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Small Things like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State

Cover Page Footnote

Sterling Professor of Law, Yale University. This essay was originally presented as the Robert L. Levine Distinguished Lecture at Fordham University School of Law on March 27, 2001.

SMALL THINGS LIKE REASONS ARE PUT IN A JAR:[†] REASON AND LEGITIMACY IN THE ADMINISTRATIVE STATE

*Jerry L. Mashaw**

“Why” is a multi-purpose word. It is the language of curiosity, evidence of intellectual engagement. We revel in our children’s and our students’ whys; reward their curiosity with attention and serious responses; turn their whys back on them—“why do *you* think?”—to stimulate independent thought, reflection.

“Why” is also a language of attention getting, even harassment. One of my favorite cartoons—I think it’s from *The New Yorker*, perhaps by Ogden Nash—shows a small child leaning forward from the back seat close to his driving father’s ear. The conversation must have been the familiar one with a bored four-year old on a car trip: “Why aren’t we there yet?” “Why are you going so slow?” “Why does Grandma live so far away?” and so on, and on. The caption at the bottom gives the harassed father’s response: “Shut up, he explained.”

“Why” is also ubiquitously the language of disappointment, even despair. It articulates a demand for comfort and for justice; a quest for understanding that often reaches beyond the facts of the matter. Indeed, “why” may signal the collapse of a world view, an anxious, even desperate attempt to reconceive of ourselves and our world in a way that makes sense; that permits our lives to go on as an understandable narrative.

These most excruciating whys, the ones that reveal our souls’ confusion and torment, may be simultaneously irresistible and hopeless. The title of this lecture is taken from a 1960s song *Comin’ Back to Me* by Jefferson Airplane. But the vocalist’s lover is not coming back. He knows he’s only dreaming. He knows as well that the reasons for the breakup are completely inadequate explanations

[†] Jefferson Airplane, *Comin’ Back to Me*, on *Surrealistic Pillow* (RCA Records 1967).

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for what went wrong. Reasons have been demanded, but in his emotional devastation they have turned out to be trivial—small things to put in a jar. Paul Simon later gave instruction on “Fifty Ways to Leave Your Lover.” None of them involved explanation.

Job repeatedly asked God “why,” but the answers were of little use to him. In Carl Jung’s famous interpretation of the Book of Job,¹ Job’s quest is for an answer that he could not possibly accept. Job’s “why” sounds in morality and justice. God’s answer is in the willfulness of the Old Testament, a will beyond human understanding. For Jung, Job’s quest for understanding demonstrates his moral superiority to the God he interrogates; it is a human quest for justice in the face of a force for whom justification is irrelevant.

It is, of course, this particular discourse of whyness, with its expectation of reason-giving, that I want to explore this afternoon. Reason has become the modern language of law in a liberal state. The anguished why of the contemporary Job confronting contemporary secular authority often carries with it an enforceable demand for justification. If our secular Job is to be treated as an independent moral agent, a citizen of a regime which can claim to respect persons as ends rather than merely means, his disappointment must be explained.

I want to ask some of my own why questions about this familiar legal language of whyness. Why do reasons matter? What reasons count? When do reasons satisfy our longing for justice? When do they fail? Why?

These are deep and abiding questions about which legal and political philosophers have had much to say over hundreds of years. I will not try to plumb the philosophic depths of these issues in a few minutes. When my wife, Anne, and I travel with our dear friends Bruce and Susan Ackerman, Anne imposes a simple conversational rule on Bruce, a man well known for his philosophic enthusiasms. Her rule is “No Heidegger before breakfast.” It is, I assure you, a rule that makes everybody better off. Conversation must be appropriate to the time and place and the capacities of the conversationalists.

So I will comment on these timeless issues mostly from the vantage point of my own particular field, administrative law. I do not believe that this limitation trivializes the subject. Indeed, I want to convince you that the discourse of whyness and of reason-giving is more important here than anywhere else in American law. Administrative law’s struggle with the uses of reason and reason-giving as the foundation of legal legitimacy provides insights of a special sort into the relationship of law and reason—and into the work that remains to be done to bring that struggle to a successful conclusion.

1. C. G. Jung, *Answer to Job* (R.F.C. Hull trans., Princeton Univ. Press 1973) (1958).

I. THE PLACE OF REASON IN ADMINISTRATIVE LAW

One might object, of course, that the substitution of reason for myth, tradition, culture or inherited power, as the basis for law and political legitimacy, describes the whole project of modernity. As self-actualizing agents in the Cartesian sense—we think, therefore, we are—we are also self-governing moral agents. We can understand ourselves only to the extent that we can give ourselves reasons for actions that correspond to a life plan that we recognize as our own. And we can understand ourselves as members of an acceptable system for collective governance, bound together by authoritative rules and principles, only to the extent that we can explain why those rules and principles ought to be viewed as binding. The authority of all law relies on a set of complex reasons for believing that it should be authoritative. Unjustifiable law demands reform, unjustifiable legal systems demand revolution.

But the reign of reason plays itself out in different ways in different domains of authoritative legal decision-making. We have in crucial ways given up on the project of rationality as applied to legislative action. As a constitutional matter we do not require that the legislature have a “rational basis” for its actions, only that we could imagine one. And, while it is virtually impossible to avoid purposive interpretation of statutory pronouncements, that is, to attempt to apply the statute consistently with the “reasons” underlying its enactment, we know that those reasons are post-hoc constructions ascribed to a metaphorical “it” that is really a “they.” Save in special constitutional contexts where fundamental human interests can only be overridden by pressing state needs, the legislature need not have investigated the facts of the matter, analyzed them cogently, or been motivated by whatever reason can be constructed as a justification for its action.²

This difference between legislative and administrative reason as a ground for the legitimacy of action was candidly acknowledged some years ago by Judge Wilkey of the District of Columbia Circuit Court of Appeals in a case involving the validity of certain standards adopted by the National Highway Traffic Safety Administration. While striking down the agency’s regulation as having no adequate rationalization, the court felt constrained to uphold two parts of the rule that had been expressly mandated by Congress. Recognizing that his discussion of the apparent irrationality of the rule applied equally

2. Struggles concerning which human interests are “fundamental,” and what level of rationality must be demonstrated to override those interests, nevertheless generate much litigation and massive scholarly analysis. For a selection, see, e.g., Geoffrey R. Stone et al., *Constitutional Law* 813-1048 (3d ed. 1996).

to all its parts, Judge Wilkey remarked simply, "No administrative procedure test applies to an act of Congress."³

Nor has reason colonized judicial decision-making as an exclusive ground for legitimacy in the way that it inhabits administrative law. At first blush this may seem an odd claim. Law talk as it is carried on in the profession as well as in the academy is almost maniacally fixated on the reasons given by appellate judges as justifications for their decisions. Yet the law treats the necessity and the importance of reason-giving in judicial dispute resolution very differently than it treats the force of reason in administrative law. The bulk of all private adjudication is settled prior to judgment. The judge need give no reason for failing to render a decision other than that the parties themselves decided to forgo judicial intervention. For anyone committed to adjudication as the preeminent rational discourse for the development of law the ubiquitousness of settlement is deeply disturbing.⁴

Moreover, many civil cases, and most criminal ones, that go to trial are decided by jury verdicts. We have self-consciously made the jury a black box. Its results are known, but its reasons are both mysterious and irrelevant to the path of the law. A jury verdict is illegitimate only in those exceedingly rare cases where no rational argument could have been constructed to justify the result. Like the legislature's duty to satisfy the "rational basis" test, the jury's verdict is subject only to the constraint of hypothetical reason.

Even in the realm of appellate court judgment numerous legal rules suppress the importance of the judicial rationale. That a lower court gave the wrong reasons for a correct decision is not by itself a justification for reversal or remand. By contrast, perhaps the most common ground for reversal of an administrative institution's order is failure to rationalize its decision adequately. When analyzing the authoritativeness of prior judicial determinations it is commonplace for lawyers, judges, and commentators to strip away all judicial rationalization not found, on post-hoc analysis, to be absolutely essential to the decision. Most of what courts say in justification for their decision-making is cast by common convention into the outer darkness of *obiter dictum*. Small things like judicial reasons are often put in a jar, which is then put out with the trash.

I am not claiming, of course, that reason plays no role in legitimating both legislative and judicial action. My claim is only that the legitimacy of legislative or judge-made law draws on sources other than rationality or reason-giving. We speak unselfconsciously not of legislative reason but of the legislative will. Law in its legislative form

3. Nat'l Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31, 37 (D.C. Cir. 1974).

4. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

is the aggregation of preferences legitimated by periodic elections. It is at best a clunky system and a deep disappointment to those who believe that democracy should be deliberative and expressive, that is, rational, rather than willful.⁵ Indeed, in an earlier era in which parliaments were struggling to wrest power from monarchs, the legislature's image was that of a deliberatively rational institution juxtaposed against the willfulness of the executive embodied in the crown.

Adjudicative legitimacy flows as much from judges' capacities to settle disputes authoritatively as from their capacity to create well-justified legal norms. While the fragmented and transparently incoherent opinions in *Bush v. Gore*⁶ deeply trouble the chattering classes, a substantial majority of Americans seem to have welcomed a simple authoritative resolution to an election that had become a bore. The Court would perhaps have done less damage to its own legitimacy had it issued the decision with no reasons at all. Too bad the Court could not use a jury and base legitimacy on some inarticulate sense of justice represented by a random selection of ordinary citizens.

By contrast, a retreat to political will or intuition is almost always unavailable to modern American administrative decisionmakers. The electoral connection is generally unavailable as a justification for administrative action. Administrators, of course, have two possible connections to the electorate: the appointment of all high level administrative personnel by the President and the ultimate derivation of virtually all administrative authority from the legislature. But, it is a rare case in which an administrator called upon to justify a decision can respond simply, "The President made me do it," or "The Congress said so." Indeed, such claims delegitimize administrative action rather than count as good reasons. Pressure by the people's representatives in congressional hearings may cause an agency's adjudicatory determinations to be invalidated, or the hearing's participants to be disqualified as administrative adjudicators.⁷ Even nonadjudicatory action, such as a decision about where or whether to build a road segment, may be invalidated when based on congressional pressure to consider matters not within the four corners of the statute under which the administrator operates.⁸ And, in "quasi-legislative," rulemaking proceedings, administrative law doctrine counsels administrators against any *ex parte* communications

5. For an attempt to square administrative governance with civic republican aspirations and for citation of some of the extensive civic republicanism literature, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *Harv. L. Rev.* 1512 (1992).

6. 531 U.S. 98 (2000).

7. *Pillsbury Co. v. FTC.* 354 F.2d 952, 963-65 (5th Cir. 1966).

8. *D.C. Fed. of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1971).

with elected officials that are not memorialized and described in the rulemaking record.⁹

Directives from the President often fare no better, as Harry Truman learned in the famous Steel Seizure case¹⁰ during the Korean Conflict. More recently, the almost equally famous *State Farm*¹¹ case, concerning the National Highway Traffic Safety Administration's passive restraints rule, stands broadly for the proposition that a change of administrative ideology consequent upon a presidential election cannot provide a sufficient reason for rescinding an administrative rule. The rescission of a rule, like its adoption, must be rationalized in terms of relevant statutory criteria and social, economic, or scientific facts spread upon the rulemaking record.

More recently yet, President Clinton announced that he was "authorizing" the Food and Drug Administration (FDA) to regulate tobacco as a drug.¹² Not only was this "authorization" ineffective in protecting the FDA's regulations from invalidation, the FDA did not even attempt to rely on the political legitimacy of presidential power as a basis for its exercise of jurisdiction. The whole burden of the FDA's legal argument emphasized technocratic rationality—new knowledge concerning the way in which cigarettes were manufactured and marketed.¹³

To some extent these failures of political justification, administrative law's attempt to insulate reason from politics, are protections for an alternative connection between administration and politics—an attempt to ensure an agency's fidelity to a statute enacted by elected representatives and signed by an elected President. But, while statutory authority is a necessary condition for legitimate administrative action, it is far from sufficient. Authority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis. Otherwise, an administrator's rule or order will be declared "arbitrary," perhaps even "capricious."¹⁴

Moreover, as those who decry the toothlessness of the non-delegation doctrine constantly remind us, the vacuity of statutory terms stretches the thread that binds administrative action to electoral

9. *Sierra Club v. Costle*, 657 F.2d 298, 400-08 (D.C. Cir. 1981).

10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

11. *Motor Vehicle Mfrs. Ass'n. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

12. President Bill Clinton, Press Conference at the White House (Aug. 10, 1995), 1995 WL 472181.

13. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 170-71 (2000) (discussing the FDA's legal justifications for its tobacco regulations).

14. See Administrative Procedure Act of 1946 § 10(e), 5 U.S.C. § 706(2)(A) (1994) (stating that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

preferences virtually to the breaking point.¹⁵ When the Congress tells the National Highway Traffic Safety Administration in the Motor Vehicle Safety Act of 1966 to “meet the need for motor vehicle safety”¹⁶ it has done little more than to tell the agency to go forth and do good.

Nor can agencies borrow much legitimacy from simple conflict resolution or jury-like allocation of decisional competence to ordinary citizens. The insinuation of stake holder negotiation into administrative procedures is often viewed as a corruption of the administrative process. Agency use of advisory committees or “regulatory negotiation” is surrounded by a host of constraints to ensure that the agency remains firmly in control of the ultimate regulatory product.¹⁷ Moreover, none of these devices reduces the agency’s obligation to explain its decision in instrumentally rational terms.

Even settlements, while hardly unknown in agency enforcement, may nevertheless be subject to demands for rationalization backed by judicial review. And, many encounters between government agencies and private parties cannot in any meaningful sense be “settled.” Whether a citizen is entitled to Social Security disability benefits, or to a commercial aviation license, has to be decided. The reasons given for these decisions are then subject to review to ensure that an adequately rational explanation has been provided. Where an agency’s mission demands actions that outrun cogent articulation of reasons we have usually stumbled into an arena in which lotteries or market solutions are more appropriate means of decision-making. Reform then proceeds in the direction of “deregulation.” The alternative economic rationality of the market, or the probabilistic equality of a fair drawing, are substituted as legitimating devices for the reasonableness of administrative law.

This connection between administration and reason is a familiar theme in the social and political theory of modernity. Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge.¹⁸ And the American Progressive Movement extolled the virtues of

15. See generally Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 Cardozo L. Rev. 731 (1999) (reviewing the jurisprudence and literature concerning the non-delegation doctrine).

16. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, § 103(a), 80 Stat. 718, 719 (1966), *repealed by* 15 U.S.C. § 1381 (1994).

17. E.g., Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990), 5 U.S.C. §§ 561-70 (2000); Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), 5 U.S.C. §§ 571-84 (2000); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972), *amended by* Pub. L. No. 94-409, 90 Stat. 1241 (1976), 5 U.S.C. app. § 1015 (2000).

18. Max Weber, 3 *Economy and Society* 956-1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

administration in terms both of substantive expertise and the creation of "rational democracy."¹⁹ But administrative decision-making in the United States was not always so focused on rationality and reasoning as the touchstones of legal legitimacy. Indeed, pre-New Deal administrative law had relatively thin rationality requirements.

One of my favorite illustrations is Justice Brandeis' decision in a 1935 case involving agricultural regulation in Oregon.²⁰ The Oregon agricultural authorities, operating under a statute demanding that they "promote . . . the horticulture interests' of the State," had adopted a regulation on the marketing of berries that excluded the use of all containers save one style of box—a box that just happened to be manufactured only in Oregon.²¹ The reasons for the agricultural authority's solicitation concerning the boxing of berries were nowhere revealed in its regulatory issuances. But, in a due process challenge urging the substantive irrationality of the regulation, Justice Brandeis simply analogized administrative regulation to legislation. The constitutional question he said was simply whether some state of affairs might be imagined under which the Oregon regulation would be a rational means for carrying out the legislative mandate.²² Because few more imaginative Justices ever graced the bench, Justice Brandeis found himself easily equal to the task. As a constitutional matter, administrative rationality, at least in the domain of rulemaking, was to be subjected to no stronger test than the hypothetical rationality applied to legislation.

But, the burgeoning of the administrative state during the New Deal and the Second World War produced a strong reaction against what Roscoe Pound, among others, described as "administrative absolutism."²³ The statutory embodiment of this reaction is the 1946 Administrative Procedure Act ("APA").²⁴ And, while the APA seemed at the time to make modest demands for agency articulation of reasons, developments since that time, both in the interpretation of the APA and the statutory prescription of other, more far-reaching, rationality requirements, are astonishing.

The modest suggestion in section 553 of the APA that agencies must file a "concise statement of the basis and purpose" of a regulation has developed into the requirement of a comprehensive articulation of the factual bases, methodological presuppositions, and

19. For a classical discussion of the progressive view of good government, see Woodrow Wilson, *Constitutional Government in the United States* (1908).

20. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

21. *Id.* at 180-82.

22. *Id.* at 181-82.

23. Pound's views on the administrative state can be found, among other places, in Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance*, 7 U. Pitt. L. Rev. 269 (1941).

24. Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (1994)).

statutory authority that justifies any exercise of rulemaking. To make certain that this exercise in instrumental rationality is real rather than hypothetical, courts routinely reject “post-hoc rationalizations,”²⁵ the agency’s use of untested facts outside the rulemaking record,²⁶ and attempts to rely on unarticulated reservoirs of agency “expertise.”²⁷ They demand, in addition, persuasive responses to cogent objections by outside parties.²⁸

Specific regulatory statutes have gone far beyond the APA to add a host of analytic requirements to particular regulatory functions. And a plethora of more general, framework statutes have made agency rulemaking into what some have characterized as an exercise in “synoptic” rationality.²⁹ In addition to rationalizing action in terms of their principal missions agencies must routinely consider the environmental consequences of their actions; provide cost benefit analyses of regulatory alternatives; consider impacts on particular clienteles; and assure objectors that, having canvassed the universe of possible actions, they have chosen the least burdensome alternative to accomplish their statutorily specified ends.³⁰

In some arenas of agency rulemaking observers claim that these multiple requirements for synoptic or comprehensive rationality have brought policymaking to a virtual standstill. Others suspect that the demand for rationality has moved from a concern for justification and legitimacy into the realm of harassment.³¹ Many agencies would certainly relish the opportunity to follow the practice of the disgruntled father who had at least some chance of getting away with an utterance like “Shut up, he explained.” Rationality as the touchstone of legitimacy in the liberal, administrative state has been enthroned as a sometime tyrant.

A similar story can be told about other domains of administrative action. The due process revolution, along with congressional attentiveness in modern statutes to the provision of formal

25. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971).

26. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring release during notice and comment period of scientific data used as basis for rule).

27. See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

28. For a compendium of materials on the requirements of administrative rulemaking, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (3d ed. 1998).

29. See generally Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (1991).

30. A compendium of these statutes along with related executive orders can be found in the *Federal Administrative Procedure Sourcebook* (William F. Funk et al. eds., 3d ed. 2000). The Sourcebook now runs a mere 1003 pages.

31. My own intemperate remarks on this matter can be found in Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. Pitt. L. Rev. 405 (1996).

adjudicatory process, has dramatically increased the demand for transparently rational administrative adjudication. With only modest recent retrenchments, the multi-decade judicial project of eliminating domains of inarticulate administrative discretion has brought reason-giving to administrative inaction, enforcement, and agenda setting³²—areas long thought protected from judicial supervision with its incessant demand for transparent rationality.

To be sure, the triumph of reason has not been complete in administrative law. I have painted here with a broad brush, leaving aside many qualifications and counter-currents. I believe nevertheless that my central point is almost undeniable. The path of American administrative law has been the path of the progressive submission of power to reason. The promise of the administrative state was to bring competence to politics. It is the institutional embodiment of the enlightenment project to substitute reason for the dark forces of culture, tradition, and myth. Administrators must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous.³³ “Expertise” is no longer a protective shield to be worn like a sacred vestment. It is a competence to be demonstrated by cogent reason-giving.

II. FROM TRIUMPH TO DISAPPOINTMENT

From this perspective, the development of American administrative law represents the triumph of the idea of reason in public life. For a host of reasons this is a triumph to be celebrated. We do not want environmental regulation based on myth, or an individual's deservedness for Social Security benefits decided on the basis of inarticulate cultural premises. We are deeply divided over appeals to the sacred in public life, and, whatever the sociological fact of the matter, reliance on hereditary status as a basis for exercising power has always seemed un-American. We treasure an independent judiciary, but only so long as we are convinced that we are keeping most of public policymaking out of its hands. We do not wish to be governed by the “artificial reason” of the law in courts. And while we prize elections, we seldom believe that politicians have received a mandate for relentless pursuit of their particular visions of the good. We do not view ourselves as in the business of electing dictators who can rule by decree while hiding behind “the will of the people.”

32. Notwithstanding the broad dicta in *Heckler v. Chaney*, 470 U.S. 821 (1985), the courts have found a multitude of devices for submitting administrative enforcement and regulatory discretion to review, thereby requiring that agencies justify their failure either to enforce or to regulate. See generally Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* 868-901 (4th ed. 1998).

33. The iconic statement of this position is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

My claim then is that American administrative government is not just a story of the triumph of reason. It is a story of the triumph of legitimate, liberal governance in a world full of dangerous alternatives.

Yet in 2001, to celebrate the administrative state seems bizarre, at best anachronistic. Have we not spent the last three decades excoriating government? Every president since Lyndon Johnson has run against it. "Bureaucrat" is not a term of approbation. Even Bill Clinton, the electoral heir of Franklin Roosevelt, declared the era of big government to be over. Promises to get the government off peoples' backs and out of the hands of pointy-headed bureaucrats are unfailing applause lines. Woodrow Wilson was probably the last—perhaps the only—president to celebrate the triumph of reason in the administrative state. Something has gone terribly wrong, and the voice from the backseat, now in a truly inquisitive mode, wants to know why.

The short answer, of course, is that I don't know. But the demands of academic lectures and occasions such as this one require that I say more than that. "Shut up, he explained," just won't do. So in the remaining few minutes I want to provide some tentative explanations for what might be called our "post-modern anxiety" about administrative governance, and to sketch out an agenda for conversation, thought, and perhaps research.

III. ROUNDING UP THE USUAL SUSPECTS

A large number of candidates come to mind as explanations for our discontent. Simple human cussedness is, of course, one of them. In a country born in revolution and dedicated to constant improvement we celebrate success momentarily, on the way to our next reform campaign. But, this explanation, because it explains our discontent with everything, carries no particular lesson for our discontent with the administrative state.

An almost equally broad explanation involves our famously anti-state, political ideology. We simply distrust government, believe smaller government is always better than bigger, and locate government itself primarily in those functionaries, read "administrators," who actually carry out or implement public policy. We blame the Department of Motor Vehicles for long lines at the counters, not the legislature that refuses to fund additional personnel and equipment. We blame the IRS for our incomprehensible personal income tax form, not the Congress that seems incapable of tax simplification. All of these petty frustrations and disappointments are rolled into a general ideological package that exalts the private market and private voluntary action, while decrying the public sector. We somehow forget that these same experiences await us at the bank if we want to do anything more complicated than use the ATM—and

much worse ones should we be so unlucky as to have a question about our health insurance.

This ideological explanation is, of course, not necessarily a rejection of reason as the grounding for legitimacy. One way to explain a pro-market ideological preference is that it represents a claim about a particular form of rationality. We prefer the rationality of the market to the quite distinct rationality of administrative policy development. The market after all makes decisions, millions of them, in a decentralized, non-coercive, almost invisible fashion. Moreover, there is ample evidence that as an engine for aggregate economic welfare, market determinations of product variety, quality, and price are hard to beat. For some of us, discontent with the administrative state is a complaint about allocation of decisional authority between the public and private spheres, however difficult it may be to separate one sharply from the other.

But this is not a very satisfactory explanation either. However much we may say we despise government in general, we overwhelmingly support government programs. There is no electoral majority for getting rid of the major programs of the American welfare state, or of the American regulatory state either. Al Smith was the last politician to run against the Social Security system. George W. Bush wants us to believe that he is a committed, but sensible, environmentalist. The notion that we are unhappy with administrative government because we want to turn the whole domain of government provision over to the private sector is belied by both our conduct and what we say in public opinion polls. We are not prepared to substitute the "rationality of the market" anywhere and everywhere for the rationalized policy choice embodied in collective governmental action. We are ideological conservatives and operational liberals.³⁴ Indeed, a moment's reflection reveals that many of our demands on government are precisely that government bureaucrats protect us from private ones.

Nor am I really attracted by the post-modern sensibility that suggests that we distrust the administrative state because we know rationality to be a sham. As that argument goes, reasons can always be given and made more or less plausible. What reasons we are prepared to accept or reject are conditioned, indeed determined, by social structures that reflect existing power arrangements. Reason is not a justification for power, it is power's benign face, a mask that consoles as it misleads. Reasons really are small things to put in a jar. They are the pathetic coinage with which the powerful buy off the

34. For an extended treatment, see Lloyd A. Free & Hadley Cantril, *The Political Beliefs of Americans: A Study of Public Opinion* (1967).

powerless in a legitimacy game that preserves the hegemony of the hegemon.³⁵

There is some truth to these claims, of course, but they simultaneously prove too much and offer too little. They suggest at their most extravagant that there is no real difference between the administrative rationality of the U.S. Social Security administration and the administrative rationality of the Rwandan military police. From the critical perspective, the regulations of the Environmental Protection Agency involve the same sort of transfer of power to special interests as do milk marketing orders in our truly corrupt system of dairy price supports. The deconstructionist project is occasionally illuminating, but it cuts too broad a swath. And its positive program is nonexistent. Some English departments are post-modern, most Americans are not. Our collective life must be managed, not merely interpreted.

But in rejecting these general explanations for our discontent with the rationalized administrative state I do not mean to suggest that no genuine complaints exist. Far from it, I want to suggest instead where I think our project of rationality and reason-giving has gone wrong—or, if that's too strong, has been inadequate. In my view the fault is not that the project has been about reason or reason-giving when it should have been about something else. My hunch is that the problem lies in too narrow a definition of rationality—in too cramped a style of reason-giving. In many instances the reasons we are given fail to respect our humanity. They treat us as people for whom reasons matter, but fail to attend to the range of reasons that we care about.

Here I want to borrow from and misuse some categories or domains of reason pioneered by the contemporary German political philosopher Jürgen Habermas. I will not, I promise you, have much to say about Habermas.³⁶ The no-Heidigger-before-breakfast rule should surely have a complement: no Habermas after 6:00 p.m. But the basic idea is just this:

Almost everywhere in the democratic, developed world we find a highly articulated system for administrative self-government that verges on paralysis. The necessity for state action is combined with deep suspicion and alienation. The administrative state, certainly the American one, is drowning in rationality requirements because it can legitimate itself only by appeals to rationality. Yet it is failing to assure the public either of its effectiveness or its bona fides.

35. For an elegant analysis of U.S. administrative law and corporation law from this perspective, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984).

36. For concise introductions to Habermas' thought, see, e.g., Arie Brand, *The Force of Reason: An Introduction to Habermas' Theory of Communicative Action* (1990); David Ingram, *Habermas and the Dialectic of Reason* (1987); and Stephen K. White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* (1988).

In Habermas' account we all operate in three broad domains of rational action: the material, the social, and the personal. Claims to rationality in these three domains are quite different. In the material world the claim is to truth. In the social realm the claim is about rightness or justice. In the personal domain, rational validity sounds in authenticity rather than in truth or right action. The problem of state legitimacy is at its base a problem of its overcapacity to address truth claims combined with its undercapacity to address claims of justice and authenticity. Administrative action not only leaves claims of justice and authenticity unaddressed, it often treats these issues as if reasons focused on truth or factual validity answered our demands for reasons of a quite different sort. To bring these highly abstract ideas down to earth, consider a few examples of the affronts to authenticity and our sense of justice that routinely flow from the activities of the administrative state.

Insults to authenticity are, of course, the primary complaint about bureaucracy in general. We are confronted everywhere by rules that do not seem to fit our particular cases. Application of the rules not only disappoints our expectations, it often seems to falsify our experience, and to challenge our conceptions of ourselves as autonomous moral agents.

I have spent an inordinate amount of time looking at the process for determining Social Security disability claims. This is a highly rule-bound system that processes millions of claims through the activities of thousands of adjudicators. Over half of those who apply for benefits have their claims denied. They find these denials deeply perplexing. Quite often claimants have struggled to continue to work despite serious impairments, and the advice of family members and physicians that they really should not persevere. Having resolved finally to accept a status, "disabled worker," that they have struggled to avoid, they are told by disability adjudicators that they were wrong. They may be a "failed" worker, unable to get and hold a job, but according to the Social Security Administration's rules they are not disabled.

Many find this determination unacceptable. They pursue further levels of appeal, which permit them to individualize their cases by the presentation of additional evidence and participate in face-to-face meetings that the rule-bound lower levels of adjudication have not provided. More than half of those who go on to this more contextualized process of adjudication are granted benefits.³⁷

But the story does not end here. Many successful claimants are also vaguely unhappy with their favorable results. In order to receive

37. For recent data on Social Security Disability adjudications, see Social Security Advisory Bd., *Disability Decision Making: Data and Materials* (2001), available at <http://www.ssab.gov/reports.html>.

income support that they desperately need, they have been forced to accept a label, "disabled," that they fundamentally reject. The system demands an all or nothing result. It applies its binary judgments to individuals whose complex reality is falsified by both the grant and the denial of their claims.

There are, of course, many other cases, involving different types of administrative decisions, in which hard-edged rules cannot be avoided. And the persistent human demand for individualization, for judgments that reflect authentic, individual situations, constantly fuels the fires of litigation. Commercial airline pilots, for example, have waged war in the courts³⁸ for over two decades against FAA rules that pluck them from the cockpit at age 60 with no attempt to determine whether the particular grounded pilot poses a greater-than-average risk of the sort of sudden incapacitation that the age 60 rule is designed to guard against. Every pilot's lawsuit has foundered on the shoals of basic administrative law doctrine. "Reasonable" general rules are legally valid even though their application may lead to erroneous judgments in particular cases.³⁹ To regain their sense of self, the grounded pilots should stop litigating and enter triathlon competitions.

Neither administrators nor the courts have ever developed a language within which to talk sensibly about the issues of authenticity raised by these ubiquitous instances of administrative or legislative rule-ishness. The Supreme Court has been almost psychotic on the subject. It has generally applied a rational basis test that justifies most rules no matter how tenuous the objective proxy criteria they substitute for the real questions of interest. Yet occasionally the Court has flirted with an "irrebuttable presumption" doctrine⁴⁰ that, by demanding that rules perfectly fit the purposes for which they are promulgated, threatens to lay to waste most of the United States Code and the Code of Federal Regulations. Asked again and again how large an affront to individual authenticity is permissible in the name of administrative efficiency, or some other collective value, the legal system has remained either ambivalent or mute.⁴¹

Indeed, elsewhere in administrative law the courts seem to shrink from this dignitary issue virtually wherever it appears. In standing cases, the Supreme Court has been heard to tell African American parents that they lack sufficient "interest" in IRS regulations favoring

38. The battle began in *Air Line Pilots Ass'n. Int'l. v. Quesada*, 276 F.2d 892 (2d Cir. 1960).

39. The foundational Supreme Court cases are *Fed. Power Comm'n. v. Texaco Inc.*, 377 U.S. 33 (1964), and *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956).

40. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974).

41. For a discussion that reveals how difficult this issue can be, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983).

segregated academies to support their standing to litigate the legality of those rules.⁴² Infirm elderly have been told that they are not entitled to a hearing concerning the closure of their nursing home, and their necessary ejection from it, because the Medicaid statute that pays their bills gives them no "entitlement" to payment to any particular home.⁴³

Cases like these seem literally to ignore who these plaintiffs are, and how their lives are shaped by their social identities and affected by the rules they seek to challenge. Time after time in standing⁴⁴ and right-to-hearing⁴⁵ cases the Court seems engaged in a desperate search for legislative recognition as the touchstone of cognizable legal interests. Yet, the affronts to our authenticity, to our understanding of ourselves as multi-faceted individuals with unique histories and life plans, are hardly satisfied by an almost random recognition of "interest" in statutory provisions which, because of their generic character, falsify our positions even as they recognize them.

The standing jurisprudence is a particularly rich source of instances for both outrage and ironic humor. One of my favorites in the latter camp is a case⁴⁶ involving a group that objected to a cross in a public park. Because it was unlikely to have a sufficient legal interest for standing as a group of "anti-establishmentarians," it transformed itself into an environmental advocate for members whose hiking and camping experiences would be impaired by the authorities' failure to maintain the park in its natural state. As "environmentalists," plaintiffs could point to numerous statutes recognizing their recreational and aesthetic interests. They thus achieved standing at the expense of complete misrepresentations of their identity. One is hard pressed to know whether to laugh or cry.

The administrative state's conversation about rightness or justness is seldom more articulate than its fumbling with issues of authenticity. Administrators by and large claim not to be making value judgments. Those are specified in the statute to be administered. Administration is just implementation; its rationality is to be judged by means-ends convergence, not by cogent argument concerning the rightness of the ends pursued.

42. *Allen v. Wright*, 468 U.S. 737 (1984).

43. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 776 (1980).

44. The tortured search for recognition that plaintiffs are within the "zone of interests" of a particular statute for purposes of determining their standing to bring suit began in *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

45. For a discussion of the need for positive law triggers to prompt due process concerns see Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. Fla. L. Rev. 433 (1987), and more generally, Jerry L. Mashaw, *Due Process in the Administrative State* (1985).

46. *ACLU Ga. v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified*, 698 F.2d 1098 (11th Cir. 1983).

But we know this administrative claim to be hollow. To return to a prior example, when the Motor Vehicle Safety Act of 1966 told the Secretary of Transportation to adopt regulations concerning the performance of automobiles that “meet the need for motor vehicle safety,” it hardly answered the question of how much of what type of regulation the society thought justified. But, the Secretary never holds a hearing on what the statutory mandate means—on how much automobile safety is needed and why. Rules are proposed and justified in instrumental terms, with engineering estimates of accidents avoided and lives saved, and economic analyses of costs and benefits.

At most, arguments about the “goodness,” not the “rightness,” of the rules are generated by these exercises in reason-giving. Cost-benefit analyses are done to determine whether, on some set of highly debatable assumptions, social welfare will go up because of the adoption of the rule. This is hardly a trivial question, but, as an attempt to address the social morality of rulemaking, cost-benefit analysis is a joke. Excruciatingly difficult, perhaps impossible, questions concerning the value of human life—whether that value can be expressed in monetary terms, whether monetary valuations should be discounted if the life is to be saved at some future day, and so on—lie just beneath the surface of all such analytic efforts. In the administrator’s analysis itself these issues usually must be swept under the rug. To be sure, the academic literature debates such questions endlessly,⁴⁷ but administrators apparently believe, perhaps for good reasons, that they must simply get on with their jobs. The rationality of these exercises in social cost accounting can be questioned, but only within the confines of the professional norms that have developed to make the analytic exercise possible. The ultimate issues are sidestepped. They lay buried, occasionally in long-forgotten legislative debates, which resolved them only by a vote and expressed the legislature’s normative conclusions in Delphic statutory language.

I know of only one instance in which a Secretary of Transportation attempted directly and publicly to address the questions of value left at large by the Motor Vehicle Safety Act. William Coleman, when Secretary of Transportation, issued an interesting, perhaps unique, notice of proposed rulemaking⁴⁸ concerning the mandatory inclusion of passive restraint devices in motor vehicles. As Coleman put it, his statute required that he adopt rules that would eliminate “unreasonable risks” to the public. But, he wondered, what could that mean? Because of existing rules automobiles already contained

47. For critiques and defenses of cost benefit analysis in agency decision-making, see Thomas O. McGarity, *A Cost-Benefit State*, 50 *Admin. L. Rev.* 7 (1998), and Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 *Colum. L. Rev.* 941 (1999), and authorities cited therein.

48. Hearing Notice, 41 *Fed. Reg.* 24,070, 24,071 (June 14, 1976).

manual belts and shoulder harnesses which were, if used, as effective as passive restraints. The problem was that the American public didn't use them.

But, what did this imply, Coleman asked. That automobiles should contain restraints that the motoring public couldn't avoid? Or did the millions of decisions by American motorists not to wear their manual restraint devices signal that the risks involved were perceived to be acceptable? And, if acceptable to most Americans, should these risks nevertheless be considered "unreasonable" pursuant to the statute? If so, on what grounds? Moreover, Coleman wondered, should the agency impose costly new requirements on all motorists in order to protect those who didn't want them, while adding to the expense of those who already used their manual devices and would gain no benefit from passive ones? Was that fair?

Coleman's rulemaking issuance may not be unique in the annals of administrative regulation, but I have read a fair number of such pronouncements and I have never seen anything else quite like it. Moreover, Coleman's almost plaintive request for instruction on these issues of social value and distributional fairness were met by deafening silence. Subsequent official documents justifying the agency's ultimate decision suggest that no one said anything about these issues worthy of comment as the rulemaking process moved, glacially, toward its ultimate resolution.

IV. WHAT TO DO

I have no good answers today for how to deal with the missing discourses of justice and authenticity in administrative law. But, it is surely plausible to imagine that some of the contemporary enthusiasm for privatization, devolution, regulatory negotiation and the like, are driven in part by a desire to re-engage questions of justice and authenticity that have been explored inadequately as we have built an administrative state that is a monument to instrumental rationality. It is possible to admire our institutions for their attention to the pursuit of the general welfare, while being simultaneously uneasy about a purely instrumental⁴⁹ approach to policy choice. While it is rational to pursue our ends by the most effective means available, it may seem irrational to have such a desiccated conversation about what our collective ends should be. And ultimately, as social beings as well as individuals, we must understand how our own particular activities, choices, and attachments can be rationalized as lives worth living

49. I do not wish to be heard as suggesting that either utilitarian or consequentialist approaches to moral judgment necessarily must ignore either justice constraints or issues of individual integrity or authenticity. For further discussion of these matters see Elizabeth Ashford, *Utilitarianism, Integrity and Partiality*, 97 J. Phil. 421 (2000) and Amartya Sen, *Consequential Evaluation and Practical Reason*, 97 J. Phil. 477 (2000).

within the context of a social reality in which collective choices must also be made.

It may be that these tensions among the domains of rational action—the conflict between our attempts to choose rational ends, effectively manipulate the material world and live authentic lives—are inevitable.⁵⁰ Perhaps we can do little better in administrative law than to bracket the questions of social justice and individual authenticity, to treat them as pressing concerns, but as outside the purview of reasoning in the administrative state. Perhaps.

I fear that such a path is dangerous. Inattention to questions of justice and authenticity can cause us to devalue unnecessarily the triumphs of administrative rationality. And, if we treat these instrumental reasons as small things to be put in a jar, thereby delegitimizing the only basis upon which the administrative state has developed to justify its actions, we may leave it bereft of defenses.

In my view that would truly turn triumph into tragedy. I have not criticized administrative law's project of rational action in order to suggest that it should, or even can, be abandoned. The project of broadening the base of administrative rationality is quite different from the project of returning most social decision-making to the quite different "rationality" of market transactions. If we want to continue to understand ourselves as *homo sapiens*, not just as *homo economicus*, we must attempt to broaden the domain of administrative reason, not abandon it as a failed idea. We must re-imagine modernity in ways that address legitimate post-modern anxieties. We must articulate how the law, in John Rawls' terms, can be "reasonable" as well as "rational."⁵¹ And we must find ways to embed those ideas in reason's preeminent, legal home, administrative law.

50. For some more general reflections on the predicament of modernity, see, e.g., Ernest Gellner, *Reason and Culture: The Historic Role of Rationality and Rationalism* (1992).

51. John Rawls, *Political Liberalism* 47-88, 212-54 (1993).

Notes & Observations