

***CONSTRUCTING THE “OTHER”: DISCURSIVE MECHANISMS AT PLAY IN THE
SENTENCING OF POST 9/11 CANADIAN TERRORISM CASES***

KIRSTEN MACLENNAN

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Department of Criminology
Faculty of Social Sciences
University of Ottawa

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ABSTRACT

Since the renowned terrorist attacks of September 11th, 2001, exclusionary narratives or “othering” have proliferated in the securitized West. Prominently associated with media campaigns, popular culture, or political debates, exclusionary discourses operating within the Canadian judiciary have been largely overlooked. Inspired by the work of Giorgio Agamben and Richard Ericson, this study is a critical discourse analysis of sentencing decisions within five terrorism cases. Findings suggest that “othering” operates in these decisions through seven discursive mechanisms. Those mechanisms construct the offenders as Muslim non-conforming foreign “others” threatening the Canadian nation, and worthy of exclusion. As such, the offenders are seen as deserving of punitive incarceration by the severest extent of the law. The courts also justify this punishment by invoking political imperatives namely the need for the State to preserve its alliance with other nations engaged in the “War on Terrorism” and the necessity to counter the “discontent with the West”. Although limited by legal safeguards, the exceptional state power at play in the post 9/11 era is not without effect on the wider population of Muslim in Canada and abroad.

Introduction of Thesis

The September 11th, 2001 terrorist attacks were a pivotal moment in Canadian history that transformed global affairs and relations among subjects residing within and beyond borders. In its immediate aftermath, Western States introduced the current era of heightened security and international conflict known as the “War on Terrorism.” Canada’s securitized responses to this evolving threat environment created a series of preventative legislative and enforcement initiatives to detect, denounce, and deter terrorism (Public Safety Canada, 2018). This response was reinforced by public fear surrounding terrorism, resulting in social and political pressure on the State to identify the “right” legitimized subjects from the dangerous “wrong” individuals threatening Canada. As a result, individuals embodying certain identities, practices and relationships have been subjected to processes of “othering” based on intrinsic “threatening” differences. In this national security context, an underlying narrative of exclusion perpetuates “othering” as a way to protect exalted national subjects. Through exceptional State power, governing institutions have upheld racialized “othering” as a securitization tool in the “War on Terrorism”.

Given the intersection of race and the post 9/11 counter terrorism environment, this thesis seeks to investigate how the Canadian judiciary, as a powerful branch of government, has constructed terrorism crimes and perpetrators. This critical analysis will be guided by the research question; How does the Canadian judiciary discursively construct the specificity of terrorism offences within their sentencing decisions and what are the social and symbolic effects of this rhetoric capable of implicating broader populations? The possible social and symbolic effects of judicial discourse will inform a broader narrative that perpetuates “othering” onto targeted populations as a source of exclusion within the West.

This thesis begins with a review of existing literature on race relations situated within the Canadian “War on Terrorism”. Chapter one discusses the scholarship on current Canadian threat conjectures and the strategic national security responses instituted to preventatively counter the established threats. Those measures include the Criminal Code amendments that lead to a securitized sentencing framework. This review of literature also addresses the way this counter terrorism environment has affected race relations in the post 9/11 “War on Terrorism”, lead by the construction of the dangerous Muslim “other” as threatening the exalted non-Muslim national subject.

Chapter two examines Giorgio Agamben's *The State of Exception* and Richard Ericson's *Counter Law* as the theoretical inspirations of this thesis. Terrorism's insecurity in the post 9/11 West has created emergency circumstances wherein the State is allocated expanded powers to apply the law outside its regular juridical order (i.e. Counter Law). This has evolved into a normalized system of control onto individuals deemed outside the legitimate polity. These echoes are felt in the sentencing of terrorist offenders.

Chapter three presents this thesis' methodological approach to critical discourse analysis. This chapter will introduce the epistemological grounding of the study, integrated within James Paul Gee's discursive tools designed to reveal the meaning and value of language in use. Gee's approach to critical discourse analysis will complement my research design based on the established empirical material of five post 9/11 Canadian terrorism sentencing decisions.

Chapter four discusses the research results. For contextual purposes, it will begin with a brief presentation of the five cases under study. The critical analyses of those five cases lead me to identify seven mechanisms of "othering" that revealed two main findings. First, they will show that the specificity of terrorism has been judicially constructed in ways that necessitate the most exclusionary punishment for terrorist offenders. This has been accomplished through the use of Richard Ericson's Counter Law to highlight terrorisms "unique" aggravating elements that necessitate the use of punitive sentencing principles such as deterrence and denunciation to accomplish severe punishment. Secondly, mechanisms exposed the Judges racialized characterizations of terrorists in ways that subject offenders to discursive processes of "othering". This is accomplished through judicial interpretations of personal traits, life circumstances and religious belief orientations as dangerous and threatening. Moreover, terrorist resentment for the "superior" West was framed a purely "Muslim" problem, reinforcing a label of "outsider". Situated within post 9/11 securitized rhetoric, these labels necessitate exclusion, or the need to protect exalted national subjects from dangerous foreign "others". These mechanisms also reveal how judicial constructions of terrorism can expand beyond the specific offender to implicate the broader populations of Muslims within this narrative of exclusionary "othering". This discussion concludes with a comparative analysis of findings against relevant criminological literature, as well as the theoretical notions of Giorgio Agamben's *The State of Exception* and Richard Ericson's *Counter Law*.

The purpose of this research is to expose how exceptional state power, operating within judicial sentencing discourses of post 9/11 terrorism cases, has discursively constructed terrorism offences in ways that induce processes of racialized “othering” by way of exclusion. This includes the broader social and symbolic effects on certain populations, specifically Muslim foreign “others”. This study contributes to literature addressing the racial impacts of the securitized State on Muslim populations. Importantly, this analysis offers a unique avenue to question the State’s use exceptional law (Counter Law) operating within post 9/11 Canada.

CHAPTER 1: LITERATURE REVIEW

1.1 Introduction

The following literature review will explore how the judicial sentencing of terrorist offenders in Canada's post 9/11 securitized environment has informed race relations. This discussion will illustrate how Canadian counter terrorism initiatives, such as the 2001 Canadian *Anti Terrorism Act*, have prompted increased securitized responses to global insecurity (Roach, 2015). I aim to demonstrate how these responses have created a dichotomy between the national subject and the foreign other, producing a palpable identity that implicates Muslim populations as a threatening enemy of the West. This identity works in concert with embedded ideologies of the "War on Terrorism" to exalt the national subject and enforce strict exclusionary boundaries around citizenship and nationality. Lastly, these racialized sentiments of identity formation are authorized and reinforced by exceptional State power.

This discussion will first, contextualize discourse identifying Canada's unique terrorism environment, referencing threats, and problems of insecurity in the post 9/11 "War on Terrorism". The second section will discuss Canada's responses to the established threats, focusing on legislative amendments that have securitized the judiciary by way of sentencing. These amendments include the broader terrorism definitions, offence categories, and punitive sanctions available to punish such crimes in Canada. This section will also discuss the effects of practical sentencing applications experienced by post 9/11 terrorist offenders. The third section of this literature review will identify the intersection of Canadian counter terrorism initiatives with racialized identity constructions of the foreign "other". Critical literature will present the broader consequences of these constructions, experienced by Muslim populations deemed the popularized "enemy". The fourth and final section will address the use of the state power within post 9/11 exceptionalism.

1.2 Terrorism: The Modern Threat Environment

Prior to 9/11, terrorism incidents in Canada were largely a result of domestic grievances expressed by national groups over conflicts such as Quebec sovereignty, environmental activism and political hostility (Jacoby, 2016). It was not until 1998 that the presence of international groups such as Daesh and al-Qaeda organized terrorist operations within Canada focused largely overseas (recruitment, dissemination of propaganda etc.) (Forcese & Roach, 2015; Mullins, 2013; Public Safety Canada, 2016). This pattern remained until the 9/11 terrorist attacks on the United States of America, which changed the nature and environment of terrorism in the Western

world, indefinitely (McCoy & Knight, 2015; Roach, 2012). As a result, post 9/11 threat analyses have recognized that terrorist operations situated internationally “beyond borders” have initiated domestic attacks occurring on Canadian territory (Public Safety Canada, 2016). This threat of both domestic and international attacks has increased the range of terrorisms capacities, perpetrators, and targets nearly twofold (Murphy, 2007). With its modern globalization, terrorism has become an unstructured web of diverse networks and centralized models purposefully refined to threaten the security of all international nations (Lutz & Lutz, 2001; Rauf, 1999).

The Government of Canada reports that extremists inspired by the violent ideologies of dominant groups such as Daesh, al-Qaeda, and the Hizballah pose the principal terrorist threat to Canada in the present day (Public Safety Canada, 2016). Such terrorist groups are enabled by the evolving threat capacities that are available in the modern terrorism environment (Forcese & Roach, 2015). Scholarship indicates specific phenomena that have created this developing threat environment. First, new technologies have initiated multi-faceted terrorist strategies including the implementation of cyber-attacks via computerized exploitation devices, construct unique weaponry for destructive means, infiltrate markets, globally distribute terrorist-related propaganda, and create viable tools to evade detection (Forcese & Roach, 2015; Hamilton & Rimsa, 2007; McCoy & Knight, 2015; Mullins, 2013). Moreover, online outlets allow extremist entities to boast about victories, develop plots, and enforce recruitment tactics through emerging communications (Crone, 2016; Public Safety Canada, 2017; Royal Canadian Mounted Police, 2009). Second, counter terrorism literature has warned against emerging threats of terrorist financing initiatives that target sympathetic individuals, Canadian businesses, and charities for money laundering interests or credit card fraud to fund extremist activities (Amicelle & Iafolla, 2017; Roach, 2012; Thachuk et al., 2008). Third, extremist travelers have gained considerable attention in recent threat literature. Reports estimate approximately 190 citizens or residents have left the country to train and participate in terrorist activities abroad, returning to Canada more deeply radicalized and equipped with enhanced operational skills (Crone, 2016; Zekulin, 2014). Terrorists from prominent conflict zones such as Turkey, Iraq or Syria have also found a nexus to Canada through such travel (McCoy & Knight, 2015; Royal Canadian Mounted Police, 2009; Thachuk et al., 2008). Lastly, the emerging impact of “leaderless Jihad” in the modern world has enhanced terrorism capabilities. Individual “lone-wolf” terrorists have become radicalized by

ideological lure, mobilizing to engage in self perpetrated terrorism-related activities (McCoy & Knight, 2015; Public Safety Canada, 2017; Zekulin, 2014). Together, these modern threat capacities have seemingly reinvented terrorism in the post 9/11 world, continually challenging Western States to counter such threats both domestically and internationally.

Due to these enhanced capacities, Canada has witnessed a significant expansion of its threat environment. As of October 2014, Public Safety Canada issued The Canadian National Terrorism Threat Level as “medium”, indicating that a violent act of terrorism “could occur” on Canadian soil (Public Safety Canada 2017). One online jihad article posted by Islamic militants in March of 2004 rated Canada as the fifth most desirable Western target for terrorist attacks (Mullins, 2013; Public Safety Canada, 2016). The Global Terrorism Database's (2016) most recent conjecture of terrorism-related violence concluded that from 2001-2016, terrorism incidents in Canada have remained on a constant incline (Lafree & Dugan, 2007). Some literature suggests that modern crisis' such as poverty or gun violence constitutes a greater threat to human life than terrorism. However, the mere possibility that one terrorist incident could kill hundreds to thousands of individuals by one single strike has prompted the Canadian State to prioritize terrorism as an immediate threat to human security (Leuprecht et al., 2010; Wolfendale, 2007).

1.2.1 Critical Literature Problematizing Canadian Terrorism Threat Conjectures

Criminological literature assessing post 9/11 terrorism in Canada has been particularly critical about the former threat estimates. Despite the mentioned claims made by Government actors and research contributions, critics contend that terrorism presents a relatively minor threat to Canada (Forcese & Roach, 2015). Wolfendale (2007) has denounced government projections by highlighting the extreme difficulties associated with assessing the unknown and undetectable likelihood that threats inspiring fear will lead to physical attacks. Furthermore, critical literature highlights problems related to "state-centric" reports for exaggerating terrorism threat levels, which subsequently induces fear in the public. These exaggerations allow the State to achieve public acquiescence for significant and far-reaching political agendas, changes to legislation, as well the promotion of massive financial and military commitments (Jackson, 2007; Silke, 2004; Toros, 2017; Wolfendale, 2007). In concert, counter terrorism research has been critically analyzed for its focus on short term immediate threat assessments that ignore broad social and

historical contexts, and the extent of state contributions influence conclusions (Gunning, 2007; Gunning et al., 2009; Jarvis & Lister, 2014).

The established threat literature emanating from post 9/11 scholarship has incited counter terrorism responses within the western world. These responses have resulted in varying initiatives to prevent, detect, and deter perpetrators from targeting Western nations for terrorist practices. The following section will discuss Canada's securitized responses to the established terrorism threat environment, including those relevant to sentencing law and enforcement on behalf of the judiciary.

1.3 The Securitized Response: Canada's National Security Strategy and Countering Terrorism in the Post 9/11 World

Following a robust review of emerging threats, the Canadian Government initiated a series of responses transforming the national security environment from a paradigm of liberty to a paradigm of security (Wolfendale, 2007; Ghatak & Prins, 2017). Canada's preventative counter terrorism framework of legal and structural amendments rejects the previous "top-down" or state-centered policing and enforcement model (Frank, 2007; Jacoby, 2016; Roach, 2005; Lafree & Hendrickson, 2007). This strategy, *Building Resilience Against Terrorism* (2011), was developed the following core premises. First, detection initiatives requiring intelligence-led investigations aim to identify terrorists, related organizations, and their supporters. Intelligence lead policing operations reinforce the need for information sharing, risk assessments, and analytical strategizing in coordination with domestic and international partners (Forcese & Roach, 2015; Public Safety Canada, 2018). Secondly, counter-terrorism initiatives are to focus on the motivations of individuals or groups as a way to detect future terrorism-related activities. Lastly, the State is to develop mechanisms to respond to terrorism proportionately, rapidly, and in an organized manner (McGuire, 2013). Together, this prevention model requires mitigating vulnerabilities, intervening within terrorist planning, strengthening Canada's targeted capacities, and punitively punishing those involved in terrorist activities. Committed to this strategy, Public Safety Canada (2011, p. 5) has declared: "Canadian's can expect that their Government will take every reasonable step to prevent individuals from turning to terrorist means, to detect terrorists and their activities, to deny terrorists the abilities and opportunities to attack, and when attacks do occur, to respond with expertise, rapidly and proportionately".

This new securitized counter terrorism model required a series of legislative and structural changes to Canada's criminal justice system (Lennox, 2007). The first securitization

strategy reinforced Canada's structural capacities, which introduced flexible, organizational and integrated federal support mechanisms to address terrorism. The 2003 creation of the Department of Public Safety and Emergency Preparedness Canada (PSEPC), and the Government Operations Center (GOP) developed structural functions tailored towards institutional duties and practical arrangements for Canadian agencies and stakeholders to adhere to during times of emergency, or prominent threat (Keeble, 2005; Shaffer, 2001). Canada's policing or enforcement services were also structurally improved, most acclaimed being the institutional expansion of Canadian Security Intelligence Service, with new abilities to collect information, investigate personal data, and disrupt plots (Lennox, 2007; Murphy, 2007). Other agencies, including Canada Border Services Agency, Immigration, Refugee and Citizenship Canada, and the Royal Canadian Mounted Police were also equipped with structural functions specific to their roles for protecting Canadian national security such as border controls, policing and investigating suspected terrorists, and inter-agency coordination (Lafree & Hendrickson, 2007).

As the second securitization strategy, the Government introduced a series of legislative amendments to repair the previous legal system deemed ill-equipped to adequately respond and punish terrorism (Gartenstein- Ross & Frum, 2012; Iacobucci, 2011; Lafree & Hendrickson, 2007). According to this new framework, Canada pursues terrorism as a distinct category of crime, which requires specialized legal instruments and purposeful sanctions (Department of Justice, 2017). These reinforcements prompted the admission of the *Anti Terrorism Act*, which amended ten Canadian statutes, including the *Criminal Code* (Roach, 2005). The law was expanded to include a wide range of criminal offence categories for terrorism-related conduct, enforce punitive sanctions for offenders, and broaden state investigatory powers on national security matters (Amirault et al., 2016; Choi, 2010; Gartenstein-Ross & Frum, 2012; Nagra, 2016). Consecutive post 9/11 Governments have encouraged enforcement personnel to utilize the new counter terrorism model to its greatest extent (Lennox, 2007).

As a leader in the global fight against terrorism, The United Nations presses Governments to adopt comprehensive national strategies that balance hard-end security measures with social, economic, and community-driven policies grounded in the rule of law and human rights commitments (Awan, 2011; Smith, 2011). As a result, many States have taken renewed action towards upholding rights obligations while applying these securitized measures (Charters, 2008; Joyner, 2004; Smith, 2011). Following suit, the Canadian State has committed to

upholding executive accountability mechanisms, and Parliamentary review assessments on national security decision-making (Alford, 2018; Dobrowolsky et al., 2009; Smith, 2003). Similar mechanisms have been developed by other nations, including the United States, the United Kingdom, and Australia (Jenkins, 2003).

1.3.1 Literature in Opposition of the Canadian Post 9/11 Response to Terrorism

Critical literature has questioned Canada's securitized responses to terrorism's insecurity. First, researchers have criticized the State's failure to maintain the delicate balance between national security's counter terrorism initiatives and democratic human rights (Smith, 2003; Murphy, 2007; Nagra, 2017). Post 9/11 governing administrations are faulted for using broadened executive powers to step outside the legal constraints of the *Canadian Constitution* and the *Charter of Rights and Freedoms* to intervene within the lives of citizens (Murphy, 2007; Nagra, 2016; Swartz, 2003; Whitaker, 2012). In similar regard, opponents of securitization have highlighted the Canadian State's failure to implement appropriate oversight, accountability, and public disclosure mechanisms to protect citizens from State power (Adelman, 2002; Jebb, 2003; Smith, 2003). Critical opponents are fearful of these findings due to the boundless nature of warranted rights infringements in the name of "national security", and the apparent absence of protection measures available for citizens deemed victims of state securitized intervention (Byrne, 2010). Secondly, critical researchers denounced the Government's securitized counter-terrorism responses for perpetuating existent and establishing new capacities targeting the Canadian nation for terrorism (Dobrowolsky et al., 2009). Termed a "blowback mechanism" (Chenoweth & Dugan, 2016), terrorist groups have become violent in retaliation against nations like Canada that are deemed "interveners" in the war due to supportive "participatory" roles in counter-terrorism initiatives (Hamilton & Rimsa, 2007; McCoy & Knight, 2015; Roach, 2012).

Essential to this thesis, literature has addressed problems associated with the State's use of the executive-oriented counter terrorism model. This model has been associated with increased opportunities for operational error and selective racial targeting (Murphy, 2007). Reactionary securitization amendments that have "tightened" borders create severe provisions that restrict commerce, resources and importantly, migration (Roach, 2015; Wark, 2005). These new discretionary measures of security have been known to harbour an "us versus them" mentality that seeks to control selective populations, resulting in the prejudicial targeting of particular ethnic or religious minority groups (Dobrowolsky et al., 2009; Royal Canadian

Mounted Police, 2009). Furthermore, policing developments that seek to identify group cells or movements based on shared cultural or religious ideologies are criticized for overlooking discrete distinctions and motivations of the real perpetrators. In consequence, these policing actions have broadened the identity of the "threat" onto some populations based on physical, cultural or belief-oriented characterizations assumed by the State (Jebb, 2003). These biased conceptualizations have targeted minority communities, prominently Jihad and Muslim, conspiring fear and mistrust between segments of society (Choi & Piazza, 2014; Mohiuddin, 2017). As witnessed within critical terrorism studies, "Once considered an illegitimate practice, racial profiling has become de-facto, and gained popular legitimacy" in attempts to counter terrorism (Dobrowolsky et al., 2009, p. 23; Irwin, 2015).

1.3.2 Legislative Developments: Canada's Terrorism Sentencing Framework

As part of the post 911 national security model, the Harper Government drafted Bill C-36 as a statute amending the *Criminal Code*. In fruition, *The Anti Terrorism Act* (2001) established new charging and sentencing laws to prevent and deter terrorism through punishment. As a first order of business, the ATA recognized "terrorist activity" as an exclusive criminal offence category in Canada. A comprehensive two-part definition of terrorism was established in Section 83.01 of the Criminal Code, distinguishing a broad set of criminalized conduct determined as jeopardizing Canadian national security (Alford, 2018; Philipupillai, 2017). The first part defined terrorism as "an act or omission committed inside or outside of Canada, that would be an offence under the major international treaties that apply to terrorist activities" (Anti Terrorism Act, 2001). This includes any activity in violation of any of the United Nations anti-terrorism conventions, including but not exclusive to hijacking or terrorist bombing (Roach, 2015). The second part of the provision defines "terrorist activity" as an act or omission undertaken, inside or outside of Canada for a political, religious or ideological purpose, objective or cause, that is intended to intimidate the public with respect to its security, including its economic security (Anti Terrorism Act, 2001). This also includes omissions used to compel a person, government, or organization from doing or refraining from doing any act that would lead to intentional serious harm (Anti Terrorism Act, 2001; Department of Justice, 2017; Dietrich, 2014). Lastly, this definition includes threatening the public or Government by killing, seriously harming or endangering a person, causing substantial property damage that is likely to seriously harm any persons, or by interfering with or disrupting an essential service, facility or system (Webb, 2005).

Subsequent 2015 amendments to the *Criminal Code* under the *Anti Terrorism Act* expanded this definition of terrorist activity and previously established terrorism-related offences for which an individual can be charged in Canada. The newest *Anti Terrorism Act (2015)* still refers to the section 83.01 definition of terrorist activity, however, included conduct that “undermines the sovereignty, security, or territorial integrity of Canada, or the lives of the security of the people of Canada”. This addition extended the definition beyond harms done onto the Canadian state, and onto individuals and their property. Moreover, the law also criminalized activities that take place in Canada, but undermine the security of another country (Public Safety Canada, 2016).

Alongside this amended definition, the *Anti Terrorism Act* instituted a new legal chapter of the *Criminal Code* that established new offences, charges, and related punitive sanctions for terrorism activities (Department of Justice, 2017a; Roach, 2012). First, the ATA added section 83.19 to the *Criminal Code* criminalizing the most extensive range of terrorist offence(s) deemed “knowingly facilitating a terrorist activity” (Amirault et al., 2016; Shaffer, 2001). This section encompasses a broad range of terrorist offences that are liable to imprisonment for a term not exceeding fourteen years, including the commission of a serious indictable offence for the benefit of, at the direction of, or in association with a terrorist group/ entity (as defined in section 83.01) (Roach, 2012; Webb, 2005). Offences of “advocacy or promotion of terrorism” were added to the *Criminal Code*, punishable up to five years of imprisonment (Alford, 2016). The Canadian Government also attempted to crack down on terrorist propaganda by criminalizing the distribution of materials and authorizing judicial seizure/forfeiture of related goods. Lastly, offence categories were also broadened by the admission of conspiracy to commit any act or omission outlined in section 83.01(1)(b)(ii)(A) to (E), accessory after the fact, or counseling in relation to any such act or omission (Public Safety Canada, 2016).

Criminalized offences for group related conduct have been expanded under section 83.19 to acts of “knowingly participating in, or contributing to any activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity” (Alford, 2016; Jenkins, 2003). Accordingly, section 83.22 was added to the *Criminal Code* criminalizing acts of “knowingly instructing, directly or indirectly, anyone to carry out a terrorist activity” as an indictable offence and liable to a sentence of life imprisonment (Jenkins, 2003). Section 83.23 included a “harbouring” offence for anyone who knowingly harbours or conceals

terrorist persons or materials to enable said activity as liable to an imprisonment term of up to ten years (Amirault et al., 2016; Forcese & Roach, 2015).

Part 4 of Canada's *Anti Terrorism Act* amended sections of the *Criminal Code* to create new terrorist financing laws, criminalizing activities related to the property or materials involved in terrorism crimes (Goldsmith, 2008). It is now a criminal offence to collect, use, possess, invite a person to provide, or make property available (financial or other related services), with the intention of or knowing they will be used in whole or in part for terrorism purposes (Bill C-51, 2015; Lennox, 2007). These varying provisions established a maximum penalty of ten years for offences including any economic connection with "terrorist activity" or "terrorist group" entities, as defined within 83.01 of the *Criminal Code* (Jenkins, 2003; Webb, 2005). The *Anti Terrorism Act* amended section 83.14(5) of the *Criminal Code* to provide Judges forfeiture powers over an accused's property if it is "owned or controlled by or on behalf of a terrorist group, or has been or will be used to facilitate a terrorist activity" (Webb, 2015). Any failure to disclose the existence of any property intended for use by a terrorist group, or any transaction in respect of such property, is also criminalized under section 83.12 and 83.1(1) (Cotler, 2005).

The *Anti Terrorism Act* was equipped with built-in legal safeguards that extend the State's ability to charge and sentence an offence for terrorism-related crimes (Roach, 2012). For instance, Section 83.18(2) of the *Criminal Code* was added under the ATA, stipulating that criminalized terrorist activities remain offences regardless of whether the ultimate terrorist means or goals are carried out (Department of Justice, 2017; Webb, 2005). Section 83.19(2) also ensures that the listed activities remain indictable offences regardless of whether the facilitator knows the specific nature of the acts in question, or that they constitute the definition of a terrorist activity under Canadian law (Amirault et al., 2016; De Goede & De Graaf, 2013). Prevention initiatives also extended the law to include a temporal element, which broadened the scope of indictable terrorism offences for which individuals may be subject to sentence(s) of imprisonment (Bell, 2011). For example, beyond the general concept of accessory after the fact, harbouring or concealing terrorist activities constitute indictable offences whether taking place before or after the commission of the prohibited activity (Lafree & Hendrickson, 2007).

Enhanced offence categories within the *Anti Terrorism Act* were supplemented by new *Criminal Code* sentencing provisions (Berkell, 2017; Penney, 2015). The law raised minimum penalties from ten to fourteen years for a broader range of offences, such as participating in or

facilitating terrorism (Amirault et al., 2016; Jenkins, 2003). Offences eligible for sentences of life imprisonment were extended, alongside the ability of the judiciary to impose maximum penalties for terrorism-related offences (Bell, 2011; *Anti Terrorism Act*, 2015). Now, a person convicted of an indictable offence (other than an offence for which a minimum life sentence is already imposed), is liable to receive a life sentence “if the act or omission constitutes the offence also constitutes a terrorist activity” (*Anti Terrorism Act*, 2015). The courts have also allocated Judges the discretion to raise the parole ineligibility periods for those convicted of terrorism offences from either one-third of a sentence or seven years, whichever is shorter, to one half or ten years (De Goede & De Graaf, 2013).

Under Canada’s current national security policy, legislation requires terrorism crimes to be sentenced under the regulatory procedure of the *Criminal Code*, with particular functions granted exclusively by the new *Anti Terrorism Act* (Public Safety Canada, 2017; Forcese & Roach, 2015). As in all criminal cases, terrorist sentencing remains a highly individualized process, dependent upon the particular facts at issue and circumstances of the offender (Public Prosecution Service of Canada, 2018). Accordingly, the courts have argued that terrorism offenders must be subject to the same principles of proportionality as other regulatory *Criminal Code* offenders (Cotler, 2005). However, terrorism sentencing is unique under Section 718.2(a) of the *Criminal Code*, requiring that a sentence be increased or reduced to account for relevant aggravating or mitigating circumstances related to the offence or the offender. Evidence confirming terrorism offences are commonly used as aggravating circumstances, representing the preeminent justification for ancillary sentencing decisions (Dietrich, 2014). Furthermore, due to the unique nature of terrorist crimes, the Supreme Court of Canada has affirmed that denunciation and deterrence, both specific and general, are to be used as the paramount sentencing principles for terrorists (Public Prosecution Service of Canada, 2018). Overall, the Canadian court has committed to enforcing sentences exceeding twenty years for terrorism offenders who knowingly engage in activity that is designed or likely to result in the indiscriminate killing of human beings (Marquardt, 2018).

Judges are to uphold many sentencing requirements established for regulatory *Criminal Code* offences. Section 718.2(b) maintains “a sentence should be similar to sentences imposed on similar offenders for similar offences committed under similar circumstances” (Canadian Bar Association, 2015). Sentencing for multiple convictions must not amount to an unduly long or

harsh punishment when consecutive sentences are imposed (Department of Justice, 2017). Sentencing Judges must consider all available sanctions other than imprisonment in terrorism cases that are reasonable under the circumstances, and consistent with the harm done to victims or the community (Roach, 2003). Accordingly, if less restrictive alternative sanctions are appropriate for penalizing the crime(s) committed, neglecting those options may deprive the offender of their liberty (Alford, 2018; Criminal Code, 1985).

1.3.3 Applications of Canadian Counter Terrorism Sentencing Law: A Critical Review

Critical scholars have assessed the implementation and enforcement of newly securitized Canadian charging and sentencing laws. First, the combined series of *Criminal Code* legal amendments are criticized for creating conflicting sentencing objectives. Judges face significant challenges emphasizing deterrence and denunciation to attain the desired severity, while withholding certain principles that may deem the punishment too harsh or obstructive of certain offender rights (Criminal Code of Canada, 1987; Pluchinsky, 2008; Forcese & Roach, 2015). Furthermore, Robert Diab (2011) has denounced the Canadian Court system for imposing a wide range of penalties in analogous cases. He argues that these wide ranges of sentencing outcomes are quite extensive, where Canadian cases have experienced sentencing ranges of 2 years to life imprisonment for serious crimes, while lesser crimes have constituted sentences of no time served to 10.5 years incarceration (Diab, 2011).

Disparate sentences in cases with similar offender characteristics, criminal misconduct, and aggravating and mitigating circumstances have raised questions over sentencing discrimination (Bushway, 2001). For Daly & Tonry (1997), sentencing discrimination exists when legally irrelevant characteristics of a defendant affect the imposed sentence after all legally relevant variables have been taken into consideration. This phenomenon is associated with the terrorist sentencing process, as extralegal variables such as race, class, gender, and religious beliefs may be enforced to a greater extent than relevant legal variables of the crime (Bushway, 2001). Although lacking empirical evidence and an emerging field of analysis, these academics have alluded to the possibility that this process may occur exclusively for immigrant offenders (Bushway, 2001; Daly & Tonry, 1997).

Observed inconsistencies in sentencing outcomes have been attributed to legally authorized prosecutorial strategies that shape judicial decision-making (Ahmed, 2017). Without standardized legal regulations, the practices of Canadian prosecutors are known for broadening

the Canadian definition of terrorist activity. Observations of prosecutor's discretionary use of Criminal Code section 83.01 have concluded that they apply varying levels of terrorism participation as a legally distinct type of crime, as well as an aggravating factor (Amirault et al., 2016; Forcese & Roach, 2015). Robert Diab has identified that prosecutor's highlight aggravating elements such as leadership roles, recruitment practices, or planning an attack motivated by race, ethnicity or religion, to mask mitigating elements (Diab, 2011; Diab, 2014). Similarly, Damphousse and Shields (2007) have uncovered patterns in prosecutorial conduct that has selectively highlighted political elements of the alleged crimes or motives of the offender that would require sentences within the higher imprisonment ranges by law (Damphousse & Shields, 2007; Smith et al., 2005). From these factors, prosecutors applying new anti-terrorism laws have more evidence to convict, while providing Judges with more evidence that weighs in favour of severe sentences (Irwin, 2015).

Given Canada's counter terrorism responses to the national security threats, literature has also recognized the social and political impacts on race relations within in the post 9/11 West. Although a proclaimed multicultural nation, Canadian scholarship conveys a unique racialization of the foreign body in the "War on Terrorism". Factors contributing to these established identities will be demonstrated in the following section.

1.4 Race and Identity Formation in the Canadian Counter Terrorism Environment

Under the framework of contemporary liberalism, race has long been analyzed as a cultural representation of the social reality of power, values, and relations operating within democratic societies. Emerging circumstances such as globalization, immigration, and the post 9/11 "War on Terrorism" have initiated new meanings to race relations when situated within the securitized West (Nagra, 2011). The following literature review will deconstruct racial discourse historically applied within Western democracies to unravel the unequal relations imbedded within such language. To deconstruct these racial discourses within the post 9/11 era, researchers have examined the policies, rules and practices governing the production of such narratives. Discourses will specifically reference Westernized conceptions of Muslim identities situated within the race-based construct of nationality (Muller, 2004). Accordingly, scholarship has paid particular attention to the use of these identity formations to reinforce sovereign powers over these racialized "others" (Agnew, 2007).

1.4.1 Canada's Historical Racialization of Foreign Identities

For some researchers such as Goldberg (1992) and Winant (2000), race is understood as a variable social outcome, establishing differential roles, order and relationships throughout various periods of time. The study of race at any historical moment necessitates an understanding of the concepts and codes of the relevant cultural framework. In this regard, studying historical outcomes of race relations in a particular society informs understandings of identity formation attributed to phenomena deemed 'racial' in modern frameworks (Agnew, 2007). Thus, prominent literature has deconstructed Canada's historical experiences with race in an attempt to inform the current post 9/11 "persistence of racial classifications and stratification in an era officially committed to racial equity and multiculturalism" (Goldberg, 1992; Winant, 2000).

Today's formation of the national subject-as-citizen stands at the center of Canadian national history, based on the racial categorization of foreign populations against the national self. Part of the ongoing colonial project, British and French settlers were cast as the true subjects of the colony, while the indigenous "Aboriginal" communities and other non-conforming groups were expelled as the enemy "outsider" (Razack, 2004). Aboriginals have long been marked as "backwards", deceitful, primal beings, whose belonging would infringe upon the nation's welfare and prosperity (Garneau & Nagra, 2018). In contrast, the white national was inherently rational, law-abiding, and benevolent, to whom the nation's future was dependent. Only could non-preferred aboriginals and immigrants be afforded the same citizenship and nationality rights if they abdicated their cultural and racial identities to acquire the values and principles established by the preferred, legitimated white national (Hoodfar, 1993; Kruger et al., 2004). Thus, the white national identity as the "preferred race" was born and legitimized through comparative disassociation with characteristics of the "non-preferred" racialized immigrant or aboriginal population (Thobani, 2007).

The colonial effect of this historical "othering" of the non-preferred "other" has led to a hierarchized triangular configuration of subjects within pre-modern societies that remains today. In this hierarchy; the national is exalted at the centre of the State's commitments, citizenship rights and human security; the immigrant receives a tenuous and conditional inclusion based on physical and cultural distinction; and the aboriginal is marked for loss of sovereignty and rejected similar privilege (Dua, Razack, & Warner, 2005; Nagra, 2017; Thobani, 2007). With these colonial roots, racial constructs of Canadian nationality, citizenship and belonging have

been sustained by historical relations of power, and have developed into a singular model of a universal, and homogeneous modern subject (Mackey, 2002).

1.4.2 Formation of Difference: The National Subject versus the Foreign Other

Literature recognizes parallels between the colonial violence done onto indigenous populations and the mid-twentieth century treatment of non-European (non-western) immigrants. Immigrants have been party to this ongoing colonization of aboriginal peoples as foreign “others”, integrated within the Western structure of nationalism by global conditions of war and globalization (Arat-Koc, 2005). For instance, the State has targeted “others” for possessing irreconcilable differences that conflict with the West’s valued principles of democracy. Thobani (2007) illustrates these fundamental differences: “the national is law-abiding where the outside is susceptible to lawlessness; the national is compassionate where the outsider has a tendency to resort to deceit to gain access to valuable resources; the national is tolerant of cultural diversity where the outside is intolerant, placing loyalty to title of kin and clan above all else; and more recently, the national is supportive of gender equality where the outsider is irremediably patriarchal” (pg. 3). If national subjects fail to live up to these qualities, they are treated as individual and isolated incidents. However, failings on behalf of outsiders are considered inadequacies of their community, culture, and entire “race”. Conversely, their successes are treated as individual and isolated exceptions (Thobani, 2007).

This formation of difference between the national subject-citizen and the foreign other has also been accomplished through exaltation (Arat-Koc, 2005; Dua et al., 2005; Garneau & Nagra, 2018). Exaltation allows the State and accepted national subjects to actualize their Western race and cultural character as ontologically distinct from the foreign “strangers” within their borders (Dhamoon & Abu-Laden, 2009). National subjects use exaltation to “reproduce their sense of “goodness” in the forms that are legitimately prescribed within a particular national formation, bonding with its compatriots and reproducing the nations mores and values along with, and as intrinsic to, the subjects own individualized humanity” (Thobani, 2007, pg. 10). Thus, exaltation provides an axis to promote cohesion and acceptance of the western national subject, and intolerance or exclusion for those that do not embody the exalted qualities (Thobani, 2007; Winter, 2014; Mackey, 2002). Interestingly, Sharma (2006) argues that the State uses exaltation to promote “Canadian values” of freedom, democracy, and diversity to supersede the

equally “Canadian” practices of colonialism, imperialism, and the subsequent racism experienced by the foreign other.

Exaltation has become a guise for citizens to protect the erosion of “our” nationality (Agnew, 2007; Thobani, 2007). Though the trope of the citizenship, national subjects are the legitimate heir to the rights and entitlements proffered by the Canadian state (Miles & Brown, 2004). These rights of passage afforded to subjects of the State positively command respect at the locus of State power (Anderson, 2008). Through processes of exaltation, these rights and entitlements have created a material stake for insiders to protect this valued identity from the encroachments of irresponsible and undeserving “others” (Muller, 2004).

1.4.3 Racial Constructions of the Muslim Enemy in the post 9/11 Context

September 11th and subsequent terrorist events have prompted racial interpretations of Middle Eastern populations within Western counter-terrorism discourse (Mackey, 2002). Popularized terms such as “Arab- Westerner” or “Muslim- Westerner” are labels used interchangeably to characterize a variety of people based on their ancestral lineage from predominantly Arab speaking nations such as in Southwestern Asia, North Africa or the Middle East (Zine, 2012). Importantly, racial signifiers such as names, physical appearances, or belief orientations that are consistent with the Arab Muslim “other” have become stereotypical determinants for terrorism identifications (Finn, 2011; Muller, 2004; Zine, 2012). Therefore, the exploitation of racial characteristics has become integral in distinguishing legitimate national subjects from “dangerous” immigrant aliens.

Some scholars emphasize the various consequences of racialized labeling of Muslims in the “War on Terrorism” (Dua, Razack & Warner, 2005). Known as “Islamophobia”, the Muslim body has been dismantled into racialized components to portray their identity as the omnipresent enemy, consequently producing prejudicial effects (Finn, 2011). Islamophobia operates by first, representing specific physical “Muslim” identifiers as markers for suspicion, including facial hair, certain articles of clothing, or veiled women (Finn, 2011). This phenomenon includes the religious interpretation of Islam as a predominantly fundamentalist faith, rather than as a source of spirituality, an element of ethno-cultural identity, a marker of geography, and an official state ideology of many countries around the world (Ashgharzadeh, 2004). In consequence, Westerners who share racialized characteristics associated with perpetrators of the U.S. September 11th attacks, or popularized incidents around the Western world, have become directly linked with the

identity of the “dangerous Muslim enemy” (Dhamoon & Abu-Laden, 2009; Nagra, 2011). For example, Pakistanis, Indians, Parsis, Hindus, Sikhs, Arabs have been demonized, and individuals affiliated with these traditional belief systems have become identified as culturally predisposed to express hatred and violence towards the West (Hoodfar, 1993).

Sanham (2006) illustrates how this Muslim stereotype in the “War on Terrorism” is similar to the race-classification of the black/white binary. Whiteness has the power to define who is and who is not a legitimate “Westerner” with respect to race, class, culture, gender, and nationality (Creese & Kambere, 2003). During the earlier period of Arab immigration, Arabic speaking peoples were phenotypically considered as part of the “white race” European majority (Sharma, 2006). This was an integral part of the dominant culture in racialized societies such as Canada, although subtle and invisible (Sharma, 2006). However, this has changed in recent decades of the post 9/11 “War on Terrorism”, where the Arab now occupies a space in between the typical racialized black and white binary as a tainted racial minority (Byng, 2008; Nagra, 2011).

Due to this popularized identity of the “dangerous” Muslim enemy in the “War on Terrorism”, a racial hierarchy has formed within western nations (similar to that of historical colonialism). Within this hierarchy, the “Arab Westerner” occupies the space at the bottom, while those deemed the proper westerner (absent of Arab or Muslim racial characteristics) maintain highest social and political positions (Dua, Razack, & Warner, 2005). This hierarchy is reinforced by the mentioned stereotypes, instigating action on behalf of the privileged to exclude or eliminate one ethnic group or historical collectivity based on racial and cultural hereditary and unalterable differences (Zine, 2012). This hierarchy illustrates how racial interpretations situated within the context of post 9/11 conflict have created a position of power and privilege for the accepted national subject (Thobani, 2007).

Together, the social, physical, ideological and religious identifiers of the Muslim “other” have become markers for exclusion in the post 9/11 West. For “others” to be accepted as national subjects, they must revoke these identity markers through the acceptance and adoption of Canadian values (Fekete, 2004; Finn, 2011). This forced assimilation of minorities has created a switch from democratic multiculturalism to what Fekete (2004) claims “mono-culturalism” or cultural homogenization. Instead of Western governments applying principles and practices of multiculturalism and integration, they have created criteria for selection (Fekete, 2004). The

promotion of Western mono-culturalism through the condemnation of Muslims incites racial intolerance while securing a powerful collective for sovereign rule.

Some scholars such as O'Brien (2001) attempt to discredit these racial stereotypes. He contends that the post 9/11 conception of the Muslim enemy is merely a western invention based on biased and misguided information. There is a common misperception that Islam unifies all Arabs. Countering this narrative, O'Brien highlights how individuals from the Middle East participate in an array of religious practices that are predominantly Christian, Catholic or Protestant denominations (2001). His empirical research investigating terrorist incidents in the United States during the 1990s confirms this reality; that an extremely small number of terrorists have been linked to Islamist inspired groups. In terms of extremist violence, only a tiny proportion of Arabs are ideological extremists, and only a minute number of these extremists become terrorists (O'Brien, 2001, p. 421). Therefore, the identity of Islam, the Arab, and the Muslims as "terrorist" is propagated on a misinformed racial label reinforced by the "War on Terrorism" (Li, 2007).

Terrorism Initiatives, Increased Security, and the Racialized enemy

Emerging scholarship has started to address how Western representations of racialized foreignness have pervaded State counter terrorism responses (Razack, 2007). These responses include those introduced within amended legislation such as the Canadian *Anti Terrorism Act*, and the enhanced national security strategies of advanced enforcement (Fekete, 2004). Some have taken a critical approach to this research to problematize the use of new securitized legal powers onto foreign others exclusively (Thobani, 2007). Muslim individuals residing within the west have been recognized as a targeted population, harassed, confined and marked for sophisticated surveillance techniques, pervasive border control technologies and the exclusionary mechanisms by both law enforcement officials and ordinary nationals (Dua, Razack & Warner, 2005). In consequence, enforcement techniques recast this figure of the Muslim dangerous outsider as the archetype of the current global threat in the Western imagination (Finn, 2011).

1.4.4 Nationalizing the Western Identity as a Culture of Superiority ("The West vs the Rest")

Prominent criminological literature highlights the importance of a process called the "nationalization of the West". Based on racial constructs, Western States have organized national identities into a single archetype, used to distinguish people of the "West from the rest". The former is constructed as a place with an internally homogenous and united identity, while the "rest" are deemed inherently dissonant outliers (Li, 2003; Thobani, 2004). As a result of these

evaluative processes, the Western identity has developed its own sense of superiority (Razack, 2007).

Canada, as a Western nation, has adopted these nationalization processes years following September 11th. Typically, scholars have been interested in the way discourses such as legislation, political narratives (speech's, mandates, conferences etc.), and media outlets have portrayed Canada's identity as superior. These discourses have characterized Canada as a diverse country, grounded in bilingual multiculturalism, and deeply influenced by principles and values idolizing a culture of tolerance, democracy, and equality (Howell, 2005; Lee, 2002). Moreover, Canadian national subjects are celebrated due to their affiliation with these politically and culturally "superior" principles, ingrained within their ideologies and actions (Smith, 2011).

This "superiority" of Canadian or Western national subjects has problematized the culture, values, behaviors and attitudes associate with the inferior foreign "other" (Thobani, 2007; Thobani, 2004). Comparatively, racialized people emerging from developing or failing states are considered prone to conflict, while Canadians are inherently prone to peacefully resolve differences in an orderly fashion and respect for parties involved (Howell, 2005). Populations of the foreign "others" engage in, or are at risk of engaging in conflict due to ethnic strife and intolerance, while Canadians exhibit a natural and historical ability to maintain a "diverse, multicultural society capable of transcending the narrow politics of ethnic and cultural difference" (Canada, 2005; DFAIT, 1995). Due to the mentioned shortcomings, foreign others have been marked as "in need" of Canadian intervention, and exposure to the highly regarded cultural practices of the "superior nation" (DFAIT, 1995; Howell, 2005). As a result, Canadians not only consider themselves as in possession of the values that comprise a good superior nation, but as a country capable of saving or overriding the oppositional values of "others". Therefore, Canada and its citizens maintain both a superiority complex, and a saviour complex.

Due to this inherited superiority from the nationalization of the West, Arat-Koc (2005) argues that a new form of power has emerged on behalf of those deemed national subjects. In the wake of September 11th, "western" people occupy "real political citizenship" and therefore possess the freedom to express their political, ideological values, views, and belief systems (Arat-Koc, 2005). On the contrary, foreigners are repressed and silenced as the illegitimate "other" (Arat-Koc, 2005).

Within recent scholarship, processes of nationalization have been used to contextualize the inherent dissonance between Western nations and the common "other" (Finn, 2011). Some of the most significant work in this field references Samuel Huntington's (2011) thesis known as the "Clash of Civilizations". Huntington depicts the West's irreconcilable differences with the "other's" racialized identities, religious practices, and adherence to primitive cultural traditions (Huntington, 2011). He argues that people who are culturally alike can co-exist in a harmonious shared world; however, this relationship is spoiled by the fear and angst that emerge in the presence of the unknown foreigner (Huntington, 2011). Present within the post 9/11 West, ongoing patterns of conflict between cultures has impinged a political identity of foreigners as potential suspects or outright enemies of the State (Fekete, 2004; Honig, 2001). Because cultures are distinctly unchanging entities, this "clash" cannot be reconciled (Arat-Koc, 2005). As conflicting cultural values and practices are increasingly exposed to one another in the face of modernity, Nation-States also use their similarities to strengthen and unify national subjects as a superior "one" (Garneau & Nagra, 2018; Razack, 2005).

Similarly, Edward Said's *Orientalism* (1979) demonstrates the historical racialization of Islam in opposition to the Western political, social, ideological, and cultural European identity. Due to this inferiority complex and the use of Orientalist tropes, all individuals identified by this Muslim guise, either by the State or by individual acclamation, are deemed backwards, inhuman, and uncivil (Said, 1979). Following the events of 9/11, popularized rhetoric on behalf of political figures, media representations, and public contestations have preserved these orientalist mechanisms of "othering" (Nagra, 2011; Zine, 2012). Identifications of the inherently uncivilized enemy as the foreign other/ "orient", continually labels the "rest" as impeding the safety of the West (Nagra, 2016). Subsequently, this process also promotes the construction of the superior national-self, and the need for the west to coalesce as one united entity (Amin-Khan, 2012; Thobani, 2004).

Critical scholars have found an issue with representations of the Canadian superior identity. Stairs (2003) published one of the only critical analyses of this narrative, arguing that Canada has become smug in their moral superiority. With this attitude, Canadians believe that their shared national values are "unusually virtuous", special, and distinct compared to those of other global nations. Stairs exposes the lack of practical evidence to substantiate such a position (Stairs, 2003). For example, Canada has positioned itself as a non-colonizing nation, valuing

respect for diversity and multiculturalism. This narrative misrepresents and outright ignores the historically racist injustices suffered by Aboriginal Canadians at the hand of white settler societies, commonly described as the genocide, enslavement and exploitation of racialized people (Stairs, 2003). Additionally, Canadian values are promoted as the ideal environment for welcoming immigrants who are seeking refuge from persecution within their homeland. These statements disregard the longstanding gender, race, and class criteria that remain implicit to Canadian immigration practices alongside the unsuccessful social integration of these people (Jopkke, 2005; Stairs, 2003). Stairs (2003) further argues that these “superior” values have been collectively abandoned in the face of competing self-interest or emergency circumstances such as the securitized conflicts within the “War on Terrorism”. Therefore, the simple articulation of “Canadian values” as peaceful, tolerant and orderly has produced a narrative of liberal Canadian superiority that fails to acknowledge Canada's less-than-noble actions.

1.4.5 Racialized Identities and the Paradoxical Relationship with Democracy

Dominant rights-based literature has addressed the Canadian State's commitment to upholding democratic rights and liberties within its national security agenda, integrating progressive approaches to race and nation formation. Proponents argue that principles of diversity (multiculturalism), liberty, and justice, met with values of fairness and equality, are said to reject the exploitation of individuals based on race, colour, origin, or other essentialized features (Li, 2007). Moreover, democratic principles of equality recognize “congenial and primordial features as having no relevance in determining the dignity, capacity and social worth of individuals” (Li, 2007, pg. 41). Democratic commitments to multiculturalism objectives reinforce societal integration of race and various cultures within its borders (Li, 2005; Smith, 2003). For these reasons, among others, scholarship has concluded that these commitments to democratic principles and practices reject racial exclusion, while ensuring the protection of race are common practice.

On the contrary, literature has also questioned these national commitments. Empirical research into western nations demonstrates that race relations operating within liberal democracies exceed the so-called “strict” margins of dominant democratic principles. Henry and Tator (2002) have developed what they term “democratic racism”, as an ideology that reconciles the tendency for democratic principles of equality and justice to coincide with negative feelings about minorities. Similarly, Li (2007) recognizes the prominence of rights-based discourse used

by State actors to target certain races as undesirable and detrimental to societal functioning. He argues that the State can use this discourse to trivialize and essentialize cultural differences without appearing “racist”, by showcasing differences in a positive light for a multicultural society (Li, 2007). Hardt and Negri have deemed these Western tendencies as the “new racism”, allowing powerful actors to adopt strategies that overtly support anti-racism and pluralism, while covertly operating within a racialized system of control (2000). Other scholars recognize how rights-based discourses have become racialized and further developed into common practice within the Canadian social sphere, impacting the widely shared system of interpretations or understandings of race, culture and integration (Hardt and Negri, 2000; Razack, 2007).

Some socio-legal research argues that traditional democratic commitments enabling the free flow of information have permitted the dissemination of racialized discourse and constructions of the Muslim enemy in Canada. Freedom of thought and expression promote open communication that fosters racialized viewpoints (Beutel, 2007). These sentiments become problematic if unconventional and anti-establishment viewpoints escalate into civil disobedience or racialized violence, or initiate prospects for future racialization (Eubank & Weinberg, 2001; Forcese & Roach, 2015; Jacoby, 2016). In conclusion, the Canadian Government’s response to pressures to uphold fundamental rights and liberties have created a unique threat environment where individuals can incite anti-democratic values (Gartenstein-Ross & Frum, 2012).

This free flow of information within the Western media has played a part in manufacturing this intolerance by popularizing the racialized identities of the “foreign enemy” versus the “western ally” (Anderson, 2016; Appadurai, 1986; Li, 2003). Literature recognizes significant patterns within the media that construct these racialized identities through the “work of the imagination” (Thobani, 2007). First, reports by columnists and editorial writers have continually emphasized Muslim participation in global acts of terrorist violence, using discursive imagery such as “Jihadi’s among us”, “your neighbourhood the terrorist” to reinforce the frames of moral panic and fear onto Canadians (Amin-Khan, 2012; Thobani, 2007). Police and intelligence services legitimize these media portrayals by constructing alarmist pictures of Muslims in societies as bad, underprivileged, and dangerous (Fekete, 2004; Smith et al., 2002). Media messaging has also exalted Canadians and western nationals by characterizing the West as superior, highlighting prominent racialized differences in national character, physical traits, values, and ideological belief orientations to that of the foreign other (Zine, 2012). Similarly,

print media is used by political advocates and ruling elites to propagate the notion of a shared history and common future among the population, to define its business as being synonymous with the public interest, and reinforce nationalist and citizenship (Amin-Khan, 2012).

Importantly, the media celebrates those who reject and condemn the characteristics of the enemy foreigner (Nagra, 2017; Stein, 2003; Zine, 2012). Therefore, the media's construction of shared temporal and spatial simultaneity among nationals against the foreign other has perpetuated this environment of intolerance (Jopkke, 2005).

1.4.6 Gendered Analysis of Race in the "War on Terror"

Feminist work on nationalism within the modern age of counter-terrorism has examined how gender relations shape the construction of national identities and social/political memberships within the west. Muslim male masculinity has been constructed within the global imaginary, reduced to ahistorical and decontextualized stereotypes of radical and ideological extremist "Jihadi's" (Nagra, 2017; Zine, 2012). Literature recognizes a specific global culture of militarism and violence that fuels with masculinity complex (Razack, 2007). As the byproduct of imperial wars, Muslims boys fighting within armies, stateless gangs, or networks of terror, have been deemed "lost boys" (Zine, 2012). Fulfilling this label, Muslim youth has been traded for the brutality of the new world order, characterizing their identity as spoiled by war, poverty and destruction (Stein, 2003). When exposed to this violence as children, the propensity for Muslim boys to become affiliated with terrorism as adults is deemed high, therefore increasing their threat capacity manifold (Whitworth, 2003). Although the West constructs this identity of the Muslim male, it does not consider itself an accomplice to this suffering (Jopkke, 2005; Zine, 2012). Instead, the Canadian State applies these racialized identities within counter terrorism initiatives to achieve harsh enforcement, punitive sanctions, and legislative amendments.

In contrast to the Muslim man, literature has identified gendered effects of racialization onto the Muslim women within post 9/11 Western environments (Sharma, 2006). The Muslim woman's national identity is bound by her relationship with the Muslim man, where she remains fixed within the Western imaginary as confined, powerless and extinguished in the name of culture (Hoodfor, 1993; Razack, 2004; Razack, 2007). This rhetoric highlights two prominent narratives. First, the Muslim woman is bound by patriarchal cultural practices that are perpetrated through oppressive circumstances and the denial of agency (Finn, 2011; Nagra, 2017; Razack, 2005). Secondly, the Muslim woman is perceived as a prominent threat in the "War on

Terrorism”, operating at the hand of her Muslim male counterparts to help plan and execute violent attacks (Razack, 2004). This threat of the Muslim woman also relates to her reproductive abilities to create undesirable populations of potentially future terrorists (Razack, 2004). These gendered interpretations of male and female Muslim bodies have served to discount and condemn their cultural ideologies and practices in comparison to the accepted democratic principles (equality, justice etc.) that are upheld within nations such as Canada (Razack, 2007).

Literature addressing racialized identity formations within post 9/11 Canada have inquired into the underlying sovereign power that has permitted and encourages such exclusionary treatment. The following section will discuss the expansion of State power under new national security laws, and how the racialized exclusionary environment of the “War on Terrorism” is reinforced by legal, social and political capacities attributed to the use of such power.

1.5 State Power

1.5.1 State Power in Emerging Counter Terrorism

Since the pivotal September 11th terrorist attacks, legal transformations have attracted scholarly investigation into newly configured applications of State power (Welch, 2007). The “War on Terrorism” has been deemed a unique era of emergency, wherein the Sovereign (the exclusive law-making entity) has gained considerable amounts of power (Campbell, 2008; Forcese & Roach, 2015). With this power, the sovereign has the authority to operate outside of prescribed law to execute enforcement action, including investigatory powers, or powers to convict and enforce severe punishment (Welch, 2007; Lafree & Ackerman, 2009; Simon, 2007). In this regard, literature has identified the bounds of this power as a “grey zone”, whereby the legality of “executive oriented”, “catch-all”, and “judge proof” State powers can be difficult to determine (Campbell, 2008). In some circumstances, the use of securitized powers can be so obviously outside the grey zone and into the sphere of illegality that the State has been recognized for its failure to uphold commitments to the rule of law (Campbell, 2008).

Outside of legal scholarship, socio-legal literature has also taken interest in applications of State power within post 9/11 nations. These scholars do not focus on this “top-down” executive-oriented approach, rather they seek to unfold the messages this power conveys to society. With the employment of such powers, particularly associated with minority communities (e.g. Muslim), this literature has been critical of State’s participation in negative, contradictory messaging, which promotes a paradoxical view of the anti-terrorism law as a source of injustice,

legal failing and rights infringements (Mohiuddin, 2017; Whitaker, 2012). Moreover, this use of newly obtained exceptional State power has been recognized for its unfavorable impact on migrant populations. This is a prominent pattern recognized by Western Governments partaking in post 9/11 securitization, including Canada.

1.5.2 Frameworks of Resistance and Contesting State Power

Pantazis and Pemberton (2013) have formulated three “frameworks of resistance”, established on behalf of individuals and communities contesting the post 9/11 expansion of State power. First, the human rights framework challenges the encroaching use of state power onto individual liberties, (Pantazis & Pemberton, 2013). Non-government organizations (NGO's), politicians, and judicial actors have all promoted the need to ensure that security initiatives uphold democratic rights and liberties (Pantazis & Pemberton, 2013). Similarly, the second “freedom framework” seeks to remove “unnecessary” state powers that control civilian freedoms, or limit individual abilities to participate in social, economic and political life (Pantazis & Pemberton, 2013). These interferences include counter-terrorism measures such as surveillance, and the broadening of police investigatory powers (Pantazis & Pemberton, 2013). Lastly, the “criminalization of communities” framework attempts to expose the harmful impacts of exceptional State power on communities. This framework has identified highly charged political discourse, the new array of discretionary legal powers (particularly those contained within the Anti Terrorism Act) and the broadened definition of terrorism, as instrumental to creating prejudicial conditions in which particular groups, mostly Muslims (Pantazis & Pemberton, 2013).

1.5.3 Frameworks of Resistance and the Canadian Counter Terrorism Environment

Legal scholars have defined the transformative qualities of these frameworks by their ability to build counter-hegemonic discourses that advocate for an alternative security paradigm (Welch, 2007). Canada has witnessed its post 9/11 national security agenda become materially impacted by these frameworks, which have prompted individuals, groups and stakeholders to analyze the issues securitized legal initiatives have created, and opportunity for transformative change. Together, the rights framework, the freedom framework, and the criminalization of community's framework have been adopted by those in opposition of security initiatives, used to question the future of the Canadian national security agenda, and create proposals for change. Recognizing each framework's stated grievances with Canada's anti-terrorism strategy, emerging securitized initiatives have begun working on community relations to both mitigate and repair

the negative effects of enforcement (Jacoby, 2016). Moving forward, Government and State actors propose to work with groups and stakeholders, to assist in reparation, address concerns, and formulate a strategic action plan that is beneficial for all frameworks (Pantazis & Pemberton, 2013).

1.6 Conclusion

As witnessed in this chapter, post 9/11 legislation and enforcement initiatives are a useful site through which scholars have examined modern Western processes of identity construction, especially in the insecurity presented by the modern “War on Terrorism” (Mackey, 2002). Specifically, this literature demonstrates how Canada’s historical racialization’s of the identity of the foreign “other” have evolved into modern conceptualizations of exalted national subjects versus the foreign body. These identity constructions have been enhanced by the modern “War on Terrorism”, specifically the western interpretation of “Muslim” racial and cultural practices that have formed the common enemy. These sentiments are further presented by State securitization techniques that seek to popularize the identity of the foreign enemy, namely through the nationalization of the West, and instituting the hierarchy of the national subject as superior to the foreign other. As a technique of new exceptional state power, harsh sentencing capacities can reinforce this popularized identity in institutional form. Furthermore, some scholars highlight the assemblage of these categories, examining the inequalities among them, while stressing the agency of migrated subjects in their accommodations to, compromises with, and contestations of discriminatory policies and practices (Thobani, 2007).

Although literature has analyzed this intersection of post 9/11 securitized enforcement, sentencing severity, and the potential racialization of the Muslim body, significant gaps remain. Literature is limited in its critical examinations of how the Canadian state has used new anti-terrorism laws to discursively construct terrorism, and the subsequent effects on those residing within the polity. The Canadian judiciary has been largely overlooked as a branch of government perpetuating this rhetoric. This relates to discourse contributing to the racialization of terrorists within processes of exclusionary “othering”. This includes the effects of terrorism sentencing discourses onto broader Muslim populations in the West. This thesis will address this gap by examining these discourses to answer the following research question: How does the Canadian judiciary discursively construct the specificity of terrorism offences within sentencing decisions and what are the social and symbolic effects of this rhetoric capable of implicating broader

populations? To supplement this thesis' contributions to the established literature, Giorgio Agamben's *The State of Exception* provides theoretical insights into how the judiciary has applied policies and practices to construct terrorism in ways that may implicate Muslim foreign "others" within this narrative of "othering". The following chapter will discuss the theoretical relevance of the "War on Terrorism" as Canada's State of Exception.

2. THEORETICAL FRAMEWORK

Giorgio Agamben: “The State of Exception”

2.1 Introduction

Developed by philosopher Giorgio Agamben, The State of Exception is a modern legal theory discussing Sovereign power over human life operating within the threshold of emergency politics (Salter, 2008). As the last volume in a three-part series, Agamben’s 2005 *State of Exception* conceptualizes former Shmittian and Foucauldian ideologies of exceptionalism, to account for the realm of Government activity transcending the rule of law, in which human life becomes the target of the organizational power of the State (Agamben, 1998; Damai, 2005). For Agamben, the State of Exception is fundamental to the legal and political traditions of the West upon which the functioning of contemporary democracies have been established (Bell, 2011; McGovern, 2012). As a result, he employs this theory to challenge liberal conceptions of the origin and nature of legitimacy afforded to contemporary democratic states in late capitalism. Namely, he argues that legitimacy is derived from a tradition of adherence to a set of legal norms that are certain, predictable and guarantee a range of freedoms in opposition to the arbitrary exercise of government power (McGovern, 2012). In doing so, Agamben further investigates an array of illiberal policies and practices that are legitimated through claims about necessary exceptions to the norm within both past and present legal and political initiatives (Agamben, 2005; Neal, 2006, p. 31). The essential task of the theory of the State of Exception is not to simply clarify the nation’s juridical nature, but to define juridical meaning, place, and relation to law as it evolves into the normative “paradigmatic form of government” in the modern world (Agamben, 2005, p. 51).

The following section will first, present Agamben’s argument that the suspension of law under the State of Exceptions is inherently connected to the juridical order, exemplified through the executive’s powerful practices over subjects of Sovereign rule (Agamben, 1998; Aradau & Van Munster, 2009; Chappell, 2006; McGovern, 2012). Section 2.3 will demonstrate how the State of Exception has evolved towards the norm within Canada’s securitized post 9/11 legal and enforcement responses to the “War on Terrorism”, with specific reference to judicial sentencing capacities. To supplement Agamben’s theoretical notions, this chapter presents Richard Ericson’s conceptual device known as *Counter Law I*. Counter Law is a legal tool used by Governments operating under the current State of Exception to amend laws in a way that erodes traditional principles in the name of national security. Consequently, this legal tool has created a

unique Canadian counter terrorism environment where the exceptional State abides by “race thinking” to distinguish individuals based on cultural, religious and ethnic identities, practices and relationships. As a result, “othering” has become explicitly prevalent within contemporary practices of modern governance, including those witnessed within the forthcoming analysis of judicial sentencing discourses for terrorist offenders.

2.2 The State of Exception as a Paradigm of Government

2.2.1 Juridical Order

As the first step in his theoretical analysis, Giorgio Agamben seeks to rationalize the State of Exception in relation to the juridical order; “although the paradigm of the exception is, on one hand, the extension of the military authorities wartime powers into the civil sphere, and on the other a suspension of the constitution (including laws protecting rights and liberties), in time, the two models end up merging into a single juridical phenomenon” (Agamben, 2005, pg. 5; Neal, 2010). Agamben rejects two schools of thought that situate the State of exception as either extra-juridical or integral to the functioning of positive law (Sherwood, 2018). Instead, he argues that the State of Exception is neither internal nor external to the juridical order, but exists within a zone of indifference where inside and outside do not exclude one another, but rather blur (Agamben, 2005; Damai, 2005; Humphreys, 2006). This zone of indifference means that the State of Exception can never be removed entirely from the law, as it is dependent its legal bounds to define the limits of the normative order (McGovern, 2012). However, The State of Exception is also predicated on the suspension of the juridical order, or abandonment of the legal limits during times of emergency, where the executive is to replace the law as the absolute power (Agamben, 2005). Although existing within a zone of indifference, the State of Exception is significant in that it represents the limits of the juridical and normative sovereign order.

Agamben applies this argument to construct what he terms a “juridical genealogy” of the State of Exception, which concerns the repeated and variegated efforts of the Western legal tradition to extricate sovereign power entirely from the habitus of law, or related, to legislate for the laws own suspension (Humphreys, 2006). This genealogy has presented unique circumstances of modern exceptional suspensions of law during times of state declared emergency, which have been used to bypass these requirements, and create a provisional abolition of the distinction among executive, legislative and judicial powers (Agamben, 2005). Agamben depicts this “bypassing” of juridical order within the State of Exception as distinctly different from a dictatorship, where laws are not continually constructed and applied (sometimes

undemocratically), but rather the law is entirely emptied of its content (Humphreys, 2006). With this suspension of the legal order, sovereign exceptionalism is not merely an oppressive abuse of what should otherwise be an adequately balanced relationship between liberty and security, subject and sovereign, but instead constitutes the very structure of sovereignty itself (Agamben, 2005; Neal, 2010). Thus, the State of Exception is an inherently juridical phenomenon existing within a zone of indifference to the legal order, which allows modern Governments to suspend or bypass juridical law as a form of sovereign power in times of emergency.

2.2.2 The Sovereign's Extension of Power

As an inherently juridical phenomenon, Agamben argues that the State of Exception is dependent upon the expansion of sovereign power to maintain the suspension of the legal order. This is made possible within the realm of sovereign decision-making as executive powers prevail over all others, possessing full discretionary authority to delegate such powers in the form of law (Agamben, 2005; Aradau & Van Munster, 2007; Nagra, 2017). He illustrates this absolutist figure of executive authority through the Roman *Auctoritas*; a figure not formally acting as the law, but which maintains the power to suspend or reactivate the law (Agamben, 2005; Humphreys, 2006). First, the *Auctoritas*, or the Government/institutional body within a State, holds the ultimate power to define an emergency as State conflict, what is in public or government interest, and what is considered necessary or worthy of protection (D'almedia, 2017). Secondly, he holds the power to decide if a citizen constitutes a danger to the state and what kind of threat they pose (Salter, 2008). Lastly, this power also translates into the ability to respond, including the situational applicability of the available laws and norms, including the outright violation or suspension of such standards (Taylor, 2009). Together, these powers of the *Auctoritas* inform an expansion of sovereign authority, and suspension of the juridical order. It is important to note that for Agamben, the sovereign *Auctoritas* does not affirm this power over life by asserting its dominion, or by presiding over a progression from natural life to politically qualified modern life (Neal, 2010). Instead, power is affirmed by the State's relationship with its subjects, where withdrawing its protections exposing certain populations to a realm of violence or lawlessness also decides their value life (Agamben, 2005; Neal, 2010).

2.2.3 The State of Exception and the Polity

With this expansion of exceptional sovereign power, the State can declare the legal status of individuals, classifying them as both subjects of politics, and human beings (Agamben, 2005). Specifically, Agamben recognizes this power as the ability to decide which lives belong to the

political community, and which will be treated only in terms of biological fact (Agamben, 1998). Agamben distinguishes these two classifications of life based on the Greek titles of *Zoe* and *Bios* (Ek, 2006). *Bios* constitutes the individuals determined as part of the “qualified” political life, while those part of *Zoe* are banned from this domain, and reduced by the sovereign as only private biological beings or “natural productive life” (Agamben, 1998; Finlayson, 2010). Agamben recognizes *Zoe* (biological life) as repositioned inside the *polis* (body of citizens), who in consequence, experience the totality of the exceptional State’s organizational power (Damai, 2005). This distinction not only bans individuals from the political community but also maintains the ability to strip the selected populous of their rights and freedoms through the suspension of law (Ek, 2006; Nagra, 2017). With modernity, Agamben argues that it is essential for the sovereign to blur these distinctive “lines” between the legitimate versus illegitimate polity, to avoid resistance, legitimate its ever-growing control, and allow the exception to ultimately prevail (Behrman, 2013).

To supplement this conceptualization of *Zoe* and *Bios*, Agamben identifies The State of Exception as bound by the relationship between the State (Sovereign), and its citizens. Agamben references this relationship as a social contract, formerly referred to in Hobbes *Leviathan*, where citizens agree to renounce their rights for a necessary political arrangement. Within this relationship, the sovereign does not denounce all civilian rights; instead, civilians allow the sovereign to retain their natural rights to everything in return for protection against biological and human threats (Agamben, 2005; Fitzpatrick, 2001; Rogers, 2008). The sovereign does not promise anything in return or guarantee how the contract will be defined or upheld (Salter, 2008). When this relationship between the state and citizen is situated within the exceptional suspension of the legal order, a space of indistinction is established where citizens are at risk of becoming a devalued form of human being. Termed *homo sacer*, this powerless form of human being is reduced to what Agamben defines as “bare life” circumstances. Constituting “bare life”, each *homo sacer* is stripped of their rights to the point where the sovereign can act upon his/her natural life, which can go as far as depriving each individual of their right to live (Taylor, 2009; Vaughn-Williams, 2008). Individuals within bare life circumstance are not “simply set outside the law or made indifferent to it”, for those who inhabit the state of exception cannot be freed from its juridical order and sovereign rule (Agamben, 2005). Instead, Agamben identifies the

homo sacer as both bound to the law and abandoned by it, as individuals are included in the juridical order “through its exclusion” (Agamben, 1998).

Agamben argues that the State uses its relationship with the *homo sacer* as a tool of sovereign control over the nations’ citizenry, especially during emergency circumstances (Agamben, 2005). Deeming a person “homo sacer” is considered efficient for a bureaucratic mandate to function, for when applying exceptional measures, one way of managing the population is to constitute them as the less than human without entitlement to rights as the humanly unrecognizable (Chappell, 2006). For example, the State’s ability to inflict bare life circumstances onto the homo sacer can threaten the citizenry with arbitrary, or at least extra-legal incarceration, degrading treatment, or torture or death in its most extreme circumstances (Neal, 2010). The sovereign maintains this tool, or form of control over the *homo sacer* by inhibiting them to establish a political voice as a democratic citizen, subsequently forcing them to be complicit to the very exceptional practices that undermine or threaten their lives (Nagra, 2017; Neal, 2010).

Agamben defines the location of where people are stripped to these bare life circumstances under the State of Exception as the “camp” (i.e. Nazi Germany Concentration Camps, Guantanamo Bay indefinite detention facilities etc.) (Agamben, 2005; Aradau & Van Munster, 2009; Damai, 2005; Ek, 2006; Patman, 2006). Within the *camp*, one form of life is separated by imagined sources of harm and perceived as a threat to other forms of life including the state as the presiding institution. To separate sources of harm, the sovereign power looks inward to detect these perceived enemies, taking legal or physical action against those for whom society has to be defended (Sherwood, 2018). Throughout this process, the Sovereign abandons its subjects, treating its citizens as potential enemies and outsiders to defend society, which creates “bare life” (Diken & Laustsen, 2005). Agamben argues that these practices used to separate life can progress within a State from an “ethnic racism” to “internal racism”, functioning to not defend one group against another, but to expose all people within a group who may inflict danger (Ek, 2006). As the logic of the camp becomes more generalized within society, the camp replaces the *polis* as the contemporary biopolitical paradigm (Agamben, 2005). Within this zone of “anomie” or instability due to the lack of ethical and social standards, the camp functions as the place where the sovereign shows how the exception is really the rule. Thus, the camp is the place in which the State of Exception is *realized* (Damai, 2005).

Agamben also argues that this suspension of law is not subject to a localized place but can appear at virtually any location and be applicable to anyone (citizens and foreigners alike) (Damai, 2005; Kisner, 2007). As such, “the political system no longer orders forms of life and juridical norms in a determinate space, rather, it contains within itself a dislocation that exceeds it, and in which virtually every form of life and every norm can be captured” (Agamben, 2005, p. 43).

Moreover, Agamben seeks to correct aspects of Foucault’s theory, specifically the statement that biopolitics begins with the emergence of biopower in modernity (Agamben, 2005). For Agamben, sovereign power is itself already biopolitical, based on the constitution of bare life as the threshold of the political order (Obaretin, 2018). As the exception increasingly becomes the rule, biopower enters into the modern political order. Thus, the emergence of the technology of biopower in modernity signifies the expansion of the existing biopolitical imperative of the State as bare life moves from periphery to the center of the State’s concerns (Ek, 2006). Furthermore, those who are excluded from liberty and law- perhaps those designated as “fundamentalists” or even “terrorists”- are not placed merely outside modern politics, but instead brought into a more fundamental biopolitical relation.

2.2.4 The State of Exception Evolving Towards the Norm

Related to this thesis, Agamben concludes that the former processes constituting the State of Exception have extended beyond classical politics and into the modern Westernized political arena (Ek, 2006). With the tendency for emergency governments to apply the suspension of law as the “force of law”, Agamben (2005) argues “the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government” (pg. 14). Accordingly, the use of the exception has reached its apex in the 20th century, and has been identified as a permanent, stable condition in securitized societies, subjecting all citizens to the possibility of bare life circumstances.

Indeed, he states that the exception is no longer contingent upon an emergency, for even in its absence, the expansion of sovereign power evolves towards the norm and runs the risk of becoming the rule (Agamben, 2005; Damai, 2005). If the exception becomes the rule we enter into a permanent sphere of pure violence, and as subjects of that violence, every individual will be included into the tradition of the oppressed and “bare life” circumstances (Taylor, 2009). Considering the possible repercussions of the racialized distinction of individuals’ as “homo

sacer” living under exceptional State power, this is a significant risk to human life (Kisner, 2007). Without preventative mechanisms, Agamben raises concerns over a foreseeable totalitarian “Stalinist-type” future bureaucratic state, or the havoc of a Maoist cultural revolution (Kisner, 2007). Therefore, Agamben does not question whether atrocities *will* actually occur within a state of exception; this is an inevitable fate with nothing in place to prevent state induced violence (Kisner, 2007).

2.3 The State of Exception as Applicable to Canadian terrorist sentencing

2.3.1 The State of Exception Operating within Post 9/11 Securitized States

Scholars have applied Agamben’s theoretical devices to identify exceptional processes underpinning post 9/11 counter-terrorism. Western nations have created reactionary legislative mandates that reinforced and strengthened the role of the State within new government enforcement initiatives (Chappell, 2006). Illiberal laws such as the Canadian *Anti Terrorism Act* (2001), and the United States’ *Patriot Act* (2001) represent executive authorization of new investigative tactics of control orders, fingerprinting, interrogations, and preventative detention of suspects for terrorism-related activities (Forcese & Roach, 2015; Nagra, 2017). These broadened executive powers on behalf of police enforcement, intelligence agencies, and the judiciary have been instituted outside of the law’s legal norms and under the guise of emergency “prevention” and security (McCulloch & Pickering, 2009). These exceptional mandates have become political tools for western Governments to combat the preconceived post-colonial enemies of the Middle East in the “War on Terrorism”. Furthermore, they prove that the State of Exception has indeed become the “contemporary paradigm of government”, where Governments have grown accustomed to politicized national security campaigns reliant upon these new conditions of power (Agamben, 2005; Forcese & Roach, 2015).

When a state declares an emergency, particularly concerning national security, a new form of the dependent social relationship between citizens and the State is produced, namely one of generalized limitless control (Sherwood, 2018). This relationship includes the “depoliticization” of citizens who are no longer seen as active participants in the democratic process, thus exemplifying Agamben’s formation of “bare life” or unqualified form of life (*Zoe*). This relationship between the State and citizens is maintained by the popular narrative depicting the State as the citizen’s sole protector in evolving the “War on Terrorism”, backed by fear of the normalized terrorist “enemy” of the State (Gabor, 2005; Nagra, 2017; Taylor, 2009). Citizens are reliant upon the State for protection from various sources of threat (Agamben, 2005). However,

these notions consequently encourage the “us versus them” perception as “fear integrates political communities according to friend/enemy lines and creates homogenous identities that need to be defended” (Aradau & Van Munster, 2009, p. 690). In this regard, Governments applying The State of Exception have created circumstances of bare life, exploited the politics of fear initiated by the “War on Terrorism’s” “emergency” circumstances to mobilize these sentiments within securitized global initiatives, and act as a tool of government to maintain sovereign power over its citizens (Hallsworth & Lea, 2011).

When discussing the impact of sovereign power onto those deemed "homo sacer", Agamben refers to the theoretical notions of Walter Benjamin, whose work conceptualizes the experiences of those subjected to the State’s securitized violence (Aradau & Van Munster, 2009). Due to the prospects of war (as with terrorism) in the State of Exception, modern Governments have used their power to decide who is "in" or "outside" of the polity through the elimination of societal groups deemed illegitimate (Sherwood, 2018). However, Agamben and Benjamin both identify another distinction occurring within the group of individuals deemed the illegitimate “homo sacer”, specifically related to the marginalized and poor, as for them, the exception has always been the rule (Taylor, 2009). For Agamben, this division within the homo sacer is based on the strength of opposition towards an individual based on religious, moral, economic, or ethnic characteristics, which have been shaped into a political tool to effectively group humans as friends and enemies (Chappell, 2006). This distinction between individuals is promoted by exceptionalism, as human activity tends to bear relation to the rule or less tangible norms such as those expressed by similarity in class, culture, family, and ethnicity (Agamben, 2005; Neal, 2010). This phenomenon has become common practice within Western States as a securitized tool to control the populous (polity).

2.3.2 The State of Exception’s Impact on Judicial Charging and Sentencing

In today’s Western democracies, the tendency to treat terrorist cases as exceptional within the court of law serves as an exemplary expression of the State of Exception underlying the politics of security. Due to the nature of the crimes executed by terrorist perpetrators, Rogers (2008) argues that modern courts have perceived the very presence of terrorists as an “anomaly” to the criminal justice system. As such, they provoke a “state of emergency” in the minds of legal decision makers, which has justified the use of exceptional circumstances for charging and prosecuting terrorists within contemporary states of exception. Furthermore, the State of

Exception creates an ambiguous and uncertain legal zone in which de facto proceedings that are in themselves extra-judicial may pass over into law, creating an indiscernible threshold between emerging exceptional norms and mere fact (Neal, 2010). This ambiguous zone has allowed for the creation and enforcement of broadened legal capacities to charge and prosecute the unique criminal population of terrorists to the fullest extent of the exceptional law. However, it has also been used as a weapon in the Government's arsenal to both shape and limit the politically possible, and dispose of unwanted members of the public (Damai, 2005).

Theoretical literature depicts emerging anti-terrorism policies under the State of Exception as enhancing discretionary judicial powers to apply the law. Deemed "necessity" under the emergency circumstances of the "War on Terrorism", anti-terrorism laws have broadened powers of legal interpretation and judicial activism exercised within Western courts. Establishing the limits of judicial activism is a political decision regarding the exercise of power allocated to the judiciary, which promotes its expansion and creates a highly malleable interpretation of the principles and standards of the law (D'almedia, 2017). Acting on behalf of executive authority, judges can interpret and apply anti-terrorism laws without the confines of former legal policy and exercise their designated discretionary judgment upon terrorist suspects (McGovern, 2017). Legal scholars have alluded to the problematic elements of expanded interpretations of the law, specifically when referring to court decisions that create new laws, decisions that are guided by political interests, or the overall interference with other powers determining final rulings (D'almedia, 2017; Forcese & Roach, 2015). Enhanced judicial interpretation and discretionary decision making can also shape extrinsic sources of the law, including the social, cultural, moral, ethical, or economic factors influencing legal decision making within court cases (Ahmed, 2017). All these exceptional factors can influence the judicial decision making over court processes, charging and sentencing of terrorism offenders under new securitized anti-terrorism laws.

2.3.3 The State of Exception and Executive powers over democratic rights and liberties

According to Agamben, as the generalized State of Exception evolves towards normalized permanency, citizens and residents are at risk of having their rights and freedoms compromised (Agamben, 2005; Patman, 2006). By adopting exceptionalist ideologies, the Canadian *Anti Terrorism Act* and its authorized policies have interfered with the democratic functioning of rights and liberties (Amirault et al., 2016). Policies and enforcement initiatives

enshrined within *The Anti Terrorism Act* and emerging securitized national security law have required the suspension of former constitutional guarantees and rights commitments to prevent, protect, and carry out proper counterterrorism investigations (Agamben, 2005; Nagra, 2017; Rogers, 2008). Within the law, this has been presented as a necessary tradeoff, constituting the loss of democratic rights to acquire security and protection against emerging global terrorism threats in return (Smith, 2003). Thus, prominent Canadian anti-terrorism laws, reflecting executive priorities, mirror current discourse on exceptionalism where security is prioritized over liberty in the post 9/11 world.

As a product of exceptionalism, the compromise of rights and liberties has been disproportionately enforced onto the populous. Scholars have identified the suspension of democratic rights and freedoms as creating a securitized environment in which not all “our” liberties are being compromised or suspended, but rather only the liberties of particularly targeted foreign “others” or enemy groups chosen by the sovereign (Forcese & Roach, 2015; Hallsworth & Lea, 2011). As such, when we are asked to accept “necessary compromises” of our collective liberty or security, it does not mean that we are asked to accept some degree of liberty loss, but that we are asked to accept the exceptional abuse of the liberties of a small minority. Neal (2010) characterizes this trade-off as the problematic legitimization of violent and exceptional practices against a selected few who will actually suffer. When the principle of liberty claims to be “under threat”, it works to legitimate exceptional practices against exceptional enemies in exceptional circumstances (Sherwood, 2018).

2.4 Internal Limitations and External Critiques

Although Agamben’s theoretical constructs have been identified within ongoing structures of state power and modern securitized enforcement capacities, his unique observations are not without criticism. As the first limitation, Agamben’s analysis of the State of Exception erases any consideration of the violent past political forces that constitute the historically contingent mode of being, and sovereign political authority that is central to the political ontology of the West (Neal, 2006). Because the nation-state is not a timeless principle but an outcome of violent historical and socio-political practice, Neal (2010) argues the inclusion of these structures is essential for a complete evaluation into exceptionalism as a paradigm of modern governance. Without, Agamben is limited in his ability to conceptualize claims about exceptionalism that have not been driven by emergency circumstances exclusively, such as

violent practices and powerful accounts of identity, value, and history (Neal, 2010). He is also limited in his ability to analyze the ways in which the nation-state has operated through claims of salvation, belonging, collective, and the realization of universal principles through time or space (Neal, 2010). Furthermore, it would only be possible to understand the impact of the exception onto the *static* position of the individual residing within the sovereign populace (Neal, 2010). To deal with the problems arising from the judicial effects of racialized “othering”, a more comprehensive mode of analysis is required for understanding the ways particular instances of sovereign exceptionalism emerge according to specific historical-political conditions (Johns, 2005).

On the empirical history on the State of Exception, Agamben describes how the exceptional delegation of powers from parliament to the executive by decree, has become normal practice for all European democracies since the First World War. As the passage to executive rule is underway in Western democracies, the State of Exception has gradually become a generalized paradigm of security and standard technique of Government (Agamben, 2005; Aradau & Van Munster, 2009; Neal 2010). While it may be the case that the State of Exception has become normalized over time with its prevalence in the West, to describe the present as a permanent State of Exception is to undermine the value of the exception as a *dialectical concept* (Kisner, 2007). The State of Exception is not a resolution between two opposing extremes concerning the governing of matters during times of emergency- between democratic freedoms and absolute sovereign control (Kisner, 2007; Agamben, 2005). Thus, understanding the State of Exception as a permanent takeover of repressive executive legal tactics and discourse ignores the functioning of the opposing side attempting to reconcile exceptional norms and the effects on the populous (Taylor, 2009).

This criticism leads scholars to the most significant gap in Agamben’s work, which concerns his absent analysis of the possible resistance towards sovereign power. Unlike Foucault and other exceptional theorists, Agamben fails to suggest a possible struggle or push back from those subjected to bare life (Kisner, 2007). Although Agamben has attempted to describe various situations in which individuals have been broken down to “bare life” (most notably referencing the Nazi Germany regime), he does not attempt to understand those groups who have resisted and fought back for their fundamental rights (Power, 2009). In reality, many of these suppressed groups have fought back and reemerged from “bare life” to form groups of active political

subjects (as witnessed in Pantazis & Pemberton's (2013) frameworks of resistance) (Behrman, 2013). In this regard, Agamben is criticized for offering a submissive approach to humanity, where the populous does not attempt any means of escape from sovereign power (Behrman, 2013).

Lastly, as referenced in the former discussion, Agamben's "bare life" seeks to distinguish the lives of those that are included within the political community compared to those who are placed outside its margins. However, this "bare life" ideal has been criticized for its modern relevance, for within Western legal systems, some argue that an area "outside" of the sovereign power does not exist; there is no space to escape the bureaucratic sovereign power (Behrman, 2013). Instead, the modern Western State is known to create a space not only where the law is suspended, but where the banished subject is placed under more extensive state supervision and subsequent power of the law (Chappell, 2006; Aradau & Van Munster, 2009). These spaces maintain a unique status, situated both outside the normative operations of the law, while having been created by legislative instruments and executive orders (Power, 2009). Therefore, critics contend that this place outside the rule of law in the modern day is also itself a function of law.

2.5 The State of Exception and the Relevance of Counter Law

Despite criticisms, *The State of Exception* provides a theoretical device to understand transformations of post 9/11 governance. Agamben's work exposes the mere boundless limits of the law that are implemented by executive bodies within western civilizations. The expansion of the legal order has revealed new national security capacities allocated to post 9/11 securitized States to enforce such law with limited resistance. These legal capacities have been afforded to the judiciary in the form of charging and sentencing initiatives, providing the State the ability to enforce value judgments over forms of life within the populous (*Zoe*, *Bios*, and *Homo Sacer*, within the *camp*). Situated within post 9/11 securitized exceptionalism, Agamben's theory has allowed me to critically analyze the relationship between authority and subjects of sovereign power.

Although relevant, I would argue that Agamben's theoretical contributions alone do not constitute a realistic depiction of legal enforcement within post 9/11 securitized governance, specifically the ability of the sovereign to expand the democratic rule of law. Agamben's accounts of Sovereign practices represent the ultimate or most extreme form of the Western Government's potential to operate under a State of Exception. Within the current reality of

Canadian governance, democracy and its various commitments (i.e. human rights) inhibit the State's ability to enforce all aspects of the State of Exception and transcend the rule of law to this extreme degree. Although limited, some important aspects of the State of Exception are embedded within the Canadian State's counter terrorism strategy and inform the racial underpinnings of the terrorist sentencing process. To this research, the State of Exception should be regarded as a theoretical tool to reveal State constructions of terrorists that necessitate severe punishment at sentencing, and the racial constructs that target the broader Muslim populations as subjects of exceptional practices, experienced through social and symbolic effects.

Utilizing Agamben's theory of the State of Exception, I propose that Western States have suspended traditional laws, characterized by strict democratic restrictions on government power to implement and utilize law at their will. When these traditional laws are suspended, emergency circumstances allow the State to replace restrictive laws with new "exceptional" policies laden with absolutist standards and procedures for the executive to enforce its power over the populous. Included within these exceptional policies are securitized anti-terrorism laws, that have transformed the judicial system into a punitive securitized institution, equipped with broad capacities for charging and sentencing terrorists, and enabling extreme judicial (executive) discretion within legal decision making (Lennox, 2007). It is important to note that within this suspension and replacement of traditional legal policy with new anti-terrorism initiatives, the Western sovereign has to must assert its expanded powers within the laws prescribed legal limits. However, the executive can still preserve and utilize its newly acquired power within these limits, as they were amended to allow for exceptional use.

To fill this theoretical gap, I will explore Richard V Ericson's legal concept of "Counter Law I". Ericson established this concept to analyze governmental responses to national security threats in the post 9/11 State of Exception. As noted, these security strategies prompted governments to suspend traditional criminal law and implement counter-terrorism initiatives deemed "exceptional". Ericson's "laws against law" provides a unique analytical scope to analyze the effects of these amendments such as investigative tactics and judicial sentencing principles. This theoretical analysis will also address the Canadian judiciary's use of exceptional power to enforce new Counter Law, and the subsequent social and symbolic effects experiences by terrorists and foreign Muslim "others".

2.6 Richard V Ericson's Counter Law and Preemptive Security

Within "Crime in an Insecure World" (2007), Richard V Ericson begins his analysis of modern-day legal exceptionalism by presenting the political environment of Government action against insecurity and putative threats pervading post 9/11 States (Ericson, 2007c; Gartenstein-Ross & Frum, 2012; Welch, 2007). Western responses to modern instances of terrorism within popularized "war on" campaigns (e.g "War on Terrorism") have witnessed a trend towards what Ericson terms "preemptive security", otherwise known as the precautionary urge for greater certainty in crime control (McCulloch & Wilson, 2016). This precautionary logic has normalized suspicion and created a strong urge on behalf of the State to criminalize not only those who incite harm, but those who are only merely suspected of exhibiting criminal intent (Ericson, 2007b). To combat these harms, the sovereign has transformed law into an institution of suspicion and exclusion, utilizing these sentiments to defend its pre-emptive preventative mechanisms as the new legal order within the State of Exception (Ericson, 2007b). With this perpetual vigilance for signs of danger, in combination with assumptions of guilt, Ericson argues that preemptive security facilitates the legal applications of his twofold concept, namely laws against law (Counter Law I) and surveillance assemblages (Counter Law II) (McCulloch & Pickering, 2009).

Due to this criminalization through precautionary logic, Ericson developed the conceptual model of "Counter Law", which seeks to illuminate recent securitized legal transformations within the neo-liberal political culture preoccupied with uncertainty (Ericson, 2007; Ericson, 2007c). This concept is divided into two separate ideologies; Counter Law I known as "laws against law", and Counter Law II deemed "surveillant assemblages" (Ericson, 2007b). Counter law I is defined as the enactment of new laws, and new uses of existing law, devised to eliminate traditional principles, standards and procedures that interfere with preempting imagined sources of harm (Ericson, 2007c). For Ericson, the use of "laws against law" is a distinct and relatively easy way for authorities to maintain the upper hand in the politics of uncertainty (Levi, 2009). Accordingly, this concept is much more than a legal- political move to treat every possible source of harm as criminal, but it is also a tool to for governments to "undermine conventional legal principles" of regulatory law (Ericson, 2007; p. 24). Applications of Counter Law I also justify the State's attempt to reassign offences into the sphere of civil and administrative proceedings, where less legal confines exist to inhibit the executive's ability "to

manage the putative problem” (Ericson, 2007; McCulloch & Wilson, 2016). On the other hand, Counter law II constitutes the development of new surveillance infrastructures, and new extended uses of existing surveillant networks, that also erode or eliminate traditional principles, standards, and procedures of criminal justice (Ericson, 2007b). Insofar that Counter Law II flourishes within the legal “grey and black holes” afforded by Counter law I developments, we see a double re-drawing of sovereign authority (Molnar, 2017). Although Counter Law II is included within Ericson’s conceptualization of new executive anti-terrorism capacities, the following conceptual framework will exclusively analyze the legal relevance of Counter law I within post 9/11 securitized counterterrorism enforcement.

Circumventing the Law

In response to traditional constitutional arrangements and procedural protections deemed inadequate to combat heightened threats to post 9/11 societies, Counter Law functions to establish new structural arrangements within policy to explicitly circumvent such hurdles (Zedner, 2009). Ericson argues that Governments operating the current politics of uncertainty have developed “skepticism about law itself, so that, culturally and politically, there is a view that liberal legal processes stand in the way of ensuring security” (Ericson, 2007, p. 25). They argue that when law maintains high standards of due process, evidence, proof and culpability, it hinders the criminal justice system’s capacities to prevent, discover, build a case against, and successfully prosecute and sentence criminal behavior (Ericson, 2007b; Levi, 2009). To circumvent this issue, the current emphasis on security has suspended the normative principles, standards, and procedures so that political authorities now routinely respond to security demands by enacting legal measures without regard for conventional legal structures (Ericson, 2007; Levi, 2009). Furthermore, Western Governments have demanded new standards of criminal law that will reduce or eliminate due process protections that have created uncertainty in the State’s ability to criminalize conduct (Ericson, 2008). This has led to the drafting of vague laws that bestow considerable amount of power onto the executive and agents of law enforcement, creating the very kind of arbitrariness that rule of law values should safeguard (Patman, 2006; Rogers, 2008).

The result of these legal maneuvers under force of “laws against law” acts as the premise of Ericson’s theoretical argument; the actions of post 9/11 States demonstrate how Counter Law exists as a legal tactic reinforcing the limitless sovereign power operating within a normalized

State of Exception. With this power, the normative aspects of the law can be obliterated and contradicted with impunity by government related violence that- while ignoring international law externally, and producing a permanent state of exception internally- still claims to be applying the law (Ericson, 2007). It is important to note that Ericson has adopted Agamben's perspective that Governments applying Counter law through the State of Exception have done so not as a momentary suspension of the legal order, but as a normalized unprecedented generalization of security that serves as the dominant paradigm of modern governance (Welch, 2007).

2.7 Counter Law and Post 9/11 Securitized Enforcement

Specific to the West, Ericson identifies the U.S. *Patriots Act*, and the Canadian *Anti Terrorism Act* as modern day representations of Counter Law in action, where policies place little to no limits on executive (sovereign) authority to criminalize those deemed terrorists (Ericson, 2007; Ericson, 2008). First, this neoliberal prioritization of heightened vigilance and crime prevention has used counter law to expand the scope of criminal liability as widely as possible onto "harms" and "harmful conduct" not formerly criminalized (Levi, 2009). For example, Counter Law is responsible for the criminalization of terrorism memberships, associations, engagements, and even racialized similarities with certain suspect groups or organizations (Forcese & Roach, 2015). Secondly, intensified security matters of intelligence, including surveillance, disruption investigations, and the mass, undifferentiated collection of personal information on the populous, are also integral to Ericson's interpretation of counter law (Ericson, 2008; McCulloch & Wilson, 2016; Nagra, 2017). All of these capacities promote the use of compulsory questioning, extended detention without charge, and control orders restricting movement and association of suspected individuals (McCulloch & Pickering, 2009). Lastly, Counter Law has allowed States to execute exceptional punishments with strict punitive life sanctions available for terrorism related crimes. As this relationship between security societies and exceptionalism progress, it is evident that post 9/11 securitized initiatives are reliant upon Counter Law I to function and institute the appropriate pre-emptive legal devices deemed necessary by Western governments.

Counter Law now influences the legal standards of sentencing, court processes and judicial decision making in the Canadian criminal justice system. For instance, this national security regime of Counter Law I "laws against law" ignores the fundamental legal standards of *actus reus*, or criminalization based on a specified act, and *mens rea*, the essential element of

guilty mind or intent (Ericson, 2007c; McCulloch & Pickering, 2009). Indeed, there is not even a pretense of what is termed "*probabilis reus*"- criminalization on the basis of actuarial knowledge of risk (Ericson, 2008). Thus, the sovereign can criminalize threats and actions based only on its own interpretation of harm, imagined or real (Levi, 2009). Importantly, only the counter law principle of *finus reus* exists; when criminalization appears necessary for national security, no justifications are required to establish preempted legal principles (Ericson, 2007). Referencing these applications of counter law, Ericson seeks to highlight that post 9/11 legislative maneuvers by the United States and Canadian Governments have circumvented normal legal processes of the criminal justice system to criminalize terrorists, have eroded or eliminated traditional principles, standards and procedures of criminal law, and have prioritized the establishment of exceptional counterterrorism law (Levi, 2009; McCulloch & Pickering, 2009; Molnar, 2017).

2.8 Exclusionary "Othering" and the Impact of Counter Law Under the State of Exception

Scholars attribute the voluntary creation of a permanent state of emergency, described by Agamben's interpretation of the exception, as enforcing control over selective populations through a process known as racialized "othering" (Zine, 2012). This kind of "race thinking" in the State of Exception has established a racialized image of the enemy that rests on religiously, culturally, and territorially based distinctions (i.e. the terrorist is dark, Muslim, has illiberal values, and lives outside the west) that establish the citizen/non-citizen dichotomy (Dhamoon & Abu-Laden, 2009). Foreigners classified by these racialized images inhabit a place in modern democracies where they are considered both an insider who legally belongs to the state as a subject of citizenship, while simultaneously deemed an outsider that does not substantively belong within the polity (Thobani, 2007). Despite occupying legal or constitutional status within the national state, foreigners do not belong, because "they" of the "other", by way of their radicalized typology are considered unlike 'us' (Dhamoon & Abu-Laden, 2009). As these racialized distinctions have evolved in the "War on Terrorism", the foreign "other" is now perceived to be dangerous, corrupting and threatening "our" national identity, "our" dominant norms of the body politic, "our" health, "our" familial, legal, symbolic, ideological values and belief systems, "our" economic agenda and employment opportunities, "our" property rights and control of the land resources, and "our" public space in Canada (Dhamoon & Abdu-Laden, 2009; Honig, 2001). With these sentiments, the citizen/ non-citizen dichotomy is significantly enhanced along racialized lines of the perceived enemy, which produces circumstances for

“othering” to prevail. To combat these perceived threats of the foreign enemy, the exceptional state has applied its limitless juridical space to control this dichotomy between the foreign other and the national subject.

Racialized “othering” has become increasingly powerful within the State of Exception as the Canadian Government has evolved into the exclusive legal entity that decides upon the imagined boundaries of a “common identity”, and how it coincides with sovereign authority over subjects. The exceptional state within the post 9/11 “War on Terrorism” has subjected people exhibiting markers of the “other” to variable treatment according to the specific ways in which discourse of the nation, security, and racialization interact. These constructions of foreignness in the current “War on Terrorism” are deployed and legitimized through state-driven appeals to security, which also serves as an alibi for the construction of the omnipresent danger posed by racialized others. In these instances, national security concerns are deployed as a means to justify states of exception and the transcendence of law that broaden state power over foreign subjects to defend and protect the nation from terrorisms insecurity. Thus, expanded state powers to monitor, regulate and discipline internal foreigners perceived as dangerous continuously gain legitimacy by state representations of threats that require strict responses to secure the nation’s people and its borders (Walker, 2006).

As situated within the State’s promotion of national security, this process of racialized “othering” and related sentiments have infiltrated exceptional post 9/11 counter terrorism initiatives. As exemplified by Thobani’s (2007) statement: “The War on Terror has allowed such a state of exception to be imposed on Muslims suspected of links to terrorism in Canada, and elsewhere, such that the suspension of the law has allowed the introduction of measures previously deemed outside the juridical order” (p. 239). In the case of Arab/Muslims, exceptional Counter Law and enforcement practices are underscored by an orientalist notion; “Although race thinking varies, for Muslims and Arabs it is underpinned by the idea that the modern, enlightened, secular peoples must protect themselves from the pre-modern, religious peoples whose loyalty to tribe and community reigns over their commitment to the rule of law” (Zine, 2012, pg 394). With this orientalist exceptionalism, counter terrorism enforcement practices are premised on the notion that the “other” is both an identity oppositional to that of the nation, as well as a threat to national functioning (Nagra, 2017). In return, the existence of the nation is dependent upon exclusion of the “other” through counter terrorism operations, which renders it

possible and coherent (Lee, 2007). Through the State of Exception and Counter Law, these exclusionary practices of foreign “othering” are enacted to mere limitless capacities, which are reinforced by the higher degree of executive authority.

Both Agamben and Ericson express concerns over of the State of Exception’s impact on “homo sacer” populations of the foreign “other”. “Othering” is linked to dominant ideologies of the prevailing culture of uncertainty, taking into account perceptions of risk, harm, and fear, occurring within a country’s borders (Ericson, 2007; Nagra, 2017). Within this culture of uncertainty, terrorists are depicted in extremely broad, harsh terms, which has created a widespread typology of prejudicial characteristics and behaviors used to discriminate and exclude the perceived “enemy” (Ericson, 2008). To combat these characteristics and behavior of the perceived enemy, government and enforcement agencies have transformed the traditional “culture of control” into a “culture of suspicion”, casting a wide net of distrust onto the populous that targets every “other” as possible source of terror (McCulloch & Pickering, 2009; Zedner, 2009). With Counter Law's broadened scope of suspicion informing new counter-terrorism enforcement policies, foreign “others” are identified under the same racialized typology as “terrorists” that has been ejected from the political community to outside the juridical order (Byrne, 2010; Ericson, 2008; Patman, 2006). Moreover, the well-documented increase of exceptional Counter Law has permitted the targeted overuse of this culture of suspicion onto marginalized or “underprivileged” populations, and subsequent discriminatory practices of institutions related to national aliens (Ericson, 2007). These practices become particularly problematic when the actions of only chosen sectors of the population are likely to become subject to harsh suspicion, criminalization, or “othering”, enhanced through counter law’s propensities for incapacitation and sentiments of elimination (Ericson, 2007b; Ericson, 2008). Through these conclusions, Ericson warns that when insecurity proves itself within the normalized paradigm of post 9/11 governance, security trumps justice, and counter law can then become a source of “harassment, alarm and distress” for some populations (Ericson, 2007c).

Some scholars warn that this treatment of *homo sacer* populations within the State of Exception can affect the charging and sentencing of terrorists within modern criminal justice systems. The differential impact of securitized Counter Law on marginalized or foreign populations within the *homo sacer* (inhabiting a space outside the polity) also applies to the judicial environment. For example, Davis (2013) argues that judicial decision-making within

modern exceptional court processes are at risk of becoming biased against defendants who share ethnic or religious backgrounds similar to those who have been deemed *homo sacer*, or outside the legitimate polity. This literature also mentions the relevance of terrorist defendants within this context, as considered part of the "homo sacer", they remain subject to the normalized distinction within judicial practices under the post 9/11 exceptional sovereign powers (Davis, 2013). When terrorist defendants share a common characteristic identifier, being ethnic or religious origin (e.g. Muslim), they remain at risk of being exposed to the mentioned biases within the enhanced charging and sentencing practices permitted on behalf of securitized states (Ahmed, 2017; Byrne, 2010). This presence of "othering" identified within Counter Law's judicial capacities will inform the upcoming analysis into the sentencing of Canadian terrorists during the current "War on Terrorism's" State of Exception.

2.9 Conclusion

Agamben's "State of Exception" introduces a theoretical framework that fosters an understanding of securitized discourses to inform executive power over juridical structures justified by emergency circumstances (Neal, 2010). Supplementing Agamben's conclusions, Ericson's conceptual analysis of "Counter Law" identifies how the western counter terrorism model operates within these seemingly absolute limits of exceptional legal systems. Utilizing these theoretical notions, this thesis will identify how the State has applied its executive powers to suspend regulatory legal policies, standards, and procedures through the implementation of securitized Counter Law within the Canadian *Anti Terrorism Act*. Amongst these functions are charging and sentencing capacities whereby the State can process Canadian terrorism cases in ways that have resulted in racialized process of "othering". More concretely, these theoretical notions will inform the following research question; How does the Canadian judiciary discursively construct the specificity of terrorism offences within their sentencing decisions and what are the social and symbolic effects of this rhetoric capable of implicating broader populations?

3. METHOD

3.1 Introduction

Researchers have previously investigated similar sentiments of “othering” within discourses emanating from Canadian Bills, lived experiences of Muslim populations, and westernized media campaigns. However, from my examination of literature, research has not investigated the Canadian judiciary’s production of “othering”, and its impact foreign populations in the post 9/11 West. Integral to the judiciary, sentencing discourses represent fruitful material and an opportunity to expose these sentiments of “othering” through the States use of Counter Law within terrorism cases.

Discourse analysis is the study of language in use. In this methodology, discourse is not understood as an abstract system, but as an empirical medium for all formal or informal interactions including spoken, and written text (Alvesson, 2002; Gee, 2005). In this regard, discourse analysis is a reflexive, reciprocal and cyclical process in which we shuttle back and forth between the structure (form, design) of a piece of language and the situated meanings it is attempting to build about the world, identities, and relationships within a specific context (Alvesson, 2002; Gee, 2014, p.148). The goal of such a method is to identify patterns and links within and across utterances to form a hypothesis that will illustrate how the relevant language is constructed and organized (Dunn & Neumann, 2016). The upcoming chapter will present Gee’s conceptual tools as the basis for his methodological approach, outline the status of empirical material that will inform this discursive analysis, alongside functions of validity as integral to such a research method.

3.2 James Paul Gee’s Discourse Analysis

James Paul Gee offers his own structured, integrated approach to discourse analysis, integrating ways of saying (informing), doing (action), and being (identity) with grammar to formulate a type of language in use known as “Discourse” (2014, p. 8). The study of Discourse seeks to describe how language through communication, both spoken and written, enacts social and cultural perspectives and identities. Specific to the context of this thesis, Gee focuses his methodology around identity formation through the study of individualized discourses people use to speak, listen, read and write.

The widely held “realistic” or descriptive model of language treats discourse as a relatively optimistic pathway to actions, beliefs or actual events. For this reason, descriptive approaches have been deemed “pointless” and “misguided” for applying language as purely

observational, not representative of everyday applications (Alvesson, 2002). As a result, these models do not recognize the potential capacity to indicate realities beyond the situational and functional aspects of language in use. For these reasons, Gee prefers critical discourse analysis as it not only offers in-depth explanations about how language works, but also speaks to, and perhaps intervenes in institutional, social or political issues, problems and controversies occurring within the world. Gee further argues that is it essential for discourse analysis to be critical, not because analysts are or need to be political, but because language itself is political in the sense that it maintains the power to distribute social goods and services (2014, p. 87).

Utilizing this critical approach, Gee assumes that language is an essential component of how humans create or dismantle social relationships, goods, and institutions within our world. This creation of reality is made possible by what Gee terms “Discourse”, which is composed of not language alone (spoken or written), but a combination of how people feel, value, believe, act, and even interact. Importantly, “Discourses” are situated within overriding “Conversations” or politically and socially charged arguments and discussions occurring within society, that become crystalized within practices, institutions, ideologies; what some would all social structures. This is how language is always part and parcel of, or partially constitute of social practices, social relationships, and socially situated identities (Gee, 2014). As a result, languages are more than just mental achievements- they are made possible by and participate in producing social and cultural practices with economic, social, and political implications. This capacity of language in relation to social context is essential to this thesis’ critical discourse analysis, providing the ability to identify problems and inequalities produced by the governance of terrorism occurring within our current judiciary, including broader social and symbolic effects. Furthermore, this analysis of language illuminates issues with the distribution and treatment of “goods” (value etc.), including who gets helped and who gets harmed (2014, p. 10). As a popularized phenomenon implicating these relations, terrorism exemplifies an institutional, social, and political issue in which discourse can critically intervene.

Gee’s method rests on the concepts deemed *tools of inquiry* and *building tasks* to analyze Discourse. He recognizes that his method is not necessarily more “right” or correct than others. However, it provides researchers with unique evidence that is grounded in theory to understand how language contributes to controversial issues, relationships and interests occurring within the social and political realm of modern societies.

3.2.1 Epistemological grounding of the project

Conducting research within the critical paradigm refers to detecting and unmasking certain beliefs and practices that limit human freedom, justice or democracy (Glesne, 2010). The emancipatory objectives of this thesis were to first, identify exclusionary conditions of Canadian Counter Law onto terrorist offenders. Secondly, this research seeks to expose the impact of State power on the treatment of Muslim individuals residing within the West (Canada), including conditions of exclusionary oppression. Knowledge is a necessary requirement for intervention to occur (Gee, 2005). Thus, knowledge emerging from this thesis can work to challenge the oppressive structures working within and beyond the judiciary, and contribute to the work of current research attempting to transform this oppressive reality of the post 9/11 world into a more inclusive environment encompassing greater equality for all.

3.2.2 Gee's Building Tasks and Tools of Inquiry

People use language and grammar to actively build, or give meaning and value to things, people, or places relevant to their world. This building or rebuilding of our worlds occurs not through language alone, but through the language used in association with actions, interactions, non-linguistic symbol systems, objects, tools, technologies and distinctive ways of thinking, valuing, feeling, and believing. This process happens almost simultaneously throughout speech or writing, constructing what Gee describes as seven areas of reality or *building tasks*; Discourse; Significance, Practices, Identities, Relationships, Politics, Connections, and Sign Systems and Knowledge. All seven building tasks are integrally linked to each other, often mutually and simultaneously supported by the same words and phrases. Within studies, the researcher is to use these tasks to ask seven different sets of questions about any piece of language in use, to identify how these seven building tasks or realities are situated within the specific Discourse.

To complement the mentioned building tasks, Gee has constructed six "thinking devices" termed *Tools of Inquiry*, that a researcher may apply in order to analyze what these building tasks are accomplishing in specific instances of language in use (2014, p. 45): Situated Meanings, Social Languages, Figured Worlds, Intertextuality, Discourses and Conversations. Like building tasks, *Tools of inquiry* are ways of looking at how language is applied within different settings. Gee indicates that these tools of inquiry are primarily relevant to how people build their own identities and practices and recognize the identities and practices that others are building around them. In applying Gee's discourse analysis, researchers should remain aware that these tools of inquiry are not meant to be rigid definitions. Rather, they are intended to be

"thinking devices" that guide investigations into specific sorts of data, and particular issues and questions. They are meant to be transformed and adapted into the reader's own purpose, thus coinciding with the relevant research and theoretical devices.

Gee argues that a successful discourse analysis uses each tool of inquiry to ask questions about the building tasks within a piece of language. Although this is what constitutes a full or ideal discourse analysis, a realistic research design will ask "only some of the questions" (2005, p. 122). As such, Gee suggests that the researcher(s) should selectively choose only some of the *building tasks* and *tools of inquiry* that will best meet the context and aspects of the data to conduct the specific discourse analysis. The following sections will outline the selected building tasks and the tools of inquiry used to analyze the empirical material in this thesis. It is important to note that while I distinguish those tasks and tools analytically, they tend to juxtapose with one another in the concrete process of analysis.

Building Tasks

Practices

The first building task known as "practices" refers to "socially recognizable and institutionally or culturally supported endeavors that usually involve sequencing or combining actions in certain specific ways" (2005, p. 17). Language is strategically used by individuals "to do something" or engage in particular sorts of activities and practices. As a result, Gee argues that Discourse cannot exist without both language and practices co-existing with one another in a reciprocal process through time.

Therefore, analysis of each sentencing decision asked: "what practice(s) (activities) was this piece of judicial language being used to enact? (i.e. get others to recognize what the offender is participating in). This building task informed a number of subsequent questions, including how did the judge use legally crafted language to strategically connect perpetrators with particular sorts of practices related to terrorism activity? Applying this building task required analyzing how the judge sequences and combines actions of behalf of the offender in certain and specific ways that are institutionally or culturally deemed "dangerous". Moreover, how did the language of the sentencing decisions reflect a set of legal standards that do not condone certain practices? This showed how language within each case enacted practices of securitized anti-terrorism enforcement on behalf of the Government and executive. Specifically, this task explores how the securitized practices of the judiciary, applying Counter Law, enact exclusionary sentiments against the foreign "other". Gee argues that the strength "practice" holds

within Discourse can change the hierarchies of power. This is particularly relevant to post 9/11 exceptionalism.

Identities

The building task termed “identities” refers to the way language is used to “enact specific socially situated identities or to project such identities onto others” (2005, p. 18). Individuals may also enact their own identities by speaking or writing in such a way that attributes a particular identity onto others, to which is then implicitly or explicitly be compared or contrasted to our own. These identity formations are relevant to the time and place in which they occur.

Operationally, the following questions were asked when analyzing the empirical material; what identity or identities did the language within each sentencing decision enact, and onto whom? How did the judge use language to enact the specific socially situated identity of “Terrorist” onto the perpetrator (e.g. dangerous, non-Canadian). Accordingly, how did the judge apply this identity to justify exclusionary discourse? What identities was this Discourse getting others to recognize as operative? This question may refer to the judge’s use of language that formulated a sort of socially and culturally situated identity on behalf of the Canadian State as a Western Superpower, superior nation with capacities to defend to and deter. What identities within each sentencing decision were attributed to generalized groups, including the Muslim populous residing both within and outside of Canadian borders? How did these identities help the judge enact their own identity?

Relationships

“Relationships” involves how language is used to create, sustain, harm or end social relationships. We use language to signal what sort of relationship we have, want to have, or are trying to have with the listeners, readers, groups, or institutions, with whom we are communicating. Analysis of this kind includes relationships with people relevant to the case, relationships with individuals beyond the case, and relationships associated with broader populations. Questions associated with this building task included: what sort of relationship was each sentencing decision seeking to enact between individuals, groups or (present or not) (Gee, 2005)? How was the perpetrator’s relationship with Canada portrayed according to their personal characteristics? How was this relationship generalized beyond the individual offender and onto larger groups? How did this discourse expose a relationship of exclusion occurring between the State, the subject in question, and others associated with the identity of the foreign “other”? How was power diminished or enhanced within stated relationships (eg. power of the Western State

over terrorists). Through this building task, I also analyzed the relationship the State was promoting with its audience including the public, specific groups (ideological groups, public interest groups, cultural groups etc.), institutions (other nations, national policing and security agencies etc.), and most importantly terrorists.

Signs Systems and Knowledge

For Gee, all sign systems constitute a different “way of knowing”. Humans use sign systems to make knowledge and belief claims about all subject matter, including persons or issues (Gee, 2014). In research, analyzing the difference sign systems reveals what ways of knowing are included or privileged, and which are excluded from the dominant political and societal environments. Questions associated with this building task include: How did this piece of language privilege or disprivilege specific sign systems, different ways of knowing and believing, or claims to these ways of knowing? To do so, this discourse analysis first, questioned what sign systems are situated within the language used in sentencing? Secondly, it identified how the language of judicial sentencing decisions privileged or disprivileged specific sign systems, including the offenders ways of knowing (culture, religion etc.), or claims about knowledge and belief that were in conflict with those socially situated as Canadian values. Through each Judge’s statements, this building task also identifies the States power to choose/legitimize which sign systems or ways of knowing are accepted, and which are excluded from Canadian society. Lastly, through sentencing discourse, the judge as the sentencing body acting on behalf of the State also exposes the Canadian Government’s sign systems, relevant to the post 9/11 securitized environment.

Tools of Inquiry

Discourse

Social languages are varieties or styles of languages used in combination with other forms of human action to enact specific socially situated identities and activities (practices). Gee uses the term “Big 'D' Discourse” to describe the ways of combining and integrating verbal and written language with actions through various symbols, tools and objects of non-verbal communication (physical appearance, gestures, timing etc.), that together enact a particular sort of socially recognizable identity. When verbal and non-verbal elements form a particular collective identity shared amongst various individuals, Gee calls these "discourse communities" (Gee, 2005). Individuals can function within a variety of Discourse communities, which carry specific advantages or disadvantages in different situations, especially concerning

representations of politics and power (Gee, 2014). Given the various elements of “Discourse”, this tool of inquiry may ask; How is “stuff” other than language relevant in indicating socially situated identities and activities?; In considering this language, what sorts of relationships among different discourses are involved? (2005, p. 60).

Operationally translated in my research by questions such as: what verbal and non-verbal elements does each judge use to build the identity and activities of the terrorist offender, and how do they use certain aspects of language as mitigating or aggravating to punish related crimes? Within each case, I analyzed how the judge combined the perpetrators spoken or written elements with non-verbal elements such as physical traits or behavior at trial to enact a terrorist reality. For example, this analysis combined the value or belief of ideological extremism indicated by religious or cultural affiliations with Islam. “Discourse” also allowed this research to examine how the written language of the judge within sentencing decisions and other forms of communication enacted their own recognizable identity as an agent of the law under an exceptional governing body, capable of inflicting extreme power onto those they deem worthy of punitive sanctions. Comparing judicial sentences between cases with similar characteristics, to that of a Canadian domestic case also allowed me to analyze the differences in discourse, and its impact on sentiments of exclusion.

Conversations

As the second tool of inquiry, Gee defines "Big 'C' Conversations" as debates that occur within society or specific social groups over unresolved or contested issues like smoking, abortion, school reform, and most relevant, terrorism. Conversations are often historically tied to much broader dichotomies that centre around power relations, or disputes between different discourses over time. Large numbers of people recognize these debates both in terms of what "sides" there are to take within the discussion, and what sorts of people tend to be on each side.

Researchers can ask specific questions of their data related to the ongoing Conversations in the current social context of their research, and how the individual's position within the debate affects the Discourse in question. Utilizing this tool, I analyzed how the judge's position as a State actor, and Western power in the “War on Terrorism”, influenced exclusionary language used in sentencing decisions. Accordingly, the “side” of those involved in terrorism was also highlighted within the judge's overview of evidence, and the perpetrator's statements or actions witnessed during the crime, investigation or at trial. This opposition to the Western position was

also recognized to highlight the racialization of the foreign “others” as dangerous affiliated to this “side” in the “War on Terrorism”.

Situated meaning

“Situated meaning” refers to specific meanings, words, and phrases take on in actual contexts of use. Speakers and writers construct their utterances or sentences to guide listeners and readers in creating these specific meanings based on what was said and the context in which it was said. Of course, speakers and writers can never be sure listeners and readers have constructed the specific situated meanings they intended, and too, listeners and readers can choose to be uncooperative or “resistant” and construct specific situated meanings without full (or any) regard for the intentions of speakers and writers.

This tool can be applied when analyzing judicial sentencing decisions, and the situated meanings of exclusionary narratives present within the language used by the judge acting under securitized law and the State's authority. As mentioned within the literature on governing post 9/11 counter-terrorism, preventing and deterring future terrorism has been one of the prominent goals related to increased punitive sanctions for terrorism and related conduct. The situated meanings and linguistic choices of the judge reflects prevention and deterrence, and the varying ways in which it is applied, to whom it is applied, and over what actions. This includes exclusion, which has become a means to achieve deterrence and denunciation. Through these sentencing decisions, the judge also constructs specific meanings to a wider international audience about what the Canadian Government thinks of people who contribute to terrorism, and how they will be punished to the utmost severity. Situated meanings were also used to see how the sentencing decisions reflect the securitized framework and the overall goal of stopping the “dangerous enemy” populations from committing acts of terrorism, as well as the treatment (emphasis on exclusion) of those who are resistant to the securitized intentions of the State.

Figured worlds (evaluative worlds)

A “figured world” is a theory, story, model, or image of a simplified world, which captures what is taken to be typical or normal about people, practices (activities), things, or interactions (Gee, 2014, p. 71). Gee argues that we all have ways to construe what is a typical or 'appropriate' way that a phenomenon should exist, for example, a house, spouse, marriage, visual characteristics, member of society, and so on through an endless list. We learn these figured worlds from experiences we have had, experiences that are guided, shaped and normalized by the social and cultural groups to which we belong (Gee, 2014). From such experiences, we infer

what is normal or typical, and tend to act on these assumptions unless something tells us that we are facing an exception (2014, p. 95). Abnormal or “different” often translates into “deviant”. Figured worlds are not just created and maintained within the minds of individuals but are often reflected in popularized texts of the media, or various social and political discourses.

I utilized the “evaluative worlds” tool to identify what the stories, beliefs, and ways of looking at world used in the decisions to Judge others or ourselves. This tool was applied to identify the State’s figured world of safety within Canada, and the requirements of a legitimate and appropriate individual permitted to reside within its borders. In doing so, I was able to analyze how the figured world of normal and abnormal has been used to construct lines of legality within the nation, and how terrorists precisely do not fit within this figured world type. Within my analysis, I then assess the consequences onto people that do not fit within the figured world, including exclusion or rejection from the juridical order. Further questions guiding this tool of inquiry included: what did the judge assume offenders feel, value, believe, consciously or not? How did they extend these notions to the greater cultural populous to which each offender identified as? What figured worlds, if any, were being used in each case sentencing decision to make value judgments about the judge him/herself, the State, the offender, or others?; Whose interests were the figured worlds representing? How are the relevant figured worlds here helping to reproduce, transform or create social, cultural, institutional, and or political relationships? (e.g. between the state and the offender, the offender and society, Muslims/ foreign “others” and the West).

3.2.3 Position Design

Speakers and writers take part in what Gee has termed *position design*, which describes how individuals design their language, using building tasks and tools of inquiry, in terms of how they would like their recipients to think, be, feel and behave (Gee, 2014). This means that speakers/writers seek to invite or hail the listeners/readers to assume a particular identity, by “positioning” recipients in certain ways. Rather than the speakers/writers designing their speech for whom they take their listener or reader to be- they sometimes actively try to entice them to be who or what we need them to be. Enticing requires persuading, motivating, changing or even manipulating recipients to take on new identities that may lead to new beliefs or actions. It is important to acknowledge the significance of Gee’s *position design* within the context of this thesis, and its prevalence within judicial sentencing decisions in times of post 9/11 national

security. Judges, acting on behalf of the State, position subjects of the law, and civilians alike, to their preferred securitized goals through designed language.

3.3 Empirical Material

3.3.1 Status of Sentencing Decisions

The sentencing decisions under study are legal texts that illustrate how the Canadian judiciary acts on behalf of federal and provincial governments by applying legal principles and exceptional laws that have been established in response to the political environment of the “War on Terrorism”. As judicial sentencing discourses are a direct reflection of these laws, this choice of data provided a unique window to expose the State’s use of power, and how it distinguishes the value of individuals based on “othering” within Canadian juridical order (society).

Given these elements, judicial discourses applied within sentencing decisions were favorable sources of qualitative data to inform the present thesis question. The five cases represent each Judge’s discretionary interpretation of the Criminal Code amended by the post 9/11 Anti Terrorism Act. Although discretionary, Judges’ must act within prescribed legal limits to interpret and apply the law, allocated to them by the same exceptional government. As a result, sentencing decisions do not represent the Judge’s opinion exclusively, and instead, reflect the State’s strategic use of the law to fulfill message or objective(s) of “othering” onto an intended audience. Thus, this data provided practical evidence to identify how the introduction of Counter Law, under the post 9/11 State of Exception, has actually impacted or transformed the traditional standards and procedures used by Judges to construct terrorism in ways that may induce social and symbolic effects of “othering”.

Although this language is used in the context of sentencing the particular offenders for their particular crimes committed, judicial discourse can be generalized beyond the specific case towards individuals and groups exhibiting similar characteristics, ideologies or affiliations. As a result, the acquired discursive data represents the Canadian State’s distinction between certain “classes” of people in Canadian society. Accordingly, these observations have identified individuals and groups deemed worthy of membership in Canadian society, and those that are illegitimated as individuals or groups to be excluded or abandoned by the juridical order (State). This data informed broader frameworks of social and political inequality effecting racialized minorities within securitized exceptional states (especially Muslims) including, but not exclusive to those relevant to the treatment of race, class, religion, alongside the opportunities and willingness of State’s to improve conditions (Wodak, 2001). In this case, the chosen data

allowed this research to identify the State's use of exceptional law to discursively construct the specificity of terrorism, while revealing the possible social and symbolic effects of racialized "othering".

3.3.2 Data Selection: Sentencing Decisions

The empirical material for this study consisted of five Canadian terrorist sentencing decisions processed under the exceptional Criminal Code, amended by the Anti Terrorism Act; *R v Namouh* (2009), *R v Abdelhaleem* (2010), *R v Ahmed* (2014), *R v Esseghair/Jaser* (these two were sentenced together in 2015). All texts were found from legal databases *CanLII: Canadian Legal Information Institute* and *NexisLexis Canada*.

These cases all pertain to men that were charged, found guilty, and sentenced in a Canadian Court. This requirement ensured that the sentencing texts met the criteria and rationales to be observed and analyzed, specifically the weighting of various case factors (crimes, offender characteristics etc.) relevant to identify exclusionary power. Considering this discursive analysis' level of detail, five cases provided a sufficient amount of material for a successful inquiry into the stated thesis topic.

This empirical material was selected according to specific case characteristics. All perpetrators within the five cases have been charged, found guilty and sentenced for various terrorism crimes identified within section 83 of Criminal Code, including but not limited to conspiracy to facilitate a terrorist activity, participation in the activities of a terrorist group, and distributing terrorism related propaganda. These crimes have been perpetrated on Canadian soil, constructed by the tribunal as having the purpose of inflicting harm on Canada, its institutions, or citizens. All offenders were fixed within a similar adult age group (18-40), as youth offenders were exempt from the analysis as they are afforded a different legal sentencing process outside of the Canadian Anti Terrorism Act. As this thesis seeks to analyze exclusionary power within Canada's terrorism environment exclusively, all cases comprised domestic terrorism crimes (as opposed to internationally perpetrated crimes). Although ideological extremism is recognized within threat literature as having a range of affiliations/commitments to various causes and organizations, Islamic extremism was identified as the dominant factor leading to terrorism within each case examined. In the post 9/11 criminal environment, all crimes legally defined as terrorism have been perpetrated by people identified as Islamic extremists, hence the overall analysis of this thesis is focused on the exclusion of Islamic/Muslim "foreign others". Lastly, the

five men found guilty of terrorist crimes since 2001 have immigrated to Canada from various countries of origin and have resided within Canadian borders for an established amount of time. Moreover, they all exhibit a realm of racial, cultural, and religious characteristics affiliated with the Muslim “foreign other”.

It is important to note that the stated terrorism case sentencing data is limited within Canada. First, crimes labeled as terrorism perpetrated on Canadian soil are rare. When committed, the dangerous and lethal nature of such crimes often results in the perpetrator’s death, either in attempts to carry out their plots (suicide) or police enforcement. As a result, a smaller number of terrorism cases enter the court of law, compared to the amount of terrorism crimes perpetrated. Moreover, with policing initiatives terrorism plots are now more likely to be intercepted before completion, resulting in a large amount of guilty pleas or plea deals entering into the court system promoted on behalf of defense counsel. These pleas are also promoted in attempts to receive a lesser sentence when charged under the new securitized Criminal Code, well known for severe punitive sanctions. However, cases sentenced by guilty pleas or plea deals do not afford the same judicial examination of offenders, and lack the essential material for the analysis. Thus, these cases were excluded from the data. Data for Canadian terrorism cases available for analysis was further limited by the requirement that they must have been completed following 2001 to be sentenced under exceptional Counter law (after 9/11). Due to these various factors, the availability of terrorism case data was limited, and the sample chosen represents nearly all cases within the population.

Following the analysis of these five cases, I analyzed the judicial discourse in the sentencing decision *R v Bain* (2016). This case pertains to a Canadian man convicted on sixteen charges including second-degree murder for attempting a mass shooting at the Parti Québécois election rally in 2012. Although his crimes were deemed political in nature with similar characteristics to the former five terrorism cases, Bain was not charged for crimes of terrorism or sentenced under Canada’s anti terrorism law. Using data collected from the former five terrorism cases, this comparative sentencing text was chosen based on the similarity of crimes perpetrated, particularly the essential political or ideological element. Importantly, Richard Henry Bain represents the white, non-Muslim offender whose identity, practices and relationships were differentially constructed than those within the five terrorism cases. The contrastive power of Bain’s case allowed me to analyze salient elements of exclusionary discourses that would have

gone unnoticed, particularly related to the construction of each offender's dominant personal characteristics based on race, ethnic or religious origin, cultural affiliations, etc. By showing how the Canadian born perpetrator of similar political offences was constructed by the Judge (State), this case highlights the stark differences in exclusionary/inclusionary judicial language of "othering", the State's securitized motivations for punishing crimes of terrorism, and treatment of terrorist "others" threatening Canadian national security.

3.4 Applying Gee's Method: Data Analysis

Applying James Paul Gee's methodology of critical discourse analysis, this qualitative research was conducted through a deductive approach to investigate language in use as determined by the specific research question (Gee, 2005; Gee, 2014). On a case-by-case basis, I began my analysis by putting the language of each sentencing text into its smallest units of meaning, or what Gee *terms lines, stanzas and macrolines*. A *line* constitutes a "clause" in the dialogue, a *stanza* consists of several lines on a topic, and *macrolines* are considered "what counts as a sentence in speech" (Gee, 2005, p. 142). Once each decision had been divided into lines and stanzas, sentences were grouped into the larger macro-structures treated as groupings of information. Once these larger macro-structural divisions were established, I used the chosen *Building Tasks and Tools of Inquiry* to guide questions and establish "codes" for observations. Due to the abundance of sentencing texts, observations were chosen on the basis that they would capture the relevant information to answer the research question (2005, p. 126). These discursive observations were also prompted by the knowledge gained from past research mentioned within the literature review, as well as the theoretical and conceptual frameworks.

Following the vertical analysis of each case according to the questions derived from Gee's building tasks and tools of inquiry, I was able to make horizontal connections across all cases based on observations that met the established codes. That allowed me to generate my findings in the form of seven discursive mechanisms of exclusionary "othering" that will be presented in the analysis chapter.

Gee states that language is always used from a perspective, and applied within a certain context (Gee, 2014). Humans actively design language to achieve a desired effect, whether to persuade, motivate, change, or even manipulate a situation (Gee, 2014). Applied within this thesis, this perspective reflects judicial agency, or the assumption that Judges craft their decisions and rationales purposefully by choosing the building blocks of conversations we are all

wrapped in. For example, judicial discourses were intended to reach and convince audiences of the State's punitive message, including the Canadian public, international governments (both allied and not), interest groups, national subjects and importantly, foreign "others". According to Gee (2014), use of language does not happen through explicit writing or speech alone (as language is a part of "Discourse" or a combination of ideals, values, acts etc.), which is why it is essential for researchers to examine the implicit meanings behind the language used within the specific context. Thus, this research assumed that the sentencing language, or "Discourse" was crafted, orchestrated, and infused within specific narratives that are both overtly stated by Judges, and hidden within the syntax of coherent subtexts (Gee, 2014). Analyzing implicit meanings meant accounting for messaging that was implied or not plainly expressed, insinuations, subtle references, vagueness, prominent arguments, or even the number of times these comments were made, all situated within a specific context (van Dijk, 2001). Analysis of implicit messaging was essential to reveal the punitive use of sentencing law, and the prominence of "othering" within the judicial construction of offender practices identities and relationships, and the way they can implicate the broader Muslim population through broader social and symbolic effects. As such, it was important to not only analyze the text on the page, but the securitized counter terrorism legal environment in which Judge's used to support their sentencing arguments and justify their decisions. I must note that research design only analyzes the effects of the Judges crafted languages (explicit and implicit) and was not interested nor equipped to speak to the Judge's intentions behind their language applied within each sentence.

To convey these messages onto intended audiences, Gee (2014) argues that meanings are specific to the context in which they occur (space, time, political environment, actors etc). Some aspects of context can affect the meaning of an oral or written language, all must be considered when analyzing interpretations (Alvesson, 2002; Gee, 2014). Within the present research, judicial sentencing decisions are contextually situated within the post 9/11 "War on Terrorism" known as the State of Exception. This broad context was pivotal to observations surrounding the consequential effects of Counter Law, including sentiments of "othering" within punitive sentencing decisions for terrorist offenders. This context also informed exclusionary observations related to the social and symbolic treatment of Muslim "others", and the use of state power to determine the value of lives to perpetuate the identity of the dangerous foreign "other".

Though similar, this application of Gee's critical discourse analysis is to be distinguished from the commonly used method known as content analysis. First, this analysis required a methodological approach that could evaluate judicially written sentences beyond the technical pieces of language, and how they create meaning ("othering") within the specific social context. This analysis of meaning considers how the language enacts social and cultural identities, practices and relationship, going beyond identifying the presence of certain words themes or concepts to make inferences about the messaging, as characteristic of content analysis. Secondly, this thesis' conception of language assumed that judicial sentences are part of the reality being studied; they are used to build the world of racial intolerance and inequalities in the post 9/11 Canada in which the sentencing discourses are situated. This contrasts with the content analysis' conception of language that makes a clear-cut division between reality "out there" and claims made about it. Lastly, guided by Gee's specified coding scheme of building tasks and tools of inquiry, my construction of the seven mechanisms of "othering" emerged over the course of my analysis in a deductive manner. Together, these elements constitute the methodology of critical discourse analysis.

3.5 Validity and Limitations

According to Gee, validity of a discourse analysis rests on how the observations work together with all other elements of the analyses to support or oppose the established argument. Following this logic, my analysis was written with attention to Gee's four building blocks of validity; *convergence*, *agreement*, *coverage* and *linguistic details*. Validity does not "argue that a discourse analysis 'reflects reality'; rather, a discourse is an interpretation of an interpretation" (2005, p.122). Thus, this discourse analysis was treated as subjective, fluid, and with its validity dependent upon the relevance of case characteristics I determined as observable, relevant and important to the argument (Alvesson, 2002). *Convergence* is what the research strives to accomplish; "the more the answers to the tools of inquiry and building tasks questions converge in a way that supports the analysis, the more the analysis offers compatible and convincing answers to any or all of them". Thus, every conclusion I made from the building tasks and tools of inquiry were analyzed in relation to the ways in which they supported or opposed the overall thesis argument. With *Agreement*, answers to questions are more convincing when "native speakers" of the social language in the data, and "members" of the Discourses implicated in the data, agree that the analysis reflects how such social language can function in actual settings. In

these texts, it is inevitable that judges, who are the “native speakers” interpreting the discourse and characteristics of each terrorist offender known as the “members” implicated in the data, will not agree (“members” are not given a voice to agree or disagree). However, the “native speakers” power to silence the “members” is the premise of determining how language functions in social settings. *Coverage* is achieved when findings of the analysis can be applied to related sorts of data. This includes being able to relate sentencing decisions to what has come before in the Canadian judicial environment and the ability to predict what may happen in future terrorism cases (however going beyond the limits of my project) (Gee, 2005). Lastly, *linguistic details* were relied upon as inferences were largely supported by detailed specific examples from the sentencing discourses examined.

Research applying methods of critical discourse analysis have been critiqued for their lack of explicit analysis techniques, which can limit the validity of research findings (Gee, 2014). Although this method is structured, Gee himself argues that there was no 'lock step way' to hypothesize and build conclusions to your research argument (Gee, 2014, p. 126). Such an organic process relies on the researcher to provide meanings and find answers within the observations based on their own individualized evaluations. Because findings are open to the researcher's interpretation, observations are not entirely fixed. As such, critical discourse analysis can too easily allow researchers to uncover the findings that he/she wants to find, or that best support their research argument. They are also able to ignore observations that oppose such arguments. As a result of such interpretive lead techniques, critical discourse analysis have been challenged by their ability to uphold confidence in methodological precision, or consistent findings (Gee, 2014).

To counter these limitations, it is important to emphasize my positionality as a researcher. I am a product of certain structures, caught up in layers of determinants, values, and ideals capable of shaping my observations analysis of the sentencing data. In this regard, I maintain a reflexive self-awareness and sensitivity to these potential influences, including my age as a twenty-five year old white Canadian (non-immigrant) female of Roman Catholic Faith. I have not experienced any personal encounters with the Canadian criminal justice system, nor have I participated in, been implicated in, or been victim of any direct terrorist violence. By the State, I am considered a Canadian national subject, and have no characteristic identifiers that subject me to the same circumstances of oppression experienced by people convicted of terrorism offences

or foreign “others” residing within post 9/11 Canada. Shaped by these factors, this position I occupy within society may influence how I interpret the observations of each terrorism sentencing decision.

In addition to my positionality, I would like to emphasize the systematicity of the analysis process. It began with a vertical analysis of each case where texts were grouped into larger macro-structures of relevant information and subjected to the chosen building tasks and tools of inquiry to guide questions and establish codes for analysis. Observations of each case were then compared horizontally across all six cases, to generate categories and instances of “othering”. Applying this systematic approach limited the ability for “cherry picking” results or observations that supported the stated research arguments. This was also supplemented by the active examination or search for deviant cases that opposed my research argument.

Lastly, highlighting the engagement between this methodological approach and the contributions of Giorgio Agamben and Richard Ericson will counter the stated limitations of critical discourse analysis. These theoretical and conceptual devices of the State of Exception and the subsequent Counter Law influenced what observations were “seen” to conclude the seven mechanisms of “othering”. Situated within the critical paradigm, these analytical tools allowed this research to reveal the State’s use of new punitive policies to sentence terrorists, and “see” how such applications have produced their own, and reproduced existing social and symbolic inequalities. In this regard, the concepts of State of Exception and Counter Law acted as a critical vessel or “lens” through which I was able to interpret sentencing discourses that characterized each offender based on predominantly racial constructs, and reveal the potential broader effects to be experienced by the targeted population of Muslims in the post 9/11 Western world.

CHAPTER 4: ANALYSIS

4.1 Introduction

This chapter explores how the Canadian judiciary discursively constructs the specificity of terrorism offences within the five sentencing decisions, and the social and symbolic effects of this rhetoric capable of implicating broader populations. Through sentencing, terrorism has been judicially constructed in ways that necessitate exclusionary punishment, and subject terrorist offenders to a narrative of racialized “othering”. These constructions have produced rhetoric that if applied, can induce social and symbolic effects within the post 9/11 Canadian polity. This analysis will demonstrate how these effects may implicate the broader population of Muslims in the West within this the frame of terrorist “othering”. In doing so, discourses will also reveal existing narratives that seek to exalt the identities and practices of the Canadian national subject. It is important to note that this research analyzes only the *discursive* constructions of terrorism, and the possible effects of this discourse. This analysis does not speak to the actual enforcement of these effects in the western reality, including the *treatment* of Muslim populations.

The following chapter is divided into three sections. The first aims to provide a contextual background of each case under study. The second and main analytical section is dedicated to the findings of my research, namely the seven mechanisms of exclusionary “othering”. These mechanisms serve as conceptual tools to identify specific legal elements, judicial practices, and racial characterizations used to construct the specificity of terrorism. The first three discursive mechanisms highlight judicial applications of Counter Law’s varying sentencing principles to frame terrorism crimes and offender culpability as worthy of exclusionary legal sanctions. The last four mechanisms pertain to the social, cultural, and religious constructions of terrorism that have contributed to broader social and symbolic effects. Specifically, these effects will address the prevalence of discourse implicating Muslims within narratives of “othering”. Although some discursive mechanisms were observed more frequently across all cases, each exhibited varying levels of influence according to case-specific or offender-specific factors. Thus, these seven mechanisms are not to be addressed hierarchically.

The last section of this chapter is dedicated to linking the seven discursive mechanisms of “othering” found in the sentencing material to existing scholarship, as well as the theoretical contributions of Agamben’s State of Exception and Ericson’s Counter Law. This discussion will demonstrate how exceptional State power has been utilized to construct terrorism’s specificity. Constructions of terrorism through these seven mechanisms has resulted in a powerful porosity

of that can be enforced by the exceptional State onto foreign (Muslim) populations as the pronounced foreign enemy within this era of heightened national insecurity.

4.2 Contextual Information of Cases Under Study

The following section will provide readers information relevant to each of the five terrorism cases examined. This will include the legal factors of each offence that lead to charges, convictions, and importantly, sentences. This section will also illustrate the offender's role in the alleged offences, and important personal characteristics underlined by each court within sentencing decisions. Before examining this information, it is important to acknowledge the skewed framing of these offender descriptions, derived from media reports and the sentencing cases themselves (due to limited availability of information). Because of issues regarding overzealous media reporting and the problematic racialized constructions emanating from each case, one must remain aware of the bias's embedded within this information (including racial underpinnings to which this thesis speaks of). I wish to express that the forthcoming presentations of each offender do not attempt to reproduce or denounce any cultural, religious, or racially based characterizations.

R v Namouh (2010)

Said Namouh emigrated from his homeland of Morocco in 2003 (National Post, 2012). At the time of the offence, Namouh was thirty-five years old, divorced, with limited employment status (Montreal Gazette, 2009). He has a prior criminal record in Canada involving a situation of conjugal violence for which he served a two-month prison sentence with probation (Mullins, 2013). In 2009, Said Namouh was indicted upon terrorism charges for his involvement in video editing propaganda for the Global Islamic Media Front (GIMF), an organization recognized by the court as a terrorist group that takes part in posting propaganda for al-Qaeda's Jihad recruitment (National Post, 2012; *R v Namouh*, 2010). Specifically, Namouh made images "widely available on the internet" to publicize a threat against Austria and Germany to detonate car bombs unless the countries withdrew troop support from Afghanistan (*R v Namouh*, 2010). For these crimes, Namouh was charged and convicted on four counts of terrorist activity in the Canadian Criminal Code; conspiracy to used explosives (465(1)(c) and 431.2(2)), participation in the activity of a terrorist group (82.18), facilitating terrorist activity (83.19), and extortion in association with a terrorist group (83.2) (*R v Namouh*, 2010). As a result, Said Namouh was sentenced to life imprisonment on count one, four years on count two, eight years on count three, and eight years on count four, with sentences two three and four to run consecutive to each other

but concurrent to count one (R v Namouh, 2010). Eligibility for parole was set to ten years (R v Namouh, 2010).

R v Abdelhaleem (2011)

Shareef Abdelhaleem is an Egyptian born immigrant and Canadian citizen (The Star, 2011). In Canada, the offender maintained a lucrative career as software engineer for a Canadian drug company (MacLean's, 2010). Following some years of travel to Syria and Mecca, Abdelhaleem returned to Canada deeply involved with his Islamic faith and involved with members of the Toronto 18 (MacLean's, 2010; The Star, 2011). This group was planning a series of three large truck bomb attacks targeting the Toronto Stock Exchange, a CSIS Toronto Office, and a military base (R v Abdelhaleem, 2011). Abdelhaleem attempted to provide three tones of chemicals for bomb construction and supplied a warehouse facility for storing related supplies (R v Abdelhaleem, 2011). In 2006, Abdelhaleem was convicted of participating in the activity of a terrorist group to facilitate or carry out a terrorist activity (83.18), and intent to cause an explosion that was likely to cause serious bodily harm or death to persons, or likely to causes serious damage to property in association with at terrorist group (83.2) (R v Abdelhaleem, 2011). As a result, Abdelhaleem was sentenced to five years on count one, that would run concurrent to life imprisoned imposed on count two (no credit given on the life sentence for pre-trial custody), with parole eligibility set to ten years (R v Abdelhaleem, 2011).

R v Ahmed (2014)

Misbahuddin Ahmed is a Pakistan born Muslim, with a family deeply involved within various Islamic communities (Ottawa Citizen, 2010). Ahmed and his family moved to Canada when he was fourteen, finding it difficult to assimilate and continue practicing his "devout faith" (Ottawa Citizen, 2010). In 2010, Ahmed was implicated within a terrorism plot with two co-conspirators where he intended to train and provide funds to construct Remote Controlled Improvised Explosive Devices (IED's) in support of the Taliban, a designated terrorist organization (R v Ahmed, 2014; Ottawa Citizen, 2017). Despite no clear plot, evidence showed that Ahmed attempted to join forces with a co-conspirator who sought to form a terrorist group in Ottawa dedicated to conduct attacks in Canada (R v Ahmed, 2014). Ahmed was charged and convicted for conspiracy to facilitate and terrorist activity (83.19) and participation in the activities of a terrorist group (83.18) (R v Ahmed, 2014). Ahmed was sentenced to twelve years imprisonment; five years for the conspiracy charge and seven for participation within the

terrorist group (R v Ahmed, 2014). Time served was totaled at eleven years for pre-trial custody, with parole eligibility to be determined by the Parole Board of Canada (R v Ahmed, 2014).

R v Esseghaier/ R v Jaser (2015)

Chiheb Esseghaier and Raed Jaser were sentenced together for terrorism crimes. At the time of the offences, Chiheb Esseghaier was a highly educated Tunisian born citizen who lived an introverted “deeply religious” Muslim lifestyle (Globe and Mail, 2013). As a known traveler to Iran, Esseghaier was a suspected affiliate of an al-Qaeda group around the Iran-Pakistan barrier. Raed Jaser and his family came to Canada in 2004 from Palestine, seeking refuge in Canada under a “stateless” status (The Wall Street Journal, 2013). Soon after arrival, Canadian immigration enforcement began investigating Jaser over suspected criminal ties, however deportation was never completed and Jaser remained in Canada on permanent residence status (The Wall Street Journal, 2013). Known as the 2013 Via Rail Terrorism Plot, both suspects were involved in Canada’s first Al Qaeda assisted attack intending to de-rail a train traveling between Toronto and New York City (Globe and Mail, 2013; R v Esseghaier, 2015). In 2013, Esseghaier was charged with conspiring to murder persons unknown for the benefit of a terrorist group, conspiring to interfere with transportation facilities for the benefit of a terrorist group, and three counts of participating in the activities of a terrorist group (R v Esseghaier, 2015). His sentences included life imprisonment on count one, life imprisonment on count two, five years on count three, less credit for pre-trial custody (totaling a 16 month sentence), eight years on count four, and five years on count five (R v Esseghaier, 2015). Jaser was convicted for one count of conspiring to murder persons unknown for the benefit of a terrorist group, and two counts of participating in activities of a terrorist group (R v Esseghaier, 2015). He received life imprisonment on count two, five years on count three less credit for pre-trial custody (totaling sixteen months), and eight years on count four (R v Esseghaier, 2015). Both Esseghaier and Jaser’s parole eligibility was set to ten years (R v Esseghaier, 2015).

R v Bain (2016)

Richard Henry Bain is a Canadian national from La Conception, Laurentides Quebec. Born an Evangelical Baptist, Bain is a devout Christian man (CBC News, 2012a). On the night of September 4th 2012, Bain opened fire on a Parti Quebecois election victory rally with a semi-automatic rifle, killing one and injuring another (CBC News, 2012b). Bain faced sixteen charges, including first degree murder, three charges of attempted murder, with remnant charges related to arson and weapons violations (R v Bain, 2016). Due to his statements upon arrest, it was

believed that Bain was a French nationalist promoting Quebec separatism from English Canada (R v Bain, 2016). In later posts and interviews, Bain spoke alternately about his “vision” from God for a separate Montreal, intending to kill as many separatists as possible (R v Bain, 2016). Despite the offender’s motives, the court recognized the political nature of Bain’s crimes as an “assault on the democratic process”, rather than bias, prejudice or hate based on political thought, belief or opinion of the members of the Parti Quebecois (R v Bain, 2016). Thus, he was not charged under Canadian terrorism laws. The jury acquitted Bain of first-degree murder, however found him guilty of second-degree murder and three counts of attempted murder (R v Bain, 2016). Bain was sentenced to life imprisonment without eligibility for parole until twenty years served (R v Bain, 2016).

4.3 Seven Mechanisms of “Othering”

The following analyses will uncover the seven mechanisms of “othering” at play in the five terrorist sentencing decisions. As made clear in the previous chapter, my critical discourse analysis does not aim to criticize, find fault, morally judge, or condone the way Judges applied sentences in these five terrorism cases. I do not posit myself as an arbiter or evaluator of the Judge’s work. Rather, the goal here is to uncover the way those cases are thought about, the rationales the Judges used to convince themselves and the public of their decisions, and the broad social and symbolic effects of this rhetoric. It is therefore a critique; a descriptive balanced analysis uncovering the inequalities produced by applications of counter terrorism law in post 9/11 Canada. While my findings are not neutral, I acknowledge the emotion-ladenness of this topic and attempt to abide by the principle of axiological neutrality; suspending my value related judgements to ensure demonstrable findings and research results.

Mechanism 1: Exercising Canadian Sentencing Principles: Perpetuating the Exclusion

This section pertains to the punitive judicial response to terrorism identified by the prioritization of sentencing principles known as deterrence, denunciation, rehabilitation, parity, and totality. Accordingly, this section will review the exclusionary impact of aggravating and mitigating factors used to limit terrorist offender’s prospects for lenient sentencing. Lastly, this mechanism will demonstrate how legal discourse, pervading sentencing objectives, has characterized Muslim terrorist offenders under the label of “foreign other”.

Denunciation

Each judge emphasized the need for greater denunciation at sentencing compared to that typically used for regulatory Criminal Code offence categories. The principle of denunciation

was prioritized to ensure blame or wrongdoing was placed on the offender, and to emphasize Canada's intolerance for such crimes. Justice Dawson in *R v Abdelhaleem* (2011) referenced statements from the Ontario court of Appeal, emphasizing the importance of denunciation in sentencing terrorists:

"Where the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the indiscriminate killing of innocent human beings, sentencing judges should give serious consideration to life sentences"... "sentences exceeding twenty years, and up to and including life imprisonment, should not be viewed as exceptional."

To supplement this argument, Justice Dawson cites The Supreme Court of Canada:

"the fact that sentences over twenty years may be imposed more often in terrorism cases... attests to the particular gravity of terrorist offences and the moral culpability of those who commit them." (*R v Abdelhaleem*, 2011).

In this context, the prioritization of the principle of denunciation not only highlights the severity of terrorism, but the valued applications of exceptional Counter Law to punish the moral and physical wrongdoings. This judicial reference separates terrorist offenders from those who commit regulatory Criminal Code offences, holding them to a higher moral culpability to appropriate denunciation. As denunciation lengthens imprisonment terms, these examples show how this principle was used as a judicial mechanism to exclude terrorists from society to the highest degree available by Canadian law.

Judges also gave little weight to mitigating evidence as a way to prioritize the principle of denunciation. Discourse presenting mitigating factors did very little to support or highlight evidence that would typically relieve offenders of moral culpability or limit the severity of sentences imposed. Justice Lablond in *R v Namouh* (2009) rationalized this limited judicial bearing of mitigating factors because:

"terrorist offenders are held to exceedingly high moral responsibility, which effects the weight judges are to accredit mitigating factors at sentencing".

The Judge in *R v Esseghaier* (2015) also highlighted the Court's adherence to this sentiment by stating:

"...sentences of twenty years to life imprisonment have been imposed in terrorist cases with strong mitigating factors, which have been upheld by the Court of Appeal" (2015). This dismissal of mitigating factors reflects the Canadian judiciary's discretionary ability to use factors that will contribute to the principle of denunciation and exclusionary sentence outcomes for terrorists.

Within the sentence of Canadian national Richard Henry Bain, observations demonstrated a significant difference in the judicial use of denunciation. Justice Cournoyer

(2016) in the case depicted denunciation through maximum sentences as the most severe form of condemnation for crimes available by the law. Due to this severity, the Judge argued that maximum life sentences are something the court should exercise with caution. Within this argument, he stated:

“a *maximum penalty of any kind* will, by its very nature, *should be imposed only rarely* and is only appropriate if the offence is of *sufficient gravity* and the *offender displays sufficient blameworthiness*”.

With this reference, it is obvious that the Judge did not prioritize the principle of denunciation to the same extent as the sentencing Judge’s within the terrorism cases. Instead of this “rare” denunciatory approach to sentencing, the Judge places stringent requirements onto the court to impose maximum sentences, limiting its use to only rare circumstances, and offender characteristics. Given the similarity of Bain’s crimes to terrorism, meeting the “political” requirements of bias, prejudice or hate based on political thought, belief or opinion of the Parti Quebecois, this observation demonstrates that Bain would have qualified for a similar denunciatory sentence. However, the religious or ideological circumstances that lead to this bias or prejudice, justifying denunciatory exclusion for terrorists was ignored.

Lastly, Justice Cournoyer undermined the standard known as ‘worst offender, worst offence’ that is typically applied in cases where denunciation is prioritized, and life sentences are imposed for severe crimes (i.e. murder). To do so, the Judge characterized Bain as lacking the dangerous offender requirement to fulfill this standard. In fact, The Judge criticized the judicial use of this standard as it adds “nothing to the analysis and should be avoided” (R v Bain, 2016). He argued that certain procedures need to be followed in order to avoid an:

” ... *unwarranted resort to maximum sentences* is adequately *precluded* by a proper application of those principles, notably the fundamental *principle of proportionality* set out in section 718.1 of the Canadian Criminal Code, and *parliaments discretion* in section 718.2 (d) and (e) *to impose the least restrictive sanction appropriate for the circumstances*” (R v Bain, 2016).

Here, the judge reflects on Canadian sentencing principles to prioritize the proportionality principle over denunciation and deterrence, evading the use of maximum sentences for all crimes in which Bain was convicted. He refers to maximum sentences as a “resort”, which discursively implies that these sanctions are an alternative, expedient, or last resort, rather than a valuable sentencing principle of denunciation as referenced in terrorist sentencing. Without this standard, Bain was provided the opportunity for potential leniency at sentencing that was not afforded to terrorists, despite criminal convictions for crimes of a similar nature. In this regard, Bain’s *Signs*

Systems and Knowledge (ways of knowing) were not dis-privileged to the same extent as observed for terrorist offenders. As a result, exclusion is not only an outcome of the discrepant weight given to denunciation in terrorist sentences compared to that of Bain (both in length and severity), but also in the differential opportunities to achieve a more lenient sentence.

Deterrence

Alongside denunciation, general and specific deterrence were applied as prominent sentencing principles that reinforced exclusion as a form of “othering”. The court in *R v Esseghaier* (2015) cited Baltman J. in *R v Hersi* supra at para 63, who vividly referenced the need for deterrence in terrorism cases:

“... terrorists are the *worst cowards* because they *deliberately target innocent members of the public* who are not prepared for combat. When it is *no longer safe to partake in ordinary activities* like watching a soccer match or attending a graduation ceremony, *deterrence takes on a different dimension*. The *message needs to be sent out that anyone that aspires to become part of such evil must pay a heavy price*”

Justice Code’s sentencing decision in *R v Esseghaier* (2015) cited the Court of Appeal in *Khawaja* (supra at paras. 126 and 130 (S.C.C)) accurately summarized the exclusionary purpose of general deterrence in Canadian sentencing:

“When *terrorists acting on Canadian soil* are apprehended and brought to justice, the *responsibility lies with the courts to send a clear and unmistakable message that terrorism is reprehensible* and those who choose to engage in it here will pay a very heavy price”

Both statements represent the new prioritization of exclusion to accomplish deterrent goals within the current era of counter terrorism’s exceptionalism. These observations exemplify how punitive incarceration has the ability both deter the specific offender from future crimes and spread the deterrent message beyond the case and onto an intended audience of established terrorists. As such, Justice Code placed significant responsibility onto the Canadian judiciary by privileging its *Sign Systems* as the primary institution capable of communicating the desired deterrent message of intolerance through punishment.

In reference to deterrence, the sentencing principle of *Separation* influenced this first mechanism of exclusionary “othering”. This element of deterrence was used to ensure that terrorist perpetrators were to be kept separate, or excluded, from society through prolonged periods of incarceration. For example, Justice Leblond (2010) prioritized the separation of Said Namouh:

“There are no mitigating circumstances. The accused does not have the excuse of youth. There are no indications that rehabilitation is possible- *he remains dangerous. He must be*

removed from society. Indeed, we do not know when, if ever he will cease being dangerous.”

In this statement, separation enforced the offender’s removal from society in order to protect the public from Namouh’s perceived dangerousness. Thus, exclusion was accomplished through separation as a means of denunciation.

Justice Cournoyer did not exercise the sentencing principle of deterrence with the same priority in the case of *R v Bain* (2016). In fact, this principle was considered provisional, and a factor that can be “*ousted by a determination by the trial judge*”. Furthermore, Justice Cournoyer stated:

“The objectives of [...] *deterrence* [...] are all *quite general*, and there is *no precise standard* that can be applied to rank them. At first glance, this is desirable, *since the sentencing process is fundamentally an individualized one* in that *sentences will vary from one offender to another* in light of particular emphasis that will be placed on one or the other of the objectives.”

Thus, the Judge promoted the subjective application of deterrence in the sentencing of Bain. In fact, the principle was only applied to determine parole eligibility, as opposed to imprisonment terms within terrorism cases. Without this deference to deterrence within *R v Bain*, the consequential exclusionary statements and sentences experienced by terrorists were absent.

Diminished Rehabilitation

As a fundamental principle of sentencing, rehabilitation is typically employed as a judicial requirement to accomplish just sanctions. However, rehabilitation was exercised with minimal authority in the terrorist cases. For instance, the court in *R v Abdelhaleem* (2011) stated:

“ The *impact of rehabilitation* as a mitigating circumstance is significantly *reduced* in this context *given the unique nature of the crime of terrorism* and the degree of far reaching *threat it poses to the foundation of our democratic society*” (2011).

As such, the Judge argues that the threatening, undue nature of terrorism outweighs the offender’s prospects for rehabilitation at sentencing. Similarly, Justice Leblond in *R v Namouh* (2010) argued that punitive sentencing principles should outweigh rehabilitation:

“*Rehabilitation* and personal circumstances should often be *given very little weight* in the case of an offender who is *charged with a terrorism offence*... a terrorism offence is an *outrageous offence*, and *greater weight is to be given to the protection of society, personal and general deterrence and retribution*”.

These statements reflect the Canadian State’s power to grant exclusionary sentences that prioritize incarceration over “second chance” initiatives such as rehabilitation, and reintegration.

In addition to the stated observations, each Judge characterized the terrorist offender’s denial of responsibility as the most influential determinant of rehabilitative sentences.

“Notwithstanding the emphasis on denunciation, deterrence and protection of the public, the *potential for rehabilitation and promotion of a sense of responsibility on the part of the offender cannot be overlooked*”... as it “constitutes *proof of some redeeming qualities*” (R v Namouh, 2010).

This absence of acknowledging a sense of responsibility resulted in aggravating circumstances that trumped the offender’s prospects for rehabilitation typically considered in criminal cases (intelligence, family support etc.). For example, both Chiheb Esseghaier and Shareef Abdelhaleem’s failure to express genuine remorse for their involvement, renounce their violent and racist jihadist beliefs, or understand why they were held criminally responsible for their involvement in the crimes were highlighted as un-rehabilitative qualities (R v Esseghaier, 2015). Specific to Esseghaier, due to the seriousness of terrorism offences based on ideological motivation, together with the offender's lack of insight and remorse, Justice Code concluded that he continued to pose a substantial risk to the public. Thirdly, Justice Dawson stated that until Shareef Abdelhaleem (2011) accepts responsibility for his actions and comes to an understanding of the danger they posed to many innocent people, he does not exhibit a willingness to repair his problems, and will not be able to make the concrete gains towards his rehabilitation. Lastly, in R v Ahmed, Justice McKinnon accepted the Crown’s submission that any claim or remorse was undercut by the fact that Ahmed did not plead guilty. These observations exemplify the judicial framing of terrorism as an irreparable crime. The offenders are presented as having little to no rehabilitative prospects and remain a threat to the Canadian State. This narrative is especially relevant when the offenders are remorseless to the victim(s) of these terrorism offences, being the Canadian State and its citizens. When remorseless toward Canada, this discourse perpetuates an identity of “dangerous enemy” foreigner on the side against the nation, therefore warranting the need for Counter Law to inflict State exclusion via punitive sentences.

This prioritization of punitive sentencing principles over rehabilitation exemplified the States promotion of terrorist “othering”. This observation demonstrated how the State views reformation, and who is worthy of such penance. Terrorist offender *Practices* (socially, institutionally, or culturally recognizable endeavors) were vilified, and considered unfavorable for rehabilitative prospects consumed their *Identity* as the “other” residing within Canada. This observation questions the fate of terrorist offenders within Canada, for without rehabilitation, reintegration within society is compromised. As such, I argue that the judiciary, through the

discursive use of post 9/11 sentencing laws, denied rehabilitation to prioritize exclusion via harsh imprisonment.

The principle of rehabilitation's impact on exclusionary "othering" further transpired from *R v Bain*. Cournoyer made a notably different analysis of Bain's rehabilitative prospects compared to that witnessed within the terrorist's sentencing results (2016). In fact, the Judge's only mention of the principle of rehabilitation stated:

"One of the *main objectives of Canadian criminal law is the rehabilitation of offenders*. Rehabilitation is one of the *fundamental moral values* that *distinguish Canadian society* from the societies of many other nations in the world, and it *helps the courts impose sentences that are just and appropriate*" (*R v Bain*, 2016).

In this passage, rehabilitation was considered a necessary principle of sentencing for the Judge to draft a just sanction. Due to personal characteristics and mental illness (to which I will come back later), Bain was considered a favorable prospect for rehabilitative initiatives despite the violent nature of his various convictions (*R v Bain*, 2016). Moreover, he was recognized as engaging in different *Practices*, and enacting a different *Identity* than those crafted against terrorists to delegitimize the use of rehabilitation. As a result, this prioritization of rehabilitation relieved Bain of "othering" and exclusionary treatment.

Parity and Totality

The sentencing objective known as the *parity principle* is established within section 718.2 of the Canadian Criminal Code: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (*R v Ahmed*, 2014). As the five terrorism cases met these requirements, the parity principal functioned as an exclusionary technique to ensure all terrorist offenders were given severe sentences of long-term incarceration.

For example, in the sentencing of Jaser and Esseghaier (2015), the Judge accepted the Crown's punitive sentencing submission:

"...*relying on recent terrorism sentencing cases* where the Ontario Court of Appeal imposed *life imprisonment or in the twenty-year range*, which have been *upheld by Khwaja, Khalid, Amara, Gaya*"

Judges practicing within the Canadian judiciary are bound to prior precedent setting decisions established by the various Courts of Appeal. For example, Justice Code (2015) exhibited this parity when devising the sentence for Chiheb Esseghaier, stating:

“I am bound by a consistent body of Ontario Court of Appeal case law, to begin my analysis at a range of twenty years to life imprisonment because of the gravity of terrorist crimes that have ‘indiscriminate killing’ as their object”.

Because Canadian Judges in the post 9/11 era have applied securitized anti terrorism law to the severest degree, these precedent-setting sanctions remain remarkably high. In this regard, the parity principle provides little opportunity for exclusionary sentences for terrorists to be reduced or diminished. Subsequently, judicial discourses characterizing varying factors (including race, culture, religion, etc.) to exclude terrorist offenders are also bound to these established sentences.

The impact of the *parity principle* in the sentencing of terrorists is emphasized by the comparative observations within the case of *R v Bain*. As with other punitive sentencing principles, Justice Cournoyer denounced the use of the parity principle and the effects it has on sentencing. First, he expressed concern over applying this principle: “*sentencing ranges are nothing more than summaries of minimum and maximum sentences imposed in the past*” (*R v Bain*, 2016). He further argued that principles governing the length of imprisonment strip the sentencing process from its individualization and the judiciary’s ability to accurately sentence offenders according to the specific case circumstances or personal characteristics (*R v Bain*, 2016). Instead of parity, the judge specifies that:

“...a system of *sentencing ranges and categories should be outweighed by principles of proportionality*, which are adopted to govern the lengths of sentences of imprisonment.” (2016)

Instead of parity, the principle of proportionality ensured the severity of the punishment fit the seriousness of the offence.

In similar regard, the judicial use of Canada’s *totality principle* supplemented the use of parity to enforce severe exclusionary sentences for each terrorist. The totality principle requires that multiple sentences be imposed when an offender is convicted for multiple offences (*R v Ahmed*, 2014). The expansion of the Criminal Code offence categories for terrorism crimes have created multiple charging capacities for each offence, increasing the number of sentences available for Canadian Judges to impose per offence (including life imprisonment). As a result, the totality principle has provided Judge’s with legal tools and additional powers to inflict the State’s exceptional interests and exclusionary authority through punitive sentencing. For example, within the case of *R v Esseghaier* (2015), the totality principle ensured that the offender received two life sentences, alongside a total of fourteen years and four months for his crimes.

Mechanism 2: Judicially framing the Unique Nature of Terrorism Offences to Necessitate the Exclusion

The second mechanism of “othering” at play within the five Canadian terrorism sentences is a narrative establishing the unique nature of terrorism crimes and the egregious motives of its various perpetrators. Judicial *Discourse* combined verbal elements with symbolic actions to portray terrorism crimes as ‘unique’. This “uniqueness” was framed in a way that distinguishes terrorism crimes from other regulatory offences, and terrorists from other regulatory offenders as more serious, harmful and deplorable to the Canadian State. Highlighting elements that comprised this uniqueness allowed Judges to target terrorists as individuals exhibiting these “unique” characteristics and support exclusionary “othering” via sentencing ranges.

To demonstrate the “unique” nature of terrorism, Judges curated three specific elements differentiating its crimes and perpetrators from regulatory Criminal Code offences (R v Abdelhaleem, 2016). First, Judges magnified the devastating effects of terrorism crimes when inflicted on innocent lives. Secondly, Judges highlighted the fundamental motivations for such crimes based on political, religious, cultural, or ideological factors. And third, terrorisms instability was emphasized, with its ability to strike a universal fear of the unknown, that play on the minds of civilians globally (R v Esseghaier, 2015). With these three elements, the “unique nature of terrorism crimes” justified sentences at the most punitive range available by the law, and consequentially the most severe sanctions of imprisonment via exclusion.

The “unique” devastating effects of terrorism were reinforced by judicial interpretations of terrorist mentalities. Terrorists were labeled as relentless perpetrators willing to go boundless lengths to accomplish their injurious goals. For example, the Judge in R v Jaser referenced the offender’s statements intercepted by the police:

“we could easily do it just one time to teach people a lesson, be *aggressive* and maybe a little careless, but *I would rather be careful so I can live and have more opportunities to do more*. The point is *not about being caught*. The plan is *not about one or two...*” (2015) With this statement, the Judge characterized terrorists as taking advantage of criminal opportunities, committed to their goals of mass devastation. This reference also framed perpetrators as having little to no fear of getting caught by Canadian authorities, or legal and social punishment. These statements identified terrorists as unique criminals in Canada.

Accordingly, Judges emphasized the intended impact and grave effects of terrorism onto all sectors of Western society to demonstrate its uniqueness. For example, Justice Leblond cited The British Court of Appeal in *Barot*, that terrorism is unique by its:

“...*devastating effects at many different levels*, there would be those who died, taken from their families, utterly *blameless people*. *Pointless death would bring grief, anger and bewilderment* in those left behind to mourn. There would be those who survive, *injured, enduring the rest of their lives with terrible disabilities, with hopes and dreams for the future destroyed and lives of families changed forever...* British economic cost of your activities cannot be ignored. This was *no noble cause*” (2010).

Justice Leblond cites this court to denounce the unique devastation and expansive effects of terrorism crimes, including those felt by direct victims, societies, States, and economies alike. What is interesting is that Leblond describes these effects in relation terrorism exclusively, distancing these crimes from regulatory Criminal Code offences that may also have similar effects. Similarly, the victims, being members of Western society, are characterized as innocent “blameless” civilians, undeserving of such casualties and suffering, and incapable of committing similar “unique” crimes. Distinguishing Canadians as victims, and terrorist “others” as the exclusive population of perpetrators committing these unique crimes, reinforces an exclusionary narrative.

Justice Dawson in the case of *R v Abdelhaleem* used this first element to differentiate terrorism crimes and perpetrators from that of regularity offence categories, and justify Counter Law’s punitive sanctions at sentencing:

“the impact of... *mitigating* circumstances is *significantly reduced in this context given the unique nature of the crime of terrorism and the degree of far reaching threat it poses to the foundation of our democratic society*. Where the accused has shown a willingness to participate in *indiscriminate killing* and there are grounds for believing he is likely to remain a *serious danger for an indeterminate time, segregation* of the offender from society becomes the *predominate purpose of sentencing*” (2010).

Within his sentence, the Judge also labeled terrorism as “*a crime onto itself*”, and “*a special category of crime* when it comes to sentencing” (2010). Similarly, Justice Leblond in *R v Namouh* stated that due to these potential grave effects: “*a terrorism offence is an outrageous offence*, and greater weight should be given to the *protection of society*” (2010). Therefore, Judges intended to magnify the devastating effects of terrorism to distinguish its crimes and perpetrators as unique, and worthy of severe sentences via Counter Law.

With the second element, Judges applied the legal definition of terrorism to identify terrorism as unique. Judges insisted that these criminal practices are incited by political, religious, cultural, or ideological conflict, in contrast to crimes processed under regulatory offence categories (i.e. murder). Judges highlighted certain *Practices* on behalf of each offender that met the unique criteria within the designated terrorism section 718.2(a) of the Criminal

Code: “evidence that the offence was motivated by bias, prejudice, or hate based on race, national or ethnic origin or religion” (R v Ahmed, 2014; R v Namouh, 2010); R v Esseghaier, 2015; R v Abdelhaleem, 2011). In R v Namouh (2010), Justice Leblond broadened bias prejudice or hate-based practices to include “*language, colour, religion, sex, mental or physical disability, sexual orientation or any other similar factor*”. In doing so, the unique elements of each crime incited by raced-based biases or prejudice, were considered aggravating factors that increased criminal responsibility, culpability, and injured prospects for lenient sanctions. Highlighting these unique factors defining terrorism the Judge in R v Namouh, (2009) affirmed that terrorism runs counter the fundamental values of Canadian society (or *Figured World*) and demands exclusion in the form of severe punishment.

The third element described the manipulative and coercive intent of terrorism crimes used to exploit the fear of Western societies in the “War on Terrorism”. Terrorism in the modern world is unique as it is capable of inciting anxiety of the unknown. The “unknown” in this context refers to the suspicion of covert terrorists running rampant in the West, capable of committing a devastating terrorism strike at any moment. In this regard, fear of this “unknown” references the established fear of the “other” or “outsider” that is absent within regulatory Criminal Code offence categories. For example, Judge McKinnon in R v Ahmed presents this narrative by referencing Justice Durno in R v Khalid (2009):

“Terrorist offences are the most vile form of criminal conduct ... it is an offence that has an enormous impact on the public, their object being to strike fear and terror into citizens in a way not seen in other criminal offences”.

Furthermore, the judge in R v Esseghaier also emphasized the offender’s mentality to prey upon the fear of the Western populous by using statements that were intercepted during the production of a propaganda video to be released for his alleged train plot:

“That will drive them more nuts, that we should hold up a Canadian newspaper or something so they will know we are on site... get out because we want this whole city, this whole country to burn, I could care less who dies, everyone is a target, they pay taxes, they vote, they’re enemies” (2015).

It is evident that Esseghaier sought to manipulate the Western fear of the enemy both mentally and through established practices of the plot. What is interesting about this statement is that he distinguishes himself and other terrorists as enemies of “everyone” in Canada, subsequently distancing this population from national subjects, and in return identifying them as “outsiders”.

Thus, sentencing Judges cited these offender statements to portray terrorism crimes and its perpetrators as “unique”.

Aside from these three elements, the severity of judicial sentences imposed exclusively for crimes of this “unique nature” created a *Situated Meaning* of exclusion. Since the 2001 introduction of the Anti Terrorism Act, only immigrants of predominantly Muslim cultural backgrounds have been charged and sentenced for terrorism crimes under Criminal Code provisions. Therefore, this language describing terrorism crimes and criminals as “unique” and worthy of punitive punishment, applies exclusively to Muslims offenders. As these sentences invoke maximum life imprisonment, this is the most severe form of exclusion a Canadian offender, or person residing in Canada may receive.

This exclusionary legal treatment for terrorism’s “uniqueness” is highlighted when compared to its absence in the case of *R v Bain* (2016). Despite the reality that Bain’s crimes were charged and sentenced under regulatory Criminal Code offence categories, the similar nature of his offences were deemed “political in nature” (*R v Bain*, 2016). Justice Cournoyer identified Bain, alongside his politically induced crimes, in a different way than what was witnessed within the five terrorism cases. Instead of focusing on the “uniqueness” of his crimes, the judge tailored his sentencing decision towards Bain’s impact on the “common heritage and sources of shared pride by political opponents in this county” (*R v Bain*, 2016). Furthermore, there is no mention of Bain victimizing “innocent Canadians”, or contributing to other prejudicial aggravating factors that functioned to justify the use of severe sentences for the various terrorists. In the absence of this narrative, Bain, a Canadian national subject was not considered worthy of exclusionary treatment by the law.

Lastly, it is important to note a nuance. Justice Code exemplified how this “uniqueness” can be applied in a less incriminating way when sentencing the offender:

“...there are a number of occasions where the accused talked about the *train plot*, or the *sniper plot*. There were also a *number of occasions on which they talked about the importance of having multiple projects in order to carry them out continuously and make a bigger impact*. There is *no serious issue* that when the accused talked about these ideas they were talking about deliberately trying to kill people, *which would be murder if it was actually carried out*. However, the real issue is not whether they were talking about murder, because *it is not a crime to talk about it*.”

Within this passage, the Justice Code argues that the elements within Jaser’s case constituting his offences as “unique” only have meaning if plots were executed and crimes were carried out. In

the case of Esseghaier and Jaser, their plot to de-rail the VIA Rail train was infiltrated by police before completion, which voids any discussion regarding these elements of uniqueness (i.e. multiple projects, bigger impact etc.). As a result, the offenders were relieved of this “unique” label, alongside aggravating elements that would have led to harsher sentences.

Mechanism 3: Canadian Alliances in the Western “War on Terrorism” as Reinforcing the Identity of the “Other”

This third mechanism of “othering” observed within the judicial discourse is related to the State’s use of Counter Law to promote Canada’s position as a Western ally in the “War on Terrorism”. When the Canadian State employs extensive punitive sanctions for terrorism crimes, it reflects the nation’s commitment to the ‘Western’ anti terrorism strategies that require strict zero-tolerance approaches to such crimes and subsequent perpetrators. As the judgments are presented, the Canadian State attempts to show its strength by upholding international obligations as a means to ensure the endorsement, cooperation and respect of other prominent nations including the United States. This recognition from other allied nations establishes Canada as a country capable of protecting the West from future threats, terrorisms global insecurity, and various economic and political advantages. This mechanism was observed in two ways: first, judicial reference to exclusionary sanctions that align with international obligations, and secondly, judicial idealization of the Western culture and social environment as “superior” to that of “others” who are worthy of exclusion.

Demonstrating the first set of observations, the need for punitive sanctions was established within each case as a requirement of the Canadian judiciary to uphold international obligations and affirm the Canadian State’s power within the fight against the “War on Terrorism”. Judges acknowledged Canada’s involvement within various international conventions as promoting cooperation among Western States for purposes of national and global security. Justice Leblond’s reference to the *United Nation’s International Convention for the Suppression of Terrorism Bombings* mentions that Canada’s involvement in global initiatives is critical in the modern world, as nations become “deeply concerned about the worldwide escalation of the acts of terrorism in all forms an manifestations” (R v Namouh, 2010). To demonstrate Canada’s commitments, Justice Leblond in R v Namouh recalled the *Declaration on Measures to Eliminate International Terrorism*, annexed to general assembly resolution 46/60 of 9 December 1994, which instituted that:

“All States Members of the United Nations solemnly reaffirm their *unequivocal condemnation of all acts, methods and practices of terrorism* as criminal and unjustifiable, wherever and by whomever committed, including those which *jeopardize the friendly relations among states and peoples and threaten the territorial integrity and security of states*”... convinced of an *urgent need to enhance international cooperation* between states in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for *the prosecution and punishment of their perpetrators.*”

By denouncing this conduct publicly through the court system, the Canadian State upholds domestic and international confidence in its anti terrorism law. However, this passage also provides another dimension to terrorist sentencing severity, intended to supplement the public assignment of blame for criminal wrongdoings. Justice Lablond established the offender’s participation as an attempt to jeopardize the integrity, functioning, and security of international relations. Specifically, these actions were portrayed as threatening the peaceful cooperation of States involved in the “War on Terrorism”. With this discourse, terrorist offenders are not only denounced by Canada, but by the entire international community of member States (i.e. “the West”) as a united force to fight terrorism’s developing insecurity.

The second judicial narrative contributing to this third mechanism of “othering” was observed through the State’s justification of securitized anti-terrorism strategies, including the mentioned punitive sanctions used in order to protect Canada’s idealized values, culture and societal functioning. Judge’s framed Canadian values and practices as coveted, idealized and an identity that foreign “others” and the international community should emulate. For example, the Superior Court of Quebec’s Justice Leblond in the case of *R v Namouh* (2010) glorified Canada’s historical contributions to religious and cultural inclusion in comparison to that of nations in conflict with the West in the ongoing “War on Terrorism”. Justice Leblond stated:

“Canada values its history of multi-cultural and multi-ethnic tolerance, we are proud people of many languages, religions, and backgrounds and can co-exist in a peaceful orderly society. This short history compared to other societies filled with generations of hostility and hatred is the beacon of hope for the future. Therefore, we must guard our individual freedoms, respect for the worth of every individual and our peaceful social order. To this end, sentencing in cases of terrorist activity must strongly repudiate activity that undermines our core values.”

This passage reflects the State’s representation of Canada’s “superior” culture, upholding values of ‘multi-cultural and multi-ethnic tolerance’, praised for maintaining “peaceful social order”, co-existence of all individuals included within society (*R v Namouh*, 2010). This discourse is

representative of the States' *Figured World*, which are the accepted ideals and norms deemed essential to embrace for the functioning of a peaceful, collective nation.

Importantly, this passage also works to condemn other societies that do not fulfill these self-proclaimed valued characteristics of Canada. Justice Leblond presents the offender as an oppositional non-member of this superior Canadian identity, despite residing in the nation for several years. In fact, this citation establishes terrorist offenders as coming from "societies filled with generations of hostility and hatred" (*R v Namouh*, 2010). Due to a *Relationship* of cultural, ethnic, and religious similarity, Muslim populations are affiliated with these condemned societies, and characterized as indifferent non-participants to these revered values. As a result, this form of "othering" is broadened beyond the offender, and onto the wider populous of individuals who have originated from these so-called "immoral societies". To "guard" Canada's "superior" values, the narrative of exclusion persists.

Mechanism 4: Forging Restraints: Perpetrators as 'Outsiders' and the Exclusionary Impact on Muslims

As a mechanism of exclusionary "othering", the perpetrators within judicial sentencing decisions were subject to the label of "outsider". Judges established this particular *identity* by interpreting each offender's wrecked *relationship* with the Canadian State, and *practices* lead by value judgments, knowledge and belief systems.

Judges dismissed narratives that legitimized a terrorist offender's characteristics as similar to, comparable to, or kindred with the Canadian insider. By doing so, Judges were able to both promote and reinforce the label of "outsider". For example, in the case of *R v Ahmed* (2014), the Judge cited psychiatrist Dr. Loza's conclusions that the offender:

"...accepts the social norms and values of democratic and pluralistic society, that he feels a part of Canadian society and expresses no feelings of hate, hostility, alienation or persecution towards Canadians. He identifies himself as being Canadian. He positively interacts with those outside of his own culture, religious and ideological group. He has empathy and tolerance towards them, as demonstrated by his history and the character witness".

However, Judge McKinnon works to delegitimize and confute this narrative. To do so, the Judge "parts paths" with Dr. Loza by finding discrepancies within his interpretation of the offender. Justice McKinnon stated that Ahmed was able to manipulate the psychological tests and conceal or disguise his "outsider" characteristics when under psychiatric evaluation. Furthermore, Justice McKinnon highlighted prominent characteristics that would prove Ahmed's "outsider"

mentality, including membership in the Taliban and other terrorist organizations, or participation in planned attacks aimed to ‘bring down’ the Canadian State.

As required of Gee’s situated meaning, each phrase or statement referencing the “outsider” label also informs the term “othering”. As a prominent example in *R v Namouh* (2010), Justice Leblond quoted precedent setting British case *R v Barot* to emphasize the impact of “othering”:

“In the wider community, there would be thousands of decent hard working *Muslims in the country*, British citizens, who would have to live their lives every day *under a cloud of deep suspicion*”.

The Judge acknowledges the negative effects of “othering” experienced by Muslim’s as a consequence of this generalized “outsider” narrative, including increased suspicion and the legal responses that follow (surveillance etc.). Although Justice Leblond recognizes a negative impact of “othering”, he continues to propagate the mentioned narrative by enforcing punitive principles and exclusionary language throughout his written decision.

This mechanism was further endorsed by discursive imagery used to classify each perpetrator as a dangerous “outsider” threatening the Canadian State. This was made possible by the choice of descriptive language used to instill a particularly graphic image of the offender’s identity, motivations, and relationship with Canada. For example, language such as “catastrophic” and “Spine-chilling” were used to describe the impact of Ahmed’s potential plot (*R v Ahmed*, 2014). In the Case of *R v Ahmed* (2014), Justice McKinnon emphasized the exact weapons purchased to accomplish the alleged plot (shoulder mounted weapons, grenades) alongside the intended targets, being the Western public and coalition troops including the Canadian Army. The emphasis on Ahmed targeting Canadian troops had symbolic reference to the Canadian State, Government, and civilians. These elements insinuate an ‘us versus them’ narrative that labels the perpetrator as a dangerous “outsider” attacking “insiders”.

Through *Situated Meaning*, this “outsider” label can insinuate a broader exclusionary narrative onto the Muslim population. At sentencing, the term “outsider” references someone or a group of people who are considered contrasting or unequal to that of Canadian national subjects by way of their ideological, religious, cultural, physical or belief differences. This label signifies distance, and difference. When referencing terrorists from exclusively Muslim societies, related cultural traditions, Islamic faith, etc., are implicated within the “outsider” label. Thus, the “outsider” encompasses all Muslim individuals associated with such characteristics.

Mechanism 5: Religious Beliefs as the Double Standard of Porosity for the “Dangerous Foreign Other”

Observations of the five terrorism sentences revealed a judicial tendency to identify certain aspects of the offender’s religion, beliefs, and faith-based *practices* as representative of the dangerous “other”. Judges characterized the Islamic belief system in relation to radical ideologies capable of inciting terrorism. This mechanism was observed through the following examples.

Judges used this mechanism of “othering” to portray the offenders as committed followers of their Muslim faith. As all five perpetrators had immigrated to Canada from predominantly Muslim countries, this was measured by way of their involvement in faith practices overseas, or Canadian mosques and Muslim Communities domestically. This was accomplished through the identification of familial ties to Islam, the offender’s upbringing within the faith, and commitment to lifelong religious practices, such as attending mosque and daily prayer. For example, in *R v Ahmed*, Justice McKinnon referenced the role of the offender’s father as a travelling Imam. This was presented as an indicator of the extent of Ahmed’s religious connections, familiarity, and commitment to Islam. In *R v Esseghaier* (2015), the Judge cited the testimony of the perpetrators younger brother Nabil to highlight Esseghaier’s devoted religious practices. Nabil testified that he witnessed Esseghaier:

“...absorbing the Muslim religion quickly, praying five times of day, going to mosque, reading the Quran and religious texts a lot, growing a beard, wearing traditional clothes, lecturing the family about needing to be strict on religious matters”

The Judge used this imagery to frame the offender’s religious and ideological practices as grandiose or unconventional, and outside the established norms of Canadian society or State’s *figured world* (interpretation of legitimate, and appropriate behavior). With this dialogue, Judges were able to frame violent Jihad (in the form of terrorism) as stemming from religiosity.

Accordingly, Judges interpreted the offenders’ religious commitments as a source of dangerous threat. In fact, religion was indicative of their extremist potential to conform to terrorist ideologies. For example, Justice Dawson in *R v Abdelhaleem* (2011) associates religious beliefs with radical ideologies by stating:

“Those who commit such offences may be dedicated ideologues who will hold to their beliefs, thereby representing an indefinite future danger to the public.”

Judges informed process of “othering” by characterizing terrorist religiosity as threatening the fundamental values of Canadian society. In the case of *R v Esseghaier*, the Judge

associated Muslims as joining “the *mission of Jihad* where *making chaos in the form of terrorism activities will bring the ruling State to its knee*” (R v Esseghaier, 2015). He uses this reference to then frame this mission as in direct conflict with Canadian societal, cultural, institutional, and legal norms that have functioned to create the harmonious westernized nation in which we live. Similarly, in R v Ahmed (2014) the Judge characterizes terrorists as inciting:

“vile forms of criminal conduct... *that attack the very fabric of Canada’s democratic ideals*. Those involved live by a *philosophy that rejects the democratic process*. Their motivations are uniquely *and fundamentally at odds with the rule of law*”.

Applying Gee’s *Discourse*, the Judge combined the offender’s actions and motives to exhibit his rejection of Canadian democracy and attempt to destroy its very existence. Using language such as “attack the very fabric of Canada’s democratic ideals” creates a distinct discord between terrorists and national subjects. As the former “lives by a philosophy” that threatens and rejects the latter as individuals, as a country, its institutions, values, and virtually all other elements of society (law, politics etc.), they are distanced as enemies of Canadian national and democratic functioning.

Central to this mechanism is the double standard of porosity for the dangerous Muslim “other”. By porosity, I am referring to the possibility that this label of “other”, based on terrorist offender’s characteristics such as religiosity, will leak or bleed into the labels and identities experienced by the broader population of Muslims. Justice Leblond demonstrated this mechanism’s porosity in R v Namouh (2010), citing British terrorism case R v Tsouli (2007) by generalizing the dangerous terrorist label onto Muslims as the exclusive “susceptible” population to engage in terrorism:

“... the contributions made towards the war effort was to deploy their skills in media presentations to *reach out to other Muslims who were susceptible to this type of extreme ideology*; to make this material available to them in order to persuade them. As a matter of *religious duty, to take action to join the jihad*, and literally to *kill such non-believers, wherever they may be found...*”

Importantly, the statement “reach out to other Muslims who were susceptible” characterizes the Muslim populous as vulnerable to accepting and employing terrorist practices and related ideologies. The term “susceptible” in this contextual reference to extreme ideologies carries some negative connotations, including a lack of restraint or control. Furthermore, the term “religious duty” insinuates that all Muslim’s have a responsibility and obligation to participate in terrorist practices against the West. This narrative negates the essential component of choice and interpretation of the Quran- that all individuals have a choice to join a terrorism movement, Jihad

or otherwise. In this example, the Judge relies on the porous effects of popularized Western discourses that have been accepted and legitimized in the evolving “War on Terrorism”, to assert Canada's figured world based on value judgments that ultimately work to inform processes of “othering”. Due to the heightened securitized circumstances of the “War on Terrorism”, the exclusionary consequences of porosity may go beyond terrorism cases to negatively impact the populations labeled as the “other” within Canadian society.

The observed absence of religion within the judicial discourse of sentencing *R v Bain* (2016) highlighted the importance of this mechanism within the terrorism cases. Religion was not treated as a paramount aggravating factor, despite Bain’s incriminating statements at trial identifying himself as an evangelical Baptist, with evidence indicating his religious interpretation lead to his crimes (*R v Bain*, 2016). Although Justice Cournoyer recognized his religious faith, it was never analyzed in relation to the political, ideological, or extremist nature of his crimes. In this same regard, there was no attempt by the judge to attribute these influences to a wider religious or cultural group or population beyond the individual offender. As a result, there were no exclusionary sentiments or discursive attempts to identify Bain’s practices as “different” or outside what is determined as normalized Canadian behaviour. I would further argue that the absence of this fifth mechanism within the sentencing discourse of *Bain* reflects an inclusionary discourse for those who exhibit shared “Canadian” religious and cultural characteristics. However, it also highlights the precarious nature of this inclusion, as it tends to constitute only those who embody the white, Christian identity of Richard Henry Bain.

Religiosity as Mental illness: A Comparative Analysis of R v Esseghaier and R v Bain

The sentencing factor of mental illness revealed differences in the exclusionary porosity of religious beliefs. Mental illness was a significant factor judicially applied in the terrorism case of *R v Esseghaier* versus the regulatory Criminal Code sentencing of *R v Bain*. Following various psychological assessments, the defense suggested that Esseghaier had limited cognitive capacities and possible schizophrenia (mental illness), which raised questions about his moral blameworthiness, and ability to endure lengthily punishment (*R v Esseghaier*, 2015). Furthermore, his extremist religious identity, beliefs, and practices were disputed as a result of his mental illness. At sentencing, Justice Code strongly denied these arguments, relieving extremist views from any mitigating relevance to mental illness, while mobilizing extremism as an exclusive religious problem:

“It is unnecessary to arrive at any firm conclusions regarding Esseghaier’s alleged mental illness. [...] Ramshaw and Klassen could have been more cautious before describing Esseghaier’s religious beliefs as delusions and as psychotic symptoms of mental illness. Both Doctor’s described Esseghaier’s central belief- that God will take his soul to heaven and release him from jail and that this event will signal the return of the Prophet Jesus and the beginning of the caliphate- as a *grandiose psychotic delusion*. From Esseghaier’s perspective, it is based on the reading of the Holy Quran. Some devout Christians believe that the Book of Genesis and the Book of Revelations, as set out in the Bible, describe real events and literal truths. There is no forensic psychiatrist that would describe these religious beliefs, about past and future events that are perceived to be as real, as psychotic delusions.”

Furthermore, the offender’s beliefs were characterized as:

“...consistent with an intensely religious or political man, who is extremely isolated and trying to come to the grips with his fate in the time since his conviction while facing the prospect of spending the rest of his life in prison.”

With these statements, the Judge was able to discredit the Doctor’s findings of Esseghaier’s mental illness, and instead label his religious beliefs and subsequent actions that lead to terrorism as a characteristic of a devout Muslim. These judicial statements inform “othering” by typifying Islam as an intense and isolated religion, capable of inciting extremist and terrorism offences. Lastly, the Judge further rejects any mitigating power of mental illness in terrorism cases, rather using it as a justification for exclusionary sentencing initiatives:

“...an untreated mental illness that is causally linked to the offending behavior cannot mitigate the sentencing of a dangerous individual. If anything, it means that the protection of the public becomes the predominant sentencing principle, requiring the imposition of a fit and appropriately lengthy sentence.” (R v Esseghaier, 2015)

To conclude, the mitigating factor of mental illness within terrorism cases was used to reinforce the dangerous religiosity of the offender in relation to extremism and increase the offender’s criminal culpability worthy of exclusionary sentencing.

Within the comparator case of R v Bain, mental illness was used as a mitigating factor to limit both moral culpability and sentence severity for his crimes leading up to murder. Similar to Esseghaier, Bain’s defense counsel ordered a psychological evaluation that concluded adverse personality disruptions including schizophrenia and hallucinations, all of which were accepted by Justice Cournoyer (R v Bain, 2016) at sentencing:

“Mental disorder, particularly schizophrenia, can significantly mitigate a sentence, even if the evidence does not disclose that the mental illness was the direct cause of the offence or that it was carried out during a period of delusions, hallucinations or such[...] the mental disorder diminishes the degree of responsibility of the offender. Impaired reasoning, delusional disorders, and like mental conditions distinguish those afflicted from the ordinary offenders who is fully accountable for his or her conduct.”

Mental illness functioned as a true mitigator for Bain, for without the discursive constructions of dangerousness or mental instability due to religious belief systems as witnessed in *R v Esseghaier*, this factor alleviated culpability and lead to a lesser sentence. Lastly, mental illness in the case of Bain was not used in conjunction with personal circumstances to characterize the offender's *Practices, Identity and Relationships* within Canada as "different", as the "other", or as a factor that encouraged terrorist exclusion.

Supplementing these differences, the judge in *R v Bain* (2016) portrayed the offender in positive terms to characterize him as worthy of the mitigating capacities mental illness has at sentencing:

"Under our system of Criminal Law, the *offender is always entitled to the benefit of the doubt- this also applies to the deliberation with respect to the mental state*"

First, Justice Cournoyer's willingness to give Bain the "benefit of the doubt" implies a rather optimistic and positive character reference and insinuates a correctness or justification for his limited culpability due to mental illness. Secondly, the term "always entitled" characterized Bain as owning the absolute legal and natural right to this benefit, despite the conditions of his legal and moral wrongdoings against the State. These discursive elements are significant when present within the case of *R v Bain* yet absent in the terrorism case of *R v Esseghaier*. When the internationally born offender was denied the mitigating "benefit of the doubt", exclusion becomes palpable.

The exclusionary effect of mental illness in terrorism cases was revealed through the disparate sentences handed down in *R v Bain* versus *R v Esseghaier*. In the former case, Justice Cournoyer (2016) stated:

"...the *effect of imprisonment* should be taken into account when it would be *disproportionately severe because of the offender's mental illness*".

As a result, the automatic life sentence requirement for convictions of second-degree murder, the three counts of attempted murder, together with various arson and weapons offences, Bain received one life sentence with eligibility for parole after 20 years. Mental illness was not analyzed against any religious or cultural elements but was instead deemed a contributor to the offences committed to warrant a less punitive sentence. In contrast, despite evidence of mental illness, *Esseghaier* was sentenced to life imprisonment for count one (conspiracy to damage transportation infrastructure for the benefit of a terrorist group), and life imprisonment for count two (conspiracy to commit murder for the benefit of a terrorist group) (*R v Esseghaier*, 2015).

Additionally, he received a sentence totaling fourteen years and four months the remaining counts related to participating in or contributing to the activity of a terrorist group (R v Esseghaier, 2015). Interpretation of religiosity and mental illness played a role in the sentencing of both offenders, but for different reasons.

Mechanism 6: Repercussions of Personal Characteristics: Injecting Suspicion and Framing Danger

This sixth mechanism highlights how Judges characterize the personal traits and life circumstances of each offender in ways that perpetuate “othering”. The identity of the “other” was characterized as different or at odds with the accepted traits recognized on behalf of Canadians. In doing so, Judges created the feeling of dangerousness that justified exclusion. Justices within all five sentencing decisions highlighted traits of Muslim cultural affiliation, including Islamic religious practices, stated beliefs, and physical appearance, including facial hair and clothing/garb. Judicial interpretations of physical traits and characteristics also expanded into personal achievements. For example, in the case of Chiheb Esseghaier, the Judge chastised the offender’s education level, including his incomplete high school record (R v Esseghaier, 2015). In this same case, the judge emphasized the offender’s prior criminality, specifically his conviction on charges of criminal fraud and uttering and receiving threats (2015). This incomplete educational record, in combination with his prior criminality presented him as atypical, abnormal, or deviant of what it means to be a functioning and civilized Canadian. Moreover, these characteristics were determinants of his unwillingness to support and contribute to society, all of which are valued and practiced by the rest of Canadians. Similarly, education was also considered within the case of Misbahuddin Ahmed, who was highly educated and attending Concordia University (R v Misbahuddin, 2014). This mitigating factor was, however, diminished at sentencing when the judge highlighted that this education was supplemented with night school Arabic classes and recent travel to Syria for the purpose of “understanding and interpreting the Holy Quran”. For the Judge, this signified continued affiliation with terrorism-laden countries, and was grounds to delegitimize his education and intelligence as the “devious and untrustworthy” requisite to his involvement within the terrorist plots (R v Esseghaier, 2015). In the absence of education, Justice Leblond in R v Namouh, (2010) highlighted the offender’s job instability as an adverse factor distancing the offender from accepted ideals, and indicative of the offender’s interests and commitments to ulterior operations beyond Canada (i.e. online terrorist propaganda).

Even in the circumstances of *R v Abdelhaleem* (2010), where characteristics of the offender's past did not meet the generalized cultural or religious labels of Muslim (until 2004 when he returned back to his faith), the Judge emphasized his routine violation of Canadian tenets. For example, Abdelhaleem's use of alcohol, drugs, unwise use of monetary funds, bad judgment in choice of friendships, lack of romantic relationships, and introverted "loner" behavior were presented as character flaws or symptoms of loose morality that are preconditioned to terrorist violence. In these various examples, the Judges' used *Discourse* to combine the offender's actions in a particularly diminishing way that portrayed their *Practices* as "different" or detrimental to Canadian society.

To establish this dangerous "other" identity, Judges relied upon the assumed knowledge of the *Conversation* of the "War on Terrorism", Canada's Westernized stance on countering terrorism's violence, and the accepted traits and practices of the prototypical law-abiding Canadian citizen in this environment of insecurity. By highlighting characteristics of the terrorist offender that do not fit with the Western "side" of the "War on Terrorism", an image of the "other" resonates within the text. Not only did the mentioned personal characterizations invalidate the terrorist "other's" norms, but also exalted representations of the idealized "Canadian". As a result, the judicial reference to factors such as education, criminality, or physical features of the terrorist offender created sentiments of "othering" that necessitates the exclusion to protect the exalted Canadian.

When the sentence of Richard Henry Bain was analyzed in contrast to the findings of each terrorism case, observations showed immense differences in the judicial portrayal of the offender's personal characteristics. Personal characteristics were not used to produce the dangerous identity of the "other" or increase the culpability or severity of Bain's punishment. Instead, personal characteristics were not requisite to the violent *Practices* involved in Bain's crimes, for they were omitted from Justice Cournoyer's sentencing discourse altogether. Bain's judicial portrayal revolved around his criminal attempt to interrupt the political functioning of Canadian democracy, however Bain was not identified as a violent, dangerous "other" due to ethnic, religious or cultural practices, and was therefore exempt from the exclusionary narrative proceeding that label.

Along the same lines, personal characteristics were rarely used as mitigating factors at sentencing. First, in the sentence of *R v Namouh* (2010), limited mitigating significance was

allocated to the offender's lack of prior criminality. It seems that the seriousness of terrorism charges for which the offender was convicted outweighed any possible mitigation. Similarly, the Judge within *R v Ahmed* (2014) mentioned the offender's young age and lack of prior criminal history as important sentencing factors, however treated them as "subordinate to the principles of denunciation and deterrence". Justice McKinnon presented this argument as such:

“...a more punitive approach will send a message that *youth and lack of criminal antecedents will count for little in ameliorating the severity of sentences* given to those convicted on *terrorism charges*” (2014).

Similar to lack of criminal history, youth was given minimal gravity at sentencing. For instance, the court in *R v Ahmed* (2014) presents his youthful *Identity* as something that “*needs to be viewed differently in terrorism cases*”. The significance of this factor within the five terrorism cases emerged when compared to how youthful first time offenders are legally sentenced for regulatory Criminal Code offences. In sentences for crimes such as armed robbery or conspiracy to commit similar offences, youth and lack of criminal record are known mitigating indicators to lessen the sentences given. They were considered optimistic characteristics, providing the offender a prospect for rehabilitation and eventual re-integration. However, this finding was not observed within terrorism cases and Muslim offenders, where instead, youth and lack of criminal history were regarded as attractive characteristics for terrorist recruitment, due to the vulnerable, impressionable, good character that makes individuals difficult to detect (*R v Ahmed*, 2014).

Mechanism 7: Muslim Discontent with the ‘West’ and the Adversarial Relationship of the Foreign “other” versus the National Subject

This mechanism of ‘othering’ pertains to offender expressions of conflict, anger or resentment towards Western nations. Deemed “Muslim discontent with the West”, this factor was used by each Judge to portray the *Relationship* between terrorists as Muslims, and the Canadian State, its citizens, and institutions as enemies in conflict. Importantly, this mechanism reveals how Judges use the ideologies and practices of terrorists to typecast all Muslim individuals sharing similar identifiers, with the same oppositional “dangerous” label.

Judge Dawson's evaluation of the psychological report in *R v Abdelhaleem* (2011) explicitly underlined Muslim discontent for west as an important factor for sentencing:

“The accused acknowledges *that Muslim discontent with the West* was potentially another motivating factor in his involvement.”

First, it is important to note that the Judge interprets the offender's expressions of conflict or discontent for the West as an exclusively "Muslim" problem, thus limiting this phenomenon to individuals exhibiting Muslim ethnic, cultural and religious identifiers. Because Muslims were labeled as individuals who possess this discontent, they are also the dangerous group that may act upon these grievances in the form of violent action such as terrorism. The judicial focus on the Abdelhaleem's common "Muslim" identifiers even abrogated his Canadian citizenship.

"Muslim discontent for the West" was judicially constructed through the offender statements denouncing Western nations intervention within international conflicts. Specifically, the offenders in the cases under study opposed Western participation in the "War on Terrorism", beginning with Afghanistan in the immediate aftermath of 9/11. At sentencing, Judges paid particular attention to each offender's contentious statements inciting retaliatory action against the West, expressed over the course of their criminal conduct, or within trial testimony. For example, Chiheb Esseghaier testified that his religious beliefs took on "a more political dimension as a result of the war in Afghanistan" (R v Esseghaier, 2014). The Judge emphasized his testimony that stated:

"Canada and the U.S have many armies in our land and this army is taking control of the land... it is our mission to fight those countries who have harmed them... it is our duty to make trouble in their homes."

Esseghaier's argument exemplified how Muslim discontent for the West fuels the violent messaging and practices of the Jihad movement, intended to inflict "trouble" in these countries through terrorism. In the case of R v Abdelhaleem, the defendant references his discontent as a need for retaliatory violence against Canada to improve the perceived ratio of killing in the "War on Terrorism":

"the whole place will be scorched, Canada will be shut down... The disaster will be for those who survive because you have killed their son and killed their cousin... ten thousand have died on our side and it is a one to ten thousand ratio" (2010).

As another example, Misbahuddin Ahmed wrote letters to various media outlets expressing his displeasure regarding Canada's involvement with the Afghanistan war. In consequence, he felt that Canadians and the western media were unfairly judging the curated Muslim Identity, which had resulted in the so-called exploitation of this population (R v Ahmed, 2014). He concluded that this exploitation has led to the unjust treatment of Muslims overseas and those residing within the West (R v Ahmed, 2014). Both of these statements place blame on Western nations for Muslim hardships, determined as grounds for retaliatory violence.

Similarly, this mechanism was observed within judicial interpretations of the terrorist offender's hostility towards Canada for interference within the Jihad movement. Judges concluded that the hateful expressions and valued ideologies governing terrorist actions were a form of retaliation against Canada's opposition towards spreading their violent interpretation of the word of God. At sentencing, Judges associated the offender's religious, ideologies, beliefs and *Practices* with that of violent Jihad in order to highlight this type of discontent. These interpretations were used as a form of "othering" to highlight the differences in accepted ideological values between those who follow the stated Jihad/Muslim tradition, versus those accepted within Canada. For example, the judge in *R v Jaser* (2015) puts forth the offender's hateful condemnation of the Canadian Government's attempt to repress the expansion of the violent Islamic State: "*The almighty God says fight the leaders of non belief*". Moreover, the Judge highlighted Misbahuddin Ahmed's (2014) comments blaming the Canadian State for their disruption attempts, implicating their violent actions the fight against Jihad; "*What the State is doing is worse than killing*". Not only did the Judges use these statements to represent Muslim Discontent for the West, but to show how the offenders fail to acknowledge their wrongdoings. These expressions of violence against the Canadian State add a threatening element of Jihad, which warrants, in the Judge's logic, exclusionary legal and social responses to these people in the West.

Muslim discontent with the West was also observed in judicial references to hateful expressions against Canadian citizens due to their so-called participation and involvement in State/governmental practices. Justice Code in *R v Esseghaier* (2015) cited Chiheb Esseghaier's statement:

"The people of Canada were *working for the State in civilian clothes*, and therefore were all *soldiers*-people are not aware of what they are doing."

This discourse referencing Canadian's as "soldiers" of the State reinforces the *Conversation* of "War on Terrorism", or a battle between the eastern predominantly 'Muslim' nations and the "West" including Canada. In a *Relationship* of two nations at war, the enemy constitutes populations to eliminate, and reject. Furthermore, the common reaction to war is for a State to defend its civilians, infrastructure, and institutions from the enemy infringing on its borders, and from those already residing in, or having access to such constituents. Therefore, the natural reaction for the Canadian State is to inflict its exclusionary power and justify eliminating the offender and similar individuals from Canadian society.

In addition to the mentioned grievances declared on behalf of the various perpetrators, Judge's emphasized offender statements that denounced Canadian cultural *Practices* as a form of discontent for the West. For example, Raed Jaser constructed his plot to de-rail a Canadian VIA Rail train because, according to him, Canadian's are:

“...*spreading corruption* around earth, *spreading evil, adultery, alcohol*. They are spreading *Christianity*... Their people [Canadians], they only understand the language of two things. *Death and money*. That's it... You take their lives, you take their wealth.” (R v Jaser, 2015).

The judge used these perspectives to analyze how the perpetrator distances Muslim beliefs from his interpretation of Canadian and western culture. Jaser does so by diminishing and condemning the Canadian *figured world*, or values, beliefs, traditions, and accepted practices of everyday life, as spreading “corruption, evil, adultery and alcohol” (R v Jaser, 2015). By referencing these sentiments, Justice Code induces a relationship of distance, incompatibility, non-conformity, and “othering” of Muslim practices that do not align with those established in Canada.

Muslim discontent for the West was treated as an aggravating factor, which reinforced the need for severe exclusionary punishment. Acknowledgement of these statements also emphasized the prominent enemy lines in the *Conversation* of the “War on Terrorism” between the Middle East and the West. Discourse involving war inherently references nations in armed conflict. A natural response to war is to protect, which is accomplished through the means of excluding those characterized as the enemy ‘other’. Lastly, these statements also suggested that terrorist offenders themselves applied this mechanism of exclusionary ‘othering’, distancing themselves from the West as a place ridden with nations for which they oppose. The intended meanings behind the exclusionary words of judicial sentences delivered curated effects that were to be read and understood by the legal system, Canadian society and the international political environment when discussed with the context of post 9/11 counter terrorism. These meanings are intended to work in conjunction with other State counter terrorism initiatives that also reinforce exclusionary narratives (e.g. heightened security practices for travelers attempting to enter Canada from known nations ridden with terrorist violence). As a result, I would argue that the observed sentencing discourses reflect judicial agency; uttered from a perspective of a western State situated within the exceptional circumstances of post 9/11 counter terrorism. Accordingly, this analysis revealed the power of judicial discourse to inflict a certain identity of the “other” onto intended populations and use this identity to exclude. This discourse has the power to limit

the larger social and cultural inclusion of Muslims, or people affiliated with certain physical characteristics or belief systems. In this regard, judicial language goes beyond the word itself, and through *situated meaning*, continues to affect the functioning and order of securitized Canadian society.

4.4 Discussion

4.4.1 Mechanisms of “othering”, the State of Exception and Counter Law

The seven mechanisms of exclusionary othering observed within sentencing discourse evoke the theoretical and conceptual accounts of Agamben’s State of Exception and Ericson’s Counter Law. First, the judicial discourse used to sentence each of the five terrorists evokes Giorgio Agamben’s description of the suspended juridical order. As Ericson’s Counter Law I “laws against law” operates within the suspended juridical order, the principle *finus reus* revealed how Judges exempt the typical practices and procedures of the law to counter each terrorist’s threats to Canadian security (Ericson, 2008). Specifically, the observed tendency for Judges to apply Canadian sentencing ranges, principles, and objectives in the most punitive form available by law exemplified the State’s expansion of legal limits during the exceptional “emergency” circumstances of the securitized “War on Terrorism”. Legal sentencing limits include factors that would restrict the severity of sentences imposed, including mitigating factors, or the use of minimum sanctions on the spectrum of sentencing ranges. The judicial neglect of these limits subsequently contributed to long-term exclusion via imprisonment, evoking the sovereign’s extension of biopolitical power. It is important to note that judicial discourse did not exhibit the extent of the total suspension or “bypassing” of the juridical order as described within Agamben’s theoretical accounts of State of Exception, by way of extricated sovereign power from the entire habitus of law. Instead, case observations demonstrated how Judges are still bound to apply legal sentencing principles, processes, and procedures, however, do so by Counter Law which allows for extreme judicial discretionary sovereign power to apply the juridical order for exclusionary purposes.

Discursive mechanisms four through seven that labeled terrorists and the affiliated Muslim population as dangerous enemy “outsiders” resonate with Agamben’s theoretical rationalization of *Zoe* versus *Bios*. Premised on the State’s categorization of identities, the observed judicial discourse declared Canadian nationals as *Bios*; the exalted “qualified” form of political life in Canada. On the contrary, judicial narratives removed terrorists, Muslims, or people affiliated with similar cultural, ethnic, or religious identities from political and social life

through this “outsider” label. As a result, “outsiders” were metaphorically banned from the domain of *Bios*’ political life and defined as what Agamben terms *Zoe*. *Zoe* comprises the population of those who experience the totality of the exceptional State’s organizational power. Their fate was left up the Judges acting on behalf of the sovereign who held the power to decide punitive sentences (e.g. life imprisonment). Observations also reflected the broadened impact of the “outsider” label onto Muslims, if not as *Zoe* then at least a lesser class of citizen, who have become targeted by way of this terrorist identity for exclusionary treatment within legal, political and social spheres.

The contrastive power of sentencing discourse in the case of Richard Henry Bain revealed how Judges constructed this offender as *Bios*- a qualified form of life. For instance, the Judge did not prioritize punitive sentencing principles (i.e. deterrence, denunciation), limiting exclusion in the form of severe imprisonment. Furthermore, Bain’s racial, religious, or cultural characteristics were not used to construct his identity, practices, and relationships as dangerous to the same extent as the terrorists “*Zoe*”. In turn, these characteristics were not referenced to inform processes of “othering” or distinguish Bain as an “outsider”. As a result, Bain was not subjected to the same processes of exclusionary “othering”, which exhibits the differential treatment of *Zoe* (terrorist “others”) versus *Bios* (“qualified” form of life) at sentencing. This is important, as Bain represents the white, non-Muslim offender, and identity of the exalted Canadian.

These theoretical and metaphorical connections to Agamben’s *Zoe* and *Bios* unveil the transformed relationship of control between the State and its citizens under the State of Exception. The Canadian State guarantees safety and security in the post 9/11 “War on Terrorism”, in return for the ability to exercise exceptional sovereign power through Counter Law. As this relationship has progressed since 2001, Agamben’s claim that executive power during these “emergency” circumstances permits overt forms of State control was exemplified throughout the established seven mechanisms. For example, the sentencing principles of deterrence, denunciation, and rehabilitation within the first mechanism were used by Judges to preventatively control the actions and ideologies of the offenders in the cases under study. This was broadened by the judicial emphasis on offender religion and personal characteristics (mechanisms five and six) that incited an *identity* and *practices* of enemy Muslim “outsiders”.

This construction of terrorists and associated Muslim “others” incites exclusionary sentiments used to control such threatening populations.

The present observations reflected Ericson’s theoretical argument that the existence of Counter Law situated within the State of Exception is dependent upon the popularization of “war on” campaigns. Specifically, Judges used Counter Law to craft language within sentencing decisions that highlighted Canada’s position within this post 9/11 “War on Terrorism” campaign as a superior Western nation in conflict with individuals promoting extremism and radical behavior. Mechanisms of “othering” constructing terrorists as “enemies” or their subsequent characteristics as “dangerous” and capable of injuring the exalted national also worked to promote this “war on” campaign. This narrative legitimized Counter Law’s continued expansion of the legal order and executive powers through the protracted State of Exception. Furthermore, this promotion of the “War on Terrorism” campaign revealed an incentive on behalf of the State; the guaranteed longevity of “emergency circumstances” that ensures a prolonged need for exceptional sovereign power.

Ericson’s Counter Law principle of *finus reus* was also observed in the analysis of the five cases. Based on the sovereign’s interpretation of terrorist violence within this era of exceptionalism, the Judges used each mechanism to classify terrorist *identities* and *practices* as dangerous only on the imagined possibility of harm. Thus, the principle of *finus reus* was prompted by orientalist “race thinking” in the State of Exception, that has created a racialized image of the enemy that rests on religiously, culturally, and territorially based distinctions (ie. the terrorist is dark, Muslim, has illiberal values, and lives outside the west) that establish the citizen/non-citizen dichotomy. These racialized distinctions were detected within each of the five cases. The seven mechanisms revealed how these distinctions of identities and practices that did not exist pre-millennium, are now the basis of exclusion in the post 9/11 State of Exception.

Examined in relation to the theoretical workings of Agamben and Ericson, the seven mechanisms of exclusionary “othering” demonstrated how the State of Exception has evolved towards the norm from 2001 to 2015, the date of the last decision under study. There was no indication within any of the five terrorist cases that Judges were receding their use of punitive sentencing principles, objectives and capacities made available by Counter Law. In fact, they were actively using Counter Law to infer aggravating factors, distinguish personal characteristics as exceedingly dangerous, and construct the most punitive sentences possible for the terrorism

crimes committed, including life imprisonment. If Counter Law were not evolving towards the norm within the State of Exception, observations would have revealed judicial hesitation or avoidance of the punitive principles and objectives.

4.4.2 Analytical Observations in relation to Counter Terrorism Scholarship

Observations conveyed the findings of previous criminological scholarship discussed within the literature review. First, judicial discourse interpreting the severity of terrorist crimes referenced State-lead threat conjectures made within Canadian terrorism reports. For example, judicial discourse highlighted the States' awareness of terrorist groups, recruitment operations, extremist threats, and Canada's targeted capacities due to participation in the "War on Terrorism". In reaction, Judges employed exclusionary sentencing as a requirement of the State's hyper vigilance towards criminalizing, denouncing, and preventing the established threats of terrorism, thus continually reinforcing the established conjectures.

In response, exclusionary mechanisms used within the five terrorism sentences represented Canada's post 9/11 national security strategy and state-building model. Through Counter Law, the State purposefully expanded criminal offence categories to inflict multiple charges and convictions per terrorist crime (e.g. advocacy, promotion, or terrorist group related activities). Related to these convictions are the raised minimum and maximum imprisonment ranges (including life) also applied by each Judge to inflict multiple sentences for each charge per crime. Relevant to some of the crimes sentenced within each of the five cases, Judges upheld Section 83.18(2) of the *Criminal Code* that severely criminalized terrorist activities regardless of completion. Lastly, the sentencing principles of totality and parity were prevalent, as well as judicial interpretations of case facts and circumstance of the offender.

However, my analysis seems at odds with the literature denouncing new terrorism sentencing laws as inconsistent. Robert Diab (2011) suggests that new sentencing categories have resulted in a wide range of penalties in analogous cases. Each comparable charge across the five cases under study was sentenced in similar fashion. There was no indication of judicial difficulty applying conflicting sentencing principles such as deterrence, denunciation, and rehabilitation. In fact, aggravating factors limiting each offender's prospects for rehabilitation were used as justifications for more severe sanctions that reflect both deterrence and denunciation. Thus, my discursive findings revealed no indication of inconsistent judicial sentences, suggested within critical counter terrorism literature.

Judicial discourse representing the seventh mechanism of exclusionary othering “Muslim discontent for the west” supplemented critical literature’s assessment of Canada’s counter terrorism strategy. Scholars including Murphy (2007), McCoy & Knight (2015) Roach (2012) and Hamilton and Rimsa (2007) all addressed the consequential potential of “blowback mechanisms”, which identified Canada’s “western” involvement in the “War on Terrorism” as potentially provoking retaliatory terrorist violence. These assessments were affirmed by each Judge’s interpretation of the identified discontent for Canada’s militaristic and political participation within Middle Eastern counter terrorism operations as reason for inciting Canadian domestic attacks.

Critical race and identity scholarship were pertinent to the observed seven mechanisms of exclusionary othering. Observations exemplified the historical formation of the national citizen-as-subject in opposition to the Canadian State’s interpretation of the foreign other. Throughout the sentencing mechanisms and relation to *R v Bain*, Canadian nationals were exalted as the qualifying, desired, and accepted culture in need of protection in the post 9/11 world. On the contrary, terrorists and affiliate foreign Muslim “others” were continually characterized as people exuding vilified racial, cultural, or religious characteristics worthy of exclusion. This observation mirrored the treatment of aboriginals within the historical settler state, who constituted “backwards”, deceitful, primal, enemies threatening the nation’s welfare.

Examples of racial dissonance within literature were prevalent throughout the former analysis. Demonstrating Samuel Huntington’s *Clash of Civilizations*, terrorists within each of the five cases were deemed fundamentally different, “at odds”, or “in conflict” with Canada’s valued principles of democracy due to their participation in politically motivated crimes. Continual reference to popularized signifiers such as belief orientations that are consistent with the Islamophobic interpretation of the Arab Muslim were also used to highlight differences compared to the white-European “Canadian” majority. This judicial tendency to emphasize Muslim “outsider” qualities as catalysts to terrorist extremism reflected a narrative of deceitful untrustworthiness, traditional “backward” underdevelopment, and cultural inadequacies unfit for Canadian integration. Through the institutionalization of these differences, the Canadian judiciary was able to highlight ongoing patterns of conflict between the two cultures in order to manifest an inherent incapability that has not only been strengthened within the “War on Terrorism”, but also become irreconcilable.

In effect, each mechanism's racialized "othering" contributed to scholarship's interest in the nationalization of the Western identity. The judicial characterization of terrorist identifiers as "different" from Canadian national subjects created a dichotomy referred to as "West versus the rest". Although this discourse referenced the identities of terrorist offenders specifically, Judges' use of this language of nationalization within the mechanisms of exclusionary othering has the power to target the larger group of Muslims beyond the cases. It reinforces the State's single archetype or standard of the superior national subject as the real political and societal citizenship. Nationalization of the "west versus the rest" not only exalted the national subject, but also reaffirmed the sense of being "at home", oneness, and belonging within Canada. As a result, those determined as nationals can remain at the top of the subject hierarchy establishing Fekete's (2004) mono-culturalism, while the Muslim foreigner is expelled from this formation as the "outsider".

The "nationalization of the West" that the analysis showed also reflected the State's "superiority complex" discussed within literature. Judges glorified the Canadian "Western" culture to denounce those associated with the Muslim "terrorist" for exclusionary purposes. For example, the first mechanism identified Canadian principles and practices as worthy of protection from the "invasion" or dismantling experienced by the presence of terrorists and foreign others. The third mechanism fixated on the Canadian-Western alliance as a congregate of powerful, valued nations integral to the global fight in the "War on Terrorism". This finding reveals both a superiority complex, and a savior complex. Mechanism seven also denounced any objectors or "discontent" against the Westernized Canadian culture as flawed, and worthy of exclusionary legal and social conduct. These discursive portrayals of the superior Canadian culture and national subject were prominently revealed within the comparative decision of *R v Bain*.

Rights-based literature highlights the importance of Canada's democratic commitments when discussing enforcement of the national security agenda. The Government is said to uphold the necessary democratic principles of diversity, liberty, equality, and multiculturalism throughout all counter terrorism initiatives, including sentencing. By upholding these commitments, all initiatives are said to reject "democratic racism", exclusion via racial constructs, or exaltation of certain cultural distinctions over others. However, the prevalence of exclusionary "othering" based on extra-legal variables such as race, culture and religious

identities within the observed sentencing mechanisms suggest that democratic principles are not upheld to the ideal standards discussed within literature. Thus, findings suggest that the Canadian court system within the State of Exception operates as a covert system of racialized control, where judicial discourses reveal the State's intent to exclude rather integrate racialized "others" within the polity in the "War on Terrorism". Given the present thesis data, I can only speak to how these democratic commitments were inconsistent to my findings observed within the post 9/11 judicial sentencing of Abdelhaleem, Namouh, Esseghaier, Jaser and Ahmed. However, the present observations provide substance to Bushaway's (2001) argument that sentencing discrimination occurs for immigrant offenders.

These manifestations of the seven mechanisms of "othering", prevalent within securitized counter terrorism initiatives such as sentencing, are made possible by race thinking and broader conditions of race relations in the post 9/11 world. The ability for Judges to construct terrorist practices, identities, and relationships to inform "othering" stems from common "terrorist" stereotypes (religious garb, facial hair, faith-based practices) that have progressed to signify the common "enemy". Razack's (2007b) article describes this race thinking as "knowing who they are" without having to be told. Based on similarities, Muslim characteristics have become "terrorist" identifiers, negatively influencing the way individuals within Canadian society think, feel and behave towards such populations (Nagra, 2017). As race presents a problem in post 9/11 societies, these relations continue to normalize and perpetuate anti-Muslim sentiments and construct the "suspect" community (Jacoby, 2016). In turn, this race-based discord necessitates the use of "othering" within anti terrorism initiatives as a tool to control and regulate threatening populations (Whitaker, 2012; Lennox, 2007). This connection then reveals the "real" critique of this research that extends beyond the scope of sentencing discourses themselves, and to the racial underpinnings occurring within Canadian society that make each mechanism of "othering" possible. The way race operates within the Canadian judiciary is a cultural representation of the social reality of power, values, and relations within society.

Lastly, judicial discourses that reinforce conditions of "othering" are made possible by the race thinking embedded within Canadian law. Law, especially securitized counter terrorism law, is a place where race thinking is constructed, enacted, and practiced (Razack, 2007b). Historical origins of law in Canada, created with the imperialist notions of distinguishing the "superior" colonizers from the indigenous populations, have constructed Western law as

inherently white, male, and classist (Thobani, 2007; Razack, 2007a; Razack, 2007b). As revealed within this thesis, the law is slated against the Muslim immigrant; a circumstance which has become heightened within the post 9/11 context where security threats have prompted more decrying amendments of law that have widened this gap of legal inequalities against the “enemy” population, and opened the door for differential applications of punitive sanctions (Razack, 2007b; Winter, 2014). Moreover, Judicial applications of the law are inclined to enforce, reinforce, and maintain conditions that make “othering” possible.

4.5 Conclusion

Together, the seven mechanisms of “othering” reveal the ways in which sentencing decisions for terrorism offenders construct the identity of the “other”. My observations reveal how Judges used mechanisms one and two as dominant techniques in the sentencing process to exercise Canadian sentencing standards and objectives in ways that frame terrorist crimes and perpetrators as worthy of exclusion via imprisonment in its most punitive capacities allowed by law. Mechanisms three and four represented identity formation of the terrorist Muslim “outsider” against the Canadian national subject who occupies a superior position within the Western culture. This narrative set the stage for mechanisms five and six. Those are discursive tools characterizing Muslim “outsiders” as dangerous enemies in the “War on Terrorism” by way of personal, cultural, or religious identities and practices. Lastly, mechanism seven refers to the way Judges denounced (excluded) foreign ideological principles and values and exalt those that characterized the Canadian Westernized accepted tradition.

These seven mechanisms also represented the expansive powers of the Canadian State’s legal, social, and political securitized agenda, provided by the current exceptional circumstances of the “War on Terrorism”. As observations conclude, this agenda has demonstrated a commitment to enforcing Counter Law, including legal initiatives that encourage punitive imprisonment terms and the removal of terrorists from western societies. Mechanisms within such agendas resulted in the characterization of individuals within and beyond national borders as either exalted national subjects, or Muslim “others” exhibiting dangerous and threatening identities. As the powerful State of Exception pervades Western nations in the ongoing “War on Terrorism”, analyzing discursive constructions of the racialized Muslim identity within the court of law-a systemic branch of Government integral to the nation’s societal, legal, and political

functioning-is imperative to reveal exclusion and relieve populations from such prejudicial treatment.

When situated within Canada's securitized landscape, this presentation of judicial sentencing discourses also contributes to broader legal and social ramifications of "othering" occurring in the post 9/11 world. First, my findings represent how "othering" has succeeded legal counter terrorism initiatives, including the racialized constructions of terrorist's and related Muslim populations in other areas of Canada's securitized enforcement practices. For example, the implementation of post 9/11 security certificates, increased security and surveillance at ports of entry, or the policing of immigration ("crimmigration"), have all been incited by "othering", while perpetuating their own similar sentiments (Razack, 2007; Zedner, 2019). Moreover, this mirroring of "othering" between terrorism sentencing and other securitized initiatives perpetually legitimates these racialized claims and constructions as a tool to distinguish the dangerous "other" within preventative and deterrent counter terrorism models.

These findings also have broader social ramifications occurring within Western societies like Canada. Mechanisms of "othering" are a product of social stereotypes, as witnessed within the judicial constructions of religious and cultural practices, physical identifiers, or social and political ideologies and relationships. These constructions occurring within the Canadian judiciary not only justify the common use of stereotypes but translate into social stigmas effecting Muslim populations. These social stigmas can be experienced through feelings of mistrust, inability to join groups or participate in events, or living under the "eye" of constant social surveillance (Razack, 2007; Zine, 2012).

Conclusion of Thesis

The Canadian judiciary uses the seven mechanisms of “othering” to discursively construct the specificity of terrorism offences within sentencing decisions. These mechanisms first, reveal the judiciary’s exclusionary use of counter law to subject terrorists to the most severe forms of punishment available by law. Secondly, these mechanisms show how terrorists have been subjected to processes of racialized “othering” that induce a narrative of exclusion. Moreover, the judicial construction of identities, practices and relationships of terrorist offenders were framed in ways that could induce broader social and symbolic effects of exclusionary “othering” for Muslim populations living within the post 9/11 West.

These two findings were revealed through the seven mechanisms of “othering”. Mechanism one demonstrated how Judge’s applied Canadian sentencing principles of denunciation, deterrence, rehabilitation, parity, and totality to prioritize blame and wrongdoing. Together, these principles contributed to the severest sentences for each charge. With the second mechanism, Judges highlighted the uniqueness of terrorism offences as a justification for exclusionary imprisonment. The severe magnitude of terrorist activity and its instability were used to distinguish terrorism offences as exceedingly dangerous from that of regulatory offences. Accordingly, terrorists committing these offences were deemed unique perpetrators worthy of such punishment. The third mechanism uncovered the judicial emphasis on Canada’s position as a Western ally in the “War on Terrorism”. Judges used this position to endorse zero-tolerance approaches for punishing terrorism crimes to protect the “superior” national subject from the threatening “other”. Mechanism four focused on the social and symbolic effects of labeling terrorism offenders as “outsiders”. Judges implicated the broader Muslim population within this label of “outsider”, affiliated with terrorists based on racial, religious, cultural, and ideological identities, practices, and relationships. In doing so, the label “outsider” was used to infer danger, which initiated rhetoric alluding to the exclusion of Muslims. Similar to this “outsider” label, mechanism five demonstrated how terrorism and related radical ideologies stem from religious practices of the Islamic faith. This was deemed representative of the identity of the non-conforming enemy of the West. Moreover, mechanism six exposed judicial portrayals of offender characteristics such as education, travel, familial relationships, education etc. as factors that shape this identity of the terrorist “other”. Lastly, judicial discourse highlighted contentious statements on behalf of offenders deemed “Muslim discontent with the West”, as indicative of

hostile subjects in conflict with Canada. Together, these seven mechanisms of “othering” revealed how the Canadian judiciary has discursively constructed the specificity of terrorism offences within sentencing decisions, which has created social and symbolic effects experienced by Muslims.

Giorgio Agamben and Richard Ericson’s theoretical accounts of the State of Exception were woven within each mechanism of “othering”. The expansion of exceptional State power in the post 9/11 “War on Terrorism” influenced the discursive constructions of terrorism within sentencing decisions. Mechanisms of “othering” represented the Canadian States use of Counter Law (new Criminal Code) to extend the juridical order. This new legal order allowed for the discursive framing of terrorists and their offences in ways that necessitate severe exclusionary imprisonment. Mechanisms also revealed the judiciary’s orientalist race-thinking, as is applied its power to rank forms of life according to State-lead interpretations of religious, ideological, or physical association with terrorist enemy “others”. This ranking perpetuated the existing dichotomy between the excluded Muslim “outsider” and the accepted national subject.

To this end, judicial sentencing decisions are one source of Canadian discourse that can expose the stated constructions. Future research could address how alternative discourses have informed similar narratives and created broader effects onto predominantly Muslim populations. For example, discursive sources could include media messaging, Government reports or legislative Bills. In this regard, my seven mechanisms of “othering” can be used as tools to guide related studies into different empirical material. This research could also be used to investigate how the social and symbolic effects of these discursive constructions of terrorism have been put into action, influencing the *treatment* of Muslim “others” in the West. This treatment includes social exclusion by national subjects, or counter terrorism enforcement on behalf of the State.

I will conclude this research by quoting Patrick Lennox in the 9/11 Commission Report, who admirably summarizes the issue of terrorism discourses emerging within the West. As witnessed within sentencing decisions, terrorism has been constructed by the State in ways that have perpetuated race-based ideologies of exclusion in Canada: “In the post 9/11 world, threats are defined more by their fault lines within societies than by the territorial boundaries between them...” (2007, p. 1020).

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ANNEXE A: CASE DATA SOURCES

R.v. Namouh, [2009] Q. J. No. 1158 (QL), 2010 QCCQ 943, [2010] J.Q. No. 1158

R.v. Abdelhaleem, [2011] O. J. No. 6691 (QL), 2011 ONSC 1428

R.v. Ahmed, [2014] ONSC 6153 (CanLII)

R.v. Esseghaier, [2015] O.J. No. 4922 (QL), 2015 ONSC 5855

R.v Bain, [2016] Q.J. No. 16738 (QL), 2016 QCCS 5785