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The "Reason Giving" Lawyer: An Ethical, Practical, and Pedagogical Perspective

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ABSTRACT

Whether as a matter of duty, ethics, or utility, lawyers give reasons for their actions all the time. In the various venues in which legal skills must be employed, reason-giving is required in some, expected in others, desired in many, and useful in most. This Essay underscores the pervasiveness of reason-giving in the practice of law and the consequent necessity of lawyers developing a skill at giving reasons.

This Essay examines reason-giving as an innate human characteristic related directly to our need for answers. It briefly surveys the scholarship on reason-giving, including an analysis of its presence in law and legal institutions. The Essay includes a brief discussion of the intersection of reason-giving and ethics. By requiring persons—particularly state actors—to provide reasons for their actions, we can induce more ethical behavior. At the same time, however, lawyers and law students must develop ethical standards in their provision of reasons when asked or required to give reasons for their actions. Understanding then that reason-giving is a skill required for effective and ethical lawyering, the Essay proceeds to emphasize the pedagogical importance of (a) teaching an understanding of reason-giving's prevalence in law; and, (b) nurturing the discrete habit and skill of reason-giving in legal education as a foundational trait of good lawyering. The Essay concludes with a case study equating the law school exam-taking process with administrative law decision-making and law school grading with the process of judicial review of agency action. In this case study, agency is to student as judge is to law professor.

Greater recognition of the role of the reason-giving lawyer—along with recognition and strengthening of the parts of legal education that help inculcate the reason-giving skill—should improve our understanding of when, how, and under what conditions reason-giving must occur for the effective functioning of the legal system and for effective lawyering.

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INTRODUCTION

Reasons matter in law, as they do in life. The "reason giving lawyer" is a typical creature in the practice of law. Whether as a matter of ethics, duty, or utility, lawyers give reasons for their actions all the time. This Essay underscores the pervasiveness of reason-giving in the practice of law and the consequent necessity of lawyers developing a skill at giving reasons.

Part I examines reason-giving as an innate human characteristic related directly to our constant yearning to understand the answer to the question "why." Part II briefly surveys the scholarship on reason-giving, including an analysis of its presence in law and legal institutions. Part III discusses reason-giving in administrative law specifically.

Part IV provides a brief but concentrated discussion of the intersection of reason-giving and ethics. By requiring persons—particularly state actors—to provide reasons for their actions, we can induce more ethical behavior. At the same time, however, lawyers and law students must develop ethical standards in their provision of reasons when asked or required to give reasons for actions. Part of the pedagogical enterprise must be to teach legal ethics' application to all skills, including the reason-giving skill.

Part V emphasizes the pedagogical importance of (a) teaching an understanding of reason-giving's prevalence in law; and, (b) nurturing the discrete habit and skill of reason-giving in legal education as a foundational trait of good lawyering. Part VI equates the law school exam taking process with administrative law

decision-making and law school grading with the process of judicial review of agency action. In this analogy, agency is to student as judge is to law professor. It is a fundamental principle of administrative law that an agency decision will be valid only if accompanied by reasons, given by the agency only, given contemporaneously with the agency action, and based on the record before the agency.[1] Likewise, it is a fundamental principle of professorial review of student exam taking action that their answer will be deficient unless it is accompanied by reasons, written by the student, on (and therefore contemporaneous with the taking of) the exam, and based on the curricular material before the student from the subject material of study being tested. By referencing the principles underlying administrative law for authority and persuasion, this Essay seeks to justify this evaluative method so common in law schools.

In many ways, law school propagates the reason-giving skill. In other ways, the law school environment can be improved. Not surprisingly, reasons matter in law school class and exam answers and are typically demanded in their evaluation. Yet students sometimes fail to grasp why professors demand that they explain the reason why when reaching their conclusions in class or on an exam. This Essay gives these students some reasons to give reasons. In part, it is about inculcating the lawyer's reason-giving skill through professorial review of law student action.

Most importantly, the case study should demonstrate that teaching reason-giving is important and is, in fact, occurring even if not explicitly recognized. Greater recognition of the role of the reason-giving lawyer—along with recognition and strengthening of the parts of legal education that help instill the reason-giving skill—should improve our understanding of when, how, and under what conditions reason-giving must occur for the effective functioning of the legal system and for effective lawyering.

I. REASON-GIVING AS AN INNATE HUMAN CHARACTERISTIC

If reasons are required in life, then we should presume that developing habits and skills for providing them effectively should have benefits. Part of legal education should be the development of skills that are transferable to legal practice, along with the habits to engage with those skills regularly.[2]

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1. Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955 (2007) ("One 'fundamental' and 'bedrock' principle of administrative law is that a court may uphold an agency's action only for the reasons the agency expressly relied upon when it acted.").

2. As Dewey has explained:

> [I]t is [the] business [of education] to cultivate deep-seated and effective habits of discriminating tested beliefs from mere assertions, guesses, and opinions; to develop a lively, sincere, and open-minded preference for conclusions that are properly grounded, and to ingrain into the individual's working habits methods of inquiry and reasoning appropriate to the various problems that present themselves. No matter how much an individual knows as a matter of hearsay and information,

Reasons matter to most people most of the time. It seems that we are conditioned to deny acceptance of many things unless we have an understanding why they are so. Glen Staszewski contends, ironically, that supplying reasons for why reason-giving is important seems almost unnecessary: "Social scientists and philosophers have recognized that reason-giving is an innate characteristic of human beings that is associated with our ability to rationally evaluate and justify our actions. From this perspective, we do not necessarily need to give reasons to anyone for reason-giving to carry intrinsic meaning."[3] Frederick Schauer makes a similar appeal to reason-giving as an element of the assessment of rationality and as a metric for sanction in human interaction. Schauer explains that, "Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality."[4] We measure each other and our actions by the reasons we give for decisions and other behaviors.

Humans thirst to receive and understand the answers to the question "Why?" As the late Charles Tilly (formerly a professor of social science at Columbia University and the author of the book *Why? What Happens When People Give Reasons . . . and Why*) explained, "[w]e might even define human beings as reason-giving animals. While by some definitions other primates employ language and even culture, only humans start off young offering and demanding reasons and then continue through life looking for reasons why."[5] Even when results should be enough, people still have a thirst to understand how they materialized.

Our thirst and desire for reasons spurs our imagination, amplifies our quest for discovery, motivates our innovation, and facilitates interaction and exchange. Unquenched, that thirst also leaves us unsatisfied and generally less accepting in the face of events or circumstances that are not or cannot be explained.

At its core, the ability to give reasons is an exercise in providing or reporting a rationale, while the next steps remain to decide whether the rationale was reached through capable reasoning (a process) that leads to reasonable conclusions (a result, that is, a matter of judgment or policy). Thus reason-giving is a separate and unique skill or habit where one includes an explanation to accompany one's

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> if he has not attitudes and habits of this sort, he is not intellectually educated. He lacks the rudiments of mental discipline. And since these habits are not a gift of nature (no matter how strong the aptitude for acquiring them); since, moreover, the casual circumstances of the natural and social environment are not enough to compel their acquisition, the main office of education is to supply conditions that make for their cultivation.

JOHN DEWEY, HOW WE THINK 27–28 (D.C. Health 1910).

3. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1285 (2009).

4. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995).

5. Charles Tilly, *Reasons Why*, 22 SOC. THEORY 445, 447 (2004) [hereinafter *Reasons Why*]. *See generally* CHARLES TILLY, WHY?: WHAT HAPPENS WHEN PEOPLE GIVE REASONS . . . AND WHY (2006) (a book expanding on the work in Tilly's 2004 article) [hereinafter WHY?].

reasoning and conclusions. Reason-giving is separate because it either stands alone or can be a prerequisite to any and all of the reasoning process and our determination whether a decision ultimately is reasonable. The distinction is in part explained by the fact that while reasoning is an internal mental process, reason-giving involves communication aimed at causing the listener to engage in the mental process of another and the reason given becomes an ingredient in the listener's own mental processes.

"Reason-giving" is a term and category that stands apart from seemingly similar yet distinct terms. This is not an essay about "reasoning" or "reasonableness"—it is about *giving* reasons. As such, the analysis in this Essay is not about logic, analytical processes, or necessarily reaching the best conclusions or making the best decisions. Reason-giving does not mean reasoning because reasoning refers to a process of inquiry, even though reason-giving may be a component part of effective reasoning. Reason-giving also does not mean reasonable, because reasonable is a value judgment on the rationality of the reasons.

Giving reasons is distinct from the exercise of judging or truth seeking. As Tilly stated, "People do not give themselves and others reasons because of some universal craving for truth or coherence," and indeed the process of reason-giving leads to the giving and acceptance of reasons at varying degrees of merit. Instead, reason-giving describes something more basic, where "[w]hatever else they are doing when they give reasons, people clearly are accomplishing social work. . . . Giver and receiver are announcing or are negotiating their proper connection."[6]

Tilly helped define reason-giving around the following: "[r]easons provide organized answers to the question 'Why does (did, should) X do Y?'"[7] Tilly explains that reason-giving is about communication or interaction where there is a giver and a receiver involved in the transaction.[8] We might also describe the receiver using the terms audience or receptor. As such, reason-giving is a relational enterprise.[9] As Tilly states, giving reasons "among other consequences, exerts effects on . . . social relations [between individuals], confirming an existing relation, repairing that relation, claiming a new relation, or denying a relational claim."[10]

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6. *Reasons Why*, *supra* note 5, at 447; *see also* WHY?, *supra* note 5, at 15.

7. *Reasons Why*, *supra* note 5, at 447.

8. *Id.*

9. *See* Jerry L. Mashaw, *Reasoned Administration: The European Union, The United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 101–102 (2007) (describing a relational account of reason-giving and explaining there are different purposes for giving reasons depending on the audience). *See generally Reasons Why*, *supra* note 5 (using a variety of real world examples of social relations where reason-giving occurs and how parties to social interactions treat it); EXPLAINING ONE'S SELF TO OTHERS: REASON-GIVING IN A SOCIAL CONTEXT (Margaret L. McLaughlin et al. eds., 1992).

10. *Reasons Why*, *supra* note 5, at 447; *see also* WHY?, *supra* note 5, at 15.

With that understanding, whether one has given *some* reason for his or her decision is rather easy to evaluate. However, much of the discussion on reason-giving delineates or establishes tests for when and how much reason-giving is required (by law or otherwise) and whether the reasons offered were adequate, satisfactory, substantial, supported, good, or some other like idea of "sufficiency." Requirements (or reasons) for giving reasons range from the philosophical, psychological, moral, ethical, or legal to the practical, prudent, or instrumental.[11]

In the classic example of a child asking her mother "why" when commanded to do something and the mother answers only "because I said so," a reason has been given but it may be unsatisfactory to the child. The parent has engaged in giving reasons in form. But the reasons may be insufficient in substance when judged by the standards of the child who is making the demand for the explanation or justification. In practice, then, most often reason-giving requires something more than a mere assertion and something more than just an appeal to power or authority. As Schauer aptly puts it, "To characterize a conclusion as an *ipse dixit*—a bare assertion unsupported by reasons—is no compliment."[12]

Reason-giving and the evaluation of it are highly contextual. There is a natural tendency to expect or appreciate reason-giving in human affairs, but the degree and frequency of its practice, or the incidence of shirking from requirements for it, will depend on the surrounding circumstances, including the audience of receivers, and applicable sanctions for failing to give reasons.[13] Given the ubiquity of its demand in human interaction, however, avoidance of reason-giving naturally tends to have adverse consequences.[14]

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11. *See* Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 90–93 (1996) (excellent discussion of reasons for giving reasons in ethical practice, including "the act of giving reasons may potentially uncover the faulty or fallacious reasoning of the proponent by exposing the reasons to further argument and evaluation").

12. Schauer, *supra* note 4, at 634.

13. *See* Mashaw, *supra* note 9, at 102. Consider also Cohen's thoughts on audience and the level of sincerity involved:

> The scope of sincerity may vary with the differing needs and expectations of one's audiences. State actors may give reasons for different audiences, and they often do so for more than one audience at a time. Reasons may be addressed to other public officials (be they immediate colleagues or members of other institutions or other branches of government), legal professionals (including lawyers, professors, and law students), the public at large, or sometimes the very individuals directly affected by the decision. The need for more or less sincere reasons may differ depending on the characteristics of the recipient. Everyone may not have an equal right to the same degree of sincerity.

Mathilde Cohen, *Sincerity and Reasoning: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1149–50 (2010).

14. *See* Rob Atkinson, *Connecting Business Ethics and Legal Ethics to the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 527 (2004) ("In a culture that values giving reasons for one's conduct, as ours has at least since Socrates's time, acting in disregard of the reasons one gives is, in and of itself, discrediting and thus costly.").

A variety of conditions may arise from or justify giving reasons and its demand or preference. Reasons provide a metric for verifiability, providing a testable reference for the receiver to judge the giver.[15] Reason-giving helps the receiver contextualize the giver's decision and thereby determine whether they approve. Reasons help to evaluate whether a giver treats individuals equally and whether her decisions have coherence.[16] One's level of compliance with an order, for example, may be directly correlated with the trust one has in the reasons offered by an authority.[17] As such, reason-giving requirements can act as constraints on power, provide accountability, and can act as a tool to limit the arbitrary exercise of authority. These consequences or states of affairs revolve around concepts such as trust or respect, which can have effects on one's allegiance to the government or obedience to commands.[18] The receiver of reasons can use them to judge whether to rely on the giver and use the reasons as a point of reference for evaluating the giver's performance.[19] Reasons, in a sense, create a record for judgment or establish precedent and reason-giving requirements therefore help provide a tool to evaluate whether our desire for the giving of reasons is adequately satisfied.[20] Reasons also, as a result, generally make conclusions and commands more persuasive, and reason-giving demands can help check the raw exercise of power. Note, however that one must be careful that reason-giving can be used as a persuasive tool for the acquisition of power as well by using reasons to convince others of the legitimacy of a command that they might otherwise not be inclined to follow.[21] The manner in which reason-giving demands a check of

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15. *See* Staszewski, *supra* note 3, at 1281.

16. *Id.*

17. Schauer, *supra* note 4, at 658.

18. *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 631 (2007) ("Because law is a coercive mechanism backed by state-mandated power, legal discourse—our public conversation about state-mandated coercion—must be a justificatory discourse, an exercise in reason-giving.").

19. Staszewski, *supra* note 3, at 1293–94.

20. Erik M. Jensen, *Reflections on Editing a Journal for Law Teachers*, 2 WYO. L. REV. 119, 125 (2002) (describing the policy of the Journal of Legal Education to give reasons for rejecting author submission although that is not the norm in publishing).

21. Mashaw, *supra* note 9, at 104–05. Mashaw explains that requiring or providing reason-giving avoids the raw exercise of power, and

> to be subject to administrative authority that is unreasoned is to be treated as a mere object of the law or political power, not a subject with independent rational capacities. Unreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes. This sort of explanation begins to illuminate why we might think of reasoned administrations as an individual right, indeed a fundamental individual right, not just as a contingent feature of accountability regimes.

Id. Yet Cohen cautions:

> This ambiguity brings to the fore the function of legal justification. Public reason-giving has long been thought of as an essential duty of democracies. . . . However, this aim is compromised by the possibility that decision makers may disclose insincere and misleading justifications as a means of preventing, rather than facilitating, accountability.

power and helps the governed determine whether those in power are acting within their constraints is one way such demands or requirements incentivize ethical behavior. All of this helps to engender a more democratic relationship with the giver and receiver.[22] Reasons add legitimacy and deviations from given reasons tend to call action into question.[23] Finally, the requirement that one give reasons can force reflection, especially when the giver knows that his reasons will thus be transparent and subject to question and review.

Certainly the demand or request for a reason may not be the end of an inquiry or satisfy another in that social interaction. The receiver may require more explanation, including asking why an alternative reason or course of action was rejected, what the reason giver's processes of choosing a reason were, or what motivated the reason giver's choice of a reason. The giving of the reason might be simply a minimum, threshold matter, but at the very least some reason must be supplied incident to an action or decision as a first order of compliance with the receiver's (direct or indirect) demand for a reason. It may be followed by a request for further evidence of how one evaluated material to choose that reason (*i.e.*, what reasoning or processes were used) and why or how one made this choice of reason (*i.e.*, one's decision-making criteria or an answer to the question about what made you decide this was the reasonable or best reason). Whether or not it was reasonable or the result of reasoning will be tested by the support one gives for the reason. A predicate requirement, however, will almost always be that there is some reason given at all that can be judged as to whether it is reasonable or whether instead it is arbitrary, capricious, and unreasonable.

In those second and third order questions, new sub-demands to give reasons also exist, yet on that level again the receiver is not yet judging the reason given but is asking for further information upon which a subsequent evaluation of the reasons can follow. In that sense, giving reasons may be supplying the full record of the data and processes that were used to reach a statement of reasons that support and immediately precede a conclusion or action. The reasons will necessarily always precede the conclusion or action—by definition, it cannot be a reason *for* action if it is simply a contrived or post-hoc rationalization, although one's *outward statement* of those reasons may be supplied either contemporaneously with the action *or* after, depending on the expectation or demand. It is true that there will undoubtedly be difficulty on the part of the receiver in determining whether such simultaneity exists when most likely the reason will be given to that other party at a time after the reason was determined. In that case, commitment

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Cohen, *supra* note 13, at 1095–96.

22. Mashaw argues that "reason-giving's most fundamental function [is] the creation of authentic democratic governance," Mashaw, *supra* note 9, at 101, although recognizing that the instrumental reasons such as to facilitate effective judicial review are important too. *Id.* at 118.

23. *See* Staszewski, *supra* note 3, at 1279–84.

seems to occur at the moment a reason is stated which may be "after the fact," but the formulation of the reason in order to be legitimate would have needed to have been made at the time of the decision or before the decision rather than only at the point of the communication of the reason.

Thus no matter whether the statement giving reasons is in the frame of "why I should do," "why I will do," or "why I am doing"—pre-decision or contemporaneous outward explanations, each looks to some commitment that was made simultaneous with or *prior* to the decision rather than some justification for the decision that may or may not have been determined before the act. Simultaneity leads to commitment not just to conclusion and sub-conclusion but also commitment to the reasons given.[24] These sets constitute reason-giving, something within the unique providence of the actor or decision maker.

Quite apart from these commitment-based statements are those backward looking rationales that are far more disconnected from the point of decision. If a statement is given in the nature of "why I did"—*post hoc* explanations—it is more difficult to determine whether or not the giver had that justification in mind at the time of action or decision. Even more distant is the reason given by a stranger after the fact, which might serve as a policy rationale for a particular decision but does not have a high level of credibility as a reason something was done. There we are dealing only with a statement of why what was done might be justified, which presumably can be provided by anyone (not simply the actor). This is nothing more than an issue of acceptance or non-acceptance at that point and the formulation thereafter of a subsequent plan to support or oppose the action for which the reason was given.

Reasons offered by people and entities serve a number of functions that help to strengthen their claims. The next two Parts will examine some of those functions and how reason-giving relates to law and legal institutions.

II. IMPORTANCE OF REASON-GIVING IN LAW

Reason-giving is not peculiarly a legal trait but it is one certainly necessary in the law.[25] Reason-giving in the law is ubiquitous, even if it is not always mandated.[26]

In the various venues in which legal skills must be employed, reason-giving is required in some, expected in others, desired in many, and useful in most. Cass

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24. Schauer, *supra* note 4, at 643–44 (giving reasons leads to a future commitment to a reason offered).

25. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 18 (2001) ("Reason has become the modern language of law in a liberal state. The anguished why of the contemporary Job confronting contemporary secular authority often carries with it an enforceable demand for justification.").

26. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1756 (1995) ("A special quality of most legal systems is a presumptive requirement of reasons for legal outcomes.").

Sunstein has proclaimed "any position about law and politics, in order to be worth holding, must be justified by reference to reasons. . . . a view unsupported by reasons is unlikely to deserve serious consideration."[27] As a result, reason-giving is valued even when not required.[28]

How and why reason-giving requirements have become embedded in legal doctrine—particularly as restraints on power or limitations on governmental action—has been the study of a significant amount of literature and this Essay need not dawdle in this area.[29] Briefly summarized, in the United States, actions of the legislature and for the most part the President are generally not answerable for a failure to give reasons attendant with their decisions.[30] Similarly, juries are not typically required to give reasons for their verdicts.[31] In other words, *required* reason-giving is not the norm in government,[32] and in fact "[e]ven within the law itself, decision-making devoid of reason-giving is more prevalent than might at first be apparent."[33] Scholars have noted that reason-giving is neither universally required for all legal decisions nor is it necessarily preferable in every instance.[34] Moreover, reason-giving is susceptible to resistance by some and in certain situations.

Yet, Schauer explains that when reasons are given in law, they often illustrate a quest to add rationality to legal decisions:

> Sometimes people who make decisions give reasons to support and explain them. And sometimes they do not. The conventional picture of legal decision-

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27. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 779 n.130 (1993).

28. Schauer, *supra* note 4, at 648 ("The conclusion that, in law, giving reasons commits the giver is also supported by the fact that quotations directly justifying a result have considerable purchase in legal argument."); *see also* Sunstein, *supra* note 26, at 1755 (stating that "[a]ll well-functioning legal systems value the enterprise of reason-giving," although recognizing some difficulties with that fact).

29. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 383–403 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (discussing the role of reason giving in judicial decisions in furthering its appearance as principled and legitimate); P. P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282, 283–85 (1994) (discussing duties of public officials to provide reasons for decisions); Schauer, *supra* note 4, at 638 (examining reason-giving, primarily in the context of judicial decision making); Staszewski, *supra* note 3, at 1279.

30. *See* Mashaw, *supra* note 25, at 19–26 (comparing and contrasting judicial review of agency action, legislation, and judicial decisions and the relative importance of reasons for decision); *id.* at 20 ("The legitimacy of legislative or judge-made law draws on sources other than rationality or reason-giving."); Schauer, *supra* note 4, at 636–37 (explaining statutes are distinguishable from administrative decisions in terms of reason-giving); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 193 (1992) ("Legislatures are not seen as subject to a formal giving reasons requirement."); Staszewski, *supra* note 3, at 1298–99 ("There are no comparable structural safeguards that consistently require the President to give reasoned explanations for his decisions, but congressional oversight and modern media coverage may provide some selective opportunities for his policy decisions to be subject to deliberative accountability.").

31. Schauer, *supra* note 4, at 637 (giving juries and other institutional examples where, in law, reason-giving is not required).

32. *Id.* at 634, 637 (reason-giving requirements are "not omni-present" in law).

33. *Id.* at 634.

34. *Id.*

> making, with the appellate opinion as its archetype and "reasoned elaboration" as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality.[35]

Reasons are not always provided to avoid official sanction because reason-giving is mandated or legally required. In many cases and from an instrumental perspective, reason-giving becomes the norm of acceptable behavior in a variety of areas of law to add weight to one's actions and heft to one's position. A great example of that fact is the custom of giving reasons in judicial opinions and the consequent establishment of our system's reliance on precedent.

Although reason-giving certainly has a long history of legal, philosophical, and jurisprudential analysis, it has received heightened attention in some of the recent literature.[36] Many reasons for giving reasons have been offered. Reason-giving serves justificatory roles, adding moral or other legitimacy to action.[37] It serves to limit the possible choices of otherwise unconstrained officials[38] and therefore can influence the decisions reached rather than merely allow us to learn about preexisting reasons.[39] The demand for reasons provides a base upon which individuals subject to legal authorities can check and monitor behavior of the government.[40] Those who know they are being monitored and expected to provide reasons will self-discipline against certain decisional biases.[41] In this sense, reason-giving not only provides accountability, but it also gives real world

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35. *Id.* at 633–34.

36. *Id.* at 635 ("Although many of the devices of generality are familiar, reason-giving is both the most common and the least analyzed."); *see* Mashaw, *supra* note 9, at 101 ("The right to reasons and the practice of administrative reason-giving. . . . is a common and important feature of both E.U. and U.S. administrative law and . . . a somewhat under-theorized one.").

37. Mathilde Cohen, *The Social Epistemology of Public Institutions*, *in* NEW WAVES IN PHILOSOPHY OF LAW (Maksymilian del Mar ed., 2011), *available at* http://ssrn.com/abstract=1743538 (last visited Nov. 12, 2012) (focusing on the "justificatory or normative role," rather than the "motivating or explanatory role" of giving reasons); Cohen, *supra* note 13, at 1091 (examining whether "sincerity" should be an added component of reason-giving requirements).

38. Cohen, *supra* note 37, at 27 ("The duty to give reasons is enforced because it also acts as a constraint on the reasons they are allowed to take into account. In strictly defined roles like that of an administrator, a judge or a policeman, only a very restricted set of considerations is supposed to bear on what one decides, while other considerations are ruled out.").

39. *Id.* ("[T]he law is interested in the potential for influencing the reasons governmental agents have, rather than in merely learning what reasons they happen to have.").

40. *Id.* at 27–28 ("The reason-giving requirement serves as a method for monitoring the reasons decision-makers choose to act on rather than as a mere disclosure strategy. . . .").

41. *Id.* at 28 ("When decision-makers are held accountable for their reasons, their propensity to succumb to psychological biases is altered, for the better or the worse. The prospect of having to show one's justification has the epistemic effect of influencing the reasons one has and, hence, it is hoped, the decision one makes."); Staszewski, *supra* note 3, at 1293 (discussing self-discipline and oversight).

monitoring and enforcement consequences to one's commitment to ethical governance and responsible decision-making. If people deviate from the expected norms or provide either reasons incapable of justification or reasons easily debunked as false, their conduct is far more transparent precisely because they have been forced by a reason-giving requirement to provide a record upon which their conduct can be judged for purposes of ethics, authority, and the just and equal application of the law, along with other power-checking standards.

There are many prudential, consequential, ethical, moral, and utilitarian reasons that reasons are given in law.[42] Reasons are demanded to force decision makers to make lasting commitments.[43] Reasons influence the level of respect given to decisions and authorities.[44] Reasons can provide assurances against arbitrary or capricious behavior.[45] Reasons serve rule of law values, presumably justifying action based on some testable standard.[46] Reasons serve accountability, because when they are demanded authorities must provide some answer and their answer provides a basis for outsider review.[47]

Constituents demand reasons for legislative action, and the durability of legislation is in part dependent on a voluntary offering of reasons for legislation.[48] For example, the public choice model posits that laws which appear more public-regarding will be more durable due to a higher immunity to challenge and are thus preferred by the legislator because the commodity of legislation offered will be more valuable.[49]

Reason-giving requirements in many of these contexts, however, have some risks. At times, a requirement that some reason be given before government may act is transformed into a rule that any reason will do; and after some reason is provided, the action is thereafter insulated from substantial review. In such cases, there are risks that insincere or inadequate reasons will be enough to legitimize an

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42. *See generally* Schauer, *supra* note 4 (explaining the history of the logic and morality of giving reasons).

43. *Id.* at 643–44 (giving reasons leads to a future commitment to a reason offered).

44. *Id.* at 658 ("[G]iving reasons may be a sign of respect.").

45. Sunstein, *supra* note 26, at 1754 ("Reason-giving is usually prized in law, as of course it should be. Without reasons, there is no assurance that decisions are not arbitrary or irrational . . .").

46. James W. Torke, *What is This Thing Called The Rule of Law?*, 34 IND. L. REV. 1445, 1450 (2001) ("The rule of law does not promise results so much as it promises an approach, a process, a practice of reason-giving, a set of argumentative conventions.").

47. *See* Shapiro, *supra* note 30, at 181 ("As Carl Friedrich noted long before the recent focus on reason-giving, in the Western tradition, the very concept of political authority, or indeed any kind of authority, implies the capacity to give reasons."); Staszewski, *supra* note 3, at 1279 ("[P]ublic officials in a democracy can be held deliberatively accountable by a requirement or expectation that they give reasoned explanations for their decisions.").

48. Staszewski, *supra* note 3, at 1281 (discussing the relationship between reason giving and the need for legislation to appear public regarding).

49. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 878–79 (1975).

action or enough to stifle the search for alternative (and perhaps better) conclusions.[50]

Therefore reason-giving is ubiquitous in law even if it is not always the subject of a specific, codified requirement. Nonetheless, some areas of law are indeed filled with actual reason-giving requirements. As stated before, generally judges and legislators and some executive officials need not give specific reasons or the right reasons for their actions nor are they bound by any reasons they give upon subsequent judicial review, so long as it can be independently verified later if reviewed that they are acting within their prescribed powers and discretion.[51] In the American system, however, administrative agencies are generally not given this freedom.

III. REASON-GIVING IN ADMINISTRATIVE LAW

Unlike the legislative and judicial domains, where reason-giving is more a matter of prudence than mandate, the non-discretionary rules developed in U.S. administrative law have institutionalized the requirement that agencies give reasons for their actions. The law has thus created enforcement mechanisms to hold agencies responsible to those reason-giving requirements.[52] This "heightened scrutiny" over agency decision-making makes administrative law unique.[53] The lawfulness of agency actions is often judged by the reasons proffered for

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50. *See generally* Cohen, *Sincerity and Reasoning, supra* note 13 (examining "sincerity" in the giving of reasons). Of course, in a law school exam setting, the professor conducting review is unlikely to be susceptible to that critique.

51. Mashaw, *supra* note 25, at 20. In addition to distinguishing general legislative and executive action from administrative law, Mashaw specifically explains that the reason-giving requirement operates more strongly in administrative law than in even judicial decisions:

> Nor has reason colonized judicial decision-making as an exclusive ground for legitimacy in the way that it inhabits administrative law. At first blush this may seem an odd claim. Law talk as it is carried on in the profession as well as in the academy is almost maniacally fixated on the reasons given by appellate judges as justifications for their decisions. Yet the law treats the necessity and the importance of reason-giving in judicial dispute resolution very differently than it treats the force of reason in administrative law

Id.

52. *See* Shapiro, *supra* note 30, at 196 (legislatures need not respond to concerns raised by "parties"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 429 (1987) ("As stated by the Court in *State Farm Bowen*, administrative agencies, unlike legislatures, are not entitled to the same presumption of correctness because they are neither politically accountable nor directly subject to checks and balances."); Stack, *supra* note 1, at 955 ("Administrative agencies may act with the force of law, but their obligations to give reasons for their decisions are very different from those that apply to Congress or the federal courts.").

53. Shapiro & Levy, *supra* note 52, at 388 (explaining that the adequate reasons "requirement is best understood as a form of heightened scrutiny of the rationale of agency decisions" and advancing a separation of powers rationale for the mandate).

decisions,[54] and the failure to give adequate reasons is the most frequent justification for finding administrative decisions invalid and unenforceable in court.[55]

The long history, evolution, and justification for reason-giving requirements in administrative law have been thoroughly examined by several scholars.[56] The requirement in administrative law began in formal rulemaking primarily as a record requirement.[57] It evolved to apply in informal rulemaking[58] where the major justification for the requirement was based on the facilitation of effective judicial review of agency action within a separation of powers construction.[59] It is the latter role—facilitation of judicial review—that is a principal concern of this Essay, although some of the other rationales will be briefly discussed. For the most part, this Essay does not delve into the debate over whether the

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54. Daniel J. Rohlf, *Avoiding the "Bare Record": Safeguarding Meaningful Judicial Review of Federal Agency Action*, 35 OHIO N.U. L. REV. 575, 575–79 (2009).

55. *See* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) ("[I]nadequate reasoning is the most frequent basis for judicial rejection of agency decisions."); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 Table 6 (1990) (20.7% of remands in 1985 were based on an inadequate agency rationale). Stack explains the true and real impact of *Chenery* well:

> The persistence and extension of the Chenery principle have had tremendous practical significance for administrative government. At its core, the Chenery principle directs judicial scrutiny toward what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision; Chenery links permissibility to the agency's articulation of the grounds for its action. On the one hand, that focus of judicial review gives agency officials strong incentives to attend to the justifications they provide for their actions, and it has helped make explicit reason-giving a major part of the industry of the administrative state. On the other hand, even with tremendous resources devoted to contemporaneous justification, the inadequacy of an agency's contemporaneous explanation for its decisions remains one of the most common grounds for judicial reversal and remand.

Stack, *supra* note 1, at 956–57, 973 ("Despite the industry of agency justification that the Chenery principle has helped to create, inadequate explanation is still among the most common grounds for judicial reversal and remand."); *see also* Shaprio & Levy, *supra* note 52, at 390, 442–454 (describing appendix with "results demonstrate the current significance of the reasons requirement, and the emergence of the rationalist model of judicial review").

56. *See, e.g.,* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory, in* COMMON LAW THEORY 134, 138–40 (Douglas E. Edlin ed., 2007); Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206–22 (1969); Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 197 (John F. Duffy & Michael Herz eds., 2005); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315, 332 (1996); Mashaw, *supra* note 25, at 105–13; Martin Shapiro, *supra* note 30, at 182; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755–67 (2006).

57. Rohlf, *supra* note 54, at 580–85.

58. *See* Shaprio & Levy, *supra* note 52, at 417–25 (tracing the reason-giving cases from the genesis of the requirement to the present).

59. *Id.* at 412–25 (discussing the "evolution of the reasons requirement and the models of judicial review").

reason-giving requirement is justified by one thing or another (*i.e.,* whether it is justified by an interpretation of the Administrative Procedure Act (APA), or mandated by the separation of powers doctrine, or is compelled for some other reason). Suffice it to say the reason-giving requirement is alive and robust in administrative law and the purpose of this Part is to describe some of its basic characteristics. The reason-giving requirement in administrative law is rather complicated but is now a long-established, fundamental, and basic part of administrative law.[60] This Part will only summarize some of its key components at least as they were intended to operate.

In short, an agency cannot simply exercise the full scope of its authority; it must explain its choice to use that authority.[61] The judicial standard in administrative law requires that the reasons and rationale for an agency decision be stated by the *right entity*—the agency itself and not the court. The reasons can be found in the *right place*—the record for review created with the agency decision. And, the reasons must be generated at the *right time*—prior to or contemporaneous with the agency decision not at some later date by agency personnel or counsel or anyone else. This right time requirement is the foundation for the general prohibition on post-hoc rationalizations.

The agency must do its part lest its decision fail to be upheld.[62] In this sense, the reason-giving requirement in administrative law serves concurrent purposes of enforcing agency accountability and at the same time limiting judicial power, encouraging judicial restraint, and protecting the separation of powers.

The reason-giving requirement in administrative law involves both an independently created judicial doctrine necessary to facilitate effective review within the judiciary's limited powers and the APA's command that an agency's action be set aside if it is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[63] As the Supreme Court

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60. Shapiro, *supra* note 30, at 179 ("Giving reasons might appear to be a rather simple and commonsense requirement. In reality it is densely packed with past legal and constitutional experience and replete with potential for development.").

61. Mashaw describes the relationship between authority and reasons as a test of legitimacy:

> [T]he only evidence that this specialized knowledge has in fact been deployed lies in administrators' explanations or reasons for their actions. 'The statute made me do it' is sometimes an adequate explanation for a ministerial, i.e., nondiscretionary, administrative act. But, in a much wider class of cases, the acceptability or legitimacy of an administrative decision will hinge not just on the authority or jurisdiction provided by a statute or treaty, but on the reasons provided for exercising that authority or jurisdiction in a particular way—either in deciding individual cases or in promulgating general norms.

Mashaw, *supra* note 9, at 117.

62. *See, e.g.*, Pierce, *supra* note 55, at 72.

63. 5 U.S.C. § 706 (2006); *see also* Shapiro, *supra* note 30, at 184–86 (explaining reasons requirement connection to APA standards); *id.* at 196 ("APA provisions . . . demand that the agency employ a process of reasoned elaboration . . . Post hoc reasons offered by government counsel in the course of rule-testing litigation do not meet that demand. The question is not 'Can reasons be given?' but rather 'Were reasons given?'").

determined in *Citizens to Preserve Overton Park, Inc. v. Volpe*, for example, "[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[64] In *Overton Park*, the Secretary of Transportation made a decision regarding the location of a highway but did not provide a contemporaneous statement of reasons for that decision. The Court would not approve the decision without a reason given, even after recognizing that there was no statutory or constitutional requirement for the Secretary to give any reason at the time of the agency decision. In doing so, the Court also refused to consider statements of reasons made after the fact of the agency decision, stating that "[t]hese affidavits were merely 'post hoc' rationalizations, which have traditionally been found to be an inadequate basis for review,"[65] because only reasons provided simultaneous with the final decision have legitimacy.

Over time, some have described the reason-giving standard in administrative law as one that has evolved into a record requirement.[66] An agency action examined under the APA by a court is "on-the-record review" and unless the agency provides the bases for their conclusions in the record, its action will be invalid. The record becomes a closed set at the point the agency makes its decision and the sources from which the court can find a reason therefore are equally closed to judicial review. That record is not generally subject to supplementation with newly stated reasons or other new material. The "whole" record includes all the information available to the agency, including material that runs contrary to the agency's decision.[67] Thus courts find an agency's decision inadequate if it fails to consider (and explain its rejection of) alternative actions or fails to address arguments against the agency decision.[68]

When the agency engages in informal rulemaking, the APA requires the agency to provide a "concise general statement of [the rule's] basis and purpose,"[69] and

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64. *Overton Park*, 401 U.S. 402, 419 (1971).

65. *Id.*

66. Shapiro, *supra* note 30, at 182.

67. As Rohlf explains:

> This strongly suggests that lawmakers intended the "whole record" to consist not merely of the information upon which an agency relies to support its decision-which of course consists mainly if not exclusively of information favorable to the agency's position-but also information in the agency's possession that undermines or even contradicts its ultimate decision. The idea that a record should include information at opposite ends of the spectrum-from documents that back the agency's rational to those potentially capable of destroying it-indicates a congressional desire to cast a very broad net over the information an agency should make available to a reviewing court.

Rohlf, *supra* note 54, at 580; *see also id.* at 584–85 ("Judicial decisions also make it clear that a "full" record includes all information considered by the deciding agency regardless whether it supports or contradicts the agency's position," and "a record consisting solely of information supporting an agency's decision would not provide a basis for objective evaluation of that decision.").

68. Shapiro, *supra* note 30, at 182–83.

69. 5 U.S.C. § 553(c) (2006).

when the agency engages in formal adjudication or rulemaking, the APA requires the agency to state "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion."[70] Conclusions must be supported by the record, and the record must contain a reasoned review.[71] The reasoned review now requires consideration of comments and alternatives and the presentation of reasons how and why comments or alternatives are considered and rejected or used.[72]

Despite some grounding in the APA, however, the primary precedent for the reason-giving requirement in administrative law and the concomitant prohibition on post hoc rationalizations comes from the principles set forth in the *Chenery* decisions. As the U.S. Supreme Court explained in *SEC v. Chenery*:

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.* To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.[73]

The Court's *Chenery II* decision in 1947 followed its determination in *Chenery I* that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."[74] The Court in *Chenery I* further articulated that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[75] *Chenery* is an element of enforcement of the APA but has more general foundations, especially as a doctrine that predates the APA.[76]

The *Chenery* principle has grown over time and encompasses almost all aspects of agency decision-making.[77] According to Mashaw, "[t]he modest

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70. *Id.* § 557(c)(3)(A).

71. Shapiro, *supra* note 30, at 186.

72. *Id.* Shapiro describes what he calls the "dialogue" requirement in notice and comment rulemaking and stating that "Giving reasons thus became an agency obligation to respond to each and every comment made with regard to a proposed rule," which by the 1980s expanded, and "agencies had to respond to all issues, not just those issues raised by the parties. . . . the obligation to give reasons becomes the obligation to defend synoptically a synoptic decision—to offer every reason needed to resolve every issue of fact, value, and choice among alternative policies that could arise in making the optimal rule." *Id.*

73. *Chenery*, 332 U.S. 194, 196 (1947) (emphasis added).

74. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 95 (1943).

75. *Id*. at 87.

76. Stack, *supra* note 1, at 976.

77. *Id.* at 962 ("The Supreme Court has extended the demand for explicit reason-giving to virtually every form of agency action and every conceivable type of deficiency in an agency's stated justification for its

suggestion in section 553 of the APA that agencies must file a 'concise statement of the basis and purpose' of a regulation has developed into the requirement of a comprehensive articulation of the factual bases, methodological presuppositions, and statutory authority that justifies any exercise of rulemaking."[78] Current doctrine has extended the reason-giving requirement to almost all actions of agencies,[79] and the rigor to provide complete, contemporaneous, discoverable, and transparent reasons has profound effects on the administrative state and its limits.[80]

Under *Chenery* and its progeny, courts may not consider post hoc rationalizations of counsel in defense of administrative agency decisions.[81] In other words, government lawyers are not permitted to defend agency judgments on grounds that the agency itself did not originally (and explicitly) rely upon in support of its decision.[82]

The reason-giving requirement and prohibition on post hoc rationalizations was restated and refined in the U.S. Supreme Court case of *Motor Vehicle Manufacturers Association of United States v. State Farm Mutual Automobile Insurance Co.*[83] The Secretary of Transportation, in promulgating a rule on passive restraints, failed to consider several alternatives to a seat belt mandate. The Court focused on the fact that, because the agency did not discuss the possible alternatives at issue at all, it could not have provided any reasons for rejecting them in favor of their preferred rule.[84] The Court refused to consider the post hoc rationalizations that the agency offered to explain why it rejected the

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action."); *see also* Shapiro, *supra* note 30, at 184, 186–87 (arguing that the reasons-giving requirement has expanded beyond just a check on discretion and opining that the standard has expanded to a judicial power that allows judges to inject their own views cloaked in a type of procedural review).

78. Mashaw, *supra* note 25, at 24–25.

79. Stack, *supra* note 1, at 964 (*Chenery* now generally demands reversals for "inadequate explanation of reasons, unsupportable reasons, and insufficient or erroneous findings of fact").

80. Mashaw, *supra* note 25, at 26 ("Administrators must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous.").

81. Ponte v. Real, 471 U.S. 491 (1985) (Marshall, J., dissenting) ("The best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision.*"); Camp v. Pitts, 411 U.S. 138, 142 (1973) ("[The] focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; . . . For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review.").

82. Mashaw, *supra* note 25, at 25 ("[C]ourts routinely reject 'post-hoc rationalizations,' the agency's use of untested facts outside the rulemaking record, and attempts to rely on unarticulated reservoirs of agency 'expertise.' They demand, in addition, persuasive responses to cogent objections by outside parties."); Stack, *supra* note 1, at 961 (describing *Chenery* as requiring the agency itself provide the rationale contemporaneous with its action and no post hoc rationalization will suffice even if "the agency's ultimate action is permissible").

83. 463 U.S. 29, 50 (1983).

84. *Id.* at 51 ("Not having discussed the possibility, the agency submitted no reasons at all. The short-and sufficient-answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

alternative rules in favor of the preferred rule—these were arguments provided by counsel for the first time on judicial review and not reasons considered and stated by the agency in and at the time of their decision.[85]

Moreover, the *State Farm* decision strengthened the precedent that "an agency must explain the 'rational connection' between the facts found and the regulatory decision made, and adequately resolve the evidentiary and policy issues before it."[86] To many, the Court embraced a willingness to review the *adequacy* of the reasons offered by the agency and not simply whether the agency provided reasons at all.[87] Largely that test:

> includes a determination of whether an agency relied on factors that Congress had not intended it to consider, whether it failed to consider 'entirely' an important aspect of the problem it was resolving, and whether it offered an explanation for its decision that ran counter to the evidence or was so implausible that it could not be explained as a product of a difference in view or of agency expertise.[88]

Thus, the *State Farm* decision gave courts a significant amount of oversight on the adequacy of the reasons given.

The prohibition on post hoc rationalizations is intended, in part, to make the agency do its job. Once a policy is decided and in place, the agency becomes vested in the policy. As such, the agency has an incentive to put forward any rationale that will keep it in place regardless of whether it is the actual basis of their decision. The ethical agency lawyer, asked to provide the reason the agency acted, should be required to provide the actual reason the agency had at the time of the decision. If one is allowed to provide a post-hoc rationalization (or reason) without consequence, there is little check on abuse and outright falsehoods and the unethical lawyer might instead provide the reason that is more likely to win the case rather than the reason at the time of the decision. Post-hoc reasoning in such an environment may not only be unethical in that regard but might also fail to reflect the most balanced judgment of an agency's exercise of discretion. *Chenery* prevents a (disciplined and non-activist) judge from converting his own arguments into the agency's position and prevents agency counsel from providing that judge with false information to aid in such an endeavor.[89]

There is a debate over what the most important justification is for the

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85. *Id.*

86. Shapiro & Levy, *supra* note 52, at 411.

87. *Id.* at 424 (*State Farm* "used the reason requirement to engage in substantive review, which under the arbitrary and capricious standard became an inquiry into the adequacy of the reasons offered by the agency").

88. *Id.* at 437.

89. *Id.* at 417 ("the Court's two decisions in the famous *Chenery* litigation completed the transformation of the reasons requirement" from proceduralist to rationalist).

reason-giving requirement, but there is certainly a long list of possibilities.[90] Stack explains that, as applied, the *Chenery* principle is a very demanding request for explanation on the part of the agency:

> [O]nce any given standard of review is joined with the *Chenery* principle, the *Chenery* principle limits judicial review to the explanation the agency relied upon when it acted. . . . As a practical matter, this conjunction requires that agencies specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives.[91]

For many, the rule requiring that agencies proffer reasons for their decisions in the record prior to judicial review is based in the fundamentals of separation of powers—requiring that the reasons are generated by the agencies to which Congress has delegated lawmaking-type powers (and not generated in the courts)—and is intended to avoid judicial policymaking where unelected judges would decide whether there is adequate justification for the agency decision.[92] One of the primary purposes of the reason-giving requirement is to give the reviewing court a basis upon which it can evaluate the agency's decision and rationale that it came to when it promulgated a rule rather than a court searching for a reason of its own.[93] Others explain that judicial review as a check on agency discretion is one of the primary reasons for the reason-giving requirement.[94]

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90. *See, e.g.*, Mashaw, *supra* note 9, at 118 (the democracy enhancing functions of the reasons-giving requirement in administrative law are the most important justification for it, although instrumental justifications like the facilitation of judicial review have a role).

91. Stack, *supra* note 1, at 972. *Chenery*, of course, has some flaws and limits. The two major limitations are one, when an agency's interpretation is of a statute, it does not administer, and the second is when the statute compels a certain result ("issues not clearly resolved by the statute"); *see id.* at 965–67. But a discussion of those details, the greater intricacies of *Chenery*, and reason-giving in administrative law is beyond the scope of this Essay.

92. Shapiro & Levy, *supra* note 52, at 390 (the reason-giving requirement in administrative law is best understood as a product of the separation of powers), 427–28 (opining that " heightened scrutiny under the reasons requirement is best understood as a product of separation of powers"), & 428 ("While the *Bowen* plurality did not expressly rely on the separation of powers doctrine as a rationale for requiring adequate reasons, the decision does reflect an awareness that the adequate reasons requirement is integrally related to the structural dilemma inherent in the delegation of legislative and judicial power to administrative agencies."); Church of Scientology of Cal. v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("The precept that the agency's rationale must be stated by the agency itself stems from proper respect for the separation of powers among the branches of government."). *See generally* Stack, *supra* note 1 (providing a separation of powers and non-delegation justification for the *Chenery* principal).

93. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) (*Chenery* prescribes a "general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision").

94. Mashaw, *supra* note 9, at 105 ("The right to reasons in American administrative law is conventionally understood as parasitic on other rights or on the necessities of effective judicial review."); Shapiro, *supra* note 30, at 181 ("[G]iving reasons has been deeply entangled with judicial review. If administrative discretion is inevitable and desirable, then one obvious mode of denaturing discretion of its poisons is to set judges to watch administrators.").

In addition to these many purposes including facilitating judicial review,[95] the reason-giving requirement in administrative law is designed to serve a number of other purposes and policies, including promoting educated deliberation, transparency, and facilitation of public participation.[96] The public that wishes to participate must have some view into the agency's mind if they are to provide useful comments and the agency must at the same time give reasons for the acceptance or rejection of such comments.[97] Forcing an agency to make its reasons known on the record supports accountability[98] and legitimacy, and it is designed to curb governmental abuse and administrative over-reaching by requiring that an agency justify its decisions with reasons that fall within its limited scope of authority.[99] It is designed to ensure that there is a record of the agency's deliberation.[100]

The reason-giving rule in administrative law is not meant to be outcome determinative.[101] The result of the agency's determination is of little concern under the reason-giving test as constructed, and the judges are reminded of their limited role and the court's incapacity to substitute its policy preferences for those of the agency.[102]

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95. Shapiro, *supra* note 30, at 181 (reasons-giving requirements are for the benefit of judges but also for the public).

96. Shapiro explains some of the benefits as follows:

> Giving reasons requirements are a form of internal improvement for administrators. A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat. In another aspect, giving reasons is a device for enhancing democratic influences on administration by making government more transparent. Such requirements are often closely brigaded, as they are in the American Administrative Procedures Act ("APA"), with requirements of notice of pending government actions, public consultation, and publication of final decisions.

Shapiro, *supra* note 30, at 180–81*; see also* Mashaw, *supra* note 25, at 23–24 (explaining that rationality requirements emerged in administrative law primarily with the onset of the New Deal).

97. Mashaw, *supra* note 9, at 111 ("[A] demand for reason-giving is also in some practical sense a demand for responsiveness to the submissions of affected parties. It therefore reinforces their rights of participation as provided by the APA. The judicial demand for reasons to facilitate judicial review reinforces participatory rights concerning general regulations in the same fashion that reason-giving protects individualized hearing rights concerning particularized decisions.").

98. Shapiro, *supra* note 30, at 181 ("The reason-giving administrator is likely to make more reasonable decisions than he or she otherwise might and is more subject to general public surveillance.").

99. Mashaw, *supra* note 25, at 23–24 ("Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge."); Shapiro & Levy, *supra* note 52, at 395 ("[J]udicial review and the legitimacy of administrative government are inextricably intertwined.").

100. Shapiro, *supra* note 30, at 182 (the reasons-giving requirement evolved into a record requirement and "if there is no record of agency deliberation, an administrative agency wielding its discretion is impervious to judicial review").

101. *Id.* at 181 (the request for reasons means "[a]dministrators may still arrive at whatever decisions they think best; they must merely give reasons for the decision at which they did arrive").

102. Shapiro and Levy describe the importance of the distinction between results and reasons as follows:

> *State Farm* makes clear that the proper focus for review is not the *result* reached by an agency, but rather the *reasons* given to support that result. This distinction is important because it reminds judges

Although this Part has focused on *Chenery* and the APA as establishing the basic reason-giving requirements in administrative law, many other statutes that regulate the behavior of agencies have their own reason-giving requirements as well.[103] Reason-giving requirements are a popular condition for administrative action.[104]

The purpose of this Part has been to introduce readers to the heightened level of reason-giving in administrative law and to understand in part the requirements and their rationale. From this, one should leave this Part with an impression that reason-giving requirements have prevalent places in law with some rather serious consequences. Second, with that appreciation, one should get a sense of the necessity for lawyers to be generally proficient in reason-giving skills. And finally, the application of reason-giving requirements for administrative law in the judicial review of administrative decisions can help one understand part of the reason-giving requirements that are implemented in law school courses and examinations. Those same requirements implemented by professors to review law student action simultaneously prepare the students with reason-giving skills that, as demonstrated in these first Parts, will have real world application in practicing law.

IV. SELECTED ADDITIONAL ETHICAL ISSUES IN REASON-GIVING

Reason-giving in practice certainly raises a number of ethical issues, some of which have been discussed in previous Parts. This Part takes a moment to focus on and stress some of the issues of legal ethics most directly implicated within the reason-giving subject. This discussion will proceed in two principal areas. First, this Part will discuss when reason-giving requirements or expectations encourage ethical behavior in the actual making of decisions and when reason-giving otherwise constrains officials from committing unethical acts. The second area of discussion involves legal professional ethics when one is the reason giver—examining what ethical standards should apply to reason-giving and what ethical obligations are owed to the receivers of reasons.

> that they are not to substitute their judgment for the policy choices of an agency and that the agency's reasoning may withstand scrutiny even if a judge disagrees with the result. Moreover, the focus on an agency's reasoning allows judges to acknowledge agency expertise where appropriate.

Shapiro & Levy, *supra* note 52, at 437–38.

103. Mashaw, *supra* note 25, at 25 (explaining that a variety of additional, specific regulatory statutes govern agency decision-making beyond the APA and "a plethora of more general, framework statutes have made agency rulemaking into what some have characterized as an exercise in 'synoptic' rationality").

104. NEPA, SBREFA, and other acts place a number of reason-giving requirements on agency action above and beyond what is required under the APA or to otherwise facilitate judicial review.

Reason-giving is about creating a metric for assessment in exactly the same way the law views ethical standards. Tasioulos explains:

> Above all, ethics relates to law as a standard of assessment. Making ethical judgments just is pronouncing on how things stand with respect to moral and prudential values. Laws, legal institutions, the behavior of legal officials and so on, form one important subject-matter of ethical judgment; . . . Hence the branch of ethics that Bentham called "censorial jurisprudence," concerned with the elaboration of ethical standards, at varying levels of specificity, to guide and assess the deliberations and activities of legislators, adjudicators and law-enforcers as well as those of citizens with respect to law and legal institutions.[105]

He continues by explaining that "the critical relation of ethics to law is perfectly compatible with" requirements unique to or prominent in law like those "procedural and rule of law values that constrain the deployment of state power."[106] Reason-giving requirements are precisely such rules.

Reason-giving requirements are popular as a powerful check on the exercise of power by providing the public with information about decisions that is testable or subject to scrutiny.[107] People demand reason-giving requirements because they induce ethical behavior[108] or allow the public to have enough information to discover unethical behavior.[109] Decision-makers tend to be more careful and disciplined with their choice of both an action and the reasons stated for it when they know that some audience will demand the giving of reasons.[110] Additionally, they will be less likely to make biased decisions lest their bias be easily exposed with the resultant consequences.[111] For example, the ethics of those in official

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105. John Tasioulas, *The Legal Relevance of Ethical Objectivity*, 47 AM. J. JURIS. 211, 228–29 (2002). Cohen also explains some of the questions involved, particularly a need to determine the standards of sincerity in reason-giving:

> The lawfulness of state actors' decisions frequently depends on the reasons they give to justify their conduct, and a wide range of statutory and constitutional law renders otherwise lawful actions unlawful if they are not justified by reasons or are justified by the wrong reasons. A question that arises is whether sincerity in reason-giving is also—and should be—required. In other words, when public officials are under a duty to give reasons for their decisions, are they also under a duty to give sincere reasons? That is, do they have the duty to state their actual motives as their reasons?

Cohen, *supra* note 13, at 1091.

106. Tasioulas, *supra* note 105, at 229.

107. Cohen, *supra* note 37, at 27 ("Reason-giving requirements have become such a widely popular check on public institutions precisely because of the peculiar epistemic consequences they produce.").

108. *Id.* at 27 (discussing reason-giving duties as constraints on what decision-makers are "allowed to take into account").

109. *Id.* at 27–28 (explaining reason-giving requirement as an effective means of monitoring behavior).

110. *Id.* at 28 ("As an anthropological matter, when people know that they will be called to account for their action, they presumably tend to be more careful—they think twice before they reach a conclusion."); Schauer, *supra* note 4, at 657 (discussing "the decision-disciplining function of giving reasons"); *see* Staszewski, *supra* note 3, at 1281 (discussing verifiability and testable references).

111. Cohen explains:

public positions generally require that they treat persons fairly and equally in the exercise of their power, and reason-giving requirements help the public evaluate whether those types of ethical standards are being met.[112]

Those required to give reasons will often be more thoughtful,[113] and the fear of reprisal will alter behavior or limit the available exercises of power which in and of itself helps to reduce governmental abuses.[114] The demand or requirement for the giving of reasons otherwise constrains decision-makers and limits the universe of acceptable actions—whether by government officials or others. Schauer, for example, explains an "unwritability" constraint. Although Schauer is talking mostly about judicial opinions, his analysis is applicable to any public pronouncement of a reason for a decision. Basically, if one is required to reveal a reason for a decision—*e.g.* "write it down"—and it would be seen as illegitimate by the receivers of the reason, a public actor will feel compelled against making that decision.[115]

At the same time, the public will have more ammunition to contest potentially unethical decision-making, which should act as a deterrent to it.[116] Deviations from given reasons will also be more transparent and more easily questioned and demands for explanations for the change in behavior will be more readily made.[117]

> We think that the legal duty to state reasons protects citizens against arbitrary decision-making by virtue of its epistemic effect on reasons. Requiring that deciders give their reasons arguably results in more carefully thought through decisions . . . [and] workers who must substantiate their . . . decisions are more likely, we assume, to make unbiased determinations.

Cohen, *supra* note 37, at 29.

112. Staszewski, *supra* note 3, at 1281.

113. Schauer, *supra* note 4, at 657 ("Under some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions.").

114. Cohen, *supra* note 37, at 28 (if persons are required to justify their actions with reasons than it will influence the outcome itself by limiting available decisions).

115. As Schauer explains, some decisions "won't write" because they would be based on socially impermissible rationale and thereby act as constraints on morally or socially or ethically unacceptable behavior:

> Perhaps the very fact of writing (or writing publicly, although the two are hardly the same) serves as a constraint. Perhaps there are things we can think but cannot write down. But why would a judge believe an outcome to be correct when it could not be explained by a reason? Perhaps the result itself is indefensible, but that begs the question, for then we can ask what makes a result indefensible. One possibility is that there is a reason for the result, albeit a legally, socially, or morally impermissible one. The judge might believe, for example, that the plaintiff should win because the plaintiff is white. This is a reason, but its social and moral unacceptability operates as a constraint. So perhaps to say that an outcome "won't write" is to say that it is justifiable only by illegitimate reasons.

Schauer, *supra* note 4, at 652.

116. Cohen, *supra* note 37, at 27 ("[T]he legal requirement to give reasons can be an effective oversight mechanism designed to prevent arbitrary decision-making and to increase the contestability of public decisions."); Schauer, *supra* note 4, at 657–58 (The "reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.").

117. Staszewski, *supra* note 3, at 1282.

Similarly, the reason given for a decision becomes a reference point from which we can test the truthfulness of the reason giver. The moral and ethical legitimacy of action can be judged by the justificatory reasons given for one's actions.[118] Moreover, the existence of pretext is more readily revealed or at least authenticity more easily challenged when there is a reference point upon which the decision-maker is relying and publicly proclaiming as a justification.[119]

Schauer explains that those designing institutions and setting legal requirements to give reasons have this ethical constraint in mind. He contends that "when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies."[120] Because receivers have a set of stated reasons to work with in evaluating conduct and some knowledge of the decision-maker's justification, the requirement to give reasons makes it more likely that the faulty, fallacious, or otherwise disingenuous or unethical reasoning on the part of officials will be exposed.[121]

We now move from the ways reason-giving supports ethical decision-making to an analysis of ethical standards applied to reason-giving. Much of what has been discussed so far in this Essay has related to the prudential or mandatory reasons for giving reasons. To begin in this second area of discussion, it is important to note that even when there is no formal, "legally-mandated" requirement to provide reasons for action, sometimes professional ethics may demand giving reasons, such as to clients or to others, to support effective representation of a client's position.[122] Thus even setting aside the ethical standards for the substance of reasons given, the provision of a reason in the first instance regardless of its substance may be ethically mandated.

In addition, when giving reasons, legal ethics has a role to play in the substance of the reasons given. However, there is no universal ethical standard for when reason-giving in law must be truthful, sincere, or otherwise perfectly correlated with the actual reason a decision was made.[123] Nonetheless, Cohen has argued that, "in the legal context, there is a strong presumption that decision makers should be sincere. Sincerity towards and between public institutions, honesty in statements to others, and accurate depictions of the law are some of the defining

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118. *See generally* Cohen, *supra* note 37; Cohen, *supra* note 13.

119. *See generally* Staszewski, *supra* note 3 (discussing generally, *inter alia*, pre-textual reasons and the failures of political accountability).

120. Schauer, *supra* note 4, at 657.

121. Kupfer, *supra* note 11, at 90–93.

122. Kupfer, *supra* note 13, at 90–93 (discussing reasons for giving reasons in ethical practice).

123. Cohen, *supra* note 13, at 1092–93 ("In a variety of legal contexts, the lack of sincere reasons is no obstacle to the legal validity of a decision. . . . In short, many decision-making environments eschew sincerity in reason-giving.").

features of legal ethics."[124] But even Cohen and some of the strongest advocates for injecting a sincerity component in our demands under reason-giving requirements recognize that such a demand must be context specific and subject to certain exceptions.[125] There simply is no universal agreement as to how ethical standards must or should apply to reason-giving.[126]

Determining standards for the ethical giving of reasons is the subject of a much wider literature and beyond the scope of this Essay. It is at least important to note that substantial ethical questions arise for those lawyers that will be expected or required to give legitimate, sincere, authentic, and accurate reasons for decisions or to report accurately the reasons upon which others have based decisions (such as the lawyers for an agency).[127]

There is no doubt that serious ethical issues can arise when a lawyer is asked to give a reason and tempted to be less than genuine in the reason given. Administrative law again provides one example. Agencies and agency officials or lawyers will have an incentive to proffer any reason that will sustain one of their decisions because they become vested in their position taken and entrenched in defending it. By prohibiting post-hoc rationalizations and by providing for judicial review of the reasons given at the time a decision is made, there is a check against this unethical temptation toward distortion. The nature of this judicial review standard in administrative law makes it even more important to practice under ethical standards of conduct in the face of reason-giving requirements precisely because the judges may not inquire deeply into the truthfulness of the reasons given. To some extent in administrative law, the reason giver's own ethics are the only check on the veracity of the reason offered or at least its contemporaneous connection to the decision for which it is offered. And most importantly, the ethical stakes are highest when reason-giving occurs within public institutions, first because those institutions hold the trust of their constituents and second because of the general preference for a limitation on the exercise of state power in the constitutional system.[128]

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124. Cohen, *supra* note 13, at 1100.

125. *Id.* at 1150 ("the conclusion of this analysis is that, to a certain extent, whether decision makers are sincere is relative to context." and calling for "[m]ore empirical research on actual reason-giving by public institutions which takes into account the theoretical understandings" of sincerity in context to assess "how the sincerity requirement applies to real world instances of reason-giving").

126. *Id.* at 1093 ("[D]espite its presumptive appeal, the idea that public officials must adhere to a norm of sincerity is not universally conceded.").

127. *Id.* at 1091 ("In law, and often elsewhere, sincerity seems to be both the usual expectation and the ideal that regulates discursive practices and exchanges.").

128. *Id.* at 1100 (giving examples of "formal procedures aimed at furthering the requirement of sincerity, such as taking oaths, calling witnesses, convening expert panels, producing evidence, securing cross-examinations, and so on" as uniquely demanding sincerity from public institutions in their reason giving); *see also* Schauer, *supra* note 4, at 658 (discussing the concept of trust).

Lawyers and law students must be taught that there is a need to (1) develop the expertise necessary to understand when and how to effectively give reasons to satisfy client or other receiver expectations or demands for reasons; but that (2) the universe of acceptable reasons for action or given for action is necessarily limited by ethical standards just as with all professional conduct. Learning where the temptations will lie to deceive or manipulate through reason-giving can help lawyers and students know what behavior is unacceptable. Knowing why authentic reason-giving facilitates the position of trust that lawyers hold will help encourage students and lawyers to be ethical in their provision of reasons to audiences of receivers to whom they may owe an obligation of good faith, candor, or other duty. While much of this Essay is focused on the first step (learning to give reasons, understanding when reasons are required, and developing a habit of giving reasons), that step, like any other subject matter learned in law school and in practice, must be tempered by our generally applicable and separately instructed ethical standards.

Questions of ethical behavior in the face of reason-giving requirements can provide fertile ground for the hypothetical testing and application of general ethical constructs to specific fact scenarios in the teaching of legal ethics. And concurrently while teaching the skill of reason-giving, we can have another occasion to invoke the teachings of legal ethics. As Kupfer has wisely charged, "the recent and persistent call to include the teaching of skills and values in legal education has refocused the need to train future lawyers to develop an ethical capacity within their work."[129] The next Parts further explore our teaching of the reason-giving skill and the evaluation of our pedagogical means for measuring our success.

V. THE PEDAGOGICAL IMPORTANCE OF INCULCATING THE HABIT AND SKILL OF REASON-GIVING

Given reason-giving's overall importance in the legal system itself, developing the skill of reason-giving in law school and continuing that development during one's legal career is important to the education of effective lawyers. Reason-giving is too prevalent and too important a skill to go unnoticed, yet there seems to be little recognition of it as a unique category of lawyerly development. More attention to this uniquely important skill is deserved in our pedagogical endeavors in law school and in continuing lawyer educational development. Lawyers should take note that there is a direct correlation with the giving of reasons and the seriousness with which one's position or argument is received.[130]

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129. Kupfer, *supra* note 11, at 35.

130. Sunstein, *Analogical Reasoning*, *supra* note 27, at 779 n.130.

The consuming audiences of legal and governmental services demand reason-giving, so lawyers must be prepared to meet that demand.

Lawyers and the law cannot avoid that word "why" and all that it entails, as discussed earlier in Part I of this Essay. Judge Henry Friendly explains the legal mind's peculiar fascination with the question "why" as follows:

> The legal mind is an inquiring mind. It does not accept; it asks. Its favorite word is "why." . . . It is analytical, it picks a problem apart so that the components can be seen and judged. It is selective; it rejects characteristics that are not significant and focuses on those that are . . . It is a classifying mind; it finds significant differences between cases that superficially seem similar and significant similarities between cases that at first seem different. It is a discriminating mind; it has a profound disbelief in what Professor Frankfurter used to call "the democracy of ideas.[131]

The legal mind is a reason-seeking mind and must also be a mind capable of reason-giving. Developing an appreciation for the question why and an aptitude for answering it are beneficial to any lawyer and therefore worth attention in teaching and learning.

As Daniel Koorstein has posited, "[t]he lawyer must obviously be skilled at arguing and giving reasons, in systematic or theoretical explanations, for this is the core of most legal reasoning and argument."[132] Lawyers who are unable to present good legal reasons for their actions or for their proposed positions are offering little more than could be proffered by someone not learned in the law.

A lawyer's expertise is not limited to the ability to offer conclusions or advise clients on an "answer" alone, or to educate the courts only on the final judgment. A lawyer cannot confidently or adequately tell a client, "well, now that I know the facts let me immediately just tell you what the outcome will be." She has a duty to her clients and to herself to understand how that result will be reached and *independently be capable of explaining how that result will be reached*.

A lawyer cannot persuade a court without an explanation of the argument she wishes the court to adopt or without explaining why alternative explanations of the law should be rejected. The lawyer must give reasons to the court that give the judge confidence and a shield should the judge choose to side with that lawyer's position. A lawyer wants a judge to adopt his conclusion, and a judge concerned with the legitimacy of his opinion will need to provide the parties and the public with reasons explaining why he reached that decision. A good lawyer can ease the judge's task and apprehend his anxiety in reaching a conclusion by providing the work product that the judge will want to adopt as his own.

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131. DAVID DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 22–23 (2012) (quoting from Judge Friendly's University of Chicago speech).

132. Daniel J. Koorstein, *The Double Life of Wallace Stevens: Is Law Ever the "Necessary Angel" of Creative Art?*, 41 N.Y.L. SCH. L. REV. 1187, 1276 (1997).

Moreover, lawyers who become legislators or executives (or their aides) in government will need the same skills. No matter if it is clients, the court, or a voting public—some constituency will be expecting every lawyer to give reasons for decisions, actions, proposals, fees, arguments, and the like. And, sometimes our own professional ethics may demand giving reasons[133] even where there is perhaps no other constituency than our own integrity.

Given all of the ways in which lawyers encounter the need to give reasons and how regularly they must evaluate the giving of reasons by others, educators should teach the reason-giving skill and develop ways in which students must practice it. There is a reason for requiring reasons from students—in class answers to questions, on a law school exam, and elsewhere in the educational process. It forces them into a habit that prepares them for the real world requirements that exist in law to provide reasons. It begins to develop the skill as to how best to supply reasons in such situations.

Reason-giving has value in demonstrating a command of the particular subject matter being tested on a law school exam.[134] Reason giving is also a generally applicable skill in law that is susceptible to testing and evaluation of legal educator's success in teaching it by looking at law school exam answers.[135] The skill itself can be tested and evaluated even in a doctrinal class with a traditional written law school exam, where professors can examine a student's reason-giving skill apart and isolated from the student's grade for the command of the subject matter itself.

When professors tell their students that reasons are required, perhaps if it is re-crafted and labeled as a "skill," students will be more cognizant of its importance and reflect on it when conducting their work. Placing demands on students to give reasons is worthwhile for their development as lawyers and the more stringent one is in evaluating students' compliance with this demand, the more effective a pedagogical method it will be.[136]

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133. Kupfer, *supra* note 11, at 90–93 (discussing reasons for giving reasons in ethical practice).

134. Sunstein, *supra* note 26, at 1756 ("[I]t [is] hard to prize a capacity to know what the law is without knowing why it is as it is, or how a case should come out without knowing why it should come out that way.").

135. In this sense, one could use various examples of the teaching of and testing of the reason-giving skill to further demonstrate a commitment to skills education as suggested by recent studies like the McCrate Report or to meet the challenge of the Carnegie Report to make legal analysis more explicit; and it could actually be a testable, verifiable, and recordable skill for purposes of satisfying learning outcomes assessment requirements from WASC and as anticipated from the ABA.

136. Vincent C. Immel, *Use of the Contracts Courses as a Vehicle for Teaching Problem Solving*, 44 ST. LOUIS U. L.J. 1205 (2000) (discussing the importance of teaching and examining reason-giving and problem solving, even though professors might become despondent when student performance does not live up to these high reason-giving expectations).

VI. A CASE STUDY OF INCULCATING THE LAWYER'S REASON-GIVING SKILL AND LESSONS FROM JUDICIAL REVIEW OF AGENCY ACTION IN ADMINISTRATIVE LAW

This Part takes a brief tour through administrative law drawing parallels with the evaluation of an answer to a traditional law school essay exam question. It serves as a case study in one of the ways that legal education can begin to prepare students and hone the reason-giving skills that will be necessary in practice. This exercise explains to students some basic facts of life in exam evaluation and hopefully provides an understandable analogy that, if communicated with students, will help them accept some basic conditions involved in the test-taker/reviewer relationship. Many have examined law school exams in the past[137] and some have provided "how to" wisdom to students taking exams,[138] but none have thoroughly looked at them as exercises in the development of the reason-giving skill.

A reason-giving requirement in law school exam answers is necessary for effective professorial review for many of the same reasons it is required in judicial review of agency action. This analogy demonstrates the fact that demanding reason giving on law school exam answers is in itself assisting in the development of a lawyering skill; and the law school exam can serve as an independent method for testing and evaluating whether a law school is performing well at teaching that particular skill.

In a recent work, I introduced the reason-giving matter for consideration in taking law school exams from a practical standpoint.[139] In part, I explained that "[t]he written exam must be the demonstration of thought, not simply a statement

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137. *See, e.g.*, Richard B. Amandes, *How We Examine,* 11 J. LEGAL EDUC. 566 (1959); Robert C. Downs & Nancy Levit, *If It Can Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822 (1997) (explaining that "[t]he typical law school examination is a single, end-of-semester or end-of-course test on which most or all of the course grade is based," but criticizing the one shot, one grade approach to law school evaluation); Kenney F. Hegland, *Law School Examination: On Essay Exams*, 56 J. LEGAL EDUC. 140 (2006) (defending the essay exam as in important tool for developing and evaluating writing skills); Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 153 (2001) (describing the traditional law school exam and explaining "[t]his system imposes a single time-limited examination at the end of the semester that covers the course material "comprehensively" by posing a series of novel problems that students must resolve under considerable time pressure"); Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 435 (1989) ("This Essay provides a 'systemic analysis' and a 'total critique' by assessing the structure, contextual relationships, values, and adverse effects of law school examinations."). *See generally* Steve H. Nickle, *Examining and Grading in American Law Schools,* 30 ARK. L. REV. 411, 411–12 (1977); Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, With a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657 (1997) (an analysis of the history and evolution of the examination process in law schools).

138. *See* Donald J. Kochan, *"Learning" Research and Legal Education: A Brief Overview and Selected Bibliographical Survey*, 40 SW. U. L. REV. 449 (2011) (listing sources).

139. Donald J. Kochan, *"Thinking" in a Deweyan Perspective: The Law School Exam as a Case Study for Thinking in Lawyering*, 12 NEV. L.J. 395 (2012).

of its conclusion," and "the submitted exam answer is the thought process memorialized on paper."[140]

Furthermore, I contended that: "[o]ne cannot presume that the evaluator knows [the] thoughts, bases, or analyses leading to [her] conclusion unless they are explored . . . on paper—the record for review."[141] Writing out one's reasons on an exam is necessary to provide the professor with a record of decision-making and a basis for exam review and grading. This guidance tracks a similar and well-known "show your work" admonition in the field of mathematics classes,[142] which has also been recognized by some others.[143] Even a few courts have drawn an analogy between procedural requirements in administrative law and the "show your work" method in math.[144] So, it should not surprise the educator who has pounded the show your work message into students that there are parallels between student accountability to professors and government accountability to the citizenry and the judges that review their use of authority.[145]

Too often students fail to give reasons for their conclusions in their answers in class or on law school exam answers. Legal educators should demand a

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140. *Id.* at 409.

141. *Id.*

142. *Id.* (discussing writers who generally discussed "show your work").

143. Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ASS'N LEGAL WRITING DIRECTORS 91, 100 n.28 (2002); *see, e.g.*, JOHN C. DERNBACH, WRITING ESSAY EXAMS TO SUCCEED (NOT JUST TO SURVIVE) xxi (2007); Karen L. Koch, *A Multi-Disciplinary Comparison of Rules-Driven Writing: Similarities in Legal Writing, Biology Research Articles, and Computer Programming*, 55 J. LEGAL EDUC. 234 (2005). Another author describes it as thinking of it as math before calculators:

> Good Writing is Good Thinking. Before the age of computers and calculators, there was only one way to solve a complex algebra problem: work it out on paper. Unlike students of algebra, however, lawyers have not yet devised the machine that can solve legal problems for them. Like the ancient mathematician, we must, therefore, write out our legal problems if we hope to get the right answer.

Bruce A. Thomason, *A Case for Improving Legal Writing*, ORANGE COUNTY LAWYER, Oct. 2000, at 36. Yet another author focused on a "no support, no credit" approach to law school exams just as it would be in math class:

> Get to the answer through careful study and consideration of all possible options. Each option is fact-and legal theory-tested. No shortcuts. Explain how you get to the answer, why the other options were discarded and why the selected answer is the most appropriate. In short, as we learned in elementary math class, show your work! No credit is given for the right answer if there is no support provided.

Jaime N. Doherty, *The Socratic Method Meets the Information Age*, LEGAL INTELLIGENCER, April 13, 2010, at 4 (providing this helpful summary, although ultimately criticizing the utility of traditional law school teaching methods to modern practice).

144. *In re* Expulsion of N.Y.B., 750 N.W.2d 318, 326 (Ct. App. Minn. 2008); *see, e.g.*, South Yuba River Citizen's League v. Nat'l Marine Fisheries Serv., No. Civ. S-06-2845, 2010 WL 2720959, at *7 (E.D. Cal. July 8, 2010) (characterizing petitioner's claims that agency "failed to consider aspects of the problem or to explain the basis for its conclusions" as "'show your work' arguments").

145. This part expands on that concept and provides the supporting analysis for the exam's place in the broader reason-giving enterprise and the teaching of the skill. Much of the uniqueness of the observations in this essay comes from its focus on judicial review of administrative action as a transferable paradigm for understanding professorial review of student action.

command of the reason-giving skill, but the task of training students to meet such expectations will undoubtedly be frustrating.[146] We cannot become despondent in this task.

Law students often rush too quickly without writing their reasons, thinking through their analysis on paper, considering all issues and alternatives and explaining their processes of conclusion in the written answer. In these situations, whether they have reasoned fully in their head and or whether they have not reasoned at all does not matter. What matters is that their reasons for conclusions, if any, have not been put on record in the written answer for professorial review. As a result, when the evaluator is prohibited from finding an answer on her own then by necessity she must label the student as having no rationale and no basis for their conclusion. It is a strange case where the absence of evidence must indeed, as a matter of review, be construed by the evaluator to be the evidence of absence.[147] The written exam is the record; and the record is key. In the grading process, the professor-evaluator simply cannot himself fill in the blank spots or give the student the benefit of the doubt. The evaluator cannot supplement the record with missing or accurate reasoning when the student has provided none.

How is it that a law professor can communicate to his or her students the nature of the grading enterprise for the traditional law school exam? One useful way of describing the process of evaluation can be drawn from administrative law, the process of judicial review, and the standards of the Administrative Procedure Act[148] and related statutes.

The best argument for a reason-giving requirement in administrative law is that it aids in judicial review—providing some reference point for the judges and limits the judge from filling in the gaps in agency analysis (i.e. keeps the judges clear of doing the agency's job for it or from second guessing the agency by substituting its will for that of the agency).[149] This justification works well when we talk about professorial review of student action and a requirement that students provide reasons in their work product that the professor must evaluate.

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146. *See generally* Immel, *supra* note 136 (discussing the importance of teaching and examining reason-giving and problem solving, even though despondency with student performance surely results from such expectations).

147. Carl Sagan famously said, in relation to the existence of extraterrestrial life, "the absence of evidence is not the evidence of absence." CARL SAGAN, THE DEMON HAUNTED WORLD 200 (1997). Donald Rumsfeld borrowed this regarding Iraq's weapons of mass destruction. Where that phrase normally is logical and holds true, the professor-evaluator must apply the rule that the absence of the evidence that thought occurred and reasons existed must be presumed to mean that in the student's mind the thinking did not occur and the student has no reasons to offer. Roger Cohen, *Rumsfeld Is Correct—the Truth Will Get Out*, N.Y. TIMES, June 7, 2006, *available at* http://www.nytimes.com/iht/2006/06/07/world/IHT-07globalist.html.

148. *See supra* Part III.

149. Mashaw, *supra* note 9, at 111 ("With respect to general regulations or rulemaking, reason-giving is demanded as a facilitator of judicial review.").

In this brief exercise of explanation, we can think of the student as acting like an agency creating a record of decision and the professor as the judge conducting judicial review. The student is entrusted with power to resolve a question and the professor must evaluate the exercise of that decision. In the agency setting as well as the exam, the reviewing body cannot uphold a conclusion with an unsupported, unlawful, arbitrary, or unarticulated rationale by the agency/student. Even if the professor knows why the student's answer is correct and can even guess or presume the processes that the student engaged in to reach her conclusion, the professor cannot (or at least many will not) search his mind and "fill in" the reasons or reasoning for the student.

The judge conducting judicial review in administrative law cases likewise will not look beyond the record. The judge will limit herself to evaluating just the rationale provided by the agency. Nothing more than that contemporaneous reason will be allowed to support the validity and legality of the agency action.[150] Under existing doctrines, a court should not venture into the justification process and will not conduct an independent search of the record to find support for the decision made by the agency.[151] The agency must be the one to offer the reason and direct the court to support for the reason in the record.[152] Where there is no reason given, "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action."[153] When an agency's action cannot be sustained on the administrative record made,[154] including the reason for the decision as stated in the record,[155] the court must vacate the agency decision and remand it for further consideration.[156] Students analogously should be required to provide the rationale for their answers on the exam. They should not expect that the reviewer will know their bases nor give them credit for some reason not stated on the exam. And professors will not look beyond the answer or allow themselves to

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150. Am. Textile Mfrs. Inst. Inc. v. Donovan, 452 U.S. 490, 539 n.73 (1981).

151. *Id.* ("There is evidence in the record that might support such a determination. . . . However, the courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

152. Simply because an agency has authority to do an act does not make its act legal, it must put forth reasons for exercising that authority and a failure to do so makes the action arbitrary and capricious. Mashaw, *supra* note 25, at 22 ("[W]hile statutory authority is a necessary condition for legitimate administrative action, it is far from sufficient. Authority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis. Otherwise, an administrator's rule or order will be declared 'arbitrary,' perhaps even 'capricious.'").

153. SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947).

154. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985) (describing on the record review).

155. Additionally, reasons must exist in the record established at the time of the decision; Rohlf, *supra* note 54, at 576 ("With narrow exceptions, federal courts base their review of agency decisions solely on a record compiled and presented to the court by the agency itself.").

156. Camp v. Pitts, 411 U.S. 138, 143 (1973) (the validity of an agency's action "must . . . stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . .").

guess at the student's rationale. And, it will be of little avail if a student can explain her answer after the fact when contesting her grade.[157]

If an agency gets the right answer but with the wrong rationale, its rule is still subject to invalidation upon judicial review. It is equally true that if the agency gets the right answer but has no rationale, its rule will also be subject to invalidation. Those situations provide wonderful parallels to the grading of law school exams. Students with the right answer but with no rationale, explanation, or analysis or with an incomplete or erroneous set of such support will fail to get points upon professorial review, the equivalent of failing to find an agency rule valid under judicial review.

Just like an agency, a student must explain not just its ultimate reason but must draw a "discernible path" leading to its decision.[158] Professors reviewing student action, like judges reviewing agency action, should not be required to "intuit what" the student "may have been thinking."[159] If a student has not written anything, there is no thinking evident for the professor to trace. "Giving reasons allows judges to run through, replay, or reconstruct the decision-making process that led to the policy decision under review. . . . retracing the administrators' decision-making process is the essence of all judicial review of administration."[160] Similarly, a professor must be able to reconstruct the student's analysis and thinking by having it explained on paper. Moreover, reasons must be presented on that exam paper in the first place, because with exams there is usually not an opportunity for the student to supplement the record (her answer)—a luxury sometimes available to agencies to cure a potential *Chenery*-based defect.

The reason-giving requirement is in part designed to prevent judicial policymaking or judicial activism, shielding courts from opportunistic substitutions of their own judgment for that of the agency (by generating or not generating reasons to support or not support the agency decision outside of those

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157. The prohibition on post-hoc rationalizations requires that an agency state and provide the bases for its decision (i.e., conclusion) before promulgating a rule. Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) ("Not having discussed the possibility, the agency submitted no reasons at all; Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981) ("Whether these arguments have merit, and they very well may, the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action."). The short-and sufficient-answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *see also* Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962)).

158. Hall v. McLaughlin, 864 F.2d 868, 873 (D.C. Cir. 1989) (agency explanation must "be sufficient to permit the court to discern the path [the agency] has taken").

159. Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ-not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.").

160. Shapiro, *supra* note 30, at 183.

offered by the agency). Courts simply cannot search for, find, or create a legitimate alternative legal argument to support the agency's decision. As a result of *Chenery* and the reason-giving requirements, the courts are bound to only consider the legitimacy of the decision the agency actually offers.[161] Courts exist to review the record and rationale, not provide or create one. There may very well be a basis in the record or support in the record that could support the agency's conclusion, but that is irrelevant to the court's role. The fact that an agency "might have" found the right rationale or used the right rationale is not enough for review, and a court cannot find something that would sustain an agency action and support the agency decision on that reason which is foreign to the record.[162]

For the student, the whole record includes all the arguments by all the parties in all the cases read and all the conclusions and theories and doctrines presented in the class materials, along with the new facts and materials presented for the first time in the exam question itself. The student should also explain what contrary law, competing rules, or alternative arguments can be made on the basis of the class record along with the test facts to reach a different conclusion and the reasons to reject the alternative arguments. Such requirements for the students are in line with what would be required of a federal administrative agency. An agency must similarly explain not just the reason it made its decision, but also the alternatives and the reasons why it rejected the alternatives in favor of the decision action.

When you take the analogy further and consider the opposing arguments and law learned as the equivalent of "comments" on the hypothetical, it is clear that, just as an agency must respond to all comments before justifying their decision, so too should a student respond to "comments" to fully support their answer.[163]

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161. ICC v. Bd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) (The court "may not affirm on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court"); Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974) ("had the order unambiguously provided what the Commission now asserts it was intended to provide, we would have a far different case to decide. But as it is, we cannot 'accept appellate counsel's post hoc rationalizations," and "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself").

162. Envtl. Def. Fund v. EPA, 898 F.2d 183, 189 (D.C. Cir. 1990) (holding that under *Chevron* "[w]e cannot sustain an action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made"). As a leading treatise explains the doctrine:

> [A]n advocate's hypothesis that an administrative decision-maker *did in fact* conclude thus-and-such because the record shows that he *could reasonably have concluded* thus-and-such, is not likely to be highly impressive. The courts prefer to appraise the validity of an order by examining the grounds *shown by the record* to have been the basis of decision.

W. GELLHORN, C. BYSE, & P. STRAUSS, ADMINISTRATIVE LAW 361 (7th ed. 1979).

163. *See* FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1838 (2009) ("Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.") (citing *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)).

Comments should be seen by the student as the facts presented in the question along with the material (doctrines, rules, and theories) learned in the course.[164]

In the real world, judges invalidate agency decisions for failures to articulate reasons. Often, courts will find an agency action invalid when it fails to meet these requirements and remand the decision to the agency, where the agency can often correct the error and provide a legitimate supporting rationale. Here, the analogy to the law student exam breaks down. Students do not usually get such a second bite at the apple. In an agency setting, the possibility of remand gives the agency the opportunity to cure its defect in reasons.[165] There is no remand in most law school exams.

Within the context of a law school exam answer, law professors have expectations very similar to judges conducting judicial review of agency action.[166] Not just any reasoning or explanation will do. The agency's rationale must mean something; it must have some substance and depth.[167] So, for example, an exam that says only "X's action constitutes adverse possession" is just as deficient as something that says only a little more such as "X's actions constitute adverse possession because there was actual entry with exclusive possession, it was open and notorious, it was under a claim of right, and it was continuous across the statutory period." In the latter situation, the reason given is only definitional and only a statement of the elements. It does not say what facts give reason to believe there was actual entry or why it was open and notorious and so on. It does not explain the use of the facts or potential competing arguments available from the record and why one conclusion was chosen as more persuasive than the other.

A good student answer guides the reviewer through the deliberative processes taken to reach the conclusion. It requires the professor evaluator to see why the student reached the conclusion. No matter whether there are meritorious arguments that the professor (or a court) can conceive or that are presented after decision made by the student (or agency), if they were not in the record as reasons for the student or agency's decision at the time of its decision then the professor

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164. Of course, the student must not just find comments but anticipate them as well, which is not always a required course of action for an agency but the analogy holds well nonetheless.

165. Shapiro, *supra* note 30, at 196 ("In theory at least, the agency might succeed the second time around if it ran another rulemaking process full of reasons and came back to court with the same rule.").

166. The professor wants to be told why, and she tests the ability of the student to provide a satisfactory explanation through the presentation of reasons. A student must be sure he has explained on the exam paper why what he stated is true, why what he stated is relevant, why his answer matters, and so on. If the student gives no reasons or only conclusory statements, his answer is beyond meaningful professorial review.

167. *See, e.g.*, Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 419 (S.D.N.Y. 2006) (The court ordered the government to issue a formal decision in a confinement case stating that the government "may not invoke "national security" as a protective shroud to justify the exclusion of aliens on the basis of their political beliefs. . . . If Ramadan is a threat to national security, or there is some other facially legitimate and bona fide reason for his exclusion, the Government may exclude him. But the Government must provide an explanation. It has not done so").

or court may not consider those reasons.[168] Simply put, because a professor or court "cannot defer to what it cannot perceive" and it can only perceive what is on the record before them, a student's or an agency's conclusion unsupported by reasons simply cannot be awarded credit or upheld no matter how high the level of deference normally conferred.[169]

Although many believe that the reason-giving requirement is or should be merely procedural for agencies, the cases have given the requirement more teeth over time.[170] Students can learn much from conclusions made about the reason-giving requirement in administrative law:

> [R]ationalism places the burden on an agency to adequately explain its decision in terms of its statutory mandate. In order to obtain judicial approval, agencies must be able to demonstrate that they have applied their expertise in a meaningful manner and have reasonably investigated the problem they are attempting to resolve.[171]

Students carry a similar burden in relation to the professor, whose approval will only be given when they apply their own expert knowledge of the subject meaningfully on the exam and after writing a full report in the exam of their mental investigation of the problem presented.

Partly, professors demand reasons to test whether the students themselves understand the reasons for their answers, which are, after all, likely derived from the real meat of the material conveyed during the class. But, whether they know it or not, professors may also be demanding that students develop the capacity and skill of reason-giving, which again will be demanded from them in their professional tasks and ethical responsibilities—whether it be to their client, the court, or some other consuming audience of their conclusions. These consuming audiences will be left unsatisfied and unimpressed if the lawyer is incapable of giving reasons. And, often, in a competitive atmosphere like an adversarial proceeding, the advocate with the superior reasons is more likely to obtain the desired result.

Although some students or lawyers may be able to think quickly and respond to queries or form conclusions without reasons, "[w]hat is asserted to be a

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168. Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981) ("Whether these arguments have merit, and they very well may, the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action.").

169. Int'l Longshoreman's Ass'n, AFL-CIO v. Nat'l Mediation Bd., 870 F.2d 733, 735–36 (1989) ("The basis for an administrative decision, of course, must be clear enough to permit effective judicial review. . . . Whatever deference is owed to the Board under *Chevron,* . . . is not due when the NMB has apparently failed to apply an important term of its governing statute. We cannot defer to what we cannot perceive.").

170. Some say that the reason-giving requirement in administrative law has emerged as primarily based in a rationalist model of judicial review "which has as its central feature the requirement that agencies articulate adequate reasons for their decisions," but that "the Court has not fully explained the significance of this requirement, or the doctrinal basis of the rationalist model." Shapiro & Levy, *supra* note 52, at 390.

171. *Id.* at 430.

capacity for perception may in fact be a product of bias or confusion, and reason-giving helps diminish this risk."[172] Every student should be aware of that danger and embrace the reason-giving habit and its capability to control against such risks.

By better understanding the structure of judicial review of agency action and the purposes and aims within it that underlay the reason-giving requirement there, a reason-giving requirement in law school exams can receive its due provision of explanation and legitimacy. If legal educators are to expect reason-giving on law school exams, in the classroom, or in other aspects of law school courses, we should be able to give reasons for it. Giving reasons for a reason-giving requirement in law school exam answers and other similar evaluative situations should, as a result, lead to a better understanding and acceptance by students of that professorial demand and its practical significance in the preparation for the practice of law.[173]

CONCLUSION

Inculcating the reason-giving skill in lawyers and law students is a valuable exercise and one which implicates and prepares lawyers for a variety of areas of law practice where reason-giving is expected, demanded, encouraged, or otherwise helpful. Understanding it as a skill and understanding the pervasiveness of reason-giving in life and law is a first step toward implementing strategies to learn how to effectively give reasons for action or decision to an outside (often reviewing or evaluative) audience.

Of course, some next steps must be addressed as well. We cannot teach students or lawyers—for both ethical and practical reasons—that any old reason is good enough. Nor should we encourage the insincere, pre-textual, contrived, or manipulative reasons. We must also be wary of students believing that it is acceptable to mask a decision in seemingly good reasons in order to deceive a less-informed consuming audience. Truth in reasons and belief in reasons should not fall out of focus. Those standards should not become victims of our concentration on that first, necessary, but incomplete step of "giving reasons." But the search for reasonable or best conclusions can only begin after that

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172. Sunstein, *supra* note 26, at 1756; *see also* Donald J. Kochan, *Thinking Like Thinkers: Is the Art and Discipline of an "Attitude of Suspended Conclusion" Lost on Lawyers?*, 35 SEATTLE U. L. REV. 1, 44–61 (2011) (discussing cognitive biases that act as barriers to effective thinking and the necessity to adopt thinking habits to overcome such biases).

173. There are a number of debates about reason-giving requirements and the propriety of demanding them in specific contexts that are beyond the scope of this Essay. We need not determine that reason-giving requirements are always a good thing for every situation, except to say that adopting a reason-giving requirement for a written exam is not only a good thing but one that is generally the accepted practice in professorial review of student exam answers. I also contend that this exam-taking exercise along with other reason-giving requirements in law school fosters effective and necessary lawyering skills of reason-giving applicable to the practice of law.

prerequisite step of developing the habit of at least giving reasons as a starting matter and inculcating that skill in our legal minds.

A giving reasons discipline should extend in pedagogy beyond just the law school exam. Law students must be warmed up for a reality in the practice of law—as attorneys, they will be called on to account and expected to have the reason-giving skill. They will be required to give reasons—to support their clients' positions, to persuade a judge or jury, to serve as agents to political institutions beholden to a reason-giving requirement or expectation, or in other capacities. The reason-giving lawyer is better equipped to deal with the expectations of the receivers of his craft and thus each student and lawyer-student of law should strive for a greater understanding and aptitude of this unique skill.