

**TRANSPARENCY OF CRIMINAL INVESTIGATIONS  
IN THE UNITED STATES AND JAPAN**

**Taisuke Kanayama**

USJP Occasional Paper 06-06

Program on U.S.-Japan Relations  
Harvard University  
61 Kirkland Street  
Cambridge MA 02138-2030

2006



## **ABOUT THE AUTHOR**

After earning an L.L.B. at the University of Tokyo in 1980, Mr. Kanayama embarked on a career in the National Police Agency. He worked in the Office of National Security Council, the Embassy of Japan in Thailand, and was the Chief of Police of the Yamanashi Prefectural Police Department before becoming Chief of the Chubu Regional Police Academy in 2004. While at Harvard, Mr. Kanayama compared the transparency of the criminal justice process in Japan and the United States.

## **ON THE OCCASIONAL PAPERS OF THE PROGRAM ON U.S.-JAPAN RELATIONS**

Established in 1980, the Program on U.S.-Japan Relations of the Weatherhead Center for International Affairs and the Reischauer Institute of Japanese Studies enables outstanding scholars and practitioners to come together for an academic year at Harvard University. During that year, Program Associates take part in a variety of activities and conduct independent research on contemporary U.S.-Japan relations, Japan's relations with the rest of the world, and domestic issues in Japan that bear on its international behavior.

The Occasional Paper Series is wide-ranging in scope. It includes papers that are valuable for their contributions to the scholarly literature; it also includes papers that make available in English the policy perspectives of Associates from government, business and banking, the media, and other fields on issues and problems that come within the scope of the Program.

Needless to say, all papers represent the views of their authors and not necessarily those of their home organizations, the Program, the Weatherhead Center for International Affairs, the Reischauer Institute, or Harvard University.



## **TABLE OF CONTENTS**

Introduction	1
Abstract	2
Chapter 1. Investigative Procedures in the United States	4
Chapter 2. Investigative Procedures in Japan	20
Chapter 3. Comparison of Helpful Systems to Ensure the Transparency of Investigation Procedures in the United States and Japan	26
Conclusion	34
Figures	37
Bibliography	40



## **TABLES AND FIGURES**

Table 1-1. Attitudes Toward Electronic Recording of Custodial Interrogations	14
Table 1-2. Advantages of Electronic Recording of Custodial Interrogations	14
Table 2. Arrests in the United States and Japan (2004)	28
Table 3. Adult Arrests and Convictions in the United States and Japan (2004)	29
Table 4. Reported Crimes in the United States and Japan (2004)	29
Figure 1. States That Require Mandatory Electronic Recording of Custodial Interrogations	37
Figure 2. Survey on Attitudes Toward Electronic Recording of Custodial Interrogations	38



## INTRODUCTION

In 2004, the Japanese Diet passed a law that will introduce, starting in 2009, a modified jury system for criminal trials involving felonies and requested the Government of Japan to study several issues in the criminal justice system to make it adaptable to the new jury system.<sup>1</sup> The requests included the promotion of transparency in the criminal investigation process. The upcoming modified jury system called the “*saiban-in* system,” stipulates that three professional judges and six citizens (*saiban-in*) drawn from the jurisdiction involved will make up a decision-making panel. The role of the citizen members is basically as same as that of the professional judges; they examine all the evidence presented in a trial and have voting rights – not only on questions of guilt, but also sentencing.

The promotion of transparency in the criminal investigation system has two purposes. One is to uphold the rights of the accused, which means that the accused should be protected from unlawful interrogations and other coercive or deceptive measures by the police. The other is to provide clear evidence about the voluntariness and truth of the defendant’s statements to the *saiban-in*. This is because these issues are often debated in trials and are difficult to judge. This paper will explore and compare several procedures of the criminal justice systems in the United States and Japan that work toward the promotion of transparency in criminal investigations.

---

<sup>1</sup>Supplementary resolution for the draft amendment of the Code of Criminal Procedure. Judicial Committee of the House of Representatives, 23 April 2004; Judicial Committee of the House of Councilors, 20 May 2004.

## ABSTRACT

First, I have explored the U.S. criminal justice system and found several kinds of procedures that might work to promote transparency in its Japanese counterpart. These include Miranda warnings, electronic recording of custodial interrogations, initial appearance, and discovery and disclosure. Miranda warnings assure the right of the accused to counsel, including counsel's presence at interrogations. The right to counsel, however, does not actually work very well in practice. Initial appearance is regarded as a critical stage in the criminal justice process that needs the assistance of counsel and is recognized as the first opportunity in the investigation process for the defense to be disclosed. Discovery and disclosure function just before trial, not in an active investigation process, but they may have some deterrent effect on the police because misconduct can be identified by the defense side after disclosure. Electronic recording of custodial interrogations is highly regarded in the United States, which has statutes to cover such measures. Several questions, however, have emerged regarding this practice, involving, for example, the consent of the accused to having their interrogations recorded and the accused's inclination to do so.

Second, I have also explored the Japanese criminal justice system and made similar findings of several kinds of procedures that might work to promote transparency in the criminal investigation system. These include "*benkai-rokushu*," interrogation situation reports, disclosure of reasons for detention, and discovery and disclosure of evidence. The right to counsel assured by *benkai-rokushu* gives rise to problems that are similar to those observed in the United States. Disclosure of reasons for detention could assist the defense in being informed about the investigation to be conducted against the arrestee. The interrogation situation report system was recently introduced in Japan and proposes to enhance the transparency of interrogations. The

system of discovery and disclosure of evidence was also recently modified in order to allow the adoption of the *saiban-in* system.

Finally, I have compared systems in each country that are helpful to ensure the transparency of the investigation process. As for Miranda warnings and *benkai-rokushu*, the right to counsel is assured by both procedures, but this right does not work well from the standpoint of transparency of investigations. Electronic recording of custodial interrogations in the United States results in more accuracy than interrogation situation reports. Thus, I examined the applicability of electronic recording of custodial interrogations to the Japanese criminal investigation process and found that several stumbling blocks, such as the difference of the period of interrogations between the United States and Japan and the consent of the accused to having their interrogations recorded, emerged.

In conclusion, the application of electronic recording of custodial interrogations to the Japanese system presents several difficulties, including the sky-high workload that would fall upon the police, prosecutors, lawyers, and judges. In addition, recording without the arrestee's consent might be an abuse of the right to remain silent; in fact, in the current U.S. statute on this matter, it is basically more advantageous to refuse to be recorded. Initial appearance and disclosure of reasons for detention are both the first opportunity for the arrestee to be informed of a probable cause of arrest. The system of disclosure and discovery of evidence in the United States was more thorough than that of Japan before 2004; due to the introduction of the *saiban-in* system, however, this situation has been improved to some extent.

# CHAPTER 1

## INVESTIGATIVE PROCEDURES IN THE UNITED STATES

### Flow of the Investigation Process

In the United States, the investigative procedures of law enforcement agencies differ depending on the jurisdiction and the type of crime involved. In this paper, unless otherwise noted, regulations and rules pertaining to investigative procedures are based on the laws and rules of the State of Massachusetts with regard to felonies.

Generally, an investigation is initiated by a crime report from a victim(s) or citizen(s). When a police officer finds a suspect and probable cause,<sup>2</sup> the officer can arrest the suspect without a warrant. Before the police interrogate the suspect, however, Miranda warnings<sup>3</sup> must be given. If this is not done, any statement given by the subject, except one involving impeachment, will be inadmissible in a trial. After the arrest, the suspect(s) should appear before a judicial officer within 24 hours<sup>4</sup> (initial appearance). In jurisdictions other than Massachusetts, the statute provides that the initial appearance shall be made “without unnecessary delay”<sup>5</sup> after arrest. The judicial officer examines the existence of probable cause and decides on either further detention of the suspect or bail. The Supreme Court of Massachusetts holds that statements made more than six hours after the arrest are inadmissible without a waiver of the right to be promptly arraigned (Safe Harbor Rule).<sup>6</sup>

---

<sup>2</sup>*Brineger v. United States* 338 U.S. 160 (1949). The common definition, however, is “reasonable belief that a crime has been committed.”

<sup>3</sup>*Miranda v. Arizona* 384 U.S. 436 (1966).

<sup>4</sup>The Massachusetts Rules of Criminal Procedure (2004) §3.1.

<sup>5</sup>See e.g. Federal Rules of Criminal Procedure Rule 5. (a), New York State Law of Criminal Procedure article 120.90.

<sup>6</sup>*Commonwealth v. Rosario* (1996) 422 Mass. 48.

After the magistrate admits the probable cause of arrest, a prosecutor will undertake an indictment procedure against the suspect, and a trial date will be set several months hence. The required investigations continue until the trial; interrogation of the suspect, however, is normally conducted while he/she is in police custody before the first appearance, and the prosecutor does not interrogate the suspect at this stage.<sup>7</sup>

Transparency of the police investigation is mainly assured as follows. First is the Miranda warning, which informs the suspect of the right to remain silent and to counsel. Second is the initial appearance. The third is electronic recording of custodial interrogations of suspects, and the fourth is disclosure of all evidence that the police collect, including exculpatory facts, to the defense.

### **Miranda Warnings**

Miranda warnings are a means of protecting a criminal suspect's Fifth Amendment right not to be subjected to coerced self-incrimination. They are composed of three elements. First is the right to remain silent during interrogation; second is the right to be interrogated in the presence of counsel; and third is notice of the availability of government-appointed counsel if the accused is indigent.<sup>8</sup> The U.S. Supreme Court holds that:

[T]he police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation... When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must

---

<sup>7</sup>Prosecutors sometimes join police interrogations in other jurisdictions, e.g. Cook County, IL.

<sup>8</sup>The government of Massachusetts provides public counsel service for indigents from the stage of initial appearance (The General Law of Massachusetts, Chapter 211D, Section 5).

be forgone or postponed.... The right to counsel is provided by the Fifth Amendment of the U.S. Constitution.<sup>9</sup>

Presence of counsel at interrogation is the most apparent way to ensure the transparency of the investigation process. According to many police officers, prosecutors, and defense attorneys whom I interviewed in Boston, Chicago, New York, and Washington, D.C., however, if counsel is present during an interrogation, he or she usually advises the suspect not to say anything; thus, the interrogation effectively comes to an end.

Even when Miranda warnings are given, many suspects waive their rights and agree to be interrogated; in such cases, the police usually obtain written consent from the arrestee to waive Miranda rights before they begin the interrogation. According to a survey conducted in the mid-1990's in the United States<sup>10</sup> and personal interviews by the present author with law enforcement officials,<sup>11</sup> approximately 80 percent of arrestees waive their Miranda rights. This practice also ensures the transparency of the investigation process.

Even though suspects waive their Miranda rights, evidence acquired from a coercive or excessively long interrogation is inadmissible. The U.S. Supreme Court holds that interrogations that last longer than eight hours and/or continue overnight violate suspects' Fifth Amendment rights.<sup>12</sup> Besides arguments concerning prolonged interrogation, defense counsel often challenges the voluntariness of the confession, claiming for example, that the defendant did not admit to the charges, or they assert

---

<sup>9</sup>*Miranda v. Arizona* 384 U.S. 436 (1966).

<sup>10</sup>Richard A. Leo, "Miranda's Revenge: Police Interrogation as a Confidence Game," *Law & Society Review*, Vol. 30, No. 2 (1996).

<sup>11</sup>Interviews were conducted in Massachusetts, the District of Columbia, and Illinois during 2005 and 2006.

<sup>12</sup>*Spano v. New York*, 360 U.S.315 (1959).

that the police misunderstood what the defendant said. Most particular claims are that the confession has been gained by coercive or deceptive tactics on the part of the police. In order to clarify such issues, electronic recordings of custodial interrogations of suspects have been introduced in some jurisdictions.

### **Electronic Recording of Custodial Interrogations**

Audio recording of interrogations has been conducted by law enforcement agencies in the United States since the 1960's, and video recording has been employed since the early 1980's.<sup>13</sup> The purpose of these recordings is mainly to provide solid evidence of confessions during the interrogations. As the presentation of electronic records at trial became more frequent, the courts began to examine such records with a view to ascertaining the voluntariness of any confessions.

The first decision to require police to record interrogations of suspects was handed down in Alaska in 1985, then in Minnesota in 1994, followed by several states in the 2000's. As of March 1, 2006, nine states and the District of Columbia had statutes mandating electronic recording of custodial interrogations by the police.<sup>14</sup> Alaska, Massachusetts, Minnesota, New Jersey, and Wisconsin are ruled by court order or decision, while Illinois, Maine, New Mexico, Texas, and the District of Columbia are regulated by acts of state.

As reasons for the introduction of these statutes, the Supreme Court of Alaska held that recording of interrogations was required by the due process called for in the Alaska Constitution.<sup>15</sup> The Supreme Court of Minnesota ruled that recording was

---

<sup>13</sup> William A. Geller, "Videotaping Interrogation and Confession" (Research Paper). (Washington, D.C: U.S. Department of Justice, 1993).

<sup>14</sup>See Figure 1.

<sup>15</sup>*Stephan v. State*, 711P.2d 1156, 1162. "An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his

adequate protection of the right of the accused to counsel.<sup>16</sup> The Supreme Court of Massachusetts concluded that: “[I]t was the Commonwealth’s burden to establish, beyond reasonable doubt, that [the defendant’s] confession was voluntary.”<sup>17</sup> The Supreme Court of Wisconsin issued a more comprehensive opinion, which said:

- First, a recording requirement will provide courts with a more accurate and reliable record...
- Second, an accurate record will reduce the number of disputes over Miranda and voluntariness issues...
- Third, recording will protect the individual interests of police officers wrongfully accused of improper tactics...
- Fourth, a recording requirement will enhance law enforcement interrogations of juveniles [because]... recordings permit detectives to focus on the suspect rather than taking copious notes of the interview...
- Finally, such a rule will protect the rights of the accused... The existence of an objective, comprehensive, and reviewable record will safeguard juveniles’ constitutional rights by making it possible for them to challenge misleading or false testimony.<sup>18</sup>

The scope of electronic recording varies. In states where such recording is mandated by court decisions, the requirement covers all crimes. In the other states, the

---

testimony concerning the circumstances of the confession... Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, under the Alaska Constitution.”

<sup>16</sup>*State v. Scales*, 518 N.W.2d 587,592 “[R]ecording is now a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self incrimination and, ultimately, his right to a fair trial.”

<sup>17</sup>*Commonwealth v. DiGiambattista*, 813 N.E. 2d 516,553-534 (Mass.2004).

<sup>18</sup>*State v. Jerrell* C.J., 2005 WI 105; 699 N.W.2d 110.

scope of the recording is limited: Illinois law applies only to homicide cases,<sup>19</sup> D.C. law to violent crimes,<sup>20</sup> New Mexico law to felony offenses,<sup>21</sup> and Maine to serious crimes<sup>22</sup>; Texas law, however, applies to all crimes.<sup>23</sup>

In cases of failure to make recordings, admissibility of evidence related to interrogations, such as statements by the suspect, varies. The Alaska Supreme Court holds that unrecorded statements are subject to exclusion.<sup>24</sup> The Minnesota Supreme Court decided that: “If law enforcement officers fail to comply with [the] recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial” and that suppression can be examined case-by-case when the failure is substantial.<sup>25</sup> Illinois law<sup>26</sup> provides that unrecorded statements shall be presumed to be inadmissible, but can be used for the purposes of impeachment. New Mexico law<sup>27</sup> admits some excuses for failure to make a recording, such as “electronic recording equipment was not reasonably available” and to use unrecorded statements for the purposes of impeachment. Texas law<sup>28</sup> provides that unrecorded statements that contain assertions of facts or circumstances that are found to be true

---

<sup>19</sup>Illinois Criminal Code of 1961, Section 9 (murder, involuntary manslaughter, reckless homicide) and Illinois Vehicle Code Section 11-501 (driving under influence of alcohol or drugs causing the death of another person).

<sup>20</sup>D.C. Official Code §23-1331(4) e.g. murder, burglary, rape, arson.

<sup>21</sup>New Mexico Statute 29-1-16. Electronic recordings of custodial interrogations.

<sup>22</sup>Maine Statute Title 25 §2803-B. Requirements of law enforcement agencies, Maine Chiefs of Police Association model policy *Recording of suspects in serious crimes*, 11 February 2005.

<sup>23</sup>Texas Code of Criminal Procedure §38.22.

<sup>24</sup>*Stephan v. State*, supra.

<sup>25</sup>*Stephan v. State*, supra.

<sup>26</sup>Illinois Code of Criminal Procedure Section 103-2.1.

<sup>27</sup>New Mexico Statute 29-1-16.

<sup>28</sup>Texas Code of Criminal Procedure §38.22.

and that conduce to establish the guilt of the accused are not inadmissible. The Supreme Court of Massachusetts gives strict instructions to juries that are presented with the product of an unrecorded interrogation concerning the need to evaluate the alleged statement or confession with particular caution.<sup>29</sup> Maine law, which does not provide any clause with regard to unrecorded statements or confessions, is more lenient.<sup>30</sup>

The evolution of legislation in the District of Columbia is interesting. In 2002, the Council of the District to Columbia passed an act<sup>31</sup> that required the Metropolitan Police Department (MPD) to electronically record custodial interrogations. Because the implementation of this act by the MPD did not satisfy the Council, however, two years later, the Council passed a new act with a section that presumed that unrecorded statements were inadmissible.<sup>32</sup> In 2005, though, the Council passed a temporary act<sup>33</sup> that omitted the article of presumption, but called for an administrative penalty against police personnel who knowingly violated the act.

Practices related to electronic recording of custodial interrogations are quite similar from one part of the country to another. All statutes require that the entire interrogation be recorded, and all police begin recording when a suspect enters the interview room and continue until the suspect leaves the room. If the suspect declines to be recorded, all statutes require electronic recording of the Miranda warnings as well as the waiver and statement of refusal to be recorded.

---

<sup>29</sup>*Commonwealth v. DiGiambattista*, 442 Mass 423 (2004).

<sup>30</sup>Maine Statute Title 24 Chapter 341 §2803-B.

<sup>31</sup>Electronic Recording Procedure Act of 2002 (D.C.).

<sup>32</sup>Electronic Recording Procedure Act of 2004 (D.C.).

<sup>33</sup>Electronic Recording Procedure and Penalties Temporary Act of 2005 (D. C.) The bill for a permanent act is currently in session.

Other jurisdictions – for example, some states such as New York and California – are considering legislation concerning electronic recording of custodial interrogations. Meantime, many law enforcement agencies, including federal law agencies, conduct voluntary electronic recording of interrogations. In addition, such countries as the United Kingdom and Australia have also adopted electronic recording of custodial interrogations. The United Kingdom introduced the measure in 1984 following the Police and Criminal Evidence Act 1984.<sup>34</sup>

Thomas P. Sullivan, a lawyer and criminal policy advisor to the governor of Illinois, cooperated with the Center on Wrongful Convictions at Northwestern University to make a broad survey on electronic recording of custodial interrogations conducted in the United States covering 238 law enforcement agencies in 38 states and introduced the positive aspects of this practice. They wrote, for example, that “recording is a great investigative device...” “inevitable to us in resolving disputes regarding confessions,” and indicated that, as a result of recording, there has been a reduction in the number of defense motions to suppress statements and confessions as well as an increase in the number of guilty pleas.<sup>35</sup> Furthermore, the most anticipated negative outcome, which is a decline in the confession rate, has not materialized, they say. This is because recording is conducted only covertly (see the paragraph below) or when a suspect agrees to be recorded. Namely, if a suspect does not want to be recorded, as Sullivan said, “[I]f necessary to obtain cooperation, stop the recording devices and proceed with the interviews in the handwritten note-taking manner.”<sup>36</sup>

---

<sup>34</sup>Stephen Moston, “Changing Face of Police Interrogation,” *Journal of Community and Applied Psychology*, Vol. 3 (1993) 101-5.

<sup>35</sup>Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* (Chicago: Northwestern University School of Law 2004) 10-16.

<sup>36</sup>Sullivan 19-22.

According to other current research, however, some negative outcomes have emerged. One, contrary to the above assertion, is a decline in confession rates. The homicide division in one U.S. police department, in fact, experienced a 30 percent decline in confession rates. They analyzed this development and concluded that the reason is the dampening effect on the interrogator and the suspect's reluctance to confess. Namely, suspects are afraid to give a clear taped confession when it might be a disadvantage in future plea bargaining.<sup>37</sup> Other police departments that conduct almost covert electronic recording have not experienced such a decline in confession rates,<sup>38</sup> but one high-ranking officer from one police department predicted that, when the recording becomes obvious to the suspects, the confession rate will decline because a videotaped confession is absolute evidence against a defendant.<sup>39</sup>

Another negative outcome is the lack of cooperation on the part of the suspects; two other police departments revealed that about half of their suspects declined to have their interrogations recorded.<sup>40</sup>

There are two possible explanations for this. The first is that written consent is required in those jurisdictions, and this procedure might make suspects wary. The second possibility is that the police themselves discourage suspects from being recorded; in those jurisdictions, however, partial recording of interrogations has been conducted for more than 30 years, and police officers are generally favorably inclined to the practice. Thus, I can conclude that this is not a likely explanation.

---

<sup>37</sup>Interview, October 2005.

<sup>38</sup>The Chicago Police Department's electronic recording devices are installed in the ceiling of the interview room. They are not obvious and interrogators do not tell the suspects that they are being recorded.

<sup>39</sup>Interview, October 2005.

<sup>40</sup>Interview, October 2005.

Why do many suspects decline to be recorded when they are requested to sign a written consent? A possible explanation is as follows. Under the statutes for mandatory recording in several states, unrecorded statements or confessions have a large disadvantage in a trial; this is because most of these jurisdictions basically declare that unrecorded statements of confession are inadmissible in a trial. Therefore, it can be said that suspects who decline to be recorded have a sizeable advantage. Those who do agree are bound by their initial confessions. On the other hand, suspects who refuse to be recorded could reverse their confession later on or even when signing a document requiring corrections of statements at the end of the interrogation. Suspects who decline to be recorded might instinctively recognize the disadvantage involved for them.

Table 1-1, a small survey on attitudes towards electronic recording of custodial interrogations,<sup>41</sup> shows that 60 percent of people would decline to be recorded if they were arrested and feel that they are guilty. Even if they felt that they were innocent, 25 percent of them would decline to be recorded, and 40 percent of them thought that electronic recording would be more beneficial to the prosecution than to the defense (Table 1-2).

---

<sup>41</sup>See Figure 2. The survey was conducted anonymously through the web site of the Weatherhead Center for International Affairs, Harvard University, from December 2005 to February 2006.

**Table 1-1. Attitudes Toward Electronic Recording of Custodial Interrogations<sup>42</sup>**

Q: Would you agree to have your interrogation recorded?				
When You Feel	YES		NO	DK*/NA
	By Video	By Audio		
Guilty	12% (3)	7% (2)	60% (23)	21% (17)
Innocent	51% (26)	14% (5)	29% (10)	6% (3)

\*Don't know.

**Table 1-2. Advantages of Electronic Recording of Custodial Interrogations<sup>43</sup>**

Q: Which side would gain the most advantage by using electronic recording of interrogations as evidence in a trial?			
Prosecution	Defense	Equal	DK/NA
42% (9)	5% (3)	36% (19)	17% (13)

Other jurisdictions that do not require written consent from suspects, such as Illinois and the District of Columbia, do not have such a low rate of recording.<sup>44</sup> The Chicago Police Department does not tell suspects about recording the interrogations, and a large proportion of the suspects do not even notice the camera.<sup>45</sup> The Police Department of the District of Columbia just tells suspects that they are going videotape the interrogation.<sup>46</sup> The U.S. Supreme Court affirms the government's right

<sup>42</sup>See Figure 2.

<sup>43</sup>See Figure 2.

<sup>44</sup>Interview, October 2005.

<sup>45</sup>Interview, October 2005.

<sup>46</sup>Interview, October 2005.

to covertly record a suspect's conversation with a secret agent or an informant,<sup>47</sup> presumably even an incarcerated suspect<sup>48</sup> Electronic recording of custodial interrogations without the consent of the suspects, however, should not be allowed for the following reasons.

First, the presentation of a recorded interrogation might possibly infringe on the right to remain silent in court. The presentation of an interrogation recorded without consent has almost the same impact as the testimony of the defendant in a trial. It is even disadvantageous for the defendant because there is no direct questioning by defense counsel as is the case in a trial. Therefore, the presentation of an interrogation without consent would be deemed as forcing the defendant to testify, which is prohibited by the U.S. Constitution. Furthermore, the U.S. Supreme Court holds that using an arrested person's silence to impeach is fundamentally unfair.<sup>49</sup> Thus, a videotaped interrogation that partially includes such a silence might also be controversial in a trial.

The second reason is that recording of interrogations without the consent of suspect(s) may possibly infringe on the Fifth Amendment right of privilege against self-incrimination. Electronic recordings of custodial interrogations reveal many things other than words – for example, tones of voice, sighs, or unnatural silences, which usually do not appear in a written statement – as well as, in the case of video, facial expressions and body language. Such content can be analyzed scientifically or experimentally and provides beneficial outcomes to the government side. The problem is that such things are rather difficult to control, even unconscious. This is because

---

<sup>47</sup>*E.g. U.S. v. White* 401 U.S. 475 (1971).

<sup>48</sup>*Arizona v. Fulminante* 89 U.S. 839 (1989). The Supreme Court did not disaffirm the use of the informant him/or herself against an incarcerated suspect in a federal prison.

<sup>49</sup>*Doyle vs. Ohio*, 426 U.S.610 (1976).

people who have just been arrested are generally nervous or restless, even frantic, and it is rather difficult for them to give logical or coherent explanations. Of course, suspects can remain silent and refuse to be interrogated; on the other hand, some argue that the suspect loses all constitutional rights when he/she waives Miranda rights. Before the introduction of electronic recording of complete interrogations, however, suspects had the basic opportunity to reasonably explain themselves without the danger of anything other than their words being captured by the government. Such a customary right or benefit should not be withheld without a judicial decision.

The third reason is that electronic recording of custodial interrogations may possibly deprive the suspect(s) of practical defensive opportunities. Namely, suspects can reverse or correct a previous statement because they misunderstood the interrogator's question and regularly such corrections do not appear in their written statements, or the suspect(s) can even refuse to sign the statement. But everything a suspect says that is captured on audio/video tape, even an apparent misunderstanding, could be arguable evidence. In other words, electronic recording of custodial interrogations gives the police the same advantage as if they obtain a signed statement from the suspect(s). Therefore, suspects should have the right to be interrogated without being recorded.

The current practice of electronic recording of custodial interrogations is conducted with the explicit or implicit consent of the suspect, except by the Chicago Police Department, which does not obtain such consent.<sup>50</sup> The problems that I mentioned above can be raised even in recorded interrogations with the consent of the suspect(s).

---

<sup>50</sup>In Massachusetts, the police obtain written consent from suspects.

These problems related to electronic recording of custodial interrogations may raise questions about the propriety of such recording as a means to achieve its purposes. As the supreme courts of several states have held, the major purpose of electronic recording of custodial investigations is to protect the suspect's constitutional rights. Thus, the means of achieving this goal should be minimal. In other words, the means should be proportionate to outcome.

Do current means of electronic recording of custodial interrogations meet this test? As Sullivan has noted, the law enforcement side gains considerable benefits from electronic recording of custodial interrogations. For example: “[Detectives] often discover significant incriminating matters they overlooked during the interview such as false exculpatory statements and alibis, subtle change of story, and (with video) body and eye movements indicating deception.”<sup>51</sup> As I have already mentioned, electronic recording of custodial interrogations has the same value as gaining a signed statement from a suspect; this may be excessively beneficial to the law enforcement side as compared with the advantage to the suspect of protecting him/her from police misconduct.

Given that some jurisdictions adopt audio recording and courts are satisfied with this, the best solution now, I think, may be to use only audio recording in custodial interrogations.

### **Initial Appearance**

A person who is arrested by the police or another law enforcement officer or agency shall be taken before competent judiciary such as a magistrate or judge for probable cause hearing without unnecessary delays.<sup>52</sup> This procedure is called “initial

---

<sup>51</sup>Sullivan 18.

<sup>52</sup>See e.g. Federal Rules of Criminal Procedure Rule 5. (a), New York State Law of Criminal

appearance,” and the U.S. Supreme Court holds that it is a critical stage of the criminal justice procedure and requires the effective assistance of counsel.<sup>53</sup> This is because the arrestee is informed of the charges against him/her and often makes an initial plea, which requires effective counsel.

At an initial appearance, the police shall present information regarding the arrest, including the charges, background facts of probable cause, and procedure of arrest under oath or affirmation. This information is not only material for determination of probable cause, but also disclosure of the investigation process for the defense side.

### **Discovery and Disclosure of Evidence**

The discovery and disclosure rules, which regulate both the defense and prosecution access to information about the other side, are very important in ensuring fairness in a trial and finding truth in order for an accurate sentence to be handed down. The U.S. Supreme Court holds that the prosecution must disclose exculpatory evidence within its possession to the defense.<sup>54</sup> This is called the Brady doctrine and is based on the due process clause of the constitution. In addition to the Brady doctrine, federal or state statutes regulate the range of disclosure.

In Massachusetts, there are two kinds of discovery. One is automatic discovery, which is mandatory discovery for both the prosecution and defense. The other is discovery by motion and is allowed only to the defense side. The range of objects of automatic discovery for the defense is wide and includes statements of suspect(s),

---

Procedure, Article 120.90.

<sup>53</sup>*White v. Maryland* 373 U.S.59 (1963).

<sup>54</sup>*Brady v. Maryland* 373 U.S. 83 (1963).

grand jury minutes, any facts of an exculpatory nature, identity of prospective witnesses, intended expert opinion evidence, relevant material, and police reports or other investigative documents and statements of prospective witnesses, and so on.<sup>55</sup> The range of objects covers almost all investigative products made by the Commonwealth except work products.<sup>56</sup> The defense is required to disclose intended expert opinion evidence, all intended exhibits, statements of prospective witnesses, and so on, as well as the “Notice of Alibi,” which covers the details of any alibi.<sup>57</sup>

Discovery should be done by the pretrial conference. The duty of disclosure, however, continues after the initial disclosure. Namely, if either the prosecution or the defense subsequently learns of additional material that it would be under a duty to disclose, it shall promptly notify the other party.<sup>58</sup>

If either side fails to reveal evidence that it would have been required to disclose, the judge may exclude such evidence from the trial.

---

<sup>55</sup>The Massachusetts Rules of Criminal Procedure (2004), Rule 14 Pretrial Discovery (a)(1).

<sup>56</sup>Work products are documents related only to legal research opinions, theories or conclusions of the adverse party. The Massachusetts Rules of Criminal Procedure (2004), Rule 14(a)(5).

<sup>57</sup>The Massachusetts Rules of Criminal Procedure (2004), Rule 14(b)(1).

<sup>58</sup>The Massachusetts Rules of Criminal Procedure (2004), Rule 14(a)(4).

## CHAPTER 2

### INVESTIGATIVE PROCEDURES IN JAPAN

#### **Flow of the Investigation Process**

In Japan, investigations are also initiated by a crime report from a victim(s) or citizen(s); arrest without a warrant, however, is only allowed when a suspect is caught red-handed. Therefore, after ascertaining that a crime has been committed, police conduct certain investigations and obtain a warrant from a judge. After the arrest of a suspect, he or she should be taken to a judicial police official<sup>59</sup> and be informed of the right to remain silent and to counsel (*benkai-rokushu*). This is like the Miranda warnings in United States. Then, within 48 hours, the police should take the suspect and evidence to the prosecutor, who will examine the case, or the police should release the suspect. Within 24 hours after examining the suspect, the prosecutor should either send the suspect to the judge for further detention or release the suspect.<sup>60</sup> A judge shall decide whether to detain the suspect depending on the requirements of the investigation. Before the end of the first detention, if the prosecutor requests that the detention be extended, the judge can, once, authorize a limited extension.<sup>61</sup>

By the end of the detention period, the police and the prosecutor should complete the investigation, and the prosecutor should indict or release the suspect. A trial should be scheduled for some months hence. During the detention period, the police and prosecutor are able to interrogate the suspect.

---

<sup>59</sup>A judicial police official is a police officer with the rank of sergeant or higher (Code of Criminal Procedure §202).

<sup>60</sup>Code of Criminal Procedure §205.

<sup>61</sup>Code of Criminal Procedure §208.

Transparency of the police investigation can be also assured, mainly in following ways: one is *benkai-rokushu*; the second is the interrogation situation report, which elucidates the interrogation procedure; and the third is the disclosure of reasons for detention and discovery and disclosure of evidence to the defense by the prosecution before the trial.

### ***Benkai-rokushu***

*Benkai-rokushu* is composed of four elements.<sup>62</sup> The first is to notify an arrestee of the charge of arrest; the second is the initial plea of the arrestee; the third is to inform the arrestee of the right to appoint counsel; and the fourth is the availability of a government-appointed lawyer when an indigent arrestee is detained by court order.<sup>63</sup> The notification of the charge is an initial disclosure about police investigation for the initial plea of the arrestee. The initial plea is the first opportunity for the police to check the reasonableness of the arrest. If the judicial police official finds no reason to detain the arrestee, he or she should be released immediately.

Even if the arrestee invokes the right to counsel, the *benkai-rokushu* process will continue. This is because it is not an interrogation, but rather a procedure to notify the arrestee of the basic information of the charge and his or her rights. The arrestee has the basic right to confer in private with an appointed counsel.<sup>64</sup> Criminal procedure law, however, provides that the police or the prosecutor can designate the date and time of the meeting between the arrestee and counsel<sup>65</sup>; the Japanese

---

<sup>62</sup>Code of Criminal Procedure §203.

<sup>63</sup>This fourth part was added by the amendment of 2004. Government-appointed counsel is available for arrestees who are detained by a court order on charges of crimes with penalties of one year's imprisonment or more.

<sup>64</sup>Code of Criminal Procedure §39(1).

<sup>65</sup>Code of Criminal Procedure §39(3).

Supreme Court holds that the right to counsel is a constitutional right for the accused and that the police should have the arrestee meet with his/her counsel freely unless the meeting could cause a significant obstacle to the investigation.<sup>66</sup> *Benkai-rokushu* should be made available to an arrestee “immediately” after the arrest made by a judicial police official or “immediately” after a judicial police official receives the arrestee from non-judicial police officials, including normal citizens, who have made the arrest. “Immediately” is interpreted as several hours, and normally *benkai-rokushu* is conducted at the nearest police station or police box where a judicial police official is available from the place where the arrest was made.<sup>67</sup>

A major difference between *benkai-rokushu* and Miranda warnings involves the notice of the right to remain silent. This is because *benkai-rokushu* is not an interrogation, and it gives the arrestee a voluntary opportunity to enter a plea on his or her own behalf. The Japanese Supreme Court has upheld the ruling that a lack of notice of the right to remain silent does not infringe *benkai-rokushu*.<sup>68</sup> This notice, however, should be given when the police interrogate the arrestee.<sup>69</sup> Old case law held that a statement without proper notice of the right to remain silent was not automatically inadmissible.<sup>70</sup> Police interrogators strictly follow the rule requiring them to notify the arrestee of the right to remain silent in current practice of police interrogations, and only a few cases have challenged this convention.

---

<sup>66</sup>Sai-Han 1978.7.10 Minshu 32-5-820.

<sup>67</sup>Sai-Han 1978.7.10 Minshu 7.10 supra..

<sup>68</sup>Sai-Han 1950.11.21 Keishu 4-11-2359.

<sup>69</sup>Code of Criminal Procedure §198(2).

<sup>70</sup>Sai-Han 1953.4.14 Keishu 7-4-841.

There is another major difference between the United States and Japan in the right to remain silent. In the United States, when the arrestee invokes this right, the interrogation should conclude and the arrestee goes to a cell; in such cases in Japan, however, he/she is not able to leave the interrogation room freely. This is also a point of argument among Japanese law professionals. The government holds that the Code of Criminal Procedure provides that “...the suspect interrogated by the prosecutor or the police can refuse to be interrogated before or after the interrogation begins unless the suspect is detained.”<sup>71</sup> And so they do.

### **Interrogation Situation Report**

The interrogation situation report system was introduced by a 2003 cabinet decision that affirmed the Promotion Plan for Judicial System Reform (PPJSR). The PPJSR stipulated that the interrogation situation report system is necessary for suspects to ensure the “properness” of the investigation process. The “properness” of the investigation process is interpreted as protection of the human rights of suspects, which is ensured by enhancement of the transparency of the interrogation by the interrogation situation report system.<sup>72</sup>

During detention of a suspect, the police should make daily reports of the interrogation situation – including the charges, date and time of entering and leaving an interview room, number of statements made, and other objective events involving the suspect, such as meeting with his/her counsel. The contents of the interrogation or statements should not be written in an interrogation situation report.<sup>73</sup> The

---

<sup>71</sup>Code of Criminal Procedure §198(1).

<sup>72</sup>The Promotion Plan for Judicial System Reform is based on the final report of the Committee for Judicial System Reform made on 19 March 2002.

<sup>73</sup>The Rule of Record of Interrogation Situation, Order of the Attorney General.

interrogation situation reports are presented as evidence at a trial only when the voluntariness of the suspect's statement is in question.<sup>74</sup>

### **Disclosure of Reasons for Detention**

After an arrestee is transferred from the police, the prosecutor can request the judge to detain the arrestee if the prosecutor can show the need for further investigation in order to bring an indictment.<sup>75</sup> When the judge receives a request to detain an arrestee, the judge shall conduct a detention hearing with the arrestee and determine whether or not to comply with the request. If the judge acknowledges no reason for detention or/and unlawfulness of procedures, the judge shall promptly order the release of the arrestee. At detention hearings, defense counsel basically is not allowed to present, and the arrestee is given little information about the reason for his/her detention. If the arrestee wants further information, he/she should request a disclosure of the reasons for detention.<sup>76</sup> The disclosure of the reasons for detention is held in open court; both the prosecutor and the defense counsel can attend and present their arguments orally or in writing, as at an initial appearance in the United States. This process, however, is only to inform the arrestee or the defense of the reasons for detention, and, if the arrestee wants to challenge the decision to detain, he/she should appeal it.<sup>77</sup> Examination of the appeal is conducted by a panel of judges of the court; both the prosecution and the defense can present to the panel; and the decision must be made within several days.<sup>78</sup>

---

<sup>74</sup>The rules of criminal procedure §198-4.

<sup>75</sup>Code of Criminal Procedure §204, 205.

<sup>76</sup>Code of Criminal Procedure §82.

<sup>77</sup>Code of Criminal Procedure §429.

<sup>78</sup>Code of Criminal Procedure §429.

## Discovery and Disclosure of Evidence

Before the amendment of the Criminal Procedure Law in 2004, the disclosure of evidence was limited to evidence that would be presented by either side. With the introduction of the *saiban-in* system,<sup>79</sup> however, the range of disclosures expanded. The *saiban-in* system is a modified jury system, and trials using this arrangement should be intensive and brief (no more than several weeks in duration). Therefore, the pre-trial preparation process, wherein the prosecutor and the defense arrange points of arguments before the trial begins, was introduced, and the range of disclosure of evidence was stretched to ensure the effectiveness of the pre-trial preparation system. The judge also presides over the pre-trial preparation process and makes decisions concerning controversial points between the prosecution and the defense.

Under the new statutes regarding disclosure of evidence, the prosecution is required to disclose the evidence it intends to present at a trial, such as evidential documents and evidence, and prospective witnesses` identities and contents of their testimony. Besides the evidence to be presented at trial, the prosecution is required to disclose other evidence, statements of the suspect(s) and witness(es), and police interrogation reports. With regard to such evidence, however, the prosecutor can make objections to the disclosure, and the judge will decide on them.<sup>80</sup> The defense is also required to disclose the evidence it intends to present at a trial, such as evidential documents and evidence, and prospective witnesses` identity and contents of their testimony.<sup>81</sup>

---

<sup>79</sup>The modified jury system, which will be introduced to criminal trials starting in 2009. Three professional judges and six citizen assessors (*saiban-in*) will make up the panel to decide on questions of guilt vs. innocence as well as on sentencing.

<sup>80</sup>Code of Criminal Procedure §316-14, 316-15.

<sup>81</sup>Code of Criminal Procedure §316-18.

## CHAPTER 3

### COMPARISON OF HELPFUL SYSTEMS TO ENSURE THE TRANSPARENCY OF THE INVESTIGATION PROCESS IN THE UNITED STATES AND JAPAN

#### **Miranda Warnings and *Benkai-rokushu***

In both systems, a factor that helps ensure the transparency of the investigation system is the right to counsel. The right to counsel in the United States includes the right to be interrogated in the presence of the suspect's attorney, and this can be said to be a completely effective system to make interrogations transparent; normal attorneys, however, always advise their clients not to say anything; as a result, no interrogation is conducted. Every American detective I interviewed<sup>82</sup> said that he or she had no experience of conducting a custodial interrogation in the presence of an attorney. According to several lawyers, in their experience of the current U.S. criminal justice system, it is undoubtedly advantageous for the arrestee not to say anything to the police. As *Miranda v. Arizona* held that the "[accused] has a right under the Fifth Amendment to the presence of counsel during interrogation," the right to counsel is a great system to ensure the transparency of interrogations; but it seems to have rarely worked.

In Japan, there is no statute about whether or not an attorney should be present at police interrogations; the police, however, can refuse to allow an attorney to be present at their interrogations, and they normally do so. The arrestee has the basic right to confer privately with an appointed counsel at any time, and, if the arrestee accuses the police of misconduct, his/her attorney can take appropriate legal action.

---

<sup>82</sup>The detectives were from police departments in Illinois, Massachusetts, New York and Washington, D.C. as well as federal law enforcement agencies.

As mentioned above, the right to counsel in the United States could be effective to ensure the transparency of interrogations, but, in practice, it does not work, while the right to counsel in Japan works only in a very limited manner. In conclusion, it can be said that the right to counsel assured in both the Miranda system and *benkai-rokushu* does not work to enhance the transparency of interrogations.

### **Electronic Recording of Custodial Interrogations and Interrogation Situation Reports**

Needless to say, electronic recording of custodial interrogations in the United States is a more accurate system to ensure the transparency of interrogations than the interrogation situation report in Japan. The question is the applicability of the system of electronic recording of interrogations to the investigation process in Japan. There are sizeable differences between criminal justice in the United States and in Japan. First, the length of custodial interrogations is much longer in Japan than in the United States. In Japan, the police or the prosecutors can interrogate an arrestee for as long as 23 days; in the United States, on the other hand, the corresponding period of time is 48 hours. Thus, the amount of work required by judges, lawyers, prosecutors, and police in connection with electronic recordings of interrogations – such as reviewing and transcribing recordings – would become unmanageable in Japan.

Second, an arrestee's consent to be recorded is more questionable in Japan. As noted above, the present practice of electronic recording of custodial interrogations in the United States requires the explicit or implicit consent of an arrestee. In addition, quite a few arrestees refuse to be recorded in certain jurisdictions, and it is also anticipated that the number of such arrestees will increase. This is because electronic recording of custodial interrogations may be disadvantageous to the guilty. The results

of an above-mentioned survey show that people have a more pronounced tendency to refuse to be recorded when they feel that the charges against them are warranted.<sup>83</sup> Thus, even if electronic recording of custodial interrogations is introduced to Japan, it would be difficult to record all the interrogations during more than three weeks of detention unless there is a statute that mandates recording without the consent of the arrestee.

The survey also showed that more than 60 percent of people want their interrogations to be recorded when they believe they are innocent; but how many of those who are arrested are found not guilty or released without penalty? Tables 2-4 below compare of number of arrests and convictions in the United States and Japan.

**Table 2. Arrests in the United States<sup>84</sup> and Japan<sup>85</sup> (2004)**

	Number of Arrests	Arrest Rate per 100,000 Population
<b>U.S.</b>	13,938,071	4,752.4
<b>Japan</b>	158,556	125.7

Table 2 shows that the arrest rate per 100,000 inhabitants in the United States is nearly 40 times higher than the corresponding figure in Japan. Furthermore, Table 3 does not show the actual relation between an individual arrest and conviction; it can

---

<sup>83</sup>See Figure 2.

<sup>84</sup>FBI, *Crime in the United States in 2004*.

<sup>85</sup>The National Police Agency of Japan. *Hanzai Tokei Shiryo (Heisei 16)* [Criminal Statistics 2004] (Tokyo: National Police Agency, 2005).

be said, however, that more than half of adult arrestees were released without penalty in the United States, in Japan, almost all are convicted.

**Table 3. Adult Arrests and Convictions in the United States and Japan<sup>86</sup>**

	States and Year	Arrested Adults	Convicted Persons	Conviction Rate
<b>U.S.</b>	Massachusetts 2004	86,970	42,745	0.491
	Florida 2004	907,713	414,728	0.457
<b>Japan</b>	All Prefectures	<b>126,818</b>	<b>127,142</b>	1.003

**Table 4. Reported Crimes in the United States and Japan (2004)<sup>87</sup>**

	Number	Rate per 100,000 inhabitants
<b>U.S.:</b> Index Crimes <sup>88</sup>	11,695,264	3982.5
<b>Massachusetts:</b> Index Crimes	187,262	2918.5
<b>Japan:</b> Penal Code Crimes <sup>89</sup>	2,562,767	2006.9

On the other hand, the reported crime rate per 100,000 inhabitants in the United States is about double of that in Japan, as shown in Table 4.

---

<sup>86</sup>Survey on Sentencing Practice FY-2004. Massachusetts Sentencing Commission; Florida State Court Statistics June 2006 [http://www.flcourts.org/gen\\_public/stats/index.shtml](http://www.flcourts.org/gen_public/stats/index.shtml)

<sup>87</sup>Crime in the US 2004 FBI; Hanzai Tokeisho 2004 National Police Agency of Japan.

<sup>88</sup>Murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, arson.

<sup>89</sup>Traffic-related crimes are excluded.

There might be several explanations for the above-mentioned disparities. First, U.S. police officers have broader power to arrest without a warrant; namely, they can arrest a suspect with only “probable cause.” Japanese police officers, on the other hand, are allowed to arrest without a warrant only when they catch a suspect red-handed, namely, when he or she is committing or just finishing a crime.<sup>90</sup> In other cases, they have to request an arrest warrant in court through a designated police officer of the rank of inspector or higher.<sup>91</sup> Second, the law and regulations declare that the investigation shall be conducted based on voluntary cooperation. Forcible measures such as an arrest or search shall be undertaken only when an investigation cannot achieve its purpose with voluntary-based measures.<sup>92</sup> Consequently, Japanese police officers very cautiously estimate the criminality of a suspect when they make an arrest and, thus, most arrestees are found guilty in a court.

Considering the high rate of refusal to be recorded by arrestees who feel that they are guilty and the current practices involving arrests by the Japanese police, the introduction of electronic recording of custodial interrogations, I think, would not work without a statute that mandates such recording without the consent of the arrestee.

Third, the feasibility of such a statute is also questionable. A majority of academics in Japan think that electronically recorded statements of defendants are admissible, the same as statements provided in the Criminal Procedure Law §322(1). The conditions for admissibility of statements provided in §322(1) are: 1) defendant’s signature or seal is required; 2) the contents of the statement are disadvantageous to

---

<sup>90</sup>Code of Criminal Procedure §212.

<sup>91</sup>Code of Criminal Procedure §199(2).

<sup>92</sup>Code of Criminal Procedure §197(1), The Rules of Criminal Investigation §99. The National Public Safety Commission.

the defendant or made in an especially credible circumstance; and 3) recorded statements are generally admissible in a court.<sup>93</sup> In other words, the arrestee has the option of refusing to sign the statement, and it will not be admissible in court even after a confession when an interrogation is conducted without electronic recording; this element of choice, however, would be non-existent if electronic recording is conducted. It can be said that electronic recording of custodial interrogations automatically provides a written statement for the prosecution with the arrestee's signature and that, thus, it is very disadvantageous for the arrestee. As long as the arrestee consents to be recorded, though, it can be said that the arrestee waives his or her rights; when the arrestee refuses to be recorded, however, it could be argued that mandatory recording would infringe on his/her right not to sign his/her statement, which is deemed to be included the right to remain silent. This is because a statement that has been signed under duress is absolutely inadmissible in court, and mandatory recording would be almost identical to such a signed document.

In conclusion, due to the difference in the length of the interrogation process in the United States and Japan, the tendency of arrestees who believe they are guilty to refuse to be recorded, and the fact that mandatory recording without the consent of the arrestee would be an infringement of rights, it would be rather difficult to introduce electronic recording of custodial interrogations to the investigation process in Japan.

### **Initial Appearance and Disclosure of Reasons for Detention**

At the initial appearance, the judicial official, such as a magistrate or judge, conducts the hearing mainly from the standpoint of the police or prosecutors to examine probable cause. An examination of probable cause may clarify the legitimacy

---

<sup>93</sup>The Criminal Procedure Law §322.

of police conduct vis-à-vis the arrestee and work as a first disclosure in the investigation process.

At disclosure of the reasons for detention, a judge explains probable cause to believe that the arrestee committed an offense and does not have a permanent place to live, or probable cause to believe that the arrestee would hide evidence, tried to escape, and/or would escape.<sup>94</sup> Therefore, disclosure of reasons for detention covers broader aspects of an investigation than the initial appearance because it includes future reasons for detention in connection with the requirements of the investigation and is more informative for the arrestee because interrogations will be conducted after the detention. Furthermore, the arrestee can appeal the decision to detain and may obtain further information from the prosecution. Logically, disclosure of reasons for detention and the appellate session deal with the same issues, but the prosecution generally discloses more information later on.

### **Discovery and Disclosure of Evidence**

Generally speaking, before 2004, the process of discovery and disclosure of evidence was more thorough in the United States than in Japan. This is because “ambush” in a trial is recognized as totally unfair in the United States. In Japan, both civil and criminal trials are held with a fairly sizeable interval, such as once a month or every several weeks, and if evidence is sprung on an opponent, the interval allows sufficient time to prepare appropriate countermeasures. It was decided in 2004, however, to introduce the *saiban-in* system which would require short and intensive trials within several weeks. Subsequently, the procedure for discovery and disclosure of evidence was thoroughly reformed in order to adapt to the new trial system to

---

<sup>94</sup>Code of Criminal Procedure §60(1).

ensure effective pre-trial preparation procedures and to maintain fairness in preventing “ambush.”<sup>95</sup> This could be helpful to enhance the transparency of the investigation process in Japan.

---

<sup>95</sup>Code of Criminal Procedure §316-2.

## CONCLUSION

The purposes of the promotion of transparency in the criminal investigation process are protection of the accused from police misconduct and clarification of the voluntariness and/or truth of statements of the accused. As noted above, several procedures could be helpful to enhance such transparency. These include the right to counsel, which is assured by Miranda warnings and *benkai-rokushu*; electronic recording of custodial interrogations and the interrogation situation report, initial appearance and disclosure of reasons for detention; and discovery and disclosure. Among these procedures, the purpose of electronic recording of custodial interrogations and the interrogation situation report is to directly ensure the transparency of the interrogation process. In the United States, electronic recording of custodial interrogations seems to work very well, as Sullivan has noted<sup>96</sup>; the major winner, however, is widely deemed to be the law enforcement side because they can obtain very accurate and definitive evidence from electronically recorded statements. Moreover, subtle and unconscious gestures and expressions of the arrestee can be gleaned by analysis of the electronic record. In exchange for these enormous advantages, law enforcement needs to follow the legal requirement not to conduct coercive or deceptive interrogations.

Why is such a good deal for the law enforcement side spreading in the United States? The major reason is thought to be the broad power of law enforcement officials to make arrests; namely, in 2004, nearly 14 million people were arrested in the United States vs. less than 159,000 in Japan.<sup>97</sup> More than 50 percent of the adult

---

<sup>96</sup>Thomas P. Sullivan, "Electronic Recording of Custodial Interrogations: Everybody Wins," *Journal of Criminal Law and Criminology*, Vol. 93, No. 3 (Spring 2005) 1127-1144.

<sup>97</sup>See Table 2.

arrestees were released without penalty in 2004 in Massachusetts and Florida; the corresponding figure for Japan in 2002 was more 100 percent.<sup>98</sup> Even considering the higher U.S. crime rate, a much larger proportion of people who are not guilty are arrested in the United States than in Japan. In addition, survey results show that more people who believe that they are innocent favor or rely on electronic recording than those who believe they are guilty.<sup>99</sup> Therefore, electronic recording of custodial interrogations has been introduced to protect the rights of arrestees, especially innocent arrestees, in the United States, even though law enforcement gets a powerful aid for their investigations in this manner.

The applicability of electronic recording of custodial interrogations to the Japanese criminal justice process is questionable. Leaving aside the enormous workload that would accompany the introduction of such measures, it could be very difficult to record an entire interrogation unless there is a statute allowing mandatory recording without an arrestee's consent.

Legislation for mandatory recording of interrogations without the arrestee's consent is also questionable. This is because such legislation would nullify the right of the accused to sign his/her statement.<sup>100</sup> This right is a rather important defensive measure for the accused in Japan, because, unlike in the United States, the accused is not allowed to refuse, or be excused from, an interrogation. The accused in Japan can remain silent, but cannot leave the interrogation room. The Japan Federation of Bar Associations argues that electronic recording should not be used as evidence against the defendant, but for the purpose of clarification of the voluntariness of the

---

<sup>98</sup>See Table 3.

<sup>99</sup>See Figure 2.

<sup>100</sup>Code of Criminal Procedure §198(5).

confession<sup>101</sup>; an interrogator's testimony about a confession that was not even recorded in a written statement with the signature of the accused, however, could be admissible in a trial, and its voluntariness and truth would be clarified by the electronic record. Thus, mandatory electronic recording of custodial interrogations without the consent of the accused has same evidential value as a signed statement.

The right of the accused to refuse to sign his/her statement may not be a constitutional right and could be amended by a new law; it is doubtful, though, whether the introduction of such drastic measures is necessary in Japan.

In conclusion, Japanese law enforcement should at least consider the introduction of electronic recording of custodial interrogations, while strengthening efforts to promote the fairness and lawfulness of interrogations, including making accurate interrogation situation reports according to current custom.

---

<sup>101</sup>The Japan Federation of Bar Associations, *Opinion Paper on Transparentaization of Interrogations*, 14 July 2003.

**Figure 1**

**States That Require Mandatory Electronic Recording of Custodial Interrogations**

<b>State</b>	<b>Year</b>	<b>Type</b>	<b>Crimes</b>	<b>Notes</b>
Alaska	1985	Case	Felony DV	Stephan v.State,711P2d 1156, 1162 (Alaska 1985)
District of Columbia	2004	Act	Violent Crimes	Electronic Recording Procedures and Penalties Temporary Act of 2005
Illinois	2005	Act	Homicide	Illinois Criminal Code of 1961 9-3(2003)
Maine	2004	Act	Serious Crimes	Maine Statute Title 25 Chapter 341 §2803-B
Massachusetts	2004	Case	All Crimes	Commonwealth v.DiGiambattista,813 N.E. 2d 516 (2004)
Minnesota	1964	Case	All Crimes	State v. Scales 518 N.W. 2d 587 (1994)
New Jersey	2006	Case	Serious Crimes	Supreme Court Rule 3:17 State v. Cook 179 N.J. 533 (2004)
New Mexico	2005	Act	Felonies	New Mexico Statute 29-1-16. Electronic recordings of Custodial Interrogations
Texas	2005	Act	All Crimes	Texas Code of Criminal Procedure Chapter 38 Art.38 22
Wisconsin	2005 2005	Case Act	Juvenile Crimes	State v. Jerrel C.J. 2005 WI 105;699 N.W. 2d 110 2005 Wisconsin Act 60

## Figure 2

### Survey on Attitudes Toward Electronic Recording of Custodial Interrogations

This is a short questionnaire about electronic recording during custodial interrogations. Your response to this web-based form will be anonymous. Your cooperation is much appreciated.

#### Information about yourself

Nationality:

U.S.            Other

Sex:

Male            Female

---

**Q1. If you were arrested by the police and want to explain your side, would you agree to have your interrogation recorded if you consider yourself guilty?**

- A. Yes, by video and audio recorder.
- B. Yes, by audio recorder.
- C. No.
- D. DK

**Q2. If you selected "C" for Q1, please state the reason why:**

- A. Because I do not want the police to have a record of my exact words.
- B. Because my unconscious expressions (facial expressions or body actions) would be recorded and this might be disadvantageous for me.
- C. Because I would be nervous in front of a camera or a microphone.
- D. Others (please comment below).

**Q3. If you were arrested by the police and want to explain your side, would you agree to have your interrogation recorded if you consider yourself innocent?**

- A. Yes, by video and audio recorder.
- B. Yes, by audio recorder.
- C. No.
- D. DK

**Q4. If you selected "C" for Q3, please state the reason why:**

- A. Because I do not want the police to have record my exact words.
- B. Because my unconscious expressions (face expression or body action) would be recorded and which might be disadvantageous for me.
- C. Because I would be nervous in front of a camera or a microphone.
- D. Others (please comment below).

**Q5. Which side would gain the most advantage by using electronic recording of interrogation as evidence in a trial?**

- A. Prosecution.
- B. Defense.
- C. Equal.
- D. DK

### SURVEY RESULTS

Total participants: 101

Nationality:

U.S.: 93            Others: 8

Sex

Male: 57            Female: 44

	Q1	Q2	Q3	Q4	Q5
A	12 (3)	21 (7)	52 (26)	10 (2)	42 (9)
B	7 (2)	17 (6)	14 (5)	2 (0)	5 (3)
C	61 (22)	9 (4)	29 (10)	7 (3)	37 (19)
D	21 (17)	14 (5)	6 (3)	10 (6)	17 (13)

Note: Number of females given in parentheses

## BIBLIOGRAPHY

- Chicago Police Department. *Lawyer's Guides to the Chicago Police Department's Electronic Recording of Interrogations*  
[http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/LawyersGuide.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/LawyersGuide.pdf).
- Drizin Steven A. and Marissa J. Reich. "Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions." *Drake Law Review* Vol. 52 (24 September 2004).
- Gejdenson, G. *The Psychology of Interrogations and Confessions*. West Sussex: John Wiley & Sons, 2003.
- Geller, William. A. *Videotaping Interrogation and Confession* (Research Paper). Washington, D.C.: U.S. Department of Justice (March 1993).
- State of Illinois. *Report of the Governor's Commission on Capital Punishment* (15 April 2002).
- Japan Federation of Bar Associations. *Opinion Paper on Tranparentization of Interrogations* (14 July 2003).
- Kassin, Saul M. and Gisli H. Gudjonsson. "The Psychology of Confessions: A Review of the Literature and Issues," *Psychological Science in the Public Interest*, Vol. 5, No. 2 (November 2004).
- LaFave, Wayne R. *Arrest, The Decision to Take a Suspect into Custody*. Boston: Little Brown and Company, 1965.
- Leo, Richard A. "Miranda's Revenge: Police Interrogation as a Confidence Game," *Law & Society Review*, Vol. 30, No. 2 (1996).
- . "Questioning the Relevance of Miranda in the Twenty-first Century," *Michigan Law Review* March 2001, 99 Mich. L. Rev. 1000.
- Meissner, Christian A., and Saul M. Kassin. "You're Guilty, So Just Confess!" *Cognitive and Behavioral Confirmation Biases in the Interrogation Room. Interrogations, Confessions, and Entrapment*. Kluwer Academic/Plenum Press, 2004.
- Moston, Stephen. "Changing Face of Police Interrogation." *Journal of Community and Applied Psychology*. Vol. 3, 101-105 (1993).
- The National Police Agency of Japan. *Hanzai Tokei Shiryo (Heisei 16)* [Criminal Statistics 2004]. Tokyo: National Police Agency, 2005.
- New Jersey Supreme Court. *The Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations*. (15 April 2005).

Stuntz, William J. *Comprehensive Criminal Procedure Second Edition*. New York: Aspen, 2005.

Sullivan, Thomas P. "Electronic Recording of Custodial Interrogations: Everybody Wins" *Journal of Criminal Law and Criminology*, Vol. 93, No. 3 (Spring 2005).

---. *Police Experiences with Recording Custodial Interrogations*. Chicago: Northwestern University School of Law, 2004.

Warden, Rob. "Illinois Death Penalty Reform: How It Happened, What It Promises." *The Journal of Criminal Law and Criminology*. Northwestern University School of Law Vol. 95, No. 2 (Winter 2005).