The Sentimental Constitution: Prostitution, Sex Work, and Human Trafficking in Colombia

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Nothing elicits or produces as many emotions as sex. Virginia Woolf famously declared that you could never hope to hear the truth about extremely controversial topics and that any matter pertaining to sex was one of these. It would seem that her admonition takes on added intensity when the topic is selling sex, particularly when the vendors are women. The debates over female prostitution in Europe and the United States for the past century, however, seem to ignore the argument for prudence suggested by Woolf when discussing the sexes (and the sex between them). When people talk about prostitution, they do not explain how they came to one opinion or another, or recognize that all they can do is leave it to their audience to draw their own conclusions based on the limitations, prejudices, and idiosyncracies of the speaker (Woolf 1980, 9). On the contrary, ever since the Victorian panic at the end of the 19th century over “white slavery”, the legal, social, and political status of prostitution has been the subject of intense disputes between those who advocate its prohibition (through the criminalization of buying and selling sex), those who seek its abolition (through penal sanctions on buying sex), those who seek to regulate it (using labor, health, urban planning, and safety regulations for the exercise of prostitution), and those who seek total legalization (de Marneffe 2010, 28-3).

When people talk about prostitution (from either side of the debate), and especially when the issue is how the State should react to the phenomenon, conversation immediately moves to

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the significance of human dignity, personal autonomy, equality, the market, and the meaning of penal sanction in the political community in which the discussion arises. Although several political and philosophical theories can be brought into the discussion, the most interesting arguments for the prohibition, abolition, regulation, or legalization of prostitution have come from feminism in many of its various configurations, queer theory, and trans studies. These arguments are so rich and complex that it would be completely unfair and nearly impossible to synthesize them into a form that relates to the ideas I want to present in this essay. Although I certainly seek to contribute to the contemporary debate over prostitution, the basic objective does not involve adopting a normative position in favor of its prohibition, abolition, regulation, or legalization, or of some intermediate regime combining those approaches. Its basic objective consists of suggesting a few elements that begin to describe one of the spaces in which this debate is currently taking place in Latin America and, particularly, in Colombia.

In the Spanish speaking countries of Latin America, exchanging sex for money among freely consenting adults is not penalized. Various regulations exist in the region that criminalize, depending on the country, child prostitution, coercion or inducement to exercise prostitution, or pandering and other forms of commercial organization of the activity. Starting in 2002, however, when Latin American countries began ratifying the 2000 Palermo Protocol,² many of the legal reforms undertaken to comply with this international treaty established peculiar relationships between human trafficking and prostitution that were determined, in good part, by the way prostitution is included in the Protocol’s definition of trafficking and the significance attributed to the victim’s consent. Article 3 stipulates, on one side, that trafficking always seeks to exploit

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² Protocolo para prevenir, reprimir y sancionar la trata de personas, especialmente mujeres y niños, que complementa la Convención de las Naciones Unidas contra la Delincuencia organizada Transnacional.
its victims and affirms that one of the forms of exploitation is “the exploitation of prostitution of others or other forms of sexual exploitation” and, on the other side, that the victims of trafficking lack agency in any case of “intentional exploitation.” The Palermo Protocol itself, through the notion of exploitation, thus establishes an intimate connection between human trafficking and the exploitation of prostitution of others and the idea that no one can consent to their own exploitation. When complying with the obligations to criminalize certain activities imposed on the States by the Protocol’s Article 5, Latin American countries have not only introduced penal sanctions for human trafficking, but have also reformed their legislation regarding inducement and pandering in a way that, without directly punishing the free exchange of sex for money itself, moves the criminal law so close to this transaction that the question of whether they indirectly penalize it is a valid one. It would seem that the intimate connection between human trafficking and prostitution that the Palermo Protocol establishes has been transformed into virtual synonymy in many areas of Latin America.

In parallel to these reforms, social organizations representing women’s rights have begun demanding the criminalization of paying for sex in general or the regulation of prostitution in a fully legal framework. Although the arguments from both positions are similar to those of various feminist arguments for abolition or regulation that have circulated in Europe and the United States since the end of the 19th century, the space opened by the entry of international law into the area of human trafficking in Latin American provides opportunities to discuss the political, legal, and socioeconomic status of prostitution in terms that are neither those of “pure” abolition or “pure” regulation. In addition, in countries such as Colombia where daily life has undergone intense ‘constitutionalization,’ prostitution has become part of the rights discourse directed towards legislators, policy makers and executives, and constitutional judges.
I do not attempt to normatively evaluate or describe in detail the relationship drawn between human trafficking, the notion of exploitation, and the victim’s lack of agency, or the meaning of the legal reforms undertaken by Latin American countries to comply with the Protocol. Nor do I defend abolition or regulation of prostitution in Latin America or Colombia. My project has a dual descriptive purpose. In the first place, I suggest a reconstruction, on the bases of several theoretical supports, of the sociopolitical space created by international law for human trafficking in the discussion of the legal status of prostitution. I propose that this space results from the combination of two phenomena: the inclusion of human trafficking in the “humanitarian reason” discourse (Fassin 2012) based on the “emotion economy” (Fassin 2009) in which compassion, fear, and indignation operate as the fundamental vehicle for social and political mobilization in favor of the victims of human trafficking and, as will be seen, prostitution; and the development of a certain form of humanitarian reason in the sexual sphere that creates a space for “sexual humanitarianism” that seeks to “save” the victims of trafficking and prostitution, especially in the third world. In addition, I sustain that, in the reconstructed space I propose, the notion of victim and the economy of compassion do not necessarily lead to situations of subordinate vulnerability. For this reason, the analysis of the political and social dynamics generated in this affective space must respond to two ideas. First it is necessary to consider, as some have already indicated (Berlant 1999, Fassin and Rechtman 2009), that the language of compassion tends to exclude other possible conceptions of justice. Secondly, and in direct relation to the first idea, it must not be forgotten that the mobilization of the compassion economy and categorization as victim can have redistributive and emancipatory dimensions that are important to analyze from a perspective that takes into account their costs and benefits in concrete situations.
In the second section I propose an analysis of the Colombian Constitutional Court’s jurisprudence on human trafficking and prostitution based on the reconstruction proposed in the first section of the essay. The objective is determining whether the ratification of the Palermo Protocol and the sexual humanitarianism implicit in it have “sentimentalized” Colombian constitutionalism. This analysis attempts to establish what happens when the language of compassion encounters the language of rights. The section therefore examines the degree to which the Court’s recognition of prostitution as sex work is affected by sedimentation from the compassion economy in the constitutional values of dignity, autonomy, and equality. Here I argue that the apparently progressive logic of the recognition of prostitution as sex work operates against the background of the underlying sexual humanitarianism logic that, in other parts of the world, has catalyzed the struggle for the abolition of prostitution. The constitutional discussion of prostitution in Colombia thus occurs in a space governed by constitutional values that, once sentimentalized, simultaneously sustain the political projects of regulation and abolition.

*Humanitarian government and sexual humanitarianism*

Much has been written in the last ten years about the consolidation of a type of political action based on the mobilization of emotions such as the compassion and pity that people in government and certain international, social, and non-governmental organizations *feel* for victims who *suffer* from armed conflict, human rights violations, and natural disasters, among other catastrophes. I do not intend to summarize the vast literature on the issue in this session, but rather demonstrate the relevance of the central characteristics of what Didier Fassin has called “humanitarian reason” to the sphere of sexuality, resulting in a certain “sexual humanitarianism” whose central political mission is rescuing and protecting victims of sexual exploitation and violence. However, unlike some positions that understand the social position of
the victim of sexual exploitation (which in the language of the Palermo Protocol is equivalent to prostitution) as essentially negative, and therefore leaves no room for agency, here I defend the idea that this position, in certain political conditions and the appropriate context, may be emancipatory in some ways. Or, to put it another way, I maintain that the vulnerability of the victim can offer a space for political resistance. If, in concrete political conflicts, the condition of victim could potentially offer emancipation, then it would become necessary to determine what the costs and benefits are of its use and mobilization in those cases.

Didier Fassin emphasized how, since the final decades of the last century, moral sentiments were converted into some “essential force” in both domestic and international politics (Fassin 2012, 1). From the perspective, he traces the genealogy of “humanitarian reason” as a “general logic” whose fundamental characteristic consists in its appeal to a “moral economy” in which mobilization and political decision-making involve compassion for the suffering of victims of catastrophic events and situations (Fassin 2009; 2012, 7, 44). For Fassin, this manner of political action, whose “goodness” is usually taken for granted, has a history the must be revealed in order to lay out all that is at stake when compassion is converted in the basic mode of administration for “precarious lives” – including the poor, immigrants, refugees, sick children, victims of armed conflict and natural disasters, and other socially excluded groups (Fassin 2012, 4-8). By my reading, Fassin’s genealogical analysis is based on two elements.

In the first place, the discourse of compassion has gradually displaced other rhetorical approaches that have historically been used to characterize, denounce, and counter social injustice. Hence, under the logic of humanitarian reason, “inequality is replaced by exclusion, domination is transformed into misfortune, injustice is articulated as suffering, violence is expressed in terms of trauma” (Fassin 2012, 6). Emphasizing the prevalence of humanitarian
reason as mode of government in the contemporary world does imply, in itself, a negative judgment of the appeal to compassion; rather, it invites analysis of the *competition* that exists between this sentiment and other possible language for what is fair and just when addressing a given injustice. It is thus possible to ask ourselves whether, in a specific context involving a social struggle or political decision, characterizing the injustice in question in terms of compassion is more beneficial than alternative approaches to justice (Fassin 2012, 8). On undertaking this type of analysis, however, we cannot lose sight of the paradoxical implications that compassion can implicate, dynamics that stem from the peculiar bond that compassion establishes between the people who show it and those who receive it. For Fassin this bond is not based on equality because it does not imply reciprocity or even genuine recognition: although those who show it act selflessly and with good will, those who suffer and are shown compassion can only reciprocate through gestures of humility (Fassin 2012, 3-4). This asymmetry leads to at least two important problems. For one, the political space for compassion can be, at times, easily converted into instances of repression, as is often the case, for example, for immigrants or people in search political asylum (Fassin 2012, 14, 16). Secondly, the political relationships based on compassion set the stage for “humanitarian melodrama” in which images of human pain and suffering in “intimate detail” are propagated by communication media and every class of political actor, images which end up representing the most visible and characteristic emblem of political action in out time (Berlant 1999, 53, 54; Meister 2011, 66-67; Fassin 2012, 250).

All of this is related to the second fundamental element I see guiding Fassin’s genealogical analysis of humanitarian reason. Humanitarian reason could not operate without a correlate that has been called the “empire of trauma” that centers the attention on those who, by virtue of their suffering, are to be shown compassion. The victim appears here as a type of
political identity that Didier Fassin and Richard Rechtman interrogate by showing how, between the end of the 19th century and the 1960s, victimhood went from a condition that implied some suspect weakness to an object of compassion whose suffering was authentic and, therefore, the grounds of unquestionable truth and moral authority (Fassin 2009, 25-39, 77-97). In this genealogy, the victim is converted into the object of compassion by an external, unforeseeable, and irresistible phenomenon that traumatizes the victim. A phenomenon that was initially developed in psychiatry and psychoanalysis as, in principle, one that affects the psyche of individuals, was thus transformed over time into a social phenomenon that has begun to play a part in contemporary moral economies and activates collective political mobilization to demand rights through compassion and empathy (Fassin and Rechtman 2009, 7, 276-284). The genealogical description that Fassin and Rechtman undertake does not lead to the condemnation or a negative normative evaluation of victimhood. Once again, it invites a contextual analysis of the uses and mobilizations of the condition of victimhood that, in concrete situations, may entail emancipatory effects, the recognition of rights, or positive changes in public policy that would not be possible by appealing to the idea of victimhood. On this point, Fassin and Rechtman coincide with other theoretical positions stemming from feminism that point to the possibilities for resistance offered by victimhood or the vulnerability with which it is usually (negatively) associated (Stringer 2014; Butler, Gambetti, Sabsay 2016). These positions, however, also identify the risks incurred by any political struggle that is channeled through the idea of victimization. They observe that, fundamentally, although the condition of victimhood is tied to rights claims and, therefore, has positive value, its origin in purely individual psychology can obscure or mask injustices of a structural order (Berlant 1999, 78; Fassin y Rechtman 2009, 281; Butler, Gambetti y Sabsay 2016, 2-3). As Fassin and Rechtman do well to point out, any analysis
of the use and mobilization of the concept of victim cannot ignore that choosing to focus on victimhood means disregarding other “possible schemes of description and action” that may be much more effective and potent when it comes to disputing and transforming structural injustice (Fassin and Rechtman 2009, 9).

The notions of humanitarian reason and the empire of trauma have acquired special meaning in the domain of sexuality and, particularly, in the contemporary space for discussion of human trafficking and prostitution. Some feminists have used the concept of sexual humanitarianism to describe, in general terms, the rise of a global dynamic whose fundamental political mission consists in saving the victims of sexual exploitation (and, therefore, the victims of human trafficking and prostitution), especially in the third world (Mai 2014; Kotiswaran 2014). To a large degree, this concept replicates in a specific domain the famous argument of Gayatri Spivak regarding the relationship between the first and third world as one produced in terms of “white men” (and regarding sexual humanitarianism we would have to include “white women,” many of whom are feminists) who save “women of color” (Spivak 1988; Kapur 2002; D’Cruze y Rao 2004). According to the most critical assessments of sexual humanitarianism, this is a mode of differentiating the Western sexual vision from a sexual otherness that exists in places where there are “pure,” “perfect,” “iconic,” or “ideal” victims of diverse forms of sexual oppression and exploitation that are often largely related to their “cultural backwardness” (Srikantiah 2007; Desyllas 2007; Hua y Nigorizawa 2010; Mai 2014). At the core of this notion, then, is the image of “the third-world sex worker subjected to slavery in a brothel of a big city” (Kotiswaran 2014, 354). These versions also point to the paradoxical character of sexual humanitarianism which, although it presents itself as a benevolent dynamic whose motor is compassion for the victims of sexual misfortune, is actually a mode of controlling and repressing
the migration of undesirable populations through the application of immigration restrictions that often convert the “perfect” victim of human trafficking into a victim “guilty” of prostitution (Desyllas 2007; Mai 2014; Jakšić 2016). Some versions of the criticism of sexual humanitarianism seem to approach the type of analysis suggested by Didier Fassin’s genealogical analysis of humanitarian reason and the empire of trauma. Here, the analysis concentrates on the fundamental role played by the Palermo Protocol in the global spread of sexual humanitarianism. According to these critical positions, the condition of victim of sexual exploitation – that is the fundamental object of the protection that the Protocol seeks to provide – is not necessarily a position of domination and repression. In some cases, this condition can be mobilized in a positive emancipatory direction that produces improvements in the living conditions of the victims of trafficking and persons who exercise prostitution. Any analysis of these specific cases, however, must account for at least four elements.

In the first place, several analyses of the Palermo Protocol point out that there was an intense debate during the negotiations leading to its adoption over the relationship between human trafficking and prostitution between “radical” feminists or “structuralists” who sought the abolition of prostitution and groups who sought the regulation of prostitution as sex work from the perspective of human rights (Doezema 2005; Halley et al. 2006; Chuang 2010; Kotiswaran 2011; Kotiswaran 2014). Inasmuch as the Protocol ended up reflecting a sort of compromise between the two visions, its domestic application can result in radically divergent solutions for prostitution (it can justify both the abolition of prostitution and its regulation as sex work) (Halley et al. 2006). Secondly, and despite this ambiguity, the dynamic of internal application of the Protocol in many countries has been in effect guided by the stance of the United States towards human trafficking and prostitution. Under the administration of George W. Bush (and
the influence of the extreme right evangelical faction in the United States), human trafficking took on traits of sexual moralism that tied it even more strongly to the abolitionists. The particular vision of human trafficking spread internationally when the United States conditioned its financial cooperation with several countries on compliance with the US Victims of Trafficking and Violence Protection Act (VTVPA) (Halley et al. 2006; Zimmerman 2010; Kotiswaran 2014). Thirdly, inasmuch as the Protocol centers – given it peculiar genesis – its protections on a “perfect” victim of sexual exploitation who lacks all agency and in doing so creates “constant confusion between trafficking and sex work trafficking and between sex work trafficking and sex work,” forms of trafficking not involving sex work are ignored and voluntary forms of sex work are punished when it is applied domestically (Kotiswaran 2014, 357). Fourthly, the Protocol’s emphasis on penalization illustrates the idea (that some qualify as “neoliberal”) that sexual exploitation is a prodeveloped their arguments in the context of educt of deviant individuals, not of structural poverty that forces certain populations to migrate in search of informal work. In this sense the Protocol, steeped in the language of compassion and suffering, masks structural injustice and displaces alternative discourses for justice that broader distributive reforms would support (Chuang 2010; Kotiswaran 2014).

Didier Fassin and many of the feminists who have critically analyzed the concept of sexual humanitarianism developed their arguments in the context of an ethnographic approach to concrete cases. Their studies fundamentally seek to demonstrate how, in certain situations, the ideas of humanitarian reason, compassion, trauma, victimization, and sexual exploitation produce positive transformations in the lives of the people who are treated as victim-objects of compassion while, in other cases, these notions lead to contradictions and dynamics that have no emancipatory effect in the lives of the people in whose name institutional compassion is
mobilized. In what follows, I do not undertake an ethnographic exercise of this type. Rather, I attempt to explore a question that Fassin leaves open. Recall that Fassin observes that although the contemporary moral economies of compassion and victimization are not in themselves pernicious, they do tend to displace other conceptions of justice that, in certain cases and contexts, could much more powerfully counter and upend structural injustices. While at one point in his work Fassin notes that the unequal relationship that tends to be established between those who show compassion and those to whom it is shown leads to situations where the humility with which the latter must respond may take the place of a genuine demand for one’s rights (Fassin 2012, 4), at another point he demonstrates how certain social groups organized around the condition of victimhood have obtained important recognitions of their rights (Fassin and Rechtman 2009, 10). With these affirmations, Fassin seems to suggest that one of the languages of justice that tends to be either dimmed or strengthened through recourse to compassion and the notion of victimhood is rights discourse. The study I undertake in the second part of this essay will establish what happens when humanitarian reason, as it is manifested in the idea of sexual humanitarianism, is expressed through constitutional rights and principles. To do so, I focus on the jurisprudence of Colombia’s Constitutional Court in which a set of complex relationships has been established between human trafficking, prostitution, and sex work.

The sentimental constitution of Colombian sexual humanitarianism

For the purposes of analyzing how sexual humanitarianism has shaped the relationships between prostitution, sex work, and human trafficking in Colombian constitutional law, the Constitutional Court’s jurisprudence can be divided into two periods. In the first period running from 1995 to 1997, prostitution first appears as a social phenomenon that can be categorized in the language of right, but one that the Court still approaches from a vision that considers it a
dangerous and immoral activity. Starting in 2009, humanitarian reason and sexual
humanitarianism make a forceful entrance onto Colombia’s constitutional scene, complicating
and transforming the phenomenon of prostitution by associating it with human trafficking and
sex work. In this section of the essay I briefly characterize the first period and devote more
concentration to a critical reading of the second.

A 1995 decision and another in 1997 can be used to date the first stage of Colombian
constitutional doctrine regarding prostitution. The importance of this period lies in an approach
to the matter that has only been partially reevaluated by the supposedly progressive Court in the
second period. In the two decisions, the Court passed judgment on two actions of tutela initiated
by people soliciting basic rights protection from “the business of procuring and pimping, white
trafficking of white women [sic], and flophouses” (in the words of the plaintiff in the 1995 case)
and from streetwalking. The Court recognized “the historical and sociological realities
demonstrate that prostitution cannot be fully or totally eradicated” such that the State “cannot
generate in the sterile effort to prohibit that which will inexorably occur and for that reason is
tolerated as a lesser, evil” (CCC 1995). This purely pragmatic affirmation serves as the starting
point for a constitutional characterization of prostitution in terms of rights at two levels. On the
first level, one focusing on the person who exercises prostitution, the Court starts by observing
that the activity is not desirable because it is “contrary to human dignity to merchandise one’s
very being” (CCC 1995, italics added). This statement is accompanied by a series of precisions
that emphasize the intrinsic immorality of exercising prostitution. The Court thus affirms that “to
live virtuously … one must possess a minimum amount of well-being, and this cannot exist
where the world of vice dominates” (referring to ‘red light’ zones), and that prostitution is a “bad
example,” a “lamentable profession” and “in essence, an obviously immoral” (CCC 1995).
However, together with the characterization of prostitution as an activity that injures human
dignity, the Court observes in one of these decisions that “juridically speaking, it can be said that
for the sake of the right to personal identity, people may resort to prostitution as a way of life”
(CCC 1995, italics added) and, in the other decision, that “the Court does not intend to ignore the
right to personal identity that the prostitutes and transvestites in question possess” (CCC 1997).

This double description of the phenomenon in terms of human dignity and personal
autonomy seems to indicate that, at this first stage, the Court considered that people are able to
choose, with complete freedom, to exercise immoral activities that injure their own dignity. This
idea of autonomy is fully consistent with the second level of constitutional characterization of
prostitution that is related to the rights of third parties that may be affected by it. Here the Court,
in a gesture compatible with its jurisprudence on the right to personal identity, indicates that
whoever exercises prostitution possesses the freedom to do so as long as it does not affect the
rights of third parties such as “the predominant rights of children,” “family intimacy,” “the rights
of others to peacefully cohabit the place of their residence” (CCC 1995), “life,” “physical and
moral integrity,” “tranquility and safety,” and “fair and dignified living conditions” (CCC 1997).
The long list of rights cited by the Court reinforces the sense that, despite being an activity that
one can freely choose to exercise, its intrinsic immorality tends, on one side, to corrupt the virtue
of certain groups that demand special protection from the State, such as children and the elderly,
and, on the other side, to threaten public order. Hence, for example, the Court maintains that “the
State is above all interested in the virtue of childhood” (CCC 1995) and that, ultimately, it is
intolerable “that minors be obliged to bear, as defenseless witnesses, actions [streetwalking] that
threaten their innocence and modesty” (CCC 1997).
The characterization of prostitution as an immoral activity that corrupts virtue – but one whose exercise can be freely chosen – and threatens public order leads to two primary consequences in terms of public policy. First, the response of the State to the phenomenon operates in the terrain of policy activity relative to the recognition that “prostitution is a lesser evil, that is, one that is tolerated but is recognized as noxious” (CCC 1995). In this sense, although the Court recognizes that prostitution is legal, it nonetheless considers that, essentially, it tends maintain “public order in a state of distress,” that its exercise is related to “the consequent eruptions of insecurity and the frequent acts of delinquency against the life and personal integrity of residents and passers-by, and against their moral and economic heritage,” that whoever exercise it “commit acts of ostentatious harassment against the unprepared citizens … causing them to suffer assaults, personal injury, threats, and serious offense to modesty,” or that “nor can it be ignored that it is an activity around which crime and the propagation of venereal disease tend to coincide” (CCC 1997). Secondly, this characterization of prostitution indicates why the Court, in this moment of its jurisprudence, could not consider prostitution as a form of labor that carried legal protections. The Court stated that “if the question is preventing through several means women from prostituting themselves” then it is necessary to conclude that “it is not accurate to present prostitution as honest work, worthy of legal and constitutional protection, since it is, in its essence, an obviously immoral activity, inasmuch as honest work implies ethical activity because it perfects and completes the person and produces a good” (CCC 1995, italics added).

From this first period of the Colombian constitutional doctrine on prostitution, it is necessary to draw out three important ideas to understand the transformations in the Court’s position that would occur with the appearance of sexual humanitarianism starting in the year
2009. In the first place, the Court advanced a doctrine that saw prostitution from the perspective of the principles of human dignity and personal autonomy. On one side, this activity offends dignity because the commercialization of one’s body is undignified. On another side, for the Court, personal autonomy allows people to choose, with complete freedom, undignified and immoral professions as long as the rights of third parties are not affected. Note that, in this first stage, the people who decide to exercise prostitution are not seen as people whose agency is limited or obscured by external factors. Choosing to exercise an immoral and undignified activity does not appear to implicate any external factor that, structurally and systematically, deprives those who prostitute themselves of their freedom to decide. In the Court’s judgment, this option must be treated as any other free option whose limits are legally fixed by their effect on the rights of third parties. Here, the person who exercises prostitution is not a victim who arouses compassion; on the contrary, the language of victimization is rather situated on the side of those who must bear the consequences of an immoral activity that tends to disrupt public order. The victims are the particularly vulnerable and impressionable beings (children, the elderly, and unwary passersby and residents) who must witness public exhibitions of sex. Secondly, the language of equality is completely absent from the jurisprudence of this first stage. There is nothing in the Court’s reflections that indicates that the people who exercise prostitution represent a group that suffers discrimination or a vulnerable social group that warrants special protection from the State. Lastly, in this stage the response of the State to the phenomenon of prostitution takes place, first of all, in the area of the police activity that must be deployed to counteract the noxious effects of its exercise on the rights of third parties and, secondly, in the denial of any labor protection to those who exercise it. The idea of sex work is thus completely absent from the constitutional doctrine.
After this first stage, prostitution disappears from the Colombian constitutional jurisprudence for twelve years. The second stage begins in 2009 with the entry and consolidation of the postulates of sexual humanitarianism in Colombian constitutional law following the ratification of the Palermo Protocol by Colombia in 2004. In the move from the first to the second stage, those who exercise prostitution go from the position of social undesirable – who, regardless, freely choose the activity to which they dedicate themselves – to a position of victim of sexual and labor exploitation or sex worker. In what follows, I propose that this paradoxical status stems from the simultaneous operation of the political project of abolitionism that is distinctive of sexual humanitarianism and that of the regulation of prostitution by way of considering it as sex work. These two projects, however, do not unfold with the same strength. In my opinion, the peculiar dynamic of the Colombian constitutional doctrine of this period led to the dominance of the politico-affective space by the sexual humanitarianism that operates as the frame within which the political project of sex work operates. This is why, in the context of a sentimentalized constitution, one that proposes saving people who exercise prostitution because they are victims of sexual exploitation, it is very difficult to establish the basis for public policy for sex work.

3 Muy brevemente, en 1999, en una decisión sobre una norma del régimen disciplinario que determinaba que era una falta contra el honor militar el asociarse o mantener relaciones con “antisociales como drogadictos, homosexuales, prostitutas y proxenetas”, la Corte consideró inconstitucional referirse a los homosexuales y las prostitutas como “antisociales en sí mismos”. A este respecto afirmó que “[l]a prostitución y la homosexualidad son, en efecto, opciones sexuales válidas dentro de nuestro Estado social de derecho, razón por la cual, aquellos que las han asumido como forma de vida, sin afectar derechos ajenos, no pueden ser objeto de discriminación alguna” y agregó que “[p]or el contrario, según las voces de la propia Constitución Política, su condición de personas libres y autónomas debe ser plenamente garantizada y reconocida por el orden jurídico, en igualdad de condiciones a los demás miembros de la comunidad” (CCC 1999). Esta decisión solitaria es la manifestación más liberal y menos prejuiciosa de la Corte sobre la prostitución. Sin embargo, como se verá, la jurisprudencia posterior no la seguirá por completo.
The paradox seems to arise from the fact that the entry of the premises of sexual humanitarianism and, especially, the moral economy of compassion and victimization, occurs in a context of Colombia’s criminal regulation of pimping. Indeed, in a verdict that set the ideological, political, and emotional tone for the whole second stage of jurisprudence, the Constitutional Court affirmed the constitutionality of the crime of involuntary prostitution (inducción a la prostitución, which hereafter will be referred to as “induction”). The criminal sanction associated with it was 10 to 22 years in prison for whoever “induced” another person to prostitute themselves or engage in sexual commerce “for profit or to satisfy someone else’s desire.” It is important to note that this crime did not involve the use of force, violence, or any other form of coercion. It was precisely for this reason that the appellant in the case argued that it violated the constitutional principle of personal autonomy – since the supposed victim had assented to the activity and, in complete freedom, decided to exercise prostitution, the individual action of the person who introduced the person to prostitution lacked any potential to violate a legally protected (tutelado) good. The Court set aside this argument using dual reasoning based on the meaning of the principle of human dignity and the reach of personal autonomy guaranteed by the Colombian Constitution.

In the context of a proportionality test, the Court claimed that, by guaranteeing protection of the dignity of those who prostitute themselves, the criminalization of induction to prostitution served a legitimate objective. For the Court, “any action undertaken to convince another to exercise prostitution represents encouragement to tarnish one’s own dignity” and “for that reason it is legitimate for the State to persecute whoever seeks to profit economically from prostitution” (CCC 2009). The justification for why prostitution offends human dignity is the same as it was in the first stage of jurisprudence on the issue; that is, “that prostitution is not desirable because it is
contrary to human dignity to merchandise one’s very being” (CCC 1995). However, the Court carefully attempts to rid this justification of any negative moral judgment regarding the practice of prostitution (remember that in 1995 it considered prostitution to be “in essence … an obviously immoral activity” and “a lamentable profession”). Hence the Court indicates that, while in the past the legally protected good justifying sanction was “the collective sexual morality or the sexual honesty of persons,” now it was “generally considered that the legal good protected by the criminal sanction is human dignity” (CCC 2009). In sum, human dignity becomes the motor driving the State’s obligation to eradicate prostitution. While in the first stage of its jurisprudence eradication took the path of police control of an undignified, immoral activity that tended to upset public order, in the second stage criminal law is brought in to prevent people to commercialize their bodies.

Considering the multiplicity of meanings that are attributed to human dignity when speaking of sexuality (Siegel 2012) and the possibility of invoking the principle both to validate the exclusive reproductive exercise of sexuality and its non-reproductive functions, we can legitimately ask whether the Court’s mere affirmation of the crime of induction tends to protect human dignity enough to dilute the relationship that the same Court established between this principle and a substantive vision of sexual morality. This doubt, however, seems to have been resolved in the context of the Court’s reflections on the relationship between personal autonomy and the exercise of prostitution and, especially, in the arguments that it offered to invalidate the consent of those who decide to prostitute themselves after having been induced to exercise that activity. It is at this point in the verdict where the premises of sexual humanitarianism that tend to associate intimately – at times, to the point of confusing them – prostitution and human trafficking enter vigorously, lending the decision all of its argumentative force. Hence the Court
maintains, in one part, that it “recognizes that the norm under examine is a juridical dispositive created by the legislator to combat prostitution and human trafficking” and, at another point, that “beyond the moral dilemma that is implicated by the exploitation of genitalia and sexuality, prostitution is associated with the crime of human trafficking” (CCC 2009, italics added).

Although the penal regime of induction to prostitution does not constitute, in a strict sense, a form of abolition of the activity to the degree that it does not punish the client of the prostitute, the grounds that the Court offers to validate the regime – based on assimilation of prostitution to human trafficking (that, as will be seen, nullifies the agency of the victim of induction) – are very similar to those that have been historically advanced by abilitionists.

The association of human trafficking with prostitution serves the purpose of constructing the “perfect victim” of sexual humanitarianism, one that reflects the image of the “sex worker in the third world subjected to slavery in a big city brothel” (Kotiswaran 2014, 354). In this operation, the Court borrows from the international law on human trafficking and documents from several organs of the United Nations in order to demonstrate that the indefectible relations that, in contemporary times, have been established between transnational organized crime, human trafficking, and prostitution mean that this activity is always forcibly exercised in conditions of exploitation that approximate slavery. The most decisive normative argument behind this relational chain is, according to the Court, found in Article 3 of the Palermo Protocol that, in its opinion, “establishes human trafficking as a crime intimately related to prostitution” and, given this close relationship, it is possible to conclude that “the criminality of induction to prostitution can even be established where there is express consent of the victim” (CCC 2009). In this way, the interpretation of international law on human trafficking permits the Court to create a situation that, in turn, serves as its central argument for discarding the idea that people are able
to decide to prostitute themselves in total freedom, going so far as to refer to the “real voluntariness of the decision to prostitute oneself and its fallacies” (CC 2009).

The fallacious nature of this voluntariness is not only based on the synonymy, normatively construed, between human trafficking, transnational organized crime, and prostitution, but also, in addition, on a description of the circumstances in which the activity tends to be exercised. The Court, once again basing its judgment on international studies and documents (that, again, qualify prostitution as a modern form of slavery), affirms that prostitution tends to occur exclusively in the context of socioeconomic destitution. In this sense, it affirms that “of the reports previously cited by this Court it is striking that in many cases the initial consent of the victim becomes the entryway to slavery and human trafficking networks, in genuine ‘circles of violence’ from which it is impossible to escape,” adding that “initial consent, corrupted either by necessity or by ignorance, is highly susceptible to coactive subjection” and ends by saying that criminalizing induction to prostitution “is even more relevant in countries like Colombia, whose social problems provide ideal conditions for people in need to resort to prostitution as a means of subsistence” (CCC, italics added). Here we might ask whether the reference to consent “corrupted either by need or by ignorance” to the idea of the relevance of “countries like Colombia” and to the notion of “people in need” operates like a colonial metonym; like the the reference that invokes conditions of indefectible poverty and “cultural backwardness” of a third world in which those who exercise prostitution – given the conditions of economic destitution in which their existence plays out – can only do so as sexual slaves. The combination of the peculiar interpretation of international law on human trafficking and the “empirical” verifications of the Court produces, in this way, victims of induction to prostitution who, for their intrinsic vulnerability, lack the autonomy to freely decide to prostitute themselves.
Through the “perfect victim” constructed by the Constitutional Court, the basic premises of sexual humanitarianism are inscribed in a peculiar combination of the constitutional principles of human dignity and personal autonomy. To begin, the moral economy of compassion that is at the heart of humanitarian reason takes shelter in the dynamic of institutional mobilization to eradicate this activity because it is “contrary to the dignity of the person to merchandise one’s own being” (CCC 1995, 2009). As has been seen, in the first stage of the constitutional doctrine on prostitution, the indignity of this activity stemmed from its intrinsic immorality. Now, in the second stage, “merchandising one’s own being” is not problematic for moral reasons but rather because in this commerce the beings that participate, because of their intrinsic vulnerability, only do so because they lack the necessary freedom to resist sexual exploitation (that can go so far as to approximate slavery). Under the premises of sexual humanitarianism, it is the exploitation associated with the practice of prostitution that offends the person’s dignity. This principle thus becomes the constitutional locus of the person who sympathizes with the person who is sexually exploited and who operates as the motor of a state action seeking to save victims of prostitution. Note, however, that this operation of saving does not seek to improve the conditions of socioeconomic destitution of those who exercise prostitution nor does it combat the social conditions and structural institutions that lead to their destitution and that, thus, operate as the origin of the vulnerability that activates the compassion economy.

The saving activity of the State is channeled, in this case, through a type of penal sanction that punishes those who take advantage of the vulnerability of people who exercise prostitution. When the Court annuls the agency of people who are induced into prostitution on the basis of the equivalence between this activity and sexual exploitation (or slavery) – the antijuridicality of the inductors’ behavior thus remains even when their victims have “freely” assented to the induction
– seems to legitimize a type of paternalist criminal law that prevents a person lacking agency, because of extreme socioeconomic vulnerability, through an action that remedies a “decision,” inflicts harm to their own dignity. In this way, compassion for the victims of prostitution, lodged in the constitutional principle of human dignity, mobilizes the judicial criminal apparatus to save these victims. Drawing from the analytical model offered by Fassin and other theoreticians of sexual humanitarianism, it can be asked wither this particular institutional mobilization of compassion, despite its presumption that those who exercise prostitution are always victims of sexual exploitation (or slavery), could in any case offer a space for social resistance or lead to positive transformations in the socioeconomic conditions of people who engage in prostitution. To begin, it does not appear that criminal persecution of pimps helps people who have been induced into prostitution politicize their social vulnerability with an aim to counteract and transform their precarious socioeconomic conditions. In effect, the dynamics of the criminal process and imposition of individual criminal responsibility on people who have induced others to prostitute themselves, dynamics in which the victims of this induction occupy a merely tangential position, do not offer space for social organization that is sufficiently powerful

4 Soy consciente de las complejidades teóricas del paternalismo penal (véase, por todos, Feinberg 1986). Sin embargo, mi argumento en este punto del ensayo no está dirigido a establecer si el delito de inducción a la prostitución es una forma legítima de paternalismo penal. Mi objetivo consiste, más bien, en tratar entender cómo el derecho penal del proxenetismo forma parte de los presupuestos del humanitarismo sexual.

5 Nada de lo dicho aquí busca ocultar el hecho de que las personas que optan por ejercer la prostitución lo hacen, con gran frecuencia, en condiciones de autonomía limitada, en el sentido de que los contextos socio-económicos en que toman esta decisión son, en efecto, contextos de pobreza y oportunidades laborales limitadas. De este modo, si estas condiciones hubiesen sido distintas, las personas que se prostituyen tal vez hubiesen optado por otra clase de oficio (cf. Anderson 2002). Sin embargo, esta limitación de la autonomía no significa que el ejercicio de la prostitución se produzca, siempre, en condiciones de explotación. En este sentido, los estudios empíricos sobre prostitución y trabajo sexual en varios lugares del mundo tienden a señalar la diversidad y complejidad de estos fenómenos, de las motivaciones de quienes ejercen estos oficios, de las relaciones entre trabajadores sexuales y proxenetas u otros intermediarios y de los propios proxenetas. Así, quienes se dedican al estudio empírico de la prostitución y otras modalidades de trabajo sexual suelen alertar contra las generalizaciones en torno a las condiciones en que, en tiempos contemporáneos, se ejerce la prostitución (Weitzer 2005, 2009, 2010).
to denounce – or much less offset – the unjust social structures that cause, in many cases, people
to choose prostitution as a way of life. In the same way, the criminal condemnation of pimps on
an individual basis does not have decisive redistributive effects on these social structures either.
In sum, the aim of sexual humanitarianism to save the victims of sexual exploitation that is
expressed through criminal punishment for induction to prostitution does not appear to constitute
an emancipatory or transformative use of the moral economy of compassion or the social status
of victimhood.

Against what was argued above, it could be said that upon validating the constitutional
legitimacy of criminalizing induction to prostitution, the Court was only referring to one of many
measures the State could take to eradicate prostitution. In this way, it would be possible, in
addition to prosecuting and criminally punishing people for pimping, for Colombian public
authorities to implement measures explicitly meant to transform the unfair structures that lead
certain people to resort to prostitution for their subsistence. Regarding this possibility, we might
consider the legal and political project of the Court in which, starting in 2010, prostitution is
considered sex work. This doctrine began with the case brought by a woman who was fired from
her position as a sex worker in a bar after she became pregnant. The plaintiff claimed that the
conditions under which she performed sex work established an actual labor contract between
herself and the bar’s owner and thus granted her all of the rights that are derived from such a
relationship. On the basis of this argument she claimed she had been unjustly dismissed and
demanded that the establishment give her the salary and social security payments that had been
missed, maternity leave, and her job back, as rightfully due.

For the first time in its jurisprudence, the Constitutional Court upheld the recognition of
prostitution as a form of sex work derived from the obligation that the Colombian Constitution
places on the State to guarantee substantive equality. According to the Court, the prejudices that have historically associated prostitution with immoral, shameful activity qualifies the people who practice it as a marginalized social group suffering discrimination. Recognition of prostitution as sex work under the regime of labor law thus represents a measure to confront and transform the unfair structures that relegate people who exercise this profession to second-class citizenship. The characterization of prostitution as sex work under the constitutional principle of equality does not, however, mean that the Court reversed its earlier jurisprudence regarding its duty to eradicate prostitution because it offends human dignity or the important role assigned to criminal law to achieve eradication. In fact, the Court itself admits the tension. It has stated that the regime being put in place that respects dignity and freedom and seeks to eliminate all forms of exploitation of humans and women” from which gives rise to “permanent tension between the effort to eradicate the activity through prohibition and punishment of behavior and efforts that go in another direction by recognizing the rights of those who practice the activity and explicitly legalize the activity in general” (CCC 2010). The way the Court attempts to operate in the context of this “tension” allows us to ask whether, given the strength of the precedent of induction to prostitution that cannot be neglected, that tension might in fact be insurmountable.

To begin, the Court does not only reiterate its doctrine regarding the crime of induction to prostitution, but also reconfirms the notion that there is an intimate connection between human trafficking and sex work. In this regard it observes that “no type of sex work can be injurious to the freedom or human dignity of any of the people in the relationship” adding that “the definitive condition for the exercise of free will and private autonomy takes on greater force and importance … when the [international] reports establish how sex work has become more and more related to human trafficking, sexual tourism, and, in definitive manner, forced prostitution”
Restrepo (CCC 2010). In what follows, however, and this represents an innovative gesture with regards its previous jurisprudence, the Court recognizes that there could exist space for legal prostitution – a space in which prostitution becomes sex work – where it is possible to establish that the free and reasoned will, particularly of the person who is selling the sexual good, is fully integrated and persistent (CCC 2010). The coexistence of the notion of the intimate relationship between prostitution and human trafficking that justifies the mobilization of criminal law as an instrument to eradicate prostitution with the idea that there exist legitimate situations for sex work – regulated by labor law – when mediated in “integrated and persistent” form by the “free and reasoned will” of the sex worker, takes on special significance in concrete cases. It is here where the tension observed by the Court seems to become a problem that is very difficult to circumnavigate, if not impossible. In effect, one could imagine that employing someone in a bar to provide sexual services in exchange for a salary agreed upon in advance and under requisite labor condition be understood as induction to prostitution.

Although the Court held that the employer (the owner of the bar) did not commit the crime of induction to prostitution, the reasons it offered to justify its decision are framed in an unconvincing argumentative exercise. For one thing, it observed that the crime of induction to prostitution “excludes from entrepreneurial initiative any action through which induction to prostitution is carried out with the objective of material profit or satisfying the desires of another person, even when this occurs without coercion”; yet it also affirms, at the same time, that the prohibition derived from this type of penal sanction that promotes sex work as a form of individual initiative is only “an additional restriction before the human resource that is developed by the activity” in itself that does not prevent the businessperson from pursuing profit through different means (than that of sex work) (CCC 2010). In the face of these affirmations of the
Court, it remains to be seen how it is possible to develop a (legal) business providing sexual services without “promoting the exercise of sex work.” This schizophrenic situation becomes more evident in light of the primary rule at the heart of the verdict. According to the Court, the characterization of sex work in terms of the constitutional principles of dignity, freedom, and equality makes recognizing that among the owners of commercial establishments that provide sexual services and their sex workers there exists a labor contract that guarantees the latter all of the rights that derived from it an “inexorable conclusion.” Thus, while the criminal prohibition of pimping – justified by the premises of sexual humanitarianism – bans the owners of legal business of sexual services from developing their business through the promotion of sex work, the labor regime for sex work, based on the constitutional principle of material equality, seems to legitimate the promotion of sex work through its recognition of the existence of a labor contract between those same businesspeople and their sex workers. To my mind, this contradiction illustrates that an egalitarian project of transformation of unjust structures of socioeconomic distribution through the broad recognition of prostitution as sex work appears to require removing the free transaction (free of violence and coercion) of sexual services from the ambit of criminal law, or at least from the ambit of criminal law shaped by the assumptions of sexual humanitarianism, leaving it, clearly, part (if not all) of its transformative power.

This conclusion, in my opinion, is reinforced by another important decision adopted by the Court in this verdict. After recognizing that between the plaintiff and the bar owner there existed a labor contract and that the worker’s dismissal was unjustified and violated the privileges accorded to pregnancy, the Court ordered the defendant to pay the salary and social security instalments that had been missed because of the dismissal, as well as ordering that the plaintiff be accorded maternity leave. Yet it decided not to order the owner to rehire the plaintiff.
as a sex worker. For the Court, in light of the State’s duty to eradicate prostitution, a duty derived from the principle of human dignity, the judges were subsequently proscribed from recognizing the right of sex workers to be rehired in cases of unjust dismissal. On this question the Court observed that “because of the specificity of the service, because in many aspects sex work affects dignity, just as the existence of precarious subordination is exercised by the employer, the right of the worker to stable labor conditions and to be rehired in cases of unjust dismissal is also precarious” (CCC 2010) italics added. Here the saving hand of sentimentalized dignity reappears, preventing sex workers unjustly dismissed from regaining their positions. In effect, the negation of the right to reintegration “saves” those who exercise an activity that, despite its denomination as sex work, continues to injure dignity. Despite the recognition of prostitution as sex work, the jurisprudence of the Court does not appear to rid itself of the basic presumption of sexual humanitarianism that sexual commerce borders on sexual exploitation. If the Court itself recognizes that people can choose to be sex workers in “free and reasoned” fashion, there is no reason to forbid someone from deciding, in “free and reasoned” fashion, to continue exercising sex work if they are dismissed. Only the logic of sexual humanitarianism explains, once again, the break with the transformative potential of the recognition of prostitution as sex work through the Court’s denial to concede the right to rehire for unjustly dismissed sex workers.

The entry of sexual humanitarianism in Colombia through the dispositions of the Palermo Protocol has sentimentalized Colombian constitutional law by permitting the moral economy of compassion to rest on the constitutional principles of human dignity and personal autonomy. The Colombian constitutional experience seems to teach us that, when this moral economy takes as vehicle rights discourse, the results have limited potential to transform the unjust structures of distribution. Although the principle of equality seems to offer much space for the recognition of
prostitution as sex work, the sexual humanitarianism rooted in human dignity and personal autonomy imposes important limits on the transformative potential of this recognition. Although the political project of abolishing prostitution in Colombia has not fully taken off, the dynamics of Colombian constitutional jurisprudence on human trafficking, sex work, and prostitution appear to offer fertile ground for the project to become consolidated to the detriment of the project of structural transformation that is an essential part of the recognition of prostitution as sex work.

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