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Preoccupations with Modernity: Geopolitics of Knowledge in Colombian Reproduction Laws, 1936-2006

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Preoccupations with Modernity: Geopolitics of Knowledge in Colombian Reproduction Laws,  
1936-2006

by

Alisa Catalina Sánchez

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Rhetoric

and the Designated Emphasis

in

Women, Gender, and Sexuality

in the

Graduate Division

of the

University of California, Berkeley

Committee in Charge:

Professor Marianne Constable, chair

Professor Paola Bacchetta

Professor Kent Eaton

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Summer 2016



Abstract

Preoccupations with Modernity: Geopolitics of Knowledge in Colombian Reproduction Laws,  
1936-2006

by

Alisa Catalina Sánchez

Doctor of Philosophy in Rhetoric

Designated Emphasis in Women, Gender, and Sexuality

University of California, Berkeley

Professor Marianne Constable, Chair

The dissertation examines how Colombian professionals have developed reproductive laws and policies during the past century in the name of being modern. I focus on four moments of reproductive lawmaking from 1936-2006, analyzing legal and sociolegal texts that record or inform the lawmaking process. These four moments of reproductive lawmaking are the 1936 Colombian Criminal Code, which increased penalties for men's sexual crimes as well as abortion; two 1960s policies that promoted family planning; the 1991 Constitutional Assembly and the debate whether to include a comprehensive reproductive right, *libre opción a la maternidad* (free motherhood) in the new constitution; and the 2006 Colombian Constitutional Court decision C-355, which decriminalized abortion in three instances.

Studying each moment reveals Colombian professionals – lawyers, politicians, highly educated feminists, doctors, and others – participating in knowledge discourses which construct a particular approach to reproduction as the necessary course of action if Colombia would be modern. In 1936, Colombian lawyer-politicians employed legal positivist science to scrutinize sexual crimes and develop a rule of law in keeping with other liberal, modern states. During the 1960s, a community of Colombian doctors and politicians developed family planning policies in an attempt to curb rapid population growth. Grounded in the ideas of transnational population studies, the Colombian professionals feared “overpopulation” would undermine Colombia's ability to prosper socially and economically, leaving Colombia “behind” modern nations. The 1991 Colombian Constitutional Assembly shows a commitment to inclusive democratic politics and women's equality to counter representations of the country as violent and the state as incapable of governance. Finally, the 2006 Constitutional Court decision decriminalizing abortion portrays Colombia as an equal partner with other states in promoting women's rights through international human rights.

The dissertation shows how Colombian professionals' understandings of current challenges facing the state interact with knowledges based in other countries or developed in transnational circles; and that the discursive construction of these knowledges as the “modern” approach

towards law and women's reproduction generates both pressure and enthusiasm among professionals to enact these knowledges in reproductive lawmaking. Based in transnational feminisms, I use the term "geopolitics of knowledge" to refer to how social, economic, and political forces shape the circulation of knowledge discourses and effects across transnational space; as well as to how relations of power at a transnational scale affect how knowledges circulate and how, when, and who participates in a given knowledge, or "takes it up." The dissertation shows that conceptions of modernity change over time, with implications for legal approaches towards reproduction and women's reproductive lives.

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## Table of Contents

Introduction.....	1
Chapter 1.....	13
Chapter 2.....	45
Chapter 3.....	77
Chapter 4.....	107
Conclusion.....	127

## Introduction

In a 2006 decision, the Colombian Constitutional Court legalized abortion in cases of rape or incest, a grave threat to the woman's health, or when the fetus would be unviable at birth. The decision is remarkable for decriminalizing abortion in Colombia, and also for the decisive role that human rights plays in the Court's reasoning. After thorough study of human rights treaties and other human rights legal resources, the Court distinguishes between the pregnant woman's right to dignified life and the fetus' absolute right to life. The Court ultimately determines that the Colombian Constitution's commitment to human dignity entails legalizing abortion in some limited circumstances. While abortion is unfortunate, the Court concludes, the increasing realization of women's human rights in Colombia will empower women and improve society overall.

The 2006 Colombian decision is part of the greater phenomenon of human rights' diffusion worldwide in recent decades. In addition to Colombia, four other Latin American countries have decriminalized abortion via high court decisions by drawing on human rights treaties: Argentina (2012), Bolivia (2014 case upholding limited legalization established in 1972 and eliminating the requirement of judge's approval), Brazil (2012), Mexico, D.F. (2008).

At the same time, however, the region has conversely seen retrenchment in anti-abortion laws, with total prohibition in six countries: Chile (1989), the Dominican Republic (2015 Supreme Court case affirming 1884 Criminal Code abortion ban), El Salvador (1998), Haiti, Honduras, and Nicaragua (2006). These countries actively prosecute women believed to have sought abortions. Beyond these six Latin American countries, only in Malta and Vatican City is abortion completely illegal. Even in countries with legal abortion, as in the case of Colombia, the procedure is only legal under extremely limited conditions such as rape or endangerment of the pregnant woman's life, however, and there are acute issues of access and stigma. Regarding access, for example, countries with limited legal abortion require varying degrees of proof that vary from the written consent of the woman and her husband or legal guardian in Venezuela, where abortion is only legal in cases of threat to the woman's life; to the approval of two doctors, in Colombia. Only in Cuba (1965), Mexico, D.F. (the federal district of Mexico) (2007), and Uruguay (2012) is abortion legal unconditionally, for the first 12 weeks of pregnancy.

Other reproductive rights are similarly embattled; if we go beyond abortion to consider the range of women's reproductive experience, we also find polarized debates and a diversity of permissive and restrictive laws on contraception, emergency contraception, pregnant workers' job security, sex education, same sex partnerships, lesbian motherhood, and same sex adoptions of children. Thus, while many identify human rights as a game-changer in advancing reproductive freedoms in Latin America, there remain great obstacles to comprehensive and effective reproductive rights.

In accounting for resistance to reproductive rights in Latin America, scholars and activists often consider the Catholic Church and *machismo* as the major sources of opposition. However, the reasons that reproductive issues are so controversial are often overdrawn and oversimplified. Many attribute great blocking power to the Church without exploring more nuanced accounts of reproductive struggles. We must likewise resist a temptation to discuss human rights simply as a solution to or champion of advancing reproductive rights. We already see some treating human rights as the preferred intervention in reproductive rights struggles (Undurraga and Cook 216). As with simplified explanations of "the Church" or "*machismo*" as



the enemies in women's reproductive freedoms, "human rights" already often appears as the game-changer, the champion.

The trouble with characterizing reproductive rights as a battle of Church and *machismo* vs. human rights is not that it is false, per se, but that it oversimplifies the struggle, leads to foregone conclusions, and misdirects us from understanding the complexity of how reproductive laws and policies come into being. The 2006 Colombian Constitutional Court decision points to the importance of human rights as an available and availed-upon *knowledge construct* for reasoning about women, life, and reproductive law. In this instance, human rights treaties and a human rights framing of the matter were crucial for determining that abortion is a constitutional right in some circumstances. We should now ask, more precisely how, at this 2006 moment, did human rights discourse play a role in decriminalizing abortion? Drawing from theories of discourse, power, and knowledge, we would expect to see laws decriminalizing abortion as sites where the development and deployment of knowledge discourses have powerful effects in producing regimes of truth about necessary or best practices for regulating reproduction. How, then, have particular knowledge discourses shaped the production of reproductive laws and policies at other moments? What motivates the usage of a particular knowledge discourse, such that it becomes the prevailing way of conceptualizing an issue like reproduction?

In pursuing these questions, the dissertation finds that the knowledges guiding reproductive laws are intertwined with concerns about the country's status as modern. I argue that concerns with building a modern state, and demonstrating a modern state to the international community of nations, influenced which knowledge discourses were taken up by Colombian professionals as they developed reproductive laws and policies. We see this in 2006, when the Colombian Constitutional Court deployed a women's rights-as-human-rights perspective to make the case that the Colombian Constitution highly valued women's rights and lives, demonstrating the country as following modern approaches towards women's reproductive rights. We also see the concern with modern status at other moments of reproductive lawmaking: during the 1936 Colombian Criminal Code reform, which took up criminal sociology to combat a seeming wave of delinquency, resulting in harsher abortion restrictions; in 1960s policies promoting contraceptive access and addressing worries that overpopulation would overwhelm the country; and during the 1991 Constitutional Assembly, which invited women's advocacy for reproductive rights, but ultimately misheard the women due to a preoccupation with the armed conflict and drug cartel violence destroying the country. Facing each of these perceived crises of the "modern" state, "modern" knowledge was deployed. Each of these moments – 1936, 1960s, 1991, and 2006 – is the focus of a dissertation chapter.

In brief, Global South countries such as Colombia are in an uncertain or vulnerable position with regards to whether they are modern countries or not, in their own eyes and in the eyes of the international community. Ambivalence about Colombia being modern is rooted in perceived crises about state capacity to govern and hold a monopoly on violence, but also on other measures such as levels of education and health. In this setting, there are both push and pull factors motivating Colombian professionals to employ what are seen as the modern ways of conceptualizing the problems and solutions around reproduction. The knowledges regarded as modern originate or travel from without Colombia, largely the United States and Europe.

Overall, I find how perceived crises of the modern nation-state drive the development of reproductive laws. While the crisis is a drive to develop law to address the problem, I find that the vulnerability to being perceived as a less modern state creates a receptive environment for taking up Eurocentric scientific, rational knowledge discourses for identifying and addressing the

problem. In this way, we see a geopolitics of knowledge at work in the development of reproductive laws and policies. Uneven power relations among countries shape which knowledges are seen as the best approaches to problems and, subsequently, the adoption of these knowledges, with significant impact on women's lives.

In focusing on knowledge discourses, the dissertation points out how knowledge discourses that are taken up, and the ways in which they are taken up, constitute a geopolitics of knowledge. That is, the knowledge discourses that are mobilized to understand and guide legal approaches to women's reproduction, are not only enmeshed in an environment of geopolitics, but also constitute one of the ways through which geopolitics operates. While these ideas have been explored in scholarship from various fields, as described below, my work brings these ideas together to show how geopolitical pressures affect the development of reproductive laws in a more detailed, historically grounded way, through considering four key moments in Colombian reproductive rights. To date, such a detailed empirical analysis on the production of reproductive laws, does not to my knowledge exist.

Through analyzing reproductive lawmaking in four moments, I find that different conceptions of modernity motivate the geopolitics of knowledge about reproduction in each moment. Each instance of developing reproductive laws and policies shows Colombian professionals' concern with creating Colombia as a modern state. As they craft reproductive law, Colombian professionals participate in knowledge discourses which construct a particular knowledge as needing urgent and necessary application if Colombia will be modern. Identifying and describing how Colombian professionals present these knowledge discourses as the "modern" approach to reproduction is the main aim of each chapter. Yet, the total dissertation reveals that what it means to be a modern state and how law should achieve or ensure modernity varies from moment to moment. The dissertation aims to trace both Colombian professionals' persistent concerns with Colombia being "modern," where "modern" denotes a state that is the authority of its territory and able to carry out endeavors that contribute to its social and economic progress, and Colombian professionals' precise, nuanced ideas of modernity at a given moment, as they interact with a geopolitics of knowledge.

The dissertation develops the argument that geopolitics of knowledge shapes the development of Colombian reproductive laws and policies through analyzing four moments from the years 1936-2006. Each moment is the subject of a chapter. Chapters 1 and 2 examine how a perceived crisis encouraged Colombian experts to urgently learn and apply knowledges from abroad that would resolve the crisis and deliver the country to a modern state. Chapter 1 analyzes the treatment of sexual crimes in the 1933 Colombian Criminal Code Reform Commission's discussions, showing how Colombian jurists in the 1930s embraced Italian legal positivism, a cutting-edge, new sociological approach to crime and the criminal, as the necessary method for defending and modernizing society. Chapter 2 studies how a discourse of an overpopulation crisis in the Third World propelled Colombian political leaders and professionals to participate in U.S.-led knowledge networks on population and development during the 1960s. The Colombian professionals' education in these knowledges, and participation in these knowledge networks, led them to view Colombian society in the terms of crisis that the knowledges set out.

Chapters 3 and 4 study the attempts of Colombian professionals to reverse an increasingly internalized global narrative of their country as inherently violent, a narrative arising in the wake of decades of political and drug violence. These chapters illustrate how professionals use women's human rights to signal a fundamental change for the country towards peace and cherishing human life. Chapter 3 studies the 1991 Constitutional Assembly and how

the debate over whether to include a right to free motherhood, which implied a right to abortion, instead led to a right to special protections for pregnant women. Chapter 4 studies the Colombian Constitutional Court's 2006 decision that legalized abortion in limited, extenuating circumstances. The decision is remarkable for decriminalizing abortion in Colombia, and also for the decisive role that a human rights framework plays in the decision. In embracing dominant global ideas of human rights, constitution-making, and constitutional courts as vehicles toward peace, Colombian elites hoped to make clear that the country could come together as a functioning democracy grounded in modern principles of law.

Overall, the dissertation demonstrates that patterns of geopolitics of knowledge can help explain not only human rights law, but also earlier moments of lawmaking on reproductive issues. In this way, we can take another angle on human rights - not as novel, but instead in continuity with the geopolitics of knowledge in developing reproductive laws in Global South countries. This reveals the importance of paying attention to how knowledges circulate around reproductive issues and law.

Admittedly, this project is one part of a larger story of the landscape of reproductive laws and policies. My focus is not on the implementation of laws, and how women subjects might negotiate or resist these laws. For this reason, this project does not address the experience of women and others in living with these laws except as they form part of the discursive sphere. Literature exists on women's experiences with legal implementation. I have chosen to focus instead on the discursive environment during legal production because it is important for understanding the concerns at work in crafting reproductive laws. Why are laws thought to be needed at a given point in time? What are the reasons given for developing reproductive laws? While a law may not necessarily have a large impact, it is a freezing of politics at the time of its production (Couso 17). Investigating legal production can reveal the workings of power and concerns at the time. Finally, this is definitely an area for future research; this project can serve as one stage of a larger project, which traces how production of a law influences implementation or experience of that law, in conjunction with other factors.

In investigating knowledge discourses, this project is grounded in Foucauldian understandings of discourse, knowledge, and power, and follows transnational feminisms scholarship in its theoretical orientation to the transnational circulation of knowledge discourses within relations of power. I elaborate on these theoretical foundations below and end with a description of my methods and sources.

#### A. Foucault, discourse, power, knowledge

The central unit of study in the dissertation are the discourses that dominate the production of laws and policies about sex and reproduction. Following Foucault, Stuart Hall defines discourse as “a group of statements which provide a language for talking about – i.e. a way of representing – a particular kind of knowledge about a topic. When statements about a topic are made within a particular discourse, the discourse makes it possible to construct the topic in a certain way. It also limits the other ways in which the topic can be constructed” (Hall 165). This definition draws our attention to two pivotal features of discourse, as Foucault conceived it. First, discourse carries out functions of bounding and ordering possible statements about a topic, and in this way, describes the topic – what it is, and what kinds of statements belong to the world of that topic. To phrase this another way: in delineating what can be said, and what cannot be said, about a given topic, discourse directs how we talk about that topic, and

how we even conceive of the topic as a discrete topic. We can think of discourse as the field or domain within which a topic gains meaning, through the functions of bounding and ordering possible statements.

The second feature of discourse is a corollary of the first: discourse is the medium through which the world is constructed and can be known. In setting out what can be said about a given topic, discourse forms “the entire conceptual territory on which knowledge is formed and produced” (Loomba 38). Discourse makes meaning and knowledge possible: it is the medium through which social reality is constructed.

Discourse is intimately linked with power and knowledge. Two key tenets of Foucault’s analysis of power are important to recall here. First, Foucault viewed power as operating in multiple sites and in myriad manners. Second, power is productive, as well as “negative” or repressive. Power creates institutions, subjects, practices, and habits. Foucault’s work explains how the production of knowledge is a part of producing power, and that in fact power does not exist without a corresponding production of a field of knowledge (*Discipline* 27). Knowledge is a form of developing power, in that the knowledge would define the object of study and how to approach it. This leads to Foucault’s concept of biopolitics, in which control over life through both productive and repressive measures shapes and controls life and death.

Foucault explains that truth does not exist a priori to discourse and the workings of power. Instead of being immutable and always-existing as what is so about the world or some part of it, truth is actually an effect of power, and so what is regarded as truth varies across societies and times, depending on the dominant discourses and workings of power of a given time and place:

Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its “general politics” of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true. (Foucault, *Truth* 131).

Appreciating that “it is power, rather than facts about reality, that make things true,” reinforces and helps explain how truth, facts, and what we know as reality or the world are actually mediated through power; are not a priori truths; are constructions through discourse, with great impact (Hall 167). Knowledge and power mutually build one another.

This view of power-knowledge shifts the way we investigate the production of knowledge, shifting from a conception of knowledge as the output of individuals such as experts or scholars, to see it as the product of ongoing, contested workings: “...it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge” (*Discipline* 28). This view of knowledge means that if we are interested in knowledge, we do not consider the “subject of knowledge,” or a producer of knowledge as independent or prior to the making of knowledge. “[O]n the contrary, the subject who knows, the objects to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power-knowledge and their historical transformations” (*Discipline* 27-28). There is a shift in viewing a),

knowledge as outside of and aloof from power, and also b) seeing knowledge and its various facets as “effects” of battles and techniques of power in the domain of knowledge.

The key to challenging power, Foucault explains, is “detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time” (*Truth* 133). Interrupting the truth status of some knowledge is what will weaken the power of that knowledge; this also accounts for how it is the case that the truth claims controlling the contours of a society shift over time.

I study the discourses that dominate the production of a reproductive law or policy, focusing on the discourses that make knowledge claims about the appropriate or scientific manner for developing law or policy on the area of reproduction. They are discourses about constitutional interpretation, criminology, inclusive citizenship, and economic modernization. These become the frameworks through which women’s reproduction is understood and discussed.

## B. Geopolitics of knowledge: power, knowledge, discourse in transnational context

Foucault’s concepts of discourse, power, and knowledge provide a foundation for how this project views knowledge discourses as distinct and important sites for how reproductive policies are produced. We can take up Foucault’s work on power, knowledge, and discourse, and consider it with scholarship that explicitly engages coloniality and geopolitics. How do discourses operate across transnational space? How are knowledges developed and employed in contexts of colonial and imperial power? Many scholars have studied the transnational character of knowledge production and noticed how former colonial powers have a strong presence and authority in the knowledge production of formerly colonized countries. I now turn to a field that thinks about transnational knowledge discourses: transnational feminisms. Transnational feminisms provides theoretical grounding to analyze a geopolitics of knowledge, in which Eurocentric knowledges establish a regime of truth.

As an academic field, “transnational feminisms” developed in the late 1990s and early 2000s from two major, recurring critiques: it claims that the subject and the nation-state are not self-contained units of analysis possessing discrete boundaries. According to this view, the particular intersection of race, gender, sexuality, class, and other identity categories make up a multiplicitous subject whose make-up will shift across time and space, depending on what identity categories become salient according to the context of the moment. Taking up work from critical geography, transnational feminists signal how “flows” of capital, people, and ideas disrupt the geographical boundaries of nation-states. Other scholarship often fails to grapple with the constant traversing of the subject and the nation-state’s boundaries, missing how the subject and the nation-state are constituted through multiple and varied interactions with their environs.

Transnational feminisms further distinguishes itself as a field in articulating its differences from postmodern and postcolonial studies, in seminal works such as Inderpal Grewal and Caren Kaplan’s *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (1994); Caren Kaplan et al.’s *Between Women and Nation: Nationalism, Transnational Feminisms, and the State* (1999); and M. Jacqui Alexander’s *Pedagogies of Crossing: Meditations on Feminism, Crossing, Memory, and the Sacred* (2005). While sharing in a foundational understanding of the discursive formation of the subject and nation-state, and a Foucauldian understanding of relations of power, transnational feminisms differs from postmodern and postcolonial studies in its feminist roots and commitment. The field emerged

during the 1990s and 2000s through its double critique of subject and nation, as a response to notions of “international women’s movement” and “global sisterhood” which were circulating as defining the recent human rights-driven women’s organizing. Transnational feminists, as activists and scholars, pressed on the actual power relations and nature of flows in this organizing environment, pointing out that these notions presumed an essential, homogenous women subject, and blanketed over disparities of challenges among women in different locations, with the effect that women in the Global South were being essentialized and made invisible through these notions. As a way to intervene both in international women’s organizing and academic studies that treated either or both the subject and nation-state as self-contained entities, transnational feminisms arose, with a commitment to studying the transnational constitution of women subjects and their living conditions for the purpose of furthering feminist organizing.

In adopting a transnational feminisms approach, my project treats the transnational circulation of knowledge discourses as crucial for understanding the production of Colombian reproductive policies and laws. Moreover, I am able to analyze how the debate over knowledge discourses in these laws construct ideas of women, reproduction, and the modern state. This is at the heart of the transnational feminist project: how the power relations operating in and through knowledge discourses constitute an entity or site, and how the nature of that entity or site shifts according to ongoing dynamics. This is a significant departure from analyses which treat their objects of study as fixed entities or sites for the reception or interaction of different forces. With a transnational feminisms approach, I can study how the circulation of knowledge discourses helps produce Colombia and women.

The focus on relations and flows is important to transnational feminisms because it disrupts the binary logics of nation-states that have facilitated patriarchy and heteronormativity. Binaries do not correspond to reality, and for this reason the proper focus is on relations and uncovering the construction of binaries, an analysis of the power structures that allow and encourage these binaries to arise. While each set of authors mentioned above describes “transnational” with their own nuances, they all present the transnational as a rejection and interrogation of conceptual geospatial binaries such as global-local and center-periphery in favor of studying relations and flows across nation-state boundaries. A binary perspective of the world is inaccurate, they contend, because binaries deny and obscure how logics and discourses actually circulate. Capitalism has shown itself a hegemonic force that operates outside of a binary formation. Moreover, neither pole of any binary is self-contained, consistent, coherent, or discrete, as the binary form pretends, and there are actually multiple powerful “centers,” a point captured by Inderpal Grewal’s conception of “scattered hegemonies” (7).

Although transnational feminisms avoids easy binaries, it still recognizes the relations of power operating to position the United States and Western European nations as powerful relative to Global South countries. The difference, again, is the attention to the relations and flows, the workings of power in transnational scale, as constitutive of First and Third World, in contrast to a view that sees a unidirectional imposition of power from a preexisting First World to a Third. It may be helpful to illustrate a transnational feminisms approach with an example, such as the study of human rights. Transnational feminisms works have studied human rights in its traveling as a discourse and knowledge, and how the ways in which it travels affects the discursive and material constructions of women subjects. This is a contrast to studies that assess how a human rights agenda affects the adoption of women’s rights, or the mobilization of women’s organizations. In viewing human rights as a globally circulating ideology, discourse, and

practice, transnational feminist scholars such as Inderpal Grewal and Jasbir Puar have argued that human rights functions to create normative subjects and maintain First World countries' dominance over Third World countries. In her book, *Transnational America*, Inderpal Grewal argues that human rights casts Third World women as victims needing to be saved from their patriarchal or oppressive states, and First World women as "free" women subjects with the resources and ability to rescue the former. In creating different subjectivities for Third and First World women, Grewal shows how human rights functions to justify First World intervention into Third World states supposedly to save Third World women. Signaling how human rights combines biopolitics and geopolitics to produce subjects and knowledges that invite regulation from state governments and coalitions of state governments, like the United Nations, Grewal describes human rights as a technology of transnational governmentality. Human rights works to legitimize and enact First World superiority over Third World countries, effectively managing national-international relations. Puar advances a similar analysis to Grewal's, arguing that the U.S. and other First World countries criticize Arab countries for anti-gay practices, when the normative subjectivity for gay and lesbian persons in the U.S. has assimilated gays and lesbians to heteronormative life trajectories of marriage and children, making only "homonormative" lifestyles acceptable and protected.

From Gayatri Spivak's critique of "white men saving brown women from brown men" (297) to Paola Bacchetta et al.'s critique of the Bush administration justifying military intervention in Afghanistan to save Afghani women, human rights on gender work to keep North dominance and power to define reality of South, legitimizing an underclass status of South and a supposed need to intervene. At times instrumental, at times sincere, the commitment to help Third World women provides reason to investigate into women's lives in these countries and intervene through financing initiatives or military presence. The transnational feminist analysis of human rights clarifies how human rights works in geopolitics, that it has the power to hold up some countries above others, with condemnation and intervention possibilities for the lesser countries.

In my work, I am able to see the knowledge discourses as part of the relations and flows, and avoid seeing the taking up of Eurocentric knowledges as a one-way imposition on Colombian legal production. At the same time, the Foucauldian attention to relations of power allows me to see how these knowledge discourses reproduce binary constructions of the world, between modern countries and not-yet-modern countries. While academic scholarship has been trending recently towards a transnational orientation as opposed to national, transnational feminisms is distinct in also pursuing a project of feminist self-determination.

I use the term *geopolitics of knowledge* to refer to how social, economic, and political forces shape the circulation of knowledge discourses and effects across transnational space; as well as to how relations of power at a transnational scale affect how knowledges circulate and how, when, and who participates in a given knowledge, or "takes it up." By "transnational scale," I mean to capture many kinds of global interactions, which go beyond state-to-state interactions. Following transnational feminisms, "transnational" is an orientation towards space that recognizes the importance of nation-states for structuring daily life and global relations, while acknowledging the great deal of movement and "links and disjunctures" that occur among people, material objects, and discourses across nation-state borders (Kaplan 60). Thus, "geopolitics of knowledge" as conceived in this dissertation departs from Geraróid O'Tuathail and John Agnew's definition of "geopolitics", which they offer as an intervention for the field of

international relations. They define geopolitics “as a discursive practice by which intellectuals of statecraft ‘spatialize’ international politics in such a way as to represent it as a ‘world’ characterized by particular types of places, peoples and dramas” (O’Tuahail and Agnew 192). Their definition is concerned with the discursive construction of regions and its formidable impact on justifying foreign policy. However, my project differs in that the emphasis is not an international relations approach to knowledge, which is concerned with how states develop or enact knowledge in relation to one another, directing state-to-state relations. Instead, with a transnational orientation, *geopolitics of knowledge* focuses on the ways that knowledge travels and is taken up, importantly shaped by a national context, but looking beyond the framework of state relations, to consider how very notions of state are constructed through the ways that knowledge circulates.

The last two chapters of the dissertation also rely heavily on Latin American politics and Comparative Courts fields. Latin American politics is an important literature for sustained questions of democratization. These processes became crucial to reproductive issues, as Chapters 3 and 4 elaborate.

## C. Sources and method

### 1. Sources

Each chapter centers on a legal text and draws on additional primary sources to illuminate the production of that legal text. Chapter 1 studies the 1936 Colombian Criminal Code; Chapter 2, the suite of policies to expand contraceptive access from 1966-1969; Chapter 3, the 1991 Colombian Constitution; and Chapter 4, the 2006 Colombian Constitutional Court decision, C-355. For Chapter 1, key additional primary sources are the minutes of the Criminal Code Reform Committee’s meetings, and Colombian legal textbooks and law journal articles from that time period. Together, these sources paint a picture of sociology of crime as the leading legal philosophy. Chapter 2 draws on health agency reports, articles from public health and demography journals, United States and Colombian politicians’ speeches, and transcripts of the U.S. Congress (on approving aid to Colombia), in order to clarify the reasoning behind adopting a population control approach to women’s reproduction. Chapter 3, like Chapter 1, also studies the recorded discussions of lawmakers as they drafted the law. In this case, these are the transcripts of the Constitutional Assembly sessions as delegates debated the formulation of constitutional articles. Chapter 3 also draws heavily on published histories of the Colombian women’s movement, books and articles by women’s movement participants, memoirs from Assembly delegates, and scholarship analyzing how violence of the 1980s influenced the Assembly. Finally, Chapter 4 supplements its close reading of the 2006 C-355 decision decriminalizing abortion with Colombian law journal articles, newspaper articles, and NGO press releases. These sources illuminate how decriminalizing abortion was a deliberate turn, on the part of the Constitutional Court, to a women’s rights-as-human rights philosophy.

I gathered the majority of these materials from archives and libraries in Bogotá from August 2011-May 2012 and June 2013. Major archives for my work are the Colombian Library of Congress, which houses records of congressional sessions and the 1991 Constitutional Assembly sessions; the digital archive of the Colombian Constitutional Court, supplemented by the record room at the Court in Bogotá; and the Luíís Ángel Library in Bogotá, a library similar



to the Library of Congress in the United States. The Luís Ángel Library is an especially important archive. It is the source of most of the documents for Chapter 1, books by Colombian authors for other chapters, and Colombian periodicals and journals.

All quotations from Spanish-language sources are my own translation. In instances where an English translation already exists of the Spanish-language source, I often use the existing translation and note the translation's author in a footnote.

## 2. Method

I approached the archives first seeking materials to answer a broad question, for example: what were the debates over reproductive rights like in the 1991 Constitutional Assembly? Why did the 1936 criminal code eliminate the health exception to abortion, provided for in the 1896 code? From there, I identified a central legal text to concentrate on for each time period, and sought other materials that illuminated these texts.

My research consists of conducting close readings of my collected primary sources. Through close readings I identify the document's concepts, logics, and other features to draw conclusions about the entities and environments that produced it. I include texts like health agencies' reports and feminist manifestos as "sociolegal" texts, understanding them as texts that contribute to discussions of reproductive law, though they are not produced for the legal arena. Overall, I regard the sources as reflections of their time and place, able to teach us a great deal about conceptions of law, women, sex, and reproduction. As the quote below describes, each source can be evaluated as expressing a perspective on women's reproduction and the law, bearing the imprints of the concerns and ways of thinking of their historical moment.

Speaking of social statistics, written documents, published sources, and oral history interviews, he notes: 'They all represent...the *social perception* of facts: and are all in addition subject to social pressures from the context in which they are obtained. With these forms of evidence, what we receive is *social meaning*, and it is this which must be evaluated. (Thompson 96; emphasis in original).

In close reading sources for the dissertation, I am seeking how the sources reflect the social meaning of their time, from their particular location. To this end, I am attentive to the constraints of form for each source; a transcript of lawmakers' debates, an academic article, a presidential speech each have unique purposes and audiences. Given the constraints of form, the variety of legal and sociolegal sources I draw upon is a choice. It is my hope that using many types of sources creates a fuller picture of the social meaning around a given instance of reproductive lawmaking.

The dissertation shares a methodological spirit with Alexandra Halkias' book on the paradox of high abortion rates in pronatalist Greece. Like Halkias, I hope that this work will demonstrate the usefulness of textual analysis for understanding past reproductive policy decisions and thinking about future ones.

...the findings of this research challenge those rigid disciplinary understandings of social and political institutions that do not properly take account of the foundational role played in the latter not only by culture, but specifically by discourse and communication. I argue that a more useful unit of analysis, for scholarly research, policy formation, and national debate alike, in Greece as well as elsewhere, is in fact the *textuality* of both subject and nation. In particular, specific constellations of discursive practices that implicate gender in the

formation of national identity, and vice versa, require attention if public policy aimed at any level of a society is to be effective. (Halkias 8).

As Halkias argues, we are better able to understand, debate, and craft laws for issues like reproduction if we appreciate how women subjects and the nation are a product of the interactions and crystallizations of discourses. We can come to understand, and from understanding, critically engage. Halkias' project focuses on the role of gender and reproduction in constructing a Greek national identity, whereas my project studies the role of gender and reproduction in constructing a modern state. Nevertheless, like Halkias, my project views gender and state as constellations of discursive practices, imbued with power relations; and considers the way to understand how they have been known, is to study their textuality.

As a whole, the dissertation moves beyond the Catholic Church and *machismo* as explanations for Colombia's restrictive reproductive laws and policies. The dissertation argues that knowledge discourses are important for understanding the production of reproductive laws, and ultimately, the impacts these laws have had on women's reproductive lives. The sources and methods practiced here allow us to see how a knowledge discourse becomes predominant for shaping the issues of women's sex and reproduction, and how the knowledge discourse, in shaping the issue, also recommends particular approaches and solutions. Thus, the knowledge discourse has a great impact on both how women's issues are conceived and are treated via policy and law.

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## Ch. 1. "Modern family, modern society: sex and ideas of progress in the 1936 Colombian Criminal Code"

Colombian jurists' discussions about sex crimes in the proposed penal code in 1936 reveal the way in which legal elites understood Colombia as a modern nation-state. To be modern was tied not only to the "positivist" legal science of Italian jurists such as Rafael Garófalo and Alfredo Angiolini, but also to a "sociological" take on what the country's problems were. Calls for codification, for improvements to society, for a criminal law that prioritized defending society from individuals' dangerous acts, testify to both of these. Tensions around modernity surface in jurists' disputes over crimes involving women's sexual dishonor, such as abortion, adultery, and passionate homicide (husbands' killing adulterous wives). The chapter argues that the root of jurists' disputes lies in differing opinions on the relation between men's authority and state authority over women's sexual conduct according to modern law.

Scholarship on Latin American women during this period has generally viewed male authority as working in partnership with liberal states. Liberalism sought modernity and progress through promoting property ownership and free trade; this translated to increased state interventionism at the expense of the Catholic Church. Liberal states assumed authority over the family, displacing the Church, but in practice left male heads of household to ensure order. Though the Catholic Church's authority over the family diminished, women's legal and social status changed very little during this period. Throughout this time period, women were defined by their sexual "honor" and were subject to *patria potestad*, the legal guardianship of their father or husband. However, I find tensions over sexual dishonor crimes in terms of how male authority and behavior should relate to modern state. Women and "honor" had served as traditional sites of patriarchal power, but were now being brought into the state's purview. Discussion of changes to the criminal code as to sex crimes, in particular abortion and passionate homicide, show how jurists representing different positions struggled with reconciling "honor" with modern law and vied to be considered "positivist."

Responding to legal elites' pressure to update the 1890 Criminal Code, the Colombian Congress appointed the *Comisión de Asuntos Penales y Penitenciarios* (Commission on Criminal and Penitentiary Issues) via Law 20 of 1933. I will refer to it as the Commission throughout the chapter. The Commission was assigned to draft a new criminal code within two years, which it would submit to Congress for approval. The Commission was to be composed of four members: one person from the House of Representatives, one from the Senate, and two appointed by the government. All the appointed Commission members were also prominent law professors: Parmenio Cárdenas (government appointment), Rafael Escallón (government appointment), Carlos Lozano y Lozano (senator), and Carlos V. Rey (representative). Another law professor, Jorge Gutiérrez Gomez, served as the Commission's secretary, recording minutes of the Commission meetings. The Commission met at least three days a week over the course of a year, from June 5, 1934 to July 31, 1935. The Commission presented the draft code to Congress on August 22, 1935. Congress approved the Commission's proposed code on April 24, 1936 via Law 95. However, Congress decided to delay its taking force as law until July 1, 1938, when new penitentiary regulations could be implemented. Although it went into effect in 1938, the code is known as the 1936 Colombian Criminal Code. It remained in force until 1980.

The Commission members were representative of Colombian elites in the early 20<sup>th</sup> century. They were all eminent law professors who rotated among political office, diplomatic appointments, and university posts. Parmenio Cárdenas (1891-1978), Carlos Lozano y Lozano

(1904-1952), and Rafael Escallón (1891-1951) all studied law at Colegio Mayor de Nuestra Señora del Rosario in Bogotá and trained there in legal positivism (Forero Ramírez 256). In typical fashion, they continued their studies abroad. Escallón studied with the most famous legal positivist, Enrico Ferri, in Rome in 1915 (Cataño 148). Lozano also did postgraduate studies in Lima, Peru at the prestigious Universidad de San Martín; Rome, Italy under the tutelage of Ferri (in 1925); and Paris, France at La Sorbonne.<sup>1</sup> As elaborated below, Colombian elites in the early 20th century were concerned with achieving progress and modernity in Colombian society. “Modernity was the obsession of the professional and political elites” throughout Latin America at this time, where modernity meant a capitalist economy and well-ordered society (Putnam, Caulfield, and Chambers 1). Legal elites like the Commission members maintained that legal science and updated legal codes would advance society.

The chapter draws its argument from a close reading of several primary sources. The central primary source is the *Trabajos Preparatorios del Nuevo Código Penal* (“Preparatory Works for the New Penal Code”), published in 1938. The *Trabajos Preparatorios* are the recorded minutes of the Commission's meetings. It exhibits all the discussions among Commission members on every article of the code. Another primary source is the *Proyecto de Código Penal*, 1935. This source is the proposed 1936 Penal Code, authored by the Commission and sent to Congress for its approval. The *Proyecto* includes the Commission’s letter introducing the proposed code to Congress, in which the Commission describes its penal philosophy and the new code's innovations. In addition to these documents, other primary sources include Gutiérrez’ comprehensive commentary on the new criminal code and criminal legal science, *Comentarios al Código Penal Colombiano* (Commentaries on the Colombian Criminal Code), published in 1940. Additional sources consist of congressional hearings and other Colombian jurists’ commentaries on the criminal code and criminal science, including relevant articles from 1931-1939 of *Revista Jurídica*, the leading national legal publication at the time, in which prominent legal minds debated current issues.

With a turn in Latin American history to study cultural institutions, there has been increasing interest in Latin American legal codes of the mid-19th to the early 20th century. Most scholarship, especially that published in English, focuses on Mexico and Argentina.<sup>2</sup> Most scholarship on Colombian codes is published in small regional Colombian academic journals or as master's theses at Colombian universities. Thus, this chapter contributes to developing study of Colombian legal codes.

An additional feature of literature on Latin American codes is the overwhelming focus on cases. Studies commonly review all the cases available on a certain crime within a defined time period. This work is invaluable for learning how law was understood and practiced, and provides a window onto how popular classes mobilized law to their advantage. Yet, there is a dearth of any close readings on the production of legal codes or debates over formulation of particular articles. While some works discuss Latin American legal education or juridical thought, there are no detailed studies of the intellectual debates that occurred during the production of codes. This means that we miss how elites in “real time,” so to speak, negotiated and determined what it

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<sup>1</sup> I have found very little information about Carlos V. Rey. The *Trabajos Preparatorios*, the Commission meeting minutes, show he attended fewer Commission meetings than the other three members and participated less when he did attend.

<sup>2</sup> For an overview of recent scholarship on 19th and 20th Latin American criminality and legal codes, see Aguirre, “Bibliographical Essay” pp.241-250 and Aguirre and Salvatore, “Writing the History of Law, Crime, and Punishment in Latin America” pp.1-32

meant to develop laws for the nation, and how they reasoned through issues such as sex and family in the legal arena.

The chapter begins with a brief overview of codification in Latin America from independence to the early 20th century, describing how codification was influenced by liberalism, positivism, and a mission to construct a modern nation-state. I then describe the knowledge, legal positivism, which animated the 1936 Colombian Criminal Code, and how a legal positivist view of social defense created a sense of urgency in applying this knowledge via criminal code reform. The remainder of the chapter conducts close readings of sexual crimes to show how the Commission understood family, women, and sex in modern law. Part II describes how jurists esteemed the family as the basic unit of society and considered women in terms of their sexual conduct and family position. Part II draws on the Commission's definition of sex acts ("carnal access") and *raptó* (kidnapping women with an intent of rape or forced marriage). Part III studies the crimes of abortion and passionate homicide (husbands' killing of adulterous wives). The Commission's brief debate about drafting the abortion crime article, compared to its lengthy, philosophical debate about passionate homicide, reveals that the jurists were conflicted over how modern law should understand men's authority in the home. Overall, the chapter shows how the Colombian jurists scrutinized family, sex, and women and men's roles more closely in keeping with their legal positivist orientation. The 1936 Criminal Code marked greater state intervention into the family, but Commission members disagreed about the extent to which modern law should encroach on male authority.

## A. Joining the rest of modern societies through participating in legal science

### 1.1 Latin American legal codes: liberalism, positivism, and constructing the modern state

Codification had been a valued state-building project in Latin America since shortly after independence (1810 for most countries, including Colombia; 1822 for Brazil). Drawing up legal codes was perceived as important both for establishing order following the first few restless decades in which groups of elites vied for control over new Latin American states, and for marking the new states as distinct from colonial rule. As legal historian M.C. Mirow writes, codes were a "shedding of the Spanish colonial past and its hierarchies" (180). Latin American legal codes largely copied current French and Spanish codes, following the Napoleonic division into five codes: civil, criminal, commercial, civil procedure, and criminal procedure (Pérez-Perdomo 76). In creating new law, the Latin American codes asserted an end to the period of colonial rule. In adopting the European codes, Latin American states also asserted that they were states equivalent to Spain or France.

The mid-19th century saw a new round of codes, as liberal republics became more firmly established throughout Latin America. The code reforms of the mid-19th century sought to promote liberal doctrine. Liberal doctrine pursued a program of "free trade, property, and anticlericalism," rooted in the idea that liberty and modernity would be achieved through participating in the free market (Dore 9, Langebaek and Robledo 3). To promote private land ownership, Latin American states ended land titles of the Catholic Church and indigenous communities. In another blow to the Church, these codes granted control to the state over institutions that the Catholic Church had traditionally managed, such as the family (marriage, birth and death records, inheritance, etc.) and education. Overall, mid-19th century Latin

American codes enacted a liberal doctrine of state intervention in the economy and daily life. The result was an increase in state authority and a corresponding decrease in the power of the Catholic Church.

Although authority over the family shifted from the Church to the state, women experienced little change in their social or legal status. Legal codes placed women under the authority of their fathers and husbands and criminalized women's conduct that deviated from sexual and social norms. Historian Elizabeth Dore argues that women even suffered diminished liberty with secularization of family law. The Church had often counseled men to cease beating their female kin or curb their adultery, since it highly valued marital harmony (Dore 23, Uribe-Urán 58). In contrast, the liberal state relied on male heads of household to keep order in their families, as the rational partners of the state in developing a well-ordered society (Molyneux 45). Family law and other laws affecting women had the goal of upholding this patriarchal, paternalistic order. As Maxine Molyneux concludes, "for all that liberal states sought to secure the nation's passage into the modern world, they wished to do so while retaining a firm grip on the family and on women, none firmer than that conferred by the patriarchal status quo" (50).

Over the course of the 19th century, Latin American elites became increasingly concerned with economic development and national character of Latin American nation-states. The way in which elites identified and discussed the problem of Latin American states was heavily racialized, expressing a belief in white *criollo* superiority and inferiority of indigenous and Afro populations. Influenced by the positivism of Auguste Comte, Charles Darwin, and particularly Herbert Spencer, elites debated whether factors of their environments, such as geographic position in the "tropics" and racial make-up, were beneficial or deleterious to constructing a prosperous, well-ordered society. There were a diversity of nuanced positions in this debate, based on careful reading and study of these authors; historians Carl Langebaek and Natalia Robledo have shown how Colombian elites debated Comte, Darwin, and Spencer in university classrooms, university theses, newspapers, and published writings. In these same venues, the elites proposed a range of solutions for improving economic standing and living conditions. For example, some Colombian elites argued that "racial degeneration" was occurring, due to the mixing of *criollo* and indigenous races, and that the nation faced a bleak future (Langebaek and Robledo 71-72). In contrast, other elites contended that indigenous races were strengthening *criollo* stock, in passing on attributes that were well-adapted to the physical environment (Langebaek and Robledo 74-75). According to a more *Indigenista* position, Europeans were ill-adapted to the heat of the tropics and the Spanish conquistadores had sullied indigenous races (Langebaek and Robledo 75, 77). Evident in these debates is elites' fixation on distinct races and a preoccupation with how to create a nation from a racially diverse population. The question of how to achieve progress, a positivist value of liberal republics, became a question of how indigenous and Afro populations could be "civilized" to productive habits and incorporated into elites' vision of liberal, modern society.

In the early 20th century, Latin American elites continued to focus on how to construct a modern state with a diverse racial make-up. Positivist social science, such as sociology, psychology, and criminology, flourished precisely because of the responses they offered to this problem. These social sciences closely studied and explained individuals' behavior in ways that allowed for classifications of human beings, which were then used to identify and address harmful social problems.

The historian María del Pilar López Uribe traces how Colombian elite discourse during 1900-1930 changed from expressing a bleak outlook for the country's future, to confidence that

Colombia could achieve progress (13-19). The change in discourse accompanied a comprehensive, targeted state intervention to shape the lower classes into productive subjects for a capitalist economy. To this end, elites supported developing laws that regulated morality (targeting the customs and everyday life) of subjects. In targeting everyday practices, these laws sought to protect society by eradicating indigenous and lower class cultural practices which elites considered inefficient and harmful. In this way, the project of modernization was also a project of cultural assimilation. The hoped-for outcome, according to elite reformers, was to create consumers who would help grow an internal capitalist economy, and who would be efficient and disciplined workers, poised to help Colombia increase its exports in the global market. As we will see in the following sections, the 1936 Colombian Penal Code sought to update penal law to defend society from perceived threats to social order.

## 1.2 A modern penal code for a modern society

In the letter of introduction attached to the final draft of the Code for Congress' review, the Penal Reform Commission presses on Congress the need for a modern penal code for Colombia:

Colombian society has lacked an efficient means of defense against delinquency and has been practically at the margin of all the innovations that the scientific movement of recent times has been putting into the hands of the State, for the better organization of means of repression against crime and the adoption of grand social prevention policies against crime. (*Proyecto 7*).

The Commission presents a picture of Colombia as at the mercy of a delinquent society, when the knowledge exists to address the problem. It asserts that Colombia needs to take heed of scientific innovations for the sake of protecting society from crime. The body of the letter describes how the proposed code incorporates recent legal science, specifically Italian legal positivism. In closing the letter, the Commission emphasizes again the transformative potential of the proposed code. "Once adopted by the Legislative Chambers," the Commission states, the code "will substantially change among us the concept and practice of criminal justice" (*Proyecto 10*). The Commission overall portrays the proposed 1936 penal code as a code that will improve criminal justice by bringing cutting-edge science to the problem of crime.

Echoing sentiments of the time, Colombian jurists explained the need for a new penal code to deal with the complexities of modern life, in which a single individual can cause great devastation to society through small acts. Increasing urban population and industrial inventions in the late 19th and early 20th centuries had resulted in a greater density of people at higher risk from a greater number of harms than previously known (Henderson 155). Seeking to control these perceived new troubles for society, the Penal Reform Commission developed a novel chapter for the 1936 Penal Code that punished the careless private acts of individuals that reverberate through the greater public. The chapter, "Crimes against health and collective integrity," the Commission explains in its introductory letter to Congress, designates new crimes such as "Fire, flood, all crimes against public health and all those that involve a common danger" (*Proyecto 16*). In addition to fire and flood, this chapter penalizes "automobile or train disasters" with two to ten years of prison. The crimes against public health include contaminating public water supply (two to ten years of prison), distributing narcotic substances (six months to five years of prison and heavy fine), and altering medicine (six months to five years of prison) or



other items destined for commercial sale (small fine) (*Proyecto* 77-78). Spreading venereal disease also appears across other chapters of the code as a new crime. "Many of these laws, completely new, are the fruit of the modern and incessant needs and complications of life today," the Commission puts plainly (*Proyecto* 17). A key feature of "modern" life in the 1930s, the Commission observes, is society's vulnerability to the actions, even accidental, of one water-poisoning individual.

Viewing modern society as a tightly interlocked web to be defended against individuals' delinquent acts follows the scholarship of Italian legal positivists, renowned as the experts in penal matters since the late 19th century (Gutiérrez, *Comentarios* 7-8, Vilar 25). Colombian legal scholarship, including discussions of the 1936 Penal Code during and after its formulation, frequently cites Italians and debates nuances of their arguments. In his commentary on the 1936 Penal Code, the Colombian law professor (and Commission Secretary) Jorge Gutiérrez Gomez quotes the "renowned" Italian jurist Alfredo Angiolini to illustrate how the new realities of modern life suddenly put wide swaths of society at risk. Private errors may have widespread, catastrophic consequences, as when "one almost imperceptible imperfection, one moment of absent-mindedness, forgivable in other cases and in other times, can," in the case of trains, "tumble the cars to the depths, destroy one convoy against another traveling on the same line, such that one guilty act can cause more victims in one day than have been produced in other times by all the guilty acts of a year" (Gutiérrez, *Comentarios* 74-75). Danger lurks everywhere and spreads swiftly in the modern age; the level of devastation possible, whether dramatic train derailments or city-wide fires, seems greater than ever before found in the history of people, to the legal minds of the time.

In seeing Colombian society as plagued by modern concerns and as facing the issues that other modern societies like Italy face and that eminent scholarship recognizes and deliberates about, the Penal Reform Commission is recognizing Colombia as a modern society. We will see later in the chapter how the Commission at times wavers in how modern Colombia is, and how this complicates their arguments for formulating certain laws and their overall vision of the Criminal Code's purpose. Yet, the reformers, perhaps given their legal training in the cutting-edge Italian scholarship of the day, cannot but see their country's problems as modern problems, needing modern solutions - namely, a modern penal code. How else to control the faulty and careless singular acts that cause societal misery? While additional social policies also develop at this time, such as sanitation programs and moral hygiene instruction, the Italians and other eminent legal minds concur that a modern penal code (for which the current Italian penal code of 1925 is a worldwide model) is imperative. Gutiérrez quotes Angiolini again in affirming the need for a new penal code to fit the times: "...if the legislator would truly want to respond to the new necessities [of life/society], he will have to forget all the old codes in effect up till now, and raise up penal law as well as civil law on thoroughly different and totally modern foundations" (Gutiérrez, *Comentarios* 74). As Angiolini makes clear here, the penal code is modern, in that it is made for the modern society that is plagued by modern problems and also that takes a modern approach, as we shall see, to these problems. The Commission members whole-heartedly adopt Italian legal positivism, hailed as modern and novel, to understand and penalize crime and the criminal in the modern society. The following section describes the main principles and innovations of Italian legal positivist thought.

### 1.3 Italian legal positivism, a scientific approach to criminal law

In its introductory letter to Congress, the Penal Reform Commission distances its proposed code from the old 1890 criminal code, still in effect, on the basis of science: "If there is one matter that has provoked the greatest number and most justified criticisms of the current Penal Code it is this, that it falls into casuistry, from its lack of scientific terminology, to the disproportional penalties between homicide and injuries, since it sometimes imposes greater penalties in the latter case than in the former" (*Proyecto* 19). Unlike the current Penal Code from 1890, then, the proposed Penal Code which will become the 1936 Penal Code follows Italian legal positivism's "scientific" precision both in naming crimes and in assigning them penalties.

These two key elements of Italian legal positivism, to which we will return, derive from the general positivist principles of this school of thought. Maintaining that the only valid knowledge about humans comes from empirical fact and observation, positivists rejected what they considered metaphysical discussions about morality as irrelevant to knowledge about the human and society, especially relating to "actionable" knowledge, or knowledge that could be the basis for governing man and living in society. In penal law, positivist scholars departed from metaphysical or classical approaches to penology over the matter of free will. Gutiérrez describes the turning point when positivists left classical penal scholarship behind: "Convinced that the existence or non-existence of free will could not be experimentally demonstrated, positivists...decided to leave this polemic to the truly philosophical and religious camp, allowing freedom of opinion on the matter, since it was no longer of interest to penal law" (Gutiérrez, *Comentarios* 33). Rather than continue to argue over whether humans had free will, and whether having free will meant people were responsible for crimes they committed, and how to name those crimes, the positivists took up crime as an "eminently social phenomenon," to quote Angiolini, "in that it [crime] cannot be conceived outside of society" (Gutiérrez, *Comentarios* 74). For positivists, removing God and other metaphysical questions from the matter of crime entailed that crime could only be social - only where there were empirical facts to study and develop upon. Reflecting on the meaning of offenses or sins were left as puzzles for philosophers and theologians; positivists saw themselves turning to a new way of thinking based in science, not metaphysical rumination.

The Italian legal positivist school also discarded the classical school's concern with free will and metaphysics as unhelpful to developing a criminal law beneficial for society. In explaining positivists' view that crime is social, Gutiérrez demonstrates their concern with making offenders pay for the damages they cause: "So they said: man acts in a social field, and he must answer for these acts, setting aside anything about free will. Here we have the principle of social and legal responsibility" (Gutiérrez, *Comentarios* 33). Setting aside free will as the locus of man's responsibility, the positivists establish what they believe more robust: holding men (and women, when they think of feminine crimes like prostitution) responsible for concrete acts they committed against society.

Viewing crime as fundamentally social, Italian legal positivists and their adherents embraced the study of crime as sociological. They emphasized a focus on society-level concerns and investigated how to best improve society as a whole. In contrast to the "classical school that proclaimed the vindication of the rights of the individual against the excesses of social power," such as the king, "the positivist school undertakes the vindication of the rights of society against the excesses of individualism, to establish the equilibrium between the individual element and the social element" (Gutiérrez, *Comentarios* 29). Gutiérrez attributes some of the impetus for legal positivists to take up studying society to "the bewilderment and unease produced by the increase in criminality" in the modern age, "which drove the need to reevaluate and monitor

dominant principles" of thinking that had been "so inefficient and unpromising for defending the conglomerate (*conglomerado*)" (Gutiérrez, *Comentarios* 29). Leading legal scholarship shifted from holding the individual is responsible for what they willed to protecting society. The social defense doctrine is a key feature of positivism.

A sociological approach to crime also focused attention on the figure of the criminal in terms of his or her dangerousness to society, and to viewing crime as an attack on society. In discussing crimes against the family and sexual honor, we will see that a criminal act is not viewed as an offense against another human being, but rather, an aggression against society. This conviction is clear in the positivists' "sociological definition of crime" that Gutiérrez cites (from an unknown source): "Crimes are punishable actions driven by antisocial and anti-human motives that contravene common morality, and injure, violate, or put in danger the conditions of existence for a determined society in a determined historical moment" (Gutiérrez, *Comentarios* 63). For positivists, society becomes an entity that can come under threat. In an extension of Darwinian thinking, society rightfully seeks to protect itself, to "repel attacks from delinquents that make an attempt against the essential elements of the life of a society, with the end of assuring its own conservation" (Gutiérrez, *Comentarios* 62). Society uses laws and other tools of the state at its disposal for this task; a robust criminal code becomes imperative.

According to positivism, a modern criminal code, moreover, recognizes that criminals present widely varying degrees of dangerousness to society and thereby deserve varying penalties for their crimes. Given that the object of punishment is society's defense, someone who poses less of a threat can safely receive a shorter prison sentence. Some criminals may even merit judicial pardons. Determining the "dangerousness of the agent" is ultimately a matter for the judge, but the Penal Reform Commission follows legal positivism's established practice of establishing minimum and maximum penalties for crimes to guide the judge's sentencing (*Proyecto* 21). Dangerousness is determined by the severity of the crime (murder, or an injury?), mitigating circumstances/motives (was a woman aborting her pregnancy trying to save her honor, a noble motive?), and concrete elements of the crime (did it take place at night, proving the criminal wished to evade detection?) (*Proyecto* 21). Discussion of dangerousness often occupies the Penal Reform Commission, and is crucial in their deliberations of whether to include men as capable of committing the crime of adultery, and considering whether a husband who kills his adulterous wife should be exempt from penalty.

## B. The family in the 1936 Penal Code: how legal positivism assists state regulation of sexual relations to improve society

### 2.1 The bridge between society and individuals: state interest in the family and its sexual economy

Occupying a special place between the scrutinized, threatening individual and the "society to be defended" is the family. The 1936 Penal Code dedicates Title XIV to "Crimes against the family." The Commission also discusses many other crimes as measures to protect the family in Title XII, "Crimes against liberty and sexual honor," and Title XV, "Crimes against life and personal integrity." While the 1890 Code also names crimes against the family, the reasoning about these crimes in the 1936 Code is marked by legal positivism and a scientific justification for state intervention in domestic matters. The way the 1936 Code treats family crimes in a positivist fashion is evidence of growing state interest in the family, to the extent of

extending law more fastidiously into the family realm. Law and legal science are positioned in relation to the family through sex - the regulation of sexual behavior and reproduction through protecting women's sexual honor.

The Commission's investment in protecting the family rests on a conception of the family as the bedrock and basic unit of society. For example, Gutiérrez describes marriage as the "fundamental institution of our social organism" and the "sacred institution that is the base of the social collective" ("El nuevo" 166). Parmenio Cárdenas, a Commission member, declares the "dignity and respect due to the family unit" is the "principal basis of the Republic and civil society" (*Anales* 2105-2106). Edmundo Vilar, another Colombian jurist mentored by Carlos Lozano (a Commission member), explains "an exemplary family...produces a person of exemplary conduct" and an "absence of family...necessarily produces an antisocial being" who poses a threat to society (69-70). These instances point to how feminist scholars have theorized the family as doing the work of organizing and managing sexual, economic, labor, power relations. Viewing the family in these functional terms reveals how state investment in the family serves its needs for ordering and organizing people. Sections 2.2 and 2.3 below explain in detail how the Commission upheld that women's sex and reproductive capacity legally belonged to men as the Commission defined sex acts and discussed the crime of *rapto*.

The Commission's discussions about how to formulate family-concerned articles, or what penalties to establish for them, reveal the family is founded on women's sexual honor. Kristin Ruggiero, one of the few scholars writing on Latin American women's crimes in the late 19th and early 20th centuries, explains the concept of women's sexual honor:

Generally, honor referred to the good reputation that followed from virtue; and in women, to the honesty and modesty and the good opinion that they gained with these virtues. Both upper and lower classes could have honor, but often it was assumed that the sentiment was more developed in 'superior' classes because of its abstract nature and complexity. (153).

Gutiérrez reflects this understanding of honor in his commentary on the 1936 Criminal Code, published in 1940 for students' edification. "[H]onor in a woman rests principally upon the esteem in which society holds her, based on her dignified conduct with regards to sexual relations. Her honor suffers a decrease and scorn if she has carnal relations that society deems illicit" (*Comentarios* 126). Gutiérrez continues to explain how honor is non-sexual for men:

In a man, on the other hand, honor is usually grounded in other diverse criteria than sexual ones and especially in correct conduct towards others' property rights. Therefore it occurs to no one to say that a man has lost his honor, or even has been humiliated, for having had illicit carnal relations, which in contrast is the worst blemish for a woman. (*Comentarios* 126).

The 1936 Code's family-concerned articles are centered on transgressions of sexual honor, on women's falling outside norms of female sexual propriety. Title XIV, "Crimes against the family," undertakes "crimes that in any way attack the home and the family, such as *rapto* [kidnapping a woman intending sexual assault], incest, bigamy, and altering the civil status of persons" and also adultery (*Proyecto* 18). The crimes of passionate homicide (killing an adulterous wife) and abortion, included under the title "Crimes against life and personal integrity," are also presented in terms of sexual honor and their harm to the family. Title XII, "Crimes against liberty and sexual honor" contains crimes of carnal violence, or rape; deflowering a virgin through devious means of seduction (*estupro*); dishonest abuses, or sexual acts against a person's will (not including rape); the corruption of minors, namely introducing

minors to sexual acts; and pandering (*proxenitismo*) (*Proyecto* 18). In keeping with penal codes of the late 19th and early 20th century, the Commission discusses these crimes in terms of their violation of family rights, either *potestad marital*, marital sovereignty, or *potestad patrimonial*, in which male heads of household held rights and responsibilities for dependents, including all women in their family.<sup>3</sup> Not until women's liberation movements will these crimes be read as offenses against the victims. In the 1930s, family rights, structured by women's sexual honor, stand in as the protection of existing patriarchal social relations.

It might seem that the Commission would reject honor and morality as irrelevant to positivist legal science. The positivist turn, after all, was a rejection of metaphysics and basing law on anything other than social fact. Honor and morality might appear to be precisely the kinds of concerns the jurists would reject for being conjectural or unproved. That the Colombian positivist jurists would reject honor is a line of thinking present in historian Walter Alonso Bustamante Tejada's analysis of the 1936 Code's article outlawing "homosexual carnal access."

Writing on the introduction of homosexuality as a crime in the 1936 Penal Code, Bustamante Tejada argues the Commission members are so obsessed with sexual morality that they disregard their own positivist legal principles to criminalize sex between men. Bustamante Tejada argues that the "criminalized act did not meet the requirements of a crime," according to the legal positivist definition of crime the jurists followed, "and the jurists were conscious of this" (128). He bases his reading on the Commission members' debate. Carlos Lozano objected to the criminalization of "homosexual carnal access" because he considered it a private act between two consenting parties. Parmenio Cárdenas and Carlos Rey objected that homosexual sex threatens "the fundamental bases of public and social morality" and the "Criminal Code means a defense of society" (128). Lozano offered no further objections and the article stood. Bustamante Tejada concludes that the Commission criminalized homosexuality "without justification" (124), since "modern notions of law told legislators that homosexuality was not an act attacking interests protected by law" (129). For Bustamante Tejada, the jurists are hypocrites when they criminalize homosexuality: they claim to follow positivist legal science, but go against legal positivism to let common morality lead their decision to criminalize homosexual sex.

Bustamante Tejada's reading erects a divide between morality and science, however, which was a more complicated relationship for the Penal Code Reform Commission jurists. Instead of reading the "homosexual carnal access" crime as the jurists contradicting their intellectual principles, this and other sexual crimes show the jurists evaluating morality's relation to law. In the case of "homosexual carnal access," Lozano and Rey rely on a social defense argument that perceives sex between men as a threat to the social order (the heterosexual family). Their position is bigoted and contemptible. Lozano disagrees with their position; he and Cárdenas disagree about other sexual crimes, as we will see in the case of passionate homicide. Thus, rather than simple intellectual disingenuousness, the criminalizing of sex between men reveals tensions among the jurists over morality's place in defending society via a positivist penal code.

In fact, the Commission explains its stance towards morality in its letter to Congress, in a paragraph explaining the Commission's approach towards crimes concerning the family. The

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<sup>3</sup> For additional literature on *potestad patrimonial* and *potestad marital* in late 19th and early 20th century Latin America, see *Honor, Status, and Law in Modern Latin America*, edited by Sueann Caulfield, Sarah C. Chambers, and Lara Putnam; and *Hidden Histories of Gender and State in Latin America*, edited by Elizabeth Dore and Maxine Molyneux.

Penal Reform Commission claims it approaches crimes concerning the family very carefully, treating the family as a private realm, in which the state must involve itself only because the family is so important to society. "The Commission took care not to invade the field of morality," the Commission explains in the letter, "occupying itself only with those acts whose seriousness and social impact necessitated their conception as norms of a penal character" (*Proyecto* 18). As good positivists, the Commission would avoid the ethical quagmire of the "field of morality" and instead focus on the concrete social harms of certain grave acts. The Commission further encourages Congress to consult the minutes of its meetings, where "an explication of reasoning on this delicate material is recorded in a fairly complete manner" (*Proyecto* 18). The Commission describes the written record as a way of exposing itself to supervision, as evidence of its sensitivity towards the family and intervening only within proper bounds. The deferential transparency of the Commission attempts to strike a balance between respecting the delicacy of the family and making clear the high stakes in criminalizing some acts that harm the family, and ultimately society.

Rather than clouding the Commission members' usual positivist judgment, the value of honor guides the Commission as it develops articles of law concerning the family. The Commission members do not always agree on what protecting family honor, and ultimately society, means for how to formulate a law. These disagreements offer a view of how honor remains a precious societal value while showing tensions around how a modern criminal code should defend honor. The crimes of abortion, adultery, and passionate homicide, are particularly revealing.

## 2.2 What is sex? Using legal science to define "carnal access" and the threat of sex

Though the Commission expressed respect for family sanctity, the 1936 Code increases state intervention in private life by expanding law's authority over a variety of sex acts, under the umbrella term "carnal access." Although "carnal access" had long existed in Latin American law, including in Colombia's 1890 Criminal Code, the 1936 Commission took pains to define "carnal access" with juridical rigor. The 1936 definition of carnal access expands the types of sex acts that come under criminal law, moving beyond heterosexual copulation. In expounding on "carnal access," the Commission clarified how illicit sexual acts threaten societal values and ultimately, societal order.

The most active member of the Commission, Carlos Lozano, depicts the attention to carnal access as responding to a modern problem: the rise of a wide range of depraved sex acts, which has disturbingly reduced procreative sex between husbands and wives. It seems that, freed from a tradition to copulate, men and women have enthusiastically embraced a fresh world of novel sexual pleasures. "In an era like the current one," Lozano explains,

in which the progressive dissolution of customs, that is characteristic of all civilizations that are very mature, it is clearly manifest, in which the limitation or suppression of fecund sexual relations is procured by all means, that aberrant sexual practices are extremely frequent, and for many persons constitute the only regular habits [of sexual activity]. (*Trabajos* 67).

He laments how the rampant abandonment of procreative copulation for new titillations is a disturbing, but seemingly inevitable effect of modernization. What is aberrant, sexually, has quickly become commonplace – if still not normal, on Lozano's view.

Yet, of even greater concern than the mere increase in number and frequency of aberrant sexual practices, or the potential spread of depravity through society, is the threat such positions pose to procreative sex. It remains implicit, but if other sex practices also afford great pleasure and without risk of pregnancy, their popularity may wipe out “fecund sexual relations.” In the quote above, Lozano describes the sea change in sexual practices as already overwhelming heterosexual, procreative sex. As with matters of disease, also a sustained concern during the early 20<sup>th</sup> century, there is a sense of chaotic hordes overrunning the proper, desirable order of things; that all the fellatio, cunnilingus, anal sex, and whatever other sexual acts Lozano is tacitly referencing, are displacing proper, desirable, healthy sexual conduct – penis-vaginal, heterosexual sex.

The depiction of the new, dangerous panorama of sex practices calls for law’s attention and intervention in the domain of sex. For example, Lozano argues that the law must adapt how it understands adultery to recognize the range of sex that constitutes a transgression of the marital relationship. “In the current state of civilization and culture,” he remarks, referencing the proliferation of various sexual practices, “it does not seem admissible that this crime [adultery] consists exclusively in the coitus or regular coupling (*ayuntamiento*) of the sexes” (*Trabajos* 67). Instead of that limited instance of coitus, Lozano concludes, “...it seems that every erotic-sexual act that constitutes for those who engage in it, a physio-psychological equivalent to carnal copulation, should be considered as adultery” (*Trabajos* 67). To restate in less medico-juridical terminology, Lozano is advocating that any kind of sex act that brings orgasm for the person (which may not be the same for everyone...perhaps intimating at the aberrant nature of some persons, that their erotics are perversions) should count as a potentially adulterous act. On Lozano's view, the world of sex, and with it the criminality of sex, has changed.

Formulating his scientific observation of the modern sexual landscape into law, Lozano submits an article criminalizing adultery for the Commission's consideration that he hopes will “define this crime in a final (*terminante*) form” (*Trabajos* 67):

Article. The married woman who has carnal access with a man distinct from her husband, or executes with him some erotic-sexual act, that constitutes its physio-psychological equivalent, is subject to a penalty of six months to three years in prison. The coauthor of the adultery is subject to the same penalty (*Trabajos* 62).

This new formulation of the adultery crime treats a variety of sex as deserving of punishment as procreative sex when outside of marriage. Expanding the criminalized sex acts gives more robust protection to procreative sex within marriage, as Lozano believes is necessary.

That the principal article criminalizing adultery targets the married woman, and not her philandering husband, is typical of the patriarchal national criminal codes at this time, in Latin America and beyond. The honor of husband and family are articulated as rights that the adulterous woman violates, which calls for sanction (*Trabajos* 67).

Yet Lozano, ever the positivist pedagogue, further justifies the woman-specific adultery article as a protective measure for women. He explains that the new range of sexual practices are particularly damaging to women. An adulterous woman not only harms her husband and family, but now also herself more profoundly, with non-procreative sex. The new sex practices “imply a more serious attack on admitted morality and are susceptible to degrade women to a much more dangerous degree, dissolving her sentiments of dignity” (*Trabajos* 67). If only Lozano would expound here, at least mentioning some of these acts by name, or how they are especially degrading. His next statement instead indicates that these acts are so debilitating to a woman's dignity because they contravene the husband's rightful possession of her sexual body, and the

natural order of things: "Marriage gives a husband exclusive right over the body of the woman, as much as regards the exercise of the sexual function, and this right experiences a total eclipse with all the forms of copulation against nature" (*Trabajos* 67). According to Lozano, all of the wife's sexuality and reproductive capacity belongs to her husband; anyone else's sexual acts with her obliterates the husband's total rights to his wife's body. Lozano's reasoning here shows how juridical science supported existing morality. A legal understanding of the diversity of modern sex acts, and the husband's legal right over his wife's sexual body as granted by marriage, become the reasoning supporting a moralistic-cum-scientific view that women's sex outside of marriage goes against nature, and places her as abnormal, a degradation to herself and others.

On this view, women's sex outside of marriage is unnatural because it is sex not with her husband, and also because this sex consists of sexual acts that do not lead to conceiving children - sex that intimates it is solely for pleasure, not wifely duty. Perhaps women's sexual pleasure is always improper, but especially when it is not given her by her husband, who is seen as owning her sexual body. Women experiencing sexual pleasure for its own sake, and not as a byproduct of procreating, are regarded as degraded, losing dignity. Dignity derives from sexual propriety.

The discussion of what kind of sex constitutes criminalized sex clarifies what kind of sexual activity is desired or tolerable in society. For women, the adultery discussion makes clear that the only proper place for women to have sex is within marriage. With its claimed scientific foundation, the 1936 Code legitimates how it codifies proper sex - for example, codifying marital sex for women, and assuring men and society that women's sex remains within marriage, or suffers repercussions.

### 2.3 Keeping women as reproductive bodies: sexual honor, biology, and morality in the family

What is it about these acts, all sexual in nature, and evaluated in terms of family honor, that is potentially so devastating to society? Attending to the sexual honor of the family, and enshrining this morality in the positivist terms of social harm in the Penal Code, does the work of managing reproductive sexual relations. Really it is the sexual honor of the wife or daughter that the Code protects, where honor emerges as her sexual integrity as virgin until marriage and then procreative sex with only her husband. Violations against sexual honor - that is, women having nonmarital sex - have the potential to upset the established structures of family and society. The types of crimes involving women in the code construct expectations for women, according to their social class, with ramifications for disobeying. The discursive formation of women, and how women experienced constraints and expectations, now came to include criminal law with the authority of scientific foundation.

One major aim of laws regulating women's sexual activity is to ensure legitimate offspring. This concern remains in the 1936 Code, as we see in Commission's discussions about adultery running the risk of "spurious children" (*Trabajos* 68).

In the early 20th century, however, an additional motivation for regulating women's sexual relations appears: to protect the biological fitness of the species. Lozano explains the criminalization of incest "indispensable," since not only does it "cause social alarm within current familial structures," but also for its "deplorable biological consequences for the species" (*Trabajos* 66). Lozano's comment reflects Colombian elites' growing attitude that the family was a site of both biological and social reproduction. Colombian medical and legal elites (as elsewhere in Latin America) promoted "maternal eugenics" to shape mothers into forces for health and morality in their families through hygiene and moral education programs (Agudelo



González 95, Stepan 121). Women's sexual dishonor was seen as dangerous to the moral formation of her children, and ultimately a threat to a well-ordered society. The legal positivists may claim to avoid morality as they are drafting the Code, but they insert current moral views on women's sexual honor in the Code and bolster them as pithily concerned with biological health of society. "Among the obligations in which the State finds itself," Lozano states, "to regulate and guarantee sexual roles, it is necessary to attend to certain norms imposed by the moral environment and by scientific learning" (*Trabajos* 66). Lozano affirms that morality and science can work together when it comes to regulating women's sexuality. The state's investment in protecting society means, for the jurists of the time, defending the family from the harm of women's sexual dishonor.

The jurists' discussion of the crime of *rapto* shows how women are conceived of according to their family status and sexual experience. The crime of *rapto* describes "He who by means of moral or physical violence or deceitful maneuvers of any kind, seizes, extracts, or retains a woman, with the purpose of satisfying some erotic-sexual desire or of marrying her," outlining penalties according to further facts of the crime (*Proyecto* 92). *Rapto* is found in other Latin American criminal codes of the time. Kidnapping women with the intent of sexual violence, and to force marriage, was regarded a common occurrence until the 1960s. At the same time, some women used *rapto* as a form of elopement, knowing that their family would have to accept their marriage if they were away overnight with a boyfriend (Putnam, Chambers, and Caulfield 4). The Commission's discussion of *rapto* and its potential scenarios shows how women's social status depended on her family role and sexual experience.

Women are always located within a family unit in the 1936 Code; they are never seen as separable individuals from a family. The idea of a woman without family appears nearly inconceivable to Lozano, as he contemplates under what circumstances *rapto* would only harm the woman involved, and not also reflect negatively on her family. He concedes that "It is true that in the case of an older woman, completely free, and, moreover, without any family members, the consequences of the crime only fall on her" (*Trabajos* 54). But he deems this "an absolutely exceptional circumstance that cannot be taken as a kind of general configuration of the crime of *rapto*" (*Trabajos* 54). The typical scenario is so much that of a woman embedded in a family, that Lozano sees his reflection as more of a thought experiment than any kind of possible reality. Women are so much conceived as always belonging to a family, that it also appears logical that what women do, or what happens to them, bears on their family. Women and family are only separable in extreme and unlikely hypotheticals. And even in Lozano's pushing himself to think of a scenario where only an individual woman would suffer from her *rapto*, it is an older woman he imagines. Presumably it is more unlikely that a younger woman would escape some manner of family relations; either a younger woman would still be under the guardianship of father, or married. The only outlet from family, at least contemplated by the jurists, is the childless widow, an only child herself, past reproductive age. Until that point, a woman's actions, including being kidnapped with erotic motives, significantly affect her family. The understanding that women are always part of, and reflect on, a family is true for all sexual crimes involving women, as we will see with adultery and the fungibility of women in the crime of abortion.

That there is only a reduction of penalty if a woman consents to her *rapto*, rather than rendering it a null crime, further reinforces how the criminalization of *rapto* regards women as belonging to the family, and not properly to themselves. The first draft article for *rapto* that the

Commission discusses does not mention consent. There are penalty increases for the kidnapper's use of force, drugs, or false promises of marriage, which all denote the woman is with the kidnapper against her will. However, that the draft article does not explicitly mention consent leads the jurist Parmenio Cárdenas to raise the possibility that a woman may consent to her *rapto*, and inquires how the law can impose a sanction in such cases. He adds for emphasis that even a married woman or a minor may consent – highlighting profiles of women whose sexuality is particularly important to protect, who would be assumed to be most reserved with their sexuality.

Lozano, the legal scientist, admonishes Cárdenas, stating that “the contemplated hypothesis is of true *rapto*,” which ostensibly is generally recognized as a woman being taken against her will (*Trabajos* 322). Yet, more substantively, Lozano clarifies that the “the victim of the act is the husband,” not the woman (*Trabajos* 322). A woman's consent to leave or be taken does not alter that her family and her marriage are victims and have had their rights violated. Indeed, it is for this scientific reason that Lozano explains his reasoning for “placing this crime [of *rapto*] among those of the family, and not simply among those committed against liberty and sexual honor, and much less among individual crimes...because here the family is who suffers in their rights and moral reputation” (*Trabajos* 54). With the real harm of *rapto* falling on the family, it belongs as a crime against the family more than in any other category – and is farthest from being merely a crime against an individual. The final published article for *rapto* does reduce penalties in cases where the woman consents to being taken away. What a woman decides is largely immaterial, however. It is how her behavior bears on her family that is important. The woman and her body is not conceivable as an individual, as not bearing on her family.

In addition to always belonging to a family, women's other defining element is their degree of sexual experience. To determine the severity of crimes against the family and appropriate penalties, the jurists use the woman's sexual experience. For example, the penalty is reduced if the woman victim is returned unharmed, or forgiven if married, or diminished if a prostitute, for all sexual crimes against women and committed by women. In the eyes of the law, a woman's place in her family structure and her sexual experience are the relevant information about her; these two characteristics are also intertwined, with a presumption of certain kinds of sexual experience according to a woman's family status.

The classification of women according to sexual experience reveals some women are regarded as more precious and vulnerable than others, according to their sexual exposure and apparent role in the sexual economy. At the height of safeguarded sexuality are the minor and the married woman, with highest penalties for sexual transgressions committed by them (as in adultery) or against them (as in *rapto*). Minors are presumed to be virgins, because they are not yet married; and they are assumed to be innocent, unfamiliar with sex, since knowledge of sex – and experience of sex – is only appropriate for women after marrying, and then only with their husbands. Their innocence consequently engenders a precious naiveté. Young women simply do not know to suspect sexual danger, according to the jurists:

while a person of certain experience, already initiated in the meaning of relations, can measure the danger and seriousness of the kidnapper's act, and consequently, resist with greater vivacity and energy, an inexperienced and innocent person is not in the conditions to appreciate the consequences of her conduct in certain circumstances. (*Trabajos* 59).

In the idealizing gaze of the jurists, young women are still innocently unaware of sex and incapable of perceiving the danger of being kidnapped. They do not know that their abductors likely act from sexual motives, or that sexual violence is likely.

While a married woman is assumed to have sexual experience with her husband, she is still highly protected like the minor because her sexuality belongs to her husband. Both the case of a minor and a wife deserve high penalties, “since in that event, there is violation of various rights, and, very especially, of that which corresponds to marital sovereignty (*potestad marital*)” (*Trabajos* 59). Lozano adds that “this type of crime” is also “much more scandalous from the social point of view” (*Trabajos* 59). The social morality around women’s proper sexual relations is a type of harm – both to the family, who suffers shame and a damaged reputation, and to the society, whose morals, and the structures they support, have been offended or weakened. In contrast, the jurists clarify that “improper” women cannot cause as much damage to their families through their sexual transgressions.

Throughout the sexual crimes sections - crimes against liberty and sexual honor, and crimes against family - the code lessens the penalty by one-fourth to one-third when the woman victim is a prostitute (*meretriz*) or “public woman” (*mujer pública*). The *rapto* of a prostitute, for example, is treated as less serious because she is already sexually active outside her family. The jurists explain:

It has seemed indispensable, although many Codes ignore such an appreciation, to maintain in this section the attenuation that results from the kidnapped woman being a prostitute known as such...The element of dishonor and suspicion that lands on the victim cannot be set aside with *rapto*, even in the case of there not being dishonest abuses, properly said. A woman who does commerce with her body does not suffer such depreciation or damage to her reputation, and even being married, the injury to marital sovereignty appears insignificant, since even if the husband is completely a stranger to the woman’s bad conduct, and protests in an ongoing manner, his position is so clearly unfavorable, that he can no longer suffer a greater decline as a consequence of the *rapto*. (*Trabajos* 59).

In explaining why prostitutes’ aggressors receive lesser prison sentences, the Commission clearly demonstrate that a woman’s sexual life is her defining characteristic. According to the Commission, a prostitute has already damaged her reputation so severely that even her husband’s right to marital sovereignty can be violated no further.

Women whose violation receives higher penalties can be said to have greater protection from sexual crimes. Thus, there are some women, and some women’s bodies, who are valued more, and more protected, than others: the women who approach the ideal chaste daughter or wife, enmeshed in their families and with appropriate levels of sexual experience. Gutiérrez states this matter-of-factly in a *Revista Jurídica* article, explaining the higher penalties for sexual assault (*violencia carnal*) for virgins: “With respect to aggravating circumstances, it must be noted that the harm produced is greater for a woman who is a virgin or of irreproachable honesty than for a woman who is not, this is the reason justifying the aggravating circumstance” (“El nuevo” 168). In demarcating women into different classes, making a taxonomy based on family attachment and sexual experience, the 1936 code *codifies* the women in society.

In practice, indigenous, Afro-Colombian, and lower class women found it more difficult to establish their honor than *criollo* and upper class women. Scholarship on Colombian and other Latin American court cases shows that women of all races and classes participated in trials as plaintiffs and defendants, but the methods for determining a women’s honor varied depending on

her class position.<sup>4</sup> Class status also heavily correlated with racial identity, with indigenous and Afro-Colombian persons nearly invariably belonging to the lower classes and white *criollo* persons belonging to upper classes. For lower class women, neighborhood gossip established women's reputation in court: relatives and neighbors testified to the woman's sexual conduct and personality, noting whether she had illegitimate children, spent time with men, was demure and obedient, or loud and coquettish. In contrast, courts usually assumed upper class women were as honorable as their family's good name indicated, relying less on witnesses' detailed accounts of the woman's personal behavior. Despite the scrutiny, lower class women regularly brought cases to seek remedies and publicly affirm their honor.

In contrast to women, men are conceivable as distinct from a family structure. On the one hand, men's actions do not entail inevitable consequences for their families and society. (Although we will see how this is further scrutinized in debates over adultery and passionate homicide.) Men are also conceived of as victims of crimes, where women are instead instruments of violations of male and family honor. Finally, men's sexual experience is never a factor in determining penalties.

While *rapto* causes great damage to the family, the jurists leave it to the family to decide whether to bring charges – because the shame in making the kidnapping public may outweigh the benefits of prosecution. “It has been adopted without vacillation, with respect to this chapter, the system of complaint or accusation by private party...there is no doubt that in this case it is left to the aggravated persons to decide if silence and secrecy, or publicity of the process, is more favorable for the rights they are trying to protect” (*Trabajos* 60). Leaving the family to decide whether to prosecute – and effectively, the male head of the family – shows again how little the crime of *rapto* regards the woman involved. The criminalization of *rapto* truly seeks to protect the family unit, not the woman who undergoes kidnapping, perhaps sexual violence, and a consequent stain on her reputation. The harm to the family is largely the shame and offended rights over the woman's sexuality. Thoroughly absent, however, is any mention of the woman's potential physical or emotional suffering.

The Code categorizes women according to their sexual status to determine the extent of harm to the family, which creates and codifies different classes of women according to their sexual profile. In sum, criminalizing certain sexual transgressions protects the family by upholding the status quo of gendered power relations and sexual economy and by identifying, in law, the value of women through their loins, granting greater value and protections to chaste wives and daughters. Law, that is, puts in place structures that uphold the patriarchal family, and in contemporary terms, manages women as reproductive bodies for the sake of the family.

#### 2.4 Shifting authority from husbands to the state: criminalizing men's adultery to protect the home

Driven by the jurist Lozano, the 1936 Code reevaluates the crime of adultery, now with a scientific focus on the harm that it causes to the family and, ultimately, society. In studying adultery's negative impacts, Lozano finds men also culpable of adultery. It is clear that his reasoning for recognizing men, also, as adulterers lies in a scientific appreciation of harm to the

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<sup>4</sup> See the essays in *Honor, Status, and Law in Modern Latin America*, edited by Sueann Caulfield, Sarah C. Chambers, and Lara Putnam; and *Hidden Histories of Gender and State in Latin America*, edited by Elizabeth Dore and Maxine Molyneux, as well as Natalia María Gutiérrez Urquijo, “Los delitos de aborto e infanticidio en Antioquia, 1890-1930.”

family, and not from any logic or inclination of bringing greater parity between men and women. To the contrary, the scientific approach leads to more minute consideration of adultery that establishes gendered differences in adultery law. The most striking difference is that women's nonmarital sex always constitutes adultery, while the same sex acts only count as adultery for men if they occur inside the home or with a concubine. Men as well as women are now capable of committing the crime of adultery, but the understanding of adultery, the penalties, and mitigating factors will vary depending on whether the wife or husband engages in extramarital sex.

Lozano readily acknowledges that an adulterous husband is not equivalent to an adulterous wife. On the second day of exposition on adultery, following the discussion of women and adultery examined above, Lozano begins by affirming the lesser offense and impact of men's nonmarital excursions: "In accordance with universally admitted opinions, a husband's adultery has been considered in form much more limited and less grave, within the fundamental principle of attending to ethical and biological consequences and recognized morality" (*Trabajos* 68). As he runs through the issues that do not arise from a husband's infidelity, it is clear Lozano is at the same time listing the fallout from women's extramarital sex: "Adultery does not degrade their personality, does not run the risk of spurious children, or that is, **turbatio sanguinis**, and does not cause nearly any scandal in society" (*Trabajos* 68, bold in original). In contrast to women, men are not seen as reproductive bodies. Clearly, men are also capable of producing children through adulterous heterosexual copulation, and anytime a child is conceived, it is with male sperm. However, the conceptualization of reproduction and its stigma is attached to women, not men. Also unlike women, and echoing the workings of honor and women's sexuality that we will see in abortion and other crimes, men's adultery "does not bring either to the family or especially legitimate descendants, any dishonor whatsoever" (*Trabajos* 68). It would seem that, just as universally known is the lack of such problems arising from men's adultery, are these terrible consequences of women's adultery.

It is left, then, to Lozano to draw out the harm to home caused by a husband's infidelity, which other codes fail to recognize. "However," Lozano continues, "it has become necessary to repress in every case adultery committed on the premises of the domestic home," including adultery committed by husbands (*Trabajos* 68). An unfaithful husband may not degrade himself, raise uncertainty about legitimate heirs, cause social scandal or family dishonor, but, "In effect, a husband who has carnal access to a person distinct from his wife, in his/their own home, attempts very seriously against internal order and the morality of his home, makes conjugal relations bitter in an irreparable manner, and gives a shameful example to the offspring, who suffer in their education and moral sentiments" (*Trabajos* 68). Lozano depicts the husband as responsible for keeping order, including moral highness, in his home. Lozano makes clear that bringing nonmarital sex into the home violates the morality of the domestic order, establishing an understanding of what is proper to the home, and what belongs outside the domestic sphere.

On Lozano's argument, the man violates the boundary of the home, and also lines of morality that keep the domestic sphere supposedly pure and doing the child-nurturing, wife-being work that makes the family the basic cell of society. It appears confusing, perhaps, for the children, to see this blurring of boundaries. Whereas an adulterous wife brings dishonor on herself and her family and the trouble of legitimate offspring, an adulterous husband throws the internal order of the home into disarray. Men not only serve as moral pillars of their families, they also play a part in affective familial life. With the masculine compass lost, the wife is bitter and the children suffer; they need the husband/father maintaining, and punishing, any

transgressions against the family. His nonmarital sex in the home shows a disrespect or carelessness with those boundaries, such that their family - their domestic morality - is damaged.

The Commission agrees with Lozano's exposition on adultery, approving the articles mentioned above in addition to five others on adultery, for a total of seven (Articles 371-377). The Commission makes one significant modification in the final article, what will be Article 377, without any recorded discussion but that keeps in line with the idea of the wife's greater sexual obligation to her husband. From the original proposed article that reduced the prison sentence by two months to a year for the adulterous spouse if he or she had been legally separated or abandoned by the other (*Trabajos* 64), the final article keeps this same reduction in the case of the separated or abandoned adulterous wife, but adds that an adulterous husband separated from or abandoned by his wife will not be imposed with any sanction (*Trabajos* 324). In other words, a wife is still punishable for having nonmarital sex if her husband abandons her, but a husband is exempt from any penalty for his nonmarital sex if he was abandoned by his wife. While it is more equal for men to also be found capable of committing adultery, the Commission's view on the matter remains thoroughly patriarchal with the wife's greater obligations for sexual fidelity. Again, the Commission's driving concern is protecting the family, and not women except as symbolic keepers of a family's integrity.

At the same time, expanding the crime of adultery to include men brings men's sexual activity under state jurisdiction. Men are also subject to sexual norms for the benefit of family and society, albeit much less restrictive ones than exist for women. The state claims final authority over matters once left to traditional societal authorities. Male heads of household still retain great authority over their family and home, but the 1936 Code begins to establish the state as the greater power.

### C. Life, death, and sex: responding to women's sexual dishonor

#### 3.1 A new restriction on abortion: at the crux of sexual honor and life

The jurists' discussion of abortion reveals an attitude that women's crime is less worrisome if the crime is motivated by honor. Although the reformers significantly narrow abortion law in the 1936 Code, they pass over the issue of abortion with brief discussion and no recorded acknowledgment of having newly restricted conditions of clemency for abortion. While the 1890 Penal Code allowed for an exemption of penalty if the woman aborted her pregnancy for sake of honor or to save her health, the 1936 Code allows only the honor exemption. The brief discussion that exists in the minutes of the Commission's discussion of abortion focuses on women's honor. The reformers seem to adopt the new restriction without recognizing they are doing so.

Abortion is included in the section of crimes against life and personal integrity, which section begins with homicide and includes exposure and abandonment of children. The four articles concerning abortion in the 1936 Code correspond to the four articles criminalizing abortion in the 1890 code: the first article criminalizes abortion broadly, the second describes a penalty for any medical professionals assisting the abortion with the women's consent, the third provides for lighter dealing with women who abort in select exceptions, and the fourth condemns abortion caused against a woman's will.

Rafael Escallón, the jurist responsible (*ponente*) for drafting the articles for the section of crimes against life and personal integrity, proposes the articles concerning abortion for the rest of

the Commission to consider. His proposed articles leave out the health exception included in the 1890 code; it is never on the table to discuss. Instead, the proposed article reads as follows: "Art. 24. When the abortion has been caused to save the honor or hide the dishonor of the woman, her mother, descendant, adoptive daughter, or sister, the sanction may be liberally reduced and even dispensed with" (*Trabajos* 99). In other words, women may receive a lesser penalty if they abort their pregnancy to save their honor, or to save the honor of their female kin (her mother, etc.), since a dishonorable pregnancy would stain the reputation of all women in the family (Melo 111-112). The dishonor would be in having a child either out of wedlock (for an unmarried or widowed woman), or from someone other than one's husband (Gutiérrez Urquijo 167).<sup>5</sup> Since an extramarital pregnancy signified extramarital sex, the pregnancy marked women as "fallen" and shamed. The dishonor lay in having had illicit sex; whether the sex was consensual or forced was immaterial, as seen above in the *rapto* crime.

Lozano takes issue with Article 24, but only to object to the lax and generous nature of the article. "Doctor Lozano says that this law is very dangerous," the minutes report, "and would be like condoning impunity for the crime of abortion, since these infractions almost always take place to hide dishonor." (*Trabajos* 111). In Lozano's judgment, aborting for the sake of honor is so predominant that allowing such leeway for these cases is in effect allowing women to get away with the crime. Lozano is concerned with keeping the integrity of the crime - which for him will mean maintaining the criminality of women who abort and not letting them off so easily, even for the more accepted reason of aborting for honor's sake.

We may give one another knowing glances, attributing Lozano's narrow-mindedness that women by and large pursued abortions for honor's sake to his patriarchal views and milieu. Surely considerations other than honor also preoccupied women. At the very least, grave threats to their health that the 1890 law had acknowledged. Scholars of Latin American women's abortion experiences during the late 19<sup>th</sup> and early 20<sup>th</sup> century also show women avoided motherhood to earn a livelihood: lower class women who worked as servants, seamstresses, or factory workers defend their abortions as desperate measures to keep their employment (Ruggiero 153, Farnsworth-Alvear 202). An esteemed professor of Legal Medicine, writing in *Revista Jurídica* in 1934, laments that women regularly abort "to not increase the number of children, or with the pretext that the family is in dire economic state, or to hide the consequences of an illicit love" (Uribe Cualla 303). However, given that honor was the only mitigating circumstance a woman might appeal to, it is not surprising that women may have often described their abortions as endeavors to hide dishonor. Moreover, honor may have simply been the language available to describe offenses against women. Perhaps women in the 1930s would also have described sentiments similar to women today who contemplate abortion: a child as an economic burden; a pregnancy resulting from rape felt as ongoing trauma. At this time, however, given the conception of women, and the language available, honor is the lens for discussing women's sexual bodies.

At the same time, it is believable that women aborted pregnancies for honor's sake, considering the grave consequences "dishonorable" women faced. An extramarital pregnancy signified women had had extramarital sex, a taboo for which they faced social and physical death. For example, Natalia María Gutiérrez Urquijo's review of abortion and infanticide trials from 1890-1930 in Antioquia, Colombia finds women defend their actions out of fear their husbands, parents, or brothers would punish or kill them for having had illicit sex (167, 171 n.37,

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<sup>5</sup> Married women were suspected of extramarital pregnancy when they were separated from their husbands or under suspicion of having an affair.

174). Blanca Melo sums up the attitude towards women's sexual dishonor in paraphrasing the words of a Colombian judge reviewing a *rapto* case in 1908: "*mejor muerta que deshonrada*," meaning, "better dead than dishonored" (Melo 121). Likewise, Ruggiero finds Argentine court cases from this period also describe women seeking abortions to avoid "social death" and "civil excommunication" (150, 153). Single and widowed women were considered unmarriageable; married women feared their husbands would abandon or abuse them (Gutiérrez Urquijo 166-167). A Colombian jurist writing on abortion in *Revista Jurídica* in 1934 declares, "A raped woman, whatever her class, is to everyone else a dishonored woman" (Marriaga 286). He describes abortion in the case of rape as very reasonable, given the consequences of being marked as dishonorable: "I do not see, then, how it is strange that a woman in such a position turns to whatever method available, to avoid knowledge of an act [the rape] that will cause her to suffer, that will confront her the remaining days of her existence" (Marriaga 286). Once a woman lost her honor, she could not recover it (Melo 112); in the eyes of the law, a disgraced woman had nothing left to lose and so lacked any incentive to behave properly. The damage this narrative caused women is evident in court cases: cases collected testimony about the woman's moral conduct from family and neighbors to determine if she was "chaste and of good morals" (Gutiérrez Urquijo 163-165, Melo 111-112). If the woman showed "good morals," the court usually accepted her argument she aborted to preserve her honor. However, if the woman already had children out of wedlock, or a "loose" reputation, the court considered her already "fallen" and rejected that she had acted to save honor she did not possess (Melo 112, Ruggiero 153). This suggests that dishonorable women were scorned and vulnerable to further violence. This pattern reveals the high stakes of women's honorable reputation and illuminates why women would carry out abortions and infanticide rather than face a dishonorable status, and society and the law would treat honor-motivated women more leniently. Nevertheless, Lozano's comment that women mostly abort for honor's sake is incomplete; it is more honest to describe "honor" as the social exclusion and violence that disgraced women experience in patriarchal society.

While Lozano may be concerned with protecting fetal life, his more pressing concern appears to be upholding the scientific nature of the criminal code. Lozano's solution for revising the proposed Article 24 is to press for more precision in penalties, "that the best thing would be to reduce the penalty by a fourth" in place of the ambiguous phrasing of "the sanction may be liberally reduced" (*Trabajos* 218). He also transforms the unclear process of "dispensing with the penalty" to a procedurally-defined judicial pardon (*Trabajos* 218). Both of these alterations are in keeping with the rest of the code and with Italian legal positivism, which invoked graded penalties and judicial pardon. Judges are expected to follow established procedures for evaluating and assigning criminal responsibility and for translating this into prison time.

The minutes relate that "Approximately three months after the section was presented by Doctor ESCALLÓN to the revising Commission [the Penal Code Reform Commission], the Commission entered into debate and definitively approved the norms of this chapter" (*Trabajos* 217). The "final definitive form" of Article 24 allowed for a reduction of penalty by two-thirds, or judicial pardon, in the case of a woman aborting for the sake of honor (*Trabajos* 218).

Escallón is not actually present during the last abortion discussions due to his daughter's illness. The day after the last abortion discussion, Escallón continues to be away for "the grave illness of a family member" (*Trabajos* 219). Lozano and the other Penal Commission member, Parmenio Cárdenas, discuss infanticide.



Although abortion appears in the crime against life section, rather than crimes against sexual honor or the family, it still focuses on women's honor. This indicates that criminalizing abortion is as much about punishing women's sexual transgressions as it is about preserving fetal life.<sup>6</sup> Ruggiero has suggested that in Argentina, the honor exception served Argentina's nation-building project by converting a common crime, abortion, into an act preserving the moral order. Abortion cases "buil[t] the moral system necessary for modernity" by allowing abortion to be rendered acceptable when it upheld the moral order, and punished when judged a sign of antisocial depravity (the unmaternal woman). Argentina's "progress was linked to international perceptions," Ruggiero explains, and Argentine elites feared abortion and infanticide were "antisocial aberrations" (162). One Argentine jurist describes abortion and infanticide as "symptoms of morbid states" and "eruptions on the skin of the social body" (Ruggiero 162). Similarly, a Colombian professor of Legal Medicine warns against abortion as "it is easier to prevent a social disease than cure it, when it has acquired a certain virulence" (Uribe Cualla 302). The Colombian professor expresses a similar view to the one Ruggiero captures, that abortion is a stain on national reputation: "if it is not combated and sanctioned, [criminal abortion] will undermine our people [*raza*] and it will be a cause of perennial national disgrace" (Uribe Cualla 302). He links the social and biological threat of abortion to a threat to national development, describing abortion as a crime "against the nation, for contributing in such a glaring way to depopulation, and thereby racial degeneration" (303). Ruggiero concludes that, "Qualifying and mitigating a woman's guilt, making her in a sense 'not guilty'... was thus a large part of the legal and medical professionals' task of tutelage over the state's human capital, whose morality was so important to the stability and progress of society" (Ruggiero 150).

Abortion is the only crime in the Criminal Code that recognizes women's agency in defending their honor or that of their kin. As Putnam, Chambers and Caulfield note, women were limited by sexual honor discourse but also resourceful with it; there are cases that suggest women of all classes used the honor exception to claim a sense of agency and dignity (18). Nevertheless, the brief discussion about abortion reveals the jurists were hardly concerned with this crime. This becomes more evident in the next section, which analyzes the lengthy, heated debate over passionate homicide, men's killing of adulterous wives.

### 3.2 Passionate homicide: positivist interpretations of sexual honor and visions of law's role for modern Colombia, at odds

#### 3.2.1

During Lozano's disagreement with two other Commission members, Parmenio Cárdenas and Rafael Escallón, over exempting family members who kill female family members for having nonmarital sex, their differing perspectives on women, honor, and penal science, come to light. What the three jurists share, although they believe it entails opposed approaches to passionate homicide, is the view that criminal law plays a crucial role in advancing society.

Passionate homicide is the act of killing or injuring a wife or daughter caught in illicit sexual relations. Cárdenas proposes the following formulation for the 1936 Code:

when the homicide or injuries are committed by a spouse, father or mother, brother or sister, against a spouse, daughter or sister, of honest repute, who is surprised in illegitimate carnal access, or against the co-participant of the crime,

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<sup>6</sup> The honor exception also applied to infanticide cases in Latin American codes. Ruggiero observes that "the principle of honor was highly respected, sometimes even at the expense of life" (160).

or when, as a result of this offense and in a state of spontaneous rage or intense pain that it brings about, the homicide or injuries are committed, even if not in the moment of surprising them in carnal access (*Proyecto 20*).

This subcategory of homicide is included to note that it is a lesser crime, meriting lesser penalty, than other types of homicide. The final article published in the 1936 Code allows for reduction of prison time in passionate homicide cases by half to three-fourths, the possibility of judicial pardon, and even of being exempted from penal sanction.

Note that it seems the wife may kill her husband for surprising him in carnal relations (only in the home or with a concubine, logically, following the adultery law) and perhaps receive the lighter sanctions for passionate homicide. However, as the Commission debates the article and its leniency, they only contemplate cases where a husband kills his wife, and indicate that this is the current practice as regards this crime. Ultimately, women are still the marks of sexual honor and representatives for the family, and men still bear the responsibility for rectifying honor damaged.

While Cárdenas and Escallón are adamant about including a total exemption of penalty for passionate homicide, Lozano objects that this effectively condones murder. Lozano draws a distinction between circumstances of motive and the criminal act, and that the stance of the law must need be different accordingly. "There can be an excuse of provocation, but not authorization of death or homicide, and that for this reason he [Lozano] considers the article unacceptable in the form in which it is conceived" (*Trabajos 111*). Lozano, recall, raises the same objection to abortion (and elsewhere to assisted suicide). He accepts judicial pardon, but not outright exemption of penalty. "Even if there are noble motives," Lozano insists, "establishing judicial pardon is a very different from the idea of the law looking on with approving eyes" to the taking of a human life. According to Lozano, it is bad penal science to exempt penalty for a crime altogether, especially when there is the option of judicial pardon. While the wrongdoing is still recognized in a pardon, but forgiven, an exemption is tantamount to declaring there was no harm committed - perhaps even declaring approval of the act.

The jurists debate the legal science behind why passionate homicide merits a reduced penalty, as Lozano presses for including a judicial pardon instead of outright exemption. To reiterate, all the jurists agree that passionate homicide is a lesser crime than standard homicide, and deserves less prison time; but they disagree over whether to also include a pardon (which admits criminality) or exemption (effectively declaring the passionate homicide was not a crime). Lozano argues that passionate homicide merits a reduced penalty because in a cuckolded husband's perturbed state, the husband acts unlike his usual self, so is less dangerous than the cold-blooded criminal, "who goes to the crime with the tranquil regularity that a professional applies to his job" (*Trabajos 211*). Cárdenas objects that the reason for reduced penalty, judicial pardon, and exemption from the crime of passionate homicide is based on the nobility of motive, of defending honor, not the husband's perturbed state. Their views of the crime read back into their evaluation of to what degree the circumstances are mitigating or not. Escallón is more practical than scientific on the matter, responding "that the mentality of the Colombian people is this way and that no court in the country has condemned a man when it deals with an event of this nature" (*Trabajos 111*).

As Lozano appeals to the positivist school in putting forth objections, Cárdenas counters that not only the nobility of motive provides for exemption, "but principally the consideration that it is about the defense of honor, which is worth more than life itself and much more than defense of property. Life without honor is worth nothing" (*Trabajos 213*). He believes Lozano is

following the outmoded classical school, not the positivist, in focusing on the perturbed mental state. Perturbed mental state treads dangerously close to the questions of free will that positivists have discarded, he claims. The positivist school puts aside questions of perturbation and only considers the driving motives, he argues, which is the basis for exemption (*Trabajos* 209). Claiming the mantle of positivist principles for his own position, Cárdenas explains that reacting to an offense against honor is an exercise of a legitimate right and perturbation does not enter into it (*Trabajos* 213). Cárdenas declares, "The only important thing is to carefully determine that it concerns an individual that has proceeded from noble motives and does not present any danger" (*Trabajos* 213). Far from being dangerous, Cárdenas claims the man committing passionate homicide is acting in the right and upholding honor - the most important value in society, in his estimation: "As much as if not more is defense of honor worth, than life itself" (*Trabajos* 209).<sup>7</sup>

Indeed, Cárdenas, declaring himself "partial to the formulation of the fascist Italian code," follows their example and would extend the article on passionate homicide to exempt not only the person who is offended by the woman's carnal acts in the moment of surprising them, but also exempting a person (possibly distinct from the original discovery) who suffers intense pain from the offense and kills or injures the woman and her consort at a later time (*Trabajos* 206-207). Thus, a husband who kills his wife after hearing about her adulterous behavior from a neighbor would be committing a passionate homicide. Cárdenas is sympathetic to, as he phrases it, "homicide committed in defense of honor or the family" (*Trabajos* 208).

Cárdenas and Escallón are unpersuaded by Lozano's ongoing arguments. Lozano cites an eminent Italian jurist, Garófalo, on the scientific incoherency of exempting husbands who murder their adulterous wives, and notes that while there must be a high incidence of adultery in society, there are only one or two cases of passionate homicide a year - not every husband seems to have the need to kill an unfaithful wife (*Trabajos* 213). Even Lozano's attempt to appeal to their logic of honor is unconvincing. And what of other crimes that are "susceptible to exacerbating the spirit to the same degree" as adultery, Lozano asks, such as "injuries to the honor of the mother, being spit (*salivazos*) at in the face, defamatory cartoons, cases in which no one has proposed an exemption of penalty?" (*Trabajos* 213). Despite Lozano's arguments against, the article is passed, two against one, and included in the final draft sent to Congress for approval. Congress ultimately approves. The 1936 Penal Code includes Cárdenas' expansion of passionate homicide as not only killing a wife or daughter in the moment of catching them in illicit sex, but also as another family member killing the wife or daughter at a later time, having been so affected by their female kin's crime.

### 3.2.2

For Lozano, the forgiving and even celebratory attitude towards passionate homicide is evidence of Colombia's lingering favor of outmoded sentiments and its resistance to modern knowledge. Lozano paints passionate homicide as anchoring Colombia in an undesirable, premodern past, as an act that persists as "a consequence of the prejudices rooted in the Colombian environment, where a multitude of feudal notions exist, incompatible with the state

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<sup>7</sup> Indeed, the perspective of an act like passionate homicide is precisely that honor is worth more than life. It could be said that this perspective is shared among women who ostensibly abort fetal life in order to preserve their honor. However, as discussed above, honor was so important to women because dishonor meant social exile and potential violence. Thus, Cardenas' declaration that honor has equal value to life, if not in fact greater value, does describe the situation of women, for whom social life and livelihood may be ended, if found to be dishonorable.

of ideas and culture in the 20th century" (*Trabajos* 209). The Colombian environment must change, eliminating its "feudal notions" that keep Colombia outside of modern time, behind the erudite nations. Ultimately, Colombia's passage to modernity is at stake for Lozano in the code's handling of passionate homicide. Were the code to dismiss the criminality of passionate homicide, it would affirm unsophisticated beliefs and practices in Colombia and block the country from achieving modernity. Lozano's arguments against lenient treatment for passionate homicide rest on what we can identify as two critical qualifications of a modern society, that the lenient treatment of passionate homicide contravenes: the greater equality between men and women and the scientific integrity of the criminal code. Although Lozano sincerely protests women's injustices, and evinces a didactic passion in extending discussions to debate the finer points of positivism, ultimately, it becomes clear that women's equality and positivist science are for him a means to the end of establishing Colombia as a peer of the modern nations.

Pointing out that women's civil and political equality is a measure of a country's modernity, Lozano attacks passionate homicide for holding Colombia in a premodern state in which the state and society condone women's subjection to men. He argues that passionate homicide is a dividing line between premodern and modern countries: "among modern societies, that only repress adultery with light penalties, that have established divorce, that have emancipated woman, that tend to admit her in all the highest offices of social life, that have assured her autonomy and independence, the system" of condoning passionate homicide "turns out to be truly unjustifiable" (*Trabajos* 209-210). When modern societies are granting women increasing civil and political rights, as Lozano lists, the approved killing of adulterous women appears a retrograde and "unjustifiable" law.

Lozano's position concurs with that of the Italian jurist Garófalo, whom Lozano quotes to reinforce the threat of passionate homicide to women's equality and the modernization of Colombia. Speaking of no country in particular, Garófalo writes passionate homicide "is, without a doubt, fruit of medieval traditions, a time in which the husband's authority was limitless and woman was considered his personal property; it represents a lesser degree of evolution, since the idea of woman's inferior condition has greater roots there where society is less civilized; and within an age, it appears more active in the countryside than in the cities, and in the lower classes than the upper" (*Trabajos* 212). Garófalo recognizes "premodern" and "modern" ideas may exist simultaneously in a society and characterizes women's equality as a marker of civilization. Like Garófalo, who indicates the urban and upper class are more civilized, Lozano argues that the erudite in society must push for the highest level of civilization: "The mission of the sociologist, moralist, or leader, is precisely the contrary. To drive the advance of ideas, condemn prejudice and aberration, force progress, by all the means that are at his reach" (*Trabajos* 210). Lozano evinces a kind of evolutionary battle: if the erudite do not rule society with civilized ideas, than society will be mired in dismal, medieval times. In this way, the upper educated class stands in metonymically for society; and their particularity is elided in face of what their science and training deems to be the voice of society. Though Lozano can recognize that men, patriarchal men, make the laws, he asserts that it is society's interests, scientifically and carefully determined, for which he speaks, and that must prevail.

For Lozano, the other jurists' favorable attitude towards passionate homicide indicates the distance yet to travel for women's rights and Colombia reaching modernity. Modern societies are allowing divorce and women's suffrage, beginning to disentangle women from the world of their male kin and grant them greater autonomy through such civil and political rights. Viewing the killing of an adulterous woman with favor, or at least as non-criminal, is a signal of how deeply

the country disavows women's autonomy and independence and continues to view women through the traditional, patriarchal family. Lozano also evinces patriarchal views, as we have seen in his explication on *rapto* and women's adultery, but draws the line at homicide.

While there had been discussions of divorce and women's suffrage in Colombia, they had been poorly received. On multiple measures of women's equality, Lozano implies, Colombia is out of step with modern societies, in denying divorce, the vote, and reasonable adultery laws to women. Already, then, with strikes against Colombia as modern, as far as women's equality is concerned, the lenient treatment of passionate homicide further entrenches and reveals Colombia is far from a modern society. "The pertinent article in our current penal law, which the esteemed Escallón has again introduced into the proposal," Lozano says of the passionate homicide exemption article, "is unique in the world. And it represents one of the consequences of rooted prejudices in the Colombian context, where there exist a multitude of feudal notions, incompatible with the state of ideas and culture in the 20th century" (*Trabajos* 209). For Lozano, the presence of "feudal notions" are clearly negative, not only in and of themselves, but also because they entail that the modern will lose out. Especially frustrating for Lozano is how his fellow elite jurists, Cárdenas and Escallón, do not seem to truly believe in Colombia's potential, nor see what modern law and society actually consists in. Lozano sees Colombia at risk of isolating itself from modern societies, through showing its feudal colors in the proposed article allowing passionate homicide to be treated as not criminal.

As Lozano criticizes the double standard between men and women, he lays the foundations for the state as the necessary and only qualified arbiter of proper sexual behavior in the home. The sexist state of affairs encourages men to wield an immense level of authority - determining the life and death of adulterous women in his home - from an inappropriate basis of passions and entrenched, unexamined custom:

When one sees the case of husbands who meet no obligation whatsoever in the home, who give themselves over to all vices and concupiscences [lusts], whose ordinary state of living is adultery, and even concubinage outside the home, and who later attempt to exercise and do exercise this species of domestic magistracy that the law grants them, the mind is astounded to think to what extremes sentimentalism and prejudice lead, applied to the debate of a subject that requires objective serenity and the calm of a sociologist (*Trabajos* 210).

Lozano depicts the act of passionate homicide as a "domestic magistracy," where the husband administers law in his home, with the power to give life or death to disobedient or law-breaking female subjects. In framing the husband's authority as a magistracy, albeit granted by the law of the state, Lozano shows what must be taken away; the law must remain in state hands, not wielded by private individuals - especially as they are so often morally corrupt. Lozano depicts husbands as horrendously unqualified to exercise such "domestic magistracy" because of their own moral shortcomings in sexual behavior and neglect of the home. Lozano has pushed for criminalizing husbands' bad behavior throughout the debates, insisting on the moral and healthful effect of men's sexual acts on the home environment. According to Lozano, husbands fail as appropriate enforcers of women's sexual norms on multiple counts: they fail to recognize the damage they themselves commit to the domestic environment; they ought to be judged and punished for their own bad behavior; and they are motivated by "sentimentalism and prejudice," by unexamined emotion. In Lozano's eyes, husbands are often adulterous criminals and they often act from unexamined emotion, not reasoned deliberation.

The reasons that male "domestic magistracy" is inappropriate in a modern state also cement for Lozano why the state, through its criminal laws and legal apparatus, is the appropriate judge of sexual acts and the family. The sexist state of affairs is dangerous not only for men hypocritically holding women to a standard of sexual decency they flagrantly flout, but also more subtly for encouraging men to wield an inappropriate level of authority in a modern state. In this case, authority over life and death of their wives and other female kin. Lozano asserts, "The government of a civilized country should not tolerate the repetition of these savage scenes; the people believe that the law authorizes the killing of adulterers, which is not true, but for it to be known, it is necessary that they see there really is not impunity; up to the present, they have seen the contrary" (*Trabajos* 212). The public morality and expectations show themselves to be savage, unenlightened and undisciplined. Lozano fears not only that the state sends Colombians the wrong message, that killing adulterous women will be tolerated, but also that the state invalidates itself as civilized to admit "repetition of these savage scenes."

In his disdain for sexist sentimentalism and prejudice, Lozano presumes a rational calm of the scientifically trained. No longer are husband or other kin the ones to handle, much less judge and apply their own beliefs or apprehension of adulterous women's criminality. The place of evaluation of adultery and women's sexual (mis)behavior is with the sociologist, the person trained in scientific principles, who possesses the equanimity of the disinterested devotee to the scientific determination. The state is the one to regulate women's sexuality, displacing the uneducated, emotional husband, likely needing improvement himself. Lozano seems to wish everyone would be troubled by not knowing and living by what is rational. Where men are unqualified as judges in the domestic environment, the state is a reasonable judge.

We can see there is different affect based on relation to reason and knowledge, which for Lozano, leads to a basis for authority for administering crime and punishment. The law is a filter for emotion, which allows the juridical apparatus to be a bastion of reason.

Lozano explicitly recognizes men's domination of women through the construction of laws. The laws reflect men's ideology, the patriarchal structure, and reveal how men do not consider women as being like themselves. The exemption of passionate homicide as a crime is an extreme instance of men's dominance: "To give the husband the right to kill his wife, to the father to kill his daughter, to the brother to kill his sister, and not accept any mitigation whatsoever for the women who act under the same circumstances and induced by the same impulse, is to give a brutal homage to the abusive predominance that man exercises over all social activities, as free to make laws" (*Trabajos* 209). In failing to see women like themselves, possibly subject to the same motives as men, the male lawmakers produce incorrect laws. It is not man, not woman, that should rule, but science, state, wherever there is science and rationality.

Cárdenas and Escallón do not address Lozano's concern for women's greater equality. They rely on the Colombian "mentality" to dismiss any attempt to count passionate homicide as a crime as impractical. "The mentality of the Colombian people (*pueblo*) is this way," Escallón declares, portraying the approval of passionate homicide as a deeply ingrained characteristic, embedded in the Colombian fiber, dismissing the prospect of changing such a deeply ingrained trait and the Colombian people as hopeless. As evidence of the Colombian pro-passionate homicide character, Escallón adds "that no court in the country has condemned when it deals with an event of this nature" (*Trabajos* 111). Like Escallón, Cárdenas also points to the current widespread acceptance of passionate homicide in legal proceedings as evidence of the people's will on what the law should be. The law "must consign a system that the generality of public

opinion accepts, as is manifested in the frequent pardons" of passionate homicide (*Trabajos* 210).

It is important to note that only (privileged) men served as judges and on juries, and it is false to equate this small group with the Colombian people or representative of all of public opinion. Nevertheless, as the two jurists' comments reveal, the privileged group of men did in effect constitute the Colombian body politic, who were the only ones to have their voices systematically expressed in matters of government and state administration. In failing to address Lozano's arguments that women merit fairer treatment in a modern society, and in overlooking the common faults of husbands as Lozano depicts them, however, Escallón and Cárdenas reveal how little they appreciate how the constitution of the body of lawmakers - and enforcers, which in this case includes every husband, father, brother, and son - reinforces their own particular viewpoints of what law should be and how it should function in society. It does not enter Escallón and Cárdenas' minds to consider what women, of any class or position, might think of widespread pardons to men who kill their sexual taboo-breaking female kin.

Driving home the view of law that this approval of passionate homicide demands, Cárdenas introduces the view that "the law...should be a reflection of the social state," as an underlying justification for exempting passionate homicide as a crime (*Trabajos* 210). The law should uphold what people know and understand. Overall, while approving of the sentiments of passionate homicide themselves, Escallón and Cárdenas also argue in favor of passionate homicide's exemption from criminality on the basis that the Colombian people are stubborn or hopeless, entrenched in their ways.

Conforming positive law to public morality directly opposes Lozano's view that the laws' purpose is to mold society through ushering people towards (what he appreciates as) more modern principles. He takes umbrage at the static view of law that Cárdenas' position entails, mocking its inevitable logical conclusion that "When the social state is barbaric, primitive, and wild [*selvático*], your position would have it be respected and conserved" (*Trabajos* 210). For Lozano, a law that reflects society does it no good in advancing society past its current state. Lozano is more blunt assessing Colombia's current state. He paints a dire picture of Colombia's prospects through carrying out to its logical conclusion the idea of law as reflecting society. Again, at stake is Colombia's stagnation in a feudal temporality, mired in its worst conditions: "And transferring the system of Colombia, here where the social state is backwards, with ignorance, lack of hygiene, moral corruption, it [the current social state] would have to be conserved and maintained; that is, it would be necessary to prolong the Middle Ages without hope of a Renaissance" (*Trabajos* 210). For Lozano, Cárdenas' philosophy of law seems to promise only hopeless stagnation.

Lozano's goal for the Criminal Code is to bring a Renaissance to Colombia, to advance to a new, enlightened state. He wishes for Colombia a law like the Roman, the juridical evolution that brought Rome to the greatest heights of civilization. "The marvelous monument of juridical evolution that Roman Law represents, that from its primitive crudeness raised itself to the most exquisite, profound, and fair conceptions of Law, would be condemned at a single stroke" (*Trabajos* 210). Lozano is willing to force growing pains on the public, for their own sake and society's sake:

[I]n the proposed Code the legal responsibility of all who infringe the penal laws has been established, without distinguishing between normal and abnormal persons, a system that the majority of public opinion does not yet comprehend, but that is necessary to introduce, demonstrate, and defend, so that scientific

notions may arrive to their logical endpoint, that should not be the privilege of the few. (*Trabajos* 210).

Lozano maintains that laws should educate and transform the people, society, and the country. They can do this when based on science, by the learned, and applied for all.

Lozano's criticism pushes Cárdenas to give an account of how the laws will help Colombia to advance, if not according to Lozano's view of propelling progress from enacting laws. Cárdenas assents that Colombia is currently in a backwards state. He accepts that the laws should move Colombia from its current state. However, he develops an alternative view of advancement through laws that reflect the higher human spirit - decidedly the masculine power, as it turns out. Rather than accept Lozano's accusation that a passionate homicide exemption ultimately reflects society as hopeless, Cárdenas defends such laws as driven by hope and a wish for a better future.

Doctor Cárdenas adds that when he has said that the laws should faithfully reflect the social state of a determined historical moment, he did not mean that they should reflect ignorance, backwardness, lack of hygiene, or moral corruption, but rather a social state that demands, as is the case in Colombia, that this deplorable situation is modified and transformed. (*Trabajos* 213).

Our common humanity is found in our drive for a better life, Cárdenas argues. He illustrates this point with a romantic picture of the "most miserable wretch": "That same ignorant person, even within his state of darkness, cannot help but demand that he receives a better life" (*Trabajos* 213). Cárdenas asserts his position is not static, not leaving Colombia behind - it is noble and elevating, both the actual values and the yearning sentiments for improvement, as he describes them. These noble yearnings will move Colombia to a more advanced society.

Cárdenas' defense of passionate homicide displays a common move in dismissing women's rights: aligning the patriarchal act with universal, human values.

But as far as an instinct in life, with regard to the sentiments of love and affection that surge from a person as a natural fact, whether speaking of an advanced society or one with little culture, there is a need to respect them [these sentiments], and precisely one of the ways of doing so, consists in incorporating them into legislative precepts. And putting aside the sometimes exaggerated opinions of the essayists in the positivist school, in the whole of humanity it is recognized as a fact of social and moral character, that he who kills in legitimate defense of honor, cannot be subject to penalty, punishment, or sanction, in determined cases, and for the Colombian legislator to proceed that way does nothing other than attack the social conscience (*Trabajos* 214).

The masculine becomes universal and loses sight of its particularity, of the men who make the laws - men like Cárdenas. Lozano and Cárdenas both wish to impose the viewpoint of the lawmaking few on society, but Lozano asseverates these men will be rational scientists, while Cárdenas claims they are to represent basic human values. Their debate reveals a tension over the conceived role of male heads of household and its relation to defending society via modern law.

#### D. Conclusion

The 1936 Colombian Criminal Code shows increasing state interest in the family and a positivist doctrine of social defense. In the Commission's discussions about carnal access and adultery, for example, the jurists enter into detailed explorations to arrive at precise definitions



and appropriate penalties because they maintain that adultery is a threat to the family and therefore, to society. Likewise, the Commission is assiduous in formulating women's sexual honor crimes according to positivist legal science: in the case of *raptó*, for example, the Commission carefully considers the different scenarios possible, establishes that the crime consists in the violation of husband and family rights, and sets penalties based on the degree of harm done to these rights. As the Commission deliberates positivist formulations of women's sexual honor crimes, it reinforces the predominant view that women's sexual honor is women's most important characteristic.

In the 1930s, abortion was regarded like other women's sexual honor crimes, in that what mattered most of all was whether a woman was honorable and upholding norms of sexual propriety. The Commission gives little attention to abortion except for Lozano's insistence that honor-motivated abortions receive a judicial pardon instead of an exemption of crime, which he declares necessary for the code's scientific integrity.

Scholarship has largely found that Latin American women's legal and social status changed little during the late 19<sup>th</sup> and 20<sup>th</sup> centuries, even as liberal states increasingly assumed authority over domestic matters previously administered by the Catholic Church. Although liberal states asserted legal and administrative control over the family (keeping vital records, arbitrating disputes), they relied on male heads of household to maintain order in the domestic sphere. Women's sexual honor continued to be fundamental to their legal and social status.

This chapter adds complexity to the above account of the Latin American liberal state and family. A close reading of the Commission's discussions about sexual crimes shows the state beginning to encroach on male authority. The Commission scrutinizes men's sexual behavior in introducing the crimes of male adultery and homosexual carnal access. The passionate homicide debate, in particular, reveals the tensions among jurists about the boundaries of state and male authority. It is the issue of passionate homicide – whether men's killing sexually improper wives and daughters will be deemed a crime in all instances, or (at the judge's discretion) exempt and its criminality dismissed - where the jurists voice frustrations, despair, aspirations, and complex visions for modern Colombian law. In the course of their debate, the jurists invoke legal positivism to argue their side. They ultimately attempt to persuade one another by linking passionate homicide's legal treatment to Colombia's modernity. Lozano argues a lenient treatment sets Colombia apart from other modern nations and delays Colombia's advancement. Cárdenas responds that values such as honor are crucial to improving society. Thus, we see how high the stakes become when men's authority over women's sexual conduct is at issue. Although Cárdenas "wins," the debate exposes tensions over the state encroaching on men's authority over women.

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## Ch.2 "Population Discourse, Family Planning Policies, and Development in Colombia, 1960-1969"

Over the course of a few short years in the 1960s, Colombia seemingly transformed from a traditional, staunchly Catholic country to a modernizing country at the forefront of research and action on what many leaders and experts worldwide considered a grave threat to humanity: rapid population growth. Scientific experts in medicine, demography, agriculture, and sociology, across multiple countries characterized rapid population growth as a serious, global problem and brought it to public attention. Political and non-profit leaders championed the message and helped make the population "crisis" visible, using their powerful positions to make speeches and support funding for population initiatives. National governments, scientific experts, private foundations, and non-governmental organizations joined together to advance population research and implement family planning policies. The Catholic Church debated family planning extensively, from the highest level at the Vatican to parish priests and lay Catholics. Until 1968, the Church appeared open to supporting some forms of artificial contraception, such as progestin-only pills; but the 1968 *Humane Vitae* papal encyclical counseled against all forms of artificial contraception. Beyond theological concerns, many Latin American Catholics, along with nationalists across the political spectrum, criticized family planning as a US imperialist plot to reduce the numbers of Latin Americans.

Despite concerns about the Colombian Catholic Church's reaction, in 1966 Colombian President Carlos Lleras Restrepo implemented the country's first family planning policy, which funded family planning training for 1200 physicians. In 1969, Colombia became the first country in South America to incorporate a population policy of lowering fertility into its national development plan. Population leaders and experts in the late 1960s and since characterize Colombia as an unexpected success for having developed family planning policies in a highly Catholic context. For example, two highly respected population researchers active since the 1960s remark, "The Colombian case is such an outstanding success story that imagining a better scenario is hard" (Measham and López-Escobar 133).

This chapter studies how a transnational discourse on population fueled the formulation of two Colombian family planning policies during the 1960s. Political leaders and experts concerned with overpopulation participated in and constructed a discourse that erected rapid population growth as a problem requiring swift intervention. The chapter unpacks the tenets of population discourse to show how the discourse assumed a divide between "developed" and "developing" countries, where developing countries needed to curb their fertility for the sake of their own modernization and international peace. In Colombia, the Division of Population Studies (DEP) at the Colombian Association of Medical Schools (ASCOFAME) participated in and contributed to population discourse and shared in its tenets. Through conducting scientific studies establishing a high fertility rate and Colombians' desire for family planning methods, DEP motivated and legitimated government family planning policies. Moreover, DEP became a key policy partner, appointed to carry out policy actions (training physicians in family planning) and informally advising the government on policy drafts.

At the same time that population discourse provided a rationale for Colombian family planning policies, studying the 1966 policy and the backlash it received shows the government distanced itself from population discourse. In a close reading of 1967 Senate hearings on Colombia's approach to population matters, I show how the government aligned itself with Catholic Church philosophy to defend its 1966 policy and general interest in population.

However, across both population discourse and the government's stance during the hearings, abortion figures prominently. Both population discourse and the Catholic Church-friendly government position justify family planning policies as a way to decrease high abortion rates. Although abortion clearly decreases births, virtually all thought abortions should not be a common family planning method. In this way, we see how abortion became a linchpin of the state's family planning policies. Population discourse upheld that fewer births via family planning was key to modernizing developing countries; those against family planning believed Colombia could achieve social and economic development via other policy actions. Both these positions were more or less able to coexist and support family planning policies by focusing on abortion prevention.

In contrast to the previous chapter's focus on the production of law via criminal code, or following chapters' concerns with constitution or constitutional decision, this chapter focuses on a two policies that appeared during 1966-1969. Policies are sets of guidelines and rules that a government sets out to pursue a specific goal. Policies differ from laws in that the former are not subject to the legislative process. I focus on policies here because they were a turning point in a history of major reproductive moments in Colombia. The emphasis is on the environment and discourses of knowledge production and how they stimulated the Colombian government to adopt family planning into national policy. The nature of these actions as policies reflects both the extremely sensitive nature of the topic in Colombia at this time, which was handled more quietly than legislation or judicial decision through policy actions; as well as the nature of the interventions, which, in accordance with their knowledge formation, were regarded as public health initiatives, led by the knowledge of the medical doctors and researchers, which needed government support to be disseminated. Thus, the chapter studies how transnational pressures and knowledge discourses about development and population created conditions for the emergence of family planning policies, in particular the 1966 agreement to fund the training of hospital physicians in family planning; and the incorporation of population concern/family planning into the 1969 national development plan. The policies represent progression from minimal support for family planning to its incorporation into the national agenda and reflect the entrenchment of population and development ideas in government planning/modernity over this period of time.

To develop a sense of the transnational population and development discourse at this time, the chapter studies a range of primary documents from Colombia, the United States, and the United Nations, published in Spanish and English. These documents include articles from demography and population journals; proceedings of population and development conferences; writings of Colombian academics in medical demography; speeches from Colombian and U.S. presidents; U.S. Senate and Colombian Senate sessions; and speeches from the United Nations and private U.S. foundations.

Five primary sources merit special mention. First, former Colombian president Alberto Lleras Camargo's speech opening the 1965 Pan-American Assembly on Population in Cali, Colombia. The 1965 Cali conference was the first Latin American conference on population; Lleras Camargo's participation brought great regional and international publicity to the conference and population matters (Stycos *Ideology* 146-149). A second crucial source is the published volume of papers from the 1965 International Conference on Family Planning in Geneva, Switzerland. This conference was the first international conference on family planning. It was attended by over 200 professionals from many fields and thirty-six countries "on every continent" (Berelson vii). The quantity and quality of papers would indicate the conference

achieved its goal of "spreading information about family planning programs from one geographic area to another and from one specialization to another" (Berelson viii). A third key source are articles and monographs by Hernán Mendoza Hoyos, the director of Colombia's Division of Population Studies from 1965 until his death in 1968. Finally, the fourth and fifth key sources are US and Colombian Senate sessions: the 1965-1968 US Senate Sessions on the "Population Crisis" led by Alaskan Senator Ernest Gruening, during which 120 experts and political leaders from a number of countries testified on the problem of overpopulation. As a result of the hearings, the US Congress approved aid to fund family planning programs in developing countries. The February 1967 Colombian Senate hearings interrogate the administration's orientation towards population and family planning. While airing Conservative Senators' objections, the hearings otherwise had little impact. Together with other sources, these five sources represent population crisis discourse during 1960-1969. From studying these sources, I have identified lines of argument and concerns representative of population discourse.

The chapter is organized into five sections. The first section defines population discourse and describes the Colombian setting and actors involved in 1960s family planning policies. The second and third sections unpack population discourse, identifying first the story of how population became a "crisis," and then the stakes of increasing population - a stretching of resources that would foment civil unrest and hamper saving capital for economic development. The stakes of increasing population most clearly signal how lowered fertility is tied to being a modern country. The fourth section considers abortion as it appears in population discourse, noting the value population leaders and experts placed on new methodologies and how they interpreted abortion studies as revealing women's "felt need" for family planning. The fifth section turns to the two Colombian policies, presenting each policy, summarizing backlash following the 1966 policy, and conducting a close reading of the 1967 Senate hearings on population approaches. Overall, the chapter shows how 1960s Colombian family planning policies emerged from a transnational population discourse centered on fertility reduction as the pathway to social and economic development. Yet, when challenged, the government distanced itself from population discourse arguments to emphasize thoughtful family planning that would decrease abortions. The shared commitment to reducing abortions paved the way for Colombia's policy success in family planning.

#### A. Population discourse and the Colombian population context

I use the term "population discourse" to describe discourse concerned with population growth based on scientific assessments of how population growth rates would affect economic and social development, especially in "developing" countries. Population discourse began in the 1950s postwar era and was firmly established as a leading knowledge worldwide during the 1960s. This is evidenced by the worldwide explosion of writings, conferences, training programs, aid programs, policies and laws during the 1960s on assessing population growth, predicting its impact, and developing initiatives to slow rapid growth. Population discourse developed in and circulated through a range of national and international institutions: national governments, universities, medical associations, and public health non-profit organizations; as well as U.S. philanthropic foundations such as the Ford Foundation; international non-profit research organizations like the Population Council; and the United Nations. Participants in population discourse included politicians, technocrats at government agencies, physicians, demographers, sociologists, and non-profit and philanthropic staff, among others. I will refer to

this group as "population leaders and experts" in the chapter to emphasize the great number who are political leaders or trained specialists.

As elaborated below, participants in 1960s population discourse recommended lowering fertility as the best solution to what they called the population "crisis". Population leaders and experts were excited at recent technological advances in contraceptives, especially the long-acting intrauterine device (IUD) and new forms of birth control pills. Widespread family planning, defined as the ability of parents to control the timing and spacing of having children, seemed within reach. Those concerned with overpopulation became avid proponents of national-scale family planning programs.

In Colombia, population policies and family planning programs were the product of partnerships across multiple entities: the Colombian government; the Colombian Association of Medical Schools (ASCOFAME) and its Division of Population Studies (DEP); PROFAMILIA (an affiliate of the International Planned Parenthood Federation); the Ford Foundation; and the Population Council. ASCOFAME and the Ford Foundation were early partners in stimulating Colombian population research. In May 1964, ASCOFAME and the Ford Foundation co-sponsored a conference "for the study of Colombian demographic problems" that "was most successful": "leading universities from throughout the country, the Ministry of Health, the National Planning Office, the National Department of Statistics, as well as several private institutions of higher education and research were represented" (Delgado, "Latin" 251). At this meeting, ASCOFAME founded the Division for Population Studies (*División de Estudios de la Población*). The Division of Population Studies (DEP) began conducting research in fertility, family planning, abortion, and socio-demography in January 1965 under the leadership of Hernán Mendoza Hoyos, a physician (Mendoza "The Colombian Program" 827). In addition to research activities, DEP also arranged for Colombian professionals to receive training in "demography, family planning, communications, physiology of reproduction, and other fields" abroad and organized twice-yearly demography seminars in Colombia (Delgado, "Latin" 252, Mendoza "The Colombian Program" 827-8). Mendoza was by all accounts a formidable advocate for family planning policies as a response to Colombia's accelerating population growth (Ott 3, Measham and Lopez-Escobar 125).

1965 also saw the founding of PROFAMILIA, an affiliate of the International Planned Parenthood Federation led by two Colombian physicians who hoped to make contraceptives (especially the IUD) available to women of lesser means and in rural areas. PROFAMILIA clinics dramatically increased women's health services in the country; the non-profit "quickly became the most outstanding IPPF affiliate and a recognized pioneer in the delivery of community-based family planning services" (Measham and Lopez-Escobar 124).<sup>8</sup> DEP and PROFAMILIA operated independently but shared a broad mission of increasing Colombians' family planning knowledge and contraceptive use. DEP focused on research and training Colombian professionals, while PROFAMILIA provided family planning services to Colombian women. Both organizations also developed family planning educational materials and promoted family planning media coverage in press, radio, and television. With dedicated leaders and international funding, DEP and PROFAMILIA helped transform the Colombian family planning landscape during 1965-1969.

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<sup>8</sup> PROFAMILIA has continued to be a transformative service provider in Colombia since its founding. Writing in 1987, one scholar concludes, "Profamilia has surpassed any private family planning association in Latin America in terms of the numbers of clients reached and program innovation" (Roper 340).

DEP and PROFAMILIA's activities encouraged a receptive Colombian government to develop family planning policies. President Carlos Lleras Restrepo (1966-1970) was an economist who entered the presidency already concerned with deleterious effects of population growth (Measham and Lopez-Escobar 124). Lleras Restrepo authorized his Minister of Health, Antonio Ordoñez Plaja, to work with DEP to develop the 1966 and 1969 family planning policies and to defend the government's involvement in family planning as the occasion arose. Although Lleras Restrepo and Ordoñez supported family planning policies, the Lleras Restrepo administration allowed DEP and PROFAMILIA to publicly advocate family planning - or in the words of some scholars, serve as "convenient lightning rods to deflect criticisms" (Measham and Lopez-Escobar 125, see also Ott 3).

Finally, international institutions, largely based in the US, were vital to DEP and PROFAMILIA's work. International institutions provided funding and training. Foreign "institutions collaborating with technical and financial aid" for Colombian demography and family planning research and services included the "Ford Foundation, Rockefeller Foundation, Milbank Memorial Fund, AID [U.S. Aid in Development], Population Council, International Planned Parenthood Federation, University of Chicago, Cornell University, University of California, University of Michigan, CELADE [the United Nations Center for Latin American Demography in Santiago, Chile], Columbia University, Universidad de Chile, and others" (Delgado, "Latin" 252).

An example of the collaboration among institutions and countries that characterized 1960s population discourse is the United Nations' "Declaration of Population," issued on Human Rights Day, December 10, 1966. The "Declaration of Population" consists of three short statements each recognizing the dangers of rapid population growth and urging action; altogether, the Declaration totals one page. In order, the statements are by United Nations Secretary General U Thant; twelve heads of state, including Colombian President Carlos Lleras Restrepo, the only Latin American signatory, and the heads of Finland, India, Korea, Malaysia, Morocco, Nepal, Singapore, Sweden, Tunisia, the United Arab Republic, and Yugoslavia; and John D. Rockefeller the 3rd, a U.S. philanthropist and Chairman of the Board of the Population Council. Rockefeller holds up the twelve heads of state as an example to emulate because they take the population crisis seriously: "These twelve national leaders, who have recognized the seriousness of this sensitive problem and are actively facing up to it, deserve our admiration and respect. I am convinced that the commitment of these leaders will give heart and encouragement to the many who are uncertain as to their course" (1). Rockefeller recognizes the heads of state as vital partners on population matters. The Declaration's show of unity, in statements like Rockefeller's and in the fact of its joint authorship, demonstrates the authors' conviction that population increase is an issue to confront together, that crosses national and organizational boundaries. A leading family planning researcher of the time, J.M. Stycos, called the Declaration "[p]erhaps the most remarkable document of the century" for bringing together motley parties to assert population increase was a serious matter for all the world over ("Prospects" 277).

The following section identifies tenets of population discourse. Section "B" relates the story of how population became a "crisis," which also constructs a divide between "developed" and "developing" countries. Section "C" draws out the perceived stakes of population growth that render increased population into a "crisis." Participants in population discourse counsel urgent intervention to evade accelerating population growth's (expected) dire consequences.

## B. Origins of the population "crisis": diminished death and abundant life



## 2.1 Science and aid lowers mortality in developing countries

I begin with former Colombian president Alberto Lleras Camargo's speech because it is a key document of population discourse, especially in Latin America. As a well-respected former president, Lleras Camargo helped legitimize family planning as a response to accelerating population growth in Colombia (Stycos *Ideology* 146). In the opening speech at the 1965 Pan-American Assembly on Population, held in Cali, Colombia, on August 11, 1965, former Colombian president Alberto Lleras Camargo succinctly explained the challenge of population: "The problem of our time resides, simplified, in that we have boldly and effectively reduced the source of mortality, and there is no capacity to control that of life" (Lleras 611). The origin of the population crisis in his account is the decline in mortality rates, with greatest declines in developing countries. Fewer people were dying than had ever been the case, and at the same time, people were having the same number of children, at least in developing countries. The same number of births with many fewer deaths meant developing countries, including Colombia, were experiencing rapid population growth.

Lleras Camargo attributes the dramatic drop in mortality to the technological advances of Western science against common diseases and the dissemination of this science in developing countries. Lleras' speech portrays science as penetrating to all corners of the earth to deliver "behind" countries from a plight of disease: "In this way it was possible to combat in the great tropical band of land, and in all the behind countries, a galaxy of illnesses that alone, or combined with one another, kept life expectancy very low in the underdeveloped countries" (Lleras 611-1). Developing countries appear as under the yoke of innumerable illnesses such that life there is diminished and only external intervention can disrupt the tyranny of disease. Lleras articulates how diseased developing countries required external assistance to improve their people's lives more explicitly a few lines later:

But the introduction of extremely effective chemical methods to combat illnesses or their vectors, created an extremely novel situation. These methods were cheap and the international team placed took up the charge of spreading them to those places where if it were up to indigenous peoples, they would never have arrived. (Lleras 611).

Lleras credits the perseverance of an "international team," even in the face of unwilling or disinterested peoples, to having reduced disease using scientific weapons. Lleras' statement is representative of a common tenet in population crisis discourse, namely, that international science brought less death to even the most remote populations of the developing world.

In the U.S. also, science was perceived as the explanation for lowered mortality in Latin American developing countries. The two representative quotes I share here also emphasize the role of external funding in disseminating scientific advancements in Latin America. In a 1966 U.S. Senate session on the global population crisis, John Hopkins University biology professor William McElroy<sup>9</sup> highlights the science-aid relationship in reducing mortality: "But now, thanks to the beneficence of science and the financial assistance of wealthier nations, death rates in the underdeveloped countries are declining precipitously...In many countries of Latin America, for example, the death rate has plummeted about 50 percent in the last 30 years"

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<sup>9</sup> McElroy also joined the President's Science Advisory Committee in 1962.

(S.1676 (5) Exhibit 142 McElroy 1963 p.962)<sup>10</sup>. In declaring "thanks" to science and aid while not acknowledging any developing countries' contributions, McElroy depicts "underdeveloped" countries as passive recipients of the goodwill and abundant resources of the better-off nations.

In contrast, Leona Baumgartner, a physician and high official at USAID from 1962-1965, recognizes the Brazilian government was as active as the U.S.-based Rockefeller Foundation in eradicating malaria from Brazil during the 1930s. Baumgartner raises the malaria example in a paper for the 1965 International Conference on Family Planning Programs in Geneva, Switzerland; she suggests that spreading family planning in developing countries is a challenge akin to eradicating malaria in Brazil. In the paper, Baumgartner describes scientific knowledge, technology, and funds aligning together to tackle malaria: "Experts knew what needed to be done. The technology was good enough. Opposition to action was tolerable...The [Brazilian] government and the Rockefeller Foundation joined skills and money to act" (288). Like McElroy, Baumgartner recognizes the partnership of science and funding in lowering mortality rates in Latin America. Unlike McElroy, Baumgartner acknowledges the developing country, Brazil in this case, played an active role in reducing illness and death. Considering the case more closely, however, it becomes evident that malarial research and eradication efforts in Brazil were initiated and led by the Rockefeller Foundation (Griffing et al. 704-707, Killeen et al. 620-622). It appears the Brazilian government's contribution was mostly authorizing Rockefeller Foundation-designed public health programs and co-funding the project. Thus, although Baumgartner recognizes the Brazilian government's role in reducing malarial deaths, to her audience familiar with the case, it would seem again the familiar narrative of an "international team" delivering scientific expertise to wrangle death.

Lleras Camargo, McElroy, and Baumgartner's statements express a foundational point of population discourse: increasing population growth was rooted in a decline in mortality, especially in developing countries. Developed countries were largely responsible for lowered mortality rates, since their scientific expertise and financial contributions sustained developing countries' public health campaigns combating common and lethal diseases.

The account above, that the population crisis begins as a result of lowered mortality achieved by developed countries' assistance to developing countries, constructs a binary between the developed West and the "underdeveloped" Global South. The divide between "developed" and "developing" or "underdeveloped" countries persists throughout population discourse. Lleras Camargo, as seen above, employs the categories of "industrialized nations" and "underdeveloped nations," as he calls them, to explain the population problem (611). The concepts of developed vs. developing nations had the effect of facilitating developed countries intervention in developing countries, and developing countries looking to developed countries for guidance, as well.

Science and aid had transformed death. Death had been, as Lleras Camargo observes, "master and lady of humankind" (611). Science, in conjunction with the funding to disseminate science, had changed death into a problem that researchers, governments, and donors could address and transform. However, the mortality decline raised problems about life for population leaders and experts. They were concerned that lowered mortality had caused rapidly accelerating population growth that would stretch national and global resources to an extent that human

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<sup>10</sup> All references cited in this manner (beginning with S.1676) are drawn from the entry noted in the Works cited page as "Hearings before the Subcommittee on Foreign Aid Expenditures of the Committee on Government Operations, United States Senate, 89<sup>th</sup> Congress, 1966."

quality of life would seriously decline. As we will see in the Section "C," science, donor aid, and government intervention are perceived as key elements for addressing the problem of "life," similar to how the problem of "death" had been handled. Before arriving to Section "C," however, the following subsection details how population discourse discussed fertility.

## 2.2 Poor parents need to realize demographic change and adjust accordingly

While people the world over generally celebrated the mortality decline, some political leaders and scientists became concerned with the consequences of greater numbers of people living and reproducing. Demographers warned of "exponential" population growth: the problem resided in the many children whose offspring would also survive and bear children of their own. This section identifies and interrogates the fixation in population discourse on the increased number of people living who previously would have died as children, and the recommendation to lower birth rates as a way of reducing the number of reproducers.

Population leaders and experts noted that lowered mortality translated to more children surviving past infancy to reproductive age with the consequence of greater numbers of people having children each generation. As Lleras Camargo explains in his 1965 Cali speech, science had "prolonged with the most humanitarian of aims the probability of living for those who before ended their time, before beginning or concluding their period of fecundity" (Lleras 611-1). Children who would have before died before having offspring - before "beginning or concluding their period of fecundity" - were now multiplying beyond themselves. That Lleras Camargo states the "aims" of lowering mortality had been "humanitarian," indicates he believes science did not flawlessly fulfill its humanitarian aims in reducing death - and that the result was actually troubling to humanity.

Baumgartner expresses an extremely similar view to Lleras Camargo, connecting lowered mortality to growing population because more children survive to reproduce children of their own. She explains that in the developing countries, "where substantially larger and larger proportions of children survive through their reproductive years, the increase of population becomes staggering" (Baumgartner 280). She continues with a more intimate rendering of this situation, personalizing survival-of-infancy-to-reproductive-age in the figure of an individual "girl baby": "As someone has recently written, 'the girl baby spared from death in early childhood contributes not only her own life to the world's people but the lives of the children she produces as she moves through her reproductive years, followed in turn by the lives of the children's children, and so on'" (Baumgartner 280). The quotation conveys an image of cascading offspring starting from the survival of one female infant. The image of cascading offspring raises the stakes of the girl's reproduction; every single number counts - counting not only the baby just born, but also the future offspring that this baby will add to the world during her reproductive years, for endless future generations. While population leaders and experts are by no means calling for a return to higher infant mortality rates, they explicitly desire fewer numbers of lives. It is also telling that this quotation focuses on the "girl baby" as the future reproducer when any children she bears will clearly also be offspring conceived with male sperm. This quote portrays girls and women, and their reproductive capacity, as the major problem of the population crisis. One could just as easily hope or call for men to ejaculate less, for the sake of the planet.

Population leaders and experts often placed responsibility of the population "crisis" on poor, uneducated, or rural parents that they describe as ignorant of the momentous drop in infant

mortality. Population leaders and experts agree that families must learn that more children are surviving. They assume that once families learn that more children survive into adulthood, they will desire fewer children. They describe families as ignorant of this fact. For example, in his 1965 essay, "600 Million Latin Americans in the Year 2000?" an international statistics expert at the U.S. Bureau of the Census, Calvert L. Dedrick warns,

Least of all, I fear, does the average young man in Latin America realize that the slow progress being made in economic and social development is, to a large degree, the result of demographic trends and characteristics of his people. Nor does he realize that the slow progress being made in economic and social development is, in a major way, related to the fact that he is "*muy macho*" and wants his wife to prove it by having many children. (54).

Dedrick suggests that Latin American men are ignorant of demographic trends and have many children because they highly value evidence of their virility. For Dedrick, "cultural" factors are responsible for Latin America's high birth rate, in addition to ignorance.

McElroy offers another reading of why people continue to have many children. He posits that the community may think that more babies are being born, rather than note that in fact, fewer infants are dying. As he reports in a UN speech, "A decline in infant mortality within the community may be viewed as an increase in births, with no appreciation of the fact that the death rate has been reduced" (S.1676 (5) Exhibit 142 McElroy 1963 p.976). McElroy describes these communities as believing themselves to be more fertile. If this were the case, it is possible the community could desire family planning methods simply because it believes it is more prolific. It may not be necessary to know that infant mortality has declined. Yet, Baumgartner insists, "It seems important for the family to realize that under present conditions more of its children can live to maturity" (Baumgartner 283). The researchers and leaders want families and communities to know that infant mortality has declined, even though the result of having more young children survive might be as motivating as learning that infant mortality has dropped, for turning to family planning methods.

While the desire to reduce number of children is important, researchers prod families towards a proper understanding about why families are growing larger, to encourage a rational procreator attitude. McElroy acknowledges changing people's reproductive behavior is a long-term project: "Since the decline in the death rate is not always quickly apparent, the realisation that it is no longer necessary to bear several children to have some survive may take considerable time" (S.1676 (5) Exhibit 142 McElroy 1963 p.976). Here, McElroy reveals the lowered death rate is not so obvious. Nevertheless, he indicates that knowing more children will survive past infancy can encourage families to plan their childbearing, to undertake it more deliberately, according to a calculus of family needs and resources.

Baumgartner, however, affirms that some rural populations are noticing the decline in infant mortality. She reports, "In many a remote village where infant mortality rates are coming down, the native intelligence of the people has already discovered this fact" (Baumgartner 283). Baumgartner's statement emphasizes the otherness of the populations she hopes to reach with family planning methods. Describing the villages as remote paints a picture of the people as rural, disconnected, and living in small, traditional communities. Her emphasis on the "native intelligence" names the knowledge of rural people as distinct from the knowledge that she and other science-based, Western researchers possess. Baumgartner immediately follows this statement with an anecdote about a U.S. public health worker prodding a Turkish farmer to admit the increased survival of children in his family:

Dr. Carl Taylor tells a delightful story of talking with a group of village men in a Turkish village. He went around asking the simple question of how many brothers and sisters each man had and how many had lived to maturity. Then he asked about the individual's own family. After only three or four men had replied, one of them spoke up and said, 'Don't bother any more, Doctor, we already know that today one doesn't have to have as many children as one had in the past in order to have sons and daughters in the field and in the house.' (Baumgartner 283).

Here is a scene of the Western, learned expert conducting a kind of lesson with the native population. He holds court with the "village men" and asks questions simple enough that he believes they can respond, based on their own immediate experience. In conducting a lesson in this way, he does not speak like a demographer, or using scientific language. He repeats this with the men until he is stopped. It seems Doctor Taylor would have continued with questioning all the men these basic questions if he had not been put to a halt by the villager who speaks up. This villager shows he is already wise to the Doctor's game, that the conclusion is obvious. Even though the villager's words are transmitted by Baumgartner, villagers show impatience with the Doctor's game and resist being treated as thick-headed. The anecdote reveals the population expert has underestimated the villagers. For Baumgartner, however, the story suggests that there is hope for rural populations to know and adjust their reproductive practices.

In his 1965 Cali speech, Lleras Camargo exhibits greater empathy than the population leaders and experts above. Although like them, he is concerned about the consequences of more children surviving to reproductive age, he also acknowledges the anguish over children lost to illness, once so commonly experienced in Latin America. Lleras Camargo names the abundance of illnesses that decimated children before the spread of scientific methods:

Some of them, usually affecting children, were actively lethal. It was in this way that they [scientific innovations] disappeared or lessened their seriousness, gastritis, enteritis, influenza, pneumonia, tetanus, sarampion...and who knows what other names that formed the terrible pathological cosmos of our childhood and held us in a constant state of mourning or upset. (Lleras 611-1).

In saying, "our childhood," he includes himself in a common Latin American experience of grief. Lleras acknowledges the sorrow and upheaval these illnesses caused and the deep extent to which they characterized life during the time when Lleras was a boy, and before.

Overall, population researchers and leaders are ambivalent and contradictory on the family planning desires of poor and rural communities, reporting that they desire fewer children, but also that they are ignorant about the need for fewer children and are apathetic in adopting family planning methods. Despite the example of the Turkish farmer, Baumgartner speaks of rural and poor populations overall as having a great deal of apathy and resistance towards family planning, or toward changing their practices around fertility. Speaking of the Turkish farmer anecdote, she concludes, "Stories like this contribute to the hope of success which many [family planning program] workers need - but, in fact, a constant search for the roots of apathy and resistance must be maintained. The early successes...may merely be 'skimming off the cream,' reaching the already convinced" (Baumgartner 283). It is clear that Baumgartner views developing countries as very different and the main locus of problems when it comes to population. Statements like Baumgartner's reveal views that poor and rural populations are ignorant and require instruction; that intervention would be beneficial.

C. Stakes. Why overpopulation is a problem: poverty, scarcity, unrest, waste.

This section describes the stakes of "overpopulation," according to population discourse. Population leaders and experts judged the stakes to be extremely high for two main reasons. First, they determined that overpopulation would engender political and social unrest. As the thinking went, overpopulation would create a scarcity of resources, leading to a volatile situation where needy masses would become discontent and cause havoc. Second, population leaders and experts expected developing countries to spend all their capital on meeting basic needs of their increasing populations, and thus would miss an opportunity to save and reinvest capital in national modernizing projects such as infrastructure or participate in the global market. The second reason is based on the linear model of development dominant at the time. This section discusses each reason in turn, showing how both portray all of humanity as hanging in the balance. Just as aberrant or disordered individuals pose a risk to the population to which they belong, population discourse regards a disordered nation as posing a risk to all nations. In this way, the population crisis discourse constructed a community of modern nations, through insisting that all countries' fates are bound up together. Population leaders and experts insisted that developing countries order themselves in such a way as to not detract from or harm the global community.

### 3.1 Fear of needy masses - scarcity is the seedbed of political and social unrest

Population experts and leaders worried about the implications of an exponentially increasing population. A frequently discussed concern was how such great numbers of people would be fed. In the "Declaration of Population," the United Nations Secretary General U Thant announces that food scarcity is likely to occur in the near future if the population continues to grow as predicted. He reports, "it is being increasingly realized that, over the two or three decades immediately ahead, when present world-wide efforts to raise food production will not have yielded the fullest results, the problem of growing food shortage cannot be solved without in many cases a simultaneous effort to moderate population growth" (1). The Secretary General indicates that despite best attempts, a global mission to increase food supply is failing. He makes a case for "moderating" population growth based on a concern that many people will go hungry if growth continues without any intervention.

U.S. expert testimony during the 1966 Senate sessions on providing family planning aid to Latin America reveals a belief that developing countries were already on the brink of food crisis. James Roosevelt, the eldest son of Franklin Delano and Eleanor Roosevelt, and then-U.S. ambassador to UNESCO, emphasizes the dire situation of developing countries vis-a-vis increasing food needs. He warns that developing countries are only scraping by: "In the developing regions as a whole, food production has barely [*sic*] kept pace with the population increase" (S.1676 (5) 1067, exhibit 148 by James Roosevelt). Roosevelt expresses a sense of weariness on behalf of developing countries, in Roosevelt's statement, at the implication that developing regions are "barely keeping pace" with the task of feeding their populations. Roosevelt portrays a situation in which developing countries must tirelessly devote themselves to meeting the food demands of their population. That countries must strive to provide sufficient food imparts a weariness that developing countries will be mired in meeting their population's food needs in perpetuity, an endless cycle of expending great effort to only barely fulfill this most important task.

Population experts forecast that developing countries will not even be able to maintain this dreary stasis, but instead will soon find themselves in freefall if population growth continues unchecked. Reporting from experts at the 1965 United Nations Conference on Population in Belgrade, Roosevelt informs his audience that "during the 1960's food production in the developing regions of the world had increased less rapidly than population, and thus per capita food output was actually declining" (S.1676 (5) 1067, exhibit 148 by James Roosevelt). According to this data, the problem of food scarcity is already encroaching in the current decade. "If the trend continues," Roosevelt warns, "the outlook is grim indeed and the threat of starvation in some countries is a very real one" (S.1676 (5) 1067, exhibit 148 by James Roosevelt). Roosevelt's gloomy prediction that developing countries will slide from just meeting food needs to a food deficit depicts these countries as teetering on the precipice of a steep and sudden decline. For the moment, developing countries may simply be stuck in a cycle of production and consumption, but soon, according to some population experts, like Roosevelt, these countries will be in truly terrible downfall.

Not all population leaders and experts were so bleak about the ability to feed a growing population. Thomas Mann, a US diplomat<sup>11</sup>, recommends humility before the question of whether food output can be sufficiently increased: "In speaking of the dimensions of the problem I do not wish to predict, like Malthus, that man is outgrowing his environment. Whether or not mankind will find it possible eventually to accommodate to soaring populations I do not pretend to know" (S.1676 (5) 1059, Exhibit 146, Mann, US Coordinator for Alliance for Progress, at Planned Parenthood Conference NYC 1964). In his 1965 Cali speech, Lleras Camargo likewise invokes the English clergyman Thomas Malthus (1766-1834). Lleras Camargo notes that Malthus, like today's population experts, predicted that the great population growth of the late 18th century was outpacing food production, and would lead to a great famine (5). However, Malthus' fears proved unfounded, given both improvements in food production and a lesser rate of population growth than predicted, due to developments such as the industrial revolution. Lleras Camargo finds a lesson in Malthus: while estimations of population growth and its negative effects must be taken seriously, there may be strategies to alter the situation (5). For Lleras Camargo, economic and social development in developing countries like Colombia is part of the solution to curbing population growth. Yet, even with his more positive outlook, Lleras Camargo insists that food production and other areas impacted by "population explosion" must be treated with the utmost importance (1).

Though ensuring sufficient food is the most pressing issue, population experts also warn that jobs, housing, education, and other items necessary for decent and productive human lives are similarly facing scarcity. Hernán Mendoza, Colombia's DEP director, reports, "Some data about the country's current situation allow us to conclude that certainly in Colombia, neither social institutions, nor resources of capital, can satisfy the demands geometrically imposed by accelerated population growth" (Mendoza, *Sobrepoblación* 15). Similarly, World Bank President Eugene Black, speaking at the United Nations, doubted that people's needs could be met at current expectations: "We are coming to a situation in which the optimist will be the man who thinks that present living standards can be maintained. The pessimist will not look even for that"

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<sup>11</sup> Thomas Mann served in the US Foreign Service and was considered an expert on Latin America. Mann served as Coordinator for the Alliance for Progress, a Latin American intensive aid program started by President John F. Kennedy. Mann prioritized US interests to the extent of supporting regime change in Latin American countries, and for this remains a controversial figure in US and Latin American politics. However, see Thomas Tunstall Allcock, "Becoming 'Mr.Latin America': Thomas C. Mann, Reconsidered" 2013.

(S.1676 (5) Exhibit 142 McElroy 1963 p.973). Expectations for future quality of human life are degrading in accordance with reality, where aspiration becomes maintaining a static, draining status quo.

Such shortages are problematic not only because of the human misery they imply, but also, according to population leaders and experts, because social and political unrest follows from widespread deprivation. This causal logic, from lack to uprising, can be said to be a tenet of the population crisis discourse. The following excerpts are three examples of this line of thinking:

I only make this suggestion: in the decades immediately ahead of us, the rate of population growth will have a direct effect on the aspirations of peoples in this hemisphere for a rapid improvement in their standards of living. To the extent that these aspirations are frustrated, additional strains and stresses are placed on the political, economic and social fabrics of the hemisphere. (S.1676 (5) 1059, Exhibit 146, Mann, US Coordinator for Alliance for Progress, at Planned Parenthood Conference NYC 1964).

The youth populations characteristic of developing countries such as Colombia and where more than 40% of the total population is 15 years or younger, [in these countries] we must invest in the upbringing and training of children 0 to 15 years old, during the greatest time in which they seek instruction and professional formation, we must mobilize all social and economic sectors to provide education, health, housing, agricultural production, industrial production, and the creation of new jobs. If, as it is logical to conclude, national resources are unable to satisfy this growing demand, state investment must orient itself towards establishing mechanisms that regulate or moderate the social conflicts that naturally emerge from this situation of forced abandonment. (Mendoza, *Sobrepoblación* 18).

Millions of people in Asia, Africa and Latin America have realized the living standards which Europeans and North Americans enjoy, and are demanding that they are also given the opportunity to obtain such benefits...And as the population continues growing more rapidly than the resources destined to satisfy its needs and desires, political unrest becomes almost inevitable, that will perhaps cause even the downfall of existing governments. (Dorn 290).

The quotations above claim exceedingly high stakes behind controlling the "population explosion." Human misery appears guaranteed if population growth continues at predicted rates, since it is believed that existing resources cannot be augmented to sufficiently meet demand. Moreover, nothing less than peace and stability are at stake, both internally, within each country, and internationally, since upheaval in one country will affect others. A leading Colombian population expert, Alfredo Aguirre, warns that overpopulation is a "the threat to the well-being of great masses of people or the stability of governments in so-called developing countries" (quoted in Fajardo Hernández 222). In this discourse, the concern with food production and other basic human needs, due to growing population, becomes a security issue. When population growth, scarcity, and unrest are linked, the situation appears to be a crisis requiring swift intervention. As María Margarita Fajardo Hernández, a historian of the Colombian medical demography field, points out, "Before such distressing panoramas, taking action would appear to



be more of a duty than a choice" (229). The expectation of unrest and misery just about requires action from all.

To summarize, one major reason the population explosion constituted a "crisis" in the eyes of population experts was the human misery and uprisings that were expected consequences of increasing the amount of human need to levels that developing countries would struggle to meet. Population leaders and experts claimed that well-being, peace, and political stability were at stake in curbing population growth.

### 3.2 Third World stasis, in the face of a need to build capital.

The second major reason that population leaders and experts considered accelerating population growth to be a crisis was also rooted in developing countries' perpetual obligation to meet ever-increasing needs of a growing population. This second reason focuses on developing countries' lost opportunity for economic development when they are stuck striving to fulfill basic needs. James Roosevelt succinctly expresses this view: "But avoiding starvation is not the only, nor even the principal, reason for concern about population increases. The problem is one of diverting resources which could otherwise be used for capital formation" (S.1676 (5) 1067, exhibit 148 by James Roosevelt). Roosevelt upholds capital formation surpasses the prevention of starvation. A second set of stakes appears in population crisis discourse: developing countries' ability to build capital, believed crucial to economic development.

Economic development was a key goal for developing countries during the 1960s, to fulfill a goal of improving conditions of human life, expanding capitalist market with greater participation from developing countries, and prevent Communist economic and political models from spreading. The model of development was largely inspired by W.W. Rostow, a U.S. economist and adviser to Presidents Kennedy and Johnson and development expert at the United Nations (Fajardo Hernández 221-2). In his 1960 book, *The Stages of Economic Growth: A Non-Communist Manifesto*, Rostow argues that countries pass through five stages of development, with the U.S. an example of the fifth and most advanced stage. A 1994 USAID report explains the concept of development during the 1960s and 1970s:

development was equated with economic growth and conceived of as a linear evolutionary process towards capitalistic modernization. Westernization of all societies was the message implicitly or explicitly carried by the programs, projects and actions through which aid was 'exported'. In this framework, it is no surprise that 'development' sought to promote urbanization, industrialization and growth of the market, which, if left free, should provide beneficial changes for most people. (Portocarrero 14).

U.S. foreign aid and United Nations development programs sought to move developing countries through the stages of economic growth to achieve an end point of "capitalistic modernization," focused on growing industries and markets. Family planning became a major *development* initiative because of the perceived threat population growth posed to capitalist economic growth, as the rest of this section elaborates.

The UN considered "Third World" development so pressing an issue that it enthusiastically approved U.S. President John F. Kennedy's 1961 proposal to designate the 1960s the UN "Decade of Development" (Jolly et al. 85, Johnson xxiv). Rostow helped draft the UN Development Decade strategic plan, titled *The United Nations Development Decade: Proposals for Action* (Jolly et al. 88). In his Foreword to *The United Nations Development Decade*,

Secretary General U Thant is hopeful about rapidly moving developing countries through stages of economic growth: "As our understanding of development deepens, it may prove possible, in the developing countries, to compress stages of growth through which the developed countries have passed" (12). Although U Thant imagines the stages can be "compressed," he evinces the concept of development of linear progression through set stages, modeled on economists' theorizing about Western and especially U.S. economic development.

Many elites in developing countries subscribed to a capitalist model of progress, and were eager to pursue changes needed, such as lowering fertility, to advance to the next stage of economic development. In Colombia, Mendoza reveals bitterness at the gap he describes between advanced countries and the "Third World" in a 1966 book: "The so-called Third World contemplates the great achievements realized in space exploration by those countries already, frankly, entering the atomic age, while its populations are expanding blindly and while its weak economies are convulsing in the shadow of social conflicts, in permanent emergency" (*Acelerado* 7). Mendoza not only describes the Third World situation as terribly bleak, he identifies a distance between the Third World and "atomic age" countries, countries like the U.S. with strong economies, stability, and less population growth. In another 1966 book, Ramiro Delgado, a medical school professor and DEP associate, describes Colombian population growth as chaotic, overwhelming, and impeding economic growth:

we are not achieving a better life for our people, and to the contrary, our population is multiplying disorderedly, we are multiplying our problems to limits where it will be nearly impossible to find an acceptable solution...The speed of Colombian population growth is creating a barrier to achieving acceptable levels of economic and social development. (*Hacia una* 10).

Delgado chastises his Colombian audience for the unplanned, haphazard manner of population growth because he considers controlled population growth necessary for economic and social development. Mendoza and Delgado seek to transform Colombians' fertility practices as part of a plan to improve Colombia's economic standing.

Population leaders and experts frequently worry over how developing countries' obligation to feed an increasing population gobbles up any possibility for growing capital and the improved future such capital makes available. In a paper circulated at the 1965 Cali conference<sup>12</sup>, U.S. demographer and sociologist Harold Dorn remarks that developing countries' precious resources become pledged to basic need instead of contributing towards economic development: "The rapid population increase in Asia, Africa, and Latin America acts as a type of brake on economic development, since a great part of relatively scarce resources must be dedicated to feeding, clothing, and educating the youth population, whose numbers increase without ceasing" (quoted in Fajardo Hernández 221). In a similar vein, Roosevelt explains the resources spent on meeting basic needs means countries have little funds available for investment, which is the way to economic and social advancement: "The difficulty is one of finding sufficient savings, after expending resources just to meet current consumption needs of an expanding population, to invest in order to insure a reasonable rate of progress toward modernization and a higher standard of living based on sustaining economic growth" (S.1676 (5) 1067, exhibit 148 by James Roosevelt). Mann also laments the resources diverted to food needs instead of industrialization projects in developing countries: "The failure to increase food production in the face of rapid population growth has required several countries to import such basic items as corn and rice,

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<sup>12</sup> Harold Dorn died in 1963; his 1962 paper, "World Population Growth" published in *Science* was translated into Spanish and included at the 1965 Cali conference.

spending scarce foreign exchange earnings which are badly needed to finance industrialization programs and infrastructure" (S.1676 (5) 1059, Exhibit 146, Mann, US Coordinator for Alliance for Progress, at Planned Parenthood Conference NYC 1964). These statements express a sense of helplessness on behalf of the developing countries, forced to constantly fill the ever-hungrier maw of their populations. The statements depict developing countries as living from hand to mouth, forced into stasis by their struggle to feed their growing populations. As Latin American historian Martha Gimenez describes, Latin America is regarded as being like "Alice in Wonderland, [who] must run as fast as possible just to stay in place" (28). Population crisis discourse maintained that developing countries would never prosper if they were unable to build capital that they could reinvest in their country's modernization projects.

The age distribution of the Latin American population, with a so-called "youth bulge," is perceived as exacerbating the challenge of economic growth. The Final Report of the 1965 Cali pinpoints the wasted opportunity for growth on the high youth population. "[B]ecause of the large proportion of young people in high fertility nations, capital is diverted from production to consumption," the Final Report asserts. Like the analyses above, the Final Report explains that resources are committed to maintenance, rather than improving current circumstances: "There is increasing difficulty in making per-capita improvements in community services when new population tends to absorb the new homes, classrooms and hospitals" (Delgado, "Latin" 254). In Latin America, the population increase and composition demands immediate consumption, such that Latin American countries are unable to produce extra capital to go beyond subsistence. Mann explains the difficulties posed by Latin American population structure in detail:

Latin America is a developing area. The composition of the population is quite different from that in the United States. For example, about one-fourth of the population is less than ten years old. A large portion of the population therefore contributes little to production; rather it is essentially a consumer. This means that the working force has a heavier burden to bear. Because a higher percentage of production must be consumed on the necessities of life, there is less available to invest in farms and factories that are needed to increase production. This is truly one of the dilemmas of the Alliance: how can we best achieve adequate levels of production so essential to social justice and political stability and at the same time meet the desire of the people that production be distributed immediately so that it can be consumed. (S.1676 (5) 1059, Exhibit 146, Mann, US Coordinator for Alliance for Progress, at Planned Parenthood Conference NYC 1964).

Concerned with increasing production and capital, children become a problematic population category in population crisis discourse. In the quote above, children are translated into economic terms and apprehended as a consumer class, not producers. This reflects anthropologist Arturo Escobar's observation that people become abstracted in development discourse, for the purpose of technical assessment: "Development was – and continues to be for the most part – a top-down, ethnocentric and technocratic approach, which treated people and cultures as abstract concepts, statistical figures to be moved up and down in the charts of 'progress'" (Escobar 91). From the population experts' viewpoint, the barrier to economic growth and prosperity in Latin America is that the continent has too many children; like the archetype of the numerous poor family, the nation has too many dependent mouths to feed.

Frequently, U.S.-based population leaders and experts worry that developing countries' rapid population growth cancels out the benefit of foreign aid dollars. The U.S. Senate "Population Crisis" hearings (1965-1968), for example, include several exhibits where

population leaders and experts use the term "nullify" to describe the effect of population increase on aid dollars. For example, Alaskan Senator Ernest Gruening urges frank talk and action on the population problem precisely because he perceives population growth has diminished the impact of foreign aid. "But if we don't come out forthrightly and say this is one of the most burning problems of the age," Gruening cautions, "our foreign aid programs are being nullified and undercut by the population increase - which we know to be the case - let's do this in a big way, let's go at it as if we meant it" (S. 1676 (5) 996). Presumably, on Gruening's line of thinking, if there were fewer people to take care of, foreign aid would be able to accomplish more per capita. The World Bank president, U.S. American Eugene Black, also uses "nullify" and directness to advise that "poorer countries[']" population increase has diluted foreign aid's reach: "I must be blunt," Eugene R. Black told the Economic and Social Council of the United Nations. 'Population growth threatens to nullify all our efforts to raise living standards in many of the poorer countries' (S.1676 (5) Exhibit 142 McElroy 1963 p.973). Stating that the larger goal is to raise living standards shows that Black considers foreign aid should do more than meet a population's basic needs. Instead, foreign aid providers like the U.S. and World Bank aimed to support capital formation and economic development that they believed would improve peoples' quality of life. In using the word "nullify," which communicates an investment being canceled out to zero, Gruening and Black's statements also indicate they seek a worthwhile return on invested dollars. Population leaders and experts wanted to see social and economic advancement, not that their dollars are at best achieving subsistence.<sup>13</sup>

The conviction that population increase nullifies foreign aid's contribution to development sets up family planning aid as magically effective. U.S. President Lyndon B. Johnson spelled out the wisdom of financial investment in population control in a June 1966 speech to the UN in San Francisco: "Let us act on the fact that less than \$5 invested in population control is worth \$100 invested in economic growth." Historian Arthur Schlesinger quotes a similar calculation in his 1965 book *A Thousand Days: John F. Kennedy in the White House*, which appears as an exhibit in the U.S. Senate's "Population Crisis" hearings. Schlesinger's expert, however, is clear that best investment is, specifically, birth control: "One AID economist calculated that in certain countries every dollar invested in birth control would be 200 times as productive as the same dollar invested in foreign aid" (S.1676 (5) Exhibit 149 Schlesinger p.1070). The calculations reveal U.S. population leaders and experts' interest in maximizing foreign aid's ability to make change and be a worthwhile venture. Overall, U.S. population leaders and experts argue that fewer births in developing countries would improve the efficacy of foreign aid dollars.

Population discourse constructs developing nations as being behind and at risk of falling farther, and poised to join if only they would seriously take up family planning and the capitalist model of economic growth. At times, the experts and leaders' frustration with population increase nullifying foreign aid is a frustration that the developing countries, but for this human multiplication, could be living in a glorious future with improved living conditions for all their people. A sense of despair and loss runs through population discourse, at the idea that the developing countries are not living at their potential. Of course, it is a vision of the future and of potential according to the leaders and experts, both those from industrialized nations and those of

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<sup>13</sup> Arthur Schlesinger, historian and special assistant to President John F. Kennedy, used the term "nullify" to describe foreign aid's relationship to population growth, but with a positive conclusion: "The Kennedy years thus further strengthened the American attack on world poverty by preparing the means to keep population growth from nullifying the development effort" (S.1676 (5) Exhibit 149 Schlesinger p.1071).

the developing countries. It prescribes what is necessary for the population in a paternalistic way, on a capitalist model, without acknowledgment that the hungry masses may have distinct visions of satisfying presents and futures; and little attempt to question them about their hopes and aspirations.

Population leaders and experts, however, did extensively interview people on their reproductive knowledge, attitudes, and practices. The following section describes these interview surveys (KAP surveys) and how they substantiated Latin America as having very high abortion rates. Leaders and experts in turn interpreted the high abortion rates as women expressing their "unmet need" for family planning. Establishing high abortion rates thus paved the way for legitimating family planning policies.

#### D. Latin America, abortion, and methodological innovation

In population discourse, abortion came to represent women's "unmet need" for family planning education and services. Studies on current reproductive practices formed a knowledge base from which Latin America was characterized as having high abortion rates and abortions were interpreted as women's "unmet need" for family planning education and services. The studies form and represent an intellectual and funding network dedicated to learning the knowledge, attitudes, practices, and vital statistics of the population with regard to fertility. This section describes the role of population experts' knowledge production in identifying Latin America as a region with excessive abortions and interpreting abortion as women's "unmet need" for family planning education and services. This had the effect of legitimating transnational investment in Latin American population studies and family planning, and motivating national population policies centered on family planning education and services.

Population researchers spearheaded new methods of collecting data that allowed them to describe reproduction within a specific population. Researchers considered especially important the "KAP" survey, or "sample surveys of *knowledge, attitudes, and practices* with regard to fertility matters" (Berelson 655, my emphasis). The KAP survey filled a gap in the existing types of data available to researchers. Prior to the KAP survey, population researchers relied on censuses to gather information about birth rates. However, as W. Parker Mauldin, the Population Council's Associate Director of the Demographic Division, noted, censuses offered limited information: "But at best censuses and registration systems give data about fertility levels, not about attitudes toward family size nor practices of birth control" (2). Population researchers identified a need to collect more information about fertility than merely birth rates, both in order to learn current fertility practices and to help design family planning policies and programs that would enable families to have fewer children.

Bernard Berelson's 1965 Geneva paper, "KAP Studies on Fertility," and Mauldin's 1965 article, "Fertility Studies: Knowledge, Attitude, Practice," together provide an overview of KAP surveys and their use among population leaders and experts. The first KAP survey designed to be representative of a national population was conducted in 1955 among middle class couples in the United States (Mauldin 9; see also Freedman, Whelp, and Campbell 1959). The KAP method spread quickly in the early 1960s: by 1965, over 20 KAP studies had been conducted worldwide, in Brazil, Chile, Ceylon, Colombia, Costa Rica, Ghana, India, Mexico, Pakistan, Panama, the Philippines, South Korea, Taiwan, Thailand, Tunisia, Turkey, and the United States again in 1965 (Berelson 655, 661 n.5). In most countries, non-profit national medical associations or university research centers conducted KAP studies, with training and funding support from U.S.

foundations (Mauldin 2). KAP surveys consisted of survey questionnaires administered in-person by trained interviewers. While question phrasing and interview duration varied across KAP studies, they all included questions on vital data; attitude towards family size; attitude towards family limitation; knowledge about reproduction, contraception, and the recent decline in infant mortality; reproductive practices, including abortion experiences; and background characteristics of "the usual demographic items" and "indices of modernized attitudes" such as interest in education (Berelson 656). Given their "objective and scientific" character, Berelson explains KAP studies "secure a reliable picture of the present situation," can evaluate family planning programs, and direct the design of future programs (665-666).

In Colombia, the first KAP fertility survey was conducted in 1964 of a random, representative sample of adult women in Bogotá (Simmons and Cardona 42). The 1964 Bogotá study was part of the United Nations' Latin American Demographic Center (CELADE)'s Capitals surveys, in which KAP fertility surveys were carried out in seven Latin American capitals in 1964 with the goal of providing a picture of fertility practices in the region (Miró 616). The Capitals surveys gathered extensive data on fertility issues and revealed that Latin American women had low knowledge of family planning and often turned to abortion to control their fertility (Miró 632, Requena 789-790). Additional Colombian KAP surveys confirmed these findings. ASCOFAME's DEP (the Division of Population, led by Hernán Mendoza until his death in 1968) conducted seven KAP surveys in six Colombian cities from 1965-1967; they also conducted another round of KAP surveys in six Colombian cities in 1969 (Mendoza, "The Colombian Program" 827, Simmons and Cardona 48). Like other Latin American KAP surveys at the time, the Colombian KAP surveys focused on abortion among a handful of topics. The DEP gathered additional data on abortion rates from carrying out studies of hospital records in five Colombian cities (Mendoza "Research Studies" 234 n.5, Seltzer and Gómez 82). Reviewing Colombian abortion studies to date in late 1967, Mendoza concludes, "that among the communities studied the ideal number of children is achieved and maintained mainly by means of induced abortion" (Mendoza "Research Studies" 226-227). This held true for women across social classes, education levels, and current family sizes. The KAP studies indicated women had little knowledge or access to family planning methods (Mendoza "Research Studies" 227, 231).

Based on 1960s Colombian and other Latin American studies, population leaders and experts became concerned that too much abortion was happening in Latin America, even though they were at the same time worried about overpopulation. Latin America, as a region, was characterized as having high abortion rates during the 1960s. Nearly every time "Latin America" appears in population discourse during the 1960s, a mention of the numerous abortions there seems to follow. What follows is a small sampling: the "Final Report" of the 1965 Pan-American Assembly on Population in Cali urges Latin American governments to address their countries' "high rates of induced abortion" and "the high incidence of criminal abortion" (Delgado, "Latin" 255-256). Mauldin writes that in Latin America, "there is a growing and widespread concern, especially about the problem of abortion, which seems to be increasing rapidly among Latin American populations" (2). Mendoza also warns in 1968 that "the incidence of abortion seems to be in a progressive upsurge" in Colombia ("Research Studies" 233). Hernán Romero, a Chilean physician and adviser to the largest Chilean family planning non-profit organization, laments, "Nothing exasperates this group [of Chilean physicians] more than the ever increasing disaster of illegal abortions in Chile" (237). Mariano Requena, a leading Chilean population researcher, reports in 1968 that "In the majority of Latin American countries, induced abortion still constitutes the most widely used method or practice to avoid live births" and "In the objectives of

all programs related to fertility, the struggle against induced abortion is always mentioned, sometimes to the extent of being pointed out as the central objective" (785).

Population leaders and experts deplored the use of abortion to control fertility. That abortion was illegal throughout Latin America (except for socialist Cuba as of 1965) meant many women suffered through unsafe abortions, experiencing complications often resulting in hospitalization or death. For example, the Colombian DEP studies found abortion complications to be the number one cause of maternal mortality at many hospitals, and the leading cause of pathological mortality among women ages 15-34 in Cali hospitals (Mendoza "Research Studies" 224). Latin American physicians saw firsthand how unsafe abortions harmed women and reliably supported contraceptive access to decrease abortions (Measham and Lopez-Escobar 122). In addition to women's health, population leaders and experts lamented the high medical costs expended on women's postabortion care (Seltzer and Gomez 9). For example, the Chilean physician Hernán Romero calculates the resources used to treat incomplete abortions at a Santiago hospital during 1960:

They [women receiving postabortion care] comprise 35% of all operations performed in maternity cases and require 17% of the transfusions and 26.7% of the volume of blood used by emergency services...they represented 184,000 bed-days and produced, by this single fact alone, an expenditure exceeding \$1million. Each survivor of *Clostridium perfringens septicemia* [septic abortion] costs over \$3,000. (Romero 245)

Romero's calculations reflect a concern for using medical resources. Decreasing the number of abortions would free up medical resources to be used elsewhere. In population discourse, abortion was regarded as hazardous and wasteful.

Abortion is also understood by population leaders and experts as a clear message of "unmet need" for effective contraceptives. An International Planned Parenthood Federation report comments that in Latin America, "the prevalence of wide scale induced illegal abortion is so evident that there can be no question of any lack of motivation to curb fertility" (Deverell 577). In this statement and others like it, the high incidence of abortion becomes an incontrovertible expression of women's desire to have fewer children. Mendoza also regarded high abortion rates and KAP studies results as women calling for family planning education and services. Across his writings, Mendoza used the phrase *necesidad sentida*, or "felt need," to refer to what he determined abortions signified - namely, women's want of contraceptives (Ott 7). For example, in a 1968 article, Mendoza declares that the knowledge gained from KAP studies demonstrates a "felt need" for family planning: "This knowledge, in turn, has made it possible to show the country its own reality: the existence of a serious population problem and of a strongly felt need for information and services that should be satisfied without delay" ("The Colombian Program" 827).

It might seem that high-abortion-rates-signify-women's-desire-for-contraceptives is a logical conclusion for population leaders and experts to draw. After all, women who abort (unless coerced) do so to avoid having a child. Yet, the strange part of this logic is that it is as if the only way women can express need is through their bodies going through abortions. Women's reproductive actions constitute their voice: researchers gather, record, and assess what women need based on their bodies' experiences transformed into statistics.

Although population experts apprehend abortion as an expression of "unmet need" for family planning, women's reasons for seeking abortion may be more ambivalent or complicated than lacking contraceptive access. Assuming that abortion rates constitute a univocal demand for

contraceptive access elides the varied and complex factors that guide women to abort. As Colombian sexologist and psychologist María Ladi Londoño observed from her practice with women after abortions during the 1970s and 1980s, women may want a child but pursue an abortion because of changes in their health, relationships, prospects, or economic conditions (163-4). Londoño's work reveals that myriad social, economic, health, and affective factors can influence women's abortion decisions, such that it is possible abortion rates express women's voice on other matters besides family planning services. For example, abortion rates could also be women's "felt need" for protection from sexual violence or job security during pregnancy (not legally established in Colombia until 1991). The population experts' assumption, however, is that women who abort pregnancies would not get pregnant if they could avoid it. In limiting abortion prevention to contraceptives, population experts miss the greater context of women's reproductive decision-making.

It might be thought that KAP surveys were methods for women to communicate to population experts their thoughts, needs, and desires about reproduction. However, KAP surveys were limited tools for women's voice. Researchers acknowledged that women might not be entirely truthful because of stigma around sex and abortion (Mauldin 9-10, Requena 786). Moreover, KAP surveys had pre-formulated questions; they did not ask women to lead the conversation. Given how common abortion was in 1960s Latin America, it is likely women may have formed opinions in favor of safe, legal abortion procedures, for example. Occasionally, population researchers raised the question whether women might not want safe, legal abortions in addition to contraceptives (Davis 733, 736). By and large, however, population researchers avoided the topic of legal abortion as too controversial and did not create space for women to consider whether abortion would be a preferred fertility control method if the procedure were safe and legal. Mauldin even casted doubt on how well "illiterate populations" could respond to a KAP survey, revealing that researchers themselves doubted how well KAP surveys could function as vehicles for voicing the respondents' needs: "Such people ["an illiterate population"] are unfamiliar with the idea of family limitation, unfamiliar with verbalizing some of their wants, certainly unfamiliar with answering questions from a stranger" (10). Mauldin suggests that the celebrated advantage of KAP surveys - its methodological innovation of carefully composed interview questions - could also a liability, at least, he muses, for illiterate populations unaccustomed to such a mode of interaction. Despite population leaders and experts' occasional reservations about KAP surveys' reliability, the leaders and experts largely celebrated KAP surveys for delivering "data up to now considered unobtainable" and understood survey results as expressions of unmet need (Miró 617).

Overall, abortion and contraceptives are discussed as actions for women to reduce population, in population discourse. Noticeably lacking is any rhetoric about women's empowerment - except in limited places from PROFAMILIA, when it speaks of providing family planning services to women to support their health. Population leaders and experts recognize women's voice above all through the reproductive actions they carry out with their bodies. Abortion would also become an important common target during the 1967 Colombian Senate hearings on Colombia's orientation towards population matters.

## E. Policies and objections

This section discusses the two Colombian family planning policies that emerged from the population crisis environment, during the period 1960-1969. I first present the 1966 and 1969



policies. Next, I describe the Catholic Church's objections to the 1966 policy beginning in early 1967 and carry out a close reading on the February 1967 Senate hearings on population, initiated by two Conservative senators. The objections from both the Church and the senators focused on the U.S. enacting imperialist designs on Latin America by financially and technically supporting family planning programs, and challenging the very idea that lowered fertility would advance social and economic development. Finally, I relate the nature of family planning objections in the late 1960s.

### 5.1 Colombian population-family planning policies

A handful of scholars have published studies on Colombia's two 1960s population policies: the 1966 policy to fund 1200 physicians' training in family planning, which incited vociferous backlash from the Catholic Church and Conservative party politicians; and the population policy included in Colombia's 1969 national development plan (Ott, Measham and Lopez-Escobar, Mendoza "The Colombian Program," Seltzer and Gomez, Simmons and Cardona, *Stycos Ideology*). Scholarship notes the fuzziness of the policy process and inability to know exactly how a policy came to be. However, most scholarship concludes that leadership and political will were the decisive factors behind the 1966 and 1969 policies (Ott, Measham and Lopez-Escobar, Simmons and Cardona).

The 1966 policy was the Colombian government's first financial and programmatic commitment to family planning. This policy consisted of a contract between the Colombian Ministry of Health and ASCOFAME, in which the Ministry of Health committed the use of USAID counterpart<sup>14</sup> funds to train 1200 public hospital physicians in family planning; ASOCFAME was charged with designing and carrying out the trainings (*Anales* 251, Ott 3, *Stycos Ideology* 147). The contract thus created a partnership between the Colombian government and a non-profit association to train doctors as frontline family planning educators to the wider public. It signified President Carlos Lleras Restrepo's vision that family planning was important for curbing population growth and achieving economic and social development, a vision he expressed in multiple statements during his presidency (*Anales* 275, Sanders "Family Planning" 3). At the same time, the 1966 policy created some distance between the government and actual service delivery on family planning, since ASCOFAME was in charge of training. Scholars note that Lleras Restrepo was careful to keep some distance between the Colombian government and family planning during the first years of his presidency, as he sought to pass constitutional reforms and wished to avoid backlash over a controversial topic like family planning (Ott 4). However, there was vociferous backlash against the 1966 policy from the Colombian Catholic Church and its conservative supporters.

The 1969 policy incorporated family planning as a response to rapid population growth into the national development plan. The policy states its "immediate objectives" are to "obtain a better territorial distribution of the population and alter the present rate of population growth by lowering fertility" (*Planes* 5). The 1969 population policy was the result of reforms and collaborations beginning in 1968. President Lleras Restrepo proposed reforms to the Planning Department which were approved by Congress in December 1968. Part of the reform was to explicitly include population policy in national planning; a new responsibility was "to study the population phenomenon and its economic and social repercussions in order to develop a

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<sup>14</sup> Counterpart funds refer to the local currency generated from selling aid commodities, such as food, or from foreign exchange received as aid. See Henry Bruton and Catherine Hill, "The Development Impact of Counterpart Funds," 1991. pp.4-5.

population policy" (quoted in Ott 5). During the first half of 1969, an informal group composed of Colombia's population leaders and experts from the Health Ministry, the Planning Department, DEP, and the Universidad de los Andes collaborated to draft a national population policy (Ott 5). As politics scholar Emilene Royco Ott notes, drafting policy in informal collaboration as opposed to "established institutional channels" "was not an uncommon phenomenon in Colombia" (5, n.9). This population policy was presented to the National Council on Economic and Social Policy, the government agency responsible for reviewing economic and social policies for national development plan, in July 1969. The Council approved the policy for the 1969-1972 national development plan. Ott explains the policy's two approaches towards lowering fertility:

(1) raise the educational level of the populace with the aim of developing attitudes that would facilitate the process of modernization, promote greater participation in society, and increase parental responsibility; and (2) make accessible family planning information and services that would "assure proper medical care and guarantee respect for the conscience of the solicitants." (Ott 5, quoting *Planes*.)

The Conservative president following Carlos Lleras Restrepo's term not only continued lowering fertility as part of population policy in the national development plan, but even expanded upon it.

While scholarship on Colombia's 1960s population policies attribute their emergence to political will and indefatigable leadership (from government, DEP, AFSCOFAME, and PROFAMILIA), they indicate that the elite political and academic networks the leaders participated in were very important, as well.

## 5.2 Objections from the Catholic Church and Conservative Senators

While population leaders and experts wondered whether family planning would fare poorly in Colombia because of a "formidable" Catholic Church, the Church did not express a formal stance towards family planning until the papal encyclical *Humanae Vitae* was issued on July 26, 1968. Before 1968, Church hierarchy and laypersons followed the general admonition to consult their own conscience (Sanders, "The Relationship" 3). Individual Colombian priests varied widely on whether they encouraged, accepted, or counseled against their parishioners' using contraceptives (Stycos, *Ideology* 80-4). The Church's delay in assuming a formal position against contraceptives allowed many people to learn and adopt family planning methods, which people continued even after official Church position became clear (Sanders, "Family Planning" 3; Stycos, *Ideology* 76-77).

However, some individuals and groups in the Colombian Catholic Church began publicly attacking family planning once the 1966 policy was announced. The attacks consisted of regular articles against family planning in the most prominent Colombian Catholic periodical, the weekly *El Catolicismo*, from January through August 1967, and a Lent Pastoral Letter by the Colombian Cardinal read in all Bogotá Archdiocese churches during Holy Week, in May 1967 (Mendoza, "The Colombian Program" 830-831, Stycos *Ideology* 151, Stycos, "Prospects" 277). The arguments against family planning were not only based in interpretations that Catholicism repudiated contraceptives, but also in the idea that family planning was a U.S. imperialist plot to intervene in Colombia and reduce the number of Latin Americans. A typical sentiment appears in this *El Catolicismo* article from January 22, 1967: "One of the most regrettable aspects of the [family planning] campaign is the fact that it amounts to play into the hands of President Johnson, who is determined to sterilize underdeveloped countries in an effort to stop a

population growth that implies so many political and financial difficulties for his own country."<sup>15</sup> The US imperialism argument judged family planning as US elites' convenient solution to a fear of being outnumbered by less-better-off neighbors. The Colombian Catholic Church's campaign against family planning thus rejected the tenets of population discourse and the very idea that rapid population growth was intrinsically problematic. Above all, the Church rejected that the state should be involved in fertility, in contrast to how population discourse justified state intervention given the predicted consequences of "overpopulation" on national development and international peace.

The closest the 1966 policy came to congressional review was two intensive weeks of Senate hearings. During February 1967, two Conservative senators initiated hearings under the title, "Subpoena to the Ministers of Health and Education in order to inform the honorable Senate about Government policy on so-called fertility control" (*Anales* 169). The hearings lasted from February 2 to February 16 and consisted of senators' speeches and questions to the Minister of Health, Antonio Ordoñez Plaja, and the Minister of Education, Gabriel Betancur Mejía. The two senators who convened the hearings were Diego Tovar Concha and Manuel Bayona Carrascal, both stalwarts of the Conservative party.<sup>16</sup>

A close reading of the hearings shows that Conservative senators rejected tenets of population discourse and the idea that Colombia had to accept family planning for social and economic development. Conservative senators emphasized the line of argument in *El Catolicismo* articles, namely that the U.S. was thickly involved in Colombian family planning research and programs with nefarious aims. In an article detailing the backlash to the 1966 policy, Mendoza observed that the "theme of 'BIRTH CONTROL, A NEW WEAPON OF IMPERIALISM' was repeated again and again" during the Senate hearings ("The Colombian Program" 829). Mendoza himself was attacked by some senators as a US pawn, politically-driven scientist, or obsessed with power (*Anales* 186, 203). The hearings aired an extensive array of arguments against family planning or state involvement in family planning via policy, with arguments of US imperialism and disrespect to the *Concordato* agreement with the Catholic Church occupying the most time.<sup>17</sup>

A summary of the February 7 session describes Tovar Concha raising the issue of "foreign advisors who intervene in possible solutions to the problem of Colombian fertility" (*Anales* 186). These foreign advisers, Tovar Concha laments, are "converting into the planners of what methods will be adopted" and are "hoping to dictate law for future national demography" (*Anales* 186). He criticizes Mendoza for wielding science to support outsiders' interest in demonstrating Colombia has a population problem. Tovar Concha claims, "they [demographers] are not developing a scientific investigation, trying to find the truth of the demographic phenomenon, but operate a methodology destined to produce determined effects previously calculated by those who have suggested the survey" (*Anales* 186). It is unclear who the referent is for "those" in Tovar Concha's statement, the "those who have suggested the survey." However, the context indicates that Tovar Concha is thinking here of both Colombian and foreign population experts.

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<sup>15</sup> The English translation of this Spanish-language source is from Mendoza "The Colombian Program" 829.

<sup>16</sup> For political biographies of Diego Tovar Concha and Manuel Bayona Carrascal, see Ayala Diago, César. *La explosión del populismo en Colombia*. pp.337-8, 344-5.

<sup>17</sup> Senators articulated a laundry list of arguments, including Bayona Carrascal's argument that the most creative, innovative men in history were the fourth, fifth, sixth child in their families, and that only children missed out on a stimulating family environment that could cultivate their greatness (*Anales* 566).

Tovar Concha and Bayona Carrascal also rejected that increasing population growth would stall social and economic development. Considering how to improve Colombians' living conditions, Tovar Concha announces, "the problem is not to be like Herrod, but to redistribute national income" (*Anales* 567). In comparing fertility planning to being like Herrod, Tovar Concha regards family planning akin to slaughter. Herrod was the biblical figure who killed all boys under age two in the Bethlehem "Massacre of Innocents" to protect his throne from a prophesied usurper (Jesus).<sup>18</sup> Tovar Concha suggests rethinking how national income is used as an alternative; he does not elaborate this idea, but his suggestion shows how those opposed to family planning were still considering how Colombia could improve its situation. Bayona Carrascal similarly recognizes the pressures of a growing population, but totally repudiates family planning as the answer:

Because we cannot accept, to the contrary we much reject with horror and limitless indignation this abusive, inhuman, incredible assertion in the century of science and advancements of all kinds, that we must avoid people being born because the Colombian population has each day growing desires and because there not sufficient resources to give them adequate food, clothing, housing and education. (*Anales* 567).

Bayona Carrascal expresses faith in scientific advancements to address the challenges of meeting a growing population's basic needs. For Bayona Carrascal, family planning would mean a loss of humanity, not only literally (fewer births), but also philosophically; to accept family planning is to reject those humans who would have been born and deny that humans could resolve their problems at a lesser cost than preventing life. He contends that, if anything, family planning would impede development by diverting doctors' attention and services from vital medical services, such as treating common diseases: "they [doctors] will not be able to return to their health clinics, because they will be ever more interested in being some hawker of death, some Herrods [*herrodes*] financed by the State so that the Colombian population will not augment in the phantasmagorical form in which they believe it is augmenting" (*Anales* 567). Bayona Carrascal intimates there is an allure to family planning, a power of life and death, magnified by a sense of heroism in combating what is believed to be an epic problem. His vivid imagery pokes fun at any family planning doctors' self-importance and undercuts the supposed gravity of rapidly growing population.

Senators also criticized the Lleras Restrepo administration for potentially violating the *Concordato*, a 1886 international treaty between the Holy See and Colombia that recognized the Catholic Church as the guardian of Christian morality in Colombia and bound Colombia to respect and cooperate with the Church.<sup>19</sup> During Betancur Mejía's questioning, Tovar Concha asks three times, increasingly pressingly, "if the program, the theories, the modus operandi, the development of the program, in the judgment of the Minister of Education is yes or no adhering to the norms of the *Concordato*" (*Anales* 483).

To refute charges that the government is contravening the Church, the subpoenaed Ministers, Ordoñez Plaja and Betancur Mejía, affirm the government's family planning goals are ones the Church also shares. Betancur Mejía draws on a recent presidential statement to show how Lleras Restrepo is principally concerned with the moral aspects of overpopulation. The statement reports on a February 8th summit at the presidential palace among Lleras Restrepo; the

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<sup>18</sup> Tovar Concha and Bayona Carrascal often refer to Mendoza as "*herrodista*," or "Herodist," "Herod-like" during the hearings.

<sup>19</sup> The *Concordato* was renewed in 1973.

Ministers of Health and Education; and two high-ranking Church officials, the President and Vice-president of the Episcopal Conference, the Archbishop of Pamplona and Bishop of the diocese of Sonsón. At the summit, Lleras Restrepo and the Church officials each shared prepared statements about their orientation towards family planning. Lleras Restrepo's opening sentences portray overpopulation as primarily a moral issue: "excessive population growth, occurring with little or no responsibility, creates, above all, grave problems of a moral character" (*Anales* 275). He elaborates that high population affects both children and parents: many children in a family can place strain on the parents such that their parenting suffers, with the result that the parents fail to provide proper parental guidance (*Anales* 275). "All this constitutes a serious problem," Lleras Restrepo declares, "principally in a country where neither the State has the resources to replace" parental guidance, "nor do sufficient private organizations exist that can fill this gap" (*Anales* 275). Hence, Lleras Restrepo maintains that family planning promotes responsible parenthood. Supporting couples to choose their number of children will enable couples to be better parents and ensure more children grow up with sufficient parental care. Lleras Restrepo's rendering of population growth as a dilemma of irresponsible parenthood and children's welfare matches the Church's concern that married couples are intentional about becoming parents (*Anales* 275). The first principle in the Church officials' statement is, "A couple's inalienable right to determine the number of children, in accordance with their conscience and moral norms, must be protected" (*Anales* 275). This principle protects parents from any imposed methods, but also recognizes parents should be thoughtful about conceiving children. Even after the Church decided against artificial contraception in 1968, the Church continued to allow couples to practice "natural" methods (such as the rhythm method, abstaining from sex during a woman's fertile period) to approach parenthood responsibly.

Betancur Mejía further aligns government and Church by signaling how the government's family planning philosophy matches the Pope's recent statement on fertility. He reads Pope Paul VI's recent statement on fertility, "*Constitución Pastoral sobre Iglesia de Hoy*" and notes the opening lines recognize population as a government matter (*Anales* 483). The Church's current position on family planning methods is vague, Betancur Mejía notes; the only guidance is for "all to abstain from those solutions promoted privately or publicly and even sometimes imposed, that contradict moral law" (*Anales* 483). The Pope does not elaborate on which, if any, methods, are acceptable or unacceptable under "moral law." The Pope concludes his statement affirming the right of married couples to decide with "well-formed conscience" the number of children to have, and that it is important for couples to have information about scientific progress in methods that can help them make their choice (*Anales* 483). Betancur Mejía asserts this is precisely the Government's position: "[The Government] is taking advantage of new methods and informing people about the methods they can adopt to plan their families" (*Anales* 483). Overall, Betancur Mejía follows Lleras Restrepo's lead (as set in the summit report) in using Church vocabulary and positions to describe the government's own family planning approach.

During his questioning, Ordoñez Plaja emphasizes family planning as a solution to Colombia's morally troubling high abortion rate. He rejects the Senate's use of "fertility control" (*control de la natalidad*) instead of "family planning" (*planificación familiar*), for example, because the former may envelop abortion. The term "fertility control," he explains, "implies adopting all methods, even those condemned not only by morality, but also by most religions and the law, if not by simple common sense; like abortion which is a method of fertility control; but in no instance is that method considered a means of family planning" (*Anales* 259). Ordoñez Plaja makes very clear that abortion is not a part of "family planning" and that the government

views abortion as problematic in multiple aspects. He reminds the Senate that both he and Betancur Mejía have used the term "family planning" throughout the hearings.

The call to intervene in abortion practices is not a top-down governmental imposition, Ordoñez Plaja continues, but comes from doctors on the frontlines with patients. Family planning policy is responding to "doctors' concern in the sense of limiting the number of children, requested by their patients," accompanied by the fact that "provoked abortions, with their criminal and dangerous consequences, were occurring" (*Anales* 259). Ordoñez Plaja underscores how family planning can support couples as well as prevent dangerous, illegal abortions. He concludes, "[Family planning] tries, respecting the inalienable right of each marriage, to help choose a method that would overcome those ineffective and dangerous methods that they [couples] have been practicing in a criminal way" (*Anales* 259). Naming couples' current methods as "criminal" indicates that Ordoñez Plaja refers to abortion here, which was the only outlawed fertility method. While the Church was vague on acceptable family planning methods, it was indubitable that the Church disapproved of abortion. In relating how the government's family planning policy would diminish abortion, Ordoñez Plaja establishes shared values and goals among the government, Conservative senators, and the Church.

The Ministers' statements during the Senate fertility control hearings show how the Lleras Restrepo administration navigated challenges to family planning. Although the Lleras Restrepo government maintained that rapid population growth challenged Colombia's economic and social development, and that fewer births via family planning were key to slowing population growth, the Ministers and Lleras Restrepo did not announce these viewpoints. Instead, they echoed the Catholic Church's vocabulary and reasoning on fertility matters, emphasizing responsible parenthood and abortion prevention. Lleras Restrepo also distanced the government from ASCOFAME, private doctors, and non-profit organizations involved in family planning in the summit statement: "The President and his Ministers cannot know, naturally, all the details of the manner in which the Medical School Association [ASCOFAME] is carrying out the contract [of the 1966 policy], and much less the activities others may be carrying out of their own initiative" (*Anales* 275). The government reveals it is attentive to the political environment and adept at handling various positions in order to pursue the 1966 policy.

The Senate hearings' outcome was the creation of a committee to study population growth and family planning programs in Colombia (*Anales* 273-4). The Senate voted 59 in favor and 7 against to create the committee and granted the committee 90 days to report its findings (*Anales* 306). The committee's report, made public in October 1969, was "favorable to the national program" and the Senate did not pursue the topic further (Mendoza "The Colombian Program" 830, Stycos *Ideology* 154).

Opposition towards family planning policies continued in other venues from a range of political and ethical positions. Beginning in 1968, leftist university students mounted a fierce critique of family planning policies and programs, on the basis that family planning was a US imperialist project.<sup>20</sup> Nationalist elites on the left and right espoused the same US imperialist line of argument in books and editorials.<sup>21</sup> Some in the Colombian Catholic Church, particularly

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<sup>20</sup> For literature on leftist and nationalist family planning opposition in Colombia, see Ott 6-9; Thomas Sanders, "Opposition to Family Planning in Latin America: the Non-Marxist Left," 1970; Thomas Sanders, "The Relationship between Population Planning and Belief Systems: the Catholic Church in Latin America" 1970; and Part 2 of J.M. Stycos, *Ideology, Faith, and Family Planning in Latin America*, 1971.

<sup>21</sup> Arguably the most renowned of these nationalist figures was Hernán Vergara, a psychiatrist and psychology professor, who argued that the US promoted family planning "to slow down - or end, who knows - the procreation

clergy in the heavily Catholic department of Antioquia, continued to disapprove of family planning. Over time, however, the Colombian Catholic Church came to accept some government involvement in promoting family planning, to the extent that it posted representatives to an government advisory committee on population and family planning matters, formed in 1970.

#### F. Conclusion: the Colombia success story, a model for other nations

We can look back now and know that the fertility rate did not continue to grow exponentially, but that since the 1960s, there has been an ongoing fertility decline in Latin America. During the 1960s, however, population researchers and leaders predicted the most dire possibilities for families, countries, and the globe due to increasing numbers of people and the needs they called for. Especially in the newer postwar spirit of human rights, leaders were calling for every human being, in principle, to live a dignified, enriched life, and yet this was precisely at the moment when the increase in numbers of people were, in their eyes, threatening this possibility.

Population discourse constructed the problem of the population "crisis" and its most promising solution - family planning to lower fertility rate. The attention, financial and technical resources, and sense of urgency attending the population "crisis" helped establish family planning research and programs in many countries. Through population discourse, family planning became tied to a national and global stable and prosperous future; family planning would allow countries, especially developing countries, to pursue economic development that would advance social development. In this way, a state's interest in population matters and support for family planning programs became associated with being a modern state. In Colombia, key policy partners such as DEP participated in population discourse, but the government took a more cautious stance that echoed the Catholic Church's position (at the time) towards family planning. Emphasizing how family planning could diminish abortions was key for gaining government, Church, and broader public support.

The DEP's studies interpreted as signaling "felt need" for family planning laid the groundwork for Colombia's 1966 and 1969 policies. As Mendoza asserted,

The Division of Population Studies of the Colombian Association of Medical Schools believes that when someone is capable of forcibly [sic: forcefully] and vehemently demonstrating the existence of a serious and threatening phenomenon, it is possible to create a favorable national reaction. This, in turn, leads to the possibility of reaching the goals suggested. (Mendoza, "The Colombian Program" 835)

For Mendoza and other population leaders and experts, the goal was achieving family planning at the policy level. This chapter places the 1960s moment as a turning point for women's reproductive lives, in making family planning education and services more available than ever before. At the same time, the chapter shows how abortion played an important role in legitimating family planning.

During the 1970s and by the 1980s, family planning shifted from a demographic issue to a women's health issue. This occurred in large part as women organized against the paternalistic

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of racially mixed, tropical and Catholic Latin Americans" in his 1968 book *El Complejo del Layo* (102). The English translation of this quote is from Stycos *Ideology* 51.

and often misogynistic medical establishment of the 1960s. Family planning would become much less about national demographic control to center on women's health and well-being.



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### Chapter 3. “Defining the right to choose motherhood: women’s organizing during the 1991 Colombian Constitutional Assembly”

The right of *libre opción a la maternidad*, or the right to freely choose motherhood, was one of the most controversial rights considered during the 1991 Colombian Constitutional Assembly. Proposed by the Colombian women’s movement, the right to *libre opción a la maternidad* encompassed a range of women's reproductive rights that included both the right to have children and the right to terminate pregnancies. While it was important to the women’s movement to argue for a comprehensive reproductive right, one which addressed the diverse experiences in women’s reproductive lives, the Assembly debate treated *libre opción* as merely a right to abortion. Ultimately, the Assembly voted against a right to *libre opción*, although it included other women's rights in the new 1991 Constitution. This chapter studies the Assembly debate over *libre opción a la maternidad* and how the discursive environment in which the debate took place facilitated an understanding of *libre opción* as an abortion right.

The turn to a new constitution arose from the problem of intractable violence and a widespread belief that making the political system more inclusive and democratic would reduce violence. By the end of the 1980s, Colombians frequently expressed concern that the state was failing since it had apparently lost the ability to contain violence from various armed groups - guerrilla movements, paramilitary groups, and drug cartels. The violence affected Colombians on an everyday, personal level, in that violent acts such as car bombings, massacres, and kidnappings occurred frequently. The violence also shaped Colombian politics, with drug cartels’ assassinations of presidential candidates and bribing Congress members. In 1989, a student movement arose focused on the idea that violence was unraveling the state and that Colombia needed a new constitution to remake itself as a strong, democratic state. The student movement’s perspective that transforming the political system was crucial to securing the state is evident in their movement slogan, “We can still save Colombia.”

Proponents of the 1991 Constitutional Assembly described it as a peace process, an opportunity to reduce the high rates of violence in the country through creating more inclusive and democratic politics. Through inviting disaffected and historically marginalized groups to help craft the new constitution, the Assembly and constitution drafting process would be both a model for inclusive society, and produce the kind of inclusive constitution needed to lead the country to peace. However, the logic underlying the idea of the Assembly as peacemaker, a logic that assumed bullets could be traded for votes, ultimately misapprehended the nature of violence in the country. At the same time, it was this logic that both invited participation from the women’s movement to define women’s rights for the new constitution, and yet whose limitations ultimately displaced women’s voice. With the focus on reducing violence instead of hearing women's arguments for a comprehensive reproductive right, the Assembly truncated *libre opción* to mean a right to abortion, and rejected it. This chapter argues that the Assembly's treatment of *libre opción* reveals the ways in which the premise that democratization brings peace (what Francisco Gutiérrez' names the "fundamental premise" of the Assembly) both motivated and diminished women’s participation as citizens in the 1991 Constitutional Assembly.

The first section describes the Colombian context and a student movement’s call for the Constitutional Assembly. In Colombia, democratization was a transition from a closed political system generally believed to have fostered disaffected populations that turned to violence as a means of political expression. In this way, the transformation of politics via the Assembly and a new constitution also came to be the hope for diminishing violence in the country. Colombian

political scientist Francisco Gutiérrez calls the idea that democratization brings peace the *ideario fundamental* ("fundamental premise").

The second section describes the Colombian women's movement leading up to and during the 1991 Constitutional Assembly and its organizing for the *libre opción* right. This section shows how the imagining of a comprehensive reproductive right lies in human rights perspectives of women's rights and reflections on women's lived experience. Together, these two influences also drove the argument that the *libre opción a la maternidad* right was fundamental to women's citizenship. That is, the Colombian women's movement made the case for *libre opción* as a necessary right in order to be able to participate as full citizens in democratic politics and society. As we will see, however, this messaging is ignored and misheard.

The third section follows the Assembly debate over *libre opción*, centered on a close reading of delegate Ivan Marulanda's impassioned speech for including the right in the constitution. Marulanda was the one Assembly delegate who was an unwavering champion of the right, and yet we will see that his presentation of *libre opción* also misread the women's movement's formulation of the right. Moreover, his misreading diminishes women's political agency through treating them as passive victims of sexual oppression. This section argues that the *ideario fundamental* misapprehended the nature of violence in Colombia, in ways that facilitated obliviousness to the holistic perspective of women's rights that the women's movement was advocating for in the *libre opción* right. This obliviousness also served to neglect to see the outsize role of the Colombian Catholic Church in crafting the new constitution, in ways that constrained the participation and inclusion of individual citizens.

#### A. The 1991 Colombian Constitution as hope for peace and reaffirming Colombia a modern state

This section describes the path to the 1991 Constitution, namely, how a student movement called for a new, more democratic and inclusive constitution as a solution to ongoing nationwide violence. Drawing on the work of political scientist Fernando Gutiérrez, I unpack constitution proponents' view that democratization would bring peace. I show how this view, which Gutiérrez names the *ideario fundamental* or "fundamental premise," assumed that Colombia's exclusionary political system created the conditions for multiple armed actors to appear and gain power. Constitution proponents maintained Colombian politics needed to change if the state were to survive and Colombians to live with less violence. The road to the new constitution reflects a sense of extraordinary politics capable of transforming the state. The 1991 Constitutional Assembly and 1991 Constitution came to embody a hope for a new Colombia. Overall, the section relates how violence raised Colombians' doubts about the viability of the Colombian state and how constitution proponents saw a new constitution as the way to establish more democratic, inclusive politics that would renew Colombia as a modern, functioning state.

During the 1980s, ongoing violence in Colombia had reached levels that raised Colombians' doubts about the state's capacity to keep its people safe and carry out the functions of a modern state. Leftist guerrilla groups, drug cartels, paramilitaries, and the Colombian government were all embroiled in an armed conflict over control of territory and governing power. The violence configured daily life for all Colombians; Daniel Bonilla, a law and politics scholar and Colombian public intellectual, writes that "most basic rights and liberties of most Colombians began to be at risk" due to the violence (114). In urban areas, armed groups set off frequent car bombs with high death tolls and homicide was the number one cause of death for

men ages 18-45, while the country's extensive rural areas lived with the threat of forced recruitment and massacres, committed by all armed groups battling over control of land. Prominent Colombians were frequent targets of kidnappings and assassinations; several journalists were also kidnapped or disappeared. In a treatise on the 1991 Constitutional Assembly's mission, an Assembly delegate describes Colombians as utterly unsafe from violence and the nation turned into a graveyard:

To use a phrase from Winston Churchill, we should eliminate so much "blood, sweat, and tears" from the Colombian nation [*pueblo*]. The country has turned into a great cemetery with daily atrocious crimes, homicides, kidnappings and assaults, which keep the people terrified and foreign opinion convinced that we do not find ourselves in a land of pleasant living, but rather in one of the bloodiest and most barbarous nations on the planet. Before ecology, in the order of priorities, are Colombian people's lives, threatened at every moment" (Intervención de Alfredo Vazquez Carrizosa. "La Nueva Constitución Tiene que Ser para una Nación Pluralista." GC No. 47. Lunes 15 de abril 1991. De Acta de Sesión Plenaria, del Día lunes 18 de febrero de 1991.)

In arguing that Colombians' basic safety is the most important item before the Assembly, the delegate reveals the great extent to which multifaceted, daily violence characterized Colombians' lives. The delegate also acknowledges that Colombia's international reputation has become one of constant violence. Using the words "bloodiest" and "most barbarous" to describe foreign perception of Colombia evokes an image of Colombia as savage and uncivilized, in effect intimating that the violence has damaged Colombia's status as a modern state.

Armed actors also targeted state institutions and politicians, to the extent that Bonilla remarks there was a "sensation that the violence was radically destabilizing the country" through undermining state authority (116). In 1989, the guerrilla group M-19 stormed the Palace of Justice, holding over 350 people hostage and ultimately killing 98 people, including twelve Supreme Court justices. In 1989 and 1990, drug cartels assassinated three presidential candidates. Paramilitary groups targeted assassinations of leftist politicians, killing over 2000 members of the *Union Patriótica* party from the mid-1980s to early 1990s (Bonilla 116 n.7). The strikes of one group received violent reprisals from other groups, played through the people and offices of the country. In a 2004 essay, César Gaviria, president from 1990-1994, comments that perhaps his was the only Colombian life untouchable by violence (when he held the presidency): "There came a point when, with the possible exception being the President of the Republic, [drug cartel leader Pablo] Escobar could kill or kidnap whomever he wanted, which in fact is what he did" ("Prologue" 36, trans. Lemaitre). Gaviria acknowledges that the drug cartel leader Pablo Escobar had ultimate control over life and death, indicating the Colombian state's powerlessness before Escobar. Approaching the end of the 1980s, Colombians' basic safety was far from assured and many Colombians questioned how the state could reassert control.

The call for a new constitution that would become the 1991 Constitution began with university students' protests over the 1989 assassination of Luis Galán, a beloved Liberal Party presidential candidate. Following Galán's assassination, students at multiple universities across the country held protests and marches protesting against the influence of violence in Colombian politics. It was widely believed at the time and has since been confirmed that Escobar's Medellín drug cartel assassinated Galán ("Así matamos"); Galán had promised to extradite drug cartel members to the United States, where they would face harsher prison conditions and longer sentencing. The student movement coalesced around a demand for a new constitution, arguing

that a constitution supporting more inclusive political participation was the only way forward from Colombia's currently corrupt politics. In the words of Ximena Palau, one of the student movement leaders, "We wanted to modify the Constitution because drug traffickers were controlling Congress and we were tired [of it]" ("La Papeleta"). The student movement's view that politics needed to be different than its current state is also evident in an extra-official ballot the students produced to gauge public interest for a new constitution. The wording of the ballot emphasizes participatory democracy and having political representatives that represent more sectors of the nation: "To strengthen participatory democracy, do you vote for the convocation of a constitutional assembly with representation from the social, political, and regional forces of the nation, integrated democratically and popularly, to reform the political constitution of Colombia?" (Hernández Becerra). From the outset, the student movement urged a constitutional assembly and constitution that would open up meaningful political participation. The student movement's slogan suggested that the movement's constitution project could "save" Colombia: the slogan was, *Todavía podemos salvar a Colombia*, or "We can still save Colombia." The slogan evinced the idea that Colombia was on the brink of collapse and needed urgent collective action to be rescued.

The focus on overhauling the political order was founded in a national consensus that the violence was rooted in Colombia's closed, exclusionary politics, which had set in with the National Front political agreement. The National Front (*Frente Nacional*) was a pact between the Conservative and Liberal political parties to alternate the presidency and major cabinet posts between them for four presidential terms, from 1958 to 1974. The agreement to share political power was the parties' solution for returning to democratic governance following the dictatorship of General Gustavo Rojas Pinilla. The agreement also intended to keep peace between the two parties; Rojas Pinilla had taken power in 1953 to end the bitter partisan violence in the country that had been growing since the 1940s, in which Liberals and Conservatives persecuted one another to the point of a totalizing civil conflict. This period of partisan violence became known as *La Violencia* - the Violence - during which an estimated 200,000 Colombians died, massive displacement took place, and many killings used torture techniques (Bailey 565-575).

Although the National Front was a pact designed to return to democracy and quell violence, many would later charge the National Front with closing down politics and contributing to violence of the 1960s onwards. As historian Marco Palacios explains, the National Front enabled the political elites to secure power among themselves. Although bitter foes, the political elites of the Liberal and Conservative parties were demographically very similar, of the highest social status, income, education, and *criollo*, or light-skinned, ostensibly descendants of early Spanish settlers, at the top of the nation's racial hierarchy. In alternating power between the parties, the political elites were able to consolidate their power through developing a highly centralized administration and frequently declaring states of emergency. Under these conditions, Palacios explains, with democratic political avenues closed to the Left, guerrilla movements emerged to advocate for socialist political ideologies (264-268). Indeed, Antonio Navarro Wolf, a leader of the Colombian M-19 guerrilla group which disbanded in 1991, explains the guerrillas sought power through armed insurgency because electoral and political options were closed (37-38).<sup>22</sup> Thus, Navarro joins Palacios in explaining Colombia's internal armed conflict as the consequence of the National Front's exclusionary system.

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<sup>22</sup> On the topic of how many Latin American countries' closed, elitist political systems precluded democratic participation from most citizens and facilitated the emergence of armed insurgency during the 1960s-1980s, see Cynthia J. Arnson, *In the Wake of War*, 2012 p.2.

In judging that the state had created conditions for violence, proponents of a new constitution believed that transforming the state would help achieve peace. Political scientist Francisco Gutiérrez isolates and names the line of reasoning that propelled the turn to inclusive and participatory democracy in Colombia the *ideario fundamental*, or fundamental principle (421). This fundamental principle is that democratization would bring peace, which is based on an idea that the roots of violence consisted in the closed nature of the Colombian political system that had left conflicts to be resolved in spaces outside of institutions (421). The *ideario fundamental*, the belief that democratization would bring peace, was so pervasive in Colombian media, academic articles, and among political actors in the late 1980s and early 1990s that it is difficult to find instances where it was ever isolated as a subject of debate (Gutierrez 421-422).

The premise that democratization brings peace goes to the heart of what it is believed democracy offers the modern state. Definitions of the state from sociologists and political scientists have centered control over force as a key feature of the state. Max Weber defined the state as being “a 'state' if and insofar as its administrative staff successfully upholds a claim on the monopoly of the legitimate use of physical force in the enforcement of its order” (54). In drawing attention to the bureaucracy of modern institutions, one of his most significant contributions to sociological theory, Weber described the regular, ordered procedures of the state in terms of how they serve to keep the exercise of physical force within the hands of the state. Building on Max Weber’s study of modern bureaucracy, political scientists have advanced the idea that regular bureaucratic procedures of elections serve citizens’ need to express their discontent. Handled through established procedures such as elections, anger and dissatisfaction with the ability to make change became manageable within the context of governance.<sup>23</sup> That is, a state could continue the business of governance in a stable and predictable manner, capitalizing on the benefits of stability and predictability, when elections serve to process the judgments and emotions of the population.

We see this view in the rhetoric of Colombian political leaders of the time. Reflecting on the Constitutional Assembly ten years later, in 2001, Antonio Navarro, the leader of the M-19 guerrillas and an Assembly president, describes the Constitutional Assembly as achieving peace – including disbanding the M-19 – through a process of exchanging violence for electoral politics. “In the armed conflict, one seeks power through the triumph of weapons, and if a guerrilla organization disarms, whatever group of agreements are achieved, it always accepts an unarmed method, and therefore an electoral method, to achieve and renew power” (38). In describing disarmament as a change in the method of seeking power, Navarro treats armed conflict and elections as equivalent, as far as being methods of gaining and keeping power. A peace process, Navarro remarks, is “the fact that bullets were exchanged for votes” (38). Similarly, in his closing speech to the Constitutional Assembly in 1991, César Gaviria, then president of Colombia, discusses upcoming elections as an opportunity “to replace machine gun fire with your voice, to displace forever the deafening sound of dynamite with the force of your ideas” (“Ha renacido”). The materiality of violence – the bullets, machine gun fire, and dynamite – in exchange for the abstractions of democratic participation, indicate that when citizens speak, they will be heard and engaged, as forcefully as with weapons of lethal force. In asserting that violence had been a means of expression that was now obsolete because of opportunities for democratic participation, Gaviria and Navarro uphold the idea that democracy’s stability and

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<sup>23</sup> Many political scientists concur that elections alone are not sufficient for a state’s regime to qualify as a democracy or a just democracy. However, (meaningful) elections are one important element. For a review of recent literature on conceptions and measures of democracy, see Larry Diamond, “Democracy, Fat and Thin,” p.150.



peacefulness is the result of its being able to defer contention to recurring elections (Hagopian 2007).

The emphasis on democratization as a way to peace was, to read it another way, a restoration of – or rather, a giving over of – the power over coercive force to the state through the means of procedures such as regular elections and petition systems. Establishing functional state bureaucracy would mark the end of a need to gain attention and express voice through violence, and would turn over violence to the state.

Of course, there are issues with assuming that democratic states' monopoly on violence becomes peace. There have been many critiques that point out the ordered violence of the state, and that rather it is a situation where certain forms of violence are allowed or facilitated to thrive, while others are suppressed. Nevertheless, as Gutiérrez points out, it is commendable that in states such as Colombia with internal armed conflict, the decision was made to turn to democracy as opposed to repressive measures (444).<sup>24</sup>

The conviction that the 1991 Constitution would create a new era for Colombia was largely due to the turn to more inclusive political participation. Yet, there was also a sense that these were new politics, politics by and for the people, due to the extra-official and extraordinary character of the Constitutional Assembly. At three different moments, the Constitutional Assembly moved past legal roadblocks through unprecedented action.

A first moment of extraordinary politics is that the call for a new constitution began with a movement of university students, a group outside the traditional two-party political structure. The students' demands coalesced into a call for a vote to convene a new constitutional assembly. Students prepared an extra-official ballot (quoted above) for voters to fill out and submit alongside official election ballots for upcoming March 11, 1990 elections. Since six ballots already existed, the student movement's ballot became known as the “*séptima papeleta*,” or the seventh ballot, and the movement itself adopted the name, *Movimiento de la séptima papeleta* (Movement for the Seventh Ballot) (Baez Vera). The media and the public responded favorably to this ballot initiative from outside the established political parties and two million voters turned in *séptima papeleta* ballots (Lemaitre). Recognizing the people's desire to vote for a constitutional assembly, President Virgilio Barco issued Decree 927 of 1990, instructing the Electoral Organization to count votes in favor or against a constitutional assembly in the May 27, 1990 presidential elections. Barco's decree would make the May vote official.<sup>25</sup> According to Colombia's 1886 constitution, only Congress could initiate a constitutional assembly, a law which had hindered presidents' previous attempts at constitutional reform. Yet, where previous presidents had failed, university students were able to gain public support and momentum for a new constitution, to get people to vote.

To accept the vote outcome and convene a Constitutional Assembly, however, led to another move of extraordinary politics involving the Supreme Court. Barco's authority to issue Decree 927 was based in far-reaching presidential powers during a state of exception; due to increasing violence, Colombia had been under a state of exception since 1984 (Decreto 1038 of 1984). All decrees issued during states of exception were subject to automatic review by the

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<sup>24</sup>However, the Colombian president elected in 2002, Álvaro Uribe, would institute repressive measures with the aid of US funds, military equipment and personnel, to strike what are agreed as definitive blows against remaining guerrilla forces.

<sup>25</sup> Generally, the Liberal Party supported the idea of a constitutional assembly. Legal scholar Julieta Lemaitre suggests that the Liberal party (Barco and Gaviria's party) saw the constitutional assembly "as the only way to modernize the State and clean up its corruption, and at the same time cement its legitimacy and governability in a moment of crisis" (Lemaitre).

Supreme Court and many were concerned the Court would reject Barco's decree for not being directly connected to state security (de la Calle 90-91). However, the Supreme Court approved Barco's decree to count votes on convening a constitutional assembly in a May 25, 1990 decision, two days before the election (Sentencia No.59). The Court explained that the constitutional assembly directly addressed the issue of violence plaguing the country, since it was an expression of the people's will of how to construct an institutional framework for a "society in crisis." A galvanizing student movement and judicious use of state of exception powers, both outside ordinary political procedures, had made possible the official vote for a new constitutional assembly. The May 27, 1990 elections showed a majority of voters - 89% - approved calling a new constitutional assembly.

The Supreme Court was crucial in another moment of extraordinary politics, when it declared the Constitutional Assembly would be its own authority. Following the May 27 elections, after the convocation of a constitutional assembly was approved, President Gaviria<sup>26</sup> attempted to shape the Constitutional Assembly process. He formulated an agreement with the newly disbanded guerrilla M-19 movement and Liberal and Conservative parties about protocol for how the constitutional assembly would operate, be convened, and the new constitution to come into effect (Zuluaga Gil n.60). Gaviria rendered the agreement into law on August 24, 1990 as Decree 1926 - another decree issued under state of exception powers. In its review of Gaviria's decree, the Supreme Court rejected the multiparty agreement and ruled instead that the Assembly would determine its own procedures (Sentencia No. 138). In its decision, the Court asserted that the constitutional assembly would "open obstructed channels of expression, or establish ones that have been denied, or, in sum, change an unfit system into an efficient one that, for diverse factors, has come to lose vitality and approval" (Sentencia No. 138 351-E). The decision reinforced that the traditional government should take a backseat to the new politics that the constitutional assembly was initiating.

From its origins in a student movement to its safeguarded independence from a Supreme Court decision, the 1991 Constitutional Assembly came into being through extraordinary moments that held it up as a messianic vehicle to deliver a constitution and new way of doing politics that would be a foundation for peace and democratic order. The extraordinariness of these moves, their being outside traditional politics and political expectations, imbued the constitutional assembly and the constitution with hope that change would occur. The student movement's proposed constitutional assembly inspired many Colombians to help create a new constitutional order as the way to "save Colombia." The following section studies how women's organizations articulated *libre opción* as a crucial right for a more democratic, inclusive Colombia.

## B. *Libre opción a la maternidad*: including and going beyond "abortion"

### 2.1 CEDAW and the concept of "*libre opción*"

During the 1991 Constitutional Assembly, women's organizations advocated for a few key women's rights to become articles of the 1991 Constitution, including the right of *libre opción*. A major influence on conceptions of women's rights at this time (and today) was the international women's rights treaty, the Convention on the Elimination of Discrimination

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<sup>26</sup> César Gaviria won the March 11, 1990 presidential election and assumed the presidency from Virgilio Barco on August 7, 1990.

Against all Women (CEDAW), which Colombia ratified in 1981. As international law scholar Beth Simmons observes, CEDAW quickly rose to prominence as a compulsory reference and framework for discussions of women's status or rights in Colombia and many other countries (253-254). This section (B.1) first describes the impact of CEDAW for imagining women's rights and then details how *libre opción* developed through the work of Colombian psychologist María Ladi Londoño. The following section (section B.2) describes women's lobbying for *libre opción* during the Assembly, showing how women's organizations consistently argued for *libre opción* as a comprehensive right for women's reproductive autonomy and connected this right to women being able to be full citizens in Colombian politics and society.

CEDAW transformed the struggle for women's equality through setting out women's rights as human rights. That women's rights were human rights meant, in the words of women's rights scholar-activist Rebecca Cook, that women possess "rights that individuals can exercise by virtue of their inherent human dignity" (977). CEDAW addressed a range of issues, from employment to education to reproductive health, revealing a perspective that women's social and economic circumstances greatly affect their ability to lead lives of dignity. CEDAW asserted women's reproductive health and choice as important in and of itself, instead of treating women's reproductive health and choice as a means to other, ostensibly more important goals: "Under this Convention, policymakers, governments, and service providers have to see fertility regulation and reproductive health services as a way to empower women, and not as a means to limit population growth, save the environment, and speed economic development" (Plata 99). CEDAW established that all forms of discrimination, whether intentional or not, violated CEDAW (Article 1). This meant that governments should strive to address any actions that had the effects of discriminating against women.

Viewing reproductive issues in terms of human rights spurred a new way of conceptualizing women's rights. Women's non-governmental organizations began drawing on CEDAW soon after ratification in ways that showed a comprehensive view of women's rights. That is, like CEDAW, women's NGOs discussed women's rights as encompassing political, social, and economic dimensions. For example, in 1986, the Colombian family planning organization PROFAMILIA launched Legal Services at their clinics to educate women about their rights and assist them with family law. The Legal Services program reflects a CEDAW kind of understanding that women's ability to exercise reproductive rights is affected by issues such as custody agreements, domestic violence, or other family law issues. The Legal Services program guidelines explicitly invoke CEDAW:

[T]o use and publicize the Convention on the Elimination of All Forms of Discrimination Against Women as a means to improve women's condition and secure for them equal access to family planning services;  
to publicize the new rights of women in the family environment by means of educational material and by direct and personalized legal orientation. (Trans. Simmons 247).

The guidelines show a double goal of educating women about their rights according to CEDAW, as well as providing concrete legal assistance. María Isabel Plata, the head of PROFAMILIA, affirmed that consciousness-raising was a primary aim of the Legal Services program: "[T]he goal," Plata explains in a 1995 *International Family Planning Journal* article, "was to expand awareness of women's rights as protected under the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)" (Plata and Calderón 1105). Thus, PROFAMILIA not only adapted its programs to address the fuller spectrum of women's

reproductive rights, in line with CEDAW; it also sought to educate its clients and patients about the CEDAW conception of women's rights. During the 1991 Constitutional Assembly, one of women's organizations' central goals was to incorporate CEDAW's women's rights perspective into the new constitution. For example, over thirty women's organizations signed a declaration calling for "the elevation of CEDAW to the constitution" in a full page advertisement in the largest national newspaper in April 1991 (*El Tiempo* April 28, 1991).

CEDAW also provided new and ready language to argue for women's reproductive rights. During the Constitutional Assembly, Colombian women's organizations adopted CEDAW language to lobby for women's rights in the new constitution. For example, women's organizations submitted proposals for constitutional articles on women's rights that echo CEDAW's conceptual approaches and wording. A collection of Bogotá-based women's organizations proposed an article that "the State would guarantee the conditions so that women can fully exercise their political, economic, social and cultural rights" similar to CEDAW's Article 3 (Quintero 10). The 1991 Constitution's articles on women's rights, inspired by women's organizations' proposals, closely match CEDAW articles. The 1991 Constitution's Article 13 asserts equal treatment between men and women, matching CEDAW's Article 1. Article 8 matches Convention Article 40 on women's political opportunity. On reproductive rights, the 1991 Constitution's Article 42 establishes couples can "freely and responsibly decide the number of their children," assuming the phrasing of CEDAW's Article 16(e). Having been forged in the contentious ground of international compromise, CEDAW offered battle-tested phrasings of women's rights that Colombian women's organizations used to argue for constitutional rights, largely successfully.

That CEDAW had the status of international human rights law also helped legitimate the idea that women's rights belonged in the 1991 Constitution. In a 1995 article, María Isabel Plata and another PROFAMILIA leader, Adriana de la Espriella, note that women's organizations emphasized the international character of women's human rights:

The strengths of the proposals advanced by the Women and Constitution Network lay not only in their recognised support by the women's organisations, but in the fact that they emphasised that the principles embraced in their proposals were mandates contained in international human rights instruments, such as CEDAW. They won legitimacy by being framed as internationally recognised human rights provisions. In this case, the use of international human rights language proved to be an effective strategy for introducing women's rights into the constitution, taking advantage of the fact that Colombia is a country that is constantly scrutinised by the international community for its compliance with human rights principles. (Plata and de la Espriella 402.)

Women's organizations leveraged a sense of international scrutiny of Colombia's human rights commitment to argue for incorporating women's rights in the new constitution. Thus, women's organizations used CEDAW and Colombia's troubled international reputation to pressure Assembly delegates to establish women's rights as constitutional rights.

While CEDAW does not include a right to *libre opción a la maternidad* or to abortion, CEDAW's view of women's rights as bearing on many dimensions and articles on women's reproductive autonomy are compatible with the *libre opción* right. During the Assembly, women's organizations lobbied for both incorporating CEDAW principles into the new constitution and the specific right of *libre opción*. The concept of *libre opción a la maternidad* was largely developed by María Ladi Londoño, a pioneer in women's sexual education and

reproductive healthcare from Cali, a major city on Colombia's Pacific Coast (Morgan and Alzate 395). At the heart of Londoño's work is a feminist commitment to treating women's health holistically. A "holistic approach," Londoño explains, "emphasizes that we make up an integrated whole, a totality interdependent with the environment" (*Prácticas* 133). When considering women's reproductive health, Londoño conceptualizes "a woman as a person integrated with her anatomy, psychology, physiology, ideology, dreams, power, fears, and hopes" (*Prácticas* 170). In contrast, the prevailing treatment model focused only on the biological, and even as it narrowly considered only the body, it rejected anything like a holistic view. Instead, it compartmentalized the body into discrete systems, taking a mechanical view of the body as interacting parts: it "reduce[s] us to determined organs or functions, which divide us into zones or convert us entirely into biological entities" (*Prácticas* 133). As Londoño hints, the problem with a mechanical, medicalized model is that it reduces human beings to mere biology. This results in bad healthcare: "To forget the person impedes carrying out effective interventions, since it ignores deeper causes...many times, [a person's condition] might be the result of socio-emotional needs, processes in crisis, not deteriorating organs" (*Prácticas* 124). The holistic view maintains that sex and reproduction are not just physical or medical matters, but are also vital issues to women's lives in social, economic, emotional, mental, and spiritual terms. Forgetting the whole person permeates the entire medical system in ways that reinforce it as patriarchal. The shift to a holistic approach is also explicitly feminist. Londoño regarded the shift to a holistic approach a feminist imperative, in the same vein as the feminist movement in public health starting in the 1970s.

Londoño practiced a holistic approach in all her projects on women's sex and reproduction. In the early 1980s, she led a well-known call-in radio show about sex topics which treated sexual pleasure and choice as a woman's right. In 1984, she founded the non-profit organization, *Sí, Mujer* (Yes, Woman), which operated a clinic for women's reproductive and sexual health, offered sex education, and the first program in Colombia to address the health needs of sexual assault survivors. Operating from a whole-person perspective, this program included mental health counseling in addition to medical attention. Based on her work in these projects, Londoño wrote a book advocating a holistic understanding of women's sexual and reproductive rights, *Prácticas de libertad en sexualidad y derechos reproductivos* (Practices of freedom in sexuality and reproductive rights), published in April 1991. This was Londoño's first book to introduce *libre opción a la maternidad*, which she describes as a "new definition" of abortion (*Prácticas* 181, 196). As she elaborates in a chapter dedicated to defining *libre opción* in a following book, *libre opción a la maternidad* is a comprehensive women's sexual and reproductive right encompassing both a woman's choice to become pregnant and to terminate a pregnancy (Londoño, *Derechos* 186-7).

While Londoño staunchly believed in a right to abortion, she believed the *libre opción* right was superior on both conceptual and strategic grounds. Conceptually, she identified a need to revise language used for reproductive health and rights, since a holistic approach asserted a distinct view: "we must specify the language we utilize, since words will represent and allow its comprehension...As far as pregnancy and abortion, we have to work to identify appropriate vocabulary that really describes the situation, as far as we are understanding it" (*Prácticas* 163). Based on her experiences as a sexologist and psychologist assisting Colombian women, Londoño argued for a right that recognized how varied sexual and reproductive experiences might be within a woman's own life, as well as across women: "Reproductive health means...regulating the birth of children, not only using contraceptives, but also interrupting, in optimal conditions,

an unwanted or inopportune pregnancy, when it appears” (*Prácticas* 153). The right to *libre opción* encompassed both those times when a woman might seek to terminate a pregnancy and when she might wish to have a child. As Cristina Grela, the Latin American Coordinator for Catholics for Choice<sup>27</sup> and reviewer of Londoño's 1991 book notes, Londoño criticized the polarized debate on abortion for "leaving the pregnant woman to the side" (2). Furthermore, Londoño emphasized that economic, affective, and social conditions were extremely important to women's autonomy in sex and reproduction (*Derechos* 190). In drawing attention to the circumstances surrounding sex and reproduction, Londoño's conception of *libre opción a la maternidad* argued that freely chosen motherhood implied having freedoms and supports in all areas of one's life. In Colombia as in other countries, many women who have abortions also have children; Londoño argued that a sexual and reproductive right would fall short of addressing women's realities if it did not speak to their range of experiences.

She also thought "*aborto*" or "abortion" was too stigmatized a term, to have productive conversations about establishing women's legal right to end pregnancy. Londoño's holistic view of reproductive health also led her to want to reframe the fight for legal and safe abortions to include the affective aspects of abortion and other reproductive experiences: "We need spaces to reflect about this experience [of abortion], in order to dismantle the mystery" (Londoño, *Prácticas* 170). For Londoño, the fight for abortion rights went far beyond legal and safe access to abortion procedures. At stake was not just women's reproductive health, but also a "revolution of conscience" that would dismantle patriarchal, heteronormative constraints on women's sexuality (Grela 2). In addition to a legal/political issue or public health issue, Londoño argued for an affective dimension that also raised consciousness. Overall, *libre opción* captured the radical shift in conceiving of women's sex and reproduction, which no longer seemed possible for "abortion" since the term was stained with controversy.

Londoño's work in women's sex and reproduction is regarded as so ground-breaking that a profile of her in the well-respected weekly magazine, *Semana*, credits her with the wholesale creation of sexual and reproductive rights as a category of women's rights (Camargo). As the profile relates the historical tale, Londoño presented her ideas of sex and reproduction as areas of women's rights at the First Congress of Sexology and Sexual Education Societies in Paraguay, in 1982, and "received an ovation from the auditorium" (Camargo). Londoño's argument for the concept of women's sexual and reproductive rights, according to the profile, spread from this meeting across time and place to result in these rights being included in major human rights treaties:

Launching this idea in this meeting had a snowball effect, the rights were spread and nourished by women from other countries...A decade later, the concept of sexual health and reproductive rights had been elaborated, assumed, and universalized. As an effect of this process, the theme reached the International Conference on Population and Development in Cairo, in 1994, and was ratified the following year in Beijing. (Camargo).

While lauding Londoño as the creator of sexual and reproductive rights can be a disservice to the efforts by many people to conceptualize and advocate for sexual and reproductive rights<sup>28</sup>, she

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<sup>27</sup> Cristina Grela, an Uruguayan doctor, founded the *Red Latinoamericana de Católicas por el Derecho a Decidir* (Latin American Network for Catholics for Choice) in 1989 in partnership with Catholics for Choice, an international non-profit organization based in the United States founded in 1973.

<sup>28</sup> Also, a comprehensive or umbrella right for women's sexual and reproductive rights appears in the international arena at least as early as the Bucharest 1974 conference.

clearly was a pioneer in Colombia and the global stage in this arena. Londoño was a part of a group of feminists who crafted proposals for constitutional reform in 1988, during an unsuccessful attempt by President Virgilio Barco to change the constitution in response to increasing violence and political apathy. The feminists' 1988 proposal included the right to *libre opción a la maternidad* (Lamus 80, quoting Martha Lucía Tamayo). The proposal would serve as a template for women's constitutional proposals during 1990-1991 (Wills 219-221). Londoño would also muster tremendous organizing at the eleventh hour of the Constitutional Assembly in a drive to save *libre opción a la maternidad*.

## 2.2 Bringing *libre opción* to the Constitutional Assembly

Once the Constitutional Assembly was approved via popular referendum in May 1990, grassroots women's organizations across the country focused their attention on bringing a feminist perspective to the Constitutional Assembly and the new constitution to be. *Libre opción a la maternidad* figured as a core right from the earliest instances of women's constitutional organizing. The first official event in preparation for the Assembly was an open meeting for all Colombians interested in exchanging ideas on constitutional change, held in Bogotá from July 13-15, 1990. During this event, titled the *Primer Congreso Nacional Pre-Constituyente*, a collective of women's organizations, under the banner, "*Mujeres por constituyente*" (Women for the constitutional convention), submitted a proposal largely based on the feminists' 1988 proposal (Wills 219-221). The *Mujeres por la constituyente* proposal included a right to *libre opción a la maternidad*, reproduced in Spanish and translated into English below:

*Las mujeres y los hombres tienen derecho a decidir sobre la prole que están en condiciones de procrear, formar y mantener. El privilegio de la mujer a la opción libre de la maternidad, el Estado garantizará a las mujeres en estado de preñez el derecho al trabajo, lo mismo que la extensión y seguridad social integrales. Se prohíben los despidos del empleo por razones de preñez.* (Quintero 10).

Women and men have the right to decide about the offspring that they are in the condition to procreate, form, and support. The right to freely choose motherhood [*la opción libre de la maternidad*] is [sic] women's right, the State will guarantee women in a state of pregnancy the right to work, as well as its extension and comprehensive social welfare. Dismissal from employment for reasons of pregnancy is prohibited.

As the *Mujeres por la constituyente* proposal shows, the right to *libre opción* was conceived as a women's reproductive right that would assure her not only the ability to end a pregnancy but also to carry a pregnancy to term. Elaborating specific workplace protections reflects the holistic approach towards women's reproduction, in that it recognizes how circumstances such as job security affect women's well-being. Protecting working pregnant women was also a priority issue since pregnancy screening was then a routine part of Colombian hiring. As Londoño explains, "to begin work, even in State organizations, a negative pregnancy test is required, since if it is positive, the woman does not have the right to work" (*Prácticas* 152). Despite the fact that this practice left pregnant women in economically precarious conditions, it was nevertheless "socially validated and considered normal, common, and even necessary for employers" (*Prácticas*, 152). With the *libre opción* right, women would have legal protection to work whatever their pregnancy status.

Martha Tamayo, an active feminist at the time, comments on the elaborated articles as attempts to fill out the conception of *libre opción* and show it was about more than abortion. She states the proposed *libre opción* article was about:

women's autonomy to decide about her motherhood together with a guarantee of social security, rights, these last ones, geared towards the State providing and guaranteeing rights related with reproductive health and sexuality... With a lack of clarity about the diverse contents of sexual and reproductive rights and the need to send messages that were not centering the debate around abortion, [the *Mujeres por constituyente* group] published a document which specifies contents such as i) promotion of workplace and life environments that do not harm human fertility and prevent risks; ii) information, education, and guidance for the exercise of sexual freedom and responsibility; iii) guarantee that processes of human fertility originating in technological and scientific advances do not harm universal principles of equality, respect and free determination of persons; iv) no discrimination for reasons of maternity or civil status. (Tamayo, quoted in "Un derecho" 19).

As we can see from Tamayo's explanation, *libre opción* encompassed a range of rights that supported women's sexual and reproductive freedom, considering economic, legal, and educational dimensions of women's sexual and reproductive lives.

The *Mujeres por la constituyente* proposal, and its formulation of *libre opción*, would be the major avenue for disseminating the *libre opción* right to women's groups around the country. In October 1990, women's organizations from across the country sent delegations to a women's forum in Bogotá, the *Encuentro del Abrazo Amoroso*, or the Loving Embrace Gathering. The goal was to exchange proposals and discuss strategy for the upcoming elections for Assembly delegates in December (Lamus 80, Wills 220). At this meeting, the *Mujeres por la constituyente* proposal circulated, which included core rights and orientation that would be "assumed and amplified by women all over the country" (Villareal 192). In addition to *libre opción a la maternidad*, three other core areas of rights were a right to freedom from discrimination based on sex; a right to equal participation in political decision-making; and the establishment of a separation between Church and State (Morgan and Alzate, Ochy, Wills, Quintero). Women's groups across the country incorporated these rights into *mesa de trabajo* proposals submitted for the Assembly's review.

Following the October 1990 meeting, women's organizations began working earnestly on formulating proposals for constitutional rights via *mesas de trabajo*, or working groups, organized at the local level. The Colombian government, led by President César Gaviria, supported the formation of *mesas de trabajo* nationwide as a way to make constitutional drafting more inclusive and democratic; according to historian Ricardo Zuluaga Gil, President Gaviria was also concerned that public interest in the Assembly would fade and the whole constitutional project would lose legitimacy as a result (78-79). The *mesas de trabajo* system was devised as a way to continue the...Using the slogan, "*Manos a la obra*" ("Hands to work"), President Gaviria invited Colombians to form *mesas de trabajo* and craft rights proposals based on their concerns (Luis Ángel website), even explicitly encouraging "feminist and women's organizations" to participate (Morgan and Alzate 375). The *mesas de trabajo* operated from September 16 to December 3, 1990. Participation was extensive across region and sector: "840 *mesas de trabajo* coordinated by mayors registered, 286 coordinated by social organizations, 244 by rehabilitation advisers, 114 from universities and indigenous councils," resulting in 100,569 proposals



(Zuluaga Gil 79). Government offices collected the proposals and organized them according to topic. The Constitutional Assembly specified how the proposals would be incorporated into the drafting process during the early weeks, when it decided its operating procedures: each Assembly Committee would receive all the proposals on topics pertinent to the Committee's purview, and review them as they drafted the rights.

While there was no requirement to heed the proposals, much of the language and ideas from proposals were incorporated in the articles drafted by each Committee. Delegate Iván Marulanda - who would be the champion of *libre opción* in the Assembly - has maintained that the *mesas de trabajo*'s proposals were "the principal raw material of the Constitution" (Zuluaga Gil 78). The *mesas de trabajo* have been criticized in years since for not providing more direct access to the Assembly (*Constituyentes por la Paz* 32-33, Jiménez Martín 146-7), but even with their shortcomings, the *mesas de trabajo* invited an unprecedented degree of political inclusion. Reflecting on them years later, Constitutional Assembly delegate Echeverri Uruburu affirmed that "these *mesas de trabajo* that the government convened in *barrios* [neighborhoods], factories, in community action meetings, etc. were the most participatory processes in the history of the country" (Zuluaga Gil 78). Leading up to the Assembly, the *mesas de trabajo* established a sense of a nationwide investment in collectively making a new constitution. They also provided a structure through which groups, such as women's groups, could participate - indeed, were called upon to participate.

We can see processes of inclusive citizenship happening within the women's movement organizing around the Constitutional Assembly - that people were gathering to define for themselves what women's rights should be included in the new constitution, how they should be worded, discussing what they meant, what they would change, in sum, deliberating and crafting conceptions of citizenship in collectives of various sizes and identities. The women's movement brought together groups and people from across identity affiliations - from political parties, labor unions, indigenous, Afro-Colombian, and regional identities - to discuss women's rights for the new constitution (Curiel 46-7). As political scientist María Emma Wills notes, "the project of the new Constitution became a motive to construct regional forums for women in which they took up topics like citizenship, democracy, gender justice or women's human rights" (223). At the same time, the women's movement deliberately set aside issues of land reform, important to indigenous, Afro-Colombian, and rural women, and lesbian rights (Curiel 61-62, 64). As anthropologist Ochy Curiel reports based on interviews with movement participants conducted in 2009, women touched on these issues in conversation, but decided to focus on rights more closely aligned with CEDAW.

The discussions and collaborations further produced a critique of how experiences crucial to women's lives, such as reproduction, were relegated to a domestic sphere apart from politics. The slogan of the women's movement, "*democracia en la plaza, democracia en la casa*" (democracy in the plaza, democracy at home), attacked the divide between public and private spaces that had historically configured women's lives. Movement leader Olga Sánchez describes the contradictory discourses about Colombian women, one of public space and another of private space:

[O]n the one hand, there is a recognition of women as a subject of rights in the public sphere, as a capable citizen that shares equality of possibilities with men. But in the private space of the family, women are ones who should take care of others, the affectionate, tender one, the one with a strong set of morals. (76).

In identifying the opposed constructions of women in the public vs. the private sphere, Sánchez points out the inconsistency of closing down women's citizenship, and her rights as a citizen, once she crosses the threshold of domestic space. The movement's focus on *libre opción a la maternidad*, or a right to freely choose motherhood, arose precisely from collapsing the wall between public and family spheres. Key to the conception of *libre opción* was also that it was necessary for women to participate as full citizens in Colombian politics and society. The women's movement slogan was, "*Sin las mujeres, la democracia no va,*" (Without women, democracy won't work).

Submitting proposals was a crucial avenue for women's groups to influence the constitution drafting, since they had disagreed over the need to elect a women's party Assembly delegate. This split emerged at the October 1990 women's meeting in Bogotá. The October 1990 women's gathering was unsuccessful in unifying behind delegate candidates who would run on a women's issues platform. Many women who organized around women's issues were also active members of political parties, grappling with the issue of *doble militancia*, or double militancy, the sense of having to fight battles on two different fronts (Curiel 50). Following the Marxist thinking of their parties, many women believed it more important to support their party candidates than to put efforts behind a candidate who would run on women's issues. As the thinking went, it was crucial to ensure a Leftist perspective in the Assembly, and less likely that a women's issues candidate would be successful (Wills 226). Two women ran, nevertheless, on a women's issues platform, but were defeated. Delegates to the Constitutional Assembly were elected in a national vote on December 9, 1990. 74 delegates were elected, 4 of whom were women. The Assembly was celebrated as more inclusive than Colombian politics had ever been theretofore: 19 delegates were from the disbanded guerrilla group M-19; 24 from the Liberal party; 11 from a new branch of the Conservative party, the *Movimiento de Salvación Nacional*; 10 from the Conservative party; 2 from the far-left *Unión Patriótica* party; 2 from evangelical parties; 2 non-voting indigenous delegates. However, there were very few women, very few indigenous members, and no Afro-Colombian delegates. Given that the Supreme Court approved the convocation of a Constitutional Assembly on October 9, 1990, activists and scholars have argued that this left little time for women to organize support for a women's issues delegate to be elected in December (Wills 226). This observation is borne out in seeing how women's unified organizing really gained steam halfway through the Constitutional Assembly, around the issue of *libre opción*.

It is worthwhile here to describe the Assembly's structure and schedule, which I draw from historian Ricardo Zuluaga Gil (97-103). The Assembly had wide latitude in determining its own regulations, apart from its opening and closing date, which were fixed for February 5, 1991 and July 4, 1991, respectively. This allowed only five months for producing the new constitution; the Assembly quickly approved in its first session a process modeled on the Colombian Congress' process of approving legislation. In effect, the first months of the Assembly, from February through April, the Assembly delegates divided into five committees, with each committee further divided into 2-3 subcommittees. Each committee was dedicated to a different topic, and tasked with drafting constitutional articles in that topic. Each committee was required to review all pertinent proposals from *mesas de trabajo*, delegates, and the Colombian government, which were delivered to them by a Technological Assistance Service. However, the committees had latitude to decide ultimately what articles to propose and how to word them. Each committee submitted its proposed articles to the full Assembly, for a first round of debate; it then moved to a second round, which many felt was rushed. In May, the plenary debates, or

final debates in full Assembly, occurred. Once these received approval, in June, the Commodification Commission took charge and reviewed the entire assemblage for conceptual consistency and grammar errors. The full Assembly reviewed the Commodification Commission's document, the proposed final constitution, in late June, and it was approved by vote on July 4, 1991. It was planned that it would go into effect on January 1, 1992.

As the Assembly got underway, it appeared at first that *libre opción* would receive serious consideration. Four delegates had submitted proposals for women's rights articles that included *libre opción* – although two delegates had also submitted proposals for establishing that life began at conception (Morgan and Alzate 377). Both the First and Fifth Committees debated a constitutional article establishing *libre opción a la maternidad*. Women's groups continued applying pressure on delegates to support women's rights in the four core areas, including *libre opción*, through actions like publishing editorials in major newspapers and holding rallies (Quintero 6-9). During these first few months, women's groups carried out actions independently and in smaller alliances. The most collective action they carried out was an April 28, 1991 full page advertisement in the largest national newspaper, *El Tiempo*, signed by twenty women's organizations from across the country. The advertisement called for the elevation of CEDAW and the four core areas of rights, including "*libre opción*" ("Comunicado", Quintero 9, and Morgan and Alzate 378). However, as April drew to a close, it became clear that the Assembly subcommittees were rejecting a *libre opción* article as too controversial for sanctioning abortion. With the plenary sessions looming in May, María Londoño called on women's groups to coordinate their strategies and try to save *libre opción*.

Londoño's efforts to keep *libre opción* in the new constitution affirmed a holistic vision for sexual and reproductive rights. Londoño circulated a letter on April 19, 1991 among women's groups asking for a gathering in Cali to pursue a coordinated strategy for the plenary sessions, particularly to make sure their voice was heard in support of *libre opción*:

Dear Friends:

In spite of the historical and social importance [of the moment] that we are experiencing in the country with the realization of the National Constituent Assembly, we painfully note the grand absence of women as a unified group in this national debate, in defending and/or supporting initiatives to protect our specific rights like those related to "free motherhood." Considering that in May the plenary sessions for the approval of our Constitution will be held, we invite you to meet in Cali, all day Saturday May 4, to study and agree on strategies so that the possibility of discussing legislation on abortion is not closed for more centuries in Colombia. (Morgan and Alzate 377-378; trans. Morgan and Alzate).

On May 4, 1991, women's groups met in Cali and formed the *Red de la Mujer y Constituyente*, the Network for Women and the Constituent Assembly, which from then on coordinated actions among the 85 member groups, including increasing personal, informal lobbying of Assembly delegates. They began having breakfast meetings with delegates and holding radio shows. In communication with the *Red*, delegate Marulanda insisted on making a speech for *libre opción* in June, and forced a plenary vote on the matter in June. Delegates voted against *libre opción* 40-25 with three abstentions in a secret vote. The defeat of *libre opción* is not surprising, in spite of the women's movement great efforts to keep it. What is interesting is how the Assembly debate treated *libre opción* as simply abortion, although women's organizing and the *Red* had always emphasized the holistic nature of the right.

C. *Libre opción* during the Constitutional Assembly. Where in the new constitution does *libre opción* belong? Isolating parts of women's rights and leaving women as reproductive bodies.

### 3.1 Marulanda's *libre opción* speech during the Plenary Session

Where *libre opción* appears in the Constitutional Assembly debates reveals the Assembly delegates' indifferent ignorance over the meaning of the right and the ambivalent support it experienced. Both the First Commission, dedicated to fundamental rights, and the Fifth Commission, dedicated to cultural, social, and economic rights, considered including *libre opción* as attached to a larger list of women's rights. Ultimately, women's rights were given over to the Fifth Commission, and included as one category under a larger umbrella of family rights.

Developing women's rights as a category under family rights treated women as fundamentally reproductive bodies, in their roles as wives and mothers, comprehensible and visible through their familial role, affecting the conception of women's rights. Women's rights become one category alongside rights of the family (describing marriage rights), children, adolescents, the elderly, and physically and mentally incapacitated. As the Fifth Commission states in its introduction of family rights to the full Assembly, the Commission studied "the essential matters that have to do with Colombians during the different stages of their life, concretely the specific rights of those who are most vulnerable" (Fifth Commission 2). Including women's rights with family rights casts women as vulnerable and as legally incapable as children and the other groups. The Fifth Commission continues to affirm that women are inseparable from the family, upholding the value of "treating them [the different groups under family rights] as a whole because one cannot speak of the family without coordinating its meaning with children - youths - women - or the elderly, nor viceversa" (Fifth Commission 2). In including women's rights under family rights, the Fifth Commission (and 1991 Constitution) portrays women as destined to be part of a family and as one of the most defenseless groups in Colombian society.

Indeed, the *Comisión Codificadora*, the commission in charge of codifying the draft of the constitution into a final draft for a final vote of approval, desired to change the placement and articulation of women's rights because placing women's rights under the family articles section reinforced the idea of women as merely reproductive bodies (Informe de la sesión de la comisión codificadora – 22 junio 1991, p.45). While Article 42 establishes that men and women are equal, the following articles for women's rights guarantee special assistance to single mothers and pregnant women. The Commission did not make the change because it would be too divergent from the original draft.

We can see the breakdown of understanding *libre opción* as crucial to women's citizenship in, paradoxically, the speech championing *libre opción* during the Constitutional Assembly, from the Liberal party delegate Iván Marulanda. Marulanda essentializes the Colombian woman as a being subjugated by her reproductive capacities, unable to see past this to advocate for *libre opción* on a basis of women's citizenship. In a lengthy speech in support of *libre opción* to the full Assembly, Marulanda matches women's organizations' holistic understanding of *libre opción* as a right to have or not have a child. He describes *libre opción* as a woman's right to have children when she deems the conditions are right: "...she has the right to choose the moment, the physical moment, the psychological moment, the spiritual moment, the

economic moment" to have sex and possibly become pregnant (143).<sup>29</sup> Naming all the different moments shows Marulanda understands the decision to become pregnant bears on many dimensions: bodily, material, and affective. However, he diverges from women's organizations in his reasoning for the right. Whereas women's organizations argue for *libre opción* as empowering, as necessary for women to exercise full citizenship, Marulanda argues for *libre opción* as a kind of women's self-defense mechanism against inescapable sexual oppression at the hands of Colombian men.

Marulanda begins his speech by describing Colombia as a machista society that regards women's sexual and reproductive desires as irrelevant, where women are subject to have sex with men, when men desire it. He deplors this situation in which women, have little choice about becoming pregnant, and once they are pregnant, are obligated to have the child. Under these sexually oppressive conditions, children become the materialization of women's subjugation to men; children are "fruit of a savage satisfaction for sex within this setting of a machista state" (Marulanda 142-143). Marulanda finds it categorically impossible for mothers to want their children because motherhood was forced upon them. In Colombia, Marulanda reports, machismo pervades society so thoroughly that "of course we are in a scenario where hundreds of thousands of children are born in Colombia each year without the affection of a family or a couple" (143). In believing that unwanted children grow up without any parental concern for their welfare, Marulanda believes these children are doomed to a deprived and exploited childhood that fosters violence:

Colombian boys, Colombian girls, are subjected to sexual exposure, to rape, to incestuous relations, to promiscuous relations, fruit of the country's scenario of poverty, and from all this emerges the bitterness of some adolescents who are coming up without love during childhood, because they did not enjoy childhood, because they were abused during childhood, and there appears of course all the consequences of this alienation that are in the same roots of impetuous and rampant and defiant violence in this Nation. (143).

This sweeping statement accounts for violence in Colombia by explaining how miserable the childhoods of unwanted children are. Women's reproductive autonomy becomes a weapon against the negative consequences of rampant machismo; reducing unwanted children protects society. This becomes what *libre opción* is about, in Marulanda's speech, why it matters that women are able to choose to be pregnant.<sup>30</sup> Marulanda's emphasis on women's sexual and reproductive oppression may be a strategic choice as to what might be a persuasive argument to the audience of delegates; yet, it actually echoes the view of women that women's organizations are trying to combat, in seeing women as primarily reproductive beings, in that they are determined totally by their reproductive lives, and are passive sufferers who at most pass their misery on in a cyclical pattern each generation. Marulanda's speech treats women as victims in need of protection, disregarding women's collaborative articulation of rights according to their experience. Marulanda's speech, while presenting *libre opción* as a comprehensive right to reproductive autonomy – the right to have or not to have children – nevertheless disconnects the

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<sup>29</sup> All quotations for Marulanda's speech come from within "Informe de la sesión de la comisión plenaria – 14 junio 1991." *Asamblea Nacional Constituyente*.

<sup>30</sup> Marulanda's speech presages the Freakonomics argument that abortion decreases crime, based on case studies of the U.S. and Romania. It shows how the idea has been in circulation, the idea that having fewer children born into poverty will benefit a nation in part because of the negative impact such children have, because their families/mothers have few resources or desire to rear them.

right as one about women's citizenship, to make it about correcting oppression of a miserable creature and saving the nation in the process.

Moreover, though he speaks of all Colombians, Marulanda's descriptions are coded to actually be circumscribed to the poor. For example, the quotation above ostensibly describes the miserable fate of all Colombian children, yet he describes these children as "fruit of the country's scenario of poverty" (143). This indicates he is actually thinking of poor children as the ones born from violent conceptions, who are doomed to a loveless upbringing, which reproduces violence in the nation. In another instance, Marulanda laments how the law contributes to the intertwined problem of women's reproductive oppression and doomed children, by painting a picture of impoverished conditions: "also we are obligating her by law to conceive and give birth to children she does not want, does not understand, in circumstances of malnutrition, in circumstances of social abandonment, of economic abandonment" (143). Malnutrition is not a condition of life for families in the upper stratas of income. Instead, Marulanda is thinking of a poor "her," a poor "she," when he insists how terrible and unconscionable it is that women are forced into motherhood, and for children to grow up within.

Marulanda relies on tropes that depict poor women as inadequate mothers and hapless reproducers, poor children as doomed from conception and a scourge of society, and poor men as sexist brutes. It naturalizes the poor as abject and miserable, rather than recognizing the forces creating and maintaining poverty. It fails to see any agency in how people living in poverty negotiate their circumstances and advocate for themselves and their communities. It can make the right to abortion read as an opportunity to decrease the pregnancies that appear in adverse conditions, and make the abortion right appear as the most important aspect of *libre opción*. It becomes a missed chance to discuss what the right to have children means – including that the right to have children can implicate not only women's reproductive autonomy (deciding when and how many children to have), but also that parents are assured the material resources to bring up a child.

### 3.2 *Libre opción* and the Catholic Church: limits of the Constitutional Assembly's authority

Another challenge to *libre opción's* inclusion in the constitution came from the Colombian Catholic Church. Though the Constitutional Assembly exercised extraordinary authority and itself defined the limits of its powers, it showed marked deference towards the opinions of the Catholic Church in matters of family and women's rights. In interviews and memoirs, delegates and *Red* organizers explain that the First Commission removed *libre opción* as a possible right due to the Church's influence (Ochy 54). The Church viewed it as a right to abortion, to which it was opposed, and stated that it would have conservative delegates insist on defining the right to life as beginning from conception, if *libre opción* were pursued (Sánchez 76). The *Red* and delegates supportive of *libre opción* decided that it would be too damaging to have the constitution define life as beginning from conception, and dropped the fight for including *libre opción* (Informe de la sesión de la comisión quinta – 10 mayo 1991 p.54).

The delegates' hesitancy to cross the Catholic Church is evident in a lengthy discussion among delegates about whether the divorce article was a violation of international law - a reference to the *Concordato*, an agreement between Colombia and the Holy See about the Church's relationship to the state. For the first time, the country would institute divorce for religious marriages. However, formulating the phrasing of this article proved very contentious and delicate for the delegates. It raised issues of how to communicate where the line was

between church and state, leaving some delegates professing that the state was turning more religious and more beholden to the Catholic Church, and others that the state was too interventionist and disrespectful of religious freedom (Informe de la sesión de la comisión comodificadora – 22 junio 1991). When reviewing the article's final phrasing, the Codification Commission members debated the best way to assert a universal right to divorce while not stepping on the Church's toes. During their debate, one of the delegates references private, unofficial conversations about divorce between Assembly delegates, the Gaviria administration, and Church hierarchy. The delegate asserts that the conversations were not a “negotiation” with the Church about divorce, but instead that delegates met with Church hierarchy “to analyze the situation, to know the Church’s opinion, but not to negotiate, [instead,] to ask the Church their opinion” (Informe de la sesión de la comisión comodificadora – 22 junio 1991, p.21). The delegate emphasizes to the other Codification Commission members that the divorce article “was a very difficult balance to reach, the product of four months, we cannot touch this article” (Informe de la sesión de la comisión comodificadora – 22 junio 1991, pp.20-21). While the delegate assures that the private meetings with Church officials were not “negotiations,” which would ostensibly recognize the Church’s authority to direct the divorce article’s phrasing, the delegate also urges the Codification Commission to leave the article alone by referencing how difficult it was to arrive at an article the Church apparently approved.

Whereas the Assembly is ready to make law outside the normal rules of law, when it comes to the Church, the Assembly acts beholden to prior legal agreements and fearful of legal missteps. The Assembly's atypical deferential attitude to this authority effectively kills the *libre opción* article. The Church's concerns, with which the Assembly takes great care, are precisely in the areas of family and women. Once again, politics is treated as a sphere distinct from the family, which excludes women given their identification with the family. Women are treated ambivalently as political subjects or subjects to be protected through special rights. Displacing women’s organizations' narrative of *libre opción* as enabling citizenship, and allowing narrative of women as reproductive bodies and their reality defined by it, enables Catholic Church to participate as important political actor and advance their own narrative, a separation of family and public, civic spheres.

### 3.3 The *libre opción* vote: the three silences

At the last minute during the Assembly’s Plenary Session, delegate Marulanda insists on adding the *libre opción* right to the end of the women's rights article. The *libre opción* additive item is voted on separately. The additive item reads: "Women are free to choose maternity in accordance with the law" (133). In the vote on *libre opción*, we see how the Assembly's procedures produce three different instances of silence that converge to constrain the understanding of *libre opción* as reduced to abortion.

During the vote on *libre opción*, the delegate who proposed it for vote, Marulanda, refuses to state explicitly whether *libre opción* is a right to abortion. Despite repeated questioning from other delegates, Marulanda explains that Assembly voting procedure prohibits further commentary on the item up for vote. Marulanda's refusal to speak is frustrating to other delegates, leading to veiled insults.

Zafra: I would like Dr. Iván Marulanda to clarify for us again if the meaning of the norm is to permit abortion.

Marulanda: Mr. President this debate had its moment, I gave an explanation of the meaning of the norm, I would not open the debate again.

Zafra: What I said to him was only if it was yes or no.

Unknown: I ask that the vote is secret.

Unknown: I want to hear the same answer from Dr. Marulanda Mr. President. (134).

As the insistence grows that Marulanda state whether *libre opción* is a right to abortion, his fellow subcommittee members distance themselves from him. Rodado clarifies that their subcommittee "judged unanimously that it would be inconvenient to bring it [the *libre opción* added item] for the Assembly's consideration, but before the insistence of Delegate Iván Marulanda it was brought, but that that remains very clear..." (134). It is clear to the Assembly and has been throughout the debates that Marulanda is the champion of *libre opción*, which his fellow subcommittee members have found too controversial. As the President calls for the voting on *libre opción* to begin, more delegates interject demands for Marulanda to admit that *libre opción* is a right to abortion.

Londoño: I believe that one Delegate alone that asks the author of a norm the scope of its meaning, the author is obligated to give it, here it has been asked and he is refusing, we don't know why he's refusing.

Marulanda: No, I don't have any...

Unknown: Mr. President, a motion of order.

Marulanda: It's out of procedure, I gave my explanation when...

Unknown: I think we have to vote Mr. President.

Unknown: Let's vote, everyone knows what's being voted.

Unknown: I don't understand, Dr. Marulanda, you are an honorable man, why not tell the Assembly members...

Marulanda: Because I already said it here, because I already said...

Unknown: Well repeat it Dr. Marulanda.

Unknown: Do us a favor and repeat it.

Marulanda: Because it's against procedure.

Unknown: Well then it's clear that...

Unknown: If you are such an honorable man, why not tell the Assembly if you are proposing abortion or not.

Unknown: Mr. President why don't we vote. (136).

Marulanda's favorable position towards *libre opción* and abortion is known to the assembly. As one constituyente says to another in frustration at Marulanda's steadfast silence, "you know very well what it [the article] means though Marulanda won't say it, please" (137). Perhaps Marulanda refuses to speak because he knows the questioning is not motivated by desire for information, but to have it on record that it amounts to a vote on abortion. Perhaps he doesn't see it that way, still sees it more holistically, and does not want it reduced to that, with the yes-or-no questioning framed by opposers. As the President attempts to begin the voting again, a constituyente requests Marulanda's silence to be noted for the record: "Mr. President...three people have asked Constituyente Marulanda to respond, let it be shown in the minutes that there was no type of response whatsoever" (137). Immediately responding, Marulanda again emphasizes that the time has passed to discuss *libre opción*, and that it cannot be discussed in a cursory manner: "Mr. President, if you open debate with great pleasure I will give an explication, but do not ask me to



answer yes or no to something so profound and of such great importance in this society, if you open debate for me with great pleasure I'll speak all the time that they like" (137). While Zafra asks the President to reopen debate, with another *constituyente* seconding this motion, the President declares that "The debate is closed according to procedure, I ask everyone that we vote..." (137).

The voting itself is silent and unknown, since it is a secret vote. Despite its commitment to transparency, the Assembly approved use of the secret vote in contemplation of the vote on extradition. The secret vote was a measure to reassure the safety of delegates to vote in favor of extradition without suffering violent reprisals from *Los Extraditables*, a group of Colombian drug traffickers who feared the possibility of extradition to the United States, which had harsher prison conditions and possibility of the death penalty. However, on the *libre opción* vote, it is a measure ostensibly to assure freedom of conscience in the vote. As one *constituyente* interjects, "It should be unconfessable," to which another responds, "That's right, and it has to be in secret" (137). Some delegates, however, vote aloud and break the secret vote. Delegates Rojas, Villa, Carranza, Pabón vote aloud in favor of *libre opción*, while Velasco Guerrero, Yepes, Gómez vote aloud against it. The result of the vote is 25 affirmative votes, 40 negative votes, and 3 abstentions, with the outcome that the vote does not pass.

Finally, there is the silence of the *Red*, who is present in the audience as a silent eyewitness of the voting on women's rights. The Assembly rules allow only delegates to speak during Assembly sessions, but permit a limited number of non-delegates to attend the sessions in quiet audience. When the Assembly turns to vote on women's rights, a *constituyente* announces a group of delegates' solidarity with the *Red*, in supporting the *Red* members' attendance: "Mr. President, in the Presidency resides a petition signed by more than twenty delegates to receive a commission from the National Network Organization, Women and Constitution" (126). Far from acknowledging the grandness of the moment, or welcoming the organization that had been so influential in drafting women's rights, the President treats the delegate's announcement as an interruption to the proceedings. "They are here in the room. *Constituyente* Benítez, finish your idea," he responds. The President's concern is hearing Benítez introduce women's rights, to proceed with the vote. Not only can the *Red* members not speak, the President's dismissive remark indicates that the *Red's* presence is unimportant to the business of the Assembly.

However, as the vote turns specifically to consider the *libre opción* statement, the *constituyente* Rojas insists on allowing the representatives of the *Red* to speak, asserting that hearing the experience of women, as the subjects who experience childbirth, is critical for voting on *libre opción*. He states that there is a proposal from President Gaviria's office "to let the *compañeras*, the women, speak, since they haven't had the chance to here" (134). As Rojas emphasizes the need to hear women's voices on the topic of *libre opción*, he leaves open that *libre opción* includes abortion, but also childbirth as relevant bodily experience that is not simply equal to abortion: "here we are talking about abortions, how childbirth feels, and the majority of us who are here are men, and there isn't a woman with the right to speak here, there is a proposal so that they can speak" (134). Though the proposal to have non-delegates speak during an Assembly session is against normal rules of procedure, the Assembly President considers allowing it. "Let's see..." the Assembly President begins, when another *constituyente* interjects, "I request that we pass this proposal" (134). The President continues, ready to let the Assembly vote on the proposal to hear the *Red* women: "We are in voting, secret voting has been requested, however there is a proposition that we hear some representatives from the *Red Nacional Mujer y Constituyente*, it seems to me that...we are in the middle of voting but if you would like we can

put this proposition to consideration" (135). Yet, the delegates' responses frustrate the procedure set in motion to proceed, and the voting is not carried out. One constituyente states "No" to holding the vote, the President goes ahead and asks for those voting yes to raise their hand, the Secretary begins to count, when a constituyente puts in a motion of order that the vote be a roll call vote, another implores, "Why don't we listen to women so they can explain their point of view about this matter?" to which another constituyente responds yes, and the motion of order to make it a roll call vote is voiced again. Apparently frustrated by these interjections, the President definitively closes the possibility of the women speaking on the basis of it being against established procedure: "See here, this is irregular, allow me to tell you with total clarity, this is irregular because we are in voting, I want to tell you then that we will vote in secret because we are already at the moment in which we are voting, so we are going to vote on the additive article in secret" (135). While the *Red* has been influential in drafting women's rights, including *libre opción*, the *Red* members are only allowed to observe the vote.

At the conclusion of the vote, as they are turning to new topics, the delegate Maria Teresa announces that "the women belonging to the *Red Mujer y Constituyente* have brought 15 thousand signatures supporting women's rights" (140). A delegate immediately asks, "Which rights?" alluding to whether it includes *libre opción*. Maria Teresa explains further, "It's that 75 women's organizations have brought a communication that they have given all of us delegates and they have requested that it stays in the minutes as a *constancia*, that they have asked the Constituyente so that it is published in the *Gaceta*, I will turn it in to the Secretary, Dr. Aida" (141). The representatives of the *Red* are prohibited from speaking, despite proposals and delegates' insistence, because it is against procedure of running voting. This leaves the vote on *libre opción* left voiceless, allowing the focus to stay on it being about abortion without greater context of understanding abortion, or how it might comprise a range of reproductive autonomy, beyond abortion.

The three silences produce a blanket of silence over the topic of women's reproductive autonomy, making this vote continuous with the "hypocritical silence," and seeing-but-not-seeing, that Marulanda and other delegates and women's organizations had criticized. The President's concern with staying close to procedure appears motivated by a desire to move through the agenda. Rather than reopen debate, the President states, "...let's do what we came to do, which is to vote today" (137).

That the Assembly's procedures produce these silences that change the meaning of women's reproductive autonomy as expressed through *libre opción*, raises doubts about the Assembly's inclusiveness and participatory politics. Interpretations of procedure are such that they do not give space for women's voice or for *libre opción* to be explained as more than abortion.

To consider how the Constitutional Assembly misheard *libre opción* as simply abortion, I extend sociologist María Theresa Uribe Uribe's argument that the Assembly's inclusive ideal actually limited people's participation and how the Assembly received people's participation. Writing ten years after the Constitutional Assembly, in 2001, Uribe argues that in striving to allow everyone to participate, citizenship discourses around the constitutional assembly homogenized everyone as an equal citizen. All the complex problems affecting different groups diversely were made absent at this level of perspective, resulting in a failure to address the problems, which are precisely the severe obstacles in the way of subjects exercising the kind of citizenship envisioned. The failure to see citizens as they truly are, Uribe argues, has the effect of depoliticizing citizenship and participatory democracy. In this way, the bland citizenship

discourses undercut themselves, obscuring reality in favor of an imagined polity, and laid the conditions for failure of citizen transformation in citizenship.

Uribe points out how the amalgam of political languages surrounding the Constitutional Assembly found common ground in an idealized vision of the citizen (205). This citizen was "virtuous" and "enlightened": knowledgeable and conscientious about their rights and duties as a citizen, engaged in civic life through regular voting and other established forms of participation, and disposed towards peaceable coexistence, ready to respectfully find common solutions for any conflicts of interest that might arise and using institutional procedures to express any suggestions or address any grievances (205). As Uribe notes, this perfect democratic citizen was the idea of the citizen that circulated, the addressee of presidential speeches and for whom NGOs designed their programs. The problem is that this citizen did not exist, and all that was missed and left unaddressed about the real citizen.

Uribe criticizes this idea of the citizen as unrealistic for failing to see how pervasive violence characterized everyday life and influenced actual practices of citizenship (206). In contrast to the robust, self-actualized and collaborative citizen, Uribe describes an everyday citizen that is aware, alert, and savvy about moving in and out of public space. The *ciudadano realmente existente*, the "truly existing citizen," she writes, is the one who

fights daily against adversities, who reinvents their jobs to get a daily subsistence, who rediscovers in practice the most fitting ways of surviving and escaping from terror and brutality, and who learned from their own experience and from tales from memory, family members, and the neighborhood which are the best ways of doing politics, of moving with caution in the public sphere, to hide oneself or make oneself visible, to participate or to keep oneself in the domestic and private sphere, to move about or to pose resistance...(207).

The "real" citizen that Uribe describes acts in order to survive, navigating a terrain of violence and scarcity. The nature of their daily life requires real citizens to be opportunistic and flexible, to negotiate circumstances as they arise. This is evident in how they innovate forms of gaining a livelihood. They not only determine the best ways of managing violence, as Uribe notes, but also, as she implies, assessing when and whether it is possible, to escape, or avoid, terror and brutality; or instead, to live with the violence and survive it; or determining how to survive after encounters with violence, which we can imagine might be discrete instances or ongoing features of life. Seen from this perspective, citizens as they actually are have a unique set of virtues: the real citizen is creative, adaptable, and resilient; discerning, possessing and deftly applying the wisdom of communal knowledges and lived experience. In terms of the public sphere, the real citizen treats the public sphere as they do any other: they evaluate the risks and benefits of public participation, and move through the public sphere with savvy that implies awareness that circumstances are shifting and the advantage or safety may change, as well. To the extent that the real citizen participates in the public sphere, it is from opportunistic motives, and not to fulfill the "imperatives of civic morality" (Uribe 207). This is a stark difference from the imagined citizen who enters public space with a sense of pride and efficacy, not only believing they are capable of enacting change or participating in political life, but have an obligation to do so for good governance.

The "real" citizen that Uribe describes has a different relation to space, time, knowledge, and movement than the idealized citizen of the democratic citizenship discourse. Uribe's description of the actual citizen evokes the users of Michel de Certeau's *The Practice of Everyday Life*. De Certeau describes how individuals innovate and manipulate products through

their everyday use of them, finding spaces and ways to maximize advantage and adapt as needed. The practice of everyday life is a source of knowledge for living, the continued negotiation of all that institutions have already set out. Similarly, for Uribe's real citizen, knowledge consists of canons of collected experience, the wisdom earned through practical living. Uribe mentions family knowledge, knowledge based on common memory, and neighborhood knowledge. These are localized, hewing close to specific areas. Rather than acting in accordance with the strategies laid out by institutions such as democratic governance, the actual citizen is opportunistic and flexible - and must be, to survive. De Certeau reflects that how everyday life is lived, with application of these knowledges, "show[s] the extent to which intelligence is inseparable from the everyday struggles and pleasure" (481). In Uribe's account, however, we can discern the pervasive violence and socioeconomic challenges necessitating a foundational knowledge, a lack of trust in the stability or safety of any space. The knowledge that circumstances shift is the product of experience, according to the life reality of the real citizen; it is a knowledge that is learned through mere living. Knowledge based in experience and the communal indicates the best ways of navigating life, and knowledge indicates that the public sphere merits caution and a readiness to move in and out, like any other area of life.

The problem of weak citizenship ten years after the constitution is not in the people, Uribe contends, but in the discourses of citizenship that posited an idealized, unrealistic citizen. Citizenship discourses are so abstract and idealized that they have hidden the actual subject. The discourses must change to recognize the way people negotiate their circumstances and participate; and this requires recognizing the pervasiveness of violence, and its ability to colonize other areas, including participatory democracy.

While Uribe's analysis of citizenship discourse surrounding the 1991 Constitutional Assembly is valuable, she can give the impression that the ideal citizen and the actual citizen were incommensurable characters, with the ideal citizenship discourse never touching the real life of citizens. This underplays the involvement of "real" citizens in advocating for conceptions of citizenship based on their lived experiences. For example, women introduced some complexity into the bland, abstracted citizen, in demanding a reckoning with patriarchal attitudes and policies, and insisting that as a group, women had special demands. Women mobilized, organized, lobbied, and participated in the Constitutional Assembly, inspired by CEDAW and new conceptions of rights. In advocating for an interpretation of citizen that fundamentally included women, women were active in meaning-making. This shows how the constitutional moment did invite and make some space - or was open to space being demanded or made - for women to interpret citizenship. Women did make gains, establishing a constitutional right that women were equal to men (Article 42) and some reproductive rights (Articles 42 and 43). While a discourse of inclusive, active citizenship was overarching for the Constitutional Assembly, it was precisely this common hinge, as Uribe calls it, that provided a space for various groups, including groups historically marginalized from politics, to enter into a larger conversation with a pluralistic group about defining and empowering citizenship. We must be careful not to overstate the unity of the ideal citizenship discourse, and recognize that it functioned so well in part because it was so capacious. In other words, the image of the ideal citizen was not imposed on everyone in a flattening, top-down manner, but was a product of complex conversations that both invited and displaced its participants. Still, we can extend Uribe's analysis to women's organizing and experience, and see how women citizens, idealized as part of a family unit and as a reproductive being, prevailed over what women were themselves demanding, a right for reproductive autonomy.

We can see the women's groups advocacy and yet being misunderstood on the issue of *libre opción*, a reproductive autonomy right, as an extension or more concrete example of this analysis: delegates and others failed to see the problems facing women, and promoted an inclusive citizen kind of view of women and claimed success and progress on women's status, which served to not really address women's problems and paper over them in the pursuit of a civic morality. It abstracted women to a citizenship that disallowed their demands for reproductive autonomy. In this way, citizenship could seem very inclusive despite the strange silences around *libre opción*, and the limits on women's participation. Uribe's work serves to show how the citizenship discourses both promoted change, while serving to defer most transformative change.

We can also add something to this analysis, in noting that it is women's participation, not just assessment of their problems, which was dismissed. Women organized for their positions, and they were encouraged, but they ultimately were misheard and displaced. The citizenship discourse that is supposedly asking for this robust participation was not actually supportive or ready for actual participation of citizens. Women used this citizenship discourse to mobilize, but its perspective and even reception of that was limited. There is not only a failure to see the problems and reality of the actual citizen, but also something missing in displacing and mishearing subjects when they participate.

To reiterate, the question at hand is not whether the women's groups that organized for the 1991 Constitutional Assembly should have won the right to *libre opción* in the Constitution, or not. The inquiry instead is into how women's groups were heard and misunderstood, invited but displaced, for an ultimately already prescribed vision of the new polity and citizen. We see the depoliticizing that Uribe signals taking place, but it is more insidious or peculiar than we might have imagined, since participation was happening, and through the citizenship discourse that was supposed to be inclusive. That is, Uribe seems to imagine or discuss citizens as participating in selective and cautious ways, or not at all, which is certainly true; but even for those participating, and participating tactically in those discourses, there is the same phenomenon of depoliticizing, which ends up as both invitation and displacement.

#### D. Conclusion

Although the 1991 Constitutional Assembly generated more inclusive political participation than any prior political process, the Assembly did not engage the women's movement vision of reproductive rights. Rather than approaching reproductive rights holistically, in the manner of *libre opción* that encompassed both abortion and childbirth, the Assembly narrowed *libre opción* to abortion alone. While the women's movement was successful in establishing CEDAW-inspired rights in the 1991 Constitution, and thereby incorporating a novel conception of women's rights as human rights, this way of thinking about women's rights stopped short at the issue of abortion. In rejecting a holistic vision of women's reproductive autonomy, the Assembly demonstrated the kind of *ideario fundamental* thinking, that holding democratic procedures would be sufficient for transforming politics and diminishing violence. Not hearing how *libre opción* was a holistic right is an example of how the Assembly process neglected the complex issues of "real" citizens, in a spirit of regarding everyone as equally able to participate.

Nevertheless, the 1991 Constitution was a galvanizing moment for Colombian women's organizing, generating much collaboration and momentum for entrenching a women's rights-are-

human rights approach in Colombian law. In 2006, the women's movement would use new procedures from the 1991 Constitution in conjunction with more forceful women's rights-are-human rights arguments to eventually decriminalize abortion, which I study in Chapter 4.

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## Chapter 4, "Colombia's 2006 abortion decision: leveraging international human rights in Colombian constitutional law"

The 2006 Colombian Constitutional Court C-355 decision legalizes abortion in three circumstances: in cases of rape or incest, a grave threat to the woman's health, or when the fetus would be unviable at birth. The decision is remarkable for decriminalizing abortion in Colombia, and also for the decisive role that a human rights framework plays in the decision. After thoroughly studying various human rights legal resources, the Court ultimately draws a distinction between a right to dignified life and an absolute right to life. The Court determines that the pregnant woman claims a human life in a way that the fetus cannot, which in some circumstances, entails that her life is worth greater constitutional protection than the fetus.

In a 2005 interview conducted while the C-355 case was in process, Monica Roa, the lawyer who initiated the case, predicted that international human rights arguments would be decisive for a decision to decriminalize abortion:

In the past 10 years two relevant legal developments have occurred that make this challenge viable and irrefutable. On the one hand the Colombian constitutional court has recognized the legal value of international human rights arguments and has used them to solve constitutional challenges in other areas. On the other hand the international human rights arguments that frame illegal abortion as a violation of women's rights became clearer and stronger. (Simmons 252).

Roa expected, as it turned out, accurately, that the Colombian Constitutional Court would consider international human rights positions on abortion, which would lead the Court to view a total ban on abortion as violating women's rights.

This chapter is the story of the Colombian Constitutional Court's C-355 decision and how international human rights played a crucial role in the Court's ruling that abortion, in some circumstances, should be legal. The chapter traces the rise of a "women's reproductive rights-are-human rights" perspective in international human rights during the late 1990s and early 2000s. The shift to emphasizing women's *reproductive* rights as human rights provided a novel perspective from which to advocate for decriminalizing abortion in Colombia. Colombian women's organizations drew on human rights to reframe the discussion around abortion. Moreover, women's organizations referenced international human rights law favorable to legalizing abortion as they made legal arguments that Colombia should end its total abortion ban. Based on the 1991 Colombian Constitution's Article 93, which incorporated international human rights treaties into the domestic legal order, women's organizations (and Roa, in the C-355 case) argued that the Colombian state was constitutionally obligated to uphold the international human rights position that illegal abortion violated women's rights. The women's reproductive rights-are-human rights discourse also tied upholding human rights to being a modern, democratic, secular state. On the one hand, modern states were expected to protect women's rights, and on the other, to carry out legal commitments as set out in constitutional law. In the C-355 decision, a surprise is that the Constitutional Court interprets the constitution as prescribing a greater place to international human rights, at the outer reaches of what it might have interpreted. Although the Court had developed jurisprudence in prior cases on making the kinds of interpretative moves that would be decisive for decriminalizing abortion in C-355, the Court significantly expanded its interpretive purview and tools in the C-355 case. C-355 is not an outlier in the Court's jurisprudence in any respect, but it did happen to mark an arguable increase in Court power.

The chapter begins by documenting the emergence of women's rights-as-reproductive rights statements in international human rights law. Then the chapter considers how Colombian women's organizations leveraged women's rights-as-human rights statements through mechanisms of the 1991 Colombian Constitution to advocate for improving Colombian women's reproductive rights. In a similar strategy, discussed next, conservative opposition drew on other international human rights treaties to argue that Colombia should continue a total abortion ban. With this background, the chapter turns to the Constitutional Court's 2006 C-355 decision. After describing how Roa brought the case to the Constitutional Court, I conduct a close reading of three key interpretive moves in the C-355 decision. Each interpretive move establishes the Court's legitimacy in proceeding as it does, from deciding to hear the case at all, to its interpretations of international human rights law, to its authority to modify legislation. Overall, the Court's three key moves enable it to incorporate international human rights law in Colombian constitutional law in a far-reaching way. Finally, the chapter's conclusion considers how abortion was a difficult topic in Colombia in part because of Colombians' sensitivity to the idea that they may not value life, given the pervasive violence in the country. I conclude that allowing abortion can be understood as a moving away from violence precisely because abortion engages questions of life and death.

#### A. Women's reproductive rights are human rights

By the early 2000s, the United Nations and women's organizations across the globe came to treat as doctrine the idea that women's reproductive rights were human rights. Women's reproductive rights as human rights knowledge discourse declared that women needed reproductive autonomy to meaningfully have other fundamental rights. While the idea that women's reproductive rights were important to women's other rights and being able to live well had been circulating for many decades, it was not until the 1990s that international human rights discourse and documents explicitly recognized a category of right under the name "women's reproductive rights" and stated that women's reproductive rights were human rights.

This discourse developed through the recommendations of treaty monitoring bodies and United Nations world conferences such as the 1994 United Nations International Conference on Population and Development in Cairo, Egypt and the 1995 Fourth World Conference on Women in Beijing, China. Treaty monitoring bodies are the entities responsible for assessing a state's compliance in fulfilling the treaty articles. States submit reports (usually every five years) on their progress with regards to the treaty, and the treaty monitoring bodies then issue the state a report of observations and recommendations. The United Nations World Conferences are international gatherings on a dedicated topic which produce a program of action with recommendations for all states to follow. Although conference programs of action are not legally binding, they carry authority as the product of international consensus on a given topic.<sup>31</sup> Both treaty monitoring bodies and United Nations conferences have served as tools in women's national organizing. Women's non-governmental organizations attending these conferences developed transnational activist networks in which they shared best practices across national boundaries (Molyneux and Craske 8-14). Women's NGOs both prepared ideas to share at conferences and disseminated ideas and strategies from the conferences in their countries.

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<sup>31</sup> Countries can express reservations to specific items in a conference report and program of action. For example, the Holy See (which has observer, not voting member status at the United Nations) expressed reservations for many family planning items in the 1994 Cairo conference report.

Together, the monitoring bodies and conferences have served as authoritative and collaboratively-produced international human rights principles on a given topic.

The 1994 United Nations International Conference on Population and Development in Cairo, Egypt (hereafter, "1994 Cairo conference") was a watershed moment for declaring women's reproductive rights a part of the "UN agenda" (Joachim 159). A focus on women's reproductive rights at the 1994 Cairo conference grew from dissatisfaction with existing population and development programs. Many conference participants criticized their countries' population policies for focusing on lowering fertility without showing interest in women's well-being or ability to make reproductive decisions. As has been well-documented, conference participants deliberately sought to bring a women's human rights approach to population and development issues (Joachim 149-159, Copelon and Petchesky 347-349). The resulting attention to women's rights and particularly reproductive rights is evident throughout the Cairo Program of Action (a list of principles states are encouraged to enact) and Conference Report (detailed discussion of issues at the conference). The Cairo Program of Action asserted in Principle 4 that "The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights" (United Nations 12, Principle 4). The Conference Report also defined "reproductive rights" and "reproductive health" for the first time in a United Nations document (United Nations 40-41, Villanueva Flores 394). In defining "reproductive rights," the Report emphasizes people's ability to make and carry out reproductive choices:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and time of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. (United Nations 40, paragraph 7.3).

The Conference Report adds that "The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning" (United Nations 40, paragraph 7.3). This amounts to recommendation for how to design and implement policy. In this way, the Conference Report seeks to influence laws and policies.

In addition to shifting population and development discussions to incorporate human rights and defining reproductive rights, the Conference Report also introduced abortion as a women's right issue. While the Conference Report communicates that abortions are undesirable, it also calls on governments and NGOs to confront abortion as a public health issue. Given its importance, I quote the paragraph in full:

8.25 In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable

information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions. (United Nations 58-59, paragraph 8.25).

The abortion paragraph recognizes that family planning information and services and postabortion care are crucial for women's health. Raising abortion was very controversial (Joachim 157-158), but the fact that women's organizations were able to include this despite the objections of the Holy See shows how women's reproductive rights and abortion were entering mainstream international human rights discourse.

Treaty monitoring bodies for CEDAW and other international human rights treaties also urged state parties to address unsafe abortions' impact on women's health beginning in the late 1990s. The monitoring body for CEDAW, the Committee for the Elimination on Discrimination Against Women (hereafter "CEDAW Committee"), made the most far-reaching recommendations by urging state parties to change punitive abortion legislation. In 1999, the Committee issued General Recommendation #24: "(c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion;" (paragraph 31(c), 20th session, Jan-Feb. 1999). The Committee explicitly recognized legal, safe abortion as women's right.

The CEDAW Committee's 1999 report on Colombia's CEDAW compliance raises Colombian abortion law as potentially violating CEDAW's Article 12 and women's rights. Under "Principal areas of concern and recommendations," the CEDAW Committee writes that a total abortion ban harms women's health and lives:

393. The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act. No exceptions are made to that prohibition, including where the mother's life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped. The Committee is also concerned that women who seek treatment for induced abortions, women who seek an illegal abortion and the doctors who perform them are subject to prosecution. The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention.

394. The Committee calls upon the Government to consider taking immediate action to provide for derogations from this legislation. Furthermore, it asks the Government to provide regular statistics on maternal mortality by region. (CEDAW/Col 04/02/1999).

The CEDAW Committee suggests that legalizing abortion for at least the three instances is necessary to support women's health and satisfy CEDAW's Article 12.

Similarly, the Committee on Human Rights, the monitoring body for the International Covenant on Civil and Political Rights, first noted a problem of illegal abortions in Colombia in

its 1997 report on Colombia, stating that “It [the Committee] is also concerned at the high mortality rate of women resulting from clandestine abortions” (CDH to Colombia, 1997, paragraph 24). The Committee on Human Rights 2004 Colombia report explicitly calls on Colombia to change abortion law to allow abortions for rape or health exceptions:

13. The Committee notes with concern that the existence of legislation criminalizing all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. It is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures (art. 6). **The State party should ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases described above.** (CDH to Colombia, 2004, paragraph 13, bold in original).

Like the CEDAW Committee, the Committee on Human Rights urges Colombia to legalize abortion, at least in grave cases such as nonconsensual pregnancy or when the woman’s life is at risk.

Other monitoring bodies followed suit and intimated that Colombia should decriminalize abortion at least in some instances. In its 2000 Colombia report, the Committee on the Rights of the Child (the monitoring body for the Convention on the Rights of the Child) expressed concern that “the practice of abortion is considered the leading cause of maternal mortality” in Colombia and cited the CEDAW Committee’s paragraph 393 above (CCRC to Colombia, 2000, paragraph 48). The Inter-American Commission on Human Rights (monitoring the American Convention on Human Rights) also explicitly takes up abortion in its 1999 Colombia report, noting, “the Commission considers it necessary to refer to abortion, as it constitutes a very serious problem for Colombian women, not only from a health perspective, but also considering their rights as women, which include the rights to personal integrity and to privacy” (CIDH 1999, paragraph 49). The report details current Colombian criminal laws against abortion, noting that there are no exceptions even for rape (CIDH 1999, paragraph 50). The Inter-American Commission observes that “The criminalization of abortion, together with the inadequate techniques and unhygienic conditions in which abortions are performed, make it the second leading cause of maternal mortality in Colombia” (CIDH 1999, paragraph 51). Based in a concern of women’s health and a perspective that a total abortion ban violated women’s human rights, the treaty monitoring bodies communicated to Colombia that it should decriminalize abortion.

## B. Bringing "women's reproductive rights are human rights" to Colombian constitutional law

Many Colombian women's organizations leaned on international human rights' statements of women's reproductive rights-are-human rights as they advocated for decriminalizing abortion in Colombia. On the one hand, the assertion itself encouraged conceptualizing women's reproductive rights as a category of right that the state should assure to women; it provided the intellectual groundwork for women to claim that their reproductive autonomy was of import to the state. "To what extent does the Colombian state, its institutions and authorities guarantee the full exercise of women's sexual and reproductive rights?" became a question that women's NGOs could not only ask, but also demand the state should address ("La protección" 2).

On the other hand, beyond shifting ideas of women's rights to include reproduction, international human rights statements on women's reproductive rights were especially fruitful for the Colombian context due to two mechanisms of Colombian constitutional law. The first

mechanism, the *bloque de constitucionalidad* ("constitutional block"), gave "teeth" to international human rights treaties ratified by Colombia by incorporating treaties into the domestic legal order. The second mechanism was the *acción de tutela*, a petition that any citizen could submit to the Constitutional Court to hear and speedily resolve cases of constitutional rights violations. Many women's organizations insisted that Colombia should decriminalize abortion, at least in three grave instances, to comply with international human rights law and Colombian constitutional law (Roa 234-235).

Colombian women's NGOs had been utilizing international human rights to advocate for women's reproductive rights since Colombia ratified CEDAW in 1981 (as Chapter 3 describes). Once the 1991 Constitution took effect, Colombian women's NGOs leveraged international human rights law in the framework of Colombian constitutional law. For example, PROFAMILIA, the Colombian chapter of the International Planned Parenthood Federation, initiated its Legal Services for Women project in 1986 to "expand awareness of women's rights as protected under the U.N. Convention on the Elimination of All Forms of Discrimination Against Women" and "provid[e] women with legal aid, information, education, and counseling about their rights and how to enforce them through litigation" (Plata and Calderón 1105). In offering legal services alongside family planning, PROFAMILIA acknowledged that family law issues such as domestic violence or custody often affected women's reproductive autonomy. The Legal Services for Women project reflected CEDAW's conception of women's human rights as encompassing a range of interconnected rights.

After the 1991 Constitution, PROFAMILIA added *tutela* preparation to its legal services with a long-term goal of creating Colombian jurisprudence on reproductive rights. María Isabel Plata, PROFAMILIA's director, explained the *tutela* strategy in a 1994 article: "An important goal is the interconnection of individual, specific rights with the overall right to health and to reproductive health. This will eventually be achieved through the jurisprudence the Constitutional Court will develop once women start using their right to petition." (Plata 104). Through *tutelas*, Plata envisioned making the argument that when an "individual, specific" constitutional right was violated, a right to reproductive health was also violated. In this way, Colombian constitutional law would come to recognize the mutual implication of women's reproductive health and rights such as the "right to life, liberty, equality, and security of the person; the right to the unrestricted development of identity; the right to found a family; the right to decide freely and responsibly the number of children they will conceive; the right of access to education and information; the right to the enjoyment of a healthy environment; and the right to health care" (Plata and Calderón 1108-9). The *tutelas* would assert the CEDAW perspective of a holistic view of women's rights to ensure the Colombian constitution also protected women's reproductive rights. Moreover, *tutela* petitioners could draw on CEDAW and other international human rights law via the *bloque de constitucionalidad* to claim that their rights had been violated (Carrera Silva 85). Through the example of PROFAMILIA's Legal Services for Women project, we see how Colombian women's NGOs adapted their work with international human rights to the 1991 Constitution's new mechanisms to improve Colombian women's reproductive rights.

In a kind of virtuous cycle, the CEDAW Committee also lauded how Colombians could use the *bloque de constitucionalidad* and the *tutela* to pursue women's rights. Under the heading "Positive aspects" in its 1999 Colombia report, the CEDAW Committee writes:

352. The Committee notes that the Convention [CEDAW] can be invoked in national courts, since it enjoys precedence within the domestic legal order and thus prevails in situations of conflict of laws.

[...]

354. The Committee notes that the *acción de tutela* or *amparo* have been increasingly used by women as a constitutional means of protecting their rights. The Ombudsman's Office has also been created along with a special unit for the protection of the rights of children, women and the elderly, which assists the Ombudsman's Office by playing a positive role in requesting reviews of *acción de tutela*. (CEDAW/Col 04/02/1999).

That the CEDAW Committee recognized the *bloque de constitucionalidad* and *tutela* as valuable tools for achieving women's rights encouraged Colombian women's organizations to use them. The CEDAW Committee's explicit mention of the two mechanisms showed the Committee was an ally to Colombian women's utilizing CEDAW in Colombian constitutional law.

As Roa notes in the quotation cited in this chapter's introduction, the early 2000s appeared the right moment for an abortion challenge precisely because of international human rights law developments which could be leveraged within Colombian constitutional law. Roa's complaint of unconstitutionality, which initiates the C-355 case, cites monitoring bodies' recommendations to decriminalize abortion and argues that Article 93 requires Colombia to take heed and change abortion law. In this way, Colombian women's organizations advocating for decriminalizing abortion law utilized the authority and legitimacy of international human rights statements. As described below, the Constitutional Court's 2006 decision heavily utilized the argument of constitutional commitment to international human rights law to decriminalize abortion.

### C. Opposition to decriminalizing abortion

During the C-355 case, anyone who wished had the opportunity to submit their thoughts on whether the abortion articles in the criminal code were constitutional or not (during a ten-day period). Intervening parties who upheld the constitutionality of the challenged articles also invoked the *bloque de constitucionalidad*, like women's organizations. However, these parties invoked the one international human rights treaty which stated that life begins at conception: the American Convention on Human Rights, ratified by Colombia in 1973. This treaty's Article 4 states, "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Given that the American Convention formed part of the *bloque de constitucionalidad*, these intervening parties argued that Colombia had a constitutional obligation to understand life as beginning from conception and so uphold criminal sanctions for all manners of abortion.

Anticipating that some would defend abortion criminalization on the basis of American Convention's Article 4, Joanna Erdman and Rebecca Cook of the University of Toronto's International Programme on Sexual and Reproductive Health Law submitted an amicus brief to the Colombian Constitutional Court solely on the topic of reconciling Article 4 with wider international human rights law and the 1991 Colombian Constitution. Erdman and Cook argue that the preponderance of international human rights law asserts women's right to safe, legal abortions, at least in cases of rape or threat to the woman's health. They also offer an alternative to fulfilling Article 4 that is compatible with women's reproductive rights:

The protection of life from the moment of conception can be accomplished in a manner respectful of women's rights. Article 4(1) might well require member states to improve pre- and post natal care, provide better nutrition during



pregnancy, and improved obstetric services to enable women and their children to survive childbirth...Protecting fetal life in these circumstances does not compromise, but complies with the rights of pregnant women who are eagerly awaiting the birth of a healthy child. (Erdman and Cook 17, paragraph 70).

Erdman and Cook propose that states might meet their obligations to the American Convention's Article 4 by providing greater prenatal care, rather than criminalizing abortion under all circumstances. They point out that there is need for improved prenatal care as well as that this interpretation harmonizes with other treaties that recognize women's reproductive rights.

#### D. Arriving to the 2006 decision

The 2006 case was part of a high impact litigation strategy led by Colombian Monica Roa. Roa received an L.L.M. from New York University in 2002. Upon returning to Colombia, she started a position as Program Director for Women's Link Worldwide, a transnational women's organization dedicated to gender equality and reproductive rights with main offices in Bogotá. As Program Director, Roa began the LAICA (*Litigio de Alto Impacto en Colombia: La Despenalización del Aborto*) project. LAICA's goal was to liberalize abortion law through strategic legal action and fomenting abortion debate in the media. Roa submitted a complaint of unconstitutionality in 2005. The main arguments of her unconstitutionality complaint were that the abortion laws violated international human rights law, which is incorporated into Colombian law via Article 93 of the 1991 Colombian Constitution, and harmed public health; and Articles 13 and 42 (which are based on CEDAW, as Chapter 3 noted).

In Sentence C-355 of 2006, the Colombian Constitutional Court declared the unconstitutionality of three articles of abortion penal law. The case came before the Constitutional Court through four separate citizens' complaints challenging the constitutionality<sup>32</sup> of Articles 122 and 124 of Law 599 of 2000, and the constitutionality of the phrase "or in women younger than fourteen years" in Article 123 of the same law. Article 122 advises a prison sentence of sixteen to fifty-four months for women aborting a pregnancy (and anyone who assists them to this end). Article 124 recommends a three-quarters reduction in sentencing for women aborting a nonconsensual pregnancy. It also permits the judge to dispense with penalization altogether when "extraordinary conditions" obtain and the concrete case does not require it. Article 123 recommends a four to ten year prison sentence for any person who causes an abortion without the woman's consent, or when the woman is under fourteen years of age.

The complainants argued that these articles contradicted the constitutional commitment to protect "dignified life," rather than mere "biological life," and provided an extensive list of women's fundamental rights they held these articles to violate.<sup>33</sup> Intervening parties<sup>34</sup> supporting

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<sup>32</sup> Art. 40 no. 6 and Art. 242 of the 1991 Constitution provide for citizens to file complaints of a law's constitutionality to the Constitutional Court. Art. 241 no.4 grants this body broad constitutional review. A technical point: in exercising constitutional review, the Court is really judging the *exequibilidad* of the contested law, or the acceptability or possibility of acting within the Constitution. This is, in effect, deciding the *constitucionalidad*, or constitutionality, of the law. For sake of translation, I employ "constitutionality" rather than "acceptability" in this paper. See Russell H. Fitzgibbon, "Glossary of Latin-American Constitutional Terms," *The Hispanic American Historical Review*, vol. 27, no. 3, Aug. 1947, p. 581 for *exequibilidad*.

<sup>33</sup> These rights being: the right to dignity (Preamble and Art. 1 of the Constitution), the right to life (Art. 11), the right to personal integrity (Art. 12), the right to equality and the right to general liberty (Art. 13), the right to free

the articles' constitutionality countered that the Constitution values the right to life, unqualified. In its review, the Constitutional Court (hereafter, "Court") agreed with the original complainants. Sentence C-355 declares Article 124 and the phrase "or in women younger than fourteen years" in Article 123 unconstitutional, thereby allowing women under fourteen years to consent to an abortion.<sup>35</sup> The Court deems Article 122 to be constitutional, but grants that women in aggravated circumstances are excepted from the general ban on abortion in Colombia and hence not to be penalized. For aggravated circumstances, the Court recognizes a nonconsensual pregnancy or one resulting from incest, when the woman's health or life is endangered by the pregnancy, or when the fetus is sure to be nonviable.

Though the Court had entertained similar complaints of unconstitutionality for abortion penal laws in 1994, 1997, 2001, and 2002,<sup>36</sup> the 2006 case marked the first time that the Court struck down such laws. That the decision permits abortion in some instances marks the case as extremely controversial; in Colombia, as in many other countries, abortion is a highly charged topic. It may seem surprising, then, that the three critical interpretations in the sentence – regarding the issues of *cosa juzgada material*, the *bloque de constitucionalidad*, and the limits on the legislator – also bear the prospect of augmenting the Court's discretion. These are bold moves for the Court in such a high-profile site. The first two issues are mechanisms of constitutional interpretation, and the third is an instance of their application. They are: 1) the *cosa juzgada material*, deciding whether the substantive issue of the case has been judged previously; 2) the *bloque de constitucionalidad*, which obliges the Court to consider international human rights treaties ratified by the State as having constitutional force in Colombia, and the "shadow *bloque*," which allows the Court to draw on recommendations and jurisprudence issued by the committees of these treaties; and 3) defining and enforcing the limits on the legislator's liberty to configure penal law. Though the Court's treatment of these three issues in C-355 is not a departure from their jurisprudence, the landmark decision they enable in this sentence affirms these issues as potent tools for substantial change. Towards capturing the possibilities that the C-355 interpretation of these three issues grants the Court, I refer to them as "potentially power-expanding moves."

E. The 2006 decision: the three interpretations asserting the place of IHRL in Colombian constitutional law

### 5.1 *Cosa juzgada material*

Deciding to hear the case at all is a bold move on the part of the Court. Ruling on the same issue contradicts the constitutional doctrine of *cosa juzgada (res judicata)*. The Court acknowledges it must clarify the novelty of the issue in C-355 since it has entertained four

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development of one's person (Art. 16), reproductive autonomy (Art. 42), the right to health (Art. 49), and obligations to international human rights law (Art. 93). C-355 sec.3

<sup>34</sup> Once it accepts a complaint of unconstitutionality, the Court establishes a ten-day period before proceedings begin during which any person or entity may submit a brief to the Court in favor of or against the contested law. Those submitting briefs are *intervinentes*, which I translate as "intervening parties." Art. 7 of Decree 2067 of 1991 details the intervention process.

<sup>35</sup> However, legal abortion is limited by further conditions (it must occur under aggravated circumstances), and minors may require the additional consent of parents/legal guardians and the father. C-355 sec. 10.3

<sup>36</sup> Sentences C-133 of 1994, C-013 of 1997, C-647 of 2001, and C-198 of 2002. These rulings were increasingly progressive, but never declared abortion penal law unconstitutional.

previous cases concerning abortion penal law. The *cosa juzgada* prohibits hearing the same issue twice for “elemental considerations of legal security – since judges’ decisions must be reasonably foreseeable,” and “also with respect to the principle of equality, since it is unjust that equal cases be resolved in distinct ways by the same judge.”<sup>37</sup> In Colombia, these considerations are balanced against “the needs of change and evolution of the legal order,” to the end that Colombian constitutional doctrine takes a teleological view of *cosa juzgada*. In Colombia, “constitutional jurisprudence has distinguished between distinct conceptual categories that define the reach of a constitutionally judged issue,” namely, the categories of *cosa juzgada material*, when the substantive issue has been previously decided, and *cosa juzgada formal*, when the very same law has already been decided. As far as the *cosa juzgada formal* is concerned, the Court has never ruled on the constitutionality of any of the challenged articles.<sup>38</sup>

Nevertheless, the Court must clarify that the challenged articles of Law 599 are also *materially* different than the earlier abortion penal laws it reviewed. When “the accused law has a normative content equal” to another law on which the Court has “previously emitted a decision,” then there exists the phenomenon of *cosa juzgada material*.<sup>39</sup> Presumably, if the law has the same normative content, then “the legal arguments that served as a base for declaring the constitutionality or unconstitutionality of the former [law] would be totally applicable to the latter,” and consequently, “the decision that would have to be adopted would be the same as was taken in the previous sentence.”<sup>40</sup> In the case C-133 of 1994, the Court did rule affirmatively on the constitutionality of Article 343 of Decree 100 of 1983, an article similar to Article 122. And in C-013 of 1997 case, the Court also declared constitutional Article 345 of the same 1983 decree, an article similar to Article 124. Some intervening parties opposed to nullifying the abortion penal laws claim in their petitions to the Court that Articles 122 and 124 are substantially the same as these 1983 articles already declared constitutional.<sup>41</sup> They insist that the Court consider *cosa juzgada material* to stand for Articles 122 and 124, that their constitutionality has already been affirmed.

The Court disagrees with such an interpretation, harking back to the need to allow the evolution of the legal order. The doctrine of *cosa juzgada material* serves not only to safeguard that a judge does not rule on the same issue twice, it also gives room to judges to adjust to changes in normative legal understandings. This second function of the mechanism is just as crucial as the safeguarding function. A difference in normative content between two laws signals a change in the normative legal context in which they were developed. And if the normative legal context has changed between the passage of two otherwise similar laws, then the reasoning for the law judged previously may no longer apply. The Court must consider new arguments for the law under review, arguments that are consonant with the new normative orientation. In order to review Articles 122 and 124, then, the Court will have to show that they possess substantially different normative content from Articles 343 and 345 of the 1980 law.

As it emphasizes the potentially far-reaching second function of *cosa juzgada material*, the Court invokes the concept of the “living Constitution,” which imports an evolutionary

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<sup>37</sup> C-355 sec. 4 All quotations in this paragraph from sec. 4. All translations from the Spanish are my own.

<sup>38</sup> The constitutionality of Article 122 did come before the Court in the cases C-1299 and C-1300 of 2005. However, in these instances it “declared itself inhibited” from ruling on the article’s constitutionality, which the Court asserts, “does not constitute a pronouncement of substance regarding the constitutionality of this law, and therefore does not establish it as *cosa juzgada*.”

<sup>39</sup> C-355 sec. 4

<sup>40</sup> C-355 sec. 4 n. 9

<sup>41</sup> C-355 sec. 3

perspective towards jurisprudence.<sup>42</sup> The Colombian Constitution is “living” in the sense that it is dynamic and adjusts to the context and times as necessary in order to accomplish its purpose of ensuring effective fundamental rights. The reach and meaning of the Constitution changes and evolves as reality does, and so when a judge decides to evaluate a law that has been previously reviewed, but is operating in a new context,

In these cases, it cannot be considered that the sentence infringes upon *la cosa juzgada*, since the new analysis departs from a distinctive framework or perspective, and that in place of being contradictory, it leads to the specifying of constitutional principles and values and permits the clarification or complementing of the scope and meaning of a legal institution.

The Constitution is not a dead, static document, but instead responds to the concrete details of each case. The Court clarifies that the *cosa juzgada material* is limited by the need for jurisprudence to evolve as concrete contexts and understandings of justice evolve: it “cannot be understood as a *petrification of jurisprudence* but rather as a mechanism that seeks to assure respect for precedent, since the contrary could *provoke unacceptable injustices*.”<sup>43</sup> The Constitution will only ensure fundamental rights if it can adapt to the variation of each concrete case, since the manner of ensuring rights will vary according to the details of the case and as understandings of justice change over time. Rather than applying a static rule of law, the living character of the Colombian Constitution requires the judge to make constitutional law “in light of economic, social, political, and even ideological and cultural changes in a community.” For this reason, “when there exist weighty reasons that motivate a change in jurisprudence – such as a new factual or normative context – the Constitutional Court can move away from the arguments put forward in previous decisions” and consider new legal arguments suited to the changed context.

The Court enjoins itself not to stop at the textual similarities between the articles of the 1983 decree and the Law 599 of 2000, placing on itself a responsibility to realize the teleological spirit of the Constitution. It must go beyond the text to evaluate whether these two abortion penal laws impose arrest sentences for abortion for contrasting ends, which would signify they were developed within two different normative contexts and hence are not identical at all. It becomes the duty of the judge not to consider “the identity between one enunciation or one normative content previously declared constitutional and another reproduced in a new normative body” to be a “concluding argument” for rejecting to review the constitutionality of the new law.<sup>44</sup> The Court emphasizes the judge’s responsibility to be persistent in investigating the particular context in each case: “Therefore, it will always be necessary to do a test of constitutionality for the accused law in order to determine if those reasons persist that led to the pronouncement of constitutionality in the decision previously adopted.” The legal arguments for the previous law may not be arguments for the law to be judged if the normative context is different. To stop at the similarity in content of two laws to evaluate *cosa juzgada material* negates the Constitution’s teleological character. It renders the Constitution meaningless since it would not be able to evolve and would consequently fail at guaranteeing rights, the purpose for which it exists.

Having framed the mechanism in terms of the constitutional end it serves, the Court then proceeds to consider whether there exists the phenomenon of *cosa juzgada material* for Articles

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<sup>42</sup> This and following quotation from C-355 sec. 4 n.14, quoting C-774 of 2001

<sup>43</sup> This and following quotations in the paragraph from C-355 sec. 4, n.13. Italics in original, and represent quotations from C-447 of 1997.

<sup>44</sup> This and remaining quotations in the section from C-355 sec. 4

122 and 124 in C-355. It compares the text of the pairs of articles side by side, and nominally shows that their normative content “differs in a substantial manner.” Article 124 departs from Article 345 since the former reduces the normal sentencing recommendation for abortion by three-fourths in the case of a nonconsensual pregnancy, while the latter establishes a reduced sentence of four months to a year in the same instance. The paragraph of Article 124 also allows the judge to dispense with the punishment according to the details of the case. Though both articles treat the reduction in sentencing for women aborting nonconsensual pregnancies, the Court finds that they are substantively different “as far as the form of the punishment and the possibility of excluding the sanction, established for the cases contemplated in the Paragraph of that law [Article 124].” The Court reads the difference in sentencing recommendations, and the possibility of excluding punishment altogether, as emblematic of substantially different normative orientations.

Although the Court does not elaborate this point, presumably the legislator must be pursuing different ends in 2000 than in 1980, to reduce the sentencing recommendation and allow dismissal of punishment altogether. No longer does the legislator hold life to be an absolute right in 2000, though he still believes it merits protection. This signals a normative context diverging greatly from that of 1980, and the normative legal contexts of these two laws are therefore substantively different. The ruling on Article 345 is distinct from ruling on Article 124, since the same legal arguments employed for evaluating Article 345 would not be “totally applicable” to evaluating Article 124. The Court applies a comparable analysis to Articles 122 and 343.

The Court also appeals to the element of time in its argument by adding that the laws are “contained in different normative contexts since they are two penal codes expedited almost twenty years apart and that obey a different penal orientation.” Reaffirming the change in normative context by appealing to the passage of time grounds again that the Court expects jurisprudence to evolve over time.

The Court, as the arbiter of *cosa juzgada constitucional*, possesses the purview to determine when there exists a new normative context. Where it recognizes a new context, the Court has the authority (and duty, if it comes before them in a case) to apply the Constitution to that situation. Through making interpretations favorable to the evolution of jurisprudence, the Court maintains the integrity of the Constitution as “living.” In this way, the Court positions itself as the legitimate authority on the Constitution. It ensures that the telos of the Constitution will be realized, casting itself as the guardian of the Constitution and the constitutional spirit.

## 5.2 The *bloque de constitucionalidad* and the shadow *bloque*

The *bloque de constitucionalidad* (“constitutional block,” hereafter “*bloque*”) is a mechanism of constitutional decision-making vested in Article 93 of the Constitution. It identifies the range of resources that a judge must consider when reviewing a case, such as the text of the constitution, constitutional values not explicitly expressed in the constitution (e.g., solidarity of the family), and certain international treaties. The *bloque* is a powerful tool; the more that is included within the *bloque*, the greater potential room the Court has in interpreting a case. In its jurisprudence, the Court has developed a distinction between the *bloque* in a strict sense, *strictu sensu*, and a weak sense, *lato sensu*. The strict sense includes the actual text of the constitution and international treaties that establish rights that cannot be infringed upon even in a state of emergency. The weak sense includes “all other norms, of diverse hierarchy, that serve as

a parameter for carrying out constitutional review of legislation,” including other international treaties that Colombia has ratified, organic laws, and statutory laws in some cases.<sup>45</sup> The *bloque* reinforces the notion of the Constitution as dynamic and teleologically committed to fundamental rights. It embeds the Colombian State in international human rights developments and allows the Court to apply new understandings of rights as they arise. It renders the Constitution an “open text,” one that can truly adapt to changing realities.<sup>46</sup> The potentially far-reaching *bloque* is thus enmeshed in the legitimacy of international human rights law. The Court may issue a decision for internal application with a sense of international backing, and can present its decisions drawing on the *bloque* as necessary given the constitutional imperative to evolve jurisprudence.

Beyond the *strictu sensu* and the *lato sensu*, there appears in C-355 a third sense of the *bloque* that consolidates even further the Court’s dynamic and evolutionary character at the same time that it potentially expands the Court’s power of discretion. I call this third level the “shadow *bloque*.” The shadow *bloque* is that which is definitely not included within the *bloque* in either the strict or weak sense, but retains a peripheral relationship to the *bloque* and may be called upon to illuminate the content of the *bloque*. In the shadow *bloque* awaits the jurisprudence and recommendations of the bodies of international treaties ratified by Colombia.<sup>47</sup> The shadow *bloque* may easily expand the scope and meaning of the Constitution, and thereby the power of the Court’s discretion. Through the shadow *bloque*, the Court gains access to a wealth of potential resources for deciding cases.

Issues that have already been decided become decidable again as thinking on these issues develops through the strict, weak, or shadow *bloque*, through their ability to engender new normative legal contexts. This is true in the case of abortion penal law, which the Court believes merits reconsideration in 2006 as complex understandings of life and women’s reproductive rights have developed over recent decades in international human rights law and within Colombia. The Court draws extensively on the *bloque* and the shadow *bloque* to evaluate the abortion penal law, accounting for this potentially power-expanding move by emphasizing its commitment to applying the most advanced understandings of fundamental rights.

In the case at hand, the Court turns to the *bloque* and the shadow *bloque* for guidance in clarifying the constitutional understanding of life as it weighs if there is “a collision between the right to life and the obligation to protect life.”<sup>48</sup> The *bloque* is useful to the Court in this question since it incorporates all the human rights treaties concerning life into the constitutional legal order. These treaties are a guide and an obligatory source to the Court in how to treat the different stages of human life. Moreover, both intervening parties in favor of nullifying the abortion penal law and those against appealed to the *bloque* in defense of their positions. Those against emphasized the International Pact of Civil and Political Rights and the American Convention on Human Rights, which both enter the *bloque* in *strictu sensu*, and the Preamble of the Convention on Rights of the Child, which is part of the *bloque* in *lato sensu*.<sup>49</sup> All of these treaties protect life as a fundamental right, but they employ language of varying specificity of the nature of life that merits State protection and intervention. Those in favor of nullifying the abortion penal law signaled CEDAW and the Convention of Belém do Pará, which are both

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<sup>45</sup> C-355 sec. 6 n.36 The international treaties must be admissible according to Art. 93 par. 2 or Art. 214 of the Constitution.

<sup>46</sup> C-355 sec. 6, quoting C-028 of 2006

<sup>47</sup> C-355 sec. 7

<sup>48</sup> C-355 sec. 4

<sup>49</sup> C-355 sec. 7.

contained in the *bloque* in *lato sensu*.<sup>50</sup> These two treaties specifically concern women's rights, including freedom from violence and reproductive rights. The Court must reckon with what these diverse treaties have to say on human life and women's rights in order to arrive at a decision on the constitutionality of abortion penal law.

There is one main guiding principle for the Court as it looks to the *bloque*: the content of the *bloque*, which again includes the constitutional text and values and ratified international treaties, must be interpreted in a "harmonious and systematic way."<sup>51</sup> This goes beyond making the "grammatical or literal arguments" of the treaties and the Constitution agree; the Court insists that an interpretation of the *bloque* must also be teleological to be harmonious.<sup>52</sup> This manner of interpretation accords with the Constitution's dynamic character, the Court explains. It allows international treaties' understandings of rights to interact with understandings of rights in Colombia, resulting in a richer approach towards rights. Consequently, neither the international treaties included in the strict sense of the *bloque* nor the Constitution prevails one over the other at the moment of interpretation.<sup>53</sup> The Court must weigh the treaties and the Constitution in each case to determine the harmonious interpretation of them that promotes rights best for that situation. The Court's understanding of rights can continue to progress in conversation with an international human rights network, and its jurisprudence will appropriately evolve.

The Court decides to appeal to various United Nations World Conferences to aid it in interpreting the *bloque* harmoniously. While all the international treaties have constitutional force in Colombia through their inclusion in the *bloque*, the Court includes the shadow-*bloque* status of the U.N. World Conferences since "they constitute an essential frame of reference for the interpretation of the rights contained in the international treaties."<sup>54</sup> The CEDAW and the Convention of Belém do Pará are powerful treaties for women's rights, especially sexual and reproductive rights, and it seems likely that the Court would have decided to nullify the abortion penal law without having to reach into the shadow *bloque* for the World Conferences. Nevertheless, the Court explains that possessing a teleological commitment to rights requires them to deploy the shadow *bloque*. It is crucial to call on the Conferences and all the resources of the shadow *bloque* to better understand the actual content of the *bloque*.

Reviewing these World Conferences, the treaties, and the Constitution harmoniously and systematically, the Court arrives at two key insights. First, the *bloque* (and its shadow) in no way hold life as an absolute right, but instead suggest that life may be considered alongside other rights and constitutional goods. They allow space for the treaties' member states to distinguish as they wish between different stages of life, such that the life of the fetus may be granted the status of a "constitutional good," and yet lack the full force of a fundamental right.<sup>55</sup> Second, these treaties elevate women's rights, including reproductive rights, to the level of fundamental constitutional rights. Women's reproductive rights are bound up with their other fundamental rights, such as "life, health, equality and freedom from discrimination, liberty, personal integrity,

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<sup>50</sup> Ibid.

<sup>51</sup> C-355 sec. 6

<sup>52</sup> Ibid.

<sup>53</sup> Undurruga and Cook describe the *bloque* poetically: "Under the constitutional block doctrine, international and domestic laws are intermingled in their interpretations, with neither keeping its original meaning after their fusion. There is a horizontal mutual influence between the international and the domestic, a process of translation that operates both ways" (229).

<sup>54</sup> C-355 sec. 7

<sup>55</sup> C-355 sec. 10.1

freedom from violence.”<sup>56</sup> In effect, the Conferences and the treaties hold that a woman must be able to effectively exercise her reproductive rights in order to enjoy her fundamental rights. With these points in mind, the Court finds itself able to properly balance between the dignified life of the pregnant woman and the biological life of the fetus. This *bloque* interpretation will be key to ultimately declaring the unconstitutionality and modifying the abortion penal law; it leads the Court, in the final section of the sentence, to decide that the life of the pregnant woman merits greater protection in some instances than the life of the fetus.

Making a harmonious and teleological interpretation of the *bloque* aids the Court in upholding its commitment to rights. The case at hand is difficult, the Court acknowledges, given its commitment to both life and women’s rights. This is not an empty commitment, but speaks to the Court’s very identity as the embodiment of the Constitution: “It is in this way that the Constitutional Court, as the guardian of the integrity and the supremacy of the Constitution, and to this end the protector of the fundamental rights of all persons, on a multitude of occasions has stood up for women’s rights in a substantive way.”<sup>57</sup> The Court explains its teleological interpretation of the *bloque* as a necessary move, since a comprehensive commitment to rights is an essential aspect of its identity.

The Court presents its deployment of the *bloque* and the shadow *bloque* as obligatory and reasonable moves in a rights-based State. At the same time, the Court reinforces its identity as the guardian of the constitutional *telos* and the authoritative interpreter of the *telos* applied to concrete situations. It showcases its function here as keeping the Colombian State true to itself, to its constitutional commitments and identity. The Court closes its discussion of women’s rights by embedding them within the overall teleological project: “Sexual and reproductive rights, in addition to their vestment, their protection and guarantee, being based on the recognition of the equality, gender equity, and emancipation of women and girls, are also essential to society and therefore, constitute one of the direct strategies for promoting the dignity of all human beings and the progress of humanity in conditions of social justice.” It is in terms of this larger project of social justice that the Court justifies its interpretation of the *bloque* and shadow *bloque*. And it is this notion of justice that the Court will also deploy in articulating the limits on the legislator.

### 5.3 Limiting the Legislator

Declaring a law unconstitutional is sensitive ground for the Court to tread. It must be careful to show that it is not infringing on the domain of the legislator to determine law and extending its will beyond its proper sphere. This would violate the principle of democracy, which the Court understands as the Colombian peoples’ exercising their will in electing representatives to develop laws that will guide their living together, such that the laws they live by will not be unduly imposed upon them and deny their autonomy and other rights.<sup>58</sup> In C-355, the Court manifests its respect for the principle of democracy by articulating the special role of the legislator in a State with a “living Constitution.” Far from contravening the legislator, the Court elucidates the duties specific to his role. Following from the Court’s role-defining faculty is a function of the Court: it must be vigilant that legislators fulfill their jobs – and only their jobs, as the Court delineates it. What appeared as the Court’s potential trespass into the legislative

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<sup>56</sup> C-355 sec. 7

<sup>57</sup> *Ibid.*

<sup>58</sup> C-355 sec. 8



sphere becomes its obligation. Defining and enforcing the limits of the legislator's liberty in making law is the Court's third potentially power-increasing move in C-355.

Essentially, the legislator's function is to make laws and policies that promote constitutional rights and goods. He can "choose from among various measures within his reach those that he considers most appropriate for protecting goods of constitutional status."<sup>59</sup> This includes legislation, but also measures like public education campaigns.<sup>60</sup> The legislator may choose to develop penal laws "for the protection of goods of constitutional rank, such as life," but the Court cautions that, "fundamental rights and constitutional principles stand as limits to the power of this configuration."<sup>61</sup> The Court allows the legislator to limit rights only so much through penal law, even for sake of preserving rights. Always mindful of the violation of rights, the Court warns the legislator not to overzealously legislate to preempt threats of constitutional goods: "Only the protection of legal goods truly threatened justifies the restriction of other rights and liberties, whose protection the Constitution equally provides."<sup>62</sup> Within the limit of legislating for the purpose of protecting rights, and the limit of not infringing on these rights in protecting them, the legislator possesses the liberty to craft law. Anything outside of this range contradicts the Constitution and the legislator's role.

From this perspective, the Court has a responsibility to review a law of contested constitutionality. Constitutional review keeps the legislator in check and maintains the integrity of the Constitution and the State. Both the legislator and the Court work towards the end of ensuring rights, with the Court as constitutional custodian: Just as it "corresponds to the legislator to adopt penal laws" for the end of ensuring rights, it "corresponds to the Constitutional Court, as the guardian of the integrity and supremacy of the Constitution, to exercise in these cases review concerning the limits that this [the Constitution] has imposed on the legislator, that is, it must examine whether such legislative measures present or not the character of constitutionally valid restrictions."<sup>63</sup> Seen in this light, the Court assures that it is by no means taking on the legislator's role in C-355, but instead is performing its duty of keeping the legislator within constitutional bounds.

In this longest section of the sentence, the Court rehearses five particular limits on the legislator's liberty to develop penal law. All constitutional rights and goods bind the legislator, but the Court deems these five limits to be most relevant to the case: human dignity as a principle and fundamental right, the right to free development of personality (basically a right to liberty), the right to health, along with life and personal integrity, the *bloque de constitucionalidad*, and finally, proportionality and reasonability.<sup>64</sup> For each limit, the Court provides its understanding of the limit, then based on this relates how the legislator must protect it without infringing upon it or any other constitutional rights and values. Lastly, the Court applies the limit to the particular context of C-355.

The Court's idea of the legislator as servant of the teleological Constitution permeates its discussion of each limit. For example, in the discussion of human dignity, the Court clarifies that it understands human dignity as a "founding principle of the legal order" in addition to a fundamental right. As a founding principle, it should "be reflected in legal norms, in the activity

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<sup>59</sup> C-355 sec. 8.5

<sup>60</sup> C-355 sec. 10.1

<sup>61</sup> C-355 sec. 8, quoting Sentence C-939 of 2002

<sup>62</sup> C-355 sec. 8.5 quoting Sentence C-070 of 1996

<sup>63</sup> C-355 sec. 8, quoting Sentence C-205 of 2003

<sup>64</sup> C-355 sec. 8. For human dignity, see sec. 8.1, for liberty, sec. 8.2, and so on.

of Government and the administrative authorities,” which implicates the legislator to always act for the end of human dignity, which the Court will define.<sup>65</sup> As a fundamental right, the Court elaborates human dignity as a protected sphere of individual autonomy and the ability to choose and reasonably carry out one’s own life plan.<sup>66</sup> This autonomy “must be respected by private and public powers,” including the legislator.<sup>67</sup>

If the legislator develops penal law to protect human dignity, the Court reminds the legislator never to sacrifice human dignity, even in order to protect other constitutional rights and goods, such as life. In fact, the Court affirmed the constitutionality of a law providing for euthanasia based on the argument that “The duty of the State to protect life must be compatible with respect for human dignity”.<sup>68</sup> Relating human dignity to abortion penal law, the Court clarifies that “in respect to women, the ambit of protection for her human dignity includes decisions related to her life plan, among which are included reproductive autonomy.”<sup>69</sup> Human dignity therefore means reproductive rights, the Court asserts. The legislator must keep this in mind at the moment of drafting abortion penal law: “in adopting norms of a penal character, the legislator cannot disregard that women are human beings with full rights and therefore must be treated as such, in place of considering them and turning them into mere instruments of reproduction of the human species.”<sup>70</sup> The Court follows this same mode of argument for the remaining four limits it discusses. The legislator’s end is always the end of the Constitution, which the Court articulates.

What emerges from the discussion of the legislator’s limits is the picture of the Court as superior to the legislator. The Court is always respectful towards the legislator, but hardly deferential. It asserts that it has the power of constitutional review, “without this signifying that legislators lacks competency to dedicate themselves to the issue [under review] within respect for constitutional limits.”<sup>71</sup> Yet, the mention of constitutional limits circumscribes the legislator again within the Court’s purview, since it is the Court who defines these limits. The legislator will ultimately have to answer to the Court, and the Court is earnest about this responsibility. If the legislator strays from what the Court deems to be her purpose, then the Court checks her by reminding her of it. For instance, the Court restricts the legislator from applying penal law except in instances when a constitutional good has actually been violated based on its conception of the legislator’s role as enabling enjoyment of rights: “This follows from the very authorities’ reason for being, to wit, to protect persons who are resident in Colombia in their life, honor, property, beliefs, and other rights and liberties (CP art. 2).”<sup>72</sup> Bearing in mind the legislator’s “reason for being” as protecting rights, the Court finds it obvious that the legislator should not unduly infringe on individuals’ rights.<sup>73</sup>

The Court is the protector, guarantor, and interpreter/sage of the *telos* of Constitution. It possesses the power to define and remind the legislator of his limits and purpose, marking itself

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<sup>65</sup> C-355 sec. 8.1, n. 58, quoting Sentence T-1430 of 2000

<sup>66</sup> *Ibid.* Article 11 of the Constitution establishes the right to human dignity. This conception of human dignity has been elaborated in jurisprudence. See Sentence T-881 of 2002, amongst many others.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* The law in question is Article 326 of Decree 100 of 1980. The relevant sentence is C-239 of 1997.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> C-355 sec. 10.1

<sup>72</sup> C-355 sec. 8.5, quoting Sentence C-070 of 1996

<sup>73</sup> Another reason to develop penal law besides protecting rights is to establish a rule of law in a state. By omitting this reason, the Court effectively denies its validity as a reason in Colombia.

as the ultimate arbiter of legitimacy of law. It will always know the spirit of the Constitution better than the legislator. The Court cannot make laws or policies, nor does it claim to know the best methods of protecting rights, but it can judge the legitimacy of the legislator's methods according to its superior knowledge of the spirit.

#### F. Conclusion: women's human rights as demonstrating respect for human life

The Court's invocation of international human rights also signals that Colombia is moving away from violence and values human life. This is important because a concern about valuing life haunts the abortion discussion in Colombia. In an article published in 1997, Colombian sociologist Mara Viveros reported her findings on the Colombian public's major stances towards abortion, results she gathered through interviews with Colombian professionals (lawyers, doctors, theologians, NGO directors) and analysis of a substantial press archive. Her work found that abortion is emphatically a social issue, that "to formulate an opinion with respect to abortion is to refer, indirectly, to fundamental aspects of social organization...in the area of relations between men and women, the family, maternity, individual and collective responsibility, and the social application of science" (3). While some of her findings are more universal, or found in other country contexts, (e.g., the idea that life is sacred), others are clearly inflected by the ongoing armed conflict in Colombia and all the grief and loss it has wrought since the 1940s.

Viveros observes that the ongoing violence has raised the question of the extent to which the Colombian state or people value human life. Synthesizing common sentiments from multiple interviews with professionals opposed to abortion, she writes, "Another argument to justify opposition to the decriminalization of abortion, with great emotional resonance in the Colombian social context, arises: How can we not defend life in a county where murders, originating in multiple and diverse conflicts, have normalized death?" (14). These sentiments of despair and grief, and a hovering question of, or need to affirm, that the Colombian state or people do indeed cherish human life, despite living with death and violence from the conflict for so long, continued to pervade public discourse in the early 2000s. For example, during a United Nations General Assembly Special Session in June 2000, to follow up on the 1995 Beijing World Conference, Colombian President Andrés Pastrana declared,

With the pain that the Colombian people [*pueblo*] suffer due to generalized violence, we have an unequivocal commitment to the right to life. Therefore, we emphatically reject all action that signifies a threat to life, including provoked abortion. The right to life is a supreme right consecrated in our constitution and ratified by our legislation. (Quoted in "Un derecho" 30.)

Turning to a human rights framework in the 2006 abortion decision also works to affirm that the Colombian Constitution and the state sincerely care about human life, simultaneously aligning the country with the "modern" countries who also embrace a human rights framework, and distancing the country from discourses that it does not value human life.

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## Conclusion

In studying the knowledge discourses shaping the production of Colombian reproductive laws and policies at four moments between 1936-2006, the dissertation shows how a geopolitics of knowledge has influenced reproductive laws and policies and understandings of women's societal role and rights. Each chapter shows how Colombian professionals' understandings of current challenges facing the state interact with knowledges based in other countries or developed in transnational circles; and that the discursive construction of these knowledges as the "modern" approach towards law and women's reproduction generates both pressure and enthusiasm among professionals to enact these knowledges in reproductive lawmaking. Across the moments, we see how women are conceived as primarily reproductive beings ensconced in a family. Accompanying a shift in focus of reproductive lawmaking from state interest to women's interests and needs, women also increasingly appear as individual legal subjects distinct from the family.

Chapter 1 analyzed the 1936 Colombian Penal Code Reform Commission's discussions about sexual crimes. A close reading of these discussions reveals an ardor and esteem for the positivist legal science of Italian jurists such as Enrico Ferri, and the enthusiastic application of scientific analysis to sex acts in the name of protecting the family from threats to its approved dynamic. Through careful interpretation of sexual crimes, including abortion, adultery, and passionate homicide, the chapter shows how Colombian jurists came to articulate the family as the "basic cell" of society and, on that basis, to justify the state's interest in men and women's sexual relations. Overall, the 1936 Penal Code Reform Commission's discussions show a desire to be current with cutting-edge, modern jurisprudence coming from abroad, while upholding existing understandings of women's sexual honor to regulate sex and family according to dominant Colombian values, all in the name of defending and modernizing society. During this period, the law regarded women as inseparable from the family unit.

Chapter 2 studied transnational population discourse and its influence on the first Colombian family planning policies. As Chapter 2 relates, in the 1960s, governments worldwide began to heed the dire warnings of economists, demographers, and other science professionals of an impending population explosion, concentrated in so-called Third World countries. It became widely accepted that overpopulation in Third World countries would impede social and economic development in these countries and eventually the globe. In response to the overpopulation threat, transnational networks of governments, social scientists, non-governmental organizations, and aid foundations worked together to design and implement family planning policies that would result in women having fewer children. In Colombia, research and non-profit organizations partnered with US donors to spearhead population research and family planning services. The Colombian government, led by President Carlos Lleras Restrepo (1966-1970), embraced family planning as a development strategy necessary for modernizing Colombia.

Once the government announced its first family planning policy in 1966, however, the Colombian Catholic Church and conservative senators attacked the government and the idea that Colombia's modernization depended on lowered fertility. A close reading of 1967 Colombian Senate hearings on family planning shows that the government assuaged objections that it should stay out of the family sphere by aligning family planning policies with Catholic Church philosophy. Namely, the government emphasized the idea of supporting responsible parenthood and reducing high abortion rates. Thus, the chapter shows a complicated story of Colombia's

family planning policies, where Colombian population leaders and experts who adhered to population discourse made family planning policies possible through their research, clinical and educational programs, and willingness to partner with the government; yet the government managed controversy over family planning policies by adopting a discourse on family planning closer to that of the Catholic Church. Ultimately, a commitment to reducing abortion united both proponents and detractors of family planning policies, to the extent that by 1969, Lleras Restrepo was able to incorporate family planning policy into the National Development Plan. During the 1960s, women's reproductive actions motivated great interest and investment for the purpose of national development. While not centered on women's needs or desires, 1960s family planning policies and programs improved women's reproductive lives by increasing women's contraceptive access.

The story of reproductive lawmaking in Chapters 3 and 4 differs from that in Chapters 1 and 2 in three respects: Colombian women's organizations play a much more visible and influential role in driving reproductive lawmaking starting in the 1990s; "women's rights-are-human rights" discourse becomes a major way of discussing women's reproductive rights; and violence becomes a major phenomenon and concern in Colombia. Chapters 3 and 4 identify how women's organization tied "women's rights-are-human rights" discourse to Colombia's being modern: in Chapter 3, granting women human rights were a way that the state could reassert itself in the face of pervasive violence, and in Chapter 4, according women human rights showed that the state fulfilled international human rights law.

Chapter 3 studies how women's organizations used women's rights-are-human rights discourse and holistic conceptions of woman's reproduction to advocate for a right to *libre opción a la maternidad*, or right to free motherhood, during the 1991 Constitutional Assembly. Initiated by a student movement demanding an end to ongoing violence, the Colombian public voted to convene a Constitutional Assembly to write a new constitution that would lead the country to peace. Proponents of the constitution held that Colombia's exclusionary politics had fostered violence in the country, such that making politics more inclusive would help eliminate violence. The 1991 Constitutional Assembly, making it more inclusive than before, ensured some representation and input from historically marginalized groups. Assembly delegates truncated women's organizations' concept of the *libre opción* right, however. Whereas women's organizations carefully developed *libre opción* as a comprehensive reproductive right that included both a right to have a child and to have an abortion, Assembly delegates treated *libre opción* as merely a right to abortion. The chapter suggests that the Assembly's focus on ending violence via inclusive politics led delegates to overestimate Colombians' capacity to participate in politics (drawing on scholar María Theresa Uribe's argument). The attitude that democratization via inclusive politics would diminish violence thus did not appreciate the social, economic, and other factors that shaped how Colombians participated in politics or not. I find that in a similar fashion, Assembly delegates did not apprehend women's holistic conception of reproductive rights. The holistic conception of *libre opción* considered the variety of conditions required for women to be able to exercise reproductive autonomy and the Assembly overlooked questions of necessary background conditions.

Chapter 4 studies how women's reproductive rights-are-human rights knowledge discourse was decisive in a 2006 Colombian Constitutional Court decision decriminalizing abortion. During the late 1990s, international human rights law began emphasizing women's reproductive rights, including rights to safe abortions. Colombian women's organizations leveraged international human rights law and mechanisms in the 1991 Colombian Constitution to

call for decriminalizing Colombian abortion law, leading to a petition to consider the constitutionality of Colombia's total ban on abortion. In a 2006 decision, the Colombian Constitutional Court legalized abortion in cases of rape, incest, or a grave threat to the woman's health, or when the fetus would be unviable at birth. The decision is remarkable for decriminalizing abortion in Colombia, and also for the decisive role that a human rights framework plays in the decision. After thoroughly studying various human rights legal resources, the Court ultimately draws a distinction between a right to dignified life and an absolute right to life. The Court determines that the pregnant woman claims a human life in a way that the fetus cannot, which in some circumstances, entails that her life is worth greater constitutional protection than the fetus. The chapter shows how women argued that Colombia's commitment to its own constitution and international human rights law required legalizing abortion in some instances. Chapter 4 shows how Colombian constitutional law thus regarded women as individual legal subjects, although it did not fully recognize their reproductive autonomy.

Operating with a transnational feminisms framework, the dissertation is able to examine how knowledges have formed and circulated across national borders and have had a significant impact on Colombian national reproductive laws and policies. Each chapter is founded on an understanding that the knowledges which Colombian professionals use to approach women's reproduction at a given point in time are not neutral or routine, but instead are particular knowledges we can identify and describe as involved in transnational relations of power. The dissertation has sought to show how internal and external perceptions that Colombia may not be fully modern have contributed to Colombian professionals developing reproductive laws and policies with a concern for assuring Colombia's modern status. This translates into professionals participating in and enacting knowledges which are constructed as the way a modern state should approach law- and policymaking on women's reproduction. Studying four moments from 1936 to 2006, it is clear that ideas of how a modern state approaches women's reproduction have varied over time. While during the 1960s, many professionals thought family planning policies aimed to lower fertility were absolutely paramount for modernization and avoiding societal collapse, in 2006, many maintained that decriminalizing abortion was necessary to demonstrate a modern state's commitment to fulfilling the 1991 Colombian Constitution and international human rights law obligations. The transnational feminisms analytical lens allows seemingly disparate moments to be understood together, as revealing how geopolitics of knowledge has shaped Colombian reproductive lawmaking.

Considering reproductive lawmaking across the 20<sup>th</sup> and early 21<sup>st</sup> centuries helps to put in perspective human rights' more recent influence on women's reproductive rights. The dissertation suggests that "women's rights-are-human rights" is one knowledge construct for approaching reproductive lawmaking, albeit one that has established women's reproductive rights to a greater extent than previous reproductive laws. In this way, the dissertation asks that we consider "women's rights-are-human rights" as being in continuity with previous knowledges that have guided professionals' reproductive lawmaking in the past. When we regard "women's rights-are-human rights" as part of a historical pattern in geopolitics of knowledge around women's reproduction, we can develop a critical perspective on human rights. To those who might regard human rights as "women's champion" or the "game-changer" for improving women's lives, we can propose creating knowledge that improves existing human rights arguments for women's reproductive autonomy.

It is my hope that the dissertation contributes to literature on reproductive lawmaking. There are very few book-length works on abortion or other reproductive issues in Colombia, in



either Spanish or English. Most academic works on reproductive issues in Colombia are articles in history or the social sciences, concerned with documenting reproductive practices or assessing reproductive law and policy implementation. As of the 1990s, especially, there is also an increasing body of advocacy journalism and feminist activist articles on reproduction, but still focused on laws and policies and their practical effects.

An exception to the law-and-policy focused literature on abortion in Colombia is the work of Colombian anthropologist Mara Viveros, who published an article on cultural attitudes towards abortion based on press analysis and interviews in 1997, and an ethnography-based book on fatherhood and men undergoing vasectomies in Bogotá, *De Quebradores y Cumplidores* (both in Spanish). Her work demonstrates how unarticulated feelings about sexuality and family are an important part of the story of abortion and other reproductive issues in Colombia. My dissertation builds on this idea, but focusing on Colombian professionals involved in law and policy discussions, and the legal and sociolegal documents these professionals produce. My methods are also textual and archival, rather than ethnographic. Overall, the dissertation is a humanistic contribution to the topic of reproduction in Colombia that ranges across a longer period of history than policy-focused papers.

### Works cited

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