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Ostracism in Japan

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Abstract: Whether in sociology or in economics, scholars have long treated informal social sanctions as a community's primary means of controlling deviance and formal legal sanctions as a more costly secondary mechanism when offenders are not amenable to informal control. Ostracism is one of the most severe informal sanctions. Outside of university laboratories, however, studies of actual examples of ostracism barely exist. We construct a formal model of ostracism and examine legal cases brought in modern Japan by targets of ostracism against their ostracizers. We find very few lawsuits resulting from attempts by a community to use ostracism to try to control members who truly are offending against social welfare. Instead, in most instances the community used ostracism opportunistically -- to extract property from a member, for example, to hide community-wide malfeasance, or to harass a rival faction. Cases against villages misusing ostracism in these ways were not filed primarily for money damages or criminal sanctions. Instead, they were brought for informational purposes: to have the court publicly certify and publicize what happened that resulted in ostracism. These cases are of course not representative of all ostracism cases, so as is usual when using lawsuits as data, we must discuss the non-random selection of disputes into ostracism, and of ostracism into litigation.

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It happened in 1952 in a small village at the base of Mt. Fuji **(Case 1)**. 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.

Teenager Satsuki Ishikawa thought this outrageous. Still in middle school, she wrote an article about this electoral fraud for her school newspaper. School administrators collected every copy of the issue and destroyed it. 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 worried that they might be part of 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 electoral fraud hit the national news. The police arrested the guilty village leaders. The community responded by ostracizing the Ishikawa family.

Readers of the Asahi wrote in from around the country in support of Satsuki Ishikawa. 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 arrived to transplant the Ishikawa fields, no one came to help.[1]

Both in sociology and in economics, scholars have treated informal social sanctions as a community's primary mechanism for controlling deviance. They have treated formal legal sanctions -- both civil and criminal -- as a more costly secondary mechanism. Among the informal sanctions, scholars have described ostracism as one of the most severe. Yet outside of the psychology laboratory, studies of actual cases of ostracism barely exist.

We examine legal cases brought over ostracism in modern Japan. Some are civil, and some criminal. We find very few cases where a community used ostracism to try to control a deviant member who had engaged in anti-social behavior. Instead, most cases involved disputes in which the community itself used ostracism opportunistically -- to shield community-wide misconduct, for example, to extract property from a member, or to harass a rival faction. The plaintiffs filing these cases did not primarily bring them for damages (or prosecutors, for criminal sanctions). Instead, they seem to have brought them for informational purposes: to have the court publicly certify their version of the events. We note, and discuss, the non-random selection both of disputes into ostracism, and of ostracism cases into litigation.

We begin by exploring the scholarly literature on formal and informal sanctions on deviance (Sec. I), and in Sec. II turn to the literature specifically on ostracism. We introduce a formal model of the interaction between ostracism and its judicial review in Sec. III. We describe our sample of modern Japanese ostracism disputes (Secs. IV, V), and conclude with a discussion of our findings (Sec. V).

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[1] 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.

I. Formal and Informal Sanctions

A. The Informal Sanctions on Deviance:

1. Introduction. -- As scholars, we picture ostracism as an informal social sanction on deviant behavior, and crime as a subset of deviance. Among the many informal sanctions that a community can impose, we picture ostracism as among the most severe. Among the many deviant behaviors in which an individual can engage, we picture crimes as among the more anti-social. We picture informal sanctions as a community's primary sanction against deviance, and formal criminal punishment as a secondary sanction to use when someone fails to respond to those informal measures.

Durkheim classically presented deviance as a phenomenon that communities worked to constrain through their networks of informal ties. The communities did not "control" an individual as much as -- in Thomas Bernard's (1995, 85) words -- provide a "structure of self-interest ... such that people find it in their interest" to follow community norms. As Thorolfur Thorlindsson and Jon Gunnar Bernburg (2004, 272) put it, the communities built "strong and durable social relationships [that] produce sensitivity to the expectations of others, and commitment to institutionalized careers ...." Crime, by this account (Bernard 1995, 85) "does not [so much] result when 'controls' break down, [as] when the structure of self-interest is such that people find it in their interest to break the law."

Differently, but just as classically, Merton explained deviance as the result of incompatibility between the socially prescribed life (cultural goals), and an individual's inability to attain it (institutional means). He posited two theories, of "anomie" and "strain", which capture similar phenomena. Anomie occurs when "a disjunction between the emphasis on cultural goals and institutional means" creates a "deinstitutionalization of norms" (Featherstone and Deflem, 2003, p. 472). Strain causes deviance "when people "are blocked from accessing the institutionalized means to these [culturally prescribed] goals..." (idem). Write Travis Hirschi and David Rudisill (1976, 19):

> While all are led to believe there is 'room at the top,' in fact there is not room for all, and legitimate means of getting there are not equally distributed through the class system. In such a situation, the 'culturally induced success-goal' exerts pressure on the disadvantaged to engage in criminal behavior as the only available means of attaining it.

In his own approach to crime, Edwin Sutherland pushed sociologists to shift their attention from the individual to the society. Sutherland largely abandoned Durkheim's focus on individual-level factors such as age and sex. Instead (in the words of Laub and Sampson, 1991, p. 1420), "crime was viewed by Sutherland as a social phenomenon that could only be explained by social (i.e., non-individual) factors." Sutherland calls his approach "differential association": individuals learned about crime -- motives, understandings, techniques -- through their contact with other individuals. As Sutherland (1940, 10-11) himself says:

> [Criminality] is learned;...it is learned in direct or indirect association with those who already practice the behavior; and... those who learn this criminal behavior are segregated from frequent and intimate contacts with law-abiding behavior. Whether a person becomes a criminal or not is determined largely by the comparative frequency and intimacy of his

> contacts with the two types of behavior. This may be called the process of differential association.

Unsympathetic scholars would write that Sutherland and his followers described crime as no different from any other career choice that a person might make.

At the opposite extreme from Sutherland--- except for joining him in describing crime neutrally as a career choice--- 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: "a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities" (Becker,1968], p. 176). To determine the cost, the potential criminal multiplies expected penalty by probability of apprehension and conviction. He advanced "a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables ...." (p. 177).

2. Sociological developments. -- The field of deviance has changed, both in sociology and in economics. Sociologists no longer suggest that crime might be just another profession (if they ever did); neither do economists pretend that social context does not matter (if they ever did). As Robert Sampson and Stephen Raudenbush (1999, 611) would write at the close of the 20th century, no one outside of the academy sees crime as just another profession:

> [O]ne of the most central of common goals is the desire of community residents to live in safe environments free of predatory crime and disorder. There is no evidence of which we are aware showing public approval of crime or disorder by any population group...

Few scholars now go as far as Sutherland in de-emphasizing individual-level variables that predict criminal behavior. Sociologists and economists alike recognize that people in their late teens engage in crime more heavily than those later in life (Hirschi & Gottsfredson 1983). They recognize that men engage in crime more heavily than women (id.). They recognize, as Robert Sampson and Byron Groves (1989, 774) put it, that "low economic status, ethnic heterogeneity, residential mobility, and family disruption lead to community social disorganization, which, in turn, increases crime and delinquency rates." And they recognize that criminals weigh the costs of crime: in the words of Hugh Barlow (1991, 230), they understand "that behavior is influenced by its consequences."

Within both scholarly traditions, informal sanctions are the primary way that societies restrain deviance. In low crime neighborhoods, residents know each other. They know how people treat each other. And they can cooperate to punish those who break norms that they value. Sampson & Groves (1989, 779) say,

> [L]ocal friendship networks will (a) increase the capacity of community residents to recognize strangers, thereby enabling them to engage in guardianship behavior against predatory victimization and (b) exert structural constraints on the deviant behavior of residents within the community.

Community members enforce codes of expected behavior against each other, implementing "rules and enforcement mechanisms that constrain individual actions, structure incentives, and increase the predictability and calculability of human interactions" (Peng [2010], p. 772).

3. Economic developments. Within those in the economic tradition, scholars today focus not just on the legal rules but on the informal sanctions that can cause people to desist from crime as well. 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 Mitchell Polinsky and Steven Shavell (2006), social sanctions "are substitutes for public law enforcement." They complement legal mechanisms by encouraging "in significant ways the attainment of desired behavior."

In the process of enforcing informal norms, people generally (but not always) induce compliance with behavioral principles that produce a "public good," notes property scholar Robert Ellickson (2001, 4). To describe the process by which they choose these principles, Ellickson constructs a model of individuals with "a selfless preference for norm changes that satisfy the criteria of Kaldor-Hicks efficiency" (2001, 7). Having done so, however, he then describes the way people enforce norms on each other (Ellickson 2001 3) "by means of social sanctions" that include "gossip and ostracism."

Within the economic tradition, in other words, modern scholars now view the informal enforcement of social norms as a cost-effective way to enforce welfare-enhancing principles of behavior. They envision legal rules as a more expensive way to enforce those principles on those individuals who will not otherwise comply. Economists and sociologists both, in other words, picture social norms and legal rules as complements: they see norms as a cost-effective but not-quite-as-effective alternative to the legal process.

4. Social capital. Perhaps one of the most intriguing development in both sociology and economics goes to the operationalization of the concept of social capital. Developed initially by James Coleman (1988) and popularized in the academy by Robert Putnam (2000), but as Rebecca Sandefur and Edward Laumann (1998) put it scholars tended initially to use the concept "largely as a metaphor that encompasses existing sociological ideas."

More recently, however, scholars in sociology, economics, and even political science have worked to operationalize the concept for empirical work. Robert Sampson and Byron Groves (1989, 780), for example, find that "communities with high rates of participation in committees, clubs, local institutions, and other organizations will have lower rates of victimization and delinquency than communities in which such participation is low." Studying inter-personal ties in China, Yusheng Peng (2010, 772) concludes that "groups or communities with dense interpersonal networks, strong solidarity, and a high level of trust are better endowed to organize collective action and enforce informal norms." Satyanath, Voiglaender & Voth (2013) find that tight webs of social capital facilitated the spread of Nazism in inter-war Germany. More generally, Christopher Lyons (2007, 819-20) posits:

> 'collective efficacy' as a key component of community social capital that mediates between ecological conditions and crime. ... collective efficacy consists of two underlying

> constructs: (1) social cohesion and trust and (2) norms of informal social control in relation to widely held goals of public safety and crime prevention. Thus defined, efficacious neighborhoods are cohesive neighborhoods characterized by expectations for informal surveillance ... and intervention in problems leading to the control of potential criminal elements.

Still others distinguish between "bridge" and "bond" civic associations -- (a) an association that connects the members of multiple groups "bridging" a social divide, and (b) an association that more tightly "bonds" together members of a group and potentially causes the larger society to fragment (Stolle & Rochon 1998; Knack 2002; Knack & Keefer 1997; Patulny & Svendsen 2007).

5. Legal sanctions. Law remains significant in modern social science, but primarily as a higher-cost back-up to use against individuals who do not respond to informal social sanctions. Thomas Bernard (1995, 86) explains it as an aspect of Durkheim's work, but it would fit within the Mertonian tradition as well: law is a "secondary" source of regulation.

> To the extent that people would find it in their interest to violate the law, the law shapes those interests via civil penalties. These penalties are restitutive in nature, but their real goal would be to structure self-interest...

Yusheng Peng (2010, 774) makes the point more directly: "When informal norms are congruent with formal rules, social networks function to reduce the enforcement costs of formal rules."

B. Formal Monitoring of Informal Sanctions:

One of the more surprising conclusions from the Japanese ostracism cases below is the extent to which almost none of it seems to fit the literature we have just reviewed in Section A. The kind of ostracism cases that appear in court are not about bringing social pressure to prevent anti-social conduct. Instead, it is more often about using collective pressure to enforce the interests of the narrow collectivity against the broader social good, or to enable some community members to benefit at the expense of others.

First, a community can use ostracism to coerce its members into behaving in ways that promote the interests of the community at the expense of the larger society. It might choose to skirt national environmental restrictions and develop a local industry with positive local externalities. It might seek to evade national fishing restrictions for the sake of its local fishing households. It might falsify information in its application for a government grant. In all these processes, it will need to ensure that no one locally reports the truth to the broader community or to the national government.

Second, segments of the local community can use ostracism to transfer wealth and other perquisites from other members of the community. They can redirect irrigation facilities from one hamlet to another. They can route highways and access roads in locally biased ways. They can skew the distribution of government subsidies. And in all these processes again, the community will need to ensure that no one locally reports the truth to outside world.

This is to be expected. Communities that have the power to enforce conformity to advance the broader good by that very fact also have the power to enforce local conformity

at the expense of broader social welfare. When that power exists, it can be abused, either to enrich the village at the expense of the outside world or the powerful villagers at the expense of the weaker. Just as giving police the power to punish deviance brings the risk of extortion, so does giving the community that power. In these situations, the courts -- as part of the formal legal apparatus -- have the potential to monitor social sanctions just as they monitor police brutality.

II. Ostracism

A. Ostracism:

Of the nonviolent social sanctions that communities might employ, ostracism is one of the most severe. Richard Posner (1997, 366) called it an "extreme" tactic in "norms enforcement." More mild expressions of disapproval acquire their power through "their implicit threat of ostracism."

"Ostracism" has multiple meanings. In modern English, it means that a single or a group of people have refused to interact with some target person. This is the word we use to translate the Japanese term "murahachibu," (村八分) which sometimes refers to a formal though extragovernmental group process. Murahachibu literally means "eight parts of the village", and one possible etymology is that the target is denied eight out of ten from a list of typical village interactions, leaving him with only "help when his house is on fire" and "attendance at a wedding".[2] When we speak of ostracism generally, we refer to a formal or informal group decision not to interact with some target because of actions the target has taken; in Sec. III, we provide a formal model to make this more precise.

A different meaning of "ostracism", from which the English word is derived, is the legal banishment procedure used in ancient Athens. Citizens would take a vote by secret ballot, writing the name of their chosen target on a piece of broken pottery (an "ostrakos"), and if the vote was high enough, the target was banished. No offense needed to be specified and there was no trial of any kind. Famously, Plutarch tells us that while Aristides the Just was a candidate for ostracism, an illiterate citizen who did not know him by sight approached him for help in writing the name "Aristides" on his potsherd. After Aristides helped him, he asked him what objection he had to Aristides. "None whatever," the citizen said, "I don't even know the fellow, but I'm tired of hearing everybody call him 'The Just'." (Plutarch's Lives, Aristides). Classicists continue to study the voting patterns in ostracism in ancient Athens using newly unearthed archaeological evidence of the actual ballots, e.g. Mattingly (1991).

The villages of Tokugawa Japan sometimes used a remarkably similar banishment procedure called "tsuiho." The villagers would vote by secret ballot on whether to banish someone and seize his farmland (Ooms 1996). We do not address either Athenian ostracism or Japanese banishment. Both relied on the coercive power of the state for enforcement, the Tokugawa village exercising that power under delegation from the provincial government, and they were legal sanctions, not social sanctions.

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[2] Smith (1961) tells us that the ten items are: "(1) rites of passage linked with the lifecycle, (2) marriage and wedding ceremonies, (3) death and funeral observances,(4) construction of buildings, (5) fires, (6) sickness, (7) floods or water damage, (8) leaving on a journey, (9) birth and related ceremonies, and (10) memorial observances for the ancestors." Ostracism is not limited to items on a list, however.

Ostracism as a social sanction, simple non-interaction as opposed to forcible ejection, is far more widespread than legal banishment, but can be equally harsh. Within communities of apes, ostracism often has the same outcome as extreme violence: the offender's death. Through ostracism, primates exclude disfavored members "from the resources and opportunities necessary to successful reproduction," writes anthropologist Jane Lancaster (1986: 215). Ostracism can also be fatal for human hunter-gatherers. To be successful, hunters need to work in groups. Ostracism excludes a member from those groups. In the process, it "sever[s] [the] social connections necessary for survival" (Wesselmann, Nairne, & Williams. 2012). Canvassing the anthropological literature on hunter-gatherer communities, Patrik Soederberg and Doublas Fry (2017, 265) report the case of a hunter caught poaching game. "Following exclusion, he was also denied membership in several other bands and finally withdrew into the woods where he and his family died of starvation..."

Depending on the type of agriculture, farmers can face dire consequences from ostracism too. Ostracism may not kill, but it can force the victim to abandon his farm. On the foothills of Mt. Fuji **(Case 1**; see Figure 1), it stopped the Ishikawa family from planting its rice. It can cut off a victim's access to the village commons (e.g., firewood, vegetables). It can deny him use of the village irrigation supply. It can exclude him from mutual aid and social insurance. "The 'cold shoulder' is only a step along the way to execution," as Lancaster (1986) put it. Informal social sanctions are not always mild; they can match the state's death penalty in severity.

[Insert Figure 1 about here.]

B. Empirical Studies:

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 on ostracism. The bulk of the studies have been associated in one way or another with Kipling Williams at Purdue; literature reviews can be found in Nezlek, Wesselmann, Wheeler & Williams (2012); Sebastian, Viding, Williams & Blakemore (2010); Williams (2007). 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 the sixty-year-old study by anthropologist Robert J. Smith (1961) of ostracism in Japan. His analysis focussed on documentary evidence from eight cases: refusing to help maintain a footbridge, stealing millet, publicizing election fraud (the schoolgirl of 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 of these resulted in a lawsuit. Here, our focus is on those very cases, and the interaction between private and public social sanctions. We will discuss which disputes reach court later, but it is worth noting here that most disputes never do reach court. This is true even of such quintessentially legal disputes as contract violation, as explained in the classic article of Macaulay (1963) and Macaulay's discussion of the difficulty over his 57+ years of teaching

Contracts of teaching both contract case opinions from appeals and supreme courts and how lawyers help businesses actually write and enforce more typical contracts (Macaulay & Whitford, 2014). From just court cases, one would imagine that American businesses were constantly in egregious violation of their promises to each other and did nothing unless compelled by court order, but this is because court cases are exactly those disputes and those businesses which could not settle their disputes without the force of the state. Smith's ostracism cases give us a smattering of the kind of ostracisms that Japanese villagers did not take to court; we will later look at cases that did result in lawsuits.

III. 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 villages enforces ostracism aside to focus on mistaken ostracism and the role of courts.

A. The Basic Model:

Consider a simple model to addresses 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.

We wish to model a village that might try to deter deviant conduct by a target member using ostracism, and a broader society that establishes a court system which may or may not wish to restrict 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: Prob($y=1|x=1$) = 1 (a simplifying assumption). However, if the target complies, the evidence sometimes mistakenly indicates that he offended: 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 much later (otherwise, the villagers could look at them to determine whether the target had offended). The village can either continue to associate with the target, or ostracize him at cost $Z > 0$ to themselves and impose cost $P > 0$ on him.

Note that 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, note that 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 significant difference to the model or our conclusions.

Note also that although in the model 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. In Ueno Village, there was no doubt that Satsuki Ishikawa had written on corruption for the school newspaper and then spilled the story to the national newspaper. What was less clear, however, was whether this was an offense against the village or a noble act, whether it would hurt the village or help it. In other cases, too, villagers need to decide not just what the facts were, but whether those facts constitute an offense or not. As phrased in the legal world, there are "mistakes of fact"-- false conclusions about what happened —- and "mistakes of law"-- false conclusions about whether what happened violated the rules. Concluding that the defendant killed someone when he did not is a mistake of fact; concluding that killing someone in clear self-defense is murder under the law of the State of Indiana is a mistake of law.

B. <u>The Outcome:</u>

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. In this exercise, 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: i.e., the utilities of the target (amounts B, P, and J), the villagers (amounts C and Z), people outside the village (amount D), and the public court costs (amount J). Note that each type of norm violation by the target 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 parameter values, 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.*

(a) 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 for doing so. 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 will be *-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 definitely be detected (under the model's assumptions) and he will be 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. Overzealous punishment results in noncompliance.

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 be an example of 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 new, not in the model --- for example, manipulation of the problem of group action for private gain (e.g., **Case 13** below), or the need to have ostracism for either all offenses or none rather than just for the kind of offences it can deter. 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 either does not exist or exists but refuses to hear ostracism cases. In the constrained ostracism regime, it does hear cases, it declares the truth of whether the target offended, and the villagers cease to ostracize if the target did not offend. This models the standard idea that not all wrong are "legal wrongs". In England and in most U.S. states, for example, people consider adultery to be immoral, a wrong, but it is not illegal (see Rasmusen, 2002). The adulterer faces neither civil nor criminal sanctions, though it is generally thought that adultery is wrong. Society has made the decision that this wrong is not one appropriate for redress in the courts, for a variety of reasons. Even so, Japanese courts and those in other countries might decide that ostracism was not something that court remedies could help with enough to be worth court costs, and so turn away anyone asking for such remedies even before inquiring into whether the offence really occurred.

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 $Max(-mP - L, -2mP)$. 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 in the unconstrained ostracism regime; 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 in the unconstrained ostracism regime 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. <u>The Social Preference:</u>

This discussion takes us to the question of whether the village and court prefer Unconstrained Ostracism or Constrained Ostracism. Stripped of details and qualifications, the former is closer to the U.S. regime, while the latter is closer to the Japanese (and Whitman's European regime; see Sec. 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 the expense of enormous costs for 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 is outside of our model, except for the fact that ostracism would fail to deter. Lynching would appear in our model as mathematically very similar to ostracism -- but with a vastly higher cost to the target (the *P* value) (on sanctions with different costs to the target, see Sec. IV). 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, frontier America, or — perhaps, if news accounts are to be believed -- modern village India (How WhatsApp, 2018).

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 they are not as accurate as adversary proceedings before an intelligent judge (and Japanese judges are extremely able—one reason why they are so expensive; see Ramseyer & Rasmusen 2001, 2003). 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. This is Blanchard's theory of international law (see Sec. IV): a court may not be able to enforce its judgements against foreigners, but if is respected for its neutrality, foreigners will believe its conclusions and act accordingly, and the target will obtain its relief.

For many offences, the Constrained Ostracism Regime also dominates a fourth regime that one 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.

It is worth noting one unintuitive implication of the model: if the village is somewhat inaccurate in its assessment of deviance, but not too inaccurate, the possibility of court review actually increase the usefulness of ostracism as a social tool. If courts did not exist, then inaccurate village ostracism would lead to so many mistakes that over time we would expect thriving villages to abandon ostracism as a tool for social control. Recall: inaccurate ostracism results both in injustice and in harm to the village from a punishment that 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 and 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. Thus, the presence of the court will, by the very fact that it limits ostracism, increase its usage.

D. Intra-Village Disputes:

In the formal model, we have 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, without the distraction and complication of showing their impact. 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 as to when to ostracize. If there are 50 villagers, and 30 of them think the target offended but 20 do not, what does the village 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 entirely a simplifying assumption, which we could change without changing our conclusions in any important way, merely complicating the analysis. It also implicitly says that the rule adopted results in the village as a group deciding to ostracize mistakenly with probability m when the target really is innocent.

If our purpose was to model ostracism per se rather than to understand ostracism's relation to government courts and to look at Japan in particular, we would want to delve into the optimal village decision rule, developing the theoretical game theory literature on collective action problems that D. Hirshleifer & Rasmusen (1989) exemplifies. Here, that

would distract, and what is useful is to lay out what is relevant to the interaction between the courts and the ostracizing body of individuals. Erroneous ostracism is central to that.

Beyond the mere existence of error, however, what is most important is 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 and decision rules, or of the infinite number of other possibilities, faces 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. The court, with less redundancy, free riding, and bias, has a huge advantage in accuracy.

Before leaving the topic of information, however, we should mention the problem of informational cascades. With over 8,000 cites on Google Scholar to its leading article (Bikhchandani, D. Hirshleifer, and Welch, 1992), this phenomenon has many complexities. We can illustrate it here, though, with a simple formal 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 against village custom. 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—and he probably will decide not to spend as much effort, since he can do some free riding off of Ichi. Suppose he, 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, 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—he will just say "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. The target is ostracized even though 18 of the 20 villagers believed, based on

his personal findings, that he was innocent. This perverse result is the big insight of cascade theory. If the villagers could pool their information, instead of proceeding sequentially, they would reach a completely different conclusion.

Thus, it is quite plausible that "village opinion" would often be unreliable. Showing this mathematically requires some sophistication—and we refer readers to the original papers for a rigorous demonstration—but villagers around the world are quite aware of the proposition that gossip is unreliable. Knowing it is unreliable is no escape: gossip is sometimes right, sometimes wrong, and the problem is inherent in a "telephone game" system where information is collected by volunteers and spread through "coarse" signals. Where there is smoke, there is fire —- usually, but (and this is the big problem) not always.

Poor information due to a collective-action problem of free riding in information collection in one problem. The second collective-action problem lies in enforcing ostracism. If villager Ichi ostracizes an offender, Ichi is hurting himself as well as the offender. 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, take care of each other's children playing. Punishing the target may help the village as a whole, but Ichi would prefer it if the rest of the village did the costly ostracism and 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 to it is to ostracize not just the target, but anybody who fails to ostracize the target. And, of course, 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.

In particular, note that this reasoning does not depend on the target actually being guilty. It does not even depend on him being really thought to be guilty. Recall that any single villager is tempted to free ride and continue social interaction with the target even if he is truly guilty, because the benefit of deterring misbehavior goes to the entire village but the cost of Ichi losing the target's target's friendship falls on Ichi alone. Thus started the chain of ostracizing Ichi if he did not ostracize the target.

Suppose, though, that Ichi and the other villagers do not think the target is guilty at all. The ostracism reasoning still works. We can imagine that the villagers have somehow acquired an expectation that anyone who has a leaf fall on his head must be ostracized or the other villagers will ostracize the non-ostracizer. In that case, if a leaf falls on the target's head, Ichi will ostracize him for fear of being ostracized himself, as will every other villager, even though none of them want it to happen. They are simply caught in a bad equilibrium, a bad set of expectations.

Game theorists have had little success in explaining how expectations arise when there are multiple Nash equilibria. This is the domain of the "focal points" of Schelling (1961), which are essentially a psychological phenomenon. Why, if two people in separate

rooms are asked to guess what number the other one will pick from the list (2, 3 ,4 , 8, 3000) can we expect them both to pick 3000? Why, especially, if we allow them to play the game repeatedly and with communication and say that their reward is zero if they disagree but $X if they both pick X? Pure rationality does not give an answer, but people have a tendency to find their way to an efficient equilibrium. In our formal model, we show what village policy ends up being best for the village, depending on the parameters. We do not say how they actually commit to that policy and make each other abide by it. Implicitly, we suggest that they will end up with the optimal policy by some unmodelled social process, just as we think both people will end up picking 3,000 in the coordination game. Similarly, we have left unmodelled why the court in our model will maximize social welfare rather than, say, the judge maximizing his own bribe revenue, or taking a perverse delight in sowing discord in villages, or simply refusing all ostracism cases to reduce his own workload regardless of social benefit. How to get judges to do what is good for society is a broader social issue --- see Ramseyer & Rasmusen (2001). How to get politicians to get judges to behave is still broader, and how to get voters to get politicians to get judges to behave is even broader still.

The multiple equilibria of ostracism, however, with its dependence on expectations, raise an issue too important to ignore here: the possibility of manipulation by some villagers for their own good and to the detriment of everyone else. In our earlier example, the bad equilibrium was for villagers to ostracize anyone on whose head a leaf fell. That is unrealistic, because it does hurt everyone and everyone has an incentive to talk the problem out and change the expectation to be that nobody will get punished for not ostracizing victims of falling leaves.

Suppose instead, however, that the bad equilibrium is to ostracize anyone who resists bullying by villager Ichi, and anyone who fails to participate in that ostracism, and-- to add something new—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 of all the other villagers 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 that is the case, it suggests 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 is that the villagers know they might be wrong in thinking the target offended, and thus are happy to stop ostracizing him once the court deliberates and 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 expectation. If the court says, "We declare that the target is innocent and that nobody should ostracize him, and of course nobody should be ostracized for not ostracizing him, and anybody who thinks otherwise is being tricked by Ichi, who is wrong when he says you'll be punished," then if the villagers believe that, it will be self-confirming. Ichi's power will melt away. The court's usefulness lies in its being outside of the village system, so it can change expectations in a way too dangerous for a villager to attempt.

IV. The Cases

A. Introduction:

Cases involving ostracism have appeared in modern, western-style court cases in Japan for over a century. The Japanese government began appointing judges to handle civil and criminal cases soon after the 1868 Meiji Restoration. It adopted a Prussian-based constitution in 1889, a German-based Civil Code in 1896, and a Criminal Code in 1907. As the new universities grew and established courses in law, the government also found itself able to replace its earliest judges with graduates trained in the new legal framework (Ramseyer & Rosenbluth 1995). To build up a body of case law, the courts and several private reporters then began publishing court opinions. By no means all cases are reported, something crucial to understand when using opinions as data. A boring case where an obvious loser brought suit and lost might not be considered worth writing up and reporting. This means that court cases, while valuable as data, are also treacherous, because what is interesting and useful to lawyers often is not what is typical. Scholars cannot ignore the wonderfully convenient and generally accurate data of court cases, but they must remember that it is selective.

B. Conventional Cases:

1. Introduction. -- Several of the ostracism cases in the published opinions 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 it took from others; whether it offered them higher compensation than he was offered; 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 voted to cut all ties with Kodama and with anyone -- "whether or not related by blood" -- who might continue to have contact with him.[3] Kodama sued in response, 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 the owner refused permission. 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.[4] 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,

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[3] *Ogawa v. Kodama*, 27 Daishin'in minroku 1260, 1275 (Sup. Ct. June 28, 1921).

[4] *Kuni v. Suzuki*, 4442 Horitsu shimbun 8 (Sup. Ct. Apr. 28, 1939).

the national government requisitioned rice from farming hamlets (effectively but not formally a tax). Community leaders then allocated that amount among the hamlet members.[5] 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.[6] The farmer sued, and again (discussed below) the court held the ostracism a tort.

2. Criminal cases. -- Among the reported cases, Japanese courts almost always declared 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 those leaders. 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.

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.[7] 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 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.[8]

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)**.[9] Kishichi had moved to the hamlet from a nearby village. He farmed land which his family had already owned, but the villages wanted him evicted anyway.

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[5] See Smith (1961, 523) for a description of the requisitioning, and its ties to murahachibu.

[6] *Ueno v. Kurokawa*, 27 Hanrei taimuzu 58 (Tokyo High Ct. May 30, 1952).

[7] For additional case finding it a crime to threaten someone with murahachibu -- absent unusual justifying circumstances -- for violating the ban on having contact with the original offender, see *Kuni v. Nakayama*, 7 Daihan keishu 533 (Sup. Ct. Aug. 3, 1928).

[8] *Kuni v. Mori*, 17 Keiroku 1520, 1522 (Sup. Ct. Sept. 5, 1911).

[9] See generally Suzuki (2020).

The court dismissed the petition and punished the village leaders. The principal leader, it banished. It ordered three other leaders to house arrest and forced labor, and nine to forced labor (Suzuki 2020):

> [The men] have ignored their agricultural work, and by plotting this insistent litigation have wrecked the [social] order. The village population was so low that the residents could not even till all the paddies and fields they have. Yet here they are trying to expel a man who has moved there. This is outrageous.

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, especially since one of them had been banished from the village (tsuiho) for previous wrongdoing. 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. Making an argument much like the medieval English writ of *quominus*, he claimed that unless they stopped the ostracism, he would not be able to pay his taxes. Now, the defendants denied that they had ever ostracized him. The case settled: the debt was declared paid, the defendants admitted to the ostracism, apologized, and reinstated the plaintiff, and all parties agreed not to file any new suits pertaining to the matter (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 had brought it in tort against the hamlet members who engineered the ostracism against him. Through the case, the Court made clear the tort equivalent of Criminal Code Section 222: to ostracize collectively a member of a community is an intentional tort. "Leave aside doctors and innkeepers for whom special rules exist," the court explained --- its reasoning tracked the principles it would apply in 1939 to criminal prosecutions **(Case 3)**:[10]

[10] *Ogawa v. Kodama*, 27 Daishin'in minroku at 1264.

> If someone wants to take part in social interchange, he does not have a right to demand it. Instead, others are free to accept his invitation or to refuse. The same goes for times when he wants to sit next to someone, talk with the person, trade, or take part in other actions or inactions.

But that each person may refuse to interact with another individually does not mean that a group can refuse to do so collectively. It is somewhat like anti-monopoly law, which in most countries allows an individual firm to charge a high price or to refuse to sell to a particular customer but is mercilessly rigorous ("per se", not "rule of reason") when firms try to agree among themselves to do the same thing.[11]

The Kodama defendants argued that they were merely exercising their right of "self-defense." After all, both criminal and civil law in Japan do allow people to defend themselves under appropriate circumstances (Civil Code, Sec. 720; Criminal Code, Secs. 36, 37). Kodama had "damaged the collective interest" of their community, the defendants claimed. They were trying to "preserve its good customs and order." The court would have none of it, no more than if all but one firm in the steel industry had gotten together and agreed to punish the excluded firm for ruining business by driving down prices. Should community members collectively decide to terminate contact with an offending member, they commit a tort under Section 709 of the Civil Code.[12]

And 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. -- The potential criminal sanctions do not end with Section 222. If neighbors vote to ostracize someone in their community, they do indeed commit criminal intimidation under Section 222 of the Criminal Code. 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

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[11] xxx[Add antitrust footnote on per se vs. rule of reason in US, Japanese, anttirust law.] Also Jese stat.

[12] *Ogawa v. Kodama*, 27 Daishin'in minroku 1260, 1272 (Sup. Ct. June 28, 1921).

100 yen, still a massive amount for a poor farmer. Announcing the decision in 1927, the court called this extortion under Section 249.[13]

5. Comic relief. -- Universities. Whether involving sensible norms or not, ostracism claims 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 for all this he owed him a refund on 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. He liked it, but most everyone else was lost. "The other graduate students aren't following you," his adviser warned. "Could you try explaining it 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 in [our field]?" Unfortunately, the court continued, "the plaintiff could not respond."

After the workshop, the student 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.[14]

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 their local rivals. 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.[15]

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 planned to leave the mob. How, he asked, could he prove to the welfare

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[13] *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. Ali & Miller (2016) describe "tempering ostracism with forgiveness" a more efficient form of punishment than permanent ostracism.

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

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

office that he was no longer a member in good standing? The officer 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.[16]

C. 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 seriously anti-social norms. There are exceptions, to be sure. In one case, it punished a man who imposed costs on his neighbors by repeatedly making bad bets in business **(Case 5)**; in two others, it punished a man who refused to contribute toward infrastructure improvements **(Cases 2 and 3)**; in still another, it punished a man who reneged on his share of the community tax burden **(Case 4)**.

We might think the punishment in these cases overly harsh. We might worry that the punished businessman was not the only one who had failed in business; that the neighborhood might have asked the punished landowner to contribute more than his neighbors; that the community might have demanded more rice from the objecting farmer than it asked of his peers. We might well worry about these possibilities, but in none of these disputes would we object to the goal itself.

Yet these plausibly benign cases are not the rule: most of the published opinions involve far more troubling disputes. Some of the cases seem to involve reasonable disagreements about community policy (Section 2, below). Some involve hamlets dominated by criminals (Sec. 3). Some involve hamlets that punished members for reporting criminal activities to the government (Sec. 4). Some involve hamlets that took property from other members (Secs. 5 and 6). And many involve hamlets that were engaging in electoral fraud (Sec. 7). These are cases in which the target's "offense" is actually to do something helpful to the outside world ($D < 0$), though it may ($C > 0$) or may not ($C < 0$) be good for the village.

2. Policy disagreements. -- In some cases, the community seems to punish a member for coming to a completely reasonable disagreement about village policy -- disagreement that in no way justifies so draconian a sanction as ostracism.

In one 1935 Supreme Court case, for instance, a firm had 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 slash the amount and quality of the fish, shellfish, and seaweed harvested. When three villagers announced their support for the factory, the rest of the community retaliated by ostracizing the three. 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

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

not say. Instead, it treats the dispute as an honest disagreement about village policy, and held the ostracism to be criminal intimidation.[17]

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 the 138 with ostracism. Japan did not have an antitrust statute in 1935, so the court simply held the ostracism to be criminal intimidation.[18]

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 had called the police on him 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 other residents, he ran it autocratically and stole community funds. Several members tried to distance themselves from the event. When they did, Kono retaliated by intimidating the other village members into ostracizing them. The Niigata District Court declared the ostracism a tort.[19]

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. So they continue to do. 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 a firefighter 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 to Fujii.[20]

Another ostracism victim 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 began to circulate a complaint.

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[17] *Kuni v. Okada*, xx Hanrei hyoron kei 98 (Sup. Ct. Apr. 19, 1935).

[18] *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.

[19] *Kono v. Kono*, 1247 Hanrei taimuzu 248 (Niigata D. Ct. Feb. 27, 2007).

[20] *Fujii v. Ichida*, 1970 WLJPCA 03240001 (Kumamoto D. Ct. Mar. 24, 1970).

Steadily, he seemed to ramp 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 sanction (slander or no slander).[21]

In 1954, the 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 (opinions rarely do), but the precipitating event seems to have been something one of the victims told the village government. The national government was still requisitioning rice from farming 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.[22]

5. Theft. -- Tomoyuki Arakawa was a nationally prominent potter in the town of Yagusa (within Toyota city, Aichi prefecture) **(Case 17)**.[23] His family had lived in the village since the Tokugawa period. Other than seven years in nearby Nagoya city, he himself 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 village in 1913. Title had lain with the descendants of the 75 families who were resident in 1913 ever since, including the Arakawa family.

To manage the mountain, the constituent 1913 families used a management company. In time, a mining company discovered it contained valuable deposits of silica. Near as it was to the Nagoya metropolis, the mountain had development potential. Near as it was to the Toyota factory network, it could provide land for access roads to that network.

In short, the humble mountain had become extraordinarily valuable. Through the management company, the constituent 1913 families exploited its potential shrewdly enough that by 2008 they had amassed 2 billion yen (about $20 million). Continue the same approach and it would soon be worth much more.

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

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

[23] Shun'ei Aikawa, "yakkaisha" 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.

When the management company decided to distribute the 2 billion yen to the constituent owners, it refused to pay Arakawa his share. Arakawa sued for the money, but 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. From time to time, observers describe Japanese farm villages as feudal bastions organized along generations-old hierarchical lines. Smith (1961, 527), however, noted that villagers did not spare wealthy elite families from their ostracism. Instead, they targeted those very elites. Several cases confirm his suspicion: poorer households use ostracism to take property from their richer neighbors and transfer it to themselves. As logically one would expect of a group effort, ostracism is a democratic tactic, whether for good or ill.

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 this 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.[24]

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 hectare (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, many had development potential (as the Yagusa families discovered, **Case 17**). And many mountains also contained food -- the "mountain vegetables" (sansai) used in some dishes, and the extraordinarily expensive (sometimes $1000 per kg) mushrooms known as matsutake.

One Hyogo town managed its local mountain collectively through a voluntary association (as Yagusa did) **(Case 19)**. The group included 103 households, a majority of the local residents. In 1950, the association decided to require all villagers owning more than 2 hectare of the mountain land to transfer to the association without compensation all

[24] *Miyamoto v. Suzuki*, 61 Hanrei jiho 22 (Takamatsu D. Ct. Mar. 1, 1955).

rights to the 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.

Five families refused to cooperate in being expropriated. When the association withheld from them their share of the communal profits in response, they sued. In retaliation for their lawsuit, the association declared ostracism on the five and on all members of their 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.[25]

7. Electoral fraud. -- The most common of the 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 in some elections be able to flip the outcome. To maximize their collective impact, they agreed to act together. When a member defected from their agreement, sometimes they ostracized him.

In 1913, the Supreme Court used an electoral dispute to decide perhaps the oddest of all its ostracism cases **(Case 20)**. The villagers in a hamlet had agreed to vote for a given candidate, and had further agreed to punish anyone who defected from that agreement. Two residents reneged. The others imposed ostracism and the prosecutors initiated criminal cases against several of the ostracizing villagers. The Supreme Court reversed the convictions. Ostracism was not always criminal, it explained. Villagers can ostracize members for a wide variety of reasons, some of them morally justified but some not. In this case, the two offenders had reneged on their promise to vote for the community-chosen candidate. When a community punishes someone to force him to do something he has no obligation otherwise to do, its members commit criminal intimidation. So too when they punish someone to stop him from doing something he has every right to do. Here, however, they simply punished the two members for breach of contract. They had agreed to vote a certain way, and they had done otherwise. The court ignored the obvious electoral context, and reversed the convictions.[26]

In 1920, the Supreme Court took a more typical approach to these electorally tied ostracism disputes **(Case 21)**. For the national Diet election in May of 1920, most of the voters in a town in Mie Prefecture favored one candidate. Katsunosuke Oku favored another. Outraged by his independence, the other villagers decided to sever all ties with Oku and his family. The prosecutor brought charges, the judge convicted, and the Supreme Court affirmed. The Court followed what would become a standard formula: no one has a right to social intercourse; no one breaks the law by refusing it; but when members of a community refuse that intercourse collectively, they commit criminal intimidation.[27]

A Supreme Court case from 1924 followed the same pattern **(Case 22)**. In September of 1923, four people had found themselves arrested for violating electoral law

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[25] *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).

[26] *Kuni v. Okubo*, 19 Keiroku 1349 (Sup. Ct. Nov. 29, 1913).

[27] *Kuni v. Fukuda*, 26 Keiroku 912 (Sup Ct. Oct. 12, 1920).

in the Miyagi prefectural elections. A certain Mr. Honda, living in the same hamlet that they did, had turned them in. The arrested villagers complained to their neighbors, and the hamlet's mutual aid society voted to expel Honda and his father and to ostracize them. The trial court convicted the villagers of criminal intimidation, and the Supreme Court (1924) affirmed.[28]

A second 1924 Supreme Court case involved not an actual hamlet sanction, but a threat by an influential leader in Nara unilaterally to oust an uncooperative villager **(Case 23)**. The leader had told the villager to vote for a particular candidate. Try anything else, he warned, and he would expel him from the village. The prosecutor brought criminal charges against the leader. Expelling someone from a village is not a technical term, of course, and the defendant's lawyer professed not to know what it meant. The Supreme Court declared it easy to see that the defendant meant "murahachibu." The lawyer also protested that the defendant had had no authority to expel someone 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.[29]

V. Zones of Judicial Neutrality

A. Introduction:

These cases suggest that the courts generally decide whether to intervene in ostracism disputes on the basis of the conduct involved: they intervene when they believe a community ostracized 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, the courts instead announce that they will let the losses lie where they fall.

In fact, this summary potentially misleads. First, these cases do not involve the typical community ostracism at stake in the earlier cases. Instead, they involve the arguably distinct question of who controls the membership rosters of voluntary associations.[30] They do not involve a village that decides to shun a non-conformist resident; they involve associations that people joined precisely to express their political and religious preferences.

The disputes arise when the leaders of an association decide to expel someone over questions involving those political or religious beliefs. Japanese courts -- taking a stand here much like that of the American courts -- try not to intervene. As Douglas Linder (1984, 1881) put it in the U.S. context, courts hesitate to compel the "benefits of membership in a voluntary association." Instead, they tend to 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."

Second, although the courts claim not to intervene in these disputes, effectively they do intervene -- indeed, they have no choice but to intervene. In both cases below, for

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

[29] *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).

[30] Definitions are of course arbitrary. Note that the most common modern example of ostracism among western observers involve the *meidung* (shunning) among the Amish -- expulsion from a church, exactly as discussed in this section.

example, an association decided to evict a dissident member from association housing. Although in each case the court declared that it would not intervene, nonintervention meant that it would not stop the association from evicting the dissident. Japanese courts generally treat landlords harshly for any self-help measures they might take. But in the cases below, the courts let the associations use the state's police power to punish a dissident member. Just as plausibly, the courts could have interpreted nonintervention to deny the association access to the state machinery and let the dissident stay where he was.

B. Political Parties:

The best known of the political cases involved a struggle for power at the center of the Japan Communist Party (JCP) **(Case 24)**. Kenji Miyamoto, Satomi Hakamoto, and Sanzo Nozaka had helped lead the party during the stormy pre-war years. Miyamoto had studied economics at the Tokyo Imperial University; Hakamada had studied in the Soviet Union. Together, in 1933 they tortured to death Tatsuo Obata, a colleague they suspected of spying for the police. Sanzo Nozaka had found himself in Moscow during Stalin's purges, and had survived by inventing charges against another JCP member in Moscow -- a man whom Stalin promptly had shot. After the war, the American-run occupation welcomed all three into the public realm.[31]

The three men promptly took over the JCP. Nozaka won election to the national legislature in April 1946. When Stalin ordered the Party in 1950 to abandon peaceful tactics, Miyamoto went underground and masterminded the party's bombing and sabotage campaign, while Hakamada stayed with the party's legal faction. Miyamoto returned to electoral politics after Stalin's death, and eventually (in 1970) rose to the post of central committee chairman; Hakamada simultaneously served 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 -- an accusation that the party leadership declared treasonous (but which Soviet archives would later prove to have been true).

Late in the 1970s, Hakamada began to write about the way he and Miyamoto had murdered Obata. Once he started writing, Miyamoto moved immediately moved to eliminate him from the party. In 1977, Miyamoto successfully dropped Hakamada from the party Central Committee. When Hakamada retaliated by publishing yet more information about the murder, Miyamoto led the party to expel him.

Since 1963, Hakamada had been living in party housing. For a house with market rental pegged by the court at 132,000 yen per month, Hakamada paid just 22,000. Having now expelled him, the party administration 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 very 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.

[31] On the occupation's role in all this (and the place of E.H. Norman), see Miwa & Ramseyer (GO WWP).

Never mind that Miyamoto had fought for decades to end representative democracy. The court continued:

> 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 in party affairs. One might have thought this meant the state would not help the party evict Hakamada from party housing. Whatever their logic (they did not explain), the justices decided it meant the opposite.[32]

C. Religious Organizations:

Courts show the same reticence toward disputes within religious organizations.[33] 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 revitalization movement in modern Japan: the "Soka gakkai." The "Nichiren shoshu" Buddhist denomination had traced its roots to its namesake 13th century priest, Nichiren.[34] In 1930, Nichiren shoshu adherents organized the Soka gakkai as their lay organization. Once the Second World War ended, the gakkai grew explosively. It remains enormously popular and has steadfastly maintained its roots in the blue-collar working class community. In 1960, gakkai leadership passed to Daisaku Ikeda. Ikeda proved to be a polarizing figure, and simultaneously brought both international publicity and domestic hostility.

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

The priest sued for tort damages, but the Shizuoka District Court refused. To the court, religious denominations were like political parties. The constitution protected their self-governance, and (unless they violated "public order and good morals" or threated "basic human rights") the courts would not intervene. Here, that meant that they would not order the denomination to compensate a dissenting priest whose career it had ruined.[35]

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[32] *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).

[33] As courts tend to do in the U.S. too. See E. Posner (1996, 55-60).

[34] "Nichiren shoshu" is distinct from the larger "Nichiren" denomination.

[35] [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).

VI. Findings

A. The Basic Observation:

A dispute arises within a village. One faction wins. Members of the winning group decide to ostracize the losers. The losers sue. And the court adjudicates.

Most of these court disputes over ostracism in Japan share one basic characteristic: they have nothing at all to do with the theory at stake in Sections I and II about informal social sanctions against deviance. Many of the 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 tried 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 its members (**Cases 4, 17, 18, 19**). In some cases, an opportunist manipulated the mechanism of 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**).

Turn to three further questions about these cases:

(a) How did the courts adjudicate the disputes presented to them?

(b) Which disputes did the villagers take to ostracism, and which cases of ostracism did they litigate in court?

(c) What did the plaintiffs or prosecutors hope to win by filing the cases that they did; and

B. How Did the Courts Adjudicate These Disputes?

1. The informational mismatch. -- In evaluating the informal sanctions that a village imposes, the courts look at a fundamentally different set of information than did the village. When villagers decide to ostracize a deviant, they typically do so on the basis of a long history. In many cases, they may have thought the deviant's latest behavior the last straw -- the most recent misconduct in a long life of misconduct.

In a traditional village, the residents have known the deviant for years. Many villagers have known him since he was born. Should they decide to ostracize him, they will not do so just to punish him for his latest outrage. They will do so if they think he -- based on the totality of his life history and character -- is unfit for this village. Psychology being what it is, it would be impossible for the villagers to make the decision any other way.

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. 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 ostracize in ways that lower social welfare. When parties to an ostracism file suit, a judge faces the task of distinguishing between those two possibilities. To do so, the judge will ask whether the community used ostracism to enforce a socially desirable norm. He or she will ask whether community members accurately understood the underlying facts. And he or she will ask whether, even if they did accurately understand the facts, they might be caught in an inefficient equilibrium.

Generally, a judge who forces unwilling people to interact with each other will lower aggregate social welfare. After all, the parties chose not to interact. If they had thought the interaction advantageous, they would not have made that choice. If one of the parties refuses to participate, presumably it thinks it would lose welfare. If the second party cannot make the trade worthwhile to the first, the trade must benefit the second party less than it harms the first.

Preliminarily, the same principles might seem to suggest that courts should not force ostracizing groups to include a dissenting member. If Suzuki does not want his children to play with Tanaka's, absent good reason we would not force the children to play with each other. If Suzuki, Imamura, and fifty other villagers do not want to let their children play with Tanaka's, the same principles would seem to apply.

At yet, group decisions are indeed different from bilateral decisions. For several straightforward reasons, welfare-increasing trades that two parties would freely consummate may fail when the number of parties grows larger. First, sometimes, the members of a large group have poorer information. Earlier (Subsec. B.1.), we discussed how the courts have a fundamentally different information set than the village. In a small and coherent village, that mismatch will tend to favor the village: they know the target better than any court ever will. In a larger community, however, the informational contrast may favor the court. In a bilateral transaction, A captures all the returns to any investment he makes in acquiring information about B. As the number of parties increases, A captures an increasingly smaller share of those returns. Facing growing incentives to free-ride on each other's efforts, the parties may fail to invest at the socially optimal level in information about each other.[36]

Second, ostracism can result from coordination failure. The parties may realize that the ostracism hurts them all, yet find themselves in situation in which it is individually irrational for any one of them to deviate. They could all benefit if they all stopped the ostracism, but no one will volunteer to be the first. As in **Case 13**, in other words, ostracism can result from social pressure in a bad equilibrium (see Kuran 1997): nobody wants to risk being the only dissident in 1980's Rumania, but (almost) everyone would be happy to help hang Ceaușescu if only he knew that his neighbors would join him.

Third, 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. In such a context, the poorer many can threaten ostracism on the wealthy few, and agree to desist for money or property.

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[36] Consider gossip. First, although people can rely on gossip in deciding whether to ostracize, yet gossip can result from informational cascades. See S. Bikhchandani, D. Hirshleifer & I. Welch (1992). In that case, people would be happy to end it—if they knew the truth.

Second, gossip is reviled not because it punishes bad behavior, but because it so often gets it wrong and accuses the innocent. Given a collective action problem, no one other than the target has much incentive to incur the cost of figuring out what actually happened. If the target himself protests his innocence, moreover, the others will rationally discount his statements by his obvious self-interest.

Third, if we may inject a topical reference: this is one reason why in cases of alleged police brutality or FBI malfeasance, prosecutors should sometimes bring cases even if they think they cannot win conviction: the accused need vindication, and only a neutral court can provide that. It may look like the prosecutors are persecuting the defendants; in actuality, they may be doing them a favor, when their reputations are already destroyed in the court of public opinion and need restoration.

3. The U.S. contrast. -- In cases of ostracism in Japan, the government may intervene. Victims may sue the ostracizers, and the courts may award them relief. Prosecutors may file charges against the ostracizers, and the judges may convict.

In the U.S., by contrast, the courts hesitate. They do recognize the tort of the intentional infliction of emotional distress. Yet usually they intervene in ostracism cases only when they see a group threatening someone in a "protected" category. Under labor law, for example, they might intervene if they believe a company is using ostracism to isolate a union organizer. Under Title VII, they may intervene if they attribute the ostracism to sex, race, religion, or national origin. But absent a protected category, courts usually leave socially isolated victims to their own devices (e.g., Coleman 2006, 60). As Brady Coleman (2006, 61) put it, "U.S. law conceptually divides harassment into different categories, some of which receive protection (or greater protection), and some of which do not."

This difference between Japan and the U.S. does not turn on any differences in the wording of the written constitutions. The 1947 Japanese constitution expressly includes the right of association in its Article 21: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed."[37] The U.S. constitution lacks that explicit language. David Cole (1999, 203) describes the freedom of association as "one of the ... least textually based rights that the Supreme court has ever found in the Constitution."[38] Yet the Court attributes the right to what Kenneth Karst (1980, 625) called a blend of "the First Amendment, equal protection, and substantive due process," and finds it all the same.[39]

4. France and Germany. -- In routinely striking down ostracism, Japan is not the outlier among wealthy democracies. America is. James Q. Whitman, for example, finds the German and French courts much more ready than U.S. courts to protect people who find themselves socially harassed. Together with Gabrielle Friedman he writes (2003, 243):

> It is becoming common coin, in continental law, that employers must be forbidden to harass ... all of their employees. Nor are employers the only target. Continental law is also concerned with the way employees treat each other: It is also becoming common coin that employees must be forbidden to harass their co-workers as well.

According to Whitman, American courts worry about the government intruding into their private sphere; European courts "aim[] to protect people from shame and humiliation, from loss of public dignity" (Whitman 2004, 1164; see Whitman 2000). "To the continental way of seeing things," explains Whitman (2004, 1162), "what matters is the right to control your public image."

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[37] See, e.g., Iwamoto v. Aichi ken shiho shoshi kai, 1056 Hanrei taimuzu 170 (Nagoya High Ct. Feb. 29, 2000).

[38] Brady Coleman (2006, 73-74) writes that: "Some courts have been concerned that holding an employer liable on ostracism grounds might violate the First Amendment right to associate freely."

[39] See generally Inazu (2010); Nelson (2015); Karst (1980); Zimmerle (2005).

Whitman plausibly attributes the continental phenomenon in part to its aristocratic past. Germany and France both maintained an "honor culture" among their elites, he writes. When they democratized, they extended the honor and dignity formerly limited to those elites to everyone. The European aristocracies also had a tradition of dueling. According to again to Whitman (2000), they protect honor and dignity at law to stop their men from protecting them by battle:

> [T]he substance of the contemporary [German] law of insult does indeed grow, strikingly enough, largely out of the old dueling practices; legally cognizable insults that we see today generally began as insults offered to dueling aristocrats.

Although Whitman may capture what German and French elites saw in the legal choices they made, aristocratic "honor culture" does not explain the cross-national contrasts. Japan, too, has an aristocratic past, and both Japan and the United States have a strong tradition of dueling. And Japanese courts did not wait to police ostracism until after they democratized in the late 1940s. They already held ostracism 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, disputes that led to ostracism, or even ostracism cases that led to litigation. Consider first data bearing on the actual incidence of ostracism. Then turn to the biases that result when the disputing parties choose to litigate a case of ostracism, and when they choose to transform a dispute into a case of ostracism.

2. Estimating 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 to it similarly.

Ostracism does indeed have different consequences from place to place. It hurts residents in an isolated village more than in an anonymous city. It hurts workers in a tightly structured, regulated profession (like physicians) more than it hurts workers with broadly useful skills such as manual labor. It hurts merchants who trade on credit within broad networks with high levels of social capital more than it hurts merchants who trade in cash on the spot market. Even in the nominally non-interventionist U.S., courts do pay attention in many of those instances where the ostracism would harm most severely. Where merchants refuse to trade with a member of a tightly knit credit network, they may impose antitrust sanctions (and where a merchant trades in cash on a spot market, no boycott would have real-world bite anyway). Where members of a licensed profession expel a member, they mandate various levels of review.

And even within a given industry, ostracism can have different consequences from place to place. In the 19th century, Japan and U.S. were both overwhelmingly agricultural societies. 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 harshly 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 make do) without community help.

That ostracism in 19th century Japan was a substantially harsher penalty than in 19th century Kansas does not mean Japanese villages were more likely to impose it. One would not expect a community to use a punishment more often just because it was harsh. It does mean that Japanese courts might worry more about groups imposing the penalty on someone who did not deserve it.[40] Ostracism was a harsher punishment in the 18th and 19th century Japan than in America, and courts police its use more rigorously in Japan than in America.

Unfortunately, we cannot pretend to know how frequently communities use ostracism -- though it does seem relatively infrequent in Japan. We know of no studies of its incidence in the U.S. We have a bit more information about Japan, and it does not support any claim that ostracism is widespread. The Asahi and Mainichi newspapers (two of the leading national newspapers) include almost no cases of ostracism beyond those discussed in this article.

Government records include evidence of about 20 instances of ostracism per year (see Table 1). Even if he chooses not to file suit, a Japanese who believes that others have infringed his human 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 obtain relief. They explain; they negotiate; they mediate; they introduce private or public 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 of these concerned ostracism. In Table 1 Panel B, we give the number specifically of ostracism cases that people reported to the Ministry of Justice human rights offices over the past five years. Obviously, we have no reason to think that people reported all cases. Subject to that qualification, from 2015 to 2019 they did report about 20 cases each year. The Ministry does not report details beyond location. Disproportionately, these cases do come from northeastern Japan (the Tohoku region), central Japan (the Chubu region), and the areas adjoining the Seto Inland Sea (the Chugoku and Shikoku regions).

3. Selection into Litigation. -- Although we describe cases that parties litigated to trial, people who fight with their neighbors litigate only a small minority of their disputes. Moreover, they litigate a decidedly non-random sample of them. In turn, prosecutors pursue to trial only a small minority of the people arrested by police. As in civil suits, they pursue a decidedly non-random sample of the people who are notified of misbehavior (threatened with lawsuit or arrested).

The logic to the selection follows the well-known dynamic of litigation and settlement (e.g., W. Landes & R. Posner 1975; Priest & B. Klein 1984). Because litigation costs more than informal settlement, both sides to a dispute will usually prefer to settle out

[40] The Japanese public concern over middle-school children (particularly girls) picking on each other arguably reflects the same phenomenon. Journalists and scholars have written extensively about the problem; governments have tried to measure the scale of the problem. If fact, of course, middle-school children pick on each other the world over. Conscientious parents do their best to help their children through it. Very few journalists write about it. No government tries to count it.

of court in the shadow of what they expect the court to decide. Suppose a community imposes ostracism on a dissenting resident, and that resident would like to challenge it. Both the dissenter and the community realize that litigation is expensive. If they both agree about what a court will do if they take their dispute to trial, they both gain by avoiding that litigation. Rather than going to trial, they both gain by settling their dispute "in the shadow" (again) of the expected litigated outcome.

Note that the informational logic to the dispute (Sec. D, below) does not affect this dynamic. Suppose a plaintiff sues to obtain public certification of his version of the dispute. Suppose that the plaintiff and the village leaders both agree that a court will ultimately decide in the plaintiff's favor. Rationally, both gain by negotiating an out-of-court settlement in which the village leaders publicly acknowledge the plaintiff'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 shame them instead. Prosecutors, too, will select the cases to pursue for the message the suit might convey to the rest of the community. In no country do prosecutors have the resources to pursue all (or even most) of the cases that police forward to them. Instead, they focus on the cases that most forcefully reinforce the norms they want people to follow. Among the disputes over ostracism, they will rarely spend time prosecuting a community decision most of them think reasonable. Instead, they will focus on the outrageous decisions. When the village gets ostracism right, the prosecutor will leave it alone.

4. Selection into ostracism. -- The logic of litigation and settlement also applies to costly disputing tactics more generally—such as ostracism. Ostracism is a cessation of voluntary interaction, a return towards autarky. It may apply to money trades, a boycott, or to trades in favors, esteem, or company. Given that parties trade only when mutually advantageous, an end to trade necessarily hurts them both, destroying the gains from trade. Because the trade between a dissenter and his community constitutes a larger fraction of the dissenter's total trades than of the village's, it hurts the dissenter more. But it still hurts both of them. As many have pointed out (see, e.g., D. Hirshleifer & Rasmusen (1989)), this means that establishing ostracism as a social custom is both costly and tricky, since it requires overcoming the free rider problem of a villager wanting others to bear the cost of punishing the target while still associating with him himself.

Given these mutual costs, a dissenter and his community both gain by avoiding ostracism and settling their dispute peacefully. Provided they both anticipate the same outcome if they push the conflict into ostracism, they both benefit by avoiding that confrontation. They gain instead by settling their dispute according to the expected outcome upon confrontation.

Crucially, however, a dissenter and his community can reach this mutually beneficial negotiated settlement only 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 trade, broadly defined, they would lose from ostracism. They know each other's feasible alternatives. They know whether any villager would defect from the collectively imposed sanction.

Sharing similar estimates of the outcome from confrontation (i.e., ostracism), they both gain by avoiding that confrontation.

When a community is in transition of any kind -- whether economic, social, or political -- 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. The dissenter may believe that the local police will arrest the bullying community leaders; the leaders may think the police will hold back -- and so forth and so on. With change comes uncertainty.

In Appendix 1, we summarize the context for each of cases of ostracism detailed above. Crucially, most of the disputes 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. We post the available details of the cases in Appendix 1. 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. And the plaintiffs could not realistically have expected the state to force the other villagers to help transplant their rice, to lend them a horse, or to have a beer with them. The intangibles are just too important.

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.

Suppose an ostracized villager sues and wins (or a prosecutor charges and wins). By finding in the villager's (or prosecutor's) favor, the judge both certifies the villager's version of the account, and disseminates it to the public. Suppose the village leaders had tried to throw an election; a dissenter had complained; and the leaders had organized ostracism against the dissenter. Outside observers knew that the village was ostracizing the dissenter. But when they inquired, the leaders told one story and the victim told another. It was the dissenter's word against the leaders'.

In these situations, litigation can change the character of the public understanding of the 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. As Blanchard (2018, 503) put it, the courts "produce information that has the power to provoke reactions by third parties that are costly for the" parties involved. 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.

2. Other contexts. -- Blanchard's context is international law, an area of law that even its practitioners realize brings smiles to the faces of lawyer and law professors. How, after all, can there be law without a government to enforce it? Without a world government, international law would seem an oxymoron. Yet Blanchard points to something an international court can do despite being unable to enforce its judgements using an international police force or the U. S. Marines. What the court in an international dispute can do is what the courts did in these cases of ostracism: it can certify information. If it has a reputation for honesty, care, and unbiasedness, it does have power — substantial power.

Rural villages in Meiji Japan are not as different as from high-tech web communities in K-Pop Korea as one might think. Consider Daniel Lee (stage name "Tablo"; David 2012), lead singer of the hip-hop act, "Epik High" (in English, no separate Korean name).. Lee is a Canadian-Korean who graduated from Stanford with both B.A. and M.A. in three years before going to Korea, marrying a movie star, and starting a hugely successful musical career.

Alas, Lee had a jealous cousin in California. The cousin did not like it that Lee, a year younger and a classic "bad boy" in high school, had done so well while he, a more conventional Stanford computer science major, languished in obscurity. He disparaged Lee. Other picked up on his suspicions, and an internet mob (some 190,000-strong) started to accuse Lee of forging his Stanford credentials. Lee posted his diplomas. He posted a video in which Stanford officials acknowledged that he had attended and graduated from the school. None of this took. The mob said it might all have been faked, as so much is by K-Pop publicity experts. His career collapsed. He fell into depression and felt ashamed to be seen by people in the hospital when his wife was giving birth. It is not just hunter-gatherers who pine when ostracized: so do Stanford graduates with careers in hip-hop.

Ultimately, the Korean system of criminal justice saved Lee. After a year, the Korean government opened a criminal investigation of possible wrongdoing by everyone concerned, including Lee. The cybercrime unit of the Korean National Police concluded that Lee had indeed graduated from Stanford, and issued a warrant for the arrest of the 56-year-old Korean-American in Chicago who was, under cover of anonymity, Lee's chief

persecutor besides his California cousin. Note that the warrant had no effect on someone in Chicago: its only effect was to emphasize the confidence of the investigators that they'd discovered wrongdoing. The court certified the truth of Lee's claims, and in due course Lee's career recovered.

VI. Conclusions

We in the scholarly community 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. Communities use legal sanctions, in other words, to control those deviant members least vulnerable to informal sanctions. 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 outside of the psychology laboratory. 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 situations in which someone is ostracized reach government courts and are resolved by trial and final judgement rather than by not being brought at all or being resolved by voluntary settlement. We find in the cases that reach government courts, however, very few cases in which a community used ostracism to try to restrain deviance. Indeed, we explain that we would not expect that to happen, since someone who is justifiably the target of ostracism is unlikely to want to spend money on lawyers to advertise that fact to the world. Instead, in most cases 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 bringing these cases did not primarily bring them for damages (or prosecutors, for criminal sanctions). Instead, the plaintiffs apparently brought them for informational purposes: to have the court publicly certify their version of the events involved. They bring them because these are the cases in which ostracism was unjust, even by village standards, and they wish the government to declare this to their neighbors so that they will change their attitude, not in the hope that the government can use its monopoly on force to threaten their neighbors with violence if they do not renew social relations.

Figure 1: Location of Cases

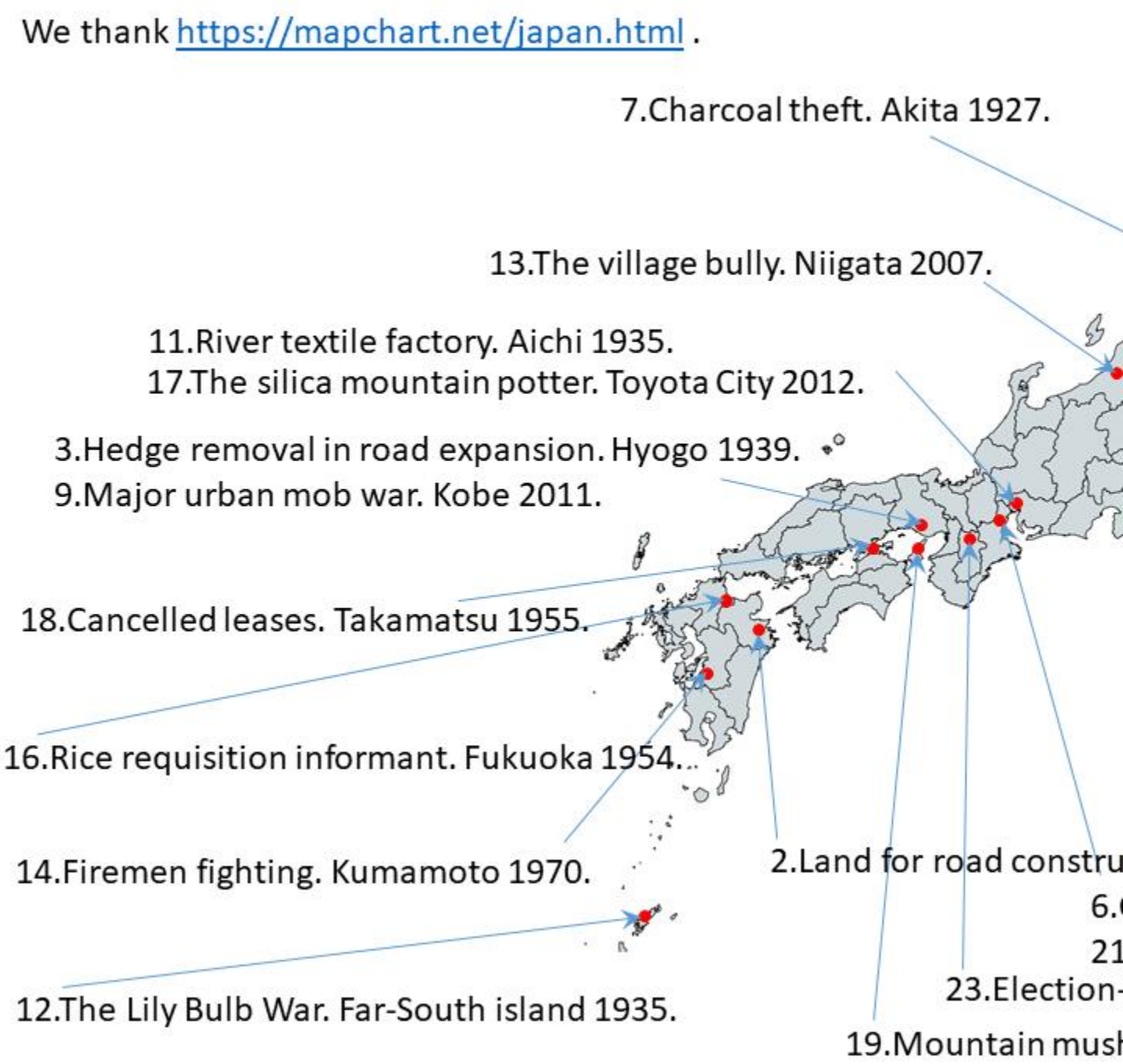

Table 1: Reports of Ostracism to Human Rights Offices, by Year and Region

	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 “murahachibu” reported to Ministry of Justice Human Rights offices.

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

Appendix 1:
The Ostracism Cases

Format: Case number. Opinion date; court (civil or criminal). Nature of incident. Location of incident. Civil judgment or criminal penalty. Citation.

Case 1. No record of case. Vote fraud in school newspaper. Ueno village now within Fujinomiya city (population 131,000; Shizuoka prefecture). Watashi wa machigatte imasuka? [Am I Wrong], *Asahi shimbun*, June 23, 1952.

Case 2. June 28, 1921; Supreme Court (civil). Land for road construction. Agricultural hamlet now within the modest Kunisaki city, and 20 miles from the Beppu metropolitan center (population 117,000; Oita prefecture). 100 yen. *Ogawa v. Kodama*, 27 Daishin'in minroku 1260.

Case 3. April 28, 1939; Supreme Court (criminal). Hedge removal in connection with road expansion. Farming hamlet now within Yaita city (population 34,000), and 20 miles from Utsunomiya metropolitan center (population 519,000; Hyogo prefecture). No record of penalty. *Kuni v. Suzuki*, 4442 Horitsu shimbun 8.

Case 4. May 30, 1952; Tokyo High Court (civil). Rice requisition. Agricultural hamlet now incorporated within Mooka city (population 79,000), and within the greater Tokyo metropolitan area. 10,000 yen. *Ueno v. Kurokawa*, 27 Hanrei taimuzu 58.

Case 5. Sept. 5, 1911; Supreme Court (criminal). Failed in business. Agricultural hamlet, location not disclosed. No record of penalty. *Kuni v. Mori*, 17 Daihan keiroku 1520.

Case 6. 1822. Domainal court (civil-criminal mixed). Newspaper account of Tokugawa period litigation. Komono village (Mie prefecture). Hiroshi Suzuki, "Murahachibu, makarinaran": Komono han no osabaki, igaini minshuteki ["Murahachibu Is Absolutely Forbidden": Judgment of Komono Domain Is Remarkably Democratic], *Asahi shimbun*, Apr. 11, 2020.

Case 7. Sept. 20, 1927; Supreme Court (criminal). Charcoal theft. Mountain hamlet now within the city limits of Yokote (population 86,000; Akita prefecture). No record of penalty. *Kuni v. Mukogawa*, 6 Daihan keishu 361.

Case 8. Jan. 25, 2017. Tokyo District Court (civil). Student power harassment. Tsukuba city (Ibaraki prefecture). Claim denied. [No names given], 2017 WLJPCA 01258006.

Case 9. May 24, 2011. Osaka District Court (criminal). Major urban mob war. Kobe-Osaka area. Defendant acquitted. Kuni v. [No name given], 2011 WLJPCA 05249002.

Case 10. Apr. 26, 2018. Shizuoka District Court. Retired gangster applies for welfare. Denial of welfare benefits reversed. [No names given], 2018 WLJPCA 04266020.

Case 11. Apr. 19, 1935. Supreme Court (criminal). The river textile factory. Fishing neighborhood, already within the city liits of Toyohashi (population 377,000; Aichi prefecture). No record of penalty. *Kuni v. Okada*, 24 Hanrei hyoron kei 98.

Case 12. Oct. 25, 1935. Supreme Court (criminal). The Lily Bulb War. Small, single-industry island dependent almost entirely on the export market debates an exclusive dealing contract with Mitsubishi Trading. Four month prison sentence, contingent on behavior over two-year period. *Kuni v. Shigenobu*, 14 Daihan keishu 1405.

Case 13. Feb. 27, 2007. Niigata District Court (civil). The village bully. Small village, only pseudonymous name disclosed. 200,000 yen. *Kono v. Kono*, 1247 Hanrei taimuzu 248 (Niigata D. Ct.).

Case 14. March 24, 1970. Kumamoto District Court (civil). Firemen fighting. Small town next to the modest city of Hitoyoshi (population 31,000) deep in the Kyushu mountains. 1,050,864 yen. *Fujii v. Ichida*, 599 Hanrei jiho 72.

Case 15. Oct. 17, 2008. Tokyo District Court (civil). The expelled slanderer. Neighborhood within Tokyo. Expulsion vacated. [No names given], 2030 Hanrei jiho 38 (Tokyo D. Ct.).

Case 16. Mar. 31, 1954. Fukuoka High Court (criminal). The rice requisition informant. Agricultural hamlet, location not disclosed. Penalty not disclosed. *Kuni v. [No name given]*, 7 Kosai keishu 217 (Fukuoka High Ct. Mar. 31, 1954).

Case 17. No record of opinion. The mountain potter. Small town within Toyota city. See Shun'ei Aikawa, “yakkaisha” 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.

Case 18. March 1, 1955. Takamatsu District Court (civil). Cancelled leases. An agricultural village, now incorporated into Marugame city (population 109,000). Case dismissed because parties settled out of court. *Miyamoto v. Suzuki*, 61 Hanrei jiho 22.

Case 19. Sept. 13, 1957. Osaka High Court (criminal). Mountain mushroom rights. Town on Awaji island in the Seto Inland Sea, now part of the modest Minami awaji city (population 44,000). 2- to 6-month prison sentences contingent on behavior over 2-year period. *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).

Case 20. Nov. 29, 1913. Supreme Court (criminal). The voting contract. Location not disclosed. 4-month prison sentence contingent on behavior over 2-year period. *Kuni v. Okubo*, 19 Keiroku 1349 (Sup. Ct. Nov. 29, 1913).

Case 21. Oct. 12, 1920. Supreme Court (criminal). The Diet election dissident. Small mountainous town, now incorporated into the city of Iga (population 86,000; Mie prefecture). Penalties not recorded. *Kuni v. Fukuda*, 26 Daihan keiroku 912.

Case 22. June 20, 1924. Supreme Court (criminal). The election fraud snitch. Either part of Sendai city (population 1.09 million) or a village 12 miles outside of Sendai. Penalty not recorded. *Kuni v. [No names given]*, 3 Daihan keishu 506.

Case 23. April 15, 1924. Supreme Court (criminal). Election-related threat. Mountainous village, now incorporated into the modest city of Uda (population 28,000), and 20 miles from the much larger Nara city (population 360,000). No penalty recorded. *Kuni v. [No names given]*, 3 Daihan keishu 338.

Case 24. Dec. 20, 1988. Supreme Court (civil). Struggle for control over the Japan Communist Party. Tokyo. Eviction sustained, and back rent ordered to be paid. *Hakamada v. Nihon kyosan to*, 1307 Hanrei jiho 113 (Sup. Ct. Dec. 20, 1988), aff'g, 1134 Hanrei jiho 87 (Tokyo High Ct. Sept. 25, 1984).

Case 25. Aug. 8, 1997. Shizuoka District Court (civil). Struggle for control over Soka gakkai. Claim for compensation dismissed. Taisekiji temple, located in Fujinomiya, Shizuoka prefecture. *[No names given]*, 1650 Hanrei jiho 109.

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NOTES OF THE AUTHORS TOT HEMSELVES, to be deleted later.

Mark, I removed this paragraph (which I modified first, so it isn't quite as in the earlier draft):

> Consider the Tokugawa debt dispute following Case 6, described more fully below. Kyujiro had a dispute with other villagers over whether he owed a debt. Whether Kyujiro had really offended against the village was highly unclear—it was a complicated contract dispute, with the ancillary issue of whether debts were still owed to another villager if he had been banished. The suit produced no money damages: what Kyujiro obtained was an admission that he had been mistreated and an unenforceable promise that it would not happen again. Yet that, it seems, was enough: the court had clarified the issues and established the truth. In this case, Kyujiro noted that if he was poorer, he would pay less tax, hurting the government—though this was most likely just a legal fiction, a procedural way to get the court to hear a case between him and the village. We have assumed in our model that the court's objective was to maximize social welfare, the sum of everybody's costs and benefits. The Tokugawa government, however, may have wished to maximize only his own benefit minus cost, which would in the model include only the offense amount D and the court cost J, to which we might add a third amount for the lost taxes.

This was in the model section, so we hadn't talked about case 6 yet. True, the court might care only about the offense amount and the court costs, rathe than also including the target and villager costs, but I thought it was confusing to bring that up and this is probably not a good example, since D=0 in the Kyujiro case--- there is no effect on outsiders of whether or not he paid his debt to another villager.
