

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

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## INTRODUCTION

Nothing generates as much discord and emotion as sex. No wonder Virginia Woolf once said, “when a subject is highly controversial—and any question about sex is that—one cannot hope to tell the truth.”<sup>1</sup> This warning seems particularly poignant where the subject is one of the sexes selling sex—

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1. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 5 (1929).

particularly when those selling it are women. Nevertheless, the debate that has taken place in Europe and the United States in the last century over women's prostitution/sex work<sup>2</sup> seems not to have heeded Woolf's call for argumentative caution when discussing the sexes (and sex). Those who talk about prostitution/sex work rarely recognize that "[o]ne can only show how one came to hold whatever opinion one does hold," or "[o]ne can only give one's audience the chance of drawing their own conclusions as they observe the limitations, the prejudices, the idiosyncrasies of the speaker."<sup>3</sup> Quite the contrary, since at least the Victorian uproar over "white slavery"<sup>4</sup> at the end of the nineteenth century, the legal, social, and political status of prostitution/sex work has ignited heated disputes among those who advocate for its prohibition (by criminalizing both the sale and purchase of sex), its one-sided criminalization (by criminalizing the purchase of sex but not its sale), its regulation (with labor, health, security, or zoning regulations, among others), or its complete decriminalization (treating sex trade as any other trade).<sup>5</sup>

Discussing prostitution/sex work (on any side of the debate), and particularly how the state should respond to it, often becomes a conversation about the meaning of human dignity, personal autonomy, equality, the market, and the centrality of criminal law in the political community where the debate takes place. Although such conversations may make appeals to the frameworks of diverse political and philosophical theories, it is within the various strands of feminism, queer theory, and trans studies that the debate over the distinct legal approaches to prostitution/sex work has been most productive. These debates are so rich and complex that it would be unfair and almost impossible to try to

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2. Using "prostitution" or "sex work" to refer to the exchange of sexual intercourse for money is a politically loaded choice. The former is the term typically preferred by prohibitionists and, in current debates, is a synonym for sexual exploitation, slavery, or human trafficking. The latter term, used by advocates of sex work regulation or decriminalization, designates a legitimate and lawful form of labor to be regulated by the state. Here, I use "prostitution/sex work" when I am referring to the political debate over the exchange of sexual intercourse for money *in the most general way*, taking into account both the perspectives of prohibitionist and pro-regulatory viewpoints without ascribing to them their specific political valences. Consequently, when I use "prostitution" or "sex work" without a slash connecting them, I am giving the term its specific political prohibitionist or pro-regulatory sex work meaning. For a similar use of "prostitution/sex work" see Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).
  3. WOOLF, *supra* note 1.
  4. See generally JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE (1980) (exploring the public discourse on prostitution in the late nineteenth century, which, among other positions, involved prostitution being framed as white slavery).
  5. Cf. PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION 28-30 (2010) (identifying four common legal models of sex work as prohibition, abolition, regulation, and full decriminalization). In this Article, the terms prohibition, one-sided criminalization, regulation, and complete decriminalization are used in place of de Marneffe's terms, respectively. This alteration is meant to recognize the unique historical and contemporary meaning of "abolition" in the United States, and especially the incongruity of using the abolition label for an effort to criminalize the purchase of sex (even if these movements may self-identify with this term).

summarize them here. Although this Article does seek to participate in the contemporary conversation about prostitution/sex work, it does not aim to adopt a normative position in favor of prostitution/sex work's prohibition, one-sided criminalization, regulation, decriminalization, or anything in between. Instead, it aims to provide a foundation for *describing* one of the spaces where this debate is currently unfolding in Latin America and, more specifically, in Colombia.

At a time when the concepts of global or transnational constitutionalism have begun to take hold, complex political debates are increasingly framed as potential judicial cases to be decided by supreme or constitutional courts around the world.<sup>6</sup> Prostitution/sex work is no exception. Both the advocates for regulation of sex work and the prohibitionists have clothed their claims in the language of rights, seeking judicial protections for the rights of sex workers or for victims of sexual exploitation, slavery, or human trafficking. In this process, “original” prohibitionist and pro-regulatory debates (originating in Europe and the United States) are translated into the specific constitutional language of particular domestic jurisdictions. Even this local specificity, however, has global potential given the transnational nature of current constitutional conversations. In this Article, I argue that the local specificity of the prohibitionist/sex work regulation debate in Colombia has been the “sentimentalization” of the Constitution through the mobilization of values such as dignity, autonomy, and equality. Although the argument is geographically circumscribed, its elaboration of the Constitution as an important affective terrain to dispute claims of social justice may have a more global reach.

In Spanish- and Portuguese-speaking Latin America, free adults willingly participating in the exchange of sex for money have not generally been punished through criminal law instruments.<sup>7</sup> Throughout the region, diverse regulations—

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6. For more on the concept of global or transnational constitutionalism, its principles, and dynamics, see, for example, *COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA* (Rosalind Dixon & Tom Ginsburg eds., 2017); *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* (Daniel Bonilla Maldonado ed., 2013); VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010); *THE LATIN AMERICAN CASEBOOK: COURTS, CONSTITUTIONS, AND RIGHTS* (Juan F. González-Bertomeu & Roberto Gargarella eds., 2016); *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2007); KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (2012); *THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA* (Conrado Hübner Mendes & Roberto Gargarella eds., Oxford U. Press forthcoming 2020); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); and ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH* (2019).
  7. Since at least the 1930s, Latin American criminal law, in very general terms, has historically evolved according to fairly “liberal” standards based on the idea that criminal law is the *ultima ratio* for imposing social order. Criminal law is therefore a subsidiary means of social control that should only be resorted to when other, less drastic forms of imposing social order have failed. This idea of the criminal law strongly rejects the criminalization of conduct based on the supposed immorality or intrinsic “dangerousness” of the agents. The decriminalization of prostitution and homosexuality is a preeminent example of this approach to criminal law. See, e.g., PEDRO PACHECO OSORIO, 2 DERECHO PENAL ESPECIAL 387-88 (1970); LUIS CARLOS PÉREZ, 5 DERECHO PENAL: PARTES

varying from country to country—have been enacted to criminalize child prostitution, coercion or inducement into prostitution, pimping, and other forms of commercialized sex work.<sup>8</sup> Beginning in 2002, however, Latin American states began to ratify the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol), which supplemented the United Nations Convention against Transnational Organized Crime.<sup>9</sup> As countries adjusted domestic legislation to comply with the Protocol through expedited legal reforms, a peculiar relationship between human trafficking and prostitution emerged. This relationship is derived, in large part, from the Protocol's inclusion of prostitution in its definition of human trafficking, as well as the role that the Protocol assigns to consent and agency. In article 3, the Protocol declares that human trafficking is always exploitative and that one form of exploitation is “the exploitation of the prostitution of others.”<sup>10</sup> The Protocol also states that in any case of “intended exploitation,” trafficking victims necessarily lack agency or consent.<sup>11</sup> Thus, the Palermo Protocol uses “exploitation” as the key concept through which it establishes a link between human trafficking and prostitution, while declaring that no person can consent to their own exploitation. By complying with the Protocol's article 5 obligation to criminalize conduct related to human trafficking,<sup>12</sup> several Latin American countries have not only introduced criminal provisions that punish human trafficking per se, but also reformulated their criminal legislation on pimping.<sup>13</sup> Without directly criminalizing the free

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GENERAL Y ESPECIAL 65-73 (2d ed. 1991); SEBASTIÁN SOLER, 3 DERECHO PENAL ARGENTINO 316-17 (1978); EUGENIO RAÚL ZAFFARONI, ALEJANDRO ALAGIA & ALEJANDRO SLOKAR, DERECHO PENAL: PARTE GENERAL (2d ed. 2002).

8. *Id.*

9. G.A. Res. 55/25, Palermo Protocol (Nov. 15, 2000).

10. *Id.* at art. 3.

11. *Id.*

12. *Id.* at art. 5.

13. For example, in Colombia, Law 1236 of 2008 quintupled the sentence for those found guilty of the crime of inducement into prostitution. *See infra* Section II.B. While the 2000 Criminal Code established a sentence of two to four years of prison, the 2008 statute increased that sentence to a prison term of ten to twenty-two years. In Argentina, statutory reforms undertaken after the signature of the Palermo Protocol show even more clearly the relationship between human trafficking, exploitation, and prostitution. In 2008, Law 26.364 (“Prevention and Punishment of Human Trafficking and Assistance to its Victims”), in addition to creating the crimes of human trafficking of persons above and under eighteen years of age, established that one of the instances of exploitation included in the crime of human trafficking was the promotion, facilitation, development or obtainment of profit “from any form of sexual commerce.” Later, in 2012, Law 26.842 (“Prevention and Punishment of Human Trafficking and Assistance to its Victims”) redefined the crime of human trafficking and established that one of the forms of exploitation of this crime is the promotion, facilitation or commercialization of “a third party’s prostitution or of any form of offer of another person’s sexual services.” The most interesting feature of this statute, however, was the reform of articles 125 bis, 126 and 127 of the Criminal Code of Argentina, which criminalized the promotion, facilitation and economic exploitation of the prostitution of any person even with her consent. Some commentators have deemed this reform to be a “change of paradigm” in the Argentine conception of pimping. *See* Javier Augusto de Luca & Valeria A. Lancman, *Promoción y facilitación de la prostitución*, ASOCIACIÓN PENSAMIENTO PENAL, CÓDIGO PENAL COMENTADO DE ACCESO LIBRE

exchange of sex for money, these developments have drawn the scope of criminal law so close to the transaction of sex that one may wonder whether the exchange itself has been indirectly criminalized. In many jurisdictions throughout Latin America, the close connection between human trafficking and prostitution established by the Palermo Protocol seems to have produced a synonymy.<sup>14</sup>

Parallel to these legal reforms, feminist scholars and women's civil society groups in Latin America have demanded the criminalization of the purchase of sex, less drastic prohibitionist measures not involving criminal law, or the regulation of sex work as a lawful form of labor.<sup>15</sup> Although these demands are

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- 5, <http://www.pensamientopenal.com.ar/system/files/epcomentado/cpc37752.pdf> [<https://perma.cc/CL72-NZYH>]. Before the reform, these acts were only criminally punished when minors under the age of eighteen were involved, when the victim was of any age but “deceit, violence, threat, abuse of authority or any other means of intimidation or coercion were used or the agent was an ascendant, spouse, sibling, tutor or the person in charge of her education or care,” or, in the case of exploitation of prostitution, when “deceit, coercive or intimidating abuse of a relationship of dependence, authority or power, violence, threat, or any other means of intimidation or coercion were used.” In Mexico, the “General Statute for the Prevention, Punishment and Eradication of the Crimes Related to Human Trafficking and for the Protection and Assistance to the Victims of these Crimes” of 2012 defines the crime of human trafficking much in the same way as the Palermo Protocol by establishing that the purpose of this crime is exploitation. One of the modalities of exploitation is “a third party’s prostitution or other forms of sexual exploitation.” LGPSEDTP art. 10-III, Diario Oficial de la Federación [DOF] 14-06-2012. In this case, however, differently from Argentina, the Mexican law does not automatically disregard the consent of the victim. According to article 13 of the statute—except when minors or persons who do not have the capacity to understand the meaning of the act are involved—the conduct of “whoever benefits from the exploitation of one or more persons through prostitution, pornography, sexual public or private exhibits, sexual tourism or any other paid sexual activity” is criminally punished only if there is deceit, physical or moral violence, abuse of power, abuse of a situation of vulnerability, serious harm or threat of serious harm, threat of reporting the victim to migration authorities or any other abuse of the use of the law or legal procedures that leads the victim to submit to the agent. *Id.* at art. 13. In a similar way, article 14 only punishes the deceit of persons to perform sexual services. *Id.* at art. 14.
14. This conflation is not specific to Latin America. As correctly observed by scholars devoted to the study of the genealogy and the particular geopolitics of the Palermo Protocol, the internal dynamics of the Protocol’s negotiation and ratification led to the conflation of human trafficking with sex trafficking, and sex trafficking with prostitution. *See, e.g.,* Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-Trafficking Campaigns*, 36 SIGNS 45 (2010); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1658-59 (2010); Prabha Kotiswaran, *Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law*, 4 U.C. IRVINE L. REV. 353, 357-58 (2014). This Article seeks to show how the conflation takes on constitutional significance through particular judicial interpretations, as well as some of the consequences of these interpretations.
15. For examples of prohibitionist organizations, activism, alliances, and feminist scholarship in Latin America, see DIÁLOGO: PROSTITUCIÓN/TRABAJO SEXUAL: LAS PROTAGONISTAS HABLAN (Lohana Berkins & Claudia Korol eds., 2007); Diana Maffía, *En la prostitución hay una relación más parecida a la esclavitud que al trabajo*, LA RETAGUARDIA (Aug. 19, 2017), <http://www.laretaguardia.com.ar/2017/08/en-la-prostitucion-hay-una-relacion-mas.html> [<https://perma.cc/XV8B-GU6G>]; Sonia Tessa, *El cuerpo recobrado*, PÁGINA 12 (Mar. 9, 2012), <https://www.pagina12.com.ar/diario/suplementos/las12/13-7117-2012-03-09.html> [<https://perma.cc/7ABS-VZ62>] (interview with Lohana Berkins); and COALICIÓN CONTRA EL TRÁFICO DE MUJERES Y NIÑAS EN AMÉRICA LATINA Y EL CARIBE, <http://www.catwlac.org/es> [<https://perma.cc/3WCN-9F3X>]. For examples of pro-regulatory sex work organizations, activism,

based on one-sided criminalization or pro-regulatory arguments somewhat similar to those that have circulated in Europe and the United States since the end of the nineteenth century, the Latin American debate has been largely informed by the emergence of human trafficking as an issue of international law. This Latin American peculiarity has provided a space to show how the political, legal, and socioeconomic status of prostitution/sex work can be discussed in terms that are not those of the original Euro-American stances. This is particularly true in countries like Colombia with an intense “constitutionalization of everyday life,”<sup>16</sup> where public debates in the streets, legislatures, executive agencies, and courts over prostitution/sex work have extensively employed a discourse of rights.

In this Article, I neither normatively evaluate nor seek to describe in detail the relationship that the Palermo Protocol has established between human trafficking, exploitation, and agency, or the legal reforms undertaken by Latin American countries to comply with the Protocol. I also do not seek to defend prohibitionist or regulatory frameworks for sex work in Latin America or Colombia. Instead, my Article has two descriptive purposes. First, I provide a theoretical reconstruction of the socio-political space that the international law of human trafficking has created for debating the legal status of prostitution/sex work. I suggest that this space results from the combination of two phenomena. The first is the inscription of human trafficking within a discourse of “humanitarian reason,”<sup>17</sup> grounded in an “economy of emotions,”<sup>18</sup> where compassion, fear, and moral indignation operate as fundamental vectors for the social and political mobilization of advocates claiming to speak on behalf of victims of human trafficking and prostitution. The second phenomenon is the development of a special form of humanitarian reason operating under the framework of what Prabha Kotiswaran has called “sexual humanitarianism.”<sup>19</sup> This “sexual humanitarianism” calls for the “salvation” of victims of both trafficking and prostitution, particularly in the Third World. In the space I describe, I argue that even concepts such as victimhood and the economy of

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and scholarship, see Marta Lamas, *¿Prostitución, trabajo o trata? Por un debate sin prejuicios*, 50 DEBATE FEMINISTA 160 (2014); Valentina Montoya Robledo, *¿Trabajadora sexual o ‘víctima perfecta’? Límites en el acceso a la justicia*, 11 PRISMA JURÍDICO 143 (2012); ASOCIACIÓN MUJERES MERETRICES DE LA ARGENTINA, <https://www.ammar.org.ar> [<https://perma.cc/9TLR-G9K8>]; RED DE MUJERES TRABAJADORAS SEXUALES DE LATINOAMÉRICA Y EL CARIBE, <https://www.redtralsex.org> [<https://perma.cc/74C7-WH7Q>]; and ASMUBULI [*Asociación de Mujeres Buscando Libertad*], TWITTER, <https://twitter.com/asmubuli?lang=es> (Colombia).

16. See Esteban Restrepo-Saldarriaga, *Reforma constitucional y progreso social: la “constitucionalización de la vida cotidiana” en Colombia*, in EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACIÓN 73-88 (2003).
17. See DIDIER FASSIN, HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT (2012) [hereinafter FASSIN, HUMANITARIAN REASON].
18. See Didier Fassin, *Les économies morales revisitées*, 6 ANNALES HSS 1237 (2009) [hereinafter Fassin, *Les économies morales revisitées*].
19. See Kotiswaran, *supra* note 14.

compassion do not necessarily dictate a subordinating reality for prostitutes/sex workers. My analysis of the political and social dynamics produced in this affective space makes two points. First, as some have already pointed out,<sup>20</sup> the discourse of compassion tends to displace other possible languages for justice. But second—and this is important relative to the first point—there may be redistributive and emancipatory dimensions to the mobilization of an economy of compassion and the social category of victimhood. Analyzing the extent to which these points manifest requires an analysis of the costs and benefits associated with the mobilization of an economy of compassion in specific political situations and contexts.

Based on this theoretical reconstruction, the second Part of the Article is devoted to an analysis of the Colombian Constitutional Court's doctrine on prostitution/sex work and human trafficking. Here, I show how the ratification of the Palermo Protocol and the peculiar brand of sexual humanitarianism this process has instantiated have led to the "sentimentalization" of Colombian constitutional law, demonstrating what occurs when the language of compassion encounters the language of rights. More precisely, my argument examines the extent to which the Court's project of recognizing sex work as a form of lawful labor has been impacted by the sedimentation of an economy of compassion entrenched in the constitutional values of dignity, autonomy, and equality. I show how the apparently progressive logic of recognizing sex work as a form of lawful labor operates against a background of sexual humanitarianism, which is more typically associated with a prohibitionist political project. Constitutional developments for prostitution/sex work in Colombia have thus taken place in a domain governed by values that, because of their sentimentalization, may simultaneously sustain both pro-regulatory and prohibitionist political projects.

#### I. HUMANITARIAN GOVERNANCE AND SEXUAL HUMANITARIANISM

Much has been written about the rise of a type of political action grounded in affects, such as compassion and pity, that domestic governments, some civil society organizations, and international institutions *feel* for victims who *suffer* the effects of armed conflicts, human rights violations, natural disasters, and other catastrophic events.<sup>21</sup> Rather than summarize the extensive literature on this topic, in this Part I argue that the features of this "humanitarian reason," as Didier Fassin has called it, have reached into the world of sex, resulting in a form

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20. See Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, in LEFT LEGALISM/LEFT CRITIQUE 105-33 (Wendy Brown & Janet Halley eds., 2002); see also DIDIER FASSIN & RICHARD RECHTMAN, *THE EMPIRE OF TRAUMA: AN INQUIRY INTO THE CONDITION OF VICTIMHOOD* (2009).

21. See FASSIN, *HUMANITARIAN REASON*, *supra* note 17; see also *COMPASSION: THE CULTURE AND POLITICS OF AN EMOTION* (Lauren Berlant ed., 2004); Berlant, *supra* note 20.

of “sexual humanitarianism.” At the center of “sexual humanitarianism” is the political mission to rescue and protect victims of sexual violence and exploitation. In contrast with some commentators who posit that the concept of the victim of sexual exploitation, which in the Palermo Protocol encompasses the prostitute as well as the victim of human trafficking, is an inherently disempowering image of a person lacking any agency, I argue that in certain political conditions and contexts, the socio-political concept of victimhood can provide emancipatory possibilities. I assert that the very vulnerability of the condition of victimhood can be a space for political resistance. But if this is so, the mobilization of victimhood in specific political debates would need to be substantiated with an analysis of the costs and benefits of its use.

Didier Fassin has highlighted how moral sentiments have become an “essential force” of both domestic and international politics since the end of the twentieth century.<sup>22</sup> Fassin has described “humanitarian reason” as a “general logic” whose fundamental feature is the appeal to a “moral economy” in which mobilization and political decision-making are based on *compassion* for the *suffering* of *victims* of catastrophic events and other situations.<sup>23</sup> For Fassin, this form of politics, with its “goodness” often taken for granted, has a history that must be understood in order to expose what is at stake when compassion becomes the fundamental mode of administering “precarious lives,” such as those of the poor, immigrants, refugees, sick children, or victims of armed conflicts and natural disasters.<sup>24</sup> For the purposes of this Article, Fassin’s genealogical analysis offers two key elements.

First, the discourse of compassion has come to replace other discourses that have historically been employed to frame, contest, and confront social injustices. Under the logic of humanitarian reason, “[i]nequality is replaced by exclusion, domination is transformed into misfortune, injustice is articulated as suffering, violence is expressed in terms of trauma.”<sup>25</sup> A critical approach to humanitarian reason as a mode of governance in our world does not imply, in and of itself, a negative judgment about such an appeal to compassion. It is rather an invitation to gauge carefully the effects of the competition that emerges between this and other possible discourses of justice in the particular contexts of different injustices. Thus, one may approach particular social struggles or political decisions by investigating and weighing the costs and benefits of framing the injustice in terms of compassion or in the language of an alternative discourse of justice.<sup>26</sup> At the same time, one must never lose sight of the fact that compassion often creates a paradoxical relationship between the person who feels

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22. FASSIN, HUMANITARIAN REASON, *supra* note 17, at 1.

23. Fassin, *Les économies morales revisitées*, *supra* note 18; *see also* FASSIN, HUMANITARIAN REASON, *supra* note 17, at 7, 244.

24. FASSIN, HUMANITARIAN REASON, *supra* note 17, at 4-8.

25. *Id.* at 6.

26. *Id.* at 8.



compassion and the person who is the object of it. For Fassin, this relationship is intrinsically unequal, for it generates neither reciprocity nor true recognition: Although the one who feels compassion generally proceeds in all good will, the suffering subject who is the object of compassion can only reciprocate through displays of humility.<sup>27</sup> This asymmetry poses at least two important problems. For one, the political space of compassion can, at times, easily turn into one of repression—as has happened, for example, in the case of immigrants or asylum seekers.<sup>28</sup> For another, political relations founded on compassion may often devolve into “humanitarian melodrama,” creating and promoting images of the “intimate details” of human pain and suffering, circulated by the media and political actors, which have become the most visible and distinctive characteristic of political action in our time.<sup>29</sup>

The second element of Didier Fassin’s genealogical reconstruction of humanitarian reason is the “empire of trauma,” which centers on those who, because of their suffering, have become objects of compassion with a political identity that Didier Fassin and Richard Rechtman interrogate. Fassin and Rechtman show how, between the end of the nineteenth century and the 1960s, the social concept of victimhood evolved from that of a condition suggesting personal weakness and inviting suspicion and distrust, to the production of an object of compassion whose suffering is viewed as authentic and, as such, a source of unquestionable truth and moral authority.<sup>30</sup> According to their genealogy, one becomes a victim through an external, uncontrollable, and unpredictable event that results in trauma. The concept of trauma, which initially emerged in psychiatry and psychoanalysis where it was understood to be limited to the psyche of individuals, has thus been transformed into a social phenomenon that informs contemporary moral economies and activates collective political mobilization for rights in the name of compassion and empathy.<sup>31</sup>

Fassin and Rechtman’s genealogical reconstruction does not condemn, discard, or negatively evaluate in normative terms victimhood or trauma.<sup>32</sup> Rather, they call for a contextual analysis of the uses and mobilizations of this condition. In their view, in specific cases, the mobilization of the victim condition may have emancipatory effects, lead to recognition of rights, or instill positive social and political transformations in public policy that would not be possible through other languages of justice.<sup>33</sup> Here, Fassin and Rechtman coincide with feminist theoretical elaborations that have highlighted the

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27. *Id.* at 3-4.

28. *Id.* at 14, 16.

29. Berlant, *supra* note 20; *see also* FASSIN, HUMANITARIAN REASON, *supra* note 17, at 250; ROBERT MEISTER, AFTER EVIL: A POLITICS OF HUMAN RIGHTS 66-67 (2011) (emphasis omitted).

30. FASSIN & RECHTMAN, *supra* note 20, at 25-39, 77-97.

31. *Id.* at 7, 276-84.

32. *Id.* at 280-81.

33. *Id.* at 281-82.

possibilities for political resistance stemming from the position of victimhood and the idea of vulnerability that is (often negatively) associated with it.<sup>34</sup> Feminist authors, however, have also warned about the risks associated with political struggles clothed in the language of victimhood. They argue that even if victimhood could be used to support the demand for rights (and may therefore have positive political outcomes), its origin in a purely individual psychic phenomenon, when translated into collective struggles, may tend to obscure injustices of a structural nature.<sup>35</sup> As Fassin and Rechtman rightly observe, any analysis of the use and mobilization of victimhood cannot ignore the fact that, when choosing this course of action, “other possible schemes of description and action” are set aside that could be more effective and powerful in confronting and transforming structural injustices.<sup>36</sup>

The concepts of “humanitarian reason” and the “empire of trauma” have taken on special meaning in the world of sex, and especially in contemporary debates on human trafficking and prostitution/sex work. Some feminist critics have used “sexual humanitarianism” as a concept to describe, in general terms, the emergence of a global movement seeking to save victims of sexual exploitation (including both victims of human trafficking and prostitutes), particularly those in the “Third World.”<sup>37</sup> In large part, this use of the concept replicates in a specific context Gayatri Spivak’s famous criticism of the relationship between the First and Third Worlds as one defined by “white men” (and, in the context of sexual humanitarianism, also white—and often feminist—women) saving “brown women.”<sup>38</sup> For radical critics of sexual humanitarianism, the concept is mobilized as an example of the West’s idealized vision of a sexualized Other located in remote and exotic places inhabited by “pure,” “perfect,” “iconic,” or “ideal” victims of various forms of sexual exploitation and oppression whose positions are often linked to “cultural backwardness.”<sup>39</sup>

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34. See REBECCA STRINGER, KNOWING VICTIMS: FEMINISM, AGENCY AND VICTIM POLITICS IN NEOLIBERAL TIMES (2014); Judith Butler, Zeynep Gambetti & Leticia Sabsay, *Introduction, in VULNERABILITY IN RESISTANCE 1* (Judith Butler, Zeynep Gambetti & Leticia Sabsay eds., 2016).
35. Berlant, *supra* note 20, at 108-09; see also FASSIN & RECHTMAN, *supra* note 20, at 281; Butler, Gambetti & Sabsay, *supra* note 34, at 2-3.
36. FASSIN & RECHTMAN, *supra* note 20, at 9.
37. See Nick Mai, *Between Embodied Cosmopolitanism and Sexual Humanitarianism: The Fractal Mobilities and Subjectivities of Migrants Working in Sex Industry*, in BORDERS, MOBILITIES AND MIGRATIONS: PERSPECTIVES FROM THE MEDITERRANEAN, 19-21ST CENTURY 175 (Lisa Anteby-Yemini et al. eds., 2014); see also PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA (2011); Bernstein, *supra* note 14; Kotiswaran, *supra* note 14.
38. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 297 (Cary Nelson & Lawrence Grossberg eds., 1988); see also Shani D’Cruze & Anupama Rao, *Violence and the Vulnerabilities of Gender*, 16 GENDER & HIST. 495 (2004); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).
39. See Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 34 J. SOC. & SOC. WELFARE 57 (2007); Julietta Hua & Holly Nigorizawa, *US Sex Trafficking, Women’s Human Rights and the Politics of Representation*, 12 INT’L FEMINIST J. POL. 401 (2010); Mai, *supra*

The object of this critique is embodied by the image of “[t]he third world sex worker enslaved in a big-city brothel.”<sup>40</sup>

Critics also highlight the paradox of sexual humanitarianism. At first glance, sexual humanitarianism appears to be driven by compassion for victims of sexual misfortune. Paradoxically, it often devolves into the control and suppression of the migration of undesirable populations through the enforcement of restrictive immigration laws that, in many cases, transform the “perfect” victim of human trafficking into the less than perfect woman “guilty” of prostitution.<sup>41</sup> In other instances, however, critical approaches to sexual humanitarianism have undertaken the type of analysis suggested by Didier Fassin’s genealogical approach to humanitarian reason and the empire of trauma, while centering their analysis on the fundamental role played by the Palermo Protocol in the global diffusion of sexual humanitarianism. For these critics, the social condition of sexual victims—the primary objects of protection for the Protocol—does not necessarily equate with domination and repression. In some cases, the condition can be mobilized in an emancipatory manner to produce improvements in the living conditions of victims of human trafficking and those who engage in sex work.<sup>42</sup> The analysis of the extent to which such dynamics occur in specific contexts should take into account at least four elements.

First, in the negotiations leading to the adoption of the Palermo Protocol, two camps intensely debated the relationship between human trafficking and prostitution/sex work. While some feminist camps defended one-sided criminalization of prostitution, other feminist groups and human rights advocates championed the regulation of sex work.<sup>43</sup> Inasmuch as the Protocol reflects a compromise between both political projects, its domestic incorporation and enforcement may support radically divergent public policies towards sex work (simultaneously justifying, for example, both criminal and regulatory policies).<sup>44</sup> Second, and despite the first point, in many countries around the world (particularly in the Global South), implementation of the Palermo Protocol has tracked the particular political position adopted by the United States vis-à-vis human trafficking and prostitution. Under the George W. Bush administration, influenced by far-right U.S. Christian groups, human trafficking became a highly

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note 37; Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

40. Kotiswaran, *supra* note 14, at 354.

41. Desyllas, *supra* note 39; Mai, *supra* note 37; see also MILENA JAKŠIĆ, *LA TRAITE DES ÊTRES HUMAINS EN FRANCE: DE LA VICTIME IDÉALE A LA VICTIME COUPABLE* (2016).

42. See, e.g., JAKŠIĆ, *supra* note 41; Chuang, *supra* note 14; Halley et al., *supra* note 2; Kotiswaran, *supra* note 14; Mai, *supra* note 37; Srikantiah, *supra* note 39.

43. See, e.g., KOTISWARAN, *supra* note 37; Bernstein, *supra* note 14; Chuang, *supra* note 14; Joe Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations*, 14 SOC. & LEGAL STUD. 61 (2005); Halley et al., *supra* note 2; Kotiswaran, *supra* note 14.

44. Halley et al., *supra* note 2.

moralized and sexualized issue increasingly tethered to calls for prohibitionist policies towards prostitution. This conflation of human trafficking and prostitution has since spread internationally as the United States has conditioned the availability of funds for international cooperation on the compliance of recipient countries with the U.S. Victims of Trafficking and Violence Protection Act.<sup>45</sup> Third, the fact that the Palermo Protocol, because of its unique genesis, focuses its protective measures on the “perfect” victim of sexual exploitation, leads to a constant conflation of trafficking with trafficking for sex work, and trafficking for sex work with sex work. This conflation has spurred domestic modalities of implementation that ignore trafficking not for the purposes of sex work while criminalizing freely chosen forms of sex work.<sup>46</sup> Fourth, the Protocol’s emphasis on criminalization foregrounds a conception, which some scholars call “neoliberal,”<sup>47</sup> that sexual exploitation is the result of the individual actions of deviant actors and not of structural poverty, which forces certain populations to migrate in conditions of insecurity in search of informal work. In this sense, the Palermo Protocol, grounded in a discourse of compassion and suffering, tends to obscure structural injustices and displace alternative discourses of justice that would promote broader distributive reforms.<sup>48</sup>

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45. *Id.*; 22 U.S.C. § 7101; Kotiswaran, *supra* note 14; Yvonne C. Zimmerman, *From Bush to Obama: Rethinking Sex and Religion in the United States’ Initiative to Combat Human Trafficking*, 26 J. FEMINIST STUD. RELIGION 79 (2010).

46. See Bernstein, *supra* note 14; Kotiswaran, *supra* note 14, at 357.

47. Critical scholars from different disciplines have noted the tendency of neoliberalism to tackle structural injustices through “individualist” solutions. While some of these solutions tend to reconstruct or bolster the individual autonomy of subjects so they become more “resilient” and therefore able to cope with their misfortunes, other proposals tend to ascribe individual responsibility (sometimes as criminal liability) for structural injustices to specific individuals whose actions are said to represent the general dynamics of the unjust structure. The idea of criminalizing pimps or clients of prostitutes/sex workers (supposedly representing the sexist structures that subordinate women through the expropriation of their sexuality) fits within this second trend. Cf. ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016) (asserting that the turn to criminal punishment in human rights law constricted responses to human rights violations as well as conceptions of justice and peace); JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY (2015) (discussing the possibilities of resisting current global capitalism through the politicization of vulnerability and the exposure of bodies); Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, 12 PUB. CULTURE 291 (2000) (describing “millennial capitalism” as based on consumption in opposition to original capitalist ideas based on production); Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015) (discussing critically how human rights law has turned to criminal law as its main compliance strategy); Luis Eslava & Lina Buchely, *Security and Development?: A Story about Petty Crime, the Petty State and its Petty Law*, 67 REVISTA DE ESTUDIOS SOCIALES 40 (2019) (describing “neo-punitive” strategies in developing countries aimed at countering structural inequality through emotional interventions in the lives of vulnerable subjects); Alice M. Miller & Tara Zivkovic, *Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights*, in BEYOND VIRTUE AND VICE: RETHINKING CRIMINAL LAW AND HUMAN RIGHTS 39 (Alice M. Miller & Mindy Jane Roseman eds., 2019) (discussing the risks of expanding criminal law’s harm principle in the field of gender, sexuality, and reproduction); Mark Neocleous, *Resisting Resilience*, 178 RADICAL PHIL. 2 (2013) (discussing how resilience, far from fostering resistance or liberation, is a form of disciplining and controlling populations).

48. See Chuang, *supra* note 14; Kotiswaran, *supra* note 14.

Both Didier Fassin and some of the feminist critics of sexual humanitarianism have deployed their respective frameworks in ethnographic analyses of concrete cases. Their studies have shown how, in some cases, the concepts of humanitarian reason, compassion, trauma, victimization, and sexual exploitation can produce positive transformations in the lives of people who are treated as victims and objects of compassion. However, in other cases, the studies have found that these same concepts can produce contradictions and few or no emancipatory effects in the lives of those for whom the concepts are mobilized. In this Article, I do not undertake an ethnographic exercise of this nature. Rather, I examine an important question left open by Fassin. Fassin, you will recall, believes that although contemporary moral economies of compassion and victimization are not, in themselves, negative or pernicious, they may displace other discourses for justice that, in certain cases and contexts, might be more productive for challenging and dismantling structural injustices. While Fassin observes that compassion may create an unequal relationship between the compassionate and those who are objects of compassion in such a manner that the recipient of compassion's compelled humility can substitute for and displace a genuine demand for rights,<sup>49</sup> he also observes that, in other cases, certain social groups who organized around their victimhood status have achieved important recognitions of rights.<sup>50</sup> Fassin thus seems to suggest that one of the languages for justice that discourses of compassion and victimhood may either obscure or promote is the discourse of rights.<sup>51</sup> In the following Part, I attempt to show what

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49. FASSIN, HUMANITARIAN REASON, *supra* note 17, at 4.

50. FASSIN & RECHTMAN, *supra* note 20, at 10.

51. An analysis of this sort—to be more fully developed in future versions of the arguments elaborated in this Article—would seek to show the costs and benefits of framing a given political struggle for emancipation in terms of compassion and, more precisely, of translating compassion into specific constitutional rights. This “affective analysis” could complement the kind of “distributional analysis” practiced by influential critical scholars since the 1980s. *See generally* GOVERNANCE FEMINISM: NOTES FROM THE FIELD (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., 2019) (assessing the limitations of feminist engagement with the state and its bureaucratic apparatus); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) (arguing for the need to take a break from feminism in order to more fully conceptualize sexuality); JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: AN INTRODUCTION (2018) (explaining how feminism made inroads into the state apparatus); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004) (discussing the blind spots in structural advocacy generated by international humanitarian engagement); DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016) (discussing the role of experts in current global governance); Karen Engle, *Human Rights Consciousness and Critique*, in A TIME FOR CRITIQUE 91 (Didier Fassin & Bernard E. Harcourt eds., 2019) (discussing how critics of human rights deal with the fear of destroying progressive political projects through their critiques); Halley et al., *supra* note 2 (asserting that feminist achievements have formulated a “governance feminism”); Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1311 (1992) (analyzing the possibility of transcending the gender regime offered by “the eroticization of domination”). For useful and insightful examples of feminist distributional analysis in Latin America, see HELENA ALVIAR GARCÍA & ISABEL CRISTINA JARAMILLO SIERRA, FEMINISMO Y CRÍTICA JURÍDICA: EL ANÁLISIS DISTRIBUTIVO COMO ALTERNATIVA CRÍTICA AL LEGALISMO LIBERAL (2012); ISABEL CRISTINA JARAMILLO SIERRA &

occurs when humanitarian reason—embodied in the form of sexual humanitarianism—expresses itself in terms of constitutional principles and rights. I focus on the doctrine of the Constitutional Court of Colombia, which has established a complex relationship between human trafficking, prostitution, and sex work.

## II. THE SENTIMENTAL CONSTITUTION OF COLOMBIAN SEXUAL HUMANITARIANISM

To understand how sexual humanitarianism has shaped the relationship between prostitution, sex work, and human trafficking in Colombian constitutional law, I divide the Constitutional Court's doctrine into three periods.<sup>52</sup> In the first period, from 1995 to 1997, prostitution emerged for the first time as a social phenomenon of constitutional relevance. Although it was clear to the Court that prostitution could be clothed in the language of rights, the Court more closely approximated a vision of prostitution as a dangerous and immoral activity. Between 2009 and 2010, humanitarian reason and sexual humanitarianism made a critical entrance into Colombia's constitutional doctrine, complicating and transforming the Court's understanding of prostitution as the Court began to associate the phenomenon with both human trafficking and lawful sex work. In the third period, from 2015 to the present, the Court has reinforced a characterization of sex work as a fully legal form of labor while failing to depart entirely from the project of sexual humanitarianism. In this Part of the Article, I briefly describe the first period before embarking on a critical analysis of the Court's jurisprudence in the second and third periods.

### *A. Prostitution as an Immoral and Dangerous Activity*

Two decisions from 1995 and 1997 define the first period of Colombian constitutional doctrine regarding prostitution/sex work. This period is important because its approach to prostitution has only been partially reevaluated by the apparently progressive jurisprudence of later periods.<sup>53</sup> In this period, the Court ruled on two constitutional injunctions (*acciones de tutela*)<sup>54</sup> initiated by

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TATIANA ALFONSO SIERRA, MUJERES, CORTES Y MEDIOS: LA REFORMA JUDICIAL DEL ABORTO (2008); and ISABEL CRISTINA JARAMILLO SIERRA, DERECHO Y FAMILIA EN COLOMBIA: HISTORIAS DE RAZA, GÉNERO Y PROPIEDAD (1540-1980) (2013).

52. The Court itself established a similar periodization. See Corte Constitucional [C.C.] [Constitutional Court], febrero 6, 2017, Sentencia T-073/17, <https://www.corteconstitucional.gov.co/relatoria/2017/t-073-17.htm> [<https://perma.cc/WQ7D-NS8R>] [hereinafter CCC 2017].

53. See *infra* Section II.C and note 85.

54. The *acción de tutela* is a judicial injunction established by the Colombian Constitution specifically to protect fundamental rights. It lacks stringent formalities and can be initiated by any person before any judge. It is similar to the *amparo* of other Spanish-speaking Latin American countries and the Brazilian *mandado de segurança*.

plaintiffs who sought protection of their fundamental rights affected by streetwalking and the operation of, in their words, “brothels, white slavery, and sleazy bars.”<sup>55</sup> At the outset, the Court found “historical and sociological evidence [that] demonstrates that prostitution is a phenomenon that cannot be completely and totally eliminated,” and therefore that the state must “tolerate” prostitution “as a minor evil,” because it “will inevitably continue” despite efforts to combat it.<sup>56</sup> This purely pragmatic assertion was the starting point for an understanding of prostitution in terms of constitutional rights that took two primary forms.

The first form, focusing on those who engage in prostitution, began with an understanding of the activity as one that is inherently undesirable, “because trading in one’s own being is contrary to *human dignity*.”<sup>57</sup> Some statements highlighted the inherent immorality of prostitution. The Court found that “living a life of virtue . . . requires a minimum level of well-being, which cannot exist where the world of vice reigns supreme” (referring to red-light districts), and that prostitution is a “bad example,” a “wretched occupation,” and an “essentially and evidently immoral activity.”<sup>58</sup> Nevertheless, and together with the characterization of prostitution as an activity that offends human dignity, the Court also observed in the same decision that “legally speaking, the *right to the free development of personality* allows people to adopt prostitution as a way of life,”<sup>59</sup> and in the second decision from the period, that “[t]his Court does not intend to ignore the *right to the free development of personality* enjoyed by the prostitutes and transvestites in this case.”<sup>60</sup>

The simultaneous description of prostitution in terms of both human dignity and personal autonomy (or the fundamental right to the “free development of personality”) suggests that, in this first period, the Court believed people could freely choose to engage in immoral occupations that impaired their own dignity. This idea of human autonomy is fully consistent with the second constitutional understanding of prostitution from this period, which focused on the rights of others affected by prostitution. The Court, in a move compatible with its doctrine on the fundamental right to the free development of personality, noted that people have the freedom to engage in prostitution as long as it does not affect the rights of third parties. These were exemplified in the first case as “the rights of children,” “family intimacy,” and “the rights of others to peacefully live in their place of residence.”<sup>61</sup> In the second case, the examples included the right to

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55. C.C., diciembre 14, 1995, Sentencia T-620/95, <https://www.corteconstitucional.gov.co/relatoria/1995/T-620-95.htm> [<https://perma.cc/F4RH-T68Q>] [hereinafter CCC 1995].

56. *Id.*

57. *Id.* (emphasis added).

58. *Id.*

59. *Id.* (emphasis added).

60. C.C., septiembre 25, 1997, Sentencia SU-476/97, <https://www.corteconstitucional.gov.co/relatoria/1997/SU476-97.htm> [<https://perma.cc/2DGH-ZJBN>] [hereinafter CCC 1997].

61. CCC 1995.

“life,” “physical and moral integrity,” “tranquility and security,” and “living in dignified and just conditions.”<sup>62</sup> The list of rights cited by the Court reinforced the idea that, in spite of being an activity that one can choose with full autonomy, prostitution’s inherent immorality nevertheless tends to corrupt the virtue of especially vulnerable social groups, such as children and the elderly, while presenting, in general terms, a threat to public order. The Court stated that “it would be unfair to expose children to a sexually promiscuous environment,” that “public authorities have a paramount interest in protecting the virtue of childhood,”<sup>63</sup> and that it is intolerable “that children be helpless witnesses to the performance of acts [of streetwalking] harmful to their innocence and modesty.”<sup>64</sup>

The characterization of prostitution as a freely chosen immoral activity that corrupts virtue and threatens public order had two main implications for public policy: increasing police presence in prostitution zones and refusing to recognize prostitution as sex work. First, the claim that “prostitution is a minor evil, that is to say, something that should be tolerated, but that is recognized as harmful”<sup>65</sup> implied the need for establishing greater police presence in zones of prostitution. Although the Court noted that prostitution is legal, it nevertheless cautioned that prostitution inherently keeps “public order in a state of disturbance” and is tied to “constant outbreaks of insecurity and the frequent commission of crimes against life, personal integrity, property and moral integrity of residents and passersby.” The Court also suggested that those who engage in it “evidently sexually harass and attack unsuspecting citizens . . . making them victims of robbery, assault, threats, and serious attacks on modesty,” and that it cannot “be ignored that this is an activity around which crimes are often committed and venereal diseases spread.”<sup>66</sup>

Second, given its characterization of prostitution, the Court was far from willing to take any steps to recognize prostitution as a form of legally protected labor. In its view, “if the goal is to prevent, by any means available, that women prostitute themselves,” one must necessarily conclude that “*it would be incorrect to treat prostitution as honest work, worthy of legal and constitutional protection, since it is, by essence, an evidently immoral activity.* Honest work is an ethical activity because it perfects the worker, provides personal fulfillment, and produces a material good.”<sup>67</sup>

To understand the changes to the Court’s position on prostitution with the emergence of sexual humanitarianism from 2009 onwards, it is important to have in mind three features of this first take on prostitution by the Colombian

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62. CCC 1997.

63. CCC 1995.

64. CCC 1997.

65. CCC 1995.

66. CCC 1997.

67. CCC 1995 (emphasis added).



Constitutional Court. First, the Court initiated a doctrine that framed prostitution—and, later, sex work—in terms of human dignity and personal autonomy (or the fundamental right to the free development of personality). While prostitution was seen, on the one hand, as an assault on dignity because the sale of one’s body is contrary to this value, on the other hand, personal autonomy was thought to allow the free choice of immoral occupations that offend human dignity as long as such choices do not affect the rights of third parties. Note that, here, the autonomy of the actor who decides to engage in prostitution was not seen as limited, curtailed or obscured by any sort of external relation or structure that systematically deprives prostitutes of their agency. For the Court, the choice to prostitute oneself was treated as any other free choice only limited by its effects on the rights of others. Most importantly, the prostitute was not a victim who inspired compassion. Quite the contrary, prostitution victimized those who had to bear the consequences of an immoral activity that tends to erode public order. These victims were those who are particularly vulnerable and impressionable: children, the elderly, and “unsuspecting” passersby and neighbors who were forced to witness public exhibitions of sex. The second feature of this first period’s doctrine was the complete absence of any the language of equality in the description of prostitution. The Court made no indication that prostitutes are a vulnerable or marginalized social group requiring special protection from the state. Finally, from a public policy perspective, the Court believed that the state should respond to prostitution, first, through police activity aimed at counteracting its harmful effects on the rights of third parties and, second, by denying any sort of labor law protection to those who engaged in its practice. The concept of sex work endowed with full legal protection was thus completely absent from the constitutional doctrine of this period.

### *B. Prostitution as Human Trafficking*

After the first period, prostitution disappeared from Colombian constitutional doctrine for twelve years.<sup>68</sup> The second period, starting in 2009,

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68. In a 1999 case dealing with the constitutional validity of a provision of the military forces’ internal disciplinary regime, which established that it was an offense against military honor to associate oneself or to maintain relations with “antisocial individuals like drug addicts, homosexuals, prostitutes, and pimps,” the Court held it unconstitutional to refer to “homosexuals” and “prostitutes” as “antisocial in themselves.” In the Court’s view, “prostitution and homosexuality are indeed valid sexual options in our Social Rule of Law (*Estado social de derecho*). Those who have chosen this way of life without affecting the rights of others cannot therefore be subjected to any form of discrimination.” The Court then added that “to the contrary, according to the Constitution, their [i.e., ‘homosexuals’ and ‘prostitutes’] status as free and autonomous individuals must be fully guaranteed and recognized by the legal system as equal with respect to all members of the community.” C.C., julio 14, 1999, Sentencia C-507/99, <https://www.corteconstitucional.gov.co/relatoria/1999/c-507-99.htm> [<https://perma.cc/KK6B-4YRB>]. Until the emergence of the notion of

and following, the ratification of the Palermo Protocol in 2004, marked the appearance and consolidation of sexual humanitarianism in Colombian constitutional law. In the ideological and rhetorical transition from the first to the second period, those who engaged in prostitution were no longer identified as dangerous social undesirables—who could, nevertheless, freely choose this occupation—but rather as sex workers and, at the same time, victims of sexual exploitation. In this Section, I argue that this paradoxical status was the result of the simultaneous operation of the pro-criminalization approach underlying sexual humanitarianism and the countervailing calls for sex work to be treated as fully lawful and regulated labor. These two projects, however, did not deploy their rhetorical and political forces with equal success. In my view, the constitutional doctrine of this period prioritized the political-affective space of sexual humanitarianism as a framework within which calls for the regulation of sex work as a form of lawful labor were subsumed. Sex work as lawful labor thus makes its appearance in Colombian constitutional jurisprudence only in the shadow of sexual humanitarianism. Under such a sentimentalized constitution—one aimed at saving those who engage in prostitution because they are seen as victims of sexual exploitation—it has become difficult to lay the foundations for sensible public policies that promote sex work as a form of lawful labor.

The paradoxical view of those engaging in prostitution as both sex workers and victims of sexual exploitation seems to emerge from the fact that sexual humanitarianism and the moral economy of compassion and victimization emerged in Colombia in the context of the criminalization of pimping. In a 2009 decision that set the ideological, rhetorical, political, and affective tone of this period, the Constitutional Court upheld a provision of Colombia's Criminal Code that had established the crime of "inducement into prostitution" (*inducción a la prostitución*).<sup>69</sup> In its original 2000 drafting, this criminal provision punished any person who induced another into prostitution "for profit or to satisfy the desires of another" with a prison sentence of two to four years.<sup>70</sup> Note that the inducing agent need not proceed through the use of force, violence, or any other form of coercion. The plaintiff argued that precisely because this crime did not entail the use of force or violence, the provision was in violation of the

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sex work in Colombian constitutional doctrine, this decision was considered the most progressive and least prejudiced analysis of prostitution by the Court.

69. For an alternative critical take on this decision based on a "preservation-through-transformation" analytical framework, see Esteban Restrepo-Saldarriaga, *Poisoned Gifts: Old Moralities under New Clothes?*, in *BEYOND VIRTUE AND VICE: RETHINKING CRIMINAL LAW AND HUMAN RIGHTS* 199-219 (Alice M. Miller & Mindy Jane Roseman eds., 2019).
70. Article 213 of the 2000 Colombian Criminal Code was amended by Law 1236 of 2008. *See supra* note 13. In its current version, it states: "Article 213. Inducement into Prostitution. Whoever induces another person into carnal commerce or prostitution for profit or to satisfy the desires of a third party, will be subjected to a prison sentence of ten to twenty-two years and a fine of sixty-six to seven hundred and fifty minimum monthly wages." L. 1236/2008, julio 23, 2008, DIARIO OFICIAL [D.O.].

constitutional principle of personal autonomy (or the fundamental right to the free development of personality). If the alleged victim responded to the induction by freely deciding to engage in prostitution, the inducing agent could not possibly have infringed upon any protected constitutional value. Based on an argument that invoked human dignity and limited the reach of personal autonomy, the Court dismissed the plaintiff's claims and upheld the statute.<sup>71</sup>

Undertaking a proportionality test, the Constitutional Court held that the crime of inducement into prostitution pursued a constitutionally legitimate end since it aimed to protect the dignity of those who engage in prostitution. The Court noted that "any action encouraging another to engage in prostitution is equivalent to encouraging this person to defile her own dignity" and added that "in principle, it is therefore legitimate for the State to criminally punish the person who promotes prostitution by making a business of it."<sup>72</sup> The premise that engaging in prostitution impairs human dignity was the same as it was in the first period of the Court's sex work jurisprudence; that is, "prostitution is not desirable, because trading in one's own being is contrary to human dignity."<sup>73</sup> The Court nevertheless attempted to remove from this justification any negative moral judgment condemning prostitution itself (recall that, in 1995, the Court labeled prostitution an "essentially and evidently immoral activity" and a "wretched occupation"). The Court observed that while in the past the crime of inducement into prostitution protected "collective sexual morality or people's sexual honesty," today it "is often considered to protect the value of human dignity."<sup>74</sup> Individual human dignity thus became the engine of the state's obligation to eliminate prostitution. And while, in the first period, the elimination of prostitution depended on police forces controlling corollary activities of public disorder arising out of the immorality of prostitution, in the second period the Court reached directly into criminal law as an instrument to prevent people's sale of their bodies.

There are multiple and contested meanings of human dignity in the context of sexuality,<sup>75</sup> and those meanings can be mobilized to validate both reproductive and non-reproductive sex. Thus, one may question whether the Constitutional Court can disestablish the link between the principle of human dignity and a specific moralistic vision of sexuality it had established in 1995 by merely asserting that a criminal statute prohibiting inducement into prostitution guarantees human dignity. That is, because of the multiplicity of meanings of

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71. C.C., septiembre 16, 2009, Sentencia C-636/09, <https://www.corteconstitucional.gov.co/RELATORIA/2009/C-636-09.htm> [<https://perma.cc/46FG-8QNF>] [hereinafter CCC 2009].

72. *Id.*

73. CCC 1995.

74. CCC 2009.

75. See, e.g., Restrepo-Saldarriaga, *supra* note 69; Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355 (2012).

“human dignity,” the concept cannot independently support both the idea that prostitutes betray their dignity by trading their bodies and the idea that criminalizing inducement preserves the prostitutes’ dignity. The question, however, seems to be answered by the Court’s discussion of the relationship between personal autonomy and prostitution and, particularly, by the arguments the Court offered for invalidating the consent of those who decide to engage in prostitution after being induced into the activity. Here, the premises of sexual humanitarianism that establish an intimate association between (and at times conflate) prostitution and human trafficking provided the argumentative weight of the opinion. The Court affirmed that the “the impugned criminal provision is a legal device created by Congress to combat prostitution and *human trafficking*,” and that, “[b]eyond the moral dilemma stemming from the commercial exploitation of genitality and sexuality, *prostitution is associated with the crime of human trafficking*.”<sup>76</sup> Although the criminalization of inducing another into prostitution is not strictly a measure of one-sided criminalization as it does not punish those who pay for sex, the reasons offered by the Court to validate the crime, based on the Court’s strong association of prostitution with human trafficking (which completely cancels the agency of the person who is induced into the act), were strikingly similar to the arguments historically advanced by those who advocate for one-sided criminalization.

The association of human trafficking and prostitution has been key to constructing sexual humanitarianism’s “perfect victim”—one who fits the image of “[t]he third world sex worker enslaved in a big-city brothel,”<sup>77</sup> or the languishing Fantine of Victor Hugo’s *Les misérables*. In associating trafficking with prostitution, the Court relied on the international law of human trafficking as well as documents from different United Nations bodies to prove the inevitable ties that exist in fact between transnational organized crime, human trafficking, and prostitution. According to the Court, these ties necessarily imply that prostitution always takes place in conditions of exploitation that border on slavery. The Court drew its most decisive normative argument in support of this chain of relationships from article 3 of the Palermo Protocol. In its view, this provision “establishes that human trafficking is a crime intimately related to prostitution” and, given this close relationship, the Court concluded that “the crime of inducement into prostitution can be committed even if the victim expressly consented.”<sup>78</sup> Interpreting international law on human trafficking thus allowed the Court to create a factual situation that, in turn, operated as the central argument for rejecting the notion that people may freely decide to engage in

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76. CCC 2009 (emphasis added).

77. Kotiswaran, *supra* note 14, at 354.

78. CCC 2009.

prostitution, going so far as to highlight the “fallac[y]” of “the real willingness of the decision to become a prostitute.”<sup>79</sup>

The “fallacy of agency” that, according to the Court, affects people consenting to engage in prostitution is not only construed through the normative conflation of human trafficking, transnational organized crime, and prostitution, but also through a peculiar description of the contexts in which prostitution often takes place. Based again on international reports and documents that characterized prostitution as a modern form of slavery, the Constitutional Court observed that prostitution tends to occur exclusively in contexts of socioeconomic destitution. The Court noted, for example, that “the reports previously cited . . . notably show that, in many cases, *the initial consent of the victim becomes her entryway into networks of slavery and human trafficking*, in true ‘cycles of violence’ from which it is impossible to escape,” and that “an initial consent, *vitiating by necessity or ignorance*, is highly susceptible to becoming a coercive restraint,” concluding that the criminalization of inducing someone into prostitution “is even more relevant in *countries like Colombia*, whose *social problems* are fertile ground for *needy people* to resort to prostitution as a means of survival.”<sup>80</sup> Here, one might ask whether the reference to consent “vitiating by necessity or ignorance,” and “countries like Colombia” with their “social problems” and “needy people,” function as colonial metonyms to designate a conception of the Third World as a space whose conditions of inevitable poverty and “cultural backwardness” imply that those who engage in prostitution—as a result of their dire poverty—can only do so as sex slaves. By combining a particular interpretation of the international law of human trafficking with its “empirical” verifications, the Court produced a victim of inducement to prostitution who, by her intrinsic vulnerability, lacked all autonomy to freely decide whether to engage in prostitution.

In constructing the “perfect victim” of prostitution, the Constitutional Court inscribed the basic premises of sexual humanitarianism at the center of the constitutional principles of human dignity and personal autonomy. The moral economy of compassion lying at the heart of humanitarian reason operated as the engine of the Court’s institutional mobilization to eradicate prostitution in the name of human dignity. Recall that, according to well-established constitutional doctrine, state authorities have a duty to eliminate prostitution “because trading in one’s own being is contrary to human dignity.”<sup>81</sup> The Court drew the indignity of prostitution from the act’s inherent immorality in its first period. But in the second period, “trading in one’s own being” was not problematic for moral reasons, but because the people who participate in this trade lack the freedom to oppose their sexual exploitation (or even their “slavery”) due to their intrinsic

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79. *Id.*

80. *Id.* (emphasis added).

81. CCC 2009; CCC 1995.

vulnerability. Under the premises of sexual humanitarianism, the offense to dignity was the exploitation that had become associated with prostitution. Human dignity became not only the constitutional space for whole institutional structures to “feel” compassion for the victims of sexual exploitation, but also the main catalyst for state action aimed at saving them. Note, however, that the salvation mission aimed neither to improving the socioeconomic destitution of those who engage in prostitution, nor to transform the unjust social and institutional structures that produce poverty and destitution and, as such, are the origin of the social vulnerabilities driving the moral economy of compassion.

Instead, the Court found criminal law to be the institutional vehicle to serve the idea of the state as savior of victims of sexual exploitation. When the Court invalidated the agency of those induced into prostitution by conflating prostitution with sexual exploitation and slavery (such that inducing another into prostitution is criminal even where the victim “freely” yields to the inducement), it seemed to legitimize a modality of paternalistic criminal law seeking to prevent a person with no agency (due to her condition of extreme socioeconomic vulnerability) from inflicting harm upon her own dignity through an act that mimics a true decision.<sup>82</sup> Compassion for victims of prostitution, nested in the constitutional principle of human dignity, saw the criminal law apparatus as their salvation.

Drawing on the insights of Didier Fassin and feminist critics of sexual humanitarianism, one may wonder whether this particular institutional mobilization of compassion, despite its presumption that those who choose prostitution as a way of life are always victims of sexual exploitation (or slavery), could nevertheless offer a space for social resistance or foster emancipatory and positive transformations in the socioeconomic status of people who engage in prostitution.<sup>83</sup> It does not seem, however, that criminal prosecution of an

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82. I am well aware of the theoretical complexities of paternalism as a justification for criminal punishment. *See, e.g.*, JOEL FEINBERG, HARM TO SELF (1986); Douglas Husak, *Penal Paternalism*, in PATERNALISM: THEORY AND PRACTICE 39 (Christian Coons & Michael Weber eds., 2013). My argument here, however, is not meant to establish whether the crime of inducement into prostitution is a legitimate form of criminal paternalism; rather, it is directed at understanding how the Colombian criminal law of procurement and pimping has been transformed by the premises of sexual humanitarianism.

83. My argument fully recognizes the fact that people who choose prostitution/sex work as an occupation often make their decision in conditions of limited autonomy. The socioeconomic contexts in which these decisions are made are indeed often plagued by poverty and limited employment opportunities, among other structural factors. If these conditions were different, people who engage in prostitution/sex work would perhaps choose another form of survival. *Cf.* Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 748 (2002) (making an argument that supports the prohibition of prostitution in the name of sexual autonomy that takes into account both liberal and radical feminist arguments). Nevertheless, that these decisions take place within conditions of limited autonomy does not mean that prostitution/sex work is always performed in conditions of exploitation/slavery. The literature on how agency and autonomy are transformed under conditions of structural inequality is extensive. For general elaborations of this problem from diverse disciplinary perspectives see, for example, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004);

individual pimp provides a space for the person who was induced into prostitution to politicize her social vulnerability in a way that would transform her structural conditions of socioeconomic precariousness. The inherent dynamics of criminal law and procedure, aimed at establishing the individual criminal liability of a specific person charged with having induced another into prostitution, where the victim is not at the center of the proceedings, do not seem to offer a space powerful enough to contest—let alone dismantle—unjust social structures that lead people to choose prostitution as an occupation. Likewise, criminally punishing a single pimp is far from obtaining decisive redistributive effects within these social structures.<sup>84</sup> In sum, the brand of sexual humanitarianism that seeks to save victims of exploitation by criminally punishing pimps charged with inducing people into prostitution does not seem to be an emancipatory use of the moral economy of compassion or the concept of victimhood.

This observation could perhaps be countered by a more charitable reading of the Court's opinion. Indeed, one could argue that in its constitutional validation of the crime of inducement into prostitution, the Court was only

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LAUREN BERLANT, *CRUEL OPTIMISM* (2011); ANGELA CAMPBELL, *SISTER WIVES, SURROGATES AND SEX WORKERS: OUTLAWS BY CHOICE?* (2016); ELIZABETH A. POVINELLI, *ECONOMIES OF ABANDONMENT: SOCIAL BELONGING AND ENDURANCE IN LATE LIBERALISM* (2011); ELIZABETH A. POVINELLI, *THE EMPIRE OF LOVE: TOWARD A THEORY OF INTIMACY, GENEALOGY, AND CARNALITY* (2006); and *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* (Catriona MacKenzie & Natalie Stoljar eds., 2000). Many empirical studies on prostitution/sex work around the world tend to indicate the diversity and complexity among these activities, the motivations of those who engage in prostitution/sex work, the relations between prostitutes/sex workers and procurers and pimps, and the procurers and pimps themselves. Scholars devoted to the empirical study of prostitution and other forms of sex work tend to warn against generalizations concerning the conditions in which, in our times, people engage in prostitution/sex work. See, e.g., Elizabeth Bernstein, *The Meaning of the Purchase: Desire, Demand, and the Commerce of Sex*, 2 *ETHNOGRAPHY* 375 (2001); Susan Dewey, *The Feminized Labor of Sex Work: Two Decades of Feminist Historical and Ethnographic Research*, 9 *LABOR* 113 (2012); Mathew A. Foust, *Sex and Selfhood: What Feminist Philosophy Can Learn from Recent Ethnography in Ho Chi Minh City*, 14 *J. INT'L WOMEN'S STUD.* 31 (2013); Prabha Kotiswaran, *Born Unto Brothels: Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 *LAW & SOC. INQUIRY* 579 (2008); Ronald Weitzer, *The Growing Moral Panic over Prostitution and Sex Trafficking*, 30 *CRIMINOLOGIST* 2 (2005); Ronald Weitzer, *Human Trafficking and Contemporary Slavery*, 41 *ANN. REV. SOC.* 223 (2015); Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 *SEXUALITY RES. & SOC. POL'Y* 15 (2010); Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 *J. CRIM. L. & CRIMINOLOGY* 1337 (2012); Ronald Weitzer, *Sociology of Sex Work*, 35 *ANN. REV. SOC.* 213 (2009).

84. These are quite intuitive, tentative, and general ideas about the limited potential of criminal law and prosecution to debunk and transform structural inequality. See generally ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 47 (asserting that the turn to criminal punishment in human rights law constricted responses to human rights violations as well as conceptions of justice and peace); Engle, *supra* note 47 (discussing critically how human rights law has turned to criminal law as its main compliance strategy); Miller & Zivkovic, *supra* note 47 (discussing the risks of expanding criminal law's harm principle in the field of gender, sexuality, and reproduction). A more elaborate and contextual analysis, based on a combination of "distributional" and "affective" analysis, see *supra* note 51, may reveal benefits of criminal prosecution for the politicization of vulnerability in specific cases.

referring to one of many institutional avenues available for public authorities to eradicate prostitution. A possibility would therefore be left open for the implementation of other non-criminal public policies explicitly aimed at the transformation of the unjust socioeconomic structures that lead people to choose prostitution as a form of survival.

### *C. Prostitution as Sex Work*

This latter possibility becomes relevant when considering the legal and political trajectory of the Constitutional Court's doctrine since 2010, as it has begun to frame prostitution as sex work.<sup>85</sup> The Court inaugurated this constitutional doctrine in a 2010 case brought by a sex worker who was fired by the owner of the bar where she worked after she became pregnant. She alleged that, even if a formal labor contract was never signed between her and the owner of the bar, the conditions under which she had conducted her sex work were those of a labor contract, which entitled her to all the rights and benefits stemming from a fully legal employment relationship. As a remedy for the unlawful termination of her labor contract, she requested that the defendant reinstate her and pay her lost wages, social security benefits, and maternity leave.<sup>86</sup>

For the first time in its jurisprudence, the Constitutional Court held that the recognition of prostitution as a form of sex work is an obligation imposed on public authorities by the substantive equality clause of the Colombian Constitution. According to the Court, the social prejudices that have historically viewed prostitution as an immoral and shameful activity have contributed to the discrimination and social marginalization of those who engage in it. Recognizing prostitution as sex work subject to the regulations of labor law is thus a measure to confront and transform the unjust socioeconomic structures that have cast those who engage in prostitution as second-class citizens. This characterization of sex work from the perspective of the constitutional principle of substantive equality did not entail, however, a simultaneous reconsideration of the Court's doctrine on the duty of public authorities to eradicate (what is now called) sex work as an activity that offends human dignity, nor the prominent role of criminal law in fulfilling that duty. The Court itself acknowledged this tension.

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85. The Constitutional Court has restated this doctrine in three decisions. In these opinions, in addition to securing a legal framework of prostitution as fully legal sex work, the Court has elaborated on the idea that those who choose this type of work are vulnerable social groups in need of special treatment by public authorities (particularly the implementation of public policies concerning sex work by local authorities). CCC 2017; C.C., octubre 31, 2016, Sentencia T-594/16, <https://www.corteconstitucional.gov.co/relatoria/2016/T-594-16.htm> [<https://perma.cc/QFH6-THV8>]; C.C., noviembre 30, 2015, Sentencia T-736/15, <https://www.corteconstitucional.gov.co/relatoria/2015/t-736-15.htm> [<https://perma.cc/RW3A-5DDS>].

86. C.C., agosto 13, 2010, Sentencia T-629/10, <https://www.corteconstitucional.gov.co/relatoria/2010/t-629-10.htm> [<https://perma.cc/7LM5-SUGG>].



In its view, the current doctrine articulates “a regime . . . aimed at pursuing dignity and liberty and the elimination of any form of exploitation of people and women” which has created a “permanent tension between the desire to eliminate [sex work] through criminal prohibition and punishment and the desire to recognize the rights of the people who engage in [sex work] and confer express legalization for this activity.”<sup>87</sup> The way in which the Court attempts to operate within this “tension” suggests that, given the force of its precedent on the crime of inducement into prostitution, the tension becomes almost irresolvable.

In this decision, the Court not only reaffirmed its doctrine on the crime of inducement into prostitution but also reinforced the close link between human trafficking and sex work. It held that “[n]o form of sex work may [be permitted to] threaten the liberty and human dignity of any of the participants in the relationship” and added that “[t]his definitive condition on the exercise of . . . private autonomy takes on greater significance . . . in light of [international] reports showing how sex work has become increasingly connected to human trafficking, sex tourism, and forced prostitution.”<sup>88</sup> However, the Court opened up new avenues distinct from its previous doctrine by recognizing that there is a space for the performance of prostitution as lawful sex work, wherever it is possible to ascertain all parties’ “complete and persistent free and informed will, particularly that of the person selling sex.”<sup>89</sup> The coexistence of the close connection between prostitution and human trafficking (supporting the use of criminal law to eradicate prostitution) and the idea that there is space for the legitimate performance of sex work regulated by labor law wherever sex workers have consented in “complete and persistent” fashion with a “free and informed will,” is especially significant in this case. It is here where the tension noted by the Court becomes an intractable (if not irresolvable) problem. Indeed, reading the Constitutional Court’s jurisprudence in light of the fact pattern of the case, it seems possible to argue that employing someone in a bar to provide sexual services in exchange for a previously agreed-upon salary and under conditions of labor subordination is a form of inducing another into prostitution.

In its decision, the Court claimed that a person who employs another as a sex worker in a bar does not commit the crime of inducement into prostitution, though it provided little coherent reasoning to justify this claim. On the one hand, the Court held that the crime of inducement into prostitution prohibits a business owner from “any act that induces another into prostitution in order to generate profit or to satisfy the desires of another, even if done without coercion.” On the other hand, the Court asserted that the prohibition against “promoting sex work in order to stimulate one’s business” is only “an additional restriction for those carrying out the business” that does not prevent the entrepreneurs from pursuing

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87. *Id.*

88. *Id.*

89. *Id.*

their business by means different from the promotion of sex work.<sup>90</sup> In view of these rather obscure statements, it remains to be seen whether it is in fact possible to develop the (lawful) business of lending sexual services without “promoting the performance of sex work.”

The haphazard nature of this standard is even more evident in light of the decision’s central holding. According to the Court, framing sex work as a manifestation of constitutional principles of human dignity, liberty, and substantive equality leads to the “inexorable conclusion” that a labor contract (guaranteeing all labor law rights and benefits) exists between the owners of commercial establishments that sell sexual services and the sex workers who provide these services. While the criminal law of pimping—premised on sexual humanitarianism—prohibits the owners of businesses who legally sell sexual services from developing their commercial activity through the promotion of sex work, the labor law regime of sex work—based on substantive equality—seems to legitimize the promotion of sex work by recognizing the existence of a labor contract between those same entrepreneurs/employers and their sex workers. The implementation of a truly egalitarian project to transform unjust structures of socioeconomic distribution through a broad recognition of sex work will only succeed through the full retreat of criminal law—animated as it is by sexual humanitarianism—from free (non-violent and non-coerced) transactions for sexual services. By failing to renounce sexual humanitarianism’s central premises, the Court’s egalitarian project of recognizing sex work lost some (or even all) of its transformative power.

Another important holding of this decision reinforces this conclusion. After recognizing the existence of a labor contract between the plaintiff and the defendant, the Court held that the owner of the bar had illegally terminated the contract in violation of the special constitutional protection afforded to pregnant employees. As a remedy, the Court ordered the payment of lost wages, social security benefits, and maternity leave. However, the Court expressly declined to order the reinstatement of the plaintiff to her former job as a sex worker. In its view, the state’s obligation to eradicate sex work in the name of human dignity precludes judges from recognizing the right of sex workers to be reinstated in their jobs in cases of illegal termination of labor contracts. For the Court, “because of the particular nature of sex work, *which, in many aspects, degrades dignity*, just as the power of the employer over the employee is limited, the right of the worker to employment stability and to be reinstated to her position in cases of unjust dismissal is also limited.”<sup>91</sup>

Here, the saving hand of sentimentalized dignity prevents the reinstatement of a sex worker who was illegally dismissed from her job. In effect, this denial of the right to be reinstated “saves” those who perform an activity that, in spite

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90. *Id.*

91. *Id.* (emphasis added).

of its legality, allegedly degrades their dignity. Although it recognizes the legitimacy of sex work, the Court's doctrine does not seem capable of ridding itself of the basic premise of sexual humanitarianism: that selling sex always borders on sexual exploitation. If the Court itself has acknowledged that people may choose to be sex workers in a "free and reasoned" way, there is no reason not to allow a person to decide, in a "free and reasoned" way, to continue engaging in sex work after being illegally fired. Only the logic of sexual humanitarianism explains, again, why the transformative potential of the recognition of sex work as a legal form of labor is constrained by the failure of the Court to recognize the right of sex workers to be reinstated.

#### CONCLUSION

The emergence of sexual humanitarianism in Colombia through the domestic incorporation of the Palermo Protocol has sentimentalized Colombian constitutional law, allowing the moral economy of compassion to permeate principles of human dignity and personal autonomy. Colombia's constitutional experience therefore seems to indicate that when this moral economy operates in the discourse of rights, it has only limited potential to transform unjust structures of distribution. Although substantive equality seems to offer an important platform for the recognition of sex work as a legal form of labor, sexual humanitarianism rooted in human dignity and personal autonomy tends to limit the transformative and emancipatory possibilities of this project. Although the movement for criminal regulation of prostitution in Colombia has not been entirely successful, the dynamics of Colombian constitutional doctrine on human trafficking, prostitution, and sex work seem to offer fertile ground for prohibitionism to thrive. This would be to the detriment of the more empowering project of structural transformation entailed by recognizing prostitution as a legitimate and lawful form of sex work.

