Criminalizing China

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The Department of Justice launched the China Initiative in November 2018 to counter national security threats emanating from the People’s Republic of China (PRC). By February 2020, the Federal Bureau of Investigation had approximately a thousand active investigations under the Initiative. The China Initiative is gaining momentum.

People and entities who have connections to the governing party-state structure of the PRC have engaged in trade secret theft and other activities that are criminal under U.S. law. The Department of Justice is not making up that there is a threat. It is, however, framing that threat in a way that is problematic.

This Article argues that using “China” as the glue connecting cases under the Initiative’s umbrella creates an overinclusive conception of the threat and attaches a criminal taint to entities that have an even tangential nexus to “China.” It further contends that implying part of the justification for prosecution and resulting punishment is a shared connection to China is worrisome when assessed in light of the goals of deterrence, incapacitation, rehabilitation, and retribution. A better path is to discard the “China Initiative” framing, focus on cases’ individual characteristics, and enhance the Department of Justice’s interactions with non-governmental experts.

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INTRODUCTION

On November 1, 2018, Attorney General Jeff Sessions launched the “China Initiative”: “Chinese economic espionage against the United States has been increasing—and it has been increasing rapidly. Enough is enough. We’re not going to take it anymore.” In March 2020, the Department of Justice (DOJ) released an information sheet with thirty-nine examples of “China-related” cases since April 2018. More cases are in the pipeline. The director of the Federal Bureau of Investigation (FBI) stated in February 2020 that there were “about a thousand investigations involving China’s attempted theft of U.S.-based technology in all 56 of our field offices and spanning just about every industry and sector.”

There is overwhelming evidence that persons—both natural and legal—who have connections to the governing party-state structure of the People’s Republic of China (PRC) have engaged in trade secret theft and other activities that are criminal under U.S. law. There is also clear evidence that the PRC government and intertwined Chinese Communist Party (CCP, and the collective ruling entity best termed the PRC party-state) is incentivizing and even recruiting people at home and abroad to acquire intellectual property in contravention of U.S. laws. The DOJ is not making up that there is a threat. It is, however, framing that threat in a way that is problematic. Constructing a criminal justice initiative under the umbrella of “China” criminalizes that concept and does so in a way that is at best in tension with foundational principles of the United States’ criminal justice system. “China” is itself of course not a defendant in any of the cases.

Federal prosecutors—supported by the FBI and other law enforcement agencies—are held to the standard that each element of the future”); see also The Latest: FBI Chief Wray Says China Poses a Serious Threat, AP, July 23, 2019, available at https://perma.cc/66NK-PTUU (“Wray told the Senate Judiciary Committee on Tuesday the FBI has more than 1,000 investigations involving economic espionage and attempted intellectual property theft. He says nearly all lead back to China.”).

4 See, e.g., WAYNE M. MORRISON, CONG. RESEARCH SERV., IF130030, U.S.-CHINA TRADE ISSUES (2019) (“In October 2018, Crowdstrike, a U.S. cybersecurity technology company, identified China as “the most prolific nation-state threat actor during the first half of 2018.”).


7 Cf. Adam Hickey, Deputy Assistant Att’y Gen., Remarks at the China Initiative Conference at CSIS, Washington D.C., (Feb. 6, 2020), at 51 min: (“The China Initiative is targeting the behavior of a foreign state. Behavior that writ large poses a strategic threat to the United States. Individual cases are based on individual behavior. We begin with what someone does, and from there a criminal investigation starts.”).

8 The FBI “is the principal investigative arm of the [DOJ] and a full member of the U.S. Intelligence Community.” What is the FBI?, https://www.fbi.gov/about/faqs/what-is-the-fbi (last visited May 10, 2020). It is
the charged offenses be proved beyond a reasonable doubt against the specific person being accused of criminal conduct. Because the Initiative’s framing does not alter that ultimate standard for conviction, some may argue that the label “China Initiative” is mere branding to heighten awareness, or that creation of this project is simply a savvy move to obtain greater financial resources.

This Article argues that the use of “China” is far more meaningful. It permeates into the cases and connects those cases into a larger whole. Although the subject of criminal conviction and punishment is not “China” directly, not only does China-ness become imprinted as a shared characteristic across the cases but also the language used as part of the Initiative anthropomorphizes China into a form that is itself ascribed condemnation.

Nor do interspersed assurances that the Initiative is not targeted at people who are “Chinese” provide an effective antidote to this framing. Such assurances are undercut by the overarching narrative of a China threat and sometimes even by language used in the same statements. For instance, FBI Director Christopher Wray stated in February 2020 that “confronting this threat effectively does not mean we shouldn’t do business with the Chinese, does not mean we shouldn’t host Chinese visitors, does not mean we shouldn’t welcome Chinese students or coexist with China on the world stage. But what it does mean is that when China violates our criminal laws and well-established international norms, we are not going to tolerate it, much less enable it.”

There are times that the shorthand of “China” is appropriate, such as when discussing foreign affairs between the United States and the PRC acting as sovereign states. The “U.S.-China Phase One Trade

not, however, the only investigative arm of the DOJ (e.g., Drug Enforcement Administration). See U.S. Dep’t of Justice, Organizational Chart (Feb. 5, 2018), https://www.justice.gov/agencies/chart.


10 Cf. CHINA INITIATIVE FACT SHEET, supra note 1 (Sessions: “This Initiative will identify priority Chinese trade theft cases [and] ensure that we have enough resources dedicated to them . . . .”); Statement of John C. Demers before the Committee on the Judiciary, U.S. Senate, Hearing on China’s Non-traditional Espionage Against the United States: The Treat and Potential Policy Responses, Dec. 12, 2018, at 1 (“[T]he former Attorney General announced an initiative to marshal our resources to better address [China’s economic aggression].”).

11 Wray, supra note 3 (emphasis added).
Agreement” was concluded in the names of the two countries’ governments. 12 Criminal law, in contrast, is based on the premise that guilt is individual, not by association with an entity—“China”—which is not in a form that can be a direct subject of the criminal law. Yet China is discussed as if it is a perpetrator. John Demers, Assistant Attorney General in the National Security Division and chair of the China Initiative steering group, said at the Initiative’s launch that “[w]ith the Attorney General [Session’s] initiative, we will confront China’s malign behavior and encourage them to conduct themselves as they aspire to be: one of the world’s leading nations.” 13 In February 2020, Attorney General William Barr noted that the DOJ “launched its China Initiative to confront China’s maligned behaviors and to protect U.S. technology.” 14

While this Article is focused on criminal law, the China Initiative is not just about criminal law. 15 The DOJ has stressed that “[c]riminal charges are only one of our tools.” 16 For example, the Initiative includes working with the Department of the Treasury to develop regulations. 17 More generally, the Trump administration has emphasized a “whole of government effort” to confront the PRC. 18 A “whole of government effort” should not lose sight of the distinct roles of different parts of the government. Policies that might be a

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13 CHINA INITIATIVE FACT SHEET, supra note 1 (emphasis added). See also Demers, supra note 10, at 2 (“China is instead pursuing its goals through malign behaviors that exploit features of a free-market economy and an open society like ours.”).
14 Barr, supra note 3. (emphasis added).
15 See, e.g., Wray, supra note 3 (“We’ve got a whole host of tools we can use, from criminal charges and civil injunctions to things like economic sanctions, entity listings, visa revocations.”).
16 “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government” (on file with author, presentation Nov. 18, 2019).
17 See CHINA INITIATIVE FACT SHEET, supra note 1.
18 See, e.g., Christopher Ashley Ford, Bureaucracy and Counterstrategy: Meeting the China Challenge, Remarks at Conference on Great Power Competition, Sept. 11, 2019, https://www.state.gov/bureaucracy-and-counterstrategy-meeting-the-china-challenge/ (statement by Assistant Secretary, Bureau of International Security and Nonproliferation, that “We are working to break down traditional institutional stovepipes to confront Beijing’s whole-of-system strategy with a broad and coordinated response of our own.”).
more comfortable fit for the State Department, National Security Council, or other segments of the executive branch can raise concerns when transplanted into the world of individual criminal prosecutions. The “China Initiative” emanates from the DOJ,\(^ \text{19} \) and core to the Initiative’s goals is using criminal law to combat a “China” threat.\(^ \text{20} \) It is thus appropriate to ask how the Initiative reflects the standard principles of criminal liability and justifications for punishment.

The DOJ has long articulated considerations for determining whether to prosecute including, among others, the nature and seriousness of the offense, the deterrent effect of prosecution, and the person’s culpability in connection with the offense.\(^ \text{21} \) This combination of utilitarian (e.g., deterrence) and retributive (e.g., blameworthiness) considerations carries through to the sentencing stage if a prosecution leads to a conviction. Federal judges are tasked with crafting a sentence that reflects four primary purposes: retribution, deterrence, incapacitation, and rehabilitation.\(^ \text{22} \) Particularly because the DOJ itself decided to amalgamate dozens (and counting) cases as reflecting a common threat, an important question that has not been asked—or at least not publicly debated—is how the “China Initiative” framing interacts with these basic principles. This Article posits that the “China Initiative” construct is problematic when viewed from the perspective of the criminal law principles that undergird the DOJ’s work, and the implementation of the Initiative has borne out these concerns.

The DOJ’s Justice Manual sets forth not only principles that should guide decisions to prosecute but also considerations that are impermissible, including a person’s ethnicity and national origin.\(^ \text{23} \) This Article is not making a claim that federal prosecutors are in fact being influenced by these factors in individual cases. It is, however, arguing that the DOJ’s initiative against “China” at a minimum undermines the spirit of non-discrimination that the Justice Manual extols. There are

\(^ {19} \) **China Initiative Fact Sheet**, *supra* note 1 (“The Attorney General’s Initiative reflects the Department’s strategic priority of countering Chinese national security threats . . . .”).

\(^ {20} \) See Demers, *supra* note 10, at 8 (explaining when describing the China Initiative that “[i]nvestigating and prosecuting economic espionage and other federal crimes will remain at the heart of our work.”).


also other concerns about the China Initiative, such as how it might run afoul of the Fifth Amendment’s guarantee of equal protection in the context of the ability of people to enter and remain in the United States. But this Article’s focus is on how the U.S. government enforces criminal laws. It calls for country-neutral framing of DOJ initiatives and, when a case does have a nexus with the PRC, greater precision in how the DOJ articulates that connection. One of the DOJ’s goals is to “reinforce the trust that leads to cooperation with law enforcement[,]” yet the current framing is instead undermining trust.

This Article proceeds as follows: Part I provides a brief historical backdrop of ways that “China” played into the DOJ’s criminal cases prior to 2018. Part II introduces the design and implementation of the China Initiative.

Part III analyzes how “China” is portrayed in the “China Initiative” context and argues that the term lacks clear boundaries: it conflates ideas of government, party, nationality, national origin, and ethnicity into an amorphous threat. Under the banner of the China Initiative, not only has “China” taken on a criminal taint, but also people—both natural and legal—who are viewed as possessing some level of China-ness are likewise stigmatized for their association with “China.” The United States’ criminal justice system does not allow guilt by association. Nevertheless, the China Initiative has created threat by

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25 Demers, supra note 10, at 8.

association, leaving persons who fall under the “China” umbrella at enhanced risk of scrutiny.

Part IV applies the lens of criminal law theory to the DOJ’s emphasis on “China” as integral to this group of cases. It takes questions usually focused on individual defendants (e.g., how might prosecuting this person deter potential criminal conduct?) and also asks them of the China Initiative as a whole (e.g., how might the China Initiative deter potential criminal conduct?). This is an unorthodox mode of critique, but it is a useful exercise in trying to identify why, and even if, the “China Initiative” is a helpful construct. Part IV warns that implying part of the justification for prosecution and resulting punishment is a shared connection to China is worrisome when assessed in light of the goals of deterrence, incapacitation, rehabilitation, and retribution.

A better path is to discard the “China Initiative” framing, focus on cases’ individual characteristics, and enhance the DOJ’s interactions with non-governmental experts. This approach does not mean building walls such that discussions cannot extend across cases. It does mean adopting a country-neutral framing and only connecting cases when there is a compelling reason to do so, not because they have been categorized as part of a larger China threat. It also means creating a more robust conversation with academia and the private sector than the initial outreach that is underway. 27 FBI Director Wray has emphasized that what “we need to understand about the threat from China is just how diverse and multilayered it is.” 28 A multilayered threat requires a multilayered understanding, which in turn would be better achieved by drawing on the well of deep expertise on the PRC that exists outside of the DOJ.

27 See Erin Nealy Cox, U.S. Attorney for the Northern District of Texas, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 1 hour, 8 min (“We have been partnering with academic institutions and universities as well as corporate America.”); Dr. Mary Sue Coleman, President of the Association of American Universities, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 3 hour, 18 min (noting appreciation for the working relationship that universities are developing with the FBI).

28 Wray, supra note 3; see also Catherine Lutz, FBI Director Christopher Wray Wants to Talk About More than Russia, ASPEN INSTITUTE (July 20, 2018) (“China from a counterintelligence perspective represents the broadest, most challenging threat we face at this time . . . because with them it’s a whole state effort.”).
I. INTERACTIONS BEFORE THE INITIATIVE

Criminal cases that somehow have a connection with the government, people, and/or place of the PRC are not new to the DOJ. But, until recently, these cases were largely treated as targeted areas of cooperation, or contention, rather than as confrontation with an existential threat. On the cooperation side, in 2008, four PRC nationals were convicted in federal court in Nevada for a money laundering conspiracy, visa fraud, and other charges related to a scheme that allegedly siphoned hundreds of millions of dollars from the Bank of China. That case stood out for the coordination between U.S. and PRC authorities, with one of the defendants voluntarily returning to the PRC and agreeing to be deposed via videoconference. The 2001 Mutual Legal Assistance Agreement between the United States and PRC facilitated this cooperation. A U.S. prosecutor who worked on the case recalled in 2015, “The history of U.S.-China cooperation is short.” The Bank of China case was a high-water mark for that cooperation.

There is also a history of cases that have been more contentious. With respect to drugs, in 1996, a shipment of heroin from the PRC in the cavities of dead goldfish led to a political row when a U.S. federal judge enjoined the removal of a witness to the PRC because of the

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31 See United States v. Chao Fan Xu, No. 09-10189 (9th Cir. Jan. 3, 2013).
potential that he would face torture or execution. Fast-forwarding to 2018, the U.S.-China Economic and Security Review Commission found that “China remains the largest source of illicit fentanyl and fentanyl-like substances in the United States.” In 2017, for example, federal prosecutors charged two PRC nationals for “conspiracies to distribute large quantities of fentanyl and fentanyl analogues and other opiate substances in the United States.” PRC-sourced fentanyl remains a point of tension in the U.S.-PRC relationship.

The use of criminal laws to combat intellectual property infringements involving the PRC also is not new. A low-tech version in the early 1990s involved 100,000 pairs of unauthorized KEDS sneakers that were produced by Stride Rite’s former licensee in the PRC and then imported into the United States as genuine KEDS. Similarly, in the 2000 case of United States v. DeFreitas, the defendant imported counterfeit Beanie Babies from the PRC. The author of this Article, having in the late 1990s worked in Beijing at the law firm representing the maker of Beanie Babies (Ty Inc.), saw first-hand the proliferation of the fake toys at the height of their popularity.

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36 See Wang v. Reno, 81 F.3d 808 (9th Cir. 1996).
39 See, e.g., U.S. DRUG ENF’Y ADMIN., DEA Acting Administrator Uttam Dhillon’s visit to Beijing (Jan. 17, 2020), https://perma.cc/V3UL-SC7H (“U.S.-China counternarcotics cooperation was a common theme throughout all of the bilateral meetings.”); George Serletis, Deadly High-purity Fentanyl from China is Entering the U.S. through E-commerce Channels, U.S. INT’L TRADE COMMISSION, EXECUTIVE BRIEFINGS ON TRADE (Sept. 2019) (“The fentanyl epidemic is regarded as a significant national security threat, and the issue is being raised in U.S.-China trade negotiations.”).
40 See United States v. Bohai Trading Co., 45 F.3d 577 (1st Cir. 1995).
42 Cf. ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLIGENT PROPERTY IN CONTEMPORARY CHINA 1 (2005) (retelling how, in 1998, “United States Trade Representative Charlene Barshefsky was stopped by the U.S. Customs Service; her bags were found to contain forty-odd counterfeit ‘Beanie Babies’ (a highly popular stuffed toy at the time) she had purchased in Beijing.”).
slightly higher tech example, in 2005, two U.S. citizens were sentenced to prison in the PRC for selling pirated DVDs on the Internet, in a case that was hailed as “a rare success in joint efforts by the United States and China to enforce intellectual property laws.”

Nor is “economic espionage” new. The Economic Espionage Act dates back to a 1996 statute, though in the first five years there were only eleven prosecutions using the Act. At the time of the Act’s passage, the United States was ending a period in which it viewed Japan as its major economic rival in Asia. The PRC had not joined the World Trade Organization, and it was not yet an economic powerhouse. But this began to change rapidly in the aughts. Intellectual property concerns expanded beyond the open-air Silk Market in Beijing to the high-tech world of Silicon Valley in California. In 2001, for example, two people were arrested trying to board a flight to the PRC with trade secrets from several Bay Area companies. They later pled guilty to economic espionage.

Key to economic espionage is that, each time the government prosecutes under this provision, it is deciding that the alleged theft of trade secrets is not just a concern for the company claiming theft to be handled in civil courts. Rather, it is a wrong with broader societal implications that should be addressed via the criminal law.

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48 See WAYNE M. MORRISON, CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES, CONG. RESEARCH SERV., RL33534, 1 (2019) (detailing how PRC’s emergence “as a major economic power has raised concern among many U.S. policymakers”).
49 U.S. Dep’t of Justice, Two Men Plead Guilty to Stealing Trade Secrets from Silicon Valley to Benefit China (Dec. 14, 2006), https://perma.cc/R35L-6WPA.
50 United States v. Ye, 436 F.3d 1117 (9th Cir. 2006); see also COMPUT. CRIMES & INTELL. PROP. SEC., supra note 41, at 209.
prosecution for economic espionage is also a statement that the theft rises to the level of harming national security. In contrast to traditional espionage of government secrets, such “economic” or “industrial” espionage expands the range of protection to the private sphere.

There are critics of casting this wider net of criminal liability, but economic espionage has become an important tool for federal prosecutors over the past two decades. The 2006 addition of a National Security Division to the DOJ enhanced the infrastructure for prosecuting economic espionage. The Division serves a coordinating and unifying function and is tasked with “protect[ing] the United States from threats to our national security by pursuing justice through the law.” Within the FBI’s Counterintelligence Division, the Economic Espionage Unit serves as a “specialized unit focused solely on prosecuting cases under the Economic Espionage Act.”

A conviction for economic espionage under 18 U.S.C. § 1831 requires prosecutors to prove that there is a nexus to a foreign government:

[T]he second mens rea requirement is that the defendant intended or knew that the offense would “benefit” a “foreign government, foreign instrumentality, or foreign agent.” . . . A “foreign instrumentality” is “any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.”

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53 See, e.g., NAT’L COUNTERINTELLIGENCE AND SECURITY CENTER, FOREIGN ECONOMIC ESPIONAGE IN CYBERSPACE 2 (2018) (“Economic or Industrial Espionage means (a) stealing a trade secret . . . .”).
57 Id.
59 COMPUT. CRIMES & INTELL. PROP. SEC., supra note 41, at 129; see also 18 U.S.C. § 1839(2) (defining a “foreign agent” is defined as “any officer, employee, proxy, servant, delegate, or representative of a foreign government.”).
A DOJ handbook on prosecuting intellectual property crimes explains that, if this entity is not a government entity per se, such as a business, there must be evidence of foreign-government sponsored or coordinated intelligence activity with the entity.\(^{60}\)

During the Obama administration, intellectual-property theft and espionage with some kind of connection to the PRC shifted from isolated cases toward being seen as part of a broader threat. The FBI expanded its efforts to inform the public of intellectual-property theft: the 2014 threat-awareness film titled “The Company Man: Protecting America’s Secrets” depicted an American who was recruited by PRC nationals to engage in industrial espionage.\(^{61}\) Similarly, the 2010 arrest of a U.S. citizen for making false statements regarding his relationship with PRC intelligence officers—which relationship began when he was an undergraduate studying in Shanghai—was the basis for another FBI film, “Game of Pawns: The Glenn Duffie Shriver Story.”\(^{62}\) The FBI explained that the film “educates viewers about the foreign intelligence threat Americans face abroad.”\(^{63}\) The FBI coupled this overt public messaging with quiet, targeted communications. For example, journalists later found that MD Anderson Cancer Center’s July 2018 announcement ousting three scientists with ties to the PRC had roots in a 2015 letter from the FBI’s Houston field office requesting assistance in a “national security investigation.”\(^{64}\)

Economic espionage took center stage in 2014 when the DOJ announced the indictment of five PRC People’s Liberation Army officers for cyber intrusions and economic espionage against U.S. companies.\(^{65}\) This case broke as Xi Jinping was still settling into his role as the top leader. On the spectrum from cooperation to

\(^{60}\) 142 Cong. Rec. 27,116 (1996); COMPUT. CRIMES & INTELL. PROP. SEC., supra note 41, at 182–83.
\(^{62}\) FBI, Game of Pawns, https://perma.cc/6BD6-9VEF.
\(^{64}\) Todd Ackerman, MD Anderson ousts 3 scientists over concerns about Chinese conflicts of interest, HOUSTON CHRONICLE (Apr. 19, 2019), https://perma.cc/Q983-MLGD.
\(^{66}\) The common convention is to put family names first in Chinese. This Article places Chinese family names first unless the order is reversed in a direct quote or if indicated to be the preference of the person named.
confrontation, the U.S. government still sought—albeit with waning confidence—to work with the PRC on protecting intellectual property. In 2015, President Obama and President Xi signed the U.S.-China Cyber Agreement, one component of which was to refrain from knowingly supporting cyber-enabled theft of intellectual property.\(^6^7\)

Also in 2015, the National Security Division released its “Strategic Plan for Countering the Economic Espionage Threat.”\(^6^8\) This plan was framed in a country-neutral manner: “To respond effectively to economic espionage, [the DOJ] must support a whole-of-government approach, just as it does with other national security threats.”\(^6^9\) The Plan did, however, highlight a case connected to the PRC party-state.\(^7^0\) The Strategic Plan also announced plans to “heighten awareness of the economic espionage threat and deliver coordinated training” including to U.S. companies, labs, and universities.\(^7^1\) Until 2018, the DOJ had not organized these activities into a clear, cohesive strategy aimed at countering the PRC.

Heightened scrutiny was in part precipitated by the PRC party-state’s announcement in 2015 of a “Made in China 2025” plan.\(^7^2\) The plan targeted ten strategic industries for development.\(^7^3\) Although innovation is generally expected and even encouraged as a country’s economy develops, Assistant Attorney General John Demers warned

\(^6^7\) United States-China Cyber Agreement, Sept. 2015, available at https://fas.org/sgp/crs/row/IN10376.pdf. For earlier efforts at cooperation during the Obama Administration, see, e.g., U.S. DEP’T OF JUSTICE, Attorney General Eric Holder Speaks at the International Intellectual Property Summit (Oct. 18, 2010), https://perma.cc/V2LD-L2A2 (“I will travel to Beijing, where I look forward to meeting with my counterparts and other officials to discuss how we can build on our nations’ bilateral enforcement efforts through the Intellectual Property Working Group of the U.S.-China Joint Liaison Group for Law Enforcement Cooperation.”).

\(^6^8\) See Richard S. Scott & Alan Z. Rozenshtein, DOJ’s Strategic Plan for Countering the Economic Espionage Threats, in 64 U.S. ATTORNEYS’ BULLETIN 23 (Jan 2016).

\(^6^9\) Id. at 23 (quoting the 2015 DOJ Strategic Plan); see also Congress’s House Resolution 643, “Calling for Further Defense Against the People’s Republic of China’s State-Sponsored Cyber-Enabled Theft of Trade Secrets, Including by the People’s Liberation Army” (H.R. 643, 113th Cong. (2014)).

\(^7^0\) Scott & Rozenshtein, supra note 68, at 24 (quoting 2015 DOJ Strategic Plan’s discussion of United States v. Liew, 2014 WL 2586329 (N.D. Cal. June 9, 2014)).

\(^7^1\) Id. at 25 (quoting the 2015 DOJ Strategic Plan).

\(^7^2\) Scott Kennedy, Made in China 2025, CSIS (June 1, 2015), https://www.csis.org/analysis/made-china-2025.

Congress in 2018 that “China has committed to pursuing an ‘innovation-driven’ development strategy and prioritizing breakthroughs in higher-end innovation. But that is only part of the story: ‘Made in China 2025’ is as much roadmap to theft as it is guidance to innovate.” This warning recalled a 2013 book titled *Chinese Industrial Espionage: Technology Acquisition and Military Modernization*. The authors describe “an elaborate, comprehensive system for spotting foreign technologies, acquiring them by every means imaginable, and converting them into weapons and competitive goods.” When President Trump took office in January 2017, these developments during the Obama administration were coalescing into a more assertive and vocal response to a “China” threat.

II. THE CHINA INITIATIVE

The word was out in fall 2018 that the DOJ was going to make an announcement and it involved China. Then Attorney General Jeff Sessions led the press conference on November 1, 2018, flanked by other members of the DOJ. What he laid out was a commitment of significant resources to counter the “grave threat to our national security” under the title of the “China Initiative.” This Part describes the design of the China Initiative (Part II.A) and provides an overview of its implementation to date (Part II.B).

A. DESIGN

The China Initiative was launched at a time of growing tensions in many facets of the U.S.-PRC relationship. The PRC’s island building in the South China Sea created a brash challenge to the United States’ interests in freedom of navigation. General Secretary Xi’s growing

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74 Demers, supra note 10, at 2.


76 Id. at 2; see also James Mulvenon, Beyond Espionage: IP Theft, Talent Programs, and Cyber Conflict with China, Harvard Fairbank Center for Chinese Studies (Webinar) (Apr. 22, 2020), https://perma.cc/NE5H-G6QV (discussing recent trends and noting forthcoming publication of follow-on book to *Chinese Industrial Espionage*).


repression at home and exertion of influence abroad exacerbated worries about the PRC’s record on human rights and how rights-depriving practices may extend beyond the PRC’s borders.79 Trade tensions were also on the rise. Part of the backdrop to the China Initiative was a March 2018 report by the Office of the U.S. Trade Representative,80 and repeated messaging that “President Trump has made it clear we must insist on fair and reciprocal trade with China and strictly enforce our laws against unfair trade. This requires taking effective action to confront China over its state-led efforts to force, strong-arm, and even steal U.S. technology and intellectual property”81. These comments made in the context of trade relations on a state-to-state basis were soon echoed by the DOJ in the criminal context.

In his remarks on November 1, 2018, Attorney General Sessions explained that “[t]he Initiative is launched against the background of previous findings by the Administration concerning China’s practices.”82 He announced that the Criminal Division and National Security Division would play key roles.83 Five U.S. Attorneys were also announced as part of the Working Group: District of Massachusetts, Northern District of Alabama, Northern District of California, Eastern District of New York, and Northern District of Texas.84

Included in the China Initiative’s launch was announcement of economic espionage charges against a ‘PRC State-Owned Company, Taiwan Company, and Three Individuals’ for alleged theft of trade secrets from Micron, an Idaho-based semiconductor company.85 These charges are paradigmatic of the stated purpose of the Initiative: [The China Initiative] reflects the strategic priority of countering Chinese national security threats and reinforces the President’s overall national security strategy. In addition

79 See, e.g., China’s Influence and American Interests: Promoting Constructive Vigilance, Nov. 29, 2018 (Larry Diamond & Orville Schell, eds.), https://perma.cc/B58Q-M9YL (explaining that General Secretary Xi “has significantly expanded the more assertive set of policies initiated by his predecessor Hu Jintao”).
80 U.S. Trade Representative, supra note 6.
81 U.S. Trade Representative, President Trump Announces Strong Actions to Address China’s Unfair Trade (Mar. 22, 2018), https://perma.cc/4VRS-ST5A.
82 CHINA INITIATIVE FACT SHEET, supra note 1.
83 Id.
84 Id.
to identifying and prosecuting those engaged in trade secret theft, hacking and economic espionage, the initiative will increase efforts to protect our critical infrastructure against external threats including foreign direct investment, supply chain threats and the foreign agents seeking to influence the American public and policymakers without proper registration.\footnote{U.S. Dep’t of Justice, Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases (Jan. 28, 2020), \url{https://perma.cc/FYN3-DDUP}.}

Economic espionage cases predate the China Initiative: “Chinese national security threats”\footnote{Id.} were not new. But the DOJ was now pursuing alleged criminal activity as a unified effort. The DOJ had previously created initiatives that targeted criminal activities in certain locations.\footnote{See, e.g., U.S. Dep’t of Justice, Fact Sheet: Department of Justice Efforts to Combat Mexican Drug Cartels (Apr. 2, 2009), \url{https://perma.cc/3WAF-TQM5}; U.S. Dep’t of Justice, Department of Justice Announces Resources for Fight Against Mexican Drug Cartels (Mar. 24, 2009), \url{https://perma.cc/3LJ8-GWSX}.} To imprint this effort with the name of a country, however, was unusual and perhaps even unprecedented.\footnote{The author has found no unified listing of all previous Department of Justice initiatives, nor any other example of an “Initiative” named for a country.}

\section*{B. Implementation}

Attorney General Sessions set the stage for the China Initiative,\footnote{See, e.g., Hickey, supra note 7, at 50 min (describing Sessions’s announcement as “sending a signal that cases related to threats from China are a priority, they’re worth spending your nights and weekends on because the stakes of those cases are very high. And the prosecutors in the [DOJ] did not disappoint.”).} but he soon departed.\footnote{Peter Baker, Katie Benner, and Michael D. Sheer, Jeff Sessions Is Forced Out as Attorney General as Trumps Installs Loyalist, NY TIMES (Nov. 7, 2018), \url{https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html}.} At William Barr’s confirmation hearing in January 2019, he identified the PRC as the United States’ “paramount economic and military rival in the world” and added, “I really thought that Attorney General Sessions was right on target in setting up his China initiative in the [DOJ] to start going after the pirating of American technology and other kinds of illegal activities that Chinese nationals are involved in here in the United States, and even abroad.”\footnote{Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Before the Committee on the Judiciary, U.S. Senate, Jan. 15-16, 2019, \url{https://perma.cc/WL3A-2X9K}. [hereinafter Confirmation Hearing].}
The Initiative gained momentum under Attorney General Barr. Economic espionage is the marquee crime but far from the only one being charged. Other charges include theft of trade secrets, wire fraud, making false statements to a government agency, obstruction of justice, violations of the International Emergency Economic Powers Act (IEEPA), violations of the Foreign Corrupt Practices Act (FCPA), computer hacking, international money laundering, acting as an agent of the PRC without notification to the U.S. government, and various conspiracy charges.93

Public statements by DOJ officials portend further expansion of the Initiative’s scope. FBI Director Wray stated on February 6, 2020, “[T]he FBI has about a thousand investigations involving China’s attempted theft of U.S.-based technology in all 56 of our field offices and spanning just about every industry and sector.”94 Andrew Lelling, U.S. Attorney for the District of Massachusetts, added at the same conference, “My prediction is that these cases will spike at some point and then begin to trail off hopefully as industry and academia become more sensitized to the problem. I can tell you that for the coming year in Boston what I anticipate frankly is prosecuting more people.”95 In an April 2020 article, Assistant Attorney General Demers is quoted as expressing a desire that all ninety-four U.S. Attorney’s Offices bring cases under the China Initiative, adding, “You’re not going to do 125 cases in a year as a U.S. attorney’s office . . . . You’re going to do maybe one, which would be great. If you do two, that’s very impressive. If you do none, that’s understandable and you’ll get there next year.”96

A notable aspect of the China Initiative is that the defendants are a broad range of people beyond traditional state-directed spies. The DOJ has stressed the role of “nontraditional collectors” such as researchers at universities and for-profit laboratories.97 In July 2018,

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93 U.S. Dep’t of Justice, supra note 2.
94 Wray, supra note 3; see also Barr, supra note 3 (noting in context of China Initiative that “you should expect more indictments and prosecutions in the future”); see also FBI has 1,000 investigations into Chinese intellectual property theft, director Christopher Wray says, calling China the most severe counter-intelligence threat to US, SOUTH CHINA MORNING POST (Jul. 24, 2019), https://perma.cc/3SM8-B9ZB.
97 See, e.g., Open Hearing on Worldwide Threats Before the Senate Select Committee on Intelligence, 115th Cong. 2 (2018) (statement of Christopher Wray, Dir. of the
FBI Director Wray stated, “I think China, from a counterintelligence perspective, in many ways represents the broadest, most challenging, most significant threat we face as a country. And I say that because for them, it is a whole of state effort. It is economic espionage as well as traditional espionage; it is nontraditional collectors as well as traditional intelligence operatives; it’s human sources as well as cyber means.”98 This concern is seen in the DOJ’s emphasis on the “Thousand Talents Plan,” a program sponsored by the PRC party-state to recruit people “with full professorships or the equivalent in prestigious foreign universities and R&D institutes” to work in the PRC.99 A November 2019 report by the Senate Permanent Subcommittee on Investigations found that “[t]he FBI’s slow response to Chinese recruitment operations through the [Thousand Talents Plan] and other talent recruitment plans provided the Chinese government the opportunity to recruit U.S.-based researchers and scientists.”100

The Thousand Talents Plan was a central feature of the January 2020 charges against Harvard professor Charles Lieber for “making materially false, fictitious and fraudulent statements.”101 A nanoscience specialist, Dr. Lieber had received U.S. government grant funding that

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101 Dep’t of Justice, supra note 86 (other cases announced at the same time involved Ye Yang (a lieutenant in the PRC military who allegedly lied on her visa form and continued to work for the PRC military while in the United States) and Zheng Zaozong (who allegedly stole biological research from a Boston hospital that was later discovered inside a sock by airport security)).
required disclosure of significant foreign financial conflicts of interest. He allegedly failed to disclose his relationship with Wuhan University of Technology and participation in the Thousand Talents Plan, through which he received $50,000 per month in addition to living and lab expenses. The DOJ indicated that additional arrests in academia would be forthcoming, with “academic espionage” increasingly entering the lexicon as part of the China threat. On February 27, 2020, the DOJ announced the arrest of a University of Tennessee professor on charges of fraud and false statements connected to his alleged affiliation with the Beijing University of Technology. On March 10, 2020, the DOJ announced that a former West Virginia University professor pleaded guilty to fraud charges connected to his involvement in the Thousand Talents Plan.

Also of growing interest are PRC-connected actors who are allegedly influencing the “American public and policymakers without proper registration.” In May 2019, the FBI’s Foreign Influence Task Force added a unit aimed at countering China’s political influence in the United States. This unit strengthened the FBI’s investigatory pipeline that can lay the foundation for later prosecutions. The U.S. government’s announcement in February 2020 that representatives of five prominent PRC news agencies would be treated as foreign-government functionaries further heightened attention on efforts by the PRC party-state to influence opinion in the United States.

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102 Id.
103 Id.
104 Michele McPhee, The China Spy Scandal That Entangled Harvard Could Hit Yale and MIT Next, NEWSWEEK (Feb. 29, 2020, 7:00 AM), https://perma.cc/WP8R-BV49 (“Federal law enforcement sources tell Newsweek that last month’s arrest of Charles Lieber . . . is just ‘the first domino to fall.’”).
107 Press Release, Dep’t of Justice, Former West Virginia University Professor Pleads Guilty to Fraud That Enabled Him to Participate in the [PRC]’s “Thousand Talents Plan” (Mar. 10, 2020), https://perma.cc/2PZX-NUEC.
108 Dep’t of Justice, supra note 86.
110 Lara Jakes & Steven Lee Meyers, U.S. Designates China’s Official Media as Operatives of the Communist State, NY TIMES (Feb. 18, 2020),
At the time of writing this Article, the China Initiative is proceeding full throttle with no end date in sight. The DOJ has underscored the long-term nature of the Initiative. John Demers stated in February 2020, “[O]ur work is far from done. We must settle in for the long haul against the government that proposes a very different set of social, political, and economic values from those of us in the west.” 111 John Brown, Assistant Director of the FBI’s Counterintelligence Division, similarly warned, “Does the world go through Communist China or the United States in the next 30 years. We have been deceived too long. . . . I think we have woken up . . . Now is a time for action. That action is together.”112

To date, this action has largely focused on investigating and prosecuting cases, but these activities have proceeded alongside a public outreach component. As explained in Part IV.E infra, this outreach has yet to mature into a sustained two-way conversation as compared with principally serving as an opportunity for the government to explain its view of the threat. The Office of Private Sector engages with academic associations, private companies, and other non-governmental entities.113 Created in 2017, the Office grew out of a need to have “an organized, coordinated, and horizontal approach to interacting with the private sector in today’s complex threat environment.”114 An October 2019 summit addressed “how the academic community can continue to work with the FBI and other federal agencies to tackle national security.”115 These efforts are laudable and should be expanded.116 Nonetheless, even more robust

https://www.nytimes.com/2020/02/18/world/asia/china-media-trump.html (naming Xinhua, CGTN, China Radio, China Daily and The People's Daily). At the time of writing, both the United States and the PRC governments were escalating restrictions on media/journalist presences in each other’s countries. See Vivian Wang & Edward Wong, U.S. Hits Back at China With New Visa Restrictions on Journalists, NY TIMES (May 9 2020), https://perma.cc/SH66-VYRF.

112 John Brown, Assistant Director, FBI, Counterintelligence Division, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 1 hour, 1 min.
114 Id.; see also FBI, This Week Strengthening Partnerships With American’s Business Community, FBI (Nov. 30, 2017), https://perma.cc/Q3U5-PHZC.
116 Wray, supra note 3 (“Through our Office of Private Sector, the FBI has stepped up our national outreach to spread awareness of this threat. . . . Our
interaction between the DOJ and non-government sectors is insufficient to fully ameliorate concerns: the “China” framing is fundamentally flawed. As explained below, the DOJ should begin by rethinking, and renaming, the China Initiative.

III. CRIMINALIZING CHINA

The Obama administration’s export control reform initiative’s goal was “to build high walls around a smaller yard” by focusing on protecting “crown jewels.”\textsuperscript{117} As the Trump administration’s concerns about PRC-linked national security threats increased, analysts outside the government revived this “small yard, high fence” approach as a prudent way of being “selective in choosing technologies that need protecting, but be[ing] aggressive in safeguarding them.”\textsuperscript{118} The China Initiative’s focus is not only what is protected within the fence but also who is of particular concern when they are within the fence. It is not just a matter of being physically within the United States’ borders, though that is the most conspicuous manner of stealing intellectual property located therein. The concern is also people reaching into the fence through cyberintrusions that do not require physical presence.\textsuperscript{119}

The U.S. government’s attention is increasingly on intrusions by entities that are connected to “China.” Assistant Attorney General Demers testified before the Senate Judiciary Committee in December 2018, “From 2011-2018, more than 90 percent of the Department’s cases alleging economic espionage by or to benefit a state involve China, and more than two-thirds of the Department’s theft of trade secrets cases have had a nexus to China.”\textsuperscript{120} In his remarks to the Center for Strategic and International Studies (CSIS) on February 6,
2020, FBI Director Wray explained as follows: “The first thing I think we need to understand about the threat from China is just how diverse and multilayered it is. And I say that in terms of its techniques, its actors, and in its targets.”

What is this “it” of a “China” threat? Later in those same remarks, Director Wray added, “To be clear, this is not about the Chinese people as a whole, and it sure as heck is not about Chinese Americans as a group. But it is about the Chinese government and the Chinese Communist Party.” Yet such interspersed words of assurance do not erase the China Initiative’s conflation of the PRC party-state (Part III.A) with PRC nationality and national origin (Part III.B) as well as Chinese ethnicity (Part III.C) into an amorphous, and even existential, threat. There are a host of conditions each of which is alone sufficient to connect a person—natural or legal—to the “China” in the “China Initiative.” Some of these conditions are immutable (e.g., DNA), but China-ness can also be acquired: one can create a nexus to “China” such that a criminal taint attaches (Part III.D). In her book *Prisoners of Politics*, Rachel Barkow discusses “lumpy” laws that group crimes of varying seriousness and blameworthiness. The DOJ’s conception of “China” similarly lumps together an array of people and

121 Wray, supra note 3; see also Lutz, supra note 28 (“China from a counterintelligence perspective represents the broadest, most challenging threat we face at this time . . . because with them it’s a whole state effort.”).

122 Wray, supra note 3.

123 See, e.g., Michael R. Pompeo, Secretary of State, Address at the Nat’l Governors Association Winter Meeting: U.S. States and the China Competition (Feb. 8, 2020), https://perma.cc/DN7Z-GWYN (“We want talented, young Chinese students to come study in the United States of America.” “The China competition is happening. It’s happening in your states, and it’s a competition that goes to the very basic freedoms that every one of us values.”); Eric Tucker, US Researchers on Front Line of Battle Against Chinese Theft, AP NEWS (Oct. 6, 2019), https://perma.cc/UUR4-4HT3 (William Evanina: “Existentially, we look at China as our greatest threat from an intelligence perspective, and they succeeded significantly in the last decade from stealing our best and brightest technology . . . .”).

124 “China-ness” is not a common phrase. In writing this article, however, the use of “China-ness” was found in an ethnographic account of “Mainland Chinese undergraduates” studying in Singapore. Peidong Yang, *A Phenomenology of being “Very China”: An Ethnographic Report on the Self-Formation Experiences of Mainland Chinese Undergraduate “Foreign Talents” in Singapore*, 42 ASIAN J. OF SOC. SCI. 233, 245 (2014) (“Indeed, anything ranging from ‘bad’ sartorial sense to clumsy Chinese-accented English to the lack of polish in social manners could be reflected upon by the Chinese scholars in retrospect as ‘very China’-ness.”).

125 RACHEL ELISE BARKOW, PRISONERS OF POLITICS 22 (2019).
entities seen as sharing ties to a common threat and, by association, deserving enhanced suspicion for those connections.

This Part breaks down these various ties to a broad conception of “China” that are interwoven into the China Initiative. This Article contends that using “China” as the glue connecting cases under the Initiative’s umbrella creates an overinclusive conception of the threat and attaches a criminal taint to entities that have an even tangential nexus to “China.” To be clear, prosecutors are not relieved of the burden of proving all elements of charged offenses beyond a reasonable doubt.”126 This is not blunt guilt by association. What is occurring is threat by association.

Not only does China-ness become imprinted as a shared negative characteristic across cases, but also the language used in the Initiative anthropomorphizes China into a form that is ascribed condemnation. Attorney General Barr warned, “Chinese theft by hacking has been prominent . . . . Those actions by China are continuing, and you should expect more indictments and prosecutions in the future. . . . China complements its plainly illicit activities with facially legal but predatory behavior.”127 A DOJ presentation on the China Initiative includes a slide titled, “What Has China Stolen?”128 And, when announcing indictments under the China Initiative in January 2020, an FBI Boston Division Special Agent remarked, “China’s goal, simply put, is to replace the United States as the world’s leading superpower, and they’re breaking the law to get there.”129

Because “China” is not an actor that can be convicted and punished, people cannot have traditional accomplice liability flowing from “China’s” actions.130 China itself cannot steal a robot arm131 or a

126 In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).
127 Barr, supra note 3.
128 “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” supra note 16.
129 FBI, Remarks Delivered by FBI Boston Division Special Agent in Charge Joseph R. Bonavolonta Announcing Charges Against Harvard University Professor and Two Chinese Nationals (Jan. 28, 2020), https://perma.cc/B5PK-RUNR.
130 Cf. 21 Am. Jur. 2d Criminal Law § 161 (2d ed. 2020) (“An accomplice is one who knowingly, voluntarily, and with common intent unites with another to commit a crime, or in some way advocates or encourages commission of the crime.”).
corn seed. Nonetheless, the China Initiative spreads a blanket of criminal suspicion over persons associated with China. In the case of Robert Mo, for instance, who pled guilty of the theft of corn seeds that were the intellectual property of DuPont Pioneer and Monsanto, “The atmosphere surrounding economic espionage investigations became so explosive that the federal judge in Mo’s case barred unnecessary mention of his ethnicity.” The judge recognized that his China-ness created an impediment to a fair trial.

To be sure, just as “China” is not a monolith, nor is the DOJ. From this author’s experience, individuals in the U.S. government working on the China Initiative vary with respect to how they conceive of the threat, how they describe the threat, and how sensitive they are to the ways that external audiences perceive the government’s language and actions. The point here is not to malign the motives of hardworking investigators and prosecutors but rather to articulate concerns regarding the framework within which they are working. An initiative can be both well intentioned and fundamentally flawed.

A country-based framing is a particularly awkward fit for the DOJ, which is not a part of the U.S. government with deep country-specific expertise. The DOJ has an Office of International Affairs that coordinates interactions with foreign governments, an FBI presence in the Beijing embassy, and a history of stationing Assistant U.S. Attorneys in Beijing on a rotating basis to act in a liaison function. The Office of International Affairs does not have any visible role in the China Initiative’s leadership or working group. Nor has DOJ developed a cadre of investigators and prosecutors who have substantial linguistic, cultural, and political expertise relevant to the PRC, as one would find in the State Department. FBI Director Wray

134 Mara Hvistendahl, Surveillance Planes, Car Chases, and a FISA Warrant: How a Chinese Immigrant Became a Pawn in America’s Technological Cold War with Beijing, VANITY FAIR (Jan. 28, 2020), https://perma.cc/7BRY-D64M.
recognized the importance of these skills in an April 2019 interview, but it is unclear to what extent the past year has seen progress in building capacity within the DOJ:

"We are trying very hard to recruit people with language skills. Every time I go to a graduation—an agent or analyst graduation—I’m looking at language skills that are reflected in the class. So people who speak Mandarin, for example, are certainly attractive to us. But, again, that’s where partnership with others helps us bridge that gap. So we’re not the only agency working on this problem, so therefore we’re not solely dependent on our own linguists. We work so much more closely now with our intelligence community partners, so we can share and collaborate with each other. And if we work more and more closely with the private sector, there are ways for us to leverage their expertise."

This is also not to say that the DOJ stands alone in presenting a problematic framing of a “China” threat. Concerns have been expressed about overreach in other aspects of U.S. policy toward the PRC. Strongly worded warnings are also found on both sides of the political aisle: Democratic Senator Mark Warren, for example, said in May 2019, “I have been convening meetings between the Intelligence Community and outside stakeholders in business and academia to ensure they have the full threat picture and hopefully, make different decisions about Chinese partnerships. A comprehensive accounting of how the U.S. government views the PRC party-state and entities affiliated therewith is beyond the scope of this Article. The focus here is more narrow: to demonstrate how, at least with respect to the

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137 See, e.g., Samm Sacks, On “Smart Competition: Adapting U.S. Strategy toward China at 40 Years,” Hearing before the House Foreign Affairs Committee, May 8, 2019 (“Overreach in the form of blanket bans, unwinding global supply chains, and discriminating against Chinese individuals based on national origin is not the answer.”).


parts of the DOJ responsible for criminal prosecutions, the approach should be adjusted to better fit their particular perch of pursuing individual criminal liability.

Nor does this Article mean to dismiss concerns about the PRC party-state both incentivizing and sometimes explicitly directing actors to engage in conduct that breaks U.S. laws. This author has spent her career scrutinizing the PRC party-state’s practices involving criminal justice and human rights. The track record is increasingly worrisome under General Secretary Xi. The question is whether there is a better path to dealing with real concerns about the PRC party-state than the DOJ’s current response. We do not know the extent to which the ballooning of cases having a nexus with “China” is due to an uptick in illegal activities as compared with the China Initiative directing investigative resources in a way that is unearthing long-standing issues. The exact scale and escalation of activities are unknown, but that there is a problem with intellectual-property theft has become widely accepted. How the DOJ is addressing that threat is, however, a problem in itself.

140 Yes, e.g., Hickey, supra note 7, at 57 min (noting when discussing slide titled “China Rewards Theft” that there are incentive system in place under which “theft is rewarded after the fact”).
143 Yes, e.g., THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY, THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY (2017), available at https://perma.cc/J8Q8-6WB5 (estimating annual cost of intellectual property theft—not China specific—to range from $225 billion to $600 billion); James Andrew Lewis, How Much Have the Chinese Actually Taken?, Center for Strategic and International Studies (Mar. 22, 2018), https://perma.cc/HZ93-AFQK (“Until recently, the United States probably lost between $20 billion and $30 billion annually from Chinese cyber espionage. This does not count the losses from traditional espionage (e.g., using agents). The cumulative cost may reach $600 billion, since this kind of espionage has been going on for more than two decades.”). For an analysis of the challenges of defining “IP theft” and calculating losses that can be attributable to “China,” see Mark Cohen, The 600 Billion Dollar China IP Echo Chamber, CHINA IPR (Blog) (May 12, 2019), https://perma.cc/B26H-63K6.
144 Cf. Lelling, supra note 95, at 1 hour, 9 min (“[T]here is something of a cultural divide between academia and law enforcement and so convincing academic institutions that there really is a problem has sometimes been difficult . . . .”).
A. THE PRC PARTY-STATE

Economic espionage requires proof that the intellectual-property theft is linked to a “foreign government.” The power structure in the PRC blends state and political party in a way that is vastly different from how those terms are used in the United States. As the Democrats and Republicans vie for the presidency, their respective candidates are running under the parties’ banners but generally do not hold significant positions within the parties’ structure (e.g., chairperson of the Democratic National Committee). Nor do either of the major political parties in the United States have an organizational structure that is enmeshed in, and actually supersedes, the formal government. In the PRC, the Chinese Communist Party (CCP) does exactly this: it is both inexorably intertwined with and superior to the formal government. “President” Xi Jinping may be the more familiar title to American audiences, but his real power lies in his position as General Secretary of the CCP.

As this author has explained elsewhere, the interconnections between party and state in the PRC are not easily conveyed in visual depictions. An approximation is to conceptualize the hyphen in “party-state” as the bonds between two strands in a double helix: an entity can exist in the state strand or party strand, but it is never far removed from a bond that would connect it to the other side. Under General Secretary Xi, this dynamic of party and state has shifted to even greater power to the party, as if the party is the nucleus of an atom with comparatively lightweight government bodies orbiting it.

It is this juggernaut of PRC party-state that is the “foreign government” for economic espionage purposes. In that respect, the DOJ is spot on in conflating the PRC’s formal government and the CCP: an intermeshed structure is an accurate description of power distribution in the PRC. Where the DOJ’s description of “China” in

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145 See supra notes 44-60 and accompanying text.
146 Cf. About the Democratic Party, https://perma.cc/2KK7-6GPF.
147 Kate O’Keeffe & Katy S. Ferek, Stop Calling China Xi’s Jinping ‘President,’ U.S. Panel Says, WALL ST. J. (Nov. 14, 2019, 9:00 AM), https://perma.cc/2NS6-GRSX.
149 See Id.
150 See Id.
the China Initiative takes a fear-provoking turn is by repeated intimations of a communist threat. William Evanina, Director of the National Counterintelligence and Security Center, stressed in February 2020, “Xi Jinping has one goal: to be the global leader geopolitically, militarily, and economically. And he and his communist party will stop at nothing to get there.”\textsuperscript{151} John Brown of the FBI likewise emphasized the increase in intellectual-property theft “for the benefit of communist China…communist China” and set up a stark contrast: “Does the world go through the communist China or the United States in the next 30 years.”\textsuperscript{152}

In name, the CCP is a “communist” party. In reality, the CCP bears little resemblance to textbook communism and is better understood as the backbone of an authoritarian state that has allowed limited economic reforms, albeit with “signs point[ing] toward further entrenchment of statism.”\textsuperscript{153} Rhetoric that presents the challenge as a clash with communism is misplaced. A more accurate path would be for the DOJ to adopt a consistent phrasing of “PRC party-state.” The U.S. government can be extremely disciplined with fraught language, as demonstrated by the delicate terminology used in the context of “Taiwan” and the United States’ “One China Policy.”\textsuperscript{154} The DOJ can and should be more precise in describing the node of the threat.

The DOJ’s expansive description of the challenge that the PRC party-state poses is further accurate in so far that the party’s influence permeates far beyond the lives of the approximately 90 million CCP members.\textsuperscript{155} Nonetheless, lacking in how the DOJ describes the “China” in the China Initiative is a clear recognition of the space, albeit constrained, for entities within the PRC to withstand pressure to engage in “coordinated intelligence activity”\textsuperscript{156} with the PRC party-

\textsuperscript{151} William Evanina, Director, Nat’l Counterintelligence and Security Center, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 9 min.
\textsuperscript{152} Brown, supra note 112, at 46 min; 1 hour, 1 min.
\textsuperscript{155} See CPC Members Exceed 90 Million, China Daily (June 30, 2019, 11:00 AM), https://perma.cc/ZK88-9KE7.
\textsuperscript{156} 142 Cong. Rec. 27,116 (1996); COMPUT. CRIMES & INTELL. PROP. SEC., supra note 41, at 182–83.
state. As cautioned by William Zarit, a senior counselor at The Cohen Group with a long career in the U.S. foreign service, the U.S. government needs to be “balanced in our approach . . . We have to be very, very clear that we don’t punish the Chinese people in this whole process . . . but actually focus on the real culprits.”157 The “Chinese people” and the PRC party-state of course do not separate neatly into two entirely discrete categories.158 As explained in Parts II.B-D infra, however, there is significant room for improvement in how the DOJ describes the source of the threat: the “China Initiative” has conflated the central concern on activities directed by the PRC party-state with a broader conception of China-ness that encompasses PRC nationality and national origin as well as Chinese ethnicity and even more tangential ties to the PRC party-state.

B. PRC NATIONALS AND NATIONAL ORIGIN

The DOJ has stated repeatedly that the China Initiative is not targeted at PRC nationals or people who have familial ties to the PRC.159 The FBI’s publication titled “China: The Risk to Academia” explains that the “FBI recognizes, and values, [the] unique package of benefits these international students and professors provide.”160 Yet this assurance is undercut by the same publication’s warning that the United States’ open academic environment “also puts academia at risk for exploitation by foreign actors who do not follow our rules or share our values” and that “the Chinese government uses some

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158 See Kerry Brown, The Communist Party of China and the Idea of ‘Evil’, OXFORD POLITICAL REVIEW (Apr. 24, 2020), https://perma.cc/5EWE-ADMT (“The Party deliberately sets out to integrate and reach deep into society. The most prudent thing one can say about the relationship between the two is that they are very complex.”).
159 See, e.g., John Brown, Assistant Director, Counterintelligence Division, FBI, Statement before the Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations, Washington D.C., Nov. 19, 2019, https://perma.cc/K54L-8SC2. Similar remarks have been echoed by other parts of the U.S. government, see, e.g., Assistant Secretary Royce Remarks at the EdUSA Forum, Bureau of Educational and Cultural Affairs, Dep’t of State, July 30, 2019, https://eca.state.gov/highlight/assistant-secretary-royce-remarks-edusa-forum (“We want future students and their families to see the United States as a welcoming destination to earn their degrees. We value the presence of students from China on our campuses, in our communities, and in our country.”).
160 FBI, supra note 63, at 1.
Chinese students—mostly post-graduate students and post-doctorate researchers studying science, technology, engineering, and mathematics (STEM)—and professors to operate as non-traditional collectors of intellectual property . . .”

Rhetoric entangling the PRC party-state with people who hold PRC citizenship and/or have familial ties to the PRC is rife in the China Initiative. In January 2019 when announcing charges against telecommunications company Huawei, Acting Attorney General Matthew Whitaker stated, “As I told Chinese officials in August, China must hold its citizens and Chinese companies accountable for complying with the law.” At his confirmation hearing, Attorney General Barr stated his support for the China Initiative and how it was “going after the pirating of American technology and other kinds of illegal activities that Chinese nationals are involved in here in the United States, and even abroad.” In February 2020, Attorney General Barr again blurred the lines between the party-state and the people by cautioning, “The Chinese have long been a commercial people. But for China, purely economic success is not an end in itself.”

Admittedly, the percentage of people engaged in acquiring intellectual property in contravention of U.S. criminal laws and for the benefit of the PRC party-state who are PRC nationals is unknown. That a higher percentage of people engaged in these illicit activities would be PRC nationals as compared with nationals of Canada, Cambodia, or Chile, for example, is logical. This article is not recommending that the DOJ allocate investigatory resources proportionally across people from all nations. Nevertheless, there is a difference between, on the one hand, stating that intellectual-property theft is a priority and then following evidence of suspicious activity wherever it may lead (even if to a higher proportion of PRC nationals) and, on the other hand, setting forth with the explicit intention of countering a “China” threat and then having that framing shape—whether explicitly or implicitly—where the inquiry leads. The former starts from a premise that PRC nationals have space to be distinct from the PRC party-state, whereas the latter

161 Id.
163 Confirmation Hearing, supra note 92.
164 Barr, supra note 3.
conflates citizenship and government. For instance, a February 10, 2020, DOJ press release announcing an indictment under the banner of the China Initiative points to an “unacceptable pattern of state-sponsored computer intrusions and thefts by China and its citizens.”

A February 15, 2019, DOJ announcement of “Chinese National Sentenced to Prison for Selling Counterfeit Computer Parts” begins, “A Beijing, China man [sic] was sentenced today to 54 months in federal prison for directing the shipment of counterfeit computer-networking equipment into the Southern District of Texas.”

Concerns about conflation of PRC party-state and PRC nationals—and people who once held that status even if later changing their citizenship—predate the China Initiative. Warnings about suspicion at least in part based on nationality has also reached beyond the PRC context. Rochelle Cooper Dreyfuss and Orly Lobel wrote in 2016, “Through references to ‘Chinese actors [as] the world’s most active and persistent perpetrators’ and to ‘the many Russian immigrants with advanced technical skills who work for leading US companies,’ the argument for greater protection [of intellectual property] appears to derive at least some of its power from xenophobia.”

That a response to activities directed by the PRC party-state would increase suspicion of PRC nationals ramped up with the launch of the China Initiative. In his December 2018 Senate testimony, John Demers stressed the need to focus on nontraditional collectors including researchers, “some of whom may have undisclosed ties to Chinese institutions and conflicted loyalties.” A 2019 FBI case example of a “Chinese Citizen’s Theft of Weapons Technology for Chinese Employment Opportunity” refers to the “Chinese citizen” sixteen times on a single page and lists as the first “Lessons Learned”: “Divided Loyalty to a Country: The Chinese citizen felt the U.S. company’s information would benefit Chinese

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168 Dreyfuss & Lobel, supra note 45, at 426 (internal citations omitted).

169 Demers, supra note 10, at 8.
weapons and aerospace programs.\footnote{170} Assistant Attorney General Demers further warned of existent, albeit unverifiable to the beyond-a-reasonable-doubt standard, ties between the PRC party-state and a “Chinese company” in one case and a “Chinese scientist” in another:

And while we could not prove in court that these thefts were directed by the Chinese government, there is no question that they are in perfect consonance with Chinese government economic policy. The absence of meaningful protections for intellectual property in China, the paucity of cooperation with any requests for assistance in investigating these cases, the plethora of state sponsored enterprises, and the authoritarian control exercised by the Communist Party amply justify the conclusion that the Chinese government is ultimately responsible for those thefts, too.\footnote{171}

The Deputy Assistant Attorney General of the National Security Division reiterated these cases of a “Chinese company” and “Chinese scientist” in which proof-beyond-a-reasonable-doubt was lacking but for which the conditions in the PRC “amply justify the conclusion that the Chinese government is in some sense responsible for those thefts, too.”\footnote{172}

The DOJ’s depiction of a string-pulling PRC party-state behind the scenes is reflected in the December 2019 report by the JASON group (commissioned by the National Science Foundation) on “Fundamental Research Security.”\footnote{173} The Report found regarding the actions of the “Chinese government” in the U.S. academic sector that “[t]he scale and scope of the problem remain poorly defined, and academic leadership, faculty, and front-line government agencies lack a common understanding of foreign influence in U.S. fundamental research, the possible risks derived from it, and the possible detrimental effect of restrictions on it that might be enacted in

\begin{itemize}
    \item \footnote{171} \textit{Id.} at 5; see also FBI, \textit{supra} note 63, at 2 (“These Chinese scholars may serve as collectors—wittingly or unwittingly—of economic, scientific, and technological intelligence from U.S. institutions to ultimately benefit Chinese academic institutions and businesses.”).
    \item \footnote{172} U.S. Dep’t of Justice, \textit{Deputy Assistant Attorney General Adam S. Hickey of the National Security Division Delivers Remarks at the Fifth National Conference on CFIUS and Team Telecom} (Apr. 24, 2019), \url{https://perma.cc/K887-EZ5P}.
\end{itemize}
response.” A November 2019 Senate report noted that “[u]niversity officials also described the FBI’s outreach on the threat that China poses as ‘haphazard’ and or a ‘mixed bag’.” These observations were preceded by a raft of statements by academic institutions expressing concern over how the DOJ’s focus on PRC nationals was impacting their communities, a sampling of which follow:

- A February 21, 2019, statement by the Berkeley leadership: “At a time when national security issues involving foreign countries make the front pages of our newspapers, it is critical that we not become any less welcoming to students, staff, faculty, visiting scholars, and other members of our community who come from those countries, or for whom those countries are an ancestral home.”

- A May 23, 2019, statement by the President of Yale University: “In recent weeks, tensions in United States-China relations and increased scrutiny of academic exchanges have added to a sense of unease among many international students and scholars here at Yale and at universities across the country. I write now to affirm Yale’s steadfast commitment to our international students and scholars; they are vital to the university community.”

- An August 12, 2019, statement by twenty-two organizations (e.g., Association of American Colleges and Universities, the Chinese American Citizens Alliance, and PEN America) raising concerns about the FBI’s outreach on campuses and cautioning that “calls to monitor individuals solely based on their country of origin violate norms of due process and should raise alarms in a democracy.”

- An August 30, 2019, op-ed by the President of Columbia University: “The FBI has stepped up its scrutiny of research practices at college and university campuses . . . . [M]ost worrisome to me, as someone who has spent five decades advocating freedom of expression and assembly, is the notion that university personnel—and perhaps students

174 Permanent Subcommittee on Investigations, supra note 100, at 97-98.
175 Carol Christ, et. al, Reaffirming Our Support for Berkeley’s International Community, BERKELEY NEWS (Feb. 21, 2019), https://perma.cc/LN86-V3QS.
themselves—should be asked to monitor the movements of foreign-born students and colleagues. This is antithetical to who we are.”

- An October 10, 2019, statement by the University of Michigan leadership affirming that, despite heightened scrutiny around potential international conflicts of interest, “not for a moment are we going to diminish our commitment to being a welcoming place for students and faculty from all around the world . . . .”

- A November 7, 2019, statement by UCLA’s Office of the Chancellor noting concerns about potential theft of intellectual property but warning that “we must never resort to suspicion based on a person’s national origin. To do so is nothing short of discrimination, which is antithetical to our values as an institution. Racial profiling, in any context, is corrosive to our community.”

Throughout these statements runs the concern for “othering”: that people bearing PRC nationality or of PRC national origin will be branded as outside and even antagonistic to what is “American.” A concern for othering of foreigners by law enforcement authorities is not new, but the us/our versus them/their rhetoric has taken on a sharper tone particularly with respect to “Chinese” in contrast to “Americans.” After noting that “international students and professors” contribute to the U.S. academic vigor, the FBI’s publication titled “China: The Risk to Academia” adds, “However, this open environment also puts academia at risk for exploitation by foreign

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180 UCLA, Office of the Chancellor, Reaffirming UCLA’s Commitment to International Collaboration and the International Community (Nov. 7, 2019), https://perma.cc/9HC4-NJCR.
181 Cf. Erin Kerrison, Wizdom Powell & Abigail Sewell, Object to Subject: Three Scholars on Race, Othering, and Bearing Witness, OTHERING & BELONGING, issue 3, 16 at 17 (Fall 2018) (“Wizdom: I think to be othered is to be denied the fulness of one’s humanity. It’s about reminding people . . . that ‘you’re not one of us.’”).
182 See, e.g., MIKE GERMAN, DISRUPT, DISCREDIT, AND DIVIDE: HOW THE NEW FBI DAMAGES DEMOCRACY (2019) (arguing that the FBI has adopted a “disruption strategy” that target foreigners, members of certain religious groups, and communities of color).
actors who do not follow our rules or share our values.”

The publication asserts that the PRC and its academics engage in “endemic plagiarism”: “Many recent high-profile examples show plagiarism is commonplace throughout Chinese academic and research institutions.”

This is in contrast to the DOJ’s depiction of American values: “Innovation in aviation has been a hallmark of life and industry in the United States since the Wright brothers first designed gliders in Dayton more than a century ago . . . . U.S. aerospace companies invest decades of time and billions of dollars in research. This is the American way. In contrast, according to the indictment, a Chinese intelligence officer tried to acquire that same, hard-earned innovation through theft.”

The contrast of American versus Chinese is further apparent in the U.S. government’s concerns regarding “Chinese companies.”

A PowerPoint slide used by the DOJ in its presentations on the China Initiative includes the “Nationality of the world’s 10 largest companies, according to annual Forbes Global 2000 list” using national flags to show shifts from 2004 to 2018.

In 2004, the composition was seven U.S. companies, two British companies, and one Japanese company.

In 2019, there were four U.S. companies, one Dutch company, and four PRC companies.

The stark categories are also reflected in statements. John Demers testified in December 2018 that, “[i]n many of the cases we see, China’s strategy is the same: rob, replicate, and replace. Rob the American company of its intellectual property, replicate the technology, and replace the American company in the Chinese market and, one day, the global market.” And one of the “goals of the China Initiative” is to “Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete unfairly

\[183\] FBI, supra note 63, at 1 (emphasis added).

\[184\] Id.


\[186\] See, e.g., SEAN O’CONNOR, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, STAFF RESEARCH REPORT, HOW CHINESE COMPANIES FACILITATE TECHNOLOGY TRANSFER FROM THE UNITED STATES, May 6, 2019.

\[187\] “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” supra note 16.

\[188\] Id.

\[189\] Id.

\[190\] Demers, supra note 10, at 5.
against U.S. businesses.”

The “Chinese” versus “American” company binary is explicit in the FBI publication titled “China: The Risk to Corporate America,” which includes advice on “Combating Foreign Adversaries’ Tactics to Target Your Company”: “To address the potential vulnerability of a company to foreigner visits to company facilities can present, keep visitor groups together . . . .” This section is written in country-neutral terms, but it is still nested within a publication explicitly on the “China” threat. This framing not only presents “Corporate America” as a discrete entity, but also depicts the threat as emanating from “China.”

Other times the us-versus-them contrast is expressed in terms of “western” and “Chinese,” with William Evanina referring to “a Western civilization company.” At the same February 2020 conference, FBI Director Wray described how “China has grown its economy rapidly by combining low-cost Chinese labor with Western capital and technology.” Although corporations have not become so multinational as to shed completely stronger associations with any one country, the labeling of companies as Chinese/Western is an oversimplification. Take Lenovo, for example. In 2005, the PRC-based company (formerly “Legend”) acquired IBM’s Personal Computing Division making it the “third-largest personal computing company in the world.” Today, Lenovo is headquartered in Hong Kong with operational centers in North Carolina, Beijing, and Singapore. Or Monsanto, a formerly American company at the center of a high-profile economic espionage case involving the PRC, that Bayer, a company based in Germany, purchased in 2016. Robert Mo (Mo Hailong), a PRC national, was sentenced to three years’ imprisonment in 2016 after pleading guilty to a conspiracy to steal trade secrets: “Mo

191 “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” supra note 16; see also Demers, supra note 10, at 8 (”[W]e will identify the violations of the Foreign Corrupt Practices Act by Chinese companies, to the disadvantage of American firms they compete with.”).
192 FBI, CHINA: THE RISK TO CORPORATE AMERICA 8 (2019).
193 Evanina, supra note 151, at 12 min.
194 Wray, supra note 3.
197 See Greg Roumeloitis & Ludvig Burger, Bayer to Buy Monsanto, Creating a Massive Seeds and Pesticides Company, Sci. Am. (Sept. 14, 2016), https://perma.cc/9ZOB-BFZL; Mara Hvistendahl, Operation Purple Haze, THE WIRE, Apr. 19, 2020 (“Monsanto appreciated all of the efforts that were taken by the U.S. Government to protect intellectual property,” a spokeswoman for Bayer wrote me after the merger.”)
Hailong stole valuable proprietary information in the form of seed corn from DuPont Pioneer and Monsanto in an effort to transport such trade secrets to China. . . . The theft of agricultural trade secrets, and other intellectual property, poses a grave threat to our national economic security.”

The shift of Monsanto’s status from “our” to “Germany’s” by virtue of corporate ownership did not change that Monsanto continued to have significant intellectual property situated in the United States.

The American Chamber of Commerce in China allows resident (i.e., “legally registered in the US and China”) and non-resident (i.e., “legally resident in the US and not in China”) corporate members. And the U.S.-China Business Council’s membership criteria provides, “Foreign companies with one or more offices incorporated in the United States may also be eligible, but are approved for membership on a case-by-case basis.” This is all to say that it is too simplistic to express the identity and loyalty of companies with national flags.

Certainly, some companies are directly under the control of the PRC party-state, most obviously if they are traditional state-owned companies. Less direct ties can also leave a company vulnerable to party-state influence. Curtis Milhaupt and Wen-tong describe “the dynamics of capture in the Chinese economy” as follows: “[F]irms of all ownership types face a choice: Grow and prosper by nestling up to the state and demonstrating the capacity to deliver on key party-state objectives, or seek autonomy from the state and risk being marginalized.”

The nature and strength of ties thus needs to be assessed with more nuance. The Council on Foreign Relations’ backgrounder on Huawei explains, “The government has considerable sway over all Chinese private companies through heavy regulation . . . . At the same time, Huawei has distanced itself from the CCP, repeatedly asserting that its equipment has never been used, and will never be used, to spy.” Tim Rühlig in his May 2020 paper titled

198 U.S. Dep’t of Justice, supra note 133. For a detailed, and gripping, account of this case, see generally HVISTENDAHL, supra note 167.


202 Lindsay Maizland & Andrew Chatzky, Huawei: China’s Controversial Tech Giant, COUNCIL ON FOREIGN RELATIONS (last updated Feb. 12, 2020), https://www.cfr.org/backgrounder/huawei-china-39029; see also Christopher Balding & Donald Clarke, Who Owns Huawei?,

[PREVIOUS PAGE]
“Who Controls Huawei?” analyzes Huawei’s complex governance structure and cautions, “It is likely that the Chinese party-state controls Huawei to such an extent that it could leverage technological dependencies to obtain political concessions.” The fine-grained analysis that Dr. Rühlig goes through to reach this point underscores the complicated relationships between companies and the PRC party-state.

The U.S. government’s charges against Huawei may well eventually be proven beyond a reasonable doubt. But the framing shifts from a targeted prosecution to a sweeping battle with “China” in light of the context that, a week before the February 2020 announcement of a superseding indictment against Huawei, Attorney General Barr warned, “Within the next five years, 5G global territory and application dominance will be determined. The question is whether, within this window, the United States and our allies can mount sufficient competition to Huawei to retain and capture enough market share to sustain the kind of long-term and robust competitive position necessary to avoid surrendering dominance to China.” He added, “As a dictatorship, China can marshal an all-nation approach—the government, its companies, its academia, acting together as one.”

https://ssrn.com/abstract=3372669 (“Regardless of who, in a practical sense, owns and controls Huawei, it is clear that the employees do not.”); Tim Culpan, Huawei’s Ties to China’s Military Aren’t the Problem, WASH. POST, July 2, 2019, https://perma.cc/7D2P-NF5M (arguing that “[t]he problem is that the Shenzhen-based company has spent considerable time and energy trying to weaken any perception that it’s tied to the Chinese government”).


204 See Samm Sacks, Testimony before the U.S. Senate, Committee on the Judiciary, Dangerous Partners: Big Tech and Beijing, Mar. 4, 2020, https://perma.cc/NS82-3AT5 (“Chinese corporate actors are not synonymous with the Chinese government or [CCP], and have their own commercial interests to protect.”)

205 Cf. Press Release, Dep’t of Justice, Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets (Feb. 13. 2020), https://perma.cc/774M-FIJK. The charges against Huawei are further notable for illustrating the potential overlap of criminal and civil penalties for intellectual-property theft. See Huawei Pleads Not Guilty to Racketeering in Beefed-Up U.S. Case, BLOOMBERG (Mar. 4, 2020), available at https://perma.cc/C12H-QV54 (“Huawei has said the new accusations rest on ‘recycled civil disputes from the last 20 years that have been previously settled, litigated, and in some cases, rejected by federal judges and juries.’”)

206 Barr, supra note 3.

207 Id.
C. Chinese Ethnicity

In the 1880s, Yick Wo, an immigrant from then Qing-Dynasty China, was charged with violating a San Francisco ordinance when he continued to operate his laundromat after the city denied his permit. The Supreme Court’s 1886 opinion is still cited today for concluding that the conviction should be reversed because it was based on a selective prosecution done on racial grounds. Justice Matthews wrote, “The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China.”

In the China Initiative context, the “China” threat similarly encompasses what foreign country people are subject to (the PRC), as discussed in Part II.B supra, as well as people who are ethnically Chinese, whether or not they have any ties to the PRC (i.e., solely on racial/ethnic grounds). In “China: The Risk to Academia,” the FBI’s first example of a “technique” that “foreign adversaries” might use to access information via academics is “[a]ppeals to ethnicity or nationality (for example, common ethnic heritage or dual citizenship).”

Simultaneously, the DOJ has reassured that it is not focusing on people because of their nationality or ethnicity. John Brown, the assistant director of the FBI’s Counterintelligence Division stated in November 2019, “I cannot overstate that ethnicity plays no role in our investigations. Instead, we follow facts and evidence wherever they lead.” He reiterated in February 2020, “We are not focused on the Chinese people as a whole . . . we’re focused on those committing crimes and conducting intelligence activities for communist China.”

210 Yick Wo, 118 U.S. at 368.
211 This Article uses “ethnicity” because it is referring to people’s status as having some historical connection to Chinese ancestry, even if that far predates the PRC. As used by the U.S. census, race is classified into five groups: “White, Black or African American, Asian, American Indian and Alaska Native, Native Hawaiian and Other Pacific Islander.” U.S. Census Bureau, Race & Ethnicity, https://perma.cc/WH4E-UCHM. There is debate over the terms “race” and “ethnicity,” see, e.g., Nancy López, The US Census Bureau Keeps Confusing Race and Ethnicity, THE CONVERSATION, Feb. 28 2018, https://perma.cc/Y2UA-F9GB.
212 FBI, supra note 63, at 7.
213 Brown, supra note 112, at 48 min.
William Evanina similarly stressed in February 2020, “We hear a lot of pushback in the government about this as a racial issue. Totally disagree. This is a fact-based issue of the theft of intellectual property, trade secrets, and ideas by a communist country.”

One challenge in untangling when the rhetoric surrounding the China Initiative refers to nationality as compared with ethnicity is linguistic: “Chinese” is commonly used when referring both to nationality and ethnicity. For example, an October 30, 2018, press release explained how “Chinese actors” used hacking methods, and then in the next sentence referred to “two Chinese nationals.” In Mandarin Chinese, by contrast, the phrasing for Chinese ethnicity (huaren) and PRC nationality (zhonghuarenmin gongheguo guomin) are distinct. That it requires more disciplined phrasing to express these two concepts in English does not relieve the speaker from taking steps to do so.

The blurring of nationality and ethnicity stretches far before the China Initiative. Recent requests under the Freedom of Information Act unearthed that the Hoover-era FBI “singled out Chinese American scientists because of their ethnicity—and that it did so even after the Senate’s Church Committee, formed in 1975, exposed some of the most egregious intelligence abuses of the era . . . .” More recently but still before the China Initiative, Congressman Ted Lieu cautioned in 2015 that “one of their issues that our federal government has had is inability of our government to realize the distinction between a foreign national and an American citizen who happens to be of Asian-American descent.”

214 Evanina, supra note 151, at 17 min.
215 U.S. Dep’t of Justice, Chinese Intelligence Officers and Their Recruited Hackers and Insiders Conspired to Steal Sensitive Commercial Aviation and Technological Data for Years (Oct. 30, 2018), https://perma.cc/FA7L-6H8W.
There are many people who are ethnically Han Chinese but have no ties to the PRC. Associating “Han Chinese” with a threat emanating from the PRC party-state is overinclusive. Take for example Wen Ho Lee, a Taiwan-born naturalized-U.S.-citizen, who was charged in 1999 with selling information about the United States’ nuclear program to the PRC government. After nearly a year in solitary confinement, a federal judge accepted his plea on a single count and stated, “Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the executive branch of our government through its Department of Justice . . .” In 2006, Dr. Lee obtained a $1.645 million-dollar settlement from the U.S. Government for “leaks disseminated to the press by government officials during the investigation of security lapses at Los Alamos National Laboratory in the 1990s.” The case also prompted self-reflection by the media with the New York Times largely standing behind its reporting but noting, among other points, “We never prepared a full-scale profile of Dr. Lee, which might have humanized him and provided some balance.”

The case against Dr. Lee and the surrounding reporting was flawed; nonetheless, there was truth that he had access to nuclear secrets and that he had contacts with foreign visitors, including from the PRC. This combination was reason to have him, and all other employment with SAFE. Any connection to the program ended when I left. I am a proud American citizen.”)

218 See People: Fact Focus, TAIWAN.GOV.TW, https://www.taiwan.gov.tw/content_2.php (last visited May 11, 2020) (explaining “Taiwan may be described as a predominantly Han Chinese society, with more than 95 percent of the population claiming Han ancestry”); see also Razib Khan, The World’s Largest Ethnic Group: Han Chinese, from North to South, MEDIUM (Feb. 16, 2018), https://perma.cc/KX5P-HYZJ (“The ethnogenesis of the Han dates to the first millennium B.C.—as the Zhou dynasty took the helm from the Shang dynasty.”).


220 WEN HO LEE WITH HELEN ZIA, MY COUNTRY VERSUS ME 2 (2001).


people in comparable positions, subject to tight protocols. What is interesting about Dr. Lee’s case is how ethnicity played a central role. He is ethnically Han Chinese but was born in Taiwan under Japanese rule.\textsuperscript{224} His ethnicity at most only connects him to the PRC by virtue of historical ties that far predate the PRC’s founding. Likewise, today the vast majority of Taiwan’s population is ethnically Han Chinese,\textsuperscript{225} but their identity is distinct—and increasingly so—from that of people in the PRC.\textsuperscript{226} Beyond Taiwan, there is a vast ethnically-Han diaspora that reaches around the world and is, to varying degrees, distinct from—and sometimes even antagonistic to—people in the PRC.\textsuperscript{227}

Nevertheless, the DOJ’s rhetoric continues to conflate ethnicity with the “China” of the “China Initiative.” In a February 2020 interview, Andrew Lelling, U.S. Attorney for the District of Massachusetts, explained: “The bottom line is that this is an effort by a rival nation state to steal U.S. technology . . . And that rival nation is made up almost exclusively of Han Chinese. And so, unfortunately, a lot of our targets are going to be Han Chinese. If it were the French government targeting U.S. technology, we’d be looking for Frenchmen.”\textsuperscript{228} There is truth that the vast majority of PRC citizens are Han Chinese. And U.S. Attorney Lelling’s argument fits our current era of risk assessment tools in so far as that a person who is a “Frenchman” by virtue of nationality or ethnicity is statistically less likely to have ties to the PRC party-state than a person who is ethnically Han Chinese. This risk-assessment mode was explicit in remarks by the Deputy Assistant Attorney General of the National Security Division regarding the China Initiative and foreign investment in the United States: “While there is a presumption of innocence in the criminal context, we are here today as risk managers, not criminal lawyers.”\textsuperscript{229} Yet U.S. Attorney Lelling’s remarks highlight the blurring of these “risk manager” and “criminal lawyer” roles. As risk assessment tools have been embraced in areas of criminal justice outside of the

\textsuperscript{224} Lee & Zia, supra note 220.
\textsuperscript{225} People: Fact Focus, supra note 218 (explaining “Taiwan may be described as a pre-dominantly Han Chinese society, with more than 95 percent of the population claiming Han ancestry”).
\textsuperscript{227} See Khan, supra note 218.
\textsuperscript{228} Mervis, supra note 9.
\textsuperscript{229} U.S. Dep’t of Justice, supra note 172.
China Initiative, they have also fallen under increasing scrutiny for being “ineffective, inaccurate and perpetuating the well-documented bias in the criminal justice system against low-income people and people of color.”

Equating ethnicity with an enhanced risk of criminal conduct linked to the PRC party-state risks repeating these mistakes.

A study of economic espionage cases from 1997 to 2015 that coded for people of Chinese descent in part based on last names of defendants found that “[f]rom 1997 to 2009, 17% of defendants charged under the EEA were of Chinese descent while an additional 9% were Other Asians. After 2009, however, the percentage of Chinese espionage defendants tripled to 52% while the rate for Other Asians remained at 9%.” As the author of the study notes, however, “[T]his Study cannot rule out the possibility that Chinese-American are simply committing three times as much espionage today as they did prior to 2009.” Further challenging an empirical analysis is prosecutorial discretion with respect to charging decisions and resolution via guilty pleas: few cases go to trial and, for those defendants who plead guilty, it is sometimes to lesser charges. Moreover, that an investigation does not result in charges—or that charges are dropped before trial—is not standing alone evidence of discrimination. There are a myriad of reasons why a prosecutor might decide not to pursue a case. What is difficult to glean from the outside are the motivations behind decisions related to investigating and prosecuting cases. In sum, the study is worrisome but inconclusive.

Accordingly, this Article is not making an empirical claim that people of PRC nationality and/or Chinese ethnicity are being investigated and/or prosecuted at a higher rate than people who are otherwise equivalently situated (e.g., both researchers at high-tech labs with similar access to intellectual property) but who are not PRC

232 Id. at 753.
233 Id. at 754.
234 Cf. id. at 787-91.
235 Cf. Barkow, supra note 125, 135 (“Although it is theoretically possible to bring a claim for vindictive or selective prosecution on ‘an unjustifiable standard such as race, religion, or other arbitrary classification,’ the hurdles for doing so are so high that almost no one prevails in even getting discovery much less succeeding on the underlying claim.”) (citing Blackledge v. Perry, 417 U.S. 21, 27 (1974)).
nationals and/or ethnically Chinese. Nor is it claiming that all people prosecuted under the China Initiative are PRC nationals or ethnically Chinese.

What this Article is arguing is that the DOJ has framed the China Initiative in a manner that expresses the U.S. government’s conclusion that people with indicators of China-ness are an enhanced threat and that message is being reiterated by officials charged with leading the Initiative. If you go looking for people who are ethnically Chinese and have committed crimes, you will in all likelihood find them. But that does not clarify the prevalence of people who are ethnically Chinese among the population committing those crimes. You also risk increasing the chances that people who have not committed crimes, but who are ethnically Chinese, will be subject to heightened scrutiny.

In a February 2020 letter to the FBI, members of the House of Representatives’ Committee on Oversight and Reform wrote “to request information about counterintelligence efforts of the [FBI] that reportedly target ethnically Chinese scientists. There are certainly authentic and legitimate cases of espionage that should be investigated. However, according to news reports, the FBI has arrested and charged many Chinese-American scientists who have turned out to be innocent.”

In March 2020, Asian Americans Advancing Justice and the ACLU “filed a Freedom of Information Act (FOIA) request for all records from six federal agencies pertaining to the government’s efforts to scrutinize, investigate, and prosecute U.S.-based scientists and researchers perceived to have connections to China.” And organizations such as the Society of Chinese Bioscientists in America are conducting seminars with titles like “What to Do When Your University, FBI, or DOJ Knocks on Your Door: Responding to University, Criminal, and Civil, and Investigations” to address concerns of PRC-nationals and Chinese-American scientists.

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236 Letter from Jaimie Raskin, Chairman, Subcommittee on Civil Rights and Civil Liberties, and Judy Chu, Chair, Congressional Asian Pacific American Caucus, to Christopher Wray, Director, FBI (Feb. 20, 2020), https://perma.cc/JUP9-NQ86; see also Letter from Jaimie Raskin, Chairman, Subcommittee on Civil Rights and Civil Liberties, and Judy Chu, Chair, Congressional Asian Pacific American Caucus, to Francis Collins, Director, National Institutes of Health (Feb. 20, 2020), https://perma.cc/RSSZ-8HMX.


238 Society of Chinese Bioscientists in America, What to Do When Your University, FBI, or DOJ Knocks on Your Door: Responding to University,
Just because some of the people prosecuted under the China Initiative are Caucasian, U.S. citizens does not cleanse the Initiative of these concerns. As explained by L. Rafael Reif, President of Massachusetts Institute of Technology, “faculty members, post-docs, research staff and students tell me that, in their dealings with government agencies, they now feel unfairly scrutinized, stigmatized and on edge—because of their Chinese ethnicity alone. Nothing could be further from—or more corrosive to—our community’s collaborative strength and open-hearted ideals.”

Concerns about an overinclusive framing of a threat also expand beyond the government and can bleed into the general public. In her dissenting opinion to a 2018 report on PRC party-state influence in the United States, Susan Shirk cautioned that “overstating the threat of subversion from China risks causing overreactions reminiscent of the Cold War with the Soviet Union, including an anti-Chinese version of the Red Scare that would put all ethnic Chinese under a cloud of suspicion.” That the novel coronavirus COVID-19 originated in the PRC has further heightened concerns about the stigmatization of people who display some form of China-ness: “On college campuses, at a music conservatory, in Chinese restaurants, among the ranks of a famous dance troupe and on streets every day, Asians have reported a rise in aggression, micro and macro.” Andrew Yang wrote in April 2020 regarding increasing anti-Asian-American sentiments, “We Asian

Criminal, and Civil, and Investigations,

L. Rafael Reif, Letter to the MIT community: Immigration is a kind of oxygen; MIT NEWS (June 25, 2019), http://news.mit.edu/2019/letter-community-immigration-is-oxygen-0625. Such stigmatization and scrutiny can feed stereotypes of people of Chinese ethnicity and, in turn, generate stereotype threat. Cf. Russell A. McClain, Bottled at the Source: Recapturing the Essence of Academic Support as a Primary Tool of Education Equity for Minority Law Students, 18 U. MD. J. RACE, RELIGION, GENDER & CLASS 139, 162 (2018) (“[S]tereotype threat refers to the effect that negative group stereotypes can have on the performance of members of those groups.”).

Americans need to embrace and show our American-ness in ways we never have before.”  

While his prescription prompted vigorous debate, what is clear is that sensitivity as to how the China Initiative equates ethnicity with enhanced threat is needed now more than ever.  

Eric Dreiband, the Assistant Attorney General for Civil Rights, wrote in April 2020, that “the coronavirus originated in China, and some people have targeted Asian Americans and Asians simply because of their ethnicity. This conduct has no place in America.”  

**D. ACQUIRED CHINA-NESS**

As explained above, the “China” in the “China Initiative” has spilled over beyond meaning the PRC party-state to encompass nationality, national origin, and ethnicity. China-ness can further attach to people whose passports and DNA have no connection to the PRC. China-ness can be acquired.

In August 2019, reports surfaced of the FBI questioning several American graduates of Yenching Academy in Beijing. Though this questioning might have been for well-grounded reasons, Rebecca Arcesati pointed out that the limited information on the FBI’s contacts with American students “may discourage young talents from...”

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participating in these academic exchanges and even jeopardize people's careers.” 247 Especially for students considering a career requiring security clearances, contacts that are necessary to understand the PRC can also run the risk of creating an impression of being too close to “China.” That the DOJ press release for the espionage conviction of Kevin Patrick Mallory included that he “speaks fluent Mandarin Chinese” 248 and the press release for the espionage conviction of Ron Rockwell Hansen likewise included that he “speaks fluent Mandarin-Chinese” 249 prompts the question why their linguistic abilities were noteworthy enough for the press releases.

The dragon-slayer and panda-hugger have long been tropes for differences among foreign experts on the PRC. 250 At a time when “engagement” with the PRC is viewed with an increasingly skeptical eye, 251 the path to interact with entities in the PRC without being labeled a naïve panda-hugger is likewise increasingly fraught. If engagement becomes conflated with complicity—a panda-helper as well as hugger—it risks pushing Americans to establish bona fides as “tough on China” to ameliorate concerns about their loyalties. American experts on the PRC should be tough on the PRC party-state if their analysis leads them to that conclusion, not because of the need to signal loyalties to the home team. It bears remembering that President Richard Nixon was the one to normalize relations with the PRC: “Nixon arguably was the only U.S. politician who could have gotten away with such a bold move. He had the right-wing credentials, as an anti-communist and advocate of Taiwan.” 252

The DOJ’s depictions of non-ethnically-Chinese, non-PRC-

248 U.S. Dep’t of Justice, Former CIA Officer Sentenced to Prison for Espionage (May 17, 2019), https://perma.cc/B5ZQ-7VNM.
citizens further creates tropes of formerly law-abiding Americans being seduced by slick PRC operatives who appeal to greed.\textsuperscript{253} The 2014 FBI film “Game of Pawns,” has a non-Asian protagonist who is recruited by PRC operatives to seek a position with the CIA and “The Company Man” likewise has a non-Asian protagonist who is lured by money from PRC nationals.\textsuperscript{254} Depicting non-Asian’s as “pawns” does not diminish concerns about the framing of a “China” threat but rather creates another layer: that part of the DOJ’s narrative is the presence of a stealthy “China” operating behind the scenes and corrupting Americans. There are ways to construct predeparture seminars for American students headed abroad that alert them to concerns—ranging from possible recruitment as spies to compliance with the country’s drug laws—without stoking fears or stereotypes.

When announcing charges against a “Harvard University Professor and Two Chinese Nationals” in January 2020, the FBI Special Agent in charge remarked, “All three individuals charged today are manifestations of the China threat.”\textsuperscript{255} This “China” of the “China Initiative” has become an “it” with, as described by Attorney General Barr, a bold historical and current ambition: “Centuries before communism, China regarded itself as the central kingdom, Zhongguo. And it wasn’t central to the region. It was central to the world. And its ambition today is not to be a regional power, but a global one.”\textsuperscript{256}

Operating within a framework that is fundamentally seen as countering China’s ambition muddles the individualized lens through which federal prosecutors should approach a decision whether to commence prosecution: the belief “that the person’s conduct constitutes a federal offense.”\textsuperscript{257} Not only is an associational stigma attaching to persons exhibiting China-ness, as explained in Part IV infra, this framing is in tension with fundamental principles undergirding why the DOJ should seek to prove criminal liability and, in turn, recommend punishment.

\textsuperscript{253} FBI, supra note 62, at 8:05 (“Amanda was pretty and smart but we never went beyond being friends.”).
\textsuperscript{254} Id.; The Company Man, supra note 61.
\textsuperscript{255} FBI, supra note 129.
\textsuperscript{256} Barr, supra note 3. But see Kaiser Kuo, Three Common Misconceptions About China, SUPCHINA, June 25, 2018, \url{https://supchina.com/2018/06/25/kuora-three-common-misconceptions-about-china/} (“China is certainly guilty of a kind of civilizational arrogance, but the notion that it has always regarded itself as the center of the universe and that even its very name implied this is just incorrect.”).
\textsuperscript{257} U.S. Dep’t of Justice, Justice Manual, 9-27.220 (emphasis added).
IV. PUNISHING CHINA

If, as Part III argued, the China Initiative gives shape to a “China” threat that spans government, party, nationality, ethnicity, and even broader contacts, the question then becomes whether this framing is a good thing. If the perspective is a blunt national security assessment that there are threats emanating from the PRC party-state and it is better to err heavily on the side of being overinclusive, then the U.S. government can try to make this case. For instance, the U.S. government argued during the post-9/11 “war on terror” that laws against torture should bend to national security concerns. The DOJ is not making this case. Rather, it is positioning the China Initiative as appropriately striking the balance between being wary of the PRC party-state while not unfairly encompassing people who have some sort of ties to “China.”

If we shift the perspective from a national security assessment to how we understand the traditional drivers behind prosecutions, then a different analysis is warranted. The DOJ has tremendous power to prosecute individuals such that, if convicted, they will be subject to unpleasant consequences: punishment. What are the guiding principles for prosecutors and how does the China Initiative stand up when evaluated against these principles?

This Part takes questions usually focused on individual defendants (e.g., how might prosecuting this person deter potential criminal conduct?) and also asks them of the China Initiative as a whole (e.g., how might the China Initiative deter potential criminal conduct?). It argues that implying part of the justification for prosecution and resulting punishment is a connection to China is problematic when assessed in light of the goals of deterrence (Part IV.A), incapacitation

258 Staff Report, Senate Select Committee on Intelligence, U.S. Senate, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Dec. 3, 2014, at 143-44, available at https://perma.cc/4ZYC-7LN3 (“The presentation [by CIA officials] warned National Security Council principals in attendance that ‘termination of this program will result in loss of life, possibly extensive.’ The CIA officers further noted that . . . ‘major threats were countered and attacks averted’ because of the use of the CIA’s enhanced interrogation techniques.’”). See generally JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM (2012) (assessing the United States’ interconnected global detention system after 9/11 including reliance on memos limiting definition of torture).

Based on this assessment, this Article closes by propose that a better path is for the DOJ to discard the “China Initiative” framing, focus on cases’ individual characteristics, and draw on outside expertise so that removing the initiative’s name is accompanied by real changes in practice (Part IV.E).

A. DETERRENCE

A slide in a DOJ presentation on the China Initiative lists reasons “Why Prosecutions Matter[,]” including, “Deter others (change cost-benefit calculation of leadership and thieves/hackers)” Deterrence is thus presented on two levels: the individual human level (the “thieves/hackes”) and the PRC party-state level (the “leadership”).

Deterrence is a central pillar of a utilitarian view of punishment: “Utilitarian purposes and limitations seek to achieve beneficial effects (or a net benefit) and, in particular, lower frequency and/or seriousness of future criminal acts by this offender or others.” Put simply, punishing the individual has benefits for society as a whole. Reducing the future prevalence and/or severity of criminal activities can occur on the individual level (i.e., specific deterrence) or more broadly in society (i.e., general deterrence). An unshakeable challenge of deterrence theory, whether specific or general, is that we cannot prove in practice what we hope is the case in theory. Research has shown that the probability of detection, prosecution, and punishment are

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260 “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” supra note 16.

261 Id.

262 Richard Frase, Punishment Purposes, 58 STAN. L. REV. 67, 69 (2005); see also Dan M. Kahan, The Secret Ambition of Deterrence, 113 HARV. L. REV. 413, 415 (1999) (”By ‘deterrence’ I intend to refer broadly to the consequentialist theory . . . that depicts punishment as a policy aimed at creating efficient behavioral incentives.”).

263 See Frase, supra note 262, at 70.

264 See Frase, supra note 262, at 71 (citing FRANK E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 72-73 (1973)).

265 See, e.g., Stephen Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497, 1517 (1974) (“whether punishment deters certain kinds of crimes at all, whether more severe penalties produce greater deterrence, even these basic questions cannot be answered with confidence”); Kahan, supra note 262, at 416 (“Empirically, deterrence claims are speculative.”).
critical factors in achieving deterrence, as compared with focusing solely on the severity of punishment. That people regularly depart from being rational actors further complicates the equation.

Beginning on the individual level, decreasing recidivism of people charged as part of the China Initiative does not appear to be a central motivation. Once a person has been exposed for stealing intellectual property or failing to disclose ties to the PRC, it is unlikely—absent a serious lapse in a company’s or university’s due diligence—that she would once again be allowed in a position with the access required to commit a similar offense. Accordingly, punishing a person who engaged in intellectual-property theft or related crimes today does not seem necessary to stop future thefts by the same person. Experiencing punishment could well give such person pause before re-engaging in similar conduct for fear of future punishment, but other external barriers kick in that do not apply, for example, if a person who is punished for burglary is again out in public with easy access to homes.

The China Initiative is instead aimed at general deterrence: discouraging possible offenders from committing intellectual-property theft or other crimes in the first place out of fear that they will face a similar end as defendants like Dr. Lieber who could receive up to five years in prison if convicted of making a false or misleading statement regarding his involvement in the Thousand Talents Program. Such an example could deter someone who has already engaged in illegal behavior (e.g., lying about connections to the PRC party-state or even currently stealing intellectual property) to cease those activities. It could also raise awareness among people who are leading completely crime-free lives that connections with the PRC party-state should be done with caution: “While association with a Talent Program is not

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266 See, e.g., BARKOW, supra note 125, at 43 (“[C]ertainty of punishment matters more than severity for deterrence.”); see generally Steven Klepper & Daniel Nagin, The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited, 27 CRIMINOLOGY 721 (1989).

267 Cf. Raymond Paternoster, How Much Do We Really Know About Criminal Deterrence?, 100 J. CRIM. L. & CRIMINOLOGY 765, 782-86 (2010) (noting, when explaining basics of deterrence theory, that it “presumes that human beings are rational enough to consider the consequences of their actions and to be influenced by those consequences”); Paul H. Robinson, The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime, 42 ARIZ. ST. L.J. 1089, 1093 (2011) (“[T]he people most likely to be offenders are the people who are most likely to be bad calculators, or be indifferent to future consequences.”).

illegal, it can create incentives to steal, violate export controls, or cause a failure to disclose conflicts of interest/foreign funding.\footnote{269} The “failure to disclose conflicts” component of the China Initiative deserves emphasis because it sweeps in a much broader range of potential defendants than crimes that are more overtly nefarious like stealing a competitor’s robot technology. The DOJ’s “Justice Manual,” which contains essential guidance for prosecutors, includes as a reason \textit{not} to commence prosecution that “there exists an adequate non-criminal alternative to prosecution.”\footnote{270} Casting a wide net of criminal charges chafes against this constraint. If increased auditing and transparency requirements could achieve the same, or at least similar, deterrence of misbehavior, then perhaps a harsh response using criminal laws is overkill.

Andrew Lelling, U.S. Attorney for the District of Massachusetts, has taken the stance that criminal prosecutions play a beneficial role. He said in February 2020 of letters from the National Institutes of Health to grantee institutions with questionable contacts in China, “I think those letters have had an \textit{in terrorem} effect . . . And that’s good, because you want a little bit of fear out there to sensitize people to the magnitude of the problem.”\footnote{271} The high-profile prosecutions and push to reach the corporate and academic worlds through briefings certainly heighten awareness of the threats that the China Initiative seeks to mitigate.\footnote{272} As Oliver Wendell Holmes, Jr. stated in 1881, “Prevention would . . . seem to be the chief and only universal purposes of punishment.”\footnote{273}

What deserves greater scrutiny is whether the China Initiative is creating overdeterrence. Also in February 2020, Andrew Lelling explained that “[t]he primary goal of the China Initiative is to sensitize private industry and academic institutions to this problem [of intellectual-property theft connected to the PRC]” and that academic institutes might think harder about collaboration with PRC-linked entities in the future.\footnote{274} When asked if this approach would have a chilling effect on collaboration with Chinese entities, he responded,

\footnotesize{\footnote{269}“The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” \textit{supra} note 16. \footnote{270}See U.S. Dep’t of Justice, Justice Manual, 9-27.220. \footnote{271}Mervis, \textit{supra} note 9. \footnote{272}Cf. Demers, \textit{supra} note 10, at 7 (“Broadly speaking, the China Initiative aims to raise awareness of the threats we face . . . .”). \footnote{273}OLIVER WENDELL HOLMES, JR., THE COMMON LAW 46 (Little Brown 1991). \footnote{274}Lelling, \textit{supra} note 95, at 1 hour, 22 min.}
“Yes, it will.” In April 2020, Politico reported that George Varghese, a former Assistant U.S. Attorney and current partner at WilmerHale, “said the China Initiative has made some of his clients in academia rethink their overall approach to working with foreign partners.”

A clear-eyed appraisal of the pros and cons of this chilling effect requires eyes beyond the DOJ. At present, the China Initiative outreach appears limited to entities that could become victims of, or accomplices to, intellectual-property thefts linked to the PRC party-state. An additional level of outreach would be to involve criminologists who are skilled at trying to disentangle the forces behind deterrence. Because deterrence is impossible to measure precisely in the complicated real world, even close coordination between the DOJ and independent criminologists is unlikely to yield an agreed upon sweet-spot whereby thefts are deterred while productive collaboration continues. But working with criminologists could shine at least some light on the ways in which the vigorous initiative—with reportedly over a thousand investigations underway—might squelch collaboration that could benefit the United States’ economic health as well as, in the age of COVID-19, its citizens’ actual physical health.

To avoid the expansive “China” threat as currently depicted by the DOJ requires steering clear of an array of people and entities that share some connection to China. Although it is true that the PRC party-state reaches into companies and universities within the PRC in a far deeper and wider manner than does the U.S. government in the United States, this does not meld the party-state, business world, and academia into a monolithic entity. Nor do all parts of PRC universities raise national security concerns. For instance, in April 2019, the U.S. government added Renmin University and Tongji University, two prestigious PRC universities, to the “unverified list” used as part of the government’s system for export controls. The list does not look at those universities on a granular level, meaning discussions on criminal justice reforms with Renmin’s law school are subject to enhanced concern along with areas like the physics department, which is much

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275 Id. Cf. Dreyfuss & Lobel, supra note 45, at 460 (“The [Economic Espionage Act] could, in short, make American universities unattractive to students, post docs, visiting faculty, and other potential foreign collaborators.”).

276 Swan, supra note 96.

277 See Wray, supra note 3.

more likely to house sensitive technologies.

A related issue that has not been adequately explored is that the China Initiative might not only squelch productive exchanges that would benefit U.S. innovation but perhaps, for some people, also encourage the very problem that the China Initiative was created to address. The utilitarian goal of deterrence is rooted in the premise that “[c]riminal penalties should not cost more than the benefits they achieve or cause individual or social harms which outweigh their crime-controlling effects of other benefits.” The FBI warns of “[a]ppeals to ethnicity or nationality (for example, common ethnic heritage or dual citizenship)” as a technique used by the PRC party-state to enlist the assistance of academics. But does the China Initiative threaten the social harm of making it easier for the PRC party-state to tap into nationalism?

In contrast to the carrots of money and accolades for assisting the PRC party-state, another question is how to address the sticks that the party-state can wield when people have familial ties to the PRC. On the one hand, the potential for using family as leverage is real.

279 Frase, supra note 262, at 72 (citing Richard S. Frase, Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?, 89 MINN. L. REV. 571, 593-95 (2005)).

280 FBI, supra note 63, at 7.

281 For a thoughtful discussion of nationalism in the PRC see Ian Johnson, China, Where State Pomp Comes With Real Feeling, NY TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/opinion/china-national-day.html. For PRC’s officials’ awareness of the increased scrutiny of PRC-connected scientists, see Zhenhua Lu & Catherine Wong, Senior Chinese diplomat warns of ‘disastrous consequences’ if US treats China as ‘enemy’, SOUTH CHINA MORNING POST (July 8, 2019), https://perma.cc/GM4K-M7XH (“There are some reports saying that some Chinese-American scientists in the US, just because they are Chinese scientists, they have been treated unfairly.”).


283 It is also well documented that the PRC party-state has taken negative actions against family members of people who are within the PRC and seen as opposed to the party-state’s interests. See, e.g., Sophie Richardson, Chinese Authorities Torment Activist’s Dying Mother, Human Rights Watch (May 1, 2020), https://perma.cc/PV43-OQUS; Jerome Cohen, Who Gets Punished? Sons and Daughters of Rights Lawyers – Collective Punishment in China, Jerry’s Blog (Oct. 20, 2015), https://perma.cc/UF3J-6XFD.
defense,\textsuperscript{284} though reported retaliation against family within the PRC of dissidents abroad raises concerns about how the PRC party-state might exploit vulnerabilities.\textsuperscript{285} Even if not rising to such extreme pressure, the already murky calculation of deterrence is even more complicated when a person is weighing not just the potential for apprehension and punishment by U.S. authorities but also the concern that going against the PRC party-state could have negative repercussions for people they care about who are living in the PRC.

On the other hand, the mere fact that people have family ties to the PRC should not, standing alone, be reason for the U.S. government to consider a person untrustworthy. Based on an analysis of over 26,000 security clearance decisions by the Defense Office of Hearings and Appeals (DOHA) from 1996 through October 2019, Bloomberg reported, “The idea that having friends or family in China makes Chinese Americans vulnerable to coercion by Chinese agents, directly or through their loved ones, is a premise of most of DOHA’s China-linked denials. In [DOHA Judge Noreen] Lynch’s 12-page ruling, the word ‘coercion’ appears 11 times.”\textsuperscript{286} Lumping people together because of a perceived shared “China-ness” diverts from the individualized focus that should be the centerpiece not only of criminal prosecutions but also of security decisions. A tendency toward categorical thinking of members of a group (e.g., based on race or ethnicity) can be mitigated by learning to individuate people, but this requires conscious work.\textsuperscript{287}

In light of these multiple layers of influences on human behavior, the DOJ needs to thread the needle of sensitizing academia and the private sector of the vulnerability of their intellectual property while not depicting the sources of that vulnerability in ways that alienates—and even aggravates—any entities that possess China-ness. Instead of trying to excise actors engaged in criminal conduct with a scalpel, the

\textsuperscript{284} See, e.g., United States v. Contento-Pachon, 723 F.2d 691 (1984) (explaining three elements: “(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm”).


\textsuperscript{287} See, e.g., Kurt Hugenberg, et. al, \textit{Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem}, 43 J. OF EXPERIMENTAL SOC. PSYCH. 334 (2007) (examining how the “Cross-Race Effect can be reduced by inducing perceivers to individuate rather than categorize [cross-race] faces”).
rhetoric surrounding the China Initiative indicates an intent to excavate any PRC-linked influence. The Director of the National Counterintelligence and Security Center introduced a circular diagram of the “PRC’s Tools for Acquiring Technology” (ranging from “intelligence services” to “academic collaboration” and “research partnerships”) by remarking, “We call this the wheel of doom.”

This rhetoric coupled with an emphasis on prosecutions portends that persons possessing China-ness may conclude that it is prudent to remain distant from the U.S. government and, at an extreme, even from the United States itself. The very people who best understand how the PRC party-state works and have the linguistic and cultural competencies to bring greater precision to the DOJ’s efforts are the same people who are swept within the description of the threat.

As noted above, DOJ officials intersperse reassurances that the China Initiative is not aimed at people because they are Chinese: “The FBI is now investigating China-related cases in all 50 states . . . . But let me be clear: we are not suggesting that all, or even most, Chinese students and visitors are somehow up to no good.”

Such statements do not remedy the problem. The action of vastly ramping up the scope and scale of investigations under the China Initiative speaks louder than words. Moreover, rote interjections denying that people who possess China-ness are under enhanced scrutiny act as microinvalidations:

Microinvalidations are verbal statements that deny, negate, or undermine the realities of members of various target groups. For example, when a white person tells a person of color that racism does not exist, she or he is invalidating and

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288 Evanina, supra note 151, at 15 min.
289 See, e.g., David Armstrong et al., Hounded Out of U.S., Scientist Invents Fast Coronavirus Test in China, CHRONICLE OF HIGHER ED. (Mar. 18, 2020), https://www.chronicle.com/article/Hounded-Out-of-US-Scientist/248262 (positing that, Weihong Tan, the researcher who developed a COVID-19 test after leaving the United States for China, “is a stark example of the intellectual firepower fleeing the U.S. as a result of a Trump administration crackdown on university researchers with ties to China”)
290 Cf. Waldman, supra note 286 (analysis of more than 26,000 security clearance decisions for federal contractors since 1996: “From 2000 through 2009, clearance applicants with connections to China—such as family or financial relationships—were denied Pentagon clearances at the same rate as applicants with links to all other countries: 44%. But from 2010 through Oct. 31 [2019], the China-related denial rate jumped to 61%, and the rate for all other countries fell to 34%.”).
291 See, e.g., Evanina, supra note 151, at 18 min
292 FBI, supra note 129.
denying the person of color’s racial reality. Similarly, when someone tells a woman that she is “being too sensitive,” or that an LGBT person “should stop complaining,” they invalidate the reality of discrimination in these people’s lives.\footnote{293}{Kevin C. Nadal, CUNY, A Guide to Responding to Microaggressions, https://perma.cc/VM2S-VZV8; see also Derald Wing Sue et al., Racial Microaggressions in Everyday Life: Implications for Clinical Practice, 62 AM. PSYCHOLOGIST 271, 274-75 (2007), https://perma.cc/69WP-84MC ("Microinvalidations are characterized by communications that exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality of a person of color. When Asian Americans (born and raised in the United States) are complimented for speaking good English or are repeatedly asked where they were born, the effect is to negate their U.S. American heritage and to convey that they are perpetual foreigners.").}

Intermittently telling people of PRC nationality and/or Chinese ethnicity that the China Initiative is not aimed at them invalidates their lived experience in the United States today.

In addition to these concerns about how deterrence theory applies on the individual human level, the China Initiative is also concerning when viewed from its goal of deterring the larger entity of the PRC party-state. Criminal law deterrence theory is not generally thought in terms of changing the calculations of a government yet, as FBI Director Wray stated at a February 2020 conference on the China Initiative, “We’ve seen how our criminal indictments have rallied other nations to our cause, which is crucial to persuading the Chinese government to change its behavior.”\footnote{294}{Wray, supra note 3.}

Deterrence theory in international relations has a long history. Michael J. Mazarr at the Rand Corporation wrote in 2018, “The challenge of deterrence—discouraging states from taking unwanted actions, especially military aggression—has again become a principal theme in U.S. defense policy.”\footnote{295}{Michael J. Mazarr, Understanding Deterrence 1, https://perma.cc/4XMB-WMW7.}

In describing how various executive-branch agencies are part of the “whole-of-government push back against China[1]”\footnote{296}{Satoru Mori, US Technological Competition with China: The Military, Industrial and Digital Network Dimensions, 26 ASIA-PAC. REV. 77, 78 (2019).} Satoru Mori notes how the U.S. government’s current approach toward the PRC is “based on the notion that inducements cannot bring about positive change in Chinese behavior and policy.”\footnote{297}{Id. at 79.} In other words, the U.S. government is putting greater
emphasis on sticks (e.g., prosecutions) over carrots (e.g., friendly gestures of working together on protection of intellectual property). Not only is pursuing individual prosecutions in attempt to change the behavior of the PRC party-state like using an ice pick in attempt to break up a glacier, federal prosecutors’ jobs of scrutinizing individual criminal liability in the interest of justice is fundamentally different from divisions of the executive branch that are tasked with managing state-to-state relations.

There is no indication that the PRC party-state leadership is reducing efforts to obtain intellectual property in violation of U.S. laws because individual people are being punished under the China Initiative. If the argument is rather that the prosecutions build solidarity with like-minded countries and then, in turn, the resulting multilateral effort (as compared with direct pressure by the United States alone) is what will deter PRC party-state directed crimes, then the DOJ should substantiate how that chain of influence is indeed happening.

Not only is an initiative aimed at deterring “China” through prosecuting individuals a departure from the DOJ’s usual work, the emphasis on “China” as the bad actor can create tunnel vision. When Mike Bloomberg entered the race for president, recordings surfaced of him defending his stop-and-frisk policy while New York City mayor:

[People say] you are arresting kids for marijuana that are all minorities.” Yes, that’s true. Why? Because we put all the cops in minority neighborhoods. Yes, that’s true. Why do we do it? Because that’s where all the crime is.

By criminalizing China, the DOJ has similarly made a decision that resources should be directed at entities with China-ness because “that’s where all the crime is”: “From 2011-2018, more than 90 percent of the Department’s cases alleging economic espionage by or to benefit a state involve China, and more than two-thirds of the Department’s theft of trade secrets cases have had a nexus to China.” To what extent is this percentage increasing now that resources are explicitly directed at a China threat? And to what extent are foreign

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298 See supra note 294 and accompanying text.
300 Demers, supra note 10, at 5.
governments other than the PRC aware that they are not the focus of the DOJ’s efforts? In short, is there underdeterrence of actors who do not have a nexus with the PRC?

To be sure, the DOJ can walk and chew gum at the same time: the China Initiative does mean that it has entirely taken its eye off other potential sources of threats. Nevertheless, constructing a massive initiative around a particularly defined threat will at least deflect some energy from other potential investigations. To justify the China Initiative framing based on a deterrence rationale requires the DOJ to demonstrate that it is not only effective in changing the behavior of the PRC leadership and individual “thieves/hackers,” but also that the downsides (e.g., overdeterrence and underdeterrence) do not outweigh the upsides.

**B. INCAPACITATION**

A second pillar of utilitarian justifications for punishment is incapacitation: “Quite simply, [the defendant’s] imprisonment prevents him from committing crimes in the outside society during the period of segregation.” This logic is simple enough on an individual level (i.e., lock a person behind bars and he cannot, or at least it will be very difficult to, commit crimes outside of those bars), but the scale of benefits to society for increasing incarceration levels has long been debated. Various degrees of incapacitation can also be achieved through restrictions on a person’s activities via electronic or other monitoring.

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302 Cf. Press release, USTR, USTR Releases Annual Special 301 Report on Intellectual Property Protection and Review of Notorious Markets for Piracy and Counterfeiting (Apr. 25, 2019), https://perma.cc/Q2Y7-6GK4 (“Trading partners that currently present the most significant concerns regarding IP rights are placed on the Priority Watch List or Watch List. USTR identified 36 countries for these lists in the Special 301 Report”).

303 Dreyfuss & Lobel, supra note 45, at 422-23.


306 See, e.g., Pew issue brief: Pew Charitable Trusts, Use of Electronic Offender-Tracking Devices Expands Sharply 3 (2016), https://perma.cc/M3SS-ZLGV (“Nationally, nearly 7 million people were in prison or jail or on probation or parole at the end of 2014, individuals tracked using electronic devices in 2015 represented less than 2 percent of that total.”).
For the intellectual-property thefts at the heart of the China Initiative, exposure is often tantamount to incapacitation. Keeping a person who has been accused of making false statements on research grants or stealing trade secrets away from opportunities to recommit similar crimes does not require prison: it requires transparent, accessible records such that anyone who is considering again putting that person in a position in which those crimes can occur simply will deny access. For example, Robert Mo was sentenced to thirty-six months in prison for conspiracy to steal trade secrets. Once his activities to obtain corn-seed technology was exposed, it is doubtful that imprisoning him was needed to stop him from committing further thefts. And, as a PRC national, he will be removed from the United States after completing his sentence. He will thus be incapacitated from activities within the United States. Aside from any valuable information that he has stored in his brain, nor will he be of use to actors within the PRC who might want to engage in intellectual-property theft in the future.

Incapacitation also is not a compelling justification for the China Initiative when viewed on the level of the PRC party-state. Of course, the United States cannot incapacitate “China” in the sense of putting this construct behind bars, but it can try to contain China in various ways. The United States can go beyond deterring interactions between U.S.-based and PRC-based entities to actually disallowing those interactions, i.e., incapacitating them. For example, the U.S. government could place certain PRC universities and individuals on the “Denied Person List” or “Entity List,” which would drastically curtail and even entirely cut off interactions.

Discussions regarding “decoupling” various facets of the U.S.-PRC relationship also moves toward incapacitation. Congressional action is necessary to change laws that lean toward decoupling. For example, regulations became effective in February 2020 implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which “strengthens and modernizes [the Committee on

307 Longer-term incapacitation is, admittedly, harder to achieve for cyber-criminals as they could access sensitive information remotely in addition to actually inserting a USB flash drive into a computer or other technique that requires physical proximity.
308 U.S. Dep’t of Justice, supra note 133.
309 HVISTENDAHL, supra note 167.
310 Ku, supra note 278.
Foreign Investment in the United States, CFIUS] to address national security concerns more effectively . . . .”\(^{312}\) The DOJ can, however, play a critical role in supporting efforts to limit activities with PRC-linked entities. The China Initiative Fact Sheet includes implementing FIRMA as a component,\(^{313}\) and, in April 2019, the Deputy Attorney General of the National Security Division’s remarks at a conference on CFIUS began with the China Initiative and the need to “broaden our approach”: “First, criminal prosecution alone is not enough to remediate the harm caused by theft or to deter future thieves.”\(^{314}\)

Just as with overdeterrence, the current discussions surrounding the China Initiative would benefit from grappling with the potential for over-incapacitation. Greater outside expertise is crucial in finding the balance between protecting sensitive technologies while still welcoming productive investment: The Rhodium Group has advised, “It is therefore in the interest of the United States to better understand the nature of these inflows [from the PRC] and how to interpret them, in order to secure the benefits while continuing to manage any traditional or new forms of potential associated risk.”\(^{315}\)

Over-incapacitation further risks cutting off channels of communication between the United States and PRC that can provide valuable information. In advising Congress that the United States should work with the PRC on setting artificial-intelligence standards, Samm Sacks explained in March 2020, “There is a national security risk if we do decouple with China and lose visibility into the way they are thinking about these issues.”\(^{316}\) In the realm of legal issues, the U.S.-China Legal Experts Dialogue was last held in 2015,\(^{317}\) and the Trump administration’s intended annual U.S.-China Law Enforcement and Cybersecurity Dialogue was held only once in 2017.\(^{318}\) These dialogues

\(^{312}\) U.S. Dep’t of Treasury, The Committee on Foreign Investment in the United States (CFIUS), https://perma.cc/QH72-96HW.

\(^{313}\) CHINA INITIATIVE FACT SHEET, supra note 1.

\(^{314}\) U.S. Dep’t of Justice, supra note 172.


\(^{316}\) Tim Starks, DOJ TALKS BREACHES, CYBER COMMAND TALKS SIZE, POLITICO (Mar. 5, 2020, 10:00 AM), https://perma.cc/AOY4-4FBJ.


give a mere limited window into the PRC leadership’s thinking, and the PRC-side is also responsible for their demise, but combined with informal channels they can provide at least a more textured understanding of the other side. When walls are built, in contrast, risks increase that the China Initiative will be based on conjecture about the thinking in Beijing rather than concrete information.

C. REHABILITATION

Rehabilitation is another forward-looking goal of punishment: the criminal can be made to no longer pose a threat to society and, perhaps, even to live a “flourishing and successful” life.319 Academics and policymakers have long debated the efficacy of rehabilitative efforts.320 On the individual level in the China Initiative, the standard rehabilitative programs such as mental health treatment, substance abuse treatment, and “[e]ncouraging inmates to develop marketable job skills[,]”321 do not seem particularly applicable to typical defendants. A scientist or professor is not in need of education programs, and a PRC national who will be removed upon release has no need to be equipped “with information and resources as they return to the community.”322 Nor has this author been able to locate any information on rehabilitative programs that are tailored to working with people convicted under the umbrella of the China Initiative.

Where the calculation is more interesting is whether “China” can be rehabilitated. John Demers said at the Initiative’s launch that the DOJ “will confront China’s malign behavior and encourage them to conduct themselves as they aspire to be: one of the world’s leading nations.”323 And one of the Initiative’s goals is to “work to improve Chinese responses to our requests for assistance in criminal investigations and prosecutions under the Mutual Legal Assistance Agreement . . . .”324 That the China Initiative might inspire “China”

322 Id.
323 China Initiative Fact Sheet, supra note 1 (emphasis added). See also Demers, supra note 10, at 2 (“China is instead pursuing its goals through malign behaviors that exploit features of . . . an open society like ours.”).
324 Demers, supra note 10, at 8.
to greater respect of intellectual property protection through positive encouragement is not reflected in the Initiative’s implementation to date. Instead, the thrust is deterrence through punishment.

Past attempts with the current PRC leadership do not bode well that a more cooperative approach would yield the desired change in behavior.\(^{325}\) And the U.S.-PRC relationship is likely going to be contentious for at least the near future even with the most adept handling in Washington DC. Nonetheless, the China Initiative would benefit from greater consideration of how the strong rhetoric and enforcement actions today could present challenges to rehabilitating the U.S.-PRC relationship should a window of opportunity open in the future. It is far easier to label something a threat than to remove that stigma once attached. Describing the China Initiative as a response to a “long-term existential threat”\(^{326}\) locks the United States into a position of confrontation with the PRC, rather than exploring how the relationship might be one of more carefully calibrated rivalry or competition.

The stark us-versus-them framing of the China Initiative further raises the concern of who will be there to rehabilitate the relationship should the opportunity arise. In 2009, President Obama announced the “100,000 Strong” initiative to increase the number of Americans studying in China,\(^{327}\) which was followed by the 2015 “1 Million Strong” initiative “to grow the next generation of leaders who have a deeper understanding of China by creating a pipeline of China-savvy employees in a range of critical industries . . . .”\(^{328}\) Yet a downturn in foreign language and regional studies learning that was already apparent during the Obama years is continuing under President Trump.\(^{329}\) Furthermore, in January 2020 the Peace Corps announced

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\(^{325}\) White House, Fact Sheet: President Xi Jinping’s State Visit to the United States (Sept. 25, 2015), https://perma.cc/RXG6-GBKA (“The United States and China agree that neither country’s government will conduct or knowingly support cyber-enabled theft of intellectual property . . . .”).

\(^{326}\) Tucker, supra note 30 (quoting William Evanina, then nominee to be director of the National Counterintelligence and Security).


\(^{328}\) 1 Million Strong, US CHINA STRONG, https://100kstrong.org/initiatives/1-million-strong/.

\(^{329}\) Kathleen Stein-Smith, Foreign Language Classes Becoming More Scarce, AM. ACAD. ARTS AND SCI. (Feb. 6, 2019), https://www.amacad.org/news/foreign-language-classes-becoming-more-scarce; Tobie Meyer-Fong, America Must Invest
plans to end its China program. The decreased emphasis on studying the PRC and the Chinese language is particularly troubling when coupled with concerns of acquired China-ness as discussed in Part III.D. Rosie Levine, a graduate of Yenching Academy, Peking University, reflected on the FBI’s interest in her classmates:

When balancing the risk of not obtaining a security clearance against the “safer” option of learning about China from a textbook, [future China specialists] may decide that the cost of studying abroad is too high. The chilling effect that FBI questioning has on young scholars risks alienating a cohort of American citizens best equipped to see our country through these increasingly challenging times.

### D. Retribution

Deterrence, incapacitation, and rehabilitation all aim to bring about beneficial consequences for society. As explained in Parts IV.A-C, the China Initiative is problematic when assessed in terms of whether the United States ultimately comes out ahead by using that framing. Retribution turns our perspective backward and rests the justification for punishment on whether the offender deserves it.

For individuals sentenced in cases under the China Initiative, that there is a “foreign” aspect to the crime can be relevant if the offense for which they were convicted is espionage, either economic or of the more traditional variety. This “foreign” element enhances the blameworthiness though, as with retributive theory more generally, it is unclear to what extent Congress made that determination based on increased harm versus moral culpability: “Two basic elements determine an offender’s degree of blameworthiness: the nature and

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331 Levine, supra note 247.


333 See, e.g., MICHAEL S. MOORE, THE MORAL WORTH OF RETRIBUTION, IN RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179–82 (Ferdinand Schoeman ed., 1987); Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 MICH. L. REV. 1880, 1891 (1991) ("Retributive justice is nonconsequentialist in that it is uninterested in influencing the offender’s future behavior or the behavior of other community members.").
seriousness of the harm caused or threatened by the crime and the offender’s degree of culpability in committing the crime.”

None of the crimes charged under the China Initiative have “China” explicitly stated in the statute, nor does the fact that the foreign government is “China” factor into the sentencing guidelines for economic espionage. Yet a 2018 study of economic espionage cases from 1997 to 2015 found that “Chinese and Asian defendants convicted of espionage crimes received sentences over twice as long, on average, as defendants with Western names convicted of espionage crimes.”

Questions deserving further study include (1) has this sentencing discrepancy persisted since 2015 and (2) if so, what are the possible explanations for the discrepancy aside from the ethnicity/race of the defendant.

If there is a discrepancy and it cannot be explained by nationality/ethnicity-neutral reasons (e.g., the cases with higher sentences involved thefts of larger value), then what is it about the person’s ethnicity/race that is prompting a higher sentence? It could be that implicit bias is in play, or that the defendants are seen as more blameworthy, or that the goal of deterrence is seen as better achieved through these cases. If the China Initiative’s emphasis on general deterrence is resulting in longer sentences for ethnically Chinese defendants, then retribution might actually serve as a limiting factor by cautioning that these defendants are being punished beyond the bandwidth that is morally justified. In other words, retribution could “tame the utility monster” of using defendants in the China Initiative as vehicles to warn the public of the consequences should they engage

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336 Kim, supra note 231, at 793.
337 See generally Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005) (explaining how implicit bias works).
338 Cf. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 199 (Chicago 1982) (“Desert is not a defining principle; it is a limiting principle.”); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66 (Stanford 1968) (“I see an important limiting principle in the criminal law’s traditional emphasis on blameworthiness as a prerequisite to the imposition of punishment.”).
in similar conduct.\textsuperscript{340} If, however, part of the blameworthiness of people convicted as part of the China Initiative is “China” and not just the intellectual-property theft or false statements or whatever the specific illicit conduct might be, then we are back to all of the concerns expressed in Part III: China is being criminalized.

Beyond the retributive calculations on the level of individual defendants, the rhetoric around the China Initiative also speaks of “China’s maligned behaviors”:\textsuperscript{341} China is doing bad things. More generally, the U.S. government is seen as “punishing” China as part of the trade dispute.\textsuperscript{342} It is an interesting theoretical question whether retribution can be scaled for state actors. How is blameworthiness measured for the PRC party-state? The more practical concern is that “China” cannot be punished through the U.S. criminal justice system. It is one thing to “punish” the PRC party-state via tariffs or sanctions,\textsuperscript{343} but the ultimate subjects of criminal punishment are individuals. The more that the bad acts of the PRC party-state are attributed to individual defendants, the more necessary it is to pause and ask whether association with “China” is in part what is driving the punishment. If a person is an accomplice of a bank robber, that accomplice’s punishment is not enhanced because the bank robber from which accomplice liability flows is a serial bank robber.

In cautioning that greater consideration is prudent regarding what and whose exactly is the blameworthy conduct being punished under the China Initiative, it bears repeating that the PRC party-state is directing and incentivizing criminal activities. There is a threat. In addition, the PRC party-state has demonstrated its own use of retribution, or more bluntly retaliation, for acts of which the leadership disapproves. At the time of writing, Canadians Michael Kovrig and

\begin{footnotesize}
\begin{enumerate}
\item For an example of how retribution can be used as a constraint on punishment, see Brian Murray, \textit{Retributive Reform of Collateral Consequences}, 52 CONN. L. REV. (forthcoming 2020).
\item \textsuperscript{341} Barr, \textit{supra} note 3.
\end{enumerate}
\end{footnotesize}
Michael Spavor had been detained in the PRC for over 400 days. The allegations against them remain unclear, but it is widely accepted that the detentions were at least in part retaliation for Canada’s detention of Huawei CFO, Meng Wanzhou. The PRC party-state has also been known to retaliate against foreign companies that complain about their treatment in the PRC or who cooperate with the U.S. government.

What the DOJ can and should do is steadfastly pursue a principled path and craft a response to the actions of the PRC party-state without enveloping a broader conception of China into that threat. The December 2019 report by the JASON group is instructive. The Report provides nine recommendations—all written in country-neutral language—that provide increased safeguards and greater emphasis on collaborative responses to threats, as well as broader supportive measures like expanding “[e]ducation and training in scientific ethics”: Like any émigrés, [U.S. citizens originally from the PRC] must be treated as fellow residents or citizens of our country and should be judged on their personal actions and not by profiling based on the actions of the government and political institutions of their home country.

E. AN INITIATIVE BY ANY OTHER NAME

Discarding the “China Initiative” in favor of an initiative with a country-neutral name like the “Espionage Initiative” or “Intellectual Property Protection Initiative” may seem cosmetic. At worst a “China” initiative might persist sub rosa within the DOJ and not be subject to

346 Zarit, supra note 157, at 2 hour, 28 min (on how the retribution against companies “is real”).
347 JASON, supra note 173, at 3.
348 Id. at 23; cf. U.S. DEPT. OF HEALTH AND HUM. SERV., NAT. INST. OF HEALTH, NIH GRANTS POLICY STATEMENT (Dec. 2019), at IIB-31 (“[Research service awards] program is conducted in compliance with applicable laws that provide that no person shall, on the grounds of race, color, [or] national origin, . . . be excluded from participation in [or] be denied the benefits of . . . receiving Federal assistance.”); see also Michelle Tesoro, Preventing National Origin Discrimination, EDI BLOG (Apr. 11, 2017), https://www.edi.nih.gov/blog/communities/preventing-national-origin-discrimination.
the sunlight of external appraisals.\textsuperscript{349} An initiative by another name might smell as unsweet.\textsuperscript{350} Prosecutors have tremendous discretion that is often shielded from outside scrutiny,\textsuperscript{351} and removing the “China” label does not guarantee a change in how the DOJ views persons possessing China-ness. Yet names do matter.\textsuperscript{352} In the different context of why using the language of human rights matters, Philip Alston explained, “[H]uman rights language does matter. It provides a context and a detailed and balanced framework, . . . it brings into the discussion the carefully negotiated elaborations of the meaning of specific rights that have emerged from decades of reflection, discussion, and adjudication.”\textsuperscript{353}

At issue with the China Initiative is not the absence of language (e.g., the failure to use the direct human-rights terminology and instead turning to more politically palatable euphemisms) but rather the presence of language: the words that the DOJ chooses to describe its work bring to the forefront what the U.S. government has decided is salient in identifying and squelching criminal threats. The broad conception of “China” cannot be ameliorated by periodic statements that the real concern is the PRC party-state coupled with assurances that the United States still welcomes people with ties to the PRC.

There is no easy way to respond to well-established concerns that the PRC party-state is connected to violations of U.S. criminal laws. But there is a better way. The term “smart on crime” is popular.\textsuperscript{354} Part of being smart on using criminal law to protect economic and national security is to enhance communication with the scientists, engineers, and educators who are creating valuable technologies. In September 2019, dozens of leading organizations representing these groups wrote to the U.S. government welcoming greater collaboration and

\textsuperscript{349} Cf. supra note 216 and accompanying text.
\textsuperscript{350} Cf. William Shakespeare, Romeo and Juliet, Act II, Scene II.
\textsuperscript{351} See, e.g., Jed. S. Rakoff, Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It, 111 NW. U. L. REV. 1429, 1430 (2017) (critiquing how prosecutors who are “the advocates for one side are given near-total power over the resolution” of criminal cases).
\textsuperscript{352} Cf. Jelena Djordjevic, “A Rose by Any Other Name: Would it Smell as Sweet?” (J. NEUROPHYSIOI. 99: 386-393, 2008) (finding that same odors were rated as more pleasant when given a positive name and more negatively when given a negative name).
\textsuperscript{354} Ed Chung, Smart on Crime: An Alternative to the Tough vs. Smart Debate, CTR. FOR AM. PROGRESS (May 12, 2017, 8:53 AM), https://perma.cc/9LB3-V5LJ.
expressing that “[o]ur organizations and members are witnessing an escalating concern among U.S. and international scientists that new policies and procedures under consideration to minimize security risks will have the unintended effect of harming the scientific enterprise.”

Kevin Droegemeier, Director of the White House Office of Science and Technology Policy (OSTP), responded promptly by welcoming collaboration and outlining work underway to coordinate work across agencies under the umbrella of the Joint Committee on the Research Environment (JCORE). Director Droegemeier also spoke at the October 2019 FBI Academia Summit.

In discussing the work of JCORE’s Subcommittee on Research Security as part of his congressional testimony in February 2020, Director Droegemeier both noted thefts and surreptitious influence by the PRC government and also affirmed that, “[t]o maintain our global leadership, America must balance protecting its research enterprise while promoting the openness that has been and will continue to be critical to our success.” This testimony echoed his remarks in January 2020: “It’s really about the Chinese government trying to influence our system, trying to take our ideas, proposals . . . theft of intellectual property . . . .” Whether Director Droegemeier and JCORE more generally can cement a role in balancing concerns of law enforcement and scientific/academic communities will likely need to wait until the worst of the COVID-19 pandemic has subsided. Nonetheless, this nascent collaboration suggests a path to decrease reliance on deterrence through the criminal law.


357 See Office of Private Sector, supra note 115.

358 Dr. Kevin Droegemeier, Before the Committee on Science, Space, and Technology, U.S. House of Representatives, on “The President’s FY 2021 Budget Request for Research & Development”, Feb. 27, 2020, at 5, available at https://science.house.gov/imo/media/doc/Droegemeier%20Testimony1.pdf (emphasis in original); see also Jeannie Baumann, Scientists Hiding Foreign Ties Prompt Concerns from the White House, BLOOMBERG LAW (Feb. 27, 2020) (“Droegemeier’s office has tag-teamed with the FBI’s field offices to step up audits of the disclosure forms. ‘Universities aren’t set up to do that. They don’t have the information, so the audits need to be done by law enforcement,’ he said.”)

Increased collaboration between the government and the communities that create valuable science and technology is necessary but not sufficient. The DOJ also needs to be “smart on China” by increasing cultural competency, linguistic ability, and knowledge of substantive areas that are critical to the U.S.-PRC relationship. Even work on how to more accurately pronounce the Pinyin Romanization system can demonstrate respect for people with Chinese names. The DOJ can take a step toward this goal by strengthening channels for meaningful, sustained conversations between the government and non-governmental experts. This requires forging ties with precisely those people being stigmatized by the China Initiative. The DOJ has expressed its desire to do this work and has taken initial steps. Done well, our China Initiative will not only improve the way law enforcement responds to China’s economic aggression, but also will raise our country’s awareness of the threats and how we as a people can work to protect ourselves and our assets from them.

The DOJ is stressing the need for the private sector to work with law enforcement when intellectual property has been compromised. And academia is becoming more sensitized of the need to assess and adjust their policies and procedures regarding reporting of foreign contacts. But for true collaboration, the DOJ needs to shift from

360 Coleman, supra note 27, at 3 hour, 52 min (“The Chinese language is extraordinarily important.”).
361 See, e.g., Brown, supra note 159 (“Engagement outside of government is another essential part of our work. Each of our 56 field offices has frequent, substantive engagement with universities and businesses in its area of responsibility . . . .”); Office of Private Sector, supra note 115, at 2 (“Director Christopher Wray welcomed members of the summit to the FBI, reinforcing that Academia is one of the greatest assets of the US and therefore the FBI. Trust and cooperation between the FBI and Academia is absolutely critical to the Bureau’s mission.”).
362 Demers, supra note 10, at 9.
363 See, e.g., The FBI and Corporate Directors: Working Together to Keep Companies Safe from Cyber Crime, Remarks by Christopher Wray at the National Association of Corporate Directors Global Board Leaders Summit (Wash. D.C., Oct. 1, 2018), https://perma.cc/249H-XHZW (“We want to work with you, we want to help you. But we can’t do anything to help if you don’t turn to us.”).
364 See, e.g., Coleman, supra note 27, at 3 hour, 29 min (commenting that universities are now “in an environment where we must have more coordination”). Enhanced transparency is also critical to conversations regarding how to protect academic freedom. See, e.g., Human Rights Watch, Resisting Chinese Government Efforts to Undermine Academic Freedom Abroad: A
messaging what it views as the threats to more substantive, bi-directional collaboration with non-governmental experts. To do this right will take time. What the DOJ has in its power to do immediately is to drop “China” from the name of the initiative and instead focus on individual cases free from an overarching specter of a China threat.

**Conclusion**

In 2015, this author cautioned about including a foreign nexus as a substantive element of crimes not only because it is difficult to discern what is “foreign,” but also because it is questionable whether a foreign link increases the threat of harm or the actor’s blameworthiness. Five years later, while Congress has not actually written “China” into the criminal statutes themselves, the DOJ has criminalized “China” by pursuing it as an explicit enforcement priority. As argued above, this is problematic first because it stigmatizes natural and legal persons who are seen as possessing a shared characteristic of China-ness. This threat-by-association lumps together a broad array of people and entities as connected within an encompassing “China” web. A broader conception of China takes on an anthropomorphic form of a perpetrator.

The China Initiative is further problematic when assessed against the standard yardsticks for the DOJ’s decisions to prosecute and, ultimately, for the target of that prosecution to be punished. The China Initiative has been gaining speed: the DOJ should instead tap the breaks and reassess the reasons for and wisdom of this construct.

Yangyang Cheng, a particle physicist who was born in the PRC but is a researcher in the United States, reflected: “I have three important sheets of paper as the world sees it: my Chinese passport, my U.S. visa, and my Ph.D. diploma. It is somewhat ironic, that with the tenuous relationships I have with both my birth country and my adopted home, as well as the directions both governments are headed,...

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365 Code of Conduct for Colleges, Universities, and Academic Institutions Worldwide (Mar. 21, 2019), https://perma.cc/2CZP-5MUT (“Disclose all Chinese government funding. Publicly disclose, on an annual basis, all sources and amounts of funding that come directly or indirectly from the Chinese government.”).

366 Cf. Permanent Subcommittee on Investigations, supra note 100, at 10, (“The FBI has yet to develop an effective, nationwide strategy to warn universities, government laboratories, and the broader public of the risks of foreign talent recruitment plans.”); Id. at 96 (“Notably, the FBI’s [Office of Private Sector] did not have a dedicated outreach team for U.S. universities until July 2019.”).

my diploma is the paper I am least likely to lose.” If the DOJ pauses and rethinks the direction that it is headed, the United States will be less likely to lose talent like Dr. Cheng.

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