

ARTICLES

TWO DECADES OF OBSCENITY AND FREE SPEECH ISSUES IN HONG KONG, WITH A U.S. COMPARATIVE PERSPECTIVE

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I. INTRODUCTION

It is the twentieth anniversary of Hong Kong's transfer from British to Chinese sovereignty, and Hong Kong has elected a new "pro-Chinese" Chief Executive Officer, Carrie Lam. But Hong Kong has experienced turmoil in recent years regarding civil liberties and civil rights. The "Umbrella Movement" is the most well-known event, when Hong Kong citizens in 2014 took to the streets to protest the People's Republic of China's intervention in choosing a Hong Kong government leader.¹ These protests were eventually quelled, though repeated citizen activism in the streets still occurred including on New Year's Day 2017.² Stunningly, in 2016, several prominent Hong Kong bookstore owners "disappeared" and ended up in Chinese custody.³ They were detained because they had sold books viewed as critical of the central Chinese government.⁴ Moreover, in 2016, Hong Kong officers interfered with a prestigious international book fair by confiscating numerous books that were considered obscene, seditious, or "indecent."⁵ As one of the

¹ See Amie Tsang, Alan Wong & Michael Forsythe, *Protestors in Hong Kong Clash with Police Over Lawmakers' Fate*, N.Y. TIMES (Nov. 6, 2016), https://www.nytimes.com/2016/11/07/world/asia/hong-kong-yau-wai-ching-sixtus-leung.html?_r=0.

² See Helier Cheung, *Hong Kong New Year's Day Pro-Democracy Protest Draws Crowds*, BBC (Jan. 1, 2017), <http://www.bbc.com/news/world-asia-38485642>. There have also been increased protests in the United States, mainly against President Trump. See also Ray Sanchez, *Weekend Brings More Anti-Trump Protests Across Nation*, CNN (Nov. 12, 2016), <http://www.cnn.com/2016/11/12/us/protests-elections-trump/index.html>. A women's march was particularly successful. Emanuella Grinberg, *What's Next for Women's March Participants*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/23/us/womens-march-next-steps/index.html>. Interestingly, some Republican dominated state legislatures have introduced bills to increase the penalties for supposedly disruptive political protests. Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protests*, THE INTERCEPT (Jan. 19, 2017), <https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest/>. The Iowa legislator who introduced the bill there called it the "suck it up, buttercup" bill. Samantha Schmidt, *The 'Suck It Up, Buttercup' Bill: Iowa Lawmaker Targets Postelection Campus 'Hysteria'*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/16/the-suck-it-up-buttercup-bill-iowa-lawmaker-targets-postelection-campus-hysteria/?utm_term=.d2c19da9ac64.

³ See PEN AMERICA, WRITING ON THE WALL: DISAPPEARED BOOKSELLERS AND FREE EXPRESSION IN HONG KONG 5, 11 (2016).

⁴ See *id.* at 44–45; see also Shirley Zhao, *Disappearance of Hong Kong Booksellers 'Has Dealt Huge Blow to Publishers of Sensitive Books'*, SOUTH CHINA MORNING POST (Nov. 5, 2016), <http://www.scmp.com/news/hong-kong/politics/article/2043149/fresh-calls-investigation-beijings-questionable-detentions>.

⁵ See Press Release from the Government of the Hong Kong Special Administrative Region, OFNAA Seizes Suspected Indecent Articles at Hong Kong Book Fair 2016 (July 27, 2016), <http://www.info.gov.hk/gia/general/201607/27/P2016072700755.htm>; see also Danny Mok, *'Indecent' Books and Comics at Hong Kong Book Fair: 1,400 Books Seized and One Publisher to Be Prosecuted*, SOUTH CHINA MORNING POST (July 27, 2016), <http://www.sc>

largest financial centers in the world, these actions in Hong Kong are especially significant as they reflect on its stability and on Chinese attitudes.

This paper deals with Hong Kong's approach to obscenity, a core free speech issue that also illuminates its civil liberties approach. Indeed, Hong Kong has considered revising its obscenity related laws for almost two decades but has yet to do so. Another reason obscenity is important is that some political material can be, and has been, labeled obscene, despite a free speech provision in the Hong Kong Basic Law. The paper will also compare Hong Kong to the United States in the obscenity area.

Part II examines Hong Kong's legal approach to obscenity; its relevant tribunal and court structure; decisions of the Court of Final Appeal (which has supported free speech), as well as other courts; and controversies in the Hong Kong Obscenity Articles Tribunal. It further discusses government proposals in 2015 to change this system, including making the penalties more severe. To my knowledge, these proposals have not been discussed in American law journals. Stunningly, Hong Kong has indicated that it will not proffer any definition of obscene or indecent speech for reasons that will be discussed, even though it will still prosecute such speech.

Part III examines the U.S. Supreme Court's approach to obscenity and similar issues. Part IV offers some tentative recommendations for Hong Kong and the United States, as well as restating the connection between obscenity and political restrictions in Hong Kong. It also assesses the current proposed policy changes. The paper ends on a skeptical note by arguing that the Chinese and Hong Kong governments keep obscenity, and free speech, standards vague as that maximizes their ability to prosecute in case of protests or other problems.

II. HONG KONG

The Hong Kong Special Administrative Region (HKSAR) has been described as "one country, two systems."⁶ This refers to the 1984 Joint Declaration whereby the United Kingdom ceded sovereignty to the People's Republic of China (PRC) as of 1997, but the PRC agreed that Hong Kong

mp.com/news/hong-kong/education-community/article/1995694/indecnt-books-and-comic-hong-kong-book-fair-1400 (notice the emphasis on the word "indecency" in both documents).

⁶ See, e.g., WU BANGGUO, *THE BASIC LAW AND HONG KONG – THE 15TH ANNIVERSARY OF REUNIFICATION WITH THE MOTHERLAND 2* (Tam Wa-Chu Maria ed., 2012), http://www.basiclaw.gov.hk/en/publications/15anniversary_reunification/; Christopher S. Wren, *Hong Kong Accord Initialed in China*, N.Y. TIMES (Sept. 26, 1984), <http://www.nytimes.com/1984/09/26/world/hong-kong-accord-initialed-in-china.html> (quoting the British ambassador to China as describing the Joint Declaration as "the practical embodiment of the imaginative concept of one country, two systems").

could operate with capitalism and significant autonomy for fifty years until 2047.⁷ Hong Kong's Basic Law went into effect in 1997 at the transition point.⁸

The Basic Law was approved in 1990 by the PRC Seventh National People's Congress after negotiations between representatives from Hong Kong and the PRC, as well as British diplomatic maneuvering.⁹ The Basic Law contains fundamental rights as well as limitations. Scholars dispute whether the Basic Law derives its authority from the PRC Congress or from the 1984 Joint Declaration (and Hong Kong's legal traditions).¹⁰

Despite many skeptics, Hong Kong remains capitalist, and its legal system has substantial independence, even though China has been asserting more political and legal authority. Indeed, a prominent business survey once named Hong Kong's legal system the best in Asia.¹¹ Moreover, some experts contend Hong Kong's capitalism influenced the mainland's move toward markets.

⁷ See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, <http://www.cmab.gov.hk/en/issues/jd2.htm>; Xianggang Jiben Fa art. 5 (H.K.), http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf ("The socialist system and policies shall not be practi[c]ed in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.").

⁸ See Ming K. Chang, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985–90*, in THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY? 3, 3–4 (Ming K. Chan & David J. Clark eds., 1991).

⁹ See *id.* at 3–29 (explaining the multiple steps of negotiations that preceded enactment of The Basic Law).

¹⁰ Albert H. Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 PAC. RIM L. & POL'Y J. 627, 628, 631–32 (2006) ("The lack of legitimacy—in the eyes of many people in Hong Kong, particularly its legal community and a significant segment of its political elite of the [National People's Congress Standing Committee] in performing the task of constitutional interpretation has proved to be the major cause of constitutional controversies in post-1997 Hong Kong.").

¹¹ Compare Agence France-Presse, *Hong Kong Has Best Judicial System in Asia: Business Survey*, ABS/CBN NEWS (Sept. 14, 2008), <http://news.abs-cbn.com/world/09/15/08/hong-kong-has-best-judicial-system-asia-business-survey> (illustrating Hong Kong's strong judicial system), with Doug Bandow, *China Takes Charge in Hong Kong: Will Personal Liberty and Territorial Autonomy Survive*, FORBES MAG. (Dec. 6, 2016), <https://www.forbes.com/sites/dougbandow/2016/12/06/china-takes-charge-in-hong-kong-will-personal-liberty-and-territorial-autonomy-survive/#6a77c50de17> ("Traditionally Hong Kong courts have been independent, but suspicions abound that the jurists considered politics as well as law.").

A. The Basic Law on Freedom of Expression in Hong Kong

Article 27 of the Basic Law specifies that, “Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration”¹² Public order concerns, however, limit this provision.¹³ Article 39 of the Basic Law states that the provisions of the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights shall generally apply.¹⁴ Article 19 of the ICCPR specifies that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.¹⁵

It is worth noting the two stages to finding a violation: the government must violate someone’s rights, and the violation must not be found justifiable.

B. Courts, Tribunals, and Procedures re. Obscenity in Hong Kong

Sexual expression in Hong Kong is regulated by the Control of Obscenity and Indecent Articles Ordinance (COIAO), which originated in 1987.¹⁶ The

¹² XIANGANG JIBEN FA [THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA] art. 27 (H.K.), http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html.

¹³ Article 39 specifies that, “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.” *Id.* art. 39.

¹⁴ *Id.*

¹⁵ G.A. Res 2200 (XXI), art. 19, International Covenant on Civil and Political Rights (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

COIAO established the Obscene Articles Tribunal (OAT).¹⁷ The OAT serves two functions. The first is “classification.”¹⁸ The second is “determination.”¹⁹ The OAT had approximately 320–400 adjudicators from diverse professional or other backgrounds, who are supposed to reflect community standards.²⁰ They need not be lawyers or professionals.²¹ This model was drawn in part from New Zealand, Germany, and Australia.²² The Hong Kong Chief Justice of the Court of Final Appeal selects the adjudicators for three-year terms.²³

“Classification” is an administrative function whereby parties who play a role in the publication, production, or design of magazine articles, Internet postings, etc. can bring them to the OAT’s attention for scrutiny.²⁴ Public officials can also invoke this process.²⁵ As this article will show, “determination” is more judicial.

The Tribunals use the following criteria:

- the standards of morality, decency, language or behavior and propriety that are generally accepted by reasonable members of the community;
- the dominant overall effect of an article or matter;
- the persons, classes of persons, or age groups intended or likely to be targeted by an article’s publication;
- in the case of matter publicly displayed, the location of such display and the persons, classes of persons, or age groups likely to view it; and

¹⁶ See DOREEN WEISENHAUS, *HONG KONG MEDIA LAW: A GUIDE FOR JOURNALISTS AND MEDIA PROFESSIONALS* 250 (2d ed. 2014).

¹⁷ *Id.* at 251.

¹⁸ *Id.* at 251–52.

¹⁹ *Id.* at 252–53.

²⁰ EastSouthWestNorth, *The Very Public Adjudicators of the Hong Kong Obscenity Articles Tribunal* (May 30, 2007), http://www.zonaeuropa.com/20070521_1.htm (referencing approximately 320 adjudicators drawn from the community and chosen by the Chief Justice); see *infra* note 22 (stating there are 500 adjudicators).

²¹ See *Court Services and Facilities: The Obscene Articles Tribunal*, H.K. Judiciary, http://www.judiciary.hk/en/crt_services/pphlt/html/oat.htm#5 (last updated Apr. 1, 2017) [hereinafter *Obscene Articles Tribunal*].

²² But see Legislative Council Brief, *Review of the Control of Obscene and Indecent Articles Ordinance* 4 (2015), <http://www.legco.gov.hk/yr14-15/english/panels/itb/papers/itb20150309-ctba23551cpt1-e.pdf>.

²³ See *Obscene Articles Tribunal*, *supra* note 21.

²⁴ WEISENHAUS, *supra* note 16, at 251.

²⁵ *Id.*; Control of Obscene and Indecent Articles Ordinance, (1997) Cap. 390, 10 § 13(2) (H.K.).

- whether the article or matter has an honest purpose or whether instead it seeks to disguise unacceptable material.²⁶

There are no separate government criteria for the Internet in Hong Kong.²⁷

1. OAT Hearing Proceedings

a. OAT Classifications

For classification, the OAT labels materials as either obscene (Category III), indecent (Category II), or neither obscene nor indecent (Category I).²⁸ No simple obscenity definition is given.²⁹ Instead the factors mentioned previously are the focus. The influential United Kingdom Obscene Publications Act of 1959, however, defined obscenity as material where the impact is “such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear [the material].”³⁰ Indecent means the material is not suitable for individuals under eighteen and explicitly includes “violence, depravity and repulsiveness.”³¹ The Court of Final Appeal has said such criteria should also be considered in the obscenity realm.³² Portrayals of hard core pornography could presumably be obscene.

A presiding magistrate and two adjudicators hold an initial OAT “classification” hearing in private.³³ They render an “interim” decision within five days.³⁴ The OAT must have identified the particular part(s) of an article that give rise to obscenity or indecency.³⁵ No reasons need be given.³⁶ If the OAT finds that Category III applies, the OAT must prohibit the speech and may impose a fine.³⁷ If Category II applies, the OAT has

²⁶ See *Obscene Articles Tribunal*, *supra* note 21.

²⁷ See WEISENHAUS, *supra* note 16, at 254.

²⁸ See *Obscene Articles Tribunal*, *supra* note 21.

²⁹ See WEISENHAUS, *supra* note 16, at 250.

³⁰ Obscene Publications Act 1959, 7 & 8 Eliz. 2 c. 66, § 1 (Eng.), <http://www.legislation.gov.uk/ukpga/Eliz2/7-8/66/section/1>.

³¹ See *Obscene Articles Tribunal*, *supra* note 21.

³² *Oriental Daily Publisher Ltd. v. Comm’r for Television and Entm’t Licensing Auth.*, [1998], 1 H.K.C.F.A.R. 279, ¶ 5 (C.F.I.) (H.K.) (decision by Chief Justice Li).

³³ See WEISENHAUS, *supra* note 16, at 251.

³⁴ *Id.*

³⁵ See *id.* at 259.

³⁶ *Id.* at 260.

³⁷ *Id.* at 252–53.

discretion to impose requirements that material be wrapped (e.g., in brown paper), that a warning be issued, and/or that a fine be levied.³⁸

The Tribunal may reconsider the classification on its own or at the request of the submitting party.³⁹ The reconsideration hearing is public and involves a presiding magistrate and four or more adjudicators who were uninvolved in the original classification.⁴⁰ After a reconsideration decision, a party has fourteen days to appeal on a point of law to the High Court of First Instance.⁴¹ Factual determinations are not reviewable.⁴²

b. OAT Determinations

By contrast, the OAT makes a “determination” when a magistrate presiding over a trial or hearing of some type seeks to have an article, Internet posting, etc. placed into one of these three categories.⁴³ This is more judicial. The OAT must render a determination decision within twenty-one days after a public hearing.⁴⁴ That decision can be appealed within fourteen days to the High Court of First Instance.⁴⁵

The OAT has had some notable glitches in its “determinations,” such as its 1995 categorization of images of Michelangelo’s *David* as obscene.⁴⁶ The decision was reversed.⁴⁷ Indeed, diverse constituencies have long criticized the OAT.⁴⁸

c. OAT Penalties

OAT can fine publishers of obscene material up to \$1,000,000 Hong Kong dollars (HKD)⁴⁹ and have them imprisoned for three years.⁵⁰

³⁸ *Id.* at 252.

³⁹ *See id.* at 251–52.

⁴⁰ *Id.* at 252.

⁴¹ *Id.*

⁴² *See* Control of Obscene and Indecent Articles Ordinance, (1997) Cap. 390 (L.H.K.), § 30 (H.K.).

⁴³ *See* WEISENHAUS, *supra* note 16, at 252; *Obscene Articles Tribunal*, *supra* note 21.

⁴⁴ *Obscene Articles Tribunal*, *supra* note 21.

⁴⁵ *Id.*

⁴⁶ *See* Eastern Express Publisher Ltd v. Obscene Articles Tribunal Respondent, [1995] 2 H.K.L.R. 290, 290 ¶ 11 (H.C.) (H.K.).

⁴⁷ *Id.* at 297.

⁴⁸ *See* WEISENHAUS, *supra* note 16, at 258.

⁴⁹ This is about \$125,000 USD. A U.S. dollar is worth about 8 Hong Kong dollars (HKD) as of September 30, 2016. *Treasury Reporting Rates of Exchange as of September 30, 2016*, U.S. DEP’T OF TREASURY, <https://www.fiscal.treasury.gov/fsreports/rpt/treasRptRateExch/currEntRates.html> (Sept. 30, 2016) (7.7540 HKD to 1 USD). All figures throughout this Article are in Hong Kong dollars.

Publishers of indecent material can be fined \$400,000 HKD the first time, along with being imprisoned for a year.⁵¹ Publishers who commit a second indecency offense can be fined \$800,000 HKD and imprisoned for another year.⁵²

d. Defenses in the OAT Process

The COIAO contains several affirmative defenses. Section 28 specifies that there shall be no liability if a publication “was in the interests of science, literature, art or learning, or any other object of general concern.”⁵³ This is similar to the United States’ obscenity test. Moreover, there can be no liability if the publishing party had no reasonable chance to inspect an item, or “had reasonable grounds for believing that the article was not indecent” or obscene.⁵⁴

2. Internet Service Providers and the COIAO

Given the impending Chinese sovereignty in 1997, several local Internet service providers (ISP) established the Hong Kong Internet Service Provider’s Association (HKSPA) to reduce the likelihood of further government restrictions.⁵⁵ The HKSPA created an ISP Code of Practices Statement on the Regulation of Obscene and Indecent Material.⁵⁶ The Code was revised in 2016.⁵⁷ Section 5 states that members shall “take reasonable steps to prevent [their] users” from posting or transmitting “obscene” material on the Internet.⁵⁸ The Code further says that members should inform their users not to publish or make available “indecent” material to those under eighteen, and that members should advise local content providers that material likely to have indecent content should be published with a page stating: “WARNING: THIS ARTICLE CONTAINS MATERIAL WHICH MAY OFFEND AND MAY NOT BE DISTRIBUTED, CIRCULATED,

⁵⁰ WEISENHAUS, *supra* note 16, at 253.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Control of Obscene and Indecent Articles Ordinance, (1997) Cap. 390, § 28 (H.K.)

⁵⁴ *Id.* § 27A.

⁵⁵ DOREEN WEISENHAUS ET AL., HONG KONG MEDIA LAW: A GUIDE FOR JOURNALISTS AND MEDIA PROFESSIONALS 226 (1st ed. 2007).

⁵⁶ See *Practice Statement on Regulation of Obscene and Indecent Material*, H.K. INTERNET SERV. PROVIDERS ASS’N (Dec. 31, 2016), <http://www.hkispaspa.org.hk/code-of-practice.html>.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 5.

SOLD, HIRED, GIVEN, LENT, SHOWN, PLAYED OR PROJECTED TO A PERSON UNDER THE AGE OF 18 YEARS.”⁵⁹

The ISP shall be considered in compliance with the Code if upon discovering obscene or indecent material, the ISP immediately blocks public access to the website or database, informs the publisher that there may be a COIAO offense, and cancels any accounts of repeat offenders.⁶⁰ Opinion polls from around 2000–2001 seek a stronger government approach, not just ISP restrictions.⁶¹

Despite those polls, however, an important government Consulting Paper from 2000 questioned public concerns about cyberspace:

There is no dispute that children and young people should be protected from indiscriminate and exploitative harmful materials. However, the seriousness and extent to which they are being exposed to such content on the Internet have to be assessed and viewed in perspective. Unlike some other forms of publication, the chances of Internet users being involuntarily exposed to pornographic material are relatively low. A great majority of the information and materials transmitted over the Internet are benign.⁶²

The 2000 paper concluded that “there is no immediate need to enact separate legislation to regulate contents transmitted via the Internet.”⁶³ This mistakenly benign view of the Internet parallels early U.S. Supreme Court opinions.⁶⁴

COIAO is not alone in the regulatory landscape of digital media. There is also the Film Censorship Ordinance for cinema and television distribution; the Television Ordinance for regulating shows prior to broadcasting; the Telecommunication Ordinance, which enables the government to ban certain messages from electronic transmission; and the Broadcasting Authority

⁵⁹ *Id.* ¶ 8.

⁶⁰ *Id.* ¶ 9.

⁶¹ Rebecca Ong, *Child Pornography and the Internet in Hong Kong*, 32 RUTGERS COMPUTER & TECH. L.J. 81, 87–88 (2005) (referencing the Television and Entertainment Licensing Authority’s survey, “Public Opinion Survey on the Control of Obscene and Indecent Articles Ordinance”). See WEISENHAUS, *supra* note 16, at 249.

⁶² INFO. TECH AND BROAD. BUREAU, PROTECTION OF YOUTH FROM OBSCENE AND INDECENT MATERIALS: THE 2000 REVIEW OF THE CONTROL OF OBSCENE AND INDECENT ARTICLES TRIBUNAL 26 (2000).

⁶³ *Id.* at 27.

⁶⁴ Mark S. Kende, *The Supreme Court’s Approach to the First Amendment in Cyberspace: Free Speech as Technology’s Hand-Maiden*, 14 CONST. COMMENT. 465 (1997).

Ordinance.⁶⁵ In addition, three other enforcement entities implement COIAO and OAT. The Office of Film, Newspaper, and Article Administration (OFNAA, formerly TELA (Television and Entertainment Licensing Authority)) monitors magazines, newspapers, etc.⁶⁶ The Hong Kong police address obscene article sales at places like video and computer shops, though actual videos and DVDs are probably covered by the Film Censorship Ordinance, not COIAO.⁶⁷ The Film Ordinance has more categories and slightly different criteria to consider (such as horror or cruelty). Customs and Excise Department officials monitor entry points and look for copyright problems.⁶⁸ Hong Kong also adopted a law targeting child pornography in 2003.⁶⁹ That law prohibits virtual images of children, as well as depictions of actual children.⁷⁰

3. *The Hong Kong High Courts*

There is an appellate process regarding the OAT censorship role. Several courts can be involved: the High Court of First Instance (similar to an important trial court in the United States), the High Court of Appeals (OAT appeals can end up here), and the Court of Final Appeal. Perhaps surprisingly, the Court of Final Appeal has vindicated freedom of expression in several noteworthy cases. For example, it upheld the right of Falun Gong members to protest in Hong Kong, a decision unimaginable on the mainland.⁷¹ The PRC Standing Committee did not interfere with the ruling, though it disagreed with some of the Court of Final Appeal's earliest post-1997 cases.⁷²

⁶⁵ Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 *TRANSNAT'L LAW*. 383, 396 (1998).

⁶⁶ See WEISENHAUS, *supra* note 16, at 251. TELA stood for the Television and Entertainment Licensing Authority.

⁶⁷ *Id.* at 250.

⁶⁸ Rebecca Ong, *Policing Obscenity in Hong Kong*, 4 *J. INT'L COM. L. & TECH.* 154, 156 (2009).

⁶⁹ Ong, *supra* note 61, at 83–84.

⁷⁰ *Id.* at 89–90. The U.S. Supreme Court has ruled that virtual images of children engaged in non-obscene but sexually explicit contexts cannot be criminalized under the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *But see* *United States v. Williams*, 553 U.S. 285, 288–89, 307 (2008) (upholding provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, codified at 25 U.S.C. § 2252A(a)(3)(B)) (pandering of “virtually” altered children engaged in sexual acts can be made criminal).

⁷¹ *Yeung May Wan & Others v. HKSAR*, [2005] 8 H.K.C.F.A.R. 137 (C.F.A.).

⁷² The Standing Committee vigorously objected to the Hong Kong Court's decision in *Ng Ka Ling and Others v. Dir. of Immigration*, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.) because the Hong Kong decision suggested the Basic Law could be directed at mainland rules.

The Court of Final Appeal, however, upheld a law against flag desecration, but still showed appreciation for the right to free speech under the Basic Law.⁷³ The Court emphasized that other means of protest existed. Moreover, numerous nations have upheld laws against flag desecration.⁷⁴ The U.S. Supreme Court, however, has twice struck down laws against such desecration.⁷⁵

The Court of Final Appeal's fundamental rights jurisprudence seems to follow European, not American, methodology as the ICCPR referenced earlier shows. Typically in Europe, once an infringement is found, a court examines whether the restriction meets a legality test (perhaps based on European Court of Human Rights precedents) and a necessity test that amounts to proportionality analysis—a form of balancing.⁷⁶ The Court of Final Appeals has also used a “margin of appreciation” approach when deferring to the legislature.⁷⁷

Perhaps the most important Court of Final Appeal indecency case was the 1998 decision in *Oriental Daily Publisher Ltd. v. TELA*.⁷⁸ The Court there addressed an OAT determination of indecency regarding numerous photos, in two of the publisher's newspaper issues, that showed naked women with their nipples only covered by opaque squares.⁷⁹ The OAT determination tribunal, however, said little more to justify its decision than repeating some OAT general criteria.⁸⁰

The High Court of Appeal, however, concluded that the OAT had “a duty to give reasons . . . when making both final classification . . . and determinations,” but had found that the photos in questions were

⁷³ HKSAR v. Ng Kung Siu & Another, [1999] 2 H.K.C.F.A.R. 442 (C.F.A.). Demonstrators put on display a defaced flag of the PRC and of Hong Kong.

⁷⁴ See ROBERT JUSTIN GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY, at xii–xiii (1996) (listing Austria, Denmark, Finland, France, Germany, Israel, Italy, New Zealand, and Switzerland as all supporting flag desecration laws unlike the struck-down U.S. law).

⁷⁵ United States v. Eichman, 496 U.S. 310, 318–19 (1990) (five-to-four decision); Texas v. Johnson, 491 U.S. 397 (1989). Paul Gewirtz stated that there are good arguments on both sides of this issue. Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200, 218 (2001).

⁷⁶ Johannes Chan, *Basic Law and Constitutional Review: The First Decade*, 37 HONG KONG L.J. 407, 422–24 (2007).

⁷⁷ *Id.* at 424–25.

⁷⁸ *Oriental Daily Publisher Ltd. v. Comm'r for Television and Entm't Licensing Auth.*, [1998] 1 H.K.C.F.A.R. 279 (C.F.A.) (H.K.).

⁷⁹ See *id.* paras. 13–19; see also WEISENHAUS, *supra* note 16, at 260.

⁸⁰ See *Oriental Daily Publisher Ltd.*, *supra* note 78, ¶ 26; WEISENHAUS, *supra* note 16, at 260.

“overwhelming[ly]” indecent and “spoke for themselves,” thus making the OAT’s minimal reasons “adequate.”⁸¹

The Court of Final Appeal affirmed the High Court of Appeal’s finding of “a duty to give reasons,” and found that the reasons given by the OAT were “inadequate to discharge [its] duty”⁸² to ensure “intellectual discipline,” proof of good faith, an increase in consistency, and greater public trust.⁸³ Conclusory statements will not suffice. Moreover, the reasoning does not have to be lengthy. Chief Justice Li concluded this important discussion by stating:

We are here concerned with photographs of females with the upper parts of their bodies naked with the nipples obscured by applied photographic technique. Contrary to the views expressed in the courts below, I do not consider that the articles in question are obviously indecent and virtually speak for themselves. In the circumstances of this case, it was [i]ncumbent upon the Tribunal to explain why they are considered indecent. I venture to suggest that if these photographs are considered indecent, the Tribunal would be coming close to holding that photographs of semi-naked females are *per se* indecent according to community standards. If that is the Tribunal’s reason, it should so explain.⁸⁴

4. More Controversies Surrounding Hong Kong’s OAT

Despite these constructive Court of Final Appeal rulings, numerous controversies have occurred at the OAT level. In October 2002, a magazine published the photo of an almost-naked woman celebrity who had been kidnapped.⁸⁵ Normally, a semi-naked woman who is not engaged in sexual activity might be indecent. The Court of Final Appeal, however, upheld an obscenity finding in the *Three Weekly* case.⁸⁶

The OAT found the material was obscene because “the dominant effect of the article shows violence and crime,” as well as “coercion and abuse.”⁸⁷ Thus, the OAT concluded and the High Court of Appeal agreed, readers

⁸¹ See *Oriental Daily Publisher Ltd.*, *supra* note 78, ¶¶ 28–29.

⁸² *Id.* ¶¶ 31, 51–52.

⁸³ *Id.* ¶ 7.

⁸⁴ *Id.* ¶ 53.

⁸⁵ WEISENHAUS, *supra* note 16, at 256.

⁸⁶ See *Three Weekly Ltd. v. Obscene Articles Tribunal and Comm’r for Television and Entm’t Licensing Auth.*, [2007] 3 H.K.L.R.D. 673 (C.A.) (H.K.).

⁸⁷ *Id.* ¶ 50.

would feel “depraved and repelled.”⁸⁸ This emphasis on how sexual portrayals can repel is interesting compared to the alternative view that they can arouse, and perhaps reflects Hong Kong’s more conservative culture.⁸⁹

The High Court of Appeal, followed the reasons stated in the OAT determination, and also accounted for human dignity concerns: “[T]he fact that the woman who was the subject matter of the relevant article and photograph, had her privacy exposed in what was said to be a very distressing and humiliating way, was quite different to a situation, where, say, she was merely posing or acting.”⁹⁰ The article “displayed not merely a woman in a state of undress but in a state of undress whilst being abused and, further than that, it shows in its effect a woman being photographed against her will whilst in a state of undress and abuse.”⁹¹ Imagery created under such circumstances is now called “revenge porn” in the United States (and other countries), and whether it can be regulated is complicated.⁹²

In 2007, the OAT fined a man for posting an Internet hyperlink that was deemed obscene.⁹³ It linked to pornography.⁹⁴ The man was only fined HK\$5,000 because he pled guilty, was contrite, and did not seek any commercial benefit.⁹⁵ The Hong Kong Internet Society chairman, however, said the prosecution was troubling because many websites link to porn.⁹⁶ He elaborated that, “[t]his man posted a link on the [i]nternet, which now becomes an act that constitutes the breaking of law, and my question is whether a link is regarded as the ‘obscene article.’”⁹⁷

In 2007, the High Court of First Instance in *Ming Pao Newspapers Ltd. v. OAT*⁹⁸ struck down an OAT indecency classification involving sex oriented

⁸⁸ *Id.* ¶ 51.

⁸⁹ See Ong, *supra* note 61, at 88 (“In a conservative society such as Hong Kong, issues concerning sex such as pre-marital sex, incest, sexual abuse, marital rape, and pornography are subjects that are not openly and freely discussed.”).

⁹⁰ *Three Weekly Ltd. v. Obscene Articles Tribunal and Comm’r for Television and Entm’t Licensing Auth.*, [2007] 3 H.K.L.R.D. 673 ¶¶ 56, 58 (C.A.) (H.K.).

⁹¹ *Id.* ¶ 60.

⁹² See Mary Anne Franks, *Drafting An Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER CIVIL RIGHTS INITIATIVE 3–4 (Sept. 22, 2016), <https://www.cybercivilrights.org/guide-to-legislation/>.

⁹³ Chandra Wong & Yvonne Tsui, *Hyperlinking in Hong Kong*, EASTSOUTHWESTNORTH (May 11, 2007), http://www.zonaeuropa.com/20070512_1.htm (originally printed in the *South China Morning Post*).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Ming Pao Newspapers Ltd. v. Obscene Articles Tribunal*, [2008] H.K.E.C. 1750 (C.F.I.), http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=62977&QS=%2B&TP=JU.

university student newspaper columns. The court said the OAT mistakenly treated the columns as one publication, yet Tribunal rules required articles be examined separately, and independently categorized.⁹⁹ The court actually said that the OAT did not have to give reasons at that stage for its decisions and that the OAT was overworked.¹⁰⁰ But the court pronounced that, “[t]here is no room for arbitrariness or slackness” in protecting the public interest, especially juveniles.¹⁰¹

The High Court of First Instance elaborated that its role was to assess the “dominant” effect of the article and also to look at whether the article had an “honest purpose.”¹⁰² The court, however, added that

even though the dominant effect of the article is not indecent and it does serve an honest purpose, there can still be cases where the Tribunal comes to a conclusion that by reason of the indecent part as identified that article is not suitable to be published to a juvenile. But such cases should by their nature be rare and exceptional.¹⁰³

Interestingly, some displeased students deluged the OAT with complaints regarding allegedly indecent or obscene Old Testament Bible passages.¹⁰⁴

Perhaps the most famous controversy involved the 2008 release of Edison Chen’s sex photographs on the Internet.¹⁰⁵ Singer/actor Chen apparently photographed himself having sex with some prominent Hong Kong actresses and singers (who had teenage fan bases).¹⁰⁶ Ironically, a man who was supposed to fix Chen’s computer may have posted the photographs online, without authorization.¹⁰⁷ OAT apparently at one point classified as obscene those videos that showed Chen and a woman having sex with genitals exposed, while sex that did not show genitals was only indecent.¹⁰⁸

⁹⁹ See WEISENHAUS, *supra* note 16, at 259.

¹⁰⁰ See *Ming Pao Newspapers Ltd.*, *supra* note 98, ¶ 104.

¹⁰¹ *Id.*

¹⁰² *Id.* ¶ 30.

¹⁰³ *Id.* ¶ 80.

¹⁰⁴ See Ong, *supra* note 61, at 158.

¹⁰⁵ See WEISENHAUS, *supra* note 16, at 257–58.

¹⁰⁶ *Id.*

¹⁰⁷ *The Life and Sex Scandal of Chinese Star and Streetwear Icon Edison Chen – Part 3*, VICE (Dec. 22, 2015), https://www.vice.com/en_us/article/dp5qbk/the-life-and-sex-scandal-of-chinese-star-and-streetwear-icon-edison-chen-part-3.

¹⁰⁸ See *Prosecution of Clerk to Go Ahead After Sex Photos Ruled Obscene*, SOUTH CHINA MORNING POST (Apr. 24, 2008), <http://www.scmp.com/article/634916/prosecution-clerk-go-a-head-after-sex-photos-ruled-obscene>. One poll surveying the most outstanding personality of 2008 placed Edison Chen only behind Barack Obama. Rebekah Pothaar, *Edison Chen*

From 2010 to 2015, surprisingly few OAT controversies were mentioned in English language newspapers and general public websites. The OAT kept meeting, however, but this was a suspiciously long silence. One wonders if the government played a censorship role to prevent possible embarrassments. In 2016, the OAT ruled against the propriety of a two-book series by Johnny Li on the subject of the “deep web” that contained sex and violence.¹⁰⁹ Li was a criminology major at City University.¹¹⁰ The OAT determined that the books must be wrapped with a notice that warned against selling the books to those under eight-teen years old.¹¹¹ Also in 2016, there was a controversy about nudity in Hong Kong with several individuals being arrested since it is against the law.¹¹²

5. Hong Kong-Initiated Review of the OAT

In October 2008, the Hong Kong government issued a consultation paper titled “Review of the Control of Obscene and Indecent Articles Ordinance.”¹¹³ This paper discussed numerous issues and posed questions for the public, which were in turn answered.¹¹⁴ Almost 19,000 responded, many supporting additional censorship. TELA also did a survey with similar results.¹¹⁵

Nominated for “Person of the Year 2008” Alongside Barack Obama, Sarah Palin, Wen Jiabao and the Dalai Lama in Hong Kong, SHANGHAI LIST, Jan. 5, 2009, http://shanghaiist.com/2009/01/05/edison_chen_nominated_for_person_of_1.php.

¹⁰⁹ Shirley Zhao, *Popular Hong Kong Book Series Deep Web Rated “Indecent” by Obscenity Body*, SOUTH CHINA MORNING POST (May 18, 2016), <http://www.scmp.com/news/hong-kong/education-community/article/1946744/popular-hong-kong-book-series-deep-web-rated>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Elaine Yau & Catherine Xu, *Bare With Us: Hong Kong’s Nudists Struggle for Acceptance*, SOUTH CHINA MORNING POST (Aug. 2, 2016), <http://www.scmp.com/lifestyle/article/1997631/bare-us-hong-kongs-nudists-struggle-acceptance>.

¹¹³ Commerce and Economic Development Bureau, *Healthy Information for a Healthy Mind*, HONG KONG SPECIAL ADMIN. REGION GOV’T (2008), http://www.coiao.gov.hk/pdf/cio_ao_review_full_eng.pdf [hereinafter *Healthy Information for a Healthy Mind*]; Commerce and Economic Development Bureau, *Healthy Information for a Healthy Mind: Report of the First Round of Public Consultation on the Review of the Control of Obscene and Indecent Articles Ordinance*, HONG KONG SPECIAL ADMIN. REGION GOV’T (2009), http://www.coiao.gov.hk/pdf/AWTC_Report_Eng.pdf.

¹¹⁴ *Healthy Information for a Healthy Mind*, *supra* note 113.

¹¹⁵ PUBLIC OPINION PROGRAMME – THE UNIVERSITY OF HONG HONG & TELEVISION AND ENTERTAINMENT LICENSING AUTHORITY (TELA), PUBLIC OPINION SURVEY FOR THE REVIEW OF THE OBSCENE AND INDECENT ARTICLES ORDINANCE 3.10 (compiled by Robert Chung et al.), (2009), http://www.coiao.gov.hk/pdf/TELA_COIAO_review_rpt_eng_final_POP.pdf (“With

For example, the government paper asked whether the “co-regulatory approach” with the industry should continue.¹¹⁶ The paper also asked, “Is it practical to impose additional statutory requirements on local ISPs regarding the dissemination of information on the Internet?”¹¹⁷ The paper, however, repeatedly acknowledged the problem of the Internet’s extraterritoriality.¹¹⁸ The 2008 consultation paper viewed the Internet with more concern than the 2000 consultation paper. The paper also asked whether there should be two distinct juvenile categories: one restricted to persons above fifteen years old and one restricted to persons above eighteen years old.¹¹⁹ The paper even asked whether the OAT should be abolished.¹²⁰

Several of the 19,000 responses merit discussion. The Hong Kong Judiciary submission criticized the OAT’s dual functions saying, “[t]he exercise of an administrative function by a judicial body may undermine the fundamental principle of judicial independence.”¹²¹ The judiciary further said that the classification function could be placed in an executive agency, an administrative tribunal, etc.¹²² The OAT then could remain in the judiciary.¹²³ The judiciary also recommended instituting a jury system rather than using adjudicators.¹²⁴

The Judiciary argued that the OAT had generally enforced the COIAO in a non-transparent, unaccountable, and inconsistent manner based on an outmoded administrative scheme, borrowed from other countries that have already reformed their approaches.¹²⁵ The University of Hong Kong Media Center asserted that Hong Kong should focus more on child pornography, where the harm is indisputable, and that many of the government’s concerns only had a subjective basis.¹²⁶

regard to the regulation of obscene and indecent articles on the Internet, three quarters of the respondents wished that the government regulation would be ‘stricter than now.’ ”).

¹¹⁶ *Healthy Information for a Healthy Mind*, *supra* note 113, at 41.

¹¹⁷ *Id.* at 43.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 30–31.

¹²⁰ *Id.* at 18–19.

¹²¹ Hong Kong Judiciary, *The Review of the Control of Obscene and Indecent Articles Ordinance (“COIAO”) (Cap. 390): The Judiciary’s Response*, 2 (2008), http://www.judiciary.gov.hk/en/publications/coia_judiciary_response.pdf.

¹²² *Id.* at 4.

¹²³ *Id.*

¹²⁴ *Id.* at 7.

¹²⁵ See WEISENHAUS, *supra* note 16, at 270–71.

¹²⁶ See Journalism and Media Studies Centre, *Submission on the Review of the Control of Obscene and Indecent Articles Ordinance 4–5*, UNIVERSITY OF HONG KONG (Jan. 31, 2009) (on file with author).

Not surprisingly, the Hong Kong Internet Service Provider's Association (HKISPA) and the Hong Kong Council of Social Service espoused self-regulation, but with a creative twist. HKISPA advocated that a representative parental assembly should put together a community blacklist and that filtering software vendors, ISPs, etc. implement the list.¹²⁷ The list could be modified and changed over time. Needy families could get free filters.

A gay and lesbian group, however, maintained that filtering blacklists have disproportionately banned gay and lesbian sites.¹²⁸ This problem might continue if a majoritarian parental assembly made more choices. Nonetheless, the HKISPA had proposed an interestingly democratic solution.

Hong Kong also entertained another set of hearings and written submissions regarding obscenity that resulted in an official Consultation Report in 2012.¹²⁹ One government official recommended doubling the penalties.¹³⁰

Finally in February 2015, the Hong Kong government announced its support for specific amendments to the current system purportedly based on the consultation report results. The Government's Chief Executive Officer (CEO) proposed adoption of the judiciary's recommendation "to abolish the administrative classification function of the OAT, leaving the OAT to deal only with judicial determination. The proposal is supported by stakeholders."¹³¹ Moreover, there had already been a dramatic decrease in administrative proceedings.¹³² The government also proposed increasing the maximum penalty, recommending the doubling suggestion mentioned earlier.¹³³ The CEO reasoned that this would still show the seriousness of the issues related to impermissible publications. In addition, the CEO

¹²⁷ Hong Kong Internet Service Provider Association, *Response to COIAO Public Consultation 5* (2009), <https://www.hkispaspa.org.hk/prelease/HKISPA-COIAO-Response.pdf>.

¹²⁸ Oiwan Lam, *LGBT Content Unreasonably Filtered Away in Hong Kong*, GLOBAL VOICES ADVOC (Jan. 23, 2009), <https://advoc.globalvoices.org/2009/01/23/lgbt-content-unreasonably-filtered-away-in-hong-kong/>.

¹²⁹ See *Report on the Second Round of Public Consultation and Public Views Collected*, COIAO, <http://www.coiao.gov.hk/en/report.htm> (last updated Jan. 7, 2013).

¹³⁰ See *Judge and Jury . . .*, OBSCENITY LAW IN HONG KONG (Apr. 17, 2012), http://censorwatch.co.uk/thread01010_obscenity_law_in_hong_kong.htm (mentioning proposal by Secretary Gregory So).

¹³¹ *Review of Control of Obscene and Indecent Article Ordinance*, GOV. OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (Feb. 13, 2015), http://www.info.gov.hk/gia/general/201502/13/P201502130835_print.htm.

¹³² *Review of the Control of Obscene and Indecent Articles Ordinance*, LEGISLATIVE COUNCIL 6 (2015), <http://www.cedb.gov.hk/ccib/eng/legco/pdf/09132015.pdf> (3,000 in 2002 to 300 in 2013).

¹³³ *Id.* at 1.

recommended that the OAT system be more representative and transparent.¹³⁴ Finally, the government advocated “increase[ing] the total number of adjudicators from about 500 to a maximum of 1500 on an incremental basis,” augmenting their training, holding more public education events, and “increase[ing] the minimum number of adjudicators at each OAT hearing from two to four . . . through amending the COIAO.”¹³⁵ No obscenity related reform legislation, however, has been enacted despite all of these actions and commands. In 2017, the government proposed increasing the payments to juries in criminal cases and adjudicators in obscenity cases.

The most stunning feature of the proposed “reforms,” however, is Hong Kong’s open abandonment of any criteria. The CEO Legislative Council Brief wrote as follows:

16. Under the COIAO, “obscenity” and “indecent” include “violence, depravity and repulsiveness.” In the second round public consultation, we consulted the public on whether we should maintain the current approach in the COIAO and not to stipulate detailed definitions of “obscenity” and “indecent” in law. There was no consensus on how the terms should be defined. Some suggested adopting much stricter definitions to tighten the control of obscene and indecent materials, while others considered that only very specific types of articles should be classified as obscene or indecent in order to protect freedom of expression. There were also a significant number of respondents supporting the status quo of not stipulating detailed definitions. They were of the opinion that “obscenity” and “indecent” were not matters of exact science capable of objective proof but concepts that changed over time and differed among individuals, making it difficult to come up with definitions that the society could agree upon.

17. Given that there is no public consensus on how “obscenity” and “indecent” should be defined, we do not consider it appropriate to stipulate detailed definitions in the legislation. We have studied the experience of overseas jurisdictions and have not been able to identify any overseas jurisdictions where precise definitions of “obscenity” and “indecent” are set out in legislation. We therefore recommend to maintain the current approach in COIAO.

¹³⁴ *Id.* at 8.

¹³⁵ *Id.* at 8, 11, 12.

18. For the reasons set out in paragraphs 16 and 17 above and having regard to the Judiciary's position that a set of administrative guidelines or standards for the OAT should not be drawn up to avoid interfering with the fundamental principle of judicial independence, we do not find it desirable or practical to draw up administrative guidelines or code of practice on the definition of "obscenity" and "indecentcy."¹³⁶

So at best, obscenity and indecency under Hong Kong law have something to do with violence, depravity (which could be sexual), or repulsiveness (which seems to be about simple offense to community members of various types). This gives the authorities virtually unlimited discretion which it appears that they have increasingly used, including discretion regarding political speech. This lack of concrete criteria resembles a sad stage of the U.S. Supreme Court's struggle with obscenity, discussed later, where the Court watched allegedly obscene movies in its basement and members just voted up or down as to whether they thought the films contained obscenity.

6. *The Oath Controversy*

Perhaps the most significant speech related action taken since Hong Kong left British control was the PRC Standing Committee's recent decision to ban two elected, pro-self-determination, Hong Kong legislators from taking office because they deliberately did not recite the oath of office properly.¹³⁷ Instead of saying China, they referenced the insulting word "Shina"¹³⁸ which was how the Japanese invaders described the nation many years earlier.

The PRC Standing Committee saw this as deliberate and issued a 500-word directive on the requirement of sincerity and solemnity in pronouncing the oath.¹³⁹ China has since ousted four other legislators from their positions for similar reasons.¹⁴⁰

¹³⁶ *Id.* at 9–10.

¹³⁷ Alan Wong, *At Hong Kong Swearing-In, Some Lawmakers Pepper Their Oath with Jabs*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/world/asia/hong-kong-legislative-council.html>.

¹³⁸ *Id.*

¹³⁹ See Willa Wu & Luis Liu, *Legal Challenges Likely Over More Legco Members*, CHINA DAILY ASIA (Nov. 10, 2016), http://www.chinadailyasia.com/hknews/2016-11/10/content_15523716.html.

¹⁴⁰ Kevin Lui, *Four More Hong Kong Lawmakers Ousted in a Blow To Democratic Hopes*, TIME (July 14, 2017), <http://time.com/4856181/hong-kong-lawmakers-oath-china-disqualified/>.

Though several prominent Hong Kong scholars, such as Albert Chen, said the Hong Kong courts could resolve this,¹⁴¹ the PRC standing committee made clear its dominance over the Hong Kong courts. These oath abuses were not technically obscene but were viewed as immoral, and they also showed the close connection between obscenity, morality, and politics in Hong Kong and China. One article explains that “China uses law in concert with technical methods of censorship [e.g., obscenity criteria sometimes] to masterfully blunt the political power of its Internet.”¹⁴² Additional turbulence has occurred in Hong Kong as its former pro-Chinese leader decided to resign after this oath controversy. His replacement, Carrie Lam, is pro-mainland.¹⁴³

Returning back to the *Ming Pao* case, a former CNN Beijing Bureau Chef summarized the overall situation by quoting from activist artist Oiwan Lam, “[t]he recent storm aroused by the Chinese University of Hong Kong student newspaper’s erotic section is just the tip of the iceberg. Political censorship has been manipulating public opinion in seemingly apolitical sectors.”¹⁴⁴

III. U.S. SUPREME COURT DOCTRINE

The U.S. Constitution’s First Amendment states in pertinent part that, “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁴⁵ The U.S. Supreme Court had difficulty with obscenity criteria for many years. The Court used to watch allegedly obscene movies once a term in its Court basement, and the Justices would vote up or down on the classification.¹⁴⁶ There was no majority legal standard.

The Court’s 1973 adoption of the three-part obscenity test in *Miller v. California*¹⁴⁷ changed that. The test set forth in *Miller* is:

¹⁴¹ See Joseph Li, *Call to Defer Oath of Pro-Independence Duo Until Court Ruling*, CHINADAILY ASIA (Oct. 25, 2016), http://www.chinadailyasia.com/hknews/2016-10/25/content_15515786.html.

¹⁴² Bryan H. Druzin & Jessica Li, *Myth Meets Reality: Civil Disobedience in the Age of the Internet*, 55 VA J. INT’L L. DIG. 29, 32 (2015).

¹⁴³ Benjamin Haas, *Hong Kong Elections: Carrie Lam Voted Leader Among Allegations of China Meddling*, THE GUARDIAN (Mar. 26, 2017), <https://www.theguardian.com/world/2017/mar/26/hong-kong-chooses-new-leader-amid-accusations-of-china-meddling>.

¹⁴⁴ Rebecca MacKinnon, RCONVERSATION (Blog), July 13, 2007, <http://rconversation.blogs.com/rconversation/oiwan/> (quoting and supporting statement by Hong Kong media activist Oiwan Lam and educator, who was charged with illegally posting photos of women’s breasts, translated by Roland Soong).

¹⁴⁵ U.S. CONST. amend. I.

¹⁴⁶ BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 198 (1979).

¹⁴⁷ *Miller v. California*, 413 U.S. 15 (1973).

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴⁸

The Court rejected an earlier version of the third factor that required the work to be “utterly without redeeming social value.”¹⁴⁹ Pornographers humorously circumvented this by inserting minimal “educational” information amidst the sexual carnival.¹⁵⁰ That tactic does not work if one has to assess the material “taken as a whole” and ensure it has “serious . . . value.”¹⁵¹ A law must satisfy all three of the *Miller* criteria to be a valid restriction on allegedly obscene speech.¹⁵² Justice William Brennan, however, and other dissenters still found this test vague, especially given the questionable benefits to adults.¹⁵³ Like the Hong Kong OAT, community standards matter.

The Court subsequently announced varied constitutional approaches for sexually explicit material that depended on the medium. The Court provided the least protection to broadcast television and radio, because broadcast was supposedly an invasive medium, potentially exposing children, and had scarce frequencies.¹⁵⁴ This rationale has been partly overtaken by technology as television becomes more digital and/or Internet connected. The Court protected newspapers and magazines the most, because they were purportedly less dangerously intrusive, and because they allowed counter-speech more readily.¹⁵⁵ Ironically, the newspaper medium may be fading too. Cable television fell in the middle.¹⁵⁶ Eventually the Court ruled that the Internet deserved as much or more protection than the press.¹⁵⁷

¹⁴⁸ *Id.* at 24 (internal citations omitted).

¹⁴⁹ *Id.* at 24–25.

¹⁵⁰ Frequently, they would insert a scene, for example, with a physician saying something like “[a]nd so our nymphomaniac subject was never cured.” WOODWARD & ARMSTRONG, *supra* note 146, at 199.

¹⁵¹ *Miller*, 413 U.S. at 23.

¹⁵² *Id.* at 24.

¹⁵³ *See id.* at 47–48 (Brennan, J., dissenting).

¹⁵⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 727–28 (1978).

¹⁵⁵ *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

¹⁵⁶ *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994).

¹⁵⁷ *See generally Reno v. ACLU*, 521 U.S. 844 (1997).

The U.S. Supreme Court has also addressed the constitutional problems posed by Internet “indecent” speech. This speech is sexual in nature or focuses on excretory functions but does not rise to the level of obscenity. One of the Court’s most important decisions involved the Child Online Protection Act (COPA).¹⁵⁸ The Court affirmed the granting of a preliminary injunction because the law raised serious constitutional problems, and it remanded the case for more hearings.¹⁵⁹ On remand, the district judge finalized an injunction against the law and in favor of free speech.¹⁶⁰

COPA was modeled on the *Miller* obscenity test. COPA imposed criminal penalties and fines for the knowing posting of material for “commercial purposes” on the Internet that is “harmful to minors.”¹⁶¹ COPA defined harmful to minors as:

[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.¹⁶²

Commercial purveyors of sexually explicit Internet material for adults had two affirmative defenses.¹⁶³ Either they could establish an age verification mechanism, or take other reasonable measures designed to shield juveniles.¹⁶⁴

Despite COPA copying *Miller*’s criteria, Justice Kennedy found COPA was content discriminatory (the core question in most American speech

¹⁵⁸ *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).

¹⁵⁹ *Id.* at 661, 673.

¹⁶⁰ *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff’d*, 534 F.3d 181 (3d Cir. 2008).

¹⁶¹ *Ashcroft II*, 524 U.S. at 661.

¹⁶² *Id.* at 661–62.

¹⁶³ *Id.* at 662.

¹⁶⁴ *See id.*

cases) and deserved strict scrutiny.¹⁶⁵ A law is content discriminatory when it singles out a particular subject matter of speech for inferior treatment. Such laws must be narrowly tailored to promote compelling governmental interests to survive. Often, there must be no less restrictive alternatives. Kennedy explained that COPA would also illegally cause adults to be limited to viewing what was suitable for children on the Internet in certain cases.¹⁶⁶ Under strict scrutiny, Kennedy determined that filtering devices at homes were less restrictive alternatives.¹⁶⁷ Furthermore, these devices would block porn sites abroad.¹⁶⁸

Justice Breyer dissented, even though he also invoked strict scrutiny.¹⁶⁹ He said filters were not less restrictive because they were a private commercial market option available under any statutory scheme.¹⁷⁰ Moreover, a strict criminal law combined with filters was more likely to deter than filters alone.¹⁷¹ Filters are also over and under-inclusive.¹⁷² Breyer acknowledged that COPA would have some minimal chilling effect for adults, but reasoned the impact was outweighed by the benefits in protecting children.¹⁷³

IV. ASSESSMENT OF THE TREATMENT OF ALLEGEDLY OBSCENE SPEECH

A. *Hong Kong*

Hong Kong's approach has numerous problems even if some of the proposed recent recommendations are adopted. First, Hong Kong has no controlling legal standard. There are various criteria but their comparative weight is open. The boundary between obscene and indecent speech is unclear, as is the affirmative defense of reasonable belief (that there was nothing crude involved). For example, how does one define repulsive? The whole area is like a Rorschach test. And the penalties may become worse. A

¹⁶⁵ *Id.* at 666–70.

¹⁶⁶ *See id.* at 667.

¹⁶⁷ *Id.* at 657–58.

¹⁶⁸ *Id.* at 657.

¹⁶⁹ *Id.* at 683–85 (Breyer, J., dissenting).

¹⁷⁰ *Id.* at 685.

¹⁷¹ *Id.* at 689 (“To remove a major sanction, however, would make the statute less effective, virtually by definition.”).

¹⁷² *Id.* at 685–86.

¹⁷³ *Id.* at 689.

2000 thesis by a law student closely examined accessible OAT files and highlighted significant inconsistencies in OAT decisions.¹⁷⁴

Second, this vagueness opens the door to political and other improper personal considerations playing a role in OAT and ISPA approaches. Another article affirmed that:

The true genius of [China and Hong Kong's censorship] statute[s] is that [they are] fantastically vague. The precise ambit of permissible speech is left unclear so as to encourage self-censorship and maximize the range within which people voluntarily restrain their behavior online. This "deliberate vagueness produces a chronic sense of insecurity as users remain perpetually uncertain as to where the line of permissibility is drawn."¹⁷⁵

This, and the blog posts of the former CNN Bureau Chief about the activist artist Oiwan Lam, referenced earlier, reveal the connection between obscenity and seditious political speech e.g., the chilling of political protests that can occur through censorship.¹⁷⁶ Certainly, excessive sexuality in the "literature" is one subject that officers are looking for at book fairs. The fact that almost any public official can simply request OAT classifications, unlike the American model where prosecutors or grand juries put publications to the test, further opens OAT decisions to improper motivations.

Third, the adjudicators act in private during interim OAT classification proceedings and do not really give reasons. This lack of transparency compounds the concerns mentioned above. And the government has not specified how it plans for more OAT transparency.

Fourth, the adjudicators do not have to be lawyers or even trained professionals, and can be selected at the Chief Justice's whim. As Doreen Weisenhaus has pointed out, Hong Kong initially borrowed the administrative model from New Zealand and Australia, but those two countries have substantially updated their professionalism requirements.¹⁷⁷

Fifth, appellate review is limited solely to questions of law, no matter how obvious the factual error.

¹⁷⁴ Lai-wing Wong, *A Study on the Work of the Obscene Articles Tribunal of Hong from a Human Rights Perspective*, UNIV. OF H.K. 28–30, 45–48 (2001), <http://sunzi.lib.hku.hk/hkuto/record/B30111213>.

¹⁷⁵ Druzin & Li, *supra* note 142, at 32.

¹⁷⁶ *Id.* at 31 (explaining the success in China neutralizing the political power of the Internet).

¹⁷⁷ WEISENHAUS, *supra* note 16, at 271.

Sixth, some of the government proposals make things worse, not better. More severe penalties will chill additional protected speech. Though this was not apparently proposed, dividing the juvenile category would only increase ambiguity. While groups like the University of Hong Kong Media Center complain about ambiguous standards, it appears the public overall wants more censorship.

B. The U.S. Supreme Court

The U.S. Supreme Court's indecency cases are also problematic. It is strange to view these global Internet obscenity criteria under a local "community standard." This also means the prosecutor usually chooses their preferred forum. Regarding indecency on the Internet, neither Justice Kennedy nor Justice Breyer really use strict scrutiny. Kennedy's rigid focus on less restrictive alternatives is actually super-strict, and he is wrong in stating that filters are a statutory alternative as Breyer showed. But Breyer's tolerance of some chilling effect is intermediate scrutiny, not strict.

Moreover, the U.S. Supreme Court's varied approaches for different types of media is odd, especially given the dynamic convergence now occurring. Verizon owns AOL and Yahoo, while Google owns YouTube. Farhad Majoo has called Amazon, Facebook, Microsoft, and Apple the "frightening five." And newspapers are withering. While the American system seems to promote consistency better than Hong Kong, as well as broader free speech, the U.S. Supreme Court's decision still defers to Internet freedom, despite the technology posing some unique risks (e.g., it can be particularly graphic; it is interactive and invasive; and it provides anonymity to predators).¹⁷⁸

Ironically, Hong Kong has a superficial looking advantage in that it has a stronger democratic pedigree. The U.S. Supreme Court produced the *Miller* test and COPA copied it. Hong Kong's approach has involved public consultations. Lastly, the United States might have followed Hong Kong by viewing certain kinds of depictions of "violence" as obscene, as there is some evidence that violent sex is more harmful than merely crude sex.¹⁷⁹ But the U.S. Supreme Court rejected that theory in *Brown v. Entertainment Merchant's Association*.¹⁸⁰

¹⁷⁸ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1739, 1740–44 (2017) (Alito, J., concurring).

¹⁷⁹ See generally KEVIN SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996) (explaining that depictions and descriptions of violence may reach certain levels that should be considered as obscene materials making them unprotected and subject to regulation).

¹⁸⁰ *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786 (2011).

C. Hong Kong Solutions

Here are some tentative suggestions from one Hong Kong outsider. First, Hong Kong needs some definitions for obscenity and for indecency, to the extent possible. The U.S. Supreme Court criteria in *Miller* (obscenity) and *Ashcroft* (COPA indecency) could be used, though imperfect. If *Miller* was employed, Hong Kong might also want to use the American practice of relying on experts (perhaps from Hong Kong), not the community, to determine artistic, scientific or other value. Experts could appear in OAT proceedings.

Second, as suggested by the University of Hong Kong Media Center, OAT adjudicators should receive substantial additional training, as in other countries, and should be required to have a minimum education level. If this is not done, then perhaps the OAT needs to be abolished and legally trained magistrates or juries, supervised by magistrates, should be employed in judicial proceedings.

Moreover, none of the proposals address the extra-territorial porn problem and the solution of, say a Chinese firewall, might be worse than the problem. Installing juries would also result in logistical complications as well as retain subjectivity in evaluation. But they exist in criminal cases. No solution is perfect. It seems unlikely that Hong Kong will abolish the OAT completely or shift to a Canadian type “harms” based view of sexual expression that can be regulated. But if Hong Kong modifies its obscenity rules, the above recommendations would at least reduce the subjectivity and restore some public trust. However, since Hong Kong has had several public consultations and done nothing, despite a proposal from the Chief Executive,¹⁸¹ one wonders about the inaction.¹⁸² Moreover, the government’s recommendations do not seem very useful.

The harsh reality is that Hong Kong cannot cooperate with China on censorship, or permit horrific activities such as kidnapping booksellers and destroying book fairs, if it seeks to be regarded as maintaining basic civil liberties and rights.¹⁸³ Subversion of the rule of law will also further

¹⁸¹ Technically, it was an Order from the Chief Executive. Communications and Technology Branch, Commerce and Economic Development Bureau, Legislative Council File Ref: CTB/A 235-5/1 (C) Pt. 1, Review of the Control of Obscene and Indecent Articles Ordinance, *supra* note 132. But it has no impact unless adopted by the Hong Kong legislature.

¹⁸² E-mail from Irene Shieh, Law Librarian, University of Hong Kong to David Hanson, Reference Librarian, Drake Law School (Mar. 27, 2017) (confirming no legislative action) (on file with author).

¹⁸³ Mike Ives, *As Hong Kong Ponders Its Future Under Beijing, Politics Infuses Its Art*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/world/asia/hong-kong-art->

endanger the financial success of Hong Kong and China, as well as the rights of their citizens.