2010

Fitting the Formula for Judicial Review: the Law-Fact Distinction in Immigration Law

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I. Introduction

The ill-defined *law-fact distinction* often stands as the gatekeeper to judicial review of an agency deportation order, restricting noncitizens facing deportation to raising only questions of law when appearing before an appellate court.[1] Even when courts are permitted to review factual questions, they must do so under the deferential substantial evidence standard of review.[2]

People who fear torture at the hands of government officials in their home country, for example, often cannot seek to reverse an agency deportation order when the error is one of fact.[3] The wholesale restriction of the review of facts threatens to hamstring reviewing courts from delivering justice. It shifts the focus of appellate briefing to the threshold question of whether the claim raises an issue of law, a complex question, and away from the merits of the case. Moreover, appellate courts must accept agency findings

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[1] *See* 8 U.S.C. § 1252(a)(2)(D) (2006) (ensuring jurisdiction over "constitutional claims or questions of law raised upon a petition for review," even if otherwise barred). For a list of jurisdictional bars, *see infra* notes 18 and 20.

[2] *See infra* note 16.

[3] As discussed *infra* note 44, appellate courts except the Ninth Circuit have held that applicants for relief under Article 3 of the Convention Against Torture typically fall within the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(C) (2005), which states that "[n]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an offense listed in 8 U.S.C. § 1182(a)(2) or 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), or (D) or any offense covered by 8 U.S.C. § 1227(a)(2)(A)(ii) "for which both predicate offenses are . . . otherwise covered by" 8 U.S.C. § 1227(a)(2)(A)(i). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, § 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

of fact even in the face of widespread criticisms of the quality of those decisions and the politicized nature of administrative judge appointments.[4]

The restriction on review most affects cases whose dispositions typically turn on the resolution of factual issues, including claims under Article 3 of the Convention Against Torture and claims for discretionary relief from deportation like cancellation of removal. In Convention Against Torture claims, for example, noncitizens must establish that it is more likely than not that an agent of their home country will inflict severe pain or suffering on them. These claims often involve extensive fact-finding on the part of the immigration judge regarding conditions in the applicant's home country and the applicant's personal circumstances. At the same time, these claims raise a plethora of issues that arguably are not purely factual, including such critical questions as: "Does the feared mistreatment rise to the level of torture?" "Is the mistreatment likely to happen?" "Has the judge followed the standards governing factual adjudications?" Whether or not a federal appellate court can answer these questions depends on which side of the law-fact divide they fall. Much is at stake for the noncitizens raising these claims. If their claims are factual rather than legal, the law precludes federal courts from exercising jurisdiction, leaving the agency as the final arbiter of whether or not noncitizens should be deported.

Academics, courts, and litigators have struggled with the law-fact distinction, a distinction whose murkiness is matched only by its ubiquity in the law.[5] Some have argued persuasively that there is no

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[4] Gabriel Pacyniak, *Current Development: Judicial Branch: Controversy Reemerges over Hiring, Review of Immigration Judges*, 22 GEO. IMMIGR. L.J. 805, 806 (2008); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 352-53 (2007); Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005, 2005-07 (2005); Benslimane v. Gonzales, 430 F.3d 828, 829-30 (7th Cir. 2005).

[5] Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 102 (2005); *Pullman-Standard v. Swint*, 456 U.S. at 290 (noting "[t]here is substantial authority in the Circuits on both sides of this question [of how to treat mixed questions of law and fact]."); Thompson v. Keohane, 516 U.S. 99, 110-11 (1995) (". . . the proper characterization of a question as one of fact or

ontological, epistemological, or analytical distinction between fact and law and that law, as a social construct, is simply a subspecies of fact.[6] Others disagree, arguing that there is an analytical difference between fact and law but recognizing the many difficulties of applying it.[7] Some have eschewed the notions of law and fact as binary concepts, characterizing them instead as "points of rest and relative stability on a continuum of experience."[8] More practically, many point out that the distinction may be understood as a functional way of allocating decision-making power, for example between a judge and jury, or agency and reviewing court.[9] Under this view, the

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law is sometimes slippery."); United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984) ("our jurisprudence concerning appellate review of mixed questions lacks clarity and coherence."); S & E Contractors, Inc. v. United States, 433 F.2d 1373, 1378 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972) (characterizing the concept of a mixed question as an "elusive abomination[]"); Khan v. Filip, 554 F.3d 681, 688 (7th Cir. 2009) (acknowledging that "the line between legal questions . . . and factual determinations...is occasionally difficult to draw"); *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); *see also* Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916 (1992); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 238-47 (1991).

[6] *See, e.g.*, Allen & Pardo, *supra* note 5; *see also* Friedman, *supra* note 5.

[7] Warner, *supra* note 5, at 103; *see also* Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367 (2006) (recognizing that "distinguishing law from fact is certainly no easy task" but nonetheless engaging with the distinction because it exists in immigration law).

[8] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233-37 (1985). *But see* Warner, *supra* note 5, at 108 (arguing that "it is a fallacy that mixed questions lie in the middle of a continuum with law and fact on either side" and that "[s]ome questions are simply outside the continuum."). Warner, however, limits his concept of law to a rule that "appl[ies] for all similarly situated people," a much more narrow concept of law than is assumed in this article. *Id.*

[9] Friedman, *supra* note 5, at 925; *see also* Leiderman, *supra* note 7; Tsen Lee, *supra* note 5, at 236; Warner, *supra* note 5, at 105-06. *See also* Monaghan, *supra* note 8, at 237 ("[a]t least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."). The U.S. Supreme Court has also expressed this view. *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985)

answer to whether a question is one of fact or law is the same as the answer to which decision-maker is best suited to make a particular finding or whether an issue is best reviewed under a particular standard of review.

This article does not directly engage with these important issues. I instead proceed from two, uncontroversial assumptions. First, I assume that the law-fact distinction does exist as a concept in the law, regardless of its ontological or epistemological status. We therefore must reckon with it. This article therefore takes the law-fact distinction as a given in immigration law, engaging with how it has played out in the world of immigration law litigation.[10] Second, I assume that federal appellate courts are unlikely to rule on the meaning of the law-fact distinction in immigration jurisdictional statutes on the basis of a policy decision about what decision maker is best suited for the job, making it necessary for courts and litigators to theorize about the law-fact distinction as a concept.

This article demonstrates that the basic, analytical concept of a question of law in immigration court decisions is more expansive than is typically understood. I unearth and analyze confusion in immigration case law and propose some ways for us to think more clearly about the law-fact distinction, focusing on questions that involve the application of law to facts that have already been established – questions that are commonly called mixed questions.[11]

("[p]erhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis.").

[10] In taking the law-fact distinction as a given, this article does not address the critically important questions of whether the statutory limitations on judicial review violate the Suspension Clause, Article III, or constitutional due process.

[11] *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (defining mixed question as one in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard."). *See also* Ornelas v. United States, 517 U.S. 690, 696 (1996) (characterizing as a mixed question the question of whether "historical facts . . . amount to reasonable suspicion or to probable cause"); Thompson v. Keohane, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact.'"). Some have pointed out that the label "mixed question" is unhelpful because the term has been

Part II of this article briefly traces the history of immigration judicial review, culminating with the REAL ID Act of 2005 and the jurisdictional savings clause contained in it. Part III discusses the concept of a mixed question of law and fact, offering a basic formula that captures the concept of a mixed question as a question of law. In Part IV, I discuss the extent to which courts regard particular mixed questions as legal or factual. Part V suggests a meta-rule formula for mixed questions that offers a way to identify and categorize mixed questions involving a breach of the rules of decision-making. Part VI addresses the interplay between the concepts of law-fact and discretion, as this has been a focal point of confusion. The article concludes with thoughts about how courts and litigators should proceed in their thinking about the law-fact distinction.

II. Brief History of Immigration Judicial Review

The history of judicial review over immigration began with our nation's first restrictions on immigration in the late 19th century aimed at people with criminal convictions, prostitutes, people likely to become public charges, and Asian immigrants.[12] Noncitizens could seek federal court review over deportation and exclusion orders by way of petitions for writs of habeas corpus.[13] Available to challenge the lawfulness of executive detention, habeas corpus provided the sole means for noncitizens to challenge decisions by

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defined in multiple ways. *E.g.*, Warner, *supra* note 5, 102.

[12] *See* Act of Mar. 3, 1875, ch. 141, §5, 18 Stat. 477, 477 (1875). In 1882, Congress enacted legislation excluding noncitizens expected to become public charges as well as "lunatics," and "idiots." *See* Immigrant Fund Act, ch. 376, §2, 22 Stat. 214, 214 (1882). In the same year, Congress passed the first Chinese exclusion act. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58, 58-59 (to execute certain treaty stipulations relating to Chinese).

[13] *See, e.g., In re* Jung Ah Lung, 25 F. 141 (D. Cal. 1885), *aff'd,* United States v. Jung Ah Lung, 124 U.S. 621, 635 (1888). *See also* Heikkila v. Barber, 345 U.S. 229, 234-35 ("During [the years after 1891], the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution.") (citing Fong Yue Ting v. U.S. 149 U.S. 698 (1893). *See generally* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998) (detailing a discussion of the history of federal court review over immigration decisions).

immigration officials until the Immigration and Nationality Act (INA) of 1952 made the judicial review provisions of the Administrative Procedure Act of 1946 apply to immigration cases.[14] In 1961, Congress amended the INA to include a judicial review provision that made deportation orders reviewable by petition for review in the courts of appeals and exclusion orders reviewable by habeas petition in the district courts.[15] The scope of review in both fora depended on whether the question was legal or factual, making the former subject to de novo review and the latter subject to substantial evidence review.[16]

Congress transformed the judicial review scheme in 1996 as part of a wholesale revamping of immigration law that restricted

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[14] Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955) (holding that the review provisions of the APA governed despite any suggestion in the INA of 1952 that administrative immigration decisions could not be reviewed by the federal courts).

[15] Prior to amendments in the law in 1996, there were two types of immigration court proceedings. *See* 8 U.S.C. § 1226 (1996) (proceedings based on exclusion); 8 U.S.C. § 1252 (1996) and 8 U.S.C. § 1252b (1996) (proceedings based on deportability). Individuals charged with a ground of exclusion under former 8 U.S.C. § 1182(a) (1996) were placed in exclusion proceedings under former 8 U.S.C. § 1226 (1996). Individuals charged with a ground of deportation under former 8 U.S.C. § 1251(a) (1996) were put into deportation proceedings under former 8 U.S.C. § 1252 (1996) and 8 U.S.C. § 1252b (1996). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1229a (1997) (IIRIRA) eliminated the dual track of proceedings and created unified removal proceedings. The term exclusion was replaced by inadmissibility but the grounds of inadmissibility and grounds of deportation remain as distinct grounds of removal within the INA. *Compare* INA § 212(a), 8 U.S.C. § 1182(a) (2006), *with* INA § 237(a), 8 U.S.C. § 1227(a) (2006).

[16] Under the substantial evidence standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (2006), reviewing courts may disagree with factual findings only if they are "unsupported by substantial evidence" in the record; Allentown Mack Sales and Service, Inc. v. N.L.R.B., 522 U.S. 359, 377 (1998) (interpreting this to require that no reasonable fact-finder would have made the finding); Hernandez v. Ashcroft, 345 F.3d 824, 832 (9th Cir. 2003) (holding legal questions are typically subject to de novo review but courts give deference to agency interpretations of statutes involving "interpretations of ambiguous statutory provisions intended by Congress to be left to the agency's discretion") (citing Dillingham v. INS, 267 F.3d 996, 1004 (9th Cir. 2001)); Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (holding in these cases, courts must affirm an agency's construction of a statute as long as it is permissible).

legal options for immigrants. First, the Antiterrorism and Effective Death Penalty Act (AEDPA) repealed judicial review for noncitizens determined to be deportable under most criminal grounds of removal.[17] Shortly thereafter, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the bar on review of criminal orders of removal and added additional jurisdictional bars, including bars on the review of certain types of discretionary agency determinations.[18] IIRIRA also amended the asylum statute to require that applicants file for asylum within one year of arriving in the United States unless they fall into certain exceptions.[19] Congress specified that no court has jurisdiction to review an agency determination that an applicant had failed to meet the one-year deadline.[20]

In 2001, the U.S. Supreme Court reined in Congress's apparent wide-sweeping repeal of judicial review, holding in the

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[17] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276 (1996). Section 440(a) of AEDPA stated that orders of deportation based on certain criminal grounds of deportation "shall not be subject to review by any court." The specific grounds were 8 U.S.C. §§ 1251(a)(2)(A)(iii) (1991) (aggravated felony), 1251(a)(2)(D) (miscellaneous offenses), or 1251(a)(2)(A)(ii) (crimes of moral turpitude). *Id.*

[18] Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), *amended by* 8 U.S.C. § 1252 (2005). "[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an offense listed in 8 U.S.C. § 1182(a)(2) or 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), or (D) or any offense covered by 8.U.S.C. § 1227(a)(2)(A)(ii) "for which both predicate offenses are . . . otherwise covered by" 8 U.S.C. § 1227(a)(2)(A)(i). 8 U.S.C. § 1252(a)(2)(C) (2005). Regarding discretionary decisions, 8 U.S.C. § 1252(a)(2)(B)(i)-(ii) barred review of "any judgment regarding the granting of relief under" 8 U.S.C. § 1182(h), 1182(i), 1229b, 1229c, or 1255 or "any other decision or action" when "the authority for which is specified under this subchapter to be in the discretion of the Attorney General other than the granting of [asylum]." 8 U.S.C. § 1252(a)(2)(B)(i)-(ii) (2005). The IIRIRA contained additional bars. *See* 8 U.S.C. § 1252(a)(2)(A)(i)-(iv) (2005). The Supreme Court recently held that the jurisdictional bar on certain discretionary decisions does not extend to review of motions to reopen, which are discretionary but not specified to be in the discretion of the Attorney General. Kucana v. Holder, 130 S. Ct. 827, 838 (2010).

[19] 8 U.S.C. § 1158(a)(2)(B) (2006).

[20] 8 U.S.C. § 1158(a)(3) (2006) ("[n]o court shall have jurisdiction to review any determination of the Attorney General . . . regarding the one-year deadline or its exceptions.").

seminal case *INS v. St. Cyr* that noncitizens affected by the jurisdictional bars could still file petitions for a writ of habeas corpus under 28 U.S.C. § 2241.[21] The court interpreted the jurisdictional bars as applying only to direct review in the U.S. courts of appeals, thereby avoiding the constitutional question of whether Congress would violate the Suspension Clause if it eliminated entirely both direct and habeas review.[22] In so holding, the Court found that the statutory interpretation question presented in the merits of the case fell squarely within the traditional scope of habeas review.[23] According to the Court, the traditional scope of habeas review has "encompassed detentions based on errors of law, including the erroneous *application* or interpretation of statutes."[24]

Congress responded in the REAL ID Act of 2005 by expressly repealing habeas corpus review for removal orders based on the enumerated criminal offenses or the exercise of discretion.[25] Mindful of the Supreme Court's discussion of the possible Suspension Clause problem in *St. Cyr*, Congress enacted what it characterized as a constitutionally adequate substitute mechanism for

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[21] INS v. St. Cyr, 533 U.S. 289, 297 (2001). *See also* Kucana v. Holder, 130 S. Ct. 827 (2010) (Supreme Court reaffirming its view that there is a presumption in favor of judicial review and that Congress must legislate expressly to overcome this presumption by motions to reopen are reviewable despite jurisdictional bar on review of certain discretionary determinations).

[22] U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

[23] INS v. St. Cyr, 533 U.S. 289 (2001) (deciding the issue was whether Congress in IIRIRA had retroactively eliminated a discretionary form of relief under former section 212(c) of the Immigration and Nationality Act, a discretionary form of relief from deportation).

[24] *St. Cyr*, 533 U.S. at 302 (emphasis added); s*ee also* Boumediene v. Bush, 128 S. Ct. 2229, 2266 (2008) ("[habeas corpus] entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law" (quoting *St. Cyr*, 533 U.S. at 302)) (emphasis in original); *see generally* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-41 (2006) (discussing how the REAL ID savings clause should be interpreted to include the application of law to facts to avoid constitutional concerns).

[25] REAL ID Act of 2005, 8 U.S.C. §§ 1252(a)(2)(B), (C) (Suppl. V 2006).

direct review in the courts of appeals.[26] The REAL ID Act thus amended the INA to insert a savings clause permitting most noncitizens with otherwise barred claims to obtain direct appellate court review of "constitutional claims or *questions of law*."[27] Congress intended the scope of review in the savings clause to match traditional habeas review, thereby satisfying any constitutional concern.[28] The savings clause in the REAL ID Act therefore expressly employs the concept of a question of law, restoring review over questions otherwise barred from judicial review but only in so far as the questions are legal rather than factual.

The REAL ID judicial review rules, as amended by the REAL ID Act, remain in force today. Before reviewing an immigration claim, an appellate court must therefore answer the critical threshold questions: 1) does a jurisdictional bar apply? and 2) if so, is the claim nonetheless reviewable under the REAL ID savings clause as a constitutional question or question of law? If a jurisdictional bar applies, a court can nonetheless review a claim under the REAL ID savings clause if it raises a question of law or constitutional question. This article takes as its focus the concept of "questions of law" as embodied in the REAL ID savings clause.

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[26] *See* H.R. Rep. No. 109-72, at 123 (2005) (recognizing that the Supreme Court's decision in *St. Cyr* forbids the elimination of all review). The Supreme Court in *St. Cyr* recognized that the Suspension Clause problem could be cured by allowing for a substitute that was "neither inadequate nor ineffective." *St. Cyr*, 533 U.S. at 314 n.38. *See also* Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 326-27 (2d Cir. 2006) (stating that questions of law include "the same types of issues that courts traditionally exercised in habeas review."); Kamara v. Att'y Gen., 420 F.3d 202, 210-11 (3d Cir. 2005) (stating that the REAL ID savings clause scope of review "mirrors" the traditional scope of habeas).

[27] INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006) ("Nothing . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or *questions of law* raised upon a petition for review . . . .") (emphasis added). The savings clause does not include claims barred by 8 U.S.C. § 1252(a)(2) (2006).

[28] H.R. Rep. No. 109-72, at 125 (2005) (the "purpose of [the REAL ID savings clause] is to permit judicial review over those issues that were historically reviewable on habeas."). As noted previously, the issue of whether the REAL ID savings clause has provided a constitutionally adequate alternative to habeas review is critical but beyond the scope of this article.

III. The Basic Formula of a Mixed Question

The REAL ID savings clause has planted the law-fact distinction front and center in immigration law jurisprudence. If a question is subject to a jurisdictional bar, it is only saved under the savings clause if it is a question of law. Questions of fact remain outside the savings clause. While the law-fact distinction has often governed the choice of a standard of review, it now stands as the sole gatekeeper to review over any question deemed to fall within a jurisdictional bar.

The savings clause presupposes a simple image—one that clearly delineates fact from law. The image is of two separate and discretely bounded sets of questions: one set includes constitutional questions and questions of law and another set contains questions of fact. As discussed below, however, this image of non-overlapping, insular categories of questions is far too simple and, among other things, ignores the existence of so-called mixed questions of law and fact.

A mixed question is commonly defined as involving the application of law to facts that have already been established either because they have been adjudicated or because they are not in dispute.[29] A mixed question is so termed because it involves both law and fact. Mixed questions contrast with legal questions that involve only statutory or constitutional interpretation. Mixed questions also contrast with factual questions involving the "who, what, when, and how" of historical events.[30]

A single case might easily involve all three types of questions, namely statutory, mixed, and factual. For example, an asylum case might raise the statutory legal question of how to interpret the term "persecution" in the refugee definition.[31] A factual question in the same case might be whether government agents from

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[29] *See supra* note 11.

[30] The Supreme Court has described these types of facts as "basic," "primary," or "historical." Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). *See also* Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987) (using the term "historical fact").

[31] 8 U.S.C. § 1101(a)(42) (2006) (using term "persecution" in the refugee definition).

the applicant's home country beat the applicant and threatened to kidnap her child. A mixed question would be whether the specific mistreatment suffered by the applicant meets the legal definition of persecution.

Mixed questions of law and fact may be understood abstractly as fitting a simple formula. If X denotes the legal rule at issue and A and B are the established facts, the basic mixed question formula is:

Do established facts A-B satisfy rule X?

In the asylum example above, the established facts (A and B) are that government agents beat the applicant and threatened to kidnap her child. The rule (X) is the legal definition of persecution. Plugged into the general formula, the mixed question is: Does the beating and threatened kidnapping satisfy the definition of persecution? The question involves the application of law (the definition of persecution) to facts (the mistreatment).

The obvious next question is whether mixed questions like this one fall on the law or fact side of the law-fact divide. At the very highest level of abstraction, some courts, including the U.S. Supreme Court, have stated that the application of law to fact is a question of law. As noted earlier, the U.S. Supreme Court in *INS v. St. Cyr* has stated that "errors of law" traditionally considered in habeas proceedings included review of "the erroneous *application* or interpretation of statutes."[32] The court, however, has not yet ruled on whether the application of law to fact constitutes a legal question within the meaning of the REAL ID savings clause.[33] The Second, Third, Ninth, and Eleventh Circuits, have taken up the issue, all finding that such questions are questions of law.[34] The Sixth,

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[32] INS v. St. Cyr, 533 U.S. 289, 302 (2001) (emphasis added). The U.S. Supreme Court cited with approval this part of the decision in *Boumediene v. Bush*. 128 S. Ct. 2229, 2266 (2008).

[33] The U.S. Supreme Court has denied certiorari in a case that would resolve this circuit split. *See* Khan v. Holder, No. 09-229, 2010 WL 58387, at *1 (U.S. Jan. 11, 2010).

[34] Singh v. Gonzales, 432 F.3d 533, 541 (3d Cir. 2006) (finding jurisdiction to consider "questions of law" including "application of law to undisputed fact"); Ramadan v. Gonzales, 479 F.3d 646 (9th Cir. 2007), *reh'g en banc denied*,

Seventh, and Tenth Circuits disagree, finding that the REAL ID savings clause only applies to "pure" legal claims or claims involving "statutory construction."[35] Under the approach of these courts, the only questions reviewable as questions of law are those involving the interpretation or constitutionality of a statute. The application of a statutory definition to the particular facts of a case would be considered a factual question.

Even more controversy and confusion abound when courts analyze mixed questions in actual cases. We can best understand this phenomenon by examining the variety of ways in which courts have handled questions that fit the basic formula of a mixed question. In many of these cases, the questions at issue straightforwardly fit the basic mixed question formula and thus we would expect them to be treated as legal questions. But even courts that accept mixed questions as legal nonetheless characterize the claim as an unreviewable factual question. Alternatively, courts characterize the question as a reviewable legal claim but then, without explanation, employ the substantial evidence standard of review for factual questions.

Ramadan v. Keisler, 504 F.3d 973, 973 (9th Cir. 2007) (finding reviewable mixed questions of law and fact in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard") (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)); Jean-Pierre v. Att'y Gen., 500 F.3d 1315, 1321 n.4 (11th Cir. 2007) (application of law to fact is a legal question within the ambit of review); Xiao Ji Chen v. U.S. Dep't. of Justice, 471 F.3d 315, 331 (2d Cir. 2006) (". . . the term 'questions of law' undeniably can encompass claims of 'erroneous *application* or interpretation of statutes'") (quoting *St. Cyr,* 533 U.S. at 302)).

[35] Almuhtaseb v. Gonzales, 453 F.3d 743, 748 (6th Cir. 2006). *See also* Stepanovic v. Filip, 554 F.3d 673, 678 (7th Cir. 2009) (finding "'questions of law'" to permit judicial review of only 'pure' questions of law") (citing Viracacha v. Mukasey, 518 F.3d 511, 515 (7th Cir. 2008)); Diallo v. Gonzales, 447 F.3d 1274, 1282 (10th Cir. 2006) (finding questions of law to be a narrow category involving "issues regarding statutory construction" and rejecting claim that failure to follow case law is a legal claim). These courts, however, fail to address the Supreme Court's statement in *St. Cyr* that errors of law have traditionally included the application of law to established facts. *St. Cyr,* 533 U.S. at 302.

IV. Disparate Treatment of Particular Mixed Questions

Depending on the precise issue, courts may or may not agree on the law/fact status of a mixed question. For example, courts overwhelmingly treat mixed questions as legal questions subject to de novo review if they involve the question of whether a particular type of criminal conviction falls within a given ground of deportation. Rewritten to conform to the basic formula, the mixed question is:

Does the criminal conviction satisfy the ground of removal?

Courts of appeals universally characterize this question as a question of law, involving the application of law (the removal ground) to an established fact (the criminal conviction as evidenced by the criminal documents).[36] In an apparent contradiction, the three circuits to hold that the REAL ID savings clause excludes mixed questions have characterized as legal the question of whether a particular criminal conviction triggers removal under the statute.[37]

Another example of a mixed question being treated as a question of law is whether certain types of mistreatment (the established facts) rise to the level of "torture" within the meaning of Article 3 in the Convention Against Torture (the rule).[38] Using the basic formula, the question is:

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[36] *E.g.*, Shaya v. Holder, 586 F.3d 401 (6th Cir. 2009); Kerr v. Holder, No. 08-60020, 2009 WL 3753528, at *2 (5th Cir. 2009); Lagunas-Salgado v. Holder, 584 F.3d 707 (7th Cir. 2009); Ramirez v. Mukasey, 520 F.3d 47, 48 (1st Cir. 2008); Klementanovsky v. Gonzales, 501 F.3d 788, 791 (7th Cir. 2007); Blake v. Gonzales, 481 F.3d 152, 155-56 (2d Cir. 2007); Morales-Alegria v. Gonzales, 449 F.3d 1051, 1053 (9th Cir. 2006); Vargas v. Dep't Homeland Sec., 451 F.3d 1105, 1107 (10th Cir. 2006); Smith v. Gonzales, 468 F.3d 272, 275 (5th Cir. 2006); Garcia v. Att'y Gen., 462 F.3d 287, 291-92 (3d Cir. 2006); Remoi v. Att'y Gen., 175 Fed. Appx. 580, 583 (3d Cir. 2006); Guenther v. Gonzales, 127 Fed. Appx. 786, 790 (6th Cir. 2005); Balogun v. Att'y Gen., 425 F.3d 1356, 1359-60 (11th Cir. 2005); Yousefi v. INS, 260 F.3d 318, 324 (4th Cir. 2001).

[37] *See* Klementanovsky v. Gonzales, 501 F.3d 788, 791 (7th Cir. 2007); Vargas v. Dep't Homeland Sec., 451 F.3d 1105, 1107 (10th Cir. 2006); Guenther v. Gonzales, 127 Fed. Appx. 786, 790 (6th Cir. 2005).

[38] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, § 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

Does the mistreatment satisfy the definition of torture?

The two appellate courts to rule on this precise question have characterized it as a reviewable question of law.[39] The Eleventh Circuit has explained: "Whether a particular fact pattern amounts to 'torture' requires a court to apply a legal definition to a set of undisputed or adjudicated historical facts." The court found that this "mixed question of law and fact" falls "squarely and unambiguously" within the REAL ID's savings clause.[40]

This agreement disappears, however, when we look beyond cases addressing removability for a criminal conviction and the definition of torture. Courts disagree about the law-fact status of applied legal standards involving the likelihood of something happening. For example, the legal standard for a grant of deferral of removal under Article 3 of the Convention against Torture is that the person must face a "substantial" likelihood of being tortured.[41] The question then becomes whether the likelihood of torture is reviewable as a legal question because it is a mixed question of law. The question fits the basic formula of a mixed question:

Do the established facts satisfy the rule that the applicant is substantially likely to be tortured?

Courts disagree about whether this is a question of law. The Third Circuit has held that the likelihood of torture is a reviewable legal question, characterizing the question as involving "not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that she will be subject to persecution or torture upon removal [to Haiti]."[42] The Second

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[39] Gourdet v. Holder, 587 F.3d 1, 5 (1st Cir. 2009); Jean-Pierre v. Att'y Gen., 500 F.3d 1315, 1316-17 (11th Cir. 2007).

[40] *Jean-Pierre*, 500 F.3d at 1322 (citing Cadet v. Bulger, 377 F.3d 1173, 1192 (11th Cir. 2004)).

[41] *See supra* note 38; *see also* 8 C.F.R. § 208.16(c)(4) (2000) (applicant entitled to protection if is "more likely than not to be tortured in the country of removal.").

[42] Toussaint v. Att'y Gen., 455 F.3d 409, 412 (3d Cir. 2006). The court, however, used the standard for factual question—the substantial evidence test. *See Id. See infra* notes 51-53 and accompanying text for a discussion of the apparent inconsistency between finding a question legal and then using the standard of review for factual questions.

Circuit has agreed.[43] Other courts, however, have held the likelihood of torture to be an unreviewable factual question.[44] For these courts, the probability of an applicant being tortured in the future is purely factual, involving no legal rule. In so holding, however, these courts do not explain how the substantial likelihood of torture standard fails to qualify as a legal rule. As demonstrated above, the application of the likelihood standard to the established facts of a case conforms to the basic formula of a mixed question and therefore could be treated as a question of law.

There is also a circuit split in cases involving the exceptions to the one-year filing deadline for asylum claims. As discussed in Part II, asylum applicants must establish "by clear and convincing evidence" that they have filed for asylum within one year of arriving in the United States.[45] A statutory exception exists for applicants who can demonstrate material "changed" or "extraordinary" circumstances.[46] Because the statute prohibits review of one-year

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[43] Fernandez v. Holder, No. 08-6205-ag., 2009 WL 3497757, at *1 (2d Cir. 2009) (treating as reviewable claim the issue of whether it was likely that the applicant would be subject to torture based on undisputed facts).

[44] Gourdet v. Holder, 587 F.3d 1, 5 (1st Cir. 2009) (holding that the likelihood of torture is an unreviewable factual question); Hamid v. Gonzales, 417 F.3d 642, 647 (7th Cir. 2005) (finding that it lacked jurisdiction to review how the agency "considered, interpreted, and weighed the evidence presented" to determine whether there was a likelihood of torture); Hanan v. Gonzales, 449 F.3d 834, 836-37 (8th Cir. 2006) (characterizing as "factual" the applicant's claim that the agency incorrectly concluded that he is unlikely to be tortured); Cadet v. Bulger, 377 F.3d 1173, 1192 (11th Cir. 2004) (categorizing the determination of the likelihood of torture as "administrative fact findings"); Lovan v. Holder, 574 F.3d 990, 998 (8th Cir. 2009) (finding that a challenge of the BIA's ruling on the likelihood of torture is "nothing more than a challenge to the agency's factual determinations"); Singh v. Att'y Gen., 561 F.3d 1275, 1280 (11th Cir. 2009) (noting the categorization of the determination of the likelihood of torture as "administrative fact findings"). The Ninth Circuit, however, has a different rule. It has held that factual questions in CAT cases *can* be reviewed because it narrowly interprets the bar at 8 U.S.C. § 1252(a)(2)(C) as only divesting jurisdiction over "orders of removal that are actually based on a petitioner's prior aggravated felony conviction." Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008).

[45] 8 U.S.C. § 1158(a)(2)(B) (2006).

[46] 8 U.S.C. § 1158(a)(2)(D) (2006) (requiring applicants to "demonstrat[e] to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility or extraordinary

deadline determinations,[47] courts have had to determine whether the REAL ID savings clause applies to permit review of the agency's application of the "changed" and "extraordinary" circumstances standards to established facts. Using the basic formula for a mixed question, the question can be rephrased as:

Do the established facts satisfy either the "changed" or "extraordinary" circumstances exceptions to the one-year asylum deadline?

Although the question conforms to the mixed question formula, the Ninth Circuit is the only circuit to have ruled that the application of one-year deadline exceptions is reviewable as a question of law.[48] The Second Circuit has taken an intermediate, case-by-case approach.[49] All other circuits have ruled that the

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circumstances relating to the delay in filing an application" within the one-year deadline).

[47] 8 U.S.C. § 1158(a)(3) (2006) ("[n]o court shall have jurisdiction to review any determination of the Attorney General . . . regarding the one-year deadline or its exceptions.").

[48] Ramadan v. Gonzales, 479 F.3d 646, 650 (9th Cir. 2007). Initially, the Ninth Circuit had held that it lacked jurisdiction over the question, finding that the question was "predominantly factual" and therefore outside the REAL ID savings clause. The court subsequently withdrew this decision and issued a new one reversing its jurisdictional holding. *See* Ramadan v. Gonzales, 427 F.3d 1218, 1221-22 (9th Cir. 2005), *opinion vacated and reissued*, 479 F.3d 646, 650 (9th Cir. 2007). The Ninth Circuit has begun to apply the exceptions to the one-year deadlines in actual cases. *See* Toj-Culpatan v. Holder, No. 05-72179, 2009 WL 4256449, at *2 (9th Cir. 2009) (the court cataloged the undisputed facts and then applied the relevant standard, as illuminated by case law). The court has refused to review the agency's one-year deadline decision when facts have been in dispute. *See* Sillah v. Mukasey, 519 F.3d 1042, 1043-44 (9th Cir. 2008) (per curiam). *But see* Seesay v. Holder, No. 07-75035, 2009 WL 3287619, at *1 (9th Cir. 2009) (dissent points out that entry date was disputed and that therefore there should have been no jurisdiction).

[49] In Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 329-30 (2d Cir. 2006), the court recognized that the term "questions of law" within the meaning of the REAL ID savings clause includes claims that raise issues involving the application of law to fact, including in the asylum one-year deadline context. The court stated that "[t]he mere use of the term 'erroneous application' of a statute will not, however, convert a quarrel over an exercise of discretion into a question of law." *Id.* at 331. The court's approach is to "look to the nature of the argument being advanced in the petition" to see if the petitioner's challenge is "merely an objection to the IJ's factual findings and the balancing of factors in which

application of the one-year deadline exceptions to established facts falls outside the REAL ID savings clause as an unreviewable question of fact.[50]

The Ninth Circuit's approach finds support in the basic formula of a mixed question. As discussed above, the question of whether established facts qualify as either "changed" or "extraordinary" circumstances fits the basic formula of the application of law to fact. One caveat regarding the court's analysis, however, is that the court indicated the result would have been different if it had ruled that the one-year deadline determination was discretionary. As discussed in Part V, courts often equate discretionary determinations with factual ones, even though they are analytically distinct.

Adding to the confusion surrounding the treatment of mixed questions, the Ninth Circuit categorized the one-year deadline question as a reviewable *legal* question but then have proceeded in a seemingly contradictory fashion to apply the substantial evidence test, the standard for *factual* questions.[51] After finding that

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discretion was exercised." *Id.* at 332.

[50] Hana v. Gonzales, 503 F.3d 39, 42 (lst Cir. 2007); Sukwanputra v. Gonzales, 434 F.3d 627, 635 (3d Cir. 2006); Gomis v. Holder, 571 F.3d 353, 355 (4th Cir. 2009), *cert. denied,* No. 09-194, 2010 WL 58386, at *1 (U.S. Jan. 11, 2010); Niang v. Gonzales, 492 F.3d 505, 510 (4th Cir. 2007); Zhu v. Gonzales, 493 F.3d 588, 595-96 (5th Cir. 2007); Almuhtaseb v. Gonzales, 453 F.3d 743, 748 (6th Cir. 2006); Vasile v. Gonzales, 417 F.3d 766, 768 (7th Cir. 2005); Ignatova v. Gonzales, 430 F.3d 1209, 1214 (8th Cir. 2005); Ferry v. Gonzales, 457 F.3d 1117, 1130 (10th Cir. 2006); Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954, 957 (11th Cir. 2005) (per curiam). The U.S. Supreme Court has denied certiorari in a case that would resolve this circuit split. Khan v. Holder, No. 09-229, 2010 WL 58387, at *1 (U.S. Jan.11, 2010). As is discussed in detail in Part V, courts have nonetheless ruled on legal issues raised in the context of the one-year deadline. *E.g.*, Shi Jie Ge v. Holder, 588 F.3d 90 (2d Cir. 2009) (court found reviewable legal claim in one year deadline case, agency misapplied the "changed circumstances exception" to the filing deadline, misapplied the plain terms of the regulation, focused exclusively on the date of his enrollment as a member of the CDP and ignored regulation which defines changed circumstances far more broadly).

[51] *See supra* note 16 for an explanation of these standards. *See also* Dhital v. Mukasey, 532 F.3d 1044, 1050 (9th Cir. 2008) (employing "substantial evidence" standard to find that established facts had not met the "extraordinary circumstances" standard for forgiving late-filed asylum application); Husyev v.

application of the "changed circumstances" standard was a reviewable legal question, the court without explanation used the standard for factual questions to hold that "the record does not compel the conclusion that [the petitioner] has shown 'changed circumstances.'"[52] Other courts have also pigeonholed a question as legal but then reviewed it under the substantial evidence test.[53]

In sum, courts vary widely in their treatment of specific mixed questions in immigration law. Often the law-fact distinction is under-theorized. Courts that have supplied the most explanation have acted inconsistently with their conclusions by applying the standard of review for facts to questions they have determined to be legal.

V. The Meta-Rule Formula For Mixed Questions

The discussion above addresses the basic formula for a mixed question: *Do established facts A-B satisfy rule X?* This section analyzes a particular type of mixed question, namely claims in which the litigant alleges that the agency has breached the rules governing fair decision-making—what I will call meta-rules. The key idea is that, in making a particular determination, an adjudicator must follow a certain rule governing decision-making. A reviewing court looks at the administrative record and decision (the established facts A-B) to determine whether the adjudicator followed the rule of decision-making (rule X).

For example, a court reviewing a case under the Convention

Mukasey, 528 F.3d 1172, 1178-79 (9th Cir. 2008) (holding the same with respect to the "extraordinary circumstances" exception).

[52] *Ramadan*, 479 F.3d at 657.

[53] *E.g.*, Khan v. Holder, 584 F.3d 773 (9th Cir. 2009) (finding reviewable under the REAL ID savings clause as a legal question the issue of whether a group to which an applicant belonged was a "terrorist organization" within the meaning of the bar to asylum eligibility but employing the substantial evidence test). The U.S. Supreme Court has noted this confusion concerning the standard of review for questions involving the application of law to established facts. *See* Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982). The issue of whether the substantial evidence test should be used as the standard of review for mixed questions deemed legal rather than factual is important but beyond the scope of this article.

Against Torture might ask whether the immigration judge considered all relevant evidence when determining that the applicant was not previously harmed by government officials in his home country. In a case involving discretionary relief from deportation, a reviewing court could ask whether the immigration judge employed the correct legal standard. The meta-rule formula for a mixed question can be stated in general form as:

Based on the established facts A-B in the administrative record and decision, did the judge violate rule X regarding how determinations should be made?

Courts routinely review meta-rule violations as questions of law, although they typically do not identify these questions as involving the application of a rule (the rule of decision making) to established facts (the administrative record and decision).[54]

Examples of meta-rules are that adjudicators must consider relevant evidence in the record;[55] consider and rule on all claims

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[54] For example, the Seventh Circuit has provided the following explanation of what it considers to be a legal challenge involving a breach of the rules of decision-making:

> [A]ll the court can decide is whether the Board committed an error of law. That will usually be a misinterpretation of a statute, regulation, or constitutional provision. But it could also be a misreading of the Board's own precedent, or the Board's use of the wrong legal standard, or simply a failure to exercise discretion or to consider factors acknowledged to be material to such an exercise.

Huang v. Mukasey, 534 F.3d 618, 620 (7th Cir. 2008) (citations omitted).

[55] Shatku v. Holder, 331 Fed. Appx. 29, 30 (2d Cir. 2009) (despite jurisdictional bar over questions concerning timeliness of asylum application, court had jurisdiction over whether "it was legal error for the agency to fail to consider all evidence of probative value") (citing Jin Shui Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003)), *overruled in part on other grounds by* Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 305 (2d Cir. 2007) (en banc); Hanan v. Mukasey, 519 F.3d 760, 764 (8th Cir. 2008) ("Because an allegation of wholesale failure to consider evidence implicates due process, we have jurisdiction to review this constitutional question") (citing Tun v. Gonzalez, 485 F.3d 1014, 1025 (8th Cir. 2007)).

raised;[56] state the reasons for their decisions so that appellate courts can engage in meaningful review;[57] make logical decisions;[58] apply the correct legal standard to the facts;[59] not rely on facts clearly

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[56] *E.g.,* Abdulai v. Ashcroft, 239 F.3d 542, 545 (3d Cir. 2001) (an IJ "must actually consider the evidence and argument that a party presents") (citing Rhoa-Zamora v. INS, 971 F.2d 26, 34 (7th Cir. 1992)); Toussaint v. Att'y Gen., 455 F.3d 409, 417 (3d Cir. 2006) (must consider separate claims raised).

[57] *E.g.,* Awolesi v. Ashcroft, 341 F.3d 227, 232 (3d Cir. 2003) ("[i]n order for us to be able to give meaningful review to [a BIA] decision, we must have some insight into its reasoning."); Dakaj v. Holder, 580 F.3d 479 (7th Cir. 2009) (agency must articulate a reason, even in discretionary determinations); Jean-Pierre v. Att'y Gen., 500 F.3d 1315 (11th Cir. 2007) (citing Lavira v. Att'y Gen., 478 F.3d 158, 164 (3d Cir. 2007) ("holding, in a case involving an HIV-positive criminal alien who claimed that he would be singled out for torture if returned to Haiti, that a 'decision that flatly ignores the grounds presented by the petitioner fails to furnish the Court of Appeals with the basis for its particular decision, and as such any meaningful review is not possible'"); *see also, e.g.,* Tan v. Att'y Gen., 446 F.3d 1369, 1375-77 (11th Cir. 2006) (granting a petition for review of an application for withholding of removal when the absence of a reasoned decision and adequate factual findings left the court unable to review the claim); Mezvrishvili v. Att'y Gen., 467 F.3d 1292, 1297 (11th Cir. 2006) (per curiam) (same result in an asylum case); Enwonwu v. Gonzales, 438 F.3d 22, 35 (1st Cir. 2006) (remanding a CAT determination to the BIA because it was "insufficiently reasoned as a matter of law"); Antipova v. Att'y Gen., 392 F.3d 1259, 1265 (11th Cir. 2004) (remanding a petition for asylum to the BIA because the court could not "undertak[e] meaningful judicial review of the merits.").

[58] *E.g.,* Larngar v. Holder, 562 F.3d 71 (1st Cir. 2009) (motion to reopen case remanded to agency where flaw in logic constituted legal error regarding whether the applicant was claiming a changed in country conditions or a change in personal circumstances).

[59] *E.g.,* Tariq v. Keisler, 505 F.3d 650, 656 (7th Cir. 2007) (jurisdiction to consider whether agency correctly required "exceptional circumstances" standard instead of "extraordinary circumstances" standard); Orellana-Gutierrez v. Mukasey, 272 F. App'x 59 (2d Cir. 2008) (reviewable question of law whether the agency failed to consider certain relatives qualifying relatives for the purpose of discretionary relief); Veloso v. Mukasey, 258 F. App'x 967 (9th Cir. 2007) (jurisdiction to review as a question of law whether the BIA committed legal error by requiring corroborating evidence of his medical condition); Mireles v. Gonzales, 433 F.3d 965 (7th Cir. 2006) (legal error in understanding of "exceptional and extremely unusual hardship" standard); Shi Jie Ge v. Holder, 588 F.3d 90 (2d Cir. 2009) (legal error where agency failed to "properly app[ly]" precedent regarding what counts as sufficient evidence in an asylum case); Ignatova v. Gonzales, 430 F.3d 1209 (8th Cir. 2005) (finding jurisdiction to consider the legal standard for a good faith marriage and to determine whether the credited evidence meets that standard). *But see* Diallo v. Gonzales, 447 F.3d 1274,

contradicted by the record;[60] rely only on facts in the record;[61] defer to the fact-finding of immigration judges;[62] be a neutral decisionmaker;[63] not engage in additional fact-finding when case is on appeal;[64] state rational justifications for decisions;[65] not mischaracterize evidence;[66] and provide a fundamentally fair hearing.[67] This list is not exhaustive.[68] Courts have also found

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1282 (10th Cir. 2006) (finding questions of law to be a narrow category involving "issues regarding statutory construction" and rejecting claim that failure to follow case law is a legal claim).

[60] *E.g*, Liu v. INS, 508 F.3d 716, 722 (2d Cir. 2007) (review over discretionary determination where legal error of "unambiguous mischaracterizations" of the record); Sillah v. Holder, 333 Fed. Appx. 209, 211 (9th Cir. 2009) (finding REAL ID savings clause includes "legal question of whether the IJ properly applied the evidentiary standard" and correct evidentiary standard not applied because factual finding was clearly contradicted by the record).

[61] *E.g.*, Shahinaj v. Gonzales, 481 F.3d 1027, 1028 (8th Cir. 2007) (judge impermissibly relied on personal opinion that the applicant "did not dress or speak like or exhibit the mannerisms of a homosexual . . .")

[62] *E.g.*, Guzman v. Holder, 568 F.3d 61 (2d Cir. 2009) (reversible legal error when BIA fails to defer to IJ fact finding).

[63] *E.g.*, Ali v. Mukasey, 529 F.3d 478 (2d Cir. 2008) (judge failed to be neutral adjudicator when concluded that no one would identify the applicant as a gay man unless he had a male partner).

[64] *E.g.*, Brezilien v. Holder, 565 F.3d 1163 (9th Cir. 2009) (reversible legal error when BIA engages in additional fact-finding in violation of 8 C.F.R. § 1003.1(d)(3)(i) (2007)).

[65] Camara v. Dep't Homeland Sec, 497 F.3d 121, 124 (2d Cir. 2007) (constitutional claim or question of law may arise from fact-finding when there has been an error of law or where a discretionary decision is argued to be an abuse of discretion because it was made without rational justification or based on erroneous legal standard).

[66] *E.g.,* Mendez v. Holder, 566 F.3d 316 (2d Cir. 2009) (jurisdiction over discretionary cancellation case because judge's mischaracterization of the evidence was so serious that it rose to the level of an error of law). *See also* De Rodriguez v. Holder, 585 F.3d 227 (5th Cir. 2009) (finding numerous meta-rule violations and reversed the BIA's decision that her marriage had not been bona fide).

[67] *E.g.*, Banat v. Holder, 557 F.3d 886 (8th Cir. 2009) (right to fundamentally fair hearing violated when agency inappropriately relied on a Department of State letter); Cinapian v. Holder, 567 F.3d 1067 (9th Cir. 2009) (right to fair hearing violated because government refused to reveal author of adverse forensic report); De Oliveira v. Holder, 564 F.3d 892 (7th Cir. 2009) (failure of asylum applicant to receive statutory right to a fair hearing before a neutral adjudicator).

[68] Another possible example of a meta-rule is that adjudicators must not abuse

constitutional due process violations when adjudicators have violated some of these rules of fair decision-making.[69]

A key characteristic of a meta-rule formulation of a mixed question is that the determination under review by an appellate court need not be a legal issue but could be a historical fact such as whether an event occurred or not.[70] It could, for example, be a credibility determination. As discussed in Part VI, it could be a discretionary determination. While the questions of whether an event occurred or whether a witness is telling the truth are straightforwardly factual questions, the question of whether a meta-rule was violated in the course of deciding these factual issues is a

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their discretion when making discretionary determinations. As discussed below in Part VI, courts routinely characterize abuse of discretion claims as factual rather than legal, however. Abuse of discretion claims are most successful when the abuse stems from the decision-maker's failure to follow another meta-rule, such as one of the rules listed above. A further complication of claims involving the abuse of discretion is that it is not only a rule of decision-making but a standard of review. Kucana v. Holder, 130 S.Ct. 827, 834 (2010) (citing INS v. Doherty, 502 U.S. 314, 323 (1992)). In this way, abuse of discretion claims differ from other types of meta-rule claims, which are typically reviewed de novo.

[69] *E.g.*, Chen v. Mukasey, 293 Fed. Appx. 785 (2d Cir. 2008) (considering due process claims where petitioner alleged that immigration judge had wrongfully failed to accept evidence and had allegedly displayed bias); Khouzam v. Att'y Gen., 549 F.3d 235 (3d Cir. Pa. 2008) (violation of due process clause where government terminated deferral of removal because not provided opportunity to challenge government's assertions that he would not be tortured); Pangilinan v. Holder, 568 F.3d 708 (9th Cir. 2009) (immigration judge failed to be thorough in treatment of pro se litigant's case); Cinapian v. Holder, 567 F.3d at 1067 (due process violation in adjudication of timeliness of asylum application); Martinez-Farias v. Holder, 338 Fed. Appx. 729 (9th Cir. 2009) (finding due process violation because hearing was fundamentally unfair); Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009) (failure of immigration judge to rely on evidence as opposed to own view of what would identify the asylum applicant as a gay person). Courts have also recognized that the failure to consider evidence violates constitutional due process. *See* Zheng v. Mukasey, 552 F.3d 277, 285-86 (2d Cir. 2009) (finding jurisdiction over due process argument that agency ignored probative evidence). *But see* Bazua-Cota v. Gonzales, 466 F.3d 747, 749 (9th Cir. 2006) (rejecting characterization as a due process claim where applicant claimed improper weighing of the equities and hardship); Mehilli v. Gonzales, 433 F.3d 86, 94 (1st Cir. 2005) (improper weighing of evidence and failure to consider evidence not a constitutional claim).

[70] *See supra* note 30 and accompanying text for a discussion of historical facts.

mixed question. Thus, reviewable mixed questions are often embedded in what initially appear as unreviewable factual questions.

If fact-finding involves the violation of a meta-rule, the reviewing court must treat it as a mixed question rather than as a factual one. Courts that rule otherwise often confuse the difference between a litigant's request for an appellate court to review *how the agency applied a substantive rule to the facts of a case* with a litigant's request for an appellate court to decide *whether the agency followed the right rules governing decision-making.*[71] While both fit the mixed question formula, the latter type of request, unlike the first, enjoys greater acceptance as a legal claim. Given this broad acceptance, litigants raising mixed questions as legal claims are typically more successful when they argue meta-rule violations. Indeed, in jurisdictions where particular mixed questions have been deemed factual, claims involving meta-rule violations are likely a litigant's only hope of gaining review.

VI. Mixed Questions and the Exercise of Discretion

Perhaps no thornier appellate issue exists in immigration law than the issue of whether and how to review discretionary decisions. After 1996, when Congress repealed judicial review over certain discretionary determinations,[72] courts have had to engage in the difficult work of deciding whether a claim involves the prohibited review of the exercise of discretion and, if so, whether the claim is nonetheless reviewable under the REAL ID savings clause as a question of law.

The Supreme Court recently held that the jurisdictional bar on discretionary decisions does not extend to discretionary decisions that are not expressly "specified" in the relevant subchapter of the INA as "in the discretion of the Attorney General."[73] It is also well-settled that statutory interpretation issues, relating to discretionary

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[71] *E.g.*, Aguilera v. Holder, No. 08-60834, 2009 WL 4279859, at *1 (5th Cir. Dec. 1, 2009) (was not a reviewable legal question whether Immigration Judge applied the right definition of qualifying "child" to the facts of applicant's case).

[72] *See* 8 U.S.C. § 1229a (2006).

[73] Kucana v. Holder, 130 S. Ct. 827 (2010) (holding that review of discretionary determinations of motions to reopen falls outside the bar).

forms of relief from removal, fall outside the jurisdictional bar on review of discretionary determinations.[74] Less clear are questions involving eligibility for discretionary relief but requiring something more than statutory interpretation.[75] Analysis of the substantial disagreement, regarding whether particular questions involve the exercise of discretion, is outside the scope of this article.[76] The analysis here focuses on determinations that are admittedly

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[74] *See* INS v. St. Cyr, 533 U.S. 289 (2001) (holding that the statute baring review of certain discretionary decisions did not apply to the statutory interpretation issue of whether the repeal of discretionary relief under former INA 212(c) was retroactive).

[75] An example would be whether a particular applicant has established that she or he has been a victim of "extreme cruelty" for the purpose of a discretionary grant of relief from removal under 8 U.S.C. § 1229b(b)(2) (2005). *Compare* Hernandez v. Ashcroft, 345 F.3d 824, 833-34 (9th Cir. 2003) (application of "extreme cruelty" standard involves nondiscretionary determination) *with* Perales-Cumpean v. Gonzales, 429 F.3d 977, 982 (10th Cir. 2005) ("extreme cruelty" determination is discretionary and not a question of law because "involves more than simply plugging facts into a formula"); *see also* Stepanovic v. Filip, 554 F.3d 673, 680 (7th Cir. 2009). For an analysis of judicial review of cancellation applications of victims of domestic abuse, *see* Anna Byrne, *What is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse*, 60 VAND. L. REV. 1815 (2007). Another example is whether the "particularly serious crime" is a bar to eligibility for asylum or withholding of removal is a discretionary determination. *Compare* Alaka v. Att'y Gen., 456 F.3d 88, 100-02 (3d Cir. 2006) ("particularly serious crime" determination is nondiscretionary and therefore reviewable); Nethagani v. Mukasey, 532 F.3d 150, 154-55 (2d Cir. 2008) *with* Matsuk v. INS, 247 F.3d 999, 1002 (9th Cir. 2001) ("particularly serious crime" determination is unreviewable); Lovan v. Holder, 574 F.3d 990 (8th Cir. 2009).

[76] Examples of disagreement over whether certain immigration law questions are discretionary abound. *Compare* Cho v. Gonzales, 404 F.3d 96, 100-02 (1st Cir. 2005) (holding that the "good faith marriage" determination for a hardship waiver under 8 U.S.C. § 1186a(c)(4) (2006) is reviewable); Ibrahimi v. Holder, 566 F.3d 758, 763 (8th Cir. 2009), *with* Urena-Tavarez v. Ashcroft, 367 F.3d 154, 159-61 (3d Cir. 2004) (holding "good faith marriage" is discretionary and unreviewable); Assaad v. Ashcroft, 378 F.3d 471, 475 (5th Cir. 2004). *Compare* ANA Intern., Inc. v. Way, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that the decision to revoke a visa is reviewable because there are non-discretionary standards for the courts to apply), *with* Jilin Pharmaceutical USA, Inc. v. Chertoff, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is specified as discretionary in the statute and falls within 8 U.S.C. § 1252(a)(2)(B)(ii)) (2005); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004).

discretionary and within a jurisdictional bar but alleged to be nonetheless reviewable as an error of law either because they fit either the basic or the meta-rule formula for a mixed question.

The above discussion of the meta-rule formula helps us to understand one way in which a reviewable mixed question can be embedded in a discretionary determination. Recall that the meta-rule formula is: *Based on the administrative record and decision (the facts A-B), did the judge violate rule X in making the determination?* As pointed out above, the determination could be a factual determination. In the asylum example in Part III, a factual determination would be whether the applicant was beaten by government agents. It could also be a discretionary determination, such as whether a noncitizen applicant merits cancellation of removal.[77] Regardless of whether an appellate court is precluded from reviewing whether the noncitizen merited cancellation as a matter of discretion, it would not be precluded from reviewing whether the agency violated a rule governing how that discretionary cancellation of removal decision was to be made. In the context of reviewing discretionary determinations like a denial of cancellation of removal, for example, a reviewing court can consider whether the agency applied the right legal standard in a hardship determination.[78]

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[77] The discretionary remedy of cancellation of removal exists in the statute in two formulations: one for permanent residents and one for nonpermanent residents. 8 U.S.C. §§ 1229b(a)–(b) (2006). Both provisions specify that the Attorney General "may" cancel the removal of the applicant. *Id.* The factors that guide decision making are contained in agency case law. *See In re* Gonzalez Recinas, 23 I.&N. Dec. 467 (BIA 2002); *In re* Monreal-Aguinaga, 23 I.&N. Dec. 56 (BIA 2001); *In re* C-V-T-, 22 I.&N. Dec. 7 (BIA 1998).

[78] *E.g.*, Sumbundu v. Holder, 2010 WL 1337221 (2d Cir. 2010) (finding jurisdiction to consider claim that the agency "applied the wrong legal standard in evaluating" a discretionary good moral character determination in a cancellation case); Gomez-Perez v. Holder, 569 F.3d 370, 372-73 (8th Cir. 2009) (jurisdiction to review legal claim that "the BIA applied an incorrect legal standard by focusing on the present circumstances of his children rather than on the future hardships that they would face if he were removed" but no jurisdiction to review claim that the "BIA applied an incorrect legal standard by failing to adequately consider certain factors that have been considered relevant in other BIA decisions"); Mendez v. Holder, 566 F.3d 316, 323 (2d Cir. 2009) (error of law when agency applies wrong standard in hardship determination); Umoh v. Mukasey, 317 Fed. Appx. 714, 717 (10th Cir. 2008) (jurisdiction to review as a question of law the "contention that

Similarly, courts that have deemed discretionary the determination of whether an asylum applicant falls within an exception to the one-year deadline can nonetheless reverse an agency decision premised on the wrong effective date of the one-year deadline.[79]

More conceptually difficult are discretionary claims that fall within a jurisdictional bar but that fit the basic (rather than the meta) formula for a mixed question—in other words, claims involving review of the application of law to established facts in a discretionary determination. Classic examples involve discretionary hardship determinations in adjudications of relief from removal like cancellation of removal.[80] In these cases, the agency must weigh the evidence to determine whether hardship to applicant and/or a qualifying family member rises to a certain level. While the statute contains only abbreviated definitions of the various hardship standards, agency decisions have elaborated on the factors to be considered.[81]

Discretionary hardship determinations fit the basic mixed question formula when there are no disputes of fact:

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the BIA applied the wrong standard in determining the extent of hardship to his family"). *But see* Nawaz v. Mukasey, 276 Fed. Appx. 45, 48 (2d Cir. 2008) (whether or not the agency failed to follow controlling BIA case law governing hardship determination is "does not constitute a question of law"); Josan v. Mukasey, 298 Fed. Appx. 374, 375-76 (5th Cir. 2008) (finding no review over cancellation claim, rejecting applicant's argument that claim raised a question of law) (citing Delgado-Reynua v. Gonzales, 450 F.3d 596, 599-600 (5th Cir. 2006)).

[79] *See* Lumataw v. Holder, 582 F.3d 78 (1st Cir. 2009) (despite one-year deadline issue being discretionary, court found agency committed legal error by failing to realize that the one year deadline did not take effect until 1997, which was after the applicant filed in 1995 (required by statute)).

[80] Discretionary determinations related to cancellation of removal applications fall within the jurisdictional bar at 8 U.S.C. § 1252(a)(B)(i) (2006), which bars review of "any judgment regarding the granting of relief" under the cancellation of removal statute. Most, but not all, courts have held that hardship determinations are discretionary. *See* Singh v. Holder, 591 F.3d 1190 (9th Cir. 2010) (holding that the extreme hardship determination in the adjudication of a waiver of the joint filing requirement on a petition to remove a permanent resident condition to be a nondiscretionary factual determination).

[81] *See supra* note 77 for a listing of the main cases elaborating on how the agency should decide these cases.

Do the established facts meet the standard for the requisite level of hardship?

At least one court has commented on how all discretionary determinations can be characterized as involving the application of law to fact.[82] Courts nonetheless have overwhelmingly treated as unreviewable the question of whether a particular set of facts rises to the required level of hardship.[83] For the most part, these courts have summarily concluded that this issue is unreviewable.[84]

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[82] Chen v. U.S. Dept. of Justice, 471 F.3d 315, 331 (2d Cir. 2006) ("every discretionary determination under the INA can in some sense be said to reflect an 'application' of a statute to the facts presented") (citing Wang v. Ashcroft, 320 F.3d 130, 142 (2d Cir. 2003)). The court, however, went on to conclude that the "exercise of discretion" could not be "convert[ed]" into a question of law. *Id.* (citing Zhang v. Gonzales, 457 F.3d 172, 178 n.3 (2d Cir. 2006) (Cabranes, J., concurring).

[83] *See* Kodjo v. Mukasey, 269 Fed. Appx. 262, 263 (4th Cir. 2008) ("Whether an alien has proved the requisite degree of hardship [for cancellation of removal] is not a constitutional claim or question of law.") (citations omitted); Herrera-Castillo v. Holder, 573 F.3d 1004, 1010 (10th Cir. 2009) (no jurisdiction over hardship determination); Orellana-Gutierrez v. Mukasey, 272 Fed. Appx. 59, 60 (2d Cir. 2008) (court lacks jurisdiction to consider discretionary hardship determination and applicant "clearly does not raise a constitutional question or question of law"); Martinez v. U.S. Att'y Gen., 446 F.3d 1219, 1222 (11th Cir. 2006) ("exceptional and extremely unusual hardship" determination is not reviewable as question of law). *See also* Noble v. Keisler, 505 F.3d 73, 77 (2d Cir. 2007) (no jurisdiction to review any claim that an IJ or the BIA erred in weighing factors relevant to the grant or denial of adjustment of status). Even before Congress imposed an express bar over discretionary determinations involving cancellation of removal, the Supreme Court had circumscribed review over hardship determinations in INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981) (finding "extreme hardship" subject to multiple interpretations such that the "construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."). *See generally* Immigration Policy and the Rights of the Alien, 96 HARV. L. REV. 1286, 1396 (1983) (discussing how post-*Wang* decisions asserted review over hardship determinations by ensuring that the agency consider the evidence cumulatively, consider all of the factors, and give reasons for its decisions).

[84] Jean v. Gonzales, 435 F.3d 475, 480 (4th Cir. 2006) (conflating discretionary questions with questions of fact to conclude "[t]o the extent that a petition asks us to review a discretionary or factual determination, however, we still lack jurisdiction"); Zhang v. Gonzales, 457 F.3d 172, 176 (2d Cir. 2006) (concluding without explanation that "the instant petition, in challenging the BIA's discretionary extreme-hardship determination, does not raise any 'constitutional

Courts that rush to decide that a discretionary claim is unreviewable typically fail to proceed to the second step in the analysis to consider whether the REAL ID savings clause reinstates reviewability because the question is legal. These courts confuse the discretionary-nondiscretionary distinction with the fact-law distinction, incorrectly assuming that all discretionary determinations are factual determinations.[85] This assumption ignores how a determination might be discretionary and legal at the same time. The hardship determination discussed above demonstrates how a question can involve the discretionary weighing of established facts to determine whether the relevant legal standard of hardship has been met.

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claims or questions of law'"); Ferry v. Gonzales, 457 F.3d 1117, 1130 (10th Cir. 2006) (holding that one-year deadline claims are unreviewable because they are discretionary determinations without deciding whether they are legal); De La Vega v. Gonzales, 436 F.3d 141, 146 (2d Cir. 2006) (finding REAL ID savings clause to not apply to discretionary determinations, presumably based on unspoken assumption that a discretionary determination cannot be a question of law) (citing Xiao Ji Chen v. USDOJ, 434 F.3d 144 (2d Cir. 2006)); Onikoyi v. Gonzales, 454 F.3d 1, 3 (1st Cir. 2006) (characterizing claim as discretionary challenge but failing to consider whether raised question of law); Camara v. Dep't of Homeland Sec., 497 F.3d 121, 124 (2d Cir. 2007); Sukwanputra v. Gonzales, 434 F.3d 627, 635 (3d Cir. 2006) ("[F]actual or discretionary determinations continue to fall outside [our] jurisdiction."). Even the Ninth Circuit has sometimes appeared confused about the issue of discretion, incorrectly assuming that the inquiry ends with the finding that an issue is discretionary. *See* Afridi v. Gonzales, 442 F.3d 1212, 1218 (9th Cir. 2006) (concluding section 106 of the Real ID Act does not restore our jurisdiction over discretionary determinations by the agency, but declining to resolve the question). Of course, not all courts fail to ask the question about whether a discretionary determination is nonetheless reviewable as a question of law. *See, e.g.*, Patel v. Holder, 563 F.3d 565, 569 (7th Cir. 2009) (holding that motions to reopen fall within discretionary bar and that question presented did not involve question of law).

[85] *E.g.,* Jean v. Gonzales, 435 F.3d 475, 480 (4th Cir. 2006) (conflating discretionary questions with questions of fact to conclude "[t]o the extent that a petition asks us to review a discretionary or factual determination, however, we still lack jurisdiction"); Ferry v. Gonzales, 457 F.3d 1117, 1130 (10th Cir. 2006) (holding that one-year deadline claims are unreviewable because they are discretionary determinations without deciding whether they are legal); De La Vega v. Gonzales, 436 F.3d 141, 146 (2d Cir. 2006) (finding REAL ID savings clause to not apply to discretionary determinations, presumably based on unspoken assumption that a discretionary determination cannot be a question of law) (citing Xiao Ji Chen v. USDOJ, 434 F.3d 144 (2d Cir. 2006))

Nothing about the *discretionary* application of law to fact converts its nature from legal to factual. Discretionary applications of law to fact are simply a subset of applications of law to fact generally. This is not to say that discretionary applications of law are identical to *non*discretionary applications of law in all respects. The two differ in significant ways. First, the discretionary application of law to fact is reviewable under an abuse of discretion standard rather than a de novo standard.[86] Second, an agency's discretionary decision may be unreviewable if there is not sufficient law for an appellate court to apply.[87] This unreviewability, however, does not stem from the question being factual rather than legal. To the contrary, it stems from the question being a legal, mixed question that cannot be reviewed because the legal standard at issue has not been sufficiently elaborated.

Some courts appear to evince an understanding that discretionary determinations can involve the application of law to fact. The Ninth Circuit in *Mendez-Castro v. Mukasey*, for example, found the hardship standard to be "subjective," making it impossible to "review an IJ's application of such standard to the facts of a case, be they disputed or otherwise."[88] This passage suggests that the court understood that the question *did* involve the application of law to facts, but found the standard too ill-defined to permit it to be a

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[86] Kucana v. Holder, 130 S.Ct. 827, 834 (2010) (citing INS v. Doherty, 502 U.S. 314, 323 (1992)).

[87] In the context of Section 701(a)(2) of the Administrative Procedures Act, the Supreme Court has drawn the "committed to agency discretion" exception extremely narrowly, applying it only "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" 5 U.S.C. § 701(a)(2). Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

[88] Mendez-Castro v. Mukasey, 552 F.3d 975, 981 (9th Cir. 2009). The court, however, recognized that it did have jurisdiction over a meta-rule claim, namely that the agency had misapplied the wrong legal standard. *Id.* at 979. The court considered whether it had jurisdiction to consider the application of the hardship standard to the facts of the case even though the petitioners had conceded that the court lacked jurisdiction "to reweigh the evidence underlying the [agency's] conclusion that removal would not cause their children an 'exceptional and extremely unusual hardship.'" *Id.*

reviewable legal question.[89] At no point, however, did the court satisfactorily explain how the subjectivity of the standard could transform a legal claim involving the application of law to fact into a factual claim.[90]

Although most courts have found unreviewable the application of hardship standards to established facts, a minority view exists. In *Mendez v. Holder*, the Second Circuit suggested that, if it had not been not bound by prior precedent, it would have been "inclined to hold that the question of whether an alien has established 'exceptional and extremely unusual hardship' is a determination that we have jurisdiction to review, just as we can review decisions dealing with the other eligibility requirements for cancellation of removal."[91] Unlike other circuits to decide the matter, the Second

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[89] The court, however, did not go so far as to say that there was insufficient law to apply under the standard of the Administrative Procedures Act. The "committed to agency discretion" standard under Section 701(a)(2) of the Administrative Procedures Act is narrow. *See supra* note 87. Others have expressed a view of the hardship standard as ill-defined. Zhang v. Gonzales, 457 F.3d 172, 176 (2d Cir. 2006) (Cabranes, J., concurring) (discussing view that the BIA has said that the term hardship cannot be defined) (citing *In re* Cervantes-Gonzalez, 22 I. & N. Dec. 560, 565 (BIA 1999)). *See also* Morales Ventura v. Ashcroft, 348 F.3d 1259, 1262 (10th Cir. 2003) (no algorithm for determining exceptional and extremely unusual hardship). *But see Zhang*, 457 F.3d at 180 (Calabresi, J., concurring) (stating that "one can read the hardship determination . . . as applications of contoured statutory language to a particular set of facts.").

[90] The court pointed to the subjectivity of the hardship standard to distinguish its holding from its prior decision in *Ramadan v. Gonzales*, in which it found the application of the asylum one-year deadline exceptions to be a question of law. *See* Ramadan v. Gonzales, 479 F.3d 646 (9th Cir. 2007); *see also* Mendez-Castro v. Mukasey, 552 F.3d 975, 980-81 (2009). The court, however, did not generalize a rule for determining when the application of law to fact could be considered a factual question. *Id.*

[91] Mendez v. Holder, 566 F.3d 316, 322 (2d Cir. 2009). The Second Circuit had previously ruled that the "exceptional and extremely unusual hardship" determination is not reviewable except where the determination is made without rational justification or based on an "erroneous legal standard" or is "flawed by an error of law." Barco-Sandoval v. Gonzales, 516 F.3d 35, 39-40 (2d Cir. 2008). For a discussion of how these meta-rule violations permit review, *see supra* Part V. The discussion in *Mendez* is consistent with Judge Calabresi's discussion in his concurrence in *Zhang*, in which he argues that the extreme hardship determination falls within the REAL ID savings clause as a question of law because it involves the "application[] of contoured statutory language to a particular set of facts."

Circuit in *Mendez v. Holder* did not consider it unworkable to review application of a hardship standard.[92]

Courts must guard against conflating the discretionary-nondiscretionary distinction with the fact-law distinction. When courts conclude that a discretionary bar has been triggered, they cannot end their inquiry. The critical next question is whether the issue is one of law reviewable under the REAL ID savings clause. If a discretionary issue involves the application of law to an established set of facts, then arguably a reviewing court has jurisdiction. Courts must engage with difficult question of whether the application of law to established facts in a truly discretionary determination is a question of law.

VII. Conclusion

We have seen how virtually any claim that is not asking for review of a historical fact is a claim that fits either the basic or meta-rule formula of a mixed question involving the application of law to established facts—a question that the U.S. Supreme Court and many U.S. courts of appeals have characterized as a legal question. This is not to say that litigants will be successful in every case that arguably fits the formula, far from it. If anything, the fact that virtually all disputes fit a version of the formula is surely evidence of the inadequacy of the law-fact distinction itself.

While the law-fact distinction may not bear up well under

Zhang v. Gonzales, 457 F.3d 172, 179-81 (2d Cir. 2006). Like the court in *Mendez*, Judge Calabresi felt bound by the court's prior decision in *De La Vega*, which held that a similar hardship determination was unreviewable. De La Vega v. Gonzales, 436 F.3d 141 (2d Cir. 2006). In *Sumbundu v. Holder*, the court similarly suggested that discretionary determination can be reviewable as a question of law if there is a sufficiently detailed standard to apply. 2010 WL 1337221 (2d Cir. 2010) ("with moral character decisions under the catchall clause, there may not be an algorithm, but there remains a standard-good moral character-which the agency must find."). The court, however, ultimately characterized the petitioner's claim as a claim that the agency failed to apply the correct standard. In other words, it characterized the claim as what this article discusses as a meta-rule violation.

[92] In this respect, the Second Circuit in Mendez v. Holder, 566 F.3d 316 (2d Cir. 2009), disagreed with the Ninth Circuit in Mendez-Castro v. Mukasey, 552 F.3d 975 (9th Cir. 2009), discussed *supra* note 88 and accompanying text.

close analysis, it nonetheless permeates our law. Courts must begin to fashion a more conceptually rigorous approach. Litigators must understand and employ the wide range of arguments available to them to secure judicial review.

The above discussion demonstrates the widespread confusion on how to treat claims that fit the formula of the application of a legal standard to an established fact. While there is considerable agreement that mixed questions involving alleged meta-rule violations are legal claims, there is considerable confusion about mixed questions involving the application of legal standards to established facts, especially when courts perceive the standard to be ill-defined. While arguably all mixed questions are legal questions, it is unrealistic and naïve for litigants to expect success given the state of the law and the legitimate concern of reviewing courts that it is difficult to weigh evidence under a standard involving many factors.

Despite these difficulties, the starting point of any analysis must be the basic formula of a mixed question and the notion that the application of law to fact is a legal question. It is incumbent on courts that deviate from these basic propositions to clearly acknowledge their departure and to explain why. To do any less is not only intellectually dishonest, but deepens the already existing incoherence in our case law. As for litigants, some battles regarding questions that fit the basic formula are already lost at certain U.S. courts of appeals, but many remain. Even in substantive areas in which a court of appeals has categorically characterized a type of mixed claim as factual and unreviewable, litigants can still argue that the agency has violated applicable meta-rules—the rules of decision making—in a particular case. Litigants can and must analyze their cases to unearth any and all legal errors committed in the course of agency decision making. By proceeding from analyses framed by the basic and meta-rule formulas for mixed questions, litigants can seek to maximize reviewability in a world of limited review and federal courts can abide by their constitutional Article III mandate.