

## Ostracism in Japan

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*Abstract:* In most communities, informal social sanctions like ostracism serve as the primary means of controlling deviance. Formal legal sanctions represent a costlier backup. Yet outside university laboratories, studies of ostracism barely exist. We construct a formal model and examine legal cases brought by targets of ostracism in Japan. Villagers who have actually offended their community tend not to bring these suits. Instead, most plaintiffs are victims of opportunistic ostracism -- cases where a group used the sanction to extort property, hide communitywide malfeasance, or harass its rivals. Typically, the plaintiffs are not trying to harness the government's coercive power. Instead, they sue to have the court publicly certify that they have not misbehaved.

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It happened in 1952 in a small village at the base of Mt. Fuji. For years, a village leader had gone house to house asking residents whether they planned to use their election ticket, the form that enabled them to vote. If not, he asked if they could give it to him lest it go to waste (**Case 1**).

Teenager Satsuki Ishikawa thought this outrageous. Still in middle school, she wrote an article about electoral fraud for her school paper. School administrators collected every copy and destroyed them. Two years later, she decided to try again. She could not complain to city hall, since the man collecting the tickets worked there. She thought of complaining to the electoral commission, but they might be in on the scheme. She considered the police, but she did not trust them either. Instead, she wrote to the national Asahi newspaper. The paper sent reporters to the village, and the fraud hit national news. The police arrested the guilty village leaders. The community ostracized the Ishikawa family.

Asahi readers wrote in from all around Japan in support of Satsuki. Her teachers and classmates encouraged her. But the Ishikawa family raised rice. In the pre-mechanized 1950s, transplanting rice required community assistance. When the time came to transplant the Ishikawa fields, no one came to help.<sup>1</sup>

Informal social sanctions are a community's primary mechanism for controlling deviance. Formal legal sanctions -- civil and criminal law -- is a more costly secondary mechanism. Of informal sanctions, complete ostracism is one of the most severe. Yet outside of the psychology laboratory, studies of actual cases of ostracism barely exist, much less examination of how it interweaves with formal sanctions.

We will construct a formal model of ostracism and examine legal cases brought over ostracism in modern Japan. Some are civil, some criminal. We find very few cases where a community used ostracism to try to control a deviant member who engaged in anti-social behavior. Instead, most cases involved disputes in which the community itself used ostracism opportunistically -- to shield community-wide misconduct, to extract property from a member, or to harass a rival faction. The plaintiffs filing these cases did not usually bring them for damages or jail time. Instead, they seem to have brought them for informational purposes: to have the court publicly certify their version of events.

## I. Formal and Informal Sanctions

Durkheim classically presented deviance as a phenomenon that communities worked to constrain through their networks of informal ties. The communities did not

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<sup>1</sup> E.g., *Watashi wa machigatte imasuka?* [Am I wrong], *Asahi shimbun*, June 23, 1952; *Saeki san yuki wo motte ...* ["Be Courageous, Satsuki," *Asahi Shimbun*, June 29, 1952; other sources on the internet.

“control” an individual as much as -- in Bernard's (1995, 85) words -- provide a “structure of self-interest ... such that people find it in their interest” to follow community norms.

Differently, but just as classically, Merton explained deviance as the result of an incompatibility between the socially prescribed life (cultural goals), and an individual's inability to attain it (institutional means). As Hirschi & Rudisill (1976, 19) described the logic: "While all are led to believe there is 'room at the top,' in fact there is not room for all .... In such a situation, ... the disadvantaged to engage in criminal behavior as the only available means of attaining it."

Sutherland pushed sociologists to shift their attention from the individual to the society. He largely abandoned Durkheim's focus on individual-level factors. Instead (in the words of Laub & Sampson, 1991, 1420; see Sutherland 1940), “crime was viewed by Sutherland as a social phenomenon that could only be explained by social (i.e., non-individual) factors.”

At the opposite extreme, Gary Becker brought a deliberately spare model of crime that turned exclusively on the individual. Scholars would do best, he argued, to posit a potential criminal who weighed his private benefit from a crime against his expected costs, and chose crime when the net result was positive (Becker [1968], 176).

Although Becker focused on legal (particularly criminal) sanctions, modern scholars in the economic tradition focus not just on the legal rules but on the informal sanctions as well. The literature is massive, but the classics include Landa (1981), Greif (1993), Ellickson (1998), and Bernstein (1992, 1996). Like many sociologists, they observe the way citizens help preserve public safety and order through informal social sanctions. They note how citizens use these sanctions to enforce norms of desirable behavior. “To some extent,” write Polinsky & Shavell (2006), social sanctions “are substitutes for public law enforcement.”

Informal sanctions are thus a community’s primary sanction against deviance, with formal criminal and civil litigation secondary, for when someone fails to respond. Among the many informal sanctions for deviant behavior, ostracism by the entire community is one of the most severe.

Scholars have written almost nothing about actual cases of ostracism in modern societies. Experimental psychologists, however, have been actively exploring how people react to it. Over the course of the past two decades they have conducted a wide variety of experiments. Most have been associated in one way or another with Kipling Williams (2007) at Purdue. A few scholars have looked at the Amish practice of “shunning”, e.g., Gruter 1986. Scattered ethnographies detail practices in hunter-gather societies, e.g., Zippelius (1986); Soederberg & Fry (2017).

Ironically, of the very few studies of ostracism in any modern democracy, perhaps the best is from sixty years ago by anthropologist Robert J. Smith (1961) on ostracism in Japan. His analysis focused on documentary evidence from eight cases: refusing to help maintain a footbridge, stealing millet, publicizing election fraud (our **Case 1**), violating a village rest day to engage in a building project, stealing potatoes, falsely claiming to police that village authorities had cut down a tree the target owned, and (in 1937) refusing to join in the celebratory send-off of an army draftee. Only the last resulted in a lawsuit.

## II. A Formal Model:

Ostracism has been modelled using game theory in various highly abstract contexts, as the idea that if one member of a group offends, the other members refuse to engage in mutually profitable interactions with him (e.g., D. Hirshleifer & Rasmusen (1989), Ali & Miller (2016)). Usually the focus is on how the group incentivizes individual members to ostracize the target by, for example, ostracizing the non-ostracizer, and the problems created by the resulting infinite chain of penalties. Here, we will put the problem of how the village enforces ostracism aside to focus on mistaken ostracism and the role of courts.

#### A. The Basic Model:

Our goal is to model a village using ostracism to deter deviant conduct, and a broader society that establishes a court system which may or may not wish to restrict ostracism. Consider several of the situations which can arise:

- (a) a villager whose actions hurt everybody but him;
- (b) a villager who hurts the village but helps society;
- (c) a villager who helps the village but hurts society;
- (d) a villager who is mistakenly believed to have hurt the village; and
- (e) other variations on the basic situation of ostracism.

Let the payoffs be normalized to zero for each player if the target villager does not deviate, the villagers do not ostracize, and the court does not get involved. The target villager chooses to comply with village custom ( $x = 0$ ) or offend ( $x = 1$ ). The village sees evidence indicating that he complied ( $y = 0$ ) or offended ( $y = 1$ ). If the target offends, he is always detected:  $\text{Prob}(y=1|x=1) = 1$ . If the target complies, the evidence sometimes mistakenly indicates that he offended:  $\text{Prob}(y=1|x=0) = m$ , where  $0 < m < 1$ .

If the target offends, he obtains personal benefit  $B > 0$  from that act but imposes cost  $C$  on the village and cost  $D$  on the rest of society. The costs and benefits  $B$ ,  $C$ , and  $D$  are unobserved until later (otherwise, the villagers could look at them to determine whether the target had offended). The villagers can either continue to associate with the target, or ostracize him at cost  $Z > 0$  to themselves and cost  $P > 0$  for him.

The costs  $C$  and  $D$  need not be positive. If they are, the target's offending is harmful; if they are negative, his "offending" is beneficial. It could be, for example, that  $C > 0$  and  $D < 0$ , which would mean that offending hurts the village but helps outsiders, as with reporting village corruption (**Case 1**, and, below, **Cases 14, 15, 16**). If  $B < C + D$ , offending is wealth-diminishing for society as a whole -- the sum of target, villagers, court, and outsiders. If  $B > C + D$ , offending is wealth-increasing for society as a whole, but still bad for the villagers if  $C > 0$ .

At cost  $L$  to himself, the target can take his case to court. At cost  $J$  to the outside world, the court can agree to hear it, to decide whether or not the target truly offended, and to announce its decision publicly (as discussed in Sec. IV.C.).

Whether or not the target has gone to court, the model then moves to a second period: the long-term. The village decides if it wants to keep ostracizing the target, in which case the costs are incurred a second time:  $Z$  for the village and  $P$  for the target.

In interpreting the model, it is unimportant that we have assumed that a target who has truly offended is detected by the village with probability one and that the court never makes mistakes. While descriptively unrealistic, adding parameters to incorporate these sources of error would make no real difference to the conclusions.

Note also that although the village “sees evidence” and “detects” offending, in application the source of the villagers’ error is not always in deciding whether the target took action X or not. Instead, sometimes the error is in whether it was appropriate for the target to take action X. There was no doubt that Satsuki Ishikawa wrote on corruption and spilled the story to the national newspaper. What was less clear was whether this was an offense against the village, or a noble act; whether it would hurt the village, or help. As law puts it, there are “mistakes of fact”-- false conclusions about what happened — and “mistakes of law”-- false conclusions about whether what happened violated rules.

### B. The Outcome:

Consider three regimes: (1) No-Penalty, (2) Unconstrained Ostracism, and (3) Constrained Ostracism. We will compute the payoffs under these regimes and compare them to see which regimes would be chosen by the village and which by the court. We assume that the target maximizes his own utility, the other villagers maximize the sum of their utilities, and the court maximizes the sum of the utilities of everyone in society-- the target (amounts  $B$ ,  $P$ , and  $J$ ), the villagers ( $C$  and  $Z$ ), people outside the village ( $D$ ), and the public court costs ( $J$ ). Each type of norm violation will have its own values for each of these parameters, and it is quite possible to have different regimes for different offenses. Reporting corruption, refusing to give up land for a road, and murder will differ in their costs, and that will be related to how the village and the courts react to them differently.

#### (1) *The No-Penalty Regime. Villagers Do Not Ostracize.*

In this regime, the villagers never ostracize anyone.

The no-penalty regime is the base case. The target will offend, for a payoff of  $B$ , since he incurs no penalty. The villagers will have an aggregate payoff of  $-C$ . The court has no role. Society’s overall welfare is  $B - C - D$ .

#### (2) *The Unconstrained Ostracism Regime: Villagers Ostracize; the Court Refuses to Hear Ostracism Cases*

(a) The villagers ostracize if they see evidence of deviant behavior.

(b) The court refuses to hear any ostracism case brought before it, ruling that ostracism is never illegal.

Under unconstrained ostracism, the target’s expected payoff is  $-2mP$  if he complies, since with probability  $m$  he will be ostracized by mistake in both periods. If he offends, it will be  $B - 2P$ , since he will be detected and ostracized. Thus, he will comply if and only if  $-2mP > B - 2P$ , which is true if  $B < 2P(1 - m)$ ; that is, if the reward from offending is small compared with the ostracism penalty and if the probability of mistaken ostracism is small enough. Note that if the probability of mistaken ostracism is high enough, the target will offend even if his benefit is small, because he can expect to be ostracized whether he really offends or not.

The village’s expected payoff depends on what the target does, so it depends on  $B$ ,  $P$ , and  $m$ . If  $B < 2P(1 - m)$  then the target complies and the village’s payoff is  $-2mZ$ , the cost of mistaken ostracism. If  $B > 2P(1 - m)$  then the target offends and the village’s payoff is  $-C - 2P$ .

Compare the village's payoff in the no-ostracism regime with the unconstrained ostracism regime. If  $B < 2P(1 - m)$ , the village benefits from having the ostracism regime if  $-2mZ > -C$ , which is true if  $2mZ < C$ . Hence the first proposition:

Proposition 1: The village prefers the ostracism regime if it does effectively deter and if the cost of mistaken ostracism is small relative to the cost from the offense.

On the other hand, if  $B > 2P(1 - m)$ , ostracism fails to deter and the target offends anyway. In that case, the ostracism regime is clearly worse for the village, because it just adds the cost of inflicting ostracism to the cost of the offense. Punishing offenders is worse than useless if it fails to deter.

We add detail to the simple statement in Proposition 1a.

Proposition 1a: In the absence of courts, villages will adopt a custom of ostracizing people who commit offenses --

that impose a relatively high cost on the village (high  $C$ ) but have a relatively low benefit to the target (low  $B$ ),

but only if the evidence for that kind of offense is reliable enough (low  $m$ )

and the cost to other villagers of ostracizing someone is not too high (low  $Z$ )

while the cost to the target is high enough to deter him (high  $P$ )

**Case 2** below will illustrate this: ostracism of the target for refusing to join fellow villagers in giving up land to construct a road that would benefit them all. Proposition 1 implies that ostracism will be used for relatively minor offenses, not major ones. It is not suitable for dealing with a villager who steals his neighbor's stash of coins. That offense is profitable for the target (high  $B$ ), unimportant to everyone except the victim (low  $C$ ), and false accusations can easily be made since the deed is secret (high  $m$ ). For such offenses, villages need government courts, and official penalties such as fines or jail.

In the unconstrained ostracism regime, society's payoff will depend on whether or not ostracism deters. On the one hand, if  $B > 2P(1 - m)$ , the target offends, so the sum of everyone's payoffs is his  $B - 2P$  plus the village's  $-C - 2Z$ , plus outsiders'  $-D$ , a total of  $B - C - D - 2(P + Z)$ . Under the no-ostracism regime, total welfare is  $B - C - D$ . Thus, social welfare is lower by amount  $2(P + Z)$  with unconstrained ostracism— since it fails to deter, all it does is impose costs on society.

On the other hand, if  $B < 2P(1 - m)$ , the target complies, so the sum of everyone's payoffs is his  $-2mP$  plus the village's  $-2mZ$ , a total of  $-2m(P + Z)$ . Under the no-ostracism regime, total welfare is  $B - C - D$ . Thus, social welfare is higher with unconstrained ostracism if  $-2m(P + Z) > B - C - D$ ; that is, if the cost of mistaken ostracism to target and village is less than the offense's benefit to the target minus its cost to the village minus its cost to outsiders.

In sum: if ostracism fails to deter offending, it merely imposes costs and it hurts the village and society. As a result, we would not expect it to persist as a social custom unless we introduce something not in the model --- for example, manipulation of the problem of group action for private gain (see **Case 13** below). On the other hand, if ostracism does deter, it can increase village and societal welfare, depending on how accurate and costly it is and whether the "offense" really is harmful to the village and to outsiders.

(3) *The Constrained Ostracism Regime: Villagers Ostracize; Court Hears Cases; Villagers Listen to the Court*

- (a) The villagers ostracize if they see evidence of deviant behavior.
- (b) The court hears any case brought before it.
- (c) The villagers end ostracism if the court declares the target did not deviate.

Regime (3) introduces court intervention. Under unconstrained ostracism, the court does not review ostracism cases. In the constrained ostracism regime, it reviews the cases, declares whether the target offended, and the villagers cease to ostracize if the target did not offend. In this regime, the target may or may not choose to comply, as we will shortly discuss, depending on the parameter values. The villagers will sometimes observe apparent offending even if he does comply, and when they observe it they will ostracize the target. The target may or may not go to court if he complies and is unjustly ostracized, depending on his legal cost,  $L$ , but if he does, he is always vindicated.

Consider the target's payoff. If he offends, his maximized payoff is his personal benefit  $B$  minus his cost of being ostracized for two periods,  $2P$ , for a total of  $B - 2P$ . If he were to go to court, he would lose and just subtract  $L$  from his payoff. If he complies instead of offending, and he goes to court if he is ostracized, his payoff is made up of the expected cost of one period of ostracism,  $-mP$ , minus the cost of going to court,  $L$ . Because he will be vindicated, however, he avoids the second period of ostracism and his overall payoff is  $-mP - L$ . If he complies but does not bother going to court, his ostracism continues, so his payoff is  $-2mP$ . Thus, he will choose to go to court if  $L < mP$ .

Consequently, the target will compare his offending payoff of  $B - 2P$  with his complying payoff of  $\text{Max}(-mP - L, -2mP)$ . On the one hand, if legal costs are high ( $L > mP$ ), he will offend if  $B - 2P > 2mP$ . In this case, the existence of the court is irrelevant since it is too expensive to use, and we are back to the same outcome as with unconstrained ostracism; the court exists and is now willing to hear ostracism cases, but access to justice is too expensive, so the result is the same as if it refused to hear cases. Thus, we can immediately conclude that for offenses complicated enough to require costly legal proceedings, the equilibrium payoffs end up being the same as under unconstrained ostracism and we can refer back to those results for our explanation of what village custom will be and whether it is a good outcome for society.

On the other hand, if legal costs are low ( $L < mP$ ), the target will offend if  $B - 2P > -mP - L$ . We will continue our analysis assuming that legal costs are low, so the target will go to court if unjustly ostracized. First, consider the village's payoff. If the target complies, the village sometimes ostracizes him unjustly, but for just one period, so its payoff is  $-mZ$ . If the target offends, that hurts the village directly plus it ostracizes for two periods, so the village payoff is  $-C - 2Z$ .

Second, consider society's payoff, which is what the court cares about. If the target complies, we must subtract the public's cost of the court,  $J$ , from the sum of his payoff,  $-mP - L$ , and the village's payoff,  $-mZ$ , for an overall social welfare of  $-J - L - m(P + Z)$ .

Thus, if the target offends, the implications for aggregate social welfare are composed of the target's payoff,  $B - 2P$ ; the villager's payoff,  $-C - 2Z$ ; and the harm to outsiders,  $-D$ ; for social welfare of  $B - D - 2(P + Z)$ .

### C. The Social Preference:

Will the village and court prefer Unconstrained Ostracism or Constrained Ostracism? Unconstrained is closer to the U.S. regime, Constrained to the Japanese (and to Whitman's European regime; see Section IV).

If the target's personal benefit  $B$  is high enough, the target is going to offend no matter what. Ostracism fails to deter, and the courts are unimportant. In that case, the no-ostracism rule is best for the village and for society. This sounds bad, but if  $B$  is large and  $C$  and  $D$  (the costs to village and outsiders) are also large, society can simply turn to criminal law, which lies outside our model. Hence Proposition 2:

Proposition 2: When a villager has violated custom and obtained enormous benefits for himself at high cost to his village *and* the outside world, the offense is criminalized.

If the offense benefits the target enough, ostracism is insufficient to deter. Instead, the court puts him in jail and prosecutes him. Failing that, the village engages in self-help: it does not just ostracize, but lynches him—though that, too, is outside of our model. Lynching would appear in our model as mathematically very similar to ostracism, but with a vastly higher cost to the target. It poses analogous disadvantages -- potential mistaken interpretation of the facts (high  $m$ ), and breakdowns resulting from collective action problems. In societies without strong state capacity, villages do often make use of lynching: think medieval Europe or frontier America.

For seriously harmful offenses, but not offences so useful to the target that ostracism would fail to deter, a society will prefer a regime in which the courts review ostracism:

#### Proposition 3:

If  $C > 0$  (the offense harms the village),  
and  $D > 0$  or  $D = 0$  (the offense harms outsiders or leaves them unaffected), and  
if the cost to the public of hearing cases,  $J$ , is not too high,  
then both village and society prefer constrained ostracism to unconstrained: court intervention is valuable.

The villagers know that sometimes they wrongly conclude that an innocent target has misbehaved. They know that judges are skilled in weighing evidence and have the benefit of hearing both sides of the story. The villagers are happy to cease ostracizing (and save the cost  $Z$ ) once they learn the truth. And since the target knows that any ostracism will be only temporary if he complies, he will comply rather than give up and decide to be truly as bad as they would think anyway by mistake. Increased accuracy helps everybody—as long as it is not too expensive.

For many offences, Constrained Ostracism also dominates a fourth regime that we might call the No-Ostracism Criminal Law Regime. In this regime, villages would not ostracize, but could choose to take an offender to court (at some cost). At that point, the court would not just determine what was true, but could impose a penalty on the target (something not in the above model). The potential superiority of the Constrained or Unconstrained Ostracism regimes over this fourth possibility is that they are cheap. Village



gossip may not be as accurate as court proceedings, but it is quick and low-cost. For modest offenses, a cheap and quick process will often dominate more accurate but costly regimes.

One unintuitive implication of the model is that if the village is somewhat inaccurate in its assessment of deviance, but not too inaccurate, the possibility of court review actually increases the usefulness of ostracism. If courts did not exist, inaccurate ostracism could lead to so many mistakes that over time we would expect villages to abandon it as a tool for social control. Recall: inaccurate ostracism results both in injustice and in harm to the village, because the punishment imposes costs on the village as well as on the target. If, however, there exists the possibility of the target going to court, the village does not need to worry so much about unjust village-harming ostracism. If the ostracism is unjust, the target will go to court, the court will inform the village of that fact, and the village will relent. Mistaken ostracism will be costly for one period, but not for two.

#### D. Intra-Village Disputes:

In the formal model, we treated “the village” as a single player. In reality, a village is a group of individuals. This is important for two reasons: it hinders information, and it hinders action. What the model shows is what the village would do if it could overcome these problems. We will now discuss them.

The information problem is already in our model, in reduced form, because the village sometimes mistakenly believes the target has offended when he has not. Mistakes like that arise even at the individual level, but they are compounded at the group level. Our model simplifies even at the individual level, because it assumes a fixed probability of mistake, whereas the individual villager makes a choice about how carefully to investigate and how much time to spend thinking about whether the target has offended. One implication of our model is that if the courts are available to remedy mistaken ostracism, the village will ostracize for offenses about which it is more likely to make mistakes. Another implication is that if the village chooses the level of care with which it decides whether the target has offended, it will choose a lower level if the court is there to fix its mistakes.

If we think about the village as a group of individuals, each making his own decision as to whether the target really offended, the village needs to have a decision rule about when to ostracize. If there are 50 villagers, and 30 of them think the target offended but 20 do not, what is the village to do? For our purposes, what matters is the probability that the rule ends up with a mistaken result. Our model implicitly says that the rule is never mistaken if the target really did offend. That is a simplifying assumption, which we could change without changing our conclusions in any important way.

Beyond the mere existence of error, however, it is important to note that the village as a group rather than individual is especially prone to error. The village as an entity, not a group, would choose an optimal effort level with which to investigate possible offending by the target. It might choose, for example, that each villager spend one hour investigating, listening, and thinking about the target, and then adopt the conclusion of the majority. Or, it might choose to have three villagers each spend 10 hours, and to have the rest of the villagers adopt the opinion of the majority of those three, which would save effort.

Either of those investigation rules raises the problems of redundancy, free riders, and bias. If more than one villager investigates and ponders, there is duplicated effort. Whether it is one villager or all, each villager who is supposed to exert effort will be

tempted to slack off, since he bears all the cost of his effort but he shares the benefit with everyone else. And each villager has a bias towards or against the target, and so delegating the investigation is fraught with the danger that he will report back wrongly. This could all be modelled mathematically, but the upshot is that villages are likely to make mistakes, and the villagers all know that.

Related to free riding is the problem of informational cascades (Bikchandani, Hirshleifer & Welch 1992). We can illustrate it with a simple example. Suppose a village consists of the target and 20 villagers, and they decide in sequence whether to say that he is guilty of an offense. Villager Ichi starts with no information, and must decide how much effort to use investigating the rumor, effort which is costly to him in time and energy. He makes a decision on how much to investigate, uncovers some evidence, and reaches the conclusion that the target is guilty, which he announces. Villager Ni now must decide how much to investigate. He already knows that Ichi investigated, so Ni will rely partly on Ichi's conclusion, partly on his own investigation. He will decide not to spend as much effort, since he can do some free riding off of Ichi by just going along with what Ichi said. Suppose Ni, too, decides the target is guilty, and announces it. It is now Villager San's turn to investigate, with even less motivation to be thorough, since he can free ride off of Ichi and Ni, and this continues with all 20 villagers. The insight of cascade theory is that even if everybody understands what is going on, this can easily reach a perverse result. It may happen that Ichi's investigation leaves him with 51% confidence that the target is guilty, but what he communicates will not be a full written report with footnotes and transcripts—just “Guilty”. Villager Ni might also, with his weaker effort, find a 51% probability and say “Guilty”. At that point, having heard Ichi and Ni say “Guilty”, suppose San's still weaker investigation turns up a 90% probability that the target is innocent. What will San do? He does not know that Ichi and Ni were on the fence, barely believing the target guilty: all he knows is that they concluded “Guilty”. Thus, quite rationally, he may disregard his own findings (which he knows are based on less effort) and also say, “Guilty”. The other 16 villagers, having seen unanimity from the first three, may also each say “Guilty” in sequence, even if each of them decides that his own, unreliable, evidence, would indicate a 90% probability of innocence. This perverse result is the big insight of cascade theory. If the villagers could pool their information, instead of proceeding sequentially, they could reach the opposite conclusion.

Poor information due to a collective-action problem of free riding in information gathering is one problem. The second collective-action problem lies in enforcing ostracism. If villager Ichi ostracizes the target, Ichi is hurting himself as well as the target. Ichi benefits from having a relationship of reciprocal help with the target. Both of them benefit when they share tools, help each other at harvest, exchange news about crop conditions, and take care of each other's children. Punishing the target may help the village as a whole, but Ichi would prefer it if the rest of the village did it but he got to keep interacting with the target. Each villager agrees that it would be better if everybody else ostracized the target, not himself.

This free rider problem has been studied in the economics literature, and the solution is to ostracize not just the target, but anybody who fails to ostracize the target. An infinite regress is required: if the target offends, then Ichi and the others must ostracize him; and if Ichi fails to ostracize him, Ni and the others must ostracize both the target and Ichi; and if Ni fails to ostracize Ichi, San and the other others must ostracize the target, Ichi,

and Ni; and so forth. Formal models are complicated because of the need to address this infinite regress (infinite because of the time dimension, even if there are only 20 villagers). They boil down to the idea that villagers will ostracize, even at personal cost, if they fear that they themselves will be ostracized if they do not, but that this set of expectations is easy to tip, with many possible equilibria depending on how the expectations arise—including how they are manipulated by the players themselves.

The multiple equilibria of ostracism, with their dependence on expectations, raise a further problem: the possibility of selfish manipulation by some villagers. Suppose the bad equilibrium is to ostracize anyone who resists bullying by villager Ichi, and anyone who fails to participate in that ostracism, and anyone who even brings up the subject of trying to change that equilibrium. Maybe nobody else likes this regime, but Ichi does, and if he is clever, he may be able to manipulate expectations so as to bring it about. Once these expectations are in place, Ichi is able to bully anybody he likes, not using his own physical prowess, but the fear other villagers have of each other.

It is important to bring Ichi's bullying because it shows how our formal model's comparison of different ideal regimes may be misguided, because maybe the village will end up maximizing not the sum of the utilities of the villagers, but the utility of Ichi. If so, we have a new reason why the target would go to court and why the court is important even if it is impotent to enforce its rulings and can only declare them. Our reason above was that the villagers know they might be wrong in thinking the target offended, and thus are happy to stop ostracizing him once the court declares the truth to them. The new reason is that the villagers know all along that the target is not guilty, but they are caught in Ichi's web of manipulated expectations and are aching for someone not caught within it to change the expectations. The court's usefulness lies in its being outside of the village, so it can change expectations in a way too dangerous for any villager to attempt.

### III. The Cases

#### A. Conventional Cases:

1. Introduction. -- We know of no catalogue of ostracism cases (usually called "murahachibu") in Japan. We do not even know of any random samples. To examine disputes that went to ostracism, we turn to published legal opinions.<sup>2</sup> We discuss the obvious questions of sample bias in Section V.

Most instances of ostracism in the published cases involve innocuous norms, disputes in which members of a community tried to enforce broadly welfare-enhancing norms of behavior. A Supreme Court case from 1921, for example, concerned a rural hamlet that had received subsidies from the larger village (mura) and county (gun) governments to build a road (**Case 2**). Sadaji Kodama owned part of the land over which the road would pass. He refused to convey it to the community. Whether his objection was that the community wanted more land from him than from others; whether it offered them higher compensation than his offer; whether the road benefited others more than him, we cannot tell from the court opinion. Three times, however, the county head visited Kodama to plead with him, to no avail. After seven or eight years passed and the hamlet had still to finish the road, the county withdrew its subsidy. Furious, hamlet members assembled and

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<sup>2</sup> We obtained most of these cases through Westlaw and Hanrei taikai searches using "murahachibu" and various synonyms.

voted to cut all ties with Kodama and with anyone -- “whether or not related by blood” -- who continued contact with him.<sup>3</sup> Kodama sued, and (as discussed in more detail below), the court called the ostracism a tort.

The Supreme Court faced a similar case in 1939 (**Case 3**). Here, too, a hamlet planned to expand a road, and here, too, a landowner refused to cooperate. The hamlet needed to remove a hedge at the edge of his property, but he refused. After long and complicated negotiations involving not just the owner but his grown nephew, community workers started to clear the hedge. The owner called the police, and the community responded by imposing ostracism.<sup>4</sup> In turn, prosecutors brought charges, and (as discussed below), the court called the ostracism a crime.

A 1952 case from the Tokyo High Court involved a hamlet's liability to the national government (**Case 4**). Under the stringent economic controls of the early post-war years, the national government requisitioned rice from farming hamlets (effectively but not formally a tax). Community leaders then allocated that amount among the hamlet members.<sup>5</sup> One of the residents in the 45-household hamlet thought his allocation unfair and refused to provide the full amount demanded. The community responded with ostracism.<sup>6</sup> The farmer sued, and again (discussed below) the court held the ostracism a tort.

In the reported cases, Japanese courts almost always declare the ostracism illegal. Sometimes police arrested the hamlet leaders, and sometimes the victims themselves sued the leaders. When prosecutors pursued criminal charges, the courts generally convicted. Section 222 of the Criminal Code made intimidation --- conduct that would “threaten the life, body, freedom, reputation, or property of another” --- a crime. The judges called ostracism criminal intimidation. When victims sued hamlet leaders, the courts generally called the ostracism a private wrong. Section 709 of the Civil Code made intentional harm a tort: the “intentional or negligent invasion of another person's rights or legally protected interests.” The judges called ostracism an intentional tort.

2. Criminal cases. -- One of the earliest criminal cases reached the Supreme Court in 1911 (**Case 5**). The case involved a man who had failed in business. He had largely brought it upon himself, and had caused his neighbors considerable harm in the process. The community imposed ostracism. Lest his friends decide to ignore the sanction, some members of the community contacted his likely sympathizers. Should the sympathizers ignore the decree, they warned, they would meet the same fate.

The court declared this threat to the sympathizers a crime.<sup>7</sup> No one has a right to social interchange, it reasoned. If anyone finds that a neighbor no longer speaks to him, he has not necessarily suffered a legal wrong. But should his neighbors stop contact collectively, they do commit a crime. “When the residents in an area decide collectively to

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<sup>3</sup> *Ogawa v. Kodama*, 27 Daishin'in minroku 1260, 1275 (Sup. Ct. June 28, 1921).

<sup>4</sup> *Kuni v. Suzuki*, 4442 Horitsu shimbun 8 (Sup. Ct. Apr. 28, 1939).

<sup>5</sup> See Smith (1961, 523) for a description of the requisitioning, and its ties to *murahachibu*.

<sup>6</sup> *Ueno v. Kurokawa*, 27 Hanrei taimuzu 58 (Tokyo High Ct. May 30, 1952).

<sup>7</sup> See also *Kuni v. Nakayama*, 7 Daihan keishu 533 (Sup. Ct. Aug. 3, 1928) (crime to threaten *murahachibu* for violating ban on contact with original offender).

punish a member, and then declare that they will cease all contact with him, they have excluded the member from their society. They have degraded his personhood, and harmed his good name.” They have, in violation of Section 222 of the Criminal Code, committed criminal intimidation.<sup>8</sup>

Government skepticism toward ostracism did not start in 1911. Even during the Tokugawa shogunate the government was skeptical. In 1822, 26 villagers in Komono village (in current Mie prefecture) sued in the local (domainal) court to expel their neighbor Kishichi. He was not, they complained, “conforming to the customs of the village” (**Case 6**).<sup>9</sup> Kishichi had moved to the hamlet from a nearby village. He farmed land which his family already owned, but the villages wanted him evicted anyway. The court thought the attempted expulsion an overreaction and punished the village leaders (Suzuki 2020).

The Tokugawa government did accept ostracism as a general tool of village control, even though its dangers were recognized. In 1827, one Kyujiro and two other villagers in what is now Saitama prefecture claimed that Chojiro owed them five ryo from loans. Chojiro denied that he owed them money. After a collection mission progressed to self-help in the form of grabbing bales of rice, a fight ensued. The crowd started breaking farm implements, and eventually a dozen other people came with the headman to break up the fight. In the end, Kyujiro paid 3 of the 5 ryo.

Two days later, the village formally ostracized Kyujiro. He immediately sued nineteen of the villagers, including the village headman. Unless they canceled the ostracism, he claimed, he would not be able to pay his taxes. The defendants denied that they had ever ostracized him, and the case settled: the debt was declared paid, the defendants admitted to the ostracism, apologized, and reinstated the plaintiff (Ooms 1996, 216-221)

Although the Supreme Court announced a flat ban on ostracism in the 1911 case (**Case 5**), courts generally took a more measured approach. In the 1939 road expansion case (**Case 3**), the Supreme Court did conclude that the ostracism was criminal. But it held it criminal only because the offenders imposed it “without a reason deemed appropriate by social convention.” As “judged by social convention, their ostracism had lacked a recognizably proper reason.” Given that lack of a “proper reason”, it violated “public order and good morals”.

Yet if in 1939 the court declared only unreasonable ostracism illegal (**Case 3**), the courts usually found the ostracism in the reported cases unreasonable. One would search long to locate any village ostracism that the courts permitted.

3. Tort cases. -- Return to the 1921 Supreme Court case where Kodama refused to provide land for a road (**Case 2**). The case did not stem from a criminal prosecution. Instead, Kodama sued the hamlet members who engineered the ostracism against him. Through the case, the Court made it clear that the tort equivalent of the Criminal Code Section 222 crime--- to ostracize collectively--- is an intentional tort. Its reasoning tracked the principles it would apply in 1939 to criminal prosecutions (**Case 3**):<sup>10</sup> “Leave aside doctors and innkeepers for whom special rules exist,” the court explained. “If someone

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<sup>8</sup> *Kuni v. Mori*, 17 Keiroku 1520, 1522 (Sup. Ct. Sept. 5, 1911).

<sup>9</sup> See generally Suzuki (2020).

<sup>10</sup> *Ogawa v. Kodama*, 27 Daishin'in minroku at 1264.

wants to take part in social interchange, he does not have a right to demand it.” But that each person may refuse to interact with another individually does not mean that a group can refuse to do so collectively.

The defendants argued that Kodama had “damaged the collective interest” of their community and they were merely trying to “preserve its good customs and order”. The court would have none of it: if community members collectively decide to terminate contact with an offending member, they commit a tort under Section 709 of the Civil Code.<sup>12</sup>

Now return to the 1952 Tokyo High Court decision about the government's rice requisition program (**Case 4**). The offending farmer refused to supply the share of the collective rice burden assigned to him by the hamlet, and the community responded with ostracism. The court declared the retaliation a tort:

This local association constitutes the base for all social activity among the residents. To participate as an individual in this activity is a right that cannot be taken away, or severely limited. ... Absent special considerations, the ostracism constitutes a tort.

4. Extortion. -- Criminal sanctions do not end with Section 222 of the Criminal Code. If neighbors vote to ostracize someone, they do indeed commit criminal intimidation under Section 222. But if they demand money in return for canceling that sanction, they commit the more serious crime of extortion, under Section 249. In 1923, a man named Kurosawa in a small Akita community made charcoal with material he had stolen from the hamlet and from a local contractor (**Case 7**). Upon discovering his theft, hamlet leaders called a general meeting and voted to terminate all contact with him.

In time, Kurosawa sought reconciliation. He asked his older brother to act as intermediary. The hamlet called a second meeting. Kurosawa apologized, and most of the members seemed inclined to end the sanction. The defendant (unnamed), however, intervened. Rather than forthrightly forgive Kurosawa, he urged the others to require that Kurosawa first pay a penalty. He demanded 200 to 300 yen. Kurosawa eventually paid 100 yen, still a massive amount for a poor farmer. Announcing the decision in 1927, the court called this extortion under Section 249.<sup>13</sup>

5. Comic relief. -- Universities. Whether involving sensible norms or not, ostracism grievances occasionally take odd turns. A 2017 case involved a breach of contract suit by an M.A. candidate at Tsukuba University (**Case 8**). The student claimed that his adviser had effectively ostracized him (the term in this case being “hamon”): he had forced him to study a topic he didn't want to study, he had exercised “academic harassment”, he had engaged in “power harassment,” and so owed the student a refund of two years’ tuition.

The adviser’s frustration seeps from the pages of the opinion. The student had originally presented his research plans in a workshop. “Consumerist Self-Change Theory: Bourdieu and Lacan,” he called his project. Most everyone else was lost. “The other graduate students aren't following you,” his adviser warned. “Could you try explaining it

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<sup>12</sup> *Ogawa v. Kodama*, 27 Daishin'in minroku 1260, 1272 (Sup. Ct. June 28, 1921).

<sup>13</sup> *Kuni v. Mukogawa*, 6 Daihan keishu 361 (Sup. Ct. Sept. 20, 1927). Canceling the punishment upon negotiation through an intermediary, followed by apology was common, as Smith (1961) notes.

again without using technical terms?” Maybe the M.A. candidate tried, because soon those other graduate students began asking questions like: “What are you trying to do in this project? Why does this matter for research?” Unfortunately, the court continued, “the plaintiff could not respond.” After the workshop, he wrote his adviser. He wanted to drop the project and pursue one of two completely different topics instead. “To be honest,” the professor replied, “I have no idea what you want to do. You're studying this and that, but are you reading the books? You can't just say, if this doesn't work I'll try that instead, or if that doesn't work I'll try this instead. Stop looking at just the surface. Ask yourself what you really wanted to do when you decided to study.”

Professors everywhere will be relieved to know that the court dismissed the claim.<sup>14</sup>

Syndicates. Organized crime syndicates in Japan (the yakuza) routinely ostracize insubordinate members. Lest rival syndicates attribute to them any misconduct by a deviant member, they send a notice (typically a printed post-card) announcing his ostracism to other gangs. One 2011 case, for example, involved fratricidal battles within the massive Yamaguchi gumi crime syndicate (**Case 9**). The leader of one faction shot the boss of the Yamaguchi gumi in a hotel lounge; the syndicate expelled (hamon) the faction; war ensued.<sup>15</sup>

A curious 2018 variation on this practice occurred in Shizuoka City (**Case 10**). The unnamed plaintiff was a long-time member of the local mob. Now in his 60s with liver cancer, he was no longer of much use to the organization. Anticipating heavy medical expenses, he applied for public welfare. The welfare office turned him down. He was still in the syndicate, and the office did not pay welfare benefits to members of the mob.

The aging gangster called a police officer he knew. He explained that he needed cancer surgery and had left the mob. How, he asked, could he prove to the welfare office that he was no longer a member in good standing? The policeman suggested he produce the usual expulsion postcard (hamonjo). Unfortunately, the gangster replied, although his boss would sign a certificate saying he had left the organization, he was too scrupulous to circulate an ostracism notice: “You haven't done anything wrong. How can I circulate an expulsion notice?” The plaintiff pleaded with the welfare office to approve him anyway. The office refused; he sued, and the district judge told the welfare office to proceed with the application.<sup>16</sup>

## B. Troubling cases:

1. Introduction. In most of the reported ostracism cases, the community did not ostracize a member in order to enforce welfare-enhancing norms; instead, it ostracized a member to enforce rather dubious norms. There are exceptions, to be sure. In one case, a man imposed costs on his neighbors by repeatedly making bad bets in business (**Case 5**); in two others, a man refused to contribute toward infrastructure improvements (**Cases 2 and 3**); in still another, a man reneged on his share of the community tax burden (**Case 4**).

Yet these plausibly benign cases are not the rule: most of the published opinions involve more troubling disputes. Some of the cases seem to involve reasonable

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<sup>14</sup> [No names given], 2017 WLJPCA 01258006 (Tokyo D. Ct. Jan. 25, 2017).

<sup>15</sup> *Kuni v. [No name given]*, 2011 WLJPCA 05249002 (Osaka D. Ct. May 24, 2011).

<sup>16</sup> [No names given], 2018 WLJPCA 04266020 (Shizuoka D. Ct. Apr. 26, 2018).

disagreements about community policy (Section 2, below). Some involve hamlets dominated by criminals (Section 3). Some involve hamlets that punished members for reporting criminal activities to the government (Section 4). Some involve hamlets that took property from other members (Sections 5 and 6). And many involve hamlets that were engaging in electoral fraud (Section 7).

2. Policy disagreements. Sometimes the community punishes a member simply for disagreeing about village policy. In one 1935 Supreme Court case, a firm planned to build a synthetic textile factory near the mouth of the Yagyu river in Toyohashi city (**Case 11**). Most residents opposed the factory on the grounds that the effluents would ruin the fish, shellfish, and seaweed harvest. When three villagers announced their support for the factory, the rest of the community retaliated by ostracizing them. Absent more detail, one cannot tell what was at stake. Perhaps the three dissenters had invested in the factory. Perhaps, the factory had bribed them. The court does not say. Instead, it treats the dispute as an honest disagreement about village policy, and held the ostracism to be criminal intimidation.<sup>17</sup>

A second 1935 Supreme Court case involved a small island off the southern coast of Kyushu (**Case 12**). Part of the Amami oshima chain, it lay a 17- to 18-hour ferry ride from the city of Kagoshima. In 1935 the island became the site of what historians would call the great “Lily Bulb War”. The residents primarily grew lily bulbs for export. In 1932, a Yokohama nursery owner formed the Japan Lily Export Association and obtained exclusive control over the government-required export inspections. Now able to block rival exporters, he planned to dominate the market. Roughly contemporaneously, however, Mitsubishi Trading decided to challenge his control. Mitsubishi offered the farmers an exclusive trading contract. The local farming association held a meeting. The farmers debated the two options. About 2,000 members voted in favor of the Mitsubishi contract and 138 voted against. The majority argued that the 138 opponents were jeopardizing the deal with Mitsubishi for private gain and hit them with ostracism. The court held the ostracism to be criminal intimidation.<sup>18</sup>

3. The village bully. -- A 2007 Niigata District Court case involved a village bully (**Case 13**). Taro Kono (a pseudonym) dominated his village through wild and unpredictable violence. He picked fights. He beat people. His neighbors called the police multiple times: when he started to strangle someone; when he swung a metal bar at someone; when he attacked a man with a sake bottle. Kono also ran the annual village festival. According to the others, he ran it autocratically and stole community funds. Several members distanced themselves from the event. When they did, Kono retaliated by intimidating the other village members into ostracizing them. Niigata District Court declared the ostracism a tort.<sup>19</sup>

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<sup>17</sup> *Kuni v. Okada*, Hanrei hyoron kei 98 (Sup. Ct. Apr. 19, 1935).

<sup>18</sup> *Kuni v. Shigenobu*, xx 1405 (Sup. Ct. Oct. 25, 1935); <http://www.kaikou.city.yokohama.jp/journal/102/02-2.html>; <http://yokohama-now.jp/home/?p=6048>; <http://psieboldii.blog48.fc2.com/blog-category-9.html>.

<sup>19</sup> *Kono v. Kono*, 1247 Hanrei taimuzu 248 (Niigata D. Ct. Feb. 27, 2007).



4. The snitch. Six decades ago, anthropologist Robert Smith (1961, 527) observed that Japanese who reported community misdeeds to the police could suffer ostracism. So they did. And it continues. Akimitsu Fujii ran a general store in Kumamoto with his wife and three daughters (**Case 14**). One January afternoon, he watched the local firemen train. After practice, the firemen shared drinks. Several of them started a fight with one who had missed practice. When the police interviewed Fujii several days later, he detailed what he had seen. The firefighters retaliated by organizing a boycott of Fujii's store, and drove him and his family out of town. He sued, and the court held the firefighters liable.<sup>20</sup>

Another ostracism target worried that the local residents' association was cheating the community (**Case 15**). The association was constructing a new building, and he suspected that the contractor was shaving costs. He circulated a complaint. Steadily, he ramped up the tension. The association leaders were (in the court's words) "crazy in the head," he asserted. They were evil. They were "liars," they were perpetrating a fraud. The community sued him for slander, and won. They also expelled him from the association. When the victim sued in response, the Tokyo District Court (2008) reasoned that expulsion from the neighborhood association would have a major impact on his life, and vacated the expulsion.<sup>21</sup>

In 1954, Fukuoka High Court faced a case of ostracism by an 18-household hamlet against four members (**Case 16**). The opinion does not describe the full scope of the offending conduct, but the precipitating event seems to have been something one of the targets told the village government. The national government was still requisitioning rice from villages. Apparently, one of the four victims told the government how much rice it could safely demand of the hamlet. The other members were outraged, and expelled all four. The court convicted the hamlet leaders of criminal intimidation.<sup>22</sup>

5. Theft. Tomoyuki Arakawa was a nationally prominent potter in the town of Yagusa, within Toyota city, Aichi prefecture (**Case 17**).<sup>23</sup> His family had lived in the village since the Tokugawa period. Other than seven years in nearby Nagoya, he had spent his entire life in Yagusa.

Arakawa made pots with clay he dug from the communal mountain. He built his kiln on the mountain. He fired his pots with wood he collected on the mountain. Sometimes he left his home for days on end to work at the kiln. His neighbors considered him an odd fellow, but no one much minded how he made his pots.

The mountain covered roughly 40 percent of the "town." Gardens and paddies occupied most of the rest. The national government had conveyed the mountain to the

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<sup>20</sup> *Fujii v. Ichida*, 1970 WLJPCA 03240001 (Kumamoto D. Ct. Mar. 24, 1970).

<sup>21</sup> [No names given], 2030 Hanrei jiho 38 (Tokyo D. Ct. Oct. 17, 2008).

<sup>22</sup> *Kuni v. [No name given]*, 7 Kosai keishu 217 (Fukuoka High Ct. Mar. 31, 1954).

<sup>23</sup> Shun'ei Aikawa, "yakkasha" no letteru wo hararete chien no rin no soto he tsukyu [Labeled a "Trouble Maker" and Thrown out of the Region, *Diamond Online*, June 26, 2012; see also Jichiku no tochi ga ookane unde ... [Communal Land Generates Massive Cash and ...], *Shukan Asahi*, Jan. 30, 2009; Toyota ga jimoto de daikibo "kankyo hakai" [Massive "Environmental Destruction" in Toyota Area], *Sentaku*, Feb. 1, 2012. A recent case of murahachibu in the city of Usa, Oita prefecture, similarly involved the distribution of subsidies to local residents. Moto komuin ga uttaeta ... [Former Government Official Complains ...], *Daily Shincho*, Oct. 18, 2018; Jichi kai shin kyu kucho ra arasou shisei [Old and New Municipal Heads Do Battle], *Asahi shimbun*, Nov. 14, 2018.

village in 1913. Title lay with the descendants of the 75 families who were resident in 1913, including the Arakawas.

Over time, the humble mountain became extraordinarily valuable. A mining company discovered it contained valuable deposits of silica. Near as it was to the Nagoya metropolis, it had development potential. Near as it was to the Toyota factory network, it could provide land for access roads. By 2008, the constituent 1913 families had exploited its potential so shrewdly that they had amassed 2 billion yen (about \$20 million).

The group decided to distribute the 2 billion yen to the constituent owners, but they refused to pay Arakawa his share. Arakawa sued for the money, and he also sued to stop the development. At root, he seems to have cared less about the money than about stopping the mining, the construction, and the roads. The other villagers invented one reason after another not to pay him his share, but they mostly wanted him gone. Ostracism came naturally in this case. “Just leave Yagusa,” one village official begged. As of 2020, the litigation was apparently still in progress.

6. Forced redistribution. – Conveniently structured to facilitate taking from the wealthy few and transferring to the poorer many, ostracism is an intrinsically populist mechanism. Communities use it for exactly that purpose. In 1946, the Miyamoto family on the island of Shikoku decided to cancel its leases with several families who had been renting its land (**Case 18**). Both the Miyamoto family and the lessees had been part of the local Japan Farmers’ Union (Nihon nomin kumiai), a hard-left group with alliances (conflicting ones) to both the Socialist and Communist Parties. Sixty of the eighty households there were part of the Union. Once the Miyamoto family announced their plan to cancel the tenancies, the local Union expelled and ostracized them. The Miyamotos could find no one from the hamlet willing to work on their land. The local court declared the ostracism a tort, and the parties settled out of court.<sup>24</sup>

The year 1946 was also the year of the U.S.-imposed “land reform” program (see Ramseyer 2015). The Miyamotos may have cancelled the leases in the hope that they would obtain better terms for land they tilled themselves. Under the program as eventually imposed, the government took land from farmers owning more than 3 hectares (with nominal compensation) and gave it to their former renters at a nominal price. Subject to modest variation, the redistribution applied to all farm land.

The program famously did not apply to mountain land. Although worth less than farm land, the mountains had real value. Obviously, they provided lumber. They supplied the firewood and grasses that farm households needed. Near metropolitan centers, they had development potential (as the Yagusa families discovered, **Case 17**). And many mountains contained food -- the “mountain vegetables” (sansai) used in many dishes and the extraordinarily expensive (sometimes \$1,000 per kg) mushrooms known as matsutake.

One Hyogo town managed its local mountain collectively through a voluntary association (**Case 19**). The association included 103 households, a majority of local residents. In 1950, it decided to require all villagers owning more than 2 hectares of mountain land to transfer to the association without compensation all rights to sansai and matsutake on their land. The national government had not redistributed the mountain land, so the locals decided to do it on their own.

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<sup>24</sup> *Miyamoto v. Suzuki*, 61 Hanrei jiho 22 (Takamatsu D. Ct. Mar. 1, 1955).

Five families refused to cooperate. When the association withheld from them their share of the communal profits in response, they sued. In retaliation for the lawsuit, the association declared ostracism on the five families. In the criminal case that followed, the district court acquitted the association members on the ground that the sanctions did not bind, but the high court reversed. In 1958, the Supreme Court affirmed the reversal.<sup>25</sup>

7. Electoral fraud. -- The most common troubling cases involve elections. The Japanese Diet did not adopt universal manhood suffrage in national elections until 1925, but suffrage for some local elections reached more broadly before that. In the typical case, members of a community assembled and collectively decided whom they would support. They realized that individually they would have no impact on the electoral outcome, but that by voting together they might be able to flip the outcome.

In 1913, the Supreme Court used an electoral dispute to decide what is the oddest of its ostracism cases (**Case 20**). Villagers had agreed to vote for a given candidate and to punish anyone who voted otherwise. Two residents did. The others imposed ostracism, and prosecutors convicted several ostracizers on criminal charges. The Supreme Court reversed the convictions. Ostracism was not always criminal, it explained. Villagers can ostracize members for a wide variety of reasons, some morally justified, some not. In this case, the two offenders had reneged on their promise to vote for the community-chosen candidate. When people punish someone to force him to do something he has no obligation to do, they commit criminal intimidation. Here, however, they punished him not for voting a certain way, but for breaking his promise to vote a certain way.<sup>26</sup>

More typical is a 1920 case in which most voters in a village in Mie Prefecture favored one candidate in the national Diet election (**Case 21**). Katsunosuke Oku favored another. Outraged by his independence, the other villagers decided to sever all ties with him. The prosecutor brought charges, the judge convicted, and the Supreme Court affirmed. The Court followed the standard formula: no one has a right to social intercourse, but when a community refuses it collectively, they commit criminal intimidation.<sup>27</sup>

A 1924 case followed the same pattern (**Case 22**). Four people were arrested for violating electoral law in the Miyagi prefectural elections. A certain Mr. Honda, living in the same village, had turned them in. The arrested villagers complained to their neighbors, and the village's mutual aid society voted to expel Honda and ostracize him. The trial court convicted the villagers of criminal intimidation, and the Supreme Court affirmed.<sup>28</sup>

A second 1924 case involved not an official village sanction, but a threat by an influential leader in Nara unilaterally to oust an uncooperative villager (**Case 23**). The leader told the villager to vote for a particular candidate. Try anything else, he warned, and he would expel him. The prosecutor brought criminal charges against the leader. Expelling someone from a village is not a technical term, and the defendant's lawyer professed not to know what it meant. The Supreme Court declared it easy to see that the

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<sup>25</sup> *Kuni v. [No name given]*, 135 Hanrei jiho 32 (Osaka High Ct. Sept. 13, 1957), *aff'd*, 154 Hanrei jiho 5 (Sup. Ct. July 3, 1958).

<sup>26</sup> *Kuni v. Okubo*, 19 Keiroku 1349 (Sup. Ct. Nov. 29, 1913).

<sup>27</sup> *Kuni v. Fukuda*, 26 Keiroku 912 (Sup. Ct. Oct. 12, 1920).

<sup>28</sup> *Kuni v. [No names given]*, Daihan keishu 506 (Sup. Ct. June 20, 1924).

defendant meant “murahachibu.” The lawyer also protested that the defendant had had no authority to expel anyone anyway. The Supreme Court observed that the defendant was an influential man, and that a resident could reasonably worry about the threat. It affirmed the conviction.<sup>29</sup>

#### IV. Zones of Judicial Neutrality

##### A. Introduction:

These cases suggest that the courts generally decide whether to intervene in ostracism on the basis of the conduct involved. They intervene when a community ostracizes for improper reasons. In a small number of disputes, however, the courts purport not to intervene at all. In cases involving political parties and religious groups, for example, courts instead announce they will let the losses “lie where they fall”.

These cases do not involve the typical community ostracism we have so far described. Instead, they involve the different question of who controls the membership rosters of voluntary associations. They do not involve a village that decides to shun a deviant resident; they involve associations that people join to express their political and religious preferences.

Japanese courts, like American courts, try to stay away from religion and politics. As Douglas Linder (1984, 1881) puts it in the U.S. context, courts hesitate to compel the “benefits of membership in a voluntary association.” Instead, they declare that “the associational freedom at stake, the right of an association to define its own membership, is fundamental to a conception of a pluralistic free society.”

##### B. Political Parties:

The best known political case involved a power struggle in the Japan Communist Party (**Case 24**). Kenji Miyamoto, Satomi Hakamoto, and Sanzo Nozaka had helped lead the party during the pre-war years. These were tough men. In 1933, Miyamoto and Hakamada tortured to death Tatsuo Obata, whom they suspected of spying for the police. Sanzo Nozaka was in Moscow during Stalin's purges, and survived by inventing charges against another Japanese Communist in Moscow, who was promptly shot.

After the war, the American occupation welcomed all three into the public realm.<sup>30</sup> The three promptly took over the Japanese Communist Party. Nozaka won election to the national legislature in 1946. When Stalin ordered the Party to abandon peaceful tactics in 1950 (the start of the Korean War), Miyamoto went underground and masterminded the party's bombing and sabotage campaign, while Hakamada ran the party's legal arm. Miyamoto returned to electoral politics after Stalin's death, and rose to the post of central committee chairman in 1970, with Hakamada as vice-chairman. Decades later, Miyamoto continued to insist that Obata had died a natural death; Hakamada wrote that they had strangled him to death. Hakamada also nursed a long-term suspicion that Nozaka remained a Soviet spy (which Soviet archives would later prove true).

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<sup>29</sup> *Kuni v. [No names given]*, 3 Daihan keishu 338 (Sup. Ct. Apr. 15, 1924). The prewar Supreme Court also affirmed criminal convictions in *murahachibu* disputes over an election in *Kuni v. Kamiya*, 13 Daihan keishu 5406 (Sup. Ct. Mar. 5, 1934), and *Kuni v. [No names given]*, Hanrei hyoron kei 123 (Sup. Ct. Sept. 9, 1942).

<sup>30</sup> On the occupation's role (and the place of E.H. Norman), see Miwa & Ramseyer (2005).

Late in the 1970s, Hakamada began to write about how he and Miyamoto murdered Obata. Miyamoto immediately moved to expel him from the party. In 1977, Hakamada was dropped from the party's Central Committee. When Hakamada retaliated by publishing yet more information about the murder, the party expelled him.

Since 1963, Hakamada had been living in party housing. For a house with market rental of 132,000 yen per month, Hakamada paid 22,000. Having expelled him, the party ordered him to leave. Hakamada refused, and the party sued. Hakamada explained that he was growing old, and having worked for the party at low pay his entire life, had little savings. The District Court ordered Hakamada out, and the High and Supreme Courts affirmed. The courts declared internal party disputes beyond their jurisdiction. Said the High Court:

Political parties are indispensable for supporting representative democracy, and effective bodies for helping citizens structure their political thoughts...

The expulsion and other punishment of party members are matters internal to the parties themselves. These matters follow from the right of party self-governance, and the courts should treat them with ample respect.

The courts would not intervene.<sup>31</sup>

### C. Religious Organizations:

Courts show the same reticence toward disputes within religious organizations. In the United States., writes Eric Posner (1996, 185), the "Free Exercise Clause and common law principles of free association ... prevent people from suing a religious group for expelling them ...." For the most part, so too in Japan. During the last decades of the 20th century, Japanese courts faced several cases involving the highest-profile religious movement in Japan: the "Soka gakkai." The "Nichiren shoshu" Buddhist denomination traced its roots to 13th century priest Nichiren.<sup>32</sup> In 1930, Nichiren shoshu organized the Soka gakkai as its lay organization. After the Second World War ended the gakkai grew explosively, with its roots in the blue-collar working-class community. In 1960, gakkai leadership passed to Daisaku Ikeda. Ikeda was a polarizing figure, and brought both international publicity and domestic hostility.

In time, clerical leaders within Nichiren shoshu grew suspicious of Ikeda. By 1991, tension reached the point where the denominational leaders demanded that priests attack the gakkai leadership and pledge loyalty to the denomination. Soon, they would expel the gakkai itself. One Nichiren shoshu priest refused to attack the gakkai (**Case 25**). He lived in temple housing, but he refused to sign the proffered statement. In response, the denomination expelled him from the priesthood, slashed his pay, and evicted him.

The priest sued for damages, but Shizuoka District Court refused. Religious denominations were like political parties. The constitution protected their self-governance,

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<sup>31</sup> *Hakamada v. Nihon kyosan to*, 1085 Hanrei jiho 77 (Tokyo D. Ct. May 30, 1983)(judgment for party), aff'd, 1134 Hanrei jiho 87 (Tokyo High Ct. Sept. 25, 1984), aff'd, 1307 Hanrei jiho 113 (Sup. Ct. Dec. 20, 1988).

<sup>32</sup> "Nichiren shoshu" is distinct from the larger "Nichiren" denomination.

and unless they violated “public order and good morals” or threatened “basic human rights” the court would not intervene.<sup>33</sup>

## V. Findings

### A. The Basic Observation:

A dispute arises within a village. One faction wins. The winners ostracize the losers. The losers sue. The court adjudicates.

Most court disputes over ostracism in Japan share one basic characteristic: they have nothing at all to do with the theory at stake in Section I about informal social sanctions against deviance. Many cases do not involve attempts by a community to control anti-social deviance at all. Instead, they involve opportunistic tactics by the community itself. In some cases, the community tried to punish a member who attempted to stop the broader patterns of community misconduct (**Cases 1, 14, 15, 16, 20, 21, 22, 23**). In some cases, the community used the ostracism to extort property from a minority of members (**Cases 4, 17, 18, 19**). In one case, an opportunist manipulated ostracism to his private advantage (**Case 13**). And in some cases the community split, and one faction used ostracism to penalize the other (**Cases 11, 12, 24, 25**).

### B. How Did the Courts Adjudicate These Disputes?

1. The informational mismatch. In evaluating what villages do to punish deviance, courts look at different set evidence than the village, and look at the same evidence differently. When villagers ostracize, they do so on the basis of a long history. They may think the deviant's latest behavior the last straw -- the most recent misconduct in a long life of misconduct. Should they decide to ostracize the deviant, they will not punish him just for his latest outrage. They will punish him for the totality of his life history and character

Judges do not do this. A judge does not know the deviant. About the deviant, he hears only what the lawyers and witnesses decide to tell him. The judge does not necessarily have a less accurate information set than the village, though his eyes are less obscured by self-interest and irrelevant evidence. He does have a decidedly more circumscribed information set.

2. The risks to stopping ostracism. Communities can ostracize to enforce welfare-maximizing norms, but they can also hurt social welfare. When an ostracism target files suit, the judge faces the task of distinguishing between those two possibilities. He will ask whether the target's behavior was socially undesirable, whether the villagers accurately understood the facts, and whether they are caught in an inefficient equilibrium.

Generally, forcing unwilling people to interact with each other lowers social welfare. After all, if the parties thought the trade of favors mutually advantageous, they would have interacted. As with trade of goods, though, there can be “market failure”. The social group may misinterpret the target's actions, or get them wrong--- gossip notoriously mixes truth and falsehood. In a small village, the danger of misinformation is less. In a larger community, however, the informational contrast may favor the court, which acquires evidence in a systematic way. As discussed earlier, free riding is a problem, and it is a

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<sup>33</sup> [No names given], 1650 Hanrei jiho 109 (Shizuoka D. Ct. Aug. 8, 1997); see also *Hakuren'in v. Furuya*, 1103 Hanrei jiho 2 (Sup. Ct. July 20, 1993).

bigger problem in a bigger social unit. And as we have explained, coordination failure and manipulation is an additional complication, and it is harder to coordinate in a larger group. Finally, ostracism can represent simple extortion. As in **Cases 18 and 19**, the few wealthy farmers in a village cannot farm without the cooperation of the poorer many. The poorer can threaten ostracism on the wealthy few, and agree to desist for money or property.

3. The U.S. contrast. In Japan, the government can intervene. Targets may sue ostracizers, and the courts may award them relief. Prosecutors may file charges, and judges may convict. In the U.S., courts hesitate to intervene. They do recognize the tort of intentional infliction of emotional distress. Yet usually they intervene in ostracism only when they see a group threatening someone in a “protected” category. Under labor law, they might intervene if a company is using ostracism to isolate a union organizer. Under Title VII, they may intervene if the ostracism is because of sex, race, religion, or national origin. But absent a protected category, they usually leave the ostracized to their own devices (e.g., Coleman 2006, 60).

4. France and Germany. In routinely striking down ostracism, Japan is not the outlier among wealthy democracies: America is. James Q. Whitman tells us that German and French courts are much readier than U.S. courts to protect people who are socially harassed (Whitman & Friedman 2003, 243). American courts worry about the government intruding into their private sphere; European courts sim “to protect people from shame and humiliation, from loss of public dignity” (Whitman 2004, 1164; see Whitman 2000). Whitman attributes this in part to Europe’s aristocratic past. Germany and France both maintained an “honor culture” among their elites. When they democratized, they extended the dignity formerly limited to elites to everyone.

That does not really explain Japan, however, Japan has an aristocratic past, to be sure. But Japanese courts did not wait to police ostracism until after they democratized in the late 1940s. They already held ostracism of peasants illegal during the distinctly non-democratic decades of the early 20th century.

### C. Selection into Litigation and Ostracism:

1. Introduction. We do not have a random sample of village disputes, of disputes that led to ostracism, or even of ostracism cases that led to litigation.

2. The incidence of ostracism. -- Measuring the incidence of ostracism is hard. If ostracism has different consequences from place to place, one would not expect people to use it similarly everywhere. Neither would one expect courts to respond similarly.

Ostracism hurts villagers more than city dwellers. It hurts workers in a tightly structured, regulated profession (e.g., physicians) more than workers with broadly useful skills (e.g., manual laborers). It hurts merchants who trade on credit within broad networks with high levels of social capital more than merchants who trade in cash with strangers. Even within a given industry, ostracism works differently from place to place. In the 19th century, Japan and U.S. were both overwhelmingly agricultural. Yet among these farmers, ostracism would have hit Japanese villagers much harder than American villagers. Japanese farmers grew rice, and pre-mechanized wet-rice farming was a necessarily communal affair (Wittfogel 1957; Haley 2016). Without community help, a farmer had no

choice but to abandon the industry and move to town. Kansas farmers grew wheat. They could easily make do, and often did, without community help.

We know of no studies of ostracism's incidence in the U.S. We have a bit more information about Japan, but it does not support any claim that ostracism is widespread. The national Asahi and Mainichi newspapers include almost no cases of ostracism beyond those discussed in this article (electronic searches, 2020).

Government records include evidence of about 20 instances of ostracism per year (see Table 1). Even if he chooses not to file suit, someone who believes others have infringed his rights may report the offense to the local office of the Ministry of Justice. Officials from the Ministry will then investigate. If they believe his rights have been infringed, they may try to help him. They explain, negotiate, mediate, and bring in private organizations that might help.

[Insert Table 1 about here.]

In 2018, people reported 19,600 cases of human rights violation to the Ministry (Homu sho 2018). Few concerned ostracism. Table 1 shows the number over a five-year period. We have no reason to think all cases were reported. Subject to that qualification, from 2015 to 2019 the rate was 20 per year. The Ministry does not report details beyond location. Disproportionately, the cases do come from northeastern Japan (the Tohoku region), central Japan (Chubu), and the areas adjoining the Seto Inland Sea (Chugoku and Shikoku).

3. Selection into Litigation. Only a small percentage of people who quarrel with their neighbors go to court. Moreover, such people and such quarrels are a decidedly non-random sample of disputes. Prosecutors pursue to trial only a small minority of people arrested. As with civil suits, the prosecuted are a decidedly non-random sample of the people arrested. The logic to the selection follows the well-known dynamic of litigation and settlement (e.g., Landes & R. Posner 1975; Priest & B. Klein 1984). Rather than pay more to lawyers, both sides to a dispute will usually settle out of court in the shadow of what they expect the court to decide. Suppose a villager sues, but both he and the village leaders agree that a court will ultimately decide in his favor. Rationally, both gain by negotiating an out-of-court settlement in which the village leaders publicly acknowledge the target's version of the dispute.

Note too that plaintiffs and prosecutors will tend to select cases in which the ostracism appears improper. To the extent that plaintiffs sue to have the court publicly endorse their claims of innocence, they will not sue when the court will publicly certify their misbehavior to the world. Prosecutors, too, will select cases to pursue for the message a conviction will convey to the rest of the community. In no country do prosecutors have the resources to pursue all of the cases that police forward to them—or even a majority of them. Instead, they focus on the cases that will most forcefully reinforce the norms they want people to follow. With ostracism, as with crime generally, they will focus on the most outrageous cases. When the village gets ostracism right, the prosecutor will leave it alone.



4. Selection into ostracism. The logic of litigation and settlement applies to costly disputing tactics more generally, and ostracism is costly. It is a cessation of voluntary interaction, a return towards autarky. Given that parties trade only when mutually advantageous, an end to trade necessarily hurts them all, destroying the gains from trade. Thus, a dissenter and his community both gain by avoiding ostracism and settling their dispute amicably. Provided they both anticipate the same outcome if they push the conflict into ostracism, they both gain by agreeing to back off from that cliff.

Crucially, however, dissenter and community only reach this mutually beneficial settlement if they can agree about what will happen if they push the dispute into ostracism. When a community is in stasis, with families, economy, roles, and power relations the same as they were the previous hundred years, the parties will often agree about the probable outcome of conflict. They both know how much interaction they would lose from ostracism. They know each other's feasible alternatives. They know whether any villager would deviate and secretly help the target.

When a community is in transition, the parties are less likely to agree on what might happen if they fight. A dissenter may believe he can find profitable employment in a nearby city; the rest of the community may know better. The community may believe they can cheaply replace the dissenter's services; the dissenter may know how much they will miss his talents. With change comes uncertainty.

Crucially, most of the disputes above involve communities in flux. Most obviously, many involve agricultural villages located near rapidly expanding municipal centers. Necessarily, in these cases both sides to a dispute will need to estimate the alternatives available to each other in the greater municipal area. Necessarily, they will rely on information that is much less certain than would be the case in remote and stable agricultural villages from which there is no realistic alternative of escape to the big city and a new life.

#### D. The Informational Logic to Litigation:

1. The logic. -- Although the plaintiffs in the ostracism cases filed monetary claims, they probably did not collect substantial compensation. Given that these are mostly appellate decisions, few give the amounts the plaintiffs recovered. Those that do give the numbers do not report large amounts.

The prosecutors could not have expected to obtain heavy penalties either. Again, given that these are appellate decisions, most do not report the penalties imposed. Those that do give them, however, report only suspended sentences.

Instead, the plaintiffs (and prosecutors) seem to have filed the suits for the informational role that courts can play -- they sued to obtain public certification and dissemination of their story. They sued in a way that reflected the role that the courts themselves can play in producing, certifying, and publishing information. They sued to capitalize on what Sadie Blanchard (2018) called the court's role as an "information intermediary." In the course of litigation, courts produce information. When they ultimately decide a case, they certify that information. They announce it to the public. They disseminate it.

Crucially, litigation can change the character of the public understanding of a dispute. If a dissenter sues and wins, the dispute now becomes the judge's word against that of the village leaders. And if the dispute has any news value, the local press will

convey the judge's word broadly. Through litigation, the victim both increases the credibility of his account, and conveys that information more broadly than otherwise he could do.

This certification and dissemination matter because of the impact that information about the dispute can have on the relative reputations of the leaders and the dissenters. Those reputations, of course, determine the capacity of both groups for advantageous trade. The more public the information, the greater the impact on future economic transactions.

Courts, explains Blanchard (2018, 512), raise a “[r]eputation's effectiveness” because they spread “information about past behavior ... more widely among potential counterparties.” One of us has written about the “stigmatization” function of punishment (Rasmusen, 1996). What the courts illustrate in this context is their capacity to “destigmatize” when communities punish the wrong party.

## VI. Conclusions

We have long treated informal social sanctions as a community's primary way of controlling deviance. We have treated formal legal sanctions -- both civil and criminal -- as a more costly secondary mechanism. Among the informal sanctions that a community can impose, we have treated ostracism as one of the most severe. Yet very few scholars have studied actual instances of ostracism.

We examine legal cases brought over ostracism in modern Japan. Some of these cases are civil, and others criminal. As with any other kind of dispute, very few cases of ostracism actually reach the courts. Of those cases that do reach the courts, however, very few involve a community that used ostracism to restrain deviance. Instead, most cases involve disputes where the community used ostracism opportunistically -- to extract property from a member, for example, to hide community-wide malfeasance, or to harass a rival faction.

The plaintiffs who bring these ostracism cases do not primarily bring them for damages (or prosecutors, for criminal sanctions). Instead, they apparently bring them for informational purposes: to have the court publicly certify their version of the events involved. They bring them because these were the cases where ostracism was unjust, even by village standards. The plaintiffs bring them to obtain the court's imprimatur on their claims of innocence.

**Table 1: Reports of Ostracism to Human Rights Offices,  
by Year and Region**

|                      | Total | Hokk'do | Tohoku | Kanto | Chubu | Kansai | Chugoku | Shikoku | Kyushu |
|----------------------|-------|---------|--------|-------|-------|--------|---------|---------|--------|
| 2015                 | 23    | 0       | 3      | 0     | 11    | 4      | 0       | 1       | 4      |
| 2016                 | 19    | 0       | 1      | 2     | 6     | 1      | 3       | 3       | 3      |
| 2017                 | 24    | 1       | 2      | 3     | 7     | 2      | 4       | 4       | 1      |
| 2018                 | 23    | 0       | 4      | 2     | 5     | 0      | 0       | 8       | 4      |
| 2019                 | 11    | 1       | 0      | 1     | 6     | 2      | 1       | 0       | 0      |
| Total                | 100   | 2       | 10     | 8     | 35    | 9      | 8       | 16      | 12     |
| 2012 Popn (millions) | 122.6 | 5.5     | 9.2    | 42.7  | 21.6  | 22.7   | 7.5     | 3.9     | 13.2   |

Notes: Cases of “muraichibu” reported to Ministry of Justice Human Rights offices.

Sources: Homu sho, Jinken shinpan jiken tokei [Statistics on the Violation of Human Rights] (various years).

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