

Canada v. Asad Ansari: Avatars, Inexpertise, and Racial Bias in Canadian Anti-Terrorism Litigation

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ABSTRACT

This chapter examines the litigation against Asad Ansari, who was charged with terrorism offences as part of the Toronto 18. The authors examined the litigation files held in the archives of the Ontario Court of Appeals. Through close readings of trial transcripts and judicial decisions on evidentiary motions, the chapter illustrates that systemically embedded in the features of Canada's adversarial legal system and *Criminal Code* are legal dynamics that enable racialized, Orientalist readings of Islam and Muslims, and echo the medieval dynamics of religious inquisitions.

Keywords: Islam; Muslims; Islamists; Terrorism; Extremism; Expertise; Orientalism; Religious Inquisition; Anti-Terrorism; Systemic Bias

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I. INTRODUCTION

This chapter examines the case of Asad Ansari, who was 25 years old at the time of his trial, as part of the so-called Toronto 18. Through a close examination of certain aspects of his case, this chapter will show that rather than Asad Ansari¹ himself being on trial, it was two competing avatars of Ansari on trial, both of which took shape through the explicitly inept and implicitly racially structured litigation of Islam itself. This was not simply a feature of this case, but it is systemic to the prosecution of terrorism offences in Canada because of the *Criminal Code* requirement of proof of religious motive. This legislative provision created the condition in the Ansari trial of collapsing Islam, the religion, into the racialized body of the defendant, standing for trial before predominantly White officers of the court.

The absurdity of this absent expertise is pregnant in the facially neutral, but substantively suspect, procedural structure of the litigation via the form of evidentiary motions and the use of leading questions on cross-examination. This procedural structure was substantially suspect in the case of Ansari because utterly inept testimonies and biased perspectives were permitted by the very structure of Canada's adversarial system of justice. From the accused, Ansari, to the government prosecutors, and even to the government-paid confidential informants, none were disinterested in the outcome of the trial. Likewise, none were duly certified by the court as impartial experts on Islam, Jihad, or the regional conflicts in Iraq, Syria, or Afghanistan, despite all of them testifying about such matters as proxies for the defendant's state of mind. Nor, as the trial record suggests, did the

¹ A note on sources: Asad Ansari's lawyers appealed the trial decision, which meant that all litigation submissions and trial transcripts were held by the Ontario Court of Appeal. The legal facts and related material are in four boxes held in storage by the Court. The authors accessed the materials in the records division of the Court, reviewing each document, factum, and transcript as they related to the motion to exclude. Citations to this litigation material reflects both standard citation practices as well as the organizational structure of the Court's archives. A second source of information about the trial was Asad Ansari, who graciously allowed Emon to interview him for this chapter. The authors express their gratitude to Ansari for his contribution. Moreover, we are grateful to the editors Kent Roach and Michael Nesbitt for their careful review and comments on earlier drafts, as well as their unfailing support for this research. Needless to say, any errors in this chapter are attributable to the authors and do not reflect upon anyone else.

presiding judge recognize the relevant parties were litigating matters outside their personal and institutional competency. Ansari's guilt was premised upon the fact that he read, reviewed, and thought about ideas that the security state considers radical and even threatening, particularly when held by racialized Muslims.² Because those ideas were embedded in propaganda from groups like al-Qaeda, the Taliban, and Iraqi insurgencies, ultimately the person of Ansari was collapsed into these hard to find and harder to defeat groups. Ansari's guilt, we argue, was then less about Ansari himself and more about the prosecution's racial and religious construction of an extremist avatar which, again, was demanded by the *Criminal Code*. Ultimately, we consider the jury's finding of Ansari's guilt highly suspect given the systemic features that discredit the quality of justice delivered.

A. Representing Avatars

Historically, the term avatar originates from Sanskrit and refers to manifestations of a deity in the world, either in superhuman, human, or animal form.³ In the world of computer science, including computer gaming, an avatar is an electronic image that represents a player. Consumers in the online marketplace participate with avatars of their own, as do companies offering products to those consumers. Avatars allow users to present themselves as they see fit, making identity claims about who they are to a broader (often virtual) public. The virtue of avatars comes in the economics of fashioning that identity. "In real life it is difficult, costly, or impossible to modify one's physical attributes. However, avatars can be instantly redesigned online by means of graphic technology."⁴ For the purposes of this chapter, "avatar" serves as a heuristic to capture how the defence and prosecution contested whether and to what extent Ansari represented danger and threat.

² Canada's National Strategy on Countering Radicalization to Violence, while attempting to treat all forms of radicalization equally, cannot help but prioritize Muslim extremist groups as posing particular concern. See generally, Canada Centre for Community Engagement and Prevention of Violence, *National Strategy on Countering Radicalization to Violence* (Ottawa: Government of Canada, 2018), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/ntnl-strtg-cntrng-rdclztn-vlnc-en.pdf>.

³ Jean-François Bélisle and H. Onur Bodur, "Avatars as Information: Perception of Consumers Based on their Avatars in Virtual Worlds," *Psychology and Marketing* 27, no. 8 (2010): 741-65.

⁴ Bélisle and Bodur, "Avatars as Information," 744.

Whereas in the consumer context avatars are “controlled sources of identity claims,” in the adversarial context of determining the special purpose requirement of the terrorism charge, Ansari was not able to stand before the Court as himself, but rather as a representation, in the form of an avatar, that drew upon extant narratives of the good Muslim and the bad and dangerous Muslim, and a legislative scheme that infused religion with extremism and violence. The use of avatar herein is apropos to Ansari’s personal journey into the world of computers and computer science. Moreover, it is analytically useful for centring Ansari’s positionality as a racialized Muslim male whose identity was fundamentally negotiated and renegotiated through the course of the trial. His identity was never solely a function of his autonomous liberty but was instead “constructed across different, often intersecting and antagonistic discourses, practices, and positions” in multiple ways by an ambiguous legislative framework and courtroom theatre.⁵

B. Legal Coding for a Dangerous Muslim

Recall that Ansari was prosecuted as part of the so-called Toronto 18, which, throughout the litigation, was reflected as the thin edge of a nebulous global Jihadist wedge in Canada.⁶ The Toronto 18 was a group comprised of Muslim defendants charged under Canada’s then-new and untested anti-terrorism legislation.⁷ Subsection 83.01(1) of the *Criminal Code of Canada* defines terrorist activity, in relevant part, as follows:

- (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

⁵ Zahra Ali, *Women and Gender in Iraq: Between Nation-Building and Fragmentation* (Cambridge: Cambridge University Press, 2018), 38 (addressing the philosophical contributions of Stuart Hall’s approach to racialization as a site of multiplicity, intersectionality, and positionality).

⁶ Isabel Teotonio, “Terror trial ends, threat of extremism still growing,” *Toronto Star*, June 24, 2010.

⁷ There was one prior prosecution under this Act, namely *R v. Khawaja*. At trial, Justice Rutherford held that s. 83.01(1)(b)(i)(A) infringed the *Charter of Rights and Freedoms* for its chilling effect on the expression of beliefs and opinions. See *R v. Khawaja*, [2006] O.J. No. 4245 (Ont Sup Ct). The trial proceeded with this provision treated as if severed from the legislation. The Supreme Court of Canada reversed the lower court’s holding in *R v. Khawaja*, 2012 SCC 69.

(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...⁸

In the case of Ansari, this motive requirement was directly connected to the underlying charge under section 83.18, namely participating in a terrorist group for the purpose of enhancing its ability to facilitate or carry out a terrorist activity. When read together, the prosecution had to show that Ansari's motive or purpose in facilitating or carrying out terrorist activity was to serve the interests of an extremist Islamist group (i.e., al-Qaeda). As the litigation showed, a few core members may very well have had this motive. But the looseness of the motive requirement – in which religion poses a conceptual nexus to violence and extremism – coupled with systemic features of courtroom litigation, required the prosecution to construct an avatar of Ansari as an extremist antagonistic to the well-being of the Canadian state.

As this chapter argues, the legislative provision created the conditions by which the prosecution and even the judge construed Ansari's avatar by reference to the racial and religious positionality of Ansari and those in the courtroom. The motive clause in the *Criminal Code's* definition of terrorist activity – “for a political, religious or ideological purpose” – posed evidentiary hurdles for the prosecution. The prosecution's approach to meeting its evidentiary onus was fraught with an inexpertise about politics and religion, an inexpertise overcome by a presumptive nexus between religion (specifically Islam), violence, and extremism. Through an examination of excluded evidence and leading questions, the government prosecutors ultimately (and inexpertly) litigated Islamic history and regional conflicts in order to cast Ansari as an avatar of the Muslim extremist.

The legislation and the litigation proceedings raise considerable doubts about the quality of justice meted out to Ansari for two fundamental reasons, discussed below.

C. Orientalist Coding of the ‘Muslim Mind’

Because most of the evidence in Ansari's case about his purpose or motive was circumstantial, any litigation strategy to show Ansari's terrorist purpose inevitably had to construct him into an extremist avatar on the

⁸ Criminal Code, R.S.C. 1985, c. C-46, s. 83.01(1).

basis of either mere possession of such material or viewing/reading such material. The legislative framework effectively required the prosecution to presume that because a text or video says X, the person watching it must therefore believe X. If a propaganda video states that Muslims must fight Jihad against the American infidel, and a local Muslim has a copy of that video on his phone, this litigation approach requires a jury to assume from that circumstantial evidence that the Muslim must therefore harbour such views or hold fast to them as a matter of ideology. This approach, however, has a long history, extending from medieval heresy inquisitions to what Edward Said coined in 1979 as an Orientalist gaze.⁹

In the Ansari case, these presumptions made possible the general failure to recognize that the matters being litigated required expertise (see below). We also see it in the way the prosecution reduced Ansari's state of mind and character to the pixels of open-access propaganda videos saved on DVDs in his possession. The Muslim involved is assumed to think and believe what sacred or sacralized texts (or in this case videos and online websites in one's possession) represent are the "true Islam."¹⁰ To fulfill the legislation's purpose/motive element, the prosecution required the jury to, at best, infer Ansari's terrorist purpose or motive from his mere possession or reading/viewing of material the prosecution considered damning. Not unlike medieval inquisitions on heresy, Ansari's possession and viewing of such material became central to a finding of purpose, despite his testimony to the contrary and the fact that the material is openly and notoriously accessible. Focusing on this fraught evidentiary conundrum for both prosecution and defence lawyers, this chapter will show that in the Ansari case, the legal system – in the persons of the prosecutors, defence lawyers, and judge, and as demanded by the *Criminal Code* – were able to recast Ansari into an avatar of extremism on flimsy grounds at best, racially and religiously biased ones at worst.

D. Inexpertise and the Introduction of Bias

Neither the Court, the prosecution, nor the defendant were competent to address the complex questions of Islamic studies, political economy, and regional politics that were all but demanded by the criminal system and the *Code*. Admitting such inexpert analysis invited the bias that we identify as

⁹ Edward Said, *Orientalism* (New York: Vintage, 1979).

¹⁰ Anver M. Emon, "The 'Islamic' Deployed: The Study of Islam in Four Registers," *Middle East Law and Governance* 11, no. 3 (2019): 347-03.

implicit in the prosecution's litigation strategy on purpose and motive. To show how inexpertise in litigating complex issues of religious history and geopolitics operated (and thereby taints the case itself), we will examine, among other features of the case, the litigation dynamics around a peculiar procedural motion, namely the motion to exclude evidence obtained from a search of Ansari's home. Early in the case, lawyers for Ansari motioned the Court to exclude evidence obtained through a search, on grounds that the search was considered more prejudicial than probative. Embedded in the procedural motion itself is a recognition that evidence might be so inflammatory as to bias the finders of fact in ways that contravene the very performance of justice.

This motion is a legal procedure to control for the systemic bias that this chapter will show could not help but permeate the case, and which ultimately tainted its final outcome. In Ansari's case, the Court first found in favour of the defence and excluded certain evidence obtained from a police search of Ansari's home. However, later in the case, after Ansari testified on direct examination about matters related to his understanding of Islamic history and geopolitics, the prosecution revisited the judge's decision and successfully got it reversed. The prosecution argued that in his direct testimony, Ansari put his character into question, which in turn prompted the government to introduce the earlier excluded evidence for purposes of effective character assessment for the benefit of the jury. Importantly, the government's argument implied that Ansari's testimony about his understanding of Islamic history and geopolitics (matters on which no one in the courtroom was qualified as an expert) was somehow connected to his character.

"Character" became the legal device by which the prosecution could argue about reintroducing excluded evidence; in this case, character was little more than a legal instrument by which the prosecution could introduce inexpert claims about Islamic history and geopolitics through the use of leading questions, and thereby import into the proceedings overt biases that we will identify below. Leading questions are a well-accepted part of legal practice in an adversarial system of justice. But in the context of the Ansari case, the prosecution formulated their leading questions (during cross-examination) to make conclusory statements about matters over which no one in the Court had the requisite expertise to evaluate or assess. The Orientalist litigation strategy of both collapsing Ansari with a corpus of literature and allowing blatant inexpertise to operate in the form of

leading questions was deployed by the prosecution to reconstruct Ansari into an avatar of the dangerous Muslim man, which was later supported by the Court's reliance on a makeshift expert who was not impartial in the case. Justice was not blind in Ansari's case. It was constructed by reference to an extremist avatar that the prosecution held in disrepute, based on 19th- and 20th-century European imperial ideals of Islam and Muslims, even before Ansari stepped into the courtroom.

II. TELLING THE STORY OF ASAD ANSARI

The reported story of Ansari does not really tell us much about the man himself. Indeed, his story would seem to begin and end with his arrest, bail, and prosecution as part of a terrorist conspiracy in Canada. As Canadian media outlets reported, 14 adults and four youth were arrested in June 2006, in a series of raids as alleged participants in a conspiracy to commit terrorist acts on Canadian soil in retaliation for Canada's military involvement in Afghanistan.¹¹ Among those men was Ansari. Only 21 years old when he was arrested, Ansari spent three years in prison awaiting trial before he was finally granted bail in August 2009.¹² Not until March 2010, at the age of 25, did his trial even begin in a Brampton, Ontario courtroom before both Judge Fletcher Dawson and the first Canadian jurors ever to sit in judgement of a terrorism charge.¹³

Ansari was tried with two co-defendants, Fahim Ahmad and Steven Chand. The prosecution was amply clear that Fahim Ahmad was the ringleader. Ansari was never considered the leader of the conspiracy. As a review of news accounts suggests, Ansari was marginal at best. His alleged contribution to this conspiracy: his computer skills.¹⁴ At all times, Ansari maintained his innocence. At all times, he claimed he had no knowledge

¹¹ Isabel Teotonio, "Last three Toronto 18 defendants head to trial," *Toronto Star*, March 22, 2010.

¹² "Accused homegrown terror suspect, 24, freed on bail after 3 years in custody," *Canadian Press*, August 28, 2009.

¹³ Thomas Walkom, "Citizens to rule on terror law," *Toronto Star*, April 13, 2010. Walkom clarifies that the other two terror trials in Canada were heard by judges alone. Ansari's case was unique in Canada because these jurors were the first ever to pronounce judgment in a case where the charges involved Canada's controversial anti-terrorism legislation.

¹⁴ Megan O'Toole, "Terror cell 'wanted to cripple Canadian infrastructure,' court hears," *Canwest News Service*, April 12, 2010.

of a conspiracy to commit any sort of infraction, let alone terrorism. He was never among Ahmad's trusted inner circle and had no knowledge of Ahmad's terrorist plans.¹⁵ Yet at all times at both the trial and on appeal, even after Ahmad pled guilty midway through the trial,¹⁶ Crown prosecutors¹⁷ viewed Ansari as a "marginal member,"¹⁸ but a member nonetheless, in a terrorist conspiracy aimed at "[c]rippling Canada's infrastructure and leaving its population devastated."¹⁹ Despite Ansari's claim of innocence and the marginal role he allegedly played, a jury found him guilty in June 2010.²⁰

The Toronto 18 prosecutions were a test of the Government of Canada's anti-terrorism legislation. But that legislation operated amid hysteric claims about sleeper cells taking aim in and from Canada. For instance, self-proclaimed terrorism expert Tom Quiggin exclaimed "[t]he warning lights are all blinking red... We know that extremism is an issue in Canada, we know that there are people who advocate violence as a means of solving problems."²¹ Shortly after the conclusion of Ansari's trial, the then-director of the *Canadian Security Intelligence Service*, Richard Fadden, stated that, "there has been an increase in second and third-generation

¹⁵ Megan O'Toole, "Accused kept in the dark about Toronto 18's alleged plot," *Canwest News Service*, May 18, 2010.

¹⁶ Isabel Teotonio, "Terror accused pleads guilty," *Toronto Star*, May 11, 2010.

¹⁷ The prosecutors in the case were Iona Jaffe, now a judge for the Ontario Court of Justice; Marco Mendicino, who was elected in 2015 as a Member of Parliament for the riding of Eglinton—Lawrence (Ontario) and, at the time of writing, served as the Parliamentary Secretary to the Minister of Infrastructure and Communities; Cyde Bond, Amber Pashuk, Sarah Shaikh, and Jason Wakely, who, at the time of writing, served as general counsel at Public Prosecution Service of Canada; Croft Michaelson, who, at the time of writing, served as deputy general counsel and head of global investigations for BMO Financial Group.

¹⁸ Isabel Teotonio, "Bail for terror suspect comes with constraints," *The Toronto Star*, August 29, 2009.

¹⁹ Allison Jones, "Attacking Parliament, devastating Canada at heart of Toronto 18 plot, jury hears," *Canadian Press*, April 12, 2010. See also Megan O'Toole, "Toronto 18 proposed military hit," *National Post*, April 13, 2010; O'Toole "Terror cell."

²⁰ "Toronto 18 member to be sentenced to time served," *Ottawa Citizen*, September 28, 2010.

²¹ Ian MacLeod, "The warning lights are all blinking red," *Ottawa Citizen*, February 23, 2008.

Canadians who consider participating in violent [J]ihad at home or abroad.”²²

Of course, none of this super-charged anxiety about Muslim radicals in Canada can be divorced from the global response to the 9/11 attacks in the United States.²³ Nor ought we discount its effects on how a judge and 12 jurors in a Brampton courtroom would weigh and examine evidence about alleged participants in an alleged terrorist conspiracy in Canada. Indeed, in a justice system where questions of law and fact are decided by two different institutional bodies (e.g., judges and jurors), where evidence is weighed and analyzed in relation to broad and often ambiguous standards, where no one comes into a courtroom without bringing their unavoidably subjective positionality into the process, one cannot help but raise questions about how the narrative about Ansari was constructed, who constructed it, and on what basis. Were sufficient precautions taken by the judge and lawyers to limit or control against an imported bias or prejudice?²⁴ And if so, what were those mechanisms and how effective were they? As it turns out, the Ansari case offers an important example of how procedures to protect against bias are inherently limited, both by how “religion” is litigated in a secular courtroom and by who gets to speak for or about “religion” in the course of ordinary litigation practices.

A. Ansari and the Pessimistic Good Muslim Avatar

The media accounts depicted only a sliver of Ansari’s life, drawing on testimony given during the course of the trial. But recounting his life story in a more narrative way than mere direct and cross-examination allow will show how rules of evidence cannot (and did not) fully account for facts that nonetheless bear upon questions of truth and accuracy. Working on the body of a racialized Muslim man, the formal rules in an adversarial structure reorient the trial from an inquiry into Ansari to a contest between competing avatars. Based on a close reading of Ansari’s testimony at trial, as well as interviews with Ansari himself, we have reconstructed a rough sketch of his life to the extent that it bears upon how he found himself in

²² Isabel Teotonio, “Terror trial ends, threat of extremism still growing,” *Toronto Star*, June 24, 2010.

²³ Marina Jimenez, “For Muslims, guilt by association,” *Globe and Mail*, September 8, 2006.

²⁴ On the importation of bias in sentencing, see Chapter 14 by Michael Nesbitt in this volume.

the company of individuals charged with terrorism offences, his level of involvement in their activities, and Ansari's state of mind at that time.²⁵

Ansari was born on March 8, 1985, in Karachi, Pakistan. Ansari's father, a finance executive, moved the family to Saudi Arabia so that he could work in its financial sector. Ansari grew up in the gated compound life that is common among middle-class and elite expat families in Saudi Arabia. As human rights reports show, though, not all from the Indian subcontinent enjoy such a lifestyle. Despite being considered the cradle of Islam and Muslim solidarity as the site of the two holy mosques, Saudi Arabia is notoriously abusive of expatriate labourers from all around the Muslim world, including Pakistanis.²⁶ Ansari spent his early childhood in this insular, gated context and began his fascination with technology and computers. As a boy of nine or ten, he learned about computers from his father's friend and was immediately hooked. Ansari was programming by the age of ten, creating simple programs using QBasic, a then-common first programming language that any young upstart in the world of computers would have known at that time. As he expanded his interest in computers, Ansari explored the then-nascent world of computer networking, going so far as to study and create experimental viruses to see how they adapt and proliferate.

When he was 12 years old, Ansari's family moved to Mississauga, "[o]ne of the fastest growing areas in Canada... and part of the Greater Toronto Area's (GTA) 905 area-code that popularly serves as a shorthand for the primary sites of immigrant settlement."²⁷ Ansari's father was still employed in Saudi Arabia, flying back and forth for work while his wife and three children planted roots in their Mississauga neighbourhood.²⁸ Formally part of the Peel Region, Mississauga's population is predominantly of immigrant background. The 2016 StatsCan Census showed that 51.5% of Peel's population is made up of immigrants. A large percentage of Peel's recent

²⁵ The author thanks Asad Ansari for agreeing to be interviewed and sharing with them his background and life history.

²⁶ "Caught in a Web': Treatment of Pakistanis in the Saudi Criminal Justice System" Human Rights Watch, Justice Project Pakistan, last modified March 2018, New York, https://www.hrw.org/sites/default/files/report_pdf/saudiarabia0318_web.pdf.

²⁷ Ihsan Ashutosh, "South Asians in Toronto: geographies of transnationalism, diaspora, and the settling of differences in the city," *South Asian Diaspora* 4, no. 1 (2012): 95-109.

²⁸ Ontario Superior Court, Trial Transcript from Asad Ansari in-ch by Mr. Norris, vol. 5, 254-55 (on file with authors) [Ansari in-ch by Mr. Norris].

immigrants – specifically 50.8% as of 2016 – are of South Asian heritage, with India and Pakistan being the top two countries from which recent immigrants hail.²⁹ On the cusp of his teenage years, Ansari found himself in a new country, new neighbourhood, and new school. As it turns out, his was not the only family to move into the neighbourhood around that time. So too did the families of Fahim Ahmad, Zachary Amara, and Saad Khalid – all of whom would find themselves on trial in 2006 as part of the Toronto 18. The four boys were part of families that immigrated to Canada and moved into the same apartment complex. The boys, all of similar ages, met at Edenwood Middle School, where they built up an almost filial relation through pick-up basketball games, shinny at the nearby hockey rink, or contests of fictive agility on video games. The boys found friendship and community together after being uprooted and displaced.

When they graduated middle school to enter high school, Ansari went to Gordon Graydon Memorial Secondary School, a specialized program that offered a superior International Business and Technology program, which appealed to Ansari's growing interest and expertise in computers. Ansari had never stopped studying computers. He became a local IT expert, helping his neighbours with their tech problems and assisting Mr. Traxler at Edenwood Middle School in the computer lab. At Gordon Graydon, Ansari was surrounded by computer aficionados, affectionately called geeks. This community and curriculum compensated for the fact that going to Gordon Graydon meant riding the bus each day away from his home, friends, and neighbourhood. But at the time, it was worth it because of the challenging program and the school's potential to help Ansari advance his growing interest and expertise in computer science.

Ansari's three friends stayed local, attending Meadowvale Secondary High School. Since Ansari still lived at home at that time, he remained connected to his long-time friends, however, travelling to a different school further away and not being in the same classes throughout the week affected his relationships with them. He would still serve as their local computer expert, assisting with basic IT support for his friends and their families. But on a day-to-day basis, he was a few steps removed from his old friends from the neighbourhood. After completing three years at Gordon Graydon, Ansari made a difficult choice and transferred to Meadowvale. The

²⁹ “2016 Census Bulletin: Immigration and Ethnic Diversity,” Peel Data Centre, last modified October 2017, <https://www.peelregion.ca/planning-maps/CensusBulletins/2016-immigration-ethnic-diversity.pdf>.

Graydon program was not what was promised. While Ansari enjoyed being surrounded by like-minded students, the school did not provide the necessary guidance or supervision to channel the talent it had among its student body. The value of the school's education no longer compensated for the arduous bus commute, which Ansari found to be increasingly intolerable. For his final year of high school at Meadowvale Secondary High School, Ansari once again found himself with his old friends from the neighbourhood.

Around this time, Ansari and his friends could not avoid the ubiquitous satellite images of the devastating 2003 U.S. "Shock and Awe" bombing campaign in Iraq. The violence in Iraq, coupled with the ambiguous (and subsequently false) grounds justifying the war itself, prompted debate among Ansari's circle of friends about America's born-again "crusade" against the Muslim world.³⁰ Despite the Chrétien government's refusal to participate in the U.S.-led war against Iraq, it participated in the conflict in Afghanistan. For many Muslims, the war on terror revealed the impoverished state of international institutions and international relations.³¹ For the broader South Asian Muslim community, which lives as a religious minority in Canada, it was hard to silence the painful echoes of Partition in 1947, as they found a shared empathy with besieged Muslims in the new War on Terror.³²

It was in this highly volatile political environment, with its heated conversations among friends and family, that Ansari applied to university as a member of Ontario's "double cohort" in 2003. This was the year Ontario changed its high school curriculum from five years to four years. The implication of this change was that in 2003, there were twice as many students graduating from high school and applying to post-secondary institutions, not all of which had the infrastructure to support the sudden

³⁰ Ewen MacAskill, "George Bush: 'God told me to end the tyranny in Iraq': President told Palestinians God also talked to him about Middle East Peace," *The Guardian*, October 7, 2005, <https://www.theguardian.com/world/2005/oct/07/iraq.usa>; Peter Ford, "Europe cringes at Bush 'crusade' against terrorists," *Christian Science Monitor*, September 19, 2001, <https://www.csmonitor.com/2001/0919/p12s2-woeu.html>.

³¹ Mahmood Mamdani, *Good Muslim, Bad Muslim: America, The Cold War and The Roots of Terror* (New York: Pantheon, 2004); Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

³² Alan Roland, "Trauma and Dissociation: 9/11 and the India-Pakistan Partition," *Contemporary Psychoanalysis* 46, no. 3 (2010): 380-94; Shazia Sadaf, "Human dignity, the 'War on Terror' and post-9/11 Pakistani fiction," *European Journal of English Studies* 22, no. 2 (2018): 115-27.

influx of students. Unsurprisingly, Ontario universities became more competitive, both in terms of admissions and the overall experience in class and on campus.³³ It was in this environment that Ansari successfully applied for the highly competitive computer science program at Waterloo University, one of Canada's pre-eminent high-tech universities. Excelling academically, however, was not enough for Ansari to attend Waterloo. As he explained to the authors, his family began to experience financial difficulties that precluded him from living away from home, in campus residence. This meant that Ansari could not attend Waterloo; he could only attend universities within commuting distance from his Mississauga home. But by the time he learned this through conversations with his parents, he had already rejected his admission to the University of Toronto's (U of T) computer science program. By sheer happenstance, he had one more application under review at U of T's Management program. He was accepted into that program, which he began the next fall.

But Ansari had no interest in management. He applied to the program as a last resort – a “safety” option – in case his applications to computer science programs did not succeed. During his first year in the management program, Ansari was depressed, disconnected, and completely uninterested in what he was learning. Before the end of his first year in the program, Ansari dropped out. Depressed and without real direction academically or professionally, he found work in tech support at D-Link Networks, a company specializing in network connectivity. While he excelled at D-Link, he bumped up against a glass ceiling since he had no formal education in computer science. After approximately one year at D-Link, Ansari quit. That was 2005. Various intercepted calls between Ansari and his friends during this time period underscore the dark, deep-rooted depression that overtook Ansari; he even confessed in one phone call that there was something wrong with him.³⁴ A year later, he would be arrested as part of the Toronto 18.

In this period of Ansari's life – miserable in a university program he did not want to be in; unhappy in a job that had no upward mobility, and thereafter unemployed and isolated with little to do but watch the world

³³ Tina Gladstone, “Double cohort graduating again,” *Toronto Star*, March 29, 2007, https://www.thestar.com/yourtoronto/education/2007/03/29/double_cohort_graduating_again.html.

³⁴ R v. N.Y., [2008] O.J. No. 3902 (Evidence, transcript of conversation between Asad Ansari and Fahim Ahmad), Terrorismcases.ca.

pass him by – the 24-hour news cycle reverberated with images of inhumanity in the Muslim world. In 2003, over 4 million Afghans were unable to reside in their homes and became refugees. All the while, Afghan poppy production was on the rise, dominating the global opium production market. In the United States, President George W. Bush unveiled a banner on the deck of the aircraft carrier *USS Abraham Lincoln* proclaiming, “Mission Accomplished” which, in retrospect, can only be seen as both hubristic and ironic. In 2004, the abuse and torture of prisoners at Abu Ghraib prison in Iraq went public, to be followed in 2005 with reports of prisoner abuse by U.S. forces in detention centres across Afghanistan. In 2006, violence raged on in Afghanistan between the Taliban and Afghan/coalition forces, leaving scores of people dead. At the end of that year, on December 30, 2006, Saddam Hussein was hung in a Baghdad execution chamber; an unauthorized video of the execution, showing Hussein surrounded by countrymen sneering at him all the while, was disseminated globally and to wide-spread consternation at the indignity of both capital punishment and how it was carried out in this instance.

In this violent global context in which Muslims were both victim and perpetrator, ideologues, and drug dealers, Ansari was alone, living at home, and unemployed.³⁵ When he visited the local mosque for prayers or community activities, global events were the topic of nearly every conversation he had. He read voraciously in this period. But as he explained, one book was particularly transformative – Amin Maalouf’s *The Crusades Through Arab Eyes*.³⁶ For much of his life, Ansari had assumed the Crusades were little more than an extremely neat and delineated clash between the Christian West and Islamic East. But after reading this book, with its careful and complex history, Ansari recognized this oppositional binary was historically false. Muslim forces fought other Muslim forces, sometimes even alongside allies drawn from Christian troops. The Crusades were messy, just like the contemporary situations in Afghanistan and Iraq. Most of all, no side had clean hands. It was during this time that Ansari decided to adopt for himself the avatar of the Good Muslim – attending his mosque, keeping a beard, nodding when people asked if he were Muslim – so that he could, in a small way, showcase to his Canadian neighbours that not all Muslims were like those extremists seen on television. Ansari adopted this outward persona to build empathy amongst

³⁵ See also Ansari in-ch by Mr. Norris, 271.

³⁶ Amin Maalouf, *The Crusades Through Arab Eyes* (London: Al-Saqi Books, 1984).

himself and non-Muslims to cultivate a more tolerant Canada. Interestingly, co-defendant Fahim Ahmad disagreed with Ansari's aim, which further isolated Ansari, pushing him further into depression and increasing pessimism.³⁷

Ansari's pessimism was neither instantaneous nor momentary. As we have illustrated, it was the product of a process of thinking, talking, reading, and ultimately failing to thrive in his professional life, despite the long and involved investment he made over the years for his future. By the time he went to the infamous Washago camping trip, which was the centrepiece of the prosecution's case, the pessimism and apathy had set in. But if he was so pessimistic, why attend a camp that was designed, as the prosecution suggests, to train terrorists? As it turns out, like many Canadians, Ansari asserted that he simply enjoyed camping and the outdoors. Ansari shared with the authors that when his parents moved the family to Canada, they never took their children camping. While in middle and high school, Ansari learned about camping adventures from his Canadian classmates. But it was not until his late teens and early 20s that he began experimenting with camping in the Canadian outdoors himself. It was precisely at this time, while trying to pull himself out of depression, that Ansari was invited by some to join the Washago camping trip. Notably, Washago was the first time Ansari was invited to go camping in the winter. Unknown to him, though, were the hidden motives of the ringleaders to transform the Washago camp into something else.

Ansari's pessimism is worth dwelling on for one more reason. It was not harmless. As Ansari explained to us in an interview, its destructive potential was directed at himself through thoughts of suicide. In his direct testimony at trial, Ansari's lawyers asked him about a set of letters found in a binder during the police search, all of which were a "farewell" to his family.³⁸ The farewell communique, whether in letter or video format, is a genre of communication associated with suicide bombers. But importantly, it also expresses the author's intent to die, to commit suicide. Studies that aspire to examine "prototypical suicide notes" often exclude farewell

³⁷ R v. Ahmad, 2009 CanLII 84777 (ON SC), Ruling No. 15, Religious and Ideological Evidence, Appeal Book, vol. 1, Tab D, 295-99 (on file with authors) [ONSC, Ruling No. 15].

³⁸ R v. Ansari, Ontario Superior Court (Transcript, Evidence of the Appellant, vol. 5) (on file with authors); Ansari in-ch by Mr. Norris, 268-71.

communiques from suicide bombers in their study.³⁹ As such, they implicitly overdetermine the terroristic intent behind this genre of farewell letters and leave little opportunity to view them as suicide letters reflecting both internal and external factors.⁴⁰ During his direct examination, Ansari described them as “drafts of suicide notes” that he wrote during “a very dark place” in his life when he felt like killing himself.⁴¹ The draft letters were not completed, and they had never been shown to anyone. As letters, they offered Ansari one option among many – a “cloud of ideas” – such as drowning himself, which he had pondered in the period prior to his arrest. Not surprisingly, given the extant field of suicidology and its exclusion of farewell letters like this, the prosecution overdetermined these farewell letters as facially clear and convincing evidence of terrorist intent.⁴² Through these farewell letters, Ansari, the depressive pessimist, became an avatar of the Muslim extremist for the prosecution.

III. EVIDENCE AND AVATARS

Ansari’s lawyers⁴³ filed a motion to exclude evidence obtained in searches conducted at Ansari’s home. The motion to exclude is a procedural device by which lawyers for the accused claim that certain prosecutorial evidence, if introduced into trial, may unduly prejudice the jury against the accused in disproportion to the probative quality of the evidence. A well-recognized principle of evidence law, the balance, in this case, was fundamentally affected by the religious or political motive requirement of the terrorism offence. As Kent Roach has convincingly argued, and which *R v. Asad Ansari* incontrovertibly shows, “[t]he requirement for proof of political or religious motive will make the politics

³⁹ See, for instance, Betty Samraj and Jean Mark Gawron, “The Suicide Note as a Genre: Implications for Genre Theory,” *Journal of English for Academic Purposes* 19 (2015): 88–101, which explicitly excludes farewell communiques; Antoon A. Leenaars and Susanne Wenckstern, “Altruistic Suicides: Are they the Same or Different from Other Suicides?” *Archives of Suicide Research* 8 (2004): 131–36, which notes the absence of meaningful studies on farewell letters in the study of suicide more broadly.

⁴⁰ Shuki J. Cohen, “Mapping the Minds of Suicide Bombers using Linguistic Methods: The Corpus of Palestinian Suicide Bombers’ Farewell Letters (CoPSBFL),” *Studies in Conflict and Terrorism* 39, no. 7/8 (2016): 749–80.

⁴¹ Ansari in-ch by Mr. Norris, 269.

⁴² Ansari in-ch by Mr. Norris, 270–71.

⁴³ Representing Ansari were lawyers Breese Davies, now a judge on the Ontario Superior Court, and John Norris, now a Federal Court judge.

and religion of suspects a fundamental issue in terrorism trials... Terrorism trials in Canada will be political and religious trials.”⁴⁴ In the Ansari litigation, the defence argued that certain evidence obtained from a search of Ansari’s bedroom ought not to be used in litigation because its prejudicial effect outweighed its probative value.

The Court made a set of decisions excluding evidence obtained from Ansari’s home. The decisions reflected concerns that such evidence might be so provocative as to prejudice a jury against Ansari. As Justice Dawson remarked, the evidence fell into one of six categories:

- Evidence related to the bomb plot and the manufacture of explosives (excluded)
- Computers and related items, including audio, video, and data storage devices (admissible)
- Mobile communications (admissible)
- Training-camp related material (admissible)
- Travel documents (excluded)
- Documents related to maps, firearms, Jihadist training, and media related to Jihad (admissible)⁴⁵

In both Motions 15 and 18, Justice Dawson excluded from trial evidence related to bomb-making and travel-related documents. Additionally, some evidence was modified so that certain prejudicial aspects were blocked out in order to make the evidence admissible and not so prejudicial. In other cases, they were fully excluded, as in the case of the “High School Essay”, an essay that Ansari wrote 2.5 years prior to his arrest, and which Ansari’s former teacher shared with the police upon learning of Ansari’s arrest.⁴⁶ In the letter, Ansari referred to Osama bin Laden. When he initially excluded the letter from evidence, Justice Dawson wrote, “[t]here is the potential for considerable moral prejudice that cannot be easily cured with a limiting instruction... On balance, I conclude the danger the jury will misuse this evidence outweighs any probative value it has. The

⁴⁴ Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens University Press, 2003), 27.

⁴⁵ ONSC, Ruling No. 15.

⁴⁶ R v. Ahmad, 2009 CanLII 84780 (ON SC), Ruling No. 18, Admissibility of the High School Essay and the “Departure Letters” (on file with authors) [ONSC, Ruling No. 18].

essay is inadmissible.”⁴⁷ Later, when the prosecution moved to reintroduce the letter, Dawson J maintained its exclusion out of concern that it might be “misconstrued or taken out of context.”⁴⁸

While the high school essay was excluded, the farewell letters were admitted. The letters’ central theme was that:

[T]he author cares very deeply for his family, but that he is leaving them to fight for the sake of Allah, and that whether he lives or dies while doing so is up to Allah. No foreign destination is mentioned. There is no indication the author will be leaving Canada to pursue the fight he is to engage in. The context of the letters supports the conclusion that the word fight means violence, and that the word is not being used metaphorically.⁴⁹

Though the letters were not dated, they were in a notebook by Ansari’s bedside table. Justice Dawson held that one could infer, based on all the evidence in the record, that these letters “were drafted in temporal proximity to the events that will be revealed by the other evidence in the case.”⁵⁰

A. Inexpertise and the Making of a Muslim Extremist Avatar

The legal drama around the excluded evidence climaxed with Ansari’s direct testimony. Lawyer John Norris (as he then was) questioned Ansari on direct examination. On the farewell letters, the direct examination proceeded as follows:

Q. [Norris] Can you tell us what those writings are?

A. [Ansari] Pretty much they’re drafts of suicide notes. That’s what they are. They’re drafts. They’re – I attempted to write them and then they’re – they’re abandoned..

Q. First of all, why did you write these draft suicide notes?

A. Like I said, I feel very strongly about education and I feel very strongly about doing something with my life, and I was at a point in my life where I was literally doing nothing. And I haven’t read these before because it takes me back to a very dark place in – in my life, and I really felt like killing myself at that time.

Q. How long did you have those feelings?

A. I can’t tell you.

⁴⁷ ONSC, Ruling No. 18, 5.

⁴⁸ R v. Ansari, Ontario Superior Court (Application to Re-Open Political and Ideological Evidence Motions), 50 (on file with authors).

⁴⁹ ONSC, Ruling No. 18, 6.

⁵⁰ ONSC, Ruling No. 18, 7.

Q. Now, obviously you didn't kill yourself. How did you overcome those feelings?

A. Sheer will, I guess, will power.

Q. Did you ever show those letters to anyone?

A. No, I didn't.

Q. In the letters there are references to dying for the sake of Allah. What did you mean by that?

A. I had many ideas at the time about what I was going to do with myself. Suicide in Islam is actually considered – it's impermissible... So I – I mean I had – it was like a cloud and I had various ideas about what I was going to do. I was going to drown myself in a lake.

Q. So what would the letters have – if that was in your mind when you wrote these letters, how would the letters be connected to that?

A. They wouldn't. It would leave an impression of me going off and fighting for the sake of Allah, and I guess that's sort of a misunderstood concept. That doesn't mean terrorism. I – I recall that around that time Iraq had been invaded, and like a lot of Muslims I had a very strong opinion on that and I'd given thought to maybe doing something with my life, going and fighting with the Iraqi insurgency. I very quickly abandoned that idea because it wasn't an organized insurgency. It was basically bloodshed and people were just terrorizing other people, and there was a lot of violence, like Sunni Shiite violence. So I quickly abandoned the idea. So that could've been one of my thoughts that I transferred onto this.

Q. Do you recall having ideas like that at that time?

A. Yes, I did. Just like I had ideas about drowning myself, hanging myself. It was a lot of – a cloud of ideas. I – I hadn't settled on anything.

Q. Did the –the writings–the writing of those letters and the sorts of thoughts that you were having at the time about ways in which you might die–or kill yourself, did any of that have anything to do with acts of terrorism?

A. No, they did not. They had nothing to do with acts of terrorism.⁵¹

In this exchange, Ansari and his lawyer Norris offer an account of the farewell letters that center on his suicidal thoughts and various ways of taking his own life. He knew that suicide is prohibited in Islam; if his family knew that he took his own life contrary to Islamic principles, they may have been forever tormented. Being deeply connected with the Muslim community as well, his family would be prohibited from giving their son an Islamic funeral if suicide was found to be the cause of death. The farewell letters were not meant to explain any extremist Jihadi impulse but rather to cover up his anticipated suicide to give his family a sense of closure after his

⁵¹ Ansari in-ch by Mr. Norris, 269-70.

passing. Projecting Ansari as the good Muslim avatar, the letters assured his readers (in this case his mother, father, and sister) that were he deemed missing, they should not worry for his body or soul. Rather than constituting his terrorist intent in the real world of legal prosecution, the farewell letters reflect Ansari's avatar of himself; a fictional image of himself that others might see as noble, even if misguided. The depressed Ansari drafted these letters to create an avatar that his family could latch onto as a final memory of a son who had gone missing. The prosecution, unsurprisingly, rejected this reading of the farewell letters. Instead, the prosecution insisted these letters represented Ansari's state of mind, or in other words, the avatar of the Muslim extremist. Ironically, both defence and prosecution construed the letters as gesturing to an avatar. But in no case did either avatar actually reflect Ansari's mindset.

Of course, Ansari never committed suicide. He never went missing. Neither his suicidal self nor his avatar came to fruition. Instead, he went on living and interacting with his childhood friends. He even went camping with them. But the prosecution, with the aid of the government's confidential informant (CI), Mubin Shaikh, argued that this was no mere camping trip. The campground, Shaikh and the prosecution argued, was a terrorist training camp – and thus fed the prosecution's construction of Ansari as a Muslim extremist avatar. Ansari's attendance at one particular camp – the Washago camp – became a focal point in the litigation, as it was not entirely clear who was directing the alleged training – the alleged terrorist conspirators or the government's confident informant, Mubin Shaikh. Whether something was a “hike” or a “march,” a military training exercise or just a fun activity – it all depended on who did the characterizing.

B. Contesting Avatars: The Paid ‘Native’ Informant

In this context, the testimony of Mubin Shaikh is of particular interest. Shaikh has become a well-known figure in anti-terrorism circles since his work on the Toronto 18 case. A child of parents from India, Shaikh attended an austere Qur'an school when he was young. In high school, he joined the Royal Canadian Army Cadets, attaining the rank of Cadet Warrant Officer. He explains that a house party he threw got him into serious trouble with his family, after which he turned to religion to reorient himself in relation to his society and family. It was in that context that he joined the Tablighi Jama'at, a religious missionary movement, while living

in India and Pakistan. While in Quetta, Pakistan, he came across the Taliban and was “bit by the [J]ihadi bug.” After fathering a child, he began to question his Jihadist views and turned his life in a new direction.⁵²

In this post-Taliban period, we find Shaikh working as a CI for Canada’s security agencies. And for all intents and purposes, Shaikh became for the Court the paid, government CI who leveraged his own identity as “bad Muslim turned good” to create an avatar of both expertise and loyalty to the state.⁵³ On direct examination, Shaikh was asked why he told Zakariya Amara and Fahim Ahmad, during an initial conversation, where he had travelled: “I wanted to show that I’ve been around. I’ve travelled to places where – I mean, basically, if you want to – if you want to be somebody in terms of learning the religion, we’ll say, the Middle East, travel to the Middle East is an important factor in that regard.”⁵⁴ Shaikh invokes in this passage the virtue of *rihla* or travels as constitutive of his standing as a person of knowledge. The *rihla* has a long history in the Islamic intellectual tradition. The *rihla* was made famous by Ibn Battuta, but it had long been characterized as a precious credential of the Muslim scholar.⁵⁵ Consequently, while Shaikh used his travels to manipulate the suspects to trust him as a religious scholar, he seems to have done the same to the Court.

The Court looked to Shaikh for his insight on the Toronto 18, and by implication, the religion of Islam. Shaikh was allowed to explain and expound upon Islamic legal doctrine as an expert, despite being on the stand in the capacity of a paid government CI. In other words, Shaikh did not testify in his capacity as an expert on Islam, or Jihad, the Taliban, or the geopolitics of Islamist extremist groups. Rather, he was always treated as the government’s CI. But when he testified, he could not help but speak (and be treated) as an expert on the religious and political contexts that the

⁵² Julia Schaumer, “The Road to Radicalization: An Interview with Former Undercover Operative Mubin Shaikh,” NATO Association of Canada, September 28, 2018, <http://natoassociation.ca/the-road-to-radicalization-interview-with-former-undercover-operative-mubin-shaikh/>.

⁵³ Sunaina Maira, “‘Good’ and ‘Bad’ Muslim Citizens: Feminists, Terrorists, and U.S. Orientalisms,” *Feminist Studies* 35, no. 3 (2009): 631–46.

⁵⁴ Ontario Superior Court, Trial Transcript from R v. Ahmed in-ch by Mr. Neander, 33 (on file with authors) [Ahmed in-ch by Mr. Neander].

⁵⁵ Kenneth Garden, “The *rihla* and Self-Reinvention of Abu Bakr Ibn al-‘Arabi,” *Journal of the American Oriental Society* 135, no. 1 (2015): 1–17; Zareena Grewal, *Islam is a Foreign Country: American Muslims and the Global Crisis of Authority* (New York: New York University Press, 2013).

prosecution needed to show informed Ansari's alleged motives. In Shaikh's testimony, government prosecutor Neander continued asking about his conversations with Amara and Ahmed, specifically their discussion of Jihad:

Q. [Neander]: Okay, tell us about the questioning?

A. [Shaikh]: He asked me a question, "Is Jihad fard ayn or fard kifayah?"

Q. Okay, maybe you can...

A. Fard is F-A-R-D –F-A-R-D A-Y-N. And I guess you could be fard kifayah, F-A-R-D K-I-F-A-Y-A-H. Basically means an individual obligation versus a communal obligation. So, I mean, like prayer is an individual obligation whereas funeral prayers, for example, if some members of the community perform it the rest are absolved of its obligation. So he asked me, "Is [J]ihad fard ayn or is it fard kifayah?" meaning I took that to mean do you yourself believe and practice [J]ihad or do you yourself believe other people should do it?⁵⁶

This particular exchange concerns a long-standing historical issue in Islamic legal thought about the nature of obligation and the circumstances under which the status of an obligation changes. Shaikh represents the historical tradition as if an expert on the matter, despite not accounting for the historical nuances of the legal tradition.⁵⁷ This was not the only time Shaikh was invited on direct examination to explain and expound on historical issues from the Islamic tradition, as if an expert.

At no time was Shaikh a properly qualified expert bound by duties of impartiality. Up until the time of the trial, he was always a paid government operative. Nevertheless, he claimed religious authority and expertise about himself, going so far as casting his compensation from the government in religious terms. Though in this very instance, he revealed his expertise as little more than popular, rather than profound. On cross-examination, defence counsel asked Shaikh about how he negotiated his compensation from the government:

Q. [Edney] Now, I understand that the RCMP initially offered you the sum of \$70,000 for your services. Do you recall that?

A. [Shaikh] I met with a member of Source Witness Protection to begin negotiations for a reward amount. He began with 70,000 and my response was, well, since I'm doing it for religious purposes seven is viewed as a religious number

⁵⁶ Ahmed in-ch by Mr. Neander, 34-35.

⁵⁷ Rudolph Peters, *Jihad: A History in Documents* (Princeton: Markus Weiner Publishers, 2015); Khaled Abou El Fadl, "Islamic Law, Jihad and Violence," *UCLA Journal of Islamic and Near Eastern Law* 16, no. 1 (2017): 1-28.

and so I said 77,000. And he did ask me if there was an amount lower than that which reflected religious views and because there was none I stuck with 77.

Q. Did you say to him that you believed the number seven is believed to be important in the Islamic world?

A. Yes.

Q. And then you therefore requested an increase to 77,000?

A. Yes, 70 is 7-0 and so 77.

Q. So it's against the Islamic faith to accept \$70,000?

A. No, it's not that it's against the Islamic faith, it's just – you know, I wanted to maintain that religious flavour.

Q. Weren't you just manipulating the teachings of Islam to get an increase to \$77,000?

A. No, because if – I could have done a much better job than 77 that's for sure.⁵⁸

As it turned out, Shaikh did a much better job by the time his work was done. After the arrests, Shaikh asked that his payout be topped up to \$300,000, “which the RCMP agreed to because there were concerns that he would not testify at a pre-trial hearing.”⁵⁹ By 2008, he began requesting a higher payout, totalling up to \$2.7 million.

His curious reference to the number seven, though, ought to have raised judicial concerns about the quality of his “expertise” on issues related to Islam and Jihad, to which he testified as if an expert. Across many traditions, the number seven has significance. Christians and Jews might find inspiration for the number seven from Genesis 2:1-3, which states that God spent six days creating the world, and on the seventh day rested. Likewise, the Ten Commandments explain that six days shall be spent in labour, and the seventh will be the Shabbat. For Jews, one sits *shiva* for seven days when mourning. Certainly, the Islamic tradition is not without some recognition of the number seven: there are seven verses in the first chapter of the Qur'an; during the annual pilgrimage to Mecca, Muslims circumambulate the Ka'ba seven times. Whether one indulges such numerology or not, Shaikh seemed quite capable of ignoring any religious flavour when he got his \$300,000 compensation package.

⁵⁸ Ontario Superior Court, Trial Transcript from Shaikh cr-ex by Mr. Edney, 115 (on file with authors).

⁵⁹ Isabel Teotonio, “Toronto 18 informant motivated by money,” *Toronto Star*, April 22, 2010.

This financial peculiarity was not taken to undermine the quality or veracity of his testimony. Nor did his addiction to cocaine. As reported, Shaikh admitted during cross-examination that during his work as a CI, he began doing “a couple of lines” as of May 2006, and later became addicted to the point of requiring a fix nearly every 20 minutes; as Shaikh testified, “[i]t was out of control.”⁶⁰ In cross-examination, Edney raised concerns that the addiction ought to undercut the reliability of his testimony: “By December of 2006... you were now an addict and a father of five children, and someone whose evidence we’re relying upon in the course of this trial, yes?”⁶¹

Shaikh could not deny his usage, but he maintained his competency as a witness. His drug use only began toward the very end of the investigation, mere days before the arrest of the suspects. His usage spiked thereafter with the intense scrutiny and public attention he received.

Shaikh’s financial interests in the investigation, as well as his drug use, apparently did not damage his character or his version of events. On the contrary, his testimony, even on mundane aspects, seemed to control the tenor and tone of all that came after. We can observe the shadow of Shaikh in the way Ansari answered questions about the Washago camp. In his direct testimony, Ansari described aspects of the camp as follows:

A. ...And I don’t know who built it [the obstacle course]. All I know is that someone came up with—someone came up with the idea, that, hey, do you want to go run the obstacle course? And we’re like, “what obstacle course?” And then we ran it and Qayyum Jamal and I got sort of lost because there was a clearly defined trail at the beginning but then sort of got murky at the end. And then Mr. [Mubin] Shaikh came back for us, to lead us to the camp site.

Q. While you were running the course did anybody shoot anything at you?

A. Yes, Mr. Shaikh was shooting paintballs at our head. And we actually told him not to because we didn’t have our paintball markers on?

Q. Sorry, paintball?

A. Sorry, paintball masks on. And when they get frozen, the paintballs, they could be pretty dangerous if you’re not wearing your proper gear.

Q. Were you able to complete the obstacle course?

A. No, we weren’t. Well, at least I and Qayyum Jamal were not able to complete.

⁶⁰ Allison Jones, “Accused’s lawyer focuses on key witness’ drug abuse,” *Waterloo Region Record*, April 23, 2010.

⁶¹ Jones, “key witness’ drug abuse.”

Q. Did you try to run it some other time or...

A. No.

Q. Or any other time?

A. No, I did not.

Q. On the video we've seen an incident where a number of people rise up at the top of a hill, and someone seems to be carrying a banner. Were you present when that incident occurred?

A. No, I was not.

Q. Do you remember seeing a banner at the camp?

A. Yes, I do.

Q. Can you describe that for us?

A. Well, it was a black banner like we saw in the video with the Islamic creed on it.

Q. What is the Islamic creed? Do you know?

A. The Islamic creed roughly translates to, "There is no God [sic] but God, and Mohammad is his last messenger." And I saw the flag at the camp.

Q. The — do you recall what colour the flag was?

A. It was a black flag. I think it had a white frill around it but I can't be sure.

Q. Did that colour have any significance in your mind?

A. Yes, it did, the color of the cube at the Kabba [sic] in Mecca.⁶² The stone you could call it. The cube that Muslims circumambulate around is sheathed in a black cloth. So black is one of those colours that has a prominent place in Islam.

Q. Mr. Shaikh has suggested that the black banner or flag had jihadist connotations in his mind. Did it have any such meaning for you?

A. No, it did not.

Q. Did you know who the flag or banner belonged to?

A. I had no idea.

Q. Mr. Shaikh has described certain marches occurring at the camp. Do you recall whether you ever went on a march?

A. Yes, I did. I guess I want to qualify that I like to call them hikes. We — I went on a hike.

⁶² The reference here is to the Ka'ba in Mecca, Saudi Arabia. In the Islamic creed, the Ka'ba is considered the "House of God." Muslims around the world perform their daily prayers by facing in the direction of the Ka'ba. The annual pilgrimage (*hajj*) that Muslims make is to the Ka'ba.

Q. Can you describe that for us?

A. It's pretty much to kill time, to have something to do. We would go on hikes, explore the area. It's actually quite pleasant, quite beautiful there...

Q. Mr. Shaikh describes marching drills and training of that nature. Did you ever see that take place there?

A. A marching drill, no, but we would hike in formation because not everyone knew the trail and there was no way, like if I gotten lost I'd have no way to get back to the camp site where I had shelter and food and fire...So a couple of people knew the trails, so we would march in formation so that we wouldn't – or hike in formation so that we wouldn't get lost. And that was it.

Q. Okay. Was there someone who appeared to be in charge of the camp?

A. There was a distinction that I drew in my mind and that was between the people who knew what they were doing in terms of winter camping and the people who did not. So for example, I would defer to Mr. Shaikh or Mr. Ahmed, or even Mr. Amara when it comes, to you know, certain tasks.⁶³

In his direct testimony, Ansari characterized the farewell letters as suicide notes and described the Washago campground as a chance to enjoy the outdoors. He talked about hikes whereas Shaikh described marches. Ansari understood the black banner in pietistic terms that invoked the annual pilgrimage to Mecca, Saudi Arabia, which Muslims undertake each year, and with which he would have been intimately familiar given his time living in Saudi Arabia. But with Shaikh's testimony helping to frame the litigation, the prosecution considered themselves well suited to go after Ansari's character.

C. Questioning Avatars: Inexpertise and Leading Questions

The prosecution chose to define the black banner, used by al-Qaeda, as a singularly distinct sign of radicalism, and were especially preoccupied with emphasizing this radical image for the jurors. The Islamic State of Iraq and Syria (ISIS) is infamously associated with such a black banner, though ISIS came along well after the Toronto 18 trial. Importantly, neither the defence nor prosecution seemed to realize that the black flag has a much longer history associated with the early years of Islam. Historical sources indicate that when the Prophet Muhammad would lead a caravan or military contingent, his banner was black. Moreover, messianic traditions from the Prophet suggest that as his people suffered, salvation would come from the East by those carrying a black banner. Indeed, such traditions created the

⁶³ Ansari in-ch by Mr. Norris, 327-29.

spiritual and messianic backdrop to the Abbasid revolution in the 8th century, which overthrew the Umayyad dynasty. Assuming the mantle of the caliphate, the Abbasids adopted the black banner to symbolize their regime.⁶⁴ Today, various sects of Islam have their own variation of the Islamic black flag to evoke its spiritual, nonviolent, historical meaning. For example, the Ahmadiyya Muslim community in Canada, an Islamic denomination that has its roots in South Asia, proudly displays its black flag adjacent to Canada's at its annual convention. No complaint is made of it, which is underscored by the notable attendees, including conservative and liberal Prime Ministers of Canada hosted over the years.

With no avowed historical expertise, and armed with the avatar of the Muslim extremist, the prosecutor cross-examined Ansari on his perceptions, feelings, and claims about the black flag, the Washago camp, and his farewell letters. For instance, the prosecution began the line of inquiry by first playing before the jury a video entitled "Return of the Crusaders". The video is propaganda that excoriates the U.S. and U.K. as little more than modern-day crusaders against the Muslim world, in light of the 2003 invasion of Iraq. Throughout the video, passages of the Qur'an are put on the screen, as images of injured Iraqi men, women, and children flash by. According to the prosecution, the video's principal purpose is "unmistakable" to show that Muslims are being persecuted worldwide and that those watching the video must fight to save them from their oppressors.⁶⁵ The Qur'anic passages offer an interpretive lens to criticize Western aggression and advocate for Jihad. The video itself is publicly available.⁶⁶ But the jury and Court do not see all of this video in one sitting. Rather, the prosecutor purposefully structures and stages how the video is displayed. The first 11 seconds start with the *basmala* in Arabic and then depict – against a black background – the Islamic creed or declaration of faith (i.e., *shahada*). In the cross-examination, Mr. Wakely, the prosecutor, paused the video, after which the following exchange occurred:

⁶⁴ Khalil 'Athamina, "The Black Banners and the Socio-Political Significance of Flags and Slogans in Medieval Islam," *Arabica* 36, no. 3 (1989): 307–26. For a more journalistic account, see William McCants, "How ISIS Got Its Flag: The centuries-old apocalyptic prophecies behind a new symbol of global jihad," *The Atlantic*, September 22, 2015, <https://www.theatlantic.com>.

⁶⁵ Ontario Superior Court, Trial Transcript from Asad Ansari cr-ex by Mr. Wakely, 8 (on file with authors) [Ansari cr-ex by Mr. Wakely].

⁶⁶ *Return of the Crusaders*, video, accessed August 20, 2019, <https://archive.org/details/returnofthecrusaders>.

MR. WAKELY: For the record we paused the video at eleven seconds.

MR. WAKELY: Q. Mr. Ansari, do you recognize the white Arabic script that's displayed on that video?

A. I believe that's the Islamic creed.

Q. That's the Islamic creed. Does it appear to be similar to the Islamic creed that was depicted on the black flag that was at the Washago camp?

A. That's correct, straight out of the Koran.⁶⁷

By recasting the Washago camp flag by reference to the same Arabic phrase depicted in a Jihad video, the prosecution framed the cross-examination using the avatar of the Muslim extremist. That avatar – however unrelated to anything Ansari did, wrote, or produced – allowed the prosecutor to challenge Ansari's claim in the above-quoted testimony that the black flag reminded him of the Ka'ba. With Shaikh's testimony in the background, but without any historical expertise and only a presentist appreciation of social media and online propaganda, the prosecution presumed the black flag at the Washago camp was a statement of solidarity with extremist groups.

The exchange over the black flag is only one example of how inexpertise informed the prosecution's Muslim extremist avatar, which in turn structured the finding of facts in this case. On various occasions, Ansari played the role of both defendant and expert on modern Islamic politics, often trying to explain to the prosecution (and the jury) what "Muslims" think, and the different strains of Jihadist ideology. The fact that Ansari had to do this suggests that the defendant, in this case, was not Ansari the individual but rather Islam and its adherents. For instance, when confronted with the Jihad videos in his archive, Ansari had to both (a) explain the different strains of Jihadi ideology around the world; and (b) expressly reject their message as delusional in the context of his prosecution:

Global Jihadists believe that this whole entire world is for God and for Islam. That's a delusional idea. It's retarded because it would not allow – it would mean a constant state of war all the time. And then there are the defensive Jihadist who would say, you know, if I'm attacked then I have a right to defend myself.⁶⁸

The prosecutor, who was not an expert in religion or politics, used the conclusory nature of leading questions in cross-examinations to posit

⁶⁷ Ansari cr-ex by Mr. Wakely, 5–6.

⁶⁸ Ansari cr-ex by Mr. Wakely, 12.

(implicitly at least) his faux expertise on the matters being litigated. Because lawyers are allowed to use leading questions in cross-examinations, the prosecutor could – before a jury of lay, non-expert members of the public – hint at, gesture to, or otherwise impute intention, motive, and purpose through conclusory characterizations of the evidence and what it implied about Ansari. The prosecution’s leading questions effectively litigated what Islam is and is not, all in the service of the purpose/objective requirement of subsection 83.01(1) of the *Criminal Code*. For instance, prosecutor Wakely asked Ansari about why he labelled the DVDs with Jihadist videos “Islamic videos.” The use of leading questions allowed Wakely to assume, as true, Ansari’s identity as a Muslim extremist avatar:

I’m going to suggest to you that you labelled them Islamic videos because the videos that are contained on this disk... they represent the version of – they represented your religious and political beliefs as of late 2005... [T]he videos represented your concept of true Islam?⁶⁹

This leading question conflates Orientalist ideals of Muslims as little more than what their texts (or in this case digital texts and videos) state. This is hardly a surprising prosecutorial strategy; the legislation makes it inevitable that possession, labelling, and viewing of such material becomes evidence of what a viewer necessarily believes as a matter of ideology. The prosecutor’s presumption that a Muslim defendant could have a singular, definitive idea of religion ignores the myriad ways people make religious meaning for themselves.⁷⁰ Moreover, it collapses the idea of Jihad and the performance of extremist violence in the body of a racialized Muslim man, a trope long manufactured by prejudice that links violence with racialized men.⁷¹

All Ansari could do was simply suggest that there is no single ‘true’ Islam: “There’s a broad spectrum of religious and political beliefs in those videos. So I can articulate my religious and political beliefs if you want but I can’t say that those are – those videos are my religious and political

⁶⁹ See fn 17. Indeed, throughout the cross-examination, Wakely kept prodding Ansari on the distinction between global Jihad and defensive Jihad, without any foundation made about their expertise in the field of Islamic studies or of Jihad, in particular.

⁷⁰ See, for instance, William Montgomery Watt, *The Formative Period of Islamic Thought* (Oxford: Oneworld Publications, 1998).

⁷¹ Calvin John Smiley and David Fakunle, “From ‘brute’ to ‘thug’: The demonization and criminalization of unarmed Black male victims in America,” *Journal of Human Behavior in the Social Environment* 26, no. 3/4 (2016): 350–66.

beliefs.”⁷² But even if Ansari did articulate his beliefs, the law’s systemic bias, which cornered Ansari into its systemically preferred avatar, could make no room for such explanation. When Ansari insisted that he was telling the truth, Wakely exceeded his role as prosecutor by retorting, “I certainly don’t accept that but we’ll return to that later.” The Court had to remind Wakely that he was a prosecutor, not the jury. As Dawson J stated, “[t]he question’s what the jury accepts.”⁷³

Exchanges like this between Ansari and the prosecution helped set the stage for the prosecution’s motion to introduce the evidence that had previously been excluded. Early in his cross-examination of Ansari, when the prosecution addressed the DVDs labelled as “Islamic videos,” Ansari was quick to reject any connection between the videos and his religious and political beliefs. Pointing out the flimsy evidentiary basis to prove religious or political purpose, Ansari retorted: “had I labelled them terrorist videos you would come to me today and say, well, look they’re labelled terrorist videos, you must think that.” Missing the irony in Ansari’s critique, Wakely curtly responded: “Well, you wouldn’t have done that, right, because that would be incriminating? You’ve taken numerous steps throughout this investigation to avoid incriminating yourself?”⁷⁴ Wakely’s claim makes sense only as part of a litigation strategy by which the government constructs Ansari in the garb of the dangerous and untrustworthy Muslim extremist avatar.

D. Judicially Enabling the Extremist Muslim Avatar

Ultimately, the prosecution’s strategy worked. Early in the government’s cross-examination of Ansari, the prosecution asked the judge to reconsider his earlier exclusion of evidence. Justice Dawson ultimately ruled in favour of the prosecution. A close examination of the Court’s reasoning illuminates the racial and religious biases that constructed Ansari – in the absence of expert testimony – as a Muslim extremist avatar.

Justice Dawson began by recognizing that where an accused testifies, certain evidence that was not admissible for the prosecution may become admissible to challenge the accused’s veracity – for example, where character is put at issue by the accused. The prosecution argued that the excluded evidence became necessary – and was now admissible – to prove

⁷² Ansari cr-ex by Mr. Wakely, 17–18.

⁷³ Ansari cr-ex by Mr. Wakely, 19.

⁷⁴ Ansari cr-ex by Mr. Wakely, 18.

the falsity of Ansari's claims and to call into question Ansari's character, which the government alleged Ansari put at issue during his direct testimony. Whether Ansari testified as to his character became a finer legal point disputed by legal counsel on all sides.

This prosecutorial strategy required the judge to determine whether and to what extent the excluded evidence was now admissible and whether the jury ought to review it, despite its potential prejudice. Justice Dawson's unsolicited remarks about "the flavour and atmosphere of the trial" speak to the systemic bias and inexpertise that operated throughout the trial. It is worth quoting him at length:

In his evidence in-chief, Mr. Ansari has presented himself as a Muslim youth with political, religious, and ideological views that the jury will likely conclude, based on Mr. Ansari's evidence and the effects of 911 [sic] on Muslim youth and common sense, are well within the normal range within the Muslim community. The jury is relatively youthful and very multi-cultural. Mr. Ansari has been able to convey that impression so far by virtue of my previous protective rulings. I must say that overall, armed with the knowledge that I have about the nature and quantity of material related to religious extremism and violent Jihad that was found on Mr. Ansari's computer drives and storage media, I fear that the jury is being deprived of information they need to properly assess Mr. Ansari and the rest of the evidence... Here my previous rulings have had the effect of limiting the context that is available to the jury.⁷⁵

Fundamentally the judge, who was not the finder of fact or a qualified expert on religion and politics, had to assess the probative quality of excluded evidence because of the structural demands of the criminal law itself. But the above passage also reveals that, like the prosecution, Justice Dawson harboured a shared view that collapsed (digital) texts with the mind and body of Ansari. The Court was sufficiently inclined to suspect Ansari's testimony about himself given the library of materials he had in his possession and which were excluded from the jury as fact finder. However modern, enlightened and reasoned the Canadian legal system aspires to be, the judge's decision to admit once excluded evidence ultimately harkened back to medieval forms of inquisition, where a person's books "were taken to reveal his true religious attitudes."⁷⁶ Moreover, that evidentiary archive

⁷⁵ R v. Ansari, Ontario Superior Court (Ruling on Admissibility of Excluded Evidence, 272-74 [emphasis added] (on file with authors).

⁷⁶ See Beatrice Gruendler, *The Rise of the Arabic Book* (Cambridge, MA: Harvard University Press, 2020), who illustrates the role of book collections in trials of religious heresy in medieval Islamic history. For similar examples in late medieval and early modern Europe, see the celebrated study by Carlo Ginzburg, *The Cheese and the Worms*:

is always and at all times framed by the avatar of the Muslim extremist. This is particularly clear in Justice Dawson's assessment of Ansari's testimony about the farewell letters. Justice Dawson wrote:

Mr. Ansari explained in some detail why he was despondent. Suicide is impermissible in Islam and Mr. Ansari testified that he drafted the departure letters as a means of covering up his contemplated suicide to his family. He added at another point in his testimony that dying for Allah did not necessarily refer to terrorism. This is one of a number of comments that made their way into Mr. Ansari's evidence at various points that subtly contribute to my concerns about a misleading impression.⁷⁷

Justice Dawson refused to view the farewell letters within the genre of suicide notes, which explains his doubts about Ansari's veracity. He only viewed those letters through the analytic lens of political and religious violence (e.g., the Muslim extremist avatar), rather than the psychology of depression and suicide (e.g., the pessimistic good Muslim avatar). Ansari's testimony about the letters could not defeat the framing presumption around those letters, despite the fact that such framing presumptions only make sense in light of a particular approach to psychology, depression, and the study of suicide. Without qualified expertise to frame these letters viz. religious studies, political science, and psychology, and the systemic requirement that the law interrogate religion to determine an individual's associated ideology, judges and juries in cases like this are required to make findings on material on which they are unlikely to be experts and are not, through the trial process, properly brought up to speed.

Even the jury poses a problem of inexpertise precisely because the Court relied on them to evaluate potentially prejudicial evidence without examining it with the relevant expertise. Ansari's trial occurred in a Brampton, Ontario, courtroom. There are limited records of jury identity in Canadian court proceedings. However, the demography of Brampton gives important context to Justice Dawson's remark about the jury and its likely composition as "relatively youthful and very multicultural." According to 2016 StatsCan census data, Brampton had at that time a population of approximately 593,638. Like Ansari's Mississauga hometown, Brampton had become a haven for recently arrived Canadians. Since 2006, immigrants made up nearly 50% of Brampton's population, as

The Cosmos of a Sixteenth-Century Miller (Baltimore: Johns Hopkins University Press, 2013).

compared to under 30% for all of Ontario and 20% nationwide. Over half of Brampton's immigrant population in 2016 hailed from Asia, with India and Pakistan being the top two countries of origin. Punjabi, Urdu, and Gujarati are the top three unofficial languages spoken by Brampton's immigrant population. This demographic data is significant. To the extent the Ansari jury was drawn from those living within a reasonable commuting distance of the Brampton courthouse, the jury members may have hailed from parts of the world that overlap with Ansari's former homes in Pakistan and Saudi Arabia, peremptory challenges notwithstanding. In a courtroom where the government's lawyers were mostly White, where the defence lawyers were White, where the judge was White, the only racialized individuals in the Court were Ansari, and those jurors on the Brampton jury who had a high likelihood of being South Asian, and possibly Muslim.

Given a presumption of a shared experiential background between the jury and the defendant, it is reasonable for the Court, in the person of Justice Dawson, to recognize that this multicultural jury might find Ansari's testimony completely consistent with what prevailed in the Muslim community. But if that were so, then the pessimistic good Muslim avatar would prevail, thereby enabling the jury to acquit Ansari. Facing the motion by the government prosecutors seeking to introduce excluded evidence, Justice Dawson remained concerned that Ansari misled the jury.

The Court's concern about the jury certainly invokes a long-standing theme in legal theory and history. Justice Dawson's concern about the jury being misled, his "fear that the jury is being deprived of information" reflects a debate in legal academia and practice about the competency of juries, and more recent debate on diverse representation on juries. Writing in 1970, Howard S. Erlanger described the issue as "whether uninitiated laymen are even able to comprehend the evidence and the instructions...."⁷⁸

It is worth reiterating here that the Ansari case was the very first terrorism trial by jury in Canadian history. All other Toronto 18 trials were bench trials. As such, we read the Court's unsolicited remarks about the jury's age and racial background alongside the competing avatars litigated in the case. Doing so lends the avatars a racial dimension, which is exacerbated when we recognize Canada's systemic racialization of terrorism across its security institutions. For example, a review of Canada's designated terrorist entity list illustrates the predominance of racialized Muslim groups

⁷⁸ Howard S. Erlanger, "Jury Research in America: Its Past and Future," *Law & Society Review* 4, no. 3 (1970): 345-70.

as presumptively terrorist.⁷⁹ Moreover, in its multilateral commitment to combating terrorism financing, Canada's whole-of-government strategy rests on associating 100% of terrorism financing risk in Canada with racial minorities and 80% of it with racialized Muslim-identified organizations.⁸⁰

The systemic effect of subsection 81.01(1) of the *Criminal Code* demands that the courts litigate religion in terrorism trials. Canada's whole-of-government strategy against terrorism systemically associates Muslims and Islam with terrorism. Religious freedom doctrines consider religious meaning a function of subjective and sincere experience.⁸¹ Common law charity doctrine views advancing religion as a public good.⁸² But in the realm of terrorism, religion and religious ideology are viewed as a threat and violent, which precludes relying on the subjective perspective of the defendant. When, for systemic reasons, the religion at issue is almost always Islam, the racialized Muslim defendant is readily read by reference to the ever-present image of the Muslim extremist avatar. The predominantly non-Muslim officers of the Court, committed to viewing Ansari in the guise of the Muslim extremist avatar, could not help but insist that the jury decide on the defendant by reference to his archive and what it represented, rather than be left to their own (multicultural) experiences to decipher what he said and how he presented himself.

Alternatively, it might be argued that the jury, precisely because they were young and multicultural, was in the position to evaluate the excluded evidence and control against bias. In this sense, the Court's reference to the jury as young and multicultural is a testament to the importance of diversity. Certainly, we can and ought to applaud diversity on juries. In a study on jury diversity, James Binnall notes that in the U.S., convicted felons are disqualified from jury service. But he asks whether felons as jurors would perform so fundamentally differently from non-felons, as is often claimed by those who insist that felons do not have the "requisite character to serve as jurors and harbour an inherent bias prompting

⁷⁹ For an up-to-date list of Canada's designated terrorist entities, see Public Safety Canada, *Currently Listed Entities* (Ottawa: PSC, last modified June 21, 2019), <https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx>.

⁸⁰ Canada, Department of Finance, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance, 2015), <https://www.canada.ca/content/dam/fin/migration/pub/mltf-rpcfat/mltf-rpcfat-eng.pdf>.

⁸¹ See, for example, *Syndicat Northcrest v. Amselem*, 2004 SCC 47.

⁸² See, for example, *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531.

sympathy for criminal defendants.”⁸³ Binnall’s empirical study shows that “diversity can enhance deliberations by improving the performance of both majority members of the group and by improving the performance of minority group members.”⁸⁴ Other studies on diversity, which examined juries across racial and gender distinctions, made the same finding.⁸⁵ But the question this raises, and which can only be gestured at here, is whether and to what extent the officers of the Court, operating under a system that centred Islam and Muslims in terrorism cases, converted the young and multicultural jury of Brampton, Ontario into an avatar of expertise. The judge’s curious remark about the jury, coupled with his suspicion of Ansari’s veracity, allowed him to admit once-excluded evidence for a lay jury to decipher without the benefit of qualified experts to address any of it.

IV. CONCLUSION

This chapter will not change whether Ansari was found guilty or innocent. That decision took place years ago in a Brampton, Ontario courtroom, and it was upheld on appeal. The Ontario Court of Appeal upheld Justice Dawson’s decision to admit the evidence and stressed that any prejudice caused by the jury hearing the religious and ideological nature of the evidence was “scarcely remarkable” and that by testifying, Ansari had placed his character in issue.⁸⁶

Nevertheless, what this chapter shows is that the Canadian legal system is structured such that certain biases consistently inform the litigation strategy and judicial discretion. The first bias is systemic and rests squarely in subsection 81.01(1) of the *Criminal Code*. By adding a political or religious motive element to the terrorism offence, this section all but opens the door to facile understandings of Islam and Muslims. This systemic bias made the second bias about expertise possible. Neither the judge nor the lawyers for either the prosecution or defence deemed expertise salient in a

⁸³ James M. Binnall, “Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-jurors’ Potential Impact on Deliberations,” *Psychology, Crime & Law* 25, no. 4 (2019): 345–63.

⁸⁴ Binnall, “Jury Diversity in the Age of Mass Incarceration,” 358.

⁸⁵ See, for instance, S.R. Sommers, “On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,” *Journal of Personal and Social Psychology* 90, no. 4 (2006): 597–612.

⁸⁶ R v. Ansari, 2015 ONCA 575 at para 122.

trial in which claims were being made about Islamic doctrines and regional conflicts. While this is systemic to Canada's anti-terrorism provision, it is neither unique nor unprecedented. In the fields of policy, law, and governance, there is no shortage of "Islam-talk" despite an absence of scholarly training.⁸⁷ In such contexts, Islam and Muslims are treated as if a constant – if not caricature – to rationalize, justify, normalize, and thereby neutralize, otherwise coercive policies, programs, and institutions of the state. Increasingly, though not surprisingly, those who invoke the spectre of Islam need not have expertise about the subject of Islam,⁸⁸ as sociologist Christopher Bail has shown through a big-data analysis.⁸⁹ For almost two decades, self-styled policy experts – e.g., Sebastian Gorka and Thomas Quiggin – make representations about "Islam" on ideological grounds rather than with disciplinary rigour.

These biases, which are in both the law itself and the conduct of the trial, made *R v. Ansari* about Islam as much as Ansari the defendant. Moreover, the Islam that was litigated was understood in light of long-standing Orientalist tropes about Muslims and medieval inquisitorial models of how people make religious meaning for themselves. The Islam on trial was not just any Islam. It was the caricature of extremist Islam, which meant that Ansari had to become an avatar of the Muslim extremist

⁸⁷ See, for instance, Anver M. Emon, "Sharia and the Rule of Law," in *Shari'a: Law and Modern Muslim Ethics*, ed. Robert Hefner (Bloomington: Indiana University Press, 2016), 37–64.

⁸⁸ For instance, political theorist Michael Walzer at the Institute for Advanced Study excoriates the left for its refusal or inability to critique Islamist groups for the violence they perpetuate. He prescribes: "We should insist particularly on the difference between writings of *zealots* like Hassan al-Banna and Sayyid Qutb in Egypt or Maulana Maududi in India and the work of the great rationalist philosophers of the Muslim past and the liberal reforms of more recent times." Walzer's distinction between zealots and "great rationalist philosophers" reflects his own construction of the "Islamic" in the service of, in this case, the Left. The construction is ironic, at best, given that since al-Ghazali (d. 1111), there has been considerable debate about whether and to what extent philosophy (Arabic *falsafa*) is or should be constitutive of what counts as "orthodoxy" in Islam. Walzer's mistake, though, is utterly productive of a certain politics of knowledge and research. While Islamic Sunni orthodoxy pushed rationalist philosophy to the margins, Walzer seeks no less than a complete inversion of that orthodoxy in a manner that mirrors what counts as reason to a North American scholar of political theory and philosophy. See Michael Walzer, "Islamism and the Left," *Dissent*, 2015, <https://www.dissentmagazine.org/article/islamism-and-the-left>.

⁸⁹ Christopher Bail, *Terrified: How Anti-Muslim Fringe Organizations Became Mainstream* (Princeton: Princeton University Press, 2015).

if the prosecution was to succeed. From litigation about black flags to online propaganda videos to testimony about conflicts in Afghanistan and Iraq – the entire litigation used external factors to telescope into the mind of a troubled, stymied, and depressed young man. And those external factors, about which no one in the Court was a certified expert, were brought in through the adversarial system’s use of motions, evidentiary balancing, and leading questions.

The leading question is perhaps the most revealing systemic device by which bias became operationalized. As a rhetorical device, leading questions are by definition conclusory. They put an onus on the witness to challenge both the premise of the question and its often-explicit conclusion. Consequently, when the prosecution asked Ansari leading questions about Islamic history (e.g., the black flag), Jihadist movements in the Muslim world, or competing doctrines of Jihad, Ansari was put in the position of having to answer questions of a scholarly nature while also maintaining his innocence. But since no one considered the questions themselves to require expertise, Ansari’s explanations could be easily disqualified or ignored as strategic manipulation by an “obviously intelligent” defendant having to rebut a non-expert paid government informant (e.g., Shaikh), all the while trying to assert his innocence to avoid a conviction.

It is not easy, even among scholars of Islam, to understand the nuances and particularities surrounding complex icons such as black flags, competing ideas of Jihad, and the implications of the extensive history of Islam on how Muslims today see themselves in the world. The surprising absence of a discussion between judges and lawyers in *R v. Ansari* on the need for expertise to separate litigation of Islam from litigation of Ansari only highlights how Canada’s legal profession assumes too much of the supposedly blind justice it proclaims to deliver.