



# Under the Lucky Moose: Belatedness and Citizen's Arrest in Canada

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## Abstract

In this paper, we use postcolonial theories of temporality—specifically the idea of belatedness—to examine how literal forms of lateness inform the so-called Lucky Moose case, wherein Chinese-Canadian grocer David Chen tardily performs a citizen's arrest in Toronto. Canadian news media outlets, the Chinese-Canadian community, and *R v Chen* (2010) all contribute to the construction of Chen as an active legal subject, capable of working through the law on his own terms and in his own temporal framework. Consequently, Chen's belatedness can be understood as part of a larger politics that serves to transform the temporality of citizenship and citizen's arrest law in Canada.

**Keywords:** Race, citizenship, temporality, postcolonial theory, police

## Résumé

Dans cet article, nous nous appuyons sur les théories postcoloniales de la temporalité, plus particulièrement l'idée de la tardivité, afin d'examiner comment des retards, au sens littéral, influencent l'affaire dit Lucky Moose, dans laquelle l'épicier sino-canadien David Chen arrête un contrevenant de manière tardive à Toronto. Les services médiatiques canadiens, la communauté sino-canadienne et *R c Chen* (2010) contribuent tous à l'idée que Chen est un sujet légal actif capable d'interpréter la loi selon ses propres conditions et son propre cadre chronologique. Par conséquent, la tardivité de Chen peut être interprétée dans un contexte politique plus large permettant de transformer la temporalité de la citoyenneté ainsi que la loi sur l'arrestation par un citoyen au Canada.

**Mots clés :** race, citoyenneté, temporalité, théorie postcoloniale, police

## Introduction

On May 23, 2009, David Chen—owner of the Lucky Moose Food Mart in downtown Toronto's Old Chinatown—noticed that his surveillance footage had captured a

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shoplifter loading a dozen money trees onto his bicycle without paying. The shoplifter left with the stolen goods. However, Chen recognized the shoplifter, who was eventually identified as repeat offender Anthony Bennett, and suspected that he would return to the store later to steal some more. Approximately 45 minutes later, the suspect returned to the Lucky Moose and was confronted by Chen. Chen demanded that the shoplifter pay for the stolen goods. The shoplifter refused and began to run away from the premises. Chen and one of his employees, Jie Chen, gave chase, catching the suspect about a block away. When a struggle ensued, Chen's brother-in-law Qing Li drove up to assist. Bennett was eventually subdued with rope and placed in a van. When police arrived following witness reports about the struggle, Chen and his colleagues were charged with assault, forcible confinement, kidnapping, and possession of a concealed weapon. Chen's attempt to perform a citizen's arrest was initially deemed criminal by both the police and the Crown. As the case proceeded through the criminal justice system, the so-called Lucky Moose case became a cause célèbre in Toronto and across Canada, ultimately inspiring the passage of the (unofficially titled) Lucky Moose Bill (Bill C-26) in March 2013.

In news media coverage of the case as well as in the court reasoning behind *R v Chen*,<sup>1</sup> David Chen becomes more than just an accused in a court case. Not only does his guilt or innocence come to stand in for that of the case's co-accused, he becomes an icon of what Canadian citizenship entails. Yet, Chen himself has a symbolic and iconic double—namely, the physical statue of a “Chinese” moose that stands atop his grocery store like a silent guardian and for which, in part, his store is named. As one of the 325 moose commissioned by the City of Toronto as part of its millennium celebration in 2000, the so-called Prosperity Moose is a peculiar creation that is not only both familiar and strange but also simultaneously Canadian and “Chinese.” As the “quintessential Canadian symbol,”<sup>2</sup> the moose provides a majestic canvas on which to display the talents of local artists. In this particular instance, the Canadian moose has been transformed into a Chinese-Canadian symbol by local Chinese artist Peng Ma. With a stoic expression and a Fu Manchu mustache, the moose embodies the concept of prosperity, as its body is decorated with images of gold (e.g., coins and nuggets) as well as with the Chinese characters meaning “wealth” and “prosperity.” Taken out of its natural habitat in the wilderness and plunked down in the urban space of downtown Chinatown, this moose has become a marker of the area's inhabitants and property owners in an attempt to represent the city's multiculturalism.

The exercise of making multicultural Canadian moose in the city is not so different from the judicial reasoning that accompanies the *R v Chen* case and the ways in which it introduces a multicultural form of citizenship in its interpretation of the Canadian law concerning citizen's arrest. In this paper, we explore how Chen becomes an icon through what we call a temporality of belatedness. Using postcolonial theories of temporality—specifically Homi Bhabha's idea of

<sup>1</sup> *R v Chen*, 2010 ONCJ 641 (hereafter referred to as *Chen*).

<sup>2</sup> George Cohon, chairman of Moose in the City, quoted in *Moose Prints* (Toronto: The Black and White Guys, 2000), 4.

belatedness—we show how the literal forms of lateness that inform this case can be understood as part of a larger politics that transforms the temporality of Canadian citizenship. We argue that Chen injects belatedness into Canadian citizenship and consequently reorients Canadian law to accommodate such a temporality in citizenship. In so doing, we examine how citizenship itself is not a binary category where one either is or is not a citizen, but instead includes and often obscures various forms of temporality. Further, the Lucky Moose case demonstrates a racialized subject—namely, David Chen—as active and capable of working through the law and being the impetus for legal change as opposed to being a passive victim who is subject to the law. Here, Chen is integral to how the case and the subsequent amendment to the citizen's arrest law (Bill C-26) contribute to the manufacture of legitimate Canadian citizens.

In the first part of the paper, we discuss Homi Bhabha's concepts of the postcolonial time lag and belatedness as particularly useful ways of examining issues of temporality in this case. In the second section, we address three literal forms of belatedness in the Lucky Moose case based on a close analysis of various publicly accessible texts, specifically, news reports and the legal decision. Our select sample reveals how the case has been constructed and circulated by the media, Chen, and the trial judge, often in ways that allow the public to identify with the very personable and personalized Chen. We end with a discussion of the implications that arise from considering different temporalities in Canadian citizenship.

### Theorizing Belatedness

In this paper, we use postcolonial theories of belatedness in order to understand Chen's actions as agential. Postcolonial theory has been concerned with issues of time and temporality. For Bhabha, belatedness signals otherness, and using belatedness in order to assert a different temporality is a form of resistance to power. Challenging the temporality of a particular regime of power, however, involves an awareness of the way in which the supposed progressiveness of white modernity is staged. But, as Bhabha argues, what the postcolonial time lag reveals is how the "progressive, future drive"<sup>3</sup> of modernity is simply part of a larger, familiar story of nationhood and the march of time: we were once a young nation and now we are maturing; we may have been guilty of terrible racism in the past, but we are more tolerant now; immigrants do not always understand how to be in this country, but they will learn and become citizens.

When we apply Bhabha's observations about progress to Canada's myth of multiculturalism,<sup>4</sup> we note, as Mawani<sup>5</sup> did, that such a myth requires a teleological

<sup>3</sup> Homi Bhabha. *The Location of Culture* (London: Routledge, 2012), 364.

<sup>4</sup> Multiculturalism has been interpreted as multiracialism. For example, multiculturalism, according to the Ontario Ministry of Culture and Recreation, entails the association of races with each other in order to enhance the contribution each can make. George W. Bancroft, ed., *Outreach for Understanding* (Toronto: Ministry of Culture and Recreation, 1977), 9.

<sup>5</sup> Renisa Mawani, "Cleansing the Conscience of the People: Reading Head Tax Redress in Multicultural Canada," *Canadian Journal of Law and Society* 19.2 (2004): 139.

reading of history: it necessitates a belief that the nation's multicultural present and future are possible because there has been a clean break and progress, a move away from the country's racist past. For example, the racial history of the Chinese in Canada has been a story of exclusion and racism. From the mid-nineteenth century to the mid-twentieth century, the Chinese were considered "Other" and consequently were deemed unworthy of entry into the country (through restrictive immigration policies, such as the Chinese Immigration Acts of 1885 and 1923<sup>6</sup>), incapable of becoming Canadian citizens,<sup>7</sup> ineligible for naturalization,<sup>8</sup> and requiring geographical and physical separation from the rest of Canadian society.<sup>9</sup> During this time period, the Chinese operated as Oriental Others<sup>10</sup> against which Canadian citizens could distinguish and define themselves. By contrast, the construction of the Chinese in current Canadian discourse obscures much of this racial history by relying on the myth of the Chinese as "model minorities."<sup>11</sup> In these relatively more recent narratives within Canadian discourse, the Chinese become living exemplars of the "immigrant dream" of (economic and civilized) prosperity.

Yet, for Bhabha, ideas about progressiveness are also intertwined with a belatedness that entails the temporalization of race. In the concluding chapter of

<sup>6</sup> The Chinese Immigration Act of 1885 was used to heavily control Chinese immigration into Canada by imposing a head tax on all Chinese immigrants, while the Chinese Immigration Act of 1923 (often known as the Chinese Exclusion Act) effectively closed off almost all Chinese immigration to Canada, except for immigrants who fell into the categories of merchant, diplomat, or foreign student.

<sup>7</sup> In the nineteenth century, Victorian anthropologists categorized races according to their relative progress in ascending an imaginary ladder of "civilization." Members of savage and barbaric races needed to acquire "civilized" qualities in order to make them "better" citizens. Within this racialization process, colonial agents in British Columbia during the mid-1870s to mid-1880s denied that the Chinese had "any capabilities for citizenship," conceptualizing them as "unimprovable" racial opposites to Anglo-Saxons. See Reginald Good, "Regulating Indian and Chinese Civic Identities in British Columbia's 'Colonial Contact Zone,' 1858–1887," *Canadian Journal of Law and Society* 26 (2011): 81.

<sup>8</sup> In *Quong-Wing v The King* (SCC 1914), the Supreme Court of Canada upheld Chapter 17 of the Statutes of Saskatchewan, which prohibited any white woman from working in a restaurant, laundry, or any other kind of business owned, kept, or managed by any "Chinaman"; for a discussion of the case, see also Constance Backhouse, *Colour-coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999), chapter 5. The act was ostensibly aimed at promoting "the interest of morality" by "protecting" white women from the immoral advances of Chinese immigrants. Despite being a naturalized British/Canadian citizen, restaurant owner Quong Wing was found to be a "Chinaman" because he was born in China to Chinese parents. Similar regulations were introduced in other provinces: for example, Ontario introduced its Act to Amend Factory, Shop and Office Building Act S.O. (c 40) in 1914, which ensured that "no Chinese person shall employ in any capacity or have under his direction or control any female white person in any factory, restaurant or laundry." In fact, Chinese small businesses were by-products of Canadian laws that had prohibited Chinese subjects from working at or owning trades and businesses that were in direct competition with white businesses. See Darla Rhyne, *Visible Minority Businesses in Metropolitan Toronto: An Exploratory Analysis* (Ontario: York University Institute for Behavioural Research, 1982).

<sup>9</sup> Often established in the physical fringes of downtown areas, Chinatowns were legitimized by government agents as a means to promote a "white European hegemony" by separating white Canada from foreigners, such as the Chinese. See Kay Anderson, *Vancouver's Chinatown: Racial Discourse in Canada, 1875–1980* (Montreal: McGill-Queen's University Press, 1991); David Lai, *Chinatowns: Towns within Cities in Canada* (Vancouver: University of British Columbia Press, 1988).

<sup>10</sup> See Edward Said, *Orientalism* (New York: Vintage Books, 1978); Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1993).

<sup>11</sup> Mawani, "Cleansing the Conscience," 144.

*The Location of Culture*, Bhabha explores belatedness and blackness in Frantz Fanon's *The Fact of Blackness*: "[Fanon] rejects the 'belatedness' of the black man because it is only the opposite of framing the white man as universal, normative . . . the black man refuses to occupy the past of which the white man is the future."<sup>12</sup> In his exploration, Bhabha highlights the ways in which processes of racialization are temporalized through a time lag or break in a white modernity that insists upon the inexorability of progress:

Fanon uses the fact of blackness, of belatedness, to destroy the binary structure of power and identity: the imperative that 'the Black man must be Black; he must be Black in relation to the white man.' Elsewhere he has written: 'The Black man is not. [caesura] Any more than the white man' (my interpolation). Fanon's discourse of the 'human' emerges from that temporal break or caesura effected in the continuist, progressivist myth of Man. He too speaks from a signifying time lag of cultural difference that I have been attempting to develop as a structure for the representation of subaltern and postcolonial agency.<sup>13</sup>

In this theorization, belatedness refuses the myths of white modernity by interrupting them, breaking them open, and injecting into them alternate, interrogative narratives. Crucially, Bhabha connects the fact of blackness with belatedness in order to illustrate a form of postcolonial agency that refuses the binarization of power and identity, of blackness and whiteness. Such agency can be applied to an understanding of *R. v Chen*, since that case also illustrates the failure of the binarization of race and the necessity of understanding its temporalization. While the figure of the black man is at the centre of Bhabha's theory of belatedness and Bennett, the star witness in the Crown's case against Chen, is himself black, Chen displaces Bennett as the central figure in this case because it is Chen's own belatedness that is in question. Chen triangulates the question of race and *seems* to render Bennett's racial identity into a nonissue. Bennett's blackness was neither a pivotal factor in the construction of the Crown's claims against Chen nor central to the ways in which the case turns on questions of temporality. However, Bennett's blackness does matter. It is Chen's displacement of Bennett that underscores the importance of the fact of Bennett's blackness. In fact, it is the inability of this case to take Bennett's blackness fully into account that allows us to see it as such a rich example of Bhabha's argument. In his decision, Justice Khawly attempts to name the complexity of race in this case by being completely frank about the racial identities of those involved:

Let us not beat around the bush. This is not the forum for political correctness. Mr. Bennett is black and the other three are Asians. In an urban multicultural environment such as ours one must live under a rock to assume that we all live in perfect harmony or that there are no elements of any ethnic groups, Caucasian or otherwise, not dealing in drugs and violence.<sup>14</sup>

Khawly's very attempt at frankness regarding race in this case obscures the ways in which Chen's belatedness destroys the binarization of race and power at work in

<sup>12</sup> Bhabha, 340–1.

<sup>13</sup> *Ibid.*, 340.

<sup>14</sup> *Chen*, para 22.

the moment of Chen's arrest. The police operate under a logic where there are only victims and perpetrators. Responding to four separate 911 calls about the incident and arriving at a scene where a black man has been hog-tied by (Exacto) knife-wielding Asian men, the police identified the Asians as criminals and the black man as victim. As Khawly recognizes, in that moment, they could not have known of Chen's evidence of Bennett's thievery. Thus, they had to subject Chen, Qing Li, and Jie Chen to both a strip search and temporary incarceration. In this case, a black man—typically constructed as and eventually proven to be a criminal—becomes a victim. At the same time, a Chinese man—typically constructed as and eventually proven to be a member of a model minority—becomes the criminal. These inversions do not simply illustrate a racialized role reversal. Instead, they point to the failure of a binarized logic of race (black versus white) and to the utter failure of this logic when it is mapped onto a binarization of criminality (victim versus criminal). The point is not that there is more than one victim here or that the inversions of racial stereotypes do not hold. Rather, the fact of Bennett's blackness is interrupted and obscured by the fact of Chen's presumed criminality, which itself interrupts a criminal justice system that cannot accommodate the collapse of its binaries. Not only does Khawly engage in narrative contortions as he struggles to find Chen innocent, the law ultimately had to change to accommodate the temporality of Chen's belatedness. Thus, Chen's literal belatedness brilliantly interrupts the white modernity of law and order. What is more, in his claims to innocence, Chen insists upon his belatedness as central to the achievement of justice, emerging as an enunciation of what Bhabha calls "the projective past" or "a form of cultural reinscription that moves *back to the future*."<sup>15</sup> This projective past insists upon the eruption of the past that refuses to stay past:

The postcolonial passage through modernity produces that form of repetition—the past as projective. The time lag of postcolonial modernity moves *forward*, erasing that compliant past tethered to the myth of progress, ordered in binarisms of its cultural logic: past/present, inside/outside.<sup>16</sup>

Chen's passage through that particular form of modernity, the justice system, projects into the future of Canadian citizenship a time when racism is not merely a regrettable feature of a forgettable past. Chen's case demands that contemporary citizenship attend to a racist past that does not compliantly remain in the past. Indeed, it reveals the ways in which contemporary citizenship depends on continuing racial exclusion despite being imbued with ideas of progressiveness and modernity.

### Three Forms of Belatedness in the Lucky Moose Case

In accordance with a range of critical race theories, the temporality of Canadian citizenship revolves around the temporality of the dominant, white, affluent male, a subjectivity that has formed both the subject and object of the law. It is the white man's behaviour that the law has in mind when it constructs its proscriptions and

<sup>15</sup> Bhabha, 361.

<sup>16</sup> Bhabha, 363.

remedies.<sup>17</sup> Through its practices and discourses, the (criminal) law has continually invoked and reproduced a white male subjectivity to the point that “white man’s [criminal] justice’ is [so] sufficiently well established in criminology and legal scholarship that it does not need to be re-argued.”<sup>18</sup>

What makes the Lucky Moose case distinctive is how David Chen’s belatedness works to transform the very temporality of (white) citizenship. In particular, there are three forms of belatedness at work in this particular case. First, Chen’s identity as a Chinese immigrant grocer in a Canadian Chinatown already serves to mark him as a belated citizen. Second, Chen is belated in terms of his attempt to perform a citizen’s arrest. Here, Chen deviates from the “good” Canadian citizen who arrests on time rather than tardily. Third, Chen justifies his own delayed actions on account of the police’s belated responses to crime. While Chen’s belatedness—his deviation from the temporality of white men in Canada—is what initially brings him into contact with the criminal law, he is able to actively mobilize a claim of victimhood to justify his belatedness, a claim that received significant support from journalists, politicians, and members of the community.

### 1. *The Chinese Immigrant Grocer as Belated Subject*

David Chen is constructed as a belated sociolegal subject as a consequence of his immigrant status as well as by his choice and place of occupation. Even before we discuss the case proper, Chen’s immigrant status already serves to mark him as belated in the eyes of Canadian policymakers. Even though Chen is a member of a “[v]ibrant ethnic [group that] can give Canadians of the second, third, and subsequent generations a feeling that they are connected with tradition and with human experience in various parts of the world and different periods of time,”<sup>19</sup> his ethnic group is presented as being connected to tradition rather than modernity. Like other immigrants, Chen embodies “human experiences” in “different periods of time,” placing him on a temporal plane that is out of step with the rest of the Canadian nation-state. In the Canadian imagination, immigrants are constructed as coming from culturally backward countries and consequently as deficient in their accomplishment of modernity.<sup>20</sup> In addition, Chen’s occupation as a Chinese grocer further serves to mark him as belated in the specific context of contemporary representations of Chinese immigration. In “Chop Suey Writing,” Ng laments the apparent “stasis” in fictional representations of Chinese Canadian immigrants by writers such as Wayson Choy and Judy Fong Bates. Commenting on the disconnect between these fictional representations and the experiences of her Chinese Canadian students, Ng writes:

<sup>17</sup> See Barbara Hudson, “Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity,” *Theoretical Criminology* 10.1 (2006): 29–47; Sherene Razack, *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002); Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2004).

<sup>18</sup> Hudson, “Beyond White Man’s Justice,” 30.

<sup>19</sup> Pierre Trudeau, “Federal Response to Multiculturalism,” *Appendix to Hansard*, October 8, 1971, <http://www.canadahistory.com/sections/documents/Primeministers/trudeau/docs-onmulticulturalism.htm>.

<sup>20</sup> Thobani, *Exalted Subjects*, 163.

These young immigrants have parents who are professionals and will themselves grow up to become professionals. The worlds of rickety houses in Chinatown and rampant superstition are as unreal to them as they are to non-Chinese readers. It is time for fiction writers to include the new generation of Chinese Canadians in their writing, to reflect these social changes as well as record the poignant history of early Chinese immigrants.<sup>21</sup>

Ng's argument is problematic in its suggestion that Chinese Canadian writers participate in the "spatial stereotyping" of Chinese Canadians, thus leaving her to wonder if "Chinese all over Canada [are] forever chained to laundromats, restaurants, sweatshops, and herbal medicine shops in variations of Chinatowns?"<sup>22</sup> While Ng's argument inaccurately reflects the work of contemporary Chinese Canadian writers, it does point to a familiar sentiment in discussions of Chinese immigration: that the figure of the Chinese immigrant huddled in an ethnic ghetto and working in a restaurant, grocery store, or laundry, is somehow out of step with contemporary reality. Thus, Chen is a subject that comes to be known through the space of his work and specifically through the space of Chinatown.<sup>23</sup> As a grocer in Chinatown, he is considered belated in much the same way that Toronto's Old Chinatown is understood by members of the Chinatown Business Improvement Area (BIA). As one member of the Toronto Chinatown BIA laments, Old Chinatown is "stuck" in a "time warp" where it remains the same even though the world around it has changed and "modernized."<sup>24</sup> Like Cho's study of small town Chinese Canadian restaurants, the BIA assumes that the belated temporality of Chinatown itself can "contain . . . an alternate temporality that challenges the desire of late-modern capitalist formations to write them out of the present. This is about slowing down and occasionally br(e)aking the relentless flow of late modernity's desire to hurry away from that which it has marked as non-modern."<sup>25</sup>

Such a perception of backwardness also reads the Chinese immigrant working in the ethnic enclave of a North American Chinatown as belated in relation to the rise of "flexible" citizens. As a new figure of Chinese immigration, the "flexible" citizen<sup>26</sup> takes the form of the multiple-passport-holding Chinese elite. This upwardly mobile professional class is being discursively produced by the official Chinese state media via the valorization of Confucianism. These "overseas Chinese are stereotyped as the embodiment of traditional Chinese familialism, business acumen, and talent for wealth making—the old Chinese folk values that are now being officially valorized for building a bridge to China's modern future."<sup>27</sup>

<sup>21</sup> Maria N. Ng, "Chop Suey Writing: Sui Sin Far, Wayson Choy, and Judy Fong Batesm" *Essays on Canadian Writing* 65 (1998): 183.

<sup>22</sup> Ng, "Chop Suey," 171.

<sup>23</sup> As Anderson (*Vancouver's Chinatown*) has noted, it was in the space of Chinatowns that the concept of a Chinese race became materially cemented and naturalized in the everyday life of Canadians.

<sup>24</sup> Interview with the author, July 17, 2013.

<sup>25</sup> Lily Cho, *Eating Chinese: Culture on the Menu in Small Town Canada* (Toronto: University of Toronto Press, 2010), 74.

<sup>26</sup> See Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham: Duke University Press, 1999).

<sup>27</sup> *Ibid.*, 43–44.



Despite pluralistic policies of multiculturalism and the stereotype of being a “model minority,” Chinese immigrants do not necessarily become integrated into the workforce in a way that matches their skills and educational background. As Li and Lo note, 44 percent of all immigrants from China arrived between 1980 and 2000 as older “skilled workers or professionals” with high educational qualifications and proficiency in the English and/or French languages.<sup>28</sup> However, it is clear that significant numbers of these skilled Chinese immigrants remain underemployed and are even often unemployed. Moreover, much of this underemployment and unemployment can be directly attributed to issues of race:

Until the 1980s, skilled immigrants arriving from various source countries were doing relatively well in the labour market. Subsequent arrivals, dominated by people of colour—Chinese and South Asians in particular—however, performed dismally. Compared to the Canadian-born and white immigrant groups from Europe, a larger percentage of them were unemployed or underemployed.<sup>29</sup>

Given the number of educated Chinese immigrants to Canada whose credentials are devalued, a significant number of them find work in sectors that are not identified as “highly skilled,” such as Chinese grocery stores and other small businesses in Chinatowns across Canada. Further, the perception of the Chinese grocer as out of step with the contemporary image of the Chinese immigrant is one that is constructed as an ideal by Citizenship and Immigration Canada (CIC) rather than a reality experienced by much of the Chinese immigrant population in Canada. The Chinese grocer as a belated subject is thus one that indicates and reveals the preoccupations of governmental structures—coincidentally by both Canada in the form of the CIC’s points system and China in the form of its conscription of overseas Chinese as successful transnational subjects who will function as a bridge for diasporic Chinese communities—rather than any specifically new immigrant subjectivity. These immigrant grocers seem out of step with a modernity that insists upon narratives of triumphalism and immigrant arrival. Thus, as a subject of seeming belatedness, the Chinese grocer offers one way of examining the investments of governing structures that seek to overlook that which is not part of their relentless drive for the new.

## **2. *Chen's Belated Citizen's Arrest***

While Chen’s identity already informs a reading of his case within a temporality of belatedness, he also acts in ways that are belated, giving rise to his encounter with the criminal law. As such, the second form of belatedness refers first and foremost to Chen’s tardy citizen’s arrest of Bennett. According to the previous law

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<sup>28</sup> This selection of highly skilled immigrants is a consequence of changes in the point system used by Citizenship and Immigration Canada. In 2002, the federal department’s point system was modified to put particular stress on language skills, education, and labour market experience. These changes led to a sharp drop in the number of Chinese immigrants to Canada. See Wei Li and Lucia Lo, “New Geographies of Migration? A Canada-U.S. Comparison of Highly Skilled Chinese and Indian Migration,” *Journal of Asian American Studies* 15.1 (2012): 1–34.

<sup>29</sup> *Ibid.*, 10.

(section 494 of the *Criminal Code of Canada*) on citizen's arrests, these arrests should only be performed by citizens in cases where they "find a person committing" an indictable offence or a criminal offence on or in relation to their property. Notably, the language of the section was written in the present tense and suggested that the law was aimed at apprehending individuals who were presently in the act of breaking a law. For example, the law presumed that a lawful citizen's arrest should occur only when a shop owner caught a shoplifter in the act. Because Chen was not able to catch Bennett in the act of theft and consequently waited nearly an hour before apprehending him, the legal question in *R v Chen* revolves around how to conceive of a time delay in the event of a citizen's arrest. Crucially, Chen's entry into protection under s 494 hinges then upon time and the temporality of his actions.

In tackling the question of time delay in *R v Chen*, Justice Khawly begins by noting that judges are expected to evolve with changes in society when interpreting sections of the *Criminal Code*. In this case, judges need to take into account technological changes, such as "ubiquitous cameras, smart phones with lens [*sic*] and other such devices which capture our every action,"<sup>30</sup> that have an impact on citizen's arrests. These gadgets and "their Orwellian videos"<sup>31</sup> allow a person to remotely see a theft in progress; however, they also necessarily introduce a time delay when it comes to apprehending the thief. By the time shopkeepers realize that surveillance cameras have caught a theft-in-progress and have made it to the physical location of the theft, the theft is already completed, and the thief might have also left the store. Consequently, Khawly suggests that the time delay in the Lucky Moose case is a "red herring."<sup>32</sup> Bennett's initial theft and his subsequent return to steal a plant from the same grocery store should not be conceived as two temporally distinct and unconnected events. Instead, they should be considered a single incident, namely, as a continuing theft. Because Bennett was committing a continuing offence, Chen "finds" him committing a theft when he returns to the Lucky Moose. Thus, Khawly agrees that Chen's action constitutes a citizen's arrest and that he should be acquitted. At this moment in the decision, Chen is restored to full citizenship. Chen may always have been a citizen, but this moment in the case transforms him from a mere citizen to a citizen who could be protected by law for what would otherwise be considered unlawful actions.

In addition to belatedly arresting Bennett, Chen also belatedly calls the police after detaining his thief. As Khawly notes in his decision, Chen's testimony did not provide a good reason for his delay in contacting the police:

Worrying about calling 911 was almost an afterthought in Chen's examination in chief. He stated that while he had thought about it, no one had a phone to make the call. When pressed on the point in Cross Examination, it took a life of its own. It now became of paramount importance. Not only

<sup>30</sup> *Chen*, para 48.3.

<sup>31</sup> *Chen*, para 83. Chen's video surveillance footage of the incident can be found online at *The Toronto Sun* ([http://www.torontosun.com/news/columnists/joe\\_warmington/2009/05/26/9569326-sun.html?menuID=260#](http://www.torontosun.com/news/columnists/joe_warmington/2009/05/26/9569326-sun.html?menuID=260#)).

<sup>32</sup> *Chen*, para 48.4.

had he thought about it but he in fact had yelled many times for someone to call the police. Later, he added that when he was yelling that out, someone advised that it had already been done. Why then was it necessary to still go to the Good Luck [warehouse] to call? I am not sure we got a convincing response when [the Crown] put that to him.<sup>33</sup>

The judge finds Chen's account to be unconvincing but stops short of accusing him of lying. Despite being an evasive and unreliable witness, Chen emerges from this decision with his stature as a heroic icon of citizenship intact. Ultimately, the belatedness of his actions does not detract from his integrity. Prior to the trial, Chen's moral integrity had been repeatedly emphasized in both English-language and Chinese-language news coverage through the image of a hardworking immigrant shopkeeper trying to make a living despite being continually "preyed on" by numerous shoplifters. Hundreds<sup>34</sup> of articles and editorials in Canadian news media outlets had constructed Chen as "[t]he picture of lawfulness."<sup>35</sup> In these narratives, he is not just any business owner but an exemplary one who showcases "honesty"<sup>36</sup> and a remarkable amount of hard work. Numerous news articles, especially those printed in *The National Post* and recirculated by the Canadian press, detail the long hours—specifically, from 4:30 am to 11:30 pm totaling over 100 hours per week<sup>37</sup>—that Chen works at his family business for an annual salary of \$35,000.<sup>38</sup> In these narratives, Chen is placed in the mould of a member of a model minority, where his success is tied to valorized cultural attributes of diligence, family solidarity, and self-sufficiency.<sup>39</sup> Such is the power of the myth of the model minority that it resurfaces in Khawly's decision, where he suggests that the Lucky Moose case can be thought of as "a screenplay: A hard working, relatively newly arrived immigrant to our shores toils relentlessly to eke out a living for his family only to find himself preyed upon by one of the undesirables of our community."<sup>40</sup> Here, the judge ties the immigrant dream of economic prosperity to Canadian citizenship through the idea that Canadian citizens have a right to be free from criminal attempts to steal their "success."

<sup>33</sup> Chen, para 65.

<sup>34</sup> Despite the case being what the judge calls a "mundane matter" (Chen, para 7), it inspired a large amount of news coverage across Canada. A Factiva search on English-language news items solely about the Lucky Moose case (e.g., the original criminal incident, reports on the trial, and items on the Lucky Moose Bill) among Toronto newspapers alone (e.g., *The Toronto Star*, *The Toronto Sun*, *The Globe and Mail*, and *The National Post*) yields more than 70 articles, many of which were reprinted in other major Canadian newspapers (e.g., *The Vancouver Sun*) and outlets (*The Canadian Press*). Toronto editions of Chinese-language news media, such as *Ming Pao* and *Sing Tao*, also covered the case. *Ming Pao's* coverage of the case included at least 40 articles.

<sup>35</sup> Peter Kuitenbrouwer, "The Picture of Lawfulness: Stephen Harper Visits the Toronto Grocer who Inspired Proposed Changes to Canada's Citizen's Arrest Law," *National Post*, February 18, 2011, A3.

<sup>36</sup> Ibid.

<sup>37</sup> Peter Kuitenbrouwer, "Grocers to the Defence," *National Post*, October 26, 2010, A3.

<sup>38</sup> Dan Robson, "Shoplifters Kept Fleeing, Grocer Testifies," *Toronto Star*, October 8, 2010, GT4.

<sup>39</sup> See Claire Jean Kim, "The Racial Triangulation of Asian Americans," *Politics and Society* 27.1 (1999): 105–38; Jason Z. Lian and David Ralph Matthews, "Does the Vertical Mosaic Still Exist? Ethnicity and Income in Canada, 1991," *Canadian Review of Sociology and Anthropology* 35.4 (1998): 461–81.

<sup>40</sup> Chen, para 91.

Such a narrative was also supported by then Minister of Citizenship and Immigration Jason Kenney, a conservative bureaucrat once described as “Mr. Chen’s highest-profile supporter.”<sup>41</sup> Kenney visited the Lucky Moose grocery store on September 27, 2009, to offer Chen moral support,<sup>42</sup> and he vowed to raise a potential amendment to the *Criminal Code* with members of Parliament that would more effectively allow retailers to apprehend shoplifters.<sup>43</sup> While the model minority stereotype has obscured the difficulties faced by many Asians in North America,<sup>44</sup> the deployment of this particular trope has the effect of placing the Chinese on a par with “white men” in the sense that both are property owners who ought to be given (more) rights to protect their personal property. When racial and ethnic minorities are able to demonstrate that they, too, are professionals or property owners, their experiences of harm and injustice tend to be recognized by the law<sup>45</sup> in contrast to cases where they demand cultural recognition for harms that are directly related to their race/ethnicity.<sup>46</sup>

### 3. *Belatedness on the Part of the Police as Justification for Chen’s Actions*

Juxtaposed against the image of the small shopkeeper who is valiantly doing his job while trying to protect his property, the police are represented as being less effective in their response to crime. According to Chen, his own belated citizen’s arrest is a reaction to the public police’s delayed response to past shoplifting incidents at his store.<sup>47</sup> For example, when a woman refused to pay for her stolen apricots, she was asked to wait in the Lucky Moose Food Mart for five hours before police arrived, even though the grocery store is physically located 400 metres away from the Toronto Police’s 52 Division. Upon arrival, the police officers dissuaded Chen from pressing charges against the woman. On another occasion, Chen along with a male shoplifter waited three-and-a-half hours for the police to appear after they were called to the grocery store for help.<sup>48</sup> Ironically, instead of the expected four hours of waiting time,<sup>49</sup> it only took minutes for three police officers to arrive in order to arrest Chen and his colleagues for their apprehension of Bennett. This temporal disparity illustrates a distinction between the police and the citizen when it comes to arrest: belated police response and arrest are not illegal, but a citizen’s

<sup>41</sup> Joe Friesen, “Blair Defends Arrest of Grocer who Nabbed Thief,” *The Globe and Mail*, October 30, 2009, A14.

<sup>42</sup> Tu Thanh Ha, “Kenney’s Visit Buys Embattled Grocer,” *The Globe and Mail*, September 28, 2009, A9.

<sup>43</sup> Rita Trichur and Carmen Chai, “Charged Chinatown Grocer ‘Victim of Crime,’ Kenney says,” *Toronto Star*, September 28, 2009, GT05.

<sup>44</sup> For example, see Lisa Lowe, “Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences,” *Diaspora* 1.1 (1991): 28.

<sup>45</sup> Hudson, “Beyond White Man’s Justice,” 31.

<sup>46</sup> For example, the demand for Chinese head tax redress as discussed in Mawani, “Cleansing the Conscience”; David Dyzenhaus and Mayo Moran, eds., *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax* (Toronto: University of Toronto Press, 2005).

<sup>47</sup> Robson, “Shoplifters Kept Fleeing,” GT4.

<sup>48</sup> Peter Kuitenbrouwer, “Shopkeeper Describes Slow Police Response to Regular Incidents of Theft,” *National Post*, October 8, 2010, A5.

<sup>49</sup> Ibid.

belated arrest can be cause for prosecution. Further, the Toronto police seem to be exceptionally timely when it comes to arresting citizens who attempt to arrest, symbolically communicating Toronto Police Chief Bill Blair's insistence that "policing should be done by the police."<sup>50</sup> Chen's case is a reminder that although citizens have limited arrest powers, they are treading on territory that is otherwise exclusive to the public police.<sup>51</sup>

The Lucky Moose case is not only a reminder that there is a substantial difference between the powers granted to the police and those allowed to citizens, but it also shows that citizens themselves belong to communities that have different perceptions of the police. After trying to unravel the mystery of unreliable testimonies from both Chen and Bennett, Khawly ends his judgment with a few remarks about "the larger picture." According to him, a subtext underlies the entire case, which was only partially and occasionally referenced in most media reports. Specifically, this subtext is related to "Chen's community."<sup>52</sup> Although it is unclear what "Chen's community" actually entails (e.g., Chinatown residents and business owners in downtown Toronto? The wider Chinese-Canadian community?), Khawly asserts that this community suffers from what Robert J. Sampson<sup>53</sup> calls a high level of "moral cynicism."<sup>54</sup> A community's moral cynicism contributes to disrespect and disdain for the law and legal system, facilitating a belief that laws are made to be broken. Thus, Chen's actions are an expression—"however garbled and uncoordinated, and imperfectly voiced"<sup>55</sup>—of his community "in the face of perceived police inaction [and] of disdain for laws that fail to protect."<sup>56</sup>

However, Khawly's reference to community seems to assume that the community must be racialized rather than representative of a more collective experience of belonging that transcends specific demographic characteristics. In doing so, the judge ignores how Chen and his supporters have justified his response as a reaction to belated and ineffective police action within a larger sociopolitical context

<sup>50</sup> Quoted from Alan Young, "When Citizens Act Like Police," *Toronto Star*, October 30, 2009, A23.

<sup>51</sup> While the Citizen's Arrest and Self-Defence Act (2013) allows for a reasonably belated citizen's arrest, it requires that the citizen call the police and deliver the arrestee without any time delay. To avoid making a potentially illegal citizen's arrest, citizens need to ensure timely police involvement. Citizens are only allowed to make an arrest when it "is not feasible" for the police to do so. Again, the new act suggests that arrest is primarily considered a police power, and citizens are discouraged from using this power.

<sup>52</sup> *Chen*, para 106.

<sup>53</sup> Here, Khawly makes a reference to Robert Sampson and Dawn Jeglum Bartusch, "Legal Cynicism and (Subcultural) Tolerance of Deviance: The Neighborhood Context of Racial Difference," *Law and Society Review* 32 (1998): 777. Sampson and Bartusch argued that legal cynicism, dissatisfaction with the police, and tolerance of various forms of deviance can be explained by structural characteristics of a neighbourhood, which have been often confounded with demographic characteristics of individuals (e.g., social economic status, race/ethnicity, age, etc.). Although the judge borrows the concept of "moral or legal cynicism" from Sampson and Bartusch, it appears that he misses the point of their overall research. That is, "Chen's community" is best understood by the structural features of the neighbourhood context (e.g., level of concentrated disadvantage and lack of resources that characterize Chinatowns across Canada). In the rest of his decision, the judge makes no reference to any structural features that might account for the neighbourhood's cynicism.

<sup>54</sup> *Chen*, para 104.

<sup>55</sup> *Chen*, para 106.

<sup>56</sup> *Ibid.*

that now recognizes the salience and experience of victims. Here, Chen acts as a recognized (figurehead) actor and legal subject, someone who is capable of following the logic of mainstream cultural thinking. To become such a legal subject, according to Schur,<sup>57</sup> the individual must assume the language of mainstream culture even if that way of thinking runs counter to his or her beliefs, values, and behaviours. Thus, Chen mobilizes the language of victimhood to justify his belated citizen's arrest and consequently finds political support among the Conservative Party of Canada.

As former Minister of Immigration and Citizenship Jason Kenney called Chen a "victim of crime,"<sup>58</sup> Chen's supporters rallied on his behalf around the banner of victims' rights. In fact, they created the Victims' Rights Action Committee (VRAC), an organization that emerged as a result of the incident at the Lucky Moose Food Mart. As the VRAC notes on its website, the "fight for justice" entails recognition that Chen's actions were warranted as he

attempted to hold [a suspected shoplifter] while waiting for the police to arrive and make their arrest. The resulting charges against Mr. Chen and his employees are serious, heavy-handed and totally inappropriate. Any citizen would consider "assault", "forcible confinement", "kidnapping" and "possession of a concealed weapon" to be offences that should be reserved for hard core dangerous criminals.<sup>59</sup>

Remarkably, Chen is not featured on the VRAC's banner. Instead, the typical figure of the victim—that is, a wide-eyed, young, white female—is juxtaposed against an exhortation to "do the right thing [and] speak up for our rights." While the Chinese community did rally around Chen,<sup>60</sup> his supporters seemed to deny victimization as a distinctively racialized ("Chinese") experience and instead suggested that Chen was a victim of crime. In doing so, they tapped into a larger culture of control where victims have come to the fore as righteous figures that need to be protected through the invocation of new laws and penal policies.<sup>61</sup> As a much more representative character whose experience is taken to be common and collective, the victim is an Everyman.<sup>62</sup> As Chen was cast as the average Everyman in the news media's coverage of the case, Khawly noted that Chen needed to live up "to his Jimmy Stewart aura" during his testimony. The association between Chen and Jimmy Stewart is not accidental and suggests a strategy by Chen's supporters to deracialize the victim in the case in order to make a claim that he is an

<sup>57</sup> Richard Schur, "Critical Race Theory and the Limits of Auto/Biography: Reading Patricia Williams's *The Alchemy of Race and Rights* through/against Postcolonial Theory," *Biography* 25.3 (2002): 457.

<sup>58</sup> Trichur and Chai, "Charged Chinatown Grocer," GT5.

<sup>59</sup> "Victims' Rights Actions Committee," accessed August 21, 2014, <http://www.vraccommittee.com/>.

<sup>60</sup> The (Toronto) Chinese community was mobilized by the city's Chinese-language newspapers as well as through the VRAC. Through these means, the Chinese community donated money to contribute to Chen's legal defence, signed petitions to change the *Criminal Code* so that Canadian property owners can better defend their own personal property, and visibly supported Chen in the courtroom during his trial.

<sup>61</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

<sup>62</sup> *Ibid.*, 11.

entitled, rational citizen. Thus, it is *David* Chen, rather than Wang Chen (his given Chinese name), who makes news headlines and gives rise to the VRAC. Ultimately, victimization by criminals is represented not as a “Chinese” problem but rather a “Canadian” one.

## Conclusion

All of these multiple and overlapping forms of belatedness culminate in changes to the *Criminal Code* authorizing belatedness in executing citizen's arrest. The Citizen's Arrest and Self-Defence Act<sup>63</sup> (Bill C-26) changes the temporality of citizenship: the citizen can now make an arrest within a “reasonable”<sup>64</sup> period of time after witnessing a crime, rather than only after catching a perpetrator “in the act.” In news reports and in the federal government's own communications, Chen is largely cited as the figurehead for the changes to the law governing citizen's arrest. Having inspired a change to the law, Chen was a recipient of a 2013 Diamond Jubilee Medal, an award that recognizes Chen as a Canadian who has made a “significant contribution to Canada.” Notably, Chen's contribution is associated with a change in the temporality of citizen's arrest, one that allows for the very belatedness Chen exemplifies. Strikingly, Chen has transformed belatedness from a negative to a positive. His belatedness incites political and legal changes, and these changes take the form of legitimizing belatedness itself. Thus, Chen's case highlights not only the value of literal belatedness in relation to s 494, but it also illuminates the temporalization of race and citizenship.

Instead of being a passive victim of a legal system that fails to attend to the particularities of his case, Chen is an active and capable subject of the law as evidenced by *R v Chen* and the subsequent changes to s.494. Not only does Chen successfully navigate the complexities of the criminal judicial process, he inspires a crucial change to that very process. Chen's belatedness can be understood as a form of resistance against a state apparatus that once insisted upon the timeliness of a citizen's actions. Chen used the history of the Toronto police's own belated responses to his previous calls in order to turn their charge of his lack of timeliness back upon them. Even more strikingly, Chen is an unlikely poster boy for the new face of Canadian citizenship. According to the explicit biases of the Department of Citizenship and Immigration Canada, Chen would hardly have been considered a model or ideal immigrant. Chen's occupation (grocer) and his lack of language

<sup>63</sup> The exact wording is as follows: “This enactment amends the *Criminal Code* to enable a person who owns or has lawful possession of property, or persons authorized by them, to arrest within a reasonable time a person whom they find committing a criminal offence on or in relation to that property” ([http://laws-lois.justice.gc.ca/eng/annualstatutes/2012\\_9/FullText.html](http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_9/FullText.html)).

<sup>64</sup> While these legal changes inject belatedness into Canadian citizenship itself, they are not without criticism. A number of legal critics, including representatives for the Canadian Civil Liberties Association, have criticized the lack of temporal specificity introduced into the law through the phrase “reasonable time.” The term “reasonable” is “fraught with some ambiguity” (Alan Young quoted in Timothy Appleby and Jill Mahoney, “New Citizen's Arrest Law Greeted with Applause, Criticism,” *Globe and Mail*, March 12, 2013, A4) because it is not based on any definable criteria. What counts as “reasonable” will need to be determined by the courts on a case-by-case basis. See Jill Mahoney, “Five Things You Need to Know about New Citizen's Arrest Law,” *Globe and Mail*, March 11, 2013, Breaking News.

skills (at his trial, his English was considered to be faulty enough to warrant an interpreter for him) signal his belatedness in terms of the kinds of highly educated, highly skilled, and linguistically fluent immigrants that the state clearly seeks to recruit.

Chen's case contributes to the current understanding of the construction of citizenship in Canada by naturalizing that which seems out of place and out of time. As we noted at the beginning of this paper, Chen's case has been inextricably tied to the figure of the "Prosperity Moose" that graces the front of his grocery store. For example, the bill that was introduced to the House of Commons by the attorney general of Canada at the time, Rob Nicholson, was widely dubbed "the Lucky Moose Bill" by the press. The moose, a relic of municipal boosterism, embodies precisely the kinds of empty celebrations of multicultural difference decried by critics such as Bissoondath<sup>65</sup> and Mackey.<sup>66</sup> Indeed, as a blank canvas that intentionally frames the ways in which difference could be asserted in the urban landscape, the moose would hardly seem like a sign of resistance. And yet, Chen and the moose have become tied in a curious lockstep where one mirrors the other's iconicity. The statue, the grocery store, and the grocer have become signs of the ways in which cultural difference transforms the very frame in which it is cast. The commingling of the Prosperity Moose, the Lucky Moose, and Chen himself breaks open the limits of Chen's Chineseness. From the moment that Chen's case circulates as a public story, his problems cease to be a Chinese immigrant's problems or a grocer's problems or a Chinese grocer's problems. They became the problems of Canadian citizens who read themselves into Chen's difference.

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<sup>65</sup> Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin, 1994).

<sup>66</sup> Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Toronto: University of Toronto Press, 2002).