The Analytic Distinction between Questions of Fact and Questions of Law

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Abstract

The distinction between questions of fact and questions of law is a fundamental one in Anglo-American law. For example, in jury trials the distinction is presupposed because, in general, questions of fact are decided by the jury (the tribunal of fact) and questions of law by the judge. In Australian administrative law, the distinction is presupposed in distinguishing the merits of an executive decision from its lawfulness. To date, the jurisprudential problem of presenting a general, analytically precise and philosophically justified account of the questions of fact/ questions of law distinction, remains unsolved.

This paper presents a rationally justified theory of the analytic distinction between questions of fact and questions of law. As much of this debate has occurred in administrative law, the discussion to follow is primarily focussed upon administrative law. It is conjectured that if the theory presented here is satisfactory for administrative law, then it may shed light upon the use of this distinction in all other areas of law.

Questions of Fact and Questions of Law: The Problem

The distinction between questions of fact and questions of law is one of the most difficult distinctions to justify in both law and jurisprudence.[1] To date, the jurisprudential problem of presenting a general, analytically precise and philosophically justified account of the questions of fact/questions of law distinction remains unsolved.[2] Gibbs J in *Aafjes v Kearney* said: '[t]he Court is called upon to consider whether the alleged error is one of law or of fact—an enquiry of a sterile and technical kind but frequently productive of

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1 N. MacCormick, 'Editor's Preface' (1999) 18 *Law and Philosophy* 443.

2 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 196 (McHugh J).

disagreement.'[3] Kirby P in *Soulemezis v Dudley (Holdings) Pty Ltd*[4] recognised the conceptual difficulty of distinguishing between questions of fact and questions of law. French J in *Nizich v Federal Commissioner of Taxation*[5] speculated that in its 'marginal applications' it could be included in the class of what Julius Stone called 'categories of meaningless reference.'[6] Hill J even said in *obiter*, in agreement with French J, in *Federal Commissioner of Taxation v Roberts*[7] that Commonwealth parliament should amend section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), to eliminate the distinction between questions of fact and questions of law for the purposes of creating a full right of appeal on matters of both law and fact.[8] Academic lawyers have agreed that the distinction is one which is difficult to draw in an analytic way.[9]

Nonetheless, the question of fact/questions of law distinction is a fundamental one in Anglo-American law. In jury trials the distinction is presupposed by the rule that, in general, questions of fact are decided by the jury (the tribunal of fact) and questions of law by the judge. Also, at common law, a court's decision on questions of 'fact' has generally no precedential value, whereas its decisions on questions of law may have precedential value. In appellate proceedings the appellate court is permitted to control legal questions but not factual questions. The distinction between questions of fact and questions of law, and generally, between law and fact, is also presupposed in the rules of pleading in many jurisdictions in the common law world[10] as well as in the law of evidence.[11]

Australian administrative law is organised around the distinction between questions of fact and questions of law. The distinction, for one thing,

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3 *Aafjes v Kearney* (1976) 50 ALJR 454, 457 (Gibbs J).

4 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 254 (Kirby P).

5 *Nizich v Federal Commissioner of Taxation* (1991) 91 ATC 4,747, 752 (French J).

6 Ibid.

7 *Federal Commissioner of Taxation v Roberts* (1992) 108 ALR 385, 391 (Hill J).

8 Ibid.

9 L. Alexander, 'Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes' (1993) 12 *Law and Philosophy* 33; K. Vinson, 'Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula' (1996) 47 *Alabama Law Review* 723, 723–724; L. Pearson, 'Jurisdictional Fact: A Dilemma for the Courts' (2000) 17 *Environmental and Planning Law Journal* 453.

10 B. Cairns, *Australian Civil Procedure*, (5th edition, 2002) 299.

11 A. Ligertwood, *Australian Evidence: Cases and Materials* (1995) 5–82.

is presupposed in distinguishing in administrative law the merits of an executive decision from its lawfulness.[12] Justice Gummow has noted extra-judicially, that the distinction between questions of fact and questions of law is reflected in both section 5(1) (f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the *Administrative Appeals Tribunal Act 1975* (Cth) (e.g. sections 42(1), 45).[13]

The High Court of Australia has continuously recognised the need to avoid, in the judicial review of administrative decisions, the constitutional danger 'of turning a review of the reasons of the decisions-maker upon proper principles into a reconsideration of the merits of the decision'.[14] The Court has 'no jurisdiction simply to cure administrative injustice or error.'[15] Chapter III courts and the executive in Australia have different constitutional roles because of the separation of powers doctrine.[16] Administrators decide questions of fact, policy and merit—issues of *content*. Courts however are concerned with matters of law and procedure—issues of *method*. A reviewing court may be required to undertake a detailed analysis of the facts of a case in order to apply some of the provisions of say, the *Administrative Decisions (Judicial Review) Act 1977* (Cth), but the court does not have the power to make a decision on the merits of the factual position itself for the purpose of forming its own opinion.[17] For this reason the High Court has been critical of the Federal Court in a number of cases involving questions of refugee status determination, on the grounds that the Federal Court has engaged in merits review.[18] In *Minister for Immigration and Multicultural Affairs v Eshetu*, for example, Gleeson CJ and McHugh J were explicit in upholding the merits/legalities distinction stating: 'No error of law was shown [by the Federal Court]. What emerged was nothing more than a number of reasons for disagreeing with the Tribunal's view of the merits of the case. The merits were for the Tribunal to determine, not for the Federal Court.'[19]

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12 H. Katzen and R. Douglas, *Administrative Law* (1999) 9.

13 Justice W.M.C. Gummow, 'Reflections on the Current Operation of the ADJR Act' (1991) 20 *Federal Law Review* 128, 129.

14 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, 1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

15 *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35–36 (Brennan J).

16 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 260.

17 *Borkovic v Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186, 188–189.

18 See J. McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347.

19 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 629 (Gleeson CJ and McHugh J). See also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ).

However, as was observed by the High Court in *Collector of Customs v Agfa-Gevaert Ltd*,[20] although the distinction between questions of fact and questions of law 'is a vital distinction in many fields of law,' and notwithstanding 'attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.'[21]

The aim of this article is to provide a rationally justified theory of the analytic distinction between questions of fact and questions of law, primarily in administrative law. The theory may shed light upon the use of this distinction in other fields of law, such as civil procedure, although development of the theory to account for all areas of law is beyond the scope of this work. However, it is my opinion from examining the academic writing on this subject, that if this problem can be solved for administrative law, then it can also be solved for other areas of law, because administrative law is the area where this problem is most precisely defined, and where extensive academic discussions have occurred. If the problem cannot be solved in administrative law, then it cannot be solved at all.

Before outlining the argument of this work in more detail, let us turn to examine the position at Australian common law on the distinction between questions of fact and questions of law.

The Distinction between Questions of Fact and Questions of Law

In its discussion of the distinction between questions of fact and questions of law in *Collector of Customs v Agfa-Gevaert Ltd*, the High Court cited with approval Fullagar J's distinction between the *factum probandum* (the ultimate fact in issue) and the *facta probantia* (the facts adduced to prove or disprove that ultimate fact).[22] Fullagar J said in *Hayes v Federal Commissioner of Taxation* that where 'the factum probandum involves a term used in a statute, the question whether the accepted facta probantia establish that factum probandum will generally—so far as I can see, always—be a question of law.'[23] Five general propositions about questions of fact and questions of law, identified by the Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[24] were discussed by the High Court:

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20 *Collector of Customs v Agfa–Gevaert Ltd* (1996) 186 CLR 389, 394.

21 Ibid.

22 Ibid 394–395.

23 *Hayes v Federal Commissioner of Taxation* (Cth) (1956) 96 CLR 47, 51 (Fullagar J).

24 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280.

> 1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law. . .[25]
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> 2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact. . .[26]
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> 3. The meaning of a technical legal term is a question of law. . .[27]
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> 4. The effect or construction of a term whose meaning or interpretation is established is a question of law. . .[28]
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> 5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law. . .[29]

The fifth proposition was stated by Fullagar J in *Hayes v Federal Commissioner of Taxation*. The court in *Pozzolanic* held that the fifth proposition should be qualified: 'when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or not is one of fact.'[30] The High Court in *Agfa-Gevaert* doubted whether the distinction between meaning (a question of fact) and construction (a question of law) could be rationally justified because meaning and construction are interdependent: 'it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law.'[31] It was however not necessary for the Court in *Agfa-Gevaert* to resolve this issue.

It has been the custom, at least since the decision in *Bathurst*, to address the question of fact/question of law distinction in a 'semantic' rather than an 'ontological' mode, that is, in terms of questions of language rather than of being. Thus it is said that if a word in a statute is an ordinary English language word, and the meaning of the word is not affected to the contrary by the whole sentence or paragraph in which the word appears, or by the syntax of the

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25 *Brutus v Cozens* [1973] AC 854.

26 *New South Wales Associated Blue–Metal Quarries Ltd v Commissioner of Taxation, Cth* (1956) 94 CLR 509, 512.

27 *Lombardo v Commissioner of Taxation* (1979) 40 FLR 208, 215.

28 *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60, 78.

29 *Hope v Bathurst City Council* (1980) 144 CLR 1, 7 (Mason J).

30 *Collector of Customs v Agfa–Gevaert Ltd* (1996) 186 CLR 395; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 288 citing *Hope v Bathurst City Council* (1980) 144 CLR 8.

31 *Collector of Customs v Agfa–Gevaert Ltd* (1996) 186 CLR 397.

whole,[32] then this meaning is a question of fact which does not require the specialist answer of a court. This certainly seems intuitively plausible, but *why* is it so? Why not view all questions of statutory interpretation as questions of law? To answer this question returns us to our starting point, searching for a jurisprudential basis for the distinction between questions of fact and questions of law.

Some academic lawyers such as H. Wade MacLauchlin have seen the questions of fact/questions of law distinction as an 'intractable doctrinal game'[33] because of the 'indeterminacy' of the distinction.[34] It is not possible in the space available here to discuss Wade MacLauchlin's alternative proposal of 'conditional deference' in detail. Nevertheless even by way of a brief summary we can see that the question of fact/questions of law problem is not so easily evaded. Stated in its simplest form, the conditional deference model states that in judicial review the key question is whether the court or the decision-maker is in the best position to interpret and apply the statutory term in question to the facts of the case. MacLauchlan sees this process as one of 'co-operative interpretation.'[35] On the basis of conditional deference a court intervenes only when the court is in a better position to interpret and apply the statutory term than the administrative decision-maker. But when will this be so? Clearly when the court has greater interpretative competence. But when will the court in general have greater interpretative competence? Surely only when the question is one of 'law' rather than 'fact.' Whatever may be the advantages of the model of conditional deference for judicial review, a matter which is beyond the scope of this work, we cannot escape a presupposition of the questions of fact/questions of law distinction, because at some point in the analysis the question of what actually grounds conditional deference and gives the court and the decision-maker their respectively greater interpretative competences must be addressed.

Paul Craig in *Administrative Law* also recognises the difficulty in maintaining the fact/law distinction.[36] He observes that there is considerable disagreement on analytic grounds whether a question is one of fact or law, this being found in the case law as well as academic commentaries—particularly on the question of whether a question of law is always involved in applying a statutory term to facts. Craig said:

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32 *R v Brown* [1996] 1 AC 543, 561 (Lord Hoffman).

33 H. Wade MacLauchlin, 'Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 *University of Toronto Law Journal* 343, 343.

34 Ibid 371.

35 Ibid 382.

36 P.P. Craig, *Administrative Law* (4th Edition, 1999).

> What is apparent is that, in reality, the division between law and fact will, in this as in other areas, be affected by an important factor which is not susceptible to such an analytic or linguistic approach: the desire of the court to intervene or not. The very difficulty of analytically separating law from fact will allow the courts to apply the label which best fits their aim of intervention or not, as the case may be.[37]

Craig describes 'his' approach to the questions of fact/questions of law distinction as a 'functional' or 'pragmatic' approach, with these labels being applied to an issue depending upon whether the court wished to intervene or not. But the question immediately arises as to whether there is some underlying rationale behind the court's decision about whether to intervene or not. Craig assumes, without argument, that there is not. The account to be presented here of the nature of the questions of fact/ questions of law distinction, will refute Craig's 'functionalism' by showing that there is a deeper lying rationale behind the seemingly pragmatic decisions of courts about whether to intervene or not in issues of judicial review.

Some legal theorists have supposed that an analytic distinction can be drawn between questions of fact and questions of law. Christopher Enright[38] has proposed that an 'element of law is a generalisation of the facts to which it applies.'[39] In order for the law to apply, all the 'elements' of a legal rule must be satisfied and these elements are satisfied by facts which 'establish' the 'elements.' Facts are in turn proven by evidence. Enright summarises this process in the following model:

Evidence ➡	**Facts** ➡	**Law**
Evidence 1 ➡	Fact 1 ➡	Element 1
Evidence 2 ➡	Fact 2 ➡	Element 2
•	•	•
•	•	•
Evidence n ➡	Fact n ➡	Element n (n = 1, 2, 3. . .)

37 Ibid 266.

38 C. Enright, 'Distinguishing Law and Fact' in C. Finn (ed.), *Sunrise or Sunset? Administrative Law in the New Millennium* (2000) 301.

39 Ibid 305.

Consequences

The legal consequences are obtained by establishing *each* element of the legal rule; otherwise the law does not apply. The elements are established by recourse to facts. Element 1 is satisfied by establishing Fact 1, Element 2 by establishing Fact 2 and Element n by establishing Fact n. In turn Fact 1 is proved by Evidence 1, Fact 2 is proved by Evidence 2, and Fact n is proved by Evidence n.[40]

For Enright, an element of law is a generalisation of the facts to which it applies. Each element of a legal rule also designates a category of facts, as element n is a generalisation of Fact n. Enright offers another diagram (which seems to be missing some symbols) representing an element of law as a category of facts:

Facts	➡	**Categories of Facts**	=	**Law**
Fact 1		Category of Facts 1		Element 1
Fact 2		Category of Facts 2		Element 2
Fact n		Category of Facts *n*		Element *n*

The relationship of law to fact is a relationship between the general to the particular or of category to the instance of the category. Law and facts are 'labelled', but differ in their scope: 'A label on an element of law is general because it refers to all instances of the thing. A label on a fact, by contrast, is particular because it refers to just one instance of a thing.'[41] An element of law applies to a fact when each has the same 'label.' Thus one of the elements of trespass to land is that there exists land and this element is applied and satisfied if 'the facts involve a meadow, because on ordinary usage a meadow constitutes land.'[42]

Law is applied to facts by the following deductive syllogism:

(1) (Major premise, a legal rule)

Facts in category CF 1-n have legal consequences LC.

(2) (Minor premise, the facts fit the rule)

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40 Ibid 304.
41 Ibid 305.
42 Ibid 305.

> The specific facts of this case, SFC, fall within the category CF 1-n.

Therefore,

> (3) These specific facts, SFC, have the legal consequences LC.

Much could be said about Enright's approach by way of the number of items left unexplained, such as what precisely is meant by 'establishes' and what exactly a 'label' is. The model is thus somewhat obscure and it is difficult to see how it provides a practical aid to a jurist pondering about the question of whether some matter M is a question of fact or a question of law. However the fundamental problem with Enright's model is that his account of the fact/law distinction contains a vitiating logical circularity. An element of law is a generalisation of the facts to which it *applies*. But how do we *first* determine which are the facts to which the law applies? Enright maintains that the law is a generalisation of facts, much as inductivists in the philosophy of science believed that scientific theories are generalisations from observations.[43] Inductivism about scientific theories is challenged by the thesis of the theory-ladenness of observation: that there is no theory-neutral observation language. Theoretical considerations are needed in the conceptual organisation of perceptual data. For the moment it can be said by way of criticism of Enright's model that propositions of law cannot be taken to be generalisations of facts because prior legal concepts and principles are required to individuate relevant facts from the potentially infinite diversity of facts which confront us in the world.

This problem of logical circularity also bedevils the account of the distinction between questions of fact and questions of law offered by Timothy Endicott.[44] Endicott has stated that a question of application of law to fact, such as 'Was Brutus' behaviour insulting?', in the Wimbledon tennis-protest case of *Brutus v Cozens*,[45] may be regarded as a question of law in one sense, insofar as Brutus' legal position is considered, but in another sense the question may be answered by pure considerations of fact, e.g. the credibility of witnesses. Endicott proposes that a question of application is a question of law in the relevant sense when the law requires 'a particular answer,' that is by giving effect to what the law requires.[46]

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43 See R. Harré, *The Principles of Scientific Thinking* (1970).

44 T.A.O. Endicott, 'Questions of Law' (1998) 114 *Law Quarterly Review* 292.

45 *Brutus v Cozens* [1973] AC 854. Brutus disrupted a Wimbledon tennis match in 1971 in an anti–apartheid protest.

46 T.A.O. Endicott, above n 44, 317.

Endicott is concerned to address the problem of application of law to fact, rather than explicitly addressing the logically prior problem of distinguishing between questions of fact and questions of law. His concern is with the question of whether the application of law to fact is a question of fact or a question of law. His answer to this question is that a question of application is a question of law, rather than a question of fact, if the court decides that the law requires one answer to the question of application. Why this is so is not exactly clear from Endicott's account. But even given that the law requires one answer be given to a question of application for the question to be a question of law, this does not preclude situations where one answer being given to a question of application results in the question being regarded as a question of fact. For example, Brutus' behaviour as a matter of fact (by the standard of the ordinary decent person) was either insulting or it was not. Questions of fact often have one answer so Endicott's criterion does not seem to be adequate to distinguish questions of fact from questions of law regarding the question of application. Thus, even if the 'one answer' approach supplies a *necessary* condition for a question Q being a question of law, it does not supply a *sufficient* condition.

Further, even if it were the case that a question of application is a question of law when the court decides that the law requires one answer to the question of application, it seems that the very act of making such a decision involves the court in making a prior determination that the question is one of law. One answer is required Endicott says because 'the court decides that the law *requires one answer* to the question of application.'[47] The key words here are 'the law *requires*.' That one answer is required to the question of application results from the law requiring one answer. For this decision to be made a prior determination must have been made that the question is one of law, thus requiring one answer. Endicott's approach involves a logical circularity.

The State of the Argument: An Alternative Approach

We have seen that even though the distinction between questions of fact and questions of law is a vital one to many areas of law there is no universal test for distinguishing between these questions. It is not the aim of this paper to present a comprehensive account of why various past attempts to present such a universal test have failed. Nevertheless there are lessons to be learned from the failure of Enright's general presentation and Endicott's more specific focus on the problem of application.

47 Ibid 317.

Previous approaches to the problem of presenting an analytic distinction between questions of fact and questions of law assume that this problem can be adequately addressed without dealing with the prior questions of 'what is law?' and 'what is a fact.' Enright's paper is a good example of this. He states, but does not prove, that the law is a generalisation of the facts, i.e., that legal propositions are generalisations of factual propositions. The objection which was made to this is that the law is *not* a generalisation of the facts, for the reason that to determine what constitutes a relevant fact requires having prior legal concepts. To use Enright's own example, cited previously, one of the elements of trespass to land is that there exists 'land', but that a meadow constitutes land requires not recourse to 'ordinary' language usage but to legal use. If we change the material object from that of a meadow, to that of the surface of the planet Mars, or to matter near the centre of the Earth, we find that our intuitions about whether or not these phenomena are 'land' are not as clear. To address such questions requires legal concepts and theories.

The problem arising from Enright's approach is that it is impossible to approach such a fundamental issue as the presentation of an analytic distinction between questions of fact and questions of law without addressing the prior questions of 'what is law?' and 'what is a fact?' Otherwise an account will presuppose an undefended account of what law is and what facts are, and will ultimately beg the question at issue. That this is so can be shown by considering the analogous question of how one distinguishes between questions of science and questions of religion. This issue arose in the legal context in the United States legal cases where 'Creation Science' advocates argued for equal time for the Genesis account of creation alongside the theory of evolution in public schools. Is the question of the nature of the origin of the human race and the universe itself, a question of science, a question of religion—or is it both? Commonsense alone dictates that before such a question can be answered there needs to be an answer to two prior questions:

(1) What is science?

(2) What is religion?

Those who wished to exclude the Genesis account of creation from having equal time alongside the theory of evolution in public schools, argued that the Genesis account did not meet certain fundamental attributes that science had, but religion did not.[48] Whether this is the case or not need not concern us here. This example illustrates the point that in considering the rationality of fundamental distinctions in any field of inquiry, it is impossible

[48] See generally on questions of scientific demarcation: P. Kitcher, *The Advancement of Science: Science without Legend, Objectivity Without Illusions* (1993).

to avoid dealing with philosophical problems of the 'what is X?' form. If there is a reason-based distinction between 'questions of X' and 'questions of Y' this can only be because there is in reality a distinction between X and Y. That is to say, X is not Y. For if X could be Y, then 'questions of X' could be 'questions of Y.' If this were so, then the initial conjectured distinction between 'questions of X' and 'questions of Y' would collapse.

What is a question of ornithology and how would you distinguish such a question from a question in oncology? To answer this question you must first know what ornithology is (the study of birds) and what oncology is (the study of tumours). On this basis you may argue that the fields overlap in the area of tumours in birds. Without knowing what these sciences are, it would be impossible to answer the first question at all.

It is proposed that the same can be said about the issue of presenting an analytic distinction between questions of fact and questions of law. If we are to avoid the philosophical problem of begging the question at issue by simply asserting that the proposed account of the distinction is correct, then some rational grounding for the account must be given. This as a matter of logical necessity must involve a prior examination of the nature of law and the nature of fact. It is the aim of this paper to supply an analytic account of the distinction between questions of fact and questions of law in a philosophically rational way by dealing with the logically basic questions of 'what is law?' and 'what is fact?' It will be shown that a rigorous analytic distinction between questions of fact and questions of law can be given, once we have a prior understanding of the nature of law and of fact. In this way the problems of circularity of definition and question begging can be avoided.

It is true that the question 'what is law? is a *general* question, while most of the time jurists and academic lawyers are concerned only with examining *specific* laws. Such people may feel some reluctance about undertaking a journey through the epistemic jungles of jurisprudence and general philosophy in search of an answer which they feel, must lie closer to the 'surface.' However it is proposed here that given the failure of academic lawyers to present a rationally adequate account of the questions of fact/questions of law distinction, an alternative approach should be adopted of looking at this problem in greater philosophical depth. After all, we need only ask the question about some specific law S, 'why is S a law?' to be led into jurisprudential considerations. Certainly I cannot prove in advance of presenting my theory that my approach is correct. Whether the theory presented in this work is acceptable will have to be judged by its overall problem-solving capacity. But the failure of all previous approaches to the problem justifies expending the energy to conduct a 'deeper' level of analysis.

What Questions of Law Are

In the previous section an examination was conducted of a number of leading attempts to provide a rational explication of the distinction between questions of fact and questions of law. It was argued that all of these attempts were unsatisfactory, being either circular or question begging, presupposing the very distinction to be explicated. Apart from this, few of these theorists used their account to tackle some of the more difficult questions arising from the questions of fact/questions of law distinction such as the problem of the application of rules, 'the question whether a rule should be taken to cover or apply to particular facts, whether proven or uncontested, or... whether particular facts should be regarded as coming within the purview or the intendment of the rule.'[49] Even jurists who share some agreement as to which questions are questions of fact and which are questions of law, may disagree about the issue of whether a question of application is one of fact or law.[50] Any satisfactory approach to the questions of fact/questions of law problem must also be capable of dealing with 'hard problems' such as the problem of the application of rules. But to do so will require much preliminary work, including an examination of the nature of law as a rule governed enterprise.

The lesson to be learnt from the failure of the leading solutions to the questions of fact/questions of law problem, as seen above, is that it is impossible to present a satisfactory general solution to the problem of the analytic explication of the questions of fact/questions of law distinction without *first* addressing the broader questions of 'what is fact?' and 'what is law?' In this section the question 'what is law?' will be addressed for the purposes of understanding what a question of law is. Even though it may not be possible to provide a rationally justified general answer to this fundamental question of jurisprudence, sufficient information and insights into the subject may be gained to at least allow us to adequately deal with our target question of supplying an analytic distinction between questions of fact and questions of law.

The connection between the questions 'what is law?' or 'what is an allegation of law?' on the one hand, and on the other 'what is a question of law?' is conceptually intimate. In *Neptune Oil Co Pty Ltd v Fowler*[51] the Full Court of the Supreme Court of New South Wales in Banco held that an allegation in a pleading is an allegation of law if and only if the truth of the allegation depended upon an answer to a question of law. An allegation in a

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49 E. Mureinik, 'The Application of Rules: Law or Fact?" (1982) 98 *Law Quarterly Review* 587, 587.

50 Ibid 587.

51 *Neptune Oil Co Pty Ltd v Fowler* [1963] SR (NSW) 530, 537 (Ferguson, Collins and Mafarlan JJ).

pleading was said to be an allegation of fact if and only if its truth depended upon an answer to a question (or questions) of fact. Unfortunately the court did not explore what exactly questions of fact and questions of law actually were.

Nevertheless the *ratio* of *Neptune Oil* could be inverted to suggest an approach to our central problem. 'P?' is a question of law if the answer to P makes ineliminable recourse to allegations or propositions of law. 'Q?' is a question of fact if the answer to Q makes ineliminable recourse to allegations or propositions of fact.[52] Such an approach has the merits of being supported by common sense: a question of say Christian theology makes ineliminable recourse to allegations or propositions about matters in Christian theology (e.g. transubstantiation, the immaculate conception etc). A question of mathematical logic makes ineliminable recourse to allegations or propositions about matters in mathematical logic (e.g. the Löwenheim-Skolem theorem, Gödel's theorem). Such an approach, however, immediately raises the question of what is an allegation or proposition of law, a question which will now be examined.

What is Law?

Rather than see law as subsumed within politics and sociology, or ethical and political philosophy, it is proposed that law should be seen as a *sui generis* endeavour which is relatively autonomous from other branches of human enterprise such as economics, sociology and philosophy. The reason for supposing that law be viewed as *sui generis* is that other approaches to the 'what is law?' question have failed—the history of legal theory is littered with the decaying remains of such approaches. This is not to say that law does not have economic, sociological or philosophical consequences or underpinnings. Law though is to be understood, first through understanding the basic principles through which it is constituted. The reason for this is that it seems to be a matter of commonsense that to adequately understand the nature or workings of anything, the basic principles through which that entity is constituted must be understood. Thus, the working of the human body cannot be understood without physiological principles.

For illustrative purposes, let us consider the nature of private law. Charles Fried has argued that private law is comprised of three fundamental principles: the contract principle of promise enforcement, the tort principle of redressing injury and the principle of restitution.[53] These principles are themselves complex and are comprised of subprinciples, priority rules and

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52 See N.D. Belnap and T.B. Steel, *The Logic of Questions and Answers* (1976).

53 C. Fried, 'The Artificial Reason of the Law or: What Lawyers Know' (1981) 60 *Texas Law Review* 35, 38–39.

often other conflicting doctrines. The task of jurists is to articulate and develop this body of thought. In the common law tradition, this is done through addressing the problems of practical reasoning arising from deciding specific cases before the court. This legal development Fried calls the 'artificial Reason' of the law, a phrase taken from Lord Coke's famous reply to James I. James I had said that since the law was grounded upon reason, and he was a man of reason, he could decide cases just as well as judges. To this Lord Coke said:

> [True] it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England, and Causes which concern the Life, or Inheritance, of Goods, or Fortunes of his Subjects, are not to be decided by natural Reason but by artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before a Man can attain to the Cognizance of it. . . [54]

I shall return to Coke's point below in presenting my own account of what a question of law is. For the moment let us further pursue the view of law as a *sui generis* enterprise.

Even if no reductive account can (or should) be given of what constitutes the law, it does not follow that the law is ineffable. For the purposes of this work enough can be articulated about the nature of law and the judicial method to enable us to rationally draw an analytic distinction between questions of fact and questions of law.

Earlier it was said that whatever law is and whatever the judicial method may be, law is concerned with practical reasoning rather than purely philosophical, scientific or general academic speculation, as judges in applying the law *must* resolve the matters before them. Law is thus, at least in part, a method of socially institutionalised dispute resolution, but not the only method as such. Dworkin proposes that there is always a *right* way to decide a case even in 'hard cases' where there is an absence of explicit legal principles. The duty of a judge is to interpret the institutional history of the law in such a coherent way as to produce a best fit between existing community values and past law.[55] For Dworkin a statement of law is true if it coheres better with the body of established law than its negation, rather than whether it corresponds to some extra-legal reality. On this basis, Dworkin supposes that there are no undecidable cases in law and ethics in the sense that moral and legal judgments are determinately true or false in all cases. Dworkin however holds

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54 Ibid 39–40.

55 R. Dworkin, *Law's Empire* (1986).

that there is no indeterminacy or underdetermination in law, so that there is no judicial discretion. Hilary Putnam in criticism has said that the 'phenomenon of ordinary vagueness alone is already enough to ensure that statements can, in some circumstances, have no determinate truth value, and there is no reason at all to think that moral statements are, in this respect, unique.'[56] My position is that Dworkin is correct that there are no undecidable cases in law, but that Putnam is right in supposing that there are undecidable cases in ethics, as well as there being undecidable factual problems due to vagueness. However there are no undecidable questions of law, not because there is no indeterminacy or underdetermination in law – which there is - but rather because a judge is not constrained by the same high standard of reason that a philosopher is constrained by and can in hard cases make a decision based upon an intuition of what is legally correct based upon judicial discretion. In summary, all that I wish to take away from this brief mention of Dworkin's work is the idea that law does not tolerate undecidable cases even given vagueness, indeterminacy and underdetermination. It is not claimed that Dworkin's view of law as a seamless web of principles avoids the general circularity problem.

It could be argued that this view of law is in fact challenged by the thesis of the indeterminacy of law—that there is no *single* right answer to a question of law or a question of the application of law to the facts of a case.[57] But even if the law is indeterminate in this sense, it by no means follows that legal nihilism is 'true', as Christopher Kutz has persuasively argued.[58] It may well be that a legal system permits the logical derivation of more than one conclusion from a set of legally authoritative premises. That merely means that we have no certain and unique legal knowledge. It does not follow from such indeterminacy that the legal conclusions are not rationally supported by the premises so that there is no justificatory relationship between the conclusion and premises. Some of the more extreme Critical Legal Studies writers often conflate a notion of *logical underdetermination*, that there is not necessarily a single right answer to a question of law, with justificatory indeterminacy, that 'anything goes' (or even 'nothing goes') But a plurality of positions arising from legal complexity and disagreement does not show that there are indeterminate questions of law, because it does not follow from the proposition that there are multiple answers to a question, that there are hence no answers to that question.

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56 H. Putnam, 'Are Moral and Legal Values Made or Discovered?" (1995) 1 *Legal Theory* 5, 6.

57 R. Unger, 'The Critical Legal Studies Movement' (1982) 96 *Harvard Law Review* 561

58 C.L. Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' (1994) 103 *Yale Law Journal* 999.

Endicott in his excellent book, *Vagueness in Law*,[59] has argued that vagueness is an essential feature of the law and a source of judicial discretion. Given, as Putnam noted in remarks quoted above, that vagueness is a problem affecting most fields of knowledge, it is not surprising that the problem of vagueness also affects law. If vagueness is an ineliminable feature of law, then, as Endicott says, 'legal theory must conclude either that judicial discretion is (sometimes) justifiable, or that law is unjustifiable.'[60] Faced with this stark choice, it is reasonable to suppose that if vagueness is an essential feature of law, then so too is judicial discretion. The discretionary nature of law is another attribute of law which distinguishes this enterprise from other human enterprises. Again this is not to say that the discretionary nature of law is an *exclusive* characteristic of law as a human enterprise, for clearly it is not. Rather it is one characteristic, among others, which law as a human enterprise possesses, and we understand the nature of law through understanding these very basic characteristics. Law can be defined as that human enterprise having those characteristics.

For legal positivists the discretion thesis asserted that judges decide 'hard cases' by making 'new law'.[61] However if Critical Legal Studies and other theorists such as Endicott are right, judicial discretion extends beyond decisions about 'hard cases.' In many cases of interest to lawyers, that reach the higher appellate courts on matters of law, and the judgments of which appear in legal textbooks, it is usual to find dissenting judgments which are clearly reasoned and powerfully expressed. Often the position expressed in such dissenting judgments is adopted by later courts to become the law. The reason why judges can reach such divergent judgments on the same factual basis is because of the presupposition of either different legal principles used to interpret and explain the facts, or else a granting occurs of different weight, significance or value to various legal principles.[62] Thus in *Riggs v Palmer*[63] it was decided that a beneficiary who had murdered the testator would not be permitted by a court of equity to benefit from a will. The principle of succession of the binding force of a will disposing of the estate of a testator in conformity with the law would lead to the decision to uphold the title of the murderer. The majority however appealed to the more general principle of equity that no one should profit from their own inequity, which the majority

59 T.A.O. Endicott, *Vagueness in Law* (2000).

60 T.A.O. Endicott, 'Vagueness and Legal Theory' (1997) 3 *Legal Theory* 37, 63.

61 B. Hoffmaster, 'Understanding Judicial Discretion' (1982) 1 *Law and Philosophy* 21; K.E. Himma, 'Judicial Discretion and the Concept of Law' (1999) 19 *Oxford Journal of Legal Studies* 71.

62 B.N. Cardozo, *The Nature of the Judicial Process* (1921).

63 *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889). For a discussion of this case see R. Dworkin, above n 55, 15–20.

believed had a greater weight than the succession principle. The court did not demonstrate that the equity principle represented 'larger and deeper social interests'[64] by any sort of argument which would satisfy the standards of analytic philosophy. In dissent Gray J in *Riggs* argued that the court was bound by rules of law established by the legislature and as the legislature had not enacted a provision prohibiting a murderer from benefit under his/her victim's will, the murderer was being deprived of legal property by *ex post facto* law.

Riggs illustrates the operation of the principle of legal indeterminacy or underdetermination: that there need not be any single right answer to a question of law because regardless of semantic vagueness, it may be possible to view the case from the perspective of different, more 'fundamental' legal principles. There is the potential for opposing interpretations, expressed in dissenting judgments because of a difference in the weighting of values given to various legal principles.

Law is also a hermeneutic enterprise.[65] There is wide agreement about this that cuts across the conflicting schools of jurisprudence. Kelsen, from the legal positivist camp, for example, maintained that human actions in themselves do not have legal significance: the legal meaning of an act is not directly perceived by the senses.[66] Legal interpretation is a matter of viewing an act through the conceptual framework of a legal system. For Kelsen, following Kant, law has both a cognitive and prescriptive function, both ordering the way the social world is perceived and conceived, as well as constraining agents with legal norms functioning as a 'scheme of interpretation'.[67]

Interpretation is central to the practices of the law. However not all normative practices assign such a key role to interpretation. In this respect the law can be contrasted with morality. There are no 'moral sources' as such, outside of theological ethics, but legal sources are central to legal practice, for interpretation in the law is most often a matter of the interpretation of cases. Deciding the *ratio* of a case is often a matter of interpretation. Indeed, other theorists in other traditions in jurisprudence have compared law to literature in this respect.[68] Ronald Dworkin sees the law as deeply and thoroughly

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64 B.N. Cardozo, above n 62, 41.

65 C. Taylor, 'Interpretation and the Sciences of Man' (1971) 25 *Review of Metaphysics* 3.

66 H. Kelsen, *Pure Theory of Law* (1967), 'On the Theory of Interpretation' (1990) 10 *Legal Studies* 127.

67 Ibid 4.

68 See R. Dworkin, *A Matter of Principle* (1985); S. Fish, *Doing What Comes Naturally* (1989).

hermeneutical: 'legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes, but generally.'[69]

Let us sum up the argument. An attempt has been made to give a broad characterisation of some of the most fundamental qualities of law through an examination of a number of debates in contemporary jurisprudence. While there is no satisfactory general jurisprudence existing at the present time—in part due to the state of epistemic disarray of social and political theory[70]—it is still possible to establish by a type of 'default' argument some broad generalisations about law as a cognitive enterprise.

In summary: the law cannot be subsumed within politics, sociology, philosophy or ethics; it is *sui generis*, a relatively autonomous human cognitive enterprise. But the law is also a practical activity; an exercise in practical reasoning, for the law exists as a social institution to resolve disputes. Even if the law is plagued by both vagueness and indeterminacy, such that there may be 'no single right answer to a question of law', this does not mean that 'anything goes'. Rather, all that follows is that we have no certain and unique legal knowledge. Just as scientific hypotheses can be refuted, legal decisions may be overruled. Questions of law are also like questions of philosophy in this respect, being underdetermined by factual considerations. Law is also like literature in being a hermeneutic enterprise, giving central importance to interpretation. This epistemological condition results in judicial discretion being essential to legal reasoning, even if this discretion arises at a 'higher level' in the judgment of the relative weights and importance in ranking of often conflicting legal principles. Law, of course, has other characteristics which have not been mentioned here. However, the law is that social institution having *at least* these characteristics. My aim here has not been to definitively and fully answer the age-old Socratic question of 'what is law?', but rather to explore the components of an answer to this question in *enough detail* to be able to present a non-arbitrary and non-circular account of the nature of questions of law as well as to be able to analytically distinguish questions of fact from questions of law. We now turn to that task.

69 R. Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527, 527.

70 See J.W. Smith, *Reductionism and Cultural Being* (1984).

What is a Question of Law?

What then are questions of law? Let us return to the remarks made by Lord Coke in reply to James I quoted in the last section. Law may be grounded upon reason, but the practice of law requires more than the exercise of sheer reasoning capacity: it also requires legal expertise, the capacity to develop a 'feel' or 'intuition' about a matter of law, based upon legal experience. As James M. Landis has put it:

> Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide.[71]

A similar view to this was put by Lord Denning in *British Launderers' Research Association v Borough of Hendon Rating Authority*[72] where he said:

> ...[I]t is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of the thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those considerations can as well be drawn by a layman [sic] (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts . . . If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer—as, for instance, because it involves the interpretation of documents or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained

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71 J. M. Landis, 'Administrative Policies and the Courts' (1938) 47 *Yale Law Journal* 519, 535.

72 *British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 462.

> lawyer—the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.[73]

This account of the nature of law has been called the 'lawyer's perspective' by Joseph Raz.[74] The basic intuition here can be expressed as follows:

> (BI) The law has to do with those considerations that it is appropriate for courts to rely upon in justifying their decisions.

The law is that which the courts rely upon in legal arguments. But it does not follow from this that *all* of the considerations made by the courts are strictly legal considerations. Following Dworkin's theory of adjudication judges may use moral considerations in their reasoning as well as factual ones. The *sui generis* nature of law does not preclude this, anymore than it would preclude a judge from using the axioms of the calculus of probability in his/her reasonings. On the theory of the nature of law presented here, distinctive legal considerations are those considerations remaining as a residue, when moral, factual and scientific considerations are excluded from judgments, characteristically having the attribute detailed in the discussion above.

The lawyer's definition of the nature of law leaves unanalysed the concept of a *court* and a critic may object that (BI) is therefore circular. A court is simply a venue where judgments are delivered and in these days of global telecommunications it may not even be located at a single point in space and time. A court must be understood by reference to its fundamental purpose: to allow disputes to be heard and decided so that a resolution can occur. The disputes are resolved by authoritative rulings deciding the matter at hand. In turn the courts are guided by the judicial method, for example, by reference to authoritative decisions of courts which bind them by precedent or else offer persuasive judgments.[75] Although appeals may be allowed at points in the judicial system, there is no potential infinite regress of justification or adjudication as found in science, ethics and philosophy. The justification of factual matters does open up a potential infinite regress of justification, which may or may not be 'vicious.' But in the adjudication of questions of law a point will be reached where legal bed rock is reached and where a final authoritative decision is given. At this point the matter is finally resolved and the doctrines of *res judicata* and issue estoppel ensure this.

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73 Ibid, 471–472 (Lord Denning).

74 J. Raz, 'The Problem about the Nature of Law' (1983) 21 *University of Western Ontario Law Review* 203.

75 J. Levin, *How Judges Reason: The Logic of Adjudication* (1992)

This formulation of the nature of questions of law is, as Detmold has observed, still potentially question-begging: law is that which is suitable for determination by the courts, but that which is suitable for determination by the courts are precisely questions of law.[76]

However this potential circularity can be escaped. A question of law can be defined as follows:

> (QL) A question QL is a question of law if and only if an adequate answer to QL requires essential reference to legal considerations and/or legal methods.

It has been the aim of this article to characterise in broad terms the nature of legal considerations and methods, so that the above definition is not simplistically question-begging as the standard 'lawyer's perspective' on the nature of questions of law typically is. There can be an understanding of what legal considerations and methods are without a prior explicit account of questions of law. This is sufficient to avoid the charge of logical circularity. But beyond this though, the modified 'lawyer's perspective' on the nature of questions of law is capable of *operationalisation*, of setting out a practical criterion which can be used to distinguish between questions of law and questions of fact. The question to be asked is this:

> (DP) *Decision procedure for questions of law*: is the question under consideration one which requires for its resolution legal expertise, that is knowledge of the traditions, cases, rules, principles and methods of the legal system of the society?

This definition is not circular merely because the term 'legal' appears in the definition because, as will be discussed below, there is a way of identifying what legal systems are without having a prior resolution of the problem of characterising questions of law.

Alternatively a question of fact is a question which can be resolved without recourse to expert legal knowledge, by observations, (primary facts), inferences from observations, or by scientific experimentation and theoretical explanation. Thus:

> (QF) A question QF is a question of fact if an adequate answer to QF requires reference only to empirical, observational or scientific considerations

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76 M.J. Detmold, *Courts and Administrators: A Study in Jurisprudence* (1989) 80–81.

> and/or empirical, observational or scientific methodologies.

These definitions capture the meaning of the brief account of the nature of questions of fact and questions of law as outlined by Lord Denning in *British Launderers' Research Association v Borough of Hendon Rating Authority* cited previously.[77]

It has been argued by Timothy Endicott[78] that (DP) ironically also fails because it too is circular. Endicott claims that to determine what are the traditions, cases, rules, principles and methods of a legal system you would first need to know what a question of law is. But this is not so. The traditions, cases, rules, principles and methods of a legal system can be identified anthropologically, if one likes by a hypothetical 'Martian anthropologist.' These aspects of a legal system can be ascertained as anthropologists have done in studying pre-modern society's legal systems. It could, for example be found that a certain culture incorporates religious categories into its legal system. As this is something which has been ascertained by empirical inquiry, it is a mistake to suppose that our only epistemological access to the identification of the knowledge of the traditions, cases, rules, principles and methods of a legal system is through a *prior* answer to the legal question of 'what is a question of law?' Anthropologists have never proceeded in this way. The question of the identification of the nature of a particular society's legal system is a scientific and factual one, and not one decided by the legal system itself. In the case of Australia, the political process in 1901, decided through the establishment of the Commonwealth Constitution what at least part of the legal system of Australia would be, such as the existence of the High Court of Australia and the doctrine of the separation of powers. Thus part of the legal system was established and identified without any technical concern with the issue of the nature of questions of law. Consequently (DP) is not circular as Endicott suggests.

In addition, given that we have distinguished questions of law from questions of fact, it is always possible on this account to say that questions of law are just those left over after questions of fact have been identified and to then use (DP) as a *guide* for further exploration even if (DP) was circular as an *explicit definition* (which I argued it is not).

To test if our account of the nature of questions of law does have merit, we turn now to a consideration of the leading Australian case on the questions

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77 See also J.M. Landis, 'Administrative Policies and the Courts' (1938) 47 *Yale Law Journal* 519, 535–536.

78 Professor Endicott kindly reviewed this paper and made numerous helpful criticisms.

of fact/questions of law distinction to see if this theory allows an understanding and explanation of the decision—or else supplies the grounds for a cogent criticism of the theory.

The Questions of Fact/Questions of Law Distinction at Australian Common Law: The Theory Applied

Hope v Council of the City of Bathurst[79] is the leading Australian case on the questions of fact/questions of law distinction. More recent cases have tended to follow *Bathurst* without elaborating upon its principles. The challenge of *Bathurst* is to understand the leading judgment of Mason J and on the basis of a jurisprudence of the questions of fact/questions of law distinction, either defend the judgment or effectively criticise it. It will be argued here that Mason J's position is essentially correct from the perspective of the jurisprudence of fact and law presented here.

In Bathurst the appellant had owned and occupied land, a little over six hectares, for the purpose of the agistment of cattle and horses for profit and had charged agistment at a rate per head per week. Around 80 per cent of the land was used for this purpose. Section 118(1) of the Local Government Act, 1919 (NSW) defined the expression 'rural land' (to which lower municipal rates applied) to mean a parcel of rateable land valued as one assessment and exceeding 8,000 square metres in area and which was wholly or mainly used for the time being by the occupier for carrying on the business or industry of grazing or other agricultural activities. The respondent, Bathurst City Council had decided that the land, being the subject of a rate notice for 1978 was not rural land, so that the appellant was not entitled to the lower general rate for rural land.

The appellant had appealed to the Land and Valuation Court of New South Wales. The issue before the trial judge Rath J was whether the appellant's agistment operations were a 'business' under section 118(1) of the *Local Government Act, 1919* (NSW). The appeal was dismissed. At the appellant's request, Rath J stated a case pursuant to section 17 of the *Land and Valuation Court Act 1921* (NSW). The majority of the Court of Appeal (Glass and Samuels JJA, Reynolds JA dissenting) held that the trial judge's decision involved no error of law. The appellant was given special leave to appeal to the High Court of Australia.

The issue to be decided by the High Court was whether the trial judge, Rath J, had made not merely an error, but an error of law in holding that the

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79 *Hope v Council of the City of Bathurst* (1980) 144 CLR 1.

appellant's agistment operations did not constitute a 'business' under the Act. Rath J had held that the use of land was not significant enough to bring it within the scope of the common or general meaning of the word 'business.' Mason J (with whom Gibbs and Stephens JJ agreed) held that on the facts as found, it was not 'reasonably open' to conclude other than that the appellant's agistment activities constituted a 'business' under the Act.[80] Mason J stated that 'it has been common ground that 'business' is used in its ordinary meaning in S 118(1).'[81] Thus, based on persuasive lower court decisions, which were not listed in Mason J's judgment, Mason J concluded that 'business' had the ordinary or popular meaning. It followed that Rath J had indeed made an error of law in holding to the contrary. In reaching this conclusion Mason J outlined four principles distinguishing questions of fact from questions of law with respect to an administrator's application of a statutory term to the facts as found. These principles may be summarised in propositional form as follows:

> (Mason 1) . . . the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law.[82]
>
> (Mason 2) . . . special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts as found fall within these words.[83]
>
> (Mason 3) The next question must be whether the material before the court reasonably admits of different conclusions as to whether the appellant's operations fall within the ordinary meaning of the words as determined; and that is a question of law.[84]
>
> (Mason 4)If different conclusions are reasonably possible, it is necessary to decide which the correct conclusion is; and that is a question of fact.[85]

The question which now needs to be decided is whether these propositions are true and if so then *why*? It will be argued that all four propositions are true.

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80 Ibid 9.

81 Ibid 8.

82 Ibid 7.

83 Ibid 7.

84 Ibid 8.

85 See *Federal Commissioner of Taxation v Broken Hill South Limited* (1941) 65 CLR 150, 160.

Regarding Mason J's first proposition it is necessary to ask *why* is it that the question of whether facts fully found fall within the provisions of a statutory enactment which has been properly construed is a question of law? Using our decision procedure (DP) for questions of law, we need to ask whether resolution of the question in issue requires legal expertise and knowledge of legal traditions, cases, rules, principles and methods? Or can the question be adequately resolved by observation, experimentation or deduction from observational and/or experimental propositions? The question of whether facts *fully found* fall within the provisions of a properly construed statutory enactment is clearly not a question of fact as understood in this work. Rather, the question at issue is one about the conceptual organization and interpretation of facts. As was seen earlier, this type of question is one which is characteristic of law, being a matter of legal interpretation. The question thus has one of the characterising properties of a legal proposition. There is thus a presumption that the question at issue is one of law, unless it can be shown that there are overriding considerations indicating that the question is one of fact.[86] To see if this is so, we need to explore this issue in more depth.

Mason J's first proposition is one response to a problem of jurisprudence which Etienne Mureinik has called the problem of the application of rules.[87] As was stated earlier, this problem is 'whether a rule should be taken to cover or apply to particular facts, whether proven or uncontested, or, what is the same thing, whether particular facts should be regarded as coming within the purview or the intendment of the rule.'[88] Another way of looking at the problem is this: if all the facts of a matter have been fully determined, and the matters of law also fully explicated, then is there some 'third step' in applying the law to the facts that gives rise to some question of law, or is the matter one of mechanical deduction? Mureinik argues that all questions of application are questions of law. The position of this paper is that this is generally so, although there are independent considerations which show that questions of the application of 'ordinary' words are questions of fact. Rather than analyse this problem by recourse to the vague metaphor of a 'third step,' this paper will follow Mureinik's more precise formulation of the problem of application.

Mureinik's article does not explore in any depth what questions of fact and questions of law actually are, but states in passing that 'the true distinction between law and fact is that one is a question of value judgment and the other

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86 *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47, 51 (Fullagar J).

87 E. Mureinik, 'The Application of Rules: Law or Fact?" (1982) 98 *Law Quarterly Review* 587.

88 Ibid 587.

a question of perceptive or factual inferential judgment.'[89] Although, as we have seen, there are complexities associated with such a characterisation, Mureinik's position is consistent with the account of the nature of law given in this work. He then goes on to distinguish questions of fact from questions of application. Whilst questions of fact may be taken to be normative in the Kantian sense that statements of fact require a decision to select certain sense perceptions from the 'infinity' of sensory experience and to in turn interpret those perceptions, disputes about questions of fact cannot be resolved by selecting facts and subsuming them into categories. Disputes about factual issues, Mureinik maintains, can only be resolved by either challenging the truth of factual statements by other more epistemically secure factual statements, or if the questioned statements are inferences from factual statements, by questioning the validity of the inference. Disputes about application can only be resolved by either subsuming or not subsuming the facts in question under a rule. Since application disputes arise 'once all the facts of the matter have been uncovered,' disputes about the application of rules are not solved in the same way as disputes about the factual questions. Although Mureinik mentions this argument as only one in passing, from the perspective of the jurisprudence of this work, which distinguishes questions of fact from questions of law on grounds of *methodology*, much more weight can be placed on this argument than Mureinik gives it. Indeed we can conclude that questions of the application of rules are not in general questions of fact. But it is possible that questions of application are not questions of law either, but belong in a *sui generis* category.

Mureinik points out that the resolution of questions of application involves distinctive attributes of adjudication and methods of legal reasoning which are shared with questions of law, but not with questions of fact. In questions of application more than one reasonable answer can be given as to whether a particular rule applies to specific facts, for if this were not so, there would be *no question* of application, but merely the application of the rule. Consequently, a question of application cannot be resolved by the uncontroversial application of a rule to the facts because this is the very matter in issue.[90] Thus, by a process of elimination, to resolve questions of application requires recourse to methods of legal reasoning such as the invocation of legislative intent or appeal to the utility or public policy consequences of the decision, among other methods.[91] But we have defined in this work a question of law, in proposition (QL) above, to be just those questions which require essential reference to legal considerations and/or legal methods to be given an adequate answer. As questions of law and questions of

89 Ibid 600.
90 Ibid 602.
91 Ibid.

the application of rules are to be answered by the same method, then questions of the application of rules are in general, questions of law.

What then of the truth of Mason's second proposition? Mureinik holds that the question of the application of 'ordinary' words used in their 'ordinary' sense in a statutory rule is not a question of fact, but a question of law. The standard argument that this question is a question of fact is that there is a reciprocal relationship between meaning and applicability. If the meaning of a term is uncertain, the decision to apply the word removes the doubt and hence the uncertainty. But if the question is whether a statutory word applies to certain facts, then meaning will determine applicability, as the answer will depend on the meaning given to the statutory word.[92] Therefore meaning depends upon common understanding and common understanding is a question of fact, so the application of 'ordinary' words must be a question of fact.

Mureinik objects to this argument, maintaining that the application of 'ordinary' words may require the use of distinctively legal reasons and methods, with consideration of the purpose of the rule, its operation and the consequences of applying it, each playing an important part.[93] He contends that words become terms of legal art and acquire a technical legal meaning in this way. Now while that may be so, this consideration alone does not show that the application of an 'ordinary' word is the same as other types of applications. Arguing by *reductio ad absurdum*, if it were the case that the application of an 'ordinary' word did require recourse to distinctively legal reason and methods, then we would have excellent grounds for simply rejecting the initial hypothesis that the word in question was an 'ordinary' word in the first place. Contrary to our first impressions, the word would be seen to be a legal word rather than an 'ordinary' word. 'Ordinary' words are those words whose justification *can* be made solely on the basis of common public knowledge of the meaning of the words. Hence although most questions of application are questions of law, the question of the application of 'ordinary' words is a matter of fact.

So much then for our defence of Mason J's first proposition. The second proposition in Mason J's judgment qualifies the first proposition. In a statute where words are used in their ordinary sense, according to common understanding, the question can be asked as to whether the facts as found fall within the meaning of those words. Mason J cites the case of *Brutus v Cozens*[94] by way of illustration. The question to be decided was whether the appellant's behaviour by court–invasion was 'insulting.' It was held in this

92 Ibid 611.

93 Ibid 612.

94 *Brutus v Cozens* [1973] AC 854.

case not to be unreasonable to hold that his behaviour was insulting, so that the question was one of fact. This reflects a pragmatic and deferential stance towards judicial review. In the situation where the statutory term to be applied uses words according to their 'ordinary' meaning and the question at issue is whether the facts as found by the administrator fall within the meaning of those words, the courts may defer to the expertise of the administrative decision-maker—providing that the interpretation is not an unreasonable one. Thus, for example, in *Bathurst*, the word 'business' as used in section 118 (1) of the *Local Government Act, 1919* (NSW), was regarded by Mason J to be an ordinary word. The meaning of this word was to be determined as a question of fact by the trial judge Rath J, provided that the interpretation was a reasonable one. However, Mason J found, that on the facts as given, no other conclusion was reasonably open but that the appellant's activities amounted to a business.

Mason J's second proposition is explicable within the jurisprudential framework which has been constructed in this work. Indeed, the proposition illustrates the merits of the 'lawyer's perspective' on the nature of law question. It has often been cynically said that questions of law are just those questions which courts wish to review, and questions of fact are those which they do not. This is said in expression of the sentiment that the distinction between questions of fact and questions of law is essentially arbitrary and not rationally grounded at all. Yet from the perspective of the jurisprudence of this work, the cynics' view glosses over an important truth: that questions of law are indeed those questions which the court wishes to review, because questions of law are precisely those questions which it is *appropriate* for courts to review. Those questions which are appropriate for courts to review are those questions which courts have expertise in reviewing because of legal knowledge and their understanding of legal traditions, practises and methods. Mason's second proposition reflects a public policy decision as to the scope and limits of judicial review in its pragmatic and deferential approach. There is nothing problematic about this for it is in the very nature of law that law-deciding bodies, such as courts, can decide questions of the scope and limits of judicial power.

Finally, it is also correct to regard the initial question of the ascertainment of the 'ordinary' meaning or common understanding of the meaning of a word (or words) occurring in a statute, as determined by the administrator, as a question of fact. If the word(s) in question is an ordinary English word that does not have a technical legal meaning, then according to our decision procedure for questions of law (DP), there is no reason to believe that technical legal knowledge or expertise is needed to give an acceptable meaning to the word. Non-lawyers are just as capable, and in the case of lexicographers, more capable, than lawyers of such word analysis.

Mason's third proposition is that it is a question of law, that when the initial question of the ordinary understanding of the meaning of a word has been determined, the factual material before the court reasonably admits of different conclusions as to whether the facts fall within the common meaning of the word. This proposition is rightly regarded as a question of law rather than a question of fact because the question asked here is that once all relevant factual considerations have been decided, being namely the determination of the common understanding of the meaning of a word, does the material before the court permit the reasonable deduction of different conclusions about whether the appellant's operations fell within the ordinary meaning of words as determined? The question is one about the interpretation and reasonableness of legal arguments; that is, what conclusions can be deduced from legal premises. This is a paradigm question of law. Indeed, in general decisions about the reasonableness of arguments are a normative or evaluative matter rather than a factual one.[95] It is unclear what observations, experimental data or deductions from factual statements would decide such a question. Therefore it is correct to regard Mason J's third proposition as a question of law rather than of fact.

Mason J's fourth proposition is that if different conclusions are reasonably possible *after* applying the third proposition—that is as to whether the facts as determined by the administrator fall within the 'ordinary' meaning of the words as so determined—and *further* it is necessary to decide which is the correct conclusion, then that matter is a question of fact. It follows that a court would not overturn an administrator's decision on such an issue. In *Bathurst* the fourth proposition was not applied because Mason J concluded on the basis of the facts as found that the appellant's activities amounted to a business and that this conclusion was the only one reasonably possible.[96] Now it would seem at first consideration that such questions should be questions of law, applying the general argument given in the previous paragraph. However this claim is not correct. The third proposition was concerned with the matter of whether the material before the court admitted of different conclusions, and this is a matter of legal interpretation. The fourth proposition assumes that different conclusions are reasonably possible, as to whether the facts as determined by the administrative decision-maker fall within the intension of the 'ordinary' meaning of words as determined, and then considers the need to decide which the correct conclusion is. Stating that such a question is one of fact is in effect to give deference to the administrative decision-maker and to limit the scope for judicial review in this respect. The High Court in *Bathurst*,

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95 N. Rescher, *Cognitive Systematization: A Systems–Theoretic Approach to a Coherentist Theory of Knowledge* (1979).

96 *Hope v Council of the City of Bathurst* (1980) 144 CLR 1, 9.

as did previous High Courts,[97] recognised that administrative decision-makers should have a sphere of discretion to make determinations based upon the 'ordinary' meaning of words in a statute, provide that the sphere includes only reasonable decisions. *Bathurst* is a case where the primary judge did make an error of law, arriving at a conclusion which could not be reasonably supported with regard to the meaning of 'business' under the Act.

It could be argued that proposition four does raise difficulties for the account of the distinction between questions of fact and questions of law presented in this paper. It could be argued that a decision about the rightness of different reasonably possible conclusions is a normative and evaluative task—that is one making essential reference to evaluative standards—and therefore a matter of law. What empirical considerations would enable one to decide which is the correct conclusion given different reasonably possible conclusions? But this argument is fallacious: it does not follow that because the process of assessment is a normative one, that it is therefore necessarily a *legal* process using *legal* methods. Even if the assessment is not made by sensory observation, it does not follow that the domain of factual methods is exhausted. Methods of linguistic analysis practiced by analytic philosophers are one way in which a non-legal choice could be made between such different reasonably possible conclusions. As the point of analytic philosophical methods of linguistic analysis was to arrive at *truths* or *facts* about linguistic use, there is no reason why our conception of factual methods should not include the methods of linguistic analysis as well. It is therefore fallacious to suppose a decision about the rightness of different reasonably possible conclusions, even if a normative matter is therefore necessarily a question of law. Questions of fact, as understood in this work encompass all non-legal questions, including questions of linguistic analysis and the evaluation of standards.

A further virtue of our theory is that it makes sense of various accepted propositions about the judicial review of findings of fact. For example, it has been held that there is no error of law in making a wrong finding of fact. As Menzies J said in *Reg v District Court*:

> Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (i.e. illogical) inference of fact would not disclose an error of law.[98]

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97 *Federal Commissioner of Taxation v Broken Hill South Limited* (1941) 65 CLR 150, 160.

98 *Reg. v District Court; Ex parte White* (1966) 116 CLR 644, 654 (Menzies J).

In other words, as Mason CJ put it in *Bond*: 'want of logic is not synonymous with error of law',[99] unless the 'want of logic' is so unreasonable that no reasonable decision-maker acting according to law could have acted in that way.[100] Further, the want of logic does not affect the validity of an inference provided that the inference is open on the evidence.[101] As is well known, courts have taken a restrictive interpretation of 'unreasonable,' for otherwise judicial review would be transformed into merits review.[102]

Why should an illogical or unsound inference of fact be an error of fact and not of law? The reason is that if questions of fact are to be decided by empirical, observational and/or scientific considerations and methodologies, it is a logical consequence that errors of reasoning in deciding such matters must also be questions of fact. As humans are not gods, and frequently make mistakes in reasoning, especially in statistical and probabilistic reasoning,[103] errors of reasoning occurring in deciding questions of fact must be taken to be questions of fact. A decision made on the basis of, say, statistically fallacious reasoning, provided that the inference could have been made on the basis of the evidence, will be an error of fact and not of law. Case law is consistent with this view.[104] Further, the question of whether an inference from factual premises is sound by the canons of deductive or inductive logic is not generally a question of law, because deciding that question does not require recourse to legal expertise and the intellectual traditions and resources of a lawyer.

An Objection: Mixed Questions of Fact and Law

It could be objected to the account of questions of fact and questions of law presented here that the account fails because it is theoretically possible that some questions Q may involve essential reference to both factual/empirical methods and legal methods to be resolved. The question Q may have intrinsically both factual and legal characteristics. Such questions are described as 'mixed' questions of fact and law and have not been dealt

99 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356.

100 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Green MR).

101 *Australian Broadcasting Tribunal v Bond*, (1990) 170 CLR 355 (Mason CJ). Whether this proposition is law is questioned by Deane J at 367. This debate does not affect the general theoretical point made in the paper.

102 T.J.F. McEnvoy, 'New Flesh on Old Bones: Recent Developments in Jursiprudence Relating to Wednesbury Unreasonableness' (1995) 3 *Australian Journal of Administrative Law* 36.

103 See J.W. Smith, G. Lyons and G. Sauer–Thompson, *The Bankruptcy of Economics: Ecology, Economics and the Sustainability of the Earth* (1999) 29–41.

104 H. Katzen and R. Douglas, *Administrative Law* (1999) 160.

with in a systematic manner at common law.[105] Jaffe classified 'mixed' questions of fact and law as questions of law.[106] Lord Mustill in *Smith (Inspector of Taxes) v Abbott* on the issue of whether journalists read newspapers 'in the performance of their duties', said that the question was 'one of mixed fact and law which the court is entitled to review.'[107] On the other hand, Pitt has regarded the category of mixed questions of fact and law as confused and in no way helping a court in deciding whether a particular question can be appealed.[108]

It is not a telling objection to the account of our distinction between questions of fact and questions of law to point out that the distinction does not provide a decision procedure where questions intrinsically having both factual and legal characteristics are involved. In general, if there is a distinction between F and L, the existence of an x such that Fx and Lx does not show that the distinction does not exist at all. For example, it may well be that certain microscopic organisms have the essential characteristics of both plants and animals; this however does not show that the distinction between plants and animals cannot be drawn at all.

A mixed question of fact and law, having both factual and legal characteristics *can* be regarded as a question of law. A finding of fact is an assertion that some state of affairs exists or has existed in the world, independent of its legal effect. However, once an assertion of legal effect is made, the question becomes a question of law.[109] But a question which intrinsically has both factual and legal characteristics cannot be decided without recourse to both factual and legal methods. Such a question in requiring recourse to legal methods in addition to factual methods is by definition (DL) a question of law. Nevertheless, it is also possible to cogently argue that a mixed question of fact and law is also a question of fact, regardless of what account of the distinction between questions of fact and

105 C. Morris, 'Law and Fact' (1942) 55 *Harvard Law Review* 1303; R.L. Stern, 'Review of Findings of Administrators, Judges and Juries: A Comparative Analysis' (1944) 58 *Harvard Law Review* 70; R.M. Levin, 'Identifying Questions of Law in Administrative Law' (1985) 74 *Georgetown Law Journal* 1.

106 L.L. Jaffe, 'Judicial Review: Question of Fact' (1956) 69 *Harvard Law Review* 1020; 'Judicial Review: Question of Law' (1956) 69 *Harvard Law Review* 239, 239–240; 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953.

107 *Smith (Inspector of Taxes) v Abbott* [1994] 1 All ER 673, 691 (Lord Mustill).

108 G. Pitt, 'Law, Fact and Casual Workers' (1985) 101 *Law Quarterly Review* 217, 225.

109 H. Whitmore, 'O! That Way Madness Lies: Judicial Review for Error of Law' (1967) 2 *Federal Law Review* 159, 166.

questions of law is given. From the premise 'F*x* and L*x*,' we may infer both 'F*x*' and 'L*x*.'

Thus the most plausible response which can be made to the problem of mixed questions of fact and law is to say that the court has discretion in reviewing such questions. Such questions are instances of genuine indeterminacy, and in dealing with such questions an inescapable recourse to judicial discretion must be made. The court may if it chooses regard such a question as reviewable or not-reviewable, because there is no argument which decisively establishes whether such a question is one of fact or of law—for it is clearly both. As this is a problem which would face *any* account of the distinction between questions of fact and questions of law, this problem does not in itself refute the account given here. Indeed, the account given in this work explains why such a differing array of responses has been given to the problem of mixed questions of fact and law. If we begin with the assumption that there exist questions which intrinsically have both factual and legal characteristics, it should not be a surprise to find that our criterion for distinguishing between factual and legal matters cannot produce a non-arbitrary decision. This concession does not show that the proposed account of the questions of fact/questions of law distinction given here is inadequate because the account has yielded an answer to this problem consistent with the account of law given in this article.

Conclusion

This paper has attempted to supply a general, analytically precise and philosophically justified account of the questions of fact/questions of law distinction, primarily in administrative law. The distinction is a fundamental one in Anglo–American law, yet the solutions to the problem of explicating the distinction presented in the literature are inadequate. This problem has been as resistant to solution because the resolution of this problem, as has been argued in this work, involves fundamental considerations about the nature of facts and of law.

This article has presented a solution to the problem of explicating the questions of fact/questions of law distinction. The article has primarily been concerned with administrative law, where much of the debate about this issue has occurred. However, it is conjectured that the theory presented here constitutes a full, general solution to the problem in areas beyond administrative law. This issue cannot be further explored here.