

# Sentencing the Toronto 18: Lessons from Then, Lessons for Now

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M I C H A E L N E S B I T T \*

## ABSTRACT

Eleven of the Toronto 18 were eventually charged and tried for terrorism offences. All of them were found guilty and received various lengthy custodial sentences. This chapter considers the enduring importance of these ground-breaking sentencing decisions, including what they have meant for future cases in terms of the length of sentence, how aggravating and mitigating factors are to be considered in the context of terrorism offences, and how the fundamental principle of sentencing is to be conceived in cases of terrorism. It finds that the Toronto 18 sentencing decisions have had lasting importance on subsequent terrorism sentencing decisions, especially since they were amongst the very first and thus, precedent setting terrorism sentencing decisions, there were so many of them relative – even now – to the total number of terrorism cases in Canada, and their logic has been adopted by subsequent judges. But this judicial logic also comes under scrutiny.

While each sentencing decision was tailored to the individual, varied in length and analysis, and clearly gave longer sentences for the lead actors,

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they also diverged in approach from the usual application of the “fundamental principle.” Instead, the analysis of terrorism offences in the Toronto 18 sentencing decisions was often portrayed through the broader lens of terrorism and the threat it poses conceptually; the result was a downplaying of individuality, which in turn caused certain fundamental mitigating considerations – such as youth and prospects for rehabilitation – to be turned into neutral, or even aggravating, factors. The result seemed to skew the normal balancing of individual moral culpability with the seriousness of the offence (the fundamental principle) towards the latter consideration, with a view to elevating denunciation and deterrence as the preminent sentencing goals in terrorism cases.

## I. INTRODUCTION

Between June 2 and August 6, 2006, 14 adults and four youths (under the age of 18) were arrested in what authorities called Project Osage.<sup>1</sup> While all of the accused lived in the Greater Toronto Area, their backgrounds varied. The group included high school students,<sup>2</sup> a computer programmer,<sup>3</sup> a janitor,<sup>4</sup> and a gas station attendant.<sup>5</sup> Likewise, their active involvement in the plots – and thus their moral culpability for any offences – also differed greatly, from Zakaria Amara and Fahim Ahmad, the recruiters and leaders of what became the two Toronto 18 splinter cells,

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<sup>1</sup> Michael Friscolanti, “The Fall of a Would-Be Bomber,” *Macleans*, October 22, 2009, <https://www.macleans.ca/news/canada/the-fall-of-a-would-be-bomber/>.

<sup>2</sup> The names of three of the youth were never published as they were tried as minors. The fourth was Nishanthan Yogakrishnan, who was a youth at the time of the offense but whose name was later published. Yogakrishnan was found guilty of participation in an activity of a terrorist group under section 83.18 of the *Criminal Code* and received a two-and-a-half-year sentence. See *R v. N.Y.*, [2009] O.J. No. 6495 (Ont Sup Ct) [N.Y. (Sentencing)].

<sup>3</sup> Shareef Abdelhaleem, a 30-year-old with stable employment. Mr. Abdelhaleem’s professional background is described in *R v. Abdelhaleem*, 2011 ONSC 1428 at para 40 [Abdelhaleem (Sentencing)].

<sup>4</sup> Qayyum Abdul Jamal, a 43-year-old who worked at the mosque where some of the group met. Mr. Jamal’s custodial work at the Al-Rahman Islamic Centre in Mississauga is described in Isabel Teotonio, “Four have Terror Charges Stayed,” *Toronto Star*, April 15, 2008, [https://www.thestar.com/news/gta/2008/04/15/four\\_have\\_terror\\_charge\\_s\\_stayed.html](https://www.thestar.com/news/gta/2008/04/15/four_have_terror_charge_s_stayed.html).

<sup>5</sup> Zakaria Amara, the 20-year-old hardliner who masterminded the bomb plot. Amara’s position as a gas station attendant is described in *R v. Amara*, 2010 ONSC 441 at para 51 [Amara (Sentencing)].

down to the youths whose charges were eventually dropped and whose involvement went little beyond showing up to the “training camps.”

Despite some media coverage that implied the monolithic character of the Toronto 18 plotters, some of which seemed further to be based on grouping the accused together by racial stereotypes,<sup>6</sup> this was indeed a disparate group of accused with disparate levels of corresponding moral and legal complicity. This varying complicity was explicitly recognized at the sentencing phase of the criminal trials, particularly with respect to the relative length of the various custodial sentences. Nevertheless, at sentencing, the offenders’ complicity was, at times, also portrayed through the lens of terrorism as a generalized concept, reading as though there was one crime of terrorism, which there is not, rather than a series of offences that attach to discrete individual activities. As we shall see, the result was a range of custodial sentences but always custodial sentences no matter the accused; lower sentences for younger, less central figures, yet relatively long sentences regardless of their moral or physical involvement in the plots; and a respect for the roles of individuals coupled with a significant downplaying of individuality when it came to mitigating factors. This is an approach to sentencing terrorism that has since become common in Canada.

The intention here is not to suggest that all of the Toronto 18 were treated without recognition of their distinct individuality at sentencing – they were most definitely not. Nor is it to suggest that those accused of terrorism should not be subject to long periods of incarceration. Rather, this chapter suggests that at sentencing proceedings, certain important aspects of the defendants’ individuality – and the corresponding spectrum of moral culpability – were downplayed in favour of a generalized assessment of the seriousness of terrorism in general. In particular, we saw a diminution of mitigating factors like age and a defendant’s prospects for rehabilitation, coupled with a persistent return to the (aggravating) threat of terrorism in general rather than the threat posed by the individual before the court. In the result, the relationship between the individual and

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<sup>6</sup> Christie Blatchford, “Ignoring the Biggest Elephant in the Room,” *Globe and Mail*, June 5, 2006, <https://www.theglobeandmail.com/news/national/ignoring-the-biggest-elephant-in-the-room/article1100051/>; Linda Frum, “Q&A with Terrorism Expert David Harris: On How Canada is Handling the Issue of Islamic Extremism,” *Macleans*, June 13, 2006, [http://web.archive.org/web/20061004162747/http://www.macleans.ca/toystories/canada/article.jsp?content=20060619\\_128873\\_128873](http://web.archive.org/web/20061004162747/http://www.macleans.ca/toystories/canada/article.jsp?content=20060619_128873_128873).

seriousness of the crime is skewed towards the broader concept of terrorism.

The end result is a practical reconfiguration of the theoretical commitment to the fundamental principle of sentencing in Canada – that being proportionality between individual responsibility and the seriousness of the crime. The repercussions of this approach include, of course, a diminution of the ever-important individual in the sentencing of crime, but also a theoretical approach to terrorism that values primarily the principles of denunciation and deterrence yet is seen to accomplish little of either, in practice.

In the end, a case study approach to the Toronto 18 provides valuable insight into both what to expect in future sentencing proceedings and what corrections might be made to a jurisprudential approach to sentencing terrorists that increasingly looks entrenched in Canadian law. To show why, this chapter will proceed in two parts. Part II will provide an empirical overview of the Toronto 18 sentences, looking in particular at the length of the custodial sentences (all accused were sentenced to jail time), how these sentences were broken down by plot and as between the leaders and major contributors and followers of each plot (their complicity, in other words), the age of the accused, and whether or not they pled guilty. This will set the stage for Part III, which draws from the numbers in Part II and offers a qualitative analysis of the legal reasoning in the Toronto 18 sentencing decisions, and particularly the approach to the fundamental principle of sentencing.

## II. EMPIRICAL OVERVIEW OF THE TORONTO 18 SENTENCES

The importance of the sentences handed down in the Toronto 18 trials – and the judicial reasoning used to justify them – continues to have an outsized impact on the law and jurisprudence related to terrorism offences and how convicted terrorists are sentenced in Canada. Just by the numbers alone, the Toronto 18 trials represent a significant percentage of the total case law on terrorism crimes in Canada: as of December 2019, of the 18 Canadian terrorism cases that had gone to trial and resulted in a judicial decision on the accused’s guilt or innocence, four came from the Toronto 18 (22%);<sup>7</sup> of the 28 trial-level sentencing decisions released between

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<sup>7</sup> See Michael Nesbitt, “An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018,” *Criminal Law Quarterly* 67,

December 2001 and December 2019 (including sentences after guilty pleas), 11 came from the Toronto 18 trials (39%);<sup>8</sup> and of the seven terrorism sentencing appeals that were issued by December 2019, three were the result of Toronto 18 prosecutions (43%).<sup>9</sup>

But to be clear, it is not just the influence of the raw numbers that matter. It is also the timing of the Toronto 18 sentencing decisions. The series of Toronto 18 cases were among the very first judgements and sentencing decisions released in Canada,<sup>10</sup> with *R v. N.Y.*<sup>11</sup> being the first sentencing decision released while the Ontario Court of Appeal (and then the Supreme Court) was still grappling with the sentencing of Momin Khawaja,<sup>12</sup> Canada's first terrorism prosecution and the only precedent for the Toronto 18 line of cases. Indeed, with release dates between May 2009<sup>13</sup> and March 2011,<sup>14</sup> all but two of the Toronto 18 sentencing decisions were released before the *Khawaja* Court of Appeal decision (Khalid was released concurrently<sup>15</sup> while Abdelhaleem was released shortly after), and all were

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no. 1/2. Of the Toronto 18, only the charges against Mr. Abdelhaleem, Mr. Yogakrishnan, Mr. Ansari, and Mr. Chand proceeded to trial and resulted in a judicial pronouncement on guilt or innocence. The remaining cases involved either guilty pleas or stays. See *R v. Abdelhaleem*, [2010] O.J. No. 5693, 89 W.C.B. (2d) 233 (Ont Sup Ct) [*Abdelhaleem* (ONSC)]; *R v. N.Y.*, [2008] O.J. No. 3902, 89 W.C.B. (2d) 83 (Ont Sup Ct) [*N.Y.* (ONSC)]; Public Prosecution Service of Canada, *Sentence in R. v. Ansari* (News Release) (Ottawa: PPSC, 4 October 2010), [https://www.ppscspc.gc.ca/eng/nws-nvs/2010/04\\_10\\_10.html](https://www.ppscspc.gc.ca/eng/nws-nvs/2010/04_10_10.html); Public Prosecution Service of Canada, *Sentence in R. v. Chand* (News Release) (Ottawa: PPSC, 26 November 2010), [https://www.ppscspc.gc.ca/eng/nws-nvs/2010/26\\_11\\_10.html](https://www.ppscspc.gc.ca/eng/nws-nvs/2010/26_11_10.html).

<sup>8</sup> Nesbitt, "Empirical Study." It is also worthwhile to note that, at the time of writing, the terrorism cases involving Raed Jaser and Chiheb Esseghaier had been sent back for retrial.

<sup>9</sup> Non-Toronto 18 appeals are *R v. Khawaja*, 2010 ONCA 862 sentence aff'd *R v. Khawaja*, 2012 SCC 69; *R v. Thambathurai*, 2011 BCCA 137; *R v. Ahmed*, 2017 ONCA 76; and *R v. Hersi*, 2019 ONCA 94. Toronto 18 appeals are *R v. Khalid*, 2010 ONCA 861; *R v. Amara*, 2010 ONCA 858; and *R v. Gaya*, 2010 ONCA 860.

<sup>10</sup> *N.Y.* (Sentencing), O.J., was released only 7 months after the first *Khawaja* judgment. See *R v. Khawaja*, 2008 CanLII 92005 (Ont Sup Ct) [*Khawaja* (ONSC)].

<sup>11</sup> *N.Y.* (Sentencing), O.J.

<sup>12</sup> *Khawaja*, SCC was the final word on the sentencing of Momin Khawaja, released three years after the first Toronto 18 sentence of Nishanthan Yogakrishnan in *N.Y.* (Sentencing), O.J. and 21 months after the last Toronto 18 sentence was handed down in *Abdelhaleem* (Sentencing), ONSC.

<sup>13</sup> *N.Y.* (Sentencing), O.J.

<sup>14</sup> *Abdelhaleem* (Sentencing), ONSC.

<sup>15</sup> *Khawaja*, ONCA at para 201.

released before the *Khawaja* decision was released at the Supreme Court of Canada in 2012. The Toronto 18 cases had, in this sense, a first-movers advantage. Not only were they the second through twelfth sentencing decisions ever released, but they were also released at a time where the Court of Appeal and then the Supreme Court were struggling with the only other sentencing decision (*Khawaja*). Moreover, they were never overturned by the Supreme Court and a number of other important terrorism cases were shortly to follow. Today, even if a newly released sentencing decision does not go directly back to the Toronto 18, it more than likely relies on a decision that in turn draws from the Toronto 18.<sup>16</sup>

Of course, the size, scope, and timing of the Toronto 18 decisions do not tell the whole story. Over the first 20 odd years of terrorism prosecutions in Canada – since the offences found their way into the *Criminal Code* in December 2001<sup>17</sup> – the vast majority of cases have been heard in two jurisdictions (Toronto then Ottawa) before a very small number of judges.<sup>18</sup> Put another way, in Canada, a very small number of judges, largely in two jurisdictions, have built case law on terrorism offences, starting with the Toronto 18.

In terms of the Toronto 18 sentences themselves, 11 individuals were ultimately tried and sentenced for a variety of terrorism offences (the remaining charges against seven individuals were ultimately stayed, meaning, in this case, that the prosecution did not deem them worthy of proceeding to trial).<sup>19</sup> The following chart provides a brief summary of the

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<sup>16</sup> An excellent example is the Court's important decision in *R v. Esseghaier*, 2015 ONSC 5855, particularly at para 96. Here, the Court could have turned to *Khawaja*, SCC as the Supreme Court's final say on sentencing terrorism. Yet, the Court in *Esseghaier* was clearly of the opinion that the Toronto 18 ONCA decisions in *Ahmad*, *Khalid*, and *Gaya* had been affirmed by the SCC in *Khawaja* and, as such, used them to find what it said were the sentencing guidelines for terrorism cases in Canada. This was despite the fact that the Supreme Court in *Khawaja* made no mention of the Toronto 18 ONCA decision.

<sup>17</sup> Anti-Terrorism Act, 2001 S.C. 2001, c. 41.

<sup>18</sup> Nesbitt, "Empirical Study," 137–38.

<sup>19</sup> The individuals who pled or were found guilty were Zakaria Amara, Shareef Abdelhaleem, Fahim Ahmad, Steven Vikash Chand, Saad Gaya, Amin Mohamed Durrani, Jahmaal James, Saad Khalid, Nishanthan Yogakrishnan, Mohammed Ali Dirie, and Asad Ansari. See *Amara* (Sentencing), ONSC; *Abdelhaleem* (Sentencing), ONSC; *R v. Ahmad*, 2010 ONSC 5874 [*Ahmad* (Sentencing)]; *R v. Chand*, 2010 ONSC 6538 at para 1 [*Chand* (Sentencing)]; *R v. Gaya*, 2010 ONSC 434 [*Gaya* (Sentencing)]; Public Prosecution Service of Canada, *Durrani Pleads Guilty to Terrorism Offence* (News Release) (Ottawa: PPSC, 20 January 2010),

individuals involved, the terrorism offences with which they were charged, and their ultimate sentences (where applicable).

Name of Accused	Charge(s) Under the <i>Criminal Code</i>	Outcome	Sentence (if applicable)
Shareef Abdelhaleem <sup>20</sup>	83.18(1), 83.2	Guilty at Trial	Life + 5 years concurrent
Ibrahim Aboud <sup>21</sup>	83.18	Charges Stayed	-
Fahim Ahmad <sup>22</sup>	83.18(1)(a), 83.2, 83.21(1)	Pled Guilty	16 years
Zakaria Amara <sup>23</sup>	83.2 (81(1)(a)), 83.18	Pled Guilty	Life + 7 years + 24 months concurrent
Asad Ansari <sup>24</sup>	83.18(1)(a)	Guilty at Trial	6 years, 5 months
Steven Vikash Chand <sup>25</sup>	83.18(1), 83.2	Guilty at Trial	10 years
Mohammed Ali Dirie <sup>26</sup>	83.18	Pled Guilty	7 years

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sppc.gc.ca/eng/nws-nvs/2010/20\_01\_10.html; Public Prosecution Service of Canada, R. v. James (News Release) (Ottawa: PPSC, 26 February 2010), [https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/26\\_02\\_10.html](https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/26_02_10.html); Khalid, ONCA; N.Y. (Sentencing), O.J.; R v. Dirie, 2009 CanLII 58598 (ON SC) [Dirie (Sentencing)]; R v. Ansari, 2010 ONSC 5455 at para 1 [Ansari (Sentencing)]. Those whose charges were dropped, stayed, or withdrawn were Ibrahim Aboud, Ahmad Mustafa Ghany, Qayyum Abdul Jamal, Yasin Abdi Mohamed, and the three unnamed youth. None who went to trial were found not guilty. See [https://www.thestar.com/topic.toronto\\_18.html](https://www.thestar.com/topic.toronto_18.html).

<sup>20</sup> Abdelhaleem (Sentencing), ONSC at paras 83–85.

<sup>21</sup> Teotonio “Four Have Charges Stayed.”

<sup>22</sup> Ahmad (Sentencing), ONSC at para 72.

<sup>23</sup> Amara (Sentencing), ONSC at paras 159–62

<sup>24</sup> Ansari (Sentencing), ONSC at paras 20–22.

<sup>25</sup> Chand (Sentencing), ONSC at paras 93–95.

<sup>26</sup> Dirie (Sentencing), CanLII at para 73.

Amin Mohamed Durrani <sup>27</sup>	83.18	Pled Guilty	7 years + 6 months
Saad Gaya <sup>28</sup>	83.18, 83.2	Pled Guilty	18 years
Ahmad Mustafa Ghany <sup>29</sup>	83.18	Charges Stayed	-
Qayyum Abdul Jamal <sup>30</sup>	83.18	Charges Stayed	-
Jahmaal James <sup>31</sup>	83.18	Pled Guilty	7 years
Saad Khalid <sup>32</sup>	83.2 (81(1)(a))	Pled Guilty	20 years
Yasin Abdi Mohamed <sup>33</sup>	-	-	-
Toronto 18 Youth 1 <sup>34</sup>	-	Charges Stayed	-
Toronto 18 Youth 2 <sup>35</sup>	-	Charges Stayed	-

<sup>27</sup> Bob Mitchell and Isabel Teotonio, "Toronto 18 Member Pleads Guilty," *Toronto Star*, January 20, 2010, [www.thestar.com/news/gta/2010/01/20/toronto\\_18\\_member\\_pled\\_guilty.html](http://www.thestar.com/news/gta/2010/01/20/toronto_18_member_pled_guilty.html).

<sup>28</sup> *Gaya*, ONCA at paras 18-20.

<sup>29</sup> Teotonio, "Four Have Charges Stayed."

<sup>30</sup> Teotonio, "Four Have Charges Stayed."

<sup>31</sup> Isabel Teotonio, "Toronto 18 Terrorist Freed after Guilty Plea," *Toronto Star*, February 27, 2010, [https://www.thestar.com/news/gta/2010/02/27/toronto\\_18\\_terrorist\\_freed\\_after\\_guilty\\_plea.html](https://www.thestar.com/news/gta/2010/02/27/toronto_18_terrorist_freed_after_guilty_plea.html).

<sup>32</sup> *Khalid*, ONCA at paras 57-58.

<sup>33</sup> Teotonio, "Four Have Charges Stayed."

<sup>34</sup> Isabel Teotonio, "The Toronto 18," *The Toronto Star*, 2010, <http://www.thestar.com/atlantic/toronto18/index.html>.

<sup>35</sup> Teotonio, "The Toronto 18."

Toronto 18 Youth 3 <sup>36</sup>	-	Charges Stayed	-
Nishathan Yogakrishnan <sup>37</sup>	83.18	Guilty at Trial	2 years + 6 months

As indicated in the above chart, only four of the 18 individuals arrested challenged their charges in court (pled not guilty) – meaning that coming out of the Toronto 18 trials, there were only four (written) trial court judgements evaluating the guilt or innocence of the accused. All accused received (relatively) lengthy custodial terms, and the average (mean) sentence for Toronto 18 plotters was almost 20 years in prison<sup>38</sup> or 10.5 years not including Amara and Abdelhaleem, who received (non-numerical) life sentences. This result presages the broader trend in terrorism trials in Canada which is, perhaps not surprisingly, that you go to jail and spend years in custody if you are convicted of any terrorism offence.<sup>39</sup>

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<sup>36</sup> Teotonio, “The Toronto 18.”

<sup>37</sup> N.Y. (ONSC), O.J. at paras 282–83; “Ban Lifted on Convicted Terrorist’s Identity,” CBC, September 9, 2009, <http://www.cbc.ca/news/canada/toronto/ban-lifted-on-convicted-terrorist-s-identity-1.778966>. Yogakrishnan was convicted as a youth but was sentenced as an adult.

<sup>38</sup> How to count the length of a life sentence is, of course, a matter of debate. One could simply use the stand-in of 25-years, the minimum parole ineligibility for first-degree murder (see Michael Nesbitt, Robert Oxoby, and Meagan Potier, “Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases,” *UBC Law Review* 52, no. 2 (2019), 567, n. 70). One could also use the parole eligibility number for life imprisonment for terrorism, though this conflates the release date with the sentence, which is not generally done to calculate a sentence at trial. Here, I have used the 2015–2017 life expectancy at birth rates for male Canadians – the most up-to-date information on life expectancy available through Statistics Canada at the time of writing. That is 80.0. See Statistics Canada, *Life expectancy at various ages, by population group and sex, Canada* (Ottawa: Statistics Canada, last modified 26 February 2021, <https://doi.org/10.25318/1310013401-eng>). I then subtracted the age of the two accused who received life sentences from 82. Thus, the sentence for Abdelhaleem (30) was 50-years, and the sentence for Amara (20) was 60-years. Of course, as with all the accused, they will be released on parole before serving their full sentences.

<sup>39</sup> See Nesbitt, Oxoby, and Potier, “Terrorism Sentencing Decisions,” 566–69.

The average sentence for those that pled guilty was approximately 19.3 years, whereas the average sentence of those that challenged their charges at court was 17.25 years, a result that arguably influenced, or at least was consistent with, a broader trend in Canadian terrorism sentencing: there is seemingly little or no meaningful discount by the numbers for those that plead guilty (thereby admitting fault),<sup>40</sup> which contradicts the general approach to sentencing guilty pleas in Canada. Other factors, of course, bear on these numbers, including that two of the youngest accused with arguably the lowest moral culpability in terms of their commitment to and involvement in the plots (Ansari and N.Y.) challenged the charges. Still, the consistency with which guilty pleas receive similar sentences to those that challenge their charges across almost 20 years of terrorism trials and sentences in Canada, coupled with the fact that in the case of the Toronto 18, those that pled guilty actually received higher sentences (including the highest sentence of all for Amara), is notable, particularly for future accused considering their plea options.

In particular, the experience with the Toronto 18 might then explain why 59% of Canadian criminal cases result in guilty pleas and only 9% proceed to trial, whereas a recent study suggests that 44% of terrorism cases proceed to trial (a much higher number than average) and 33% of terrorism prosecutions have ended in a guilty plea<sup>41</sup> – and even this relatively low overall guilty plea rate is inflated by the high number (seven) of Toronto 18 plea deals. Simply put, as the numbers to date seem to bear out, there is limited value in pleading guilty to a terrorism charge in Canada; as a result, a defence lawyer advising a client to plead guilty to terrorism charges would surely be doing their client a disservice, at least insofar as the decision is based on a prospective custodial sentence alone.

This result is not without its problems. First, it means that the courts seem to be treating those convicted of terrorism the same whether they admit to their wrongdoing and work with authorities or not. This is seemingly inconsistent with the general principles of sentencing that require courts to consider as mitigating all expressions of remorse and admissions of guilt. But second, this may also well signal a problem for the already-overburdened Canadian criminal justice system: in both the Toronto 18 cases and more generally in terrorism trials, a higher percentage of accused take their cases to trial as discussed above – cases that are

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<sup>40</sup> Nesbitt, Oxoby, and Potier, “Terrorism Sentencing Decisions,” 569–70.

<sup>41</sup> Nesbitt, “Empirical Study,” 111.

generally long and very complex – resulting in increased costs for the system and a tax on overstressed court resources. This trend started with the Toronto 18, but it remains equally true as of the time of writing this chapter.

Finally, of the 11 individuals involved in the Toronto 18 plot that the Crown proceeded with charges against, all were male (as were all 18 members of the Toronto 18), with ages at the time of the arrests ranging from 18 to 30 and an average (mean) age of 21-years old (see Age Table, below). Only two plotters who were tried were age 24 or older (Chand and Abdelhaleem; Jamal, an accused member of the Toronto 18 who was not tried, was an outlier within the larger group, at 43-years old).<sup>42</sup> Putting these results together, we see that the plotters were young, male, and, seemingly, largely without prior criminal records,<sup>43</sup> all of which is consistent with the overall make-up of those prosecuted for terrorism in Canada.<sup>44</sup>

*Age Table*

Faction	Accused	Age at Arrest	Guilty Plea	Sentence
Parliament Hill Plot	Fahim Ahmad	21	Yes (mid-trial)	16 years
	Steven Vikash Chand	24	No	10 years
	Amin Mohamed Durrani	19	Yes	7.5 years
	Jahmaal James	23	Yes	7 years
	Nishanthan Yogakrishnan	18	No	2.5 years
	Mohammed Ali Dirie	22	Yes	7 years

<sup>42</sup> Anthony DePalma, “Six of 17 Arrested in Canada’s Antiterror Sweep Have Ties to Mosque Near Toronto,” *New York Times*, June 5, 2006, <https://www.nytimes.com/2006/06/05/world/americas/05canada.html>.

<sup>43</sup> Mr. Dirie did have a youth criminal record. See *Dirie* (Sentencing), CanLII at para 29.

<sup>44</sup> Nesbitt, “Empirical Study,” 113–14.

	Asad Ansari	21	No	6 years, 5 months
<b>Bomb Plot</b>	Zakaria Amara	20	Yes	Life
	Shareef Abdelhaleem	30	No	Life
	Saad Khalid	19	Yes	20 years
	Saad Gaya	18	Yes	18 years

As the above table suggests, the Toronto 18 offenders were split into two groups.<sup>45</sup> The first was the Parliament Hill plot, also called the Scarborough Group, which was led by Fahim Ahmad. The second group, also called the Mississauga Group, was led by Zakaria Amara along with the group’s recruiter, Shareef Abdelhaleem, and was planning the bombing of the Toronto Stock Exchange. The latter group, and plot, was considered the more serious because it was deemed further along in its planning – and thus closer to its deadly execution – but also because its leaders, Amara and Abdelhaleem, were considered the more effective planners, and thus the plot itself was considered more plausible. As a result, both Amara and Abdelhaleem received sentences of life imprisonment and, as of writing, they remain the only two members of the Toronto 18 still incarcerated.

Breaking down the charges and sentences by plot reveals that the Court did indeed tailor the custodial terms of the offenders such that those in the more serious plot bore the more serious moral culpability, and thus, the associated offenders got the longer sentences. Likewise, as the tables below make clear, the group leaders got the longest sentences while those on the periphery of the less serious Scarborough group received the most lenient terms, at least relative to the other offenders in the broader Toronto 18.

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<sup>45</sup> See the Introduction to this book for background on the characteristics and leadership of these two groups.

*Sentencing the Scarborough Group/Parliament Hill Plot (Less Serious)*

Name of Accused	Charge(s) Under the <i>Code</i>	Outcome	Sentence
Fahim Ahmad *	83.18(1)(a), 83.2, 83.21(1)	Pled Guilty <sup>46</sup>	16 years
Steven Vikash Chand	83.18(1), 83.2	Found Guilty	10 years
Amin Mohamed Durrani	83.18	Pled Guilty	7.5 years
Jahmaal James	83.18	Pled Guilty	7 years
Nishanthan Yogakrishnan	83.18	Found Guilty	2.5 years
Mohammed Ali Dirie	83.18	Pled Guilty	7 years
Asad Ansari	83.18(1)(a)	Found Guilty	6.5 years

\* Plot leader

*Sentencing the Mississauga Group/Bomb Plot (More Serious)*

Name of Accused	Charge(s) Under the <i>Code</i>	Outcome	Sentence
Zakaria Amara *	83.18, 83.2 (83(1)(a))	Pled Guilty	Life
Shareef Abdelhaleem	83.18(1), 83.2	Found Guilty	Life
Saad Khalid	83.2 (81(1)(a))	Pled Guilty	20 years
Saad Gaya	83.18 (charge dropped), 83.2	Pled Guilty	18 years

\* Plot leader

In the result, we can see from the two above Tables, for example, that Abdelhaleem and Ahmad were both considered recruiters for the Toronto

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<sup>46</sup> Mr. Ahmad originally pled not guilty but changed his plea partway through the trial. See Isabel Teotonio, "Toronto 18 Ringleader Pleads Guilty in Terror Trial," *Toronto Star*, May 10, 2010, [https://www.thestar.com/news/crime/2010/05/10/toronto\\_18\\_ringleader\\_pleads\\_guilty\\_in\\_terror\\_trial.html](https://www.thestar.com/news/crime/2010/05/10/toronto_18_ringleader_pleads_guilty_in_terror_trial.html)

18 and both pled guilty to the similar offences (participation under 83.18 and the most serious terrorist offence, commission, under 83.2; Ahmad also pled guilty to section 83.21, instructing others to carry out an activity for a terrorist group). Nevertheless, it was Abdelhaleem, a member of the more serious bomb plot, that received the life sentence, whereas Ahmad received a more lenient, but still stiff, 16 years in prison. Indeed, all members of the bomb plot received custodial sentences longer than the leader (Ahmad) in the Parliament Hill plot, with the lowest custodial sentence in the former group being 18 years in custody for Gaya. N.Y. or Yogakrishnan – a member of the less serious Scarborough plot and youth at the time of his participation, thus the alternating use of N.Y. – received the shortest custodial sentence (2.5 years).<sup>47</sup> N.Y.'s sentence is notably light as compared to the custodial sentence of other terrorists, though it is similar in length to other youth terrorism offences.<sup>48</sup> The numbers suggest that at least relative to one another within the group(s), the judges did tailor the sentences to the individual.

One might be tempted to take from the numbers – and the fact that we are talking about terrorism, after all – that things are as they ought to be. The group leaders got longer sentences than the followers, and the members of the more serious plot got uniformly longer sentences than those associated with the more speculative plan. Terrorism was treated seriously upon sentencing while, by the numbers, it is evident that account was taken for the moral culpability of each offender in accordance with the fundamental principle of sentencing, which demands that a judge balance the seriousness of the offence with the culpability of the offender. While all of that is undoubtedly true, it is also the case that relative to other Canadian sentences, even serious offences, the custodial sentences were comparatively very long, particularly when considering youthful offenders without a criminal record and those, like Asad Ansari (Scarborough plot), who also had little knowledge about the plots or even the intentions of

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<sup>47</sup> N.Y. (Sentencing), O.J.

<sup>48</sup> One youth charged in Quebec received a two-year sentence. See Nesbitt, “Empirical Study,” 134–35, 137. See also Cour du Québec, 17 December 2015, *Judgements du Québec*, No 7759; Cour d’appel du Québec, Montreal, 24 November 2015, *Green v. R.*, *Judgements du Québec*, No 14345; Cour d’appel du Québec, Montreal, 26 November 2018, *X c. Sa Majesté la Reine*, 2018 QCCA 1985; Cour d’appel du Québec, Montréal, 26 September 2018, *X c. Sa Majesté la Reine*, *Judgements du Québec*, No 11200. Another youth charged in Manitoba received a 20-month sentence (including six months deferred).

those at the training camps. Moreover, a closer qualitative look at the legal reasoning used by the sentencing judges to arrive at the respective sentences reveals that the fundamental principle of sentencing seems to be operating a little differently, perhaps even uniquely, when applied to terrorism offenders as compared to how it is usually approached.

### III. A QUALITATIVE ASSESSMENT OF THE SENTENCING DECISIONS

Section 718.1 of the *Criminal Code* offers the fundamental principle of sentencing in Canada: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”<sup>49</sup> The fundamental principle demands that a balance be sought between, on the one hand, the seriousness of the specific offence committed (the left side of the equation) and, on the other hand, the degree of moral culpability of the individual offender on trial (the right side of the equation). In analyzing said proportionality, the court must consider aggravating and mitigating factors (section 718.2) associated with the accused – age, prospects for rehabilitation, previous criminal record, etc. The court must also consider general objectives of sentencing (section 718), including deterrence, denunciation, separation of offenders from society, rehabilitation, reparations to society and victims, and the promotion of a sense of responsibility in offenders. Within the fundamental principle’s equation, there is thus a great deal of discretion for the judge to tailor the appropriate sentence; but there are also numerous constraints and considerations in sections 718.2 and 718 that limit the options available. In *R v. Khawaja*, the Supreme Court of Canada made it abundantly clear the usual principles of sentencing – including, of course, the fundamental principle – apply with equal vigour in terrorism cases.<sup>50</sup>

But while it may be true that the fundamental principle applies in cases of terrorism – and the equal applicability in terrorism cases was certainly reinforced through the Toronto 18 sentencing decisions – the judicial approach to evaluating the fundamental principle in the terrorism context installs different, sometimes confusing, and sometimes seemingly contradictory considerations. Put another way, the high-level (fundamental)

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<sup>49</sup> Criminal Code, R.S.C. 1985, c. C-46, s. 718.1.

<sup>50</sup> See *Khawaja*, SCC at para 115: “The general principles of sentencing, including the totality principle, apply to terrorism offences.”

principles are, in theory, the same in terrorism offences as all other offences, but how they are applied and analyzed looks distinctly different in practice.<sup>51</sup> In particular, the proportionality analysis is skewed time and again away from the individual and distinctly towards the (terrorism) offence, which itself is often described not in terms of the specific terrorism offence and charge but by the idea of terrorism in general.<sup>52</sup> This turn away from the individual and towards terrorism justifies a primary focus on punishing the offender and deterring others, though tautologically the focus on punishing the offender and deterring others is likewise used to bring the focus away from the individual and towards the concept of terrorism in general.

Perhaps the starkest example of the (initial) move away from the individual offender is the Court's treatment to date of rehabilitation as a mitigating factor upon sentencing terrorism offenders. As the Supreme Court confirmed in *Khawaja*, rehabilitation remains "an important factor in sentencing" terrorism.<sup>53</sup> Again, the starting point remains the same with terrorism as with all offences: the fundamental principle applies in theory. But in Chapter 15 of this book, Reem Zaia canvasses in stark detail how the offenders' prospects for rehabilitation and reintegration into society are routinely subordinated in the context of terrorism trials. Other studies have gone further in suggesting that courts may have flipped the logic pertaining to rehabilitation, from a logic where evidence of the possibility of rehabilitation is treated as a mitigating factor, to the terrorism context where the accused's failure to prove the possibility of rehabilitation (a virtual impossibility) becomes a previously unheard-of aggravating strike against them at sentencing.<sup>54</sup>

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<sup>51</sup> For a more detailed analysis of this point across both the Toronto 18 cases and, more broadly, across almost 20-years of terrorism cases in Canada, see Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 582–83.

<sup>52</sup> See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 591–92.

<sup>53</sup> *Khawaja*, SCC at paras 114, 122–24.

<sup>54</sup> See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 597–603. Other excellent studies have made a similar point about rehabilitation in the context of terrorism trials. See e.g., Robert Diab, "Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law," in *Terrorism, Law and Democracy: 10 Years After 9/11*, eds. Craig Forcese and François Crépeau (Montreal: Canadian Institute for the Administration of Justice, 2012), 347; Reem Zaia, "Mental Health Experts in Terrorism Cases: Reclaiming the Status of Rehabilitation as a Sentencing Principle," *Criminal Law Quarterly* 64, no. 4 (2017), 548.

The treatment of youth and young offenders is another interesting example. Age, and particularly youthfulness, is a mandatory factor that courts must consider in the mitigation of a criminal sentence. This is true even in terrorism cases, as the court affirmed in *R v. Gaya*: “even for the most serious of offences as this one is, the mitigating effect of youth is not obliterated.”<sup>55</sup> The same is true for the prior criminal record of the accused: the lack of a previous criminal record should remain a mitigating factor on sentencing.

But when it comes to terrorism offences, all young offenders – starting with N.Y. in the Toronto 18 context but also considering other very young adult offenders without criminal records, like Asad Ansari – receive long custodial sentences, even if such sentences are shorter than those of other terrorism offenders.<sup>56</sup> An analysis of the terrorism sentencing decisions reveals why: the logic implementing the recognized principle that youthfulness is mitigating begets a somewhat different story in practice.

The young age of an offender generally mitigates the sentence because they possess the greatest potential for reform and rehabilitation... as the offence gets more serious, the mitigating effect of age decreases... That does not mean that age is totally eliminated from the sentencing equation for serious offences, just that it has less significance.<sup>57</sup>

Thus, although age is a consideration in sentencing, it is less so in serious offences, and terrorism of course is among the most serious. What does it mean, then, for age to both matter and have “less significance”? Perhaps the numbers from Part II tell the best story: a young offender, and especially youth, will get a lesser sentence as compared to others charged with terrorism, but they will still get a relatively long custodial sentence. Age matters, but only within the relative confines of other terrorism sentences. An honest assessment of this implementing logic was offered by the Court in *Khalid*:

We accept that the respondent's youth and his lack of criminal antecedents were relevant considerations on sentencing. But, in terrorism cases, these factors must be viewed through a different lens. Youthful first offenders present as attractive recruits to sophisticated terrorists. They are vulnerable and impressionable because of their youth and their prior good character makes them difficult to detect by law enforcement authorities. The sad truth is that young home-grown terrorists with no criminal antecedents have become a reality. And that is

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<sup>55</sup> *Gaya* (Sentencing), ONSC at para 64.

<sup>56</sup> See Nesbitt, Oxoby, and Potier, “Terrorism Sentencing Decisions,” 567–69.

<sup>57</sup> *Amara* (Sentencing), ONSC at para 119.

something the courts must recognize and take into account when deciding how much leniency to give to youthful first offenders who commit terrorist crimes.<sup>58</sup>

We see here how age – a factor relevant to individual moral culpability, the right side of the fundamental principle’s equation – is seen not as an independent variable to be evaluated with respect to the individual and their actions but rather as a dependent variable seen through a “different lens”: that of the seriousness of terrorism.

The implication in *Khalid* (and the above quote in particular) seems to be that age and first-time offender status simply cannot matter as much in terrorism both because terrorism is serious and because the offence itself is different, or “unique” as the Court has said on other occasions.<sup>59</sup> But there is a further, perhaps more subtle, implication, that being that age could be treated as something other than mitigating, for it is the youthful offender that is more prone to be attracted to terrorism (something equally true for a wide variety of crimes), and it is the youthful “good character” that makes the youthful offender “vulnerable and impressionable” and “more difficult to detect by law enforcement.” Perhaps, then, rather than acting as a mitigating factor, or even being largely dismissed because of the seriousness of terrorism, the youthfulness of an offender should be cause for concern.

The result of the Court’s analysis of the right side of the fundamental principle’s equation (individual culpability) is then the unconscious diminution of the individual at terrorism sentencing hearings in favour of the seriousness of terrorism offences. In other words, the seriousness of terrorism becomes the dominant consideration when engaging in an analysis of age, prior convictions, or prospects for rehabilitation. The next step in judicial logic then solidifies the approach and, arguably, the outcome for the accused: the court moves to an evaluation of the left side of the proportionality principle’s equation and considers, once again, the seriousness of the offence. The individual, in this way, is viewed through the lens of the worst horrors of terrorism over and again; proportionality is adjudged as between the seriousness of terrorism (the right side of the equation) and the seriousness of terrorism (the left side). In both cases,

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<sup>58</sup> *Khalid*, ONCA at para 47 [emphasis added].

<sup>59</sup> See *Khalid*, ONCA at para 32. Similar sentiment was expressed in various Toronto 18 sentencing decisions, including *R v. Khalid*, [2009] O.J. No. 6414 at para 108 (Ont Sup Ct); *N.Y. (Sentencing)*, O.J. at para 24 aff’d on other grounds *R v. N.Y.*, 2012 ONCA 745 at para 152; *Gaya (Sentencing)*, ONSC at paras 117–18; *Gaya*, ONCA at para 19; *Amara (Sentencing)*, ONSC at paras 140–42; *Abdelhaleem (Sentencing)*, ONSC at para 72; and *Dirie (Sentencing)*, CanLII at para 32.

terrorism is treated as “a crime unto itself,”<sup>60</sup> the most serious of crimes. Put another way, the left side of the equation is rated serious because terrorism is serious, then the right side of the equation is viewed through the lens of an individual who commits terrorism, and proportionality is discovered as between the two views of terrorism. It should then come as no surprise to see, in Part II above, extremely long custodial sentences across the board.

Moreover, the judicial approach to terrorism on both the left and right side of the equation tends to toggle between an evaluation of the specific offence charged and terrorism in the general sense, using phrases like the crime of terrorism or terrorist offences – as though there were not a host of discrete terrorism offences.<sup>61</sup> For example, the Ontario Court of Appeal cited with approval the sentencing judge’s position in *R v. Khalid*, asserting:

The sentencing judge... described terrorist offences as “a most vile form of criminal conduct”, noting that they “attack the very fabric of Canada’s democratic ideals” and “strike fear and terror into the citizens in a way not seen in other criminal offences.”<sup>62</sup>

As seen here, the then-nine (now 14) different terrorism offences found between sections 83.02–83.04 and 83.18–83.23 of the *Criminal Code* quickly become amalgamated into more generalized “terrorist offences.”

Seen in turn through the prism of terrorism writ large, it is easy to understand how one moves from an analysis of a youthful individual’s involvement at the Toronto 18 Washago training camp to a decision that views such actions as putting the whole “fabric” of Canadian democracy at risk.<sup>63</sup> While such foundational concerns regarding the horrors of terrorist actions are justifiable with regard to, for example, the 9/11 attacks or perhaps even with respect to the most radicalized leaders of the Toronto 18

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<sup>60</sup> *Abdelhaleem* (Sentencing), ONSC at para 62. As the Crown prosecutor asserted to the *National Post* after Abdelhaleem’s sentencing, “[t]he next terrorist that comes before the court charged with an offense like this is going to have an uphill battle... [terrorism] is a crime unto itself. It threatens all of us. It threatens our way of life. There’s nothing like it, and that’s why [the court] has been unequivocal in its intolerance” [emphasis added]. See Megan O’Toole, “The Defining Case for Trying Terrorists,” *National Post*, March 5, 2011, <https://nationalpost.com/posted-toronto/the-defining-case-for-trying-terrorists>.

<sup>61</sup> *Chand* (Sentencing), ONSC appears to be the sole case from the Toronto 18, or even thereafter, which does not discuss the seriousness of terrorism in general.

<sup>62</sup> *Khalid*, ONCA at para 44 [emphasis added].

<sup>63</sup> *Khalid*, ONCA at para 44.

plot, it is harder to maintain that the actions of N.Y. or Asad Ansari – whose complicity is covered in Chapter 11 of this book – offered the potential for so great a harm to the very fabric of all of Canada.

Nevertheless, in the case of Ansari, after canvassing his actions, including the editing of a video and showing up at the Washago training camp with other accused terrorists, the sentencing judge had the following to say: “[t]errorist activity of any sort poses a grave threat to the safety of the community. It also strikes at the very foundation of our democratic way of life, something ordinary people have struggled to obtain in a laborious process that has spanned hundreds of years.”<sup>64</sup> Such logic demands a fairly specific understanding of “terrorist activity” in general – that in all its iterations, it necessarily strikes at the foundation of democracy – and that this conception be applied to a youthful, relatively marginal figure (Ansari).<sup>65</sup> In its sweeping generality, this statement also ignores the fact that many forms of terrorism (e.g., the IRA) make no political claim to setting back Western society hundreds of years.

In the result, the individual characteristics of the accused – in this case, Ansari – and his complicity in the plot are bound to be enmeshed in the terrorist plot and terrorism in general, which then means that the “dominant consideration” upon sentencing must be responding to terrorism as an idea. But the need to respond to terrorism, in general, explains the move away from the individual. In the end, the individual is sentenced so as to punish and denounce terrorist activity, which itself is seen as “strik[ing] at the very foundation of our democratic way of life.”<sup>66</sup>

Putting the logic in the sentencing decisions together, the starting point of the terrorism sentencing decisions – as it was in *Ansari* – recognizes the preeminence of the fundamental principle of sentencing, that being that the court must find proportionality between the individual terrorism offender and the seriousness of the offence. That includes a consideration of the individual, including their age, prior criminal record, prospects for rehabilitation, and whether or not they pled guilty. All of this leaves enough room to level lifetime sentences for the worst offenders (leaders) and shorter custodial sentences for the hangers-on. But in the end, the court then qualifies the individual with reference back to the seriousness of the

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<sup>64</sup> *Ansari* (Sentencing), ONSC at para 17 [emphasis added].

<sup>65</sup> For further discussion of this issue, see Chapter 11 in this book by Anver M. Emon and Aaqib Mahmood.

<sup>66</sup> *Ansari* (Sentencing), ONSC at para 17.

offence and then conducts (another) proportionality analysis as between the individuals seen through the lens of terrorism in general. In this way, the individual is both front and centre and significantly diminished as compared to many offenders that commit other offences. Put another way, relative to other terrorists, those most culpable will get the longest sentences and those least culpable will get the shortest; here, we see individual responsibility at work. But all sentences will be custodial, all will dismiss prospects for rehabilitation and, seemingly, the reality of guilty pleas, and as such, all sentences will tend toward the maximum of what one might expect. In the latter situation, we lose the individual to the horrors of terrorism as a generalized concern, one that is seen through the lens of threatening our very way of life.

All of this has another effect, as articulated by the court in *Ansari*, above, but also in other cases like *Ahmad*: “denunciation, deterrence and protection of the public must be treated as the predominant principles of sentencing.”<sup>67</sup> The logic is clear: if the sentence is tied primarily to the seriousness of the offence, then the justification must be that we care most about denunciation, deterrence, and safety. Rehabilitation, youthfulness, and guilty pleas, despite being confirmed as applicable mitigating considerations in terrorism cases, fall away because the goal is to focus on other principles like denunciation. Of course, once rehabilitation and the promotion of a sense of responsibility are subordinated, this in turn surely justifies the failure to meaningfully consider the prospects for rehabilitation as a factor in mitigating the sentence of the accused. Rehabilitation is foregrounded then immediately backgrounded on principle: prospects for rehabilitation matter, but primacy is given to denunciation and deterrence as the fundamental purposes of sentencing in all terrorism cases which mandates that to come full circle at the end of the day, things like rehabilitation, youthfulness, and guilty pleas matter very little indeed.

Of course, such logic has implications for the individual, the most obvious being that the individual may feel that terrorism worldwide is being sentenced rather than the individual on trial. But there are also national security implications to this approach. First, when the prospects for rehabilitation are seen as diminished to the faintest light, one would expect to see limited options for rehabilitation in the criminal processes. As Reem Zaia discusses in Chapter 15, this is demonstrated in Canada’s complete lack of programming in prisons and reduced options on parole. Similarly,

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<sup>67</sup> *Ahmad* (Sentencing), ONSC at para 52.

when guilty pleas are seen as having no (or a negligible) effect, then we see sentences that look very similar in custodial duration as between those individuals that take responsibility for their actions and plead guilty and those that do not (see Part II, above). Taking responsibility matters less to the court and, thus, a sense of responsibility is not theoretically promoted in the individual. In light of this court messaging, specific deterrence is hardly applicable because there is little incentive or opportunity to take responsibility or corrective action. It also means that, as the numbers bear out, we should expect to see more cases going to trial as opposed to resolving via plea agreements. Unfortunately, in the context of terrorism, such trials are almost always long, complex, and resource-intensive, meaning the increased incentive to go to trial is very costly indeed.

Second, even if sentencing terrorism is in theory significantly about deterrence, as the Court has asserted, in promoting those principles in the way terrorism cases have, we may have undermined our capacity to denounce and particularly deter. The reasoning here goes as follows. We sentence to deter individuals (either the offender or others in society) from engaging in serious acts of terrorism. But most individuals are not plot leaders, and most start small, with engagement in the Toronto 18 training camp, for example, rather than specific planning about bombing the TSX – a part of the plot that only came later. Yet, in practice, Canada's sentencing decisions send the following message of specific deterrence: once a person has crossed the threshold of terrorist activity – has engaged generally in facilitating terrorism or perhaps participated with a terrorist group – then the specifics of their actions matter less than that general terrorism characterization. For example, if a person has already assisted in some minor way in a larger terrorism plot, say editing a video for a terrorist group (i.e., Ansari), there is no legal disincentive not to take further, more serious steps to help the organization; the individual actions will already be diminished in the assessment of the generalized engagement in the terrorism plot. Likewise, there is limited incentive to back out of the plot and plead guilty, for such pleas do not seem to much affect sentence lengths. When one is in for a penny, then they are in for a pound, at least as concerns the criminal law; once you cross the terrorist activity threshold, a long custodial sentence awaits regardless of your subsequent actions. In this sense at least, specific deterrence – the threat of criminal punishment to deter the offender from escalating or taking further actions – is greatly reduced.

So, where might specific or general deterrence play a role? First, in theory, the Canadian approach might deter those that are seriously thinking about leadership roles in terrorism plots in which they are already engaged, knowing that their lesser activities are likely to get them 10–20 years in prison, but a leadership position will likely receive a life sentence. It is difficult to imagine this scenario playing out in the real world, and there is not a single example in Canadian terrorism cases of such reasoning taking place. Second, deterrence might, in theory, be engaged in advance of any individual's move towards engaging in terrorist plots (general deterrence or deterrence of other non-offenders) because those not (yet) engaged will, in theory, become aware of the long custodial sentences and choose a different path (again, an unlikely scenario). In the latter situation – already dubious because this does not tend to be how general deterrence works, if it works at all – those most likely to be deterred are not yet engaged and, in all probability, are unlikely to engage in terrorism. This is hardly the group to which we most need to send a message.

The case against Mr. Ansari again offers an illustrative example of how this all plays out at sentencing. The Court described Ansari and his involvement in the Toronto 18 plots in the following way:

While Mr. Ansari's involvement in the offence was serious, it is not at the most serious end of the scale. Mr. Ansari was out of shape and was not selected for further training. He participated in the camp, but in a more limited way than some others; he utilized his technical skills with the requisite knowledge and for the requisite purpose, but I am not convinced he did so with complete knowledge of what was going on; the evidence demonstrates he was not in a leadership position.<sup>68</sup>

Ansari's involvement was "serious" because of his involvement in terrorism – his presence at the Toronto 18 training camp had crossed the terrorism threshold. By most other metrics – a consideration of Ansari the person, his age (21 at the time), or what specifically he did – his involvement was fairly limited, to the point where the Court admits he may not even have fully known what was going on. In that context, Ansari received a sentence of six and a half years in jail – an extremely stiff sentence in the broader context of Canadian criminal law. Once he crossed the threshold to terrorism, no matter his involvement, capacity, youthfulness, or knowledge, he was bound to receive a long custodial sentence.

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<sup>68</sup> *Ansari* (Sentencing), ONSC at para 14.

In the end, what justifies this unique approach if deterrence is unlikely to be well-served by Canada's approach to sentencing terrorism and if rehabilitation has fallen by the wayside? Why treat terrorism as a crime unto itself and thus, in turn, treat the logic of sentencing differently than with respect to other crimes? The answer was enunciated by the Court in *Ahmad*, which is consistent with the other Toronto 18 decisions:

In circumstances such as these the principles of denunciation and general [seen as unlikely, above] and specific deterrence [seen as unlikely, above] must come to the forefront in sentencing, together with the need to protect the public by removing the offender from society. While mitigating factors such as youthfulness, lack of a criminal record and the prospect of rehabilitation must still be taken into account, they must play a subordinate role.<sup>69</sup>

We are left with denunciation and the protection of society as the dominant principles, with the avowed subordination of the individual. But even here, most terrorism offenders will get out of prison, usually at an age where they are still at a theoretical risk of reoffending,<sup>70</sup> and if rehabilitation is not a meaningful principle, and if that means, in turn, that parole boards and prisons do not take rehabilitation seriously in the context of terrorism offences,<sup>71</sup> then the theory that we protect society via removal (through imprisonment) amounts to a temporary measure without a long-term plan. One is left, then, with a theory of sentencing that largely amounts to denunciation, which is to say punishment of an idea and/or action to express disapproval. Seen in this light – where punishment for the concept of terrorism becomes the driving factor in sentencing terrorism – the long custodial sentences across the board for the Toronto 18 plotters, as seen in Part II of this chapter, are no surprise.

In the end, instead of the fundamental principle of sentencing, the overriding principle in sentencing terrorism offenders appears, in practice, to be denunciation as punishment coupled with vague assertions about deterrence and protection of society, neither of which are particularly well-served by what is really a punishment-driven approach. This is a result of the fact that courts have treated terrorism differently from other crimes and replaced a complex fundamental principle with a rather blunt theory of

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<sup>69</sup> *Ahmad* (Sentencing), ONSC at para 51.

<sup>70</sup> Recall that of the Toronto 18, only two received life sentences; most were scheduled to be released on parole while still in their 20s or early 30s, well within the usual age range of terrorism offences (or reoffences) worldwide. See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 572–73.

<sup>71</sup> See Chapter 15 in this volume by Zaia.

punishment, all with questionable societal results. Moreover, though such an approach might offer catharsis for a Canadian populace looking to disavow and punish terrorism, it has also diminished the individual on trial – an individual who rightly must be central to all sentencing considerations in Canada.<sup>72</sup> The Toronto 18 sentencing decisions began this trend and have reinforced its consistent application; it is a trend that, respectfully submitted, is neither fair to the offender nor offers the greatest protection and security for society. Rather, it is a trend that strains to fit a punishment-oriented approach to sentencing within a broader, much more nuanced fundamental principle. In the end, the theoretical commitment to the fundamental principle is lost in the practical analysis of terrorism writ large; meanwhile, the individual is subordinated, the crime is punished harshly, the individual is left feeling wronged, and society is left without rehabilitation programs in prison. It is time to turn the theoretical commitment to the fundamental principle of sentencing into a manifest commitment to its ideals. It is time for the logic and the analysis to move away from the worst fears of terrorism worldwide and towards the individual offenders and the sentences best suited to their actions and society's needs.

#### IV. CONCLUSION

In many ways, the factual and legal circumstances of the Toronto 18 cases have presaged the Canadian terrorism cases that would follow: young men plan a terrorist attack, some of which are scarily plausible while others are wildly implausible; they are found guilty (usually for inchoate, or planning, activities), receive relatively long custodial sentences regardless of age, past criminal involvement, prospects of rehabilitation, or even if they plead guilty; and, that custodial sentence is justified by the unique character of terrorism. Prospects for rehabilitation and taking personal responsibility are limited throughout the process, from the decision to plead guilty or not and go to trial, to the sentencing considerations, through to opportunities for reform upon incarceration and parole. The individual, and the personal capacity to change, is muted while the fear of terrorism, in general, is foregrounded. This is an approach that seems inconsistent in practice with the fundamental principle of sentencing to which the Canadian system has committed.

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<sup>72</sup> See generally Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions."

As this chapter has shown, the similarity between Toronto 18 sentencing decisions and subsequent decisions – and, indeed, virtually all terrorism sentencing decisions in Canada that are subsequent to the Toronto 18 decisions – should come as no surprise. First, there is the fact that they were the original sentencing decisions dealing with the new terrorism offences under the *Anti-Terrorism Act* 2001, a significant consideration unto itself in a legal system that demands respect for judicial precedent.<sup>73</sup> Second, the Toronto 18 plot remains the biggest homegrown terrorism plot in Canadian history, and, consequently, the largest-scale mass arrest and series of prosecutions for terrorism offences. As a result, and as shown in Part II of this chapter, the Toronto 18 prosecutions represent a statistically significant percentage of the overall sentencing decisions for terrorism offences in Canada. More important than statistical prevalence, however, is the fact that, as shown in Part III of this chapter, certain aspects of the juridical reasoning established in the Toronto 18 sentencing decisions – for example, those which have militated towards longer custodial sentences, diminished the relevance of plea bargaining, obfuscated the importance of rehabilitation, and overemphasized deterrence – have been followed in subsequent terrorism cases. Finally, it is worthwhile to note that the majority of terrorism cases in Canada have been tried in the same jurisdiction, with the same small group of judges as the Toronto 18 cases, which might explain how the original sentencing decisions have taken on increased importance.

As we in Canada move further down the road, and as other Canadian jurisdictions and other judges begin to assess the individual moral culpability of young men without prior criminal records convicted of heinous, ideologically driven violent plots that seem, in motivation, to tear at the fabric of Canada’s democratic institutions, it is worth remembering the context of those initial (Toronto 18) sentencing decisions and revisiting the logic that drove the results. Within the Canadian system and, in my best guess, within the Canadian psyche, there is nothing wrong with punishing a convicted terrorist seriously; indeed, it is likely that much of the Canadian public would demand it. But in our *Criminal Code*, there are a series of (14) discrete terrorism offences, not one offence of terrorism, and some of these are more serious than others. Similarly, there is a spectrum along which terrorism offenders will fall, from the repentant

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<sup>73</sup> As noted at above, Khawaja’s appeal went all the way to the Supreme Court was ongoing at the time of the Toronto 18 trials.

young offender on the fringes of an implausible plot to the leader of a group intent on blowing up the TSX (i.e., Amara). The fundamental principle of sentencing demands that we take these individuals and these circumstances seriously, that the generalities of the offence with which an individual is charged are but one balancing consideration in the overall sentence of an individual.

The fundamental principle of sentencing – the demand for proportionality between the individual moral culpability and the seriousness of the specific offence as charged – has generally served Canada well, even as we strive and occasionally fail to live up, in practice, to its high-minded principles. Perhaps, then, it is all the more important that when it comes to offences dubbed “terrorism” – offences that uniquely stigmatize offenders and accused – we retrench in those high-minded principles. We must treat the fundamental principle of sentencing as the most fundamental where it is hardest to do so. We must see individuals as unique, and even individual criminal acts as unique, but no set of crimes necessarily and abstractly as such. Mitigating factors like youth, prospects for rehabilitation, a willingness to express remorse (as shown by, for example, pleading guilty), the lack of a criminal record, and the accused’s level of moral and physical complicity in the plot must remain front and centre to the sentencing decision, no matter the crime. An approach to sentencing that nibbles away at the protections which are foundational to a balanced application of justice is one that both betrays the citizen – the pillar of democracy – and strays from the principles of fundamental justice protected by the *Charter*.<sup>74</sup> The Toronto 18 sentencing decisions helped remind us that centring the individual and contextualizing the crime that the individual committed – in contrast to engaging with the idea of a crime more broadly – are of preeminent importance. But these cases also reveal that we must be careful to manifest in practice what we claim to do in theory.

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<sup>74</sup> The application of the principles of fundamental justice to substantial rights within the *Charter* is discussed at length in the Supreme Court’s decision in *Reference Re: BC Motor Vehicles Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.