Courting Victims: Exploring the Legal Framing of Exploitation in Human Trafficking Cases

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Abstract

This article examines how exploitation informs judicial interpretations of human trafficking in Canadian criminal cases. While socio-legal and popular notions of trafficking often suggest that forced movement into a decidedly exploitative labour context is required, our analysis of key appellate cases and constitutional challenges reveals that actual exploitation is not a necessary element of the offence. Instead, the trafficking in persons provision criminalizes the *intent* to exploit, while requiring the court to adopt an "objective" assessment of whether a reasonable person in the complainant's circumstances could potentially fear for their safety in the context of providing (sexual) labour. We argue that this objective standard contributes to a gendered hierarchy of legal knowledge and ultimately privileges the perceived masculinized rationality of the courts and legal actors while rendering the subjective experiences of complainants as less central to the prosecution of human trafficking.

Keywords: sex work, prostitution, procuring, criminal law, sexual assault, victimology, forced migration, *Protection of Communities and Exploited Persons Act*

Résumé

Cet article examine comment l'exploitation influence les interprétations juridiques de la traite des personnes dans les affaires de nature criminelle au Canada. Bien que les notions sociojuridiques et populaires de la traite des personnes suggèrent souvent qu'il faut un déplacement forcé dans un contexte d'exploitation du travail matérielle, notre analyse d'une série de jugements clés issus de cours d'appel et de contestations constitutionnelles révèle que l'exploitation réelle n'est pas nécessairement un élément constitutif de l'infraction. La disposition relative à la traite des personnes criminalise plutôt *l'intention* d'exploiter, tout en obligeant le tribunal à évaluer « objectivement » si une personne raisonnable dans la situation du plaignant aurait pu craindre pour sa sécurité dans le contexte de l'offre d'un travail

This research was generously supported by the Faculty of Arts Democracy, Equity and Justice Grant at Toronto Metropolitan University.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2022, Volume 37, no. 3, pp. 409–429. doi:10.1017/cls.2022.20

(sexuel). Nous soutenons que cette évaluation objective contribue à une hiérarchisation genrée des connaissances juridiques, ce qui entraîne une prédominance de la rationalité masculinisée des tribunaux et des acteurs juridiques, et ce, tout en rendant les expériences subjectives des plaignants et plaignantes moins centrales dans la poursuite des infractions relatives à la traite des êtres humains.

Mots clés: traite des êtres humains, travail sexuel, prostitution, proxénétisme, droit criminel, agression sexuelle, victimologie, migration forcée, *Loi sur la protection des collectivités et des personnes victimes d'exploitation*

Introduction

The seismic wave of anti-trafficking campaigns and organizations since the 1990s has entrenched the narrative that human trafficking is a significant and growing problem that requires strong global partnerships between governments, non-government organizations, and private corporations (Heynen and van der Meulen 2021). These coalitions between public and private entities, with varying mandates and orientations, continue to expand and often blur social, legal, and political definitions of trafficking (De Shalit and van der Meulen 2019; Lobasz 2018). This lack of clarity has created a dynamic whereby various public safety institutions—including government and policing agencies—create their own definitions, understandings, and knowledges around trafficking. As a result, anti-trafficking narratives and responses tend to merge with other criminal legal issues, including gendered colonial violence (Kaye 2017) and anxieties around border control and migration (Pickering and Ham 2014). While various courts in Canada have been tasked with adjudicating and clarifying the legal definition, the development of political and juridical narratives must be contextualized through the shifting regulatory frameworks related to trafficking, sex work, exploitation, and the conflation of these terms.

In 2000, the United Nations established the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, which served as an international call to combat the recruitment and movement of persons into forced labour. The protocol set an international enforcement standard for criminalizing human trafficking and called on nation states to adopt a comprehensive approach to protecting vulnerable persons from exploitation. Despite an international consensus on addressing the problem, Jansson (2014) argues that the drafters of the protocol could not agree on a universal definition of what actually constitutes trafficking, including discrepancies over whether the focus of trafficking should be on forced migration, whether states could deport alleged victims to their countries of origin, and whether the offence should "protect" those consensually involved in the sex trade.

These definitional ambiguities have also been prevalent in Canadian anti-trafficking legislation. In 2002, the country implemented its first iteration of an anti-trafficking provision into the *Immigration and Refugee Protection Act* (IRPA), which holds, "No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion" (section 118(1)). Three years later, in 2005, a broader anti-trafficking

https://doi.org/10.1017/cls.2022.20 Published online by Cambridge University Press

offence aimed largely at targeting domestic instances of trafficking was added to the *Criminal Code*, prohibiting anyone "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" (section 279.01).

The *Criminal Code* trafficking in persons provisions (set out in sections 279.01 to 279.04) are broad in that they capture a wide range of unwanted and exploitative activities that are believed to disproportionately affect sex working and migrant communities (Clancey and Mahon 2020). The existence of two areas of trafficking law (i.e., IRPA and *Criminal Code*), each governed by their own statutory framework and with their own respective orientation towards domestic and/or international trafficking, has created some tensions in the Canadian juridical context, especially regarding how each legislative paradigm is animated by prohibited acts and the discursive framing of the problem as one related to the forced transnational movement of people versus domestic forms of exploitation—particularly sexual exploitation (Fudge et al. 2021).

Prosecuted cases related to human trafficking remain relatively low, with even fewer corresponding convictions. Between 2006 and 2018, for example, there were only ninety-two prosecuted cases, eighty-five of which were related to sex trafficking and just forty-five resulting in a conviction (Millar and O'Doherty 2020a). Yet, trafficking continues to be framed as a problem on the rise, out of control, clandestinely hidden, and inherently tied to the sex trade. Following the enactment of the *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014, the conflation between trafficking and sex work became even more entrenched in law and politics (Durisin and van der Meulen 2021). The current legislative framework, implemented following the Supreme Court decision in *Canada (Attorney General) v Bedford* (2013), shifted the regulatory rubric of sex work to focus more on criminalizing the purchase of sexual services and the "need to protect society itself from the normalization of a gendered and exploitative practice" (Department of Justice 2014, 11). Canada's adoption of PCEPA in effect replaced the previous regulatory framework, which criminalized sex work as a public nuisance.

Instead, PCEPA relies primarily on framing sex work as exploitative, and thus justifies ongoing criminalization by rendering most sex workers as victims of exploitation (Durisin, van der Meulen, and Bruckert 2018; Sibley 2018, 2020). This poses an inherent challenge for many reasons. First, if all (or most) commercial sexual transactions are viewed through the lens of exploitation, the possibility of consensual sexual exchange is virtually impossible through law. Second, there is a fundamental confusion regarding the limits of sex work regulation and efforts to curtail human trafficking, which is explicitly defined through the criminalization of exploiting others. Third, police practices have conjoined anti-sex work enforcement activities with anti-trafficking ones. For instance, police officers coordinate "john sweeps," arresting those who attempt to purchase sexual services (Khan 2015, 2018), while also engaging in inappropriately named "raid and rescue" operations promoted as efforts to "save" trafficking victims and target their clients (Butterfly 2018; Fudge et al. 2021).

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The conflation of sex work with trafficking has created some opacity around legal definitions of exploitation and forced labour and how trafficking is operationalized through law (Kaye and Hastie 2015). This legal uncertainty has since been established by several court decisions. In this article we contribute to a critical examination of appellate rulings (*R v Urizar* (2013), *R v A.A.* (2015), *R v Gallone* (2019), *R v Sinclair* (2020)), and key constitutional challenges (*R v Stone and Beckford* (2013), *R v D'Souza* (2016)) related to the definitions of exploitation in human trafficking, with particular attention paid to the Ontario Court of Appeal rulings *A.A.* (2015) and *Gallone* (2019). These two held that when considering the prohibited conduct elements of the trafficking in persons offence, a material and meaningful form of exploitation need not actually occur. Instead, the focus on exploitation requires an objective interpretation as to whether the accused *intended* to exploit, and whether, given the circumstances, a complainant could *potentially* fear for their safety. This in turn sustains a juridical paradigm whereby legal actors are given immense latitude in assembling or constructing narratives of violence through vectors of potential exploitation or interpersonal violence. Here, we do not refute or disregard the significance of people's lived experiences of violence, abuse, or cruelty. Rather, we focus on the legal principles at play that make possible the conditions for prosecutors and judges to determine exploitation and thus justify the continued use of human trafficking laws, which can in turn lead to the heightened criminalization of sex work.

Building on the work of Roots (2018) and Millar and O'Doherty (2020a), our analysis reveals that courts interpret the trafficking in persons offence to capture a wide range of behaviours, which ultimately allows for a broad interpretation of what counts as exploitation. Guided by Parliament's anti-trafficking mandate, the courts have clarified that the intent to exploit is the defining feature of the trafficking offence. Focusing on intent requires the court to invoke legal principles of "objectivity." This reorients questions of whether the complainant experienced a fear for their safety in providing labour versus whether the accused's actions could reasonably cause fear. Coupled with the state's renewed and ongoing efforts to criminalize sex work under the rubric of exploitation, this contributes to the gendering of complainants as passive, naïve, and incapable of exercising agency. As we will demonstrate, if complainants can be placed within the context of potentially exploitative dynamics—regardless as to how they perceive their own circumstances—the courts may in fact recognize them as trafficked, despite never being forced to provide sexual services or doing so willingly. This dynamic is an extension of the PCEPA framework and the state's positioning of sex work as exploitation.

Exploitation in the Context of Human Trafficking

Lee (2011) argues that there is a conceptual "double-speak" in political and legal narratives around human trafficking, in that politicians and law makers tend to frame the issue as one that relates to the rights of migrants and their safety, while at the same time using it to demonize illicit migratory practices and vilify migrants, especially those who are non-status. Though conceptualizations of trafficking

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frequently centre on forced migration, our analysis here takes a closer look at how the legal definitions of what is sometimes called domestic trafficking are constructed through case law in Canada. We show that the definition of domestic trafficking, as outlined by the *Criminal Code* and clarified by the courts, differs drastically from the more broadly understood globalized narrative of human trafficking, which continues to emphasize transnational forced movement.

The *Criminal Code* trafficking in persons provision is made out through two components: 1) the conduct elements; and 2) the intent or purpose elements. The conduct elements set out the prohibited acts, namely the recruiting, transporting, receiving, holding, concealing, or harbouring of another person. The purpose elements of the offence refer to an accused's intent to exploit that person. Of note is that the same wording of the former element is reproduced in the "Commodification of Sexual Activity" section of the *Criminal Code* under "procuring," which reads:

> Everyone who procures a person to offer or provide sexual services for consideration… recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years. (s. 286.3)

The difference between the procuring provision (colloquially and problematically referred to as "pimping") and the trafficking provision is the purpose element related to exploitation. Though worded almost identically, they differ in that the trafficking offence is triggered when any of the prohibited actions are done with the "purpose of" exploiting another. Despite this distinction in law, political representations continue to explicitly link procuring with an exploitative and "parasitic" practice (see also Roots 2013). The Supreme Court decision in *Deutsch v The Queen* (1986), which remains the standard common law interpretation of procuring, holds that the "decisive act" to make out the criminal intent is to "cause, induce, or have a persuasive effect" on a person in having them providing sexual services to another. At the core of both the *Criminal Code* definition and the relevant jurisprudence, procuring requires a kind of interpersonal inertia that propels another person to commit an illicit or socially undesirable sexual act.

The parasite, as a metaphor for exploitation, was the central framing of the living on the avails of prostitution offence which was repealed in 2013 by the Supreme Court in *Bedford.* This decision notably held that while the criminalization of sexual services could be justified under law, prohibitions against the ability to employ personal safeguards by screening clients, hiring security personnel, or working indoors could not be justified under the legislative mandate to curb prostitution as a public nuisance, and therefore were deemed unconstitutional. Following this, Parliament, led by a Conservative majority government under Prime Minister Stephen Harper, re-inserted certain aspects of the previous criminalization framework into its new PCEPA paradigm. Living on the avails (formerly s. 212), for example, was modified into a material benefit provision (s. 286.2). To comply with the ruling set out in *Bedford*, the new provisions allow for certain exemptions, notably that sex workers may hire personnel such as bodyguards or

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drivers, but continues to criminalize third parties profiting from sexual labour (Bruckert and Parent 2018; Department of Justice 2014).

More recently, the supposedly parasitic and inherently exploitative nature of the sex trade—as expressed through law—has become more explicitly articulated through anti-trafficking discourse (Durisin and van der Meulen 2021). The trafficking in persons offence in the *Criminal Code* establishes that the offence cannot be made without the Crown's ability to prove that the accused committed the prohibited acts and did so with the intent to exploit, which is triggered, according to s. 279.04(1), "if they 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." Though political and legal narratives continue to render procuring as a parasitic practice, the trafficking in persons offence centres on exploitation as a fundamental legal requirement. Indeed, trafficking comprises "different actors along the trafficking continuum, including those who do not directly exploit the victim's labour or services […], a conviction for trafficking can be entered for conduct that involves one of the prohibited acts coupled with the intent to facilitate the exploitation of a person by someone else" (Department of Justice 2015, 19).

For the federal government, the human trafficking continuum is seen to be connected to both domestic and international organized crime networks that are nebulously intertwined with other serious offences: "Many human trafficking suspects have been linked to other organized criminal activities, such as conspiracy to commit murder, credit card fraud, mortgage fraud, immigration fraud, and organized prostitution, in Canada or abroad" (Department of Justice 2015, 10). Further, the RCMP notes that human trafficking is directly tied to gang violence, citing that "[t]raffickers are associated with street gangs in approximately 50 percent of human trafficking specific cases" (2013, 12). Despite these claims, Millar and O'Doherty's (2020a) comprehensive study of available human trafficking data—traced through official reports, court records, and media—found that between 2006 and 2018 there were only two cases of organized crime charges related to human trafficking. Accordingly, they argue that there is "negligible evidence of either transnational or domestic organized criminal involvement" (Millar and O'Doherty 2020a, 34). Roots's (2018) study had similar findings, suggesting that the majority of cases tracked through the courts involve a blurring between those involved in the sex trade and their involvement in abusive or toxic relationships. While these often tend to be characterized by judges and prosecutors as exploitative, Roots suggests that the individual and complex dynamics of each case requires consideration. Nevertheless, abusive interpersonal relationships are often misconstrued as "pimping" or trafficking.

While there have been various amendments to the trafficking section of the *Criminal Code* since its inception in 2005, the core written definition of trafficking has remained largely unchanged over the past decade and a half. The laying of criminal charges, however, has risen relatively significantly, especially since the passage of PCEPA. Between 2006 and 2018, 1,096 persons were charged in relation to 1,416 trafficking offences, with 82% of those charges being issued after PCEPA

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was implemented in 2014 (Millar and O'Doherty 2020a, 21). This is likely attributed to several factors, including a more robust conflation between trafficking and sex work, the drastic increase in public funding for anti-trafficking policing and non-governmental organization efforts, the creation of new anti-trafficking units within municipal police forces, and a reframing of sex work regulation away from a nuisance-management strategy and towards a more direct counter-exploitation movement (Sibley 2020).

Legal Interpretations of Trafficking

To understand the Canadian judicial interpretations of trafficking, we draw upon key cases that challenge the constitutionality of the trafficking in persons rubric, namely *R v Stone and Beckford* (2013) and *R v D'Souza* (2016), as well as several important appellate-level decisions that clarify and set out the definitions of exploitation within this legislative paradigm, including *R v Urizar* (2013), *R v A.A.* (2015), *R v Gallone* (2019), and *R v Sinclair* (2020). Emphasis will be placed on *A.A.* and *Gallone,* as they have significantly shaped the post-PCEPA legal framework on trafficking and exploitation. We focus on this subset of constitutional and appellate cases because they offer a robust and comprehensive engagement with the underlying legal rationales that guide human trafficking law in Canada.

In 2013, David Stone, the appellant in *R v Stone and Beckford,* argued that the wide range of conduct elements in the trafficking offence, coupled with both a "diminished *mens rea* and the imprecise and uncertain definition of exploitation" violates life, liberty, and security set out in section 7 of the *Charter of Rights and Freedoms* (*R v Stone and Beckford* 2013, para 2). Stone asserted that the wide range of prohibited acts captured under the offence did not reflect the moral blameworthiness inscribed into the offence and its corresponding mandatory minimum sentence. The appellant also claimed that Bill C-310, which was implemented in 2012 and amended the *Criminal Code* trafficking provision to add specific factors of exploitation to serve as a guide for judges and prosecutors, was an admission that the provision had lacked precision (para 12). He contended that much of the imprecision regarding the exploitation section of the *Criminal Code* relates to the fact that *actual* exploitation need not occur. Conversely, the Crown argued that the high degree of *mens rea* is preserved in criminalizing the purpose to exploit.

In the decision, Miller J. of the Ontario Superior Court of Justice made several findings. First, that the definition of exploitation—as found in the *Criminal Code*—was clear and that the wording of the offence criminalizes the "purpose" to exploit. The judge ruled that, similar to cases where an accused utters threats, the threshold for conviction is not necessarily whether the recipient felt intimidated but, instead, whether the accused intended to have that effect. The court also held that such a standard requires both intent and knowledge that the actions of the accused could cause the complainant to fear for their safety, thus maintaining a degree of *mens rea* required for the offence (paras 39–40). Further, the court held that the wording of the offence was easy to understand and that the wide range of behaviours captured under the offence is not impermissibly vague.

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That same year, in 2013, the Quebec Court of Appeal case of *Urizar* challenged the substantive interpretation of trafficking, arguing that the court should adopt a reading of the provision in a way that is consistent with the United Nations (2000) definition of trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception… for the purpose of exploitation" and its focus on migrant labourers. The Quebec Court of Appeal, however, stated that there is nothing in Parliament's drafting of the *Criminal Code* provision that restricts the interpretation of exploitation to those resembling forced migrants. The significance of both *Stone and Beckford* (2013) and *Urizar* (2013) lies in the court's rejection that that the drafters of the provision limited the scope of the offence to that of the United Nations definition. Together, they placed Canada's legal paradigm in 2013 as one that considered the intent to exploit, versus the material circumstances that would facilitate exploitation, as the central feature of anti-trafficking law.

Following these, in 2015 the Ontario Court of Appeal made several key findings in *R v A.A.* that continue to guide the interpretive framework for exploitation in Canadian law. Indeed, the *A.A.* decision is one of the first and most relevant cases that provides a detailed interpretation of the exploitation provision as it relates to trafficking. This particular case involved the alleged trafficking of a teenage female (G.M.S.) by a teenage male (A.A.) in the summer and fall of 2011. The accused was charged with several *Criminal Code* trafficking and prostitution related offences, including living on the avails of prostitution of a person under the age of eighteen (s. 212(2)), trafficking of a person under eighteen years of age (279.011(1)), and receiving a material benefit from trafficking (s. 279.02). It is alleged that, within four months of the two beginning a romantic relationship, A.A. had trafficked G.M.S. into the sex trade. In a conversation at a park, A.A. said that he heard G.M.S. had arranged to dance "for a mutual friend," but G.M.S. stated that those plans had not actualized (para 8). A.A. then asked if G.M.S. would dance for him and, shortly after, he arranged for her to work at strip clubs in Ontario and Quebec, driving her to each club, sometimes with a friend of his. G.M.S. frequently turned over her earnings to A.A., who also encouraged G.M.S. to provide "extras," saying "that she should charge $100 for a blow job or sex" (para 27). According to evidence submitted at trial: "When asked why she left in November, G.M.S. explained that, despite his promises, A.A. had not changed his ways. He expected her to work long hours to make more money and would not allow her to carry her own money because she might use it to run away or spend it on 'stupid stuff'" (para 37). The trial judge noted that while A.A. did not exercise control over the complainant, the Crown had proved beyond a reasonable doubt that the accused had influence over the movements of G.M.S. (para 47).

However, the trial judge ruled that the Crown had not satisfied its burden of proving that A.A. acted for the purpose of exploitation by causing G.M.S. to fear for her safety. The trial judge also concluded that the accused used deception and "mind games" to ensure that G.M.S. continued to dance and that A.A. "preyed on a vulnerable, confused young woman, promising her his love and devotion to get her to dance and give him the money she made. He made it such that she wanted to please him, she wanted him to protect her and to love her. However, I am not

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satisfied he caused her to dance because she believed her safety was threatened if she did not" (para 50). The trial judge asserted, "Deception may lead to exploitation as defined in s. 279.04 but it is not automatic it is but a factor" (para 50). A.A. was ultimately acquitted at trial.

The Crown appealed the acquittal on the basis that the trial judge erred in interpreting the exploitation provision while also adopting an unduly narrow interpretation of exploitation, thus limiting the analysis of what is captured by the trafficking offence (para 53). The Crown also argued that the trial judge erred in applying a "subjective interpretation, rather than an objective standard" when assessing whether A.A. acted with the intent to exploit (para 60). The Crown went on to cite the 2012 amendments to the *Criminal Code* by way of Bill C-310, noted above, that added non-exhaustive factors related to determining whether exploitation occurs, which are to be interpreted broadly with consideration to the "psychological security of a person" (para 59). In response, the defence argued that adopting a narrow definition of exploitation is reasonable in that it serves to distinguish "the normal, everyday meaning of exploitation from the statutory one that appears in s. 279.04" (para 61).

In rendering its decision, the Ontario Court of Appeal held that the trafficking offence, made of several prohibited acts, should not be read conjunctively. Instead, "the conduct requirement may be established in different ways including exercising control, direction or influence over the movements of another person" (para 80). This means that each part of the trafficking provision is unique in its own right and commission of any one of the prohibited acts listed (e.g., recruiting, transporting, receiving, holding, concealing, harbouring, or exercising control, direction, or influence over the movements of a person) satisfies the *actus reus* of the offence. This was reaffirmed in 2019 by the Ontario Court of Appeal in *Gallone,* to be described in more detail below, which held that the trafficking in person offence requires a "disjunctive" reading. In other words, the commission of one prohibited act is enough to violate the conduct portion of the offence, making its application much more readily available to law enforcement and prosecutors. This legal definition offers a contradistinction to how trafficking is generally discussed and conceptualized as a series of actions that lead to the exploitation of another. If the trafficking in persons provision is activated by the exercise of influence over a person's movements with the intent to exploit, then instances captured under this offence could be so broad that many forms of labour, including those considered normal or commonplace in late capitalist economies, may also trigger the offence (Beatson and Hanley 2017). The defining feature of these court cases, however, is the role of *sexual* labour and the emphasis in protecting against forms of *sexual* exploitation.

The appellate court in *A.A.* also found that, on a "straight-up reading," three important conclusions can be made regarding the trafficking in persons provision: "i. the expectation of the specific belief engendered by the accused's conduct must be reasonable, thus introducing an objective element; ii. the determination of the expectation is to be made on the basis of all the circumstances; and iii. the person's safety need not actually be threatened" (para 70). Since Parliament has worded the exploitation provision to capture conduct that could "reasonably be expected to cause" a person to fear for their safety, the objective standard of the

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reasonable person is invoked. Again, the Court of Appeal in *A.A.* iterates that a "plain reading" of the trafficking provision "would support the conclusion that the terms 'exploiting' and 'exploitation' would bear their normal, natural every day meaning of taking advantage of or using another person for one's own ends" (para 83).

The *A.A.* decision further lays out that the definition of exploitation must be interpreted through a purportedly objective standard. Here, exploitation should not be viewed solely from the position of the complainant, but instead must be adjudicated based on "objective factors" (para 76). As the court notes, while some complainants may not link the abuse or violence they experience in the sex trade to exploitation, if a "reasonable person" in the complainant's position could have feared for their safety, such factors are enough to satisfy the exploitation requirement of the offence. In other words, complainants may not actually fear for their safety, but given that violence may be used in relationships between alleged traffickers and victims, the court can make an objective claim that fear was possible given the circumstances.

In this way, appellate courts have understood the trafficking provision as preemptory criminalization and, further, that if any of the prohibited acts are done with the purpose to exploit, then the offence has been made out. Such interpretations had been previously established by the Quebec Court of Appeal in the case of *Urizar*, noted above:

> The central element of the legislative texts in question is the criminalization of the concept of exploitation. The acts mentioned in the first paragraph of article 279.01 constitute criminal acts only to the extent that they are committed with a view to exploiting or facilitating the exploitation of the person, regardless of whether actual exploitation ensues. (*R v Urizar* 2013, para 69)

The court's interpretation raises concern around the dubious nature of what gets captured as exploitation. For one, the appellate court in *A.A.* ruled that, since the expectation of reasonableness is embedded in the trafficking provision, the objective standard requires a focus on the mindset of the accused. Such an emphasis is required because the offence targets the purposive conduct of an accused, and thus, "for there to be exploitation, an accused's conduct must give rise to a reasonable expectation of a particular state of mind in the victim" (*R v A.A.* 2015, para 70).

Similar legal interpretations are reaffirmed in *R v Gallone* (2019)—an appeal from a jury acquittal of the accused on several prostitution and human trafficking charges. The accused (a twenty-two-year-old woman) and the complainant (an eighteen-year-old woman) worked as dancers in a strip club in Ontario. The complainant testified that the accused had posted advertisements on the website *Backpage.com* and arranged for her to provide sexual services to clients. At various times, two male acquaintances of the accused drove both women to client appointments. The court described a tumultuous relationship between the accused and the complainant whereby, if the complainant did not get the money from a client, the accused "became angry with her" (*R v Gallone* 2019, para 12). The accused, on the other hand, testified that it was the complainant's idea to sell sexual services and

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denied that she was involved in any form of exploitative conduct, asserting that she had simply assisted the complainant in posting advertisements and that they did so together "step-by-step" (para 13). At trial, the judge clarified the legal interpretation of trafficking for the jury, articulating that the various prohibited acts outlined in the offence (e.g., holding, concealing, harbouring, etc.) should be taken to have a similar meaning related to the movement of the complainant. The Crown argued that this was a far too restrictive reading of the provision.

Contrary to *A.A.*, where the Court of Appeal established that the intent to exploit was central to the offence, the trial judge in *Gallone* instructed the jury that the trafficking offence was made out if the Crown had proven that the accused actually exploited the complainant. Put differently, exploitation needed to decidedly take place in order for trafficking to be established, rather than be merely intended. The *Gallone* trial judge remarked, "Was there an exercise of control over [the complainant's] movements and was she exploited?" (para 53), and further instructed the jury to consider the prohibited elements of the trafficking provision as inextricably linked, stating:

> It has been suggested to you that you can read them individually and separately. Please do not do that. That is legally incorrect, you should read them together. Individually they may have very different meanings but they have to take their meaning from the context of all being put together. The individual meanings you have to take in account, but then come out with a total meaning that they all contribute to. (para 20)

On appeal of the accused's acquittal, the Crown argued that the trial judge's reading was far too restrictive and violated the principle of statutory interpretation, which holds that legislation must be read in its entirety, in harmony with the broader objectives of the act in question, and with special attention to its grammatical structure and ordinary sense (para 30). In addition, the Crown suggested that the provisions be put into context with the broader legislative intent of Parliament.

In its decision, the Court of Appeal addressed this issue by writing:

> On a plain reading of s. 279.01(1), it is clear from the use of the word "or" throughout the part of the provision describing the conduct caught by it that the *actus reus* is disjunctive – not, as the trial judge interpreted it, conjunctive. Thus, the conduct requirement is made out if the accused engaged in any one of the specific types of conduct set out in the first part of the provision – *i.e.* recruits, transports, transfers, receives, holds, conceals or harbours. It is also made out if the accused's conduct satisfies one of the acts in the second part – *i.e.* exercises control, direction or influence over the movements of a person. For example, the *actus reus* would be made out if the accused recruited the complainant. It would also be made out if the accused exercised influence over the movements of the complainant. (paras 33–34)

Thus, like the Court of Appeal in *A.A.*, the Court of Appeal in *Gallone* established that the trafficking in persons provision must be read in a disjunctive manner, that forced movement was not a necessary element of the offence, and that actual exploitation is not required.

The *Gallone* decision also drew on other appellate rulings, including the 2013 Quebec Court of Appeal decision in *Urizar*, where the accused argued that the

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application of human trafficking provisions requires a specific focus on the movement of the complainant, especially in a cross-border context. The defence in *Urizar* posited that, since Canada implemented the criminalization of human trafficking as part of the signing of the United Nations *Trafficking Protocol* (2000), which imagined trafficking in the context of cross-border movement, the *Criminal Code* provision should be understood in much the same way. The trafficking in persons provision, according to the defense, "concerns migrants who are moved or hidden while being obliged to provide forced labour. Without forced movement, there is no crime" (*R v Urizar* 2013, para 34). The court in *Urizar* rejected this argument, citing that "Parliament has opted for general legislative measures that do not relate the offences to cross-border movement or to a specific activity" (para 68). Thus, the court reaffirmed a much broader reading of trafficking than that implemented by the United Nations.

A challenge similar to *Urizar* was launched by the defence in *D'Souza* (2016) to impugn the constitutionality of the trafficking provision. The defence in that case argued that there is no standard definition of exploitation and that the definition "is neither exhaustive nor restrictive" (*R v D'Souza* 2016, para 57). At issue was the broad interpretation of exploitation which could capture a wide range of behaviours, including those linked to consensual sex work. This constitutional challenge, however, failed due to the defence's argument that exploitation in the *Criminal Code* reflects the kinds of clandestine and abusive power dynamics experienced by migrant labourers or those "commodifi[ed]" in the "global slave trade" (para 59).

The appellate court rejected this argument, stating that Parliament's intention could not be restricted solely to movements akin to those of a (forced) migrant and instead must be read in a broader context related to domestic trafficking:

> The Defence is quite correct that the impugned provisions are relatively broad in that they cast a fairly wide net over conduct that may fall within human trafficking and include a fairly expansive meaning of exploitation. But there is a difference between a law that is relatively broad and one that is unconstitutionally overbroad. The impugned provisions fall within the former and not the latter category. (paras 175–76)

Accordingly, despite the fluidity around what constitutes exploitation in various contexts and to varying degrees, Canadian courts have ruled that the definition of exploitation is relatively easy to interpret and reveals itself in obvious and straightforward ways.

The relevant trafficking cases at the appellate level examined here demonstrate two important legal underpinnings: first, that trafficking—as expressed through the *Criminal Code*—does not solely imply forced movement; and second, that each element of the trafficking provision must be understood in relation to the capacity to facilitate exploitation. Taken together, this leaves considerable room for the legal definition of trafficking to mirror the broad and politicized versions of the offence. In this sense, the legal definition has the potential to be constituted through abstracted victims who are mapped through vectors of violence that may be nebulously related to the core tenets of exploitative conduct.

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Rendering (and Gendering) the Victim

When considering how trafficking is discursively constituted both in the media and by state and non-governmental organizations, there is an underlying emphasis on the movement of "vulnerable" or "naïve" women into what has been colloquially referred to as "sexual slavery" (for critiques, see Doezema 2013; Heynen and van der Meulen, 2021; O'Connell Davidson, 2015). Lee (2011) argues that these dominant narratives frame the trafficked victim as a subject exposed to constant violence and victimization, so much so that the situatedness of victimhood—informed and negotiated by various forms of socio-economic, racialized, and gendered power—are rendered invisible:

> These negative and disempowering images and assumptions about trafficked victims (primarily women) lie at the heart of a prosecution-oriented victim support regime… Individuals who adhere to recognised stereotypes are more likely to be identified as trafficked victims by police, immigration officials and welfare agencies; in contrast, those who do not display obvious signs of raw physical suffering or whose experiences and conditions of exploitation do not fall neatly into a very specific constellation of deception, abuses, debt bondage and false imprisonment, are more likely to be deemed 'unworthy' or 'unsuitable' for the criminal justice process. (64)

In other words, for Lee, trafficking is frequently collapsed into a uniform notion of the helpless victim. What we see in some of the legal rationales discussed above is not that the victim-complainant is rendered invisible or that their victimization is not intelligible to the courts. Rather, the victim-complainant is constituted through notions of harm that are sometimes nebulously constructed as exploitation. Indeed, courts are willing to interpret a wide range of disparate constellations of power as a defining relationship to trafficking.

Given that the majority of trafficking prosecutions involve sexual exploitation and the majority of accused are men and complainants women (Millar and O'Doherty 2020a), we argue that the juridical reading of these dynamics is inherently gendered and has the potential to shift power away from complainants and their capacity to decide how they may perceive exploitation. Instead, the court, which is instructed by Parliament to disregard consent in matters related to trafficking in persons (see s.279.01(2)), positions itself as the exalted arbiter of this complex dynamic. Within this, the scenario of trafficking itself is constituted through a dramatized re-telling of the victim-event. In the case of *A.A.*, for example, the trial judge ruled that the Crown did not make direct links between exploitative or intimidating conduct and the complainant's fear if she did not engage in sex work. The court's "objective" standard, however, requires it to imagine whether a reasonable person might experience fear in similar context—in which case, *actual* exploitation need not occur. This type of victim assessment is not conducted in a vacuum. It requires the trier of fact to insert themselves into the subject position of another and make an adequate determination as to whether they could have feared for their own safety. Thus, when the facts lend themselves to be complex, messy, and blurred, the judge or jury is required to envision themselves as the version of the victim-complainant offered and curated by the Crown. Here, an

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objective analysis is all but impossible given the continued legal and social conceptualization of sex workers as inherently vulnerable and in need of "saving" (Scoular and Carline 2014).

The distinction between the subjective and objective view of exploitation is at odds in trafficking cases. In the constitutional challenge in *Stone and Beckford* (2013), the court notes that, "The Crown takes the position that 'for the purpose' requires a subjective state of mind directed at the prohibited consequence—the exploitation or facilitation of the exploitation of the person. This requires both intent and knowledge" (para 39). The court goes on to state, "This, I find, is in keeping with the high degree of *mens rea* required in order for the offence to be committed, and eliminates the risk of punishing individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to the trafficking of persons" (para 40). In this framing, the subjective state of mind of the accused is what ensures the constitutional validity and high degree of *mens rea* of the offence. This is further complicated by the ruling in *A.A.* (2015), which holds that "for there to be exploitation, an accused's conduct must give rise to a reasonable expectation of a particular state of mind in the victim" (para 70). The question remains: how does criminal law view and constitute exploitation?

Since the scope of the offence is to criminalize the intent to exploit, courts and juries are required to use an objective standard for assessing whether a complainant could have subjectively feared for their safety. In other words, the trier of fact must objectively assess how a complainant might interpret the conduct of the accused. While the court in *A.A.* recognizes the viewpoint of the complainant, it suggests that findings of exploitation arise from the objective facts and not necessarily the subjective viewpoint of how the victim internalizes or experiences those circumstances:

> In cases where exploitation, as defined in s. 279.04, arises from the facts, inferring that the accused's purpose was to exploit the victim will usually be a relatively straightforward task. In cases where the facts do not lend themselves to a finding of actual exploitation, the definition of exploitation in s. 279.04 informs the court's analysis of whether the accused was acting with the requisite purpose when he or she committed one of the listed acts. However, it does not become an essential element of the offence. (paras 86–87)

In this legal dynamic, the court must decide whether the accused acted with the intent to exploit, even if the accused was unsuccessful in effectuating exploitation. Accordingly, the appellate court in *A.A.* ruled that the trial judge erroneously found that the complainant had not been exploited because the trial judge had viewed exploitation through the lens of whether the complainant linked the abuse and deception to forced labour. For example, while the complainant G.M.S. had stated that she could leave at any time, she also noted: "it was more psychological [reasons] that kept me" (para 75). The trial judge also stated that the complainant never testified that she danced because she felt her safety was threatened—she continued to dance "because she was deceived"—and that the threats made to her safety were if she were to talk to the police, not if she ceased dancing (para 75). In addition, the trial judge made findings that the physical abuse G.M.S. endured in

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her relationship with A.A. was not a result of refusing to dance, but rather a result of confronting the accused about his behaviour. The assertion that the complainant was deceived, despite not framing it as such herself, is just one of the ways complainants are rendered (and gendered) by the courts as agency-less victims in need of rescue.

Consideration of the complainant's "state of mind" is given less attention in *Gallone*. In its interpretation of the ruling in *A.A.*, the appellate court in *Gallone* (2019) writes:

> Specifically, although the trial judge correctly charged the jury that the Crown must prove what the respondent did was "for the deliberate purpose of exploiting" the complainant, and that "[t]he focus is on the accused's actions and what effect they might be anticipated to have as opposed to what effect they actually had on the alleged victim", he subsequently stated that the Crown was required to prove that the respondent actually exploited the complainant. Specifically, he instructed the jury: "In short, did [the respondent] cause there to be a reasonable expectation of fear for safety in [the complainant] if she did not provide sexual services? That is the question." He also instructed the jury: "Was there an exercise of control over [the complainant's] movements and was she exploited? Those are the questions."
>
> These latter instructions are incorrect, because a finding of actual exploitation is not an essential element of the offence. The Crown need only prove that the accused intentionally engaged in any of the conduct described in s. 279.01(1) with the purpose of exploiting the complainant or facilitating her or his exploitation. (paras 53–54)

It is worth noting here that the tropes of exploitation and subjugation are further complicated in *Gallone* by the fact that the accused is both a woman and a sex worker. Nonetheless, the courts are focused on an objective standard which erases the gendered dynamics that might challenge how Parliament has framed ideas of traffickers and the trafficked.

In recent case of *Sinclair* (2020), the Ontario Court of Appeal considered whether the trial judge should have explicitly mentioned notions of "serious bodily harm" or "subjective fear for safety" as part of the definition of safety articulated in the jury instructions. At trial, the judge posed the following to the jury:

> So the evidence related to this question is: [the complainant] testified that she felt she had to go to work as a prostitute, because she was afraid of Mr. Sinclair, in other words that her safety was threatened. She said he did punch her on one occasion and tipped her out of a chair on another occasion when he was angry. You will recall that she also said they had numerous arguments in which he insulted her. She said he threw the fact that her children were taken by the CAS in her face. Remember what I said about "safety" including "psychological safety" as well as "physical safety." (*Sinclair* 2020, para 23)

The Court of Appeal held that these instructions were adequate since the word "safety" inherently includes a person's physical or psychological well-being, and that it was clear that an objective standard had been expressed when framing the issue to the jury by focusing on whether the accused's conduct could be reasonably

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expected to cause the complainant to believe that her safety was threatened (para 24).

When considering the totality of the events, the fact finder is required to stand in for the victim, and to assess whether the context could lead to a finding of guilt based on the fact that a person may have been counselled, encouraged, or forced to provide sexual services and that they could fear for their safety. The retelling of abuse or exploitation is what complicates matters. The events outlined in both *A.A.* and *Sinclair* blur whether a complainant experienced intimidation or fear in the context of providing their labour, or that they had been working in the sex trade while also in controlling or abusive relationships. Since the importance of this question is de-emphasized in the context of trafficking in favour of assessing the *potentiality* to exploit, the link between abuse and labour is not especially central to the question of trafficking.

As noted, given that most prosecutions involve cases of sex trafficking with female victim-complainants and male accused, there is an inherently gendered component to the ways trafficking is conceptualized, which must be understood in conjunction with how women in the sex trade are discursively framed (Bernstein 2019; Durisin and Heynen 2015; De Shalit, Heynen, and van der Meulen 2014). Indeed, the standards of reasonableness and objectivity obfuscate how law actively constructs the concept of exploitation. It obscures and blurs how exploitation is constituted outside of law as something that is shaped by power, gender, race, class, and other intersecting facets of identity and social location. At the same time, it constructs (the mostly male) legal actors as the standard of reasonableness, leaving room to label the experiences of (the mostly female) complainants as "subjective," fallible, and incapable of recognizing exploitation (or calling it something else), even in cases when they might directly experience it. Though race is not explicitly referenced in the cases discussed above, Millar and O'Doherty (2020b) show that the enforcement of human trafficking also tends to reproduce narratives of the racialized "trafficker" who exploits young white female victims, which in turn continue to inform how sex trafficking is constituted through a racialized and gendered lens. Such constructions reproduce the now widely debunked nineteenth- and twentieth-century panic around so-called "white slavery," in which legal and policy interventions sought to rescue young white women from racialized and immigrant men who were purportedly trafficking them (Doezema 1999).

The current socio-legal context, which casts those in the sex trade as both a public nuisance and as inherently vulnerable and requiring saving, is largely erased within purely juridical analyses. The focus on questions of law, rather than identity, blurs the gendered and often racialized power dynamics at play (Naffine 2015). As Lacey (1998) argues, "The epistemological assertion of 'knowledge' or 'objectivity' disguises this process of construction, and writes sexually specific bodies out of the text of law" (8). At the same time, criminal law fails to consider the ways in which sex workers (especially racialized and/or migrant) may in fact experience exploitation by the state and the criminal legal system itself. The masculine chorus of law, the voice of reason so to speak, is in many ways producing the very subject it ostensibly seeks to protect. The paternalistic intonation of law reverberates when the court suggests that the identification of exploitation in trafficking cases "will

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usually be a relatively straightforward task" (*R v A.A.* 2015, para 87). And yet, the cases we have analyzed here are anything but straightforward.

The suggested simplification of trafficking is in itself a manifestation of the law's power to constitute juridical subjects and to identify the commonsensical nature of legal concepts (see also Valverde 2009). In the case of interpersonal or sexual violence, the complaining witness is at the centre of the proceedings, their credibility, demeanour, and candour are scrutinized (Randall 2010; Sibley et al. 2019). When witnesses recant or when there are discrepancies in their testimony to police versus their testimony in court, judges and juries are tasked with evaluating which version of the account is more likely to be credible (Moore and Singh 2018). Sometimes, this results in a co-optation of the story or a prosecutorial emphasis on facts that can establish legal guilt rather than provide meaningful or adequate resolutions for victims (Dylan, Regehr, and Alaggia 2008). In the context of trafficking, however, the prosecution does not require *any* version of the complainant. Instead, if they can articulate a dynamic whereby the trier of fact can objectively assess vulnerability and threat to personal safety, a conviction can be made out.

Accordingly, we suggest that the decision to prosecute by way of human trafficking offences versus other *Criminal Code* provisions, such as domestic violence or sexual assault, reflects a socio-political agenda that continues to target and criminalize sex workers. We fear that the recent precedents discussed here are advancing a dynamic whereby anti-trafficking initiatives aimed at rescuing or saving victims may not even require complainants to express any feelings of exploitation or harm. Instead, if police and prosecutors argue that exploitation *could* occur, they may proceed. If the law requires judges and jurors to make inferences about a victim-complainant's state of mind by imagining themselves through gendered tropes of poor and naïve sex workers, the state reaffirms its role as the protector of women "lured" into the sex trade by prosecuting violence or abuse as exploitation, even in cases where exploitation does not occur or where complainants may not view their participation in the sex trade as exploitative. This could lead to enhanced criminalization of those who engage in consensual sexual exchanges.

Conclusion

Our analysis of key trafficking appellate rulings and constitutional challenges shows that courts in Canada have reaffirmed the legislative intent to capture a wide array of behaviours with the anti-trafficking paradigm. Some of these behaviours, as we have pointed out, may only be tangentially related to or indirectly part of a person's involvement in the sex trade. These may include abusive romantic relationships, dysfunctional business arrangements, fee-for-service security provisions or transportation by third parties, or a complex blending of the preceding (Bruckert and Parent 2018; Gillies and Bruckert 2018). Women in such situations are frequently deemed trafficked, rendering these dynamics, which also commonly occur outside of the sex trade, as exploitative (Cotter 2021). The fact remains, however, that courts have simplified their analysis in focusing on the intent to exploit rather than

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actual exploitation. In so doing, the courts have rendered and gendered the trafficked subject as someone who need not actually experience exploitation, but rather, *could* have experienced exploitation given the circumstances.

This research reveals that the relevant court decisions have created a legal paradigm in which the definitions of trafficking depend largely on whether exploitation can be imagined rather than it having been experienced. The inertia needed to compel someone into forced labour (or forced movement) is irrelevant. And while Millar and O'Doherty (2020a) remind us that trafficking convictions remain extremely low, the implications of these legal decisions carry with them the possibility for sweeping prosecutions. Thus, more research is needed on how complainants in human trafficking cases are brought before the courts and the consequences of having the courts interpret exploitation on their behalf. Though it is often accurately said that victims of exploitation are frequently subjected to intimidation tactics by their abusers, we are concerned about how this gets taken up in the prosecution of trafficking. Exploitation is not simply a binary that exists; it is complex, subjective, and multidimensional (Roots 2018). As such, questions abound as to the threshold of what constitutes a threat to one's physical or psychological safety. The impacts of these legal decisions continue to strengthen the mechanisms of criminalization and render those in the sex trade increasingly vulnerable to police surveillance and criminal law enforcement.

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https://doi.org/10.1017/cls.2022.20 Published online by Cambridge University Press