

Washington University Global Studies Law Review

Volume 2 | Issue 2

January 2003

Obscenity Laws in a Paternalistic Country: The Korean Experience

Jaewan Moon
Dankook University

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies



Part of the [Comparative and Foreign Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Jaewan Moon, *Obscenity Laws in a Paternalistic Country: The Korean Experience*, 2 WASH. U. GLOBAL STUD. L. REV. 353 (2003),
https://openscholarship.wustl.edu/law_globalstudies/vol2/iss2/3

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

OBSCENITY LAWS IN A PATERNALISTIC COUNTRY: THE KOREAN EXPERIENCE

JAEWAN MOON*

Table of Contents

I. INTRODUCTION.....	354
A. <i>Legal Framework Regarding Sexual Expression</i>	355
B. <i>The Constitution and Freedom of Speech</i>	357
C. <i>Criminal Punishment</i>	358
D. <i>Administrative Regulations</i>	359
E. <i>Special Legislation for Minors</i>	360
II. THE DEVELOPMENT OF CASE LAW	362
A. <i>Korean Supreme Court Cases</i>	362
1. <i>The Nude Maja Case</i>	363
2. <i>The Revolting Slaves Case</i>	364
3. <i>The Married Life Case</i>	364
4. <i>The Happy Sara Case</i>	365
5. <i>The Santa Fe Case</i>	367
6. <i>The Lie to Me Case</i>	368
7. <i>Conclusion</i>	369
B. <i>Comparison of Case Law in Korea and the United States</i>	369
1. <i>Defining Obscenity</i>	369
2. <i>Who Decides?</i>	373
3. <i>Protecting Minors</i>	374
III. RATIONALES FOR SUPPRESSING SEXUALLY EXPLICIT EXPRESSION.....	376
A. <i>Public Morality and Freedom of Expression</i>	376
B. <i>The Battle over Freedom of Speech</i>	378
C. <i>Paternalism in Korea and the United States</i>	380
IV. REGULATION OF SEXUAL EXPRESSION IN THE INTERNET AGE	383
A. <i>Regulating Online Pornography</i>	383
1. <i>Censorship by Committee</i>	384
2. <i>ISP Self-Regulation</i>	385
3. <i>Prosecution</i>	386
4. <i>The Government's Internet Content Rating System</i>	387
V. CONCLUSION	389

* Professor of Law, Dankook University in Seoul, Korea; LL.B., Seoul National University College of Law (1985); S.J.D., LL.M., Indiana University School of Law (Bloomington) (2002). I would like to thank Professor Fred H. Cate, Daniel O. Conkle, and Joseph L. Hoffmann for their encouragement and enlightening comments during my study at Indiana University.

I. INTRODUCTION

Obscenity laws in Korea are coming under increased scrutiny as the Korean people develop inconsistent attitudes towards sexual expression in the age of the Internet. Even mild sexual expression is not officially accepted. Ostensibly, Korea is a traditional society heavily influenced by Confucianism. Sex is a private matter, only marital sex is permitted, and even benign forms of sexual expression are not officially accepted. Korea is one of the few Asian countries that has criminalized adultery.¹ Korean courts contribute significantly to the preservation of conservative norms. Based on its obscenity laws, Koreans are living in a society comparable to that of the United States fifty years ago. The *Hicklin* test,² which defines obscenity as the tendency to deprave and corrupt susceptible persons, remains a part of obscenity jurisprudence in Korea.

In cyberspace, sexually explicit materials are easily accessible. For example, in February 1999, Hyun Kyung Oh, Miss Korea 1988 and a famous actress, sought shelter in the United States after a private videotape of Ms. Oh and her boyfriend appeared on the Internet. Ms. Oh claimed that they recorded the videotape as an expression of their love. The public reaction to the videotape and its dissemination on the Internet was so severe that she could not stay in Korea. Most Koreans, especially the older generation, were shocked that Ms. Oh would voluntarily make a videotape and condemned her boldness. Ms. Oh had no choice but to apologize,³ and end her career as an actress.

Ironically, after the private videotape circulated on the Internet, many of Koreans, including older males who lacked computer skills, rushed on to the Internet and downloaded the Ms. Oh's video clips. Koreans joked at the time that Ms. Oh, not the CEO of Samsung or the Korean Minister of Information and Communication, contributed to the rapid growth of Internet Korea.⁴ Two years later, another private videotape of a pop singer Ji Young Baek,

1. Under Article 241 of the Korean Criminal Code, a married person guilty of adultery is subject to imprisonment for up to two years. The Constitutional Court of Korea upheld the constitutionality of this provision. Dissenting justices argued that other countries had already repealed such statutes. *See* Constitutional Court Judgment of Sept. 10, 1990, 89 HunMa 82, 2 KCCR 306 (S. Korea).

2. *See infra* text and accompanying notes 88-90.

3. Myung Keon Lee, *Talent Ohyunkyung*, "Oyang Video Mulee Ileekyu Zoisong" [*Miss Oh Said "Sorry for the Disturbance"*], DONGA ILBO, May 8, 1999, at 26.

4. Sang Yeon Kim, *Oyangeun Internetee Choidae Pihaeja* [*Miss Oh, the Victim of the Internet*], SEOUL KYUNGGE, Dec. 3, 1999, at 1. Even people unfamiliar with computers quickly learned how to access the Internet and view Ms. Oh's videotape. *Id.*

appeared on the Internet.⁵ It was reportedly downloaded at a rate of 200,000 copies a day.⁶

A recent survey of sexual attitudes shows that Korea is not as conservative as it appears. *Time* magazine reported that Koreans are more likely to enjoy pornography than Asians who live in Hong Kong, Korea, Thailand, Philippines, or Singapore.⁷ Moreover, one of every two Korean men interviewed admitted to having watched pornography in the past three months, while approximately one of every three Korean women watched pornography over the same period.⁸

This Article examines the development of obscenity laws, the rationale behind governmental regulation of sexual expression in the light of freedom of speech, and the cultural context for these regulations in Korea compared to those of the United States. Finally, this Article addresses the impact that the Internet will have on sexual expression. The Internet has exposed the internal conflict Koreans have regarding pornography. The fact that Koreans are among the heaviest users of Internet⁹ could circumstantially be connected to the results of the *Time* survey.

A. Legal Framework Regarding Sexual Expression

Because Korea is a civil law country, statutes prevail over other normative sources. Statutory provisions regarding sexual expression must be examined before judicial decisions.¹⁰ The outstanding characteristics shown in Korean statutes with regard to sexual expression can be summarized as follows.

Preservation of public morality or social order is a common justification for regulations on sexual expression in Korea. Such rationales are based on

5. Doug Struck, *S. Koreans Clash on Internet Sex Video*, WASH. POST, Dec. 25, 2000, at A35.

6. *Id.*

7. Stephen Short, *Sex in Asia: Dirty Movies*, TIME (ASIA ED.), Mar. 19, 2001, available at <http://cgi.pathfinder.com/cgi-bin/time/asia/gdml3/osform/generic>.

8. Fifty-one percent of Korean males admitted to viewing pornography within a three month period in 2001, compared to 48% of Philipino men, 40% of Thai men, 31% of Hong Kong men, and 20% of men in Singapore. *Id.* Thirty percent of Korean women admitted viewing pornography in the same period, compared to 24% of Philipino women, 20% of Thai women, 11% of Singapore women, and 10% of women in Hong Kong. *Id.*

9. According to Neilson/Netratings, in January 2001, Koreans spent an average of sixteen hours and seventeen minutes, the most in the world. See Hyung Jin Kim, *Koreans Become World's Heaviest Users of Internet Sites*, KOREA HERALD, Mar. 12, 2001, available at 2001 WL 8116599. Canadians (10 hours 48 minutes) and Americans (9 hours and 46 minutes) placed second and third. *Id.* In Korea, as of November 2002, over 10,000,000 people subscribed to high-speed Internet services. *Id.*

10. Article 1 of the Civil Act set up the sources of law in the following order: the law, the local legal customs, and failing these two, the general principles of law. However, the Supreme Court cases have de facto binding force upon lower courts.

the Constitution, which allows restrictions on free speech in order to maintain public morality and social order. Legislative invocation of a concern for public morals is usually a politically popular justification for government regulation. However, lawmakers are unable to define sexual morality or public morality. Because of this uncertainty, the state possesses discretion in determining public morality. Nonetheless, such conjecture has not deterred the Korean government to rigorously regulate sexually explicit expression via the following states: the Criminal Act; the Juvenile Protection Act; the Promotion of the Movie Pictures Industry Act; the Sound Records, Video Products, and Game Software Act; the Broadcasting Act, the Registration of Periodicals Act; the Telecommunications Business Act; Act on Promotion of Information and Communication Network Utilization and Information Protection; the Outdoor Advertisements, Control Act; the Customs Act; and the Import and Distribution of Foreign Publications Act. Almost all these acts contain penal provisions that authorize imprisonment and imposition of fines against violators.

De facto censorship of the media through administrative regulations and quasi-governmental committees is an effective source of enforcement. The Korean government has tried to control what its citizens read, hear, or view. This kind of censorship clearly violates the Korean Constitution, which unambiguously declares that censorship is impermissible.¹¹ To avoid a constitutional crisis, the government has established quasi-governmental committees consisting of civil professionals. Many of these committees, including the former Public Performance Ethics Committee, the Juvenile Protection Committee, and the Film Grade Commission, have acted as governmental proxies that screen potentially harmful materials before they are released to the public. However, it is unknown whether committee actions are susceptible to constitutional challenges. The Constitutional Court recently held that a committee's conduct constitutes state action.¹² Since 1996, many pre-screening provisions of various acts have been declared unconstitutional.

Finally, freedom of expression for Koreans under eighteen has been stifled with regards to sexually related expression. The Juvenile Protection Committee possesses the authority to screen potentially harmful materials and prevent them from falling into the hands of minors. This paternalistic view has led to the banning of sexual materials for juvenile consumption. Juveniles in Korea cannot legally obtain materials even for sex education

11. KOREA CONST. art. 21(2), *translated in* 1 STATUTES OF THE REPUBLIC OF KOREA 5 (1997) [hereinafter ROK STATUTES].

12. Constitutional Court Judgment of Aug. 30, 2001, 2000 HunGa 9.

purposes. Furthermore, adult rights to sexual expression and the consumption of sexual material are frequently curtailed in the name of protecting juveniles.

B. The Constitution and Freedom of Speech

The Korean Constitution gives the government flexibility to regulate speech and does not protect freedom of speech as broadly as the First Amendment in the United States.¹³ The Korean Constitution guarantees freedom of speech,¹⁴ but also contains broad and clear restrictions on speech. For example, Article 21(4) states that “[n]either speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.”¹⁵ In addition, the Constitution has a general restriction clause, which permits the curtailment of fundamental freedoms. Article 37(2) states that “[t]he freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare.”¹⁶ Accordingly, any statute restricting sexual expression has at least two constitutional bases: preserving public morals or maintaining social order. The phrase “undermine public morals or social ethics” in Article 21(4) provides particularly solid constitutional ground for the regulation of sexual expression.¹⁷

Scholars are divided regarding the bases for restricting speech. Most scholars support the notion that freedom of speech has intrinsic limitations, but it should not be abused.¹⁸ Freedom of speech should be restricted in isolated instances, even if there was no explicit limitation clause in the Korean Constitution. The Constitutional Court of Korea agreed, stating that “there are some expressions, the harm of which cannot be cured in the marketplace of ideas, or which will bring about too severe harm for the government to stay outside.”¹⁹ Professor Huh argues that the framers of the current Constitution included the specific limitation clause of Article 21(4) to

13. U.S. CONST. amend. I.

14. KOREA CONST. art 21(1), 1 ROK STATUTES 5.

15. *Id.*

16. KOREA CONST. art. 37(2), 1 ROK STATUTES 9.

17. Producing Most Korean constitutional law textbooks include “production” or “sales of obscene material” as conduct that undermines public morals or social ethics. See CHEOL SU KIM, HEONBEOBHAK GAERON [CONSTITUTIONAL LAW] 632 (2001).

18. See, e.g., *id.* at 626; YOUNG SEONG KWON, HEONBEOBHAK WONRON [PRINCIPLES OF CONSTITUTIONAL LAW] 330 (2001); Yong Sang Park, *Pyohyunee Jayuwa Jehanee Gwanhan Ilbanieron* [General Theory of Freedom of Speech and Its Limitations], in 77 JAEPAN JAROE [TRIAL MATERIALS] 61 (Beobwon Doseokwan ed., 1997).

19. Constitutional Court Judgment of Apr. 30, 1998, 95 HunGa 16, 10-1 KCCR 327 (S. Korea).

emphasize the social responsibility of the media.²⁰ Arguably, it could be difficult for Korean courts to declare statutes that regulate sexually explicit materials unconstitutional.²¹

C. Criminal Punishment

In the interest of preserving public morals and ethical behavior, the Korean government frequently imposes criminal sanctions on individuals. The Korean legislature uses such authority to the full extent. Free speech advocates argue that maintaining public morals or proper behavior cannot justify criminal sanctions. Typically, only materials deemed obscene can be worthy of criminal prosecution. Once a certain expression is found to be obscene, it is automatically condemned as harmful to public morals.²²

Not surprisingly, whereas many statutes regulate obscene materials, no statute defines obscenity. Articles 243²³ and 244,²⁴ under Chapter 22 of the Criminal Act constitute the foundations for laws prohibiting obscene expression. These two articles attempt to safeguard the public from potentially harmful materials. The constitutionality of these articles has rarely been challenged.²⁵ Most Koreans, including scholars, have accepted the articles' legality without question.

However, Articles 243 and 244 of the Criminal Act do not apply to all digital forms of obscene material. In *Choi Sang Ho v. State*,²⁶ the Supreme Court of Korea held that Article 243 of the Criminal Act did not apply in cases when the accused transferred a computer file containing obscene pictures through various computer networks. Legislators responded to the decision by enacting a special article for this case that addressed

20. YOUNG HUH, HANKUK HEONBEOBRON [KOREAN CONSTITUTIONAL LAW] 535-36 (2001).

21. See, e.g., Chang Jeong Il v. State, 98 To 679, Daebeobwon [Supreme Court] (Oct. 27, 2000), 2000 Panrae kongbo [Official Gazette of Supreme Court Decisions] 120 (S. Korea); Ma Kwang Su v. State, 94 To 2413, Daebeobwon [Supreme Court] (June 16, 1995).

22. Jin Hwan Oh, *Eumran Ddoneun Jeosokhan Ganhaengmulee Gaenyum Mit Pandan Bangbub* [Standards of Obscene and Indecent Materials], in 23 DAEBEOBWON PANRAE HAESUL [INTERPRETATION OF SUPREME COURT CASES] 439, 444 (Beobwon Hangjeongcheo ed., 1995); Jeong Jin Oh, Pornography Yeungoo [A Study on Normative Discourses of Pornography] 12, 13 (2000) (unpublished Ph.D. dissertation, Seoul Nat'l University) (on file with the Seoul Nat'l University Library).

23. Criminal Act, Act No. 5057 (1995), art. 243, 4 ROK STATUTES 471.

24. *Id.* art. 244.

25. A complaint filed in the Constitutional Court of Korea claimed that Articles 243 and 244 were unconstitutional because the definition of obscenity in the Criminal Act was vague. See Constitutional Court Judgment of Nov. 27, 1997, 96 HunMa 103 (S. Korea). The Court dismissed the complaint because of the expiration of the statute of limitations. *Id.*

26. 98 To 3140, Daebeobwon [Supreme Court] (Feb. 24, 1999), 1999 Panrae kongbo 79 (S. Korea).

dissemination of obscene materials in digital format.²⁷

In another attempt to regulate the dissemination of obscene materials available on the Internet, the legislature passed the Telecommunications Business Act.²⁸ Under this Act, the Minister of Information and Communication could order Internet service providers (ISPs) to not carry content that could potentially hurt social order or public norms.²⁹ The Act further provided that ISPs who did not follow the Minister's order would face imprisonment for at least two years or a fine not exceeding twenty million won.³⁰ On June 27, 2002, the Constitutional Court found this Act unconstitutional as vague and overbroad.³¹

The Juvenile Protection Act³² (JPA) was enacted to "regulate the distribution of harmful media materials" to minors.³³ The JPA is another example of how often the Korean legislature resorts to criminal punishment for obscenity law violations. According to the penal provisions of the JPA, person who sells, rents, or distributes media materials harmful to minors "shall be punished by imprisonment for not more than three years or by a fine not exceeding twenty million won."³⁴ Also, a person who failed to place disclaimers on potentially harmful materials or "failed to pack" harmful materials in a designated way, would be punished for up to two years imprisonment or ten million won.³⁵ Furthermore, a person who defaced disclaimers or disturbed the product's packaging could face a fine up to five million won.³⁶

D. Administrative Regulations

Administrative sanctions, such as denial of delivery, revocation of registration, or withholding of a movie rating, are often effective alternatives to criminal sanctions when regulators try to block the spread of sexually explicit materials in Korea. For example, the Postal Service Act allows the

27. Framework Act on Telecommunications, Act No. 5219 (1996), art. 48-2, 16 ROK STATUTES 1008.

This provision was deleted in the Framework Act on Telecommunications and moved into the Act on Promotion of Information and Communication Network Utilization and Information Protection when the latter act was deleted on January 16, 2001. *Id.*

28. Act No. 5220 (1996), art. 53, 16 ROK STATUTES 107.

29. *Id.*

30. *Id.* art. 71; 16 ROK STATUTES 1080-81.

31. Constitutional Court Judgment of June 27, 2002, 99 HunMa 480, 14-1 KCCR 616 (S. Korea).

32. *See infra* Part II.A.4.

33. Act No. 5817 (1999), art. 1, 19 ROK STATUTES 1001.

34. *Id.* art. 17, 50, 19 ROK STATUTES 1013, 1029-1.

35. *Id.* art. 51, 19 ROK STATUTES 1013, 1029-2.

36. *Id.* art. 52, 19 ROK STATUTES 1013, 1029-2.

Minister of Information and Communication to deny delivery of obscene goods in order to prevent the disturbance of “sound social order.”³⁷

Administrative sanctions may constitute de facto censorship. For instance, the Promotion of Motion Pictures Industry Act contains a clause that permits an agency to withhold a rating for movies that “harm public morals or disrupt the social order by their excessive description of violence and lewdness.”³⁸ Movies without rating are not allowed to be screened at movie theaters.³⁹ In 2001, the Constitutional Court of Korea held that the ratings withholding system was unconstitutional on the ground that it is a form of prior restraint that is prohibited by the Korean Constitution.⁴⁰ As a result of this decision, administrative sanction clauses, which had once been unhesitatingly accepted, are now being challenged and repealed as the Korean people begin to assert their constitutional rights. Subsequent Constitutional Court decisions have followed the trend of holding administrative regulations that are de facto prior restraints unconstitutional. For example, Constitutional Court struck down regulations requiring clauses on pre-inspection of motion pictures, commercial recordings, and video products by the Public Performance Ethics Committee (later the Film Grading Commission).⁴¹

E. Special Legislation for Minors

Protecting minors from sexual expression is a great concern in Korea. The government has attempted to prevent minors from coming into contact with sexually explicit material. In 1997, after receiving criticism for confusion caused by inconsistent laws concerning minors and their access to sexually explicit materials,⁴² the legislature enacted the JPA.⁴³ The JPA preempted all similar statutes and imposed “criminal punishment in relation to the regulation of the environment harmful to juveniles.”⁴⁴ Furthermore, penalties under the JPA are generally harsher than those of other obscenity-related

37. Postal Service Act, Act No. 5384 (1997), art. 17(1), 16 ROK STATUTES 936.

38. Act No. 5929 (1999), art. 21(4), 7 ROK STATUTES 869.

39. *Id.* art. 21(2), 7 ROK STATUTES 869.

40. *Id.*

41. See Constitutional Court Judgment of Oct. 4, 1996, 93 HunGa 13, 8-2 KCCR 212 (S. Korea) (motion pictures); Constitutional Court Judgment of Oct. 31, 1996, 94 HunGa 6, 8-2 KCCR 395 (S. Korea) (commercial recordings); Constitutional Court Judgment of Dec. 24, 1998, 96 HunGa 23, 10-2 KCCR 807 (S. Korea) (video products).

42. Young Hwan Kim, *Cheongsonyun Yuhaemaechae Gwanri Gyujereul Wehan Beobjeok Jangchi Yeongu [A Study of the Legal System and its Regulation of Harmful Information to Minors]*, 8-1 KOREAN CRIMINOLOGY REV. 41, 47 (1997).

43. Act No. 5297 (1997), 19 ROK STATUTES 1001.

44. *Id.* art. 6, 19 ROK STATUTES 1007.

statutes.⁴⁵ The JPA regulates all kinds of “media materials [that are] harmful to juveniles,”⁴⁶ such as books, magazines, movies, broadcasting programs, commercial recordings, video products, electronic game cartridges, audio information, film information and written information through telecommunications, and signboards.⁴⁷

The JPA was enacted to examine depiction of sexual desire in various media outlets that could be considered abnormal or undesirable for juveniles. Sexual expression, according to the JPA, should be relentlessly suppressed if it could possibly “stimulate [the] sexual desire of juveniles.”⁴⁸ However, as one commentator pointed out, the JPA excessively infringes upon juveniles’ right of self-determination.⁴⁹ A related issue is the JPA’s unintended restrictions on adults. Sexually explicit materials that are legally accessible by adults, are frequently censored because of a concern that minors may gain access to them.

Legislators have been careless in distinguishing “indecent” from “obscenity.” Article 5-2 of the Registration of Publishing Companies and Printing Offices Act of 1997⁵⁰ authorized the Minister of Culture and Tourism to revoke the registration of publishing companies upon proof that publishers distributed obscene or indecent comics to children. In 1998, the Constitutional Court, however, ruled Article 5-2 unconstitutional, holding that “indecent is within the ambit of freedom of expression.”⁵¹

The Juvenile Protection Committee (JPC) determines harmful materials for juveniles.⁵² The JPC consists of at least twelve individuals, one of whom is a chairperson appointed by the President of Korea. Other members are “appointed or commissioned by the President upon the proposal of the Prime Minister after recommendation of the chairman.”⁵³ The power of the JPC is vast. It is entitled to “inspect” and “investigate” any matter related to the distribution of media materials deemed harmful to juveniles.⁵⁴ The JPC may order a citizen to remove the harmful materials or take other corrective

45. When someone is indicted on a charge of selling obscene material to adults, he may be imprisoned for up to one year according to the Criminal Act, but if sales of the same material to minors result in three years imprisonment. *Id.* art. 50, 19 ROK STATUTES 1029-1.

46. *Id.* art. 7, 19 ROK STATUTES 1007.

47. *Id.*

48. *Id.* art. 10(1), 19 ROK STATUTES 1010.

49. In Seob Han, *Geomyulgwa Jayuwa Chaekim [Censorship, Freedom, and Responsibility]*, CHEOLHAKGWA HYUNSI [Philosophy and Reality], Spring 1997, at 71.

50. Act No. 5454 (1997).

51. Constitutional Court Judgment of Apr. 30, 1998, 95 HunGa 16, 10-1 KCCR 327 (S. Korea).

52. *Id.* art. 8(1), 19 ROK STATUTES 1007.

53. *Id.* art. 29(1), (2), 19 ROK STATUTES 1020.

54. *Id.* art. 35(1), 19 ROK STATUTES 1023.

measures.⁵⁵ The JPC also has the authority to “rate . . . media materials [by considering] the degree of their harmfulness to juveniles, the age of juveniles utilizing them, their characteristics and hours, and places of their utilization into account.”⁵⁶

II. THE DEVELOPMENT OF CASE LAW

A. Korean Supreme Court Cases

The Korean Supreme Court has played a key role in defining and developing guidelines with regards to obscenity. In particular, the Constitutional Court of Korea officially determines the constitutionality of specific obscenity statutes.⁵⁷ Compared to the United States, Korean courts rarely address cases that involve sexual expression. Since 1970, approximately twenty obscenity cases have been decided by the Supreme Court.⁵⁸ Unfortunately, Supreme Court decisions have not clearly or persuasively provided a definition of what constitutes something that is obscene. The Supreme Court did not articulate a precise obscenity test until the mid-1990s. One possible explanation for the delay in establishing a test could be due to preexisting rigid enforcement by Korean authorities. Therefore, there has been little opportunity to raise the issue of obscenity in Korea, as the government had blocked production, distribution, or importation of sexually explicit material. In the early-1970s, liberal ideas that permeated through Western countries never reached Korea. In the United States, the 1970 Report of the Commission on Obscenity and Pornography suggested deregulation of the pornography industry.⁵⁹ In the Federal Republic of Germany, the 1974 reform acts regarding sex-related crimes established that most hardcore pornography would no longer be illegal.⁶⁰

55. *Id.* arts. 36 & 37, 19 ROK STATUTES 1023.

56. *Id.* art. 9, 19 ROK STATUTES 955.

57. The Constitutional Court, based on the European Model, was established in September 1988 to protect the fundamental rights and limit governmental power. The Constitutional Court can decide the constitutionality of a law upon the request of other courts, rule intragovernmental disputes, adjudicate petitions filed by individuals, preside over impeachments, and make judgments that could dissolve political parties. *See* KOREAN CONST. art. 111(1), 1 ROK STATUTES 25. Until recently, the Supreme Court decided obscenity cases. Even after creation of the Constitutional Court, obscenity cases are rarely heard.

58. A search for *Eumran* [Obscenity] on the Supreme Court search engine results in only seventeen cases related to obscenity. *See* http://www.scourt.go.kr/kg_p.html (last visited Nov. 4, 2002).

59. *See* U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

60. Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West*

However, in Korea, it was not until the late-1980s that people asserted their right to free speech on sexual matters. Eventually in the 1990s, the Korean Supreme Court heard more cases involving obscenity.

1. *The Nude Maja Case*⁶¹

In 1970, obscenity first became an issue for the Supreme Court of Korea in the *Nude Maja* case. In that case, the accused was indicted for distribution of a purportedly obscene picture, a copy of the *Nude Maja*, a painting by the Spanish artist Francisco de Goya. The defendant printed the image on matchbox advertising. The Supreme Court affirmed the obscenity conviction without offering a clear definition of what made the image obscene. The Court ruled that the painting was obscene on the grounds that it (a) stimulated and aroused viewers' sexual desire and (b) could damage the sexual morality of ordinary people and sound social customs.⁶² Korean courts have subsequently used this two-prong test in prosecuting and defining obscenity. Due to the inherent vagueness of the second prong, the first prong has emerged as the only substantive test for obscenity. Nonetheless, the first prong has also been criticized as being ambiguous. Sexual expression inevitably arouses sexual desire in people. The Supreme Court should have more clearly identified forms of sexual expression that is unacceptable. Furthermore, the Court should have provided a plausible reason as to why society would punish an individual who arouses another's sexual desire. The *Nude Maja* case was typical of the Supreme Court and was influenced by Confucianism, which abhors open discussion of sex.⁶³

The Court suggested some guidelines regarding obscene materials. First, the Court distinguished strictly commercial from artistic, literary, and educational purposes. However, the Court did not clearly establish a social value exception to obscenity laws. In contrast, in the United States, materials that have "redeeming social values" are not considered obscene. The Korean Supreme Court held even a renowned artistic masterpiece could still be obscene when used for commercial purposes.⁶⁴ Second, the Court ruled that the obscenity charge did not have an intent requirement.⁶⁵ As a result, the

Germany and the United States, 21 U. MICH. J.L. REFORM 201, 214-15 (1988).

61. *Shin Sang Cheol v. State*, 70 To 1879, Daebeobwon [Supreme Court] (Oct. 30, 1970), 1971 Hyung 1 (1971).

62. *Id.*

63. Hee Ki Shim, *Munyejakpumee Eumranseong Pandangijun [Obscenity Standards in Literature]*, 4-1/2 YOUNGNAM BUBHAK 261, 265 (1998).

64. *Shin Sang Cheol*, 4 Panrae wolbo 79.

65. *Id.*

Court affirmed the conviction despite lack of criminal intent to distribute obscene pictures.

2. *The Revolting Slaves Case*⁶⁶

This is the first case in which the Korean Supreme Court reversed the guilty verdict of a person indicted on obscenity charges. Novelist Jae Man Yum published *Revolting Slaves*, which contained a two page description of sexual intercourse. The Court ruled that the depiction was not so “explicit and specific” as to “excessively” arouse sexual desire or to “considerably” harm normal sexual morality.⁶⁷ Additionally, the Court observed that *Revolting Slaves*, considered in its entirety, was not obscene.

The *Revolting Slaves* case somewhat advanced the development of obscenity jurisprudence in Korea because the Court more clearly delineated the confines of what it considered to be obscene by using words like “explicit and specific,” “excessively,” and “considerably.” One commentator noted that this decision was more liberal than the *Nude Maja* opinion.⁶⁸ However, the Court, still influenced by Confucianism, maintained the notion that public expression of sexual desire was harmful to society. The Court affirmed the lower court’s ruling that the novel was not obscene, since it described a person who resisted carnal desires. Based on this case, the nature and overall intention of the material at issue is critical in determining whether material is obscene. Because *Revolting Slaves* merely described heterosexual intercourse the Court decided to be more lenient.

3. *The Married Life Case*⁶⁹

In the 1980s, Korean courts did not deliver significant obscenity decisions, not because the Supreme Court had resolved all the issues regarding obscenity, but because few people asserted their freedom of speech under Korea’s despotic regime. After successful installation of a democratic regime in 1987, Koreans began to express ideas more freely and turn to the judicial system and assert their rights.

In 1991, the Korean Supreme Court affirmed the obscenity test articulated in the *Revolting Slaves* case sixteen years earlier: if the depiction of sexual

66. Yum Jae Man v. State, 74 To 976, Daebeobwon [Supreme Court] (Dec. 9, 1975), 530 Beobwon kongbo [Official Gazette of Supreme Court Decisions] 8901 (Feb. 15, 1976) (S. Korea).

67. 530 Beobwon Kongbo 8902.

68. Shim, *supra* note 63, at 267.

69. Lee Geun Suk v. State, 91 To 1550, Daebeobwon [Supreme Court] (Sept. 10, 1991), 907 Beobwon kongbo 2562 (Nov. 1, 1991) (S. Korea).

elements is so explicit and specific as to arouse reader's prurient interest, it is obscene. Still, the *Married Life* case demonstrated the lingering conservatism of the Court. The accused was the publisher of the monthly magazines: *Married Life*, *Cheer*, and *Love Digest*. Each magazine regularly contained illustrated articles describing sexual techniques. Most pictures depicted sexual intercourse, but none showed genitals. According to the *Married Life* ruling, any picture that merely implied sexual intercourse cannot survive obscenity challenges. Once sexual intercourse is depicted in any way, the Court would find the material explicit and specific enough to arouse a reader's prurient interest. Furthermore, the Court did not accept defendant's argument espousing the educational purpose of the magazines. The Court ignored such arguments.

In the fifteen years between the *Revolting Slaves* and *Married Life* decisions, sexual behavior and the portrayal of sexuality changed dramatically. However, the Supreme Court refused to adopt and officially rejected the general trend toward greater tolerance in sexual matters prevalent in Korea's now more open society. Despite the media's tendency to publish ever more stimulating expressions of sexuality the Court stated that it would not permit any form of obscenity, because it harmed normal sexual morals and social customs.⁷⁰ This conservative attitude still prevails.

4. *The Happy Sara Case*⁷¹

The novel *Happy Sara* was published in 1992. The author, Kwang Su Ma, was a well-known professor of literature at a top ranked Korean university. Sara, the main character, represented the younger generation, for whom sex is not regarded as shameful or something worthy of suppression. The novel tells the story of Sara who enjoys sex with men and women. The book caused a controversy due to its frank description of sexual behavior that was heretofore unimaginable for the older generation. The author was arrested for violation of Articles 243 and 244 of the Criminal Act. The trial attracted the attention of the entire nation. This case was considered to be a litmus test of whether the judiciary could adapt to an open and free society. Not surprisingly, the courts maintained their traditional attitudes. Both the trial court and the appellate court held that *Happy Sara* was obscene and sentenced Professor Ma to eight months imprisonment, with probation for two years.

Professor Ma's Supreme Court appeal was founded on three arguments.

70. 907 Beobwon Kongbo 2563.

71. Ma Kwang Su v. State, 94 To 2413, Daebeobwon [Supreme Court] (June 16, 1995).

First, he declared the courts used the vague concept of “a sound common idea” in defining obscenity. The trial court stated that obscenity negatively affected desirable sexual habits and the sexual morality by arousing sexual interests and making ordinary adults shameful.⁷² Second, Professor Ma argued that *Happy Sara* was not obscene under judicial standards, because common ideas on sexual expression were becoming more progressive. Third, he claimed sexual desire could never be illegal because of its relationship with human reproduction.

The Supreme Court rejected Professor Ma’s arguments. The Court defined obscenity as “whatever damages sexual morality by arousing the sexual desire and shame of ordinary people.”⁷³ The Court further explained why *Happy Sara* fit its definition of obscene. In doing so, the Court finally articulated its most comprehensive standard of obscenity since the *Nude Maja* case. The Court presented six factors in deciding what constitutes obscenity:

- whether the extent and skill of describing sexual behavior was explicit and specific;
- the ratio of sexual descriptions to nonsexual matters;
- the relationship between the sexual description and the author’s overall theme for the work,
- the organization or plot of the book;
- the extent to which the literary, artistic, or philosophical value of the work mitigates sexual content; and
- the tendency of the work as a whole to arouse prurient interest.⁷⁴

Finally, the Court noted that “obscenity is to be decided, after considering all factors above, depending upon (a) whether it publicly stimulates sexual desire, (b) whether it hurts the sense of shame and disgust, and (c) whether it violates good sexual morality, each of which is measured by a current sound, common ideas.”⁷⁵ However, this three-prong test was only a refinement of the general test and would not supercede the broader test. The Court held that once a work aroused prurient interests, the three-prong test would be unnecessary. Therefore, the Supreme Court did not mention the three-prong test in applying the general obscenity test to *Happy Sara*. More specifically,

72. Byung Wun Kim, *Eumranhan Munseo Dohwae Gaenyumgwa Pandangijun* [Concepts and Standards of Obscene Books and Pictures], in 1 HYUNGSA JAEPANEE JEMUNJE [VARIOUS ISSUES IN A CRIMINAL TRIAL] 76, 78 (1997).

73. *Ma Kwang Su*, 99 Beobwon kongbo 2673.

74. *Id.* at 2674.

75. *Id.*

the Court objected to the following: (a) depiction of free and deviant sexual behavior present in most of the novel, (b) Sara's promiscuity, (c) depiction of non-traditional sexual behavior, and (d) the dearth of literary, artistic, or philosophical value in the novel.⁷⁶ The Court thus held that Professor Ma wrote *Happy Sara* only to arouse prurient interests.⁷⁷

The *Happy Sara* decision was a critical component in the development of Korean obscenity laws. First, it finally articulated standards as to what constituted obscenity. The Supreme Court's decision reflected increasing public frustration over the previously ambiguous and outdated standards. Unfortunately, the Korean Supreme Court still did not make a concerted effort to formulate standards of obscenity that would accommodate new trends. Rather, the Court simply imported complicated obscenity standards from Japan.⁷⁸ Second, the *Happy Sara* decision confirmed that the "arousal of prurient interest" factor would be the deciding factor in obscenity determinations. Third, the Supreme Court failed to consider the novel's literary merits. The Court stated that even a literary work could be regulated if it violated sound sexual habits and good sexual morality as under the Criminal Act.⁷⁹ In the Court's view, literary value could only be taken into account when it mitigated prurient interest.

5. *The Santa Fe Case*⁸⁰

In the *Santa Fe* case, a sister case to *Happy Sara*, the Supreme Court decided whether pictures could be obscene. The Court applied the same test to both cases.⁸¹ In the *Santa Fe* case, the Court clearly emphasized the newly proposed standards and factors. In this case, three kinds of photo books were at issue. *Santa Fe* was a collection of nude pictures of a Japanese actress. The second book, *Portrait of Eve*, contained seminude pictures of a Korean actress. The third book, *Sexy Star*, contained pictures of Western celebrities such as Madonna, Sharon Stone, Marilyn Monroe, and Cindy Crawford.

The Supreme Court ruled that only *Sexy Star* was obscene because the pictures aroused prurient interest. Even though pictures in *Santa Fe* showed the pubic region, in the Court's view, those pictures did not remind viewers

76. *Id.*

77. *Id.*

78. Kim, *supra* note 72, at 100.

79. *Ma Kwang Su*, 997 Beobwon kongbo 2674.

80. Yun Kang Jun v. State, 94 To 1758, Daebeobwon [Supreme Court] (June 16, 1995), 997 Beobwon kongbo 2270 (Aug. 1, 1995) (S. Korea).

81. One judge argued that one must differentiate printed materials from pictures only in special circumstances. Oh, *supra* note 22, at 449.

of sexual intercourse. Moreover, the Court ruled that the artistic value in *Santa Fe* mitigated the sexual feelings it might arouse.

The *Sexy Star* opinion revealed the contradictory and inconsistent standard of obscenity used by the Supreme Court. Because none of the pictures in *Sexy Star* showed pubic regions or the genitals, the lower courts held that *Sexy Star* was not obscene. The Supreme Court, however, reversed the verdict, interpreting “arousing prurient interest” more broadly, pointing out the problematic pictures depicted: sexual satisfaction and sexual emotion. Throughout its opinion, the Supreme Court suggested a rule prohibiting publication of materials that reminded viewers or readers of sexual behavior.

Two years later, the Supreme Court held that a similar collection of pictures was obscene by applying the same principles.⁸² The Court rejected arguments that images need not depict sexual intercourse to be deemed obscene. The Court, once again, placed emphasis on the fact that images could arouse readers’ prurient interests.

The Supreme Court has thus attempted to stultify consumers’ imagination via obscenity laws. If this is the case, nearly every sexually provocative image encountered in the mass media would be considered obscene. One commentator argued that the Court’s reasoning in *Happy Sara* and *Santa Fe* was unpersuasive.⁸³ He was incredulous that the Supreme Court would find artistic merit in the *Santa Fe* album, but not in *Happy Sara*.⁸⁴

6. *The Lie to Me Case*⁸⁵

In 1997, a number of high-profile obscenity cases, including the *Lie to Me* case, gained public attention. On January 13, 1997, popular novelist, Jeong Il Chang, was prosecuted for violating obscenity laws for his novel, *Lie to Me*. Prosecutors failed to get a warrant from a judge in the Seoul District Court. In July, the Seoul District Prosecutors Office investigated Korea’s most popular cartoonist for obscenity law violations. The next month, prosecutors charged fourteen editors-in-chief and the cartoonists of three major nationwide sports newspapers with violating indecency clauses of the Minors Protection Act. Writers, artists, and movie producers protested, in vain, against these prosecutions.

The trial court sentenced Mr. Chang to one year imprisonment. The

82. Han Eun Hi v. State, 97 To 937, Daebeobwon [Supreme Court] (Aug. 22, 1997), 1997 Panrae kongbo 43 (S. Korea).

83. Shim, *supra* note 63, at 273-74.

84. *Id.*

85. Chang Jeong Il v. State, 98 To 679, Daebeobwon [Supreme Court], 2000 Panrae kongbo 120.

appellate court affirmed the conviction and the Supreme Court rejected Mr. Chang's appeal. In the *Lie to Me* case, the Court clarified its position regarding the relationship between artistic value and obscenity. The Court ruled that despite literary or artistic value, a questionably obscene work may not escape censorship.⁸⁶ In essence, the Court merely restated its view that artistic value can only mitigate prurient interest.

7. Conclusion

The line of case law establishing obscenity jurisprudence in Korea provides the following conclusions. First, the threshold standard for the Korean Supreme Court in obscenity cases is finding of a "prurient interest." The Court has never provided evaluations for other standards such as what constitutes "degrading human dignity" or "sexual inequality." The Court maintains that arousing prurient interest will always damage public morality. However, the Court has never attempted to explain why a person who arouses the public's prurient interest deserves prosecution.

Second, even though the targets of obscenity charges involve books written by reputable, well-known authors, the Court makes no exceptions for works that have artistic or educational value. The Court has neither differentiated the impact of printed and pictorial material, nor has it addressed the issue of more graphic materials found in pornography.

Third, because no justice has ever written a dissent in obscenity cases, there is little evidence that the Court has truly deliberated on critical issues. Moreover, the Court has rarely provided sound rationales for their decisions. Instead, the Court has merely reiterated the facts. Even in the mid-1990s, when the Court finally provided some articulated standards for obscenity cases, the justices merely incorporated the standards from the Japanese Supreme Court. Because obscenity has never been a controversial issue in Korea, the Supreme Court has never felt public pressure to clarify its position.

B. Comparison of Case Law in Korea and the United States

1. Defining Obscenity

The Korean and U.S. Supreme Courts use similar approaches to define obscenity. Both Courts emphasize the effect that sexually explicit material has on a consumer's sexual desire. Therefore, the "appeal to prurient

86. *Id.* at 2477.

interest” standard plays an important role in determining obscenity in both countries.⁸⁷

The historical basis for obscenity laws in the United States originate from the 1868 English case of *Regina v. Hicklin*.⁸⁸ In *Hicklin*, Lord Chief Justice Cockburn articulated an obscenity test founded on “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”⁸⁹ Based on this view, “any publication” that destroyed “the morals of society” could be subject to governmental regulation.⁹⁰ In *Roth v. United States*,⁹¹ that the U.S. Supreme Court officially rejected the *Hicklin* test. The *Roth* Court defined obscene material as “material which deals with sex in a manner appealing to prurient interest.”⁹² Instead, the U.S. Supreme Court adopted an alternative test⁹³ to determine obscenity based on “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁹⁴ The *Roth* Court thus liberalized American obscenity laws and restricted the government’s authority to sanction certain types of sexual expression.

The U.S. Supreme Court developed its current obscenity test in *Miller v. California*.⁹⁵ After struggling to define obscenity since *Roth*, the Court finally formulated a three prong test to determine whether material is obscene. Those standards are as follows:

87. Germany provides an alternative to defining obscenity. See Reimann, *supra* note 60. The West German Federal Supreme Court found that pornography causes “a problem of human dignity.” *Id.* at 223. German judges have focused on “how the material portrays sex as a human relationship and how they depict the persons involved in it.” *Id.* at 228-29. Based on this approach pornography is problematic because it portrays human sexuality in an undesirable manner. The German approach overcomes the subjective problem of American definition of obscenity by focusing on specific relationships.

88. L.R. 3 Q.B. 360 (1868).

89. *Id.* at 371.

90. *Id.* at 369 (quoting T. STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 158 (2d ed. 1838)).

91. 354 U.S. 476 (1957).

92. *Id.* at 487.

93. Substitute test developed by a New York federal court three years after the *Lady Chatterley’s Lover* case was supported by many courts at the time. The court emphasized “the normal person” test. See *U.S. v. One Book Called Ulysses*, 5 F. Supp. 182, 185 (S.D.N.Y. 1933).

94. *Roth*, 354 U.S. at 489. Many lower courts had already adopted this test prior to the *Roth* decision. See *id.* at 489 n.26.

95. 413 U.S. 15 (1973).

- whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁹⁶

Thus, under both obscenity tests the focus is whether sexually explicit material appeals to prurient interest. However, the Korean Supreme Court has defined obscenity more broadly than the U.S. Supreme Court because it includes vague terms like “sexual morality” and “shamefulness.”⁹⁷ Under the Korean standard, even the slightest form of sexual expression could be prohibited because of the traditional Korean belief that sex is not suitable for public discussion.⁹⁸ However, the Korean Supreme Court has responded to such criticism in the *Happy Sara* decision by providing six specific factors in evaluating whether material is obscene. Ostensibly, Korean obscenity jurisprudence is comprised of two layers, the threshold three-prong test and the six-part test. Nonetheless, the Korean test is still unclear.⁹⁹

96. *Miller*, 413 U.S. at 24. Anti-pornography feminist MacKinnon ridiculed this standard because it “feels like you’re a cop reading someone’s Miranda rights.” Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 20 (1985).

97. The Korean definition of obscenity is “what damages sexual morality by stimulating ordinary people to arouse sexual desire and shameful.” See *supra* text accompanying note 73.

98. A recent case showed how law enforcement officials acted conservatively under the current Korean obscenity laws. On May 28, 2001, a junior high school art teacher was arrested for posting nude photos of himself and his pregnant wife on the Internet. The police charged the teacher with committing a sexual offense against minors. *Id.* The teacher argued that these photos were not pornography. *Id.* He wished to express his aesthetic appreciation of the nude body. *Id.* Parents of children in the art class requested prosecution. *Id.* Soh Jung Yoo, *Art Teacher Arrested for Posting Nude Photos on His Internet Home Page*, KOREA HERALD, May 29, 2001, available at 2001 WL 20828912.

99. *Eumranmul Dansokgwa Pyohyuneey Jayu [Regulation of Obscenity and Freedom of Speech]*, in 1997 NYUNDO INKWON BOGOSEO [HUMAN RIGHTS REPORT OF 1997] 454 (Korean Bar Association ed., 1998). Discrepancies between opinions by the Supreme Court and the Constitutional Court regarding a definition of obscenity created more confusion. The Constitutional Court defined obscenity as:

[A] naked and unabashed sexual expression that distorts human dignity or humanity; appeals only to the prurient interest, has no literary, artistic, scientific, or political value, degrades the sound sexual ethics of society, and causes harm unresolvable in the marketplace of ideas.

CONSTITUTIONAL COURT OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT (1988-1998) 155 (2001), available at <http://www.court.go.kr/English/decision03.htm>. The definition of the Constitutional Court includes elements of both the human dignity approach and the prurient interest approach. The Supreme Court has rejected the former approach. Furthermore, the Constitutional Court has implied that works with social value may be excluded from the definition of obscenity. The Supreme Court does not recognize the exception.

In contrast, the *Miller* test is simpler. The *Miller* test has two parts, one based on whether a work is patently offensiveness and another based on whether the work possesses any redeeming social value. The *Miller* Court provided examples of sexual conduct that was “patently offensive.” The state can regulate: “(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated (b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁰⁰

In *Happy Sara*, the Korean Supreme Court only considered whether the material in question appealed to prurient interest. Alternatively, the *Miller* test asked whether the work was described or depicted “patently offensive conduct.” This distinction leads to different results for cases pertaining to softcore pornography. Under *Miller*, only hardcore pornography is subject to prosecution for obscenity. However, under *Happy Sara*, both hardcore and softcore pornography are subject to regulation. The *Santa Fe* case provides another example where the conflict between the U.S. and Korean standards produce disparate outcome. If the Korean Supreme Court applied the *Happy Sara* and *Sexy Star* tests to the Korean edition of *Playboy*, it would be deemed obscene.¹⁰¹ Accordingly, a Seoul appellate court has affirmed the denial of registration for *Playboy* magazine.¹⁰² Alternatively, *Playboy* is not obscene under the *Miller* test.

Furthermore, *Miller* excludes works with serious social value from regulation. However, the *Happy Sara* regards social value as only one factor that mitigates prurient interest.¹⁰³ With no social value exception, novels written by well-known authors are frequently targets for obscenity charges. Korean artists who refer to sex in any way fear prosecution, creating chilling effect on Korean culture. Jae Dong Park, a cartoonist investigated on obscenity charges stated that “censorship by the government causes self-censorship. Authors are thus confined to the bounds of the government imagination.”¹⁰⁴

100. *Miller v. California*, 413 U.S. 15, 25 (1973).

101. See *supra* text accompanying notes 80-84.

102. 97 Ku 41274, Seoul GodeungBeobwon [Seoul High Court] (July 29, 1998), Hageubsim Panraejib [Official Gazette of Lower Court Decisions] 1998-2 at 570 (S. Korea).

103. Even in the United States, distinguishing art from pornography generates controversy. Judge Posner has suggested a way to protect artists from obscene prosecution, arguing that “[i]f an artist achieved a reputation for his nonpornographic work, his pornographic work would be conclusively presumed to have artistic merit.” See RICHARD A. POSNER, *SEX AND REASON* 378 (1992). In contrast, Korean law enforcement officials prosecute artists in spite of their fame.

104. Han, *supra* note 49, at 60.

2. *Who Decides?*

Obscenity laws differ from other statutes, they require the court to ascertain the states of mind of persons not present at the proceeding. In Korea, the definition of obscenity requires the court to determine whether a work may trigger shame or embarrassment to the ordinary person. But how can any court understand the emotional state of the hypothetical ordinary person? In the end, all parties, including the prosecution and the defense, can only base their arguments from personal experience. Similar challenges arise in U.S. courts. The *Miller* test identifies the “average person” and “community standards as requisite standards.” Neither country provides adequate, unbiased definitions.

In U.S. criminal trials, the judge instructs jurors to resist extraneous distractions and only consider admitted evidence. In obscenity cases, however, jurors must speculate how an “average person” would react to the material at issue. Furthermore, expert testimony does not aid jurors because the materials are “the best evidence of what they represent.”¹⁰⁵ The prosecutor only needs to present the evidence to the jury and attribute the sexually explicit material to the accused.¹⁰⁶ The jury then decides whether the average person in the community finds that the material appeals to prurient interest and whether it patently offends community standards.¹⁰⁷ However, because of the lack of frank discussion about sex in most communities, juries must resort to conjecture. In the end, jurors apply their own preferences.

The Korean situation is worse than that of the United States. The Korean definition of obscenity depends heavily upon the definition of shame and the abstract notion of sound sexual morality. In Korea, the judge alone must act as both factfinder and decisionmaker because obscenity is a normative concept.¹⁰⁸ Judges have full authority to determine what constitutes the prevailing ideas of society, without the aid of statistical surveys to determine predominant public attitudes towards sex.¹⁰⁹ It is unrealistic to assume that judges can make such determinations within the confines of a courtroom. Besides, judges are usually more conservative and only reflect the views of an elite, if isolated sample of the Korean public. Despite pledges of unbiased adjudication, it is difficult for Korean judges to decide “from the standpoint

105. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 56 n.6 (1973).

106. See James Peterson, Comment, *Behind the Curtain of Privacy: How obscenity Law Inhibits the Expression of Ideas about Sex and Gender*, 1998 WIS. L. REV. 625, 637-38.

107. See *Jenkins v. Georgia*, 418 U.S. 153, 160 (1973).

108. *Cho Dong Su v. State*, 94 To 2266, Daebeobwon [Supreme Court] (Feb. 10, 1995), 988 Beobwon kongbo 1367 (Mar. 15, 1995) (S. Korea).

109. *Id.*

of the average person in the society.”¹¹⁰ At a recent judicial seminar, one judge admitted, “it is certain that we cannot take the current situation as a legal standard even if our society admits that obscene materials are flowing everywhere.”¹¹¹ Another judge argues that “judges should not accept society as is, but remain critical about moral corruptions.”¹¹² This argument suggests that “judges act as reformers” and protect society from corruption.¹¹³

In the United States, lawyers select juries from diverse populations that more closely reflect a representative sample of the community than a single judge. Because Korean judges alone must take responsibility to protect public morals, they are more likely to issue more conservative opinions. Recently, scholars have suggested that Korea should adopt a jury system similar to the America’s in order to promote more objective verdicts.¹¹⁴

3. *Protecting Minors*

Not surprisingly, in both Korea and the United States, minors have restricted access to sexually explicit materials. In *Ginsberg v. New York*,¹¹⁵ the U.S. Supreme Court held that the state may reasonably regulate sale of materials harmful to minors because it is in the state’s best interest to protect a child’s well-being.¹¹⁶ In Korea, the same rationale justified passage of the Juvenile Protection Act.

However, both countries differ in their approaches to promoting the best interests of a state. In the United States, the Supreme Court is more concerned about the chilling effect obscenity laws have on free speech. As a result, the U.S. Supreme Court imposes the strict scrutiny standard when determining whether a statute restricting speech is unconstitutional. The Court first identifies a compelling government interest and then determines whether the regulation in question is the least restrictive means to achieve the

110. *Chang Jeong Il*, 98 To 679, 120 Panrae kongbo 2477. Before this case, the Supreme Court of Korea usually used the word, “ordinary people.” See *Shin Sang Cheol*, 70 To 1879, 4 Panrae wolbo 79; 94 *Ma Kwang Su*, 94 To 2413; 99 Beobwon kongbo 2673.

111. Kim, *supra* note 72, at 115.

112. Wee Su Han, *Eumranmulee Hyunsajeok Gyujee Gwanhan Jemunje* [*Several Problems with Criminal Sanctions for Obscene Material*], in 13 *FAIRNESS AND JUSTICE* 42, 47 (1998). The Supreme Court of Japan expresses the same attitude. *COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60* 23 (John M. Maki ed., 1964).

113. See Han, *supra* note 112.

114. See Kyung Sik Oh, Heonbeobsang Eumranee Beobrie Gwanhan Yoengu [A Study on Obscenity in Constitutional Law] 221 (1998) (unpublished Ph.D. dissertation, Kyung Hee University) (on file with the Korea National Assembly Library).

115. 390 U.S. 629 (1968).

116. *Id.* at 643.

government interest. For example, in *Reno v. ACLU*,¹¹⁷ the Court ruled the Communications Decency Act of 1996 unconstitutional because the government failed to prove there were no other less restrictive alternatives to achieving its goals. However, in another case, a U.S. appellate court upheld a California law¹¹⁸ that prohibited the sale of “harmful matter” in vending machines that could not identify the adult status of the consumer.¹¹⁹ Despite protest from free speech activists, publishers, and consumers, the Ninth Circuit held that the statute was narrowly tailored and it did not prevent adults from accessing materials from alternative sources.¹²⁰ Thus, one commentator has stated that “at least when kids are at issue, the question is not really whether the regulation is too burdensome on free speech, but whether the regulation is more burdensome than it needs to be.”¹²¹

In contrast, Korean adults do not have access to sexually explicit material because of laws that protect minors. In many cases, the simple goal of protecting minors is a sufficient reason for the government to regulate any sexually explicit material. Judge Han has noted that problems with obscenity laws that do not distinguish adult consumers from minors.¹²² Because Korean courts have not adopted the strict scrutiny test, the government does not need to provide for less burdensome alternatives. The Korean government can regulate sexually explicit work by merely suggesting that minors may have access to the material.¹²³ Korean courts focus on the effect sexually explicit have on children because they are a susceptible class. Korean courts are unconcerned with the potential of stifling free speech.

In the United States, both federal and state governments make an effort to protect children under the age of eighteen from exploitation.¹²⁴ In *New York*

117. 521 U.S. 844 (1997).

118. California Penal Code § 313.1(c)(2),(h) (1999).

119. Crawford v. Lungren, 96 F.3d. 380, 389 (9th Cir. 1996).

120. *Id.* at 388-89.

121. Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 631 (1998).

122. Han, *supra* note 112, at 76. Current American obscenity laws have established varying standards adjusting the level of scrutiny to accommodate specific features of a particular medium. Broadcasting has been the target of the most extensive government regulation. In *FCC v. Pacifica Foundation*, the U.S. Supreme Court justified broadcasting limitations because of its unique characteristics: invasiveness, easy access to children and scarcity of spectrum space. *See* 438 U.S. 726 (1978).

123. Because minors could easily access the photographs, the police arrested the art teacher after nude self-portraits appeared on the Internet. *See* Yoo, *supra* note 98.

124. In the United States, federal law strictly regulates child pornography. For example, 18 U.S.C. § 2257 requires photographers to obtain two forms of identification from underage models. Federal law also prohibits the sale or distribution of computer-generated images of children with images of adults who pretend to be under the age of eighteen. *See* 18 U.S.C. § 2256. The Free Speech Coalition challenged this law and the case was decided by the Supreme Court in April 2002. *See* Ashcroft v.

v. *Ferber*,¹²⁵ the U.S. Supreme Court held that states have discretion to regulate distribution of child pornography, regardless of whether the material satisfies the *Miller* test.¹²⁶ The Korean Supreme Court has yet to decide a child pornography case.

III. RATIONALES FOR SUPPRESSING SEXUALLY EXPLICIT EXPRESSION

A. *Public Morality and Freedom of Expression*

American scholars struggle to formulate plausible theories for the state intervention in private actions that do not directly harm others. Liberals¹²⁷ argue that state police power should only intervene in private matters when actions harm others. In contrast, conservatives argue that obscenity should be regulated if it corrupts sexual morality. This view advocates practice of “proper” sexual behavior. Conservatives do not believe that pornography has any artistic or communicative function. Even when conservation scholars admit that pornography has educational value, it is still of low social value. Anti-pornography feminists share such conservative views.¹²⁸ In the early of 1980s, Catharine MacKinnon and Andrea Dworkin theorized that pornography, not obscenity, instigated discrimination and violence against women. As time goes by, the key issue in the U.S. obscenity debate will center on whether obscene material will cause a specific harm to a protected class.¹²⁹

In Korea, however, the harmful effects of obscene material or free speech have never been a real issue. The public has not opposed state restriction of obscene materials when the government purports to protect public morality. Korean scholars view obscenity as being outside of the realm of legal protection because the Constitution admits restrictions on free speech in

Free Speech Coalition, 535 U.S. 234 (2002).

125. 458 U.S. 747 (1982).

126. *Id.* at 761. The Court emphasized that the *Miller* test could not provide a satisfactory solution to child pornography because it “does not reflect the state’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.” *Id.*

127. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 115 (1999) (defining three liberal approaches for regulating morality).

128. Professor Harcourt named this new approach “conservative liberalism” because “[p]roponents of regulation and prohibition began to employ increasingly harm arguments in support of a conservative agenda.” *Id.* at 116, 118-19.

129. Professor Harcourt recognized “the collapse of the harm principle,” because “[c]laims of harm have become so pervasive that the harm principle has become meaningless.” *Id.* at 113. He added that “[t]oday, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent.” *Id.*

order to preserve public morality. Scholars and judges generally support the traditional conservative view. One commentator has stated that even in the age of increasing sexual liberalization,¹³⁰ preservation of morals is the predominant concern.¹³¹ Korean legal scholars regard obscenity laws as necessary to “keep legal order and preserve minimum sexual norms”¹³² from “the possibility that such materials may harm normal sexual feelings of ordinary persons and in maintaining a sound social order.”¹³³ When the Constitutional Court of Korea defined obscenity, it adopted the conservative position.¹³⁴

There are two categories of sex crimes in Korean criminal law, those that infringe on other people’s sexual rights (obscenity clauses) and crimes that damage social norms (sexual norm clauses).¹³⁵ One professor has explained that the sexual norm clauses were introduced in order to preserve sex, marriage, or family, from collapse and protection from deviant acts of others.¹³⁶

Obscenity law in Korea focuses on the preservation of public morality rationale. The voice of anti-pornography feminists¹³⁷ is silent in Korea because the public rarely stands up for sexual freedom. Even scholars who support government regulation of pornography do not follow the viewpoint of anti-pornography feminists.¹³⁸ The development of obscenity debates in America parallels the Korean situation. In the United States, the anti-pornography feminists began protesting when other supporters who advocated preservation of public morals lost ground to liberals because they could not identify specific harm attributable to being exposed to obscene

130. IL SOO KIM, HYUNGBEOB GAKRON [INDIVIDUAL CRIMES] 530, 539 (2001).

131. *Id.*

132. KWON, *supra* note 18, at 478.

133. Lee Geun Suk v. State, 91 To 1550, Daebeobwon [Supreme Court] (Sept. 10, 1991), 907 Beobwon kongbo 2562, 2563.

134. *See supra* text accompanying note 19.

135. SAN DEOCK HWANG, HANKUK HYUNGBEOB GAKRON [INDIVIDUAL CRIMES IN KOREAN CRIMINAL LAW] 142-45 (1972).

136. KIM, *supra* note 130, at 530.

137. In the early of 1980s, American feminists, such as Catharine MacKinnon and Andrea Dworkin, focused on pornography not as a moral cause, but rather as a type of discrimination against women that could lead to violence. *See* Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL’Y REV. 321, 325, 330 (1984). Like the moralists, they advocate regulation of certain forms of explicit sexual expression. *Id.*

138. Feminists in Korea struggle over sexually explicit expression. They confessed that they could not support the government because they believed in freedom of speech, but that they were uncomfortable with discriminatory treatment of women in movies. Min Hee Park, *Pyohyunee Jayu=Yeoseong Bihae Jayu?* [Freedom of Speech=Freedom to Disdain Women?], at <http://www.hani.co.kr/section-005100032/2001/09/005100032200109031843009.html> (last visited Aug. 8, 2003).

material. The anti-pornography feminists succeeded in establishing the harm principle and successfully collaborated with conservatives to combat obscenity.

In contrast, Korean conservatives rely solely on the preservation of social norms rationale. As a result, free speech libertarians and anti-pornography feminists have not found a place in the obscenity debate.

Despite a prevailing argument against obscenity in Korea, the judicial system has yet to define “public morality” and “sound sexual norms.” The Korean Supreme Court depends upon the amorphous “a sound common idea”¹³⁹ concept. One commentator has criticized the Supreme Court by stating, “we cannot expect theoretical development in the field of obscenity because the Supreme Court has decided obscene cases without identifying ascertainable benefits to the public.”¹⁴⁰ The Korean people, influenced by Confucianism, tend to relate social upheaval with corruption of morals. It is easy for people to blame sexual express in as a factor that contributes to the degradation of public morals. Politicians will resort to this argument whenever obscenity is at issue. Anyone who supports free expression will be faced with the assertion that they contribute to the corruption of public morals. In Korea, freedom of speech does not exist because it is only supported by a muted minority.

B. The Battle over Freedom of Speech

Korean scholars argue about the importance of freedom of speech,¹⁴¹ yet they unanimously admit that it should be limited. In Korea, free speech has never been acknowledged as an absolute right. The Founding Constitution of Korea, enacted three years after Korea achieved independence from Japan, prescribed limitations on free speech.¹⁴² Article Thirteen states that “the freedom of speech, publication, congregation, and association cannot be limited without enactment.” This Article permitted the Korean legislature to create laws abridging freedom of expression. The framers did not regard freedom of speech as a natural right and allowed restrictions when necessary.¹⁴³ One commentator has articulated that Korea has never truly

139. See *supra* text accompanying note 72.

140. Han Seong Kim, *Eonron Chulpanee Jayu [Freedom of the Press and Publication]*, in HANKUKESOEEOE GIBONKWON IERONEE HYUNGSEONGGWA BALGEON 269 (Huhyoung Baksa Hwagappinyum Nonmungip Ganhangweewonhoi ed., 1997).

141. Constitutional Court Judgment of Sept. 16, 1991, 89 HunMa 165, 3 KCCR 524 (S. Korea).

142. The Founding Constitution remained in force from July 17, 1948 to June 15, 1960 and it was amended twice during that period.

143. Kim, *supra* note 140, at 261.

experienced a marketplace of ideas.¹⁴⁴ Free communication of ideas is thought to be dangerous in Korea, especially in the aftermath of the Korean War and over a quarter century of despotic rule.¹⁴⁵

Korea has been divided into two countries since independence from Japan in 1945. After the Korean War, both sides still confront each other over ideological differences. Korean culture allows restriction of speech when necessary. Censorship existed without significant resistance. The Founding Constitution does not explicitly prohibit censorship. In fact, a censorship was deemed necessary after the Korean War.¹⁴⁶ Only after approval of the Constitution of the Third Republic did freedom of the press and prohibition of censorship become part of the law.¹⁴⁷ Scholars still believe censorship is appropriate for political and sexual speech. In light of tensions between North and South Korea, censorship is approved for sake of national security. Again preserving morality is an easy argument for censorship.¹⁴⁸ Another professor has sanctioned censorship of imported movies, sexually explicit books, and controversial publications if they threaten national interest and social order.¹⁴⁹ Scholars argue that censorship of movies and other forms of entertainment is constitutional.¹⁵⁰ The Supreme Court has agreed.¹⁵¹ However, a 1996 Constitutional Court decision finally declared censorship unconstitutional.¹⁵²

Although the contemporary Constitution reflects Korea's commitment to democracy, it nonetheless preserved constitutional limitations on free speech. Freedom of speech does not predominate over other fundamental freedoms. Two limitation clauses in the Constitution, in addition to a general restriction

144. Sang Beom Han, *Geundaebobee Jayusijangronee Gaseolgwa HyundaeHeonbeobee Gibonkwon* [*Hypothesis of the Marketplace of Ideas and Basic Rights in Modern Constitutional Law*], in HANTAERYEON BAKSA HWAGAPGINYUM NONMUNGIP 73-83 (1977).

145. There is no doubt that “[t]he dictatorship ha[d] long invoked national security to rationalize its repressive regimentation of South Korean society.” James M. West & Edward J. Baker, *The 1987 Constitutional Reform in South Korea: Electoral Processes and Judicial Independence*, in HUMAN RIGHTS IN KOREA 223 (William Shaw ed., 1991). The Korean military government “purposely blurred the distinction between political dissent and real threats to national security.” *Id.*

146. The Korean War lasted for three years, from June 25, 1950 to July 27, 1953.

147. The Constitution of the Third Republic lasted from December 27, 1963 to December 27, 1972.

148. IL KYUNG PARK, SHIN HEONBEOBHAK WONRON [NEW PRINCIPLES OF CONSTITUTIONAL LAW] 78 (1986).

149. BYUNG SAK KU, SHIN HEONBEOBHAK WONRON I [NEW PRINCIPLES OF CONSTITUTIONAL LAW I] 385 (1984).

150. TAE YEON HAN, HEONBEOBHAK [CONSTITUTIONAL LAW] 328 (1979); HONG JU MOON, HANKUK HEONBEOB [KOREAN CONSTITUTIONAL LAW] 275 (1987).

151. 70 Da 900, Daebeobwon [Supreme Court] (Jan. 29, 1971), 7 PANRAE WOLBO 27 (S. Korea).

152. Constitutional Court Judgment of Oct. 4, 1996, 93 HunKa 13, 8-2 KCCR 212, 223 (S. Korea).

clause, apply to fundamental rights. One clause prohibits harms to reputation and other detriments to public morals or social ethics. Obscenity more closely related to the second clause.

In general, the current Constitution prohibits censorship.¹⁵³ Again, a clause allows for limits on the freedom of the press in cases of emergencies.¹⁵⁴ Therefore, the potential for censorship exists.

C. Paternalism in Korea and the United States

Without objection from the general public, the Korean government regularly intrudes upon the private affairs of its citizens. This is the antithesis of America, which thrives on individual choice and freedom. Still even in the United States, preservation of traditional values is important.¹⁵⁵ Professor Clor believes traditional values can help society solve some problems.¹⁵⁶ Community interests are just as important as individual rights in communal society.

Several U.S. Supreme Court cases support the preservation of public morals rationale. Chief Justice Rehnquist's plurality opinion rationale in *Barnes v. Glen Theatre*,¹⁵⁷ reflects this view. *Barnes* involved an Indiana statute prohibiting nudity in public places.¹⁵⁸ Chief Justice Rehnquist argued that "a substantial governmental interest in protecting societal order and morality" justified prohibition of nude dancing despite "the incidental restriction on First Amendment freedom."¹⁵⁹ He stated that "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals."¹⁶⁰ However, four other justices¹⁶¹ maintained that

153. KOREAN CONST. art. 21(2).

154. *Id.* art. 77(3).

155. HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 34 (1996).

156. *Id.* at 37.

157. 501 U.S. 560 (1991).

158. *Id.* at 562.

159. *Id.* at 569, 571. The plurality opinion applied the O'Brien test because the Indiana law was content-neutral. The O'Brien test can be stated as follows:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

160. *Glen Theaters*, 501 U.S. at 569.

161. Justice Scalia concurred, arguing that the Indiana statute was not directed at specific expression, but at conduct. He argued that certain acts should be punished "not because they harm others, but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral." *Id.* at 575. He stated that "[t]he purpose of Indiana nudity law would be violated, I think, if 60,000

the statute should have been held unconstitutional because the governmental interest in “promoting societal order and morality” was “not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity.”¹⁶²

The Court also cited the *Paris Adult Theater I* case as another example of the importance of public morality.¹⁶³ In that case, the Court did not use the term “public morality.” However, according to Clor’s argument, public morality is implied when the Court discussed “quality of life.”¹⁶⁴ In contrast, in *Cohen v. California*,¹⁶⁵ the Court rejected the contention that “the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary” on the grounds that “the Constitution leaves matters of taste and style so largely to the individual.”¹⁶⁶ In general, public morality in America acts as a check liberalism.¹⁶⁷

In Korea public morality is the absolute standard when deciding obscenity cases because the government engages in paternalism. John Kleinig explained paternalism in the following way: “X acts paternalistically in regard to Y to the extent that X, in order to secure Y’s good, as end, imposes upon Y.”¹⁶⁸ Moreover, Joel Feinberg defined legal paternalism as “the theory that it can be morally legitimate for the state to interfere with an individual’s liberty on the sole ground that the intervention is necessary to prevent the individual from harming or risking harm to himself, even though no third party interests are threatened by his conduct.”¹⁶⁹ Paternalism assumes that the coercer knows what is best for the public. One commentator has argued that the essence of paternalism lies not in “coercion or interference with freedom,” but in the “justification of his [A’s] action without B’s consent.”¹⁷⁰

The U.S. Supreme Court has resisted paternalistic intervention in First Amendment jurisprudence.¹⁷¹ For instance, the Court stated that “[t]he First

fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.” *Id.*

162. *Id.* at 590.

163. *Id.* at 57-58.

164. CLOR, *supra* note 155, at 25-26.

165. 403 U.S. 15 (1971).

166. *Id.* at 22-23, 25. Justice Harlan wrote, stated that “it is nevertheless often true that one man’s vulgarity is another’s lyric.” *Id.* at 25.

167. CLOR, *supra* note 155, at 30, 31.

168. JOHN KLEINIG, PATERNALISM 13 (1984).

169. Joel Feinburg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 456-57 (1983).

170. David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 523 (1988).

171. Shapiro, *supra* note 170, at 542. Shapiro identified the best examples of anti-paternalistic in the following cases: *Stanley v. Georgia*, 394 U.S. 557 (1969); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Assoc. v. Township of*

Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.¹⁷² With regards to children, the Court has conceded that “[t]he state’s authority over children’s activities is broader than over like actions of adults.”¹⁷³ In the United States, one commentator has pointed out that paternalism is an “almost ‘un-American’ rationale for any type of government activity.”¹⁷⁴

However, Korean paternalism permeates throughout society. First, communal behavior that maximizes social welfare is more important than selfish act.¹⁷⁵ Professor Shapiro classifies such communal concerns “public paternalism.”¹⁷⁶ Government believes that intervention in private affairs benefits all citizens. Second, Korea’s blanket regulation of obscenity reflects the culture of paternalism. While the government’s interest in preserving traditional sexual norms is laudable, such intervention stifles individualism. Third, judges contribute to the norms in a paternalistic atmosphere.¹⁷⁷ The judge in the *Lie to Me* case, Hyung Jin Kim, he stated, “I must sentence the accused to physical punishment as a warning to other ‘realistic’ novelists who would write this sort of thing.”¹⁷⁸ The judge is expressing a self-imposed duty to save Korea from evil. The judge ignores paternalism’s chilling effect on free speech. Jong Pil Kim, the trial judge in a popular cartoonist’s obscenity case, pronounced his paternalistic attitude and declared, “I asked myself whether I would show this cartoon to my kids if I were a parent. My answer was ‘No.’”¹⁷⁹ The judge should not have decided the case as a personal matter. His opinion should have focused on whether

Willingboro, 431 U.S. 85 (1977); *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978). Even in *Paris Adult Theater I case*, attempted to “articulate nonpaternalistic rationale.” *Id.* at 543-44. However, others argue that many obscenity decisions have been based on legal paternalism. See Feinberg, *supra* note 169.

172. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

173. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

174. Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1103 (1983) (asserting that paternalism does not confer with “free market assumptions”). *Id.*

175. During Korea’s economic development, Koreans followed the government’s leadership according to “the pie theory,” which emphasized individual sacrifice for the common good.

176. See Shapiro, *supra* note 170, at 527. Shapiro differentiated public paternalism from private paternalism in that the former is an action for another’s benefit, while the latter is an action on behalf of the state. *Id.*

177. OH, *supra* note 22, at 24, 31.

178. Dae Yul Kwon, *Chang Jeong Ilssi Beobjeong Gusok/Seoul Jibeob Eumransoseol 10 wol seongo* [*Jeong Il Chang Arrested in Court/Seoul District Court Sentenced 10 Months for an Obscene Novel*], CHOSUN ILBO, May 31, 1997, at 31.

179. Seong Young Choi, *Eumranmul Pandangijun Dljuknaljjukhada* [*Inconsistent Obscenity Standards*], LAW TIMES, July 24, 2000, available at http://www.lawtimes.co.kr/gisa/main.asp?NEWS_SERIAL=2503&news=n.

the government is entitled to penalize artists for expressing ideas. Fourth, paternalism is an obvious concern when the innocence of children is at stake. This concern is universal, but in Korea, adults do not accept that children are capable of independent thought. Above all, adults must protect children. One commentator has thus argued that the government and parents act together to decide what is in the best interests of children.¹⁸⁰ The Juvenile Protection Committee has censored a variety of materials that are perceived as titillating to minors.

All three branches of the Korean government are deeply involved in the private matters of its citizens. While paternalism is a well-meaning gesture by leaders, such acts sacrifice individual rights. Unfortunately, there is no system to check the government if it becomes overzealous in its goal of maintaining uniform moral standards. In the United States, such a chilling effect on free speech is the primary concern. Self-expression is essential in a true democracy.

IV. REGULATION OF SEXUAL EXPRESSION IN THE INTERNET AGE

A. *Regulating Online Pornography*

The Internet has revolutionized communication because it allows for anonymous interaction between users. Anyone can publish content anonymously and leave no paper-trail for others to identify the author. On the Internet, identities are fluid. Men could be women and children can be adults. Professor Lessig explained, “what others see is within your control; what others understand of you is within your control as well.”¹⁸¹ Such anonymity creates confusion in the enforcement of obscenity laws, which usually target adults. Minors can disguise themselves as adults. Because of the difficulty in enforcement, pornographers are emboldened to create sexually explicit material that ranges “from the modestly titillating to the hardest-core.”¹⁸²

Confronted with the proliferation of online pornography, the Korean government has resorted to censoring sexual expression and aggressive enforcement of obscenity law. Recently, the Korean government has instituted an Internet rating system. Despite these measures, online pornography is thriving in Korea. The biggest producer of online

180. Han, *supra* note 49, at 71.

181. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 876 (1996) (defining anonymity as “the power to determine whether they will know your name, or who you are; the power to determine whether they will know what you say, or even what language you speak.”).

182. *Reno*, 521 U.S. at 853.

pornography counts 1.8 million page views per week.¹⁸³ To skirt more restrictive Korean laws some companies move servers to the United States. Foreign Internet pornography companies, especially Japanese adult websites, recognize the demand in Korea and have begun to provide Korean language services.

1. Censorship by Committee

Korea's Information and Communication Ethics Committee (ICEC) monitors online pornography. Its mission is to censor and control harmful information on the Internet. The Telecommunications Business Act (TBA) promotes the development of electronics and communication businesses to benefit public welfare.¹⁸⁴ Article 53 of the TBA proscribed guidelines for regulating harmful information.¹⁸⁵ However, Article 53 was declared unconstitutional on June 27, 2002. Article 53-2 authorized the ICEC to determine what constitutes harmful information. The ICEC can demand Internet service providers (ISPs) to stop delivering harmful material.¹⁸⁶ The ICEC is supported by the Ministry of Information and Communication, therefore, ISPs have no choice but to comply. The ICEC is ostensibly a non-government organization, but it acts as a quasi-administrative institution because the ICEC chairperson requires approval by the Minister of Information and Communication.¹⁸⁷ The ICEC also receives financial aid from the government,¹⁸⁸ and can report non-complying ISPs to the Ministry.¹⁸⁹

ICEC obscenity standards are more stringent than those used by courts. Article 15(1) of the Deliberation Standards, the ICEC's guide for identifying unhealthy information, describes obscenity as any content that overly stimulates sexual desire or makes people feel disgusted.¹⁹⁰ Criticized as overbroad and vague, the ICEC established the Specific Deliberation Standards (SDS) containing more detailed standards on obscenity. The SDS is founded

183. Seong Gyu Bae, *Geomchal Seonginbangsong Dansoknaseo* [*Prosecutors Investigating Internet Adult TV*], HANKOOK ILBO, June 18, 2001, at 30.

184. Telecommunications Business Act, Act No. 4903 (1995), 16 ROK STATUTES 1073.

185. This provision declared unconstitutional for vagueness and overbreadth on June 27, 2002.

186. Enforcement Decree of the Telecommunications Business Act, Presidential Decree No. 155579 (1997), art. 16-4(1), 16 ROK STATUTES 1100.

187. *Id.* art. 16-2(1), 16 ROK STATUTES 1099.

188. Telecommunication Business Act, art. 53-2(6), 16 ROK STATUTES 1072.

189. Enforcement Decree of the Telecommunications Business Act, art. 16-4(3), 16 ROK STATUTES 1100.

190. Simee Gyujeoung [Deliberation Standards for Harmful Information], art. 15-1, at <http://www.icec.or.kr/icec/front/discuss/discussrule.jsp> (last visited Nov. 5, 2002).

on the traditional Confucian notion that discourages open discussion of sexual matters. Article 7(1) of the SDS states that obscenity includes direct description of sexual intercourse, fellatio, caressing of genitals, masturbation, as well as exposure of genitalia.¹⁹¹

The ICEC also regulates the textual content. The SDS prohibits description of unethical love affairs, prostitution, sex crimes, and information regarding sex shops. In contrast, the Korean Supreme Court can only address materials that explicitly and specifically describe of sexual behavior.¹⁹² Thus, the ICEC wields power over Internet content via publication of comprehensive obscenity standards.

The Juvenile Protection Committee (JPC) regulates matter that could potentially harm young people.¹⁹³ The JPC regulates the distribution of media materials that could harm minors, while at the same time, it supports beneficial materials.¹⁹⁴ According to the JPA, all media deemed harmful to juveniles by the JPC must contain warnings.¹⁹⁵ Violators may be sentenced to prison terms that include hard labor or fines not more than ten million won.¹⁹⁶ The JPC can also rate media considered harmful to juveniles.¹⁹⁷

2. ISP Self-Regulation

Korean ISPs delete harmful information or refuse to connect customers to certain websites. ISPs such as MegaPass, HanaFOS, and ThruNet, refuse access to popular adult websites.¹⁹⁸ This authority is provided for in agreements between ISPs and customers. Under these agreements ISPs can restrict Internet use whenever users violate telecommunication laws.

Not long ago, ISPs required website operators to prove compliance with the SDS before signing user contracts.¹⁹⁹ These obstacles amounted to prior restraint of online content. Though website managers only had to submit outlines of content and representative samples of their products, the chilling

191. Jeoungbosimee Simee Sechik [Specific Deliberation Standards for Harmful Information], art. 7(1), at <http://www.icec.or.kr/icec/front/discuss/discussdetail.jsp> (last visited Nov. 5, 2002).

192. YEE SUN RYU ET AL., KOREA INFORMATION SOCIETY DEVELOPMENT INSTITUTE, ONLINESANGEE BULGEONJEONJEONGBO GYUJEBANGAN [A STUDY ON THE REGULATION OF HARMFUL ONLINE INFORMATION] 82 (1998).

193. Juvenile Protection Act, art. 8(1).

194. *Id.* art. 28 (1)2.

195. *Id.* art. 14.

196. *Id.* art. 51.

197. *Id.* art. 9.

198. Some groups are organizing a suit against MegaPass, a major ISP, because it prevented access to foreign adult websites. See http://www.ddanzi.com/ddanziilbo/84/84ch_701.asp (last visited Nov. 5, 2002).

199. RYU ET AL., *supra* note 192, at 78.

effect on free speech is inevitable due to the fear of criminal prosecution. The certificate submission system was abolished on October 1, 1998.

The ICEC currently uses a new screening system in order to monitor ISP self-censorship. In 2001, the ICEC reviewed 25,210 cases involving allegedly harmful material. In 21,502 cases, the ICEC ordered ISPs to delete harmful information, attach warnings, suspend services, or terminate user agreements.²⁰⁰

In a paper presented to the OECD Internet Content Self-Regulation Dialogue on March 25, 1998, the Global Internet Liberty Campaign (GILC) criticized “privatized censorship.”²⁰¹ The GILC found that ISPs were censoring customer web content. The GILC maintained such restraint was not voluntary, but “a more sophisticated means” of government supported censorship.²⁰² Korean ISPs engage in the type of censorship condemned by the GILC. The ISPs “take the role of police” and delete “possibly illegal material in advance of legal judgment” without “due process.”²⁰³ Like government sponsored censorship, self-censorship prevents individuals from using the Internet to engage in discourse that could be controversial.

3. Prosecution

The Korean government has enforced its anti-obscenity policy through the police power.²⁰⁴ Police officers arrest violators in hope of deterring others from committing similar crimes. The authorities use their discretion and target more blatant violators in order to educate the public about the boundaries of obscenity laws. Not surprisingly, well-known novelists, such as Kwang Su Ma and Jeong Il Chang, and cartoonists such as Hyun Se Lee, were arrested in the 1990s and used as high profile examples.²⁰⁵ In Professor Ma’s view, the conservatives scapegoated him as a corruptor of public morals because of his irreverent promotion of open sexual expression.²⁰⁶

Police officers treat online pornography in the same way as printed materials. For example, eighteen months after the first Korean Internet adult TV network launched in July 1997, fifty similar versions appeared and over

200. See http://211.253.9.212:8080/icec/front/discuss/discuss_statistics.jsp# (last visited Nov. 5, 2002).

201. Global Internet Liberty Campaign, *Member Statement on Impact of Self-Regulation and Filtering on Human Rights to Freedom of Expression*, at <http://www.gilc.org/speech/ratings/gilc-oecd-398.html> (last visited Nov. 5, 2002).

202. *Id.*

203. *Id.*

204. Kim, *supra* note 42, at 45.

205. KWANG SU MA, JAYUEEE YONGGI [COURAGE TO FREEDOM] 77, 220 (1998).

206. *Id.*

one million people subscribed.²⁰⁷ As competition amongst these stations increased, the sexual content became more explicit. Without an adequate system to screen-out minors, young people could freely access sexually charged programming by pirating legitimate identification numbers.²⁰⁸ In hopes of encouraging more rigorous screening methods, law enforcement indicted six CEOs of five Internet adult TV companies on January in 2001. They were all found guilty.²⁰⁹

4. *The Government's Internet Content Rating System*

The Internet content rating system rates Internet content based on the amount of nudity, sexual behavior, violence, or language. The rating method is purportedly unbiased because it quantitatively identifies sexual material without making value judgments. Ratings are displayed on web pages by website authors or third parties such as Internet blocking software companies and the government. Internet software and web browsers recognize the ratings. The software or web browser displays only content that is in accord with its criteria pre-established screening standards. Therefore, Internet users decide the content they receive. The public has accepted the Internet rating system as an effective tool that protects minors but guarantees free of speech.

In the United States, Internet rating systems like RSAC or Safesurf are based upon the Platform for Internet Content Selection (PICS) that attaches tags to Internet content. It is “an empty vessel” that can accommodate different rating systems.²¹⁰ Industry groups such as the World Wide Web Consortium and the Information Highways Parental Empowerment Group created the PICS due to increased pressure from politicians.²¹¹ In Korea, governmental coercion spurred creation of the Internet rating system.²¹²

207. Jee Bong Lim, *Pyohyune Jayuwa Internet Seonginbangsongeseoe Seongjeokpyohyune Heoyounghangyeroeseoe Eumransung* [Freedom of Speech and Obscenity in Terms of the Permitted Limits of Sexual Expression in the Area of Internet Adult Broadcasts], SIMINGWA BYUNHOSA [CITIZEN & LAWYER], Apr. 1, 2001, at 19.

208. See Min Goo Go & Hee Yeon Yu, “Yuryung Juminzeung Beonho” *Beomzoi Akyoung* [“False Resident Registration Numbers” Are Abused], MUNHWA ILBO, June 6, 2001, at 23.

209. Six CEOs received sentences ranging from eight to twelve month prison sentences, but most were all released on probation. Jeong Eun Lee, *Internet Seonginbangsong Yuzoi, 5gae Bangsongsa Daepyo “Jipyu” Pangyul* [Internet Adult TV Sentenced Guilty, 5 CEOs Put On Probation], DONGA ILBO, Feb. 17, 2001, at 29.

210. American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning?*, at <http://www.aclu.org/issues/cyber/burning.html#1> (last visited Sept. 1, 2001). The ACLU pointed out that only a few third party rating systems—PICS SafeSurf, Net Shepherd, and “the de facto industry standard” RSAC—have dominated the market. *Id.*

211. RASC is now the Internet Content Rating Association (www.icra.org/about/).

212. See Jang-jin Hwang, *Internet Content Rating Scheme under Fire*, KOREA HERALD, Aug. 29, 2000.

Professor Lessig has argued that “state sponsored or induced PICS” forces artists to label their own speech, ultimately raising “its own free speech concerns.”²¹³ According to a draft proposal for a state-sponsored rating system, the government would authorize the ICEC to write Internet rating standards.²¹⁴ The draft requires labeling of material harmful to minors.²¹⁵ The draft also requires schools, libraries, Internet cafes, and other places frequented by minors to install content filters.²¹⁶

Many Koreans protested the proposed rating system and accused the government of censorship.²¹⁷ Still, the ICEC blacklisted 119,000 websites distributing this list to filtering companies.²¹⁸ The government compiled the blacklist based on a crude search engine that merely searched for supposedly suspect keywords. As a result, many websites that could actually educate minors were blacklisted solely because the search engine found the words “lesbian” or “gay”²¹⁹ on a web page. The ICEC refuses to reveal the names of blacklisted sites.

After recognizing the public outcry, the Korean government retreated. On September 23, 2000, the government revised the proposal.²²⁰ With regards to rating system, the government could only recommend that website operators rate their own material according to ICEC standards. However, the change failed to abate criticism. Free speech advocates argued that the government still promoted Internet censorship. Again, the government changed its

213. Lessig, *supra* note 121, at 668. Professor Lessig stated that “the constitutional problem with a state-sponsored or induced PICS regime” lies in “narrow tailoring.” *Id.* In his view, PICS may regulate “speech quite generally.” *Id.* at 665.

214. Proposed Revision Draft of Law for Enhancing Communications Network Usage, art. 30.

215. *Id.* art. 31.

216. *Id.* art. 34.

217. Seong Ho Park, *Internet Naeyoung Deunggeupjewa Pyohyuneee Jayu* [*Internet Content Rating System and Free Speech*], MINJUSAHWOIWA BYUNRON, Jan./Feb. 2001, at 30.

218. Gi Seob Shin, *Haewisite 12mangae Bulgeonjeon Bunrue* [*12,000 Foreign Sites Classified as Harmful*], HANKYOREH, May 2, 2001, at 8.

219. See Association for Progressive Communications, *Censorship of Gay Sites Continues on South Korean Internet*, at http://www.apc.org/english/news/fulltext.shtml?sh_itm=c81c96a8a8a48493a1f3d01d72b5095b (last visited Aug. 8, 2003). It also reported that many mainstream lesbian and gay websites were among the 120,000 websites that were blocked. Association for Progressive Communication, *Compulsory Filtering by Government Decree is Not the Way Forward*, at <http://www.apc.org/english/rights/alerts/index.htm> (last visited Aug. 8, 2001). For example, the homepage of the International Lesbian and Gay Association, “a world-wide federation of national and local groups dedicated to achieving equal rights for lesbian, gay men, bisexuals and transgendered people,” is on the blacklist. Rok Sam Park, *NGO/Jaegalmulin Internet Banbal Hwaksan* [*NGO’s Increasing Protest against an Gagged Internet*], DAEHAN MAEIL, July 2, 2001, at 21.

220. The Korean government changed the name of the Act from “the Act on Promotion of Information an Communications Network Usage” to “the Act on Promotion of Information and Communication Network Utilization and Information Protection, etc.” The new name shows that Korean government wanted to avert criticism by focusing on protecting private information.

proposal deliberated in the National Assembly. The revised law, announced on January 16, 2001, does not mention an Internet rating system.

However, one provision in the revised law can be a de facto rating system. Article 42 of the JPA states that website managers highlight information that could harm minors. Thus, the Korean government successfully introduced the rating system when it amended the JPA's enforcement ordinance. Article 21(2) of the enforcement ordinance states that information providers prescribed under the JPA should attach tags on any published content inappropriate for persons under nineteen. The Notification of the Ministry of Information and Communication specifically refers to an Internet rating system.²²¹

The Korean government has tenaciously promoted the Internet rating because it believes the rating system is the most effective method of blocking adult content. If ratings and filtering remain voluntary, they may be the best alternatives available in Korea. Cyber cafes face fines of 50,000,000 won²²² for failure to install filtering software.²²³ The Korean government is thus using coercive methods to require mandatory filtering systems.

V. CONCLUSION

The Korean government is intent on blocking all Internet access to pornography. The government feels it has a paternalistic duty to rid the nation of obscene material. However, the growth of the Internet guarantees that governmental efforts to block sexual expression will be futile. Since the Internet enables adult content to circulate throughout the world, national standards of morality will give way to international standards. Governments cannot effectively enforce obscenity laws within its borders. Detection costs are too high and only inordinately severe punishment can guarantee effective deterrence.

The global nature of the Internet has muddied domestic standards of public morality. Before the Internet, protecting communities from sexually explicit materials consisted of closing down adult bookstores and theaters that were in plain view of unintended viewers. In the Internet age, only the consumer can see sexually explicit material on personal terminals. Interested parties view sexually explicit material within the privacy of home, without

221. See Notification 2001-89 of the Ministry of Information and Communication published on Oct. 12, 2001, at http://www.mic.go.kr/jsp/mic_d/d100-0002-1-1.jsp (visited Nov. 5, 2002).

222. Sound Records, Video Products and Game Software Act, Act No. 6186 (2001), art. 53(1)-3, 7 ROK STATUTES 919-9.

223. *Id.* art. 32, 7 ROK STATUTES 916-18.

fear of public intrusion.

In the end, paternalism will collapse. The government cannot sufficiently police the Internet. Today, citizens are more reluctant to defer to the government. Now, people question the motives of their government. It is time for the Korean government to reconsider its obscenity laws.