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Nuno Garoupa

Tom Ginsburg

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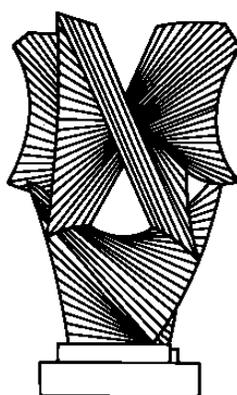
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Reputation, Information and the Organization of the Judiciary

Nuno Garoupa and Tom Ginsburg

THE LAW SCHOOL
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REPUTATION, INFORMATION AND THE ORGANIZATION OF THE JUDICIARY[±]

NUNO GAROUPA, UNIVERSITY OF ILLINOIS COLLEGE OF LAW
TOM GINSBURG, UNIVERSITY OF CHICAGO LAW SCHOOL

It takes many good deeds to build a good reputation, and only one bad one to lose it.
--Benjamin Franklin

Reputation is character minus what you've been caught doing.
--Michael Iapoce

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INTRODUCTION

Reputation is crucial in many arenas, and judging is no exception. A judge with a good reputation will enjoy the esteem of his friends and colleagues and may have chances for advancement to higher courts. If particularly well-known, he or she will have a legacy that endures long after death, as do those of Coke, Blackstone and Holmes. A judiciary that operates effectively will earn respect within its own political system and internationally, and may become a model for other countries, providing opportunities for travel and exchange for judges. A judiciary with a poor reputation, in contrast, will find itself starved of both resources and respect.

Despite the sense that reputation is important, we know very little about how judicial reputation is produced. We understand that some judges and judiciaries are viewed as successful and others are not, but we do not really have any theories about how reputation is developed and sustained. In this article, we use economic analysis to provide a theory of judicial reputation, and provide preliminary evidence of the institutional consequences from a range of legal systems.

We define reputation in some depth below, treating it as the aggregate of judgements used to predict future performance.¹ The object of our analysis is how reputation is formed or produced, the mechanisms by which reputation is achieved and the institutional incentives that reinforce or harm judicial reputation. We do not discuss whether or not reputation is a good or a bad thing, whether individual reputation is better or worse than group reputation, or whether individual visibility and exposition enhances creativity and legal change in a more appropriate way than a group-focused professional environment. Nor is our analysis normative. Our concern in this paper is to understand how different institutional configurations facilitate different modes of producing reputation, with impact on professional norms and the position of judges in society.

Judicial reputation plays two important roles. First, it conveys information to the uninformed general public about the quality of the judiciary (more generally, about the legal system) as perceived by the relevant audiences. Second, reputation fosters esteem for the profession and for the individual judge, both self-esteem and esteem in the eyes of others. Esteem of others is a predicate to better payoffs both in terms of material resources available to the judiciary as well as insulation from other political actors who might expropriate such resources. We can think of self-esteem as a form of intrinsic motivation, and resource-based motives as extrinsic motivation.

The reputation of the judiciary, individually or as a whole, determines its status in any given society and its ability to compete effectively for resources within the government. Therefore a reputation for high quality of judicial performance or of the legal system in general is important. We do not specify a universal reputation function for judges, and recognize that judges in different systems will seek reputations for different qualities—such as predictability, wisdom, and efficiency—that might not be valued in other systems. In this sense we treat reputation as instrumental toward some other end for which we use the generic term “judicial quality.” This quality might be assessed formalistically (judges should apply and interpret the law correctly according to the will of the legislator), authoritatively (judges should be the authority for excellence in lawmaking), or from an agency perspective (judges should maximize the welfare of the

¹ See below, Sec. I for a more extended discussion.

principal, presumably society as a whole). Whatever the definition of judicial quality in a particular legal system, reputation emerges as a relevant factor and plays an important role.

We make three claims. First, reputation matters. Virtually every theory of judicial power is dependent, ultimately, on perceptions of judges, who famously lack the purse or the sword. Only if judges have a reputation for high quality will their decisions be respected and produce compliance. Without compliance, judges cannot accomplish their social functions of resolving disputes, articulating rules, and serving as vehicles for social control.² Thus, reputation is essential from an instrumental perspective.

Our second claim is that reputation can be divided into individual and collective components. Individual reputation provides information about individual performance whereas collective reputation provides information about the quality of the judiciary in general. At the same time, each member of an institution cares about his individual reputation, but also about the reputation of the group as a whole (establishing and shaping the character, attributes and nature of the group). Collective reputation determines the status of the judiciary, but individual reputation influences the judge's relative perception vis-à-vis their fellow judges. Therefore, not all reputation building is necessarily socially beneficial; it is possible that some internal status dynamic operates differently than what would be socially optimal.

The bifurcated nature of reputation creates interesting institutional challenges, which we analyze below using the economic concept of team production.³ If judicial performance were essentially individual and the quality of the judiciary could be easily disaggregated into the individual contributions, individual reputation should prevail as the most important mechanism to provide information. But crucially, it is often difficult to monitor separate individual contributions since judicial production entails to some extent non-separable elements. Hence, information about aggregate performance of the judiciary is also relevant. Consequently, investments into the different components of reputation are important to achieve the adequate balance of information required by a specific society, and so an important task of institutional design is to provide optimal incentives for production of reputation.

Third, different legal systems configure institutions in different ways in order to address the problem of information and reputation. The classical understandings of the common law and civil law judiciaries can be seen as sets of linked institutions that are mutually supportive in addressing the problem of information and reputation. We describe these institutions from the perspective of information and reputation, and explain how they inter-relate. Judiciaries that emphasize collective reputation utilize institutions to limit publicly available information about the performance of the individual judge.

² Shapiro M 1981 *Courts, A Comparative and Political Analysis* University of Chicago Press; Shapiro, M 1995 'The United States', in Tate CN and Vallinder T (eds), *The Global Expansion of Judicial Power* making the point that only reputable courts can defend rights from infringements by the majority.

³ The foundational papers on team production include Alchian AA and Demsetz H 1972 'Production, Information Costs and Economic Organization' 62 *American Economic Review* 777; Holmstrom B 1982 Moral Hazard in Teams 13 *Bell Journal of Economics* 324; Aoki M 1994 'The Contingent Governance of Teams: Analysis of Institutional Complementarities' 35 *International Economic Review* 657; Rajan RG and Zingales L 1998 'Power in the Theory of the Firm' 113 *Quarterly Journal of Economics* 387.

Those that emphasize individual reputation, on the other hand, facilitate the disclosure of such information. In both cases the disclosure or non-disclosure of private information about individual performance reinforces the kind of reputation that prevails in the judicial system.

Our discussion of institutional arrangements is fundamentally positive. We explain how institutions favor the production of individual and collective information. Presumably there is an optimal mix that can vary across jurisdictions depending on local preferences, historical events that determine the allocation of human capital, and political economy considerations. Although from an economic perspective, we might expect that information about individual performance would always be valuable to the relevant audiences (other judges, lawyers, economic and political agents, and general public), it could well be that the political context makes disclosure of information on individual performance harmful. For example, a judiciary that is concerned about threats to its independence may prefer to mask individual judicial contributions out of concern that politicians may seek to remove judges who decide cases against them.

Our effort is consistent with a recent body of work in comparative law that looks at the actual institutional structures of different legal systems.⁴ This approach contrasts with the deductive approach that starts with legal origins and assumes that ancient institutional distinctions are enduring and consequential.⁵ We believe that institutions matter, but also emphasize that institutional structures can change over time, and suggest that minor institutional reforms can have severe and unintended consequences on the production of reputation. This perspective, we argue, is more helpful to understand judicial behavior than the simple categorization of legal origins.

Our article is organized as follows. Part I lays out why reputation matters; Parts II and III describes our theory, treating judicial reputation from the perspective of the economics of team production. Part IV identifies how particular institutions affect reputation, and suggests that institutional configurations fall into two clusters, roughly but not exclusively corresponding to the common law and civil law judicial systems. The former system, we find, favors the production of individual reputation and the latter collective reputation. Part V suggests lessons for reform.

I. WHY REPUTATION MATTERS

To begin, we should define what reputation is with some precision. As mentioned above, we think of reputation of any particular agent as the aggregate of private

⁴ For a similar approach, see Hadfield G 2008 'The Levers of Legal Design: Institutional Determinants of the Quality of Law' 36 *Journal of Comparative Economics* 43 ; Hadfield G forthcoming 2009 'The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law' [Journal](#) of Economic Behaviour and Organization.

⁵ The vast literature on legal origins is associated with La Porta R, Lopez de Silanes F, Shleifer A and Vishny RW 1998 'Law and Finance' 106 *Journal of Political Economy* 1113 ; La Porta R, Lopez-de-Silanes F, Shleifer A and Vishny RW 1997 'Legal Determinants of External Finance' 52 *Journal of Finance* 1131 ; Djankov S, La Porta R, Lopez-De-Silanes F and Shleifer A 2003 'Courts' 118 *Quarterly Journal of Economics* 453; La Porta R, Lopez de Silanes F, Pop-Eleches C and Shleifer A 2004 'Judicial Balances and Checks' 112 *Journal of Political Economy* 445.

judgments of past behavior used to predict of future performance.⁶ This involves information on past performance, as well as signals given by the agent herself. It is possible, but not at all necessary, to imagine that reputation includes an esteem component, so that reputation is granted on the basis of some interdependent production function by a particular audience. Assessment of reputation may be based on public information or private information, depending who is the relevant audience.

In particular, individual reputation conveys information about the individual performance of a given judge whereas collective reputation reveals information about the general quality of the judiciary. Due to the non-separable nature of judicial production, collective reputation is not simply the aggregation of individual reputations. If it were, then collective reputation would be trivial. In other words, collective information may differ from the sum of assessments about individual performance. Notice that our distinction is not merely explained by cognitive limitations, such as the idea that the general public cannot recall the individual names of all judges and therefore uses the perception of an average performance as a proxy. Our distinction is driven by our understanding of judicial production as team work. Judges produce the law collectively and so it is difficult to determine whether any individual decision results from qualities of the individual judge or the judiciary as a whole.

Judicial reputation matters. It matters from a social welfare perspective because it provides information and signals about individual judges and the general quality of the judiciary, thus reducing search costs for those who demand court services. Information about the judiciary matters for legal certainty, the rule of law, anticipated enforcement of property rights, and indirectly for investment and economic growth.

Judges, like most everyone, care about their reputation to the extent that reputation is an important social and economic asset.⁷ They care about their monetary payoffs, and therefore reputation is important to the extent that those monetary payoffs vary with reputation. If information about individual performance determines salaries, then judges care about individual reputation. If information about collective performance and quality of the judiciary determines salaries, then judges change their behavior accordingly.

⁶ Miller GD 2003 'Hypotheses on Reputation: Alliance Choices and the Shadow of the Past' 12 *Security Studies* at 40–78.

⁷ On judicial individual preferences, see Posner R 1993 'What Do Judges and Justices Maximize? (The Same Thing as Everybody Else)' 3 *Supreme Court Economic Review*1; Posner R 2005 'Judicial Behavior and Performance: An Economic Approach' 32 *Florida State University Law Review* 1259; Posner R 2006 'The Role of the Judge in the Twenty-First Century' 86 *Boston University Law Review* 1049 and Posner R 2008 *How Judges Think* Harvard University Press. See also Easterbrook FH 'What's So Special About Judges?' 1990 61 *University of Colorado Law Review*773; Cohen M 1991 'Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?' 7 *Journal of Law, Economics, and Organization* 183 ; Cohen M 1996 'The Motives for Judges: Empirical Evidence from Antitrust Suits' 12 *International Review of Law and Economics* 13; Simon D 'A Psychological Model of Judicial Decision' 30 *Rutgers Law Journal* 1; Schauer F 2000 'Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior' 68 *University of Cincinnati Law Review*615; Foxall GR 2004 'What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function' 25 *Liverpool Law Review* 177; and Guthrie C, Rachlinski JJ and Wistrich AJ 2007 'Blinking on the Bench: How Judges Decide Cases' 93 *Cornell Law Review* 1. For a different perspective, see Baum L 1994 'What Judges Want: Judges' Goals and Judicial Behavior' 47 *Political Research Quarterly* 749 and Baum L 2006 *Judges And Their Audiences* Princeton University Press.

But judges also care about nonmonetary payoffs and in this respect reputation is an important professional asset. Reputation is defined as a credible signal of high quality, which allows judges to fulfill professional duties and achieve career goals.⁸ Individual and collective information conveyed to the relevant audience shape the ability of judges to influence society. Hence consistency and conformity are important for individual judges; following precedents guarantees their ability to shape the law in particular cases.

Reputation does not matter only for the welfare of an individual judge. The reputation of the judiciary as a whole is dependent on the reputation of its component judges. And the reputation of the courts as a whole is the crucial determinant in the judiciary's ability to accomplish its goals. Judicial decisions, after all, are not self-enforcing, and the courts famously lack the power of the purse or sword to implement their decisions.⁹ Judicial decisions require real-world institutions to take real actions to ensure compliance.

There are a variety of theories as to why it is that real world actors obey the pronouncements of courts. One traditional set of arguments focused on the legitimacy of judicial decisions. Another set of arguments emphasized enforcement by other state officials, but this only begged the question, for one must have an account of why other officials have an incentive to obey courts. A third, increasingly important view sees judicial decisions as facilitating coordination of parties' expectations by providing focal points.¹⁰ In this view, parties obey the judges because they expect other parties to play certain strategies in response to the court decision. But regardless of the theory as to why judges are obeyed, reputation matters inasmuch the information it conveys is valuable. A better reputation will be correlated with an increased likelihood of compliance, whether the mechanism of compliance involved relies on legitimacy, on enforcement, or on coordination. As judicial decisions are complied with, they will provide feedback in the form of an improved reputation.

Recently, a former Chief Justice of Israel has explained in detail why individual judges care about collective reputation and the extent to which it influences their decisions. He identifies collective goals: the judiciary is in his view the "junior partner" in the legislative process, in the sense of playing an important role in responsiveness to change in social reality within the law; the judiciary is also the "senior partner" in the creation and development of the common law, within the powers and limitations of the legal system. In order to achieve these goals effectively as a collective, the judiciary needs consistency and credibility. In his view even concurring opinions weaken the force

⁸ For the different possible goals of the judiciary, see Baum L 2004 *The Puzzle of Judicial Behavior* University of Michigan Press and Robbenolt JK, MacCoun RJ and Darley JM, 'Multiple Constraint Satisfaction in Judging' available at <http://ssrn.com/abstract=1133184>. See also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) making the point that extending the power of the judiciary (juristocracy) as a collective goal can only be achieved with certain court reputation, for example, impartial adjudication at the eyes of the public,

⁹ 'The Federalist No. 78' in Wright B ed 1961 at 461.

¹⁰ McAdams R 2005 'The Expressive Power of Adjudication' 2005 *University of Illinois Law Review* 1043; Ginsburg T and McAdams R ' ' 2004 45 *William and Mary Law Review* 1229; Law DS 2009 'A Theory of Judicial Review and Judicial Power' 97 *Georgetown Law Journal* 723.

of the judgment. But a robust collective reputation allows courts to make flawed decisions occasionally since there is confidence in individual and collective independence, fairness and impartiality. In sum, individual judges are confronted with balancing the benefits of insisting on individual opinions, which may advance their personal goals, versus the costs in terms of consistency and credibility, which may create uncertainty within the legal system and hurts their prestige and ability to shape the law.¹¹

One can get a sense of how important reputation is by considering the situation of judges in some developing countries. Despite a recent consensus that law plays a crucial role in economic development, real-world reforms are difficult to implement, and we have little evidence that billions of dollars of investment in improving judicial performance has actually paid off.¹² In many countries, the judiciary has a reputation for corruption.¹³ In these environments, collective action has failed, and individual judges seek to maximize their own wealth at the expense of their collective reputation. It is hard to pin ones hopes for reform on institutions that have poor reputations to start out.

Reputation also plays an important role in the recruitment of judges. A more reputable judicial system attracts candidates with higher levels of human capital. Judiciaries with low reputations or reputations for corruption will attract the ill-qualified and greedy. A lazy judiciary will attract lazy individuals. Even if a system has overcome these problems, it is still the case that different reputation mechanisms might attract different types of people.¹⁴ Selection processes tend to reinforce the status quo, since the new judges are interested in reinforcement of the reputation that attracted them to the profession in the first place.¹⁵

In short, we believe that reputation is a central quality of judiciaries that has received too little treatment in the literature. Virtually every function for which societies rely on the judiciary depends on the production of a reputation for high quality, impartial and independent decision-making. Without reputation, judiciaries are doomed to irrelevance.

II. A THEORY OF REPUTATION

¹¹ See Barak A 2006 *The Judge in Democracy* Princeton University Press.

¹² Carothers T 2006 *Promoting the Rule of Law Abroad: In Search of Knowledge* Carnegie Endowment for International Peace.

¹³ See, e.g., Buscaglia E 2000 'Judicial Corruption in Developing Countries: Its Causes and Economic Consequences' *Essays in Public Policy* Stanford University Hoover Institution Press at 24–29 (; Buscaglia E 1997 'Judicial Corruption in Latin America' *Essays in Law and Economics* Amsterdam Kluwer.

¹⁴ See Malleon K 2004 'Selecting Judges in the Era of Devolution and Human Rights' in Le Sueur A ed 2004 *Building The UK's New Supreme Court: National And Comparative Perspectives* Oxford University Press (making the point that a career judiciary in common law would create considerable adverse selection by attracting less talent since the reputation for judicial independence would be reduced, even if recruitment would be more transparent).

¹⁵ For example, if reputation is based on social diversity, judicial professionalism, political ideology, and the size of case load, then we should expect judges to promote an agenda that reinforces those factors. See Caldeira GA 1983 'On the Reputation of State Supreme Courts' 5 *Political Behaviour* 83.

Reputation can be divided into two components, individual and collective. Individual reputation is related to the name recognition of each judge.¹⁶ Collective reputation is linked to the role the judiciary is perceived to have in any given society. Each and every judge is affected by individual and by collective reputation and consequently cares about both. Nevertheless, depending on incentives and the institutional framework, judges might be more concerned with one or the other in different societies.

Individual reputation-building is fundamentally an activity that each judge must accomplish on his or her own, while collective reputation-building is the product of teamwork. Furthermore, it is not always the case that effort allocated to individual reputation building enhances collective reputation and vice-versa. In fact, in many circumstances these two goals conflict (although in others they do not). For example, individual reputation might encourage each judge has to differentiate herself from other judges; excessive differentiation across the bench might seriously undermine collective reputation. High variance in the performance of individual judges can hurt the reputation of the judiciary as a whole.

Judges allocate effort between building individual and collective reputations as a response to incentives and the institutional environment. For example, a judge might have to decide between advancing his or her own preferences (hence building individual reputation for a certain profile) or conforming with the general preferences of his or her colleagues (hence promoting collective reputation for consensus). In many circumstances, a particular effort can enhance both individual and collective reputation at the same time. But in many other circumstances, by investing more in building individual reputation, a judge contributes less to building collective reputation. In these circumstances each judge has to make a choice as to which type of reputation to invest in. Choices are influenced by incentives, which in turn are established by different actors. These actors can be considered principals on whose behalf the judiciary works.

Collective reputation is essentially determined by external mechanisms. It reflects the views of society or public opinion in general toward the judiciary, but also by how the interests of the relevant particular constituencies with power over the courts are addressed. These constituencies might include the bar, other branches of government, political parties and others, depending on the institutional environment of courts. Collective reputation shapes the social and political influence of the judiciary as a whole, and consequently has monetary and non-monetary implications for the welfare of the judges. For example, collective reputation may impact the overall judicial budget, salaries, pensions, and other perks available to the judiciary, as well the level of social

¹⁶ Previous work on individual reputation includes Miceli TJ and Cosgel MM 1994 '*Reputation and Judicial Decision-Making*' 23 *Journal of Economic Behaviour and Organization* 31 (showing that individual reputation can both restrain judicial discretion, but also inspire it if future judges are expected to be persuaded by a decision and follow it, thereby enhancing the authoring judge's reputation); Harnay S and Marciano A 2003 '*Judicial Conformity versus Dissidence: An Economic Analysis of Judicial Precedent*' 2003 23 *International Review of Law and Economics* 405 (explaining that an individual decision made by a judge does not only reflect his personal preferences about a case but also the expected response of the judicial community to the decision); Levy G 2005 '*Careerist Judges*' 36 *RAND Journal of Economics* 275 (showing that the possibility of appeal generates an equilibrium where careerist judges tend to be creative due to the assumption that contradicting previous decisions is a signal of ability and increases individual reputation; at the same time, there is an aversion to reversals because they reduce reputation).

prestige and overall working conditions in the courts. In other words, collective reputation determines the size of the pie to be divided among individual judges.

Individual reputation is established by external mechanisms (such as academic commentators, the bar and political actors) but also by internal mechanisms (such as peer evaluation by other judges or a judicial council). Individual reputation, as established by these internal mechanisms, determines the share each judge gets of the pie while the outside appraisal by relevant external constituencies determines potential supplementary payoffs obtained individually. The balance between external and internal mechanisms shapes individual reputation building.¹⁷

In our analysis, we assume that reputation is a noiseless signal of judicial quality, however defined. (In information theory, noise refers to distortion in the accuracy of the received signal, so that a noiseless signal is one that provides accurate information about reputation). Reputation provides information about individual and collective performance. Although in the real world, reputations are noisy, we make the simplifying assumption that reputation maps accurately onto judicial quality. This assumption is not strictly speaking necessary for our analysis—all we need to assume is that noise does not vary systematically across the institutional structures that we analyze. Nevertheless, we set aside noise in the present discussion. This means we need not consider how reputation dissipates after it is acquired. In the real world, the fact that reputation is noisy means that relevant constituencies may continue to accord the judiciary with status, even after behavior changes. Reputations in the real world are sticky, a feature which heightens the importance of investing in reputation and makes the problems we discuss even more salient.

III. JUDICIAL REPUTATION AS A PROBLEM OF TEAM PRODUCTION

The legal system and courts are complex, and the role of judges is multifaceted. In theory, one might be able to produce a measure or a set of appropriate measures of performance to evaluate the contribution of an individual judge to each case or decision. However, when we look at the quality of the legal system as a whole, in terms of uniform application and enforcement of the law, conflict resolution, and norm-articulation, the marginal contribution of each judge cannot be perfectly determined. In other words, measuring individual judicial productivity might be possible in individual cases but from an aggregate perspective is quite complicated, due to significant interdependencies in production.

We can say that the output produced by each judge has an individual component reflected in each case decided, and a non-separable component that contributes to the overall quality of the court system.¹⁸ This is neatly captured by Ronald Dworkin in his

¹⁷ For the general public, see for example Caldeira GA 1986 'Neither the Purse nor the Sword: Confidence in the Supreme Court' 80 *American Political Science Review* 1210 and Caldeira GA and Gibson JL 1992 'The Etiology of Public Support for the Supreme Court' 36 *American Journal of Political Science* 635; for administrative bodies and government audiences, see W. N. Eskridge WN 1993 'The Judicial Review Game' 88 *Northwestern University Law Review* 382; Eskridge WN and Ferejohn JA 1992 'The Article I, Section 7 Game' 80 *Georgetown Law Journal* 523; and Ferejohn JA and Weingast BR 1992 'A Positive Theory of Statutory Interpretation' 12 *International Review of Law and Economics* 263; for the larger law school audience, see Schauer above note 7.

¹⁸ The non-separable component is extensively discussed by Barak above n 11.

description of judicial production as co-authorship in a chain novel.¹⁹ The non-separable nature of a portion of judicial output is aggravated by the specific human capital required to perform judicial work.²⁰ The characteristics of the job require specific knowledge and training in order to achieve the desired understanding of the law. Therefore any assessment concerning individual output requires an identical or similar stock of specific human capital. The most important beneficiaries of a high quality legal system, the general public, lack the knowledge and the sophistication to make such assessment at the individual level. Generally speaking, the public is more likely to have an overall perception of the court system than a precise assessment of each member of the judiciary.

As a consequence of the non-separable nature of the output coupled with the need for specific human capital, the judiciary operates as a team, and therefore every member of the judiciary benefits from a collective reputation. Individual reputation matters to the extent that different constituencies look at the individual component of the output. Nevertheless, since each judge operates within a court system with a given quality, collective reputation necessarily matters as well. The balance between these two will depend on institutional attributes and incentives. Significantly, as in any team, coordination issues and collective action problems arise. How these problems are addressed by a given legal system generates its specific configuration and the balance between individual and collective reputation.

Standard economic theory of teams considers two solutions, usually called *ex ante* and *ex post* sharing rules (both in reference to output production by the team). We explain them in the context of the judiciary; *ex ante* sharing rules correspond to our collective reputation model and *ex post* sharing rules correspond to our individual reputation model.

Ex Ante Sharing Rules: Collective Reputation Only

One solution to problems of team production is to rely on *ex ante* sharing rules, which in our context would mean that each judge earns an equal share of reputation. This implies a judiciary that is reliant solely on collective reputation. Given the non-separable nature of output and the need for specific human capital, collective reputation is necessarily part of the payoff function. However, an emphasis on collective reputation only naturally raises concerns with shirking, the most common problem with *ex ante* sharing rules. Judges may be driven to reduce their own effort in reputation-building by free-riding on their peers. The argument cuts two ways. First, lazy judges will benefit from collective reputation and may therefore appropriate surplus reputation for which they did not contribute. Second, the costs of undermining reputation are disseminated across the judiciary.

Another important aspect of *ex ante* sharing rules that is implicated in an emphasis only on collective reputation is that it also generates a collective action problem concerning monitoring or coordination mechanisms to reduce the free-riding problem. In the absence of specialized actors or an intermediate hierarchy (perhaps in a body such as a judicial council) to internalize these coordination issues, individual judges have no incentive to unilaterally invest time and resources in detecting lazy judges. Hence, not

¹⁹ See Dworkin R 1982 'Law as Interpretation' 60 *Texas Law Review* 527.

²⁰ In fact, the non-separable component also includes non-judicial actors such as clerks or lawyers.

only does shirking take place, but detection and punishment of shirking is very infrequent.

Collective reputation only configures a legal system with low powered incentives for individual judges. The idea of low powered incentives in the literature on transaction cost economics refers to systems of compensation in which individuals do not share in the gains from particular transactions, while high powered incentives allow individuals to benefit from their marginal contribution.²¹ In judiciaries without information about individual judicial performance, judges can free-ride and shirk. Ex ante sharing rules only are thus an insufficient solution to the problem.

Ex Post Sharing Rules: Individual Reputation Only

Implementing an institutional design that relies on ex post sharing rules would involve, in this context, a judiciary totally reliant on individual reputation. An ex post allocation of rewards will likely induce opportunistic rent-seeking, as judges will invest time and effort to grab a larger share of resources available to the judiciary and enhance their individual reputation. This waste of time and effort is damaging given the partially non-separable nature of judicial output. That is, relying only on ex post rewards will induce judges to expend more effort on the separable component of output and less effort on the non-separable components. It seems clear that a judicial system solely based on individual reputation could reduce shirking but would become dysfunctional in other ways.

This framework may suggest why it is that no judiciary of which we are aware seeks to pay judges exclusively at a rate equivalent to their marginal output. Salaries tend to be identical at each level of the judicial hierarchy in all legal systems. This is not simply a matter of administrative convenience, but an implicit recognition that differentiated salaries may discourage investment in those activities that tend to contribute to collective reputation.²²

To provide a concrete illustration, suppose managers of the judicial system decided to try to improve efficiency by paying judges on the basis of the number of cases they decide. This could lead judges to seek out the easiest cases, or to spend less time deciding any individual case. While many individual judges would improve their reputations for efficiency, the difficult cases would not be handled well, and overall quality could decline. This in turn would affect the reputation of the judiciary as a whole.

A legal system that relies on individual reputation only promotes information about individual judges and develops collective reputation as a mere aggregation of individual reputations. This is a legal system that operates with high powered incentives.²³ However, due to the nature of team production, high powered incentives might be inefficient and reduce the appropriate investment in the non-separable component of judicial production.

Need for Accountability

²¹ Williamson O 1985 *The Economic Institutions of Capitalism* Free Press.

²² We will discuss variable pay for the judiciary in detail in Part V. For example, a notable exception is Spain, where variable pay has been introduced in 2003.

²³ See Williamson above n. 21.

Either pure mechanism using only ex ante or ex post sharing rules creates serious problems. Therefore, a superior approach is to utilize a combination of both ex ante and ex post sharing rules, so as to induce production of both collective and individual reputation. However, the co-existence of both modes might not be enough to curtail the problems of shirking and rent-seeking that we have identified, given the non-separable nature of output and the specific human capital inherent to the judiciary. Furthermore, external constraints (such as future job opportunities or political interference) might shape incentives one way or the other.

Some palliatives might be necessary to mitigate these problems. In many situations, ex ante and ex post sharing rules could conflict in a serious way. For example, sometimes a judge may be able to maximize their own reputation by deciding a particular case in a manner that conflicts with the rule of law, harming the reputation of the judiciary as a whole.

In order to solve these problems and conflicts, we import here the concept of a “mediating hierarchy” as developed by Blair and Stout.²⁴ The essence of a mediating hierarchy is that members give up important rights to a third party in a horizontal interaction. The quality of the horizontal monitoring depends on evidence, signals and susceptibility to group punishment, but it avoids the problem posed by a vertical hierarchy, that of curtailing independence of agents. Furthermore, a vertical hierarchy is not an ideal solution when individual monitoring is very costly and severe punishment is difficult (since individual punishment presupposes separable output).

In our view, a judicial council could play the role of a mediating hierarchy. Judicial councils are institutions that have responsibility for selecting, training, and in some systems, disciplining judges.²⁵ They can help ensure that the judiciary achieves a balance between collective and individual reputation through soft policies rather than as a full-fledged supervisor. In particular, the judicial council can encourage the development of professional norms and, through careful selection processes, team member attributes that enhance both the collective and individual reputation of the judiciary.

A deficient design of a mediating hierarchy can nevertheless lead us to exacerbate rather than reduce many of the problems we have identified. Furthermore, there are important issues that a mediating hierarchy cannot fully resolve. One controversial issue is the adequate relationship between the judiciary and other branches of government. The judicialization of public policies may serve to enhance both collective reputation and individual reputation. However, it may unleash countervailing forces that target the collective reputation of the judiciary, leading to politicization of the judiciary. Excessive media exposure (a form of accountability) could, for example, make time and effort into building individual and collective reputation better applied if judges actively engage in judicializing public policies.²⁶ Constitutional safeguards against “judicial government” of

²⁴ See Blair M and Stout LA 1999 ‘A Team Production Theory of Corporate Law’ 85 *Virginia Law Review* 247.

²⁵ Ginsburg T and Garoupa N 2009 ‘Guarding the Guardians? Judicial Councils and Judicial Independence’ 57 *American Journal of Comparative Law* 103 and Ginsburg T and Garoupa N forthcoming 2009 ‘The Comparative Law and Economics of Judicial Councils’ 27 *Berkeley Journal of International Law* 53.

²⁶ An immediate question is the extent to which the judiciary should take into account public opinion when sentencing. See, for example, Sunstein CR 2007 ‘If People Would Be Outraged by Their Rulings, Should Judges Care?’ 60 *Stanford Law Review* 155.

public policy become then more relevant in order to limit judicial activism. A serious political problem may occur when one branch of government (the judiciary or the executive) can raise its relative status in the public eyes by lowering the relative status of the other branches, necessarily generating important institutional conflicts.

At the same time, the linkage between reputational incentives and accountability also depends on the interaction of other relevant institutional characteristics. For example, when the control mechanisms exercised by senior judges weaken, a shift from collective to individual reputation building could emerge as the most powerful, if not the only available mechanism, to enhance accountability. In other cases, where the judiciary is subject to the external influence from multiple sources (for example, the ECJ where rewards can come from multiple constituencies such as EU institutions and bodies, national governments, national judiciaries), conflictive goals could in fact impede an effective mediating hierarchy.

A second important issue is known in the economics literature as the relevance of team boundaries. It is important for team production that the members of the team, and only the members of the team, are responsible for observable output. It could be argued that the boundaries of the judiciary are reasonably well-defined and therefore this is not a problem in this context. However, the non-separable part of the output (for example, the quality of the court system) is also affected by agents who are not members of the judiciary and in many circumstances are not even under the control of the judiciary, such as clerks, lawyers, and government officials responsible for enforcement. Since the non-separable part of the judicial output is the determinant of collective reputation, serious conflicts are likely to emerge between the mediating hierarchy and other branches or bodies of government with respect to control over these other agents.

IV. COMPARATIVE INSTITUTIONAL ANALYSIS

In every legal system, individual and collective judicial reputations and information are important. However the relative degree of importance varies not only across legal families, but even within the same legal family. If we look at the US federal judiciary, for example, individual reputation seems to matter a great deal. The Supreme Court is identified with the name of the Chief Justice (such as Warren, Rehnquist or Roberts) and the great judges of the past are heroes, such as Marshall, Brandeis, and Holmes. Newspapers discuss how individual justices vote in particular cases and quote from dissents. Federal judges give talks to the public and write books advancing their views on important issues, and the appointment mechanism includes Senate confirmation hearings in which individual candidates to the federal courts have to expose their views. Academics study the judicial contribution of individual justices in detail,²⁷ and they are the subject of popular biographies.²⁸ There seems to be a significant production of individual information and a serious assessment of individual performance.

In France, Japan and Germany, in contrast, most people have no idea of the identity of the Chief Justice, much less the other justices of the Supreme Court; newspapers very rarely report on dissenting views across the bench; justices usually

²⁷ See, e.g., Posner RA 1993 *Cardozo: A Study in Reputation* University Of Chicago Press .

²⁸ See, e.g., Foskett K 2005 *Judging Thomas: The Life and Times of Clarence Thomas* William Morrow.

avoid exposure and contact with public opinion in general; and very few judges get to be known by the public in general.²⁹ If justice is blind, judges are anonymous. In these legal systems, information about individual performance seems to be intentionally underplayed, if not systematically hidden from the general public.³⁰

In the United Kingdom, the Law Lords enjoy high levels of prestige but most members of the public do not know the names of these twelve people (or even their number) except in rare instances when controversial cases draw media attention (such as the Pinochet case in the late 90s).³¹ Many judges become known by the public only if they head specific inquiries into practices or decisions by the government.³²

Although the political stakes of the European Court of Justice would seem to provide opportunities for individual reputation building, this is another example of a court that forcefully pursues collective reputation and avoids any kind of individual focus on a single judge. Public unanimity is the norm and there are no dissenting opinions. There is a very powerful reason for this. The judges appointed to the European Court of Justice defend the need for secrecy and unanimity because their appointments are only for six-year renewable terms and not life: if they were to sign separate opinions, member states could check whether their judges were voting for or against the national interest

²⁹ For example, Sophie Boyron identifies a major concern in France with the “esprit de corps” of the judiciary, a professional culture driven by early socialization in the *Grande École*, then reinforced by collective decision-making with a profound distrust for the individual judge and further enhanced by judicial trade unions that effectively impose judicial collective bargaining. She also argues that in France judicial accountability is collective. See Boyron S 2006 ‘The Independence of the Judiciary: A Question of Identity’ in Canivet G, Andenas M and Fairgrieve D eds 2006 *Independence, Accountability and the Judiciary*. Another comparativist, Basil Markesinis, argues that French judges are trained to keep their ideas to themselves, see Markesinis BS 1994 ‘A Matter of Style’ 10 *The Law Quarterly Review* 607. In her book, Eva Steiner proposes that the French judiciary is educated and trained as a unit to adhere to a collegial form promoted by French courts, see Steiner E 2002 *French Legal Method* Oxford University Press.

³⁰ See, among others, van Caenegem RC 2002 *European Law in the Past and the Future: Unity and Diversity over Two Millennia* Cambridge University Press (arguing that, while in Britain the bench is paramount and the judges have a highly personal role, in the Continent courts are faceless and the judges are described as fungible persons) and Van Caenegem RC 1987 *Judges, Legislators and Professors: Chapters in European Legal History*, Cambridge University Press (asserting that the legal system is dominated by judges in common and by law professors in civil law). A tendency toward bureaucratization seems to be detected in the United States by Fiss O 1983 ‘The Bureaucratization of the Judiciary’, 92 *Yale Law Journal* 1442.

³¹ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other (Appellants), Ex Parte Pinochet (Respondent)* (On Appeal from a Divisional Court of the Queen's Bench Division); *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)* (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999. But some commentators have noted that many people failed to understand the role of Lady Thatcher, judging her to be a dissenting minority who voted against the extradition of General Pinochet, without being able to distinguish the twelve Law Lords, the other Lords of Appeal (currently other thirteen judges) and other members of the House of Lords (including Lady Thatcher). See Steyn J 2002 ‘The Case for a Supreme Court’ 118 *The Law Quarterly Review* 382.

³² See Garoupa and Ginsburg above note 25, subsection on the UK. See also Penny Darbyshire P ‘Brenda and the Law Lords’, mimeograph on file with authors (observing that the Law Lords have been scrutinized by academics since the 1960s, yet the media does not seem to be interested in their activity).

and refuse to reappoint judges who did not vote appropriately, thereby compromising their independence.³³ This is an excellent example of how provision of individual information can be detrimental.

It is clear that in some legal systems collective reputation prevails over individual reputation whereas in other legal systems the opposite takes place; some legal systems pursue individual performance whereas other prefer to limit information about individual performance and rely more on collective assessment.³⁴ These differences are very important at two levels. First, they respond to different incentives and organizational attributes within a complex institutional arrangement. Second, they ought to be seriously considered in designing legal reforms, especially in an era when most legal systems are experiencing increased judicialization of public policies. This section discusses some of the different institutional structures that condition the development of judicial reputation. We do not provide a theory of why these institutional structures exist, but rather focus in this paper on the contribution of institutional structure to disclosure of information and reputation building. For example, we do not discuss the rationale for the existence of an appeal system (presumably error correction), but rather examine how the different designs of an appeal system enhance individual versus collective reputation or provides individual versus collective information.

A. *Career vs. Recognition Judiciary*

One way of contrasting different types of judicial structures is to distinguish the “career” from “recognition” judiciaries.³⁵ The career system involves judges entering a judicial bureaucracy at a young age, and spending an entire career as a judge.³⁶ The recognition system appoints judges later in life, usually after the candidate has established themselves as an excellent candidate. It involves fewer opportunities for promotion.

Judicial appointments based on individual recognition typically involve appointing a candidate relatively late in life on the basis of a reputation that has already been established. The appointment is based on the individual reputation of the candidate, as assessed by the relevant constituency, using an external mechanism outside the judiciary. For example, in the United States, the President appoints federal judges, with the advice and consent of the Senate, after the candidates have developed a stellar reputation in other spheres. The external mechanism helps to compensate for the absence

³³ See Rosenfeld M 2004 ‘Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court’ 4 *International Journal of Constitutional Law* 618 (contrasting the style and rhetoric of the ECJ and the US Supreme Court). Another good case for consideration is the European Court of Human Rights.

³⁴ See Merryman JH and Pérez-Perdomo R 2007 *The Civil Law Tradition* 3rd edition (observing the pressure for consensus in civil law jurisdictions due to legal tradition). See also Merryman JH 1988 ‘How Others do It: The French and the German Judiciaries’ 61 *Southern California Law Review* 1865.

³⁵ Nicholas Georgakapolous N 2000 ‘Independence in the Career and Recognition Judiciary’ 7 *University of Chicago Law School Roundtable* 205.

³⁶ For example, the judiciary in the UK has been presented as a career judiciary, where barristers are regarded as a first step into the judiciary, in a system more similar to the Continent than to United States. See for example, Posner R 1996 *Law and Legal Theory in England and the United States* Oxford University Press (discussing the British career judiciary in chapter 1).

of a vertical hierarchy in the judiciary, which decreases the incentives to comply with rigid professional norms. Therefore, the appointment system by external agents dilutes the collective identity of the judiciary. Finally, the lack of a promotion system seriously weakens internal mechanisms of control. Therefore in recognition judiciaries, individual reputation as perceived by external mechanisms is the dominant factor in judicial appointments.

In contrast, a career judiciary is selected and promoted based on internal judicial assessments of individual merit. Relatively little information is available to the public about judges, but the judiciary itself develops and uses internal performance measures to make promotion decisions. Compliance with internal mechanisms makes collective reputation much more important. The credibility of a given judge does not depend on her individual merits but on the reputation of the entire judiciary. Serious doubts concerning the way judges are promoted, rewarded or disciplined will not primarily hurt any particular judge, but the entire profession. Consequently collective reputation building is very important for career judges.³⁷ Such systems tend to emphasize the anonymity of the law, and the myth that there is a single correct answer for legal questions that in principle is invariant to the individual judge making the decision.

B. Individual Opinions/Dissents/Voting

The availability of information on the particular judges—be it through the existence of individual opinions, the possibility of dissent by judges, or the availability of judicial votes in a transparent and verifiable way that is visible to laymen—has two important consequences. First, it helps establish an individual reputation for each judge, depending on the importance of the opinion, the judge's vote, the opinion-writer's creativity, innovation and knowledge, and the extent to which she makes a difference in jurisprudence.³⁸ Eventually certain judges may be more likely to side with other judges who have similar views and interpretations of the law, creating informal coalitions that allow outsiders to assign labels to specific judges (as liberal, conservative, libertarian, etc.). Second, individual opinions and dissent help undercut the idea of a homogeneous, uniform, bureaucratic, noncritical judiciary. Both aspects favor individual over collective reputation building.³⁹ This device is enhanced when the judiciary is faced with big public policy decisions that are controversial or at the centre of intense debate across a society, such as those involving abortion, gay marriage, segregation, or the welfare state.⁴⁰

When individual opinions cannot be recorded and dissent is not allowed, the judiciary is seen as a homogeneous body, faceless and bureaucratic, in which discussion

³⁷ See generally Ramseyer JM and Rasmusen E 2003 *Measuring Judicial Independence* University Of Chicago Press (focusing on Japan).

³⁸ See evidence by Taha AE 2004 'Publish or Paris? Evidence of How Judges Allocate their Time' 6 *American Law and Economics Review* 1.

³⁹ See discussion about the quality of opinion writing by Nugent DC 1994 'Judicial Bias' 42 *Cleveland State Law Review* 4 and Miller GP 2004 'Bad Judges' 83 *Texas Law Review* 431.

⁴⁰ For the US, see the evidence provided by Sunstein CR, Schkade D, Ellman LM, and Sawicki A 2006 *Are Judges Political? An Empirical Analysis of the Federal Judiciary* Brookings Institution Press (discussing these issues in chapter 5). See generally, Stack KR 1996 'Note: The Practice of Dissent in the Supreme Court' 105 *Yale Law Journal* 2235 and George TE 1998 'Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeal' 58 *Ohio State Law Journal* 1635.

and diversity are replaced with compromise and uniformity.⁴¹ The content of decisions hurts or enhances the reputation of the judiciary as a whole and not that of a particular judge. Peer-pressure becomes dominant since decisions must be reached by consensus, resulting eventually in highly complex language to disguise divergences in the bench and further reducing the ability of the public to scrutinize opinions.⁴²

Beyond individual opinions, oral proceedings also offer opportunities for the cultivation of individual reputation. Oral proceedings allow judges not only to reveal their legal skills, but also their individual positions and make specific contributions to the decision taken by the court. They can also communicate to the specialist audience of lawyers, distinguishing themselves from their colleagues.

Our theory of dissent complements at least one recent account of the practice. In tracing the history of opinion practices in common law jurisdictions, Professor Todd Henderson argues that opinion practices reflect the desire of courts to expand their role in a competitive milieu of norm-articulation.⁴³ He further argues that those encouraging dissent have sometimes wanted to use the presence of multiple opinions as a way of constraining the courts, while others have sought to use dissent to advance judicial power.

In our view, changes in the overall reputation of the judiciary are the driving force in changes in common law opinion practice, rather than political views about the relative power of the judiciary *per se*. Thus, particular problems with individual or collective reputation will trigger pressures to move in one direction or the other. For example, Chief Justice Marshall shifted toward unanimous opinions at a time when the status of the judiciary was low, in part because seriatim opinions were difficult to understand. Centralizing opinion practice enhanced collective reputation, and deviation was explicitly

⁴¹ For the French case, see Steiner E 2002 *French Legal Method* Oxford University Press. She traces the historical reasons for the inexistence of dissenting opinions and the doctrine supporting such choice. Historically, the absence of dissenting opinions is based on the secrecy rules introduced by Philippe VI (1328-1350) and Charles VII (1422-1461) to protect judges. This rule was abandoned in 1789 but reinstated in 1795. It has now a statutory basis in Art. 448 of the Code of Civil Procedure and Art. 355 of the Code of Criminal Procedure. The doctrinal justification is that dissenting opinions are seen as undermining legitimacy of the court and the stability of law (since may lead to subsequent changes of the case law).

⁴²Lasser, M. 2004. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* Oxford University Press, makes the point that by signing a decision, the judges assume individual responsibility, a principle disliked by the French. Such rejection of individual judicial responsibility is embodied by the Law on Judicial Organization from 1790 which restricted the high courts (the *Parlement*) from passing regulations or suspending royal legislation by refusal to record them in the official registry (essentially exercising a veto). However, Professor Lasser argues that American legal scholarship has misunderstood the bifurcated system existent in France. The idea that French judges have no individual responsibility on shaping doctrines and developing law is misplaced. They do, but not publically. There is a bifurcation of legal reasoning and policy analysis into two argumentative dimensions: the *rappports* by the reporting judge and the conclusions of the advocate general, on one side, and the *projets d'arrêt* prepared by the reporting judge, on the other side.

⁴³ Henderson MT 2007 'From Seriatim to Consensus and Back Again: A Theory of Dissent' *University of Chicago John M. Olin Working Paper No.363*. See also Orth J 1994 " 73 *North Carolina Law Review* 255

discouraged.⁴⁴ Canon 19 of the ABA's 1924 Canons of Judicial Ethics called on judges not to “yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.”⁴⁵ Later, Chief Justice Stone presided over a rapid increase in individual opinions, a practice that continues to this day.⁴⁶ Professor Henderson ties this latter shift to the need to maintain power for the court in an era of legal realism, when formalist claims to “truth” would not be convincing to relevant audiences.⁴⁷ Alternatively, one can characterize Stone’s encouragement of individual opinions as facilitating investment in individual reputation at a time when the court contained a diverse set of personalities and had just avoided collective disaster from Roosevelt’s court-packing plan. Those justices who fought Roosevelt had put the collective reputation of the entire judiciary at risk; one can imagine that afterwards, there would be internal pressures within the court to allow segmenting of reputations to individual authors. This would both ameliorate the new minority, who could continue to fight and risk only their individual reputations, but also be good for the new majority supportive of Roosevelt, which could avoid negative reputational consequences of the minority position. Our account is consistent with those scholars, such as Professors Post and Guinier, who see the shift in Supreme Court opinion practices as facilitating new discourses with new audiences.⁴⁸

In short, we see the practice of dissent as reflecting alternative institutional designs to achieve the goal of reputation. Individual opinions will be associated with a relatively flat organizational structure, in which superior judges have little control over inferiors. Collective opinions will be associated with the suppression of individual reputation and the institution of hierarchical controls to overcome collective action problems in the production of collective reputation. Small wonder, then, that judges who support the institution of dissent have criticized the alternative model as suppressing individual conscience. Justice William Brennan, for example, critiqued Chief Justice Marshall (who strongly pushed for unanimous judicial opinions of the court as a whole) as trying to “shut down the marketplace of ideas.”⁴⁹

In a system that seeks to encourage individual opinions, another possible strategy is open to judges. Judges can write opinions that follow precedent in terms of the ultimate decision but seek to develop a new rationale for the decision. In this way, the

⁴⁴ See Fuld SH 1962 ‘The Voices of Dissent’ 62 *Columbia Law Review* 923 at 928; Post R 2001 ‘The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court’ 85 *Minnesota Law Review* 1267 at 1349–57.

⁴⁵ 1924 ‘ABA Canons of Judicial Ethics Canon 19’ in Milord LL 1992 *The Development of the ABA Judicial Code* American Bar Association, Center for Professional Responsibility at 137.

⁴⁶ Walker T et al 1988 ‘On the Mysterious Demise of Consensual Norms in the United States Supreme Court’ 50 *The Journal of Politics* 36

⁴⁷ See also Post above n 44.

⁴⁸ Post above n 44; Guinier L 2008 ‘Foreword: Demosprudence Through Dissent’ 122 *Harvard Law Review* 4 at 21–23.

⁴⁹ Brennan Jr WJ 1986 ‘In Defense of Dissents’ 37 *Hastings Law Journal* 427 at 438; see also Ginsburg RB 1992 ‘Speaking in a Judicial Voice’ 67 *New York University Law Review* 1185 (1992); Ginsburg RB 1990 ‘Remarks on Writing Separately’ 65 *Washington Law Review* 133.

judge can have an impact through their reasoning, even when they decide cases consistently with case law.

Beyond the possibility of individual opinions, the legal impact of decisions is also relevant. In the United States, precedent from a higher court generally controls lower courts, and this provides an incentive for higher court judges to issue clear, well reasoned decisions that induce lower courts to comply. Within lower courts, however, precedents do not control. For example, in the United States, federal district court opinions do not count as precedent within the same district. An individual federal district court judge need not follow the legal holding of a prior decision in the same district. This device seems to encourage experimentation in lower courts, and to reward investment in individual reputation at the expense of collective reputation at the lower court level. At the same time, the requirement of following superior court precedents means that the costs to the collective reputation of the judiciary as a whole can be contained. The U.S. system thus favors individual reputation, with some offsetting devices to ensure some collective consistency.

C. Sentencing and Procedural Discretion

Discretion in criminal sentencing and in procedural rulings favors individual reputation over collective reputation by providing yet another way for judges to distinguish themselves from each other.⁵⁰ Reduced discretion in sentencing and in procedure favors homogeneity across the bench. There are two relevant consequences of this observation. First, differences in sentencing or in procedure could be exacerbated by judges who are purely interested in individual reputation building. In other words, the variance in sentencing or in applying procedural rules could increase significantly if judges focus on individual rather than collective reputation. Second, if the degree of discretion is higher with procedure than with substantive sentencing, judges could be tempted to use procedure to build individual reputation and therefore effectively curtail sentencing rules or guidelines (e.g., use evidence and other related procedural rules to bias the court one way or the other). Strict sentencing rules could have very different consequences in a system in which collective reputation prevails, where such rules would enhance uniformity and hence reinforce collective reputation, as opposed to a system where individual reputation is important. In the latter, strict sentencing guidelines might be undermined by procedural discretion since they limit the ability for individual judges to be distinct. This account sheds some light on judicial resistance to sentencing guidelines in the United States. Judges are embedded in a set of structures that encourage investment in individual reputation. Efforts to constrain their ability to do so, unless accompanied by much broader institutional reforms, are likely to fail and lead to new arenas in which judges seek individual reputation.

⁵⁰ On how judges use discretion in civil procedure to favor their own goals, see Macey JR 1994 'Judicial Preferences, Public Choice, and the Rules of Procedure' 23 *Journal of Legal Studies* 627 (1994) and Alexander JC 1994 'Judges' Self-Interest and Procedural Rules: Comment on Macey' 23 *Journal of Legal Studies* 647.

In some sense this discussion raises broader themes in legal scholarship of the distinction between rules and standards.⁵¹ Rules, it is often argued, are useful for constraining the discretion of individual judges, but are expensive to produce at a sufficient level of detail. In addition, rules can be over- and under-inclusive, subsuming within their ambit behavior not intended to be covered by the norm. Standards, on the other hand, empower the individual judicial decision-maker at the expense of uniformity. We should expect that the institutional structure of the judiciary will tend to favor rules when collective reputation is valuable, and standards when individual reputation is valuable.

D. Appeals

The appeal system and the nature of the relationship between superior and inferior courts play an important role in shaping incentives to invest in individual versus collective reputation building. A generous appeal system that essentially allows superior courts to review and evaluate the decisions taken by inferior courts induces compliance by junior judges and favor homogeneity and uniformity in decision-making.⁵² An appeal system that imposes few constraints on junior judges gives them more discretion and naturally generates more heterogeneity in sentencing which favors individual reputation. At the same time, an appeal system that permits conflicts of jurisdiction and law across courts, such as the American system which allows for the possibility of circuit splits, disfavors collective reputation and pushes toward investment in individual reputation. An appeal system that effectively internalizes potential conflicts and therefore reduces discrepancies in courts' decisions contributes decisively to collective reputation.

A crucial dimension on which appeals systems differ is the question of *de novo* review. In common law jurisdictions, appeals courts generally only hear questions of law, leaving the factual record to be developed at the trial level. This is often explained as originating in the institution of the jury, which finds facts and would have to be reconvened or reproduced to have *de novo* review. In contrast, civil law jurisdictions have *de novo* review of facts at the higher levels. This involves replication, but also allows fuller monitoring of junior instances to ensure quality. Our interpretation is that *de novo* review is a device to ensure collective reputation, while the lack of such review encourages individual judges to develop novel interpretations of law and to use their fact-finding power toward reputational development.

E. Citations

The use of citations in decisions reflects the importance of individual opinions, and hence generally contributes to enhancing individual reputation.⁵³ Citations presuppose that

⁵¹ See, e.g., Schauer F 2005 *Profiles, Probabilities and Stereotypes* Belknap Press ; Sullivan KM 1992 'The Supreme Court, 1991 Term--Foreword: The Justices of Rules and Standards' 106 *Harvard Law Review* 22; Kaplow L 'Rules versus Standards: An Economic Analysis' 42 *Duke Law Journal* 557 at 561-62.

⁵² Shavell S 1995 'The Appeals Process as a Means of Error Correction' 24 *Journal of Legal Studies* 379.

⁵³ See Choi S and Gulati M 2007 'Ranking Judges According To Citation Bias (As A Means To Reduce Bias)' 82 *Notre Dame Law Review* 1279; see also Posner R 2000 'An Economic Analysis of the Use of Citations in the Law' 2 *American Law and Economics Review* 381; Landes WM, Lawrence Lessig L and Solimine ME 1998 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges' 27

some cases and court decisions are path-breaking, not just because the object of the action is extremely relevant, but because the doctrine and legal interpretation offered by a given judge is worthy of consideration. Controversial decisions attract attention and generate debate even when they are not good law. Obviously this means that individual judges can seek to be identified for a famous case or a notorious decision. The widespread use of citations clearly favors individual reputation building, particularly when combined with the institution of individual named opinions.

F. Case Selection

The degree to which the judiciary controls the dockets of courts plays an important role in the process of establishing reputation.⁵⁴ The control of dockets can operate at the micro level, that is, in choosing particular cases, and at the macro level through such devices as justiciability doctrines that narrow or expand the scope of judicial review. When judges cannot effectively influence the cases they hear, collective reputation operates as a type of insurance, since some judges will randomly be assigned cases that are more suited for enhancing individual reputation than others through a mechanism that does not take into account different skill levels across the bench.⁵⁵ In other words, collective reputation reduces the potential reputational damage from being assigned cases that are detrimental to a particular judge in terms of preferences or skills. When dockets are effectively controlled by the judiciary itself, case assignment is not longer truly random. Individual reputation becomes an asset in such a system in two complementary ways. First, reputation allows individual judges to become favored in the distribution of cases to be reviewed by the courts relative to other colleagues. Second, reputation allows further enhancement of individual reputation, by allowing judges to pick cases that are more appropriate for the relevant constituencies. Case selection is a strategic variable in preparing the setting for reputation building.

G. Branding

A legal system that allows judges to attach their names to opinions, doctrines, extrajudicial inquiries, and law reform projects obviously places great value on individual reputation. For example, in the United Kingdom, judges are frequently called upon to lead inquiries into government behavior.⁵⁶ A legal system in which law reforms are conducted by bureaucrats and law professors, quasi-judicial inquiries are led by government officials, and doctrines are developed by law professors does not provide significant incentives for judges to invest in their individual reputation.

Branding also extends to private sector opportunities after retirement, including corporate advisory positions, participation in politics, teaching and prestigious conferences. Clearly individual reputation is more important than collective reputation

Journal of Legal Studies 271, and Choi S and Gulati M 2004 'A Tournament of Judges?' 92 *California Law Review* 299.

⁵⁴ See, among others, Jacobi T 2008 'The Judicial Signaling Game; How Judges Shape their Dockets' 16 *Supreme Court Economic Review* 1.

⁵⁵ That is, "better" judges do not get "better" cases whatever "better" might mean in this context.

⁵⁶ King A2007 *The British Constitution* Oxford University Press at 135.

for private sector opportunities after retirement, although a collective reputation for honesty and transparency could be beneficial from this point of view.

A third important component of branding is a legacy, broadly defined. For example, judges may be concerned with how they will be cited and discussed in casebooks, and how their decisions will be vindicated by future generations of judges. Concern for legacy motivates investment in individual reputation of particular judges, and less so on the collective reputation of the entire judiciary.

H. Size

The size of the judiciary is important in structuring incentives to invest in reputation. A larger judiciary raises the cost for each judge to engage in individual reputation building because there is more competition, and decreases the cost for each judge to engage in collective reputation building, since the effort required of any individual judge will be smaller. In a supreme court with nine justices, the actions of a single individual are easily monitored and assessed by the media in general. In a supreme court of seventy-five justices, as is not uncommon in the civil law world, only experts can assess the actions of individual judges, and effective monitoring is limited to other judges or the members of the high judicial council. Therefore a small judiciary generates investment in individual reputation and recognition; larger numbers induce uniformity and investment in collective reputation.

Larger judiciaries also affect incentives in another way: through providing opportunities for advancement and promotion. If there are relatively few opportunities for promotion, judges will be less sensitive to pressures from higher levels of the hierarchy. They may therefore be less willing to sacrifice elements of individual reputation for the collectivity. In contrast, in a large bureaucratic judiciary, there are significant opportunities for advancement and judges will be sensitive to the concerns of their superiors.⁵⁷ This design tends to suppress individual variance and lead to greater investments in collective reputation.

I. Budget and Allocation of Resources

Judges are also the managers of the legal system under very different institutional arrangements. Management requires resources and a budget. These resources have to be negotiated with the government, since tax revenues are collected by the government. Courts may have their own resources from legal fees and other financial instruments, but these do not typically account for a significant proportion of revenues for the judicial system. The dependence on the government for resources creates a need for bargaining with the government, as well as bargaining within the court system for shares of overall resources.

If resources and the budget, in particular, are allocated to judges as individuals then individual reputation becomes a major asset in bargaining over resources within the court system. However, if resources are allocated in a manner that is administratively and independently of the individual judge, collective reputation becomes a major variable since only through collective reputation can the judiciary obtain more resources from the government. As mentioned before, the practice of identical pay for judges of a similar

⁵⁷ Ramseyer and Rasmusen above n 37.

rank can be viewed as a device to encourage investment in collective over individual reputation.

J. Other Mechanisms

Other mechanisms that incentivize individual comparisons of judges are elections to select judges and forum shopping. In judicial elections, each candidate has to present a distinctive platform to convince the electorate to vote for him or her, heightening incentives to disassociate the judge from collective reputation, and to brand decisions with his or her personal stamp.⁵⁸ Forum shopping is more complicated, because it involves the need for a particular court as a whole to associate itself with particular doctrinal or procedural positions to attract litigants.⁵⁹ This requires some investment in collective reputation, but only for the court rather than the judiciary as a whole. The competition for cases should produce greater variance in decisions across courts, especially to the extent that the Supreme Court also induces courts. Panels in lower courts, on the other hand, tend to reduce the possibility of individual evaluation of judges and so complicate the development of individual reputation.

K. The Interdependence of Institutional Choices

The above institutions are conceptually distinct from each other. Crucially, however, they are reinforcing in terms of reputation and provision of information about performance. The common law tendency toward a “recognition” judiciary is based on judges who are selected because their earlier investments in reputation allow ex ante screening for quality and effort. Such judges can be trusted to write high quality individual opinions. In contrast, the “career” system associated with the civil law hires judges at a young age, and therefore cannot trust them to adequately invest in individual reputation without extensive monitoring. Hence we see collective opinions. Citations are also less important, as the identity of any individual judge is usually not known. Branding is frowned upon.

The career system also requires many more judges, because monitoring output at the lowest level requires an intermediate supervisory level (itself an autonomous body or a different layer of a more hierarchical court system). Appeal is essential to maintain quality and discourage shirking. Appeals are *de novo*, in order to ensure that individual judges do not harm the collective reputation of the judiciary. We thus observe much larger judiciaries to accomplish *de novo* review. This reinforces the notion of team rather than individual production, and reduces the amount of effort required by any single judge to produce reputation.

We also see differences in the discretion over dockets in the two systems. The judges in recognition systems have a variety of devices to exercise docket control,

⁵⁸ On judicial elections, see, e.g., Webster P 1995 ‘Selection and Retention of Judges: Is There one Best Method?’ 23 *Florida State University Law Review* 1 ; Hanssen FA 2004 ‘Learning About Judicial Independence: Institutional Change in State Courts’ 33 *Journal of Legal Studies* 431 at 462; Epstein L, Knight J and Shvestova O 2002 ‘Selecting Selection Systems’ in Burbank SB and Friedman B eds 2002 *Judicial Independence at the Crossroads: An Interdisciplinary Approach* Sage Publications, Inc at 191–226 (S).

⁵⁹ See generally Klerman D 2007 ‘Jurisdictional Competition and the Evolution of the Common Law’ 74 *University of Chicago Law Review* 1179 at 1188 .

particularly at the senior levels. This allows them to control their policy-making role. In contrast, career judges are viewed as relatively low level functionaries without individual discretion.

It is interesting to think about the ideology of the common law and civil law as reinforcing these institutional features. It is generally understood that the civil law tradition conceives of “the law” as a unified coherent whole, with pre-existing answers to legal questions that are identifiable through the exercise of legal science.⁶⁰ This idea de-emphasizes the role of the individual judge in crafting the law, and in principle different judges are not thought to be able to arrive at different answers to legal questions. In contrast, common law judiciaries tend to see law as more akin to policy. Policy matters are those which in principle reasonable minds can disagree. This is not to suggest that law is infinitely plastic, but rather that for hard legal questions (of the type most likely to be litigated) different judges may come up with different answers. Seeing law as policy means that we need to identify the particular reasoning and to associate it with an individual judge. These different conceptions of the law obviously track the distinction between collective and individual reputation.

V. AN ILLUSTRATION: THE UNITED STATES AND JAPAN

By way of illustration, contrast the U.S. Federal judiciary with that of Japan. We take these two countries to represent ideal-typical poles in the organization of judiciaries, and hence use them to illustrate the argument.⁶¹ The United States is a classic example of a “recognition” judiciary, in which judges are appointed to the bench in large part because of individual accomplishments in other spheres. They are known as superior individuals who have already developed a certain amount of reputation; indeed, the collective reputation of the judiciary may in part derive from achievements in other spheres. An extreme case was former President Taft, who subsequently became Chief Justice. Individual judges in the United States sit alone at trial level, and do not move courts, unless they are lucky enough to be appointed to a higher level. At the appellate level judges frequently write their own dissenting and concurring opinions. A vigorous citation practice encourages this individuation of opinions.

Individual judges have a good deal of discretion. At the trial level, notwithstanding efforts to develop sentencing guidelines, judges retain a good deal of control over the procedure. The appellate system is limited to questions of law, meaning that the system tolerates a good deal of diversity both across first-instance courts and across regions of the country. Lawyers, of course, know this, and so sometimes seek to forum shop to obtain a favorable venue; less formally, most lawyers will have strong views about the character of individual justices at the appellate level.

The limited appellate system means that a relatively small judiciary is tolerable. The United States has one of the lowest ratios of judges to lawyers in the world.⁶² This in turn enhances the prestige of those lawyers who actually do make it onto the bench.

⁶⁰ Merryman and Pérez-Perdomo above n 34.

⁶¹ More examples are discussed in detail by Garoupa N and Ginsburg T 2009 ‘Judicial Reputation and Audiences: Perspectives from Comparative Law’, 47 *Columbia Journal of Transnational Law* 451.

⁶² See Posner above n 36.

Judges are generalist wise men and women, and many of them develop a reputation as judicial statesmen or public intellectuals. Supreme Court cases are routinely front-page news, and scrutinized by the chattering classes for their public policy implications. Many judges become heroes, and their names live on in history. This is a system that greatly values individual reputation.

Contrast all this with the Japanese judiciary. Japanese judges enter the judiciary at a young age and spend their career in a hierarchical structure. They will spend their career in a series of two- and three-year rotations, moving around the country and so unable to be identified with any particular court location.⁶³ Opinions are unsigned at all levels save the Supreme Court and dissenting opinions are rare. Japanese Supreme Court decisions are rarely front page news, and even many lawyers cannot name the justices of the Court. Decisions at the lower level are unsigned and so the judge is essentially faceless, reflecting the civil law ideology that the decision reflects the law rather than views of any particular judge. The judiciary as a whole has a reputation for quality and predictability, but individual judges have no reputation at all.⁶⁴

The ideology of judging is such that judges are seen as having no independent influence on case outcomes, and there is a theoretical correct answer for every case. Indeed, in some cases the judge will be replaced because of the rotation system, with no concern for problems that may cause.⁶⁵ There are also internal systems for uniformity, including tables of formulae for damage awards, so that like cases will be treated alike regardless of the judge hearing the case. The rotation system also provides for suppression of discretion: judges who are outliers can and will suffer in terms of being assigned to undesirable locations.⁶⁶ This can be seen as a device for ensuring that individuals contribute to collective reputation, and that an overall reputation for uniformity is maintained.

A major scholarly debate concerns whether or not the Japanese judiciary is independent.⁶⁷ Professor Ramseyer and co-authors have emphasized the ability of the Supreme Court Secretariat to discipline judges at lower levels. Because the Secretariat is appointed by the Supreme Court itself, the Supreme Court is appointed by the Diet, and the Diet has been controlled by a single political party for most of the last six decades, Ramseyer argues that judges are ultimately subject to external control.⁶⁸ He provides evidence that judges who ruled against the interests of the ruling Liberal Democratic

⁶³ Ramseyer and Rasmusen above n 37.

⁶⁴ Haley J 'The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust' *Lectures and Occasional Papers, Whitney R. Harris Institute for Legal Studies, No. 3. Washington University School of Law* available at <http://law.wustl.edu/igls/lecturespapers/2003-3haleyjapanesejudiciary.html>

⁶⁵ Haley J 1990 *Authority Without Power* Oxford University Press.

⁶⁶ Ramseyer and Rasmusen *Measuring* above n 37.

⁶⁷ Upham F 2005 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary' 30 *Law and Social Inquiry* 421.

⁶⁸ Ramseyer and Rasmusen above n 37; Ramseyer JM and Rasmusen EB 2001 'Why Are Japanese Judges So Conservative in Politically Charged Cases?' 95 *American Political Science Review* 331; v JM and Rosenbluth FM 1993 *Japan's Political Marketplace* Harvard University Press at 178; see also Law DS 2009 'The Anatomy of a Conservative Court: Judicial Review in Japan' 87 *Texas Law Review* 1545 (2009).

Party have suffered career sanction. This account emphasizes a particular external audience for the courts that operates at the individual level.

Professor Haley, by contrast, emphasizes the internal audience and the collective quality of the judiciary.⁶⁹ Japanese judges work in a hierarchy that is similar to that of other large Japanese organizations, in which one enters the organization at a young age and spends one's whole career in the same institution. For all large organizations, internal controls help to socialize staff. The emphasis is on mechanisms of collective reputation, in which Japanese judges are evaluated by society only on a collective basis. Haley points to the relative rarity of sanctions, the complete absence of reported instances of judicial corruption, and strong corporate identity of the judiciary to argue that the Japanese judiciary is indeed quite independent.

Our concern is not with independence *per se*. Much of the debate between Haley and Ramseyer turns on one's conception of judicial independence and whether it inheres in the individual judge or the judiciary as a whole. From our perspective, the key question is what audience the judiciary is addressing in its decision-making. Even if Professor Ramseyer is correct (and we find his evidence convincing) it does not explain judicial decision-making in the vast majority of cases which have low political salience. For these cases, internal audiences are indeed the most important. Certainly, when compared with a judiciary such as that of the United States, Japan's institutional structures lean heavily toward collective reputation.

This situation has begun to change slightly. In the late 1990s, after several years of economic malaise, Japan's elites initiated a major program of legal reform, culminating in the creation of a Justice System Reform Council in 1999. The Council issued its report two years later and was quite critical of the judiciary for maintaining a detached stance toward society, and being insufficiently transparent.⁷⁰ It called for increasing the number of appointments from the ranks of practicing lawyers. Though the number of such appointees remains low so far, this has the potential to introduce new incentives for judges to focus on the legal profession as a relevant audience. Another recommendation focused on allowing citizens some role in the reappointment of judges. This is required for Supreme Court justices every ten years under Japan's Constitution, though in practice this is never utilized because judges are appointed to the Supreme Court relatively close to the retirement age.⁷¹ In 2003, an eleven-member Advisory Committee for the Nomination of Judges was established, five of whom are "insiders" (judges, prosecutors or lawyers) and the remaining six from academia and the general

⁶⁹ Haley JO 2007 'The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust' in Foote DH ed 2007 *Law in Japan: A Turning Point* University of Washington Press at 99, 109 (); see also O'Brien DM and Ohkoshi Y 2001 'Stifling Judicial Independence from Within: The Japanese Judiciary' in Russell PH and O'Brien DM eds 2001 *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* University of Virginia Press 37, at 59.

⁷⁰ Justice System Reform Council 2001 *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*.

⁷¹ Constitution of Japan, Art. 79(2) ("The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter.").

public. The Committee has already rejected some proposed candidates on the basis of its own investigations.⁷²

Perhaps even more radically, the JSRC recommended the introduction of a quasi-jury system, in which citizens will sit in a mixed panel with judges in serious criminal cases. This reform, while not demanded by the public, was seen as an important step toward improving the transparency and legitimacy of the justice system as a whole. As a result, from August of 2009, ordinary citizens began to sit as *saiban-in*, lay decision-makers, deciding serious criminal cases.⁷³ One can view this development as seeking to force the judiciary to make its decisions more transparent to the ordinary citizen, reflecting a shift from internal toward external audiences for judges. One also observes increased coverage of legal cases in newspapers, and even criticism of some decisions in public. Still, the core institutions of the career judiciary have remained in place, and the shift is only a matter of degree.

VI. DISCUSSION: LESSONS FOR REFORM

Our basic argument is that institutional structures will incentivize investment in either individual or collective reputation in different degrees. These incentives respond to the needs for individual and collective performance information as perceived in each legal system. An ideal structure will provide sufficient incentives to invest in both individual and collective reputation, and we believe that systems that stray too far in one direction will not be able to deliver efficient, neutral justice. In fact, when too little of one type of information is provided or made available, legal reforms might try to provide incentives to reverse the situation.

This argument has implications for judicial reform programs. Above all, our analysis suggests caution in introducing reforms, as the linked nature of many institutions that affect reputation mean that change in one can have unanticipated effects in other institutions. Still some reforms might be feasible and appropriate. We consider first proposed reforms that are designed to induce more investment in individual reputation and then reforms designed to enhance collective reputation.

A. Reforms to Induce Greater Individual Effort

1. *Variable Pay*

We wonder if there might not be greater scope for introducing variable compensation for judges based on performance. In an ideal world, we would compensate judges for their marginal contribution to judicial reputation, which would require some proxy for individual judicial performance. There are however three substantive problems that need to be considered, some of them already detected in Part III. First, individual performance measures might disrupt team work and raise agency costs, that is, given the existence of a non-separable component, it might not be possible to approximate the

⁷² Rokumoto K 2007 'Judicial Reform in Japan' in Choi D and Rokumoto K 2007 *Justice System in Transformation* Seoul National University Press.

⁷³ Anderson K and Nolan M 2004 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-In Seido) From Domestic Historical and International Psychological Perspectives' 37 *Vanderbilt Journal of Transnational Law* 935.

individual marginal contribution. Second, inadequate individual performance measures might distort activities, hence generating strategic adjustments by the judiciary in order to boost the potential gains. For example, we might see judges invest insufficient time in hard cases, or seek to hear only easy ones. Finally, there might be a crowding-out effect between intrinsic and extrinsic motivation. Many professional norms among the judiciary (regarding, for example, judiciousness and precedent) are established by prestige and status, and they could be undermined by the introduction of high powered market incentives that result in differential pay.⁷⁴

Fee for service has some history in the common law. Until 1799, judges in the English monarchical courts were paid a salary and also were allowed to charge fees that ranged from 8 to over 54% of total judicial income.⁷⁵ Professor Klerman has argued that these fee for service arrangements facilitated competition among judges and among courts to produce quality rules, particularly those that favored plaintiffs.⁷⁶ There is some evidence that courts with institutional structures that concentrated authority were better able to produce innovative rules in this process of competition.⁷⁷ The English system thus seems to have provided some incentive for both individual and collective reputation.

The system, however, was controversial in the United States.⁷⁸ Though fee for service arrangements were common in colonial America, there was concern about the potential for judicial corruption and many state constitutions banned the practice.⁷⁹ Article III of the U.S. Constitution seems to frown upon, and probably ban, the practice for federal judges, referring as it does to payment for services “at stated Times.”⁸⁰ The Judiciary Act provides for salaries rather than fees, and when one early district court judge insisted on charging fees for admiralty cases, the Congress responded by forbidding the practice.⁸¹ In short, the US experience has shied away from fees for ordinary judges. Specialized courts and some lower level magistrates, however, have received variable pay. For example, bankruptcy judges were paid by size of case till 1890s.

The only such modern effort of which we are aware was in Spain. A controversial law allowed for the possibility of performance based salaries for the

⁷⁴ The crowding-out effect is well-known in the economic literature. See, among others, Frey B and Neckermann S 2008 ‘Awards: A View from Psychological Economics’ Working-Paper 357 Institute for Empirical Research in Economics University of Zurich and McAdams R and Rasmusen E 2007 ‘Norms in Law and Economics’ in Polinsky AM and Shavell S eds 2007 *Handbook of Law and Economics* North Holland.

⁷⁵ Klerman D 2007 ‘Jurisdictional Competition and the Evolution of the Common Law’ 74 *University of Chicago Law Review* 1179 at 1188 ; Aylmer GE 1974 *The King’s Servants: The Civil Service of Charles I, 1625-1642* Columbia University Press revised edition; Aylmer GE 1973 *The State’s Servants: The Civil Service of the English Republic, 1649-1660* Routledge and Kegan Paul Books .

⁷⁶ Ibid.

⁷⁷ Ibid at 1217

⁷⁸ Pfander JE 2008 ‘Judicial Compensation and the Definition of Judicial Power in the Early Republic’ 105 *Michigan Law Review* 1.

⁷⁹ Ibid at 3. Pfander notes that other states allowed payment of fees into the 19th century.

⁸⁰ Ibid at 12-15.

⁸¹ Ibid at 22.

judiciary (*Ley 15/2003*). The judicial council (*Consejo General del Poder Judicial*) implemented that new system of compensation in 2004 (*Reglamento 2/2003*) but the Spanish Supreme Court nullified it in March of 2006 (*Sentencia de la Sala de lo Contencioso Administrativo 17/2004*). Aside from procedural issues, the substantive arguments provided by the Supreme Court included that the estimation of individual productivity is contrary to the very nature of judicial activity and the work of the judiciary is not compatible with quantitative assessments of productivity. We view this decision as privileging collective reputation over individual reputation.⁸²

Presumably, in theory, adequate performance measures should be able to avoid all these shortcomings (minimizing the costs of disrupting team work, deterring strategic inefficient substitution of activities, and avoiding crowding-out effects with intrinsic motivation), but it might be unfeasible for practical purposes to develop such measures. Furthermore, the most obvious performance measures as embraced by the Spanish legal policymakers are likely to be insufficient and even detrimental. Compensation based on the number of cases or the speed of case disposition is likely to induce judges to spend too little time on cases, and to seek to avoid complex cases. Using productivity in terms of the number of pages drafted is likely to lead to wordy opinions that are too long. In conclusion, although ideal individual performance measures would be the optimal instrument to improve individual reputation from an economic perspective, we are quite skeptical that such devices can be utilized effectively. Still, we encourage scholars to consider workable proxies for judicial performance that might facilitate the creation of new incentive structures for judiciaries.⁸³

2. *Transparency*

Another reform that may be workable is to introduce transparency into the operations of the judiciary. Simply informing the public of the judges who sit in a particular case will induce marginal investment into individual reputation while encouraging accountability. Currently, information is hard to come by, particularly in many developing countries. Judicial councils and ministries of justice provide information in some systems.

One idea here is to encourage competing sources of information. There would be some cost in terms of duplication but there may also be corresponding benefits in accuracy. In many developing countries, non-governmental “judicial watch” programs have been established, often with the help of foreign donors. The thought is that the judiciary, like any other administrative agent, requires monitoring. Because of concerns about judicial independence, hiring another state agency to watch the courts seems inappropriate and so civil society can play a role in watching individual cases (as can the

⁸² Details can be found in Contini F and Mohr R 2007 ‘Reconciling Independence and Accountability in Judicial Systems’ 3 *Utrecht Law Review* 26. A background on the Spanish judiciary and the transition from the Franco regime to democracy (in particular, noting that the judiciary has been more heterogeneous than expected and less of an instrument of a rigid governance), see Larkins CM 1996 ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ 44 *American Journal of Comparative Law* 605.

⁸³ A weak substitute could be a ranking of courts and judges. In this respect, the United States has a tradition without parallel in the world since the classical study dates from the 1930s, Mott RQ 1936 ‘Judicial Influence’ 30 *American Political Science Review* 310.

media.) If working well, this tends to enhance investment in both individual and collective reputation.

Forum-shopping could be another interesting way to pursue individual reputation. It naturally introduces competition among courts which puts pressure on judges to build individual reputation in order to attract litigants.

B. Reforms to Induce Greater Collective Effort

Unlike individual reputation, investment in collective reputation requires collective action on the part of the judiciary as a whole. When senior judges have a supervisory role, they may be the focus of reform efforts. How might the senior managers of the judiciary be induced to foster higher levels of investment in collective reputation?

1. Ratings systems

In recent years there have been a plethora of “ratings” systems, measuring various qualities of interest across countries and ranking them accordingly. Examples include the World Competitiveness Report, Transparency International’s Corruption Reports, the World Bank’s Governance Indicators, to name a few. These systems have been the target of much critique, both methodologically and substantively.⁸⁴ Nevertheless, there is some evidence that countries take them seriously.⁸⁵

Cross-national ratings such as the World Bank’s Rule of Law Measure can induce the managers of the judiciary to ensure that there is sufficient investment into collective reputation. Because the managers ultimately work for the public, high profile ratings can capture public attention and lead to pressures on the managers to improve performance. It can also motivate the government to expend resources on the judiciary, empowering judges in the internal competition for funds. It should be recognized, though, that any simple metric risks inducing new pathologies into the system as managers and judges try to game the system. Suppose, for example, that a cross-national metric of time to disposition is used to rank judiciaries, just as the World Bank’s *Doing Business Report* measures administrative procedures required to set up a firm. This could lead to an emphasis on speed over quality, which might in turn hinder the overall reputation of the judiciary.

2. Random De Novo Appeal

As we have seen, systems with *de novo* appeal tend to have a greater emphasis on collective reputation than those without such appeals. This might lead one to propose an expansion of *de novo* appeal as a way of ensuring judicial quality. The problem is that de

⁸⁴ For example, Larkins above 82, provides the following objections: reliance on formal indicators rather than reality; the appropriate information is unclear for comparative purposes; problematic interpretation of significance of judicial outcomes; and the arbitrary nature of many findings due to subjectivity in numerical scoring. The rule of law indicator of the World Bank’s Governance Indicators, which is seen as the state of the art in many ways, lacks internal validity, as it purports to measure different concepts from year to year. See Kurtz M and Schrank A 2007 ‘Growth and Governance: Models, Measures, and Mechanisms’ 69 *The Journal of Politics* 538.

⁸⁵ Taylor V 2006 ‘The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies’ in Lindsey T ed 2006 *Law Reform in Developing States* Routledge.

novo appeal is expensive, and many judiciaries that do not allow it also have a relatively small number of judges.

One way to obtain the benefits of *de novo* appeal without incurring all the costs would be to use a randomization method to draw a certain number of cases into a *de novo* review. If trial judges know that there is some chance that their fact-finding would be reviewed in detail, this might induce them to invest more resources into individual cases, which presumably would enhance the overall quality of fact-finding. The number of *de novo* appeals could be calibrated to balance the marginal cost against the marginal deterrence benefit in heightened quality. We know of no system which utilizes random audit methods for reviewing judicial cases, but it seems an elementary innovation, with potential beneficial effects in countering corruption as well as producing more careful decisions.

VII. CONCLUSION

Judicial reputation matters. It provides information about performance and indirectly affects judicial resources and power. As of yet, however, we do not have a complete understanding of the determinants of reputation. This paper has used law and economics tools to understand investment in reputation as a problem of team production. Judiciaries require individual effort by judges, but it is difficult to observe any particular judge's contribution to overall performance. Furthermore, judges who are concerned only with their own reputation might undermine collective judicial reputation. On the other hand, too much emphasis on collective reputation might lead judges to shirk, producing lower quality justice.

This framework helps us to understand the inner workings of judicial systems. We have identified a set of particular institutional choices, roughly but not perfectly corresponding to the distinction between common law and civil law systems, that provide the incentives structure for judges. We believe that these institutional choices are linked and, in the aggregate, determine the particular texture of judicial reputation. Crucially, legal systems can experience pathologies when institutional reforms skew investment incentives in one direction or another.

As a normative matter, designers of judicial systems need to think about incentives for reputation building, which will enhance to the various outputs expected from the judiciary. Our particular proposals are intended to be suggestive, but we believe that we have identified the right level of analysis to characterize national patterns in a more refined way.

Readers with comments should address them to:

Tom Ginsburg
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
tginsburg@uchicago.edu

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Tom Ginsburg
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
tginsburg@uchicago.edu

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