

PROSECUTING CHINESE “SPIES”: AN EMPIRICAL ANALYSIS OF THE ECONOMIC ESPIONAGE ACT

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“[A]lmost every student that comes over to this country [from China] is a spy.”

—President Donald Trump, August 7, 2018¹

“[We see China] us[ing] . . . professors, scientists, students [to steal intelligence] in almost every field office that the FBI has around the country. It’s not just in major cities. It’s in small ones as well. It’s across basically every discipline. . . . They’re exploiting the very open research and development environment that we have [in our universities], . . . they’re taking advantage of [this].”

—FBI Director Christopher A. Wray, February 13, 2018²

“We cannot tolerate another case of Asian-Americans being wrongfully suspected of espionage. . . . The profiling must end.”

—Representative Judy Chu, April 26, 2016³

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¹ Annie Karni, *Trump Rants Behind Closed Doors with CEOs*, POLITICO (Aug. 8, 2018, 9:36 AM), <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609> [<https://perma.cc/UA2R-EAQH>]; Bess Levin, *Trump Uses Dinner with C.E.O.s to Claim Chinese Students Are “Spies”*, VANITY FAIR (Aug. 8, 2018, 6:11 PM), <https://www.vanityfair.com/news/2018/08/donald-trump-china-spies> [<https://perma.cc/6PQX-7FJ8>].

² *Open Hearing on Worldwide Threats: Before the S. Select Comm. on Intelligence*, 115th Cong. (2018) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation); see also Betsy Woodruff & Julia Arciga, *FBI Director’s Shock Claim: Chinese Students Are a Potential Threat*, DAILY BEAST (Feb. 13, 2018, 7:02PM), <https://www.thedailybeast.com/fbi-directors-shock-claim-chinese-students-are-a-potential-threat> [<https://perma.cc/2YRZ-NVUC>].

TABLE OF CONTENTS

INTRODUCTION	751
I. ECONOMIC ESPIONAGE AND FEDERAL LAW	757
A. <i>Chinese “Spies”</i>	760
B. <i>Economic Espionage Act and Other Serious Charges</i>	763
C. <i>Pretextual Prosecutions and False Statements</i>	764
1. <i>Pretextual Prosecutions and Unfair Punishment</i>	765
2. <i>Pretextual Prosecutions and Prosecutorial Accountability</i>	769
3. <i>False Statements</i>	771
II. RESEARCH ON PROSECUTIONS OF ECONOMIC ESPIONAGE	776
III. DATA AND DESCRIPTIVE STATISTICS	778
A. <i>“Possibly Innocent” Defendants</i>	787
B. <i>Punishment</i>	793
IV. DISCUSSION AND ANALYSIS	794
A. <i>Racial Disparities in EEA Prosecutions: “Researching While Asian”</i>	794
B. <i>Destruction of Evidence and Risk of Flight</i>	798
1. <i>Destruction of Evidence</i>	799
2. <i>Risk of Flight</i>	800
C. <i>False Statements and Pretextual Prosecutions</i>	805
1. <i>Punishing Minorities for Investigators’ False Suspicions</i>	806
2. <i>False Statements and Efficient Investigations</i>	809
3. <i>Prosecutorial Accountability</i>	812
V. SOLUTIONS	814
CONCLUSION.....	820
APPENDIX.....	822

³ Matt Apuzzo, *After Missteps, U.S. Tightens Rules for Espionage Cases*, N.Y. TIMES (Apr. 26, 2016), <http://www.nytimes.com/2016/04/27/us/after-missteps-us-tightens-rules-for-national-security-cases.html> [<https://perma.cc/LCX3-FURR>].

INTRODUCTION

America is worried about Chinese spying.⁴ Recent months have brought a steady stream of arrests⁵ and accusations⁶ related to the theft of United States secrets for Chinese government⁷ or businesses related to China.⁸ At the same time, governmental rhetoric about the threat of Chinese spying has become increasingly broad and alarming. In a February 13, 2018 hearing of the Senate Intelligence Committee, the heads of the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and National Security Agency (NSA) warned that Americans should not use phones made by Huawei, the world’s second largest smartphone manufacturer.⁹ Although they presented no evidence that these phones have *actually* been compromised, the intelligence chiefs argued that the Chinese government could use its power to influence the China based Huawei and thereby gain the

⁴ See, e.g., Josh Rogin, *Waking up to China’s Infiltration of American Colleges*, WASH. POST (Feb. 18, 2018), https://www.washingtonpost.com/opinions/global-opinions/waking-up-to-chinas-infiltration-of-american-colleges/2018/02/18/99d3bee8-13f7-11e8-9570-29c9830535e5_story.html?%20utm_term=.8cfd9a28772&utm_term.ed948ee49b9c [<https://perma.cc/MSM6-PJP3>] (Chinese government-sponsored Confucius Institutes may be “spying outposts” in American Universities).

⁵ See, e.g., Josh Gerstein, *Ex-CIA Officer Charged with Spying for China*, POLITICO (June 22, 2017, 8:10 PM), <https://www.politico.com/story/2017/06/22/kevin-mallory-ex-cia-officer-arrested-spying-china-239877> [<https://perma.cc/872P-DJTH>] (Kevin Mallory charged with selling secret government documents to China).

⁶ See, e.g., Daniel Shane, *U.S. Panel Accuses Chinese Journalists of Spying for Beijing*, CNN: MONEY (Nov. 16, 2017, 6:17 AM), <http://money.cnn.com/2017/11/16/media/chinese-media-us-foreign-agents/index.html> [<https://perma.cc/KU7M-G7NT>] (U.S. government panel alleges that Chinese journalists in the U.S. are spying for the Chinese government).

⁷ See, e.g., Adam Goldman, *Ex-C.I.A. Officer Suspected of Compromising Chinese Informants is Arrested*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/politics/cia-china-mole-arrest-jerry-chun-shing-lee.html> [<https://perma.cc/FE6H-FKVT>] (Jerry Chun Shing Lee, a naturalized U.S. citizen, charged related to identification and killings of U.S. informants in China).

⁸ See, e.g., Gabrielle Banks & Keri Blakinger, *Feds Accuse 6 Houston-Area Men of Stealing Trade Secrets for China*, HOUS. CHRON., <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-area-men-accused-of-stealing-trade-11171821.php> [<https://perma.cc/N47T-B6MN>] (last updated Apr. 28, 2018, 2:11 PM) (six U.S. citizens and foreign nationals accused of selling trade secrets to manufacturer in China).

⁹ James Vincent, *Don’t Use Huawei Phones, Say Heads of FBI, CIA and NSA*, VERGE, <https://www.theverge.com/2018/2/14/17011246/huawei-phones-safe-us-intelligence-chief-fears> [<https://perma.cc/4PU2-NHLT>] (last updated Feb. 15, 2018) (six U.S. intelligence agencies recommend American citizens avoid products made by Chinese tech giants Huawei and ZTE).

“capacity to conduct undetected espionage” on Americans.¹⁰ In the same hearing, Senator Marco Rubio expressed his concerns about “the counterintelligence risk posed to U.S. national security from Chinese students, particularly those in advanced programs in the sciences and mathematics.”¹¹ FBI Director Christopher Wray agreed with the Senator that the threat from Chinese “professors, scientists, [and] students” in higher education is significant and widespread, and that it is “naïve[]” for universities to think otherwise.¹²

Others, however, worry that legitimate concerns about Chinese espionage are being twisted into an irrational “Red Scare.”¹³ Critics assert that the American intelligence community is racially profiling Asian-Americans as “perpetual foreigners” whose loyalty to their country will always be in doubt.¹⁴ Activists rally behind names like Xi Xiaoxing, Sherry Chen, Guoqing Cao, and Shuyu Li, all naturalized American citizens of Chinese descent who were arrested, charged with spying for China, and then, after months of disgrace and hundreds of thousands of dollars in legal fees, revealed to have been innocent.¹⁵

Tough rhetoric from Department of Justice (DOJ) officials does not, however, equate to evidence that the DOJ is disproportionately

¹⁰ Sara Salinas, *Six Top US Intelligence Chiefs Caution Against Buying Huawei Phones*, CNBC, <https://www.cnbc.com/2018/02/13/chinas-huawei-top-us-intelligence-chiefs-caution-americans-away.html> [<https://perma.cc/6A3D-JELX>] (last updated Feb. 15, 2018, 11:03 AM) (quoting FBI Director Christopher Wray’s testimony in the Senate Intelligence Committee hearing on February 13, 2018); see Edward C. Baig, *Spy Games: Is Buying a Chinese Smartphone Risky?*, USA TODAY, <https://www.usatoday.com/story/tech/columnist/baig/2018/02/27/chinese-espionage-huawei-zte-congress/356095002/> [<https://perma.cc/75LM-NNYP>] (last updated Mar. 12, 2018, 7:29 PM).

¹¹ *Open Hearing on Worldwide Threats: Before the S. Select Comm. on Intelligence*, *supra* note 2 (statement of Senator Marco Rubio).

¹² S. Intelligence Comm., *Global Threats and National Security*, C-SPAN, at 1:06:59–1:08:30 (Feb. 13, 2018), <https://www.c-span.org/video/?440888-1/fbi-director-rob-porter-background-check-completed-july&start=4136>; see also Elizabeth Redden, *The Chinese Student Threat?*, INSIDE HIGHER ED. (Feb. 15, 2018), <https://www.insidehighered.com/news/2018/02/15/fbi-director-testifies-chinese-students-and-intelligence-threats> [<https://perma.cc/2XFH-FVB7>].

¹³ Nicole Perlroth, *Accused of Spying for China, Until She Wasn’t*, N.Y. TIMES (May 9, 2015), <http://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html> [<https://perma.cc/GZN9-XEHK>] (quoting Peter J. Toren); see also Berlin Fang, *The Preposterous ‘Evidence’ that Casts Chinese Students as Spies*, CHINA DAILY USA, <http://www.chinadaily.com.cn/a/201802/22/WS5a8d9df9a3106e7dcc13d3fa.html> [<https://perma.cc/FN73-WGQV>] (last updated Feb. 22, 2018, 12:27 AM).

¹⁴ See Woodruff & Arciga, *supra* note 2 (quoting statement from OCA-Asian Pacific American Advocates).

¹⁵ See *infra* Part I.

prosecuting people of Asian descent and a handful of wrongfully accused Chinese-Americans does not, by itself, prove that we face systemic problems of innocence. Moreover, competing assumptions about what disparities might exist do little to help policymakers craft nuanced reform.

This Study provides the first systematic empirical analysis of racial disparities in DOJ prosecutions for espionage. It reveals significant disparities in the rates at which people of Asian descent are prosecuted for espionage and the outcomes of those prosecutions. It finds, *inter alia*, that Chinese and other Asian defendants are twice as likely to be innocent as those of other races. It then offers insights into the possible causes of those disparities, including benign causes, and identifies specific opportunities for reform.

This Study analyzed a random sample of cases charged under the Economic Espionage Act (EEA) from 1997 to 2015, 136 cases involving 187 individual defendants using court documents drawn from the Public Access to Court Electronic Records (PACER) database. Although PACER does not generally report the race of defendants, by analyzing each defendant’s name, this Study was able to code each defendant as either “Chinese,” “Other Asian” (including East Asian, South Asian, and Southeast Asian names), “Western named” (including Latino and Eastern European names), or “Arabic.”¹⁶

From 1997 to 2009, 17% of defendants charged under the EEA were of Chinese descent while an additional 9% were Other Asians. After 2009, however, the percentage of Chinese espionage defendants tripled to 52% while the rate for Other Asians remained at 9%. Since 2009, 62% percent of defendants charged under the EEA have been of Asian heritage.

Almost half (48%) of cases involved the alleged theft of trade secrets to benefit an American company or person. In one third (34%) of cases, the alleged thefts were intended to benefit Chinese entities. The remaining cases involved nations as diverse as South Africa, India, Iran, and the Czech Republic. None of the prosecutions in the sample were alleged to have benefited Russia or a Russian company.

The average sentence for Chinese defendants convicted of espionage was twenty-five months, while the average sentence for all Asians, including Chinese and Other Asians, was twenty-two months,

¹⁶ *Infra* Part III explains how PACER files provided insufficient information to reliably code based on citizenship or nationality.

twice as long as defendants with Western names, eleven months. Nearly half (48%) of defendants with Western names received sentences of only probation, while only 21% of Chinese and 22% of all Asian defendants received only probation.

Finally, this Study finds that 21% of Chinese and 22% of all Asian defendants charged under the EEA are never proven guilty of espionage or any other serious crime. Rather, the defendant is acquitted at trial, the prosecutors drop all charges before trial, or the defendant pleaded guilty to making false statements during the investigation and received a sentence of only probation. In other words, as many as one in five Asian-Americans accused of being spies may be innocent. The same can be said for only 11% of defendants with Western names. The fact that these defendants were not convicted of espionage does not, of course, necessarily mean they were not guilty of espionage. Nonetheless, these statistically significant differences may suggest that the DOJ is prosecuting innocent Asian defendants far more frequently than those of other races.

Although these findings are consistent with concerns of racial profiling and racial bias, this Article argues that the complete explanation may be much more complex.

First, it is possible that at least some of the disparities in which Asian defendants are *charged* with espionage crimes are caused by disparities in which people of Asian descent *commit* espionage. Due to the limited data available, this Study cannot rule out the possibility that Chinese-Americans are simply committing three times as much espionage today as they did prior to 2009. Nonetheless, as David Harris argues with respect to pretextual stops for “driving while black,” “there is a connection between where police look for [evidence of crimes] and where they find it.”¹⁷ This Study equally cannot rule out the possibility that Chinese and other Asians are disproportionately prosecuted for espionage because the DOJ is disproportionately *targeting* crimes committed by defendants of Asian descent. Although such prioritization of resources would increase the number of Asian-American spies who are punished, it would also mean that fewer spies of *other* races would be punished. Nonetheless, it is possible that the DOJ is legitimately more concerned about spying by and for China than other spying. If so, the disparities revealed by this Study could be a byproduct of a

¹⁷ David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 300-01 (1999).

legitimate focus on crimes that benefit China, which disproportionately involve defendants of Chinese descent.

Second, this Article argues that cases like Xi and Chen, in which prosecutors file charges, continue their investigations, and then drop charges after concluding they are innocent, occur essentially because prosecutors file charges too early in the investigation when the evidence of guilt is still weak. One possible explanation for why this occurs more often with Asian-Americans is implicit bias. Essentially, prosecutors may be more likely to view ambiguous evidence of guilt as conclusive when it involves an Asian suspect because that evidence comports with their preexisting image of Asians as spies. Rather than racial animus or indifference, it may be that prosecutors are filing charges based on weaker evidence because they honestly believe the evidence is stronger than it really is.

Another explanation for why prosecutors might rush to file charges against some Asian-American suspects is the risk that continuing the investigation could allow the suspect to flee the country. After all, many Asian-Americans have lived part of their lives in a foreign country and so some might find it easier to abandon life in the United States to avoid a lengthy stay in prison. This is particularly true if the defendant has strong ties to a foreign country, like China, that lacks an extradition treaty with the United States. Indeed, four cases in the sample, all involving defendants of Chinese descent, remain unresolved because the defendants successfully fled from justice. Although flight can be a legitimate reason to file charges before obtaining concrete evidence of guilt, *perceptions* of flight risk can also be shaded by racial bias. There is a risk that preexisting images of Asian-Americans as “foreign” may cause prosecutors to overestimate the risk of flight. Drawing on bail reform literature, this Article argues that prosecutors seeking to use flight as a justification for filing charges early should first make an objective assessment of whether the suspect *actually* presents a risk of flight. Doing so may reveal that some suspects, like Xi and Chen, who lived nearly half their lives in the United States, own their homes in the United States, and have family in the United States, would be unlikely to completely abandon life in America even if they were guilty.¹⁸

Finally, this Article analyzes the issue of “pretextual prosecutions” in the context of espionage prosecutions. As explained further in Part I, in the Wen Ho Lee case, prosecutors accused a nuclear physicist of

¹⁸ See *infra* Section IV.B.

selling secrets about America's nuclear arsenal to the Chinese government.¹⁹ Lee was charged with fifty-nine separate counts for which he could have received life imprisonment.²⁰ After holding Lee in solitary confinement for months, prosecutors allowed him to plead guilty to one count of mishandling data, for which he was sentenced to "time served," and allowed this alleged traitor to walk free that same day.²¹ Perhaps similarly, two defendants in this Study's sample, both Asian-American, were charged under the EEA but were allowed to plead guilty to "false statements," for which they received sentences of probation only.²² The big question, of course, is whether these convicted defendants were actually "spies."

In what are known as "pretextual prosecutions," prosecutors who believe, but cannot prove, that a defendant is guilty of a serious offense will seek conviction and punishment for a more minor offense.²³ This strategy was most famously employed in the case of Al Capone, the notorious gangster who was suspected of numerous homicides but was ultimately convicted for tax evasion.²⁴ Scholars argue that such prosecutions are often fair and efficient because the pretextual conviction effectively delivers just punishment for the serious crimes of which she is likely guilty.²⁵ In contrast, this Article argues that the conviction of Asian-Americans falsely accused of espionage for minor offenses will often impose *unjust* punishment. In such cases, conviction for the lesser offense serves only to punish an otherwise innocent defendant for prosecutors' incorrect and possibly racially biased suspicions. Moreover, punishing otherwise innocent researchers for making false statements to federal investigators perversely discourages loyal Asian-Americans from *speaking with* investigators, thus making it

¹⁹ Indictment, United States v. Lee, 79 F. Supp. 2d 1280 (D.N.M. 1999) (No. 99-cr-01417); see *Nuclear Physicist Wen Ho Lee Charged with 59 Counts in Los Alamos Case*, CNN (Dec. 10, 1999, 6:18 PM), <http://archives.cnn.com/1999/US/12/10/lee.indictment> [<https://perma.cc/5PQ2-KQ52>].

²⁰ See *Nuclear Physicist Wen Ho Lee Charged with 59 Counts*, *supra* note 19.

²¹ Bob Drogin & Eric Lichtblau, *Reno, Freeh Insist Wen Ho Lee Posed 'Great Risk' to U.S.*, L.A. TIMES (Sept. 27, 2000), <http://articles.latimes.com/2000/sep/27/news/mn-27508> [<https://perma.cc/8H9H-8JD8>].

²² Indictment, United States v. Lam, No. 04-cr-20198 (N.D. Cal. Nov. 3, 2004); see also Plea Agreement, United States v. Lam, No. 04-cr-20198 (N.D. Cal. Mar. 8, 2010).

²³ See generally Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583 (2005).

²⁴ *Id.*

²⁵ See, e.g., *id.* at 595-97.

harder to uncover *actual* espionage.²⁶ Such harsh practices also discourage highly qualified researchers from working in government laboratories, hampering the creation of the very research they seek to protect.²⁷ In the same way racial profiling of African-Americans as criminals may create the crime of “driving while black,”²⁸ this Article argues that the profiling of Asian-Americans as spies, combined with broad federal statutes like false statements, may be creating a new crime: “researching while Asian.”

This Article proceeds in five Parts. Part I presents the problem of economic espionage and the laws federal prosecutors use to combat it, including the EEA and false statements statutes. Part II discusses prior studies and data related to economic espionage. Part III explains the methodology used in creating the data set and presents descriptive statistics of the data. Part IV analyzes the findings and discusses the possible implications of the disparities. Part V offers reforms to reduce the number of innocent Americans prosecuted for espionage, reduce the harm caused by such prosecutions, and improve the accountability of the DOJ.

I. ECONOMIC ESPIONAGE AND FEDERAL LAW

The “spies” that appear in today’s media headlines and courtrooms are concerned less with obtaining nuclear launch codes or preventing doomsday plots²⁹ and more concerned with money. The goal of economic espionage is to obtain secret information that one party is

²⁶ See Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515 (2009) (false statements prosecutions can discourage cooperation with investigators).

²⁷ See generally James Glanz, *Fallout in Arms Research: A Special Report; Amid Race Profiling Claims, Asian-Americans Avoid Labs*, N.Y. TIMES (July 16, 2000) <http://www.nytimes.com/2000/07/16/us/fallout-arms-research-special-report-amid-race-profiling-claims-asian-americans.html?pagewanted=all&r=0> [<https://perma.cc/M74B-PK2H>] (Asian-American scientists avoiding employment at national laboratories due to racial harassment and increased suspicions of espionage).

²⁸ Harris, *Driving While Black*, *supra* note 17, at 309.

²⁹ See, e.g., AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY (New Line Cinema 1997) (in which the title character successfully thwarts Dr. Evil’s plan to trigger global volcanic eruptions).

using to try to make money, known as “trade secrets”³⁰ and provide that information to another party, who will also try to use it to make money.

Sometimes the theft of trade secrets is highly sophisticated, as when five Chinese military officers were charged with hacking into major American companies to steal trade secrets in a range of industries.³¹ In other cases, the alleged thefts are more direct, as when Dr. Xiaoxing Xi was falsely accused of emailing sensitive documents from his work computer to China.³² Still, other cases look very little like traditional “espionage,” such as when an employee of a company quits to take up a similar job at a competitor and copies the files he used at his first company to use at his next job,³³ or when an employee takes data he helped create to use to start a competing business.³⁴

In recent years, concerns about economic espionage have been growing, particularly with respect to the theft of trade secrets intended to help Chinese businesses.³⁵ Estimates of the cost of economic espionage to the American economy encompass a wide range including reports from \$19 billion³⁶ to \$445 billion each year,³⁷ though precise

³⁰ The Restatement defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).

³¹ *Five Chinese Military Hackers Charged: Indicted in Connection with Cyber Espionage Offenses Against U.S.*, FED. BUREAU INVESTIGATION NEWS (May 19, 2014), <https://www.fbi.gov/news/stories/five-chinese-military-hackers-charged-with-cyber-espionage-against-us> [<https://perma.cc/838U-WVFG>]; see also Press Release, Fed. Bureau Investigation Nat’l Press Off., FBI Announces Economic Espionage Awareness Campaign (June 23, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-economic-espionage-awareness-campaign> [<https://perma.cc/7747-69QZ>].

³² See, e.g., Apuzzo, *supra* note 3.

³³ *United States v. Say Lye Ow*, No. 00-cr-20110 (N.D. Cal. Dec. 11, 2001) (regarding a defendant that pleaded guilty copying a trade secret and was sentenced to twenty-four months in prison).

³⁴ See, e.g., *United States v. Wang*, No. 01-cr-20065 (N.D. Cal. Feb. 5, 2002) (defendant plead guilty); Indictment, *United States v. Qin*, No. 10-cr-20454 (E.D. Mich. July 22, 2010). In *Qin*, both defendants were found guilty by a jury, see *United States v. Shanshan Du*, 570 F. App’x 490 (6th Cir. 2014); Indictment, *United States v. Yang*, No. 11-cr-00458 (N.D. Ill. Sept. 28, 2011). In *Yang*, defendant pleaded guilty, see Judgment, *United States v. Yang*, No. 11-cr-00458 (N.D. Ill. Mar. 10, 2015).

³⁵ See generally John R. Schindler, *The Unpleasant Truth About Chinese Espionage*, OBSERVER (Apr. 22, 2016, 9:45 AM), <http://observer.com/2016/04/the-unpleasant-truth-about-chinese-espionage> [<https://perma.cc/8EZJ-DLQ2>].

³⁶ Christopher Munsey, *Economic Espionage: Competing for Trade by Stealing Industrial Secrets*, FED. BUREAU INVESTIGATION L. ENFORCEMENT BULL. (Nov. 6, 2013), <https://>

figures are notoriously difficult to obtain.³⁸ Many argue that Chinese businesses, with the implicit or explicit support of the Chinese government, are directly responsible for many of these crimes.³⁹ Indeed, these concerns are so significant that they provoked President Barack Obama in 2013 to pledge that the DOJ would do more to combat the threat of Chinese espionage.⁴⁰ Taking a more aggressive stance against Chinese espionage, however, may increase the risk that innocent defendants may be prosecuted.

leb.fbi.gov/2013/october-november/economic-espionage-competing-for-trade-by-stealing-industrial-secrets [https://perma.cc/4ZH9-PA8Z].

³⁷ Ellen Nakashima & Andrea Peterson, *Report: Cybercrime and Espionage Costs \$445 Billion Annually*, WASH. POST (June 9, 2014), https://www.washingtonpost.com/world/national-security/report-cybercrime-and-espionage-costs-445-billion-annually/2014/06/08/8995291c-ecce-11e3-9f5c-9075d5508f0a_story.html [https://perma.cc/X7SY-TSGT]. *But see* Joshua Philipp, *Exclusive: How Hacking and Espionage Fuel China's Growth*, EPOCH TIMES, <http://www.theepochtimes.com/n3/1737917-investigative-report-china-theft-incorporated> [https://perma.cc/AL27-4ZLR] (last updated June 17, 2016) (reporting that “U.S. companies and the U.S. economy lose approximately \$5 trillion each year, or over 30 percent of the U.S. GDP when you factor the full value of the stolen innovation,” but such numbers are likely not credible).

³⁸ *Cf.* Gavin C. Reid, Nicola Searle & Saurabh Vishnubhakat, *What's It Worth to Keep a Secret?*, 13 DUKE L. & TECH. REV. 116, 140–47 (2015) (reporting significant differences in that valuation of trade secrets depending on the valuation model used).

³⁹ *See, e.g.*, Bill Gertz, *Chinese Espionage and Intelligence Activities at All Time High, Experts Say*, ASIA TIMES (June 14, 2016, 12:02 AM), <http://www.atimes.com/chinese-espionage-and-intelligence-activities-at-all-time-high-experts-say> [https://perma.cc/G5TG-D5LH] (Chinese espionage at all time high); Lesley Stahl, *The Great Brain Robbery*, CBS NEWS (Jan. 17, 2016), <http://www.cbsnews.com/news/60-minutes-great-brain-robbery-china-cyber-espionage> [https://perma.cc/T3B6-D4QV] (60 Minutes report on Chinese espionage); Taylor Armerding, *Chinese Spies Target US Intellectual Property*, CYBER SECURITY ONLINE (Aug. 24, 2015, 3:25 AM), <http://www.csoonline.com/article/2973542/security-industry/chinese-spies-target-us-intellectual-property.html> [https://perma.cc/ZGD2-FY9Y] (“Dean Cheng, senior research fellow at the Asian Studies Center at The Heritage Foundation, recently told The Diplomat that “There is no real precedent for the scale of state-sponsored/state-supported corporate espionage (by China) that we are seeing.”). *But see* Joseph Menn & Jim Finkle, *Chinese Economic Cyber-Espionage Plummet in U.S.*, REUTERS (June 20, 2016, 8:06 PM), <http://www.reuters.com/article/us-cyber-spying-china-idUSKCN0Z700D> [https://perma.cc/K522-MBLC] (reporting that cyber-attacks from China decreased precipitously after a bilateral agreement between China and the United States in summer 2015).

⁴⁰ David E. Sanger, *In Cyberspace, New Cold War*, N.Y. TIMES (Feb. 24, 2013), http://www.nytimes.com/2013/02/25/world/asia/us-confronts-cyber-cold-war-with-china.html?_r=0 [https://perma.cc/Y6UY-34KU].

U.S. Attorneys prosecute defendants suspected of economic espionage under a number of different statutes, including the EEA, mail and wire fraud statutes, and alternative charges like false statements.⁴¹

A. *Chinese “Spies”*

In May 2015, a dozen FBI agents armed with assault rifles and bulletproof vests stormed into the house of Dr. Xiaoxing Xi to arrest him on charges of being a foreign spy.⁴² Xi came to America from China in 1989 and is a naturalized citizen of the United States.⁴³ Xi was chairman of Temple University’s physics department and was a leader in the field of superconductor research.⁴⁴ Federal prosecutors accused Xi of sending schematics of a secret device, called a “pocket heater,” to agents in China to help China advance its superconductor research to the detriment of the United States.⁴⁵ According to the DOJ, Xi had betrayed his adoptive country.⁴⁶

Temple University placed Dr. Xi on administrative leave, stripped him of his title as chair of the department, and barred him from speaking with certain colleagues.⁴⁷ Months later, U.S. Attorneys finally showed Xi the evidence they claimed conclusively proved his guilt: an email sent from Xi’s account to researchers in China with the allegedly secret pocket heater’s blueprints attached.⁴⁸ The blueprints were not

⁴¹ See, e.g., Indictment, United States v. Lockwood, No. 06-cr-20331 (E.D. Mich. June 20, 2006), 2006 WL 2037531 (Liu was charged with theft of trade secrets, fraud by wire, conspiracy to defraud the United States, and fraud connected with computers. And Lockwood was charged with theft of trade secrets, fraud by wire, and conspiracy to defraud the United States); Indictment, United States v. Liu, No. 11-cr-00208-SRC (D.N.J. Apr. 6, 2011) (Liu was charged with exporting defense articles, transporting stolen goods, and making false statements).

⁴² Matt Apuzzo, *U.S. Drops Charges that Professor Shared Technology with China*, N.Y. TIMES (Sept. 11, 2015), http://www.nytimes.com/2015/09/12/us/politics/us-drops-charges-that-professor-shared-technology-with-china.html?_r=0 [https://perma.cc/CF7B-XAR].

⁴³ *Id.*

⁴⁴ Caitlin McCabe, *Temple Prof Vindicated, but Still Silent*, PHILA. INQUIRER (Sept. 15, 2015, 1:08 AM), http://www.philly.com/philly/news/20150915_Temple_prof_vindicated_but_still_silent.html [https://perma.cc/K6PT-QHZ2].

⁴⁵ See Apuzzo, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Wang Lei, *Wronged Chinese-American Physicist Sues FBI Agent*, CGTN (May 12, 2017, 3:41 PM), https://news.cgtn.com/news/3d45444e30677a4d/share_p.html [https://perma.cc/ZTE2-B9TP].

secret.⁴⁹ Indeed, they were not even designs for a pocket heater.⁵⁰ Rather, they were for a different device that was patented and publicly available to anyone.⁵¹ After confirming that none of the information Dr. Xi had shared was secret, federal prosecutors sheepishly dropped all charges.⁵²

In a similar story, Sherry Chen, also a naturalized citizen from China, was falsely accused of stealing sensitive flood pattern data, ostensibly to aid a former colleague in China.⁵³ In addition to charging Chen with stealing government data, prosecutors also charged Chen with “false statements” for telling federal investigators, among other things, that she had last seen a former classmate in “I think, 2011” when she had actually seen him in 2012.⁵⁴ Although all charges were dropped, after a month long ordeal, her supervisors nonetheless fired Chen for demonstrating untrustworthiness.⁵⁵

Chen, however, was lucky compared with Dr. Wen Ho Lee. In 1999, Lee was a nuclear physicist at Los Alamos National Laboratories who was suspected of stealing designs for nuclear weapons for China.⁵⁶ Lee was fired from his position at Los Alamos and then, after months of suspicion, was arrested and charged with fifty-nine counts of violating the Federal Atomic Energy Act and the Federal Espionage Act.⁵⁷ Several of these counts carried a maximum of life imprisonment.⁵⁸ Lee was kept

⁴⁹ See Caitlin McCabe, Jeremy Roebuck & Susan Snyder, *A Year Later, Temple Professor Haunted by Spying Allegations*, PHILA. INQUIRER (May 16, 2016, 1:07 AM), http://www.philly.com/philly/news/20160516_A_year_later_Temple_professor_haunted_by_spying_allegations.html [<https://perma.cc/ALS2-P87M>].

⁵⁰ *Id.*

⁵¹ See Ronn Blitzer, *Professor Sues FBI After False Arrest for Being Chinese Spy and Alleged Illegal Spying*, LAW & CRIME (Oct. 31, 2017, 4:04 PM), <https://lawandcrime.com/high-profile/professor-sues-fbi-after-false-arrest-for-being-chinese-spy-and-alleged-illegal-spying> [<https://perma.cc/M484-SDF9>].

⁵² Apuzzo, *supra* note 42.

⁵³ Angela Fritz, *Falsely Accused of Spying, Weather Service Employee’s Life Turned Upside Down*, WASH. POST (May 12, 2015), https://www.washingtonpost.com/news/capital-weather-gang/wp/2015/05/12/falsely-accused-of-spying-weather-service-employees-life-turned-upside-down/?utm_term=.018be2e12f59 [<https://perma.cc/HQ2W-469S>].

⁵⁴ Perloth, *supra* note 13 (“It was the last time I visited my parents, I think 2011, May 2011.”).

⁵⁵ *Id.*

⁵⁶ Lowen Liu, *Just the Wrong Amount of American*, SLATE (Sept. 11, 2016, 9:20 PM), http://www.slate.com/articles/news_and_politics/the_next_20/2016/09/the_case_of_scientist_wen_ho_lee_and_chinese_americans_under_suspicion_for.html [<https://perma.cc/ZW72-SHPU>].

⁵⁷ *Nuclear Physicist Wen Ho Lee Charged with 59 Counts in Los Alamos Case*, *supra* note 19.

⁵⁸ *Id.*

in solitary confinement for nine months until he finally agreed to plead guilty to one count of mishandling data.⁵⁹ Although prosecutors originally accused Lee of betraying his adopted country in the most heinous way, they finally dropped all but one charge and allowed him to be released the same day he pleaded guilty.⁶⁰

Cases like these and others⁶¹ have raised major concerns on Capitol Hill. On December 4, 2015, the entire Congressional delegation from Delaware demanded that the DOJ investigate the Xi and Chen cases to determine whether they were symptomatic of broader problems of racial profiling.⁶² One month later, the DOJ offered a pro forma response, simply stating that the DOJ “have received assurances from the respective [United States Attorney’s Offices] and the FBI that the race, ethnicity, and national origin of the individuals played no role in th[ose] cases.”⁶³ In April 2016, Representative Judy Chu, Chair of the Congressional Asian Pacific American Caucus (CAPAC), Democrat of California, declared in a response to these cases that “[w]e cannot tolerate another case of Asian-Americans being wrongfully suspected of espionage.”⁶⁴ In her words: “The profiling must end.”⁶⁵ Indeed, on July 15, 2016, the United States Commission on Civil Rights also wrote to the Inspector General of the DOJ to request an independent investigation out of “concern[] that these cases may reflect insufficient supervision, due diligence and expertise in investigating before arresting our fellow citizens and tainting them and their families with the charge of disloyalty.”⁶⁶ Thus far, the DOJ has not reported starting such an investigation.

⁵⁹ See Liu, *supra* note 56.

⁶⁰ *Id.*; 146 CONG. REC. H9,880 (daily ed. Oct. 12, 2000) (statement of Rep. Mink).

⁶¹ See, e.g., Jeff Swiatek & Kristine Guerra, *Feds Dismiss Charges Against Former Eli Lilly Scientists Accused of Stealing Trade Secrets*, INDY STAR, <https://www.indystar.com/story/news/crime/2014/12/05/feds-dismiss-charges-former-eli-lilly-scientists-accused-stealing-trade-secrets/19959235> [<https://perma.cc/J7EM-XZV3>] (last updated Dec. 5, 2014, 5:21 PM) (all charges dropped against Guoqing Cao and Shuyu Li, Eli Lilly scientists who were accused of passing trade secrets to a Chinese drug company).

⁶² Letter from Peter J. Kadzik, Assistant Att’y Gen., to Hon. Thomas R. Carper, U.S. Sen. (Jan. 15, 2016), <http://jeremy-wu.info/wp-content/uploads/2016/01/2016-1-15-Indictments-of-Asian-Americans-Carper-3177492.pdf> [<https://perma.cc/V3TX-49QR>].

⁶³ *Id.*

⁶⁴ Apuzzo, *supra* note 3.

⁶⁵ *Id.*

⁶⁶ Letter from Martin R. Castro et al., U.S. Comm’n on Civil Rights, to Hon. Michael E. Horowitz, U.S. Inspector Gen. (July 15, 2016), http://jeremy-wu.info/wp-content/uploads/2016/07/PR_LetterChineseAmericanProsecutions.pdf [<https://perma.cc/W6C2-G9J9>].

Defenders of the DOJ, on the other hand, argue that any racial disproportions that might exist would be attributable to disparities in the rates at which Chinese-Americans and Chinese nationals commit espionage.⁶⁷ They claim that the Chinese government and businesses often target people of Chinese descent and ask them to steal secrets for China.⁶⁸ As a result, they argue, there simply *are* more Chinese spies than other races.⁶⁹

B. *Economic Espionage Act and Other Serious Charges*

Federal prosecutors use a variety of different statutes when prosecuting defendants suspected of espionage. First and foremost is the Economic Espionage Act of 1996.⁷⁰

The EEA criminalizes the theft of trade secrets in two ways.⁷¹ First, one commits the crime of “economic espionage” when she attempts to take or receive a trade secret with the intent to benefit “any foreign government, foreign instrumentality, or foreign agent.”⁷² This language makes it a crime to steal trade secrets not only for the benefit of an unfriendly foreign government, as in spy thrillers, but also to steal trade secrets for the benefit of any foreign company, such as a foreign competitor to a domestic business.⁷³ Separately, one commits the crime of theft of trade secrets when one attempts to take or receive a trade secret “to the economic benefit of anyone other than the

⁶⁷ See, e.g., Schindler, *supra* note 35; Edward Wong & Didi Kirsten Tatlow, *China Seen in Push to Gain Technology Insights*, N.Y. TIMES (June 5, 2013), <http://www.nytimes.com/2013/06/06/world/asia/wide-china-push-is-seen-to-obtain-industry-secrets.html> [https://perma.cc/5DXC-YSGF].

⁶⁸ For example, Dr. Paul D. Moore, former chief of the FBI’s Chinese counterintelligence analysis, stated in 2000 that the Chinese government specifically targeted Chinese-Americans as potential spies. In his words: “It’s unfair, . . . ‘but what are you going to do?’” Glanz, *supra* note 27; see also Schindler, *supra* note 35 (“The most challenging part of how China spies on the United States is that Beijing’s *modus operandi* relies overwhelmingly on co-nationals.”).

⁶⁹ Schindler, *supra* note 35.

⁷⁰ See Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831–39 (2006)). See generally CHARLES DOYLE, CONG. RESEARCH SERV., R42682, STEALING TRADE SECRETS AND ECONOMIC ESPIONAGE: AN ABRIDGED OVERVIEW OF 18 U.S.C. 1831 AND 1832 (2014).

⁷¹ See 18 U.S.C. §§ 1831–32 (2018).

⁷² *Id.* § 1831(a)(5) (economic espionage is punishable by up to fifteen years in prison).

⁷³ *United States v. Chung*, 659 F.3d 815, 824 (9th Cir. 2011).

owner . . . intending or knowing that the offense will injure [the] owner.”⁷⁴

The language of the EEA is broad enough to apply not only to cloak and dagger break-ins to steal valuable prototypes at the behest of a foreign government, but also to far more mundane conduct, such as an employee copying data he was authorized to access and then taking that data to use at his new place of employment.⁷⁵

Federal prosecutors can also file other serious charges against defendants suspected of espionage in addition to *or instead of* EEA violations. For example, Dr. Xiaoxing Xi was accused of sharing secret blueprints with “government entities” in China,⁷⁶ conduct that, if proven, would clearly make him guilty of economic espionage. Rather than EEA charges, however, the U.S. Attorney in charge of the case filed charges only of federal wire fraud.⁷⁷ These other serious charges can include charges such as money laundering,⁷⁸ mail and wire fraud,⁷⁹ blackmail,⁸⁰ and interstate transport of stolen goods.⁸¹

C. *Pretextual Prosecutions and False Statements*

“Somebody steals from me, I’m gonna say you stole. Not talk to him for spitting on the sidewalk. Understand?”

—Al Capone, as portrayed in *The Untouchables*⁸²

In addition to EEA, fraud, or other serious charges, federal prosecutors also often file and convict defendants on lesser charges.⁸³

⁷⁴ 18 U.S.C. § 1832(a) (theft of trade secrets is punishable by up to ten years in prison).

⁷⁵ See, e.g., Plea Agreement, *United States v. Say Lye Ow*, No. 00-cr-20110, (N.D. Cal. Sept. 14, 2001) 2001 WL 34134265 (defendant pleaded guilty); Plea Agreement, *United States v. Lee*, No. 09-cr-00290 (N.D. Ill. Sept. 1, 2010) (defendant pleaded guilty).

⁷⁶ See Indictment, *United States v. Xi*, No. 15-cr-00204, (E.D. Pa. May 14, 2015) 2015 WL 13702237.

⁷⁷ *Id.*

⁷⁸ 18 U.S.C. § 1956 (2018).

⁷⁹ 18 U.S.C. § 1345 (2018).

⁸⁰ 18 U.S.C. § 873 (2018).

⁸¹ 18 U.S.C. § 2314 (2018).

⁸² *THE UNTOUCHABLES* (Paramount Pictures 1987).

⁸³ 18 U.S.C. § 1001 (2018) punishes, inter alia, any defendant who “falsifies, conceals, or covers up by any trick, scheme, or device a material fact.” See, e.g., *Brogan v. United States*, 522 U.S. 398, 410 (1998) (Ginsburg, J., concurring) (upholding conviction of a defendant who

Indeed, in some cases, prosecutors convict defendants originally suspected of espionage for *only* false statements the defendant made in the course of the investigation⁸⁴ or for under-enforced crimes like taking a government-issued laptop out of the country without prior permission.⁸⁵ These stand-alone convictions of suspected spies for lesser offenses raise significant questions as to whether they can be justified as pretextual prosecutions⁸⁶ or legitimate process offenses.⁸⁷ As this Article argues in Section IV.C, these standard justifications have little force in espionage cases.⁸⁸ Rather, convicting minorities suspected of espionage for minor offenses may often operate as punishment simply for being unfairly suspected of espionage in the first place.

1. Pretextual Prosecutions and Unfair Punishment

Debates about pretextual prosecutions date back to the prosecution of Al Capone for tax evasion.⁸⁹ Al Capone was a notorious gangster in the early twentieth century, believed to be responsible for the St. Valentine’s Day Massacre, extortion, numerous homicides, and bootlegging, among other crimes.⁹⁰ Unfortunately, federal authorities could never prove Capone guilty of these serious offenses beyond a reasonable doubt.⁹¹ As with modern drug selling organizations, the man on top rarely, if ever, handles the contraband or tommy-gun himself. Ultimately, federal prosecutors were able to convict Capone not for murder, but for tax evasion, by proving that Capone had earned money

falsely denied committing illegal conduct, even though those denials did not mislead investigators).

⁸⁴ See, e.g., Sentencing, *United States v. Lam*, 04-cr-20198 (N.D. Cal. Mar. 18, 2010) (defendants pleaded guilty).

⁸⁵ See, e.g., Plea Agreement, *United States v. Huang*, No. 12-cr-01246 (D.N.M. Aug. 25, 2014) (defendant pleaded guilty).

⁸⁶ See generally Richman & Stuntz, *supra* note 23.

⁸⁷ See, e.g., Griffin, *supra* note 26; Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009).

⁸⁸ *Infra* Section IV.C.

⁸⁹ See generally Richman & Stuntz, *supra* note 23.

⁹⁰ *Al Capone*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/history/famous-cases/al-capone> [<https://perma.cc/8S56-BHLP>] (last visited Oct. 9, 2018).

⁹¹ See Jennifer Rosenberg, *Biography of Al Capone*, THOUGHTCO., <https://www.thoughtco.com/al-capone-1779788> [<https://perma.cc/6QT3-S6D6>] (last updated Aug. 8, 2017).

and not paid taxes on it.⁹² In Capone's case, the charges of tax evasion were clearly pretextual. Tax evasion is and was a rarely prosecuted crime, and Capone's unpaid taxes were discovered in the course of an investigation into far more serious offenses.⁹³ Prosecutors charged Capone with tax evasion precisely because they could not convict him of the charges they actually cared about. Since the prosecution of Al Capone, these types of prosecutions have become a standard part of the U.S. Attorneys' arsenal and have been deployed in many high-profile cases such as in the prosecutions of Martha Stewart, Bill Clinton, and Barry Bonds.⁹⁴

Pretextual prosecutions raise significant concerns about the risks of imposing unfair punishment on defendants and interfering with the accountability of prosecutors.⁹⁵ In these cases, after all, prosecutors seek punishment for minor offenses precisely because they are unable to prove the defendant guilty of the crimes for which they were originally investigated. As Daniel C. Richman and William J. Stuntz argue in their seminal piece, *Al Capone's Revenge*, however, four features common to most cases like Capone, Stewart, and Bonds help alleviate these concerns.⁹⁶

First, the lesser offenses in pretext cases are generally discovered in the course of investigations for more serious offenses.⁹⁷ This feature, they argue, helps reduce the risk of injustice in singling the defendant out for punishment of an under-enforced offense. After all, "[w]hatever the odds were that Capone was innocent of the tax charge, the odds that he was both innocent of that charge and innocent of the crimes that first prompted his investigation must have been vanishingly small."⁹⁸ In

⁹² See, e.g., Richman & Stuntz, *supra* note 23.

⁹³ *Id.*

⁹⁴ Martha Stewart was suspected of insider trading but pleaded guilty to false statements, while Bill Clinton was suspected of fraud connected with the Whitewater scandal but was prosecuted for only perjury in a largely unrelated case. See *id.* at 590. Barry Bonds was suspected of using performance enhancing steroids but convicted of obstruction of justice for giving an evasive answer under oath. See Maura Dolan, *Barry Bonds Convicted of Obstruction of Justice in Performance-Enhancing-Drugs Case*, L.A. TIMES (Apr. 13, 2011, 2:35 PM), <http://latimesblogs.latimes.com/lanow/2011/04/barry-bonds-verdict-.html> [<https://perma.cc/8N73-B4P5>]. See generally Murphy, *supra* note 87, at 1437; Griffin, *supra* note 26, at 1518 (false statements statute has "become a tool for penalizing otherwise unreachable defendants or forcing cooperation with an inquiry").

⁹⁵ See generally Richman & Stuntz, *supra* note 23, at 589–96.

⁹⁶ *Id.* at 588–99.

⁹⁷ *Id.* at 589.

⁹⁸ *Id.*

other words, the defendant’s probable guilt of the more serious charge alleviates concerns that punishment for the lesser charge will be unfair.

Second, lesser offenses like tax evasion, perjury, and false statements occur so often that it would be impractical to try to prosecute them every time they occur.⁹⁹ Every year, tens of thousands of witnesses consciously stretch the truth under oath in civil suits.¹⁰⁰ Moreover, substantially all readers of this Article know someone who has exaggerated the value of an in-kind donation on their taxes. Auditing everyone’s taxes and investigating each discrepancy to find enough evidence to support criminal charges would likely grind the entire economy to a halt. At the same time, however, these laws must be enforced *sometimes*, or they would lose all force. When an investigation into serious crimes reveals evidence of perjury or tax evasion, prosecuting the defendant in question is an economical way to ensure that the laws still have deterrent effect. Indeed, because these defendants are likely guilty of more serious crimes, singling them out for harsh punishment for white lies on their taxes seems less unjust than singling out, for example, a random innocent scientist.¹⁰¹

Third, as a result of the well documented expansion of federal criminal laws, pretextual crimes are often far easier to prove than the more serious charges that motivate an investigation.¹⁰² Indeed, Harvey A. Silverglate argues that due to the expansiveness and vagueness of modern federal criminal laws, many Americans unwittingly commit as many as three federal felonies each day.¹⁰³ As such, an intensive investigation into most Americans’ lives could easily reveal or, in the case of false statements charges, manufacture¹⁰⁴ the defendant’s guilt of relatively minor offenses that nonetheless carry substantial maximum penalties. Richman and Stuntz, pointing to the reputational damage Kenneth Starr incurred from his dogged pursuit of the false statements charges against then President Bill Clinton, argue that federal prosecutors will generally find it in their best interests to avoid pursuing

⁹⁹ *Id.* at 588–90.

¹⁰⁰ *Id.*

¹⁰¹ *Cf. id.* at 590.

¹⁰² *Id.* at 609.

¹⁰³ See generally HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).

¹⁰⁴ Murphy, *supra* note 87, at 1437.

such stand-alone lesser charges unless conviction serves the interests of justice.¹⁰⁵

Fourth, Richman and Stuntz point out that many of the targets of pretextual prosecutions are famous.¹⁰⁶ They argue that a defendant's status as a celebrity can help justify singling out that person for punishment for crimes that usually go unpunished for a number of reasons, largely based on deterrence.¹⁰⁷ First, the conviction and punishment of a famous person is often broadly discussed in the media and living rooms, greatly increasing people's awareness of the consequences of even minor criminal conduct.¹⁰⁸ Second, allowing famous people to openly flout the law sends the opposite message, that either certain people are above the law or that the government is incompetent.¹⁰⁹ Thus, even if Martha Stewart was fully innocent of the insider trading for which she was investigated, and even if a five month sentence for, inter alia, false statements was unfair to her personally, punishing her serves important societal functions.

In short, Richman and Stuntz argue that pretextual prosecutions usually avoid the problems of unfair punishment because (1) the defendants are usually guilty of more serious crimes, justifying the punishment; (2) punishment serves important deterrent functions; (3) prosecutors will usually not pursue minor charges when doing so would be unfair; and (4) the defendants are often privileged and famous, so punishing them for relatively minor infractions can deter criminal behavior and send good messages about the rule of law.¹¹⁰ As this Article argues in Section IV.C, these features that may help justify punishment in most pretextual prosecutions often may be absent with

¹⁰⁵ Richman & Stuntz, *supra* note 23, at 590–92.

¹⁰⁶ *Id.* at 592–95.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* See also Griffin, *supra* note 26, at 1549–50; Natalie Finn & Claudia Rosenbaum, *Inside Teresa Giudice's Fraud Case: How Her Bankruptcy Filing Led to Criminal Charges*, E! NEWS (July 30, 2013, 7:13 PM) <http://www.eonline.com/news/444273/inside-teresa-giudice-s-fraud-case-how-her-bankruptcy-filing-led-to-criminal-charges> [https://perma.cc/UK6L-CMDR] (New Jersey tax attorney Todd Unger said: “‘These high-publicized cases serve as the best advertisement for the government,’ he say [sic]. ‘And, in particular, the IRS. The truth is, the government loves them. People know when celebrities get in trouble. And it creates this fear, especially with the IRS.’”).

¹⁰⁹ Mary McClelland, *Teresa Giudice and Joe Giudice Hit with \$551,000 Tax Lien!*, REALITY TEA (Nov. 19, 2015), <http://www.realitytea.com/2015/11/19/teresa-giudice-joe-giudice-hit-551000-tax-lien> [https://perma.cc/7FKB-CPM7]; Finn & Rosenbaum, *supra* note 108 (failed to report income from national TV Show).

¹¹⁰ Richman & Stuntz, *supra* note 23.

respect to prosecutions of minority defendants originally accused of espionage.¹¹¹

2. Pretextual Prosecutions and Prosecutorial Accountability

Although Richman and Stuntz argue that pretextual prosecutions generally avoid imposing unfair and excessive punishment on defendants, they argue that convicting defendants of lesser crimes because of suspicion of more serious charges can create major problems with the accountability of prosecutors.¹¹² Convicting defendants suspected of serious crimes, such as terrorism, espionage, or fraud for minor offenses like false statements, makes it difficult for the public to understand whether the defendant actually committed any serious crimes and how effective the DOJ has been at deterring the serious crimes the public cares about.

For example, after the terrorist attacks on September 11, 2001, the DOJ came under tremendous pressure not only to punish those who commit terrorist attacks, but also to identify and prosecute terrorists before they strike.¹¹³ Questions arose, however, as to how many “terrorists” or supporters of terrorists the DOJ actually convicted. In January 2003, the Government Accountability Office (GAO) revealed that although the DOJ reported 288 terrorism-related convictions in the previous year, at least 132 of those convictions had been misclassified as terrorism, and that “[t]he overall accuracy of the remaining 156 convictions is questionable.”¹¹⁴ Moreover, at a March 2003 House Appropriations hearing, Attorney General John Ashcroft announced that his DOJ had secured 108 guilty pleas in cases “related to terrorism.” When asked whether those defendants had pleaded guilty to terrorism *charges*, however, he responded that although “these were individuals that we believe were related to terrorism, the criminal charges are not

¹¹¹ *Infra* Section IV.C.

¹¹² Richman & Stuntz, *supra* note 23, at 598.

¹¹³ *Id.* at 618–19; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-578T, FBI TRANSFORMATION: FBI CONTINUES TO MAKE PROGRESS IN ITS EFFORTS TO TRANSFORM AND ADDRESS PRIORITIES 20–33 (2004), <http://www.gao.gov/new.items/d04578t.pdf> [https://perma.cc/4F3Q-ZM5J].

¹¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-266, JUSTICE DEPARTMENT: BETTER MANAGEMENT OVERSIGHT AND INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS 6 (2003), <http://www.gao.gov/new.items/d03266.pdf> [https://perma.cc/C9LJ-DXHE].

always. Some of the criminal charges are related, for example, to document fraud.”¹¹⁵ Citing the “Al Capone” strategy of pretextual prosecutions, the Justice Department spokesperson Mark Corallo later argued that

[t]he fact that many terrorism investigations result in less serious charges does not mean the case is not terrorism-related. Moreover, pleas to these less serious charges often result in defendants who cooperate and provide invaluable information to the government—information that can lead to the detection and prevention of other terrorism-related activity. . . . Often, there is no clear line between terrorism and other criminal activity such as money laundering, identity theft, visa fraud, or immigration violations.¹¹⁶

Indeed, it appears that at least some of these “terrorism” charges may have been for such conduct as “stealing and reselling baby formula, illegally redeeming huge quantities of grocery coupons, collecting fraudulent welfare payments, swiping credit card numbers and hawking unlicensed T-shirts.”¹¹⁷ Moreover, later in 2003 the Transactional Records Access Clearinghouse (TRAC) reported that although 879 people had been convicted based on “terrorism” referrals since September 2001, only 373 of them had been sentenced to prison, most for very short terms,¹¹⁸ raising questions as to how significant the defendants’ “terrorist” activity could actually have been.¹¹⁹

The point, as Richman and Stuntz argue, is not whether the DOJ overclaimed how many terrorists it caught, but that convictions of suspected terrorists for lesser crimes makes it extremely difficult for the public to *understand* how many terrorists the DOJ caught and how

¹¹⁵ *Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2004: Hearing Before the S. Comm. on Appropriations*, 108th Cong. (2003) (colloquy between Attorney General John Ashcroft and Representative Jose Serrano).

¹¹⁶ Press Release, Dep’t of Justice, Statement of Mark Corallo, Director of Public Affairs, Regarding TRAC Study (Dec. 7, 2003), http://www.usdoj.gov/opa/pr/2003/December/03_opa_670.htm [https://perma.cc/2N4Z-WJ57].

¹¹⁷ John Mintz & Douglas Farah, *Small Scams Probed for Terror Ties*, WASH. POST (Aug. 12, 2002), https://www.washingtonpost.com/archive/politics/2002/08/12/small-scams-probed-for-terror-ties/acfb904e-002e-49c2-a531-8c7c2e46573b/?noredirect=on&utm_term=.aeabe9a1bd55 [https://perma.cc/3M2N-GVC3].

¹¹⁸ *Criminal Terrorism Enforcement Since the 9/11/01 Attacks*, TRAC REPORTS (Dec. 8, 2003), <http://trac.syr.edu/tracreports/terrorism/report031208.html> [https://perma.cc/4V5L-N9ZE].

¹¹⁹ See Richman & Stuntz, *supra* note 23, at 618–24 (chronicling the debates about these numbers).

many relatively innocent minorities were swept up in the panic.¹²⁰ As Corallo noted, there are a number of legitimate reasons for why prosecutors would choose to seek conviction of actual terrorists for lesser charges, such as if evidence of the greater crimes is hard to produce or if the defendant was offered a deal in exchange for information.¹²¹

When defendants are convicted of terrorism charges, such as providing material support for terrorists,¹²² the public knows that our judicial system has concluded beyond a reasonable doubt that the defendant tried to further terrorism. On the other hand, when an alleged terrorist is convicted of only false statements, as more than half of terrorism convictions were,¹²³ the public is forced to wonder whether the defendant was a terrorist whose guilt of terrorism could not be proven beyond a reasonable doubt, a terrorist granted leniency in exchange for information, or a normal person singled out based on race and religion for minor offenses that usually go unpunished.¹²⁴

3. False Statements

Under 18 U.S.C. § 1001, a defendant can be punished by up to five years in prison if she “makes any materially false, fictitious, or fraudulent statement or representation” or “falsifies, conceals, or covers up . . . a material fact” relevant to any matter within the jurisdiction of the federal government.¹²⁵ Convictions for false statements raise

¹²⁰ *Id.* at 623–24; *see also* Griffin, *supra* note 26,26 at 1544–47 (pretextual charging interferes with the accountability of prosecutors).

¹²¹ *Cf.* Richman & Stuntz, *supra* note 23, at 615, 621–22 (piling on charges); *see also* Griffin, *supra* note 26, at 1518; Murphy, *supra* note 87, at 1495 (arguing that the “prosecutor can layer process charges upon substantive offenses in an effort to coax a plea from a defendant leery of the probability of acquittal on a laundry list of charges, or the government can simply drop the substantive offense altogether and take to the jury a cleaner, easier, more readily presentable process case”).

¹²² 18 U.S.C. § 2339A (2018).

¹²³ *Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks*, *supra* note 118.

¹²⁴ Richman & Stuntz, *supra* note 23, at 624 (prosecutorial credibility).

¹²⁵ [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 (2) makes any materially false, fictitious, or fraudulent statement or representation; or

particular concerns given the breadth and nature of the conduct that can give rise to liability.¹²⁶

The classic case for false statements is *Brogan v. United States*.¹²⁷ In *Brogan*, federal investigators asked Brogan, whom they knew had committed a particular crime, whether he had committed the crime.¹²⁸ Brogan's response to this question was simple: "no."¹²⁹ Brogan's denial in no way impeded the investigation, as prosecutors already had known he was guilty. Moreover, the investigators asked Brogan the question solely because they believed, and hoped, that he would deny his guilt, thereby making him guilty of making a false statement.¹³⁰ Nonetheless, the Supreme Court upheld Brogan's conviction, in spite of the concurrence's observation that the false statements statute, so interpreted, confers on prosecutors the power "to manufacture crimes" by asking suspects questions that, if not assisted by counsel, they would naturally be expected to deny.¹³¹ (Of course, any competent attorney would advise their client that the answer in such a situation is neither "Yes," nor "No," but "I refuse to answer any questions.")¹³²

Scholars and courts have long argued that false statements statutes do not give potential defendants fair notice that a false statement could give rise to criminal liability.¹³³ Unlike statements that give rise to perjury charges, false statements under 18 U.S.C. § 1001 need not be, and are generally not, sworn statements.¹³⁴ Moreover, the circumstances of interviews that create false statements often "do not sufficiently alert

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry

18 U.S.C. § 1001(a) (2018); see also *Brogan v. United States*, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring).

¹²⁶ See generally Griffin, *supra* note 26, at 1518; Murphy, *supra* note 87, at 1495.

¹²⁷ *Brogan*, 522 U.S. 398.

¹²⁸ *Id.* at 399–400.

¹²⁹ *Id.*

¹³⁰ *Id.* at 408–09 (Ginsburg, J., concurring) (observing that the false statements statute gives prosecutors the power "to manufacture crimes").

¹³¹ *Id.*

¹³² *Id.* at 409–10 (Ginsburg, J., concurring) ("Had counsel appeared on the spot, Brogan likely would have received and followed advice to amend his answer, to say immediately: 'Strike that; I plead not guilty.'").

¹³³ *Id.*; see generally Murphy, *supra* note 87, at 1465; see also Griffin, *supra* note 26, at 1544–45; *United States v. Ehrlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974).

¹³⁴ See Griffin, *supra* note 26, at 1523 ("[18 U.S.C.] § 1001 imposes 'no requirement of an oath . . . and no guarantee that the proceeding will be transcribed or reduced to memorandum.'").

the person interviewed to the danger that false statements may lead to a felony conviction.”¹³⁵ Rather, they can occur quite informally, and with no warning that a failure to be completely forthright can lead to criminal liability.¹³⁶ Moreover, the “material[ity]” requirement has been interpreted quite expansively and need not relate directly to any conduct that is itself criminal.¹³⁷

For example, in the case of Jianyu Huang, the defendant, a nanotechnologist at Sandia National Laboratories, was accused of having sold \$25,000 worth of restricted information.¹³⁸ During the course of the investigation, Huang was asked whether he planned to bring any government property overseas, which he denied.¹³⁹ Nonetheless, because Huang did intend to bring his government issued work laptop with him to make a PowerPoint presentation in China, his previous denial provided the basis for his later conviction for false statements.¹⁴⁰ As a result, Huang was sentenced to one year and a day in

¹³⁵ *Id.* at 1523 (citation omitted).

¹³⁶ See Griffin, *supra* note 26, at 1523–24; Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 REGENT U. L. REV. 429, 439 n.45 (2007) (comparing the oaths witnesses take in court, which are “calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to [speak truthfully]” with the unwarned nature of interviews that give rise to many false statements convictions) (quoting FED. R. EVID. 603 advisory committee’s note) (alteration in original); see also Brogan v. United States, 522 U.S. 398, 410–11 (Ginsburg, J., concurring) (noting the “extremely informal circumstances” of agent interviews) (quoting *Ehrlichman*, 379 F. Supp. at 292).

¹³⁷ See *Ehrlichman*, 379 F. Supp. at 292 (§ 1001 imposes “no strict rule of materiality”); Griffin, *supra* note 26, at 1523, 1527–28; see, e.g., *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, 109 PENN. ST. L. REV. 1059, 1070 (2005) (Martha Stewart “talked, but [prosecutors] did not like what was said. Therefore, they proceeded to charge her with crimes related to lying instead of . . . charging the substantive crimes for which they were initially investigating her.”); Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2024–25 (2005) (arguing that the government in the Martha Stewart case “was reduced, in effect, to arguing that it was illegal for her to lie about something that was not illegal and that her protestations of innocence constituted the fraud upon which she should be considered guilty!”).

¹³⁸ Julian Bentayeb, *Classified Data in the Jianyu Huang Fraud Case?*, LLNL—THE TRUE STORY (May 21, 2013), <http://llnlthetruestory.blogspot.com/2013/05/classified-data-in-jianyu-huang-fraud.html> [<https://perma.cc/4PLB-QEFJ>].

¹³⁹ Eric M. Johnson & Joseph Kolb, *U.S. Scientist Pleads Guilty to Taking Government Laptop to China*, REUTERS (Aug. 26, 2014, 2:20 AM), <http://www.reuters.com/article/us-usa-new-mexico-scientist-idUSKBN0GQ0DZ20140826> [<https://perma.cc/5STY-U8CW>].

¹⁴⁰ Plea Agreement, *United States v. Huang*, No. 12-cr-01246 (D.N.M. Aug. 25, 2014) (defendant pleaded guilty); see also Indictment, *United States v. Huang*, No. 12-cr-01246 (D.N.M. May 23, 2012).

prison for his single false statement and for bringing his government laptop overseas without permission.¹⁴¹ Similarly, in the investigation of Sherry Chen, investigators asked when Chen had last seen a former classmate, to which she responded, “I think 2011.”¹⁴² Because she had in fact seen the classmate in 2012, prosecutors filed an additional false statements charge against her.¹⁴³

As Lisa Kern Griffin argues, convictions for unsworn false statements are very troubling because the “natural reaction of most subjects confronted by investigators is to respond in a way that deflects scrutiny and forestalls liability.”¹⁴⁴ In other words, most people confronted by federal investigators who suspect them of a crime will be inclined to say things, truthful or not, to convince the investigators that the suspects themselves have done nothing wrong.¹⁴⁵ Although suspects have the Fifth Amendment right to remain silent, government agents rarely advise suspects of that right during unsworn interviews.¹⁴⁶ Indeed, without a formal reminder of the right to remain silent, many people may feel compelled to speak, knowing that “in our normal social dealings, one who remains silent in the face of an accusation often is presumed to be guilty.”¹⁴⁷

Criminalizing this type of “defensive deception” is highly problematic because it invites investigators to initiate conversations

¹⁴¹ Press Release, Dep’t of Justice, Former Sandia Corporation Scientist Pleads Guilty to Taking Government Property to China (Aug. 25, 2014), <https://www.fbi.gov/contact-us/field-offices/albuquerque/news/press-releases/former-sandia-corporation-scientist-pleads-guilty-to-taking-government-property-to-china> [<https://perma.cc/J2LZ-WZZN>].

¹⁴² See Perlroth, *supra* note 13 (“It was the last time I visited my parents, I think 2011, May 2011.”).

¹⁴³ *Id.*

¹⁴⁴ Griffin, *supra* note 26, at 1520; see also *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) (“It probably is the normal instinct to deny and conceal any shameful or guilty act.”); EVELIN SULLIVAN, *THE CONCISE BOOK OF LYING* 75 (2001) (“[O]nly a perpetrator who is repentant or out to be punished is honest.”); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!/?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 648 (1991) (“For many people, and probably for most, the threat of serious criminal punishment is sufficient” to cause them to lie).

¹⁴⁵ See *Commonwealth v. Webster*, 59 Mass. 295, 317 (1850) (“[A]n innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs.”), *abrogated on other grounds*, *Commonwealth v. Russell*, 23 N.E.3d 867 (Mass. 2015).

¹⁴⁶ See Griffin, *supra* note 26, at 1530–31, 1531 n.71.

¹⁴⁷ Griffin, *supra* note 26, at 1530–31; see also STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME* 85 n.34 (2006)

with suspects solely in order to *induce* suspects to commit the crime.¹⁴⁸ As such, interviews with suspects “can involve defendants who enter a conversation technically innocent but end up exposed to criminal liability because they lie reflexively to protect themselves from embarrassing revelations rather than to obstruct legitimate prosecutions.”¹⁴⁹

Although on its face the false statements statute is intended to protect the accuracy of information obtained in government investigations, it operates in practice as a tool to allow federal prosecutors to more efficiently seek punishment for suspected criminal behavior.¹⁵⁰ Because false statements are generally quite easy to prove, and often easy to manufacture,¹⁵¹ they provide an alternative way to convict and punish defendants suspected of crimes that are often harder to prove, allowing for cheaper and easier pretextual prosecutions.¹⁵²

A major problem that can arise when false statement charges are applied unjustly is that they can *deter* people from openly and honestly providing information to federal investigators.¹⁵³ Unjust prosecutions for misstatements and minor falsehoods made voluntarily to investigators can reduce the willingness of people to engage in consensual interviews in the first place. After all, if defendants can be sent to prison for nervously denying plans to take their work laptop overseas or for speculating about the last time she saw a classmate, sharing any information with authorities could become a risk even for those who previously did nothing criminal.¹⁵⁴ Indeed, if certain groups,

¹⁴⁸ *Brogan v. United States*, 522 U.S. 398, 416–17 (Ginsburg, J., concurring); Griffin, *supra* note 26, at 1520, 1525, 1531; Murphy, *supra* note 87.

¹⁴⁹ Griffin, *supra* note 26, at 1525.

¹⁵⁰ See *id.* at 1535–36; see also Murphy, *supra* note 87, at 1467 (the false statements statute is “[a]n obscure 1930s law, not to be confused with perjury, . . . [that] has quietly become the tool that independent counsels love to use when all else fails”) (quoting Paul Glastris, “False Statements”: *The Flubber of All Laws*, U.S. NEWS & WORLD REP. 25 (Mar. 30, 1998)). Cf. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (arguing that Congress designed criminal statutes like these in order to make it easier for prosecutors to convict suspects).

¹⁵¹ See, e.g., *Brogan*, 522 U.S. 398.

¹⁵² See Griffin, *supra* note 26, at 1535–36. Cf. Stuntz, *supra* note 150.

¹⁵³ See Griffin, *supra* note 26, at 1517 (“Deep deterrence of harmless lies may lead to diminished compliance and other backfire effects, so that an offense that ostensibly protects the government’s access to information in practice produces less of it.”).

¹⁵⁴ Cf. Plea Agreement, *United States v. Huang*, No. 12-cr-01246 (D.N.M. Aug. 25, 2014) (defendant pleaded guilty); see also Indictment, *United States v. Chen*, No. 14-cr-00149 (S.D. Ohio Oct. 16, 2014).

such as minorities, believe they are being unfairly targeted, they may be less willing to cooperate with authorities regardless of the personal risk.¹⁵⁵

II. RESEARCH ON PROSECUTIONS OF ECONOMIC ESPIONAGE

Because concerns of differential treatment of espionage cases are relatively recent, there is relatively little research in the area. Moreover, the few databases related to the subject suffer from selection biases that make them unsuitable for an objective analysis of racial disparities in charging or sentencing.

One resource of note is the FedCases database, created and maintained by Jeremy Wu, a Chinese-American activist.¹⁵⁶ FedCases collects information on all known espionage prosecutions of Asian-Americans and Chinese nationals, as well as all information on all known EEA prosecutions. FedCases functions as an important advocacy tool for demonstrating the breadth of DOJ investigations into Chinese related espionage. Nonetheless, because FedCases candidly aims to create an exhaustive list of all *Chinese* related espionage cases in addition to all EEA cases, it cannot be used to determine whether innocent people of Chinese descent are *disproportionately* being prosecuted as spies.¹⁵⁷

Another significant resource is a database compiled by Nolan Barton Bradford & Olmos LLP, a white-collar defense firm based in

¹⁵⁵ Cf. Griffin, *supra* note 26, at 1547–56 (arguing that prosecutions for harmless false statements can undermine the legitimacy of authorities, reducing the willingness of people to obey the law in general); Harris, *Driving While Black*, *supra* note 17, at 309 (“Why should law-abiding residents of these communities trust the police if, every time they go out for a drive, they are treated like criminals?”); Murphy, *supra* note 87, at 1495–97 (excessive enforcement of obstinacy charges is “symptomatic of a system that stands on tenuous footing, and that cannot absorb the slightest insults to its authority”).

¹⁵⁶ FedCases, JEREMY S. WU, PH.D., <http://jeremy-wu.info/fed-cases> [<https://perma.cc/44UV-XP6>].

¹⁵⁷ See Jeremy Wu, *A Web-Based Resource on China-Related Federal Prosecutions of Economic Espionage and Trade Secrets*, LINKEDIN (Jan. 25, 2016), <https://www.linkedin.com/pulse/web-based-resource-china-related-federal-prosecutions-jeremy-wu?published=t> [<https://perma.cc/AY35-ANFR>] (“FedCases . . . is a complete collection of all known China-related EEA prosecutions of Asian Americans and Chinese Nationals since the enactment of EEA in 1996.”).

Silicon Valley.¹⁵⁸ This database collects data about EEA cases from PACER court filings. Many of the cases in this database are collected by searching for cases charged under the EEA statutes, 18 U.S.C. §§ 1831 and 1832, in the various PACER court websites. In order to be as comprehensive as possible in its coverage, however, it also includes cases found through searches on Google, in particular those covered in the news and addressed in U.S. Attorney press releases. As explained below, this latter fact introduces a potentially very significant selection bias into the Nolan database.

Similarly, a significant study on the EEA by Gavin C. Reid, Nicola Searle, and Saurabh Vishnubhakat (Reid database), used PACER data to analyze differences in the valuation of damages in EEA cases, and did not examine racial disparities.¹⁵⁹ It also identified EEA cases in large part through DOJ press releases. Although this methodology may be appropriate for analyzing the effects of different methods of calculating damages in EEA cases, as explained below, it produces a potentially biased dataset for purposes of analyzing racial disparities.

U.S. Attorneys do not publish a press release for every case they file. Rather, they save press releases for cases they believe might be of particular interest to the public or may be significant for the goals of the DOJ.¹⁶⁰ The specter of Chinese espionage has been particularly salient in the public imagination in recent years, being featured in blockbuster movies,¹⁶¹ best-selling novels,¹⁶² and reached such a level in 2013 as to compel the Obama administration to pledge to focus DOJ efforts on preventing and punishing Chinese espionage.¹⁶³ U.S. Attorneys, therefore, likely experience greater incentives to publish press releases in cases that could be labeled “Chinese espionage” than in other cases. Because the Nolan and Reid databases include cases drawn from Google, which likely include more high-profile cases, they may reflect a significant selection bias that distorts any findings about prosecutorial

¹⁵⁸ See Thomas J. Nolan, *Trends in Trade Secret Prosecutions*, NOLAN BARTON BRADFORD & OLMOS LLP, <http://jeremy-wu.info/wp-content/uploads/2016/01/Trends-in-Trade-Secret-Prosecutions.pdf> [<https://perma.cc/A34W-U847>] (last visited Oct. 10, 2018).

¹⁵⁹ Reid, Searle, & Vishnubhakat, *supra* note 38.

¹⁶⁰ Conversations with a U.S. Attorney, on file with author.

¹⁶¹ See, e.g., *SPY GAME* (Beacon Pictures 2001); *TOMORROW NEVER DIES* (Eon Productions 1997).

¹⁶² Jemimah Steinfeld, *A License to Thrill? Spy Novelists Hit Pay Dirt in China*, CNN (June 24, 2015, 9:16 AM), <http://www.cnn.com/2015/06/10/asia/china-spy-novels> [<https://perma.cc/4CJP-7DH8>].

¹⁶³ Sanger, *supra* note 40.

decision-making they might produce. Moreover, none of the existing studies have examined the question that is the focus of this Study: does the DOJ disproportionately file espionage charges against innocent people of Asian descent?¹⁶⁴

III. DATA AND DESCRIPTIVE STATISTICS

There are many challenges to producing a reliable, unbiased sample of espionage cases for analysis. First, as explained in Part I, federal prosecutors use a broad range of charges against defendants they suspect of espionage, which often, but do not always, include EEA charges. For example, although Xi's alleged conduct would likely have satisfied the elements of the EEA, as he allegedly misappropriated a trade secret to benefit a foreign agent, he was actually indicted on four counts of wire fraud under 18 U.S.C. § 1343 and was *not* charged under the EEA.¹⁶⁵ Indeed, it appears that some U.S. Attorneys may have intentionally *avoided* filing "espionage" charges against some defendants in order to avoid internal DOJ regulations for handling espionage cases.¹⁶⁶ Thus, producing a complete dataset of all espionage cases would require scouring essentially all federal criminal cases to determine which cases involved "espionage," a task that would likely take years of man-hours to accomplish.

Another possible approach would be to collect cases by searching DOJ press releases for cases the U.S. Attorneys themselves described as "espionage." This, however, would create the same selection bias as in the Nolan and Reid databases.¹⁶⁷ As explained in Part II, U.S. Attorneys do not publish a press release for every case they file but only in cases that are higher profile and of greater public interest.¹⁶⁸ Because U.S. Attorneys have incentives to appear to be prosecuting Chinese

¹⁶⁴ In addition to the FedCases and Nolan databases, there is Matthew T. Priebe, *The Economic Espionage Act of 1996: A 15 Year Review* (Dec. 2014) (unpublished Masters thesis, Grand Valley University) <http://scholarworks.gvsu.edu/theses/742> [<https://perma.cc/LUJ9-G7Q8>]. The Priebe study, however, focused its analysis only on § 1832, and excluded § 1831 cases.

¹⁶⁵ See, e.g., Indictment at 5, *United States v. Xi*, No. 15-cr-00204, (E.D. Pa. 2016).

¹⁶⁶ Apuzzo, *supra* note 3.

¹⁶⁷ See, e.g., Reid, Searle & Vishnubhakat, *supra* note 38 (first identifying EEA cases from press releases, then finding data, making the study biased towards more significant cases; same with academic sources).

¹⁶⁸ *Id.*

espionage aggressively, they are more likely to issue a press release in cases that look like Chinese espionage. Therefore, a dataset that relied on U.S. Attorney statements or press releases would likely be heavily skewed.

Rather than attempting to create a complete dataset of all espionage cases or relying on U.S. Attorneys’ self-reporting, this Study limits its analysis to a random sampling of cases filed under the EEA in federal court. Doing so provides two major benefits. First, it ensures that all the cases in the sample include alleged conduct that involves a person taking trade secrets from one party for the benefit of another, the definition of economic espionage. Second, because inclusion in the sample depends on actual court filings, the sample avoids the selection biases of self-reporting by the DOJ.

The dataset used in this Study was created by searching for all cases in the PACER system¹⁶⁹ that included EEA charges (18 U.S.C. §§ 1831 and 1832), between October 11, 1996, when the EEA was passed, through July 1, 2015.¹⁷⁰ Although one would hope that a search for all EEA cases in the PACER system would reveal all EEA cases filed in federal courts, this was not the case for two reasons. First, each of the ninety-five federal district courts has its own Electronic Case Files website, with different formats and capabilities. Although ninety-three districts allow searches for cases by charging statutes, two districts, the Central District of California and the Northern District of Ohio, do not. Cases from those districts are excluded. Second, and perhaps more significantly, not all EEA cases filed in the districts that allow search by statute appear in a search for EEA cases. Indeed, comparing the Nolan database, which includes cases found through DOJ press releases and their own internal records,¹⁷¹ reveals ten cases from the Central District of California or Northern District of Ohio and thirty-three cases from districts that *do* allow searching by statute that were not revealed in a search of PACER sites. There was no discernable pattern in the thirty-three “missing” cases that might offer a systematic explanation for their exclusion. As such, it seems likely that they were caused by clerical errors in the coding of the charging statute, which is likely a lower

¹⁶⁹ PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, www.pacer.gov [<https://perma.cc/GX9Z-6VTP>] (last visited Oct. 10, 2018).

¹⁷⁰ *Id.* (cases were found by utilizing the search by statute function on the individual PACER websites for each District Court).

¹⁷¹ *See* communications with Thomas J. Nolan and Jenny Brandt, who, along with Tyler Keefe, created the Nolan database, on file with Author.

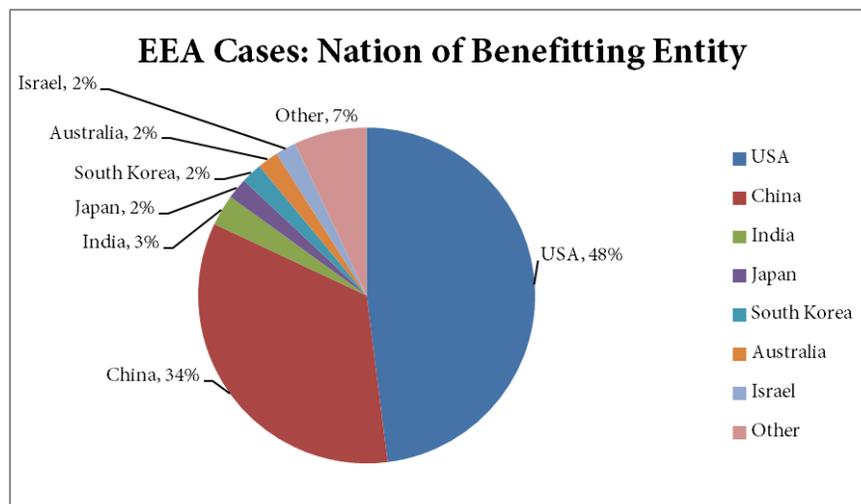
priority variable for the clerks who enter the cases into PACER. Where a defense attorney or prosecutor would likely notice and complain if a clerk mis-entered the case number or sentence, so that the file could not be found, few other than empirical researchers are likely to search for cases by charging statute or notice if a case is missing. Thus, it seems reasonable to assume that the cases found in the PACER search represent a random sample of all EEA cases filed in federal court. Cases that were still pending—without a final judgment—were excluded in most analyses unless the court documents mentioned exceptional circumstances, such as a defendant who remained a fugitive or died before final judgment. The dataset includes 136 cases involving 187 individual defendants and excludes any corporate defendants.

Roughly half, 48%, of EEA cases, involved defendants who were accused of stealing trade secrets for the benefit of an American corporation or person.¹⁷² In 34% of cases the alleged beneficiary was based in China. Other benefitting nations included India, Japan, South Korea, Australia, and Israel.¹⁷³

¹⁷² The intended beneficiary nation could be identified in 118 out of 136 cases. Cases involving multiple benefitting nations were coded as a separate observation for each nation, for a total of 130 observations.

¹⁷³ Four cases involved India, three involved Japan, three involved South Korea, two involved Australia, and two involved Israel. In addition, New Zealand, the Czech Republic, Germany, Italy, South Africa, Iran, Taiwan, and Malaysia were each involved in one case.

Chart 1. EEA Cases: Nation of Benefitting Entity:



Most PACER documents do not mention the race or national origin of the defendant, a crucial variable for this Study. This Study used the defendant’s name in conjunction with searches of DOJ press releases and news coverage of individual cases to identify the likely race of each defendant. Name analysis has been used by epidemiologists and other researchers as a method to identify the race of subjects whose race cannot be directly verified.¹⁷⁴ Analysis of last names is not an accurate methodology for differentiating between African-Americans and non-Hispanic white Americans because the last names of many African-Americans and white Americans are of European origin.¹⁷⁵ However, many Asian last names are highly distinctive and easily identifiable as originating not only from Asia, but also from particular countries or even religious subgroups.¹⁷⁶ As a result, the technique has been found to

¹⁷⁴ See, e.g., M. White et al., *Smoking and Alcohol Consumption in a UK Chinese Population*, 115 PUB. HEALTH 62, 62–69 (2001) (using sample created through name analysis to analyze smoking and alcohol consumption patterns among the Chinese populations in the United Kingdom); Jennifer Czuprynski Kali et al., Joint Statistical Meetings Panel Discussion, *Using Names to Check Accuracy of Race and Gender Coding in NAEP* (Aug. 10, 2005) (using names to identify coding errors in the gender and race/ethnicity in the National Assessment of Educational Progress survey).

¹⁷⁵ See Kevin Fiscella & Allen M. Fremont, *Use of Geocoding and Surname Analysis to Estimate Race and Ethnicity*, 41 HEALTH SERV. RES. 1482, 1482 (2006) (“Surname analysis is not accurate for identifying African Americans.”).

¹⁷⁶ See Angus Nicoll, Karen Bassett & Stanley J. Ulijaszek, 40 J. EPIDEMIOLOGY & COMMUNITY HEALTH 364 (1986) (“Asian names are distinctive and seem to be easily

be a reliable coding technique for identifying people of Asian descent, particularly when first names are included in the analysis.¹⁷⁷

This Study coded defendants' names as "Western," including Eastern European, Hispanic and Latino names,¹⁷⁸ "Chinese," "Other Asian," including Indian names, and "Arabic" based on the totality of the first, middle, and last names. Many names, such as "Brian Murphy" or "Robert M. McKimmey," were immediately coded as Western. Other names, such as "Eun Joong Kim," were easily identified as Korean, based on the Author's cultural knowledge, and coded as "Other Asian." For names that could be of ambiguous origin, the researcher searched DOJ press releases and other news coverage about the specific defendant, which often revealed the ethnicity of the person in question. When the ethnicity of the specific person could not be identified, the researcher searched for all or part of the name in Facebook, which for almost all names¹⁷⁹ revealed a precise enough association with a country or region

distinguishable from non-Asian. Further, most of the Asian names allow subdivision into the ethnic religious subgroups.").

¹⁷⁷ See, e.g., *id.* (name analysis has "high reliability, particularly if both first and second names were used"); Bernard C. K. Choi et al., *Use of Surnames to Identify Individuals of Chinese Ancestry*, 138 AM. J. EPIDEMIOLOGY 723 (1993) (surname analysis has high positive predictive value for identifying people of Chinese descent in Ontario, Canada); Fiscella & Fremont, *supra* note 175, at 1482 ("[S]urname analyses produces reasonable estimates of whether an [America health services] enrollee is Hispanic or Asian/Pacific Islander . . ."); J.O. Harland et al., *Identifying Chinese Populations in the UK for Epidemiological Research: Experience of a Name Analysis of the FHS Register*, 111 PUB. HEALTH 331 (1997) (only 2% of 1064 people in the United Kingdom identified as Chinese through name analysis were misclassified); Bridget Huey-Huey Hage et al., *Telephone Directory Listings of Presumptive Chinese Surnames: An Appropriate Sampling Frame for a Dispersed Population with Characteristic Surnames*, 1 EPIDEMIOLOGY 405 (1990) (technique applied to identify Chinese residents of Melbourne, Australia yields a sample demographically comparable to census data).

¹⁷⁸ Some Filipino Americans, who this Study would consider non-Chinese Asians, have Hispanic names. Hispanics constitute 12.5% of the U.S. population while Filipinos are slightly less than 1%, making it highly likely, ex ante, that any defendants with Hispanic names are of non-Filipino descent. Seven defendants in the Study had Hispanic or Latino names. DOJ press releases or other news coverage revealed that one defendant was from the Dominican Republic and revealed no indication that the remaining defendants had Filipino heritage. All seven defendants were convicted of serious crimes. If the six defendants with Hispanic names whose race could not be verified were all Asian (Filipino), the percentage of possibly innocent Asians would be reduced from 22.2% to 20.3% and the percentage of Other Asians charged would increase from 9.0% to 12.2%.

¹⁷⁹ The one exception was "Daniel Park," a name that, based on the first and last names, could be either Other Asian (Korean) or Western. For example, in 2000, Daniel Park was a resident of San Jose, California, who was accused of stealing data on semi-conductor sales and pleaded guilty to copyright infringement. Indictment, United States v. Chang, No. 00-cr-20203 (N.D. Cal. June 14, 2000). Specific information on the race of this defendant could not be

of the world to be coded into one of the four categories. The coding of all names was then double-checked by a second researcher, Dr. Jeremy S. Wu, who is fluent in Mandarin and Cantonese, was born in Hong Kong, and has extensive experience in matters of diversity and advocacy of Chinese-American rights.¹⁸⁰

Although all the names in the data set were coded with a substantial level of certainty, this methodology inherently has limitations, particularly with respect to adoption and marriage. Around 1.6% of Americans today were adopted by people other than their birth parents, many of whom changed their name after adoption.¹⁸¹ Around 71% of women who marry today change their name to their spouse’s name, while the remaining kept their maiden name or chose another option such as hyphenating their last name.¹⁸² Many married women who change their last name retain their maiden name as a middle

found. However, thirty-nine of the first forty “Daniel Park” entries in a Facebook search were clearly Asian, suggesting that there are significantly more Asian Daniel Parks in the world than Western Daniel Parks. Accordingly, this entry was coded as “Other Asian.” Because Daniel Park pleaded guilty to crimes other than false statements, he was coded as guilty. If Daniel Park was miscoded and is actually Western, the proportion of Other Asians charged under the EEA would be marginally smaller, 8.5% rather than 9.0%, and the rate of possibly innocent Other Asians would be marginally higher, 22.6% rather than 22.2%.

¹⁸⁰ Many thanks to Dr. Jeremy S. Wu, who has served as, inter alia, Project Director for Longitudinal Employer-Household Dynamics at the U.S. Census Bureau, Director of the Departmental Office of Civil Rights at the U.S. Department of Transportation, principal advisor to Secretary Norman Mineta on civil rights and equal opportunity issues, National Ombudsman for the U.S. Department of Energy and advisor to Secretary Bill Richardson on matters of diversity, and Deputy Director, Office of Civil Rights, in the U.S. Department of Agriculture (USDA). In addition, since 2003, Jeremy Wu has been a member of the Committee of 100, a select organization of Chinese Americans dedicated to promoting the full participation of all Chinese Americans in American society. See *Jeremy Wu*, COMMITTEE 100, <https://www.committee100.org/member/jeremywu> [<https://perma.cc/UD5G-3L3J>] (last visited Oct. 10, 2018).

¹⁸¹ See *generally Adoption Statistics*, ADOPTION HIST. PROJECT, <http://pages.uoregon.edu/adoption/topics/adoptionstatistics.htm> [<https://perma.cc/U52G-5VSS>] (around five million Americans alive today are adoptees which, compared with 319 million Americans, would be 1.6%).

¹⁸² See Google Consumer Surveys, *2 of 2 Questions from NYT Upshot Maiden Names*, <https://www.google.com/insights/consumersurveys/view?survey=tpjh7dfv56ff2&question=2&filter=gen%3AFemale> (at time of writing, more than 70% of female respondents changed last name to spouse’s, more than 15% kept last name, about 6% hyphenated last name, and about 5% chose “other” option) (cited in Claire Cain Miller & Derek Willis, *Maiden Names, on the Rise Again*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/upshot/maiden-names-on-the-rise-again.html> [<https://perma.cc/GNU8-9N9R>]).

name,¹⁸³ a fact that helped identify “Janice Kuang Capener” and “Carroll Lee Campbell”¹⁸⁴ as defendants whose race should be examined more closely. A DOJ press release revealed that Capener was a woman of Chinese descent.¹⁸⁵ Although “Carroll” is traditionally an Irish male name that means “fierce in battle,”¹⁸⁶ a search on Facebook revealed that many women spell their first name the same way. A newspaper article revealed that Campbell was, in fact, a man of Western descent.¹⁸⁷ Because over twice as many Asian-American women marry a person of another race as Asian-American men, there is a much greater risk that this methodology would miscode an Asian person as Western named than vice-versa.¹⁸⁸ As such, there is some risk that this Study underestimates the percentage of Asians and Chinese people charged with espionage.

The database includes 57% of defendants with Western names, 31% with Chinese names, 9% with Other Asian names, and 2% with Arabic names.

¹⁸³ See Nara Schoenberg, *A Modern Take on How to Craft a Married Name*, CHI. TRIB. (June 26, 2013), http://articles.chicagotribune.com/2013-06-26/features/sc-fam-0625-women-name-change-20130626_1_maiden-laurie-scheuble-married-name (citing studies showing that between 3% and 25% of married women use their maiden name as a middle name).

¹⁸⁴ See *United States v. Campbell*, No. 98-cr-00064 (N.D. Ga. Feb. 25, 1998); *United States v. Capener*, No. 12-cr-00027 (D. Utah Apr. 25, 2012).

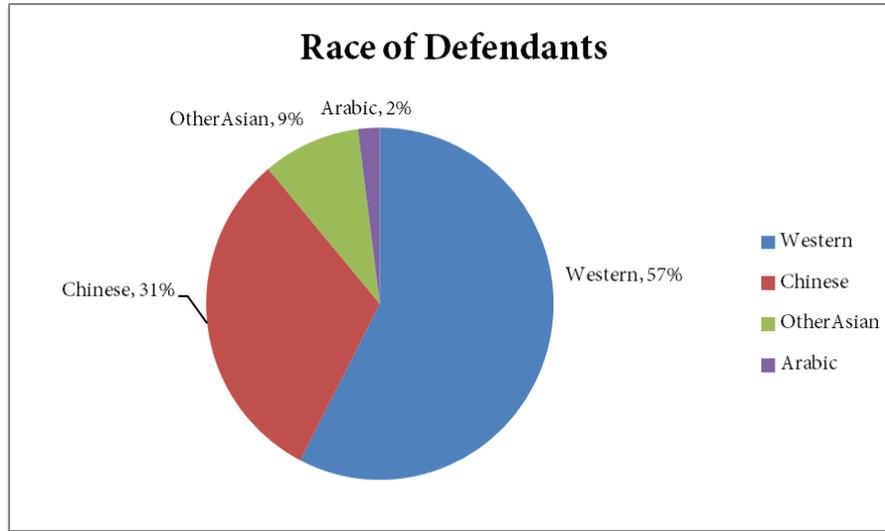
¹⁸⁵ See Press Release, U.S. Attorney’s Office, D. Utah, Fed. Bureau Investigation, Federal Charges Filed in Case Involving Alleged Theft of Trade Secrets from Utah Company (May 7, 2012), <https://archives.fbi.gov/archives/saltlakecity/press-releases/2012/federal-charges-filed-in-case-involving-alleged-theft-of-trade-secrets-from-utah-company> [<https://perma.cc/Z6W6-J9F4>] (identifying Capener as a citizen of China).

¹⁸⁶ See *Carroll*, BABY NAMES IRE., <http://www.babynamesofireland.com/carroll> [<https://perma.cc/K8QC-EE7V>] (last visited Oct. 10, 2018) (“Carroll” is a male name that means “fierce in battle”).

¹⁸⁷ See *Man in Jail for Trying to Sell Secrets*, ASSOCIATED PRESS, Aug. 27, 1998 (referring to Campbell as “he”).

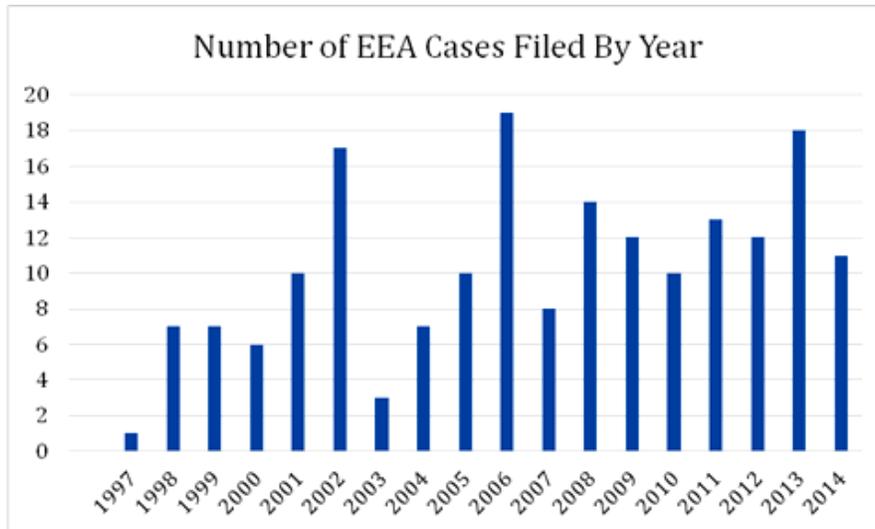
¹⁸⁸ See Wendy Wang, *Interracial Marriage: Who Is ‘Marrying Out?’*, PEW RES. CTR. (June 12, 2015), <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out> [<https://perma.cc/8CJU-JR82>] (16% of Asian male and 37% of Asian female newlyweds married someone of a different race).

Chart 2. Race of Defendants:



As can be seen in the following chart, there is significant fluctuation in the number of EEA cases filed each year.¹⁸⁹

Chart 3. Number of EEA Cases Filed by Year:



¹⁸⁹ Each “case” in these charts is a single defendant who was charged under the EEA. Because the data set includes only cases filed by July 1, 2015, the year 2015 was excluded from these charts. As of July 1, 2015, charges for three EEA cases had been filed in 2015. One of these defendants was Chinese and two of them had Western names.

The proportion of Chinese defendants charged under the EEA has risen dramatically under the Obama administration. Where only 17% of defendants charged between 1997 and 2008 were Chinese, since 2009, 52% of all EEA defendants have been Chinese. The rate of Other Asians charged has held steady under the Obama administration, at around 9%.

Chart 4. EEA Defendants by Race:

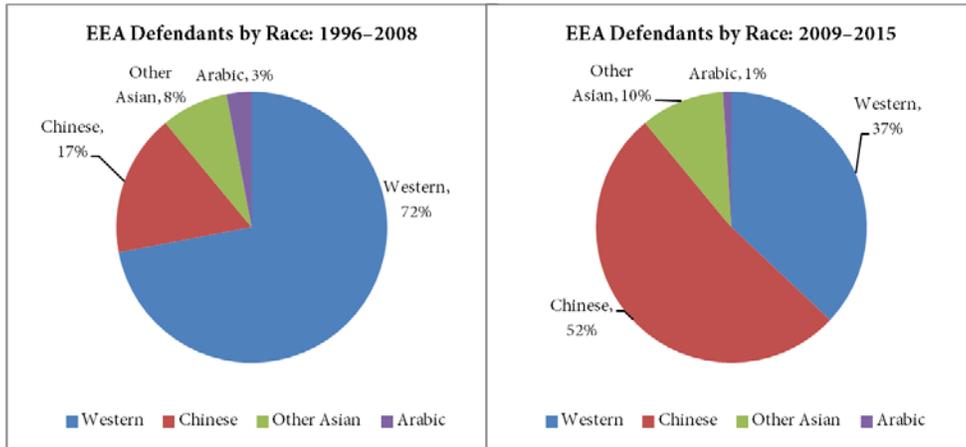
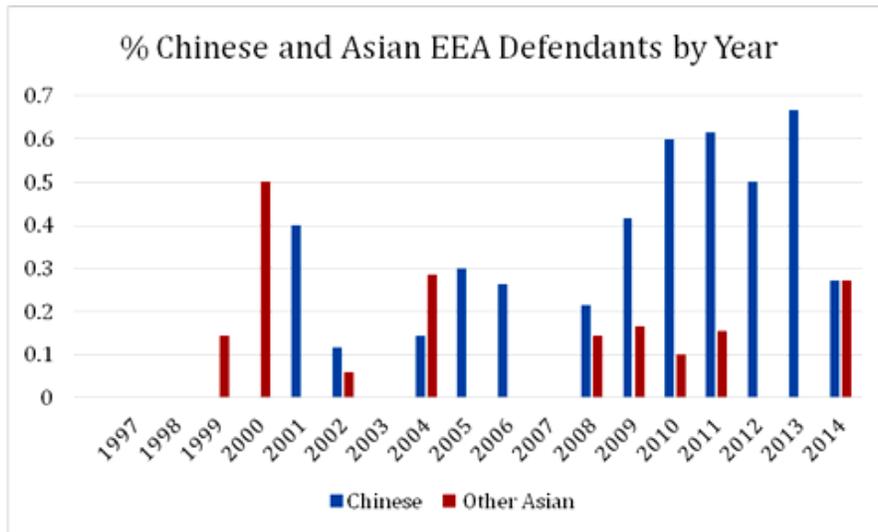


Chart 5. Percent of Chinese and Asian EEA Defendants by Year:



A. “Possibly Innocent” Defendants

The Study first finds that defendants with Western names charged under the EEA are found guilty of espionage-type crimes at a significantly higher rate than Chinese or Asian defendants. In other words, a larger percentage of Chinese and Asian defendants charged with espionage are “possibly innocent” of spying than defendants with Western names.

Federal prosecutors rarely, if ever, hold press conferences to announce that they have unjustly prosecuted an innocent person. Indeed, our criminal justice system provides no process for determining that a person is “innocent” of a crime.¹⁹⁰ Rather, our juries are instructed to determine only whether they believe a defendant is “guilty beyond a reasonable doubt,” or whether a reasonable doubt exists as to the defendant’s guilt.¹⁹¹ The most that could ever be said based on the available court documents is that it is possible that the person was innocent of being a spy. This Article uses the term “possibly innocent” to describe such defendants and includes in the term defendants who might be factually guilty of minor crimes, like making false statements, that they likely would not have been convicted of without the original false accusation of espionage.

Evidence that a defendant was “possibly innocent” can come in several forms. First, defendants acquitted at trial were, by definition, not proven guilty beyond a reasonable doubt. Although such defendants have not been proven “innocent,” there is a significant possibility that they were not, in fact, a spy.

Next, defendants could be considered “possibly innocent” if prosecutors dismissed all charges against the defendant prior to trial, as the U.S. Attorneys did in the cases of Xi and Chen. There are, however, reasons for why prosecutors might dismiss charges against a defendant *other* than a determination that the defendant was “possibly innocent.” For example, if a defendant is part of a larger conspiracy, she might be able to negotiate to have all charges against her dismissed in exchange

¹⁹⁰ On the civil side, however, the federal government, the District of Columbia, and thirty-three states have statutes under which wrongfully convicted defendants can, after a determination of innocence, seek compensation from the government. See *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted> [https://perma.cc/LQH4-W83W] (last visited Aug. 24, 2018).

¹⁹¹ See generally WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, *DEFINING CRIMES* (2d ed. 2015).

for her testimony against the other defendants. Separately, if certain key evidence was ruled inadmissible against a defendant, prosecutors might have no choice but to drop the charges against a defendant who was clearly guilty, but whose guilt could no longer be proven in court. For some cases, the court documents include some information that suggests that charges were dropped because the defendant was likely innocent, or that charges were dropped in spite of the defendant's likely guilt. For the vast majority of cases in which charges were dismissed, however, the most that can be said is that the defendant is "possibly innocent."

Finally, this Study coded defendants as "possibly innocent" of being spies when they were charged under the EEA but pleaded guilty only to false statements. The failure to convict on espionage charges in such cases could reflect "pretextual prosecutions," in which the prosecution convicts a defendant known to be guilty of serious crimes on lesser offenses that are easier to prove.¹⁹² Convictions for false statements could, however, also reflect only the defendant's innocence of the serious espionage charges for which she was originally accused.¹⁹³ Innocent defendants charged with espionage might be willing to plead guilty to any number of minor offenses in order to avoid the risk of harsher punishments. For example, Wen Ho Lee was charged with fifty-nine counts related to false accusations of stealing designs for nuclear weapons; charges that carried the risk of life imprisonment. He pleaded guilty, however, only to mishandling data in exchange for his release from custody the same day he pleaded.¹⁹⁴ Jianyu Huang was accused of espionage but pleaded guilty to taking his work laptop overseas without permission and false statements about doing so.¹⁹⁵ Sometimes, however, guilty pleas to non-EEA charges *do* reflect the defendant's guilt of espionage. For example, Nathan Leroux was charged under the EEA for his participation in the "Xbox Underground," a group of hackers who broke into U.S. Army computers and stole more than \$100 million dollars' worth of software and data related to the Xbox One gaming console and games like the "FIFA" soccer series and "Call of Duty:

¹⁹² See *supra* Section I.B.

¹⁹³ Cf. Plea Agreement, United States v. Huang, No. 12-cr-01246, (D.N.M. Aug. 25, 2014) (defendant pleaded guilty).

¹⁹⁴ Drogin & Lichtblau, *supra* note 21.

¹⁹⁵ See *supra* Section I.B.3.

Modern Warfare 3.”¹⁹⁶ As part of Leroux’s plea deal, prosecutors dropped all EEA charges and allowed him to plead guilty to conspiracy to commit unauthorized access to computers with a twenty-four month sentence.¹⁹⁷ To avoid overestimating the number of “possibly innocent” defendants, this Study coded defendants as “possibly innocent” if they were convicted of only false statements and treated convictions for any other crimes as guilt of serious espionage related crimes.

Each defendant was coded based on the disposition of the individual case, as shown in Table 1: (1) Pled guilty to economic espionage or other serious charges; (2) Convicted at trial on such charges; (3) Wanted fugitive; (4) Acquitted at trial; (5) All charges dropped; or (6) Pled guilty to only false statements.

Table 1. Dispositions of Defendants’ Cases:

Table 1: Dispositions of Defendants’ Cases (n=170) ¹⁹⁷	
Likely Guilty of Espionage	
1) Pled guilty to espionage	122
2) Convicted at trial for espionage	19
3) Wanted fugitive	4
Possibly Innocent of Espionage	
4) Acquitted at trial	4
5) All charges dropped	19
6) Pled guilty to false statements	2

The vast majority of defendants charged under the EEA, 85%, were coded as guilty of espionage. Of all defendants, 72% pleaded guilty to EEA charges or other serious charges related to the theft of trade secrets, such as wire fraud or blackmail, whereas 11% were convicted at trial on espionage related charges. Four defendants’ cases had not been resolved

¹⁹⁶ See Louis Rosella, *Mississauga Hacker Jailed in the U.S. for Breaking into Military Network*, STAR (June 10, 2015), <https://www.thestar.com/news/gta/2015/06/10/mississauga-hacker-jailed-in-the-us-for-breaking-into-military-network.html> [https://perma.cc/FC69-JC7V].

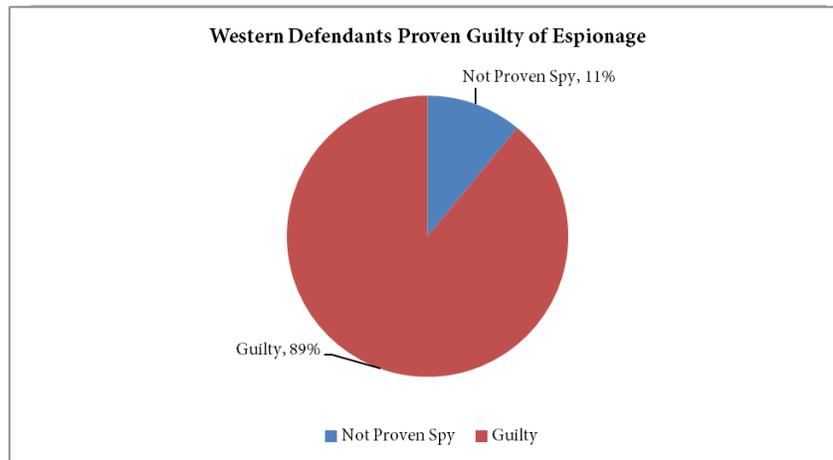
¹⁹⁷ Press Release, Dep’t of Justice, Third Member of International Computer Hacking Ring Pleads Guilty to Hacking and Intellectual Property Theft Conspiracy (Jan. 20, 2015), <https://www.justice.gov/opa/pr/third-member-international-computer-hacking-ring-pleads-guilty-hacking-and-intellectual> [https://perma.cc/A6JQ-BHX5].

because although there are outstanding warrants for their arrests, they have yet to be placed in custody. Although these defendants have not been proven guilty beyond a reasonable doubt, all four are Chinese and were coded as “guilty” in order to be as conservative as possible in the analysis of defendants who were falsely accused of espionage. One defendant committed suicide before his case was resolved. Rather than speculate as to the motivations behind this death, this case was excluded from this part of the analysis.

“Possibly innocent” defendants, those charged under the EEA but who may not have been guilty of espionage, include four defendants who were acquitted at trial and two who were charged with theft of trade secrets and wire fraud, but only pleaded guilty to making false statements and were sentenced to only probation. For an additional nineteen defendants, all charges were dismissed. In all, 15% of all defendants fell into the category of “possibly innocent.”

Breaking out these findings by race, for defendants with Western names, 89% were found guilty of espionage or other serious charges, while only 11% were “possibly innocent” because they were acquitted at trial or had all charges against them dismissed.

Chart 6. Western Defendants Proven Guilty of Espionage:



For Chinese defendants, 21% were “possibly innocent,” a much larger proportion than for Western-named defendants, and a difference that is statistically significant applying the one-sided test of difference of

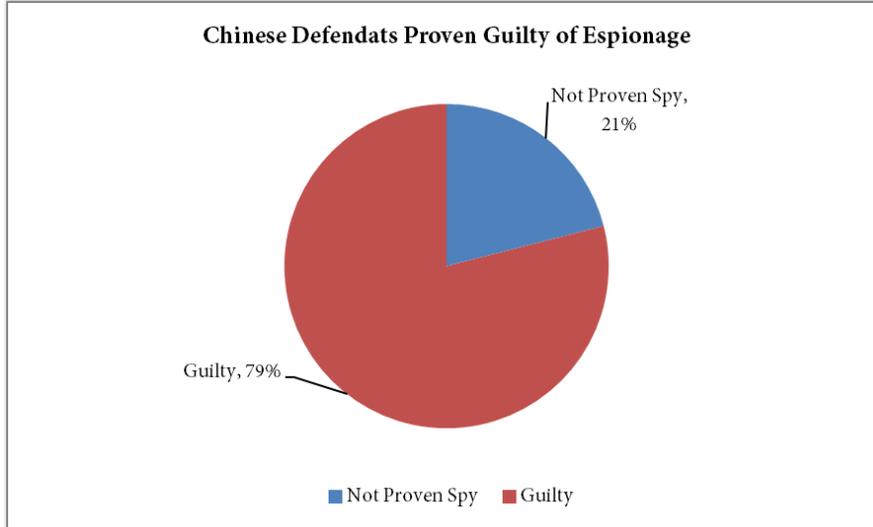
proportions.¹⁹⁸ These “possibly innocent” defendants consisted of two defendants who were acquitted at trial, and eight others against whom all charges were dismissed.

¹⁹⁸ See Appendix. There are two traditional tests of statistically significant differences in proportions for two samples, the two-sided test and the one-sided test. See generally Graeme D. Ruxton & Markus Neuhäuser, *When Should We Use One-Tailed Hypothesis Testing?*, 2010 METHODS ECOLOGY & EVOLUTION 114. Applying the one-sided test, the statistical significance of the difference between Chinese people and defendants with Western names is 4.1%, significant at the traditional 5% level. Under the two-sided test, the significance is 8.3%, indicating a 91.7% likelihood that innocent Chinese people are prosecuted at a higher rate, but not a difference that is “statistically significant” under the traditional use of the term.

The one-sided test is appropriate when the proportion for sample A could be the same as or greater than the proportion for sample B but could not realistically be smaller. The two-sided test is appropriate when the proportion could be larger either for sample A or for sample B. In this case, the two-sided test would be appropriate only if there was a realistic possibility that the DOJ has been prosecuting innocent defendants with *Western* names *more often* than they prosecute innocent Chinese defendants.

As explained in Part V *infra*, all of the theoretical factors that might cause a difference in the rates of prosecutions of innocents point towards a greater risk of false accusations against Chinese people than defendants with Western names, from biases in the civilians who report suspicious behavior, to biases in investigations, to possibly legitimate concerns over the risk of flight, and to biases in prosecution decisions. In the future, it is possible that current concerns over the prosecutions of innocent Asian Americans could cause “counter-bias,” so that prosecutors insist on stronger evidence before filing charges against Asian Americans than against Caucasian suspects. Cf. Lois James, Stephen M. James & Bryan J. Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black than White Suspects?*, 15 CRIMINOLOGY & PUB. POL’Y 457, 472–73 (2016) (study finding that police officers have implicit biases against African Americans but hesitate more to shoot African Americans, possibly due to heightened concerns about backlash against officers who shoot African American suspects); Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145 (2016) (discussing James, James & Vila, *supra*). The current uproar over possible DOJ racial bias began, however, only after the Sherry Chen and Xi Xiaoxing cases were dismissed in May and September 2015. Because this data set includes only cases filed as of July 1, 2015, it seems unlikely that there is any realistic risk that the DOJ is prosecuting innocent Chinese at a *lower* rate than defendants of other races, making the one-sided test appropriate.

Chart 7. Chinese Defendants Proven Guilty of Espionage:

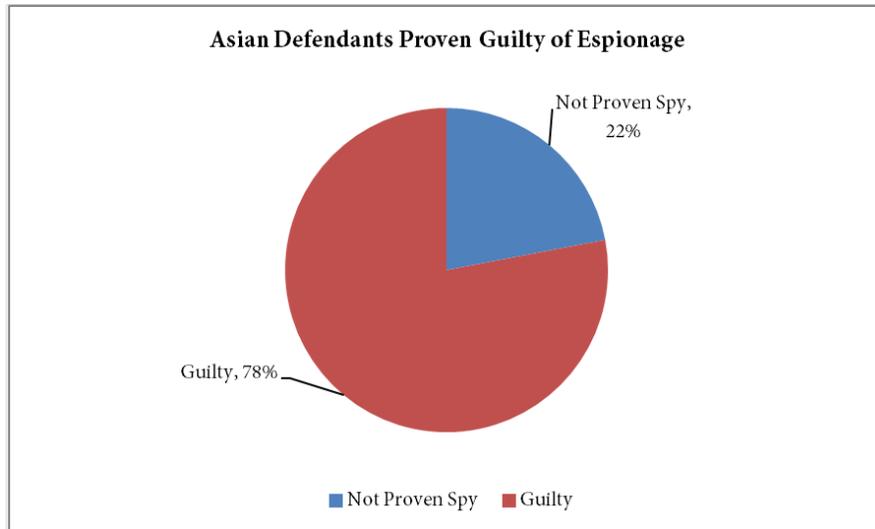


Looking at all defendants with any Asian names, which includes Indian names, 22% are “possibly innocent,” also a statistically significant difference from the proportion of “possibly innocent” defendants with Western names.¹⁹⁹ The additional “possibly innocent” defendants consist of two against whom all charges were dismissed and another two who were charged with espionage but pleaded guilty to only false statements. Given the expansiveness of the federal false statements statute, it is likely that the latter two defendants were in fact guilty of making false statements.²⁰⁰ As discussed in Section I.B.3, however, these stand-alone convictions for false statements raise significant questions as to whether the suspects were guilty of espionage, as originally charged, particularly as both received sentences of only probation.

¹⁹⁹ See Appendix. The difference between all Asian defendants and defendants with Western names is statistically significant at the 5% level under both the one-sided and two-sided tests.

²⁰⁰ See *supra* Section I.B.3.

Chart 8. Asian Defendants Proven Guilty of Espionage:



B. Punishment

The next issue this Study examines is the punishment given to defendants convicted of espionage offenses.

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. The average sentence for Western named defendants convicted of espionage or other serious crimes was eleven months, compared with average sentences of twenty-five months for Chinese defendants and twenty-two months for all Asian defendants.²⁰¹

Indeed, Chinese and Asian defendants were also much more likely to receive a sentence of incarceration, rather than receiving only probation. Nearly half, 49%, of defendants with Western names who were convicted of espionage or other serious crimes received sentences of only probation, while only 21% of convicted Chinese defendants and 22% of all Asian defendants received only probation.

²⁰¹ Defendants who received probation only were coded as zero months of incarceration. Sentences for “time served,” in which the defendant would not spend any time incarcerated after sentencing were coded as zero months of incarceration.

This Study finds that Chinese and Asian named defendants charged with EEA offenses receive much harsher punishment for their crimes than defendants with Western names.

IV. DISCUSSION AND ANALYSIS

This Study finds the following: (1) 31% of defendants charged under the EEA are Chinese and 9% are Other Asian defendants, and that since 2009, 62% of all defendants have been Asians of any race; (2) Chinese and all Asians convicted of serious charges received average sentences of twenty-five months and twenty-two months, respectively, twice as long as defendants with Western names, who received eleven months; (3) almost half of defendants convicted of serious charges with Western names, 48%, received sentences of only probation, while only 21% of convicted Chinese defendants and 22% of all Asian defendants received only probation; and (4) where 11% of Western-named defendants were “possibly innocent,” 21% of Chinese and 22% of all Asian defendants were “possibly innocent.” This Part addresses whether and how these findings may reveal problems in the selection and punishment of Chinese and Asian defendants for espionage prosecutions and the treatment of suspects once they have been cleared of espionage charges, and, finally, offers solutions.

A. *Racial Disparities in EEA Prosecutions: “Researching While Asian”*

This Study finds that defendants with Asian names accused of stealing trade secrets under the EEA are twice as likely to be proven guilty of espionage than defendants with Western names, and that guilty defendants with Asian names receive sentences over twice as harsh as those with Western names. What, then, do these findings say about DOJ investigations into suspected espionage and our courts?

First, with respect to punishment, although these findings are consistent with the hypothesis that Chinese and Asian defendants are punished more harshly for similar crimes, these findings do not *necessarily* suggest that this is true. The fact that one group of defendants tends to receive more severe punishment than another can reflect conscious or subconscious bias against that group, but it can also

indicate that the one group simply commits, is prosecuted for, and is convicted of more serious crimes than the other.²⁰² Federal statutes authorize a broad range of sentences that judges are authorized to impose.²⁰³ For the EEA, the allowable sentence’s range is from zero to ten or fifteen years.²⁰⁴ The Federal Sentencing Guidelines reign in judges’ discretion by giving a recommended range for defendants’ punishment based on hundreds of potentially mitigating and aggravating factors that courts are supposed to give significant weight to.²⁰⁵ Because this Study was not able to access the presentence reports used in determining the defendants’ final sentences, it cannot speak to whether the crimes committed by convicted Chinese or Asian defendants are, on the whole, worse than those committed by defendants with Western names. Therefore, the Study cannot speak to whether there *is* unfair bias in the sentencing of Chinese and Asian defendants but can only identify bias as one possible explanation for these disparities.

Similarly, the fact that people of Asian descent account for 62% of EEA cases since 2009 does not necessarily indicate that Chinese and other Asian-Americans are being unfairly targeted for prosecution. Neither does the fact that around one third of EEA cases allegedly involve a beneficiary based in China necessarily suggest that the DOJ is unfairly singling out Chinese related defendants for prosecution. According to the Commission on the Theft of American Intellectual Property, led by Dennis C. Blair, former Director of National Intelligence, and Jon M. Huntsman Jr., former ambassador to China, the “[n]ational industrial policy goals in China encourage IP theft, and an extraordinary number of Chinese in business and government entities are engaged in this practice.”²⁰⁶ If it is true that some Chinese businesses

²⁰² See Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 281–88 (2010).

²⁰³ Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195 (2015).

²⁰⁴ 18 U.S.C. §§ 1831–32 (2018).

²⁰⁵ See, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007).

²⁰⁶ INTELLECTUAL PROP. COMM’N, THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 3 (May 2013), http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf [<https://perma.cc/P4UR-STEJ>]; Edward Wong & Didi Kirsten Tatlow, *China Seen in Push to Gain Technology Insights*, N.Y. TIMES (June 5, 2013), http://www.nytimes.com/2013/06/06/world/asia/wide-china-push-is-seen-to-obtain-industry-secrets.html?_r=0 [<https://perma.cc/CB9K-MJ42>].

and government agencies are encouraging the theft of trade secrets, the remarkably large percentage of EEA prosecutions involving Chinese defendants and beneficiaries could, in part, reflect larger numbers of such incidents. In other words, the fact that the percentage of Chinese EEA defendants has tripled since President Obama took office could simply be the result of a dramatic increase in the actual amount of Chinese espionage that is taking place.

At the same time, however, it is possible that the increase in prosecutions of Chinese defendants reflects not an *actual* increase in Chinese espionage but the *belief* that espionage related to China has increased. In his foundational piece, David A. Harris argued that the belief that certain racial groups disproportionately commit certain crimes can lead to charging and conviction rates that appear to confirm those stereotypes.²⁰⁷ As Harris explains, some police officers believe that it is “mostly minorities” that are involved in the trafficking of marijuana and cocaine in the United States.²⁰⁸ Regardless of whether this is factually true or not, officers who work for superiors who believe it to be true, or believe it themselves, will respond by looking for evidence of drug crimes more among African-American drivers.²⁰⁹ As such these beliefs can “become a self-fulfilling prophecy.”²¹⁰

Because police will *look* for drug crime among black drivers, they will *find* it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals. At the same time, because police will focus on black drivers, white drivers will receive less attention, and the drug dealers and possessors among them will be apprehended in proportionately smaller numbers than their presence in the population would predict.²¹¹

²⁰⁷ See Harris, *Driving While Black*, *supra* note 17, at 301 (“[T]here is a connection between where police look for contraband and where they find it.”) (emphasis removed).

²⁰⁸ *Id.* at 297 (quoting Carl Williams, who in March 1999 asserted that “mostly minorities” commit drug crimes).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (emphasis added).

Similarly, the belief that Chinese businesses and people are disproportionately involved in the theft of trade secrets may cause the DOJ and the FBI to focus their investigations on potential *Chinese* espionage. Indeed, in his 2015 National Security Strategy discussion of threats from China, President Obama stated that “[o]n cybersecurity, we will take necessary actions to protect our businesses and defend our networks against cyber-theft of trade secrets for commercial gain whether by *private actors* or the Chinese government.”²¹² By committing to combat the threat of China-related espionage, President Obama ensured that the FBI and U.S. Attorneys would focus additional resources on identifying and investigating the potential theft of trade secrets by people who have a connection to China, in the same way that some police officers concerned with drug crimes focus their pretextual stops on African-American motorists. Doing so will naturally increase the number of Chinese people who *are* engaged in the theft of trade secrets to be caught. Doing so, however, also diverts resources away from the investigation and prosecution of non-Chinese defendants. Thus, by focusing investigatory and prosecutorial resources on Chinese espionage, the DOJ may be artificially inflating the number of Chinese defendants convicted of the theft of trade secrets while simultaneously deflating the number of non-Chinese defendants they convict. Although the DOJ may be catching more Chinese and Asian spies, it is possible that they do so only by allowing more non-Asian spies to go free.

Harris, and many others, argue that police officers’ subjective beliefs that African-Americans are more likely to commit drug crimes, combined with the power of pretextual stops, effectively creates a new crime, “driving while black.”²¹³ Similarly, it may be that DOJ suspicions that Chinese and other Asian-Americans are more likely to commit industrial espionage, combined with charging power largely unchecked

²¹² WHITE HOUSE, NATIONAL SECURITY STRATEGY 24 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [<https://perma.cc/B5QE-YSDA>] (emphasis added); see also Sanger, *In Cyberspace*, *supra* note 40.

²¹³ See generally Harris, *Driving While Black*, *supra* note 17; Milton Heumann & Lance Cassak, *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping*, 53 RUTGERS L. REV. 911 (2001); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004).

by grand juries,²¹⁴ effectively creates a new crime, “researching while Asian.”

B. *Destruction of Evidence and Risk of Flight*

The first time Xiaoxing Xi learned that he was suspected of espionage was when armed federal agents arrested him, after charges had already been filed.²¹⁵ In other cases of suspected espionage, however, such as the cases of Terry Gunderson,²¹⁶ Troy Matthew Ulmer,²¹⁷ Jason Alarcon,²¹⁸ or Hong Meng,²¹⁹ the DOJ engaged in discussions with the suspect and his lawyer *prior* to the filing of charges.²²⁰ Speaking to a suspect prior to the filing of charges can provide a number of benefits, but also comes with some risk. On the benefit side, it can give the DOJ greater leverage to encourage lesser suspects to cooperate with an investigation. Although promises to recommended only probation or drop all charges in exchange for cooperation are often very appealing, promises to never file charges in the first place might put potentially helpful witnesses in a much more agreeable mood. More importantly, “trade secrets,” by their nature, often involve very complicated and technical information, the importance and nature of which may not always be obvious to FBI agents or U.S. Attorneys. Speaking to suspects prior to the filing of charges, as usually occurs in white-collar crime investigations, can give innocent suspects the opportunity to explain why certain evidence that

²¹⁴ See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410–15 (2001).

²¹⁵ Perloth, *supra* note 13.

²¹⁶ Report and Recommendation, United States v. Gunderson, No. 02-cr-00055 (N.D. Iowa Jan. 22, 2003) (defendant pleaded guilty).

²¹⁷ Report and Recommendation, United States v. Ulmer, No. 05-cr-00203 (W.D. Mich. Sept. 13, 2005) (defendant pleaded guilty).

²¹⁸ Criminal Cause for Pleading, United States v. Alarcon, No. 07-cr-00454 (E.D.N.Y. June 20, 2007) (defendant pleaded guilty).

²¹⁹ Judgment, United States v. Meng, No. 10-cr-00056 (D. Del. Oct. 26, 2010) (defendant pleaded guilty) (Meng was coded as Chinese).

²²⁰ All four of these defendants arranged plea agreements with U.S. Attorneys prior to the filing of charges. Six other defendants, five with Western names and one with an “Other Asian” name, also had convictions that were recorded as “pre-indictment” pleas.

might look damning to a lay person is actually perfectly innocent.²²¹ Indeed, if the FBI had confronted Xi with the “smoking gun” blueprints to the “pocket heater,” he could have immediately pointed out that the allegedly secret blueprints were publicly available at the United States Patent Office and the entire ordeal could have been avoided. On the other hand, confronting suspects prior to filing charges can give the suspect a greater opportunity to destroy relevant evidence or to run.²²² Although there is little reason to believe that the risk of destruction of evidence is greater with Chinese and Asian defendants suspected of espionage, there may be some cases in which speaking to a suspected spy prior to the filing of charges would significantly increase the risk of flight.

1. Destruction of Evidence

First, with respect to the destruction of evidence, surprising a suspect with a warrant for her arrest allows prosecutors to immobilize the suspect, preventing her from shredding evidence before it can be secured. Before they can file charges, however, prosecutors must first establish probable cause that the suspect did try to steal trade secrets.²²³ In most cases, the same probable cause that established the suspect’s guilt of the theft of trade secrets would also provide probable cause to support a search warrant to search for evidence of the theft of trade secrets.²²⁴ As such, if all DOJ officials were concerned about in expediting arrests was destruction of evidence, they could just as easily obtain a search warrant to find that evidence, and greatly reduce the risk of arresting and publicly humiliating an innocent person. Moreover, it is difficult to imagine why this risk of destruction of evidence would be greater with respect to Chinese and Asian defendants.

²²¹ See generally JOEL M. ANDROPHY, WHITE COLLAR CRIME (2014). Apuzzo, *supra* note 3 (“In traditional white-collar criminal investigations, those conversations between prosecutors and defense lawyers often happen before charges are filed.”).

²²² See generally ANDROPHY, *supra* note 221.

²²³ See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that a defendant is entitled to a prompt probable cause assessment after arrest); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (holding that a probable cause review should be conducted within forty-eight hours of an arrest).

²²⁴ See *Brinegar v. United States*, 338 U.S. 160, 175–77 (1949) (regarding the definition of probable cause. If this definition is met for the arrest, it is likely met for a search for evidence of the same crime).

2. Risk of Flight

With few exceptions, notably material witness statutes,²²⁵ state actors do not have the authority to restrict a suspect's movements without arresting the defendant on probable cause that she committed a crime.²²⁶ The command, "Don't leave town," often heard in police dramas,²²⁷ has no legal force unless accompanied by an arrest and conditions of release on bail.²²⁸ Generally speaking, the only way police and FBI agents can prevent a suspect from leaving the country is to establish probable cause that the person committed a crime and arrest them.

Once a person suspected of serious crimes leaves the United States, it can be very difficult to force her to return to face charges or accept the punishment for her crimes. For example, in 1977, famed film director Roman Polanski pleaded guilty to having sex with a 13-year-old girl, whom he was suspected of drugging and raping.²²⁹ Before he could be sentenced, however, he fled to Europe. Decades later, in spite of extradition treaties with Switzerland and Poland and multiple attempts to secure his return, Polanski remains a free man and continues to win awards for his films.²³⁰ Similarly, in 1999, Takashi Okamoto allegedly stole DNA and other materials related to Alzheimer's research and left

²²⁵ See 18 U.S.C. § 3144 (2018); *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

²²⁶ *Gerstein*, 420 U.S. 103; *Cty. of Riverside*, 500 U.S. 44 (both cases involve reviews of probable cause for the arrest of a defendant).

²²⁷ See, e.g., *Castle: Nanny McDead* (ABC television broadcast Mar. 16, 2009), *transcribed script available at* <http://scriptline.livejournal.com/17581.html> [<https://perma.cc/2RJ5-LKK2>].

Beckett: "You can go. But just don't leave town until we speak again. Do you understand?"

...

Castle: "Don't leave town? Don't you need probable cause for something like that?"

Beckett: "Only he doesn't know that, does he?"

Castle: "You can lie like that? That is so cool."

²²⁸ ERWIN CHERMERINSKY & LAURIE L. LEVENSON, *CRIMINAL PROCEDURE: ADJUDICATION* 78 (3d ed. 2013).

²²⁹ Sewell Chan & Joanna Berendt, *Poland Revives Effort to Extradite Roman Polanski*, N.Y. TIMES (May 31, 2016), http://www.nytimes.com/2016/06/01/world/europe/roman-polanski-poland-extradition.html?_r=0 [<https://perma.cc/7S26-FQK6>].

²³⁰ *Id.*

for Japan.²³¹ Federal prosecutors subsequently filed charges against Okamoto and requested his extradition pursuant to an extradition treaty with Japan.²³² In 2004, however, the Tokyo High Court rejected the extradition request, shielding him from the United States justice system for as long as he remains in Japan.²³³ Concerns about flight can be particularly salient with respect to suspects who have significant ties to foreign nations with which the United States has *no* extradition treaty, such as China.²³⁴ The risk that a suspect will flee the country if tipped off to government suspicions will be greater when (1) the suspect expects to be found guilty of the crime and expects a long term of incarceration if convicted; (2) the suspect’s ties to the United States are weak; or (3) the suspect has lived in, may prefer, and could easily establish a new life in a foreign nation without an extradition treaty with the United States. Examining these factors reveals that *some* Asian-Americans may experience stronger incentives to flee the United States if they know they are guilty of espionage than do non-Asian Americans. For the vast majority of Asian-Americans, however, this is likely *not* true.

With respect to the first factor, Chinese and Asian defendants do tend to receive longer sentences when convicted of crimes related to the theft of trade secrets. Where nearly half of defendants with Western names receive only probation, over 78% of Asian-American defendants receive a sentence of at least some incarceration, and the average sentences for Asian-American defendants are twice as long as for defendants with Western names. Nonetheless, the sentences Asian-Americans receive are still relatively modest. Around 75% of convicted Asian-Americans receive a sentence of two years and a day or less.²³⁵

²³¹ *Court Rejects U.S. Request for Extradition in Industrial Spy Case*, JAPAN TIMES (March 30, 2004), <http://www.japantimes.co.jp/news/2004/03/30/national/court-rejects-u-s-request-for-extradition-in-industrial-spy-case/#> [<https://perma.cc/UX6X-GCYX>]. See also *FedCases*, *supra* note 156 (search for Okamoto).

²³² *Court Rejects U.S. Request for Extradition in Industrial Spy Case*, *supra* note 231.

²³³ *Id.* If Okamoto or Polanski voluntarily returned to the United States or were forced to return by a third party, they could still be forced to stand trial for their crimes. As, for example, occurred with the fictional character Lau in *THE DARK KNIGHT* (Warner Bros. 2008). However, it does not appear that Batman has chosen to intervene in these cases.

²³⁴ *Countries with No Extradition Treaty with US*, WSFA 12 NEWS (July 31, 2015, 1:00 PM), <http://www.wsfa.com/story/22665099/countries-with-no-extradition-treaty-with-us>; see 18 U.S.C. § 3181 (2018) (the annotations after the statute contain a list of all the countries with which the United States has an extradition treaty. China is not one of the countries listed).

²³⁵ Seventy-six percent of all Asians and 72% of Chinese defendants receive a sentence of two years and a day or less. Eighty-eight percent of defendants with Western names receive sentences of two years and a day or less.

Next, although some Asians suspected of industrial espionage may be sleeper agents sent by Chinese companies to infiltrate America's technology sector, happy to cut all ties with the United States at the first sign that their crimes have been detected, others may look more like Sherry Chen. Chen was born in Beijing, where she earned advanced degrees in hydrology.²³⁶ She moved to the United States to earn a degree in water resources and climatology at the University of Nebraska and became a United States citizen in 1997.²³⁷ She spent eleven years working for the state of Missouri and then moved with her husband to Ohio, where she began her career at the National Weather Service in 2007.²³⁸ On October 20, 2014, FBI agents arrested Chen, who had received awards for her government service, on false charges of espionage.²³⁹

Chen, as the DOJ effectively acknowledged by dropping all charges,²⁴⁰ was innocent, and so would have had little reason to flee the country if the DOJ had continued its investigation prior to filing charges and marching her past her coworkers in handcuffs.²⁴¹ Nonetheless, consider what fleeing would have meant for Chen if she *had* been guilty. Chen had lived in the United States continuously for more than twenty-three years, nearly half her life, at the time she was arrested for espionage.²⁴² Fleeing to Europe, as Roman Polanski did,²⁴³ or to China would have meant abandoning all of the friends and family she had known for decades. Leaving the country would mean giving up her government pension,²⁴⁴ her husband, her ranch-style home in the

²³⁶ Perloth, *supra* note 13.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ The DOJ dropped all charges without explanation. *Id.*

²⁴¹ *Id.*

²⁴² In order to have become a naturalized citizen in 1997, Chen would have had to have maintained continuous residence in the United States for at least five years, plus for at least another six months to a year to process her citizenship. Because she was fifty-eight when she was arrested, her at least twenty-three-year residence in the United States would be nearly half of her life. *See id.* *See also* Ashwanth Paul, *How Long Does the US Citizenship Process Take?*, IMMIGR. DIRECT (Apr. 19, 2011), <https://www.us-immigration.com/us-immigration-news/us-citizenship/how-long-does-the-us-citizenship-process-take> [<https://perma.cc/4W3Q-6WS3>].

²⁴³ Chan & Berendt, *supra* note 229.

²⁴⁴ As a federal government agency, National Oceanic and Atmospheric Administration (NOAA) employees are eligible for retirement benefits that vest after five years of service. *Federal Employees Retirement System: An Overview of Your Benefits*, U.S. OFF. PERSONNEL

suburbs, and her idiosyncratically passionate research into flow patterns in the Ohio River basin.²⁴⁵

One might assume that because Chen had only spent two or three decades in America, her ties to the United States might not be as strong as those of someone who was born in America and spent her entire life here. One might also assume, however, that these same facts make her ties to the United States *stronger*. As someone who *has* lived in another country and knows what it is like, Chen, and other immigrants like her, may be better positioned to understand and appreciate much of American life that others may take for granted. Moreover, by choosing to stay in America, they have demonstrated by their actions that they prefer what America has to offer more than other countries. Although Chen, who was charged with, *inter alia*, theft of government property, faced a statutory maximum penalty of up to ten years,²⁴⁶ as explained above, due to the Federal Sentencing Guidelines, it is very rare for a defendant to actually receive the maximum penalty in a case, particularly for a first time offense.²⁴⁷ As such, it is questionable whether someone like Chen, even if she were guilty of stealing data, would have been willing to leave everything she knew just to avoid a relatively short stay in federal prison.

Next, for some Chinese and Asian suspects, establishing a new life in a non-extradition country can be relatively easy, even preferable. For example, David Yen Lee was a native of Taiwan who rose through the ranks to become a technical director at Valspar Corporation, a major American paint company, and then stole secret paint formulas to benefit a company in China.²⁴⁸ It is safe to assume that Lee would have been

MGMT. 5 (1998), <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-1.pdf> [<https://perma.cc/9RAQ-9DLK>].

²⁴⁵ See Perlroth, *supra* note 13.

²⁴⁶ 18 U.S.C. § 641 (2018); Indictment, United States v. Chen, No. 14-cr-00149 (S.D. Ohio Oct. 16, 2014). Although some newspaper reports suggested that federal prosecutors threatened Chen with up to twenty-five years in prison, this figure could not be verified in court documents. See, e.g., Perlroth, *supra* note 13.

²⁴⁷ See generally Kim, *supra* note 203 (discussing the effects of the Federal Sentencing Guidelines on final sentences, including how defendants with no criminal record receive significantly lower sentences).

²⁴⁸ Press Release, Fed. Bureau Investigation, Former Paint Manufacturing Chemist Sentenced to 15 Months in Prison for Stealing Trade Secrets Valued up to \$20 Million (Dec. 8, 2010), <https://archives.fbi.gov/archives/chicago/press-releases/2010/cg120810-1.htm> [<https://perma.cc/ZKM9-ECPM>]; Greg Burns, *China Corporate Spy Case Paints Outside the Numbers*, CHI. TRIB. (July 2, 2009), <http://www.chicagotribune.com/news/ct-xpm-2009-07-02-0907010635-story.html>.

happy and eager to establish a new life in China not because he was fluent in Mandarin and not because, as a Taiwanese native, he may have a greater familiarity with Asian and Chinese cultures, but because at the time he was arrested, Lee had already accepted a job at a competing paint manufacturer in China and purchased a one-way ticket to Shanghai.²⁴⁹ For other Asian-American suspects, however, establishing a new life in a country like China can be much more difficult. In addition to giving up everything they have known for years or decades, they would have to find a job, become accustomed, or re-acquainted, to a country that, although they may have been born in, has changed radically in the years or decades since they left.²⁵⁰

Finally, any theoretical concerns that continuing an investigation without filing charges would allow a suspect to flee the country are entirely moot in cases like Sherry Chen and Wen Ho Lee in which the suspect was not only aware of but *cooperating with* the investigation before charges were filed. The investigation into Chen spanned over two years, during which she was interrogated multiple times, once for seven hours.²⁵¹ In September 2014, Chen was stopped, and had her luggage searched before she was allowed to board a flight to Beijing.²⁵² Chen was not charged and arrested until October, shortly after Chen *returned* from China.²⁵³ Similarly, in March 1999, Lee was fired from his position at Los Alamos National Laboratories for “serious security violations.”²⁵⁴ However, it was not until nine months later, during which time he was subjected to a highly publicized investigation and yet completely free, that he was finally arrested.²⁵⁵

Filing charges and arresting Chinese and Asian-American defendants before an investigation is fully complete can, in some cases, greatly reduce the substantial risk that the defendant will flee the country before they can be tried. Indeed, four defendants in the dataset,

²⁴⁹ Burns, *supra* note 248.

²⁵⁰ See generally Werner Meissner, *China's Search for Cultural and National Identity from the Nineteenth Century to the Present*, in 68 CHINA PERSP. (2006), <https://chinaperspectives.revues.org/3103> [<https://perma.cc/8LKY-QN8Q>] (documenting significant changes in the culture and economy since 1980).

²⁵¹ See Perloth, *supra* note 13.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *From The Editors; The Times and Wen Ho Lee*, N.Y. TIMES (Sept. 26, 2000), <http://www.nytimes.com/2000/09/26/us/from-the-editors-the-times-and-wen-ho-lee.html?pagewanted=all&r=0> [<https://perma.cc/8LCQ-UPW3>].

²⁵⁵ *Id.*

all Chinese, are currently fugitives, with outstanding warrants out for their arrests.²⁵⁶ It bears noting also that, as the DOJ emphasized in its written responses to inquiries by Senator Carper, Senator Coons, and Representative Carney, neither Sherry Chen nor Xiaoxing Xi were actually tried or punished for their alleged crimes. Rather, after more thorough investigation, the DOJ dropped all charges, as they did in 17% of cases involving Chinese defendants and 16% of cases involving any Asian-American. Filing charges early, based on weaker evidence, can help ensure that federal prosecutors deliver fair punishment to the guilty without *formally* punishing the innocent. At the same time, however, rushing to file charges against suspected spies before establishing as much strong evidence as possible greatly increases the chances of upending the lives of innocent people. Although there can be legitimate concerns that a particular defendant may present a greater flight risk if tipped off to government suspicions, there is a risk that the DOJ may simply *assume* that suspects born in other nations are more likely to flee, rather than asking whether there is any particular reason to believe this is true.

C. *False Statements and Pretextual Prosecutions*

As explained in Section I.B.3, Jianyu Huang was a nanotechnologist at Sandia National Laboratories accused of selling restricted information to China.²⁵⁷ He was convicted, however, only of improperly bringing a government laptop, containing no secret information, to China and making false statements for denying that he would bring his work laptop.²⁵⁸ In the Sherry Chen case, prosecutors ultimately dropped all charges, but not before asking her to plead guilty

²⁵⁶ Indictment, *United States v. Zhang*, No. 10-cr-00827 (N.D. Cal. Nov. 10, 2010) (defendants Liang and Li have outstanding warrants relating to this case); Complaint, *United States v. Liew*, No. 11-cr-00573 (N.D. Cal. July 27, 2011) (only one defendant, Hou Shengdong, is currently a fugitive, *see* Press Release, U.S. Att’y Office, N.D. Cal., Two Individuals and Company Found Guilty of Conspiracy to Sell Trade Secrets to Chinese Companies (Mar. 5, 2014), <https://archives.fbi.gov/archives/sanfrancisco/press-releases/2014/two-individuals-and-company-found-guilty-in-conspiracy-to-sell-trade-secrets-to-chinese-companies> [<https://perma.cc/R5PS-GGNF>]); Arrest Warrant, *United States v. Xiang*, No. 14-cr-00160 (M.D. N.C. Apr. 29, 2014) (defendant Xiaohang’s is outstanding as of this date). All four fugitive defendants were coded as “guilty” of espionage charges for purposes of this Study.

²⁵⁷ Second Superseding Indictment, *United States v. Huang*, No. 12-cr-01246 (D.N.M. Mar. 26, 2014).

²⁵⁸ Plea Agreement, *United States v. Huang*, No. 12-cr-01246 (D.N.M. Aug. 25, 2014).

to making the false statement of “I think [I last saw my classmate in] 2011,” when she had actually seen him in 2012.²⁵⁹ In this Study’s data set, two defendants, Trieu Lam and Trinh Tran, were originally charged under the EEA but were ultimately indicted for only making false statements.²⁶⁰ Both defendants are non-Chinese Asians, constituting 3% of all Asians in the sample, and both received sentences for probation only. It is impossible to say based off the bare court records whether the prosecutions of Huang and the defendants in the sample were pretextual punishment for espionage crimes that could not be proven or stand-alone convictions of non-spies for lesser offenses. Nonetheless, they raise concerns about equitable punishment and prosecutorial accountability.

As explained in Section I.B, convictions of people suspected of serious crimes, like espionage or multiple homicides for lesser offenses like false statements²⁶¹ or tax evasion,²⁶² raises a number of concerns, including the risk of over punishing people for minor offenses, unfairly singling out individuals for punishment for under-enforced crimes, manufacturing crimes through unsworn questioning by investigators, the accountability of prosecutors, and the efficiency of federal investigations.²⁶³ Scholars like Richman and Stuntz argue that many of these problems are significantly mitigated with respect to most pretextual prosecutions.²⁶⁴ This Section argues that these problems are greatly exacerbated with respect to the prosecution of minorities for minor crimes only discovered or manufactured through the investigations of false accusations of espionage.

1. Punishing Minorities for Investigators’ False Suspicions

First, as explained in Section I.B.1, Richman and Stuntz argue that pretextual prosecutions usually avoid the problems of unfair

²⁵⁹ See Perlroth, *supra* note 13.

²⁶⁰ *But see* Judgement, *United States v. Liew*, No. 11-cr-00573, (N.D. Cal. July 10, 2014) (defendants pleaded not guilty but were found guilty on multiple charges under the EEA); *United States v. Liew*, 856 F.3d 585 (9th Cir. 2017).

²⁶¹ Plea Agreement, *United States v. Lam*, No. 04-cr-20198 (N.D. Cal. March 8, 2010) (defendant Lam pleaded guilty); Judgement, *United States v. Lam*, No. 04-cr-20198 (N.D. Cal. March 18, 2010) (defendant Tran has judgment entered).

²⁶² Richman & Stuntz, *supra* note 23, at 588.

²⁶³ See Griffin, *supra* note 26, at 1553–56.

²⁶⁴ *Supra* Section I.B.

punishment because (1) the defendants are usually guilty of more serious crimes; justifying the punishment; (2) punishment for these minor crimes serves important deterrent functions; (3) prosecutors will usually not pursue minor charges when doing so would be unfair; and (4) because the defendants are often privileged and famous, punishing them for minor infractions can deter criminal behavior and send good messages about the rule of law.²⁶⁵ When prosecutors determine that a minority suspect is *not* guilty of espionage but nonetheless seek conviction for minor offenses, these four mitigating factors are usually absent.

First, in cases like Al Capone, where a notorious gangster responsible for multiple homicides was convicted for tax evasion, there is little doubt that the defendant was guilty of far worse crimes than the rarely enforced crime of which he was convicted.²⁶⁶ In cases where prosecutors determine that the defendant is *not* guilty of the serious espionage charges for which she was investigated, singling out the defendant for punishment for crimes that are rarely enforced simply cannot be justified as pretextual punishment for more serious behavior.

Second, it is undeniable that, as Richman and Stuntz argue, relatively minor offenses, like false statements or misuse of government property, cannot go completely unenforced.²⁶⁷ As they argue, attempting to detect and punish all instances of crimes like perjury, tax evasion, or false statements would simply be cost prohibitive.²⁶⁸ They argue, therefore, that prosecuting violations of such minor offenses that happen to be discovered through investigations of more serious misconduct is a cost-effective way to ensure that those laws still have deterrent effects.²⁶⁹ Richman and Stuntz argue that this type of enforcement of crimes is generally fair, because the people punished are essentially picked randomly, as a happenstance of investigations into larger crimes, and, again, the defendants are usually guilty of more serious offenses.²⁷⁰

This justification is far less convincing in the current context for two reasons. First, as discussed in Section V.A, this Study’s findings raise serious questions as to whether espionage investigations *are*

²⁶⁵ Richman & Stuntz, *supra* note 23.

²⁶⁶ *See supra* Section I.B.1.

²⁶⁷ Richman & Stuntz, *supra* note 23, at 588–89.

²⁶⁸ *Id.* at 589.

²⁶⁹ *Id.* at 588–90.

²⁷⁰ *Id.*

random with respect to guilt, or whether they are biased towards the investigation and prosecution of crimes involving Asian beneficiaries and Asian defendants. If more minor crimes committed by Chinese and other Asians are discovered simply because more Chinese and Asians are investigated, the selection of defendants to punish for minor crimes looks less random and more like the type of racial profiling that underlies concerns about “driving while black.”²⁷¹ Second, as explained above, in cases where prosecutors pursue convictions for minor crimes after determining that the defendant was *not* guilty of espionage, punishment for the minor crimes no longer serves as pretextual punishment. Rather, it serves as punishment simply for being wrongfully suspected of crimes the defendant did not commit.

Third, Richman and Stuntz argue that, although prosecutors have the power to pursue prosecutions for minor offenses unfairly, political and economic forces will generally deter the worst offenses.²⁷² Citing the example of the prosecution of Bill Clinton for deceptive statements in a deposition, which many considered unjust, they argue that the political backlash of unfair prosecutions will often deter prosecutors from prosecuting defendants for minor offenses when there is little underlying moral culpability. Unlike high profile defendants like Bill Clinton, Martha Stewart, Barry Bonds, or Al Capone, defendants accused of espionage are generally unknown to the public, and individual cases usually garner little attention in the media. Indeed, attempts in the current Study to supplement the PACER records with media coverage were hampered by the fact that there simply was not *any* media coverage for most cases. Moreover, in the context of prosecutions of Asian-Americans for espionage, this critique simply begs the question of *whether* political consequences *will* change DOJ charging and investigatory practices. Because this Study is the first to provide empirical evidence that cases like Xiaoxing Xi and Sherry Chen may be part of systemic issues in the DOJ, it may be that the full political consequences are yet to be seen.

Finally, Richman and Stuntz argue that even if it turns out that the target of a pretextual prosecution was innocent of the crime for which she was investigated, convicting the suspect of minor crimes will often send a strong message about the rule of law because most targets of pretextual prosecutions were rich and famous before they were

²⁷¹ See *supra* Section IV.A; see generally Harris, *supra* note 17, at 301–02.

²⁷² Richman & Stuntz, *supra* note 23, at 590–91.

investigated.²⁷³ As they argue, prosecuting celebrities for offenses that usually go unpunished helps increase deterrence, because their fame helps spread word of the consequences of criminal violations, and sends a message that even powerful people are not above the law.²⁷⁴ In contrast, defendants investigated for economic espionage are generally unknown to the public and are disproportionately Chinese and Asian. Because of the growing concern that innocent Chinese defendants are falsely profiled and investigated as spies, convicting otherwise innocent defendants for crimes that usually go unpunished may send a very different message: Asian-Americans suspected of espionage will be punished, regardless of whether they committed espionage.

Where most pretextual prosecutions for minor offenses may contribute to fair punishment and the rule of law, prosecutions of Asian-Americans for crimes discovered due to only false suspicions of espionage may often harm those very interests. In many cases, such prosecutions will punish otherwise innocent minorities simply for researching while Asian.

2. False Statements and Efficient Investigations

Convicting falsely accused spies for false statements made in the course of their investigations is particularly problematic because it (1) punishes defendants solely for very natural “defensive deception” in the face of serious accusations; and (2) it ultimately may deter innocent people from cooperating with investigators.

First, as explained in Section I.B.3, Lisa Kern Griffin argues that convictions for unsworn false statements are very troubling because the “natural reaction of most subjects confronted by investigators is to respond in a way that deflects scrutiny and forestalls liability.”²⁷⁵ Griffin argues that punishing otherwise innocent defendants for false statements made in an attempt to convince investigators of the person’s innocence is particularly problematic because their only crime in such cases is to “reflexively [] protect themselves” when confronted with

²⁷³ *Id.* at 592–96.

²⁷⁴ *Id.*

²⁷⁵ Griffin, *supra* note 26, at 1520.

criminal or embarrassing accusations.²⁷⁶ In other words, it may be unfair to punish even guilty defendants for doing what most people would do when confronted with serious accusations.

These moral concerns are especially significant with respect to convictions of otherwise innocent Asian-Americans for false statements made in response to false accusations of espionage. As discussed above, this Study suggests that federal prosecutors are disproportionately charging innocent Chinese and other Asian-Americans for espionage.²⁷⁷ These findings are consistent with the hypothesis that some form of racial bias affects DOJ investigations and charging decisions in suspected espionage cases. It is possible, therefore, that many of the interviews that gave rise to false statements by otherwise innocent Asian-Americans simply never would have occurred if not for the racial bias that led to the investigations. Rather than punishing defendants for truly culpable criminal behavior, such stand-alone convictions for false statements may really punish defendants for having the misfortune of being unfairly profiled in the first place.

Second, regardless of the morality of punishing otherwise innocent defendants for false statements, doing so may ultimately undermine the very purpose of the false statements statute.²⁷⁸ As discussed in Section I.B.3, the primary and most obvious purpose of the false statements statute is to improve the efficiency of federal investigations by providing criminal sanctions for lying to federal investigators. As numerous commentators have observed, however, the most iron-clad way to avoid convictions for false statements is to simply refuse to speak to investigators in the first place.²⁷⁹

The vast majority of Asian-Americans, like the vast majority of all Americans, are loyal, honest people who value the rule of law. Most who see evidence of serious criminal wrongdoing would generally like to share that information with authorities, so long as doing so would not expose the informant to substantial personal risk. Seeing otherwise innocent people punished solely for statements they made while cooperating with federal investigators, however, may force potential

²⁷⁶ *Id.* at 1525; *see, e.g.*, *United States v. Cisneros*, 26 F. Supp. 2d 24, 42 (D.D.C. 1998) (dishonesty concerned amount and quantity rather than existence of bank checks during a background check).

²⁷⁷ *Supra* Parts II, III.

²⁷⁸ *See supra* Section I.B.3.

²⁷⁹ *See Griffin, supra* note 26; *Murphy, supra* note 87; *Richman & Stuntz, supra* note 23.

witnesses to think twice before opening up.²⁸⁰ Indeed, what reasonable attorney would counsel their client to speak with investigators if she believed there was a risk that doing so could create criminal liability where none existed previously?

The risk that false statements convictions will deter potential witnesses from speaking with authorities may be compounded if the witnesses believe that authorities are unfairly targeting, with suspicion, a minority group to which they belong. This problem has long been recognized in the literature on police interactions with African-American populations.²⁸¹ As David Harris argues, “If upstanding citizens are treated like criminals by the police, they will not trust those same officers as investigators of crimes . . . Fewer people will trust the police enough to tell them what they know about criminals in their neighborhoods.”²⁸² Indeed, Harris asks, “Why *should* law-abiding residents of [African-American] communities trust the police if, every time they go out for a drive, they are treated like criminals?”²⁸³ Similarly, if Asian-American scientists and businessmen believe they, as a group, are being unfairly targeted with investigations for economic espionage, why should they, as individuals, feel a desire to help authorities prosecute such defendants? Moreover, if Asian-Americans believe they are more likely to face false statements charges for misstatements as trivial as “I think [I saw my classmate in] 2011,”²⁸⁴ or “I am not planning to take my laptop to China,”²⁸⁵ how safe will they feel making *any* statements to federal investigators?

False statements charges can serve legitimate purposes, such as when a witness willfully deceives federal investigators about the serious criminal conduct of third party.²⁸⁶ However, when otherwise innocent

²⁸⁰ See generally Griffin, *supra* note 26, at 1516–17 (arguing that overzealous prosecutions for false statements can perversely reduce the willingness of people to assist federal investigators).

²⁸¹ See, e.g., Harris, *supra* note 17, at 268–69, 309 (addressing the effects of “driving while black” on community policing).

²⁸² *Id.* at 268.

²⁸³ *Id.* at 309 (emphasis added).

²⁸⁴ See Perloth, *supra* note 13.

²⁸⁵ Indictment at 5, United States v. Huang, No. 12-cr-01246 (D.N.M. May 23, 2012) (defendant told the Counterintelligence Officer “that he was not going to take any SNL-owned electronic equipment with him on an upcoming trip” to China).

²⁸⁶ Cf. generally United State v. Serizawa, No. 02-cr-00156 (N.D. Ohio filed on Apr. 29, 2002) (defendant lied about knowing that his co-defendant had taken a job at a competing research lab and lied about how many vials of biological research materials were taken from his lab).

Asian-Americans are punished for defensive deception in response to false accusations of espionage, it raises the risk of punishing innocent people for *being* racially profiled and may deter Asian-Americans from assisting in federal investigations.

3. Prosecutorial Accountability

One of the greatest problems with pretextual prosecutions is the barriers it imposes to prosecutorial accountability.²⁸⁷ The public has a strong interest in knowing whether a person charged with espionage is guilty of espionage or not.²⁸⁸ After all, if Chinese espionage is as serious a threat as some allege, the public has a right to know how effective the DOJ has been in addressing it. Punishing a person accused of espionage for minor offenses like false statements²⁸⁹ or misuse of government property,²⁹⁰ makes it difficult for the public to understand whether the defendant was actually guilty of espionage or whether she was innocent of serious wrongdoing but singled out for punishment for lesser crimes.

The problem is similar to that which plagued the Bush administration in its efforts to combat terrorism after the attacks on September 11, 2001.²⁹¹ Although official DOJ statistics reported hundreds of convictions for terrorism related offenses, a closer look revealed that the majority of these “terrorism” convictions were actually for only false statements, while most of the rest related to other non-terrorism charges like visa fraud or fake identification.²⁹² DOJ officials argued that although these lesser charges were not directly related to terrorism, all were pretextual prosecutions of supporters of terrorism or

²⁸⁷ See Griffin, *supra* note 26, at 1544–47; Richman & Stuntz, *supra* note 23, at 598, 618–24; *supra* Section I.B.

²⁸⁸ Cf. Richman & Stuntz, *supra* note 23, at 598 (“The public had a strong interest in knowing whether Bill Clinton was guilty of any more-than-technical crimes in connection with the Whitewater Development Corporation and Madison Guaranty Savings & Loan. The Lewinsky investigation left that issue murky.”).

²⁸⁹ See, e.g., Plea Agreement, United States v. Lam, No. 04-cr-20198 (N.D. Cal. March 8, 2010) (defendant Lam pleaded guilty); Judgment, United States v. Lam, No. 04-cr-20198 (N.D. Cal. March 18, 2010) (defendant Tran has judgment entered).

²⁹⁰ Indictment at 5, United States v. Huang, No. 12-cr-01246 (D.N.M. May 23, 2012).

²⁹¹ See *supra* Section I.B.2.

²⁹² *Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks*, *supra* note 118; *Lead Charge for International Terrorism Criminal Referrals*, TRAC REP., http://trac.syr.edu/tracreports/terrorism/169/include/lead_charge_ref.html [<https://perma.cc/B2GQ-DN3U>] (last visited Oct. 10, 2018).

plea deals to obtain terrorism related information.²⁹³ The major systemic problem is not whether the DOJ was artificially inflating the number of “terrorism” convictions it produced, as some alleged, but that the use of these pretextual prosecutions makes it impossible for the public to understand how good a job the DOJ *actually* did in the fight against terror.²⁹⁴

Similarly, when the DOJ issues a press release, as it did²⁹⁵ announcing that Jianyu Huang, who was previously charged with stealing data for China,²⁹⁶ had pleaded guilty to taking his Department of Energy laptop to China and lying about it,²⁹⁷ the public is left to wonder what actually happened. If Huang was in fact a nefarious spy who stole \$25,000 worth of data from a government laboratory to send to a foreign country, the one year and a day sentence he received²⁹⁸ would seem to be a remarkably light sentence for such a betrayal of trust. On the other hand, if Huang was mistakenly profiled as a spy, a sentence of a year and a day in prison for lying about taking his work laptop on a work trip without filing the proper paperwork²⁹⁹ would seem extraordinarily harsh. If the public knew for certain that either of these facts were true, large segments of the American population would likely be outraged for opposite reasons. However, because the conviction for these lesser offenses obscures the truth, the public is simply left to wonder what the U.S. Attorney actually concluded with respect to Huang’s guilt of espionage.

Perhaps even more concerning is the risk that allowing these convictions for lesser offenses reduces incentives on prosecutors themselves to reach the truth about whether a particular defendant is guilty of espionage or not. No ethical prosecutor would ever file charges against a defendant unless she was convinced that there was probable

²⁹³ Statement of Mark Corallo, *supra* note 116; see Richman & Stuntz, *supra* note 23, at 618–24 (chronicling the responses and counter responses of the DOJ to allegations that they inflated or deflated terrorism numbers).

²⁹⁴ See Richman & Stuntz, *supra* note 23, at 623.

²⁹⁵ Former Sandia Corporation Scientist Pleads Guilty to Taking Government Property to China, *supra* note 141.

²⁹⁶ Associated Press, *Ex-Sandia Scientist Pleads Not Guilty to Stealing Data*, ALBUQUERQUE J. (June 6, 2012, 10:17 AM), <http://www.abqjournal.com/111342/updated-ex-sandia-scientist-pleads-not-guilty-to-stealing-data.html> [https://perma.cc/RD5Q-QBY2].

²⁹⁷ Former Sandia Corporation Scientist Pleads Guilty to Taking Government Property to China, *supra* note 141.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

cause to believe that the defendant had actually committed the crime.³⁰⁰ As Dan Simon argues, however, once a prosecutor decides that a particular defendant has committed a crime, psychological forces come into play that cause her to resist believing evidence to the contrary.³⁰¹ Indeed, the innocence literature is replete with cases in which prosecutors continued to pursue, and obtain, convictions of serious crimes even in the face of substantial exculpatory evidence.³⁰² For federal prosecutors whose espionage cases begin to crumble, charges of false statements or other minor offenses may offer a psychological middle ground. Rather than having to accept that she had prosecuted an innocent person or doggedly pursuing espionage charges in the face of ever weakening evidence, the prosecutor can concede that the more serious charges would be difficult to prove and allow the defendant to plead guilty to lesser charges like false statements. Doing so might allow the prosecutor to avoid the psychological burdens of admitting her original mistake, by obtaining a conviction for a crime the defendant is factually guilty of, while avoiding the greater burdens of convicting the defendant on charges over which there is significant doubt. Nonetheless, such a path leaves open the ultimate question our justice system is meant to resolve, whether the defendant was actually guilty of the crimes with which she was charged.

V. SOLUTIONS

“Nobody should live in fear of being persecuted for crimes they did not commit, solely based on their ethnicity. . . . We must fight against institutional biases where they exist, especially within the federal government. The pattern of targeting investigations of Chinese Americans on the basis of national origin fundamentally goes against the basic civil liberties owed to every American citizen. I . . . urg[e] the [DOJ] . . . [to] establish and enforce internal procedures against racial profiling so that we may prevent cases like these from happening in the future.”

—Congresswoman Grace Meng³⁰³

³⁰⁰ *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”).

³⁰¹ See generally DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012).

³⁰² *Id.*

³⁰³ Press Release, Rep. Chu Joins Wrongly Accused Asian American Scientists to Call for Accountability from DOJ and an End to Profiling (Nov. 17, 2015), <https://chu.house.gov/press->

This Study finds evidence that the DOJ is disproportionately charging both guilty *and* innocent Chinese and other Asian-Americans with espionage. As explained above, some of these disparities may be explained by legitimate fears about the risk of flight and disparities in the number of Asian-Americans who commit these crimes. It is also possible, however, that racial biases contribute to the problem, too. This Section offers four proposals to help reduce these disparities and the harm that current DOJ policies cause: (1) implicit bias training; (2) in cases in which prosecutors are concerned that continuing an investigation will create a flight risk, make objective determinations of whether a foreign born suspect is *actually* a flight risk before filing charges; (3) when destruction of evidence is a concern, seek search warrants to secure the evidence, rather than warrants for arrest; and (4) when an investigation reveals no evidence that a suspect actually attempted to commit espionage, decline to pursue charges for false statements and other under enforced crimes in most cases and, when lesser charges are appropriate, such as when a suspect significantly misled investigators about actual crimes, specify why charges were appropriate.

First, in three-fourths of the “possibly innocent” cases, prosecutors dropped all charges against the defendant before trial. Although there are many reasons for why prosecutors might drop charges against a defendant,³⁰⁴ these findings suggest that in at least some cases, prosecutors continued their investigations after filing charges and eventually concluded that the defendant was not guilty, as occurred in the cases of Xi and Chen. Part of the problem, therefore, appears to be that federal prosecutors are more likely to file espionage charges based on weaker evidence when the defendant is of Chinese or Asian descent. One possible explanation for why they would do so is implicit bias.

As Congresswoman Grace Meng and numerous other elected officials have suggested, part of the problem may be racial stereotyping and implicit bias.³⁰⁵ In recent years, the national media has reported on

release/rep-chu-joins-wrongly-accused-asian-american-scientists-call-accountability-doj-and [https://perma.cc/J5QA-JGKZ].

³⁰⁴ See *supra* Section IV.A.

³⁰⁵ See, e.g., Press Release, Rep. Chu Joins Wrongly Accused Asian American Scientists to Call for Accountability from DOJ and an End to Profiling, *supra* note 303 (“I . . . hope that the [DOJ] will establish and enforce internal procedures against racial profiling so that we may prevent cases like these from happening in the future.”).

countless stories of individual acts of espionage linked to China and the problem of “Chinese espionage” as a whole.³⁰⁶ Although some of these stories have involved Caucasian people who shared secret information with Chinese entities,³⁰⁷ the vast majority of these cases involved defendants of Chinese heritage.³⁰⁸ As one commentator claims, “Chinese intelligence agencies seldom stray far from working with ethnic kin and Beijing-related spy cases here that do *not* involve ethnic Chinese are very much an exception.”³⁰⁹ Although there is a logical appeal to the assumption that most people who steal secrets for China are of Chinese descent, it is a logical leap to assume that people of Chinese descent are more likely than others to steal secrets. After all, in nearly half of EEA prosecutions, the defendant was alleged to have stolen secrets to benefit an *American* company, and the majority of defendants charged have Western names. The fact that Chinese-Americans may be more likely to steal secrets for the benefit of Chinese companies than non-Chinese, does not mean that Chinese-Americans are more likely to steal secrets than non-Chinese.

Nonetheless, this salience of *Chinese* espionage in the public mind may contribute to implicit biases about the behavior of Chinese researchers and businessmen. Someone who observes unexpected behavior by a coworker may be more likely to view it as suspicious and report the behavior if the coworker is Chinese than if the person were Caucasian. FBI investigators may similarly subconsciously view ambiguous evidence of espionage more favorably if the suspect is

³⁰⁶ See, e.g., *Caught on Tape: Selling America's Secrets*, CBS NEWS (Feb. 25, 2010), <http://www.cbsnews.com/news/caught-on-tape-selling-americas-secrets> [https://perma.cc/C6W6-AJT9]; Rob Davies, *Espionage Arrest of Nuclear Engineer Fuels US Suspicions of Chinese Tactics*, GUARDIAN (Aug. 11, 2016, 1:57 PM), <https://www.theguardian.com/technology/2016/aug/11/espionage-arrest-of-nuclear-engineer-fuels-us-suspicious-of-chinese-tactics> [https://perma.cc/LHG2-A5V7]; Rudy Takala, *State Department Emphasizes 'Ongoing' Chinese Espionage*, WASH. EXAMINER (June 29, 2016, 5:09 PM), <http://www.washingtonexaminer.com/state-department-emphasizes-ongoing-chinese-espionage/article/2595265> [https://perma.cc/6XKP-MBBG].

³⁰⁷ See, e.g., Steve Gorman, *U.S. Contractor Gets 7 Years for Passing Secrets to Chinese Girlfriend*, REUTERS (Sept. 17, 2014, 9:42 PM), <http://www.reuters.com/article/usa-china-espionage-idUSL1N0RJ02T20140918> [https://perma.cc/QG9W-MPUH] (60-year-old Caucasian retired Army Lieutenant Colonel passed secret information to 27-year-old Chinese woman with whom he had a sexual relationship).

³⁰⁸ See generally John R. Schindler, *The Unpleasant Truth About Chinese Espionage*, OBSERVER (Apr. 22, 2016, 9:45 AM), <http://observer.com/2016/04/the-unpleasant-truth-about-chinese-espionage> [https://perma.cc/4REZ-EFRF] (“Even when non-Chinese are involved, there is usually someone tied to Beijing by ethnicity somewhere in the operation.”).

³⁰⁹ *Id.* (emphasis in original).

Chinese or has a connection to China, choosing to initiate an investigation.³¹⁰ Similarly, federal prosecutors viewing evidence that a Chinese suspect has committed espionage may be more apt to believe it simply because it comports with preexisting notions of Chinese spies.³¹¹

One can imagine very unpleasant explanations for why federal prosecutors are more willing to file espionage charges against Chinese or Asian defendants with weaker evidence, including racial animus, explicit racial profiling, or a reduced concern for the damage false accusations impose when the victim is Asian-American. Implicit bias, however, offers a less malicious, but more intractable, explanation. Federal prosecutors may be filing espionage charges against Asian-Americans based on weaker evidence simply because, as a result of implicit biases, they mistakenly believe the evidence of “Chinese espionage” is stronger than it really is.

Implicit biases can contribute to biased decision-making at all levels of law enforcement, from decisions of whether to pull the trigger of a gun to the proper sentence for a criminal defendant, and can involve biased cognition with respect to any stereotyped group.³¹² Recognizing this, the DOJ recently announced plans to mandate implicit bias training for all federal agents and prosecutors.³¹³ When asked by the House Judiciary Committee about whether this training will help “ensure that Asian-Americans are not wrongly profiled and targeted for economic espionage,” however, Attorney General Loretta Lynch responded only that “it will not be limited to any particular ethnicity.”³¹⁴ Rather than simply mandating generalized implicit bias training, therefore, it may be more effective to inform federal prosecutors that they may be filing espionage charges against Asian-

³¹⁰ Cf. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing how implicit biases can affect how judges and juries view the strength of the same evidence).

³¹¹ *Id.*

³¹² See generally David A. Harris, *The Dangers of Racialized Perceptions and Thinking by Law Enforcement*, in DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM 146, 152–59 (Devon Johnson et al. eds., 2015); Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 350–61 (2015); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296–314 (2012); *FAQs on Implicit Bias*, DEP'T JUST., <https://www.justice.gov/opa/file/871121/download> [<https://perma.cc/4DHT-XCD7>].

³¹³ Eric Yoder, *Federal Agents, Prosecutors to be Trained on Recognizing Implicit Bias*, WASH. POST (June 28, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/06/28/federal-agents-prosecutors-to-be-trained-on-implicit-bias> [<https://perma.cc/8JXS-5EVR>].

³¹⁴ Q&A between Judy Chu and Loretta Lynch (July 2016) (transcript on file with author).

Americans based on weaker evidence and institute policies to directly address this problem. Such policies might include requiring a separate Assistant United States Attorney (AUSA) to independently review the evidence of such charges to confirm the strength of the evidence. If this reviewing-AUSA believes there is a substantial risk the suspect is innocent, a more thorough investigation should be required before charges are filed.

Next, as was explained in Section IV.B, one legitimate reason for why prosecutors might choose to file espionage charges against Asian-Americans before making as thorough an investigation as possible is the risk that the suspect, once tipped off that they are under investigation, might flee the country.³¹⁵ When there is a significant risk of flight, it often *will* make sense to file charges and arrest the defendant before interviewing her, to ensure that the defendant, if guilty, will be brought to justice. Although this *can* be a legitimate justification for filing charges early in an investigation, it, too, is a factor that may be shaded by racial biases and stereotypes. Because many Asian-Americans were born and lived in other countries before moving to the United States, it may be tempting to assume that it would be easier for them to leave the country to avoid charges and never return. Although this may be true with respect to some Asian-Americans, it is simply inaccurate for the vast majority.

Fleeing from federal charges requires a defendant to give up her job, her house, her favorite restaurants, and all of her friends and family in the United States.³¹⁶ It requires resettling in a new country, becoming accustomed to a new way of life, finding stable employment in a country that even if she was born in, she may never have worked in before. It also requires her to never, ever return to the United States for the rest of her life. After all, although the standard five-year statute of limitations applies to the filing of EEA charges,³¹⁷ all criminal statutes of limitations are suspended for defendants who flee from justice.³¹⁸ Fleeing from federal charges, in other words, is an extreme measure. This is especially true with respect to EEA charges because although the EEA allows for penalties of up to ten or fifteen years, the sentences actually imposed are

³¹⁵ *Supra* Section IV.B.

³¹⁶ *See supra* Section IV.B.2.

³¹⁷ 18 U.S.C. § 3282 (2018).

³¹⁸ 18 U.S.C. § 3290 (2018); *see generally* U.S. Dep't of Justice, Criminal Resource Manual § 657, <https://www.justice.gov/usam/criminal-resource-manual-657-tolling-statute-limitations> [<https://perma.cc/C3ZK-AXKT>].

relatively mild. In the sample, 75% of Asian defendants received sentences of two years and a day or less.

Rather than simply assuming that Asian-Americans who have lived in a foreign country present a flight risk, prosecutors who seek to use flight risk as a justification for filing charges early in an investigation should be asked to demonstrate why the *particular* defendant presents a substantial risk of flight. The literature on bail and preventive detention cites a number of factors that are correlated with a failure to appear on charges, such as the severity of the charges, the defendant's age, marital status, prior convictions, whether they are currently employed, and length of time living in a residence.³¹⁹ In the context of the risk that a person suspected of espionage will flee the country, one can consider a number of additional factors, including: (1) whether the person has family in the United States; (2) how long it has been since the person lived in a foreign country; (3) whether the person is suspected of stealing secrets to benefit a foreign company at which she might obtain employment; (4) whether the suspect has current plans to leave the country; (5) whether the person owns a house in the United States; (6) whether the person owns property or businesses in another country; (7) whether the person is fluent in a foreign language; or (8) whether the person has significant ties to a country with no extradition treaty with the United States. When weighing these factors, federal prosecutors may often realize that some suspects whom they instinctively believed presented a substantial risk of flight, simply do not. In such cases, rather than rushing to file charges, it may be best to simply continue the investigation to ensure that they do not unintentionally prosecute and arrest an innocent person.

Another reform that might help reduce the number of innocent defendants prosecuted for espionage is for the DOJ to enforce a policy of preferring search warrants over warrants for arrest. Although espionage cases, like all cases, carry a risk that evidence will be destroyed, in most cases this risk can be minimized by first obtaining a warrant to search for the evidence, rather than filing charges and arresting the suspect and then searching. After all, the same probable cause that might support the filing of charges and arrest of a defendant will usually suffice as probable cause to support a warrant to search for

³¹⁹ See generally Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (discussing factors used by various pretrial risk assessment tools).

evidence.³²⁰ Doing so might still expose innocent suspects to the humiliation and inconvenience of a warranted search of their homes and workplaces, and perhaps seizure of their computers and files. Nonetheless, it would be a lesser evil than performing the search *in addition to* filing charges and placing an innocent person in handcuffs.

Finally, the DOJ should institute a policy of declining to pursue lesser charges like false statements or misuse of government property in cases in which a suspect is investigated for espionage, investigators conclude the suspect was not guilty of or aware of any theft of trade secrets, and the minor offenses were only discovered or manufactured through the course of the investigation. As explained in Part I, scholars have offered a variety of justifications and explanations for why prosecuting people suspected of serious crimes for minor, pretextual offenses can be a fair and efficient use of prosecutorial resources.³²¹ As was explained in Section IV.C, however, none of these justifications apply with respect to the prosecution of people wrongfully suspected of economic espionage.³²² Indeed, if such investigations and prosecutions disproportionately focus on a particular minority, such as Asians or Chinese in particular, the result could be that loyal, civic minded people begin to refuse to cooperate with federal investigators, out of fear that doing so will lead to their own prosecution for the simple crime of researching while Asian.

CONCLUSION

This Study finds that Chinese and other Asian-Americans are disproportionately charged under the Economic Espionage Act, receive much longer sentences, and are significantly more likely to be innocent than defendants of other races. Although it is possible that Asian-Americans are prosecuted more often because they commit espionage more often, it is also possible that they are prosecuted more often because the DOJ has focused more resources to detect and punish spying related to Asian countries and defendants and so spends fewer resources investigating espionage conducted by defendants of other

³²⁰ Cf. *Brinegar v. United States*, 338 U.S. 160, 175–76 (regarding the definition of probable cause. If this definition is met for the arrest it is likely met for a search for evidence of the same crime).

³²¹ *Supra* Part I.

³²² *Supra* Section IV.C.

racism. This Study also suggests that the DOJ is more likely to file charges prematurely, based on weak evidence, when the case involves an Asian-American defendant. Although some of these disparities may reflect legitimate concerns over the risk of flight, they may also reflect implicit biases with regard to the loyalty of Asian-Americans to the United States. In addition, this Article reveals that the traditional justifications for pretextual prosecutions generally do not apply to convictions of Asian-Americans originally suspected of espionage for false statements. Rather, these convictions harm the accountability of the DOJ, may serve to punish otherwise innocent minorities simply for being wrongfully profiled, and, ultimately, may force loyal Americans to refuse to cooperate with investigators for fear of being punished for false statements. By addressing racial biases and creating more transparent processes for charging and resolving espionage cases, however, we can reduce the number of innocent Americans charged with espionage and minimize the harm caused by these unfortunate cases.

