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Reasons for Reasons

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This chapter examines some popular justifications for public reason-giving common in liberal political thought. An obvious way of arguing in favor of the duty to give reasons is to point out that publicly substantiating decisions is an intrinsically valuable practice. Giving reasons simply makes for better decision-making. Yet in liberal democracies reasons are increasingly defended on “instrumental” grounds. Giving reasons is valuable because some other value will thereby be realized. Reasons are used for (other) reasons. Reasons become proxies for democratic values. The giving reasons requirement results in getting credit, not so much for increasing the quality of the underlying decisions, but rather for fostering essential democratic values such as respect, trust in the institutions, social consensus, and public accountability. The paper discusses why liberalism cannot implement these ideals fully and why the attempt can have undesirable consequences. There is a risk that reasons become self-defeating in the process. Requiring reasons may result in lowering rather than increasing the quality of the decisions themselves. Democratic societies should therefore engage in a critical reflection on their reasons for reasons.
Chapter 7

Reasons for Reasons

Mathilde Cohen

In most legal systems, courts and administrative agencies are required to give reasons to substantiate their decisions. Legislators and members of the executive increasingly tend to put forward reasons in support of their actions. How can one account for this practice? What value(s) is it pursuing?

This question must be distinguished from other ways of inquiring into the practice of giving reasons. A typical approach rests on the fact that public reasons giving is nowadays such a well-established phenomenon that it has become common to make two kinds of assumptions: a normative assumption that giving reasons is what should be the case in the realm of public action and a factual assumption that, in fact, most public decisions are being given proper reasons for. Because the practice of giving reasons is taken for granted, much of academic inquiry focuses on the rhetorical or logical structure of these reasons. In this line of scholarship, it has become very popular to study public institutions’ practice of giving reasons under the label of “legal reasoning.”

In short, the focus is usually not on the different values that are achieved by reason giving. This will be the topic of this paper: why do we give reasons? What are the reasons for giving reasons? Answering these questions is but a stage in a larger project regarding the notion of giving reasons. In particular, the question of why we give reasons must not be separated from two other inquiries. The first is conceptual and attempts to determine what giving reasons consists in. What kind(s) of reasons count as valid reasons for public decisions? Are reasons intrinsically different in the public and in the private sphere? The second is institutional and focuses on the way in which different public decision-makers are subject – or not – to giving reasons requirements. Why is it that some public institutions are obligated to give reasons while others have the discretion whether or not to give reasons and still others are prohibited from giving reasons? Why is it that institutions usually give reasons for some types of decisions but not others?
This paper’s goal is to shed light on the different values that are pursued by the giving of reasons. Is there something intrinsically valuable in the mere fact of giving reasons? Or rather, does reasons giving have a purely instrumental value, having to do with the effective pursuit of whatever other goals one is trying to use law to promote? It seems that there is no intrinsic value in giving reasons for the sake of giving reasons. If we were constantly giving reasons for everything we do, we decide and we say, most of our lives would consist in uninterrupted and extremely boring self-justifications. Similarly, if public decision-makers gave reasons for every single decision they make, they would spend most of their time drafting official documents that almost no one would have the time to read. Distinguishing innovative decisions from routine decisions would become difficult. We give reasons in certain circumstances only, when the action or the decision we are giving reasons for is of a certain importance or/and when it modifies the status quo. Do we abstain from giving reasons in recurrent circumstances because there is no value in the mere fact of giving reasons? Not necessarily, but to be sure, giving reasons is considered valuable in relation to a particular decision or action and to a particular relationship between the reason-giver and the reason-recipient. The action or the decision we are giving reasons for must be of some interest to someone here and now. When we do give reasons, it also seems that it is because something valuable can be thereby achieved, such as showing respect to those affected by the decision/action. In a word, we usually give reasons because by doing so we think that some other value will be realized. Reasons for giving reasons are often instrumental reasons.

Perhaps the most obvious non-instrumental value in giving reasons lies in the fact that giving reasons for a decision or an action might, taken alone, make that decision/action better. In that sense, there is no necessary temporal distinction between, first, the making of a decision and, second, the reasons adduced in its support. The reasons that can be given in support of the decision are part of the decision-making process. There is an extensive literature on this issue of whether or not the mere fact of giving reasons for a decision increases the quality of the decision. However, in this paper, I want to focus on instrumental reasons for giving reasons, i.e. on reasons for giving reasons that are meant to achieve certain values distinct from the value of the decision itself. Focusing on instrumental reasons for giving reasons does not mean that giving reasons only achieves instrumental values. The giving of reasons might also achieve non-instrumental values, such as respect: each person has a fundamental interest in being treated as a person with equal moral standing among his fellow citizen.

There are many different instrumental reasons why we give reasons to support decisions. One of them is to convince the people being personally affected by it that it is a good, valid, decision. In the context of public institutions, reasons are often given because they help citizens to reach an agreement on certain important political

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1By “non-instrumental value,” I mean here a value that does not lie in the fact that the decision will be useful in achieving any other goal, but in the very fact that the decision will be better, regardless of other considerations.
decisions, but also because they might increase the chances of compliance on the part of citizens. Another reason for requiring from officials that they give reasons is accountability: instituting a giving reasons requirement, it is thought, lays the basis for future checking. Thus far I have introduced a variety of reasons which certainly do not constitute an exhaustive list. Rather than to provide such a list, in the course of this paper, I will examine some of the reasons that seem to be the most important and interesting ones. The way I will proceed is to present these reasons from the point of view of the value(s) that they are seeking to achieve. In what follows, the focus will be on four main values that are being pursued when decision-makers give reasons for their decisions: guidance, agreement, trust and respect. These values are not discrete ideals that are disconnected and separable from one another. They are structurally related in a certain framework. This is why it will sometimes seem artificial to examine them successively.

The most important value that is being fostered by reason giving is that of guidance: decision-makers want public decisions to effectively guide citizens, i.e. they want their decisions to be authoritative. Public authorities need citizens to act on the reasons that are being given. So as to achieve that end, they give reasons for their decisions that can be understood and accepted by citizens. This guidance function of the legal system can best be carried out where there is some degree of agreement with its prescriptions. Reasons are primarily designed to guide, but to do so, they must first be recognized as good, valid reasons. Yet, this is not sufficient. There is little hope of attaining acceptance unless people both feel that they are being respected by decision-makers and trust public institutions. The reasons given are thus also reasons designed to display respect for the people and to develop trust.

In attempting to explicate these values, I will proceed in the following order: from respect to trust, to agreement and to guidance, eventually to arrive at the claim that ultimately, the essential reason for giving reasons is to reinforce a legal system’s authority. At times I will pause to challenge the assumption that giving reasons really succeeds in achieving the underlying value under consideration. However, the main purpose of this article will be constructive, rather than critical; it will merely try to give a picture of the types of values being pursued by giving reasons.

Reasons alone, provided they are sufficiently clear, can affect the behavior of people. Even though individuals disagree with the reasons that apply to them, they may still be guided by them as long as, for example, these reasons are backed by sanctions. This is a frequently observable situation in educational contexts. For instance, students will stop drawing graffiti on school furniture if teachers and supervisors clearly forbid it and support their prohibition with disciplinary action. Students may wholly disagree with the school’s rationale (which may be based on the desire to preserve a clean and appealing environment), they may for instance think that their graffiti make the school furnishings more beautiful and attractive, but nevertheless be guided by the prohibition. Agreement with reasons is not a necessary condition for guidance, but guidance is likely to be much more effective where there is agreement.
7.1 Giving Reasons and Respecting

From the point of view of a person being affected by a decision, the first, immediate, value of reasons is to make him/her feel respected. In this regard, public decision-making does not differ from ordinary decision-making. Each time someone makes a determination that will affect others, he/she should provide reasons as a mark of respect toward these others. My friends and I decide to go out to see a movie. They generously allow me to choose the movie. If I merely announce: “I decided that we will see Solaris,” without providing any additional explanation, they are likely to feel disrespected. They might think for instance that I am using them. I wanted to see this movie anyhow and I am dragging them with me with no concern for what would be an interesting movie to them. I just want company. I am ignoring the fact that they too have interests, preferences for this or that type of film. On the other hand, if I substantiate my choice with reasons that they can accept, discuss, or reject, they are likely to feel that they are being treated with respect. For example, I can say that the reason why I chose this movie is that the director was my friend, that I like one of the actors, that the show time and location of the movie theater are convenient and so on. Now my friends have a basis on which to decide whether they still want to accompany me or to discuss my choice and perhaps even convince me to change my mind. If they do decide to accompany me, it will not be because (or at least not only because) I chose to see that movie, but because they now think that the movie is worth seeing for x, y or z reasons. A similar arrangement is to be found when one switches from the private to the public sphere. Government agents should give reasons, it is thought, as a way of respecting citizens. In doing so, they acknowledge the fact that people are autonomous beings. What does this autonomy that must be respected consists of? In this context, it seems that people’s autonomy requires decision-makers to be mindful of two things: that people cannot be simply ordered about and that they must be allowed to criticize decisions that apply to them.

7.1.1 Giving Reasons and Ordering

It is commonly assumed that people are rational, self-directing agents who ought to be treated as such. What does treating them as such entail? The fact that they are rational and self-directing makes it possible for others to guide their conduct. Presumably, only rational beings’ actions can be guided; this is why it is often said that we cannot guide animals’ conduct, but at most tame or train them to do some specific things. Human beings are the only beings who can be ordered about, but at the same time, precisely because they are rational and intentional creatures, it is considered illegitimate, or immoral, to simply order them about. A fortiori, government agents should not order people about. The legitimacy of public decisions is contingent on the fact that their subjects have reason to accept them as binding. Giving reasons is a mark of respect because by giving reasons, it is acknowledged that citizens are rational and independent beings who can make choices for themselves. If public institutions do not give reasons, their decisions are akin to orders or, at best, unintelligible preferences that they seek to impose on others. Giving reasons
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Involves respect because it establishes a relationship that is not merely that of a commander/commanded between the decision-maker and the decision-receiver. The decision-maker, by giving reasons, is trying to show to the decision receiver that he should comply with the outcome of the decision not merely because it was ordered, but because it is a valuable thing in itself. In this sense, giving reasons aims at being the opposite of commanding. Of course, an order supported by reasons may still be an order. The fact that an order is an order depends not on whether it is accompanied by reasons, but on the circumstances of its utterance (such as: Who uttered it? When? In regard to whom? Is it backed by sanctions?) However, whether the order is respectful toward its recipients seems to depend on whether supportive reasons are advanced. The fact that a decision is respectful toward its receivers and is perceived as indicating a good or true outcome is something a decision or an order must earn, it is not part of what is said when we identify it as legally valid.

Imagine the following order: “Do 50 push-ups.” In the context of an army boot camp, uttered by an army captain, it might be an order that soldiers obey because they are liable for sanctions if they do not comply. The same sentence has an entirely different flavor when uttered by a fitness instructor in a fancy New York gym, to exercisers who are voluntarily taking part in the class and are very much willing to do as many push-ups as it takes to look good. If the army captain gives reasons to support his order, (such as: “soldiers must suffer,” “soldiers must be stronger,” “push-ups make you look good,”) even though it is still an order backed by the threat of sanction, it also becomes an order backed by reasons. Some soldiers might realize that some of these reasons apply to them regardless of the order. They might become convinced that they have independent reasons to comply with the order (independent from the fact that it is an order). But how is the army captain showing respect to his recruits by offering them reasons for doing push-ups? One possible answer is that by providing reasons, he is trying to relate his order to goals or larger aims that the young men may have independently of the army. People act intentionally when they do something because they see some point or attraction in doing it. We do what we do because we think that the action is something good. Our reasons for action are things which are valuable. Because giving reasons for an order, a decision, consists partly in showing why that order or that decision is worth being complied with, the army captain is trying to give the soldiers the opportunity to engage in a valuable practice as part of their goals.

7.1.2 Giving Reasons and Autonomy

Giving reasons is not only a passive way of respecting people, of merely refraining from interfering. In this sense, it is not only a principle of self-restraint. Giving

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Hobbes defines command: “Command is, where a man saith, Do this or, Do not this, without expecting other reason than the will of him that sayes it” (Leviathan, Part II, Chapter XXV. Cambridge: Cambridge University Press (1904), p. 182.)
reasons makes heteronomy less unpalatable, to be sure, but it even aims at fostering autonomy. Human beings are people who are autonomous because they are capable of intentional action, i.e., of having a view about their situation and the situation around them. Classically, autonomy is understood as self-legislation. On this conception, giving reasons can be said to strengthen autonomy because even though I may not have directly contributed to the enactment of the legal rule which applies to me, I can appropriate the reasons that justify the rule. Because I accept its reasons, the rule it is no longer extraneous to me. The rule becomes my rule, albeit \textit{a posteriori}.

But there is another way to understand autonomy on which I want to focus. Autonomy thus understood is the capacity to make choices. Giving reasons can increase people’s autonomy by helping them to view their situation more clearly. This is done in two ways. First, giving reasons, it is thought, helps people make better-informed choices, by having more information available, in particular on the rules that apply to them. Second, giving reasons also opens new courses of actions and introduces goals, which people may or may not pursue. It may lead people to discover valuable options that they were not aware of. There are various options open to them in every situation, that they can adopt or not. Giving reasons is a way to reinforce this openness. This is why giving reasons involves respecting people’s ability to conduct their lives by helping them to do so.

For example, during an ethnographical survey of French administrative courts, I witnessed a deportation hearing during which a man who had been staying illegally in France for a couple of years was appealing from a deportation order that had been issued ten months earlier. His lawyer argued that the order constituted a violation of his “right to respect for private and family life,” in the sense of Article 8 of the European Convention on Human Rights, since he was living together with his (French) partner in Paris, actively taking care of her children, and was planning to get married to her. After the hearing, I interviewed the judge and asked him what he had decided in this case. He answered that it had been a hard case, because it was obvious to him that the order was indeed interfering with the petitioner’s family life. He, nevertheless, decided to affirm because under French law, the legality of deportation orders must be assessed on the basis of petitioners’ situation on the issuing date. At the time the order was entered, the petitioner had not yet moved in with his partner and was therefore precluded from claiming violation of his right to pursue a normal family life. However, the judge said that in this case, like in other cases of this type, he would write a detailed opinion explaining very precisely why he had sustained the order, so as to enable the petitioner to adapt his conduct.\footnote{This attitude, which appears to be relatively common among judges dealing with immigration law, is made possible by the fact that a vast majority of deportation orders are not enforced. Most petitioners simply receive a letter “inviting” them to leave the country before a fixed date and, in practice, most stay.}

In other words, the judge was claiming that thanks to the reasons given in support of his decision, the petitioner would be able to understand that his only options were not either to go back to his country or continue to live a clandestine life in
France, but that there could be a third way. Deportation orders expire and must be re-issued every twelve months. Since any new deportation order issued after his family life had started would be illegal, he should wait for a new order to be filed against him and then appeal from it, this time with a much greater chance of reversal. The reason given: “the legality of the deportation order is assessed on the basis of the petitioner’s situation on the day the order was issued” is the kind of explanatory reason that can help petitioners make choices for themselves. In this sense, giving reasons is essential to ensure that petitioners are respected, partly because they are not fully informed about the subtleties of the law. Not letting them know the options available to them might condemn them to live a diminished life.

In this example the judge is not trying to suggest new life plans or goals, but merely giving information likely to prove helpful for the effectuation of the life plans that the petitioner already has. The trouble, however, with this way of thinking about giving reasons as a way of enhancing people’s autonomy is that it can appear paternalistic. On the one hand, the practice of reasons giving seems to promote autonomy by suggesting values that people can embrace as part of their life plans. On the other hand, in the course of this activity, government agents might not resist the temptation of acting like they know better what is good for others and of imposing certain values on people. However, this worry is not justified. Giving reasons does not run the risk of turning into paternalism because reasons enable active criticism. Even though offering reasons is indeed suggesting that some things are valuable, it also results in laying the grounds for discussion and contestation.

### 7.1.3 Giving Reasons and Criticism

Giving reasons for a decision greatly contributes to making the decision a possible object of discussion and of criticism. In the public context, this possibility of discussion is especially crucial because it allows citizens to criticize, and sometimes even modify, decisions affecting them. There may or may not be a formal review procedure available for people to contest a particular public decision. In any case, the fact that reasons are given helps the public to at least discuss the decision. For instance, formal review of administrative action is usually available. A citizen can appeal from a decision made by an administrative agency and argue (usually before a court) why he thinks that the decision is invalid and should be reformed. But such a procedure does not always exist in other contexts. For example, there is no review procedure available against supreme courts’ decisions. The fact that their decisions are usually highly publicized and supported by abundant reasons nevertheless enables citizens to express its support or its discontent in the public forum. Even though individuals cannot formally appeal from a supreme court’s decision, reasons give them at least the occasion to debate it.\(^5\)

\(^5\)One could even argue that, especially in parliamentary systems, formal appeal from supreme courts’ decisions is available. People have the possibility, in a sense, overrule supreme courts’
Giving reasons is a mark of respect because it implies that public institutions assume that people are autonomous beings, who can choose whether to adopt the reasons as their own or to criticize them. Abstaining from giving reasons would constitute a lack of respect because people would then have to accept decisions as orders that they must obey \textit{qua} orders. To be sure, many of the public decisions which are not substantiated by reasons can nevertheless be appealed from or criticized, but in that case, citizens bear the burden of conjecturing the grounds on which the decision was taken, which makes it much harder to effectively contest its validity. Respecting someone as a citizen when one is a public decision-maker may therefore consist in part in giving him grounds for reflection and eventually, criticism.

7.1.4 \textbf{Individualized Reasons?}

There seems to be something missing in the preceding analysis. What respect requires differs depending on whom or what you respect. It varies according to the grounds one has to respect $x$ or $y$, not out of an a priori analysis of the concept of respect. Sociologist Charles Tilly observes that the acceptability of the reasons given greatly depends on their compatibility with the social relations that prevail between the giver and the receiver.\footnote{Tilly C (2006). \textit{Why?} Princeton and Oxford: Princeton University Press, p. 26.} He cites as an example the fact that the phrase “Gotta go” can properly end a conversation with a talkative stranger who has stopped you to ask directions, but not a chance meeting with an old friend you have not seen for years. From this perspective, giving the same reasons, regardless of the person one is dealing with, is a mark of disrespect. Yet public institutions seem to be doing it all the time. Usually, officials give more or less standardized reasons that are not tailored to the particularities of their recipients. For instance, administrations, when they give reasons to support their decisions, do so regardless of whether the people affected are laypersons or professionals with expert knowledge of the matter. This is why it has become common to complain that many reasons are formal, artificial reasons that are not based on any personalized consideration of the individual involved. Another source of worry stems from the fact that certain public bodies subject to giving reasons requirements circulate among their members lists of ready made or model reasons that can routinely be used for certain kinds of cases. How is a citizen to feel respected if formal reasons are being cut and paste in decisions that apply to him?
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There are two possible answers to this objection. A first, realist answer might pinpoint the possibility that public reason giving departs from private reason giving in this regard because of practical necessity. It may be right that different persons should be given different types of reasons, (for example, people who lose a lawsuit and people who win it, people who are familiar with the law and laypersons,) but public institutions generally lack the time and the personnel to individualize reasons in such a way. Yet sometimes the legal system acknowledges that some differences between people should yield specific reason giving. For instance, such a differential treatment is established for administrative action in most civil law countries. Agencies are usually only required to give reasons when their decisions are both individual and unfavorable. If a decision concerns a category of persons, who are not individually named, reasons need not be put forward. Similarly, if the outcome of the decision is favorable to those concerned, then it need not be justified. The underlying assumption is that only those who have been singled out and whose petition has been rejected are due reasons, while others, especially citizens whose petition was granted, do not need such attention. Public institutions therefore seem to avoid distinguishing among different reasons-recipients for pragmatic considerations, unless doing so would be too disrespectful.

The second possible answer does not attempt to account for public institutions’ relative blindness to people’s particularities, but speculates that narrowly tailored reasons are not the kind of reasons citizens are in need of. Reason giving in the public context has a symbolic aspect that is much more important than in the private sphere. Reasons often constitute symbolic acts of respect in our society. Qua symbols, they are not designed to match their recipients’ particularities, but rather to represent respect to all. A lot of public reason giving is symbolic in the sense that it aims more at displaying respect than at actually respecting personally each individual. Some reasons, for example, are incomprehensible for their receivers who are laypersons, but they still have a value as symbols. The giving of reasons has acquired this symbolic quality, independent of the content of the reasons themselves, such that the absence of reasons is felt like a mark of disrespect. In that sense, formal reasons are better than no reasons at all. This argument from symbol reinforces the claim that there are different purposes for giving reasons: for some purposes, reasons should be individualized and for others, they need not be.

Respect is not the only value prompting the giving of reasons. To be sure, public institutions ought to respect citizens, but this is not enough to secure their authority. People must additionally trust officials. From this standpoint, giving reasons can play a crucial role inasmuch as it may foster trust.

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Laypersons are often represented by lawyers who can explain the reasons to them. This point is further developed below.
7.2 Giving Reasons and Trusting

Trust in public institutions and in official decision-makers is a major value democratic governments are supposed to achieve. Why does trust matter so much? Here again the primary need for trust in the context of public life does not differ in nature from the need for trust in everyday life. We need to trust people, because we rely on others for an incredible number of things. I need to trust the engineers who built my house to be able to sleep at night, I need to trust the farmers from whom I buy my groceries to be able to eat my food and so on. In short, we need to expect that people will behave in a certain way so that we can plan our actions accordingly. Trust is necessary for action. People have plans, goals, aims, and so as to achieve them, they need to be able to plan their future. In the context of public action, trust is thought to be particularly important for two additional reasons. Only trust can enable public institutions to fulfill their function. People who trust institutions are likely to seek their services when they need to. In that sense, trust renders institutions effective. For instance, in case of dispute, citizens who trust the police will appeal to the justice system rather than attempting to resolve the problem informally within their community, but through the justice system. Trust also helps institutions to be more efficient. If people trust institutions, they will comply with public decisions more easily and perhaps even spontaneously.

7.2.1 The Paradox of Trust

How does giving reasons for public decisions foster trust? The problem stems from the fact that any form of government presumably involves institutions which can make relatively unconstrained choices. In our sublunary world, contingency is such that even if officials were constrained by extremely rigorous rules and guidelines, they would still enjoy a residual amount of discretion. From this metaphysical fact arises the need for building trust in governmental decision-makers. Giving reasons requirements may fulfill this need when implemented in order to establish or re-establish trust in public institutions. They may do so in two ways.

First, such requirements work as constraints on government agents’ discretion. They diminish decision-makers’ leeway because through the reasons that are given, any decision can ideally be traced back to specific rules and well-entrenched precedents. One role traditionally assigned to reason giving is to constrain the potentially misguided or arbitrary exercise of governmental power. The underlying idea is that requiring officials to give reasons will make for better decision-making by means of

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Arguably, this alone does not necessarily require trust in the usual sense. For instance, competitors in athletic contests; soldiers in wars may plan actions based on expectations of how opponents will act. Following Luhman; it could be suggested that as far as action planning is concerned, trust and distrust are functional equivalent. However, in “complex societies” such as ours, trust is to be preferred as a more efficient and economical way of predicting and organizing collective action. See Luhmann N (1979). Trust and Power. New York: John Wiley & Sons.
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discipline, review by higher courts, informal criticism by colleagues, social acquaintances and even public opprobrium. Here giving reasons renders decision-makers accountable, prevents abuse and therefore fosters trust. Giving reasons works as a safeguard against arbitrary or irrational decisions. In that sense, giving reasons encourages trust because helps people plan their lives. The reasons produce constraints which limit decision-makers’ discretion and promote predictability.

Second, giving reasons requirements engender trust because they work as a device allowing for control by the citizens over public organs. By supplying reasons, decision-makers become accountable to the public and lend themselves more easily to checks, in part because they leave records of their action. In this view, controlling the government implies that whenever there is discretion, the people, individually or collectively, should be given the power to urge government agents to modify or at least explain their decisions. In short, it is thought that reasons make the decision-making process more transparent and the decision-makers more accountable. How does that relate to trust? It has become common to think that in order to make institutions more trustworthy, you need to make them more accountable. This may sound paradoxical: trust normally releases us from the need to check. Only in situations of doubt, conflict, danger, that is, of mistrust, do we start checking. Accountability might therefore appear as a self-defeating way to build up trust. Advocates of accountability propose that we trust something precisely because we believe that in case of doubt, checking it and measuring it against some established criteria could easily restore certainty. For example, I trust doctors when they announce their diagnoses even though I am completely ignorant when it comes to medicine and biochemistry. I trust them in part because I know that in case of doubt, I could have access to the evidence and the medical knowledge on which the diagnosis was based.

7.2.2 Giving Reasons and Accountability

Different patterns of institutionalized checking and trust have been developed to regulate activities where resources are exchanged or entrusted. Accountability mechanisms are typically needed to establish or re-establish trust when institutions enjoy a certain degree of autonomy from the people they are accountable to. Typically, institutions falling under agent-principal categories are thought of as being in pressing need of accountability. One could argue that to demand reasons there must first be a relation of accountability, a requirement for one party (the agent) to give account of his actions to another party (the principal). Trust, then, reveals an

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9For example, Kennedy D (1986). Freedom and constraint in adjudication: a critical phenomenology. *Journal of Legal Education* 36, (arguing, p. 527, from the point of view of a hypothetical judge that he would feel constrained because “various people in my community will sanction me severely if I do not offer a good legal argument for my action. It is not just that I may be reversed and will have broken my promise. It is also that both friends and enemies will see me as having violated a role constraint that they approve of.”)
agent-principal relationship between public institutions and citizens. The relevant principals, depending on the institution, may be the public at large, local residents, taxpayers, consumers of public services such as students, commuters, and perhaps even future generations.

The claim that companies – the paradigmatic case of agent-principal relations – are in need of greater accountability has become virtually ubiquitous. Accountability, in that context, is secured not by setting up a giving reasons requirement, but for example, by guidelines for proper managing and accounting. For companies which are financed by shareholders, a form of accounting which allows a check, or what is called “audit,” has been developed to be made of the activities of the company. When companies are audited, their accounting practices are the primary materials that are being checked, partly because accounting practices say a lot about the way in which a company is managed, but most importantly because these are the kind of activities that are easily auditable (they are measurable for instance.) Companies exemplify the situation when the economic resources of one party are entrusted to another. Human nature is assumed to be weak, untrustworthy and in need of some kind of check. Advocates of auditing argue that it would be naïve to fully trust individuals with economic resources. They must not only be made to account for their actions, but their account itself must be checked.

One could similarly argue that giving reasons requirements stem from the situation where some political or legal power is entrusted to public institutions. Assuming that decision-makers are weak and potentially untrustworthy, citizens need to monitor or at least to have the possibility to verify ex post facto that they exercised their tasks properly. To do so, the public needs to know, not only the outcome of decisions, but the reasons on which they were based. Forms of accountability such as auditing rely not on the giving of reasons, but on results. People are often made accountable without having had to give reasons. Results are the sorts of things that make individuals accountable, sometimes after being evaluated in terms of target schemes or performance indicators. If they reach the target or achieve a high performance score, they will be rewarded (by bonus, promotion, etc.) If they do not, they might be penalized in one way or another. This shows that reasons are not a necessary and sufficient condition for accountability. However, reasons can do some work: they may change the way accountability functions. Because of the ever-changing character of human existence, governmental decision-makers are often faced with new, unpredictable or very particular situations. If their work were assessed solely on the basis of results, our evaluations would not pay full attention to their achievements.

For instance, when governments decide to regularize illegal immigrants by granting them residence or work permits, they usually issue guidelines designed to direct individual regularization decisions made by the relevant agencies. Some priorities may be set: for example, it might be decided that people who have been in the country for 10 years or more and/or families with children going to school should be regularized first. Such guidelines usually include specific targets to reach:

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immigration officers are told to issue permits to at least 6000 families, or at most
100 000 people. Administrative agents’ work is usually not merely assessed based
on the fact that targets have or have not been reached, but usually with some con-
sideration given to reasons as well. The reasons given to substantiate refusals to
grant permits, for example, may modify the assessment that would result from the
sole consideration of targets. Suppose the agency regularizes 6000 families because
there are only 6000 families composed both of parents who have been in the country
for at least 10 years and of children who go to school. Then, it seems the agency
did a good job following the guidelines. If there are 100 000 families corresponding
to the criteria and no valid reason why some were given permits and others were
not, then administrators will look like they acted arbitrarily. Reasons can rebut this
presumption. They can help understand that the 6000 families who were granted
permits had other characteristics that made them eligible (e.g., the parents had a
job offer, they had been paying their taxes for years and could demonstrate integra-
tion into the community, etc.) When decision-makers give reasons, accountability
based on results becomes defeasible. Assessment of accountability may completely
change after consideration of the reasons that explain or justify the results.

There is another way to explain why reasons are linked with accountability.
Reasons tend to become proxies for accountability in the public sphere by virtue
of pragmatic considerations. Just as accounting practices are the sort of things that
are audited because they are auditable, one could argue that reasons are checked
because they are the kind of things that can easily be reviewed. Reasons make
checking easier in various ways. Firstly, giving reasons requirements call for metic-
ulous record-keeping: the reasons are given in a written document, which makes
checking easier because there is something tangible to check. Second, as was noted
earlier, it is much harder to criticize a decision whose outcome is not supported by
reasons, because one must imagine the possible rationales decision-makers had in
mind. Third, reasons themselves can function as performance indicators which ren-
der government agents’ work more assessable: an agent will be considered to have
made a good decision if he was able to support it with sufficiently relevant, legally
valid reasons that are difficult to challenge.

7.2.3 Giving Reasons and Personal Trust

It is not only through accountability mechanisms that giving reasons fosters trust.
Philip Pettit showed that “impersonal trust” alone is insufficient to build trust toward
government agents. Citizens need to trust officials both impersonally and person-
ally.¹¹ In impersonal trust, reliance on an agent is associated with the belief that
he is independently motivated, perhaps constrained to act in the pertinent manner.
By contrast, in personal trust, reliance on an agent is associated with the belief that

the agent, being of a cooperative disposition, will be motivated by my reliance on
his being reliable. What we have described until now as trust based on account-
ability is the kind of trust that Pettit would label “impersonal trust.” Accountability
alone is insufficient to engender trust in institutions: according to Pettit, knowing
that decision-makers’ discretion is constrained by restraint principles such as giving
reasons requirements is not good enough. There must also be some personal trust
toward governmental agents. Does this rule out the giving of reasons as a way to
foster trust? Not so. Reason giving may contribute to generate personal trust. Once
again, it is a misconception to reduce giving reasons requirements to a restraint
principle. The fact that officials give reasons does not only work as a discretion-
reducing mechanism, but also develops personal trust. I believe that public officials
are trustworthy, not only because they are subject to checks, but because they know
that I trust them. They show me that they are responsive to my trust by giving me
reasons for their action, i.e., by displaying the fact that they are motivated by proper
reasons and acting in a trustworthy manner. In this sense, giving reasons encourages
trust because it is a way of showing that one reached a decision in a conscientious
fashion.

This interpretation can find support in the psychological literature on trust and
government. In particular, Tom Tyler’s psychological studies tend to provide an
empirical basis for arguing that giving reasons helps create personal trust toward
public officials. Based on an extensive survey of Chicago residents, Tyler argues
that trust in the motives that prompted authorities to make decisions is one of the
central factors underlying the willingness to obey legal rules.12 If people feel that
authorities making legal rules are “trying to be fair” to them, they are much more
willing to accept those rules. Tyler distinguishes between two forms of trust, which
roughly coincide with Pettit’s impersonal/personal trust divide. One form is (imper-
sonal) trust in government agents’ competence, i.e., in the belief that authorities will
solve problems well. Another is (personal) trust in benevolence, consisting in the
feeling that officials are motivated by the desire to be fair and that they care about
those with whom they are dealing. Tyler’s study reveals that for a majority of sub-
jects, benevolence is more important than competence. People evaluate the agent
primarily in terms of their impression of his (or her) positive intentions and general
good will towards them. This would then confirm the idea that giving reasons is an
integral part of respecting them as well as creating a relationship based on personal
trust.13

All these alleged virtues of reason giving in the quest for trust have, nonethe-
less, been severely challenged. One of the main arguments is that giving reasons,

13Of course, there may be a difference between the personal and small scale problems Tyler is
studying and “big government” decisions such as decisions to go to war, supreme court decisions,
etc. In the latter case, the public might be less concerned by decision-makers’ motives and benevo-
ience than in the former. Does it make a great deal of difference to me to know that when deciding
to go to war the President cares about me? The answer would probably depend on people.
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far from promoting trust, is a source of distrust. The real enemy of trust is not the absence of reasons, it is said. On the contrary, we often trust in the absence of any reasons. The real enemy is deception. By increasingly requiring that government agents support their decisions with reasons, one creates more opportunities for deception and misrepresentation. Officials wanting to shelter themselves from accountability have an incentive to give artificial reasons that shield them from liability rather than candid reasons which might be challenged more easily. In such a situation, giving reasons requirements would fail in relation to both kinds of trust, impersonal and personal. The requirement fails to secure impersonal trust, because it does not work as a proper check on discretion: officials get around it by providing formal or artificial reasons and in reality make largely unconstrained choices. The requirement also fails to engender personal trust, because it provides officials with a deleterious incentive: they are not motivated to be conscientious because people trust them, but on the contrary, they are motivated to provide the reasons that look more trustworthy so as to safeguard themselves from potential liability. Reasons that look trustworthy can be deceiving if they do not reflect the real mental state of decision-makers. Reason giving does not achieve any value when it turns out to be a deceiving practice: trust is lost and respect together with it. Giving deliberately false reasons implies an intention to damage people’s plans and their capacity to act autonomously. In that sense, deceiving officials are disrespecting their fellow citizens.

This challenge reminds us that there is always a risk that reason giving requirements yield the opposite of the results that were originally sought. Giving reasons requirements are therefore devices that can be misused and can lead to disrespect and mistrust. This explains why some writers call for constraints on the reasons that can be given by governmental officials. It has been suggested that only reasons that could be accepted from everybody’s point of view be given. This would not only ensure that people are respected and have a basis for trust, but also that they can accept the decisions that have a bearing on them.

7.3 Giving Reasons and Reaching Agreement

A major reason for giving reasons is to secure agreement. In everyday life, when one seeks the agreement of others, the best method is to put forward reasons which show why the thing one wants is good or true. If one’s interlocutor accepts the reasons as valid, there is a great chance (assuming that one’s reasoning is sound and that the individual is rational) that he will also agree with the conclusion.

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14This is Onora O’Neill’s view, as expressed in (2002) A Question of Trust. The BBC Reith Lectures. Cambridge: Cambridge University Press, p. 19: “Perhaps the culture of accountability that we are relentlessly building for ourselves actually damages trust rather than supporting it.”
7.3.1 Giving Reasons and Legitimacy

In the public context, agreement is even more important. This comes from the idea that no regime is legitimate unless it is acceptable from every individual’s point of view. This can be said as soon as one insists that people should be able to enjoy liberty and freedom from domination, that is, on the principle that no one should be able to interfere arbitrarily in their lives. Giving reasons, if seen as the necessary condition for reaching agreement is a fundamental feature of a liberal political regime. In liberal democracies, the legitimacy of authority is thought to be conditional on the fact that its subjects have reason to accept it as binding and therefore to agree with it. Giving reasons is considered to be particularly crucial in pluralist societies, i.e. in societies where people have irreconcilable conceptions of the good and therefore have different practices and beliefs. Pluralist liberal democracies usually exhibit broad disagreement among citizens on issues of principle. Do such disagreements call for restraint in political action? If so, is giving reasons, or giving some specific forms of reasons, a promising restraint strategy?

Rawls’s discussion of “public reason” suggests that giving reasons should indeed constitute a restraint principle designed to ensure that every citizen can agree on the most fundamental political issues.15 Rawls’s idea of public reason offers a solution to an ongoing problem affecting liberal democracy, i.e., the fact that people have different, sometimes even conflicting, views which have a bearing on collective life. If divergences of perspectives on fundamental topics dominate political life, society may become severely divided. Yet, as long as citizens are to enjoy equal respect, one cannot require from them that they agree on fundamental political matters on the basis of reasons that they cannot share. Coercing people by means of the conceptions of the good that are held by others might consist in forcing them to embrace reasons that they cannot reasonably be expected to accept. A solution to this problem is found in the reliance on public reasons, i.e., on reasons that citizens share as members of the same political community. According to Rawls, the fundamentals of political life should be agreed upon and set outside political disputes. Since people with different comprehensive views might have similar ideas about political justice, a consensus on the basic political structure of society is possible. For Rawls, appropriate principles of justice are ones that could be sustained by an overlapping consensus of comprehensive views. A well-ordered society will have wide agreement on principles of political justice, supported by such an overlapping consensus. To achieve and maintain this minimal form of collective agreement, the different branches of the government must exercise various levels of restraint in their action through the giving of public reasons. Courts are the most rigidly monitored: they are always subject to the constraints of public reason, which is the “sole reason” they

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should ever exercise. Legislators and citizens enjoy more leeway: for them, “the
limits imposed by public reason do not apply to all political questions but only to
those involving what we may call ‘constitutional essentials’ and questions of basic
justice.”

Public reasons therefore enable citizens holding different comprehensive views
to reach a minimal agreement on principles of justice and on the structures of the
state. From this perspective, giving some specific form of reasons is ultimately part
of what makes public decisions legitimate. However, this idea that reasons are able
to play such a role in building agreement and legitimacy has been attacked. Reasons
are supposed to foster agreement, but some writers argue that in reality, the oppo-
site may occur: the giving of reasons can reveal an underlying disagreement. This
argument is more cogent as applied to reasons in general than to public reasons in
Rawls’s sense, because the status of public reasons is supposed to be, by definition,
uncontroversial and independent of any comprehensive view. But even public rea-
sons can create disagreement. Public reasons are based on political values everyone
can reasonably be expected to endorse. However, one might refuse to agree with
reasons that give only a partial picture of the whole truth, that deliberately put aside
relevant aspects of an issue. One may disagree with the very idea of giving public
reasons as a way of reaching collective agreement and thus of legitimizing public
action. For many citizens, public reasons are insufficient to justify public deci-
sions and are themselves the object of disagreement because truth, not acceptability,
should be the proper basis for agreement and legitimacy. If even public reasons
can engender disagreement, then a fortiori reasons in general, unconstrained by the
Rawlsian concept of publicity, i.e., not based on political values that everyone can
be reasonably expected to endorse, run the risk of yielding disagreement.

7.3.2 Giving Reasons and Disagreement

There is a tension between the fact that, on one hand, giving reasons is supposed to
foster agreement, consensus and mutual respect, and the fact that, on the other hand,
people usually agree on outcomes more than on the reasons justifying the outcomes.
Inquiring into the reasons why people support an outcome, it is said, undermines,
rather than contributes to consensus. It is easier to obtain the people’s agreement
on outcomes than on the reasons supporting the outcomes. The consequence is that
giving reasons is a source of dissension in society. One explanation is that vari-
ous people who agree on the same outcome often do so on different grounds: for
example, I may think that the minimum wage should be higher on the grounds that
people would consume more, thereby boosting the economy and making the stock
market go up. You may think that minimum wages should be higher because that
would be more fair: as it is, people are underpaid and they could have a better life

if they would get paid more. If the legislator decides to increase minimum wages, we will both agree with the provision included to that end in the statute. Yet, if our representatives decide to give reasons for why they enacted this new provision, (for example, by drafting a preamble stating that the statute is designed to reform labor law so as to defend workers against exploitation by big companies,) then you and I might start disagreeing about it. I will think that this goal is outrageous and that view might weaken my initial agreement with the outcome. I might now oppose the provision as a means for implementing a policy of which I strongly disapprove.

In short, giving reasons increases the number of issues about which it is possible to disagree. Moreover, not only citizens, but officials as well disagree on the reasons that are put forward in support of particular outcomes. When multiple decision-makers are involved, they often disagree among themselves about the reasons they should give to support a particular determination. The problem is especially acute in multimember bodies composed of agents holding divergent rationales.¹⁸ For example, when panels of judges decide cases, it seems easier for them to reach a majority on the outcome than on the reasons. This is readily observable in legal systems allowing for the practice of concurring opinions where one or more judge(s) express(es) his agreement with the holding of the majority, but not with its reasoning.

On the face of such disagreement, one solution may be to limit the number or the nature of the reasons that support outcomes. Arguably, this is what Cass Sunstein suggests with his notion of “incompletely theorized agreement.” Public institutions should not strive to give numerous and elaborate reasons for their decisions. In particular, they should perhaps not seek to give “public reasons,” i.e. reasons based on political conceptions that could be potentially accepted by all, but which are often very general and abstract. Instead, they should imitate participants in legal controversies, who try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principles. They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions.¹⁹

The goal here is to obtain consensus on an individual outcome among people who do not want to inquire into questions of political philosophy or into general discussions so as to avoid disagreement over principles. According to this view, giving reasons is more likely to lead to disagreement than to agreement, and can


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together, giving reasons cannot be the ultimate legitimizing device for public action.

One response could be that the giving of reasons never aimed at being a completely theorized practice in the first place. It was never the claim that all reasons that are relevant for a particular decision must be given so that the agreement be complete and settle the controversy forever. On the contrary, it could be argued that inherent in the practice of giving reasons is the idea that one gives some, and only some of the relevant reasons. This is based both on epistemological and practical considerations. The epistemological point is that people may converge on a correct outcome even though they do not have a full account for their judgment. They can agree that \( x \) is true without entirely knowing why \( x \) is true. In fact, this is very much the case with most of the things we deem true, such as scientific truths: I believe that the earth is turning around the sun but I am unable to demonstrate it. In order for people to agree with a particular determination, it is ordinarily not necessary to give all the reasons that support it. The practical point is that giving all the relevant reasons would not only be fastidious and boring but would perhaps present a practical impossibility. Decision-makers would spend their life listing all the applicable reasons for decisions and citizens would spend theirs reading them. Giving reasons is always a partial, non-exhaustive enterprise. For instance, when an institution gives reasons for why \( x \) decision is the best, it does not give reasons for why a hundred other, different decisions would have been bad, although this might be relevant information. At most, it is usually noted that other decisions \( x' \) and \( x'' \) would have been less commendable than decision \( x \) for \( z \) and \( y \) reason.

Most often, giving reasons seems a highly selective practice: the reasons given do not exhaust the list of all possible reasons. This is the case because people need to agree with fundamental political decisions; it is also desirable for people to be guided by public decisions, to act on them in everyday life. How can that goal be achieved by the giving of reasons?

7.4 Giving Reasons and Guidance

Usually the purpose of giving reasons is to guide conduct. The ability to secure compliance with decisions and rules, which can also be designated as the ability to be authoritative, is widely recognized to be a central characteristic of effective political and legal institutions. In other words, to be effective, legal rules and decisions must be obeyed. They must influence the actions of those toward whom they are directed. Compliance achieved through deterrence motives or threats of sanction is deemed a controversial method for the effective exercise of legal authority. Instead, authorities need the voluntary and spontaneous compliance of most citizens with most laws, most of the time. Ideally, internal values should lead citizens to want to act in ways that accord with or even benefit the government. In any case, gaining voluntary cooperation with the law involves giving reasons that can actually guide people.
7.4.1 Outcomes Are Insufficient to Guide When Unsupported by Reasons

Giving reasons is necessary to ensure that public decisions effectively guide people. Who are the people that reasons are meant to guide? Public reasons should be forward-looking, composed so as to guide the public at large, to be sure, but also lawyers and other counselors, who must advise clients. Even public decision-makers (such as judges, administrators, and other public officers) need to be guided by reasons. If the law is to be obeyed, it must be capable of guiding the behavior of its subjects. Does this mean that reasons can only function as guides if they are understood by the people to whom they are addressed? Obviously, yes; I cannot be guided by reasons that are wholly unintelligible to me. The trouble is that it is a well-known fact that a good deal of public decisions, especially in technical areas of law, are substantiated by reasons that are obscure not only to the immense majority of the people but even sometimes to the professionals. In light of this common phenomenon, it would be too strong a requirement to assume that only reasons that can directly be understood by their addressees are capable of guiding. In most legal systems, the solution is thought to lie in the creation of institutions entrusted with the task of explaining decisions and their reasons to those who do not understand them. Mediation is expected to bridge the gap between reasons and the public. Interested parties in a lawsuit, as well as individuals dealing with administrative agencies rely on intermediaries such as attorneys, advisers, trade unions, NGO representatives, to understand the reasons and explain them. The public at large relies on journalists to provide public accounts and explanations of lawsuits, court or jury decisions, new statutes, regulations, policies, etc. Persons who wish to go further can seek more exhaustive understanding in academic or doctrinal publications. In short, although it is true that people need to understand reasons to be effectively guided by them, they need not understand them directly, but can rely on others as mediators. Of course one must assume that it is necessary that at least counselors and other decision-makers have the ability to understand and act according to the reasons.

If one considers public decisions from a guidance perspective, it seems that what guides most effectively people is not the outcome of a decision, but the set of reasons given to support the decision. Once offered publicly, reasons may be applied to future cases that the governmental organ cannot possibly have before it while justifying a particular decision. This is why reason giving promotes planning. Giving reasons for decisions helps people understand why a decision was made and predict the outcome of future decisions in similar circumstances. From this perspective, some may argue that a bare statement of the law, unaccompanied by reasons, would provide little useful information. Decisions that are not supported by reasons do not indicate, for instance, what the public officials will consider in the future to be “like cases.” Is the decision a narrow one, based on the particular facts of the case? Or, on the contrary, does it initiate a fundamental change in the area(s) of law under consideration? In particular, when judicial decisions are at stake, lawyers and judges need to know the scope of holdings and the purposes behind them so as to predict whether and how they may bear on similar cases. Does it follow, then, that the more
the reasons, the better? Too many reasons may fail to provide adequate guidance, particularly when decision-makers leave unclear which reasons are crucial to the outcome. How much reason is enough to guide then?

It seems excessive to claim that “bare statements of law,” unaccompanied by reasons, have no guidance function whatsoever. It may be true in many instances, but not always. Unqualified statements of the law, especially if they are novel, may provide more guidance than many routine public decisions. In the United States, for example, most district courts do not give reasons at all for their decisions; they do not even write opinions. They do not provide us with a statement of the law, but only with an outcome (the plaintiff won or lost). In most legal systems, a great deal of administrative decisions follows the same pattern: agencies grant or deny petitions to individuals without saying which legal rule(s) control or whether some factual determination explains the result. These are situations of full particularity: cases seem to be decided on their (unspecified) facts, based on legal rules that are left unmentioned. Yet, it would be an overstatement to claim that these decisions do not guide at all. They may not guide someone who is unfamiliar with the area of law in question and the institution making the decision, but they might guide more experienced individuals. These cases probably guide the institution’s regulars: for example, lawyers or litigants who frequently appear before a court and petitioners who constantly deal with an agency may still be guided by particularistic decisions unsupported by reasons or by statements of the law. They are rewarded for their familiarity with these outcomes, in part because similar cases might come up routinely, or more generally because they become acquainted with the decision-makers’ way of deciding cases.

By comparison with such particularistic and unsubstantiated decisions, when institutions indicate the legal rules according to which they are acting, they provide a substantial form of guidance. Even if they are only literally copying and pasting the applicable legal provision, such unsubstantiated statements of law still retain a guidance function. For example, in a desegregation of public facilities case, a court may limit itself to saying, without providing any further detail, that race cannot be taken into account in placing children at schools. But this decision will still guide the actions of school principals and parents, eventually affecting the whole community. While reasons would certainly prove helpful in the implementation of decisions and in filling potential legal gaps or ambiguities, they are not necessary for guidance.

20 An intermediary situation would be that of an official decision-maker who only provides an outcome, but where the individuals affected by the decision had the opportunity to present reasons. It may be assumed that the outcome was based either on a dismissal or on an espousal of those reasons. This is typically the case in lower courts: the judge’s determination, when unsupported by reasons, can – theoretically at least – be traced back to the arguments that have been forward by the parties during the proceedings. Presumably, this situation provides more guidance than a “bare statement of the law,” but less than a decision substantiated by explicit reasons.
Reasons might not be always necessary to guide *hic et nunc*, but they are indispensable for public decisions to guide people over time. We give reasons because reasons matter more than outcomes: reasons allow for change, adaptation. The understanding of legal rules, of rights, of certain legal concepts, may shift and deepen with time. If past decisions were standing alone, unaccompanied by reasons, it would be very difficult for the law to adapt itself, to evolve. According to Joseph Raz, rights are often used and referred to as reasons in practical arguments. Rights may be analyzed as reasons which generate new duties as circumstances change: they have a dynamic aspect. For example, the right to privacy changes with technological advancement, some things which were acceptable before become impermissible. The right to privacy is not some immutable principle, but a “direction” addressed to courts, to which they are subject as they decide what is necessary to protect privacy. There is no such thing as the right to privacy: the right is constituted by a cluster of reasons (for and against allowing x, y, z conduct,) which can be found in a series of supreme court decisions and which can be revalued over time. Lloyd Weinreb’s study on analogical reasoning illustrates this adaptation of legal concepts by means of reasons given in judicial opinions. The reasons given by previous judges, more than the outcomes, serve as guides to distinguish relevant from irrelevant analogies and in doing so adapt legal rules to new circumstances. Courts are guided by the reasons in the sense that a previous case’s reasons are either adopted or rejected in new cases bearing on the same issue. Reasons thus allow for change and adaptation of the law. But which reasons do that? Do all reasons have the same guidance function?

Not all reasons are guides for actions. Not every reason given by governmental agents is directed toward people’s conduct. The term “reason” is indeed used indiscriminately to designate various types of arguments that may have a different status and a different function. The “reasons” given to substantiate public decisions usually encompass three different things: empowering norms, explanatory reasons and normative reasons. Only the last type of reason is strictly designed to guide action.

A substantial part of what is usually called “legal reasoning” consists in officials’ showing that they had the power to make a decision, usually by referring to an empowering norm. This is the case when administrative agencies maintain that

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24 This can be illustrated by the way in which the United States supreme court, in *Katz v. United States*, 389 U.S. 347 (1967), dismissed the reasons that the majority had given in *Olmstead v. United States*, 277 U.S. 438 (1928) and espoused – with modifications – the reasons justifying the dissent.
under statute, they are entrusted with the power of granting or rejecting types of permits, when courts claim that case falls under their jurisdiction in virtue of procedural rule, when congress points to constitutional provision as a basis for legislating, and so on. When a decision-maker refers to such an empowering norm, he uses that norm to mark the decision as valid. The purpose of such reason giving is to show that a decision has been produced in conformity with the established rules and procedures governing the creation of new law in a given legal system. But this reason is not a reason for action. The fact that the decision is produced according to a proper procedure is not a reason for anyone to engage in any specific action, it is merely a way of showing that the decision is legally valid.

From the above discussion it follows that not all reasons are guides for actions. The reasons that explain, for example, how passive smoking may result in lung cancer are not, taken alone, reasons for me to act in a special way. But the reasons that justify the enactment of a norm such as “it is forbidden to smoke in public spaces,” namely because doing so would expose non-smokers to passive smoking, are reasons for me to refrain from or to perform certain actions. There is another sense in which reasons can be explanatory. Decision-makers often give reasons that explain their directives so as to enable people to obey them correctly. These reasons are meant to explain their directives to the extent that they provide, as it were, instructions for use. Just like a medicine’s directions for use are essential to understand how to abide by a doctor’s prescription but do not tell patients why they should take this precise medication; much of public reason giving aims at securing compliance by detailing the steps that individuals must take in order to properly observe the law. Explanatory reasons are found particularly useful to clarify complex and technical rules. For example, in most country, taxpayers receive, together with their income tax returns, accompanying manuals instructing them how to file their forms, with such details as which revenues are taxable on which account, etc. However, knowing how to file my tax returns does not, by itself, give me any reason to actually file them and pay the taxes I owe.

In order to explicate how giving reasons may have a bearing on action, one must distinguish, following Joseph Raz, between two sorts of reasons: “normative reasons,” that are considerations for action (e.g., when I say that the reason why I did is that I promised to do x) and “explanatory reasons,” which are facts or events that explain why things are (e.g., when I say that the reason why I did x is that I believed that y was the case.) Only the first, the normative reasons, seem to directly guide action. Explanatory reasons in and of themselves do not provide reasons for acting in the sense that they do not tell me why a certain course of action is intelligible and preferable to another.

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25 That is, this is not a reason for action for anyone other than the official making the decision, except in the very limited sense that knowing that x institution is habilitated to make y kinds of decisions is a reason for people to bring their case to the competent institution.

Even though the three sorts of reasons do not all directly guide conduct, they all achieve some form of value in that they reinforce the authority of the legal system. As a consequence, they all, at least indirectly, end up bearing on conduct. Reasons that express empowering norms tend to confirm that a particular decision is authoritative in that it has been issued by the organ which has authority in the matter. Even though the fact that decision $x$ was arrived at by the proper official based on a specific empowering norm $y$ does not directly provide me with any reason to act in any particular way, it might nevertheless do so indirectly. I may now have a reason to comply with the decision due to the authority of its decision-maker. This reason to act is independent of the content of the decision: I am not yet guided in any determinate way, but I have a presumptive reason to act in the way that is indicated by the decision. Explanatory reasons contribute to law’s authority inasmuch as they facilitate the public’s understanding why specific decisions are valid or good and therefore justify the authority of decision-makers. Explanatory reasons may also exert an indirect guidance function in a similar fashion to the extent that they demonstrate that decision-makers are experts in the matter, I will have a reason to follow their directives, whatever they are. Lastly, normative reasons, because they directly provide people with reasons to act (or to refrain from acting) in specific ways participate in making the legal system authoritative.

7.5 Conclusion

It appears that giving reasons does indeed guide action, but in a limited and specific way. Not all reasons are guides in the same way and the absence of reasons is not the end of guidance. This conclusion resembles suggestions we encountered before: not all reasons are respectful, not all reasons generate trust and not all reasons yield agreement. The giving of reasons does not fully achieve the four values that have been examined in what precedes (respect, trust, agreement, guidance). For each of the values fostered by the giving of reasons, there is a sort of open-endedness. Reasons are never the necessary and sufficient condition to achieve the four values. However, reasons certainly affect preexisting values. While the situations considered in this paper illustrate the ways in which institutions required to give reasons may fail to achieve these values, it should be noted that some of these same values can be attained by institutions which usually do not give reasons (e.g., parliaments) or which are even precluded from giving reasons (e.g., juries). Even though jurors are prohibited from giving reasons for their decisions, they are assumed to respect defendants and they are commonly trusted and supported by the public. Their decisions do guide legal professionals and the public at large (for example, in the U.S., following a series of medical malpractice suits in the 1980s, insurance companies raised their premiums for physicians based on juries’ tendency to award very high damages).

These skeptical remarks should not lead to the conclusion that the practice of giving reasons is wholly overrated and generally fails to achieve any value. I take
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It that giving reasons does contribute to the realization of important values, but that cannot be asserted indiscriminately and in an abstract fashion. For a more informed treatment of this issue, the set of values analyzed in this paper should be further examined and explicated by an institutional analysis of the different ways in which decision-makers are subject to or exempted from giving reasons requirements.
## Chapter 7

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