Legalizing Lawlessness: Evaluating the Role of Law in the Utilization of Extra-Legal Discretionary Practices within the War on Terror

by

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Abstract

This thesis evaluates the perpetual state of exception which formed as a result of post 9/11 anti-terrorism legislative amendments. It sets out to examine the role of law as a mechanism which influences the utilization of extra-legal practices in the post 9/11 era. The concern with such practices is that while they might be justifiable as temporary measures in conditions of severe emergency, there is a danger that they will extend beyond the state of emergency and as such, risk becoming the norm. This thesis will explore the impact of legality, in this case the amendments to the *Criminal Code* effected by the *Anti-terrorism Act*. The new provisions have become permanent components of criminal law, and as such appear to be in accordance with a legality model, which provides individuals charged with terrorism related offences the same rights that are guaranteed to all accused in the criminal justice system. However, they raise concerns that the appearance of legality may mask expansive discretionary powers that within the present social and political climate are likely to be focused on select minorities. Thus a state of exception may be the concealed effect of traditional criminal law, raising concerns that the appearance of legality may legitimize a permanent state of exception, at least for these select minorities. While the current concerns raised throughout this thesis are confined to the "war on terror", there is an imminent danger that the state of exception and the subsequent creation of camps which it authorizes could extend to other crimes in the future and be subjected to another subset group within society.

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I dedicate this thesis to my Mother and Father,

Mom, Thank you for pushing me to continue and reminding me that any goal that I strive to achieve is possible. I want to thank you for supporting me every step of the way and most importantly for always being there for me. I am so fortunate and grateful to have a mother like you.

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Table of Contents

Introduction

The events of 9/11 represent a critical juncture within modern history, it is the point from which Canadian society went from a pre-9/11 sense of security into an era of uncertainty. The terrorist attacks resulted in heightened security, a fundamental overhaul of security protocols and an expansion of emergency powers. The concept of legality during such a state is complex, as security concerns raise controversies concerning the use or necessity of extra-legal discretionary practices. In a state of emergency security agencies may engage in what would otherwise be considered unconstitutional or illegal practices, as the need for flexibility is thought to outweigh the need for strict legislative controls over discretionary power. These actions have created new concerns surrounding the potential for security legislation to seep into traditional law. While people may tolerate an erosion of basic rights during an emergency – a temporary "state of exception"[1] - the practices may extend to the traditional legal system, thus masking the exception. While the attacks of 9/11 prompted a state of emergency in which legislative amendments were promptly set in motion, this thesis is interested in the subsequent perpetual state of exception. "

The legislative response to 9/11 has incited an impressive body of academic work; it is the contribution of various legal scholars which will be examined throughout this thesis. The predominant interest of research has focused on the constitutional validity of anti-terrorism legislation. This thesis will evaluate the role of law as a mechanism which

[1] Giorgio Agamben, *State of Exception*, translated by Kevin Attell, (The university of Chicago press, 2005) [Agamben].

influences the utilization of extra-legal practices within the post 9/11 era. The concern with such practices is that while they might be justifiable in conditions of severe emergency (the ticking bomb scenario), there is a danger that such practices will extend beyond the state of emergency and as such risk becoming the norm. This concern is compounded by the fact that in the present social and political climate, discretionary power is likely to be focused on a particular minority group – Muslims and people of Middle Eastern descent.

The *Anti-Terrorism Act (ATA)*[2] amended the *Criminal Code*[3] to include numerous offences specifically targeting terrorism. It also included a definition of terrorism that inadvertently resulted in a pre-conceived criminal identity which considers the perpetrator's race and religion as a potential precursor of terrorism. The decision of Justice Rutherford in *R. v. Khawaja*[4] shows a consciousness of the law's potential to create zones of illegality. The *Criminal Code* provisions mandate law enforcement officials to engage in surveillance on individuals whose political or religious beliefs are currently suspect. The information collected in these processes is not only used to support criminal charges – which involves the full range of due process protections of the criminal justice system. It is also used for the issuing of security certificates, the creation of a no fly list and cases of extraordinary rendition. It is important to recognize the practice of lawlessness, in this case the permanent limitation of individuals' rights through the utilization of extra-legal discretionary practices within the "war on terror", due to the impact that such practices project on a selective minority. Equally important to

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[2] *Anti-terrorism Act,* S.C. 2001, c.41. [ATA]
[3] *Criminal Code*, R.S.C.1985, c.C-46. [Criminal Code]
[4] *R. v. Khawaja* , (2006), 42 C.R. (6th) [Khawaja]

consider is the likelihood that such utilization of extra-legal discretionary practices may extend in implementation beyond the crime of terrorism.

In the first chapter, this thesis will examine the role of legality within a state of emergency and analyze whether such extra-legal practices should be justified. The chapter will consider Oren Gross's "Extra-Legal Measures model"[5] and David Dyzenhaus's "Legality model"[6], and the concerns that the practices sanctioned under the state of exception may seep into the ordinary law, becoming permanent. This section will evaluate how the post 9/11 "state of acceptance"[7], a state in which society is willing under a perceived emergency to accept a temporary suspension of legality in exchange for a sense of security, is a vital element of lawlessness and how this acceptance sanctions a state of exception. It is within the boundaries of acceptance that one finds the notion of Orientalism[8] and the fabrication of the "enemy others".

The work of Edward Said will provide the required foundation in order to understand the strength of discourse and the subsequent impact and de-humanization within the "war on terror". Such concepts are fundamental in establishing how unconstitutional and prejudicial practices continue to take place under the state of exception. In addition, the work of Sherene Razack will provide an insight into camps, areas in which individuals targeted by the state of exception are metaphorically

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[5] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 The Yale Law Journal 1011 at 1021 [Chaos and Rules].
[6] David Dyzenhaus, "The state of emergency in legal theory" in Victor V. Ramraj, Michael Hor& Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 65 [Dyzenhaus].
[7] The "state of acceptance" within this thesis refers to the public tolerance or acceptance of extra-legal discretionary practices during times of emergency. Put differently, the state of acceptance in this context is a state in which there is an overwhelming level of societal approval regarding anti-terrorism practices even in cases where individuals are subjected to extra-legal discretionary practices. The term, while original to this thesis is influence by Oren Gross and Sherene Razack who have significantly contributed to the ongoing research vis à vis societal acceptance of post 9/11 practices.
[8] Edward W. Said, *Orientalism* (New York: Vintage Books A Division of Random House, 1979) [Said].

transported into.[9] The state of permanency is another concern which is addressed within this thesis. Through the permanent amendments made to the *Criminal Code* there exists a veneer of legality, one which conceals the perpetual state of exception.

In the second chapter, this thesis will examine the Canadian legal response to 9/11 by reviewing controversial components of the *ATA*. In order to understand the relationship between legality and lawlessness it is important to first establish how law attempts to prevent terrorism and more importantly the role it plays in identifying the targets of terrorism. While the *Criminal Code* respects the fundamental essence of justice and due process, its application, especially with respect to the "motive clause" remains problematic in that it influences the security apparatus. In the Canadian context, the *ATA* is important in that it permanently, with the exception of sunset clauses, amended the *Criminal Code* to reflect a number of terrorist specific offences. The *ATA*'s preventative agenda is also important as it inadvertently invites law enforcement to prevent perceived terrorism through any means including the utilization of extra-legal discretionary practices in a perpetual manner.

The legal analysis of Justice Rutherford's judgment within chapter three provides an evaluation surrounding the social impact of *ATA*. Justice Rutherford's decision offers a non-traditional judicial review surrounding the role of law in the utilization of extra-legal discretionary practices. Although Justice Rutherford's insight is relevant to this thesis, a number of other judgments have challenged its validity. These decisions offer a

[9] Sherene H. Razack. "Casting Out The Eviction of Muslims from Western Law & Politics" (Toronto: University of Toronto Press, 2008.) [Razack].

contrary perspective, and while they are important to analytically review they offer an example of the reluctance to recognize the existence of such practices.

Chapter four will demonstrate how the *ATA* was fabricated as a reactive law which was enacted specifically in response of 9/11. The work of Kent Roach, among others, will be addressed in order to determine the impact of anti-terrorism amendments found in Part II.1 of the *Criminal Code*. Furthermore, this chapter will engage in a comparative study between the *War Measures Act*[10] and Part II.1 of the *Code* in light of the issues raised by Gross and Dyzenhaus. The *War Measures Act* gave law enforcement officials broad powers such as detention and search and seizure without judicial oversight. Legal controls over discretionary power were largely abandoned, supposedly in the interests of security. But the Act's provisions were designed to be invoked on a temporary basis. In contrast the anti-terrorism provisions of the *Criminal Code* do, to a large extent, follow a model of legality for those who are actually charged with an offence; because they are permanent parts of the ordinary law they would not otherwise be tolerated. However, Justice Rutherford's judgement suggests that they may have an impact on discretionary practices. Specific examples such as the no fly list, security certificates practices and extraordinary rendition will provide an insight into the post 9/11 state of exception.

[10] *War Measures Act* Statutes of Canada 1914, c.2. [WMA]

Chapter 1- The State of Exception in the Aftermath of 9/11

The concept of legality is often reflected through the rule of law, individual's rights and the notion of due process. While the role of law is an essential element of society, the strength of legality is at times challenged by emergencies. The response to a state of emergency, whether traditionally conceived or not, represents a challenge to the rule of law as it often seeks to rectify the issue at any cost. The engagement of lawlessness, through the use of extra-legal discretionary powers is often a contested issue; however the debate which transpires in times of emergency can offer differing perspectives on what the role of law ought to be.

In this chapter, I will examine two views on the issue of legality in times of emergency. Oren Gross advocates for a distinction between the rule of law and extra-legal practices which can be utilized outside of the legal sphere in response to the emergency.[11] On the other hand, David Dyzenhaus has defended the integrity of the rule of law by restricting emergency practices from extending beyond legality.[12] While both perspectives offer valid justifications for or against the utilization of extra-legal practices in times of emergency, this chapter is particularly concerned with the danger that emergency legislations, like the *ATA*, will mask the exception and as such will result in a permanent state of exception.[13] The concern is not so much whether extra-legal discretionary power ought to be used in a ticking bomb scenario, but rather on the lasting impact of these otherwise unconstitutional powers. Put differently, the danger in defining

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[11] Chaos and Rules, *supra* note 5.
[12] Dyzenhaus, *supra* note 6.
[13] Agamben, *supra* note 1.

the threshold of legality within emergency scenario is that such power will extend to traditional law and thereby create a permanent state of exception. In this state, some will be relegated to "camps" wherein the law is suspended.[14]

While the role of law is customarily conceived as a fundamental tenent of democratic society, the state of acceptance within emergencies is important to analyze as it often deviates from what would traditionally be considered an unacceptable violation of legal rights. The state of acceptance during a state of emergency is important as it represents the willingness of society to accept a temporary suspension of legal rights and the subsequent utilization of extra-legal discretionary powers in exchange for security. As such, the state of acceptance is created through the discourse of emergency and the overall sense that specific measures including unconstitutional practices must be carried out in order to quell insurrection. Under the state of exception the rationale of acceptance is founded upon the basis that "we become inured to lawlessness, as long as it remains in the camps, as long, that is, that it is applied only to certain bodies who live outside of reason."[15]

In examining the post 9/11 state of acceptance, one can establish two common factors, the power of discourse, as addressed through the work of Edward W. Said, and the appearance of legality. While both factors are problematic, the latter view creates the additional concern that the veneer of legality will mask the exception and as such the exception will ultimately become the norm.

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[14] Razack, *supra* note 9.
[15] *Ibid* at 58.

The State of Emergency and 9/11

Following disaster or civil unrest, nations opt to declare a state of emergency. Such state practices are commonly referred to as martial law or emergency law both of which share the common element of suspending traditional legislation by implementing emergency protocols to remedy the situation. As seen in the *War Measures Act*, such measures are limited in time and often do not exceed beyond the emergency in question.

While the events of 9/11 created an overwhelming sense of emergency, there was no suspension of legislation or implementation of martial law in the traditional sense. The legislative changes brought on as a result of 9/11 were not like those made temporarily in order to quell some insurrection or crisis. The differentiation constructed following 9/11 was that terrorism was a phenomenon which could not be rectified by implementing a temporary suspension of law. Rather, the response was crafted through permanent legislative amendments, partly to the *Criminal Code*. As a consequence of these changes, the permanent legislative amendments have masked the exception. While 9/11 is perceived as an emergency, thus subject to practices only permissible through a state of emergency, it is also considered permanent and as such results in a permanent state of exception. The events of 9/11 are problematic as they lay somewhat between an emergency, the actual terrorist attacks, and the perpetual "war on terror".

The distinction between an acceptable and non-acceptable response vary greatly. On the one hand, the perceived imminent threat attempts to validate the utilization of extra-legal discretionary practices in light of prevention. On the other hand, the response to terrorism is established within the reactive legal amendments to the *Criminal Code*, the

ATA. The latter, in theory considers terrorism as a new reality which legality attempts to prevent. However, the notion that terrorism is an emergency is indirectly coupled with the idea of legality and this creates the underlying issue that what we have here is in fact a permanent response to what ought to be temporary.

The State of Emergency and the Application of Law – Gross vs. Dyzenhaus

In order to examine how 9/11 has resulted in a permanent state of exception for a selective minority, it is important to evaluate the competing theories surrounding the role of law within a state of emergency. This debate holds two perspectives. The first considers the possibility that under some emergency, "there may be circumstances where the appropriate method of tackling grave dangers and threats may entail going outside of the constitutional order, at times even violating otherwise accepted constitutional principles, rules and norms."[16] The other perspective differs in that it supports "response to emergencies which preserves the rule of law."[17]

According to Gross, among the common theories of acceptable practices, the "Business as Usual model", states that "ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace. "[18] Although the merits of this model have been challenged by the response to 9/11, the growing trend of normalizing the exception might reshape the validity of this theory. In addition to this

[16]Chaos and Rules, *supra* note 5 at 1023.
[17] Dyzenhaus, *supra* note 6 at 74.
[18] Chaos and Rules, *supra* note 5 at 1021.

approach, the "model of Accommodation" which combines a number of emergency models as defined by Gross and which authorizes "certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible."[19] Put differently, the model of accommodation allows for "some significant changes to the existing order so as to accommodate security considerations while keeping the ordinary system intact as far as possible."[20] This model has mainly been criticized due to the potential for undermining the ordinary legal system.[21] While both models offer some direction in order to deal with a state of emergency, whether one opts to utilize the traditional legal system or enact new emergency legislation, the impact or validity of extra-legal practices must be addressed. Central to Gross's "Extra-Legal Measures model" is the following assumptions;

"(1) emergencies call for extraordinary governmental responses, (2)constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies, and (3) there is a strong probability that measures used by government in emergencies will eventually seep into the legal system even after the crisis has ended."[22]

The arguments presented by Gross's "Extra-legal Measures model" supports the notion that under violent or extraordinary emergencies (the ticking bomb scenario) law enforcement is likely to act in a matter which is otherwise unconstitutional. As such, the model presented by Gross supports the notion that extra-legal practices will be utilized in order to rectify the emergency; however such discretion to act outside of law is subjected to an after-the-fact evaluation of illegal actions. Therefore, individuals who opted to

[19] *Ibid* at 1058.
[20] Dyzenhaus, *supra* note 6 at 67.
[21] *Ibid*
[22] Chaos and Rules *supra* note 5 at 1097.

prevent the ticking bomb scenario through illegal practices are later held accountable for their actions through public disclosure. The "Extra-Legal Measures model" is influenced by Locke's Theory of the Prerogative Power, in which the prerogative is understood by Gross as, "nothing but the Power of doing publick good without a Rule."[23] The prerogative power is understood as "necessary in order to deal with situations when strict and rigid observation of the laws may lead to grave social harm."[24] A similar principle is observed through Gross's model which states that;

"In appropriate circumstances, the government may deviate from existing legal principles, rules, and norms. For such an action to be appropriate, however, it must be aimed at the advancement of the public good and must be openly, candidly, and fully disclosed to the public."[25]

This approach is founded on the premise that public accountability will follow and adequately challenge any act of lawlessness. The openness of such actions is central to the "Extra-Legal Measures model" as it "calls for an ethic of responsibility not only on the part of public officials but also the general public."[26] A proper utilization of this model requires a definite acknowledgement of illegality which is later assessed by the public. While the success of public accountability will be addressed through the state of acceptance, it suffices to note that Gross accepts that under some circumstances, the utilization of extra-legal practices might be justified. However, he argues that the process of accountability required within his

[23] *Ibid* at 1102.
[24] *Ibid*
[25] *Ibid* at 1111.
[26] *Ibid* at 1099.

model "with its uncertain outcomes, also serves the important function of slowing down any possible rush to use extralegal powers by governmental agents."[27]

Gross understands this model as being beneficial to the preservation of the rule of law in that, "going completely outside the law in appropriate cases may preserve, rather than undermine, the rule of law in a way that constantly bending the law to accommodate emergencies will not."[28] A possible concern surrounding emergency legislation is the potential for any change in laws, or "Accommodation" to result in seepage with ordinary law.[29] This concern which will be further addressed through this chapter is valid, especially within the post 9/11 era where emergencies defined as terrorist threats are considered permanent realities, thus requiring a permanent "emergency" legislation.

On the other hand, David Dyzenhaus, critiques the utilization of extra-legal practices which in any circumstances violates the rule of law. Regardless of the actual emergency Dyzenhaus argues that, "emergency laws show, liberty- and its protections through the rule of law … we can still require that government act in accordance to the rule of law, and thus protect our liberty, even where there is an emergency."[30] Dyzenhaus proposes a "Legality model", one which "regards the separation of powers as instrumental to the values of the rule of law or legality."[31] Under times of emergency, it

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[27] *Ibid* at 1024.
[28] *Ibid* at 1097.
[29] Dyzenhaus, *supra* note 6.
[30] David Dyzenhaus "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald Daniels, Patrick Macklem and Kent Roach (eds) *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*. Toronto: University of Toronto Press. 21 at 29 [Permanence of the Temporary].
[31] Dyzenhaus, *supra* note 6 at 74.

becomes important for Dyzenhaus to "loosen the grip" on the formal separation of powers which in turn will able "imaginative response to emergencies which preserve the rule of law."[32] The role of judges is particularly relevant in this model as they have the power to "force government to come clean about their legislation in a way which increases political accountability."[33]

In order to better understand the impact of utilizing extra-legal practices in times of emergency, Dyzenhaus provides a number of challenges with respect to the "Extra-Legal Measures model". One of the concerns surrounding the validity of this model argues that, "if the law to which they are accountable is not the law which exist at the time of their actions, but a law that which after the fact declares their actions to be legal, then they are not accountable at all. One is left with the façade not the substance of the rule of law."[34] Central to the Gross argument, the functionality test which derives from Locke, relies on the public in assessing whether the illegal actions could be justified under the state of emergency. This requirement as addressed by Gross will "prevent illegal official action from breeding a culture of lawlessness."[35] The functionality test is however challenged under a state of emergency in which Dyzenhaus argues, "the atmosphere of public fear that attends emergencies is not conducive to deliberation and leads to easy acceptance of official action that is claimed to be necessitous."[36]

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[32] *Ibid*
[33] *Ibid* at 86.
[34] *Ibid* at 72
[35] *Ibid* at 69.
[36] *Ibid* at 72.

This thesis is particularly interested in the response to 9/11, a scenario in which terrorism is defined as an emergency, however the response to these attacks have resulted in the amendment of traditional law. In this case, the emergency was and continues to be prevented through the application of the *Criminal Code*. The impact of utilizing traditional law to deal with an emergency, in this case terrorism, has resulted in a dangerous scenario in which practices acceptable in time of emergency have been permanently conveyed into traditional law. Within this veneer of legality one finds what Dyzenhaus fears

> *"the government introduces legislation that is inherently suspect from the perspective of the rule of law, but avoids in so far as this is possible that seem in flagrant violation of rule of law principles. The dirty work is done by those charged with implementing the law and the government expects that judges who hear challenges to the validity of particular acts will put aside their role as guardian of the rule of law because in issue is the security of the state."*[37]

Thus for a selective class of individuals, in this case Middle Eastern /Muslims, the veneer of legality has resulted in a permanent state of exception. While the law has afforded due process to individuals like Khawaja[38], others have been subjected to extra-legal practices which are justified under the pretext of the post 9/11 state of emergency. The work of both Dyzenhaus and Gross demonstrate differing points of view regarding acceptable practices within a state of emergency. The competing perspectives offer a framework surrounding the utilization of established legal practices as compared to the implementation of extra-legal practices in order to quell emergencies. While this thesis is in favour of utilizing an approach which upholds legality as described through

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[37] Permanence of the Temporary, *supra* note 30 at 30.
[38] Isabel Teotonio, "Toronto 18" *The Star* (1996-2010) online: The Star <http://www.thestar.com/static/toronto18/index.html>.

Dyzenhaus's "Legality model", it is understood that various extra-legal practices have been utilized following 9/11 in order to fight the threat of terrorism.

It is important to recognize the likelihood that emergency legislation may seep within traditional law and potentially into post 9/11 practices due to the permanency of the amendments made to the *Criminal Code*. The following chapters will argue that the attacks of 9/11, represent by definition an emergency which prompted a number of new security protocols. This new state of emergency is however now defined as a permanent reality which often considers the threat of terrorism as the new normal.

Defining the State of Exception – Giorgio Agamben

The selective use of extra-legal discretionary practices has resulted in the fabrication of a state of exception, one which Agamben defines as, "not a special kind of law (like the law of war); rather insofar as it is a suspension of the judicial order itself"[39], one which "defines law's threshold or limit concept."[40] The suspension of law as described by Agamben has become a problematic reality of the so called "war on terror". The concern is the absence of checks and balances and adherence to due process that is otherwise afforded through law. Within post 9/11 practices, the defining line between law and lawlessness is vague and arguably often not addressed or even identified. When this line is trespassed and certain civil liberties are breached the necessity to protect national security is a commonly utilized justification. Individuals whom are subject to security certificates, the no fly list or discretionary heightened surveillance and suspicion due to

[39] Agamben *supra* note 1 at 4.
[40] *Ibid* at 4.

ill-informed biases or false intelligence are the constructed minority subject to a state of exception.

The *ATA* was the legal response to 9/11 and certain aspects of the act were controversial. The *ATA*'s amendments to the *Criminal Code* appeared to be tolerated under the premise that the most contentious components were subject to sunset provisions to ensure they would not become a permanent part of the criminal law landscape[41]. As such, on its surface, the legislative response respected the fundamental essence of justice and set out to accomplish this through race neutral laws. However the impact of establishing the targets of such law indirectly invited extra-legal discretionary measures which often consider race and religion as a precursor to terrorism, essentially negating the race neutral premise. Thus it is important to consider the role of the state of exception and how it is manifested through such laws. As noted by Dyzenhaus, "even if sunset clauses are introduced, the fact that what we have is not emergency legislation but a terrorism law – an emergency law masquerading as an ordinary statute - means we have stepped outside of the rule of law."[42]

The events of 9/11 gave rise to security concerns which, it was argued, could not be corrected solely under the application of existing law. Rather terrorism has been viewed as an exceptional crime which requires a long term robust commitment, one which ultimately creates the climate conducive for a permanent state of exception which results in "legal measures that suspend rights in the interest of national security."[43] While laws such as those contained in Part II.1 of the *Criminal Code* do not in themselves

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[41] *Criminal Code*, *supra* note 3, ss. 83.28, 83.29, 83.3
[42] Permanence of the Temporary, *supra* note 30 at 28.
[43] Razack, *supra* note 9 at 11.

constitute a suspension of rights, their underlying application as addressed by Justice Rutherford invite an unwarranted degree of extra-legal discretionary practices[44]. As such the utilization of extra-legal discretionary practices has caused a problematic "legal civil war that allows the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system."[45]

The state of exception does not only involve the suspension of legal rights but further establishes which individuals fall victim to such suspension of legal rights. Declaring an abstract ambiguous "war on terror" similar to doing so for the war on drugs, crime and poverty provides for a broad overall mandate to select the individuals, groups or behaviours such a war must combat. Unlike a traditional war the duration is undefined because the parameters for success are often impossible to achieve. What is however common to all wars, is the overall creation of an enemy "other" and in the Canadian context this creation has illegitimately alienated a minority of citizens from the protection of traditional law. Within the "war on terror" potential enemies are not only ill-defined but further generalized to the extent that the criminal identity of a terrorist is transformed to an enemy "other" who somehow resembles the perpetrators of 9/11.

Dyzenhaus defines how anti-terrorism legislation errs on defining the criminal when he states that,

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[44] *Khawaja supra* note 4.
[45] Agamben, *supra* note 1 at 2.

"the target is 'terrorism', an offence which is indefinable since it presupposes that there is an internal political enemy, someone so existentially different that we cannot name him in advance in order to deal with him either through the ordinary criminal law, or by relaxing the rule of law to some extent for a definable and carefully supervised period."[46]

This enemy is automatically defined by the events of 9/11 and through such classification is subjected to the state of exception, one which may be subject to pre-emptive actions. The post 9/11 state of exception constantly reminds us that while the crime in itself is the underlying force behind the legislative amendments, the offence must be prevented before it happens.

As the need for flexibility increases the scope of discretionary power, the temptation to use excessive means to pursue those perceived to be a potential threat based on preconceived notions is great. There is a potential for discretionary practices to result in subjective biases by authorities' which "reflect the shadow of suspicion and anger falling over all who appear to belong to have any connection with the religious, political or ideological grouping identified with specific terrorist act.[47]" It is precisely those individuals who become victimized by what Agamben defines as a state of exception, one which "constitute a point of imbalance between public law and political fact that is situated like civil war, insurrection and resistance in a ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political."[48]

It is within this intersection that law and lawlessness are encountered under the common agenda of preventing terrorism, a prevention which to date has mainly been approached through extra-legal practices. Within the state of exception "is this notion of

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[46] Permanence of the Temporary, *supra* note 30 at 28.
[47] Khawaja, *supra* note 4 at para 58.
[48] Agamben, *supra* note 1 at 1.

prevention … that best sums up the post 9/11 changes and the increasing logic that laws must be suspended in the interest of national security."[49]

While this thesis recognizes that the *ATA* respects the fundamental rights of individuals, the concern is that a substantial amount of practices justified in the interest of national security, have resulted in a lack of due process for a select minority. While individuals charged with terrorism offences are offered due process, the concern which is examined in latter chapters is that a significant portion of terror prevention, mainly through the investigative stages, occurs outside of the judicial system and at times outside of legal protections. One ought to further examine how the state of exception customarily limited to a state of emergency has resulted in a perpetual suspension of legality during a time of normalcy, one which to date has arguably affected a mainly Muslim Middle Eastern minority.

Camps and Lawlessness – Sherene H. Razack

While some of the anti-terrorism provisions contained in Part II.1 of the *Code* were controversial, individuals such as those charged as part of the "Toronto 18" were prosecuted in accordance with due process and Charter protections. However, a vast number of post 9/11 practices targeted individuals who did not benefit from the protection offered by procedures in the criminal courts because they were never charged with criminal offences. Such, individuals, defined as "others", have been transported to a unique and problematic space in which legality and individual rights do not exist. At the

[49]Razack, *supra* note 9 at 30.

onset it is important to acknowledge that such spaces can appear difficult to recognize as they are fabricated by discretionary measures which are challenging to accurately assess. In the "war on terror", exceptional measures often taken place through the use of broad discretionary powers.

Razack describes the camp as "a place where paradoxically, the law has determined that the rule of law does not apply. Since there are no common bonds of humanity between the camp's inmates and those outside, there is no common law."[50] As such "camps are places where the rules of the world cease to apply"[51], a dangerous space in which individuals targeted by the "war on terror" regardless of actual guilt or crime are metaphorically transported to and detained without due process. The very existence of camps is only possible under Agamben's state of exception, as it cannot be governed through law. Individuals held within camps, such as detainees in the "war on terror" are considered, "the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight."[52]

One can observe a number of camps within the "war on terror", perhaps most obvious within the Canadian context is the practice of using security certificates. Razack observes the security certificate hearing as highly undemocratic and against the rule of law because "there is a casual, unreflect-upon lawlessness, an abandonment of the rule of law."[53] Examples of such areas are airport security holding facilities, the no fly list and detention centers for security certificates. There are also subtle and arguably intangible

[50] *Ibid* at 8.
[51] *Ibid* at 7.
[52] Agamben, *supra* note 1 at 4.
[53] Razack, *supra* note 9 at 29.

conditions that would also suffice as camps, specifically the overall scrutiny and suspicion directed towards specific minorities and the effect of these unwarranted manufactured biases on everyday interactions. While the camps following 9/11 have taken on many different forms, at the minimal impact, one would find that it has resulted in creating an overall class of individuals who for reasons of faith or race fall under a blanket of suspicion. At their worst, camps have resulted in the deportation and torture of individuals, like Maher Arar, under false information and the premise that he too posed a threat to national security.

For those who fall under the scope of discretion and are under scrutiny for being Muslim or Middle Eastern following 9/11, the right to be treated fairly and within legal jurisdiction is overshadowed by society's understanding of post 9/11 terrorism. The unfortunate reality within the "war on terror" is that, "anti-Muslim racism now operates in a culture of exception, where to be profiled a terrorist is to have a high chance of being taken to a place of law without law."[54] The new normal allows society to consider certain individuals to have a predisposition to commit acts of terror and under such premise, discretion is permitted and profiling becomes a common practice. Such discriminatory practices are resulting in a growing number of people who are ultimately "evicted from law, and thus from political community, abandoned outright in camps or stigmatized as the culturally different."[55] As such, post 9/11 camps, only definable through lawlessness, have somehow authorized a sub-human category of Canadians marked as potential terrorists without legal rights and without having committed any actual offence. It is unclear why one would require camps to prevent terrorism, if the intended outcome is to

[54] *Ibid*, at 34.
[55] *Ibid* at 176.

deter terror, marginalizing a group and nullifying their rights produces a climate of suspicion, alienation and anger.

While discrimination is evidently a problematic aspect of the fabrication of camps, it is important to note that individuals targeted by such camps are not only discriminated against, but rather "communities without the right to have rights are significantly different from communities who are merely discriminated against. They are constituted as a different order of humanity altogether by virtue of having no political community, willing to guarantee their rights."[56] It is furthermore difficult to justify why camps are required other than their ability to convict the potential innocents, or those whom the law could not legally prosecute. Extra-legal discretionary practices were not needed when Momin Khawaja and in a separate case the "Toronto 18" were successfully tried in a court of law.

Camps and the lawlessness within them are possible and authorized by the state of exception[57]. It is within these metaphorical and sometimes physical areas that individuals are placed without legal recourse. Among the concerns raised by this thesis is the likelihood that such camps, as a by-product of the state of exception, will not be strictly limited to emergency times but rather extend to periods of normalcy. Again under the pretext of emergency, the "war on terror" has resulted in a number of practices including, but not limited to the holding of individuals without due process and extraordinary rendition which in the following chapters will serve as example of camps.

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[56] *Ibid* at 7
[57] *Ibid* at 11.

State of Acceptance and Orientalism – Edward W. Said

The state of acceptance is fundamental to the approval of extra-legal practices. Within a state of emergency, the projected threat is often sufficient in justifying the use of otherwise unacceptable practices. Within the state of exception and the "war on terror" one ought to question the overall sense of societal acceptance that has arguably limited accountability and transparency of governmental law enforcement agencies. Within the common lexicon terms such as terrorist, terrorism, Islamic extremism, militant Muslims, Islamists, jihadist, home grown terrorist and now national security are all related and part of the national post 9/11 discourse. The characterization of the enemy aggressor coupled with the sense of urgency to combat, eradicate and quell this threat has contributed to the fabricated perception of the populace. Dyzenhaus notes that within this war,

"we were told that at stake was the very existence of Western democracy, that the West would have to embark on a 'crusade' of 'infinite justice', that other countries had to see that they were either 'with us or against us' and that the rules of the response were those of the Wild West, that is anything goes."[58]

Under such a powerful discourse, individuals are led to the false belief that the "war on terror" only has two sides, one of complete trust in government without any challenge and one of complete support for terrorism. Under this approach, legitimate dissent and concerns surrounding the "war on terror" and the practices which it entails could be collectively silenced under the fear that any challenges to anti-terrorism practices might be construed as sympathizing with terrorists. Such misconceptions not only result in an acceptance of the state of exception, but reinforce Justice Rutherford's

[58] Permanence of the Temporary, *supra* note 30 at 26.

concerns which ultimately result in a climate in which Canadians sharing a common religious or political view as those indirectly targeted by the *ATA* will fall under the unwarranted suspicion and prejudice[59].

In the post 9/11 state of exception, the framework of "us" versus "them" is essential to the justification for extra-legal practices. Said's work on Orientalism provides a historical account surrounding the problematic and persistent fabrication of a division between the "West" and the "East"[60], one which ultimately extends to the "us" and the "other" of the "war on terror". Said recognizes that history, mainly through the European experience, has entrenched a persisting belief that there exists a separation between the "civilized population" and the "Oriental Other".[61] Thus, Orientalism constitutes "a political vision of reality whose structure promoted the difference between the familiar (Europe, the West, "us") and the strange (the Orient, the East, "them")."[62] This understanding of the "West" and the "Oriental Other" has manifested itself through the illogical but lasting principle that;

"there are Westerners, and there are Orientals. The former dominate; the latter must be dominated, which usually means having their land occupied, their internal affairs rigidly controlled, their blood and treasure put at the disposal of one or another Western power."[63]

Under this rationale the characteristic of the Oriental as "irrational, depraved (fallen), childlike, "different"... was not the result of his own efforts but rather the whole complex series of knowledgeable manipulations by which the Orient was identified by

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[59]Khawaja, *supra* note 4.
[60] Said, *supra* note 8.
[61] *Ibid.*
[62] *Ibid* at 43.
[63] *Ibid* at 36.

the West."[64] This perception has further extended to the "Arab Orientals", which has primarily set forth the notion that both Arabs and Islam "symbolize terror, devastation, the demonic, hordes and hated barbarians."[65] While such a view continues to proliferate through the post 9/11 discourse, the origin of Arab Orientalism stems not from the attacks of 9/11 but rather from the introduction of Islam within Europe.

However primitive, Orientalism continues to be seen within the "war on terror" in which Arabs are fabricated as "others" and the west or the "us" continue to be portrayed as democratic civilized people. The scope of Orientalism has resurfaced in the aftermath of 9/11 by reminding "us" that "on the one hand there are Westerners, and on the other there are Arab-Orientals; the former are (in no particular order) rational, peaceful, liberal, logical, capable of holding real values, without natural suspicions; the latter are none of these things."[66] This rationale, however ill-informed and problematic, has influenced how the exercise of power in the state of exception plays out; specifically, the toleration of the use of extra-legal discretionary practices, providing that these practices are directed at the "Oriental Others".

Within the post 9/11 era, the separation between "us" and them is important in establishing a rationale for extensive security measures. Oren Gross notes that "in times of crisis, when emotions run high, the dialectic of "us versus them" ... accounts for the greater willingness to confer emergency powers on the government."[67] The level of willingness of individuals to accept such governmental powers is directly correlated to

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[64] *Ibid* at 40.
[65] *Ibid* at 59.
[66] *Ibid* at 49.
[67] Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice. Cambridge Studies in International and Comparative Law* (Cambridge University Press, 2006) at 220.

the perceived threat. As such, "the greater the threat "they" pose to "us," the greater in scope of the powers assumed by government and tolerated by the public becomes."[68] Thus the combination of fear and a dehumanizing discourse of "enemy others" or Orientalism, results in an acceptance, one which again problematically suppresses criticism when the rights of individuals are nullified and when individuals like Maher Arar are transported to camps.

Clearly, legal amendments following 9/11 are applicable to the overall population; however they are not directed towards all members equally. Instead those likely to be subjected to such law are defined through the event that prompted the amendments. While the law itself is race-neutral the discretionary practices it engenders are often perceived to only target "the enemy" and not those who reside outside of the state of exception. Within America following 9/11, "most Americans did not worry about such measures. They were not the intended targets and their rights were unlikely to be infringed."[69] As such, "when faced with an acute exigency, public officials and decision-makers, as well as the general public, are often willing to resort to measures and mechanisms that they themselves had strongly rejected in the past."[70] Thus the creation of the "enemy other" is fundamental to the understanding of how society, the West, is capable of engaging in practices defined by the state of exception.

While historically Orientalism has resulted in the misconstruction surrounding the strength of the West and the weakness of the East, to date it ironically serves to reinforce the misconception that the "Other" poses a threat to our democratic lifestyle. As such, the

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[68] *Ibid* at 221.
[69] *Ibid* at 222.
[70] *Ibid* at 228.

Orientals post 9/11, are not weak but perceived to be ideologically corrupted and above all a threat to Western civilization. This narrative ultimately challenges individual's acceptance through a powerful discourse which results in collective fear, which has the potential of undermining the rule of law and the notion of individual rights. The subject of the "war on terror" or the "others" can change, subsequently resulting in a new threat and a new target, the fact that a suspension of legality is occurring, regardless of the actual targets, is in itself a grave violation of legal rights.

One can consider the case of Maher Arar, to highlight this reality. Following a problematic and inaccurate sharing of intelligence, a practice made possible post 9/11, Arar was deported and tortured under the misconception that he was a terrorist. This ordeal illustrates that "the risk is that decision makers who believe themselves faced with sleeper cells and international conspiracies will interpret the facts before them through the lens of fear and will adopt a 'better safe than sorry' mentality whereby it is better to violate someone's rights than risk a terrorist incident."[71]

Edward Said's work on the he notion of "enemy other" can be transposed upon the current discourse post 9/11. The narrative of the "enemy other" is explored throughout the following chapters in relation to the societal acceptance of extra-legal practices upon a perceived threat. One could argue that by identifying the "enemy other" as a prevailing threat and offering extra-legal measures as a solution, allows for lawless to thrive without scrutiny. Another issue raised by this thesis is that the "enemy" in this case is not only ill-defined but is generalized through a form of acceptable racism[72]. The

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[71]Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293 at 301 [Reem].
[72]*Ibid*

impact of legality, more specifically the motive clause which defines terrorist activities by including religious, political and ideological motives will be addressed in order to establish a link between the *ATA* and the usual suspects of investigative practices.

State of Permanency: When the Exception Becomes the Norm

One cannot adequately define the aftermath of 9/11 without considering the state of exception and subsequently the creation of camps. It is within the exception that one finds what Agamben has described as a suspension of the legal order, one in which lawlessness takes place[73]. It is fair to argue that under most circumstances individuals would be hard pressed to accept some restriction on legal rights, let alone its complete elimination unless such actions were a temporary response to a serious threat and applied equally to all members of society. However, almost ten years after the events of 9/11, the state of exception and as such the elimination of rights for targeted individuals continues to unfold within camps. During a period of emergency or severe crisis there is a temporary restriction on some fundamental rights similar to what Canadians experienced under the FLQ crisis. The response however to 9/11, both through legal and non-legal measures are permanent and as such "the legal responses after 9/11 are not to a state of emergency, classically conceived. Rather, prompted by the allegation that terrorism is here to stay, these responses seek to deal with emergence not as temporary external threat but as internal permanent problem."[74] Because the measures are permanent, they are

[73] Agamben *supra* note1.
[74]Dyzenhaus, *supra* note 6 at 67.

given a veneer of legality which conceals the existence of "camps" occupied by a select group who are denied the protection of the law.

With respect to terrorism, it is important to first establish that the crime in question is not only ill-defined and discriminatory within the post 9/11 era but also one which cannot be eradicated. As such the idea of the "war on terror", while it might assume a possible victory, in reality remains a war without end. The threat of another attack has justified legal amendments to the *Criminal Code* which have thus become part of the ordinary legal system. Under the constant culture of fear, the threat to national security trumps the restriction of rights and legality. Ironically, among the perceived common motivators of terrorism, individuals are told that they, "the others" do not like "our" freedoms, however it is in fact those cherished freedoms that are eliminated within a state of exception.

The permanent nature of the state of exception under the pretext of emergency, nationally rationalizes lawlessness through the utilization of discretionary measures. Under the pretext of exception, the treatment of individuals considered "inclined" to engage in acts of terrorism results in a permanent utilization of discriminatory practices which are largely ungovernable by law. While one might be tempted to argue that in the name of national security, such measures are acceptable, their lasting nature appears to surpass any apparent necessity. Rather "when race thinking unites with bureaucracy, when, in other words, it is systematized and attached to a project of accumulation[75], it

[75] Sherene Razack views the project of accumulation as a way in which racial stereotypes become intertwined with general profiling surrounding terrorism. As such, the accumulations of pre-conceived prejudices risk becoming organizing principles. The project of accumulation is problematic as it utilizes a pre-established set of characteristics, mainly race and faith, as a precursor to the crime of terrorism. The

loses its standing as a prejudice and becomes instead an organized principle."[76] The concern arises "when decision makers operate against a backdrop of ingrained, but often unconscious stereotypes, they are likely to filter and interpret facts or events through the lens of stereotypes rather than by making an individual and rational assessment based on the particular facts of a given case."[77] The troubling reality is that, "over time, we become comfortable with our prejudices and determinations of risk become even more inextricably linked with stereotypes about Arabs and Muslims so that Arabness and Muslimness itself becomes a substitute for risk."[78]

Overall the post 9/11 state of exception has resulted in a dangerous precedent in which, "the camp has become the rule, and our culture is now one of exception."[79] What we now have within our culture of exception is a "bill which is designed to remove, in so far as the Charter permits this, law enforcement and intelligence-gathering from the discipline of the rule of law"[80] one which is now observed in the perpetual use of extra-legal discretionary practices. As such the "war on terror", unlike ordinary wars, results in an "endless state of emergency that ensures the permanence of the temporary."[81]

The notion of permanency is important as it establishes that current practices are not limited by an exception but rather have become permanent. The concern is that

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accumulation as such represents a body of prejudiced beliefs which risk being compiled as legitimate facts within the war on terror.

[76] Razack, *supra* note 9 at 9.

[77] Reem, *supra* note 71 at 305.

[78] *Ibid* at 308

[79] Razack, *supra* note 9 at 12.

[80] Permanence of the Temporary, *supra* note 30 at 27. Dyzenhaus is referring to Bill-c-36 which was addressed during a conference surrounding Canada's anti-terrorism bill (later produced as a book in 2001)

[81] W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41 Osgoode Hall L.J. 267 at 271. [Pue]

emergency protocols that are viewed as controversial with respect to their adherence to legality were previously limited in time and scope; it is these protocols that are now being implemented in a perpetual indefinite manner. Put differently, the (ticking bomb scenario) may require practices which are not traditionally viewed as acceptable, but once the scenario has been quelled and the threat eliminated those practices are eradicated and normalcy is restored. The events of 9/11 have prompted a different scenario in which the events which incited the controversial practices have no projected expiry. Unlike other occurrences of terrorism such as the FLQ crisis, modern day terrorism is viewed as an imminent threat indeterminate in time. It is this constant uncertainty that is fundamental to understanding not only the camps which it creates but their lasting attributes which will be addressed in the following chapter. By acknowledging the permanence of the post 9/11 responses, this thesis will challenge both the implication of lawlessness within the "war on terror" and the acceptance of extra-legal practices.

Chapter 2 - The *Anti-terrorism Act*, Canada's Official Response to 9/11

While the state of exception and the subsequent creation of camps are founded outside of the legal sphere, such practices have stemmed from reactive law – law that is passed in response to a specific event. In order to examine how legislation can lead to extra-legal discretionary practices and a state of exception, it is important to begin by evaluating the legal response to 9/11.

This chapter will examine both the international pressure for individual states to enact anti-terrorism legislations and Canada's domestic response to 9/11 through the *ATA* amendments to the *Criminal Code*. The act in itself must be evaluated in order to establish how specific and controversial sections have resulted in both the legal and the extra-legal practices post 9/11. It is important to recognize the *ATA's* influence on the motion of various mechanisms of power, not only in terms of criminal prosecution but involving law enforcement agencies that are required to engage in surveillance and terrorism prevention.

Since 9/11, academics have evaluated the *ATA* through a legal lens and are primarily concerned with the adherence to due process and Charter rights. While these kinds of analyses are important, the extra-legal implications of the *ATA* and its subsequent ability to create zones of lawlessness are sometimes overlooked. While the *ATA* constitutes a legal response to terrorism which aims, among other things, to use criminal law mechanisms as a means of punishing terrorist activities, one ought to further consider the indirect consequences of the act in the post 9/11 era, particularly its

relationship to the creation of a state of exception that may become permanent. As it will become apparent in the following chapters, the implementation of the *ATA* indirectly provided security officials with discretionary power which results in what Razack described as "camps"- zones where the legal rules do not apply[82]. These areas are reserved for those who fit a prefabricated criminal identity of a terrorist, one which is indirectly constructed through the interpretation of the *ATA*.

The Road towards the *Anti-terrorism Act*

Following the events of 9/11, the United Nations Security Council issued a condemnation of the attack and put forth resolution 1373. The resolution addressed the attacks of September 11 by recognizing that "such acts, like any act of international terrorism, constitute a threat to international peace and security."[83] Furthermore resolution 1373, which was unanimously adopted on September 28 2001, called upon "member states to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities."[84] Among those measures, allied states were directed to;

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[82] Razack, *supra* note 9 at 7.
[83] UN Security Council Resolution 1373, Sres73 (2001).
[84] Security Council Counter-Terrorism Committee, "Our Mandate" (2011), online: Security Council-Terrorism Committee <http://www.un.org/en/sc/ctc/>.

"criminalize the financing of terrorism, freeze without delay any funds related to persons involved in acts of terrorism, deny all forms of financial support for terrorist groups, suppress the provision of safe haven , sustenance or support for terrorists, share information *with other governments on any groups practicing or planning terrorist acts, cooperate with other governments in the investigation, detection, arrest, extradition and prosecution of those involved in such acts; and criminalize active and passive assistance for terrorism in domestic law and bring violators to justice."*[85]

While resolution 1373 called upon "all states under the mandatory provisions of Chapter VII of the United Nations Charter"[86] to guarantee that crimes of terrorism were to be considered serious offences and subsequently addressed as such, it failed to provide a universal definition of what unambiguously constituted terrorism.[87] The task of defining terrorism, along with the expedited creation of anti-terrorism legislation, rested with individual nations to carry out as they saw fit. In order to guarantee execution of this resolution, the Counter-Terrorism Committee of the United Nations was created. It provided nations ninety days to act in accordance with resolution 1373 following its release.[88]

The timeline defined by the committee hastened the creation of emergency legislation which forced national legislative bodies to pass laws without having the opportunity to consider or address some of the concerns surrounding the overall impact of such enactments. Canada, following these guidelines attempted to expeditiously engage in the "war on terror" and subsequently introduced the *ATA*. The *ATA* represents

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[85] *Ibid*
[86] Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 W.R.L.S.I. 5 1 at 5[Reviewing Canada's Anti-terrorism Law].
[87] Victor V. Ramraj, Michael Hor& Kent Roach, *Global Anti-Terrorism Law and Policy*, (New York: Cambridge University Press, 2005) at 4.
[88] *Ibid*

an emergency style law created in haste, introduced in Parliament October 15 2001 exactly 34 days after 9/11, to be put into operation by December 18 2001.[89]

Prime Minister Jean Chrétien established the Ad Hoc Cabinet Committee on Public Security and Anti-terrorism swiftly after the attacks of 9/11.[90] Under the direction of John Manley, then Minister of Foreign Affairs, a review of legislation pertaining to terrorism was executed and the *ATA* was implemented. The act in question constituted the following five objectives, "to prevent terrorists from getting into Canada; to protect Canadians from terrorist acts; to bring forward tools to identify, prosecute, convict and punish terrorists; to keep the Canada-U.S. border secure and open to legitimate trade; and to work with the international community to bring terrorists to justice and address the root causes of terrorism."[91]

Such an agenda however came at a significant cost, the total 7.7 billion dollars has been invested by the Government of Canada in order to fight terrorism.[92] Reports from Foreign Affairs and International Trade Canada indicated that 280 million dollars has been spent in immediate measures such as "enhanced policing, security and intelligence."[93] In the post 9/11 era, the following categories have been funded utilizing the 7.7 billion dollars budgeted for national security:

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[89] *Ibid*
[90] "Backgrounder Canada's Actions Against Terrorism Since September 11" *Foreign Affairs and International Trades Canada* (7 February 2003), online at <http://www.international.gc.ca/anti-terrorism/canadaactions-en.asp>.
[91] *Ibid*
[92] *Ibid*

[93] *Ibid*

"more intelligence and front-line investigative personnel, improve coordination among agencies and boost marine security($1.6 billion); improve screening of immigrants, refugee claimants and visitors (including detention and removals), for the quicker determination of refugee claims and for new fraud-resistant Permanent Resident Cards ($1 billion); improve critical infrastructure protection, emergency preparedness and response and expand anti-terrorism capacity for the military ($1.6 billion); create a new air security organization, assign armed undercover police officers on Canadian aircraft, purchase explosives detection equipment and enhance policing ($2.2 billion); and enhance border security and improve the infrastructure that supports major border crossings to ensure the legitimate flow of goods and people ($1.2 billion)."[94]

This allocation of funding towards national security should not come as a surprise considering that NATO's statement regarding the attacks on American targets were to be considered as an act against the international community as a whole.[95] For Canada, this appeared to justify the requirement for legislative amendments and the financial investment on prevention efforts such as policing and elevated airport security. However it is important to note that such amendments had the effect not only of expanding the scope of criminal offences, but also the scope of discretionary power wielded by officials responsible for preventing terrorism. An example of the ongoing costs of post 9/11 security reported by the Ottawa Citizen indicated that Canadian Air Transport Security Authority paid a significant sum per year for the Air Marshal program which is contracted through the RCMP.[96] The article confirms, that "the agency responsible for airline security paid the RCMP $40 million a year to provide armed officers on domestic

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[94] *Ibid*

[95] North Atlantic Council, "Statement by the North Atlantic Council", (September 12, 2001) online at <http://www.nato.int/cps/en/natolive/news_18553.htm?mode=pressrelease>

[96] Glen McGregor, "Air Marshal program cost $40M a year Documents show agency paid RCMP for armed officers" *Ottawa Citizen* (14 August 2011) online: Ottawa Citizen <http://www.ottawacitizen.com/news/marshal+program+cost+year/5254421/story.html>.

and international flights as a deterrent to terrorists."[97]

The introduction of the *ATA* has resulted in a significant number of debates which have polarized critics on both sides of the argument. This contentious legislation instigated discussions which have included both civil libertarians and academics[98] who believe the *ATA* contains "new and potentially dangerous legal concepts"[99] and pro-*ATA* advocates who argue that it is simply a vital tool whose justification is self-evident in a dangerous post 9/11 world. Among some of the critics, Stuart noted that;

"Bill C-36 puts in place many unfettered Ministerial powers, such as the power to define terrorist groups, authorize electronic surveillance and file fiats against use of sensitive material (not just that relating to national security). These powers contravene fundamental hallmarks of our justice system such as the rule of law, the presumption of innocence and the need for State proof guilt beyond a reasonable doubt in a trial before an independent and impartial judge."[100]

On the other hand, Justice Minister Anne McLellan advocated for anti-terrorism laws by establishing that such legal amendments should primarily focus on preventing the act of terrorism. As such she stated that,

"Our current laws allow us to investigate terrorism and prosecute those who have engaged in various specific acts generally associated with terrorism, including hijacking, murder, and sabotage. However, these and other laws are not sufficient. Perhaps the greatest gap in the current laws is created by the necessity of preventing terrorist acts from taking place. Our laws must reflect fully our intention to prevent terrorist activity,

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[97] *Ibid*
[98] Don Stuart, "The Danger of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 should be Withdrawn" in Daniels, Ronald J., Patrick Macklem & Kent Roach eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, 2001) at 214 [Stuart].
[99] Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism"(2002) 47 R.D McGill 893 at 895 [Did September 11 Change Everything?].
[100] Research and Statistics Division / Department of Justice, *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act* by Thomas Gabor, (March 31 2004)1 at 81.

and currently they do not. Under our current laws we can convict terrorists who actually engage in acts of violence if we are able to identify and apprehend them after their acts have been committed. However, I think we all agree that Canadians have a right to expect their government to do everything it can to prevent such horrific acts as those of September 11 from happening in the first place."[101]

As stated above, the crime of terrorism was considered an offence punishable within the pre-911 *Code*. The statement presented by Justice Minister Anne McLellan appears to distance itself from traditional law enforcement practices by recommending that the Government do "everything it can to prevent such horrific acts as those of September 11 from happening in the first place."[102] This statement is problematic as it places an unsustainable burden upon law enforcement to prevent acts of terror from being carried out by individuals or groups prior to them taking place.

The *Anti-terrorism Act* and Amendments to the *Criminal Code*

Law is often seen as the mechanism through which we preserve social order, but legal rules, particularly the emergency legislation of the type that was passed after 9/11, can have insidious indirect effects. In order to examine such effects, a review of some of the *ATA* most significant provisions ought to be carried out in order to evaluate the extra-legal impact which it creates. At the outset it is important to recognize that September 11th was not the first time the West was subjected to terrorism. It could also be argued

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[101] Canada, Evidence presented to Standing Committee on justice and human rights, (20 November 2001) at 1220. Online at: Parliament of Canada <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041152&Language=E&Mode=1&Parl=37&Ses=1>.

[102] *Ibid*

that, the offences which the *ATA* added to the *Criminal Code* in order to prosecute terrorists could have in large part been prosecuted and tried under existing *Criminal Code* provisions.[103] In fact, Canada utilized the pre 9/11 *Criminal Code* to prosecute the murder of cabinet minister Pierre Laporte during the October crisis and again in the Air India terror bombing.[104] Furthermore, the *Criminal Code* pre 9/11 already included provisions which "prohibited participation in crimes such as murders and bombings, as well as conspiracies and attempts to commit such crimes."[105] Roach argued that "we can affirm the equal value and humanity of every person by applying the regular criminal law in a resolute and non-discriminatory manner to each and every act of terrorism."[106] Therefore non-discriminatory laws which applied to first degree murder, equally and effectively can also be applied to terrorism.

However the simplicity of utilizing pre-existing laws to remedy terrorism clearly did not prevent the attacks of 9/11. As such "once the ordinary criminal law is seen as inadequate for dealing with the perceived threat of terrorism, the tendency of legislators has been to create new super-criminal offences under the banner of terrorism."[107] This however implies that "the new terrorist offences have to be distinguished from ordinary crimes and the way in which this is done often invites controversy."[108] The crime of terrorism has been transformed into a super offence, one which was presented as a threat

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[103] *Criminal Code*, *supra* note 3.
[104] Kent Roach, "Canada's Response to Terrorism" in Victor V. Ramraj, Michael Hor & Kent Roach eds., *Global Anti-Terrorism Law and Policy*, (New York: Cambridge University Press, 2005) 511 at 514 [Canada's Response to Terrorism].
[105] *Ibid*
[106] Did September 11 Change Everything?, *supra* note 99 at 910.
[107] Victor V. Ramraj, Michael Hor& Kent Roach, *Global Anti-Terrorism Law and Policy*, (New York: Cambridge University Press, 2005) at 3.
[108] *Ibid*

that required special laws and special powers to eradicate. Such enactments are vital to the overall utilization of extra-legal discretionary practices as they induce the notion that the threat defined by the attacks of 9/11 are so severe that it requires additional laws to deal with the problem. Although legal amendments are not unconstitutional or even uncommon, in dealing with modern terrorism there is an imminent danger that the perception of inadequacy within traditional law will support the utilization of lawlessness.

The catalysts for Canadian anti-terror law were crimes carried out by non-state actors that took place on foreign soil. Under the agenda of prevention, the *ATA* "criminalized a broad array of activities in advance of the actual commission of a terrorist act, including the provision of finances, property and other forms of assistance to terrorist groups, participation in the activities of a terrorist group, and instructing the carrying out of activities for terrorist groups."[109] In addition to the *Criminal Code* amendments, Bill C-36, the *ATA*, also amended the *Official Secrets Act* (now the *Security of Information Act*), which creates new offences in order to "counter intelligence-gathering activities by foreign powers and terrorist groups, as well as other offences, including the unauthorized communication of special operational information."[110] The act also amended the *Canada Evidence Act* which gives "the Attorney General the powers to assume carriage of a prosecution and to prohibit the disclosure of information in connection with a proceeding for the purpose of protecting international relations or national defence or security."[111]

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[109] Canada's Response to Terrorism, *supra* note 104 at 514.
[110] *ATA*, *supra* note 2.
[111] *Ibid*

Defining Crime through Political, Ideological and Religious Motive

The *ATA* legislation, which totals over 170 pages, contains, among other things, amendments to the *Criminal Code*, adding Part II.1, which sets out specific, terrorism related provisions and creates certain exceptional powers for law enforcement officials. The new provisions include, for the first time under the *Criminal Code*, a rather controversial definition of terrorism. The definition as such serves as an ill equipped descriptive tool to define what terrorism is and more significantly it attempts to prescribe what may motivate an individual to commit such actions. Furthermore the definition, perhaps indirectly, prescribes "against whom extensive new investigative power can be exercised."[112]

Section 83.01(1)(b)(i) of the act identifies terrorist activities as followed:

"(b) an act or omission, in or outside Canada,
(i) that is committed
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada."[113]

The overall impact of requiring religious, political and ideological motives in defining terrorist activities will be addressed in detail through Justice Rutherford's judgement in *R. v. Khawaja*. However it is important to note that based upon this

[112] Stuart, *supra* note 98 at 208.
[113] *Criminal Code*, *supra* note 3 at section 83.01.

definition there is a potential risk that the security apparatus such as policing and the intelligence gathering organizations will engage in discretionary practices which will unduly profile individuals who are automatically associated to the criminals behind 9/11 under a common element of race or faith. Under the premise of the "war on terror" and the construction of a state of exception, the risk of such discretionary practices to become an organizing principal is no longer a possibility but rather a dangerous and permanent reality for individuals who are argued to warrant such discretionary treatment.

In addition to defining terrorism, the *ATA* criminalized the financing of terrorism[114], participation[115], facilitation[116], instruction to carry out[117]and the harbouring of terrorists.[118] The *Criminal Code* amendments explicitly make participation in the activities of a terrorist group an offence under section 83.18.

Under section 83.18 (1); "Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."[119]

It is important to note that section 83.18 defines participation as a crime regardless of the outcome meaning that whether or not, "a terrorist group actually facilitates or carries out a terrorist activity"[120] and also irrespective of whether "the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a

[114] *Ibid* at s.83.02.
[115] *Ibid* at s. 83.18.
[116] *Ibid* at 83.19.
[117] *Ibid* at 83.22.
[118] *Ibid* at s.83.23.
[119] *Ibid* at 83.18 (1).
[120] *Ibid* at s.83.18(2) (a).

terrorist activity."[121] This section also does not consider the accused's knowledge surrounding the specific nature of terrorist activities as relevant in assessing fault.[122] Put differently, whether or not the accused has full knowledge of the specific nature of the terrorist activity, is not relevant in establishing his or her involvement and will not absolve them of criminal liability.

In addition to participation, the *ATA* criminalizes providing or the making available of property or services for the purpose of terrorism. Under section 83.03 which makes the following an indictable offence,

> "Everyone who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services
> (*a*) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
> (*b*) Knowing that, in whole or part, they will be used by or will benefit a terrorist group."[123]

Although both participation and providing for terrorist activities can rightfully be construed as a criminal offence, the risk is that in the post 9/11 climate the intended target can easily be projected onto a community as a whole. While it would be fair to argue that Middle Eastern/ Muslim minorities especially post 9/11, have personally felt a sense of profiling and discrimination[124], the above section may result in heightened scrutiny and profiling of a community as a whole. The potential for Canadians to reject societal interaction such as employment, business transactions, personal friendship or assistance to "certain" individuals based on their racial or religious background under the guise that

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[121] *Ibid* at s. 83.18 (2) b.
[122] *Ibid at. s.*83.18(2) c.
[123] *Ibid* at 83.03
[124] Reem, *supra* note 71.

this individual may or may not be associated to terrorism might be a resulting factor.

The case of Maher Arar illustrates "how a person's reputation can be damaged by being associated in any way with a terrorism investigation. Although Maher Arar was released by Syria and has not been charged with an offence since his return to Canada, he has been unable to find employment despite his skills as a computer engineer and the Arar Commission's fact finder has found that this state of affairs has caused Mr. Arar much pain."[125] In this case it is important to note that Arar has been exonerated of any wrongdoing and yet the stigma attached to being associated with terrorism is still prevalent. It is also worth noting that the Arar incident represents a public and well known example, others less fortunate who have not had their innocence publicly acknowledged may be at greater risk of similar alienation.

The fear of association and the possibility for societal rejection in light of the post 9/11 climate was also addressed by Sherene Razack, who examined a case in which individuals were fired or reassigned from their employment based on their ethnicity.[126] In the first case, "Canadians born in Syria and Iran who were working on a defence contracts awarded to Bell Canada were fired from their jobs or reassigned owing to a U.S stipulation that such workers cannot be employed on projects that involves the construction of American strategic military weapons."[127] In a different case, the Royal bank of Canada, "initially agreed to prohibit Canadians with dual citizenship in countries

[125] Kent Roach, "National Security, Multiculturalism and Muslim Minorities" (2006) Singapore Journal of Legal Studies 405 at 430.
[126] Razack, *supra* note 9 at 4.
[127] *Ibid at 4.*

under American sanction (Iran, Iraq, Cuba, Sudan, North Korea and Myanmar) from opening U.S. dollars accounts."[128]

While not specific to this particular section, the overall acceptance of profiling against Middle Easterners and Muslims has been addressed through the work of Reem Bahdi. In her research she cited that "48 per cent of Canadians reported that they approved of racial profiling."[129] She further cites a survey conducted by the national Islamic anti-discrimination and advocacy group in 2002 indicated that "(60 percent) of Canadian Muslims say they experienced bias or discrimination since the 9/11 terrorist attacks."[130] Thus one could argue that members of the Middle Eastern community might find themselves stigmatized by the public discourse surrounding the "war on terror" as well as being subject to heightened security and discretionary practices. These individuals are ostracized not for what they have done but rather for what some in society perceive people "like them" might do.

Another contested section of the *ATA* is section 83.05; which publicly lists entities, groups or individuals who are suspected of terrorism. This section states that;

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[128] *Ibid*

[129] Reem, *supra* note 71 at 296. The data obtained by Reem Bahdi is available at; "September 11th in Hindsight: Recovery and Resolve" (2002), online: Canadian Broadcasting Corporation <http://cbc.ca/september11/content_files/text/poll_nw.html#section3>.

[130] Council on American-Islamic Relations Canada, "SURVEY: MORE THAN HALF OF CANADIAN MUSLIMS SUFFERED POST-9/11 BIAS" (5 September 2002), online: <http://www.caircan.ca/itn_more.php?id=A90_0_2_0_M>.

"(1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a)."[131]

In cases of mistaken identity, individual like Liban Hussein, addressed below, can appeal to Solicitor General under section 83.07.[132] The process in itself is controversial due to the fact that it takes place "without any adversarial challenge and on the basis of information that is covered by both Cabinet confidences and national security confidentiality."[133] This lack of transparency is increased if the information resulting in the listing of entities derives from foreign sources. The critical point of contention is that there may be non-disclosure of information and as such inadequate information to legally defend oneself.

In addition, concerns surrounding ethnic profiling similar to those raised by the definition of terrorism have resurfaced. The problematic result is that "one poorly drafted definition piles atop others as definitions of "terrorist group" are constructed on top of the definition of terrorism."[134] In additional to the lack of transparency and limitation of defense, there is significant concern surrounding mistaken identities within this process

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[131] *Criminal Code*, *supra* note 3 at s.83.05
[132] *Ibid* at 83.07.
[133] Kent Roach, "Ten Ways to Improve Canadian Anti-Terrorism Law" (2005) 51 Criminal Law Quarterly 102 at 109 [Kent Roach 2005].
[134] Pue, *supra* note 81 at 277.

and as such "the resulting danger is the potential for extensive investigation and the exercising of administrative discretion to significantly affect the economic and civil liberties of individuals without any thorough assessment of merit."[135] This concern was turned into reality in June 2001 when Canadian citizen Liban Hussein was inaccurately put onto the list. His ordeal, while corrected in June 2002, resulted in both incarceration and the freezing of his assets.[136] While Hussein suffered from an obvious error at law through his incarceration and restriction of assets, he also suffered the stigmatization of being labelled a terrorist, a label that cannot easily be rectified post 9/11. One of the concerns with listed entities is that "the mere fact that someone has a certain common Arabic name in and of itself makes that person the object of suspicion, requires proof of innocence, and draws the attention of security officials."[137]

Two additional contentious sections within the *ATA* are investigative hearings and recognizance with conditions. While both provisions have since expired under a sunset clause the government has attempted to resurrect these provisions numerous times. The sections are considered controversial as they authorize extraordinary powers such as; compelling an individual to provide information and detaining an individual in absence of an actual offence. Under investigative hearings, individuals who are believed to have information with respect to terrorism can be compelled to attend a hearing and answer questions surrounding their potential knowledge. Such a provision under the consent of the Attorney General legally compels individuals to share information by stating that, "a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex*

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[135] John Boccabella, "Profiling the Anti-terrorism Act: Dangerous and Discriminatory in the Fight Against Terrorism" (2003) 9 Appeal 17 at 21.
[136] *Ibid* at 22.
[137] Reem *supra* note 71 at 302.

parte to a judge for an order for the gathering of information."[138] The point of contention here is individuals forced to appear under investigative hearings are not guilty of any actual criminal offence but rather are being legally held responsible to provide information on something that may or may not be happening.

Recognizance with conditions under section 83.3 states that;

(2) "a peace officer may lay an information before a provincial court judge if the peace officer (a) believes on reasonable grounds that a terrorist activity will be carried out; and (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity."[139]

Recognizance with conditions is problematic because under section 83.3(4)(b), a peace officer has the power to "arrest a person without a warrant and cause the person to be detained in custody, in order to bring them before a provincial court judge."[140] This section is arguably one of the most problematic as it legalizes arrest without a warrant. Once taken before a judge, "the provincial court judge may commit the person to prison for a term not exceeding twelve months if the person fails or refuses to enter into the recognizance."[141]

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[138] *Criminal Code*, *supra* note 3 at 83.28 (3)
[139] *Ibid* at s. 83.3 (4)(b)
[140] *Ibid* at s. 83.3 (4)
[141] *Ibid* at 83.3 (9)

In the past both *Bill S-3*[142] and *Bill C-19*[143] have unsuccessfully attempted to reinstate both sunset provisions which expired in February of 2007.[144] *Bill S-3*, "was amended by the Special Senate Committee on 5 March 2008, passed by the Senate on 6 March 2008, and had reached the debate at second reading stage in the House of Commons in April 2008, before it died on the *Order Paper* at the end of the 39th Parliament on 7 September 2008."[145] The latter Bill c-19 "was last introduced in the 40th Parliament, 2nd Session, which ended in December 2009."[146] The debate in favour of reinstating both provisions is underlined by Minister of Justice and Attorney General, Rob Nicholson who stated that;

"we should put in the hands of the police forces the tools they need and deserve to fight terrorism in this country. We cannot turn our heads away and hope that this country will not be targeted or become a victim. We know that terrorism and those who want to disrupt our society exist. Therefore, when we see legislation like this that responds in a responsible manner with appropriate safeguards, it should have the support of all members of the House and, indeed, the members of the other place."[147]

In 2010, *Bill C-17*[148] has once again attempted to re-introduce both provisions and sparked new debates surrounding their impact on individual's rights. Groups that have contested reintroducing these provisions such as the Canadian Civil Liberties Association (CCLA), argue that "bill C17 weakens our democratic traditions, poses real threats of

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[142] Bill S-3, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Session, 39th Parliament.
[143] Bill C-19, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Session, 40th Parliament.
[144] Legal and Legislative Affairs division Parliamentary Information and Research Service, *Bill C-17: An Act to Amend the Criminal Code(investigative hearing and recognizance with conditions*, by Dominique Valiquet, (Ottawa, Canada, Library of Parliament , 2011).
[145] *Ibid*
[146] *Ibid*
[147] *House of Commons Debates*, No.066 (20 September 2010) at 1240 (Hon. Rob Nicholson).
[148] Bill C-17, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*3rd Session, 40th Parliament.

arbitrary interference with liberty, undermines our commitments to habeas corpus, and provides no safeguards that evidence obtained from third states was not procured by torture."[149]

Investigative hearings and recognizance with conditions were accepted under the premise that they were temporarily required in order to remedy the emergency. The CCLA questions whether the reinstatement of both sunset clauses will result in "the 'normalization' of weakened due process protections in the face of terrorist threats."[150] Such reality is significant as legal amendments and subsequent extra-legal discretionary powers continue to preside over the permanent "war on terror". While it is correct to assume that the normalization of law will extend to other areas of the legal system, it is equally true that the lawlessness created through the application of law will expand onto various facets of society.

While the *ATA* continues to inspire debates surrounding its application, its utilization must remain adherent to legal principals set forth by the *Canadian Charter of Rights and Freedoms.*[151] Such rights have been respected for both the case of Mohammad Momin Khawaja and the case of the "Toronto 18", a group tried for their intention to detonate explosive devices within Canadian establishments including the Toronto Stock

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[149] "CCLA Argues Bill C17 Is Unconstitutional and Ineffective" Canadian Civil Liberties Association (10 February 2011) online CCLA: < http://ccla.org/2011/02/10/9558/>.

[150] *Ibid*

[151] *Charter of human rights and freedoms*, R.S.Qc.C-12.

Exchange and CSIS headquarters.[152] Among the 18, seven men have pleaded guilty to the terrorist charges brought against them.[153] A grand total 11 individuals were handed sentences ranging from two and a half years to life in prison, the remaining 7 including 3 youths had their charges stayed by the court.[154] While the sentencing has varied, the offenders of these crimes have been afforded all legal rights and due process within a court of law and as such were convicted within the traditional legal sphere. Although such rights may appear banal, the utilization of legality to adequately convict offenders guilty of engaging in terrorism activities is absent within the state of exception, post 9/11. While the *Anti-terrorism Act* provides a legal response to terrorism, its application and its subsequent impact within the ongoing "war on terror" invites a problematic element of discretion within the overall approach to preventing terrorism, one which is utilized outside of any legal transparency and as such is not legally controllable.

At its core such emergency style legislation results in far more problematic matters than those based on its necessity. Instead the *ATA* creates, perhaps unintentionally, a zone of lawlessness, one which creates a social cultural milieu of discretionary practices targeting primarily individuals who fit the usual suspect profile which the *ATA* indirectly identifies and as such become part of camps. The fact that the amendments to the *Criminal Code* were in direct response to 9/11 coupled with identifying what constitutes terrorism through its motive clause leads to a potential scenario in which perception would be biased against certain individuals. In the following

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[152]"TIMELINE Toronto bomb plot Toronto 18: Key events in the case" *CBC News* (17 December 2010), online: CBC News <http://www.cbc.ca/canada/story/2008/06/02/f-toronto-timeline.html>.
[153] *Ibid.*
[154] *Ibid.*

chapter I will discuss Justice Rutherford's examination of this potential scenario as he evaluates the constitutional validity of the motive clause within the *ATA* as a potential indicator of bias. In addition, the *ATA*, provides information which is ultimately utilized as a confusing tool which empowers police discretion while offering no legal recourse to those affected by such lawlessness. This new reality has been foreshadowed through the *Khawaja* decision, when the justice raised important concerns surrounding security officials' discretion aimed primarily at Middle Easterners/Muslims.

While the world stood in solidarity to denounce the actions of a few, an overall discourse stemming from fear, outrage and misconception was established and the "war on terror" was fabricated. In response to this specific offence the *ATA*, was instituted as the legal response to remedy and perhaps more significant to the overall agenda, introduced in order to prevent future acts of terror. Thus the state of exception, created by the post 9/11 era, recognized the apparent need for new emergency style laws, commonly underlined by the ideology that "desperate times call for desperate measures". It is however important to note, that within the post 9/11 era, the exception has become the new normal and as such the *ATA* unlike other emergency legislations is not temporary but rather permanent. Equally problematic are the extra-legal impacts created by the state of exception which is also permanent in nature, a new reality which creates a permanent zone of lawlessness. While the *Criminal Code* amendments following 9/11 appear to be constitutional there remains a significant and alarming concern surrounding the impact of their application especially with respect to lawlessness.

While the impact of the *ATA* will be addressed through my analysis of Justice Rutherford's decision, it suffices to note that under its legal framework, there continues to be a minority who are subjected to heightened scrutiny based on a pre-conceived notion of what modern day terrorism is and more so what the *Criminal Code* amendment is attempting to prevent. It is the overall result of the interpretation of the *ATA*, along with certain provisions which invites extra-legal practices. In other words, the *ATA* in itself does not constitute lawlessness, however in practice some of its provisions including the motive clause and the listed entity process encourages law enforcement to gather information which is then utilized outside of law. It is the result of this information gathering which fabricates what will be later argued as extra-legal practices such as the construction of a no fly list, the process of security certificates and at its worst extraordinary rendition.

Chapter 3- The Creation of Lawlessness: A legal analysis of *R. v. Khawaja*

Following 9/11 the focus of law with respect to enforcement and crime prevention vis à vis terrorism shifted towards a largely preventative process. Due to this shift, the post 9/11 agenda has unintentionally, through legal and practical amendments resulted in the construction of lawlessness. There exists a zone in which law fails to prevail for a selected class of individuals guilty of a shared identity, one which is now automatically associated with terrorism. This lawlessness may occur as a by-product of law; legislation may engender unfettered discretion by security officials, creating a state of exception with respect to suspect classes of individuals.

Lawlessness underlines challenging areas within the legal structure which instigate measures such as discretionary heightened security, extensive police powers and subsequent profiling. Mohammed Momin Khawaja's 2006 pre-trial judgment by Justice Rutherford addressed the difficult realities of legal amendments following 9/11. The case in question represents Canada's first attempt to try an individual under the new anti-terrorism provisions of the *Criminal Code* passed by the *ATA*. This chapter will evaluate Khawaja's Charter application which considered, not only the express provisions of the legislation, but also the social context in which the law would operate, and the significance of law for a selected minority. This decision is vital to this thesis because it's ruling, particularly with respect to the motive clause within the definition of terrorism, represents a legal examination which dares to step outside of the traditional application of

law. Without the benefit of "specific factual foundation"[155], Justice Rutherford "frame of reference here was the real world of police work, intelligence gathering, imperfect information and human interaction."[156] His decision was founded within the social realities and implication of the application of the *ATA*, especially its legal ability to define terrorist activities, s.83.01 (1)(b)(i)(A), through religious political and ideological motives.

The case of Momin Khawaja is one with special legal significance, primarily because of the notorious nature of the crime and the implication of the case's position as the first to be tried under the newly amended sections 83.01 to 83.33 of the *Criminal Code*. The judgement of Justice Rutherford represents a unique legal opinion surrounding the potential impacts of the *ATA*, those which are often unacknowledged within the courts as they occur outside of the legal sphere.

Khawaja, the Crime of Terrorism and the Legal Implications.

Khawaja, Canadian born citizen of Pakistani descent, was a resident of Orleans, a suburb of Ottawa. He was an educated man who held a respectable position as a contract software developer in the department of Foreign Affairs.[157] While Khawaja appeared to be a regular law abiding citizen with no prior criminal records, suspicions surrounding his involvement with terrorism came to light during a trip to London where he met with then

[155] Wesley W. Pue & Robert Russo, "The Problem of Official Discretion in Anti-Terrorism Law: A Comment on R.v.Khawaja" (2008) 24 W.R.L.S.I 57 at 60 [Comment on Khawaja].
[156] *Ibid*
[157] "IN DEPTH Canadian security Mohammad Momin Khawaja" *CBC News* (22 May 2009), online: CBC News <http://www.cbc.ca/news/background/cdnsecurity/khawaja_mohammad.html>.

suspected terrorist Omar Khyam and his brother Shujah Mahmood.[158] The two men were among a group of approximately 50 others under surveillance for their involvement with al-Qaida.[159] The group was later accused of conspiring to carry out a bombing plot which would have targeted areas within Britain. Khawaja was referred to as the "the fixer" within the plot due to his contribution surrounding the development of the remote trigger.[160]

Following an RCMP raid on his dwelling, Khawaja was arrested and indicted on seven counts of terrorism, including;

"work on the development of a device to activate a detonator, with intent thereby to cause explosion of an explosive substance likely to cause serious bodily harm or death to persons or likely to cause serious damage to property, thereby committing an indictable offence under paragraph 81 (1)(a) of the Criminal Code, and that he committed the said indictable offence for the benefit, of at the direction of or in association with a terrorist group, namely Omar Khyam and others, thereby committing an offence under section 83.2."[161]

Furthermore, he was accused of having "in his possession or under his care of control an explosive substance with intent thereby to enable another person"[162] an indictable offence under paragraph 81(1) (d) of the *Criminal Code*. In addition to the above charges Khawaja was also charged with;

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[158] "THE KHAWAJA FILE From the start, the Mounties knew the investigation into Mohammad Momin Khawaja had to be flawless" *The Ottawa Citizen* (29 October 2008), online Canada.com < http://www.canada.com/montrealgazette/story.html?id=d7d4d876-6de5-47d3-89f5-f0081d0792ca>.

[159] *Ibid*
[160] *Ibid*
[161] Khawaja, *supra* note 4 at para 1.
[162] *Ibid* at para 1.

"knowingly participating in or contributed to activity of a terrorist group, namely Omar Khyam and others for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity as defined in section 83.01(1), by receiving training, within the meaning of paragraph 83.18(3)(a) of the Criminal Code, and did thereby commit an offence under paragraph 83.18(1)."[163]

Further charges included the instruction to carry out a terrorist activity under section 83.21(1), the making available of property to benefit terrorism as set out in section 83.03(a), participating in meetings and activities surrounding terrorism as described within section 83.18 and the facilitation of a terrorist activity as addressed within section 83.19 of *the Criminal Code*.[164]

Challenging the Constitutional Validity of the *ATA's* Legal Amendments to the *Criminal Code*.

From the onset, it is important to note that this case is one which represented a clear utilization of law in order to fight terrorism. This was evident at the early stages of this case in which Khawaja was informed of the charges brought against him and was afforded due process. There is no debate surrounding the serious nature of the offences for which Khawaja has been convicted; however, the sentencing of the offender remains outside of the scope of this thesis. Instead the focus surrounding the 2006 pre-trial hearing considers the applicants claims which includes the notion that;

[163] *Ibid* at para 1.
[164] *Ibid*

"sections 83.01 (1), 83.03 (a), 83.18 (1), 83.18 (3)(a), 83.19. 83.2 and 83.21(1) are of no force and effect pursuant to section 52(1) of the Constitution Act, 1982, on the basis that the provisions are vague and/or over-broad, they dilute the essential fault requirements of criminal law, and they infringed his rights to freedom of association, freedom of conscience and religion, and freedom of thought, belief, opinion and expression pursuant to section 2 of the Charter."[165]

Justice Rutherford began with a judicial examination surrounding the constitutional validity of the above sections, particularly section 83.01(1)(b)(i)(A), for which he found that "the new provisions cast such a wide net and in such vague terms that they were unconstitutional."[166] While Justice Rutherford found section 83.01(1)(b)(i)(A) to be unconstitutional, he dismissed the claim that sections, 83.03 (a), 83.18 (1), 83.18 (3)(a), 83.19. 83.2 and 83.21(1) were vague and overbroad and as such held them to be constitutional.[167] In his decision, Justice Rutherford utilized the vagueness doctrine to determine that "the impugned provisions were neither void for vagueness nor overbroad in their reach as they could be read, construed and applied in conformity with the principles of fundamental justice."[168] Justice Rutherford cited the case of *R. v. Spindloe*[169], which supported that "it is exceedingly rare for a law to be declared unconstitutional on the basis of vagueness."[170] Within his decision Justice Rutherford applied the vagueness doctrine, as described within *R. v. Nova Scotia Pharmaceutical Society*[171], which recognizes two interconnected rationales in determining whether a law is in fact vague. The two interconnected rationales to which

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[165] *Ibid* at para 3.
[166] *Ibid* at para15.
[167] *Ibid* at para 6.
[168] *Ibid* at 2.
[169] R v. Spindloe (2001), 154 C.C.C. (3d) 8.
[170] Khawaja, *supra* note 4 at para 16.
[171] *R. v. Nova Scotia Pharmaceutical Society* , [1992] 2 S.C.R. 606.

the vagueness doctrine is founded includes; "fair notice to the citizen that certain conduct is criminal and limitation of law enforcement discretion."[172]

A common concern surrounding vagueness in law stems from the possibility of discretion within law enforcement practices. This possibility is addressed by Justice Rutherford who cites the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*[173] in stating that a vague law; "invokes the further concern of putting too much discretion at the hands of law enforcement officials, and violates the precept that individuals should be govern by the rule of law, not the rule of persons."[174] As noted throughout this case, "the doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application."[175]

This concern is particularly important within the post 9/11 context, as discretionary practices stem not only from vague laws but also from the possibility that law enforcement will misconstrue what terrorism is, based on preconceived notions. Without adequate guidelines or transparency in anti-terrorism legislation there is an imminent danger that the crime of terrorism will not only be defined through law but rather through the subjectivity of law enforcement who have been exposed to both the actual events of 9/11 and to the legal reactive responses which have reinforced the political and religious cursors of this crime.

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[172]Khawaja, *supra* note 4 at para 16.

[173] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 180 C.C.C. (3rd) 353.
[174] Khawaja, *supra* note 4 at para 16.
[175] *Ibid*

In addition to vagueness, the applicant argued that the legislation was unconstitutional on the basis of over breadth; with emphasis surrounding the term "facilitate" which was argued to be both vague and over-broad. Justice Rutherford adopted the doctrine of over breadth and agreed with Madam Justice Fuerst who previously stated in *R. v. Lindsay*[176] that "words such as the verb "to facilitate" and the adjective "serious" had sufficiently clear meanings and did not cast the legislation as vague or over-board."[177] The defence further argued that the fault requirements displayed within some of the offence provisions were "water-down as to render those provisions unsustainable in light of s.7 of the Charter."[178] On such application, Justice Rutherford disagreed and found that, "the subjective fault requirement or *mens rea* involves a knowing provision of assistance, support or benefit to a person or group that the accused knows is engaged in terrorist activity... meets the minimal constitutional requirement to comport with the fundamental principles of justice under the *Charter.* "[179]

The Legal Impact of Defining Terrorist Activity

Justice Rutherford's judgment also considers Khawaja's challenge under section 2(a) and (b) to clause 83.01(1)(b)(i)(A) of the *Criminal Code*. Section 83.01(1)(b)(i)(A) defines terrorist activity by requiring that the act be;

[176] R. v. Lindsay, [2004] O.J. No. 845 (QL), 182 C.C.C. (3d) 301 (S.J.C.J).
[177] *Khawaja supra* note 4 at para 24.
[178] *Ibid* at para 28.
[179] *Ibid* at para 42.

"an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause."[180]

The applicant argued that this section, which defines terrorism through religious, ideological and political motives violated Khawaja's Charter rights under section 2(a) and (b) which states that;

"2. Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression."[181]

The legal reasoning was addressed through the following two important aspects, the first being the irrelevance of an accused's motive for committing an offence and the second, which is most significant to this thesis, being the effect that the inclusion of such motives would have on discretionary practices of security and law enforcement officials. Within the analysis of this claim, Justice Rutherford is concerned with the social impact of law on society. Thus the focus here is not a traditional legal approach, which observes "constitutionality construed in the rarefied atmosphere of superior courts."[182] Rather, the constitutional validity of the motive clause is challenged through "the daily rituals of implementations that play themselves out as bureaucrats, security officials, police officers, and investigators that interact with each other and with those subject to their power on a day-to-day basis."[183] This evaluation is essential within the current post 9/11

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[180] *Ibid* at para45.
[181] *Canadian Charter of Rights and Freedoms*, s.2, Part I of the *Constitutional Act, 1982*, being schedule B to *Canada Act 1982* (U.K.), 1982, c.11.
[182] *Supra* note 155 at 61.
[183] *Ibid*

state of exception, where the day-to-day interactions are influenced by a pre-conceived notion of terrorism and subsequently result in extra-legal discretionary practices.

Political and Religious Motive: Proving the Unusual and Irrelevant

In evaluating section 83.01(1)(b)(i)(A), Justice Rutherford considers the inclusion of motive as an element to a criminal offence to be irrelevant with respect to criminal culpability. Justice Rutherford agreed with Roach in concluding that, "the criminal law has traditionally been based on the proposition that it is not necessary for the Crown to establish motive as an element of the offence."[184] In fact, the ability for the *Code*, to require such motive elements in defining terrorist activities is "foreign to criminal law, humanitarian law, and the law regarding crimes against humanity."[185] Including a particular motive as an element of an offence is not necessarily a violation of the *Charter*; however, motive is typically only relevant at the sentencing stage in criminal matters.[186] Interestingly the religious and political motive within the definition of terrorism in the Canadian *Criminal Code* is absent in the Anti-terrorism legislations of other nations including the United States, France, Germany, Italy and the Netherlands.[187]

[184] Khawaja *supra* note 4 at para 55.
[185] *Ibid* at 61.
[186] *Criminal Code supra* note 3 at s.718.2
[187] Khawaja *supra* note 4 at para 70.

Justice Rutherford notes that the motivational reasoning for committing an offence is not important. This rationale is based on the supposition that "the reasons "why" someone commits a criminal act-neither establishes nor excuses a crime."[188] The notion of motive with respect to a criminal offence was previously addressed by Supreme Court case, *United States of America v. Dynar*[189] in which Cory J. and Iacobbucci J. stated that,

"society imposes criminal sanctions in order to punish and deter undesirable conduct. It does not matter to society, in its efforts to secure social peace and order, what an accused's motive was, but only what the accused intended to do. It is no consolation to one whose car has been stolen that the thief stole the car intending to sell it to purchase food."[190]

Terrorism is an act with catastrophic outcomes; the motive for committing the wrong bears no importance to the individuals affected by its execution. This is demonstrated by Justice Rutherford's recollection of terrorist events such as the 1985 Air India bombing, the Oklahoma City bombing, the Japan sarin gas subway poisoning, the events of 9/11 and the 2004 Madrid commuter train bombings all of which resulted in loss of innocent life regardless of the victims' particular view of the offenders motives.[191] Justice Rutherford further negates the relevance of the offenders' motive on victims of terrorism when he states "just what political, religious or ideological objectives or causes the perpetrators felt they were supporting with their actions is largely lost on the populations affected. And for good reason. It really doesn't matter."[192]

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[188]Khawaja, supra note 4 at 61.
[189] *United States of America v. Dynar* [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481.
[190] Khawaja, supra note 4 at para 63
[191] *Ibid* at para 78.
[192] *Ibid* at para 79.

The effect of s. 83.01(1)(b)(A) placed an additional burden on the Crown because it no longer only required proof of *actus reus* and *mens rea*, but also added the need to show a specific motivation. It was this inclusion of the motive element that compounded the difficulty of prosecution. Justice Rutherford found this section to be a violation of the *Charter* which could not be justified under s.1.[193] He recognized that it also had the effect given the current social context, of casting a shadow of suspicion upon those who belong to the Muslim faith. Such a perceived inclusion was also addressed by Roach who considered a possible rationale for Canada's decision to include motive element in the prosecution of terrorism.

"A possible explanation is a desire to denounce not only the crimes of the September 11 terrorists, but also their apparent anti-Western political and religious motives. Although no manifesto explaining the rationale for the horrible events of September 11 has been issued, almost everyone believes that the terrorists acted out of hatred for the West and capitalism, and because of what is commonly called Islamic fanaticism."[194]

With respect to the legal implication of section 83.01(1)(b)(i)(A), Justice Rutherford held that it was an infringement upon s.2 (a), (b) and (d) of the *Charter.*[195] Following the concern that the motive clause will undoubtedly influence the conduct of law enforcement towards an overall group, Justice Rutherford found that section 83.01(1)(b)(i)(A), "amounts to a *prima facie* infringement or limitation of the freedoms of conscience, religion, thought, belief, expression and association such that would have to be justified with reference to s. 1 of the *Charter.*"[196] Furthermore Justice Rutherford

[193] Khawaja, *supra* note 4 at para 80.
[194] Did September 9/11 Change Everything?, *supra* note 99 at 905.
[195] Khawaja, *supra* note 4 at para 83.
[196] *Ibid* at para 58.

concluded this particular case by utilizing the doctrine of severance which struck down section 83.01(1)(b)(i)(A) of the act.[197]

Recognition of Lawlessness: Social and Practical Impacts of the Motive Clause

Justice Rutherford's analysis extended beyond the legal constitutionality debate of section 83.01 (1) (b) (A) and considered the extra-legal discretionary practices it might engender. While the anti-terrorism provisions of the *Criminal Code* in themselves do not promote lawlessness or justify its existence, one ought to consider the incidents of profiling, extra-legal practices and discretionary authoritative powers which have transpired since 9/11. The Rutherford decision is unique in that it provided a candid evaluation of the possibility for extra-legal discretionary practices to result from the motive based definition of terrorist activity. Interestingly, Justice Rutherford's concern lies not with this specific offender's rights per se, but on the protection of those likely to be subject to suspicion and heightened surveillance based on a shared identity.

As such, the fear is not that individuals like Khawaja will be found guilty through the application of the law, thereby receiving all the legal rights to which they are entitled, but rather for those innocent individuals who will be subject to the exercise of extra-legal power without legal recourse. The concern is not limited to the mere application of law but extends to the likelihood that those individuals who share a common trait - that of being Middle Eastern/Muslim - are more at risk of being profiled and victimized by discretionary surveillance based not on fact but rather on suspicion. Justice Rutherford is thereby concerned that Canadians of Middle Eastern descent:

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[197] *Ibid* at para 87.

"who might share the political, religious or ideological stripe of the foreign groups under scrutiny could not help but fall under some sort of shadow. It is exactly that sort of phenomenon that has given rise to concerns for racial or ethnic profiling and prejudice in the aftermath of the notorious terrorist actions in a number of countries around the world in recent years."[198]

The risk of racial profiling is much greater during the investigative stage in which individuals may be pursued under a mere suspicion by law enforcement, a suspicion which is now developed due to one's religion and race. This is especially the case when the *Code*, identifies the specific motives which must be met in order to meet the threshold of terrorism. As such following 9/11 there is little doubt surrounding which religious or political motives the *Code* is referring to when it attempts to define terrorism. Rather the message which is unintentionally echoed identifies the pre-established targets of the "war on terror".

Such attitudes and misconceptions result in the possibility that "individuals and authorities' attitudes and conduct reflect the shadow of suspicion and anger falling over all who appear to belong to or have any connection with the religious, political or ideological grouping identified with specific terrorist acts."[199] This is further emphasized by the reality that a standard and universally accepted definition of terrorism is non-existent, therefore, as addressed within the Suresh decision, "the term is open to politicized manipulation, conjecture, and polemical interpretation."[200] While the anti-terrorism provisions of the Code are not specific with respect to spelling out what particular faith and political ties they are concerned with, under present conditions law enforcement officials, the agents who engage in the detection and prevention of terrorism,

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[198] *Ibid* at para 52.
[199] *Ibid* at para.58.
[200] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at para 94.

as well as the general public, will likely associate it with the religion of Islam and Middle Easterners. Without any absolute knowledge of what activity or actions in fact constitute terrorism, the additional component of religious, political and ideological elements provides an extra area of confusion which can serve as a distraction to both the legal process and to law enforcement.

Although section 83.01(1)(b)(i)(A) does not in itself sanction such discretion and is on its face race-neutral, its understanding and its contextual element in the post 9/11 social context , creates practices which are neither condoned or recognized by law. While the *Code*, as per its legal application, provides legal protections to individuals, the ability of the *Code* to indirectly articulate what behaviours constitute terrorism creates camps in which individuals find themselves outside of the law and without legal recourse. This reality was addressed by Justice Rutherford, who stated that:

"the concern is not that individuals will be prosecuted let alone convicted of terrorist offence only on the grounds of political, religious or ideological view or expression... Rather, the concern is that the focus on essential ingredient of political, religious or ideological motive will chill freedom protected speech, religion, thought, belief, expression and association therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by governmental authorities at many levels."[201]

While legislation in itself remains silent on the racial implication of this law, "racial profiling takes place 'on the ground' and is often the product of discretionary decision-making."[202] The consequence of this silence within the legislation further

[201] *Ibid* at para 73.
[202] Reem, *supra* note 71 at 297.

creates a scenario in which "at best, fails to effectively check racial profiling and, at worst, creates opportunities for racial profiling."[203] The act fails to address "the criteria to be used in deciding who is to be targeted for investigation, leaving considerable discretion to law enforcement."[204] Rather the criteria set forth by the act specifies in no uncertain terms the problematic religious and political motives which serve as a subtle yet directional pointer for where discretionary powers ought to be focussed. Thus, without any indication that the legislation is intended to be construed as race neutral, coupled with the required motive set by law and the overall discourse of terrorism post 9/11, one can only deduce that the discretion of law enforcement would narrowly target Middle Easterners or Muslims. Although the potential for prejudice is greater within the investigative stages where extra-legal discretionary practices occur, Roach extends the concern to jury trials "where they may be a willingness on the part of the jury to conclude that someone with political and religious motives similar to those of some terrorists may have been more likely to commit acts of terrorism."[205]

Like any religion, Islam consists of many branches of understanding and practices distinctive from one another. The utilization of such a wide premise for assessing a suspect may result in more wrongful convictions than prevention. In addition, "the unfair equation of Islam with extremism or fanaticism, and with religious and political violence, may itself constitute one of the stereotypes that is implicitly invoked by the extraordinary

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[203] *Ibid*

[204] James Stribopoulos, Research and Statistics Division / Department of Justice, *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act* by Thomas Gabor, (March 31 2004) at 74 [Stribopoulos].

[205] Kent Roach (2005), *supra* note 133 at 104

inclusion of motive as an essential element of crimes of terrorism enacted as a direct and immediate response to September 11."[206]

Under the premise of prevention and through the implication of religious and political guidelines, the practice of policing those who are perceived to share "terrorist" tendencies results in the victimization of the minority being left without any legal protections. The overall agenda of preventing terrorism and doing so before the actual offence creates an unchallengeable space dictated by lawlessness and discretion, one which Agamben and Razack identify as camps. The strong mantra of prevention has been echoed through various apparatus of the "war on terror". The Anti-terrorism agenda, including the *Criminal Code* amendments, was concerned with prevention. "The Government saw the Bill as a preventive one, enabling terrorists to be identified early, interrupted early, disabled early, starved of money and resources and deterred, early before the terrorist event happened."[207]

Within his decision Justice Rutherford provides an important analysis surrounding the common perception that within the "war on terror" there is "us" vs "them" which "in this war the 'them' are invariably Muslim, and predominantly Arabs."[208] The current definition of terrorism, "serves to legitimize, the somewhat inevitable focus on Muslims and Arabs."[209] Within this reality "the risk, that members of these groups will be unfairly targeted for investigation is great."[210] This separation founded on Orientalism, is important not only in understanding how legislation sets forth who the usual suspects are,

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[206] Did September 11 Change Everything?, *supra* note 99 at 905.
[207] Khawaja, *supra* note 4 at para 76.
[208] *Ibid* at para 53.
[209] Stribopoulos, *supra* note 204 at 75.
[210] *Ibid*

but further dictates a narrative which promotes societal acceptance of extra-legal practices.

Such scrutiny of Muslims and individuals with Middle Eastern backgrounds is further problematic as it occurs outside of the legal sphere and thereby lacks legality and control which is otherwise guaranteed to all citizens. There is no clear mechanism to identify racial profiling or unwarranted interest targeting Muslim minorities. Unlike traditional law enforcement in which the conduct of police officers are held to the scrutiny of the law, within the "war on terror", the lack of direction and the predominant focus on religion and racially focused observation creates a dangerous zone of discretion in which authoritative powers are left unchallenged.

The Impact of Justice Rutherford – The Correlation of Law and Society

Khawaja's pre-trial decision is fundamental to understanding the true impact of anti-terrorism law. Under a state of exception, conceived in this case to target the Middle Eastern or Muslim minority, there may be a potential danger to overlook the role of legislation in identifying which individuals ought to be subjected to camps. In reality, "rights are affected powerfully by police, security officials, immigration officials, and others in many, many circumstances that never come before the courts."[211] These extra-legal discretionary practices utilize law in establishing which motives ought to be subjected to investigation but fail to act within the parameters of law when investigations lacks legal merit. Instead, Part II.1 of the *Criminal Code*, provides guidelines towards

[211] Comment on Khawaja, *supra* note 155 at 67.

both the crime it attempts to prevent and the offenders who are likely to engage in such terrorist activity. It is exactly these concerns which give rise to the "chilling effects" which Justice Rutherford predicts; those which have already transpired through camps such as the security certificates process, the no fly list and extraordinary rendition.

Interestingly this judgment, based on the potential impact of law, is not typically seen within the courts which traditionally rely on factual evidences. Although this judgement correctly assesses the risk of extra-legal discretionary practices, others have been hard pressed to provide a similar ruling. For example the *United States of America v. Nadarajah,*[212] addressed the claim that the motive clause could result in "chilling effects" and held that;

"No particular group or set of beliefs have been identified or targeted by the legislation. Terrorist acts by there very nature are routed (SIC) in political, religious or ideological purposes or objectives. The fact that Parliament has elected to make motive an element of the definition is within its jurisdiction. Parliament is entitled to explicitly identify the nature of the activity targeted. The fact that it does so does not support the inference that the government is involved in profiling or discrimination or interfering with free expression."[213]

These findings, while in part correct, remain highly problematic in understanding that the underlying religious and political motive is of obvious nature. This is evident based on both the events which lead to the reactive law amendment and to the overall discourse surrounding the rational which favoured such legislation. Although Parliament is within its jurisdiction to "identify the nature of the activity targeted,"[214] it is also "Parliament's job to define standards clearly, citizens right to expect that, and the

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[212] *United States of America v. Nadarajah and Sriskandarajah* (2009), 243 C.C.C. (3d) 281 (Ont. S.C.)
[213] *Ibid* at para 41.
[214] *Ibid*

obligation of the Courts to insist upon it."[215] It is also important to note that Justice Rutherford's concerns were not directed at Parliament per se but rather, the legislative impact on law enforcement who conform and are influenced by legislative recommendation / descriptions, such as the motive clause. While Parliament does not engage in profiling or discriminatory practices, the potential that legislation would be construed or interpreted as such should be dutifully clarified, as it will be considered the law of the land.

In *R. v. Ahmad*[216] , the court also disagreed with the *Khawaja* decision regarding the potential "chilling effects" of the motive clause by opting to assign responsibility and accountability more toward society rather than law. In this case the court stated that;

"I have no trouble concluding on a common sense basis that some members of minority communities have experienced a chill when it comes to the expression of their political, religious or ideological views because they are concerned they may be seen as extremist and singled out for scrutiny. Where I have difficulty is in connecting such a chill to the motive requirement articulated in s. 83.01(1)(b)(i)(A) of the Criminal Code, particularly in view of s. 83.01(1.1). It seems to me that any such chill could simply be the result of the general state of our society in the post "9/11" environment."[217]

This judgment correctly identifies the reality that within the post 9/11 era, there is a potential "chill" for individual who express their religious or political views. Furthermore the court recognizes that such "chilling effects could be the result of "the general state of our society in the post 9/11 environment."[218] However it fails to recognize the connection between the impact of the motive requirement and the "chilling effects" cautioned by Justice Rutherford. Clearly the "state of society" has been altered

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[215] Comment on Khawaja, *supra* note 155 at 67.
[216] *R. v. Ahmad* (2009), 257 C.C.C. (3d) 199 (Ont. S.C.)
[217] *Ibid* at para 133.
[218] *Ibid*

since 9/11, not only through legislative amendments but also through various facets of society. The changes which have transpired have always included a discourse of national security which intertwines with both anti-terrorism legislation and law enforcement practices. The idea that terrorism is now defined through traditional law rather than emergency legislation invites a number of controversial practices which would otherwise be unacceptable. Among such controversies, the motive clause has defined terrorism through law, however the impact of such definition is not limited to the application of law but will extend to law enforcement who, as addressed by Dyzenhaus, are left with the dirty work of preventing terrorism.[219] The urgency of combatting terrorism has initiated a mandate that perhaps indirectly influence members of the security apparatus to carry out actions by any means in order to prevent new acts of terror. However, the fact that terrorism is addressed through traditional law creates a concern in which practices otherwise limited to emergency situations might seep into traditional practices. Terrorism is now understood as a new threat which requires extraordinary and permanent legislation to combat. As such what we have is an exception which is masked by the application of traditional law.

Another problematic challenge to Justice Rutherford's judgment is demonstrated within *R. v. Khawaja* (2010)[220] Ontario Court of Appeal decision. The decision opposed Justice Rutherford's argument surrounding the possible "chilling effects" of the motive clause. The court's arguments included a number of points which one ought to examine thoroughly. Initially the decision considers Justice Rutherford's judgment to lack traditional evidences and considers that "the problem with the trial judge's view of the

[219] Permanence of the Temporary, *supra* note 30 at 30.
[220] *R. v. Khawaja*, (2010) ONCA 862.

indirect effect of the impugned definition is that it is founded entirely on speculation, both as to the existence of the 'chilling effect' and the cause or source of that 'chilling effect', if indeed one exists."[221] The realities of post 9/11 practices have proven this statement to be beyond the realm of speculation.

Although the court argues that the "absence of evidence cannot be overcome by judicial speculation or academic commentary,"[222] it takes the unusual position of recognizing that "chilling effects" are in fact taking place.

"Many, but by no means all, of the major terrorist attacks in the last 10 years have been perpetrated by radical Islamic groups fueled by a potent mix of religious and political fanaticism. It is hardly surprising that, in the public mind, terrorism is associated with the religious and political views of radical Islamists. Nor is it surprising that some members of the public extend that association to all who fit within a very broad racial and cultural stereotype of a radical Islamist."[223]

Perhaps the conception that "chilling effects" lack evidences is due to the fact that they mainly take place within extra-legal discretionary practices and as such are difficult to adequately assess. Common sense and human experience would result in the understanding that when "members of the public extend that association to all who fit within a very broad racial and cultural stereotype"[224] you will likely have members of a minority that will self-restrict themselves publicly in order to avoid perpetual undue and unwarranted harassment or alienation. It is that self-restriction and self-perception that results in a "chilling effect". The irony is that the makeup of the minority like any

[221] *Ibid* at para 119
[222] *Ibid* at para. 124.
[223] *Ibid* at para 126.
[224] *Ibid*

minority is politically and socially diverse; there is no universal political or social opinion that applies to all members of this group.

Another interesting aspect of the court's analysis evaluated Justice Rutherford previous concerns surrounding the potential for law enforcement to engage in extra-legal discretionary practices, targeting individuals based on their religious and political views. While the court found this to be an "important and proper concern,"[225] it failed to recognize a link between law enforcement conduct and the motive clause.

"If the police have grounds to believe that someone is engaged in or associated with "terrorist activity", they are not only entitled, they are obliged, to investigate that person. Individuals who associate themselves through their conduct or statements with the goals or activities of terrorist groups can expect to be investigated by the police even though it may turn out that those persons have not engaged in any "terrorist activity". As long as the police conduct their investigation in a lawful manner, any "chilling effect" on those targeted by the investigation is no basis upon which to find a Charter infringement."[226]

The court found that profiling based on race and religious characteristics is in itself unconstitutional and should be handled accordingly. However, the court also found that "where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional."[227] The question of law enforcement accountability is important and under different circumstances would likely be the best way to remedy a scenario in which an officer steps outside of their code of ethics. Instead, the aftermath of 9/11 constitutes a turning point in which national security has dictated the need for permanent legislative amendments. It is these permanent amendments which influence law enforcement

[225] *Ibid* at para. 132
[226] *Ibid* at para. 133
[227] *Ibid* at para. 134.

practices. The legislative impact is greater on law enforcement that relies on such information to construct the potential criminals of this war. While this definition is not the only element in the overall utilization of lawlessness in the "war on terror", any abuses which it creates contribute to the overall fabrication of a state of exception, individual police conduct notwithstanding.

The role of Parliament in enacting reactive legislation to reflect the new era of terrorism is one with serious consequences which extends far beyond legal text. The potential for extra-legal discretionary practices, those of "chilling effects" are made possible when the rule of law lacks clarity and protections for those likely to be negatively affected by its enforcement.

"The rule of law requires clarity in penal prohibitions for, without clarity, the rights of anyone to go about business unhindered by the state rest entirely on the discretion of police officers, prosecutors, bureaucrats and politicians ... When a sort of 'umpire's discretion' takes the place of rules, the Rule of Law is lost entirely."[228]

Lawlessness in Action: The Maher Arar Inquiry

The case of Maher Arar appears to be precisely the kind of scenario which Justice Rutherford cautioned against. In the "war on terror" horrific misjudgements have already occurred and will continue to demonstrate the potential for unwarranted detention, especially in a climate where law and order are often overshadowed by an imminent need to preserve national security. The Maher Arar incident, which will be addressed in greater detail in the following chapter, has become one of the high profile cases of extra-legal

[228] Pue, *supra* note 81at 284.

discretionary practices. The Arar commission is particularly relevant as it details the use of lawlessness in order to fight a perceived threat of terrorism.

Among other things, when the inquiry looked at the possibility for extra-legal discretionary powers to surface under the premise of national security they revealed;

"Many of the decisions made in the context of national security, including decisions by the police, are discretionary. They may include decisions to input information into national security databases, ask questions of individuals, select suspects for investigation, recruit and use a human source, and act upon information supplied by a foreign government."[229]

The extent of such discretionary practices are however difficult to analyze because "unless charges are laid, there will likely be no external scrutiny of these discretionary decisions."[230] Individuals, like Arar, who are subjected to discretionary powers, have no legal recourse as they are investigated outside of any legal sphere. The deportation and torture of Maher Arar has proven that discretionary powers, mainly the discretion over information sharing can have a severe consequences for those subjected to its application. As a result of inaccurate information gathering which was later shared with the United States, Arar was imprisoned and tortured.[231] While a more detailed analysis surrounding his ordeal will be provided in the following chapter, this situation highlights the potential impact of discretionary powers especially within the investigative stages. As noted by the Arar inquiry,

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[229] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Government Services, 2006) at 436

[230] *Ibid*

[231] Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, "Report of the events Relating to Maher Arar: analysis and Recommendations" (Ottawa: Government Services, 2006).

"The most significant problems arising from the Project A-O Canada investigation pertained to information sharing with the United States. Unfortunately, the RCMP gave Project A-O Canada unclear and even misleading directions on how to share information with the American agencies primarily responsible for terrorist activities in the U.S. and then failed to adequately oversee the Project's practices in that regard. As a result, Project A-O Canada did not comply with RCMP policies with regard to screening information and attaching caveats to information provided to other agencies."[232]

The information gathered by Project A-O[233] during their investigative process did not result in any sort of criminal prosecution. However Canadian officials left to their own discretion deemed it substantial enough to forward it to their American counterparts which lead to Arar's extraordinary rendition. As such, "racial, ethnic and religious profiling practices emerge not from a legislative direction, but from administrative discretion and investigative practice."[234] This is particularly problematic when terrorism is defined through religious, ideological and political motives because such "shift towards motive as an essential element in a crime provides increased reason for national security investigations to involve inquiry into a subject's personal religious or political beliefs, or for investigation to stem from suspicions aroused by a subject's personal beliefs."[235]

Justice Rutherford was also concerned that under the preventative agenda of the anti-terrorism legislation, individuals would be more likely to fall under a scope of unwarranted investigation. Within the "war on terror", and in this case the Arar ordeal,

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[232] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Reports of the Events Relating to Maher Arar* (Ottawa: Government Services, 2006) at 22.
[233] Project A-O was a RCMP national security group which specialized in anti-terrorism operations. This particular group would later be linked to the Maher Arar ordeal.
[234] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Government Services, 2006) at 437.
[235] *Ibid* at 438.

"prevention was the first priority for any investigation after 9/11, whether carried out by an intelligence agency or, as in the case of Project A-O Canada, by a law enforcement agency."[236] Since prevention became the primary focus of the RCMP, among other law enforcement apparatus, the focus on prosecution became a more distant priority.[237] The inquiry also revealed that "the focus on prevention is something of a cultural shift for our law enforcement community. It places the emphasis on the collection of intelligence, rather than the investigation of crimes that have already occurred."[238] The issue at hand is not prevention per se, but rather that anti-terrorism practices have significantly shifted from traditional law and as such have resulted in individuals being investigated without any actual prosecution. Such investigations are conducted out of suspicion rather than factual evidence admissible in a court of law. The current practices deviate far too much from traditional practices and in doing so they invite controversial extra-legal practices without any proof that terrorism is in fact preventable.

Justice Rutherford's decision regarding the motive clause within this chapter provides an important analysis regarding the potential impacts of the *ATA* outside of the legal realm. The final chapter of this thesis will follow such analysis by examining how the *ATA* as a reactive law, was enacted in direct response to the events of 9/11. Although Canada's has successfully (while some might argue) dealt with home grown terrorism through the FLQ crisis and the subsequent temporary invocation of the *War Measures*

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[236] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Factual Background Volume 1* (Ottawa: Government Services, 2006) at 17.
[237] *Ibid*
[238] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, (Minister of Public Works and Government Services, 2006) at 56.

Act, the next chapter recognizes the impact of utilizing traditional law to deal with what is otherwise considered an emergency. It is through the implementation of permanent and reactive law that a final examination of specific extra-legal practices will validate Justice Rutherford's concern regarding the potential for the *ATA* to result in extra-legal discretionary practices.

Chapter 4- Reactive Law and Extra-Legal Discretionary Practices

Contentious components of legislation are often critiqued on the basis of their failure to adhere to standards of fairness or due process. It is not surprising that many challenges to Part II.1 of the *Criminal Code* have raised such concerns, particularly with respect to conformity with the *Charter*. The legal amendments which have transpired post 9/11 ought to further be scrutinized as to their ability to create areas of lawlessness through the discretionary powers that they mandate – powers that are to a large extent unregulated by legal norms of due process. As previously established the *ATA* in itself does not prescribe discretionary practices, such practices are the consequential discourse of the events of 9/11 and the interpretive influence of anti-terrorism legislation.

Although such practices are difficult to recognize because they reside within a unregulated space in which the practices of law enforcement are often left unchallenged, this chapter will examine the most obvious areas of lawlessness within this current state of exception. In order to examine which practices ought to categorize as extra-legal, it is first important to understand how legislation influences such controversial and illegal practices. Thus the *ATA* will be analyzed as a reactive law, which like the *War Measures Act*, has resulted in a legal response to a specific event. While the *ATA* is a permanent legislative response to 9/11, the *War Measures Act*, was temporary and as such did not result in a veneer of legality. Dyzenhaus's concerns surrounding the potential for emergency legislations and practices to seep within traditional law is an issue which will be examined within this chapter.

Furthermore this chapter will evaluate how the reactive elements of the *ATA* produce a narrative which creates a cultural milieu of suspicion and discretion, one which seeks a specific group of individuals who risk becoming targets of surveillance without benefit of the rule of law or legal protection. Subsequently this chapter will examine the utilization of extra-legal discretionary measures including the no fly list, the security certificate process and the use of extraordinary renditions.

Defining reactive law

The legal system is fundamental to the workings of society as it provides the necessary tools to achieve law and order while protecting the rights of individuals. Law making is a mechanism which continuously develops through legal amendments and regulations that address various social issues. While reactive laws mimic the overall agenda of traditional law and order, there is an underlying emphasis placed on deterrence. Reactive law is directly correlated to criminal events, in that these laws are enacted in response to a particular instance of criminal activity. These types of laws result in legislation specifically targeting anyone who engages in the specific type of criminal offence that legislators are attempting to deter.

The practice of introducing new legislation in the wake of specific crimes is not a novelty but rather a frequent exercise. As noted by Victor. V. Ramraj, "this tendency to look at law as the solution to distressing events is not unique to the terrorism context, and

has been described by criminologists as 'governing through crime'."[239] This is particularly noticeable in instances where crimes of a serious or sensational nature have occurred, events in which the crime that unfolded is overtly offensive and as such affronts society. Such phenomenon of legislating through specific offences is examined by Kent Roach who notes that the *Criminal Code* often results in the textual summary of what he considers "a yearly calendar of the horrific crimes we have experienced."[240] Examples of recent amendments made to the *Criminal Code* included, among others, street racing[241], gang and firearm related offences[242]. Offences related to terrorism however are defined by the events of 9/11, and as such they tend to focus attention on individuals based on ethnic and/or religious affiliation – specifically Middle-Eastern Muslims.

The terrorist acts of 9/11 already constituted offences under existing criminal legislation in both the United States and Canada. Nonetheless the events of that day resulted in the *ATA's* amendments to the *Criminal Code* that created, among other things, new criminal offences specifically associated with terrorism. Under such a framework it is no longer just a specific crime that is investigated, rather the focus is placed upon individuals associated with the criminal event. It is the characteristics of the primary criminals that become the default "template" for all others who are more likely or predisposed to commit such a criminal act. This ultimately produces undue suspicion

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[239]Victor V. Ramraj, "Terrorism, risk perception and judicial review" in Victor V. Ramraj, Michael Hor& Kent Roach, eds,., *Global Anti-Terrorism Law and Policy* (New York: Cambridge University Press, 2005) 107 at 113.
[240]Did September 11 Change Everything?, *supra* note 99 at 901.
[241]C-338*An Act to amend the Criminal Code (street racing)*, 3rd session, 37th Parl., 2004.

[242]Bill C-10, An *Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make consequential amendment to another Act*, 1st session., 39 Leg., 2007.

towards a whole group of individuals who unintentionally share similar visual characteristic identities as those responsible for the event that prompted the law. In order to thwart the events in question from reoccurring, individuals who resemble the original perpetrators often become the usual targets and as such become possible victims of extra-legal discretionary practices, such as heightened surveillance by security forces.

It is important to establish the link between reactive nature of the *ATA*, and the fabrication of a state of exception. Furthermore one ought to evaluate the role of the *ATA* in identifying both the events which it attempts to deter, and the individuals who become the usual suspects of such events. The inherent danger is that the *ATA* may, as noted by Justice Rutherford bring about a "phenomenon which has given rise to concerns for racial or ethnic profiling and prejudice in the aftermath of the notorious terrorist actions."[243] Justice Rutherford expresses important concerns surrounding the *ATA's* ability to distinguish between the act of terrorism and the suspicion of a minority group falsely associated with 9/11. Rutherford states "Canadians who might share the political, religious or ideological stripe of the foreign groups under scrutiny could not help but fall under some sort of shadow."[244] It is exactly this scenario that should concern Canadians; one which best describes the problematic realities and impacts of the *ATA.* Such associations between the *ATA* and the events of 9/11 provide a hazardous portrayal of individuals categorized as potential terrorists resulting in unsanctioned discretionary practices.

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[243]Khawaja *supra* note 4 at 52.
[244] *Ibid.*

The *War Measures Act*: a Historical Utilization of Reactive Emergency Law

Canada has engaged in reactive practices with respect to terrorism prior to the events of 9/11. In October of 1970 following the kidnapping of James Cross and Pierre Laporte (the October Crisis) Canada experienced its own version of home grown domestic terrorism.[245] The events which lead to the implementation of the *War Measures Act* involved a radical French Canadian nationalist group identified as the Front de Libération du Québec (FLQ). The FLQ was comprised of various loosely connected cells which were responsible for a bank robbery, numerous mailbox bombings, abducting British diplomat James Cross and most notoriously for kidnapping and later murdering Quebec Labour Minister Pierre Laporte[246]. In light of such events, with the exception of the murder of Pierre Laporte who was killed the following day[247], then Prime Minister Pierre Trudeau, invoked the *War Measures Act*, an act which was arguably "responsible, directly or indirectly, for extensive human rights abuses across the country."[248] The Act represented an emergency legislation which "gave dictatorial power to the federal cabinet, and in doing so suspended the rights of all Canadians."[249]

The *War Measures Act* was presented as one of national necessity in order to eradicate the imminent threat posed by terrorism.[250] The reaction to the wrongs committed by the FLQ allowed the government to set the narrative and invoke a climate

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[245] Dominique Clément, "The October Crisis of 1970: Human Rights Abuses Under the War Measures Act" (2008) 42 Journal of Canadian Studies 160 [October Crisis].

[246] *Ibid*
[247] *Ibid*
[248] *Ibid* at 161.
[249] *Ibid*
[250] "Trudeau War Measures Act speech" *CBC Television News* (16 October 1970), online: CBC Digital Archives < http://archives.cbc.ca/war_conflict/vietnam_war/topics/348/>.

of fear. The government was able to project the perception that Canada faced an insurrection unlike any seen before and used it to justify the temporary suspension of basic legal rights. The government's position was candidly presented in an interview conducted by Tim Ralfe a reporter with the Canadian Broadcasting Corporation at the time of the crisis. Mr. Ralfe asked Prime Minister Trudeau his views surrounding the concern of citizens who disagreed with the various tactics and practices utilized by their government. Prime Minister Trudeau stated that, "well there are a lot of bleeding hearts around who just don't like to see people with helmets and guns. All I can say is, go on and bleed, but it is more important to keep law and order in the society than to be worried about weak-kneed people who don't like the looks of a soldier."[251] When Trudeau was asked how far he would be willing to go he famously and without reserve answered "just watch me."[252] This straightforward answer demonstrates the potential of limitless creative discretionary power during a state of emergency.

Section 3 of the *War Measures Act* provided the government power of "arrest, detention exclusion and deportation."[253] Section 3(b), was particularly problematic because it resulted in the arrest of hundreds of individuals who were later released without any charges.[254]The restriction of due process, including legal representation was sanctioned under the premise of a state of emergency.[255] Although the proportionality debate surrounding the legal response to the FLQ remains a debated factor, under the

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[251] Tim Ralfe, "Just watch me" CBC Television News (October 13 1970) online at : <http://archives.cbc.ca/war_conflict/civil_unrest/topics/101-610>.
[252] *Ibid*
[253] *WMA, supra* note 10. at sec. 3(b).
[254] Claude Bélanger, "War Measures' Act" Quebec History Marianopolis College (20 August 2004) online: Quebec History Marianopolis College <http://faculty.marianopolis.edu/c.belanger/quebechistory/readings/warmeas.htm>.
[255] The October Crisis, *supra* note 244 at 167.

suspension of civil liberties, "it becomes easy and common to arrest and detain people incommunicado simply because they have, or are suspected of having, ideas deemed to be dangerous by the government."[256]

The *War Measures Act* conferred a number of powers upon peace officers who were tasked with actively seeking individuals with separatist leanings or share similar ideologies to the FLQ movement. When the *Public Order Temporary Measures Act*[257] replaced the *War Measures Act* law enforcement was given extended use of these powers in order to pursue remnants of the insurrection. The Act stated that;

"A peace officer may arrest without warrant a person who he has reason to suspect is a member of the unlawful association; a person who professes to be a member of the unlawful association; or a person who he has reason to suspect has committed, is committing or is about to commit an act described in any of paragraphs b. to g. of section. 4."[258]

Other exceptional powers included the possibility for peace officers to engage in search without warrant. Section 10 states that;

" A peace officer may enter and search without warrant any premises, place, vehicle, vessel or aircraft in which he has reason to suspect a. anything is kept or used for the purpose of promoting the unlawful acts of, or the use of the unlawful means advocated by, the unlawful association for accomplishing its aims, principles or policies; b. there is anything that may be evidence of an offence under this act; c. any member of the unlawful association is present; or d. any person is being detained by the unlawful association."[259]

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[256] Guy Bouthillier, "Forty Years After Canada's War Measures Act: Trudeau's Darkest Hour." CounterPunch (October 6 2010) online: CounterPunch <http://counterpunch.org/bouthillier10062010.html>.
[257] *Public Order Temporary Measures Act*, 1970
[258] *Ibid at* s. 9.1
[259] *Public Order Temporary Measures Act*, 1970 at s. 10.

While exceptional powers are bestowed upon law enforcement, under the state of emergency there is always a danger that such powers will also extend to discretionary practices that illegally render individuals guilty based on a shared identity. In times of emergency and under a cultural milieu of fear the enemy's profile is often ill defined and as such easily adaptable to fit anyone. Declaration of a state of emergency often implies that the situation at hand is dire and that anything and everything must be done to prevent future attacks. This sense of emergency is then conveyed onto law enforcement and security officials who are primarily concerned with the eradication of the imminent threat, regardless of the cost. Under the climate of heightened security and the subsequent enforcement of the *War Measures Act*, the scope of discretionary practices unsanctioned by law became prevalent, especially when they appeared on surface to quickly quell the crisis.

The *War Measures Act* and the *ATA*, share a reactive style of legislation. The climate under which both are enforced result in extra-legal discretionary practices. Such practices are made possible because they adhere to the overall agenda of eradicating terrorism. Under a state of exception, it becomes likely that these extra-legal discretionary practices will be deemed necessary as they are perceived to be required elements in a time of danger. Although today one might be pressed to challenge the RCMP's actions with respect to the FLQ, during the time in which they occurred the line between law and lawlessness was blurred.

Among some of the reported discretionary measures, Operation Ham which was conducted by RCMP agents resulted in widespread abuses and illegal practices.[260] The reports allege the agents illegally engaged in the theft of computer tapes containing information surrounding the members of the Parti Québécois.[261] It is also reported that the RCMP orchestrated a break-in at the offices of L'Agence de Presse Libre du Québec and issued a forged FLQ communiqué.[262] The agents also participated in the theft of dynamite and subsequent burning of a suspected FLQ barn in addition to the illegal detention of two alleged FLQ members.[263] The majority of individuals held under the *War Measures Act* were later released without charges. Reports indicated that, "497 persons were arrested under the War Measures Act. Of these, 435 were released and the other 62 were charged."[264]

The *War Measures Act* and the *ATA*

The *War Measures Act,* unlike the *ATA,* constituted a temporary suspension of civil liberties, one which granted government various powers without the standard limitations of law. While Part II.1 of the *Criminal Code* does not suspend civil liberties through its legal application, the potential for lawlessness as addressed by Justice Rutherford transpires outside of its legal boundaries. While both legislations are similar

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[260] Claude Bélanger, "Chronology of the October Crisis, 1970, and its Aftermath" *Marianopolis College* (23 August 2000) online: Marianopilis College <http://faculty.marianopolis.edu/c.belanger/quebechistory/chronos/october.htm>. The illegal actions of the RCMP lead to the Keable inquiry and the McDonald Inquiry.
[261] *Ibid*
[262] *Ibid*
[263] *Ibid*
[264] *Ibid*

in their overall agenda vis-a-vis terrorism, they also differ with respect to their individual practice(s) resulting in lawlessness. The *War Measures Act*, through law, authorized the suspension of due process and civil rights, while, the impact of Part II.1 of the *Criminal Code*, through extra-legal discretionary practices, has created areas of lawlessness in which the suspension of legality occurs for a selective group of individuals.

Another significant difference is that the *ATA*'s amendments to the *Criminal Code* were permanent changes to the ordinary criminal law whereas the *War Measures Act* was a temporary suspension of law. As such, suspension of civil rights and due process which resulted from the implementation of the *War Measures Act* was limited by the temporary invocation set out in s. 6. Unlike the *Code*, (with the exception of ss. 83.28, 83.29, 83.3, which were limited by a "sunset clause" contained in s. 83.32), the *War Measures Act* legally prescribed expiration to the emergency powers upon resolution of the event leading up to its implementation. Section 6 states that;

"The provisions of the three sections last preceding shall only be in force during war, invasion or insurrection, real or apprehended."[265]

The importance of specifying that the act is operating under a temporary invocation reinforces the perception that society will return to a state of normalcy once the crisis has been quelled. Otherwise the perpetual state of suspending civil rights and due process indicates that the current condition is the new normal and as such becomes a permanent state of exception. While there are rights respecting due process within the anti-terrorism *Criminal Code* provisions, the same cannot be said about the *War Measures Act*. Under the *War Measures Act* there were a number of questionable

[265] *WMA, supra* note 10.at s.6.

practices that befell those arrested, such as the suspension of due process and habeas corpus along with the accused inability to consult legal counsel.[266] These are eerily similar to practices displayed in post 9/11 security certificate procedures. Under the *War Measures Act* individuals could be detained for seven days prior to any charges being laid, this is in addition to the 21 days which could be ordered by the attorney general.[267] Under such a restriction, both those arrested under the *War Measures Act* or through post 9/11 security certificates, fall victim to a common element of lawlessness, as they are transported into a space which does not recognize traditional legal rights. The nonexistence of due process, detention and the lack of legal representation, within a state of exception results in the fabrication of camps.

The *War Measures Act* and the *ATA* differ in some areas; however, they are both implemented under a state of emergency. In both instances, the legal response to terrorism is one which gains acceptance following a strong and persuasive discourse of emergency. Governments of various nations have simultaneously engaged in questionable post 9/11 practices and it is these states that have particularly justified their actions with ad hominem dissent debate killing statements such as "you are with us or with the terrorists."[268] Recent examples of such rhetoric previously mentioned include statements such as "desperate times calls for desperate measures", "you are either with us or against us". In the "war on terror", "the justification offered for considerable

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[266] October Crisis, *supra* note 245 at167
[267] *Ibid*
[268] Washington D.C, *Address to a Joint Session of Congress and the American People* Speech delivered by President Bush, (2001)

expansion of state powers and the suspension of fundamental rights rest on the notion that it is necessary to strike at the enemy before he strikes us."[269]

Similar to Trudeau's reaction during the October Crisis, the response with respect to the attacks of 9/11 has been uncompromising and absolute. It is significant to state unequivocally that these events are not equivalent for a variety of reasons; however the suspension of legal rights and due process which resulted is similar. Perhaps more problematic is the fact that the *ATA* will continue to remain permanent not only through its legal application but through its ability to indiscriminately create lawlessness.

On the one hand, the *War Measures Act* represented a suspension of legality through the implementation of temporary statues. Common to a state of emergency, the emergency legislation conveyed broad discretionary powers to law enforcement, however such powers where only set in motion to remedy the FLQ crisis. Under such mandate, there is no veneer of legality because such measures are recognized as exceptional and temporary. On the other hand, Part II.1 of the *Code* has created different concerns surrounding the permanent legislative amendments which have masked the exception through the veneer of legality. Unlike the *War Measures Act*, the utilization of extra-legal discretionary practices indirectly influenced by the legislation has become permanent. The current perpetual application of emergency legislation through permanent amendments creates a problematic seepage in which emergency legislation and its associated practices are implemented within traditional law. As such the danger is that

[269]Razack *supra* note 9 at 30.

practices only acceptable during a state of emergency will transpire through varies facets of law.

Discretionary Practices: The Aftermath of 9/11

Part II.1 of the *Code*, while controversial in some aspects, offers legal protections to individuals subjected to its application. While offenders charged under the *Code* have legal rights and protections, the concern is that individuals outside of the law, throughout the investigative stages will risk being persecuted outside of legality. As addressed by Justice Rutherford the underlined concern is that the impugned section of the *Code* may engender discretionary practices that involved heightened surveillance. As such, the concern is that the information gathered through the post 9/11 legal amendments, will result in heightened security which targets individuals based on race and religion. Unlike individuals charged under the *Code*, the extra-legal practices which derive from this information will be utilized outside of legal protections.

A significant and problematic area of lawlessness has surfaced within the "war on terror". It is within this lawless space that discretionary practices, unsanctioned by law, have been utilized to deal with the threat of terrorism. Although the *ATA*, offers a legal response to events like those of 9/11, the "usual suspects" indirectly created by law, have been investigated outside the legal boundaries. Extra-legal practices which operate not on factual evidence but rather on suspicion and discretion cannot be conducted under the law as they are illegal. Such practices utilized exclusively in dealing with terrorism, have primarily sacrificed legality in the pursuit of prevention in circumstances where they

lacked evidence to pursue the matter at law. The utilization of extra-legal discretionary practices by RCMP was recently addressed and "while the RCMP stresses criminal prosecution is its preferred method of countering terrorism, they insist the use of controversial "disruptive strategies" is sometimes necessary when a credible and imminent threat is suspected but investigation lack sufficient evidence to justify charges."[270] Reports indicated that practices ranging from raids to intrusive surveillance were utilized at least 32 times over the past four years.[271] Such practices conducted by the RCMP have recently claimed to have disrupted 6 terrorist activities; however this was achieved without laying any criminal charges.[272]

The role of reactive law cannot be ignored as it plays a significant role in the creation of extra-legal discretionary practices. The reactive laws enacted specifically following 9/11 have amounted to "an invitation to place unquestioning trust in the discretion (a polite term for denoting biases, gut instincts, upbringing and socialization) of officialdom."[273] The discretion of law enforcement is more problematic in the post 9/11 era, where, "it is the notion of prevention, the detaining and the deportation of individuals *before* they committed a crime, that best sums up the post 9/11 changes and the increasing logic that law must be suspended in the interest of national security."[274] It is through unwarranted use of extra-legal discretionary practices that Middle

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[270] Ian Macleod, " 'Disruption strategies' used to foil terrorism Activist warn such tactics can lead to innocents being hurt" *Vancouver Sun* (11 June 2011) online: The Vancouver Sun <http://www.vancouversun.com/news/Disruption+strategies+used+foil+terrorism/4931243/story.html>. Reports indicate that practices such as raids, and intrusive surveillance were among the disruptive strategies conducted by the RCMP.
[271] *Ibid*
[272] *Ibid*
[273] Pue *Supra* note 81 at 281.
[274] Razack *supra* note 9 at 30.

Easterners/Muslims are subject to, the no fly list, security certificates and extraordinary rendition.

Information Sharing Post 9/11: The Creation of the No Fly list.

The events of 9/11 have among other things resulted in an unprecedented era of surveillance and security. These practices, while justifiable to some extent, have facilitated a narrative which casts a shadow on those of a Muslim and Middle Eastern minority. This new era of extra-legal surveillance is perhaps best demonstrated through extensive airport security practices. It is now common for individuals travelling internationally to be subjected to passenger scanning that extends beyond traditional boarder security protocols; this is especially the case for those who fit the perceived profile of a terrorist following 9/11. While some might be inclined to defend these contentious security practices based on the threat of terrorism, the debate must include the problematic realities surrounding information sharing which contribute towards the creation of the specified person list, commonly referred to as the no fly list.

Introduced June 18 2007, the list is one of three subdivisions found within the passenger protect program[275] and is "designed to identify individuals that may pose a threat to transportation and disrupt their ability to cause harm or threaten aviation.[276]" As stated under the *Identity Screening Regulation,*

[275]Transport Canada, "Passenger Protect Program", Transport Canada, online: <http://www.passengerprotect.gc.ca/home.htm>.
[276]*Ibid*

3. (1) An air carrier shall, before issuing a boarding pass to any person who appears to be 18 years of age or older, screen the person by comparing his or her name with the names of persons specified to the air carrier by the Minister under paragraph 4.81(1)(*b*) of the Act.[277]

The list is sited by authorities as an essential tool to protect passengers. However, its creation has become a "'sort of a charade' to make people feel like they have greater security."[278] On surface the list is offensive because it reinforces who and what constitute a terrorist without the traditional standard of proof and without the application of the law. Individuals who fall victim to the list, are often stigmatized, profiled and perceived as terrorists simply because their name is found on the list and not because there is an overwhelming burden of proof indicating that the individual is legally involved in terrorist activities. Under such dilemma, individuals are put in a reprehensible position where they must prove that they are not a terrorist but rather a Canadian citizen(s) who happens to share the name of another "potential" terrorist. To date, "thousands of non-dangerous passengers have either been mistakenly put on the lists or are detained for having the same or similar name as someone on the list and these people have no meaningful opportunity to remedy these errors or appeal their status. Most critically, there is no clear criteria for inclusion or exclusion and no actual appeal process."[279]

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[277] *Identity Screening Regulations*, S.O.R./2007-82, s.3.
[278] "Critics alarmed by Canada no-Fly list" *CBC News* (18 June 2007), online: CBC News <http://www.cbc.ca/news/canada/story/2007/06/18/no-fly-list.html>. Barry Prentice, director of the Transport Institute at the University of Manitoba criticized the no-fly list as a problematic tool creating a false security among Canadians.
[279] Letter from British Columbia Civil Liberties Association by Jason Gratl (10 June 2005) online: BCCLA< http://www.bccla.org/othercontent/05nofly.html>.

While the application of the no fly-list is contentious for those subjected to detention over mistaken identities, the overall gathering of questionable information obtained outside the legal sphere is equally alarming as it constitutes a non-legal mechanism to identify individuals who are perceived as terrorists. The no fly list offers a discretionary tool based on "information procured in mass surveillance and 'information grabs' by governments,"[280] a dangerous reality which "increases the chances of errors, the likelihood of racial profiling and discrimination, and creates a chilling effect on civil liberties."[281] The information gathered, while secret and non-transparent, is said to come from multiple sources including, "foreign or multilateral intelligence."[282] This implies that some of the information which is utilized in Canada derives from sources responsible for the controversial version of the American no fly-list. The information gathering which occurs in the no fly-list is unchallengeable, primarily because it is unknown.

The source of information which is also unknown, contributes to the overall unrest surrounding the accuracy of the dangerous and if valid important data. While individuals cannot benefit from the protection of knowing the accusation made against them, the information is weakened by the instability of its sources, especially foreign information that might have been obtained through illegal and unreliable practices contrary to Canadian and International law.

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[280] Canadian Civil Liberties Association, "Watch Out -- It's The U.S. No-Fly List" (25 November 2005), online CCLA <http://ccla.org/2010/11/25/watch-out-its-the-us-no-fly-list/>.

[281] *Ibid.*

[282] Canadian Labour Congress, "Creation of a no-fly list in Canada" (15 July 2007), online Canadian Labour Congress < http://www.congresdutravail.ca/node/679>.

The critical issue is that this practice creates an undisclosed list of individuals "likely" capable of committing serious harm. However, the information which classifies the suspected individuals remains unclear and is obtained through questionable channels outside of law. It is no longer a criminal offence which renders these individuals dangerous or unfit to fly but rather discretion which limits their freedom of transportation. The overall application of the no fly-list result in an alarming scenario in which some individuals are considered too dangerous to fly but not dangerous enough to be charged. While it is practical common sense to consider, like Justice Minister McLellan, that "if the terrorists are on the plane, it's too late,"[283] one must equally consider it valid that individuals charged under anti-terrorism legal amendments will not be on planes but will rather be incarcerated following due process. To ignore this key element only results in practices which validate Justice Rutherford's concerns, that is, an overall response to terrorism outside of law, one which ultimately "result in fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by government authorities at many levels."[284]

The utilization of the no fly list post 9/11 has become another example of the fabrication of camps. For the innocent individuals victimized by such list, their ability to defend themselves is initially voided and the information against them is confidential and held under the virtue of national security. Any false information cannot be contested through evidence and cannot be challenged through law. As such the individual's right to

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[283]House of Common, *Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th Parl. 1st sess., (March 22, 2005).

[284] Khawaja *supra* note 3 at para 73.

freedom of travel is infringed upon without further notice and all of this without any proof that the no fly list is effective in the "war on terror".

Without a proven level of success and the obvious issue of legality, "the collection of personal airline passenger information, the potential for ethnic, cultural and political criteria for denial of airline passenger service, and the subjection of ordinary citizens to enhanced and deeply invasive searches and questioning"[285] cannot and should not be an acceptable practice.

Security Certificates: Prevention in a Time of Exception

Security certificates are another tool utilized by authorities to combat terrorism post 9/11. The security certificate process which derives from immigration law is not a criminal proceeding but rather falls under the *Immigration and Refugee Protection Act*[286].

Under section 77 of the *Immigration and Refugee Protection Act,*

"The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court."[287]

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[285] Letter from British Columbia Civil Liberties Association by Jason Gratl (10 June 2005) online: BCCLA< http://www.bccla.org/othercontent/05nofly.html>.
[286] *Immigration and Refugee Protection Act*, 2001, c. 27
[287] *Ibid* at s.77.

The objective of such certificate is to remove permanent residents and foreign nationals who allegedly pose a threat to national security. At the onset it is important to note that security certificates are not new and in fact did not originate post 9/11. Canada has had these practices in place since 1978. Authorities have issued security certificates 28 times since 1991, six of which have been issued following 9/11.[288] Although this process is not new, the practices of detention following 9/11 has arguably resulted in the utilization of immigration law to enable "government to arrest, detain and deport foreign national who has been subject to the certificate on the ground that he or she is a danger to national security"[289] without due process.

Following the invocation of a security certificate, "a judge of the Federal Court then reviews the certificate to determine whether it is reasonable: s. 80. If the state so requests, the review is conducted *in camera* and *ex parte*."[290] The process is controversial because the individual affected by the certificate, "has no right to see the material on the basis of which the certificate was issued."[291] Although some material can be revealed to the individual held under the certificate any "sensitive or confidential material must not be disclosed if the government objects."[292] The concealment of information affects legal representation as they are unfairly challenged by the lack of information against his/her client. Since national security dictates that the information must be kept confidential, "the secrecy required by the scheme denies the named person the opportunity to know the case

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[288] Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, 2nd Sess., 39th Parl., 2008, c.3

[289] Jonathan Shapiro, "An Ounce of Cure for a Pound of Prevention Detention: Security Certificates and the Charter" (2008) 33 Queen's L.J. 519 at 520.

[290] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at 5.

[291] *Ibid*

[292] *Ibid*

put against him or her, and hence to challenge the government's case."[293] The question of guilt in such cases is difficult and perhaps impossible to defend. Furthermore the burden which the label of terrorism brings to these individuals is critical and ought to be properly managed. Because the information is classified as per the usual dilemma of 9/11, one cannot confirm the validity of the sources which lead to the certificate. In such cases not only is the information held secret, but the way in which officials have obtained the data is non-transparent and as such irrefutable. If the security certificate is determined to be valid by the judge then "there is no appeal and no way to have the decision judicially reviewed: s. 80(3)."[294]

The overall utilization of security certificates post 9/11 has been altered in a manner that renders its use problematic against a vulnerable minority. Critics of security certificates perceive that such extra-legal discretionary practices, "have become the front line tools used by Canada to fight terrorism, and their usage is now primarily directed at Arab Muslims."[295] The last five men held under security certificates are Hassan Almrei, Mohammed Jaballah, Mohammed Harkat, Mohammed Mahjoub and Adil Charkaoui all of which share a common characteristic of race and faith.[296]

Without revealing the details surrounding their investigation of individuals under security certificates "the state simply believed that someone is likely to commit a future criminal act and holds that person with no prospect of a trial."[297]Although the personal

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[293] *Ibid* para 65.
[294]*Ibid at para 5.*
[295] Razack *supra* note 9 at 26.
[296]*Ibid* at 27
[297] Jonathan Shapiro, "An Ounce of Cure for a Pound of Prevention Detention: Security Certificates and the Charter" (2008) 33 Queen's L.J. 519 at 523.

history of individuals held under security certificate might raise suspicion, without a fair trial individuals are transported into lawless zones in what Agamben and Razack refer to as camps. The Kingston Immigration holding center (KIHC) at the Millhaven maximum penitentiary can be construed as a camp, as it represents a location in which individuals are transported without rights to due process under security certificates. In this instance one ought to evaluate how individuals are detained and transported to a prison without the opportunity to review or even argue accusations brought against them. This lack of due process is addressed by Razack who argues that the process of security certificate results in a scenario in which "detainees have no opportunity to be heard before a certificate is issued, and a designated judge of the federal court reviews most of the government's case against the detainee in secret hearing at which neither the detainee nor his counsel is present."[298] In addition, the information gathering which leads to the implementation of security certificates is challenged by Roach who notes that; "the information that is presented to the judge *in camera* may include matters such as eyewitness identification, a jailhouse or other unreliable informer, a false confession and evidence and information filtered through tunnel vision that may lead to miscarriages of justice in which the innocent are detained for prolonged periods."[299]

This scenario is a key example of camps as it facilitates for individuals to be treated outside of the law, without any protection while others, in this case convicted criminals are sentenced through law. As such we have two unique systems, one which recognizes legality and due process and the other which facilitates actions through

[298] Razack, *supra* note 9at 28.
[299] Kent Roach (2005), *supra* note 133 at 117.

lawlessness. The detention and treatment of those held under security certificates has been challenged by a number of activists and politicians. For example NDP Member of Parliament Bill Siksay noted that "KIHC is a maximum security prison within a maximum security prison specially constructed to detain those held under security certificate provisions of the Immigration and Refugee Protection Act."[300] It is furthermore important to note that the five individuals held under security certificates post 9/11 have all been released without charge. Hassan Almrei, a Syrian born man who was held for 8 years was released without charges.[301] Similarly Adil Charkaoui was also released after imprisonment for two years, followed by 4.5 years of restrictive house arrest, under the allegation that he had ties to Al-Qaeda.[302] The same scenario applies to Mohamed Harkat and Mahmoud Jaballah, both of whom were held under security certificates to later be released.[303]

The reason these examples are problematic is the information provided through extra-legal measures, those ultimately leading up to their arrest, were only valid outside of the traditional legal system, ironically the same system which adequately tried and convicted Canadian terrorist Khawaja. It is important to note that some of these men held on security certificates have already received a sentence which similarly resembles that of Khawaja in length, only to be released without any substantial evidence or charge. While

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[300] *House of Commons Debates*, No. 109 (13 February 2007) at 1005 (Hon. Peter Milliken).

[301] "Former terror detainee Hassan Almrei sues feds" The Canadian Press (4 May 2010), online: The Canadian Press <http://www.ctv.ca/CTVNews/Canada/20100504/terror-detainee-almrei-100504/ >.

[302] "Security certificates and secret evidence" *CBC News* (14 December 2009), online: CBC News < http://www.cbc.ca/news/canada/story/2009/08/21/f-security-certificates.html>.

[303] *Ibid*

national security is arguably an issue with the utmost priority in the post 9/11 era, legality must preside in the handling of these cases. If legality and due process are not adhered to one could otherwise conclude that those held under security certificates lack sufficient or valid evidence to be tried at law.

It comes as no surprise then that such procedures have subsequently been scrutinized by the Supreme Court of Canada with specific relation to the Charkaoui decision.[304] The case was evaluated on the appellant's claim which considered the *IRPA*'s security practices in clear violation of five provisions guaranteed within the *Charter*. As stated by the court,

"The appellants argue that the IRPA's certificate scheme under which their detentions were ordered is unconstitutional. They argue that it violates five provisions of the Charter :the s. 7 guarantee of life, liberty and security of the person; the s. 9 guarantee against arbitrary detention; the s. 10(c) guarantee of a prompt review of detention; the s. 12 guarantee against cruel and unusual treatment; and the s. 15 guarantee of equal protection and equal benefit of the law."[305]

The Court agreed that within this case,

"The IRPA's procedure for the judicial approval of certificates is inconsistent with the Charter, and hence of no force or effect. This declaration is suspended for one year from the date of this judgment. If the government chooses to have the reasonableness of C's certificate determined during the one-year suspension period, the existing process under the IRPA will apply. After that period, H and A's certificates will lose their "reasonable" status and it will be open to them to apply to have the certificates quashed. Likewise, any certificates or detention reviews occurring after the one-year delay will be subject to the new process devised by Parliament. Further, s. 84(2), which denies a prompt hearing to foreign nationals by imposing a 120-day embargo, after confirmation of the certificate, on applications for release, is struck, and s. 83 is modified so as to allow for review of the detention of a foreign national both before and after the certificate has been deemed reasonable."[306]

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[304] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.
[305] *Ibid* at 11
[306] *Ibid* at 6.

As a result of the courts judicial ruling, the Government enacted Bill C-3, an act which responded to the Charkaoui judgement by introducing changes to the procedural practices associated to security certificates. The overall changes which now include the appointment of a special advocate furthermore includes,

"Equal treatment of permanent residents and foreign nationals in making detention decisions, and requires periodic reviews of such detentions. It clarifies ministerial responsibilities, takes care of various housekeeping matters, and contains transitional provisions and a consequential amendment to the Canada Evidence Act."[307]

It is critical to note that the Court did not strike down the security certificate legislation. While the overall application of such practices has been addressed by the Court, the overall structural merit of targeting specific individuals following 9/11 is left unchallenged. In *Khawaja*, Justice Rutherford addressed how individuals who fit the profile of the "enemy" are likely to fall under the shadow of suspicion, one which results in the application practices like security certificates. Under the pretext of national security, there already is a noticeable limitation of an individual's rights, however in cases of individuals held under secret evidence these rights all but vanish. At its core security certificates represent an area best described as camps within a state of exception, a region in which those classified as "others" are subject to the elimination of rights.

[307] Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, 2nd Sess., 39th Parl., 2008, c.3

The exception, founded upon the tragedy of 9/11, has created a scenario in which individuals held under security certificates have been excluded from the traditional legal rights offered to those who are outside of the camps. It is this space created by lawlessness which concerns Justice Rutherford, an area formed through extra-legal discretionary practices which indirectly following anti-terrorism legislation appears to identify a pre-conceived "enemy".

Extra-Legal Discretionary Practices in Action: The Case of Maher Arar.

The case of Maher Arar is to date one of the most significant examples exhibiting the danger which lies in the utilization of extra-legal practices. His story represents the impact of discretion, the danger of inaccurate information sharing and the result of lawlessness absent of any legal protections. The extraordinary rendition of Arar has fundamentally challenged post 9/11 practices.

Maher Arar, born in Syria, became a Canadian citizen in 1991 after immigrating at the age of seventeen[308]. Arar's ordeal began on September 26th 2002, when he was taken into U.S custody after returning alone from a family vacation in Tunisia where he visited his mother in law.[309] Upon his return to Canada, U.S. Immigration and Naturalization Services apprehended Arar at New York's JFK airport, detained him for 9 hours and questioned him without access to a lawyer before moving him to the

[308] "Maher Arar- overview" *Amnesty International* online: <http://www.amnesty.ca/human_rights_issues/maher_arar_overview.php>.
[309] *Ibid.*

Metropolitan Detention Centre in New York.[310] Arar was incarcerated for several days without access to a lawyer or the ability to contact anyone. On October 4th he was visited by Canadian consul Maureen Givan who assured him that he will not be transferred to Syria.[311] On October 5th he was visited by a lawyer who advises him to not sign any document, this will be the only visit permitted during his ordeal in America.[312] Arar carried a dual citizenship to both Canada and Syria; however, American authorities, contrary to his requests, decided to deport him to Syria. He was sent to Syria on October 8th and imprisoned again, but this time at the Palestine Branch secret prison in Damascus.[313] He described his detention space at the Syrian prison as a grave[314]. Arar was held for over ten months "in a tiny basement cell without light … there was no furniture in the cell, only two blankets on the floor."[315] The living conditions as he described in his cell were "a small grate in the ceiling opened up into a hallway above. Through it cats and rats urinated on him."[316]

While such conditions are arguably a form of torture in itself, Arar was subjected to severe beatings some of which were done with electrical cable in addition he was subject physical restrictive mechanism which was "a torture device that stretches the spine."[317] Eventually the torture lead to a false confession by Arar. In order to cease the infliction of pain, he manufactured a story about participating in training camps in

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[310] *Ibid.*
[311] Maher Arar, "Maher Arar: Chronology of events" (2011), online at <http://maherarar.net>.
[312] *Ibid*
[313] *Ibid*
[314] *Ibid*
[315] "Maher Arar- overview" *Amnesty International* online: <http://www.amnesty.ca/human_rights_issues/maher_arar_overview.php>.
[316] *Ibid.*
[317] *Ibid.*

Afghanistan.[318] During this time he was visited by the Canadian consulate and once by a Member of Parliament; however, he was never in a position to tell the visitors about his horrendous conditions.

Monia Mazigh, the wife of Mahar Arar, mounted a long and public campaign for the safe return of her husband. This process challenged the role of Canada's engagement in such extraordinary renditions post 9/11 and resulted in the return of Arar to Canada in October of 2003. In fact, "the government did what it often does in politically uncomfortable situations, and in 2004 it appointed the Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar."[319] The torture which he endured, the illegal detention to which he was subjected and above all the complete abolishment of his legal rights can only take place in a state of exception.

The report released by Justice O'Connor resulted in what Justice Rutherford cautioned surrounding the danger of information sharing based on prejudicial authoritative discretion. The commission confirmed Justice Rutherford's concerns by concluding that the Arar ordeal occurred due to "inaccurate and prejudicial"[320] information shared with the U.S, information which originated from the RCMP. The power of information sharing in a post 9/11 era was addressed by the inquiry which stated that,

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[318] *Ibid*

[319] Audrey Macklin, "From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture" (2008)10 European Journal of Migration and Law. 11 at 14. [Macklin]

[320] *Ibid* at 15.

"the RCMP described Mr. Arar and Dr, Mazigh as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement The RCMP had no basis for this description, which had the potential to create serious consequences for Mr. Arar in light of American attitudes and practices at the time."[321]

Furthermore the commission found that,

"reports were prepared within government that had the effect of downplaying the mistreatment or torture to which Mr. Arar had been subjected. Both before and after Mr. Arar's return to Canada, Canadian officials leaked confidential and sometimes inaccurate information about the case to the media for the purpose of damaging Mr. Arar's reputation or protecting their self-interests or government interests."[322]

Arar was awarded monetary compensation for his ordeal. This political remedy was only achieved due to overwhelming evidence of wrongdoing by the RCMP, the exposure and awareness brought on by the media, the commission of inquiry's findings and the efforts of his wife in this case. Proponents of extra-legal discretionary practices may argue that this is an anomaly and that this was an extremely rare mistake in what is otherwise a functional system. This argument however would prove false as other Canadians have been subjected to similar circumstances. Like Arar, Ahmad El Maati, who on November 12 2001, while on his way to celebrate his wedding was arrested in Syria, detained and like Arar was subjected to torture, confinement in a "in a dark, underground cell measuring only three by six by seven feet."[323] The reason for his arrest is arguably directly linked to information which according to Amnesty International

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[321]Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, "Report of the events Relating to Maher Arar: analysis and Recommendations" (Ottawa: Government Services, 2006) at 13.

[322] *Ibid* at 16.

[323] Open letter from Warren Allmand et al. to Prime Minister Harper (1 March 2006) Amnesty International "Canada: Hold a public and independent inquiry into the arrest and detention of Canadian citizens abroad", online: Amnesty International < http://www.amnesty.ca/archives/canada_inquiry_open_letter.php>

"could only have originated in Canada."[324] Like most individuals held within such camps, Ahmad El Maati was stripped of both his legal and human rights. Following a transfer to Egypt on January 25 2002, Ahmad was subjected to more torture until his release on January 11 2004.[325] Due process and legality were non-existing factors for Ahmad, who was never charged with any crime.[326] A similar case occurred for Abdullah Almalki, who similarly following a visit to his family in Syria on May 3 2002, was detained, tortured and interrogated surrounding information which again arguably came from Canada.[327] In total Almalki's ordeal within the Syrian base camp lasted for over 24 months and ended like the other men without any formal charges being laid.

For these men, lawlessness has prevailed. Through camps, they have endured torture and incarceration without the benefit of a legal trial and without due process. It is this type of event which occurs within a state of exception. While individuals are preoccupied in making sure that the terrorist events of 9/11 never reoccur, those subjected to camps are themselves terrorized.

Following 9/11, whether through the use of security certificate, no fly list or deportation, one ought to recognize a growing trend reaching outside of legal boundaries. With respect to Arar, "Canadian officials realized immediately upon Arar's rendition that he was at risk of being "questioned in a firm manner" (read: tortured) and, indeed, that

[324] *Ibid*
[325] *Ibid*
[326] *Ibid*
[327] *Ibid.*

this was the very purpose of rendition."[328] Such logic can only surface through lawlessness, where in this case and in the overall extra- legal response to the "war on terror", Canadians are subjected to camps because and only because they have been categorized as potential terrorists.

One can argue that individuals with suspicious life stories and connections with questionable individuals ought to be scrutinized and treated as a potential suspects. However overzealous use discretion offers a problematic result, one which wrongfully targets individuals like Arar. Of course it is imperative that the Government continue to do everything in its power to prevent terrorist attacks, any actions taken against a perceived threat must be done through legal means, transparency and respect legal rights. One cannot respond to terrorism outside of the legal sphere, through practices that are otherwise deemed extra-legal and as noted by Justice Rutherford discretionary in nature. If an individual is dangerous to the extent that one would provide information to a nation known for its lack of human rights, why not simply legally try the individual? While acts of terrorism might occur again, as it has in various forms throughout history, the precedent of opting to investigate and arrest individuals outside of law is perhaps of the greatest negative consequences of 9/11.

[328] Macklin, *supra* note 319 at 26.

Conclusion and Final Remarks

The events of 9/11 significantly altered many facets of Canadian society. It fabricated a new policy empowering the urgency of national security against an emerging threat. It reinvigorated the discourse of "enemy others", introduced modern society to the "war on terror" and through an emergency narrative embraced a permanent response to terrorism. This thesis has set out to examine the implications arising from anti-terrorism provisions within the *Criminal Code* by evaluating the extra-legal discretionary practices and the creation of a perpetual state of exception which has been influenced by the application and mandate of the *ATA* – in particular the *ATA's* amendments to the *Criminal Code*.

In order to evaluate the impact of extra-legal discretionary practices, an analysis of the state of emergency provided a foundation with which to study current debate within the field. This thesis has demonstrated that while extra-legal practices are often supported under pressing emergencies such as the (ticking bomb) scenario, the implication of such practices have lasting negative impacts. It was the intention of this thesis to evaluate particular extra-legal practices which have thus far transpired throughout the post 9/11 era and in doing so it examined the debate surrounding what in fact constitutes as acceptable emergency practices.

The works of Oren Gross and David Dyzenhaus, presented opposing arguments regarding the boundaries of legality within a state of emergency. Gross recognized the validity in utilizing unconstitutional practices under a critical emergency (the ticking bomb scenario), while Dyzenhaus favoured operating within the boundaries of legality

regardless of the crisis at hand. While this thesis has favoured Dyzenhaus's "Legality model", it recognizes that both approaches attempt to remedy emergencies by recognizing two potential and problematic outcomes of emergency response, the veneer of legality masking the exception and the normalization of the exception. The critical concern that is echoed in both arguments is the potential danger that emergency legislation may seep into traditional law and that the exception then becomes the norm.

In contrast to the temporary nature of the *War Measures Act* Canadians now live under permanent legislative amendments mandated to prevent terror attacks within "war on terror". The concern regarding this response is the fact that modern day terrorism has been classified under an emergency narrative as well as an enduring crime. Rather than utilizing temporary measures such as the *War Measures Act*, the attacks have prompted a scenario in which temporary legislation is deemed ineffective in combating the emerging threat and as such required robust long-term measures. This response has resulted in the problematic scenario that while legality is utilized to prosecute terrorist criminal activities, there remains an overwhelming use of extra-legal discretionary practices. This concern was addressed by Justice Rutherford who suggested that the influence of the current anti-terrorism provisions can have a devastating impact on individuals outside of the legal sphere. Justice Rutherford's judgment reflected on the likelihood that under the social climate in which the reactive anti-terrorism provisions were enacted, there is a great potential for the security apparatus to engage in heightened security and information gathering which will target Muslim and Middle Eastern minorities. This fear is emphasized through the ongoing emergency narrative which recognizes terrorism through the ethnicity of the 9/11 perpetrators. In addition, this thesis has recognized a

weakness within the legal definition of terrorist activities as set out within the motive clause. By including religious, political and ideological motive as an element to terrorism, the legislation has perhaps inadvertently set forth the "pre-conceived potential suspect" of this particular offence. It is the glaring correlation between the characteristics of the 9/11 conspirators and the subsequent anti-terror legislation - "war on terror" that disingenuously creates a stereotype that marginalizes an overall minority.

This bias could influence the security apparatus to target Middle Eastern /Muslim communities during the investigative stage in which the collection of information occurs. Information gathering obtained through the investigative stage and influenced by the overall mandate and definition of terrorism often results in practices which do not merit criminal investigation. The suspected individuals in this scenario do not have the ability to clarify any misconceptions or suspicion raised against them. Rather, the information gathered is kept confidential under the premise of national security and as a consequence may result in extra-legal practices such as additions to the no fly list, security certificates and in the case of Maher Arar extraordinary rendition. While such practices might be justified under a state of emergency, its current application through the permanent response to terrorism has resulted in a perpetual state of exception for a selective class of individuals.

The thesis has also demonstrated how the power of discourse has contributed to the utilization of extra-legal practices. The work of Edward Said has shown how the creation of an "enemy other" enables unconstitutional practices to occur as long as it affects only those characterized as "others". This characterization rationalizes the dehumanization of the "other" and justifies the utilization of extra-legal discretionary

practices which in this case are the new normal. This thesis has demonstrated that the current erosion of individual rights, while primarily limited to Middle Eastern minorities, has resulted in a state of exception as defined by Agamben. By permanently opting to deal with terrorism through anti-terrorism provisions, this thesis has established that the exception has become the norm. What we have now, is a dangerous and adaptive scenario in which one event, while tragic, has resulted in a situation where the exception is being masked through the veneer of legality and as such has resulted in a perpetual hidden state of exception. Legal controls over the use of extra-legal discretionary power, even in times of emergency, seem desirable. However, Justice Rutherford's decision suggests that ordinary law enacted in response to emergency conditions carries particular risks. An assessment of such laws requires a broad view that goes beyond the specific procedural protections engendered by the law, and takes into account the social context that will shape the use of discretionary power.

The contributions of legal scholars reflected throughout this thesis have rightfully challenged the constitutionality and necessity of the *ATA*. Their contribution to academia has reinforced the strength of research, in insuring that individual rights be respected through the application of due process. In joining such body of research, this thesis has evaluated the external impacts of the *ATA* more specifically the utilization of extra-legal discretionary practices which occur within the investigative stages and often without actual criminal responsibility.

A significant part of this research was inspired by the story of Maher Arar and the other men who have borne the worst of lawlessness and camps. The fundamental

reasoning behind this research was to underline the reality that within this "war on terror" what we have is not only a dehumanization of "enemy others" or the utilization of unconstitutional investigative practices but rather we have an acceptable form of lawlessness, an independent system in which individuals are stripped of their fundamentals rights. Put differently, the aftermath of 9/11 has resulted in an acceptable legal "black hole".

Perhaps the greatest limitation of this thesis was the inability to undergo further research to determine the role of law enforcement in creating zones of lawlessness. A better understanding of the overall working of the security apparatus first hand might result in a enriched comprehension surrounding the utilization of extra-legal practices. Although this issue is complex, the interpretative impact of law enforcement, the way in which the front-line enforcement understands terrorism, might provide insight into a possible and constitutional solution. Dyzenhaus reminds us that the dirty work of this "war" is left to those in charge of preventing future attacks; as such it would be better to understand how they perceive their role and duty as necessary. As emphasized throughout this thesis, the response of today will certainly extend to tomorrow.

Bibliography

LEGISLATION

Anti-terrorism Act, S.C. 2001, c. 41.

Bill S-3, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2008.

Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, 2nd Sess., 39th Parl., 2008.

Bill C-10, *An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make consequential amendment to another Act*, 1st Sess., 39 Leg., 2007.

Bill C-17, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*3rd Sess., 40th Parliament., 2011.

Bill C-19, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Session, 40th Parliament., 2009.

C-338 *An Act to amend the Criminal Code (street racing)*, 3rd session, 37th Parl., 2004.

Canadian Charter of Rights and Freedoms, s.2, Part I of the Constitutional Act, 1982, being schedule B to Canada Act 1982 (U.K.), 1982, c.11.

Criminal Code, R.S. C. 1985, c.C-46.

Identity Screening Regulations, S.O.R./2007-82, s.3.

Immigration and Refugee Protection Act, 2001, c. 27

Public Order Temporary Measures Act, 1970.

UN Security Council Resolution 1373, Sres73 (2001)

War Measures Act Statutes of Canada 1914, c.2

JURISPRUDENCE

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 180 C.C.C. (3rd) 353.

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350

R. v. Ahmad (2009), 257 C.C.C. (3d) 199 (Ont. S.C.)

R. v. Khawaja, (2006), 42 C.R. (6th)

R. v. Khawaja, (2010) ONCA 862

R. v. Lindsay, [2004] O.J. No. 845 (QL), 182 C.C.C. (3d) 301 (S.J.C.J).

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606

R v. Spindloe, (2001), 154 C.C.C. (3d) 8

United States of America v. Dynar, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481

United States of America v. Nadarajah and Sriskandarajah (2009), 243 C.C.C. (3d) 281 (Ont. S.C.)

SECONDARY MATERIAL: ACADEMIC SOURCES

Agamben Giorgio, *State of Exception*, translated by Kevin Attell, (The university of Chicago press, 2005).

Bahdi Reem, "No Exit: Racial Profiling and Canada's war Against Terrorism" (2003) 41 Osgoode Hall L.J. 293.

Bélanger Claude, "Chronology of the October Crisis, 1970, and its Aftermath" *Marianopolis College* (23 August 2000) online: Marianopilis College <http://faculty.marianopolis.edu/c.belanger/quebechistory/chronos/october.htm>

Bélanger Claude, "War Measures' Act" Quebec History Marianopolis College (20 August 2004) online: Quebec History Marianopolis College <http://faculty.marianopolis.edu/c.belanger/quebechistory/readings/warmeas.htm>.

Boccabella John, "Profiling the Anti-terrorism Act: Dangerous and Discriminatory in the Fight Against Terrorism" (2003) 9 Appeal 17

Clément Dominique, "The October Crisis of 1970: Human Rights Abuses Under the *War Measures Act*" (2008) 42 Journal of Canadian Studies.160.

Daniels Ronald, Macklem Patrick and Roach Kent (eds) *The Security of Freedom: Essays on Canada's Anti-terrorism Bill.* (Toronto: University of Toronto Press, 2001).

Dyzenhaus David, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald Daniels, Patrick Macklem and Kent Roach (eds) *The Security of Freedom: Essays on Canada's Anti-terrorism Bill.* Toronto: University of Toronto Press, 2001)

Dyzenhaus David, "The state of emergency in legal theory" in Victor V. Ramraj, Michael Hor& Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 65

Gross Oren & Aolain Fionnuala, Ni, *Law in Times of Crisis: Emergency Powers in Theory and Practice. Cambridge Studies in International and Comparative Law* (Cambridge University Press, 2006).

Gross Oren, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 The Yale Law Journal 1011.

Gross Oren, "Stability and flexibility: A Dicey business" in Victor V. Ramraj, Michael Hor& Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 90.

Macklin Audrey, "From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture" (2008)10 European Journal of Migration and Law. 11.

Okumu Wafula & Botha Anneli eds. *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps* (Institute for Security Studies, 2008)

Pue Wesley W. & Russo Robert, "The Problem of Official Discretion in Anti-Terrorism Law: A Comment on R.v.Khawaja" (2008) 24 W.R.L.S.I 57

Pue Weskey W., "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41 Osgoode Hall L.J. 267

Ramraj Victor V.,Hor Micheal & Roach Kent, eds., *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005).

Razack Sherene H. "Casting Out The Eviction of Muslims from Western Law & Politics" (Toronto: University of Toronto Press, 2008).

Roach Kent, "Canada's Response to Terrorism" in Victor V. Ramraj, Michael Hor & Kent
Roach eds., *Global Anti-Terrorism Law and Policy*, (New York: Cambridge University Press,
2005) 511

Roach Kent, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893.

Roach Kent, "SPECIAL VOLUME: THE RULE (AND ROLE) OF LAW AND POLITICS IN A POST 9/11 WORLD: ARTICLE: The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law "(2008) 24 W.R.L.S.I. 5 1.

Roach Roach, "*Ten Ways to Improve Canadian Anti-Terrorism Law*" (2005) 51 Criminal Law Quarterly 106.

Said Edward W, *Orientalism* (New York: Vintage Books A Division of Random House, 1979)

Shapiro Jonathan, "An Ounce of Cure for a Pound of Prevention Detention: Security Certificates and the Charter" (2008) 33 Queen's L.J. 519

Stuart Don, "The Danger of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 should be Withdrawn" in Daniels, Ronald J., Patrick Macklem & Kent Roach eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, 2001)

SECONDARY MATERIAL: ARTICLES

"Backgrounder Canada's Actions AgainstTerrorism Since September 11" *Foreign Affairs and International Trades Canada* (7 February 2003), online at <http://www.international.gc.ca/anti-terrorism/canadaactions-en.asp>.

Canadian Civil Liberties Association, "Watch Out -- It's The U.S. No-Fly List" (25 November 2005), online CCLA <http://ccla.org/2010/11/25/watch-out-its-the-us-no-fly-list/>.

Canada, Evidence presented to Standing Committee on justice and human rights, (20 November 2001) Online at: Parliament of Canada <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041152&Language=E&Mode=1&Parl=37&Ses=1>.

Canadian Labour Congress, "Creation of a no-fly list in Canada" (15 July 2007), online Canadian Labour Congress < http://www.congresdutravail.ca/node/679>.

"CCLA Argues Bill C17 Is Unconstitutional and Ineffective" *Canadian Civil Liberties Association* (10 February 2011) online CCLA: < http://ccla.org/2011/02/10/9558/>.

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Factual Background Volume 1*(Ottawa: Government Services, 2006).

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Government Services, 2006)

"Critics alarmed by Canada no-Fly list" *CBC News* (18 June 2007), online: CBC News <http://www.cbc.ca/news/canada/story/2007/06/18/no-fly-list.html>.

"Former terror detainee Hassan Almrei sues feds" The Canadian Press (4 May 2010), online: The Canadian Press <http://www.ctv.ca/CTVNews/Canada/20100504/terror-detainee-almrei-100504/ >.

Guy Bouthillier, "Forty Years After Canada's War Measures Act: Trudeau's Darkest Hour." CounterPunch (October 6 2010) online: CounterPunch <http://counterpunch.org/bouthillier10062010.html>.

Hassan Almrei, Mahmoud Jaballah, Mohammed Mahjoub, "LETTER FROM SECURITY CERTIFICATE DETAINEES AND RESPONSE FROM CBSA" (November 16, 2006) online: <http://cmte.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2829796/cimmrp12/10_appe-e.htm>.

House of Commons Debates, No. 109 (13 February 2007) at 1005 (Hon. Peter Milliken).

House of Commons Debates, No.066 (20 September 2010) at 1240 (Hon. Rob Nicholson).

House of Common, *Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th Parl. 1st sess., (March 22, 2005).

"IN DEPTH Canadian security Mohammad Momin Khawaja" *CBC News* (22 May 2009),online: CBC News <http://www.cbc.ca/news/background/cdnsecurity/khawaja_mohammad.html>.

Ian Macleod, "'Disruption strategies' used to foil terrorism Activist warn such tactics can lead to innocents being hurt" *Vancouver Sun* (11 June 2011) online: The Vancouver Sun <http://www.vancouversun.com/news/Disruption+strategies+used+foil+terrorism/4931243/story.html>.

Letter from British Columbia Civil Liberties Association by Jason Gratl (10 June 2005) online: BCCLA< http://www.bccla.org/othercontent/05nofly.html>.

"Maher Arar- overview" *Amnesty International* online: <http://www.amnesty.ca/human_rights_issues/maher_arar_overview.php>.

North Atlantic Council, "Statement by the North Atlantic Council", (September 12, 2001) online at <http://www.nato.int/cps/en/natolive/news_18553.htm?mode=pressrelease>

Open letter from Warren Allmand et al. to Prime Minister Harper (1 March 2006) Amnesty International "Canada: Hold a public and independent inquiry into the arrest and detention of Canadian citizens abroad", online: Amnesty International < http://www.amnesty.ca/archives/canada_inquiry_open_letter.php>

"Passenger Protect Program", Transport Canada, online: < http:// www.passengerprotect .gc.ca/homehtm>.

"Research and Statistics Division / Department of Justice, *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act* by Thomas Gabor, (March 31 2004)

"Security certificates and secret evidence" *CBC News* (14 December 2009), online: CBC News < http://www.cbc.ca/news/canada/story/2009/08/21/f-security-certificates.html>.

"Security Council Counter-Terrorism Committee", online: Security Council-Terrorism Committee<http://www.un.org/en/sc/ctc/>.

Teotonio Isabel, "Toronto 18" *The Star* (1996-2010) online: The Star <http://www.thestar.com/static/toronto18/index.html>.

"THE KHAWAJA FILE From the start, the Mounties knew the investigation into Mohammad Momin Khawaja had to be flawless" *The Ottawa Citizen* (29 October 2008), online Canada.com < http://www.canada.com/montrealgazette/story.html?id=d7d4d876-6de5-47d3-89f5-f0081d0792ca>.

"TIMELINE Toronto bomb plot Toronto 18: Key events in the case" *CBC News* (17 December 2010), online: CBC News <http://www.cbc.ca/canada/story/2008/06/02/f-toronto-timeline.html>.

Tim Ralfe, "Just watch me" CBC Television News (October 13 1970) online at : <http://archives.cbc.ca/war_conflict/civil_unrest/topics/101-610>.

"US expands 'axis of evil' " *BBC News* (6 May 2002), online: BBC News <http://news.bbc.co.uk>.

Washington D.C, *Address to a Joint Session of Congress and the American People* Speech delivered by President Bush, (2001)