

LEGAL VS. FACTUAL NORMATIVE QUESTIONS & THE TRUE SCOPE OF *RING*

*Emad H. Atiq**

Abstract. *When is a normative question a question of law rather than a question of fact? The short answer, based on common law and constitutional rulings, is: it depends. For example, if the question concerns the fairness of contractual terms, it is a question of law. If it concerns the reasonableness of dangerous risk-taking in a negligence suit, it is a question of fact. If it concerns the obscenity of speech, it was a question of fact prior to the Supreme Court's seminal cases on free speech during the 1970s, but is now treated as law-like. This variance in the case law cannot be explained by traditional accounts of the law/fact distinction and has fueled recent skepticism about the possibility of gleaning a coherent principle from judicial rulings.*

This Article clarifies a principle implicit in the settled classifications. I suggest that judicial practice is consistent: it can be explained by the distinction between normative questions that are convention-dependent and those that are convention-independent. Convention-dependent normative questions, or those that turn essentially on facts about our social practices (roughly, what we do around here) are reasonably classified as questions of law. By contrast, convention-independent normative questions, which turn instead on fundamental moral norms concerning what persons are owed simply on account of being persons, are properly classified as questions of fact. This principle, echoed in recent holdings, clarifies law/fact classifications in such diverse areas as torts, contracts, First Amendment law and criminal procedure.

*The principle also promises to resolve a looming constitutional controversy. In *Ring v Arizona*, the Supreme Court held that all factual findings that increase a capital defendant's sentence must be decided by the jury under the 6th Amendment. Two recent denials of cert. suggest that members of the Court wish to revisit, in light of *Ring*, the constitutionality of judges deciding whether a criminal defendant deserves the death penalty. Applying the principle to *Ring*, I argue that the question of death-deservingness is a convention-independent normative question, and for that reason should be deemed a factual question for the jury.*

* Yale Law School, JD. Princeton University, Dept. of Philosophy, PhD candidate.

I am indebted to Erin Miller for her extensive and very helpful feedback on earlier versions of the paper. I am also grateful for the thoughtful comments I've received from Scott Altman, Akhil Amar, Alisabeth Ayars, Ian Ayres, Chad Flanders, Stephen Galoob, Joshua Kleinfeld, Daniel Markovits, Jens Ohlin, Michael Pardo, Philip Pettit, Joseph Raz, Gideon Rosen, Michael Smith, Kate Stith, Nat Tabris, and Gideon Yaffe.

Table of Contents	
Introduction.....	3
I. How Courts Deal with Normativity Under the Law/Fact Distinction.....	11
A. Traditional Conceptions of Law and Fact: Normative vs. Empirical, General vs. Particular.....	13
B. The Domain Relative Treatment of Normative Questions.....	15
C. Changes in Classification over Time.....	22
D. Skepticism About the Distinction’s Overall Coherence.....	26
II. A Framework for the Classification of Normative Questions under the Law/Fact Distinction.....	27
A. Convention-dependent & Convention-independent Normative Questions.....	28
B. The Conceptual and Pragmatic Reasons for Interpreting ‘Law’ and ‘Fact’ in Terms of the Normative Distinction.....	34
III. Judicial Sensitivity to Conventional and Pre-Conventional Norms.....	37
A. Convention-independent Norms in Negligence Law and Sentencing.....	37
C. The Convention-dependent Morality of Contract Law.....	47
D. Explaining Intertemporal Shifts: The Cases of Obscenity, Malice, and Aggravation.....	54
IV. A Framework for Sixth Amendment Jurisprudence: Does the “Life-to-death” Judicial Override Infringe on the Jury’s Fact-finding Responsibility?.....	59
A. The Supreme Court’s Recent Death Penalty Jurisprudence and the Judicial Override.....	59
E. Alabama’s Judicial Override on the Question of the Weight of Aggravating & Mitigating Evidence.....	61
F. The Weighing of Aggravating and Mitigating Factors Raises a Convention-independent (“Factual”) Normative Question.....	63
Conclusion.....	65

INTRODUCTION

When is a normative or evaluative question that arises at trial a question of *law* as opposed to a question of *fact*?¹ The short but not very helpful answer based on judicial rulings is: it depends.² If the question concerns the reasonableness of an ‘implied’ term in a contract or the unconscionability of the contract as a whole, it is a question of law.³ If it concerns the unreasonableness of the defendant’s conduct in a negligent suit, it is a question of fact.⁴ In criminal law, whether the defendant’s conduct was especially “cruel” or “heinous” to warrant a higher penalty is a question of fact for the jury.⁵ Additionally, there have been shifts in classification across

¹ Described as the “controlling distinction between the power of the court and that of the jury,” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), the law/fact distinction determines whether the judge or jury will decide an issue, the standard of review on appeal, whether burdens of proof and discovery rules apply, as well as the decision’s precedential value. See discussion *infra* Part I. The maxim that “judges do not answer a question of fact, and juries do not answer a question of law” has been traced to the 16th century. See Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966) (citing COKE, COMMENTARY ON LITTLETON 460 (1818)).

The distinction determines factors that powerfully predict a party’s likelihood of prevailing on the issue. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) (finding that plaintiffs in product liability and medical malpractice cases prevail at a much higher rate before judges than they do before juries); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995) (“Appellate courts have to decide what the ‘standard of review’ is, and that standard more often than not determines the outcome.”); Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73 (2009) (finding empirical evidence of a difference in affirmation and reversal rates based on standard of review); Kimberly A. Moore, *Judges, Juries, and Patent Cases: An Empirical Peek inside the Black Box*, 99 MICH. L. REV. 365 (2000); Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, UTAH L. REV. 1, 5 (2012).

² I am specifically interested in the use of the distinction by *judges* to classify issues that plain statutory law does not specify as judge- or jury issues. How legislatures treat questions is not the focus of present discussion.

³ RESTATEMENT (SECOND) OF CONTRACTS § 204, cmts a, c. U.C.C. § 2-302(1) (2011). Although the UCC’s enactment makes contractual unconscionability a question of law by legislative fiat, the UCC’s drafters drew on the historic practices of common law judges in deciding the issue. See Donald Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMPLE L. Q. 743, 745-8 (1981); discussion *infra* Part I.B.

⁴ See Weiner, *supra* note 1, at 1877 (“The courts of all American jurisdictions, with possibly one exception, adhere to this principle. . . . There are literally hundreds of cases in which this concept has been asserted.”); *id.* at n43 (citing cases invoking the rule); discussion *infra* Part I.B.

⁵ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 542

time. In the context of defamation actions, whether a false statement was made with “actual malice” was traditionally a question of fact reviewed deferentially.⁶ But ever since *Bose Corp. v. Consumers Union*, it is reviewed *de novo*, the standard for questions of law.⁷ A similar shift occurred in the case of obscenity: whether a publication was “obscene” or “prurient” used to be a paradigmatic question of fact for the jury until the Court’s seminal cases on free speech in the 1970s, when it began to be treated as law-like.⁸

The case law presents a puzzle with deceptively high stakes. Judicial practice flatly contradicts standard theories of the common law’s ‘law/fact’ distinction. The dominant view amongst legal theorists is that the law/fact distinction tracks or maps on to the distinction between normative and empirical questions. On this view, normative questions—questions concerning what *ought* to happen or how persons ought to behave—are necessarily legal; while all and only empirical questions—those concerning (roughly) what happened in the world—are factual.⁹ The first part of my project involves showing that this dominant view is mistaken: judges in the common law have long treated some normative questions as legal and others as factual, which suggests that the law/fact distinction, at least as it has been interpreted by judges, cuts across the normative domain.¹⁰ Courts recognizing

U.S. 296 (2004).

⁶ James L. Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 688-98 (1978) (observing a long history of jury findings on the question of malice in civil and criminal defamation cases). See discussion *infra* Part 1.C.

⁷ 466 U.S. 485, 501-2, n27 (1984).

⁸ See *Miller v. California*, 413 U.S. 15, 30 (1973); *Jenkins v. Georgia*, 418 U.S. 153, 159-61 (1974); discussion *infra* Part 1.C. Specifically, the question of whether the depiction of sexual conduct is “patently offensive” began to be treated as law-like.

⁹ I discuss the empirical-normative distinction more carefully in Part I. Other theories similarly struggle to explain the practice of judges—for instance, the view that legal questions are ones of general applicability whereas factual questions are case-specific or particular. See discussion *infra* Part I. The challenge that this part of the case law poses for traditional theories of the law/fact distinction has been widely discussed in the literature. See Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. L. REV. 1769, 1771 (2003) (“The ubiquitous distinction, despite playing many key doctrinal roles, is muddled to the point of being conceptually meaningless.”); Weiner, *supra* note 1, at 1868 (observing that courts have shown no inclination to fashion definitions of law and fact which can serve as useful guidelines); Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 812 (1944) (“What is law to one Justice is fact to another, and perhaps vice versa when the next case comes along.”); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944). Skepticism about the distinction goes back many decades. See, e.g., LEON GREEN, *JUDGE AND JURY* 270 (1930); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 2 (1922).

¹⁰ I suspect that the story of how the distinction maps on to the empirical domain is

the difficulty in deriving a coherent principle from the settled classifications have described the jurisprudence as “elusive,” “slippery,” and as having a “vexing nature.”¹¹ The hard question of interpreting the case law comes up frequently and with constitutional ramifications: the law/fact distinction is a trigger for Sixth and Seventh Amendment jury trial rights. The Supreme Court interprets the scope of the jury trial rights based on the common law practice of distinguishing essentially legal from factual questions.¹² As a result, the issue of how to classify normative questions under the law/fact distinction has resulted in some controversial decisions.

Consider *Cooper Industries v. Leatherman Tool*.¹³ In that case, the majority held that the question of whether punitive damages in an unfair competition action were proportional or not could be reviewed *de novo* as intermediate between law and fact, despite the proportionality question having been historically regarded as a factual question meant for the jury and reviewed deferentially.¹⁴ The majority emphasized that punitive damages involve “moral condemnation,”¹⁵ echoing the traditional scholastic view that whereas questions of law are normative questions involving “the establishment, disestablishment, modification, or interpretation of legal rules,”¹⁶ factual questions are those concerning “who did what, where, when, how, why, with what intent or motive.”¹⁷ But as Justice Ginsburg reasonably emphasized in her dissent in *Cooper Industries*, normative findings have a long history in the common law of being characterized “as *factfindings*—e.g., the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, . . . whether the defendant behaved negligently, recklessly, or maliciously.”¹⁸ Whatever one thinks of Justice Ginsburg's ultimate conclusion in the case, she is surely

complicated as well, but we will be concerned solely with the normative domain in what follows.

¹¹ *Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); *Williams v. Taylor*, 529 U.S. 362, 385 (2000). *See also* *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (observing the difficulty of stating a rule that would “unerringly distinguish a factual finding from a legal conclusion”)

¹² *See* discussion *infra* Parts I and IV.

¹³ 532 U.S. 424 (2001).

¹⁴ *Id.* at 437.

¹⁵ *Id.* at 424.

¹⁶ Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APPELLATE PRACTICE & PROCESS 101 (2005).

¹⁷ RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 10.5, at 732 (4th ed. 2002). *See also* Allen, R., Brunet, A., & Roth, S., *An External Perspective on the Nature of Non-Economic Compensatory Damages and their Regulation*, 56 DEPAUL L. REV. 1249, 1262 (2007) (reciting evidence that ‘fact’ has historically been understood to concern events in the external world capable of identification through empirical inquiry).

¹⁸ 532 U.S. at 446 (Ginsburg, J., dissenting).

right that normative questions are often classified as factual in the common law.

More recently, the issue of how normative questions should be classified came up again in two recent denials of cert., from 2013 and 2016, concerning capital sentencing procedure.¹⁹ The plaintiffs sought review of Alabama's practice of letting judges independently decide the question whether the defendant deserves the death penalty based on the cumulative weight of the aggravating and mitigating factors in the defendant's case. Under *Apprendi v. New Jersey* and *Ring v. Arizona*, all "findings of fact" that increase the severity of a defendant's sentence must be found by the jury in light of the 6th Amendment.²⁰ The issue is whether a finding on the death-deservingness question is a "finding of fact." Although the Court denied cert., Justices Sotomayor and Breyer wrote a strongly worded dissent from the 2013 cert. denial, observing that "[t]he statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury."²¹

I suspect that the likely sticking point that separates the majority from Justices Sotomayor and Breyer is that the question of death-deservingness (and the overall weight of the aggravating and mitigating evidence) is a *normative* question. The Supreme Court has routinely emphasized the normative character of this final determination, suggesting that "in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the moral guilt of the defendant."²² As discussed, such questions are not always treated as factual. Justices Sotomayor and Breyer did not articulate a reason for treating the normative question on which the death penalty turns as a question of fact.²³ If there is a principle immanent in the settled classifications that would confirm the Justices' view, it has yet to be articulated.

This Article argues that there is indeed a useful principle implicit in the

¹⁹ See *Woodward v. Alabama*, 134 S. Ct. 405, 407 (Mem) (2013) (Sotomayor, dissenting). *Brooks v. Alabama*, 136 S. Ct. 708 (Mem) (2016).

²⁰ 530 U.S. 466 (2000); 536 U.S. 584 (2002).

²¹ *Woodward*, 134 S. Ct. at 410-11.

²² *Spaziano v. Florida*, 465 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part). See also *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (outlining the capital jury's task of expressing "the conscience of the community on the ultimate question of life or death"); *Woodson v. North Carolina*, 428 U.S. 280, 297-98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty). See also discussion *infra* Part IV.

²³ See discussion *infra* Part IV.

established case law. While this principle may not afford a complete explanation for how judges have treated normative questions, it is at least part of the explanation for judicial practice and, moreover, the principle *should* inform future classifications under the distinction.²⁴ Judges have been tracking a distinction between two kinds of normative questions: essentially convention-dependent and convention-*independent* normative questions. Conventions can be understood as social practices—roughly “what we do around here” or what norm we actually follow. There are merchant conventions, conventions of legislators and judges, and conventions of various other sorts. Normative questions are essentially convention-dependent when they only admit of a determinate answer by appeal to convention facts. When the relevant conventions are inconclusive or ambiguous, such normative questions do not admit of determinate answers.²⁵ By contrast, convention-*independent* normative questions do not turn primarily on facts about what we do around here. They turn instead on, and are determinately answered by, fundamental moral norms—e.g., those concerning what persons deserve simply on account of being persons.²⁶

How does this distinction help rationalize judicial classification of normative questions as legal or factual? Judges classify normative questions as legal or factual at some stipulated level of generality. They classify *types* of normative questions as legal or factual—e.g., the question of reasonableness in negligence actions, or the question of unconscionability in a contracts dispute.²⁷ The relevant question is how *likely* is a type of

²⁴ My preferred methodology for legal theorizing is rational reconstruction or charitable interpretation. The aim is to interpret judicial behavior in a way that casts judges and their decision-making in the best possible light. By unifying under relatively simple general principles a disparate body of case law, we preserve continuity with past practice while also generating decision criteria that can be useful going forward. Finding order and reason in judicial practice, even if it is not entirely faithful to the actual intentions of all parties involved, is a worthwhile exercise: it serves the important functions of rendering the law more integrated and fostering respect for law. In other work, I defend the importance of charitable interpretation for legal systems.

²⁵ Convention-dependent norms, I argue, tend to be ones that (1) concern the distribution of benefits and burdens that do not implicate matters of fundamental right; (2) solve moral problems that require large-scale collective action; (3) arise in contexts where a paramount concern is respecting the expectations of participants in a convention.

²⁶ These admit of determinate answers, either by appeal to fundamental moral facts alone, or on the basis of the fundamental moral facts *plus* facts about our conventions.

²⁷ The law, as Lee Fennell, notes is lumpy: it operates through general rules of thumb. Lee A. Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012). My view predicts how judges will classify a type of normative question, once the type (or level of generality) has already been chosen by judges. For example, the category ‘unconscionability in a contracts dispute’ is a more general category than ‘unconscionability in mortgage contract disputes.’ The classification of questions of unconscionability as legal has occurred at the more general level of contracts disputes. The distinction between types of question and particular

normative question classified under the law/fact distinction to be essentially convention-dependent or -independent in particular cases. And the central claim of this Article is that if a type of normative question is more likely to be convention-independent—that is, if it is more likely to implicate fundamental moral norms, then it is reasonably classified as a question of fact. Juries are well suited to deciding such questions. By contrast, there are sound conceptual and pragmatic reasons for classifying as *legal* those types of normative questions that are likely to be essentially convention-dependent.²⁸ There are echoes of this principle in court opinions.²⁹ But its primary virtue is that it promises to explain the actual practice of common law judges.

The principle explains, *inter alia*, the contrasting treatment of key reasonableness questions in torts and contracts. The question whether a factory owner behaved reasonably in failing to implement safety protocols that could have prevented severe injuries suffered by her employees is a different kind of question from whether a price term in a contract is reasonable. Reasonableness norms governing dangerous risk-taking often turn not simply on convention facts, but, as Gregory Keating writes, “from rights and obligations that attach to persons *simply as persons*.”³⁰ One reason

tokens or instances is worth bearing in mind in what follows. Just because there are instances of a type that are convention-dependent does not settle whether the general type is more likely to be convention-dependent or -independent. In follow-up work, I explore instances where it might be better for courts to ask the convention-dependent/-independent (law/fact) question at a different level of generality—in particular, at a more fine-grained level.

²⁸ See discussion *infra* Part II. The conceptual argument appeals to what distinguishes essentially *legal* from pure *moral* normativity—the former’s at least partial dependence on social conventions—drawing on a point of relative consensus in legal philosophy. Both in ordinary language and within the law, we recognize different varieties of normativity (legal, moral, semantic). The pragmatic argument emphasizes, among other things, that judges have a special competence to decide normative questions that turn on conventions (law-related or otherwise), but it is unlikely and at the very least highly controversial that they have any special expertise over the jury in deciding fundamental questions of moral fact.

Although, I have put the principle in terms of a purely statistical notion of likelihood, the issue may involve more than mere likelihood. The relevant question might be whether a normative question is *sufficiently* likely to implicate matters of basic right and wrong.

²⁹ See, e.g., *Bose*, 466 U.S. at 501 n.16 (justifying de novo review in cases where a normative finding “cannot escape broadly social judgments”). Though it might seem like my theory gets things backwards—convention-independent norms appear more robustly normative than convention-dependent norms, after all—it does not. When pure moral questions are implicated under the law, answers to such questions cannot and should not be deemed legal, or so I argue. Moreover, the social or convention-dependent character of legal norms does not make them any less normative. Finally, my analysis rejects the values vs facts view of the law/fact distinction. See discussion *infra* Parts I and II.

³⁰ Gregory Keating, *Is the Role of Tort to Repair Wrongful Losses?*, in RIGHTS AND

why basic moral rights are often implicated in negligence cases is that such cases routinely involve harms to interests that have a special moral priority, including “the interests in one’s own physical health and vigor, the integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement. . . .”³¹ Given the harms at stake, it is reasonable to assume that basic moral rights bear on what constitutes reasonable risk-taking. Of course, conventions may also bear on the issue, but they are not independently determinative of the normative question. Plausibly, the relevant conventions are themselves the result of agents trying to do what they morally ought to do, and are thus indicative of background pre-conventional moral norms.³² Basic moral rights and obligations are sufficiently implicated in negligence actions to rationalize the classification of the reasonableness of dangerous risk-taking as a question of fact.

By contrast, the reasonableness of an implied price term in a contract is not the sort of question that can be settled independently of conventions or by appeal to basic moral principles. If there are no set conventions in place regarding how to price widgets, there will simply be no determinate fact of the matter as to what constitutes a ‘reasonable price’ to be implied by the court within a broad range of possible prices, when parties forget to settle on a price term. This is because the distribution of benefits and burdens stemming from voluntary trade does not implicate interests of foundational moral importance. More generally, in the economic context, judges reasonably regard questions concerning the reasonableness of implied contractual terms and overall contractual unconscionability as essentially convention-dependent—as determined by merchant and regulatory conventions. The modern marketplace is quite plausibly an arena of ‘relaxed’ interpersonal expectations, with conventions of self-interested and even predatory behavior having displaced pre-conventional moral norms of good behavior.³³ Thus, judges will frequently refer to the unique “morals of the marketplace”³⁴ and refuse to “impose duties higher than the morals of the marketplace.”³⁵

I use the framework to explain other aspects of the case law on legal and factual normative questions. But its prescriptive upshot for the impending capital sentencing controversy discussed earlier warrants special emphasis.

PRIVATE LAW, at 383 (Nolan, D. & Robertson, A. eds., 2012).

³¹ JOEL FEINBERG, HARM TO OTHERS 37 (1984).

³² There is an important difference between the way conventions bear on what is reasonable in torts—they play an *evidential* role, indicating background moral norms—and the way conventions independently determine contractual norms. See discussion *infra* Part III.A.

³³ See discussion *infra* Part II.

³⁴ *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)

³⁵ *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 162 (Wyo. 2003).

The analysis bolsters the case for the unconstitutionality of judges issuing death sentences independently of juries. The question whether a criminal defendant deserves to be executed is paradigmatically not the kind of question that can be *affirmatively* answered by appeal to social convention facts. An affirmative answer to the question of death-deservingness implicates fundamental questions of fairness and basic dignity.³⁶ Moreover, the Court has regularly emphasized the foundational ethical character of this final determination, and that it must be a “reasoned moral response to the defendant’s background, character, and crime.”³⁷ Members of the Court recognize that the law demands moral deliberation from the sentencer, that the life-or-death decision is a question concerning the defendant’s “moral entitlement to live,”³⁸ and that it must be based on a “moral inquiry into [his] culpability.”³⁹ These holdings can be interpreted as standing for the proposition that the normative question on which the death penalty ultimately rests is a convention-independent moral question. Accordingly, given the framework I outline, it is a question of fact. To the extent that the common law rule controls in this case (and I argue that it does or at least weighs heavily) there is a strong argument to be made that only juries can affirmatively answer the question of death-deservingness.⁴⁰

Part I explains the basic role of the law/fact distinction and its significance within the common law and constitutional law. It also describes traditional theories of the distinction and the challenges facing these theories using settled law/fact classifications in torts, contracts, criminal procedure, and First Amendment law. Part II introduces and defends an alternative theoretical frame for understanding the law/fact distinction as it has been interpreted by courts: the difference between convention-dependent and convention-independent norms.⁴¹ Part III demonstrates the framework’s potential for explaining how judges have handled normative questions. Part IV is primarily prescriptive, focusing on the framework’s material implications for the scope of *Ring*, the Sixth Amendment jury trial right, and the unconstitutionality of Alabama judges independently deciding whether a

³⁶ See discussion *infra* Parts II and IV.

³⁷ *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

³⁸ *Spaziano*, 465 U.S. at 469.

³⁹ *California v. Brown*, 479 U.S. at 545 (O’Connor, J., concurring).

⁴⁰ A negative answer—that is, a determination that life not death is warranted—can be made by judge and jury, I argue. An affirmative answer needs to overcome basic moral constraints. A negative answer does not and can be based on a social practice of mercy and forgiveness.

⁴¹ I am primarily interested in the principles immanent in the behavior of common law judges—that is, the wisdom of the common law judge. My account does not address how or why legislatures have assigned questions to judge or jury.

criminal defendant deserves the death penalty.⁴²

I. HOW COURTS DEAL WITH NORMATIVITY UNDER THE LAW/FACT DISTINCTION

There are two strands of case law on the law/fact issue that should be distinguished. There is, on the one hand, a line of Supreme Court cases interpreting the scope of the Sixth and Seventh Amendment rights to have juries decide questions of fact in civil and criminal cases.⁴³ The constitutional case law is concerned not just with distinguishing factual questions from legal ones but with determining whether a question of fact *must* be decided by the jury for constitutional purposes.⁴⁴ By contrast, the common law practice of distinguishing questions of law from questions of fact is not necessarily directed at satisfying constitutional requirements. The primary goal of the common law practice is to allocate decision-making responsibilities between judge and jury in a principled way and set standard of review when plain statutory law and the constitution are *silent* as to whether a judge or jury should decide a question that arises at trial.⁴⁵

This is an important difference to bear in mind in what follows. While the common law distinction guides judges on the allocative question, it is not always considered decisive. Courts will, for example, sometimes reserve for

⁴² Recent cases suggest that members of the Court believe the practice of judges independently sentencing defendants to death is headed for a constitutional challenge. See discussion *infra* Part IV. On April 11th, 2017, Alabama governor Kay Ivey signed into law a bill banning judges from independently of juries sentencing to death defendants convicted after April 11th, but the law does not apply retroactively to defendants convicted before April 11th. S.B. 16, Reg. Sess. 2017 (Ala. 2017). Judges remain free to exercise the ‘life-to-death override’ for pre-April 11th murder convictions. The legislation will not affect the 183 inmates currently on Alabama’s death row. Alabama judges have overridden jury life sentences 112 times since 1976. See *Alabama Ends Death Penalty by Judicial Override*, ASSOCIATED PRESS, April 11, 2017. <https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override>.

⁴³ U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). The Sixth Amendment in relevant part states “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State.” U.S. CONST. amend. VI. See discussion *infra* Parts I.B, I.C; Allen & Pardo *supra* note 9, at 1779.

⁴⁴ Welsh White makes a similar point regarding the importance of distinguishing the two lines of jurisprudence. See *Fact-finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 4-5 (1989).

⁴⁵ See discussion *infra* Part I.B; Weiner *supra* note 1, at 1867-8 (describing state statutes that leave it to judges to define what ‘law’ and ‘fact’ mean). See also OLIVER W. HOLMES JR., THE COMMON LAW 122-27 (1881).

judges the responsibility of deciding a factual question for pragmatic reasons.⁴⁶ Alternatively, paradigmatic questions of fact may be assigned to judges by legislative fiat. By contrast, the constitutional question is a question of *right*: when *must* a plaintiff or defendant be afforded the right to have juries decide a question of fact raised at trial. The constitutional and common law rulings on law and fact are related, however. The Supreme Court regards the common law practice of treating an issue as factual or legal as a factor in deciding the constitutional question.⁴⁷ Nevertheless, it is important to keep the two lines of jurisprudence separate, given that the constitutional analysis turns on more than just the law/fact issue. It is also worth bearing in mind that our concern is solely with *judicial* practice—that is, how judges have interpreted the law/fact distinction; and not necessarily with the behavior of, say, legislatures in assigning questions to judges or juries.

The procedure for deciding the Seventh Amendment question involves the Court determining, first, whether a right to a jury trial exists for the overall cause of action.⁴⁸ If the right exists, the Court engages in a historical enquiry to see whether a specific question arising in the case would have been assigned to the jury in 1791, when the Amendment was ratified.⁴⁹ If the historical inquiry is inconclusive, the Court examines a wide variety of factors, including prudential and “functional” considerations, in deciding whether to mandate jury involvement.⁵⁰ The functional analysis takes into account judicial practice as well as conceptual differences between questions of law and fact.⁵¹ The key point, which will be demonstrated at length in what follows, is that both constitutional and common law rulings have been guided by the assumption that the conceptual distinction between legal and factual questions is both objective and related to the pragmatic question of who—judge or jury—is better placed to decide the issue.⁵²

⁴⁶ See White *supra* note 36 (noting that judges make factual findings in the evaluation of evidence). Pragmatic considerations even give rise to a “complexity exception” to the Seventh Amendment right to have juries decide issues of fact. See, e.g., *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976).

⁴⁷ See, e.g., *Markman v. Westview Instruments, Inc.* 517 U.S. 370, 378 (1996); *Ring*, 536 U.S. at 584 (citing approvingly the work of Welsh White, who observes that English legal scholars and the common law understanding of the distinction between law and fact “undoubtedly influenced the framers.”). See also White, *supra* note 44, at 4-5.

⁴⁸ See, e.g., *Tull v. United States*, 481 U.S. 412, 417-18 (1990).

⁴⁹ On the two-prong test, see *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 564 (1990). See also Allen & Pardo *supra* note 9, at 1779.

⁵⁰ *Id.*

⁵¹ See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (describing historical facts as paradigmatically factual and legal questions as essentially normative).

⁵² Indeed, it would be surprising if the conceptual distinction that judges have used did not serve the *practical* end of allocating questions between judge and jury in a useful way.

A. *Traditional Conceptions of Law and Fact: Normative vs. Empirical, General vs. Particular*

Before getting to the case law concerning normative questions, it will be helpful to have theories of the law/fact distinction on hand.⁵³ On a widely-embraced view, questions of fact are *empirical* or *historical* questions concerning “who did what, where, when, how, why, with what intent or motive,”⁵⁴ while questions of law are *normative* questions involving “the establishment, disestablishment, modification, or interpretation of legal rules.”⁵⁵ Judge Richard Posner provides the example of questions about what happened during the reign of Richard III. These have a different “ontological status” from questions about rules or norms derived from statutes, judicial opinions, and other such sources, which are legal.⁵⁶ Similarly, Richard Friedman suggests that “fact-finding” involves determining or describing some part of reality, whereas “law-discovery” always involves interpreting normative standards, such as: “cruel and unusual.”⁵⁷ The normative vs.

Any account of the conceptual distinction should explain why the distinction is practically useful. But on this analytic approach, the order of explanation runs *from* the conceptual distinction to the pragmatic justification, not the other way.

⁵³ Modern theorists tend to agree that legal questions remain *factual* at least in the sense that there can be a determinate fact of the matter regarding what the law is on some issue. See, e.g., Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917 (1992) (noting that the relevant difference is between legal and non-legal facts); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985). See also Allen & Pardo *supra* note 9, at 1792 (“[T]he answers to legal questions are propositional statements with truth value and are therefore, like other propositions with truth value, factual. . . . One can be objectively right or wrong about the rules of basketball or chess even though these are also human-made, linguistic constructs.”). The law/fact distinction tracks questions concerning legal facts, on the one hand, and *non-legal* facts, on the other (the current use of ‘fact’ in discussing the distinction will follow this usage, with ‘non-legal’ occasionally added for emphasis).

⁵⁴ RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 10.5, at 732 (4th ed. 2002). See also Allen, R., Brunet, A., & Roth, S., *An External Perspective on the Nature of Non-Economic Compensatory Damages and their Regulation*, 56 DEPAUL L. REV. 1249, 1262 (2007) (reciting evidence that ‘fact’ has historically been understood to concern events in the external world capable of identification through empirical inquiry).

⁵⁵ Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APPELLATE PRACTICE & PROCESS 101 (2005).

⁵⁶ RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 198 (1990).

⁵⁷ Friedman, *supra* note 53, at 918; Arthur W. Phelps, *What is a “Question of Law”?*, U. CIN. L. REV. 259 (1949) (“[A] legal system which postulates norms (roughly, rules and principles of law) must make some differentiation between a norm and the question of the existence of the facts which call for its application.”); Bohlen, *supra* note 9, at 112 (defining ‘law’ as “a body of principles and rules which are capable of being predicated in advance . . . awaiting proof of the facts necessary for their application.”)

empirical conception of the law/fact divide has at times been cited approvingly by the Supreme Court.⁵⁸

A related account distinguishes non-legal from legal facts based on their degree of specificity or particularity. Such an account can allow normative findings to count as ‘factual’ so long as they are highly particular, for instance, a finding that a defendant was negligent based on a rich and complex combination of factors that were true in the individual case. By contrast, more general normative truths are law-like. They concern what is true in a wide range of cases, for instance, that a failure to comply with a statutory requirement designed to protect persons from harm is negligence *per se*.

Proponents of both the normative/empirical and general/specific accounts of the distinction tend to concede that ‘law’ and ‘fact’ may not be binaries. There may be types of questions that are not easily classified as either legal or factual because they resemble both.⁵⁹ What legislatures intend to do appears to be a historical/empirical fact. Yet legislative intent is paradigmatically a question of law decided by judges in the course of interpreting statutory language. Thus, Henry Monaghan writes that 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.”⁶⁰

The “mixed” status of certain questions needn’t be a mark against a theory of the distinction. Many of our ordinary concepts track genuine differences in the world, even while failing to determinately apply in borderline cases. There may not be a fact of the matter regarding whether persons in an intermediate stage of hair loss count as bald or not, but that does not mean that there isn’t a genuine difference between those who are bald and those who aren’t. The crucial question for theorists is whether the features that determine whether a type of question is more legal than factual can be specified *ex ante*. The theoretical challenge is to say precisely which features characterize the ‘nodes’ and, accordingly, determine where on the continuum between legality and factuality a question lies. The relevant features may be generality or normativity, but the account should ideally square with the actual practice of judges tasked with interpreting the distinction.

⁵⁸ See, e.g., *Cooper*, 532 U.S. at 437 (“Unlike the measure of actual damages suffered, which presents a question of historical [fact] . . . the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.”). *But see id.* at 446 (Ginsburg, J., dissenting).

⁵⁹ See, e.g., Monaghan, *supra* note 53, at 233, n24; Walter W. Cook, ‘Facts’ and ‘Statements of Fact,’ 4 U. CHI. L. REV. 233, 244 (1937) (“[T]he time-honored distinction between statements of fact and conclusions of law is merely one of degree.”).

⁶⁰ Monaghan, *supra* note 53, at 233. See also Warner, *supra* note 55.

B. The Domain Relative Treatment of Normative Questions

The trouble with existing accounts of the distinction is that they struggle to explain the actual case law.⁶¹ The theory that normative questions are necessarily legal is hard to reconcile with the numerous cases in which normative issues are classified as questions of fact. In tort law, for example, it is a firmly entrenched rule that whether the defendant acted unreasonably and thereby breached a duty of care owed to the plaintiff is a question of fact for the jury.⁶² Jury instructions routinely emphasize that “the law does not say what a reasonably careful person using ordinary care would or would not do.”⁶³ Instead, juries are responsible both for articulating the norm governing reasonable and unreasonable behavior in the context of subjecting others to risk *and* for applying the norm to the facts of the case. While the question of fact status of the negligence issue attracts a fair bit of academic criticism, including from those who think normative questions are necessarily questions of law, the Supreme Court has endorsed the classification, hinting that the important values at stake and the prevalence of reasonable disagreement on what constitutes negligence is part of the justification.⁶⁴ Other concepts in the tort context, like “proximate causation,” whose application and interpretation are assigned to the jury, often turn out to be “crypto-normative”—that is, concepts whose application non-obviously involves determining normative questions.⁶⁵ Whether the defendant’s conduct proximately caused the plaintiff’s injury can turn, among other things, on whether the injury was *reasonably* foreseeable.⁶⁶

The treatment of normative questions as questions of fact is not confined to tort law. In criminal law, juries decide, often by constitutional mandate, such questions as whether the defendant’s conduct was especially “cruel” or “heinous,” which involves determining the normative significance of

⁶¹ See discussion in Allen and Pardo, *supra* note 9, at 1800-06.

⁶² See Weiner, *supra* note 1, at 1877 (“The courts of all American jurisdictions, with possibly one exception, adhere to this principle. . . . There are literally hundreds of cases in which this concept has been asserted.”); *id.* at n43 (citing cases invoking the rule).

⁶³ Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT. L. REV. 587, 608 (2002).

⁶⁴ For critics of the common-law treatment of negligence, see sources cited in Allen & Pardo, *supra* note 9, at n76. See also *Sioux City*, 84 U.S. at 657 (endorsing the question of fact status of negligence).

⁶⁵ Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49, 51 (1991) (discussing the view that “proximate cause has nothing to do with causation and little to do with proximity” and instead refers to the “scope of duty in negligence cases”). On cryptonormative judgments generally, see Alex Worsnip, *Cryptonormative Judgments*, EUR. J. OF PHIL. (forthcoming).

⁶⁶ See Kelley, *supra* note 65.

empirical facts (like the use of a type of weapon or injuries to bystanders).⁶⁷ Indeed, virtually all “sentencing factors” or factors used to increase sentences beyond statutory maximums have question-of-fact status under constitutional law. In an important lines of cases beginning with *Apprendi v. New Jersey*, the Supreme Court has emphasized that the Sixth Amendment right to a jury trial includes the right to have the jury decide all questions of fact, including those concerning the presence of aggravating and mitigating factors that increase the maximum sentence the defendant can receive from that allowed by a finding of guilt alone.⁶⁸ More recently, in *Alleyne v. United States*, the Court held explicitly that the finding of virtually any fact that increases a punishment in any way, including the statutory minimum, is a fact that must be found by the jury.⁶⁹

In the capital sentencing context, jury-findings of “aggravating” and “mitigating” factors determine whether the defendant receives the death penalty.⁷⁰ In nearly all states that allow the death penalty, juries play a decisive (and often final) role in determining whether a capital defendant should be sentenced to death, based on a weighing of mitigating against aggravating factors.⁷¹ The Court has emphasized the normative character of this final determination, suggesting that “in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of .

⁶⁷ See *Blakely v. Washington*, 542 U.S. 296 (2004). (“[The] statutory maximum sentence a judge may impose must solely be based on the facts reflected in the jury verdict or admitted by the defendant.”). The Court found the judge’s finding of “deliberate cruelty” at sentencing to be an unconstitutional invasion of the jury’s fact-finding role. For discussion of the trend of greater jury involvement in sentencing, see Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 897 (2005); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 902 (2009).

⁶⁸ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (“Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (validating *Apprendi* and extending it to the Federal Sentencing Guidelines).

⁶⁹ 133 S. Ct. 2151 (2013) (holding that any fact that increases the mandatory minimum must be submitted to the jury including normative findings of fact).

⁷⁰ See *Ring*, 536 U.S. at 584 (holding that aggravating factors present a question of fact for the jury). See also Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1003 n.56 (1996) (“Capital sentencing juries are said to represent the ‘conscience of the community.’ However, they ‘represent’ the community only because they are members of the community, not because they discern and then apply community standards.”).

⁷¹ In 27 of the current 32 death penalty states, the jury’s decision to sentence a defendant to life imprisonment is final and cannot be overridden by a trial judge. See *Woodward v. Alabama*, 134 S. Ct. 405, 407 (Mem) (2013).

. . . the moral guilt of the defendant.”⁷²

Cases such as these strongly suggest that question-of-law status is unlikely to be a function merely of a question’s normative character. Upon reflection, it is indeed hard to see why, given that in ordinary language we find it helpful to distinguish different types of normative questions (legal, moral, epistemic), *every* normative question raised under the law would be, simply for being normative, a *legal* question. For instance, we distinguish moral questions from questions of etiquette or prudence.

It is also not the case that those who support the normative/empirical theory have the distinction backwards: the case law offers many examples of normative questions classified as legal.⁷³ Contract law and, more generally laws governing conduct by economic actors (such as unfair competition law), provide several illustrations.⁷⁴ Judges are often asked to fill the gaps in contracts with “implied terms,” and in doing so draw upon considerations of fairness/reasonableness.⁷⁵ Thus, § 204 of the Restatement explicitly directs courts to imply terms that comport with “community standards of fairness and policy,”⁷⁶ and 2-204(3) of the UCC says courts should supply terms if “there is a reasonably certain basis for giving an appropriate remedy.”⁷⁷ Courts acknowledge that the reasonableness of implied terms is a question of law just as universally as they do that it is a normative question.⁷⁸ In

⁷² Spaziano v. Florida, 465 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part). *See also* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury’s task of expressing “the conscience of the community on the ultimate question of life or death”); Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty); Witherspoon v. Illinois, 391 U.S. 510, 519-20 (1968) (“[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”).

⁷³ For a comparison of the treatment of normative issues in torts and contracts, see Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORD. L. REV.* 407 (1999). The disparate treatment of normative issues under the law/fact distinction has been widely commented on. *See, e.g.*, Allen & Pardo, *supra* note 9, at 1781-3; Gergen, *supra* note 73; Weiner, *supra* note 1, at 1893-5.

⁷⁴ *See generally* Williams C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, *WIS. L. REV.* 93 (2001); *id.*

⁷⁵ *See* Allen and Pardo, *supra* note 9, at 1782; Gergen, *supra* note 73; Charles T. McCormick, *The Parole Evidence Rule as a Procedural Device for Control of the Jury*, 41 *YALE L.J.* 365 (1932).

⁷⁶ *RESTATEMENT (SECOND) OF CONTRACTS* § 204, cmts a, c.

⁷⁷ *U.C.C.* § 2-204(1) (2011).

⁷⁸ Judge Posner observes that “whether we say that a contract shall be deemed to contain such implied conditions as are necessary to make sense of the contract, or that a contract obligates the parties to cooperate in its performance in “good faith” to the extent necessary to carry out the purposes of the contract, comes to much the same thing.” *Market Street Associates v. Frey*, 941 F.2d 588 (7th. Circ. 1991). *See also* *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984); Harold Dubroff, *The Implied Covenant of Good*

Pennsylvania, for instance, the doctrine of “necessary implication” states that “[i]n the absence of an express term, [this doctrine] may act to imply a requirement *necessitated by reason and justice* without which the intent of the parties is frustrated.”⁷⁹

Similarly, the “unconscionability” of contractual terms is a question of law.⁸⁰ Judges can refuse to enforce a contract deemed unconscionable. According to the UCC, “[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise.”⁸¹ This manifestly normative enquiry involves appraisal of both the procedural fairness of a contract, having to do with symmetry of information and bargaining strength of the contracting parties, as well as substantive fairness, having to do with the relative gains and losses allocated to either side.⁸²

Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic, 80 ST. JOHN L. REV. 559, 616 (2012) (observing three categories of implied terms including “terms imposed by the court for reasons of policy or fairness, or in obedience to rules of law.”); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S. C. L. REV. 293, 297 (1997) (“[T]he reasonable person, under the banner of sanctity of contract or that of fairness, is used to fill gaps in otherwise inchoate contracts.”); *id.* at 297-8 (“The implication of society’s rules of fairness and reasonableness is generally accomplished through the courts’ fabrication of the reasonable person.”); CHARLES FRIED, *CONTRACT AS PROMISE* 75 (1981) (“[I]t seems as if contractual relations depend not on the will of the parties but on externally imposed substantive moral judgments of what the relations between the parties should be”); Randy E. Barnett, ... *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 427 (1993).

⁷⁹ Somers v. Somers, 613 A.2d 1211, 1214 (Pa. Super. Ct. 1992). See discussion of rule in Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, UTAH L. REV. 1, 15 (2005).

⁸⁰ U.C.C. § 2-302(1) (2011) (“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.”); *id.* at § 2-302(2). See also *Landsman Packing Co. v. Cont’l Can Co.*, 864 F.2d 721, 729 (11th Cir. 1989) (reversing lower court’s decision to allow the jury to decide unconscionability).

⁸¹ UCC § 2-302 (Official Uniform Comment) (citation omitted). It is also important to note that an unconscionability finding by a judge is not equivalent to a finding that no reasonable juror could find the contract conscionable. It is a determination made entirely at the judge’s discretion and not controlled by whether reasonable persons might disagree.

⁸² See E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* (1990) (defining procedural unconscionability in terms of the “absence of meaningful choice on the part of one of the parties”); MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 125 (2013) (“Substantive unconscionability refers to defects in the bargain itself: the notion that some contracts may look so one-sided or unequal or oppressive that the court in good conscience simply should not tolerate enforcing them.”); Arthur A. Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

Although the UCC's enactment makes contractual unconscionability a question of law by legislative fiat, the UCC's drafters drew on the historic practices of common law judges in deciding the issue. As Donald Price notes, juries were excluded from unconscionability determinations well before the issue was legislatively assigned to judges.⁸³

Another helpful example is the treatment of punitive damages in economic contexts. In *Cooper Industries v. Leatherman Tool Group*, which involved unfair competition and false advertising claims, the jury awarded \$4.5 million in punitive damages, and the issue on appeal was the appropriate standard of review in assessing the damages awarded for proportionality.⁸⁴ The Supreme Court held that *de novo* review—the standard for questions of law—was appropriate for the proportionality of punitive damages. It deemed the finding of punitive damages to have intermediate status between law and fact, noting in particular the element of moral condemnation involved.⁸⁵ As we have noted, however, moral findings, including those involving condemnation of a defendant's conduct, are routinely treated as factual and reviewed deferentially, a fact that Justice Ginsburg emphasized in her dissent in *Cooper*.⁸⁶ For reasons not entirely clear, the moral condemnation in this instance and the normative question raised at trial was deemed to be law-like.

If the normative/empirical account of the distinction fails to explain the case law, the general/specific account does not fare much better. Proponents of the latter view think that normative issues are questions of law when they implicate general as opposed to specific normative considerations. However, it is far from obvious that contractual norms interpreted and applied by judges have a greater degree of generality than those arising in the torts and criminal context.⁸⁷ There have been few attempts to unify under general normative rules findings of contractual unconscionability or reasonableness.⁸⁸ In fact, scholarship on unconscionability tends to emphasize the highly case-specific nature of the enquiry.⁸⁹ Courts seem to agree: “the precise number of days . .

⁸³ Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMPLE L. Q. 743, 745-8 (1981).

⁸⁴ 532 U.S. 424, 437 (2001).

⁸⁵ *Id.* at 437.

⁸⁶ *Id.* at 446 (Ginsburg, J., dissenting).

⁸⁷ See sources cited *supra* note 9.

⁸⁸ See, e.g., Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, MICH. ST. L. REV. 211, 222 (2013) (“Procedural unconscionability can result from any of the following elements: (1) absence of meaningful choice; (2) superiority of bargaining power; (3) the fact that the contract is an adhesion contract; (4) unfair surprise; or (5) sharp practices and deception.”).

⁸⁹ Browne & Biksacky, *supra* note 88, at 215-6 (arguing that the policing of unconscionability by the courts has been “inherently contradictory . . . since the inception

. which will constitute a ‘reasonable time,’ . . . depends upon circumstances as variable and uncertain as are the transactions and characters of men, and finally to be determined by the discretion, not to say, caprice of the Court.”⁹⁰ Moreover, normative questions classified as factual do seem to be decided under general moral principles. For instance, jurors in criminal sentencing seem to decide issues on the basis of general maxims, as evidenced by patterns in the treatment of emotional disturbance and severe environmental deprivation (or SED) evidence.⁹¹ It is, to say the least, a controversial notion that the varying classification of normative questions as legal or factual is to be explained in terms of differences in the generality or specificity of the normative truths in question.

There has been a tendency amongst theorists to treat the case law that is hard to square with theory as exceptional in one of two ways. The more common approach has been to acknowledge inconsistencies and explain them as cases of judges ignoring the law/fact distinction for case-specific pragmatic reasons but failing to do so explicitly.⁹² For instance, a judge may

of the doctrine”).

⁹⁰ *Goodwin v. Davenport*, 47 Me. 112, 117-18 (1860). *See also Seaver v. Lincoln*, 38 Mass. 267, 268-69 (1838) (noting that “one decision goes but little way in establishing a precedent for another”); *Commercial Nat’l Bank v. Zimmerman*, 185 N.Y. 210, 217 (1906) (“[W]hat constitutes reasonableness of time . . . cannot be determined by any fixed rules.”); *A.N. Deringer, Inc. v. Strough*, 103 F.3d 243, 246 (2d Cir. 1996) (invalidating a geographical limitation on competition for unreasonableness and supplying a new limitation); *RESTATEMENT (SECOND) OF CONTRACTS* § 204 (1979); *U.C.C.* § 2-204(3) (2011).

⁹¹ *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563-6 (1998) (finding based on empirical study that mental or emotional disturbance is treated as highly mitigating and poverty and deprivation are assigned mitigating weight by half of jurors); Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. LAW 751 (2004) (finding that mock jurors are less likely to assign a death sentence in light of SED evidence).

⁹² *See, e.g.,* Bohlen, *supra* note 9, at 115 (arguing that assignment of the negligence issue to juries is not based on strict application of the law/fact rule); Monaghan, *supra* note 53, at n22. (“[T]he allocation of negligence questions to the jury rests on grounds of policy, not on abstract conceptions of the intrinsic nature of the question itself.”); *id.* at 234-35 (“The difficulty comes when the judges seek to force such [pragmatic] allocation decisions into the conventional categories of law and fact. Distortions in the analytic content of the categories occur.”); Friedman, *supra* note 53, at 922 (“We should not be fooled [by negligence]. The jury in such a case does more than determine an aspect of reality. It also determines the norms that will be applied in that case.”); Oliver W. Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899) (“I venture to think . . . that every time that a judge declines to rule whether certain conduct is negligent he avows his inability to state the law. . . . [I]f a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from

refer to what is really a question of fact as a legal question if she feels that judges are uniquely qualified to decide the issue. Randall Warner suggests that “evaluative determinations” are “special” and classification by judges of an evaluative issue as law or fact does not turn on the essence of the law/fact distinction but instead on “a policy choice concerning the judicial actor better positioned to decide a particular issue.”⁹³ What lends support to this view is the frequency with which judges justify their classificatory choices by appeal to prudential considerations. In deeming a question to be one of law, judges appeal to factors like the complexity of an issue or the need for uniformity and predictability.⁹⁴ They might also appeal to the importance of bringing community sentiment to bear on an issue in assigning a question to the jury.⁹⁵ It is far from obvious whether such pragmatic concerns have anything to do with the essential difference between legal and factual questions.⁹⁶

There are several reasons why theorists should resist the temptation to explain away difficult case law as judges letting prudential considerations that are both case-specific and unhinged from the conceptual differences between legal and factual questions guide classification. The case law keeps legal theorizing from devolving into data-free speculation. It is therefore important to try and explain as much of it as one can by appeal to general theory. If judges routinely use case-specific pragmatic analysis rather than the analytic distinction to decide the law/fact issue, then this raises the possibility that the analytic distinction itself does no real work. Instead, ‘law’ and ‘fact’ may just be labels judges use to indicate their independently reached pragmatic conclusions regarding who should decide an issue. As Allen and Pardo write, “[t]he extent to which pragmatic considerations determine the allocative question is plain in these areas, but this does not make ‘legal’ issues out of factual issues.”⁹⁷ The pragmatic considerations may have an important role to play in reinforcing classification. But our theory of legality and factuality should be consistent with as much of the difficult case law as possible.

Another reason that the pragmatic account of the controversial cases is less than satisfying is that the prudential reasons cited for assigning an issue to the judge or jury tend to be less than persuasive.⁹⁸ Take, for instance, the view

the street.”). *See also* *Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate*, 733 F.2d 195, 205-06 (2d Cir. 1984) (Newman, J., concurring) (arguing that negligence is left to the jury for practical reasons).

⁹³ Randall, *supra* note 55, at 130.

⁹⁴ *See, e.g.*, *Markman v. Westview Instruments*, 517 U.S. 370, 390-1 (1996).

⁹⁵ *See, e.g.*, *R.R. Co. v. Stout*, 84 U.S. 657, 659 (1873).

⁹⁶ *See* Allen & Pardo *supra* note 9, at 1782.

⁹⁷ *Id.*

⁹⁸ *Id.* (“The second rationale for this rule—administrative concerns—involves the need for uniformity and predictability with frequently reoccurring fact patterns. . . . No justification

that judges' expertise at interpreting written documents makes them especially good at discerning the reasonableness of implied contractual terms, given the central role of the explicit contractual language in determining such reasonableness. In cases of genuine gap-filling, there is often no clear language in the contract that speaks to the issue, and judges must rely on considerations unrelated to exegesis including the going rates in the industry and their own sense of fairness. Similarly, it is often claimed that judges tend to be uniform in their decisions which results in greater predictability. Yet there are reasons to doubt that this holds true. The research suggests that juries are often as predictable as judges.⁹⁹

A different approach that is sometimes taken by theorists in response to the differential treatment of normative questions is to treat them as "mixed questions of law and fact," or questions that share features of both and can therefore be classified as either.¹⁰⁰ As discussed earlier, an analytic theory of the law/fact distinction can accommodate "mixed questions" as well as the idea that questions can have both law-like as well as 'factual' characteristics. Crucially, however, the theorist needs an account of the features in virtue of which a question counts as mixed. In other words, the theory needs to explain what determines the more law-like character of normative fact-finding in the contractual or economic domain, for example, than that of normative fact-finding in capital sentencing proceedings. To say that the question of reasonableness in contracts is more law-like because judges decide it would be circular. On the analytic approach, the order of explanation must run the other way: one must appeal to essential differences between legal and factual questions to explain *why* judges should decide the issue. Unfortunately, there is no generally agreed upon theory of mixed questions in the academic literature or elsewhere. Courts have reasonably responded by describing mixed questions as "elusive abominations"¹⁰¹ and the overall jurisprudence in this area as "lack[ing] clarity and coherence."¹⁰²

C. Changes in Classification Over Time

Another challenge for theorists is to explain why normative questions of

has been given, however, as to why this only applies to contracts and not to other areas such as negligence, or any other area for that matter.").

⁹⁹ See Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable*, 9 LEWIS & CLARK L. REV. 231 (arguing, based on empirical studies, that the transfer of patent claim construction from a question of fact for the jury to one of law for the judge has not made the law more predictable)

¹⁰⁰ See, e.g., Warner, *supra* note 55.

¹⁰¹ *S & E Contractors, Inc. v. US.*, 433 F.2d 1373, 1378 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972).

¹⁰² *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir. 1984), *abrogated on other grounds by Pierce v. Underwood*, 487 U.S. 552 (1988).

fact can become legal over time and vice versa. The Supreme Court's First Amendment jurisprudence provides several examples of such transitions. In certain cases, the Court will legitimize *de novo* review (the standard for questions of law) of issues historically treated as factual and reviewed deferentially. For instance, in the context of defamation actions, whether a false statement was made with "actual malice" or "reckless disregard for the truth" was traditionally a question of fact reviewed deferentially.¹⁰³ In *New York Times v. Sullivan*, the Court made a finding of actual malice a condition on punitive damages in defamation actions brought by public officials.¹⁰⁴ Shortly thereafter, the Court in *Bose Corp. v. Consumers Union of United States* determined that in light of its previous holding and the important constitutional right of free speech that turns on it, the malice question is intermediate between law and fact—a "constitutional fact," and, accordingly, should be reviewed *de novo* by appellate courts.¹⁰⁵

Similar examples of *de novo* review of what used to be paradigmatic factual findings abound in other areas of First Amendment law. The normative question of whether speech appeals to "prurient interest" or is "patently offensive," a finding that precludes protection under the First Amendment, is reviewed *de novo*.¹⁰⁶ Prior to the Supreme Court's seminal cases on obscenity and free speech in the 1970s, jury findings of obscenity were deferentially reviewed as paradigmatic findings of fact for decades by appellate courts at the state and federal level, and the Court had explicitly declined to review findings *de novo*.¹⁰⁷ Similarly, whether "fighting words"

¹⁰³ James L. Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 688-98 (1978) (observing a long history of jury findings on the question of malice in civil and criminal defamation cases).

¹⁰⁴ 376 U.S. 254 (1964).

¹⁰⁵ See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501-2, n27 (1984). In recent years, the Court has emphasized that actual malice requires "material" falsity. *Air Wisconsin Airlines Corp. v. Hooper*, 134 S.Ct. 852 (2014).

¹⁰⁶ See *Miller v. California*, 413 U.S. 15, 30 (1973) (recognizing the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary"); *Jenkins v. Georgia*, 418 U.S. 153, 159-61 (1974) (reviewing *de novo* and reversing a unanimous jury determination that the movie *Carnal Knowledge* was patently offensive while recognizing that the determination was factual); *Roth v. United States*, 354 U.S. 476, 497 (1957) (suggesting that whether an attacked expression is suppressable is a problem requiring "particularized judgments which appellate courts must make for themselves") (Harlan, J., concurring in the result, dissenting in part). There is some controversy as to which part of the 'prurience' determination calls for *de novo* review. Under *Miller*, prurience turns on what is ordinarily found to be prurient, whether the work 'offensively' depicts sexual conduct specifically defined in statutory law, and whether the work lacks serious value. See *United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 653 (3d Cir. 2000).

¹⁰⁷ *Com. v. Isenstadt*, 62 N.E.2d 840, 847 (Mass. 1945) (The principal question in the case is whether . . . we can say as matter of law that an honest jury . . . would not be acting

are “inherently provocative,” a finding that determines whether or not the speech is entitled to constitutional protection, is reviewed *de novo* as a “constitutional fact” intermediate between law and fact.¹⁰⁸ Outside the free speech context, the Court has been far more reluctant to invoke the constitutional fact rationale, even where normative findings classified as factual trigger important constitutional rights. The Court declined to require that questions of discriminatory intent in racial discrimination cases be reviewed *de novo* as questions of law.¹⁰⁹

To put the issue in terms of the law/fact distinction, what is needed is some account of why certain normative findings have come to be treated as mixed questions of fact and law whereas others haven’t. As several commentators have pointed out, mere appeal to the importance of implicated constitutional values cannot explain disparities in the way the doctrine has been applied.¹¹⁰ Moreover, what is needed is an account of why so-called constitutional facts were previously regarded as wholly factual, receiving deferential review, if they were “constitutional” all along. To quote Allen and Pardo, “we suppose it is possible to confuse lions with zebras, even when

as reasonable men in concluding beyond a reasonable doubt that this book, taken as a whole, possesses the qualities of obscenity, indecency, or impurity. The test is not what we ourselves think of the book, but what in our best judgment a trier of the facts might think of it without going beyond the bounds of honesty and reason.” *id.* at 556 (finding that a reasonable jury could find the publication obscene); *Alexander v. United States*, 271 F.2d 140, 146 (8th Cir. 1959) (“The primary responsibility for determining the obscenity issue is upon the jury. . . . The jurors are entitled to make their own evaluation of the books upon the basis of all the evidence before them. . . .”) *United States v. Roth*, 237 F.2d 796, 801 (2d Cir. 1956), *aff’d*, 354 U.S. 476 (1957) (finding that a reasonable jury could find materials obscene). Justice Harlan in his partial dissent in *Roth* objected to the Court’s failure to review the obscenity question *de novo*: “I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.” *Roth*, 354 U.S. at 497–98 (Harlan, J., concurring in the result, and dissenting in part). *See also* Whitney Strub, *Slouching Towards Roth: Obscenity and the Supreme Court, 1945-1957*, 38 J. SUPREME COURT HIST. 121 (2013) (noting that prior to *Roth* the Court had last substantively weighed on the obscenity issue in 1896).

¹⁰⁸ *Street v. New York*, 394 U.S. 576, 592 (1969) (exercising independent judgment on the question).

¹⁰⁹ *Pullman-Standard v. Swint*, 456 U.S. 273, 286-288 (1982) (“Whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past [is] essentially factual, subject to the clearly-erroneous rule.”); *id.* at 287-8 (“That question, as we see it, is a pure question of fact.”); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (applying “clearly erroneous standard” to review issue of discrimination in election rules). *But see* *Norris v. Alabama*, 294 U.S. 587 (1935). (reviewing *de novo* racial discrimination in the exclusion of jurors from state juries). On discrimination being a moral category, see BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* (2016).

¹¹⁰ *See, e.g.,* Monaghan *supra* note 53, at 266-67; Allen & Pardo, *supra* note 9, at 1786.

staring at them for a couple of centuries, but it is unlikely.”¹¹¹ The theorist can try to explain these changes in terms of mistake or error, but crucially an account is needed for why judges might have been mistaken and why confusing certain mixed or law-like factual questions for pure questions of fact is not like confusing lions for zebras.

Additionally, there are cases of judge-decided legal issues that come over time to be treated as questions of fact for the jury. To take a relatively recent example, consider the increased role of the jury in finding facts that bear on criminal sentencing outside of statutory requirements/guidelines. Judges previously had discretion to raise or lower a defendant’s sentence based on factors that militate in favor of a harsher sentence. In *Apprendi*, the Court prohibited judges from enhancing criminal sentences beyond statutory maxima based on facts other than those decided by the jury under the Sixth Amendment jury trial right.¹¹² The rule was further extended to the capital sentencing context in *Ring*, where the Court held that judicial determination of a capital defendant’s “death eligibility” based on “aggravating factors” was inconsistent with *Apprendi*.¹¹³ The majority emphasized that the Sixth Amendment is not a limitation on judicial power but a reservation of jury power. It limits judicial power only to the extent that it infringes on the fact-finding responsibility of the jury. Determining sentencing factors often involves normative assessment. Whether a murder was “Cold, Calculated, and Premeditated” or “Heinous, Atrocious, and Cruel” turns not just on empirical facts, like the use of a weapon or injuries to bystanders, but on an assessment of the degree to which such facts bear on the heinousness of the crime and, ultimately, militate in favor of a harsher sentence.¹¹⁴

Prior to *Ring* and *Apprendi*, there was far greater judicial involvement in determining the existence of factors that determine appropriate punishment.¹¹⁵ In *Ring*, Justice Ginsburg identified five states in which capital sentencing, including evaluation of aggravating and mitigating factors, was entirely the responsibility of judges.¹¹⁶ Since the Court’s decisions constitutionally mandating jury determination of sentencing

¹¹¹ Allen & Pardo, *supra* note 9, at 1784.

¹¹² See *Apprendi*, 530 U.S. at 466.

¹¹³ See *Ring*, 536 U.S. at 609 (“[T]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”)

¹¹⁴ See *id.* at n1.

¹¹⁵ See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 963-68 (2003); Kirgis, *supra* note 67, at 897-8 (noting that judges routinely made determinations after the defendant’s guilty for a crime had been established to determine appropriate sentence).

¹¹⁶ See *Ring*, 536 U.S. at n6.

factors, the role of the jury has grown. In almost all states the jury's decision to sentence a defendant to life imprisonment is *final* and cannot be overridden by a trial judge.¹¹⁷ Only Alabama affords judges the power to override the jury and independently decide the death-deservingness question.¹¹⁸ The constitutionality of the practice is suspect, an issue we shall return to later. The crucial point for present purposes is that the law has trended in the direction of limiting the judge's role in determining aggravating factors that affect criminal sentencing. Increasingly, any normative finding that bears on a defendant's sentence has come to be viewed as factual rather than legal, even though courts used to assign such findings to the judge.

D. Skepticism About the Distinction's Overall Coherence

The aspects of law/fact jurisprudence we have considered mainly concern the challenge that *normative* questions pose for courts grappling with the distinction. But, as Randall Warner points out, courts have struggled not just with evaluative or normative questions.¹¹⁹ In *res judicata* disputes, for example, the identity of a cause of action with a previously litigated one was historically a question of fact, but came to be viewed in the mid-18th century as a question of law, seemingly without acknowledgement by judges of the inconsistency.¹²⁰ This "chaotic legal landscape" leads critics of the distinction to conclude that the law/fact distinction is a "legal fiction," that "the quest to find 'the' essential difference between [law and fact] that can control subsequent classifications of questions as legal or factual is doomed from the start, as there is no essential difference."¹²¹

The aim, in what follows, is to demonstrate that the case law is not as unprincipled as it seems. As far as the treatment of normative questions is

¹¹⁷ See discussion *infra* Part IV. See generally Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. CRIM. L.J. 117 (2004); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 55 ALA. L. REV. 1091 (2003).

¹¹⁸ See discussion *infra* Part IV..

¹¹⁹ See Warner, *supra* note 55. See also Steven J. Madrid, *Annexation of the Jury's Role in Res Judicata Disputes: The Silent Migration from Question of Fact to Question of Law*, 98 CORNELL L. REV. 463, 465 (2013) (arguing that the law/fact distinction has been misapplied in *res judicata* cases); Rebecca A. Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 60 (2010) (arguing that courts have misapplied the distinction); McGinnis, J. & Mulaney C., *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2009) (arguing that courts should treat congressionally determined 'social facts' as special and review the findings *de novo*); Rebecca H. Allensworth, R., *Law and the Art of Modeling: Are Models Facts?*, 103 GEO. L.J. 835 (2015) (arguing that scientific predications based on empirical models should not be treated as findings of fact).

¹²⁰ See Madrid, *supra* note 119.

¹²¹ Allen & Pardo, *supra* note 9, at 1770. See also sources cited *supra* note 9.

concerned, there is a logic implicit in the holdings that is very much connected to the essential difference between legal and non-legal questions. There are several reasons for the present focus on normative questions, in particular—questions that invoke concepts like reasonableness, fairness, aggravation, and the like. First, the ultimate goal of this paper is not to fully characterize the boundaries of legality and factuality.¹²² The goal is to provide a richer understanding of how the distinction has been and should be applied by judges in a range of hard cases that have been the focus of much recent discussion. Second, the proper treatment of normative questions under the distinction is an issue of unique importance to recent constitutional controversies, many of which turn on whether the jury or judge should be deciding a question of fairness or reasonableness. The analysis bears on the proper resolution of these controversies.¹²³ I am certain that, ultimately, more will need to be said to defend the theory put forward and its fit with decisions made under the rule. Moreover, an account will still need to be given of how non-normative or *empirical* questions fit under the rule, a question I have ignored altogether.¹²⁴ But in showing (i) that the skeptical case against the analytic distinction is considerably weaker than has often been assumed and (ii) that the distinction remains doctrinally relevant, the discussion to follow should be of significant interest to both critics and proponents of the judicial practice of distinguishing questions of law from questions of fact.

II. A FRAMEWORK FOR THE CLASSIFICATION OF NORMATIVE QUESTIONS UNDER THE LAW/FACT DISTINCTION

This section's aim is chiefly theoretical: to distinguish essentially convention-dependent from convention-independent norms. Having defended the normative distinction, I offer the beginnings of an argument for construing the categories of law and fact in terms of it. There are both conceptual and pragmatic reasons for treating convention-dependent normative questions as questions of law and convention-independent ones as questions of fact. Later sections will explore whether and to what extent the

¹²² In general, vindicating the usefulness of a concept and showing how it applies in hard cases does not require fully characterizing necessary and sufficient conditions for its application.

¹²³ See discussion *infra* Part IV.

¹²⁴ It makes sense to theorize in this piece-meal fashion about the law/fact distinction because the distinction between normative and empirical facts is a robust one. I see no pre-theoretic reason for assuming that how the law/fact distinction is applied in the normative context must also explain how it is applied in the empirical domain. No doubt I am influenced in this judgment by my own meta-normative views. But I believe it to be a plausible assumption common to many contemporary views on the metaphysics of the normative domain, that the normative is distinct from the empirical.

theory helps us explain actual judicial practice.

A. *Convention-dependent & Convention-independent Normative Questions*

While all normative truths depend (or hold in virtue of) non-normative or empirical facts, normative truths can be distinguished based on the kinds of non-normative facts on which they depend.¹²⁵ For instance, there are normative truths that are hard to discern because they depend on a wide range of complex empirical facts.¹²⁶ Whether it is good for a market economy to encourage highly self-interested and even exploitative economic behavior depends on a host of non-normative empirical facts pertaining to the consequences of such behavior for the overall economy, standards of living,

¹²⁵ The framework relies critically on a general truth about the normative domain: namely that normative facts *supervene* on (or are made true by) other, non-normative facts. See Jaegwon Kim, *Concepts of Supervenience*, 45 PHIL. & PHENOMENOLOGICAL RESEARCH 153 (1984). Normative supervenience is taken as an uncontroversial starting point in meta-ethics. See Gideon Rosen, *What is Normative Necessity* 1 (manuscript) (describing it as the “least controversial thesis in metaethics”); Michael Smith, *Does the Evaluative Supervene on the Natural?*, in ETHICS AND THE A PRIORI 208 (2004) (“The supervenience of the evaluative on the natural thus purports to operate as a conceptual constraint on evaluative judgment. This too is accepted by nearly everyone writing about the nature of value.”).

¹²⁶ On the nature of objectivity or truth in the normative domain, there is considerable disagreement within moral philosophy. See Michael Smith, *Meta-ethics*, in THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY (Michael Smith & Frank Jackson eds., 2005); T.M. SCANLON, BEING REALISTIC ABOUT REASONS Ch. 1 (2014). A principle source of disagreement is whether moral or normative judgments represent facts in the way that ordinary, descriptive judgments do. According to non-cognitivists, moral judgments express desire-like mental states—e.g., the judgement that it is good to promote happiness in the world merely expresses the judging agent’s desire to promote happiness in the world. The function of moral language is to express the relevant ‘non-cognitive’ mental states. Non-cognitivists earn our right to talk about facts in the normative or evaluative domain by combining a desire-based view of moral judgment with a deflationary account of truth and facthood, where the judgement ‘it is a *fact* that promoting happiness is morally good’ simply amounts to judging that it is good to promote happiness. In other words, by using the fact-based language we express the very desire-like attitude that constitute moral judgment. See, e.g., SIMON BLACKBURN, RULING PASSIONS (1998). Cognitivists oppose this sort of view and very much take moral thought and talk to involve belief-like, representational states, such as the belief that Yale University is in New Haven, Connecticut. On one version of cognitivism (‘moral non-naturalism’), moral thought and talk describes a part of reality consisting of properties and relations neglected by the natural sciences (irreducibly *moral* properties and relations). See, e.g., Enoch, *supra* note 103.

As in the case of legal philosophy, we can mostly ignore such disagreements, for the only sense in which normative facts needs to be objective, for our purposes, is in the sense of being fixed by factors other than judicial preference. All talk of normative/moral truth and fact in this article is meant to be neutral between cognitivist and non-cognitivist theories. Non-cognitivism provides all the resources to sustain the distinctions within the normative domain that will be discussed in what follows.

disparities in income, the gravity of the harms to individuals who are exploited, etc. By contrast, there are normative truths that depend on relatively simpler or more accessible empirical facts. The wrongness of torturing someone for the sheer fun of it follows directly from the nature of pain or those features of a person in virtue of which they have moral status. For instance, under a Kantian conception of morality, the prohibition on torturing persons is made true by the dignity that persons have simply by virtue of their capacity for free and rational agency.¹²⁷ Our ordinary sense of what people are owed as a matter of right is presumably informed by our sensitivity to such basic features of persons and their mental states, features we recognize as morally relevant as a matter of course.

Some normative truths hold partly in virtue of law-related conventions like legislative enactments and judicial practice. To take a prosaic example, consider the reasons we have to drive on the right side of the road. The normative truth that one ought to drive on the right is at least partly determined (or made true) by the fact that we have settled on a convention of driving on the right. Of course, following the convention has various benefits including, first and foremost, motorist safety, and securing those benefits is one reason we follow the convention. But, nevertheless, the existence of the convention plays an essential role in *making it true* that one has reason to drive on the right. By contrast, the wrongness of torture does not seem to turn on conventions we have established. It follows directly from truths about the nature of persons from which flow basic moral rights.

Surprisingly, theoretical work on the general distinction between convention-dependent and convention-independent normativity is limited.¹²⁸ George Mavrodes' work in just war theory offers a helpful examination of convention-*dependent* norms, in particular.¹²⁹ Mavrodes argues that various

¹²⁷ See, e.g., David Sussman, *What's Wrong with Torture?*, 33 *PHILOSOPHY AND PUBLIC AFFAIRS* 1 (2005). See also IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 429-30 (1785); Onora O'Neill, *Consenting Adults*, 14 *PHILOS. & PUB. AFFAIRS* 252 (1985). For data on the sizable percentage of Americans who believe that torture is never or rarely ever justified, see Paul Gronke et al., *U.S. Public Opinion on Torture, 2001–2009*, 43 *POL. SCI.* 437 (2010).

¹²⁸ What is often discussed is the way specific normative obligations presuppose practices or conventions. For example, there is an extensive literature on the nature of promissory obligation and the general practices of promisors & promisees. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER*, chap. 7 (1998); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 *PHILOSOPHY & PUBLIC AFFAIRS* 119 (2003); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *THE PHILOSOPHICAL REVIEW* 481–524 (2008). See also ARTHUR APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999) (arguing that agents by entering professions like law can acquire unique moral license to violate familiar moral prohibitions). For helpful discussion on this point, thanks to Stephen Galoob.

¹²⁹ *Conventions and the Morality of War*, 4 *PHIL. & PUBLIC AFFAIRS* 117 (1975)

ethical principles prescribing appropriate conduct in war that are assumed to be convention-independent are, in fact, more plausibly regarded as convention-dependent. His main example is the prohibition against harming enemy non-combatants, widely thought to be a norm whose reason-giving force stems directly from *a priori* facts about human dignity. Against the dignitarian view, Mavrodes argues that sometimes non-combatants are more responsible for the harms perpetrated by a state that justified going to war in the first place, making them apt targets of blame and punishment.¹³⁰ Moreover, if war is always unjust, then it is far from clear that immunizing non-combatants from harm is the best way of minimizing the injustices of war. He suggests, ultimately, that the reasons to follow the principle—to the extent that it represents a genuine normative constraint on our conduct in war—may be wholly explained by the fact that there is a reasonably widespread convention in the international community of not harming non-combatants, a convention that we have reason to support because it has made war considerably less bad in various ways and its existence is better than having no such convention.¹³¹ More generally, there can be reasons to comply with and support conventional practices that are, all things considered, less than morally ideal (in the sense that strictly following them does not always or even most often realize the morally best outcome) when having a widely-followed convention that does reasonably well at solving large scale moral problems is better than having none at all.¹³²

The other important study of convention-based normativity is Mark Greenberg's recent work in legal philosophy.¹³³ Greenberg's work is less concerned with the contrast between convention-dependent and convention-independent normative truths, and more with identifying the circumstances that give rise to convention-*dependent* normative truths. Greenberg points out that legal institutions and practices can help constitute the moral obligations and duties we have. On his 'anti-positivist' theory, the law *just is* the subset of our moral obligations that depend on law-related social practices.¹³⁴ But we can separate Greenberg's theory of law from his helpful commentary on the relationship between law-related conventions and a certain class of normative truths.

Greenberg provides several examples of cases where conventions bear on what one ought to do. Like Mavrodes, he points to circumstances that generate complex moral problems whose solution requires collective

¹³⁰ *Id.* at 120-23.

¹³¹ *Id.* at 124-130.

¹³² *Id.* at 127.

¹³³ See Greenberg, *supra* note 149.

¹³⁴ *Id.* On anti-positivism, see discussion *supra* note 149.

action.¹³⁵ In such circumstances, when some collective activity emerges that does reasonably well at achieving morally good outcomes, there can be reasons to support the practice. Greenberg's principal example of this phenomenon is "specific schemes for the public good," like tax laws:¹³⁶

Without a legal system, people will have general moral obligations to help others. But there will often be no moral obligation to give any particular amount of money to any particular scheme. For one thing, especially when it comes to problems of any complexity, many different possible schemes are likely to be beneficial, and the efforts of many people are needed for a scheme to make a difference.¹³⁷

The tax system solves this problem, more or less effectively, by selecting one scheme directed at the public good. Once we have tax laws in place, our general moral obligation to help others becomes a more specific one so long as paying taxes represents an especially effective way of discharging the general duty to help others. Moreover, the reasons to support and participate in a scheme are especially strong when it is part of a broader social institution that we have reason to respect (e.g. a democratic system). Greenberg describes such reasons for respecting social conventions as "reasons of democracy."¹³⁸

Another way that conventions can end up influencing what one ought to do is through the logic of promising:

By making promises and entering into agreements, people change their moral obligations. The fact of agreement has moral force. Even if what was agreed on is an arrangement that is seriously morally flawed—a different arrangement would have been much fairer, for example—the fact that the arrangement was agreed on may be sufficient to create a moral obligation.¹³⁹

In this way, the existence of a convention, and one's explicit or implicit acceptance of it, can generate reasons for acting in accordance with the convention, reasons of a similar species as those that favor keeping one's promises having to do with respecting the expectations of others.¹⁴⁰ Market conventions plausibly have this kind of normative force for economic agents.

Now, consider convention-*independence*. It seems unlikely that the establishment of new conventions could explain or alter the significance of our most basic moral norms. Consider the question of whether a person morally deserves to be executed for his crime. It seems unlikely that an

¹³⁵ *Id.* at 1312.

¹³⁶ *Id.* at 1314.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1313.

¹³⁹ *Id.* at 1312-3.

¹⁴⁰ *See also* sources cited *supra* 128.

affirmative answer to this question turns in any way on how we have historically sentenced capital defendants. Even if there were a convention in place of executing a particular class of defendants, this would not make it morally appropriate to visit such a grave harm on a person who did not independently deserve it. The appropriateness of ending someone's life, as a threshold matter, does not seem to turn on what we *do* or *have done* "around here." It turns, if anything does, on fundamental facts regarding what persons deserve in light of their actions and circumstances.¹⁴¹

The notion that there are norms that are relatively 'inflexible' and derive their force not from what we say or do around here but from *a priori* facts about persons and the nature of certain harms is a familiar one.¹⁴² Facts concerning fundamental rights of the sort emphasized by deontologists fall within this normative category. Here, for example, is Frances Kamm on the grounds of the right to free speech:

The right to speak may simply be the only appropriate way to treat people *with minds of their own* and the *capacity to use means to express it*. . . . To say that any given person is not entitled to the strong right to free speech is . . . a way of saying that *certain crucial features of human nature are not sufficient to generate the right in anyone*.¹⁴³

As a rule of thumb, relatively fundamental moral truths concerning rights and basic obligations tend to be convention-independent. They tend to be convention-independent because they express truths about what persons are owed simply on account of being persons.¹⁴⁴ Even a consequentialist who thinks that all rights are subject to balancing and compromise can get behind the notion that some are especially weighty and basic in that their significance

¹⁴¹ The point is routinely emphasized in the case law. See sources cited *supra* note 72. Prominent theories of criminal law's justification declare proportionality to be an essential moral precondition on just punishment, and the principle finds approval in prevailing practice. See, e.g., H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 646 (2005) ("Limiting retributivism is a sound jurisprudential principle which enjoys widespread support, and the Supreme Court has used this principle to place constitutional limits on the imposition of capital punishment, fines and forfeitures, and punitive damages.").

¹⁴² On the grounds of moral status and basic rights, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); WARREN QUINN, MORALITY AND ACTION (1993); ROBERT NOZICK, ANARCHY STATE AND UTOPIA (1974); Joel Feinberg, *The Nature and Value of Rights*, 4 J. OF VALUE INQUIRY 243 (1970).

¹⁴³ INTRICATE ETHICS 247 (2007).

¹⁴⁴ Crucially, it is not simply their *moral* status that determines their pre-conventionality. Recall Greenberg's example of the way tax schemes alter our general moral duty to help others. Instead, it is the subject matter and relative importance of the relevant moral truths that makes them pre-conventional.

stems from fundamental facts about human experience.¹⁴⁵

It might be helpful in what follows to refer to conventions *displacing* or *altering* pre-conventional moral norms, where this denotes the process by which the establishment of conventions generates reasons for following the convention as opposed to whatever pre-conventional moral rule that would have been authoritative absent the convention. Whereas conventions cannot displace or alter some basic moral principles and prohibitions, conventional establishment *can* shape, in combination with the fundamental moral truths, what ought to be done in circumstances where many competing values are at stake that are roughly on a par and trade-offs are inevitable. When we do not have simple deontological rights and prohibitions to resolve normative questions regarding what ought to be done, the role of conventions and reasons for following them tend to acquire greater significance.

In sum, there is a genuine and structurally interesting difference between convention-dependent and convention-independent normative facts. The former, like the obligation to pay taxes, partly depend on conventional facts, including, sometimes the very social practices and conventions that are law-related (in that they are influenced by the actions of paradigmatic legal actors like judges and legislators). *Essentially* convention-dependent norms tend to be ones that wouldn't arise *but for* the establishment of conventions. These often (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; (3) arise in contexts where a paramount concern is respecting the expectations of participants in a convention. Normative questions that do not turn primarily on conventions (law-related or otherwise) tend to implicate matters of fundamental right and wrong. Our answers to these reflect our pre-conventional sense of what we owe to each other.

Just as we can ask of a highly specific (or 'token') normative question (e.g. did Susan, in light of all the empirical facts true in her case, behave unreasonably?), whether it is convention-dependent or -independent, we can ask of normative questions considered in general—or *types* of normative questions—how *likely* they are to be essentially convention-dependent or -independent in individual cases (e.g. questions concerning reasonable risk-taking). In other words, we can ask how likely a type of question is to be settled by basic moral principle of right and wrong. Bear in mind that judges apply the law/fact distinction to types of questions (like questions of reasonableness in torts) not to highly particular questions in an *ad hoc* case-specific way. So, the general question of likelihood is important for purposes of applying the law/fact distinction. The likelihood that a given type of question will be convention-independent may in many cases be hard to

¹⁴⁵ See Jamie Dreier, *Structures of normative theories*, 76 THE MONIST 22 (1993); Philip Pettit, *The Consequentialist Can Recognize Rights*, 38 PHIL. QUARTERLY 42 (1998).

determine.¹⁴⁶ But the potential for complexity should be no mark against the genuineness of the distinction between convention-dependent and convention-independent normativity.

B. The Conceptual and Pragmatic Reasons for Interpreting ‘Law’ and ‘Fact’ in Terms of the Normative Distinction

There are conceptual as well as pragmatic reasons for classifying normative questions that are more likely to be essentially convention-dependent as *legal* and those likely to be convention-independent as *factual*. Beginning with the conceptual reasons, despite considerable disagreement in legal philosophy, there is relative consensus that law is distinguished at least in part by its unique dependence on certain sorts of social practices and conventions.¹⁴⁷ Legal facts paradigmatically (if not always) depend on what individuals such as legislatures, judges, elected officials, say, believe, do, or intend. I refer to the relevant law-determining activities of persons as law-related conventions.¹⁴⁸ To illustrate the point, if it is the law in a jurisdiction

¹⁴⁶ For instance, Mavrodes may be wrong about our reasons for obeying standard prohibitions against harming enemy non-combatants in war and it turns out that our reasons predominantly hinge on fundamental facts about human dignity, convention-based reasons may nevertheless form an important component of the totality of considerations in favor of complying with such a prohibition. See, e.g., Robert K. Fullinwider, *War and Innocence*, 5 PHILOS. & PUB. AFFAIRS 90 (arguing that the prohibitions against harming non-combatants is not wholly convention-based). This issue will be taken up in a discussion of “mixed” questions of law and fact.

¹⁴⁷ Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004) (“Nearly all philosophers of law agree that . . . ordinary empirical facts about the behavior and mental states of people such as legislators, judges, other government officials, and voters play a part in determining [law].”).

The central task of analytic jurisprudence is to describe in the most fundamental terms what law is: the features in virtue of which a norm gets to be *legal* rather than something else. The hope is that work in this area of legal philosophy might help us distinguish ‘law’ from ‘fact.’ Legal philosophers have had little to say about the law/fact distinction. This is somewhat surprising given that the common law rule provides a convenient test-case for philosophical theories of law. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832); H.L.A. HART, *THE CONCEPT OF LAW* (1961); RONALD DWORKIN, *LAW’S EMPIRE* (1986). For criticism of the notion that the legal concept has a distinctive essence, see Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 32 OXFORD J. LEG. STUD. 663 (2012).

¹⁴⁸ This is only slightly artificial usage, considering that ‘conventions’ in the ordinary sense refers to things said and done as a matter of course (or customary human activity). If my usage of ‘convention’ feels unnatural, the reader should feel free to substitute all instances of ‘convention’ with ‘what people say and do.’ The distinction between normative questions that depend on ‘what people say or do’ and those that are independent can do all the theoretical work that is required. See discussion *infra* Part II.B.

that first-degree murderers are imprisoned for life, this fact holds at least partly in virtue of such social practices and conventions as legislators having enacted, according to established procedures, a statute that prescribes life-imprisonment for murderers.

This essential connection between law and social conventions may not be the whole story regarding how legal facts are determined. Indeed, analytic jurisprudence has been embroiled in a famous disagreement over the remainder.¹⁴⁹ But it suffices for present purposes to find *some* characteristic feature of law that might be useful in contrasting legal from non-legal questions—namely, the dependence of legal questions on various social practices and conventions.

Convention-dependent normative questions are accordingly *law-like*. They essentially depend on conventions, law-related or otherwise: the practices of merchants, regulators, parties to a case, judges, and so on. As in the case of paradigmatic legal questions, figuring out convention-dependent normative facts often requires looking to practices within legal institutions and what legal actors have done and intended to do (recall the example of market norms). This fact furnishes a sound conceptual reason to treat convention-dependent normative questions as questions of *law*.

The conceptual reason is buttressed by pragmatic considerations. It is often suggested that the law/fact distinction is primarily a device for allocating decision-making responsibilities between judge and jury based on their respective competencies. Judges are thought to be better suited than juries to decide questions of law but not questions of fact. The convention-dependence of law (in general) furnishes a straightforward general justification for the rule: it makes eminent sense for judges rather than the jury to decide questions of law if answering these questions requires figuring out such conventions as what judges and legislatures have decided and done, given that judges are trained and have expertise in interpreting judicial and

¹⁴⁹ The disagreement that has come to define the field is whether distinctly *moral* (or broadly normative) facts in addition to the social practice facts necessarily contribute to making the law what it is. Positivists believe that it is only social practice facts that are essential to law. Hart, for instance, famously thought that a rule's *being law* was wholly determined by the rule's being part of a broader hierarchy of rules habitually obeyed in the community, including 'primary rules' that prescribe what individuals should do in various situations, and 'secondary rules,' which specify the circumstances under which a primary rule emerges. *Supra* note 147, at 99. By contrast, anti-positivists think that moral facts, like the fact that it is *morally good* for a community to abide by the plain meaning of statutes, help determine the legal rules of a jurisdiction, along with the relevant social practices. *See* Dworkin, *supra* note 147, at 52, 87. The dispute between positivists and anti-positivists goes well beyond the Hart-Dworkin debate, and the battle lines continue to be drawn, in new and interesting ways, by contemporary positivists and anti-positivists. *See, e.g.,* Scott Shapiro, *LEGALITY* (2011); Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1118 (2014).

legislative behavior. This justification extends to judges deciding essentially convention-dependent normative questions, even when the conventions aren't law-related, insofar as the skill that judges acquire at interpreting social practices is suitably general.

Secondly, conventions serve their coordinating function best when they are more widely known and well understood. Judges unlike jurors articulate *reasons* for their conclusions and this makes them especially well-situated to promulgate conventions in the course of deciding essentially convention-dependent normative questions. By contrast, even in cases of special verdicts, the jury gives little to no explanation for its ultimate rulings on issues. The jury's inability to give detailed accounts of its judgments makes it less suited to articulate the facts concerning social conventions underlying its normative conclusions. Accordingly, judges are well-suited to decide convention-dependent normative questions.

Thirdly, as discussed earlier, there is often no determinate answer to convention-dependent normative questions when the conventions are ambiguous or inconclusive. If no social practices clearly indicate how widgets have been priced (perhaps because widgets are a recent innovation or because merchant practices are ambiguous), there is no determinately reasonable price within a broad range of prices. Judges (and indeed the law) have an important role to play in 'settling' indeterminate convention-dependent normative questions, by simply *choosing* a convention—or, in other words, by convention-mongering in such cases. As quasi-legislative actors, judges have authority to make such choices.

By contrast, conceptual and pragmatic reasons militate *against* judges deciding convention-*independent* normative questions. It is much harder to justify the claim that judges might be better suited than juries to decide questions concerning matters of fundamental moral right—for instance, those concerning what persons are owed simply on account of being persons. Furthermore, in a pluralistic society characterized by significant moral disagreement on questions of fundamental right, it seems appropriate to have the jury (rather than a single judge) decide convention-independent moral questions if and when they come up at trial insofar as the jury consists of multiple persons drawn from a representative cross-section of the community. We no doubt tolerate deviations from this principle, as in the case of judicial interpretation of basic rights enshrined in the constitution. But in such cases judges have *explicit* constitutional or legislative authority to decide the basic moral question. When a question of basic morality arises at trial and the Constitution and plain statutory law are silent as to who decides the question—which is precisely when the common law rule applies—it seems intuitive to think that judges lack default authority to decide the question. At the very least, in such cases judicial authority to decide the

question does not seem like it can be straightforwardly grounded in the question's nature. So, in general, it seems a sound rule for a legal system to adopt that questions of basic moral right and wrong that come up at trial and that haven't been explicitly assigned to judge or jury by the legislature or the Constitution are presumptively questions of fact for the jury.

With the meta-normative distinction in place and reasons for thinking that judges should be tracking it in allocating decision-making responsibilities between judge and jury, the next step is to see whether judges really have been tracking this distinction given their treatment of normative questions under the law/fact rule. I take up this challenge in the next section.

III. JUDICIAL SENSITIVITY TO CONVENTIONAL AND PRE-CONVENTIONAL NORMS

The preceding section suggests a rationale for distinguishing normative questions under the law/fact distinction. Some normative questions are essentially convention-dependent in that addressing them requires figuring out conventions (often law-related ones, like what prior judges or legislators have done, for example) or settling on new conventions. This makes them importantly 'law-like' on standard accounts of the nature of law, and judges happen to be uniquely suited to resolving them. There are also normative questions that are convention-independent. These typically concern fundamental moral requirements and prohibitions (matters of justice or basic rights). Convention-independent normative questions can reasonably be regarded as "questions of fact"—they have little if anything to do with *law* as such.¹⁵⁰ The aim of this section is to show that this basic principle helps explain judicial practice concerning the classification of normative questions under the law/fact distinction.

A. *Convention-independent Norms in Negligence Law and Sentencing*

The question of reasonable conduct in negligence cases and other areas of tort law has historically been treated as factual under the common-law rule. Its status as a relatively convention-independent normative question finds support in corrective justice theories of tort law.¹⁵¹ On the corrective justice

¹⁵⁰ There are echoes of this reasoning in the case law. *See, e.g., Bose*, 466 U.S. at 501 n.16 (justifying *de novo* review in cases where a factual finding "clearly implies the application of standards of law" and where it "cannot escape broadly social judgments") (quoting *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944)). The present account fills in the details regarding when evaluative questions "imply the application of standards of law." They do when convention-dependent norms are implicated.

¹⁵¹ *See, e.g., Earnest J. Weinrab, The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1988); Jules Coleman, *Corrective Justice And Wrongful Gain*, 11 J. LEG. STUD., 420 (1982); JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST*

approach, the concept of a moral wrong is central to tort law, especially in the case of intentional torts, like assault and battery, as well as negligence.¹⁵² A standard negligence claim involves a plaintiff claiming redress for having been wronged by the defendant's failure to exercise the degree of care of a reasonable person. The wrongfulness of the defendant's conduct is explained not in morally neutral terms, such as the defendant's being the "least-cost avoider" of the harms caused, but in terms that imply moral culpability and blame.¹⁵³ The defendant exhibited *inadequate* regard for the interests of others.

The relevant aspect of this tradition in tort law scholarship is not just its emphasis on a distinctly moral concept of wrongfulness or unreasonableness at the heart of tort law, but precisely the conviction amongst proponents of the view that the question of reasonableness/unreasonableness often turns on fundamental facts regarding the rights of persons. As Gregory Keating writes, "tort norms articulate obligations to avoid harming people in various ways, and to respect their authority over their persons and their property in various ways. These wrongs are grounded . . . in *rights* people have *as persons*, such as the right to physical and psychological integrity."¹⁵⁴ Why does the wrongfulness of tortious conduct often turn on fundamental moral rights? Part of the explanation concerns the nature and significance of the interests that "reasonable care" in this context is meant to protect. The relevant moral norms of reasonable behavior "protect important boundaries against unauthorized crossings" and "our essential interests as persons."¹⁵⁵ These interests include one's sovereignty and power of discretion "over one's physical person or one's real property."¹⁵⁶ Joel Feinberg in his famous catalog

APPROACH TO LEGAL THEORY (2001); Gregory Keating, *Is the Role of Tort to Repair Wrongful Losses?*, in RIGHTS AND PRIVATE LAW, at 367 (Nolan, D. & Robertson, A. eds., 2012); EARNEST J. WEINRAB, *THE IDEA OF PRIVATE LAW* (1995); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010). See generally David G. Owen, *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (1997).

¹⁵² See, e.g., Keating, *supra* note 151, at 367; Coleman, *supra* note 151, at 9, 15, 36.

¹⁵³ See, e.g., James A. Henderson Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377 (2002) (noting that basing liability on wrongful conduct rather than on conduct that merely causes harm appeals to the shared intuitions of American judges.). Cf. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) 26. ("I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents.").

¹⁵⁴ Keating, *supra* note 151, at 369. See also *id.* at 383 ("The facts that tort rights and obligations attach to persons *simply as persons* . . . , and run from every person in the jurisdiction to every other person, need to be front and center in our thinking about the character and content of primary obligations.")

¹⁵⁵ *Id.* at 390, 393.

¹⁵⁶ *Id.* at 390. See also W. PAGE KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* 8 ("The common thread woven into all torts is the idea of unreasonable interference with the interests of others."); Nicholas J. McBride, *Rights and the Basis of Tort Law*, in RIGHTS AND PRIVATE LAW (Nolan, D. & Robertson, A., eds., 2012).

of harms identifies certain interests of persons as critical including:

the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income.¹⁵⁷

Negligence cases routinely involve the failure of agents to guard against setbacks to interests that fall in Feinberg's privileged set of critical interests—as when an employer's failure to implement a safety feature results in the amputation of an employee's limbs; and when they do not, as when the harms are purely economic and arise out of market exchange, courts tend to be reluctant to treat the case under tort law.¹⁵⁸

Another reason for thinking that the reasonableness enquiry in torts implicates matters of basic right, consistently with the corrective justice framework, is that a finding of negligence liability plausibly involves moral condemnation or *blame* of the defendant, and often results in punitive damages, as in cases of gross negligence. Basic principles of fairness militate against blaming or punishing agents unless they are truly morally blame and punishment-worthy: that is, only if they violate their moral obligations.

The corrective justice approach can be understood in terms of the framework developed earlier of convention-independent normativity. The tradition emphasizes that normative questions raised in tort law are often convention-independent; that is, they implicate 'pre-conventional' moral norms. The moral norms governing reasonable risk-taking in the sort of cases that frequently recur in the tort context—cases involving serious harms to agents—concern a form of regard we owe to others simple on account of their being persons whose interests matter. The relevant norms are not so easily displaced by contrary conventions or a general practice of doing less than what is morally required. Even if a community developed a habit of, say, driving drunk or recklessly on the road, for instance, this would not necessarily immunize a person from the charge of having behaved wrongfully or negligently when they cause substantial injury to another motorist on account of their recklessness. Given the gravity of the harms at stake, it seems sensible to assume that persons do not freely and intelligently consent to a

¹⁵⁷ JOEL FEINBERG, HARM TO OTHERS 37 (1984).

¹⁵⁸ Under the "pure economic loss" rule, the law in most states is opposed to recovery under tort law in cases where the plaintiff's injuries are "purely economic" and there is no personal injury or damage to tangible property. See Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AMER. J. COMPAR. L. 111, 112 (1998); Gergen, *supra* note 73, at 413 ("The narrow protection afforded economic interests in tort law signals the law's greater tolerance for selfishness when the interests affected are purely economic.").

relaxation of moral prohibitions and requirements in this domain, at least not without careful and near universal consideration of the merits of doing so. In other words, bad driving habits that emerge organically, even when they generate expectations of reckless behavior on the road, cannot wholly undermine the moral obligation one has as a motorist simply to avoid being reckless. After all, people's lives are at stake. While sufficiently wide spread and deliberately chosen conventions of increased risk-taking—ones that have been legislatively enacted, for instance—could theoretically displace moral norms prohibiting negligence on the road, the fact that they would have to be widely shared and very deliberately chosen itself reflects the relative inflexibility of basic moral norms in the negligence context.

It is certainly true that the norms of the reasonable person are also meant to be ones that are generally obeyed in society (the norms, as it is often put, are those internalized by the “ordinary, prudent person”).¹⁵⁹ However, it would be odd to think that it is the fact that most of us do not behave recklessly that grounds the *moral wrongfulness* of driving at high speeds or under the influence. Our practices have *evidential* value, indicating as they do the existence of basic norms of decency and reasonable behavior that most people follow as a matter of course. More importantly, our practices in the negligence context are not decisive. They must be tested against questions of basic rights and fairness.

Undoubtedly, there are cases in tort law where the harms in question seem less severe, falling short of violations of interests on Feinberg's list. Accordingly, it becomes more plausible that the norm violated evolved from and depends essentially on conventions. Arguably, part of what makes it morally unreasonable to fail to keep one's house in good repair when inviting people over is that people *expect* responsible community members to do the same, an expectation that may well be grounded in a general practice of repairing one's home rather than *a priori* moral facts about what invitees are owed.¹⁶⁰ If the general practice disappeared, perhaps some of the moral obligation to keep one's home in good repair would be undercut (and the onus would be on the invitee to take reasonable precautions or else assume the risk of harm). Conventions play an even bigger role, consistently with the corrective justice framework, in cases where the reasonable person standard is applied to professionals, like doctors and lawyers. In such cases, the

¹⁵⁹ See, e.g., N.Y. P.J.I. 2:10 (3d ed. 2000); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI-KENT L. REV. 587, 595 (2002) (describing the emphasis in jury instructions on “ordinary” care).

¹⁶⁰ See RESTATEMENT (SECOND) OF TORTS § 343 (1977) (discussing premises liability); Patrick J. Kelley, *Who Decides - Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 324-25 (1990) (discussing the role of community safety norms in settling expectations).

standard is naturally articulated by reference to the practices and conventions amongst the relevant professional class regarding different sorts of risks.¹⁶¹

Even if conventions play some role in shaping our sense of what counts as morally reasonable risk-taking, this hardly settles whether the conventions *determine* the standard of care or instead exist precisely because members of the community have internalized fundamental norms requiring adequate concern for others.¹⁶² Given the interests at stake—in the case of risk to invitees, their interest in physical safety—it is at least plausible that the conventions and general practice amongst home owners *reflect* or *operate in tandem* with the background pre-conventional norms governing interpersonal interactions rather than creating or co-opting those norms.¹⁶³ The view does not require being overly sanguine about the degree to which our community standards for risk taking (or the standards internalized by professionals like doctors and lawyers) realize the best of all possible moral worlds; or that the ordinary person shows just the kind of care that we, independently of our conventions, morally owe to one another. The view depends only on its being plausible that our general conventions of protecting the critical interests of others, including their health and safety, get things at least roughly right from the pre-conventional moral point of view. Our conventions need not be morally perfect for the point to stand that their evidential significance in the negligence context may go only so far as they line up with an independent and relatively basic moral structure of what we owe to each other. Moreover, it is eminently plausible that our conventions of risk-taking need to be regularly tested against the basic moral question of what agents are owed as a matter of *right* given the harms at stake—in many cases, the fact that the defendant's actions were consistent with what is conventionally done will not immunize her from liability.¹⁶⁴ To quote Judge Hand in the famous *TJ Hooper* case: “there are some precautions so imperative that even their universal disregard will not excuse their omission.”¹⁶⁵

Admittedly, the approach to negligence defended by corrective justice theorists is far from universally accepted. However, it suffices for present purposes that the view is plausible and widely-endorsed. For it is enough to *rationalize* (not fully vindicate) judicial behavior using our basic principle to motivate its explanatory potential. Corrective justice theory has been tremendously influential, historically, and continues to be widely embraced.

¹⁶¹ See Joseph H. King Jr., *In Search of a Standard of Care for the Medical Profession: The Accepted Practice Formula* 28 VAND. L. REV. 1213 (1975); 99 A.L.R.3d 1133 (1980).

¹⁶² See discussion in Keating, *supra* note 151, at 369.

¹⁶³ See, e.g., Kelley, *supra* note 160, at 324 (noting that community safety norms can develop through moral teaching).

¹⁶⁴ The discussion to follow of various cases elaborates on this point.

¹⁶⁵ 60 F.2d 737 (2nd Cir. N.Y. 1932).

Its proponents include Blackstone and influential nineteenth-century American jurists.¹⁶⁶ Its well-known contemporary proponents include Jules Coleman, Gregory Keating, and many others.¹⁶⁷

So long as the question of reasonableness in negligence law is plausibly understood to implicate convention-independent norms, the case law appears driven by the claimed difference between legal and factual normative questions. Even if the norms applicable in the negligence context turn out to be far more convention-dependent than they appear, this would not make the historic practice of judges assigning the question to juries inexplicable. The structure of reasonableness norms in the context of dangerous risk-taking is far from obvious, and it is eminently reasonable to suppose that convention-independent moral principles concerning basic rights should have an important role to play in settling when injured persons should be entitled to demand redress and punishment when others inflict dangerous risks on them.

While a full-scale defense of corrective justice theory is not the point of this section, it is worth expanding on some of the ways in which corrective justice theory can explain key aspects of negligence law that other theories struggle with. It will be helpful to compare the theory with its main rival amongst theorists: the law and economics approach.¹⁶⁸ The economic approach traditionally eschews moral categories in explaining tort law's normative concepts. What makes negligent conduct "unreasonable" is not that it violates some *a priori* or relatively basic moral norm. Instead, its unreasonableness is wholly explained by the fact that it inflicts a harm on the defendant that the negligent actor could have more cheaply avoided. Moreover, the imposition of liability is conceptualized not as punishment for immoral conduct but as akin to a licensing fee or tax imposed to incentivize efficient risk-taking: risk-taking that minimizes the monetary costs of accidents.¹⁶⁹ The resulting account characterizes tort law's ultimate aim as that of efficiently allocating costs in a way that leads to overall wealth maximization.¹⁷⁰ The economic approach may be very sensible in many

¹⁶⁶ See Goldberg & Zipursky, *supra* note 151, at 929, n67 (citing jurists for the moral wrong based view of torts).

¹⁶⁷ See sources cited *supra* note 151.

¹⁶⁸ See, e.g., Calabresi, *supra* note 153; WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85-107 (1987); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). See also *United States v. Carroll Towing, Co.*, 159 F.2d 169 (2d Cir. 1947) (articulating the famous Learned Hand formula for negligence). On the Hand formula, a person's conduct is unreasonable only if $PL > BP$, where P is the probability of an injury occurring, L is the magnitude of the injury, and B is the expected benefit of engaging in the conduct. The economic approach appraises L and B in financial terms (often using willingness to pay as a proxy for value).

¹⁶⁹ See, e.g., Calabresi, *supra* note 153.

¹⁷⁰ See, e.g., Landes & Posner, *supra* note 168, at 356-7 (defining values to be promoted in terms of willingness to pay and wealth maximization).

domains of tort law—e.g., strict liability law and cases where the harms at stake fall outside of Feinberg’s critical interests. But it struggles to explain the actual practice of juries empowered to decide the question of *negligence*.¹⁷¹

In a systematic examination of state jury instructions, Patrick Kelley and Laurel Wendt find that jurors deciding the negligence issue are never told, through jury instructions or otherwise, to calculate and decide purely based on how costly it was to take relevant precautions.¹⁷² Neither are they usually told to look at general conventions except in cases involving professional actors like doctors or lawyers. Kelley and Wendt write:

To law professors, of course, unreasonable foreseeable risk conjures up Henry Taylor Terry's cost-benefit test for negligence in the first and second Restatements and summarized in Learned Hand's *Carroll Towing Company* test. But it seems to us that this is not the meaning that would be conveyed to the jury [of reasonable prudence]. . . . The instructions seem to call on the jury to determine whether the defendant's conduct, which resulted in harm to the plaintiff, was a *private injustice* to the plaintiff.¹⁷³

The hypothesized reasonable person “though not a paragon of virtue simpliciter, can be expected to act in reasonably careful or reasonably prudent ways. The only virtue this fully endows the hypothesized person with is the virtue of justice: the reasonably careful person exercising ordinary care under the circumstances gives the plaintiff what is her due.”¹⁷⁴ While some states add various qualifications to the typical instructions (qualifications having to do with emergency situations, avoidable situations, and with the inappropriateness of imposing an excessively demanding standard of an exceptionally reasonable person, for example), *none of them excuse the defendant if most people would have done the same or if the financial costs of taking precautions would have outweighed the benefits*.¹⁷⁵ State jury instructions routinely include the disclaimer: “the law does not say how the negligence standard applies, rather that it is for the jury to decide, based upon the facts in the case.”¹⁷⁶ Moreover, recommendations made by scholars that normative language be excised from instructions on negligence so that they refer only to care taken by the “ordinary person”—rather than the ordinary,

¹⁷¹ Some theorists favor mixed theories of tort law for this reason. See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

¹⁷² *Supra* note 159.

¹⁷³ *Id.* at 618-19.

¹⁷⁴ *Id.* at 621.

¹⁷⁵ *Id.* at 603-7.

¹⁷⁶ *Id.* at 608 (citing Mich. 10.02 (2d ed. 1981 & Supp. 2001)).

reasonable person—have been followed virtually nowhere.¹⁷⁷

Jury instructions on negligence reveal more than just the difficulties confronting the economic theory of tort law (construed as a theory attempting to describe how the law *is* rather than how it ought to be). They reinforce the central claim made by corrective justice theorists—that jurors deciding the negligence issue are invited to tap into their basic moral sentiments, those “constitutive of the [ordinary] sense of justice itself.”¹⁷⁸ While it is impossible to say with certainty how jurors *in fact* decide what counts as reasonable or unreasonable risk-taking, there is considerable evidence to suggest that jurors respond unfavorably to defendants who defend risk-taking by appeal to conventions or economic cost-benefit analysis.¹⁷⁹ The famous Ford Pinto case provides but one example of juror antipathy to economic and convention-based reasoning.¹⁸⁰ Ford was found to have sold its Pinto model car with a design element that made it especially prone to explosion upon impact from the rear, a feature that Ford knew would result in deaths and serious injuries amongst customers. Ford’s engineers and management were especially explicit in their rationale for not implementing a safer design. They found that the cost of the safer design was outweighed by the amount Ford would have to pay in liability for deaths, pain, and suffering caused by exploding Pintos. Ford based its calculations on actuarial tables estimating the ‘value’ of a person’s life.¹⁸¹ Jurors found Ford guilty of negligence and imposed hefty punitive damages despite Ford’s insistence that such cost-benefit calculations were routinely made in the industry. According to the jury, Ford displayed inadequate regard for people’s lives and its decision to tolerate the risks inherent in selling the Pinto was not one that was Ford’s to unilaterally make.¹⁸² The Ford Pinto case is far from unusual in terms of juror behavior.¹⁸³ The actual practice of jurors lends further plausibility to the claim that the question of reasonableness in negligence law is widely seen to

¹⁷⁷ *Id.* at 613 (describing unsuccessful attempts to simplify instructions by excising ‘reasonable.’).

¹⁷⁸ Keating, *supra* note 151, at 376.

¹⁷⁹ See, e.g., Richard W. Wright, *The Standards of Care in Negligence Law*, in *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (Owen, D., ed., 1997) (“Defendants that are thought to have deliberately made such risk-utility decisions are often deemed by juries and judges not only to have been negligent, but also to have behaved so egregiously as to justify a hefty award of punitive damages”); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1757 (1981) (finding that New Hampshire and California courts are reluctant to find that economic costliness justified a defendant’s risk-taking).

¹⁸⁰ See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981). See also Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 *RUTGERS L. REV.* 1013, 1034-8 (1991).

¹⁸¹ *Id.*

¹⁸² Schwartz, *supra* note 179, at 1014.

¹⁸³ See sources cited, *supra* note 179.

be likely to be a convention-independent moral question.

Moving on to the death penalty case, there is an even stronger argument to be made that normative questions that arise in capital sentencing (e.g., whether the defendant's conduct was sufficiently heinous to warrant the death penalty) are convention-independent (and hence factual). Whether and to what extent aggravating or mitigating factors are present in the defendant's case—that is, whether the facts militate for capital punishment—is almost universally decided by the jury.¹⁸⁴ The question is one of profound moral seriousness.¹⁸⁵ It amounts, ultimately, to the question whether the state is justified in taking a person's life, an affirmative answer to which depends on what we owe convicted criminals as a matter of right.¹⁸⁶ If criminal defendants who have suffered from severe mental handicaps have a moral right to the community's mercy, for example, conventions (law-related or otherwise) cannot displace their right to the community's mercy. The significance of the right depends, among other things, on the way mental handicaps impair a person's capacities for moral and rational action, and the gravity of the harm that is ending a person's life.¹⁸⁷ Even if we have previously executed defendants who have suffered from severe mental handicaps, our previous practices would not shake the fundamental moral prohibition—if there is one—on sentencing them to death.

The stakes are simply too high for normative evaluation of the aggravating or mitigating significance of the defendant's conduct and circumstance, at least one that *favors* the death penalty, to turn on convention-based reasoning.¹⁸⁸ The harm of undeserved execution is not outweighed by

¹⁸⁴ See discussion *supra* Part I.C.

¹⁸⁵ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (nothing that the death sentences must “reflect a reasoned moral response to the defendant's background, character, and crime”). Members of the Court have consistently recognized that the law demands moral deliberation from the sentencer, that the life-or-death decision is a question concerning the defendant's “moral entitlement to live,” *Spaziano*, 465 U.S. at 469, and that it must be based on a “moral inquiry into [his] culpability,” *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring). See also *Kansas v. Marsh*, 548 U.S. 163, 180 (2006) (noting that a jury is constitutionally tasked to engage in a “measured, normative process . . . when deciding the appropriate sentence for a capital defendant”); *Blystone v. Pennsylvania*, 494 U.S. 299, 317 (1990); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

¹⁸⁶ See *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (“[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment”).

¹⁸⁷ See, e.g., Richard Lipke, *Social Deprivation as Tempting Fate*, 5 CRIM. L. PHIL. 277 (2011). The Supreme Court has essentially affirmed this style of moral reasoning, as having broad appeal, and not just among ethicists. See *Penry*, 492 U.S. at 319; *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

¹⁸⁸ Judges can, I argue, be involved in determining whether *mercy* is warranted. Mercy

the value of following conventions in the death penalty context. It is no surprise, then, that the Supreme Court has explicitly prohibited the use of legal rules for discarding potentially mitigating evidence in juror instructions.¹⁸⁹ The frequently repeated mantra in such rulings of the importance of deciding issues on a “case-by-case” basis reflects the Court’s recognition that legalistic reasoning cannot support a finding that the defendant deserves to die, not, at any rate, without allowing pre-conventional moral norms concerning what the defendant deserves in light of the facts of his case to constrain findings of death-eligibility.¹⁹⁰ Accordingly, the *factual* status of questions concerning the existence of aggravating factors in the death penalty context (and the question of death-eligibility more generally) is not just favored by courts in most states; it is constitutionally mandated.¹⁹¹

To sum up: questions concerning the reasonableness of the defendant’s conduct in negligence cases and the question of death-eligibility in capital sentencing are convention-independent normative questions; answers to which do not turn primarily on conventions. Negligence law is involved in the punishment and remedy of wrongful risk taking—the sort of risks that endanger the critical interests of others. The wrongfulness or unreasonableness of conduct that is familiarly the subject of a negligence action does not turn solely on what we do around here, but plausibly on the kind of respect that is fundamentally owed to others. The “question of fact” classification of such normative questions is precisely what our principle concerning the difference between legal and factual normative questions would predict. In capital sentencing, fundamental moral principles against undeserved execution *must* be taken into account when issuing death sentences, if a capital sentencing regime has any chance of being morally legitimate, a fact endorsed by the Supreme Court based on its interpretation of the Eighth Amendment’s prohibition against “cruel and unusual” punishment.¹⁹² Questions of mitigation and aggravation are therefore

can be warranted, even for the most heinous offenders, by appeal to social practice.

¹⁸⁹ See *Eddings v. Oklahoma*, 455 U.S. 104 (1982). (holding that sentencer cannot refuse to give the defendant’s turbulent family history mitigating weight based on a legal test of criminal responsibility). *Id.* (“Just as the State may not by statute preclude the [capital] sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.”). See also *McKinney v. Ryan*, 2015 WL 9466506, at *8 (9th Cir. 2015).

¹⁹⁰ See *e.g.* *Blystone v. Pennsylvania*, 494 U.S. 299, 317 (1990) (“[I]n the end it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death.”); *Graham v. Collins*, 506 U.S. 461, 515 (1993) (noting that a reasoned moral response requires “individual assessment of personal culpability”).

¹⁹¹ *Ring*, 536 U.S. at 584.

¹⁹² See sources cited *supra* note 190. See also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments require that “the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s

reasonably regarded as convention-independent normative questions or “questions of fact”: in deciding them the jury invokes its pre-conventional sense of justice regarding what the defendant is owed.

C. *The Convention-dependent Morality of Contract Law*

Two independent lines of reasoning suggest that normative truths implicated in contracts disputes, having to do with the unconscionability of a contract or the reasonableness of implied terms, are in general determined essentially by conventional facts. The first is connected to the essential role that non-legal conventions play in determining what counts as contractual reasonableness and/or unconscionability. Courts routinely look to the parties’ prior course of dealings and the general practices of the merchant community when determining whether a price or other implied term would be reasonable.¹⁹³ Whereas in the case of general risk-avoidance, our practices and the conduct of ordinary persons plausibly *reflect* or operate in tandem with (rather than constitute) pre-conventional norms of basic decency and regard, market conventions are not ultimately a function of the moral dispositions of merchants or reflections of basic moral rights. ‘Conventional’ prices are fixed based on parties pursuing their own self-interest under conditions of scarcity. Moreover, the going rates for goods sold in the marketplace or prices historically accepted by buyers and sellers seem to weigh significantly on the reasonableness of set prices, given that parties can expect to be charged such rates in the absence of explicit agreement.¹⁹⁴ So long as one of the central values to be promoted through contract law is the expectations of parties, as is often suggested, then the relevant market-based conventional facts can truly be said to determine in a non-derivative way the

character or record and any of the circumstances of the offense”).

¹⁹³ See e.g. U.C.C. §1-303 (2011); *Western Indus., Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198, 1204 (7th Cir. 1984) (trade custom can even override UCC gap-filler defaults and can give rise to binding contract provision); *American Mach. & Tool Co. v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 596-98 (Minn. Ct. App. 1984) (evidence of trade usage and course of dealing admissible for determining delivery dates). See generally Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law*, 1987 DUKE L.J. 1 (1987); R. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VIRG. L. REV. 821 (1992).

¹⁹⁴ See e.g. C. A. Riley, *Default Rules in Contract Law: Consent, Conventionalism, and Efficiency*, 20 OX. J. LEG. STUD. 367 (2000) (arguing that gap-filling ought to be driven by the subjective consent of the parties and the customs and conventions immanent within the parties’ community). *Id.* 374-82 (suggesting that the case for conventionalist defaults include considerations having to do with cost, fairness, tacit consent, fairness, reasonable reliance, and positive incentives); 996; R. Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). It is implausible that there are *a priori* moral facts regarding reasonable pricing for most non-essential goods and services.

reasonableness of implied terms and contractual fairness.¹⁹⁵

Given the dependence of contract law on non-legal conventions, it is not hard to see why what counts as contractual reasonableness and fairness might also depend on law-related conventions—such as judicial practice or regulation. In many instances, the appropriate price or some other missing term will not be settled by the prior contractual history of the parties or even industry-wide practice; therefore, judges must make *some* choice of default rule from among various acceptable options.¹⁹⁶ Judges are especially well-suited to make such choices and the relevant default rules known, as quasi-legislative officials who can be held accountable, given their responsibility for making the rationale behind their judgments explicit. Any party able and empowered to make the non-legal conventions and default rules known will inevitably end up *influencing* non-legal conventions as well, given that merchants often turn to case law for information about the merchant community's practices. Even a court's initially mistaken interpretation of industry custom may become correct over time because the industry conforms to the interpretation. In other words, what judges *say* and *decide* has a role to play in determining what counts as reasonable in contractual exchange. It makes sense, therefore, to regard the question of reasonableness of contracts as an essentially convention-dependent normative matter.

It is worth emphasizing why this sort of analysis does not work in the case of negligence. Law-related conventions—legislative practice, for instance—obviously do influence what counts as negligent conduct. A defendant's failure to comply with statutory requirements, if it results in harms that the statute aims to prevent, is considered negligence *per se*, or negligence as a matter of law.¹⁹⁷ However, such rules drawing on legal conventions are treated as exceptions to the general practice of juries deciding what counts as negligent conduct. Moreover, the reason statutory requirements are often introduced in negligence cases is because they are plausibly *derivative* of more basic, pre-conventional moral norms that parties are supposed to respect. When a person injures another while driving drunk, what makes such conduct wrongful and unreasonable is the degree of disregard the person shows for the safety of others. Its wrongfulness is not principally explained by the fact that the law forbids drunk driving or the driver's failure to comply with the law. To reiterate the point made earlier, the law-related conventions in the tort context *reflect* important pre-conventional moral facts, grounded

¹⁹⁵ See e.g. Lord Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 LQR 433 (1997); Riley, *supra* note 194, at 375-80.

¹⁹⁶ See generally, Ian Ayres & Rob Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992). The U.C.C. gives courts broad gap-filling powers. U.C.C. § 2-204(3) (2011).

¹⁹⁷ RESTATEMENT (THIRD) OF TORTS §14 (2010).

in the dignity and importance of other people and their fundamental interests. On this popular conception of tort law, the actor deciding the negligence issue typically does not need to know the law-related conventions to decide whether the conduct at issue is wrongful enough to warrant compensation and punishment.¹⁹⁸ In short, the way in which contractual norms are convention-dependent is different in kind from the way legal and non-legal practices bear on the negligence question. In the contracts case, it does not make sense for the decision-maker to decide what terms are reasonable independently of conventions or by reference to their intuitive sense of what is owed to others as a matter of basic decency. This is because the interests under threat in contracts cases are not ones that we must, as a matter of basic decency, safeguard out of respect for our contractual partners.

The second line of reasoning that supports the unique convention-dependence of contractual norms is more involved, and it may be better to layout its basic structure before defending its key premises. The main idea is that the interests of individuals safeguarded by contractual norms (like reasonableness and unconscionability) are less morally vital than those protected by tort and criminal law norms. Because of these lower stakes in the economic context, pre-conventional moral norms governing contractual exchange are comparatively easily displaced by conventions requiring less than what pre-conventional morality requires (always keeping one's promises, for example), especially if such conventions can be justified by appeal to overall social good. Moreover, such conventional displacement of ordinary morality *has* plausibly occurred in the modern marketplace, through a combination of laws, economic policy, and cultural attitudes. By contrast, it is much less plausible that fundamental moral norms prohibiting the physical endangerment of others are flexible or have shifted in the face of contrary conventions.

Beginning with the lowered stakes, the prototypical contractual dispute over the reasonableness of implied terms or unconscionability implicates interests of parties that are primarily economic: losing a bargained-for benefit or losing more than one bargained for. As Mark Gergen notes, there is a long history in the common law of treating such economic losses arising out of voluntary transactions as having a lesser moral significance than harms to persons and property resulting from agents' tortious or criminal conduct.¹⁹⁹ There are several reasons for this disparity. For one, the loss of an economic benefit is at best instrumentally bad for an agent, whereas physical injury, emotional trauma, and interference in certain privileged domains (like a person's home) have an inherent or intrinsic badness.²⁰⁰ Economic harms

¹⁹⁸ See discussion Part III.B, note 179.

¹⁹⁹ Gergen, *supra* note 73, at 412-3.

²⁰⁰ See discussion in Feinberg, *supra* note 157, at 31.

resulting from unconscionable contracts or contracts with unreasonable terms can certainly be substantial, as when the losses are sustained by impoverished agents like poor tenants or uninformed consumers. If a mortgagor is about to lose her home despite having paid off a good portion of her debt due to a uniquely burdensome mortgage, the potential harm to her, absent judicial intervention under unconscionability doctrine, is surely great.²⁰¹ Nevertheless, it is true that the losses sustained in the course of doing business with other self-interested economic actors *typically* lack the gravity of unconsented-to physical injury or damage to real property sustained at the hands of reckless, malicious, or negligent agents. This is a recurrent theme in the corrective justice literature on torts as well as in accounts of the differences between contracts and other areas of law, and the supposition is borne out by existing case law.²⁰²

Another reason for the differential importance of harms inflicted in paradigmatic tort and criminal cases compared to those inflicted in contractual suits is that the former are caused by morally blameworthy or wrongful agents. By contrast, it is far from clear that economic agents, even when they behave in exploitative and highly self-serving behavior, are to blame for the harms they cause (not including conduct by such actors deemed tortious or criminal). Harms resulting from morally blameworthy conduct warrant greater concern than harms caused by blameless agents, and thus generate stronger reasons for state-authorized corrective and *punitive* action.²⁰³ Part of the explanation for these differences in moral responsibility concerns our unique conventions and cultural expectations for economic actors—issues to be discussed later in this subsection. The imposition of duties and obligations in contracts disputes does not generally carry implications of blame or punishment.

Because the harms to individuals are less severe, it makes sense that any pre-conventional moral duties or prohibitions that we might have owed to one another in contractual exchange will be relatively flexible in the face of a convention or general practice of doing *less* than what pre-conventional moral norms require, especially when the existence of such conventions results in overall societal good. Certain foundational moral norms (the prohibition against torture, for instance) have a rigidity that, in the extreme, gives rise to inviolable rights—i.e., rights that generally cannot be justifiably compromised based on considerations of overall, societal good. The norms governing reasonableness and fairness in contracts are unlikely to be rigid in this way in light of the harms at stake.

²⁰¹ See e.g. *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973).

²⁰² See Gergen, *supra* note 73.

²⁰³ See generally Seana V. Shiffrin, *Harm and its Moral Significance*, 18 LEGAL THEORY 357 (2012).

Moreover, it is quite likely that the standards for appropriate and inappropriate behavior in the market context *have* shifted in light of our cultural practice of tolerating and even encouraging unbridled self-interest in the marketplace.²⁰⁴ Capitalistic societies encourage the relentless pursuit of material gain out of a sense that it promotes the general good.²⁰⁵ The dominant view amongst economic historians is that law and culture have strongly shaped participants' sense of what is and is not appropriate in the market domain, and so long as we can trust this collective sense of the unique "morals of the marketplace," it favors a convention-based account of the norms at play.²⁰⁶

Conventional-displacement or alteration of the moral landscape in the contractual arena sets up a kind of feedback loop, where the existence of fairly wide-spread conventions of doing less than what is pre-conventionally thought to be decent behavior affects the nature and gravity of the harms when parties fail to act decently. Once the marketplace becomes a domain in which it is well-known that ordinary moral norms of decency and kindness are relaxed, parties incur an obligation to recognize and guard against the risk of exploitation when they voluntarily participate in market exchange. Relatedly, participants can be said to impliedly consent to the risk of being harmed by the self-interested and even highly predatory behavior of others.

²⁰⁴ See e.g. John K. Galbraith, *A HISTORY OF ECONOMICS* 37 (1987) (noting that the emergence of "mercantilism involved . . . a marked break with the ethical attitudes and instructions of Aristotle and of Saint Thomas Aquinas and the Middle Ages in general); Harry J. Glasbeek, *Commercial Morality through Capitalist Law: Limited Possibilities*, 27 *LE REVUE JURIDIQUE THEMIS* 263, 303 (1993) ("The ideological power, and legal acceptance, of the primacy of selfishness and the merits of a utilitarian approach to public policy-making ensures weak restraints, that is, weak regulation."); *Id.* at 306 (noting the "advent of capitalist relations was truly revolutionary" with respect to the norms of market exchange); Lawrence E. Mitchell, *Groundwork Of The Metaphysics Of Corporate Law*, 50 *WASH. & LEE L. REV.* 1477, 1484 (1993); Christopher Calvo, *Responsibility, Ethics and American Economic Thought, 1776-1900*. History of Corporate Responsibility Project Working Paper No. #7 (2011) (noting the impact of the Jacksonian era market revolution on economic culture); Robert L. Heilbroner, *THE NATURE AND LOGIC OF CAPITALISM* (1985) (comparing norms of pre-capitalist and capitalist society); Alan Wolfe, *WHOSE KEEPER?* (1989) (arguing that modern economic systems have supplanted traditional moral norms). Cf. St. Thomas Aquinas, *On Fraud Committed in Buying and Selling*, in *EARLY ECONOMIC THOUGHT* 60 (Arthur Eli Monero, ed., 1930), (arguing that it is impossible for buyers and sellers not to fall into sin); James Davis, *MEDIEVAL MARKET MORALITY: LIFE, LAW AND ETHICS IN THE ENGLISH MARKETPLACE, 1200-1500* (2014).

²⁰⁵ Adam Smith, *THE WEALTH OF NATIONS*, Ch5, 540 ("The natural effort of every individual to better his own condition . . . is so powerful, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity.")

²⁰⁶ See e.g. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928); *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 162 (Wyo. 2003) ("We have said that the relationship between a lender and its customer is contractual in nature so we impose no duties higher than the morals of the marketplace").

So long as persons engaged in economic exchange should anticipate and guard against the predatory behavior of others, the harms suffered by parties due to unconscionable contracts have a diminished significance. Consider again the mortgagor who is tied to a possibly unconscionable contract that requires foreclosure despite considerable payments made towards her home. In one sense, a court's willingness to bail out the mortgagor by finding the contract procedurally or substantively unconscionable involves a willingness to help out potentially irresponsible risk-takers. One need not be a shill for the economically powerful to see that, as far as empathetic victims go, those who suffer in the market place at the hands of genuinely selfish and predatory actors are less sympathetic victims than those who have been subjected to another's unexpected negligence or malice. Outside the marketplace, it is implausible to assume that we have collectively consented to a system of social organization where parties can inflict dangerous risks to physical and mental health on one another.

This overarching theory of contractual norms delivers a prediction: if it is true that judges are in the business of enforcing convention-dependent norms rather than pre-conventional morality, we should expect to find that judicial interpretation of concepts like unconscionability might fail to jibe with people's ordinary sense of interpersonal morality. And that is indeed what we find. There is a large quantity of scholarship pointing out the wide gap between ordinary notions of what is morally unconscionable and what judges deem unconscionable.²⁰⁷ Some critics take this tension to reveal a failing on the part of courts to apply the law of contractual unconscionability correctly.²⁰⁸ But there is a way of making sense of what judges are doing that

²⁰⁷ Glasbeek, *supra* note 204, at 292; Arthur Allen Leff, *Unconscionability and the Code - The Emperor's New Clothes*, 15 U. PA. L. REV. 485 (1967); Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 583 (1992). ("Unconscionability decisions mix radical rhetoric with conservative actions"); Radin, *supra* note 82. Notably, when parties to a contract are merchants in a commercial setting, courts invoke a "presumption of conscionability." See e.g. *Xerox Corp. v. Graphic Mgmt. Servs. Inc.*, 959 F.Supp.2d 311, 320 (W.D.N.Y.2013); *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 20 (N.Y.S.2d 1983) ("[C]ontract[s] in a commercial setting [have] a presumption of conscionability.").

²⁰⁸ Price, *supra* note 83, at 744 ("Examination of the case law decided under section 2-302 will demonstrate that the matter-of-law mandate has resulted in badly-reasoned decisions on the issue of unconscionability"); M Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 250 (2013) ("[I]n cases where factors suggest unconscionability, judges still rule against unconscionability and implicitly evoke Adam Smith's laissez-faire statement: 'Every man, [so] long as he does not violate the laws of justice, is left perfectly free to pursue his own interest [in] his own way.'"); *Id.* at 250-54 (discussing cases where the authors believe courts should have found contracts unconscionable). Nancy S. Kim, WRAP CONTRACTS 72-73 88, 207-9 (2013) (critiquing courts' failure to rein in unfair contracts); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism--The Sliding Scale*

both acknowledges the authentic moral intuitions of these critics while also charitably interpreting the holdings. Judges are not in the business of enforcing pre-conventional moral standards of fairness and justice because, plausibly, these do not apply in a context where exploitative behavior is tolerated for the general good. Courts can be viewed as enforcing less familiar and less demanding standards of interpersonal fairness. The routine emphasis one finds in judicial opinions on the distinctive “morality of the marketplace” supports this view.²⁰⁹ There are other, more general features of contract law that reinforce the conventional view of contractual norms. There is, for instance, the widely-discussed tolerance in contract law of efficient breach.²¹⁰ Parties to a contract can refuse to perform their contractual obligations, in which case they are only obliged to pay expectation damages, rather than being compelled to perform. This strikes many as evidence of the law’s tolerance for promise-breaking.²¹¹ As a number of writers have argued, however, ordinary norms of promise-keeping plausibly do not apply in the contractual context.²¹² Another telling feature of contract law is the absence of punitive damages and the reluctance of judges to express moral condemnation of actors, except in contexts where a party’s conduct is tortious or criminal (as in the case of fraud).²¹³

There is ample basis, then, for the common law to treat normative questions in contract law as convention-dependent and, hence, as questions of *law* to be decided by judges. The grounds include (i) the lesser prototypical harms at stake, (ii) the essential role of non-legal conventions and judicial practice in defining what counts as “reasonable” economic behavior, and (iii) the wide-spread, legal and cultural promotion of uniquely self-interested behavior in economic exchange. At the very least, these factors render plausible an explanation in terms of our overarching framework of why the common law treats normative questions arising in the torts and criminal

Approach to Unconscionability, 44 LOY. U. CHI. L.J. 1, 4 (2012).

²⁰⁹ See e.g. sources cited *supra* note 206; Browne & Biksacky, *supra* note 208.

²¹⁰ See Robert Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); See RESTATEMENT (SECOND) OF CONTRACTS, intro. note to ch16, at 100 (1981).

²¹¹ See e.g. Melvin Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 1012-13 (2005); Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 462 (1897).

²¹² See e.g. Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VIRGINIA L. REV. 1939, 1982 (2011) (rejecting the notion that efficient breach cannot be squared with promissory morality); Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439 (2006).

²¹³ See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981); Laurence P. Simpson, *Punitive Damages for Breach of Contract*, OHIO ST. L.J. 284 (1959) (arguing that punishment has no place in commercial transactions).

context differently from those pertaining to contractual reasonableness and unconscionability. Moreover, the analysis suggests a general recipe for determining whether a type of normative question is one of law or of fact. Courts might begin by examining what typically turns on the normative question—in particular, the gravity of harms that the relevant norms aim to prevent. If the harms are less serious, courts should consider whether conventions, including law-related conventions, might have altered the normative landscape making our pre-conventional, ordinary sense of fairness and justice a poor guide to answering the normative question.

The framework provides a helpful lens from which to view other developments. Recall the decision in *Cooper Industries*, where the Supreme Court held that the appropriateness of punitive damages in a case involving unfair competition/false advertising could be reviewed *de novo* as a finding intermediate between law and fact. The Court emphasized the moral condemnation involved in punitive damages awards.²¹⁴ The dissent was keen to emphasize that moral findings are routinely treated as factual and reviewed deferentially as in negligence law.²¹⁵ What *Cooper* left unsaid is that the moral question of appropriate punishment in the context of essentially economic conduct like unfair competition can only be answered by considering the unique morals of the marketplace, which, as discussed, are shaped by conventions. This makes the moral question of appropriate punishment law-like. In other words, squaring *Cooper Industries* with the wider case law on normative questions and the law/fact distinction involves deploying the framework of convention-dependent and convention-independent normativity

D. Explaining Intertemporal Shifts: The Cases of Obscenity, Malice, and Aggravation

An aspect of the puzzle concerning normative questions was the inconsistent treatment of such questions under the law/fact distinction over time. A theory of the distinction needs to explain such changes. If the shifts are to be explained in terms of judicial error, we need a plausible account of why judges might have gotten things wrong. Alternatively, what is needed is an account of the changes in the world on which the factual or legal status of these questions has turned.

The present framework sheds important light on these changes, beginning with the case of a factual question that comes to be regarded as legal, or in-

²¹⁴ *Cooper Indus.*, 532 U.S. at 432.

²¹⁵ *Id.* at 446 (“But there can be no question that a jury’s verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings—*e.g.*, . . . whether the defendant behaved negligently, recklessly, or maliciously.”) (Ginsburg, J., dissenting).

between legal and factual. The question of whether a false statement was made with “malicious intent” or “reckless disregard for the truth” was historically a question of fact for the jury, in both criminal and civil defamation cases under English as well American common law.²¹⁶ After the decision in *New York Times v. Sullivan*—requiring a finding of actual malice before punitive damages can be awarded to public official claimants—appellate courts began reviewing the issue *de novo*. In *Bose Corp. v. Consumers Union of United States, Inc.*, the Supreme Court explicitly affirmed the widespread use of *de novo* appellate review of the “actual malice” question, noting the “vexing nature of the law/fact distinction.”²¹⁷ The Court ruled that the question of whether a false statement was made maliciously was intermediate between law and fact—“a constitutional fact”—given the important First Amendment value at stake (a finding of actual malice licenses punishment of the speech in question).²¹⁸ Multiple scholars have since pointed out that it is hard to find a principled basis for the Court’s treatment of the issue, given its disinclination to treat as constitutional facts other traditionally factual questions on which important constitutional rights hang.²¹⁹

On the present reading, the change in classification of the normative question—was the intent to publish a false statement sufficiently malicious and/or reckless to license punishment?—can be understood in terms of a cultural shift in our attitudes towards reputational harm (the kind of injury that defamation law seeks to prevent). As Robert Post writes, “defamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, *so will the nature of the reputation that the law of defamation seeks to protect.*”²²⁰ Post goes on to observe that American society has grown increasingly skeptical of the notion, popular in what he calls “deference societies,” that harm to a person’s reputation or honor is a matter of grave moral importance.²²¹ That is, reputational harm used to be conceived in terms of personal dignity and fundamental right. This dignitarian view of reputational harm—with its presuppositions regarding fundamental morality—was supplanted with an economic view, on which a person is harmed by attacks on their reputation only insofar as it prevents them from acquiring property. “Contemporary

²¹⁶ See discussion *supra* Part I.C; Bose, 466 U.S. at 517 (“In my view the problem results from the Court’s attempt to treat what is here, and in other contexts always has been, a pure question of fact, as something more than a fact—a so-called “constitutional fact.”).

²¹⁷ Bose, 466 U.S. at 501-2.

²¹⁸ *Id.* at 517.

²¹⁹ See sources cited *supra* note 110.

²²⁰ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986).

²²¹ *Id.* at 702.

Americans are uneasy with the concept of honor” but “they are intimately comfortable with the concept of property.”²²²

Why would a cultural shift from treating reputational harm as an affront to a person’s dignity to treating it as a mere economic injury help explain the changed law/fact status of the “actual malice” question? When reputational harm was viewed as very serious, it made sense for the law to draw on convention-independent moral concepts in specifying normative conditions on punishment. The question of malice was treated as *factual* (convention-independent) in light of the presumed relevance of pre-conventional moral concepts of malice and reckless disregard to the question of what ought to be punished and how much in the context of defamation. However, as the harms from malicious defamation (in the pre-conventional moral sense) come to be viewed as less serious, the relevance of pre-conventional moral norms to the question of what defamation law should punish becomes less obvious. The harm from malicious defamation begins to look increasingly susceptible to trade-off and balancing against benefits incurred from the law’s tolerating such harms to promote free speech. Accordingly, courts reasonably responded by supplanting a convention-independent normative concept of “actual malice” with a convention-dependent one (defined in part by our law-related conventions including judicial interpretation of the concept).

What was once perceived as a convention-independent normative question comes to be seen as legal convention-dependent precisely *because* of our evolving understanding of the relevant moral facts.²²³ A similar account can be given of other areas of First Amendment law where courts have employed the “constitutional fact” doctrine to treat a normative question historically regarded as factual more like a legal question. In the case of obscenity law, the questions of whether a publication is “obscene” or “patently offensive” have come to be treated as constitutional questions requiring *de novo* review despite having been historically treated as paradigmatic questions of fact for the jury that were reviewed deferentially.²²⁴ Similarly, the question of whether provocative speech is so “inherently inflammatory” as to count as “fighting words” which are likely

²²² *Id.* at 726. In the early 20th century, the moral harm of defamation weighed more heavily than First Amendment values. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (exempting defamatory speech from constitutional protection given the “social interest in order and morality”).

²²³ Unsurprisingly, we find the Court minimizing the significance of reputational harm in its rulings and continuing to interpret the “actual malice” condition on punishment in increasingly demanding ways. *See e.g.* *Post, supra* note 220, at 736-38 citing cases of judicial discomfort with the notion of reputational harm as harm to dignity; *Air Wisconsin Airlines Corp. v. Hooper*, 134 S.Ct. 852 (2014) (“[W]e have required more than mere falsity to establish actual malice: The falsity must be ‘material.’”) (citations omitted).

²²⁴ *See* discussion *supra* Part I.C.

to provoke the average person to retaliation, receives *de novo* review.

It is tempting to think that this entire area of law has been influenced by evolving societal attitudes towards the relevant sorts of harm.²²⁵ In a society that takes harms caused by obscenity very seriously, the law will take its cue from pre-conventional morality in deciding what kind of speech to prohibit or protect. However, once the harms come to be seen as less serious, it no longer makes sense for the law to closely track pre-conventional moral concepts of obscenity. Accordingly, legal actors respond by supplanting convention-independent moral concepts in First Amendment law, those based on the ordinary sense of right and wrong or basic conceptions of human dignity, with concepts that are at least in part shaped by convention (what we *find* or judge to be obscene). Note that on such a view the law's treatment over time of normative questions under the law/fact distinction far from being unprincipled is responsive to changes in our understanding of the normative truths relevant to these questions. What drives the treatment of issues under the law/fact distinction, then, is our (evolving) understanding of what is or is not morally fundamental or open to compromise—as it should be. The resulting account of transitions in law/fact classification may be one of error and correction, but, importantly, the need for such corrections stems from the complexity of the moral terrain and not from incoherence in the classificatory scheme.

Compare the present analysis of the “constitutional fact” doctrine with one that treats the importance of the constitutional values at stake as the principle grounds for the classification. The latter view falters in part because of the implausibility of viewing the constitutional values at stake as less important in areas where the Court has refused to review normative questions *de novo*, such as in the case of racial discrimination, as discussed earlier.²²⁶ There is a different angle from which to approach the doctrine, one that emphasizes the relative importance (or unimportance) of pre-conventional/fundamental morality in deciding a normative issue. That factor appears to be a key driver of the doctrine's invocation. Pre-conventional moral concepts and norms appear more relevant in cases where the Court has refused to invoke the doctrine. In discrimination cases, for instance the normative question of whether the defendant was wrongfully discriminated against is appropriately answered by appeal to pre-conventional moral

²²⁵ See Dennis Chong, *Tolerance and Social Adjustment to New Norms and Practices*, 16 POL. BEHAV. 21, 35 (1994) (noting that the Supreme Court's late 1950s decisions limiting the reach of obscenity statutes coincided with the sexual revolution); Harold T. Christensen and Christina F. Gregg, *Changing Sex Norms in America and Scandinavia*, 32 J. MARRIAGE & FAMILY 616 (1970) (noting that attitudes towards sex liberalized considerably during the 50s and 60s).

²²⁶ See discussion *supra* Part I.C.

concepts of discrimination on the basis of race and morally arbitrary features.

Let us turn to cases where what were previously questions of law come to be treated as factual questions, as in the case of normative questions in death penalty cases, like the existence of mitigating and aggravating factors.²²⁷ Is it plausible that the convention-independence of the ‘death-eligibility’ question simply escaped judges for so long? The notion that even the worst criminal offenders might have a basic dignity unsuited for a punishment as severe as the death penalty is a relatively modern one.²²⁸ More generally, fundamental moral rights are frequently overlooked; one glimpse at the long-tolerated practice of slavery is sufficient to confirm this fact.²²⁹ So long as convention-independent moral facts can be elusive, judges may incorrectly classify as questions of law some normative questions that are decisively determined by pre-conventional moral facts, like the question of whether sufficiently many aggravating factors are present in a defendant’s case to warrant consideration of the death penalty.

Our charge was either to explain based on the overarching framework how historically changing law/fact classifications were *not* the result of judicial error, or else to explain how these errors could happen. I have offered both kinds of explanation. Whether a normative question raised at trial should be classified as a question of law or fact is vexing precisely because the relevance of conventions is not always obvious. Correct application of the law/fact distinction depends on the entirely non-trivial issue of whether and to what extent legal outcomes, in various domains of law, turn on fundamental moral norms; and the boundary between fundamental morality and law can be elusive. Once this complexity is appreciated, we can no longer move so easily from the fact that judges change their minds about the law/fact status of normative questions that arise at trial to skepticism about the distinction’s analytic coherence *vis-a-vis* normative questions. It is not always easy to determine whether a normative question is convention-dependent and so legal or convention-independent and thus factual.

²²⁷ See discussion *supra* Part I.C.

²²⁸ The Court’s death penalty jurisprudence is based on the Eighth Amendment, which “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,” and in the past twelve years alone, capital punishment has been outlawed for the mentally handicapped, for minors, and for crimes other than murder and treason¹²⁹—all to bring our sentencing practices into alignment with the evolving moral standards of the citizenry. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (abolishing the death penalty for the mentally retarded); *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for individuals under the age of eighteen at the time of their capital crimes); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (abolishing the death penalty for rape where the death of the victim was neither the result nor the intent).

²²⁹ On our bad track record with ensuring fundamental rights generally, see E. G. Williams, *The Possibility of an Ongoing Moral Catastrophe*, 18 *ETHIC. THEORY & MORAL PRAC.* 971 (2015).

IV. A FRAMEWORK FOR SIXTH AMENDMENT JURISPRUDENCE: DOES THE “LIFE-TO-DEATH” JUDICIAL OVERRIDE INFRINGE ON THE JURY’S FACT-FINDING RESPONSIBILITY?

The aim of this Article so far has been descriptive—to bring to the fore a principle implicit in courts’ classification of normative issues as legal and factual. I conclude with an application of the principle to an ongoing controversy. The controversy concerns the constitutionality of the “judicial override”—a legal mechanism still used by Alabama judges to override jury life-sentences in capital trials.²³⁰ The “life-to-death” judicial override presents a constitutional puzzle that the Supreme Court has been grappling with over the last few decades, and as recently as January of 2016, when it decided, in *Hurst v. Florida*, to strike down similar override provisions in Florida’s capital sentencing scheme.²³¹ This scheme of capital sentencing seems headed for constitutional prohibition, given recent developments in the Court’s death penalty jurisprudence, not limited to its special emphasis on the jury’s fact-finding responsibility in capital trials.²³² The aim, in what follows, is to suggest that the constitutional question may turn on a proper understanding of the law/fact distinction.

A. *The Supreme Court’s Recent Death Penalty Jurisprudence and the Judicial Override*

Capital sentencing schemes across all states that have the death penalty follow the same basic structure. They require three findings before a defendant can be lawfully sentenced to death: (i) a finding of aggravating factors in the defendant’s case; (ii) a finding of mitigating factors; and (iii) a balancing of aggravating against mitigating factors based on the “weight” of each.²³³ A convicted defendant can lawfully receive the death penalty *only if* the aggravating factors are found to outweigh the mitigating factors.

²³⁰ On April 11th, 2017, Alabama governor Kay Ivey signed into law a bill banning the judicial override for defendants convicted after April 11th, but the law does not apply retroactively to defendants convicted before April 11th. S.B. 16, Reg. Sess. 2017 (Ala. 2017). Judges remain free to exercise the override for pre-April 11th murder convictions. The legislation will not affect the 183 inmates currently on Alabama’s death row. Alabama judges have overridden juries 112 times since 1976. See *Alabama Ends Death Penalty by Judicial Override*, ASSOCIATED PRESS, April 11, 2017. <https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override>.

²³¹ 136 S. Ct. 616 (2016).

²³² See discussion *infra* Part IV.A.

²³³ Modern sentencing schemes stem from the requirements outlined in *Gregg*, 428 U.S. at 153. See also Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. CRIM. L.J. 117, 153 (2004).

Aggravating factors might include multiple victims killed or injured in the course of committing the murder, prior convictions, or a lack of remorse.²³⁴ Mitigating factors may include mental impairment, childhood abuse or neglect, and remorse.²³⁵ Judicial override provisions grant authority to the trial judge to override a jury's determination of aggravating and mitigating factors' existence or weight. Prior to *Hurst*, only three states—Florida, Delaware, and Alabama—had override provisions in their capital sentencing schemes.²³⁶

In *Hurst*, decided only last year, the Court held that Florida's override scheme at the time violated the crucial holding in *Ring*,²³⁷ that in capital cases any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict must be submitted to a jury.²³⁸ The *Hurst* Court found that the existence of an aggravating factor is a "fact that exposes the defendant to a greater punishment" and so must be found by the jury.²³⁹ The jury's merely "advisory verdict" on the existence of aggravating factors was deemed not to satisfy *Ring*'s requirements.

Whereas Alabama's scheme of judicial overrides avoids the problem found in Florida's—namely, the judge's ability to independently find aggravating factors; it nevertheless empowers judges to have the final say in *weighing* the aggravating against the mitigating factors.²⁴⁰ Judges, in other words, can override the jury on the ultimate determination of whether death is the appropriate sentence. Moreover, in Alabama, the judge's overriding discretion is much less constrained than in Florida.²⁴¹ The jury's findings and recommendations need not be given any particular weight by the sentencing judge. All that the state requires is that the judge "consider" the advisory verdict.²⁴² Given this broad discretion afforded to judges, Alabama is the *only* state where judges continue to routinely override jury life sentences. Between

²³⁴ See, e.g., 18 U.S. Code § 3592.

²³⁵ *Id.*

²³⁶ See Michael Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. STATE L. REV. 793, 818 (2011) (listing overrides in Indiana); *id.* at 828 (listing overrides in Florida); *id.* at 825-827 (listing overrides in Alabama).

²³⁷ *Hurst*, 136 S. Ct. at 617.

²³⁸ *Ring*, 535 U.S. at 613.

²³⁹ *Hurst*, 136 S. Ct. at 616.

²⁴⁰ ALA. CODE §§ 13A-5-39 to -59 (2012).

²⁴¹ The Florida Supreme Court articulated, in *Tedder v. State*, what has come to be known as the "*Tedder* standard," which requires that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So. 2d 908, 910 (Fla. 1975). Nothing comparable to the *Tedder* standard constrains judges in Alabama

²⁴² See Radelet, *supra* note 236, at 809.

1981 and 2011, 93 defendants were sentenced to death after the jury recommended life imprisonment.²⁴³ Since 2000, 26 of the 27 life-to-death overrides in the United States have occurred in Alabama alone.²⁴⁴

On April 11th, 2017, Alabama governor Kay Ivey signed into law a bill banning the judicial override for defendants convicted after April 11th, but the law does not apply retroactively to defendants convicted prior to that date.²⁴⁵ Judges remain free to exercise the override for prior murder convictions. Accordingly, the legislation will not affect the 183 inmates currently on Alabama's death row and those due to be sentenced based on pre-April 11th convictions.²⁴⁶

In *Harris v. Alabama*, decided prior to *Ring*, *Apprendi*, and *Hurst*, the Supreme Court explicitly upheld Alabama's override scheme.²⁴⁷ However, there is increasing evidence that some justices are prepared to review the Court's earlier decision. While the justices recently denied cert. in a 2016 appeal that would have allowed them to reconsider the constitutionality of Alabama's override in light of *Hurst*, Justices Ginsburg and Sotomayor wrote a concurrence clarifying that the denial, in their minds, was not based on the merits of the issue but was instead due to procedural constraints in the case preventing relief.²⁴⁸ Moreover, they openly suggested that Alabama's capital sentence scheme is due a rehearing based on recent developments in the Court's capital jurisprudence on jury fact-finding.²⁴⁹ The justices noted that *Harris*, which upheld Alabama's override, was based on cases that *Hurst* overruled.²⁵⁰

E. Alabama's Judicial Override on the Weight of Aggravating & Mitigating Evidence

Can Alabama's override scheme withstand the ruling in *Hurst* requiring that "any fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict . . . must be submitted to the jury"? The issue is complicated by the fact that *Hurst* dealt specifically with the practice of judges independently finding *aggravating factors* and thus deciding the death-eligibility issue. But a determination that particular

²⁴³ *Id.* at 801-2.

²⁴⁴ *Woodward v. Alabama*, 134 S. Ct. 405, 407 (Mem) (2013) (Sotomayor, dissenting).

²⁴⁵ S.B. 16, Reg. Sess. 2017 (Ala. 2017).

²⁴⁶ *Alabama Ends Death Penalty by Judicial Override*, ASSOCIATED PRESS, April 11, 2017. <https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override>.

²⁴⁷ 513 U.S. 504 (1995)

²⁴⁸ *Brooks v. Alabama*, 136 S. Ct. 708 (Mem) (2016).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

aggravating factors exist is distinct from a finding that the aggravating factors *outweigh* the mitigating factors—or, in other words, the ultimate finding that the defendant should receive the death penalty. The critical question, then, is whether in light of *Hurst* and related cases, judges can still independently weigh the aggravating and mitigating factors and make the ultimate sentencing decision over the jury.

Justices Sotomoyor and Breyer have suggested that the answer is no—judicial determination of the ultimate sentence, whether based on the jury’s advice or not, unlawfully infringes on the jury’s power to decide questions of fact in capital cases.²⁵¹ They could not have stated their position more clearly than in their 2013 dissent from a cert. denial. The case involved an Alabama judge overriding a jury’s 8-to-4 life sentence recommendation after independently finding that the aggravating factors outweighed the mitigating factors. The justices observed that “[t]he statutorily required finding that the aggravating factors of a defendant’s crime outweigh the mitigating factors is necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.”²⁵² Whether other members of the Court agree remains to be seen, but the position requires a more detailed examination, one that I provide below.

Quite apart from the law/fact issue, there are various constitutional principles that seem to be in tension with Alabama’s sentencing scheme. The override is hard to square with the Court’s broader death penalty jurisprudence, which emphasizes, among other things, (1) the need for death sentences to enjoy broad-based communal support in order to be consistent with the Eighth Amendment,²⁵³ and (2) the need for capital sentencing procedures to guard against arbitrariness in death sentencing.²⁵⁴ Shannon Heery makes a compelling empirical case that judicial overrides make death sentencing more arbitrary than it would otherwise be in states like Alabama.²⁵⁵ Precisely because the overall case against the constitutionality of the override seems so strong, a number of commenters expect the Court to strike it down.²⁵⁶ But it is worth clarifying the rationale for doing so based on

²⁵¹ *Woodward*, 134 S. Ct. at 410-11.

²⁵² *Id.*

²⁵³ See, e.g., sources cited *supra* note 72. See also Steve Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144 n.232 (2002) (“[T]he case law as a whole indicates that communal values must play a role in capital sentencing”).

²⁵⁴ See *Gregg*, 428 U.S. at 194 (noting that “the concerns expressed in *Furman*” included that the death penalty “not be imposed in an arbitrary or capricious manner”).

²⁵⁵ *If It’s Constitutional, Then What’s the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J. L. & POL’Y 347, 348 (2010).

²⁵⁶ See, e.g., Radelet, *supra* note 236, at 817. (“Perhaps the uniqueness of the Alabama

the jury's fact-finding responsibility in light of the law/fact distinction.

F. The Weighing of Aggravating and Mitigating Factors Raises a Convention-independent ("Factual") Normative Question

Justices Sotomayor and Breyer are quite right that the ultimate determination that the aggravating factors outweigh the mitigating factors is a question of fact for the jury. But this does not simply fall out of *Hurst*'s requirement that all "facts" raising the likelihood of a severer sentence must be found by the jury. The Court emphasized in *Ring* that the scope of the Sixth Amendment jury trial right turns on the understanding of the jury's role that prevailed at the time of the Amendment's adoption.²⁵⁷ It cited approvingly the work of Welsh White, who observes that English legal scholars and the common law understanding of the distinction between legal questions and factual questions "undoubtedly influenced the framers."²⁵⁸ White cites Blackstone, who explicitly appeals to the law/fact distinction in delineating the jury's authority in civil and criminal cases.²⁵⁹ Moreover, the distinction's relevance is well-established under the Court's interpretation of the Seventh Amendment jury trial right. Jury trial rights under the Sixth and Seventh Amendments have been implemented in coordinate fashion and have been understood to serve similar societal functions.²⁶⁰ Accordingly, a "finding of fact," under *Hurst*, can reasonably be interpreted as referring to the law's traditional understanding of factual as opposed to legal questions. Under this line of reasoning, even if the capital sentencing judge's final determination that the defendant deserves the death penalty obviously "increases the likelihood of a more severe penalty," it does not violate *Hurst* unless it also represents a "finding of fact" as opposed to a "finding of law."

Whether the final determination is factual is not obvious. For one, it rests on a normative evaluation—a weighing of aggravating and mitigating factors. The final weighing of the evidence represents an "ethical judgment," and in the "final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the moral guilt of the defendant."²⁶¹ As

law and the increasing dissimilarity of its override cases to other death penalty cases will soon lead the Supreme Court to find that such overrides clearly violate evolving standards of decency and guarantee the power of the jurors to firmly reject the death penalty. Stay Tuned.").

²⁵⁷ *Ring*, 536 U.S. at 584.

²⁵⁸ *Id.* See also White, *supra* note 44, at 4-5.

²⁵⁹ White, *supra* note 44, at 3-4 ("[T]he principles and axioms of law . . . should be deposited in the breasts of the judges But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice.") (citing Blackstone).

²⁶⁰ See Kirgis, *supra* note 67, at 6-7. See also *Cooper Indus., Inc.*, 532 U.S. at 424.

²⁶¹ Spaziano, 468 U.S. at 481.

previously discussed, there are many examples of normative questions that have historically been treated as questions of *law*, as in contract law.²⁶² To consider an especially pertinent example, in *Cooper Industries*, the Court held that punitive damages findings in the context of unfair competition are intermediate between law and fact, emphasizing precisely the normative character of such findings.²⁶³ Hence, the application of *Hurst*—and the *Ring-Apprendi* line of cases on which it builds—to the life-to-death judicial override turns crucially on whether the normative evaluation that ultimately determines a death sentence is factual as opposed to legal.

To put the issue in terms of the present framework, the question is whether the normative truths pertaining to the weight of the relevant evidence are convention-dependent or convention-independent. In the case of punitive damages in the economic context, it is very plausible to think that law-related conventions have a role to play in determining whether conduct should be punished financially. It is far less plausible to think that the question of whether a criminal defendant deserves the death penalty based on the facts about his crime and his circumstance turns in any significant way on our conventions—how judges treat similarly situated defendants, for instance.²⁶⁴ Conventions cannot *favor* the imposition of the death penalty where the penalty is morally undeserved, given the gravity of the harm inflicted and the importance of protecting defendant's from undeserved execution.²⁶⁵ An affirmative answer to the death penalty question must be settled by morally weighing the particular facts in the defendant's case and considering whether the death penalty would be consistent with the fundamental rights of persons.²⁶⁶ In other words, Alabama's override scheme is inconsistent with *Hurst* because it empowers the judge, alone, to rule on a convention-independent normative question, or a question of fundamental moral fact. Once the nature of the normative question is properly understood, Sixth Amendment jurisprudence and the logic of the law/fact distinction can be seen to support the conclusion that the life-to-death judicial override unconstitutionally impinges on the jury's fact-finding responsibility in criminal trials.

The Court might find it advantageous to rely on an apolitical rule in deciding the issue, given that capital sentencing continues to be morally and politically contested. As such an apolitical rule, the common law's distinguishing of legal from factual normative questions, combined with a

²⁶² See discussion *supra* Part I.B, III.B.

²⁶³ *Cooper Indus., Inc.*, 532 U.S. at 424.

²⁶⁴ See *Gregg*, 428 U.S. at 182, and discussion *supra* Part III.A.

²⁶⁵ *Id.* at 187 (“When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.”).

²⁶⁶ See cases cited *supra* note 185, 190.

straightforward application of the Court's recent holdings, seems a powerful basis on which to eliminate the life-to-death override.

CONCLUSION

Leon Green once observed that "[n]o two terms of legal science have rendered better service than 'law' and 'fact,'" given the many uses to which they have been put, and, so, warned that "the man who could succeed in defining them would be a public enemy."²⁶⁷ Green's warning, while partly ironic, touches on a legitimate concern one might have about attempts to define legal terms and distinctions. Definitions impose constraints which, when artificial, can rob legal distinctions of the flexibility that made them useful to judges in the first place. But the importance of objective constraints on judicial discretion that can be specified *ex ante* is equally worthy of emphasis: they are essential to the rule of law.²⁶⁸ Walking the thin line between these two concerns, I have sought to offer not a full definition of 'law' and 'fact,' but an intuitive principle that can inform the classification of normative questions under the distinction. The principle should promote the integrity of law in this domain, while respecting the reality of judicial judgment.

Simply put, normative questions that essentially depend on conventions, and the practices of legal officials in particular, are aptly described as "questions of law"; normative questions that are primarily independent of such conventions are better described as questions of fact. This basic principle explains settled law/fact classifications in a broad range of legal domains, including torts, contracts, First Amendment law, and criminal procedure. It also points towards a possible solution to a looming controversy over judicial involvement in capital sentencing.

* * *

²⁶⁷ *Supra* note 9.

²⁶⁸ To quote Justice Benjamin Cardozo, "[a] jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into . . . a jurisprudence of mere sentiment." *THE NATURE OF THE JUDICIAL PROCESS* 106 (1921).