Giving Reasons

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The practice of providing reasons for decisions has long been considered an essential aspect of legal culture. In this article, Frederick Schauer explores the logic of giving reasons. What is the structural relationship between a reason and the result that it is a reason for? What commitments, if any, attach to giving a reason? Professor Schauer concludes that giving reasons involves committing, and that this insight can inform our understanding of why giving reasons might be encouraged in some spheres yet discouraged in others.

Sometimes people who make decisions give reasons to support and explain them. And sometimes they do not. The conventional picture of legal decision-making, with the appellate opinion as its archetype and “reasoned elaboration” as its credo,¹ is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds.² In law, and often elsewhere, giving reasons is seen as a

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². “The Court’s product has shown an increasing incidence of the . . . formulation of results accompanied by little or no effort to support them in reason . . . and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.” Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3 (1957). For other critiques of the Supreme Court’s use of summary opinions, see Ernest J. Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958); Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 100-01 (1959); Albert M. Sacks, The Supreme Court, 1953 Term—Foreward, 68 Harv. L. Rev. 96 (1954); see also Paul R. Verkuil, Crosscurrents in Anglo-American Administrative Law, 27 WM. & MARY L. Rev. 685, 701-05 (1986) (maintaining that Americans find a conception of natural justice or due process without a requirement that decisionmakers give reasons “inexplicable,” and criticizing the failure of English courts to embrace such a requirement); Anthony
necessary condition of rationality. To characterize a conclusion as an *ipse dixit*—a bare assertion unsupported by reasons—is no compliment.

The conventional picture, however, may be mistaken. Like voters who simply say aye or nay, like publishers and journal editors who turn down submissions without explanation, like employers and admissions officers who send rejection letters that announce outcomes without providing justifications, like homeowners who rarely explain to the painters and carpenters whose proposals they have rejected why someone else was chosen, and like referees in sporting events who make calls that are ordinarily unsupported by explanations, many decisionmaking environments eschew the very feature that the conventional picture of legal decisionmaking takes as an essential component of rationality. Even within the law itself, decisionmaking devoid of reason-giving is more prevalent than might at first be apparent. When juries deliver verdicts, when the Supreme Court denies certiorari, when state supreme courts refuse review, when federal courts of appeals dispose of cases from the bench or without opinion, when trial judges rule on objections and frequently when they rule on motions, when lawyers exercise peremptory challenges and sometimes when judges dismiss jurors for cause, when housing and zoning authorities refuse to grant variances from their regulations, and sometimes when judges impose sentences, the conclusion stands alone, unsupported by reasons, justifications, or explanations.

Are all of these examples instances of irrationality? Some may be explained by the efficiencies of saving time, but is that the only justification for failing to give reasons? Do the examples suggest that there may be fewer grounds for treating reason-giving as a necessary condition of rationality than many scholars have supposed? Perhaps at times it is better not to give reasons than to give them. If so, when might that be? The practice of giving reasons in law has rarely been analyzed, perhaps because we assume the practice is central to what makes the legal enterprise distinctive, and is indeed virtually definitional of rationality. Yet once we see that the practice of giving reasons is not omnipresent, we are better situated to try to understand what is gained—and at what price—when a decisionmaking environment requires giving reasons.

My aim is to explore the logic and morality of giving reasons—the practice of engaging in the linguistic act of providing a reason to justify what we do or what we decide. By "logic" I mean the structural relationship between a reason and what it is a reason for; and by "morality" I mean the question of what commitments, if any, attach to giving a reason, announcing it publicly, and writing it down in canonical form. If offering a reason consists of taking a decision to its next level of generality, as I will argue it ordinarily does, then is the offeror committed to the reason, and thereby to the other decisions that lie within its scope, or only to the actual decision itself? If only to the actual decision, then what role does the reason play? And if to the reason as well as to

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the result, then might there be stronger arguments against giving reasons than traditionally recognized?

This inquiry into the practice of giving reasons is part of the larger topic of the role of generality in law. Consider rules, principles, standards, canons, maxims, and, of course, laws. The institution we call "law" is soaked with generality, for one of its central features is the use of norms reaching beyond particular events and individual disputes. Indeed, it is more than mere coincidence that the very name for the enterprise—law—is the same one that scientists use to designate exceptionless empirical generalizations.3

Although many of the devices of generality are familiar, reason-giving is both the most common and the least analyzed. When lawyers argue and when judges write opinions, they seek to justify their conclusions, and they do so by offering reasons. The reasons they provide, however, are broader than the outcomes they are reasons for. Indeed, if a reason were no more general than the outcome it purports to justify, it would scarcely count as a reason. The act of giving a reason, therefore, is an exercise in generalization. The lawyer or judge who gives a reason steps behind and beyond the case at hand to something more encompassing.4 By learning more about reasons, we may learn more about the place of generality in law, and indeed about the relationship of generality to rationality.

I

I start with a crucial definitional preliminary. When referring to "reasons," I mean less by that word than is customary in the literature of law, moral philosophy, and normative theory. I certainly mean nothing so grand as Reason itself, the capacity of thought and rationality. But even when we get less grandiose than Reason, and think only of "reasons," the common uses still carry too much freight. Although philosophers debate whether reasons are the causes of the actions they are reasons for, whether they are internal or external, and whether they are propositions or beliefs or facts, they often use the word "reason" in such a way as to suggest that "good reason" is redundant and "bad reason" oxymoronic.5 To have a reason for a decision is to have a good reason, and what some might think a bad reason is simply no reason at all.

3. The similarity in name may stem from an ontology that few accept today. If legal norms and empirical regularities emanate from the same stroke of the hand of God, then it makes perfect sense to use the same word to mark the two phenomena.

4. I intentionally do not say "above." Nothing in my analysis presupposes a deductive or "top down" model of normative reasoning, in which we move down a hierarchy of norms from the most general at the top to the most particular at the bottom. Even if we always reasoned from the "bottom up," from the particular to the general, the general would still necessarily encompass more than the particular, for that is just what it is to be general.

5. See, e.g., Richard Norman, Reasons for Actions: A Critique of Utilitarian Rationality (1971); David A.J. Richards, A Theory of Reasons for Action (1971); G. Harman, Reasons, in Practical Reasoning 110 (Joseph Raz ed., 1978). The latter two authors use the term "good reason," but only to indicate that the reason in question is relatively strong—in other words, that it is likely to prevail over other, conflicting reasons. See Richards, supra, at 53; Harman, supra, at 113-14.
Here, by contrast, it is important that there be the possibility of bad reasons, or at least a thin sense of how giving a reason might differ from having a reason. For my purposes, therefore, “reason” labels what follows the word “because” in, “We reach this result because . . .” or, “I find for the plaintiff because . . .” or, “You should come to this conclusion because . . .” Under this definition, a judge who says she has decided for the plaintiff because it is raining in Calcutta offers a reason—“because it is raining in Calcutta”—even though the reason, unconnected to any sound basis for decision, is a bad one indeed. But although it is a bad reason, it still exhibits the feature of legal practice that I seek to analyze—the explicit act of offering a justification or explanation for the result reached.

This definition of “reason” may be jarring, yet it appears unavoidable. For when we look for alternative terms, we discover that words like “justification” and “explanation” contain the same linguistic ambiguities as does “reason.” A justification may be what does justify a decision, such that something offered as a justification will not actually be a justification if it proves faulty. Alternatively, a justification may be the act of offering something in the form of a justification, such that what is offered remains a justification even if a bad one. Similarly, the explanation of some phenomenon may be that which in fact explains what happened, or it may be the verbal act of attempting to explain something without regard to the soundness of the explanation. My definition of “reason” tracks the latter of each of these pairs, for my focus is the statement rather than the soundness of what is stated. It follows that I am concerned not with having a reason, but instead with giving a reason, and with what follows from the very act of giving one, whether it is a good reason or not.

II

It will be useful in further setting the stage to note the variety of legal modes in which reason-giving is absent. Consider first the voice of a statute, regulation, or constitution. The voice is not one of persuasion or argument, but one of authority, of command. Statutes say, “Do it!”; they do not say, “Do it because . . . .” The bare assertion characteristic of statutes suggests a relationship between the authority implicit in a statute and the nonuse of reasons in statutes. Only rarely do statutes offer reasons to justify their prescriptions, and then usually out of concern about potential interpretive problems in difficult cases. Typically, drafters of statutes, like sergeants and parents, simply do not see the need to give reasons, and often see a strong need not to: The act of

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6. Peter Achinstein offers a speech act account of the idea of explanation, defining an “explaining act” as independent of the soundness of the explanation contained in the explaining act. Peter Achinstein, The Nature of Explanation 3-4, 19 (1983). I use “reason” the way Achinstein uses “explaining act,” although it is regrettable that there is no felicitous and unambiguous term that relates to “reasons” the same way “explaining act” relates to “explanation.”

7. Consider Llewellyn’s reference to a “singing reason,” the explicit statement within a rule of its purpose or justification. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 183 (1960). The 2d Amendment is a good example, for it announces its underlying rationale—“A well regulated Militia, being necessary to the security of a free State,”—in a way that most statutes and constitutional provisions do not. U.S. Const. amend. II.
giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges. Or vice versa. But whatever the hierarchy between reason and authority, reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important.

A second category of reason-avoidance in the law occurs when legal decisionmakers facing specific controversies simply announce results without giving reasons to support them. When juries deliver verdicts, when the Supreme Court denies certiorari, and when trial judges rule on objections, for example, the decisionmakers speak with a declarative rather than an imperative voice. Yet here as well, each outcome is unaccompanied by an articulate explanation of why the decisionmaker reached the announced conclusion. Reasons do play a role in producing such decisions—jurors give reasons to each other when they deliberate, Supreme Court justices have reasons for denying certiorari, and trial judges have reasons for overruling objections—but the form in which the conclusions are announced cuts off access to those reasons, suggesting that the reasons are none of the reader’s (or hearer’s) business.

A third category, a mixed case, is the class of decisions announced in the form of an authoritative restatement of (some of) the facts, yet still without a statement of the reasons supporting the outcome. The “no-action” letters or advisory opinions of some administrative agencies, for example, commonly repeat some of the facts presented by the requester of the opinion, but the restatement of facts is followed only by a bald pronouncement of intended inaction. Trial judges sometimes employ this approach, coupling a narrative of their conclusions of fact with a quite uninformative list of their conclusions of law, and jury verdicts may take this form when juries are required to answer special questions in conjunction with their general verdicts.

8. My focus is primarily on decisions, like those of courts and administrative agencies, whose outcomes must be communicated to the parties directly affected by the outcomes. But insofar as these outcomes are themselves the products of multimember decisional processes, then much that I say here is relevant to two additional questions: whether the constituent individual decisionmakers should be required to give reasons for their decisions to each other, and whether they should be required to reveal their individual votes to each other or to the subjects of the collective decision. Thus, questions about whether ballots should be open or secret, see Geoffrey Brennan & Philip Pettit, Unveiling the Vote, 20 Barr. J. Pol. Sc. 311 (1989) (arguing against secret voting), are closely tied to the issues I discuss here.

9. As will become apparent, the basis for not offering reasons in some circumstances is closely related to the basis for offering them in others. If reasons are commitments, as I argue below, then a desire not to commit will be reflected in a practice of not offering reasons, no less a practice because it is one of omission rather than of commission.


11. More pervasively, but also more controversially, the assertion of an analogy, without an articulated explanation of why the analogy holds, resembles the assertion of a result unaccompanied by any reason for that result. Because the bare statement that a resembles b presupposes some general rule subsuming both a and b, and because the failure to articulate the rule leaves open any number of exten-
In contrast to these reason-barren decisionmaking modes stands the practice of giving reasons. Commonly associated with appellate argument and appellate opinions, the practice of explicitly providing reasons to support conclusions is also found in presidential veto messages, commission and committee reports, numerous trial court opinions at preliminary or final stages, some arbitration opinions, and the explanatory opinions or private letter rulings of agencies such as the Internal Revenue Service. At times the practice of giving reasons is explicitly mandated, as with the requirement in the Administrative Procedure Act that decisions "shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." And, of course, a host of less formal deliberative settings exist in which we expect conclusions to be explicitly supported by a statement of the reasons underlying those conclusions. Thus in many contexts, yet tantalizingly not in many others, a decisionmaker is expected to provide, ordinarily in writing, a statement of the reasons underlying her conclusion. It is now time to examine the structure and status of those reasons, for such an understanding will enable us to see when it is important that reasons be given, and when it is equally important that they not be.

III

Consider the logical structure of a reason. I intend to argue that reasons are typically propositions of greater generality than the conclusions they are reasons for, so we must start by looking at the idea of generality itself. Initially, the dimension of generality is a measure of the size of the field of extension of some term or principle. When we say that one term is more general than another, we usually mean that the former includes all of the latter, and more. The
class of mammals is more general than the class of dogs, and the class of dogs
more general than the class of Dalmatians. The class of law students is less
general than the class of university students, which is in turn less general than
the class of students.\footnote{Generality is different from universality, for the latter refers to complete inclusion within some field (as when Kantians argue that only those norms that could be prescribed for all humans are to count as moral norms). But since the dimension of universality is relative to some field of indeterminate size, universal principles that apply to a small field can turn out to be of quite limited generality. \textit{See R.M. Hare, Freedom and Reason} 38-40 (1963) (noting that “barquentine” is much less general than “vessel,” even though the two terms are of equivalent universality); Martha Minow & Elizabeth V. Spelman, \textit{In Context}, 63 S. Cal. L. Rev. 1597, 1629-31 (1990) (noting the universality of highly specific principles such as “Thou Shall Not Kill Except if Thy Name Be Rambo And Thy Motives Be Inspiring to a Public Composed of Teenagers”). Moreover, the degree of generality is not necessarily measured along the same metric as the degree of vagueness (as most versions of the rules/standards distinction mistakenly suppose), because some highly specific terms—“insect”—may be substantially more general than more ambiguous terms designating a somewhat indeterminate subset of the larger set—“little bugs.”}

So too with rules or principles. “Write thank-you notes” is less general than
“Show appreciation for social kindnesses,” and “Do unto others as you would
have them do unto you” is the most general of all. In law, “Intentional misrep-
resentation by fiduciaries is unlawful” is more general than “The directors of
Delaware corporations shall not deceive the shareholders,” which is more gen-
eral than “It is unlawful for the directors of the Delaware Widget Corporation
to include false or misleading representations in proxy statements.”

As this last example shows, generality is independent of derivation—the
question of where principles come from, and whether narrow principles pre-
cede or follow more general ones. That principle \( p \) is less general than prin-

ciple \( q \) says nothing about subsumption, instantiation, or individuation, nothing
about induction or deduction, and nothing about how, if at all, one gets from \( p \)
to \( q \), or from \( q \) to \( p \). The claim of generality is only about relative size, the size
of the population of the class of acts that are the within the extension of some
principle compared to the size of the population of the class of acts that are
within the extension of some other principle.\footnote{It is thus easiest to compare degrees of generality when the propositions compared are nested within each other. We see that “Delaware laws” is more general than “Delaware corporation laws,” because all Delaware corporation laws are Delaware laws, but not all Delaware laws are Delaware corporation laws. It is problematic, however, and likely impossible, to determine whether “California corporation laws” is more or less general than “Delaware laws.” The former contains one additional qualifier, and thus may look less general, but at the same time the size of its extension—the actual number of items it describes—may be larger. The claim of generality is therefore a comparative one, and noncomparative claims about the presence or absence of generality make little sense. \textit{See R.M. Hare, Principles, in Essays in Ethical Theory} 49, 51 (1989) (noting that it would be impossible “to rank all principles in a single scale of generality.”)

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laches, even though temporally subsequent, is still more general than the specific outcomes in cases dismissing actions brought by tardy petitioners.

The extreme of nongenerality is "specificity" or "particularity." "Susan's two-year-old Dalmatian is named Ralph." "Mary should write a thank-you note to John for having her to dinner on March 23, 1991." "Jane acted unlawfully in signing, as a member of the Board of Directors of Delaware Widget Corporation, the April 28, 1987, proxy statement containing false statements about the profitability of Delaware Widget's plant in Dover, Delaware." And although a statement can be more particular (less general) than another without being this specific, generality and particularity mark opposite directions on the same scale.

With the distinction between the general and the particular in hand, consider a typical case of reason-giving. To give a reason for attending a dinner party despite illness, I might first give a characterization—a statement of some facts about the situation. I say that although I have a cold, I had promised to attend the dinner party and knew that the host had relied on my acceptance of the invitation. And then I include that characterization within a more general principle, saying perhaps that it is rude and therefore unacceptable to break social promises except in dire emergencies. Similarly, consider a housing authority's decision to deny a building permit. The housing authority, asked to give a reason for its decision, first provides a characterization of the situation and then a principle encompassing this characterization but not limited to this case: "The plans indicate that the house will be three stories high [the characterization], and we do not permit buildings taller than two stories [the general principle]." So too in law. When a court gives a reason, it typically either calls forth a preexisting rule that encompasses this case (as well as others), as when a court says that a complaint will not be accepted because it (and many others) is barred by a six-year statute of limitations, or, if candidly acknowledging that it is making new law, it announces a new rule that includes cases other than the one at hand. When then-Judge Cardozo concluded in *MacPherson v. Buick Motor Co.* that Buick was liable to Mr. MacPherson despite a lack of contractual privity, Cardozo gave as a reason the new rule that in *all* such cases, lack of privity would not bar recovery, and gave as a reason for that rule the even more general proposition that liability should be placed on those with the power to locate and correct defects. When the California Supreme Court in *Knight v. Kaiser Co.* refused to allow the plaintiff to claim that the sand pile under which her son died was an "attractive nuisance," it supported its conclusion by explaining why sand piles—*all* sand piles, and not just the sand pile under which the plaintiff's son asphyxiated—were not to be considered attractive nuisances. When the United States Supreme Court decided *Ernst & Ernst v. Hochfelder*, it justified its refusal to allow the plaintiff to recover for securities fraud under rule 10b-5 by explaining why no defendant without the state of

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17. Nothing turns on the fact that some of the terms in each of the foregoing phrases are themselves generalizations that could be made narrower and thus less general.
mind known as scienter could be held liable, the consequence being that this defendant without scienter could not be held liable.20

The feature of giving reasons that I wish to highlight is now clear. The key point, indeed the linchpin for the entire analysis, is that, ordinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.21 When we provide a reason for a particular decision, we typically provide a rule, principle, standard, norm, or maxim broader than the decision itself, and this is so even if the form of articulation is not exactly what we normally think of as a principle. "I criticized Mary because she did not write a thank-you note" presupposes (or conversationally implies) that there is a principle pursuant to which people in Mary’s situation should write thank-you notes, and that Mary’s behavior, falling within the scope of the principle, is open to criticism for not comporting with the principle. "The members of the Board of Directors of Delaware Widget Corporation are liable to the stockholders because they signed a proxy statement containing misleading facts about the company’s facilities" similarly calls forth (or creates) as its justification a rule more general than one pertaining only to the behavior of these directors with respect to this proxy statement containing these facts about this plant. To provide a reason in a particular case is thus to transcend the very particularity of that case.

The same structure also operates when we justify a rule or principle itself. Just as providing a reason for an outcome ordinarily takes the outcome to a greater level of generality, so too does providing a reason for a reason, or a reason for a rule or principle. When the Supreme Court in New York Times Co. v. Sullivan established the so-called “actual malice” rule, it gave as its reason the proposition that anything resembling a seditious libel action—not just those civil defamation actions to which the actual malice rule applied—violated the First Amendment.22 The scope of instances encompassed by the reason—all state actions carrying the same risks to freedom of speech and press as a seditious libel prosecution—is broader than the scope of instances encompassed by the actual malice rule that the reason was provided to support. To justify a principle is to put the class of instances encompassed by it within a wider class of instances encompassed by a more general principle, and thus to maintain that

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21. I say “ordinarily” because some reasons might seem less general than the decisions that they support. An answer to why it is true that every American car has an engine could be that Fords have engines, Chevrolets have engines, Chryslers have engines, Cadillacs have engines, and so on. Sometimes when a decisionmaker announces an analogy as a reason for some result, it is unclear that the analogy is more general than the result. But see note 11 supra. And when we narrow a principle because it encompasses an intuitively unacceptable result (the association with a Rawlsian process of reflective equilibration is intentional), the reason for narrowing the principle is less general than the result the principle supports. Although it might be argued that all of these instances are just different versions of giving reasons more general than their results (narrowing a previous principle still yields a reason more general than the particular result, for example), I will not pursue this possibility, for nothing in my analysis turns on whether all reasons are more general than the results they support. It is sufficient for my purposes that many are, and my interest here is the class of generalizations offered as reasons for decisions, without regard to whether this class exhausts the class of all reasons.
the narrower principle is sound because it is subsumed under the stipulated-to-be-sound broader principle.

A parallel relationship therefore exists at numerous levels of argument, and the process of providing a reason is ordinarily nothing more than (but nothing less than) the process of locating a result within a greater degree of generality. Reasons, therefore, are commonly results, rules, principles, maxims, standards, or norms taken to the next level of generality. But regardless of the level of generality, and whether we are seeking to justify a result or a rule, the central point is that to say "x because y" is not only to say x, but to say y as well. When put this way the claim seems trivially tautological, but its consequences are both interesting and problematic.

IV

The notion of greater generality thus locates the logical relationship between a reason and what it is a reason for. To explore the implications of this relationship, I begin with some simple conversational examples to introduce the central issue of commitment, and to put on the table the question whether various conversational and social practices establish fixed points from which it may be unreasonable to expect legal practice, situated at least partially within social practice, to depart.

You ask why I am carrying an umbrella, and I respond that the weather forecast predicted rain. Although the response is not explicitly prescriptive, it embraces the mandate, "Carry an umbrella when rain is forecast," which is more general than the fact that I am carrying this umbrella on this day in response to a particular weather forecast. In everyday social practice, to provide a reason for an act is paradigmatically to provide, if only implicitly, a general prescription—a rule, standard, or guideline—encompassing that act.

23. I reemphasize that I make no claims either about the sources of reasons or the temporal relationship between reasons and outcomes. Legal language is commonly the language of discovery, with lawyers asking courts not to create new rules but to place a case within a preexisting one, and with judges justifying their conclusions not on the basis of a rule they just created, but on the basis of one that existed prior to the case at hand. It is quite possible, however, that the language of discovery, of finding, is frequently false or misleading, masking a reality of law creation. See generally Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL. EDUC. 518 (1986) (discussing the legal reasoning a judge might employ to reach an outcome that differs from her initial sense of the state of the law); Frederick Schauer, Formalism, 97 YALE L.J. 509, 515-20 (1988) (explaining that the language of discovery might conceal a choice that existed between different legal routes). But even if the language of discovery often or always obscures the practice of creation, the reason created is typically more general than the result it supports. Even if decisionmakers were to candidly acknowledge that reasons often do not temporally precede results, newly created reasons would still normally occupy the same logical space vis-à-vis the results they rationalize as do preexisting reasons vis-à-vis the results they are said to generate.

24. An important question, though not mine here, is whether saying x, without more, commits the speaker to at least some y of a degree of generality larger than x alone. The issue is important to the possibility that naked results might have precedential effect. See Larry Alexander, Constrained By Precedent, 63 S. CAL. L. REV. 1, 28-44 (1989) (describing a theoretical model of precedent where the constraints of precedent follow from the results of earlier cases). If conventions of categorization place a particular in a larger category even when there is no explicit statement to that effect, then (and only then) can a particular establish a rule capable of being followed in the future. See Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 576-88 (1987).
Although it requires contextual implications to move from reason ("because the weather forecast predicted rain") to norm ("Carry an umbrella when the weather forecast predicts rain"), the move involves few contestable conversational rules. If "because the weather forecast predicted rain" does not implicitly embrace "Carry an umbrella when the weather forecast predicts rain," then there was no point in giving the reason at all. So although the move from the reason to the norm presupposes compliance with the sincerity conditions of discourse, that is, that one ordinarily means what one says, my point is basically a logical one. If in saying, "x because y," one is not (at least at that moment, and under those conditions) affirming y, then one is either being dishonest or self-contradictory. So if I decline a dinner invitation because of illness, I have, to say the least, a heavy burden of explanation if the host sees me at a restaurant with friends on that very day, even though no explanation would be called for had I not claimed illness.

25. Nothing here addresses the weight of the reason. If you ask why I am carrying an umbrella, and I say that I am carrying an umbrella because the weather forecast calls for rain, and you then observe that the weather forecast called for rain yesterday but that I was not carrying an umbrella yesterday, a perfectly legitimate response on my part is that although yesterday's weather forecast gave me a reason to carry an umbrella yesterday, the fact that I had to carry two armloads of books to my office yesterday gave me a stronger reason not to carry an umbrella. What I have a reason to do is not necessarily what I should do, all things considered. See Schauer, supra note 14, at 5-6, 112-15; John Searle, Prima Facie Obligations, in Practical Reasoning, supra note 5, at 81. My claim is that there is a commitment to the reason, not a commitment to its conclusiveness, although a strong version of Legal Realism might question whether and when this distinction (and its kin—burdens of proof, standards of review, and levels of scrutiny) makes a decisional difference.

26. On sincerity conditions, see John R. Searle, Speech Acts: An Essay in the Philosophy of Language 60-67 (1969); Daniel Vanderveken, Non-literal Speech Acts and Conversational Maxims, in John Searle and His Critics 371 (Ernest Lepore & Robert Van Gulick eds., 1991). There is much discussion in the speech act tradition of (pragmatic) commitments flowing from the context of one's utterances, and much discussion within other corners of the philosophy of language on the (semantic) commitments made by virtue of the semantic and logical entailments and presuppositions of an utterance. But to the best of my knowledge, there is no discussion of the moral status of these commitments, or of the nature of the wrong that stems from violating such a commitment. I do not want to overload the word "moral" at this point, but I am intrigued by the nature of the wrong coming from a breach of one of these supposed commitments. Perhaps these commitments are merely rules to coordinate social actions, such that we should not complain (and what if we do complain?) if we are interpreted according to these commitments even if we mean otherwise. Or perhaps the wrong is more serious. If we think of language use as a practice, then violating rules both internal to the practice and necessary for its existence may have a moral component and may even verge on being definitional of morality, depending on the practice. See, e.g., David Gauthier, Morals by Agreement (1986) (explaining the rationality of moral constraint through a game-theoretic notion of social coordination). If so, the rules of communication, necessary for social existence, may have a similar moral aspect. On this point, see David K. Lewis, Convention: A Philosophical Study (1969).

When we talk specifically about the sincerity conditions of discourse, we tap into centuries of philosophical thinking about lying, from Kant to the present, and about the consequentialist and anticonsequentialist arguments that have frequently used lying as the centerpiece. See, e.g., J.J.C. Smart & Bernard Williams, Utilitarianism: For and Against (1973). Indeed, the debate about the relationship between sincerity and morality has a legal manifestation. See e.g., Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296 (1990); Martha Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered, 101 Harv. L. Rev. 10 (1987); David Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731 (1987); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353 (1989). Apart from sincerity conditions, however, the question of the moral status of the rules and commitments of discourse is more problematic, and part of my enterprise is to explore the moral status of the commitments that might be part of the narrower practice of giving reasons.
This is familiar ground, for it undergirds what (among other things) goes on in the standard law school socratic dialogue when a student, asked to give a reason for an assertion, is bombarded with an array of carefully crafted hypotheticals designed to test the student's commitment to the reason she has just offered. Implicit in the process is the notion that one who offers a reason for a result (or a rule) is, at least at that time, committed to the reason as well as to the less general result. And equally implicit is the corollary that to be committed to a reason is to be committed to the results encompassed by that reason. Because reasons are typically more general than the results they are reasons for, to offer a reason is to offer a statement encompassing at least one result other than the one that prompted giving the reason in the first place. The minimal sincerity conditions of ordinary conversational practice thus indicate that the giver of a reason is, at least at the moment of giving the reason, committed to no less than one result other than the result that prompted giving the reason.

But now things get troubling. We have been assuming simultaneity, such that if I say, "x because y," then I am committed, because of obligations of sincerity and noncontradiction, to y, at least at that time and under what I take to be the same conditions leading me to conclude x. But let us eliminate the condition of simultaneity and consider the possibility of cross-temporal commitment to reasons as well as results. Does giving a reason now commit the giver of the reason later? Consider first a silly hypothetical case. A friend and I are talking about food. The talk turns to lobster, and I say I adore it. She asks why. I say I adore lobster because I like the red color, find the taste and texture of shellfish very appealing, and enjoy the very process of cracking the shells and working to remove the flesh inside.

Two weeks later, I am at her house for dinner. She serves crab legs. But because I was bitten by a crab at the ocean as a child, I have grown up with a great distaste for crab, even though it is the only shellfish I dislike. Consequently, I cannot and do not eat the crab legs.

Now, is my host justifiably more aggrieved when I refuse to eat the crab legs under these circumstances than if I had previously said nothing? Am I now obliged, if I do not eat the crab legs, to offer not only an explanation, but an apology? Intuitively, I think the answer to these questions is yes, precisely

27. One perfectly legitimate response to such questioning tends to be neither encouraged nor accepted: "Professor X, the rule I offered would generate a bad result for the hypothetical you just posed, but of course you know as well as I do that the generation of one or even several bad results by faithful application of a rule is no argument against a rule, since all rules are overinclusive or underinclusive vis-a-vis some ideal conception of the right result. So I will stick with the rule I offered, even in the face of the bad result you suggested, because I believe that this rule will generate, in application, fewer bad results than any other rule we can imagine."

28. See note 14 supra and accompanying text.

29. Some of what follows touches on issues raised by attempts to explain the constraints of principled decisionmaking shorn of implausible claims of "neutrality." For a discussion of these concepts, see M.P. Golding, Principled Decision-Making and the Supreme Court, 63 COLUM. L. REV. 35 (1963), and Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982 (1978). Once again, however, I assert in unqualified terms that nothing I argue entails any claim about the neutrality or objectivity of a general reason offered to support a more specific result.

30. This part is neither hypothetical nor silly.
because the crab legs fall within the literal scope of the reason I had given previously. Just by giving the reason, I induced reliance on the part of another, and inducing reasonable reliance places obligations on the one who does so. The reason accordingly resembles a promise, and having given this reason I am no less committed to the particulars lying within its scope than I would be to the particulars lying within the scope of something like, "I will eat shellfish." The commitment creates a prima facie obligation to act in conformity with it, and requires me to offer something—at least an apology—when I am unwilling or unable to keep it.31

This example tests the extent to which general assertions (of which reasons are a species, at least in this context) carry the same kinds of promissory commitments vis-à-vis future actions or decisions as do locutions more explicitly seen as promises. One possibility, of course, is that they do not. Perhaps the word "promise," or a close equivalent varying with conversational context, is a necessary condition for commitment in the future to what we say now. Perhaps someone relies at her peril on an assertion not explicitly flagged as a promise. If so, anyone relying on what I say, absent my use of words like "promise," does so at her own risk, and I have no reason to feel committed to complying with my past assertions.

Yet this seems wrong. Even when we do not use words like "promise," and we ordinarily do not, we expect that others will rely in the future on what we say today, at least absent intervening distinctions obvious to both of us. If it sounds right that the dinner host has reason to feel slightly more aggrieved by my refusal to eat crab than she would have been had I not given a reason for liking lobster that linguistically encompasses crab, then it appears that even in ordinary conversation we make prima facie commitments to future decisions when we give reasons more general than the particular decisions or statements that they are given as reasons for.

V

Now consider the same question—whether there exists at least a prima facie commitment to future decisions lying within the scope of a general reason—in the context of legal decisionmaking. We start with an actual case. In New York v. United States,32 the Supreme Court held33 that federal legislation exceeds the bounds of congressional power under Article I, or violates the Tenth Amendment, or both, when it commands a state legislature to legislate in a particular way. The case involved the Low-Level Radioactive Waste Policy Act.34 One portion of the Act—the "take title" provision—required states to either regulate low-level radioactive waste in a certain way or take title to the

31. I accept that the degree of commitment may vary, such that the reason "because there is no shellfish I do not like" may, because of listener expectations, create a stronger commitment than "because lobster meat is sweet."
33. Of course my summary of what the Court "held," what materials I use to reach that conclusion, and just what it is for a court to "hold" something, are exactly the points at issue.
waste and provide for its lawful disposal. In explaining why this provision violated the Constitution, Justice O'Connor's majority opinion stated that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."35

New York v. United States is both a bad and a good example for the point I wish to pursue. It is bad because it is a constitutional case from the Supreme Court of the United States, and is thus part of a decisionmaking milieu in which the indeterminacy claims of Legal Realism are at their acme.36 Given the operation of the selection effect,37 the open-endedness of textual norms, and the extant array of Supreme Court opinions (to say nothing of other legitimate sources), the likelihood of serious formal legal constraint in most Supreme Court decisions is small, and such cases thus provide a poor vehicle for pursuing a series of arguments about the possibility of constraint.38 Accordingly, I use this case as a metaphor for the possibility of constraint, and the sources thereof, rather than as a claim about constraint in these circumstances.

I pick New York v. United States as my metaphor, however, because it contains two desirable features. First, it includes the above-quoted sentence, a crisp example of a reason broader than the result in the case, and one plainly embracing a range of statutes other than the one before the Court.39 Second, the Court was quite clear that this reason was conclusive. It was not a factor to be balanced, nor something that would decide the case if all other things were equal (which they never are). Indeed, the Court made it clear that this principle could not be overridden even in cases of compelling interest.40 Based upon what the Court said, this case was decided the way it was because of the existence of the above-quoted principle, and because of the Court's statement that any act of Congress infringing on this principle was eo ipso unconstitutional.

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35. 112 S. Ct. at 2435.
37. That is, the proposition that cases that reach trial and appellate courts are not "a random sample of the mass of underlying cases," and its various effects on studies of the legal system. Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. LEGAL STUD. 337, 337 (1990); see also George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984) (defending the proposition that the highly visible portion of the caseload, such as appellate decisions, is not of the same character as the less visible portion); Frederick Schauer, Judging in a Corner of the Law, 61 S. CAL. L. REV. 1717, 1722 (1988) (arguing that appellate adjudication occupies a small and skewed portion of the "universe of law").
39. This is indicated by the large role this particular phrase played in Board of Natural Resources v. Brown, 992 F.2d 937, 946-47 (9th Cir. 1993) (holding that Congress exceeded its authority by directing states to regulate according to federal guidelines in the Forest Resource Conservation and Shortage Relief Act).
40. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." 112 S. Ct. at 2479.
Now suppose a different statute comes before the same decisionmakers in 1995. Upon looking at this statute, enacted under different conditions, the reaction of the justices who made up the 1992 majority is (1) that the statute is an act of Congress compelling the states to enact a federal regulatory program, and thus within the literal reach of the reason offered previously; and (2) that had the justices contemplated the possible existence of such an act in 1992, they never would have said what they said in 1992. The question is then on the table: Are 1992's decisionmakers committed in 1995 to the result indicated by the reasons they gave in 1992, even though when faced with 1995's situation they realize that what they said in 1992 was not what they should have said?

The question in the legal case is the same as in the crab case: Are reasons actually given to be considered commitments, of the same genus as contracts and promises, or are they simply noncommitting statements subject to unimpeded defeat in the event of changed or newly discovered circumstances?

One quaint response could be that the Court’s statement in *New York v. United States* was merely dicta and not the holding of the Court. As a result, according to the traditional dicta/holding distinction, the Court in 1995 would not be bound by its 1992 statement. But this will not do. First, the 1992 statement is not dicta in the sense that it is an aside unnecessary to the result. The statement is the very proposition that generates the result, or so the Court said. Without this proposition, there is, we can assume, no reason for the result. And because this reason directly supports the Court’s result, it does not become dicta just because the Court could have given a narrower reason. Under that logic all reasons would be dicta, since all reasons can always be narrowed to the point at which their degree of generality is no greater than the outcome they

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42. The possibility of drawing a distinction now (in 1995) is a red herring. If the previously articulated principle did not draw the distinction, then drawing the distinction now, even if plausible, is inconsistent with the previously articulated principle. "All a except y" is inconsistent with and not mere suplementation of "all a," as I argue in Frederick Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871 (1991).

43. My reference to "unimpeded defeat" should be read in conjunction with both note 25 *supra* and my repeated references to commitment as prima facie. When there is a subsequent commitment to reasons, the weight of the commitment will produce some outcomes different from the ones that would have been produced without the commitment. This is because the weight of the commitment increases the weight of the countervailing factor necessary to override the commitment. The existence of a commitment will thus, over time, produce an array of results in which the existence of the commitment turned out to be dispositive, even though it is not necessarily dispositive in every case. A noncommitting reason, by contrast, carries no independent decisional force in future cases, and stands as no barrier to a court reaching the result it would have reached even in the absence of any previous action.

44. The assumption is reasonable, since much of the Court's opinion explains this proposition. See 112 S. Ct. at 2420-31, 2434-35.
If a reason that can be narrower is for that reason dicta, then anything other than the announcement of an outcome is dicta. Once we recognize that reasons are usually, as here, results taken to a greater level of generality, then an argument from the dicta/holding distinction for the noncommitting character of dicta collapses into an argument against the committing character of reasons. The argument from dicta, therefore, does not add a new argument, but only restates the argument against the claim that reasons, when given, create commitments. The argument from dicta may be relevant to thinking about the future effect of a statement not standing in some sort of "vertical" justificatory relationship to the immediate result, but it does not help in thinking about the relation of reasons to commitments.

If a reason is the result itself at a greater level of generality, then a legal reason has the same logical structure as the reason in the crab case. And as in the crab case, such a reason appears to be a prima facie commitment to other outcomes falling within its scope. While any conclusion about the conditions of commitment is an empirical assessment of social practice, this assessment nevertheless appears sound. First, if the commitment-creating intuition in the crab case correctly reflects background social practice, then such social practice is likely to substantially influence legal practices existing against that background. This is not to say that legal practice might not diverge from social practice. It is to say, however, that the existence of a background social practice suggests, in the absence of more explicit counterconventions, that legal practices are best understood in ways consistent with, rather than contradictory to, the background social practice. Insofar as there is a background social practice pursuant to which we are prima facie expected to mean tomorrow what we say today, legal practice is more plausibly understood as consistent rather than inconsistent with that practice.

The conclusion that, in law, giving reasons commits the giver is also supported by the fact that quotations directly justifying a result have considerable purchase in legal argument. Direct quotes from previous cases do not always control; lawyers argue that such quotes are taken out of context and they strain to distinguish the cases in which the quotes first appeared. Still, the deployment of a direct quote to support the argued result at least appears to shift the burden of persuasion by imposing a burden of denial on the lawyer seeking to resist the effect of the quote. If this hypothesis is correct, it would further support the conclusion that the legal practice of commitment, exemplified in

45. For a discussion of whether there is a moral obligation to offer reasons of maximum generality, see Jiwei, The Logic of the Generality of Moral Principles, 38 Phil. Q. 305 (1988). Jiwei makes the intriguing suggestion that since more general principles (if they are prohibitions) decrease the freedom to act, there is a tendency to underjustify, which must be counterbalanced by a commitment to justify until a point of maximum generality is reached. Perhaps, more plausibly, the same argument might claim that there is a moral obligation to offer a reason of some degree of generality, even if not of maximum generality.

46. Even this is not so clear. What is the point of making a statement, even if orthogonal to the result to which it is connected, unless the maker of the statement is at least slightly committed to, and therefore constrained by, that statement in the future?

47. Although I have not done so, this hypothesis could be tested empirically.
the notion that the 1995 Court would be more constrained as a consequence of
the 1992 statement than it would have been had the 1992 statement not existed,
is broadly consistent with the social practice of commitment we saw in the crab
example.

The conclusion that giving a reason creates a commitment relates reasons to
promises, and thus to contracts. Just as a promisor or contractor is committed
to the terms of the promise or contract even in the face of subsequent reasons to
recant, so too might the giver of a reason be committed to its terms, even if
further reflection or subsequent and unanticipated events suggest that it was not
a good reason to give.

Consider why promises create commitments. We commonly think that
promises create commitments because it is morally wrong to lead someone to
rely on some proposition and then undercut the basis for that reliance. Some
may argue that this is circular: If there were no practice of commitment, there
would be no reasonable reliance. The response to this argument is that without
a practice of commitment, there would be no point in making a promise in the
first place. So too with providing reasons. Giving reasons induces reasonable
reliance, partly because of the background social practice that statements in-
duce reasonable reliance, partly because the inducement of reliance is typically
the (known) intention of the reason-giver, and partly because without reliance
there would be much less point in bothering to give reasons. Thus just as mak-
ing a promise induces reasonable reliance, giving a reason creates a prima facie
commitment on the part of the reason giver to decide subsequent cases in ac-
cordance with that reason.

To repeat, the argument for commitment in the law is stronger if the argu-
ment for commitment as a social practice—the crab case—is sound. If a social
practice exists pursuant to which reasons given in ordinary discourse constrain
and commit future action, it establishes a baseline of minimal commitment be-
low which it would be difficult for the legal system (or any other social subsys-
tem) to go. Just as legal language has only a limited ability to depart from
ordinary language, even while legal usage may diverge from ordinary usage,
legal commitment practice cannot completely depart from social commitment
practice.

48. The analogy with contracts (although not with promises) may beg the question because the
doctrine of consideration establishes that in law we are not committed to everything we say or write
upon which others may rely. On the other hand, the doctrine of promissory estoppel, arguably reflecting
social expectations insufficiently captured by the doctrine of consideration, provides that inducing rea-
sonable reliance, questions of consideration aside, is still thought to prima facie commit the inducer.
Still, the analogy with contracts might beg the question because a contract-commitment model of rea-
sons may be the result of a determination that a court is committed to the reasons it offers, without
argument as to why this is or should be so. My descriptive claims about actual social and legal practice
are designed to argue that this is so, and my analogy with promising is designed to suggest the norma-
tive underpinnings of the descriptive claim.

49. See P.S. Atiyah, Promises, Morals, and Law (1981); Charles Fried, Contract as Prom-
ise 7-27 (1981); Margaret Gilbert, Is an Agreement an Exchange of Promises, 90 J. Phil. 627 (1993);
Dennis M. Patterson, The Value of a Promise, 11 Law & Phil. 385 (1992); Thomas Scanlon, Promises

50. For a careful analysis of this claim, see Mary Jane Morrison, Excursions into the Nature of
The phenomenon, however, is not symmetrical. If an antecedent social practice of commitment exists, it may contaminate legal practice, making it difficult for the legal system to choose a model of noncommitment even if it wanted to. But if there is no social practice of commitment, if my inference from the crab case is as wrong as the case is silly, institutions might still create their own practices of commitment. Still, it is less likely that there is a legal practice of commitment to reasons if the social practice of commitment does not exist.

The argument for the nonexistence of commitment to reasons in legal practice likely stems from a common law tradition of particularity. Law is not about generality, the tradition holds, but about particular situations and decisions in cases that the infinite variety of human experience ensures will never repeat themselves.\(^\text{51}\) So although the reason given by a court reflects a decisionmaker’s thinking at the time of her decision, and perhaps also demonstrates respect for the subject of the decision, it should not, so the argument goes, be considered a commitment.\(^\text{52}\) Because the concrete dominates the abstract, and the particular dominates the general, the argument continues, the same justices who gave reasons in 1992 may say in 1995 that the issue looks different upon seeing different facts and a different situation. Moreover, abstract reasoning is necessarily deficient, and rules are incomplete until applied, so any abstract

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\(^{51}\) Of course, no one would push the tenets of the common law so far as to say that no level of general rulemaking could be sustained, just as no one would seriously assert that law consists merely of a process of logical deduction from eternal, neutral, universal, objective, and foundational principles. Still, much of the common law tradition, see Melvin A. Eisenberg, The Nature of the Common Law (1988); Llewellyn, supra note 7, much of the teaching of the Realists, see William Tinning, Karl Llewellyn and the Realist Movement 216-29 (1973) (on “situation sense” and the “power of the particular”), much of the jurisprudence of Lon Fuller, see Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958), much of modern legal pragmatism, see Richard A. Posner, The Problems of Jurisprudence (1990); Margaret Jane Radin, Reconsidering the Rule of Law, in Wittgenstein and Legal Theory 125 (Dennis M. Patterson ed., 1992), and much of feminist jurisprudence, see Katherine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829 (1990); Suzanna Sherry, Civic Virtue and the Feminist Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986), promote greater sympathy for the particular and eschew reliance upon more general and rigid rules.

\(^{52}\) In fact, an inverse relationship may exist between views about judicial candor, see note 26 supra, and views about commitment. If a reason is not a commitment, then its primary value is as a reflection of what the decisionmaker was thinking, and the least we can expect is some degree of candor from the decisionmaker. Conversely, if reasons are commitments, and those who give them are consequently committed to what they have said, then we might be less concerned with whether the reasons given also provide insight into the actual decisionmaking process.

Similarly, one datum for the proposition that our legal culture has at least partially adopted the commitment model is the culture’s relative unconcern with the fact that most federal appellate opinions are not written by judges, but by clerks with short-term appointments. If those opinions commit the judges who sign them, then the sources of their production seem less relevant than if they are mere guides to the dispositions of their authors.

Consider also those opinions written neither by a judge nor her clerks, but to which she assents. If a judge is part of a majority, is she more free to disclaim the majority opinion later than if she (or her clerks) actually wrote the opinion? And what if (as is more common in courts of appeals than in the Supreme Court) a judge assents for reasons of compromise, logrolling, or timesaving, rather than because of any deeper agreement? These questions are in some sense more psychological than logical, but part of this enterprise is about the feeling of commitment, and the effect of a discourse of commitment, as much as it is about narrower conceptions of logic or morality.
conclusion must be considered genuinely tentative and defeasible until actual cases provide the privileged knowledge that only the concrete can give us.

But if this argument against a commitment model of reasons is sound, then surely the practice of giving reasons has developed far beyond what the use of those reasons could justify. For example, if reasons were not commitments of at least some weight, then it would make sense to write opinions as if they were no-action letters, with detailed statements of fact followed by naked statements of result. But because judicial opinions are much more than that, and because the reasons they provide serve as more than biographical guides to the feelings of those who write them, much suggests that the existing practices of opinion-writing and reason-giving are not those that would have been expected to flow from a thoroughgoing commitment to particularity. Instead, the actual practice of writing and using opinions seems more consistent with a contract/commitment model of the force of legal reasons.

VI

Description is not justification. But if giving reasons is centrally explained by a reason's generality and the reason giver's commitment to that generality, then giving a reason is like setting forth a rule. Justifying reason-giving will thus track justifying rule-based decisionmaking and, conversely, justifying the avoidance of reason-giving will parallel justifying highly particularistic decisionmaking. In other words, justifying the practice of giving reasons and treating those reasons as commitments will implicate familiar questions about the advantages and disadvantages of rules. Because I and others have said much about these questions in other contexts, I will only focus on a few of the most relevant dimensions.

If a decisionmaker is prima facie committed in the future to the reasons she gives for a conclusion now, and if those reasons are typically more general than the conclusion they support, then she commits herself to deciding some number of cases whose full factual detail she cannot possibly now comprehend. One consequence of a commitment model, therefore, is the treatment of consistency for consistency's sake as an independent value, although it is debatable when and whether we should do so. Moreover, a decisionmaker committed to her present reasons commits her future self to treating the very pastness of the past as a reason for decision in accordance with that past, and it is equally debatable

53. Opinions can be used to find out much of interest about their authors. See, e.g., Jerry Frug, Argument as Character, 40 Stan. L. Rev. 869 (1988). But the use of opinions in the legal culture is far more well-developed than would be expected were opinions considered only as evidence of their authors' views.


when and whether we should do that. Apart from this familiar terrain in the literature on precedent, however, there is another way current knowledge of future commitment constrains what we do in the present. Think of a judge who reaches a conclusion but then, after struggling with the opinion, says, “It won’t write.” Just what does that mean, and what assumptions does it reflect?

One possibility is that a judge who says that an outcome “won’t write” is simply rejecting a creation model of judicial power. Such a judge refuses to reach any result unauthorized by an identifiable preexisting legal rule encompassing some plausible presentation of the facts in the present case. In other words, the judge decides (by “hunch,” by “gestalt,” by “situation sense,” or by some other nonformulaic method) that a case ought to be decided in a particular way. She then tries to find a preexisting legal rule that encompasses most of what seems relevant in the case and that produces the desired result. If such a rule exists, all well and good. If it does not, however, then a judge who believes that her role prohibits her from creating new law will not reach this result. Hence the explanation, “It won’t write.”

But suppose the judge has a sufficiently post-Realist understanding of her role such that she recognizes that she is “permitted” to reach a result for which she cannot find a preexisting rule, so long as she can write a reason for it. But we have seen that a reason is, itself, a type of rule. As a result, a judge required to give a reason is a judge required either to call forth a preexisting rule or to create a new one. We can understand why a judge who believed she should not create rules would say, “It won’t write,” when there is no preexisting rule, but why would a judge who did not think that judicial rule-creation was uncommon or undesirable ever say such a thing?

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


57. The foregoing is agnostic as to whether the rule is genuinely created anew, or was, as Ronald Dworkin and others would argue, immanent in the preexisting materials. See RONALD DWORdIN, LAW’S EMPIRE (1986).


59. If the reason were morally unacceptable but, at the same time, socially acceptable, then a judge who believed it would not hesitate to write it down.
Judges and other decisionmakers rarely think their own outcomes illegitimate, however, so it is unlikely that the perception that there are things we can think but not write down only concerns morally and socially impermissible reasons. So if neither a prohibition on rule-creation nor outcome-impermissibility explains, “It won’t write,” then the only remaining explanation is one premised on the equation of rationality with some minimum quantum of generality. The idea of an outcome that is not patently illegitimate, but still incapable of being justified in writing, appears based on a decisionmaking norm about the size of the field within which decisions should be made. Perhaps some decisions are simply too narrow to be rational. 60 Perhaps some norms require a decisionmaker to include a decision within a type, field, or class at least somewhat bigger than the particular case. 61 In other words, perhaps the constraint of unwritability (and therefore of reason-giving) is based on the idea that generality is a necessary condition of rationality.

I am not sure, however, that this is so. More importantly, I am not sure that the legal system operates as if this were so. If the legal system operated on the assumption that giving reasons served an important decision-disciplining function, it would be less tolerant of reason-avoiding (or reason-hiding) in jury verdicts, sentencing, certiorari denials, no-action letters, exclusion of jurors, rulings on objections, and summary affirmances. In short, these situations suggest that the legal system functions as if openly placing a result within a larger category is not a necessary condition of rationality. Yet the legal system does appear to suppose that it is sometimes desirable for legal decisionmakers to be committed to, and therefore constrained by, a range of results larger than the case at hand. This might, as noted above, stem from a preference for stability, but it might also be a corrective against the potential for the bias built into excess particularity. Although there is no basis for presuming that particular decisions are necessarily a function of decisionmaker partiality, it might be supposed that particular decisions are often, empirically, the result of decisionmaker partiality, and that an artificial constraint of giving reasons, and therefore of generality, is designed to counteract this tendency. 63

60. This seems to be the basis of Morey v. Doud, 354 U.S. 457 (1957) (holding that a beneficial regulatory exemption uniquely tailored for the American Express Company was invalid on equal protection grounds), overruled by New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (applying an extremely deferential standard of review in cases of “exclusively economic regulation”).

61. Could it be that a particular result might just be the unique area of overlap or intersection among a number of larger reasons? If so, then a decisionmaker could justify a particular result by appealing to these multiple reasons in a cumulative way, such that she could suppose that she was simultaneously appealing to reasonably large categories, but not (except in the most extraordinary circumstances) committing to the decision of any future cases. I believe, however, that these so-called multiple reasons would be translatable into one highly qualified or complex reason (reason a, but only when coupled with reasons b and c), and then the question would arise whether such a complex reason would, except as a matter of deception, qualify as a reason of sufficient size.


63. There is undoubtedly much to say here about the relation of all of this to philosophical arguments about transparency, and even more directly to Rawlsian ideas about the “publicity condition.” See John Rawls, A Theory of Justice 133 (1971); see also Kurt Baier, The Moral Point of View: A Rational Basis of Ethics 194–95 (1958) (arguing that the openness of moral principles helps bind
If we think that giving reasons ensures generality, and generality is a way to improve the quality of decisions, then there is a plausible argument that subsequent decisionmakers, even within the same decisionmaking institution, should not be committed to and constrained by the reasons offered by their predecessors. If those predecessors were compelled to offer reasons and to be committed to the results encompassed by those reasons because it would make their decisions better, then their commitment need not carry over to subsequent decisionmakers. Other arguments for commitment, however, especially arguments for cross-temporal stability, and for intraintitutional stability in the face of changing personnel, might militate in favor of a broader conception of commitment. Here the arguments closely track the argument supporting a strong regime of precedential constraint. Rather than rehearse those arguments, I merely note that the arguments in favor of precedent or stare decisis as a strong constraint often require decisionmakers at a later time to subjugate, in the service of stability for stability's sake, their own best judgment to the erroneous (as they see it) judgment of earlier decisionmakers. Similarly, arguments against strong precedential constraint, which stress case-by-case optimization and question why the value of stability should compel decisionmakers to repeat the mistakes of the past, also apply to the question why decisionmakers should subjugate their own best judgment to general statements made in the past, and thus also to the question why decisionmakers should be required to give reasons, a practice likely to have that effect.

VII

Precedential constraint permits courts to influence outcomes in future cases that they may now only dimly perceive. Reason-giving has the same potential. If the reasons provided by courts constrain future decisions, then giving reasons can be opposed as undesirably encouraging courts to influence decisions arising in contexts at which they can only guess. Consider, in this regard, the aversion to advisory opinions. Although some state courts issue advisory opinions, and although courts in other countries sometimes issue advisory opinions or evaluate the constitutionality of proposed legislation without the encumbrance of the "case or controversy" requirement, federal courts in the United States are different. Here the advisory opinion is anathema, and for numerous well-

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64. I will not delve into the mechanisms of compulsion, but I am thinking of the way in which various norms of professional practice are enforced by criticism, by praise, and by granting and withholding various professional "perks," including honors and promotions.


66. When the later decisionmaker agrees with the earlier decision, the constraint of precedent is redundant, as is the constraint of commitment to reasons under those circumstances.

67. The aversion to advisory opinions dates from Chief Justice John Jay's 1793 letter, on behalf of the Court, to president George Washington, refusing Washington's request that the Court give constitu-
massaged reasons American federal courts will not decide cases removed from the context of a real controversy between real parties.68

The aversion to advisory opinions, however, stands in tension with the commitment model of legal reasons. If a court is constrained by the reasons it gives in addition to the result it reaches, and if reasons are results taken to a greater level of generality and so include a wider class of acts, then under a commitment model a court giving reasons is deciding a class of cases not now before the court, and a class of cases for which the supposed crucible of experience is missing. Thus every time a court gives a reason it is, in effect, giving an advisory opinion.69

If legal practice thus tolerates a wide range of decisions based on speculative imaginings about possible cases within the extension of a reason, then requiring a concrete case seems peculiar. For example, suppose the reason given to support the result in one actual case encompasses a thousand potential cases. Since giving the reason represents some commitment to a decision when one of those thousand cases actually arises, the case or controversy requirement dictates that only one out of 1001 cases be real before a court offers its judgment on the other thousand. Why is it so important, then, that there be even one real case, given that the decision also decides a thousand cases that have yet to occur?

This question is not rhetorical. There may be good grounds for wanting one real case before effectively deciding a thousand other ones. It might be desirable to cabin the courts, for example, and the aversion to advisory opinions is a strategic way of preventing overreaching. But my concern here involves the interplay between the particular and the general, and with the claim that seeing a particular is an important part of making general decisions. Now it is true that seeing one particular may, at times, help a decisionmaker imagine other cases. But just as human weakness and partiality might prevent us from imagining what others would imagine, so too might real cases distort by “hogging the stage,” by occupying so much of the foreground of our phenomenology that they narrow rather than broaden the imagination, and dominate a form of decisionmaking that seeks desirable outcomes for many possible cases whose own details can only be the product of guesswork. Although there may be good reasons to worry about the distorting effects of uninformed speculation, there may be equally good reasons to worry about the distorting effects of decision-
making overinformed by the grip of a particular instance. Perhaps this is what people mean by “result-oriented,” a curious phrase that few outside the legal culture take as the pejorative it is within the culture. But to the extent that it remains a pejorative, it is because real cases produce reasons whose array of results is, on balance, more detrimental than the good produced by the right result in the original case, such that it would have been better to reach the wrong result in the original case.  

From this perspective, one possible approach to reason-giving is to give better reasons, ones that will not produce a hundred wrong results in exchange for one right one. Another is to reject the commitment model of giving reasons, but this is difficult given the commitment model of social practice. A third approach is not to give reasons at all. If reasons are what cause the right outcome in this case to generate wrong outcomes in others, then weakening the reason-giving requirement can produce the right outcome now without negative side effects. In effect, lowering the cost of reaching the right result may make it easier to reach the right result more often.

The argument against giving reasons thus tracks the argument against advisory opinions, and the legal culture’s attraction to reasons and aversion to advisory opinions is inconsistent in that both involve deciding hypothetical cases possibly arising under facts we can only dimly perceive now. We might even say that the legal culture is wrong to think itself averse to advisory opinions, because advisory opinions are given all the time. On the other hand, the legal system may be right to think that rendering advisory opinions is a bad idea. If so, then giving reasons may be a worse idea than many people suspect.

VIII

The thesis I advance, therefore, is that giving reasons is committing, although not inviolably so. Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason. Insofar as the word “commitment” might be too strong to capture the defeasible commitments to which I refer, it could be said simply that the very act of giving a reason provides an independent ground (i.e., a “reason” for action, in a different sense of “reason”) for following that reason in future cases. These grounds compete with other bases in decisionmaking, especially the desire to decide this case in


71. This suggests the possibility of an economic analysis not only of the practice of giving reasons, but also of the scope of the reasons given. On my analysis, giving a reason decides (prima facie) some number of future cases. We can then weigh the benefits of both the guidance and checks that reasons provide against the costs of commitment to results that further reflection or subsequent events may prove to be mistaken. For an instructive analysis of the role of a reason in providing guidance, reliance, and planning benefit for its recipient, in exchange for the constraint and commitment costs to the reason-giver, see Steven Shavell, An Economic Analysis of Altruism and Deferred Gifts, 20 J. LEGAL STUD. 401 (1991).
the right way, but the grounds emanating from the practice of giving reasons still reduce the reason-giver's freedom of decision in future cases.

As a device of institutional design, reason-giving can thus be seen as contingent rather than necessary, a style of decisionmaking with disadvantages of excess commitment that might at times outweigh its advantages. But there are advantages to giving reasons, the most obvious being the very commitment that is at times a disadvantage. Although decisionmakers are typically loath to commit themselves out of reluctance to constrain their own future decisions, others might nevertheless want to compel decisionmakers to commit themselves. When the forces of institutional design require decisionmakers to give reasons, it may be that these forces have more cause to want commitment than do the decisionmakers themselves. Decisionmakers usually desire flexibility and the freedom to try to reach the optimal outcome in each case. But from an institutional perspective, the virtues of decisionmaker flexibility and case-by-case optimization are sometimes best tempered by an appreciation of the values of reliance and stability for stability's sake. When designers of institutions (including the democratic process itself) believe it would be beneficial for decisionmakers to commit themselves, and when the designers believe the decisionmakers are likely to undercommit, then imposing a requirement of reason-giving on the decisionmakers—that they state in advance how they are likely to decide cases other than the one before them and that in the future they treat their prior statements as constraining—is a valuable way of achieving the proper level of commitment.

Distinct from the question of commitment, however, is the decision-disciplining function of giving reasons. Again, decisionmakers themselves are unlikely to fully apprehend and appreciate this function, for most decisionmakers underestimate the need for external quality control of their own decisions. But when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies. Under some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions.

72. The dynamics of reliance complicate the statement in the text. Insofar as a decisionmaker's commitment induces reliance on the part of those likely affected by future decisions, decisionmakers may voluntarily commit themselves in order to encourage such reliance. In some contexts, decisionmakers may encourage reliance because relying parties may value reliance sufficiently to "pay" for it, as in contracts, by making commitments in return.

73. The value of reliance, however, is best evaluated against a baseline of antecedent understandings by the relier. Whether reliance is a good thing may thus depend on what will be believed by a subject with less reliable means of determining what a decisionmaker is likely to do in the future. If we are concerned with maximizing enforcement, for example, it may be beneficial to keep risk-averse enforcement subjects in a state of some uncertainty about likely enforcement action. See, e.g., Suzanne Scotchmer, Who Profits From Taxpayer Confusion?, 29 ECON. LETTERS 49 (1989) (arguing that because some taxpayers do not resolve their uncertainty about tax rules by seeking advice, the state has higher revenues). When this is so, discouraging decisionmakers from giving reasons may help produce an optimal compliance level.

74. I do not claim that the only way to slow a decisionmaker inclined toward excessive haste is with a requirement of reason-giving. Devices requiring decisionmaker duplication, such as a legislative
reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.

Additionally, giving reasons may be a sign of respect. As noted at the outset, announcing an outcome without giving a reason is consistent with the exercise of authority, for such an announcement effectively indicates that neither discussion nor objection will be tolerated. When the source of a decision rather than the reason behind it compels obedience, there is less warrant for explaining the basis for the decision to those who are subject to it. But when decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise. Even if compliance is not the issue, giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one.

That giving reasons is a way of opening a conversation may in fact be an independent basis for a reason-giving requirement. In some contexts, discussion and conversation are to be avoided, even apart from the question of authority. Discussion takes time and may, on occasion, heighten rather than dampen disagreement. Yet discussion can be the vehicle by which the subject of the decision feels more a part of the decision, producing the possibility of compromise and the respect for a final decision that comes from inclusion.

Yet as I have stressed throughout, the advantages of giving reasons come at a price. Not only does giving reasons take time and sometimes open up conversations best kept closed, it also commits the decisionmaker in ways that are rarely recognized. Specifically, giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict. Moreover, the commitment that comes from giving reasons is a commitment of categorization and a commitment of generalization. To give a reason is both to create a category larger than the decision at hand and to generalize. Reason-giving is therefore in tension with and potentially a check on maximal contextualization, on case-by-case determination, and on recognition of the power of the particular. Conversely, reason-giving is the kin of abstraction, of rule-based decisionmaking, and of decontextualization. As soon as giving a reason puts this case into a larger category including other cases, the pull away from the particular and toward the general has begun. In many decisionmaking environments, the pull away from the particular and away from context is precisely what is desired by institutional designers. When that is the case, a requirement that decisionmakers give reasons can be one—although by no means the only—instrument of achieving that goal. But when particularization and contextualization are desired, and categorization and abstraction are resisted, then requiring decisionmakers to give reasons for their decisions impedes the aims of particularization and contextualization. This says little about whether and when giving

requirement of two readings and the common requirement in many university faculties of two meetings to approve a senior appointment, can serve the same purpose.
reasons, all things considered, should be required. It does say, however, that when context, case-by-case decisionmaking, and flexibility are thought important, the benefits of requiring decisionmakers to give reasons do not come without a price.