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# INTRODUCTION OF VIDEOTAPING OF INTERROGATIONS AND THE LESSONS OF THE IMAICHI CASE: A CASE OF CONVENTIONAL CRIMINAL JUSTICE POLICY-MAKING IN JAPAN

Setsuo Miyazawa and Mari Hirayama<sup>†</sup>

*Abstract:* Malcolm M. Feeley examined cases of criminal justice reform in the United States, where reforms can be conceived and initiated in a very open structure, but implementation of the introduced reforms can be handed over to highly fragmented implementers. The story of mandatory videotaping of interrogations and accompanying changes in Japan demonstrates the reform process at the other end of the scale, where the members of the criminal justice establishment can exert a strong influence even at the *conception* and *initiation* stages, and have even stronger control at the *implementation* and *routinization* stages. We believe that Feeley's theoretical framework can be expanded to be more generally applicable to court reforms outside the United States. This could be achieved by introducing the degree of openness of the policy-making process at the *conceptualization* and *initiation* stages, and by introducing a degree of fragmentation of the policy-making process at the *implementation* and *routinization* stages as central independent variables which determine the course of the reform.

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## I. INTRODUCTION

### A. *Malcolm M. Feeley's Analysis of Court Reforms in the United States and the Purpose of This Paper*

In 1983, Malcolm M. Feeley published a seminal book on criminal court reforms in the United States, *Court Reform on Trial: Why Simple Solutions Fail*.<sup>1</sup> According to Feeley, the primary problem with American courts is that “the courts themselves have . . . fostered unrealistic expectations, and promoted bold but often empty solutions.”<sup>2</sup> Such problems arise due to changes caused by raised standards and increased

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<sup>1</sup> MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983).

<sup>2</sup> *Id.* at xiii.

attention from politicians, the press, and the scholarly community. Even when these changes produce significant achievements, they often result in disillusionment and disappointment. Feeley emphasizes fragmentation as the American courts' most visible and natural quality.<sup>3</sup> The American courts are arenas in which a range of competing and conflicting interests collide. Accordingly, this fragmentation appears to make coherent implementation of introduced reforms particularly difficult. Planned changes often fail because innovators do not understand these characteristics of the court. Feeley identified the following five stages of planned change: 1) *diagnosis or conception*; 2) *initiation*; 3) *implementation*; 4) *routinization*; and 5) *evaluation*.<sup>4</sup> In the four cases Feeley analyzed, fragmentation seems to have worked most strongly at the stages of *implementation* and *routinization*. In those stages, fragmentation produced a result contrary to that expected by those who had diagnosed the status quo and initiated the given reform.

What was Feeley's solution for reforming the American courts? Instead of bold reforms conceived and initiated from outside the judiciary, he essentially proposed to let the courts introduce reforms by themselves through the course of litigation. Feeley argued that litigation is well suited to pursue changes in complex institutions because "[i]t is problem specific[,] . . . [i]t is ameliorative[,] . . . [i]t is incremental[,] . . . and litigation is relatively inexpensive."<sup>5</sup> This argument reminds the readers of his later research on prison reforms through judicial decisions.<sup>6</sup>

At the time of its publication, Feeley's book was considered "one of the best statements of the policy science . . . tradition within the sociology of law."<sup>7</sup> It has continued to inspire research on various areas of court reform in the United States until today.<sup>8</sup> Given its prominence within research on American court reforms, one may be tempted to try to expand this argument to a more universally applicable framework on court reform. East Asian

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<sup>3</sup> *Id.* at 9–10.

<sup>4</sup> *Id.* at 35–37.

<sup>5</sup> *Id.* at 214.

<sup>6</sup> See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS* (1998).

<sup>7</sup> Austin Sarat, *Courts and Court Reform: Which Appearances Are the Most Deceiving?*, 8 *ALSA F.* 454, 458 (1984) (review of FEELEY, *supra* note 1).

<sup>8</sup> Most recent examples include Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 *OHIO ST. J. CRIM. L.* 521 (2017). The authors of this paper state that, "[w]e frame our inquiry around Malcolm Feeley's thesis that court reforms are more likely to fail than to succeed, and draw conclusions about the conditions under which such reforms are likely to be successful." *Id.* at 522.

countries can provide cases for such an expansion because many reforms have been recently introduced there.<sup>9</sup> Japan is no exception.<sup>10</sup>

Our research in Japan suggests three main areas of expansion of Feeley's theoretical framework. The first point of expansion concerns the stages of *diagnosis or conception* and *initiation*. While Feeley's analysis suggests that idealistic expectations of reform outside the court system can often have a strong influence at these stages in the United States, the policy-making process in Japan is likely to be far more closed. Those who have worked in the existing court system can also often prevent the influence of idealistic reforms outside the court system. Reforms conceptualized and initiated in such a system may be far less idealistic, and remain within the boundary acceptable to those who have been working in the existing system. Therefore, it seems necessary to add the degree of openness within the policy-making process at the stages of *diagnosis or conception* and *initiation* as a new variable to Feeley's analytical framework.

The second point of expansion of Feeley's framework concerns the stages of *implementation, routinization, and evaluation*. Feeley's analysis suggests that the highly fragmented nature of the American courts often makes faithful implementation of idealistic reforms difficult if they are conceptualized and initiated outside the court system. Reforms are therefore often routinized in ways acceptable and possible under the existing conditions of the court system. Due to this limitation, the evaluation is likely a failure from the perspective of idealistic reformers who conceptualized and initiated reforms outside the court system. In Japan, the court system is a national bureaucracy in which a majority of judges join immediately after completing the apprenticeship period, even though they have no experience as practicing attorneys. These judges remain on the bench until the mandatory retirement at the age of 65.<sup>11</sup> They are carefully

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<sup>9</sup> See generally LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW (John O. Haley & Toshiko Takenaka eds., 2014); EAST ASIA'S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21ST CENTURY: THE FUTURE OF LEGAL AND JUDICIAL LANDSCAPES IN EAST ASIA (Setsuo Miyazawa et al. eds., 2015).

<sup>10</sup> See Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice*, in JAPANESE BUSINESS LAW 39–89 (Gerald Paul McAlinn ed., 2007) [hereinafter *Law Reform, Lawyers, and Access to Justice*]; Setsuo Miyazawa, *Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue*, 36 HASTINGS INT'L & COMP. L. REV. 313 (2013) [hereinafter *Justice System Reform in Japan*]. See also other articles in the same symposium issue.

<sup>11</sup> For an outline of the Japanese court system, see Setsuo Miyazawa, *Introduction: Japan*, in JAPANESE BUSINESS LAW, *supra* note 10, at 30–38.

appointed, evaluated, relocated, and promoted by the administrative organ called the General Secretariat of the Supreme Court. Since judges' decisions are closely monitored by the General Secretariat, and decisions contrary to Supreme Court precedents and mainstream judicial decisions negatively impact career trajectories,<sup>12</sup> most judges are likely to faithfully implement and routinize reforms introduced through the *conception* and *initiation* stages dominated by members of the existing court system. The evaluation of the result by members of the existing court system is likely to be positive, while the evaluation of the result by outside reformers whose proposals were totally or largely rejected in the *conception* and *initiation* stages is likely to be negative. Accordingly, the degree of fragmentation must be considered as a variable during the stages of *implementation* and *routinization*. Although the American court system may be highly fragmented, the Japanese court system may be highly unfragmented.

The third point for expansion of Feeley's analytical framework is the role of litigation in court reform. While Feeley found a significant role for litigation in prison reform in the United States,<sup>13</sup> the same cannot be said for Japan. Litigation is unlikely to play a significant role in Japanese court reform because the administrators of the court system react unfavorably to judges who challenge the existing system.<sup>14</sup> To refute this claim, one may consult the 2002 case involving the arrest and punishment of prison guards who allegedly used excessive force to subdue inmates in Nagoya Prison. This poor treatment served as a catalyst for the eventual amendment of the century-old Prison Law.<sup>15</sup> However, rather than administrative litigation seeking prison reform, this case arose from criminal charges filed by the prosecutor seeking punishment of individual guards. The Ministry of Justice had already initiated the amendment of the Prison Law long before this case. The criminal case's apparent contribution to passing the

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<sup>12</sup> On the lack of independence of individual judges in Japan, see J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 263–91 (Philip S.C. Lewis ed., 1994) [*Administrative Control of Japanese Judges*]; Mark A. Levin, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, 20 PAC. RIM. L. & POL'Y J. 265, 265–318 (2010).

<sup>13</sup> See FEELEY & RUBIN, *supra* note 6.

<sup>14</sup> See sources cited *supra* note 12.

<sup>15</sup> See Takuya Asakura, *Prison Abuses in Spotlight Following Guard Arrests*, JAPAN TIMES, Nov. 13, 2002, <https://www.japantimes.co.jp/news/2002/11/13/national/prison-abuses-in-spotlight-following-guard-arrests>; Eric Johnston, *Prison Reforms Seen as Too Little, and Way Too Late*, JAPAN TIMES, June 26, 2007, <https://www.japantimes.co.jp/news/2007/06/26/reference/prison-reforms-seen-as-too-little-and-way-too-late/>. JAPAN TIMES, an English daily in Japan, is available on the LexisNexis database.

amendment was a helpful byproduct rather than the purpose of the litigation. Therefore, one should consider the prevalence of litigation seeking to reform the existing court and justice system as a variable when analyzing the relative merits of differing routes to reform. Such litigation seems to be more widely utilized in the United States than in Japan. Accordingly, the role of litigation may be different between the countries.

The purpose of this Article is limited to the first and second points for the expansion of Feeley's analytical framework. It will discuss adding a degree of openness to the policy-making process during the *diagnosis or conception* and *initiation* stages and the degree of court system fragmentation at the *implementation* and *routinization* stages as new variables to Feeley's analytical framework. This Article will illustrate how members of the existing court system can repel the reform proposal from outside and transform it into one which would not harm their interests, and may even benefit them. This conclusion is supported by analyzing the process of introducing mandatory videotaping of interrogations in Japan, which was proposed in May 2016 and will be implemented by June 2019.<sup>16</sup> For the first time in Japanese history, this reform requires police and prosecutors to videotape interrogations. However, legislators managed to limit application of this reform to only a tiny proportion of cases. This reform is not about the court system, but rather about the investigation. However, the investigation depends heavily on confessions obtained by police and prosecutors, and is often considered the most crucial part of the entire criminal justice system in Japan.<sup>17</sup> This example of the effect of the policy-making process on criminal investigations in Japan is an excellent illustration of the conventional process of policy-making in criminal justice in Japan.

### B. *Conventional and Extraordinary Policy-Making Processes on Criminal Justice in Japan*

It should be noted here that the preceding three articles in this symposium on Japan discussed examples of extraordinary policy-making

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<sup>16</sup> See generally Keiji soshōhō tō no ichibu o kaiseisuru hōritsu [Act Amending Part of the Code of Criminal Procedure], Law No. 54 of 2016 (Japan). For the full text of the original proposal submitted by the Ministry of Justice on March 13, 2015, and related information, see *Keiji soshōhō tō no ichibu o kaiseisuru hōritsuan* [Bill to Amend Part of the Code of Criminal Procedure], HŌMUSHŌ [MINISTRY JUST.], [http://www.moj.go.jp/keiji1/keiji14\\_00103.html](http://www.moj.go.jp/keiji1/keiji14_00103.html) (last visited Nov. 11, 2017).

<sup>17</sup> See DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 243–75 (2002).

process.<sup>18</sup> In ordinary cases, any major reform proposal for the legal system is referred by the Justice Minister to the Legislative Deliberation Council (“LDC”) (*Hosei Shingikai*) established under the Justice Ministry.<sup>19</sup> The LDC is divided into several subcommittees. The Justice Minister refers the reform proposal to an appropriate subcommittee, where a majority of members are current members of the judicial establishment. These members include the judiciary, the Justice Ministry, and other governmental agencies. Although the membership of these committees is supplemented by academics, many of the members share the establishment’s perspectives. The Justice Ministry works as the secretariat for the LDC, which prepares the agenda and materials for deliberation and even drafts recommendations to be presented to the Justice Minister. The subcommittee’s draft recommendations are then presented at a general meeting of the parent LDC which authorizes the draft and presents the final recommendation to the Justice Minister.

The membership of the LDC subcommittees on criminal justice is largely fixed. For instance, the four most recent subcommittees on criminal justice consisted of voting members (*iin*), non-voting members (*kanji*), and related officials (*kankei-kan*):

- (1) Subcommittee on the lay judge system: four judges,<sup>20</sup> six Justice Ministry officials, including prosecutors, two executive police officers,<sup>21</sup> three practicing attorneys, eight academics, one member of the Cabinet Legislation Bureau,<sup>22</sup> and one member of a crime victim assistance organization;<sup>23</sup>

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<sup>18</sup> Daniel H. Foote, *Diversification of the Japanese Judiciary*, 27 WASH. INT’L L.J. 7 (2017); Matthew J. Wilson, *Assessing the Direct and Indirect Impact of Citizen Participation in Serious Criminal Trials in Japan*, 27 WASH. INT’L L.J. 75 (2017); Erik Herber, *Victim Participation in Japan*, 27 WASH. INT’L L.J. 119 (2017).

<sup>19</sup> For the role of *shingikai* in Japanese politics, see generally FRANK J. SCHWARTZ, *ADVICE AND CONSENT: THE POLITICS OF CONSULTATION IN JAPAN* (1998).

<sup>20</sup> Judges in these subcommittees may include those holding administrative positions in the General Secretariat of the Supreme Court.

<sup>21</sup> We use the term “executive police officers” to mean top-ranking police officers who occupy policy-making positions at the National Police Agency or the Tokyo Metropolitan Police.

<sup>22</sup> The Cabinet Legislation Bureau reviews draft bills before submission to the Cabinet. See SCHWARTZ, *supra* note 19, at 185.

<sup>23</sup> Committee Register, Ministry of Justice, *Hōsei shingikai keijihō (saiban’in seido kankei) buhai iin tō meibo* [Legislative Deliberation Criminal Justice Laws (Lay Judge System) Subcommittee Member List] (May 21, 2014), <http://www.moj.go.jp/content/000118545.pdf>. Please note that membership might have changed between the time of writing and publication.

(2) Special Subcommittee on the Criminal Justice System in a New Era (*Shin-Jidai no Keiji Shihō Seido Tokubetsu Bukai*): three judges, one former judge, eight Justice Ministry officials, including prosecutors, one former prosecutor, four executive police officers, one former executive police officer, five practicing attorneys, eleven academics, one member of the Cabinet Legislation Bureau, one member of a crime victim assistance organization, and five other members;<sup>24</sup>

(3) Subcommittee on sex offenses: three judges, six Justice Ministry officials, including prosecutors, two executive police officers, three practicing attorneys, eleven academics, one member of the Cabinet Legislation Bureau, and one member of a crime victim assistance organization;<sup>25</sup>

(4) Subcommittee on juvenile law: five judges, ten Justice Ministry officials, including prosecutors, three executive police officers, four practicing attorneys, twelve academics, one member of the Cabinet Legislation Bureau, one member of a crime victim organization, and one member from a newspaper.<sup>26</sup>

These judges, Justice Ministry officials, and executive police officers presented perspectives of the mainstream members of the criminal justice system in Japan. Most academics who served on these subcommittees were law professors. Two of them served on three subcommittees each, while eight of them served on two subcommittees each. Together, these academics represent the “criminal justice establishment” in Japan. The conventional process of making criminal justice policy in Japan is dominated by this establishment.

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<sup>24</sup> Committee Register, Ministry of Justice, *Hōsei shingikai shinjidai no keiji shihō seido tokubetsu buikai iin tō meibo* [Legislative Deliberation Council Criminal Justice System in a New Era Special Subcommittee Member List] (Apr. 16, 2014), <http://www.moj.go.jp/content/000122717.pdf>. This subcommittee deliberated on the introduction of mandatory videotaping of interrogations, as will be discussed later in this paper.

<sup>25</sup> Committee Register, Ministry of Justice, *Hōsei shingikai keijihō (sei hanzai kankei) buikai iin tō meibo* [Legislative Deliberation Council Criminal Justice Laws (Sexual Offenses) Subcommittee Member List] (May 25, 2016), <http://www.moj.go.jp/content/001184600.pdf>.

<sup>26</sup> Committee Register, Ministry of Justice, *Hōsei shingikai shōnenhō, keijihō (shōnen nenrei, hanzaisha shogū kankei) buikai iin tō meibo* [Legislative Deliberation Council Juvenile Law, Criminal Justice Laws (Juvenile Age, Criminal Treatment) Subcommittee Member List] (Oct. 30, 2017), <http://www.moj.go.jp/content/001239481.pdf>.



Both the reform of judicial appointment discussed by Daniel H. Foote and the introduction of the lay judge system discussed by Matthew J. Wilson did not explore this conventional policy-making process. The business community, represented by the Japan Business Federation (*Keidanren*)<sup>27</sup>—the most powerful interest group working closely with the Liberal Democratic Party (“LDP”) which had controlled the government for most periods since its founding in 1955—demanded that the government expand and improve the judiciary and legal profession. In support of this goal, the business community proposed a wide range of reforms in 1998, including legal education reform. Since the Justice Ministry and the judiciary were targeted by the demanded reform, the LDP government established the Justice System Reform Council (“JSRC”) (*Shiho Seido Kaikaku Shingikai*). Instead of falling under the Justice Ministry, the JSRC fell directly under the Cabinet.<sup>28</sup> Of the thirteen members, the JSRC had only one member each who respectively represented the judiciary, the procuracy, and practicing attorneys, so that there were expectations that the JSRC and the implementation process which followed would produce extensive reforms.

However, members of the existing system often managed to limit reform to levels much lower than expected by progressive reformers outside the system. Reform of judicial appointments and the introduction of the lay judge system were no exception.

In the case of the appointment of lower court judges, which before was handled entirely by the Personnel Bureau of the General Secretariat of the Supreme Court, the Supreme Court preempted reforms from outside and established a consultative committee which would evaluate judicial

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<sup>27</sup> See KEIDANREN [JAPAN BUS. FED’N], <http://www.keidanren.or.jp/en/> (last visited Aug. 6, 2017); see also SCHWARTZ, *supra* note 19, at 100–05 (explaining the role of *Keidanren* in Japanese politics in the 1990s).

<sup>28</sup> For an early observation about the JSRC, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 1 ASIAN-PAC. L. & POL’Y J. 89, 89–121 (2001). For a semi-official English translation of the final recommendations presented by the JSRC to the Prime Minister in June 2001, see THE JUSTICE SYSTEM REFORM COUNCIL, *Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century*, PRIME MINISTER OF JAPAN AND HIS CABINET (June 12, 2001), <http://japan.kantei.go.jp/judiciary/2001/0012report.html>. For a warning that reforms initiated by the JSRC may be further reduced and narrowed through the implementation process which returned to the traditional process dominated by members of the existing system, see *Law Reform, Lawyers, and Access to Justice*, *supra* note 10, at 39–89. For a recent evaluation of the justice system reform initiated by the JSRC, see *Justice System Reform in Japan*, *supra* note 10, at 313–47.

candidates presented by the Personnel Bureau. The result almost completely prevents practicing attorneys from being appointed as judges.<sup>29</sup>

The lay-judge system seems to have fared better. More than 95% of those who served as lay judges felt it was a worthwhile experience.<sup>30</sup> Still, the introduced system was much less revolutionary than what reform proponents outside the criminal justice establishment wanted.<sup>31</sup> While outside reformers wanted to democratize the criminal trial system by introducing a jury system in order to minimize the involvement of professional judges, the JSRC proposed a system in which professional judges and lay people worked together. The JSRC defined the purpose of the new system not in terms of the democratization of criminal trials, but in terms of promoting public understanding and enhancing public trust in the administration of criminal justice.<sup>32</sup> The system's application was limited to the most serious types of cases, which accounted for only 2 or 3% of all criminal cases. Further, by requiring any decision made by the six lay judges be supported by at least one of the three professional judges who decided the case, professional judges essentially maintained a veto power.<sup>33</sup>

The incorporation of victim participation in criminal trials discussed by Erik Herber was a more conventional reform effort than the previous two cases because it was based on a recommendation by the LDC.<sup>34</sup> However, it was still an extraordinary case of policy-making because the reform was initiated by an organization established by bereaved families of crime victims instead of members of the criminal justice establishment. Crime victims, bereaved families, and their representatives obtained far more rights

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<sup>29</sup> See Takayuki Ii, *Japan's Judicial System May Change, but Its Fundamental Nature Stays Virtually the Same? Recent Japanese Reforms on the Judicial Appointment and Evaluation*, 36 HASTINGS INT'L & COMP. L. REV. 459, 459–74 (2013).

<sup>30</sup> *Justice System Reform in Japan*, *supra* note 10, at 341.

<sup>31</sup> For a view from a prominent member of the reform movement outside the criminal justice establishment, see Satoru Shinomiya, *Adversarial Procedure without a Jury: Is Japan's System Adversarial, Inquisitorial, or Something Else?*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS* 114, 114–27 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002). Progressive reformers like Shinomiya proposed to introduce a jury system exactly like that in the United States or a system where lay judges far outnumber professional judges.

<sup>32</sup> See Noboru Yanase, *Deliberative Democracy and the Japanese Saiban-in (Lay Judge) Trial System*, 3 ASIAN J.L. & SOC'Y 327, 330–34 (2016).

<sup>33</sup> For an outline of the system, see Setsuo Miyazawa, *Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives*, 42 INT'L J.L. CRIM. & JUST. 71, 71–82 (2014) [hereinafter *Citizen Participation in Criminal Trials in Japan*].

<sup>34</sup> See Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policies*, 10 PUNISHMENT & SOC'Y 47, 47–77 (2008) [hereinafter *The Politics of Increasing Punitiveness*].

than, for example, those making victim impact statements in the United States because victims may behave like prosecutors in trials, questioning the defendant and recommending a sentence.<sup>35</sup> And yet, the system did not seriously erode the power of prosecutors. Rather, the system provided prosecutors new resources to buttress their demands for convictions and harsher penalties. This was because victim representatives invariably demand harsh penalties, most typically the death penalty in homicide cases.<sup>36</sup> The Justice Ministry continues to appoint members of punitive victim organizations to committees on criminal justice and shows no sign of abolishing or diminishing the victim participation system within criminal trials.<sup>37</sup>

These cases suggest that even reforms conceptualized and initiated in unconventional ways can be implemented and routinized by members of the existing system in such a way that they will not significantly affect the judicial establishment's power in countries where it is tightly formed and unfragmented—such as Japan. If so, in cases of policy-making through more conventional means in countries like Japan, members of the existing system may be able to control the policy-making process more strongly, even from the earlier stages of *conceptualization* and *initiation*. The rest of this paper will present an analysis of such a case which took place in Japan recently.

## II. CONVENTIONAL PROCESS OF CRIMINAL JUSTICE LEGISLATION IN JAPAN: THE CASE OF MANDATORY VIDEOTAPING OF INTERROGATIONS

### A. *Policy-Making Process of Mandatory Videotaping of Interrogations*

The case began with a crisis for police and prosecutors. An arrested suspect may be detained for up to twenty-three days for each count he or she is charged with in Japan, with the first three days at the discretion of police and prosecutors and the following twenty days subject to judicial authorization upon a prosecutor's request.<sup>38</sup> Most suspects are detained in

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<sup>35</sup> See *Citizen Participation in Criminal Trials in Japan*, *supra* note 33, at 75.

<sup>36</sup> For an early analysis of lay judge trials where a victim representative participated, see David Johnson, *Early Returns from Japan's New Criminal Trials*, 36 ASIA-PAC. J. | JAPAN FOCUS 1, 1–15 (2009).

<sup>37</sup> See *The Politics of Increasing Punitiveness*, *supra* note 34, at 47–77; See Setsuo Miyazawa, *Will Penal Populism in Japan Decline?: A Discussion*, 33 JAPANESE J. SOC. CRIMINOLOGY 122, 122–35 (2008).

<sup>38</sup> See SETSUO MIYAZAWA, *POLICING IN JAPAN: A STUDY ON MAKING CRIME* 11–33 (Frank G. Bennett, Jr. trans., 1992); JOHNSON, *supra* note 17, at 22–36.

police detention cells (*ryuchijo*) where interrogators try to obtain a confession, as opposed to detention facilities (*kochisho*) managed by the Justice Ministry.<sup>39</sup> This system has been criticized as “hostage-taking justice” (*hitojichi shiho*)<sup>40</sup> and has been described as a “hot bed” (*onsho*) of false confessions leading to false convictions. Because defense lawyers are not allowed to be present during interrogations,<sup>41</sup> videotaping of interrogations was proposed as a remedy by the Japanese Bar and other reformers.<sup>42</sup>

In March 2010, Toshikazu Sugaya, who had been sentenced to indefinite imprisonment (life imprisonment with a possibility of parole) for murder in 1990, was acquitted by a retrial based on new DNA evidence (the “Ashikaga case”).<sup>43</sup> Audiotapes of Sugaya’s interrogations by prosecutors were found and showed how psychological pressure had been applied to press him into making a false confession.<sup>44</sup> The Japanese Bar and other reformers used this case to bolster their demand for the videotaping of interrogations.

In September 2010, Atsuko Muraki—a former head of the Welfare Ministry’s Equal Employment, Children, and Families Bureau—was acquitted by a trial court of a charge alleging she had issued a fabricated certificate that falsely recognized an organization as a group for the disabled in order to enable the group to use a postage discount system (the “Muraki case”). Her indictment was based on the pretrial statements of her co-defendant given to prosecutors. But, the court considered the possibility that those statements had been made under the pressure of

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<sup>39</sup> See SETSUO MIYAZAWA, *supra* note 38, at 21–23; JOHNSON, *supra* note 17, at 62.

<sup>40</sup> Kazuko Ito, *Wrongful Convictions and Recent Criminal Justice Reform in Japan*, 80 U. CIN. L. REV. 1245, 1250 (2012).

<sup>41</sup> See JOHNSON, *supra* note 17, at 74.

<sup>42</sup> For a recommendation from an American scholar, see Richard A. Leo, *Miranda, Confessions, and Justice: Lessons for Japan?*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, *supra* note 31, at 212–15.

<sup>43</sup> Setsuko Kamiya, *All Interrogations Must Be Taped: Sugaya*, JAPAN TIMES, Mar. 27, 2010, <https://www.japantimes.co.jp/news/2010/03/27/national/all-interrogations-must-be-taped-sugaya/#.WcbUpbpFyc0>.

<sup>44</sup> *Id.* In Japan, arrested and detained suspects may not refuse interrogation itself, although they have the right to remain silent. Interrogation will continue as long as they deny allegations. Continuing to deny charges for a long period of time in solitary confinement without constant support of an attorney is often unbearable. Suspects in such a situation may be tempted to make a false confession simply to escape these circumstances without thinking about the consequences. Sugaya described such a psychological process in his memoir. TOSHIKAZU SUGAYA, ENZAI: ARU HI WATASHI WA HANNIN NI SARETA [FALSE CONVICTION: ONE DAY, I WAS SUDDENLY MADE A CRIMINAL], 17–23 (2009).

leading questions from prosecutors.<sup>45</sup> Furthermore, a prosecutor who had investigated this case was indicted for tampering with evidence, and his two former bosses in the same public prosecutor's office were indicted<sup>46</sup> and subsequently convicted of similar charges. Since they were members of the elite Special Investigation Squad (*tokusobu*) of the Osaka District Public Prosecutors Office and Muraki was a prominent female civil servant, the case attracted a great deal of attention and further fueled the debate over the need for the videotaping of interrogations.<sup>47</sup>

In May 2011, Shoji Sakurai and Takao Sugiyama, who had been sentenced to indefinite imprisonment for a murder-robbery in 1967, were acquitted by a retrial (the "Fukawa case").<sup>48</sup> This was the seventh case in postwar Japan in which a defendant previously sentenced to death or indefinite imprisonment was acquitted in a retrial. The court pointed out the possibility that the investigators had used leading questions while interrogating the suspects, increasing the demand for introducing videotapes of interrogations.

Meanwhile, the reformist Democratic Party of Japan ("DPJ") won in the Lower House election in September 2009. Its election manifesto called for the videotaping of entire interrogations. Justice Minister Keiko Chiba of the DPJ cabinet tried to introduce a bill based on the election manifesto, but Hiroshi Nakai, a member of the same cabinet and the Chairman of the National Public Safety Commission, which oversees the National Police Agency, opposed it. Chiba backed down and proposed a "realistic review" of the present system, meaning only a limited application of videotaping.<sup>49</sup> Prosecutors led by the Supreme Public Prosecutor's Office continued to oppose the idea of complete videotaping and, instead started discretionary partial videotaping.<sup>50</sup> Chiba created a private advisory body called

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<sup>45</sup> *Indictment under Unjust Scenario*, JAPAN TIMES, Sep. 14, 2010, <https://www.japantimes.co.jp/opinion/2010/09/14/editorials/indictment-under-unjust-scenario/#.WcbVf7pFyc0>.

<sup>46</sup> *Examine Prosecution Process*, JAPAN TIMES, Oct. 23, 2010, <https://www.japantimes.co.jp/opinion/2010/10/23/editorials/examine-prosecution-process/>.

<sup>47</sup> Ito, *supra* note 40, at 1271–73.

<sup>48</sup> *Case Highlights Judicial Misdeeds*, JAPAN TIMES, May 28, 2011, <https://www.japantimes.co.jp/opinion/2011/05/28/editorials/case-highlights-judicial-misdeeds/>.

<sup>49</sup> *Why the Investigative Secrecy*, JAPAN TIMES, July 24, 2010, <https://www.japantimes.co.jp/opinion/2010/07/24/editorials/why-the-investigative-secrecy/>. She simply recommended that studies be carried out on limiting the scope of interrogations that must be videotaped.

<sup>50</sup> *Half-baked Reform Won't Cut It*, JAPAN TIMES, Mar. 5, 2011, <https://www.japantimes.co.jp/opinion/2011/03/05/editorials/half-baked-reform-wont-cut-it/>; Minoru Mitsutani, *Top Prosecutor Opposes Fully Taped Interrogations*, JAPAN TIMES, Mar. 1,

*Kensatsu no Arikata Kentokai* in Japanese, which literally translates to “The Deliberative Committee on How the Prosecution Should Be.”<sup>51</sup> This body consisted of four practicing attorneys, two former judges, two former public prosecutors, and two academics. Practicing attorneys wanted a broad videotaping requirement, while prosecutors opposed it. Unable to reach a consensus, in March 2011, the *Kensatsu no Arikata Kentokai* presented Satsuki Eda, Chiba’s successor as Justice Minister, with a lukewarm proposal that merely called for increasing the scope of partial videotaping and establishing an in-house inspection team within public prosecutor’s offices to check on prosecutorial activities.<sup>52</sup> Notably, the proposal only addressed prosecutorial interrogations, despite the fact that an overwhelming majority of suspects were interrogated by police.

Nevertheless, Eda moved ahead and established the Special Subcommittee on the Criminal Justice System in a New Era (*Shin-Jidai no Keiji Shiho Seido Tokubetsu Bukai*) in the LDC in June 2011.<sup>53</sup> While most members of the Special Subcommittee were members of the criminal justice establishment, it also included Atsuko Muraki, of the Muraki case, and Masayuki Suo, the Director of the 1997 hit movie “Shall We Dance?” as well as the 2007 legal movie “*Soredemo Boku wa Yattenai*” (I Just Didn’t Do It), which is based on the true story of a young man falsely accused of groping a young girl on a crowded train. Suo was nominated by the Japan Federation of Bar Association, the national association of practicing attorneys, upon request from Justice Minister Eda.<sup>54</sup> Muraki’s appointment may have had a similar background.

Although videotaping was the main issue of deliberation, no members of the subcommittee were scholars who had studied videotaping, and none were psychologists who had studied interrogation. Instead, the Special Subcommittee was dominated by members of the criminal justice establishment, including past and current police executives, prosecutors,

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2011, <https://www.japantimes.co.jp/news/2011/03/01/national/top-prosecutor-opposes-fully-taped-interrogations/>.

<sup>51</sup> On the use of private advisory bodies by cabinet ministers, see SCHWARTZ, *supra* note 19, at 105–15.

<sup>52</sup> *Insufficient Evidence of Reform*, JAPAN TIMES, Apr. 11, 2011, <https://www.japantimes.co.jp/opinion/2011/04/11/editorials/insufficient-evidence-of-reform/>.

<sup>53</sup> *Judicial System Reform*, JAPAN TIMES, July 10, 2011, <https://www.japantimes.co.jp/opinion/2011/07/10/editorials/judicial-system-reform/>.

<sup>54</sup> MASAYUKI SUO, *SOREDEMO BOKU WA KAIGI DE TATAKAU: DOKYUMENTO KEIJI SHIHO KAIKAKU* [STILL I FIGHT IN THE COMMITTEE: A DOCUMENT ON CRIMINAL JUSTICE REFORM] vi (Iwanami Shoten 2015). Justice Minister Eda came from outside the criminal justice establishment and was working against police and prosecutors who were resisting the introduction of mandatory videotaping of interrogations.

judges, and conservative academics who had regularly served on LDC subcommittees on criminal justice. Suo writes that he was told by his attorney friends that “these members are hopeless.”<sup>55</sup>

Deliberation in the Special Subcommittee progressed extremely slowly under the DPJ cabinet. The government had changed from the more liberal DPJ to the more conservative coalition government of the LDP and the Komeito<sup>56</sup> as a result of their landslide victory in the Lower House election in December 2012. The Special Subcommittee then submitted an interim report to the parent Committee in February of 2013. *The Japan Times* criticized that “the report appears to have forgotten the most important goal: how to prevent false charges from being filed against innocent people,” and reported that “opinions in general supported the electronic recording of the entire interrogation process. But panel members who formerly served as police officers vehemently opposed the idea.”<sup>57</sup> The interim report presented two options: (1) to require recording of entire interrogations only in cases that must be handled by the lay judge system and (2) to give discretion to police and prosecutors. The second option would not change the status quo, and even the first option would only apply to about 3% of all reported crimes and would exempt cases like the Muraki case.

Deliberation in the Special Subcommittee dragged on one more year without a conclusion. Police and prosecutors continued to oppose mandatory recording of interrogations, arguing that it would make interrogations more difficult.<sup>58</sup> In March 2014, five non-lawyer members, including Muraki and Suo, presented an unsuccessful proposal to record interrogations for all crimes except minor cases, such as traffic violations.<sup>59</sup> Soon after that, in May 2014, the Justice Ministry presented its own proposal to the Special Subcommittee. It had two proposals regarding the videotaping of interrogations: (1) to require both police and prosecutors to record entire interrogations in cases that would be handled by the lay judge system and (2) to require prosecutors to record entire interrogations only in

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<sup>55</sup> *Id.* at 6.

<sup>56</sup> Its name is the same in Japanese and English. See KOMIITO, <https://www.komei.or.jp/en/> (last visited Aug. 7, 2017).

<sup>57</sup> *Reform Panel Pulls its Punches*, JAPAN TIMES, Feb. 22, 2013, <https://www.japantimes.co.jp/opinion/2013/02/22/editorials/reform-panel-pulls-its-punches/>.

<sup>58</sup> *Transparent Interrogations*, JAPAN TIMES, Feb. 13, 2014, <https://www.japantimes.co.jp/opinion/2014/02/13/editorials/transparent-interrogations/>.

<sup>59</sup> *Transparency in Interrogations*, JAPAN TIMES, Mar. 27, 2014, <https://www.japantimes.co.jp/opinion/2014/03/27/editorials/transparency-in-interrogations/>.

cases they initiated. In other words, prosecutors would be required to record in a slightly broader range of cases than police.

There were two additional surprises in the Justice Ministry's proposal. One was to increase the number of crimes for which wiretapping was allowed from four (drug crimes, gun crimes, group smuggling, and organized murders) to fourteen, including but not limited to murder, battery, assault, burglary, and the production of child pornography. The other was to introduce a plea-bargaining system that would allow prosecutors to drop an indictment in return for incriminating information against another person.<sup>60</sup> The proposed range of videotaping was very limited, yet it was difficult for reformers like Muraki and Suo to reject, because doing so could mean that a political opportunity for introducing videotaping of interrogations would be lost for the near future. That was exactly why Suo and Muraki accepted the whole package.<sup>61</sup> Although the Special Subcommittee quickly decided to expand wiretapping and introduce plea bargaining, it only mandated videotaped interrogations in cases to be tried by the lay judge system, and provided exemptions in certain instances, such as cases in which recording would make it impossible to obtain a meaningful confession.<sup>62</sup>

When the Cabinet presented the bill to amend the Code of Criminal Procedure and other related laws to introduce above-mentioned "reforms" to the Diet in March 2015, *The Japan Times* warned that plea bargaining might create "more chances for false charges."<sup>63</sup> The Lower House passed the bill in August 2015,<sup>64</sup> while the Upper House failed to pass it before the end

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<sup>60</sup> See Masahito Inouye, *Witness Immunity and Bargain Justice: A Look at the Japanese Concept of the Adversary System*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS*, *supra* note 31, at 173–92; *Get Serious on Interrogation Reform*, *JAPAN TIMES*, May 14, 2014, <https://www.japantimes.co.jp/opinion/2014/05/13/editorials/get-serious-interrogation-reform/>. The most influential law professor on the Subcommittee, who was also a member of the parent LDC, had written an article about the possibility of introducing plea bargaining into Japan more than ten years earlier.

<sup>61</sup> MASAYUKI SUO, *supra* note 54, at 199–201. Suo mentions Muraki's leadership among members who wanted a broader range of mandatory videotaping. *Id.* at 216.

<sup>62</sup> *Interrogation Recording Pinched*, *JAPAN TIMES*, July 5, 2014, <https://www.japantimes.co.jp/opinion/2014/07/04/editorials/interrogation-recordings-pinched/>; *Most Criminal Interrogations to Remain Opaque*, *JAPAN TIMES*, July 3, 2014, <https://www.japantimes.co.jp/news/2014/07/02/national/crime-legal/most-criminal-interrogations-in-japan-will-remain-opaque/>; *Say No to Plea Bargaining*, *JAPAN TIMES*, July 2, 2014, <https://www.japantimes.co.jp/opinion/2014/07/01/editorials/say-plea-bargaining/>. See also MASAYUKI SUO, *supra* note 54, at 129. Suo considers that the mandatory videotaping will cover only 2 to 3% of criminal cases.

<sup>63</sup> *More Chances of False Charges*, *JAPAN TIMES*, Mar. 19, 2015, <https://www.japantimes.co.jp/opinion/2015/03/18/editorials/chances-false-charges/>.

<sup>64</sup> Tomohiro Osaki, *Lower House Oks Recording of Suspect Questioning*, *JAPAN TIMES*, August 8,



of the term of the Diet in September 2015. However, the Cabinet presented the bill again to the Diet in 2016, and the bill was finally passed in May of 2016. The amendments were promulgated in June of 2016 and are expected to become effective over the next three years.

This case illustrates that members of the criminal justice establishment who dominate the conventional policy-making process can limit even reform initiated by a Justice Minister and produce separate policies that benefit the criminal justice establishment. The requirement of videotaped interrogations was conceptualized and initiated by a reformist minister, but the policy-making process was controlled by former and current members of the criminal justice establishment who were supported by academics working closely with them. The result was a combination of a very limited reform based on the initial conception and other unanticipated policies which would provide new or expanded weapons for the criminal justice establishment.

Interrogation videotaping has not yet been officially introduced, so determining how it will be implemented must wait until 2019. Formal evaluation of the system must also wait until that time. However, police and prosecutors have been videotaping interrogations on an experimental basis.<sup>65</sup> At least one of these cases serves as a warning that videotaping alone may not bring about the effects desired by practicing attorneys and progressive scholars. That is because police and prosecutors may interrogate suspects on a “voluntary” basis before arresting them.<sup>66</sup> Videotaping will not be required for “voluntary” interrogations, and crucial confessions can be obtained through such “voluntary” interrogations. Furthermore, such “voluntary” interrogations can be conducted on an arrested and detained suspect if the arrest and detention were made on a separate charge: interrogations regarding one charge can be “voluntary” interrogations where no videotaping is required if the suspect has been

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2015,

<https://www.japantimes.co.jp/news/2015/08/07/national/crime-legal/lower-house-oks-recording-of-suspect-questioning>.

<sup>65</sup> The Supreme Prosecutor’s Office reported that prosecutors videotaped interrogations in 1325 cases that were eligible to be tried as lay-judge trials from April to September 2016. *Kensatsu no “kashika” zōka* [Prosecutors’ “Transparency” Increasing], ASAHI SHINBUN, Feb. 1, 2017, evening, at 10. The National Police Agency reported that police had videotaped all the interrogations after arrest in 72.8% of cases which might have been tried by lay judge trials in 2016. *Zenkatei kashika 72.8% ni zō: keisatsu torishirabe 19-nen no gimuka hikae* [Transparency of the Entire Process Increased to 72.8%: Ahead of Becoming Mandatory for Police Interrogations in 2019], ASAHI SHINBUN, May 25, 2017, evening, at 11.

<sup>66</sup> See SETSUO MIYAZAWA, *supra* note 38, at 16–18.

arrested and detained on a separate charge. Therefore, videotaping does not necessarily ensure the recording of crucial moments in the interrogation.

The case in point is called the Imaichi Case, in which a 33-year-old Taiwanese immigrant was convicted for the kidnapping and murder of a 7-year-old girl.<sup>67</sup> Specifically, the Imaichi Case presents three key problems with the procedures for videotaping interrogations:

- (1) videotaping of interrogations will not be required if the suspect has not been arrested and detained for the given charge; videotaping of interrogations will not be required even when the suspect has been arrested and detained if the basis for the arrest and detention is a separate charge;
- (2) the interrogation of a suspect arrested for a minor offense outside the jurisdiction of lay judge trials will not be recorded, although the suspect can give a confession for another, more serious offense in such interrogations;<sup>68</sup>
- (3) a video of an interrogation and confession can be used as evidence of a lack of coercion and may also serve as substantive evidence of the guilt of the defendant.

The Imaichi Case is discussed in detail in the following section based partly on our observation of the trial.<sup>69</sup>

## B. *The Imaichi Case as a Touchstone*

### 1. What is the Imaichi Case?

On December 1, 2005, a 7-year-old girl (“V”) went missing in Imaichi City (now Nikko City) in Tochigi Prefecture, which is located northeast of Tokyo. The next day, her body was discovered in the woods in the nearby Ibaraki Prefecture. She had been stabbed to death. V was

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<sup>67</sup> *A Case for Recording All Interrogations*, JAPAN TIMES, April 4, 2016, <https://www.japantimes.co.jp/opinion/2016/04/13/editorials/case-recording-interrogations>.

<sup>68</sup> It is estimated that videotaping will be required in only 2–3% of criminal cases. See MASAYUKI SUO, *supra* note 54. It means that videotaping will not be required in 97–98% of criminal cases.

<sup>69</sup> See Mari Hirayama, *Imaichi-Jiken Saiban-in Saiban wa Shikinseki to Narietaka - Bochoki wo Motoni Ikutsukano Keijitetsuzuki jono Juyona Kadai wo Ronjiru* [Can the Imaichi Case Lay Judge Trial Become a Touchstone Case - Discussing Some Significant Issues in the Criminal Procedure through Trial Observations], 739 HOGAKU SEMINA 1, 1–5 (2016).

last seen on her way home from school. Witnesses reported seeing a suspicious white vehicle near the time and place where V was last seen.<sup>70</sup>

Tochigi Prefectural Police and Ibaraki Prefectural Police jointly established investigation headquarters and launched an investigation. Though the two prefectural police forces mobilized a total of more than 160,000 officers for the investigation and investigated 24,000 possible suspects,<sup>71</sup> they did not make any arrests. The case received a great deal of publicity, and the police placed posters with V's picture requesting information in local police stations.

On January 29, 2014, more than eight years after V's murder, a man in his early thirties ("X") was arrested in Tochigi for possession of fake handbags with intent to sell, a violation of the trademark law. The Tochigi Prefectural Police had been conducting an undercover investigation of X as a suspect in V's murder for two years. It was clear that the real intention behind X's arrest was not to prosecute him for possessing the fake handbags, but to get him to confess to the unsolved murder.<sup>72</sup> X had been a suspect in V's murder because he drove a white vehicle that matched the description of the suspicious vehicle reported by witnesses near the last place where V had been seen.<sup>73</sup> In addition, because X had graduated from the same elementary school that V attended, the police thought that X was probably familiar with the area.<sup>74</sup> After his arrest, X was detained in the police cell of the Imaichi Police Station.<sup>75</sup>

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<sup>70</sup> "Imaichi jiken 1-nen" sōsa nankō: "isshun no kūhaku" toboshii jōhō ["Imaichi Case Year 1" Investigation Stymied: "Momentary Gap" Meager Information], YOMIURI SHINBUN, Nov. 21, 2006, morning, at 37.

<sup>71</sup> *Imaichi jiken yogisha no otoko taiho* [A Male Suspect is Arrested in the Imaichi Case], ASAHI SHINBUN, June 4, 2014, morning.

<sup>72</sup> Of course, the police and prosecution denied that it was "bekken taiho" (arresting and detaining a suspect for a minor crime in order to interrogate a serious crime which the police and prosecutors are really interested in), while the defense claimed that it was "bekken taiho." See "Jiken no nyūsu mita": hikoku, higaisha to onaji shōgakkō ["I Saw It on the News": Defendant Graduated from Victim's Elementary School], ASAHI SHINBUN (Tochigi), Mar. 18, 2016, morning, at 29.

<sup>73</sup> *Nin'i chōshu go haisha ni: Ibaraki shō-1 satsugai yōgisha, shōko inmetsu ka* [Vehicle Scrapped After Voluntary Interview: Suspect in Murder of Ibaraki First-Grader Could Be Destroying Evidence], ASAHI SHINBUN, June 5, 2014, morning, at 39.

<sup>74</sup> The woods where V's body was found were secluded and not easy to access unless the killer was local. See *id.*

<sup>75</sup> As described earlier, in Japan, a suspect can be detained for up to twenty-three days after the arrest before being indicted. See MIYAZAWA, *supra* note 38, at 20. Ninety-eight percent of detained suspects are detained at police detention cells, not at detention facilities operated by the Justice Ministry. This practice of using police detention cells as "daiyo kangoku (substitute prisons)" has been criticized as a major cause of false convictions. See Ito, *supra* note 40.

According to the testimony of the prosecutor who interrogated X (“A”), on the morning of February 18, 2014, when X’s detention for his trademark violation was about to expire, X suddenly started to confess to V’s murder.<sup>76</sup> According to A, when A asked, “You have murdered someone, haven’t you?” X replied, “How did you find that out?”<sup>77</sup> However, this part of “the first confession” was not recorded by the prosecution. At the trial, A testified that the very first confession was not videotaped because he just wanted to put out a feeler and never expected that X would actually start to confess. The Prosecutor’s Office, in haste, started to record the rest of the interrogation, beginning that afternoon. However, when the prosecutor resumed the interrogation, X kept saying “I was panicked in the morning,” or, “I do not remember what I said in the morning.” X was indicted for his violation of the trademark law on that day and was detained as an indicted defendant. The police and prosecutors continued to interrogate X for the murder as a “voluntary interrogation” because X had not yet been arrested for the murder. Most—but not all—interrogations by the prosecution were recorded after the very first “confession” on February 18th, and some of the police interrogations were also recorded. There were more than 86 hours of recorded interrogation,<sup>78</sup> and seven hours and thirteen minutes of them were shown at the trial, based on the agreement between the prosecution and the defense. In the long but “voluntary” interrogations shown at the trial, X often changed his statements. He admitted that he had kidnapped and killed V, but then he changed his story and said that that he had kidnapped V but had not killed her, and then he denied everything.<sup>79</sup>

These interrogations were conducted while X was being charged with a violation of the trademark law. X was finally arrested for the murder on June 3, 2014, and then indicted on June 24th. The court, the prosecution, and the defense had met more than 20 times for pretrial meetings before the trial, which started almost 10 years and 4 months after the crime.<sup>80</sup>

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<sup>76</sup> *Jihaku no yōsu kensatsukan shōgen: Imaichi jiken kōhan hikokunin shitsumon mo* [Prosecutor Testifies on Circumstances of the Confession: Imaichi Case Public Trial and Defendant Questioning], YOMIURI SHINBUN (Tochigi), Mar. 10, 2016, morning, at 33.

<sup>77</sup> *Tochigi sho-1 satsugai 32-sai otoko taiho* [32-year-old Man is Arrested for the Murder of the First-grader in Tochigi], ASAHI SHIMBUN, June 4, 2014.

<sup>78</sup> The total sum of the hours of interrogations against X is, of course, much greater.

<sup>79</sup> *Sadamaranu jihaku shinjitsu wa* [Uncertain Confession, Where Is the Truth?], YOMIURI SHINBUN, Apr. 20, 2016 (Tochigi), morning, at 35.

<sup>80</sup> *Jiken hassei kara 10-nen 4-kagetsu* [10 Years and 4 Months After the Incident Occurred], YOMIURI SHINBUN (Tochigi), Apr. 9, 2016, morning, at 32.

## 2. The Lay Judge Trial Turned into Screen Event?

On February 29, 2016, the lay judge trial for the Imaichi Case started in the Utsunomiya District Court.<sup>81</sup> It was one of the most sensational trials in recent years, and 913 people lined up for the 43 seats available in the courtroom. The presiding judge was female, and the two junior judges were male. The lay judges were No. 1 (male, approximately 70 years old), No. 2 (male, approximately 30–40 years old), No. 3 (male, approximately 30–40 years old), No. 4 (female, approximately 70 years old), No. 5 (female, approximately 30–40 years old), and No. 6 (female, approximately 30–40 years old).<sup>82</sup> Interestingly, there were five prosecutors,<sup>83</sup> while there were three defense lawyers.

Other than X's confessions, most of which had been recorded, there was no solid evidence in the case. The police could not find the weapon, and there were no witnesses at all. Even worse, there were some inconsistencies between X's confessions and the evidence on V's body—for example, the nature of her wounds and the amount of blood she lost. Even the forensic doctor, who examined V's body by police order, testified that X's confession did not match his understanding of how the murder was committed. Other than X's confessions, the police and the prosecution relied on circumstantial evidence: (1) the record of the vehicle number tracking system, which showed that X drove his car in the direction of the woods where V was found and came back the same night; (2) a cat hair found on V that matched the hair of X's cat;<sup>84</sup> and (3) an apology letter X wrote to his mother while he was detained, which just mentioned that he was “sorry for what [he had] done” and “the trouble [he] caused to [his mother and everyone],” which X claimed was in reference only to the trademark violation case.<sup>85</sup>

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<sup>81</sup> *Suspect in 2005 Murder of Tochigi Girl Pleads Innocent after Initially Confessing*, JAPAN TIMES, Feb. 29, 2016, <http://www.japantimes.co.jp/news/2016/02/29/national/crime-legal/suspect-in-2005-murder-of-tochigi-girl-pleads-innocent-after-initially-confessing/#.V0nFKo9OKUk>.

<sup>82</sup> These descriptions are based on observations by Professor Mari Hirayama.

<sup>83</sup> The victim participation system was applied in this case, and it is normal to have a larger number of prosecutors participate in such cases. However, assigning five prosecutors was quite unusual, even for cases with victim participation. This fact suggests the determination and zealotry of the prosecution to obtain a conviction.

<sup>84</sup> This hair was matched using mtDNA. Cats are divided into seventy-one groups by mtDNA.

<sup>85</sup> *Hikoku no haha e no tegami, kōbō* [Argument over Letter to Defendant's Mother], ASAHI SHINBUN (Tochigi), Mar. 3, 2016, morning, at 29 (“*Konkai jibun de hikiokoshita jiken de, okāsan ya minna ni meiwaku o kakete shimai, hontō ni gomennasai.*”).

Given the lack of direct evidence and limited circumstantial evidence, the prosecution relied heavily on X's confessions, especially the recorded confessions. This trial was not the first trial in which DVDs of recorded confessions were played.<sup>86</sup> However, this trial gathered the most attention because the crime was unresolved for nearly 9 years and because the case was quite rare in that, despite his confession, the defendant "completely denied the guilt."<sup>87</sup>

On the eighth day of the trial, March 10, 2016, the Court began to examine the recorded confessions in the courtroom. It began with the interrogation conducted on the afternoon of February 18, 2014, the first day X confessed to V's murder. However, as previously noted, the prosecutors did not record the part of X's confession in which he admitted his guilt for the first time. Thus, this portion of the confession was not played. The professional judges, the lay judges, the defendant, and the defense lawyers watched the DVD on the screen before them, and there were screens on the side walls for the audience in the public seats. In the DVD, Prosecutor A asked X about him confessing his guilt in the morning, but, as described above, X replied that "I was panicked" or "I don't remember." A then tried to confirm X's confession by asking "whether you killed the victim or not," but X replied only by groaning or sighing.<sup>88</sup>

Then the interrogation conducted on February 21, 2014 was played. X still made ambiguous statements and told A that he had had nightmares after the crime. Next, the recording of the interrogation on February 25th was played. A called X a "coward," saying, "You will be grudged by the bereaved family through your life." X shouted, "I cannot take this" a few times, and he ran to the window and tried to jump. The police officer present in the interrogation room subdued X. When this recording was played at trial, the silent courtroom resounded for several minutes with X's sobbing in the video. Next, the interrogation of February 27 was played.

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<sup>86</sup> For an explanation of how DVDs of recorded interrogations have been treated as evidence in trials recently, see Kazuhiro Maruyama, *Torishirabe DVD no Jissitsu Shoko-ka [DVDs of Recorded Interrogations Have Become Actual Evidence]*, 82 KIKAN KEIJI BENGU 50, 57 (2015).

<sup>87</sup> Unlike criminal procedure in the United States, trials are held in Japan even when the defendant pleads guilty, so that most criminal trials are uncontested and the only issue is sentencing. There is no "plea bargaining" to avoid trials in Japan. For more info on criminal procedure in Japan, see Ito, *supra* note 40.

<sup>88</sup> *Torishirabe rokuon, rokuga o saisei: kenji no chōshu namanamashiku [Playing Back the Recorded and Videotaped Interrogation: The Prosecutor's Vivid Questioning]*, ASAHI SHINBUN (Tochigi), Mar. 11, 2016, morning, at 29 ("Kenji ' . . . Koroshita koto dake kakuninsasete kure. Machigai nai na? Dō da?' . . . Hikoku 'Jikan kudasai.'").

A asked X why he ran to the window, and X replied simply, “I thought I would feel better if I jumped from the window.”<sup>89</sup>

On March 11, 2016, the ninth day of the trial, the prosecution played more of the February 27, 2014 interrogation. Prosecutor A addressed X only by his first name, without any “*kun*” or “*san*,” a term usually added after the name in friendly conversations in Japan. A’s tone was intimidating.

On March 14, 2016, the tenth day of the trial, the prosecution played police interrogations dating from June 3rd to June 17th. At the interrogation on June 3rd, X said “I am sorry” and signed a statement in the dossier,<sup>90</sup> but on the night of that same day, X changed his statement and said, “I didn’t kill the victim.” At the trial, X claimed that he was assaulted and threatened, but the three police officers who interrogated X testified that they did not assault or threaten X during the interrogation.<sup>91</sup> However, because the police did not record all of the interrogation, and so it remained unclear whether X or the police told a lie.

On March 15, 2016, the prosecution played a recorded interrogation conducted on June 11, 2014 by a different prosecutor (“B”). The interrogation was conducted after X was arrested for murder. Quite differently from A, B spoke with a soft voice and called X “X-*kun*,” an honorific title. According to a newspaper article,<sup>92</sup> the recorded communication between X and B went as follows:

B: X-*kun*, what matters here is the attitude as a human. Can you say you will “live like a human?”

X: I will live like a human.

B: I do not want you to pretend to live like a human. You must show that from your deep heart. You must not turn around. You killed V, didn’t you?

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<sup>89</sup> *Id.* (“*Tobioritara raku da ne*”) (Japanese).

<sup>90</sup> Statements taken at interrogations in Japan are not verbatim records. They are composed by interrogators and the suspect is asked to sign them.

<sup>91</sup> *Keikan, jihaku kyōyō o hitei: “hitai no kega, jishō”* [Police Officers Deny Coerced Confession: “Head Injury Was Self-Inflicted”], ASAHI SHINBUN, Mar. 15, 2016, morning, at 37.

<sup>92</sup> *Saiban deno hinin nai* [I Will Not Deny at the Trial], ASAHI SHINBUN, Mar. 16, 2016.

X: Yes.

Then X explained, with a gesture and tears, how he stabbed and killed V. After he made these statements, he said, “Thank you. I am relieved.”<sup>93</sup> X even said to B, “If we had met in a different situation, we would be friends.”<sup>94</sup>

Contrasting the interrogations of X by A with those by B might clearly indicate the strategy of “Good Cop versus Bad Cop.” In fact, at the trial, X claimed that the reason why he cooperated with B was that he didn’t want to be disliked by B. The defense lawyer also argued that the X’s confession to B was made under the influence of intimidating interrogation by A and the police officers.<sup>95</sup>

The Court, however, granted the voluntariness of the confessions made to A on the 14th day of the trial, March 18, 2016.<sup>96</sup> Under Article 6-2 (2) of the Act on Criminal Trials with the Participation of Saiban-in, the voluntariness of confessions is deliberated and decided only by professional judges even in lay judge trials. On the day of the verdict, April 8, 2017,<sup>97</sup> the court granted the reliability of the confessions made to B, found X guilty, and sentenced him to an indefinite imprisonment.<sup>98</sup>

A review of the judgment document<sup>99</sup> suggested that the Court placed a high value on the recorded confession to B. On the one hand, the Court clearly denied the value of the circumstantial evidence stated above, and clearly stated that the inferences from that circumstantial evidence were limited.<sup>100</sup> On the other hand, the Court recognized the reliability of the

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<sup>93</sup> *Id.*

<sup>94</sup> At the closing argument, the prosecutor mentioned this remark by the defendant.

<sup>95</sup> See “*I Saw It on the News*”: *Defendant, Victim from Same Elementary School*, *supra* note 72.

<sup>96</sup> Noguchi Reiko, *Tochigi, kyū-Imaichi-shi no shō-1 jōji satsugai: jihaku chōsho saiyo rokuon, rokuga, kimete ni “rieki yūdō” mitomezu* [*Murder of a First-Grade Girl in the Former City of Imaichi, Tochigi: Confession Records Admitted into Evidence, Recording and Videotaping Were the Decisive Factor; “Influence Peddling” Denied*], MAINICHI SHINBUN, Mar. 18, 2016, evening, at 15.

<sup>97</sup> The verdict date was originally scheduled for March 31, 2016. However, at the last minute, the Utsunomiya District Court decided to postpone the verdict for one week. Such a postponement is very unusual, especially in lay judge trials, as courts normally are reluctant to disturb lay judges’ daily schedules. It seemed that both the professional judges and the lay judges in this case had experienced difficulty in deciding the verdict.

<sup>98</sup> *Toboshii busshō semerareta handan* [*Under Pressure to Make a Decision with Scant Physical Evidence*], ASAHI SHINBUN, Apr. 9, 2016, morning, at 35.

<sup>99</sup> Utsunomiya [Dist. Court], April 8, 2016, Heisei 28 no. 245, LEXDB 25542682, <https://lex.lawlibrary.jp/> [hereinafter LEXDB 25542682]. LEXDB is an online legal database in Japan.

<sup>100</sup> *Id.*



confessions by explaining that “X’s confessions to B are not contradicted with objective fact”<sup>101</sup> and that “X’s confessions are concrete and include many elements which are difficult to tell unless X himself had experienced them.”<sup>102</sup> These statements demonstrate that, in making its decision, the Court heavily relied on the recorded interrogations. Reviewing comments by lay judges given at the press conference after the verdict, the bigger problem appears to be that the lay judges considered not the dossiers, but the recorded interrogations as “substantial evidence” to decide the verdict.

### 3. Recorded Interrogation: Supplementary Evidence or Substantial Evidence?

Recording interrogations has been a goal for defense lawyers and many liberal legal scholars.<sup>103</sup> On the other hand, the police and the prosecution have not supported those movements. This is primarily because they thought recording interrogations would make it difficult to interrogate suspects effectively. The lay judge system has changed the attitudes of prosecutors. In 2012, the Supreme Public Prosecutor’s Office established the Task Force on Suspect Interrogations in a New Era (“Task Force”) (*Aratana Jidai niokeru Torishirabe no Arikata Kento Chiimu*).<sup>104</sup> In May 2013, the Task Force concluded that recorded interrogations would be useful to prove cases and encouraged district prosecutor’s offices to consider using recorded interrogations not as “supplementary evidence” but as “substantial evidence.”<sup>105</sup> Since then, prosecutors have become more receptive to recording their interrogations. It seems they realized that recorded interrogations would be their new weapons.

So, what is the difference between “substantial evidence” and “supplementary evidence”? Why does it matter? Most defense lawyers

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<sup>101</sup> The court was referring to the examined evidence regarding V’s body.

<sup>102</sup> LEXDB 25542682, *supra* note 99.

<sup>103</sup> The JFBA had published a proposal, “Recording Interrogation Act Draft,” in 2003. Proposal, Japan Federation of Bar Associations, Proposed Legislation for Interrogation Recordings (Dec. 4, 2003), [http://www.nichibenren.or.jp/library/ja/special\\_theme/data/kashika\\_rippouan.pdf](http://www.nichibenren.or.jp/library/ja/special_theme/data/kashika_rippouan.pdf). Since then, its realization has been one of the most important issues for the JFBA. See Makoto Ibusuki, *Higisha Torishirabe Rokuga Seido no Saizensen: Kashika wo Meguru Ho to Shokagaku* [*The Cutting Edge of the Suspect Interview Recording: Approaches from Law and Empirical Sciences*], in HORITSU BUNKA-SHA 332–33 (2016).

<sup>104</sup> See SUPREME PUBLIC PROSECUTOR’S OFFICE, *Audio/Video Recording of Interrogations by Public Prosecutors and Related Future Policies*, MINISTRY JUST., <http://www.moj.go.jp/content/000102283.pdf> (last visited Aug. 10, 2017).

<sup>105</sup> *Torishirabe kashika: Saikōken “kashika wa yūkō” hanzai risshō ni katsuyō teigen* [*Recording Interrogations: Supreme Prosecutor’s Office “Recording is Effective” Recommends Utilizing it for Proving Crimes*], MAINICHI SHINBUN, May 5, 2013, morning, at 1.

and liberal legal scholars expected recorded interrogations to be used only as “supplementary evidence” to prove the voluntariness and the reliability of confessions.<sup>106</sup> They assumed that the primary evidence to be examined at trial would still be the dossiers, not the recordings.

However, if one values recorded interrogations as more “objective” and “precise” records of interrogations than dossiers, one would expect that recorded interrogations could be used as “substantial evidence” of a crime. Newspaper articles reporting comments by the lay judges at the press conference after the Imaichi decision indicate that these lay judges agreed with this perspective. They said: “We could see X’s facial expressions and gestures well, which played a big part for our decision,” “Since we did not have a conclusive evidence, the recorded DVD made us to decide,” and, “Unlike dossiers, the DVDs had good presence. I think playing DVDs at the trial is significant for lay judges to decide”;<sup>107</sup> “There wasn’t any definitive evidence, but we reached our verdict because of the recordings (of the confession)”;<sup>108</sup> “Without DVDs, I had not decided. They (DVDs) have played a large role” and “I am not sure what the verdict would be (without the DVDs).”<sup>109</sup> And one alternative lay judge commented: “What [the defendant] said on video was different from what he said in court, so our task was to determine which was true.”<sup>110</sup>

It’s quite clear that the lay judges saw the recorded interrogations as substantial evidence. The defense team seemed to have understood the potential impact of the DVDs at trial, but at the same time, it did not seem to have considered it seriously enough. At the pretrial procedure, the defense team argued against playing the DVDs at the trial in front of lay judges, while the prosecution argued that they would present the DVDs as “substantial evidence” because they knew the impact they were likely to have on the lay judges. The Court then decided to examine the DVDs not as “substantial evidence,” but as “supplementary evidence” at the trial. It

<sup>106</sup> See Takayuki Aoki, *Torishirabe wo Rokuon-Rokugashita Kiroku Baitai no Jisshitsu Shoko Riyo* [Utilizing Recorded Media of Interrogations as Actual Evidence], 31 KEIO HOGAKU 63 (2015).

<sup>107</sup> *Jyoji satugai jiken: hikoku ni muki choeki* [The Girl Murder Case: The Defendant Was Sentenced to the Life Sentence with a Possibility of Parole], NHK, Apr. 8, 2016, <http://www3.nhk.or.jp/shutoken-news/20160408/4097412.html>.

<sup>108</sup> *Recorded Confession Decisive Factor in Tochigi Child Murder Case Conviction*, MAINICHI, Apr. 9 2016, <https://mainichi.jp/english/articles/20160409/p2a/00m/0na/008000c>.

<sup>109</sup> *Torishirabe eizo handan ni eikyo: Saiban-in ra kaiken* [Recorded Interrogations Have Impacted the Decisions: Press Conference by Lay Judges], SHIMOTSUKE SHIMBUN, Apr. 9, 2016, at 2.

<sup>110</sup> “*Kanashimi owaranai*”: *izoku nao kuyashisa* [“The Sadness Does Not End”: Victim’s Family Still Frustrated], YOMIURI SHINBUN, Apr. 9, 2016, morning, at 39 (“*Eizō de itte iru koto to, hōtei de itte iru koto ga chigau no de, dochira ga tadashii ka o mikiwameru sagyō datta*”).

seems that the defense team did not refuse strongly enough to stop the DVDs from being played at trial, as they also thought that the showing of the interrogation by A, the intimidating prosecutor, played into their strategy to claim X's confession was not voluntary.<sup>111</sup>

The problem here is that the lay judges (and possibly the professional judges) heavily relied on what they saw on the DVDs to decide the verdict.<sup>112</sup> The overconfidence in videos or DVDs as “objective” because “everybody sees the same thing in DVDs” is obvious here. The lay judges seemed to have convicted X based on the recorded interrogations even though the police and prosecution did not record the whole process of the interrogations and presented only partial recordings at trial. The defense team failed to sufficiently anticipate the powerful influence of partial recordings and partial showings. A genie is released! Although initially conceived by defense lawyers and liberal scholars as a method for protecting defendants from threatening interrogations, videotaping interrogations has actually become a powerful weapon for the police and the prosecution.

#### 4. Implications of the Imaichi Case for the Eventual Evaluation of the Videotaping of Interrogations

The Imaichi case involved all three problems mentioned at the end of the preceding section. To repeat, they are:

- (1) videotaping of interrogations will not be required if the suspect has not been arrested and detained for the given charge; videotaping of interrogations will not be required even when the suspect has been arrested and detained if the basis for the arrest and detention is a separate charge;
- (2) the interrogation of a suspect arrested for a minor offense outside the jurisdiction of lay judge trials will not be recorded, although

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<sup>111</sup> See Mari Hirayama, *Imaichi Jiken Saiban-in Saiban ni okeru Higisha Torishirabe Rokuon-Rokuga Eizo no Inpakuto - Keiji Saiban no Riarity* [The Impacts by the Recorded Interrogations at the Imaichi Case Lay Judge Trial – The Reality of Criminal Trials], in *THE LEGAL PROCESS IN CONTEMPORARY JAPAN: A Festschrift in Honor of Professor Setsuo Miyazawa's 70th Birthday 198* (Keiichi Ageishi et al. eds., 2017).

<sup>112</sup> Shinichiro Koike, *Imaichi Hanketsu wo Ukete: Bubun Kashika Hoan no Mondaiten* [The Imaichi Case Verdict: Problems in Partial Recording of Interrogations], 507 *HO TO MINSHUSHUGI* (2016).

the suspect can give a confession for another, more serious offense in such interrogations;

- (3) a video of an interrogation and confession can be used as evidence of a lack of coercion and may also serve as substantive evidence of the guilt of the defendant.

The system for videotaping interrogations which will be introduced in Japan by June 2019 will also involve problems one and two, while the third may be a fundamental problem common to any system of recording interrogations. Evaluation of the system to be introduced in 2019 would clearly depend on the position of the evaluators in relation to the criminal justice establishment.

Those who belong to, or are close to, the criminal justice establishment would welcome the third, while they would still want to prevent the introduction of videotaping, even if it has limitations like one and two. However, given that such a limited form of videotaping will be introduced in exchange for a greatly expanded wiretapping system and the introduction of plea bargaining, the overall reform package would be considered a success by members of the criminal justice establishment.

Alternatively, those who conceived of and initiated the introduction of videotaping interrogations as a powerful reform to the criminal investigation system in Japan, which had long been criticized for “hostage-taking justice,” will now face an extremely serious dilemma: if they reject the introduced system of mandatory videotaping for its ineffectiveness, the investigation system will simply return to the old system of “hostage-taking justice.” In lieu of the very limited and ineffective mandatory videotaping, those reformers outside the criminal justice establishment may want to introduce far more progressive reforms, such as requiring defense attorney to be present at interrogations. However, given the structure of the policy-making process dominated by members of the criminal justice establishment, such reform is highly unlikely. It would seem, then, that their only option is to adapt to the new reality.

### III. CONCLUSION: EXPANDING FEELEY'S FRAMEWORK

Malcolm M. Feeley examined cases of criminal justice reform in the United States, where reforms can be conceived and initiated in a very open structure, but implementation of the introduced reforms can be handed over to highly fragmented implementers. The story of the mandatory videotaping of interrogations and accompanying changes in Japan shows the reform process at the other end of the scale, where the members of the criminal justice establishment who were the targets for reform can exert a strong influence even at the *conception* and *initiation* stages, and have even stronger control at the *implementation* and *routinization* stages. We believe that Feeley's theoretical framework can be expanded and made more generally applicable to court reforms outside the United States. This could be achieved by introducing a degree of openness in the policy-making process at the *conception* and *initiation* stages, while also introducing the degree of fragmentation in the policy making process at the *implementation* and *routinization* stages as central independent variables which determine the course of the reform.