

“RULE OF TRUST”: THE POWER AND PERILS OF CHINA’S SOCIAL CREDIT MEGAPROJECT

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Emerging as a comprehensive and aggressive governance scheme, China’s “Social Credit System” (SCS) seeks to promote the norms of “trust” in Chinese society by rewarding behavior that is considered “trust-keeping” and punishing that considered “trust-breaking.” This Article closely examines the evolving SCS regime and corrects myths and misunderstandings popularized in the international media. We identify four key mechanisms of the SCS (i.e., information gathering, information sharing, labeling and joint sanctions) and highlight their unique characteristics as well as normative implications. In our view, the new governance mode underlying the SCS—what we call the “rule of trust”—relies on an ambiguous concept of “trust” and wide-ranging, arbitrary and disproportionate punishments. It derogates from the notion of “governing the country in accordance with the law” enshrined in China’s Constitution.

This Article contributes to legal scholarship by offering a distinctive critique of the perils of China’s SCS in terms of the party-state’s tightened social control and human rights violations. Further, we critically assess how the Chinese government uses information and communication technologies to facilitate data-gathering and data-sharing in the SCS with few meaningful legal constraints. The SCS’s boundless and uncertain concept of “trust” and the unrestrained employment of technology are a dangerous combination in the context of governance. We caution that the Chinese government is preparing a much more sophisticated, sweeping version of the SCS that will likely be reinforced by artificial intelligence tools such as facial-recognition and predictive policing. Those developments will further empower the government to enhance surveillance and perpetuate authoritarianism.

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I. INTRODUCTION

The leaders of the People’s Republic of China (PRC) have often claimed to be “governing the country in accordance with the law” (*yifazhiguo*).¹ While this policy has often been frustrated by widespread state-party practices in violation of the law,² it is still the mantra of China’s legal system.³ However, this Article argues that a new mode of governance is emerging with the rise of China’s “Social Credit System” (*shehui xinyong zhidu*) or SCS. The SCS is an unusual, comprehensive governance regime designed to tackle challenges that are commonly seen as a result of China’s “trustless” society that has featured official corruption, business scandals and other fraudulent activities.⁴ In our view, the regime of the SCS reflects what we call the “rule of trust,” which has significant implications for the legal system and social control in China.

¹ XIANFA art. 5 (1982) (last amended Mar. 2018) (China).

² See generally Jerome A. Cohen, *Law’s Relation to Political Power in China: The Domestic Situation*, in DI LIU JIE MA HANBAO JIANGZUO LUNWEN HUIBIAN (第六屆馬漢寶講座論文彙編) [SIXTH HERBERT HAN-PAO MA DISTINGUISHED LECTURESHIP] 251 (2017); EVA PILS, *HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM* (2017); SIDA LIU AND TERENCE C. HALLIDAY, *CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK* (2016).

³ There have been debates in the existing literature as to the distinction between the “thin rule of law” and the “thick rule of law” in China. The former focuses on the formal or instrumental aspects of the rule of law, regardless of “whether the legal system is part of a democratic or nondemocratic society, capitalist or socialist, liberal or theocratic.” The latter, by contrast, is premised on certain substantive elements such as political morality, conceptions of human rights and so on. Some would even argue that what Chinese leaders promote in the legal system is not the “rule of law” but the “rule by law.” The distinction here is that while the rule of law imposes certain restraints on the government, the rule by law concerns only how the government uses law to rule its people. On different theories of the rule of law in China, see, e.g., Randall Peerenboom, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 3, 63-71 (2002). On the distinction between the “rule by law” and the “rule of law” in China, see e.g., Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43 (2001).

⁴ Guanyu Yinfa Shehui Xinyong Tixi Jianshe Guihua Gangyao (2014—2020 Nian) de Tongzhi (关于印发社会信用体系建设规划纲要(2014—2020年)的通知) [Notice on Issuing the Outline of Plan for Building the Social Credit System (2014–2020)] (promulgated by the State Council, June 14, 2016), available at http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm [hereinafter *2014 SCS Plan*]. An unofficial translation is available at <https://chinacopyrightandmedia.wordpress.com/2014/06/14/planning-outline-for-the-construction-of-a-social-credit-system-2014-2020/> (last visited July 28, 2018).

We define the “rule of trust” as a governance mode that imposes arbitrary restrictions—loosely defined and broadly interpreted trust-related rules—to condition, shape and compel the behavior of the governed subjects. The idea of “trust” (*xin*, sometimes translated as honesty), a moral principle that may be traced back to virtues cherished by Confucian thought, can be rather fuzzy in the contemporary era,⁵ but it may be understood as part of the Chinese government’s recent efforts to fill an ideological void.⁶ As noted by a leading China legal scholar, Jerome Cohen, an immediate challenge confronting Chinese Communist Party leaders is to find a credible ideology to legitimate their rule.⁷

The SCS “rule of trust” governance model is changing China’s legal system in fundamental ways. On the one hand, the “rule of trust” may greatly enhance China’s weak and deficient law enforcement system by forcing legal compliance through the imposition of additional sanctions on dishonest illegal conduct.⁸ On the other hand, we argue that the “rule of trust” is in fact undermining “rule of law” ideals in a number of ways. First, the officially imposed norms of “trust,” which are vague and constantly expanding, weaken the role of clear and predictable legal rules in guiding and regulating social and individual behavior. Second, the SCS in its current form makes already disadvantaged groups more vulnerable to additional punishments, which is a departure from the principle of equality before the law. Third, the punishments jointly imposed by multiple government agencies under the SCS constitute an additional layer of broad and disproportionate sanctions that go beyond what may be legitimately imposed on an individual in the case of violation of law or regulation. In our view, the SCS derogates from the notion of “governing the country in accordance with the law” enshrined in China’s Constitution. The “rule of trust,” in its ultimate form, threatens to replace this conventional principle.

⁵ Admittedly, it is difficult to find a proper translation for *xin*. In the context of China’s SCS, translators often use the phrases “credit” or “trust,” but *xin* can also refer to integrity and other personal virtues. For our purposes, *xin* is translated as trust.

⁶ Similarly, the recent rhetoric about establishing a “civilized society” (*shehui wenming*) also appears to echo Confucian humanism. Xianfa Xiuzheng An (宪法修正案) [Amendment to the Constitution], art. 32 (which was revised to read as promoting “the coordinated development of material, political, spiritual, social and ecological civilization, to build China into a prosperous, democratic, civilized, harmonious and beautiful modern socialist power and realize the great rejuvenation of the Chinese nation.”). Scholars have argued that one distinctive feature of the Chinese legal system is the use of various campaigns to address perceived crises arising out of shortcoming in the existing framework. In this light, the SCS can be seen as yet another new, comprehensive campaign that underpins China’s governance. See Sarah Biddulph et al., *Rule of Law with Chinese Characteristics: the Role of Campaigns in Lawmaking*, 34 (4) L. & POL’Y 373 (2012).

⁷ Jerome A. Cohen, *Xi Jinping Sees Some Pushback Against His Iron-fisted Rule*, WASH. POST (Aug. 2, 2018), <https://www.washingtonpost.com/news/global-opinions/wp/2018/08/02/xi-jinping-sees-some-pushback-against-his-iron-fisted-rule>.

⁸ Jeremy Daum, *Credible Threat? Taiwan, Websites and Social Credit*, CHINA LAW TRANSLATE (June 30, 2018), <https://www.chinalawtranslate.com/credible-threat-taiwan-websites-and-social-credit/>; Rogier Creemers, *China’s Social Credit System: An Evolving Practice of Control* (May 9, 2018), available at <https://ssrn.com/abstract=3175792>.

We note that this new mode of the “rule of trust” as embedded in the SCS, along with other new tools (such as a far-reaching national network of facial-recognition cameras and data-driven profiling and surveillance mechanisms), has been enabled by China’s fast-paced technological advances. Conventional wisdom has long held that technological developments, especially those related to information and communications technologies (ICTs), constitute a largely positive force that supports civil society movements and hence generate positive impacts on democratization.⁹ Yet such technological advances can serve as a mega-infrastructure that empowers not only civil society and individuals, but also autocratic regimes that attempt to perpetuate and exacerbate the existing power asymmetry via omnipresent and omnipotent surveillance, censorship and control mechanisms. China’s SCS plainly highlights this reality as it exploits this mega-infrastructure in the interest of authoritarian control.

This trend dovetails with the “trust” rhetoric promoted by the Chinese government. In the name of boosting social trust, the ruling power finds plausible justification for employing intrusive technology and data-gathering-and-sharing practices to closely surveil and regulate social interactions, thereby strengthening and expanding its political control. In the context of governance, a boundless notion of “trust” and the unrestrained development of technology are a dangerous combination.

The aims of this Article are threefold. First, this Article offers a comprehensive, up-to-date account of the evolving system of China’s SCS. While a small number of experts have begun to examine China’s SCS closely,¹⁰ there remain certain popular myths and

⁹ See, e.g., LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING AMERICAN DEMOCRACY FOR THE INFORMATION AGE* 5–6 (1996); Rupert Wegerif, *New Technology and the Apparent Failure of Democracy: An Educational Response*, 1(1) J. FOR RES. & DEBATE 1, 1 (2018); Oren Perez, *Open Government, Technological Innovation and the Politics of Democratic Disillusionment: (E-)Democracy from Socrates to Obama*, 9 I/S: J. L. & POL’Y FOR INFO. SOC’Y 61, 64 (2013). Many scholars have argued that the Internet, the advances in ICTs and the availability of big data have reshuffled power and promoted democracy through stronger civic empowerment, greater access to information and channels of expression and higher levels of transparency. See e.g. Deborah G. Johnson, *COMPUTER ETHICS* 212 (3rd ed., 2001); Bernd C. Stahl, *Democracy, Responsibility, and Information Technology*, PROC. OF THE EUR. CONF. ON E-GOVERNANCE 429, 434-35 (2012). Technological innovations like smartphones, digitalization of information, the Internet and various data-sharing programs, along with the growth of global social media platforms, have together profoundly “empowered citizens to amplify their voices and hold governments accountable.” *Technology Is Transforming Democracy*, NATIONAL DEMOCRATIC INSTITUTE, <https://www.ndi.org/technology-transforming-democracy> (last visited Nov. 8, 2018); Thomas Carothers, *Why Technology Hasn’t Delivered More Democracy*, FOREIGN POLICY (June 3, 2015), <http://foreignpolicy.com/2015/06/03/why-technology-hasnt-delivered-more-democracy-democratic-transition/>.

¹⁰ Among the handful of law review articles that touch upon China’s social credit system, some consider the linkage between lending practices and an individual’s footprint in the online environment. This is not, strictly speaking, the SCS that we are referring to here. See e.g., Nizan Geslevich Packin & Yafit Lev-Aretz, *On Social Credit and the Right to be Unnetworked*, 2016 COLUM. BUS. L. REV. 339 (2016). Others rely on media coverage and describe the SCS as giving every citizen and company a “trustworthiness score.” See e.g., Chris Muellerleile & Susan L. Robertson, *Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism*, 25 IND. J. GLOBAL LEGAL STUD. 187, 209 (2018). Still others, in addressing the risks associated with data-driven technologies in other contexts, simply refer to the term “social credit” without

misunderstandings.¹¹ To be clear, the system has not—at least for now—employed artificial intelligence (AI) technologies, real-time data or automated decisions, despite foreign media reports to the contrary.¹² Nor has it reached the stage where each individual is given a numeric “score” as such in determining the person’s social status, as imagined in the fear-inspiring episode “Nosedive” from Netflix’s dystopian series “Black Mirror.”¹³ Yet the current development of China’s SCS is already concerning. We critically assess the perils of the system in terms of tightened social control and human rights violations. We also caution that, with considerable sophistication, the Chinese government is preparing a more sweeping version that could combine the SCS with AI-enabled tools like facial-recognition and predictive policing. Such tools could further empower the government to enhance authoritarianism and consolidate its social control.

Second, this Article highlights how the Chinese government uses ICTs and other technologies to facilitate data-gathering and data-sharing in the SCS with few meaningful legal constraints. Throughout the world the uses of technology have engendered scholarly debates over ethical, social, legal and political dimensions, but much of the discussion has focused on the American or European contexts.¹⁴ The Chinese government’s resort to such innovations has thus far received limited discussion in Western scholarship, despite the fact that China is

elaboration. See e.g., Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing*, 18 MINN. J. L. SCI. & TECH. 673, 707 (2017). Although some consider the SCS in greater detail, their focuses are more on relevant ramifications for a specific sector. See generally, e.g., Hideyuki Matsumi, *Predictions and Privacy: Should There Be Rules about Using Personal Data to Forecast the Future?* 48 CUMB. L. REV. 149 (2017-2018); Eva Pils, *In Whose Service? The Transnational Legal Profession’s Interaction with China and the Threat to Lawyers’ Autonomy and Professional Integrity*, 41 FORDHAM INT’L L. J. 1263 (2018). Three excellent prior works offer general insight on the SCS: Yongxi Chen & Anne S. Y. Cheung, *The Transparent Self under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System*, 12 (2) J. COMP. L. 356 (2017); Creemers, *supra* note 8; Xin Dai, *Toward a Reputation State: The Social Credit System Project of China* (June 10, 2018), <https://ssrn.com/abstract=3193577>.

¹¹ Jeremy Daum, *China Through a Glass, Darkly: What Foreign Media Misses in China’s Social Credit*, CHINA LAW TRANSLATE (Dec. 24, 2017), <https://www.chinalawtranslate.com/seeing-chinese-social-credit-through-a-glass-darkly/>. See also Jamie Horsley, *China’s Orwellian Social Credit Score Isn’t Real*, FOREIGN POL’Y (Nov. 16, 2018), <https://foreignpolicy.com/2018/11/16/chinas-orwellian-social-credit-score-isnt-real/>.

¹² See e.g., Rachel Botsman, *Big Data Meets Big Brother as China Moves to Rate its Citizens*, WIRED (Oct. 21, 2017), <https://www.wired.co.uk/article/chinese-government-social-credit-score-privacy-invasion>; Mariel Myers, *China Turns to Tech to Monitor, Shame and Rate Citizens*, CNET (Apr. 25, 2018), <https://www.cnet.com/news/china-turns-to-tech-to-monitor-shame-and-rate-citizens/>; Samantha Hoffman, *Technology-Enhanced Authoritarian Control with Global Consequences*, AUSTRALIAN STRATEGIC POLICY INSTITUTE, <https://www.aspi.org.au/report/social-credit> (last visited July 28, 2018); Matthew Carney, *Leave No Dark Corner*, ABC NEWS (Sept. 17, 2018), <https://www.abc.net.au/news/2018-09-18/china-social-credit-a-model-citizen-in-a-digital-dictatorship/10200278>.

¹³ See e.g., Sophie Gilbert, *Black Mirror’s ‘Nosedive’ Skewers Social Media*, THE ATLANTIC (Oct. 21, 2016), <https://www.theatlantic.com/entertainment/archive/2016/10/black-mirror-nosedive-review-season-three-netflix/504668/>.

¹⁴ The recent literature in particular focuses on various aspects of AI—such as legal personhood of robots, regulatory frameworks for self-driving cars, autonomous weapons and the use of data-driven technologies in policing and court proceedings. See e.g., Andrew Guthrie Ferguson, *Policing Predictive Policing* 94 WASH. U. L. REV. 1109 (2017); MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW (EDWARD ELGAR, 2015).

leading the way in crafting and deploying technologies in its ruling framework.¹⁵ Our Article helps fill this gap.

Third, this Article uncovers a shift in China's governance. The SCS reflects the Party-state's heavy reliance on an ambiguous concept of "trust" and the disproportionate, arbitrary punishment for those who are considered "trust-breakers," a convenient governance tool that serves power holders. With the SCS operation due to peak in 2020 according to the Chinese government's planning,¹⁶ government policies will continue to be grounded in the promotion of "trust." The outcome of the struggle between the "rule of trust" and the policy of "governing the country in accordance with the law" remains to be seen.

Against this backdrop, the rest of this Article proceeds as follows. Part II offers an overview of the SCS. We trace the evolution of the concept of "social credit" and identify the four mechanisms that sustain the operation of the contemporary system: (1) information gathering, (2) information sharing, (3) labeling and (4) joint sanctions. We examine each mechanism in detail and highlight its distinctive characteristics and functions in China's SCS. We further note the spillover effects of the SCS on certain foreign entities. Part III discusses private, commercial credit rating services spearheaded by Ant Financial's Sesame Credit (which employs cloud computing and machine learning to calculate a user's score) and its relevance to China's SCS. Also, we underscore the latest development by the Chinese government to set up a publicly funded credit rating agency with the joint force of major private companies, which merits follow-up research. In Part IV, we assess the Chinese government's "advantages"—largely derived from its authoritarian control and limited legal checks—over other countries in developing the SCS as is and potentially incorporating AI and blockchain in the future to fulfill its vision of a "trust-keeping" society and omnipresent government power. We critique this approach by pointing out the serious perils that come with unfettered power, including the party-state's extensive, repressive control of all aspects of social life, reproduction and reinforcement of unjustified social exclusion and discrimination, shrinking

¹⁵ The way in which China sophisticatedly leverages its data-driven and AI technologies to further entrench its political hold has led some to coin titles for the regime, such as the "Digital Totalitarian State," or call it a practitioner of "Cloud Totalitarianism." China's rapidly expanding, nationwide web of facial-scanning cameras and its deployment of predictive policing to monitor Uyghurs in Xinjiang both represent (in)famous illustrations of the government's political grip. See e.g., *China Invents the Digital Totalitarian State*, THE ECONOMIST (Dec. 17, 2016), <https://www.economist.com/news/briefing/21711902-worrying-implications-its-social-credit-project-china-invents-digital-totalitarian/>; Simon Denyer, *Beijing Bets on Facial Recognition in a Big Drive for Total Surveillance*, WASH. POST (Jan. 7, 2018), https://www.washingtonpost.com/news/world/wp/2018/01/07/feature/in-china-facial-recognition-is-sharp-end-of-a-drive-for-total-surveillance/?utm_term=.f0d5ff2552d2; *China: Big Data Fuels Crackdown in Minority Region*, HUMAN RIGHTS WATCH (Feb. 26, 2018), <https://www.hrw.org/news/2018/02/26/china-big-data-fuels-crackdown-minority-region>.

¹⁶ 2014 SCS Plan, *supra* note 4.

space for privacy and the erosion of due process in the giant government machine. Part V concludes this Article.

II. CHINA'S SOCIAL CREDIT SYSTEM

A. *The Evolution of "Social Credit"*

1. A Primitive, Financially-Oriented Concept

While the SCS has only caught the world's attention in recent years, the term "social credit" has existed in China for quite some time. As early as 2002, then Chinese Communist Party leader Jiang Zemin underscored the need for the nation to "strengthen the social credit system in the modern market economy" in his report to the 16th Party Congress.¹⁷ On its face, the use of the term "social" here clearly implied something other than "credit" as employed in a business or financial sense. Yet, nowhere in this report did it precisely explain what the term actually meant. Judging from the context, "social credit" seemed to go hand in hand with Jiang Zemin's proclaimed goal to "rectify and regulate the order of the market economy."¹⁸ That is, the idea of "social credit" at this point appeared confined to the policy of seeking to collect financial data for the purpose of building credit history for commercial transactions. Indeed, in that same year, when Jiang Zemin called for strengthening "social credit" in the country, the State Council authorized the People's Bank of China (PBoC) to establish a national credit database and to establish a specialized credit reporting agency.¹⁹ Accordingly, the PBoC introduced a "Credit Reference Center,"²⁰ the only national credit-scoring bureau at the time that provided financial credit reports on individuals and businesses.²¹

It follows from the above that the notion of social credit at that time seemed more business-oriented, with a view toward creating a credit system implemented in contemporary

¹⁷ Creemers, *supra* note 8, at 8 (citing Zai Zhongguo Gongchandang Di Shiliuci Quanguo Daibiao Dahuishang de Baogao (在中国共产党第十六次全国代表大会上的报告) [Report at the 16th National Congress of the Chinese Communist Party] available at Zhongguo Gongchandang Lici Quanguo Caibiao Dahui Shuju Ku 中国共产党历次全国代表大会数据库 [Database of Past CCP National Congresses] (November 8, 2002), <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429120.html>).

¹⁸ *Id.*

¹⁹ Cao Guizhi (曹桂芝), *Rang Shixin Zhe Cunbunaxing--Woguo Shehui Xinyong Tixi Jianshe de Huigu yu Zhanwang* (让失信者寸步难行—我国社会信用体系建设的回顾与展望) [*Let the Untrustworthy Be Unable to Move a Single Step--Review and Prospect of China's Construction of the Social Credit System*], HUNAN SHENG SHEHUI ZHUYI XUEYUAN XUEBAO (湖南省社会主义学院学报) [J. HUNAN INSTITUTE OF SOC.] no. 17, 2016, at 82.

²⁰ *Jinrong Xinyong Xinxi Jichu Shujuku* (金融信用信息基础数据库) [*Basic Financial Credit Information Database*], <http://www.pbccrc.org.cn/zxxz/zxgk/gywm.shtml> (last visited Nov. 9, 2018).

²¹ Creemers, *supra* note 8, at 9.

financial markets, such as FICO scores in the United States. Underlying this plan was China's "shadow banking" problem.²² Notwithstanding China's robust economic growth since its "Reform and Opening" policy, the country was struggling to establish an adequate credit-scoring system comparable to those in liberal market economies.²³ The increasing demands of finance thus forced many small and medium-sized businesses, as well as individuals with limited or no credit history, to borrow outside the formal banking institutions.²⁴ For the government, one immediate response to the negative ramifications of informal financing was to develop a credit system,²⁵ which arguably paved the way for the current social credit system.

2. The Current Aggressive Concept Designed to Build Social Trust

The years following witnessed the expansion of the concept, as well as the scope of the application of "social credit." In 2006, China's 11th Five-year Plan for National Economic and Social Development (China's all-important policy planning blueprint) discussed the need to accelerate the construction of the SCS and identified the goal of improving the credit records of "loans, tax payments, contract fulfillment and product quality."²⁶ This announcement was followed by a 2007 notice by the General Office of the State Council, the first national guidance on SCS,²⁷ requiring government agencies to collect information not only about one's *financial credit*, but also about *tax payments* and *contract defaults* and to digitize data pertaining to *product quality*. The notice further required government efforts to gradually integrate all such information into a unified database.²⁸ Meanwhile, the State Council established a coordinating

²² Dai, *supra* note 10. Broadly, the term shadow banking refers to "financial markets and institutions that perform credit, maturity or liquidity transformation outside the formal banking system." In China, this term may include "a diverse range of financial products, trust and guarantee companies, brokerage firms, cooperative associations, pawn shops, and informal lenders." Dan Awrey, *Law and Finance in the Chinese Shadow Banking System*, 48 CORNELL INT'L L.J. 1, 3-4 (2015). For a complete account of China's shadow banking issue, see SHEN WEI, *SHADOW BANKING IN CHINA: RISK, REGULATION AND POLICY* 38-65 (2016).

²³ Rachael Lu, *Why There are No Credit Scores in China*, FOREIGN POLICY (May 8, 2014), <http://foreignpolicy.com/2014/05/08/why-there-are-no-credit-scores-in-china/>.

²⁴ *Id.*

²⁵ Because of its planned economy, China historically lacked the full-fledged credit systems common among market economies. It was not until the 1990s that the Chinese government began to overhaul its credit system to facilitate financing while controlling risks. Some of the prime examples of those reforms were the "Bank Credit Registration Consultation Management Measures (Trial)" issued by China's central bank in 1999. An earlier initiative was the so-called "loan certificates." See *infra* note 107 and accompanying text.

²⁶ Guomin Jinji he Shehui Di Shiyi ge Wunian Guihua Gangyao (国民经济和社会发展第十一个五年规划纲要) [Outline of the 11th Five-Year Plan for National Economic and Social Development] (Mar. 16, 2006), available at www.gov.cn/ztl/2006-03/16/content_228841.htm.

²⁷ Guowuyuan Bangong Ting Guanyu Shehui Xinyong Tixi Jianshe de Ruogan Yijian (国务院办公厅关于社会信用体系建设的若干意见) [Opinions of the General Office of the State Council concerning the Building of a Social Credit System] (Mar. 23, 2007, promulgated by the General Office of the State Council, invalidated in 2015).

²⁸ *Id.*

mechanism in the form of an inter-ministerial joint conference to plan and carry out initiatives for the SCS (SCS Joint Conference).²⁹ While government efforts still appeared tilted toward “credit” in the commercial context,³⁰ the meaning of “social credit” apparently began to breach the boundaries of conventional financial credit.

The background for such upscale efforts of the government was considerable public complaint regarding widespread, serious “trust-breaking” problems in society, including shocking scandals of contaminated or counterfeit food and commonplace practices of hiding assets to avoid tax liabilities, contract payments and the enforcement of court judgments, among others.³¹ The SCS has been deemed to be able to address the “trust” problem by disciplining what the system considers odious behavior and creating incentives for positive behavior.³² As one scholar notes, “credit” (*xinyong*) in the Chinese language is associated with the moral virtues of trustworthiness and integrity.³³ This is aligned with the meaning of “credit” in English, which stands for a reputation for sound character or qualities.³⁴ Additionally the word “social” (*shehui*) captures social interactions the government seeks to monitor and regulate.³⁵

The scheme culminated in the SCS Plan issued in June 2014 by the State Council (2014 SCS Plan).³⁶ In this comprehensive and aggressive document, the Chinese government lays out a roadmap for building a social credit megaproject aimed at boosting society’s “honesty/integrity awareness” (*chengxin yishi*) and “credit standards” (*xinyong shuiping*).³⁷ The Plan identifies four priority areas that encompass virtually every aspect of one’s social life: (1) government matters/governance; (2) business; (3) society; and (4) the judiciary. Chinese policymakers view social credit as a strategic plan for the “socialist market economy system and the social governance system.”³⁸ As envisaged, the credit records of “all members of the society” will be covered under the full-fledged “online credit infrastructure.”³⁹ Following the

²⁹ Creemers, *supra* note 8, at 9.

³⁰ *Id.*

³¹ See e.g., *Enforcement of Civil Judgments: Harder than Reaching the Sky*, CHINA LAW AND GOVERNANCE REVIEW, Issue No. 2, June 2004, available at www.chinareview.info/issue2/pages/legal.htm; Jim Yardley & David Barboza, *Despite Warnings, China’s Regulators Failed to Stop Tainted Milk*, N.Y. TIMES (Sept. 26, 2008), <https://www.nytimes.com/2008/09/27/world/asia/27milk.html>; Xie Yu, Choi Chi-yuk, Yujing Liu, *Chinese Authorities Crack Down on Tax Dodges, Illegal Capital Remittances by Celebrities*, S. CHINA MORNING POST (Aug. 13, 2018), <https://www.scmp.com/business/china-business/article/2159456/chinese-authorities-crack-down-tax-dodges-illegal-capital>.

³² Creemers, *supra* note 8, at 13.

³³ Dai, *supra* note 10, at 16.

³⁴ THE FREE DICTIONARY, <https://www.thefreedictionary.com/credit> (last visited Aug. 5, 2018).

³⁵ Dai, *supra* note 10, at 16.

³⁶ 2014 SCS Plan, *supra* note 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

2014 SCS Plan, both central government agencies and local governments have issued a variety of legal and policy documents within their mandate, comprising an expanding regulatory network under the SCS.⁴⁰

What worries many observers, however, is China's great ambition to move well beyond collecting and analyzing people's financial credit records. As the 2014 SCS Plan makes clear, social credit is part and parcel of China's "social governance,"⁴¹ under which a wide range of activities are included and categorized to profile individuals and entities as "trust-keeping" and "trust-breaking." We now turn to these core features.

B. How the System Operates: The Four Mechanisms of Social Credit

The operation of the SCS relies on a number of important and distinctive features—information gathering, information sharing, labeling and joint sanctions—which together constitute four essential elements of the system. We discuss their form and substance in order.

1. Information Gathering: Comprehensive Bureaucratic Networks Targeting "Trust-Breaking" Behavior

The first step accomplished under the SCS is the identification of each and every person and business through the assignment of a "social credit unified code" ("SC Unicode").⁴² For citizens, the SC Unicode is the 18-digit code on their identity card, which further links to personal data, including income, tax and social insurance payments. For corporations and other social groups, various numbering systems employed in the past for different purposes (such as commercial permission, organization registration and taxation) have now been integrated into one unified 18-digit number in the SCS comprising all financial, registration and tax

⁴⁰ For a survey of relevant legal and policy documents, see CHINA LAW TRANSLATE, <https://www.chinalawtranslate.com/social-credit-documents/> (last visited Dec. 6, 2018).

⁴¹ 2014 SCS Plan, *supra* note 4.

⁴² Guanyu Shishi <Guowuyuan Jigou Gaige he Zhineng Zhuanbian Fang'an> Renwu Fengong de Tongzhi (关于实施<国务院机构改革和职能转变方案>任务分工的通知) [Notice on Dividing the Tasks for Implementation of the Plan for Institutional Reform and Functional Transformation of the State Council] (promulgated by General Office of the St. Council, Mar. 26, 2013); Guanyu Zai Banli Xiangguan Yewu Zhong Shiyong Tongyi Shehui Xinyong Daima de Tongzhi (关于在办理相关业务中使用统一社会信用代码的通知) [Notice of the General Office of the National Development and Reform Commission on the Use of Unified Social Credit in Handling Relevant Matters] (promulgated by the General Office of the Nat'l Dev. and Reform Comm., Mar. 1, 2018); Unified Social Credit Code Registration Certificates Issued to Social Organizations, CHINA DEV'T BRIEF (Jan. 6, 2016), <http://www.chinadevelopmentbrief.cn/news/unified-social-credit-code-registration-certificates-issued-to-social-organizations/>.

information.⁴³ The SC Unicode serves as an index to store and locate individualized information.

What type of information is collected? The primary goal of the SCS to date is to single out people and organizations whose acts are considered to be “breaking trust” (*shixin xingwei*) by breaching certain legal rules, government regulations or industry standards.⁴⁴ The system therefore seeks to collect information about such breaches as a priority, as well as other ordinary records regarding administrative punishments and administrative approvals. In addition to these data, contraventions of certain legal rules, regulations and industry standards are also recorded, including the failure to honor a court decision and civil penalties, such as safety violations and even traffic violations.⁴⁵ Individuals and organizations found to have relevant violations—that is, those that are deemed “trust-breaking” (*shixin*)—will be placed on “Blacklists” and those deemed “trust-keeping” (*shouxin*) will be placed on “Redlists.” This publicized data represents the core of the “credit information” (*xinyong xinxi*) of the SCS, which serves as a substantive basis for reputation-driven sanctions, as illustrated below.

At first glance, the SCS is initially reminiscent of the party-state’s traditional practice of keeping secret files on individuals (*dang’an*) before the digital era,⁴⁶ a practice similar to that found in Eastern Europe before democratization.⁴⁷ In China, such a file, much of which consisted of reports from police and informants, could significantly undermine a citizen’s upward social mobility throughout his or her entire life, including the chance of being hired,

⁴³ Notice on Clarifying Issues Concerning the Use of Unified Social Credit Code by Social Organizations and Other Tax Payers and the Handling of Tax Registration (promulgated by State Administration of Taxation, Effective March. 15, 2016), http://www.aqsiq.gov.cn/xxgk_13386/ywxx/cpzl/201312/t20131205_389972.htm; State Council, *New Social Credit Code System to Increase Administrative Efficiency*, ENGLISH.GOV.CN (June 17, 2015), english.gov.cn/policies/latest_releases/2015/06/17/content_281475129090642.htm.

⁴⁴ See *infra* Part II.B.3.

⁴⁵ Jiaotong Guanli Xingui Weifa Jiang Ru Zhengxin Yice Weifa Keneng Chuchu Shouxian (交通管理新规违法将入征信 一次违法可能处处受限) [Traffic Violations Will Be Incorporated into Credit Information; One Violation May Result in Comprehensive Restrictions], XINHUA NEWS (Nov. 10, 2016), www.xinhuanet.com/auto/2016-11/10/c_1119883939.htm. See also Horsley, *supra* note 11 (“The government does collect regulatory information on all companies and social organizations, and different departments maintain their own dossiers on individuals. Some of this information is made public, and the social credit system is intended to create a culture of greater trust and creditworthiness in society as a whole. However, at present the system prioritizes compiling and sharing public record-type data such as licensing, other regulatory information and adverse court decisions on adults in key areas. Unless people are sole proprietors or company representatives, have taken a loan or credit card, violated the law or defaulted on a court judgment, they’re unlikely to be in the social credit database.”)

⁴⁶ Nicolas D. Kristof, *Beijing Journal; Where Each Worker Is Yoked to a Personal File*, NEW YORK TIMES, Mar. 16, 1992, available at <https://www.nytimes.com/1992/03/16/world/beijing-journal-where-each-worker-is-yoked-to-a-personal-file.html> (last visited July 28, 2018).

⁴⁷ Justin Huggler, *East German Stasi Files Open to Public Online for First Time*, THE TELEGRAPH, Jan. 9, 2015, available at <https://www.telegraph.co.uk/news/worldnews/europe/germany/11336288/East-German-Stasi-files-open-to-public-online-for-first-time.html> (last visited Aug. 5, 2018).

promoted or even becoming a Communist party member.⁴⁸ No institutional channel existed to allow access to or correction of the information in one's file.⁴⁹

While this insight is useful to some extent, it should be noted that the SCS is a much more far-reaching megaproject than any of the earlier attempts. Today, the Internet, cloud storage and other ICT advances have enabled the Chinese government to collect and integrate a broad spectrum of information concerning certain "trust-breaking" behavior of the world's largest population (1.4 billion), as well as numerous business entities and social groups, in a rapidly changing society. The regulatory activities of various bureaucratic agencies at different levels help to generate massive numbers of records about the behavior and interactions of people and groups. Despite this complex web of information collection and the use of personal information, there are few constraints on the government.⁵⁰

2. Information Sharing: Breaking Down "Credit Information Barriers"

Another important mechanism of the SCS is the active integration and sharing of credit information. As part of its strategic plan, the Chinese government aims to tear down what it refers to as "credit information barriers"⁵¹ by combining dispersed information across different regulatory and judicial systems under the aegis of one unified platform. All credit information collected by the government is now uploaded to a "National Credit Information Sharing Platform" (which has operated since October 2015)⁵² and shared among government agencies (a total of 37 ministries and commissions, including courts, tax departments, police, civil affairs, health and environment, treasury and finance authorities and custom agencies etc.) plus local governments nationwide.⁵³ Information can be searched using a SC Unicode and is shared with

⁴⁸ Lena H. Sun, *China's Secret Personnel Files: A Tool of Communist Control*, WASHINGTON POST (Mar. 17, 1992), https://www.washingtonpost.com/archive/politics/1992/03/17/chinas-secret-personnel-files-a-tool-of-communist-control/8f0e2fce-43a2-42fa-a22c-d2578a94ba28/?utm_term=.4bc9ac4a5fd2.

⁴⁹ *Id.*

⁵⁰ *See infra* Part IV.A.

⁵¹ Guanyu Jiakuai Tuijin Shixin Bei Zhixing Ren Xinyong Jiandu, Jingshi he Chengjie Jizhi Jianshe de Yijian (关于加快推进失信被执行人信用监督、警示和惩戒机制建设的意见) [Opinions on Accelerating the Development of a System of Credit Supervision, Warning and Sanctions for Trust-Breakers on the Defaulters' Lists] (promulgated by the General Office of the Communist Party of China's Cent. Comm. and the General Office of the St. Council, Sep. 25, 2016), available at http://www.xinhuanet.com/politics/2016-09/25/c_1119620719.htm.

⁵² Guojia Fagai Wei: Quanguo Xinyong Xinxi Gongxiang Pingtai yi Guiji Xinyong Xinxi Chaoguo 107 Yi Tiao (国家发改委: 全国信用信息共享平台已归集信用信息超过 107 亿条) [National Development and Reform Commission: More Than 10.7 Billion Pieces of Credit Information Have Been Gathered on the National Credit Information Sharing Platform], Nov. 15, 2017, https://www.creditchina.gov.cn/toutiaoxinwen/201711/t20171120_96166.html.

⁵³ 2017 Nian Shehui Xinyong Tixi Jianshe Buji Lianxi Huiyi Zaijing Zhaokai (2017 年社会信用体系建设部际联席会议在京召开) [The Inter-Ministerial Joint Conference on the Construction of Social Credit System in 2017 was held in Beijing], May 6, 2017 http://www.ndrc.gov.cn/gzdt/201705/t20170516_847618.html.

the goals of imposing “joint sanctions” (*lianhe chengjie*) on those deemed “trust-breaking” and offering “joint rewards” (*lianhe jili*) for those deemed “trust-keeping.”⁵⁴

The inter-ministerial SCS Joint Conference plays a crucial role in this context. Led by the National Development and Reform Commission (NDRC) and the PBoC, this Conference consists of over 30 government agencies and Communist Party organizations, including the Central Discipline Inspection Committee, Central Propaganda Department, Central Political-Legal Committee and Central Office for the Construction of a Spiritual Civilization.⁵⁵ Members of the inter-ministerial SCS Joint Conference hold regular meetings to coordinate initiatives and cooperate in the sharing of information and implementation of sanctions.

The government has also designated a specific website, “Credit China,”⁵⁶ as a one-stop shop for individuals and businesses to check their own credit information, as well as a place where public credit information is stored and maintained by members of the SCS Joint Conference. In addition to ordinary credit information, “Credit China” prominently features “Blacklists”⁵⁷ and “Redlists,” as noted above.⁵⁸

Apart from the unified national platforms sponsored by the government (the “National Credit Information Sharing Platform” and “Credit China”), various institutions and organizations maintain their own systems.⁵⁹ The PBoC has run the non-profit “Credit Reference Center” (which targets financial data and issues credit reports) since 2006.⁶⁰ Many provincial governments have also created their own “credit” websites to promote the SCS and to share data with agencies at the provincial, municipal and county levels,⁶¹ such as “Honest

⁵⁴ Guanyu Jianli Wanshan Shouxin Lianhe Jili he Shixin Lianhe Chengjie Zhidu Jiakuai Tuijin Shehui Chengxin Jianshe de Zhidao Yijian (关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见) [Guiding Opinions concerning Establishing and Perfecting Incentives for Promise-keeping and Joint Sanction Systems for Trust-Breaking and Accelerating the Construction of Social Credit] (promulgated by St. Council, May 30, 2016). An unofficial translation is available at <https://chinacopyrightandmedia.wordpress.com/2016/05/30/state-council-guiding-opinions-concerning-establishing-and-perfecting-incentives-for-promise-keeping-and-joint-punishment-systems-for-trust-breaking-and-accelerating-the-construction-of-social-sincer/>.

⁵⁵ Shihui Xinyong Tixi Jianshi Buji Lianxi Huiyi Chengyuan Danwei (社会信用体系建设部际联席会议成员单位) [Members of the Inter-ministerial Joint Conference for the Construction of the Social Credit System], CREDIT CHINA, www.creditchina.gov.cn/home/?navPage=0 (last visited Aug. 5, 2018).

⁵⁶ CREDIT CHINA, <https://www.creditchina.gov.cn/> (last visited Nov. 14, 2018).

⁵⁷ Heimingdan Jiansuo (黑名单检索) [Blacklist Search], CREDIT CHINA, <https://www.creditchina.gov.cn/xinyongfuwu/shixinheimingdan/> (last visited Nov. 9, 2018).

⁵⁸ Hongmingdan Jiansuo (红名单检索) [Redlist Search], CREDIT CHINA, <https://www.creditchina.gov.cn/xinyongfuwu/shouxinhongmingdan/> (last visited Nov. 9, 2018).

⁵⁹ Mirjam Meissner, *China's Social Credit System: A Big-data Enabled Approach to Market Regulation with Broad Implications for Doing Business in China*, MERCATOR INST. FOR CHINESE STUD. (May 24, 2017), at 7.

⁶⁰ See *infra* note 107.

⁶¹ See, e.g., Sichuansheng Shehui Xinyong Tixi Jianshe Gongzuo Shishi Fang'an (四川省社会信用体系建设工作实施方案) [Measures to Implement the Construction of the Social Credit System in Sichuan Province] (promulgated by the Sichuan Provincial People's Gov't, effective Aug. 25, 2016), available at <http://zewj.sc.gov.cn/xxgk/NewT.aspx?i=20160901151058-663478-00-000>.

Shanghai.”⁶² In addition to government schemes, various private service providers operate commercial credit systems,⁶³ and some of them team up with government agencies to form public-private partnerships. On “Credit China,” one can find links to the websites of all these systems,⁶⁴ building a dense network of information.

3. Labeling: Blacklisting, Naming and Shaming

The SCS claims to address the “trust” deficit in society. Accordingly, of utmost interest to the government is information concerning breaches of “trust.” The labeling of behavior that “breaks trust” is a prominent component of the SCS.

The 2014 SCS Plan offers a laundry list of problems caused by “trust-breaking behavior” in the four targeted areas: government, business, society and the judiciary. In general, such “trust-breaking behavior” refers to certain types of violations of law and regulations (such as official corruption and commercial fraud) and even industry standards (such as violations of codes of conduct of unions and professional associations).⁶⁵ Such behavior, however, is vaguely defined and hence triggers a great deal of legal uncertainties. For instance, “spreading rumors” on the Internet is also deemed “trust-breaking.”⁶⁶ Other behavior that may not violate any laws or regulations is not spared under the SCS. Rejecting university admission after passing the national exam, for example, is seen as a “trust-breaking” act in Henan Province.⁶⁷

In 2016, the State Council issued a Guiding Opinion⁶⁸ that seeks to impose joint sanctions by multiple agencies on “serious trust-breaking behavior” in certain priority areas. This is broadly defined to include (1) “behavior that seriously damages people’s health, lives and security;” (2) “behavior that seriously damages the market order of fair competition and normal order in society;” (3) “refusal to fulfill legal obligations, thereby seriously affecting the

⁶² 信用中国(上海) [HONEST SHANGHAI] <http://www.shcredit.gov.cn/> (last visited Nov. 9, 2018) (This address may only be accessible through Chinese IP addresses). See also Shanghai: Rang Shuju “Pao” Qilai Guanzhu Shixin Qiye (上海: 让数据“跑”起来 管住失信企业) [Shanghai: Let the Data “Run” and Control the Untrustworthy Enterprise], SHANGHAI OBSERVER (Jan. 31, 2018), <https://www.jfdaily.com/journal/2017-01-31/getArticle.htm?id=242470>.

⁶³ See *infra* Part III.

⁶⁴ Geren Xinyong Guanlian Xinxi Chaxun (个人信用关联信息查询) [Personal Credit Related Information Inquiry], CREDIT CHINA, <http://www.creditchina.gov.cn/gerenxinyong/?navPage=14> (last visited Aug. 4, 2018).

⁶⁵ 2014 SCS Plan, *supra* note 4.

⁶⁶ *Id.*

⁶⁷ [Chengxin Jianshe Wanli Xing] Henan Chuzhao: Fang Gaoxiao “Gezi” de Shixin Kaosheng Jiang Shou Chengjie ([诚信建设万里行] 河南出招: 放高校“鸽子”的失信考生将受惩戒) [[Integrity Construction Miles] Henan's Move: the Untrustworthy Applicants Who Put Colleges and Universities Up Will be Disciplined], CREDIT CHINA, http://www.creditchina.gov.cn/zhuanxiangzhili/difangzhuanxiangzhilijingyan/201807/t20180716_120584.html (last visited Aug. 4, 2018).

⁶⁸ Guiding Opinions Concerning Establishing and Perfecting Incentives for Promise-Keeping and Joint Sanction Systems for Trust-Breaking and Accelerating the Construction of Social Credit, *supra* note 54.

credibility of judicial and administrative organs;” and (4) “refusal to fulfill national defense obligations.”⁶⁹ “Serious trust-breaking behavior” also leads to inclusion on the “Blacklist,” which results in joint sanctions.⁷⁰

Contrasted with the Blacklists are the so-called “Redlists,” which identify those people and organizations deemed to be in remarkable compliance with legal rules and other social norms.⁷¹ As mentioned above, these people are labeled as “trust-keeping.” There is no single unified standard for such lists, and agencies in charge of various sectors have their own Redlists. Examples include taxpayers who are rated as “A Class,” businesses that pass verification of customs authorities and even young volunteers.⁷² “Redlist” status typically brings about benefits such as fast-track government services, less cumbersome bureaucratic procedures and lower inspection frequencies. In addition to agencies in the central government, many local governments are experimenting innovatively with the use of Redlists. In Rongcheng and Shandong, for instance, people who “care for aged parents” will receive a good rating in the local government’s database.⁷³ Shaanxi Province’s “Youth Redlist” offers prize money for youngsters who help out in their neighborhood, among other criteria.⁷⁴

However, more important to the SCS is the Blacklist. At present, different sectors—such as judicial, tax, customs, security supervision, environmental protection, safety inspection and transportation authorities, to name a few—maintain separate Blacklists for “serious” violations of relevant rules in their fields.⁷⁵ For business entities that contravene relevant rules, not only

⁶⁹ *Id.*

⁷⁰ See *infra* Part II.B.4.

⁷¹ Guiding Opinions Concerning Establishing and Perfecting Incentives for Promise-Keeping and Joint Sanction Systems for Trust-Breaking and Accelerating the Construction of Social Credit, *supra* note 54; Guanyu Jiaqiang he Guifan Shouxin Lianhe Jili he Shixin Lianhe Chengjie Duixiang Mingdan Guanli Gongzuo de Zhidao Yijian (关于加强和规范守信联合激励和失信联合惩戒对象名单管理工作的指导意见) [Guiding Opinions on Strengthening and Regulating the Joint Management of Trustworthiness and Untrustworthy Joint Disciplinary Objects] (promulgated by Nat’l Dev. & Reform Com’n & People’s Bank of China, Oct. 30, 2017), available at http://www.ndrc.gov.cn/zcfb/gfxwj/201711/t20171103_866289.html.

⁷² Qiu Haifeng & Wang Qingqing (邱海峰&王青青), *Xinyong Honghei Mingdan Zheyang Yingxiang Shenghuo* (信用红黑名单这样影响生活) [*This is How Credit Red Blacklist Influences Life*], PEOPLE.CN (July 11, 2018 4:27 PM), <http://society.people.com.cn/n1/2018/0711/c1008-30138986.html>.

⁷³ Mareike Ohlberg, Shazeda Ahmed and Bertram Lang, *Central Planning, Local Experiments: The Complex Implementation of China’s Social Credit System*, MERCATOR INST. FOR CHINESE STUD. (Dec. 12, 2017), https://www.merics.org/sites/default/files/2017-12/171212_China_Monitor_43_Social_Credit_System_Implementation.pdf, at 3.

⁷⁴ Shanxi Shou Pi Qingnian Shouxin Lianhe Jili “Hong Mingdan” Chulu (陕西首批青年守信联合激励“红名单”出炉) [*Shaanxi’s First Batch of Youth Credit Cooperative Incentive “Redlist” Released*], CREDIT CHINA, (Dec. 20, 2017), http://www.creditchina.gov.cn/xinyongfuwu/shouxinhongmingdan/shouxinhongmingdanzuixindongtai/201712/t20171220_101194.html.

⁷⁵ Notable lists include, among others, “the defaulters’ list” issued by the Supreme People’s Court, serious tax violations, businesses whose commercial registration is revoked, businesses that violate customs regulations and people and businesses in the transportation industry that violate speed and load limitations etc. Liuyuefen Xin Zeng Shixin Lianhe Chengjie Duixiang Gongshi Ji Qingkuang Shuoming (6月份新增失信联合惩戒对象公示

the organizations themselves, but also their legal representatives and personnel with “direct responsibility” are placed on the Blacklist and sanctioned accordingly. As mentioned, these lists are shared with other central government agencies and local governments on the “National Credit Information Sharing Platform” and “Credit China.”

The most prominent and well-developed Blacklist that lies at the heart of the increasingly expansive SCS is probably “the Defaulters’ List” issued by the Supreme People’s Court (SPC). In July 2013, the SPC issued a regulation (SPC Defaulters Rule) pursuant to the revised 2012 Civil Procedure Law⁷⁶ requiring courts nationwide to produce “Defaulters’ Lists” to track down those who fail to comply with a court judgment.⁷⁷ The Defaulters’ Lists are uploaded to the SPC’s public database and shared on national websites.⁷⁸ Under the SPC Defaulters Rule, all courts are required to share their Defaulters’ Lists with “relevant government departments, financial supervisory authorities, financial institutions, public institutions undertaking administrative duties and trade associations.”⁷⁹ Again, those on the lists may be slapped with sanctions in a variety of areas.⁸⁰

In addition, the SPC Defaulters Rule allows for the use of naming and shaming as a strategy to ensure compliance with court decisions. For example, when a government official is placed on the list, the default information will be provided by the courts to the agency he or she works for and other “relevant departments.”⁸¹ The practice of collecting data about individuals and sharing it with their work units or organizations closely mirrors the traditional *dang’an* regime, as noted above. Furthermore, in some cases courts publicize such individuals’

及情况说明) [Publicizing New Defaulting Subjects in June: Notice and Circumstance Explanations], (Jul. 04, 2018), http://www.gov.cn/fuwu/2018-07/04/content_5303334.htm.

⁷⁶ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Committee of the Nat’l People’s Cong., June 27, 2017, effective July 1, 2017), art. 255, available at http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm.

⁷⁷ Guanyu Gongbu Shixin Beizhixingren Mingdan Xinxi de Ruogan Guiding (关于公布失信被执行人名单信息的若干规定) [Provisions on Publishing the Judgment Defaulter List], (promulgated by the Supreme People’s Court, Feb. 28, 2017, effective May 1, 2017), available at <http://www.court.gov.cn/fabu-xiangqing-37172.html>. [hereinafter *SPC Defaulters Rule*]. The Defaulters’ Lists are readily available via the platform launched through Supreme People’s Court website. See Zuigao Renmin Fayuan Wang Kaitong Gongbu yu Chaxun Pingtai Shixin Bei Zhixing Renmingdan Xinxi Suishi Kecha (最高人民法院网开通公布与查询平台失信被执行人名单信息随时可查) [Defaulters’ Lists Publicly Available Through Supreme People’s Court’s Website], CHINACOURT.ORG (Oct. 24, 2013), <https://www.chinacourt.org/article/detail/2013/10/id/1112516.shtml>.

⁷⁸ Zhongxuanbu, Zuigao Fa, Yinjianhui Xiaofa Guanyu Chuangjian Wanshan Shixin Bei Zhixing Ren Puguang Pingtai de Tongzhi (中宣部、最高法、银监会下发关于创建完善失信被执行人曝光平台的通知) [The Publicity Department of the Communist Party of China, the Supreme People’s Court and the China Banking Regulatory Commission Issued a Notice on the Establishment of a Platform for the Implementation of the Perfected Untrustworthy Enforced Person], XINHUA NEWS (Oct. 10, 2017), http://www.xinhuanet.com/2017-10/10/c_1121778065.htm.

⁷⁹ *SPC Defaulters Rule*, *supra* note 77, art. 8.

⁸⁰ See *infra* Part II.B.4.

⁸¹ *SPC Defaulters Rule*, *supra* note 77, art. 8.

names and photos, along with other personal data, on newspapers, TV or even street billboards and LED screens. Some courts work with local telecommunications companies to activate a special ringtone for blacklisted people that will let callers know the person has been blacklisted.⁸²

By the end of 2017, 9.59 million people had been placed on the Defaulters' List in the SPC database.⁸³ According to the SPC, its Blacklist has delivered desirable outcomes. So far, over 2.2 million people listed have either made the payments as per the judgment or settled with the plaintiff.⁸⁴

In addition to the Blacklist and Redlist techniques, local governments have experimented with scoring projects, which appear to be an even more zealous form of the SCS. The Shanghai Municipal Government, for instance, launched a mobile phone app called "Honest Shanghai," in which voluntary participants can input their personal data and promptly receive their ratings in the government system, ranging from "very good" to "good" to "bad."⁸⁵ Another example is Rongcheng in Shandong Province, where each resident is given a numerical score of up to 1,000 points.⁸⁶ Any act that is undesirable in the eyes of the local government (such as traffic violations) will bring about a deduction of points. Yet, these scoring projects have not been implemented on a nationwide-scale, as the core of the current SCS is still connected to the use of Blacklists and Redlists.

4. Joint Sanctions: "Trust-Breaking Here, Restrictions Everywhere"

For those on the Blacklists, the central government's policy documents have established a wide range of joint sanctions that force compliance. The central idea promoted by the current leadership is "*trust-breaking here, restrictions everywhere*" (*yichu shixin, chuchu shouxian*).⁸⁷ For example, failing to comply with a court decision will result in multiple punishments that may have nothing to do with the original form of wrongdoing whatsoever. More specifically, the defaulter's personal information is publicized together with the list, and default status leads to serious restrictions in areas including "government procurement, bid tendering,

⁸² *Ringtone of Shame Rings Bell for Debtors in East China*, CHINA DAILY (July 30, 2017), http://www.chinadaily.com.cn/china/2017-07/30/content_30295804.htm.

⁸³ *Chinese Courts Blacklist Nearly 9.6 Min Defaulters*, XINHUA NEWS (Jan. 13, 2018), http://www.xinhuanet.com/english/2018-01/13/c_136893488.htm.

⁸⁴ *China Improves Social Credit System*, XINHUA NEWS (Mar. 19, 2018), http://www.xinhuanet.com/english/2018-03/19/c_137050692.htm.

⁸⁵ Ohlberg, Ahmed and Lang, *supra* note 73, at 12.

⁸⁶ *Id.*

⁸⁷ Opinions on Accelerating the Development of a System of Credit Supervision, Warning and Sanctions for Trust-Breakers on the Defaulters' Lists, *supra* note 51.

administrative approvals, government support, financing credit, market access and determination of qualifications.”⁸⁸

The goal of “trust-breaking here, restrictions everywhere” is made possible through institutionalized coordination among government agencies and Communist Party organizations that are members of the SCS Joint Conference. In particular, memorandums of understanding (MoUs) ensuring cooperation are signed by members to coordinate joint sanctions. These MoUs target “trust-breaking” behavior in a multitude of fields, including *inter alia* default on court judgments, tax matters, finance, customs, insurance, environmental protection, production safety, real estate, charity organizations, transportation construction, economic cooperation with foreign companies and even marriage registration.

Each field has its own MoU, which is endorsed by relevant government agencies responsible for enforcing the joint sanctions within their mandate. For instance, the MoU for the SPC’s defaulters’ list, “MoU Concerning Imposing Joint Sanctions on Trust-Breaking Persons Non-Compliant with Court Enforcement,” is signed by a total of 44 institutions, including government agencies (such as NDRC, SPC and the PBoC, etc.), Communist Party organizations (including the Central Organization Department, Central Propaganda Department, State Commission Office for Public Sector Reform and Central Office for the Construction of a Spiritual Civilization), government-organized non-governmental organizations (including the All-China Federation of Industry and Commerce) and the China Railway Company. As of November 2018, there have been 38 MoUs, most of which facilitate joint sanctions (only a few offer “joint rewards” for “trust-keeping behavior”).⁸⁹

While the number of MoUs continues to grow, some commonly used joint sanctions for “serious trust-breaking behavior” can already be discerned from the existing regime. In addition to naming and shaming, a violation in one area can trigger all or some sanctions in the following categories.

The first group is targeted at business and legal persons, including measures to (1) intensify relevant government supervision and frequency/stringency of inspection and (2) bar or prevent their access or opportunities in the following areas: (a) government approvals and

⁸⁸ *SPC Defaulters Rule*, *supra* note 77, art. 8.

⁸⁹ For a survey of the memoranda among central government agencies and other organizations, see Lianhe Jili Chengjie de Hezuo Beiwanglu (联合激励惩戒的合作备忘录) [Memoranda on Joint Rewards and Sanctions], CHINA LAW TRANSLATE, <https://www.chinalawtranslate.com/social-credit-documents/> (last visited Nov. 25, 2018). Local government agencies have signed similar memoranda at the local level. See Difang Lianhe Jiangcheng Beiwanlu (地方联合奖惩备忘录) [Local Memoranda on Joint Rewards and Sanctions], CREDIT CHINA, <http://www.creditchina.gov.cn/lianhejiangcheng/lianhejiangchengbeiwanglunew/> (last visited Dec. 6, 2018).

qualifications, (b) government subsidies and loans and (c) government bidding and other projects.

The second group is designed to restrict individuals from (1) serving as civil servants or high-level positions in the private sector (such as company representatives, board members, managers and high-level employees), (2) obtaining certain professional qualifications and licenses (such as doctors, lawyers, accountants and social workers etc.) and (3) engaging in “high consumption behavior unnecessary to the maintenance of life and work” (such as acquiring real estate, buying cars, booking vacations and highly rated hotels and taking planes or higher classes of trains).⁹⁰ Worse still, joint sanctions in the case of SPC defaulters can even implicate their children—people blacklisted by the SPC are prevented from sending children to private schools that cost more and are considered to offer better quality of education.⁹¹

Local pilot projects have also adopted meddlesome sanctions. In the pilot project in Rongcheng, for instance, depending on their numeric scores, people are punished by additional bureaucratic requirements (or rewarded with preferential treatment) when they deal with the government.⁹² As the central and local governments continue experimenting with miscellaneous sanctions, joint sanctions may become increasingly interconnected, cumulative and intrusive.

Albeit less developed, “joint incentives” are another peculiar mechanism worth noting. People who have made “prominent contributions” in the form of donations, for example, may be classified as “trust-keeping donors” and benefit from a number of convenient procedures provided by the government, including a fast-track process for obtaining household registration (*hukou*) or resident status in cities (which is an important status that has social implications in

⁹⁰ China's National Development and Reform Commission, along with other government agencies, have issued notices that prevent certain “serious trust-breaking people” from traveling by train and plane (“travel restricted list”). See Guanyu Zai Yiding Qixiannei Shidang Xianzhi Teding Yanzhong Shixinren Chengzuo Huoche Tueidong Shehui Xinyong Tixi Jianshe de Yijian (关于在一定期限内适当限制特定严重失信人乘坐火车推动社会信用体系建设的意见) [Opinion on Appropriate, Fixed-term Restrictions on Certain Seriously Untrustworthy People in Using Railway Transportation to Promote the Construction of the Social Credit System] (promulgated by the Nat'l Dev. & Reform Comm'n, effective Mar. 2, 2018), available at http://www.ndrc.gov.cn/zcfb/zcfbtz/201803/t20180316_879618.html; Guanyu zai Yiding Qixiannei Shidang Xianzhi Teding Yanzhong Shixinren Chengzuo Minyong Hangkongqi Tueidong Shehui Xinyong Tixi Jianshe de Yijian (关于在一定期限内适当限制特定严重失信人乘坐民用航空器推动社会信用体系建设的意见) [Opinion on Appropriate, Fixed-term Restrictions on Certain Seriously Untrustworthy People in Using Air Transportation to Promote the Construction of the Social Credit System] (promulgated by the Nat'l Dev. & Reform Comm'n, effective Mar. 2, 2018), available at http://www.ndrc.gov.cn/zcfb/zcfbtz/201803/t20180316_879624.html.

⁹¹ Guanyu dui Shixin Beizhixingren Shishi Lianhe Chengjie de Hezuo Beiwanglu (关于对失信被执行人实施联合惩戒的合作备忘录) [Memorandum of Cooperation Concerning Imposing Joint Sanctions on Trust-Breaking Judgement Defaulters] (signed by the National Development and Reform Commission and the Supreme People's Court etc., effective Jan. 20, 2016), art. 3(23), available at https://www.creditchina.gov.cn/zhengcefagui/zhengcefagui/201709/t20170916_43853.html.

⁹² Ohlberg, Ahmed and Lang, *supra* note 73, at 12.

China).⁹³ Young people who volunteer and accrue three straight years of good records can similarly be labeled “5A Young Volunteers,” who will be blessed with a preferential status in admissions to schools, party organizations and business entities. Companies operated by “5A Young Volunteers” will also be granted access to expedited procedures relating to tax matters, customs and bond issuance.

C. *Spillover: Extraterritorial Effects*

Another salient feature of the SCS is its spillover effects across nationality and border. While the above-discussed four mechanisms seem to have a domestic focus, the impact of social credit does not stop at China’s border. First, foreign enterprises in China are subject to general business registration and sectoral regulations that underscore the operation of the SCS. In general, all foreign entities seeking to establish a presence in China, whether they are subsidiaries or representative offices, must apply to the relevant authorities for business licenses before carrying on activities.⁹⁴ During the course of business registration, foreign entities will receive an SC Unicode and become subjects of the SCS. Together with an open-ended general requirement that obliges all foreign entities to comply with “laws and regulations in China” and to not harm “the social public interest” and “national security” of China, assigning foreign entities SC Unicodes allows the Chinese government to secure a regulatory hook over these entities and shape their behavior to fit its interests.

In addition to general business registration, the Chinese government has rolled out various sectoral rules applicable to foreign enterprises. For example, the Civil Aviation Industry Credit Management Measures (Trial Implementation), effective January 2018, explicitly include “foreign airline companies” in the SCS; the activities of these foreign airlines are therefore monitored and labeled as “trust-breaking” or “serious trust-breaking,” as the case may be.⁹⁵ This rule applies to both “enterprises” and “individuals” who carry out civil aviation activities

⁹³ Spencer Sheehan, *China's Hukou Reforms and the Urbanization Challenge*, THE DIPLOMAT (Feb. 22, 2017), <https://thediplomat.com/2017/02/chinas-hukou-reforms-and-the-urbanization-challenge/>.

⁹⁴ Waizi Qiye Fa (外资企业法) [Wholly Foreign-Owned Enterprise Law] (promulgated by Standing Committee of Nat’l People’s Cong., Sep. 3, 2016; effective Oct. 1, 2016) art. 6-7, *available at* http://www.npc.gov.cn/npc/xinwen/2016-09/06/content_1997114.htm; Waiguo Qiye Changzhu Daibiao Jigou Dengji Guanli Tiaoli (外国企业常驻代表机构登记管理条例) [Regulation on the Administration of Registration of Resident Representative Offices of Foreign Enterprises] (promulgated by State Council, Nov. 19, 2010, effective July 18, 2013) art. 4, *available at* <https://advance.lexis.com/api/document/collection/statutes-legislation/id/5PF8-4JC0-01PR-32K7-00000-00?cite=2013%20China%20Law%20LEXIS%201830&context=1000516>.

⁹⁵ Guanyu Yinfa “Minhang Hangye Xinyong Guanli Banfa (Shixing)” de Tongzhi (关于印发《民航行业信用管理办法(试行)的通知》) [Notice on Printing and Distributing the Civil Aviation Industry Credit Management Measures (Trial)] (promulgated by the Civil Aviation Admin., Nov. 6, 2017, effective Jan. 1, 2018), *available at* http://www.caac.gov.cn/XWZX/MHYW/201711/t20171114_47546.html.

in China or operate outside China but are otherwise subject to China's approval.⁹⁶ It is clear that on the one hand, foreign airlines without a local presence in China can still be regulated by the SCS so long as they require an approval from the regulatory body. The Chinese government can leverage such sectoral-based approval to bring foreign airlines under the aegis of the SCS, regardless of their presence or business registration. The Civil Aviation Industry Credit Management Measures list 14 prescribed scenarios that may constitute "trust-breaking" or "serious trust-breaking," while maintaining a catch-all clause granting regulators broad discretion in determining a particular act to be "serious trust-breaking" in relation to the breach of other laws, regulations or rules.⁹⁷ Furthermore, under these Measures, if a foreign airline breaches any of the prescribed duties, its "legal representatives, principal person in charge and other staff with direct responsibilities" would also be recorded as having engaged in "serious trust-breaking."⁹⁸ The fact that foreigners have no Chinese national ID is scarcely a technical bar to implementation of the SCS: in such instances, the rule directs regulators to use passports or travel documents to manage foreigners' credit records.⁹⁹

Similar spillover effects can be found in the case of overseas NGOs. Those that register in China after January 1, 2017, when a new law regulating overseas NGOs went into effect,¹⁰⁰ are assigned an SC Unicode, as required by the relevant tax authorities.¹⁰¹ Those established before this date are obliged to gradually migrate toward the SC Unicode-based system. In other

⁹⁶ *Id.* art. 2.

⁹⁷ *Id.* art. 8.

⁹⁸ A recent incident demonstrates well how potent the SCS can be as a tool of the Chinese government to force foreign companies into complying with its demands—be it political or otherwise. In April 2018, China's Civil Aviation Bureau issued an order to 36 foreign air carriers, demanding that, in accordance with China's "One China Principle," they stop referring to Taiwan as an independent nation on their websites and that they rename it as "Taiwan, China" or "the Taiwan Region of China." Failure to do so would result in "serious trust-breaking" in the SCS and be sanctioned accordingly. Most airlines have bowed to China's order. Beijing's move has diplomatic repercussions. The White House has criticized China's order as "Orwellian nonsense." A U.K. foreign affairs official remarked that, "U.K. companies should not be placed under political pressure to make changes" on its designation of Taiwan. See Guanyu Xianqi Dui Guanfang Wangzhan Zhenggai de Tongzhi (关于限期对官方网站整改的通知) [Notice to Correct Certain Information on Your Official Website], available at https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/05/05/Editorial-Opinion/Graphics/AirlineLetter.pdf?tid=a_mcntx (last visited Nov. 17, 2018); Daum, *supra* note 8; U.K. *Insists on Its Terminology for Taiwan Amid Chinese Threat*, FOCUS TAIWAN (July 12, 2018), focustaiwan.tw/news/afav/201807120006.aspx.

⁹⁹ Notice on Printing and Distributing the Civil Aviation Industry Credit Management Measures (Trial), *supra* note 95, art. 2.

¹⁰⁰ Jingwai Feizhengfu Zuzhi Jingnei Huodong Guanli Fa (境外非政府组织境内活动管理法) [Law on Administration Over the Activities of Overseas Non-government Organizations Within China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Nov. 4, 2017, effective Nov. 5, 2017), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=21963>.

¹⁰¹ Guanyu Zuohao Jingwai Feizhengfu Zuzhi Daibiao Jigou Shuiwu Dengji Banli Youguan Gongzuo de Tongzhi (关于做好境外非政府组织代表机构税务登记办理有关工作的通知) (Notice on Implementation of Tax Registration for Representative Offices of Overseas NGOs) (issued by State Admin. of Taxation, Jan. 19, 2017, effective Jan. 19, 2017), available at <http://www.lawinfochina.com/display.aspx?id=23573&lib=law>.

words, all overseas NGOs fall within the SCS and may be labeled “trust-breaking” if they are found to have violated relevant rules or moral norms in various fields. According to Deutsche Welle, the Chinese government is currently developing new guidelines that will determine the numeric score of each overseas NGO.¹⁰² It is reported that any conduct that may cause detriment to “China’s unification, security and peace” can result in a reduction of 100 points; the staff of these NGOs is also subject to relevant sanctions.¹⁰³ Presumably, applying the SCS to overseas NGOs will reinforce China’s controversial, stringent overseas NGO law, thereby further discouraging NGO activity in China.

It is evident that the Chinese government has utilized the SCS not only to place domestic citizens and entities under control, but also some foreign citizens and entities. Yet it remains to be seen how aggressively and expansively the SCS will be used to further shape the behavior of all foreign entities and individuals in practice, and, of course, whether and to what extent international society can push back against unjustified intrusive acts. It is beyond doubt that in this scenario, Beijing has employed the SCS to interfere with the operation of foreign businesses and to compel them to follow the will of the Chinese government on very controversial issues.¹⁰⁴

III. RELEVANCE OF COMMERCIAL CREDIT RATING REGIMES IN BUILDING UP THE SCS

It should be noted that while commercial, privately owned credit rating systems are parallel to and to some extent overlap with the development and operation of the SCS, they serve different functions. The SCS exercises public authority with the clear aim of controlling and disciplining the behavior of individuals and covered entities, and at the moment, commercial, privately owned credit rating systems do not yet play an indispensable role in the SCS, contrary to what has been (mistakenly) reported in major media platforms.¹⁰⁵

¹⁰² *Jifenzhi Yaolaile Jingwai NGO Rizi Huojiang Geng Nangou* (积分制要来了 境外 NGO 日子或将更难过) [*The Point System Is Coming; the Days for Overseas NGOs Will Be Even More Difficult*], DW (May 6, 2018), <https://www.dw.com/zh/%E7%A7%AF%E5%88%86%E5%88%B6%E8%A6%81%E6%9D%A5%E4%BA%86-%E5%A2%83%E5%A4%96ngo%E6%97%A5%E5%AD%90%E6%88%96%E5%B0%86%E6%9B%B4%E9%9A%BE%E8%BF%87/a-43674878>.

¹⁰³ *Id.*

¹⁰⁴ *See supra* note 98.

¹⁰⁵ Although Sesame Credit, Tencent Credit and other similar schemes grown out of the private sector can be broadly considered to be part of China’s overall agenda toward constructing a comprehensive SCS, they operate in a fashion that differs from the government projects discussed above.

It is true that when the SCS began to take shape, financial credit initially formed an integral part of the scheme¹⁰⁶ because efforts to establish a modern financial credit system predated the SCS.¹⁰⁷ Further, the past several years have seen new rules that seek to better regulate the market of private credit reporting services, including the State Council's Regulation on the Administration of Credit Investigation Industry in 2012¹⁰⁸ and the PBoC's Measures for the Administration of Credit Rating Agencies in 2014.¹⁰⁹ However, the types of data collected and the ways in which data is analyzed and interpreted clearly demonstrate key differences between the SCS and other commercial, privately owned credit rating systems.

Consider, for example, the leading private credit scoring system in China, Sesame Credit of Ant Financial Services Group (Ant Financial),¹¹⁰ an Alibaba affiliate. Sesame Credit's data generally comes from the following sources: (1) the user's activities on e-commerce websites owned by the Alibaba Group; (2) online payment and financial data collected by Ant Financial, including e-payments from Alipay and Ant Financial's microfinance services; (3) data from cooperating government agencies (e.g., public security authorities and the courts); and (4) other data provided by the user.¹¹¹ Notably, this method of comprehensively collecting users' online activities is made possible by China's strict online real-name registration rules, under which each user's data is linked to his or her true identity.¹¹² Each Sesame Credit user is given a score between 350 and 950, which, as explained by the platform, is calculated using cloud computing and machine learning (a technique that has not been employed in the government's SCS). The calculation of the credit score is based on five categories of data, namely, the person's credit

¹⁰⁶ 2014 SCS Plan, *supra* note 4.

¹⁰⁷ Back in 1992, the PBoC created the system of "loan certificates" (*daikuanzheng*), which recorded the credit information of business entities. Later with technological advances, the PBoC digitalized credit information and finally set up a national "Credit Reference Center" in 2006.

¹⁰⁸ Zhengxinye Guanli Tiaoli (征信业管理条例) [Regulation on the Administration of Credit Investigation Industry] (promulgated by the State Council, effective Mar. 15, 2013).

¹⁰⁹ Zhengxin Jigou Guanli Banfa (征信机构管理办法) [Measures for the Administration of Credit Reporting Institutions] (promulgated by the People's Bank, effective Dec. 20, 2013).

¹¹⁰ See generally Zhima Xinyong (芝麻信用) [SESAME CREDIT], <http://www.xin.xin/#/home> (last visited Aug. 4, 2018).

¹¹¹ Ye Wenhui (叶文辉), *Da Shuju Zhengxin Jigou de Yunzuo Moshi Ji Jianguan Duice—Yi Ali Baba Zhima Xinyong Wei Li* (大数据征信机构的运作模式及监管对策—以阿里巴巴芝麻信用为例) [*The Operation Mode of Big Data Credit Information Agencies and Regulatory Response—Taking Alibaba's Sesame Credit as an Example*], WUHAN JINRONG (武汉金融) [WUHAN FINANCIAL JOURNAL], No. 2, 2016, at 66.

¹¹² For a discussion of China's online real-name registration, see Jyh-An Lee and Ching-Yi Liu, *Real-Name Registration Rules and the Fading Digital Anonymity in China*, 25 (1) WASH. INT'L L. J. (2016). Specifically, China's new Cybersecurity Law, effective from June 1, 2017, imposes duties on network operators to require users to disclose their real name and personal information. Jyh-An Lee, *Hacking into China's Cybersecurity Law*, 53 WAKE FOREST L. REV. 57, 89 (2018).

history, behavioral preferences, fulfillment capacity, identity characteristics and social relationships.¹¹³

People can check the scores of their friends with permission, which appears to be an effective way to exert peer pressure, though rarely in a positive sense. Users have begun to game the system by, for instance, subscribing to more of Alibaba's services to raise their scores¹¹⁴ or befriending people with higher scores.¹¹⁵ Those with good scores enjoy financial benefits provided by the Alibaba group (and other companies that are willing to acknowledge the credibility of Sesame Credit), including instant online loans, lower interest rates and other perks, such as waivers of deposits for hotel-booking and bike-sharing services.¹¹⁶ However, a higher score, which is perceived to represent a better socioeconomic status, is primarily valued in and of itself as a reputational asset.¹¹⁷

Although Sesame Credit originated as a market-driven initiative and operates outside the government realm, there seems to be a trend toward the merger of public and private systems. In July 2015, Ant Financial signed an unprecedented memorandum of understanding with the SPC.¹¹⁸ This document promises the one-way sharing of data: the SPC provides and makes the defaulters' data available on Sesame Credit, but not vice versa, at least for now.¹¹⁹ Such information sharing appears to be the first step in bringing credit rating agencies under the aegis of the government, which is yet another crucial development in building up a comprehensive SCS.¹²⁰

¹¹³ See generally Cha Zhima Fen (查芝麻分) [CHECK SESAME CREDIT], <http://www.xin.xin/#/detail/1-2-1> (last visited Aug. 5, 2018). By and large, Sesame Credit remains a "black box" by not explaining how the algorithm actually operates and the nexus between the data collected and the scores calculated. It is also unclear how one should understand what the score stands for in relation to one's "credit record".

¹¹⁴ Zheping Huang, *I Fixed My Poor Credit Score by Being a More Loyal Alibaba Consumer*, QUARTZ (Oct. 9, 2017), <https://qz.com/1097766/i-fixed-my-poor-sesame-credit-score-by-being-a-more-loyal-user-of-alibabas-wallet-app-alipay-in-china/>.

¹¹⁵ Ane Bislev, *Contextualizing China's Online Credit Rating System*, CHINA POL'Y INST. (Dec. 4, 2017), <https://cpianalysis.org/2017/12/04/contextualizing-chinas-online-credit-rating-system/>.

¹¹⁶ Huang, *supra* note 114.

¹¹⁷ Dai, *supra* note 10, at 26–27.

¹¹⁸ *Zuigao Fayuan Lianshou Zhima Xinyong Chengjie Shixin Jian Chengxiao* (最高法院联手芝麻信用惩戒失信见成效) [*Effectiveness of Cooperation between Supreme People's Court and Sesame Credit in Disciplining Trustworthiness*], PEOPLE.CN (Dec. 21, 2015, 6:32 AM), <http://legal.people.com.cn/n1/2015/1221/c188502-27953185.html>.

¹¹⁹ *China Focus: Chinese Courts Use Technology to Tighten Noose on Debt Defaulters*, XINHUA NEWS (Oct. 3, 2017, 10:19 PM), www.xinhuanet.com/english/2017-10/03/c_136657135.htm.

¹²⁰ The above-mentioned Ant Financial was one of the eight companies permitted in 2015 to run pilot projects that provided credit services to individuals. None of them, however, obtained official licenses after the testing period. Allegedly, the government justified its decision by the potential conflict of interest here: these firms can hardly be objective and independent credit agencies because they have e-commerce and related services of their own. Presumably, consumers have incentives, for instance, to use Alibaba's Alipay (China's largest online payment system) to boost their scores on Sesame Credit. In addition, it also appears that Chinese government is uneasy with the growing power of these private companies. See Guanyu Zuohao Geren Zhengxin Yewu Zhunbei Gongzuo de Tongzhi (关于做好个人征信业务准备工作的通知) [Notice on Preparing for

More recently, the Chinese government began to shift the private sector's credit rating power over individuals back to its own control in a centralized manner. In February 2018, the government spearheaded efforts to create Baihang Credit Scoring, the first entity licensed to carry out personal credit-scoring activities.¹²¹ In July 2018, the government-backed Baihang launched a website (beta version) as one of the first steps towards operation.¹²² While its operational details remain unclear at this stage, observers expect that eight companies will share their data with the government.¹²³ Yet a report rightly warns that, “[c]onflicts and rivalry between bureaucratic and commercial players could delay or even derail [the SCS] implementation.”¹²⁴ If the government's vision indeed supports Baihang in becoming a more powerful player to compete or even replace Sesame Credit, which mines non-bank consumer behavior data, the SCS of the future will probably evolve to absorb AI-enabled credit scoring programs originally developed in the private sector .

IV. THE POWER AND PERILS OF CHINA'S "RULE OF TRUST"

A. *The Power: Toward a "Futuristic" Version?*

China's official SCS is still taking shape and remains primitive at this point in terms of technology, as the system has not applied real-time data and analysis or relied on unified "scores" calculated by algorithms and assigned to individuals. Yet, as stated in an important official document on the development of AI, China plans to "promote the integration of

Personal Credit Investigation Business], PEOPLE'S BANK OF CHINA (Jan. 5, 2015, 5:20 PM), available at <http://www.pbc.gov.cn/zhengxinguanliju/128332/128352/128402/2810010/index.html>; *China Cracks Down on Tech Credit Scoring*, FIN. TIMES (Feb. 4, 2018), available at <https://www.ft.com/content/f23e0cb2-07ec-11e8-9650-9c0ad2d7c5b5>; *China Changes Tack on 'Social Credit' Scheme Plan*, FIN. TIMES (July 4, 2017), available at <https://www.ft.com/content/f772a9ce-60c4-11e7-91a7-502f7ee26895>; *Alibaba's Social Credit Rating is a Risky Game*, FIN. TIMES (Feb. 20, 2018), available at <https://www.ft.com/content/99165d7a-1646-11e8-9376-4a6390addb44>

¹²¹ The largest shareholder of Baihang is the National Internet Finance Association of China, which is composed of the PBoC and other government agencies, and the remaining shares are held by eight private companies. According to state media, Baihang's service is to supplement the state-run (Bank of China) personal credit database. *China Approves Personal Credit Platform for Online Lending*, XINHUA NEWS (Feb. 22, 2018, 8:00 PM), http://www.xinhuanet.com/english/2018-02/22/c_136991905.htm.

¹²² BAIHANG CREDIT, <https://www.baihangcredit.com/baihang.html> (last visited Dec. 6, 2018).

¹²³ "Xinlian" Luodi Nandian Hai Zai Shuju ("信联"落地 难点还在数据) [*"Baihang" Landing, Difficulties Are Still Data*], XINHUA NEWS (Mar. 6, 2018), http://www.xinhuanet.com/info/2018-03/06/c_137019148.htm; *Mudi Ping Baixing Zhengxin Sheli: Dui Geren Daikuan Zichan Zhiliang Juyou Zhengmian Xinyong Yingxiang* (穆迪评百行征信设立: 对个人贷款资产质量具有正面信用影响) [*Moody's Commented on the Establishment of Baixin Credit Information: Positive Credit Impact on the Quality of Personal Loan Assets*], EEO.COM (Mar. 1, 2018, 6:55 PM), <http://www.eeo.com.cn/2018/0301/323437.shtml>; *Announcement: Moody's Publishes March Edition of 'Structured Thinking: Asia Pacific' Newsletter*, MOODY'S (Mar. 27, 2018), https://www.moody's.com/research/Moodys-publishes-March-edition-of-Structured-Thinking-Asia-Pacific-newsletter--PR_381335.

¹²⁴ Ohlberg, Ahmed and Lang, *supra* note 73.

blockchain and AI to establish a new type of social credit system.”¹²⁵ The details of such a system have not yet been revealed, though recent trends indicate that the Chinese government will likely leverage big data to upgrade the SCS to a near-omnipotent version. Given the power stemming from its technological advances, it is capable of doing so.

Indeed, compared with other countries, China has many advantages in mining data-driven technologies. First, the Chinese government’s access to data is unparalleled and is still expanding in light of its political agenda.¹²⁶ The government and Internet conglomerates are sitting on a huge repository of behavioral data gleaned from more than 751 million Internet users.¹²⁷ The rise of e-commerce as well as various e-payment schemes that reorient the nation toward a “cashless society” further fuels this data boom.¹²⁸

Additionally, authorities are highly interested in using digital traces to gather personal data. The Ministry of Public Security’s “Police Cloud” program reportedly links personal data, such as medical histories, supermarket memberships and delivery records to individuals’ national identification numbers (namely, the SC Unicode).¹²⁹ A prying campaign is targeted at Muslims in Xinjiang, collecting their DNA, iris scanning, fingerprints and blood types.¹³⁰ Another program of the Ministry of Public Security, the “Sharp-Eye Program,” employs the fast growing network of facial recognition cameras nationwide to enhance surveillance and sharing captured information among the police.¹³¹ Recently, “Credit China” began to encourage individuals to use facial recognition to log on to its website in order to verify the

¹²⁵ Guowuyuan Guanyu Yinfa Xin Yidai Rengong Zhineng Fazhan Guihua de Tongzhi (国务院关于印发新一代人工智能发展规划的通知) [Notice of the State Council on Issuing the Development Plan on the New Generation of Artificial Intelligence] (promulgated by the State Council, July 8, 2017), available at http://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm.

¹²⁶ Meng Jiang, *China Trails US in Every Area of AI Development Except Big Data*, *Oxford University Report Finds*, S. CHINA MORNING POST (Mar. 19, 2018, 7:02 PM), www.scmp.com/tech/china-tech/article/2137887/china-trails-us-every-area-ai-development-except-big-data-oxford.

¹²⁷ See *White Paper: China Internet Statistics*, CHINA INTERNET WATCH, <https://www.chinainternetwatch.com/whitepaper/china-internet-statistics/> (last visited Aug. 5, 2018).

¹²⁸ E.g., fish vendors in traditional markets have their own QR codes for consumer payment, and even panhandlers on the street have their own codes to collect handouts. Zigor Aldama, *Going Cash Free: Why China is Light Years Ahead in the Online Payment Revolution*, POST MAG. (Sep. 9, 2017),

<http://www.scmp.com/magazines/post-magazine/long-reads/article/2110118/going-cash-free-why-china-light-years-ahead>.

¹²⁹ *China: Police “Big Data” Systems Violate Privacy, Target Dissent*, HUMAN RIGHTS WATCH (Nov. 19, 2017), <https://www.hrw.org/news/2017/11/19/china-police-big-data-systems-violate-privacy-target-dissent>.

¹³⁰ *China: Minority Region Collects DNA from Millions: Private Information Gathered by Police, Under Guise of Public Health Program*, HUMAN RIGHTS WATCH (Dec. 13, 2017, 10:48 AM), <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions>.

¹³¹ Robert Schmitz, *Facial Recognition In China Is Big Business As Local Governments Boost Surveillance*, NPR NEWS (Apr. 3, 2018),

<https://www.npr.org/sections/parallels/2018/04/03/598012923/facial-recognition-in-china-is-big-business-as-local-governments-boost-surveillance>.

person's identity, enabling users to access more information therein.¹³² This data is at the ready disposal of the government.

Second, there are limited legal restraints on the government's collection and use (or abuse) of data. Until the Cybersecurity Law, which went into effect on June 1, 2017, China lacked a legal framework to govern personal data protection—despite constitutional mandates regarding personal freedom, privacy and the prohibition of unlawful search or intrusion into a citizen's residence.¹³³ The primitive structure of China's data protection scheme is now complete and is conditioned by China's Cybersecurity Law, its accompanying measures (including a "Personal Information Security Specification" that took effect on May 1, 2018) and some patchwork regulations.¹³⁴ Such a scheme is, for the most part, intended to prevent individuals and businesses from accessing personal information illegally, not to guard against the government itself.¹³⁵ While the Cybersecurity Law, for instance, prohibits network operators from collecting personal information that is not relevant to the services they offer, it introduces controversial "data localization" measures to keep data stored at home.¹³⁶ Data exports are permitted if and only if relevant agencies are content with the "security assessment."¹³⁷ Although data localization may presumably be a way to offer security, it may also be used to reinforce government monitoring of people's online activities.¹³⁸ While the government continues to discuss additional legislation related to personal data protection, there appears to be no consensus on how to balance the need for data protection and the government's ambition to develop and expand data-related applications.¹³⁹

In addition, some scholars point out that there is no legislation that defines the content of the right to "privacy" and that "the scope of privacy is far from clear in the public law context,"¹⁴⁰ thereby making it difficult to challenge the government's intrusive acts. In fact, many laws and policies in China keenly seek to facilitate, rather than deter, the government's

¹³² National Development and Reform Commission: More Than 10.7 Billion Pieces of Credit Information Have Been Gathered on the National Credit Information Sharing Platform, *supra* note 52.

¹³³ For an overview, *see e.g.*, GRAHAM GREENLEAF, ASIAN DATA PRIVACY LAWS: TRADE AND HUMAN RIGHTS PERSPECTIVES 191–225 (2014).

¹³⁴ *See generally* Sams Sacks, *China's Emerging Data Privacy System and GDPR*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 9, 2018), <https://www.csis.org/analysis/chinas-emerging-data-privacy-system-and-gdpr>.

¹³⁵ Wangluo Anquan Fa (网络安全法) [Cybersecurity Law] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective June 1, 2017), *available at* http://www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001605.htm.

¹³⁶ *Id.* art. 37.

¹³⁷ *See id.*

¹³⁸ *See* Jennifer Daskal, *The Un-territoriality of Data*, 125 YALE L. J. 326, 391 (2015) (arguing that while it could make sense for countries like the US to keep data at home for law enforcement purposes, the same logic can be used for countries like China or Russia to compel a service provider operating within their borders to turn over data of dissident human rights activists).

¹³⁹ Sacks, *supra* note 134.

¹⁴⁰ Chen & Cheung, *supra* note 10, at 372.

control of personal data. Airbnb, for instance, is required by Chinese law to proactively hand over information on foreign guests to government authorities, including their passport numbers and dates of stay.¹⁴¹

Third, the SCS has by and large encountered little domestic resistance. To enhance the “trustworthiness of members of society” and create “an excellent credit environment” are popular expressions used by the Chinese government to justify its SCS.¹⁴² This narrative about using the SCS to cure many social problems in a “low-trust society” enjoys favorable coverage in the domestic media.¹⁴³ Of course, the domestic media is tightly controlled by the government. But the popularity of the SCS may also be genuine due to its potential role in reducing prevalent fraudulent activities, such as financial fraud, tax evasion, non-compliance with court-ordered payments, food-safety violations and so on. The growth in private credit services also helps those with no access to formal banking to secure credit.¹⁴⁴ In our view, however, the legitimacy of such a sweeping social control scheme can scarcely rest upon effectiveness alone, and it is unclear whether and to what extent the SCS has truly improved trust among people. The question is still open as to whether social trust and personal morals can be imposed by a system reliant on punishments and incentives.

B. *The Perils: Social Control and Human Rights Violations in the Name of “Trust”*

1. Social Control Under the “Rule of Trust”

China’s goal to become the world’s tech leader must be understood not only in terms of a dominant position in relevant industries and markets, but also in terms of the Communist Party’s ambition to use new governance tools to reinvent social governance and social control.¹⁴⁵ The SCS magnifies the perils of such powers in the following two ways.

First, the SCS expands the scope of behavior under government scrutiny beyond the existing legal system. While in most instances violations of laws or regulations appear to be

¹⁴¹ *Airbnb to Give Chinese Authorities Guest Information*, BBC NEWS (Mar. 29, 2018), <http://www.bbc.com/news/business-43578948>.

¹⁴² *2014 SCS Plan*, *supra* note 4.

¹⁴³ *Social Credit Scores in a Low-Trust Society*, ASIA SOCIETY (October 2018), <https://asiasociety.org/switzerland/social-credit-scores-low-trust-society>; *see also* Ohlberg, Ahmed and Lang, *supra* note 73, at 6–8.

¹⁴⁴ Stefan Brehm & Nicholas Loubere, *China’s Dystopian Social Credit System is a Harbinger of the Global Age of the Algorithm*, CONVERSATION (Jan. 15, 2018),

<https://theconversation.com/chinas-dystopian-social-credit-system-is-a-harbinger-of-the-global-age-of-the-algorithm-88348>.

¹⁴⁵ Reports have surfaced that China’s technological surveillance is deployed to target “petitioners” and Muslims in Xinjiang and other minority regions. *China: Police “Big Data” Systems Violate Privacy*, *supra* note 129.

conditions for the SCS to label an act as “trust-breaking,” not all “trust-breaking” behavior is actually illegal. The SCS casts a rather large and uncertain shadow over the conduct of individuals and entities. “Trust-breaking” behavior may merely breach social and moral norms that are not codified as legal rules. Most crucially, it may further involve “norms” that are artificially imposed by the government at will. As illustrated in Part II.B.3 of this Article, behavior ranging from “spreading rumors” on the Internet (which can be interpreted loosely) to “rejecting university admission” (which hardly involves any agreed-upon norms) is deemed “trust-breaking.” The label of “trust-breaking” generates new government-backed sanctions for behavior not originally condemned in the legal system, thus blurring the line between social/moral norms and legal norms. This is quite contrary to the slogan of “ruling the country in accordance with the law” that Chinese leaders so often tout.¹⁴⁶ With the SCS in place, the “rule of trust” largely trumps the “rule of law,” and those in China (including foreigners and foreign entities) are therefore ruled by expansive, ill-defined ideas about what is “trust-keeping” and what is “trust-breaking.”¹⁴⁷

Second, for behavior that is already considered illegal, an additional label of “trust-breaking” attaches one more (unjustified and disproportionate) layer of punishment that restricts the subject’s activities in a wide range of areas. In practice, China’s legal system is filled with examples of vaguely worded language that leaves plenty of room to maneuver. Among the most notorious are so-called “pocket crimes” (such as “picking quarrels and provoking trouble” and “gathering a crowd to disturb order in a public place”), which are abused by the police to punish dissidents, activists and petitioners.¹⁴⁸ This new authority to impose a complex web of sanctions through the use of the SCS further empowers the Chinese government to punish those who are deemed in non-conformance with its rules.

2. Unjustified Social Exclusion and Discrimination

In other countries, an individual with a poor credit score is normally considered to be a high financial risk, and hence, is unlikely to secure a loan under favorable terms.¹⁴⁹ By contrast, China’s SCS operates in a different fashion. Joint sanctions in the SCS extend far beyond unfavorable treatment in a purely business sense. They involve expansive and enormous disadvantages in myriad areas, from employment, professional qualifications and social

¹⁴⁶ RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 6 (2002).

¹⁴⁷ See *supra* Part II.B.3.

¹⁴⁸ CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ANNUAL REPORT 2014 81 (2014), available at https://www.cecc.gov/sites/chinacommission.house.gov/files/2014%20annual%20report_0.PDF.

¹⁴⁹ See e.g., Irina Barakova et al., *Does Credit Quality Matter for Homeownership?* 12 J. HOUSING ECON. 318, 334 (2003).

mobility to various socioeconomic activities. Individuals failing to execute a civil judgment are barred from serving as a public servant or employee in publicly funded institutions or from taking a managerial post in the manufacturing and banking sectors or state-owned enterprises. Nor can they work in industries related to medicine and food. Additionally, their physical mobility is restricted. Taking planes and trains in certain classes, booking travel, staying in highly rated hotels or leaving the country are generally constrained or prohibited altogether. Their family may also be punished—denial of admission into private and more prestigious schools is a typical consequence for a defaulter’s child.¹⁵⁰ That is, being labeled as “trust-breaking” brings about far-reaching, adverse ramifications that may not be justifiably linked to the original infraction. Moreover, as mentioned previously, there are many ways to name and shame the guilty party. Putting the photos and personal data of defaulters on the street’s LED screen and assigning them a special ringtone is meant to discredit their reputation and induce psychological harm. The above analysis also applies to the legal representatives and “major responsible persons, persons bearing direct responsibility for fulfilling debts and persons actually controlling the entity” whenever the defaulter is a business entity.¹⁵¹

While there are indeed people who conceal assets from the courts, there are also those who are genuinely socioeconomically disadvantaged. The many barriers created by the policy of “trust-breaking here, restrictions everywhere” seem disproportionate and unjustified when sanctions are completely disassociated from the original wrongdoing. These expansive punishments will inevitably hamper the person’s upward mobility and social integration, creating a *de facto* lesser social class that is identified as an unwelcome group and walled off from many public spheres.

There is another discriminatory concern that has not yet materialized but is worth watching as China’s SCS advances. If the government adopts the practice of Sesame Credit to use cloud computing and machine learning to determine a person’s “trustworthiness,” the dangers cannot be overstated. Western media and scholarly research have highlighted the pitfalls and biases embedded in the algorithms, which have already been highly contested, especially in the context of criminal justice proceedings.¹⁵² Technologies driven by algorithms,

¹⁵⁰ See *supra* note 91, art. 3.

¹⁵¹ *Id.* arts. 3 (19), (20), (21), (22) and (23).

¹⁵² See e.g., Ellora Thadaneys Israni, *When an Algorithm Helps Send You to Prison*, NEW YORK TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html>; Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; Andrea Roth, *Machine Testimony*, 126 YALE L. J. 1972 (2017) (addressing the problem about machines as witnesses in the criminal justice system); Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871, 877-79 (2016) (addressing implications of new technology for Fourth Amendment jurisprudence in U.S. law); Han-Wei Liu, Ching-Fu Lin & Yu-Jie Chen, *Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization*,

due to their complexity and proprietary nature, operate in a rather opaque way. Frank Pasquale popularized the term “black box” to describe the algorithm-enabled determination process, which has proven extremely difficult to understand and to challenge.¹⁵³

The black box concern also applies to the Chinese context. In Chinese social life, discrimination abounds. Take, for example, the Uyghurs in Xinjiang, a population that was already suffering social and economic discrimination before the digital age. They have now been under expansive, strict surveillance. Campaigns have been rolled out to set up comprehensive facial recognition cameras in the region¹⁵⁴ and to gather the biometrical data of Uyghurs. With magnified scrutiny, it is much more likely that fault will be found among this population than other groups and its members will be disproportionately labeled as “troublemakers.” Such labels can, in turn, reinforce the bias against targeted ethnic groups.

If the Chinese government or private firms build upon data colored by racism or discrimination in shaping a data-driven, automated decision-making process, one may well expect hidden social discrimination to penetrate every corner of society in China. Without proper safeguards, new technologies could be applied to further oppress those disadvantaged. Put simply, the critical challenge one might consider is: Whether and, if so, to what extent will the future system reproduce biased data? There is no critical debate in China comparable to the Western critique of the discriminatory implications of technology. In fact, the domestic media (which is largely controlled by the Chinese government) and tech experts appear celebratory when it comes to the use of big data for “the greater good,” hastily brushing aside potential concerns.¹⁵⁵

3. Shrinking Space for Privacy

Criticisms regarding China's lack of privacy and data protections, as well as its surveillance mechanisms, are hardly new.¹⁵⁶ With the evolving SCS, however, any remaining space for privacy is shrinking rapidly. One can understand “privacy,” as Mireille Hildebrandt

and Accountability, INT'L J. L. & INFO. TECH. (forthcoming 2019) (discussing how the use of data-driven technology and automated decision-making in government functions may undermine human rights and the rule of law). See also *infra* note 173 and accompanying text.

¹⁵³ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROLS MONEY AND INFORMATION* (2015).

¹⁵⁴ Simon Denyer, *Beijing Bets on Facial Recognition in a Big Drive for Total Surveillance*, WASHINGTON POST (Jan. 7, 2018), <https://www.washingtonpost.com/news/world/wp/2018/01/07/feature/in-china-facial-recognition-is-sharp-end-of-a-drive-for-total-surveillance>.

¹⁵⁵ Ohlberg, Ahmed and Lang, *supra* note 73, at 6-7.

¹⁵⁶ See e.g., *China: Police “Big Data” Systems Violate Privacy, Target Dissent*, *supra* note 129; Louise Lucas and Emily Feng, *Inside China's Surveillance State*, FINANCIAL TIMES (July 20, 2018), <https://www.ft.com/content/2182eebe-8a17-11e8-bf9e-8771d5404543>.

suggests, as “a social setting that permits a person to prevent, ward off or contest unreasonable constraints on the construction of her identity.”¹⁵⁷ When the practice of gathering personal data is intrusive and omnipresent, people are most unlikely to be fully aware of what is collected by both the public and private sectors,¹⁵⁸ and therefore they do not know what to “prevent, ward off or contest.” Even if they are aware, they may not be able to opt out of the regime, as some measures are mandatory, while others bring about conveniences in the default setting. Consciously or not, people are trading their right to privacy for the right to remain part of the data-driven, contemporary society.¹⁵⁹

While there is, indeed, growing concern among Chinese citizens about privacy¹⁶⁰ and some savvy netizens and experts have openly criticized privacy violations,¹⁶¹ the existing resistance does not appear sufficiently effective to slow down the pace by which the SCS is advancing. In fact, one report finds that domestic media coverage tends to demonstrate a high level of trust toward the government’s plan, while at the same time blaming private companies as the source of privacy violations.¹⁶² It is hard to gauge the public’s perception of space for privacy in China, where information and the media are often controlled and nontransparent. Given the increases in new technologies, innovative methods and additional venues for surveillance, the public may develop greater tolerance for them, and the space for privacy will continue to diminish, frustrating the very aim of the protection of privacy.¹⁶³

In light of the sweeping effects of the SCS, Chinese government agencies’ unfettered use of such data (which may or may not be related to the original purpose of data gathering) could

¹⁵⁷ HILDEBRANDT, *supra* note 14, at 102.

¹⁵⁸ Ohlberg, Ahmed and Lang, *supra* note 73, at 2 (“Neither party-state nor private media fundamentally question the need for the Social Credit System. Social media coverage suggests that many citizens have yet to grasp what the Social Credit System is and what its implications in their daily lives may be.”).

¹⁵⁹ A study finds that consumers may be willing to give up some private information in the supermarket surveillance practices as a “tradeoff” for greater convenience. See Jenifer Sunrise Winter, *Surveillance in Ubiquitous Network Societies: Normative Conflicts Related to the Consumer In-store Supermarket Experience in the Context of the Internet of Things*, 16 (1) ETHICS AND INFO. TECH. 27, 39 (2014).

¹⁶⁰ Ohlberg, Ahmed and Lang, *supra* note 73, at 8.

¹⁶¹ *Id.* at 8.

¹⁶² *Id.* at 6-8.

¹⁶³ See G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, Article 17, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. Admittedly, China has not ratified the ICCPR which it signed in 1998. Nevertheless, as a signatory, China is obliged to, as per Article 18 of the Vienna Convention on the Law of Treaties, to which is acceded in 1997, “refrain from acts which would defeat the object and purpose” of the ICCPR. China has declared on various occasions that it accepted the recommendations to “create conditions for the early ratification of the ICCPR,” but its systematic approach to innovate measures that step up surveillance casts doubts on the Chinese leaders’ political will to ratify the ICCPR at all. National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: China, Human Rights Council, Working Group on the Universal Periodic Review Fourth Session, at 7, U.N. Doc. A/HRC/WG.6/4/CHN/1 (Nov. 10, 2008).

result in harm to privacy and thereby deter individual activities.¹⁶⁴ Such deterrence and its chilling effects would also operate in a manner that is contrary to the underlying rationale behind the protection of freedom of speech.

4. Due Process Concerns

The SCS also raises concerns about the very real potential to undermine due process of law in its operation and in particular the right to an effective legal remedy.¹⁶⁵ The way the current regime works to remove false or outdated information is confusing. Each government agency is in charge of managing its own Blacklist. Once an incorrect record is found (or the blacklisted individual complies with relevant rules or a specified period of time passes), the agency may remove the subject from the Blacklist and notify other agencies to cease joint sanctions.¹⁶⁶ However, if the agencies fail to correct information, it appears there is no effective mechanism for redress in place.

Among the many Blacklists, the one managed by the SPC has relatively more detailed rules than others regarding how to remove inaccurate information.¹⁶⁷ Even there, however, protection seems inadequate: The SPC Defaulters Rule allows a blacklisted defaulter to request removal, but there is nothing requiring the courts to notify the individual about the Blacklist in the first place, which would enable the listing to be contested as soon as possible. To initiate the correction process, the defaulter must first apply to the original court that blacklisted him and then appeal to the upper-level court in the case of an unsatisfactory result.¹⁶⁸ There is no public hearing that allows the person to state his or her opinion. This procedure, which involves no outside scrutiny, calls on the court to correct its own error. In addition, the SPC Defaulters Rule requires that the listing be kept in place while the defaulter challenges it.¹⁶⁹ Although the court review process is relatively short (15 days for each level),¹⁷⁰ by the time the procedure is completed, the incorrect listing will have already caused detriment to one's day-to-day activities and reputation. It is unclear if other agencies will make corresponding corrections as quickly as the SPC process allows. In practice, stories have surfaced in which people find it difficult to correct false information once and for all.¹⁷¹ More broadly, there is no uniform

¹⁶⁴ On the notion of privacy harm and possible limits, see e.g., M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L. J. 1131 (2011).

¹⁶⁵ See ICCPR, *supra* note 163, art. 2.

¹⁶⁶ See e.g., SPC Defaulters Rule, *supra* note 77, arts. 9–11.

¹⁶⁷ *Id.* arts. 9–13.

¹⁶⁸ *Id.* arts. 11–12.

¹⁶⁹ *Id.* art. 12, para. 2.

¹⁷⁰ *Id.* art. 12, para. 1.

¹⁷¹ Maya Wang, *China's Chilling 'Social Credit' Blacklist*, HUMAN RIGHTS WATCH (Dec. 12, 2017),

procedure for rectifying information among various Blacklists.¹⁷² Correction procedures vary, and the robustness of each of these Blacklists is largely unclear.

Another question turns on the nature of the future SCS determination process. As previously mentioned, although the system has not yet reached the stage of applying algorithms to its collected data and the Chinese courts have not begun to deploy big data in determining a wrongdoer's fate, as the system continues to evolve, there may be a role for AI and data analytics in helping the executive and judicial branches make a judgment call regarding "trustworthiness." If this is the case, the very nature of data-driven, automated decision-making processes may become hurdles for a fair, accountable procedure.

For many, data-driven mechanisms seem a promising solution to deliver to the world a fair, rational and cost-effective outcome without prejudice. Such a belief has led both the public and private sectors to rely more heavily on statistics and algorithms in their decision-making. However innovative these systems may be, they can scarcely be immune from human bias, subjectivity and heuristics. The creators of such automated systems can still be ensnared by cognitive biases of various types while they collect and process the data or write the code. The use of algorithms and data analytics in democratic countries, most notably in the United States, has already raised enormous controversies: A recent case in the U.S., *State v. Loomis*, is one such illustration revealing the potential risks of using software that is arguably designed with biases against racial minorities.¹⁷³ Yet, the biases can be impossible to challenge when they are hidden in algorithms that claim to be objective and scientific. In addition, the black box problem refers not only to the complex dynamics of the underlying data and algorithms, but also to the proprietary nature of these programs. In particular, rightly or wrongly, the latter may justify a proprietor's rejection of a request for disclosure or an explanation, impeding one's resort to a legal challenge. Depending on how China incorporates this innovation into its governance regime, the black box problem is far from a hypothetical concern.

V. CONCLUSION

The Chinese government has been designing new mechanisms and employing new technologies to reinforce and entrench its political and social control. The ambitious SCS is

<https://www.hrw.org/news/2017/12/12/chinas-chilling-social-credit-blacklist>.

¹⁷² Ohlberg, Ahmed and Lang, *supra* note 73, at 11.

¹⁷³ *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). For a critique on the use of data-driven technologies in criminal justice, see, e.g., Natalie Ram, *Innovating Criminal Justice*, 112 NW. U. L. REV. 659 (2018); Kiel Brennan-Marquez, "Plausible Cause": Explanatory Standards in the Age of Powerful Machines, 70 VAND. L. REV. 1249 (2017).

one of the latest and perhaps most aggressive of its inventions that have attracted considerable media attention. This Article has offered a careful and up-to-date examination of the system and a critical view that is distinctive from the existing literature. While we note that the SCS may enhance law enforcement in some ways, we emphasize the serious perils inherent in this intrusive governance mode, which is anchored on an ambiguous and expansive notion of “trust.”

In the name of trust, the Chinese government now implements vaguely-worded rules to encourage and compel “trust-keeping” behavior and imposes arbitrary, disproportionate punishments on those who are considered “trust-breakers.” We note with concern that the new governance mode that underlines the SCS—what we call the “rule of trust”—derogates from the principle of “governing the country in accordance with the law” that Chinese leaders have long purported to endorse. It is a convenient governance tool that serves power holders to enhance authoritarianism and consolidate their social control.

We further caution against the perils that accompany new regulatory tools aided by technological progress. The comprehensive SCS is made possible by unconstrained practices of collecting and sharing personal information by government agencies through the use of various technologies. More advanced technologies, such as AI-based systems that have been used in other fields in China, are expected to be incorporated in the future SCS. Without meaningful checks, the surveillance of society will surely grow with technological advances.

Indeed, a boundless notion of “trust” and the unrestrained employment of technology are a dangerous combination in the context of China’s governance. This Article has analyzed the adverse consequences of this combination, including the party-state’s extensive, repressive social control, unjustified social exclusion and discrimination, the resulting shrinking space for privacy and the erosion of due process in the giant government machine.

The Chinese party-state’s ambitions for comprehensive control did not begin with the current SCS megaproject, and will not end with it. Many important questions remain as the SCS continues to evolve together with technologies: What will a full-fledged SCS look like? What will be the outcome of the struggle between the “rule of trust” and China’s Constitutional principle of “governing the country in accordance with the law”? To what extent will the SCS shape and restrain the behavior of China’s citizens and non-citizens, in China and beyond, over the long term? How will the Chinese government integrate other subsystems—such as the collection of personal behavioral information, facial recognition policing, social media control and government decision-making mechanisms—into the future SCS? In light of the unique political, legal and social context in China (including an inadequate legal framework for privacy protection, lack of independent judicial review and a one-party authoritarian regime), can there be any effective checks on China’s reliance on technology-reinforced governance

tools? Will the proposed solutions often seen in a Western context—such as privacy by design, the right to an explanation, the right to reject automated decision-making, the right to be forgotten and so on—work for China? Last and certainly not least, how can China’s civil society and the international community counter the growing interference of the SCS with the freedoms of individuals and entities and promote their shared interests in human rights? All of these questions merit greater scholarly attention and future research.

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