

Learning to Love Japan: Social Norms and Market Incentives

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As academics many of us love Japan. But many of us love it for the wrong reason. We love it because it lets us imagine a world where our analytic principles seldom apply, and our academic imaginations can run wild. Once we cite Japan all our counterfactual whimsies become fair game: corporate control markets become inefficient, unions promote product quality, competitive stock markets lead to inefficiently short-term horizons, efficient firms offer workers life-time employment, and regulation systematically improves market efficiency. Once we cite Japan all our social scientific principles, and all the constraints on our collective flights of fancy that they impose, disappear — dismissed as the culturally contingent detritus of an intellectually imperialist American discourse.

Within law schools, we tend to use Japan to make a narrower point — to argue that economic incentives need not matter. Whatever incentives markets and laws may provide, perhaps people simply ignore them. The domestic political consequences to this vision of Japan are clear, as the debate between Richard Epstein and his critics implicitly suggests:¹ if independent social norms can sustain systematically unprofitable behavior in Japan, then maybe they would have sustained Jim Crow policies in the American south. If Japanese routinely ignore economic incentives to perpetuate social norms, then maybe whites would have ignored the market advantage to hiring African Americans and discriminated against their own

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1. This debate took place at a symposium sponsored by the University of San Diego and the Liberty Fund on Richard Epstein's book, *Forbidden Grounds: The Case Against Employment Discrimination Laws*.

best interests. If our picture of Japan is true, then maybe merely dismantling the *legal* edifice of Jim Crow will not do.

I had thought the potential problems with this analysis apparent, but (given the responses to Epstein) apparently I thought wrong. For the sake of illustration, consider whether (or when) Japanese disputants will ignore advantageous legal rules in order to settle by reference to disadvantageous social norms.² Posit a Japanese court-enforceable rule about issue *X* that differs significantly from Japanese communal norms about *X*. Suppose further that courts are not prohibitively expensive, and ignore for the moment any social sanctions against invoking the court-enforceable rule. In most disputes over *X*, one of the parties (*P*) will have an incentive to sue. By suing, *P* will be able to invoke the legal rule which — differing significantly from the communal norm — necessarily works to *P*'s benefit. Because *P* can credibly threaten to sue, even parties that settle will settle by reference to the legal rule.

Consider now an additional norm, one that stigmatizes those who sue as antisocial. If a Japanese who invokes a legal rule (i.e., one who sues) incurs substantial communal sanctions, then many members of the community may no longer find it advantageous to invoke the rule. Yet in any community, the susceptibility of its members to social sanctions varies. For some members social respectability matters tremendously; for others it matters very little. Given this differing vulnerability to social sanctions, however, those for whom the sanctions are least costly may well decide to flout the sanctions and invoke the court-enforced rules.

The fragility of social norms becomes clearest here, for norms are subjectively compelling only when widely observed. The more often some Japanese (those least vulnerable to social sanctions) invoke court-enforced rules, the harder others (those more vulnerable to such sanctions) will find it to tell themselves (a) that the social norm about *X* (not the legal rule) is the right way to resolve *X*, and (b) that people who invoke legal rules are antisocial. The more often some members of a community violate a given norm, the harder other members will find it to define those norms as true and the violators as immoral. As a result, absent *institutional* incentives that make immoral behavior unprofitable, those social norms defining the behavior as immoral will often tend to unravel.

The qualifications to all this are important, but straightforward. The smaller the gains to ignoring social norms,³ the smaller the threat that economic incentives will pose to communal norms. The

2. Lest anyone miss the parallel to the Symposium, it is: consider whether (or when) southern white employers would have ignored the economic gains to hiring African American workers in order to conform to southern white discriminatory norms.

3. In this Japanese example: the greater the costs to litigation and the smaller the

more closed the society, the more costly the communal sanctions will be, and — again — the smaller the threat economic incentives will pose. But given those caveats, the basic point is simple: the more self-interested strategies give members of a community an incentive to deviate from communal norms, the more precarious those norms will be.

Epstein used this logic to suggest that market competition would likely have eliminated most Jim Crow practices even when white social norms mandated those practices.⁴ He could have (given the reaction of his critics,⁵ he obviously *should* have) done better than to cite an obscure article on Japanese traffic accidents for this point.⁶ After all, the authors of the traffic accident study hardly invented the theory from thin air. On the fragility of social norms, for example, Epstein could easily have quoted several prominent anthropologists and sociologists. Take Clifford Geertz:

The source of [religious or normative] vitality is conceived to lie in the fidelity with which it expresses the fundamental nature of reality. . . . [P]robably the overwhelming majority of mankind are continually drawing normative conclusions from factual premises . . . despite refined, and in their own terms impeccable, reflections by professional philosophers on the "naturalistic fallacy."⁷

Because *how* we collectively act determines *what* we individually believe, social norms remain stable only when most members of a society have little incentive to violate them. At stake is a basic ideological dialectic: as Geertz put it, "How, given what we believe, must we act; what, given how we act, must we believe."⁸

difference between the court-ordered judgments about *X* and the socially mandated resolution of *X*. In the southern white society at issue in this Symposium: the smaller the economic gains to transacting with African Americans.

4. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 97 (1992).

5. See, e.g., Richard H. McAdams, *Epstein on His Own Grounds*, 31 SAN DIEGO L. REV. 241 (1994); J. Hout Verkerke, *Free to Search*, 105 HARV. L. REV. 2080-81, 2090 (1992) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)).

6. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

7. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 126, 141 (1973).

8. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 180 (1983). Anthropologist Marshall Sahlins — no friend of law & economics — identifies the same dialectic: "The great challenge to an historical anthropology is not merely to know how events are ordered by culture, but how, in that process, the culture is reordered The historical process unfolds as a continuous and reciprocal movement between the practice of the structure and the structure of the practice." MARSHALL SAHLINS, *HISTORICAL METAPHORS AND MYTHICAL REALITIES* 8, 72 (1981).

In fact, the dialectical logic antedates Geertz. Sociologist of religion Peter Berger, for instance, outlined one version of it nearly three decades ago. As Berger explained it, we create a normative world collectively, and internalize it individually. Crucially, however, we internalize it only if it has a "taken-for-granted quality."⁹

The more often some members of a society violate a norm, Berger argues, the less likely others will take it for granted. "[T]he deviant's conduct challenges the societal reality as such," he explains, and "put[s] in question its taken-for-granted cognitive . . . and normative" quality.¹⁰ Because of this contingent character, all normative worlds "are inherently precarious. Supported by human activity, they are constantly threatened by the human facts of self-interest and stupidity."¹¹ They often survive, therefore, only if the society uses institutional incentives (other than group opprobrium) to prevent the greedy and foolish from flouting them.

Restated in social anthropologist Mary Douglas' terms, social norms are a "public good" subject to the usual corrosive logic of the prisoner's dilemma.¹² Members of a community collectively gain if they all adhere to the norms; members individually gain if they violate them; and the norms themselves (by the logic above) unravel if members individually follow that noncooperative strategy. Unless the members can monitor each other and *force* each other to comply with the norms, the most marginal members of the community will deviate and the norms themselves may lose much of their plausibility.

In effect, Epstein's critics miss the second half of Geertz's ideological dialectic. As they rightly note, and as Robert Ellickson elegantly demonstrated,¹³ norms *do* influence behavior. But they influence behavior only imperfectly, for most people have their price. When market incentives generate a high enough return to antisocial behavior, many people will find their price met. They will flout the norms and, as they do, the basic plausibility of the norms themselves will begin to collapse. None of this analysis is peculiar to Japan, for none of it is peculiar to any society. Instead, it is basic sociology of knowledge. If it applies anywhere, it applies everywhere. It clearly applies to Japan. By all odds, it should apply to the Old South as well.¹⁴

9. PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 4, 24 (1969).

10. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 113 (1966).

11. *Id.* at 29.

12. MARY DOUGLAS, *HOW INSTITUTIONS THINK* 9-43 (1986).

13. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

14. I emphatically do *not* believe that the "symbolic subordination of minorities assists the majority in maintaining its social norms." McAdams, *supra* note 5, at 261.

The beauty and the frustration of social scientific analysis is that it generates predictable results — even when, for political reasons, we would prefer that it generate something else. We love Japan because it seems to let us imagine a society where we can ignore those determinate results. We love it because it seems to let us indulge our fancy for worlds where symbols and discourses (not well-ordered responses to institutional incentives) reign. It is time we learned instead to love Japan for telling us the cold truth: that, notwithstanding the rich variation within and among societies, economic incentives generate similar and largely predictable results everywhere — in Tokyo, in Chicago, and in Jackson, Mississippi.

Furthermore, contrary to McAdam's suggestion, I have explicitly argued that, in evaluating the importance of social norms, the distinction between one-shot and repeated games is often overdrawn. *Id.* at 259-61. See J. Mark Ramseyer, *Legal Rules in Repeated Deals: Banking in the Shadow of Defection in Japan*, 20 J. LEGAL STUD. 91 (1991).

