

Articles

Judicial Audiences and Reputation: Perspectives from Comparative Law

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Whether judges are motivated to make good law or maximize policy goals, they need to develop and maintain a good reputation with some audience. We distinguish internal and external audiences for individual judicial decision-making: internal audiences are those within the judiciary itself, while external audiences include lawyers, the media or the general public. Different legal systems emphasize different audiences: some rely on external audiences that encourage judges to invest in their individual reputations, while others emphasize internal audiences that facilitate the collective reputation of the judiciary as a whole. The article analyzes the interaction between internal and external audiences over time, using case studies from both common law and civil law jurisdictions to illustrate how the concept of judicial audiences illuminates institutional reforms of the judiciary.

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INTRODUCTION

What motivates judges remains somewhat of a mystery: some say judges seek to advance favored policies, while others say judges are legal craftsmen seeking to produce the best legal decisions they can. Others say that judges want the same things as everyone else.¹ Whatever it is that judges seek to maximize, their ability to do so depends on certain audiences that react to their decisions: the media, politicians, lawyers and law professors, and the public itself. And judicial ability to communicate with these audiences in turn depends on the institutional structure in which judges operate.

We describe this using the idea of reputation. Through their decisions and actions, judges acquire a reputation with different audiences. A judge with a good reputation will enjoy the esteem of his friends and colleagues, and may be able to advance to a higher court; a judge with a bad reputation with colleagues is less likely to have significant career advancements. A judge with a good reputation with the media will have more opportunities for exposure. A judge with a good reputation with lawyers and law professors will be likely to have a more enduring legacy and may even be remembered after her death, like the great judges of the common law such as Coke, Blackstone and Holmes. A judge with a good reputation with certain

1. See Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing as Everybody Else)*, 3 SUP. CT. ECON. REV. 1 (1993); Richard Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005).

political or ideological audiences will be able to be more influential when those groups are in power.

Individual reputation with different audiences goes side by side with group or collective reputation. A judiciary that operates effectively will earn respect as a unit within its own political system. This will allow the judiciary to capture more resources and enhance their political and social influence, which benefits judges individually. A high quality judiciary may also become more visible internationally. The global “conversation of courts” means that there are important new audiences for judicial output, and judiciaries may earn prestige through citation by courts of other countries.² A judiciary might become a model for judicial reform programs abroad, providing judges with opportunities for travel and exchange. A judiciary with a poor reputation, by contrast, will find itself starved of both resources and respect.

Individual and collective reputations seem to matter, but we do not have a good understanding of how they develop or change over time. One observation is that reputation, both individual and collective, depends crucially on the relevant audiences. As a first step toward developing a theory of judicial reputation, this article characterizes the audiences for individual judicial decision-making as internal or external. By internal, we mean audiences within the judiciary itself; by external, we mean audiences such as lawyers, the media or the general public. Some judges and judiciaries are essentially dominated by internal audiences: their socialization occurs essentially within the profession, and they seem less exposed to other audiences than to their own colleagues and superiors. These judiciaries develop important mechanisms to evaluate the performance of judges, and thus emphasize the internal reputation of the individual judge, while promoting the collective reputation of the judiciary as a whole before external audiences. In such systems individual judges may be well-known within the profession but are anonymous to the outside world.

Other judges and judiciaries are much more attentive to external audiences, from law professors to politicians, and may enjoy significant media exposure. Such judges are likely to have a higher profile as individuals and may be more well-known than judges in

2. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

systems that emphasize collective reputation.

Reputation is important for any judiciary as well as for any judge. Yet the interaction of the relevant audiences provides different incentives for judicial behavior, and consequently for reputation building. In a related paper, we define judicial reputation as a mechanism to convey individual and collective information to the relevant audiences.³ The implication is that if the audiences are different, so will be judicial behavior since the assessment and the required information vary across audiences. For example, advancing ideological preferences with no regard for consensus might be appreciated by political parties who share those preferences, but might lead to a negative assessment in the eyes of law professors and colleagues. Being unkind to lawyers when they use procedural rules to delay sentencing could hurt judicial reputation with the legal profession and yet enhance reputation with the general public.

Judicial decisions and actions respond to incentives, and these incentives are provided by different audiences. Sometimes the incentives are consistent across the audiences that the judges must consider, but sometimes they are in contradiction with each other. Depending on the relative weight of each audience, judges will respond to some incentives more than to others. Therefore, judges might gain reputation with some audiences, and lose reputation with others. A complete institutional analysis of the judiciary requires attention to such considerations.

The object of our analysis in this article is to explain how judges respond to incentives provided by different audiences and how legal systems design their judicial institutions to calibrate the appropriate balance between audiences. We do not discuss whether or not certain audiences *should* prevail over others, and in that sense, our article is not normative. We do not have a strong normative theory that judges should, for example, pay more attention to the public rather than the legal profession or superior judges. Our concern is to understand how different institutional configurations facilitate different modes of judicial production, which impact professional norms and the organization of the judiciary.

We do not specify a normative approach to the function of the

3. See Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Industrial Organization of the Judiciary* (forthcoming 2009) (on file with authors).

judiciary. Some audiences might assess judges and the judiciary formally (judges should apply and interpret the law correctly according to the will of the legislator), others authoritatively (judges should be the authority for excellence in lawmaking), and others from an agency perspective (judges should maximize the welfare of the principal, that being society or a political group). Whatever the definition of judicial quality to a particular audience, reputation emerges as a relevant factor and plays an important role in determining how judges decide cases and act.

Following our related work,⁴ we divide reputation into individual and collective components. Each individual judge cares about his reputation with the relevant audiences, but also about the reputation of the group as a whole (establishing and shaping the character, attributes and nature of the group) with external constituencies. Collective reputation determines the status of the judiciary within the relevant audiences, but individual reputation influences the judge's relative perception vis-à-vis fellow judges. The bifurcated nature of reputation creates interesting institutional challenges, which we have analyzed as a problem of team production in our related work.⁵

Different legal systems configure institutions in different ways in order to address the problem of relevant audiences. One way of contrasting different types of judicial audiences is to distinguish "career" from "recognition" judiciaries.⁶ The career system involves judges entering a judicial bureaucracy at a young age, and spending an entire career as a judge, the process of socialization occurring essentially within the ranks of the profession.⁷ In a recognition system, judges are appointed later in life, usually after the candidate has established his or her excellence as a practicing lawyer, prosecutor or academic. The recognition system involves fewer opportunities for promotion because judges spend less time in the judiciary before retirement.

Judicial appointments in recognition systems are based on the individual reputation of the candidate, as assessed by the relevant constituency, using an external mechanism outside the judiciary. For

4. *Id.*

5. *Id.*

6. Nicholas Georgakapolous, *Discretion in the Career and Recognition Judiciary*, 7 U. CHI. L. SCH. ROUNDTABLE 205 (2000).

7. See, e.g., RICHARD POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND THE UNITED STATES* (1996) (discussing the British career judiciary in ch. 1).

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 incentives to comply with rigid professional norms. Therefore, the appointment system by external agents dilutes the importance of internal controls and the collective identity of the judiciary, but increases the relevance of external assessment. Finally, the lack of a promotion system seriously weakens internal mechanisms of control. Therefore, in recognition judiciaries, individual reputation as perceived by external mechanisms is the dominant factor in judicial appointments.

In contrast, a career judiciary is selected and promoted based on internal judicial assessments of individual merit. Relatively little information is available to the public about judges, but the judiciary itself develops and uses internal performance measures to make promotion decisions. Compliance with internal mechanisms makes individual reputation within the profession more important, which in turn enhances the role of collective reputation with external constituencies. The external credibility of a given judge does not depend on her individual merits, but more on the reputation of the entire judiciary. Serious doubts concerning the way judges are promoted, rewarded or disciplined will not primarily hurt any particular judge, but the entire profession.⁸ Such systems tend to emphasize the external 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. We characterize these systems as relying on collective over individual reputation for external audiences.⁹

The interaction between internal and external constituencies is nevertheless dynamic. Legal reforms might alter the relative importance of these audiences. For example, expanding or limiting the powers of a judicial council will affect the relative importance of an internal audience dominated by peers.¹⁰ Constitutional reforms that

8. See generally J. MARK RAMSEYER & ERIC RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003) (focusing on Japan).

9. Garoupa & Ginsburg, *supra* note 3.

10. See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians? Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 201 (2009); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53 (2009).

alter the mechanism to appoint judges might have dramatic effects in terms of incentives for judicial action. However, other changes exogenous to the law might also be relevant. For example, the growing importance of media exposure could bring an external audience into a judicial system traditionally dominated by internal individual reputation and external collective reputation. Economic and social changes that reshape the nature of litigation could readdress the balance between different external groups and lobbies.¹¹

The article is organized as follows. Part I explains why incentives and audiences matter. We develop the idea of judicial audiences and describe how they shape the judiciary in different legal families. We provide a common framework for understanding what have been traditionally perceived as very different institutions, namely the so-called “career” judiciary and the “recognition” judiciary. This framework provides new insights into the profound changes judiciaries have been undergoing in many different jurisdictions across the world. Part II considers the particular dynamics of internal and external audiences for judicial performance, using case studies from various judicial systems. In particular, we look at traditional civil law jurisdictions such as France, Italy and Japan where judicial activism has progressively made its way. We also compare the United States and Britain, examining recent British constitutional reforms in detail and speculating about the future consequences of the new institutional design. We argue that our framework provides a useful way of understanding the main forces shaping the recent changes in all these different jurisdictions, thus providing a common ground for analysis. Part III concludes the article.

I. JUDICIAL AUDIENCES AND INCENTIVES

Judges, like most everyone, care about their utility and respond to incentives.¹² Hence, their reputation is an important social

11. The implication is that some change in the balance between internal and external constituencies is caused by legal reforms, and therefore presumably the output of an intended plan. However, some of the changes in the balance between internal and external could be unintended, and the consequence of external factors uncontrolled by reformers.

12. On judicial individual preferences, see Posner, *What Do Judges and Justices Maximize?*, *supra* note 1; Posner, *Judicial Behavior*, *supra* note 1; Richard Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006). See also Mark Cohen, *The Motives for Judges: Empirical Evidence from Antitrust Suits*, 12 INT’L REV. L. ECON 13

and economic asset to the extent that it helps them to achieve their goals and maximize their utility. Reputation provides a credible signal of high quality, which allows judges to fulfill professional duties and achieve career goals.¹³ In that respect, judges are provided with different incentives created by a large set of agents, audiences to whom judicial decisions and actions matter.

We also distinguish between individual and collective reputation. Individual reputation is related to the name recognition of each judge by the relevant constituency. Collective or group 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.¹⁴

Judges allocate effort in response to incentives. As a consequence, each judge builds a certain reputation with a particular constituency. At the same time, the judiciary as a whole builds a professional reputation. In many circumstances, a particular effort by a given judge can enhance both individual and collective reputation at the same time. But in many other circumstances, by investing more in building individual reputation, a judge contributes less to building collective reputation.¹⁵ Choices are influenced by incentives, which in turn are established by different actors. These audiences can be considered principals on whose behalf the judiciary works.

External incentives come from outside of the judiciary, reflecting the views of society or public opinion in general, but also the interests of the particular relevant constituencies with power over the

(1996); Mark Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183 (1991); Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773 (1990); Gordon R. Foxall, *What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function*, 25 LIVERPOOL L. REV. 177 (2004); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, CORNELL L. REV. (2008); Eric J. Miller, *Judicial Preference*, 44 HOUS. L. REV. 1275 (2008); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); Dan Simon, *A Psychological Model of Judicial Decision*, 30 RUTGERS L.J. 1 (1998). For a different perspective, see LAURENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006); Laurence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994).

13. For the different possible goals of the judiciary, see LAURENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (2004); Jennifer K. Robbennolt, Robert J. MacCoun & John M. Darley, *Multiple Constraint Satisfaction in Judging*, available at <http://ssrn.com/abstract=1133184>.

14. See Garoupa & Ginsburg, *supra* note 3 (discussing in detail the relevance of the distinction between collective and individual reputations).

15. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

courts. These constituencies might include the bar, academic commentators, other branches of government, as well as political parties and others, depending on the institutional environment of courts. How the judges respond to these external constituencies, individually and collectively, shapes the social and political influence of the judiciary as a whole. For example, it might determine judicial budget, salaries, pensions and other perks available to the judiciary, as well as the level of social prestige and overall working conditions in the courts.¹⁶

Internal mechanisms are developed inside the judiciary, either actively (because the judges engage in developing their own internal control mechanisms) or passively (because other actors fail to provide incentives, and therefore only internal mechanisms matter). Internal mechanisms are shaped by the judiciary itself and are developed within its professional culture. The way each judge responds to the internal mechanisms determines the share each judge gets of the pie while the outside appraisal by relevant external constituencies determines potential supplementary payoffs obtained individually.

The balance between external and internal mechanisms shapes judicial behavior. Although each particular legal system might pursue a different mix, both internal and external mechanisms are important. Relying solely on external mechanisms could become dysfunctional at some point if each judge disregards precedent and coherence (hence undermining legal certainty and rule of law) in order to maximize their individual appeal to particular constituencies. Functioning solely in terms of internal mechanisms usually generates the standard problems of captured self-regulation, including rent-seeking, free-riding and reduction of output.

Establishing the appropriate balance between external and internal mechanisms requires a sophisticated institutional design. In

16. See generally Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992). For administrative bodies and government audiences, see William N. Eskridge, *The Judicial Review Game*, 88 NW. U. L. REV. 382 (1993); William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. ECON. 263 (1992). For law students and lawyers, see Benjamin Barton, *Judges, Lawyers, and a Predictive Theory of Legal Complexity* (U. Tenn. Coll. of Law, Legal Studies Research Paper Series, Paper No. 31, 2008), available at <http://ssrn.com/abstract=1136372>; Schauer, *supra* note 12.

fact, to some extent, it is expected that the multiple external and internal incentives provided by the different audiences are contradictory, conflicting and even inconsistent. For example, while internal mechanisms could favor compliance with precedent (hence building up collective reputation for legal certainty), external mechanisms might push for a particular ideological agenda that enhances individual reputation with particular groups, potentially conflicting with precedent. Sometimes a judge may be able to maximize his or her own reputation by deciding a particular case in a manner that potentially conflicts with the rule of law, harming the reputation of the judiciary as a whole. Institutional palliatives are necessary to mitigate these problems.

In order to solve these problems and conflicts, we have argued in previous work that institutions such as judicial councils play an important role.¹⁷ Judicial councils broadly defined are the institutions that have responsibility for selecting, training, and in some systems, disciplining judges. They should be designed to respond to the appropriate balance of internal and external pressures through soft policies rather than serving as a full-fledged powerful supervisor of the judiciary. In particular, a judicial council can encourage the development of professional norms that incentivize judges to internalize the inconsistencies or conflicts created by multiple constituencies.

Notwithstanding, there are important issues that a judicial council might fail to fully resolve. Severe conflicting goals could in fact impede the ability of an effective judicial council to operate as a mediator between different audiences. For example, a sound relationship between the judiciary and other branches of government could require further institutional development, such as constitutional protection of “judicial independence.” The growing judicialization of public policies may alter the traditional balance of internal and external incentives.¹⁸ It may also unleash countervailing forces that lead to a new politicization of the judiciary. Excessive media exposure (reflecting the greater visibility of judicial decision-making in many legal systems) could, for example, lead judges to invest more time and effort into building reputation through actively judicializing

17. See Garoupa & Ginsburg, *supra* notes 3 and 10.

18. See, e.g., JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* (3d ed. 2007) (1969) (discussing recent developments in civil law countries).

public policies.¹⁹ 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, necessarily generating severe institutional conflicts.

In every legal system, internal and external mechanisms provide incentives and facilitate the establishment of judicial reputation. The relative degree of importance of internal and external mechanisms varies across legal families. The common law tradition of a “recognition” judiciary is based on judges who are selected by external audiences because of their earlier investments in reputation. In that respect external mechanisms are expected to prevail in terms of *ex ante* screening for quality and effort. In contrast, the “career” system associated with the civil law hires judges at a young age, and therefore favors internal mechanisms that promote the adequate development of quality and effort.

Notwithstanding, the balance between internal and external mechanisms varies even within the same legal family. Take the common law countries. If we look at the U.S. federal judiciary, for example, external incentives seem to matter a great deal. Great judges of the past are heroes for the general public. 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,²⁰ and they are the subject of popular biographies. Internal mechanisms seem to be weak.

In contrast, in the United Kingdom, although the Law Lords enjoy high levels of prestige, external mechanisms seem not to be strong.²¹ The general public does not know the names of the twelve

19. An immediate question is the extent to which the judiciary should take into account public opinion when sentencing. See, e.g., Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

20. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (Univ. of Chicago Press 1993) (1990).

21. See ANTHONY KING, *THE BRITISH CONSTITUTION* (2007) (providing a general overview).

people who sit at the apex of the British judiciary (or even their number) except in rare instances when controversial cases draw significant media attention (such as the Pinochet case in the late 1990s).²² Many senior judges are only seriously exposed to external constituencies when they head specific inquiries into practices or decisions by the government.²³ Apparently internal mechanisms are stronger in the United Kingdom, even though it shares a common law tradition with the United States.²⁴

Within the civil law systems similar distinctions can be traced. Traditionally in France, Japan ~~or~~ and Germany, internal mechanisms prevailed. Senior judges were simply not visible to the general public; newspapers very rarely reported on their decisions; justices usually avoided exposure and contact with public opinion in general; and very few judges have names that live on past their tenure.²⁵ On the other hand, the development of strong judicial hierarchies and later the influence of powerful judicial councils emphasized internal mechanisms.²⁶ In the civil law tradition, judges are anonymous and overwhelmingly respond to internal rather than external audiences.²⁷

Yet external audiences have gained importance in many civil law countries in recent decades. Some of this development is due to

22. R. v. Bartle et al., R. v. Evans et al., *Ex Parte Pinochet* (No. 3), [1999] UKHL 17 [2000] (appeal taken from Q.B.D.) (U.K.). But some commentators have noted that many people failed to understand the role of Lady Thatcher, judging her to be a dissenting minority who voted against the extradition of General Pinochet, without being able to distinguish the twelve Law Lords, the other Lords of Appeal (currently thirteen other judges) and other members of the House of Lords (including Lady Thatcher). See Johan Steyn, *The Case for a Supreme Court*, 118 L. Q. REV. 382 (2002).

23. See *infra* Part II.C. See also Penny Darbyshire, Brenda and the Law Lords (2009) (unpublished manuscript on file with authors) (observing that the Law Lords have been scrutinized by academics since the 1960s, yet the media does not seem be interested in their activity).

24. See POSNER, *supra* note 7 (establishing greater similarities between the British judiciary and the Continental judiciary and less so with the American judiciary).

25. For example, Sophie Boyron identifies a major concern in France with the “esprit de corps” of the judiciary, a professional culture driven by early socialization in the *Grande École*, then reinforced by collective decision-making with a profound distrust for the individual judge and further enhanced by judicial trade unions that effectively impose judicial collective bargaining. She also argues that in France judicial accountability is collective. Sophie Boyron, *The Independence of the Judiciary: A Question of Identity!*, in INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2006). For further discussion, see *infra* Part II.B.

26. See Garoupa & Ginsburg, *supra* note 3.

27. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 18.

essentially exogenous factors that have changed the general public perception of the judiciary and have provided for new kinds of incentives; the Italian case is a prominent example in this regard.²⁸ Other countries have seen the increasing importance of external audiences as a consequence of endogenous factors, such as legal reforms that introduced a Constitutional Court very different in function and nature from the traditional judicial courts. The interaction between this new body and the traditional courts as well as the other powers of government has dramatically changed the balance between internal and external audiences.²⁹

We believe that there have been secular pressures on all countries that are forcing judiciaries to place greater weight on external audiences. No doubt the increasing importance of the media in democratic countries forces all government agencies to consider the public relations aspects of their work. Beyond this general trend, there has been an increasing “judicialization of politics” in many countries.³⁰ If judges are having a greater impact on matters of political and social importance, it is only natural that there will be greater interest in the operation of the judiciary and demands for greater judicial accountability. Unprecedented political stability after WWII has also reduced the pressure for judicial formalism that shielded the judiciary from periodical changes of political regime that characterized most of the 19th and early 20th century in Europe.

Notwithstanding these general trends, it is clear that in some legal systems internal audiences prevail over external audiences, whereas in other legal systems the opposite takes place. These differences are relevant at two levels. First, they respond to different organizational attributes within a complex institutional arrangement that evolved through time in response to local needs. Second, they ought to be seriously considered both in designing legal reforms and in responding to exogenous factors that have disturbed the traditional balance, especially in an era when most legal systems are experiencing increased judicialization of public policies.

28. *See infra* Part II.A.

29. *See infra* Part II.B.

30. C. NEAL TATE & TORBJORN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995).

II. APPLICATIONS

We have identified internal and external mechanisms as determinants of incentives for judges to invest in their reputation, and by consequence, in effort and quality. We do not take a position on whether a specific arrangement is better in any particular jurisdiction. Nevertheless, our sense is that we are in an era in which external mechanisms have gained importance in respect to internal incentives. Broadly speaking, this trend seems to have disrupted traditional structures more deeply in civil law rather than in common law jurisdictions. In other words, if external mechanisms are gaining in importance because of secular developments in industrial societies (such as the rise of real-time media and the stability of political regimes), common law countries seem to have an institutional design better situated to adjust to such changes than traditional civil law countries. One piece of evidence for this is the performance on cross-national surveys of judicial quality, in which common law judiciaries typically outrank civil law judiciaries.³¹

An implication of the analysis is that incentive systems are changing. Tinkering with various aspects of judicial incentive structures might produce novel configurations different from the ideal typical civil and common law systems. In this section, we consider several illustrations of these changes and consider their effect in shaping important changes in judicial behavior.

A. *The Italian Judiciary: From Internal to External Audiences*

Since it played a central role in the political crisis of the early 1990s, the Italian judiciary has attracted a lot of attention from legal scholars and social scientists.³² Some authors even suggest that the

31. See generally Thorsten Beck, Asli Demirgüç-Kunt & Ross Levine, *Law and Finance: Why Does Legal Origin Matter?*, 31 J. COMP. ECON. 653 (2003); Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 J. FIN. 2401 (2003); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006* (World Bank Policy Research, Working Paper No. 4280, 2007); see *infra* note 155.

32. See, e.g., David Nelken, *The Judges and Political Corruption in Italy*, 23 J.L. & SOC'Y 95 (1996); Carlo Guarnieri, *The Judiciary in the Italian Political Crisis*, in CRISIS AND TRANSITION IN ITALIAN POLITICS 157, 157–75 (Martin Bull & Martin Rhodes eds., 1997).

Italian judiciary illustrates the maximalist notion of judicial independence.³³ Nevertheless, the politically influential role of the Italian judiciary in the 1990s was the outcome of a longer process of institutional reform that resulted, in our view, in a shift from a more traditional internal mechanism of incentives and reputation to a more external oriented judiciary. Several Italian judges fighting corruption and organized crime became well-known public figures, including anti-mafia judges like Rocco Chinnici, Giovanni Falcone or Paolo Borsellino, and anti-corruption judges like Antonio Di Pietro, Francesco Saverio Borrelli, Ilda Boccassini, Gherardo Colombo or Piercamillo Davigo.³⁴

It is clear that a set of distinguishing features have helped the Italian judiciary to enhance independence, autonomy and influence in a more persuasive way than other civil law judges. Our interpretation is that these features have reallocated investment effort in judicial production and reputation toward a more individual basis driven by external constituencies.

The origins of the trend can be found in the influential and extremely strong judicial council, *Consiglio Superiore della Magistratura*, formed in Italy in the late 1950s.³⁵ Two-thirds of the membership of the council were magistrates, elected by their peers at various ranks, with the remaining members being appointed by parliament.³⁶ Aimed at guaranteeing judicial independence, the council decided all personnel issues (recruitment to retirement); in time it also managed to block all executive and legislative attempts to interfere with the judiciary. Furthermore, the council undermined the traditional judicial hierarchy, which had played a role in monitoring lower court judges. In doing so, the council inadvertently incentivized judges to seek status and political power, to the point of effectively limiting the

33. See Sanford Levinson, *Identifying "Independence"*, 86 B.U. L. REV. 1297, 1306 (2006).

34. A Google search of any of these names will reveal many newspaper articles referring to their work. See generally Nelken, *supra* note 32.

35. The court was actually founded in 1959, although it was already recognized by the 1948 Italian Constitution. See Garoupa & Ginsburg, *Comparative Law and Economics of Judicial Councils*, *supra* note 10, at 106–10.

36. Giuseppe Di Federico, *Independence and Accountability of the Judiciary in Italy: The Experience of a Former Transitional Country in a Comparative Perspective*, in JUDICIAL INTEGRITY 181, 184–85 (Andras Sajó ed., 2004), available at <http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf>.

ability of the executive to control legal reforms in Italy.³⁷ This development was spurred on by the creation of judicial associations or unions, whose members would help select council members, replacing the traditional judicial hierarchy as the institution to internalize conflicts of interest within the profession. This resulted in an internal fragmentation of the judiciary that further empowered the associations. The formalist Supreme Court was virtually replaced by the judicial associations in negotiating with politicians, these associations being more activist and less low profile than the traditionalist Supreme Court. With time, the relationship between the judiciary and the politicians changed. The traditional political system where there was a natural friendship between the highest ranks of the judiciary and the executive was progressively replaced by a straight connection between political parties and judicial associations.³⁸

One important milieu in which this dynamic played out was the system of promotions. Until the mid 1960s, promotions were based on assessments of the judge's written work (opinions and sentences). This system was deeply transformed between 1963 and 1979, because it was claimed that such assessment hindered judicial independence and promoted conservative legal interpretation among lower court judges. At the same time, the growing importance of the judicial associations in the election procedure for the council empowered the low ranking magistrates (the vast majority of the electorate in those elections) vis-à-vis their superiors. The result was the new "automatic promotion" doctrine established in the 1970s. Promotion was essentially automatic, even to the highest ranks of the judiciary, so that every judge could gain the benefits of higher office (even if in fact they continued to occupy lower offices) without being assessed for quality. Salaries were high regardless of skill.³⁹ With

37. See Carlo Guarnieri, *Judicial Independence in Latin Countries of Western Europe*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 111, 120 (Peter H. Russell & David M. O'Brien eds., 2001); Nelken, *supra* note 32, at 99–100; David Nelken, *Using the Concept of Legal Culture*, Center for the Study of Law and Society Jurisprudence and Social Policy Program, Papers Presented in the Center for the Study of Law and Society Bag Lunch Speaker Series 20, 27 (2004), available at <http://repositories.cdlib.org/csls/lss/20>.

38. See Patrizia Pederzoli & Carlo Guarnieri, *The Judicialization of Politics, Italian Style*, 2 J. MOD. ITAL. STUD. 321, 331 (1997).

39. Salary and benefits earned by magistrates are the highest in Italy for public service with the purpose of guaranteeing all the conditions for true independence, not depending on individual judicial performance (under pressure from the judicial associations, judicial salaries have increased far beyond those of other civil servants).

no quality control, the incentives of judges to contribute to collective reputation broke down. In practice, assignment has become more relevant than promotion, and this had the effect of further increasing the power of the judicial council.⁴⁰ Rather than invest in quality, judges have spent energy cultivating personal ties with those who control promotions and, if ambitious, seeking to gain membership to the judicial council. Because these positions are elected by the judges themselves, they result in a good deal of investment in individual reputation by those who seek power within the judiciary. But they have led to an emphasis on connections over quality.

A relevant change was the increasing availability of extra-judicial opportunities that enhanced the importance of external audiences. Gradually judges were both elected to the Parliament and the European Parliament, and served as government ministers or city mayors. Judges also took on part time extra-judicial occupations, such as: teaching, consultancy and arbitration (until it was recently restricted). Seniority is not affected if a magistrate leaves the judiciary temporarily to undertake such activities. These opportunities encouraged investment in individual reputation with relevant constituencies outside of the judiciary.

Another set of reforms that affected judicial incentives was procedural. In 1990, as part of reforms of civil procedure,⁴¹ the collegial bench was replaced by a single judge court in most civil matters in first instance cases. This and other reforms enhanced the influence of individual judges.

All this led to enhanced judicial activism, first to address problems of political terrorism and organized crime in the 1970s. Popular support for investigating magistrates, whose names appeared in the media, provided for opportunities to enlarge their scope of action and build up investigative skills that would be an important element of their success in the 1990s. Politicians were well aware of this. For example, the Craxi governments tried to curtail judicial powers in the 1980s without success. The positive feedback and support from public opinion and the magistrates' individual reputa-

40. See Di Federico, *supra* note 36. See also Carlo Guarnieri, *Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government*, 24 J. LEGAL STUD. 169 (2004).

41. Law No. 353 of Nov. 26, 1990, Gazz. Uff., Dec. 1, 1990, No. 353. See also Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657 (1997).

tion and visibility born from it further encouraged the individualistic incentives of judges.⁴² The trend reached its zenith in the 1990s, with the “judicial revolution” of the *Mani Pulite* case in 1992. Here the judges, led by individual magistrates who became quite well-known, essentially brought down the entire post-war political system in a series of corruption scandals. Antonio di Pietro, the leading investigating judge, is today a popular politician.

The Italian case study illustrates how structural changes to judicial incentives can have far-reaching effects. Essentially, Italy has shifted from a classic civil law system in which internal mechanisms and collective reputation to the outside audiences are the dominant mode to one in which individual reputation is very important (even if not dominant), and external constituencies play an important role. Judges emerged as heroes of sorts in the 1990s.⁴³ Arguably, however, this has led to underinvestment in aspects of collective reputation such as providing consistent and coherent legal decisions. Structural problems such as court congestion and the incapacity to provide effective justice in due time have contributed to a general sense of judicial incompetence. Rank and file judges may find it more desirable to slack off than to invest in judicial quality.

B. Mixed Systems: The French Supreme Court and Constitutional Court

France has three higher courts: the supreme court for civil and criminal matters known as the *Cour de Cassation*; the supreme court for administrative matters known as the *Conseil d'Etat*; and the constitutional court known as the *Conseil Constitutionnel*.⁴⁴ The con-

42. See Di Federico, *supra* note 36, at 4 (noting that such public visibility is precisely an important cause for an increasing number of candidates to the judicial school, the majority desiring investigative functions); Maria Ferrarese, *Penal Judiciary and Politics in Italy*, 1 GLOBAL JURIST TOPICS 1 (2001); Adam Reynolds, *Dimensions of Justice in Italy: A Practical Review*, 3 GLOBAL JURIST ADVANCES 1 (2003).

43. See Nelken, *supra* note 32; Patrizia Pederzoli, *The Reform of the Judiciary*, in ITALIAN POLITICS: QUO VADIS 153 (Carlo Guarnieri & James Newell eds., 2005); Donatella de la Porta, *A Judges' Revolution? Political Corruption and the Judiciary in Italy*, 39 EUR. J. POL. RES. 1, 2 (2001).

44. Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57, 65 (1994). See also JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW, 44 (2006) (providing a good introduction to the French judiciary in ch. 2).

trast between the *Cour de Cassation* and the *Conseil Constitutionnel* shows how a system where internal audiences prevail (hence producing essentially collective reputation for external audiences) can coexist with a system fundamentally based on external audiences (hence with an important component of individual reputation for external constituencies). Obviously collective reputation for consistency and decision quality is important in the *Conseil Constitutionnel* as well, but not as much as it is in the *Cour de Cassation* due to the political pressure and the nature of the actors involved. The reverse is also true. Some degree of individual external reputation exists in the *Cour de Cassation* but has been very limited until recently.⁴⁵

The *Cour de Cassation* is a massive court, made up of about eighty-five judges and is broken down into six different chambers. Each chamber is headed by a chief judge known as the President. However, the entire court is overseen by a chief judge known as the First President. The First President has the power of administering the judges. As the highest officer in the judiciary, the First President must work closely with the Minister of Justice to ensure compliance with the rules set forth by the parliament.

The judges are appointed into the *Cour de Cassation* through a nomination procedure managed by the judicial council, the *Conseil Supérieur de la Magistrature* (CSM). The CSM is less powerful than its Italian counterpart, since it is chaired by the President of France and by the Minister of Justice, but it has the monopoly over filling judicial vacancies and deciding the rules of conduct and discipline for the judiciary. Therefore, judges, even at the highest courts, are civil servants but enjoy special statutory protection from the executive. They may not be moved or promoted without their consent since their careers are overseen by the CSM.⁴⁶

From an American perspective, the minimal respect for the *Cour de Cassation* is striking. That is understandable once one recognizes that, unlike the U.S. Supreme Court, its jurisdiction is limited.⁴⁷ The *Cour de Cassation* reviews neither administrative nor

45. The *Cour de Cassation* was originally developed to act on the behalf of the legislature to make sure the judiciary would not engage in lawmaking. The essential role of the *Cour de Cassation* was to supplement authoritative interpretations of the law and enforce the obedience of the courts to the laws developed by the legislator.

46. See John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1759 (1988).

47. See Kublicki, *supra* note 44, at 66–67.

constitutional controversies. Such matters are the domain of the *Conseil d'Etat* and the *Conseil Constitutionnel*, respectively. The major mission of the *Cour de Cassation* is to maintain the uniformity of judicial decision-making, thereby ensuring a homogenous application of French (essentially private) law. The emphasis is clearly on collective external reputation. Moreover, the *Cour de Cassation* is not a court of appeals but rather a court of review.⁴⁸ The power of review of the *Cour de Cassation* is also limited because the courts of appeals are not bound by the decision of the court.⁴⁹ Moreover, the opinions of the court are succinct and neither include the signature of the judges, nor disclose any dissenting opinions. Individual appeal to external constituencies is difficult to cultivate in such a system.

The *Conseil Constitutionnel*, established by the Constitution of 1958, is of a different nature as the highest constitutional authority in France.⁵⁰ It acts more like a third branch of the legislature than a judicial court, and was set up to facilitate the centralization of the executive branch, and to limit the power of the parliament.⁵¹ The duty of the *Conseil* is to ensure that the principles and rules of the constitution are upheld in a situation in which both the executive and legislative branches had independent lawmaking authority. Therefore, the *Conseil* was established to act as a watchdog on behalf of the executive branch, since it was not French tradition to allow the judicial authorities the power to examine the law created by the parliament. The founders of the *Conseil* saw it as a referee established to settle the conflicts of legislation between the executive and the parliament, though it was not meant to be fair, neutral or impartial.⁵²

The jurisdiction of the *Conseil* is limited to the acts of the parliament. Moreover, the *Conseil* is not formally a part of the French judiciary. For example, the impact from the decisions of the *Conseil*

48. *Id.* at 66. The *Cour de Cassation* does not have the ability to substitute its judgment for that of the French appellate courts. The power of the *Cour de Cassation* is limited solely to considerations of questions of law.

49. *Id.* at 66. Instead, the French Court of Appeals reviews the cases that are remanded from the *Cour de Cassation* de novo. However, if the same case is appealed to the *Cour de Cassation* several times, the decision of the court becomes binding on all French appellate courts, but only at this advanced stage of review.

50. 1958 CONST. arts. 37, 41; *See also* ALEC STONE SWEET, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992).

51. Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel and the US Supreme Court*, 34 AM J. COMP. L. 45 (1986); STONE SWEET, *supra* note 50, at 46.

52. *See* STONE SWEET, *supra* note 50, at 48.

is concentrated exclusively on the legislature and on legislative outcomes (abstract and preventive constitutional review). The *Conseil* is composed of nine members who serve a nine-year, nonrenewable term. The council is renewed in thirds every three years. Three of its members are named by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate. In addition to the nine members, former Presidents of the Republic are members of the constitutional council for life.⁵³ The appointments to the *Conseil* are not always judges, and some members are not even legally trained, but rather are predominantly professional politicians. Therefore, the most important criterion for appointment to the council is political affiliation.⁵⁴

Although the collegiality of the *Conseil* has been pursued with the secret nature of judicial deliberations—the façade of unanimity, no dissenting opinions and no methods for detecting division—the politicization of the council at later stages opened the way to individual external reputation mechanisms.⁵⁵ The initial council had nominees of the presidents of the Republic and of the National Assembly, who were trusted supporters of the founder of the Republic, General de Gaulle. In those early years, the council was subservient to the executive of General de Gaulle and his ideas for the new Republic.⁵⁶ The council's President, Noel, was a close confidant of the General and was consulted on a variety of political matters.⁵⁷ Other members were known to be loyal to the General. Noel's successor, Palewski, admitted openly that the council acted in this period as a group of "yes men," but argued that it was absurd to contradict the author of the Constitution as to its interpretation.⁵⁸

An extraordinary departure from this conformist approach was illustrated by the decision to strike down as unconstitutional an important amendment to the law governing private associations in 1971 (after the death of General de Gaulle), marking what many scholars call the "birth of judicial politics in France."⁵⁹ This change

53. 1958 CONST art. 56.

54. See STONE SWEET, *supra* note 50.

55. Bell, *supra* note 46. The *Conseil*, like the constitutional courts in Italy, Austria and Belgium, has no power to issue dissents.

56. See STONE SWEET, *supra* note 50.

57. *Id.*

58. *Id.*

59. Peter L. Lindseth, *Law, History and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49, 52 (1997).

was reinforced by the 1974 reform that allowed the parliamentary opposition to refer laws to the court (originally the Parliament was excluded from referring to the court).⁶⁰ This reform has empowered the court to challenge the government in a wider scope of cases. Since 1981, the most important pieces of legislation ended in the court, increasing the public exposure of the court and promoting activism. The original constitutional arrangement dominated by the government and the President was readdressed in the 1970s, and the constitutional court played an important role in achieving a new balance of powers in France.⁶¹ If the changes secured in 1971 and 1974 explain this change, the personalities of the constitutional judges also matter.⁶²

However, the 1980s would see even further changes. In 1983 and 1986, the Socialists, in power for the first time since the creation of the Fifth Republic, sought to ensure greater representation on the council, particularly in anticipation of the electoral defeat in March 1986 and the ‘cohabitation’ between a Socialist President and a conservative Prime Minister that followed.⁶³ For example, very vigorous political criticism was echoed by the President of the Republic’s nomination of his Minister of Justice, Robert Badinter, as President of the *Conseil* less than a month in advance of an expected (and confirmed) Socialist defeat at the polls.⁶⁴ By the late 1980s, the members of the *Conseil* were starting to be scrutinized on individual merits, some were regarded as independents (e.g., Marcihacy and Legatte among the members of the council in 1986) and others with political activity in the past were exposed to public assessment by the media.⁶⁵ This had a major impact in the status of the *Conseil*, for example, generally invalidating measures put forward by those who nominated its members. The transfers of power in 1981 and 1986 created a gap between the council’s interpretation of the republican tradition and the momentary, partisan political concerns of its nominators.⁶⁶ In particular, the nationalizing of the economy by the new socialist government in the early 1980s as well as the regulation of

60. See generally JOHN BELL, FRENCH CONSTITUTIONAL LAW (1992).

61. *Id.*

62. *Id.*

63. See STONE SWEET, *supra* note 50.

64. *Id.*

65. *Id.*

66. *Id.*

media pluralism in the mid 1980s were particularly traumatic.⁶⁷ This trend was further pursued in the 1990s due to both the character of the people nominated and the nature of the tasks.

Not surprisingly, the French tradition historically focused on collective external reputation, with a great fear of an overly politicized *government du juges*. The lack of individual prestige constrains judicial boldness and consequently restrains judicial review from seriously interfering with the government. The *Conseil* became the first exception, a kind of island of individual reputation within a general structure that disfavored external audiences. The expanding sources of constitutional law beyond the Constitution itself to include constitutional values (such as the Preamble of the 1946 Constitution) has increasingly allowed a more active role for a naturally politicized constitutional judiciary. However, the court has always tried to keep a legalistic approach trying to mimic the judicial courts, in particular the *Conseil d'Etat*.⁶⁸

The development of the *Conseil* was clearly not anticipated by the founders of the Constitution. However, the mixed composition (career judges, academics, bureaucrats and politicians)⁶⁹ and the appointment mechanism favored the departure from the original low profile of the court once external audiences became more important, in part because rights and civil liberties are necessarily more politicized than the original scope of review.⁷⁰

Traditionally, very few judges were individually known by the public.⁷¹ The First Presidents of the *Cour de Cassation* were low profile figures that commanded prestige within the ranks of the profession, but were not well-known to the general public. Recently things have started to change, in part as a result of the empowerment of the *Cour de Cassation* through the growing role of E.U. law and in part as a consequence of the influence of the *Conseil Constitution-*

67. See generally ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

68. See BELL, *supra* note 60, at 233 (“[T]he Conseil tries to develop legally applicable principles and to apply them in a legalistic fashion. It acts very much like a court receiving a reference on a point of law.”).

69. For example, George Pompidou became prime minister and President after being a member of the constitutional court.

70. See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 148 (1998) (“[T]he area of rights and civil liberties has always been a political mine-field where specific political choices bear heavily on the outcome.”).

71. See Garoupa & Ginsburg, *supra* note 10.

nel.⁷² The former First President (1999–2007), Guy Canivet, emerged as a strong leader, and his push for reforms was followed by the current First President (since 2007), Vincent Lamanda.

Still, there have been some tensions resulting from recent controversies that have negatively impacted the collective reputation of the court. For example, *l'affaire d'Outreau*, in which a rogue judge prosecuted twenty innocent people for a child molestation ring, triggered a public uproar highlighting the failure in the functioning of the judiciary in France. This event led the government and the public to question the judiciary.⁷³

Currently, as a result of recent tensions, Lamanda, like many others who promote the idea of judicial independence, are lobbying for the CSM to become completely independent from the French government, thereby calling for the complete removal of government officials from the judicial council.⁷⁴ Both Lamanda and Canivet, now members of the *Conseil Constitutionnel*, seem to have been calling for a modernization of the judiciary to increase its power and ameliorate its reputation.⁷⁵

We can see here clearly how the individual reputation building in the *Conseil Constitutionnel* has spilled over to the more traditional *Cour de Cassation*. Clearly it is in the early stages, but it is possible that the French judiciary will slowly move to a balance of internal vs. external audiences more in line with the Italian case, in particular if the reforms pushed by Canivet and Lamanda are implemented. The long-standing French fear of *government du juges*, it seems, is fading away.

72. See STONE SWEET, *supra* note 67, at 124 (discussing how decisions by the French constitutional court are as short and declarative as the ones by the *Cour de Cassation* as a way to make them look similar and more influential, and also discussing how the *Conseil d'Etat* now accepts that case law dictated by the *Conseil* is a source of law after initially being hostile to the idea). See also Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 62–63 (2007) (“That the *Conseil Constitutionnel* finally managed to win recognition from other jurisdictions must be attributed to the intellectual caliber of the *Conseil*’s case law . . .”).

73. *L'affaire Outreau* triggered the heavy discussion of judicial reform. It put in the public spotlight the inefficiencies of the French judiciary forcing the parliament to form a commission (i.e. *la commission Outreau*) to inquire into the matter and review possible reforms to address the inefficiencies of the judiciary.

74. See Alaine Salle, *Les Nominations dans la Magistrature Suscitent un Débat sur une réforme du CSM*, LE MONDE, Apr. 14, 2007, at 12.

75. See Nathalie Guibert, *Independent et traditionnel, Vincent Lamanda prend la tête de la Cour de cassation*, LE MONDE, May 30, 2007, at 12.

C. *Internal Audiences in Common Law: The U.K. Law Lords*

In England and Wales, judges are not a separate or co-equal branch of government in the American sense.⁷⁶ Until recently, for example, the Lord Chancellor was the senior judge, a cabinet member, and frequently an active politician, as well as head of a significant executive department.⁷⁷ The highest court was the House of Lords, consisting practically of the twelve Law Lords (Lords of Appeal in the Ordinary under the Appellate Jurisdiction Act of 1876).⁷⁸ The wide jurisdiction of the Lord Chancellor together with the political appointment of judges and the dual roles of the Law Lords make it impossible to have an institutional concept of judicial independence based on a notion of separate branches of government.⁷⁹

Not until the Appellate Jurisdiction Act of 1876 was there a definite line between the House of Lords' roles as a legislative chamber and as a court. In fact, originally, many Law Lords were not legally trained but peers with seats in the upper house. This generated an interesting dynamic—legally qualified peers had a disproportionate influence and therefore a shape of a court slowly emerged throughout the centuries.⁸⁰ The last case with no legally qualified

76. See ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR'S OFFICE* 2 n.8 (1993) (noting that separate branches of government, as in the U.S., do not exist in England).

77. See *id.* at 2

The Lord Chancellor is not only the senior judge, presiding when available in the final court of appeal for the United Kingdom (the House of Lords) and the vestiges of Commonwealth (the Judicial Committee of the Privy Council), he is also speaker of the House of Lords presiding in legislative sessions. Equally importantly, he is a member of the Cabinet, and at least from 1880 onwards the Lord Chancellor has run an executive department—the Lord Chancellor's Office, responsible for the judiciary, the courts, law reform, legal aid, and related activities.

78. See *id.* at 4 ("The judiciary was small. There were twelve judges sitting in three common law courts."); see also Glenn Dymond, *The Appellate Jurisdiction of the House of Lords*, 2, 8 (2007), available at <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

79. *Id.* But see Lord Woolf, *Judicial Review: The Tensions Between the Executive and the Judiciary*, 114 L.Q. REV. 579, 582 (1998) ("As long as the Lord Chancellor is punctilious in keeping his separate roles distinct, the separation of powers is not undermined and the justice system benefits immeasurably.").

80. Kay Goodall, *Ideas of 'Representation' in UK Court Structures*, in *BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES* 67, 70 (Andrew Le Sueur ed., 2004) ("In many cases . . . in effect the decisions were made by the legally qualified peers.").

peer was heard in 1834.⁸¹ Pressure of further judicial work and the inevitable backlog forced procedural reforms and increased pressure for legally-qualified Law Lords.⁸² Until 1948 judicial business was heard in the main chamber before the whole chamber was convened for non-judicial business, that is, political debate.⁸³ Quite interestingly, the Appellate Jurisdiction Act of 1876 requires that three Law Lords be present on the panel but does not explicitly exclude other lay peers from participation.⁸⁴ Nevertheless, the Law Lords do join the wider house to make and scrutinize legislation.

The Law Lords have similar functional characteristics to the U.S. Supreme Court justices, where judgment carries concurring and dissenting opinions.⁸⁵ Yet, for example, the Law Lords seem disinclined to pressure peers to decide cases or write opinions.⁸⁶ The Law Lords have security of tenure, which is linked to the Act of Settlement of 1700.⁸⁷ Security of tenure prevents judges from being dismissed other than through a complaint addressed to both Houses of Parliament.⁸⁸ Second, Law Lords enjoy financial independence.⁸⁹ Third, Law Lords enjoy freedom from executive pressure.⁹⁰ The Law Lords “operate in a highly formalized system with a strong sense of the law as a series of objective rules impartially enforced.”⁹¹ However, the Law Lords have “discretion over sentencing, the inter-

81. *See id.* (“There were also cases heard with no legally-qualified peers present, the last in 1834.”).

82. *See id.* at 74 (“The growing importance of the House of Lords as an appellate court brought into focus the need for a core body of legally-qualified judges.”).

83. *See id.* at 87 (“As recently as 1948 the court heard its appeals in the chamber of the House itself: judicial business was heard for the first part of the day, then the whole House convened to consider non-judicial business.”).

84. *See id.* (“[T]he Appellate Jurisdiction Act of 1867 requires that three Law Lords be present on the panel but does not state that lay peers cannot also participate.”).

85. ROBERT J. MARTINEAU, *APPELLATE JUSTICES IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* (1990).

86. ALAN PATERSON, *THE LAW LORDS* (1982).

87. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597, 598 (1999).

88. This is also considered to be a modified form of impeachment. *Id.* at 598.

89. *Id.* at 598 (explaining the reason for this as being that their salaries are protected in value through the semi-independent Top Salaries Review Body and somewhat distinguished from the common herd of public salaries by being paid out of the consolidated fund).

90. *Id.* at 598. However, judges have abandoned the view they expressed forty years ago that they were both apolitical and value free. Although they may approach decision-making with an open mind with respect to factual situations and specific parties, judicial values and predispositions inevitably shape approach to decision-making.

91. *Id.* at 603.

pretation of statutes, and developments in the common law, giving them the opportunity to allow their personal views full rein.”⁹² Some even have observed that Lords “do not have their political or social opinions carefully removed.”⁹³

The very limited caseload allows the Law Lords to produce detailed written opinions, oral hearing and full dialogue, permitting individual reputation building.⁹⁴ The scheme of reasoning employed by the Law Lords and the substance of justification also help.⁹⁵ Individual Lords are able to obtain a high judicial reputation.⁹⁶ Yet the Law Lords have always insisted more on their collective reputation for external audiences and less on individual visibility or exposure. There is definitely a sense that many people, especially the politically informed, know who the individual Law Lords are. Nevertheless, the Law Lords have tried to develop a self-image as apolitical. Collective external reputation seems a more obvious route to create the appearance of apoliticism for three reasons.⁹⁷

First of all, the homogeneity of the English judiciary in general and the Law Lords in particular has raised skepticism about its neutrality.⁹⁸ There is said to be confusion among Law Lords, the public and politicians regarding the concept of impartiality, since judges often serve as heads of commissions involving sensitive political topics.⁹⁹ Some judges who have held such positions have signif-

92. *Id.* at 604.

93. *Id.* at 604 (quoting Lord Hailsham, Conservative Lord Chancellor).

94. David Anderson, *The Law Lords and the European Courts*, in *BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES* (Andrew Le Sueur ed., 2004).

95. Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the USA*, 24 *AM. J. COMP. L.* 43, 44 (1976).

96. Stevens, *supra* note 87, at 610. In fact, for example, academic research on the Law Lords is not as extensive as with the U.S. Supreme Court, but it is quite relevant and has been increasing since the late 1970s. See Laurence Baum, *Research on the English Judicial Process*, 7 *BRITISH J. POL. SCI.* 511, 520 (1977) (criticizing the lack of interest in England for studying the courts and the judiciary in general); Darbyshire, *supra* note 23, at 1; PATERSON, *supra* note 86; David Robertson, *Judicial Ideology in the House of Lords: A Jurimetric Analysis*, 12 *BRITISH J. POL. SCI.* 1 (1982); ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976* (1978).

97. The contradiction between their apolitical positioning and the massive growth of judicial review in the 1980s and 1990s is discussed by Darbyshire, *supra* note 23. See also, LISA HILBINK, *JUDGES BEYOND POLITICS IN DICTATORSHIP AND DEMOCRACY: LESSONS FROM CHILE* (2007).

98. See Stevens, *supra* note 87, at 604 (expressing, for example, that “the bar is predominantly white, male, middle-aged, Oxbridge and public school educated”).

99. *Id.* at 604 (In Britain, there have been “a vast array of government commissions

icantly damaged their reputations after making their political views too clear.¹⁰⁰ Moreover, the political views of some judges are also affected by executive interference, as they have served both in the Cabinet and for large executive bodies.¹⁰¹

Second, Law Lords are very politically involved, which makes them highly dependent on public perception. As a result, the interaction between the judiciary and political institutions plays a significant role in defining the independence of the judiciary in England. For example, many Law Lords individually benefit from previous political experience of being involved in the Cabinet. Still, even after the constitutional reform, there is no consensus on the extent to which having the Law Lords sitting on one of legislative chambers is positive. One of the biggest disadvantages is the appearance of judicial partiality in legislative discussions and confusion about the role of judges.¹⁰²

Third, the lack of sufficient transparency,¹⁰³ away from the public eye, with no clear constitutional principles to guide case selection,¹⁰⁴ and the complexity of their role has contributed to their apparent loss of prestige with the general public. The high-profile Pinochet case in 1999 contributed overwhelmingly to this loss of collective reputation¹⁰⁵ and raised serious questions about having the most senior judiciary sitting at the House of Lords.¹⁰⁶

Our possible argument is that while important incentives exist for individual reputation building with external audiences, the peculiar arrangement with Law Lords being politically appointed and sit-

and committees, half of them were chaired by either judges or lawyers.”).

100. *Id.* at 605.

101. *Id.*

102. *Id.* at 621 (For example, “when the Fire Brigade case came on before the Lords in 1995, it was difficult to find five law lords to sit judicially, since so many of them had already spoken out, legislatively against the Home Secretary Michael Howard’s proposals.”).

103. Andrew Le Sueur, *The Conception of the UK’s New Supreme Court*, in BUILDING THE UK’S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 3, 7 (Andrew Le Sueur ed., 2004).

104. Andrew Le Sueur, *Panning for Gold: Choosing Cases for Top-level Courts*, in BUILDING THE UK’S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 271, 272, 287 (Andrew Le Sueur ed., 2004).

105. See Robert Stevens, *Judicial Independence in England: A Loss of Innocence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, CRITICAL PERSPECTIVES FROM AROUND THE WORLD 155, 157 (Peter H. Russell & David M. O’Brien eds., 2001).

106. The contradictory decisions taken by different panels of three Law Lords were not easily understood by the public. For a detailed account, see ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 120–21 (2002).

ting in a legislative body has induced collective external reputation to become important as a way to support the apolitical pretense. In fact, the particular design might well explain why the House of Lords has been unwilling to engage openly in judicial activism and, for example, has been quite averse to change precedent.¹⁰⁷ The Law Lords have been extremely cautious with the apportionment of political responsibility between them and the legislature. They have operated with the objective of being perceived as deciding cases by rules and substance of the law, and not ideological or personal goals. Clearly the emphasis on collective reputation can be easily understood in this context.

However, things might change soon.¹⁰⁸ In 2003, Prime Minister Blair's Government announced its intention to change the system for making appointments to the judiciary in England and Wales.¹⁰⁹ The reform was justified by two goals: to improve judicial independence and to enhance accountability and public confidence in judicial offices.¹¹⁰

The Constitutional Reform Act 2005¹¹¹ introduced several substantive changes in England and Wales, including a statutory duty on government members not to influence judicial decisions. Two reforms were especially far-reaching. First, the Act abolished the office of the Lord Chancellor¹¹² (the most senior judge in England and Wales) and transferred his judicial functions to the President of the Courts of England and Wales (formerly known as Lord Chief Justice of England and Wales).¹¹³ Second, it created a new Supreme Court, with twelve judges independent of and removed from the House of

107. See Brice Dickson, *Judicial Activism in the House of Lords 1995-2007*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 363, 367-68 (Brice Dickson ed., 2007) (discussing judicial activism in the House of Lords from 1995 to 2007 and observing that only in 1966 the House of Lords decided they could overrule their own precedents).

108. See Diana Woodhouse, *United Kingdom: The Constitutional Reform Act 2005—Defending Judicial Independence the English Way*, 5 INT'L J. CON. L. 153, 163 (2007).

109. In the case of Scotland, judicial appointments were under review since September 1999 and an independent Judicial Appointments Board was established in June 2002.

110. See Woodhouse, *supra* note 108, at 156-57.

111. See *id.* at 162.

112. See generally DIANA WOODHOUSE, *THE OFFICE OF LORD CHANCELLOR* (2001).

113. The President of the Courts of England and Wales sits in the Court of Appeal, the High Court and the Crown Court, among others, and is responsible for expressing the views of the judiciary and for welfare, training and guidance of the English judiciary. He is not the President of the Supreme Court.

Lords with their own independent appointment system.¹¹⁴

According to the Constitutional Reform Act 2005, although the judicial functions of the House of Lords will be transferred to a new Supreme Court, it will initially consist of the current twelve Law Lords.¹¹⁵ Even so, these reforms significantly change the balance of incentives, and it would be of no surprise that in the future individual external reputation building will emerge as a more relevant dimension.¹¹⁶

The constitutional reform is developed in a context of enhanced influence of the judiciary in Britain. The Human Rights Act of 1998 has allowed the courts to review Acts of Parliament for the first time ever (by assessing compliance with the European Convention of Human Rights, for all legislation passed after and before 1998).¹¹⁷ Although courts tend to follow a general doctrine of deference to the legislature, the Human Rights Act of 1998 increases considerably the weight of external audiences.¹¹⁸ Some of these behavioral changes were already being developed since the European Community Act of 1972.¹¹⁹ The fine line between law and politics

114. The new Supreme Court is to be launched in 2009 with the current twelve Law Lords (the Lords of Appeal in Ordinary). There will be a Supreme Court *ad hoc* selection committee presided by the President of the Supreme Court for future appointments. The remaining Lords of Appeal who are members of the House of Lords and eligible to hear and decide judicial business under the Appellate Jurisdiction Act of 1876 will not be moved to the Supreme Court (in January 2007 there were thirteen of them including three former Lord Chancellors). The exact nature of the relationship between the new selection committee and the Secretary of State for Constitutional Affairs is still not clear at this point.

115. Although those judges already holding a peerage will apparently continue to sit in the House of Lords.

116. In fact, this collective external reputation could explain why some scholars have argued that the English judiciary is closer in style to the Continental judiciary than to the U.S. federal judiciary. See POSNER, *supra* note 7, at 20–38.

117. See generally Vernon Bogdanor, *Constitutional Reform in Britain: The Quiet Revolution*, 8 ANN. REV. POLIT. SCI. 73 (2005).

118. See Margit Cohn, *Judicial Activism in the House of Lords: A Composite Constitutional Approach*, 1 PUB. L. 95 (2007). She considers a first example of the trend to more judicial activism the controversy surrounding the 2001 Anti-Terrorist, Crime and Security Act; the House of Lords considered the original bill inconsistent with the European Convention of Human Rights, forcing the government to make changes. More recent decisions have been perceived as a rising judicial activism. Other scholars go back to the Human Rights Act 1998 that enhances judicial review by providing an augmented interpretative mandate. This has entrenched some of the Labor political ideas protected by courts through a more active judiciary. See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS, JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 27–33 (2008).

119. See Robert Stevens, *Reform in Haste and Repent at Leisure: Iolanthe, the Lord*

has been blurred since the late 1970s, posing a serious problem to the traditional arrangement from the perspective of the reformers.¹²⁰

We can speculate that the enhanced transparency of the appointment process coupled with a clear distinction between legislator and judiciary will reduce the need for the traditional apolitical façade, and therefore promote more judicial activism. Necessarily judicial activism will respond to demand by external audiences. The traditional formalism developed by the English judiciary to avoid possible political interference¹²¹ will naturally give away to a bolder judiciary confronted with a wider scope of independent judicial review.¹²² The weak posture of the House of Lords was in part due to the need to be perceived as apolitical reinforced with a homogeneous pattern of recruitment that provided stable and structured professional norms.¹²³ The awareness of political biases due to the closeness to the legislature increased the need to avoid them, hence forcing the Law Lords to be extremely careful about interpretation and application of the law. The new appointment process and the clear separation of the Supreme Court from the House of Lords unsettle this equilibrium. A more heterogeneous recruitment and a reduced need for some apolitical façade given the more transparent appointment process will naturally provide new opportunities for external audiences and incentives.

But it is not only the new appointment mechanism and the dislocation from the House of Lords that makes this transformation more likely.¹²⁴ We have already referred to the political implications

High Executioner and Brave New World, 24 LEGAL STUD. 1, 14 (2004).

120. See K. E. Malleon, *Modernizing the Constitution: Completing the Unfinished Business*, 24 LEGAL STUD. 119, 120 (2004).

121. See Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, CRITICAL PERSPECTIVES FROM AROUND THE WORLD 157 (Peter H. Russell & David M. O'Brien eds., 2001).

122. See Lord Woolf, *supra* note 79 (anticipating this shift in the judiciary's attitude).

123. See generally Stevens, *supra* note 119 (asserting that these reforms are unnecessary and harmful according to current Law Lords because in their views the current system is independent in substance and in form). Stevens himself argues that the current arrangement is a compromise between the traditional approach that emerged from the Act of Settlement of 1701 and the need for modernizing the role of independent judiciary in the last 200 years. In his view, judges might be influenced by politics but they also influenced politicians through the presence of the Lord Chancellor as a member of the Cabinet. *Id.* at 16. Hence there has been a fluid balance of political and judicial influence. However, Stevens recognizes that the important reforms initiated by the Hatherley Commission in 1860 and the Judicature Act of 1873 were unfinished. *Id.* at 30.

124. See Diana Woodhouse, *The Constitutional and Political Implications of a United*

of more judicial activism in the context of the European Community Act of 1972 and the Human Rights Act of 1998.¹²⁵ The new court will also have jurisdiction over Devolution to Scotland, Wales and Northern Ireland,¹²⁶ thus participating in the adjudication of questions arising between different levels of government.¹²⁷ This will naturally increase the importance of political audiences for the Law Lords, and if adjudication becomes unavoidably political in some cases, then the institutional arrangement will inevitably respond to that.¹²⁸ It could even be that parliamentary sovereignty will be eroded and replaced by a more balanced distribution of constitutional power.¹²⁹ The current anomalies of the Scottish case might also force the new Supreme Court to become more active in establishing a universal and uniform jurisdiction across the United Kingdom.¹³⁰ In fact, some scholars anticipate that the new Supreme Court will evolve (probably unintended by the current reformers) into a powerful constitutional court, hence appealing to different audiences and playing a different role than that of the traditional Law Lords.¹³¹

Kingdom Supreme Court, 24 LEGAL STUD. 134 (2004) (Justices in the future will be more overtly political than the Appellate Committee of the House of Lords; separation from the House of Lords rather than insulate them will foster political games and more involvement by the Justices in the political process).

125. See Stevens, *supra* note 119, at 31.

126. Scotland Act, 1998, c. 46; Northern Ireland (Location of Victims' Remains) Act, 1999, c. 7; Government of Wales Act, 1998, c. 38; and Government of Wales Act, 2006, c. 32.

127. See Jeremy Webber, *Supreme Courts, Independence and Democratic Agency*, 24 LEGAL STUD. 55 (2004). This was a transfer of competences from the Judicial Committee of the Privy Council (JCPC). Although the Law Lords (formally, the Appellate Committee of the House of Lords) will cease to exist after October 2009, the JCPC will, however, survive, presumably located within the new Supreme Court building, as the final court of appeal for several states in the Commonwealth.

128. See generally Brenda Hale, *A Supreme Court for the United Kingdom?*, 24 LEGAL STUD. 36 (2004); Allan C. Hutchinson, *Judges and Politics: An Essay from Canada*, 24 LEGAL STUD. 275 (2004).

129. See Woodhouse, *supra* note 124, at 152–53 (approximating the balance of constitutional power in Britain to the model of continental jurisdictions).

130. See Thomas Legg, *Brave New World—The New Supreme Court and Judicial Appointments*, 24 J. LEGAL STUD. 45 (2004); Chris Himsworth & Alan Paterson, *A Supreme Court for the United Kingdom: Views from the Northern Kingdom*, 24 J. LEGAL STUD. 99 (2004). They identify the following Scottish problems with the new Supreme Court: (i) anomaly concerning the hearing of Scottish criminal cases (apparently there will be no right of appeal from the High Court of Justiciary, Scotland's highest criminal court), (ii) jurisdiction over Scotland Act 1998, and (iii) the question of autonomy of the Scottish legal system under the Treaty of Union of 1707. They also mention concerns with respect to the Scottish influence in the appointment of the new justices.

131. See John Bell, *Reflections on Continental European Supreme Courts*, 24 J. LEGAL

Although the current reform does not propose any changes in procedure, some scholars anticipate that such changes will take place given the likely expansion of judicial activism and the lost connection to the legislature, making it more similar to the U.S. Supreme Court.¹³² Others propose that a wider composition of the Supreme Court (socially and professionally) might also push for significant changes in the style of argument and judgment.¹³³ Eventually, the new court might exercise a more selective control over dockets than has been the practice so far.¹³⁴ The Supreme Court might even be faced with repeat litigators that will eventually create a new audience that the Law Lords were not exposed to before.¹³⁵ Current voluntary constraints might be replaced by highly abstract and formal notions of procedure that enhance reputation with external audiences.¹³⁶

The current constitutional reform in the U.K. will inevitably change the balance of internal and external audiences. The new Supreme Court will emerge as a judicial institution quite different from the Law Lords. We anticipate that external audiences will play a more important role, and the traditional self-restraint of the judiciary coupled with a façade of apolitical will not resist pressures toward more judicial activism.

D. *Internal and External Audiences in the United States*

The United States has a “recognition” judiciary in which judges are appointed at a relatively late age after accumulating a significant reputation in law, politics or academia.¹³⁷ It shares many of

STUD. 156 (2004).

132. See Stevens, *supra* note 119, at 30–35; Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, 24 J. LEGAL STUD. 73, 96–97 (2004).

133. See Hale, *supra* note 128, at 38 (also explaining that jurisdiction over ordinary civil cases might require some uniformity of procedure that does not exist, in particular given the current arrangements with Scotland).

134. See Legg, *supra* note 130, at 47.

135. See Judith Resnik, *Composing a Judiciary: Reflections on Proposed Reforms in the United Kingdom on How to Change the Voices of and the Constituencies for Judging*, 24 J. LEGAL STUD. 228, 243 (2004).

136. See Webber, *supra* note 127, at 67.

137. See, e.g., Caldeira, *Neither the Purse Nor the Sword*, *supra* note 16; David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 371–72 (1999); Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331 (2005).

the features of the English system that incentivize investment in individual external reputation, including individual opinions, a relatively small judiciary, relatively few hierarchical controls and frequent citation to other courts. Docket control at the highest level means that the Supreme Court, in particular, can choose what cases to focus on, giving it a powerful tool in shaping reputation.

The United States has some features that heighten pressures to invest in individual external reputation. Many states continue to elect judges, sometimes on a partisan basis. Without entering the normative debate on the practice, we note that it should enhance investment in individual external reputation, as judges seek to signal their views both in the campaign process and while serving as incumbents. Judges will try to distinguish themselves and emphasize their relatively unique suitability for their positions vis-à-vis competitors.

Another distinction from contemporary Great Britain is that the presence of multiple jurisdictions means that forum shopping is a possibility, further incentivizing courts to distinguish themselves from each other. State courts, for example have distinct reputations. Tort lawyers frequently seek out particular jurisdictions thought to be conducive to plaintiff success.¹³⁸ This has led for some to call for nationalizing cases that have national implications.¹³⁹ Even at the federal level, however, forum shopping is possible. Different circuits have different reputations, largely dependent on the quality of individual judges, and these can change over time.¹⁴⁰ Professor Solimine, for example, notes that the Second and District of Columbia Circuits were generally perceived as the most prestigious and influential over much of the twentieth century.¹⁴¹ The presence of two highly productive and creative judges on the Seventh Circuit (Judges Posner and Easterbrook), however, has rapidly increased the prestige of that circuit.¹⁴²

138. Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235 (2004); AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2005, 6 (2005), available at <http://www.atra.org/reports/hellholes/2005/hellholes2005.pdf>.

139. Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 441 (2008).

140. Solimine, *supra* note 137, at 1341, 1346 (stating Second and D.C. Circuits have good reputations, Ninth Circuit has a relatively poor one).

141. *Id.* at 1341.

142. *Id.* at 1350.

Individual judges in the United States can engage in activities that directly appeal to external audiences. Supreme Court justices are public figures who write books and give speeches.¹⁴³ They head commissions and have taken on a variety of extrajudicial tasks, dating from Chief Justice John Jay's service as an ambassador to England while sitting on the court, through Earl Warren's chairing of the commission to investigate the assassination of President Kennedy. Judges have also sought to limit these tasks on occasion.

At the same time, we occasionally see battles over judicial reputation-building. One interpretation of the recent battle over federal sentencing is that Congress has sought to reduce variance associated with a highly individuated judiciary. In the 1980s, following a wave of sentencing guideline projects at the state level, the United States Sentencing Commission issued federal guidelines to reduce sentencing variance. The Guidelines sought to limit sentencing determination to main factors, the severity of the crime and the criminal history of the defendant, and provide a set range within which sentences should fall. This limited the discretion of individual judges significantly. When the U.S. Supreme Court struck down the guidelines as a violation of the Sixth Amendment in *United States v. Booker*,¹⁴⁴ it restored at least some power of the judges, even though the decision focused on the jury fact-finding requirement. We thus see some pressures on occasion toward collective external reputation, even in the most individuated judicial system.

E. Pressures for Transparency in a Career System: The Japanese Judiciary

If any judiciary illustrates the predominance of internal audiences, it is that of postwar Japan. Operating in a classic "career" judiciary, Japanese judges are appointed at a young age and spend their entire careers as judges. Indeed, even before entering the judiciary they begin socialization by the courts, which run the Legal Re-

143. STEPHEN J. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1998); ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008); CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

144. 543 U.S. 220 (2005).

search and Training Institute through which all admittees to the bar must pass. As a junior judge, a Japanese appointee will sit in panels with more senior judges, who monitor their decision-making. They will be assessed and their performance graded. They will spend their careers moving around the country in a series of two- and three-year assignments, a process managed entirely by the Secretariat of the Japanese Supreme Court. Because some locations are more desirable than others, the Secretariat's assignment decisions provide the major set of incentives structuring judges' behavior. Indeed, recent scholarship has demonstrated how these assignment decisions are used to punish judges whose decisions are considered undesirable by the top decision-makers in the judiciary.¹⁴⁵

The importance of these internal audiences contrasts with the relative unimportance of external audiences. Japanese Supreme Court decisions are rarely front page news, and even many lawyers cannot name the justices of the Court. Decisions at the lower level are unsigned and so the judge is essentially faceless, reflecting the civil law ideology that the decision reflects the law rather than the 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.¹⁴⁶

A major scholarly debate concerns whether or not the Japanese judiciary is independent.¹⁴⁷ Professor Ramseyer and co-authors have emphasized the ability of the Supreme Court Secretariat to discipline judges at lower levels. Because the Secretariat is appointed by the Supreme Court itself, the Supreme Court is appointed by the Diet, and the Diet has been controlled by a single political party for most of the last six decades, Ramseyer argues that judges are ultimately subject to external control.¹⁴⁸ He provides evidence that judges who ruled against the interests of the ruling Liberal Democratic Party have suffered career sanction. This account emphasizes a

145. RAMSEYER & RASMUSEN, *supra* note 8, at 2.

146. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99, 127 (Daniel H. Foote ed., 2007).

147. See, e.g., Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 *LAW & SOC. INQUIRY* 421 (2005).

148. See J. MARK RAMSEYER & FRANCIS MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* 178 (1993); RAMSEYER & RASMUSEN, *supra* note 8, at 2; J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 *AM. POL. SCI. REV.* 331, 331 (2001). See also David S. Law, *How to Design a Conservative Court: Constitutional Review in Japan*, 87 *TEX. L. REV.* (forthcoming 2009).

particular external audience for the courts that operates at the individual level.

Professor Haley, by contrast, emphasizes the internal audience and the collective quality of the judiciary.¹⁴⁹ Japanese judges work in a hierarchy that is similar to that of other large Japanese organizations, in which one enters the organization at a young age and spends one's whole career in the same institution. For all large organizations, internal controls help to socialize staff. The emphasis is on mechanisms of collective reputation, in which Japanese judges are evaluated by society only on a collective basis. Haley points to the relative rarity of sanctions, the complete absence of reported instances of judicial corruption, and strong corporate identity of the judiciary to argue that the Japanese judiciary is indeed quite independent.

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

This situation has begun to change slightly. In the late 1990s, after several years of economic malaise, Japan's elites initiated a major program of legal reform, culminating in the creation of a Justice System Reform Council ("JSRC") in 1999. The Council issued its report two years later and was quite critical of the judiciary for maintaining a detached stance toward society, and being insufficiently transparent.¹⁵⁰ It called for increasing the number of appointments

149. See Haley, *supra* note 146, at 109. But see David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37, 59 (Peter H. Russell & David M. O'Brien eds., 2001).

150. See JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

from the ranks of practicing lawyers.¹⁵¹ 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.¹⁵² This is required for Supreme Court justices every ten years under Japan's Constitution.¹⁵³ In 2003, an eleven-member Advisory Committee for the Nomination of Judges was established, five of whom are "insiders" (judges, prosecutors or lawyers) and the remaining six are from academia and the general public. The Committee has already rejected some proposed candidates on the basis of its own investigations.¹⁵⁴

Perhaps even more radically, the JSRC recommended the introduction of a quasi-jury system, in which citizens will sit in a mixed panel with judges in serious criminal cases. This reform, while not demanded by the public, was seen as an important step toward improving the transparency and legitimacy of the justice system as a whole. As a result, from May of this year, ordinary citizens will sit as *saiban-in*, lay decision-makers, deciding criminal cases.¹⁵⁵ One can view this development as seeking to force the judiciary to make its decisions more transparent to the ordinary citizen, reflecting a shift from internal toward external audiences for judges. One also observes increased coverage of legal cases in newspapers, and even criticism of some decisions in public. Still, the core institutions of the career judiciary have remained in place, and the shift is only a matter of degree.

151. *Id.*

152. *Id.*

153. KENPŌ [Constitution] art. 79, para. 2 (Japan) ("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.").

154. See Kahei Rokumoto, *Justice System Reform in Japan: Its Background and Process*, in JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD 319, 343 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

155. Kent Anderson & Mark Nolan, *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 VAND. J. TRANSNAT'L L. 935, 992 (2004).

CONCLUSION

Judges address different audiences, largely in response to the institutional incentives in which the judiciary operates. We have analyzed the audiences of judges as being either internal or external, and used a law and economics approach to understand why it is that one or the other constituency will predominate. This framework helps us to understand the functioning of judicial systems beyond the superficialities of “common law” and “civil law,” as well as to assess serious problems that have occurred when institutional reforms skew incentives in one direction or another. It also helps to understand the dynamics that occur when reforms shift the incentives of judges.

Our analytical effort should be understood as contributing to a recent body of work in comparative law that looks at the actual institutional structures of different legal systems.¹⁵⁶ This approach contrasts with the deductive approach that starts with legal origins and assumes that ancient institutional distinctions are enduring and consequential.¹⁵⁷ We believe that institutions matter, but also emphasize that institutional structures can change over time, and suggest that minor institutional reforms can have severe and unintended consequences on the production of incentives. This perspective, we argue, is more helpful to understand judicial behavior than the simple categorization of legal origins. Indeed, many of our examples show that the mere categorization of judiciaries as “common law” and “civil law” is misleading when it comes to understanding the relevant judicial audiences and how incentives and reputation operate in the different legal contexts.

For example, the United Kingdom judiciary has in many ways resembled that of its continental cousins more than that of the United States.¹⁵⁸ Its senior most judges have labored in quiet anonymity,

156. For a similar approach, see Gillian K. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, 36 J. COMP. ECON. 43 (2008); Gillian K. Hadfield, *The Quality of Law: Judicial Incentives, Legal Human Capital and the Evolution of Law* (USC CLEO Research Paper No. C07-3, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967494.

157. The vast literature on legal origins is associated with Rafael La Porta, et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004); Simeon Djankov, et al., *Courts*, 118 Q. J. ECON. 453 (2003); Rafael La Porta, et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

158. See POSNER, *supra* note 7, at 20–36.

and they have eschewed judicial activism for a more quiescent approach. The Italian case demonstrates how relatively minor institutional changes led to a complete restructuring of the role of the judiciary in society, so that external audiences have become much more important than they are for the British judiciary.

What the cases do show is that all systems, even those of classic “careerist” judiciaries such as in France and Japan, have witnessed subtle shifts toward external audiences. These increase the incentives of judges to invest in their individual reputations rather than the reputation of the judiciary as a whole. In France, the shifts have occurred at the apex of the judiciary thus far, but the changes seem particularly significant given longstanding French resistance to *government du juges*. In Japan, the Justice System Reform Council can be seen as an effort to open up the process of judicial decision-making to greater public scrutiny, most apparent in the adoption of a system of lay assessors to assist judges in deciding serious criminal cases. This is likely to increase public attention to the judicial process, and may have yet further unanticipated consequences down the road.

We can only speculate as to the causes of these trends with regard to the role of the judiciary in society. It is likely the result of a combination of factors. The greater responsibility of the judiciary for major decisions affecting society, captured in the notion of judicialization, has naturally led external audiences to be more interested in judicial decision-making. Greater media scrutiny, and a secular social interest in high-profile cases, also contributes to demand for transparency from outside the judiciary. The unprecedented stability of political regimes has allowed civil law judiciaries to abandon more formalist approaches that shielded them from abrupt political changes.

Despite these secular trends, the particular dynamics in each judicial system reflect local institutional considerations. Judges need to establish a reputation with some constituency, and the relative balance between individual and collective reputation is largely the result of particular institutional structures. As external audiences seek to learn more about judicial performance and decision-making, they must work through these structures, which may in fact resist easy modification.