THE HONG KONG 2019 PROTEST MOVEMENT: A DATA ANALYSIS OF ARRESTS AND PROSECUTIONS

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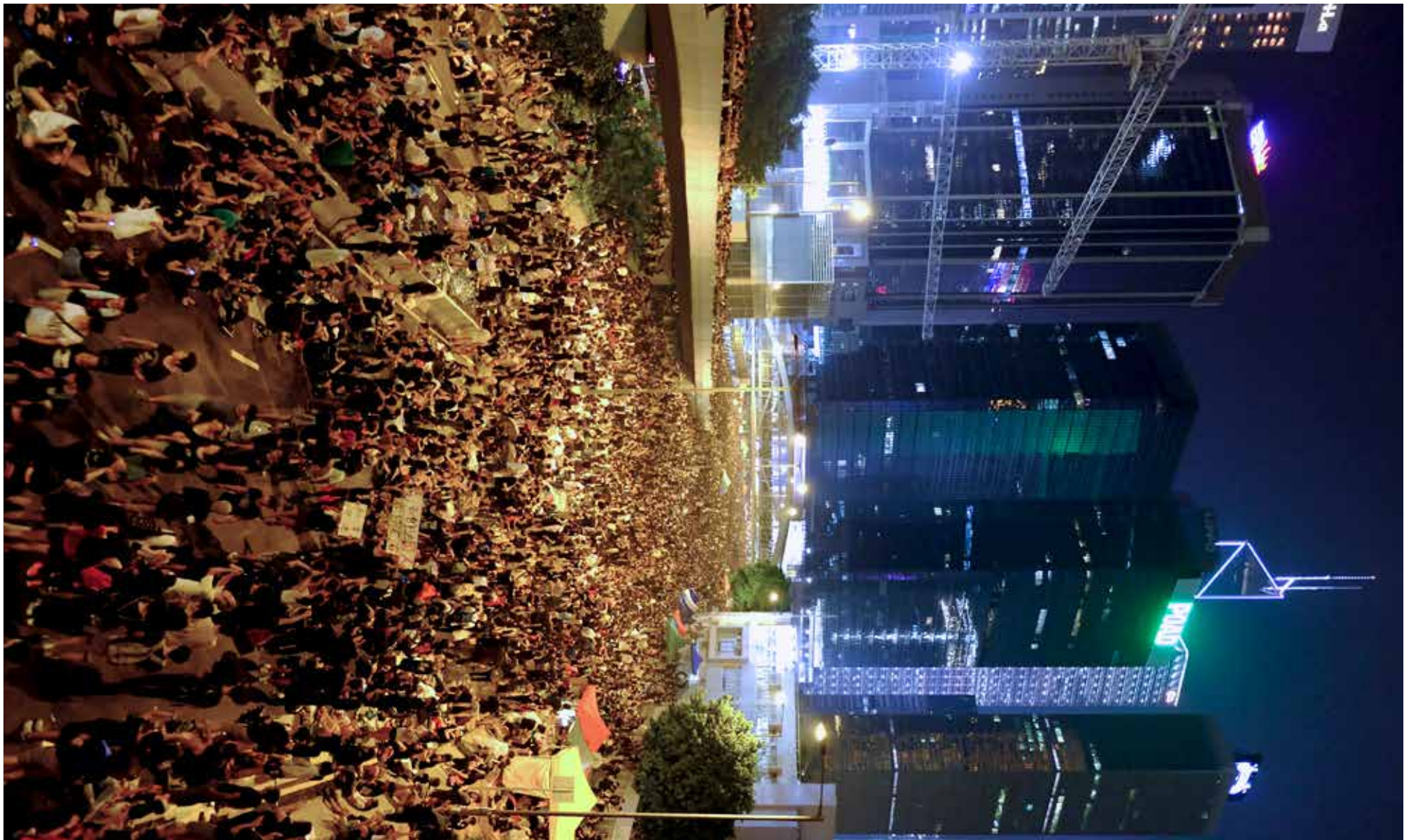
I. INTRODUCTION



On August 6, 2019, two months into mass protests in Hong Kong against a proposed extradition bill and police violence, the Chinese Government's Hong Kong and Macau Affairs Office announced a press conference with its spokesmen, Yang Guang and Xu Luying. To that point, the government had made little effort to compromise on the bill or to hold police accountable for alleged abuses. So, few had any expectation that Beijing would announce a surprise turnaround.

Yet in hindsight, what the spokesmen said that day was prophetic: "It's only a matter of time" before "punishment" for the protesters, Yang said, and "any attempt to play with fire will only backfire" Xu then blamed Hong Kong's education system and Western influence for the protests. "It's important for young people to realize the importance of loving their country and Hong Kong," he declared.

Sure enough, in the years that have followed, the Hong Kong government, with Beijing's support, has charged thousands of people, most in their teens and 20s, with crimes related to the protests, many of them nonviolent. In part using the justification that "foreign forces" meddled with the city's young people, the government has sought harsh penalties for these protesters while clamping down on speech and assembly rights in the broader society.

In this report, we analyze the first two years of data (June 2019-July 2021) on arrests, prosecutions, and imprisonments of protesters from the 2019 Anti-Extradition Movement. Our data show an over-arching effort by the government to use the criminal justice system to punish 2019 protesters and deter future protests. To do so, it has, with the support of the judiciary, departed in many ways from past precedents and norms, straining the system of rights, due process, and fairness previously (if always imperfectly) guaranteed to defendants.

Many defendants have been denied bail for months or even years as they await trial. Probation and alternative sentencing have been vastly curtailed as methods to resolve cases. Prosecutors have, in a stark departure from past practice, repeatedly appealed sentences and in almost every case won harsher sentences from appellate courts.

The large number of defendants has strained the system as a whole. Alleged rioters are often tried in groups where the circumstances of individual defendants are given little attention. Many have been convicted and sentenced to years in prison for the actions of their associates, or even for simply being nearby an incident.

A wide range of crimes have been charged, many of which have been rarely used in past decades. Unlawful assembly has been used to charge nearly 200 people, many of whom were demonstrating peacefully. Prosecutors have also stretched the limits of weapons possession laws to charge people for possessing items such as laser pointers and plastic ties. And across the board, the rate of imprisonment and the length of sentences have been severe.

Significant political pressure has been placed on prosecutors, judges, and magistrates to obtain convictions. The Hong Kong government and senior members of the Hong Kong judiciary frequently insist that the judiciary remains independent. Nonetheless, even if judges really have remained independent in a formal sense, they do not live in a vacuum: the political pressure placed on them, particularly by state media and government officials, has likely impacted judicial outcomes.

This harsher approach has extended to the courts' increasing unwillingness to protect defendants' basic constitutional rights. Traditional protections and mitigation given to underage defendants have all but disappeared. The wait time from charges to trial has also increased drastically, with many having to wait years for a resolution. In many cases, defendants have been denied bail and must wait out these long periods in prison, despite not having been convicted of any crime.

The courts have not entirely succumbed to government pressure: approximately one fifth of counts are still acquitted, and occasional positive rulings have come out of the Court of Final Appeal in the rare event that a case reaches that level and the court decides to hear it. Yet, the trends are cause for concern, and the sheer number of irregularities and departures from past practice are alarming.

II. EXECUTIVE SUMMARY

As of August 2022, according to government figures, more than 10,000 Hong Kongers associated with the 2019 anti-extradition protest movement have been arrested, nearly 3,000 prosecuted, and more than 1,300 incarcerated, with the number rising every week. This report closely examines all cases where judicial proceedings concluded in roughly the first two years of protest-related prosecutions—1,592 counts altogether—to assess key trends. The data set of concluded cases used for this report ends on July 31, 2021. The Georgetown Center for Asian Law (GCAL) hopes to supplement these findings with further research into the ongoing prosecution effort.

Our key findings include the following:

SECTION V: MORE CHARGES, MORE CONVICTIONS, LONGER SENTENCES

- Compared with the 2014 Umbrella Movement, judges and magistrates are sentencing defendants arrested for participation in the Anti-Extradition Movement much more harshly. 81% of counts of conviction received custodial sentences, compared to only 31.6% in the Umbrella Movement. Higher incarceration rates were seen across different criminal charges, including unlawful assembly, police obstruction, and police assault.
- An unknown number of individuals have been imprisoned merely for their peaceful participation in pro-democracy protests that were themselves largely peaceful. As our legal analysis makes clear, Hong Kong's colonial-era Public Order Ordinance defines the crime of unlawful assembly quite broadly, which allows the government to charge individuals with this crime even if they have not engaged acts of vandalism or violence. There are a total of 195 counts charged with unlawful assem-bly, making it the most charged offense in our dataset.
- Our data also indicates an apparent problem with the credibility of police witnesses. In counts of acquittal or that were withdrawn after being commenced, where reasons were given for the withdrawal or acquittal (202 counts total), a significant proportion—40.6 percent—cited problematic evidence from the police, as opposed to the more typical rationale of insufficient evidence, which was cited in 51 percent of counts. This data suggests that Hong Kong may have a problem with false testimony by police officers in some cases.

SECTION VI: IS THE GOVERNMENT WEAPONIZING COURT PROCEDURE AGAINST PROTESTERS?

- Even as the police and DOJ have launched thousands of protest prosecutions, the court system has failed to adjust its capacity to handle

the deluge. As a result, defendants must wait an exceptionally long time to reach trial. We found that 41.8% of protest cases take more than a year to complete, with an average wait time of 343 days, but this number almost certainly underestimates the true situation as it only includes counts that have completed; those with the longest wait times have now been waiting for well over two years.

- The DOJ has taken an aggressive approach to bail, reportedly requesting that bail be denied to political defendants even in many minor and non-violent cases. This stance has further compounded the problems posed by the long wait times for trial: in many cases, individuals have been detained for several months or even more than a year in pre-trial detention. It is difficult to compile statistics on this phenomenon, as media are prohibited from reporting all but the barest facts about bail proceedings in most cases. But it's clear that scores of individuals have been affected: figures disclosed by the Correctional Services Department in 2020 reported that 422 people had entered jail or prison due to their involvement in the protests, with 57.1% of those (241 people) being individuals remanded prior to trial.
- Our review also noted a significantly more aggressive approach to appeals by the Department of Justice (DOJ), with an unusually high success rate. Through July 2021, the DOJ had filed 20 appeals for review of sentencing in protest cases, compared to only six in 2018, and won every single appeal. In contrast, protest defendants were far less successful: of the protester appeals that reached a final appellate ruling, protesters only enjoyed a 17.1% (n=7) success rate, while appeals were rejected in 25 other cases (61%); others were either withdrawn (n=8, 19.5%) or referred to the court of appeal (n=1, 2.44%). This data raises questions as to whether the appellate courts are properly exercising their power of review, particularly given the significant trend upwards in custodial sentences noted above.

SECTION VII:CLOSER LOOK: KEY LEGAL QUESTIONS

Juveniles

- The data we have collected also shows how disproportionately the crackdown has affected Hong Kong's youth. The median age of defendants is 23, with more than 130 under 18. While juvenile cases are not publicly reported, we have collected data on these court cases from various sources and estimate a 54.2% conviction rate for juvenile cases that reached a final verdict. Of the 148 counts involving juvenile convictions for which we have complete data, more than 66% of those convicted (98 counts) received custodial sentences. This is an extraordinarily high rate of incarceration for children. (Throughout this report,

rehabilitation center, detention center, imprisonment, protection order, drug addiction treatment center, and reformatory school are all considered custodial sentences; probation order, fines, and community service are considered non-custodial sentences.)
Under treaties to which Hong Kong is a signatory, young people are only to be arrested, detained, or imprisoned as a last resort. Our data suggest strongly that Hong Kong is not in compliance with its treaty obligations in this respect.

Possession of Weapons

- We also assessed the use of weapons and unlawful item possession charges to prosecute protest defendants. The most common item alleged to have been possessed by protesters was laser pointers,which was used to prosecute a full 1 in 5 possession counts, followed by spray paint at nearly 1 in 10. It is, of course, a stretch to call laser pointers an "offensive weapon," but the courts have repeatedly accepted the prosecution's arguments on this point: almost half of those charged solely with possessing a laser pointer have been convicted, with 62.1% of those convicted then sentenced to imprisonment.

Rioting

- We took a close look at cases in which defendants were charged with rioting—among the most serious of the various charges brought against protest defendants, with a potential maximum sentence of ten years. Troublingly, the courts have defined rioting as a "collective" crime, which has meant that an unknown number of defendants were convicted of rioting based on the actions of others, rather than their own individual behavior.
- Our analysis of rioting cases suggests that the DOJ has engaged in extensive forum shopping: it has brought every single rioting case in District Court rather than the High Court, where there is no right to a trial by jury. We believe that this unbroken pattern represents a deliberate effort by the DOJ to avoid allowing defendants to exercise their right to a jury trial.
- Sentencing decisions in rioting cases rarely take into account the young age of many defendants, instead focusing on the need for harsh sentencing, even for minors and young adults. At the same time, in several cases, health conditions, including mental health conditions, were not given sufficient weight in sentencing. This appears to be

the result of a 2018 Court of Appeal ruling, in which the panel stated that those with mental health conditions "must equally be deterred from voluntarily involving themselves in mob violence."

- Our qualitative analysis of rioting decisions makes clear that deterrence has become an overarching rationale guiding sentencing decisions. In decision after decision, the same phrases are used, at times referring to the protests as a whole—most of which were peaceful—as "riots." Over and over again, judges refer to the need to punish and sufficiently deter any who would seek to undertake such "riots" again.

"Anti-Mask" Law

- A final area where we examined cases is prosecutions under the so-called "anti-mask law"—a law passed in October 2019 that prohibited wearing masks in public assemblies. A later court verdict narrowed the provision to prohibit the wearing of masks at "unauthorized" gatherings—meaning gatherings to which the police had not given explicit approval. According to our data, 60.5% of those charged with violating the anti-mask law were convicted. Despite the seemingly minor nature of the criminal charge, 81.8%. (n=18) of those convicted of violating the mask ban (in most cases in addition to other crimes) were sentenced to prison, with an additional 13.6% (n=3) sent to rehabilitation centers.

Overall, our findings suggest that the DOJ has sought to weaponize the criminal justice system, to punish those who took part in the 2019 pro-democracy movement, including peaceful protesters. In all too many cases, these efforts have not been successfully checked by the courts.

III. BACKGROUND

For many across the world unfamiliar with Hong Kong, in 2019 it may have felt like the mass protests that swept the city erupted out of nowhere. But Hong Kong has a long history of street demonstrations, with widescale anti-British protests in the 1960s and a pro-democracy movement forming as early as the late 1980s. In some ways, Hong Kong's protest culture was unique in the world, just as its political system has also been relatively unique. Whether under British or Chinese rule, the Hong Kong people have long been denied the right to self-determination or much in the way of democratic political participation, yet at the same time were afforded relatively broad civil liberties. Both before and after London handed the city to Beijing in 1997 (known as the "Handover"), Hong Kongers could freely protest against government policies and actions that they didn't like, but they had limited power to affect change at the ballot box.

Left with few avenues to affect policy from the inside, Hong Kongers have long turned to mass demonstrations to express their wishes and oppose government decisions—at times with great success. Thus, when in 2019 the government introduced an unpopular law, it was quite natural to Hong Kongers to take to the streets.

1. EARLY DEVELOPMENT OF HONG KONG'S PRO-DEMOCRACY PROTEST CULTURE

There have been two large-scale, sustained social movements in post-Handover Hong Kong: the 2014 Umbrella Movement and the 2019 Anti-Extradition Movement. The 2019 movement is the primary focus of this report. But Hong Kong people have been taking to the streets well before 2014, and even before the "Handover."

On May 21, 1989, as many as 1.2 million people protested in Hong Kong in support of pro-democracy protesters in and around Beijing's Tiananmen Square and other cities across China.[1] After that May 21 protest, subsequent Hong Kong protests were organized by the newly-formed Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("Hong Kong Alliance"), which was formed for the purpose of expressing Hong Kong's support for China's democracy movement. After the Chinese military violently quashed the protests in Beijing on June 3-4, 1989, the Hong Kong Alliance again organized hundreds of thousands to protest on June 5.[2] Every year after that for three decades, the Hong Kong Alliance would organize masses of people to join a candlelight vigil in Victoria Park on the anniversary of the crackdown, June 4. Perhaps more than anything else, this annual prac-

1. Andy Ho, Chris Yeung and John Tang, "Huge HK Rally Backs Students: Up to 600,000 Call on Li Peng to Quit," *South China Morning Post*, May 22 1989. The 1.2 million figure appears to h ve been settled on later. See, e.g. Jimmy Cheung and Claudia Lee, "500,000 Take to Hong Kong's Streets in Protest Against Proposed National Security Legislation," *South China Morning Post*, July 2, 2003.
2. "1,400 Feared Dead, 10,000 Hurt: Troops Fire Wildly at Crowds Outside Top Beijing Hotel," *South China Morning Post*, June 5, 1989.

tice—and the civil society groups that have sprung up around that event—are responsible for the robust protest culture that has emerged in Hong Kong in recent years.

After the 1997 Handover, there were a few years of relative quiet, though protest culture and the democracy movement remained a force in local politics. But in 2003, the government put forth a plan to impose a sweeping national security law on the territory, acting under to Article 23 of the Hong Kong Basic Law. In response, a relatively new coalition of civil society groups known as the Civil Human Rights Front, or CHRF, organized a pro-democracy rally attended by an estimated 500,000 people on July 1, 2003—the sixth anniversary of the Handover.[3] The national security law was soon withdrawn, but a new protest tradition had begun. Every year on July 1, tens of thousands would march peacefully for democracy in protests organized by CHRF.[4]

In between these large-scale annual protests, there was no shortage of smaller protest movements in defense of Hong Kong's distinct identity. Prominent examples included protest movements to save the historic Queen's Pier on Hong Kong's iconic Victoria Harbor from being dismantled for land reclamation,[5] and to save a distinctive rural village from being bulldozed for the Hong Kong-Mainland China High Speed rail link.[6] Those two protest movements failed, but other efforts did succeed in influencing government policy.

The increasing focus on Hong Konger identity, and the Hong Kong government's failure to address the growing trend toward a politically-engaged localist identity among some Hong Kongers, set the scene for the next milestone in the evolution of Hong Kong's protest culture in 2012. In July, a coalition of groups including Civil Human Rights Front, Hong Kong Alliance, Professional Teachers Union, and—in a sign that a new generation of protesters was rising—Scholarism, a group of secondary students led by a then-unknown sixteen-year-old activist, Joshua Wong, organized opposition to a new "patriotic education" plan put forth by the Hong Kong government. Under the proposed curriculum, schoolchildren would be required to take classes based on a pro-China and pro-Communist Party education curriculum that some critics saw as little better than official propaganda [7] In August 2012, Wong and Scholarism began a hunger strike outside government headquarters.[8] The sit-in went on for over a month, and in early September a series of protests were organized by an alliance of civil society groups formed by Scholarism, Civil Human Rights Front, Hong Kong Alliance, and others. Up to 120,000 attended the largest protest on September 7. On September 8, the government withdrew the national education plan.[9]

3. Jimmy Cheung and Claudia Lee, "500,000 Take to Hong Kong's Streets in Protest Against Proposed National Security Legislation," *South China Morning Post*, July 2, 2003.
4. The Rise and Fall of Hong Kong's July 1 Protests, *Associated Press*, June 28, 2021.
5. Vaudine England, "Placid Hong Kong rallies to save a historic pier," *New York Times*, July 30, 2007.
6. Tom Mitchell and Andy Ho, "Hong Kong anti-rail protest gathers steam," *Financial Times*, Jan. 15, 2010.
7. Alexis Lai, "'National education' raises furor in Hong Kong," *CNN*, July 30, 2012.
8. Joyce Lau, "Thousands Rally Against Hong Kong Curriculum," *New York Times*, Sept. 3, 2012.
9. "Hong Kong backs down over Chinese patriotism classes," *BBC*, Sept. 8, 2012.

Thus, coming into 2014, the pro-democracy movement had experienced occasional successes in preventing implementation of hated laws and policies. Street protests had become the preferred means of attempting to achieve political goals, in part because many of the other tools of political participation — government and legislative lobbying, for example, as well as elections for the LegCo and the Chief Executive — were either of limited effectiveness or off the table altogether.

2. THE 2014 UMBRELLA MOVEMENT

On August 31, 2014, after years of calls for Beijing to honor its pre-Handover assurances that it would strive for direct election of the Hong Kong Chief Executive, the Standing Committee of the National People's Congress announced its long-awaited plan for electoral reform. It was a disappointment to many: the Chief Executive was to be directly elected, but the only candidates allowed would be two or three people selected by a Beijing-controlled "nominating committee."[10] Thus, voters would have virtually no chance of being able to select a leader not pre-approved by the Communist Party of China.

Less than a month later, on September 26, youth groups led by the Hong Kong Federation of Students and Scholarism began an ongoing sit-in outside the Central Government Complex, and scuffles broke out with police.[11] In a sign of the generational divide over protest tactics, civil society groups with older membership did not immediately join the protest. However, on September 28, after Joshua Wong and others had been arrested, Hong Kong University law professor Benny Tai, who had planned to begin an "occupation" of the Central business district on October 1, moved up his plan and announced that the occupation would begin immediately.[12]

Protesters showed up by the thousands, blocking roads and bridges around the Central Government Complex. In the evening, riot police arrived and began shooting tear gas at the peaceful protesters, ultimately firing 87 rounds. As word spread throughout the city and outrage grew, thousands more joined the occupation overnight. The protest spread to other parts of the city, occupying areas in Mongkok, Causeway Bay, and Wanchai.[13]

The occupation continued through the first half of October. On October 13, hundreds of people arrived wearing masks and began attacking protesters and the barricades.[14] Protesters alleged that the attackers came from triads and other criminal gangs colluding with Mainland officials—a not-uncommon practice in the

10. Richard C. Bush, "China's Decision on Universal Suffrage in Hong Kong," *Brookings*, Sept. 2, 2014.
11. James Pomfret and Yimou Lee, "Hong Kong students storm government HQ in challenge to Beijing," *Reuters*, Sept. 26, 2014.
12. "Hong Kong police fire tear gas as thousands join Occu y Central," *South China Morning Post*, Sept. 28, 2014.
13. Ibid.
14. Jonathan Kaiman, "Hong Kong pro-democracy activists reinforce barricades at protest site," *The Guardian*, Oct. 13, 2014.

CCP's history in Hong Kong, and one that has also been used by local governments on the Mainland to crack down on would-be protesters.[15]

On October 17, news channel TVB broadcast video of pro-democracy politician Ken Tsang being carried off and beaten by seven police officers. In the ensuing outrage, they were removed from duty, prosecuted, and convicted in 2017.[16] But in a sign that many in the police and their allies had a very different concept of law and order than the general public, after the police attackers were jailed, 33,000 police officers and their allies held a rally in support of their colleagues—despite the assault being caught on camera and indisputably an abuse of power.[17]

Throughout that October, police would clear areas with a light protester presence, only to have protesters return and retake the area after the police had left. This back-and-forth led to sporadic scuffles, injuries, and arrests.[18]

On October 21, roughly a month after the Occupy Central protests had begun, protest leaders, including Alex Chow, Lester Shum, Nathan Law, Eason Chung, and Yvonne Leung, finally met with then-Chief Secretary Carrie Lam and other senior officials to make the case for revisions to the proposed election reform scheme. Lam and her colleagues held their ground, declaring outright that nomination by the public—a minimum threshold to meet international standards on democracy—was out of the question.[19]

Although many in Hong Kong supported the goal of pro-democratic reform, public support for the Occupy Central protests was mixed. Soon after the protests began, taxi and truck drivers obtained and sought to enforce court injunctions granted to remove barricades and clear the streets in Mongkok. Fights broke out between the protesters and anti-protest groups.[20] Court injunctions were extended on November 10, and on the following day, Chief Secretary Lam announced that there would be no further discussions with protesters and that barricades would be removed.[21] As the protests extended into their third month, public support waned further and fewer protesters remained at the occupy sites. Armed with multiple court injunctions, police began clearing barriers.[22] Scuffles continued for the following two weeks, as protesters ebbed and flowed from protest sites.[23] But ultimately, police managed to clear the protest sites. On

15. Louisa Lim, "The Thugs of Mainland China," *The New Yorker*, Oct. 8, 2014.
16. Alan Wong, "7 Hong Kong Police Officers Co victed of Assaulting Protester in 2014," *New York Times*, Feb. 14, 2017.
17. Niall Fraser and Danny Mok, "33,000 gather in support of Hong Kong officers jailed or beating up Occupy protester Ken Tsang," *South China Morning Post*, Feb. 22, 2017.
18. "Hong Kong protests: Timeline of the occupation," *BBC*, Dec. 11, 2014.
19. Ibid.
20. Donny Kwok and Farah Master, "Scuffles break out in HK as anti-protest groups tear down barricades," *Reuters,* Oct. 13, 2014.
21. "Hong Kong protesters face arrest after court rules on evictions," *Associated Press*, Nov. 11, 2014.
22. Chris Buckley and Alan Wong, "Hong Kong Clears an Area of Pro-Democracy Protesters," *New York Times*, Nov. 17, 2014.
23. Chris Buckley and Alan Wong, "Hong Kong Police Remove Protesters' Camp After a Night of Chaotic Clashes," *New York Times*, Nov. 25, 2014.

December 15, the final site in Causeway Bay was cleared with no resistance, and the protests came to a quiet end.[24]

In April 2015, the government reintroduced its plan for a Beijing-controlled nominating committee to select candidates, after which the public would vote on the nominees. In June, the proposal was put to the Legislative Council for a vote. After a day of confusion in the LegCo that included walkouts by many pro-Beijing councilors waiting for one of their own camp's legislators to turn up and vote, the proposal was voted down by the pro-democracy camp.[25]

Thus, after months of protests and years of consultations on the reform, the end result was that elections would be carried out in exactly the same way they had since the Handover—via the selection of a Beijing-controlled committee. The protests had failed.

What's more, the government's response to the Umbrella Movement marked the expanded use of colonial-era laws as a key tool to limit civil liberties, in particular the rights to free association and assembly. These laws would be used aggressively in response to the 2019 protests. In retrospect, the government's successful resurrection of these restrictions in 2014 without significant pushback from the courts set a dangerous precedent—and may have lit a powder keg.

At the same time, it seems clear that the Hong Kong government drew the wrong lessons from the 2014 protests. For years to come, senior government officials seemed to view the pro-democracy camp as a spent force, one that need not be negotiated with or even listened to on key matters of policy. The government notched a series of wins in the years after 2014. Brimming with confidence, it ignored warnings in the run-up to the 2019 protests that it was playing with fire. Had it taken more time to reflect on the evolution of public opinion in the aftermath of the Umbrella Movement protests, it may well have decided against putting forward the extradition bill in the first place. Instead, it pressed ahead, sparking one of the largest and most impressive protest movements seen anywhere in the world in recent years.

3. THE 2016 MONGKOK "FISHBALL REVOLUTION"

And yet, for those paying close attention, the signs of Hong Kong's political evolution were all too easy to see. After the Umbrella Movement, a number of more radical groups appeared, including Hong Kong Indigenous, a "localist" group with a more militant stance than the groups that led Occupy Central. Hong Kong Indigenous saw itself as the voice of Hong Kong's alienated and disaffected youth population, and advocated more drastic steps to prevent further integration with

24. "Police clear final Hong ong protest site at Causeway Bay," *BBC*, Dec. 15, 2014.
25. Michael Forsythe and Alan Wong, "Hong Kong Legislature Rejects Beijing-Backed Election Plan, *New York Times*, June 18, 2015.

Mainland China.[26] The popularity of more radical groups stemmed from a number of factors, including: a strong, distinct "Hong Konger" identity among the younger generation; the failure of the Umbrella Movement to achieve its goals; the police abuses committed during the Umbrella Movement that had gone largely unpunished; growing economic inequality and lack of opportunity, which was seen as very much a function of Hong Kong's undemocratic government structure; the flow of mainland migrants and tourists entering Hong Kong;[27] and the perceived untrustworthiness of the local and Beijing governments.

The "Fishball Revolution" marked a turning point in the growth of pro-localist groups. During the Chinese New Year holiday, hawkers traditionally have sold various seasonal foods on the street in Mongkok and other busy districts of Hong Kong. These vendors were typically unlicensed, but the government had taken a hands-off approach to them in the past.[28] But as the week-long holiday began in February 2016, the government decided to take a more aggressive approach.

On the first day of the holiday, February 8, officers from the Food and Environmental Hygiene Department (FEHD) began patrolling the streets and approaching hawkers. Hong Kong Indigenous put out a call for action online, and hundreds appeared at the scene to shield the hawkers. As the scene became rowdier, police at around midnight ordered protesters to clear the street. Protesters resisted, and violent clashes broke out. Riot police arrived with helmets, shields, batons, and pepper spray. Protesters, in response, threw objects at police. At about 2:00 a.m., a police officer was surrounded by protesters who threw projectiles at him. Another officer on the scene fired two gunshots in the air. This caused the scene to escalate further, as protesters charged the police line and tossed more objects at them. At 4:00 a.m., protesters began lighting fires on the street, and blocked roads into Mongkok. Special Tactical Squad (STS) officers arrived in paramilitary gear, and fights continued through the night. By 9:00 a.m., calm had returned to the streets.[29]

By February 23, 74 people had been arrested. The leader of Hong Kong Indigenous, Edward Leung Tin-kei, and about 40 others were charged with rioting— the first use of the British colonial criminal provision in decades.[30] In a sign of the

26. Duncan Hewitt, "Hong Kong's Clashes Over Mainland Shoppers Show Rising Cultural Tensions With China," *IBT*, Apr. 8, 2015.
27. Beijing has long had a policy of allowing a significant number of migrants into Hong ong, at times up to 150 migrants per day (more than 50,000 per year in a city of 7 million). *See* HKSAR Government, "Entry of One-way Permit Holders" (Last accessed Jan 27, 2023). This policy, and the flow of immigrants that resulted, raised concerns among some local residents that Beijing's ultimate aim was to reduce or eliminate Hong Kong's cultural distinctiveness through in-migration of Mainlanders (a practice Beijing has used in Xinjiang and Tibet). While these concerns were understandable and often expressed in appropriate terms, they also led to at-times disturbing hostility towards and discrimination against Mainland residents and tourists by some Hong Kongers. See, e.g., Fiona Sun, "Insulted, humiliated, shunned: Hong Kong's mainland Chinese immigrants face unending discrimination in struggle to feel at home, survey shows," *South China Morning Post*, October 2, 2021.
28. Bernice Chan, "The tradition of New Year food hawkers, and why Hongkongers are so attached to them," *South China Morning Post*, Feb. 10, 2016.
29. Chris Lau et al., "Shots fired and bri ks thrown: Hong Kong tense after Mong Kok mob violence on first d y of Lunar New Year," *South China Morning Post*, Feb. 9, 2016.
30. Clifford Lo, "Hunt on for 100 Hong Kong rioters who took 'active role' in Mong Kok mayhem," *South China Morning Post*, Feb. 23, 2016.

localist movement's growing public support, Leung, despite being charged with rioting, proceeded to run in the February 28 New Territories East Legislative Council election. He received 15 percent of the vote (66,524 votes), coming in third out of seven.[31] Leung was eventually sentenced to six years in prison for his role in the Mongkok unrest.

The Fishball Revolution was dismissed by many in pro-Beijing circles as a minor incident, one that was — in their view — properly dealt with by the police and the courts. For many Hong Kongers, however, the incident was seen quite differently: as an attack on an important element of a distinctive Hong Kong culture. For those who took part in the Mongkok protest, the police response was seen as excessive and heavy-handed. In the years following the Fishball Revolution, the influence of groups like Hong Kong Indigenous continued to grow, and their ideas — once considered at the margins of Hong Kong's political discourse — became more influential, especially among younger people. The table was set for a confrontation between an increasingly out-of-touch government and a disaffected public.

4. THE 2019 ANTI-EXTRADITION MOVEMENT

In February 2019, the Hong Kong government, now under Chief Executive Carrie Lam, proposed amendments to the Fugitive Offenders Ordinance that would allow extradition of crime suspects to jurisdictions with which Hong Kong had not signed an extradition agreement, including Mainland China. The proposal raised alarm among some in the city, particularly civil society groups focused on human rights and the rule of law. For one, it would allow Hong Kongers to be transferred to jurisdictions where the basic rights enshrined in Hong Kong law, including the fundamental rights to a fair trial and access to an attorney, might not be protected. For another, it raised the prospect that political enemies of the Communist Party could be singled out on trumped up charges and transferred to Mainland China.[32]

At the time, Lam claimed she had been stirred to action by a Taiwanese murder case involving a Hong Kong citizen, and that Beijing had not been involved in her administration's initial drafting of the extradition bill (which would have violated the city's guarantees of autonomy). But later reports suggested that, in fact, the central government had been pressing senior Hong Kong officials for an extradition mechanism for years prior to the bill's announcement in 2019. Beijing had previously used illegal means to abduct Hong Kong residents, including the high-profile abduction of billionaire Xiao Jianhua from Hong Kong's Four Seasons Hotel in January 2017. But it preferred a legal pathway for pursuing its enemies in Hong Kong. As a senior Chinese official told Reuters, "The extradition law would have been a

31. Hong Kong Government, "Legislative Council NT East Geographical Constituency By-election: Election Result," https://www.elections.gov.hk/legco2016by/eng/results.html?1667512357743. Feb. 28, 2016.
32. Christy Leung, "Extradition Bill Not Made to Measure for Mainland China and Won't Be Abandoned, Hong Kong Leader Carrie Lam Says," *South China Morning Post*, Apr. 1, 2019.

boost to Chinese interests… by eliminating the need to resort to kidnappings or other controversial extrajudicial acts in Hong Kong."[33]

Initial public protests against the bill were relatively small, but momentum began to build over the course of the spring. The government generally refused to engage with the bill's critics, including pan-democratic LegCo members who warned the government that public opposition was mounting.

As the bill moved closer to passage, public opposition spread. On June 9, 2019, as many as a million Hong Kongers (in a city of 7.4 million people) took part in a march against the bill. The government, caught off guard by the mushrooming opposition and likely hemmed in by pressure from Beijing, refused to withdraw it.[34]

On June 12, 2019, the Legislative Council planned its second reading of the bill as it pushed forward towards a quick passage. In an echo of the 2014 Occupy sit-ins, tens of thousands of protesters gathered near the LegCo where they successfully stopped councillors from entering and halted the second reading of the bill. But in the afternoon, events descended into chaos. After a small group of protesters attacked police lines, police responded with the use of excessive force on the entire protest area, including on the vast majority who were peacefully demonstrating. They used tear gas, rubber bullets, pepper spray, and batons on protesters in scenes captured on video by local and international media. In one particularly egregious incident, hundreds of protesters were trapped between two police lines in front of the CITIC Tower when police began shooting tear gas into the middle of the crowd, causing a near-stampede.[35] Countless videos appeared showing police attacking peaceful protesters and journalists, including several who were shot in the face with rubber bullets.[36]

Following the familiar pattern of previous protest incidents, the police abuses led to widespread public outrage, feeding calls for larger protests and more civil disobedience. Rather than back down, the government declared the protest had been a riot, denied police had used unjustified force, and claimed—unconvincingly—that police had not worn their ID numbers because there was "no room" on their uniforms.[37]

As public anger grew, Chief Executive Lam announced that the bill would be delayed indefinitely on June 15, but she still refused to withdraw it. The next day,

33. David Lague et al., "How Murder, Kidnappings and Miscalculation set off Hong Kong's revolt," *Reuters*, Dec. 20, 2019.
34. Austin Ramzy, "Hong Kong March: Vast Protest of Extradition Bill Shows Fear of Eroding Freedoms," *New York Times*, June 9, 2019.
35. "Longitude and Latitude: Admiralty 612," *NowTV*, July 1, 2019 (in Chinese).
36. Javier C. Hernandez et al., "Did Hong Kong Police Abuse Protesters? What Videos Show," *New York Times*, June 30, 2019.
37. Phila Siu et al., "Questions over credibility of Hong Kong Police Force as security chief says riot squad uniforms have no room for officer ' identity numbers," *South China Morning Post*, June 20, 2019.

as many as 2 million people participated in another march—this time not just against the bill, but also against police violence.[38]

But with neither side willing to budge, the violence continued to escalate. Protests would form rapidly and in multiple locations, and police would turn to violence earlier and earlier. In turn, protesters would resort to setting up roadblocks and fight for their position on the street with whatever means were at hand. Isolated incidents of extreme violence on both sides were covered widely in the media and fueled further hostilities. Arrests increased drastically, with groups of police officers often appearing quickly, grabbing as many protesters as they could reach, and then retreating. Often, the people grabbed were not using violence, but instead were merely those unfortunate enough to be close to the police when they appeared.

As arrests continued to mount, police and prosecutors began using the Public Order Ordinance and Crimes Ordinance to charge protesters with offenses including unlawful assembly, rioting, assaulting or resisting a police office , and possession of weapons or instruments unfit for an unlawful purpose. Often, these charges stretched the facts beyond reason, with laser pens and plastic ties used as grounds for weapons possession charges, and mere presence at the scene of protests that had turned violent used as grounds for rioting charges.

As summer turned to autumn, the increasingly chaotic protests began to reach a peak. On August 31, police stormed Prince Edward MTR Station and attacked unarmed passengers on platforms and on trains at random. The images were seen across the world.[39] Then, in late November, in what became known as the "Siege of PolyU," the police trapped hundreds of protesters, medics, journalists, and others inside Hong Kong Polytechnic University, refusing to allow them to leave without being arrested. In response, protesters organized days of violent attacks on police front lines to try to break the siege and allow those inside to escape.[40] Dozens if not hundreds of protesters were arrested during the siege, seen by many as the culmination of the violent back and forth that had been escalating for months.

With the arrival of Covid-19 in early 2020, the protests ended. With fear among the public of the virus and general movement fatigue already leading to quieter protests, police banned gatherings of any size and effectively forced an end to the protests.

38. "As it Happened: A Historic Day in Hong Kong Concludes Peacefully as Organisers Claim Almost 2 Million People Came Out in Protest Against the Fugitive Bill," *South China Morning Post*, June 16, 2019.
39. BBC, "Hong Kong protests: The flashpoints in a year of anger," Aug. 31, 2020.
40. Elaine Yu, Russell Goldman, and Ezra Cheung, "In Hong Kong, Daring Escapes From a Violent Siege at a University," *New York Times*, November 18, 2019.

5. DISMANTLING OF CIVIL SOCIETY SINCE 2019

Since the 2019 protests, the Hong Kong government, with the support of Beijing, has acted to dismantle the institutions of civil society that formed over decades. All of the groups discussed in this section—Civil Human Rights Front, Hong Kong Alliance, others—have shut down, with their leaders imprisoned, exiled, or intimidated into silence. Thousands of protesters have been arrested and charged with various crimes, as discussed later in this report. Most independent unions, such as the Hong Kong Professional Teachers' Union and the Hong Kong Confederation of Trade Unions, have also been pressured into closing.[41]

In November 2019, elections were held for district councils. Despite the limited role of these hyper-local councils, the election saw the largest voter turnout in Hong Kong history, and pro-democracy (and pro-protest) candidates won overwhelmingly, taking control of all but one of the 18 district councils.

This was the last free election in Hong Kong, and will likely stand as a high-water mark for democratic participation in Hong Kong elections for years to come. In July 2020, Beijing imposed a national security law. Its provisions and the process by which it was imposed upon Hong Kong violated pre-existing local and national laws.[42] For the Legislative Council election scheduled for September 2020, pro-democracy candidates held an informal primary to choose candidates to rally behind and improve their chances. Then, citing Covid-19, the government announced the unprecedented postponement of the election for a year. Several months later, in January 2021, national security police arrested the entire democratic opposition who had participated in the primary, charging 47 of them with "subversion" under the new National Security Law (NSL) for trying to win the election and vowing to oppose the government's policies.[43] Four months later, in May, Beijing unilaterally imposed an "electoral reform" on Hong Kong that effectively made it impossible for democratic candidates to win or even to run without permission from the government.[44]

Since its passage, the NSL and other security-related laws have been used to arrest a wide range of figures, from virtually the entire political opposition to the authors of children's books about wolf and sheep (seen as an allegory for the police and the Hong Kong people). Newspapers have been shut down and their editors arrested, while a growing number of people have been charged with

41. William Nee, "The crackdown on trade unions in Hong Kong: What response from responsible investors?," *Cambridge Core Blog*, Apr. 19, 2022.
42. Lydia Wong and Thomas E. Kellogg; ie and Hong Kong's National Security Law: A Human Rights & Rule of Law Analysis, Georgetown Center for Asian Law report, February 2021.
43. "Primary election 47 case: more than 139-page case document made public, accusing Benny Tai and 5 others as 'organizers,' Andrew Chiu Ka-yin's individual acts not included in a separate section," *InMedia*, Aug. 18, 2022 (in Chinese).
44. Edmond Ng and Sara Cheng, Pro-Beijing 'patriots' sweep Hong Kong election with record low turnout," *Reuters*, Dec. 20, 2021.

sedition for acts as small as clapping in court.[45] Hong Kong's famed civil society and free-wheeling protest culture have effectively disappeared, and its small and hard-won democratic gains have been erased.

Since the National Security Law went into effect on July 1, 2020, media attention has understandably shifted to focus on the series of high-profile NSL arrests and prosecutions that have taken place over the past two and a half years. Many of Hong Kong's top pro-democracy voices have been jailed under the NSL, including media mogul Jimmy Lai, protest leader Joshua Wong, and pro-democracy politician Claudia Mo. And yet, the vast majority of those arrested in connection with the 2019 protest movement were arrested under various pre-NSL laws that have been on the books for decades. Amazingly, some of these cases are still ongoing, more than three years after the protests came to an end, with some of the charged defendants remanded to pre-trial detention for much of that time. In the sections below, we assess two years of court proceedings stemming from the 2019 protests, and paint what we believe is the most in-depth picture of the government and court system's handling of the protest movement to date.

6. METHODOLOGY AND SCOPE

The main dataset compiled for this report covers the period from June 9, 2019, when the first large-scale anti-extradition protest took place, through July 31, 2021. We only include cases that were concluded (i.e., verdict and/or sentence was handed down) during this period.

The dataset consists of all cases arising out of the anti-extradition protests. Whether a particular case arose from the protests can sometimes be difficult to determine. At times, multiple protests took place in different areas of the city on the same day, or even spanning large swaths of the city with varying levels of intensity, and it was often unclear where or when a protest began and ended. Additionally, members of the public were often charged under the Public Order Ordinance simply for being near a protest site at the wrong time, regardless of whether they actually participated. Further, some arrests and charges in relation to the anti-ELAB movement were made well after the incident, sometimes even months or years later. Finally, there were cases during the relevant period which were not directly related to a particular anti-ELAB protest, but were nonetheless politically motivated.

Given such complexities, we adopt a "legal cause" two-pronged approach common in legal analysis. First, we apply the "but for" test: But for anti-extradition protests, would the arrest have occurred? If the answer is affirmative, we

45. Kanis Leung, "Hong Kongers who clapped in court jailed for sedition charges", *Associated Press*, Oct. 27 2022. For a fuller analysis of NSL arrests that have taken place thus far, see Eric Yan-ho Lai and Thomas Kellogg, "Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong," *Chinafile* April 5, 2022.

then apply the "proximate cause" direct causation test: Were there any independent intervening causes of the arrest that warrant excluding it?

The "but for" test poses little difficulty. It expansively covers all arrests that would not have happened but for the protests, including later National Security Law arrests and other tangentially related arrests, such as for stockpiling weapons. The direct causation test poses more difficulty and requires a degree of subjective assessment as to what constitutes a sufficient intervening cause to warrant exclusion.

Following this approach, we made the decision to exclude all NSL-related cases, as well as other cases particularly separated in distance or time from the protests. For instance, we excluded a case in which a person was arrested because he attempted to make bombs in his own home in early 2020 (later convicted),[46] as this incident involved significant other causal factors beyond the scope of the protests themselves.

We are aware of how polarizing the anti-extradition protests were in Hong Kong; thus, we sought data from across the political spectrum. By doing so, we hope to offer an empirically grounded analysis into how these cases were dealt with throughout the entire criminal justice process. The database used in this study is compiled from three different sources. The first came from a group of journalists in Hong Kong. The second is from a group of law students on the ground who attended and reported on court proceedings. Due to security concerns, their identities are anonymized in this report. The final data source was a website, https://www.803.hk/prosecutions, which is believed to be backed by Hong Kong's former pro-Beijing Chief Executive CY Leung.

We are aware that there are other data sources such as the Citizen News database and a Telegram channel dedicated to documenting and broadcasting news about anti-ELAB court cases. However, they were not included in this study because neither a reference number nor full name of the defendants was attached to each case, making it virtually impossible for us to cross-check and omit duplicates. Additionally, the U.S.-based Hong Kong Democracy Council has compiled its own dataset and report on political prisoners, but their dataset is both broader and narrower than ours: broader in that it includes National Security Law cases and others deemed "political" that fall outside the confines of the 2019 protest movement arrests, and narrower in that it focuses only on the subset of people who have been either sentenced to prison or remanded before trial.[47]

For the first two datasets, we obtained the raw data directly from the journalists (n=1,472) and student volunteers (n=1,233) who created them. Information in these two records was largely obtained via physical attendance at court hearings

46. "Wong Wai-yin sentenced to 20 months in prison for manufacturing explosives in a case involving 12 Hong Kongers", *Ming Pao*, May 12, 2022 (in Chinese).
47. Hong Kong Democracy Council, Hong Kong Reaches a Grim Milestone: 1,000 Political Prisoners (March 2022).

and subsequent media reports, making them reasonably reliable. As for the 803.hk dataset (n=1,920), we built an automatic web crawler to scrape all data from the website.

The data structures vary across the three datasets, but in general, they all contain features that are of interest to this study, including demographic information such as sex, age, and defendant's occupation, as well as case information such as charges, case numbers, and (if applicable) verdicts and sentences. We used unique case numbers to exclude duplicates. The final data set is comprised of 1,592 counts of charge and 16 attributes. Note that the primary unit used throughout this report is count of charge, unless otherwise specified. A count refers to a defendant being charged for a particular crime, in a particular case. It is noteworthy that in any case, there can be multiple defendants, and each defendant can be charged with multiple offenses, and end up with different judicial outcomes.

According to the Security Bureau, by the 31 July 2021 cut-off date for the dataset, 10,265 individuals had been arrested, of whom 2,684 had been prosecuted.[48] Of those, 1,527 persons had completed the entire judicial process. This report, on the other hand, covers 1,592 counts of charges involving 988 known defendants and covering at least 811 cases. (We count the number of cases using their uniquely identifiable case number. Note that 109 (6.8%) of the counts in the report do not come with a case number and thus excluded in the total number of cases covered in this report. Thus, it is likely that this number is only a conservative estimate.) If measured against the statistics published by the government, the coverage rate of this study stands at about 64.7%. Our actual coverage rate is almost certainly higher, however. Our count of 988 defendants only includes those where the data shows their full Chinese name. 78 of the cases included in our database did not include any defendant names, so it is possible these cases involve as many as 78 additional defendants. Another 50 cases disclosed only the last names of defendants, most of whom were underaged, and are thus excluded from our total number of known defendants. Thus, our data includes an indeterminable number of additional defendants that likely bring our coverage rate significantly closer to the 1,527 individuals noted by the Security Bureau.

Section V of this report, which compares the anti-extradition protests to other Hong Kong protest movements, additionally relies on a dataset created by Chinese University of Hong Kong Associate Professor Dr. Ma Ngok that records the arrests and convictions stemming from the 2014 Umbrella Movement.[49]

Hong Kong's complex political environment presents certain limitations for our data. For criminal trials in Hong Kong, the reasons for verdict and sentencing in almost all Magistrates' Court and the vast majority of District Court cases are only delivered orally in court by the judge. Written versions (or even transcripts of the

48. "Police detain 10,000 anti-amendment protesters, prosecution rate roughly 25%," *am730*, Sept. 8, 2021 (in Chinese).
49. Ma Ngok, *A Community of Resistance: The 2019 Hong Kong Anti-Extradition Movement*, Left Bank Culture Publishing House, 2020, pp 32 — 41 (in Chinese).

oral delivery of the verdict) are generally not publicly available. This means that at most, anyone who does not attend court in person can only rely on media reports from journalists who were present.

Further, while the DOJ and the police release official statistics upon request from Legislative Council members and journalists, most data published by the government is aggregated and does not provide detail sufficient to conduct an in-depth empirical inquiry. As a result, researchers often have to rely on secondary sources collected by court reporters. Making matters worse, over the course of data collection for this report, many pro-democracy media outlets disbanded due to political pressure. *Apple Daily*, *Stand News* and *Citizen News*, all of which collected extensive anti-ELAB case data, had ceased their operations by January 2022 after police raided Apple Daily and Stand News and arrested many of their editors in June and December 2021, respectively. Furthermore, since the December 2021 Legislative Council election, held after virtually all leading pro-Democracy candidates had been arrested, imprisoned, or forced to flee the city, the LegCo has been made up almost entirely of pro-Beijing politicians, none of whom have requested sensitive DOJ and police data.

Having said that, we have taken steps to ensure the integrity of the data collected in this study. We conducted in-depth interviews with three journalists directly involved in data collection process to inquire about potential gaps in the data. They raised two areas where our data could be incomplete.

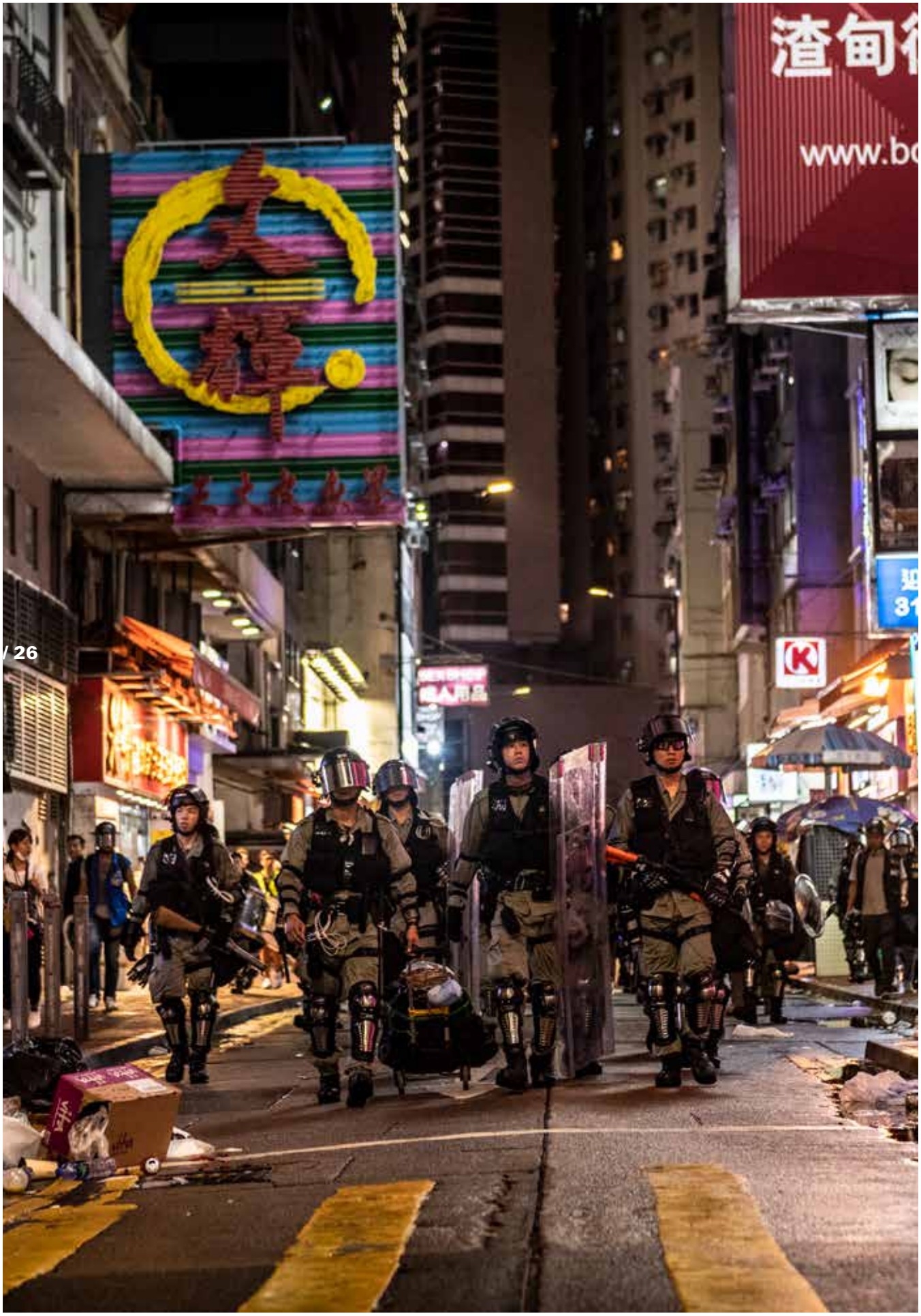
First, two of the datasets used in this report relied heavily on a Telegram channel whose administrators were in contact with either the defendants or their families. Court reporters learned about hearings to attend from the channel. What they heard in court would then be recorded in the database. The journalists we interviewed noted that, at the beginning of the anti-ELAB movement, the Telegram channel was still in its infancy and contacts with defendants and their families were incomplete. Therefore, some cases completed at the earliest stage of the movement may have been missed.

Second, according to the reporters we interviewed, the Telegram channel did not publish the details of cases involving underaged defendants in order to protect their privacy. To address this potential gap, we sourced an additional dataset produced by a Hong Kong-based activist who is in close contact with families of juvenile defendants as well as social workers involved in these cases. This data is particularly valuable to our research as a significant portion of the protesters involved in the anti-extradition movement were underage. Yet, information on young offenders is quite limited. This is due to the fact that Hong Kong rightly has very strict laws in place to protect juvenile defendants. In most circumstances, the press is not allowed to disclose details of the case, and access to court hearings is often restricted to family members.

Finally, wherever possible, we cross-checked our data with other sources including official statistics, media reports and, when available, written rulings.

Last but not least, it is worth noting that our dataset relies not on official statistics (which are not publicly available), but on data collected from multiple credible non-governmental sources. Thus, it is inevitable that the data we use here is incomplete. Most variables suffer from some very limited problems of missing data. That said, in some cases, the missing data problem is more significant. Where relevant, we will explain how missing data is handled and taken into account, depending on the context, in the respective sections.

Thus, while likely incomplete in some respects, we are confident of the quality of the data presented in this report, and the conclusions we have sought to draw from it.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IV. THE 2019 PROTEST CRACKDOWN: THE LEGAL FRAMEWORK

As the Section V makes clear, the primary legal tool used by the government to crack down on protesters was the Public Order Ordinance (POO). Some aspects of this colonial-era law simply can't be reconciled with Hong Kong's constitutional rights protections. Sadly, rather than judicially narrowing the law, the courts have moved to impose heavier penalties on those who are convicted of POO crimes, while discounting the weight of these constitutional rights.

The criminalization of peaceful public protest in Hong Kong involves all three branches of government: in the run-up to the 1997 Handover, the pro-Beijing Provisional Legislative Council undid liberal amendments to the POO, ensuring that its key provisions would remain intact. During the 2014 Umbrella Movement protests, the Hong Kong government used the POO's criminal provisions, as well as other laws, to crack down on peaceful protesters. Also starting in 2014, the Hong Kong courts have moved away from their post-1997 practice of giving some weight to Basic Law human rights protections. Instead, they have both increased the criminal penalties for violations of the POO, and have also issued guilty verdicts in a number of high-profile cases brought by the government against top pro-democracy activists and politicians.

This section proceeds in four parts. In the next section, we describe the key provisions of the POO, and outline the ways that its vague and overbroad provisions can be used to criminalize peaceful protest. In Section II, we describe the politicization of key prosecutorial decisions made during the aftermath of the 2014 Umbrella Movement. As this section makes clear, the Department of Justice has pursued a number of legally-questionable cases against leading pro-democracy figures, in ways that are difficult to square with its mandate to maintain political independence and pursue the broader interests of justice for the people of Hong Kong. In Section III, we describe the ways in which the Hong Kong courts have been overburdened by the wave of 2019 protest cases, which has led to extremely long wait times for all criminal defendants, some of whom have waited months or years in pre-trial detention before their cases are heard.

Finally, in section IV, we describe and analyze the evolution of the court system's post-1997 jurisprudence. We find that the courts were initially able — with some key exceptions, to be sure — to maintain their role as the final guarantors of basic Law human rights protections for a full seventeen years after the Handover. After 2014, however, the courts began to move away from their efforts to preserve human rights, at least in more highly-charged and politically sensitive cases involving prominent defendants who are at the heart of Hong Kong's pro-democracy movement. While it is impossible to know exactly what motivated the judiciary's shift away from human rights, nonetheless the increasing political pressure on the courts — often in the form of direct statements from Beijing through pro-Beijing media outlets — likely played an important role.

1. THE PUBLIC ORDER ORDINANCE—RESTRICTING FREE ASSEMBLY

The Public Order Ordinance was passed by the British colonial government in response to the 1967 riots in Hong Kong. In many ways, the law is a product of that era: its vague and overbroad language — partially reined in by future amendments, some of which were undone by the post-1997 SAR government and LegCo — seems almost designed to cover peaceful political activity.[50] Most importantly, its heavy delegation of authority to government officials to approve or deny the right of Hong Kongers to exercise their basic rights to association and assembly also reflects a colonial-era mindset, one in which government officials are presumed to know best, and their authority is generally not limited by constitutional rights protections.[51]

Even at the time of its passage, the law was criticized for being vague and overbroad, and for putting too much discretionary authority in the hands of government officials [52] The British colonial government largely ignored these criticisms. That said, the government did largely refrain from using the law after the 1967 riots: in the 1970s and 1980s, the law fell into more or less complete disuse.

In the run-up to the 1997 reversion of sovereignty, however, the POO was one of several laws that were given a second look by the outgoing British colonial government, and by the pre-Handover Legislative Council. Beijing's bloody crackdown on pro-democracy protesters in 1989 raised fears among many in Hong Kong that the post-Handover government would fail to live up to its human rights promises, and would use laws like the POO to restrict basic rights. The 1991 enactment of the Bill of Rights Ordinance (BORO), which for the first time incorporated the International Covenant on Civil and Political Rights (ICCPR) directly into Hong Kong law, further facilitated the wide-ranging review and revision of Hong Kong laws, including the POO.[53]

In 1995, the Legislative Council amended the POO to bring it more into line with the BORO. The central change was a welcome one: the POO's licensing scheme was replaced with a simple notification requirement. As a result of the amendments, the government no longer had the power to block proposed meetings and processions in most cases. The liberalizing reforms proved too much for Beijing: in February 1997, the National People's Congress Standing Committee (NPCSC) determined that the POO — and also elements of the BORO and the Societies

50. For a broader critique of the British colonial government's response to the 1967 riots, see Ray Yep, "Cultural Revolution in Hong Kong: Emergency Powers, Administration of Justice, and the Turbulent Year of 1967," *Modern Asian Studies*, vol. 46, no. 4 (July 2012), pp. 1007-32.
51. For an excellent summary of the constitutional arrangements of colonial-era Hong Kong, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Second Edition), pp. 14-19.
52. Hong Kong Watch, *Outdated and Draconian: Hong Kong's Public Order Ordinance*, Hong Kong Watch report, 2019, p. 12.
53. For an excellent overview of the enactment of the BORO and its initial implementation, see Johannes Chan and Yash Ghai, eds., *The Hong Kong Bill of Rights: a comparative approach*, Butterworths Asia, Hong Kong, 1993. For an in-depth look at the BORO's initial — and quite successful — pre-1997 implementation by the Hong Kong courts, see Johannes Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence," *International and Comparative Law Quarterly*, vol. 47, iss. 2 (April 1998), pp. 306-33.

Ordinance — violated the Basic Law, and therefore had to be revised by the Provisional Legislative Council.[54] The Provisional LegCo took action to amend the POO even before the July 1, 1997 Handover, passing amendments to the law on June 14.[55] Crucially, it reinstated the Ordinance's permit system, which remains in place to this day, and gave the police commissioner new, wide discretion to ban public assemblies for "national security" reasons.

At its core, the POO is a tool to regulate — and limit — the basic rights of free association and assembly. The core mechanism that the POO uses to do this is a licensing scheme: individuals or groups who seek to hold public meetings, or who want to hold public protests ("public processions," in the language of the POO) must apply to the police for permission to do so. If the Chief of Police believes that a public meeting or procession could threaten national security, public order, or public safety, then he may prohibit the meeting or procession from going forward,[56] or he may allow the proposed event to take place subject to certain restrictions on size, timing, and place.

This licensing regime gives the Hong Kong government, and in particular the Police Commissioner, enormous discretionary power: she or he can decline to authorize protests that are critical of the government, or that call for pro-democratic reforms, merely by suggesting that the proposed protest may threaten national security or public order. In other words, under the POO's statutory regime, Hong Kong citizens can only exercise their constitutional right to free assembly when and if the Hong Kong government permits them to do so.[57]

The POO also creates a number of criminal offenses meant to penalize acts which the government views as threatening to public order, three of which are relevant to this report: unauthorized assembly, unlawful assembly, and rioting.

Unauthorized assembly: under Article 17A of the POO, anyone who participates in a public meeting or procession that is not authorized by the Commissioner of Police can be charged with unauthorized assembly.[58] It is worth noting that there is no requirement that the assembly in question lead to any adverse

54. Amnesty International, *Hong Kong: Basic Rights at Risk: Comments on the HKSAR Consultation Document of April 1997*, April 1997, ASA 19/06/97. The Provisional Legislative Council (PLC) was set up by Beijing in response to democratic reforms to the LegCo enacted by the British colonial government in 1992. Suzanne Pepper, "Hong Kong in 1994: Democracy, Human Rights, and the Post-Colonial Political Order," *Asian Survey*, Jan. 1995, Vol. 35, no. 1, pp. 48-60. PLC met over the Hong Kong border in Shenzhen, and acted in parallel with the democratically-elected LegCo, which continued its work up until the July 1 Handover.
55. Tao-tai Hsia and Wendy Zeldin, "The Hong Kong Special Administrative Region: Potential Threats to the Authority of the Courts and its Autonomy," Law Library, Library of Congress report, August 1997, p. 6.
56. POO, Section 9(1) and 14(1). In full, the relevant language of Section 9(1), on public meetings — which is more or less the same as the language of Section 14(1), covering public processions — states that: "the Commissioner of Police may prohibit the holding of any public meeting… where he reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others."
57. As the Hong Kong Bar Association (HKBA) put it in a commentary on the POO in November 2000, "the question of a restriction on a constitutionally guaranteed right… is probably something that is far too important to be left to a policeman." Instead, the HKBA argued, such restrictions should only be determined by a judge applying clearly defined legislation that is in line with ey constitutional human rights protections. Hong Kong Bar Association, "The Bar's Submissions on the Right of Peaceful Assembly or Procession," November 25, 2000.
58. Public Order Ordinance, Section 17A(3).

consequences in terms of public order. The mere holding of a public meeting or procession without official permission is sufficient to trigger criminal liability. As discussed in more detail below, this provision of the POO was used less often by the Hong Kong government in response to the 2019 protests. Instead, the government chose to rely more heavily on the unlawful assembly provision, which emphasizes the "provocative manner" of the protest itself.

The potential criminal penalties that can be applied to those found guilty of unauthorized assembly can be quite severe: individuals who hold an unauthorized assembly — again, any public gathering or protest that has not been pre-approved by the police — can be sentenced to up to five years in prison. Those who hold authorized protests that go beyond approved limits can also be criminally prose-cuted: they can be fined and sentenced to up to twelve months in prison.

Unlawful assembly: the crime of unlawful assembly is defined under Article 18 of the POO as "3 or more persons, assembled together, conduct(ing) themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace."[59]

Notably, the crime of unlawful assembly is not dependent on the underlying legality of the public meeting or procession itself: an individual can be charged with unlawful assembly even if she or he has taken part in a protest that was approved by the Commissioner of Police. Individuals convicted of unlawful assembly can be sentenced to up to five years in prison. In lesser cases, individuals can be sentenced to a fine and up to three years in prison; in such cases, the individual would be tried in a lower-level court and not be given access to a trial by jury.[60]

One key concern with Section 18 is its vague and overbroad language, which allows it to be used by the government to cover protests that, though peaceful, may well be rambunctious, energetic, or passionate. Given the elasticity of words like "disorderly," "insulting" and "provocative," the government could easily enough stretch the unlawful assembly provision of the POO to target and punish protest acts — and protesters — that it simply doesn't like.

As the below analysis shows, that is indeed what happened when the government began to prosecute individuals involved in the 2019 protest movement: among the cases that we studied for this report, a full 199 individuals were charged with Section 18 crimes, making it the most-charged offense in our dataset. Those charged with unlawful assembly were subjected to months-long detention as they awaited trial, often merely for their peaceful participation in pro-democracy protests.

Rioting: Rioting is covered by Section 19 of the POO. That provision builds on the POO's definition of unlawful assembly under Section 18: an individual who

59. Public Order Ordinance, Section 18(1).
60. POO, Section 18(3)(b).

engages in an unlawful assembly as defined by S. 18, and who also engages in a breach of the peace, is guilty of rioting. Section 19 of the POO, which covers the offense of rioting, is the POO's heavy artillery: it carries the stiffest penalties, and has emerged as one of the most feared tools in the government's post-2019 tool-kit. Individuals convicted of rioting can be sentenced to up to 10 years in prison. Our dataset includes a full 42 rioting cases that were handled by the courts up to our July 2021 cut-off date.

The growing body of caselaw that has emerged in recent years suggests that the government has taken a particularly expansive view of the crime of rioting, to mean an individual's mere *presence* at an unlawful assembly in which a breach of the peace has occurred.[61] Such a reading of Section 19 means that, in effect, an individual can participate in a legally-sanctioned protest that — in the view of the government at least — devolves into an uncontrolled situation that the government labels a riot, and then be charged with rioting, even if that individual has not engaged in any violent or otherwise criminal activity.[62]

As discussed in more detail below, this extremely broad reading of Section 19 has been used to particularly damaging effect in a significant number of cases by the government in response to the 2019 protests. A trend has emerged in which individuals can be convicted of the very serious crime of rioting, not based on their own behavior, but rather on the government's — and, to be sure, the court's — assessment of the behavior of the assembled group as a whole.

2. PROSECUTION DECISIONS: IN THE INTERESTS OF JUSTICE?

Given the weaknesses of the POO and other laws, the role of the Department of Justice (DOJ) becomes all the more crucial: should it choose to use them, it has the legal tools it needs to prosecute Hong Kongers merely for exercising their basic rights to free assembly, association, and expression. In this context, the DOJ's use of its powers — and in particular the Prosecution Division's use of its prosecutorial discretion — becomes all the more crucial as a means to ensure against the political weaponization of the law. The choices made by the DOJ — whom to prosecute, and for what alleged crimes, and in which court — can quickly become overtly politicized, and can do great damage to the rights of the accused. At the same time, politicization of prosecutorial decisions also does great damage to the DOJ's reputation: the Department of Justice must both make decisions independent of political factors, and *be seen to be making* such decisions independently from the interests of the Hong Kong government and Beijing.

61. *Outdated and Draconian: Hong Kong's Public Order Ordinance*, Hong Kong Watch report, 2019, p. 27.
62. For an in-depth assessment of the broad application of the riot provision of the POO to cover individuals who did not themselves engage in violent acts, see Margaret Ng, Jason Ko, and Kin Lau, "Is Hong Kong's Riot Law 'Respectable'?" 50 Hong Kong L.J. 935 (2020).

Unfortunately, many Hong Kongers view the DOJ as having abandoned its independence in favor of a policy of maximum punishment of those who took part in the 2019 protests. The DOJ also declined to prosecute a single police officer, despite the existence of video evidence that caught some officers on tape engaged in acts of what appeared to be excessive use of force. In many cases, it is unclear whether these alleged illegal acts were even investigated, even as they went without criminal charges.

The trend of political influence ver DOJ decision-making began to emerge even before 2019. Concerns over politicization of DOJ—and over Hong Kong's long-vaunted professional civil service — began as early as 2001, when then-Chief Executive Tung Chee-hwa pushed for reforms that would make most department heads essentially political appointees. Under the so-called "principal officials accountability system," department heads would come not from the ranks of the civil service, but rather would be selected by the Chief Executive, and formally appointed by the State Council in Beijing.[63] The reform was largely seen as an effort to increase the already significant authority of the CE, and to ensure that his policy preferences were robustly implemented by the relevant government departments.

Such a system is not inherently problematic: many political systems, including the United States, embrace political appointments for top executive branch jobs. But in most of those systems, the head of the executive branch — the President in the U.S. context, for example — is directly elected, and thus accountable to the voters themselves, which in turn serves as an indirect check on the actions of department heads. Hong Kong has no such democratic check on the Chief Executive. Instead, the Chief Executive is functionally accountable only to Beijing, which creates an even greater incentive for her to use her expanded appointments power to select department heads in line with Beijing's political and policy priorities.

The seemingly political role of the Secretary for Justice — and the controversial nature of key decisions taken by the DOJ — intensified in the wake of the 2014 Umbrella Movement. Perhaps unsurprisingly, many of these cases involved prosecutions under the POO. In 2017, for example, then-Secretary for Justice Rimsky Yuen appealed the sentences of top Umbrella Movement student leaders Alex Chow, Joshua Wong, and Nathan Law. The three had been convicted in August 2016 of inciting unlawful assembly under the POO during the Umbrella protests, and were sentenced to various non-custodial punishments, including community service and suspended jail sentences. The sentences imposed on the three were in line with both existing sentencing guidelines and established practice. Secretary Yuen's decision to appeal their sentences and seek jail time was seen by many as an effort to put some of the Hong Kong government's staunchest critics behind bars, merely for their efforts to organize a peaceful pro-democratic protest.

63. *Accountability without Democracy? The Principal Officials Accountability System in Hong Kong*, National Democratic Institute and Civic Exchange report, October 16, 2002.

In August 2017, the Court of Appeal revised the sentences for Chow, Wong, and Law, on the basis of its own newly-issued sentencing guidelines for POO crimes.[64] All three were given jail time, in line with the stricter sentencing guidelines put forward in the Court of Appeal's ruling. The heavier sentences also meant that the three were ineligible to run for public office or five years, an outcome that, in the eyes of many, was seen an intended goal of the government's appeal.[65] Both Secretary Yuen's decision to appeal the sentences, and the Court of Appeal's verdict, were widely criticized, both by pro-democracy leaders in Hong Kong and by the international community: in November 2017, for example, a group of U.N. human rights experts issued an open letter to the Hong Kong government expressing concern over the case, and calling on the Hong Kong government to respect the rights of pro-democracy activists.[66]

The Court of Final Appeal (CFA) later reversed the Court of Appeal's decision, which meant that, in the end, Law, Wong, and Chow were not sentenced to prison over their roles in the 2014 protest.[67] Somewhat troublingly, however, the court relied heavily on the principle of non-retroactivity, and not on the defendants' fundamental right to free assembly, in overturning the revised sentences.[68] It also left the new sentencing guidelines — with their stiffer penalties for non-authorized protests–in place, a move that opened the door to heavier punishments for 2019 protesters.[69]

Secretary Yuen's decision to appeal the sentences against Law, Chow, and Wong set a troubling precedent: as discussed in more detail below, once the 2019 protest cases began to work their way through the courts, then-Secretary for Justice Teresa Cheng moved to appeal several sentences for individuals convicted of various protest-related crimes. As with the Law, Chow, and Wong cases, it was hard to discern any significant public interest rationale or the appeals. Instead, it seemed to many observers that DOJ appeals were being driven by the government's political imperative to "get tough" on protesters taking to the streets to demand democratic reforms.

Other cases of apparent manipulation of the criminal justice process also emerged in the aftermath of the Umbrella protests. In March 2017, the Department of Justice brought charges against nine participants in the Umbrella protests, including three of its top leaders: law professor Benny Tai, sociology professor Kin-min Chan, and spiritual leader Chu Yiu-ming. The nine individuals were charged with various public nuisance offenses, including "public nuisance,"

64. CAAR 4/2016, judgment dated 17 August 2017. For an excellent analysis of the case, see Michael C. Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law*, Association for Asian Studies Asia Shorts, 2020, pp. 44-5.
65. Alan Wong, "Joshua Wong and 2 Others Jailed in Hong Kong Over Pro-Democracy Protest," *New York Times*, August 17, 2017.
66. "U.N. experts urge Hong Kong to uphold rights of democracy activists," Reuters, November 6, 2017. See also Lord Alton et al., "A Letter to China: Hong Kong's democrats should be honoured," *The Guardian*, August 18, 2017.
67. "Hong Kong: Student Leaders' Sentences Overturned," Human Rights Watch press release, February 6, 2018.
68. FACC Nos. 8, 9 and 10 of 2017, [2018] HKFCA 4.
69. The CFA's decision to leave the sentencing guidelines in place is discussed in more detail below, in the section on the post-1997 human rights jurisprudence of the Hong Kong courts.

"conspiracy to commit public nuisance," "incitement to commit public nuisance," and — perhaps most worryingly — "incitement to incite public nuisance."[70]

The charges against the 9 activists were part of a wave of cases brought against pro-democracy advocates and protesters in 2017: according to one expert analysis, more than two dozen pro-democratic leaders faced roughly 40 different cases, many of them stemming from the 2014 Umbrella Movement.[71] Overall, the DOJ brought charges against over 250 protesters who took part in the Umbrella protests, many for alleged POO crimes.[72] According to government data, the Hong Kong police arrested over 1,000 individuals who had taken part in the Umbrella protests.[73] Many of those arrestees faced years of legal uncertainty over whether they would be formally prosecuted merely for taking part in pro-democratic protests.

Chan, Tai, and Chu had been arrested in January 2015 under the POO for allegedly taking part in an unauthorized assembly. The DOJ's decision, more than two years later, to bring common law public nuisance charges against them seemed hard to justify from a broader justice perspective. Many experts pointed to the very different criminal penalties attached to the two crimes as a likely explanation for the DOJ's extremely unusual move: as discussed above, prior to the Court of Appeal's 2017 sentencing reforms, those convicted of unauthorized assembly could be sentenced to up to three months in prison and a fine, whereas those convicted of public nuisance could be sentenced to up to seven years in prison and a fine. As a common law crime, public nuisance is more vague and ill-defined than even the POO, and the criminal penalties that attach are similarly more flexible and subject to prosecutorial and judicial manipulation.[74] It seemed clear that the DOJ was attempting to use an antiquated and excessively broad common law crime to punish a group of leading pro-democracy advocates, in clear violation of the government's constitutional obligation to protect the basic right to freedom of assembly.

In a decision that very much foreshadowed many of the verdicts handed down by the courts in the wake of the 2019 protests, the District Court found all nine activists guilty of various public nuisance crimes.[75] The court's verdict was handed down in April 2019, nearly five years after the Umbrella Movement itself ended,

70. Amnesty International, *Umbrella Movement: End Politically-Motivated Prosecutions in Hong Kong*, AI Report, November 2018, ASA 17/9379/2018, p. 7.
71. Kong Tsung-gan, "Overview of prosecutions and lawsuits brought by the Hong Kong government against pro-democracy leaders," April 13, 2018
72. Austin Ramzy, "9 Hong Kong Democracy Advocates Convicted for Role in 2014 Protests," *New York Times*, April 8, 2019. According to that expert, the pseudonymous Kong Tsung-gan, 118 individuals were convicted of various crimes stemming from their participation in the Umbrella movement. *See also* Amnesty International, *Umbrella Movement: End Politically-Motivated Prosecutions in Hong Kong*, AI Report, November 2018, ASA 17/9379/2018, p. 9.
73. Ibid., p. 9.
74. For more on the history of public nuisance as a vague and ill-defined common l w offense, see J.R. Spencer, "Public Nuisance: A Critical Examination," *Cambridge Law Journal*, March 1989, vol. 48, no. 1, pp. 55-84.
75. DCCC 480/2017, April 9, 2019.

and was largely dismissive of the defendants' freedom of assembly claims.[76] Tai, Chan, and Chu were all later sentenced to 16 months in prison; Chu Yiu-ming's sentence was suspended due to health concerns. The Occupy Central Nine — as the group came to be known — appealed their convictions to the Court of Appeal, but those convictions were all upheld in April 2021.[77]

3. THE HONG KONG COURT SYSTEM: OVERBURDENED AND POLITICALLY WEAKENED?

As the above section shows, many of the laws that the courts were called on to interpret and implement in the wake of the 2019 protests were deeply flawed: they were vague and overbroad, and could be manipulated by the authorities. The POO in particular could be used to punish the exercise of basic rights by Hong Kongers. In such cases, it is the job of the courts to apply Basic Law human rights protections to block any such moves by the government. All too often, that didn't happen. There are a number of different reasons for this, including the political pressure that was brought to bear on the courts.

That said, there were also other factors at work that directly influenced the judicial response to the wave of 2019 protest cases analyzed in this report. This section covers one of those key factors: the overburdening of the court system. As many experts predicted, the Hong Kong courts were quite simply unprepared to handle the wave of cases that emerged in mid-2019. The flooding of the court system led to significant delays in the processing of cases. In practice, defendants, some of whom were denied bail and thus had to await trial in extended pre-trial detention, waited months to get into court. Some experts also attributed the thinness — and, in the view of some, sloppiness — of some of the cases that were brought to simple overwork on the part of prosecutors and the police.[78]

Hong Kong's court system: the basic structure

For decades, both before and after the 1997 Handover, Hong Kong's common law judiciary has been held up as the key bulwark of human rights and rule of law in Hong Kong. For several years after 1997, the professionalism and integrity of the judiciary was largely unquestioned, and — with some significant exceptions[79] — Beijing largely respected the independence of the Hong Kong courts. The structure of the judicial system remained largely unchanged after 1997, with one key exception: the formation of the Court of Final Appeal (CFA), which took the place

76. Sharon Hom, "The Occupy Central 9 Cases: Rule of Law or Rule by Law in Hong Kong?," JURIST Academic Commentary, April 30, 2019.
77. Jasmine Siu, "Hong Kong's High Court unanimously rejects appeal against Occupy convictions by Benny Tai, eight others," *South China Morning Post*, April 30, 2021.
78. Pui-shan Cheng, "Is the wave of prosecutions 'administering Hong Kong according to law,' or a judicial crisis?," *The Initium* (in Chinese), December 26, 2019.
79. The so-called right of abode cases, for example, led to Beijing's first- ver interpretation of the Basic Law in response to a Court of Final Appeal ruling. For more on Beijing's authority to interpret the Basic Law, see Thomas E. Kellogg, "Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158," *Hong Kong Journal*, Issue no. 9, January 2008.

of the Judicial Committee of the Privy Council as the final arbiter of key constitutional questions, and which exercises the formal power of final adjudication under the existing court structure.

The structure of the Hong Kong criminal courts will be familiar to many common law lawyers: the Magistrates' Courts, the District Courts, and the Court of First Instance of the High Court generally have jurisdiction over criminal cases. Jurisdiction is decided in part on the basis of the seriousness of the charges involved: the Magistrates' Courts can hear cases potentially involving a maximum of two years in prison and a maximum fine of HKD$ 00,000 (USD$12,740), whereas the District Court can impose a maximum jail sentence of up to seven years. Generally speaking, defendants appearing before a Magistrate's Court judge or a District Court judge do not have the right to trial by jury.

Though the lack of a trial by jury has been standard operating procedure for the lower courts in Hong Kong for several years, nonetheless this element of the system came to be seen by many observers as a key flaw that had a direct negative impact on the judiciary's handling of 2019 protest cases, particularly when the public began to strongly doubt the fairness and independence of lower court judges and magistrates, who serve as factfinders in lieu of a jury. The prosecution indirectly determines which level of the judiciary will hear a specific case, based on the charges it brings, which allows it to evade jury trials in many cases.

For its part, the Court of First Instance (CFI) of the High Court handles cases involving more serious charges, and can sentence defendants who are found guilty to extremely heavy penalties, including life terms. Given the seriousness of the penalties that can be imposed, most criminal cases that are heard in the CFI are heard by a jury.

Criminal appeals are heard by the CFI and the Court of Appeal (CA) of the High Court, as well as by the CFA. Importantly, however, criminal appeals are not heard as a matter of right in Hong Kong. Instead, the appellant courts can grant or refuse a defendant's leave to appeal. Also, if a convicted person decides to seek a final appeal from the CFA or the CA. This procedural mechanism provides a further avenue for, she or he must first secure a certificate from either blocking criminal appeals, and for challenging criminal convictions on human rights grounds. As of this writing, only one criminal appeal related to the 2019 protests has been granted a leave to appeal to be tried at the CFA level.[80]

80. *Secretary for Justice v. Tong Wai Hung*, FACC 7/2021; [2021] HKCFA 37. This case was tried with another case concerning the proper understanding of the structure and elements of the POO crimes of unlawful assembly and riot.

Hong Kong Court System – Basic Structure

NAME	
Court of Final Appeal (CFA)	Hears appeals on civil and criminal matters from the CA and the CFI. Non-permanent judges from other commonwealth jurisdictions are invited to hear cases sometimes. As of now, only one criminal appeal related to the 2019 protests had been granted a leave to appeal and be tried at CFA.
Court of Appeal (CA)	Hears appeals on all civil and criminal matters from the CFI and the District Court. Also hears appeals from various tribunals and statutory bodies. Together with the CFI, they form the High Court. From 2019 onwards, both convicted protestors and the Department of Justice (the prosecution) have been bringing cases for appeal at CA, either asking the Court to review the sentencing or the verdict as a whole.
Court of First Instance (CFI)	For criminal trials, life imprisonment can be imposed, and judges of the CFI sit with a jury of seven or nine on the special direction of the Judge. Also hears appeals from Magistrates' Courts and other issue-specific tribunals. In 2018, some rioting cases related to the 2016 pro-independence protest event were tried at the CFI with a jury. Jury trial can be removed in NSL cases if the Secretary for Justice issues a certificate to request a no-jury trial
District Court	Criminal jurisdiction is limited to seven years' imprisonment. So far, all rioting cases related to the 2019 protests are tried in the District Court.
Magistrates' Courts	The seven Magistrates' Courts (Eastern, Kowloon City, Kwun Tong, West Kowloon, Fanling, Shatin, Tuen Mun) exercise criminal jurisdiction over a wide range of indictable and summary offences meriting up to two years imprisonment and a fine of HKD$100,000. Most of the 2019 protest-related cases are tried at Magistrates' Courts.
The Juvenile Court	Hears charges against children and young persons under the age of 16, except in cases of homicide. 2019 protest cases involving minors were tried in the Juvenile Court, including cases of rioting.

Average Waiting Time (Days), Criminal Cases

	TARGET	2019	2020	2021	2022
MAGISTRATES' COURTS					
SUMMONSES—FROM PLEA TO DATE OF TRIAL	50	67	75	79	101
	Charge cases except for Juvenile Court— from plea to date of trial				
For defendants in custody	30-45	41	45	48	62
For defendants on bail	45-60	51	67	70	82
	Charge cases for Juvenile Court— from plea to date of trial				
From plea to date of trial for defendants in custody	30-45	30	13	56	94
For defendants on bail	45-60	58	60	74	89
DISTRICT COURT					
CRIMINAL FROM FIRST APPEARANCE OF DEFENDANTS IN DISTRICT COURT TO HEARING	100	191	210	287	350
HIGH COURT (COURT OF APPEAL)					
CRIMINAL FROM SETTING DOWN OF A CASE TO HEARING	50	49	55	48	48
HIGH COURT (COURT OF FIRST INSTANCE)					
CRIMINAL FIXTURE LIST— FROM FILING OF INDICTMENT TO HEARING	NIL	167	349	383	323
APPEALS FROM MAGISTRATES' COURTS FROM LODGING OF NOTICE OF APPEAL TO HEARING	90	105	128	168	160

This data was taken from the Hong Kong Judiciary Annual Report, 2022; it is available at on the judiciary's website at www.judiciary.hk.

This basic court structure was put under extreme stress as it started to deal with the hundreds of criminal prosecutions stemming from the 2019 protest movement. Many of Hong Kong's top lawyers foresaw that the unprecedented wave of new cases would challenge the courts as never before, and would likely impact the quality of the judicial process. In a December 2019 media interview, former Legislative Councilor Margaret Ng predicted that the flood of cases would cause "an unpredictable judicial disaster," and called on the Department of Justice to scale down its prosecutions in the broader interests of justice.[81] In a January 2020 speech, then-Bar Chairman Philip Dykes echoed Ms. Ng's concerns, and also called on the DOJ to consider the broader public interest — including the interest of the public in having a functioning judiciary that is not overwhelmed by POO protest cases — in its prosecutorial decisions.[82]

The burden being placed on the courts by the flood of 2019 protest cases is perhaps most vividly illustrated by the court system's own statistics on case processing times. From 2019 to 2021, the waiting time for criminal trials at all levels of the court system have increased dramatically. For the District Court, where all rioting cases have been tried, the average waiting time for all criminal cases has increased by 50% between 2019 and 2021, to a full 287 days. This wait time is almost three times longer than the target average waiting time of 100 days set by the judiciary.

Such long wait times suggest that the court system is flailing under the weight of the massively increased caseload. This in turn suggests that a decision to decline to prosecute a significant number of 2019 protest cases, particularly non-violent protest cases, would have been in the interests of justice, because it would have allowed the court system to return to a more manageable caseload, and would have reduced excessive wait times for all criminal defendants.

No doubt under extreme political pressure, the Department of Justice declined to take up the suggestions of top barristers like Margaret Ng and Philip Dykes to reduce caseloads. As far as is publicly known, no serious consideration was ever given to the calls by many top legal experts to consider a blanket amnesty for non-violent alleged crimes. Instead, the DOJ pursued a maximalist approach, seeking to prosecute hundreds of individuals for their involvement in the 2019 protest movement, despite the fact that the vast majority of them were charged with non-violent crimes. Indeed, at one point, then-Chief Executive Carrie Lam suggested an increase in judicial capacity as the solution to the problem of the clogged court system.[83]

81. Pui-shan Cheng, "Is the wave of prosecutions 'administering Hong Kong according to law,' or a judicial crisis?," *The Initium* (in Chinese), December 26, 2019.
82. Philip J. Dykes SC, "Speech Given at the Opening of the Legal Year by the Chairman of the Hong Kong Bar Association," January 13, 2020.
83. Rhoda Kwan, "Hong Kong Policy Address: New 'Mega Courtroom' to Relieve Shortage," *Hong Kong Free Press*, October 6, 2021.

Beyond the judicial capacity problem, there was also a strong political argument to be made in favor of a decision to decline to prosecute a large number of 2019 protest cases. Given the extreme political tensions that Hong Kong currently faces, such a move by the Hong Kong government would have been at least a small step toward lowering the political temperature. Sadly, given the extreme political pressure that the Hong Kong government is under, it seems any consideration of the merits of such an idea has proved impossible.

4. THE HONG KONG COURT SYSTEM'S HUMAN RIGHTS JURISPRUDENCE: BOWING TO POLITICAL PRESSURE?

After the 1997 Handover, the Hong Kong courts were faced with an urgent question: would they still be able to protect basic rights, or would pressure from the new SAR government and from Beijing make any effort to judicially rein in the POO and other colonial-era laws impossible?

Several key provisions of the Basic Law have helped to protect judicial independence in the post-Handover era. Specifically, Articles 2, 19, and 85 promise Hong Kong a "high degree of autonomy"[84] in executive, legislative, and judicial matters, and grant to the Hong Kong courts "independent judicial power, including that of final adjudication"[85] In deciding cases, the courts are empowered to protect the equality of Hong Kong citizens before the law (Article 25), ensure access to justice and judicial review of administrative actions (Article 35), safeguard basic human rights in line with the ICCPR (Article 39), and guarantee the right to trial by jury in line with pre-1997 standard practice (Article 86). All of these key provisions provide the courts with a wide array of potentially quite powerful tools to rigorously police the power of the government to limit the rights of free association, assembly, and expression.

As this section documents, the courts were in fact able to issue a number of rights-protective rulings for several years after 1997, often drawing on key Basic Law provisions when they did so. At the same time, the courts seemed to also be acutely aware of the need to avoid an overt political confrontation with Beijing, one that could lead to a constitutional crisis. Therefore, the court system's post-1997 jurisprudence shows a desire to protect rights, but within limits that are acceptable to Beijing.[86] The result was a series of cautious, incremental rulings that only went as far as the judiciary's reading of what the broader political system — and especially the central government in Beijing — would bear.

This more cautious approach largely worked from 1997 until 2014: with the exception of the 1999 right of abode controversy, the courts were largely able to avoid a direct conflict with Beijing, while at the same time issuing a number of rulings

84. Basic Law, Article 2.
85. Basic Law, Article 19.
86. For an excellent in-depth analysis of the court system's response to the political threat posed by Beijing, *see* Julius Yam, "Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts," *Law and Social Inquiry*, vol. 46, iss. 1, February 2021, pp. 153-73.

that advanced core human rights protections.[87] But there were also real downsides to this strategy: as Beijing's tolerance for human rights began to decline after Xi Jinping took office in 2012, the courts were less able to strike a nuanced balance between constitutional rights protections and the central government's political imperatives. Particularly as the 2014 Umbrella Movement cases began to work their way through the courts, Hong Kong judges began to strike a more pro-government tone in their decisions, and began to abandon their role as constitutional rights guarantors.

In some ways, the court system's post-2014 evolution set the stage for the judiciary's response to the 2019 protests: both lower-level judges and the CFA itself had already signed off on the government's more assertive use of the POO, and had signaled to the government that the Basic Law's free assembly provision would generally not be used to scale back the government's authority to crack down on peaceful protesters. When the 2019 protests began, the government already had a judicially-approved tool in hand, ready to be deployed against a new, and even larger, protest movement.

Hong Kong caselaw: a slow evolution

One early case that set the tone for the CFA's more modest approach to human rights in the post-1997 era was *HKSAR v. Ng Kung Siu and another*.[88] In that case, which involved the right to free expression and restrictions on flag desecration, then-Court of Final Appeal Chief Justice Andrew Li made clear that freedom of expression is "a fundamental freedom in a democratic society," one that "lies at the heart of civil society and of Hong Kong's system and way of life." The centrality of basic rights like free expression to Hong Kong's civic life meant that the Hong Kong courts "must give a generous interpretation to its constitutional guarantee."[89]

Chief Justice Li also made clear that certain restrictions on the right to free expression can in fact pass constitutional muster on public order grounds. He held that flag burning could in fact be prohibited by the Hong Kong government, and that the criminal punishments levied against the defendants — which included a bind-over and an HKD$2000 fine — could stand.

The case was politically fraught: it involved judicial interpretation of an ordinance meant to implement a national-level law that had been applied to Hong Kong by the central government in Beijing, which meant that any decision to vacate the convictions would touch on Beijing's own legislative powers, however indirectly.[90] At the same time, Beijing had also signaled its views on the case when some

87. The courts were able to impose a constitutional requirement on the police to seek judicial warrants for wiretapping, for example, which suggested that even the actions of the Hong Kong Police could be subject to constitutional review. Thomas E. Kellogg, "Surveillance, Basic Law Article 30, and the Right to Privacy in Hong Kong," Hong Kong Human Rights Monitor Briefing aper, October 2005.
88. FACC No. 4/1999, 15 December 1999.
89. *Ng Kung Siu*, paragraph 41.
90. Danny Gittings, *Introduction to the Hong Kong Basic Law*, Hong Kong University Press (2013), pp. 295-8.

National People's Congress delegates vehemently criticized a lower court decision vacating the convictions.

The CFA's strategic retreat, made with heavy reference to key human rights norms and relevant international human rights jurisprudence, no doubt staved off a showdown with the central government. To be sure, it did so at the cost of protecting political speech. But given that flag burning is a form of political speech whose value is less integral to a free society than other forms of political discourse, and also given that the courts could make reference to other rights-respecting jurisdictions that had come to a similar conclusion, the damage to Hong Kong's constitutional rights framework seemed acceptably minimal.[91]

The CFA took a more rights-protective approach in *Leung Kwok Hung and Others v. HKSAR*. In 2002, Leung, a prominent rights activist known as "Long Hair," led others in an unauthorized protest in Chater Garden in the heart of Hong Kong. Leung and two others were later charged under the POO with holding an unauthorized assembly. They were convicted, and fined HKD$500. Their convictions were upheld on appeal, which set the stage for a constitutional challenge to the POO in the CFA.

In its 2005 ruling, the CFA held that the POO's protest licensing scheme was in fact constitutionally valid, but that the concept of "public order (ordre public)" as statutory grounds for denying permission to hold a public protest was impermissibly vague.[92] It therefore severed that language from the remainder of the statute, and upheld the bulk of the POO's regulatory regime.

In finding the permitting regime to be constitutionally valid, the CFA did note that the Hong Kong government's discretion to approve or deny permission to hold protests is "limited", and also "constrained by the proportionality test."[93] In other words, the Commissioner of Police is *legally required* to make a determination as to whether any conditions imposed on a protest application — including outright denial of such an application — are "no more than necessary."[94] He must provide any such reasons for his decision in writing, and his decisions are appealable to the POO's Appeals Board. Given these constraints on the authority of the Commissioner in regulating the core constitutional right of peaceful assembly, the CFA held that the permitting regime could in fact stand.

The *Leung Kwok Hung* verdict is in many ways a highlight of the CFA's post-1997 rights jurisprudence: it makes robust use of comparative law jurisprudence, with

91. For a more critical assessment, see Raymond Wacks, "Our Flagging Rights, 30 HKLJ 1 (2000). Cited in Gittings, *Introduction*, p. 298. Gittings himself is critical of the CFA's judgment, arguing that the Chief Justice's ruling applied an excessively expansive definition of "public order (ordre public)" to the facts of the case. Gittings, p. 299.
92. *Leung Kwok Hung and others v. HKSAR* [2005] FACC1 & 2/2005, paragraph 77. In essence, the court held that reference to "public order (ordre public)" made sense at the constitutional level, given that constitutional language is often broad. But the same language at the statutory level could accord too much discretion to government officials, especially when restrictions on rights are i volved, thus rendering that statutory language impermissibly vague and imprecise. Ibid., paragraph 76.
93. *Leung Kwok Hung and others v. HKSAR* [2005] FACC1 & 2/2005, paragraph 93.
94. Ibid., paragraph 93.

ample citation to court verdicts from the United Kingdom, Canada, and the European Court of Human Rights.[95] It also cites to international best practice standards like the Siracusa Principles,[96] and authoritative commentaries on the ICCPR by leading international law scholars. In making use of this comparative case law and best practice, the CFA is clearly nudging its jurisprudence and Hong Kong law itself toward conformity with other rights-respecting open societies.

That said, there are limits to how far the court was willing to go in *Leung*. The court's failure to strike down the POO's licensing regime signaled a level of judicial modesty that is also characteristic of much of the CFA's human rights jurisprudence in the years after 1997, prior to the 2014 Umbrella Movement protests. In general, the CFA sought to take incremental steps in advancing protections for core civil and political rights, thus avoiding any potential conflict with the Hong Kong government, and more importantly Beijing, over its verdicts.

It is impossible to know whether the CFA's caution was born out of its knowledge that the Hong Kong government, working in collaboration with the NPCSC in Beijing, had moved to reinstate the licensing regime just a few years before the *Leung* case came before the courts. If the CFA had struck down the permitting requirement, it would have made a constitutional finding that directly contradicted the NPCSC's own decision on the Basic Law from February 1997. Given the CFA's cautious post-1997 judicial record, it is worth asking whether the court shied away from such a move that could have put it in direct conflict with Beijing.

Regardless of the CFA's motivations, its more limited verdict in the *Leung* case meant that the POO's permitting regime remained on the books, there to be put to use by the Hong Kong government in deeply damaging ways in response to the 2014 and 2019 protests. The court's ruling in *Leung* may have only postponed the day of reckoning with Beijing's declining commitment to the human rights protections found in the Basic Law, rather than fully and finally avoiding it.

Still, prior to 2014, both the CFA and the court system as a whole continued to incrementally build on the rights-respective approach put forward in the *Leung* verdict. Crucially, both the CFA and lower courts also continued to reiterate the importance of a rigorous proportionality test in cases involving moves by the government to limit core human rights.[97]

In *HKSAR v. Chow Nok Hang*, for example, the CFA engaged in a rigorous reading of the POO to find that wo protesters who had disrupted a public ceremony involving Hong Kong's Transportation Secretary were in fact not guilty of creating a "disorder in a public place" under article 17B of the POO.[98] The two defendants,

95. *Leung Kwok Hung*, paragraph 34.
96. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights were drafted in 1984 by a group of leading legal experts on the ICCPR, and now constitute a key "soft law" source that can guide states looking to ensure that their day-to-day governance practices are in line with ICCPR human rights obligations.
97. See, e.g., *Hysan Development Co. Ltd. V. Town Planning Board* [2016] FACV 21&22/2015.
98. *HKSAR v Chow Nok Hang and another*, [2013] HKCFA 101; FACC12, 13, & 14/2012.

both protesting against fare increases for Hong Kong's MTR public transport system, had charged the stage while the Transportation Secretary was speaking at an April 2011 fundraising event. One of the two dumped fake "evil money" on the stage before being escorted away by security guards. The second lunged at the Secretary, grabbed her microphone, and shouted slogans before he too was removed from the scene.[99]

In its verdict, the CFA highlighted the importance of Basic Law human rights protections in cases involving public protest. In contexts involving freedom of assembly, the CFA pointed out that the courts must engage in a rigorous reading of the statute in question, in this case the POO. The CFA held that, while one or both of the protesters might have violated other criminal laws, nonetheless they could not be said to have engaged in "disorder in a public place": their behavior did not show the requisite intent to provoke a breach of the peace by others in attendance.[100] After all, the court pointed out, the fundraising event continued even after the two men had rushed the stage: the event was temporarily disrupted, but it did not descend into a broader public incident as a result of the two men's actions.[101]

The CFA's verdict in *Chow* did not involve a constitutional evaluation of the POO, and as such did not narrow the statute's broad language. That said, the CFA's move to take a rigorous look at the application of the POO to the facts of the case was welcome: the verdict made clear that the CFA wanted to maintain its role as the key protector of basic rights, and that it would seek to maintain a purposive and expansive approach to interpreting Basic Law human rights provisions in relevant cases, including criminal prosecutions under the POO.

There were reasons, however, to suspect that the court's approach in the *Chow* case might not be as easy to adopt in future cases. Because *Chow* involved a very small protest against a fare increase policy, and because the legal implications of the verdict were quite limited, the CFA may have felt that it could take a freer hand, and issue a more rights-protective ruling. In future cases, the court's approach would turn out to be quite different.

The turning point came in the CFA's response to the Umbrella Movement cases that began making their way through the court system in 2014. In those cases, the CFA was clearly struggling to maintain its role as the core protector of basic rights in the face of growing political pressure from the government and Beijing. In general, the court prioritized the avoidance of conflict with Beijing, and increasingly gave short shrift to defendants' constitutional rights claims.

99. *Chow Nok Hang*, paragraphs 103-107.
100. *Chow Nok Hang*, paragraphs 100-101. The CFA pointed out that the second protester in particular could have been charged with assault or other crimes related to his disorderly behavior. Such charges, the CFA suggested, might have been a better fit than criminal provisions that are "designed to prevent the instigation of public disorder." Ibid., paragraph 102.
101. *Chow Nok Hang*, paragraphs 226-7, 230.

Perhaps the most important free assembly case to emerge from the Umbrella Movement was *Secretary for Justice v. Wong Chi Fung and others* (2018).[102] That case, involving an appeal by prominent pro-democratic activists Joshua Wong, Nathan Law, and Alex Chow against a POO conviction for unlawful assembly during the Umbrella Movement protests, did offer a small victory to the pan-democratic camp. As discussed above, the CFA did quash the jail sentences imposed by the Court of Appeal on the activists, on the grounds that newly-issued sentencing guidelines put forward by the Court of Appeal in its verdict could not be applied to the Wong, Law, and Chow cases without violating the principle of non-retrospectivity. As a result, the activists received much lighter sentences.

At the same time, however, the CFA upheld the constitutionality of the new guidelines, even though those guidelines would clearly impose heavy custodial sentences on peaceful protesters whose only crime might be failing to receive formal government permission to hold a protest. Such heavy punishments would seem to violate international human rights jurisprudence, and thus run afoul of Hong Kong's obligations under the ICCPR.

Troublingly, the CFA also signaled its approval for the more punitive approach to unauthorized assembly. In so doing, the CFA seemed to offer its constitutional stamp of approval for additional arrests under the POO:

> It was appropriate for the Court of Appeal to say that, in the circumstances now prevailing in Hong Kong, including incidents of unrest and a rising number of large-scale protests, it is now necessary to emphasize deterrence and punishment in large scale unlawful assembly cases involving violence.[103]

The CFA went on to state that:

> We are satisfied that it was right for the Court of Appeal to send the message that unlawful assemblies involving violence, even the relatively low degree of violence that occurred in this case, will not be condoned and may justifiably attract sentences of immediate imprisonment in the future, given the gravamen of the offence involving the instigation of risk and fear of a breach of the peace by virtue of the number of protesters involved.[104]

The CFA's stamp of approval on the new sentencing guidelines for POO violations marked a key turning point in Hong Kong human rights jurisprudence. In *Wong*, the CFA stepped away from an effort to balance human rights protections and Beijing's political imperatives, and instead embraced a full accommodation of the Hong Kong government and Beijing's claims that new tools were needed to get tough on pro-democracy protesters. Pro-democratic activists were on notice: any

102. FACC Nos. 8, 9, and 10 of 2017, [2018] HKFCA4.
103. *Wong Chi Fung*, paragraph 120.
104. *Wong Chi Fung*, Paragraph 124.

future protests could be met with prison sentences stretching as long as five years. As discussed in more detail below, those convicted of rioting could face even longer sentences, of seven to ten years. Such long custodial sentences are impossible to reconcile with Hong Kong's obligations under key international rights covenants, including the ICCPR.

The impact of the Court of Appeal's new sentencing guidelines for POO crimes, and of the CFA's endorsement of them, was felt immediately: they were put to use in a number of cases that emerged during the 2019 pro-democracy protest movement, including against some of Hong Kong's most prominent pro-democracy advocates. In June 2019, for example, at the height of the protest movement, top activists Joshua Wong, Ivan Lam, and Agnes Chow took part in a peaceful protest outside Hong Kong Police headquarters. The protest was peaceful, but had not been authorized under the POO. The three were later convicted of inciting, organizing, and participating in an unauthorized assembly, and given sentences of between 10 and 13.5 months. The magistrate handling the case stated that, although the protest was non-violent, immediate imprisonment was the "only option" that would achieve deterrence, given what he saw as the "potential risks" that the protest could have turned violent, and also given the fact that the activists were challenging the authority of the police.[105]

Put simply, such custodial sentences would not have been possible prior to the issuance of new sentencing guidelines. In imposing such stiff penalties on peaceful protesters, the verdict marked a clear departure from comparative best practice and international human rights jurisprudence.

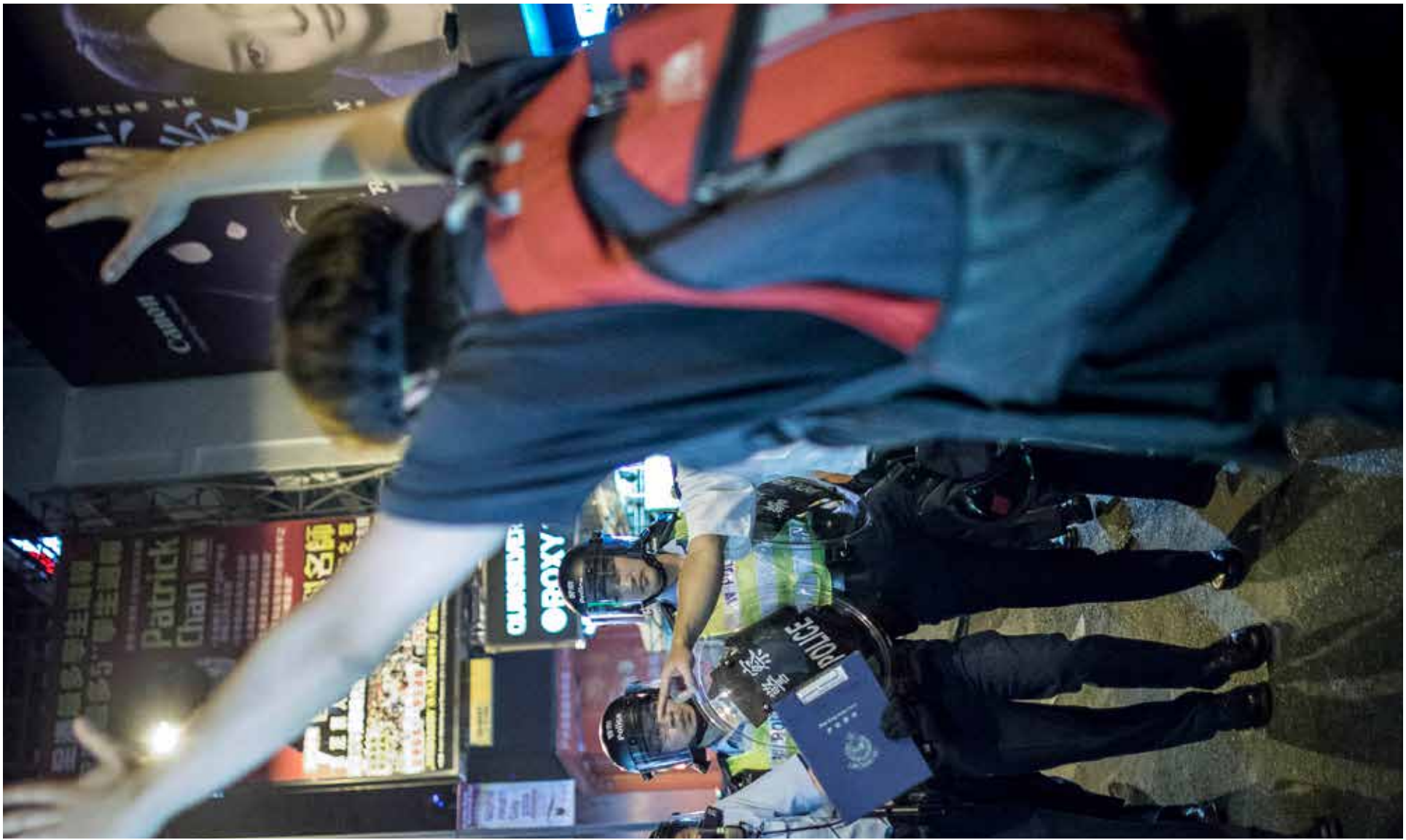
Even after the 2019 protests ended, Hong Kong courts continued to hand down stiff custodial sentences for individuals involved in peaceful pro-democratic protests. In 2021, for example, a group of nine top pro-democracy advocates and politicians were convicted of organizing an unlawful procession.[106] All nine were eventually sentenced to prison terms ranging from 8 months to 18 months. Although four individuals were given suspended sentences, nonetheless the harsh punishments would have been impossible to imagine under the prior, pre-2018 Public Order Ordinance sentencing guidelines. Overall, 30 top pro-democratic figures, including a number of the leaders of the pan-democratic political parties, were imprisoned over their involvement in peaceful yet unauthorized assemblies during the 2019 protests.[107] The imprisonment of over three dozen top political figures, merely for exercising their right to peaceful protest, simply cannot be squared to the human rights protections found in the Basic Law. At the same time, as this report documents below, hundreds of other peaceful protesters

105. *HKSAR v. Wong Chi Fung, Lam Long Yin, and Agnes Chow*, [2020] HKMagC 16; WKCC 2289/2020, paras 31, 39, and 49.
106. *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020. For an excellent assessment of the case, see Timothy Otty, *Hong Kong Special Administrative Region v. Lai Chee Ying et al.*, TrialWatch Fairness Report, July 2021.
107. Yan-ho Lai, "Securitisation or Autocratisation? Hong Kong's Rule of Law under the Shadow of China's Authoritarian Governance," *Journal of Asian and African Studies*, pp. 1-18, October 2022.

were also given custodial sentences, merely for participating in the 2019 protest movement.

A new era in Hong Kong has begun: the government now has direct authority over the right to protest in Hong Kong, and can use that authority to limit or even flatly deny individuals and groups their right to peaceful protest. Those who defy that wide-ranging authority can — and, if recent court decisions are any guide, likely will — face the very real prospect of imprisonment.

V. MORE CHARGES, MORE CONVICTIONS, LONGER SENTENCES: DOJ AND COURT HANDLING OF 2019 ANTI-EXTRADITION MOVEMENT CASES



In this section, we assess how the justice system's handling of the 2019 Anti-Extradition Movement has departed from past practice, particularly with respect to the charge and conviction rate, nature of charges, and sentences. In nearly all respects, the post-2019 response has on average been more punitive than prior responses to social movements, particularly the 2014 Umbrella Movement.

1. NUMBER OF CHARGES

There were at least 988 people charged in the Anti-Extradition Movement. In the Umbrella Movement, only 99 defendants were charged. The vast difference in charges is due to differences in the movements themselves and in police and prosecution policies.

With respect to differences in the movements themselves, there are at least three material differences that play a part. First, the Umbrella Movement went on for less than half as long as the Anti-Extradition Movement: approximately 2.5 months of large-scale protests for the Umbrella Movement, compared to approximately 6.5 months for the Anti-Extradition Movement. Second, the Umbrella Movement's protests were mostly centered around several encampments across Hong Kong Island and Kowloon, whereas the 2019 protests were dispersed throughout the territory, often with multiple events in one day. The sheer number and geographic dispersion of the latter movement's protests led to more arrests. Third, the intensity of violence and destruction in the 2019 movement went well beyond that of the 2014 movement. In 2014, with sporadic exceptions, police responded to the protests with relative restraint, and protesters were similarly restrained.[108] In 2019, on the other hand, police responded with far more aggressive clearance operations against mostly peaceful protesters that quickly led to widespread allegations of abuses. While more destructive, radical elements of 2019's early protests were small and contained, public anger over police abuses led to wider acceptance of vandalism and more violent confrontations between protesters and police, which in turn led to further escalation.[109]

With respect to the policy changes, there is evidence that between 2014 and 2019, Beijing worked with the Police Force to shift its approach towards the use of more proactive, aggressive tactics. For years prior to the 2019 protests, the Chinese government moved to increase its ties to and influence over the police, including through numerous visits by senior Hong Kong police officers to Beijing, Xinjiang, and elsewhere in China to "study local methods" of policing.[110]

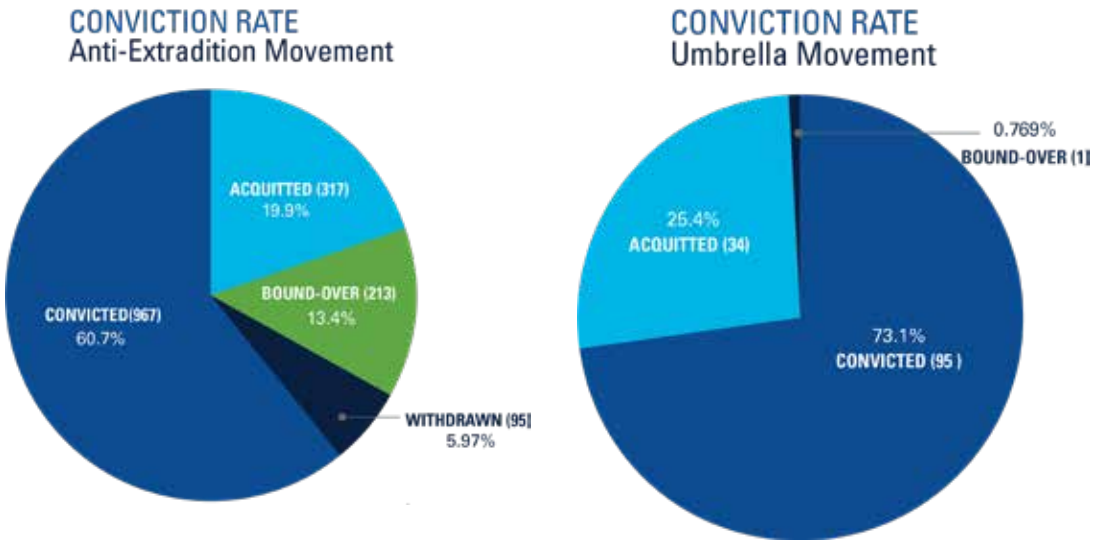
108. Richard C. Bush, "Hong Kong: Examining the Impact of the 'Umbrella Movement,'" *Testimony before the Subcommittee on East Asian and Pacific Affairs of the Senate Committee on Foreign Relations*, Dec. 3, 2014.
109. Martin Purbrick, "A Report on the 2019 Hong Kong Protests," *Asian Affairs*, Vol.50, 2019.
110. *See, e.g.*, Christy Leung, "Hong Kong's anti-terrorism task force goes to Xinjiang to study local methods, as China rejects international calls to investigate mass internment centres," *South China Morning Post*, Dec. 6, 2018; "Officers gain verseas and Mainland exposure," *Offbeat: The Newspaper of the Hong Kong Police Force*, May 4, 2017; "Mainland forensic experts visit the Force," *Offbeat: The Newspaper of the Hong Kong Police Force*, Oct 4, 2017; "DMS leads expatriate delegates to visit Mainland," *Ofbeat: The Newspaper of the Hong Kong Police Force*, Jan. 10, 2018; "Mainland forensic experts visit the Force," *Offbeat: The Newspaper of the Hong Kong Police Force*, Aug. 15, 2018.

Many of these Mainland approaches to policing were simply inappropriate for an open, rule-of-law society like Hong Kong.

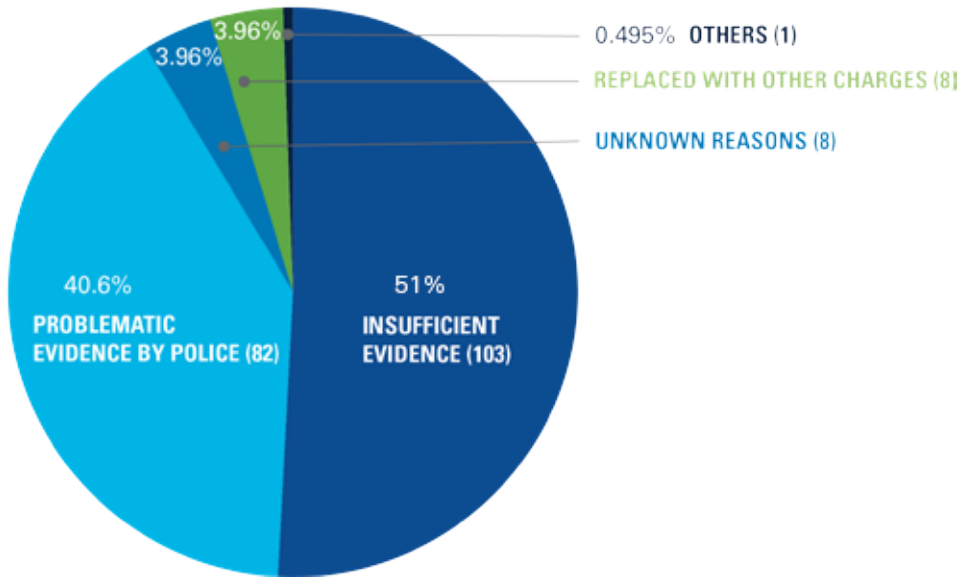
The police force, in view of its own perceived "shortcomings" in its response to the 2014 Umbrella Movement, also made efforts to boost manpower in its paramilitary-style divisions, particularly the Police Tactical Unit ("PTU").[111] Having "learned from [the] Mongkok riot," the police further shifted its approach to crowd control, deploying large numbers of PTU officers in advance of elections, protests, and other major events, irrespective of whether it had intelligence indicating potential disturbances. This more hands-on, assertive approach increased interactions—and consequently the opportunities for violent exchanges—between anti-riot police in tactical gear and members of the public.[112]

2. CONVICTION RATE AND REASONS FOR ACQUITTAL

We have conviction data for all counts covered in our data set. Counts are either classified as guilty, acquitted, withdrawn or bound over. Of all counts[113] (n=1,592), the overall conviction rate in the Anti-Extradition Movement was 75.3% (n=967) for counts that reached a resolution in court (or 60.7% if we include counts that were withdrawn or bound over). In the Umbrella Movement, excluding withdrawals and bind-overs (n=1),[114] the conviction rate was even higher—73.6%, with 95 counts being convicted.[115]



111. Niall Fraser, "Hong Kong police force set for manpower boost after shortcomings exposed by Occupy," *South China Morning Post*, Feb 14, 2015.
112. Christy Leung, "Police 'learned' from Mong Kok riot: 2,000 elite officers on standby for Hong Kong elections," *South China Morning Post*, Aug. 22, 2016.
113. A bind-over order is entered if the DOJ agrees not to enter any evidence, effectively conceding the case, if the defendant maintains good behavior for a period of up to two years.
114. For one account of an Umbrella Movement protester's experience of having his case being bound over by the courts, see An OccupyHK arrestee tells his story, *Kong Tsung-gan's Medium Page,* June 16, 201.
115. We do not have statistics for withdrawals and bind-overs in the Umbrella Movement, so cannot compare the overall number inclusive of these cases. In the Umbrella Movement, it has been reported that close to 1,000 people were arrested and at least 40 cases dropped. *See* Karen Cheung, "Legal scholar calls for database of false police testimony after Occupy cases reveal unreliability," *Hong Kong Free Press*, Sept. 26, 2015.



Of 967 convictions, we have data for 926 counts when it comes to modes of conviction; of those, 545 (58.9%) were guilty pleas, while the rest were convictions at trial. We do not have corresponding guilty plea data for the Umbrella Movement, so we cannot make a comparison on plea rates.

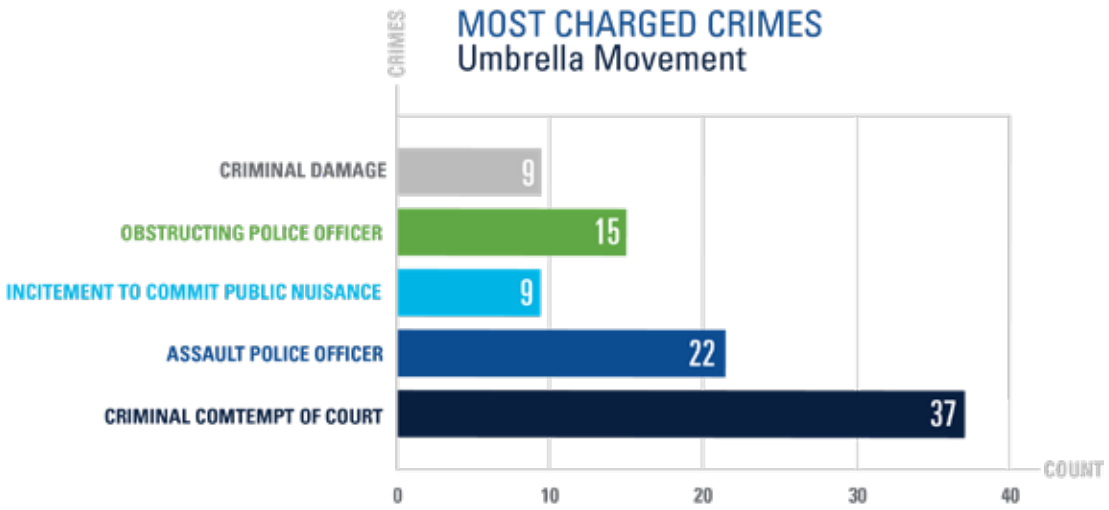
Amongst the 412 counts which were either acquitted (n=317) or withdrawn (n=95), we know the reasons for acquittal/ withdrawals in 202 counts. Most (51%; n=103) were withdrawn due to insufficient evidence. In addition, 40.6% (n=82) of the counts also point to unreliable evidence provided by the police, instances of which had been widely reported in the media.[116] As for acquittals, for most counts (87.6%, n=280) the available data does not disclose the reasons for the acquittal. If further research and analysis suggests that this admittedly small sample is in fact reflec-tive of the larger body of acquittal cases, then that pattern would raise serious concerns about police reliability in court. A number of these instances in which courts concluded that the police had provided false testimony were reported in the press. For instance, in April 2020, Special Magistrate Lau Suk-han of West Kowloon Magistracy, in acquitting two students of taping posters to government property, pointed to "fickle" testimony put forward by the police officer in court[117] In another case, Magistrate Stanley Ho found that two police officers were "unreliable witnesses" who "told lie after lie" under oath when testifying against Eastern District Councilor Jocelyn Chau and her assistant, who had been charged with assaulting a police officer.[118]

116. *See, e.g.*, Kelly Ho, "Protest graffiti students acquitted by Hong Kong court over 'unreliable' police testimony," *Hong Kong Free Press*, Dec. 16, 2021; Brian Wong, "Hong Kong teen cleared of weapons charges after court finds police o ficer ailed to present whole account of arrest," *South China Morning Post*, Sept. 9, 2020.
117. Brian Wong, "Hong Kong judge cites office 's inconsistent accounts, failure to note 'confessions' in ruling for alleged protest poster duo," *South China Morning Post*, Apr. 7, 2020.

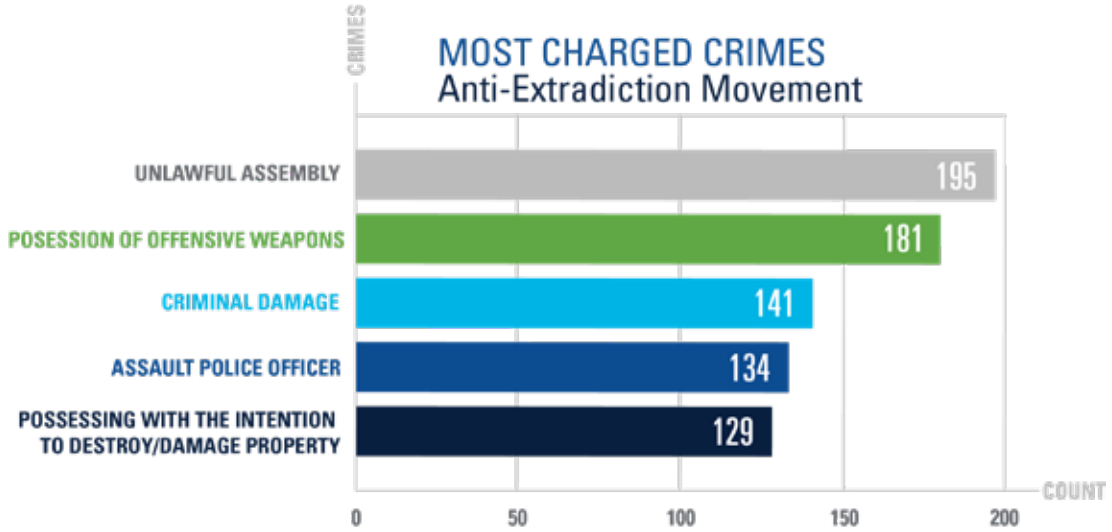
(A month later, Magistrate Ho was removed from the bench and transferred to an administrative post, purportedly in a pre-planned transfer but announced suspiciously soon after attacks on him by state-run media outlets in Hong Kong.[119])

Concerns over the unreliability of police testimony in politically-charged protest cases is not a new problem in Hong Kong, however. Police unreliability was also seen by some observers as a serious problem in a number of Umbrella Movement prosecutions. It was reported that charges were dropped in at least 40 Umbrella cases after videos "cast doubt on police testimony."[120] In another parallel to the anti-extradition cases, magistrates handling Umbrella protest cases repeatedly cast doubt on the honesty of police witnesses. In one Umbrella Movement case against a chef accused of "charging cordon lines," video produced by the defense at trial contradicted police testimony by showing the defendant only running to avoid being hit by police. The magistrate acquitted the defendant, calling the police testimony "completely unreliable."[121]

Most concerning of all is what these acquittals and withdrawals imply: if police have been found to have falsely testified with such frequency even in cases where there is video evidence to expose them, the problem may also extend to cases where there is no video evidence to disprove the police testimony. The worrying question, then, is whether individuals have been convicted based on false police testimony in cases where no exonerating evidence, such as videos, was available to expose the false claims.



118. Kelly Ho, "Hong Kong court acquits district councillor of police assault charge; magistrate says officers 'told lie after lie'," *Hong Kong Free Press*, Aug. 13, 2020.
119. Rachel Wong, "Hong Kong magistrate transferred, as pro-Beijing lawmakers hit out over protest rulings — local media," *Hong Kong Free Press*, Sept. 8, 2020.
120. Karen Cheung, "Legal scholar calls for database of false police testimony after Occupy cases reveal unreliability," *Hong Kong Free Press*, Sept. 26, 2015.
121. Karen Cheung, "Occupy protester who 'jogged' towards police lines found not guilty," *Hong Kong Free Press*, Sept. 15, 2015.



3. TYPE AND SEVERITY OF CHARGES

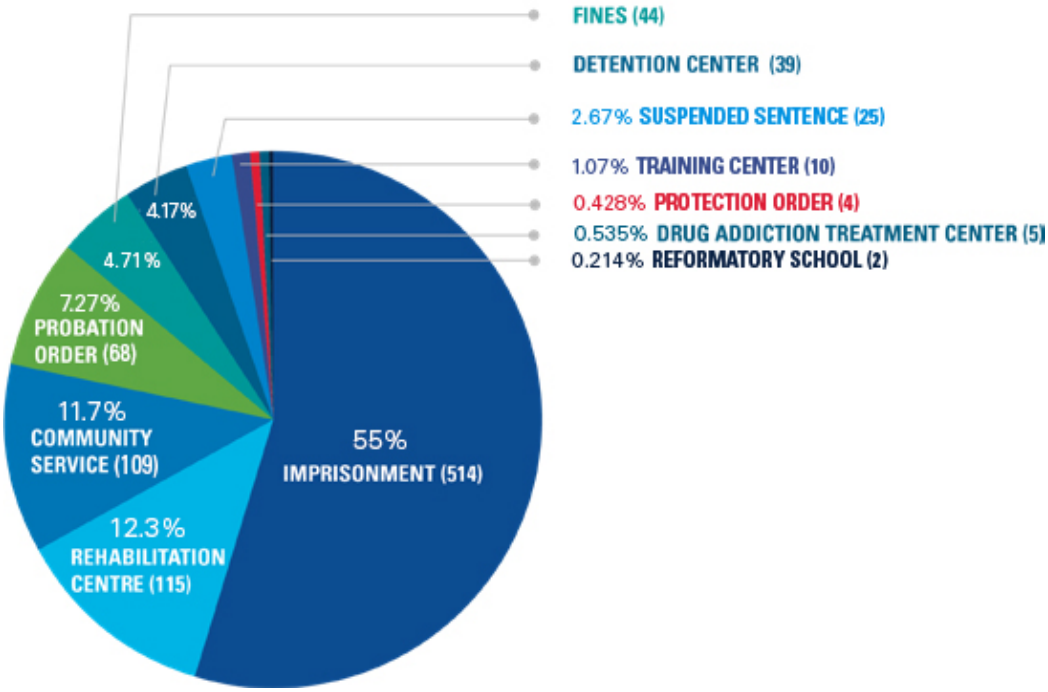
A wide variety of charges were used in 2019, with 100 different offenses involved. The most charged offense, unlawful assembly, still only made up 12.2% (n=195) of charges. Two of the top five offenses, possession of offensive weapons (11.4%; n=181) [122] and possessing anything with intent to destroy or damage property (8.1%; n=129)[123] were rarely used after the 2014 Occupy Movement. As explained later in this report, while some were charged for possession of items plainly intended for use as weapons or vandalism, in many cases the police and DOJ greatly stretched the bounds of these charges, invoking them for "weapons" such as laser pointers and items to "destroy or damage property" such as plastic ties.

The charges in the Umbrella Movement, on the other hand, made use of a smaller set of crimes. The offense charged the most during the Umbrella Movement was criminal contempt of court (28.5%; n=37). The 2014 movement was dismantled only after private parties who were affected by the obstruction of public spaces, such as bus companies, went to the court and asked for injunctions, most of which were granted.[124] In this way, the police were merely "enforcing" the order of the court, and those refused to comply with the injunctions were later charged with criminal contempt of court.[125] Some of the most high-profile prosecutions involved the third most-charged offense, incitement of public nuisance. Among those convicted were the "Occupy Central Trio"—law professor Benny Tai, sociology professor Chan Kin Man, and retired pastor Chu Yiu-ming.

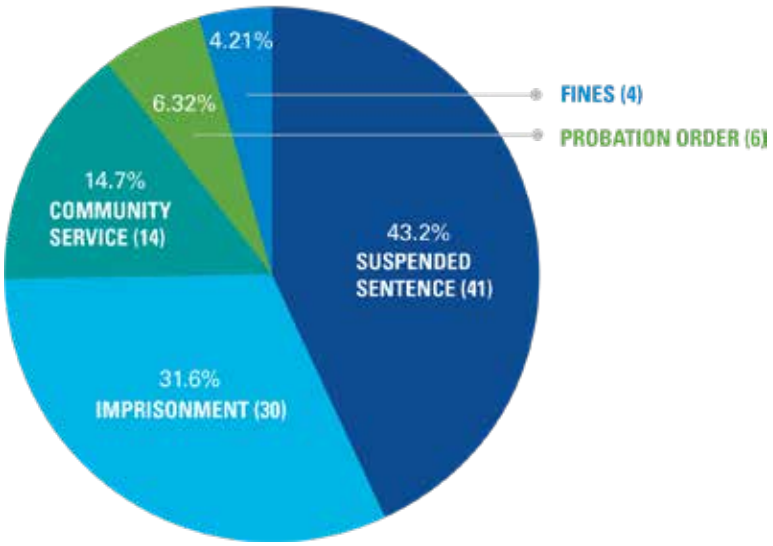
122. Public Order Ordinance, Cap. 245, § 33.
123. Crimes Ordinance, Cap. 200, § 61.
124. *See, e.g., Kwoon Chung Motors Co. Ltd. and Persons Who Erected or Placed or Maintained Obstructions…*, HCA 2222 & 2223 of 2014 (Dec 1, 2014).
125. Lily Kuo, "Hong Kong's democracy movement is being dismantled by a bus company," *Quartz*, Dec. 2, 2014.

For the anti-Extradition Movement, our data reports 967 counts of conviction. Of those, 32 counts come with missing data for the types of sentences. In other words, for the remaining 935 counts, we know what kind of sentences convicted defendants received. Courts dealing with Anti-Extradition Movement cases have

SENTENCE TYPES | **Anti-Extradiction Movement**



SENTENCE TYPES | **Umbrella Movement**

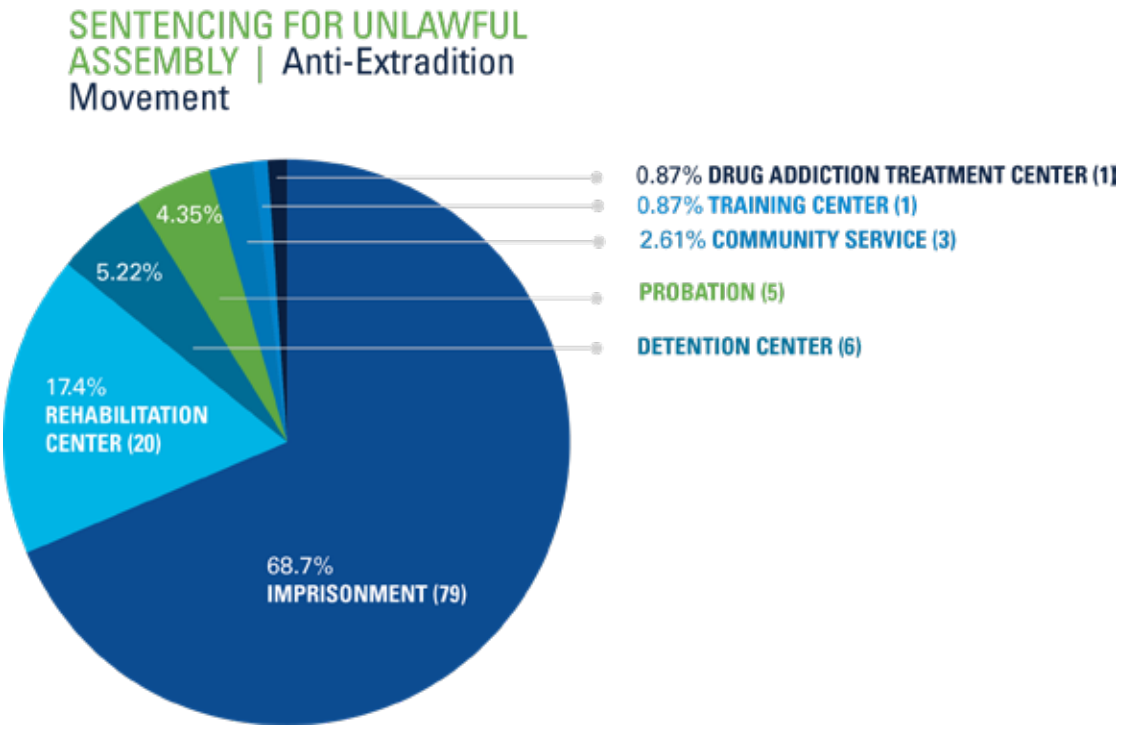


sentenced an unusually large proportion (81.0%; n=757)[126] of convicted defendants to custodial sentences, often for their peaceful participation in protests. In 2014, by comparison, only 31.6% (n=30) of convicted defendants were sentenced to imprisonment, the only custodial form of punishment handed down during the Umbrella Movement.

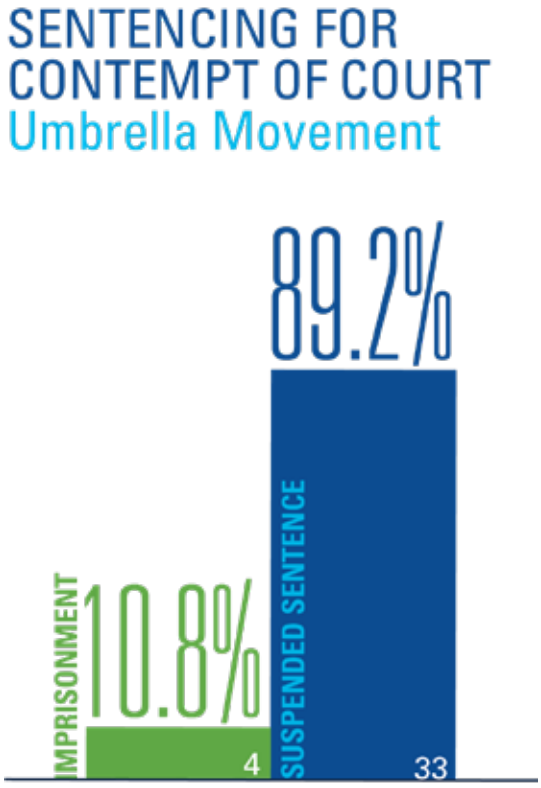
Further, according to our Anti-Extradition Movement data, only 2.67% (n=25) were given a suspended sentence, compared to nearly half (43.2%; n=41) in the Umbrella Movement.

At first glance, one might assume that the higher rate of detention from the 2019 movement is due to its greater degree of violence. But by breaking down and comparing the detention rate for individual crimes, we see that this is not the case—people committing non-violent crimes in 2019 were still far more likely to be sentenced to prison than in 2014.

In 2014, as discussed above, prosecutors tended to use criminal contempt of court charges to deal with those who rebuffed police and bailiff efforts to enforce the civil injunctions private parties had obtained to clear the protests. In 2019, in contrast, they tended to use unlawful assembly charges. In effect, the DOJ used two different charges to deal with very similar actions by protesters. On paper, criminal contempt is potentially the more serious charge, with a maximum sentence of seven years in prison, compared to maximum five years for unlawful



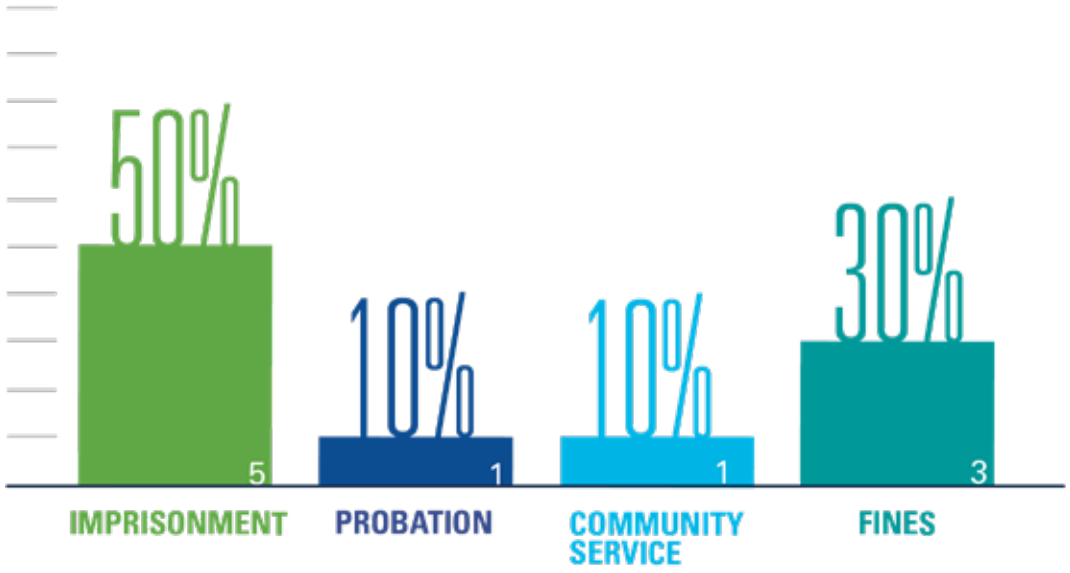
126. 55% (n=514) were sentenced to prison and the rest to detention and rehabilitation centers. Our data shows convictions in an additional 32 counts for which we do not have sentencing details.



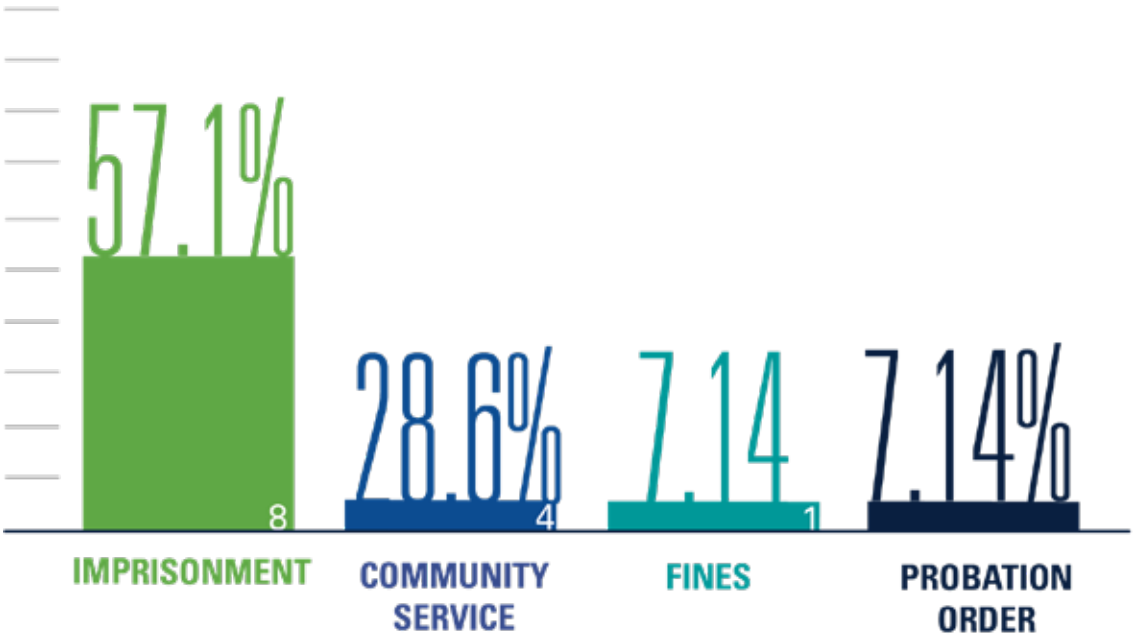
assembly. But in practice, in 2014 the vast majority (89.2%; n=33) of defendants convicted of criminal contempt were handed a suspended sentence, with only 10.8% (n=4) of the defendants actually being imprisoned. In 2019, the situation was reversed: 93% (n=107) of convicted counts of unlawful assembly were sentenced to detention (imprisonment, rehabilitation centers, or detention centers), while only 7% were sentenced using non-custodial methods, including probation order and community service.

Other offenses also show increases in detention rates between 2014 and 2019. In obstruction of a police officer counts stemming from the 2019 protests, more than half (57.1%; n=8) of convicted counts were sentenced to prison. (A total of 16 counts were convicted for obstructing police officer; of those, there are 2 counts with missing data). In 2014, while the number of convictions for obstructing a police officer was relatively small (n=10), most defendants were either sentenced to fines (30%) or community service (10%) for the exact same offense. Only 50%—five defendants total—were imprisoned. Similarly, in 2014, half of those convicted of assaulting a police officer were sentenced to imprisonment, whereas in 2019, of those convicted counts with complete data for types of sentences (n=71), (A total of 75 counts were convicted for assaulting police officer; of those, there are 4 counts with missing data. In other words, our data-set contains sentence data for 71 convicted counts), 90.1% were given custodial sentences—76.1% (n=54) to traditional prisons, others to rehabilitation, training, detention centers as well as given protection order.

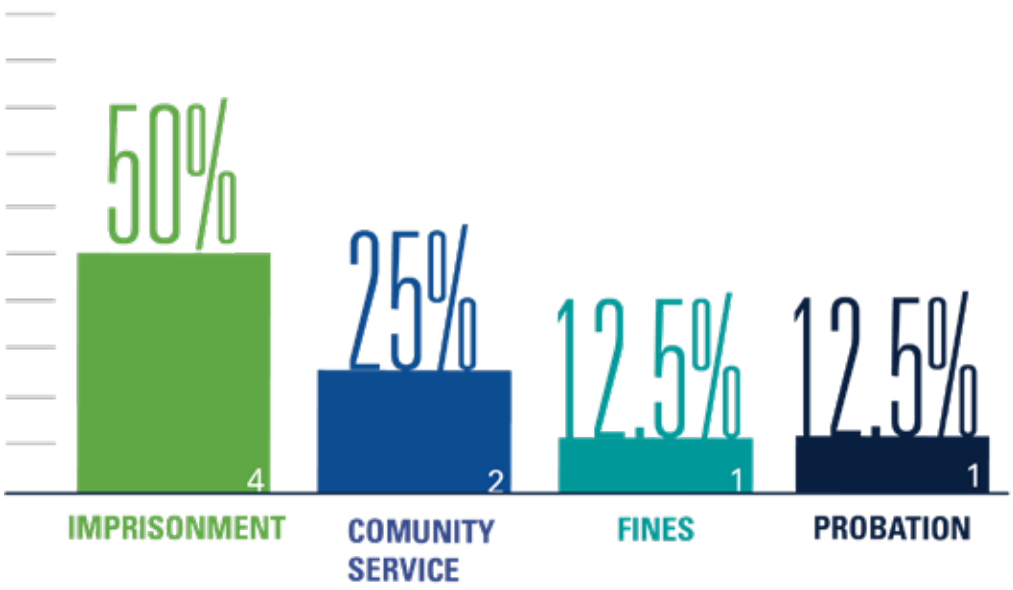
SENTENCING FOR OBSTRUCTING POLICE OFFICER
Umbrella Movement



SENTENCING FOR OBSTRUCTING POLICE OFFICER
Anti-Extradition Movement



SENTENCING FOR ASSAULTING POLICE OFFICER
Umbrella Movement



SENTENCING FOR ASSAULTING POLICE OFFICER
Anti-Extradition Movement

If we compare the length of imprisonment for the exact same crime, the trend towards a more severe punishment over the years becomes even more apparent. For those charged with obstructing a police officer, the average imprisonment length increased from less than 1 month to 4.7 months— almost 5 times more in 2019 when compared to that of the Umbrella Movement. Note that for length of imprisonment, we count only cases in which defendants were only charged with one crime. This is because jail terms handed down by the court are often discounted or, in some cases, compounded, if defendants are involved in multiple crimes at the same time. To ensure that our estimate is as accurate as possible, we exclude contemporaneous crimes in our analysis.

In cases stemming from the 2019 protests, magistrates often justified their custodial sentences and unusually lengthy terms by citing the need for deterrence and the violent nature of the protests. However, the vast majority of protesters remained peaceful, and many judges who cited deterrence as a rationale did so while sentencing peaceful protesters to prison.[127] What's more, even those who remained non-violent at scenes of the demonstrations were often charged with violent crimes. In *HKSAR vs Lau Ka Tung* for instance, Lau, a social worker, was convicted of obstructing a police officer in the due execution of his duty for merely standing in front of the slowly advancing police line and pleading with the police to give the crowd more time to disperse.[128]

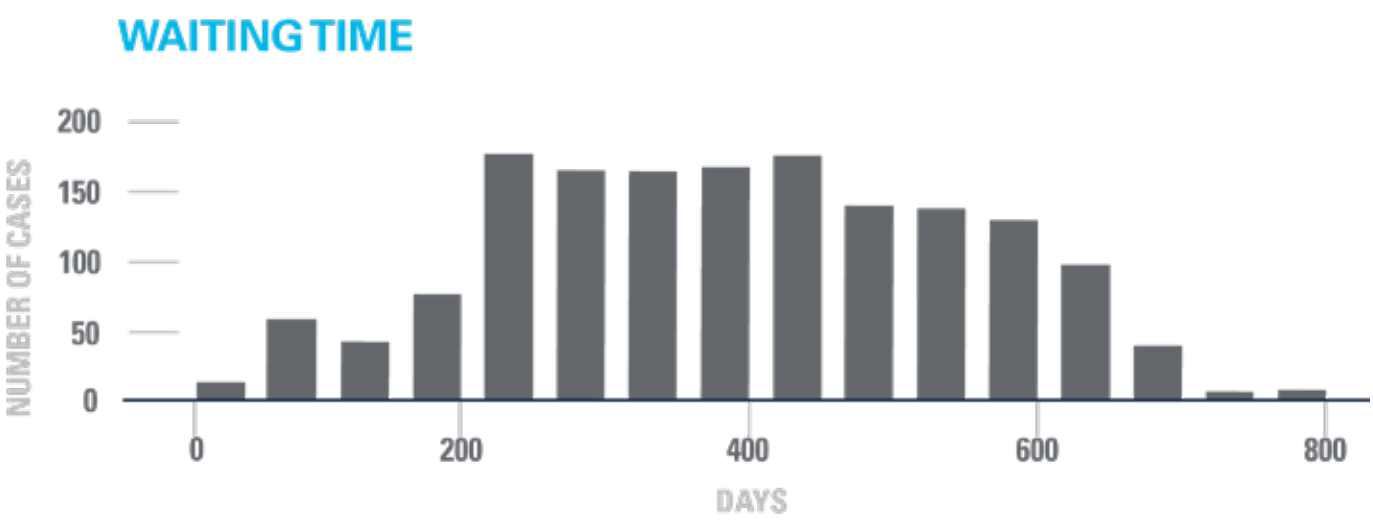
127. See, e.g., Candice Chau, "Media tycoon Jimmy Lai and 7 other Hong Kong democrats jailed over banned Tiananmen Massacre vigil," *Hong Kong Free Press*, Dec. 13, 2021 ("The judge, when deciding on the punishment, said there was a need for "deterrent" sentences."); "Hong Kong Court Jails Joshua Wong, District Councilors Over Tiananmen Vigil," *RFA*, May 6, 2021 (Judge Stanley Chan cited "the need for a deterrent to future illegal assemblies").
128. *HKSAR v. Lau Ka Tung*, HCMA 137/2020 (26 April 2021).

VI. IS THE GOVERNMENT WEAPONIZING COURT PROCEDURE AGAINST PROTESTERS?

In addition to shifts in charging and conviction practices, some aspects of otherwise ordinary criminal procedure are being used in ways that, intentionally or not, are placing a greater burden on Anti-Extradition Movement defendants than is typical. This section analyzes data on waiting times, prosecution appeals, and bail rulings to determine the extent of these shifts.

1. TRIAL WAITING TIME

In order to calculate the average waiting time, we used case numbers to identify 811 unique cases in our data set, of which 13 are missing data for waiting time. The available data shows that on average, an anti-extradition case from arrest to sentence takes 343 days to complete. This finding is in line with Security Bureau data, which, after an assessment of 90 district court cases from the Anti-Extradition Movement, found in April 2022 that the average waiting time ranged from 300-400 days,



about 30 percent longer than "other criminal cases" (presumably meaning all criminal cases other than Anti-Extradition Movement cases).[129] More than 41.8% (n=331) of the cases took over a year to finish. These figures likely underestimate the waiting time, as both our data and the government figures include only cases that have concluded. It has been reported that some cases are scheduled to be heard in 2024, meaning that the waiting time for the defendants would be at least five years.[130] As a result, many defendants find themselves in legal limbo, with many restricted in their freedoms via bail conditions such as travel restrictions and onerous police report-ing requirements. In some cases, defendants were denied bail entirely.[131]

Article 5 of the Hong Kong Bill of Rights provides that defendants "shall be entitled to trial within a reasonable time."[132] Section 26 of the Magistrates Ordinance (Cap 227) provides that the prosecution shall prosecute a case within six months

129. "Legislative Council Question 14: Statistics on criminal cases," *Hong Kong SAR Government Press Release*, Apr. 27, 2022.
130. Wang Renchang, "64 people accused of rioting to be tried in 3 cases, trial scheduled for 2023," HKET, Apr. 9, 2021 (in Chinese).
131. The problem of extended pre-trial detention is discussed in more detail below, sub-section 3.
132. Bill of Rights Ordinance, Cap. 383.

from the time when the matter of such complaint or information respectively arose, except for indictable offenses. However, there is no legal requirement in relation to the duration of the entire prosecution process.

In an ongoing case against 47 democratic political leaders under the National Security Law[133], one judge raised concerns about the lengthy delay until trial, but despite most of the defendants languishing in pre-trial detention and the implication that their Article 5 rights had been violated, she made no ruling to penalize the prosecution or release the defendants. This suggests that the right to trial within a reasonable time may mean little in practice.[134]

It is easy to imagine how the exceedingly long waiting time could have detrimental effects on the defendants involved in the anti-extradition cases. While waiting for their cases to be heard, many have lost their jobs, had their studies disrupted, and suffered from mental distress.[135] Such mental and financial impacts can create even greater difficulties for younger defendants. A 19-year-old university student who was charged with unlawful assembly for raising his middle finger at riot police described his time on bail as "mental torture," and said he needed to take various medications to sooth his nerves.[136] It is generally not easy to be faced with an upcoming criminal trial, but the burden it places on the accused is one reason for the need for faster resolutions. Yet, in 2021, with the added challenges posed by the Covid-19 pandemic, it took approximately 383 days for a case to proceed from prosecution to an initial hearing at High Court—a delay that slowed the resolution of both protest and non-protest cases.[137]

Importantly, long delays can also affect the ultimate resolution of cases. Given the practical and emotional difficulties that long delays can cause to defendants, it is likely that some have chosen to plead guilty to crimes they do not believe they have committed in order to end the ordeal. In the case of the 47 pan-democratic political leaders, for example, many have chosen to plead guilty, likely in part to put a long and drawn-out court process behind them and avoid the mental and financial burden of a trial. The guilty pleas that have been entered in that case thus far skew heavily towards those who have been put under the greatest strain—those in long-term pre-trial detention.[138]

133. NSL cases are not included in our data, but have also faced significant del ys. GCAL has analysed NSL cases in other prior reports and shorter analyses. *See* Lydia Wong and Thomas E. Kellogg, Hong Kong's National Security Law: A Human Rights & Rule of Law Analysis, (Feb. 2021); Lydia Wong, Thomas E. Kellogg, and Eric Yan-ho Lai, Hong Kong's National Security Law and the Right to a Fair Trial: A GCAL Briefing aper (June 28, 2021).
134. SCMP Editorial, "Backlog of Hong Kong cases must be cleared so justice is not delayed or denied," *South China Morning Post*, Apr. 29, 2022.
135. Liang Haolin, "Late Trials, Prisons of Thought, Lives Suspended: Hong Kongers Caught in the Wheel of Prosecutions," *The Reporter*, Jan. 19, 2022 (in Chinese).
136. Rachel Cheung, "Hong Kong's arrested protesters now face years of fear and limbo," *Los Angeles Times*, Feb. 5, 2021.
137. "The Court System says case schedule is 'distorted' by the pandemic, and the target waiting time for criminal cases in the High Court is 'left blank'," *InMedia*, Feb. 23, 2022 (in Chinese).
138. Samuel Bickett, "The Hong Kong 47 Committed No Crime…So Why Are they Pleading Guilty?," *Hong Kong Law & Policy*, Aug. 20, 2022.

2. APPEALS

As of July 2021, the DOJ had filed a total of 20 appeals for review of sentencing, all of which were granted. In other words, the government enjoyed a 100% success rate in court on appeals for review of sentencing. One could argue the fact that the DOJ only chose to appeal 20 out of a total of more than 1,500 cases could be considered restrained. However, the prosecutorial discretion to appeal a sentence had rarely been used in the past in Hong Kong. According to the official statistics released by the government, the DOJ filed only six prosecutorial appeals in 2018, for example.[139]

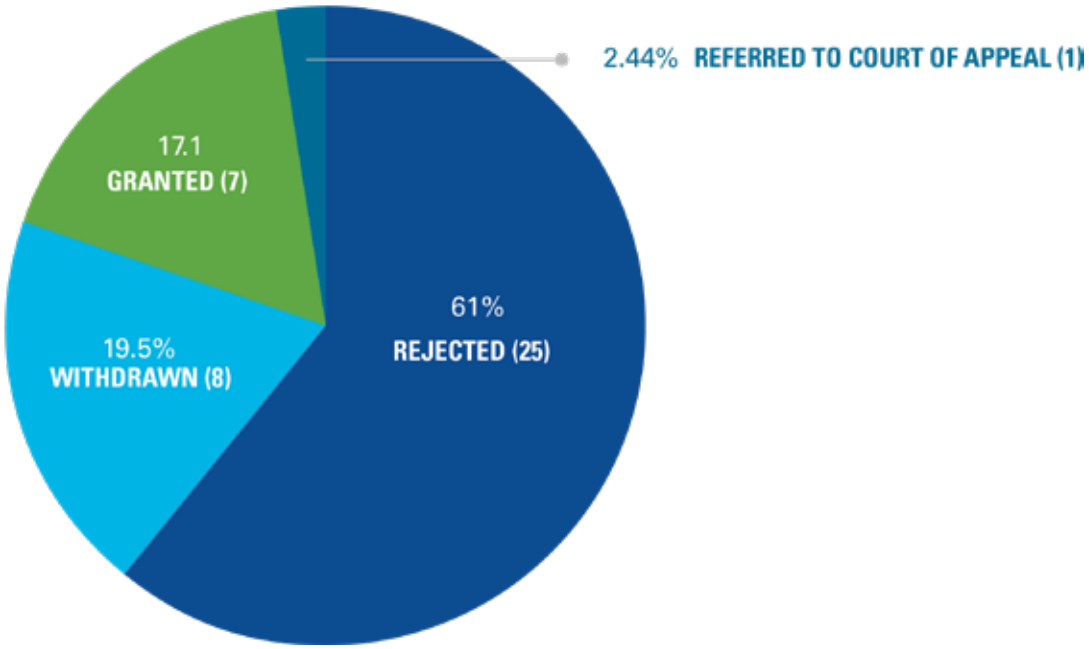
In all 20 cases, these appeals have resulted in more punitive sentencing against those convicted. Of the 20 appeals, 13 sentences were changed from non-custodial to custodial, while five defendants received at least an additional three months' imprisonment added to their sentence. For the remaining two cases, one was changed from a Protection Order to a Probation Order, while the other was increased from a Probation Order to 120 hours' community service together with a curfew.

One notable case involved ex-legislator Au Nok-hin, who was convicted at Magistrate's Court of assault for using a megaphone near a police officer during an anti-extradition protest and sentenced to 140 hours of community service.[140] The DOJ then filed an appeal in which the Court of Appeal sentenced him to nine weeks of jail time instead.

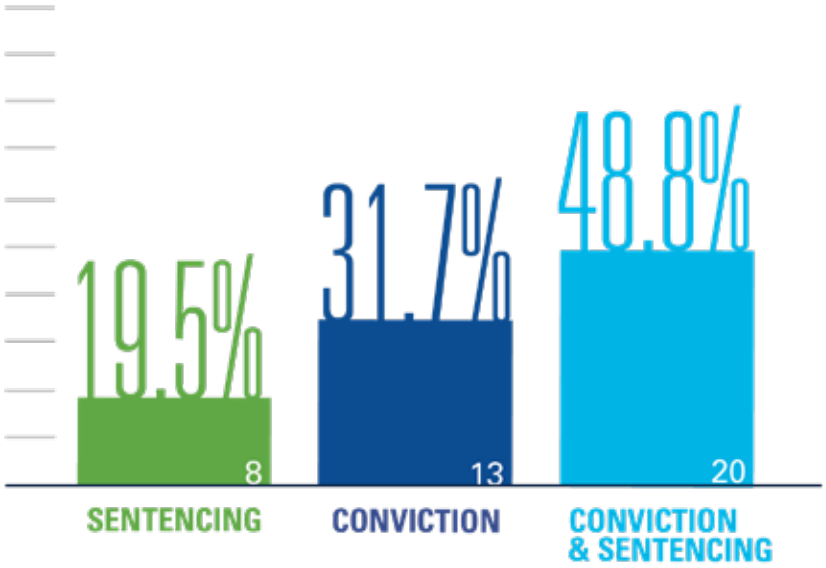
In some cases, the DOJ has also appealed against not-guilty verdicts that it doesn't like. In one case, the DOJ appealed against the acquittal of eight people accused of rioting. Most evidence presented in court was circumstantial—they were regarded as "rioters" simply due to the fact that they were dressed in black. Jackie Chen, a social worker who was one of the eight defendants, criticized the DOJ's move as "groundless" and expressed concerns that the appeal would place "unnecessary pressure" on the other seven defendants, especially given that rioting is punishable by a maximum ten-year jail sentence.[141] The appeal was

139. Secretary for Justice Teresa Cheng, "SJ reaffirms sentencing principle ," *Hong Kong SAR Gov't Admin and Civic Affairs*, Mar. 23, 2021.
140. Tom Grundy, "Hong Kong democrat Au Nok-hin convicted of assault after using loudhailer near cop," *Hong Kong Free Press*, Apr. 7, 2020.
141. Rhoda Kwan, "Hong Kong Dep't of Justice appeals aftear 8 acquitted of rioting during 2019 Wan Chai protest," *Hong Kong Free Press*, Nov. 10, 2020.

RESULTS OF APPEALS BY PROTESTERS



TYPES OF APPEALS BY PROTESTORS



finally heard in January 2023—more than two years after the acquittal—and is awaiting a result at time of this report's publication.[142]

By contrast, appeals by protesters yielded far less successful results. Individuals convicted of protest-related offenses filed a total of 41 appeals; of which, 48.8% (n=20) were appealing both conviction and sentence, 31.7% (n=13) were conviction appeals, and the rest (n=8; 19.5%) were sentence appeals. Protesters only enjoyed a 17.1% (n=7) success rate, while appeals were rejected in 25 other cases (61%). Others were either withdrawn (n=8, 19.5%) or referred to the court of appeal (n=1, 2.44%).

The reasons for the low success rate for defendants appealing their conviction or sentencing remains unclear. If current trends continue, and the success rate for prosecution appeals and defendant appeals continue to diverge, there may be a need for additional qualitative research on these cases to determine why the government continues to succeed in most appeals, and why many defendants fail in their appeals efforts.

3. BAIL

According to the Annual Report published by the Correctional Services Department (CSD), the average daily number of prisoners remanded in pre-trial detention reached a record high in 2020, growing from 1,436 in 2011 to 1,962 in 2020, representing a 37% increase. The highest single-day number of remands in 2020 stood at 2,195, which is 39% more than in 2011.[143]

CSD disclosed that in 2020 alone, 422 persons were admitted to prisons due to their involvement in the anti-extradition protests.[144] Of those, a majority (57.1%; n=241) were remands while the rest had been convicted.[145] Among the remanded prisoners, 44.4% (n=107) were under 21. Additionally, a March 2022 report by U.S.-based Hong Kong Democracy Council counted 129 defendants from the protest movement still remanded in pre-trial detention, more than two years after the end of the large-scale protests. The report found that the average time on remand before reaching trial is 16.6 months, with some waiting significantly longer.[146]

Under Hong Kong law, a person who is detained in custody shall be granted bail by the police unless there are legitimate reasons not to do so. Where the police have detained someone, the arrested person must be brought before a Magistrate, where the defendant may apply for court bail. As spelled out in Sections 9D and 9G of the Criminal Procedure Ordinance (Cap 221), the court shall grant bail to

142. Case No. CACC 278 / 2021; "Respondent Jacky Chen and others in rioting case dodge an appeal: memory is fuzzy, retrial is unfair," *Ming Pao*, Jan. 19, 2023 (in Chinese).
143. Correctional Services Department, "2020 Annual Review," *Hong Kong SAR Gov't Press Releases*, Apr. 28, 2021.
144. *Ibid.*
145. *Ibid.*
146. Hong Kong Democracy Council, "Hong Kong Reaches a Grim Milestone: 1,000 Political Prisoners," March 2022.

the arrested unless there are "substantial grounds" for believing that the defendant would fail to surrender to custody, commit offences while on bail or obstruct the course of justice.

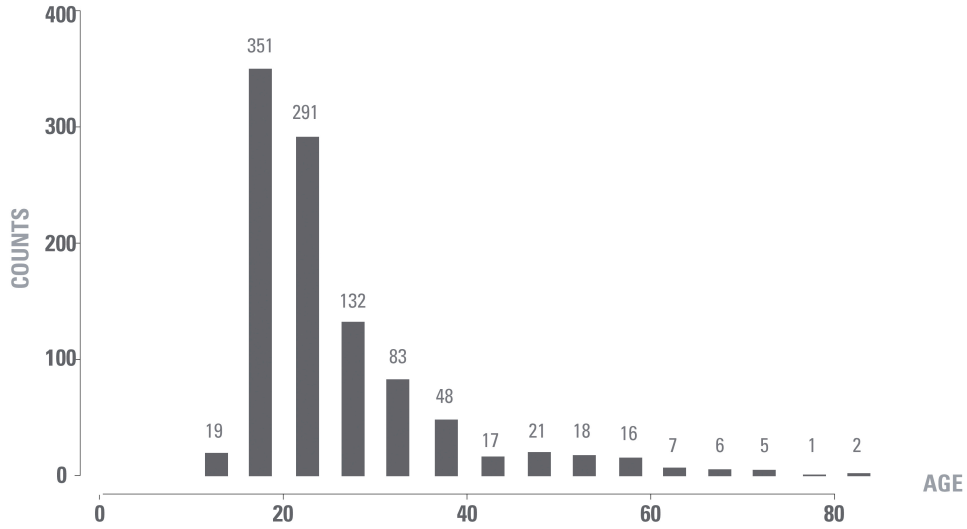
We can find no consistent pattern to bail rulings. It has been reported that judges have denied bail to some first-time offenders but not to others, for example.[147] Further, the Department of Justice appears to have a policy of pressing to keep defendants charged with rioting remanded in custody pending trial, without specifying how this policy is in line with general principles — and the government's human rights obligations — regarding bail.[148] There is no reliable way to verify these claims, given that the government does not release official statistics on number of people on bail, and that the media is not allowed to report details of bail proceedings in most instances.

One important principle in both the common law and international human rights law[149] is that all defendants should be treated as innocent until proven guilty. Barring exceptional circumstances, individuals awaiting trial should be allowed bail, especially for alleged non-violent crimes. However, the alarming number of remand prisoners from the Anti-Extradition movement, as well as the apparent arbitrary nature of some bail rulings, suggests this principle is, at best, under strain.

147. Suzanne Sataline, "'Assumed as criminals': Hong Kong defendants find bail elusi e," *Al Jazeera*, Jan. 27, 2022.
148. *Ibid.*
149. International Covenant on Civil and Political Rights, Art. 14, pg. 2 (1966).

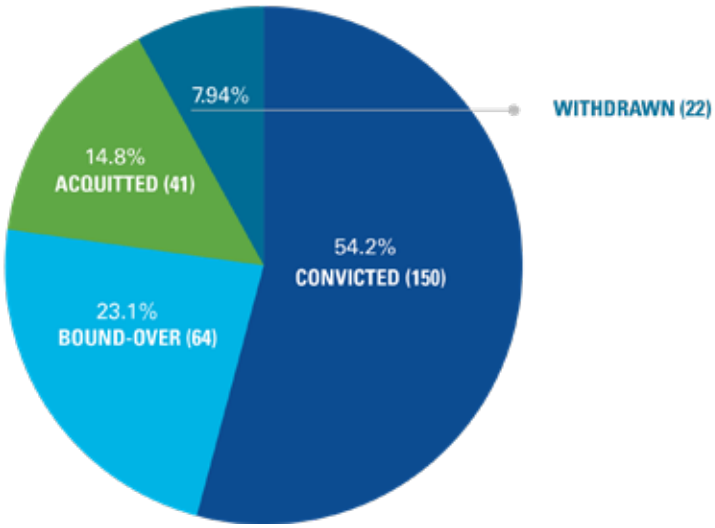
VII. CLOSER LOOK: KEY LEGAL QUESTIONS

1. A CLOSER LOOK: JUVENILES



According to our data, the mean and median age of all defendants are 26 and 23 respectively. 138 of defendants (minus missing data) were under 18; of those, 19 were under 16, with the youngest being only 12 years old. (Each bar in the graph above represents five years.) Note that here, we are counting unique number of defendants, rather than the counts of charges. These estimates are likely lower than the actual numbers, as many cases involving minors under 16 were heard in juvenile court, where information is restricted and media are prohibited from reporting details. As discussed in the methodology section

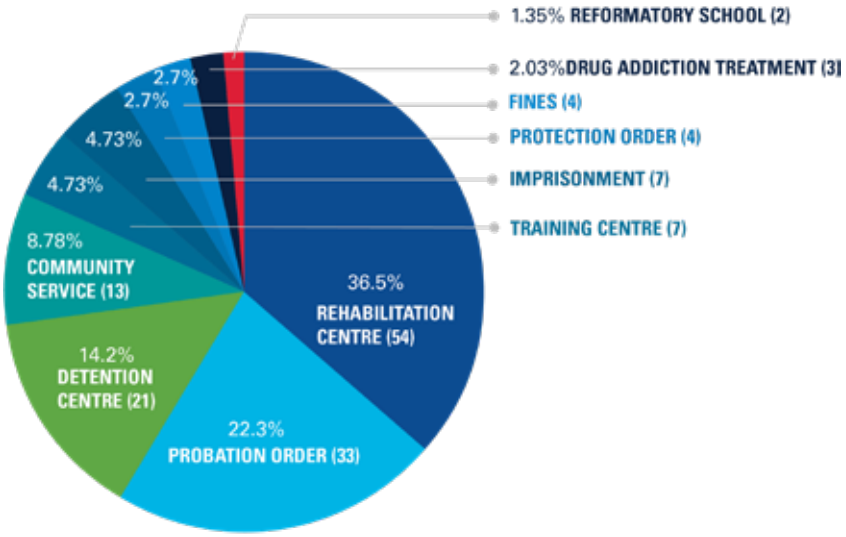
CONVICTION RATES | Underaged Defendants



above, we have sought to collect data on juvenile cases from other sources, but the results are likely less accurate than the data for adults.

54.2% (n=150) of the counts involving an underage (under 18 years old) defendant in our data were convicted, compared to 60.7% overall (see the data on convictions in Section V, above), and 14.8% were acquitted, compared to 19.9% overall. 7.9% (n=22) of these counts had their cases withdrawn, while 23.1% (n=64) of the counts received a bind-over, compared to 13.4% overall. It is unsurprising that a larger percentage of juvenile defendants would be given bind-overs and a lower portion convicted, as many of these counts are first offenders and therefore should be more eligible for other, non-carceral options that act as an important alternative to incarceration.

TYPE OF SENTENCING | Underaged



Of those 150 underage convicted counts, we have 2 missing data for types of sentences. Of all known sentences, 66.2% (n=98) faced custodial sentences including imprisonment, training, detention, rehabilitation, and drug addiction treatment centers. Those who faced imprisonment on average received 12.7 months of jail time. One particularly long sentence was 32 months, for a young person convicted of possessing an object with intent to destroy or damage property.

In her November 2020 policy address, then-Chief Executive Carrie Lam proposed that youth involved in the anti-extradition protests should be given a chance to be placed under the Police Superintendent's Discretion Scheme or given a bind-over.[150] Under the Police Superintendent's Discretion Scheme, persons under 18

150 Kelly Ho, "Policy Address 2020: Hong Kong's Lam says restoring constitutional order an 'urgent priority,' hails security law," *South China Morning Post*, Nov. 25, 2020.

who have committed a criminal offence might be placed under police supervision for a period of two years or until they reach 18 years of age. The defendant will not be brought before a court, and a caution under such an arrangement is not criminal conviction, meaning that the offender keeps a clear record. Similarly, a bind-over—available to both adults and juveniles—is a measure whereby a defendant agrees to be on "good behavior" and "keep the peace" for a period not exceeding three years, and in exchange the case will be withdrawn.[151]

Did Lam's proposal in 2020 ever materialize? We collected data specifically on juvenile defendants and the answer is a resounding no. From 2016 to 2018, 32% to 38.8% of underaged defendants were placed under the Police Superintendent's Discretion Scheme. The number went down to 17.1% in 2020. If we look at only anti-extradition cases, the number dropped drastically to just 1.2% as of July 2021.[152]

As discussed in Section VII, in recent years DOJ has frequently used prosecutorial appeals to seek harsher punishment against those involved in anti-government protests. Juvenile offenders are no exception. According to the data collected for this report, the DOJ sought sentencing review for at least nine defendants under age 18, of whom all but one had already pleaded guilty. Every single one of these appeals resulted in harsher sentences, often changing from non-custodial to custodial punishments.

As noted above, defendants in anti-extradition cases skewed young in age. This raises particular concerns as to whether their treatment has been in accordance with international human rights standards, such as those spelled out in the United Nations Convention on the Rights of the Child (UNCRC), to which Hong Kong is a signatory. Article 37 of UNCRC stipulates that children and young people must only be arrested, detained, or imprisoned as a last resort and for the shortest possible time. Our data show that approximately 66.2% of convicted juveniles in the Anti-Extradition Movement have received imprisonment or other forms of custodial sentences, often for non-violent offenses. This high figure suggests quite strongly that Hong Kong is in breach of its obligations under Article 37 of the CRC.

2. CLOSER LOOK: RIOTING

Riot-related charges are worthy of in-depth discussion here for a number of reasons. It is one of the most serious charges leveled against protesters in large numbers, with a maximum sentence of ten years. The DOJ has elected to bring most protest rioting cases in District Court, where there is no right to a jury trial but the maximum sentence is seven years—still a very significant custodial sentence. Rioting charges have been politically charged and controversial since the

151 Criminal Procedure Ordinance, Cap 221 s. 109I.
152 "Found guilty of participating in anti-extradition protests? Carrie Lam wants arrested youths to admit their mistakes firs ," *Vision Times*, Apr. 4, 2021 (in Chinese).

British colonial authorities added them the statute after the 1967 unrest.[153] After a long period of disuse, the riot provisions of the POO were revived starting with the 2016 Mongkok unrest, and have been used against a number of anti-extradition protesters. International watchdogs have repeatedly called for the revision of POO rioting provisions, as the definition of rioting under the s atute is "vague and arbitrary," and thus vulnerable to misuse as a political weapon.[154]

After tens of thousands of people took to the streets to protest against the anti-extradition bill on 12 June 2019, the police responded with tear gas, rubber bullets, and assaults on demonstrators.[155] Chief Executive Carrie Lam and the police commissioner referred to the demonstration as a "riot,"[156] causing widespread public anger. Retracting the classification of protesters as "rioters" became one of the five core demands that sustained the Anti-Extradition Movement for the rest of 2019, in part because the government's use of the term carried clear legal implications.[157] Nonetheless, 42 protesters had been convicted of rioting as of July 2021, and there has been a notable increase in rioting trials and convictions since then—usually mass convictions of groups of protesters, with insufficient attention given to each defendant's individual circumstances by judges or prosecutors in a number of cases.[158]

All rioting cases in relation to the Anti-Extradition Movement were heard in District Court. Thus, our report benefits from the written reasons for sentence handed down by the judges, all of which are publicly accessible on the DOJ's website.[159] Out of the 42 counts concluded between 9 June 2019 to 31 July 2021, we were able to retrieve all but three of the reasons for sentence, based on which we hand-coded details of each case including age of defendants, number of contempora-neous charges, length and types of sentencing, and mode of conviction, as well as mitigation and aggravating factors and their corresponding increased/decreased sentence. Table 1 presents an overview of these variables.

153. Iain Marlow and Natalie Lung, "What Hong Kong's 1960s Chaos Could Teach City's Besieged Leaders," *Bloomberg*, Aug. 16, 2019.
154. Margarete Bause MP et al., "Statement: 11 international parliamentarians call for reform of the Public Order Ordinance following Edward Leung re-trial verdict," *Hong Kong Watch*, Mar. 22, 2019.
155. Javier C. Hernandez et al., "Did Hong Kong Police Abuse Protesters? What Videos Show," *New York Times*, June 30, 2019.
156. Julia Hollingsworth, "Hong Kong police declare China extradition protest 'a riot' as rubber bullets and tear gas fired at cr wd," *CNN*, June 12, 2019.
157. Tara John, "Why Hong Kong is protesting: Their fi e demands listed," *CNN*, Aug. 30, 2019.
158. For a sampling of post-July 2021 cases, see, e.g., "8 convicted of rioting in Tsim Sha Tsui during siege at Hong Kong's PolyU in 2019," *Hong Kong Free Press*, Oct. 19, 2022; Kelly Ho, "11 Hong Kong protesters convicted of rioting outside gov't headquarters in 2019," *Hong Kong Free Press*, Aug. 23, 2022; Kelly Ho, "9 Hong Kong protesters jailed up to 4 years and 4 months over 2019 Tsim Sha Tsui riot," *Hong Kong Free Press*, Aug. 19, 2022; Lea Mok, "9 Hong Kong protesters jailed for 3.5 years each over 2019 riot near gov't headquarters," *Hong Kong Free Press*, Sept. 9, 2022; Peter Lee, Hong Kong court convicts 3 of rioting during 2019 protests," *Hong Kong Free Press*, Apr. 26, 2022; Kelly Ho, "Hong Kong court convicts 11 people for rioting at 2019 anti-mask demo," *Hong Kong Free Press*, Apr. 25, 2022; Selina Cheng, "20 convicted of rioting near Hong Kong's China offic during 2019 protests," *Hong Kong Free Press*, Nov. 15, 2021; Selina Cheng, "Hong Kong court convicts 5 of rioting during Chinese University clashes in 2019," *Hong Kong Free Press*, Sept. 3, 2021.
159. *See* https://www.judiciary.hk/en/judgments_legal_reference/judgments.html.

	MIN.	MAX.	MEAN	MEDIAN
AGE	**14**	**58**	**26.5**	**24**
No. of Contemporaneous Offences	0	3	0.9	1
Sentencing Starting Point (months)	42	72	54.2	53.5
Length of Imprisonment	28	63	45	45
Discount for Mitigating Factors	1	18	3.7	2.5
Uplift for Aggravating Factors	2	3	2.5	2.5
Mode of Conviction	**Early Plea**	**Late Plea**	**No Plea**	
	18	4	17	
Types of Sentencing	**Imprisonment**	**Detention Centre**	**Training Centre**	
	38	2	2	
Criminal History	**Yes**	**No**		
	6	33		
Mitigation Factors	**Health**	**Personal Background**	**Age**	
	2	10	3	
Aggravating Factors	**Public Transport**	**Airport**		
	2	2		

The age of defendants convicted of rioting ranges from 14 to 58, with an average of 26. As with most of the criminal case categories studied in this report, young people make up a disproportionate number of those tried and convicted of rioting. Roughly 38% (n=15) of the defendants were convicted of rioting alone. The rest

(n=24) were found guilty of at least one additional crime. These additional charges include possession of offensive weapons, assaulting police officers, wounding, arson, and false imprisonment.

Typically, when deciding upon the length of imprisonment for the convicted, judges first determine a starting point for the sentence. They then adjust upward or downward after considering all mitigating and aggravating factors.

Every defendant convicted of rioting received a custodial sentence. For the rioting cases covered in this report, the starting point varied from 42 months to 72 months, with an average of around 54 months. Mitigating factors which led to a discount in jail time include health conditions, age, and good personal background.

In some instances, the court also considered aggravating factors to increase the sentence. All aggravating factors considered in these cases related to the location: two cases were considered aggravated because they took place inside an MTR station, while two others were at the Hong Kong International Airport. Judges in these cases pointed to the fact that riots taking place in public transport create an even greater disturbance to the public and thus a more severe breach of the peace.

Under normal circumstances, defendants will receive a reduction in sentence if they have a clear record. As shown in Table 1, more than 84% (n=33) of the convicted did not have a criminal history. However, having a clear record rarely counted as a mitigation factor for anti-extradition cases.

Under *HKSAR v. Ngo Van Nam*[160], if the defendant tenders a guilty plea at the first possible opportunity, she or he is entitled to a one-third discount in sentence. If she or he pleads guilty at some point after that but before the trial, the discount will be reduced to 25%. It will be reduced further to 20% if the plea takes place on the first date of trial, and to less than 20% after the trial has started. 46% (n=18) of the defendants took an "early plea," for which they received a one-third reduction. Another 10% (n=4) pled guilty at a later stage and were granted a 25% reduction. The rest (43.6%; n=17) pled not guilty and received no discount.

After consideration of mitigating and aggravating factors, the final sentences handed down by courts varied from 28 to 63 months. On average, defendants convicted of rioting received 45 months of jail time, or three years and nine months.

Beyond the empirical overview reported in Table 1, we also conducted an in-depth qualitative analysis into the reasons for sentence. Several observations are worth noting here.

First, many defendants were convicted of rioting based on the actions of their associates rather than their own behavior. In the 2018 so-called "Fishball Riot"

160. CACC 418/2014.

unrest case, *HKSAR v Tang Ho Yin*,[161] the Court of Appeal laid out three principles for sentencing on rioting charges that were expansive in scope. This decision opened the door to the widespread use of rioting charges against anti-extradition movement protesters, including individuals who themselves did not engage in violent activity. First, the gravity of the offence is judged not merely by the actions of the individual but also those of the group. Second, the offence may be aggravated by the commission of other crimes during the course of the riot. Third, those who associate with others to inflict widespread violence and dest uction must be strongly deterred. Taken together, these three principles underscored the court's decision to define rioting laws as collective in nature. Hence, the Court in *Tang Ho Yin* ruled that it did not matter whether the defendant actually threw bricks at police officers; rather, by associating himself with the rioters, "he was clearly lending support and encouragement to others in the group to violently challenge and attack the police with missiles."[162] Accordingly, the convicted should receive a sentence that reflects the *overall* seriousness and intensity of the disturbances as a whole.

The effect of *Tang Ho Yin* is evident in subsequent cases arising from the anti-extradition protests. In some instances where the court admitted that there was no evidence that defendants had actually committed any acts of violence, the culpability of those convicted was still considered severe. In *HKSAR v Sin Ka Ho*,[163] for instance, Judge Amanda Woodcock stated that: "I will consider the extent of the overall violence involved, not the defendant's individual acts in isolation in order to decide a starting point. His behavior seen on CCTV shows he endorsed the offense and actively took part in it. His culpability is significant"[164] In a recent decision, the Court of Final Appeal prohibited using joint enterprise principles to charge non-rioters with rioting, but left the broad principles of *Tang Ho Yin* in place.[165]

Second, the prosecution's approach to bringing riot cases suggests that it may be engaged in a form of forum shopping, meant to effectively negate the defendant's right to a jury trial.[166] All of the rioting cases stemming from the 2019 protests have been brought in District Court, rather than — as one might expect, given the seriousness of a rioting charge — in the Court of First Instance. As noted above, District Court defendants do not enjoy the right to a jury trial, and defendants prosecuted there may only be sentenced to up to seven years in prison.[167] Defen-

161. CACC 113/2018.
162. *Id.*, at ¶ 26.
163. DCCC 783/2019.
164. *Id.*, at ¶ 58.
165. *HKSAR v. Lo Kin Man* and *Secretary for Justice v .Tong Wai Hung*, FACC 6 and 7 of 2021.
166. The right to a jury trial is protected by the Basic Law. *See* Basic Law of the Hong Kong SAR of the People's Republic of China, at Art. 86. For an extended discussion of the right to a trial by jury in the context of NSL trials, *see* Lydia Wong et al., "Hong Kong's National Security Law and the Right to a Fair Trial: A GCAL Briefing aper," Georgetown Center for Asian Law, June 28, 2021.
167. For an in-depth discussion of the need to expand the right to a jury trial to other levels of the Hong Kong court system, see Franklin Koo, "Power to the People: Extending the Jury to Hong Kong's District Court," *City University of Hong Kong Law Review*," vol. 2, pp. 301-29 (2010).

dants whose cases are heard in the CFI are allowed a jury trial as a matter of right, and can be sentenced to up to ten years in prison if convicted.

To be sure, no concrete evidence has emerged confirming that the DOJ is seeking to avoid having to make its case in front of a jury. But the unbroken pattern of 42 2019 protest movement rioting cases, all brought in District Court, does suggest that DOJ may be engaged in a disturbing trade-off: lose the opportunity to see defendants sentenced to maximum penalties under the law, but also avoid a potentially embarrassing acquittal by a jury of Hong Kong citizens who cannot be politically pressured, and whose belief in the importance of the constitutional right to free assembly may well be quite strong.

The DOJ's handling of 2019 riot cases is also a departure from recent practice: the 2018 Edward Leung Tin-Kei case stemming from the Fishball Riot, for example, was tried with a jury at the High Court.[168] Trial by jury enhances the perceived fairness and credibility of the trial process. If the DOJ were to move any future rioting cases to the CFI, such a move would strengthen the public viability of the resulting verdict. Doing so would also allow the DOJ to dispel growing perceptions that the DOJ is intentionally steering cases away from any venue that would allow defendants to receive a jury trial.

Third, in another departure from past practice, the courts appear to have become more willing to issue severe sentences to young defendants. In *HKSAR v. Yeung Ka Lun*,[169] another 2016 riot case, the Court of Appeal expressed regret over sending an educated young person with no criminal record to prison, but said there was a need for the sentence to "proportionately reflect the seriousness of the crime committed." In the end, the defendant was sentenced to five years in prison, and the Court of Appeal upheld the sentence as not "manifestly excessive."

Fourth, in a number of cases, health conditions were not given significant consideration in sentencing. In 2018, the Court of Appeal in *HKSAR v Tang Ho Yin*[170] concluded that medical conditions, such as ADHD, should not be used to mitigate the sentences issued against those convicted of rioting. The CA further noted that "…those who suffer from such conditions must equally be deterred from volun-tarily involving themselves in mob violence."[171] This judgment has since been cited numerous times in lower courts as a basis to dismiss medical conditions as a mitigating factor for defendants. For instance, in *HKSAR v. Yau Man King*,[172] where the defendant was diagnosed with ADHD, depression and Asperger's syndrome, Judge Anthony Kwok Kai-on refused to grant any sentence reduction, citing *Tang Ho Yin*.

168. HKSAR v. Leung Tin Kei, HCCC 408/2016, [2018] HKCFI 184. For a more in-depth discussion of the Leung case and the offense of rioting in Hong Kong, *see* Margaret Ng et al., "Is Hong Kong's Riot Law 'Respectable'?," *Hong Kong Law Journal*, vol. 50, part 3, pp. 935-60 (2020).
169. CACC 130/2017.
170. CACC 113/2018.
171. *Id.*, at ¶ 34-35.
172. DCCC 814/2019.

Finally, deterrence clearly emerged as the dominant theme in issuing harsh sentences for rioting. In *Secretary of Justice v. Wong Chi Fung* (2018),[173] the CFA held that "in view of the circumstances now prevailing in Hong Kong including increasing incidents of protests involving violence," the court would put additional emphasis on "general deterrence."[174] The court reiterated this principle again in *HKSAR v. Leung Tin Kei* (2020),[175] stating that "the court would impose punitive and sufficiently dete rent sentences on people who commit riot, and an immediate custodial sentence is in general the inevitable choice of sentence."[176] *Wong Chi Fung* and *Leung Tin Kei* have both had a tremendous impact on the sentencing outcomes in anti-extradition rioting cases. In *HKSAR v. Leung Pak Tim*,[177] for instance, Judge Amanda Woodcock observed that "[a] sentence must not only seek to prevent the offender from reoffending, but also give a proper warning to deter others from violating the law by breaking and disrupting public order in a like manner. Acts of violence or threats of violence will not and cannot be tolerated; such acts will attract a deterrent sentence to ensure that the public is protected."[178]

Thus, the general trend in rioting sentencing has been towards harsher sentences with fewer mitigating factors. Courts have been generally unsympathetic to youth, medical conditions, or even the lack of actual participation in violence. For a small but significant number of ounger protesters charged and convicted of rioting, their sentences could be life-changing: an individual in her or his late teens or early 20s convicted of rioting might have his education interrupted, and may find it difficult to find a job after release, given his criminal record.

173. [2018] HKCFA 4.
174. *Id.*, at ¶ 120.
175. [2020] HKCA 275.
176. *Id.*, at ¶ 75. The Court of Appeal in *Leung Tin Kei* set out various factors to be taken into account when passing sentence on the offence of riot. Courts must consider these factors and principles to arrive at a sentence according to the facts of each individual case. The factors include:
(1) whether the riot was spontaneous or premeditated; if it was the latter, how detailed and precise the plan was;
(2) the number of people engaged in the riot;
(3) the degree of violence used by the rioters, including whether weapons were used and, if so, what kind and quantity of weapons;
(4) the scale of the riot, including the time, location, the number of places and the area in which the riot took place;
(5) the duration of the riot, including whether the riot was prolonged, and whether it still went on despite repeated warnings by the police or public officers;
(6) the harm caused by the riot; for example, whether there was any loss or damage to properties and, if so, to what extent; whether anyone was injured and, if so, the number of injured persons and the degree of injury;
(7) what imminence and gravity of threat was caused by the riot;
(8) the nature and extent of nuisance caused to the public by the riot;
(9) the impact on the relationship among community groups caused by the riot;
(10) burden caused to public expenditure by the riot;
(11) the offender's role and group participation; for instance, apart from taking part in the riot, whether he had arranged, led, summoned, incited or advocated others to take part in the riot;
(12) whether the offender committed any other crimes during the course of the riot.
177. DCCC 813/2019.
178. *Id.*, at ¶ 58.

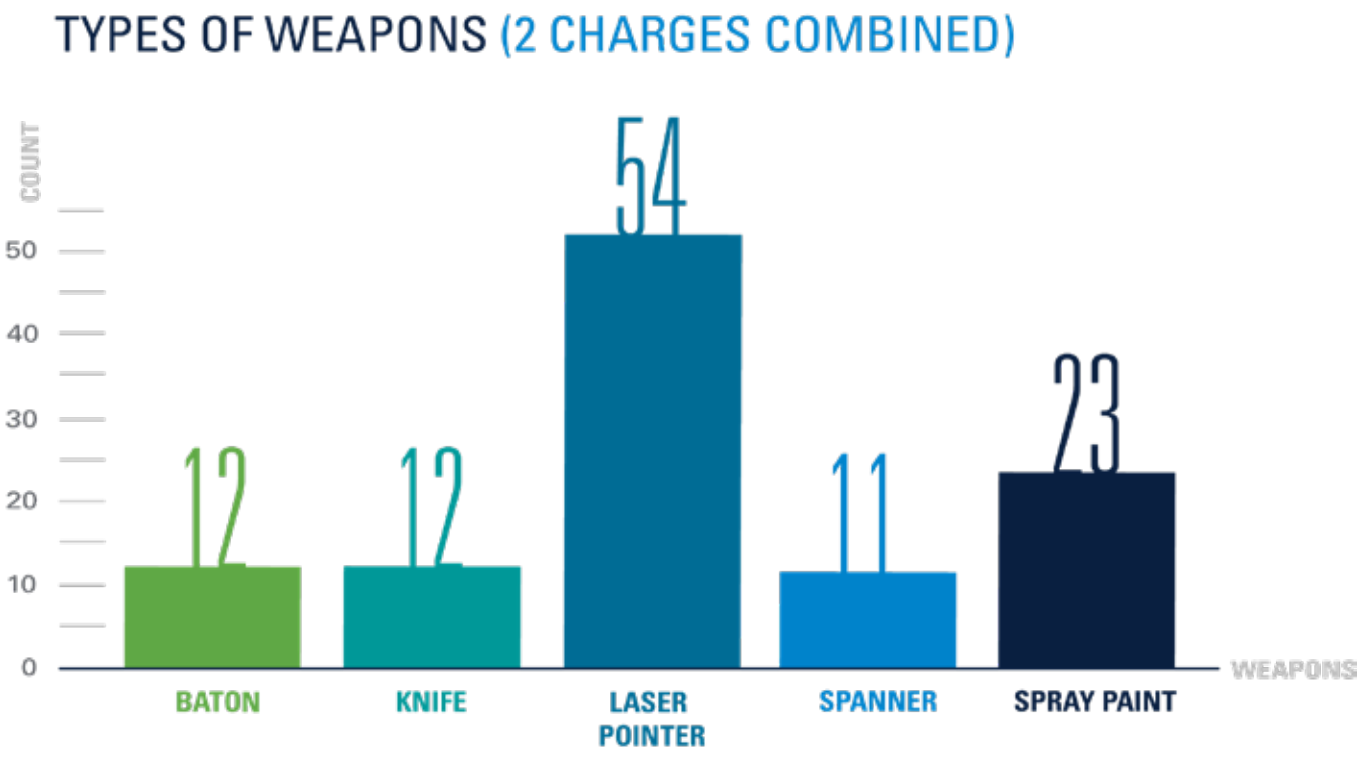
3. CLOSER LOOK: POSSESSION OF WEAPONS

Two of the most charged and convicted crimes during the Anti-Extradition Movement were closely related—possession of an offensive weapon in public place and possessing anything with the intent to destroy or damage property. The former is set out in Section 33 of the Public Order Ordinance with a maximum three-year sentence. The latter is set out in Section 62 of the Crimes Ordinance, which states:

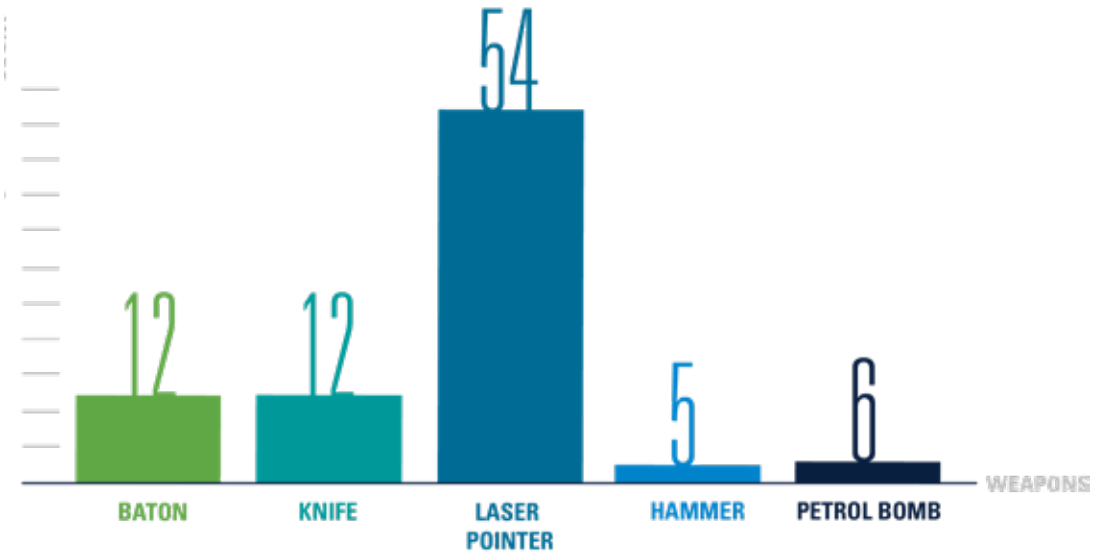
> A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it to destroy or damage any property belonging to some other person or to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person, shall be found guilty.

This crime is punishable by up to 10 years in prison—significantly higher than weapons possession.

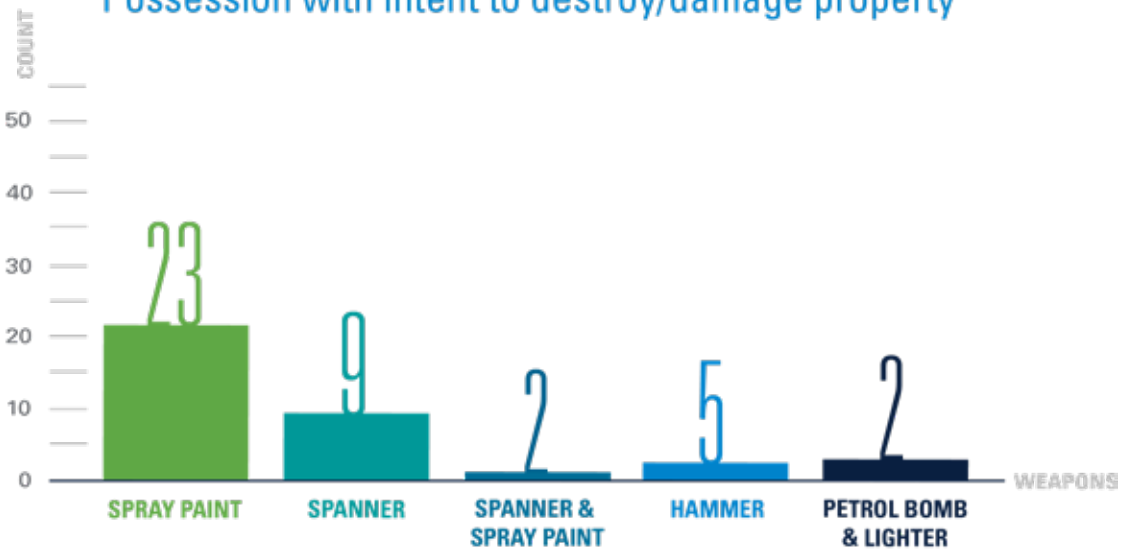
A total of 310 counts involving these two offenses were brought against anti-extradition protesters during the period covered by our data. We were able to collect data as to exactly what "weapons" the defendants had allegedly possessed in 86.5% (n=268) of those counts.



TYPES OF WEAPONS
(Possession of Offensive Weapons in Public Place)

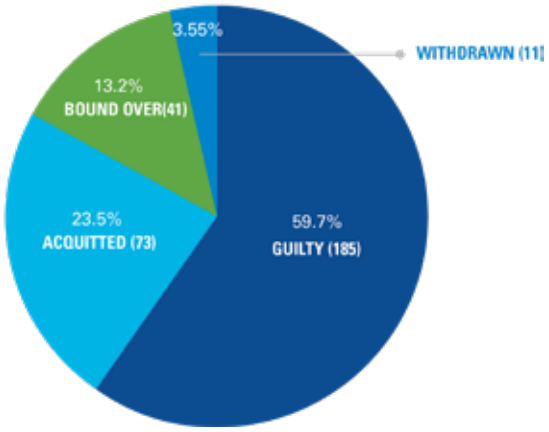


5 MOST COMMON TYPES OF WEAPONS
Possession with intent to destroy/damage property

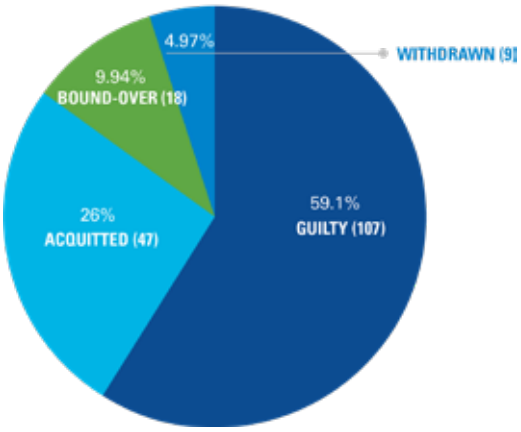


There are numerous combinations of weapons which are alleged to be have been possessed by protesters, with the most common one being possessing laser pointers alone (without possessing any other items), which appeared in 1 in 5 counts (20.1%; n=54). It was followed by spray paint (8.6%; n=23) and batons and knife respectively (4.5%; n=12). Where only one charge was levied—either possession of offensive weapons in a public place and possessing anything with the intent to destroy or damage property—laser pointers and spray paint were still the top two items alleged. Note that each weapons-related charge may involve more than one weapon—for instance, in one count, the defendant allegedly possessed only laser pointer alone; whilst in another instance, another defendant was accused of possessing laser pointer or a knife. Our goal here is not to highlight all

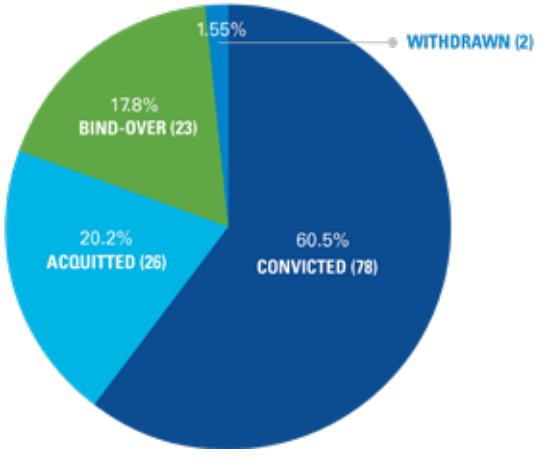
CONVICTION RATES — WEAPONS (Two Crimes Combined)



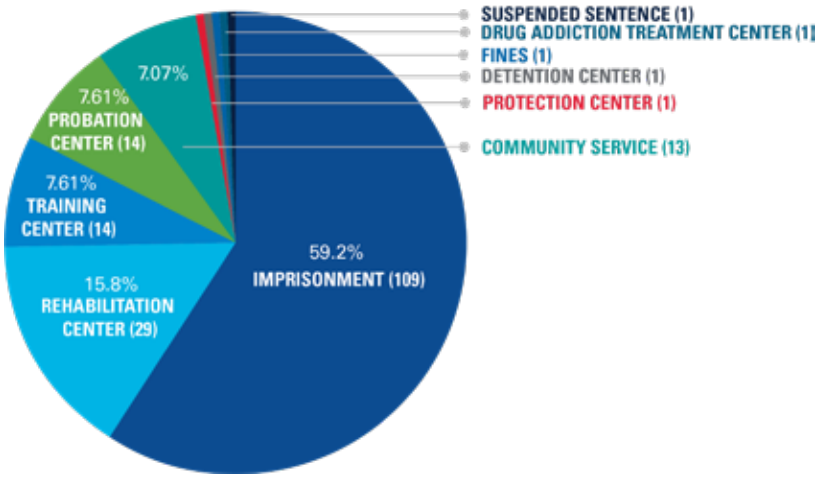
CONVICTION RATES
Possession of Offensive Weapons



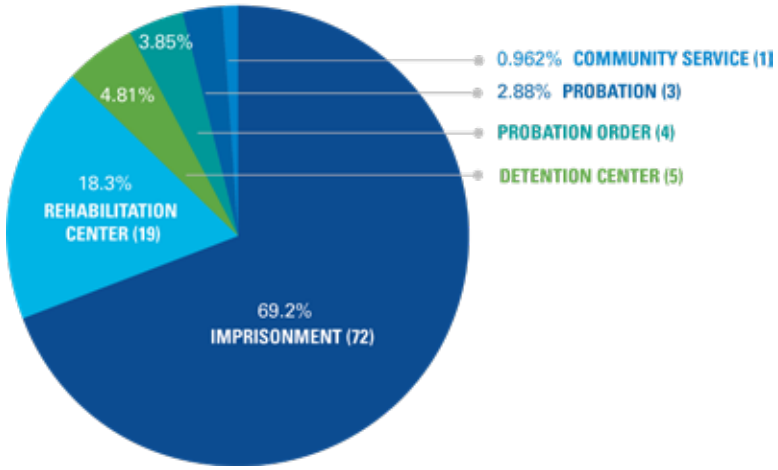
CONVICTION RATE
Possessing with Intent to Destroy/Damage Property



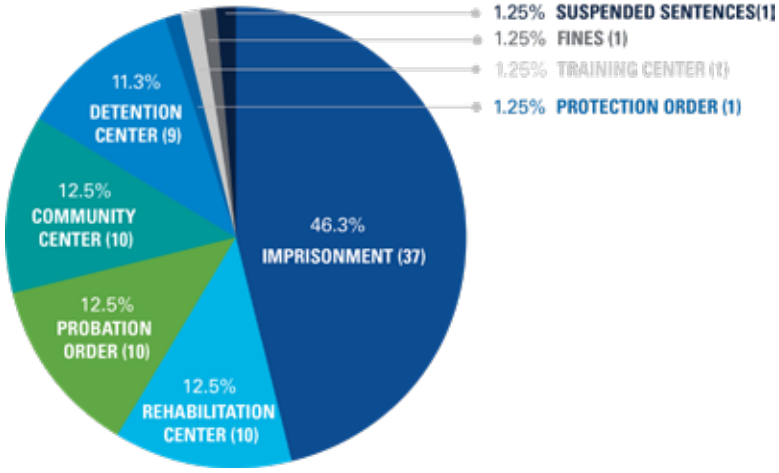
TYPE OF SENTENCES | Two Crimes Combined



TYPE OF SENTENCING | Possession of Offensive Weapons



TYPE OF SENTENCING | Possession Anything with Intent to Destroyor Damage Property



cases which involve laser pointers, as possession of a laser pointer and other offen-sive weapons, such as a knife, would likely be a legitimate ground for a weapons charge. Rather, we are focusing exclusively on cases which involve laser pointers alone, because we believe that the legal ground in such cases is much shakier.

During the protests, protesters often used laser pointers to flummox cameras and disorient police. To be sure, laser pointers were used by protesters as a means of facilitating their participation in protests. That said, it is a stretch to call them "offensive weapons," given that they were not used or intended to be used to commit acts of violence. And yet, the courts have repeatedly accepted the pros-ecution's arguments on this point: 55.6% (n=30) of those charged with possessing a laser pointer alone were convicted by court. Of those for which we have sentence data (n=29), 62.1% (n=18) were sentenced to imprisonment.

As shown in Table 2, those found with *only* a laser pointer have been imprisoned for up to six months, with an average imprisonment of 4.4 months. Again, as explained above in Section V, we count only cases in which defendants were only charged with one crime for length of imprisonment presented in Table 2.

Table 2

	LENGTH OF IMPRISONMENT (MONTHS)			
TYPES OF CHARGES	MIN.	MAX	MEAN	MEDIAN
2 Charges Combined (n=45)	1.5	38	8.6	6
Possession of Offensive Weapon in Public Place (n=33)	1.5	12	6.9	6
Possessing Anything with the Intent to Destroy or Damage Property (n=12)	2.3	38	11.2	6.75
Possession of Offensive Weapon in Public Place (Laser Pointer Only) (n=7)	3	6	4.4	4

In one notable case, Keith Fong Chung-yin, President of Student Council of Hong Kong Baptist University, was arrested by plainclothes police officers who, by happenstance, saw him buying ten laser pointers at a market in August 2019. This incident quickly sparked outrage from the public. Just hours after Fong was arrested, hundreds of people gathered outside Hong Kong's Space Museum with laser pointers in hand, denouncing the authorities' claim that these were offensive weapons. Fong was later acquitted of this charge by the court, yet the judge in the case nonetheless imprisoned Fong for obstructing the police. The supposed obstruction amounted to simply refusing to follow the instructions of plainclothes people accosting him in a shop for a crime that the court accepted he did not commit.[179]

179. *See* Kelly Ho, "Former Hong Kong student leader jailed for 9 months for resisting police and perverting course of justice," *Hong Kong Free Press*, Apr. 7, 2022.

In another case, a 15-year-old boy found with a laser pointer was convicted of possessing offensive weapons in a public place. At court, a government expert observed that laser device could cause harm if it were pointed at the human eye within a distance of 36 meters. Accordingly, acting chief magistrate So Wai-tak concluded that the defendant had intended to protest in a non-peaceful manner: because the boy was wearing protest gear when he had the laser pointer, he therefore must have intended to use it to inflict harm or discomfort upon others. Magistrate So came to this conclusion despite the fact that there was no evidence to suggest that the defendant had even used the device. There was also no evidence showing that others had actually used them to inflict harm on police officers or others during the course of the protests.[180]

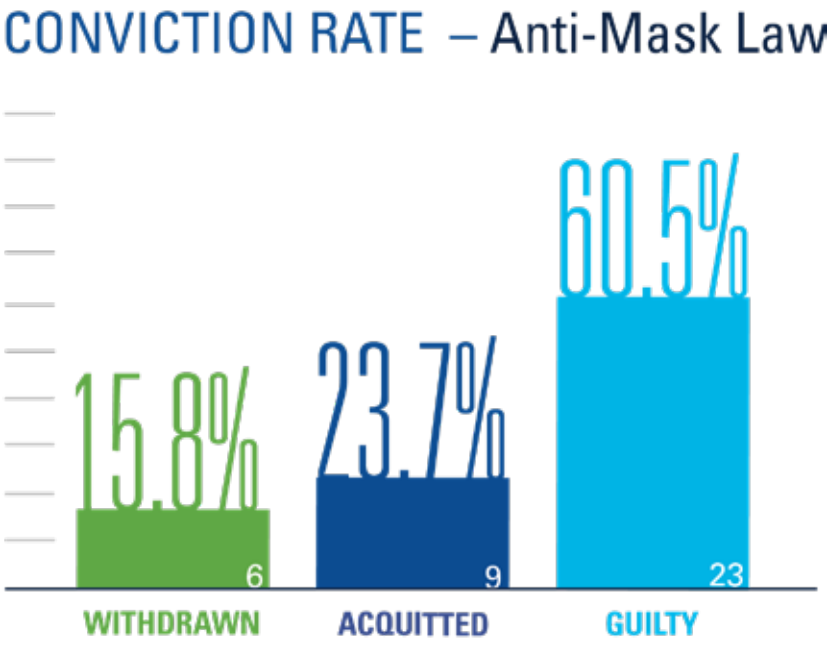
In one positive development, another item for which a number of protesters had been charged under the "fit for unlawful purposes" statute—possession of plastic ties—was rejected by the Court of Final Appeal in July 2022, which held that the statute could not have been intended to be applied so broadly. This case has provided at least some hope that some of the weaker theories presented by the DOJ and accepted by magistrates and lower court judges might ultimately be rejected on appeal.[181]

4. CLOSER LOOK: "ANTI-MASK" LAW

Another highly controversial law frequently used by the government against protesters is the anti-mask law. In October 2019, in response to the protests, the government passed the Prohibition on Face Covering Regulation which, with few exceptions, prohibits the wearing of facial coverings that conceal one's identity in public assemblies, and empowers the police to require the removal of such coverings. Under the anti-mask law, wearing facial coverings in a public meeting or procession is punishable by up to a year in jail and a HKD$25,000 (US$3,206) fine. The law's constitutionality had been challenged in various rounds of appeals; it was upheld by the city's top court in late 2020 with respect to unauthorized protests, though overturned with respect to lawful processions[182]— currently a somewhat meaningless distinction as all pro-democracy political gatherings since the 2019 protests have been unauthorized.

We found at least 38 completed anti-mask law counts from the Anti-Extradition Movement. Of those, 23 (60.5%) were found guilty, while nine (23.7%) were acquitted, as shown as shown in the above data illustration. The rest (n=6; 15.8%) were withdrawn. The police also reported that 77 people were arrested under the anti-mask law a few days after its enactment.[183] According to the data we collected, 18 defendants convicted of violating this law were sentenced

180. Jasmine Siu, "Hong Kong protests: teen loses appeal over laser pointer conviction," *South China Morning Post*, May 21, 2020.
181. Brian Wong, "Hong Kong protests: top court acquits first person jailed or carrying zip ties, rules items 'not instruments fit for unlawful purposes'," *South China Morning Post*, July 15, 2022.
182. *Leung Kwok Hung v. Secretary for Justice*, [2020] HKCA 192.
183. "Police say 77 people arrested in Hong Kong for anti-mask law violations," *Reuters*, Oct. 8, 2019.



to imprisonment. The length of the jail time varied from two weeks to three months. In addition, three defendants were sent to a rehabilitation center and one was fined HKD$4,000. (We are missing data on sentencing for one conviction.)

According to press reports, the courts continued to sentence those convicted of violating the anti-mask law to custodial sentences after July 31, 2021. The government's push to impose custodial sentences on individuals who were convicted of violating the anti-mask law is illustrative of the broader approach to the Anti-Extradition Movement as a whole: wherever possible, the government is seeking to punish those who took part in the 2019 protests, even in cases in which individuals are accused of minor, non-violent crimes.

In some anti-mask cases, judges linked the charges against the defendants to the broader protest environment. This could lead to somewhat puzzling outcomes. In one case, a group of five defendants were acquitted of rioting charges yet found guilty of breaching the anti-mask regulation.[184] Although the court found that there was insufficient evidence to prove their participation in a riot, Deputy District Judge David Ko Wai-hung reportedly declared at court that "I am not prepared to impose non-custodial sentences. I cannot take my eyes off the background of the case. It was the second day the mask ban took effect. The riot on that day was serious. So were the acts committed by its participants."[185] As a result, three of the convicted were sentenced to 2.5 months in prison, while their co-defendants were sentenced to nine months of correctional training and 240

184. Brian Wong, "Hong Kong protests: 5 cleared of rioting, but judge says group will be jailed for breaking anti-mask law," *South China Morning Post*, Dec. 22, 2021.
185. *Ibid.*

hours of community service respectively.[186] Those sentenced to custodial sentences could not be proved to have done anything other than wearing a mask at a protest, and yet they were sentenced to jail time.

Where the anti-mask charge is one of multiple charges, it has had a compounding effect on sentencing. For example, Owen Au, the former Chinese University of Hong Kong's Student Union president, was convicted of violating the mask ban and of possessing a bottle of spray paint with intent to damage property, for which he received a total of six months' jail time.[187]

Even in cases where defendants were not charged with breaching the anti-mask law, the fact that they wore a mask in a protest zone was sometimes cited by the court as a contributing factor to the conviction or sentence. In *HKSAR v. Sham Hiu Lun*[188], for instance, Judge Anthony Kwok Kai-on noted that the defendant, who was convicted of riot but not charged under the anti-mask law, had his face covered at the protest. Judge Kwok cited that fact as one factor in his decision to hand down a more severe sentence. [189] Sham was eventually sentenced to four years in prison.

186. Brian Wong, "Hong Kong protests: 3 jailed for 2½ months each for breaking anti-mask law; 2 others get correctional training, community service," *South China Morning Post*, Jan. 11, 2022.
187. Kelly Ho, "Former Hong Kong student leader Owen Au jailed for 6 months over 2019 anti-mask law protest," *Hong Kong Free Press*, June 2, 2021.
188. DCCC 825/2019, [2020] HKDC 853.
189. *Id.*, at ¶ 19.

VIII. CONCLUSION

This report cannot tell the full story of 2019 protester prosecutions, because that story is not yet fully written. In October 2022, the government reported new prosecution figures related to the protests. Since the July 2021 cutoff of our data through August 2022—a little more than one year—an additional 517 cases have concluded, for a total of 2,044. Even more notably, it is clear that the DOJ is still working through the backlog and *charging* people, more than two years after the end of the protests. From July 2021 to August 2022, an additional 209 people were charged for protest-related crimes. With 10,279 total arrests during the protests, it is quite possible that additional charges will continue to be filed for some time, even as other cases complete the judicial process.[190]

UPDATED 2019 PROTEST PROSECUTION FIGURES			
	GOVERNMENT STATS THROUGH JULY 2021	GOVERNMENT STATS THROUGH AUGUST 2022	DIFFERENCE (I.E., ADDITIONS FROM 7/21-8/22)
Arrests	10,265	10,279	+14
Prosecuted	2,684	2,893	+209
Completed Judicial Process	1,527	2,044	+517

The data we have presented in this report show that there are numerous irregularities with the ongoing prosecutions that raise questions about whether defendants are able to get a fair trial. What's more, the extremely long period of time in which these prosecutions have been going on, and indications that they will continue for years, suggests that the discontent in society caused by the perceived irregularities and unfairness of these prosecutions will not go away anytime soon.

There are other options available to the Hong Kong government. Since the protests themselves, many voices — including top criminal lawyers, members of the Hong Kong Bar Association, legal academics, and others — have called for amnesty for protesters. Thus far at least, these calls have been rejected by the Hong Kong government. But as Hong Kong now seeks to turn the page on the events of 2019, in order to attract both foreign investment and foreign talent back to Hong Kong, it's time to revisit the question of an amnesty, or at the very least a decision to end further prosecution of 2019 cases, especially for those charged

190. Kelly Ho, "Almost 3,000 people, including 517 minors, prosecuted so far over 2019 Hong Kong Protests, Hong Kong Free Press, Oct. 27, 2022.

with non-violent crimes. We recognize that the chances of the government changing course on amnesty at this point seems very low. Nonetheless, the findings of this report make clear that doing so would in fact be in the interests of justice, and would go a long way in repairing the divisions in society created over the past three years.

APPENDIX

PAGE 50:
MISSINGNESS DATA: MODES OF CONVICTION AND REASONS FOR ACQUITTAL/WITHDRAWAL

	NUMBER OF ENTRIES WITH MISSING DATA
Modes of conviction	41
Reasons for acquittal/withdrawals	210

PAGE 63: TRIAL WAITING TIME

	MIN	MAX	MEAN	MEDIAN	TOTAL NUMBER WITH DATA FOR WAITING TIME, REMOVING DUPLICATES	MISSING VALUE
Waiting time	17	768	343.0	329.5	811	13

P. 70: JUVENILES: AGE OF DEFENDANTS

	MIN	MAX	MEAN	MEDIAN	TOTAL NUMBER OF CASES (WITH AGE, REMOVING DUPLI-CATES)	NUMBER OF CASES INVOLVED PERSONS UNDER 18	NUMBER OF CASES INVOLVED PERSONS UNDER 16
Age	12	84	26	23	1039	138	19

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