

You Don't Need a Weather Man to Know Which Way the Wind Blows: Lessons from the United States and South Korea for Recording Interrogations in Japan

David T. JOHNSON*

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"You don't need a weather man to know which way the wind blows."

Bob Dylan, *Subterranean Homesick Blues*

I. Introduction

I live in a beach town called Kailua on the island of Oahu, about 20 minutes from Honolulu when the traffic is moving well. The weather in Hawaii is consistently good — so pleasant, in fact, that one puzzle for newcomers to the state is why news programs and newspapers put so much energy into reporting about it. Why bother? In Hawaii, you don't need a weather man to know it is going to be another fine day. All you need to do is look out the window.

And so it is with recording custodial interrogations. As Bob Dylan might put it if he became a criminologist (heaven forbid), "you don't need a Ph.D to tell which way the wind is blowing in this critical sphere of criminal justice."

* Associate Professor of Sociology and Adjunct Professor of Law, University of Hawaii.

The point of departure for this paper is the observation that in the world's developed democracies, the wind of reform is blowing strongly in the direction of requiring video and voice recording of custodial interrogations. Since this trend has been described elsewhere (Kim 2005; Drizin and Reich 2004; International Bar Association 2003), my main aim here is merely to provide an updated sketch of some of its contours. The international trend toward recording is important for Japan because "nothing spurs adoption of new ideas like other actors doing the same" (Sherman 2004: 91). Leadership from early adopters often influences what "followers" do (Gladwell 2000).

Let me start by saying that when I came to Japan two years ago, I received a pamphlet published by the Japan Federation of Bar Associations (Nihon Bengoshi Rengokai 2003) which showed that in comparative perspective, Japanese interrogation rooms are especially closed and secretive. In fact, of the nine countries listed in that pamphlet—England, America, France, Germany, Italy, Australia, Taiwan, South Korea, and Japan—only Japan, Korea, and Germany were categorized as countries that do not record. This article demonstrates that since the pamphlet was published, South Korea has embarked on an extraordinary course of reforms to record custodial interrogations. What is more—and what may be especially intriguing to Japanese readers—Korea's movement to record is being led by prosecutors. As for Germany, which the JFBA mistakenly included in the category of "developed democracies that do not record interrogations," police there actually do record in some cases (Kim 2005: 16-17). More fundamentally, suspects in Germany are "usually accompanied by a defense counsel" during interrogations, a policy that "minimizes the risk of police impropriety" and hence reduces the need for recording in the first place (International Bar Association 2003: 25).¹⁾ Thus, of the nine nations mentioned in the JFBA's brochure, Japan now stands alone as the only country that neither permits defense lawyers to attend interrogations nor records them.

Throughout modern history, the interrogation room has been one of the most closed, secretive spaces in most societies (Leo 2008). In recent decades, however, that space has become substantially more transparent. Moreover, during the last few years the wind of reform has started to blow with increased intensity. This article explains why more and more interrogation room doors are being blown open in the United States and South Korea. In both of these countries, the movement to record must be reckoned one of the most important criminal justice developments of the last 40 years because courts are finally becoming able to see what goes on behind closed doors. These developments are the foci of sections II and III. Section III also briefly describes recording developments in the East Asian jurisdictions of Taiwan, Mongolia, Hong Kong, and China. My hope is that

1) South Korean prosecutors also permit defense lawyers to attend interrogations far more frequently than do their Japanese counterparts (Shim 2005).

recording reforms in all of these places will enable courts to draw bright lines about what law enforcement may and may not do during interrogation. My prediction is that within five years, the wind of reform will force police and prosecutors in Japan to begin opening their interrogation rooms too. This is the focus of section IV. Foreign experience suggests that once law enforcers in Japan do start recording, they will quickly come to perceive it as a welcome advance over previous practice.

II. Recording in the United States

Although I have been mingling with Japanese criminal justice officials since 1992, I have sometimes hesitated to push them about the need to record interrogations. This reluctance was not rooted in ambivalence about the propriety of the reform, for I have long believed that recording is the right thing to do (Johnson 2002: 273; Johnson 2004a). Rather, my caution arose from the twofold recognition that most police in the United States do not record interrogations, and that Japanese law enforcement officials would say it is hypocritical to push a practice on them when it is not even standard operating procedure in my own country. But as recording in the United States has spread, my reluctance to nudge Japan toward reform has shrunk.

This section unfolds in three installments. First I summarize the main trends in America's recording movement, and then I explain the changes. Part three examines why many American police have become "converts" (*tenkoshi*) to the cause of recording.

A. Trends

American calls to record interrogations are almost as old as the tape recorder (Drizin and Reich 2004: 620). Indeed, 75 years ago the well-known Wickersham Commission "Report on Lawlessness in Law Enforcement" (1931) argued that in order to curb the widespread use of "third degree" tactics by the police, it was essential to "make records during the interrogation of exactly what occurred" (Drizin and Reich 2004: 622). The first explicit call to electronically record came in 1940 from the police themselves. In one of the earliest interrogation manuals ever published, W.R. Kidd "called for the verbatim recording of interrogations, either through a sound recording if one was available or through a stenographer if one was not" (Leo 2005: 27). In the decades that followed, many reformers echoed Wickersham and Kidd, largely to no avail.

American calls to record have been stimulated by three main motives: the need to reduce the risk of false confessions by eliminating abusive police interrogation practices; the need to improve the administration of justice by enabling fact-finders to make accurate assessments about the voluntariness and trustworthiness of confession evidence; and the need to strengthen the relationship between police and the communities they serve (Drizin and Reich 2004: 621). Although progress toward recording was for a long time "glacial"

(Drizin and Reich 2004: 639), the movement to record gained significant momentum in the 1990s. The next few pages summarize how far America has come in the last several years toward making recording interrogations mandatory and customary. While much remains to be done, “much has been accomplished” (Drizin 2004).²⁾

At present, five American states “engage in the recordation of custodial interrogation in some form at a statewide level” (New Jersey Supreme Court 2005). In addition, many other jurisdictions either require recording or routinely practice it for at least some categories of crime. Consider first the five states that record.

- Alaska has required recording in all felony and domestic violence cases since 1985 (by order of the state supreme court).
- Minnesota has required the recording of interrogations in all criminal cases, not just felonies, since 1994 (by order of the state supreme court).
- Maine passed a statute in 2004 requiring that state law enforcement agencies adopt written policies to record interrogations, and the next year the Maine Criminal Justice Academy adopted minimum standards and the Maine Chiefs of Police instituted a model recording policy.
- Illinois began requiring the recording of interrogations in all homicide cases as of 18 July 2005 (by a statute passed pursuant to recommendations made by the Governor’s Commission on Capital Punishment).
- The Massachusetts Supreme Judicial Court required (in 2004) that a jury instruction be given upon request when a defendant’s unrecorded statement is admitted as evidence. The instruction must inform jurors that the defendant’s statement should be evaluated with “particular caution.”

In addition, there have been major recording developments in five other American states and the District of Columbia:

- New Mexico has passed legislation requiring police to record interrogations “when reasonably possible” in all felony cases beginning in 2006.
- New Jersey will require recording of the entire interrogation for “predicate crimes” ranging from burglary to murder (by recommendation of the “Special Committee on Recordation of Custodial Interrogations” to the state supreme court). The requirement will become effective 1 January 2006 for homicide offenses and 1 January 2007 for other predicate crimes.
- Rhode Island appears poised to require the recording of interrogations for crimes with sentences of life imprisonment (murder, manslaughter, rape, robbery, arson, and child molestation), as its state senate passed a bill in June 2005 (Milkovits 2005).

2) Notable American holdouts include the Federal Bureau of Investigation, which still does not record, and local police departments in New York City, Philadelphia, and Detroit (Drizin and Reich 2004).

- The Supreme Court of Wisconsin recently required that “all custodial interrogations of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention” (*Wisconsin v. Jerrell*, 7 July 2005). Less than two months later, Wisconsin legislators moved to introduce legislation requiring recording in adult felony cases as well, a move supported by Democratic Governor Jim Doyle. As in Rhode Island, the bill seems destined to pass (US State News 2005).
- Texas requires that statements be recorded if the prosecution seeks to admit them as evidence in a criminal proceeding. The Texas statute (1981) does not require recording of the entire interrogation, only of statements to be used at trial, but police in many jurisdictions, including Austin, Corpus Christi, Houston, and San Antonio, do record entire interrogations.
- Washington D.C. has required the video recording of interrogations for serious crimes in almost all circumstances (by act of the D.C. City Council in 2003).³⁾

The American movement to record has reached many other jurisdictions. The most comprehensive study of the national contours of recording was conducted by former United States Attorney for the Northern District of Illinois, Thomas P. Sullivan, who is now a senior partner at the Chicago law firm of Jenner & Block LLP (see Sullivan 2004a, 2004b, 2005a, 2005b, and 2005c). Sullivan hardly leans to the left or against law enforcement interests. He used to be one of the most powerful prosecutors in America, and he still believes that “with few exceptions, [American] police are honorable and law abiding” (Sullivan 2004a: 2). Sullivan’s research found more than 260 American law enforcement agencies in 41 states that “record complete custodial interviews of suspects in felony investigations” (Sullivan 2005c). To arrive at this total, he did not use normal survey techniques. Rather, Sullivan contacted only those police and sheriff’s departments that *he was told engage in recording complete interrogations*, from the first word of the Miranda warning to the last word of the statement or confession. By Sullivan’s definition, a police department is said to “record” if and only if it records more than 50 percent of interrogations in a given class of cases (such as homicides or sexual assaults). Because Sullivan’s study is not an exhaustive census of all American police departments, and because it does not count departments that record less than half the time, the “true number” of departments that record is much higher than 260 (Sullivan 2004b: 25).⁴⁾

3) As explained in section IV of this article, because the Washington D.C. law provides no sanctions for non-compliance, police frequently flout it (Cauvin 2005).

4) In a nationwide survey administered in 1990, William A. Geller found that over one-third of America’s law enforcement agencies serving populations of 50,000 or more videotaped at least some confessions. Based on the agencies’ stated plans, Geller estimated that by 1993 more than 60 percent of such police departments “will use videotape to document interrogations or confessions in at least some cases” (Geller 1993: 2; see also Young 2000 and Drizin and Reich 2004: 643).

While *how much* recording occurs is the leading indicator of the strength of the American movement to record, it is also notable *who* has come out in favor of this reform. In 2004, the American Bar Association unanimously adopted a resolution urging law enforcement departments around the country to videotape interrogations (Drizin and Reich 2004: 640). Capital punishment commissions in Illinois, Arizona, Connecticut, and North Carolina have made similar recommendations. And in July 2005, when the Supreme Court of Wisconsin held that the state's law enforcement agencies must record "all custodial interrogations of juveniles," one justice even argued that the new rule "obviously includes adults."

American prosecutors with impeccable "law and order" credentials also support recording because they recognize that it helps law enforcement more than it hurts. For instance, Robert Morgenthau has been elected District Attorney of Manhattan seven times since 1974, and prior to that he was U.S. Attorney in the Southern District of New York for a decade. Widely regarded as the dean of American prosecutors, Morgenthau has been called "legendary" and "the premier justice figure" in the United States (Toobin 2005). He also was a pioneer in the use of videotaping to memorialize confessions, calling it (in 1990) "the most significant advance in law enforcement in 20 years" (quoted in Drizin and Reich 2004: 645).⁵⁾ Other prominent and former prosecutors support recording too, including Thomas Sullivan, whose study was summarized above, and Scott Turow (2004), Sullivan's co-chair on the Illinois Governor's Commission on Capital Punishment. In Maryland, prosecutor Jack Johnson pressured Prince George's County Police Department (in Baltimore) into adopting a taping policy. In Florida, Broward County (Miami) Attorney Michael Satz urged Fort Lauderdale's Police Department and the Broward County Sheriff's Department to adopt recording regimes (Drizin and Reich 2004: 645). In New York City, Arnold Kriss, a former police officer and prosecutor who ran against the incumbent (Charles Hynes) in the race for Brooklyn District Attorney, made the need to record one pillar of his campaign platform (Hicks 2005). The most passionate prosecutor advocate for recording interrogations in the United States may be Hennepin County (Minnesota) District Attorney Amy Klobuchar, who believes unequivocally that "videotaping serves the cause of justice" (Klobuchar 2002). As for legal scholars, even conservative Paul Cassell, the author of several articles disputing the extent of America's false confession problem, believes that interrogations should be recorded so that courts can make better determinations of voluntariness and reliability. Cassell (who recently became a federal judge) also argues that videotaping does *not* impede police in their efforts to obtain confessions (Cassell 1996; Cassell 1999).

The most extraordinary support for recording comes from John E. Reid & Associates, the largest trainer of police interrogators in the United States. To date, Reid & Associates

5) Although a pioneer in initiating the recording of confessions, Morgenthau has resisted the routine recording of entire interrogations (Drizin and Reich 2004).

have trained more than 100,000 police in interrogation techniques, many of which rely on manipulation and deception to elicit confessions (Leo 1996; Slobogin 2003). In 1961, Fred E. Inbau, one of the original partners of this Chicago-based consulting firm, argued against opening interrogation rooms to public scrutiny (Inbau 1961). Since then, and through publication of the fourth edition of their “how to” interrogation manual in 2004, Reid & Associates have vigorously opposed the electronic recording of interrogations because, they claimed, the camera makes it harder to get suspects to talk (Inbau et al 2004: 395). In February 2005, however, Reid & Associates revealed a surprising change of heart when they announced plans to write a book entitled *Practical Guidelines for Electronically Recording Interviews and Interrogations*. Six months later the firm made another stunning proclamation, that they would promote WordSystems, a communications equipment company based in Indianapolis, and iRecord, its prototype system for recording interrogations, in exchange for the company agreeing to promote Reid’s interrogation training courses when it teaches police customers how to use the recording software (Malarkey 2005). According to Northwestern University Law Professor Steven A. Drizin, a leader of the American movement to record interrogations, these are “radical departures” from the Reid & Associates philosophy that has ruled the police since the early 1960s. The firm’s change of course may well be “a concession to market forces” (Drizin 2005a and 2005b). Recording interrogations has become a growth industry in the United States, and Reid & Associates now seem to recognize the benefits (and dollars) that will accrue by heeding the advice offered by this American maxim: “if you can’t beat them, join them.”⁶⁾

B. Causes

American criminal justice institutions often resist reform (Blumberg 1979). In some circumstances, however — Compstat policing programs, SWAT (Special Weapons And Tactics) teams, police use of lethal force — standard operating procedures have changed with remarkable rapidity. Following decades of little progress, recording in the United

6) Two market factors probably prompted Reid & Associates to change their position on recording: Thomas Sullivan’s report (2004a) on the widespread use of recording in American police departments, and the move by other interrogation trainers to include materials in their curricula about how to interrogate while being recorded. (David Zulawski of Wicklander and Zulawski, another major trainer of police interrogators, has been extremely pro-active about publicizing the Sullivan study.) Further evidence Reid & Associates have become convinced that resistance to recording is futile can be seen at their website (www.reid.com), which now advertises a book by David M. Buckley and Brian C. Jayne entitled *Electronic Recording of Interrogations* (John E. Reid & Associates Inc., 2005). While remarkable, the “conversion” of Reid & Associates may be incomplete. Law Professor Steven Drizin predicts that their forthcoming book will continue to insist that recording be done surreptitiously, that there be no exclusionary rules for failing to record, and that the camera focus only on the suspect — a technique that makes jurors less likely to believe a suspect has been pressured or coerced (Drizin 2005a).

States has become another example of rapid reform. In fact, the American movement to record interrogations is accelerating so fast that it may be nearing a “tipping point” (Gladwell 2000). Most American analysts believe the “social epidemic” of recording will continue until it becomes standard practice. As Thomas Sullivan sees it, “in 10 years, virtually all [American] police will be recording for their own good” (Dolan and Larrubia 2004).

One key question is what explains the rapid spread of recording in recent years? A comprehensive answer would need to frame recording in at least two ways: as a “social movement” (with all the attendant questions about interests, resources, mobilization, and so on), and as one instance of “the diffusion of innovations” (Klinger 2003). But since such a broad approach is beyond the scope of this article, my analysis will focus more narrowly on the causal importance of two major failures in American criminal justice: the *Miranda* rules for regulating interrogation, and the common occurrence of false confessions.

1. *Miranda*. The first failure is *Miranda*, the 1966 Supreme Court decision which held that in order to dispel the inherently coercive atmosphere in American interrogation rooms, custodial suspects must be informed of their rights to remain silent, retain an attorney, and (for indigent suspects) be represented by an attorney paid for by the state. *Miranda* further held that in order to use a confession as evidence, the state bears the burden of demonstrating that the suspect waived these rights “voluntarily, knowingly, and intelligently.” *Miranda* generated tremendous controversy in the United States—not to mention high hopes among its proponents that interrogations would become better governed by the rule of law. In Japan, *Miranda* stimulated the creation (in 1995) of the *Miranda* Association, which is dedicated to seeing the *Miranda* principles regulate Japanese interrogation practices (Takano 2002). Unfortunately, Japan’s *Miranda* Association has made little progress, and even in its own birthplace “the warnings regime established by that case has had very little impact on the way [American] police conduct interrogations” (Slobogin 2003: 309). Indeed, the American scholarly consensus is that “*Miranda*’s impact in the real world is, for the most part, negligible” (Leo 2005: 18). Suspects continue to confess at about the same rate as in pre-*Miranda* days, police behavior in the interrogation room has not improved, and (what may be worst of all) the *Miranda* decision frequently functions as a “cover” for illegal police interrogation practices by encouraging “judicial myopia about voluntariness, supposedly the ultimate issue in interrogation regulation” (Slobogin 2003: 310). American interrogators so routinely violate the substance of *Miranda* (Simon 1991, Leo 1996) that some analysts conclude they have “all but killed” the principles espoused by this decision (Kamisar 1999).

The heart of the problem is that once the *Miranda* warnings have been given and a “valid” waiver has been obtained (something that happens 78 to 96 percent of the time,

often through police manipulation and deception), American courts are extremely likely to find the confession “voluntary” (Leo 1996).⁷⁾ As a result, *Miranda*-without-recording makes it easier for American courts to ignore police manipulation and deception, practices that are as common in American interrogation rooms as jumping is to a cat.⁸⁾ If, as the *Miranda* majority assumed, “American interrogation practices in the 1960s needed to be revamped, they still need to be revamped today,” four decades after the revised rules were announced (Slobogin 2003: 312). Many American criminologists and criminal justice professionals now believe that “unless tape-recording of police interrogations is required, it will be of no great moment whether *Miranda* is expanded or cut down or reshaped” by the courts (Kamisar 1999). Whatever its contours, *Miranda* without a recording requirement has proven incapable of subjecting interrogation to the rule of law as the U.S. Supreme Court intended to do when it issued the original decision.⁹⁾ The implication for Japanese reformers may be that they should care less about *Miranda* and more about recording.

2. False Confessions. The second American failure that has encouraged recording arises in part from the failure of *Miranda* to adequately regulate police interrogation practices. This is the problem of false confessions, so many of which have been exposed, and so many of which have led to wrongful convictions and incarcerations, that I have been forced to conclude that American criminal justice does not reliably perform its most fundamental function: separating the innocent from the guilty. America’s longstanding refusal to heed reformers’ calls to record has helped produce a steady stream of false confessions even though the best available evidence suggests that more than 90 percent of interrogations in the United States last less than two hours (Leo 1996: 279). Another lesson for Japan, where interrogations last a lot longer, is this: Sow secrecy in the interrogation room, and you may reap miscarriages of justice, the most catastrophic outcome that can occur in any criminal justice system (Drizin and Reich 2004: 633).

Consider a few threads from the growing fabric of evidence on the frequency of false confessions in American criminal justice. According to data compiled by the 35 “Innocence Project” clinics in the United States (the first of which was established in 1998 at New York’s Benjamin Cardozo School of Law), of the first 142 DNA exonerations of wrongfully convicted persons, 35 (25 percent) involved false confessions (Drizin and Reich

7) Law Professor Welsh White could find only nine cases over a two-year period in which confessions obtained after a waiver were excluded by American courts (Slobogin 2003: 310).

8) One reason interrogation abuses remain common is because since *Miranda*, “the great majority of state courts has held that the testimony of an officer that she complied with *Miranda* is sufficient and need not be corroborated” by other evidence (Kamisar 1999).

9) Another critical problem with *Miranda* is that American courts have failed to interpret the decision as requiring police to respect a suspect’s *indirect* invocation of a right (such as “Maybe I should talk to a lawyer”). In this criminal justice context and others, American law adheres to “deeply entrenched notions about language, many of which are wrong” (Solan and Tiersma 2005).

2004: 634). More generally, Professors Steven Drizin and Richard Leo have documented 125 “proven false confessions” between 1971 and 2002. Since more than half of those occurred in the last ten years, the pace seems to be accelerating (Drizin and Leo 2004).

Consider also one of the highest profile crimes in recent American history: the Central Park Jogger case in New York City. In 1989, police in that city investigated the beating and sexual assault of a female jogger in Central Park, and they elicited false confessions from no fewer than five teenagers. Unsurprisingly, all five were convicted.¹⁰⁾ Fourteen years later, all five convictions were proven false by DNA evidence and by a confession from the real offender (who had been incarcerated for other crimes). Although four of the five false confessions were videotaped, *only the final confessions were taped*, not the interrogations that preceded them. The “Central Park jogger case” thus illustrates a crucial point about how to record: taping only the final confession does little to protect against the risk of police coercion and false confession (Drizin and Leo 2004: 891).

Finally, consider the state of Illinois, where seventeen men were exonerated and released from death row between 1980 and 2003, eleven of whom gave false or coerced confessions (www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Illinois.htm). More broadly, of 42 invalid homicide convictions confirmed in Illinois by DNA testing since 1970, 25 (60 percent) were based on false confessions. In a system where false confessions occur this often, in cases where the stakes are as high as they can go, and in a political environment where elected officials refuse to enact reforms that would make capital justice more fair, just, and accurate, it is little wonder that Governor George Ryan, a Republican who supported capital punishment throughout his long political career, saw the need to commute the sentences of all 167 condemned persons on the Illinois death row (Turow 2003).

Ironically, while the failure of *Miranda* and the failure to heed calls to record interrogations have contributed to the problem of false confessions, the exposure of false confessions has in turn created “cause for optimism that recording interrogations may soon become the rule” in American criminal justice (Drizin and Reich 2004: 639). The trend is not only in that direction, it is accelerating. During the seven short years of the “innocence revolution” that was initiated by the advent of Innocence Projects in 1998, “more has been accomplished” to improve the truth-seeking function of American criminal justice “than has been accomplished throughout the history of American jurisprudence” (Drizin 2004). One of the most prominent features of this ongoing revolution is the movement to record interrogations, the most important impetus of which is “the changing public perception about the likelihood of error in the criminal justice system as a result of the sustained media coverage of numerous false confessions and wrongful convictions”

10) Studies show that 73 to 81 percent of false confessors who go to trial get convicted (Drizin and Reich 2004: 637).

across the United States (Leo 2005: 30). Another important impetus has been police support for recording. As we now shall see, more and more American police are embracing recording because once they try it they realize its positive effects.

C. Conversions

The good news about recording interrogations in the United States is not only that more police are doing it but also that once they do it they discover that it helps them more than it hurts. As a result, many American police have become become “converts” (*tenkoshi*) to the cause of recording. As one Illinois officer described his experience, “When we started [recording], I thought, ‘Who’s going to talk to you on tape?’ But [suspects] forget it’s there . . . I was a doubter at first. I was a naysayer. I was a fool” (quoted in Main 2005). Conversely, American police who continue to oppose recording “are almost invariably those who have never attempted to do so. They speculate about potential, hypothetical problems, whereas those who have recorded for years do not express similar misgivings” (Sullivan 2004b: 18).

The most comprehensive summary of the costs and benefits of recording come from the New Jersey Supreme Court (2005), which has described twelve main benefits of recording interrogations. Note that benefits 1, 2, 3, 4, 9, 10, and 11 all concern ways in which recording promotes truth-finding, the “cardinal objective” in Japanese criminal justice (Johnson 2002: 98).

1. Recording provides an accurate and complete record of what transpired during the interrogation (*if* the police record what transpired from start to finish).
2. Recording makes the trial court’s decisions more reliable (fewer wrongful convictions), and also provides a cleaner record for appellate review.¹¹⁾
3. Recording results in a reduction in *Miranda* admissibility motions and hearings.
4. Recording serves as a valuable investigative tool because seemingly innocuous statements sometimes become relevant when the recording is later reviewed.
5. Recording results in fewer trials (because more defendants plead guilty) and fewer contested pre-trial hearings.
6. Recording reduces the risk of impermissible interrogation practices.
7. Recording protects and enhances police officers’ credibility.
8. Recording saves police time.
9. Recording allows for more effective interrogation because police do not have to pause to take notes.

11) False confessions are the second most common cause of wrongful convictions in the United States (eyewitness misidentification is the leading cause), and innocence may actually increase the risk of making a false confession because innocent suspects are more likely to waive their rights and because claims of innocence tend to trigger highly confrontational interrogation tactics (Kassin 2005; Kassin and Gudjonsson 2005).

10. Recording allows the jury to see inconsistencies and changes in the suspect's responses, even when the suspect has not confessed.
11. Recording results in a more complete evidentiary picture because the jury can not only see and/or hear what the suspect said, it can also observe the suspect's demeanor.
12. Recording is a useful training aid for police.

Many accounts of recording in the United States stress that it is not a "zero sum solution" (what helps one side is not offset by what hurts the other). Rather, recording "benefits all the parties who value accurate fact-finding and more informed decision-making" in the criminal process (Leo 2005: 32).¹²⁾ One such account identifies six positive effects of recording (Leo 2005):

1. Recording promotes truth-finding.
2. Recording provides a check against unwarranted state power.
3. Recording protects legal rights.
4. Recording is a valuable law enforcement tool.
5. Recording saves time and money.
6. Recording professionalizes the interrogation process.

Since calls to record began decades ago, American police have voiced three major objections to it. None is convincing. The first and most frequent objection is that recording custodial interrogations will lead to fewer confessions and convictions. Studies show that there is no empirical basis for this fear. As Thomas Sullivan's analysis of more than 260 police agencies found, "the use of recording devices, even when known to the suspect, does not impede officers from obtaining confessions and admissions from guilty suspects" (Sullivan 2004b: 10). In fact, in many American contexts, police are "able to get more incriminating information from suspects on tape than they were in traditional [unrecorded] interrogations" (Sullivan 2004b: 22). And for American prosecutors, recordings have increased the number of guilty pleas and given them greater leverage over sentences (Sullivan 2004b: 12). In short, recording in the United States "does not affect [law enforcement's] ability to obtain cooperation, admissions, and confessions" (Sullivan 2004b: 19).¹³⁾

12) While recording does "benefit all the parties," it does not benefit all parties equally. Police and prosecutors seem to benefit the most (Sullivan 2004a). This raises a question that needs to be researched: If recording is so good for law enforcement, why don't more defense lawyers oppose it?

13) A recent study by Reid & Associates surveyed 800 police investigators from Alaska and Minnesota. Since the response rate (14 percent) was low, the results should be interpreted with caution, but this study does suggest that police perceive confession rates to be higher when recording devices are not visible. The same study concludes that recording is "not only feasible, [it] may have an overall benefit to the criminal justice system" (Jayne and Buckley 2004).

The second objection to recording is cost, a concern that is also unfounded. Sullivan's study summarizes the types of costs and savings that recording generates. Most expenses (equipment, remodeling rooms, training) come on the front end when recording is first implemented, and they diminish after the equipment is in place and police have been trained to use it. In contrast, the savings—fewer claims of police abuse, coercion, and perjury, stronger evidence for the prosecution, fewer pretrial motions to suppress, and so on—continue for as long as recording continues. In the hundreds of conversations Sullivan had with police throughout the United States, “very few mentioned cost as a burden, and none suggested that cost warranted abandoning recordings” (Sullivan 2004a: 24).¹⁴⁾ More fundamentally, “many [American police] believe that, whatever the cost, full custodial recordings should be made because they help to secure convictions of the guilty and avoid convictions of the innocent” (Sullivan 2004a: 23).¹⁵⁾

Third and finally, American police have feared that jurors would be so offended by the interrogation tactics they see that they will “punish” the state at trial. Sullivan's report dispels this myth too. Of course, interrogations can be ugly—so unsightly that they have been likened to making sausage because, while the goal is clear, the process by which a confession is achieved is not appetizing to watch. Nonetheless, Sullivan found that American jurors are seldom offended by seeing scenes of police yelling or deception during interrogation (Sullivan 2004a). Similarly, Neil Nelson, a police commander in Minnesota who trains officers around the country in interrogating suspects on tape says “I certainly have found that juries and judges understand that a custodial interrogation is not a walk in the park” (in Wills 2005). Sullivan's study further shows that recordings “dramatically reduce the number of defense motions to suppress statements and confessions,” something

14) One point of reference for cost is the Chicago Police Department, which implemented mandatory electronic recording for homicide offenses on 18 July 2005. The Chicago system, which relies on digital recording directly onto a computer hard drive at CPD headquarters (not storage onto tapes, CDs, or DVDs) seems to be “setting the standard for other jurisdictions,” including South Korea, which sent prosecutors to Chicago to learn about its “state of the art” system (Mecklenburg 2005; author's interviews in Seoul, June 2005). The CPD installed digital recording equipment in 37 interrogation rooms at a cost of \$2.9 million (\$78,378 per room). In addition, CPD spent about \$1 million on training more than 670 detectives and investigators (\$1493 per interrogator; see Main 2005). Of course, expenses are lower for simpler technology. In New Jersey, for example, it costs about \$5000 to install covert cameras and microphones that are wired to a control room where the interrogation can be monitored and recorded onto a DVD (though the total expense varies depending on what changes need to be made to the architecture of the room). Even cheaper are video systems that record onto VHS tape, which cost about \$1000 to install, and high quality audio tape recording devices (such as the Marantz recorder, Model PMD201), which cost approximately \$300 (New Jersey Supreme Court 2005: 24-27).

15) Another cost-related objection to recording has been called “feasibility” (Leo 2005: 45). On this view, it is impractical to expect police to record interrogations in all circumstances (imagine a case in which the recording equipment malfunctions). In several American states, this objection has been addressed by requiring the prosecution to persuade the trial court (by a preponderance of the evidence) that recording was not feasible given the circumstances at the time of the interrogation.

that would not occur if defense attorneys believed the tapes revealed police conduct jurors might object to (Sullivan 2004a: 8). Rather than making police vulnerable to jurors' criticism, recording more often spares them from having to defend themselves against "allegations of coercion, trickery, and perjury" (Sullivan 2004a: 8). In this way, recording increases public confidence in and approval of police interrogation practices (Sullivan 2004a: 16).¹⁶⁾

In sum, the most common American objections to recording are debunked by the available evidence. Electronic recording of interrogations has proven to be "an efficient and powerful law enforcement tool" for the vast majority of American police departments that have taken up the practice (Sullivan 2004a: 6).¹⁷⁾ As for how to record, extant studies agree that while audio is good, video is better. Studies also show that it is important to record the entire interrogation (not just the confession) and, where feasible, to record both the suspect and the interrogators with multiple cameras in order to capture the totality of the encounter (Lassiter 2004). Whatever the logistics, the key fact is that recording—law enforcement's version of "instant replay"—helps police so much that "virtually every officer" who has "given [it] a try" is "enthusiastically in favor of the practice" (Sullivan 2004a: 6).¹⁸⁾ The American police experience with recording "has been uniformly positive" (Sullivan 2004a: ii). As long as this remains the reality, the number of police "converts" will continue to increase.

III. Recording In East Asia

It might be tempting to dismiss American criminal justice as too different and too dysfunctional to be relevant to Japan's own situation. Indeed, my own research has stressed the many ways in which Japan and the United States differ (Johnson 2002) as well as the many problems in American criminal justice that make it a dubious model for reform (Johnson 2005; see also Winston 2003). But while it may be easy to reject

16) In addition to the fact that American jurors are seldom shocked by the police practices they see on tape, it is important to recognize that recording results in fewer cases reaching the jury at all because it facilitates pleas of guilt (Sullivan 2004a: 12).

17) Although support for recording is widespread among American police who have used it, even some experienced officers complain that it has made their jobs more difficult. For example, in the Boston Police Department, some detectives believe that the advent of tape-recording (and of double-blind eyewitness line-ups) has caused the homicide clearance rate to drop, though some outside observers believe recording is not the real problem (McPhee 2005).

18) Police who have tried recording are "enthusiastically in favor of the practice" not just in the United States but in other nations as well. In New Zealand, for example, "Police officers find the [recording] system acceptable and workable. The vast majority are very enthusiastic about it and would hate to revert to the old system" (The New Zealand Video Interview Project, quoted in Kim 2005: 26). Similarly zealous support has been heard from law enforcement personnel in Australia, England, Scotland, Germany, Hong Kong, Taiwan, and South Korea (see Kim 2005).

America for these reasons, it would also be wrong, because recording is one of those things—like independent courts and the presumption of innocence—that fits well in a wide variety of cultures and contexts, including those that most closely resemble Japan.

A. Taiwan, Mongolia, Hong Kong, and China

Recording is not just a “Western” practice; it already occurs in several East Asian jurisdictions, including Taiwan, Mongolia, and Hong Kong. In Taiwan, for example, recording is required for all custodial interviews, and video is used in some circumstances (Yang 2005; Chen 2005). In Mongolia, about 40 percent of felony interrogations are recorded (as of July 2005), and interviews with juvenile victims are video-recorded. In both Taiwan and Mongolia, recording was introduced by law enforcement officials in order to better establish the voluntariness of suspects’ statements and confessions. In Hong Kong, recording is required for all crimes punishable by five years or more in prison and for other crimes related to public safety. If Hong Kong police believe it is necessary and if the suspect consents, or if the suspect asks for it, video-recording is used. In all three of these East Asian places—as in the United States too—many police have become supporters of recording after some initial resistance (Kim 2005; Shinomiya 2005). Here too, experience generates conversions.

Even more striking is the fact that top prosecutors in the People’s Republic of China recently “demanded that the interrogation of criminal suspects be filmed in a bid to deter police [from] using torture to force confessions” (Agence France Presse 2005). This extraordinary call puts Chinese prosecutors ahead of their Japanese counterparts on the road to transparency in interrogation. It was stimulated by two related facts: the high frequency with which Chinese defendants revoke their confessions at trial, and the revelation of miscarriages of justice that were caused by coercive interrogation practices. The latter fact is especially important. Indeed, the influence of false confessions on Chinese attitudes appears similar to the American pattern summarized in Section II.B.

In 2005 alone, “about a dozen” wrongful convictions have been exposed in China, including at least four for murder (Kahn 2005). These cases helped produce a “national uproar over increasing miscarriages of justice” in the country’s judicial system and a “rare discussion in China’s state press of the widespread use of torture by police” (Agence France Presse 2005; Hoo 2005).

In the first murder case, Nie Shubin, a farmer in Hebei province who was condemned and executed for rape and homicide in 1994, was declared innocent in January 2005 after the real culprit was arrested and pleaded guilty to the crimes (China Daily 2005).

China’s second high-profile false confession case involved She Xianglin, who spent 11 years in prison for murdering his wife in Hubei province. Police coerced She’s confession after keeping him awake for 10 days straight. He signed the confession

without even reading it. She was originally sentenced to death in 1994. On appeal, he was granted a new trial, which eventually resulted in a 15-year sentence that was imposed in 1998. In April 2005, She was declared innocent and released from prison after his wife reappeared to announce that she had run away to escape a bad marriage. (Her return to Hubei apparently was motivated by a desire to visit the couple's daughter.)¹⁹⁾ During She's incarceration, his mother, brother, and two villagers were arrested and jailed for "interfering with justice" (with their protests of innocence) and for uncovering evidence that the "victim" was still alive (China Daily 2005). After She was released from prison, one of the police who coerced the confession committed suicide amidst an investigation into the handling of the case (Hoo 2005; Agence France Press 2005). Another consequence was more welcome: the Sichuan Provincial High Court issued "China's first ruling that confessions or evidence obtained by torture, trickery, or coercion can't be used in court" (NewsMax.com 2005).²⁰⁾

China's third false confession case came to light in June 2005, when another woman thought murdered turned up alive (this time saying she had been sold as a wife), 16 years after the person convicted of killing her had been executed. Teng Xingshan, the wrongfully condemned man, confessed to police in Hunan province and was convicted and executed in 1989. At the time, the court found that Teng "confessed his crime on his [own] initiative" and stressed that his confession "conforms with scientific inspection and identification" (Hoo 2005).

Finally, in China's fourth murder miscarriage of 2005, a 30-year-old laborer in Shanxi province was released from prison in June after a boy he confessed to killing and dumping into the Yellow River returned home. It seems the "victim" had merely migrated to a city in order to find work (Kahn 2005).

It is impossible to tell how much public support for recording has been mobilized by

19) In addition to the false confession, She's arrest, indictment, and conviction were based on the coincidence of his wife's disappearance with the discovery of a decomposed corpse that could not be identified and on which no DNA tests were conducted (China Daily 2005).

20) Although torture was outlawed by China in 1996, police still use it to extract confessions. Hence, although judges in China already had the power to throw out cases where torture is suspected, the new ruling by the Sichuan court in southwestern China requires them to do so. According to Duan Qihua, the founder of China's oldest private law firm, China's judiciary "had to do this because there are just way too many cases of forced confessions. The problem is that the [old] law isn't enforced" (NewsMax.com 2005). Mo Shaoping, a prominent Chinese defense lawyer, said that until the Sichuan ruling, judges sometimes considered claims of police torture from suspects who could show wounds or other physical evidence, but defendants (like She Xianglin) who suffer sleep deprivation or psychological abuses that leave no marks received little attention at all (NewsMax.com 2005). Chen Xingliang, the vice-president of Peking University Law School and one of China's most highly respected criminal law scholars, has stated similar criticisms, while Chen Guangzhong, a professor at the China University of Politics and Law, has called for recording interrogations and for the presence of a lawyer whenever a suspect is being interrogated (China Daily 2005).

these and other miscarriages of justice in the world's most populous nation.²¹⁾ It is also unclear how responsive China's authoritarian regime would be to public demands for change. Time will tell. Still, two facts seem noteworthy: China's top prosecutors have publicly called for the recording of police interrogations, and even the nation's state-run media are publicizing the issue. In both respects, China contrasts with Japan.

B. South Korea

Though the China case is interesting, South Korea's movement to record interrogations merits even more attention, not least because it is much further along. What is more, the criminal justice systems of Japan and Korea are so similar that the Korean case can be used to test Japanese objections to recording (Hongo 2003). Japan annexed Korea in 1910, and "the Japanese criminal justice system prevailed everywhere in the country" until 1945 (Chung 1982: 145). Despite some postwar reforms, Korean criminal justice continues to resemble Japanese criminal justice in many important ways. In both systems interrogations are long, confessions are considered "the king of evidence," prosecutors possess immense power (more power in Korea than in Japan because Korean prosecutors exercise more control over the police), the bar is small, conviction rates are high, there is no right to bail until after indictment, and there are movements to reform key features of the criminal process (Moon 1995; Cho 2002; Johnson 2004b; Johnson 2005). Notwithstanding these similarities, Korean prosecutors have taken a position on recording that is diametrically opposed to the stance taken by their counterparts in Japan. In fact, Korean prosecutors have become such ardent advocates of recording that they must be called the leading edge of the movement to record. This section describes some of the steps that led to this situation.

I visited Seoul in June 2005 to give a lecture on "Lessons from the United States and Japan for Justice System Reform in Korea" (Johnson 2005). While there, I discovered that prosecutors in some parts of Korea have been recording custodial interrogations for almost two years, and that recording seems to be spreading even more rapidly in Korea than it is in the United States. Prosecutor Kim Jong-Ryal, one of the prime movers behind the trend, predicted that "probably within two years and certainly within three, all prosecutors offices in Korea will be recording interrogations" (author's interview, 15 June 2005). Mr.

21) In 2005, three Chinese police officers also were convicted of torturing a man into saying that he had killed a prostitute. The man had been scheduled to go on trial for murder in 2002 when the real killer confessed to the crime (Kahn 2005). For a detailed account of the wrongful conviction of Qin Yanhong, who was wrongfully sentenced to death in 1999 based on a false confession for murder that police had coerced, and who was released in May 2002, 16 months after the real murderer gave a detailed confession to the police (which police suppressed until a journalist forced their hand), see Kahn 2005. Official statistics from China's Department of Justice suggest that interrogation abuses are common. In the twelve months ending July 2005, 4645 criminal suspects had suffered humans rights violations (including torture).

Kim further averred that the main impediment to implementing recording more quickly is the need to secure additional funds for equipment and room reconstruction. Although the costs are not prohibitive, acquiring a bigger budget will “take a little time.” As of June 2005, Mr. Kim reported that “about 70 percent” of Korean prosecutors supported the movement to record interrogations, a figure that grew markedly during the months leading up to our conversation, for reasons that will be explained below in section III.C.

Some of the strongest Korean resistance to recording comes from judges and attorneys who believe that videos would be “too vivid” and “too compelling” to be allowed as evidence. In effect, this is an objection that recording will disproportionately advantage law enforcement and thereby exacerbate an imbalance of advantage in Korean criminal procedure that already favors state interests (Cho 2002). Notably, this is the opposite of the fear most often voiced by objectors in Japan—that recording will handicap law enforcement. Some Korean judges also resist recording because they want to shoulder more of the “initiative” and “responsibility” at trial rather than letting prosecutors continue to “dominate” trial proceedings as they frequently do now (author’s interviews). Parts of the Korean bar oppose recording for similar reasons, as do many legal scholars (Weisbart 2005). All three types of “resister” mistrust prosecutors too much to believe that they would conduct recording fairly and accurately. More fundamentally, all of these resisters would prefer to see interrogation-induced information, whether written in a dossier or recorded on a CD, excluded as evidence so that Korean trials can become the venue where real adjudication occurs instead of functioning so often (as they are now) as rituals that merely ratify the results of the prosecution’s investigation.

Despite this resistance, Korea’s procuracy built 12 recording rooms in 2004 and 42 more during the first six months of 2005. The ones I visited, in the Seoul Southern District Prosecutors’ Office, were equipped with state-of-the-art digital cameras and recorders that were operated according to protocols for different types of interrogation and interview.²²⁾ Korean prosecutors are keen to monitor the effects of recording as the reforms unfold. As a result, they were able to show me tables summarizing the interrogations that had been recorded thus far, along with the corresponding case outcomes. The evidence so far suggests that recording rarely inhibits suspects from talking. Of the 531 interrogations recorded between 24 December 2004 and 31 May 2005 in the Seoul Southern Office, only two suspects seemed affected by the presence of the camera, one of whom only wanted to know if the interrogation was being broadcast on

22) Korea’s protocol for recording the interrogation of criminal suspects prescribes eight successive stages: arrival, confirmation of the matter at hand, announcement and clarification of rights, confirmation of the starting time, interview, confirmation of the finishing time, finish, and making the CDs. Two CDs are burned immediately after the interrogation concludes, one of which is sealed in the presence of the suspect. During the interrogation, one or more prosecutor-observers may jot notes to indicate key points in the conversation (author’s interview, 14 June 2005). Defense lawyers also attend interrogations more frequently in Korea than they do in Japan (Shim 2005).

TV (author's interview, June 2005).

Korea's first concrete step towards recording was taken in May 2002, when Kim Jong-Ryal made a proposal to his superiors in the Supreme Prosecutors Office. Although the initial reception was chilly — "recording will hurt us because suspects will clam up" — Mr. Kim eventually received permission to design a prototype model. In April 2003, the first room for electronically recording interrogations was established. Two months later, a "Science Investigation Research Team" was formed, consisting of 38 prosecutors. It was headed by Kim Jong-Ryal and his colleague Baek Seong-Min (now a professor of law at Yonsei University). In the months that followed, the Research Team sent study missions to England, Australia, Germany, Hong Kong, and the United States (Chicago, Houston, and New York City), in order to learn how recording works in other countries and contexts. Before long, the Research Team created what may be the world's best comparative data bank on recording custodial interrogations. As for the circumstances that provoked recording innovations in these various places, Kim Jong-Ryal believes "the pattern is remarkably similar everywhere": recording starts to occur when miscarriages of justice and revelations of official misconduct generate public concern.

In January 2004, Korea's Prosecutor General approved a proposal from the Science Investigation Research Team to take the next step. The next month, pilot studies were started in 10 prosecutors' offices.²³⁾ By June 2005, 54 recording rooms had been established in the procuracy, and Korean police were consulting prosecutors about how to establish their own recording facilities. Soon thereafter, police announced plans to launch their own pilot program to record interrogations in November 2005, and they have already secured the necessary funds to expand recording in 2006.

South Korea has about 1500 prosecutors. On the average, Mr. Kim says, one recording room is needed for every two prosecutors. Since many Korean prosecutors are not involved in criminal investigations, he estimates that the procuracy will need about 400 to 500 "plain" rooms for interrogating criminal suspects (\$10,000 per room), 80 to 100 "comfortable" rooms for victim, witness, and "confrontation" interviews (one for every 10 prosecutors, at \$15,000 per room), and 55 "specially equipped" rooms for interviewing children, women, the disabled, and other "vulnerable" persons (one per prosecutor building, at \$25,000 per room). In addition to room costs that total \$7,875,000, Mr. Kim estimates approximately \$3500 is needed for the electronic equipment in each room (655 rooms x \$3500 = \$2,292,500). CDs cost "only a dime each," he adds. "That's nothing." The total estimated expense for the procuracy's recording reform is therefore about \$10 million, which is less than the organization spends to investigate some individual cases. As Kim Jong-Ryal sees it, "cost is not much of an issue at all," and other prosecutors agree

23) In 2004, South Korea also enacted the Sexual Assault Protection Act, which mandates the recording of interviews with children under age 13 (Shinomiya 2005).

(author's interviews, June 2005).²⁴⁾

A few days after I left Seoul, the Supreme Prosecutors' Office hosted an "International Symposium on Electronic Recording of Investigative Interviews" at the Lotte World Hotel (21-23 June 2005). It was organized by Mr. Lee Yung-Sang, a prosecutor in the Supreme Prosecutors' Office. At this symposium, legal professionals from the United States, Australia, the United Kingdom, Taiwan, and South Korea presented information about how recording is done in their jurisdictions (Supreme Prosecutors' Office 2005). Missing from the lineup of presenters was a representative from Japan. Despite the similar roles played by prosecutors in Japanese and South Korean criminal justice, the two have adopted very different attitudes toward recording interrogations. The next section explores why this divergence occurred.

C. How Korean Prosecutors Became "Progressive"

Korea's recording movement is remarkable because prosecutors seem to be leading the charge. On the surface, this contrasts with the United States, where false confessions and other interrogation abuses have stimulated courts, legislatures, and public opinion to push for recording reforms. It contrasts even more with Japan, where prosecutors still resist recording. The most ardent institutional advocate of recording in Japan is the JFBA, which has sent delegates to at least eight foreign countries in order to learn how and when recording occurs.²⁵⁾ In Korea, by comparison, it is prosecutors who have circumambulated the globe in order to learn about recording.

What explains this Korean difference? More specifically, why have Korean prosecutors taken such a "progressive" stance toward recording when in so many other ways their attitudes and actions resemble those of their Japanese counterparts (Cho 2002; Johnson 2002; Weisbart 2005)? Although I am not certain of the answer to this question, three Japan-Korea contrasts do seem causally relevant: differences in prosecutor leadership, differences in public reactions to prosecutor misconduct, and differing trajectories of justice system reform.

1. Prosecutor Leadership. It is obvious that leaders matter; the main difficulty is discerning how and why. Churchill, Mao, Thatcher, and Gandhi clearly changed the worlds in which they lived, as have Toyotomi Hideyoshi, Yoshida Shigeru, and Ishihara Shintaro in Japan. Leaders so obviously matter that it is puzzling why so many

24) A prosecutor at the Seoul Southern District Prosecutors' Office provided a second (non-itemized) estimate of the cost to outfit the procuracy with full recording capacity: 5 billion won, or about \$5 million (author's interviews, 14 June 2005).

25) The JFBA's visits occurred between January 2004 and September 2005, and the jurisdictions observed were Taiwan, Korea, Hong Kong, Italy, Australia, Mongolia, the UK, and the USA (Shinomiya 2005).

intellectuals routinely subordinate the choices they make to “large and impersonal forces” (Samuels 2003: 1). Too often, it seems, our explanations privilege the power of inexorable social facts over individual choice. The first thing to stress in explaining how Korean prosecutors have come to support recording is that leadership matters.

Prosecutor-leaders in Korea have been faster than their Japanese counterparts to perceive the benefits of recording interrogations. If one takes the time to talk to members of both groups, the difference is clear. A similar difference is reflected in their contrasting propensities to study how recording is done in foreign countries. Critically, Korea's procuracy has produced a handful of leaders who believe in the power of recording to improve the quality of Korean criminal justice. In particular, Kim Jong-Ryal (“the idea man”) and Baek Seong-Min (“the technology man”) are the two prosecutors who have done the most to develop a vision for how and why to record, and they have also done much to cultivate support for that vision among their colleagues and superiors.

Analytically, leadership is “that constrained place where imagination, resources, and opportunity converge” (Samuels 2003: 6). In the first few years of 21st century Korea, these factors may be converging around the issue of recording. As we have seen, the *material resources* have not been hard to mobilize (though the institutional and ideological barriers may prove more formidable). And as we will see, the *opportunity* to record has been made attractive to prosecutors by the imperatives of public opinion and of Korea's justice system reform movement. As for *imagination*—the most nebulous but most catalytic aspect of leadership—prosecutors such as Kim and Baek have perceived the positive possibilities of recording for at least two reasons: because comparative study has raised their awareness of how Korean interrogations can be improved, and because knowledge of the relevant technologies makes it clear that recording is not only desirable, it is feasible. Many people adopt an attitude towards technology that says they will live with it and have something to do with it, if necessary, but will at the same time remain detached and even alienated from it (Pirsig 1974: 27). In contrast, Kim and Lee see technology as an ally in their pursuit of an improved criminal justice system. The result has been rapid advance to a better state of (recorded) interrogations. This—“advance to a better state”—is the very definition of “progress,” and it is one reason why I regard Korean prosecutors as more “progressive” than their Japanese counterparts.

2. Public Reactions to Prosecutor Misconduct. Korean prosecutors are so powerful that criminal justice in their country has often been called a system of “prosecutorial justice” (Cho 2000: 139). A similar label has been used in Japan, and for many of the same reasons: prosecutors monopolize the charge decision; they can suspend any charge, no matter how serious the case or how strong the evidence; they conduct pre-charge interrogations and investigations; their sentencing recommendations are frequently followed by the courts; they can appeal both sentences and acquittals; and they supervise the

execution of sentences after they have been imposed (Johnson 2002: 15). In all of these ways, the powers of Korean and Japanese prosecutors exceed the substantial powers of prosecutors in the United States.

There are, however, at least two things that distinguish prosecutors in Korea and Japan. First, Korean prosecutors are more powerful than their Japanese counterparts, chiefly because of their powers over the police. The police in Korea are actually “a subsidiary organ of the prosecution, lacking independent powers of investigation” (Cho 2002: 381). Korean police have tried to gain more autonomy vis-à-vis the procuracy (as police in Japan enjoy), but so far they have failed to affect much change, in large part because there remains deep-rooted public distrust of police in Korean society (they have long been perceived as the coercive and unprofessional “strong arm” of an authoritarian executive), and because Korean prosecutors are reluctant to share their investigative powers. In criminal justice systems in the UK, the USA, and East Asia, prosecutors have on the whole been less hostile to recording reforms than have the police because prosecutors are more apt to appreciate the evidentiary payoffs that recording provides. The weaker political position of the police in Korea helps explain why their resistance has not been especially visible or forceful.²⁶⁾ Conversely, the immense power of Japanese police — to resist recording (by, among other things, keeping it off the agenda for justice system reform), and to maintain their position of primacy in the criminal process — goes a long way towards explaining why Japan has yet to implement meaningful police reforms (Johnson 2004c; Johnson 2004d).

The second critical difference is that Korean prosecutors have been subject to substantially more public scrutiny and criticism than have their Japanese counterparts. The key context is democratization, for South Korea has experienced major changes in its polity, economy, and society since the launch of democratic reform in 1987. Prosecutors have played a part in that dynamism too, both as *agents of change* (when they investigate and indict prominent actors), and as *targets of change* (when they are criticized for being too beholden to executive power or too “political” in their investigations). At the same time, the Korean public holds high expectations for prosecutors. Since high expectations create greater room for disappointment and frustration, this helps explain why Korean prosecutors have been subject to much criticism in the mass media (Johnson 2004b).

One case of prosecutor misconduct may have been an especially important agent of change. In October 2002, a brutal interrogation resulted in the death of a Korean gangster. The public backlash was severe, and contrasted sharply with the tepid public

26) Although some police in South Korea support the procuracy’s efforts to record interrogations, more seem to resist. Thus, in the politics of this recording movement, police have aligned *with* judges and attorneys *against* prosecutors. One motive for taking this stance is the strong police desire to gain “independent investigation power” from the procuracy. As one Korean prosecutor sees it, this is a “very funny and delicate problem.”

reaction in Japan after the “third degree” tactics of three prosecutors were exposed in 1993-94 (Johnson 2002: 253-262). The Korean prosecutor in charge of the interrogation and the prosecutor’s assistant who actually committed the brutality were arrested, convicted, and incarcerated. In Japan, by comparison, only one of the three brutal prosecutors was even indicted, and he eventually received a suspended sentence. Moreover, during the period when the three Japanese cases of prosecutor brutality were being exposed, the Japanese media “acted more like a lapdog than a watchdog” (Johnson 2002: 262). Similarly, when “slush fund” (*uragane*) abuses were exposed a few years later, implicating numerous Japanese prosecutors in the large-scale embezzlement of public funds, the public and media reactions were mild (Mitsui 2003). Although there are many reasons for this seeming tolerance towards prosecutor misconduct in Japan, the institutional structure of the mass media seems to be especially important, because it has fostered an “information cartel” in which journalists are spoon-fed information from official sources through an exclusive system of “press clubs.” In return for informational handouts, Japanese journalists have neglected their duty to question and investigate official statements (Freeman 2000). In Korea, by contrast, a lawsuit filed in May 2001 by a reporter from the *OhMy News* web newspaper “caused the country’s press club system to collapse at one stroke” (McNeill 2005).

In sum, Korean prosecutors have been subject to more criticism than have their Japanese counterparts. Although Korean prosecutors may be more deserving of disapprobation, it is important to recognize that prosecutors in Japan have also engaged in serious misconduct (as have Japanese police), only to enjoy a relatively relaxed response from the Japanese public and other sources of external accountability. If the first lesson of the Korea-Japan comparison is “No leadership, no recording,” the second is “No public pressure, no recording.” As we now shall see, the third lesson amplifies the second.

3. The Imperatives of Justice System Reform. Korea’s movement to record interrogations accelerated rapidly when events in the justice system reform movement left prosecutors with little choice but to support recording lest they be forced to accept other reforms that would be more unpalatable. The first major event was a decision by Korea’s Supreme Court (16 December 2004) to forbid the use of a confession as evidence after the defendant denied its reliability. This was a devastating blow to Korean prosecutors who, like prosecutors in Japan, have long relied on interrogation-induced confessions for evidence even when defendants repudiate them. As one Korean prosecutor told me, “It was like a bomb thrown into our house.”²⁷⁾

More bombs fell in April and May of 2005, when Korea’s Presidential Committee on

27) Although some commentators contend that the Supreme Court’s ruling “has not been put into practice” (Weisbart 2005), there is no question that it motivated Korean prosecutors to accelerate the development of their own reform proposals, especially for recording custodial interrogations.

Judicial Reform (PCJR) issued a series of far-reaching recommendations for revision of the country's Code of Criminal Procedure.²⁸⁾ The core proposal was a bill called "The Special Act for Lay Participation in Criminal Trials," which the government planned to submit to the National Assembly in September 2005. The bill requires 5 to 9 lay jurors to preside with 3 professional judges at serious felony trials, where the mixed tribunal would decide questions of guilt and punishment. In order to make this central reform effective, the PCJR proposed other reforms too, including one that would impose strict limitations on the use of dossiers at trial if the defendant whose statements they recorded did not consent to their use. This was a substantially more confrontational approach than the one Japanese progressives took in response to a similar problem in their own justice system reform movement: How to enliven criminal trials by reducing reliance on written statements produced during interrogation (Johnson and Shinomiya, forthcoming). While the reform movements in Japan and Korea are still ongoing, the more confrontational Korean approach has produced, so far at least, more progress towards recording reform.

But the initial response from Korean prosecutors can hardly be called "progressive." Indeed, many prosecutors blasted the PCJR's proposed reforms as "hasty" and "poorly conceived." Some said the recommendations merely "mimicked" America, a country that was too different and too dysfunctional to serve as a suitable model for reform.²⁹⁾ Other prosecutors said the reforms "incoherently mixed" criminal justice features from too many foreign systems. Still other prosecutors argued that the PCJR needed to listen to public views about what reforms they deemed desirable. Some senior prosecutors even threatened to resign if the PCJR's proposals were enacted, and a similarly critical response was issued by a group of more than 100 junior prosecutors.

After this initial wave of surprise and anger subsided, Korean prosecutors realized their interests would be better served by advocating their own proposals for change. Three years had passed since Kim Jong-Ryal made the first recording recommendation to executives in the Supreme Prosecutors Office. While much progress had been made, significant resistance remained within the organization. The "external shocks" from Korea's Supreme Court and from the Presidential Committee on Judicial Reform transformed much of that resistance into support for recording. By June 2005, approximately 70 percent of Korean prosecutors supported recording, and the procuracy was even campaigning for recording in the mass media and other public forums. Those Korean prosecutors who still harbored reservations about recording seemed to recognize that "the perfect can be the enemy of the good." In their view, it is better to be able to use recorded confessions as evidence than (as the most likely reform alternative would

28) The Presidential Committee on Judicial Reform was appointed by President Rho Moo-hyun in January 2005. It was composed of 20 persons, 12 from the President's own Cabinet.

29) In fact, the PCJR's proposed restrictions on the use of confessions as evidence at trial are even *more* restrictive than the restrictions imposed by American law (Johnson 2005).

have it) not to be able to use confessions as evidence at all.

In July 2005, the PCJR issued a revised proposal to amend the Code of Criminal Procedure that would explicitly approve the electronic recording of interrogations, though the use of videotapes as evidence would remain limited.³⁰⁾ The proposed limitations reflect the ongoing concern of Korean lawyers, judges, and legal scholars that videotaped interrogations would be so “vivid” that they would possess excessive evidentiary force. Prosecutor Kim Jong-Ryal expects the bill to pass the National Assembly in February 2006 (perhaps in a revised form).

While it remains to be seen what reforms will be enacted, Mr. Kim stresses that speed is of the essence. As he sees it, the procuracy is “in a race to record” because if recording can be made standard operating procedure, “it will be difficult for those who resist to get their way.” Korea’s movement to record thus shows that when change seems inevitable, people are not limited to choosing between futile resistance and passive acquiescence. There is also the middle ground of “anticipating the change and ordering one’s affairs so as to come out as well as possible under the new regime” (Banner 2005: 309). In significant part, that is what Korean prosecutors have done here.³¹⁾

IV. Recording in Japan

Recording has taken a different trajectory in Japan than it has in the United States and South Korea. On the one hand, the basic position of Japanese courts and lawyers is “almost the same” with respect to recording: both want interrogations to become more transparent in order to prevent “endless arguments about the authenticity of suspects’ statements” and in order to help lay judges make sound decisions in the new trial system

30) The Presidential Commission’s (July 2005) proposed amendment to the Code of Criminal Procedure (Article 244-2) states that (1) With the consent of the suspect or his/her counsel, the statement of the suspect can be videotaped. In that case, however, the entire session of interrogation and its attendant circumstances should be videotaped; (2) When the original videotape is completed, it should without delay be sealed in front of the suspect or his/her counsel, and the suspect should sign his/her name or affix his/her seal to it; (3) When asked by the suspect or his/her counsel, the interrogator should allow the suspect to watch the videotape. When there is an objection about the contents of the videotape, it should be recorded and attached to the videotape (author’s correspondence with Kim Jong-Ryal, 21 September 2005).

31) The Korean debate about recording is complicated, and many of its details are beyond the scope of this essay. One should note, however, that “perhaps the most heated point of controversy in the [Presidential Committee’s] reform draft is whether videotaped interrogations of defendants can be admitted as evidence” (Joong Ang Daily, 10 May 2005). The Presidential Committee on Judicial Reform initially stated three conditions under which it would agree to the use of videotaped interrogations as evidence at trial: (1) when the defendant consents; (2) when the video is introduced as evidence *after* all other evidence has been presented; and (3) when a defense lawyer was present during the recorded interrogation and it can be shown that the defendant did not speak under duress (Korea Herald, 6 May 2005). Korean prosecutors have denounced these conditions as unduly restrictive. As of this writing, the conflict continues.

that is set to start in 2009 (Tsunetsugu and Tanaka 2005; Nihon Bengoshi Rengokai 2005). On the other hand, Japanese prosecutors “strongly oppose” recording, as do many current and former law enforcers in Japan (Tsunetsugu and Tanaka 2005; Hongoh 2003).³²⁾ Their main reason for resistance is the perception that “if the secrecy of interrogation is not maintained, suspects will not speak the truth” (*Asahi Shimbun* 2005). Still, it does seem notable that Japan’s top prosecutor, Matsuo Kunihiro, recently asked his subordinates to “engage in a thorough discussion” about “how to prove the admissibility and credibility of investigators’ records of oral statements taken from suspects.” With Japan’s new lay judge system on the horizon, Matsuo even wonders whether it is “possible to continue the conventional way” (Tsunetsugu and Tanaka 2005).

My answer to Mr. Matsuo is No, it will not be possible for Japanese prosecutors (or their police siblings) to continue operating in the conventional way—by relying on confessions that are elicited and constructed in the closed and secretive space of the interrogation room. As this essay has argued, you do not need to be Nostradamus in order to see that recording is rapidly becoming the new “conventional way” of conducting interrogations in developed democracies. Sooner or later, police and prosecutors in Japan will be forced to accept reforms of the kind that have been welcomed by law enforcement officials in other nations. As for opponents’ claims that “those who call for recording do not know the true nature of investigations” (former prosecutor Munakata Norio, quoted in *Asahi Shimbun* 2005), the reality is that police and prosecutors in other countries have learned from experience that recording does not inhibit suspects from talking (Sullivan 2004a; Supreme Prosecutors’ Office 2005; interviews with Korean prosecutors, June 2005).

Still, there are reasons to wonder whether recording reforms will take a long time to take root in Japan. In addition to the differences that distinguish Japan from its closest East Asian neighbor (in prosecutor leadership, in public reactions to prosecutor misconduct, and in the political structure of justice system reform), there are at least two more reasons to worry about the pace of reform. First, courts in Korea and the United States have issued decisions that put pressure on law enforcement to make interrogations more transparent. Japanese courts have not said anything remotely similar, and considering the extraordinary passivity they display toward other organs of government—and toward law enforcement especially—this kind of “external shock” may not come until the new lay judge system is implemented (Johnson and Shinomiya, forthcoming). Second, the exposure of false confessions has helped mobilize public support for reforms that reduce the risk of justice miscarrying in the United States and elsewhere. In Japan, by contrast, false confessions have not been exposed nearly as often, and even when they have been uncovered they have failed to stimulate significant reform (Foote 1992; Hamada 1992; *Asahi Shimbun*

32) Though occasionally, Japanese law enforcers have recorded *part* of an interrogation and submitted the tape as evidence at trial (*Asahi Shimbun* 2005; Ibusuki 2005).

2005).³³⁾

Thus, the Japanese movement to record interrogations could fail to produce tangible results for some time to come. My own sense of the situation is that resistance from police and prosecutors is the most important obstacle to the kinds of recording reforms that would help improve the quality of Japanese criminal justice. Many Japanese defense lawyers seem to agree (Nihon Bengoshi Rengokai 2005: 35-36).³⁴⁾ In conclusion, therefore, I shall make six modest suggestions for reformers in Japan who would like to overcome law enforcement resistance.

1. Stress the fact that recording helps law enforcement, and confront rationalizations with rationality and evidence. In public forums and private negotiations, reformers should emphasize why law enforcement in other nations supports the recording of custodial interrogations. This article has described some of the benefits that police and prosecutors in other countries perceive and appreciate. Prosecutors in Japan, by contrast, have speculated about the potential costs of recording without taking into account the countervailing benefits or law enforcement's positive experience with recording in other nations (Hongoh 2003). Such distorted cost-benefit analysis should be confronted with relevant facts. Similarly, comparative evidence can help Japanese reformers debunk the objections that police and prosecutors make. Research shows that recording in the United States and South Korea does *not* "shut the mouths of suspects," as many Japanese opponents of recording fear (Hongoh 2003; *Asahi Shimbun* 2005). In fact, this objection — the core concern of Japanese police and prosecutors — is contradicted by almost all of the available evidence. Law enforcement officials in Japan have long been adept at keeping certain key issues, such as their own power, performance, and unaccountability, outside the realm of public discussion. Their "success" at agenda-setting shows that power has the capacity to define "reality" by producing knowledge that is conducive to the "truth" it

33) According to attorney Goto Sadato (a leader of Japan's recording movement), the revelation of four false confessions in death penalty retrial cases during the 1980s failed to stimulate "any self-reflection at all" among Japanese judges. Nearly two decades later, one harbinger of progressive change may be the retrials that have been granted to Okunishi Masaru (by the Nagoya High Court in April 2005), and to Sakurai Shoji and Sugiyama Takao (by the Tsuchiura Branch of the Mito District Court in September 2005). All three men were convicted of murder based on confessions that could prove false (The Japan Times 2005; asahi.com 2005). Such court decisions are rare in Japan. According to Supreme Court officials, only 8 cases involving indefinite prison sentences or death sentences have been reopened for retrial since World War II.

34) Of course, recording interrogations is not a panacea for all of the problems in Japanese criminal justice (though I do consider it the single most significant change the system could make). Some observers have argued that recording is a "limited" reform that could result in even greater "dependence on confessions" (*jihaku hencho*) if other problems in Japan's criminal process (such as the length of interrogations) are not also addressed (*Asahi Shimbun* 2005; Ibusuki 2005; Hirano 2005). Perhaps, but recording the *complete* interrogation should enable courts to see how long interrogations and abusive interrogation techniques undermine the reliability of suspects' statements.

wants and by *suppressing* the knowledge for which it has no use. One reform implication seems clear: pro-recording forces should publicize the fact that since at least the time of the Occupation, Japanese police and prosecutors have routinely produced rationalizations that serve their interests and suppressed rationality that would challenge their position of primacy in Japanese criminal justice (Johnson 2004c).

2. Cultivate and educate the media. Recording reforms in other jurisdictions have often been preceded by sustained newspaper coverage of interrogation abuses and false confessions. This is not only the pattern in Florida, Massachusetts, Illinois, Maryland, Washington D.C., and other parts of the United States, it also helps explain why top prosecutors in authoritarian China are now calling for recording. Japan's pro-recording forces should try to educate newspaper editors and reporters about the problem of false confessions, the international trends described in this article, and the need for reform.³⁵⁾

3. Push for pilot studies. One challenge to implementing reform in Japan is the fact that its criminal justice system is in many respects national in scope. Unlike the United States, there is no "natural laboratory" of regional variation in policy that can be studied in order to observe how reforms work in practice. South Korea's experience with recording could help to overcome this obstacle. There, where criminal justice is as national and hierarchical as it is in Japan, prosecutors conducted a series of pilot studies to test recording on a small scale before implementing it more widely. Japan can do likewise if it finds the political will. Moreover, since it is possible that recording could influence the behavior of police and suspects differently in Japan than it has in places such as the United States and South Korea, Japan should not rely solely on evaluations done in other countries, it should conduct evaluation studies of its own (Sherman 2004: 84).

4. Start with juveniles. In July 2005, the Wisconsin Supreme Court issued a decision requiring that all juvenile interrogations be recorded (*Wisconsin v. Jerrell* 2005). Less than two months later, Wisconsin legislators introduced legislation to require recording of interrogation in adult felony cases too (US State News 2005). For Japanese who would welcome similar reforms, focusing first on juvenile cases seems a sound strategy. Juveniles are more vulnerable to interrogation pressures (Drizin and Leo 2004), there is already more protection for juveniles than for adults in Japanese law, and juvenile suspects may well engender more public sympathy than adult suspects can. Once the door is opened to recording in juvenile cases, it should become harder to maintain a policy against recording adult interrogations.

35) The mass media have also helped catalyze other criminal justice reforms. In American states that have abolished the death penalty, for example, newspapers often played "pivotal roles" in framing the relevant issues (Gallagher et al 2002; 216).

5. Insist that recording laws have sanctions for non-compliance. One of the most striking features of Japan's socio-legal landscape is how often laws lack sanctions for non-compliance. Indeed, one prominent scholar says "no characteristic of Japanese political life seems more remarkable or intrinsic than the separation of authority from power" (Haley 1991: 13). Unless a legal rule is enforced — unless a law is backed by a penalty for failing to follow it — the viability of the rule depends on consent and consensus (Haley 1991: 9). "Law without sanctions" is not just a Japanese problem. In America's capital, police are required to record interrogations on video in almost all serious cases. This, anyway, has been the law since 2002. Unfortunately, police in Washington D.C. "have flouted the statute and the department order that followed it by recording only a small fraction of their interrogations" (Cauvin 2004). In 2004, barely 20 percent of the interrogations that should have been fully recorded were recorded even in part. The D.C. case illustrates what happens when a law is passed without any sanction for failing to follow it. Police ignore the law. Washington D.C. is therefore a good "negative role model" (*hanmen kyoshi*) for the kind of recording law that Japan should *not* pass.³⁶⁾

6. Learn more about recording developments in the United States and South Korea. Towards this end I have two practical suggestions. First, Northwestern University Professor of Law Steven A. Drizin administers an immensely informative reporting service about significant developments in interrogation and false confessions in the United States. Much of the information he distributes speaks to Japanese concerns too. Ask him to add you to his e-list. Second, ask prosecutor Kim Jong-Ryal to come to Japan and talk about recording developments in South Korea and elsewhere. He possesses a wealth of practical and comparative knowledge, he is an ardent supporter of recording, and there is much that Japanese reformers could learn from him.

V. Conclusion

I believe Japan will begin recording interrogations in earnest within five years. Although this article provides reasons to believe my prediction could be disproved, the international movement to record and the internal pressures produced by Japan's new lay judge system seem likely to result in the gradual opening of one of the most secretive spaces in Japanese society (Johnson and Shinomiya, forthcoming). Let us hope so. Recording is the right thing to do because it creates an objective, comprehensive, and reviewable record of what transpired during questioning, a record from which all parties — victims, judges, lay judges, suspects, defense lawyers, police, prosecutors, and the public — "can make

36) The widespread refusal to record in Washington D.C. has produced pressure for stronger legislation (Cauvin 2004).

accurate and informed decisions about the interrogation process and the resulting confessions” (Leo 2002: 212). Recording is also the right thing to do because it does not inhibit suspects from speaking the truth. The benefits of recording are now being enjoyed in a wide variety of countries and cultures. Japan should join the club.

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