

Reason Giving Regimes in Public Law

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The path of law from command to argument

- Conventional view:
 - “The act of giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges.” (Fredrick Schauer)
- Only residual pockets of opacity:
 - Jury verdicts, denial of certiorari, rulings on objections at trial
 - Legislation
- Path: public power treated as authoritative only when justified expressly
 - Authority is (increasingly) a function of reason-giving.

Reason-Giving Regimes: Four Dimensions

(1) When Must Reasons be Provided?

- Ex ante (at time of action) v. Ex post (after action or only in review)

(2) When Will Reasons be Reviewed?

- Ex ante (before effect) v. Ex post (after the action)

(3) Which Reasons Are Relevant to Review?

- Only ex ante reasons v. Ex post reasons also allowed

(4) What is the Level of Scrutiny?

- Low (rational basis, any basis in record)
- High (hard look review, probable cause)

	Timing of Reasons: Required Ex ante v. Permitted Ex post	Timing of Review: Ex ante v. Ex post	Reasons Relevant for Review: Ex ante only v. Ex post reasons allowed	Level of Scrutiny of Reasons: Low v. High
I. Police Search with Warrant	Ex ante	Ex ante (pre-search)	Only ex ante	High (probable/ plausible cause)
II. Administrative Rulemaking & Adjudication	Ex ante	Ex ante (for Rules, pre-enforcement review avail. and OIRA) or Ex post	Only ex ante	High (hard look review & substantial evidence)
III. Trial court decision (without jury)	Ex ante	Ex post	Ex post reasons allowed	Low (affirm on any basis in record)
IV. Legislation (not triggering strict scrutiny)	Constructed ex post in review	Ex post	Ex post reconstruction needed	Low (rational basis)
IV. Jury verdict	Constructed ex post in review	Ex post	Ex post reconstruction needed	Low (affirm on any basis in record)

Reasons for Reasons

Reasons for Reasons – Four Values

- (1) To enhance legal accountability of individual decisions
 - Focus on delimited factors made relevant by law
 - Flush out illegitimate reasons
 - Constrains discretion
- (2) To promote predictability and efficiency of system
- (3) To augment the legitimacy of decisions
- (4) To respect dignitary interests of audience

Note Role of Reasons Depends on Other Values

Principles explaining our regimes

- (1) When interests in legal accountability is high and role of reasons in legitimating is high, regime will require **ex ante reasons** and **review based only on ex ante considerations** (and possibly also strict standard of review). *Compare* Type I & II v. Type IV.

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- (2) When interest in systemic predictability is high, regime will treat reasons as establishing strong precedents. *Compare* Type I-III v. Type IV.

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Principles explaining our regimes

- (1) When interests in legal accountability (decision based on particular factors) is high *and* role of reasons in legitimating is high, regime will require **ex ante reasons** and **review based only on ex ante considerations** (and possibly also strict standard of review).

Compare Type I & II v. Type IV.

- (1) When interest in systemic predictability is high, regime will treat reasons as establishing strong precedents.

Compare Type I-III v. Type IV.

- (1) To the extent dignitary interests in reasons are triggered, the demand for reasons – whether ex ante or ex post – will be high.

Are dignitary interests confined to adjudicative/as applied decisions?

Path of law suggests broader demands. . . .

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