# The Stigma of Human Trafficking and the Limits of Evidentiary Presumptions

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## ABSTRACT

The Criminal Code requires that a court presume an individual is engaged in human trafficking if a non-exploited individual lives with or is habitually in the company of a trafficked person unless the accused provides 'evidence to the contrary' that raises a reasonable doubt about whether they were engaging in human trafficking. This presumption is borrowed from other exploitation-related offences, most notably the presumption that an individual who lives with or is habitually in the company of a sex worker is living off the avails or materially benefitting from the provision of sex work. Such presumptions routinely violate the presumption of innocence protected under section 11(d) of the Charter. The Supreme Court nevertheless upheld the presumption relating to the pimping offence under section 1 of the Charter because of the inherent and unique difficulties in prosecuting such offences. While similar evidentiary challenges and the more serious nature of the human trafficking offence suggests similarly strong evidentiary presumptions are warranted in that context, the offence's stigma – a modern day 'slave trader' – is of such a serious nature that it may constitutionally compel the state to prove subjective fault beyond a reasonable doubt before it may secure a conviction.

KEYWORDS: *Human Trafficking; Stigma; Evidentiary Presumptions; Presumption of Innocence; Canadian Charter of Rights and Freedoms*

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## INTRODUCTION

In 2015, Parliament added a presumption that those who live with or are habitually in the company of an individual who is trafficked are presumed to be guilty of human trafficking unless they provide "evidence to the contrary."[1] The placement of an evidentiary burden on the accused operates identically to the prior living off the avails of sex work offence and the current receiving a "material benefit" from sex work offence found in section 286.2(3) of the *Criminal Code of Canada*.[2] The former provision is of particular note as it was subjected to an unsuccessful constitutional challenge in the Supreme Court's decision in *R v Downey*.[3] The impugned provision stated that "[e]vidence that a person lives with or is habitually in the company of prostitutes… is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution."[4] While violating the presumption of innocence, the Court held in *Downey* that placing an evidentiary burden on the accused was justified under section 1 of the *Canadian Charter of Rights and Freedoms*.[5] It arrived at this conclusion largely due to the unique difficulties law enforcement face when attempting to prove an individual engaged in pimping.[6]

In enacting the same presumption in the human trafficking context, Parliament likely thought that a similar constitutional conclusion would follow. Not only do similar evidentiary challenges arise in the human trafficking context,[7] the greater moral gravity of the offence suggests that Parliament's case for imposing an evidentiary burden on the accused is stronger.[8] Yet, this argument overlooks another important feature of the human trafficking offence: the heightened stigma it imposes on the

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1 See *An Act to Amend the Criminal Code (Exploitation and Trafficking in Persons)*, SC 2015, c 16, s 1.

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

3 [1992] 2 SCR 10.

4 See *Criminal Code*, *supra* note 2, s 212(1)(j) (as it then read).

5 Being schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*].

6 See *Downey*, *supra* note 3 at 30-39.

7 These challenges will be discussed below.

8 This is evidenced by the disparate sentencing regimes for the offences. See *Criminal Code*, *supra* note 2, s 212(1)(j) (maximum ten years); 279.01-.011 (maximum 14 years of imprisonment and a minimum of 4 years of imprisonment if the victim is an adult and five years if they are a minor).

offender. While few in number, the Supreme Court has required proof beyond a reasonable doubt of subjective fault for a limited number of criminal offences under section 7 of the *Charter*. These offences include murder, attempted murder, war crimes, and crimes against humanity.[9] If human trafficking were added to this list, the justificatory question under section 1 of the *Charter* would necessarily be placed in a different light. Given this different context, courts at minimum should avoid assuming that the evidentiary burden is justified because of the inherent difficulties with proving human trafficking. It is possible that for certain offences the heightened stigma imposed by a conviction should require the Crown prove beyond a reasonable doubt that an individual committed the offence. While I am not fully convinced that this argument is correct, it may prove forceful to courts given that the novel legal context arising from the evidentiary presumption adopted in the human trafficking context requires a nuanced and novel balancing of the relevant competing interests.

The article unfolds as follows. In Part I, I provide an overview of the Supreme Court's relevant jurisprudence explaining when placing a burden of proof on the accused will violate the presumption of innocence. In so doing, I also explain why this jurisprudence led to a violation of section 11(d) of the *Charter* in *Downey* and will necessarily lead to a similar conclusion in the human trafficking context. In Part II, I unpack the Court's earlier jurisprudence under section 7 of the *Charter* requiring subjective fault for a limited number of highly stigmatizing criminal offences and explain why the human trafficking offence should be added to the list of "stigma" offences. I conclude in Part III by suggesting that any law that relieves the state of proving a stigma offence beyond a reasonable doubt ought to be approached with increased skepticism under section 1 of the *Charter*. Difficulties in proving an offence should nevertheless be given due weight and may in fact warrant upholding the evidentiary presumption.

## I. THE PRESUMPTION OF INNOCENCE

Section 11(d) of the *Charter* provides that "[a]ny person charged with an offence has the right… to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." This explicit recognition of the presumption of innocence in the *Charter* ensures that those charged with an offence are presumed innocent until proven guilty beyond a reasonable doubt. As Chief

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[9] This jurisprudence is discussed below.

Justice Dickson explained in *R v Oakes*,[10] the presumption of innocence is for this reason deeply connected to the human dignity interests of each individual. In essence, the presumption serves to confirm "our faith in humankind" and "reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[11] Citing *Woolmington v Director of Public Prosecutions*,[12] Chief Justice Dickson agreed with the House of Lords that the important role of the presumption of innocence warrants it being described as the "golden thread" of the criminal law.[13]

Chief Justice Dickson also described the content of the presumption of innocence in the *Oakes* decision. Most important for present purposes are the requirements that "an individual must be proven guilty beyond a reasonable doubt" and that "it is the State which must bear the burden of proof."[14] The presumption of innocence therefore requires that the Crown "establi[sh] the guilt of the accused beyond a reasonable doubt before the accused must respond."[15] The elements of the offence include both those required by the relevant statute and those required under the *Charter*.[16] In addition, Chief Justice Dickson interpreted the component of section 11(d) of the *Charter* requiring proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal."[17] As he explained, this provision requires prosecutions be "carried out in accordance with lawful procedures and fairness."[18] While this does not require implementing "the most favourable procedures imaginable," the accused's perspective about the fairness of the procedure must be assessed alongside the relevant views of the complainant and community in determining what procedures are fundamentally fair.[19]

In applying the presumption of innocence, the Supreme Court held in *Oakes* that placing both persuasive and evidentiary burdens of proof on the accused to avoid a finding that they committed any element of a criminal

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10 [1986] 1 SCR 103.

11 *Ibid* at 119.

12 [1935] AC 462 (HL).

13 See *Oakes*, *supra* note 10 at 120 citing *Woolmington*, *supra* note 12 at 481-82.

14 See *Oakes*, *supra* note 10 at 121.

15 See *R v Lamoureux*, 2012 SCC 57 at para 24.

16 See *R v Vaillancourt*, [1987] 2 SCR 636 at 654-55.

17 See *Oakes*, *supra* note 10 at 121.

18 *Ibid*.

19 See e.g., *R v JJ*, 2022 SCC 28 at para 125 (citing various sources).

offence violates section 11(d) of the *Charter*.[20] The former burden is often referred to as a "reverse onus" and requires that the accused disprove a fact by providing evidence that rebuts a presumed fact on a balance of probabilities. In contrast, an evidentiary burden requires that if the state establishes a basic fact then an incriminating fact will be presumed unless the accused raises a reasonable doubt about that fact.[21] Regardless of which standard is deployed, Chief Justice Dickson observed in *Oakes* that "[a] basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt."[22] An accused subject to such a burden of proof "could thereby be convicted despite the presence of a reasonable doubt" which in turn "would violate the presumption of innocence."[23] Whether any rational connection between the established and presumed fact is justifiable for policy reasons is more logically assessed when determining whether the presumption satisfies the broader proportionality test under section 1 of the *Charter*.[24]

There is nevertheless one exception to the general rule requiring the Crown to prove the essential elements of an offence beyond a reasonable doubt. As the Supreme Court observed in *R v Whyte*,[25] "substituting proof of one element for proof of an essential element will not infringe the presumption of innocence if, upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element."[26] In other words, "[o]nly if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid."[27] As the Court later clarified in *R v Morrison*,[28] "[a]n 'inexorable' link is one that necessarily holds true in all cases."[29]

Applying section 11(d) of the *Charter* in *Downey*, the Supreme Court concluded that the living off the avails provision violated the presumption

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20 See *Oakes*, *supra* note 10 at 132-33.

21 See *Downey*, *supra* note 3 at 22-23.

22 *Ibid* at 24-25 citing *Oakes*, *supra* note 10 at 134.

23 *Ibid*.

24 See e.g., *Downey*, *supra* note 3 at 29.

25 [1988] 2 SCR 3.

26 *Ibid* at 19.

27 *Ibid*.

28 2019 SCC 15.

29 *Ibid* at para 53.

of innocence. As detailed earlier, the provision required that the trier of fact presume the existence of a core element of the offence's *mens rea*: the accused derived a benefit from an individual's sex work. This presumption, however, did not follow inexorably from the fact that the accused lived with or was habitually in the company of an individual who performed sex work. To illustrate the point, Justice La Forest invoked the circumstance of a "spouse or companion of a prostitute, who is working, self-supporting and not dependent or relying upon the income garnered by the spouse or companion from prostitution."[30] Despite there being "nothing parasitical about such a relationship," the presumption may result in the spouse being found guilty if the accused does not lead evidence or the trier of fact decides not to believe the accused's evidence to the contrary.[31]

A similar conclusion follows under section 279.01 of the *Criminal Code*. To explain this point, it is first necessary to unpack the elements of the human trafficking prohibition. Subsection 279.01(1) criminalizes the conduct of "[e]very person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation." Subsection 279.01(2) further states that "[n]o consent to the activity that forms the subject-matter of a charge under subsection (1) is valid." The *Criminal Code* provision can be contrasted with the prohibition under the *Immigration and Refugee Protection Act*,[32] which prohibits "organiz[ing] the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."[33] The term "organize" is defined as "recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons."[34] The plain wording of the *Criminal Code* offence thus serves to extend the human trafficking prohibition beyond the immigration context by significantly broadening its *actus reus*.[35]

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30 See *Downey*, *supra* note 3at 30.

31 *Ibid*.

32 SC 2001, c 27 [*IRPA*].

33 *Ibid*, s 118(1).

34 *Ibid*, s 118(2).

35 See *House of Commons Debates*, (17 October 2005) at 8620 (Honourable Irwin Cotler) ("[Bill C-49 aims to] broaden the reach of our existing prohibition to comprehensively respond to all forms of human trafficking, whether they occur wholly within Canada or whether they involve some cross-border or international dimension").

In addition to the broad types of conduct to which the offence applies, the offence's *mens rea* requires that the *actus reus* be done for an exploitive purpose. The term "purpose" is typically interpreted in criminal law as requiring intent to bring about the offence's *actus reus*, and nothing in the human trafficking legislation suggests the offence is an exception.[36] Section 279.04 of the *Criminal Code* further provides a disjunctive definition of the term "exploitation." Under that section, an individual exploits a person if they "(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service" or, alternatively, they "(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed."

In *R v TJF*,[37] the Supreme Court recently provided its first interpretation of the human trafficking offence. In so doing, however, Justice O'Bansawin noted explicitly that the presumption in subsection (3) was not in force at the time of the accused's charges and therefore did not receive significant comment in the decision.[38] The broadest aspect of the offence's *actus reus* instead was the object of interpretation. In defining the terms "control, direction or influence," Justice O'Bansawin observes that the terms imply "a spectrum of power that the accused exerts over the victim."[39] On one end, "the accused will exercise 'control' over the victim's movements… such that the victim will be left with little choice over their movements."[40] On the other end, "the accused will exercise 'influence' over the victim's movements when they… 'induce action or change the decisions or acts of [the victim]' about their movements."[41] While such an individual is "free to move wherever they like…, when they decide how to exercise their freedom,

36 See *R v Hibbert*, [1995] 2 SCR 973.

37 2024 SCC 38.

38 *Ibid* at para 53, note 1. The substantive offence came into force in 2005. See Bill C-49, *An Act to Amend the Criminal Code* (*Trafficking in Persons*), 1st Sess, 38th Parl, 2004-2005.

39 See *TJF*, *supra* note 37 at para 65.

40 *Ibid* citing Bryan Garner, *Black's Law Dictionary*, 12th ed (St Paul: Thomson Reuters, 2024) at 418.

41 See *TJF*, *supra* note 37 at para 65 citing Garner, *Law Dictionary*, *supra* note 40 at 918.

the accused 'alter[s], sway[s], or affect[s] [their] will.'"[42] In between these two poles, the term "direction" means '"[t]o guide', 'to govern', and '[t]o instruct (someone) with authority.'"[43]

Justice O'Bonsawin further observed in *TJF* that to "exercise" control, direction, or influence over a person can only be met by the accused "actualiz[ing] [their power]… in one way or another, such that the victim's movements have been controlled, directed, or influenced by the accused."[44] Given the plain meaning of these terms, it followed that "nothing in the text of the provision bars the Crown from establishing the *actus reus* through evidence of violence and threats of violence by an accused towards a victim and, more generally, a violent relationship between the two, if the effect of that violence is such that the victim's movements have been controlled, directed, or influenced."[45] In her view, such control, direction, or influence can "persist over time, thus creating a situation or a relationship throughout which the victim's movements are being controlled, directed, or influenced regularly."[46]

In addition, Justice O'Bonsawin also offered an interpretation of the human trafficking offence's fault requirement. While actual exploitation is not a requirement of the offence,[47] exploitation will be proven in the relevant sense when the accused "(i) causes the victim to provide (or offer to provide) labour or a service and (ii) a reasonable expectation that the victim could believe that their safety (or the safety of a person known to them) would be threatened if they failed to provide that labour or service."[48] In making this determination, the court must consider "the victim's personal characteristics and vulnerabilities, such as their lack of education, prior victimization, socio-economic disadvantage, and social and family isolation."[49] Citing the Ontario Court of Appeal's reasons in *R v Sinclair*,[50]

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42 *Ibid*.

43 See *TJF*, *supra* note 37 at para 66 citing Garner, *Law Dictionary*, *supra* note 40 at 576.

44 See *TJF*, *supra* note 37 at para 67.

45 *Ibid* at para 68.

46 *Ibid*.

47 *Ibid* at para 99.

48 *Ibid* at para 103.

49 *Ibid* at para 105.

50 2020 ONCA 61.

Justice O'Bonsawin highlighted a variety of factors that are relevant in making this determination.[51]

Justice O'Bonsawin further observed that a finding of actual exploitation of the victim may justify an inference that the accused's conduct was undertaken for that purpose.[52] She explicitly agreed with the Crown's suggestion that "regular violence and threats of violence by the accused against the complainant is relevant to establishing that the accused exploited the complainant."[53] In Justice O'Bonsawin's view, "evidence of regular violence and threats of violence by the accused against the victim, when paired with other evidence establishing that the victim engaged in labour or offered labor during the time they were subjected to the accused's regular violence, can be relevant to establishing exploitation."[54] Justice O'Bonsawin nevertheless also cautioned that the evidence must be assessed as a whole and "courts should pay careful attention to evidence that would contradict, even refute, the inference."[55]

Given this overview of the human trafficking offence, it is now possible to assess whether the presumption found in subsection 279.01(3) of the *Criminal Code* violates the presumption of innocence. That section provides as follows: "evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation." It follows that the accused must be presumed to have committed the offence of human trafficking if they are not an exploited person and live with or are habitually in the company of a person who is a trafficked person within the meaning of the provision.

Applying this provision, a variety of individuals are captured despite not engaging in human trafficking and for whom the fact of living with or being habitually in the company of a person who is being trafficked would not lead inexorably to the inference compelled by section 279.01(3) of the

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51 See *TJF*, *supra* note 37 at para 105 citing *Sinclair*, *supra* note 50 at para 15. Notably, an attempt to codify these factors failed to pass through Parliament. See Bill S-224, *An Act to Amend the Criminal Code (Trafficking in Persons)*, 44th Parl, 1st Sess, (19 June 2024).

52 See *TJF*, *supra* note 37 at para 97.

53 *Ibid*.

54 *Ibid* at para 98.

55 *Ibid* at para 102.

*Criminal Code*. For instance, consider an impoverished individual who shares housing with a trafficked individual as their limited means only permit renting a room in a shared house. Or consider an individual who was formerly exploited – such as an ex-sex worker – who befriends an exploited person to provide emotional and other support given their acute understanding of exploitation. At minimum, these and other individuals will be presumed guilty of a serious crime – subjecting them to a minimum sentence of four or five years of imprisonment depending on the age of the victim[56] – unless they provide evidence that is believed by the trier of fact that their actions were taken for non-exploitive purposes.

## II. THE STIGMA DOCTRINE

It is clear from *TJF* that the human trafficking offence generally requires proof of subjective fault. The presumption found in section 279.01(3) of the *Criminal Code* nevertheless permits the Crown to secure a human trafficking conviction without proving the basic elements of the offence. While this provision infringes the presumption of innocence, it also violates another core doctrine of criminal law theory: the principle of fundamental justice requiring proportionality between the offence's stigma and fault component. As I contend below, the fact that the presumption operates in the context of an offence that imposes a severe stigma should result in a particularly serious infringement of section 7 of the *Charter*. This infringement in turn should significantly impact the determination of whether the impugned presumption constitutes a justifiable infringement of rights under section 1 of the *Charter*.

### A. Fault and Fundamental Justice

In *R v Brown*,[57] the Supreme Court recently affirmed its jurisprudence holding that "proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands

[56] The jurisprudence is currently split on whether these minimum sentences constitute cruel and unusual punishment contrary to section 12 of the *Charter*. See *R v Europe*, 2024 ONSC 5352 (upholding the provision); *R v PO*, 2023 ABKB 656; *R v Jean*, 2020 ONSC 624; *R v Finestone*, 2017 ONCJ 22 (striking the provision).

[57] 2022 SCC 18.

subjective fault."[58] While this an accurate statement of the law, a complex history exists concerning the relationship between fault and the "principles of fundamental justice" protected under section 7 of the *Charter*.[59] Under that provision, legislatures are prohibited from passing a law that engages the "life, liberty, or security of the person" interests of any individual in a manner that is inconsistent with a "principle of fundamental justice." The principle of fundamental justice from which the general rule affirmed in *Brown* is derived is a proportionality requirement between the fault element of a criminal offence and the stigma imposed by that offence.[60] As I explain below, however, the Supreme Court has carved out a specific doctrine prohibiting conviction without subjective fault for what may be called "high stigma" offences.

The Supreme Court's method for determining whether an offence's *mens rea* is proportionate derives from two distinct ideas. As Chief Justice Lamer observed in *R v Martineau*,[61] the cardinal conception requires "a proportionality between the stigma and punishment attached to a[n] [offence] and the moral blameworthiness of the offender."[62] Put differently, there is an abstract balancing of the type of *mens rea* for an offence (e.g., penal or criminal negligence, knowledge, intent, and so on) and the stigma that the offence imposes on the offender. While the cardinal conception is the focus of the stigma jurisprudence, Chief Justice Lamer also recognized an ordinal conception of the proportionality principle. As he explained, it is a "fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally."[63] It follows that an offence's fault element must be organized relative to other similar criminal offences. For instance, those who commit a culpable act like an assault with subjective foresight of death

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58 *Ibid* at para 90.

59 For an excellent review, see Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61 University of Toronto Law Journal 545.

60 See *R v Martineau*, [1990] 2 SCR 633 at 646. See also *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 [*BC Motor Vehicles*]; *Vaillancourt*, *supra* note 16; *R v Logan*, [1990] 2 SCR 711; *R v Creighton*, [1993] 3 SCR 3; *R v Finta*, [1994] 1 SCR 701.

61 *Supra* note 60.

62 *Ibid* at 646. Importantly, reliance on the offence's "punishment" was downplayed in subsequent jurisprudence. See e.g., *Logan*, *supra* note 60 at 743.

63 See *Martineau*, *supra* note 60 at 645 citing HLA Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968) at 162.

(e.g., murder) must be labelled differently than those who kill with some lesser form of *mens rea* such as objective foreseeability of bodily harm (e.g., manslaughter).[64]

The Supreme Court's development of the relationship between the fault element of true crimes and the principles of fundamental justice began in *R v Vaillancourt*.[65] In that case, the accused constitutionally challenged parts of the now repealed section 230 of the *Criminal Code*. This provision permitted conviction for murder if a death occurred during the commission of a listed offence like robbery with a weapon despite the accused not foreseeing that anyone would be killed during the offence. Known as the doctrine of "felony murder," the Court struck down in a piecemeal fashion what was considered to be among "the harshest [felony murder rules] in the common law world."[66] In so doing, the Court was hesitant in *Vaillancourt* to constitutionally require subjective fault with respect to a killing for an offender to be labelled a "murderer" due to the offence's severe stigma. Due to its broad scope, the impugned provision did not even require objective foresight of death. Three years later in *Martineau*, however, the Court confirmed a subjective foresight of death requirement when it struck down a further mode of felony murder: an unlawful killing elevated to murder when the offender used a weapon during the commission of certain offences or to facilitate fleeing the scene from such offences.[67]

Following *Vaillancourt* and *Martineau*, the remaining felony murder rules[68] – as well as the objective arm of the unlawful object mode of liability for murder[69] – were all clearly violative of section 7 of the *Charter*. Shortly after *Martineau*, the Supreme Court extended its application of the proportionality principle relating to fault to the offence of attempted murder in *R v Logan*.[70] As Chief Justice Lamer observed, "[t]he attempted murderer is no less a killer than a murderer: he may be lucky – the

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64 *Ibid*.

65 *Supra* note 16. The initial jurisprudence constitutionalizing a requirement of fault when an accused's liberty interest is engaged derives from *BC Motor Vehicles*, *supra* note 60. The constitutional rule requiring at minimum a due diligence defence in this context is not necessary to review for present purposes.

66 See e.g., Bruce Archibald, "The Constitutionalization of the General Part of Criminal Law" (1988) 67 Canadian Bar Review 403 at 420.

67 See *Martineau*, *supra* note 60 at 644.

68 See e.g., *R v Sit*, [1991] 3 SCR 124.

69 See *Criminal Code*, *supra* note 2, s 229(c).

70 *Supra* note 60.

ambulance arrived early, or some other fortuitous circumstance – but he still has the same killer instinct."[71] It followed that the "stigma associated with a conviction for attempted murder is the same as it is for murder."[72] Importantly, Chief Justice Lamer also backpedaled the previous suggestion in *Vaillancourt* that an offence's "punishment" is a significant part of the analysis under section 7 of the *Charter*. As he observed, "the social stigma associated with a conviction is the most important consideration, not the sentence."[73]

While the Supreme Court has subsequently held that war crimes and crimes against humanity qualify as stigma offences[74] – as well as suggested in *obiter* that theft so qualifies[75] – the Court's subsequent jurisprudence rejected an argument that manslaughter requires subjective fault for the consequence of death. Not even objective foreseeability of death was required; instead, only objective foreseeability of "bodily harm" (defined as harm that is not trivial or transient)[76] is required to sustain a manslaughter conviction.[77] Subsequent to this early jurisprudence, however, few offences have been challenged for imposing an unconstitutional degree of fault. When they have been so challenged, the Court generally demurs as occurred in *Morrison* when the offender suggested that the offence of child luring qualified as a "high stigma" offence. While the issue was unnecessary to decide, Justice Moldaver wrote for a majority that it is "very doubtful that this stigma and punishment rise to the level of requiring purely subjective *mens rea*."[78]

This retreat from employing the proportionality rule relating to the fault element of criminal offences is likely due to two reasons. First, Parliament in general has passed offences with subjective fault requirements including when enacting particularly stigmatizing offences such as the

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71 *Ibid* at 743.

72 *Ibid*.

73 *Ibid*.

74 See *Finta*, *supra* note 60.

75 See *Logan*, *supra* note 60 at 744 citing *Vaillancourt*, *supra* note 16 at 653. While this *obiter* comment has been criticized, I defend it elsewhere. See Colton Fehr, *Rethinking Homicide: The Constitutional Case for Reform* (Montreal: McGill-Queen's University Press, forthcoming).

76 See *Criminal Code*, *supra* note 2, s 2.

77 See generally *Creighton*, *supra* note 60.

78 See *Morrison*, *supra* note 28 at para 79.

terrorism offences.[79] As a result of Parliament's sensitivity to the need to prove subjective fault with respect to most criminal offences, new offences are generally not challengeable based on their fault element alone. Second, the Supreme Court's proportionality principle has been the object of scholarly criticism.[80] As Alan Brudner contends, the Court's cardinal proportionality principle, "(at best) invokes an ethical standard that cannot be legally enforced without its ceasing to be a standard."[81] For Brudner, this follows as "[t]he standard this view invokes is an equality between some combination of popular disapproval and penalty on the one hand and some level of moral fault on the other – an equality that the impugned law supposedly fails to achieve."[82]

While Brudner's criticism is not without merit,[83] the Supreme Court's recent jurisprudence shows no signs of rescinding the principle of fundamental justice requiring proportionality between an offence's fault element and the stigma it imposes. Instead, it is likely that the Court will continue to employ a high standard before an offence will be required to impose subjective fault. If the Court was "very doubtful" about whether child luring – which imposes the stigma of being a pedophile willing to sexually assault a young person – qualifies as a stigma offence under section 7 of the *Charter*, then the bar strikes me as being quite high. Yet, the human trafficking offence falls somewhere between child luring and murder, but in my view far closer to the latter than the former. If human trafficking qualifies as a stigma offence, then a presumption allowing such a conviction

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79 See *Criminal Code*, *supra* note 2, s 83.01-83.3; Kent Roach, "Terrorism Offences and the *Charter*: A Comment on *R v Khawaja*" (2007) 11 Canadian Criminal Law Review 271.

80 See e.g., Rosemary Cairns Way, "The *Charter*, the Supreme Court and the Invisible Politics of Fault" (1993) 12 Windsor Yearbook of Access to Justice 128; James Stribopoulos, "The Constitutionalization of 'Fault' in Canada: A Normative Critique" (1999) 42 Criminal Law Quarterly 227; Alan Young, "Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law" (2008) 40 Supreme Court Law Review (2d) 441 at 482; Jamie Cameron, "Fault and Punishment Under Sections 7 and 12 of the *Charter*" (2008) 40 Supreme Court Law Review (2d) 553 at 569; Roach, "Mind the Gap", *supra* note 59.

81 See Alan Brudner, "Proportionality, Stigma and Discretion" (1996) 38 Criminal Law Quarterly 302 at 306.

82 *Ibid*.

83 I elsewhere discuss Brudner's criticism in more detail but ultimately suggest some role ought to be retained for the cardinal proportionality principle. See Fehr, *Rethinking Homicide*, *supra* note 75 at Chapter 2. A lengthy review of this dialogue is unnecessary for the purposes of this article.

without subjective fault with respect to the offence's core elements violates fundamental justice. If correct, this conclusion should be impactful when considering whether the primary infringement of section 11(d) is justifiable under section 1 of the *Charter*.

## B. The Stigma of Human Trafficking

As the earlier review of the human trafficking offence revealed, the *actus reus* of the offence is exceptionally broad. In addition, the *mens rea* does not require a key element typically thought necessary to prove human trafficking: actual exploitation. Instead, a reasonable perception of a threat if the victim fails to undertake a service is all that must be proven to satisfy the fault element for the human trafficking offence. This far-reaching offence definition no doubt pushes the boundaries of the definition of human trafficking. For present purposes, however, the offence also captures human trafficking as it is more commonly understood: one individual selling the labour of another for profit. It is the stigma underlying this plain understanding of the offence of human trafficking that necessarily forms the basis of any stigma analysis.[84]

Before adopting the human trafficking prohibitions in the *Criminal Code*, Parliament devised a national action plan to combat human trafficking wherein it detailed the specific rationale underlying the prohibition.[85] As the report writers correctly note, human trafficking "is often described as a modern form of slavery."[86] In so concluding, the writers of the national action plan define human trafficking similarly as under the *Criminal Code*: "the recruitment, transportation, harbouring and/or exercising control, direction or influence over the movements of a person in order to exploit that person, typically through sexual exploitation or forced labour."[87] They further observe that traffickers typically exercise control over their victims "in various ways such as taking away their identity

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84 This approach is consistent with the Supreme Court's application of its stigma principle. For instance, in declaring various felony murder provisions unconstitutional the Court did not allow the fact that an individual could be convicted of murder if they did not intend to kill a person or did not in fact physically kill a person impact the stigma of the murderer label. See *Vaillancourt*, *supra* note 16; *Martineau*, *supra* note 60.

85 See Government of Canada, *National Action Plan to Combat Human Trafficking*, (2012), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf> [*National Action Plan*].

86 *Ibid* at 4.

87 *Ibid*.

documents and passports, sexual abuse, threats, intimidation, physical violence, and isolation."[88] Victims are also often "socially or economically disadvantaged, such as some Aboriginal women, youth and children, migrants and new immigrants, teenaged runaways, children who are in protection, as well as girls and women, who may be lured to large urban centres or who move or migrate there voluntarily."[89]

As is clear from the national action plan report, it is the stigma of being a modern-day slave trader that Parliament meant to convey when crafting the human trafficking offence. This label strikes me as eminently reasonable in light of the conduct described in Parliament's plan to combat human trafficking. If true, however, then it should be asked if the stigma underlying this offence is adequate to qualify as one of the few offences under the *Criminal Code* that requires subjective fault. In my view, this question should be answered in the affirmative. Enslaving someone implies that the offender deems it acceptable to dehumanize, degrade, and instrumentalize another human being for personal gain. The strong correlation with the use of violence and other coercive means to maintain control over those who are trafficked further makes this among the most reprehensible offences as it denies the victim's human dignity completely. The label "slave trader" therefore communicates that the offender utterly rejects basic principles of the liberal democratic order such as the right of everyone to liberty and equality.

The fact that the human trafficking offence imposes a severe stigma – and rightly so – is also inferable from the offence's mandatory minimum four- or five-year penitentiary sentence.[90] Not only is this among the highest minimum sanctions available in Canadian criminal law,[91] the sentences imposed for human trafficking can approach – and in some particularly serious cases be comparable in gravity to – those imposed for a second-

88 *Ibid*.

89 *Ibid* at 6.

90 The minimum sentence is increased if the victim is under 18 years of age. See *Criminal Code*, *supra* note 2, ss 279.01(1)(b), 279.011(1)(b). The minimum sentence is also elevated if offenders "kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence." See *ibid*, ss 279.01(1)(a), 279.011(a).

91 It is notable that the jurisprudence considering the minimum sentence's constitutionality is mixed in large part due to the breadth of the offence's *actus reus*. See the cases cited *supra* note 56. Such a minimum sentence would nevertheless seem lenient for a typical human trafficking conviction, and judges recognize that the range is usually 4-8 years of imprisonment and can be elevated from that point. See e.g., *R v Swaby*, 2024 ONSC 6141 at para 34 citing *R v AE*, 2018 ONSC 471 at para 46.

degree murder conviction per section 745(c) of the *Criminal Code*.[92] The latter sentence is obviously more severe on average as it imposes a life sentence alongside a ten-year minimum parole ineligibility period. However, any sentence that routinely approaches this severe sentence[93] strikes me as relevant to the stigma analysis. While the Supreme Court in *Logan* downplayed the role of penalty in analyzing an offence's stigma, it did not entirely exclude this consideration. In addition, the offence notoriously impacts vulnerable communities adding a further reprehensible component. As is evident from a recent compilation of victim data from 2013-2023, "the vast majority [of victims] (93%) were women and girls, and about one-quarter (23%) were children and youth younger than 18 years."[94] Taken together, it is my view that the penalty and the extreme moral opprobrium attached to the offence of human trafficking warrant its inclusion as a high stigma offence requiring subjective fault.

It is nevertheless true that the elements of the human trafficking offence clearly adopt a subjective fault requirement. It does so by requiring that any of its *actus reus* components are done "for the purpose" of exploiting the individual. For present purposes, the importance of the offence qualifying as a "high stigma" offence is that the evidentiary presumption allows for a conviction where the Crown has not proven the *mens rea* of the offence beyond a reasonable doubt. Instead, the Crown need only prove that the accused was living with or habitually in the presence of a person who was exploited per section 279.01(3) of the *Criminal Code*. Where this presumption is applied, the violation of the presumption of innocence detailed earlier is aggravated by the fact that section 7 of the *Charter* is also violated due to the Crown being relieved of proving a constitutionally required element of a "high stigma" offence. This in turn must impact any attempt by the state to justify the impugned law's rights violations.

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92 For a detailed review of the sentencing jurisprudence, see Federal/Provincial/Territorial Working Group on Trafficking in Persons, *A Handbook for Criminal Justice Practitioners on Trafficking in Persons* (Ottawa: Department of Justice Canada, 2024) at 147-92 (describing dozens of cases in detail).

93 For my argument as to why this minimum sentence may be unconstitutional and the case upholding the sentence (*R v Latimer*, 2001 SCC 1) overturned, see Fehr, *Rethinking Homicide*, *supra* note 75 at Chapter 7.

94 See Statistics Canada, "Trafficking in Persons in Canada" *The Daily* (2024 November 1), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/241101/dq241101a-eng.htm>.

## III. SECTION 1 OF THE *CHARTER*

Section 1 of the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Supreme Court's interpretation of this provision requires that any law passed by a legislature must have both a pressing and substantial objective and constitute a proportionate infringement of the rights in question. As the human trafficking presumption clearly forwards an important purpose, it is only necessary to unpack the meaning of "proportionality" in the section 1 context before asking whether the evidentiary difficulties with human trafficking prosecutions justifiably violate sections 7 and 11(d) of the *Charter*.

### A. The Justification Test

For a law to constitute a proportionate infringement of rights, the Supreme Court has consistently required that it satisfy a three-requirement test with each constituent element requiring proof on a balance of probabilities.[95] First, the law must be rationally connected to its objective. The Court expanded upon this requirement in *RJR-MacDonald Inc. v Canada (Attorney General)*.[96] As Justice McLachlin (as she then was) observed, there must be "a causal connection between the infringement and the benefit sought on the basis of reason or logic."[97] Put differently, "the government must show that the restriction on rights serves the intended purpose."[98] In cases where a legislature seeks to alter human behaviour, Justice McLachlin explained that it is only necessary for courts to "find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective."[99]

Second, the impugned law must constitute a "minimal impairment" of the relevant rights infringements.[100] In *RJR MacDonald*, the Supreme Court explained that this requirement demands that the government "show that

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95 For the original statement of this test, see *Oakes*, *supra* note 10 at 138-39.

96 [1995] 3 SCR 199.

97 *Ibid* at para 153.

98 *Ibid*.

99 *Ibid* at para 154.

100 See *Oakes*, *supra* note 10 at 138-39.

the measures at issue impair the right… as little as reasonably possible in order to achieve the legislative objective."[101] As the legislative drafting process "seldom admits of perfection," courts must also "accord some leeway to the legislator" such that "[i[f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."[102] As the Court later explained, "[t]his is particularly the case where the impugned measures 'attempt to strike a balance between the claims of legitimate but competing social values.'"[103] On the other hand, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[104]

Finally, a rights-infringing law must strike a proportionate balance between its salutary and deleterious effects to be upheld under section 1 of the *Charter*.[105] At this stage of analysis, the courts must undertake "the broadest assessment of the benefits of [the impugned law] to society" and "[weigh those benefits] against the cost of the limitations to ss. 7 and 11(d) of the *Charter*."[106] The judicial balancing at this stage of the analysis therefore requires courts to "transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society 'in direct and explicit terms.'"[107]

## B. Evidentiary Difficulties

To determine whether the impugned law is rationally connected to its objective, it is first necessary to decipher the objective of the presumption relating to the human trafficking offence. The objective strikes me as clear on its face: preventing the exploitation of vulnerable persons. Notably, the Supreme Court arrived at a similar conclusion in *Downey* when determining the objective of a near identically worded presumption applied to the living

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101 See *RJR MacDonald*, *supra* note 96 at para 160.

102 *Ibid*.

103 See *Quebec (Attorney General) v A*, 2013 SCC 5 at para 439 citing *McKinney v University of Guelph*, [1990] 3 SCR 229 at 285; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 53.

104 See *RJR MacDonald*, *supra* note 96 at para 160

105 See *Oakes*, *supra* note 10 at 139.

106 See *Brown*, *supra* note 57 at para 143 citing *R v KRJ*, 2016 SCC 31 at para 77; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 123; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 122.

107 See *KRJ*, *supra* note 106 at para 79.

off the avails of sex work offence.[108] Relying heavily on the Fraser and Badgley Reports,[109] the Court in *Downey* agreed that "physical violence, forced acts of sexual degradation and subtle forms of coercion, were used by the pimps to keep [sex workers] on the streets" in a relationship that was "[i]n some ways… most closely analogous to slavery."[110] It followed that sex workers typically feared speaking to police about their pimps and the degree of control pimps exercised over sex workers often resulted in a psychological dependency on their pimps leading to difficulties with some sex workers functioning without them.[111] The presumption permitted the Crown to circumvent these evidentiary difficulties when the accused lived or was habitually in the company of a sex worker. This allowed the criminal law to better prosecute and deter pimping which in turn aided in protecting vulnerable individuals from being exploited.

The Supreme Court's first interpretation of the human trafficking offence revealed similar concerns. As Justice O'Bonsawin explained in *TJF*, Parliament's adoption of the human trafficking laws sought to "[capture] all forms of trafficking in persons" with a specific objective of protecting "women and children, who are especially vulnerable to trafficking in persons."[112] She further observed that "jurisprudence, national commissions and inquiries, and research echo this concern and recognize that women and children, including Indigenous women and girls, are 'disproportionately subjected to sexual violence.'"[113] Despite a staggering number of human trafficking cases in Canada,[114] scholars have observed

[108] See *Downey*, *supra* note 3 at 32.

[109] See Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*, vol 2 (Ottawa: Minister of Supply and Services Canada, 1985) [Fraser Report]; Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children*, vol 2 (Ottawa: Minister of Supply and Services Canada, 1984) [Badgley Report].

[110] See *Downey*, *supra* note 3 at 33 citing Fraser Report, *supra* note 109 at 379.

[111] See Badgley Report, *supra* note 109 at 1057-58.

[112] See *TJF*, *supra* note 37 at para 59 citing *House of Commons Debates* (26 September 26 2005) at 7988 (Honourable Paul Harold Macklin); *House of Commons Debates* (17 October 2005) at 8619 (Honourable Irwin Cotler).

[113] See *TJF*, *supra* note 37 at para 60 citing *R v Friesen*, 2020 SCC 9 at paras 68, 70.

[114] See *TJF*, *supra* note 37 at para 55 ("the RCMP estimated that approximately 600 women and children were trafficked into Canada each year for sexual exploitation alone, and at least 800 women and children for all domestic

that "[p]rosecuted cases related to human trafficking remain relatively low, with even fewer corresponding convictions."[115] Indeed, between the years 2006 and 2018, "there were only ninety-two prosecuted cases, eighty-five of which were related to sex trafficking and just forty-five resulting in a conviction."[116] The difficulties in prosecuting human trafficking offences help explain why Canada continues to be "identified as a source, destination and transit country for victims of human trafficking for the purposes of sexual exploitation and forced labour."[117]

These difficulties are unsurprising in light of the evidentiary challenges proving human trafficking offences. Similar to pimping offences, Parliament recognized in its national action plan to combat human trafficking that "these cases often go unnoticed and unreported due to manipulation, fear, threats from traffickers, shame, language barriers or mistrust of authorities."[118] These challenges are amplified with foreign victims of trafficking as they "are usually in the country alone, without family or a support system, and may be obstructed by language barriers."[119] These victims also "may not always see themselves as victims" and are often "skeptical of police and see very little value or nothing to gain from cooperating with police."[120] In light of these challenges, permitting the Crown to rely on an evidentiary presumption when an individual lives or is habitually in the company of a trafficked person evinces a logical connection

markets, including drug trade, domestic work, and labour for garment or other industries"). See also Jacqueline Oxman-Martinez, Marie Lacroix, and Jill Hanley, *Victims of Trafficking in Persons: Perspectives from the Canadian Community Sector* (Ottawa: Department of Justice Canada, 2005) at 2.

115 See Marcus Sibley and Emily van der Meulen, "Courting Victims: Exploring the Legal Framing of Exploitation in Human Trafficking Cases" (2022) 37 Canadian Journal of Law & Society 409 at 411 citing Hayli Millar and Tamara O'Doherty, *Canadian Human Trafficking Prosecutions and Principles of Fundamental Justice: A Contradiction in Terms?* (2020), online: <https://icclr.org/wp-content/uploads/2020/06/Millar-and-ODoherty-Technical-Report-on-CanadianHuman-Trafficking-Prosecutions-1.pdf?x85459>.

116 *Ibid*.

117 See Public Safety Canada, "Statistics on Human Trafficking" (09 January 2025), online: <https://www.publicsafety.gc.ca/cnt/cntrng-crm/hmn-trffckng/abt-hmn-trffckng-en.aspx>.

118 See *National Action Plan*, *supra* note 85 at 5.

119 *Ibid* at 7.

120 *Ibid*.

between Parliament's aim of preventing the exploitation of vulnerable persons.

The question of whether the evidentiary presumption applied to the human trafficking offence constitutes a minimal impairment of rights also bears similarities to the presumption at issue in *Downey*, although significant differences remain. The majority of the Supreme Court in *Downey* concluded that there were no available means to pursue Parliament's important objective in a similarly efficacious manner. As Justice Cory wrote, completely eliminating the presumption "would reward [pimps] for the intimidation of vulnerable witnesses in a situation where it has been demonstrated that just such intimidation is widespread."[121] Parliament's restraint was also evident from the fact that it chose to impose an evidentiary as opposed to a persuasive burden of proof on accused.[122] For these reasons, the evidentiary burden in the living off the avails context was held to be minimally impairing of the presumption of innocence.

A similar argument can be made with respect to whether the human trafficking presumption constitutes a minimal impairment of rights. First, Parliament was clearly concerned with the evidentiary difficulties in proving these types of offences. As the review provided earlier revealed, Canada remains a destination spot for human trafficking, prosecutions are relatively few compared to the number of known victims, and, where charges are brought, they tend to have low success rates. Second, Parliament also employed the least restrictive presumption type to aid the Crown in proving human trafficking: an evidentiary presumption. It is unclear what less restrictive tool could be used to achieve Parliament's objective of facilitating human trafficking prosecutions against vulnerable victims. For these reasons, it is possible that the human trafficking presumption would be minimally impairing of the rights that it infringes.

It is nevertheless notable that the minimal impairment analysis in *Downey* did not engage with the question of whether other evidentiary tools could be effectively deployed to encourage witnesses to testify against human traffickers.[123] Under the *Criminal Code*, it is possible to issue protection orders against offenders and others affiliated with a criminal accused where reasonable grounds exist that the individual will cause personal injury to the victim, their intimate partner, or child, or damage

121 See *Downey*, *supra* note 3 at para 64.

122 *Ibid*.

123 I thank an anonymous reviewer for raising this point.

their property.[124] It is also possible to provide witnesses who testify under trying circumstances with various forms of testimonial aid.[125] These types of protection are also now affirmed under provisions of the *Canadian Victims Bill of Rights*[126] directed at ensuring the security of victims, protecting their privacy, and explicitly requiring courts to consider victim need for testimonial aid.[127] The fact that the existence of these options overlaps with low prosecution rates might nevertheless convince courts that these measures are inadequate substitutes due to vulnerable witnesses perceiving a limited capacity of the state to protect them.

Another key difference between the human trafficking and living off the avails offences is also relevant: the stigma for the former offence is far greater than for the latter offence. It may be retorted that the Fraser Report suggested that at least some of the sex workers controlled by pimps endure treatment "analogous to slavery."[128] This will no doubt be true in some cases, and those cases would likely be prosecuted today under the human trafficking offence. Notably, that offence simply did not exist at the time *Downey* was decided. There are nevertheless two reasons to distinguish the reasoning in *Downey*. First, the Supreme Court was not asked to consider whether the living off the avails offence is a stigma offence under section 7 of the *Charter*. Second, and more importantly, the stigma of any offence necessarily derives from the label it imposes. It strikes me as obvious that a conviction for "living off the avails of sex work" does not have as severe a connotation as a conviction for "human trafficking." The lesser severity of a conviction for the former offence is also evident from the fact that the punishment provisions for the living off the avails offence did not include a minimum sentence and subjected the accused to a less severe maximum punishment.[129]

If the foregoing analysis is persuasive, then it should follow that the constitutionality of the presumption under section 279.01(3) of the *Criminal Code* will turn on the final balancing stage of the *Oakes* test. In *Downey*, the Court relied on the same considerations detailed under the

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124 See *Criminal Code*, *supra* note 2, s 810.

125 *Ibid*, s 486.1-486.7.

126 SC 2015, c 13.

127 *Ibid*, ss 9-13.

128 See Fraser Report, *supra* note 109 at 379.

129 See *Criminal Code*, *supra* note 2, s 212(1)(j) (such an offender is "guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years").

minimal impairment branch to conclude that the salutary effects from the infringing provision struck a reasoned balance vis-à-vis its deleterious effects on rights. In particular, the challenges in prosecuting the offence were relied upon in combination with the fact that the accused need only raise a reasonable doubt about whether they were living or habitually in the company of a sex worker for non-exploitive purposes. These twin rationales for adopting the evidentiary presumption mitigated the potential for wrongful convictions to a tolerable level.[130] Similarly, the fact that the victims of this crime tend to be vulnerable minorities weighed in favour of upholding the presumption that an individual who lives or is habitually in the company of a sex worker was presumed guilty of living off the avails of sex work.[131]

While similar considerations apply in the human trafficking context, the difference is that the latter offence imposes a much more severe stigma on the offender without requiring the Crown to prove guilt beyond a reasonable doubt. Whether this constitutes a proportionate response is difficult to assess as I am unaware of any case that has raised a similar issue. The Supreme Court's reasons in *Oakes* nevertheless provide a prudent starting point for addressing this question. As Chief Justice Dickson observed, "[s]ome limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."[132] Emphasizing this statement 36 years later in *Brown*, the Supreme Court affirmed that "sections 7 and 11(d) are rights that 'will not be easily outweighed by collective interests" under section 1.'"[133]

In *Brown*, the Supreme Court was asked to uphold a law that violated both sections 7 and 11(d) of the *Charter* due to limitations the law imposed on the intoxication "defence." The former section 33.1 of the *Criminal Code* required the trier of fact to substitute the blameworthiness inherent to an accused's choice to become extremely intoxicated – a level of impairment that puts the accused in a state of automatism – for the *mens rea* of any violent offence. Although often referred to as a defence, extreme intoxication provides an evidentiary basis for denying that the accused acted

130 See *Downey*, *supra* note 3 at para 66.

131 *Ibid* at para 67.

132 See *Oakes*, *supra* note 10 at 139-40.

133 See *Brown*, *supra* note 57 at para 166.

in a physically voluntary manner thereby preventing the Crown from proving the most basic and fundamental aspect of the *actus reus* of any offence.[134] Such a degree of intoxication also prevents any inference from the accused's conduct that the accused intended the natural consequences of their action thereby preventing the *mens rea* for such an offence from being proven.[135]

Despite violating these basic pre-requisites for criminal liability, the limitations on the intoxication defence also sought to forward important policy aims. In particular, the scourge of violence against women and children that is often fueled by intoxication weighed significantly in favour of upholding the relevant law. As Justice Kasirer observed, "[s]ection 33.1 voices society's strong intolerance for such behaviour, and affirms society's commitment to the equality and security rights of victims vulnerable to intoxicated crime."[136] In so doing, the Court further held that the impugned provision also increased confidence in the criminal justice system by holding people to account for intoxicated violence. This factor nevertheless also cut both ways as confidence in the justice system might decrease by upholding laws infringing fundamental tenets of the justice system.[137] Parliament's accountability objective was nevertheless "undone by the very means it chose to pursue it" as the impugned provision did not "require objective foreseeability of the risk of falling into a state of automatism, much less the risk of consequential harm."[138] As the impugned law violated the most basic pre-requisites for criminal liability, a unanimous Court in *Brown* was unable to conclude that the infringement was justifiable under section 1 of the *Charter* despite its important social policy aims.[139]

The application of section 1 of the *Charter* in *Brown* is informative when considering the constitutionality of the evidentiary burden imposed on those accused of human trafficking but again is readily distinguishable. First, the Supreme Court in *Brown* was addressing a breach of an even more basic principle of justice as it underlies the *actus reus* component of an offence: accused must physically choose to commit a criminal act. Extreme intoxication, like other forms of automatism, erases the ability to infer the basic elements of the offence from the accused's conduct. While convicting

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134 *Ibid* at paras 45-47.

135 *Ibid* at para 48.

136 *Ibid* at para 146.

137 *Ibid* at para 149.

138 *Ibid*.

139 *Ibid* at para 166.

an accused of a stigma offence without requiring that the state prove the elements of the offence beyond a reasonable doubt is also a serious breach of fundamental justice, it strikes me as less serious as there is at least a rational connection between the evidentiary presumption and the human trafficking offence. Although there are instances where such a presumption could be rebutted, Parliament's intuition that those who live or are habitually in the company of a trafficked person will often be individuals engaged in human trafficking is not irrational and will likely often be factually correct.

Second, the evidentiary burden in the human trafficking context is much easier to meet than the persuasive burden imposed in the context of pleas of automatism.[140] As in *Downey*, it is likely that the vast majority of those inappropriately subjected to the human trafficking evidentiary presumption will be able to raise a doubt about whether the inference is logical. This nevertheless leaves a risk of wrongful conviction in some cases where the accused is unable to meet this low evidentiary threshold and in fact has not engaged in human trafficking. While a serious concern, it also is mitigated by adhering to Justice O'Bonsawin's prudent caution in *TJF* that courts must assess the evidence as a whole and that courts should pay particularly "careful attention to evidence that would contradict, even refute, the inference."[141]

Finally, and most importantly, the tangible benefits of the evidentiary presumption strike me as strongly connected to achieving greater prosecutorial efficacy in a context that has proven extremely difficult to prosecute due to the sociological challenges connected to human trafficking. This in turn may deter human trafficking by raising the likelihood of conviction in a jurisdiction that is objectively viewed by traffickers as relatively low risk.[142] The evidence in *Brown* did not develop a strong link between barring an intoxication defence and preventing violence against women and children, although the former limitations on the intoxication defence certainly provided an accurate and important statement of social values. It is nevertheless far from clear that individuals will seriously refrain from consuming alcohol or drugs because they will be

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140 See e.g., *R v Daviault*, [1994] 3 SCR 63. I would be remiss not to add that I have questioned the constitutionality of the persuasive burden of proof (or at least the procedure underlying it) in the intoxication context elsewhere. See Colton Fehr, "Automatism and the Burden of Proof: An Alternative Approach" (2020) 25 Canadian Criminal Law Review 115.

141 See *TJF*, *supra* note 37 at para 102.

142 See Public Safety Canada, "Statistics on Human Trafficking", *supra* note 117.

held liable for their violent conduct on the off chance that they both become extremely intoxicated and commit a violent offence. On the other hand, human traffickers can reasonably be expected to be deterred from committing such an offence in Canada based on an increased chance of being caught and convicted of an offence due to the evidentiary presumption adopted under section 279.01(3) of the *Criminal Code* forwarding precisely this aim.

It is nevertheless notable that the suggestion that a breach of section 7 of the *Charter* could be justified under section 1 runs up against early Supreme Court jurisprudence. In *Re B.C. Motor Vehicle Act*,[143] the Court noted in its first decision interpreting section 7 of the *Charter* that breaches of fundamental justice may be justified "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, [and] epidemics."[144] While the Court subsequently softened this view,[145] only a breach of the broadest (and contested)[146] principle of fundamental justice – the "individualistic" conception of overbreadth[147] – has been upheld under section 1, and only in one instance by an appellate court.[148] The Supreme Court itself has never upheld a breach of section 7 of the *Charter* under section 1. While some commentators find such a possibility "troubling,"[149] the foregoing analysis suggests one possible law wherein a justificatory argument may well be defendable in light of the pressing and substantial

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143 *Supra* note 60.

144 *Ibid* at 518.

145 See *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 57 ("[i]t is difficult, but not impossible, to justify a s. 7 violation under s. 1").

146 Notably, Hamish Stewart recently agreed with me that the individualistic conception of overbreadth does not qualify as a principle of fundamental justice. See Hamish Stewart, "Overbreadth Revisited" (2024) 69 McGill Law Journal 247 at 286-87, fn 137 citing Colton Fehr, "Re-thinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58 Alberta Law Review 133. While Stewart thinks a broader conception of overbreadth should be constitutionalized, I disagree. See Colton Fehr, "The Constitutional Status of Overbreadth: A Reply to Professor Stewart" (2025) 33 Constitutional Forum (forthcoming).

147 For a review of this term, see Colton Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51 University of British Columbia Law Review 55.

148 See *R v Michaud*, 2015 ONCA 585.

149 See Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60 McGill Law Journal 576 at 593, note 73 (rejecting Kent Roach's suggestion that section 1 should play some role in the section 7 context). See Roach, "Mind the Gap", *supra* note 59.

policy objectives underlying the need to violate a principle of fundamental justice.

## CONCLUSION

The difficulties with prosecuting human trafficking offences spurred Parliament to adopt an evidentiary presumption that on its face raised similar constitutional issues as a presumption upheld by the Supreme Court in *Downey*. Considered in its unique context, however, the evidentiary presumption imposed in the human trafficking context directly infringes another principle of fundamental justice: the requirement that the state prove subjective fault with respect to "high stigma" offences. The challenges with prosecuting human trafficking offences and the use of an evidentiary as opposed to a persuasive burden nevertheless suggest that the impugned law might be one in which a violation of sections 7 and 11(d) of the *Charter* should be upheld. On the other hand, the prospect of convicting and sentencing anyone to a "high stigma" offence without requiring the state to prove guilt beyond a reasonable doubt is a serious transgression of fundamental rights. While a reasonable case can be made that the infringement is proportionate to the impugned law's objective, the novelty of this constitutional question is likely to divide the judiciary and academic commentators.