

Spring 3-1-2015

## When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach

Mathilde Cohen

*University of Connecticut School of Law*

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Judges Commons](#)

---

### Recommended Citation

Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483 (2015), <https://scholarlycommons.law.wlu.edu/wlulr/vol72/iss2/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [lawref@wlu.edu](mailto:lawref@wlu.edu).

# When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach

Mathilde Cohen\*

## *Abstract*

*Influential theories of law have celebrated judicial reason-giving as furthering a host of democratic values, including judges' accountability, citizens' participation in adjudication, and a more accurate and transparent decision-making process. This Article has two main purposes. First, it argues that although reason-giving is important, it is often in tension with other values of the judicial process, such as guidance, sincerity, and efficiency. Reason-giving must, therefore, be balanced against these competing values. In other words, judges sometimes have reasons not to give reasons. Second, contrary to common intuition, common law and civil law systems deal with this tension between reasons for and against reason-giving in increasingly similar ways.*

*By combining theories of democratic legitimacy with empirical, doctrinal, and historical evidence of judges' concrete reason-giving practices in the United States and Europe, the Article argues that rather than being in opposition, these two legal cultures are converging toward a common methodology. No longer can it be assumed that civil law judges and common law judges are on opposite ends of the spectrum.*

---

\* Associate Professor of Law, University of Connecticut School of Law. For helpful suggestions and comments, I thank Hawa Allan, Ittai Bar-Simantov, Lenni Benson, Jessica Clarke, Ashley Deeks, Erin Delaney, Elizabeth Emens, John Ferejohn, Kent Greenawalt, Bert Huang, Michael Kavey, Lewis Kornhauser, Alexi Lahav, Molly Lands, Joseph Landau, Gillian Metzger, Henry Monaghan, Trevor Morrison, Anthony O'Rourke, Tanusri Prasanna, Daniel Richman, Jessica Roberts, Carol Sanger, Elizabeth Sepper, Eva Subotnik, Irene Ten Cate, and participants of the Columbia Law School Associates and Fellows Workshop.

*Table of Contents*

I. Introduction .....	484
II. Reasons for Reason-Giving .....	496
A. Judges as Model Reason-Givers .....	498
1. Rawls's Doctrine of Public Reason .....	500
2. Dworkin's Conception of Constitutional Democracy .....	502
B. Reasons for Judicial Reason-Giving .....	504
1. Participatory Reasons .....	504
2. Accountability Reasons .....	506
3. Accuracy Reasons .....	511
III. Reasons for Not Giving Reasons .....	514
A. Institutional Reasons .....	514
B. Cognitive Reasons .....	518
C. Efficiency Reasons .....	522
IV. Federal Courts Balance and Require .....	525
A. No Affirmative Duty in the Federal Courts .....	526
1. Administrators Must Give Reasons, Not Judges .....	528
2. The Only Judicial Duty Is to Enable Review .....	532
B. Yet Courts Balance and Require .....	536
1. Context 1: Immigration .....	538
2. Context 2: Sentencing .....	549
V. Civil Law Courts Require and Balance .....	557
A. Civil Law Theory: Affirmative Duty .....	557
B. Civil Law Reality: De Facto Balancing .....	562
VI. Conclusion .....	570

*I. Introduction*

We are in the “age of reasons.”<sup>1</sup> Never before have reasons been so praised, cherished, advocated, and promoted in public

---

1. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959) (“The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it.”).

discourse as well as in academic circles.<sup>2</sup> Buzzwords and catch-phrases such as “reason-giving requirement,”<sup>3</sup> “reasoned elaboration,”<sup>4</sup> “public reason,”<sup>5</sup> and “public justification,”<sup>6</sup> have, along with a host of others, become major themes of the legal and political lexicon.<sup>7</sup> Influential theories of law have celebrated reason-giving as the new paradigm of democratic legitimacy.<sup>8</sup> According to these theories, public institutions and the State are legitimate to the extent that their decisions are justified by reasons.<sup>9</sup>

The discussion in law and jurisprudence focuses on the liberal-democratic virtues of reason-giving.<sup>10</sup> Within a liberal-democratic

2. See *id.* at 19 (“A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”).

3. See Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 128 (1987) (noting that liberal political theories require reasons to accompany State actions).

4. See Weschsler, *supra* note 1, at 16 (emphasizing the role of reason in the judiciary). In the 1950s, partly as a reaction against the activism of the Warren Court, legal process scholars developed a theory of legal decision making centered not on the outcomes of legal decisions but on the *processes* by which courts decide. Against legal realists, they argued that courts should strive to make principled decisions by focusing on “reasoned elaborations,” i.e., justifying their determinations on the basis of neutral principles of law. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 427 (1958) (suggesting different starting points for judicial reasoning, such as custom).

5. See JOHN RAWLS, *POLITICAL LIBERALISM* 216–20 (1993) (reviving the notion of “public reason” as a reciprocity requirement demanding that citizens be able to justify their political decisions to one another using publicly available values and standards); see also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997) (“Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.”).

6. See generally FRED D’AGOSTINO & GERALD F. GAUS, *PUBLIC REASON* (1998) (arguing that the idea of public justification is the key idea in contemporary liberal-democratic political theory).

7. See *id.* (emphasizing the reliance of legal and political lexicon on reason).

8. See *id.* (citing contemporary liberal-democratic political theory as an example of an influential theory of law that celebrates reason-giving).

9. See RAWLS, *supra* note 5, at 216–20 (arguing that “public reason” requires justification by reason).

10. See generally D’AGOSTINO & GAUS, *supra* note 6 (explaining the liberal-

regime, courts are defined by the very fact that they give reasons to explain what the law is and how it applies in each particular instance.<sup>11</sup> More than other branches of government, judges are expected to be model reason-givers.<sup>12</sup> The purpose of judicial reasons is to set forth an explanation for a decision on questions presented before a court.<sup>13</sup> These reasons may include the court's articulation of the factual and legal basis for its decision as well as its interpretive and policy analysis of the law it is applying.<sup>14</sup>

Judicial reason-giving has not, however, always been considered so clearly desirable.<sup>15</sup> Reason-giving is a typically modern idea.<sup>16</sup> There have been historical moments when it was deemed valuable *not* to give reasons.<sup>17</sup> For instance, Roman courts,<sup>18</sup> ecclesiastical courts,<sup>19</sup> and a number of aristocratic

democratic political theory).

11. *See id.* (emphasizing that reason is a key virtue of the liberal-democratic political theory).

12. *See* Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1097 (2010) (arguing that judges are held to a higher sincerity standard than other branches of government when giving reasons).

13. *See id.* at 1091 (“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.”).

14. *See id.* at 1092 (noting that judges “are expected to disclose facts and arguments supporting their actions in which they sincerely believe”).

15. *See* Richard H. Helmholz, *The Ratio Decidendi in England: Evidence from the Civilian Tradition*, in 1 RATIO DECIDENDI—GUIDING PRINCIPLES OF JUDICIAL DECISIONS 73, 77 (W. Hamilton Bryson & Serge Dauchy eds., 2006) (explaining that English judges were not permitted to offer their reasons to the public).

16. *See* Laurens Winkel, *Ratio Decidendi—Legal Reasoning in Roman Law*, in 1 RATIO DECIDENDI—GUIDING PRINCIPLES OF JUDICIAL DECISIONS, *supra* note 15, at 9 (explaining that reasons did not accompany Roman judicial decisions).

17. *See id.* (using Rome as an example of a place where it was considered better not to give reasons).

18. In the Roman-law formulary system of procedure, which lasted roughly from the end of the second century B.C. until the third century A.D., judgments were typically unreasoned. *See* Ernest Metzger, *Roman Judges, Case Law, and Principles of Procedure*, 22 LAW & HIST. REV. 243, 251 (2004) (pointing out that, in Rome, “[a] system of case law would be all the more difficult to realize because a judgment was oral and gave no reasons”); *see also* Winkel, *supra* note 16, at 9 (“Many decisions of the Roman jurists are not motivated, or justified.”).

19. As early as the twelfth century, the Pope—Innocent III—issued a

courts<sup>20</sup> in premodern, continental Europe functioned without giving reasons for their decisions.<sup>21</sup> Their task was to decide cases, not to issue explanations.<sup>22</sup> In Ancient Rome, for a time, the College of Pontiffs had a monopoly on declaring what the law was.<sup>23</sup> The *pontifices* did not explain their pronouncements: they pontificated.<sup>24</sup> The justification commonly advanced for not giving reasons in the twelfth and thirteenth centuries was that explaining decisions would jeopardize, rather than further, the power and legitimacy of the courts.<sup>25</sup> Giving reasons, the argument went, would create an appearance of uncertainty and open the door to criticism not only on the part of the litigants but

---

decretal recommending that judges not give reasons justifying their decisions. See *Sicut nobis*, X 2, 27, 6 (1199) (requiring judges to refrain from reason-giving); see also Helmholz, *supra* note 15, at 77 (arguing that English ecclesiastical courts “were positively discouraged from giving their reasons when formulating their sentences”).

20. For instance, French prerevolutionary courts had an established practice of not giving reasons for their decisions. Legal historians usually ascribe this non-reason-giving rule to the principle of secrecy of judicial deliberations, which was formally recognized in a March 11, 1344 ordinance. See ANDRÉ ISAMBERT, RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES DEPUIS L’AN 1420 JUSQU’À LA REVOLUTION DE 1789, at 498, 503 (1824) (“From the moment the judgments have been delivered and published, no one shall say or repeat the lords’ opinion. Because in doing so, one would break the oath they took to keep and not reveal the court’s secrets.”). Similar prohibitions on judicial reason-giving can be found during the same period in most courts of last resort. See Philip Godding, *Jurisprudence et motivation des sentences, du Moyen Age à la fin du XVIIIe siècle*, in LA MOTIVATION DES DÉCISIONS DE JUSTICE 37, 59, 63, n.81 (Chaim Perelman & Pierre Foriers eds., 1978) (describing the prohibitions on judicial reason-giving that existed from the Middle Ages to the late eighteenth century).

21. See Winkel, *supra* note 16, at 9 (noting that some courts believed that refraining from reason-giving was both functional and desirable).

22. See *id.* (arguing that these courts believed reason-giving would do more harm than good).

23. See DIG. 1.2.2.6 (Ulpian, Ad Edictum 18) (composing part of the Digest, the body of civil law issued under Justinian I).

24. See ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 53 (1988) (“Unlike modern judges, Roman pontiffs were required only to render decisions: they did not have to give reasons or cite well-established ‘rules’ as justifying their adjudications.”).

25. See 6 PHILIPPE GODDING, LA JURISPRUDENCE, TYPOLOGIE DES SOURCES DU MOYEN-AGE OCCIDENTAL 20 n.14 (1973) (pointing out that thirteenth-century Italian canonist Hostiensis observed that it would be foolhardy for judges to give reasons because if the reasons were found erroneous, the disposition could be voidable under canon law rules).

also on the part of other institutions, the most dreaded of which was the royal power.<sup>26</sup> The idea was that by refraining from giving reasons, courts would preserve their discretion to decide cases and make law as they pleased because their decisions would be insulated from review and annulment.<sup>27</sup> A few modern institutions are reminiscent of this way of thinking about reason-giving.<sup>28</sup> To this day, reason-giving is discouraged or even prohibited in a number of decision-making contexts, such as those involving juries,<sup>29</sup> voters,<sup>30</sup> clemency decisions,<sup>31</sup> or national-security affairs.<sup>32</sup>

---

26. See generally Véronique Demars-Sion & Serge Dauchy, *La non motivation des décisions judiciaires dans l'ancien droit français: un usage controversé*, in 1 *RATIO DECIDENDI—GUIDING PRINCIPLES OF JUDICIAL DECISION*, *supra* note 15, at 87, 89–98 (noting that even though it is not proven that French laws in 1789 prohibited judges from making their reasoning known, it is true that they refrained from doing so).

27. See *GODDING*, *supra* note 25, at 20 n.14 (justifying a lack of reason-giving in Italy on the grounds that reasons might provide a basis for the decision being voided).

28. See GUIDO CALABRESI & PHILIPP BOBBIT, *TRAGIC CHOICES* 57–64 (1978) (providing modern juries as an example of a current institution that does not engage in reason-giving).

29. Traditionally, the distinctive feature of Anglo-American criminal procedure has been that juries deliver unreasoned general verdicts. Upon returning from their deliberations, jurors merely announce “guilty” or “not guilty.” See *id.* (noting that jurors are not required to explain their decisions). See generally John D. Jackson, *Making Juries Accountable*, 50 *AM. J. COMP. L.* 477 (2002) (describing the constitutional independence of juries from state control).

30. Most democratic legal systems view the principle of secret ballot as an essential institution for protecting voters from fear of intimidation or coercion. Citizens are free not to give reasons for casting their votes; the Government is prohibited from requiring them to justify their vote. See *International Covenant on Civil and Political Rights* art. 25, Mar. 23, 1976, 999 *U.N.T.S.* 171 (considering the secret ballot a crucial component of a free and fair electoral process).

31. The pardon power can be analyzed as a remnant of the old regime view of reason-giving. For instance, the President of the United States needs not provide any reason for granting pardons. See Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 *FED. SENT'G REP.* 150, 150 (2001) (arguing against a reason-giving requirement for clemency decisions).

32. There is no affirmative requirement for the Executive to provide reasons for its actions, although it is generally expected to do so. When it comes to sensitive issues involving diplomacy, the secret services, or national security, it is generally thought that some level of secrecy is desirable to conceal information that, if disclosed, would endanger the national interest. See Stephen

This Article has two main purposes. First, it argues that, although reason-giving is important, it is often in tension with other values of the judicial process, such as guidance, sincerity, and efficiency.<sup>33</sup> Judges, therefore, balance the benefits of reason-giving against these competing values. In other words, they may have reasons not to give reasons. Second, this Article shows that despite their very different sets of institutions and dissimilar positive law traditions, the United States and the Council of Europe's judiciaries deal with this tension in increasingly similar ways.<sup>34</sup> The apparent picture—according to which civil law judges are under an affirmative reason-giving requirement and common law judges are free to balance the justifications for and against reason-giving—should be nuanced.<sup>35</sup> No longer can it be assumed that civil law judges and common law judges are on opposite ends of the spectrum.<sup>36</sup>

This Article provides an analytical reassessment of the reason-giving requirement and argues that the comparative story is more complex than it appears at first. Courts, like

---

Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 322–23 (2009) (criticizing the Bush administration for its extensive use of the privilege not to give reasons and analyzing a quotation from George Bush addressing Bob Woodward). George Bush said the following to Bob Woodward: “I’m the commander—see, I don’t need to explain—I do not need to explain why I say things. That’s the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don’t feel like I owe anybody an explanation.” BOB WOODWARD, *BUSH AT WAR* 145–46 (2002).

33. *Infra* Part III.

34. *Infra* Part V.

35. While the Council of Europe includes common law jurisdictions such as the U.K., Ireland, and Malta, the majority of its member states are usually associated in one way or another with the civil law tradition broadly defined. *See generally* NINA-LOUISA AROLD, *THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007) (questioning the adequacy of the common law–civil law distinction in categorizing judges). Despite its well-known weaknesses, for the purpose of this Article, I will take the common law–civil law distinction as is. *See, e.g.*, Mirjan Damaska, *Rethinking the Common Law/Civil Law Divide: Residual Truth of a Misleading Distinction*, 49 SUP. CT. REV. (Canada) 3–21 (2010) (pointing out that the adversarial and inquisitorial models of procedure are misleading ways of identifying distinctive features of the “common law” as opposed to the “civil law,” but arguing that some use for the distinction still remains).

36. *See id.* (calling the legitimacy of a strict common law–civil law distinction into question).

other public institutions, must constantly compromise between reason-giving and other values.<sup>37</sup> Reason-giving is only *one* value of the judicial process that must be balanced against others, such as efficiency,<sup>38</sup> sincerity,<sup>39</sup> and guidance.<sup>40</sup> Understanding how reason-giving alternately furthers or undermines the democratic and institutional goals for which courts aim is as crucial for doctrine as it is for legal theory.<sup>41</sup> The claim is that, just as there are strong justifications for judges to give reasons for their decisions, there are also justifications militating against reason-giving.<sup>42</sup> In practice, judges may balance democratic rationales for reason-giving against institutional, cognitive, and pragmatic reasons not to give reasons.

This Article contends that a comparative law analysis of courts is key to understanding these competing interests at stake. Civil lawyers tend to think about reason-giving in absolutist terms, while common lawyers favor a balancing approach.<sup>43</sup> In the civil law countries of continental Europe, courts are usually under a constitutional<sup>44</sup> or

---

37. *Infra* Part III.

38. For instance, would it be preferable for a court to give more explanations or to move its docket faster? The answer depends on the type of case and audience involved. While repeat players would presumably choose speed over reason-giving, especially in well-settled areas of litigation, one-shotters probably see more value in clear and thorough explanations.

39. See Cohen, *supra* note 12, at 1097 (arguing that pressures towards more judicial reason-giving may be counterproductive when they result in encouraging boilerplate or insincere explanations). See generally Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008) (defending the view that judges should have a sincere belief in the reasons in their opinions).

40. See Lee Epstein, William M. Landes & Richard Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 107 fig.1 (2011) (suggesting that high rates of separate opinions by judges who reached the same decision by different reasoning may do more harm than good).

41. See RAWLS, *supra* note 5, at 231–40 (emphasizing the importance of reason-giving to the legitimacy of courts).

42. *Infra* Part III.

43. *Infra* Part V.

44. Examples of such constitutional reason-giving requirements include: 1994 CONST. art. 149 (Belg.) (“All judgments are motivated.”); Art. 111(6) Costituzione [Cost.] (It.) (“Reasons must be stated for all judicial decisions.”); Luxembourg Constitution art. 89 (“All judgments shall be reasoned.”); C.E.,

statutory<sup>45</sup> mandate to write opinions for all cases decided on the merits.<sup>46</sup> Yet, civil law opinions have been disparaged as formalistic, offering little useful information for why the court decided the way it did.<sup>47</sup> In contrast, no such affirmative mandate exists in the Anglo-American tradition generally and in the U.S. federal judiciary in particular.<sup>48</sup> Despite the lack of a formalized requirement, however, the federal courts have cultivated a robust tradition of reason-giving.<sup>49</sup> They are known

---

B.O.E. n. 120.3, Dec. 29, 1978 (Spain) (“The sentences shall always be motivated and shall be pronounced in public audience.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6.1, Rome, 4.XI. 1950 (“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security.”). Outside of Europe, see the Peru Constitution, art. 139 (“[W]ritten motivations of judicial resolutions in all instances except merely procedural decrees, with express mention of the applicable law and the de facto grounds on which they are based.”).

45. Examples of such statutory reason-giving requirements include: Treaty of Nice Amending the Treaty on European Union, the Treaty Establishing the European Communities, and Certain Related Acts art. 36, Feb. 26, 2001, 2001 O.J. (C 80) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:080:0001:0087:EN:PDF> (subjecting the Court of Justice of the European Union to a statutory duty to give reasons expressed in the following terms: “Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations”). In France, there is a general, statutory mandate for all courts—private law courts, criminal courts and administrative courts—to write opinions accompanying their decisions. See Nouveau Code de Procédure Civile art. 455 (allowing juries to request consultations); Code de Procédure Pénale art. 485 & 593 (requiring the judge to sign the formal judgment and voiding judgments with insufficient reasoning); Code Administratif art. 9 (providing that all judicial decisions shall be accompanied by written reasons); Conseil d’État, Aug. 2, 1924 *Dame Paquin* (pointing out that the reason-giving requirement is a “general procedural rule which must be followed by all courts even absent a written statute”).

46. *Infra* Part V.A.

47. See JACK DAWSON, *THE ORACLES OF THE LAW* 410–11 (1968) (describing the cryptic nature of French judicial opinions).

48. See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161, 162 (1930) (explaining that the balancing approach is important in the Anglo-American tradition largely because of the role of precedent in deciding future cases).

49. When discussing the American legal system, this Article concentrates on the federal courts. The argument applies to most state courts, but its full implications for the state judicial systems are too vast to trace here. There are two additional reasons for focusing inquiry on the federal courts, at least for the purpose of this Article. First, unlike many state judges, federal judges are unelected. This democratic deficit means that they need to develop non-electoral

for highly sophisticated, informative, and detailed opinions, especially at the intermediate appellate level and at the Supreme Court level.<sup>50</sup> The comparison leads to an apparent paradox: in the U.S. system, where opinions are not always constitutionally and statutorily required, they are abundant and often extensively reasoned.<sup>51</sup> In the civil law tradition, there is an absolute mandate for opinion writing, but many opinions are devoid of reasoning.<sup>52</sup>

In these two legal traditions, different branches of the government have in principle been entrusted with the task of balancing the competing interests at stake in judicial reasoning. In the civil law, the people or their elected representatives typically conduct the balancing *ex ante* by imposing upon courts a blanket reason-giving requirement via a constitutional or a statutory provision.<sup>53</sup> By contrast, the American approach permits judges to weigh the justifications for and against reason-giving themselves.<sup>54</sup> In civil matters, the only rule in the U.S. Code that comes close to imposing such a reason-giving requirement is Rule 52(a) of the Federal Rules of Civil Procedure.<sup>55</sup> In bench

---

forms of legitimacy and accountability, such as reason-giving. Second, federal courts, especially at the intermediate appellate level and at the Supreme Court level, generally enjoy greater visibility from the center and often deal with high profile cases. Judges and legal professionals across the nation follow their dockets and read their opinions.

50. See Kevin Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 955 (2007) (noting that, even in the face of faulty reasoning, a correct decision cannot be overturned on appeal).

51. See *id.* (suggesting that lengthy opinions are low risk because correct decisions will be upheld even if the reasoning is erroneous)

52. See DAWSON, *supra* note 47, at 410–11 (describing civil law decisions in France as largely devoid of reasoning).

53. See *supra* notes 44–45 (providing examples of the relevant constitutional and statutory provisions).

54. See 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. (SPECIAL ISSUE) 387, 425–28 (describing the origin of the reason-giving requirement in America).

55. See FED. R. CIV. P. 52(a) (requiring the court to “find the facts specially and state its conclusions of law separately” in actions “tried on the facts without a jury”). Granted, the Federal Rules mandate reason-giving but only in very limited circumstances: when district judges issue injunctions or when they rule on summary judgment. Rule 65 thus states that “[e]very order granting an

trials,<sup>56</sup> the rule mandates that district judges find the facts specially and state their conclusions of law.<sup>57</sup> In criminal matters, district judges are only under a statutory duty to “state in open court the reasons” for imposing a “particular sentence.”<sup>58</sup> In short, federal appellate judges<sup>59</sup> and Supreme

---

injunction and every restraining order must: state the reasons why it issued.” FED. R. CIV. P. 65(d)(1). Rule 65 gives no indication, however, as to how those reasons ought to be stated—orally or in writing. *See id.* (requiring only that the reasons must be stated somehow). Similarly, Rule 56(a) provides that “[t]he court should state on the record the reasons for granting or denying the motion [for summary judgment].” FED. R. CIV. P. 56(a). The Rule 56(a) requirement, however, has been construed as a weak reason-giving requirement as it does not amount to a requirement for courts to make findings of fact and conclusions of law when deciding a summary judgment motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (holding that there is no requirement that trial judges make findings of fact when granting summary judgment).

56. By which I mean all “action[s] tried upon the facts without a jury or with an advisory jury.” FED. R. CIV. P. 52(a)(1).

57. Similarly, circuit courts’ rules and internal operating procedures usually direct appellate judges to write opinions for cases in which their written explanations would have precedential value. *See, e.g.*, 1ST CIR. R. 36.a (requiring a judgment to be entered “when it is noted on the docket”); 2D CIR. R. 32.1.1(a) (stating that “[r]ulings by summary order do not have a precedential effect”); 3D CIR. I.O.P. 7.3 (“In some instances when a panel reverses or remands a case to the district court or agency and it is not feasible to write an opinion, usually because the matter requires immediate attention, the court enters a dispositive order setting forth briefly the reasons for its actions.”); 4TH CIR. I.O.P. 36.3 (allowing summary opinions that do “not discuss the facts or elaborate on the Court’s reasoning” when “all judges on a panel” are in agreement); 5TH CIR. R. 47.6 (allowing judgments that “would have no precedential value” to be affirmed without opinion); 6TH CIR. R. 36 (“The court may announce its decision in open court when the decision is unanimous and each judge of the panel believes that a written opinion would serve no jurisprudential purpose.”); 7TH CIR. R. 32.1 (“It is the policy of the circuit to avoid issuing unnecessary opinions.”); 8TH CIR. R. 47.A.a (“The court on its own motion may summarily dispose of any appeal without notice.”); 8TH CIR. I.O.P. IV.A (“The presiding judge on the panel assigns each case for preparation of a signed opinion, per curiam opinion, or a dispositive order.”); 9TH CIR. R. 36.2 (establishing the criteria for designation of a “written, reasoned disposition” as an “OPINION”); 10TH CIR. R. 36.1 (“Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.”); 11TH CIR. I.O.P. 36.5 (“A majority of the panel determine[s] whether an opinion should be published. Opinions that the panel believes to have no precedential value are not published.”).

58. 18 U.S.C. § 3553(c) (2012).

59. *See* FED. R. APP. P. 36(a)(2) (specifically recognizing the possibility that a judgment be “rendered without opinion”).

Court Justices<sup>60</sup> have by and large been free to decide when to give reasons, how much reason to give, and in what form—ranging from the full-blown published opinion to the summary order to oral explanations delivered from the bench to no reasons at all.<sup>61</sup>

Relying on a methodology that brings together theories of democratic legitimacy with empirical, doctrinal, and historical evidence of judges' concrete reason-giving practices in the United States and Europe, this Article argues that courts operating under supposedly opposite reason-giving regimes are actually converging in their approach.<sup>62</sup> More specifically, it points out that, in a few circumscribed areas, such as sentencing and immigration, where U.S. federal judges consider the justification for reason-giving to be overwhelming, the federal courts seem to move, to some extent, in the direction of the no-balancing, civil law methodology.<sup>63</sup> In these contexts, federal appellate judges impose upon trial-level adjudicators an affirmative reason-giving mandate that preempts their balancing the reasons for and against reason-giving. Likewise, partly due to growing caseload pressures and other resource constraints, and despite their mandate to give reasons, civil law courts in Europe are increasingly engaging in the type of balancing United States federal courts are accustomed to.<sup>64</sup> Civil law judges consider and

---

60. The U.S. Supreme Court is expected to explain its decisions and issue written opinions, but it is not required to do so. *See* SUP. CT. R. 41 (providing that “[o]pinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs”); *see also infra* notes 266–268 (describing the enormous discretion possessed by the Supreme Court regarding how to explain its decisions).

61. *See* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 68–94 (2009) (recounting the past and present opinion-writing practices in England and in the United States). For examples of contexts where no reasons are given at all, *see* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) (pointing out the U.S. Supreme Court’s practice of denying certiorari without explanations, the federal courts of appeals’ practice of disposing “of cases from the bench or without opinion,” trial judges’ ruling on objections or motions without reasons, and judges dismissing jurors for cause unsupported by justifications).

62. *Infra* Part V.

63. *Infra* Part IV.B.

64. *Infra* Part V.

weigh the justifications for and against giving reasons. They ration reason-giving in a subset of their caseload to direct their justificatory efforts on specific cases.

The discussion proceeds in four Parts. Parts II and III concentrate on the tension between the rationales for and against reason-giving. Part II introduces the liberal democratic theory of reason-giving and its focus on judges.<sup>65</sup> Part III turns to skeptical arguments against the unqualified value of reason-giving by pointing out that there are also reasons against giving reasons.<sup>66</sup>

Part IV explains that although no universal reason-giving requirement applies to U.S. federal judges, who are usually free to balance the competing interests involved in reason-giving, they nonetheless follow a well-entrenched practice of writing opinions and providing oral explanations from the bench. In a few circumscribed areas, however, such as sentencing and immigration, where they deem the justifications for reason-giving to be paramount, appellate judges have developed administrative law-like reason-giving requirements that are evocative of the civil law methodology.<sup>67</sup>

Finally, Part V develops the civil–common law comparison by focusing on the Supreme Court of the United States and the European Court of Human Rights as symbols of common and civil law judicial decision making respectively.<sup>68</sup> On the one hand, the Supreme Court is under no affirmative duty to give reasons, but it enjoys discretionary jurisdiction over its docket and issues highly explanatory opinions for its decisions on the merits.<sup>69</sup> On the other hand, the European Court of Human Rights is under a blanket duty to give reasons for all of its decisions.<sup>70</sup> Due to its

---

65. *Infra* Part II.

66. *Infra* Part III.

67. *Infra* Part IV.

68. *Infra* Part V.

69. See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634 (2008) (noting the recent increase in the length of the Supreme Court's majority opinions).

70. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 51, Rome, 4.XI. 1950 (“Reasons shall be given for the judgment of the Court. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judges shall be entitled to deliver a separate opinion.”).

enormous caseload and mandatory jurisdiction,<sup>71</sup> however, European judges cannot possibly draft original and comprehensive opinions for all of their decisions.<sup>72</sup> Thus, they engage in the type of balancing of justifications for and against reason-giving that is familiar to their American counterparts.<sup>73</sup>

## II. Reasons for Reason-Giving

This Part introduces the liberal-democratic theory of reason-giving.<sup>74</sup> At the heart of contemporary theories of liberalism stand two main ideas—pluralism, the idea that there are many competing conceptions of the good life,<sup>75</sup> and toleration, the idea that reasonable persons may disagree about those conceptions and that we must therefore learn to live with those who do not share our values.<sup>76</sup> The duty to give reasons arises in a democracy as an attempt to reconcile the fact of pluralism with our ideal of toleration.<sup>77</sup> Proponents of very different versions of liberal democracy usually disagree on certain features that define a democratic regime.<sup>78</sup> They often agree, however, that reason-

---

71. As of December 31, 2013, there were 99,900 cases pending before the European Court of Human Rights. See EUR. CT. H.R. ANNUAL REPORT 2013, at 191 (2014) (listing the number of pending cases).

72. See *id.* (noting the enormous number of cases before the European Court of Human Rights).

73. See *id.* (suggesting that balancing in civil courts is a function of practical necessity).

74. See RAWLS, *supra* note 5, at 218 (“As reasonable and rational, and knowing that they [citizens] affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.”).

75. See *id.* at 145 (explaining pluralism as a large family of views in which each subpart “has its own account based on ideas drawn from within it, leaving all values to be balanced against one another, either in groups or singly, in particular kinds of cases”).

76. See *id.* at 154 (“To apply the principles of toleration to philosophy itself is to leave to citizens themselves to settle the questions of religion, philosophy, and morals in accordance with views they freely affirm.”).

77. See *id.* at 157–58 (explaining that reconciliation by public reason identifies “the fundamental role of political values in expressing the terms of fair social cooperation consistent with mutual respect between citizens regarded as free and equal”).

78. See *id.* at 159 (explaining that “there is disagreement among those

giving must be an essential activity of the democratic State.<sup>79</sup> More specifically, they insist that *judicial* reason-giving is fundamental to the political and moral legitimacy of a democracy.<sup>80</sup> Because under conditions of freedom, people do not agree about values, public officials ought to justify the State's action on reasons that all citizens may reasonably accept, or at least understand.<sup>81</sup> As subpart A describes, judges, in particular, are often presented as model decision makers because they have a moral obligation—and in some jurisdictions a legal obligation—to provide reasons for their decisions.<sup>82</sup> Subpart B then provides a

---

holding liberal principles as to the more exact content and boundaries of these rights and liberties, as well as on what further rights and liberties are to be counted as basic and so merit legal if not constitutional protection”).

79. See Waldron, *supra* note 3, at 128 (noting that liberals demand explanations that all can understand). Of course, there are liberal-democratic theories that do not accord such a central place to reason-giving. On the aggregative view of democracy, for one, legitimate political decisions proceed from the aggregation of existing interests and preferences through voting. Such theories consider that majoritarian or utilitarian decision schemes (elections, conclusion of cost-benefit analysis) provide their own justification. See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1976) (describing democracy as “an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”). Another example is Joseph Raz’s perfectionist liberalism, which argues that decisions and laws have all the authority they need if they are right or just; they need no further justification of the sort that deliberative democrats require. See Joseph Raz, *Disagreement in Politics*, 43 *AM. J. JURIS.* 25, 39 (1998) (refraining, however, from denying that deliberation may be useful at arriving at better (more just) outcomes in politics). In the last two decades, a number of philosophers have advanced a justificatory conception of liberalism. See generally GERALD F. GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* (1996) (critically examining liberal political theories’ reliance on various epistemologies of justification).

80. See, e.g., Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215, 218 (1987) (arguing not only that public justification has the practical value of ensuring political stability, but also that the possibility of justifying the system to as many participants as possible is of independent moral importance); Stephen Macedo, *The Politics of Justification*, 18 *POL. THEORY* 280, 281 (1990) (arguing that commitments to reason-giving and reason-demanding inform some of our most valuable political practices).

81. See Nagel, *supra* note 80, at 218 (emphasizing the importance of justifying State actions to as many citizens as possible).

82. *Infra* Part II.A.

taxonomy of the benefits theoretically achieved by judicial reason-giving.<sup>83</sup>

### A. Judges as Model Reason-Givers

A number of liberal-democratic theories depict judges as the heroes of reason-giving.<sup>84</sup> This depiction might come as a surprise considering that the judiciary is not known for being the most democratic branch of government.<sup>85</sup> Most judges lack a democratic pedigree in the traditional sense<sup>86</sup>—federal judges are not elected and enjoy lifetime tenure.<sup>87</sup> Despite their lack of

83. *Infra* Part II.B.

84. The two most prominent examples being Rawls's portrait of the U.S. Supreme Court as an "exemplar" of public reason and Dworkin's superjudge Hercules. See RAWLS, *supra* note 5, at 231 (explaining that "public reason is well suited to be the court's reason in exercising its role as the highest juridical interpreter but not the final interpreter of the higher law"); see also RONALD DWORKIN, LAW'S EMPIRE 397–98 (1986) (characterizing the superjudge Hercules as "guided by a sense of constitutional integrity," and believing that "his judgment about which interpretation is best is sensitive to the great complexity of political virtues bearing on that issue"). There are a few exceptions to this judge-centric approach to democratic legitimacy. Philip Pettit, for example, focuses on legislators. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 183 (1997) (explaining that legislators have discretion over the content of laws); see also Jeremy Waldron, *The Core Case Against Judicial Review*, 115 YALE L.J. 1346, 1382 (2006) (pointing out that legislators give reasons for their votes just as judges do: the reasons are given in what we call legislative debates and they are published in the Congressional Record; the difference is that lawyers are trained to study and analyze the reasons judges give, not legislative reasoning).

85. See DWORKIN, *supra* note 84, at 397–98 (describing the notion of the all-powerful "superjudge").

86. Christopher Eisgruber argues that federal judges should have a democratic pedigree. See Christopher L. Eisgruber, *Democracy and Disagreement: A Comment on Jeremy Waldron's Law and Disagreement*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 35, 45 (2003) (arguing that the appointment process results in a "democratic pedigree" for judges); see also Samuel Freeman, *Public Reason and Political Justifications*, 72 FORDHAM L. REV. 2021, 2066 (2004) (discussing Rawls's seemingly counterintuitive claim that the Supreme Court is the "exemplar of public reason" considering the antimajoritarian character of the Court).

87. Although federal judges are appointed with life tenure, most state judges are elected for short terms and, therefore, presumably enjoy a greater democratic legitimacy. See, e.g., Damon M. Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 232 (2007) (comparing the situation of state judges serving in states with

accountability at the ballot box, a number of democratic theorists nonetheless portray courts as “deliberative institutions.”<sup>88</sup> They point out that courts’ legitimacy must be established on reasons.<sup>89</sup> Democratic theorists emphasize that even if, unlike legislatures, courts make decisions in closed sessions, many of their processes are open to the public.<sup>90</sup> The U.S. Supreme Court and the circuit courts hear oral arguments for a large portion of the cases they decide.<sup>91</sup> They engage in public discussion with lawyers at oral arguments.<sup>92</sup> Their reasoned opinions expose legal reasoning to public view and comment.<sup>93</sup> Concurrences and dissents reveal disagreements among judges.<sup>94</sup> In sum, liberal-democratic theorists insist that federal judges’ justifications, which connect judicial decisions to prior democratic acts embodied in the Constitution or in statutes, function as proxies for democratic

---

appointment or merit selection systems and that of state judges serving in states with elections).

88. See, e.g., John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21, 22 (Wojciech Sadurski ed., 2002) (noting that constitutional courts, despite being differently situated in various political systems, retain an exemplary deliberative character).

89. The constraint of reason-giving is stronger for the judiciary than for other branches of government, the argument goes, precisely because federal judges are unelected and politically unaccountable. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 388 (1996) (“[J]udges occupy a unique and limited role, one that does not allow them to substitute their views for those in the executive and legislative branches . . . who have the constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions.”).

90. See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 27 (2003) (emphasizing the importance of public reasons backing all Government actions).

91. But by many accounts, oral arguments are diminishing at the appellate level.

92. See RAWLS, *supra* note 5, at 231–40 (suggesting that this is because well-reasoned justifications are expected from judges).

93. See *id.* (emphasizing that this legal reasoning is offered because judges know the public expects it).

94. See AMY GUTMANN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* 100 (1996) (describing well-reasoned justifications as necessary for cooperation between disagreeing parties).

legitimacy.<sup>95</sup> The idea is that when courts publicly articulate their decisions, citizens will perceive them as legitimate.<sup>96</sup> Reasons provide citizens with a content-independent basis for obeying the law.<sup>97</sup> The mechanism of adjudicative legitimacy is one of persuasion.<sup>98</sup> Two particular liberal theories illustrate the importance of judicial reason-giving in a democracy: Rawls' doctrine of public reason<sup>99</sup> and Dworkin's conception of constitutional democracy.<sup>100</sup>

### 1. Rawls's Doctrine of Public Reason

Rawls famously argued that public reason is an essential legitimizing feature of the liberal-democratic State.<sup>101</sup> According to his theory, the U.S. Supreme Court is the "exemplar" of public reason.<sup>102</sup> In his conception of the liberal state, the government's

95. See *id.* (arguing that public reasoning is a primary facilitator of democratic legitimacy).

96. Deliberative democrats generally agree that, for a decision to be seen as legitimate, reasons must exist to justify the decision and be made public. See Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 37 (1986) (discussing how to lend legitimacy to decisions); GUTMANN & THOMPSON, *supra* note 94, at 10 ("[O]nly public justifications can secure the consent of citizens, whether it be tacit or explicit. Such justifications help sustain a sense of legitimacy that makes political cooperation possible in the face of continuing moral disagreement."); RICHARDSON, *supra* note 90, at 27 ("The burden of legitimation entails that governments must not act in an elementally arbitrary way but must instead offer reasons for their actions."). *But see* Earl M. Malz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1398 (2000) (questioning the theory that the public cares about the process of legal decision making).

97. See GUTMANN & THOMPSON, *supra* note 94, at 10 (arguing that public reasons promote legitimacy even in the face of disagreement).

98. See Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 14 (2001) (arguing that meaningful participation can produce democratic legitimacy in both adjudication and majoritarian politics).

99. See RAWLS, *supra* note 5, at 231–40 (describing public reason as especially important to the legitimacy of courts).

100. See DWORKIN, *supra* note 84, at 410 ("Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is.")

101. See RAWLS, *supra* note 5, at 231–40 (arguing that public reason is especially important for courts in a liberal democratic state).

102. See *id.* (describing courts as exemplary deliberative institutions in

exercise of political power is proper only when governmental officials offer reasons justifying their action.<sup>103</sup> If citizens are to enjoy equal respect, they should not be coerced on the basis of reasons they cannot reasonably be expected to accept.<sup>104</sup> In essence, public reason requires citizens to explain their political decisions to one another using publicly available values and standards.<sup>105</sup>

Although public decisions need to be justified in various settings,<sup>106</sup> such as when citizens vote or representatives debate legislative enactments,<sup>107</sup> Rawls notes that the constraint of public reason is most obvious in “the discourse of judges in their decisions, and especially the judges of a supreme court.”<sup>108</sup> He contrasts legislators’ and citizens’ casting of votes to the Supreme Court’s decision making.<sup>109</sup> While legislators and citizens may vote based on their controversial conceptions of the good, “public reason is the sole reason the court exercises. It is the only branch

---

which reasons, explanations, and justifications are both expected and offered); Ferejohn & Pasquino, *supra* note 88, at 22 (comparing “European and American constitutional courts as deliberative forums” and arguing “that constitutional courts are very differently situated in various political systems”); Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 107 (2007) (debating what Rawls meant when he claimed that the Supreme Court is an “exemplar of public reason”).

103. See RAWLS, *supra* note 5, at 767 (specifying the persons to whom the idea of public reason applies: “government officials and candidates for public office”).

104. See *id.* at 770 (arguing that coercing people on the basis of the comprehensive views that others hold may well entail coercing them on the basis of reasons they could not reasonably be expected to accept).

105. See *id.* at 137 (“[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”).

106. According to Rawls, the duty to justify decisions with public reasons is a moral, not a legal, duty: it is a duty of civility, which applies to citizens and elected representatives as well as judges. See *id.* at 235 (comparing the different ways that citizens, legislators, and judges exercise public reason).

107. See *id.* at 215–16 (arguing that public reason applies to citizens “in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements”).

108. JOHN RAWLS, *THE LAW OF PEOPLES* 133 (2000).

109. See *id.* at 134 (noting that “the idea of public reason applies more strictly to judges than to others, but that the requirements of public justification for that reason are always the same”).

of government that is visibly on its face the creature of that reason and that reason alone.”<sup>110</sup> Rawls’s respect for the Court’s use of public reason arises in large part from its practice of delivering fully reasoned opinions.<sup>111</sup> The issuance of written published opinions, including concurrences and dissents, appears to Rawls highly congruent with the democratic function of reason-giving in a liberal society.<sup>112</sup> In a comparable fashion, Ronald Dworkin recognizes judges as model reason-givers.<sup>113</sup>

## 2. Dworkin’s Conception of Constitutional Democracy

Dworkin defends a “constitutional conception of democracy,” akin to the deliberative conception of democracy.<sup>114</sup> Because people disagree about justice, they need what he calls principles

110. See RAWLS, *supra* note 5, at 235 (arguing that the court’s role is “to give due and continuing effect to public reason by serving as its institutional exemplar”).

111. In making this statement, Rawls is relying in part on Bruce Ackerman’s work. Ackerman reconciles judicial review with democratic theory by arguing that the Supreme Court exercises control on behalf of a majority of “the People” achieved in the past against the laws enacted by representatives in periods of normal politics. See generally Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) (reconciling democracy and representation with court decisions).

112. See Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 659 (1994) (covering Rawls’s views of the courts in society).

113. See Conrado Hübner Mendes, *Political Deliberation and Constitutional Review*, in LAW, LIBERTY, AND THE RULE OF LAW 121, 128 (Imer B. Flores & Kenneth E. Himma eds., 2013) (“Rawls and Dworkin conceived the deliberative ability of courts merely as reason-givers.”).

114. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION*, 15–16 (1996) (describing his idea of a “constitutional conception of democracy” and how it rejects majoritarian ideals). For a definition of the deliberative conception of democracy, see Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 407, 412–13 (James Bohman & William Rehg eds., 1997) (according to the deliberative conception, “to justify the exercise of free public reasoning among equals,” in which the participants base their arguments upon “considerations that others have reason to accept” (emphasis added)); see also AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2009) (“In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return. . . . Deliberative democracy[s] . . . first important characteristic, then, is its *reason-giving* requirement.”).

of fairness.<sup>115</sup> There must be fair methods for making decisions when people differ on what those decisions should be.<sup>116</sup> Dworkin identifies courts as the core institutions of modern political societies.<sup>117</sup> While he laments the unargumentative character of contemporary politics,<sup>118</sup> he praises the quality of courts' public arguments, especially those of supreme courts.<sup>119</sup> Dworkin argues that the value of the public debate is increased by constitutional adjudication:

[T]he quality of public argument is often improved, because the argument concentrates from the start on questions of political morality. . . . When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.<sup>120</sup>

He thinks that a system of final decision by judges on certain great issues of principle may actually enhance the participatory character of our politics.<sup>121</sup> Dworkin's conception of political legitimacy, which he labels "integrity," is court centered.<sup>122</sup> It understands legitimacy on the model of judicial decision making—the normative choices of a political community should enjoy the same constancy and coherence that we would hope to

---

115. See DWORKIN, *supra* note 84, at 164–65 (describing fairness as a way to ensure all people have an opportunity to share their views).

116. See *id.* (discussing the importance of fairness and due process in decision making to ensure proper outcomes).

117. See *id.* at 2 (noting the importance of courts in shaping society).

118. See, e.g., RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 17 (2008) (arguing that ordinary politics is in an appalling state as Americans no longer know how to disagree civilly while remaining respectful).

119. See *id.* at 156 (praising the Constitution, as well as the courts, for providing an opportunity for public argument).

120. DWORKIN, *supra* note 114, at 345.

121. See DWORKIN, *supra* note 84, at 7–15 (noting how our court systems can enhance participation in politics).

122. See *id.* at 151–224 (discussing integrity).

find in comparable decisions of a single person.<sup>123</sup> The normative claim is that society as a whole should exhibit a concern for justice that is as coherent as any individual theory of justice might be.<sup>124</sup> Dworkinian judges must give reasons for their decisions, and their reasons are constrained and inspired by prior decisions.<sup>125</sup>

As Rawls and Dworkin's theories illustrate, courts are often presented as model reason-givers because of the multiple values purportedly achieved by judicial reason-giving.<sup>126</sup> In the next subpart, I present these values in greater detail.<sup>127</sup>

### *B. Reasons for Judicial Reason-Giving*

Liberal-democratic theorists have distinguished a number of benefits theoretically achieved by judicial reason-giving.<sup>128</sup> I summarize these benefits by focusing on the three central values promoted by reason-giving in the courtroom: participation, accountability, and accuracy. At its core, imposing a reason-giving requirement aims, on the one hand, to secure litigants' involvement in the judicial process and, on the other hand, to keep the judiciary in check and ensure accurate decisions.

#### *1. Participatory Reasons*

Theorists of procedural justice have suggested that requiring reasons facilitates participation.<sup>129</sup> The key liberal-democratic

123. *See id.* at 193–94 (discussing the relationship between community coherence with individual thought).

124. *See id.* at 196–98 (describing the importance of claims of individual theories of justice).

125. *See id.* at 380 (noting some ways in which judges are constrained in their decision making).

126. *See* Mendes, *supra* note 113, at 128 (“Rawls and Dworkin conceived the deliberative ability of courts merely as reason-givers.”).

127. *See infra* II.B.2 (addressing reasons for judicial reason-giving).

128. *See, e.g.,* Cohen, *supra* note 12, at 1114 (discussing some benefits of reason-giving).

129. *See, e.g.,* Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) (noting that the norm that an “adjudicator should *explain* his decision in a

notion is that citizens have a right to be treated with equal dignity and respect.<sup>130</sup> On this view, judicial reason-giving is fundamental to a democratic regime because free and equal citizens should be treated not merely as objects of rule application and rule making but also as autonomous agents who take part in making the law of their own society, be it through lawsuits or through representatives in the political process.<sup>131</sup> Being subject to judicial authority that is unreasoned is to be treated as a mere object of the law or of the political power, not a subject with independent rational capacities.<sup>132</sup> In other words, reason-giving treats parties and the general public as rational moral agents who are entitled to evaluate and sometimes to participate in judicial decisions.

Equal respect means not only that everyone is entitled to their day in court but also that judges, at least in civil trials, should strive to limit their role to responding to parties' arguments.<sup>133</sup> Lon Fuller famously defined the essence of adjudication in terms of participation.<sup>134</sup> He argued that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."<sup>135</sup> The centrality of reasoned argument to the adjudicative process requires that decisions made in response to those arguments must likewise "meet the

---

manner that provides a substantive reply to what the parties have to say . . . help[s] to satisfy the loser that the decision is not arbitrary" and "giv[es] assurance that the adjudicator has in fact attended" to "what the parties have to say").

130. *See id.* at 417 ("[P]reservation of individual dignity points to the desirability of an ordering process in which those persons will be able to express their view of the matter to the decisionmaker before the decision is made.").

131. *See id.* at 431 (explaining how reason-giving is important to democracy).

132. *See id.* at 426 (discussing the importance of reasoning in establishing respectful authority).

133. *See generally* Lon L. Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (covering the role of judges during adjudication).

134. *See id.* at 364 (discussing the importance of participation in adjudication).

135. *Id.*; *see also* Eisenberg, *supra* note 129, at 411 (quoting Fuller's argument regarding the distinguishing characteristic of adjudication).

test of reason.”<sup>136</sup> Judges must explain their decisions to show that they are responsive to parties’ proofs and arguments.<sup>137</sup> By explaining her determination, a judge indicates to what extent arguments put forward by the parties have been understood and accepted or formed a basis for the decision.<sup>138</sup> Though Fuller would not require that judges give reasons for all judicial decisions,<sup>139</sup> he notes that “[w]ithout such opinions the parties have to take it on faith that their participation in the decision has been real.”<sup>140</sup>

Empirical scholarship seems to bolster Fuller’s participation thesis.<sup>141</sup> Social psychology studies have found the perception that the decision maker has given “due consideration” to the “respondent’s views and arguments” is crucial to individuals’ acceptance of both the decision and the authority of the institution that imposes the decision.<sup>142</sup> Direct participation in decision making produces a more deliberative process in which consensual agreement is more likely.<sup>143</sup>

## 2. Accountability Reasons

Judicial reason-giving also functions as a transparency- and accountability-enhancing mechanism.<sup>144</sup> The essence of

136. Fuller, *supra* note 133, at 387–88.

137. See Eisenberg, *supra* note 129, at 412 (“The decision should be *strongly responsive* to the parties’ proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments.”).

138. See *id.* (discussing the importance of judges explaining their decisions).

139. See Fuller, *supra* note 133, at 387 (“Does the integrity of adjudication require that reasons be given for the decision rendered? I think the answer is, not necessarily.”).

140. *Id.* at 388.

141. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 69 (1988) (discussing studies addressing participation in decision-making processes).

142. See *id.* at 80–81, 104–06 (showing that procedures are viewed as fairer when they vest process control or voice in those affected by a decision).

143. See *id.* at 8 (“[D]ecisions are more likely to be accepted when the procedure used to generate the decision allows participation by those affected.”).

144. Judges themselves often endorse this value. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999) (asking the rhetorical question, “[w]hen a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and

accountability is answerability—having the obligation to answer questions regarding decisions and actions.<sup>145</sup> Because life-tenured judges are not held accountable at the ballot box,<sup>146</sup> their accountability stems from the reasoned explanations they produce.

Reason-giving ensures basic monitoring in that it implies a one-way transmission of information from lower-court judges to appellate judges as well as to the public generally.<sup>147</sup> From this viewpoint, reason-giving is about limiting judicial discretion by ensuring that written decisions or at least some record of the proceedings can be read and reviewed by higher courts.<sup>148</sup> In other words, judicial reason-giving is contingent on the necessities of effective judicial review.<sup>149</sup> Reasons are primarily about facilitating control of lower courts by higher courts.<sup>150</sup> As a result, historically, the American legal system has viewed judicial accountability as arising primarily from a fully reasoned *written* judicial opinion, informed by comprehensive *written* lawyers' briefs.<sup>151</sup>

---

perhaps for no reasons other than a change of mind, can the power that is being exercised properly be called 'judicial'?).

145. See generally Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7 (2008) (proposing evaluations to hold the judiciary accountable and answerable).

146. See *Federal Judges and How They Get Appointed*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183> (last visited Jan. 18, 2015) (describing life tenure for judges) (on file with the Washington and Lee Law Review).

147. Reason-giving fosters lower and intermediate courts' accountability toward higher courts inasmuch as it enables reviewing courts to appraise their decisions. Reason-giving also promotes accountability toward the general public—including that of the U.S. Supreme Court—in a variety of ways, ranging from public debate to legislative action. Dissatisfied citizens can elect legislators who can overrule judicial decisions they dislike through statutes or constitutional amendments.

148. See Cohen, *supra* note 12, at 1143 ("Reason-giving is an efficient tool for supervision within the judicial hierarchy.").

149. The giving of reasoned judgment enables any appellate court to review the decision and decide whether it is subject to reversible error.

150. See *id.* (noting precedent as the primary role of reason-giving).

151. See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1163–64 (2004) (distinguishing the English conception of judicial accountability, which depends on the ability to see and hear a judge decide a case orally and the specifically American version of judicial accountability, resting upon the ability to read a judicial opinion

Reason-giving is thus a doctrine of judicial restraint. Common law legal systems develop through precedents, that is, judicial decisions that may or may not be binding on courts in future cases.<sup>152</sup> Under the doctrine of stare decisis, courts may be bound to follow a particular precedent.<sup>153</sup> These two principles serve both an accountability function and a law-making function.<sup>154</sup> Precedent is a specific judicial accountability mechanism, which encourages consistency, vindicates the settled expectation of litigants and society, and promotes the rule of law.<sup>155</sup> The practice of reason-giving limits the scope of available discretion over time by encouraging judges to treat similarly situated cases alike and to treat differently situated cases differently.<sup>156</sup> Once offered publicly, reasons may apply to cases that the court, in justifying a particular decision, does not have before it.<sup>157</sup> Stare decisis dictates that judges ought to apply rules

---

explaining the basis of the judge's decision).

152. See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 36 (2011) (discussing precedence and its role in the common law legal system).

153. See Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 3 (1979) (examining the thesis according to which the U.S. Supreme Court opinions' stare decisis effect applies to the Court itself).

154. In Federalist No. 78, Hamilton argued that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

155. See generally A. Lindquist & Frank C. Cross, Univ. of Tex. Sch. of Law, *Stability, Predictability and the Rule of Law: Stare Decisis As Reciprocity Norm* (Mar. 26, 2010) (explaining the role and importance of precedent in society).

156. See Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 949–54 (2010) (discussing discretion and its connection to reason-giving).

157. It is worth noting that this application was not always the case. It used to be that common law judges were bound not by the reasons they gave in prior cases, but only by the outcome they had reached. See, e.g., Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930) ("The reason which the judge gives for his decision is never the binding part of precedent."). Today, it is generally recognized that judicial opinions, especially those of the Supreme Court, and to a lesser extent, those of appellate courts, serve as a means of establishing the law. See KARL L. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960) (explaining the ways in which court opinions and their reasoning establish the law); Schauer, *supra* note 61, at 640 (discussing the differences between specificity and generality and its implication for precedent); James Boyd White, *What's an Opinion For?*, 62 U.

and principles to the case before it that have been laid down in prior cases.<sup>158</sup> When justifying their holdings, judges usually declare whether the substantive holding is consistent with existing precedent or whether they are breaking with precedent.<sup>159</sup> Frederick Schauer thus points out that reason-giving creates *prima facie* commitments to deciding future cases similarly.<sup>160</sup> These are *prima facie* commitments only because in certain cases judges may depart from precedents and create new law.<sup>161</sup> Judicial reasons play a dual role: they work both as a vehicle for precedent creation and as an enforcement mechanism for the duty to follow precedent.<sup>162</sup>

---

CHI. L. REV. 1363, 1366 (1995) (arguing that reason giving is necessary for future courts to invoke past decisions as authoritative). For an analysis of competing understandings of judicial opinions, see generally Thomas W. Merrill, *Judicial Opinions As Binding Law and As Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993) (covering the role of the Executive Branch in interpreting judicial decisions).

158. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (arguing that *stare decisis* was developed as a means of restraining the discretion “that legal indeterminacy would otherwise give judges”).

159. See Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 590 (1991) (discussing some ways courts use precedents). See generally Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996) (showing that the Supreme Court arguments from precedent vastly outnumber all other kinds of arguments in attorneys’ written briefs, the Court’s written opinions, and the Justices’ arguments in conference discussions).

160. See Schauer, *supra* note 61, at 649 (“[G]iving a reason creates a *prima facie* commitment on the part of the reason giver to decide subsequent cases in accordance with that reason.”).

161. See *id.* at 645 (discussing some ways in which courts can depart from precedent).

162. English legal historian Paul Brand assumes that the doctrine of precedent predated the reason-giving practice and suggests that the former rapidly called for the latter as both judges and attorneys could not merely rely on their memories of previous decisions and arguments and hence started citing specific cases as precedents in their judgments or pleadings. See generally Paul Brand, *Reasoned Judgments in the English Medieval Common Law 1270 to 1307*, in *RATIO DECIDENDI: GUIDING PRINCIPLES OF JUDICIAL DECISIONS*, *supra* note 15, at 55 (discussing the role of precedent in English courts). In contrast, Judge Emlin McClain argues for the reverse causation. In his view, the doctrine of precedent was the “inevitable result” of judges’ practice to announce the reasons for their judgment. See Hon. Emlin McClain, *The Evolution of the Judicial Opinion*, 36 AM. L. REV. 801, 811 (1902) (discussing the outcome of

There are also epistemic justifications for judicial reasoning. One aspect of judicial accountability refers to the transparency needed both for the general public to know the law and for reviewing courts to verify that judges are carrying out their obligations adequately.<sup>163</sup> Transparency in adjudication may be thought of as an individual right,<sup>164</sup> not just as a feature of the judicial hierarchy and the need for lower courts to create a record for higher courts to review.<sup>165</sup> From this perspective, judicial reasons are not only addressed to the litigants and the reviewing court, but potentially aimed at the entire citizenry.<sup>166</sup>

One can identify at least three types of audiences for judges' explanations, ranging from the most internal to the most external:

1. For judges' internal audience, that is, for the parties and their counsel, transparent reasons make it much easier to narrow the issues they will need to address if they decide to appeal the decision.
2. For judges' institutional audience, that is, colleagues at the court or at other courts, members of the local bar or other legal professionals, as well as other branches of government, reasons are needed for guidance and coordination purposes. If legal actors are unaware that a particular judge or court has handed down a specific decision, or if they cannot identify its underlying reasons, they can hardly be guided by it or take it into account in solving coordination problems.

---

precedents).

163. See, e.g., Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 103 (2007) (using transparency as a way to provide accountability for decision makers).

164. See *id.* at 105 (arguing, in the context of administrative law, that reason-giving should be reframed as an independent human right).

165. See *id.* (providing other functions for reason-giving in addition to the need for creating a record).

166. On these various audiences and their influence on judges' decisions, see generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006) (analyzing the potential and actual impact of several audiences, including the public, other branches of government, court colleagues, the legal profession, and judges' social peers).

3. For judges' external audience, that is, for the general public, transparent reason-giving is crucial both for guidance and contestation purposes. Rules that citizens know little about or do not understand are unlikely to provide them with meaningful guidance. Similarly, they may not be in a position to contest a judicial decision effectively if they cannot discern its underlying justification.

In sum, the existence and availability of judicial reasons ensures that a wide variety of audiences can evaluate, discuss, follow, or criticize judicial decisions.<sup>167</sup>

### 3. Accuracy Reasons

Finally, reason-giving imposes a form of self-discipline that is thought to improve the quality of the decisions themselves.<sup>168</sup> This process is often described as the "it won't write" phenomenon.<sup>169</sup> In attempting to reason her decision, a judge

---

167. See generally *id.* (commenting on the effects of reason-giving on judicial audiences).

168. See Rt Hon. Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 *ARB. INT'L* 141, 143 (1988) ("I cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed."); see also Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 *ADMIN. L. REV.* 753, 761 (2006) ("Defenders of hard look review, including the courts that employ it, argue that it ensures the supposedly expert agency really has based its decision on a reasoned analysis of relevant information."); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *GEO. L.J.* 1283, 1287 (2008) (discussing the purported benefits of written judicial opinions).

169. For a description of this phenomenon, see Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 *U. ILL. L. REV.* 917, 931 (1983) ("[J]udges may frequently discover that the original opinion they originally had in mind 'won't write' . . . . The discipline of a written opinion, when combined with the goal of neutral principles and the doctrine of *stare decisis*, also operates as an important control on judicial arbitrariness."); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1447–48 (1995)

Reasoning that seemed sound "in the head" may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in

discovers that she cannot find an appropriate legal justification, leading her to reconsider her initial ruling and make a more accurate determination.<sup>170</sup> The theory can be generalized to non-written forms of justification: forcing judges to substantiate their decisions based on facts and legal arguments enhances the accuracy of judicial decision making.<sup>171</sup> It ensures that judicial decisions are not made arbitrarily or based on speculation, suspicion, or irrelevant information.<sup>172</sup> The giving of reasons, it is thought, ensures that the deciding court has considered all relevant factors, researched the applicable law and given the case the thought it deserved.<sup>173</sup> The process of searching for justifications itself performs both creative and critical functions that result in a better decision, one that is not only more thorough, but is more responsive to the facts and more attentive to precedent.<sup>174</sup> It also increases the likelihood that judges will arrive at true findings of fact and draw correct conclusions of

---

reading what he has written will be wondering how an audience would react. Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing. A link is somehow forged between the unconscious and the pen. The link is lost to the judge who does not write.

Alvin B. Rubin, *Book Review*, 130 U. PA. L. REV. 220, 227 (1981) (reviewing FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980)) (noting that occasionally judges “find that ‘it won’t write’—our jargon for saying that we cannot prepare an opinion reaching the desired result in acceptable professional form”); Charles M. Merrill, *Query: Could Judges Deliver More Justice If They Wrote More Opinions?*, 64 JUDICATURE 435, 435 (1980) (“The very act of writing opinions reinforces the decisional process. Misconceptions or oversights may come to light in the course of articulation.”).

170. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375 (1995) (“It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because ‘it just won’t write.’”).

171. See generally, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (analyzing the relationship between accuracy and process of judicial decision making).

172. See, e.g., *id.* at 31 (providing an example of inaccurate judicial decision making when swayed by an irrelevant settlement demand).

173. See, e.g., *id.* at 41 (emphasizing the importance of a court considering all relevant factors).

174. See, e.g., Peter Friedman, *What Is a Judicial Author?*, 62 MERCER L. REV. 519, 532 (2011) (establishing a connection between judicial opinions and creativity).

law.<sup>175</sup> Indeed, there is some evidence, drawn from cognitive psychology research, that requiring decision makers to explain may diminish some forms of cognitive bias.<sup>176</sup>

This Part has shown that according to a number of democratic theories, judicial reason-giving provides us with a model of what decision making and public justification at all levels of government should aspire to in a democratic society.<sup>177</sup> However, as I point out in the next Part, the practice of giving reasons can sometimes compromise other important values of the judicial process. In other words, judges may also have reasons for not giving reasons.

---

175. See, e.g., Timothy P. O'Neill, *Law and "The Argumentative Theory"*, 90 OR. L. REV. 837, 840 (2012) (discussing how reasoning can lead to a correct conclusion).

176. See Chris Guthrie et al., *supra* note 171, at 36–38 (arguing that preparing a written opinion or simply stating the reasons for the decision before the ruling is announced may induce deliberation and reduce cognitive biases); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 134–35 (2002) (noting how requiring explanation may reduce certain framing effects in choice); see also *infra* Part III.B. However, there is growing psychological literature questioning whether thinking about one's justifications before deciding really improves decision quality, especially in an institutional context. See generally Philip E. Tetlock, *Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors*, 109 PSYCHOL. REV. 451 (2002) (showing that if decision makers expect to be accountable to an audience of unknown views, they engage in "preemptive self-criticism." In other words, they engage in systematic reasoning about evidence; but if audience views are known, the decision maker is more likely to move in the direction of the audience's viewpoint); Robert J. MacCoun, *Psychological Constraints on Transparency in Legal and Government Decision Making*, 12 SWISS POL. SCI. REV. 112 (2006) (arguing that the complexity of the brain machinery makes it difficult for actors to either consciously monitor or control their judgment process and showing that accountability can have perverse effects).

177. See, e.g., John Rawls, *The Idea of Public Reason*, in DELIBERATIVE DEMOCRACY 93, 108–14 (James Bohman & William Rehg eds., 1997) (characterizing the Supreme Court as the "exemplar" of the type of "public reason" that should govern the public arena); see also Oldfather, *supra* note 168, at 1285 (recognizing "longstanding conceptions of the judicial role, in which reasoned analysis stands as the core feature of legitimate judging"); Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1574 (1988) (recognizing that appellate judges are usually accountable in the sense that they give reasons or justifications for their decisions).

### *III. Reasons for Not Giving Reasons*

Reason-giving is only one value of the judicial process, which may conflict with other values. There may be institutional, cognitive, and efficiency harms in systematically requiring judges to give reasons—and certain kinds of reasons. In judicial practice, as Part IV suggests, efficiency reasons are likely to be most salient, but institutional and cognitive reasons, though more subtle, may also motivate judges to carefully weigh the pros and cons of giving reasons.

#### *A. Institutional Reasons*

An institutional justification militating against giving reasons is that rather than furthering litigants and the public's acceptance of judicial decisions, it may lead to the opposite result, that is, to inflaming people's disagreement with judicial dispositions and to cultivating their distrust for the judicial institution as a whole.<sup>178</sup> There is a tension, therefore, between the fact that, on the one hand, giving reasons is supposed to foster participation, accountability and accuracy, and the fact that, on the other hand, different individuals are more likely to agree on outcomes than on the reasons justifying those outcomes.<sup>179</sup> From this perspective, inquiring into the reasons why judges come to a given judicial outcome may undermine, rather than further, the perception that courts make accurate decisions in a participatory and accountable fashion.

Cass Sunstein has popularized a version of this problem under the characterization of “incompletely theorized agreements.”<sup>180</sup> The idea is that it is rare for an individual to theorize any decision completely, that is, to accept both a highly abstract theory and a series of steps that relate the theory to a

---

178. See Bob Dickerson, “*Let’s Impeach that Damn Judge!*”, 6-MAY NEV. LAW. 6 (1998) (discussing some ways in which opinions may be misinterpreted and lead to disagreement).

179. See *id.* at 7 (describing this tension and the role of the judiciary in the middle of it).

180. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (discussing the idea of “incompletely theorized agreements” and its implications).

particular conclusion.<sup>181</sup> For instance, people may agree that whenever presented with case raising environmental issues, courts should rule in favor of measures designed to protect endangered species, “while having quite diverse theories of why this is so. Some may stress obligations to species or nature as such; others may point to the role of endangered species in producing ecological stability; still others may point to the possibility that obscure species will provide medicines for human beings.”<sup>182</sup> Mandating judges to give reasons, the argument goes, creates more opportunities for contestation and disagreement by surfacing these deep divisions within society.<sup>183</sup> In short, giving reasons may increase the number of issues about which it is possible to disagree.

Moreover, when multiple decision makers are involved, they often disagree among themselves on the appropriate reasons justifying the decision.<sup>184</sup> The problem is especially acute in multimember judicial panels.<sup>185</sup> In these contexts, while there may be transparency reasons to encourage each individual judge to give her reasons for the decision, there are also institutional reasons for restricting reason-giving. Setting limits on reason-giving may bolster a court’s legitimacy (by creating a clearer governing legal standard) and may enhance judicial efficiency (by avoiding the considerable work associated with consistently writing extensive majority opinions or separate opinions).<sup>186</sup> This restraint can be accomplished, for example, through a norm of consensus requiring an entire multi-member panel to agree on a common set of reasons to put forward for the decision.

---

181. See *id.* at 1739 (summarizing the theory of “incompletely theorized agreements”).

182. *Id.* at 1736.

183. See generally, e.g., Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982) (discussing some of the ways requiring judges to give reasons lead to societal discussions).

184. See Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. RICH. L. REV. 1235, 1252–53 (2005) (showing how when judges sit in panels, their decisions are affected by other members of the panel).

185. See *id.* at 1258 (discussing impacts of multi-member panels).

186. See generally J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779 (1989) (discussing the value of putting restraints on judicial reason-giving).

The history of the U.S. Supreme Court's opinion-delivery practices illustrates these competing rationales for and against imposing limits on reason-giving.<sup>187</sup> The Marshall Court is famous for introducing a norm of unanimous reason-giving doing away with the English practice of seriatim opinions.<sup>188</sup> In Chief Justice Marshall's view, Supreme Court opinions were to be delivered by one Justice speaking "for the Court."<sup>189</sup> The conventional explanation for this norm of consensus points to institutional reasons.<sup>190</sup> Marshall was wary of the adverse consequences of letting Justices publicly voice their disagreement on the Court's legitimacy and power relative to the other branches of government.<sup>191</sup> In contrast, the Stone Court is often described as having established a more individualistic reason-giving practice at the Court, leading to the demise of the norm of consensus.<sup>192</sup> The resulting increase in the frequency of separate

---

187. See generally Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1006) (covering the role of reason-giving, particularly in dissenting opinions, in the Supreme Court).

188. See PERCIVAL E. JACKSON, *DISSSENT IN THE SUPREME COURT* 22 (1969)  
The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.

(citing 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 320 (1919)).

189. See John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court*, 77 WASH. U. L.Q. 137, 144 (1999) ("During [John Marshall's] tenure, three important developments took place. First, nearly all opinions came to be delivered by one Justice speaking for the Court.").

190. See, e.g., *id.* at 150–52 (discussing some of the rationales for Marshall's method).

191. See R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 358 (2001) (noting the importance of solidarity among the Justices in establishing the Court's power).

192. See Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 364 (1988) (arguing that the regime change occurred under Stone's leadership). *But see* Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158, 1162 (1992) (arguing that not Stone but Hughes initiated the increase in separate opinions). Yet another explanation points to the passage of the Judiciary Act of 1925, popularly known as the Judges' Bill, which gave the Justices increased control over their docket. The argument is that such enhanced control over the Court's agenda enabled the Justices to focus on contentious issues and to being less compelled to suppress

opinions is a central event in the history of the Court's reason-giving practices.<sup>193</sup> Before the shift, unanimous reason-giving was the norm; since then, fragmentation is expected.<sup>194</sup> Transparency reasons have overcome institutional reasons: judicial individualism and overt dissensus are now an accepted, perhaps even encouraged, mode of reason-giving.<sup>195</sup> A number of legal scholars, however, have condemned the consequent rise in "the number of decisions in which there is no simple majority opinion."<sup>196</sup> The concern with fragmented judicial reason-giving is that it provides little guidance to the general public and to the courts below that have to deal with the issue.<sup>197</sup>

In sum, more judicial reason-giving in the form of separate opinions may not only have divisive effects on the public, it may also aggravate divisions within a court itself and, therefore, compromise the guidance function of judicial reasons. As the psychological literature on reason-based choice, which I discuss below, suggests, there may also be concerns that more reason-giving would lower the quality of the decisions themselves.<sup>198</sup>

---

their individual reasoning. See Stephen Halpern & Kenneth Vines, *Institutional Disunity, The Judges' Bill and the Role of the Supreme Court*, 30 W. POL. Q. 471, 474 (1977) (discussing the effects of the Judiciary Act of 1925).

193. See Walker, Epstein & Dixon, *supra* note 192, at 387 (noting the importance of separate opinions as a rise in reason-giving practices).

194. See *id.* at 386 ("Contemporary justices accept individual expression as an established practice.").

195. See *id.* at 362 (explaining the high value placed on individual reason-giving and opinions).

196. See, e.g., Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 207 (noting ways in which courts are dismissing their role of providing guidance through opinions).

197. This phenomenon can also be observed at the federal courts of appeals, but to a much lesser degree. See Lee Epstein, William M. Landes & Richard Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106, fig. 1 (2011) (finding a much higher rate of separate opinions in the Supreme Court than in the federal courts of appeals: in their samples, they found a dissent rate of 62% and a concurrence rate of 40.3% in the Supreme Court and only 2.6% and 0.6% respectively in the courts of appeals).

198. See generally, e.g., John McMackin & Paul Slovic, *When Does Explicit Justification Impair Decision Making?*, 14 APPL. COGNITIVE PSYCHOL. 527 (2000) (questioning whether reason-giving actually leads to better decisions).

### B. Cognitive Reasons

As the preceding discussion suggests, the reasons that enter into the making of decisions are likely to be intricate and diverse.<sup>199</sup> A number of cognitive and experimental psychologists have questioned whether thinking about one's justifications for decisions before deciding really improves the decision quality.<sup>200</sup> According to the traditional, rationalist theory of knowledge, which has long prevailed in philosophy, psychology, and law, decision making follows a linear pattern: the reasoner searches for relevant evidence, weighs evidence, coordinates evidence with the applicable law and the dominant doctrines before reaching a decision.<sup>201</sup> This is a step-by-step, conscious, intentional and controllable process.<sup>202</sup> Once the decision has been made, the decision maker asked to give a justification simply recounts these steps.

A number of psychologists, however, have offered accounts suggesting that people's reasoning and justifications are often unconsciously motivated in the sense that the reasoning process constructs post hoc justifications—even if individuals experience the illusion of objective reasoning.<sup>203</sup> Reasoning is “motivated” in

---

199. See *infra* Parts IV & V (discussing the numerous reasons for and against providing reasons in decisions).

200. See McMackin & Slovic, *supra* note 198, at 535–39 (presenting results suggesting that thinking about reasons for decisions before deciding may degrade decision quality when the decision process relies on intuitive rather than analytic tasks).

201. See generally Deanna Kuhn, *Children and Adults As Intuitive Scientists*, 96 PSYCHOL. REV. 674 (2001) (1989) (discussing ways in which people make decisions); RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (same).

202. See NISBETT & ROSS, *supra* note 201, at 530 (explaining how the best decisions are made through conscious deliberation).

203. See generally Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) (arguing in favor of a “social intuitionist model” of moral judgment, that is, the claim that moral judgment is caused by quick moral intuitions and is followed, when needed, by slow, ex post facto moral reasoning); Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL. 3 (1999) (arguing that inferences are inherently bidirectional, so that the distinction between premises and conclusions is blurred, the latter often influencing the former); Marc Hauser, Fiery Cushman, Liane Young, R Kang-Xing Jin & John Mikhail, *A Dissociation Between Moral Judgments and Justifications*, 22 MIND & LANGUAGE 1 (2007)

the sense that people show a strong tendency to search for facts, justifications, and other “evidence” exclusively on their preferred side of an issue.<sup>204</sup> When individuals are asked to explain why they decided or acted the way they did, they frequently cite factors that could not have mattered and fail to recognize factors that did matter.<sup>205</sup> According to social psychologist Jonathan Haidt, “what people are searching for is not a memory of the actual cognitive processes that caused their behaviors, because these processes are not accessible to consciousness. Rather, people are searching for plausible theories about why they might have done what they did.”<sup>206</sup> They first turn to a “pool of culturally supplied explanations for behavior.”<sup>207</sup>

This phenomenon has been described by Dan Kahan as the “motivated cognition” problem, which he argues causes a “neutrality crisis” at the U.S. Supreme Court.<sup>208</sup> In Kahan’s view, promoting justification in Court opinions and public discourse generally leads to a “cognitive form of illiberalism,”<sup>209</sup> which reinforces the predisposition of diverse groups to attribute culturally partisan aims to those who disagree with them.<sup>210</sup> For instance, when Justices invoke supposedly neutral and objective

---

(challenging the view that moral judgments are solely the product of conscious reasoning on the basis of explicitly understood moral principles and providing illustrations of dissociation between judgment and justification).

204. See Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11, 33 (1993) (“We often search for a convincing rationale for the decisions that we make, whether for inter-personal purposes, so that we can explain to others the reasons for our decision, or for intra-personal motives, so that we may feel confident of having made the ‘right’ choice.”). See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (discussing the connection between motivation and reasoning).

205. See Haidt, *supra* 203, at 822 (describing how people explain their decision-making processes).

206. *Id.*

207. Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 249 (1997).

208. Dan M. Kahan, *The Supreme Court 2010 Term: Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011) (discussing theories of the effect of cognition on the Supreme Court).

209. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 144 (2007).

210. See *id.* (addressing some of the effects of Court opinions on diverse groups).

empirical evidence as a reason justifying the Court's decision, the sincerity of the justification is questioned, not only by other Justices but also by the general public.<sup>211</sup> According to Kahan, *Brown v. Plata*,<sup>212</sup> in which the Court affirmed a California district court order directing the State of California to release more than 40,000 inmates from its prisons, illustrates the risk of cognitive illiberalism resulting from judicial reason-giving.<sup>213</sup> The supposedly objective and factual question underlying this decision was that of assessing the consequences of the prisoners' release on public safety.<sup>214</sup> According to the majority, the district court had "rel[ied] on relevant and informed expert testimony" by criminologists and prison officials, who based their opinion on "empirical evidence and extensive experience in the field of prison administration."<sup>215</sup> But dissenting Justices, Justice Scalia in particular, emphasized the "motivated" nature of the district court's findings, which relied, according to him, on "broad empirical predictions necessarily based in large part upon policy views."<sup>216</sup> The general public also seems to have been unpersuaded by the majority's reasoning: according to a poll following the decision, 63% of respondents declared that "the court cannot order criminals to be released."<sup>217</sup>

The psychology of motivated reasoning suggests that requiring judges to give reasons can be counterproductive in at least two ways.<sup>218</sup> First, it may encourage judges to think about

---

211. See Kahan, *supra* note 208, at 34–35 (discussing effects of utilizing empirical evidence to justify opinions).

212. 131 S. Ct. 1910 (2011).

213. See Kahan, *supra* note 208, at 32 (explaining risks in the Court's reasoning for this particular case).

214. See *id.* (highlighting the Court's focus on public safety).

215. *Plata*, 131 S. Ct. at 1942.

216. *Id.* at 1954 (Scalia, J., dissenting).

217. Press Release, Fairleigh Dickinson University's PublicMind, U.S. Voters Weigh in on *Brown v. Plata*, Case Involving Prison Overcrowding (May 23, 2011), available at <http://publicmind.fdu.edu/2011/brownvplata> (on file with the Washington and Lee Law Review).

218. See McMackin & Slovic, *supra* note 200, at 529 (2000) ("Support for the hypothesis that thinking about reasons may disrupt the decision process is found in both social psychology and cognitive research. The process seems to be one in which thinking about reasons brings to mind a biased subset of cognitions about the attitude object whereupon attitudes are adjusted.").

their reasons for the decision in a strategic way before deciding the outcome.<sup>219</sup> They may, for instance, engage in preemptive cognitive dissonance reduction<sup>220</sup> by searching for reasons justifying a decision that they fear will be perceived as furthering their preferred policy objectives<sup>221</sup> or effectuating their goals in the long term.<sup>222</sup> Second, requiring judges to give reasons may work as an incentive for them to fabricate post hoc constructions intended to justify their intuitions.<sup>223</sup> Psychologists have documented the fact that individuals are sometimes unaware of the precise factors that determine their choices and generate spurious explanations when asked to account for their decisions.<sup>224</sup> In short, the actual reasons that guide decisions may

---

219. See Philip E. Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 RES. ORG. BEHAVIOR 297, 310 (1985) (discussing how individuals may adjust their reasoning based on to whom they are accountable); Philip E. Tetlock & R. Boettger, *Accountability Amplifies the Status Quo When Change Creates Victims*, 7 J. BEHAVIORAL DECISION MAKING 1, 18–21 (1994) (suggesting that people who are accountable to others for their decisions are in general more likely to think about the reasons for their decisions than people who are not accountable to others).

220. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (discussing cognitive dissonance and mitigation tactics); Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, 17 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 229 (1984) (according to cognitive dissonance theory, when people behave or hold beliefs which seem to contradict the prevailing norms (e.g., irrationally, incompetently, foolishly, immorally), they will tend to adjust their attitudes so as to make the behavior or the belief seem less abnormal or “dissonant”).

221. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–110 (2002) (presenting an attitudinal model of judicial decision making holding that judges make decisions that maximize their policy preferences).

222. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 79–81 (1998) (arguing that justices are “forward-thinking” actors who make choices based on what they think will happen in the future); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J WAHLBECK, *CRAFTING THE LAW ON THE SUPREME COURT* (2000) (describing a strategic model of judicial decision making that takes into account the ways in which the predicted actions of other judges and public officials impact the likelihood that they will effectuate their goals in the long term).

223. See Cohen, *supra* note 12, at 737–38 (discussing the benefits of requiring judges to state reasons as well as the argument that judges’ reasons are “at best post hoc rationalizations of the results arrived at by instinct or hunch”).

224. See Nisbett & Wilson, *supra* note 207, at 209 (“Subjects not only failed to report some influential factors, also they sometimes reported that particular

or may not correspond to those reported by judges.<sup>225</sup> Imposing strict reason-giving requirements on judges may yield insincerity and artificiality in judicial discourse, rather than promoting accountability and transparency.<sup>226</sup>

### C. Efficiency Reasons

Finally, there are pragmatic reasons against reason-giving. Judges at all levels face increasing caseload pressures.<sup>227</sup> One cannot deny the pragmatic difficulties that the federal court system faces in adjudicating the ever-increasing number of cases that are filed each year.<sup>228</sup> The sheer volume of judicial decisions is clearly the primary obstacle to giving reasons.<sup>229</sup> According to the 2013 annual report of the Administrative Office of the United States Courts, 375,870 combined criminal and civil cases were filed last year in the district courts and close to 56,475 appeals were filed in the federal courts of appeals.<sup>230</sup> In

---

factors had influenced their behavior when the experimental evidence suggested they had had no such effects. These erroneous reports were found in several studies.”).

225. See *id.* (explaining how individuals can fabricate reasons for decisions upon being questioned to do so).

226. See generally Mathilde Cohen, *Reason Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008) (arguing based on empirical research carried out in a French court that judicial reason-giving can be so distorted as to effectively shield judges from accountability); Cohen, *supra* note 12 (discussing the connection between reason-giving and insincerity in the law).

227. See, e.g., Thomas B. Marvell, *Are Caseloads Really Increasing—Yes*, 25 JUDGES J. 34, 35 (1986) (“On average, state trial court filings are doubling about every 15 to 20 years and appeals are doubling each decade.”).

228. See generally Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3 (discussing the procedural “innovations and techniques adopted by some judges to deal with the caseload pressures” and subsequent criticism).

229. See *id.* at 39–46 (discussing how increased caseload provides judges with less time to address the issues and how many judges delegate opinion drafting to clerks).

230. See *Annual Report of the Director*, ADMIN. OFF. U.S. COURTS, [www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx) (last visited Jan. 11, 2015, 11:49 AM) (listing the number of filings for the U.S. courts of appeals and the U.S. district courts) (on file with the Washington and Lee Law Review).

2012, the U.S. Supreme Court received 7,509 certiorari petitions.<sup>231</sup>

Can the 677 district judges and the 179 federal appellate judges, even with the help of other court personnel,<sup>232</sup> thoroughly explain all their decisions to dispose of cases on procedural grounds or on the merits? Could Supreme Court Justices give reasons to explain all their denials of certiorari in addition to issuing opinions for cases decided on the merits?

Even assuming that systematic reason-giving would be feasible, it might not be normatively desirable for deeper efficiency reasons.<sup>233</sup> Giving reasons for so many decisions might come at too high a cost: it might jeopardize other values of the judicial process such as the speedy resolution of disputes and high quality reason-giving in the subset of cases that are truly lawmaking.<sup>234</sup> Universal reason-giving would also compromise judges' case-management responsibilities.<sup>235</sup> As they make decisions, judges must not only balance justifications for reason-giving against institutional and cognitive reasons for not giving reasons, but also against their need to manage their workload.<sup>236</sup> Judges' case-management responsibilities give rise to incentives to get cases resolved and off the docket.<sup>237</sup>

---

231. See *id.* at tbl. A-1 (listing all certiorari petitions).

232. See *Federal Judgeships*, U.S. COURTS, [www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx](http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx) (Jan. 11, 2015, 12:24 PM) (listing the total number of judgeships) (on file with the Washington and Lee Law Review). These figures are understood broadly to include non-permanent personnel such as law clerks, but also permanent personnel such as magistrate judges, staff attorneys, administrators, and court reporters.

233. The most obvious structural response would be to increase the number of judges. See, e.g., Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52, 53 (1993) (proposing doubling the size of the courts of appeals); see also Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 45–49 (summarizing arguments for and against adding judgeships). But see Michael Abramowicz, *En Banc Revisited*, 100 COL. L. REV. 1600, 1603–04 (2000) (pointing out that when Congress did provide more judgeships, the caseload grew even faster).

234. See Cohen, *supra* note 12, at 1116 (“Major impediments to sincere reason-giving lie in time limitations and in an endemic lack of resources.”).

235. See *id.* (noting these same impediments to sincere reason-giving).

236. See Judith Resnik, *Managerial Judges*, 7 HARV. L. REV. 374, 378 (1982) (“Judges have described their new tasks as ‘case management.’”).

237. See, e.g., Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1445 (1983) (critiquing the increasing bureaucratization of the

“Managerial judges” are concerned with saving time, reducing delays, and improving efficiency.<sup>238</sup> In this view, a primary task judges face, at least at the trial and intermediate appellate levels, is the need to move the docket and that goal would be undermined by a general mandate to give reasons.<sup>239</sup>

To be sure, judges sitting on different courts face different sets of tasks and demands. For district judges, giving oral reasons for granting or denying a non-dispositive pretrial motion may be subject to different constraints than writing an opinion after having reached a verdict in a bench trial.<sup>240</sup> For circuit judges, affirming a well-reasoned district court decision in a well-settled area of law may not call for as much explanatory work as would a case of first impression likely to have national repercussions.<sup>241</sup> Finally, efficiency reasons for not giving reasons play out quite differently at the U.S. Supreme Court given that Justices enjoy even more latitude over their agenda than any other court: by granting or denying certiorari, they effectively pick and choose the cases for which they want to give reasons.<sup>242</sup>

Judicial reason-giving implicates a wide variety of objectives. Judges may be required to balance democratic reasons for reason-giving against institutional, cognitive and efficiency reasons not to give reasons.<sup>243</sup> A comparison of the civil

---

judiciary).

238. See Resnik, *supra* note 236, at 378 (defining the term “managerial judge”).

239. See *supra* notes 226–232 and accompanying text (discussing how the increasing judicial workload is an obstacle to reason giving).

240. See Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 440 (2011) (discussing some of the benefits of a “short oral ruling” from the bench and a “polished decision designed for print”).

241. Cf. Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1329 (1995) (discussing how certain situations would limit judicial candor in opinion writing such as “fashioning new legal doctrines, extending existing doctrines into new and often controversial areas, and confronting questions that place the courts in unusually awkward . . . relationships vis-à-vis . . . the public”).

242. See H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 6 (1991) (describing the U.S. Supreme Court as “an institution that has virtually complete discretion in setting its own agenda”).

243. One may wonder how judges could be asked to balance the cognitive reasons for not giving reasons given that those reasons involve an element of

law and the common law judicial systems suggests, however, that different legal systems have adopted contrasting approaches to resolve this tension.<sup>244</sup> The entity in charge of balancing all these reasons for and against giving reasons is distinct depending on the local legal culture.<sup>245</sup> In the United States federal courts system, the judges are making the choice, while in the civil law systems of continental Europe, it is in principle left to the drafters of the Constitution or the legislature.<sup>246</sup> In what follows, I take each system in turn and argue that these two judicial cultures have developed reason-giving methodologies that are more analogous than it seems at first.

#### *IV. Federal Courts Balance and Require*

Legal scholars have observed that there has never been a common law duty for judges to give reasons,<sup>247</sup> but what this Part shows is that American federal judges are under no affirmative duty to provide reasons for all of their rulings. In deciding whether and how many reasons to give, they have been free to balance the justifications for and the reasons against reason-giving.<sup>248</sup> In certain contexts, however, such as immigration and sentencing, judges have

---

self-deception or at least unconsciousness. Dan Kahan's work can be read as an attempt to make these cognitive biases widely known so that legal actors—Justices in particular—become more aware of them and take them into account when justifying their decisions. See Kahan, *supra* note 208, at 65 (arguing that “[a] clear account of these dynamics . . . can equip us to identify what should be done, and by whom, to repair the Court’s capacity to keep the liberal peace”).

244. See generally Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179 (comparing the American reason-giving requirement in administrative law with its European counterpart).

245. See Vlad Perju, *Reasons and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 315–26 (2009) (discussing the administrative, legislative, and judicial reasons for reason-giving in the European context).

246. See *supra* notes 44–45 and *infra* Part V (listing the reason-giving requirements of various foreign countries).

247. See, e.g., David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in DOUGLAS E. EDLIN (ED.) COMMON LAW THEORY 135 (2007) (“It is almost an assumption . . . that judges are under a duty to give reasons . . . this assumption has hardly ever been the case. It is still not the case . . . [but] the law is beginning to recognize such a duty.”).

248. See *infra* note 254 and accompanying text (explaining how federal courts have never had an affirmative reason-giving requirement).

deemed the justifications for reason-giving particularly compelling, and have developed judge-made reason-giving requirements similar in certain respects to civil law reason-giving requirements.<sup>249</sup>

### A. No Affirmative Duty in the Federal Courts

A few statutory and doctrinal mechanisms exist to constrain federal judges' reason-giving, but they do not amount to a universal duty to give reasons.<sup>250</sup> A court must enter *some* judgment in order to dispose of a case, but need not necessarily provide an explanation of that judgment.<sup>251</sup> Unlike some of their state<sup>252</sup> or

---

249. See *infra* Part IV.B (discussing reason-giving in the sentencing and immigration context).

250. The statutory mechanisms are very limited. Examples include the Federal Rules of Civil Procedure mandate that district judges find the facts specially and state their conclusions of law. See FED. R. CIV. P. 52(a) (articulating this mandate). Additionally, in the sentencing context, district judges have a duty to “state in open court the reasons” for imposing a particular sentence. 18 U.S.C. § 35.53(c) (2012).

251. See FED. R. CIV. P. 58 (noting that for district court, “[e]very judgment and amended judgment must be set out in a separate document”). For courts of appeals, see FED. R. APP. P. 36(a) (“A judgment is entered when it is noted on the docket.”). For the U.S. Supreme Court, see SUP. CT. R. 41 (“Opinions of the Court will be released by the Clerk immediately upon their *announcement from the bench*, or as the Court otherwise directs.” (emphasis added)); see also Merrill, *supra* note 157, at 62 (“[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.”).

252. A number of state constitutions currently provide constitutional requirements for judges to give reasons, write opinions, or both. These state requirements usually apply only to the state Supreme Court, but a few also apply generally to all the courts of the state. See ARIZ. CONST. art. VI, § 20 (“The decisions of the [supreme] court shall be in writing and the grounds stated.”); CALIF. CONST. art. VI, § 2 (“In the determination of causes [by the Supreme Court], all decisions of the court in bank or in department, shall be given in writing, and the grounds of the decision shall be stated.”); MD. CONST. art. IV, § 15 (“In every [Supreme Court] case an opinion, in writing, shall be filed within three months after the argument or submission of the cause”); MICH. CONST. art. VI, § 6 (“Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal.”); MO. CONST. art. V, § 12 (“The opinions of the supreme court and court of appeals and all divisions or districts of said courts shall be in writing and filed in the respective causes, and shall become a part of the records of the court, be available for publication, and shall be public records.”); NEV. CONST. art. XV, § 8 (“The Legislature shall provide for the speedy publication of . . . such decisions of the Supreme Court, as it may deem

foreign<sup>253</sup> counterparts, who often operate under constitutional or statutory reason-giving requirements, federal judges exercise wide discretion as to whether or not explain their decisions.<sup>254</sup>

---

expedient.”); OHIO CONST. art. IV, § 2(C) (“The decisions in all cases in the Supreme Court shall be reported, together with the reasons therefor.”); ORE. CONST. art. VII, § 4 (“At the close of each term the [supreme court’s] judges shall file with the secretary of state concise written statements of the decisions made at that term.”); WASH. CONST. art. IV, § 2 (“In the determination of causes all decisions of the [supreme] court shall be given in writing and the grounds of the decision shall be stated.”); W. VA. CONST. art. VIII, § 4 (“When a judgment or order of another court is reversed, modified or affirmed by the [supreme] court, every point fairly arising upon the record shall be considered and decided; the reasons therefor shall be concisely stated in writing and preserved with the record.”).

A few states used to have constitutional reason-giving requirements that were later repealed. For example, until 1970, the Indiana constitution provided, “The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon.” IND. CONST. art. VII, § 5 (repealed 1970); *see also* LA. CONST. art. VII, § 1 (repealed) (“The judges of all courts shall refer to the law and adduce the reasons on which every definitive judgment is founded.”); OKLA. CONST. art. VII, § 5 (repealed 1967) (“The Supreme Court shall render a written opinion in each case.”); S.C. CONST. art. V, § 8 (repealed 1971)

When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in the cause and fairly arising upon the record of the case shall be considered and decided and the reason thereof shall be concisely and briefly stated in writing and preserved with the record of the case.;

UTAH CONST. art. VIII, § 25 (repealed 1984) (“When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefor shall be stated concisely in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with the record of the case.”).

A few states have statutory reason-giving requirements. *See, e.g.*, MD. CODE ANN. CTS. & JUD. PROC. § 12-203 (West 2013) (“Reasons for the denial of the writ shall be in writing.”); IND. CODE §§ 33-24-3-2, 33-25-3-6 (West 2013) (“The judicial opinion or decision in each case determined by the supreme court shall be reduced to writing [and] [t]he judicial opinion or decision in each case determined by the court of appeals shall be reduced to writing.”).

253. *See supra* notes 44–45 and *infra* Part V (listing the reason-giving requirements of various foreign countries). *See generally* Shapiro, *supra* note 244 (comparing the American reason-giving requirement in administrative law with its European counterpart).

254. Historically, there has never been an affirmative reason-giving requirement bearing on the federal courts. While the Judiciary Act of 1789 required the clerks of all federal courts to maintain accurate records of the orders, decrees, judgments, and proceedings of the courts, it remained silent about judicial opinions. *See* Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76

The U.S. Supreme Court has consistently sustained the discretionary nature of judicial reason-giving.<sup>255</sup> To be sure, guidelines exist in the form of local rules of civil and appellate procedure or internal operating procedures for when judges ought to publish their opinions if they choose to write any.<sup>256</sup> But these rules are usually silent as to the first-order question of whether judges should offer reason dispositions in the first place.<sup>257</sup>

### 1. *Administrators Must Give Reasons, Not Judges*

The reason-giving requirement is a staple of the exercise of administrative function in modern bureaucratic states.<sup>258</sup> As Jerry Mashaw has shown, the right to reasons in American

---

(1789); see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 230 (1997) (noting that “[n]either the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution”).

255. See, e.g., *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (“We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.”); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 472 (1981) (Stevens, J., dissenting) (“Judges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error.”).

256. See *supra* note 57 (listing examples of local court rules requiring opinions). For a complete list of current local rules, see *Federal Rules of Practice & Procedure*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/LocalCourtRules.aspx> (last visited Jan. 14, 2015, 3:45 PM) (on file with the Washington and Lee Law Review).

257. See *supra* note 57 (listing examples of local court rules requiring opinions); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 27 J.L. & ECON. ORG. 1, 7 (2011) (pointing out that despite the existence of guidelines directing judges when to publish opinions, research shows that judges fail to follow them); see also Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 207 (1988) (discussing the arguments in favor of limited publication of judicial opinions); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUSTICE SYST. J. 782, 784–88 (1992) (discussing the process of how a case gets published).

258. See Shapiro & Levy, *supra* note 54, at 425–28 (recounting the history of the American reason-giving requirement and depicting it as a manifestation of a separation-of-powers principle). See generally Shapiro, *supra* note 244 (comparing the American reason-giving requirement in administrative law with its European counterpart).

administrative law is contingent on other rights or on the necessities of effective judicial review.<sup>259</sup> The underlying idea is that if in fact administrative judgments are reviewable by courts, then agencies must provide judges with a record of their decision-making processes and their justifications for reaching a particular outcome.<sup>260</sup> Indeed, the U.S. Supreme Court has repeatedly held that the duty to give reasons is a function of due process in the administrative context.<sup>261</sup> Administrative reason-giving requirements have been analyzed as a due process protection designed to ensure that agencies do not act in an arbitrary manner.<sup>262</sup> Whether reason-giving is required by the

---

259. See Mashaw, *supra* note 163, at 105–12 (2007) (discussing the right to reasons in American administrative law); see also Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010) (pointing out that “[p]art of the explanation for this expansion of substantive judicial scrutiny of agency decisionmaking lies in constitutional concerns with broad delegations of power to agencies and the attendant risk of unaccountable and arbitrary exercises of administrative power”).

260. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (establishing procedural requirements in informal rulemaking that were not specified in the APA: an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))); see also Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—Of Politics and Law, Young Lawyers and the Highway Goliath*, in ADMINISTRATIVE LAW STORIES 258 (Peter L. Strauss ed., 2006).

261. The doctrine of judicial review of administrative action is extremely complex, but it is safe to say that the Supreme Court has articulated an agency’s duty to give reasons in two landmark cases: *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) and *Overton Park v. Volpe*, 401 U.S. 402 (1971). For a discussion of the complexity of the doctrine on this, see David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010) (arguing that the six separate tests that exist to review agencies’ decisions should be simplified into a “reasonable agency” standard). In individual cases, the Court has held that the due process reason-giving requirement applies only to actions threatening people’s “life, liberty, and property” under the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (“We have held . . . that the Constitution does not require opportunity for a hearing . . . unless [the respondent] can show that the decision . . . somehow deprived him of an interest in ‘liberty’ or . . . ‘property.’”); *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569–70 (1972) (“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”).

262. See Lisa Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690–92 (2004) (discussing agency requirements for reason-giving to avoid improper influences dominating

Constitution<sup>263</sup> or by a statute supplemented by the Administrative Procedure Act,<sup>264</sup> it is considered one of the standard features of the right to a hearing itself.<sup>265</sup>

The federal courts, however, including the Supreme Court,<sup>266</sup> enjoy wide latitude about whether or how to explain their

the agency decisions at the public's expense).

263. See Mashaw, *supra* note 163, at 111 (pointing out the constitutional basis of the reason-giving requirement in American administrative law); see also Richard W. Murphy, *The Limits of Legislative Control Over the "Hard-Look,"* 56 ADMIN. L. REV. 1125, 1132–34 (2004) (arguing that hard-look review has a constitutional dimension).

264. To ensure that agencies do not act in an arbitrary manner, two statutory reason-giving requirements have developed in administrative law. The first is found in § 555(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(e) (2012). It requires federal agencies to provide a "brief statement of the grounds for denial" when denying written petitions or applications. *Id.* This means that an agency must provide a written explanation when it denies either a rulemaking petition or a petition for enforcement action. See *Massachusetts v. E.P.A.*, 549 U.S. 497, 533 (2007) (stating that the agency can "avoid taking further action . . . if . . . it provides some reasonable explanation as to why it cannot or will not" act). In the context of informal adjudication, when denying a written application or a petition made in connection with an agency proceeding, an agency must provide a "brief statement of the grounds for denial." See *id.* (stating that the agency can "avoid taking further action . . . if . . . it provides some reasonable explanation as to why it cannot or will not" act).

Section 706(2)(A) of the APA creates a second, heightened, reason-giving requirement. See 5 U.S.C. § 706(2)(A) (2012) (instructing reviewing courts to hold "unlawful . . . agency action . . . found to be arbitrary, capricious, an abuse of discretion"). The Court has interpreted this section as requiring agencies to justify their decisions with adequate reasons: "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfg. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). This version of the requirement allows the judiciary, the executive, and the public at large to check the reasons supporting agencies' exercises of delegated discretion and to guard against arbitrariness. See *supra* note 262, at 1690 (discussing how reason-giving reduces the opportunity for "covert, private-interested, or otherwise arbitrary" decisions).

265. See Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 47 (2014) ("[T]he agency should go through a process of learning 'through reasoned argument' that would have been provided by the notice-and-comment provisions of the APA. That process, of course, might require open-ended hearings to get public input and reason-giving designed for both the court and the public.").

266. See SUP. CT. R. 41 (providing that the "[o]pinions of the Court will be released by the Clerk immediately upon their *announcement from the bench*, or

decisions.<sup>267</sup> The Supreme Court is no more under a duty to give reasons, let alone to write them up in an opinion, than district or appellate judges are.<sup>268</sup> Yet federal judges at all levels of the judicial hierarchy are prolific reason-givers.<sup>269</sup> Reason-giving is so instinctive and commonplace in the U.S. judicial culture that the practice has hardly needed formalization.<sup>270</sup> What is striking from a comparative law perspective is that reason-giving talk is usually associated with an administrative doctrine, not a procedural doctrine pertaining to the judicial context.<sup>271</sup> The due process clause requires that a person receive notice and an opportunity for a hearing when the Government deprives him or

---

as the Court otherwise directs” (emphasis added)); *see also* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 146 (1999) (pointing out that “the Supreme Court has no legal obligation to issue opinions”).

267. A case like *Mathews v. Eldridge*, 424 U.S. 319 (1981), could lead one to think that the Court was embarking on a path leading to the imposition of a constitutional reasons requirement upon federal judges. *Mathews* sets forth a “balancing” test for determining whether particular procedures, including the reason-giving requirement, are required as a part of a hearing process in the administrative context. *See id.* at 334 (“[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.” (quotations and citations omitted)). However, the Justices have expressed reluctance to consider judicial reason-giving as a requirement of due process. *See, e.g., Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (“We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.”).

268. Historically, there has never been an affirmative reason-giving requirement bearing on the federal courts. *See Harrison, supra* note 254, at 230 (noting that “[n]either the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution”).

269. *See* Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 23 (2005) (discussing the number of opinions federal circuit judges author).

270. *See* Cohen, *supra* note 114, at 259 (“[I]n most contemporary legal systems, there is a requirement—formal or informal—for courts, administrative agencies, and other public institutions to provide reasons for their decisions.”).

271. *See* S.E.C. v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (distinguishing the *Chenery* doctrine under which the courts can affirm an administrative decision only on the actual basis used by the administrative agency to reach that decision from “the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason’” (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937))).

her of life, liberty, or property.<sup>272</sup> A court must give affected parties notice and a hearing before it acts,<sup>273</sup> but unlike administrators, it is exempt from a constitutional reason-giving requirement.<sup>274</sup> Justice Stevens's dissent in *Connecticut Board of Pardons v. Dumschat*<sup>275</sup> is enlightening in this respect. Stevens emphasizes that "a brief statement of reasons is an essential element of the process that is due" to prison inmates when a Board of Pardons decides on the commutation of a sentence.<sup>276</sup> But he distinguishes the situation of courts from that of Board of Pardons. Judges are not subject to a reason-giving requirement because the judicial setting affords litigants other procedural protections: "Judges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error. But the ordinary litigant has other substantial procedural safeguards against arbitrary decision-making in the courtroom."<sup>277</sup>

## 2. *The Only Judicial Duty Is to Enable Review*

In the judicial context, the reason-giving doctrine has focused on providing higher courts with a mechanism to facilitate their review of lower courts' decisions rather than on securing the public's understanding of judicial decisions.<sup>278</sup> In the common law tradition, judicial reason-giving does not attach to individual right holders.<sup>279</sup> Litigants or defendants have no enforceable right

---

272. See U.S. CONST. amends. V, XIV ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

273. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing . . .").

274. See *Harrison*, *supra* note 254, at 230 ("Neither the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution.").

275. 452 U.S. 458 (1981).

276. *Id.* at 472 (Stevens, J., dissenting).

277. *Id.*

278. See *supra* Part II.B.2 (discussing accountability reasons for judicial reason-giving).

279. See *Conn. Bd. of Pardons*, 452 U.S. at 472 (Stevens, J., dissenting)

to reasoned decisions; a judge's failure to give reasons does not amount to reversible error.<sup>280</sup> The validity of the judgment is evaluated independently from the reasons given for it.<sup>281</sup> Unreasoned decisions are protected by the "harmless error" doctrine.<sup>282</sup> The rationale behind this rule appears to be judicial economy.<sup>283</sup> No appeal lies on the grounds that a court gave inadequate or insufficient reasons.<sup>284</sup> A successful appeal must contend that the judgment was *incorrect* and thus warrants reversal.<sup>285</sup> This is not the case in many parts of the world.<sup>286</sup>

---

("But the ordinary litigant has other substantial procedural safeguards against arbitrary decision making in the courtroom.").

280. See Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 20 (2001) (noting that a common ground for reversal of an administrative order is the failure to state adequate reasons, but pointing out that the fact "[t]hat a lower court gave the wrong reasons for a correct decision is not by itself a justification for reversal or remand"); see also Stack, *supra* note 50, at 955 (noting that if the "decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason").

281. See *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason.").

282. See FED. R. CIV. P. 61 (requiring that federal courts "disregard all errors and defects that do not affect any party's substantial rights"); see also Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture*, 1994 *WIS. L. REV.* 9, 10 (pointing out that in determining that an error was harmless, appellate judges "decide that even if there was a legal violation it would not have changed the result. [They] avoid deciding whether there was a legal violation by discarding the question"); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 *B.U. L. REV.* 1, 38-40 (2004) (criticizing the harmless error doctrine as a way for courts to avoid and obscure the law).

283. See *supra* Part IV.A.2 (discussing efficiency reasons for not giving reasons).

284. See *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 n.7 (D.C. Cir. 1999) ("In cases on appeal from the district court, we are to review judgments, not opinions. Orders issued by agencies . . . we do not sustain a 'right-result, wrong-reason' decision of an agency. We send the case back to the agency [to] fix its reasoning or change its result." (internal citations omitted)).

285. See *Chevron, U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[S]ince this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error *resulted* in an erroneous judgment." (emphasis added)).

286. In a number of civil law jurisdictions, the inexistence of reasons is considered a procedural defect that warrants voiding the judgment altogether.

Federal courts are free to decide cases without providing reasons or with minimal reasons, except when the absence of reasons would entirely frustrate review.<sup>287</sup> A reviewing court unable to discern how a lower court reached its decision may remand for further proceedings.<sup>288</sup> Historically, this has been the purpose of Federal Rule of Civil Procedure 52(a),<sup>289</sup> which requires that in bench trials district judges make findings of fact and draw conclusions of law.<sup>290</sup> The purpose of requiring findings

---

*See, e.g.*, Nouveau Code de Procédure Civile [C.P.C.], arts. 455, 458 (observing that where reasons are insufficient, contradictory, or unclear, the reviewing court will generally reverse and remand to the lower court for adequate reasoning).

This attitude toward insufficient reasons is not unheard of in common law jurisdictions such as England. *See, e.g.*, H.L. Ho, *The Judicial Duty to Give Reasons*, 20 LEGAL STUD. 42, 46–47 (2000) (pointing out “[t]hat the failure to give reasons is a good self-standing ground of appeal was acknowledged by the English Court of Appeal . . . failure of a judge to give reasons adequately when he or she is legally required to do so has been treated as an error of law . . . the usual (and perhaps most effective) remedy for this failure is a retrial”).

This is also the Canadian approach. *See, e.g.*, Michael Taggart, *Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?*, 33 U. TORONTO L.J. 1, 8 (1983) (pointing out that in Canadian courts “it has always been the case that a trial judge’s failure [to state facts and reasons in civil cases] . . . might, in certain circumstances, result in reversal by the appellate court . . . recent cases appear to go further and suggest that something akin to a legal obligation to state findings and reasons exists”); *see also* Hamish Stewart, *The Trial Judge’s Duty to Give Reasons for Judgment in Criminal Cases*, 14 CAN. CRIM. L. REV. 19, 24 (2009) (showing that failure for trial judges to give reasons for judgments in criminal cases, in particular to explain why they have treated the evidence in a certain way, often amounts to a reversible error).

287. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (“Because this record does not fully inform us of the precise nature of the litigation . . . [we] vacate the judgment below, and remand.”).

288. *See id.* (“Because this record does not fully inform us of the precise nature of the litigation . . . [we] vacate the judgment below, and remand.”).

289. FED. R. CIV. P. 52(a) (“In an action tried on the facts without a jury . . . the court must find the facts . . . and state its conclusions of law . . . . The findings and conclusions may be stated on the record . . . [or] may appear in an opinion or a memorandum of decision.”).

290. *See id.* (requiring courts to find facts and state conclusions). Courts of appeals, however, construe findings liberally in support of a judgment, even if the findings are not as specific or detailed as might be desired. *See Zack v. CIR*, 291 F.3d 407, 412 (6th Cir. 2002) (stating that “findings are to be liberally construed in support of a judgment” (quoting *In re Fordu*, 301 F.3d 693, 710 (6th Cir. 1999))). Compliance with Rule 52(a) is not jurisdictional and the appellate court may decide the appeal without further findings if it feels that it

of fact by the trial court, as has been recognized in a significant number of cases, is limited to enabling review by the appellate court by affording it an explicit explanation or at least a record indicating the ground of the trial court's decision.<sup>291</sup> This rule is the closest equivalent to a reason-giving requirement in the federal judiciary, but it falls short of imposing that district judges explain their decisions in writing.<sup>292</sup>

A 1972 reapportionment case, *Taylor v. McKeith*,<sup>293</sup> illustrates both the Supreme Court's broad grant of discretion to federal judges in determining whether or not to give reasons and its limiting courts' freedom in exceptional circumstances. In this case, the Court vacated and remanded a Fifth Circuit summary reversal because its lack of reasons did not allow for meaningful review.<sup>294</sup> The Fifth Circuit had reversed, without opinion or any other form of explanation, a district court's approval of a reapportionment plan.<sup>295</sup> In doing so, the appellate judges adopted a competing plan that would have reinforced the dilution of the African-American vote.<sup>296</sup> The Supreme Court could not determine whether a substantial federal question existed because it was unsure of the appellate court's reasoning. In an unusual move, the Court vacated the summary reversal and remanded the

---

is in a position to do so. *See, e.g.*, *United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir. 2005) ("We conclude that the best way to deal with this . . . is to follow the approach adopted by our colleagues on [other circuit courts] and ask the person who knows the answer, the sentencing judge. Rather than affirm . . . we elect to remand.").

291. *See Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (deciding on the trial court's ultimate findings because the Ninth Circuit issued a decision without reasoning or findings before the trial court had issued findings of fact).

292. *See* 9C CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571 (3d ed. 2008) (pointing out that Rule 52(a) was amended in 1948 and 1983 making clear that findings and conclusions are unnecessary on the decision of most motions and to provide explicitly that the district judge may make the findings and conclusions orally in open court and have them recorded).

293. 407 U.S. 191 (1972).

294. *See id.* at 194 ("Because this record does not fully inform us of the precise nature of the litigation . . . [we] vacate the judgment below, and remand.").

295. *See id.* at 194 n.4 ("[H]ere the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge.").

296. *See id.* at 193 ("[T]he Court of Appeals reversed without opinion and adopted the Attorney General's alternative division.").

case to the court of appeals for further proceedings, “[b]ecause this record does not fully inform us of the precise nature of the litigation, and because we have not had the benefit of the insight of the Court of Appeals.”<sup>297</sup> In a footnote, the Court emphasized the exceptional nature of its request for reason-giving, observing that “the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances.”<sup>298</sup> In short, so long as the record available to the reviewing court enables some form of review, there is no reason-giving requirement bearing on federal judges.<sup>299</sup>

In practice, because insufficient or non-existent reason-giving may contribute to inaccurate or unjust judicial outcomes, federal judges have generally been generous reason-givers when they have found the justifications for reason-giving to outweigh the costs of reason-giving.<sup>300</sup> The next subpart presents two case studies showing that in the two contexts of immigration and sentencing, the federal courts of appeals have developed reason-giving doctrines that aim at securing (some of) the values of reason-giving identified in Part I.

### *B. Yet Courts Balance and Require*

Immigration and sentencing are two areas in which trial-level adjudicators are required by the reviewing court to give reasons for their decisions in an administrative law-like fashion.<sup>301</sup> Trial-level immigration adjudication is an

---

297. *Id.* at 194.

298. *Id.* at 194 n.4 (citation omitted); *see also* *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993) (observing it was “remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion”).

299. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (stating that “by failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals’ bare order in light of the District Court’s ultimate findings”).

300. *See supra* Part III.B (discussing the efficiency reasons for not giving reasons).

301. Immigration adjudication is literally administrative at the trial level and at the Board of Immigration Appeals (BIA) level, as immigration judges and

administrative form of adjudication conducted by Immigration Courts and the Board of Immigration Appeals (BIA), which comprise the two levels of the Executive Office for Immigration Review (EOIR).<sup>302</sup> Similarly, sentencing has arguably acquired a quasi-administrative quality since the establishment of the U.S. Sentencing Commission and the articulation of the first Federal Sentencing Guidelines<sup>303</sup> together with a statutory duty for sentencing judges to state reasons for the sentence.<sup>304</sup> Perhaps because these two decision-making contexts lack the traditional procedural safeguards and concepts of the American civil common

---

BIA members are employees of the Department of Justice and comprised within the so-called Office for Immigration Review (EOIR). *See generally* Jill E. Family, *Conflicting Signals: Understanding U.S. Immigration Reform Through the Evolution of U.S. Immigration Law*, 40 REVISTA CATALANA DE DRET PUBLIC 145 [40 CATALAN J. OF PUB. L. 145] (2010) (Spain) (recounting the history and evolution of administrative adjudication and its lack of decisional independence from immigration agencies). The administrative color of sentencing is not as clear. *See* *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (holding that the Sentencing Reform Act of 1984 was a constitutional delegation of powers). A number of scholars, however, have pointed out that the institution of sentencing guidelines has fundamentally altered sentencing and brought it closer to an administrative model of decision making in which, even after *United States v. Booker*, 543 U.S. 220 (2005), district judges' discretion is bounded by the guidelines. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 721–23 (2004) (arguing that the sentencing commission is best understood under an agency model).

302. *See About the Office*, DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, [www.justice.gov/eoir/orginfo.htm](http://www.justice.gov/eoir/orginfo.htm) (last visited Jan. 17, 2015 12:42 PM) (“The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security.”) (on file with the Washington and Lee Law Review).

303. One could argue that even the transformation of the federal guidelines into an advisory system following the *Apprendi-Booker* line of cases has not entirely counteracted the administrative quality of sentencing. The Guidelines are passed by an administrative agency and approved by Congress. Though advisory, their use remains mandatory. They assign preferred outcomes to identified facts. *See generally* *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

304. A sentencing court “shall state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c) (2012). If the sentence is not of the kind prescribed by, or is outside the range of, the sentencing guidelines referred to in § 3553(a)(4), the court shall indicate the specific reasons for imposing a sentence different from the guidelines. *Id.* § 3553(c)(2). These “reasons must also be stated with specificity” in the written order of judgment and commitment. *Id.*

law—such as Article III judges, jury decision making and full judicial autonomy—federal judges have imposed a blanket reason-giving mandate, in a move that evokes the civil law legislative reason-giving requirements.<sup>305</sup>

### 1. Context 1: Immigration

Immigration courts adjudicate individual claims concerning a noncitizen's legal right to remain in the country.<sup>306</sup> They make determinations of removability, deportability, and excludability.<sup>307</sup> This adjudication takes the form of a traditional hearing involving two parties, and each case involves the interpretation or application of law, findings of fact based on evidence in the record, and the exercise of a specific statutory discretion.<sup>308</sup> The constitutional due process protection requires no more than a fair administrative proceeding, which is satisfied by the opportunity for a hearing before an immigration judge.<sup>309</sup> Circuit courts, however, have developed a reason-giving

---

305. See Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 651 (2012) (noting that immigration removal proceedings lack procedural safeguards because deportation is “not a punishment in the constitutional sense”).

306. See 8 C.F.R. §§ 1240.1(a), 1240.31, 1240.41 (discussing the authority of immigration judges).

307. See *id.* (providing that immigration judges have the authority to make decisions regarding deportation, removability, and exclusion).

308. See OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 57–83 (2008), [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice\\_Manual\\_review.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf) (discussing immigration hearing procedures).

309. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“[D]ifferences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.” (citations omitted)); see also *Albathani v. INS*, 318 F.3d 365, 376 (1st Cir. 2003) (“An alien has no constitutional right to any administrative appeal at all.”); *Ekasinta v. Gonzales*, 415 F.3d 1188, 1195 (10th Cir. 2005) (“The constitution requires no more than a fair administrative proceeding.”); *Kambolli v. Gonzales*, 449 F.3d 454, 460 (2d Cir. 2006) (“Kambolli is therefore afforded an opportunity to appeal the IJ’s [Immigration Judge’s] decision only because Congress and the Attorney General have chosen to provide an appeals process by statute and regulation.”).

requirement bearing on first-instance immigration judges—their decisions must be reasoned, either orally or in writing.<sup>310</sup>

The main goal behind this requirement is that of ensuring the meaningful review of non-Article III immigration judges' decision making by the federal circuits.<sup>311</sup> The requirement is very similar to that which bears on other administrative agencies.<sup>312</sup> Judicial review of administrative action requires something to review and if the agency provides only its result without an explanation of the underlying fact finding and analysis, a court is unable to provide judicial review.<sup>313</sup> Judge Richard Posner clearly expressed the administrative nature of the reason-giving requirement in the immigration context: "as we tirelessly repeat, . . . an agency opinion that fails to build a rational bridge between the record and the agency's legal conclusion cannot survive judicial review."<sup>314</sup> Indeed, immigration courts are not part of the federal judiciary.<sup>315</sup> Instead, they are

---

310. See OFFICE OF PLANNING, ANALYSIS & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK D1 fig.4 (2011), <http://www.justice.gov/eoir/statspub/fy10syb.pdf> (providing a breakdown of immigration proceedings by either decision or other completions from fiscal year 2006 to fiscal year 2010).

311. See *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975) ("[T]o enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide the court and the complaining witness with copies of a statement of reasons supporting his determination."). Petitioners cannot appeal directly to the circuit courts before exhausting their claim before the BIA. See 8 U.S.C. § 1252(d)(1) (2012) (providing that a court may not review a final order until the alien has exhausted all administrative remedies); *Morales v. U.S. Att'y Gen.*, 210 F. App'x 978, 980 (11th Cir. 2006) (interpreting § 1252(d)(1) to require the BIA to hear claims before a court may hear the claim).

312. See Donald J. Kochan, *The "Reason-Giving" Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 277 (2013) (noting that the reason-giving requirement extends to almost all agencies' actions).

313. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."); *Guentchev v. I.N.S.*, 77 F.3d 1036, 1038 (7th Cir. 1996) (providing a statement of reasons is the "norm of administrative law").

314. *Mengistu v. Ashcroft*, 355 F.3d 1044, 1047 (7th Cir. 2004).

315. Immigration Judges (IJs) and BIA members are outside of the mainstream judicial profession in terms of recruitment, status, and career. For a comparison, see CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* (1997). Unlike federal judges, who are generalists and are expected to deal with all kinds of cases with equal

administrative tribunals.<sup>316</sup> But immigration courts are not subject to the Administrative Procedure Act's formal adjudication requirement: they are treated as first-instance courts with federal appellate review.<sup>317</sup>

Following a growth of immigration appeals that flooded the courts starting from 2002,<sup>318</sup> federal circuits have developed an

---

skill, IJs and BIA members are specialized immigration law judges. See Lawrence Baum, *Immigration Law and Adjudication: Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1546 (2010) (discussing IJ's and BIA's specialization in contrast to federal judges).

316. Immigration Judges are not considered administrative law judges as defined by the Administrative Procedure Act (APA). See Organization of the Department of Justice Executive Office for Immigration Matters, 52 Fed. Reg. 44,971 (Nov. 24, 1987) (changing the title of "Special Inquiry Officer" to "Immigration Judge"). Rather, immigration courts constitute a unique type of administrative tribunal, deriving from congressionally delegated authority to the Department of Justice (DOJ). In 1983 the Attorney General created the Executive Office for Immigration Review (EOIR) within DOJ. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,038, 8,039 (Feb. 25, 1983).

317. The 1946 APA "created strict procedural requirements for formal agency rulemaking and adjudication." Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 665 (2006). Following its passage, controversy ensued concerning whether its procedures were meant to apply in the immigration realm. See *id.* 666–67 (discussing how DOJ thought the APA did not apply, but the Supreme Court ruled otherwise). In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950), the Court found that the Fifth Amendment's Due Process Clause required application of the APA's strict procedural requirements. Later that year, however, the agency was successful in lobbying for an appropriations bill, which exempted it from abiding by the formal adjudication requirements. See Durham, *supra* note 317, at 667. Thus, the changes in the immigration adjudication process were short lived. Since *Wong Yang Sung*, however, the process has gradually evolved to more closely resemble formal adjudication. See *id.* at 691 (concluding that immigration adjudication has evolved "in many respects [mirroring] a formal judicial proceeding").

318. On the surge and its underlying causes, see Lenni Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in Federal Court*, 51 N.Y.L. SCH. L. REV. 37 (2006) (exploring the interconnected factors contributing to the increase in immigration-related federal court cases); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals' Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481 (2005) (describing the streamlining procedure and its effect on the BIA decision making); see also John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO.

affirmative reason-giving requirement.<sup>319</sup> During the early years of the surge, circuit judges became increasingly aware of and outspoken about the insufficient reasoning of immigration decisions at both the trial and the appellate level.<sup>320</sup> They were adjudicating an unprecedented number of appeals from the BIA, which has jurisdiction to conduct appellate review of immigration courts' decisions.<sup>321</sup> Because many of the BIA decisions were "affirmances without opinions," circuit judges had to review the trial-level decisions by immigration judges.<sup>322</sup> When the BIA

---

IMMIGR. L.J. 1, 54–89 (2005) (describing a series of variables that might explain the surge).

319. The Second Circuit thus declared: "Under applicable laws and regulations, even after streamlining, an applicant for asylum or withholding of removal remains entitled to a full hearing on his asylum claims, *a reasoned opinion from the IJ*, the opportunity for BIA review, and the right to seek relief from the courts." *Zhang v. U.S. Dept. of Justice*, 362 F.3d 155, 159 (2d Cir. 2004) (emphasis added).

320. See AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM 2–26 (2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf) ("[F]ederal appellate judges have frequently criticized the ill-reasoned and/or incomplete oral decisions of immigration judges that have reached the circuit courts.").

321. Once the BIA decides the case, the respondent has a statutory right to petition for review to the U.S. court of appeals with jurisdiction over the case. See 8 U.S.C. § 1252(d)(1) (2012) (providing that a court may review a final order once an alien has exhausted all administrative remedies).

322. When the BIA adopts and supplements the IJ's opinion on administrative appeal of order of removal, the court of appeals reviews the IJ's opinion as supplemented by the BIA. See Immigration and Nationality Act, § 242(b)(4)(A)–(B), 8 U.S.C. § 1252(b)(4)(A)–(B) (2012) (providing the court of appeals' scope and standard of review). As the Eleventh Circuit observed in *Mendoza v. U.S. Attorney General*, 327 F.3d 1283 (11th Cir. 2003), "meaningful review of the INS's removability determination is not precluded by the brevity of the BIA's summary affirmance decision because an appellate court will continue to have the IJ's decision and the record upon which it is based available for review." *Id.* at 1289 (internal quotation marks omitted); accord *Dia v. Ashcroft*, 353 F.3d 228, 244 (3d Cir. 2003) (holding that BIA summary affirmances "do not force us to venture 'through the looking glass' (like Alice in Wonderland), because we have the IJ's reasoning and the record necessary to exercise our function of review"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003) (holding that BIA's failure to issue an opinion does not compromise due process when the court of appeals can "review the IJ's decision directly"); *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003) ("Since we review directly the decision of the IJ when a case comes to use from [a BIA summary affirmance pursuant to the streamlining regulations], our ability to conduct a full and fair appraisal of the petitioner's case is not compromised, and the petitioner's due process rights are not violated."). Like the Third Circuit, "[w]e are unaware of

affirms without opinion, the immigration judge's decision becomes the final agency determination.<sup>323</sup> The court of appeals reviews the reasoning in the immigration judge's decision, not the BIA's unwritten reasoning.<sup>324</sup> As a result, circuit judges began reading masses of transcripts of proceedings conducted by immigration judges that were inadequately or illogically reasoned.<sup>325</sup> In many cases, the review concluded that the immigration judges' reasoning was incoherent, indecipherable, or not supported by the record.<sup>326</sup> Circuit judges around the nation

---

any requirement, let alone any constitutional requirement, that an agency adjudicator must commit to writing or otherwise verbalize his or her reasoning, where, as here, the agency has directed us to an opinion for review." *Dia*, 353 F.3d at 240.

323. See 8 C.F.R. § 1003.1(e)(4)(ii) (2007) ("If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.'"); see also *Falcon Carriche*, 350 F.3d at 855 ("If the BIA streamlines a case, the IJ's decision becomes the final agency decision, and the regulatory scheme gives us a green light to scrutinize the IJ's decision as we would a decision by the BIA itself.").

324. See 8 C.F.R. § 1003.1(e)(4)(ii) (providing that when the BIA affirms a decision without opinion, the IJ's decision is the final agency determination). But when the BIA summarily affirms a decision entirely on grounds that the circuit court does not have jurisdiction to review under Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the REAL ID Act, the BIA affirmance will be the final ruling. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 382–83 (2006) (discussing that 8 U.S.C. § 1252(a)(2)(B) restricts circuit court's judicial review).

325. See Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for the U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1012, 1023–27 (2007) (describing the circuit courts' frustration and irritation with increased burdens placed on their own courts as a result of poor decision making at the BIA and immigration courts).

326. The reviewing circuit court is not foreclosed from reviewing the trial-level IJ's decision. See *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 855 (9th Cir. 2003) ("If the BIA streamlines a case, the IJ's decision becomes the final agency decision, and the regulatory scheme gives us a green light to scrutinize the IJ's decision as we would a decision by the BIA itself."); *Rusev v. Gonzales*, 123 F. App'x 316, 317 (9th Cir. 2005) ("Because the BIA streamlined and affirmed the IJ's decision without opinion, we review the decision of the IJ."). As the regulation clearly provides, it is the reasoning in the IJ's decision that should be reviewed, and not the BIA's unwritten reasoning. See 8 C.F.R. § 1003.1(e)(4)(ii) (2014) (providing that the BIA may affirm the IJ's decision without opinion and thus, the IJ's decision becomes final agency determination). When the BIA has summarily affirmed IJ's decisions that were based on reasoning that was incoherent, indecipherable, or not supported by the record, the circuit courts

have criticized immigration courts' handling of cases, in particular asylum petitions.<sup>327</sup> Judge Posner of the Seventh Circuit has been particularly vocal in denouncing the inadequacy of the reason-giving taking place in immigration courts.<sup>328</sup> In one case, he noted that "there is no reasoned basis for the immigration judge's conclusion, which was based . . . [on] unsubstantiated conjectures."<sup>329</sup> In another, he complained that "[t]he immigration judge's opinion cannot be regarded as reasoned; and there was no opinion by the Board of Immigration Appeals."<sup>330</sup>

During the early years of the immigration caseload surge, the federal circuits refined their reason-giving doctrine so as to monitor immigration judges' decisions more tightly.<sup>331</sup> Given the BIA's extended use of summary procedures, the circuits seemed determined to ensure that at least at the trial level respondents would obtain some form of reasoned decision.<sup>332</sup> The Ninth

---

have readily remanded for clarification or rehearing. *See* *You Hao Yang v. Bd. of Immigration Appeals*, 440 F.3d 72, 73, 76 (2d Cir. 2006) (finding the IJ's reasoning contained errors and remanding the case to the BIA for reconsideration).

327. *See, e.g.*, Adam Liptak, *Courts Criticize Judges' Handling on Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (discussing that circuit court judges have criticized IJs' "pattern of biased and incoherent decisions in asylum cases").

328. *See* *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) ("[A]djudication of these cases at the administrative level has fallen below the minimum standards of legal justice."); *accord* *Guchshenkov v. Ashcroft*, 366 F.3d 554, 556, 560 (7th Cir. 2004) (referencing "continuing difficulty that the board and the immigration judges are having in giving reasoned explanations for their decisions to deny asylum" and "systematic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum").

329. *Hor v. Gonzales*, 421 F.3d 497, 500 (7th Cir. 2005); *see also* *Joshi v. Ashcroft*, 389 F.3d 732, 736–37 (7th Cir. 2004) ("A decision that resolves a critical factual question without mention of the principal evidence cannot be considered adequately reasoned.").

330. *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

331. *See* Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J. L. & SOC. POL'Y 1, 26–28 (2012) (recounting how federal judges became "increasingly vocal about the poor quality of immigration adjudication").

332. *See* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–82 (2007) (noting that many judges like Judge Posner are criticizing the competency of immigration judges).

Circuit<sup>333</sup> and the Second Circuit,<sup>334</sup> which are the two courts most affected by the surge, have been particularly active in articulating a reason-giving requirement.<sup>335</sup> Notwithstanding the numerous and complex standards of review that apply to various components of an immigration judge's decision,<sup>336</sup> the circuits

---

333. The Ninth Circuit has the largest immigration docket. See JOHN D. BATES, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2013 ANNUAL REPORT OF THE DIRECTOR tbl.B-3 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf> (comparing the Ninth Circuit's number of BIA appeals in 2013 with the other circuit courts). Its administrative appeals caseload grew from 1,063 in 2001 to a high of 6,583 in 2005, and then declined to a still whooping 4,625 cases in 2008. See LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR 92 tbl.B-3 (2004), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/b3.pdf> (providing statistics from 2000 to 2004); JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 98 tbl.B-3 (2009), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/B03Sep09.pdf> (providing statistics from 2005 to 2009). In 2008, appeals from BIA decisions in the Ninth Circuit amounted to 45% of all BIA appeals. See *id.* at 94 tbl.B-3, 98 tbl.B-3 (dividing 4,625 by 10,280, the total number of BIA appeals in 2008); see also Michael Corradini, Note, *The Role of the Circuit Courts in Refugee Adjudication: A Comparison of the Fourth and Ninth Circuits*, 23 GEO. IMMIGR. L.J. 201, 202–03 (2008) (discussing the surge of immigration cases in circuit courts after 2002 and providing statistics).

334. The Second Circuit has the country's second-highest immigration docket after the Ninth Circuit. See BATES, *supra* note 333, at tbl.B-3 (comparing the Second Circuit's number of BIA appeals in 2013 with the other circuit courts). The immigration caseload of the Second Circuit amounts to 21.6% of all appeals from the BIA. See DUFF, *supra* note 175, at 94–95 tbl.B-3 (dividing 1,624 by 7,518, the total number of BIA appeals from October 2008 to September 2009); see also Tom Perrotta, *Immigration Appeals Surge in Second Circuit*, 231 N.Y. L.J. 17, 17 (2004) (discussing the reasons for the immigration surge and measures the Second Circuit is taking to keep pace with the appeals); Mark Hamblett, *Circuit Struggles to Cope with Upsurge in Asylum Appeals*, 234 N.Y. L.J. 17, 17 (2005) (discussing the continued backlog of immigration appeals in the Second Circuit); Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Case Management*, 74 BROOK. L. REV. 429, 429 (2009) (noting that “[t]he flood of asylum claims that came to the Second Circuit from 2002 through 2004 presented an unprecedented challenge of case management”).

335. Of course, other circuits have also contributed to this reason-giving doctrine. See, e.g., *Zewdie v. Ashcroft*, 381 F.3d 804, 807 (8th Cir. 2004) (“[T]he immigration judge failed to articulate a reasoned analysis based on the recorded evidence for denying [the petitioner’s] claims.”).

336. “Questions of law and the application of law to undisputed fact are

have clearly developed a requirement for them to explain their determinations.<sup>337</sup> In doing so, federal appeals judges have striven to foster at least some of the democratic values of reason-giving discussed in Part I, in particular accuracy and accountability.

The immigration reason-giving requirement has been articulated with a view to enhancing accuracy in adjudicating claims. Federal circuits are very deferential in reviewing an immigration judge's credibility determination, but they will readily remand for clarification or rehearing<sup>338</sup> if it is based on flawed reasoning, faulty fact-finding, or impermissible speculation.<sup>339</sup> The substantial evidence standard<sup>340</sup> requires that the immigration judge's factual findings be supported by "reasonable, substantial and probative evidence in the record."<sup>341</sup> Additionally, an immigration judge must support adverse credibility findings with "specific[,] cogent reasons."<sup>342</sup> In other

---

reviewed de novo." *Hu v. Holder*, 579 F.3d 155, 158 (2d Cir. 2009) (citing *Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008)). The factual findings of the IJ and BIA are reviewed under the "substantial evidence" standard, which treats them as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4) (2012); *see also* *Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008) (quoting § 1252(b)(4)).

337. A Westlaw search under Key # k24k575 "Findings or statement of reasons" returned 966 federal circuits' opinions and headnotes (as of March 1, 2015) discussing the sufficiency of IJs' reasons.

338. *See You Hao Yang v. Bd. of Immigration Appeals*, 440 F.3d 72, 76 (2d Cir. 2009) (remanding to the BIA because the IJ's reasoning was unsupported by substantial evidence on the record).

339. *See Hu v. Holder*, 579 F.3d 155, 158 (2d Cir. 2009) (remanding because the IJ's determination was based "on a flawed fact-finding process, impermissible speculation, and flawed reasoning"); *see also* *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 289 (2d Cir. 2007) (providing that the court has authority to remand cases if the IJ's decision has "flawed reasoning, a sufficiently flawed fact-finding process, or the application of improper legal standards"); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 400 (2d Cir. 2005) (discussing that the court will defer to an IJ's factual findings unless the findings are not supported by substantial evidence).

340. The substantial evidence standard was articulated by the Supreme Court in *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481–84 (1992) (holding that "[t]he BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole'" (citation omitted)).

341. *Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 116 (2d Cir. 2006) (quoting *Islami v. Gonzales*, 412 F.3d 391, 396 (2d Cir. 2005)).

342. *Gao v. Ashcroft*, 299 F.3d 266, 276 (3d Cir. 2002); *see also* *Secaida-*

words, the reviewing court will check whether the immigration judge's reasons for reaching a particular outcome are consistent with the evidence on the record.<sup>343</sup> If a court of appeals is not satisfied with the immigration judge's reasons, it will reverse or remand.<sup>344</sup>

Immigration judges must identify reasons specific enough to permit review of whether they correctly applied the law.<sup>345</sup> The avowed goal for the requirement is not a participatory or a legitimizing one.<sup>346</sup> When mandating reasons, the federal circuits are not primarily concerned with whether or not immigration courts appear legitimate in the eyes of respondents or the larger public.<sup>347</sup> Indeed, the immigration adjudication process is not a model of transparency. The requirement can be satisfied by oral decisions, which are heard only by those present in the courtroom and later available in the record for federal courts to review.<sup>348</sup>

---

Rosales v. I.N.S., 331 F.3d 297, 307 (“When an IJ rejects an applicant’s testimony, the IJ must provide ‘specific, cogent’ reasons for doing so.” (quoting Aguilera-Cota v. I.N.S., 914 F.3d 1375, 1381 (9th Cir. 1990)).

343. See, e.g., *Nagi El Moraghy v. Ashcroft*, 331 F.3d 195, 205 (1st Cir. 2003) (“[D]eference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record.” (quoting *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 487 (1st Cir. 1994)).

344. See, e.g., *Dia v. Ashcroft*, 353 F.3d 228, 251 (3d Cir. 2003) (deciding to remand the case because the IJ’s determination “[did] not logically flow from the facts she considered”).

345. See, e.g., *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) (holding that the IJ’s explanation of why an asylum seeker’s arrests and physical abuse in Kosovo did not rise to the level of persecution was insufficient to allow meaningful review of whether the judge correctly applied the standard for assessing the claim of past persecution).

346. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1952))).

347. See *Dia*, 353 F.3d at 249 (discussing that federal judges, when reviewing an IJ’s determination, analyze whether the evidence supports what “a reasonable mind would find adequate”).

348. While immigration courts’ hearings are usually open to the public, the judges’ opinions, even when written, are not published. See OFFICE OF THE CHIEF IMMIGRATION JUDGE, *supra* note 308, at 10 (noting that most hearings are open to the public). Oral decisions are not transcribed, absent appeal. See *id.* at 63 (noting that hearings are recorded electronically and on appeal the hearing is transcribed). Parties may obtain record copies of the oral proceedings upon request, but the courts do not provide nonparties with copies of the records. See

Immigration judges do not usually write opinions, but instead orally dictate their decisions using a recording device.<sup>349</sup> Most often, they read their decisions at the conclusion of a removal hearing.<sup>350</sup> In rare cases when they determine that there is a complex or novel issue of law at stake, they send respondents a written decision in the mail or schedule a master calendar date for the respondent to return for the decision.<sup>351</sup>

---

*id.* at 11–12 (noting that parties may receive a copy of the hearing from the Immigration Court, but non-parties may not). To obtain an official record, nonparties must file a request for information under FOIA. *Id.* at 12. A major problem with this system is that transcripts are sometimes inaccurate or incomplete. See *Witjaksono v. Holder*, 573 F.3d 968, 971 (10th Cir. 2009) (noting that “[t]he fifty-seven page transcript in this case is replete with nearly two hundred notations saying ‘indiscernible’”); see also Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 96 (2008) (advocating in favor of making written decisions by IJs available to the public).

349. See 8 C.F.R. § 1003.36 (2014) (“The Immigration Court shall create and control the Record of Proceeding.”). Section 1003.37(a) further provides

A decision of the Immigration Judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the Immigration Judge in the presence of the parties and a memorandum summarizing the oral decision shall be served on the parties. If the decision is in writing, it shall be served on the parties by first class mail to the most recent address contained in the Record of Proceeding or by personal service.

See also OFFICE OF THE CHIEF IMMIGRATION JUDGE, *supra* note 308, at 81 (providing that an immigration judge may give an oral or written decision); *EOIR Training Materials for New Immigration Judges*, TRAC, <http://trac.syr.edu/immigration/reports/211/> (last visited Jan. 15, 2015) (providing educational materials used for training newly appointed immigration judges) (on file with the Washington and Lee Law Review); Daniel Dowell & Jack H. Weil, *Preparing and Delivering Oral Decisions* 6–8 (2008), [http://trac.syr.edu/immigration/reports/211/include/III-11training\\_course\\_delivering\\_oral\\_decisions.pdf](http://trac.syr.edu/immigration/reports/211/include/III-11training_course_delivering_oral_decisions.pdf) (providing step-by-step dictation instructions and best practices); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 9 (2006) (noting that immigration judges’ “decisions are not published, but are often oral opinions recorded on tapes”).

350. The oral decision typically begins by summarizing the facts. Immigration judges then read boilerplate language about the legal standards for the relief sought, and finally analyze the facts in light of the law. The oral decision itself usually consists in reading a selection of explanatory clauses chosen from “Templates” prepared by the EOIR, which are available in an online “Benchbook,” available at <http://www.justice.gov/eoir/vll/benchbook/templates/Generic%20Template.htm>.

351. See Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and*

The reason-giving requirement is not intended to further the value of participation either. Some form of participation, however, is required in that immigration judges must address the respondents' argument.<sup>352</sup> Minimal responsiveness is usually deemed sufficient, though.<sup>353</sup> Indeed, full and meaningful participation would require that respondents really understand what is happening in the proceedings.<sup>354</sup> This would entail the systematic presence of qualified interpreters<sup>355</sup> at the hearing as well as government-appointed counsel<sup>356</sup> for indigent respondents. By many accounts, neither seems to be the case.<sup>357</sup>

---

*Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 65 (2008) (quoting an IJ complaining that “[t]he cases require judges . . . to rule promptly at the end of the hearing in the form of a lengthy, detailed[,] and extemporaneous oral decision with little or no time to reflect or to deliberate”).

352. The Ninth Circuit, for example, clearly requires that IJs be somewhat responsive to respondents' arguments. *See, e.g.*, *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (stating that “IJs and the BIA are not free to ignore arguments raised by [a party]”).

353. *See Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006) (explaining that individualized consideration does not require an IJ to discuss every piece of evidence, and accepting the IJ's general statement that he considered all the evidence before him).

354. *See* Stephen H. Legomsky, *Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1653–54 (2010) (providing that in immigration proceedings many aliens do not speak English and thus require the use of a translator); *id.* at 1655 (discussing problems with immigration proceedings, including difficulties with interpreters and unprepared lawyers).

355. Respondents are entitled to interpretation services at the government's expense in all immigration court hearings. *See* NAT'L LANGUAGE ACCESS ADVOCATES NETWORK, LANGUAGE ACCESS PROBLEMS IN IMMIGRATION COURT 1 (2010), [http://brennan.3cdn.net/5c3459d5d38a1553e3\\_e3m6bxf8z.pdf](http://brennan.3cdn.net/5c3459d5d38a1553e3_e3m6bxf8z.pdf) (explaining that the Department of Justice has required federal agencies to make their services accessible to non-English speakers, pursuant to Title VI of the Civil Rights Act of 1964 and Executive Order 13166).

356. Because immigration deportation proceedings are not considered criminal in nature, noncitizens have no right to have counsel provided. *See Ogbemudia v. I.N.S.*, 988 F.2d 595, 598 (5th Cir. 1993) (“[A]n alien does not have a Sixth Amendment right to counsel in an immigration proceeding.”). They only have the right to be represented at no cost to the government. *See* Immigration and Nationality Act, 8 U.S.C. § 1362 (2012); *see also* RAMJI-NOGALES, JAYA ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 92 (2009) (showing that represented asylum clients are more than three times likely to win their cases in immigration court).

357. *See, e.g.*, IMMIGRATION COURT OBSERVATION PROJECT OF THE NAT'L LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS

Due to their meager financial resources, respondents are often unrepresented or poorly represented.<sup>358</sup> They have no constitutional right to government-appointed counsel,<sup>359</sup> but they do have a statutory right to counsel.<sup>360</sup>

Immigration thus presents us with an illustration of how a rather minimal, yet affirmative reason-giving requirement may work in practice. Here, the adjudicators' duty is restricted to giving oral reasons for their decisions. If the requirement does not fully vindicate the values of participation and transparency, it does at least provide for a workable accountability mechanism in addition to promoting accuracy.

## 2. Context 2: Sentencing

District judges are subject to a reason-giving requirement in the sentencing context, enforced by the federal courts of appeals.<sup>361</sup> Moreover, since *United States v. Booker*<sup>362</sup> and its progeny,<sup>363</sup> district judges “must adequately explain the chosen

---

IN NEW YORK CITY IMMIGRATION COURTS 11 (2011), <http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf> (pointing out that “[i]n most jurisdictions, . . . including New York, immigration court interpreters render *only* those statements made by and directed to respondents”).

358. See Nina Bernstein, *In the City of Lawyers, Many Immigrants Fighting Deportation Do It Alone*, N.Y. TIMES, Mar. 13, 2009, at A21 (discussing that many corporate firms in New York have cut back on pro bono work and other reasons for the lack of lawyers willing to represent immigrants); see also Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 10 (2008) (noting the wide disparity in the quality of representation in immigration appeals).

359. See 8 U.S.C. § 1229a(b)(4)(A) (2012) (providing that an alien has the privilege of representation, but at his own expense, not at the government's expense); *Compean*, 24 I. & N. Dec. 710, 714 (Dep't of Justice 2009) (holding that noncitizens have no “constitutional right to effective assistance of counsel in removal proceedings”), *vacated*, 25 I. & N. Dec. 1, 2 (Dep't of Justice 2009) (*vacating Compean*, but declining to reach the constitutional issues).

360. The right to counsel is codified at 8 U.S.C. § 1362 (2012). See *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007) (“[T]he statutory right to counsel exists so that an alien has a competent advocate acting on his or her behalf at removal proceedings.”).

361. See 18 U.S.C. § 3553(c) (2012) (requiring the court to provide reasons for its particular sentencing).

362. 543 U.S. 220 (2005).

363. After *Booker*, it was unclear how reasonableness review would work in

sentence to allow for a meaningful appellate review and to promote the perception of fair sentencing.”<sup>364</sup> *Booker* empowered district courts with greater discretionary authority to impose individualized, policy-based sentences based on the specific features presented by a particular case.<sup>365</sup> Specifically, *Booker* rendered the U.S. Sentencing Commission’s Guidelines (the Guidelines) advisory rather than mandatory and their application subject to review for reasonableness.<sup>366</sup> This greater discretion came at a price: the imposition of a reason-giving requirement for sentencing decisions, also known as the “reasonableness review” standard for the appellate review of sentencing decisions.<sup>367</sup>

---

practice. But the Court explained how lower courts should implement its holding in three other cases: *Rita v. United States*, 551 U.S. 338, 350–51 (2007); *Gall v. United States*, 552 U.S. 38, 46–51 (2007); and *Kimbrough v. United States*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring).

364. *Gall*, 552 U.S. at 50. A number of circuits, however, have adopted a presumption of reasonableness for within-Guidelines sentences. *See, e.g.*, *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (agreeing “with the Seventh Circuit that a sentence imposed ‘within the properly calculated Guidelines range . . . is presumptively reasonable.’” (quoting *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005))); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006) (“[A] sentence within a properly calculated Guideline range is presumptively reasonable.”); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (“We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.”); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (“[A] sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”); *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005) (“When a defendant’s sentence is within the guidelines range it is presumptively reasonable.”).

365. *See* John L. Kane, *From the Bench, Sentencing: Beyond the Calculus*, 37 LITIG. 3, 5 (2010) (pointing out that “[s]entencing . . . is in its essence subjective. . . . It is not possible to determine a condign sentence without looking closely at all relevant facts and circumstances, and making a nuanced decision”).

366. *See Booker*, 543 U.S. at 245 (finding “the federal sentencing statute that makes the Guidelines mandatory . . . incompatible with today’s constitutional holding”).

367. *See id.* at 261, 268 (discussing that circuit courts must review a sentence to determine whether it is reasonable or unreasonable); *see also* *United States v. Crosby*, 397 F.3d 103, 116 (2d Cir. 2005) (instructing that “[d]istrict judges will, of course, appreciate that whatever they say or write in explaining their reasons for electing to impose a Guidelines sentence or for deciding to

In reviewing sentences for reasonableness, the Supreme Court requires that appellate courts look both to procedural reasonableness and substantive reasonableness.<sup>368</sup> Procedural reasonableness considers the procedure the district court followed in arriving at the sentence, e.g., it must have properly calculated the Guidelines range, considered the 18 U.S.C. § 3553(a) factors,<sup>369</sup> and adequately explained the chosen sentence.<sup>370</sup> Next, the appellate court must consider the substantive reasonableness of the sentence under an abuse-of-discretion standard.<sup>371</sup>

The new reason-giving requirement is imposed through procedural reasonableness review.<sup>372</sup> Circuits require that the sentencing judges make their reasoning clear in either the trial transcript or an official sentencing statement.<sup>373</sup> Failure to give an adequate explanation for the sentence may amount to a procedural defect, which could lead to remand, reversal, or both.<sup>374</sup> Procedural reasonableness review focuses not on the

---

impose a non-Guidelines sentence will significantly aid this Court in performing its duty to review the sentence for reasonableness”).

368. See Sigmund G. Popko, *Throwing the Book at Sentencing Appeals: Reasonableness and the Booker Decision*, 38 ARIZ. ST. L.J. 483, 504 (2006) (discussing the “two-faceted analysis” that emerged in reasonableness analysis after *Booker*).

369. These factors include advisory Guidelines range and relevant policy statements, along with the nature and circumstances of the offense, history, and characteristics of the offender, seriousness of the offense, promotion of respect for the law, providing just punishment, affording adequate deterrence, protecting the public, providing appropriate training or treatment, the kinds of sentences available, the need to avoid unwarranted sentencing disparities, and the need to provide restitution. 18 U.S.C. § 3553(a) (2012).

370. See Popko, *supra* note 368, at 504 (“[C]ourts examine the procedural method by which the trial court arrived at the sentence.”).

371. See *id.* at 508 (noting that *Booker* requires reasonableness in light of § 3553(a) factors and this subjective standard and “[a]t least two circuit court decisions have equated reasonableness with an abuse of discretion-type standard”).

372. *Gall* specifically recognizes “failing to adequately explain the chosen sentence” constitutes “significant procedural error.” *Gall v. United States*, 552 U.S. 38, 51 (2007).

373. See *id.* at 50 (providing that a district court “must adequately explain the chosen sentence to allow for meaningful appellate review”).

374. See, e.g., *United States v. Friedman*, 554 F.3d 1301, 1308 n.10 (10th Cir. 2009) (reversing a non-Guideline, downward variance sentence, noting “the undeniably sparse record in this case certainly bears on the question whether Friedman’s sentence is substantively reasonable”). “To compound matters, the

terms imposed, but on the reasons given for imposing them.<sup>375</sup> The idea is that those reasons must comport with Congress's sentencing priorities.<sup>376</sup>

Just like the immigration requirement, the sentencing reason-giving requirement is primarily geared toward accountability. Despite the subjectivity of sentencing decisions, district courts must clearly explain the reasoning for their sentencing decisions to enable appellate courts to conduct the proper type of review.<sup>377</sup> The problem to which the requirement was meant to be an answer is the following: how can we allow district courts some discretion in sentencing while at the same time ensuring accountability? In *Rita v. United States*,<sup>378</sup> the Supreme Court clarified that the new standard of review in the advisory-Guidelines era would be abuse of discretion, replacing the de novo review standard for non-Guidelines sentences in the pre-*Booker* era.<sup>379</sup> Deference to a sentencing determination, however, requires that the appellate court understand the basis for that determination.<sup>380</sup> In *Gall v. United States*,<sup>381</sup> the Court

---

district court did not undertake to explain, in even a limited fashion, why [the Guidelines were not followed.]” *Id.* The circuit court lamented that its substantive reasonableness review must be conducted “against the backdrop of an exceedingly limited record and an almost complete absence of explanation on the part of the district court.” *Id.* On four different occasions, the panel stressed that “there is simply nothing in the record” to support the sentencing judge’s decision. *Id.* at 1308 n.11; *see also* *United States v. Juwa*, 508 F.3d 694, 700 (2d Cir. 2007) (finding that the district court relied on unsubstantiated facts in imposing sentence, a legal error that rendered the sentence procedurally unreasonable); FED. R. CRIM. P. 32 (requiring a presentence report).

375. *See* *United States v. Johnson*, 467 F.3d 559, 563 (6th Cir. 2006) (finding that the lack of a reasoned explanation made Johnson’s sentence procedurally unreasonable, regardless of the sentence’s substantive length).

376. Eric Citron, Comment, *United States v. Pho: Reasons and Reasonableness in Post-Booker Appellate Review*, 115 *YALE L.J.* 2183, 2184 (2006).

377. *See, e.g.*, *United States v. Figaro*, 273 F. App’x 161, 163–64 (3d Cir. 2008) (“It is therefore vital that the district court ‘state adequate reasons for a sentence on the record so that this court can engage in meaningful appellate review.’” (quoting *United States v. King*, 454 F.3d 187, 196–97 (3d Cir. 2006))).

378. 551 U.S. 338 (2007).

379. *See id.* at 361–65 (discussing *Booker*’s reasonableness review standard and discussing pre-*Booker* cases).

380. *See* *United States v. Cirilo-Muhoz*, 504 F.3d 106, 132 (1st Cir. 2007) (“In short, [appellate courts] cannot do [their] job of appellate review if [they] must guess at the reasons underlying the district court’s sentence.”).

381. 552 U.S. 38 (2007).

thus emphasized that an appellate court must clearly demonstrate that the district court abused its discretion based on the sentencing judge's reasoned decision.<sup>382</sup> The Court recognized that the thoroughness of the explanation required depends on the circumstances and noted that a brief explanation would suffice even when the defendant or the government put forth "nonfrivolous reasons" for imposing a non-Guidelines sentence.<sup>383</sup> "[W]e cannot read the statute (or our precedent) as insisting upon a full opinion in every case."<sup>384</sup> Nonetheless, "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence . . . the judge will normally go further and explain why he has rejected those arguments."<sup>385</sup>

In contrast to the immigration context, the sentencing reason-giving requirement also aims to effectively protect other democratic values, in particular transparency and participation. The Court has emphasized that the requirement serves a valuable information-forcing purpose.<sup>386</sup> Transparency in sentencing greatly increases congressional and judicial

---

382. *See id.* at 40 (holding that "courts of appeals must review all sentences . . . under a deferential abuse-of-discretion standard"). The Second Circuit gave a detailed explanation for the standard:

[F]or our own purposes, an adequate explanation is a precondition for "meaningful appellate review." We cannot uphold a discretionary decision unless we have confidence that the district court exercised its discretion and did so on the basis of reasons that survive our limited review. Without a sufficient explanation of how the court below reached the result it did, appellate review of the reasonableness of that judgment may well be impossible.

United States v. Cavera, 550 F.3d 180, 193 (2d Cir. 2008) (internal citation omitted).

383. *See Rita*, 551 U.S. at 357 ("Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.").

384. *Id.* at 356.

385. *Id.* at 357.

386. *See id.* at 356 ("Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust."); *see also* United States v. Blackie, 458 F.3d 395, 403 (6th Cir. 2008) (emphasizing that articulating reasons for a sentence "is important not only for the defendant, but also for the public to learn why the defendant received a particular sentence") (internal quotation marks and citation omitted).

understanding of the reasons for variation in sentencing.<sup>387</sup> Such transparency remains necessary to “dispel concerns that sentences vary arbitrarily among judges, or that irrelevant factors, such as race or ethnicity, significantly affect sentences.”<sup>388</sup> Moreover, transparency “facilitate[s] debate and evaluation of the merits of particular policies” as well as assists in the anticipation of the effects of changes in sentencing policy.<sup>389</sup> Perhaps more importantly, transparency “reduces the possibility of surprise and confusion regarding the reasons for the sentence ultimately imposed.”<sup>390</sup> This increased transparency, in turn, helps appellate courts determine whether a sentence is *substantively* reasonable.<sup>391</sup> Reason-giving thus serves an accuracy-enhancing purpose in sentencing. Procedural reasonableness is a tool to promote substantial reasonableness.<sup>392</sup>

The sentencing reason-giving requirement also gestures toward participation. While the Court left the quantity of stated reasons to a sentencing judge’s discretion, it did at least require that district courts give enough reasons “to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking

---

387. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 137 (2004), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf) (discussing the advantages of the Guidelines).

388. *Id.* at xi.

389. *Id.* at 137.

390. *Id.* at 12.

391. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (“After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”).

392. The Second Circuit thus noted that the procedural requirement that a district court state the reasons for a defendant’s sentence enables more accurate substantive review of that sentence. See *United States v. Rattoballi*, 452 F.3d 127, 135 (2d Cir. 2006)

Indeed, a district court may be able to justify a marginal sentence by including a compelling statement of reasons that reflect consideration of § 3553(a) and set forth why it was desirable to deviate from the Guidelines. In the absence of such a compelling statement, we may be forced to vacate a marginal sentence where the record is insufficient, on its own, to support the sentence as reasonable.

authority.”<sup>393</sup> This directive, however, is vague and leaves it up to the circuit courts to determine the level of responsiveness required.<sup>394</sup> As Judge Posner has declared, “a sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence.”<sup>395</sup> The Supreme Court indicated that a district judge may need to give a more robust explanation if “a party contests the Guidelines sentence generally under § 3553(a)—that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way—or argues for departure.”<sup>396</sup> At the same time, the Supreme Court made clear that there is no duty for judges to address the argument expressly. Implicit reasoning may suffice when an explanation can be inferred from the record.<sup>397</sup>

The sentencing context illustrates the functioning of a more searching reason-giving requirement than in the immigration context. Despite variations among circuits over the level of specificity required from the district courts in explaining sentences,<sup>398</sup> they all require a written record of the

---

393. *Rita v. United States*, 551 U.S. 338, 356 (2007) (citing *United States v. Taylor*, 487 U.S. 326, 336–37 (1988)).

394. *See id.* (“The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances.”).

395. *United States v. Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005).

396. *Rita*, 551 U.S. at 358.

397. *See id.* at 358–59 (acknowledging that a judge might have said more to explain a decision, but that such explanation was not required); *id.* at 356

[W]e cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word “granted,” or “denied” on the face of a motion while relying upon context and the parties’ prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge’s own professional judgment.

398. *See* Sherod Thaxton, *Determining “Reasonableness” Without a Reason? Federal Appellate Review Post-Rita v. United States*, 75 U. CHI. L. REV. 1885, 1898 (2008) (arguing that appellate court rulings fall along a spectrum: some requiring very little, if any, explanation of sentencing determinations and others requiring thoroughly reasoned and fact-specific sentencing opinions).

reasons.<sup>399</sup> In sentencing, the requirement has more ambitious democratic aims, as it purports to protect defendants' participation, as well as promoting accuracy in decision making and judicial accountability.<sup>400</sup>

It is no coincidence that the federal courts impose a reason-giving requirement in the immigration and sentencing contexts. Deportation and incarceration are the most serious sanctions the law may impose.<sup>401</sup> These extraordinary deprivations of liberty stand out as perhaps the most significant decision a judge can make.<sup>402</sup> When judges make decisions of such dramatic and direct personal consequence, it appears from the preceding analysis, that they are more willing to put aside the efficiency, cognitive and institutional justifications for not giving reasons.<sup>403</sup> These

399. According to a number of academic commentators, sentencing judges actually obey the reason-giving requirement. *See, e.g.*, Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 965 (2010)

[B]oth district and circuit courts usually get it right in practice, whether their language about what they are doing gets it right or not. The reasoning is generally sufficiently supported in the district court record, either on the transcript or in written reasoning of the sentencing court, so that it is apparent that all the requisite hoops were jumped through—that the judge considered the presentence report, heard arguments from parties, and gave reasons for the sentence based on legitimate considerations under the statute.

400. *See* Schauer, *supra* note 61, at 65 (discussing policy arguments for and against reason-giving requirements).

401. The U.S. Supreme Court has called the effect of deportation to be the equivalent of banishment, a sentence to life in exile, loss of property, or all that makes life worth living; in essence, deportation is a “punishment of the most drastic kind.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see also* *Jordan v. De George*, 341 U.S. 223, 231 (1951) (noting the “grave nature of deportation”); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“To deport one who so claims to be a citizen, obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living.” (citation omitted)); *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) (“To banish them from home, family, and adopted country is punishment of the most drastic kind.”); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (“Deportation is always a harsh measure.”); *Padilla-Agustin v. INS*, 21 F.3d 970, 978 (9th Cir. 1994) (“When an alien faces the threat of deportation the stakes are high.”); *Stuart L. Lustig et al.*, *supra* note 351, at 57–58 (“Perhaps the most disturbing stories of human suffering anywhere in the legal system arise in asylum cases.”).

402. *See* cases cited *supra* note 401 (discussing the serious nature of deportation).

403. *See, e.g.*, *Jordan v. De George*, 341 U.S. 223, 231 (1951) (“Despite the

two case studies show that American federal judges, despite enjoying by and large the constitutional and legislative freedom to balance justifications for and against reason-giving, do not shy away from enforcing reason-giving mandates on trial-level adjudicators when they deem it warranted.

### V. Civil Law Courts Require and Balance

In this final Part, I develop a comparative law example showing that the judicial balancing approach to reason-giving, which is typical of the Anglo-American judicial tradition, is more widely shared than one might assume. A number of civil law jurisdictions, especially in continental Europe, have apparently embraced a wholly different methodology: in principle, the drafters of the Constitution or the legislatures, not the judges, are in charge of balancing the reasons for and against reason-giving.<sup>404</sup> As a result, civil law judges are commonly either under a constitutional or a statutory duty to give written reasons for all cases decided on the merits.<sup>405</sup> In practice, however, this Part argues that despite this absolutist mandate, civil law judges engage in balancing along the lines of their American counterparts.<sup>406</sup>

#### A. Civil Law Theory: Affirmative Duty

The no-balancing approach has traditionally been the civil law approach. This methodology originated in France, where all judges are subject to a statutory reason-giving requirement and must write opinions in all cases disposed of on the merits.<sup>407</sup> The

---

fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.”).

404. See *infra* note 422 and accompanying text (discussing the emergence of statutory reason-giving requirements in civil law jurisdictions in Europe).

405. See *infra* notes 417–421 and accompanying text (discussing the French requirement to give reasons).

406. See *infra* note 432 and accompanying text (pointing out that the *Cour de cassation* writes differently depending on the type of case).

407. See *supra* note 45 and accompanying text (discussing French statutes that require written opinions that include reasons for the decision).

requirement can be traced back to the August 16–24, 1790 revolutionary statute on judicial organization, which imposed a formal mandate on courts to provide reasons for their decisions.<sup>408</sup> The reform was constructed on the principle—a corollary of legislative sovereignty—that the arbitrary power of the Old Regime courts (the “*parlements*”) must end.<sup>409</sup> The pre-revolutionary judiciary was perceived as a corrupt and reactionary enemy of social reform.<sup>410</sup> In the new regime, legislation was to be the primary source of law and judges were no longer to participate in the lawmaking function. They would become the “mouthpiece of the law,” as Montesquieu had hoped for.<sup>411</sup> The revolutionaries endorsed legislative supremacy, following Rousseau’s postulate that law is the expression of the general will and can therefore be generated only by the elected body, that is, by the legislature.<sup>412</sup> In this view, enacting a reason-giving requirement was thought of as the ideal tool to monitor the judges of the young Republic.<sup>413</sup> The mandate aimed at subordinating judges to the legislature and preventing them from making law by demanding that they systematically indicate

---

408. The August 16–24, 1790 Statute, Title V, art. 15 provides that a judicial opinion must have four parts, the third of which must consist of “the reasons that determined the judge” (“*les motifs qui auront déterminé le juge*”). See JACQUELINE LUCIENNE LAFOND, *LA RÉVOLUTION FRANÇAISE FACE AU SYSTÈME JUDICIAIRE D’ANCIEN RÉGIME* (2001) (recounting the attitude of the French revolutionaries toward the Old Regime judicial system).

409. See Bernard Beignier, *Les Arrêts de Règlement*, 9 DROITS 45 (1989) (discussing the pre-revolutionary French courts and their tendencies to behave like sovereign legislatures enacting rules of general application). See generally ARLETTE LEBIGRE, *LA JUSTICE DU ROI: LA VIE JUDICIAIRE DANS L’ANCIENNE FRANCE* (1988) (discussing the role of the law in the pre-revolutionary royal regime in France).

410. See ISSER WOLLOCH, *THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER 1789–1820* 297–320 (1994) (discussing the attitude of French revolutionaries toward the Old Regime judicial system).

411. MONTESQUIEU, *THE SPIRIT OF THE LAWS* Bk. XI, Ch. 6 (1748).

412. See JEAN JACQUES ROUSSEAU, *SOCIAL CONTRACT* Bk. II. (1762).

413. See Cohen, *supra* note 226, at 257, 261 n.11 (“This interpretation is comforted by historical research on the emergence of a duty to give reasons in French law.” (citing Tony Sauvel, *Histoire du Jugement Motivé*, 61 RDP 5 (1955)); Godding, *supra* note 20, at 65 (discussing the emergence of the reason-giving tradition for published decisions in France); Pascal Texier, *Jalons pour une histoire de la motivation des sentences*, in *LA MOTIVATION, ACTES DU COLLOQUE LIMOGES*, 1998, L’ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE 5 (2000).

which provision of the statute they applied in each particular case.<sup>414</sup>

In practice, however, as Mitchell Lasser has shown, in an ironic twist, over the past two hundred years or so, French judges have deployed such a cryptic style of opinion writing that they have perhaps been less constrained than their common law colleagues.<sup>415</sup> To this day, the French judicial opinion “is [often] an uninformative syllogism of a few hundred words that purports to deduce the holding from a code or statutory provision. French opinions are neither reasoned nor candid.”<sup>416</sup> They are famously concise, lacking any developed findings of fact, almost never referring to past judicial decisions, and containing little that could be considered as serious interpretive or policy analysis.<sup>417</sup> French judges do not exist as individual reason-givers. The fiction is that they should express the view of “the Court,” a single, unanimous unit.<sup>418</sup> Concurrences and dissents are prohibited.<sup>419</sup> Opinions are not presented as the work of individual judges, but strictly adhere to a disembodied, objective tone, using the third person singular—“In the name of the French people . . . [the Court] decides.”

This structure, which in theory should have ensured that the statutory law alone dictate the outcome of judicial controversies, has led to the opposite result. French judges have no personal responsibility for shaping the doctrine they produce and often abstain from disclosing much information on the reasons that

---

414. See Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 94 (1994) (discussing the formal requirements of French judicial opinions).

415. See MITCHEL DE S.-O.-L'E LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 5 (2004) (“In a paradoxical twist, French judges have . . . deployed a cryptic style of opinion writing whose main purpose was to prove their dutiful submission but which left them in fact more free.” (internal quotation marks and citation omitted)).

416. Wells, *supra* note 414, at 84.

417. See *id.* at 104–06 (showing that the paradigmatic French judicial opinion has survived unchanged since the Revolution).

418. See Wells, *supra* note 414, at 98 (“Anonymity and collegial decisionmaking are regarded as necessary safeguards for judicial independence and impartiality.”).

419. See *id.* (“French opinions contain no dissents or concurring opinions . . .”).

persuaded them.<sup>420</sup> As a result, the reason-giving requirement fails to act as a check on judicial discretion.<sup>421</sup> The *Conseil d'État*, for example, France's Supreme Court for administrative law, has evolved as one of the country's foremost lawmakers, resolutely departing from the role ascribed to courts by the revolutionaries, all the while maintaining the tradition of syllogistic opinions.<sup>422</sup> Since the Second World War, one of the *Conseil d'État*'s boldest moves has been to declare "general principles of law applicable even in the absence of legislative provision."<sup>423</sup> These general principles, which the *Conseil d'État* has used to review both executive and legislative action, differ substantially one from the other and have been developed outside of any systematic doctrinal framework.<sup>424</sup>

The first such principle to be recognized was a due process right to fair hearing in *Dame Veuve Trompier-Gravier*, which is considered a landmark case in French law.<sup>425</sup> Mrs. Trompier-Gravier was authorized by the prefecture to run a newsstand in Paris.<sup>426</sup> The prefect withdrew the authorization but refused to explain why.<sup>427</sup> The *Conseil d'État* reversed, not based on a statutory provision, but on the ground that "not having been given the opportunity to put forward her grounds of defense, [the

---

420. See *id.* at 106 (stating that French opinions included no reasons at all prior to the French Revolution, and that judicial opinions since the Revolution have merely added a few clauses).

421. See *id.* at 107–08 (arguing that French courts have exercised broad authority to make law since the Revolution in spite of the reason-giving requirements intended to limit the courts).

422. See FRITS STROINK & EVELINE C.H.J. VAN DER LINDEN, JUDICIAL LAWMAKING AND ADMINISTRATIVE LAW 108 (2005) (discussing the development of the *Conseil d'État*).

423. Roland Drago, *The General Principles of Law in the Jurisprudence of the French Conseil d'État*, 11 AM. U. L. REV. 126, 126 (1962) (internal quotation marks omitted). See generally Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 INT'L & COMP. L.Q. 594 (1986) (discussing the increasing importance of general principles in French courts' decisions).

424. Some flow from constitutional principles, others stem from "the nature or essence of a republican regime," e.g., the principle of legality, or from the "spirit of a text or a body of texts"; still others are said to be required by the rule of law. See generally RENÉ CHAPUS, DROIT ADMINISTRATIF GÉNÉRAL (2001).

425. *Dame Veuve Trompier-Gravier*, CE Sect., May 5, 1944, Rec. Lebon 133.

426. *Id.*

427. *Id.*

respondent] is entitled to maintain that the challenged decision has been taken by the Prefect of Seine in an irregular manner and is thus *ultra vires*.”<sup>428</sup> What is extraordinary about this opinion is that in a mere 236 words,<sup>429</sup> making no attempt to justify its power to create law without relying on statutory authority or to even suggest that there is a gap in the existing statutes, and without ever referring explicitly to “general principles,” the *Conseil d’État* is effectively declaring its prerogative to create law overriding administrative regulations as well as legislation.<sup>430</sup> Think of a *Marbury v. Madison*<sup>431</sup> opinion that would never use the words: “power,” “Constitution,” “constitutional,” “unconstitutional,” “legislature,” “judicial authority,” etc., and would provide no justification whatsoever for

428. *Id.*

429. *Id.* The opinion is so short that it can be quoted at full length:

Conseil d’Etat.

Having seen the summary application and the further particulars filed on behalf of Madame the Widow Trompier-Gravier, born Tichy (Marie Gabrielle) domiciled in Paris 14th arrondissement . . . asking that it please the Conseil to annul a decision dated 26 December 1939 whereby the Prefect of Seine withdrew the license to occupy a newspaper kiosk of which she was the holder;

Having seen the orders of the Prefect of Seine dated 13 March and 11 December 1924 and 22 January 1934; the Act of 18 December 1940;

Considering that it is settled that the challenged decision, whereby the Prefect of Seine withdrew Madame Trompier-Gravier’s licence to sell newspapers in a kiosk on Boulevard Saint-Denis, Paris, was taken on the grounds of misconduct by the applicant;

Considering that, having regard to the nature of the withdrawal in the circumstances mention and to the gravity of this sanction, such a measure could not lawfully be taken without Madame Trompier-Gravier’s having been enabled to discuss the grievances mounted against her; that the applicant, not having been given the opportunity to put forward her grounds of defense, is entitled to maintain that the challenged decision has been taken by the Prefect of Seine in an irregular manner and is thus *ultra vires*; (Prefect’s decision annulled).

430. A few months after the decision *Trompier-Gravier*, the Court finally referred explicitly to the “general principles” in the case of *Aramu*, CE Ass., Oct. 26, 1945, Rec. 213, which held, in a post-war, purging case dealing with the dismissal of a police officer implicated in the Vichy regime, that “it follows . . . from general principles of law applicable even in the absence of a text that a sanction cannot be lawfully pronounced when the respondent was not given the opportunity to meaningfully defend himself.”

431. 5 U.S. 137 (1803).

the newfound judicial authority to determine the constitutionality of legislation.

To sum up, the French statutorily imposed reason-giving requirement, rather than working as a compelling judicial restraint mechanism effectively subordinating judges to legislators, has arguably allowed courts to exercise great discretion in making law. More fundamentally, though, it has proved ineffective at mechanically revealing judges' reasons for deciding cases. In practice, much like common law judges, French judges have had the liberty to balance the justifications for and against reason-giving. They have developed their own judicial methodologies to sort out cases they deem worthy of serious reason-giving from those that are relegated to boilerplate explanations.<sup>432</sup>

### *B. Civil Law Reality: De Facto Balancing*

Initially, the French example seemed to suggest that the civil law approach to reason-giving is fundamentally different from the U.S. federal courts' balancing approach in that it imposes the writing of a formalized, unanimous opinion for all cases decided on the merits while American judges can choose whether or not to give reasons and in what form (be it a 100-page long published opinion including several concurrences and dissents or an oral explanation delivered from the bench).<sup>433</sup> In practice, however, the American and the civil law approaches are not so inconsistent. De facto civil law judges, who are sensitive to the never-ending tension between reason-giving and caseload management, balance the reasons for and against reason-

---

432. See, e.g., Christian Atias, *Crise de la Motivation Judiciaire?*, COUR DE CASSATION (May 17, 2005), [http://www.courdecassation.fr/colloques\\_activites\\_formation\\_4/2005\\_2033/intervention\\_m\\_atias\\_1\\_8108.html](http://www.courdecassation.fr/colloques_activites_formation_4/2005_2033/intervention_m_atias_1_8108.html) (last visited Jan. 17, 2015) (analyzing the reason-giving practices of the *Cour de cassation* and pointing out that the court writes differently when it is engaging in dispute resolution and when it is developing the law, "general and solemn phrases" being reserved to the latter case) (on file with Washington and Lee Law Review).

433. See *infra* note 447–448 and accompanying text (discussing the discretionary jurisdiction and practices of the U.S. Supreme Court).

giving.<sup>434</sup> While there is a de jure right to reasons in jurisdictions operating under a constitutional or a statutory reason-giving requirement, that right does not always exist de facto.<sup>435</sup>

In light of growing dockets and other resource constraints, civil law judges ration reason-giving. They engage in what empirical legal scholars William Reynolds and William Richman have called “de facto certiorari” in the context of the U.S. courts of appeals.<sup>436</sup> The idea of de facto certiorari describes the fact that dramatic increases in caseloads have transformed the federal courts of appeals into “certiorari courts” in the sense that they use streamlined procedures doing away with oral arguments and full-fledged opinions for a significant portion of their docket, all the while deciding all properly presented appeals on the merits.<sup>437</sup> According to Reynolds and Richman, despite being courts to which appeals are formally as of right, for reason-giving purposes, the courts of appeals often function as if they had discretionary jurisdiction.<sup>438</sup> They certainly decide all properly presented appeals, but because of docket pressures, they can give detailed reasons only in a subset of the cases they dispose of on the merits.<sup>439</sup>

---

434. See *infra* notes 461–463 (arguing that the current practices of French courts indicate that courts are in fact balancing reasons for and against reason giving).

435. See *supra* note 430 and accompanying text (discussing how French judges have rationed reason-giving).

436. William L. Reynolds & William M. Richman, *The New Certiorari Courts: Congress Must Expand the Number of Judges on the U.S. Courts of Appeals to Restore Their Traditional Role*, 80 JUDICATURE 206, 207 (1997) (hereinafter Reynolds & Richman, *The New Certiorari*); see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 281–82 (1996) (stating that the expectation of a fully reasoned, published opinion at the appellate court level no longer exists).

437. See Reynolds & Richman, *The New Certiorari*, *supra* note 436, at 206 (stating that Article III appellate courts use traditional methods of oral argument and fully reasoned opinions in less than half of their cases).

438. See *id.* (comparing the practices of certiorari courts with present appellate court practices); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006) (suggesting that “tracking and screening systems have instituted what is, in effect, a gloss of discretionary appellate jurisdiction for the appeal as of right to which federal litigants are statutorily entitled”).

439. See Richman & Reynolds, *supra* note 436, at 282 (“[P]ublished opinions today account for less than a third of federal circuit terminations.”).

Interestingly, something similar has happened in a number of civil law courts, which operate under the dual constraint of mandatory jurisdiction and the duty to write opinions for all cases decided on the merits.<sup>440</sup> Certain appeals receive more careful consideration, while others are disposed of on the merits with minimal reason-giving. For the former, the number and authority of reason-givers may be greater than for the latter: some appeals are decided by a three-member panel of judges or by an even larger panel of judges, while others are resolved by a single judge, or sometimes, effectively by court staff.<sup>441</sup> Correspondingly, the reason-giving may range from a carefully crafted, individualized opinion to a two-sentence boilerplate opinion form.<sup>442</sup> If it is true that civil law judges also engage in this type of *de facto* certiorari, then the interesting institutional design observation is the following: whether or not drafters of the Constitution or legislators attempt to preempt courts' balancing the justifications for and against reason-giving by imposing a blanket requirement, judges nonetheless develop their own reason-giving methodologies to reconcile caseload constraints and other goals of the judicial process with the democratic values of reason-giving.

Let us compare two highly respected courts that epitomize to some extent their respective legal traditions, the European Court of Human Rights (ECtHR) and the U.S. Supreme Court. Despite different respective institutional and cultural settings, these two institutions are sufficiently similarly situated for the purposes of comparing reason-giving. Although neither is a constitutional court, the two courts are similar in that they engage in extensive constitutional review based on a written instrument<sup>443</sup> and have a direct relationship with individuals (unlike a number of European constitutional courts that individual litigants cannot petition directly.)<sup>444</sup> There are, however, major differences between the two

---

440. See *infra* note 449 and accompanying text (discussing the mandatory duty to give reasons in French judicial opinions).

441. See *infra* note 456 and accompanying text (discussing the relatively new practice of allowing a single judge to determine admissibility of cases).

442. See *infra* notes 459–464 and accompanying text (discussing methods of resolving cases and completing opinions).

443. Respectively, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United States Constitution.

444. The ECtHR is one of Europe's supranational courts, which hears

institutions. While the ECtHR is a supranational court whose reach now extends to close to 900 million people in forty-seven countries, the U.S. Supreme Court is a national court.<sup>445</sup> Moreover, and most importantly for the purpose of the current argument, the two courts are dissimilar in one key respect: while the ECtHR is under a blanket reason-giving requirement *and* has *mandatory* jurisdiction over all the meritorious petitions it receives,<sup>446</sup> the Supreme Court enjoys *discretionary* jurisdiction over its docket<sup>447</sup>

---

complaints that a contracting State has violated the fundamental rights protected by the European Convention on Human Rights. *See* THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 34, Sept. 21, 1970 (“The Court may receive applications from any person . . . claiming to be the victim of a violation by one of the High Contracting Parties.”); Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEGAL STUD. 405, 405–07 (2003) (describing the European Convention on Human Rights as a constitutional order in the sphere of human rights); *see also* PETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 51 (4th ed. 2006) (emphasizing the importance of individual access to the ECtHR).

445. The European Convention on Human Rights, an international treaty created after the Second World War, has given rise to a system that has taken on elements of a federal constitutional order. Though not a federation, the Convention system is notable for its overlapping rights regimes: a supranational level charter of rights, interpreted by the ECtHR, and vibrant rights protection and articulation in the many states signatories to the Convention.

446. *See* EUR. CT. H.R., RULES OF COURT 37–38 (2014), [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf) (spelling out the writing and publication requirements for decisions and describing the mandatory content of the ECtHR’s opinions). The court’s mandatory jurisdiction has been significantly relaxed by Protocol 14, which entered in force in June of 2010. As amended, the Convention allows single judges to “declare inadmissible or strike out of the Court’s list of cases an application.” Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 27, June 4, 2010 (amending the control system of the Convention).

447. The U.S. Supreme Court has evolved from a Court of mandatory jurisdiction to a Court of discretionary jurisdiction thanks to various acts passed by Congress. The Judiciary Act of 1891, also known as Evarts Act, created the U.S. courts of appeals, which resulted in an immediate reduction in the Supreme Court’s workload (from 623 cases filed in 1890 to 379 in 1891) by transferring most of the Court’s direct appeals to the newly created nine circuits and by introducing the statutory writ of certiorari for the first time as a mechanism to enable discretionary review and docket control. *See* Act of March 3, 1891, ch. 517, 26 Stat. 826. *See generally* DORIS PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980). Most importantly, the Judiciary Act of 1925 (also known as the “Judge Bill”) and the Supreme Court Case Selections Act of 1988 finalized the transformation of the Court into a court of discretionary jurisdiction. Judiciary Act of 1925, Pub. L. No. 68–415, 43 Stat. 936; Supreme Court Case Selections Act of 1988, Pub. L. No. 100–352, 102 Stat.

and almost always refrains from explaining its denials of certiorari.<sup>448</sup>

The French revolutionary ideal permeates the ECtHR reason-giving requirement: in theory, the European court is not supposed to balance justifications for and against reason-giving.<sup>449</sup> In recent years, however, the ECtHR has become a victim of its own success. It faces a docket crisis of massive proportions,<sup>450</sup> the consequence of the increasing number of member states subject to its jurisdiction, its favorable public reputation, a distrust of domestic judiciaries in some member states, and enduring human rights violations in others.<sup>451</sup> As a

662. Today, the Court enjoys nearly unfettered discretion to choose which cases to hear via the discretionary writ of certiorari.

448. See SUP. CT. R. 16.1. (providing that, after consideration of the papers distributed on petition for certiorari, “the Court will enter an appropriate order,” which “may be a summary disposition on the merits”); see also EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 328 (9th ed. 2007) (“Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefor.”); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 402 (2004) (pointing out that no explanation “is ever rendered for the Court’s action,” and “no record of the Court’s vote is ever published (regardless of whether the case is granted or denied)”).

449. This ideal is reflected in the ECtHR case law itself. Since 1994, the ECtHR has held that the right to fair trial protected by Article 6 of the Convention requires that “judgments of courts and tribunals should adequately state the reasons on which they are based.” *Hirvisaari v. Finland*, App. No. 49684/99, 38 Eur. H.R. Rep. 7, para. 30 (2004); see also *Ruiz Torija v. Spain*, App. No. 18390/91, 19 Eur. H.R. Rep. 553, para. 29 (1995); *Higgins v. France*, App. No. 20124/92, 27 Eur. H.R. Rep. 703, para. 42 (1999) (considering reason-giving as critical to ensure effective access to justice and holding that judgments lacking reasons are a violation of the right to fair trial).

450. As of December 31, 2013, there were 99,900 cases pending before the European Court of Human Rights. *Supra* note 71 and accompanying text.

451. The caseload problem can be traced back to Protocol 11, entered into force in 1998, which replaced the Commission and original structure of the ECtHR with a permanent court. Prior to that reform, the Convention system was based on a division of labor between the European Commission of Human Rights and the ECtHR: the Commission decided on the admissibility of an individual complaint, and reviewed the merits of the case in the first instance. In most cases, the ECtHR would have the final merits determination. See Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT’L L. REV. 101, 101–02 (2003) (discussing the jurisdiction and case load of the European Court

result, in 2013, the ECtHR issued 916 judgments,<sup>452</sup> that is, about twelve times more than the U.S. Supreme Court, which handed down seventy-five opinions during the same time frame.<sup>453</sup>

The peculiar institutional design of the ECtHR, together with its bureaucratic culture,<sup>454</sup> partly account for this contrast. First, the ECtHR does not decide cases en banc with all of the forty-seven judges present.<sup>455</sup> Instead, depending on the nature and importance of the case, judges may sit alone or in “committees” of three judges, “chambers” of seven judges, and a “Grand Chamber” of seventeen judges.<sup>456</sup> Second, ECtHR judges rely on an army of bureaucrats, including about 270 full-time staff attorneys to write opinions, using templates, databases of ready-made clauses, and other shortcuts.<sup>457</sup> These institutional differences, however, should not be the end of our inquiry. There are latent similarities between the European and American high courts’ judicial practices.

Indeed, upon closer examination, it appears that the two courts’ reason-giving practices are not so far apart. Granted, during the 2013 Term, the Supreme Court issued seventy-five

---

of Human Rights).

452. EUR. CT. H.R. ANNUAL REPORT 197 (2014). It should be noted that the ECtHR disposes of the bulk of its applications via “decisions,” rather than “judgments.” Given the cursory and repetitive nature of decisions, I focus on judgments for the purposes of comparison with U.S. opinions.

453. *2013 Term Opinions of the Court*, SUPREME CT. OF THE U.S. (Jan. 18, 2015), <http://www.supremecourt.gov/opinions/slipopinion/13> (last visited Jan. 19, 2015) (on file with Washington and Lee Law Review).

454. See Andrew Tickell, *Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a “Bureaucratic Rational” Construction of the Admissibility Decision-Making of the European Court of Human Rights*, 12 GER. L.J. 1786, 1796–97 (2011) (pointing out the bureaucratic character of the ECtHR, especially of its admission decision-making procedures).

455. Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 14–24 (2005) (discussing the structure and practice of the ECtHR).

456. EUR. CT. H.R. RULE 1 (defining “Grand Chamber,” “Chamber,” and “Committee”). Since Protocol No. 14 came into force on June 1st, 2010, judges sitting alone (“single-judge formation”) can now decide whether or not to admit cases. EUR. CT. H.R. ANNUAL REPORT 2010 18, 79 (2011).

457. See McKaskle, *supra* note 455, at 27–31 (discussing the large staff of the ECtHR and noting that “[e]xtensive use of a central legal staff may also result in greater bureaucratic or institutional decision-making”).

opinions while the ECtHR issued 916.<sup>458</sup> But from a practical and functional standpoint, the European judges did not author 916 *lawmaking* opinions.<sup>459</sup> Only a small percentage of these 916 opinions are truly making law and of any jurisprudential significance. Tellingly, in 2013, only about thirty opinions were deemed by the court to be of high importance.<sup>460</sup> These are judgments the ECtHR considers to be making a significant contribution to the development, clarification, or modification of its case law, and, therefore, are worthy of reporting in its official printed reports.<sup>461</sup> Even more strikingly, the Grand Chamber, which “deals with cases that raise a serious question of interpretation or application of the Convention, or a serious issue of general importance,”<sup>462</sup> and is thus perhaps the U.S. Supreme Court’s most plausible comparator at the European level, authored only thirteen of that year’s 916 judgments—about 1.4%.<sup>463</sup>

These figures suggest that the ECtHR is in fact balancing reasons for and against reason-giving. In contrast to the U.S. Supreme Court, whose caseload has been diminishing in the past years,<sup>464</sup> the ECtHR does not have at its disposal the writ of

---

458. See *infra* note 464 and accompanying text (listing the number of Supreme Court opinions produced each year).

459. See EUR. CT. H.R. ANNUAL REPORT 2013, at 73–75 (2014) (listing the twenty-nine opinions selected for publication in the Reports of Judgments and Decisions 2013 as well as the four additional opinions that the court reserves the right to report).

460. See *id.* (listing only twenty-nine opinions as selected for publication out of 913 total).

461. See *id.* (listing only the few opinions selected for publication).

462. EUR. CT. H.R. ANNUAL REPORT 2010, at 17 (2011).

463. EUR. CT. H.R. ANNUAL REPORT 2013, at 61 (2014).

464. The Justices decided ninety-two merits cases in total during the 2009 term compared to seventy-three during the 2013 term. The numbers for previous Terms are 73 (OT13), 79 (OT12), 78 (OT11), 85 (OT10), 86 (OT09), 79 (OT08), 71 (OT07), 72 (OT06), 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00), and 77 (OT99). See *Stat Pack Archive*, SCOTUSBLOG <http://www.scotusblog.com/reference/stat-pack/> (last visited Jan. 19, 2015) (on file with the Washington and Lee Law Review); see also Erwin N. Griswold, *Rationing Justice—The Supreme Court’s Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 339–41 (1975) (arguing that the Court’s discretionary cutting of its docket has become extreme); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 410–12 (discussing the effect of mandatory jurisdiction repeal); Margaret Meriwether

certiorari. But that has not prevented the European court from disposing of a large proportion of its docket through procedural terminations<sup>465</sup> and from concentrating its attention on the small share of cases it decides with an eye to making law, all the while issuing boilerplate opinions or opinions entirely written by the staff for the remaining cases of its reviews on the merits.<sup>466</sup> In other words, the ECtHR is partly operating as a certiorari court in which reason-giving functions as an implicit filtering mechanism.<sup>467</sup> De facto, it selects the cases judges will decide by giving meaningful reasons.

This comparison allows us to rethink the balancing of reasons. Another way of thinking about the problem seems to be the following: should courts decide more cases at the cost of giving fewer reasons and reasons of lesser quality? Or should

---

Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751–58 (2001) (same); Philip Allen Lacovara, *The Incredible Shrinking Supreme Court: If Their Productivity Were Measured By Private Sector Standards, the Supremes Might Receive Pink Slips*, AM. LAWYER 53 (Dec. 2003) (listing problems with the policy of giving Supreme Court justices absolute discretion over their docket).

465. See Tickell, *supra* note 454, at 1792–93 (critiquing the ECtHR's failure to clarify the criteria it uses for declaring cases admissible or not admissible).

466. For example, on February 28, 2002, the ECtHR issued a set of 133 nearly identical opinions (but for the name of the petitioners) in conjunction with 133 judgments on alleged Article 6 violations by Italian courts—that is, on the unreasonable delay in processing trials. Somewhat amusingly, even dissents can be boilerplate: Italian judge Ferrari Bravo dissented on the entire set of judgments using the same exact dissenting opinion. See, e.g., Maddalena Palmieri v. Italy, App. No. 51023/99, Sec. 1, Eur. Ct. H.R., Feb. 28, 2002, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60222> (beginning the dissent with the following words of apology: “I regret for having to dissociate myself from my colleagues in the 133 cases examined today, but I believe that the measure is outrageous and one can no longer remain silent”) (my translation).

467. This raises the question whether the opinions that the ECtHR did not consider to be of “high importance” last year should have been issued at all considering that the ECtHR increasingly sees its role as being primarily that of a supranational constitutional court, rather than a super appellate court. See Wojciech Sadurski, *Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 HUM. RTS L. REV. 397, 397–401 (2009) (arguing that the ECtHR has acquired an increasing “constitutional dimension,” thus dispelling the fiction of it being merely a sort of super-appellate court that scrutinizes individual decisions rather than laws of the Member States).

they decide fewer cases and give more reasons and reasons that are more explanatory? The answer probably depends on the court under consideration. For instance, should the U.S. Supreme Court augment its shrinking docket at the expense of its elaborate opinions?<sup>468</sup> A number of legal scholars seem to think that if the Court took more cases, and took the “right” cases, it could provide much needed guidance in a broader range of areas of the law.<sup>469</sup> Conversely, should the ECtHR expand its discretion to hear cases<sup>470</sup> and decide fewer cases so that it has more resources to dedicate to quality reason-giving for the important cases it chooses to decide? Current plans for reforming the ECtHR seem to be heading in this direction.

## VI. Conclusion

To conclude, it is clear that judicial reason-giving implicates a wide variety of objectives. In practice, judges may be required to balance democratic justifications for reason-giving against institutional, cognitive, and efficiency justifications not to give reasons. The apparent comparative law story is that civil lawyers tend to think about reason-giving in absolutist terms, while common lawyers favor a balancing approach. The former focus on the judicial restraint potential of reason-giving, while the latter see reason-giving as a judicial prerogative best left to the courts’ discretion. This Article is part of a larger project that aims to bridge the gap between these two ways of thinking about reason-

---

468. See Black & Spriggs II, *supra* note 69, at 630 (analyzing data showing that the average length of the majority opinion of the Court has increased in recent years).

469. See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 622–23 (2009) (arguing that the Court is taking too many cases involving major questions of constitutional law and too few cases resolving circuit splits).

470. The ECtHR seems to be moving forward in that direction, as evidenced by the creation of a “Filtering Section” in January 2011. The Section is presently focused on filtering out inadmissible cases but is expected to assume broader functions in the years to come. See *FILTERING SECTION SPEEDS UP PROCESSING OF CASES FROM HIGHEST CASE-COUNT COUNTRIES*, EUR. CT. OF HUM. RTS., [http://www.echr.coe.int/Documents/Filtering\\_Section\\_ENG.pdf](http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf) (discussing the function of the Filtering Section).

giving and to study decision making in different legal cultures. The Article's principal contribution lies in bringing attention to the fact that judges constantly make trade-offs between reasons for reasons and reasons against reasons. In balancing these equities, the civil law and the common law tradition have developed methodologies that turn out to be more analogous than usually assumed.