

Racializing Terror: Reassessing the Motive of the Motive Clause

P R A B J O T S I N G H *

ABSTRACT

This paper reviews the legislative history and application of the *Criminal Code*'s definition of terrorist activity to trace how the "motive clause" reinforces systemic racism within Canada's criminal justice system. By outlining this process, this paper argues that the motive clause contributes to a dynamic that racializes terror offences as a specific type of criminal offence committed by racialized individuals—marking terrorism as a unique social characteristic of racialized communities. This occurs mainly due to the legislative requirement to prosecute the ideas of accused persons, which, in practice, has increased the likelihood of courts admitting otherwise prejudicial evidence against the accused and the problematic ways in which expert evidence has (or has not) been used in terrorism trials. Although discrimination may not be an inevitable or intended outcome of the drafted legislation, it creates a framework that encourages discriminatory prosecutorial strategies, facilitates bias in the admission and treatment of some evidence, and potentially contributes to the exclusive use of the provisions against racialized communities specifically.

Keywords: Systemic Racism; Racialization; Terrorism; National Security; Cultural Competency; Bias; Motive; Prejudicial Evidence.

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INTRODUCTION

In late 2001, legislative bodies around the world, from the United Nations Security Council (UNSC) to Canadian Parliament, scrambled to enact a number of measures to respond to the events of September 11, 2001. These measures ranged from shifting military policy to adding domestic investigative powers and new criminal offences. In Canada, the *Anti-terrorism Act* ("ATA") was rushed in, receiving royal assent in December 2001.¹ With respect to the *Criminal Code*, the legislation created a series of terrorism-related offences with new definitions of "terrorist activity" and "terrorist group" at their core.² While these definitions did not become crimes unto themselves, they formed the essential elements of various offences. One particularly controversial addition has been the "motive clause" in the definition of terrorist activity.³ The motive clause makes the accused's motive an essential element of the offence and has received significant academic commentary,⁴ judicial consideration,⁵ legislative debate,⁶ and critique from civil liberties groups.⁷

Upon surveying the legislative framework and the impacts of this provision in practice, there are compelling grounds to conclude that the motive clause reinforces systemic racism within Canada's criminal justice

¹ *Anti-terrorism Act*, SC 2001, c 41 [ATA].

² *Criminal Code*, RSC 1985, c C-46, s 83.01 [*Criminal Code*].

³ *Ibid*, s 83.01(1)(b)(i)(A).

⁴ Ben Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?" in Andrew Lynch, Edwina MacDonald, George Williams, eds., *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007) at 28; Kent Roach, "The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive" in Andrew Lynch, Edwina MacDonald & George Williams, eds., *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007) at 39 [Roach]; Maureen Webb, "Essential Liberty or a Little Temporary Safety – Review of the Canadian Anti-terrorism Act" (2005) 51:1 Crim LQ 53 [Webb]; Roger Douglas, "Must terrorists act for a cause? The motivational requirement in definitions of terrorism in the United Kingdom, Canada, New Zealand and Australia" (2010) 36:2 Commonwealth L Bull 295 [Douglas].

⁵ *R v Khawaja*, 2012 SCC 69 [Khawaja III]; *United States of America v Nadarajah*, [2010] 95 OR (3d) 514, 243 CCC (3d) 281 [Nadarajah].

⁶ Senate, Special Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (Ottawa: February 2007).

⁷ Groups that opposed the motive clause during the legislative process included Amnesty International, B'nai Brith Canada, Canadian Arab Federation, Canadian Council of Islamic-American relations, and the Canadian Muslim Lawyers Association.

system by racializing terrorism offences and thereby stigmatizing and discriminating against racialized communities. Systemic racism refers to the “social production of racial inequality in decisions about people and the treatment they receive” and is undergirded by the process of racialization: “the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life.”⁸ In this case, terrorism offences are racialized as they are implicitly attributed to racialized groups as unique personality traits and behaviours. This occurs mainly due to the legislative requirement to prosecute the *ideas* of accused persons, which, in practice, has increased the likelihood of courts admitting otherwise prejudicial evidence against the accused and the problematic ways in which expert evidence has (or has not) been used in terrorism trials. This leads to impacted communities experiencing stigma, alienation, limited religious freedom, and a sense of diminished citizenship as a direct result of Canada’s counter-terrorism practices.⁹

Although I sympathize with and draw upon past criticism of the motive clause, I review the legislative history and application of the motive clause to identify a unique issue altogether. While the prevalent critiques have focused on the “chilling effect” on fundamental freedoms, the risks of profiling by law enforcement agencies, or the politicization of criminal trials, I seek to move the debate outside the realm of previous critiques to articulate another problem more directly and holistically. In its current avatar, the motive clause contributes to the racialization of terror offences in the sense that terror offences are prosecuted as a specific type of criminal offence committed by racialized persons. This is further reinforced by the fact that the provision creates an evidentiary requirement due to which the religious, political, or ideological “cause” of the accused is prosecuted and litigated in the courtroom. This dynamic compounds with the pre-existing impacts of systemic racism by unreasonably and unnecessarily subjecting racialized (predominantly Muslim) accused persons to the bias and cultural incompetence exhibited in the courts and by some counsel. Examples of this can be seen in the way certain prejudicial evidence has been admitted

⁸ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at 39-40.

⁹ Baljit Nagra & Jeffrey Monaghan, “Security Governance and Racialization in the ‘War on Terror’” in Caorlyn Cote-Lussier, David Moffette & Justin Piche, eds, *Contemporary Criminological Issues: Moving Beyond Insecurity and Exclusion* (Ottawa: University of Ottawa Press, 2020) 167 at 181 [Nagra & Monaghan].

and interpreted by the courts. Further, there is a strong argument that the motive clause contributes to the exclusive application of terrorism offences to racialized persons. This is evidenced by the fact that it has almost exclusively been Muslims that are prosecuted under these offences.¹⁰

This is not to say that the motive clause is the sole cause of stigmatization and any ensuing discrimination. As noted in the literature and case law, this stigmatization of racialized communities post-9/11 is symptomatic of broader social issues beyond the scope of the motive clause alone. However, there is evidence to suggest that the motive clause unnecessarily contributes to this racist dynamic without any justifiable reason or merit. Even if the discrimination is not an inevitable or intended outcome of the drafted legislation, it creates a legislative framework that facilitates the stigmatization of racialized communities by unreasonably encouraging discriminatory prosecutorial strategies, facilitating bias in the admission and treatment of some evidence, and contributing to the limited use of the provisions against Muslim and other racialized accused persons.

Although a definition of terrorist activity without the motive clause would not universally address all the problems and critiques of Canada's counter-terrorism regime, this step would bring Canadian criminal law in line with a growing consensus within international institutions, harmonize the definitions of terrorism that appear in other areas of Canadian law,¹¹ and move closer towards turning terrorist offences into politically neutral provisions to some degree. This shift would make the definition of terrorist activity capable of flexibly capturing a specific kind of violent criminal activity without effectively restricting its application to racialized communities or certain ideas while ignoring other violent offenders altogether.

HISTORY AND EVOLUTION OF THE LEGISLATIVE FRAMEWORK: INTERNATIONAL CONTEXT

The international community has faced a significant challenge in developing a universally accepted definition of terrorism for many years. The question of whether political motives should form part of the definition, in particular, has plagued attempts to reach an agreement on this

¹⁰ Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) 67 Crim LQ 95 at 120.

¹¹ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at 98.

question.¹² This challenge came to the fore precisely as disagreements about the morality or legitimacy of certain forms of violence revolved around the perpetrator's motive and the role this played in influencing the definition and scope of "terrorism." This has been a persuasive argument in favour of defining terrorism without regard for the motive of the accused. Doing so seeks to ensure that the act rather than the motive is determinative and, thereby, that the law determines criminal culpability, not politics.¹³

The lack of consensus in comprehensively defining terrorism resulted in a compromise in this very direction. Rather than weighing the motive of perpetrators, international parties agreed to adopt a series of international conventions in a piecemeal fashion. These conventions defined specific acts as terrorism without providing a comprehensive definition or probing the motive animating the act. The treaties focussed on identifying specific acts such as hijacking, bombing, and financing to generate consensus on the responsibilities of the international community to respond to these specific acts through extradition or prosecution.¹⁴ Some experts have described the suppression treaties as an attempt to "avoid the offence being politicized" by conceptualizing the crime as a freestanding act undertaken by non-state actors against civilians.¹⁵ A persistent problem was that these were limited only to specific contexts and particular methods of violence rather than the killing of civilians by any means or method.¹⁶ The adoption of the *International Convention for the Suppression of the Financing of Terrorism* in 1999 broadened the scope. In this conception, terrorism is defined as a criminal act intended to cause death or bodily harm to individuals not participating in an armed conflict, with the purpose of intimidating a population or compelling a government body to do or abstain from doing any act.¹⁷

After the events of 9/11, the issue would be raised in international fora with renewed urgency. The UNSC passed Resolution 1373, calling on states

¹² Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2012) at 63 [Boister].

¹³ Webb, *supra* note 4 at 59.

¹⁴ At least 14 such treaties have been signed thus far. See Craig Forcese & Leah West, *National Security Law*, 2nd ed (Toronto: Irwin Law Inc, 2021) at 153.

¹⁵ Boister, *supra* note 12 at 62.

¹⁶ Ben Saul, "Terrorism as a Transnational Crime," in N Boister & Robert J Currie, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015) at 398.

¹⁷ *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002), Art 2.

to ensure that “terrorist acts” be established as serious criminal offences in domestic law and that punishment duly reflects the seriousness of such acts to bring perpetrators to justice.¹⁸ Similar to previous attempts, the resolution did not provide a definition for terrorism or terrorist acts. In 2002, Canada ratified the Inter-American Convention Against Terrorism.¹⁹ Rather than developing an independent definition of terrorism, Article 2 of the convention defines “offences” by reference to the earlier suppression treaties. In the years to come, international organizations will continue the endeavour to develop a universal definition. In 2004, the UNSC passed Resolution 1566, which described terrorism as:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism...²⁰

The Resolution offered a comprehensive description similar to the *Financing Convention*, taking no account of the perpetrator’s motive.

In contrast, the North American Treaty Organization (“NATO”) adopted a definition that describes terrorism as:

the unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives [emphasis added].²¹

While a number of Canadian allies, like the United States, France, Germany, Italy, and others, have *not* included a motive clause in their domestic definitions of terrorism, Canada ultimately joined Australia, New Zealand, and South Africa in modelling its definition of terrorism after the description included in the UK’s legislation.²²

¹⁸ UNSCOR, 56th Year, 4385th Mtg, UN Doc S/RES/1373 (2001).

¹⁹ *Inter-American Convention Against Terrorism*, Organization of American States, 6 June 2002, (entered into force 10 July 2003).

²⁰ UNSCOR, 59th Year, 5053th Mtg, UN Doc S/RES/1566 (2004).

²¹ NATO, *NATO Glossary of Terms and Definitions*, AAP-06 (2018) at 124 [emphasis added].

²² *Terrorism Act 2000* (UK), s 1(1)(c); *Criminal Code Act 1995* (Aus), s 100.1(1)(b); *Terrorism Suppression Act 2002* (NZ) s 5; *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (South Africa), s 1(1)(xxv).

HISTORY AND EVOLUTION OF THE LEGISLATIVE FRAMEWORK: DOMESTIC CONTEXT

Canada responded to Resolution 1373 with the ATA and adopted a definition of terrorist activity into domestic criminal law. There are two “pathways” to fall within the definition of “terrorist activity” under section 83.01. The first is an act that falls under the suppression treaties ratified by Canada. The second requires three essential elements. First, the “kinetic” element is an act or omission (which occurs inside or outside Canada) which causes death or bodily harm or endangers a person’s life. Second, the act must have been committed with the intention to intimidate the public or a segment of the population or compel a person, government, or international organization to do or refrain from doing any act. Lastly, the “motive clause” requires that an accused be found to have committed the prohibited act “in whole or in part for a political, religious or ideological purpose, objective or cause.” This clause distinguishes Canada’s definition of terrorism from those developed by various international institutions. As noted above, many of these international legal instruments do not contain any provisions similar to the “motive clause” in Canadian legislation.

During debate in the House of Commons, there was vocal opposition to the clause because of concerns that it would be discriminatory due to the intrusive nature of prosecutors investigating and litigating an accused’s religion, politics, or ideology. Opposition MPs introduced a motion to delete the clause raising concerns about the irrelevance of motive to the crime of terrorism, as well as possible discrimination resulting from Crown prosecutors litigating the religious beliefs of an accused person.²³ Then-opposition MP, Peter MacKay, commented on the challenges of always ascribing motivation to a coherent or logical structure of thought—opening the possibility of potential offenders escaping the scope of “terrorist activity.” He argued that other motives also ought to be considered, particularly pointing out the salience of hatred in terror offences.²⁴

In response, the Parliamentary Secretary to the Minister of Justice defended the provision by arguing that the motive clause is not intended to single out a community or criminalize expression or religion. He suggests

²³ “Bill C-36, Anti-terrorism Act”, Report Stage, *House of Commons Debates*, No 118 (26 November 2001) at 1225 (Scott Reid) and 1315 (Vic Toews).

²⁴ *Ibid* at 1315 (Peter MacKay).

that the clause actually acts as a limitation to narrow the scope of terrorism offences. In his conception, removing the clause would transform the counter-terror provision into something “nearly indistinguishable from a general law enforcement provision.”²⁵ To address concerns raised in the Senate that the motive clause criminalizes political or religious expression in violation of section 2 of the *Canadian Charter of Rights & Freedoms*, Parliament added section 83.01(1.1). Rather than agreeing to Senate’s recommendation to add a clear non-discrimination clause within the bill,²⁶ this addition simply reiterates that terrorist activity does not capture any expression that falls outside the scope of the definition in its entirety (in other words, expression not engaging in violence does not constitute an offence). The second Senate report expressly acknowledged that the representatives of religious and ethnic minorities that were consulted were not persuaded that their liberty would be protected by the tools provided in the bill. Rather than substantively addressing these concerns, the majority’s recommendation was simply to encourage the Attorney General to prioritize an educational program to ensure cultural sensitivity amongst federal agents.²⁷

During a review of the ATA in 2007, the special senate committee delegated to review the legislation provided a strong critique of the motive clause and recommended its deletion.²⁸ The key concerns of the committee were related to how the clause requires or encourages state agencies to investigate the personal beliefs of individuals intrusively, prompting racial profiling amongst investigative agencies as well as other broader discrimination. Further, the Senate committee noted how Canada’s diplomatic representatives abroad have been advocating a straightforward definition of terrorism within international fora—that does not include the motive clause. Similarly, the judiciary has acknowledged the challenges of defining terrorism in *Suresh* and adopted the definition in the *Financing Convention*—which does not include motive—for the purposes of that immigration decision. The committee also considered a UN Human Rights

²⁵ *Ibid* at 1235 (Stephen Owens).

²⁶ Senate, Special Senate Committee on the Subject Matter of Bill C-36, *First Report* (Ottawa: November 2001).

²⁷ Senate, Special Senate Committee on the Subject Matter of Bill C-36, *Second Report* (Ottawa: December 2001).

²⁸ Senate, Special Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times* (Ottawa: February 2007).

Committee review of Canada's anti-terror legislation, which raised concerns that Canada should "adopt a more precise definition of terrorist offences" to ensure that individuals will not be targeted based on religion, politics, or ideology.²⁹ The committee accordingly recommended a single definition of terrorism for federal purposes without the motive clause, recognizing the "importance of having a domestic definition of terrorism that reflects Canada's specific needs, concerns and experiences with terrorism, as well as the importance of developing an internationally acceptable definition of terrorism."³⁰

In response to the concerns raised, the House of Commons report limited its focus to addressing concerns about the possibility of racial profiling by enforcement agencies—ignoring other forms of systemic racism and discrimination that may occur.³¹ The report reiterates that the RCMP and CSIS have various policy statements denying that they engage in profiling and cited testimony provided to the committee by a former RCMP commissioner. The report acknowledges that racialized communities still had serious concerns at the time but made no recommendation beyond maintaining the outreach strategies and cultural sensitivity training that were already being conducted. This report argues that the motive clause is useful as a safeguard because the offence could be more easily prosecuted to a conviction without it.³² The response failed to substantively address the intrusive nature of investigating and prosecuting an individual's religion, politics, or ideology and the concerns that arise from this. The Government response was similar, arguing that the clause operates to seemingly narrow the scope of the offence and distinguish terrorism from other criminal activity.³³

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ House of Commons, Standing Committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (Ottawa: March 2007) at 8-10.

³² *Ibid.* at 9.

³³ Government of Canada, *Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security* (Ottawa: 18 July 2007).

A. Constitutional Challenge

The landmark prosecution of Momin Khawaja is important to understand the challenges to the motive clause.³⁴ Not only was this case Canada's first prosecution under the new offences, but it dealt substantially with some of the constitutional questions that arise from the ATA's definition of terrorist activity, including the motive clause. At trial, Justice Rutherford found that the motive clause created a *prima facie* violation of *Charter* rights under section 2, which could not be saved under section 1. This was due to the "chilling effect" believed to have on the freedoms of those groups associated with the religious, political, and ideological cause of accused persons. Justice Rutherford's concerns were that the focus on the motive would chill freedoms associated with protected speech, religion, thought, belief, expression, and association; promote fear and suspicion of targeted political or religious groups; and result in racial or ethnic profiling by governmental authorities.³⁵

To complete the section 1 analysis, Justice Rutherford sought out the government's objective and quoted then-Justice Minister Anne McLellan on the purpose of the provision. He noted the stated purpose of the offences was to set up preventative steps to cut off terrorists from financing and other means to execute their deadly plans.³⁶ This explanation was supplemented by a government media release which stated that the motive clause itself is important to the definition of terrorist activity in order to recognize:

the unique and insidious nature of this activity. Removing the notion of political, religious or ideological motivation would transform the definition from one that is designed to recognize and deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the Criminal Code [emphasis added].³⁷

In his analysis, Justice Rutherford found that the stated purposes were to thwart terrorist activity before it occurred by identifying, interrupting, and disabling plots while also distinguishing terrorism from other provisions in the *Code*. The actual effect, however, narrows the range of activity targeted by the legislation while inevitably putting investigative and enforcement powers—as well as public attention—"on some of the freedom-protected aspects of the lives of those on whom any shadow of suspicion

³⁴ *R v Khawaja*, [2006] 42 CR (6th) 348, 214 CCC (3d) 399.

³⁵ *Ibid* at 73.

³⁶ *Ibid* at 65.

³⁷ *Ibid* at 66 [emphasis added].

may fall, with or without justification.”³⁸ Accordingly, Justice Rutherford found that there was no justification for the violation.

The trial judge’s decision was subsequently overturned by the Ontario Court of Appeal, mainly on the ground that the trial judge did not base his decision on evidence that clearly established the chilling effect he describes as an effect of the motive clause. Further, with respect to profiling concerns, the Court clarified that the provision did not require profiling. As improper police conduct does not subsequently render lawful legislation unconstitutional, this ground was also dismissed. Noting that an appellant bears the onus of establishing a breach, the Court found that the trial judge did not draw on any evidence of a chilling effect and instead improperly took judicial notice on the basis of academic commentary without saying so.³⁹ The Court also found difficulty in specifically connecting such a chill to the motive requirement and instead linked it amorphously to the “post ‘9/11’ environment.”⁴⁰ The Supreme Court of Canada (“SCC”) upheld the above decision and reasoning. In upholding the appellate decision, the SCC decided that the motive clause was “clearly drafted in a manner respectful of diversity, as it allows for the non-violent expression of political, religious or ideological views. It raises no concerns with respect to improper stereotyping.”⁴¹

Despite the SCC’s decision to uphold the constitutionality of the motive clause, it is crucial to note that this does not foreclose the possibility—or necessity—of amendments to the clause for policy reasons. The conclusion of the SCC simply confirms that enacting the provision was wholly within the power of Parliament and that the appellant failed to fulfill his onus to provide evidence that would establish a *prima facie* violation of the *Charter*. While the Court’s decision acknowledges that Parliament exercised its lawful authority to enact the legislation, this recognition does not prohibit lawmakers from recognizing the subsequent harmful impacts of the law and exercising that same legislative authority to repeal the clause.

³⁸ *Ibid* at 77.

³⁹ *R v Khawaja*, 2010 ONCA 862 at 123.

⁴⁰ *Ibid* at 125.

⁴¹ *Khawaja III*, *supra* note 5 at 83.

B. Reviewing the Motive Clause: Twenty Years On...

Despite the concerns raised by opposition MPs, the Senate committee, civil liberties, and international organizations, Parliament has chosen to maintain the clause up to the date of publication. Reviewing the nature of the debate throughout the Parliamentary process is relevant for a number of reasons. Firstly, this history illustrates that opposition has been intelligent, consistent, and emanating from a diverse array of actors throughout the entire legislative process. Legislators and civil liberties organizations consistently flagged the potentially discriminatory impacts of the clause—beyond just racial profiling—and the intrusive nature of putting the accused’s beliefs on trial. With the benefit of hindsight almost twenty years later, we can see that the evidence has illustrated that these concerns were valid and real. As will be discussed further below, the concerns and problems with the motive clause are not limited to concerns of racial profiling—or even general discrimination by investigative agencies alone—even though this is what much of the early debate has focussed on. Experiences since the provision was enacted have made it clear that the harmful impacts go much further and subsequently seep into the judicial process itself.

Secondly, reviewing this history provides a degree of insight into Parliament’s explanation for enacting the provision and, ultimately, what legislative objective is being considered in the trade-off for its deleterious effects. The government’s stated objective for enacting the ATA overall was to target dangerous preparatory conduct and prevent a possible terrorist attack. Within this framework, the motive clause is portrayed as the primary demarcating factor that is key to distinguishing the severe implications of terrorist activity from “ordinary criminal activity.” Government sources consistently argue throughout this period that the motive clause is necessary as a safeguard to narrow the scope of terrorism and increase the burden on the Crown to secure a conviction. As will be discussed below, this is a weak argument, especially when confronted with the expansiveness of its harmful impact. Terrorism can already be distinguished from ordinary crime through the “purpose clause,” which requires an intent to intimidate the public or compel a governmental entity to do or refrain from doing any act. This does not require litigating the religion or politics of an accused person.

STIGMATIZING RACIALIZED COMMUNITIES: ADMISSION AND TREATMENT OF PREJUDICIAL EVIDENCE

One way the motive clause contributes to the stigmatization and discrimination of racialized communities is through the evidentiary requirement it creates to prosecute and litigate the accused's religious, political, or ideological beliefs. By legally requiring the Crown to draw a link between the criminal act and motive, prosecutorial strategies are forced to achieve this by drawing on some evidence to ascribe a religious, political, or ideological cause to the accused. In practice, this has largely meant that the ideas of Muslims and/or Islam must occupy prominence to prove an element of the offence in each trial. As a result, what would otherwise likely be considered prejudicial evidence, must now be adduced to prove an element of the offence—often with the effect of presenting the possession of certain literature or media to ascribe a belief and motive to the racialized accused.

One of the foundational principles of the law of evidence is that the evidence admitted by the courts must be relevant by tending to prove or disprove a material fact at issue.⁴² Even if the evidence is relevant, there remain circumstances in which submitted evidence may be inadmissible, including if the prejudicial effect outweighs its probative value. The safeguard against admitting prejudicial evidence, unless outweighed by its probative value, is crucial to protecting the integrity of a fair trial. The exclusion is meant to avoid “moral prejudice” due to its potentially inflammatory nature, causing it to be given more weight by the trier of fact than deserved, as well as “reasoning prejudice,” which confuses or distracts from the issues at trial.⁴³ While moral prejudice can mar the character of the accused in the eyes of the jury—creating a risk that the jury will determine guilt based on the accused's general disposition or nonetheless deserving of punishment, reasoning prejudice distracts the jury's focus away from the offence towards extraneous acts of misconduct.⁴⁴ In *Handy*, the SCC elaborated on this principle:

It is frequently mentioned that “prejudice” in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful*

⁴² *R v Arp*, [1998] 166 DLR (4th) 296 at para 38, 232 NR 317.

⁴³ *R v Handy*, 2002 SCC 56 at 100 [*Handy*].

⁴⁴ *R v Hart*, 2014 SCC 52 at 74.

conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.⁴⁵

In a criminal trial, the elements of the offence play a pivotal role in weighing the probative value of proposed evidence against its prospective prejudicial effect. Although a body of evidence may be exceedingly inflammatory, its probative value significantly increases where the evidence becomes necessary to prove a key issue, such as an element of the offence. In this case, if proving a motive is mandated by the *Code*, in order to secure a conviction, the Crown is required to adduce evidence to prove this element beyond a reasonable doubt. To do so, prosecutors often produce circumstantial evidence of literature and media consumed by the accused in order to ground an inference that the possession and consumption of such materials must mean that the accused accepts and believes the ideas presented. This relies on a particularly tenuous connection between the materials and the accused's beliefs despite the SCC's guidance that an inference of guilt based on circumstantial evidence must be the only reasonable inference permitted by the evidence.⁴⁶ This is the structural problem with the offence as it currently stands. Not only does this evidence usually consist of inflammatory content which arouses the emotions and hostility of the jury, but as will be shown below, it is often interpreted within a racialized framework that compounds the prejudice faced by the accused.

Second, Canadian criminal law does not generally make "motive" an essential element of an offence.⁴⁷ Although the court has made it clear that this is not an inviolable principle of fundamental justice and Parliament is empowered to make motive an element of an offence if it so chooses,⁴⁸ academic commentators suggest that this is still somewhat anomalous.⁴⁹

In the case of terrorism offences, both principles have been impacted to some extent due to the motive clause—resulting in a legislative framework that reinforces systemic racism within Canada's legal system. In such cases,

⁴⁵ Handy, *supra* note 43 at 139.

⁴⁶ *R v Villaroman*, 2016 SCC 33 at 30.

⁴⁷ Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law Inc., 2018) at 208.

⁴⁸ Nadarajah, *supra* note 5.

⁴⁹ Kent Roach, "The New Terrorism Offences and the Criminal Law" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002) 151 at 156 [Roach].

the requirement to prove motive for the Crown to secure a conviction means that successful prosecution will include proof beyond a reasonable doubt that the accused (or the relevant terrorist group) was motivated or driven to some degree by a religious, political, or ideological cause. This inevitably results in a dynamic in which the ideas, beliefs, or cause must be argued and proven to secure a conviction. Kent Roach describes this dynamic as the “forced admissibility” of political or religious evidence that could expose a jury to prejudicial and inflammatory evidence about the accused’s religious or political beliefs that may have little to do with guilt. Roach suggests that even if the correct result is reached, “the process may be tainted by the admission of what should be irrelevant evidence.”⁵⁰ This dynamic also leads to the politicization of criminal trials.⁵¹ Considering the statistics that 100% of cases that resulted in trials dealt with al-Qaeda-inspired individuals and groups, this has meant that Courts have had to litigate the ideas of Muslims and/or Islam exclusively.

This problematic dynamic can be witnessed in terrorism cases, such as the prosecution of Asad Ansari. Ansari was charged for his alleged role in what has become known as the ‘Toronto 18’ case. In June 2010, he was convicted by a jury for participating in or contributing to the activities of a terrorist group. The allegations presented against him included:

- attendance at a camping trip in Washago, which was characterized as a terrorist training camp by the Crown. Ansari was not in attendance for the full duration, and it was believed Ansari did not know the leaders’ real intention for the trip when attending;⁵²
- providing technical assistance to one of the ringleaders of the plot with regards to video recordings of the Washago trip; and
- repairing another ringleader’s computer by removing keylogging software.⁵³

In a powerful analysis of Ansari’s case, Anver Emon and Aaqib Mahmood strongly argue that his trial “took shape through the explicitly inexpert and implicitly racially structured litigation of Islam itself”—because of the law’s requirement to prove motive and its resulting infusion of religion with extremism and violence.⁵⁴ Despite his testimony to the

⁵⁰ Roach, *supra* note 4 at 47.

⁵¹ Roach, *supra* note 49.

⁵² *R v Ansari*, 2015 ONCA 575 at 20-23 [Ansari].

⁵³ *R v Ahmad*, [2009] OJ No 6154 at 70-71, 89 WCB (2d) 246 [Ahmad].

⁵⁴ Anver Emon & Aaqib Mahmood, “Canada v. Asad Ansari: Avatars, Inexpertise, and Racial Bias in Canadian Anti-Terrorism Litigation” (2021) 44:1 Man LJ at 256-257 [Emon & Mahmood].

contrary and the fact that the seized material was easily accessible to the public, Ansari's possession of alleged *jihadi* content became central to proving his motive and knowledge. Due to the legislative framework of the definition, the Crown was encouraged to meet the motive clause by inferring Ansari's terrorist motive from his mere possession of material considered damning.⁵⁵ According to the authors:

The legislative framework effectively required the prosecution to presume that because a text or video says X, the person watching it must therefore *believe* X. If a propaganda video states that Muslims must fight *jihad* against the American infidel, and a local Muslim has a copy of that video on his phone, this litigation approach requires a jury to assume from that circumstantial evidence that the Muslims must therefore harbour such views, or hold fast to them as a matter of ideology.⁵⁶

Ansari's guilt appears to have largely been premised upon the fact that he possessed and presumably consumed ideas "that the security state considers radical and even threatening, particularly when held by racialized Muslims."⁵⁷ While some of the inflammatory evidence was excluded, police also seized literature and media retrieved from his bedroom after his arrest, which allegedly contained *jihadi* content. The contents discovered in his bedroom also included "farewell letters" to his family, described as suicide notes during a bout of depression by the defence and contemplation of a 'suicide attack' by the Crown (this was, notably, not interpreted with the aid of expertise). Much of this evidence was excluded early in the trial, while some were admitted and considered corroborating factors. In the initial ruling, Ansari successfully filed a motion to exclude certain evidence considered inflammatory (to bias the jury and allow propensity reasoning) and, therefore, prejudicial. Upon his testimony regarding his understanding and beliefs regarding Islamic history and geopolitics, the Crown argued to reverse this decision based on the argument that Ansari's understanding of these topics was connected to his character.⁵⁸ The Crown explicitly argued in the second hearing that "this is a case about extreme views."⁵⁹

In deciding the subsequent admissibility of documents, Justice Dawson relied on the "doctrine of documents in possession" to draw inferences

⁵⁵ *Ibid* at 260.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 257.

⁵⁸ *Ibid* at 261.

⁵⁹ *R v Ahmad*, 257 CCC (3d) 199 at 17, [2009] OJ No 6151.

about the state of mind of an accused from their possession of certain documents.⁶⁰ While he does note that this is a permissive inference, not a mandatory one, the evidence on record does not appear to show that Ansari recognized, adopted, or acted upon the contents in any way beyond simple possession, based on the contents of the ruling.⁶¹ Despite this, however, the evidence was still admitted. In the appellate decision, the Court found that Ansari's defence was inconsistent with his possession of the alleged *jihadi* content, his association with the ringleaders of the group, and his attendance at the Washago trip where the training camp allegedly took place.⁶² According to the Court, the possession and knowledge of these documents were relevant to cast doubt on the truthfulness of Ansari's claim that "he was a moderate Muslim who eschewed jihadist activity."⁶³ In his consideration of whether to admit the previously excluded evidence, Justice Dawson observed and commented:

Mr. Ansari has presented himself as a Muslim youth with political, religious, and ideological views that the jury will likely conclude, based on Mr. Ansari's evidence and the effects of 911 on Muslim youth and common sense, are well within the normal range within the Muslim community... Mr. Ansari has been able to convey that impression so far by virtue of my previous protective rulings. I must say that overall, armed with the knowledge that I have about the nature and quantity of material related to religious extremism and violent *jihad*... I fear that the jury is being deprived of information they need to properly assess Mr. Ansari and the rest of the evidence.⁶⁴

His character was deemed to have been raised by rejecting and countering the Crown's theory in his testimony, and his mere possession of certain content was considered necessary to share with the jury despite its acknowledged inflammatory impact. Emon and Mahmood incisively analyze this decision whereby the judge—who was not the trier of fact nor a qualified expert—assessed the probative value of excluded evidence based on the structural demands of the criminal law by collapsing the texts into Ansari's mind and racialized body.⁶⁵ In this sense, the Court was "inclined to suspect Ansari's testimony about himself given the library of materials he

⁶⁰ Ahmad, *supra* note 53 at 12.

⁶¹ *Ibid* at 14.

⁶² Ansari, *supra* note 52 at 142.

⁶³ *Ibid* at 154.

⁶⁴ Cited in Emon & Mahmood, *supra* note 54 at 286.

⁶⁵ *Ibid* at 287.

had in his possession.”⁶⁶ It is important to reiterate that Ansari did not recognize or adopt the contents of the texts in any of the evidence referred to in the motion rulings or sentencing judgement. Despite this, however, the possession and presumed agreement with the content was admitted—regardless of its acknowledged prejudicial effect—and permitted to make several inferences about Ansari’s motives, knowledge, and, ultimately, his guilt.

The impacts of admitting and interpreting such prejudicial evidence were further compounded by the Court’s use, misuse, and lack of use of expert evidence.

STIGMATIZING RACIALIZED COMMUNITIES: EXPERT EVIDENCE THROUGH THE ‘NATIVE INFORMANT’

Proving the motive of an accused requires a complex social analysis that lay lawyers, judges, and jury members may not be competent to interpret, therefore requiring the aid of expert witnesses. As a result of the problematic application of the rules of expert evidence (or lack of application) in terrorism cases, courts have had to make grave decisions concerning the accused’s liberty without having the tools to fully understand and interpret the evidence. There are grounds to argue that this has led to bias in favour of the Crown based on racist stereotypes and cultural incompetency. The combination of the “purpose” and “motive” clauses in the definition results in extraordinarily complex litigation, which requires the court to interpret, for example, what mere ownership of certain texts and symbols might mean in terms of ideology.⁶⁷ The motive clause specifically opens itself to a need for expert evidence because to secure a conviction, it requires the Crown to prove an identifiable religious, political, or ideological cause and interpret the evidence provided in order to satisfactorily connect the acts of the accused with the purported cause. This requires a fluid labyrinth of evidence. When dealing with such complex social factors and attempting to comprehend texts, symbols, and practices of religion, politics, or ideology, it appears inevitable that expertise would be required.

⁶⁶ *Ibid.*

⁶⁷ Michael Nesbitt & Ian M Wylie, “An Empirical and Qualitative Study of Expert Opinion Evidence in Canadian Terrorism Cases: November 2001 to December 2019” (2020) 43:3 *Man LJ* at 63 [Nesbitt & Wylie].

Expert evidence is a unique category of evidence in which witnesses are permitted to provide their opinion on issues and evidence within a carefully circumscribed purview. This category of evidence is admitted by the court when dealing with subject matter that ordinary people are unlikely to form a correct judgement about without assistance or an issue arises that is outside the experience and knowledge of the judge or jury.⁶⁸ Studies regarding the use of expert evidence in terrorism trials have illustrated that such evidence plays an important role, especially with regard to social science expertise, in understanding the foundational elements of terrorist activity, including the motive clause.⁶⁹ Despite how pivotal expertise appears to be, to prevent courts from relying on stereotypes or confirmation bias to interpret evidence, this importance does not appear to have been translated into practice. The reality is that expert evidence is not used in litigating the motive clause in terrorism prosecutions as often as one might expect.

As of December 2019, expert evidence was called in approximately 50% of proceedings before the court.⁷⁰ These proceedings can be further broken down into several categories of expertise: technical, psychological, and social science. Social science experts, in particular, are invaluable in providing testimony regarding religious, political, and ideological causes, symbols, and practices to prove the motive clause. Surprisingly however, social science experts on such matters seem to have only appeared in six matters out of the 22 in which experts were called (multiple experts appeared in a single matter at times).⁷¹ Another related expert testimony has dealt with attempts to discern whether the accused was motivated by religious, political, or ideological concerns or a mental health illness. Of the social science experts providing some form of context or interpretation, they have been called to explain religious ideology or texts, overviewing general political or historical issues and the specific activities of an accused.⁷²

In proving motive, the Crown must particularly avoid the risk of circular logic (i.e., the accused would have committed the act because of their ideology, and their ideology can be seen through their planned attack) with independent corroboration of the ideology through properly

⁶⁸ David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law Inc., 2015) at 213.

⁶⁹ Nesbitt & Wylie, *supra* note 67 at 95.

⁷⁰ *Ibid* at 50.

⁷¹ *Ibid* at 69. See also *supra* note 61.

⁷² *Ibid* at 69.

contextualized and interpreted evidence.⁷³ This is particularly the case when every trial to date has concerned a “religious” motive (except for a guilty plea by someone accused of an offence concerning the Liberation Tigers of Tamil Eelam).⁷⁴ Considering this exclusive focus on al-Qaeda-inspired individuals and groups, this has meant that interpreting and understanding religious texts and symbols—not well understood by legal professionals—has played a prominent role in almost every case to date.⁷⁵ Adding the motive clause as an essential element has, therefore, “all but opened the door to” facile understandings of Islam and Muslims when neither the judge nor the lawyers (for either party, in most cases) deem expertise salient in trials despite the complex claims and inferences being made with regards to Islamic doctrine, geopolitics, and other specialized topics.⁷⁶ This highlights the importance of cultural competence and raises concerns about bias seeping into decision-making in the absence of informed opinions.⁷⁷ In this regard, the Canadian legal system is specifically structured to allow certain biases consistently inform litigation strategies and judicial discretion.⁷⁸ A simple example of this problem (discussed in further detail below) is the lack of expertise deemed necessary to determine whether a black flag with the foundational Islamic creed suggests a *jihadi* motive or whether it is simply a symbol of piety used by devout Muslims. These biases in both the law and conduct of trials make prosecutions about Islam as much as they are about the accused—litigated in light of “Orientalist tropes about Muslims and medieval inquisitorial models of how people make religious meaning” through the books they possess.⁷⁹

The requirement to prove motive in this framework leads to a fundamental problem concerning the use of expert evidence. Either expert evidence is not deemed necessary due to the “self-evident” nature of the evidence and religious symbols—which are then litigated without expertise—or expert evidence is relied upon without acknowledgment. Relying on racist stereotypes in the latter case, racialized witnesses and accused persons are called upon as spokespersons to speak “on behalf” of their respective

⁷³ *Ibid* at 61.

⁷⁴ *Ibid* at 51. See also *supra* note 11.

⁷⁵ *Ibid* at 83.

⁷⁶ Emon & Mahmood, *supra* note 54 at 291.

⁷⁷ Reem Bahdi, “No Exit: Racial Profiling and Canada’s War Against Terrorism” (2003) 41:2/3 Osgoode Hall LJ 293 at 306.

⁷⁸ Emon & Mahmood, *supra* note 54 at 291.

⁷⁹ *Ibid* at 292.

communities, similar to the ‘native informants’ used by colonial anthropologists.⁸⁰ In other words, lay witnesses are asked to provide expert testimony without the requisite procedural safeguards or instructions. In a detailed analysis of the use of expert evidence in terrorism trials, Nesbitt and Wylie noticed a number of occasions where experts could have helped better understand an issue or piece of evidence during the trial. Despite this, the authors noted that complex phenomena outside the training of lawyers, such as the specifics of religion or ideology, foreign conflicts, or technical international legal doctrines, were too often evaluated without the use of an expert.⁸¹ As a result of the status quo, religious symbology and ideation were discussed in every trial to date, but social science experts only appeared in a fraction of the cases.⁸²

As helpful as expert evidence can be, Nesbitt and Wylie note that it can also be extremely dangerous where the evidence will speak to the foundational elements of the offence (i.e., motive).⁸³ This is the case when the evidence being proffered is highly complex, and the concerned officers of the court may have little to no familiarity, let alone expertise, with the subject matter. In surveying the case law and academic commentary, it appears that Crown witnesses, including police, testified in terrorism prosecutions without the expert qualification their evidence arguably should have required. In this regard, Nesbitt and Wylie note the real risk of wrongful convictions without “increased scrutiny of both expert and non-expert evidence that skirts the line with expert opinion evidence.”⁸⁴ The risk is compounded when the apparent expert evidence is not even preliminarily limited within the procedural safeguards as vetted experts.

This dynamic is particularly evident in the prosecution against Asad Ansari, where the Crown’s approach to meet its evidentiary onus regarding motive was fraught with a lack of expertise which they sought to overcome through a “presumptive nexus between religion, violence, and extremism.”⁸⁵ In this case, the Crown sought to construe a black flag and the Islamic creed seen in Washago as an unequivocal symbol of extremism and carefully curated this alarming imagery for the jurors. This was done by playing a

⁸⁰ Linda Tuhiwai Smith, *Decolonizing Methodologies*, 2nd ed (London: Zed Books, 2012).

⁸¹ Nesbitt & Wylie, *supra* note 67 at 100.

⁸² *Ibid* at 99.

⁸³ *Ibid* at 65.

⁸⁴ *Ibid* at 101.

⁸⁵ Emon & Mahmood, *supra* note 54 at 259.

video found during the search of Ansari's room in which a black screen with the Islamic creed preceded a *jihadi* video. Pausing the video at this moment, the Crown cross-examined Ansari about whether he recognized this symbol and whether it was similar to the one that appeared on a black flag at the Washago "training camp." Ansari agreed while denying the terrorist connotation and linking it to the venerated Kaaba in Mecca instead.

No one in the courtroom among the prosecution, defence, or judge addressed the long history and complexity of the symbol—nor did they even recognize the need for expertise. Emon and Mahmood note further examples where Ansari appears to be playing the dual role of both defence and expert on modern Islamic politics (particularly during cross-examination), forced to explain to the court "what 'Muslims' think" while simultaneously rejecting the Crown's incriminating suggestions in the context of his prosecution.⁸⁶ The Crown interrogated Ansari's religious beliefs and Ansari's beliefs on what "true Islam" is—suggesting his "true" beliefs were reflected in the content recovered from his room. As a result, Ansari was effectively put in the role of an expert while also maintaining his innocence. Because no one in the courtroom considered expertise to be required for the questions or the answers, Ansari's explanation could easily be disqualified or ignored as strategic manipulation.⁸⁷ The Crown's star witness—a paid informant—was also asked to describe Islamic legal doctrine about *jihad*—arguably as an expert—without being qualified by the court or bound by impartiality.⁸⁸ Two lay witnesses—and very clearly, partisan witnesses—were thus expected to address highly complex and contentious issues on their own. The lack of discussion between the lawyers in the courtroom on the need for expertise arguably reveals a tendency to revert to facile assumptions about religion, specifically Islam, and its link to violence.

Roach acknowledges the relevance of motive in non-terrorism criminal prosecutions to bolster an inference and prove an element of an offence (either the prohibited act or the accused's state of mind). But he also remarks that in some cases, sentiments or similar motives can become so widespread within a community (perhaps due to a response to extraordinary events) that the motive is no longer relevant to advancing the Crown's case because the motive is no longer unique or sufficiently probative.⁸⁹ This

⁸⁶ *Ibid* at 283.

⁸⁷ *Ibid* at 293.

⁸⁸ *Ibid* at 277.

⁸⁹ Kent Roach, "The Three Year Review of Canada's Anti-Terrorism Act" (2005) 54

observation is highly relevant in the present case as it deals with a young racialized Muslim in Canada who testified to have struggled to navigate the racist backlash in the aftermath of the 9/11 attacks and the subsequent military invasions of Iraq and Afghanistan. It is plausible for emotional and political turmoil to impact a young person who may potentially explore or engage with highly publicized yet controversial ideas for answers in such a context. To place undue weight on this evidence, or interpret simple possession as evidence of uncritical adoption of the contents without expert analysis or further corroboration, may lead to problematic results for the administration of justice and problematic assumptions about the ideas of racialized youth.

It is possible that the origins of this issue (undue weight to prejudicial evidence without appropriate contextualization) is a problem to be addressed by emphasizing cultural competency, addressing problems with prosecutorial strategy, or possibly further training for judges; however, it appears that the disproportionate emphasis placed on motive—and the presumptions that may be drawn between certain ideas and an inclination to violence—is linked to the motive clause. The absence of the motive clause would not prohibit motive evidence from ever being admitted; it would simply limit motive from receiving undue and unfettered attention. As a result, this may discourage biased prosecutorial strategies, which are required to emphatically insist on the radicalization of individuals' religion and politics or the admission of otherwise prejudicial evidence. By doing so, motive evidence may continue to be admitted, but only where relevant, and only if admitted according to the relevant exclusionary rules, the judge's discretion to exclude or limit instructions where necessary.

VI. RACIALIZING TERRORISM: THE IMPACT OF STIGMATIZATION AND BIAS

Tracing the history of Canada's motive clause to the UK legislation, Roach notes its origins in an FBI manual used for operational purposes—not as a legal term with a decisive impact on the liberty of an accused person. He builds on this genealogy to point out how this clause effectively begins to blur the lines between criminal law enforcement on the one hand and the security concerns of intelligence agencies on the other. According to

UNBLJ 308 at 315.

Roach, “once policy-makers focus on the extremist politics and religion that motivate terrorism, they may want to use the criminal law to respond directly to such politics and religion.”⁹⁰ In other words, not only does the motive clause make the politics, religion, or ideology of the accused a “central feature of their criminal trials,”⁹¹ but an argument can be made that criminal law is being used bluntly to respond to certain ideas considered abhorrent or undesirable. This inference is bolstered by the nearly exclusive application of terrorism offences to Muslim individuals and groups. Subsequently, the motive clause contributes to an environment where specific ideas and religions are stigmatized due to their alleged association with terrorism. This sentiment is echoed by Professor Irwin Cotler, former MP and Minister of Justice, who suggests that the criminalization of motive politicizes investigative and prosecutorial procedures, chills the expression of other community members, and departs from the general principles of criminal law.⁹²

While the text of the motive clause may not directly point to the targeting and scrutiny of certain groups, the political discourses used to justify such laws feature highly racialized language and practice.⁹³ This impact is evidenced by the fact that predominantly, and almost exclusively, Muslim individuals are prosecuted under these offences. In fact, a well-documented systemic problem stems from a disproportionate focus on violence associated with racialized and Islamicate contexts at the expense of other motivations and forms of violence.⁹⁴ This can be seen in the clear systemic bias under which Al Qaeda-inspired individuals and groups are being charged under terrorist offences, whereas individuals and groups on the “far-right” or linked to White supremacy are being dealt with under ordinary criminal offences and hate speech.⁹⁵ Recognizing this massive disparity, Roach engages with the suggestion that anti-terrorism has some resonance with “enemy criminal law,” which targets “others” deemed

⁹⁰ Roach, *supra* note 4 at 45 [emphasis added].

⁹¹ Roach, *supra* note 49.

⁹² Irwin Cotler, “Terrorism, Security and Rights: The Dilemma of Democracies” (2002) 14:13 Nat’l J Const L.

⁹³ Nagra, page 168.

⁹⁴ Michael Nesbitt & Dana Hagg, “An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offence” (2020) 57:3 Alta LR 595 [Nesbitt & Hagg].

⁹⁵ Michael Nesbitt, “Violent crime, hate speech or terrorism? How Canada views and prosecutes far-right extremism (2001-2019)” (2021) Comm L World Rev 1 at 4.

enemies using harsh preventative measures in comparison to the “citizen criminal law” used against those considered its own.⁹⁶ The qualitative study conducted by Nagra and Monaghan between 2014-2015 further reveals an overwhelming concern among interviewees that terrorism was being conflated with Islam through Canada’s anti-terror measures, including security certificates, no-fly lists, airport and border security, and criminal prosecutions. In particular, the study revealed that Canadian Muslims were experiencing stigma, alienation, limited religious freedom, and a sense of diminished citizenship as a direct result of Canada’s counter-terrorism practices.⁹⁷ These results make it clear that even though the legislation is drafted in seemingly objective terms, the underlying political discourse and implementation in investigation, prosecution, and sentencing work to racialize terrorism offences with real and actual impacts on affected communities.

The application of the terror offences not only overdetermines terrorism and terrorist activity with reference to Al-Qaeda-inspired individuals and groups, but the legislative framework explicitly ties terrorist activity with the ideas of Muslims and/or Islam as the primary “motivation” for extremist violence. While the specific drafting of the clause has been carefully wordsmithed to be “respectful of cultural diversity,”⁹⁸ the actual application of the provision, combined with the statements of public officials, suggests that the motive clause is the defining characteristic of terrorism itself and may function as a way of actually identifying the “distinctiveness” of terrorism in relation to some Islamicate connection. In this sense, the argument in favour of the clause that “motive” is the distinguishing factor between terrorism and ordinary crime may be conflating the criminal act of terrorism with acts of violence, motivated specifically by racialized religions and politics. This suggests that the existence of the motive requirement should be understood as “symptomatic in the sense that it represents the legislators’ sense of what terrorism involves” based on the historical and political context of the time.⁹⁹ Functionally, this produces an arbitrary distinction between people—on the

⁹⁶ Kent Roach, “Counterterrorism and the challenges of terrorism from the far right” (2020) *Comm L World Rev* 1 at 8.

⁹⁷ Nagra and Monaghan, *supra* note 9 at 181.

⁹⁸ *Khawaja III*, *supra* note 5 at 83.

⁹⁹ Douglas, *supra* note 4 at 306.

basis and evaluation of motive—who otherwise engage in similar criminal activity by inflicting violence for the purpose of intimidating a segment of the population or compelling a government body to do or refrain from some act.¹⁰⁰ This illustrates a clear systemic bias in the Canadian legal system whereby violence (contemplated or perpetrated) by racialized individuals is treated as terrorism, while far-right extremist violence is treated as “ordinary crime,” punishing and stigmatizing the former far more than the latter.¹⁰¹

This overdetermination of terrorism as a concept in relation to Muslims and Islam can be seen in the subtle ways terrorism is characterized and described by public officials, in specific reference to violence ascribed to Muslims, without saying so explicitly. After an incident in which violence had been inflicted by seemingly ideologically motivated individuals within Canada, the former Minister of Justice, Peter MacKay, stated on record that since the attack did “not appear to have been culturally motivated,” it was “therefore not linked to terrorism.”¹⁰² This cognitive bias seems to be similarly reflected in RCMP documents which expressed doubt about whether “right-wing” violence can amount to terrorism or whether it is “ideological violence.”¹⁰³ These anecdotal statements give further credence to the perception that terrorism is an inherently political concept which has been racialized as the (irrational) political violence of a racialized “other.” This argument is corroborated by investigative and prosecutorial trends.

Barbara Jackman’s insightful analysis of intelligence profiles highlights how racially neutral factors are effectively used to substitute for race and religion, while race remains the lens through which the activity of a suspect is assessed.¹⁰⁴ Using the example of a Syrian Arab Muslim deemed a threat to Canada, she illustrates how threat profiles use seemingly objective characteristics to develop a profile not based solely on being Arab and/or

¹⁰⁰ *Ibid* at 302.

¹⁰¹ Nesbitt & Hagg, *supra* note 94 at 4.

¹⁰² “Alleged Halifax shooting plotters ‘were prepared to wreak havoc and mayhem,’” (14 February 2015), online: CBC News <www.cbc.ca/news/canada/nova-scotia/alleged-halifax-shooting-plotters-were-prepared-to-wreak-havoc-and-mayhem-1.2957767> [perma.cc/T8YR-KLWY] [emphasis added].

¹⁰³ Stewart Bell, “What does it take to lay terrorism charges? An internal government document explains the RCMP view” (27 April 2018), online: Global News <globalnews.ca/news/4173552/canada-terrorism-charges-rcmp-document/> [perma.cc/PED4-U2GG].

¹⁰⁴ Barbara Jackman, “Sustaining Investigations and Security Certificates Through the Use of Profiles” in Richard Marcuse, ed, *Racial Profiling* (Vancouver: BC Civil Liberties Association, 2010) at 69.

Muslim but which remains heavily dependent on race and religion for interpretation.¹⁰⁵ This divorces the profile from explicitly racial factors, although it is a profile that draws its very sustenance from such characteristics.¹⁰⁶ Overall, this work outlines the bias that exists within investigations, prosecutions, and judicial decision-making wherein assumptions about individuals—supposedly incapable of rational thinking and prone to extremist violence—are imputed to a person based on their ethnicity, religion, race, or a combination of such factors which appear unrelated to a racial profile but serve as substitutes for these characteristics.¹⁰⁷

The historical backdrop of the enactment of the ATA was the response to the 9/11 attack by Al-Qaeda. As we have seen, the provisions have been almost exclusively applied against Muslim accused persons, and the procedural framework created by the provision creates a dynamic in which the religious, political, and ideological ideas of the accused Muslims are put on trial and dealt with based on prejudicial presumptions about the relationship between Muslim ideas and extremist violence. In contrast to government claims that the clause acts as a “safeguard,” none of the reported cases thus far have seen an acquittal of a Muslim accused on the basis that he or she did not have a motive animating their alleged conduct. Rather than a “safeguard,” the statistics and enforcement trends seem to indicate that offenders who commit violent offences with links to far-right causes and/or White supremacy are the ones who have been “safeguarded” from being charged with terrorist offences, partially because of the absence of a “cultural” motive. The result is that violence committed to intimidate a segment of the population or compel the government to do or refrain from an act—that is not driven by a perceived Islamic (or otherwise racialized) animus—is excluded from the realm of terrorist activity. This bolsters the suggestion that the “safeguard” of the motive clause, intentionally or unwittingly, only operates to safeguard those persons coded as ‘White’ from being prosecuted for terrorism, or in other words, that the “motive” is a means to specifically criminalize individuals and groups associated with Muslim or “Islamist” politics. As such, the motive clause’s role as a “safeguard,” weighed against the stigmatization of racialized

¹⁰⁵ *Ibid* at 70.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid* at 75-76.

communities due to a problematic evidentiary requirement and compounded by biased implementation, does not appear as a convincing argument to maintain the provision by any means.

In this vein, Sherene Razack's argument that the "exiling" of Muslims from the political community has been a central facet of the war on terror since 2001 offers important theoretical insight into the racialization of terror offences. In the context of the war on terror, Razack identifies how "racial distinctions become so routinized that a racial hierarchy is maintained without requiring the component of individual actors who are personally hostile towards Muslims."¹⁰⁸ Expanding on this, Razack outlines how this process is underpinned by the idea that "modern enlightened, secular peoples must protect themselves from pre-modern, religious peoples whose loyalty to tribe and community reigns over their commitment to the rule of law."¹⁰⁹ The comments of Canadian lawmakers and investigative agencies that the "distinctiveness" of "terrorism" cannot be identified without a "cultural motivation" similarly belie the trademarks of this systemic racism. This is not expressed simply in racial hostility borne towards racialized groups but in the idea that the state must "protect itself from those who do not share its values, ideals of beauty, and middle-class virtues."¹¹⁰

This paper's overall argument thus focuses on the process of racialization, which requires two discrete analytical steps: first, identifying and enumerating certain biological or social characteristics, and second, asserting that these characteristics bear social significance by ascribing them to a particular racialized group. By tracing this process, this paper argues that the motive clause within Canada's terror offence contributes to a dynamic that racializes terror offences as a specific criminal offence committed by racialized individuals—marking terrorism as a unique social characteristic of racialized communities. As evidenced in the discourse of various policymakers and the application of the provision by investigative agencies and prosecution services, the motive clause is central to what sets terror offences apart from "citizen criminal law" or "general law enforcement provisions," as suggested by Former Minister McLellan. In practice, this motive is exclusively associated with the politics, religion, and

¹⁰⁸ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at 9.

¹⁰⁹ *Ibid* at 9-10.

¹¹⁰ *Ibid* at 11.

ideology of racialized accused and, most often, Muslims. In this sense, the theoretical underpinning of critical race theory helps identify and understand this dynamic. By questioning the dominant legal claims of neutrality and challenging ahistoric readings of the terror offence, critical race theory insists on a contextual and historical analysis of the law.¹¹¹ In this case, this is achieved by tracing the development and implementation of the motive clause in practice. In this context, the concept of systemic racism is helpful as it elucidates how seemingly neutral legal provisions can have an adverse impact on racialized groups, while the role of implicit bias also provides some explanatory power in the way that numerous individuals in the criminal justice system appear to have unconsciously associated terrorism with the cultures and ideas of racialized communities.

VII. REVISITING THE MOTIVE OF THE MOTIVE CLAUSE

Assessing whether the skewed dataset is due to a reflection of empirical reality (i.e., Muslims are the only people engaged in “terrorist activity” in Canada), the biased interpretation of the provisions leading to the racialization of terrorism as a concept, or the biased enforcement of the provisions by investigative agencies, prosecutors, and the courts is beyond the scope of this paper. While a dedicated study to this question may be useful to provide a definitive answer, the motive clause clearly appears to be a contributing factor to this reality.

Roach provides a strong argument in favour of defining terrorism with restraint to focus on intentional violence against civilians.¹¹² He agrees that a definition of terrorism needs to distinguish the phenomenon from ordinary crime but disagrees with the motive clause being the means to do so. Instead, he argues that the focus should be on whether the alleged terrorist is “pursuing a purpose of intimidating a population or compelling governments or international organizations to act.”¹¹³ Removing the motive clause avoids an official inquiry into the accused’s political and religious beliefs that may give the impression that the state is “responding to the

¹¹¹ Mari J Matsuda et al, “Introduction” in Mari J Matsuda, ed, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, 1st ed (Boulder, Colorado: Westview Press, 1993) at 6.

¹¹² Roach, *supra* note 4 at 39.

¹¹³ *Ibid* at 40.

accused's politics or religion as opposed to his or her plans to commit acts of violence."¹¹⁴ Doing so protects the accused (and others) from discrimination on the basis of holding unpopular—even heinous—religious, political, or ideological views. It also prevents the criminal trial from becoming a political or religious trial which would be contrary to the logic and spirit of criminal law—which asserts that “motive neither excuses nor constitutes intentional crime.”¹¹⁵ Going further, Roach makes a striking argument that targeted violence against civilian targets should not be exempted from the label of terrorism simply because there is no evidence of the accused person's motivation or where the motive cannot be described as political, religious, or ideological. If Parliament successfully made this transition, not only would Canada's penal definition of terrorism realign with international definitions, but it would also harmonize itself with the foundational principles of criminal law, including international criminal law. When analyzing other serious offences for which international consensus has been developed, motive does not characterize, justify, or excuse an abhorrent act. Although Canadian law has developed a constitutional principle that certain high-stigma offences may require a minimum fault requirement so that the stigma of certain offences corresponds to the accused person's moral blameworthiness, this principle does not require a specific motive to set it apart—only a specified threshold of fault.¹¹⁶ This can be seen clearly across the board, whether discussing murder, crimes against humanity, or genocide. Bringing terrorism in line with these similarly grave offences could be a crucial step to resisting the racialization of the offence and the stigmatization of racialized communities.

The motive clause, as it is, is also currently afflicted by another problem. None of the three categories (religion, politics, and ideology) have been clearly defined by the statute or jurisprudence. The terms “political,” “religious,” and “ideological” are key elements of the offence but arguably remain ambiguous. Nesbitt and Wylie point to the challenges of identifying and defining “ideology,”¹¹⁷ while a body of research in social science and the humanities also illustrates that the category of “religion” itself does not have a stable definition that can be relied upon universally. This literature further problematizes attempts to clearly distinguish between the “religious”

¹¹⁴ *Ibid* at 41.

¹¹⁵ *Ibid* at 43.

¹¹⁶ *R v Vaillancourt*, [1987] 2 SCR 636, 39 CCC (3d) 118.

¹¹⁷ Nesbitt & Wylie, *supra* note 67 at 60.

and “political” by suggesting that these distinctions and categorizations are themselves based on racist perspectives about non-Western politics and Eurocentric presumptions about the relationship between religion (especially Islam) and violence.¹¹⁸ In the absence of a clear definition in the statute or jurisprudence and no application to other suspects in practice, these restrictive yet uncertain terms arguably contribute to an unnecessarily narrow definition, which may leave some activity outside the scope of the offence due to its indeterminate status as a coherent ideology.

VIII. CONCLUSION: DISMANTLING SYSTEMIC RACISM WITHIN THE *CRIMINAL CODE*

The government’s consistent justification for maintaining the clause has revolved around distinguishing terrorism from ordinary crime and acting as a safeguard. In reality, the clause adds little to no benefit as a safeguard other than maintaining systemic racism within Canada’s legal system by stigmatizing racialized communities based on prejudicial presumptions and the myopic application of terrorism provisions. The clause does not increase security; thwarted attacks and successful prosecutions were not made possible by virtue of the motive clause. To the contrary, however, the evidence reviewed in this paper suggests that the motive clause, as currently framed, is functioning to help restrict the application of terrorism offences to those acts committed by racialized actors and subsequently prosecuting their religious and political ideas based on facile understandings of complex social issues. As suggested by Canadian civil liberties organizations and legal scholars, however, the solution is not simply to “expand anti-terrorism in the name of anti-racism” but to identify and address the systemic problems and concerns within Canada’s anti-terrorism apparatus.¹¹⁹ This paper is one small contribution to this effort to identify how Canada’s terror offences have been racialized and disparately impact Canada’s racialized communities.

¹¹⁸ William Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009) [Cavanaugh].

¹¹⁹ Letter from Azeezah Kanji and Tim McSorley et al to Federal Party Leaders, “Re: Use of anti-terrorism laws to combat racism and white supremacy” (22 February 2021), online (pdf): <bccla.org/wp-content/uploads/2021/02/Letter-to-leaders-regarding-Terrorist-List-for-White-Supremacist-Organizations.pdf> [perma.cc/QG52-VFUF].

While there is undoubtedly a wider social context that can provide explanations for the systemic racism within the Canadian legal system, adding a political or religious motive element to terrorism offences has specifically structured criminal law in such a way that reinforces the stigmatization and discrimination of racialized communities. The systemic effect of the provision demands that courts litigate religion in terrorism trials—ultimately leading to furthering a systemic association between terrorism and racialized communities, particularly Muslims and Islam. This is especially problematic when courts fail to appropriately seek the guidance of experts in which liberty and guilt are contingent on complex claims about religious ideas and politics. Despite the fact that the bias and cultural incompetence of some counsel contributes to this problematic treatment of the evidence, the motive clause enables this by creating a burden to prove motive by some means in a way unique from the regular treatment of motive in criminal law. This legislative framework, combined with bias and cultural incompetency in some cases, leads to circumstances where accused persons are made vulnerable to the risk of penal sanction without appropriate contextual analysis conducted on the evidence presented to the courtroom. Considering the “systemic racialization of terrorism”¹²⁰ across political and security institutions, it is imperative that policymakers and enforcement agencies reflect on these discriminatory impacts of the motive clause on the criminal justice system in Canada.

¹²⁰ Cavanaugh, *supra* note 118 at 28.