MAKING CHINESE COURT FILINGS PUBLIC? SOME NOT-SO-FOREIGN AMERICAN INSIGHTS

Over the past twenty-odd years, China has embarked on a somewhat determined path toward judicial transparency.[1] Much of the progress came about during the first term of the Xi Administration, which has witnessed from 2013 to 2018 the rollout and revamp by the Supreme People's Court (SPC) of three online platforms: for publication of Chinese court opinions, streaming of judicial proceedings, and disclosure of court judgments' enforcement status.[2] Though the implementation of these measures is far from satisfactory,[3] the SPC continues to explore new possibilities of making Chinese courts more transparent. One recent highlight is the Provisions on the Publication of Judicial Process Information by People's Courts on the Internet[4] (the PJPI Provisions),

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[1] *See* Björn Ahl & Daniel Sprick, *Towards Judicial Transparency in China: The New Public Access Database for Court Decisions*, 32 CHINA INFO. 3, 5–7 (2018); Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law* 3–7 (21st Century China Ctr., Research Paper No. 2017-01; Columbia Pub. Law, Research Paper No. 14-551, 2017), https://ssrn.com/abstract=2985861 [https://perma.cc/K9VR-5VP4] (tracing such transparency efforts to the mid-1980s and 1990s); *see also* Susan Finder, *China's Translucent Judicial Transparency*, *in* TRANSPARENCY CHALLENGES FACING CHINA 141, 147–62 (Fu Hualing et al. eds., 2019) (describing China's more recent transparency measures).

[2] *See* Ahl & Sprick, *supra* note 1, at 5–7 (summarizing the developments).

[3] The literature focuses mostly on the reasons for selective nonpublication of court opinions that should have been published on the online platform, the China Judgements Online. *See, e.g.*, Ma Chao (马超), Yu Xiaohong (于晓虹) & He Haibo (何海波), *Dashuju Fenxi: Zhongguo Sifa Caipan Wenshu Shangwang Gongkai Baogao* (大数据分析: 中国司法裁判文书上网公开报告) [*Big Data Analytics: A Report on Publishing Court Opinions on China Judgements Online*], ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA L. REV.], no. 4, 2016, at 195, 207–08, 222 (finding that between 2014 and 2015, Chinese courts, depending on their provincial localities, published twenty percent to eighty percent of their opinions and often omitted those of high-profile cases); Tang Yingmao (唐应茂), *Sifa Gongkai jiqi Jueding Yinsu: Jiyu Zhongguo Caipan Wenshu Wang de Shuju Fenxi* (司法公开及其决定因素：基于中国裁判文书网的数据分析) [*Judicial Transparency and Its Determining Factors: Based on Data Analysis of China Judgements Online*], QINGHUA FAXUE (清华法学) [TSINGHUA U. L.J.], no. 4, 2018, at 35, 40–45; Tang Yingmao (唐应茂), *Lingdao Yiyuan, Jigou Nengli he Sifa Gongkai — Beijing, Shanghai, Guangdong Caipan Wenshu Shangwanglü de Chubu Yanjiu* (领导意愿、机构能力和司法公开 — 北京、上海、广东裁判文书上网率的初步研究) [*Leaders' Willingness, Institutional Capacity and Judicial Transparency — A Preliminary Study of the Online Publication Rates of Court Opinions Issued in Beijing, Shanghai and Guangdong*], ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA L. REV.], no. 6, 2018, at 90, 94–101; *see also* KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 72–73 (2017) (describing the problem of accessing past Chinese court decisions, even by Chinese judges).

[4] Zuigao Renmin Fayuan Guanyu Renmin Fayuan Tongguo Hulianwang Gongkai Shenpan Liucheng Xinxi de Guiding (最高人民法院关于人民法院通过互联网公开审判流程信息的规定) (issued Mar. 4, 2018, effective Sept. 1, 2018), CLI.3.311592 (EN) (Lawinfochina) [hereinafter PJPI Provisions]. For an English introduction, see Laney Zhang, *China: Courts Required to Provide Judicial Process Information Through One Online Platform*, LIBR. CONGRESS (July 31, 2018), https://www.loc.gov/law/foreign-news/article/china-courts-required-to-provide-judicial-process-information-through-one-online-platform [https://perma.cc/WW3U-YE5C].

under which the SPC officially started to contemplate making public, among other things, court filings.[5]

U.S. laws, the SPC noted, set a favorable example of public access to court filings.[6] Indeed, American courts have a longstanding tradition of opening up judicial records to the general public, a tradition that was derived from and built upon their English common law heritage.[7] Recent experiences prove that calls for a stronger right of access to court records are never old, and ever new. In 2019 alone, there have been a bipartisan congressional bill and a high-profile class action both seeking to remove fees for online access to federal court filings.[8] A national news organization has also litigated before the federal circuit courts for years, most recently in 2018, asserting a constitutional right of access to filed complaints upon their immediate receipt by certain state courts.[9] In public and academic discourses, proposals for greater judicial transparency, including better access to court filings, have appeared time and again.[10]

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[5] PJPI Provisions, art. 9(1). Textually, the Provisions allow Chinese courts to publish filings in some extremely limited circumstances. *See id.* art. 1, para. 2; *infra* note 25 and accompanying text.

[6] *See* Li Liang (李亮) & Zhang Yang (章扬) [SPC officials], *Renmin Fayuan Shenpan Liucheng Xinxi Gongkai de Ruogan Wenti — Dui "Zuigao Renmin Fayuan Guanyu Renmin Fayuan Tongguo Hulianwang Gongkai Shenpan Liucheng Xinxi de Guiding" de Lijie* (人民法院审判流程信息公开的若干问题 — 对《最高人民法院关于人民法院通过互联网公开审判流程信息的规定》的理解) [*On Several Issues of Publishing Judicial Process Information — Understanding the PJPI Provisions*], FALÜ SHIYONG (法律适用) [J.L. APPLICATION], no. 17, 2018, at 42, 45 [hereinafter *Understanding the PJPI Provisions*]; Li Liang (李亮) & Zhang Yang (章扬), *Dangqian Shenpan Liucheng Xinxi Gongkai Gongzuo Yingdang Zhuyi de Jige Wenti* (当前审判流程信息公开工作应当注意的几个问题) [*On Several Issues of Judicial Process Information*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], May 9, 2019, at 5.

[7] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW 25–26 (1953); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 428–29 (1991); Stephen Wm. Smith, *Kudzu in the Courthouse: Judgements Made in the Shade*, 3 FED. CTS. L. REV. 177, 187–97 (2009).

[8] *See* Electronic Court Records Reform Act of 2019, H.R. 1164, 116th Cong. § 3 (2019) (providing also that all filings should be made "text-searchable and machine-readable"); Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. TIMES (Feb. 4, 2019), https://nyti.ms/2DToT8M [https://perma.cc/W5EJ-ENKK] (reporting on *Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123 (D.D.C. 2018), and noting that it has "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups and a sponsor of the [E-Government Act of 2002]").

[9] *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1065 (7th Cir. 2018); Courthouse News Serv. v. Planet, 750 F.3d 776, 779 (9th Cir. 2014).

[10] Roughly a decade before China started to embrace judicial transparency, there was also in the United States "an intense, nationwide campaign . . . underway to create a 'presumption of public access' to *all* information produced in the litigation." Miller, *supra* note 7, at 429; *see also id.* at 429 n.7 (collecting federal and state legislation that aimed to increase court transparency); *infra* p. 1734 (discussing how remote public access to federal court filings was established in the 1990s). For more recent calls for enhancing court transparency, see, for example, POUND CIVIL JUSTICE INST., JUDICIAL TRANSPARENCY AND THE RULE OF LAW (2016); David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 906–16 (2017); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787,

Inspired by these developments in the two countries, this Note investigates some of the U.S. policy considerations underpinning public access to court filings and argues that they are, in varying degrees, either compatible with or complementary to existing Chinese legal institutions concerning judicial transparency. To put the discussion in perspective, Part I briefly describes the reality of accessing court filings in China and the evolving U.S. public access regime. Part II does two things. First, it identifies two specific U.S. arguments favoring such access and finds that they make a somewhat appealing case in the Chinese legal context. Second, it responds to a concern shared by both systems, that increasing transparency might undermine the quality of judicial decisionmaking, and finds it wanting as to making court filings public in China. Part III examines certain U.S. justifications for the incidental privacy and reputational harms caused by disclosure of court filings. It suggests that the common thread of such justifications — that private interests should yield to certain significant public ones — can complement existing Chinese courts' rationales for resolving the growing tension between judicial transparency and individuals' need for secrecy. At bottom, this Note follows modern China's century-old aspiration to "modernize" its legal system based on ideas from foreign law,[11] mindful, nonetheless, of an important caveat: that this historical enterprise has merits today only if the foreign ideas found actually fit with China's legal framework and can help solve problems arising thereunder.[12]

I. SYNOPSES OF TWO REGIMES

A. Public Access to Court Filings in China

Chinese court filings are generally restricted to the view of the parties to the case.[13] Courts have described them as "internal litigation documents (内部诉讼文书)" for litigants' (and courts') eyes only.[14] While there are no specific laws proscribing their publication,[15] doing so on

839–45 (2016); and Editorial Board, Opinion, *Public Records Belong to the Public*, N.Y. TIMES (Feb. 7, 2019), https://nyti.ms/2UNvni5 [https://perma.cc/Y7D5-9VGF].

[11] *See generally* Taisu Zhang, *The Development of Comparative Law in Modern China*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 228 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019). That foreign law can be a source of domestic law reform has been long touted as a major virtue of comparative law. *See* ALAN WATSON, LEGAL TRANSPLANTS 17 (Univ. of Ga. Press 1993) (1974).

[12] *See* SU YEONG-CHIN & FANG LIUFANG (蘇永欽 & 方流芳), XUNZHAO XIN MINFA (尋找新民法) [SEARCHING FOR A NEW CIVIL LAW] 21 (2019) (remarks of Professor Fang Liufang).

[13] *See* Li (李) & Zhang (章), *Understanding the PJPI Provisions*, *supra* note 6, at 45–46.

[14] Li Laichang yu Ni Youxi Mingyu Quan Jiufen Ershen Minshi Panjueshu (李来昌与倪有喜名誉权纠纷二审民事判决书) [Li Laichang v. Ni Youxi], CHINA JUDGEMENTS ONLINE (Nantong Interm. People's Ct. May 5, 2017).

[15] Although there is a cobweb of internal regulations prohibiting Chinese judges from disclosing an array of case files referred to as "judicial work secrets" (审判工作秘密) or "trial secrets" (审判秘

one's own initiative risks civil liabilities. A case in point is *Guan Lili v. Zhao Yao*,[16] where a criminal defense lawyer was held liable for defamation and privacy invasion for posting online his defense opinions made in an already-closed, openly tried case that involved the plaintiff's husband.[17] Although the court concluded that the statements were reasonably supported by openly challenged evidence, it nonetheless found that they contained information that discredited the plaintiff, and their nonconsensual disclosure had harmed her privacy and reputation.[18] Not all the damages sought by the plaintiff were awarded though, presumably because the court realized that attorneys' litigation-related statements are also protected under Chinese law.[19]

Despite *Guan Lili*, Chinese lawyers have not uncommonly circulated court filings to the media in order to check judicial abuses and pressure courts to reason better, especially in criminal cases.[20] Indeed, the now-regularly published court decisions bring to light one vexing problem of Chinese courts: writing up thinly reasoned opinions that, among other things, accord only cursory, if any, attention to litigants' submissions in court filings.[21] A terse summary, if one is given at all, of each party's factual and legal positions tends to be the order of the day, irking not only the losing party but also the winning one.[22] Worse still, courts are sometimes too quick to dismiss complaints that are either meritorious to

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密), *see* Finder, *supra* note 1, at 145–46, documents filed by the parties do not fall into those categories.

16 Guan Lili yu Zhao Yao Mingyu Quan Jiufen Ershen Minshi Panjueshu (关力立与赵耀名誉权纠纷二审民事判决书), CHINA JUDGEMENTS ONLINE (Shenzhen Interm. People's Ct. Dec. 11, 2014).

17 *See id.*

18 *Id.* While the defense statements were not libelous, the court found defamation liability based on an SPC rule that privacy disclosure in literary works can constitute defamation. *Id.* (citing Zuigao Renmin Fayuan Guanyu Shenli Mingyu Quan Anjian Ruogan Wenti de Jieda (最高人民法院关于审理名誉权案件若干问题的解答) [Answers of the SPC to Certain Questions on Adjudicating Defamation Cases] (issued and effective Aug. 7, 1993), art. 9, CLI.3.6342 (Chinalawinfo)).

19 *Id.* (discussing attorneys' professional duty to advocate for clients).

20 *See* Liu Feng (刘峰), *Lüshi Bianhuci Dailici Ye Ying Gongkai* (律师辩护词代理词也应公开) [*Attorneys' Filed Briefs Should Also Be Made Public*], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Mar. 25, 2015, at 19; *see also* Benjamin L. Liebman, *The Media and the Courts: Towards Competitive Supervision?*, 208 CHINA Q. 833, 840–42 (2011) (discussing how media coverage of high-profile Chinese criminal cases brought about changed outcomes).

21 *See* NG & HE, *supra* note 3, at 52 ("Legal analyses rarely appear in . . . judgments. Neither do judges respond directly to lawyers' submissions in judgments."); Colloquium, *"Caipan Wenshu Shuoli de Jiqiao yu Guize" Yantaohui Fayan Zhaideng* ("裁判文书说理的技巧与规则"研讨会发言摘登) [*Selected Comments at Colloquium on "Methods and Norms of Providing Reasoning in Court Opinions"*], RENMIN SIFA·YINGYONG (人民司法·应用) [PEOPLE'S JUDICATURE: APPLICATION], no. 25, 2016, at 90, 96 (Remarks of Chinese Judge Tang Wei (唐卫)).

22 *See* Jin Hao (靳昊), *"Sheng de Mangran, Shu de Hutu," Caipan Wenshu Ruhe Yi Li Fu Ren* ("胜得茫然、输得糊涂", 裁判文书如何以理服人) [*"Confusing Win, Baffling Loss," How Court Opinions Can Persuade Litigants with Reason*], GUANGMING RIBAO (光明日报) [GUANGMING DAILY], July 15, 2018, at 7.

begin with or at least worthy of fuller explanations for dismissals.[23] As early as 1999, the SPC noted that the quality of judicial reasoning had suffered from courts' very failure to respond adequately to litigants' arguments.[24] Yet, despite steadfast institutional resolution to tackle this problem, little progress has been made since.

The PJPI Provisions provided for the first time for discretionary public disclosure by courts of parties' filings — limited, for now, to complaints and answers, appeal briefs, and certain filed petitions — in "cases with major social impact (具有重大社会影响案件)."[25] This modest exception to the general nondisclosure was put forward as a response to growing public interest in high-profile cases, and as a measure to improve public monitoring and social accountability of the judiciary, as well as to promote general understanding of the law.[26] Yet the PJPI Provisions' *primary* aim still is, the SPC emphasized, to "safeguard parties' right to know adjudicatory matters (保障当事人对审判活动的知情权)."[27] not that of the public. Until further deliberation, the SPC felt that it was not ready yet to make disclosure the norm.[28] Notably, U.S. laws have been invoked as important reasons both for making Chinese court filings public and, more emphatically, for being circumspect in doing so.[29] The tension between the public's right to know and privacy protection is proffered by the SPC as one major source of its hesitation.[30]

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[23] *See* NG & HE, *supra* note 3, at 125; *see also infra* note 74 and accompanying text.

[24] *See* Quanguo Minshi Anjian Shenpan Zhiliang Gongzuo Zuotanhui Jiyao (全国民事案件审判质量工作座谈会纪要) [Summaries of National Conference on Improving the Quality of Civil Case Adjudication] (published Nov. 29, 1999), pt. 2, para. (4), CLI.3.141183 (Chinalawinfo).

[25] PJPI Provisions, art. 1, para. 2.

[26] Luo Shuzhen (罗书臻), *Shenru Tuijin Sifa Gongkai Nuli Manzu Renmin Qunzhong Duoyuan Sifa Xuqiu — Zuigao Renmin Fayuan Shenguanban Fuzeren jiu "Guanyu Renmin Fayuan Tongguo Hulianwang Gongkai Shenpan Liucheng Xinxi de Guiding" Da Jizhe Wen* (深入推进司法公开 努力满足人民群众多元司法需求 — 最高人民法院审管办负责人就《关于人民法院通过互联网公开审判流程信息的规定》答记者问) [*SPC Answers Press Questions on the PJPI Provisions*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], Mar. 17, 2018, at 3.

[27] *Id.* (quoting PJPI Provisions, pmbl.).

[28] *Id.*

[29] *See* Li (李) & Zhang (章), *Understanding the PJPI Provisions*, *supra* note 6, at 45; Li (李) & Zhang (章), *On Several Issues of Judicial Process Information*, *supra* note 6.

[30] *See* Li (李) & Zhang (章), *On Several Issues of Judicial Process Information*, *supra* note 6; SPC, *Dui Shisan Jie Quanguo Renda Yi Ci Huiyi Di 6059 Hao Jianyi de Dafu* (对十三届全国人大一次会议第6059号建议的答复) [*SPC's Response to Proposal No. 6059 of the First Meeting of the Thirteenth National People's Congress*], QUANGUO RENDA DAIBIAO QUANGUO ZHENGXIE WEIYUAN GOUTONG LIANLUO PINGTAI (全国人大代表 全国政协委员 沟通联络平台) [SPC'S COMM. PLATFORM FOR MEMBERS OF THE NAT'L PEOPLE'S CONGRESS & THE PEOPLE'S POL. CONSULTATIVE CONF.] (Dec. 5, 2018, 2:31 PM), http://gtpt.court.gov.cn/site/NPCSystem/jytabl/info/2018/http68e003f5-f48b-4c3e-a8d7-fc0ac826f1f7.html [https://perma.cc/FA5U-6HFU]

B. Public Access to Court Filings in the United States

The U.S. Supreme Court has recognized a common law "presumption . . . in favor of public access to judicial records"[31] — a public right of access "that predates the Constitution itself."[32] As a threshold matter, courts often decide whether a specific filing is presumptively public by asking whether it can be classified as a "judicial record,"[33] for which varying, but mostly relaxed, standards have been employed.[34] If this threshold is cleared, then the inquiry becomes whether there exist countervailing considerations for nondisclosure that can overcome the presumption for disclosure,[35] a balancing exercise that the Supreme Court found "best left to the sound discretion of the trial court."[36] Heeding this call, the D.C. Circuit, for example, has identified six factors to rein in lower courts' discretion, with the starting point being a "strong presumption" favoring public access.[37] Some circuits have taken an even more protective view of this common law right of access, allowing sealings of court filings only when they are "narrow[ly] tailor[ed]" to serve "compelling" confidentiality interests,[38] a standard reminiscent of that more often used to protect constitutional rights.

Indeed, many courts have held that the First Amendment also gives rise to a presumption of public access to court records. While the Supreme Court's view so far is that the amendment grants the public a right of access only to criminal trials,[39] "the federal courts of appeals

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[31] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 602 (1978). Unlike the English practice, "American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Id.* at 597.

[32] *Id.* at 612 (Marshall, J., dissenting) (quoting United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976)).

[33] *See, e.g.*, United States v. Kravetz, 706 F.3d 47, 54 (1st Cir. 2013); United States v. Amodeo (*Amodeo I*), 44 F.3d 141, 145 (2d Cir. 1995) (using the term "judicial document").

[34] The most relaxed one, employed by the Third Circuit and some other jurisdictions, is that "all material filed in connection with nondiscovery pretrial motions" is considered judicial records and subject to "a presumptive right to public access." Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 165 (3d Cir. 1993); *see also id.* at 161–62 (endorsing "the principle that the filing of a document gives rise to a presumptive right of public access"). Some circuits have required more than a mere filing of a document; the document also has to bear some relationship to judicial decisionmaking. *See Amodeo I*, 44 F.3d at 145–46 (discussing First Circuit cases). State legislatures and courts have similarly defined judicial records broadly. *See* CROSS, *supra* note 7, at 137–39, 141.

[35] *Nixon*, 435 U.S. at 598–99.

[36] *Id.* at 599.

[37] *See* MetLife, Inc. v. Fin. Stability Oversight Council, 865 F.3d 661, 665 (D.C. Cir. 2017) (citing United States v. Hubbard, 650 F.2d 293, 317–22 (D.C. Cir. 1980)).

[38] *See* ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., SEALING COURT RECORDS AND PROCEEDINGS 3 & nn.9–10 (2010) (citing cases decided by the First, Fourth, and Ninth Circuits).

[39] *See* Press-Enter. Co. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1, 10 (1986); Press-Enter. Co. v. Superior Ct. (*Press-Enterprise I*), 464 U.S. 501, 505 (1984); Ardia, *supra* note 10, at 850, 855 ("Since *Press-Enterprise I* and *II*, the Supreme Court has not revisited its conclusion that the First

have widely agreed that [such right] extends to civil [judicial] . . . records."[40] A two-pronged approach, the "tests of experience and logic,"[41] has been used to determine whether the First Amendment right of access applies to a particular court filing: under the experience prong, whether the document "ha[s] historically been open to the press and general public,"[42] and then, under the logic prong, whether "public access plays a significant positive role in the functioning of the particular process in question."[43] Court filings that meet both prongs are presumptively public, and such "presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[44] However, applying this test to court filings is not universally followed; some courts have sidestepped the First Amendment inquiry altogether and applied only the common law test.[45]

So much for the legal doctrines. The U.S. public's right of access to judicial records became everyday reality only in the 1990s when people no longer had to "queue up at the counter and mark the papers [they] wanted copied" at the courthouse.[46] With respect to federal courts, the Public Access to Court Electronic Records (PACER) system, instituted nationwide in 1990,[47] allows the public to remotely view court filings of "all district, bankruptcy, and appellate courts . . . immediately after they have been electronically filed."[48] The now-general requirement that

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Amendment provides a qualified right of access to criminal trials and trial-like proceedings . . . ." *Id.* at 855.).

40 Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014) (collecting cases).

41 *Press-Enterprise II*, 478 U.S. at 9; *see* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1069–70 (7th Cir. 2018).

42 *Press-Enterprise II*, 478 U.S. at 8 (citing Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605 (1982)).

43 *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

44 *Id.* at 9 (quoting *Press-Enterprise I*, 464 U.S. at 510).

45 *See* Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1760 (2006); *see also* Ardia, *supra* note 10, at 875 (same conclusion). But, "[i]n practical terms, it may be of little consequence whether a right of access is rooted in the First Amendment or 'only' in the common law," REAGAN, *supra* note 38, at 4, because "courts have employed much the same type of screen in evaluating their applicability to particular claims," *In re* Providence Journal Co., Inc., 293 F.3d 1, 10 (1st Cir. 2002).

46 Electronic Public Access at 10, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Sept. 2000, (quoting Chief Bankruptcy Judge Leonard of the Eastern District of North Carolina, who also said that this was the "only access to court records" pre-1988).

47 *See id.* at 4 (discussing the Judiciary Appropriations Act of 1991, Pub. L. No. 101-515, tit. IV, 104 Stat. 2129).

48 PACER, https://www.pacer.gov [https://perma.cc/4LEQ-CQAH] (click "WHAT INFORMATION IS AVAILABLE ON PACER?"). To be more precise, such filings are available on PACER "once [they] ha[ve] been filed or entered in the courts Case Management/Electronic Case Files (CM/ECF) system." *Id.* (click "Frequently Asked Questions"; click "Case Related"; then click "How soon after a document is filed will it be in PACER?"). The SPC is apparently very interested

litigants before the federal judiciary must file electronically[49] speaks to the volume of information one can obtain 24/7 from PACER with an easily registered account and for a small fee.[50] The state courts, while lacking an as-comprehensive online database, have also generally provided electronic access to their filings.[51] In this sense, then, the scope of the U.S. public's right of access is not so much delineated by the law as by the technology that lifts the geographical and temporal barriers to accessing information.

II. PUBLIC ACCESS AND JUDICIAL DECISIONMAKING

So what are the U.S. arguments for relatively unfettered access to court filings? And how would they fare in China? This Part looks into these questions and suggests that at least two U.S. arguments are agreeable to the Chinese judiciary and public, measured by existing Chinese legal rules and enduring institutional goals. It also responds to a twist, as reflected in both Chinese and U.S. judicial theories and practices: for purposes of optimal judicial decisionmaking, transparency is not an unqualified good and some secrecy is imperative. This Part briefly explains why this principle should not concern Chinese policymakers when assessing the desirability of making court filings public. The primary goal here is not so much to canvass all the arguments for public access to court filings in China as to sketch, in a comparative light, some of the relevant considerations of judicial transparency that might be shared by two otherwise very different legal systems.

A. How Would the U.S. Arguments Fare in China?

From U.S. case law, one can distill two specific, recurrent arguments favoring public access to court filings that may be relatable to China. First, disclosure functions as a monitoring mechanism that allows the public to understand and assess judicial decisions.[52] The idea is that

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in this database. *See* Li (李) & Zhang (章), *On Several Issues of Judicial Process Information*, *supra* note 6 (commenting approvingly on the efficiency of PACER and CM/ECF).

[49] This applies only to lawyers; pro se litigants can still file on paper. *See, e.g.*, 1ST CIR. R. 25(a)(2)(B)(i)–(ii).

[50] *See* PACER, *supra* note 48 (click "WHEN CAN I ACCESS PACER?"); *id.* (click "HOW MUCH DOES PACER COST?"). Some documents, however, may be unavailable on PACER, including "[p]re-2003 bankruptcy case documents" and "[c]riminal case documents older than Nov. 1, 2004." *Id.* (click "IS ALL CASE INFORMATION AVAILABLE TO THE PUBLIC?"). In the future, PACER is likely to be free. *See* sources cited *supra* note 8.

[51] *See Privacy/Public Access to Court Records*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links [https://perma.cc/S9KJ-FZHX] (providing state database links and descriptions).

[52] *See, e.g.*, MetLife, Inc. v. Fin. Stability Oversight Council, 865 F.3d 661, 665 (D.C. Cir. 2017); FTC v. AbbVie Prods. LLC, 713 F.3d 54, 62 (11th Cir. 2013) ("[A]ccess to the complaint is almost always necessary if the public is to understand a court's decision."); Lugosch v. Pyramid Co. of

the public, in addition to knowing the case outcomes, should be able to ask: Why and how did courts arrive at these conclusions? Should they?[53] To this end, U.S. courts have generally agreed that filings that are in fact relied upon in adjudications (say, pleadings) are presumptively public; so too are those that "would reasonably have the *tendency* to influence" judges' decisions (say, evidentiary motions).[54] In many ways, public examination of the bases of court rulings can be seen as emanating from a profound liberal view that judges are tasked with providing reasons in a constitutional democracy and should, by implication, make their reasons transparent for accountability purposes.[55]

The second U.S. argument for making court filings public is that they reveal information on matters of public concern.[56] It overlaps with the monitoring argument to the extent that what is being revealed is the basis of judicial decisionmaking. Yet, even where no merits decisions have been rendered, the public is still found to have a legitimate interest in knowing, for example, "the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed."[57] This knowledge interest rests upon the idea that litigation, even among private parties, is more than just private dealings, because "state power has been invoked" and "public resources

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Onondaga, 435 F.3d 110, 123 (2d Cir. 2006) (agreeing that "the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision" (quoting *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 43 (C.D. Cal. 1984))). Deterrence of judicial misconduct is a related benefit. *See* United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1048 (2d Cir. 1995); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993).

[53] To make this point even stronger, whether the public will in fact dive into the opinions is "simply irrelevant" — what matters is its "assurance that when an important case arises [it] will have a presumptive right of access to the bases of judicial decisionmaking at the time when that case is newsworthy." *In re* the Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1352 (D.C. Cir. 1985) (Wright, J., concurring in part and dissenting in part).

[54] Brown v. Maxwell, 929 F.3d 41, 49 (2d Cir. 2019); *see id.* at 49–50 (following this reasoning and holding that "motions to compel testimony, to quash trial subpoenae, and to exclude certain deposition testimony" are presumptively public, *id.* at 50); *see also MetLife*, 865 F.3d at 674–75. Doctrinally, the public access inquiry is often framed as whether a particular court filing is "relevant to the performance of the judicial function," *Amodeo I*, 44 F.3d 141, 145 (2d Cir. 1995), and the weight of the right of access to different filings can vary, *see Amodeo II*, 71 F.3d at 1048–49.

[55] *See* JOHN RAWLS, POLITICAL LIBERALISM 231, 235–36 (expanded ed. 2005); *see also MetLife*, 865 F.3d at 675 (calling transparency of judges' rationales "a fundamental norm of [the U.S.] judicial system").

[56] *See, e.g.*, Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 140–41 (2d Cir. 2016); *cf.* BP Expl. & Prod., Inc. v. Claimant, 920 F.3d 209, 212 (5th Cir. 2019) (refusing to seal oral argument so that the party can keep secret its filed claim because the claim is a "public matter").

[57] *Bernstein*, 814 F.3d at 140 (quoting Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2d Cir. 2004)); *see also id.* (collecting circuit-level cases for the view that even in pending or settled cases pleadings should be presumptively public).

spent."[58] The normative and rhetorical force of this logic is reinforced by the fact that significant social and political issues are often channeled to the courts.

On Chinese legal terrain, one would not sound foreign in making the monitoring argument.[59] For one thing, it responds well to the reality that Chinese courts often fail to take litigants' arguments seriously, which is contrary to long-running top-down mandates from the SPC.[60] While the reasons for this gap are complicated,[61] disclosure of court filings at least gives the public — informed by the media and legal community — a role in monitoring the compliance of these mandates, whose enforcement has so far relied solely on Chinese courts' self-discipline. In reality, self-interest seems to have taken over instead, as shown by a perverse effect of requiring Chinese courts to publish only their opinions: many judges, instead of writing better-reasoned opinions, have offered even *less* reasoning to evade exposure of the decisions' potential weaknesses.[62] (Contemporaneous) disclosure of the inputs of decisions could at least make it marginally more difficult for judges to be evasive. Lawyers might, in turn, have more incentives (and pressure) to be persuasive in their filings.[63]

In addition, this U.S. monitoring idea — that materials influencing court decisions should be subject to public scrutiny — is compatible with existing Chinese legal rules and practices. Starting in 2016, livestreams of judicial proceedings in China became available online, where the public can actually watch litigants literally read out their filings in open courts.[64] Meanwhile, a faithful summary of litigants' submissions has been, for years, a required component of Chinese judicial

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[58] *Id.* at 141; *cf.* Doe v. Vill. of Deerfield, 819 F.3d 372, 376–77 (7th Cir. 2016) (noting courts' general "disfavor of parties proceeding anonymously" because the public has a right "to know who is using court facilities and procedures funded by public taxes").

[59] The SPC seems to have partially embraced this argument, reasoning that court filings should be published because they frame the issues of, and are integral to, adjudications, and their disclosure helps to both monitor courts and deter recantation by litigants. *See* Li (李) & Zhang (章), *Understanding the PJPI Provisions*, *supra* note 6, at 46.

[60] *See supra* pp. 1731–32.

[61] Many institutional constraints, such as heavy caseloads and limited independence of individual judges, have contributed to Chinese courts writing terse, nonresponsive opinions. *See* Colloquium, *supra* note 21, at 98 (remarks of Judge Xu Ziliang (徐子良)); Jin (靳), *supra* note 22.

[62] *See* Tang (唐), *Leaders' Willingness, Institutional Capacity and Judicial Transparency*, *supra* note 3, at 97–98.

[63] Even scholars generally skeptical of the desirability and feasibility of requiring Chinese judges to reason more in their opinions concede that they should respond better, albeit selectively, to lawyers' arguments. *See* Ling Bin (凌斌), *Faguan Ruhe Shuoli: Zhongguo Jingyan yu Pubian Yuanli* (法官如何说理:中国经验与普遍原理) [*How Judges Reason: Chinese Experience and Universal Principles*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.], no. 5, 2015, at 99, 115–16. This position is consistent with, if not justified by, the normative view that the public should know what arguments have been made and which ones deserve courts' attention.

[64] Ahl & Sprick, *supra* note 1, at 6.

opinions.[65] Not to mention Chinese lawyers, seeking the aid of public opinion, often disclose court filings on their own in high-profile cases.[66] The upshot is that making these documents public records shouldn't really be that drastic of a change under the current Chinese legal regime.

Turning, then, to the information-revealing argument, that court filings should be disclosed because they contain information on matters of public concern, one might, at first glance, find it a bit out of touch with the institutional reality of Chinese courts. For starters, many of these courts have deliberately avoided adjudicating, or even taking, impactful cases out of political stability concerns.[67] Private mediation is still courts' much preferred option, where judges can more easily persuade, or "soft[ly] coerc[e]," disgruntled litigants to settle.[68] Publicity of lawsuits, which might cause parties to litigate with greater intransigence[69] or bring unwanted populist pressure upon courts, could then become a big headache for the conflict-avoiding Chinese judges. More to the point, the information-sharing rhetoric of this argument would alarm the distinctly bureaucratic Chinese judiciary.[70] For decades, it has been classifying under vague standards a slew of judicial documents and information, a tradition that has now created a strong bureaucratic mindset against publicizing even nonclassified judicial materials.[71]

But still, there remains much ground for appealing to a public right to know about lawsuits in China. In 2013, the SPC, when explaining why the public should access court opinions over litigants' objections based on privacy concerns, argued precisely that because litigation invokes "state power (公权力)" and spends "public judicial resources (司法

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[65] *See, e.g.*, Zuigao Renmin Fayuan Guanyu Yinfa "Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan" "Minshi Susong Wenshu Yangshi" de Tongzhi (最高人民法院关于印发《人民法院民事裁判文书制作规范《民事诉讼文书样式》的通知) [Notice of the SPC on Issuing the Specifications for Preparing Civil Judgments by People's Courts and the Style of Civil Litigation Documents] (issued June 28, 2016, effective Aug. 1, 2016), pt. 3, sec. 5, para. 2–3, CLI.3.274653 (EN) (Lawinfochina).

[66] *See supra* p. 1731.

[67] *See* NG & HE, *supra* note 3, at 125–26.

[68] *Id.* at 49.

[69] There hasn't been much study about this point in China, but it's supported by American experience. *See* Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 326–27 (2007).

[70] *See* NG & HE, *supra* note 3, at 119–20 (sketching the strong bureaucratic features of the Chinese judiciary).

[71] *See* Wang Shaohua (王韶华), *Sifa Gongkai yu Shenpan Mimi* (司法公开与审判秘密) [*Judicial Transparency and Trial Secrets*], RENMIN SIFA·YINGYONG (人民司法·应用) [PEOPLE'S JUDICATURE: APPLICATION], no. 5, 2014, at 54, 54–55. As Max Weber keenly pointed out, "[t]he concept of the 'official secret' is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude." MAX WEBER, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

公共资源)," it ceases to be a private process.[72] Whether reflecting a genuine normative belief or a mere rhetorical strategy of the SPC, this argument, which resonates with the U.S. information-revealing argument, should be extended to support public access to Chinese court filings. Moreover, despite trying to push off controversial cases, Chinese courts are already dealing with public law cases on a regular basis — the prime example being "administrative litigation" where private parties sue governments for official abuses in legislating and implementing laws.[73] At least in these cases, the social need for disclosing court filings is justified, for the plaintiffs, usually the worse off, unwarrantedly lose too often, and many of them have been forced to withdraw complaints.[74] Indeed, as Professors Xin He and Kwai Ng observed, "[f]or the protesters-cum-litigants, the Chinese courtroom has become *a public space* in which the resistant voices and practices of lay people can be expressed."[75]

In the end, since more judicial transparency, the SPC acknowledged, would expose more flaws in the judiciary,[76] the public demand for even more transparency combined with the increasing social significance of litigation, would likely make the public-monitoring and information-revealing arguments mutually reinforcing in China.

B. Response to the Imperative of Judicial Secrecy

The usual, and justified, reaction to a call for greater judicial transparency is that it must be tempered with protection of nonjudicial interests, such as privacy and proprietary information.[77] This is of course true in the case of court filings.[78] This section, however, takes up a point less often stressed: transparency imposes costs on judicial decisionmaking itself, whose optimal functioning requires some secrecy. As Professor Frederick Schauer duly observes, a more transparent judiciary, while useful to disinfect a few more bad decisions (echoing

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[72] Zhang Xianming (张先明), *Jiji Huiying Shehui Guanqie Zhudong Jieshou Shehui Jiandu — Zuigao Renmin Fayuan Shenpan Guanli Bangongshi Fuzeren jiu Caipan Wenshu Shangwang Da Jizhe Wen* (积极回应社会关切 主动接受社会监督 — 最高人民法院审判管理办公室负责人就裁判文书上网答记者问) [*SPC Answers Press Questions on Publishing Court Opinions Online*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], July 3, 2013, at 3.

[73] *See* Liebman et al., *supra* note 1, at 17–23 (analyzing 20,321 Chinese administrative decisions in Henan Province).

[74] *See id.*

[75] NG & HE, *supra* note 3, at 134 (emphasis added).

[76] *See, e.g.*, Zhang Weigang (张伟刚), *Tingshen Gongkai: Rang Gongzheng Yan Jian Wei Shi* (庭审公开: 让公正眼见为实) [*Open Trials: Let Justice Be Seen*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], Dec. 25, 2013, at 1 (citing SPC spokesperson Sun Jungong (孙军工)).

[77] *See, e.g.*, Miller, *supra* note 7, at 464–74; *supra* note 30 and accompanying text.

[78] *See infra* pp. 1741–42.

Justice Brandeis[79]), may also impede a few more good decisions that would have been made more easily in darkness than in sunlight.[80]

This tradeoff notwithstanding, whether to adopt a cost-benefit approach to judicial transparency — increasing transparency only if the incremental benefits to decisionmaking outweigh its costs — or a lopsided approach — maximizing (or minimizing) only benefits (or costs) at the expense of suboptimal decisionmaking — largely depends on the existing level of public trust in the judiciary itself.[81] The Chinese and U.S. judiciaries apparently differ in this respect, but they still agree upon the basic point: that a full-scale public access to judicial records is undesirable for quality decisionmaking. Take U.S. federal judges' working papers. Despite containing documents such as draft opinions and bench memos that are produced during public service and highly informative of final, published decisions, they are not subject to the presumption of public access; instead, judges disclose them at their pleasure.[82] The principal affirmative justification for this practice is that secrecy facilitates informed collective decisionmaking by allowing a candid, thorough exchange of alternative views.[83] In the early 2000s in China, this animated the primary objection to publicizing nonmajority opinions: many worried that without the shield of secrecy, Chinese judges wouldn't even feel safe to take unpopular positions.[84]

Whatever the force of this deliberation-liberating or -protecting justification in these contexts, it should in theory function as a limiting principle to the public-monitoring and information-revealing

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[79] *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."). In China, the main impulse behind its judicial transparency measures by far is to "curb [judicial] wrongdoing." Liebman et al., *supra* note 1, at 7.

[80] Schauer argues, based on decision theory, that determining the appropriate level of transparency is "a resolution of the comparative probability" of the "expected harm[s]" from failing to prevent bad decisions and from preventing good decisions respectively. *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1353 (citing HOWARD RAIFFA, DECISION ANALYSIS (1968)); *see also* Frederick Schauer, *The Mixed Blessings of Financial Transparency*, 31 YALE J. ON REG. 809, 821–22 (2014) (making the same argument).

[81] *See* Schauer, *Transparency in Three Dimensions*, *supra* note 80, at 1353–54 (contrasting Zimbabwe and the United States to illustrate this point).

[82] *See* Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1674–78 (2013).

[83] *See, e.g.*, Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 GA. ST. U. L. REV. 849, 876–77 (2016). The more prophylactic concern is that disclosure of the papers would perversely chill judicial deliberation. *See* Watts, *supra* note 82, at 1726–27; *cf.* United States v. Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").

[84] *See* Feng Wensheng (冯文生), *Lun Gongkai Heyiting Shaoshu Ren Yijian* (论公开合议庭少数人意见) [*On Publicizing Minority Opinions of the Collegial Panels*], FALÜ SHIYONG (法律适用) [J.L. APPLICATION], no. 12, 2002, at 29, 33 & n.18; *see also* Wang (王), *supra* note 71, at 55–56 (discussing the principle of deliberative secrecy and the quickly halted attempts by some Chinese courts to publish dissents around 2000).

arguments. But the point here is that, it would seem all but hyperbolic to argue that public access to court filings in China might somehow impede the quality of judicial decisionmaking. The precise reason is that even with this additional transparency, the Chinese judiciary is still shrouded in ample, if not excessive, secrecy necessary to produce "desirable" decisions as easily as it does now. Many outcome-determinative case files have traditionally and continuously been hidden from litigants, much less the public.[85] Behind-the-scenes exchanges between judges and their superiors regarding how to decide pending cases are also a longstanding institutional custom.[86] More fundamental, the sunlight measures of the Chinese judiciary have so far omitted a reliable public enforcement mechanism: none other than a right to sue when public court records are unlawfully withheld. It thus seems unlikely that there would be too much self-imposed transparency by the judiciary. Instead, it is more likely that disclosure of court filings, if implemented, would be highly restrained and, at times, arbitrarily selective.[87]

III. PUBLIC ACCESS AND PRIVATE HARMS

What is a real possibility, however, is that court filings would be "used to gratify private spite or promote public scandal" or "serve as reservoirs of libelous statements for press consumption."[88] The response of the U.S. legal system is to have courts "weigh the need for secrecy against the public's right of access,"[89] accomplished often through a multifactor balancing test.[90] Certain judicial records are also sealed in general, and presumptively public ones can be redacted before their releases.[91] For now, China needs to deal with only published court opinions, and its solution to privacy concerns is similarly to excise certain personal identifiers from the opinions before their publication on the SPC-managed platform.[92] Parties to the case who disclose litigation

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[85] *See* Liu Renwen (刘仁文), *Lun Woguo Fayuan Fujuan Zhidu de Gaige* (论我国法院副卷制度的改革) [*On Reforming Our Country's System of Supplementary Files*], FAXUE PINGLUN (法学评论) [LAW REV.], no. 1, 2017, at 170, 171–73.

[86] This practice is referred to as *qingshi* (请示) in Chinese judicial lingo. *See* NG & HE, *supra* note 3, at 94; *see also* Li Hua (李华), *Anjian Baosong* Qingshi *Zhidu Pouxi* (案件报送请示制度剖析) [*Examining the Institution of* Qingshi], FAXUE (法学) [LAW SCI. MAG.], no. 2, 1997, at 40, 41 (arguing that *qingshi* violates the Chinese Constitution).

[87] *Cf.* sources cited *supra* note 3 (examining the reasons for selective nonpublication of court opinions in China).

[88] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (quoting *In re* Caswell, 29 A. 259, 259 (R.I. 1893)).

[89] REAGAN, *supra* note 38, at 17.

[90] *See supra* p. 1733.

[91] *See* REAGAN, *supra* note 38, at 5–17.

[92] *See* Zuigao Renmin Fayuan Guanyu Renmin Fayuan zai Hulianwang Gongbu Caipan Wenshu de Guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定) [SPC Provisions on Publishing Online Court Opinions by the People's Courts] (issued Aug. 29, 2016, effective Oct. 1,

documents and leak such sensitive information could incur civil liabilities.[93]

But to the extent that public disclosure of court filings is desirable, these measures can only allay but not avert privacy and reputational harms. This Part's interest, then, is in the justifications for these incidental burdens on individuals. In America, of particular relevance are the policies underlying two common law rules: First, the "fair report privilege" that immunizes a publisher's report of libelous court filings from defamation liability if the account is "accurate and complete or a fair abridgement."[94] Second, the "litigation privilege" that further immunizes litigants and attorneys from liability for "words or writings used in the course of [judicial] proceedings reflecting injuriously upon others," as long as such statements are "material and pertinent" to the disputes.[95] Understanding why these rules make sense, this Part argues, can helpfully complement the existing Chinese judicial approach to applying functionally equivalent Chinese rules to resolve China's growing tension between judicial transparency and individuals' need for secrecy.

A. Justifications for the Fair Report Privilege

U.S. courts have advanced two principal theories to justify the fair report privilege. The first one is the "public information theory," positing "that no risk should be imposed on those who bring important public information forward."[96] In reporting judicial proceedings, the press brings forward important public information to citizens who are

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2016), art. 8–10, CL I.3.311592 (EN) (Lawinfochina) (requiring courts to remove from published opinions personal identifiers such as home addresses and Chinese resident identity card numbers).

[93] *See, e.g.*, An Sijie, Liu Pingxing Yinsi Quan Jiufen Ershen Minshi Panjueshu (安思洁、刘平兴隐私权纠纷二审民事判决书) [An Sijie v. Liu Pingxing], WU SONG (无讼) [ITSLAW] (Mianyang Interm. People's Ct. Aug. 23, 2018) (holding defendant liable for disclosing plaintiff's civil complaint that contained his home address and resident identity card number).

[94] RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST. 1977). To be sure, this privilege encompasses reports of all official proceedings. *Id.*; *see also* Diane Johnsen, Note, *When Truth and Accuracy Diverge: The Fair Report of a Dated Proceeding*, 34 STAN. L. REV. 1041, 1043 n.7 (1982) (collecting sources on the broad scope of this privilege).

[95] Marsh v. Ellsworth, 50 N.Y. 309, 311 (1872); *see* Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 HOFSTRA L. REV. 401, 401 (2015). The qualifier is sometimes phrased differently, though equivalent in substance. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 586–587 (explaining that statements must bear "some relation" to the litigation). This privilege also goes by "the 'judicial proceedings privilege,' the 'judicial privilege,' or 'the defamation privilege.'" Hill, *supra*, at 401 n.2. But once these statements are made outside of the judicial proceedings — for example, if lawyers circulate defamatory filings to the media — they might lose the protection of this "absolute" privilege and instead be entitled only to a "qualified" privilege. *See* Richmond, *supra* note 69, at 326–27.

[96] Salzano v. N. Jersey Media Grp. Inc., 993 A.2d 778, 786 (N.J. 2010) (citing Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir. 1981)); *see also id.* at 791 (emphasizing that the press should be able to report judicial proceedings "without fear of having to defend a defamation case and without the inhibitory effect of such fear").

legally entitled to, but practically cannot, observe those proceedings.[97] The second theory, an "analogue" to the first one, is the "public supervision" theory that holds press publicity also helps public oversight of judicial (mis)conduct.[98] Essentially, these two theories are a special case of the familiar principle that private interests must be outweighed by paramount public interests. Here, it is more important to secure the public's right to know and monitor judicial operations than to safeguard individuals' privacies and reputations.[99]

The harder questions are how far this general justification can go and whether and where to draw a line. In reality, deep, irreparable private harms may result from buzz-driven but otherwise privileged news reports of scurrilous allegations that are intentionally filed and then dropped before their veracity is challenged in open courts.[100] Motivated by this concern, the U.S. common law rule used to be that the fair report privilege did not apply to reports of initial, ex parte pleadings or other filings that have received no judicial action.[101] But now, this limitation is generally obsolete.[102] Courts have offered several rationales for this extension of the privilege: first, a policy judgment that public interest in the judicial system begins with these initial filings;[103] second, an empirical observation that the public is capable of telling accusation from proof;[104] and third, a practical consideration that one-sided party filings wouldn't be any less defamatory simply because they have been acted upon in some judicial form.[105]

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[97] *Id.* at 786.

[98] *Id.* (citing Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (opinion of Holmes, J.)).

[99] This view can be traced back to English common law. *See* R v. Wright (1799) 101 Eng. Rep. 1396, 1399; 8 T.R. 293, 298 (KB) (opinion of Lawrence, J.). In the United States, the privilege used to be justified by an agency theory, that "[t]he publisher [is] free to report accurately to the public what the public could have seen or heard if it had attended the proceeding itself," but this theory proved to be both under- and overinclusive. *See* Johnsen, *supra* note 94, at 1049.

[100] *See* Park v. Detroit Free Press Co., 40 N.W. 731, 734 (Mich. 1888); RESTATEMENT (SECOND) OF TORTS § 611, cmt. e (discussing this concern).

[101] *See* Campbell v. N.Y. Evening Post, Inc., 157 N.E. 153, 155 (N.Y. 1927) (citing both American and English sources); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 845–46 (1941); Notes, 14 COLUM. L. REV. 583, 595 (1914).

[102] *See Salzano*, 993 A.2d at 789 ("[T]oday among our sister jurisdictions, there is a clear trend away from recognizing [this] exception.").

[103] *See* Solaia Tech., LLC v. Specialty Publ'g Co., 852 N.E.2d 825, 844 (Ill. 2006) (citing Newell v. Field Enters., Inc., 415 N.E.2d 434, 444 (Ill. App. Ct. 1980)); *see also Salzano*, 993 A.2d at 790 (endorsing this rationale).

[104] This argument appears to have been first made by the New York Court of Appeals in 1927. *See Campbell*, 157 N.E. at 155; *see also Solaia*, 852 N.E.2d at 844 (adopting this argument); *Salzano*, 993 A.2d at 790 (same).

[105] *See Newell*, 415 N.E.2d at 444–45; *Campbell*, 157 N.E. at 155–56; Langford *ex rel.* Langford v. Vanderbilt Univ., 287 S.W.2d 32, 36 (Tenn. 1956). *But see* Comment, *Press Releases and Defamatory Pleadings*, 63 NW. U. L. REV. 699, 704 (1968) (criticizing this line of cases for ignoring "a careful weighing of the interests of defamed individuals against the needs of the press and the public for information").

B. Justifications for the Litigation Privilege

Since protecting fair and accurate press coverage of damaging court filings already takes a toll on individuals' privacy and reputation interests, why does U.S. law further protect litigants and lawyers for initially making these filings under the litigation privilege? There exist at least three major policy justifications. For starters, such a privilege "afford[s] litigants . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions."[106] Additionally, it facilitates courts' "truth-seeking" process by allowing unobstructed inquiries among parties and judges.[107] Third, and relatedly, it enables lawyers to "speak freely to zealously represent their clients without fear of reprisal or financial hazard,"[108] despite the risk that a "shady practitioner" would occasionally be protected.[109] Serving these values, the litigation privilege is aptly revered as being "indispensable to the due administration of justice."[110]

Still, that this privilege plus the fair report privilege might leave a defamed party remediless for harms caused by publication of court filings has not been lost on U.S. courts. As the Second Circuit recently lamented, "[s]hielded by the 'litigation privilege,' bad actors can defame opponents in court pleadings . . . without fear of lawsuit and liability."[111] The court thus "urge[d] the media to exercise restraint in covering potentially defamatory allegations,"[112] "caution[ed] the public to read such accounts with discernment,"[113] and mobilized "common law courts to revitalize [the] crucial qualification to the litigation privilege," that is, the qualification that the privilege attaches only to statements that are material and pertinent to the litigation.[114] Nevertheless, as the Supreme

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106 Silberg v. Anderson, 786 P.2d 365, 369 (Cal. 1990) (internal citations omitted); PROSSER, *supra* note 101, at 824. This policy, again, originated in English common law. *See* Cutler v. Dixon (1585) 76 Eng. Rep. 886, 887–88 (KB) (reasoning that allowing actions for litigation-related statements would deter "those who have just cause for complaint," *id.* at 888).

107 *Silberg*, 786 P.2d at 369–70 (quoting, among other sources, Briscoe v. LaHue, 460 U.S. 325, 333 (1983)); *see* Front, Inc. v. Khalil, 28 N.E.3d 15, 18 (N.Y. 2015) (noting that New York courts have adopted this rationale since 1897).

108 *Front*, 28 N.E.3d at 18 (citing Park Knoll Assoc. v. Schmidt, 451 N.E.2d 182, 184 (N.Y. 1983)); *see also Silberg*, 786 P.2d at 370. For other, more auxiliary justifications, see Hill, *supra* note 95, at 401 & n.4.

109 *Silberg*, 786 P.2d at 370 (quoting Thornton v. Rhoden, 53 Cal. Rptr. 706, 719 (Dist. Ct. App. 1966)).

110 Loigman v. Twp. Comm., 889 A.2d 426, 434 (N.J. 2006) (quoting Fenning v. S.G. Holding Corp., 135 A.2d 346, 350 (N.J. App. Div. 1957)) (noting also that "[t]he public policy rationale for the litigation privilege has not changed in half a millennium").

111 Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019) (footnote omitted).

112 *Id.* at 53.

113 *Id.*

114 *Id.* at 53 n.47. But history shows that after American courts adopted this qualification, they gradually interpreted it liberally, with good reasons. *See* PROSSER, *supra* note 101, at 825.

Court of Pennsylvania reasoned over a century ago, under the litigation privilege, "[w]rong may at times be done to a defamed party, but it is *damnum absque injuria*. The inconvenience of the individual must yield to a rule for the good of the general public."[115]

C. A Useful Complement to China

A central theme of the justifications for the fair report privilege and litigation privilege is that some important public interests, such as monitoring the judiciary and ensuring its proper functioning, are worth the incidental private injuries to individuals. This idea can be a useful addition to the current Chinese judicial conception on the tension between disclosure of judicial records and protection of privacy and reputation.

Unlike their U.S. counterparts, Chinese courts rarely advert to the public interests that may be at stake in cases featuring such tension. Where the media reports court records and then is sued for defamation or invading privacy, many Chinese courts appear to conceptualize such publication as concerning only the immediate litigants.[116] The result is that even where the media prevails, the win seems equivocal on policy grounds, as the courts often express discomfort about sanctioning private harms flowing from an act that is perceived to be advancing only private interests.[117] Thus, in a recent decision holding that a media company's provision of an online search tool for court opinions had not harmed plaintiff's reputation and privacy, the court nonetheless admonished the company to remove personal information already contained in these opinions in order to "avoid unnecessary litigations (避免不必要的纠纷)."[118]

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[115] Kemper v. Fort, 67 A. 991, 995 (Pa. 1907) (emphasis added). Of course, to ameliorate this *damnum absque injuria*, courts have identified various legal institutions, including protective orders, Federal Rules of Civil Procedure Rule 11 sanctions, and Rule 12(f), which authorizes courts on motion or sua sponte to strike "scandalous" portions from a pleading. *See Brown*, 929 F.3d at 51–52; *Amodeo II*, 71 F.3d 1044, 1049 (2d Cir. 1995).

[116] An oft-employed logic is that because publication is itself lawful under the relevant regulations, no wrongs have been done to the plaintiffs. But why such publication should be lawful in the first place is seldom, if ever, explained. *See, e.g.*, Ruan Jing, Beijing Huifazhengxin Keji Youxian Gongsi Yinsi Quan Jiufen Ershen Minshi Panjueshu (阮璟、北京汇法正信科技有限公司隐私权纠纷二审民事判决书) [Ruan Jing v. Beijing Huifazhengxin Tech. Ltd.], CHINA JUDGEMENTS ONLINE (Wuhan Interm. People's Ct. Jan. 10, 2017).

[117] Such discomfort is also manifest in disputes where litigants published court opinions of their own cases and then were sued by opposing parties for privacy invasion. *See* Li Yougen (李友根), *Caipan Wenshu Gongkai yu Dangshiren Yinsi Quan Baohu* (裁判文书公开与当事人隐私权保护) [*Publication of Court Opinions and Protection of Litigants' Privacy Right*], FAXUE (法学) [LAW SCI. MAG.], no. 5, 2010, at 126, 126–27 (collecting cases).

[118] Liu Hai, Beijing Huifazhengxin Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen Ershen Minshi Panjueshu (刘海、北京汇法正信科技有限公司网络侵权责任纠纷二审民事判决书) [Liu Hai v. Beijing Huifazhengxin Tech. Ltd.], CHINA JUDGEMENTS ONLINE (Xiangyang Interm. People's Ct. Apr. 21, 2017) (ruling for the company because the published information was legally obtained). Why suing someone for republishing public information is even meritorious, the court did not answer.

Failure to justify disclosure on public interest grounds would be more consequential in cases where litigants or lawyers are sued for making allegedly libelous yet litigation-related statements in court filings. The logic of many Chinese courts in ruling for these defendants is that the challenged filings, such as civil answers, have not been widely circulated but are privy only to the parties (and the courts), and so the alleged disclosure harms are presumably minimal.[119] What is unaddressed, however, is that even if these filings got out, why such "harms," if any, should not be outweighed by public interest in, say, judicial transparency and zealous attorney advocacy. It could be that *Guan Lili v. Zhao Yao*, discussed in Part I, is many Chinese courts' contemplated answer: privacy or libel liabilities would be assessed in this scenario, but, to account for defendants' advocacy interests, they would be lesser than what the plaintiffs are suing for.[120] The degree of the publicity of the alleged defamatory filings would then effectively become the metric against which judicial relief is meted out — the more publicized such filings are, the more severe the liabilities imposed.

There is, however, a better alternative to adjudicating such cases: a few Chinese courts have begun to rely on more public-oriented rationales that are similar to, though still less developed than, those of the litigation privilege and the fair report privilege. For example, in a 2018 case where the defendant was sued for allegedly filing a libelous civil answer,[121] the Beijing No.2 Intermediate Court held that the answer did not harm plaintiff's reputation *not* because, as the lower Beijing Xicheng District Court argued, it was made known only to the litigants,

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[119] *See, e.g.*, Zhu Jianwei yu Chongqing Huazhong Jianzhu Anzhuang Gongcheng Youxian Gongsi Mingyu Quan Jiufen Ershen Minshi Panjueshu (朱建伟与重庆华中建筑安装工程有限公司名誉权纠纷二审民事判决书) [Zhu Jianwei v. Chongqing Huazhong Constr. Ltd.], CHINA JUDGEMENTS ONLINE (Chongqing No.1 Interm. People's Ct. Mar. 15, 2019); Li Meijiao, Pan Jiangjie Mingyu Quan Jiufen Ershen Minshi Panjueshu (李美娇、泮将杰名誉权纠纷二审民事判决书) [Li Meijiao v. Pan Jiangjie], CHINA JUDGEMENTS ONLINE (Taizhou Interm. People's Ct. Dec. 19, 2017); Li Mou, Wang Mou yu Wang Xiaomou Mingyu Quan Jiufen Ershen Minshi Panjueshu (李某、王某与王晓某名誉权纠纷二审民事判决书) [Li v. Wang], CHINA JUDGEMENTS ONLINE (Jinan Interm. People's Ct. Mar. 13, 2017). Courts also sometimes cite a party's right to make his case as another important reason, but, again, without diving into the right's public interest underpinnings. *See, e.g.*, Jiang Maorong yu Pingyin Xian Gonganju Mingyu Quan Jiufen Ershen Minshi Panjueshu (江茂荣与平阴县公安局名誉权纠纷二审民事判决书) [Jiang Mao Rong v. Pingyin Cty. Police Dep't], CHINA JUDGEMENTS ONLINE (Jinan Interm. People's Ct. Aug. 1, 2017).

[120] *See supra* p. 1731; *cf.* Lian Guangming yu Li Guocong Mingyu Quan Jiufen Yishen Minshi Panjueshu (连光明与李国聪名誉权纠纷一审民事判决书) [Lian Guangming v. Li Guocong], CHINA JUDGEMENTS ONLINE (Renhua Basic People's Ct. June 12, 2017) (rejecting plaintiff's demand for a court-ordered public apology by defendant for filing an allegedly libelous civil answer because it was not circulated outside of the courtroom; holding instead that a private, verbal apology should suffice).

[121] Zhang Jinguo yu Zhongguo Guofang Baoshe Mingyu Quan Jiufen Ershen Minshi Panjueshu (张进国与中国国防报社名誉权纠纷二审民事判决书) [Zhang Jinguo v. China Nat'l Def. Press], CHINA JUDGEMENTS ONLINE (Beijing No. 2 Interm. People's Ct. Jan. 31, 2018).

but because the public should not equate allegations to court-verified truth even if the answer was publicized.[122] Only two years earlier, this contrast of reasoning had featured a factually similar case decided also by Beijing courts, though the outcome was reversed.[123] There, the lower court employed the above logic of the No.2 Intermediate Court to find for the defendant, reasoning further that litigants being able to argue freely in courts should justify the reputation risks to their adversaries.[124] But, on appeal, it was the publicity-focused logic of the Xicheng District Court that had carried the day.[125] As to the press, the Chenzhou Intermediate Court in recently explaining why, under a 1993 SPC rule, the press cannot be subject to libel liabilities unless the reporting is grossly inaccurate,[126] emphasized particularly its responsibility for securing "the public's right to know (大众知情权)."[127] The challenged coverage of court opinions was thus held not libelous despite being slightly off.[128]

To some extent, the split-the-differences approach adopted in *Guan Lili* and suggested by other cases reflects the traditional "middle way" policy of many Chinese courts.[129] But, as the above cases reveal, there exists institutional space for accommodating a more public-trumps-private approach. And that is why the justifications for the two U.S. rules might be useful: they can complement Chinese courts' understanding of many functionally equivalent *Chinese* rules bearing on the tension between disclosure of judicial records and individuals' need for secrecy. Indeed, besides the 1993 SPC rule previously mentioned, the SPC has provided since 1998 that objective and accurate media coverage of

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122 *Id.*

123 *See* Li Mou yu Beijing Shi Tongzhou Qu Yongledian Diqu Jiaotong Anquan Weiyuanhui Deng Mingyu Quan Jiufen Ershen Minshi Panjueshu (李×与北京市通州区永乐店地区交通安全委员会等名誉权纠纷二审民事判决书) [Li v. Yongledian Reg'l Transp. Safety Bd.], CHINA JUDGEMENTS ONLINE (Beijing No. 3 Interm. People's Ct. Mar. 16, 2016).

124 *See id.*

125 *See id.*

126 Li Rihua yin yu Nanfang Zhoumo Baoshe, Nanfang Baoye Chuanmei Jituan, Guangdong Nanfang Baoye Chuanmei Jituan Youxian Gongsi Mingyu Quan Jiufen Ershen Minshi Panjueshu (李日华因与南方周末报社、南方报业传媒集团、广东南方报业传媒集团有限公司名誉权纠纷二审民事判决书) [Li Rihua v. S. Weekly Co.], CHINA JUDGEMENTS ONLINE (Chenzhou Interm. People's Ct. Apr. 19, 2017) (quoting Zuigao Renmin Fayuan Guanyu Shenli Mingyu Quan Anjian Ruogan Wenti de Jieda (最高人民法院关于审理名誉权案件若干问题的解答) [Answers of the SPC to Several Issues on Adjudicating Defamation Cases] (issued and effective Aug. 7, 1993), art. 7, CLI.3.6342 (Chinalawinfo)).

127 *Id.*

128 *Id.*

129 *See* NG & HE, *supra* note 3, at 126 (describing this policy as reflecting "a broad and eclectic philosophized notion of the idea of 'balance,'" which, in the judicial context, is linked to courts' "political concern with stability maintenance and the desire to avoid[] bitter grievances in a society that has become increasingly conflict ridden").

official records is free from defamation liabilities.[130] The plain text of a 2014 SPC rule also indicates that republication of otherwise private or damaging information from public court records should be immune from civil liabilities.[131] And in *Guan Lili*, one wonders why China's Lawyers Law, which was amended in 2007 to explicitly grant lawyers immunity for words spoken in courts,[132] did not even appear in the four corners of an opinion issued in 2014.[133] Now that the SPC is considering granting public access to court filings, it should of course be cautious about any reputational and privacy implications, but, as shown by many Chinese lower courts' rulings, it is more important to foreground the public interest underpinnings of such access when designing the relevant substantive rules. The U.S. ideas might, then, be worth a thought.

CONCLUSION

The SPC has suggested that making court filings public in China is only a matter of time, but one needs to bear in mind that it took China fifteen years to publish, at the national level, (most) court opinions after one regional court first experimented in 1999.[134] Time would be well spent, though, if the Chinese judiciary can think through the relevant pros and cons of public access to court filings and how it should adjudicate concrete disputes arising out of their disclosure. U.S. laws, to the extent they are consulted, can provide some not-so-foreign inputs into this process, including how this access might interact with judicial decisionmaking and cut back certain private interests. Needless to say,

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130 Zuigao Renmin Fayuan Guanyu Shenli Mingyu Quan Anjian Ruogan Wenti de Jieshi (最高人民法院关于审理名誉权案件若干问题的解释) [Interpretations of the SPC on Several Issues of Adjudicating Defamation Cases] (issued Aug. 31, 1998, effective Sept. 15, 1998), art. 6, CLI.3.20791 (EN) (Lawinfochina).

131 Zuigao Renmin Fayuan Guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定) [Provisions of the SPC on Adjudicating Several Issues in Civil Cases Involving Using Information Networks to Injure Personal Rights] (issued Aug. 21, 2014, effective Oct. 10, 2014), art. 12, paras. 4–5, CLI.3.235297(EN) (Lawinfochina) (immunizing publication of information that "has [already] been disclosed in accordance to the law," *id.* at para. 4, or has been "obtained through lawful channels," *id.* at para. 5).

132 Zhonghua Renmin Gongheguo Lüshi Fa (中华人民共和国律师法) (amended by the Standing Comm. of Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), art. 37, sec. 2, CLI.1.98767(EN) (Lawinfochina).

133 To be fair, the reversed lower court apparently thought this was an easy case: it noted that the defendant lawyer has a legal right (if not a duty) to advocate for his client and summarily concluded that the defense statements did not constitute defamation. *See* Guan Lili yu Zhao Yao Mingyu Quan Jiufen Ershen Minshi Panjueshu (关力立与赵耀名誉权纠纷二审民事判决书) [Guan Lili v. Zhao Yao], CHINA JUDGEMENTS ONLINE (Shenzhen Interm. People's Ct. Dec. 11, 2014).

134 *See* Yang Jianwen (杨建文) & Chen Dongsheng (陈东升), *Renmin Fayuan Wangshang Gongbu Caipan Wenshu Guocheng Jiemi* (人民法院网上公布裁判文书过程揭秘) [*The Unmasking of the Road to Publishing Court Opinions Online by the People's Courts*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Jan. 8, 2014, at 4.

specifics of the access and nonaccess rules governing Chinese court filings should — and will — be left only to the Chinese.[135] Indeed, that this whole comparative law enterprise is a practical pursuit may be due chiefly to the fact that judicial transparency is a relatively non-Western, ideologically neutral value that does not conflict with the political needs of the Chinese authorities. Rather, it fits their goals to enhance, in a technocratic fashion, courts' professionalism, accountability, and institutional legitimacy, but not necessarily to afford them more independence.[136] It is not yet clear how much net benefit this approach can yield, but there is hope that a more transparent Chinese judiciary will be on the positive side of the ledger.

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[135] *See* Zhang, *supra* note 11, at 247 (observing that China "has traditionally balanced foreign institutional transplants with a large dose of pragmatic localism").

[136] *See* NG & HE, *supra* note 3, at 201 (discussing Chinese party-state's vision for its judiciary).