

# Reputation, Information and the Organization of the Judiciary

---

NUNO GAROUPA AND TOM GINSBURG \*

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 Iapoe

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 judgments used to predict future performance.<sup>1</sup> 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 is to understand how different institutional configurations facilitate different modes of producing reputation, with an impact on professional norms and the position of judges in society.

\* Nuno Garoupa: University of Illinois College of Law; Tom Ginsburg: University of Chicago Law School.

<sup>1</sup> See below for a more extended discussion.

Judicial reputation plays two important roles. First, it conveys information to the uninformed general public about the quality of the judiciary (and more generally about the legal system) as perceived by the relevant audiences. Second, it 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 and as insulation from other political actors who might expropriate such resources. Self-esteem can be thought of 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 recognise that some systems will value qualities — such as predictability, wisdom and efficiency — that other systems may not. In this sense we treat reputation as instrumental towards 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 maximise the welfare of the 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.<sup>2</sup> Thus reputation is essential from an instrumental perspective.

Our second claim is that reputation can be divided into individual and collective components. 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 judges’ 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 in a different way from what would be socially optimal.

The bifurcated nature of reputation creates interesting institutional challenges, which we analyse below using the economic concept of team production.<sup>3</sup> If judicial performance were essentially individual and the quality of the judiciary could be easily disaggregated

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

<sup>3</sup> 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.

into the individual contributions, such individual reputation would prevail as the most important mechanism to provide information. But crucially, it is often difficult to monitor 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.

Our third claim is that 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 emphasise collective reputation utilise institutions to limit publicly available information about the performance of the individual judges. Those that emphasise 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 favour 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 the 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.<sup>4</sup> This approach contrasts with the deductive approach that starts with legal origins and assumes that ancient institutional distinctions are enduring and consequential.<sup>5</sup> We believe that institutions matter, but also emphasise that institutional structures can change over time, and suggest that minor institutional reforms can have severe and unintended consequences on the production of

<sup>4</sup> 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*.

<sup>5</sup> 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.

reputation. This perspective, we argue, is more helpful to understanding judicial behaviour than the simple categorisation of legal origins.

The article is organised as follows. The first section sets out why reputation matters; the next two sections describe our theory, treating judicial reputation from the perspective of the economics of team production. The fourth section 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, favours the production of individual reputation and the latter collective reputation. The article ends with suggested lessons for reform.

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

In particular, individual reputation conveys information about the 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, it would be trivial. In other words, collective information may differ from the sum of assessments about individual performance. Notice that this distinction is not merely explained by cognitive limitations, such as the idea that the general public cannot recall the all judges' names and therefore uses the perception of an average performance as a proxy. The 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 people, care about their reputation to the extent that reputation is an important social and economic asset.<sup>7</sup> They care about their monetary payoffs. If

<sup>6</sup> Miller, GD (2003) 'Hypotheses on Reputation: Alliance Choices and the Shadow of the Past' 12 *Security Studies* 40.

<sup>7</sup> 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; id (2005) 'Judicial Behavior and Performance: an Economic Approach' 32 *Florida State University Law Review* 1259; id (2006) 'The Role of the Judge in the Twenty-First Century' 86 *Boston University Law Review* 1049; and id (2008) *How Judges Think* Harvard University Press. See also Easterbrook, FH (1990) 'What's So Special About Judges?' 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; id (1996) 'The Motives for Judges: Empirical

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 behaviour accordingly.

But judges also care about non-monetary payoffs and in this respect reputation is an important professional asset. It is defined as a credible signal of high quality, which allows judges to fulfil professional duties and achieve career goals.<sup>8</sup> Individual and collective information conveyed to the relevant audience shapes 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 only matter 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.<sup>9</sup> Judicial decisions require real-world institutions to take real actions in order to ensure compliance.

There is a variety of theories as to why real world actors obey the pronouncements of courts. One traditional set of arguments focuses on the legitimacy of judicial decisions. Another emphasises enforcement by other state officials, but this only begs 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 co-ordination of parties' expectations by providing focal points.<sup>10</sup> 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 as 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 co-ordination. As judicial decisions are complied with, they will provide feedback in the form of an improved reputation.

Recently, a former Chief Justice of Israel explained in detail why individual judges care about collective reputation and the extent to which it influences their decisions. He identified 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

---

Evidence from Antitrust Suits' 12 *International Review of Law and Economics* 13; Simon, D (1999) '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 id (2006) *Judges and Their Audiences* Princeton University Press.

<sup>8</sup> For the different possible goals of the judiciary, see id (2004) *The Puzzle of Judicial Behavior* University of Michigan Press, and Robbenolt, JK, MacCoun, RJ and Darley, JM (2008) 'Multiple Constraint Satisfaction in Judging' available at: <http://ssrn.com/abstract=1133184>. See also Hirschl, R (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* Harvard University Press, making the point that extending the power of the judiciary (juristocracy) as a collective goal can only be achieved with a certain court reputation, for example, impartial adjudication in the eyes of the public.

<sup>9</sup> 'The Federalist No 78' at 461.

<sup>10</sup> McAdams, R (2005) 'The Expressive Power of Adjudication' 2005 *University of Illinois Law Review* 1043; Ginsburg, T and McAdams, R (2004) 'Adjudicating in Anarchy: an Expressive Theory of International Dispute Resolution' 45 *William and Mary Law Review* 1229; Law, DS (2009) 'A Theory of Judicial Review and Judicial Power' 97 *Georgetown Law Journal* 723.

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 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 hurt their prestige and ability to shape the law.<sup>11</sup>

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.<sup>12</sup> In many countries the judiciary has a reputation for corruption.<sup>13</sup> In these environments collective action has failed, and individual judges seek to maximise their own wealth at the expense of their collective reputation. It is hard to pin one's hopes for reform on institutions that have poor reputations to start with.

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.<sup>14</sup> 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.<sup>15</sup>

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.

<sup>11</sup> See Barak, A (2006) *The Judge in Democracy* Princeton University Press.

<sup>12</sup> Carothers, T (2006) *Promoting the Rule of Law Abroad: In Search of Knowledge* Carnegie Endowment for International Peace.

<sup>13</sup> See eg 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; id (1997) 'Judicial Corruption in Latin America' *Essays in Law and Economics* Kluwer.

<sup>14</sup> See Malleson, K (2004) 'Selecting Judges in the Era of Devolution and Human Rights' in Le Sueur, A (ed) *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 were more transparent).

<sup>15</sup> 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.

## A THEORY OF REPUTATION

As mentioned above, reputation can be divided into two components, individual and collective. Individual reputation is related to the name recognition of each judge.<sup>16</sup> 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 all judges must accomplish on their own, while collective reputation building is the product of team-work. It is not always the case that effort allocated to individual reputation building enhances the collective reputation or vice-versa. In fact, in many circumstances these two goals conflict. For example, individual reputation might encourage judges to differentiate themselves 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, judges might have to decide between advancing their own preferences (hence building an individual reputation for a certain profile) or conforming with the general preferences of their colleagues (hence promoting the collective reputation for consensus). In many circumstances, a particular effort can enhance both individual and collective reputation at the same time. But in other circumstances, by investing more in building an individual reputation, a judge contributes less to building the collective reputation. In these cases 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 towards the judiciary, but also how the interests of the relevant 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 the 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 affect the overall judicial budget, salaries, pensions and other perks available to the judiciary, as well the level of social prestige and overall working

<sup>16</sup> 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 and 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' 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).

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 both by external mechanisms (such as academic commentators, the bar and political actors) and by internal mechanisms (such as peer evaluation by other judges or a judicial council). The internal mechanisms determine 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.<sup>17</sup>

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 on to judicial quality. This assumption is not strictly necessary for our analysis; all we need to assume is that noise does not vary systematically across the institutional structures that we analyse. 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 behaviour 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.

## 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.<sup>18</sup> This is neatly captured by Ronald Dworkin in his description of judicial production as co-authorship in a chain novel.<sup>19</sup> The non-separable nature of a portion of judicial output is aggravated by the specific human capital required

<sup>17</sup> 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 id 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 Eskridge, WN (1993) 'The Judicial Review Game' 88 *Northwestern University Law Review* 382, id 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 'Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior' *supra* n 7.

<sup>18</sup> The non-separable component is extensively discussed by Barak *The Judge in Democracy* *supra* n 11.

<sup>19</sup> See Dworkin, R (1982) 'Law as Interpretation' 60 *Texas Law Review* 527.

to perform judicial work.<sup>20</sup> 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 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 the two will depend on institutional attributes and incentives. Significantly, as in any team, co-ordination 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 only on collective reputation naturally raises concerns with shirking, the most common problem with *ex ante* sharing rules. Judges may be driven to reduce their own effort 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 is that they generate a collective action problem concerning monitoring or co-ordination mechanisms to reduce the free-riding problem. In the absence of specialised actors or an intermediate hierarchy (perhaps in a body such as a judicial council) to internalise these co-ordination issues, individual judges have no incentive to invest time and resources to detect lazy judges. Hence, not only does shirking take place but its detection and punishment 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

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

from their marginal contribution.<sup>21</sup> 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 be likely to induce opportunistic rent-seeking, as judges will invest time and effort to grab a larger share of the 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.<sup>22</sup>

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 them. 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.<sup>23</sup> 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

Serious problems can be created by using either only ex ante or only ex post sharing rules. Therefore, a superior approach is to utilise a combination of both, 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 in the judiciary. Furthermore, external constraints (such as future job

<sup>21</sup> Williamson, O (1985) *The Economic Institutions of Capitalism* Free Press.

<sup>22</sup> We will discuss variable pay for the judiciary in detail below. For example, a notable exception is Spain, where variable pay was introduced in 2003.

<sup>23</sup> See Williamson *The Economic Institutions of Capitalism* supra n 21.

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 judges may be able to maximise 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.<sup>24</sup> 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.<sup>25</sup> 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 however lead to exacerbation rather than reduction of many of the problems we have identified. Furthermore, there are important issues that a mediating hierarchy cannot fully resolve. One controversial issue is the relationship between the judiciary and other branches of government. The judicialisation of public policies may serve to enhance both collective and individual reputation. However, it may unleash countervailing forces that target the collective reputation, leading to politicisation 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 judicialising public policies.<sup>26</sup> Constitutional safeguards against 'judicial government' of public policy then become 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 eye by lowering the relative status of the other branches, 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

<sup>24</sup> See Blair, M and Stout, LA (1999) 'A Team Production Theory of Corporate Law' 85 *Virginia Law Review* 247.

<sup>25</sup> Ginsburg, T and Garoupa, N (2009) 'Guarding the Guardians? Judicial Councils and Judicial Independence' 57 *American Journal of Comparative Law* 103 and id (forthcoming 2009) 'The Comparative Law and Economics of Judicial Councils' 27 *Berkeley Journal of International Law* 53.

<sup>26</sup> 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.

subject to external influence from multiple sources (for example, the European Court of Justice where rewards can come from multiple constituencies such as EU institutions and bodies, national governments, national judiciaries), conflicting 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 (such as 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.

### 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,<sup>27</sup> and they are the subject of popular biographies.<sup>28</sup> 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 avoid exposure and contact with public opinion in general; and very few judges get to be known by the public in general.<sup>29</sup> If justice is blind, judges are anonymous. In these legal systems, information

<sup>27</sup> See eg Posner, RA (1993) *Cardozo: A Study in Reputation* University Of Chicago Press.

<sup>28</sup> See eg Foskett, K (2005) *Judging Thomas: the Life and Times of Clarence Thomas* William Morrow.

<sup>29</sup> For example, Sophie Boyron identifies a major concern in France with the 'esprit de corps' of the judiciary, a professional culture driven by early socialisation 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) *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)

about individual performance seems to be intentionally underplayed, if not systematically hidden from the general public.<sup>30</sup>

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 1990s.<sup>31</sup> Many judges become known by the public only if they head specific inquiries into practices or decisions by the government.<sup>32</sup>

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 focus on an individual 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 and refuse to reappoint those who did not vote appropriately, thereby compromising their independence.<sup>33</sup> 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 others it is the opposite; some legal systems pursue individual performance whereas others prefer to limit information about individual performance and to rely more on collective assessment.<sup>34</sup> These differences are very important at two levels. First, they respond to different incentives and organisational 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

---

*French Legal Method* Oxford University Press.

<sup>30</sup> 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 id (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 towards bureaucratisation seems to be detected in the US by Fiss, O (1983) 'The Bureaucratization of the Judiciary' 92 *Yale Law Journal* 1442.

<sup>31</sup> 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 12 Law Lords, the other Lords of Appeal (currently another 13 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.

<sup>32</sup> See Garoupa and Ginsburg 'The Comparative Law and Economics of Judicial Councils' supra n 25, subsection on the UK. See also Darbyshire, P (2008) 'Brenda and the Law Lords' Kingston University, mimeograph on file with authors (observing that the Law Lords have been scrutinised by academics since the 1960s, yet the media does not seem to be interested in their activity).

<sup>33</sup> See Rosenfeld, M (2004) 'Comparing Constitutional Review by the European Court of Justice and the US 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.

<sup>34</sup> See Merryman, JH and Pérez-Perdomo, R (2007) *The Civil Law Tradition* Oxford University Press 3rd ed (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.

judicialisation 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 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 provide individual versus collective information.

### Career versus Recognition Judiciary

One way of contrasting different types of judicial structures is to distinguish ‘career’ from ‘recognition’ judiciaries.<sup>35</sup> The career system involves judges entering a judicial bureaucracy at a young age and spending an entire career as a judge.<sup>36</sup> The recognition system appoints judges later in life, usually after they have 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 of a vertical hierarchy in the judiciary, which decreases the incentive to comply with rigid professional norms. The appointment system by external agents therefore dilutes the collective identity of the judiciary. Finally, the lack of a promotion system seriously weakens internal mechanisms of control. Hence in recognition judiciaries, individual reputation as perceived by external mechanisms is the dominant factor.

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 judges does not depend on their 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 will affect the entire profession. Consequently collective reputation building is very important for career judges.<sup>37</sup> Such systems tend to emphasise 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.

<sup>35</sup> Georgakapolous, N (2000) ‘Independence in the Career and Recognition Judiciary’ 7 *University of Chicago Law School Roundtable* 205.

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

<sup>37</sup> See generally Ramseyer, JM and Rasmusen, E (2003) *Measuring Judicial Independence* University of Chicago Press (focusing on Japan).

## Individual Opinions/Dissents/Voting

The availability of information on the particular judges — whether 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 creativity, innovation and knowledge shown by the opinion, and the extent to which the judge makes a difference in jurisprudence.<sup>38</sup> Eventually certain judges may be more likely to side with others who have similar views and interpretations of the law, creating informal coalitions that allow outsiders to assign labels to specific judges (such as liberal, conservative or libertarian). Second, individual opinions and dissent help undercut the idea of a homogeneous, uniform, bureaucratic and non-critical judiciary. Both aspects favour individual over collective reputation building.<sup>39</sup> 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.<sup>40</sup>

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 and diversity are replaced with compromise and uniformity.<sup>41</sup> 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, which further reduces the ability of the public to scrutinise opinions.<sup>42</sup>

Beyond individual opinions, oral proceedings also offer opportunities for the cultivation of individual reputation. Oral proceedings allow judges to reveal not only their legal skills but also their individual positions, and to make specific contributions to

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

<sup>39</sup> 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.

<sup>40</sup> 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 ch 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 US Courts of Appeal' 58 *Ohio State Law Journal* 1635.

<sup>41</sup> 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. It is based on the secrecy rules introduced by Philippe VI (1328-50) and Charles VII (1422-61) 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 the legitimacy of the court and the stability of law since they may lead to subsequent changes of the case law.

<sup>42</sup> Lasser, 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 (Parlement) from passing regulations or suspending royal legislation by refusing to record them in the official registry (essentially exercising a veto). However, Lasser argues that American legal scholarship has misunderstood the bifurcated system in France. The idea that French judges have no individual responsibility for 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.

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.<sup>43</sup> 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, in the United States, Chief Justice Marshall shifted towards unanimous opinions at a time when the status of the judiciary was low, in part because seriatim opinions were difficult to understand. Centralising opinion practice enhanced collective reputation, and deviation was explicitly discouraged.<sup>44</sup> 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.'<sup>45</sup> Later, Chief Justice Stone presided over a rapid increase in individual opinions, a practice that continues to this day.<sup>46</sup> 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.<sup>47</sup> Alternatively, one can characterise 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 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, and also be good for the new majority supportive of Roosevelt, which could avoid the 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.<sup>48</sup>

<sup>43</sup> 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) 'The Truth about Justice Iredell's Dissent in *Chisholm v Georgia* (1793)' 73 *North Carolina Law Review* 255.

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> Walker, T et al (1988) 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' 50 *The Journal of Politics* 36.

<sup>47</sup> See also Post 'The Supreme Court Opinion as Institutional Practice' supra n 44.

<sup>48</sup> Ibid; Guinier, L (2008) 'Foreword: Demosprudence Through Dissent' 122 *Harvard Law Review* 4 at 21-23.

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 organisational 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 criticised 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'.<sup>49</sup>

In a system that seeks to encourage individual opinions, another possible strategy is open to judges. They 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, judges 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, 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 US system thus favours individual reputation, with some offsetting devices to ensure some collective consistency.

## **Sentencing and Procedural Discretion**

Discretion in criminal sentencing and in procedural rulings favours individual reputation over collective reputation by providing yet another way for judges to distinguish themselves from each other.<sup>50</sup> Reduced discretion in sentencing and in procedure favours 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 (for example, use

<sup>49</sup> 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; id (1990) 'Remarks on Writing Separately' 65 *Washington Law Review* 133.

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

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.

In some sense this discussion raises broader themes in legal scholarship of the distinction between rules and standards.<sup>51</sup> 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, they can be over- and under-inclusive, subsuming within their ambit behaviour 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 favour rules when collective reputation is valuable and standards when individual reputation is valuable.

## 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 favours homogeneity and uniformity in decision-making.<sup>52</sup> An appeal system that imposes few constraints on junior judges gives them more discretion and naturally generates more heterogeneity in sentencing which favours 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 towards investment in individual reputation. An appeal system that effectively internalises 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, appeal 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

<sup>51</sup> See eg 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 (1992) 'Rules versus Standards: An Economic Analysis' 42 *Duke Law Journal* 557 at 561-62.

<sup>52</sup> Shavell, S (1995) 'The Appeals Process as a Means of Error Correction' 24 *Journal of Legal Studies* 379.

judges to develop novel interpretations of law and to use their fact-finding power towards reputational development.

### **Citations**

The use of citations in decisions reflects the importance of individual opinions, and hence generally contributes to enhancing individual reputation.<sup>53</sup> Citations presuppose that 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 favours individual reputation building, particularly when combined with the institution of individual named opinions.

### **Case Selection**

The degree to which the judiciary controls the dockets of courts plays an important role in the process of establishing reputation.<sup>54</sup> 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.<sup>55</sup> 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 favoured in the distribution of cases to be reviewed by the courts relative to other colleagues. Second, it 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.

### **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.

<sup>53</sup> 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, Lessig, L and Solimine, ME (1998) 'Judicial Influence: a Citation Analysis of Federal Courts of Appeals Judges' 27 *Journal of Legal Studies* 271; and Choi, S and Gulati, M (2004) 'A Tournament of Judges?' 92 *California Law Review* 299.

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

<sup>55</sup> That is, 'better' judges do not get 'better' cases whatever 'better' might mean in this context.

For example, in the United Kingdom, judges are frequently called upon to lead inquiries into government behaviour.<sup>56</sup> On the other hand, 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 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 by particular judges.

## 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 by 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 75 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.<sup>57</sup> This design tends to suppress individual variance and lead to greater investments in collective reputation.

## 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

<sup>56</sup> King, A (2007) *The British Constitution* Oxford University Press at 135.

<sup>57</sup> Ramseier and Rasmusen *Measuring Judicial Independence* supra n 37.

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 within the court system. However, if resources are allocated in a manner that is administratively independent of any individual judge, collective reputation becomes a major variable since only through collective reputation can the judiciary obtain more resources from the government. As mentioned above, the practice of identical pay for judges of a similar rank can be viewed as a device to encourage investment in collective over individual reputation.

### **Other Mechanisms**

Other mechanisms that encourage individual comparisons of judges are elections to select judges and forum shopping. In judicial elections, candidates have to present a distinctive platform to convince the electorate to vote for them, heightening incentives to disassociate judges from collective reputation and to brand decisions with their personal stamp.<sup>58</sup> 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.<sup>59</sup> 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.

### **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 towards 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 invest adequately 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

<sup>58</sup> On judicial elections, see eg 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) *Judicial Independence at the Crossroads: An Interdisciplinary Approach* Sage Publications at 191-226.

<sup>59</sup> See generally Klerman, D (2007) 'Jurisdictional Competition and the Evolution of the Common Law' 74 *University of Chicago Law Review* 1179 at 1188.

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, 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.<sup>60</sup> This idea de-emphasises 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.

#### AN ILLUSTRATION: THE UNITED STATES AND JAPAN

By way of illustration, contrast the US Federal judiciary with that of Japan. We take these two countries to represent ideal-typical poles in the organisation of judiciaries, and hence use them in order to illustrate the argument.<sup>61</sup> The United States is a classic example of a 'recognition' judiciary, in which judges are appointed to the bench in large part because of their 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 areas. 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

<sup>60</sup> Merryman and Pérez-Perdomo *The Civil Law Tradition* supra n 34.

<sup>61</sup> 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.

country. Lawyers, of course, know this, and so sometimes seek to forum shop to obtain a favourable 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.<sup>62</sup> This in turn enhances the prestige of those lawyers who actually do make it on to the bench. 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 scrutinised 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 fit into a hierarchical structure. They spend their career in a series of two- and three-year rotations, moving around the country, and so are unable to be identified with any particular court location.<sup>63</sup> 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. Because decisions at the lower level are unsigned, judges are 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.<sup>64</sup>

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 any problems that may cause.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> Professor Ramseyer and co-authors have emphasised 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.<sup>68</sup> He provides

<sup>62</sup> See Posner *Law and Legal Theory in England and the United States* supra n 36.

<sup>63</sup> Ramseyer and Rasmusen *Measuring Judicial Independence* supra n 37.

<sup>64</sup> Haley, J (2003) '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>.

<sup>65</sup> Id (1990) *Authority Without Power* Oxford University Press.

<sup>66</sup> Ramseyer and Rasmusen *Measuring Judicial Independence* supra n 37.

<sup>67</sup> Upham, F (2005) 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary' 30 *Law and Social Inquiry* 421.

<sup>68</sup> Ramseyer and Rasmusen *Measuring Judicial Independence* supra n 37; id (2001) 'Why Are Japanese Judges So Conservative in Politically Charged Cases?' 95 *American Political Science Review* 331; Ramsayer, JM and

evidence that judges who ruled against the interests of the ruling Liberal Democratic Party have suffered career sanction. This account emphasises a particular external audience for the courts that operates at the individual level.

Professor Haley, by contrast, emphasises the internal audience and the collective quality of the judiciary.<sup>69</sup> Japanese judges work in a hierarchy that is similar to that of other large Japanese organisations, in which one enters the organisation at a young age and spends one's whole career in the same institution. For all large organisations, internal controls help to socialise 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 the 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 towards 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 programme of legal reform, culminating in the creation of a Justice System Reform Council (JSRC) in 1999. The Council issued its report two years later and was quite critical of the judiciary for maintaining a detached stance towards society, and for being insufficiently transparent.<sup>70</sup> It called for increasing the number of appointments from the ranks of practising 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 it is never utilised because judges are appointed to the Supreme Court relatively close to retirement age.<sup>71</sup> In 2003, an eleven-member Advisory Committee for the Nomination of Judges was established, five of whom are 'insiders' (judges, prosecutors or lawyers)

---

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.

<sup>69</sup> Haley, JO (2007) 'The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust' in Foote, DH (ed) *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) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* University of Virginia Press 37 at 59.

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

<sup>71</sup> 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').

and the remaining six from academia and the general public. The Committee has already rejected some proposed candidates on the basis of its own investigations.<sup>72</sup>

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 towards improving the transparency and legitimacy of the justice system as a whole. As a result, from August 2009, ordinary citizens began to sit as *saiban-in*, lay decision-makers, deciding serious criminal cases.<sup>73</sup> 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 towards external audiences for judges. It also led to 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.

## DISCUSSION: LESSONS FOR REFORM

Our basic argument is that institutional structures will encourage investment in either individual or collective reputation in different degrees. These incentives respond to the need 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 programmes. 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 others. Nevertheless, 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.

### Reforms to Induce Greater Individual Effort

#### *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 above. 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 individual

<sup>72</sup> Rokumoto, K (2007) 'Judicial Reform in Japan' in Choi, D and Rokumoto, K *Justice System in Transformation* Seoul National University Press.

<sup>73</sup> 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.

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.<sup>74</sup>

Fee for service has some history in the common law. Until 1799, judges in the English monarchical courts were paid a salary and were also allowed to charge fees that ranged from 8 per cent to over 54 per cent of total judicial income.<sup>75</sup> Professor Klerman has argued that these fee-for-service arrangements facilitated competition among judges and among courts to produce quality rules, particularly those that favoured plaintiffs.<sup>76</sup> There is some evidence that courts with institutional structures that concentrated authority were better able to produce innovative rules in this process of competition.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> Article III of the US Constitution seems to frown upon, and probably ban, the practice for federal judges, referring as it does to payment for services “at stated Times.”<sup>80</sup> The Judiciary Act provides for salaries rather than fees, and when one early district court judge insisted on charging fees for admiralty cases, Congress responded by forbidding the practice.<sup>81</sup> In short, the US experience has shied away from fees for ordinary judges. Specialised courts and some lower-level magistrates, however, have received variable pay. For example, bankruptcy judges were paid by size of case till the 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 judiciary (Ley 15/2003). The judicial council (Consejo General del Poder Judicial) implemented the new system of compensation in 2004 (Reglamento 2/2003) but the Spanish Supreme Court nullified it in March 2006 (Sentencia de la Sala de lo Contencioso Administrativo 17/2004). Apart 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

<sup>74</sup> 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) *Handbook of Law and Economics* North Holland.

<sup>75</sup> 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 rev ed; Aylmer, GE (1973) *The State’s Servants: The Civil Service of the English Republic, 1649-1660* Routledge and Kegan Paul.

<sup>76</sup> Klerman, ‘Jurisdictional Competition and the Evolution of the Common Law’ supra n 75.

<sup>77</sup> Id at 1217

<sup>78</sup> Pfander, JE (2008) ‘Judicial Compensation and the Definition of Judicial Power in the Early Republic’ 105 *Michigan Law Review* 1.

<sup>79</sup> Id at 3. Pfander notes that other states allowed payment of fees into the 19th century.

<sup>80</sup> Id at 12-15.

<sup>81</sup> Id at 22.

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.<sup>82</sup>

Presumably, in theory, adequate performance measures should be able to avoid all these shortcomings (minimising 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 policy makers 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 ones. 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 sceptical that such devices can be utilised effectively. Still, we encourage scholars to consider workable proxies for judicial performance that might facilitate the creation of new incentive structures for judiciaries.<sup>83</sup>

### *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' programmes 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 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.

### **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

<sup>82</sup> 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.

<sup>83</sup> A weak substitute could be a ranking of courts and judges. In this respect, the US 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.

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?

### *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 and the World Bank’s Governance Indicators. These systems have been the target of much criticism, both methodologically and substantively.<sup>84</sup> Nevertheless, there is some evidence that countries take them seriously.<sup>85</sup>

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 to improve performance. They can also motivate the government to expend resources on the judiciary, empowering judges in the internal competition for funds. It should be recognised, though, that any simple metric risks inducing new pathologies into the system as managers and judges try to play 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.

### *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. This might lead one to propose an expansion of *de novo* appeal as a way of ensuring judicial quality. The problem is that this 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 randomisation 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 utilises 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.

<sup>84</sup> For example, Larkins ‘Judicial Independence and Democratization’ *supra* n 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.

<sup>85</sup> Taylor, V (2006) ‘The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies’ in Lindsey, T (ed) *Law Reform in Developing States* Routledge.

## CONCLUSION

Judicial reputation matters. It provides information about performance and indirectly affects judicial resources and power. As yet, however, we do not have a complete understanding of the determinants of reputation. This article 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 incentive 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 characterise national patterns in a more refined way.