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## Too Smart for his own Good? The Devolution of a "Model" Asian American Student

Nary Kim

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# Too Smart for his own Good? The Devolution of a “Model” Asian American Student

Nary Kim<sup>†</sup>

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“It is nearly impossible for me to fathom the fact that I degenerated from a hard-working student and good citizen to a deranged individual who took another human being’s life.”<sup>1</sup>

## INTRODUCTION

I was fifteen years old when I first heard about director Justin Lin’s debut film, *Better Luck Tomorrow*.<sup>2</sup> The film caught my attention because it was and remains one of few films that depicted characters who shared my age, ethnic background, socioeconomic status, family values, and academic drive. In short, the film was about a group of smart and driven Asian American high school students who become bored by the utter predictability of their lives. When I watched the film in theaters with a group of my Asian American friends, the commonalities that we shared

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1. From a letter to Judge O’Leary from Robert Chan, a high school student convicted of first-degree murder. Matt Lait, *Youth Gets Life Term in Honor Student’s Death*, L.A. TIMES (Aug. 9, 1994), [http://articles.latimes.com/1994-08-09/news/mn-25180\\_1\\_honors-student](http://articles.latimes.com/1994-08-09/news/mn-25180_1_honors-student).

2. BETTER LUCK TOMORROW (MTV Films 2003).

with the film's protagonists became all the more pronounced. As we witnessed our onscreen doppelgangers shed their pristine images and slink into a pattern of lawbreaking and delinquency, I found the film's plot to be ingenious: a twisted and fantastical story, in which seemingly inculpable Asian American students begin to lead a secret double life riddled with drugs, sex, and crime. It was an entertaining concept, I thought, but wholly lacking in realism.

I was startled when I learned that *Better Luck Tomorrow* was not a product of pure, creative invention, but rather grounded firmly in reality—based on the grisly murder of a bright and driven Asian American high school student, Stuart Tay, at the hands of equally accomplished Asian American students.<sup>3</sup> Upon learning about the real-life existence of the teenaged killers depicted in the film, I felt a strange mix of revulsion and compassion. How was it possible for one person to simultaneously embody (1) a “quintessential” Asian American student, assuredly on the path to a top-tier college and a well-paying job and (2) a hardened and incorrigible murderer, deserving of lifelong incarceration?

It has been ten years since I first watched *Better Luck Tomorrow* and on its ten-year anniversary, the questions provoked by the film remain as disturbing as a decade ago. In this Comment, I re-examine the representation of the Asian American students in *Better Luck Tomorrow* and explore the interplay between two very different racial mythologies about Asian Americans: the virtuous “model minority” stereotype and the contrasting “yellow peril” metaphor. In Part I, I piece together the facts surrounding the murder of Stuart Tay, first by looking at the cinematic adaptation of the story in *Better Luck Tomorrow*, and corroborating it with facts gleaned from news media sources that chronicled the real-life murder investigation and trial.<sup>4</sup> By examining the portrayal of these Asian American boys in the film and in the popular press, I attempt to make sense of their depiction as Asian Americans who somehow embody both the “model minority” and “yellow peril” stereotypes.

Part II focuses on the first of the two Asian American stereotypes: the myth of the “model minority.” Here, I track the real-life criminal trials of the four Asian American defendants and theorize that their racial identity may have not only influenced their depiction in the news, but also the thrust of the prosecution's argument and their guilty verdicts. I argue that the positive stereotypes associated with Asian Americans, such as intellect

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3. See Daniel Yi, *They're the Bad Seeds?*, L.A. TIMES, (Apr. 6, 2003), <http://articles.latimes.com/2003/apr/06/entertainment/ca-yi6>.

4. As a caveat, though filmmaker Justin Lin admits to following the Stuart Tay case in the newspapers, he insists that *Better Luck Tomorrow* is a work of “pure fiction” that draws upon a multitude of inspirations, including the Columbine shootings, to tell a more general story about youth violence. See *id.* In spite of this disclaimer, it is my view that *Better Luck Tomorrow* is faithful to many of the details surrounding the Stuart Tay murder and therefore a useful (albeit fictionalized) point of reference for studying the real-life case.

and mental acuity, turn into a double-edged sword for an Asian American defendant in the American criminal justice system, when he is attempting to assert a legal insanity defense that presupposes a mental deficiency.

Part III focuses on the second racial stereotype: the “yellow peril” metaphor for Asian Americans and the contemporary reincarnation of it in Asian American gangs. Here, I explore the depiction of Asian American gangs and juvenile delinquents in popular culture by looking at two episodes from the television show *The Shield*—one in which a Los Angeles police team tries to catch the leader of an Asian American street gang, and the second in which police officers chase a group of Asian American youth on a home robbery spree. Through this lens, I discuss how the fear of being racialized as the “yellow peril” may inspire Asian Americans to embrace the model minority stereotype, and consequently refrain from cooperating with the police—a relationship already strained due to a lack of bilingual police officers, inadequate community outreach efforts, and a history of tension between police forces and the Asian American community. Absent meaningful engagement with the Asian American community, law enforcement falls back on inadequate data and overgeneralizations of what an Asian gang member or associate looks like. In Part IV, I explore the consequences of police tactics that rely exclusively upon the most obvious indicia of gang membership, such as stereotypical gang attire and lengthy criminal records. I argue that Robert Chan, the main defendant on trial for Stuart Tay’s killing, was not only undone by the trappings of the seemingly positive model minority myth, but was also hurt by his incompatibility with the negative yellow peril stereotypes associated with Asian American gangbangers. Unlike the stereotypical “at-risk” Asian American teenager, a spotless record allowed Chan and his cohorts to commit a slew of smaller infractions without detection—laying the foundation for their final deadly crime.

## I. ART IMITATES LIFE

### A. *Better Luck Tomorrow*

The film *Better Luck Tomorrow* opens with a stark shot of steel fixed bars; they are not unlike the bars that line a prison cell, but as the camera pans out, the audience realizes that they are security bars guarding the entrance to an affluent gated community. Within the insulated community, two Asian American high school students, Benjamin Manibag and Virgil Hu, are exchanging Ivy League fantasies. As the boys discuss their pending admissions, neither is anxious; their acceptance into a top-tier school is a foregone conclusion. Mid-conversation, they are interrupted by the sound of a beeper. “Not mine,” each says. It suddenly dawns on them: the ringing is coming from the beeper on a dead body that they had buried in the yard. As the boys rush to dig up the body, it suddenly dawns on the audience:

these two boys are the killers.

Benjamin Manibag (Ben) is the film's protagonist and narrator—a baby-faced high school senior who performs community service at a local hospital, organizes beach cleanups, tutors his classmates in Biology, and works at a fast food restaurant. Ben is from a well-to-do family and hardly needs an afterschool job, but he has one for the purpose of filling a line on his college application. In addition to his numerous extracurricular commitments, Ben shoots 215 free throws a day and has achieved a ninety eight percent shooting rate; he takes deep satisfaction in the fact that he has broken the NBA's record for free throws in the privacy of a community park.

While the term “model minority” as a description for Asian Americans is no longer in fashion, Ben's personal narrative calls this stereotype to mind: he is a member of a larger ethnic group that routinely collects praise for its industry, academic achievements, high family incomes, and low levels of criminal behavior.<sup>5</sup> Ben strikes a natural friendship with another Asian American student, Daric Loo, who is the class valedictorian and president of virtually every after school club—an even more exaggerated “model minority” than Ben.

Ben and Daric are introduced by the film as a pair of stereotypical Asian American teenagers: they are too eager to do well in school, have few friends, and shyly lust after Stephanie, a high school cheerleader who is dating their more handsome and wealthier counterpart, Steve Choe. Throughout the film, Steve derides Ben and Daric for their lack of dimension and their infatuation with his girlfriend, even taunting Daric for “stalking” his girlfriend. Steve's criticisms hit a nerve in both of the boys, and Ben and Daric both find themselves reassessing the emptiness that afflicts their lives.

Daric tries to inject adventure into his one-note life by starting a “cheat sheet” business to sell exam answers to his fellow classmates. The business plan is simple: Jesus Navarro, a friend of Virgil's cousin Han Seoul-Oh, steals the exam questions from the cabinets of teachers. Daric then assigns the questions to “smart” students he recruits, like Ben and Virgil, and sells the answers to their less academically inclined classmates for a fee. The cheat-sheet scheme marks the beginning of the many small-time plots that Daric and Ben hatch. “People like us—we don't have to play by the rules,” Daric explained to Ben when he first cajoled Ben into joining the cheat-sheet team. The cheat-sheet enterprise soon branches out into the more lucrative business of selling drugs and stealing computers from their high school. Between the cheat-sheet business and school computer heist, Ben, Daric, Virgil, and Han manage to carry out their

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5. See Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 *ASIAN L.J.* 1, 2 (2000).

crooked activities right under the nose of the school's authority figures.

But even as the four Asian American boys delight in their triumphs of cleverness, they are neither socially fulfilled nor accepted by their peers at school. Instead, the other students begin to refer to the group as the "Chinese Mafia." While the four boys are all of Asian descent, they are not all Chinese, and the nickname reflects the fact that the students regard them with respect and fear, but also a tinge of satire.<sup>6</sup> Soon, the novelty of the fast living begins to wear off, and Ben and Daric retire from the cheat-sheet business, leaving only Virgil and Han at the helm. When the enterprise gets sloppy, the school authorities who had been content to ignore the cheating ring are forced to intervene, but only do so half-heartedly—suspending Han, but otherwise dismissing the rumors about the so-called mafia floating around the school.

With their cheat-sheet business in hiatus, Ben voices the group's collective desire to give up their recent pattern of bad habits. But when the group's nemesis, Steve Choe, approaches the boys with a home robbery proposal, Daric convinces his friends that they should pretend to go along with Steve's plan, while secretly planning to turn him in to the cops. Steve asks to buy a gun for his role in the robbery and the five boys agree to meet at Jesus's house on New Year's Eve for the exchange.

On New Year's Eve, Ben insists on playing the least involved role of "lookout." When Steve arrives at Jesus's house, Ben directs him to the garage, where Steve expects to acquire his new gun. But instead of the agreed upon gun exchange, Daric and Virgil launch into a surprise attack. From outside, Ben hears a gun go off and races into the garage with a baseball bat in hand. When Steve reaches for the gun, Ben suddenly hits him on the head with the bat. As Daric watches Steve twitch on the ground, Daric takes a rag, soaks it in alcohol, and crams it into Steve's mouth until he suffocates to death. After Daric picks the pocket of Steve's limp body for cash to pay Jesus for the use of his garage, the boys proceed to hose down the place and bury Steve's body in a shallow grave. The boys then leave to attend a classmate's New Year's Eve party.

In the days that follow, Ben struggles with what he has done and debates coming clean to the police; meanwhile, Virgil attempts to commit suicide and Daric is overcome with paranoia that Han or Ben will go to the cops. In the film's closing scene, Ben is walking home when Steve's girlfriend, Stephanie, offers him a ride. As he slides into the passenger seat, Ben realizes that for the first time in his perfectly choreographed life, he has no clue what lies ahead for him in his future—only that his life path has been irreversibly changed.

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6. See Roger Ebert, *Better Luck Tomorrow*, CHICAGO SUN-TIMES, (April 11, 2003), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20030411/REVIEWS/304110302>.

### B. *The Real-life Murder of Stuart Tay*

The principal cast of characters in *Better Luck Tomorrow*—Daric Loo, Benjamin Manibag, Virgil Hu, Han Seoul-Oh, Jesus Navarro, and Steve Choe—are mirrors of their real-life counterparts—Robert Chan, Kim Young Kim, Charles Choe, Mun Bong Kang, Abraham Acosta, and Stuart Tay.<sup>7</sup> Like the *Better Luck Tomorrow* character Daric Loo, Robert Chan was a top-ranked student at his high school and a candidate for class valedictorian.<sup>8</sup> Chan, too, was a member of his school's academic decathlon team and ran a side business of hiring smart students to take the SAT Reasoning Test on behalf of their peers.<sup>9</sup> Also paralleling the film's depiction, Chan bragged to his fellow classmates about his involvement in a California-based national Chinese gang.<sup>10</sup> Meanwhile, the victim Stuart Tay, like his onscreen counterpart Steve Choe, was the child of doting parents, zoomed around town in a flashy silver Mercedes, carried hundred-dollar bills, wore a beeper, and bragged about his shady connections.<sup>11</sup> And like the emotionally fragile *Better Luck Tomorrow* character Virgil Hu, the real-life Charles Choe had displayed erratic behavior prior to the New Year's Eve killing—even coming to school with a bloody knife to show off to a girl.<sup>12</sup> Choe was also the weakest link in the group for the police to break and later agreed to help the prosecution make its case against Chan as the “mastermind” behind the murderous plan.<sup>13</sup>

The events connected with the New Year's Eve killing are virtually identical in the real-life and film versions. As in the film *Better Luck Tomorrow*, Tay's girlfriend was a high school cheerleader who had once jilted Chan—the sting of which apparently lingered.<sup>14</sup> The same cheerleader had introduced the two boys to each other and Tay later contacted Chan to propose robbing a computer dealer's home.<sup>15</sup> Like his

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7. See Rene Lynch, *O.C. Murder Mystery: Why Tay Was Killed*, L.A. TIMES (May 8, 1994), [http://articles.latimes.com/1994-05-08/news/mn-55177\\_1\\_tay-family](http://articles.latimes.com/1994-05-08/news/mn-55177_1_tay-family) (describing the cast of the real-life murderers and victim); Rene Lynch, *Teen Guilty in Tay Murder Case: Courts: Jury Quickly Convicts Robert Chan in Trial that Shocked O.C. Another Youth Enters a Surprise Guilty plea. Jury Selection Starts for two Remaining Defendants*, L.A. TIMES (May 4, 1994), [http://articles.latimes.com/1994-05-04/news/mn-53660\\_1\\_robert-chan](http://articles.latimes.com/1994-05-04/news/mn-53660_1_robert-chan).

8. Catherine Gewertz, *Image in Death Doesn't Match Stuart Tay's Life*, L.A., Jan. 10, 1993, [http://articles.latimes.com/1993-01-10/news/mn-1667\\_1\\_stuart-tay](http://articles.latimes.com/1993-01-10/news/mn-1667_1_stuart-tay); Gregory Crouch & Jodi Wilgoren, *Death Penalty Called Possible in Tay Slaying*, L.A. TIMES (Jan. 7, 1993), [http://articles.latimes.com/1993-01-07/news/mn-1227\\_1\\_death-penalty](http://articles.latimes.com/1993-01-07/news/mn-1227_1_death-penalty).

9. Lynch, *O.C. Murder Mystery*, *supra* note 7; Gewertz, *supra* note 8.

10. Crouch & Wilgoren, *supra* note 8.

11. Lynch, *O.C. Murder Mystery*, *supra* note 7; Gewertz, *supra* note 8.

12. Rene Lynch, *January Trial Set for 4 in Slaying of Honor Student*, L.A. TIMES (Sept. 28, 1993), [http://articles.latimes.com/1993-09-28/local/me-39968\\_1\\_january-trial-set](http://articles.latimes.com/1993-09-28/local/me-39968_1_january-trial-set).

13. *Id.*

14. Gregory Crouch, *Tay Suspects Give All Answers—Except Why*, L.A. TIMES (Jan. 8, 1993), [http://articles.latimes.com/1993-01-08/news/mn-1132\\_1\\_police-report](http://articles.latimes.com/1993-01-08/news/mn-1132_1_police-report); Gewertz, *supra* note 8.

15. Gewertz, *supra* note 8; Crouch & Wilgoren, *supra* note 8; Rene Lynch, *Star Witness Recounts Cold Facts of Tay Killing*, L.A. TIMES (Apr. 8, 1994), <http://articles.latimes.com/1994-04->

film counterpart Ben, Kirn Young Kim occupied the role of the “lookout” during the surprise attack on Tay; Kim later explained to the police that he had met the group at Acosta’s home under the impression that they were there to “teach Tay a lesson.”<sup>16</sup> Consistent with the film’s depiction of the killing, Tay entered Acosta’s garage, where he had expected to purchase a handgun.<sup>17</sup> There, the boys beat Tay in the head with baseball bats and forced him to chug rubbing alcohol before duct-taping his mouth shut.<sup>18</sup> Tay died when he was asphyxiated by his own vomit.<sup>19</sup> As the film depicted, Chan picked Tay’s pockets for cash to pay Acosta and the group buried the body in one of their backyards before attending a classmate’s New Year’s Eve party.<sup>20</sup>

Interestingly, while the film’s depiction of the New Year’s Eve killing exposes a group of nervous teenagers who killed their victim pursuant to a poorly thought-out plan and clumsy execution, journalists dubbed the killing a “near-perfect crime” and the deputy district attorney proclaimed in his closing that Chan “almost got away with” murder.<sup>21</sup> The testimony offered at trial painted the murder as meticulously planned—stressing details like a dress rehearsal, rubber gloves to cover fingerprints, and a faked carjacking to mislead the police.<sup>22</sup> Yet the hasty attempt to bury Tay’s body in a too-shallow grave and burn the bats and clothes in a beach barbeque pit exposes a plan that was far from flawlessly devised, executed, or concealed.<sup>23</sup> In fact, the so-called mastermind of the plan had naively plucked out tips on how to commit crimes from watching police dramas on T.V. and went on to openly talk about the murder at school—hardly exemplifying masterful criminal calculation or afterthought.<sup>24</sup>

## II. THE “MODEL MINORITY” MYTHOLOGY

While the film *Better Luck Tomorrow* portrays its fictionalized version of Robert Chan as an essentially good kid who makes a series of poor decisions, the news media tracking the real-life trial told the opposite story of an evil-minded teen, who carried out extraordinarily smart and meticulously crafted decisions. In America, Asians have been crowned by the media as the “model minority”—showered with praise for their achievements in academia, conservative values, and uncomplaining nature; but concealed in this high praise is the vague worry that Asians possess a

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08/news/mn-43653\_1\_robert-chan.

16. Crouch, *supra* note 14.

17. *Id.*; Lynch, *O.C. Murder Mystery*, *supra* note 7.

18. See Gewertz, *supra* note 8.

19. Crouch & Wilgoren, *supra* note 8.

20. See Crouch, *supra* note 14.

21. Lynch, *O.C. Murder Mystery*, *supra* note 7.

22. *Id.*

23. See *id.*

24. See *id.*



superior natural intelligence that has enabled them to succeed as a minority group in America.<sup>25</sup> While the stereotype that Asians possess a superior intelligence than their non-Asian counterparts is at first glance a positive one, the model minority myth is in fact two-faced: “Every attractive trait matches up neatly to its repulsive complement, and the aspects are easily reversed.”<sup>26</sup> The caveat in the otherwise sunny “model minority” story lies in the threat felt by other Americans who may suspect that Asians are *too* equipped to achieve academic and professional success in America.<sup>27</sup>

This discomfiture with smart and crafty Asian Americans is encapsulated in the word “mastermind”—one of the buzzwords that the prosecution invoked to characterize Chan, the primary defendant on trial for Tay’s murder.<sup>28</sup> The term “mastermind” is the perfect underhanded compliment: at once conveying the virtue of Chan’s natural intelligence and the danger it poses to others when combined with a criminal streak. In an interview following the trial, Tay’s parents echoed these views—describing Chan as a “cruel and diabolical killer” and further emphasizing, “[t]he fact that he is so intelligent and yet so coldblooded is frightening.”<sup>29</sup>

#### A. *The Origins of the Mythology*

The history of the model minority myth is linked to the Immigration Act of 1965, which both lifted the ethnic quotas capping Asian immigration into the United States and enforced selective criteria for entry; under the newly devised immigration policy, Asians eligible for entering the United States were educated and affluent “skilled workers,” such as graduate students, professionals, and technicians.<sup>30</sup> As a result, the incoming class of Asian immigrants was markedly different from immigrants of the past who had come to America to fill hard labor positions in the railroad and agricultural industries.<sup>31</sup> In time, the post-1965 influx of learned and wealthy Asian immigrants helped change the public perception of the Asian American community and earned it the moniker “America’s Super Minority.”<sup>32</sup>

Meanwhile, the increasingly glowing praise bestowed upon Asian Americans overlapped with a growing concern over the rising poverty and

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25. See Yen, *supra* note 5, at 2.

26. Miranda O. McGowan & James Lindgren, *Testing the Model Minority Myth*, 100 NW. U.L. REV. 331, 343 (2006) (internal citations omitted).

27. See Pat C. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 6 (1994).

28. See e.g., Lait, *supra* note 1; Lynch, *O.C. Murder Mystery*, *supra* note 7; Lynch, *January Trial Set*, *supra* note 12.

29. Lait, *supra* note 1.

30. Yen, *supra* note 5, at 2-3.

31. *Id.* at 3, 7.

32. Anthony Ramirez & Barbara C. Loos, *America’s Super Minority*, FORTUNE, Nov. 24, 1986.

crime rate among African Americans and Latino Americans.<sup>33</sup> In addition to presupposing that Asian Americans were all intelligent and industrious, the model minority stereotype pegged Asian Americans as reticent and unchallenging of white racial privilege.<sup>34</sup> As a contrast to the “bad” minorities that staged protests and disrupted social disorder, Asian Americans were posited as the “good” and docile minority.<sup>35</sup> That Asian Americans could quietly achieve success within the confines of the current system lent credence to the idea that other racial minorities, too, could overcome the poverty in their communities through sheer hard work and self-reliance—without the help of government handouts or affirmative action—thereby relieving white Americans of their responsibility to fix the conditions that perpetuate such problems.<sup>36</sup> Asian Americans were thus upheld as “models” for the other minority groups: proof that any minority could propel itself into high societal standing by emulating the Asian American work ethic.<sup>37</sup>

#### B. Criminal Implications of the “Model Minority” Mythos

The American jury system, which entrusts the people with the heavy task of finding a criminal defendant either guilty or not guilty, is vulnerable to both the latent and blatant prejudices of jurors.<sup>38</sup> For example, socio-legal research has explored how racial stereotyping of African Americans significantly amplifies a juror’s perception of guilt.<sup>39</sup> Similarly, in criminal trials involving Asian American defendants, scholars have theorized that race may play a role in a jury’s decision to convict, based on the influence of Asian American stereotypes.<sup>40</sup>

In the trial for the murder of Stuart Tay, the four Asian American defendants were consummate examples of the model minority description: “nonassertive and deferential, intelligent but devious, and mathematically and technically oriented.”<sup>41</sup> Nearly all of the journalists following the Tay trial pointed out Chan’s academic prowess, his participation in academic

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33. Yen, *supra* note 5, at 3.

34. Darren S. Teshima, A “Hardy Handshake Sort of Guy”: The Model Minority and Implicit Bias About Asian Americans in *Chin v. Runnels*, 11 UCLA ASIAN PAC. AM. L.J. 122, 124 (2006); see Chew, *supra* note 27, at 4 (noting that Asian Americans are less politically organized and vocal than other ethnic groups in America).

35. Teshima, *supra* note 34, at 128.

36. Yen, *supra* note 5, at 4; see McGowan & Lindgren, *supra* note 26, at 339; see Teshima, *supra* note 34, at 129.

37. See Teshima, *supra* note 34, at 129.

38. Yen, *supra* note 5, at 9.

39. *Id.* at 9-10.

40. See *id.* at 1. In *A Reflection on the Wayne Lo Case*, Yen revisits the criminal trial of an Asian American college student whose shooting spree at his school left two dead and four wounded. In particular, Yen examines how certain Asian stereotypes may have affected the jury’s rejection of Lo’s insanity defense. *Id.* at 17, 24.

41. See Teshima, *supra* note 34, at 130 (quoting Chew, *supra* note 27, at 38).

decathlons, or his aspiration to attend Princeton University.<sup>42</sup> The prevalent perception of the educational success enjoyed by Asian Americans is perhaps the most conspicuous in the context of high school, where Asian American students achieve a disproportionately high rate of acceptance to elite colleges, outscore their non-Asian counterparts on the Math section of the SAT, and regularly come out on top in science contests.<sup>43</sup> Notably, the only non-Asian defendant on trial for the murder argued that he was mentally retarded and had been manipulated by the smarter Asian American boys.<sup>44</sup>

Among the Asian American defendants, Chan was named “Student of the Month” at his high school; Kim was described by peers as a “nerd” who loved computers; Choe was characterized by peers as “clean cut” and interested in computers; and Kang was “quiet and kept to himself.”<sup>45</sup> Not only did their academic records and physical appearances seemingly confirm the model minority myth, but the Asian American boys on trial were also described as highly civic-minded individuals. News stories detailed a long list of the community service work performed by defendants Kim and Choe—including packing food for a Boy Scouts Thanksgiving food drive, participating in the high school’s service club, and volunteering with a local YMCA’s child-care program.<sup>46</sup>

While good grades, top standardized test scores, and a dedication to community service are hardly the typical sort of incriminating evidence, in effect, the representation of Robert Chan as an intelligent and ambitious student narrowed his choice of defenses. Robert Chan was not from a poor family, struggling in school, limited in his job opportunities, or living in a neighborhood ravaged by crime. Chan led a life befitting of a “model minority,” unhampered by the economic struggles or social excuses that other criminal defense attorneys might invoke in attempts to exonerate or mitigate the sentences for their clients.<sup>47</sup> On the surface, Chan was an

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42. See e.g., Lait, *supra* note 1; Lynch, *O.C. Murder Mystery*, *supra* note 7; Gewertz, *supra* note 8.

43. McGowan & Lindgren, *supra* note 26, at 334.

44. Lynch, *O.C. Murder Mystery*, *supra* note 7.

45. *Id.*

46. *Id.*

47. To compare the legal strategy employed to defend two members of the “Tiny Rascals” gang on trial for murder in connection to a home-invasion robbery, see Jason H. Lee, *Dislocated and Deprived: A Normative Evaluation of Southeast Asian Criminal Responsibility and the Implications of Societal Fault*, 11 MICH. J. RACE & L. 671, 672 (2006). The facts of the 1995 Tiny Rascals Gang murders and the 1992 New Year’s Eve killing run parallel: five young Asian American men hatching a plot to steal expensive valuables in Los Angeles suburbs become embroiled in a violent encounter resulting in the deaths of their respective victims. See *id.*; see also Rene Lynch, *Last Two Youths Convicted in Murder of Student*, L.A. TIMES (July 2, 1994), [http://articles.latimes.com/1994-07-02/news/mn-11010\\_1\\_stuart-tay](http://articles.latimes.com/1994-07-02/news/mn-11010_1_stuart-tay). But the glaring distinction between the five Tiny Rascals gang members and the five Sunny Hills high school students is their level of education and socio-economic status. Accordingly, in the “Tiny Rascals” case, the defense attorney emphasized his clients’ lack of education and poor economic status to mitigate the defendants’ sentences, though the argument

exemplary Asian American youth—certainly not someone who appeared vulnerable to falling in with a violent street gang—and Chan’s defense attorney could hardly evoke a sympathetic upbringing or lack of education as factors to excuse or explain Chan’s behavior.

Most critically, Chan’s seemingly superior intelligence may have undercut his main defense: Chan was diagnosed as paranoid schizophrenic and claimed that he only agreed to kill Tay out of a genuine fear that Tay was going to kill him first—raising the theory of imperfect self-defense.<sup>48</sup> A clinical psychologist explained that Chan heard voices in his head and had acted under the delusion that Tay had rigged his home with explosives, which could detonate at any time.<sup>49</sup> According to the psychologist, Chan feared that Tay was a member of an Asian mafia and that Tay knew information about Chan that no one else did.<sup>50</sup> But when prompted to choose between first-degree murder and voluntary manslaughter convictions for Chan—the “mastermind” behind Tay’s murder—the jurors chose the former.<sup>51</sup> Chan was convicted of first-degree murder with the special allegation of lying in wait, and was thereafter sentenced to life in prison without the possibility of parole.<sup>52</sup>

In spite of the testimony by a clinical psychologist, Chan’s embodiment of the model minority stereotype may have influenced the jurors’ ability to sincerely evaluate the merits of Chan’s imperfect self-defense argument.<sup>53</sup> This is especially plausible given that stereotyping is a cognitive mechanism that all people rely upon “to simplify the task of perceiving, processing, and retaining information about people in memory.”<sup>54</sup> The model minority stereotype, which disproportionately attributes intelligence and wiles to Asian Americans, packs the potential to influence trials for Asian American defendants, particularly in crimes that

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ultimately proved unpersuasive. Lee, *supra* note 47, at 672.

48. See Lynch, *O.C. Murder Mystery*, *supra* note 7; Rene Lynch, *Final Arguments Presented in Tay Murder Trial*, L.A. TIMES (May 3, 1994), [http://articles.latimes.com/1994-05-03/local/me-53267\\_1\\_robert-chan](http://articles.latimes.com/1994-05-03/local/me-53267_1_robert-chan).

49. Rene Lynch, *Tay’s Accused Killer is Mentally Ill, Jury Told*, L.A. TIMES (Apr. 26, 1994), [http://articles.latimes.com/1994-04-26/local/me-50588\\_1\\_robert-chan](http://articles.latimes.com/1994-04-26/local/me-50588_1_robert-chan).

50. *Id.* While the jury in Chan’s case apparently did not give his fear of a “dangerous Asian” defense much credence, there are several examples of criminal trials where a *non*-Asian’s use of deadly force against their so-called dangerous Asian victims was found to be justified. For example, in *State v. Simon*, 646 P.2d 1119, 1121 (Kan. 1982), the court acquitted a defendant who shot and killed his unarmed Chinese neighbor—finding that the use of deadly force was justified based on the defendant’s assumption that his Asian victim was an expert in martial arts. Harvey Gee, *Beyond Black and White: Asian Americans, Mass Incarceration, and the Criminal Justice System*, ASIAN AM. POL’Y REV. 79, 82 (2011). The same martial arts stereotype was invoked by a police officer in California, who shot and killed “a pudgy, lachrymose and clearly soused little man would lay him low with some sort of ‘martial arts’ move.” Scott Winokur, *Kuanchung Kao’s Political Legacy*, S.F. CHRON (Sept. 9, 1997), <http://www.sfgate.com/news/article/Kuanchung-Kao-s-political-legacy-3101781.php>.

51. Lynch, *Final Arguments*, *supra* note 48.

52. Lait, *supra* note 1.

53. See Yen, *supra* note 5, at 24.

54. Teshima, *supra* note 34, at 131 n. 44.

involve an element of deliberation.<sup>55</sup> In such cases, the prosecution can insist that Asian Americans are capable of “masterminding” crimes and outsmarting non-Asians, even when the crimes lack clear design.<sup>56</sup> Meanwhile, in order to prove legal insanity in California, the accused must prove by a preponderance of the evidence that he was “incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong” at the time of the offense.<sup>57</sup> In the end, it may be too paradoxical for jurors to find that a scholarly and well-educated defendant has a mental defect that clouds his ability to discern right from wrong—though subsequent events continue to point to a correlation between a high level of intelligence and mental illness.<sup>58</sup>

### III. THE “YELLOW PERIL” MYTHOLOGY

On the flip side of the “model minority” mythology is the more obviously sinister stereotype that characterizes Asian Americans as the “yellow peril.” Long before the advent of the model minority myth, the prevalent stereotype of Asians focused on their foreignness and the danger they posed both to the labor market and “the purity of American society.”<sup>59</sup> Rather than celebrating Asians for their successful assimilation in America, the yellow peril metaphor contrarily brands Asians as foreigners, marred by low ethical standards and a penchant for cunning and treachery.<sup>60</sup> Historically, exclusionary immigration policies reflected the shared view by Congress and the Supreme Court that Asians could not assimilate in America.<sup>61</sup> Early Asian immigrants were perceived as strange and exotic—a notion expertly exploited by circus manager P.T. Barnum, who placed Chinese men on display as a sideshow act in his carnivals.<sup>62</sup> By the late 1800s, the anti-Chinese hostility had grown so fierce that it prompted the California Senate to issue a public statement declaring that Chinese immigrants had polluted the state with prostitution and other criminal

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55. Yen, *supra* note 5, at 18.

56. *See id.*

57. CAL. PEN. CODE § 25(b) (Deering 2012).

58. For example, James E. Holmes, the man charged in the 2012 Aurora shooting, graduated from UC Riverside with a BS in Neuroscience. *Colorado shooting suspect studied neuroscience at UC Riverside*, L.A. NOW (July 20, 2012), <http://latimesblogs.latimes.com/lanow/2012/07/james-holmes-colorado-shooting-dark-knight-riverside.html>. Adam Lanza, the gunman in the Sandy Hook Elementary School shooting, was remembered by classmates as an extremely intelligent student. Rachel Quigley et al., *Changing face of a killer: How gunman went from fresh-faced schoolboy to home-schooled loner who liked to burn himself with a lighter*, DAILY MAIL (Dec. 16, 2012), <http://www.dailymail.co.uk/news/article-2249230/Adam-Lanza-How-Newtown-gunman-went-fresh-faced-schoolboy-home-schooled-loner.html>.

59. Teshima, *supra* note 34, at 127.

60. Yen, *supra* note 5, at 6-7.

61. Sheila A. Bedi, *The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 HARV. BLACKLETTER J. 181-82 n.5 (2003).

62. Yen, *supra* note 5, at 7.

activities.<sup>63</sup>

In contemporary society, the proliferation of Asian American crime has again revitalized the soft rumbles and innuendos that Asians are morally deviant and afflicted with an “inherent criminality.”<sup>64</sup> The ascendancy of Asian American gangs is in large part owed to the strategic targeting of their own community members to commit the most lucrative and low-risk crimes.<sup>65</sup> Seemingly true to the stereotypes engendered by the model minority myth, many Asian American victims of the gangs have been reticent and uncomplaining—often refusing to file police reports or testify against the gang members in court.<sup>66</sup> In this sense, the seemingly incompatible model minority and yellow peril mythologies operate to reinforce one another.

Just as the model minority trait of intelligence can be twisted to insinuate an Asian American’s inherent slyness and treachery, it appears that the desire to silence talk of the yellow peril can push some Asian Americans to embrace the model minority trait of reticence. While most Asian Americans outwardly reject the model minority stereotype as a gross overgeneralization, there may be a private, simultaneous need to protect the model minority mythology and quash a re-surfacing of the yellow peril stereotype. In addition to language barriers and distrust of law enforcement, the under-reporting of Asian-on-Asian crimes may be informed by the fact that a public fear of the yellow peril had once given rise to a long pattern of governmentally and judicially sanctioned discrimination against Asian Americans.<sup>67</sup> A concern that even a smattering of new yellow peril suspicions could reawaken the earliest prejudices held by white Americans about Asian Americans may harden the community’s desire to keep Asian American crime out of the public eye. As a result, there is a yawning chasm expanding between Asian American community members, who mask the gang problems in their communities, and law enforcement officers, who have been unable to penetrate these communities.

#### A. *The Rise of Asian American Gangs*

In the United States, Asian American gang members account for just

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63. *Id.* at 7 n. 32.

64. *Id.* at 8.

65. Hong H. Tieu, *Picturing the Asian Gang Member Among Us*, 11 UCLA ASIAN PAC. AM. L.J. 41-42 (2006).

66. *See id.* at 42, 67.

67. *See* Chew, *supra* note 27, at 10. Fear of prejudice based on being characterized as inherently criminal, devious, and untrustworthy is a pressing reality for today’s Sikh, Muslim, Arab, and South Asian communities in the post-9/11 world. *See also* Deepa Iyer, *Post-9/11 discrimination must end*, USA TODAY (Aug. 9, 2012), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-08-09/sikh-shooting-muslims-bias/56920502/1>; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

six percent of the total gang population.<sup>68</sup> Despite this small demographic, law enforcement officials have long predicted that modern Asian American gangs would replicate the historical expansion of Italian-led groups in America.<sup>69</sup> By the 1980s, Chinese crime syndicates had risen to match the size and sophistication of the Italian Mafia and had gained control over sixty percent of the heroin smuggling activity in America.<sup>70</sup> By the 1990s, Asian American organized crime ranked second only to the Italian Mafia as a criminal threat to American law enforcement.<sup>71</sup> Currently, the new wave of Asian American gangs is climbing the ranks of the more established and organized crime powerhouses—bolstered both by their connections to organized Asia-based crime syndicates and the growth in the overall Asian American population.<sup>72</sup>

Unlike the traditional Chinese-dominated gangs in America, the new breed of Asian American gangs lures new recruits with promises of friendship, fast cars, and money.<sup>73</sup> Also unlike their more populous black and Latino counterparts, who are often motivated by turf wars, Asian American gang members are driven primarily by monetary incentives.<sup>74</sup> In line with other ethnic crime groups of the past who “preyed on their own” before expanding into different areas, Asian American gangs, too, target members of their own community.<sup>75</sup> The rationale behind the Asian-on-Asian attack plan is two-fold. First, Asian American gangs are acquainted with Asian habits and customs, such as the tendency to eschew banks in favor of storing one’s life savings and valuables at home.<sup>76</sup> Second, targeting Asian homes and businesses helps gang members evade criminal liability when the fear of gang retaliation and language and cultural barriers operate to deter Asian victims from seeking police protection or filing a

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68. See Figure 4, in JAMES C. HOWELL, YOUTH GANG PROGRAMS AND STRATEGIES SUMMARY 51 (OJJDP, U.S. Dep’t of Just. Aug. 2000).

69. See James Dao, *Asian Street Gangs Emerging as New Underworld*, N.Y. TIMES (Apr. 1, 1992), <http://www.nytimes.com/1992/04/01/nyregion/asian-street-gangs-emerging-as-new-underworld.html?pagewanted=all&src=pm>.

70. Yen, *supra* note 5, at 8.

71. Tieu, *supra* note 65, at 41.

72. See Dao, *supra* note 69. As a point of clarification, traditional organized crime and modern gangs are two different phenomena. See Rafe Arnott, *The Difference Between Organized Crime and Gangs*, ABBOTSFORD MISSION TIMES (June 22, 2010), <http://www.abbotsfordtimes.com/news/story.html?id=3185623>. However, as contemporary gangs grow in sophistication and discipline, they mimic some of the formalities that typify “organized” crime groups, such as defined leadership roles, internal hierarchy, regular meetings, formal rules, and relationships with neighborhood businesses. See generally Scott H. Decker et al., *A Tale of Two Cities: Gangs as Organized Crime Groups*, 15 JUST. Q. 395 (1998). The line between organized and unorganized groups is further blurred when Asia-based crime groups attempt to establish their presence in America through Asian American street gangs. See Dao, *supra* note 69.

73. Dao, *supra* note 69.

74. Tieu, *supra* note 65, at 41-43.

75. Dao, *supra* note 69.

76. Tieu, *supra* note 65, at 41-42.

report.<sup>77</sup>

One episode of *The Shield* entitled “Riceburner”<sup>78</sup> illustrates the cultural forces that restrain the Asian American community’s leaders and crime victims from cooperating with the police—thereby obstructing the detection and enforcement of Asian-on-Asian crime.<sup>79</sup> At the start of the episode, the police department’s anti-gang team is tasked with executing a high-risk warrant for Charlie Kim, the enforcer for the K-town Killers. In addition to firebombing a motel in Koreatown, Kim is the suspected triggerman in four homicides in the Koreatown area. But despite the terror that Kim inflicts throughout Koreatown, the detectives find themselves barred from obtaining accurate information on Kim’s whereabouts from Koreatown residents.

“If you’re going to get murdered, might as well be by your own kind,” one detective observes wryly. Enraged by the lack of cooperation from Korean eyewitnesses, the cops begin to harass Koreatown residents by shutting down restaurants for health code violations, towing parked cars for no legitimate reason, and seizing merchandise from vendors. Seeking an insider’s advice on how to penetrate the Koreatown community, the captain of the police precinct recruits the help of a childhood friend, Thomas Choi, a prominent Korean American businessman and local politician. But Choi, too, is reluctant to help and sums up the community’s philosophy: “Don’t trust anyone but your own kind.” Choi further explains that unlike the police, Koreatown gang members are still trusted members of the community, who keep the black and Latino gangs at bay—a feat that the police themselves have proved inept at accomplishing.

Nationwide studies show that community cooperation and collaboration are necessary to effectively address a gang problem in a community.<sup>80</sup> But as vocalized by the fictional community leader Thomas Choi in “Riceburner,” there are members of the Korean American community who remain staunchly adverse to seeking outside help to resolve a gang problem in the community—some of whom withhold from reporting crimes committed by fellow Korean Americans due to the shame and fear of negative publicity.<sup>81</sup> Statistically, among all racial groups, Asian American victims of violent crimes are the least likely to file a police

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77. *Id.* at 42. In addition to fear of gang retaliation, language barriers, and unfamiliarity with the American criminal justice system, undocumented immigrants fear deportation in connection with filing a police report, while other immigrant groups feel complacent about gangs because such extortion is commonplace in their native countries. *Id.*

78. *The Shield: Riceburner* (FX television broadcast May 25, 2004). *The Shield* is a television series depicting a fictional division of the Los Angeles Police Department.

79. See Tieu, *supra* note 65, at 69.

80. HOWELL, YOUTH GANG PROGRAMS, *supra* note 68, at 46, 54.

81. Daniel Ahn, *Profiling Culture: An Examination of Korean American Gangbangers in Southern California*, 11 *ASIAN L.J.* 57, 89 (2004).



report.<sup>82</sup>

The systematic under-reporting of gang-related crimes by community members reinforces the stereotype of Asian American as “model minorities” and preserves the illusion that Asian American gang activity is not pervasive. This, in turn, ensures the continued under-funding of police programs tailored specifically to address this strain of gang activity.<sup>83</sup> While the Asian American community may benefit from cooperating with law enforcement officials, convincing them to do so has proved to be challenging. In California, recent attempts to foster good rapport with the resident Asian population include recruiting more bilingual officers from the Asian community and electing them into higher positions, such as police chief.<sup>84</sup> Yet, these piecemeal solutions have not solved the problem: Asian American communities remain unreceptive to help from law enforcement and continue to cite concerns that police officers are culturally insensitive and undeserving of their trust.<sup>85</sup>

As illustrated by the police officers in *The Shield* who proceed to harass Koreatown residents for refusing to immediately cooperate with their investigation, changes in policy often do not reflect changes on the ground. Surely, the Asian American community acts voluntarily when choosing whether or not to cooperate with police; at the same time, calls for more cooperation will not be compelling without continued efforts from law enforcement to engage in meaningful community outreach, provide guarantees that immigrants will not be deported for reporting crimes, and address other insensitive tactics that unhinge an already shaky relationship. Residents in Los Angeles’ Koreatown will not soon forget that, in the midst of the Los Angeles race riots, “Westwood escaped the brunt of the uprising [because] Koreatown was offered up in exchange.”<sup>86</sup>

### B. *The Rise of Asian American Youth Delinquency*

In another episode of *The Shield* entitled “Carnivores,” two police officers investigate a home invasion ending in a murder-torture-suicide of two elderly Korean victims.<sup>87</sup> The officers enter the home of the Korean immigrant couple to find the elderly woman strangled to death and her husband’s feet nailed to the floor; the couple’s so-called home bank, containing its entire life’s savings, has been stolen from underneath their mattress. The elderly Korean couple represents the ideal target for Asian-

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82. Timothy C. Hart & Callie Renniso, *Reporting Crime to the Police 1992-2001*, U.S. DEP’T OF JUST. (Mar. 2003), <http://bjs.ojp.usdoj.gov/content/pub/ascii/rcp00.txt> (noting that 49% of violence against black victims, 42% of violence against white victims, and 40% of violence against Asian victims was reported during this nine-year period).

83. Tieu, *supra* note 65, at 42-43.

84. *Id.* at 64-67.

85. *Id.* at 43.

86. Mari Matsuda, *Crime and Affirmative Action*, 1 J. GENDER RACE & JUST. 310, 311 (1997-98).

87. *The Shield: Carnivores* (FX television broadcast May 21, 2002).

on-Asian crime: they cannot speak English, avoid the police, distrust banks, and keep tens of thousands of dollars in cash stuffed underneath a mattress.

After the detectives remove the bloodied nails from the elderly man's feet and seat him in an armchair, the man retrieves a gun and shoots himself in the head. With no living witnesses to help identify the criminals, the detectives seek out the victims' grown daughter, Rhee-Soo, for her assistance. But the detectives soon discover that not only is Rhee-Soo monolingual in Korean, but she is also unwilling to share her theories on the identity of her parents' attackers through a Korean translator. Meanwhile, the unit's gang specialists eliminate the "Dragon Ten" and "Flaming Fists" gangs from the list of suspects, reasoning that legitimate Asian gangs would have tagged the walls of their victim's home. Based on the reports of neighbors who heard the elderly man converse with a younger-sounding intruder, the officers suspect that the perpetrators were a group of Asian American youngsters. The detectives want to explore the possibility of Rhee-Soo's son, Nam Yung, who has a record for committing minor infractions, but the translator warns that Rhee-Soo will only grow increasingly mum if prodded with prying personal questions. When the police are summoned to investigate a second home robbery in the same community, the detectives find that while the victims are still alive, the adults are just as unwilling to share information about the invaders with the police. The only member of the household who cooperates with the police is a Korean American teenager, who not only speaks fluent English, but is also not constrained by the concerns that silence his older family members. Against his father's loud protests, the teenager ignores all of the practical ramifications of seeking police assistance and freely divulges that his cousin is behind the home invasion.

Mirroring the thwarted police efforts to target hard-core Korean American gangs in *The Shield* episode "Riceburner," in "Carnivores," the crime victims' silence handicaps the efforts by law enforcement to eradicate the growing litany of Asian-on-Asian crimes committed by Asian American youth. More so than the terror posed by Asian-on-Asian crime, "Carnivores" hints that what some members of the community fear is the shame that would be brought about by the public exposure of the failures of Asians as a group.<sup>88</sup> Perhaps even more damaging than reporting the crimes committed by notorious Asian gangbangers is acknowledging those committed by members of the younger generation, who are supposed to represent a bright and promising future for Asian Americans—and whose actions could both refuel and reframe the "yellow peril" debate for a new generation of Asian Americans.

Scientific data reveals that many of today's adolescent gang members are "good kids," who come from respectable families with college-

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88. See Ahn, *supra* note 81, at 89.

educated parents.<sup>89</sup> And while the Asian American community struggles to come to grips with the existence of youth delinquency, the rate of arrest for Asian American youth has spiked by over eleven percent.<sup>90</sup> Nowadays, an Asian American youth is suspended from a public school every one minute, arrested every sixteen minutes, and arrested for a violent crime every seven hours—statistics that point to a disquieting truth about Asian American juvenile delinquency and violence.<sup>91</sup>

#### IV. THE SHORTCOMINGS OF GANG ENFORCEMENT TOOLS

Studies confirm that the most effective way to reduce both youth and adult gang crime is a *preventative* approach—to discourage children and teenagers from joining gangs in the first place.<sup>92</sup> However, a community's hesitancy to work with the authorities, justified or not, precludes the use of early intervention strategies.<sup>93</sup> Unlike community-based initiatives that aim to prevent gang participation, the law enforcement approach to violent crime generally involves *reactive* investigations of gang members.<sup>94</sup> This section of the Comment examines the problems that inhere in the gang-suppression approach by law enforcement, as illustrated by the gang-enforcement tools of gang profiles and databases.

##### A. *Defining and Identifying a Gang Member*

Law enforcement agencies commonly use the tool of “gang profiles” to distinguish gang members from the non-gang population in their efforts to target criminal activity.<sup>95</sup> While the definitions that exist for the term “gang” are plenary, criminal law formulations advise that the defining feature of a gang is its criminality, as opposed to sociological definitions that emphasize social characteristics like friendship or a shared interest.<sup>96</sup> But counter-intuitively, the criteria used by law enforcement agencies to compile their gang profiles skew their focus towards the social aspects of a gang—such as a person's clothing or neighborhood—rather than to the criminal or violent aspects of a gang.<sup>97</sup> Despite this logical lapse between identifying gang members based on predominantly *social* criteria and the goal of targeting *criminal* behavior, law enforcement agencies continue to employ socially skewed criteria to identify the gang members to include in

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89. HOWELL, YOUTH GANG PROGRAMS, *supra* note 68, at 50.

90. Lee, *supra* note 47, at 675.

91. COALITION FOR ASIAN AMERICAN CHILDREN & FAMILIES, MYTHS & FACTS, [http://www.cacf.org/resources\\_mythsfacts.html](http://www.cacf.org/resources_mythsfacts.html) (last visited June 2, 2013).

92. See HOWELL, YOUTH GANG PROGRAMS, *supra* note 68, at 11.

93. *Id.* at 53.

94. See *id.* at 30.

95. Suzin Kim, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 270-72 (1996).

96. *Id.* at 266-68.

97. *Id.* at 270.

their gang profiles and mug books.<sup>98</sup>

For example, the California Department of Justice, California Bureau of Investigation, and local law enforcement agencies have innovated a computerized gang file system called “CalGang,” through which the various agencies share the information that they collect on gang members in their locales.<sup>99</sup> Local police officers collect this type of information during “investigatory stops” of individuals whom they approach upon suspicion of gang membership or association.<sup>100</sup> An officer often bases his suspicion of gang affiliation on the person’s clothing, tattoos, hand signs, a history of previous arrests, or his simply being seen with other gang members.<sup>101</sup> Officers have also been known to target individuals of a specific racial ancestry when compiling gang profiles.<sup>102</sup> Disturbingly, actual criminal conduct is not a mandatory criterion for entry into a gang database; instead, the most frequently invoked criterion is a person’s attire.<sup>103</sup>

Critics point out that the law enforcement’s reliance on such loose criteria and stereotypes during investigatory stops makes the CalGang database error-prone to include innocent persons.<sup>104</sup> Due to the vagaries in

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98. *Id.* at 272-74.

99. Matthew O’Deane, *The CAL-GANG System*, LAWOFFICER.COM, Nov. 16, 2010, <http://www.lawofficer.com/article/investigation/cal-gang-system>. Formerly known as “Gang Resistance Education and Training” (GREAT), the CalGang program was the first crime database in the country to focus exclusively on street gangs. Heather Walczak, *Dangerous Data: The Use and Abuse of Gang Databases*, SELECTED WORKS OF HEATHER WALCZAK (May 2009), available at [http://works.bepress.com/heather\\_walczak/1](http://works.bepress.com/heather_walczak/1).

100. Tieu, *supra* note 65, at 44. During a typical investigatory “photo stop,” a police officer conducts an interview, records personal information, and takes a photograph of the suspected gang member. *Id.* This information is recorded in the local police department’s gang mug books and then shared via CalGang with state law enforcement, Federal Bureau of Investigation, and U.S. Citizenship and Immigration Services. *Id.* at 44-45.

101. *Id.* at 55; K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-trial Detention*, 23 ST. THOMAS L. REV. 620, 638 (2011); Kim, *supra* note 95, at 270 (enumerating the criteria used by Tri-Agency Resource Gang Enforcement Team to identify gang members in California). The above-listed factors are only illustrative of the criteria typically used by California police departments; there is no standardized statewide set of criteria for determining a person’s eligibility for CalGang. Tieu, *supra* note 65, at 56.

102. Bedi, *supra* note 61, at 185.

103. Howell, *Fear Itself*, *supra* note 101, at 638; Kim, *supra* note 95, at 274.

104. Tieu, *supra* note 65, at 55-56. Problematically, one’s inclusion in a gang database—whether accurate or not—packs significant legal consequences for the accused. In California, the Street Terrorism Enforcement and Prevention Act makes it easier for the prosecution to prove a group is a “gang” and then exacts heavy enhancements in the sentences imposed upon criminal defendants determined to be gang members. Howell, *Fear Itself*, *supra* note 101, at 646-47; CAL. PENAL CODE § 186.22 (2012). A defendant with a CalGang file may have his sentence automatically increased based solely on the existence of the file. Tieu, *supra* note 65, at 60; CAL. PENAL CODE § 186.20 (2012). In the context of a pre-trial bail hearing, the bare allegation of a defendant’s affiliation with a gang can cancel the possibility of release on reasonable bail. Howell, *Fear Itself*, *supra* note 101, at 621. In particular, when the charges are relatively minor (i.e., a misdemeanor or non-violent felony), prosecutors routinely request a disproportionately large bail based on the allegation of gang affiliation. *Id.* at 626. Many of these cases provide no evidentiary review to confirm the accuracy of the allegation. *Id.* at 632, 638-39.

the criteria, a person who is identified as a gang member may be a hard-core gangbanger or just a “wannabe,” and may either be active or inactive.<sup>105</sup> Critics further stress that the gang databases are both over- and under-inclusive: an overreliance on stereotypes ensnares those youth who dress a certain way or live in a certain neighborhood, while excluding those individuals who do not fit the stereotype.<sup>106</sup>

### B. Refining the Conventional Anti-Gang Tactics

As a preliminary matter, a more measured and discerning definition of a gang ought to differentiate between bona fide gangs and merely “delinquent groups,” as well as a gang’s active and inactive members.<sup>107</sup> For starters, a gang can be broken up into full-fledged and “wannabe” members.<sup>108</sup> While “wannabe” members claim gang affiliation, they commit crimes separately from the parent gang as their own delinquent subgroup, typically to improve their own reputations or to gain official membership status.<sup>109</sup> But under the application of the criteria used by gang profiles, this type of youth may be mislabeled as a bona fide gang member.<sup>110</sup> Moreover, after extracting the “wannabes” from the real gang, there is a further need to distinguish between a gang’s active and inactive enrollment.<sup>111</sup> Inactive members also include newer, fledgling members, like children who join a gang in their early teens but quit within a short period of time.<sup>112</sup> This distinction is particularly pressing in light of studies that show that gang membership among at-risk youth is not only infrequent, but also quite fleeting.<sup>113</sup> But under the current system of tracking gang members, despite the short-term allegiance to a gang, a youth who has been entered into a gang database is unlikely to be removed.<sup>114</sup>

One initiative that has its antennae out for subtler signs of gang participation than the criteria used by gang databases is the Asian Gang Consortium, an organization founded by the Asian Gang Unit specialist of the Monterey Park Police Department in California.<sup>115</sup> The Consortium draws its strengths from the wide breadth of its participants—bringing together school administrators, family counselors, local police, parole officers, and deputy district attorneys in a concerted effort to fight gang

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105. See Howell, *Fear Itself*, *supra* note 101, at 647-48.

106. See *id.* at 624.

107. See *id.* at 644-45.

108. *Id.* at 647; Kim, *supra* note 95, at 268-69.

109. Howell, *Fear Itself*, *supra* note 101 at 647.

110. Tieu, *supra* note 65, at 45.

111. For example, within a gang, the “core” members commit the vast majority of the crimes, while “fringe” members may have only joined the gang for purposes of protection—not to actually partake in the criminal acts. Howell, *Fear Itself*, *supra* note 101, at 647-48.

112. *Id.* at 648.

113. *Id.* at 652.

114. *Id.*; see also Tieu, *supra* note 65, at 55.

115. See Tieu, *supra* note 65, at 65.

involvement.<sup>116</sup> Unlike the vague “baggy clothing” criterion used by some police officers to identify potential gang members, school administrators are more equipped to provide up-to-the-moment information on trends in gang attire, including specific jersey numbers, shoelace color, and brand of sneakers.<sup>117</sup> And unlike the law enforcement techniques designed to track *ongoing* gang activity, the community-oriented approach focuses its efforts on teenagers *on the cusp* of falling into a gang, and reaches out to the parents of the at-risk teenagers.<sup>118</sup> The collaborative nature of these techniques takes into account the fact that the parents of a troubled youth may adopt a fiercely protectionist stance when it comes to their child and initially resist the possibility that the child could be a gang member.<sup>119</sup>

Yet, by and large, gang awareness and counseling programs that reach out to Asian youth fixate only on those who are most visibly at high risk of becoming members of violent street gangs. But the predictors for a child or teenager joining a gang are many and varied—ranging from personal or school-related problems to peer group associations and family conditions.<sup>120</sup> Accordingly, the community and police programs designed to deter children and adolescents from joining gangs necessarily entail more nuanced strategies to account for the complexity and diversity of the variables involved.<sup>121</sup> Moreover, as current trends in Asian gang involvement indicate a move away from home robberies and extortion and towards white-collar crimes, such as credit card fraud, counterfeiting money, and drug pushing, anti-gang efforts must be wary of an even more covert, under-the-radar wave of criminality.<sup>122</sup> Instructively, while the four Asian American defendants on trial for killing Stuart Tay all maintained a clean-cut image and good grades, the warning signs were there. For instance, Chan bragged to his classmates about his dangerous gang ties<sup>123</sup> and ran a cheating ring for the SAT exam at school;<sup>124</sup> meanwhile, Choe had once come to school with a bloodstained knife.<sup>125</sup> But when wealthy and educated “model” teenagers, who fell outside of the category of Asian youths most susceptible to gang life, engaged in debauchery or criminal activity, their behavior went wholly undetected.

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116. *See id.*

117. Marshall Allen, *Gang Consortium Helps Schools Identify Groups*, STREETGANGS.COM ,(Oct. 23, 2002), <http://www.streetgangs.com/topics/2002/102302asian.html>.

118. *See Tieu, supra* note 65, at 66.

119. *See id.* at 69.

120. HOWELL, *YOUTH GANG PROGRAMS, supra* note 68, at 54.

121. *Id.*

122. *See Tieu, supra* note 65, at 63.

123. Crouch & Wilgoren, *supra* note 8.

124. Lynch, *O.C. Murder Mystery, supra* note 7.

125. Lynch, *January Trial Set, supra* note 12.

## CONCLUSION

Bart: "I believe that after you die, you come back as whatever you want. I'll be a butterfly."

Lisa: "How come?"

Bart: "Because nobody suspects the butterfly."<sup>126</sup>

I was going on eight years old and about to complete my second year of elementary school when I watched this particular episode of the television show *The Simpsons*, in which Bart—the cartoon embodiment of youthful rebellion and bad behavior—explains to his sister Lisa the rationale behind his ideal reincarnation in his next life. As he speaks, in his imagination, Bart-the-Butterfly is holding an empty gas can and laughing sinisterly while fluttering over Springfield Elementary School as it burns down to the ground. The police are on the ground interrogating Principal Skinner, who insists, "I didn't burn down the school. It was the butterfly, I tell you, the butterfly!" The cops, of course, disbelieve him. How could a creature as faultless and unoffending as a butterfly be responsible for setting the school on fire?

I remember this particular episode of *The Simpsons* with such haunting clarity owing to a series of extraordinary events that preceded it. During my elementary school's annual fund-raiser, the magazine drive, three members of the student council were discovered to have been stealing discreet amounts of cash from the collected funds. They had also rigged the competition to ensure that one of them would win the grand prize award for the student who sold the most magazine subscriptions. All three of the student council members were "model" Asian American students with unblemished academic and behavioral records. As I watched *The Simpsons* episode in which Bart-the-Butterfly gleefully set his elementary school ablaze—certain that he would not be caught or punished for his mischief—I thought about my three disgraced classmates. Did they think that they were butterflies—too discreet and beyond suspicion to face any consequences for their bad behavior? Following the magazine drive incident, the three students were expelled from school and I never saw them again.

I like to imagine that my three former classmates grew up to become reformed, law-abiding adults. They were young and lucky to have been caught committing a minor indiscretion, rather than a more flagrant offense further down on the crooked path. I wonder what would have happened to Robert Chan, Kirn Young Kim, Charles Choe, and Mun Bong Kang had their parents or the school authorities paid more heed to their antics and recognized the warning signs that subtly flashed. Before the killing of Tay, Chan openly boasted of ties to a Chinese gang and orchestrated a cheating ring at his school;<sup>127</sup> Choe had come to school with a bloody knife and had

126. *The Simpsons: 'Round Springfield* (Fox television broadcast Apr. 30, 1995).

127. Crouch & Wilgoren, *supra* note 8; Lynch, *O.C. Murder Mystery*, *supra* note 7.

cheated on his SAT test;<sup>128</sup> and Tay had held himself out to be a local crime boss involved in counterfeiting and weapons trafficking.<sup>129</sup> But between the non-Asian school faculty members who are blinded by the model minority myth, and Asian American parents who reject the criminal depictions of their kids, there was not a single adult to vocalize his or her concern about the erratic behavior on display.

In his book, *Covering: The Hidden Assault on our Civil Rights*, NYU Law Professor Kenji Yoshino explores the trade-off practice of “downplay(ing) a disfavored trait so as to blend into the mainstream.”<sup>130</sup> For some in the Asian American community, the potential to be racialized as a “yellow peril” may push them to embrace the model minority myth, even as they recognize that Asian Americans are far from uniformly educated, assimilated, or financially successful.<sup>131</sup> While these two Asian mythologies represent the two extreme ends of the population—the model citizens and the criminals and delinquents—they also have surprising points of intersection. For instance, the level of super-intelligence attributed to Asians feeds into the idea of an evil, criminal genius. Meanwhile, the fear of shame and negative publicity tied to the resurgence of the yellow peril myth may silence some of the victims of Asian-on-Asian crimes. And lastly, the lofty standard promulgated by the model minority myth may incite its subjects to rebel against the high expectations society has set for them.

This urge to reject the high standard of a model minority is evident in the rise of yellow peril behavior trending among Asian American teenagers who live in gang-free environments and have plenty of other opportunities in their school and professional lives.<sup>132</sup> While some Asian Americans cling to the positive public images popularized by the model minority myth and shun the negative implications of the yellow peril myth, these Asian American teenagers do the exact opposite. Beyond the universal truth that all teenagers will experience some form of angst, it seems that Asian American students are uniquely predisposed to undergo a crisis of identity—a maddening urge to reject the categorization of studiousness and nerdiness that naturally befalls them by virtue of their race and embrace a delinquent alter ego inspired by the yellow peril stereotype.<sup>133</sup> It is this co-

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128. Lynch, *January Trial Set*, *supra* note 12; Lynch, *Star Witness Recounts*, *supra* note 15.

129. Rene Lynch, *Judge Sentences 3 Teens, Closing Tay Slaying Case*, L.A. TIMES (Jan. 21, 1995), [http://articles.latimes.com/1995-01-21/news/mn-22729\\_1\\_judge-sentences](http://articles.latimes.com/1995-01-21/news/mn-22729_1_judge-sentences).

130. Kenji Yoshino, *Covering* (March 4, 2013), <http://www.kenjiyoshino.com/covering.htm>.

131. COALITION FOR ASIAN AMERICAN CHILDREN & FAMILIES, *supra* note 91; *see generally* Lee, *supra* note 47 (describing trends among Southeast Asian refugees in America).

132. *See e.g.*, HOWELL, YOUTH GANG PROGRAMS, *supra* note 68, at 50.

133. *See* Yen, *supra* note 5, at 6 (quoting Daya Sandhu, Professor of Educational and Counseling Psychology, who explains how the model minority myth pre-empts Asian Americans from defining themselves as individuals and triggers an array of psychological anguish, including feelings of marginality, weakness, and alienation).



existence of the model minority and yellow peril stereotypes that empowers some Asian American youth to use their good grades and meek appearances to deflect the suspicions of their parents and school administrators while winning reputational points with their peers by pulling off illicit stunts.

Fittingly, the judge sitting trial for the murder of Stuart Tay found herself struggling to make sense of this exact paradox: the disconnect between the Asian American defendants' history of good behavior and the crime with which they were charged.<sup>134</sup> In the end, the judge attributed the Tay murder to "misguided youths who had difficulty fitting in and were trying anything to get respect from their peers," and lightened the severity of the sentences for Kang and Kim, who are scheduled to become eligible for parole after they turn thirty.<sup>135</sup> In the meantime, the judge encouraged the two Asian American boys to take advantage of the rehabilitation programs in prison and even made a special mention of Kim's plan to pursue a master's degree in business administration.<sup>136</sup> In spite of the murder conviction, apparently, the judge at least saw in Kim some vestigial potential to be a model minority.<sup>137</sup>

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134. Lynch, *Judge Sentences 3 Teens*, *supra* note 129.

135. *Id.*

136. *Id.*

137. On a sad final note, there is Internet talk that one of the defendants in the Tay murder has passed away after contracting AIDS in jail. The deceased is rumored to be Mun Bong Kang. See Bonnie Kernene, *This Day in History: Stuart Tay murder 12/31/1992 Buena Park, CA*, MY LIFE OF CRIME (Dec. 31, 2005), <http://mylifeofcrime.wordpress.com/2005/12/31/december-31-1992-stuart-tay-murder/> (last modified Feb. 15, 2012).