

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 June 2020, the Federal Bureau of Investigation had approximately two thousand active investigations under the Initiative.

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

This Article argues that using "China" as the glue connecting cases prosecuted under the Initiative's umbrella creates an overinclusive conception of the threat and attaches a criminal taint to entities that possess "China-ness" even if they do not have a nexus to the PRC party-state. The Article further contends that, when assessed in light of the goals of deterrence, incapacitation, rehabilitation, and retribution, it is worrisome that the prosecution and punishment of people and entities rests in part on a connection with "China." 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.”¹ In March 2020, the Department of Justice (DOJ) released an information sheet with thirty-nine examples of “China-related” cases since April 2018.² More cases are in the pipeline. In June 2020, Christopher Wray, the director of the Federal Bureau of Investigation (FBI), said that there were “more than 2,000 active investigations that link back to the Chinese government.”³ This is a marked increase from Director Wray’s statement 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.”⁴

¹ U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL JEFF SESSION’S CHINA INITIATIVE FACT SHEET (2018) [hereinafter CHINA INITIATIVE FACT SHEET].

² U.S. Dep’t of Justice, *Information About the Department of Justice’s China Initiative and a Compilation of China-Related Prosecutions Since 2018*, <https://www.justice.gov/opa/page/file/1223496/download>.

³ Ursula Perano, *Wray: FBI Has Over 2,000 Investigations that Trace Back to China*, AXIOS, June 24, 2020, <https://www.axios.com/fbi-wray-china-counterintelligence-investigations-f809b7df-865a-482b-9af4-b1410c0d3b49.html>.

⁴ Christopher Wray, Director, FBI, Opening Remarks at the China Initiative Conference at the Center for Strategic and International Studies (CSIS),

There is overwhelming evidence that persons—both natural and legal—with connections to the governing party-state structure of the People’s Republic of China (PRC) have engaged in trade secret theft and other crimes under U.S. law.⁵ 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) are incentivizing and even recruiting people at home and abroad to acquire intellectual property in contravention of U.S. laws.⁶ The July 2020 closure of the PRC consulate in Houston underscored intellectual property as a national security concern: the Trump administration’s stated reason was “to protect American intellectual property and Americans’ private information.”⁷ In short, the DOJ is not making up a threat.⁸ However, it is framing that threat in a problematic way. It is

Washington D.C. (Feb. 6, 2020) (*available at* <https://www.csis.org/analysis/fbi-director-christopher-wrays-opening-remarks-china-initiative-conference>); *see also* William Barr, U.S. Att’y Gen., Keynote Address at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020) (transcript *available at* <https://www.csis.org/events/china-initiative-conference>) (noting in context of China Initiative that “you should expect more indictments and prosecutions in 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.”).

⁵ *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.”).

⁶ *See, e.g.*, Jack Goldsmith & Robert D. Williams, *The Chinese Hacking Indictments and the Frail “Norm” Against Commercial Espionage*, LAWFARE (Nov. 30, 2017, 1:00 PM), <https://www.lawfareblog.com/chinese-hacking-indictments-and-frail-norm-against-commercial-espionage>.

⁷ *Timeline: The Unraveling of U.S. China Relations*, NPR, July 22, 2020, <https://www.npr.org/transcripts/893767828>; Michael R. Pompeo, Communist China and the Free World’s Future (July 23, 2020) (transcript *available at* <https://www.state.gov/communist-china-and-the-free-worlds-future/>) (announcing PRC consulate closing “because it was a hub of spying and intellectual property theft”). *But see* Mark Cohen, *The IP Theft Nexus in the Houston Consulate Closing*, CHINA IPR, July 22, 2020, <https://chinaipr.com/2020/07/22/the-ip-theft-nexus-in-the-houston-consulate-closing/> (questioning whether “an economic espionage matter were really the motivation for this sudden evacuation of the consulate and not election-year politics”).

⁸ *See, e.g.*, U.S. Trade Representative, Findings of the Investigation Into China’s Act, Policies, and Practices Related to Technology Transfer, Intellectual Property, and

constructing a criminal justice initiative under the umbrella of “China” and criminalizing that concept in a way that is in tension with foundational principles of the United States’ criminal justice system.

China is itself of course not a defendant in any cases.⁹ Federal prosecutors—supported by the FBI and other law enforcement agencies¹⁰—must prove each element of the charged offenses beyond a reasonable doubt against the specific person 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,¹¹ or that creation of this project is simply a savvy move to obtain greater financial resources.¹² 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 China is not the subject of criminal conviction and punishment directly, not only does the Initiative’s framing cause China-ness to become imprinted as a shared characteristic across cases, but also the language used anthropomorphizes China into a condemned form: “If you are an

Innovation Under Section 301 of the Trade Act of 1974, Executive Summary, Mar. 22, 2018, at xii (“[E]vidence indicates that China continues its policy and practice . . . of conducting and supporting cyber-enabled theft and intrusions into the commercial networks of U.S. companies.”).

⁹ 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.”).

¹⁰ 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 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>.

¹¹ Cf. Jeffrey Mervis, *U.S. Prosecutor Leading China Probe Explains Effort that Led to Charges Against Harvard Chemist*, SCIENCE (Feb. 3, 2020, 11:45 AM), <https://perma.cc/3TUQ-DFLP> (“[Y]ou want a little bit of fear out there to sensitize people to the magnitude of the problem . . .”).

¹² 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 Threat 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].”).

American adult, it is more likely than not that *China* has stolen your personal data.”¹³

Nor do interspersed assurances that the Initiative is not targeted at “Chinese” people provide an effective antidote to this framing.¹⁴ The overarching narrative of a China threat undercuts such assurances. For instance, FBI Director 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.”¹⁵

There are times when the shorthand “China” is appropriate, such as when discussing foreign affairs between the United States and the PRC acting as sovereign states. For example, the two countries’ governments concluded a trade agreement titled the “U.S.-China Phase One Trade Agreement.”¹⁶ Criminal law, in contrast, is based on the premise that guilt is individual, not by association with an entity—China—that does not exist in a form that can be directly prosecuted. 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.”¹⁷ In February 2020, Attorney General William Barr noted that the DOJ “launched

¹³ Christopher Wray, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States*, July 7, 2020, <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-state> (emphasis added).

¹⁴ See, e.g., *id.* (“This is not about the Chinese people, and it’s certainly not about Chinese Americans.”).

¹⁵ Perano, *supra* note 3 (emphasis added); see also Wray, *supra* note 13 (“[W]hen China violates our criminal laws . . . we are not going to tolerate it.”).

¹⁶ See White House, *Remarks by President Trump at Signing of the U.S.-China Phase One Trade Agreement* (Jan. 15, 2020, 11:51 AM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-u-s-china-phase-one-trade-agreement-2/>.

¹⁷ CHINA INITIATIVE FACT SHEET, *supra* note 1 (emphasis added). See also Demers, *supra* note 12, 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.”).

its China Initiative to confront *China's* *maligned behaviors* and to protect U.S. technology.”¹⁸

Although this Article is focused on criminal law, the China Initiative is not just about criminal law.¹⁹ The DOJ has stressed that “[c]riminal charges are only one of our tools.”²⁰ For example, the Initiative includes working with the Department of the Treasury to develop regulations.²¹ More generally, the Trump administration has emphasized a “whole of government effort” to confront the PRC.²² A “whole of government effort” should not lose sight of the distinct roles of different parts of the government. Policies that might fit more comfortably within 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,²³ and core to the Initiative’s goals is using criminal law to combat a “China” threat.²⁴ It is important to ask how the Initiative reflects the standard principles of criminal liability and justifications for punishment.

The DOJ has articulated considerations that apply anytime a

¹⁸ Barr, *supra* note 4. (emphasis added).

¹⁹ See, e.g., Wray, *supra* note 4 (“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.”).

²⁰ “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).

²¹ See CHINA INITIATIVE FACT SHEET, *supra* note 1; see also Alan Rappeport, *U.S. Says China Is No Longer a Currency Manipulator*, N.Y. TIMES, Jan. 13, 2020, <https://www.nytimes.com/2020/01/13/us/politics/treasury-china-currency-manipulator-trade.html> (reporting decision to reverse course on designating the PRC as a currency manipulator while still pressing forward with regulations “scrutiniz[ing] foreign investment that were devised with China in mind”).

²² 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.”).

²³ CHINA INITIATIVE FACT SHEET, *supra* note 1 (“The Attorney General’s Initiative reflects the Department’s strategic priority of countering Chinese national security threats . . .”).

²⁴ See Demers, *supra* note 12, 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.”).

decision is being made whether to prosecute, including the nature and seriousness of the offense, the deterrent effect of prosecution, and the person's culpability in connection with the offense.²⁵ 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.²⁶ Particularly because the DOJ itself decided to amalgamate dozens (and counting) of prosecutions 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 these 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.²⁷ This Article does not claim that the DOJ is intentionally prosecuting people because of their ethnicity and/or national origin. But it does argue that the DOJ's initiative against “China,” at a minimum, undermines the spirit of non-discrimination that the Justice Manual extols. There are 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 people's ability to enter and remain in the United States.²⁸ But this Article's focus is on how the U.S. government

²⁵ U.S. Dep't of Justice, Justice Manual, 9-27.230, *available at* <https://www.justice.gov/jm/justice-manual>.

²⁶ U.S. SENTENCING COMMISSION, FEDERAL SENTENCING: THE BASICS 3 (2018), <https://www.ussc.gov/guidelines/primers/federal-sentencing-basics> (citing 18 U.S.C. § 3553(a)(1)-(7)).

²⁷ U.S. Dep't of Justice, Justice Manual, 9-27.260.

²⁸ *Cf.* Emily Feng, *Visas are the Newest Weapon in U.S.-China Rivalry*, NPR (Apr. 15, 2019), <https://perma.cc/F74Z-34V5>. The China Initiative itself has not included travel bans, though the Trump Administration has enacted strict limits in other contexts. *See, e.g.*, Centers for Disease Control and Prevention, Travelers Prohibited from Entry into the United States, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html> (last visited May 11, 2020) (“CDC is working with public health partners to implement travel procedures announced in several Presidential proclamations on novel coronavirus.”); Alex Azar, Secretary, Health and Human Serv., Remarks on Declaration of Public Health Emergency for

enforces criminal laws. It calls for a country-neutral framing of DOJ initiatives and, when a case does have a nexus to the PRC, greater precision in how the DOJ addresses that connection. One of the DOJ's goal is to, "reinforce the trust that leads to cooperation with law enforcement,"²⁹ yet the current framing instead undermines trust.

Part I of this Article 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 and melds them into an amorphous threat. Under the banner of the China Initiative, not only has China taken on a criminal taint, but people—both natural and legal—who are viewed as possessing some level of China-ness are likewise stigmatized. The United States' criminal justice system does not allow guilt by association.³⁰ But the China Initiative has created *threat* by association.

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, when assessed in light of the goals of deterrence, incapacitation, rehabilitation, and retribution, it is worrisome that the prosecution and punishment of people and entities rests in part on a connection with "China."

2019 Novel Coronavirus (Jan. 31, 2020), <https://perma.cc/76JG-VGRU> ("[T]he President has signed a Presidential Proclamation . . . temporarily suspending the entry into the United States of foreign nationals who pose a risk of transmitting the 2019 novel coronavirus."); Ruthann Robson, *Constitutionality of President's "Muslim Ban": Equal Protection Issues*, CONSTITUTIONAL L. PROF. BLOG (Jan. 28, 2017), <https://perma.cc/2D69-PHXB>; see also Alexandra Yoon-Hendricks, *Visa Restrictions for Chinese Students Alarm Academia*, N.Y. TIMES (July 25, 2018), <https://perma.cc/58BV-325R> (discussing June 2019 decision of the Trump administration to require annual visa renewals as compared with the prior policy of five-year student visas).

²⁹ Demers, *supra* note 12, at 8.

³⁰ See, e.g., *Scales v. United States*, 367 U.S. 203, 224 (1961) ("[I]n our jurisprudence guilt is personal.").

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.³¹ The U.S. government can and should do a better job of working with non-governmental actors to reconcile two real phenomena: the threat by association attaching to people who possess China-ness and the threats from the PRC Party-state that go far beyond traditional spying.³² FBI Director Wray has emphasized that what “we need to understand about the threat from China is just how diverse and multilayered it is.”³³ 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.

I. INTERACTIONS BEFORE THE INITIATIVE

Criminal cases that somehow have a connection with the government, people, or place of the PRC are not new to the DOJ.³⁴ But, until recently, these cases were largely treated as targeted areas of cooperation—or contention—rather than as confrontation with an

³¹ 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).

³² See Margaret K. Lewis, *Is There a Future for Values-Based Engagement With China?*, CHINAFILE (July 21, 2020), <https://www.chinafile.com/conversation/there-future-values-based-engagement-china>.

³³ Wray, *supra* note 4; 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.”).

³⁴ See Loren M. Scolaro, Note, *The Past, Present, and Future of United States-China Mutual Legal Assistance*, 94 N.Y.U. L. REV. 1688, 1693 (2019) (“The first joint investigation and prosecution between the United States and China occurred in the late 1980s and early 1990s.”).

existential threat.³⁵ In 2008, a Nevada federal court convicted four PRC nationals for their participation in 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.³⁶ 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.³⁷ The 2001 Mutual Legal Assistance Agreement³⁸ between the United States and PRC facilitated this cooperation.³⁹ A U.S. prosecutor who worked on the case recalled, “[t]he history of U.S.-China cooperation is short.”⁴⁰ The Bank of China case was a high-water mark for that cooperation.

Other cases have been more contentious. In 1996, a shipment of heroin from the PRC, hidden 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 potential that he would face torture or execution.⁴¹ 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

³⁵ Cf. Eric Tucker, *US Officials Warn Chinese Espionage an ‘Existential Threat’*, ASSOC. PRESS, Feb. 6, 2020, <https://www.businessinsider.com/us-officials-warn-chinese-espionage-an-existential-threat-2020-2> (quoting William Evanina, then nominee to be director of the National Counterintelligence and Security Center, as stating regarding Chinese economic espionage that “[t]he long-term existential threat to the security of our nation is real”).

³⁶ See *United States v. Chao Fan Xu*, No. 09-10189 (9th Cir. Jan. 3, 2013).

³⁷ See Margaret K. Lewis, *Mutual Legal Assistance and Extradition: Human Rights Implications*, 2 CHINA RTS. F. 83, 86–87 (2007).

³⁸ See Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., June 19, 2000, 80 Stat. 271, T.I.A.S. No. 13,102, available at <https://www.state.gov/13102> (entered into force on Mar. 1, 2001).

³⁹ For discussions of the Bank of China case see, e.g., Scolaro, *supra* note 34, at 1700-01; Eleanor Ross, Note, *Increasing United States-China Cooperation on Anti-Corruption: Reforming Mutual Legal Assistance*, 86 GEO. WASH. L. REV. 839, 853 (2018); Matthew Bloom, Note, *A Comparative Analysis of the United States’s Response to Extradition Requests from China*, 33 YALE J. INT’L L. 177, 201-02 (2008).

⁴⁰ Ronald Cheng, *A Personal History of U.S.-China Law Enforcement Cooperation*, COLUM. L. SCH. (Oct. 12, 2015), <https://perma.cc/9PBN-WSPV>.

⁴¹ See *Wang v. Reno*, 81 F.3d 808, 813 (9th Cir. 1996) (“To remedy the due process violations and to protect Wang from future torture, the court entered a permanent injunction barring the United States from removing Wang or returning him to China. . . . We affirm.”); see also William W. Tanner, *The Case of Wang Zong Xiao v. Reno: The International Implications of Prosecutorial Misconduct*, 24 GA. J. INT’L & COMP. L. 155 (1994) (analyzing the case and its impact on U.S.-PRC relations).

States.”⁴² In 2017, 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.”⁴³ PRC-sourced fentanyl remains a point of tension in the U.S.-PRC relationship.⁴⁴

It is also not new to use criminal laws to combat intellectual property infringements involving the PRC. A low-tech example of intellectual property infringement 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.⁴⁵ Similarly, in *United States v. DeFreitas*, the defendant imported from the PRC counterfeit Beanie Babies,⁴⁶ then a widely popular toy.⁴⁷ As a slightly higher tech example, in 2005, the PRC imprisoned two U.S. citizens for selling pirated DVDs in a case that was hailed as “a rare success in joint efforts by the United States and China to enforce intellectual property laws.”⁴⁸

Nor is economic espionage new. Congress enacted the Economic

⁴² SEAN O’CONNOR, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, ISSUE BRIEF, FENTANYL FLOWS FROM CHINA: AN UPDATE SINCE 2017 (Nov. 26, 2018).

⁴³ U.S. Department of Justice, *Justice Department Announces First Ever Indictments against Designated Chinese Manufacturers of Deadly Fentanyl and Other Opiate Substances*, (Oct. 17, 2017), <https://perma.cc/4TA6-CRZM>; see also U.S. Dep’t of Justice, *Three Chinese Nationals Using the Alias “Alex” Indicted in the United States for Conspiring to Import and Distribute Deadly Opioids* (Oct. 1, 2019), <https://perma.cc/L8NB-WU2Z>.

⁴⁴ See, e.g., U.S. DRUG ENF’T 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 bi-lateral 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.”).

⁴⁵ See *United States v. Bohai Trading Co.*, 45 F.3d 577 (1st Cir. 1995).

⁴⁶ COMPUT. CRIMES & INTELL. PROP. SEC., DEP’T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES 129 (4th ed. 2013) (citing *United States v. DeFreitas*, 92 F. Supp. 2d 272 (S.D.N.Y. 2000)).

⁴⁷ Cf. ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL 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.”).

⁴⁸ 2 *Americans Sentenced in DVD Piracy In China*, N.Y. TIMES (Apr. 20, 2005), <https://perma.cc/UXZ6-3K7K>.

Espionage Act in 1996,⁴⁹ though in the first five years there were only eleven prosecutions using the Act.⁵⁰ 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.⁵¹ The PRC had not joined the World Trade Organization (WTO),⁵² and it was not yet an economic powerhouse.⁵³ 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 2001, police arrested two people trying to board a flight to the PRC with trade secrets from several Bay Area companies.⁵⁴ They later pleaded guilty to economic espionage.⁵⁵

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 civil concern for the company claiming theft. Rather, it is a wrong with broader societal implications that should be addressed via criminal law.⁵⁶ A 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,⁵⁷ economic espionage—sometimes termed industrial espionage—

⁴⁹ 18 U.S.C. § 1831 (Economic Espionage).

⁵⁰ See Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARKE L. REV. 419, 421 (2016).

⁵¹ See John Hemmings, *Lessons from the American-Japan Trade War of the 1980s*, NAT'L INTEREST (July 2, 2018), <https://perma.cc/8MSN-TUC2>.

⁵² See generally Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUDIES L. REV. 97 (2003) (discussing PRC's accession in 2001); BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 389 (2007) (noting that PRC applied to rejoin the GATT (General Agreement on Trade and Tariffs, the predecessor of the WTO) in 1986).

⁵³ 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").

⁵⁴ 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>.

⁵⁵ COMPUT. CRIMES & INTELL. PROP. SEC., *supra* note 46, at 209; see also *United States v. Ye*, 436 F.3d 1117 (9th Cir. 2006) (describing arrest when boarding flight to China and charges for stealing trade secrets).

⁵⁶ See generally Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469 (2011) (proposing an analytical and normative framework to understand criminal sanctions for IP theft).

⁵⁷ See 18 U.S.C. § 793-799 (2018).

expands the range of protection to the private sphere.⁵⁸

There are critics of casting this wider net of criminal liability,⁵⁹ but economic espionage has become an important tool for federal prosecutors.⁶⁰ The DOJ's addition of a National Security Division in 2006 enhanced the infrastructure for prosecuting economic espionage.⁶¹ 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."⁶²

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."⁶³

A DOJ handbook on prosecuting intellectual property crimes explains that, if the entity is not a government entity per se, there must be evidence of foreign government sponsored or coordinated intelligence activity with the entity.⁶⁴

⁵⁸ 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 . . .").

⁵⁹ See Nicola Searle, *The Criminalization of the Theft of Trade Secrets: An Analysis of the Economic Espionage Act*, IP THEORY, vol. 2, issue 2, 33 at 41–42 (2012) (discussing debate on merits of criminalizing trade secret theft).

⁶⁰ CHARLES DOYLE, CONG. RESEARCH SERV., R42681, STEALING TRADE SECRETS AND ECONOMIC ESPIONAGE: AN OVERVIEW OF THE ECONOMIC ESPIONAGE ACT (2016).

⁶¹ Dep't of Justice, Nat'l Security Division, *About the Division* (last updated Apr. 12, 2019), <https://www.justice.gov/nsd/about-division> (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").

⁶² FBI, *Combating Economic Espionage and Trade Secret Theft* (May 13, 2014), <https://perma.cc/KS3E-YNU3>.

⁶³ COMPUT. CRIMES & INTELL. PROP. SEC., *supra* note 46, 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.").

⁶⁴ 142 Cong. Rec. 27,116 (1996); COMPUT. CRIMES & INTELL. PROP. SEC., *supra* note 46, at 182–83.

During the Obama administration, intellectual property theft and espionage with a connection to the PRC shifted from isolated cases toward a broader program. The FBI expanded its efforts to inform the public of these concerns. The 2014 threat awareness film titled “*The Company Man: Protecting America’s Secrets*” depicted an American recruited by PRC nationals to engage in industrial espionage.⁶⁵ Similarly, the 2010 arrest of a U.S. citizen for making false statements about his relationship with PRC intelligence officers—a relationship that began when he was an undergraduate studying in Shanghai—was the basis for another FBI film, “*Game of Pawns: The Glenn Duffie Shriver Story*.”⁶⁶ The FBI explained that the film “educates viewers about the foreign intelligence threat Americans face abroad.”⁶⁷ The FBI coupled this overt public messaging with quiet, targeted communications: a 2015 letter from the FBI’s Houston field office requesting assistance in a “national security investigation” preceded MD Anderson Cancer Center’s July 2018 announcement ousting three scientists with ties to the PRC.⁶⁸

Economic espionage took center stage in 2014 when the DOJ announced the indictment of five officers of the PRC People’s Liberation Army for cyber intrusions and economic espionage against U.S. companies.⁶⁹ This case broke as Xi Jinping⁷⁰ was settling into his role as the top leader. The U.S. government still sought—albeit with waning confidence—to work with the PRC on protecting intellectual property. In 2015, the U.S.-China Cyber Agreement included a provision on refraining from knowingly supporting cyber-enabled theft of intellectual property.⁷¹ In 2016, in a nod to concerns about

⁶⁵ FBI, *The Company Man: Protecting America’s Secrets*, <https://perma.cc/5PS2-ZTH2>.

⁶⁶ FBI, *Game of Pawns*, <https://perma.cc/6BD6-9VEF>.

⁶⁷ FBI, CHINA: THE RISK TO ACADEMIA 8 (2019), <https://www.fbi.gov/file-repository/china-risk-to-academia-2019.pdf/view>.

⁶⁸ Todd Ackerman, *MD Anderson Ousts 3 Scientists Over Concerns About Chinese Conflicts of Interest*, HOUSTON CHRONICLE (Apr. 19, 2019), <https://perma.cc/Q983-MLGD>.

⁶⁹ Indictment, United States v. Dong, et al. (W.D. Pa. May 1, 2014) (No. 14-188), available at <https://perma.cc/3VT7-53KW>; Press Release, Dep’t of Justice, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), available at <https://perma.cc/Y7MS-9U3L>.

⁷⁰ 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.

⁷¹ United States-China Cyber Agreement, Sept. 2015, available at <https://fas.org/sgp/crs/row/IN10376.pdf>. For earlier efforts at cooperation

how criminal law was being used to enforce intellectual property rights, the fact sheet from the 27th U.S.-China Joint Commission on Commerce and Trade (JCCT) included that “[t]he United States and China confirm that trade secret investigations are conducted in a prudent and cautious manner.”⁷²

In 2015, the National Security Division released its “Strategic Plan for Countering the Economic Espionage Threat.”⁷³ The DOJ framed this plan 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.”⁷⁴ However, the plan did highlight a case connected to the PRC party-state.⁷⁵ The Strategic Plan also announced the intention to “heighten awareness of the economic espionage threat and deliver coordinated training,” including to U.S. companies, labs, and universities.⁷⁶ Until 2018, the DOJ had not organized these activities into a clear, cohesive strategy aimed at countering what it labeled a “China” threat.

The PRC party-state’s announcement in 2015 of a “Made in China 2025” plan in part precipitated heightened scrutiny.⁷⁷ The plan targeted

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.”).

⁷² U.S. Trade Rep., U.S. Fact Sheet for the 27th U.S.-China Joint Commission on Trade and Commerce, Nov. 2016, *available at* <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2016/november/us-fact-sheet-27th-us-china-joint>; *see also* PRC Ministry of Commerce, 第 27 届中美商贸联委会联合成果清单, Jan. 6, 2017, <http://mds.mofcom.gov.cn/article/ghlt/201701/20170102497565.shtml> (Chinese version: “中美双方确认，对商业秘密案件的调查会以谨慎小心的方式进行”).

⁷³ 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).

⁷⁴ *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)).

⁷⁵ Scott & Rozenshtein, *supra* note 73, at 24 (quoting 2015 DOJ Strategic Plan’s discussion of *United States v. Liew*, 2014 WL 2586329 (N.D. Cal. June 9, 2014)).

⁷⁶ *Id.* at 25 (quoting the 2015 DOJ Strategic Plan).

⁷⁷ Scott Kennedy, *Made in China 2025*, CSIS (June 1, 2015), <https://www.csis.org/analysis/made-china-2025>.

ten strategic industries for development.⁷⁸ Although innovation is generally expected and even encouraged as a country's economy develops, Assistant Attorney General John Demers warned 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 a roadmap to theft as it is guidance to innovate."⁷⁹ This warning recalled a 2013 book titled *Chinese Industrial Espionage: Technology Acquisition and Military Modernization*.⁸⁰ 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."⁸¹ When President Trump took office, these developments during the Obama administration were coalescing into a more assertive and vocal response to a China threat.

II. THE CHINA INITIATIVE

On November 1, 2018, former Attorney General Jeff Sessions announced the commitment of significant resources to counter the "grave threat to our national security,"⁸² under the title of the "China Initiative." This Part describes the design of the China Initiative (Part II.A) and provides an overview of how the DOJ has implemented it (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'

⁷⁸ See U.S. CHAMBER OF COMMERCE, MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS 10 (2017), <https://perma.cc/NB8Z-SD3W> (listing strategic industries for development, e.g., next generation information technology and new energy vehicles).

⁷⁹ Demers, *supra* note 12, at 2.

⁸⁰ WILLIAM C. HANNAS, JAMES MULVENON, & ANNA B. PUGLISI, CHINESE INDUSTRIAL ESPIONAGE: TECHNOLOGY ACQUISITION AND MILITARY MODERNIZATION (Routledge, 2013), <https://perma.cc/M6DY-WWZR>.

⁸¹ *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*).

⁸² U.S. Dep't of Justice, *Attorney General Jeff Sessions Announces new Initiative to Combat Chinese Economic Espionage* (Nov. 1, 2018), <https://perma.cc/EYJ3-UCWN>.

interests in freedom of navigation.⁸³ General Secretary Xi's growing repression at home and exertion of influence abroad exacerbated worries about the PRC's human rights record and how rights-depriving practices could extend beyond the PRC's borders.⁸⁴ 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 Representative⁸⁵ 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."⁸⁶ 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."⁸⁷ He announced that the Criminal Division and National Security Division would play key roles.⁸⁸ Five U.S. Attorneys were also announced as part of the Working Group: U.S. Attorneys from the District of Massachusetts, Northern District of Alabama, Northern District of California, Eastern District of New York, and Northern District of Texas.⁸⁹

Included in the China Initiative's launch was an announcement of economic espionage charges against a "PRC State-Owned Company, Taiwan Company, and Three Individuals" for the alleged theft of trade

⁸³ See Gregory Poling, *The Legal Challenge of China's Island Building*, *Asia Maritime Transparency Initiative*, Feb. 18, 2015, <https://amti.csis.org/the-legal-challenge-of-chinas-island-building/> (analyzing "the military potential of China's unprecedented island building work . . .").

⁸⁴ 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").

⁸⁵ U.S. Trade Representative, *supra* note 8.

⁸⁶ U.S. Trade Representative, *President Trump Announces Strong Actions to Address China's Unfair Trade* (Mar. 22, 2018), <https://perma.cc/4VRS-ST5A>.

⁸⁷ CHINA INITIATIVE FACT SHEET, *supra* note 1.

⁸⁸ *Id.*

⁸⁹ *Id.*

secrets from Micron, an Idaho-based semiconductor company.⁹⁰ These charges were 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 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.⁹¹

Economic espionage cases predate the China Initiative: "Chinese national security threats"⁹² 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.⁹³ To imprint this effort with the name of a country, however, was unusual and, perhaps, unprecedented.⁹⁴

B. IMPLEMENTATION

Attorney General Sessions initiated the China Initiative,⁹⁵ but he soon departed.⁹⁶ At William Barr's confirmation hearing in January 2019, he identified the PRC as the United States' "paramount

⁹⁰ U.S. Dep't of Justice, *PRC State-Owned Company, Taiwan Company, and Three Individuals Charged with Economic Espionage* (Nov. 1, 2018), <https://perma.cc/P49X-2NUC>.

⁹¹ U.S. Dep't of Justice, *Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases* (Jan. 28, 2020), <https://perma.cc/FYN3-DDUP>.

⁹² *Id.*

⁹³ See, e.g., U.S. Dep't of Justice, *Fact Sheet: Department of Justice Efforts to Combat Mexican Drug Cartels* (Apr. 2, 2009), <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), <https://perma.cc/3LJ8-GWSX>.

⁹⁴ 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.

⁹⁵ See, e.g., Hickey, *supra* note 9, 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.").

⁹⁶ Peter Baker, Katie Benner, and Michael D. Sheer, *Jeff Sessions Is Forced Out as Attorney General as Trumps Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

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.”⁹⁷

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.⁹⁸ The spectrum of concern ranges from classic spying⁹⁹ to failing to disclose ties to PRC universities while receiving federal grant funds.¹⁰⁰

Public statements by DOJ officials portend further expansion of the Initiative. Director Wray stated in a June 2020 interview that the FBI had more than 2,000 active investigations that link back to the PRC government¹⁰¹ Andrew Lelling, U.S. Attorney for the District of Massachusetts, explained in February 2020, “[m]y 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

⁹⁷ 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, <https://perma.cc/WL3A-2X9K>. [*hereinafter* Confirmation Hearing].

⁹⁸ U.S. Dep’t of Justice, *supra* note 2.

⁹⁹ See, e.g., Press Release, Dep’t of Justice, Singaporean National Pleads Guilty to Acting in the United States as an Illegal Agent of Chinese Intelligence (July 24, 2020), <https://www.justice.gov/opa/pr/singaporean-national-pleads-guilty-acting-united-states-illegal-agent-chinese-intelligence>.

¹⁰⁰ See, e.g., Press Release, Dep’t of Justice, Researcher at University Arrested for Wire Fraud and Making False Statements About Affiliation with a Chinese University (Feb. 27, 2020), <https://www.justice.gov/opa/pr/researcher-university-arrested-wire-fraud-and-making-false-statements-about-affiliation>.

¹⁰¹ Perano, *supra* note 3; see also Wray, *supra* note 4; Barr, *supra* note 4 (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>.

is prosecuting more people.”¹⁰² In an April 2020 article, Assistant Attorney General Demers was quoted as expressing a desire that all ninety-four U.S. Attorney’s Offices bring cases under the China Initiative, adding, “[y]ou’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.”¹⁰³

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.¹⁰⁴ In July 2018, 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.”¹⁰⁵ 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.¹⁰⁶ A November 2019 report by the Senate Permanent Subcommittee on Investigations found that “[t]he FBI’s slow response to Chinese recruitment

¹⁰² Andrew Lelling, U.S. Attorney for the District of Massachusetts, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 1 hour, 43 min.

¹⁰³ Betsy Woodruff Swan, *Inside DOJ’s nationwide effort to take on China*, POLITICO (Apr. 7, 2020), <https://perma.cc/T72W-W6GV>.

¹⁰⁴ 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 F.B.I.), available at <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0> (“I think in this setting I would just say that the use of nontraditional collectors, especially in the academic setting, whether it’s professors, scientists, students, we see in almost every—in almost every field office that the FBI has around the country . . .”); see also U.S. Trade Representative, *How China’s Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World*, June 18, 2018, at 14 n.113, available at <https://perma.cc/5XFM-QZ97> (noting that the term “‘non-traditional collector’ is commonly used in the Intelligence Community”).

¹⁰⁵ Christopher Wray, Director, Fed. Bureau of Investigations, Remarks at the Aspen Security Forum (July 18, 2018).

¹⁰⁶ Recruitment Program of Global Experts, *The Recruitment Program for Innovative Talents (Long Term)*, www.1000plan.org.cn/en/ (last visited Feb. 23, 2020) (for people who sign contracts “for at least 3 consecutive years and with at least 2 months each year working in China”).

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.”¹⁰⁷

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.”¹⁰⁸ An indictment was issued in June 2020.¹⁰⁹ A nanoscience specialist, Dr. Lieber had received U.S. government grant funding that required disclosure of significant foreign financial conflicts of interest.¹¹⁰ 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.¹¹¹ The DOJ indicated that additional arrests in academia would be forthcoming,¹¹² with “academic espionage” increasingly entering the lexicon as part of the China threat.¹¹³ 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.¹¹⁴ On March 10, 2020, the DOJ announced

¹⁰⁷ Staff Report, Permanent Subcommittee on Investigations, U.S. Senate, Threats to the U.S. Research Enterprise: China’s Talent Recruitment Plans, Nov. 19 2019, at 94, *available at* <https://perma.cc/YA38-USZR>. For an analysis of the Thousand Talents Plan and similar programs, see David Zweig & Siqin Kang, *America Challenges China’s National Talent Programs*, Center for Strategic and International Studies (May 2020), *available at* <https://perma.cc/SX75-P3F5>.

¹⁰⁸ Dep’t of Justice, *supra* note 91 (other cases announced at the same time involved Ye Yanqing (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 Zaosong (who allegedly stole biological research from a Boston hospital that was later discovered inside a sock by airport security)).

¹⁰⁹ See Press Release, Dep’t of Justice, Harvard University Professor Indicted on False Statement Charges (June 9, 2020), <https://www.justice.gov/opa/pr/harvard-university-professor-indicted-false-statement-charges>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 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.’”).

¹¹³ See, e.g., American Council on Education, *House Defense Bill Includes Provisions on Academic Espionage, For-Profit Oversight* (July 15, 2019), <https://perma.cc/5CA7-L4GH>.

¹¹⁴ Press Release, Dep’t of Justice, Researcher and University Arrested for Wire Fraud and Making False Statements About Affiliation with a Chinese University (Feb. 27, 2020), <https://perma.cc/QTS2-7L5R>.

that a former West Virginia University professor pleaded guilty to fraud charges connected to his involvement in the Thousand Talents Plan.¹¹⁵

Also of growing interest are PRC-connected actors who are allegedly influencing the “American public and policymakers without proper registration.”¹¹⁶ In May 2019, the FBI’s Foreign Influence Task Force added a unit aimed at countering China’s political influence in the United States.¹¹⁷ 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.¹¹⁸

The DOJ has underscored the long-term nature of the China Initiative. John Demers said in February 2020, “our 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.”¹¹⁹ John Brown, Assistant Director of the FBI’s Counterintelligence Division, similarly warned, “[d]oes 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.”¹²⁰ Beyond the DOJ, in July 2020, Secretary of State Michael Pompeo likewise accentuated a protracted conflict ahead: “We must admit a hard truth that should guide us in the years and decades to come, that if we want to have a

¹¹⁵ 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>.

¹¹⁶ Dep’t of Justice, *supra* note 91.

¹¹⁷ Bethany Allen-Ebrahimian, *Exclusive: How the FBI Combats China’s Political Meddling*, AXIOS (Feb. 12, 2020), <https://perma.cc/8NP7-ZE68>.

¹¹⁸ Lara Jakes & Steven Lee Meyers, *U.S. Designates China’s Official Media as Operatives of the Communist State*, N.Y. TIMES (Feb. 18, 2020), <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*, N.Y. TIMES (May 9, 2020), <https://perma.cc/SH66-VVRF>.

¹¹⁹ John Demers, Assistant Att’y Gen for Nat’l Security, Remarks at the China Initiative Conference at CSIS, Washington, D.C. (Feb. 6, 2020) at 3 min.

¹²⁰ 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.

free 21st century, and not the Chinese century of which Xi Jinping dreams, the old paradigm of blind engagement with China simply won't get it done.”¹²¹

To date, the DOJ's role in this new paradigm has largely focused on investigating and prosecuting cases, but these activities have proceeded alongside a public outreach component. As explained in Part IV.E, 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.¹²² 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.”¹²³ An October 2019 summit addressed “how the academic community can continue to work with the FBI and other federal agencies to tackle national security.”¹²⁴ These efforts are laudable and should be expanded.¹²⁵ Nonetheless, even more robust interaction between the DOJ and non-government sectors is insufficient to fully ameliorate concerns. The “China” framing is fundamentally flawed. The DOJ should begin by rethinking, and reworking, 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.”¹²⁶ 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

¹²¹ Pompeo, *supra* note 7.

¹²² FBI, *Office of Private Sector*, <https://perma.cc/H2RZ-P349>.

¹²³ *Id.*; see also FBI, *This Week Strengthening Partnerships With American's Business Community*, FBI (Nov. 30, 2017), <https://perma.cc/Q3U5-PHZC>.

¹²⁴ See Office of Private Sector, *2019 FBI Academia Summit* (Oct. 10, 2019), <https://perma.cc/SS4E-TS2L>.

¹²⁵ Wray, *supra* note 4 (“Through our Office of Private Sector, the FBI has stepped up our national outreach to spread awareness of this threat. . . . Our Office of Private Sector also engages with a variety of academic associations on the China threat . . .”).

¹²⁶ Press Release, White House, Fact Sheet on the President's Export Control Reform Initiative (Apr. 20, 2010), *available at* https://fas.org/blogs/secrecy/2010/04/export_control/; see also Steven Aftergood, *Export Control Policy as a Guide to Secrecy Reform*, *Federation of Am. Scientists*, Apr. 26, 2010 (discussing the reform initiative).

prudent way of being “selective in choosing technologies that need protecting, but be[ing] aggressive in safeguarding them.”¹²⁷ 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 cyber-intrusions that do not require physical presence.¹²⁸

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.”¹²⁹ 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.”¹³⁰

What is this “it” of a “China” threat? Later in those same remarks, Director Wray added, “[t]o 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.”¹³¹ 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,

¹²⁷ Lorand Laskai & Samm Sacks, *The Right Way to Protect America’s Innovation Advantage*, FOREIGN AFFAIRS (Oct. 23, 2018), <https://perma.cc/62HZ-J27G>.

¹²⁸ U.S. Dep’t of Justice, *Information About the Department of Justice’s China Initiative and a Compilation of China Related Criminal Cases Since Jan. 2018* (Nov. 22, 2019), <https://www.justice.gov/opa/press-release/file/1179321/download> (“The threat posed by Chinese government-sponsored hacking activity is real and relentless . . .”).

¹²⁹ Demers, *supra* note 12, at 5.

¹³⁰ Wray, *supra* note 4; see also Lutz, *supra* note 33 (“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.”).

¹³¹ Wray, *supra* note 4.

threat.¹³² 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:¹³³ 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.¹³⁴ The DOJ’s conception of “China” similarly lumps together an array of people and entities seen as sharing ties to a common threat. For instance, the opening sentence of a July 2020 press release announcing fraud and false statements charges describes “[a] rheumatology professor and researcher *with strong ties to China . . .*”¹³⁵

This Part breaks down 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 possess “China-ness” even if they do not have a nexus to the PRC party-state. To be clear, prosecutors are not relieved of the burden of proving all elements of

¹³² 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 . . .”).

¹³³ “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.”).

¹³⁴ RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* 22 (2019).

¹³⁵ Press Release, Dep’t of Justice, Researcher Charged with Illegally Using U.S. Grant Funds to Develop Scientific Expertise for China (July 9, 2020), <https://www.justice.gov/opa/pr/researcher-charged-illegally-using-us-grant-funds-develop-scientific-expertise-china> (emphasis added).

charged offenses beyond a reasonable doubt.¹³⁶ This is not blunt guilt by association. It is threat by association.

Not only does China-ness become imprinted as a shared negative characteristic across cases, but 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.”¹³⁷ A DOJ presentation on the China Initiative includes a slide titled, “What Has China Stolen?”¹³⁸ 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.”¹³⁹ Secretary of State Pompeo amplified these sentiments in his July 2020 speech by stating, “China ripped off our prized intellectual property and trade secrets”¹⁴⁰

Because China is not an actor that can be convicted and punished, people cannot have traditional accomplice liability flowing from China’s actions.¹⁴¹ China itself cannot steal a robot arm¹⁴² or a corn seed.¹⁴³ Nonetheless, the China Initiative spreads a blanket of criminal suspicion over persons associated with China. For example, in the case of Robert Mo, who pled guilty of the theft of corn seeds that were the

¹³⁶ *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.”).

¹³⁷ Barr, *supra* note 4.

¹³⁸ “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” *supra* note 20.

¹³⁹ 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>.

¹⁴⁰ Pompeo, *supra* note 7.

¹⁴¹ *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.”).

¹⁴² Laurel Wamsley, *A Robot Named ‘Tappy’: Huawei Conspired to Steal T-Mobile’s Trade Secrets, Says DOJ*, NPR (Jan 29, 2019), <https://perma.cc/2AX7-7HBG>.

¹⁴³ FBI, *Protecting Vital Assets: Pilfering of Corn Seeds Illustrates Intellectual Property Theft* (Dec. 19, 2016), <https://www.fbi.gov/news/stories/sentencing-in-corn-seed-intellectual-property-theft-case>.

intellectual property of DuPont Pioneer and Monsanto,¹⁴⁴ “[t]he atmosphere surrounding economic espionage investigations became so explosive that the federal judge in Mo’s case barred unnecessary mention of his ethnicity.”¹⁴⁵ The judge recognized that his China-ness created an impediment to a fair trial.

To be sure, just as China is not a monolith, neither 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,¹⁴⁶ but rather it is 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.¹⁴⁷ However, 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 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

¹⁴⁴ U.S. Dep’t of Justice, *Chinese National Sentenced to Prison for Conspiracy to Steal Trade Secrets* (Oct. 5, 2016), <https://perma.cc/PJA8-BUBP>.

¹⁴⁵ 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>.

¹⁴⁶ See Wray, *supra* note 13 (“Our folks at the FBI are working their tails off every day to protect our nation’s companies, our universities, our computer networks, and our ideas and innovation.”).

¹⁴⁷ See Dep’t of Justice, *Office of International Affairs*, <https://www.justice.gov/criminal-oia>; FBI, *Beijing, China*, <https://www.fbi.gov/contact-us/legal-attache-offices/asia/beijing-china>; U.S. Dep’t Of Justice, *Attorney Advisor (International)/Resident Legal Advisor, China*, <https://perma.cc/X57J-Y6FA>; see also DEA Opens Shop in China to Help Fight Synthetic Drug Trade, VOICE OF AM. (Jan. 6, 2017) (announcing the Drug Enforcement Administration’s planned opening of an office in Guangzhou).

building capacity within the DOJ.¹⁴⁸

This is also not to say that the DOJ stands alone in presenting a problematic framing of a China threat. Similar trends are seen in other aspects of U.S. policy toward the PRC.¹⁴⁹ Strongly worded warnings are also found on both sides of the political aisle: Joe Biden, for example, was criticized for exacerbating xenophobic trends when a campaign ad claimed that “Trump rolled over for the Chinese.”¹⁵⁰ 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.¹⁵¹ While highlighting how hawkish rhetoric has permeated the Trump administration,¹⁵² the focus here is to demonstrate how, at least with respect to the 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.¹⁵³ More generally, the PRC

¹⁴⁸ See *A Conversation with Christopher Wray*, Council on Foreign Relations, Apr. 26, 2019, <https://www.cfr.org/event/conversation-christopher-wray-0> (“[W]e 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.”).

¹⁴⁹ 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.”).

¹⁵⁰ Palmer Haasch, *Joe Biden’s Latest Ad Said ‘Trump Rolled Over For the Chinese’ on Coronavirus, and People are Calling It Racist and Xenophobic*, BUSINESS INSIDER, Apr. 21, 2020, <https://www.businessinsider.com/joe-biden-ad-china-trump-coronavirus-racist-xenophobic-2020-4>.

¹⁵¹ See, e.g., Susan Shirk, Dissenting Opinion (in Diamond & Schell, ed. report); see also *The New Red Scare on American Campuses*, THE ECONOMIST (Jan. 2, 2020), www.economist.com/briefing/2020/01/02/the-new-red-scare-on-american-campuses

¹⁵² Pompeo, *supra* note 7.

¹⁵³ See, e.g., Hickey, *supra* note 9, 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”).

party-state's track record when it comes to respecting human rights and the rule of law is increasingly worrisome under General Secretary Xi.¹⁵⁴ There is, however, a better path to dealing with real concerns about the PRC party-state than the U.S. government's current response. We do not know the extent to which the ballooning of cases having a nexus to 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,¹⁵⁵ but there is most definitely a problem with intellectual-property theft.¹⁵⁶ How the DOJ is addressing that threat is, however, a problem in itself.

A. THE PRC PARTY-STATE

Economic espionage requires proof that the intellectual-property theft is linked to a “foreign government.”¹⁵⁷ 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. In the United States, candidates generally run under parties' banners without holding significant positions within the parties' structure (e.g., chairperson of the Democratic National Committee).¹⁵⁸ Nor do either of the major

¹⁵⁴ See generally Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131 (2020) (arguing that, especially under Xi Jinping, the PRC has failed to meet even the minimal standards required of signatories to the International Covenant on Civil and Political Rights).

¹⁵⁵ See, 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/J8QB-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-AFQN> (“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>.

¹⁵⁶ Cf. Lelling, *supra* note 102, 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 . . .”).

¹⁵⁷ See *supra* notes 49–64 and accompanying text.

¹⁵⁸ Cf. *About the Democratic Party*, <https://perma.cc/2KK7-6GPF>.

political parties in the United States have an organizational structure that is enmeshed in, and actually supersedes, the government. In the PRC, the Chinese Communist Party (CCP) is both inexorably intertwined with and superior to the formal government.¹⁵⁹ “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.¹⁶⁰

The interconnections between party and state in the PRC are not easily conveyed in visual depictions, yet they resemble 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.¹⁶¹ Under General Secretary Xi, this dynamic of party and state has shifted to an even more party-centric structure, as if the party is the nucleus of an atom with lightweight government bodies orbiting it.¹⁶²

It is this juggernaut of PRC party-state that is the foreign government for economic espionage purposes. In that respect, the DOJ’s conflation of the PRC’s formal government and the CCP as an intermeshed structure is an accurate description of power distribution in the PRC. Where the DOJ’s description of “China” in 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.”¹⁶³ 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.”¹⁶⁴ Attorney General Barr warned in July 2020 that “[a]

¹⁵⁹ See generally Ling Li, “Rule of Law” in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China, 2 ASIAN J. OF L & SOC. 93 (2015) (identifying and conceptualizing the structural features of the PRC party-state).

¹⁶⁰ 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>.

¹⁶¹ See Margaret K. Lewis, *Seeking Truthful Names: The External Implications of China’s Internal Ideology and Organisation*, in LAW AND THE PARTY IN XI JINPING’S CHINA: IDEOLOGY AND Organisation (Rogier Creemers & Susan Trevaskes eds., Cambridge University Press, forthcoming 2020) (draft on file with author).

¹⁶² See *id.*

¹⁶³ 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.

¹⁶⁴ Brown, *supra* note 120, at 46 min; 1 hour, 1 min.

world marching to the beat of Communist China's drums will not be a hospitable one”¹⁶⁵ The Trump administration's broader accentuation of the “Communist” in CCP was made all the more clear by titling Secretary of State Pompeo's major policy address in July 2020 “Communist China and the Free World's Future.”¹⁶⁶

In name, the CCP is a communist party. In reality, the CCP bears little resemblance to textbook communism.¹⁶⁷ It is better understood as the backbone of a deeply repressive, authoritarian state that has allowed limited economic reforms, with “signs point[ing] toward further entrenchment of statism.”¹⁶⁸ Rhetoric that presents the challenge as a clash with communism is misplaced.¹⁶⁹ A more accurate path would be for the DOJ to adopt consistent phrasing of a “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.”¹⁷⁰ In the context of national security concerns linked to the PRC, the DOJ can and should be more precise in describing the node of the threat. One indication that this might be starting to occur is the titling of FBI Director Wray's February speech as “Confronting the China Threat”¹⁷¹ but his July speech as “The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and

¹⁶⁵ Dep't of Justice, Attorney General William P. Barr Delivers Remarks on China Policy at the Gerald R. Ford Presidential Museum, July 16, 2020, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-china-policy-gerald-r-ford-presidential>.

¹⁶⁶ Pompeo, *supra* note 7.

¹⁶⁷ See China Opinion, Chinese Communism is a Magic Mirror, Medium, July 23, 2020, <https://medium.com/@anotherchinaopinion/chinese-communism-is-a-magic-mirror-52fec4a71bd6> (“‘We are the Communist Party of China, and we will define what Communism is.’ That’s what Chen Yuan, the deputy governor of China’s central bank, told political scientist Tom Robinson at a dinner party in the mid-1980s.”).

¹⁶⁸ Scott Kennedy, *China Won't Be Scared Into Choosing Marketization*, CSIS, Apr. 23, 2020, <https://www.csis.org/analysis/china-wont-be-scared-choosing-marketization>; see also Jessica Chen Weiss, *A World Safe for Autocracy?: China's Rise and the Future of Global Politics*, FOREIGN AFFAIRS (July/August 2019), <https://perma.cc/J79Y-T3AG>.

¹⁶⁹ See, e.g., Pompeo, *supra* note 7.

¹⁷⁰ See Richard C. Bush, *A One-China Policy Primer*, BROOKINGS (Mar. 2017), <https://www.brookings.edu/research/a-one-china-policy-primer/>.

¹⁷¹ Christopher Wray, *Confronting the China Threat*, Feb. 6, 2020, <https://www.fbi.gov/news/stories/wray-addresses-china-threat-at-doj-conference-020620>.

National Security of the United States.”¹⁷² It is unclear, however, the extent to which this shift reflects a deeper grappling with the complex nature of the PRC party-state and how best to express this in the U.S. government’s language.

The DOJ’s expansive description of the challenge that the PRC party-state poses is also accurate insofar as the CCP’s influence reaches both in and beyond the lives of the approximately 90 million CCP members.¹⁷³ Nonetheless, phrasing such as “[t]he CCP has launched an orchestrated campaign, across all its many tentacles in Chinese government and society, to exploit the openness of our institutions in order to destroy them[,]” as used by Attorney General Barr, expresses these interconnections in a sinister manner.¹⁷⁴ The reality of what Party membership means—let alone tangential ties by virtue of being a PRC citizen living in the PRC today—is complex.¹⁷⁵ This texture is lost in the blunt Communist-threat rhetoric that dominates in the Trump administration.

The DOJ’s description of “China” in the China Initiative also lacks a recognition of the space, albeit constrained, for entities within the PRC to withstand pressure to engage in “coordinated intelligence activity”¹⁷⁶ with the PRC party-state. Andrew Lelling, U.S. Attorney for the District of Massachusetts, asserted, “If you are collaborating with any Chinese entity, whether it’s a university or a business, you are giving that technology to the Chinese government.”¹⁷⁷ In contrast, William Zarit, a senior counselor at The Cohen Group with a long career in the U.S. foreign commercial service, cautioned, the U.S. government needs to be “balanced in our approach We have to

¹⁷² See Wray, *supra* note 13.

¹⁷³ See *CPC Members Exceed 90 Million*, China Daily (June 30, 2019, 11:00 AM), <https://perma.cc/ZK88-9KE7>.

¹⁷⁴ See Barr, *supra* note 165.

¹⁷⁵ See Bang Xiao, *Current and Former Chinese Communist Party Members Explain Their Motivations for Joining*, ABC.Net.Au, July 25, 2020, <https://www.abc.net.au/news/2020-07-25/chinese-communist-party-members-motive-join-us-travel-ban/12485530> (explaining how the overwhelming majority of CCP members “include industrial workers, professionals, academics, university students and business people, who have no input in Beijing’s policy making or upper echelons of Government”).

¹⁷⁶ 142 Cong. Rec. 27,116 (1996); COMPUT. CRIMES & INTELL. PROP. SEC., *supra* note 46, at 182–83.

¹⁷⁷ Andrea Widener, *70 Years of US Suspicion Toward Chinese Scientists—And What Those Caught in the Middle Should Do Now*, Chemical & Engineering News, Mar. 22, 2020, <https://cen.acs.org/policy/research-funding/70-years-US-suspicion-toward/98/i11>.

be very, very clear that we don't punish the Chinese people in this whole process . . . but actually focus on the real culprits.”¹⁷⁸

This demarcation between “Chinese people” and “real culprits” is not clear cut. If “real culprits” means only the PRC leadership, they too are people who are Chinese. If “real culprits” is expanded to CCP members versus “Chinese people,” that takes approximately 90 million people out of the “Chinese people” and fails to account for the significant variation among CCP members. The Chinese people and the PRC party-state simply do not separate neatly into two entirely discrete categories.¹⁷⁹ Yet the Trump administration has taken to using a binary framing: Secretary of State Pompeo explained in July 2020 that the United State must “engage and empower the Chinese people—a dynamic, freedom loving people who are completely distinct from the Chinese Communist Party.”¹⁸⁰

Thus, on the one hand, comments like that from U.S. Attorney Lelling above indicate that contact with “any Chinese entity” is tantamount to handing information to the Chinese government. On the other hand, Pompeo is separating Party and people into two buckets. Both of these approaches diminish the space for human agency: individuals making decisions. If an individual's actions break the law, then prosecuting that individual might be warranted. To the extent that individuals are not just breaking the law but doing so in ways that benefit the PRC party-state, then this triggers national security concerns. Countering efforts by the PRC leadership to incentivize and even direct individuals to engage in acts that violate U.S. law is exactly what U.S. law enforcement should be doing. The question is how this work is being done. The China Initiative has conflated the central concern on activities intertwined with the PRC party-state with a broader conception of China-ness that encompasses PRC nationality and national origin as well as Chinese ethnicity and other expressions of connections with “China.”

¹⁷⁸ William Zarit, The Cohen Group, Remarks at the China Initiative Conference at CSIS, Washington D.C. (Feb. 6, 2020), at 3 hours, 11 min.

¹⁷⁹ 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.”).

¹⁸⁰ See Pompeo, *supra* note 7.

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.¹⁸¹ 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."¹⁸² 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 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"¹⁸³

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, "[a]s I told Chinese officials in August, China must hold its citizens and Chinese companies accountable for complying with the law."¹⁸⁴ 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."¹⁸⁵ In February 2020, Attorney General Barr again blurred the lines between the party-state and the

¹⁸¹ 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.").

¹⁸² FBI, *supra* note 67, at 1.

¹⁸³ *Id.*

¹⁸⁴ U.S. Dep't of Justice, *Chinese Telecommunications Device Manufacturer and its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction Of Justice* (Jan. 28, 2019), <https://perma.cc/49H5-TTCL>.

¹⁸⁵ Confirmation Hearing, *supra* note 97.

broader population by cautioning, “[t]he Chinese have long been a commercial people. But for China, purely economic success is not an end in itself.”¹⁸⁶ In July 2020, Secretary of State Pompeo warned of the threat posed by PRC nationals in the United States, stating “not all Chinese students and employees are just normal students and workers that are coming here to make a little bit of money and to garner themselves some knowledge. Too many of them come here to steal our intellectual property and to take this back to their country.”¹⁸⁷

Admittedly, the percentage of people illegally engaged in acquiring intellectual property for the benefit of the PRC party-state who are PRC nationals is unknown. It is logical that a higher percentage of people engaged in these illicit activities would be PRC nationals as compared with nationals of Canada, Cambodia, or Chile. This article is not recommending that the DOJ allocate investigatory resources proportionally across people from all nations. Nevertheless, there is a difference between prioritizing intellectual property theft and following evidence of suspicious activity wherever it may lead (even if to a higher proportion of PRC nationals) and setting forth with the explicit intention of countering a “China” threat and then having that framing influence 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 conflates citizenship with the governing power structure. 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.”¹⁸⁸ 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.”¹⁸⁹

¹⁸⁶ Barr, *supra* note 4.

¹⁸⁷ Pompeo, *supra* note 7.

¹⁸⁸ U.S. Dep’t of Justice, *Chinese Military Personnel Charged With Computer Fraud, Economic Espionage and Wire Fraud for Hacking into Credit Reporting Agency Equifax* (Feb. 10, 2020), <https://www.justice.gov/opa/pr/chinese-military-personnel-charged-computer-fraud-economic-espionage-and-wire-fraud-hacking>.

¹⁸⁹ U.S. Dep’t of Justice, *Chinese National Sentenced to Prison for Selling Counterfeit Computer Parts* (Feb. 15, 2019), <https://perma.cc/D3TB-ZH4D>.

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.¹⁹⁰ Warnings about suspicion at least in part based on nationality have also reached beyond the PRC context. Rochelle Cooper Dreyfuss and Orly Lobel wrote in 2016, “[t]hrough 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.”¹⁹¹

Recognition 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.”¹⁹² 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 the following as the first “Lessons Learned”: “Divided Loyalty to a Country: The Chinese citizen felt the U.S. company’s information would benefit Chinese weapons and aerospace programs.”¹⁹³ 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

¹⁹⁰ See, e.g., MARA HVISTENDAHL, *THE SCIENTIST AND THE SPY* (Penguin 2020).

¹⁹¹ Dreyfuss & Lobel, *supra* note 50, at 426 (internal citations omitted).

¹⁹² Demers, *supra* note 12, at 8.

¹⁹³ FBI, CHINA CASE EXAMPLE: CHINESE CITIZEN'S THEFT OF WEAPONS TECHNOLOGY FOR CHINESE EMPLOYMENT OPPORTUNITY (2019), <https://perma.cc/Z448-JFZW>.

Communist Party amply justify the conclusion that the Chinese government is ultimately responsible for those thefts, too.¹⁹⁴

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 conditions in the PRC “amply justify the conclusion that the Chinese government is in some sense responsible for those thefts, too.”¹⁹⁵

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.”¹⁹⁶ 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 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’.”¹⁹⁷ 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

¹⁹⁴ *Id.* at 5; see also FBI, *supra* note 67, 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.”).

¹⁹⁵ U.S. Dep’t of Justice, *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), <https://perma.cc/KR8T-EZ5P>.

¹⁹⁶ JASON, FUNDAMENTAL RESEARCH SECURITY, JSR-19-2I, Dec. 2019, at 2, https://www.nsf.gov/news/news_summ.jsp?cntn_id=299700. JASON is an elite science advisory group that has been providing analysis to the U.S. government since 1960. See Ann Finkbeiner, *Jason—A Secretive Group of Cold War Science Advisers—is Fighting to Survive in the 21st Century*, SCIENCE, June 27, 2019, <https://www.sciencemag.org/news/2019/06/jason-secretive-group-cold-war-science-advisers-fighting-survive-21st-century>.

¹⁹⁷ Permanent Subcommittee on Investigations, *supra* note 107, at 97-98.

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.”¹⁹⁸

- 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.”¹⁹⁹
- 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.”²⁰⁰
- 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 themselves—should be asked to monitor the movements of foreign-born students and colleagues. This is antithetical to who we are.”²⁰¹
- An October 10, 2019, statement by the University of Michigan leadership affirming that, despite heightened scrutiny around potential international conflicts of interest,

¹⁹⁸ Carol Christ, et. al, *Reaffirming Our Support for Berkeley’s International Community*, BERKELEY NEWS (Feb. 21, 2019), <https://perma.cc/LN86-V3QS>.

¹⁹⁹ Paul Salovey, *Yale’s Steadfast Commitment to our International Students and Scholars* (May 23, 2019), <https://perma.cc/MN2C-FR7T>.

²⁰⁰ *Statement in Response to Report the FBI is Urging Universities to Monitor Chinese Students and Scholars*, PEN AMERICA (Aug. 12, 2019), <https://pen.org/fbi-universities-monitoring-chinese-students/>.

²⁰¹ Lee Bollinger, “No, I Won’t Start Spying on My Foreign-Born Students,” WASH. POST (Aug. 30, 2019), <https://perma.cc/53YF-A7Y3>; see also Lee C. Bollinger, *Columbia’s Commitment to Its Foreign-Born Students and Visiting Scholars* (Sept. 3, 2019), <https://perma.cc/48YG-TZM4>.

“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”²⁰²

- 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.”²⁰³

Throughout these statements runs the concern for “othering.”²⁰⁴ 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,²⁰⁵ 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, “[h]owever, this open environment also puts academia at risk for exploitation by foreign actors who do not follow *our* rules or share *our* values.”²⁰⁶ 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.”²⁰⁷ 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

²⁰² University of Michigan, *Supporting Our Global Research Community* (Oct. 10, 2019), http://www.provost.umich.edu/provost_comm/20191009global.html.

²⁰³ UCLA, Office of the Chancellor, *Reaffirming UCLA’s Commitment to International Collaboration and the International Community* (Nov. 7, 2019), <https://perma.cc/9HC4-NJCR>.

²⁰⁴ 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.’”).

²⁰⁵ 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).

²⁰⁶ FBI, *supra* note 67, at 1 (emphasis added).

²⁰⁷ *Id.*

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.”²⁰⁸

The contrast of American versus Chinese is further apparent in the U.S. government’s depiction of Chinese companies.²⁰⁹ A PowerPoint slide used by the DOJ in its presentations on the China Initiative includes the “[n]ationality of the world’s 10 largest companies, according to annual Forbes Global 2000 list,” using national flags to show shifts from 2004 to 2018.²¹⁰ In 2004, the composition was seven U.S. companies, two British companies, and one Japanese company.²¹¹ In 2019, there were four U.S. companies, one Dutch company, and four PRC companies.²¹² 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.”²¹³ One of the “goals of the China Initiative” is to “Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete unfairly against U.S. businesses.”²¹⁴

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 foreigner visits to company facilities can present, keep visitor groups

²⁰⁸ U.S. Dep’t of Justice, *Chinese Intelligence Officer Charged with Economic Espionage Involving Theft of Trade Secrets from Leading U.S. Aviation Companies* (Oct. 10, 2018), <https://perma.cc/SNX8-GCRG> (quote by Benjamin C. Glassman, U.S. Attorney for the Southern District of Ohio).

²⁰⁹ 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.

²¹⁰ “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” *supra* note 20.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Demers, *supra* note 12, at 5.

²¹⁴ “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” *supra* note 20; see also Demers, *supra* note 12, 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.”).

together”²¹⁵ 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 specifically 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.”²¹⁶ 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.”²¹⁷

Although corporations have not become so multinational as to completely shed 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.”²¹⁸ Today, Lenovo is headquartered in Hong Kong with operational centers in North Carolina, Beijing, and Singapore.²¹⁹ Or Monsanto, a former American company at the center of a high-profile economic espionage case involving the PRC, that Bayer, a company based in Germany, purchased in 2016.²²⁰ Was it still “Western” and thus of heightened importance to U.S. national security? 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 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.”²²¹ The shift of Monsanto’s status from “ours” to “Germany’s” by virtue of corporate ownership did not change that

²¹⁵ FBI, CHINA: THE RISK TO CORPORATE AMERICA 8 (2019).

²¹⁶ Evanina, *supra* note 163, at 12 min.

²¹⁷ Wray, *supra* note 4.

²¹⁸ Lenovo, *Company History*, <https://perma.cc/NN6E-K8M2>.

²¹⁹ Lenovo, *Locations*, <https://www.lenovo.com/us/en/lenovo/locations/>.

²²⁰ See Greg Roumeliotis & Ludwig Burger, *Bayer to Buy Monsanto, Creating a Massive Seeds and Pesticides Company*, SCI. AM. (Sept. 14, 2016), <https://perma.cc/9ZQB-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.”)

²²¹ U.S. Dep’t of Justice, *supra* note 144. For a detailed, and gripping, account of this case, see generally HVISTENDAHL, *supra* note 190.

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.²²² And the U.S.-China Business Council’s membership criteria provides, “[f]oreign 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.”²²³ 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 enterprises. Less direct ties can also leave a company vulnerable to party-state influence. Curtis Milhaupt and Wentong Zheng 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.”²²⁴ The Council on Foreign Relations explains, “[t]he 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.”²²⁵ Tim Rühlig in his May 2020 paper titled, “Who Controls Huawei?” analyzes Huawei’s complex governance structure and cautions, “[i]t is likely that the Chinese party-state controls Huawei to such an extent that it could leverage technological dependencies to obtain political

²²² See AmCham China, <https://www.amchamchina.org/membership/1>.

²²³ See U.S.-China Business Council, Application for Membership, *available at* <https://www.uschina.org/about/join/application>.

²²⁴ Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L. J. 665, 670 (2015).

²²⁵ 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-chinas-controversial-tech-giant>; see also Christopher Balding & Donald Clarke, *Who Owns Huawei?*, <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-NE5M> (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”).

concessions.”²²⁶ The fine-grained analysis that Dr. Rühlig goes through to reach this point underscores the complicated relationships between companies and the PRC party-state.²²⁷

The U.S. government’s charges against Huawei may well eventually be proven beyond a reasonable doubt.²²⁸ But the framing is presented as a sweeping battle with “China” rather than a targeted prosecution against a specific company. A week before the February 2020 announcement of a superseding indictment against Huawei, Attorney General Barr warned, “[w]ithin the next five years, 5G global territory and application dominance will be determined. The question is whether . . . 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.”²²⁹ He added, “[a]s a dictatorship, China can marshal an all-nation approach—the government, its companies, its academia, acting together as one.”²³⁰

C. CHINESE ETHNICITY

In the 1880s, prosecutors charged Yick Wo, an immigrant from then Qing-Dynasty China, with violating a San Francisco ordinance when he continued to operate his laundromat after the city denied his permit.²³¹ The Supreme Court concluded that this was a selective prosecution aimed at a Chinese-owned business.²³² Justice Matthews

²²⁶ Tim Rühlig, *Who Controls Huawei? Implications for Europe*, UI Paper No. 5, May 2020, <https://perma.cc/27GJ-PSAP>.

²²⁷ 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.”).

²²⁸ 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-FJLK>. 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/CL2H-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.’”)

²²⁹ Barr, *supra* note 4.

²³⁰ *Id.*

²³¹ See *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886).

²³² See *id.* at 362 (“The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out

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.”²³³

Over a century later, the DOJ’s conception of a “China” threat encompasses nationality, as discussed in Part II.B, as well as people who are ethnically Chinese, whether or not they actually have any ties to the PRC (i.e., solely on racial/ethnic grounds).²³⁴ 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).”²³⁵

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, “[w]e are not focused on the Chinese people as a whole . . . we’re focused on those committing crimes and conducting intelligence activities for communist China.”²³⁶ William Evanina similarly stressed in February 2020, “[w]e 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.”²³⁷

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, DOJ press

of business all the numerous small laundries, especially those owned by Chinese”). The case is still taught today as an important example of a prosecution being struck down as impermissibly based on ethnicity/race. *See, e.g.*, MARC L. MILLER, ET AL., CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 182 (6th ed., 2019).

²³³ Yick Wo, 118 U.S. at 368.

²³⁴ 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>.

²³⁵ FBI, *supra* note 67, at 7.

²³⁶ Brown, *supra* note 120, at 48 min.

²³⁷ Evanina, *supra* note 163, at 17 min.

release explained how “Chinese actors” used hacking methods, and then in the next sentence referred to “two Chinese nationals.”²³⁸ In Mandarin Chinese, by contrast, the phrasing for Chinese ethnicity (*hua ren*) and PRC nationality (*zhonghua renmin 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”²³⁹ More recently, 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.”²⁴⁰

There are many people who are ethnically Han Chinese but have no ties to the PRC.²⁴¹ Associating “Han Chinese” with a threat

²³⁸ 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>.

²³⁹ Mara Hvistendahl, *The FBI’s China Obsession*, THE INTERCEPT (Feb. 2, 2020), <https://theintercept.com/2020/02/02/fbi-chinese-scientists-surveillance/>.

²⁴⁰ *Discrimination Suspect in Chinese-American Scientists’ Arrests*, NPR, Nov. 7, 2015, <https://perma.cc/23DW-WYJU>; see also *Chinese National Accused of Economic Espionage Scheduled for Arraignment Thursday*, LIEU.HOUSE.GOV (June 16, 2016), <https://perma.cc/2U3W-DWTR>. Viewing people who exhibit some type of China-ness with wariness is not confined to the Department of Justice. See, e.g., Dan Primack, *GOP Congressman Accuses California Pension Official of Working for China*, AXIOS (Feb. 26, 2020), <https://perma.cc/VHS2-GVQC>; John Gittelsohn, et al., *CalPERS’ Top Money Man is Targeted in Fears of Chinese Espionage*, LOS ANGELES TIMES (Feb. 25, 2020), <https://perma.cc/J56R-YJYW> (quoting Ben Meng: “I was associated with the [Thousand Talents Plan] through my employment with SAFE. Any connection to the program ended when I left. I am a proud American citizen.”).

²⁴¹ 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.”).

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.²⁴² 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"²⁴³ 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."²⁴⁴ The case also prompted self-reflection by the media with the *New York Times* largely standing behind its reporting but noting, among other points, "[w]e never prepared a full-scale profile of Dr. Lee, which might have humanized him and provided some balance."²⁴⁵

The case against Dr. Lee and the surrounding reporting was flawed. Yet there was truth that he had access to nuclear secrets and that he had contacts with foreign visitors, including from the PRC.²⁴⁶ This combination was reason to have him, and all other 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.²⁴⁷ His ethnicity 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,²⁴⁸ but their identity

²⁴² Indictment, *United States v. Lee*, 79 F. Supp. 2d 1280 (D.N.M. 1999) (No. 99-cr-01417).

²⁴³ WEN HO LEE WITH HELEN ZIA, *MY COUNTRY VERSUS ME* 2 (2001).

²⁴⁴ Jones Day, *Dr. Wen Ho Lee Obtains Landmark Settlement in Legal Battle with U.S. Government Arising from Press Leaks During Los Alamos Investigation* (June 2006), <https://perma.cc/LDN7-UNDD>.

²⁴⁵ James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets for Bombs*, U.S. Aides Say, N.Y. TIMES (Mar. 6, 1999), <https://perma.cc/BNJ8-DVPS>.

²⁴⁶ See, e.g., Matthew Purdy, *The Making of a Suspect: The Case of Wen Ho Lee*, N.Y. TIMES (Feb. 4, 2001), <https://www.nytimes.com/2001/02/04/us/the-making-of-a-suspect-the-case-of-wen-ho-lee.html> ("In 1994, Dr. Lee surprised laboratory officials when he appeared uninvited at a Los Alamos briefing for visiting Chinese scientists and warmly greeted China's leading bomb designer.").

²⁴⁷ Lee & Zia, *supra* note 243.

²⁴⁸ People: Fact Focus, *supra* note 241 (explaining "Taiwan may be described as a pre-dominantly Han Chinese society, with more than 95 percent of the population claiming Han ancestry").

is distinct—and increasingly so—from that of people in the PRC.²⁴⁹ Beyond Taiwan, there is an expansive ethnically-Han diaspora that reaches around the world and is, to varying degrees, distinct from—and sometimes even antagonistic to—the PRC.²⁵⁰

Nevertheless, the DOJ's rhetoric conflates ethnicity with the "China" of the "China Initiative." In a February 2020 interview, Andrew Lelling, U.S. Attorney for the District of Massachusetts, explained, "[t]he 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."²⁵¹ There is truth that the overwhelming 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."²⁵² 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 China Initiative, they have also fallen under increasing scrutiny for being "ineffective, inaccurate and perpetuat[ing] the well-documented bias in the criminal justice system against low-income people and people of color."²⁵³ The unearthing of a 2017 FBI memo on the rise of a "black identity extremist" movement generated criticism that the FBI was "reverting to the surveillance and sabotage of black activists that had defined its activities in the civil rights era."²⁵⁴ Equating ethnicity with an enhanced

²⁴⁹ Cf. Nathan Batto, *The State of (Out of Date) Public Opinion*, FROZEN GARLIC (Sept. 26, 2017), <https://perma.cc/WU4K-ZDFY>.

²⁵⁰ See Khan, *supra* note 241.

²⁵¹ Mervis, *supra* note 11.

²⁵² U.S. Dep't of Justice, *supra* note 195.

²⁵³ American Bar Ass'n., *The Good, Bad and Ugly of New Risk Assessment Tech in Criminal Justice* (Feb. 16, 2020), <https://perma.cc/PZ7Q-KR9Y>.

²⁵⁴ Alice Speri, *Fear of a Black Homeland*, THE INTERCEPT, Mar. 23, 2019, <https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/>.

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 defendants²⁵⁵ found that, “[f]rom 1997 to 2009, 17% of defendants charged under the [Economic Espionage Act] were of Chinese descent while an additional 9% were Other Asians. After 2009, the percentage of Chinese espionage defendants tripled to 52% while the rate for Other Asians remained at 9%.”²⁵⁶ However, “this Study cannot rule out the possibility that Chinese-American are simply committing three times as much espionage today as they did prior to 2009.”²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ In sum, the study is worrisome but inconclusive. Similarly, information released by the National Institutes of Health (NIH) in June 2020 showed that the PRC was the source of undisclosed support for 93% of the 189 scientists whom NIH had investigated, and 82% of those people investigated were Asian.²⁶⁰ Whether these numbers are proportionate to the actual number of scientists who have undisclosed financial support from the PRC party-state is, however, unknown.

Accordingly, this Article is not making an empirical claim that the

²⁵⁵ Andrew Chongseh Kim, *Prosecuting Chinese “Spies”: An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749, 781-84 (2018).

²⁵⁶ *Id.* at 753.

²⁵⁷ *Id.* at 754.

²⁵⁸ *Cf. id.* at 787–91.

²⁵⁹ *Cf. Barkow, supra* note 134, at 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)).

²⁶⁰ Jeffrey Mervis, *Fifty-Four Scientists Have Lost Their Jobs as a Result of NIH Probe into Foreign Ties*, SCIENCE, June 12, 2020, <https://www.sciencemag.org/news/2020/06/fifty-four-scientists-have-lost-their-jobs-result-nih-probe-foreign-ties>.

DOJ is actually investigating and/or prosecuting people of PRC nationality and/or Chinese ethnicity at a higher rate than people of other nationalities/ethnicities who are equivalently situated (e.g., researchers with similar access to intellectual property and similar indicators of potential legal violations). We simply do not have the data to prove or disprove such a claim.

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 exhibiting 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 some. 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."²⁶¹ 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."²⁶² 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

²⁶¹ 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/R5SZ-8HMX>.

²⁶² Asian Americans Advancing Justice, *Advancing Justice: AAJC and ACLU Seeks Records on Federal Investigation, Prosecutions, and Agency Action Against Scientists* (Mar. 18, 2020), <https://perma.cc/9RUF-Y2Y9>.

concerns of PRC-nationals and Chinese-American scientists.²⁶³

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.”²⁶⁴ Pointing to prosecutions of non-Asians is an insufficient response to this stigma.

Concerns about an overinclusive framing of a threat also expand beyond the government and 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.”²⁶⁵ 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.”²⁶⁶ Former presidential candidate

²⁶³ Society of Chinese Bioscientists in America, What to Do When Your University, FBI, or DOJ Knocks on Your Door: Responding to University, Criminal, and Civil, and Investigations, <https://register.gotowebinar.com/register/7110915936603617548>; see also Elizabeth Redden, *Letter: ‘Racial Profiling Harms Science’*, INSIDE HIGHER ED., Mar. 22, 2019, <https://perma.cc/AP4R-KMXS>.

²⁶⁴ 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.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.”).

²⁶⁵ Shirk, *supra* note 151.

²⁶⁶ Reis Thebault, Alex Horton, & Lateshia Beachum, *How to Prepare for Coronavirus in the U.S. (Spoiler: Not sick? No need to wear a mask.)*, WASH. POST (Feb. 28, 2020),

Andrew Yang wrote in April 2020 regarding increasing anti-Asian-American sentiments, “[w]e Asian Americans need to embrace and show our American-ness in ways we never have before.”²⁶⁷ While his prescription prompted vigorous debate,²⁶⁸ what is clear is that sensitivity as to how the China Initiative equates ethnicity with enhanced threat is needed now more than ever.²⁶⁹ Eric Dreiband, the Assistant Attorney General for Civil Rights, was spot on when he 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.”²⁷⁰

D. ACQUIRED CHINA-NESS

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

<https://perma.cc/YF4A-MDBD>; see also Mara Hvistendahl, *As Trump and Biden Trade Anti-China Ads, Hate Crimes Against Asian-Americans Spike*, THE INTERCEPT (May 11, 2020), <https://perma.cc/P6N5-V2ZT>. Anti-Defamation League, Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads (Apr. 17, 2020), <https://perma.cc/9A47-BAZS>.

²⁶⁷ Andrew Yang, *We Asian Americans Are Not the Virus, But We Can be Part of the Cure*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/opinions/2020/04/01/andrew-yang-coronavirus-discrimination/>.

²⁶⁸ Compare Canwen Xu, *Andrew Yang Was Wrong: Showing Our ‘Americanness’ is Not How Asian-Americans Stop Racism*, WASH. POST (Apr. 3, 2020), <https://www.washingtonpost.com/opinions/2020/04/03/andrew-yang-was-wrong-showing-our-american-ness-is-not-how-asian-americans-stop-racism/> with Melissa Chen, *In Defense of Andrew Yang*, SPECTATOR USA (Apr. 4, 2020), <https://spectator.us/andrew-yang-right-america-asians-racism-coronavirus/>.

²⁶⁹ Concerns prompted introduction of congressional resolutions “urg[ing] public officials to denounce” . . . “anti-Asian sentiment, racism, discrimination and religious intolerance related to COVID-19.” Anne Q. Hoy, *Science Societies Endorse Congressional Resolutions Denouncing Anti-Asian Racism*, AM. ASSOC. FOR THE ADVANCEMENT OF SCIENCE, Apr. 22, 2020, <https://www.aaas.org/news/science-societies-endorse-congressional-resolutions-denouncing-anti-asian-racism>.

²⁷⁰ Eric Dreiband, *How the Justice Department is Standing Up For Civil Rights Amid the Coronavirus Pandemic*, WASH. EXAMINER, Apr. 9, 2020, <https://www.washingtonexaminer.com/opinion/op-eds/how-the-justice-department-is-standing-up-for-civil-rights-amid-coronavirus-pandemic>.

American graduates of Yenching Academy in Beijing.²⁷¹ Though this questioning might have been for well-grounded reasons, Rebecca Arcesati pointed out that the limited information about the FBI's contacts with American students "may discourage young talents from participating in these academic exchanges and even jeopardize people's careers."²⁷² 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 releases for the espionage convictions of Kevin Patrick Mallory and Ron Rockwell Hansen included that they "speak[] fluent Mandarin Chinese"²⁷³ prompts the question why their linguistic abilities were noteworthy enough for the press releases.

Dragon-slayer and panda-hugger have long been tropes for differences among foreign experts on the PRC.²⁷⁴ At a time when "engagement" with the PRC is viewed with an increasingly skeptical eye,²⁷⁵ 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, who normalized relations with the PRC, "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-

²⁷¹ See Emily Feng, *American Graduates of China's Yenching Academy are Being Questioned by the FBI*, NPR (Aug. 1, 2019), <https://perma.cc/D9UE-LBDN> ("One of the agents asked if anyone in China had tried to recruit [Yale student Brian Kim] for espionage efforts.").

²⁷² Rosie Levine, *Why is the FBI Investigating Americans Who Study In China*, CHINAFILE (Sep. 13, 2019), <https://perma.cc/E7XM-2CJD>.

²⁷³ U.S. Dep't of Justice, *Former CIA Officer Sentenced to Prison for Espionage* (May 17, 2019), <https://perma.cc/B5ZQ-7VNM>.

²⁷⁴ Rob Gifford, *Panda-Huggers and Dragon-Slayers: How to View Modern China Today*, NAT'L COUNCIL FOR SOCIAL STUDIES (Jan./Feb. 2010), <https://perma.cc/DYL9-QVHB>.

²⁷⁵ See, e.g., Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, FOREIGN AFFAIRS (Mar./Apr. 2018), <https://www.foreignaffairs.com/articles/china/2018-02-13/china-reckoning> ("Neither carrots nor sticks have swayed China as predicted. Diplomatic and commercial engagement have not brought political and economic openness.").

communist and advocate of Taiwan.”²⁷⁶

The DOJ’s depictions of non-ethnically-Chinese, non-PRC-citizens further creates tropes of formerly law-abiding Americans being seduced by slick PRC operatives who appeal to greed.²⁷⁷ 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.²⁷⁸ “The Company Man” also dramatizes a non-Asian protagonist who is lured by money from PRC nationals.²⁷⁹ Depicting non-Asians 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 briefings for the business community and 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, “[a]ll three individuals charged today are manifestations of the China threat.”²⁸⁰ 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.”²⁸¹

Operating within a framework that is 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

²⁷⁶ David Ignatius, *Nixon’s Great Decision on China, 40 Years Later*, WASH. POST (Feb. 10, 2012), https://www.washingtonpost.com/opinions/nixons-great-decision-on-china-40-years-later/2012/02/10/gIQAtFh34Q_story.html.

²⁷⁷ FBI, *supra* note 66, at 8:05 (“Amanda was pretty and smart but we never went beyond being friends.”).

²⁷⁸ *Id.*

²⁷⁹ *The Company Man*, *supra* note 65.

²⁸⁰ FBI, *supra* note 139.

²⁸¹ Barr, *supra* note 4. *But see* Kaiser Kuo, *Three Common Misconceptions About China*, SUPCHINA, June 25, 2018, <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.”).

offense.”²⁸² Not only is an associational stigma attaching to persons exhibiting China-ness, this framing is in tension with fundamental principles undergirding why the DOJ should seek to prove criminal liability and recommend punishment.

IV. PUNISHING CHINA

With the China Initiative giving shape to a China threat that spans government, party, nationality, ethnicity, and even broader contacts, the question is then whether this 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.²⁸³ 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 punishment.²⁸⁴ 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.,

²⁸² U.S. Dep’t of Justice, Justice Manual, 9-27.220 (emphasis added).

²⁸³ 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).

²⁸⁴ *Cf.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968) (discussing the nature of punishment).

how might the China Initiative deter potential criminal conduct?). It argues that having prosecution and punishment rest in part on a connection with “China” is worrisome when assessed in light of the goals of deterrence (Part IV.A), incapacitation (Part IV.B), rehabilitation (Part IV.C), and retribution (Part IV.D).

Based on this assessment, 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[.]”²⁸⁵ including “[d]eter others (change cost-benefit calculation of leadership and thieves/hackers).”²⁸⁶ Deterrence is thus presented on two levels: the individual human level (the “thieves/hackers”) and the PRC party-state level (the “leadership”).

Deterrence is a central pillar of a utilitarian view of punishment.²⁸⁷ 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)²⁸⁸ or more broadly in society (i.e., general deterrence).²⁸⁹ 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.²⁹⁰

²⁸⁵ “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” *supra* note 20.

²⁸⁶ *Id.*

²⁸⁷ Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69 (2005) (“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.”); *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.”).

²⁸⁸ *See* Frase, *supra* note 287, at 70.

²⁸⁹ *Id.* at 71 (citing FRANK E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 72-73 (1973)).

²⁹⁰ *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 287, at 416 (“Empirically,

Research has shown that the probability of detection, prosecution, and punishment are factors in achieving deterrence, as compared with focusing solely on the severity of punishment.²⁹¹ That people regularly depart from being rational actors further complicates the equation.²⁹²

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 made false statements today does not seem necessary to stop future transgressions 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. It seeks to discourage possible offenders from committing crimes in the first place out of fear that they will face a similar end as defendants like Dr. Lieber.²⁹³ Such an example could deter someone who has already

deterrence claims are speculative.”); R. W. Burnham, *Review of “Deterrence. By Franklin E. Zimring & Gordon J. Hawkins”*, 16 BRITISH J. OF CRIMINOLOGY 403, 403(1976) (“For as long as I have been involved in the field, I have heard both professionals and laymen in criminal justice, practitioners and observers, offer assertive, indeed would-be definitive opinions on the value, presence, absence or whatever of deterrence, and have felt uneasy about it.”).

²⁹¹ See, e.g., BARKOW, *supra* note 134, at 43 (“[C]ertainty of punishment matters more than severity for deterrence.”); Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) (“[O]ur findings suggest that both the certainty and severity of punishment are deterrents . . .”).

²⁹² 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.”).

²⁹³ Ellen Barry, *U.S. Accuses Harvard Scientist of Concealing Chinese Funding*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/us/charles-lieber->

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 and that, “[w]hile association with a Talent Program is not illegal, it can create incentives to steal, violate export controls, or cause a failure to disclose conflicts of interest/foreign funding.”²⁹⁴

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 blatantly nefarious like stealing a competitor’s robot technology. The DOJ’s “Justice Manual,” which contains essential guidance for prosecutors, includes as a reason *not* to commence prosecution that “there exists an adequate non-criminal alternative to prosecution.”²⁹⁵ Casting a wide net of criminal charges chafes against this constraint. If increased auditing and transparency requirements could achieve the same or similar deterrence of misbehavior, then perhaps a harsh response using criminal laws is overkill.

The DOJ has taken the stance that criminal prosecutions play a beneficial role. For example, Andrew Lelling said in February 2020 of letters from the NIH to grantee institutions with questionable contacts in the PRC, “I think those letters have had an *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.”²⁹⁶ 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.²⁹⁷ As Oliver Wendell Holmes, Jr. stated in 1881, “[p]revention would . . . seem to be the chief and only universal purposes of punishment.”²⁹⁸

What deserves greater scrutiny is whether the China Initiative is creating overdeterrence. Also in February 2020, Andrew Lelling

harvard.html (Dr. Lieber could receive up to five years in prison if convicted of making a false or misleading statement regarding his involvement in the Thousand Talents Plan.); U.S. Dep’t of Justice, *supra* note 91.

²⁹⁴ “The Department of Justice Responds to Economic Aggression and Other National Security Threats from the Chinese Government,” *supra* note 20.

²⁹⁵ See U.S. Dep’t of Justice, Justice Manual, 9-27.220.

²⁹⁶ Mervis, *supra* note 11.

²⁹⁷ Cf. Demers, *supra* note 12, at 7 (“Broadly speaking, the China Initiative aims to raise awareness of the threats we face . . .”).

²⁹⁸ OLIVER WENDELL HOLMES, JR. THE COMMON LAW 46 (Little Brown 1991).

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.²⁹⁹ When asked if this approach would have a chilling effect on collaboration with Chinese entities, he responded, “Yes, it will.”³⁰⁰ 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.”³⁰¹

An appraisal of the pros and cons of this chilling effect would benefit from eyes beyond the DOJ. At present, the China Initiative outreach appears centered on entities that could become victims of, or accomplices to, crimes. Efforts to quantify the benefits of connectivity between the United States and PRC—including the flow of people, information, and money—are needed to better calibrate when deterrence could place the United States in a worse competitive position vis-à-vis the PRC. As an example of how outside expertise could be valuable in this process, in June 2020, MacroPolo launched a “Global AI Talent Tracker,” with a key takeaway that “China is the largest source of top-tier AI researchers, but a majority of these Chinese researchers leave China to study, work, and live in the United States.”³⁰² In July 2020, Attorney General Barr warned of the PRC’s advances in AI, adding “[w]hichever nation emerges as the global leader in AI will be best positioned to unlock not only its considerable economic potential, but a range of military applications, such as the use of computer vision to gather intelligence.”³⁰³ Yet an overzealous China Initiative could actually impede the United States’ prospects for emerging as this global leader.

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, even close coordination between the DOJ and independent criminologists is

²⁹⁹ Lelling, *supra* note 102, at 1 hour, 22 min.

³⁰⁰ *Id.* Cf. Dreyfuss & Lobel, *supra* note 50, at 460 (“The [Economic Espionage Act] could, in short, make American universities unattractive to students, post docs, visiting faculty, and other potential foreign collaborators.”).

³⁰¹ Swan, *supra* note 103.

³⁰² Ishan Banerjee & Matt Sheehan, *America’s Got AI Talent: US’ Big Lead in AI Research Is Built on Importing Researchers*, MacroPolo, June 9, 2020, <https://macropolo.org/americas-got-ai-talent-us-big-lead-in-ai-research-is-built-on-importing-researchers/>.

³⁰³ See Barr, *supra* note 165.

unlikely to yield an agreed upon sweet-spot whereby crimes are deterred while productive collaboration continues. It is no easy feat to stop hackers from grabbing COVID-19 research—as announced in a July 2020 indictment³⁰⁴—while also encouraging cross-border scientific partnerships to find a vaccine. But working with criminologists could shine at least some light on the ways in which the initiative 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.³⁰⁵

Avoiding altogether the expansive China threat as currently depicted by the DOJ requires that researchers steer clear of an array of people and entities with some connection to the PRC. 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.³⁰⁶ 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 more likely to house sensitive technologies.

A related issue that has not been adequately explored is that the China Initiative might not only deter productive exchanges that would benefit U.S. innovation but perhaps encourage the very problem that the China Initiative was created to address. The utilitarian goal of

³⁰⁴ Press Release, Dep’t of Justice, Two Chinese Hackers Working with the Ministry of State Security Charged with Global Computer Intrusion Campaign Targeting Intellectual Property and Confidential Business Information, Including COVID-19 Research (July 21, 2020), <https://www.justice.gov/opa/pr/two-chinese-hackers-working-ministry-state-security-charged-global-computer-intrusion#:~:text=A%20federal%20grand%20jury%20in,non%2Dgovernmental%20organizations%2C%20and%20individual>.

³⁰⁵ Cf. Andrew Silver, *Scientists in China say US Government Crackdown is Harming Collaborations*, Nature, July 8, 2020, <https://www.nature.com/articles/d41586-020-02015-y> (“Researchers in both countries say that US policies . . . are also having a chilling effect on bilateral research partnerships.”).

³⁰⁶ Cf. Julian G. Ku, *The U.S. Recently Erected a New Hurdle to U.S.-China Academic Cooperation. Here’s What It Might Mean*, CHINAFILE (Aug. 8, 2019), <https://perma.cc/9J2P-SQ8R>; see also Federal Register, *Revisions to the Unverified List (UVL)*, <https://perma.cc/SLQ8-3TLC>.

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.”³⁰⁷ 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.³⁰⁸ But does the China Initiative make it easier for the PRC party-state to tap into nationalism?³⁰⁹

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 or other close ties to the PRC.³¹⁰ On the one hand, the potential for using family as leverage is real.³¹¹ It is a high bar for a defendant in federal court to prevail on a duress defense,³¹² though reported retaliation against family within the PRC of dissidents abroad raises concerns about how the PRC

³⁰⁷ Frase, *supra* note 287, 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)).

³⁰⁸ FBI, *supra* note 67, at 7.

³⁰⁹ For a thoughtful discussion of nationalism in the PRC see Ian Johnson, *China, Where State Pomp Comes With Real Feeling*, N.Y. 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.”).

³¹⁰ See, e.g., Press Release, Human Rights Watch, *Resisting Chinese Government Efforts to Undermine Academic Freedom Abroad* (Mar. 21, 2019), <https://perma.cc/V287-LPNW> (“Academics told Human Rights Watch that students from China have described threats to their families in China in response to what those students had said in the classroom.”).

³¹¹ 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/PVR3-QQUS>; 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-6XFG>.

³¹² 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”).

party-state might exploit vulnerabilities.³¹³ 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. An example from the Defense Office of Hearings and Appeals (DOHA) is instructive even if not directly relevant to the DOJ. Based on an analysis of over 26,000 security clearance decisions by DOHA from 1996 through October 2019, Bloomberg reported, “[t]he 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.”³¹⁴ As the writer and physicist Yangyang Cheng has observed, “With their ethnicity appropriated by both governments, Chinese people in the U.S. are double-victimized, by an overreaching ancestral homeland on one side of the Pacific and a paranoid Washington establishment on the other.”³¹⁵

Lumping people together because of a perceived shared Chineseness 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.³¹⁶ It also requires time and resources to make more fine-grained, individualized determinations rather than using proxies like ethnicity and nationality to estimate risks.

In light of the multiple layers of influences on human behavior,

³¹³ Cf. William Yang, *How China Intimidates Uighurs Abroad by Threatening Their Families*, DW (Nov. 7, 2019), <https://www.dw.com/en/how-china-intimidates-uighurs-abroad-by-threatening-their-families/a-49554977>.

³¹⁴ Peter Waldman, *Mistrust and the Hunt for Spies Among Chinese Americans*, BLOOMBERG (Dec. 10, 2019), <https://perma.cc/LL5M-KTAD>.

³¹⁵ Yangyang Cheng, *Field of Dreams*, SUPCHINA, May 27, 2020, <https://supchina.com/2020/05/27/field-of-dreams/>.

³¹⁶ See, e.g., Kurt Hugenberg, et. al, *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”).

the DOJ should seek to thread the needle of sensitizing academia and the private sector to 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. To date, instead of trying to excise actors engaged in criminal conduct with a scalpel, the 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, “[w]e call this the wheel of doom.”³¹⁷ This rhetoric coupled with an emphasis on criminal prosecutions as a method for sending broad warnings means that the safe route is for researchers to avoid projects with links to the PRC. It also means that scientists who themselves possess 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.³¹⁸ Furthermore, 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.³¹⁹

As noted above,³²⁰ 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.”³²¹ Such statements do not remedy the problem. Vastly ramping up the scope and scale of

³¹⁷ Evanina, *supra* note 163, at 15 min.

³¹⁸ 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”).

³¹⁹ Cf. Waldman, *supra* note 314 (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%.”).

³²⁰ See, e.g., Evanina, *supra* note 163, at 18 min

³²¹ FBI, *supra* note 139.

investigations under the China Initiative speaks louder than words. Moreover, rote interjections denying that people who possess Chineseness are under enhanced scrutiny act as microinvalidations.³²² 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, “[w]e’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.”³²³

Deterrence theory in the different context of international relations has a long history. Michael J. Mazarr at the Rand Corporation wrote in 2018, “[t]he challenge of deterrence—discouraging states from taking unwanted actions, especially military aggression—has again become a principal theme in U.S. defense policy.”³²⁴ In describing how various executive-branch agencies are part of the “whole-of-government push back against China,”³²⁵ Satoru Mori notes how the U.S. government’s current approach toward the PRC is

³²² Kevin C. Nadal, CUNY, A Guide to Responding to Microaggressions, <https://perma.cc/VM2S-VZV8> (“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 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.”); 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.”).

³²³ Wray, *supra* note 4.

³²⁴ Michael J. Mazarr, Understanding Deterrence 1, <https://perma.cc/4XMB-WMW7>.

³²⁵ Satoru Mori, *US Technological Competition with China: The Military, Industrial and Digital Network Dimensions*, 26 ASIA-PAC. REV. 77, 78 (2019).

“based on the notion that inducements cannot bring about positive change in Chinese behavior and policy.”³²⁶ 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, scrutinizing individual criminal liability is fundamentally different from 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. There are, however, intimations that the PRC is revising its own Criminal Law with the China Initiative in mind: proposed amendments announced in July 2020 include the possibility of five or more years’ imprisonment if a person steals, spies, buys, or illegally provides commercial secrets to overseas institutions, organizations, or personnel.³²⁷ Mark Cohen at China IPR blog points out differences between this provision and “economic espionage” under US law but explains how commentators have suggested the amendment is “a ‘tit for tat’ provision in retaliation for US economic espionage cases.”³²⁸ Ironically, the United States had previously pushed the PRC to increase criminal penalties for intellectual property infringements, as seen in a 2007 WTO complaint against the PRC.³²⁹

If the argument is that 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,³³⁰ then the DOJ should

³²⁶ *Id.* at 79.

³²⁷ See 修改妨害传染病防治罪、高空抛物入刑、严惩金融乱象：七大看点解析刑法修正案（十一）草案，XINHUA.NET, June 28, 2020, (“为境外的机构、组织、人员窃取、刺探、收买、非法提供商业秘密的”), http://www.xinhuanet.com/legal/2020-06/28/c_1126169191.htm.

³²⁸ Mark Cohen, *Proposed Amendments to the Criminal Code on Trade Secrets*, China IPR, July 13, 2020, <https://chinaipr.com/2020/07/13/proposed-amendments-to-the-criminal-code-on-trade-secrets/>.

³²⁹ See generally Donald P. Harris, *The Honeymoon is Over: Evaluating the U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM J. INT’L L. 96 (2008) (evaluating U.S. complaint alleging the PRC violated its obligations under TRIPS to provide adequate protection for and deterrence against infringing intellectual property rights).

³³⁰ See *supra* note 323 and accompanying text.

substantiate how that chain of influence is indeed happening. In his July 2020 speech on U.S. policy toward China, Secretary of State Pompeo went so far as to state, “Maybe it’s time for a new grouping of like-minded nations, a new alliance of democracies.”³³¹ How and whether this grouping would change the PRC leadership’s behavior is yet to be clearly articulated let alone seen.

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.³³²

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.” John Demers reported in December 2018 that, “[f]rom 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.”³³³ To what extent is this percentage increasing now that resources are explicitly directed at a China threat?³³⁴ And to what extent are foreign governments other than the PRC aware that they are *not* the focus of the DOJ’s efforts?³³⁵ In short, is there underdeterrence of actors who do not have a nexus to the PRC? That in July 2020 Attorney General Barr provided the following, slightly-different numbers without any

³³¹ Pompeo, *supra* note 7.

³³² Elliot Hannon, *Leaked Audio Captures Bloomberg Defending Racial Profiling and Stop-and-Frisk Policing*, SLATE (Feb. 11, 2020, 10:13 AM), <https://perma.cc/QPT9-RDY4>.

³³³ Demers, *supra* note 12, at 5.

³³⁴ Cf. National Counterintelligence and Security Center, *2018 Foreign Economic Espionage in CyberSpace* (Jul 26, 2018), <https://perma.cc/9F63-U2MK> (“The report also provides insights into the most pervasive nation-state threat actors – including China, Russia and Iran”); Dreyfuss & Lobel, *supra* note 50, at 422-23 (noting USTR watch list of countries included China, India, and Thailand).

³³⁵ 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”).

mention of the time period covered underscores the need for greater clarity: “About 80% of all federal economic espionage prosecutions have alleged conduct that would benefit the Chinese state, and about 60% of all trade secret theft cases have had a nexus to China.”³³⁶

To be sure, the DOJ can walk and chew gum at the same time. The China Initiative does not mean that DOJ 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/hacker,”³³⁷ but also that the downsides (e.g., potential overdeterrence of contacts with the PRC and underdeterrence of criminal activity without a nexus to the PRC) do not outweigh the upsides.

B. INCAPACITATION

A second pillar of utilitarian justifications for punishment is incapacitation.³³⁸ This logic is simple enough on an individual level: lock a person behind bars and he cannot, or at least it will be very difficult to, commit crimes outside of those bars. The benefits to society from increasing incarceration levels is, however, contested.³³⁹ Various degrees of incapacitation can also be achieved through restrictions on a person’s activities via electronic or other monitoring.³⁴⁰

For the intellectual property thefts at the heart of the China

³³⁶ See Barr, *supra* note 165.

³³⁷ Dreyfuss & Lobel, *supra* note 50, at 422-23.

³³⁸ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17 (8th ed. 2018) (“Quite simply, [the defendant’s] imprisonment prevents him from committing crimes in the outside society during the period of segregation.”).

³³⁹ See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 14 (1995) (analyzing the justifications for incapacitation and explaining its appeal as partly that “restraint from future crime operates as a concrete justification for imprisonment”); Shawn D. Bushway, *Evaluating Realignment: What Do We Learn About the Impact of Incarceration on Crime?*, 15 CRIMINOLOGY & PUB. POL’Y 309, 313 (2016) (in analyzing data on the impact of California’s reduction of its prison population, disagreeing that studies showed “that incapacitation as a strategy is fundamentally flawed”).

³⁴⁰ 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.”).

Initiative, exposure is often tantamount to incapacitation.³⁴¹ 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.³⁴² Once his activities to obtain corn-seed technology were 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.³⁴³ He will thus be incapacitated from physical activities within the United States. Aside from any valuable information that he has stored in his brain, he will not be of use to actors in the PRC who might want to engage in intellectual-property theft in the future.

Similarly, incapacitation 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. For example, the U.S. government can place certain PRC universities and individuals on the “Denied Person List” or “Entity List,” which would drastically curtail and even entirely cut off interactions.³⁴⁴

Discussions regarding “decoupling” various facets of the U.S.-PRC relationship also move toward incapacitation.³⁴⁵ 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 Foreign Investment in the United States, CFIUS] to address national

³⁴¹ 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.

³⁴² U.S. Dep’t of Justice, *supra* note 146.

³⁴³ HVISTENDAHL, *supra* note 190.

³⁴⁴ Ku, *supra* note 306.

³⁴⁵ Lindsey Ford, *Refocusing the China Debate: American Allies and the Question of U.S.-China “Decoupling,”* BROOKINGS (Feb. 7, 2020), <https://perma.cc/UF8C-L3WF>.

security concerns more effectively”³⁴⁶ While it cannot enact laws or investment regulations, the DOJ can play a critical role in supporting efforts to limit activities with PRC-linked entities. The China Initiative Fact Sheet includes implementing FIRRMA as a component,³⁴⁷ 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, the need to “broaden our approach,” and recognizing that “[c]riminal prosecution alone is not enough to remediate the harm caused by theft or to deter future thieves.”³⁴⁸

Just as with overdeterrence, the current discussions surrounding the China Initiative would benefit from wrestling 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, “[i]t 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.”³⁴⁹

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, “[t]here is a national security risk if we do decouple with China and lose visibility into the way they are thinking about these issues.”³⁵⁰ In the realm of legal issues, the U.S.-China Legal Experts Dialogue was last held in 2015,³⁵¹ and the Trump administration’s intended annual U.S.-China Law Enforcement and Cybersecurity Dialogue was held only once in 2017.³⁵² These dialogues

³⁴⁶ U.S. Dep’t of Treasury, *The Committee on Foreign Investment in the United States (CFIUS)*, <https://perma.cc/QH72-96HW>.

³⁴⁷ CHINA INITIATIVE FACT SHEET, *supra* note 1.

³⁴⁸ U.S. Dep’t of Justice, *supra* note 195.

³⁴⁹ Thilo Hanemann & Daniel H. Rosen, *Chinese Investment in the United States: Recent Trends and the Policy Agenda*, RHODIUM GROUP (Dec. 9, 2016), <https://perma.cc/5ZMQ-3WVM>.

³⁵⁰ Tim Starks, DOJ TALKS BREACHES, CYBER COMMAND TALKS SIZE, POLITICO (Mar. 5, 2020, 10:00 AM), <https://perma.cc/AQY4-4FBJ>.

³⁵¹ See U.S. Dep’t of State, *The 7th U.S.-China Legal Experts Dialogue* (Oct. 14, 2015), <https://2009-2017.state.gov/r/pa/prs/ps/2015/10/248211.htm>.

³⁵² U.S. Dep’t of Justice, First U.S.-China Law Enforcement and Cybersecurity Dialogue (Oct. 6, 2017), <https://perma.cc/87FG-T3JU>; Shannon Tiezzi, *Another U.S.-China Dialogue Bites the Dust*, DIPLOMAT (Oct. 2, 2018), <https://thediplomat.com/2018/10/another-us-china-dialogue-bites-the-dust/>.

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. In contrast, when walls are built, 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.³⁵³ Academics and policymakers have long debated the efficacy of rehabilitative efforts.³⁵⁴ 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”³⁵⁵ 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.”³⁵⁶ Nor are there 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.”³⁵⁷ 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”³⁵⁸ That the China Initiative might inspire China to

³⁵³ MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 234 (1984) (though critiquing the latter aspect as “paternalistic in character”).

³⁵⁴ See, e.g., Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 315 (2007).

³⁵⁵ U.S. Dep't of Justice, *Prison Reform: Reducing Recidivism By Strengthening the Federal Bureau of Prisons*, <https://www.justice.gov/archives/prison-reform>.

³⁵⁶ *Id.*

³⁵⁷ CHINA INITIATIVE FACT SHEET, *supra* note 1 (emphasis added). See also Demers, *supra* note 12, at 2 (“China is instead pursuing its goals through malign behaviors that exploit features of . . . an open society like ours.”).

³⁵⁸ Demers, *supra* note 12, at 8.

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.³⁵⁹ The U.S.-PRC relationship is likely going to be contentious in the near future even with the most adept handling in Washington DC. The Trump administration's increasingly hard line toward the PRC, as seen in the sudden closure of a PRC consulate,³⁶⁰ brings into question whether the stated cooperative aims of the China Initiative still hold at all.

Despite the current dark times for U.S-PRC relations, 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. This does not mean that the U.S. government should be soft on the PRC leadership. It does mean that the U.S. government should compete in a vigorous and principled manner. It is far easier to label something a threat than to remove existing stigma. Describing the China Initiative as a response to a "long-term existential threat"³⁶¹ 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,³⁶² which was followed by the 2015 "1 Million Strong" initiative that aimed "to grow the next generation of leaders who have

³⁵⁹ 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 . . .").

³⁶⁰ See U.S. Gov't, Briefing With Senior U.S. Government Officials on the Closure of the Chinese Consulate in Houston, Texas (July 24, 2020), <https://www.state.gov/briefing-with-senior-u-s-government-officials-on-the-closure-of-the-chinese-consulate-in-houston-texas/>.

³⁶¹ Tucker, *supra* note 35 (quoting William Evanina, then nominee to be director of the National Counterintelligence and Security).

³⁶² U.S. Dep't of State, *100,000 Strong Educational Exchange Initiatives*, <https://2009-2017.state.gov/100k//index.htm> (last visited Feb. 24, 2020).

a deeper understanding of China by creating a pipeline of China-savvy employees in a range of critical industries”³⁶³ Yet a downturn in foreign language and regional studies learning that was already apparent during the Obama years is continuing under President Trump.³⁶⁴ Furthermore, in January 2020, the Peace Corps announced plans to end its China program.³⁶⁵ This was followed by an announcement in July 2020 that the U.S. government would end the Fulbright exchange program with both mainland China and Hong Kong.³⁶⁶ The decreased emphasis on studying the PRC and the Chinese language is particularly troubling when coupled with concerns of acquired China-ness. 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.³⁶⁷

D. RETRIBUTION

Deterrence, incapacitation, and rehabilitation all aim to bring about beneficial consequences for society.³⁶⁸ The China Initiative is problematic when assessed in terms of whether the United States ultimately comes out ahead by using that framing. Retribution turns

³⁶³ *1 Million Strong*, US CHINA STRONG, <https://100kstrong.org/initiatives/1-million-strong/>.

³⁶⁴ 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 in Knowledge Infrastructure to Address Global Challenges*, THE HILL (Jan. 29, 2020, 6:30 PM), <https://thehill.com/opinion/international/480576-america-must-invest-in-knowledge-infrastructure-to-address-global>.

³⁶⁵ See *Peace Corps to End China Program*, NPR (Jan. 24, 2020, 4:19 PM), <https://www.npr.org/2020/01/24/799358578/peace-corps-to-end-china-program>.

³⁶⁶ The President’s Executive Order on Hong Kong Normalization, July 14, 2020, <https://www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/>.

³⁶⁷ Levine, *supra* note 272.

³⁶⁸ See Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–87 (Joshua Dressler, ed., 2d ed. 2002).

our perspective backward and rests the justification for punishment on whether the offender deserves it.³⁶⁹

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 traditional or economic espionage. 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 seriousness of the harm caused or threatened by the crime and the offender’s degree of culpability in committing the crime.”³⁷⁰

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.³⁷¹ 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.”³⁷² 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,³⁷³ or that the defendants are seen as more

³⁶⁹ 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.”).

³⁷⁰ Frase, *supra* note 287, at 73 (citing ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 29–33 (1933)); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 590 (2005).

³⁷¹ U.S. Sentencing Commission, Amendment 771, <https://www.ussc.gov/guidelines/amendment/771>.

³⁷² Kim, *supra* note 255, at 793.

³⁷³ See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (explaining how implicit bias works).

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 what is morally justified.³⁷⁴ In other words, retribution could "tame the utility monster"³⁷⁵ of using defendants in the China Initiative as vehicles to warn the public of the consequences should they engage in similar conduct.³⁷⁶ However, if 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."³⁷⁷ More generally, the U.S. government is seen as "punishing" China as part of the trade dispute.³⁷⁸ 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,³⁷⁹ but the subjects of criminal punishment are individuals. The more that the bad acts of the PRC party-state are

³⁷⁴ 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.").

³⁷⁵ Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 7-8 (2003) ("The Packer-Morris position sought to tame the utility monster . . .").

³⁷⁶ For an example of how retribution can be used as a constraint on punishment, see Brian Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. (forthcoming 2020).

³⁷⁷ Barr, *supra* note 4.

³⁷⁸ See, e.g., Alan Rappeport & Ana Swanson, *Peter Navarro, Trump's Trade Warrior, Has Not Made His Peace With China*, N.Y. TIMES (Dec. 26, 2019), <https://www.nytimes.com/2019/12/26/us/politics/peter-navarro-china-trade.html> ("Mr. Navarro is still looking for ways to punish China").

³⁷⁹ At the time of writing, the Trump Administration's rhetoric was heating up regarding retaliation for China's handling of the coronavirus. See, e.g., Jeff Mason, et al., *Trump Threatens New Tariffs on China in Retaliation for the Coronavirus*, REUTERS (Apr. 30, 2020), <https://perma.cc/S8JY-3CF9>; Joseph A. Wulfsohn, *John Bolton declares China 'responsible' for coronavirus outbreak, says world must hold them 'accountable'*, FOX NEWS (Mar. 21, 2020), <https://perma.cc/K5LJ-Q7Z7>.

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.

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 Michael Spavor had been detained in the PRC for over 600 days.³⁸⁰ 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.³⁸¹ 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.³⁸²

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.”³⁸³ It notes that, “[l]ike 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.”³⁸⁴

³⁸⁰ Nathan Vanderklippe, *Michael Kovrig and Michael Spavor Mark 600 Days in Detention in China*, GLOBE AND MAIL (July 31, 2020), <https://www.theglobeandmail.com/world/article-600-days-in-detention-a-sobering-milestone-for-michael-kovrig/>.

³⁸¹ Chun Han Wong, John Lyons & Josh Chin, *‘No Coincidence’: China’s Detention of Canadian Seen as Retaliation for Huawei Arrest*, WALL ST. J. (Dec. 12, 2018, 11:49 PM), <https://perma.cc/PT56-RWCF>.

³⁸² Zarit, *supra* note 178, at 2 hour, 28 min (on how the retribution against companies “is real”).

³⁸³ JASON, *supra* note 196, at 3.

³⁸⁴ *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

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 the sunlight of external appraisals.³⁸⁵ An initiative by another name might smell as unsweet.³⁸⁶ Prosecutors have tremendous discretion that is often shielded from outside scrutiny,³⁸⁷ and removing the “China” label does not guarantee a change in how the DOJ views persons possessing China-ness. Yet names do matter.³⁸⁸ In the different context of why using the language of human rights matters, Philip Alston explained, “human 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.”³⁸⁹

At issue with the China Initiative is not the absence of language 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 combatting criminal threats. The broad conception of “China” cannot be ameliorated by statements that the real concern is the Chinese government and/or Chinese Communist Party coupled with assurances that the United States still

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>.

³⁸⁵ *Cf. supra* note 239 and accompanying text.

³⁸⁶ *Cf.* William Shakespeare, *Romeo and Juliet*, Act II, Scene II.

³⁸⁷ *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).

³⁸⁸ *Cf.* Jelena Djordjevic, “A Rose by Any Other Name: Would it Smell as Sweet?” (J. NEUROPHYSIOL. 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).

³⁸⁹ Philip Alston, Keynote Address at the Nordic Trust Fund for Human Rights and Development Annual Workshop: Rethinking the World Bank’s Approach to Human Rights (Oct. 15, 2014), <https://perma.cc/4GJ9-KC62>.

welcomes people with ties to the PRC.³⁹⁰

Admittedly, 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.³⁹¹ 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. U.S. Attorney Andrew Lelling, for instance, has recognized that the DOJ needs to learn more about how the science works: “The investigators involved have to build their own expertise in the underlying activity. And I think you see that here.”³⁹² In September 2019, dozens of leading organizations representing the scientific community wrote to the U.S. government welcoming greater collaboration and 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.”³⁹³ Kevin Droegemeier, Director of the White House Office of Science and Technology Policy (OSTP), responded promptly and positively by outlining work underway to coordinate work across agencies under the umbrella of the Joint Committee on the Research Environment (JCORE).³⁹⁴ Director Droegemeier also spoke at the October 2019 FBI Academia Summit.³⁹⁵

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

³⁹⁰ Cf. *supra* Christopher Wray, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States*, July 7, 2020, <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-state>.

³⁹¹ 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>.

³⁹² See Widener, *supra* note 177.

³⁹³ Position Statement: Multisociety Letter on Foreign Influence, Sept. 4, 2019, *available at* <https://perma.cc/ZC3S-TDQL>.

³⁹⁴ See Letter to the United States Research Community (from Kevin Droegemeier), Sept. 19, 2019, *available at* <https://perma.cc/7U9K-FNHG>; *see also* OFFICE OF THE PRESIDENT, SUMMARY OF THE 2019 WHITE HOUSE SUMMIT OF THE JOINT COMMITTEE ON THE RESEARCH ENVIRONMENT (JCORE), Nov. 2019, <https://perma.cc/H36F-E6P4>.

³⁹⁵ See Office of Private Sector, *supra* note 124.

promoting the openness that has been and will continue to be critical to our success.”³⁹⁶ This testimony followed remarks in January 2020 on the “systemic threat” from the PRC government: “We live in a world very different today than we did even 10 years ago, so we want to have the proper amount of vigilance and oversight.”³⁹⁷ Whether Director Droegemeier and JCORE more generally can cement a role in balancing concerns of law enforcement and scientific/academic communities is uncertain, but nascent collaboration suggests a path to decrease reliance on deterrence through the criminal law.

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,³⁹⁸ 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:³⁹⁹ “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

³⁹⁶ 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.”)

³⁹⁷ Rick Sobey, *Trump’s Science Adviser: Boston Lab Theft Case Part of ‘Systemic Threat’ From China*, BOSTON HERALD (Jan. 14, 2020), <https://perma.cc/F9HU-47LV>.

³⁹⁸ Coleman, *supra* note 31, at 3 hour, 52 min (“The Chinese language is extraordinarily important.”).

³⁹⁹ *See, e.g.*, Brown, *supra* note 181 (“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 124, 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.”).

can work to protect ourselves and our assets from them.”⁴⁰⁰

The DOJ is stressing the need for the private sector to work with law enforcement when intellectual property has been compromised.⁴⁰¹ And academia is becoming more sensitized of the need to assess and adjust their policies and procedures regarding reporting of foreign contacts.⁴⁰² But for true collaboration, the DOJ needs to shift from messaging what it views as the threats to more substantive, bi-directional collaboration with non-governmental experts.⁴⁰³ 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

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.⁴⁰⁴ This is problematic because it stigmatizes natural and legal persons who are seen as possessing a

⁴⁰⁰ Demers, *supra* note 12, at 9.

⁴⁰¹ 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.”).

⁴⁰² See, e.g., Coleman, *supra* note 31, 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 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.”).

⁴⁰³ See Lewis, *supra* note 32 (arguing for enhanced collaboration with multiple communities to avoid the U.S. government’s response to a “China threat” from creating self-inflicted wounds on values); cf. Permanent Subcommittee on Investigations, *supra* note 107, 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.”).

⁴⁰⁴ Congress has, however, written “foreign” into certain criminal statutes. Yet it is difficult to discern what is foreign and it is questionable whether a foreign link increases the threat of harm or the actor’s blameworthiness. See Margaret K. Lewis, *When Foreign is Criminal*, 55 VA. J. INT’L L. 625 (2015).

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 convicted individuals to be punished. The overwhelming emphasis on national security is impeding the ability to engage in a clear-eyed assessment of the costs that come with the China Initiative. The Initiative has been gaining speed, but 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, my diploma is the paper I am least likely to lose.”⁴⁰⁵ 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.

⁴⁰⁵ Yangyang Cheng, *Faulty Lines in Humanity*, SUPCHINA, Feb. 26, 2020, <https://supchina.com/2020/02/26/fault-lines-in-humanity/>.