims in the patent, relied primarily on *Bischoff v. Wethered*,[28] a case involving a contract for the assignment of a patent. The plaintiff in *Bischoff* had determined that a prior patent had been awarded for an identical invention. If that were true, the presence of the prior patent would nullify the patent he purchased. He brought an action for breach of contract, in which the central issue was whether the two inventions were in fact identical. In other words, the case turned on whether an infringement action would succeed if one were brought. The Supreme Court understood the construction of the patent to require the mental recreation of the invention. '[T]he whole subject-matter of a patent is an embodied conception outside of the patent itself . . . . This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence in pais.'[29] Thus, the *Bischoff* Court saw the decision-maker's role as mentally recreating the invented products based on the patents and the expert testimony, and then comparing the 'invention' described in the first patent to the 'invention' described in the second patent to decide whether they are the same. It held that the jury should make this determination.

The Supreme Court in *Markman* rejected that approach to patent law. While it recognized that a 'novelty' action such as *Bischoff* might turn on the outward embodiment of the patent, it maintained that a patent infringement action turns on simple document interpretation. 'Where technical terms are used, or where the qualities or substances or operations mentioned or any similar data necessary to the comprehension of the language of the patent are unknown to the

judge, the testimony of witnesses may be received upon these subjects, and any other means of information be employed. But in the actual interpretation of the patent the court proceeds upon its own responsibility, as an arbiter of the law, giving to the patent its true and final character and force.'[30]

Bischoff adopted an understanding of patent law that would require the decision-maker to draw inductive inferences about the transactions or occurrences in dispute (the outward embodiment of the patented product). In turn, the *Bischoff* Court saw patent claim construction as a question of fact for the jury. *Markman* rejected that understanding in favor of an approach focusing on the literal meaning of the words contained in the patent. That approach requires no inductive inferences about the transactions or occurrences in dispute. It requires only deductive inferences about the semantic meanings of the terms in the patent. Accordingly—and rightly given its understanding of what claim construction actually involves—the *Markman* Court saw patent claim construction as a question of law for the judge.

The Supreme Court almost certainly would not have decided *Markman* differently had it understood the fact-law distinction in inferential terms. But it might have better understood—and better explained—why its interpretation of patent law removed claim construction from the province of the jury. Ron Allen and Michael Pardo are absolutely right that misunderstandings about the nature of the fact-law distinction have produced 'conceptual confusion' in courts. But they have not provided a solution to that problem. The solution is to better understand the

characteristics of the questions that courts label 'fact' and of the questions that courts label 'law.' Understanding the fact-law distinction in inferential terms can help in that process.

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[1] R.J. Allen & M.S. Pardo, 'Facts in Law and Facts of Law,' (2003) 7 E & P 153.

[2] I am focusing on the fact-law distinction as it informs the choice between judge and jury at the trial stage of adjudication. The analysis is similar, however, for the employment of the terminology at other stages, such as to decide whether a matter on appeal deserves discretionary or plenary review.

[3] As it happens, this is much easier to do in common-law countries like the United States and the United Kingdom than in continental systems because of the adversarial system. The adversarial system produces transparency in the decision-making process by prescribing discrete roles for the different actors and then enforcing those roles. In contrast, the decision-making process in inquisitorial systems is relatively opaque. These differences in methods of adjudicative process from country to country probably explain, at least in large measure, the lack of consistency in understandings of the fact-law distinction that Allen and Pardo highlight. As Allen and Pardo did, I will focus on the Anglo-American system.

[4] Allen and Pardo also invoke the general-specific dichotomy as one of the factors that intersect when judges determine who should decide an issue. That dichotomy is a feature of theories of general jurisprudence. It is not particularly well-suited to pragmatic analyses of the fact-law distinction because there are so many instances in which highly specific questions—such as the citizenship of a party for jurisdictional purposes—are considered matters of law.

[5] P.F. Kirgis, 'The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment' (in press)(2003) 64 *Ohio State Law Journal*.

[6] H.M. Hart, Jr. & A.M. Sacks, *The Legal Process* (Eskridge & Frickey eds. 1994) 350-51. Hart and Sacks described the three steps in the adjudicative process as "law declaration," "fact identification," and "law application."

[7] By 'adjudicative decision' I mean a decision carrying consequences that are recognized by society as 'legal' and that society will enforce.

[8] A number of years ago, Professor Stephen Weiner drew a similar distinction to the one I draw by distinguishing 'questions of law' relating to governing rules from the application of 'law' to 'fact' in specific cases. S.A. Weiner, 'The Civil Jury Trial and Law-Fact Distinction,' (1966) 54 *California Law Review* 1867, 1867-72.

[9] Courts have sometimes concluded that the matters to be decided in the jurisdictional analysis strike so close to the heart of the case that they should be decided by the jury. See Note, 'Trial by Jury of Preliminary Jurisdictional Facts in Federal Courts,' (1963) 48 *Iowa Law Review* 471.

[10] Like certain jurisdictional issues, some evidentiary matters go to the jury. For a discussion of the complexities of jury decision-making on evidentiary issues, see J. Kaplan, 'Of Mabrus and Zorgs—An Essay in Honor of David Louisell,' (1978) 66 *California Law Review* 987.

[11] Allen & Pardo, above n. 1, at 155.

[12] U.S. Constitution amendment VII. The Seventh Amendment provides that '[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' In criminal cases, for which the jury right is governed by the Sixth Amendment, juries decide the 'elements' of the offense, while the judge may decide 'sentencing factors.'

[13] See C.S. Peirce, *Philosophical Writings of Peirce* (1955) 150-56.

[14] This is not a novel understanding of inductive reasoning. See, e.g., M.R. Cohen & E. Nagel, *An Introduction to Logic and Scientific Method* (1934)278-79. It is, however, contrary to the common misapprehension that inductive reasoning is characterized by inferences moving from the specific to the general.

[15] R.M. Chisholm, 'The Contrary-to-Fact-Conditional' (1971) *Logic as Philosophy: An Introductory Anthology* 118 ('We seem to have knowledge of what *might* have happened, of what *would* happen if certain conditions were realized, of what tendencies, faculties, or potentialities an object *could* manifest in suitable environments.')(emphasis in original).

[16] *Restatement (Second) of Judgments* § 24 (1980)(defining 'claims' in terms of transactions or series of transactions).

[17] H.L.A. Hart & T. Honoré, *Causation in the Law* (2nd ed. 1985).

[18] Ibid. at 111.

[19] In defining deductive and inductive inferences in this way, I tread on uncertain philosophical terrain. There is no consensus about how to draw the distinction between deductive and inductive inferences, or even whether such a distinction is possible. I concede that my definitions of the terms may be somewhat idiosyncratic and may fray at the edges. Such is the nature of philosophical distinctions. Nevertheless, it seems clear that there is a rough dichotomy between inferences that draw probabilistic conclusions about the world and inferences that involve the manipulation of linguistic concepts to categorize or label existing beliefs about the world. This rough dichotomy has appeared in a number of philosophical guises, including the distinctions between necessary and contingent truths, between analytic and synthetic judgments, and between *a priori* and empirical knowledge. *See* S. Wolfram, *Philosophical Logic: An Introduction* (1989) 80; A.C. Grayling, *An Introduction to Philosophical Logic* (1982) 44-45; 1 *Encyclopedia of Philosophy* (P. Edwards, ed. 1967) 105, 140-44. When I use the terms 'deductive' and 'inductive' inference, I do not use them to suggest clear and immutable categories. I use them to invoke this rough dichotomy between probabilistic inferences leading to new beliefs about the world and inferences that categorize or label existing beliefs about the world.

[20] For examples of syllogistic reasoning in adjudication, see R.A. Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 42-43.

[21] The distinction I draw here is roughly equivalent to the one between adjudicative and legislative facts. See *Federal Rule of Evidence* 201, Advisory Committee Note ('Adjudicative facts are simply the facts of the case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.').

[22] Sometimes a defendant will point to the activities of legislatures or other government actors as a grounds of defense. This situation is presented by a pending case in Britain, where peace activists Margaret Jones and Paul Milling have been charged with conspiracy to cause criminal damage to a refuelling truck and tractor units used for loading bombs onto B-52s at a Royal Air Force airbase. Their defense is that their actions were justified because they were acting to prevent a crime—the 'illegal' war in Iraq. A central question in the case is whether the judge or a jury should decide the question of the war's legality. *See* A. Wade, 'Was the War in Iraq Illegal?' *The Guardian*, 16 Sept. 2003. A judge could simply decide that the posed question is inappropriate—that alleged violations of international law by sovereign states are not the kinds of 'crimes' that the justification defense is intended to recognize. If a judge finds that the question is appropriate, however, it is a 'fact' question under an inferential analysis. Inferences about the legality of the Iraq war are clearly inductive. And the circumstances of that war are events or conditions to which the defendants have pointed as triggering a legal rule in their defense. Accordingly, they are part of the transactions or occurrences in dispute and, following my approach, should be decided by the jury.

[23] *Restatement (Second) of Torts* § 283 (1965)('Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.').

[24] Ibid. § 283 comment c (1965).

[25] Ibid. § 291 (1965). *See also* United States v. Carroll Towing Co., 159 F2d 169, 173 (1947)(postulating that conduct is negligent when the cost of preventing the injury is less than the product of the probability of the injury and the loss resulting from the injury (B<PL)).

[26] *Restatement (Second) of Torts* § 295A (1965).

[27] 517 US 370 (1996).

[28] 76 US (9 Wall.) 812 (1869).

[29] Ibid. at 815.

[30] *Markman*, 517 US at 388.