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**DRUG MULES AND THE LIMITS OF CRIMINAL LAW FROM THE
PERSPECTIVE OF GENDER AND VULNERABILITY**

Nayeli Urquiza

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**A DISSERTATION SUBMITTED IN PART OF FULFILLMENT OF THE
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**Examined by: Dr. Elena Loizidou (Birkbeck Law School) and Dr. Sinead Ring (Kent
Law School)**

“...we said ourselves in an outburst of anger “They will pay”. And our anger seemed to promise a joy so heavy that we could scarcely believe ourselves able to bear it. They have paid. They are going to pay. They pay each day. And the joy has not risen up in our hearts” (Beauvoir 2004, 246).

“All this is just another way of saying that it is most difficult when in a state of pain to stay responsive to the equal claim of the other for shelter, for conditions of livability and grievability” (Butler 2009, 184).

Abstract

This thesis probes the limits of concepts and practices in criminal law through an interdisciplinary analysis of vulnerability and gender, shown through the case study of women who act as drug mules and have been sentenced for drug importation offences in England and Wales. While this thesis critiques the current state of drug control and how international drug law characterizes drug trafficking as crime carried out by ‘evil’ and ‘greedy’ offenders, the enquiry is much broader because it questions role of criminal law in the severe punishment of drug mules. Discourses on the vulnerability of drug mules expose the difficulties of judging them solely as threatening traffickers and highlight the particular effects and situation of women participating in the international drug trade. Rather than accepting the victim-offender dichotomy given by legal categories, this thesis suggests that the ambivalent construction of drug mules’ legal subjectivity evinces a deep-seated contradiction in criminal law. The strict frameworks within criminal law labelling actors into either victims or offenders are ways in which the ambiguity intrinsic in human action and embodied social life are denied while shaping and perpetuating a heterosexist models of legal subjectivity.

Drawing on phenomenology, critical theory, and feminist legal theory, the thesis offers a critique of legal subjectivity and the grounds of criminal law from the perspective of gender and vulnerability. Specifically, it maps the effects of disembodied legal personhood and notions of subjectivity in Western liberalism, noting in particular how they can lead to violent practices in law and politics which securitize physical and political bodies in pursue of an ideal of invulnerability. Disembodiment is not only a modality of living which alienates embodiment from history, gender and relationality, but it also facilitates gendered forms of violence. While this project contests relations of invulnerability by rethinking embodied vulnerability, there are also important challenges for feminist scholars in foregrounding the body of women in criminal law. The interdisciplinary gender analysis presented here suggests that describing drug mules as vulnerable offenders alone cannot provide justice to these offenders because it can reify the logic of invulnerability. Thus, we need to understand what the modes of relations with the vulnerable body are and how these relationships to vulnerability is re-inscribed in legal, scholarly, and political discourse. Although vulnerability discourses can be totalized into existing norms of subjectivity in criminal law, namely feminized victims and masculinized agents, this project also gestures towards imagining vulnerability otherwise. This involves holding a space for ethical ambiguity in the encounters between law and gender which are set against the historical background of neoliberal precarity and securitized drug policies.

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As I mentioned, this thesis did not start at the moment of writing the first chapter. It has had a life prior to becoming a text. It would be hard to include all those moments when it began to take shape and the people who affected it. Yet, two places need to be reckoned because they are part of the history and affective intensities within this work. One is Mexico, where I come from and has been turned into a mass grave by misguided drug policies which enable the worse kind of dispossessions and relations of invulnerability. The second place is Vienna and the National Library where this thesis matured and regenerated into a passionate form, especially during a year marked by the desire to flee from this project. Instead, Vienna and the loving friends there who are too many to include in these pages but always remind me about being generous towards oneself and others. A special thanks to Conchita, Alejandra, Ximena, Anabelle, Ericka, Fede, Anastasia, Jana, Masha, and Gregory, Cate, Maz, and Oliver, who delivered me into this new adventure. To Guillaume, Erasmo, and Gerardo, who first introduced me to law and drug policy, but most importantly, their friendship.

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Offences against the Person Act 1861

International Opium Convention of 1909

Hague Convention of 1912

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Customs and Excise Act 1952

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Dangerous Drugs Act 1967

Criminal Appeal Act 1968

United Nations Convention on Psychotropic Substances 1971

Misuse of Drugs Act 1971

Customs and Excise Management Act 1979

Controlled Drugs Penalties Act 1985

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Crime and Disorder Act 1998

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R. v Graham (Paul Anthony) (1982) 74 Cr. App. R. 235

R. v Aramah (John Uzu) (1983) 76 Cr. App. R. 190; (1982) 147 JP 217

R. v Jakeman (Susan Lesley) (1983) 76 Cr. App. R. 223

R. v Taaffe (Paul Desmond) [1984] 2 W.L.R. 326

R. v Courtie (Thomas) [1984] A.C. 463

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R. v Bilinski (Edward) (1988) 86 Cr. App. R. 146

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R. v Cole (Terence) [1994] Crim. L.R. 582

R. v Aranguren (Jose de Jesus) (1995) 16 Cr. App. R. (S.) 211

R v. Latif and Shazad [1996] 1 All ER 353

R. v Thornton [1996] 1 W.L.R 1174

R. v Bowen (Cecil) 1996] 2 Cr. App. R. 157

R. v Abdul-Hussain (Mustafa Shakir) [1999] Crim. L.R. 570

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R v Boakye & Ors [2012] EWCA Crim 838
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R v Henry (Nadine Chrystel) [2014] EWCA Crim 980

List of Abbreviations

CA- Court of Appeal (Criminal Division)

DG- Definitive Guidelines for Drug Offences 2012

HL- House of Lords

SAP- Sentence Advisory Panel

SC- Sentencing Council

SGC-Sentencing Guidelines Council

UKBA- United Kingdom Border Agency

UNODC- United Nations Office on Drugs and Crime

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I. Introduction

1. Vulnerability and the ‘typical drug mule’

In 2013, Guernsey’s local newspaper reported the arrest and conviction of British mother and daughter who smuggled about 220g of a class B drug in their bodies from Dorset, England, to the island of Guernsey. The news story, titled "Mother and heavily pregnant daughter acted as drug mules", quoted the plea to the court made by the mother, fifty-year-old Annette Cronshey: “We are just so stupid. We are both vulnerable and were used...They pick on the vulnerable ones. I was just so scared”(Guernsey Press 2014). Both Annette Cronshey and her daughter, Danielle Lucas were unemployed. Cronshey had suffered many years of domestic abuse and Lucas was heavily pregnant at the time of the arrest. The news report cited Judge Russell Finch, who “said the pair were typical drug couriers, vulnerable and susceptible to those who dealt in illegal substances” (ibid.). In addition, both the defence and probation officer stressed Cronshey’s domestic abuse was among the worst they had heard of in many years. The judge also heard how they had committed the offence following threats against their family. Each one received a 4 years sentence in custody.

Readers (mostly male) who commented online said they did not believe their claims about their vulnerability, saying that the threats were fabricated, and how they had no sympathy for them. Instead, vulnerability appeared to readers as sign of duplicity met with scepticism. In other words, we can see how readers judged the culpability of the two women drawing on distinctions between victims and offenders. A female reader challenged a reader’s suggestion that the abuse claims were not real. She saw it as a way of further victimization (ibid.). In fact, the quotes from the judge and the prosecution also identified vulnerability with domestic abuse. Curiously, most readers’ comments focused on the offence and the offender as well as the financial burden on Guernsey’s government to imprison foreigners, yet few speculated about the failure of the institutions to take into account the impact on victims of domestic abuse.

The narratives in this news report are a microcosm of those played out in scholarly, legal and political discourses on drug mules-couriers. Such discourses struggle to define the culpability and punishment of drug importation offenders described through references of ‘vulnerability’. This is a long-standing problem. The first reference to vulnerability in a sentencing judgement in England and Wales was made by the House of Lords (HL) in the 1983 guideline of *Aramah*¹. Delivering the judgement, Lane LJ observed that:

...one will frequently find students and sick and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly, it is felt that the courts may be moved to misplaced sympathy in their case.²

Yet, the HL decided vulnerability and ‘good character’ could not afford mitigating circumstances for ‘couriers’ because the court reasoned drug traffickers recruited them on the basis of those characteristics. In effect, deterrence overrode culpability considerations. Describing them as vital cogs of the drug trade, a lenient treatment of ‘couriers’ would undermine the deterrence of drug crimes. Thus, the courts should not ‘misplace’ any ‘sympathy’ towards couriers. Note here how ‘vulnerable’ referred to the susceptibility of the will to a quick profit, apparently based on age (students and elderly).

Today, the scope of the term ‘vulnerable’ appears to have changed but it is not clear how. The new sentencing guideline for drug offences, in force since 2012, includes the “exploitation’ of the offender’s ‘vulnerability’ as a sentencing mitigating factor (Appendix I, Table 4). More importantly, ‘involvement through naiveté and exploitation’ (Sentencing Council 2012) is also indicative of the role of a convicted drug importation offender, particularly those known as ‘mules’. In one of the first cases appearing before the Court of

¹ [1983] 76 Cr. App. R. 190

² *Aramah* (n 1) 3.

Appeal (CA) after the entry into force of the guidelines, Hughes LJ described ‘mules’ as “disadvantaged defendants, particularly those from an under-developed country, who have been exploited by serious drugs criminals and persuaded to carry drugs often for very small reward”³. In contrast, a courier was a “‘worldly-wise’ offender who trafficked drugs ‘as a matter of free choice for the money.’”⁴

Almost forty years ago, the term ‘vulnerable’ was used to describe ‘couriers.’ Today, it is more often associated with ‘mules’ described by the CA as a ‘subtype of courier.’⁵ Whether someone is recognised a courier or a mule is now an important source of tension because the role is understood in the guidelines as evidence of culpability. This thesis argues that legal, scholarly, and political discourses describing drug mules as vulnerable offenders exposes a set of problems or tensions embedded in criminal law which are represented in the dichotomy between couriers-mules. These two categories for offenders are iterated in the discourse along gendered divisions of embodied subjectivity. In that sense, this project deploys vulnerability and gender as critical frameworks that mark the limits that justify criminal law and practice. The next sections map the methods, research questions, and definitions adopted in this thesis.

2. Method and methodologies

Overall, the underlying method is a philosophical inquiry on the punishment of female drug mules and couriers, two terms that will be briefly mapped in the following section. Unlike traditional legal methods applied to the study of criminal law, this thesis is an interdisciplinary project that critically analyses legal doctrine drawing on techniques that cross over analytic and normative concepts. More specifically, it examines the concepts of legal personhood, punishment, and legal responsibility from an interdisciplinary approach which draws on

³ *Boakye and Ors* [2012] EWCA Crim 838 [9]

⁴ *ibid* (n 3) [36].

⁵ *ibid* [9].

theoretical resources from history, philosophy, feminism, critical theory, and law. The conspicuous absence of vulnerability from the idea of the legal subject of crime, often understood as a rational actor who calculates and acts according to individual will (Norrie 2001; Davies 2005; Naffine 2009) sparks the interest in exploring the relationship between criminal law and the notion of vulnerability applied to women who traffic drugs. In the context of criminal law, vulnerability has been used as a characteristic of a person or a group requiring additional care, such as gender, age or disabilities (Corston 2007; Jacobson and Talbot 2009). In other cases, vulnerability can appear as a synonym of experiences of domestic abused, human trafficking, and other acts of violence experienced by women who live and make choices in spaces infused with gender norms. However, it is not often clear whether vulnerability discourses advance women's concerns before the law (Munro and Scoular 2012), and especially, criminal law.

In that sense, this thesis critiques the concept of vulnerability, by asking what it means and what the implications are when deploying this term in the context of criminal courts concerned with implementing drug control laws. And yet, what does it mean to be a critical scholar researching the phenomenon of drug mules and vulnerability? Traditionally, critique implies a 'distance' from the object of study (Philippopoulos-Mihalopoulos 2014). For example, observing how criminal law observes or frames legal personhood or how feminist scholarship frames drug mule work. Still, this view leaves out the position of the observer or critical scholar, wondering how the observer judges or explains how others see and how they explain. Another view is to acknowledge the role of the observer as embedded in a "parallel context" and thus, "includes and implies self-observation" (ibid., 391). This is what Andreas Philippopoulos-Mihalopolous calls 'critical autopoiesis' or the self-observation within observation that takes into account its location (ibid.). For example, in the process of writing this thesis, my location vis-à-vis the notion of vulnerability was not of the dispassionate

observer but rather a continuous reflection of how this position limited or enabled an appreciation of the vulnerability of others. It meant acknowledging something that is universal in our condition of being embodied and sensible, and affective beings but also the particularities of each person that may be never be known or ‘understood’. Moreover, my position takes into account Michel Foucault’s suggestion that knowledge is a form of power (Foucault [1975] 1995) and in that sense the task of knowing about vulnerability may appropriate what or who may be elusive to our thought or comprehension. Critique and ethics are not necessarily the same but each can enable the possibility of knowing without possessing, reifying norms or eclipsing the multiple forms of life that exist without us knowing.

This appreciation is resonant with one of the frameworks that most influenced the approach to criminal law in this thesis, namely critical and feminist legal studies. By criminal law, I refer to what is known as the ‘general part’ broadly understood as the body of rules, principles and practices which are believed to “reflect a philosophical understanding of the relationship between the individual, law and the state” (Norrie 1997, 1). Unlike doctrinal legal scholarship, which focuses on coherence-based legal reasoning, I approach criminal law through discourse analysis and interpret the judgements through narrative and textual analysis. Let me explain first what I mean by coherence-based legal reasoning. The jurisprudence of coherence and clarity has been essential to the definition of the identity and authority of criminal law articulated since the sixteenth century in Britain (Norrie 2001; Loizidou 2007; Lacey 1998a; Conaghan 2013a). One influential jurist who incorporated this approach was William Blackstone, who sought to uncover the underlying wisdom in disparate Common Law sources and show the “the general spirit of laws and the principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original, reason and history” (Blackstone 1979, vols. I, ii.). Reviewing the effect of the logic of legal coherence in Common Law, Conaghan suggests this method of interpreting the law

played “a vital role in authenticating and legitimating law and presenting it as an intelligible and unified field” (Conaghan 2013a, 27). Blackstone’s quote shows this method is premised on the view there is a rational, universal order that defines the legal objects of knowledge.

Feminist and critical legal scholars have pointed the limits of legal reasoning (Kleinman 1987; Young 1997; Mcveigh and Rush 1997) which purports to represent the law as systematic and harmony-oriented institution. Thus, coherence based reasoning appears not only limited by its own rules and perspective but it is arguably the problem itself because it glosses ‘irrationalities’ and ‘incoherencies’ impinging legal theory through techniques of exclusion (Davies 2005; Norrie 2005). Drawing on the traditions of critical legal studies and feminist legal studies, chapter III and IV interrogate how normative concepts like legal personhood, criminal responsibility and punishment, exclude and efface the embodied life of subjects coming before the law. The relationship between politics and the law is central to critical legal studies (Stone et. al., 2012), and an important approach to the study of drug policy and laws. From a strict legal-coherence perspective or based on legal principles, judgments on drug offences often make no sense (Norrie 2001; Fortson 2005; Sunter 2008). Deterrence has been a primary objective embedded in the English legal framework, particularly for sentencing (Green 1998). One need look only at the United Nations Single Narcotic Convention 1961 for the legal basis of the almost obsessive attachment to deterrence. This treaty, depicts drug use and trade as an ‘evil’ crime (Lines 2010).

Thus, part of this thesis examines the doctrinal interpretation of drug importation offences in England and Wales but cannot leave out the discourse and practices underpinning domestic and international drug control framework. Some academic and political discourses on vulnerability may naturalise ideas about risk and resilience which only strengthen the rhetoric of securitisation engrained in drug control (chapter II and V). Hence, the discourses analysed here include policy papers by national and international stakeholders in law, politics,

and research. By discourse, I wish to convey in broad terms to Foucault's notion of discourse, understood as a body of ideas and practices that claim knowledge, legitimacy, truth and power (Foucault 1990; Jorgensen and Phillips 2002). Whilst touching on aspects of Foucault's work, my approach throughout chapters IV-VII draws more explicitly on the performativity approach gender based on Judith Butler's work (Butler 1997a; Butler 2006; Butler 2009a; Butler 2009b) and Elena Loizidou's interpretation as to how performativity relates to law, ethics and politics (Loizidou 2007). Whilst acknowledging the debt to Foucault to performativity theory and critical legal studies, my aim is to give feminist and queer scholarship a centre stage in this project.

At the same time, a discursive analysis on drug policy and laws offers only limited sources for getting a fuller picture on the phenomenon of drug mules sentenced to prison. This thesis presents the information available about the extent of the participation of women in the international drug trade, incarceration statistics in the United Kingdom, and also gaps in the data collected. One salient issue is the lack of a common definition to collect data and inconsistent gathering of data disaggregated by sex (Fleetwood and Haas 2011). Other barriers include the ambiguity of the term 'drug trafficking' and the arbitrary nature of how governments define which quantity crosses the threshold of 'personal use' of drugs and becomes an illicit commercial activity (Gottwald 2006). Although knowledge about women's participation in the drug trade is limited, social research produced over the last 20 years provides rich ethnographies and interviews with women and men who have worked as mules. Part of this thesis draws from the reflections and narratives by Jennifer Fleetwood's ethnographic research in Ecuador (Fleetwood 2014). Of course, the claim is not that all drug mules' experiences are the same to that of drug mules importing drugs to England. Instead, the studies cited throughout offer an invaluable insights into the multiplicity of stories of drug mule work, showing the nuances in the experiences according to different geographical and political

settings, as well as intersection of experiences and concerns shared by women and men working as drug mules-couriers (Torres 2008; Giacomello 2013; Martel 2013; Fleetwood 2014).

The contribution of this research is not to explain what women and men go through when they traffic drugs across international borders or how they agree to smuggle drugs in the first place. It nevertheless references studies that give us a glimpse into the processes involved in this illicit economy (Torres 2008; Fleetwood 2011; 2014). In short, the stories that cannot be seen in statistics about drug seizures and arrests. And yet, unlike those publications, the contribution of this project is to offer a glimpse into the end of the process of unsuccessful drug trafficking. That is, the sentencing stage. Recalling the metaphor of the observer at the beginning of this section, the narratives explored in the case law present a picture of the law as an observer, translator, and judge of women and men who are presumed to be mules. In that sense, the narratives presented have been already translated and filtered by the legal norms of reasoning and adjudicating legal responsibility. The aim of the case study, is to present how the law encounters and responds to claims about vulnerability. In the process, it also shows a partial yet rich view on the stories of women and men who are convicted for drug trafficking in England and Wales. At the same time, this picture could be considered rather small because it only looks at sentencing appeals.

Conscious of the inevitable and necessary risks in speaking *about* others (bell hooks 1990; Spivak 1988; Doezema 2005; 2010), my intentions is not to speak for drug mules but to point out the frames of exclusion and inclusion in the law which intensify the precariousness of people who are by no means 'evil' drug traffickers. Concretely, this thesis critiques the frames that identify someone as a 'victim' or an 'offender.' Of course, speaking in strict legal terms drug mules are not recognised at any point as 'victims.' They are convicted offenders who were either tried by a jury or pleaded guilty to the offence. What is meant by frames of inclusion and exclusion is slightly different from the traditional terminology or ideas of

criminal law and criminal justice. As noted before, coherence-based reasoning delimits what is included or excluded within the field of legal knowledge. Pierre Schlag uses the very useful term of ‘logic of the frames’(Schlag 1998). Rather than simply being a conceptual tool, the frame is “the shape and the limit of apprehension and understanding itself” (ibid., 74). This means the activity of reasoning is not solely an abstraction or an ‘object’ apprehended by consciousness. Instead, there is a long list of scholars who have pointed out to interdependence between images and figures of speech and formative effect on concepts and material practices (Lakoff and Johnson 1980; Murphy 2012a; Bourke 2012). In other words, the ‘logic of the frames’ cannot be dissociated from language and more generally discourse. Of course, discourse analysis is not necessarily the same as narrative or textual analysis. Narrative analysis “situates women as subjects rather than objects of knowledge” (Fleetwood 2014, 64) that helps to bring forth “subjective interpretations of material circumstances...”(ibid. 162). It is a methodology that links wider questions of gender, structure, and agency (ibid). For example, Fleetwood argues that drug mules offered their own interpretations and evaluations yet these narratives could not be completely dissociated from the dominant accounts of victimhood and criminality that frame drug mules’ experiences. The point is that there are legal, political and academic discourses that naming women drug mules either as ‘victims’ or as ‘offenders’ but these categories do fit entirely to how people interpret or evaluate their lives and experiences. Still, Fleetwood shows how drug mules respond and adopt those frames, even when may fail to convey their own stories (ibid.).

Narrative analysis in law also portrays stories as an embodiment of individual and collective experiences (Brooks 1996). The law and literature (L&L) methodologies treat also the law as form of rhetorical narrative in order to evaluate and examine the relation between legal argumentation and judgements with storytelling. This approach proposes that law-making is ‘made’ rather than ‘found’ (Gerwitz 1996) and in that sense, recognizes the “power of

storytelling” (Gerwitz 1996, 19). The ‘power’ in stories have led to formalizing “the conditions of telling- to assure those charged in judging them in certain rule-governed forms” (ibid.) In contrast to the aforementioned traditional legal interpretation, Allison Young suggests that the “interpretation of facts is constructed to have an effect upon the interpretation of legal rules” (Young 1997, 130). In other words, the law is articulated and grounded by the case narratives and the legal actors who reconstruct narratives into stories that shape and rehearse gender and legal norms. Legal texts show the “subtle mutations, manipulations, and metamorphoses” (ibid, 129) of both events and the law. My aim is not to present the legal text as a piece of paper capturing the intentions of an author or the truth of an event. Instead, a text can be seen as ‘allegorical reading’⁶ which performs a promise and a failure (De Man 1979). In other words, the text reflects a discourse articulated by the judge, the counsel, or the probation officer, which is presented in the form of a legal story. However, those stories may fail and those failures open the spaces for resistance to dominant discourses on drug mules.

One of criticisms to interpretative analyses, whether it is discourse, narrative, or hermeneutic, has been that it fails to account for the materiality of lives (Bevir and Rhodes 1995), as if the literal and figural were unrelated. Chapter IV, V and VII address this dilemma through Judith Butler and Elaine Scarry’s approach to discourse, narratives, texts, and language in general (Scarry 1985; 1994; Butler 1997b; 1997a), showing how these are not simply literal or rhetorical vehicles for knowledge or recording events but have very material effects. The contribution of poststructuralist or deconstructive approaches⁷ is, for example, the added layer of complexity where that figurative language is marked by its own rhetorical inflection. In other words, a text paradoxically performs the impossibility and concretisation of theory, treatise, or figure of speech (De Man 1978; 1986).

⁶ We could play with the meaning of this term. Trope means generally a ‘figure of speech’.

⁷ Scarry could not be considered a deconstructive author, yet her unique approach bears resemblances. This is probably because their common ground is the influence of J.L. Austin in the American academia.

The reason for adopting an interdisciplinary approach was to expand limited scope offered by legal doctrine to understand the effects of characterising drug mules as vulnerable women from ‘underdeveloped countries’.⁸ Rather than simply looking at what Foucault calls the juridical, this research understands “juridical power” as “only one form of power among many: analysis of the subject in relation to law alone does not fully explain his or her subjection” (Davies 2005, 21). In other words, this project departs from the idea that it is harder to grasp or comprehend the characterisation of drug mules adopted by the criminal courts without considering how drug policy and law frame the offence of trafficking; how gender is absent from the concept of legal personhood; how vulnerability draws attention to the body but it is a ubiquitous concept that refers also to broader experiences in life, mainly to pain and injuring. Of course, these experiences cannot be looked in isolation either, as if they were simple biological facts of life. The next section maps the multifaceted presence of vulnerability across many disciplines.

3. Defining vulnerability: The performative ambiguity of vulnerability

What happens when a women drug mules are described as vulnerable persons? What discourses are evoked by the term ‘vulnerability’? What does it evoke in each specific context or discourse? For example, what are the differences in calling someone ‘vulnerable’ in the context of criminal justice or in the context of feminist activism? Who is figured, imagined or understood as being vulnerable in the context of drug control or crime? Is vulnerability gender-specific? How is vulnerability described in law? To an extent, these questions address specifically criminal law and gender. It is worth pointing out how neither of the quotes from the leading sentencing cases presented at the beginning of this chapter mentioned specifically the gender of mules. The absence of gender, also known as ‘gender-neutrality’, is only present

⁸ *Boakye and Others* (n 3) [9].

in the formal legal terminology. Before explaining why gender matters in this research, might help clearing and narrowing down the view adopted to navigate the different approaches to vulnerability.

The concept of vulnerability has been addressed in a wide range of studies, from bioethics, human rights (Morawa 2003; rua Wall 2008; Grear 2010a; Andorno and Baffone 2014), gender and sexuality (Snow 2008), development studies (Watts and Bohle 1993), sociology (Turner 2006), ethics, in both the traditional sense (moral philosophy) and in critical theory (Harris 1997; Hershock 2003; Murphy 2012a) . Other interdisciplinary areas of research also include the framework of vulnerability, such as like migration studies (Heikkilä 2005) and geography (Philo 2005). But one might also find vulnerability discourses in religious studies (Stone 2011), psychology and philosophy (Vetlesen 2009), policy-making (Furedi 2008), and crime control (Ramsay 2012) to name a few. What is common to most of these perspective is their investment on the idea of the fragility or ‘injurability’ (Fineman 2008a).

Vulnerability derives from the Latin word *vulnus* translated into ‘injury’. The Latin term *iniūria* already signals the mediation of law in notions of wounding. Defined as a ‘wrong’ or an ‘offence’, injury hints at the normative and prohibitive dimension of the act of wounding: *Iniūria*, composed by the prefix in-“not” and *iūs, iūris* which is ‘right’ or ‘law’ (Harper 2014). Although vulnerability pointed to something more concrete, it still appeared suspiciously broad. Yet, the literature pointed out clearly to the image of an injury on ‘bodies’ as the ‘home’⁹ of several approaches to vulnerability (Shildrick 2002; Bergoffen 2003; Philo 2005; Turner 2006; Cavarero 2009; Kruks 2012). The injury may be literal or symbolising something else, such the malleability and porosity of bodies. And from that point of view, vulnerability has not been conceived as something all bodies have in common. Liberal legal discourse on

⁹ I am purposefully paraphrasing Elaine Scarry in one of the sections where she talks about *poena* or pain, as the ‘etymological home’ of punishment (Scarry 1985, 16). My intention of course is to bring closer the metaphors giving life to punishment and vulnerability in an effort to understand how they relate, if they relate at all.

personhood uses vulnerability to describe people with physical or cognitive disabilities (Dunn et. al., 2008). Instead of including stigmatized individuals, this limited understanding of vulnerability pathologizes their identity (Fineman 2008a, 8). While vulnerability discourses seek to offer special protection to marginalised social groups (Morawa 2003), the description appears to be linked to identity characteristics rather than a universal feature all human beings have by virtue of their interdependence (Fineman 2008b).

Fineman clearly anchors vulnerability to interdependence and the image of the injurable body, but it is not often clear in the literature if vulnerability applies only to human bodies and subjects. Several authors, including Fineman, note how state and institutions can be also characterised as vulnerable (Turner 2006; Fineman 2008a), while others argue that non-human subjects like corporations, political body, legal order, are portrayed as a vulnerable entity (Butler 2006; Grear 2010a; Ramsay 2012). Vulnerability has also been used to defy the borders of humanity and signal the commonality of embodied fragility with non-human animals (Shapiro 1989; Stanescu 2012). Some resist the negative association of vulnerability with ‘injurability’, noting how the concept points at other affective states, like love, empathy, care, and a disposition of openness to others that engenders more virtuous legal and ethical relations (Harris 1997; Hershock 2003; Butler 2012a; Assiter 2013).

After careful reading and based on the interpretative approach in this thesis, I was persuaded by the claim that vulnerability is an ‘ambiguous’ concept that could point to different meanings and cause different effects that were beyond the control of the actors who enunciate the term (Murphy 2012a; 2012b; Munro and Scoular 2012). We could think of vulnerability as part of a metonymic family of concepts related to wounding. A metonymy is defined “a figure of speech characterized by the action of substituting for a word or phrase denoting an object, action, institution, etc., a word or phrase denoting a property or something associated with it” (Oxford English Dictionary 2014a). Thus, the metonymy substitutes the

name of a thing or a concept with something that is closely linked to it. Indeed, its Greek etymological meaning is ‘to change names’ (ibid.). Like metaphors, metonymies ‘carry over’ but only something which is already associated with it. Metaphors could be seen as more radical because they transfer “to an object or action different from, but analogous to, that to which it is literally applicable”(Oxford English Dictionary 2014b). What this means is that vulnerability-as-metonymy does not efface completely the object or concept. In contrast, vulnerability-as-metaphor substitutes the original referent.

The suggestion presented here is that vulnerability is a relational concept but it can take the shape of a concept by effacing the referent (metaphor) and presenting itself as a wholly different thing. Or, it can also hold those relations in sight through resemblance. For example, vulnerability is metonymically related to suffering, pain, risk, harm, weakness but also courage, love, empathy, or even care. More importantly, the point illustrated here is how vulnerability is not a concept defined in isolation as if it had a unique and stable meaning. More than being an identity and adopting Margrit Shildrick’s terminology, vulnerability marks ‘encounters’. In its most simple, an encounter is unexpected and un-defined, where “the self and the other are mutually engaged, and yet are irreducible the one to the other” (Shildrick 2002, 78). Vulnerability this conceived is irremediably impinged by ambiguity and ambivalence. Murphy argues how feminism’s critical ontologies of vulnerability show that it is:

above all a figure that concerns potentialities, and the critical practice of imagining vulnerability otherwise requires the that the potential for violence and wounding be taken seriously and also held in abeyance lest the production ambiguities that animate vulnerability be concealed by its overwhelming association with violence (Murphy 2012a, 98)

In that sense, ambiguity is deployed also a critical concept which holds in sight the social ontology of subjectivity and the struggles between ethics and politics to define subjects through

the logic of sameness and identity. Ambivalence points precisely to the possibilities that of care and violence instantiated in the encounters with vulnerability. In that sense, the encounter also entails working or moving through “incommensurable layers of power and emotion” (Shildrick 2002, 78) in the relation between self and ‘other’. Finally, the ‘layers of power and emotion’ explored in this thesis are set specifically within the context of criminal justice and the influence of social contract theories on how the law should negotiates the relationship between individuals and the state.

In short, the thesis situates emotion and power within the context of social contract theories. As will be explained later, these theories ground the rules to relate with others and the state. However, as feminist scholars have often pointed out, women have been assigned a place of their own place in the social contract (Pateman 1988), through the division of the public and private sphere. Contrary to the belief that there are vulnerable individuals whose vulnerability is a private affair- a belief implicit in the sentencing frameworks- this thesis grounds vulnerability in Judith Butler’s “social ontology” of subjectivity. Transgressing the boundaries between private-public, Butler argues that the dispossession to vulnerability mediates and sustains socio-political life (Butler 2006). In that sense, people who appear before the courts present stories of dispossession and socio-political abandonment. Whilst many judges recognise the stories of precariousness, the sentencing decisions show that criminal law is more invested in sustaining the ideology of personal responsibility, a dangerous discourse which arguably has the effect of excluding vulnerability. Concretely, the project presented here examines the performance of vulnerability discourses in sentencing practice and its effects on the distinction of between ‘couriers’ and ‘mules’. The distinction can be read as a practice that eliminates the ambivalence in the legal, academic, discourses about women who do drug mule work (chapter II). The ambivalence is not unique to legal discourses; it rather shows the

complexity involved in agreeing on the names, concepts and descriptions that reflect the roles performed by people who traffic drugs.

4. What is in a name? The ambivalence of drug mules and couriers

The terms ‘mule’ and ‘courier’ have been often used interchangeably in legal, scholarly and political discourse. As noted at the beginning of this chapter, there has been a change in how the courts understands and differentiates mules and couriers. To understand the changes, it is important to point out how one of the most recurrent criticisms across jurisdictions has been the disproportionality of the penalties. Politicians and courts alike have believed in the power of deterrence, a view that has shaped sentencing decisions in the U.S. (Young 1990; Tobin 1998; Mauer and Chesney-Lind 2002), England (Fortson 1996; Green 1998), and several Latin American countries (Uprimny et. al., 2013). In addition to the judicial and parliamentary increase of minimum sentencing terms during the 1980s, the decision in *Aramah*¹⁰ also meant judges should disregard mitigating circumstances and the role of the drug trafficker (Green 1998; Fortson 2005).

Responding to the harsh sentences and disregard to individual justice issues, scholars and civil society have called for greater attention to the role performed by the drug trafficker, also understood as individual culpability (Fortson 1996; Green 1998; Sevigny and Caulkins 2003; Harris 2010; Uprimny et. al., 2013). One of the main criticisms to the deterrence approach to sentencing for drug offences in England and Wales has been the disproportionality of the penalties, especially in the case of drug mules (Green 1998; Harris 2010; Sentencing Advisory Panel 2009). Chapter II maps the institutional and sentencing frameworks reforms in England and Wales which pay more attention to the role of drug mules. Despite the relative consensus that drug mules receive harsh sentences because their role is minimal, there is no

¹⁰ Aramah (n1)

consensus on what defines the role of a drug mule. The following discussion marks with hyphens the exact term used in the literature.

Naming or categorising offenders as ‘mules’ or ‘couriers’ is not only a practical problem researching databases, but also ideological (Fleetwood 2014). They cannot be easily characterised as neutral concepts because each term calls forth a different approach to drug trafficking that has been entangled to market ideologies, post-colonial ideas about victimhood, historical labour struggles, among others. In practical terms, a ‘key-word’ search produce a larger set of results using the term courier in comparison to the term ‘mule’. This point is carefully elaborated in Chapter II and in the research design of the case study in Chapter VI. The only objective now is to map the actors who use term mule or courier and how they are described. For example, several United Nations reports and resolutions also use the term ‘courier’ (Fleetwood and Haas 2011) although there are also documents which distinguish ‘human couriers’ from ‘postal couriers’ (United Nations 2009) because parcel services have been used to smuggle drugs. The Working Group of the Criminal Bar Association of England and Wales recognised the term ‘mule’ had a pejorative connotation (Fleetwood 2014). The term courier appears to be neutral because it describes how the drug was trafficked, whether inside the body or concealed in an object. Confronted by the problems of sentencing disparities and criticisms of deterrent penalties, the United States Sentencing Commission Working Group defined a ‘courier’ as a “person who transported substances with the aid of a vehicle or other equipment” while a ‘mule’ was distinguished as “a person who transports or carries controlled substances internally or on their person, including baggage, souvenir, or clothing” (Tobin 1998, n. 117–118).

In contrast, the European Monitoring Centre on Drugs and Drug Addiction (EMCDDA) suggests that in general, the courier is an importer who is in physical possession of the drug during the process of crossing an international borders (EMCDDA 2012). Mapping

the way practitioners, academic researchers, and professionals use these concepts/definitions, in the European context, the EMCDDA suggests that the courier represents a “general type.” This concept is further subdivided into two other subtypes: a) ‘couriers’ who organise the importation themselves; 2) ‘mules’ who import drugs for others. The difference between them is the “level of organisation and commercial interest in the transportation of a drug...” (EMCDDA 2012, 3). The results from a survey presented to European researchers, law enforcement representatives, and professions, the majority agreed ‘mules’ have a limited role and little further involvement beyond carrying drugs across international borders (EMCDDA 2012, 23). But the devil is in the details. Mules receive a wage, a salary, fee or reduction of debts, while couriers are “self-employed” actors who derive a benefit from the selling the drugs (ibid). Payment rates depend “on the type and weight of drugs transported” (ibid., 20). For example, the profit derived from selling the same amount of cocaine is higher than cannabis. The fixation on quantity and whether it reflects how much the mule will earn is the most contentious issue in the cases presented in the case study.

Quantity and type of drug is a common method to distinguish the level of the offence or punishment, but it is not the sole factor (EMCDDA 2003). Other things considered in sentencing by a majority of European jurisdictions include intent and all the circumstances of the offence (ibid). Young argues that in U.S. context, the reasoning of the federal guidelines for sentencing has been drug quantities reflect the role of the offender in the trafficking scheme (Young 1990). The problem is that this approach conflates quantity with role. From another perspective, it also does not reflect the intent of the offenders. For example, a supplier and distributor has a very different intent than a mule or a courier (Young 1990; Tobin 1998). The role of quantity matters more often between drug users and traffickers because users may be given only a fine or a warning, depending on the jurisdiction (EMCDDA 2003). One of the main criticisms to quantity-based sentences is that threshold quantities are often based on

arbitrary parameters (Fleetwood 2011; UK Drug Policy Commission 2011). For example, the CA established in *Aranguren*¹¹ that offenders who imported between 500 grams and 5 kilos of a Class A drug,¹² like cocaine, the appropriate sentence was between 10 years or more. Above the 5 kilo threshold, the sentencing range would be between 14 years and above.

Other EU countries do not specify a precise amount, preferring the terms ‘small’ quantity as a guide and greater room for discretion (EMCDDA 2003). Also, the problem with specific weight parameters is that they may not reflect how ‘mules’ may often carry higher quantities than professional couriers because mules do not have the same agency over the process of transporting drugs (Fleetwood 2011). Another issue raised by Young is how fixation on quantities does not necessarily reflect the culpability or role of the offender because “couriers” are paid a flat sum rather than a percentage of the delivery (Young 1990). In other words, this statement implies that a mule may carry 3 or 10 kilos but the salary may not significantly change. In contrast, what is known about ‘self-employed couriers’, as the EMCDDA suggests, is that they ‘own’ “both the distribution networks and the drugs the potential for profit is much higher” (EMCDDA 2012, 20).

Profit and method are not the sole methods to distinguish couriers from mules. Legal, scholarly and political discourse seek to explain drug mules’ motivations through the perspective of individual *agency* or the *structure*. Simply put, either a person chooses freely to participate in the drug trade or is a passive actor because she has been coerced through threats of violence or forced by poverty and need. For example, descriptions of drug mules often draw on passivity references, in which mules are “victims of violence and intimidation...who take the most visible and risky roles in the supply and delivery chain” (Global Commission on Drug Policy 2011). A great number of studies and reports which argue that mules are less culpable

¹¹ *R v Aranguren* (1994) 99 Cr. App. R. 347; (1995) 16 Cr. App. R. (S.) 211

¹² The quantity is calculated according to a hundred percent purity of the substance.

offenders tend to draw on the position of the agency of drug mules *prior to the offence*. However, few actually consider the gradients of agency during the process. The extent of the use of coercion is not well known but some studies show coercion plays a role *during* the process of trafficking drugs, rather than before (EMCDDA 2012; Fleetwood 2014). Fleetwood suggests that the vulnerability of ‘mules’ can be best illustrated “by a lack of opportunities for decision-making, or control over one’s actions during the process of international travel” (Fleetwood 2014, 15). The vulnerability was marked by the isolation in the process and limited possibilities for backing out (ibid). As I will discuss in chapter VI, importation offences themselves contribute to narrowing down the possibilities to ‘back out’ from drug mule work.

While few studies available focus on the process, a majority pay attention to the background of the offence or the pathway to drug trafficking. The most common argument is that drug mules’ poverty and opportunities in the legitimate market are very limited. International organisations describe drug mules as “reckless, desperate, or ignorant” (UNODC and WB 2007). Following the reasoning of the economic analysis, drug trafficking becomes an alternative source of income (Del Olmo 1990). However, the position of disadvantage (poverty) increases the possibility of being used or exploited. For example, Genevieve Harris argues that “is widely accepted that the majority of drug mules come from a poor background and are vulnerable or exploited” (Harris 2010, 4). This statement might be powerful, but also unclear how poverty is already immediately a condition for exploitation and vulnerability of drug mules. Tracy Huling also argues that drug mules, particularly women, perform “cheap and expendable labour” (Huling 1996, 57). Exploitation and vulnerability are commonly tied to gender, pointing out structural issues like the feminisation of poverty and women’s caring responsibilities (Malinowska-Sempruch 2002; Bewley-Taylor, Hallam, and Allen 2007). A large part of the research outlined in this section has been gender ‘neutral’-or more precisely gender-blind- because it uses the terms of the market (quantity, supply, payment) and the law

(culpability). At the same time, the association between drug mules and gender is complex. The feminisation of poverty has provided a framework that explains drug mule in terms of gender-specific victimisation, while other approaches describe female drug mules as victims of male exploiters (Fleetwood 2014). The next section fleshes out the relevance of gender in drug mule research followed by an exposition of why gender matters in criminal law

5. Why women? Sentencing and punishment of drug importation offenders

While gender-blindness dominates sentencing practices, the female prison population convicted for drug offences *in general* is very high in many jurisdictions. For example, female drug offenders represented 70 per cent of female prisoners in Ecuador and 60 per cent in Argentina ¹³(Bewley-Taylor et. al., 2007). In the US, there was an 888 per cent increase of women in prison between 1986-1999, driven by draconian drug sentencing schemes in the US (American Civil Liberties Union 2005). Although the sentencing practices in the US are peculiar, rising trends have been registered also in European, Asian and Latin American countries (Bewley-Taylor, Hallam, and Allen 2007; WOLA 2011). Also, these figures do not specify how many women have been convicted for drug trafficking offences. In England and Wales, there is also a high percentage of women convicted for *drug offences in general* (note, not trafficking). After violent offences, drug offences were the second most common offence for which women were convicted in 2009 (Loveless 2012a). Loveless stresses how sentences for drug offences show a *high degree of gender similarity*¹⁴ unlike violent offences, where there sentencing appears to be more lenient (ibid.). In short, women and men received similar sentences for drug offences while women get shorter sentences for violence offences. Most recent statistics (2013) from the Ministry of Justices show that 15.3 per cent of women sentenced had been convicted for drug offences in comparison to 14.8 per cent of men (Ministry

¹³ The data above refers to all drug offences and not exclusively international drug trafficking.

¹⁴ My emphasis.

of Justice 2014, table 1.3b). At the same time, global statistics show male offenders make up more than 70 per cent of ‘detected traffickers’ (United Nations Commission on Narcotic Drugs 2011). However, the problem with the figures above is that sex/gender data for drug trafficking offences are not consistently collected (Fleetwood and Haas 2011) and ‘trafficking’ has a very wide meaning (EMCDDA 2003; 2012; Gottwald 2006). On that note, the absence of a common definition of mules and couriers also makes it difficult to ascertain how many are serving a prison sentence.

Even though gender has been invisible in the sentencing frameworks and drug trafficking statistics, there is a popular assumption that drug mules are women (Fleetwood 2014). In the absence of sentencing frameworks that are sensitive to the specific impact of drug policies and laws on women, researchers have highlighted the invisibility of gender (Raeder 1995; Corston 2007; Giacomello 2009). As Raeder argues “women have been boxed in by a guideline structure which is dominated by visions of male criminality” which exclude considerations of culpability on account of “gendered roles in criminal enterprises” (Raeder 1995, 161). What does appear to be consistently reported in the research is how more women have been convicted for drug trafficking offences since the 1980s (Fleetwood 2014; Loveless 2012b; Harper, et.al., 2002). In the English context, Janet Loveless points out how data from the Ministry of Justice in 2009 shows 20 per cent of female offenders were convicted for an importation offence in comparison to six per cent of male offenders (ibid). The Sentencing Council actually presented in the same year a higher figure (26 per cent) (Sentencing Council 2011a, 4).

Foreign women are disproportionately represented in drug trafficking statistics in the England and Wales. The population of foreign national prisoners- imprisoned for all offences- increased by 152 per cent from 1994-2004, compared to a 55 per cent increase in British nationals (Prison Reform Trust 2004). At that time, the Prison Reform Trust highlighted how

nearly half of the foreign offenders (male and female) had been convicted for drug offences. Figures from 2005 show that about 80 per cent of foreign women imprisoned had been convicted for drug trafficking offences (Joseph 2006, 156). The trend continues, as foreign female drug offenders represented 46 per cent of the prison population in 2012, largely sentenced for drug importation offences (Prison Reform Trust 2012). Foreign women offenders are at a disadvantage for many reasons, including language barriers, separation from the family, and lack of support during the legal process (Hales and Gelsthorpe 2012).¹⁵ While the appellate courts refer to drug mules as offenders from ‘under-developed countries,’ reports from Colombian and Venezuelan authorities reported in 2013 an increase in Spanish ‘mules’ in their prison population.¹⁶ Racial profiling has been commonly blamed for the higher percentage of foreign nationals and racial minorities in prison in US and the UK (Green 1998; Boyd 2004; American Civil Liberties Union 2005; Sudbury 2005; Institute of Women and Criminal Justice 2006). The relation between statistical data must be unpacked and question its connection and perpetuation of profiling practices (Diaz-Cotto 2005; Sudbury 2005; Lawrence & Williams 2006) by reifying law enforcement’s assumptions about who is the typical drugs mule (Schemenauer 2012). For example, law enforcement authorities in the US increased their surveillance of foreign and poor women based on the belief that this particular group is more likely to be drugs mules (ibid). While these statistics show there are issues in how governments collect data on women who traffic drugs, the question addressed in this thesis is how the law judges and punishes them in the first place. The problem is not so much how

¹⁵ Hibiscus, a service for foreign prisoners in the UK, estimates that a thousand children are left on their own after the imprisonment of their mothers in the UK. Corston suggested, based on her review and the ‘Inspectorate’s thematic review of foreign national prisoners’ (2006) that there should be shorter sentence for drug mules, more consideration of mitigating factors particularly for foreign women with children ‘whose safety cannot be guaranteed in the absence of their mothers; and use of community sentences in the UK in appropriate cases’ (Corston 2007). Family links were of particular concern for foreign offenders, among others, such as language barriers and immigration concerns.

¹⁶ Spanish news media reports Colombia, Spaniards occupied the first place in airport detentions in 2013. Peruvian authorities reported 17 per cent of Spaniards imprisoned for drug trafficking (Brunat 2014).

the law is gender-blind, instead, the next section delineates the complex relationship between law and gender.

6. Law, feminism, and gender

Feminist legal studies is a broad umbrella term to designate a heterogeneous body of thought and perspectives that incorporate gender and sexuality into the study of the law. This includes a critique of concepts like sex/gender, where sex has been understood as the facticity of biological body and gender as a product of social and cultural roles and practices ascribed to femininity and masculinity (Beauvoir 2011). Without rehearsing the history of feminism, one of the common critiques has been the influence of the mind-body duality reflected in heterosexual gender differences (Grosz 1994; Lacey 1998b; Beauvoir 2011). While this strategy allowed feminism to take a distance from biological essentialisms, Joanne Conaghan argues the dichotomy simply reproduced the Cartesian duality where “gender became aligned with the realm of the ideal and sex was reduced to raw, unmediated materiality” (Conaghan 2013a, 20). Drawing on the work of Moira Gatens, Conaghan emphasises how feminist interventions distanced too much from bodies in order to hold together a clear distinction between sex-gender. In the 1990s, Judith Butler’s queer theory troubled the debate further by suggesting that assumptions that sexed bodies were not immune to the effects of gender. The essentialisation of sex in the language of biology “becomes ontologically immunized from the power relations and for its historicity” (Butler 1999, 121). In other words, sex is already a product of a heterosexual gender matrix where the appearance of queer sexualities is limited and yet constantly reproduced in practice (Butler 1997b; Butler 1999).

Concepts like gender, sex, and sexuality are fields of constant contestation, where the relationship between the idea of the ‘body’ and social norms are key categories of debate. In that sense, this project is no different. The notion of the body and the social and legal norms that make some bodies more injurable than others is a key concern examined in chapter IV and

V. Drawing on Conaghan's definition, I understand gender as "a category of social ordering" that can be "deployed as an analytical tool to interrogate particular social relational configurations and their effects" (Conaghan 2013a, 24). While this thesis does not engage in an in depth inquiry on notions of sexuality and sex, these issues addressed through the discussion of bodies, embodiment, and the figure of the 'maternal' which is so central to vulnerability discourses. The idea of gendered embodiment is interrogated through the perspective of phenomenology and performative theory. In that sense, it also incorporates feminist philosophies of embodiment, which draw on the interdisciplinary cross-overs between phenomenology and post-structuralism, to interrogate the symbolic attachments to the idea of the 'maternal'. In some ways, my engagement with these methodologies expose both a dialogue and a contrasting exercise between Butler's performative theory, characterised as a contestation (Loizidou 2007) or a continuity of French feminism influenced by Simone de Beauvoir (Murphy 2012b) and more broadly existential phenomenology (Coole 2008). The link between them, as this thesis suggests, is more explicit in their engagement and re-appropriation of ambiguity and ambivalence. The concepts function as critical tropes to re-imagine interdependence (Beauvoir 1986; Butler 2009c; Murphy 2012b). Concretely, the suggestion here is to incorporate the frame of inter-dependence into the analysis of how criminal law and punishment responds and relates to vulnerability.

Feminist legal scholarship has often shown the complicated and unjust treatment of women implicit in criminal doctrine, pointing out the tension between the invisibility of female subjectivity and hyper-visibility of female bodies (Naffine 1996; 1997; Lacey 1998b; Conaghan 2013a). For example, feminist scholars have often argued that criminal law does not view women's as subjects but as objects of male desire. The legal norms in place do not recognise female subjectivities and by extension, fail to address them as legal subjects with rights (Du Toit 2009; Cornell 1995). These critiques draw back to the principles shaping legal

doctrine, particularly the conspicuous exclusions implicit in the principle of equality under the rule of law and the white European male impinging notions of legal personhood (Naffine 2009; Davies 2012; Conaghan 2013a). Vulnerability approaches to law have enlivened the discussions on whether the equality has worked to advance feminist claims. Responding to the failure of equality discourses, Martha Fineman suggests that the liberal subject of rights is actually what needs to be reconsidered. Thus, her proposal puts vulnerability at the centre of law rather than outside of it, as if it was something that affects only marginalised identities (Fineman 2008b). While this thesis follows Fineman's impulse to ground vulnerability in the human condition, it also suggests there are some problems in the theoretical resources and discourses underpinning her approach to vulnerability in law. To advance vulnerability discourses through the trope of the 'mule' in order to ensure proportional sentencing is only the 'tip of the iceberg' in the relationship of criminal law and gender. As mentioned before, vulnerability marks the embodied relationality of subjects in a socio-political context, and thus, the relationship cannot leave out the effect of power relations. Normative concepts in criminal law instantiate relations of power by determining the terms of inclusion and exclusion as to whom is a legal person or who is vulnerable or not.

7. Gendered exclusions/inclusions in criminal law and social contract theories

One of the ideas advanced in this thesis is that the relation between criminal law and gender has been overtly determined by an ideal of disembodiment in punishment theories. By bringing into sight *the relation* between embodiment and disembodiment through a phenomenological analysis, the aim is to show criminal law's ethical failure towards people who do not conform to the norm of rational legal personhood. In other words, the stress put throughout this work is the relation of criminal justice towards people considered to be vulnerable. Vulnerability marks and ethical potential (Murphy 2012a), but it might offer a straightforward solution to social

justice claims (Munro and Scoular 2012). This is because contemporary discourses on the vulnerability of drug mules do not unpack the philosophical imaginaries of violence underpinning the relation between law and vulnerability. The vulnerability of individuals or groups may be disavowed in contexts driven by discourses on the survival of the life of the political sovereign. The idea of the political sovereign is by no means straightforward. However, I do not refer to a political sovereign embodied in a monarch, a president, or even a congress. Instead, the political sovereign can include, as Emily Crick explains, the international drug control community which fashions itself, through reiterative speech acts, as a unified ‘self’ whose survival is threatened by illicit drug trade (Crick 2012). Judith Butler makes a similar point in the context of terrorism, explaining how the nation-state fashions itself as a vulnerable self who lashes out on others when its survival is jeopardized. Although scholars like Julian Reid argue that some vulnerability discourses closely chime liberal social contract theories and facilitate a conservative politics of defence where the goal of the sovereign is to secure its existence (Reid 2013), I will suggest that performativity theory provides a more nuanced account on the relationship between political sovereignty and vulnerability. The main difference is articulated by Butler’s performative account of vulnerability and subjectivity. In traditional liberal accounts, the subject is conceived as a bounded atomistic subject (Naffine 2009; Nedelsky 1990), raising doubts about the possibility for intersubjectivity, relationality, and other categories of thought which aim to demonstrate how the individual is not a self-made unit. Whilst this thesis does not deny that vulnerability discourses tap on on the fear of an Other who threatens my life (and thus, the desire to cut and renounce that Other as part of me), the conceptual frame proposed here shows that even when the relations are disavowed, they never disappear fully. The operation of inclusion/exclusion of intersubjectivity can be observed in the relationship between law and gender. Joanne Conaghan suggests that legal concepts conspicuously erased the formal presence of gender through abstract categories but gender has

been “a crucial part of what law is or does” (Conaghan 2013a). She argues that the ubiquitous references femininity in common law evince how legal concepts draw on gender while denying the interdependence to feminine symbols. For example, influential jurists have described the common law as a beautiful but flirty woman, an old shrew, a ‘patient housewife’, as erratic and careless, and as justice, law genders but it is also gendered (ibid.). Because femininity appeared only through figures of speech, it was not properly inside legal discourse but neither outside. Instead, gender has constituted law through and through but without an acknowledgement to of the debt to the feminine.

Tracing the historical development of the public-private divide, Conaghan argues that gender became seen as an ‘improper’ category of law (ibid., 132) after societal and epistemic transformation in Europe. Ancient and medieval philosophy held a ‘one-sex’ model while the ‘two-sex’ model emerged in the seventeenth century. Drawing on the work by Thomas Lacquer, she explains how female bodies as defective versions of the male body. Yet, bodies belonged to a ‘natural order’ of things, where biology and social order did not have clear borders. In that sense, women’s subjectivity was articulated by early common law jurisprudence through their relations as mothers or wives (ibid.,151). Yet, the apparent symbolic and political ‘exclusion’ of the feminine shows a shift in the *organization* of social order along the lines of the ‘two-sex model’. The two-sex model shadows two of the leading social contract theorists. Thomas Hobbes suggested women were *vulnerable because of their role as child-bearers*; while John Locke suggested women had a weaker constitution (ibid, 152). The two-sex model was influenced by scientific discourse, which presents male and female bodies as radically different. Crucially, the two-sex model blended seamlessly with doctrine of separate spheres articulated through social contract theory (private/public order in politics) (ibid.). Locke and Hobbes differentiate women from men through characteristics attributed to the female body. As a result, women’s biological differences began to be

understood at that time as oppositional to the legal order instituted on the rational, autonomous, able-bodied liberal legal subject (Naffine 1997; Norrie 2001; Naffine 2009; Grear 2010a). This legacy persists in legal doctrine today.

What happened is that formal equality, represented by the liberal and universal subject of law, was conceptualised by “ignoring gender rather than acknowledging gender” (Conaghan 2013a, 132), although the logic of liberalism depended on asserting the identity between law’s addresses and the dominantly male political establishment (ibid., 153). The principle of equality was only formally acknowledged in social contract theories. They would not have been able to logically sustain their coherence without the ideal of equality. However, the feminine is best characterised to be inside/outside legal and political order of the social contract theories. For example, Antigone stands as a liminal subject between past and future, divine norms and man-made laws. She represents the struggle of conflicting views on ethical living (Butler 2000; Norrie 2005; Loizidou 2007; Conaghan 2013a)¹⁷ and how the relation between ethics and law has not yet been resolved in criminal law. As Alan Norrie explains, eighteenth and nineteenth century philosophy of punishment represents the struggle of modern criminal law is with itself, between the moral ideal of individual justice and the apparent necessity of ‘rough justice’ as a method to control crime. This failure is inimical to the architecture of criminal law’s attempt to eliminate the contradictions in the genesis of legal norms and concepts (Norrie 2005). While agreeing with Norrie’s analysis, this project suggests that the relation between ethics and criminal law is impartial because of its complex relation with the feminine, particularly when represented as a symbol of vulnerable embodiment. The exclusion/inclusion of gender arguably explains how legal norms and practices categorise women either as feminized victims or women who transgress femininity norms by acting like

¹⁷ In a way, her struggle is also the struggle of the ‘Beautiful soul’ (morality) and the Unhappy Consciousness (law) between the younger more idealistic Hegel and the older Hegel who gave in to the realities of private property and coercive laws to maintain social order (Norrie 2005).

men.

Finally, it is important to point out that this thesis does not try to prove the truth-claims about the vulnerability of female drug mules. Instead, it excavates and exposes the frames which prevent the law from recognising vulnerable lives through an analysis of the relations of domination and violence impinging the appropriations and exclusions of vulnerability. Instead, the idea presented here is that criminal law includes/excludes vulnerability of drug mules by gendering vulnerability. The case study presented here shows how the law does not recognise the vulnerability framing drug mule work because the rationale underpinning liberal social contract theories leads to the abjection of vulnerability. Criminal law has long sought to manage and control one aspect of the main features of vulnerability- the interdependence of social life- through disembodied legal norms and relations depending on consensual contracts. The effect of this troubled relation of law with vulnerability is the feminization of vulnerability (Bergoffen 2003). To maintain the 'proper order' of vulnerability, the concept of legal personhood adopted by criminal law includes and excludes the feminine, instead of holding a space for ethical ambiguity. Instead, the legal and political ideation of 'invulnerability', best represented by the imaginaries of boundaries, self-bounded and individualistic subjects (Nedelsky 1990), is a sign of the denial of vulnerability's ethical ambiguity. Ultimately, the aim is to find out the possibilities for reclaiming vulnerability 'otherwise' by acknowledging the role of failure and renewal in socio-political relations. This attitude is presented as being an expression of agonistic politics rather than antagonistic. It is also an attitude that recognises that naming drug mules as vulnerable offenders in the courts is a practice that may call forth appropriations and exclusions justified through liberal social contract theories, but it also may disrupt the ideological underpinnings of contemporary practices of punishment of drug trafficking offenders. Resistance to these practices involve the exercise of clearing and unpacking the

disavowal of gender in criminal law as well as a collective encounters to reclaim of vulnerable otherwise.

8. Structure of the thesis

The departure point for this research project is ambivalent characterisation of drug mules as victims and offenders. Chapter II outlines the legal, political, and scholarly discourses underpinning both tropes, and queries the role of gender in the distinction between these categories, mapping the representation of drug trafficking actors. It suggests that to understand how the vulnerability of mules-couriers has been articulated, we need to unpack the productive ambiguity of gendered iterations of victims and offenders. The chapter unpacks two strands of scholarly and political discourse on drug trafficking and how victimhood articulations intersect and may even be appropriated by securitization and neoliberal crime management discourses. Discourses on the vulnerability of mules-couriers expose a tension between criminal responsibility and punishment theories. One of the sources of those tensions include how criminal legal doctrine is organized along gender lines, where legal personhood has been characterized by the disembodiment of rationality and decontextualized attribution of criminal responsibility. Vulnerability discourses hold in sight the gender and embodiment of drug mules, but vulnerability is sensitive to the appropriate of knowledge-producers.

Chapter III examines the history of criminal law and theories of criminal responsibility and punishment, signposting the relationship between criminal legal doctrine and ideas of embodiment and disembodiment. My aim is tease out a critique of criminal law and key normative concepts like legal personhood, criminal responsibility, and the justification of punishment, through the notion of ‘ambiguity’. Following Beauvoir’s insights, ambiguity expresses the socio-political and legal dilemmas that arise from the ‘relation’ with self or others. The relation between self and others is signalled by corporeal embodiment but criminal

legal theory and practices of punishment have effaced ambiguity through the institutionalisation of the rational legal person. In that sense, this chapter explores how ideations of disembodied subjectivity are a ‘strategy’ to reduce the risk of being injured by others and ensure the political future of the community. More generally, this chapter begins to build a critique of the disavowal of embodied vulnerability in criminal law through Simone De Beauvoir’s conversions of ambiguity. Although ‘ambiguity’ has been generally considered by the coherence-based rationality of law as a problem in legal texts, this concept calls for more ethical practices in criminal law by pointing to the failure of punishment, particularly in the neoliberal modality.

Reading through a series of re-interpretations addressing the legacy of Descartes, chapter IV presents an analysis with intertwining levels: epistemological, ontological and political. Departing from the claims that vulnerability is intrinsic to the human condition, this chapter interrogates why vulnerability has been disavowed as a constitutive aspect of subjectivity. The inquiry suggests that the disavowal of vulnerable embodiment bears structural similarities with the Cartesian (mis) reading of the body in pain and the political phenomenology of torture. Specifically, it suggests pain is an experience that underpins the interpretation of the relationship between self and ‘others’ marked by radically difference and qualified by alienation, scepticism and abjection. Through a different interpretation of the relationship between pain, embodiment and politics, this chapter unsettles onto-epistemologies¹⁸ of duality and advances further the idea of the potentially disruptive effects of holding in sight the ambiguity and ambivalence of embodied vulnerability.

Chapter V explores critical feminist and queer approaches to the sexual politics of vulnerability, building on the symbolic/material relation between injured bodies and

¹⁸ Karen Barad defines an ‘onto-epistemology’ as the ‘intertwined study of the practices of knowing and being’ as thoroughly material practices (Barad 2007, 379).

language. In particular, this chapter examines how vulnerability discourses may be accommodated into gendered discourses of risk and penetrability that justify securitization to protection institutional and state vulnerability. This chapter defends the ethical ‘provocations’ when one names and exposes vulnerability in the political and legal spheres. By re-appropriating ambiguity and ambivalence, feminist and queer theory approaches to vulnerability map its ethical potential, particularly to rearticulate the bonds of social and political interdependence, but also alert critically to its limits. Thus, the labour of ambiguity and ambivalence is to point at the political appropriations and disavowals of vulnerability but also against ‘wounded attachments’ (Brown 1995) that reaffirm disempowering ‘protective’ interventions.

Chapter VI explores the sentencing narratives on vulnerability deployed in the Court of Appeal. It maps the dominant articulations of vulnerability thematized through economic precariousness, caring responsibilities and personal characteristics of drug importation offenders considered through the generally as couriers. The analysis of the judgments probes the limits imposed to the appearance of vulnerability in the court, and narrowing down of the category of ‘drug mules’ through the logic of inclusion/exclusion. In other words, it suggests that the doctrine of mercy underpinning the legal recognition of vulnerability articulates the inclusion of drug mules as ‘absolute feminised victims’ from the ‘third world’ to confirm the norm of the rational offender motivated by financial greed. It suggests that limit the appearance of vulnerable lives and effects the exclusions through the disavowal of the ambiguity of agency signalled by the ambivalence of drug mules. Instead, it is an expression of protecting the borders of legal personhood and maintenance of the two-sex model (chapter I) impinging law and the sexual politics of vulnerability.

Finally, chapter VII returns to the dilemma of the appearance of vulnerability in the sphere of law. The conclusion reaffirms the potential of vulnerability to disrupt and retrace the

practices of exclusion in criminal law in general, and drug control in particular. It suggests that a critical approach to sentencing must expose the practices of exclusions that push drug mules' vulnerability into the 'private' world of 'personal characteristics'. The narratives reviewed in the case study show, the exclusion of vulnerability is not a matter of 'personal circumstances and characteristics' but about the differential distribution of vulnerability along gendered relations of violence (Butler and Athanasiou 2013, 1). Naming vulnerability in sentencing appeals enable the space for addressees to resist names given and the silencing effect of guilty pleas, and by doing so, exposing again and again the failure of the project of criminal law and atomistic versions of legal personhood.

II. Drug mules: Ambivalent offenders

1. Summary

This chapter maps the representation of drug trafficking actors, including mules-couriers in scholarly, legal, and political discourses. It suggests that in order to understand how the vulnerability of mules-couriers has been articulated, we need to unpack the productive ambivalence of the gendered iterations of victims and offenders. I unpack two strands of scholarly and political discourse on drug trafficking and the ways that victimhood discourses intersect and may even be appropriated by the securitization and neoliberal crime management rationalities underpinning drug policy. Securitization in international drug policy discourse geared up to contain foreign offenders and colonize victims through paternalistic practices; while capitalist/neoliberal discourses frame drug offences as a risk to be contained through managerial strategies in criminal justice. This approach posits drug offenders as failed subjects of capitalism who by-pass the labour market through crime. The second part of the chapter explores the different iterations about the vulnerability of female drug mules in feminist research that suggest alternative avenues to address the gender dimension of drug mule work. Overall, the aims of this chapter is to show how discourses on the vulnerability of mules-couriers expose a tension impinging criminal responsibility and punishment theories. One of the sources of those tensions include how criminal legal doctrine is organized along gender lines, where legal personhood has been characterized by the disembodiment of rationality and decontextualized attribution of criminal responsibility. In that sense, incorporating vulnerability into the frames of the law, and particularly as a way to expose the case of women drug mules, is a necessary task, although susceptible to appropriation by knowledge-producers.

2. Ambivalent performances: Gender, victimhood and agency

A public inquiry commissioned by the Home Office, titled the *Corston Report* (2007), which was sparked by the suicide of six women serving custodial sentences. The report recognised that many women offenders are ‘vulnerable’ in some way (mental illness, histories of abuse) and therefore required gender-sensitive treatment. The report identified three broad sources of women’s vulnerability: domestic situation,¹⁹ personal circumstances,²⁰ and socio-economic status (ibid., 2). These factors may lead to a crisis point in a woman’s life, including prison. In short, experiences of domestic violence, sexual abuse, coercion, mental health problems, precarious housing, and coercion by men to commit crimes (ibid.) frame women’s pathways into crime. Corston recommended institutional support to women so that they could “develop resilience, life skills and emotional literacy” (ibid., 14). The point that is most interesting is how the report characterises women as both victims and offenders (ibid., 17) and yet, their vulnerability could not excuse them from having committed a criminal offence. A few years earlier, Baroness Brenda Hale similarly emphasised the gender differences between women and men offenders, characterizing women also as victims and perpetrators (Hale 2005a).

The central message of the *Corston Report* was the failure of androcentric approaches to prison management and other criminal justice institutions, an argument well-known in criminology, legal studies, politics, and other areas. For example, Ngaire Naffine explains how women were invisible in nineteenth century criminology, both as “criminal subjects and non-criminal subjects” (Naffine 1996, 19). From its inception, criminology focused mostly on men but under the guise of universality. Gender was not a relevant category of analysis. Mapping

¹⁹ Domestic circumstances referred in the report were mainly intimate partner violence or single parenthood. As noted by Christine Chinkin, describing partner violence as a ‘domestic’ issue separates violence against women along the lines of private and public divide (Chinkin 1999).

²⁰ The report describes personal circumstances also as a private issue in women’s lives, lacking any perspective about the social dimension of the ‘circumstances’ described, such as eating disorders, mental illness, and substance misuse.

the history of criminology, Naffine argues that “men were beings whose gender was not crucial to their identity; it was only women who constituted a particular sex” (Naffine 1996, 20). In other words, women’s gender mattered to explain their criminality, but the same logic did not apply for men. To counter the masculine-bias operating in the background under the guise of ‘objectivity’ (Naffine 1996, 21), feminism has sought to make gender visible. Feminists have challenged the androcentric approaches cloaked in gender-neutral language by documenting and exposing experiences of intimate partner abuse, sexual violence, and mental health problems, among other life-events that function as explanations to female offending. Mapping feminist theorizing in criminology, Meda Chesney-Lind and Katherine Faith noted how victimization has been central to explaining female offending (Chesney-Lind and Faith 2000). At the same time, this approach to gendering the subject of crime calls for a persistent balancing act. Rendering visible the experience of victimhood has been one of the strategies to assert gender-difference (Snider 2003) The balancing act is characterized by accounting for factors contributing to victimization of women without negating or masculinizing female agency (Mardorossian 2014).

There is a similar identification of women convicted for drug importation offences as both victims and offenders. For example, the UK Drug Policy Commission recommended that sentencing courts regard how they may play the “role as both offender and victim” (UK Drug Policy Commission 2011, 15). Numerous media stories (UNODC 2012a; Bulawayo 24 2012), international reports, and scholarly articles highlight the gender differences between drug trafficking offenders, highlighting women’s victimization (Malinowska-Sempruch 2002; Kampfner 2005; Bewley-Taylor et.al., 2007; Kramer et. al., 2009; Pieris 2014). While acknowledging narratives of victimization and gender violence, Julia Sudbury argues that victim-offender dichotomies may limit our understanding of why women risk their lives and freedom for a subordinate role in the drug hierarchy. Instead, she situates drug smuggling in

the context of interlocking phenomena, mainly the shrinking of the welfare social net; the rise of the privatization of prison services; and a racist ‘tough on crime’ agenda (Sudbury 2005). For her, women who engage in drug ‘mule’ work are not passive victims, but agents whose choices are severely restricted by socio-economic pressures, structural gender violence and global inequities (ibid.).

Stephanie Martel unpacks the dichotomy of victims and offenders in the context of securitization processes in South-east Asian countries,²¹ stressing how law enforcement authorities in the Philippines have increasingly stated their concern over the recruitment of vulnerable women by foreign traffickers, particularly transnational crime from Nigeria, China, and Iran. The image of the male foreign trafficker discourse that ensnares national women is a common myth underpinning organised crime. What is worth pointing out is how securitization discourses feed on this focus on the foreign predator to justify increasing measures for law enforcement. Adopting a similar approach, Ellie Schemenauer argues that victim and offender discourses in drug policy are shaped by a racialized and masculinized logic of security and ‘protection’ of victimized offenders (Schemenauer 2012).

The victim-offender dichotomy is also implicit in other offences considered within the umbrella term of transnational organized crime. For example, in Jo Doezema’s provocative analysis of the history of sex trafficking/white slavery regimes, she argues that the myth of the ‘white slave’ in Britain was constructed as the “innocent victim in opposition to the willing whore” (Doezema 2010, 13). Consent has been used to demarcate the distinction between the ‘sex slave’ and the ‘whore’ to decide who is deserves to be ‘rescued’ (Soderlund 2005). Feminist critics of human trafficking rhetoric argue that the attachment to a post-colonial

²¹ Barry Buzan, Ole Wæver, and Jaap de Wilde define securitization as a socially constructed process where issues are framed as existential threats (Buzan, Wæver, and Wilde 1998) against an ‘other’. Seen as a threat, interventions against perceived threatening others justify actions beyond the normal rules of political engagement. Securitization speech acts are not successful just when an authority, for example, a political enunciates the threat. Instead, securitization underscores the intersubjective relation between the authority enunciating the speech act, a receptive audience and the right context (Martel 2013).

trafficking victim stereotype (Doezema 2001; Sharma 2005; Zheng 2010; Davies and Davies 2010) has been used to justify paternalistic interventions with regard to third world women. But protect them from whom? Nandita Sharma argues that human trafficking discourses “simultaneously obscure the vulnerability of migrant women in the nexus of state and capitalist practices while representing them as victims solely of traffickers” (Sharma 2005, 89). While I do not want to conflate human trafficking with drug trafficking, there are parallels because they are framed through an international crime control strategy. Framing transnational organized crime along categories of ‘suitable enemies’ (Green 1998) preying on ‘suitable’ victims (Kempadoo 2005) sustains and justifies intrusive interventions to ‘protect’ groups understood as vulnerable.

Moreover, the victim-offender dichotomy is not normatively neutral. Maggy Lee and Jo Doezema, among others, show how human trafficking policy and scholarly discourses separate the morally deserving victims from those who are not (Lee 2011; Doezema 2010). The migrant sex worker is pitted against the sexually exploited trafficking victim, a distinction implicit in the language and aims of the UN Human Trafficking Protocol (Doezema 2005). The dichotomy of the sex slave-sex worker reflects deep-seated ideological approaches to women’s autonomy. Doezema contends that Western feminist activists have an attachment to the idea of ‘third-world-prostitute’ who is an emblem for ‘suffering bodies’ (Doezema 2001). Far from being a compassionate or protective endeavour, disciplining the colonial others through the metaphor of injured bodies is central to advance the identity and political prerogatives of Western feminists as emancipated subjects of rights within their own countries (Mohanty 1988). One of the criticisms of prostitution abolitionists, who categorically reject sex work as a choice, is that abolitionism appropriates suffering for its own political and ideological purposes (Doezema 2005; 2010; Soderlund 2005). The trope of the suffering female body has been also articulated as a characteristic of drug mules. Law-enforcement authorities expect

female drug mules to perform and show their victimhood (Schemenauer 2012). Naturalized models of motherhood play a significant role in the narratives of what Schemenauer calls the ‘knowing subjects’ of the international drug trade, such as customs officers, probation officers issuing pre-sentencing reports and defence attorneys. Drug mules are assumed to be peaceful, vulnerable, and weak; while the state distinguishes them from the ruthless hyper-masculine criminals supposedly using them. The dichotomy of the violent narco-trafficker and the passive mule “reinforces the drug war logic and the protector–protected” roles on which it thrives (Schemenauer 2012, 94–95). Additionally, Schemenauer stresses how victim discourses deny agency by reaffirming “Latin American and Caribbean women’s association with poverty, innocence, and most importantly, motherhood” (ibid. 93).

The victim discourse not only drives the attention to poor, foreign, women crossing international borders, but also practices that seek to differentiate the genuine and fake drug mule. Schemenauer underscores the implicit judgement made against drug mules who “use notions of femininity and womanhood to thwart the suspicious authorities” (ibid., 91). Law enforcement discourse interprets failed or deceptive performances of femininity through the symbolic content of ‘vamps’ or ‘whores’:

Vamps are the trickster-sisters who strategically perform feminine roles to deceive and escape detection. The ‘deception’ tends to fall under four basic types: the fake mother; the concealment of drugs in feminine body-parts; the fake professional woman; and the sexual tease (ibid). The main point is to illustrate how victim narratives backlash because they bolster authorities’ justifications to militarize borders and increase surveillance strategies against enemies ‘imagined as masculinized drug kingpins (ibid. 83).

The following sections explore how gender figures in the literature on drug trafficking. These discourses reflect the typologies shaping organized crime literature by organizing drug

traffickers characteristics according to their motivations (Dorn et. al 2005). For example, the politico-military drug traffickers trade in drugs to finance their struggles against a political regime. In contrast, there are also business entrepreneurs whose sole interest profit. Finally, organized crime literature represents drug mules as ‘adventurers’. That is, people who engage in the drug trafficking because they have been coerced; pressured by financial debts; or, because they seek the excitement of the risk (ibid.). However, these typologies import gendered assumptions by alluding to masculinity and femininity tropes. The next sections maps how these typologies, embedded in the international legal framework on drug offences, are not neutral explanations about the drug trade. Instead, drug control studies traffic particular views on gender, race and ethnicity into their analytic frameworks.

3. Drug control policy: Between securitization and neoliberal management of crime

Organized crime and security studies typically describe drug traffickers as a threat to the state (Dorn et al., 2005), and the illicit drug trade as a ‘national security’ concern. This approach is putatively implicit in the history of the international drug control regime, although its punitive façade is more clearly the product of the ‘war on drugs’ rhetoric made by US presidents in the 1970s-1980s. The origins of drug control bear little resemblance to the war on drug rhetoric because it was actually characterized by a mercantilist dispute over the monopoly of opium trade. After the opium wars, the imperial powers proposed a new way to regulate and reduce the opium trade (Mccoy 2000). The Hague Convention of 1912 became the first international treaty on drug control, shaped by colonial trade interests in Asia.²² The convention was eventually superseded by other treaties and today’s international drug control system, which will be explained below. Before that, it is important to clarify ‘illegal drugs’ were quite

²² Britain imposed its economic interests onto China, forcing this country to legalise opium so that Britain could export opium from its East India Company, produced in the colonized region of Bengal. The revenues from the Chinese market were highly lucrative and sustained British colonialism in India (Green 1998, 108)

common in Victorian Britain for medical purposes (Bancroft 2009). The first law regulating the use of drugs in Britain was the Dangerous Drugs Act of 1920, which condensed a number of war time regulations prohibiting the possession of opium and cocaine because they were blamed for hampering the effectiveness of the troops (Green 1998). The 1920 Act was the first national statute limiting the importation, exportation, and production of opioid derivatives and “enabled the United Kingdom to ratify the Hague Convention of 1912” (Fortson 2005, 12). The 1920 Act was repealed by the 1971 Misuse of Drugs Act, to be discussed in more detail in chapter VI. Drug regulation significantly expanded during the twentieth century, both in the scope of the international prohibitions and restrictions against the trade of ‘altering’ substances (Bruun et. al., 1975; UNODC 2008). Under the mandate of the League of Nations, nations added claims to limit the trade of certain substances across borders, increasing the scope of substances regulated through the creation of more multilateral agreements (UNODC 2008). The Second World War suspended international cooperation but was resumed soon after by the United Nations through the 1946 resolutions transferring the responsibilities of the international drug treaties of the League of Nations to the Commission of Narcotic Drugs (United Nations Economic and Social Council 1946). The Commission is a functional commission of the Economic and Social Council and the main body dealing with controlled substance policy. It consolidated the pre-war treaties into the UN Single Convention on Narcotic Drugs 1961, which is the main international drug control instrument in operation today along with the 1971 UN Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Single Convention has a number of aims which will not be discussed at length here as they are largely mirrored in the domestic statute, the Misuse of Drugs Act 1971.

Key figures of the anti-alcohol movement participated negotiation of the Single Convention and arguably shaped the moral language condemning the personal use of drugs and

the prohibitionist approach (Boister 1995). In contrast, Germany and the UK proposed a regulatory approach that would limit personal consumption through taxes amongst other methods (Bruun et al. 1975). The result was a balance between the member states interested in protecting the commercial interests of the pharmaceutical industry and the ones which advocated for the criminalization of drug use and illicit drug trade (Bruun et. al. 1975). Drug control is characterised by a two-pronged approach which allows the use, production, trade, etc. when it is intended for medical and scientific purposes. Anything else, for example recreational drug use, is considered illicit. Of course, those categories (medical or recreational), under-researched and constantly contested (Taylor 2008).

What stands out in the Single Convention of 1961 is the characterisation of the drug trade as “evil.”²³ Rick Lines argues that no other UN treaty addressing issues considered abhorrent to the international community - such as slavery, apartheid or torture - uses similar terminology (Lines 2010). Drugs have also been depicted in UN documents as a potential weapon for “the most hideous crimes against mankind” (ibid,10). The ‘existential rhetoric’ surrounding drug control can be traced back to the pre-United Nations treaties. Paul Gootenberg argues that anti-drug rhetoric and laws served to reverse the roles in exploitation relationships through narratives which depicted immigrants and racial others as those who ‘enslaved’ white people with their drugs (Gootenberg 2005). At the turn of the twentieth century and the demise of colonialism and slavery, foreign drug merchants were represented as predators, “vipers”, and “snakes”, infesting the country with their “venom” (ibid.). The ‘evil’ nature of the illicit drug trade was coupled in the 1970s to the ‘war on drugs’ rhetoric. This policy, born in the U.S. has since spread throughout the world through foreign aid mechanisms (Norton-Hawk 2009; Barrett 2010). President Richard Nixon told the US Congress in 1971 that drug addiction had “assumed the dimensions of a national emergency” (Vullyamy 2011). In

²³ Single Convention on Narcotic Drugs 1961, preamble, [6]-[7].

the 1980s, President Ronald Reagan framed illicit drug trade as an issue of national security against external threats (Morales 1989). Curtis Marez suggests that the militaristic discourse preceded the actual implementation of Reagan's international drug wars, characterized by U.S. military complicity in international drug trafficking. The bellicose discourse began as a pervasive "mass media event" (Marez 2004, 2–3) against crack cocaine use amongst already marginalised communities (Acker 2010), but eventually translated into the militarisation of drug control (Corva 2009). Although the 'drug war' started as a rhetorical ploy, Patrick Gallagher argues it is a metaphor that has become 'real' (Gallagher 2011a) in many countries. Links made between drug trafficking and terrorism are troublesome examples of how war and crime have become indistinct. The blurred lines between drug war and drug crimes has been reaffirmed in presidential statements at the UN Security Council, where international drug trafficking has been described as global security problem rather than a health problem (ibid.).

While the punitive style of American drug policy is unique, it arguably has a more global influence because the bellicose logic was institutionalised the Convention against the Illicit Trafficking of Narcotics and Psychotropic Substances of 1988 (Stewart 1989). Again, the treaty negotiations were led by the US, whose domestic policies favoured increased funding for law enforcement and less for treatment for drug dependency, and increased international cooperation mechanisms (such as mutual legal assistance) to prosecute global trafficking (Boister 1995). Although punitive approaches to crime could be considered associated to political conservatism, Ethan Nadelman shows how the 'drug war' rhetoric has been replicated and embraced by communist, socialist, democratic, autocratic, and imperial governments alike (Nadelman 1990).

As suggested earlier, securitization is shaped by notions of masculinity and femininity (Kimmel 2003a; Schemenauer 2012; Pickering 2014). 'Tough masculinity' is deployed when the state perceives itself to be vulnerable to symbolical injuries (Kimmel 2003b; Butler 2009a).

Governments embrace border securitization narratives, justified and expressed through existential threat speech acts, which affirm their resolve to face the multiple threats of the globalized world (Crick 2012). Emily Crick argues that the concept of security is not an objective situation; rather, it is the political result of a specific speech acts against the State (ibid). State-actors identify with the notion of the international community fighting drugs as if it were a united ‘global self’ constructed around the idea that the Single Convention is the guardian of mankind responsible for eliminating the ‘evil’ of drugs (Lines 2010). Bolstered by a perception of morally superiority articulated as a battle between good and evil (Crick 2012), judicial and political authorities reverberate these speech acts uncritically. For example, judges in England and Wales commonly preface sentencing decisions with remarks like the following: “the dangers of these drugs, the damage they cause both to those who take them and to society at large is such that the courts have taken the view those harsh deterrent sentences must be visited on those who help to promote this evil trade”.²⁴ In terms of political accountability, securitization strategies may by-pass legitimate political arena and even “frame alternative discourses as immoral and irrational” (Crick 2012, 413). While political dissent may be compromised by the “existential rhetoric” of drug control, Crick suggests that de-securitization is not impossible (ibid). The task of critical scholarship in drug policy is to show the processes that normalise the way drug policy is construed. In that sense, the next section elaborates on one of the dominant frames used to explain, understand and criminalise drug supply offences, including trafficking.

4. Economic metaphors and neoliberal interpretations of crime

Drug markets are studied as if they were legitimate business through economic models of crime control (Teichman and Broude 2009). The distinct language and metaphor of the market

²⁴ *R. v Basoah* [2004] EWCA Crim 104 [7].

(Wacquant 2009) applies analytical tools such as ‘supply’ and ‘demand’ in order to understand the motivations of criminal actors. Drug trafficking can be considered a ‘business’ or an ‘enterprise’ where buyers and sellers trade illicit goods (Wright 2006; Jenner 2014). In the 1970s, the term transnationalism, used in political and economic theories, entered the discourse of criminology, describing new forms of crime which were eventually named as *transnational organised crime* (Felsen and Kalaitzidis 2005). Thus conceived, drug traffickers are rather international criminal entrepreneurs (Dorn et. al., 2005), whose main goal is to “prosper commercially without being disturbed” (Lee 1991, 9). Coupled with a political and juridical analysis, drug trafficking also figures as a threat to the rule of law (UNODC 2012b) which weakens the legitimacy of the state institutions and delays the delivery of basic needs to citizens (Costa 2008).

Through the frame of the market, the most pervasive explanation for drug crimes is economic gain (Seddon 2000). Of course, there are different views on economic issues, and the study of crime has been influenced by neoliberal scholarship. Bernard Harcourt shows how neoliberal scholars from the University of Chicago²⁵ had a considerable impact on shaping drugs crime-control policy, mainly propitiating a shift away from criminological theories based on psychological motives and social context explanations (Harcourt 2011). Rational choice theory explains criminal “choices” along lines of costs and benefits (Harcourt 2011, 133–134). Richard Posner was one of the first to “embed the free-market presumption right into the very conception of crime” (ibid., 136) precisely by interpreting some offences as a form of “market by-passing” (ibid.). Posner’s thesis is simple and powerful; but also imports a capitalist morality, which condemns free-riders who seek to accumulate wealth by cheating the rules of the labour market (ibid.). In the words of Alhaji Ahmadu Giade, the former chairman of the

²⁵ A key notion developed by Milton Friedman, who was in favour of drug liberalization, was that people get involved in crime ‘as their position in the legitimate market deteriorates’ (Western et al. 2004). Of course, the profitability illicit drug trade becomes an incentive from a rational point of view (Thoumi and Windybank 2007) though the higher the risk, the more profit that one can make.

NDLEA National Drug Enforcement Agency of Nigeria, a courier caught smuggling drugs into the UK embodied a “moral degeneracy that includes greed and unwillingness to perform honest work” (Klein 2009, 388). Chapter VI shows the influence of these frameworks on legal judgements and the category of the courier described in the Court of Appeal as people who want quick and easy money.

The morality implicit in economic analyses is a barrier to drug research because it drives away the attention from “empirical research on/with/about traffickers” (Fleetwood 2014, 25), but it also imports the “language of control” into the frames of analysis (Gootenberg 2005). In that sense, research discourse “talks like the state” because it endorses the distinction between illicit/licit drugs. Gootenberg argues this binary is shaped by “elaborate fantasies about *human loss of control* - or inversely, fantasies about the state’s possible ‘control’ of the psychoactive realm” (ibid., 115, my emphasis). The fantasy of control does not apply only to markets, but also to international security threats. Some examples in history also show how the language of control has been marshalled against gendered and racialized ‘others’. For example, Marez explains how the Mexican drug criminal of the U.S. Prohibition Era in the 1930s was constructed as a sexual predator who used drugs to assault young, virginal women (Marez 2004). Perverse sexuality coupled to drugs “helped to promote police actions by imbuing drug enforcement with tabooed erotic fantasies” (ibid.,174). However, other social and political dynamics were brewing at the time. Marez argues that the criminalization of cannabis in the US supported “the capitalist demands for labour discipline and control” (ibid., 175) at a moment when migrant communities demanded recognition for their labour-rights. Although the term ‘mule’ is considered derogatory (Fleetwood 2014), it may also bring back into sight an aspect of social labour relations. Marez suggests that the romanticized image of Mexican-

American labour relations,²⁶ symbolised by the migrant and the donkey, was eventually juxtaposed to the unruly radical Mexican (Marez 2004, 118). Thus, the labour migrant would be disciplined through the criminalisation of cannabis imported from Mexico. One of the striking characteristics derived from referring to some actors in the drug trade as ‘drug mules’ is how the name implies servitude, being like a working animal. This reference was explicitly addressed by the trial judge in the English case of *Surina*²⁷ to differentiate roles between co-defendants:

Surina was the mug with the drugs around his waist, you financed this operation, made all the arrangements, bought all the tickets, he was the donkey, the mule who came through with you on this amateurish effort.²⁸

The suggestion throughout section is not that economic analyses are not helpful to drug trafficking research. To the contrary, the history of economic thought shows the diversity of this field of study. However, monetary vocabularies of the market render invisible the social dramas behind the experiences of drug mules and how they became part of the drug trade (Torres 2008, 185). Research based on microeconomics fetishize the ‘objective’ and abstract signifiers of drug control such as ‘operations’, ‘drug seizures’, changes in purity, demand-supply dynamics, and ‘trade routes’ (ibid.). The ‘quantification logic’ is not only applied to measure the situation of the world drug problem (through indicators about drug use, arrests, markets, supply and demand dynamics), but it becomes the measure for policy effectiveness and shaping the reality. For example, countries depending on financial aid from the US have to fulfil arrest quotas to prove their progress (Ponton and Torres 2007). The first to be caught are often the ‘expendable’ actors in the drug trafficking chain, such as farmers, drug mules,

²⁶ Pastoral paintings in the US often represented Mexican workers through the image of ‘happy’ Mexicans on donkeys, trading *legal* goods across the border.

²⁷ *R v. Surina* (CA 20 November 2000)

²⁸ *ibid* (n 27) [4].

street dealers, and consumers (Edwards 2003; WOLA 2011). Arrests of drug mules help institutions meet drug seizure targets (Green 1998). In short, it is an approach that totalizes the legal, academic and political discourse. Moreover, the market metaphor also justifies conceptualising the drug trade as a “series of automatic processes” that tend to “marginalise questions about gender and exploitation” (Fleetwood 2014, 25). Expunged of race, gender, nationality, the alleged ‘neutral’ language of economic analysis effaces the constrained socio-political contexts of oppression in which people make choices (Sudbury 2005; Sudbury 2010; Fleetwood 2014).

Aware of the politics of exclusion through colonial labour dynamics, William Jankowiak and Daniel Bradburd’ historical and anthropological analysis explores the links between European colonial expansion and the drug trade from the sixteenth to nineteenth century (Bradburd and Jankowiak 2003). Coca was often used to enhance productivity or overcome drudging labour in the Andean Spanish colonies. The irony is that current drug wars today are now engaged against drug producing countries by former European colonies which originally introduced the drug trade as colonial powers seeking economic expansion. The point being made in this analysis is not to deny the economic processes underpin the drug trade. Instead, my claim is that it need broaden the epistemological and methodological scope by including a social and political analysis. Development studies (Youngers and Walsh 2010), post-colonial theory (Agozino et al. 2009), neo-colonialism (Oriola 2006) and labour dynamics (Zaitch 2002; Fleetwood 2014), counter the mechanistic explanations of market dynamics by situating actors within the context of power-dynamics, oppression, and history.

Although this project does not explain empirically why women and men accept to do drug mule work, the question is implicit in the sentencing narratives and the research. There are two dominant approaches to this question: either they need money or want money. One stresses necessity and the other is a gain read in light of social norms of legitimate ways to

acquire money. The appeal of understanding crime through economy necessity is undeniable but also one to be used with caution because it resonates with neoliberal and mainstream feminisms which understand consumerist 'freedom' as gender empowerment. Nina Power calls it the paradigm of the 'one dimensional' woman (Power 2009) whose individual identity is defined by the power to purchase her femininity. Echoing the critique on the morality implicit in crime analyses at the beginning of this section, liberal feminists have been sustained by the idea of white women freed by entering the work-force, while the criminal 'other' (the illegal migrant, the prostitute or the drug mule) is seen as someone who cannot 'get it together' according to the social and cultural neoliberal demands of production and consumption (Eisenstein 2009). Mainstream politics emphasising personal responsibility implicitly judge women who participate in informal economies because they fail to conform to the middle-class, white, working woman (Eisenstein 2009). Neoliberal feminisms lose sight of how globalization has been built on the backs of foreign women and men marginalized from economic power, sustaining the domestic work-force formerly done also by white women (ibid.). Depending on the context of the discourse, the use of economic frames to explain the motivations of drug mules and couriers may misfire and encourage a judgement about the 'proper use' of one's freedom characteristic of neoliberal ideology.

Furthermore, a gender-neutral approach cannot be achieved simply by analogizing drug offenders to business criminals. Globalization studies note how mainstream drug trafficking literature reproduces the view that the feminine (woman drug mule) is local while the masculine (international drug trafficker) is global (reference needed). If 'transnational business masculinity' is a hegemonic trope (Connell and Wood 2005), one must question and unpack the gendered construction of the business criminal in drug trafficking literature. Framing mules and couriers as 'entrepreneurs' who take calculated risks and rational business decisions rational decisions and calculated risks (Dorn et. al., 2005) blurs gender differences before and

during the process of trafficking drugs (Fleetwood 2014). In other words, what is called a ‘rational choice’ is another version of andro-centrism. Women are condemned as bad mothers to trick law enforcement bad workers who by-pass the labour market to earn quick money; but also as undeserving ‘third world’ victims who perform eroticized roles rather than being passive preys to drug traffickers (Schemenauer 2012).

In that sense, discourses about women drug mules struggle to explain criminal responsibility without considering gender and victimization. At the same time, invoking situations of victimhood run the risk of reifying gendered assumptions if female identity was defined by victimhood. Vulnerability discourses may tap on the idea of risk and manage and control potential threats that need to be securitised (Munro and Scoular 2012). The next section explores the neoliberal risk management measures adopted to counter crime risks (Bell 2011, 167) which gain authority by justifying the protection vulnerable individuals, communities and more generally the state.

5. Vulnerability and criminal justice: Between risk mitigation and punitive sentencing

Victimhood discourses seeking to condemn the effects of drug law enforcement represent women as ‘prisoners of war’ (Huling 1995) or ‘collateral damage’ (Norton-Hawk 2010) of the drug war inaccurately suggest that women are not targeted by crime control policies. Women recede to the background, as if law enforcement did not act upon them directly through profiling practices (Lawrence and Williams 2006; Schemenauer 2012). The assumption that women drug mules are passive, unintentional victims of drug traffickers paradoxically makes them more likely to be the subject of state control adopting paternalistic protection practices.

Vanessa Munro and Jean Scoular suggest that the deployment of vulnerability discourses in the UK has coincided with “‘victim-centred’ initiatives and with the adoption of

more actuarial forms of risk-assessment and management” (Munro and Scoular 2012, 190), bolstering the image of the state as a ‘benevolent’ actor. Discussing the UK’s approach to human trafficking, Munro and Scoular note that victim discourses “attach the condition too firmly to the individual herself and accept uncritically the appropriateness of criminal law as a mechanism” of eradication (ibid, 193). The ambiguity of the term ‘vulnerability’ as adopted by state institutions arguably increases the risk and stigmatization of marginalized populations. Vulnerability is duplicitous in the sense that, in this case sex workers are considered vulnerable individuals, but also the cause of other people’s vulnerability.²⁹ Similarly, drug policies portray the vulnerability of the general population to drug addiction, a view which is in tension with the vulnerability of drug mules.

As I will explain and show in the case study, drug policy and sentencing discourses have adopted vulnerability as a very loose term translated in a dangerous, productive ambiguity. Whether vulnerability is considered innate or circumstantial, the recognition of vulnerability is shrouded by political inclusions and exclusions. Most commonly, political discourse attributes vulnerability to ‘less abled’ and ‘traumatised’ bodies who have suffered from substance abuse, ‘chaotic’ emotional lives, persons with disabilities, and/or with a history of sexual and domestic abuse (Corston 2007). Martha Fineman argues that in the face of vulnerable subjects, state responsiveness is required as opposed to rolling-back the support of social institutions (Fineman 2010). Despite the appeal of vulnerability discourses, Munro and Scoular warn against the “mutually re-affirming relationship between constructions of the ‘vulnerable subject’ and of the ‘vulnerable state’” (Munro and Scoular 2012, 197). In other words, the language of vulnerability has been used by political actors to expand the reach of the state through increasing criminalisation of ‘risk’ individuals (whether they are *at risk* or pose a risk *to* others).

²⁹ For example, street sex workers impact on the vulnerability of children or local residents.

When state actors become concerned about risks posed by criminal subjects, actuarial models of risk analysis are one of the tools deployed to identify and manage potential these ‘potential threats’. The actuarial model is a “mode of bureaucratic management of crime involving a style of thought that emphasizes aggregation, probabilities, and risk calculation” (Harcourt 2003, 106). In basic terms, the actuarial rationality seeks to predict criminality by knowing the criminal subject through probabilistic inference. By individualizing the offender, the criminal justice institutions have the knowledge which could help them identify and preempt crime. However, this approach has had “serious consequences for the way we think about and engage in law enforcement, sentencing and punishment” (Harcourt 2001, 135) because it is more than just ‘taming’ and controlling the chances of potential crimes to happen. Instead, it also can be seen as shaping crime statistics (Harcourt 2003). For example, profiling couriers became an essential tool to counter drug trafficking in the US from the late 1970s to the 1980s. Searches by border agents were triggered by a combination of ‘courier’ behaviours, such as nervousness, and demographic characteristics, including gender, race, or nationality (Harcourt 2001). Although the US courts attributed a high degree of sophistication and specialization to these practices (Rudovsky 1999; Harcourt 2001), Harcourt maintains that:

... racial profiling, assuming its premises and fixed law enforcement resources, may be a self-confirming prophecy. It likely aggravates over time the assumed correlation between race and crime. This could be called a “compound” or “multiplier” or “ratchet” effect of criminal profiling: profiling may have an accelerator effect on disparities in the criminal justice system (Harcourt 2001, 147).

One objection to self-fulfilling prophecy argument could be that certain groups actually carry out more crimes than others or that they will adapt to profiling and change the behaviour accordingly. While all of this might be true, Harcourt suggests that “even if the underlying

assumptions of profiling are right, there may nevertheless be adverse compounding effects” (ibid., 149).

Profiling may not be simply an issue of discrimination but also a response to institutional demands and constraints, a way to make crime control more efficient. In England, customs officers similarly developed courier profiles throughout the 1980s (Green 1998, 149). Although the precise characteristics of the offender were not clear, Green suggests nationality played an important role (ibid.). Green also maps the institutional shifts shaping drug interdiction practices. During the 1990s, the Labour government cut significantly the budget of Customs and Excise and substituted the loss of labour force with a change in strategy. Firstly, through greater emphasis on investigation and intelligence work; and secondly, rationalising the resources without affecting the interdiction of drugs (ibid.,148–153). By scaling back of resources and introducing a rationale of quantitative efficiency, the Customs and Excise embraced the “cult of managerialism” where performance was measured through the expediency to achieve the institutional targets (ibid., 151).

The main point addressed in this section is how the actuarial rationality underpins contemporary drug control approaches in England and Wales. Although profiling does not explicitly target people by their race or gender, the shift is in how profiling is framed through the dispersed category of ‘risk’ which under-funded institutions need to avert. For example, the UK Border Agency (UKBA) stressed in a 2009 report on the cocaine trade that it did not target people based on ethnicity. Instead, it stopped individuals on the basis of ‘risk factors’, which included the travel origin and route; travel history; purchase of the ticket; baggage information; and records of prior smuggling attempts. Other indicators included behaviour and direct observation by UKBA officers of passengers upon disembarking. The report also stated that the UKBA did not only target South Americans but also North Europeans as the arrest statistics showed a high percentage (38 per cent in 2009) of drug mules belonged to that group

(Home Affairs Committee 2009, para 137). Thus, the House Affairs Committee concluded there were no grounds “for introducing profiling of passengers on the basis of nationality or ethnicity” but it supported the “risk-based targeting of passengers entering the UK” using flight information and intelligence reports (ibid., para 141-142). While UKBA does not explicitly targeting on nationality or ethnicity, it still does not eliminate the fact that attention to geographical travel origin is prioritized. If the travel origin is both a hub for drug supply and a developing country, nationals are highly likely to be searched. The UKBA’s attempt to unlink nationality/ethnicity from geographical travel origin is basically a tautology.

Considering the above, the suggestion in this section is the following. Even if drug mules are understood to be akin to victims, the intensification of vulnerability discourses could have the effect of increasing the surveillance of people considered to be ‘at risk’ (Jones 2004; Munro and Scoular 2012). In the context of actuarial drug control, vulnerability discourses may expand the reach of the state through an increasing criminalisation of individuals who are figured as vulnerable but also pose a risk *to* others. The main point I wish to stress it that vulnerability discourses are not made in a vacuum. Instead, they are uttered in historical, institutional, and political context, which translates claims about vulnerability in different ways. That being said, vulnerability discourses about drug mules intersected with the increasing securitisation of drug trafficking in the 1980s, which was reflected in higher sentences for drug importation. The next section outlines the sentencing law and practices for drug importation offences driven by the logic of deterrence and how the 2012 Definitive Guidelines seek to address specifically the effects of deterrent sentences on vulnerable drug mules.

6. Deterrence and the exclusion of vulnerability

Although the measures implemented in the US differ greatly, Green suggests that Britain adopted of its own version of the ‘war on drugs’ (Green 1998), reflected in the increasing

penalties and average lengths for drug importation offences in the 1990s (Green 1998; Fortson 2005). Of course, there are no minimum mandatory sentences which are at fault for driving the prison population in the US (Mauer and King 2007) and judges in the English courts could exercise more discretion in sentencing (Ashworth 1990).³⁰ Still, the 1980s social-political context shifted towards the securitization of national borders against the threat of drug trafficking underpinned by xenophobia (Green 1998). At the same time, Fortson shows the increasing penalties had been already began to develop at the end of the 1960s. For example, The Dangerous Drugs Act 1967 increased sentences from the statutory minimum of two years³¹ to 10 years regardless of the type of drug imported (ibid.). The trend exacerbated in the 1980s, through the Controlled Drugs Penalties Act 1985 established seven years to life as the maximum penalty for drug trafficking (ibid., 157), while the Crime (Sentences) Act 1997 required courts to impose minimum sentences of 7 years or more for offenders with two or more convictions of the similar offence (ibid., 154). The House of Lords (HL) justified the upward trend stating that it needed to deter the “parasites who trade with human misery”, “merchants of death” and “evil men and women who are making huge commercial profits out of the destruction of human lives” (ibid., 157).³²

The courts have had also considerable authority to interpret the sentencing requirements in the statutes and reflected that in ‘guideline judgements’. Historically, the first guideline judgements from the Court of Appeal (CA) were handed down by Lawton LJ in the 1970s and continued by Lord Lane in the 1980s (Ashworth 2010). The decision in *Aramah*³³ is a good example of a guideline judgement, where Lord Lane set out a minimum of four-year sentence

³⁰ Andrew Ashworth argues that judges have had discretionary powers in sentences for drug offences (Ashworth 1990).

³¹ The Customs and Excise Act 1952 allowed a maximum sentence of two year’s imprisonment for drug importation (Fortson 2005, 91).

³² The quotes collected by Green correspond to the debates in the House of Lords (Committee Stage) of the Controlled Drugs Penalties Act (1985) (Green 1998).

³³ (1983) 76 Cr. App. R. 190

for Class A drug importers and a maximum of 14 years which was later adjusted in *Bilinsky*³⁴, after the 1985 Controlled Drugs (Penalties) Act increased the maximum sentence to life. Guideline judgements set out “general parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentences” (Ashworth 2010, 36). Their authoritative and binding effect derived from the fact they were issued by the Lord Justice. Strictly speaking, Ashworth argues they could be considered as *obiter dicta*, known as commentaries without a binding effect, but their intention and treatment was to have an authoritative effect in a way that other CA judgments are not (ibid., 36).

The significance of Aramah’s guidelines is not only that it is a binding judgment. Its content is most revealing of the tension that, as I will argue in chapter VI, continues to this day. The struggle is how to accommodate the ambivalence of drug mules. As noted in the chapter I, Lord Lane recognised drug mules’ vulnerability, represented as a characteristic which affected the offender’s powers to reject alluring prospect of easy money, such as an illness, juvenile naiveté, and old age. On the other, this logic also portrays drug mules as individuals who are vulnerable to the drug traffickers who exploit those characteristics. In short, we see the contours of the trafficker who abuses the vulnerability of old, young, and ill people. Poised between victimhood-criminality, the HL still decided in favour of disregarding any personal circumstances or characteristics of the drug mule in order to uphold deterrence. Yet, the tension and injustice of giving drug mules harsh deterrent sentences, emerged five years later, when the CA accepted the obvious harshness of the *Aramah* guidelines but could only depart from them in cases meriting the mercy of the court. As noted in *Faluade*,³⁵ a mature woman from Nigeria who was sick and had a large family to care for:

³⁴ [1987] Cr App. R 146

³⁵ [1989]11 Cr App R (S) 156

There are certain cases in which this court can in suitable circumstances act with mercy.

This we do not see as such a case. Once a person knowingly acts as a courier bringing heroin into this country, there is seldom, if ever, any room for mercy.³⁶

The case introduces the possibility of granting mercy to vulnerable drug mules. It also implicitly creates internal distinctions of vulnerability in order to maintain the existing guidelines and prevent the floodgates from opening. The case study presented in chapter VI develops in depth an analysis of the effect of the doctrine of mercy and its interaction with discourses on vulnerable drug mules. Suffice it to say for now that sentencing practices for drug mules have been substantially criticised because the *Aramah* guidelines impose disproportional sentences vis-à-vis the limited role of the mule (Fortson 1996; Green 1998; Sentencing Advisory Panel 2009; Harris 2010). In that sense, the Definitive Guidelines for Drug Offences (DG) that came into force on February 27, 2012³⁷ (Appendix I), aims for a more systematic and balanced approach to roles or the culpability of the offender, particularly drug mules (Sentencing Council 2011b). Janet Loveless notes how the DG incorporated some of the recommendations made by the Sentencing Advisory Panel, particularly the need for proportionality in sentencing for drug offences. However, the SC rejected any changes to sentencing ranges (Loveless 2012b). Effectively, the SC retained the policy of deterrence as it explained that “the guideline aims to increase the consistency of sentencing while leaving the average severity of sentencing unchanged” (Sentencing Council 2011b). At the same time, the SC conceded that “the increased focus on role in the development of the sentencing ranges for importation offences may result in a downward shift in sentences” for the “so called drug

³⁶ *R v Faluade* [1989]11 Cr App R (S) 156

³⁷ The Definitive Guideline (DG) for drug offences are the product of a public consultation convoked by the Sentencing Council (SC), a non-departmental public body of the Ministry of Justice created in 2010 which substituted the Sentencing Guidelines Council (SGC) and the Sentence Advisory Panel (SAP). The SAP’s consultation and draft guidelines on drug offences was submitted to the SCG and then the SC, which published its own draft guidelines in 2011 (Loveless 2012b).

mules” (Sentencing Council 2011b, 4–5). Although I will explain in more detail who is considered a drug mule under the current sentencing regime, the SC characterized them as vulnerable offenders who were “engaged by pressure, influence, intimidation or relatively small reward” (Sentencing Council 2011c, 1). Finally, it is worth noting how one of documents reviewed in the consultation for the DG was a case study of 12 women drug mules commissioned by the Sentencing Council in 2011 (Sentencing Council 2011c). This case study was carried out in response “to documented concerns over the circumstances that may lead to the offending, the roles they tend to play in these types of offences and the impact of imprisonment on women and their families, particularly those with caring responsibilities” (ibid., 1). Other characteristics that were highlighted in the case study was how the majority of the interviewees were foreign nationals, without their own housing, with significant caring responsibilities, and often in financial debt. The SC acknowledges that this case study informed the development of the guidelines but it is not quite clear its impact. In other words, are drug mules understood only as foreign women with caring responsibilities?

While I do admit the case study provides a unique picture on the lives of women who have been sentenced for drug trafficking, the DG might end up facing a similar problem noted by Sonia Lawrence and Toni Williams after a shift in sentencing practices for drug mules in Canada. The Canadian courts considered that drug mules carried out a “distinctive offence deserving of mitigation because of the social context – the racialized identities, impoverished circumstances, and parenting responsibilities” (Lawrence and Williams 2006, 287). This view was clearly taken by the Ontario appellate court in *Hamilton*,³⁸ which was a considerable break from established sentencing practice because the two offenders (black women mules) were given a conditional sentence. Lawrence and Williams argue the decisions mirrored partially the contextual analysis of women offenders developed by feminist and critical anti-racist

³⁸ (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. Sup. Ct.J.)

scholarship, which emphasized the “vulnerabilities arising from the combined effects of oppressive social relations, exclusionary social practices, and victimization, usually by men” (Lawrence and Williams 2006, 293) . They stress how the courts accepted feminist critique to an extent. What the courts fail to take into account are the more radical approaches implicit in the scholarship which delegitimizes criminal justice practices because it “cannot address the problems that draw women into crime” (ibid., 293). For that reason, the authors caution against celebrating the judicial construction of drug mules in *Hamilton*³⁹ because it made “questionable links between black women, poverty, drugs, and crime” (ibid.,289). Within the frame of the penal logic, sensitivity to the context of women drug mules could end up reinforcing profiling practices and without challenging the demonization of drug offences (ibid). The re-affirmation of the criminal profile by the courts (the black poor mother), constructed through emphasis of the 'social context' “seems more likely to increase their vulnerability to harsh punishment than to mitigate how punishment descends upon them” (ibid, 331).

A similar concern arises in this project in relation to the Definitive Guidelines for Drug Offences. Chapter VI shows how the English Court of Appeal characterisation of drug mules also draws dubious links between foreign women, poverty and crime. Although the sentencing guidelines are couched in gender neutral language which does not single out drug mules as women, the attention to women drug mules poses difficult questions about how to mainstream gender into criminal justice and its effects. As discussed in the introduction, there is an obvious need to consider how sentencing practices for drug trafficking affects women and how sentencing practices have been androcentric (Raeder 1995; Fleetwood and Haas 2011), there are different ways to portray women that may reify norms of femininity and exclude women who fail to fit into the norms, as discussed in the first section of this chapter. One of the concern addressed in this project is how discourses on women drug mules represent victimhood and

³⁹ (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. Sup. Ct.J.)

whether vulnerability discourses import a particular notion of feminine victimhood. The next section unpacks the different ways gender has been addressed in the literature on women drug mules.

7. Unpacking femininity: Women drug mules and relational notions of femininity

Recalling the discussion at the beginning of this chapter, gendering the subject of crime calls for a persistent balancing act between accounting for factors contributing to victimization of women without negating or masculinizing women's agency (Mardorossian 2014). The following discussion shows how research unpacks gender in drug mule work. There are different themes that run throughout the literature, such as race, nationality, women's caring responsibilities, sexualised feminine bodies, and exploitative gender relations framing women's agency. One of the most common arguments, emphasized in articles and reports, is how socio-economic, political and gender dynamics partake in the context of the offences and the offenders' lives. Factors that explain women's engagement in the drug trade include the feminization of poverty (O'Connor 2004); the traditional roles women fulfil in the home based on caring and family responsibilities (Diaz-Cotto 2005; United Nations Economic Commission for Latin America and the Caribbean 2007; Del Olmo 1990; WOLA 2011; Giacomello 2013); and racial and socio-economic discrimination underpinning drug control strategies (Joseph 2006; Bewley-Taylor et. al., 2007).

Motherhood and poverty figure prominently in the description of women drug mules by international governmental and non-governmental organisations. For example, reports by UN bodies often reference the poverty of women who smuggle drugs in order to secure alternative income to sustain the household (International Organization for Migration 2009; Fleetwood and Haas 2011; Schemenauer 2012). Studies on drug mules imprisoned across the world explain how the burden of caring responsibilities for children (Huling 1995; Kampfner

2005; Diaz-Cotto 2005; Giacomello 2013; Pieris 2014) or of relatives experiencing an illness (Klein 2009) precipitated the incursion into the drug trade. Caring responsibilities weigh heavier on women because of gendered divisions of labour (Del Olmo 1990), exacerbated among women who are single parents (Kampfner 2005). Julia Sudbury argues that state encroachment tightening the accessibility and funding of social welfare leaves women with limited options but to engage in illicit economies (Sudbury 2005). In that sense, drug trafficking and other supply offences are explained as a 'survival' strategy, whereby choices and accessibility to stable employment is limited (Del Olmo 1990; Sudbury 2005; A. Klein 2009). Similarly, Axel Klein suggests the drug trade is a form of alternative source of income for Nigerians who have relatively few choices in a precarious socio-economic context (Klein 2009).

While the economic burden of parenting responsibilities may explain why some women engage in drug mule work, it opens up a gap when it comes to childless women (Fleetwood 2014). Many of the women interviewed by Fleetwood were heavily invested in their caring roles. Offending occurred at moments when the role as good mother or partner were at risk. Fleetwood argues that while "'driven' by these identities, yet they were also engaged in creative constructions of them" (ibid., 105). Although the interviewees were invested in their relational identities, these gender identities and desires were also underpinned by the material realities. In other words, gender "is a social structure with global reach and scale" (ibid, 117), that cannot be isolated from global neoliberalism's impact reshaping economic structures, subjectivity, identity and desire (ibid.).

To be sure, this project also seeks to give an account of drug mules' relational subjectivities and precarious economic conditions. However, in the criminal law context, we face the challenge of the totalising and reductive categories of victim and offenders. How do we account for financial instability because of debts and/or limited work opportunities in Latin

America (Del Olmo 1990) without reifying an ‘attachment’ to the third-world suffering women described by Doezema (Doezema 2001)? The ‘feminization of poverty’ also imports normative assumptions (Mohanty 1988) which deny women’s voice and the opportunity to represent themselves (Kapoor 2004). Chandra Talpade Mohanty rightly warns us about the humanist and scientific impulse of Western researchers who, in their attempt to ‘protect’ women, fail to acknowledge local specificities and historical processes producing a generalizable ‘poor mother’ (Mohanty 1988). This trope risks homogenizing women drug mules whose individual experiences are understood through a monolithic language of oppression. For example, Fleetwood stresses that individual narratives of poverty intersected with gender, race, ethnicity and local circumstances. Drug mule work occurred in the context of “relative deprivation refracted through narratively constructed selves” (Fleetwood 2014, 96). Precarious economic conditions, caring responsibilities, and pressure to pay debts are an undeniable part of the background, but it cannot be isolated from how women understood themselves.

Without denying the impact of economic policies on women, explanations framing drug mule work as a last resort for ‘desperate’ poor women disregard the agential investment in caring responsibilities but also the effect of cultural gender roles in shaping identities. Fleetwood suggests that ‘provisioning’ underpins the attachment to relational identities and desires influenced by cultural norms. While experiencing relative poverty, women express their desire to provide for their family, a better school, etc., which is notably a desire to fulfil gender roles and consumer culture norms (ibid., 105). Their own understanding of themselves is shaped and constrained by those cultural gender norms, as they “rarely spoke of wanting to have more money for themselves, despite the global influence of discourses about women as empowered consumers” (ibid.). Women assuming responsibility to take care of children often draw this responsibility from cultural norms of motherhood yet these are restricted in a context of economic precariousness. In other words, economic need does not necessarily mean absolute

poverty. This does not mean caring responsibilities do not matter, but rather how a more nuanced analysis shows the gender dynamics which do bear on mothers who accept to do drug mule work. More importantly, the issue of normalisation in discourse of the victimized mother who is extremely poor can become a norm in the courts, as will be explained in chapter VI. Where the real woman appearing before the sentencing court does not show extreme passivity as a result of having no other option but to do the crime, the problem is how to accommodate the ambivalent offender.

8. Relational selves: Of love, sexed bodies and other demons

Romantic relationships also frame the participation of women in drug mule work. Andreina Torres interviewed women who explained how they ended up doing mule work through self-sacrifice narratives. Although their stories were mediated through the experience of prison, some said they accepted to do the drug run to help a boyfriend and perceiving themselves as a body “for others” (Torres 2008, 153). Self-sacrifice in the name of love also functioned as a mechanism of individuation and solidarity with their partner in trouble (*ibid.*). From the recruiter’s point of view, Torres suggests that a woman’s romantic attachment also functioned as “guarantee” that the contract would be fulfilled (*ibid.*). Similarly, Fleetwood noted cases where women became involved through a boyfriend, husband or friends of their partners (Fleetwood 2014). Intimate partner violence was not often cited as a direct explanation for women’s incursion in drug mule work (Sudbury 2005), although intimate partner or a history of family violence figures prominently in statistics about women imprisoned in the UK in general (Corston 2007). Instead, a common narrative is the vulnerable drug mule targeted by a stranger/drug trafficker (Fleetwood 2014). The trafficker myth is problematic and inaccurate because many respondents in Fleetwood’s research actually “became involved through incidental social relationships, including boyfriends and friends who were involved” (*ibid.*, 72)

Many cases explored in the case study for this project, also present the story of a stranger preying on the naïve mule-courier with promises for a ‘free’ holiday⁴⁰ or asks them to carry a package for a relative or friend living abroad. Whether or not these stories are true, is not the point. What matters is how are translated or accommodated into the legal discourse.

Media and scholarly accounts tend to highlight stories of coercion (Huling 1995), grooming and entrapment by strangers (Dorado 2005), lured into a debt through loan sharks or powerful men in their lives (Green 1998; Jeavans 2005). This does not mean women and men have been subject to threats but it challenges the view that people are coerced into the offence rather than during the process. For example, by taking away the passport before the actual flight, threats against a close relative, or advance payments which effectively bound them in a debt with the recruiters (Fleetwood 2014, 150-153). As Fleetwood suggests, experiences of coercion are more nuanced if one looks at the whole process of engaging in drug mule work. While most of the interviewees in her case study in Ecuador sought out and agreed to engage in drug mule work, the possibility of backing out once the agreement had been made was constrained by assumptions of violence or outright threats. Gender scripts have shaped many times the perceptions of risk and fear (ibid.). As we will see in the analysis of the cases in chapter VI, legal counsellors often flag coercion but only for the purpose of sentence reductions. Meanwhile, accounts of ‘passports/ documents being taken away from them once journeys had started, being chaperoned on the journey, being told what to do/ say (including what not to do/ say)’ (Sentencing Council 2011c, 4) have received less attention as potential indices of how drug mule work might be coercive.

Apart from motherhood and romantic relationships, the eroticized female body has also been the subject of analysis in the literature. Sexualized feminine performances are regarded with suspicion because they are viewed as strategies to avoid detection. Schemenauer argues

⁴⁰ *R v Rainho (Angela)* [2002] EWCA Crim 1981; *R v Henry (Nadine Chrystel)* [2014] EWCA Crim 980

that the male gaze ‘eroticizes’ women deemed to be flirting with border agents (Schemenauer 2012). As mentioned briefly at the beginning of this chapter, drug enforcement officers joke about women’s concealment strategies, such as the ‘egg packages’ inserted in the vagina. Other forms of sexualisation of bodies draw on ethnic and racial stereotypes. Racial stereotypes of female body parts, such as breasts, hips, and buttocks, hair-braids and ‘shapely’ figures associated with nationality archetypes become the focus of the male gaze. Femininity markers stand out as well in the methods of concealing drugs. For example, women carry drugs while pregnant or a fake a pregnancy, hide the drugs in stuffed toys (Schemenauer 2012) or cocaine breast implants (RT News 2014).

The purpose of pointing out the sexualisation of drug mules bodies is simply to tease out the complex gender dynamics in the drug enforcement and in legal and scholarly discourses on this subject. Facile characterizations of ‘victims,’ ‘vamps,’ or ‘evil’ distort the social space in which the actions of drug mules take place. Postcolonial critiques suggest that the victim trope- black junkie, poor mother from the ‘third world woman’ reproduced by liberal feminism and development theories (Mohanty 1988)- also enables the colonization of these subjects. For this reason, it is important to register how criminalization and penal governance “colonize fields of victimization and represent them as part of the territory of penalty” (Biko Agozino 2008, xi), and to keep in check the disciplining effects of ‘victim/vamp’ discourses trying to eliminate the ambivalence which characterises discourses on women drug mules. Feminist and gender research on drug mule work unpicks the facile simplifications and normalisation of gender roles represented in the passive victim/greedy whore tropes. It is important to keep in mind this dichotomy because it is arguably in the background of the legal interpretation of who is and who is not a drug mule, as will be further discussed in the sentencing analysis in chapter VI. The last section of this chapter maps the role of exploitation discourses, the last common

theme identified in the research and how gender and postcolonial approaches situate exploitation within the wider frame of globalized economy and racist drug policies.

9. Precariousness, exploitation and gender

Exploitation is central in the scholarly and legal discourses about drug mules. Despite its prevalence, exploitation has different meanings for legal and feminist scholars. For example, Sudbury argues that the relationship between drug mule and recruiters is characterized by “exploitation, not partnership” (Sudbury 2005, 175). Drug mule work is considered exploitative (Hunt 2005; Harris 2010) because people are reduced to “disposable workers of the global drug industry” (Sudbury 2005, 175). Although these accounts stress the role of drug traffickers in the exploitation of drug mules, Sudbury’s critique is addressed to the general context where exploitative labour practices and gendered power relations occur. Similarly, Kemba Smith, who was convicted for a drug offence in the US and pardoned by President Clinton, described her own experience as “akin to modern day slavery” because it was “driven by politically motivated drug policies that disadvantage minorities in the US” (Agozino 2008, xvii). Neoliberal penal regimes manage crime control through mass incarceration (Wacquant 2009) of populations dispossessed by state’s encroachment; and historical processes of economic and racial exclusion (Smith 2005; Acker 2010). Similarly, Angela Davis argues that the prison industrial complex in the US is an extension of the chattel slavery abolished in the nineteenth century. The key point addressed by these critical approaches to drug policy is how drug offences function as a tool for political disenfranchisement (Pettus 2013), which exclude and profit from the criminalisation of drug offences.

There is another view, much less explored, which is drug mule work as economic exploitation. Of course, this poses empirical and ideological difficulties. It is not yet known if this is a constant in drug mule work and hard to determine because of the “hidden nature of the

international drug trade” for which “the only practical way to access women’s experiences (and to understand the work done by mules more generally) is through individuals’ narratives” (Fleetwood 2014, 14). The organization of drug mule work is less researched. The most likely approach is the micro-economic analysis focusing on supply-demand figures provided by interdictions of drugs, among other data. Fleetwood’s research focused on the significance of gender in drug mule work and how much control they had over their labour (ibid., 121), and “disentangle gendered forms of exploitation from exploitation of mules more generally” (ibid). The distinction is crucial for future research and for how the courts could understand exploitation. Legally, one of the clear barriers in conceptualizing drug mule work as exploitative is that coercion often functions as that which delimits the willing worker and the unwilling one. However, coercion, the absence or withdrawal of consent, is subject to much debate (International Labor Office 2009; Bakirci 2009; Doezema 2010). The debate about whether consent, deception and coercion demarcate exploitative labour has been well rehearsed in human trafficking debates without a conclusive decision so far (Bales 2000; Voorhout 2007). What is exploitative work? Can one be exploited if one earns money? These questions certainly remain unresolved, but the emphasis on exploitation in the sentencing judgments presented in Chapter VI suggests that clarification is important if drug mule work is seen from the perspective of labour exploitation; or if it is to be understood in the traditional legal sense of the expression. That is, such as in the case of *Aramah*, where ‘exploitation’ is a general term to describe when someone is taken advantage of because of a personal characteristic or circumstance. In sum, among the tasks set out in chapter VI is to unpack the construction of gender (both women and men), with reference to remuneration and exploitation; and to map the effects that these narratives have on sentencing practices addressing the case of drug mules.

10. Conclusion

This chapter sought to trouble the distinctions between victims and offenders. Ideas about normative gender behaviour, race and mystification of ‘foreigners,’ play a role in the distinctions between victim/offenders in drug trafficking discourses. The first sections stressed how knowledge producers, whether academic, political, or legal, seek to define drug mules by naming them and explaining their experiences and pathways into crime. Snider and Torres suggest that narratives of victimization by offenders may often be necessary to reconstitute resistance within these frames. Naming victimhood is not a simple task but it is nevertheless a necessary one. Instead, the trope of the vulnerable women who engage in drug mule work could be better characterised through the ambivalence it performs. There might not be a ‘right’ way of naming but attention to the effects of naming, especially naming and deploying vulnerability in ways which differ from dominant discourses in criminal justice that associate it with risk and securitization is also a practice of resistance. Despite the tendency to conceptualise actors through these binaries, the victimization and agency of drug mules are not absolute states of being but rather context-specific (Fleetwood 2014). However, ambivalent representations that recognize both victimization and agency in the offence cannot be easily accommodated into doctrinal rules and practice of criminal law, especially the process of adjudicating guilt. For example, the Sentencing Advisory Panel (SAP) noted⁴¹ how the vulnerability of drug mules was “questionable bearing in mind that most offences are committed in the knowledge of what is being done (and that it is illegal)” (Sentencing Advisory Panel 2009). Simply put, the law only understands drug mules’ actions as either guilty or innocent.

Although this thesis probes how the victim/criminal agent trope is embedded in

⁴¹ The review on sentencing carried out by the Sentencing Advisory Panel (2009) was superseded by the one done by the Sentencing Council (2011a, 2011b). Arguably, the approach to this particular point is no different because once convicted, either through a contested trial or a guilty plea, the issue becomes the role and the harm of the offence, to be determined by the sentencing judge with reference to the guidelines.

sentencing law- signified in the distinction between mules and couriers by the CA (chapter I)- it explores more generally how gender figures in criminal law, including the doctrine of criminal responsibility (Rollinson 2000). Vulnerability has no place in the adjudication of the crime because the legal subject of crime is conceived as a disembodied, rational agent. While many would agree that references to personal characteristics or circumstances which explain an offender's vulnerability is best located in sentencing, Nicola Lacey persuasively argues that sentencing decisions:

affect the fundamental interests of the offender in just as coercive and intrusive way as decisions at the conviction stage [...] it almost amounts to bad faith to place so much emphasis on doctrinal values at one stage of the process whilst virtually ignoring them at others (Lacey 1987, 222–3).

As much as I agree with Lacey, the question occupying this thesis is: why is vulnerability relegated to the sentencing stage? Alan Norrie argues that the doctrine of criminal responsibility leaves little room to factor personal circumstances or characteristics in the determination of legal guilt because criminal responsibility is based on a disembodied rational legal person (Norrie 2001; 2005). Reading through Norrie's approach, the next chapter suggests the victim/agent trope mirrors a tension at the heart of the structure of juridico-moral responsibility in liberal criminal law (Norrie 2000). At the centre of this tension is the idea of the legal subject of crime, posited as a disembodied being living yet acting in an embodied world. The exclusion of embodiment in the doctrine of criminal responsibility, juridical personhood and punishment, developed at a particular historical period known as the European Enlightenment. By mapping the disembodiment of criminal law, the aim explore also why relationality, embodiment, and precariousness do not figure within the frames of legal doctrine and punishment theories. Vulnerability discourses on drug mules resurface these themes as shown in the last section on the research on drug mule work. They represent aspects of drug

mule work, but as noted in the first sections, they can be appropriated into masculinist frames that translate embodiment into objectified sexualised bodies; passive victims of their circumstances; or self-interested women performing a 'fake' victimhood. However, the last section also presented some of research on women who have engaged in drug mule work which show the nuances and resistance to simplifications of drug mules as passive feminized victims or masculine agential offenders.

III. Crime and Punishment: Between relations of ambiguity

1. Summary

This chapter looks at the history of criminal law and theories of criminal responsibility and punishment, signposting the relationship between criminal legal doctrine and ideas of embodiment and disembodiment. My aim is to tease out a critique of the subject of criminal law theories using the notion of ‘ambiguity.’ Through the puzzle presented by ambiguity we can trace the limitations in punishment and responsibility theories, manifested in the absence of embodiment in criminal law. Bringing back the body of the subject of law is important in so far as it brings into sight the relational constitution of subjectivity and how it might trouble traditional justifications for punishment. Ambiguity, as we shall see, is lodged in the notion of the self/other relation and is signalled by corporeal embodiment. By ‘other’ I do not wish to mean exclusively other people: it could also mean histories, temporalities, or geographies. For the same reason, ambiguity is also a space where struggles, affects, and ethical encounters can take place.

2. A tale of two bodies: The legal body and the body of criminal law

This section begins to unravel the position and role of embodiment and subjectivity in criminal law, and grounds the two aims pursued in this chapter. One is methodological and the other substantive. Methodologically, the chapter seeks a point of encounter between philosophy and legal theory in general, and phenomenology and criminal law in particular. The concept of embodiment stands at the centre of both the methodological and substantive aims. It departs from the critique of the legal subject of liberal individualism because it is conceived without a body (Naffine 1997) or, if it has a body, it is predominantly a male body (Grear 2010a).

Critical legal scholarship gives an account not only of how the law has presented a disembodied version of the male subject, but also how the female body in criminal law has been represented as an object rather than a subject. That female body is depicted as ‘lifeless’, a ‘body-bag’, an object in the shape of a vessel for the male phallus (Naffine 1997), or a commodity to capture or appropriate (Lacey 1998b; Du Toit 2009). Hence, there is a tension implicit in criminal law, between the objectified female body and the disembodied (male) juridical subject. This section maps these tensions tracing the disappearance of the human body in legal personhood and the appearance of the ‘body’ of laws and ideas that substantiate the doctrines of criminal law. Paradoxically, the historical analysis presented here shows how criminal law ‘gained a body’ while human subjects (mostly male) ‘lost a body’ (or so it is believed) when liberal theories of criminal responsibility and punishment moved towards a disembodied notion of the legal person.

i. The human body

Despite the disembodied character of legal personhood, re-inserting the body into criminal law is a difficult task, especially for a feminist project. As Nicola Lacey rightly suggests ‘merely “reprioritising or reinserting the body” is hardly a panacea from a feminist or any other politically progressive point of view’ (Lacey 1998b, 61). In *Unspeakable Subjects* (1998), Lacey suggests that we ought to think about embodiment in a way that moves towards the integration- as opposed to separation- of the mental, embodied and affective dimensions of women and men. The overwhelming breadth and multi-disciplinary engagements with the concept of embodiment attest to its complexity (Weiss and Fern Haber 1999). Notoriously, actual material bodies take centre stage in embodiment theorising. And yet, there are multiple approaches to how the body may be understood. Edmund Husserl, one of the leading proponents of phenomenology, drew a distinction between *koerper* and *leib* accordingly translated from German to English as ‘physical body’ and ‘lived body’ (Leder 1990, 5). The

anatomized body can be an object of study, studied in parts. The 'lived body' is figured as the ground for grasping our experiences in the world, as it is proposed by existential phenomenology (Heinamaa 2003). As pointed out by many feminist legal scholars, women's bodies have been interpreted within the legal schemes of intelligibility as objects of possession (Du Toit 2009; Grear 2010b), as 'body bags' that can be lawfully penetrated by the male sexual subject (Naffine 1997). In contrast, men's bodies are represented as impenetrable, self-bounded containers for subjectivity, which finds its seat in reason (Nedelsky 1990). The function of the Kantian concern "about the sanctity and integrity of the (male) body..." has been to police the boundaries of sexual bodies and desires, particularly to underpin the prohibition of homosexual desires while reaffirming the lack of corporeal boundaries of female bodies (Naffine 1997, 89).

Other criticisms of the paradigm of the legal subject of reason stress the absence of skin colour, gender, class, culture, and political and geographical location. At the same time, there is increasing pressure on legal personhood to encompass more beneficiaries of legal rights, including animals, fauna, or more abstract entities like corporations (Grear 2010a). In fact, close interrogation reveals that various types of legal personhood operate in legal discourse, some of which are depicted as more embodied than others (Naffine 2009). Charting the different articulations of legal personhood, Naffine identifies and names two broad positions on legal personhood. The first position, associated with what she calls 'legalists,' considers legal personhood as an artificial construct which does not necessarily have to match the human subject (Naffine 2009). The second position, represented by the 'metaphysical realists' as Naffine calls them, posits that in general legal personhood mirrors legal subjectivity (ibid.). Yet, there is no consensus about which characteristics define legal subjectivity, making subjectivity a ground for contestation. Naffine outlines three different positions held by metaphysical realists - as rationalists, religionists or naturalists. Religionists believe that

humans are defined by a transcendental soul while rationalists believe that reason defines human beings, that it is this capacity which ‘defines and dignifies us.’ In either context, the law is endowed with the responsibility of reflecting and preserving this fundamental attribute of humans (that is as either soul possessing or reason reflecting) (Naffine 2009, 22). In contrast, ‘naturalists’ believe that law should give the protection of legal personhood to “natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives” (Naffine 2009, 24).

Vulnerability intersects with the position of both naturalists and religionists. For example, religionists believe in the sanctity of life even when that life has not formed the capacity to reason, as in the case of a foetus. Naturalists extend the mantle of legal personhood to animals, since they are embodied beings also capable of suffering pain. Interestingly, in the United States, religionists have sought to piggy-back on the position of naturalists to lend further support for the personhood of the foetus. Using medical studies on pain, the foetal personhood movement claim that foetuses experience pain at 20 weeks. The evidence has been criticized within the scientific community because pain itself is a subjective experience and also because of the scant evidence to support the foetal pain theory (Robertson 2013). The intersection of pain and subjectivity will be discussed further in the next chapter. Suffice it to say for now that both religionist and naturalist arguments around the foetus tend to converge around notions of potent life. By contrast, full legal personhood, understood by rationalists as encompassing rights and responsibility, is limited to able-bodied persons who have the maturity to reason independently. Thus, there has been a general principle that the ‘weak’ and the vulnerable may be sometimes exempted from responsibility, as in the case of the criminal defence of insanity or the criminal responsibility of children.

I want to dwell a bit more closely on the rationalist position as it tends to assert itself with particular vigour in the context of criminal law. The notion that reason defines human

beings is an idea which is at the core of the Western philosophical tradition which emerged during the Enlightenment (Naffine 2009, 22). But if reason was prioritised at this point in history, then where did the body go or did it go somewhere at all? How did the body become secondary in the concept of subjectivity reflected in ‘rationalist’ legal personhood? Different approaches to history appear to tell different stories about what happened to embodiment in the legal person and criminal law. For example, although Alan Norrie suggests that the legal person of criminal law was disembodied during the Enlightenment period. It is worth point out he is not referring primarily to the ‘human body’ but rather to the social and material context of crime. Thus, Norrie criticizes the rationalist position outlined by Naffine, while historicizing the material and political circumstances of legal personhood, in particular, the political and ideological project of the Enlightenment (Norrie 2001; Bhaskar and Collier 1998, 394).

ii. *The legal body*

Coming back to the Lacey’s concern about how to re-approach the body in criminal law, this subsection suggests that the notion of embodiment in phenomenology studies offers some interesting avenues, mainly because the body is not conceived as a self-bounded, atomistic unit (Nedelsky 1990). Thomas Csordas argues that if “embodiment is an existential condition in which the body is the subjective source or intersubjective ground for experience, then studies under that rubric of embodiment are not ‘about’ the body per se” (Csordas 1999, 143). He adds that, insofar as embodiment is a ‘standpoint of being-in-the-world’ culture cannot be eliminated from the analysis. Taking into account Csordas’ view, embodiment encompasses not simply external shapes but also experiences within a historical and cultural milieu. If the story is that criminal law legitimized the disembodiment of the legal subject and legal norms, through the convention of the universal rational subject, the question that emerges is not only how and why the body was suppressed from subjectivity, but also what happened to the body?

Was it simply erased without a trace or displaced? While mapping embodiment and disembodiment in criminal law, we would benefit from looking into another ‘body’: the body of criminal law.

A basic definition of criminal law describes it as the ‘body’ of laws or rules (*corpus juris* in Latin) defining offences against the community which “regulates the apprehension, charging and trial of suspected persons and fixes penalties and modes of treatment applicable to convicted offenders” (Jescheck and Norton 2014). Of course, one could point to the history of English common law to trace the body of law in the origins of offences, punishments, and rules, and the institutions in charge of their implementation. Yet, what does it mean for the criminal law to ‘have’ or ‘be’ a body? Is it a ‘living body’ or a ‘corpse’? I do not wish to suggest that the body of criminal law is identical to a human body, but rather to approach this question as an exercise which highlights how criminal legal concepts are not atemporal universal propositions but ideas with a ‘living body,’ materially substantiated and situated in space and time.

Historical and phenomenological approaches to law assist in the task of mapping what is lost in abstract rules. Concepts, theories and norms disconnected from history and materiality are transformed into ‘corpses.’ Maria Drakopoulou makes a similar point with regards to feminist theory, cautioning against ‘immortalizing’ experiences without considering the historical context in which they emerge (Drakopoulou 2013). Historical analyses temporalize “the distinct fields of law’s discursive power” (ibid., 18). Discourse critique, in Drakopoulou’s view, creates a monolithic paradigm of oppression that may not actually relate anything about contemporary experiences, affirming unshakeable oppressions where there might not be any or which operate in different forms (ibid.). Still, there are different ways of engaging with history. Scholars investigated in the chapter broadly apply three approaches to history: *teleological*; *dialectical*, and *genealogical*.

These approaches present a plurality of criminal law's history and serve to unsettle grand narratives in legal doctrine. For example, teleological approaches present the history of criminal law as an institutional and conceptual evolution, where the practice of punishment as retribution evolved into moral and rationalized forms of retribution. In contrast, *dialectal* approaches to the history of criminal law "reveal law's continuing and structural problems" by exposing the contradictions in the application of norms (Norrie 2000, 68). The dialectical analysis will be explained in more depth in this chapter. Finally, genealogical approaches to the history of criminal law caution against the naturalization of grand narratives of 'progress' (which are often the product of teleological accounts). Ricardo Baldissoni and Marc de Wilde emphasise that "legal history can serve as an ideological means for giving legitimacy to the present, but it can also function as a challenging medium that disrupts existing beliefs and distributions of power" (Baldissoni and Wilde 2013, 176). In that sense, one could ask, using the genealogical approach, if the historical account of the transformation from 'barbarian' revenge punishment to institutionalized retribution is a founding ideology that gives legitimacy to modern criminal law (Lindsey Farmer and Dubber 2007a, 2). To say that criminal law is modern implies the existence of a 'pre-modern' version. Anglo-American jurisprudence often refers to the 'modern' period to signal the transformations in law taking place between the seventeenth and nineteenth century (Norrie 2001; Harcourt 2003; Valverde 2005; Lacey 2008). What makes the criminal law 'modern' varies according to what has been valued or considered characteristic as 'modern'. The markers of modernity range from the adoption of the rationality of the law over the irrationality of revenge (Foqué 2008), to the organisation, institutionalization, and professionalization of criminal punishment into a 'system' of justice (Lacey 2008, 8). Norrie suggests that one of the markers of modern criminal law is the individualization of legal responsibility, rights and the emergence of a particular logic of legality (Norrie 2001, 25), while Lacey identifies it in William Blackstone's task of drafting

‘general principles’ from a dispersed common law (Lacey 1998a). General doctrine of criminal law often assumes that principles emerging at this time are foundational to law today (Simester and Shute 2002).⁴²

English criminal law scholarship has developed a critical approach to reading history, power, society, and politics, into the ‘analytic’ approach in the general doctrine. Mapping the scholarship that historicized criminal law, Lindsey Farmer and Markus Dubber stress the influence of E.P. Thompson’s work, which exposed the criminal law as a “double-edged quality of the rule of law” (Thompson 1975; Lindsey Farmer and Dubber 2007a, 1) and Douglas Hay’s proposition that the ideology in criminal law is repeated to sustain the preservation of social order and property rights (Hay 1975). Published also in 1975, *Discipline and Punish* (Foucault 1995) went further, questioning the humanist impulse that ‘modernized’ criminal punishment. Foucault’s historical inquiry charts the multiplication of techniques regulating human behaviour including disciplinary techniques distributed among other institutions, such as education, hospitals, and factories, amongst others (Smart 1989; Lindsey Farmer and Dubber 2007b). In sum, history opens up fields of inquiry but it can also close or narrow them down: one can use history to expose plurality or to sediment history into narrowed down narratives. The next sections, explore the three historical approaches mentioned above and how they implicitly and explicitly account for the tension around the presence or absence of embodiment in criminal law.

iii. Rational legal personhood in the history of analytic criminal law

As I map the history of criminal law to understand why and where embodiment disappeared (if it was ever important at all), I need to invoke the history of *mens rea*, known as the mental element of an offence. As noted before, the rationalist account of legal personhood prioritizes

⁴² The ‘General Doctrine’ of criminal law is generally understood as “the principles and rules which reflect a philosophical understanding of the relationship between the individual, law and the state” (Norrie 2005a, 53).

reason as a capacity of all human beings. Individuals under the purview of criminal laws are assumed to have particular cognitive and volitional capacities. Offences generally consist of two elements, the ‘guilty mind’ and ‘guilty act, which the prosecution needs to prove beyond reasonable doubt in a trial. In other words, a person is not necessarily guilty of an act unless he also has a guilty mind. As engrained as this general principle may be in our times, legal historians argue it was unknown to ‘ancient’ and early modern punishment (Lacey 2008). Martin Gardner suggests, the ‘principle of *mens rea* was causally related to the systematic emergence of the punitive sanction’ (Gardner 1993, 640). In such pre-modern times, punishing offenders was done on the act alone, regardless of the desire, knowledge, will, or evil intention. In fact, punishment was not limited to human beings but also extended to animals and objects (Schiff Berman 1994). Societies espoused a different cosmogony and understanding of what we conceive as agency (Evans 1906; Beirnes 1994). Similarly, notions like individual harm and personal responsibility were foreign notions as much as the distinction between private/public harm. Instead, punishment was more akin to a self-help practice, where a private party was both judge and executor of the sanction in Teutonic and to some extent Anglo-Saxon Law (Carson 1916). Laws allowed revenge but also tried to limit blood feuds through a compensation system. A blood feud was not necessarily about making the offender suffer since penalties varied considerably: from exile, banishment, compensation, pardons and the death penalty.

These pre-modern tariff systems “provided a useful nonviolent alternative to the blood feud...” (Gardner 1993, 649). Despite the availability of different punishment methods and tariffs, their application was not systematic and depended also on the social strata to which an individual offender belonged. In feudal England, compensation was an option for free persons, while slaves were subject to corporeal punishment or death regardless of the severity of the offence (Frankowski 1986, 400–401). For Carson, the emergence of “true punishment” was

reflected in Teutonic law. Political authority converted the “unlimited right” to “hunt down and slay the offender into the duty to catch the offender and deliver the offender to the state for punishment by the state” (Carson 1916, 652–653). The shift of the one authorized to punish evidenced the transition from a tribal to state-structured political system in sixth century England. Offences were figured as injuries to the sovereign and the compensation system became a source of revenue for the Crown rather than compensation to injured parties. By the twelfth century, Henry II of England had abolished the system of compensatory remedy and punishment was increasingly used as a response to crime (Gardner 1993).

Tracing the sources of *mens rea* in common law, Gardner pinpoints its emergence in the thirteenth century, when punishment was increasingly justified on the grounds of moral guilt and the sanction had to be proportionate to the offence, a shift propitiated by canonical law (ibid). The focus of the law was not so much the criminal deeds as the ‘inward’ thoughts of the offender, shaped by psychologically-oriented norms (ibid.). Intention became essential, although the meaning of intention in this context has been constantly contested (Norrie 2001; Nevins-Saunders 2012; Lacey 1993). This view fitted neatly with emerging ideas of individual blame proposed by retributivist or utilitarian theories produced during the period of the European Enlightenment (Frankowski 1986; Gardner 1993).

Neither Gardner nor Frankowski elucidate upon the historical frame used. Frankowski implies England’s punishment was backward up until the nineteenth century, caught in feudal practices of punishing only the injurious deeds. Jeremy Bentham’s rationalism and pragmatism undermined the ‘humanitarian’ project of Continental Enlightenment. Common law reforms were not planned with foresight and general principles achieved ‘conceptual clarity’ rather late (Frankowski 1986, 450). In this sense, a teleological narrative implies there is an ‘evolution’ from an unsatisfactory to a satisfactory state of affairs. For example, Justine Fleming’s history of the common law describes the process from blood feuds to trials as a civilizing endeavour

(Fleming 1994). Similarly, Theodore Ziolkowski maps how the *Oresteia*⁴³, symbolized the bedrock of justice for philosophers, historians, legal scholars and literary figures (Ziolkowski 1997). Gardner also imports teleology into his reading of the history of criminal law, albeit a ‘Hegelian’⁴⁴ type of analysis. Whilst there are ambiguities and vacillations around the principle of *mens rea*, these are “the product of an ongoing historical process of accommodating within a single system of criminal law the virtues of two sometimes conflicting philosophical traditions: retributivism and utilitarianism” (Gardner 1993, 640). Despite their contradictions, both traditions converged in the protection of reason in the jurisprudence of *mens rea*.⁴⁵

3. Enlightened stories of the subject: Disembodying criminal law

Alan Norrie starts his analysis of the juridical subject of criminal law at this juncture, the historical period generally known as ‘modernity’ (Norrie 2000, 2001, 2005, 2012). One of Norrie’s core arguments throughout his work is that the juridical subject of liberal theory is an amalgam of the *homo economicus* and *homo juridicus* and that this amalgam became the foundation of modern criminal law (Norrie 2001). The *homo economicus* is a free individual who is moved by economic self-interest, articulated more clearly by Jeremy Bentham. The second is the subject whose rights would be limited through punishment, an idea that emerged

⁴³ Aeschylus’ *Oresteia* has often considered an allegory of the birth of justice. It tells the story of the transition from revenge and blood feuds- driven by the Erinyes, three scary female-looking *daimonas*- to the reconciliation of vindictive forces through the birth of the court of justice, the *Areopagus*. Theodore Ziolkowski characterizes the Greek tragedy as a ‘cornerstone in Western civilization’ where there is the shift from “matriarchy to patriarchy, the Jungians who sense there an evolution of the unconscious to conscious, the Nietzscheans who detect a tilt from the Dionysian to the Apollonian, or from chaos to cosmos, the social anthropologists who register a shift from shame culture to guilt[culture, the legal historian who trace a process from irrational to rational law, from retaliation to retribution, or from strict liability to liability based on fault- all attribute to this powerful dramatic trilogy what Freud called ‘the decisive step in human culture: the replacement of the might of the individual by the might of the community’” (Ziolkowski 1997, 20).

⁴⁴ In the *Philosophy of History*, the German philosopher endeavoured to study history using the dialectic method. He argues that events in history are not random but are part of a rational process of evolution towards freedom.

⁴⁵ Gardner suggests that the mental state of intention is the product of retributivism and its emphasis on subjective states of mind while negligence can be traced to utilitarianism and its emphasis on objectively-based harms. Strict liability is different because it does not require knowledge or awareness, whether subjective or objective (Gardner 1993, 749).

more clearly among philosophers like Immanuel Kant and Georg Hegel (ibid., 17-18). While seemingly opposite to each other, both theoretical models presuppose a rational subject, who is equal to his peers and is able to enter into contracts with others by his own choice.

These two traditions in penal theory ground the authority of the law in different ways. The subject of liberal Enlightenment was construed in opposition to the absolutist sovereign who controlled social populations through the threat of corporeal pain and terror (Foucault 1995; ibid.). Punishment no longer relied exclusively on inflicting physical pain and relied more on the discourse of rights and individual justice. Retribution as retaliation could not be acceptable in 'just desert' theories, which became more prominent in the 1980s (Gerber and Jackson 2012) but drew on the Kantian tradition. In just desert theories, punishment is justifiable when the sentence is equal to the offence. In contrast, utilitarianism justified punishment when it serves the greater good. One version of utilitarian punishment was prominently developed by the English philosopher, Jeremy Bentham, who grounded moral utility in happiness. Actions that caused happiness to a greater number of people outweighed the pain caused to a minority (Bentham 2007). Unlike the deterrent punishment exercised by the sovereign monarch, utilitarian deterrence had to be slightly disproportional to the offence. Punishment would always be an evil, albeit a necessary one because penal reformers in eighteenth century England also sought to protect the property of the rising middle-class. As Norrie explains, utilitarian reformers transposed an economic theory of behaviour into social control policy, conceiving offenders as rational actors who calculated opportunities and risks (Norrie 2001). In retributive approaches, agents were conceived as having the ability to access self-evident moral truths through reason. Both traditions present two different ideas about how free subjects decide to act and how criminal law should judge their actions, yet coincide in how individuals make those choices through reason.

Norrie argues that the history of criminal law is punctuated by the political and

ideological struggles between these two approaches to crime (Norrie, 2001). Neither can really sustain its stated aims on its own. Instead, the shared problem of retributivism and utilitarianism is the “incompleteness of their ideological premises” (ibid. 21). What these theories excluded was the real world where the legal subject inhabits:

Economic man or juridical man were abstractions from real people emphasising one side of human life-the ability to reason and calculate- at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways (ibid).

These two theories have a dialectical and contradictory relation with each other which signals the ‘fault lines’ originating in the ideology of the liberal subject. On the one hand, the rational legal subject legitimized the emancipation of the bourgeoisie from monarchical and aristocratic power. On the other, it distributed legitimate and illegitimate relations of property expropriation, where the ruling colonial and industrial classes expropriated property legitimately while the poor were punished for stealing to survive. In this sense, the juridical subject was instrumentalized: used as a political and ideological construction “which seals off the question of individual culpability from issues concerning the relationship between individual agency and social context” (Norrie 1993, 224). The new rulers were also confronted by the ‘practical necessity’ of limiting freedom through coercive sanctions against individuals and collectives. As such, the law simultaneously embodies and undermines the ideal of individual liberty and justice (Norrie 2001). The current persistence of this approach can be seen in the commentary by David Cameron in 2011 that the London riots were “criminality, pure and simple”(The Telegraph 2011). This perspective elides any acknowledgment of the relation between the behaviour condemned and the marginalization of communities and their constant harassment through intrusive policing practices (Hopkin 2011). Thus, law operates as

an instrument of politics by covertly protecting privilege (Norrie 2005, 60) while simultaneously adopting a formalist approach to individual responsibility based on rationality, autonomy and will (Norrie 2000, 45), which partially ‘disembodied’ the legal subject of crime. Anna Grear suggests that the archetype of the subject in liberal legality is not entirely “disembodied because the male morphology is trafficked into the idea of legal personality” (Grear 2010a, 44). Paradoxically then, the legal person of rationality is “quasi-disembodied” because it is “formally empty” but also incompletely empty since it smuggles the male body. The juridical person performs a sleight of hand in the ideology of liberalism which unsuccessfully abstracts a notion of subjectivity (ibid).

i. Ambiguity of the legal subject: Rethinking criminal justice through relational subjectivity

The last section noted how contradictions in the juridical person of criminal law signify a tension between the abstractions of existential and political questions and the legal forms adopted by the law to solve them (Norrie 2000). While historical and political conditions cannot be left out of questions of criminal responsibility, Norrie is not prepared to jettison agency *and* moral responsibility, two prominent Kantian themes. Instead, he suggests finding “a non-Kantian answer to the Kantian question” of justice (Norrie 2000). By grounding an ethical law based on individual moral autonomy, Kant did so at the cost of shutting out what is passionate and heteronomous in the subject (ibid). A fuller account of subjectivity would internally *relate* the *antinomy* embedded in the juridical subject, a formal term to designate false separations leading to binaries and then to contradictions (Norrie 2012). The individual matters for moral thinking but “only if it is understood in a fundamentally different, non-individualistic, relational way” (Norrie 2000, 5), articulated *through a critical realist dialectic* (Norrie 2000; 2005). Dialectical critical realism is broadly characterized as a philosophical movement

engaging with physical sciences and transcendental philosophy (Bowring 2010; Scotford Archer et. al. 1998) which purports to transcend the dualisms implicit in the debates on philosophy of social sciences (Benton 1998, 297). A classic example is the nature of consciousness. Western philosophy has represented consciousness and reason as something immaterial. In contrast, physical sciences ground explanations about consciousness in physical phenomena, such as the body's processes (Weiss and Fern Haber 1999, xiii–xiv). Unlike the 'linguist' and constructivist turn, which Norrie believes to be overtly focused on epistemological issues, he argues that dialectic critical realism "stresses the crucial role that being (ontology) plays in our understanding of how knowledge (epistemology) is possible" (Norrie 2010, 7). Liberal legal epistemology fails to give an account of "real material lives" (Naffine 1997, 80). Two central tropes emerge in Norrie's critique: ambiguity and ambivalence. Ambiguity exposes the dual location of the agency of the "modern self" while *ambivalence* expresses the contradictions in retributive criminal justice (Norrie 2000, 3-4).

Ambiguity is defined as the "susceptibility of multiple interpretation regarding meaning" (Martin 2002). It has also been a concept or trope used in existentialist and poststructuralist ethics that implies a lack of definitive resolution, and openness that exceeds meanings (Reynolds 2004; Anker 2009). In contrast, ambivalence has been central to the philosophy of action and articulated as a conflict of the will, according to American scholar Harry Frankfurt (Swindell 2010). As the etymology of the term implies, ambivalence implies there is a simultaneous opposition of feelings or desires, implying 'indecision.' Ambivalence has been said to reflect a dilemma of how to act, or even an indecision that threatens autonomy because one's will is divided (Poltera 2010). Although different, both concepts are closely interrelated. For example, one can be ambivalent about acting according to one's desire or one's sense of duty. Yet, Norrie suggests at times that ambiguity and ambivalence are dialectically related. Ambiguity refers to the dual location of individual autonomy between the

personal and the social. In this sense, agents mediate their decisions in a social context which provides them with vocabularies of right and wrong. Ambivalence refers to the effect of the ambiguity of the individual's responsibility reflected in contradictory judgements. Crucially, he explains:

...the ambiguity of responsibility and the ambivalence of judgement are dialectically related. They feed off each other in order to resolve what is essentially irresolute, the judgement of individual responsibility in the particular case (Norrie 2005, 100).

Drawing on Rom Harré's social psychology (Harré 1983; Norrie 2000; Norrie 2005b), Norrie uses the notion of the ambiguous modern self to critique the Kantian subject of law. The self is ambiguous because modern individualism does not locate autonomy and moral responsibility where it actually is, that is, in between the personal and the social (Norrie 2000, 6). Social relations maintain and produce one's sense of autonomy (Norrie 2005, 88). Individual selfhood is "secondary", as an effect of the primary structures of human life, particularly society. We arrive into a world already existing and exerting pressure on us to act as individual selves. Individual agents participate in "playing" social roles, reiterated through "language" (ibid., 88). One becomes a 'self' through societal support to perform particular roles. Selfhood is dualistic because it exists in relation to others but also requires a denial of that relation in order to exist as an individual. Through the example of selfhood, Norrie shows there is an internal dialectical connection between the individual and social although they are also separate.

Subjectivity and selfhood⁴⁶ serve as springboards for a critique of modern criminal justice thinking, particularly the notion of orthodox subjectivism. This contemporary articulation of retributivism is characterized by an attempt to align morality with law (Norrie

⁴⁶ Selfhood and subjectivity are inter-related yet contested terms. Subjectivity tends to refer to psycho-social theories of subjection "without succumbing to the reductionism of social determinism" (Layton 2008, 60). Selfhood implies a reflection on individuality and identity, to know oneself as different from others.

2000). Whilst sympathetic to the project, Norrie disagrees with subjectivists like Michael Moore, Anthony Duff, and Andrew Ashworth, because, he maintains, their approaches reproduce old problems (Norrie 2000; Norrie 2001; Norrie 2005). One of them is the reliance of punishment on an artificial version of individual blame, culpability and responsibility⁴⁷ that separates and denies the ambiguity of modern selfhood (Norrie 2000, 3). The separation, for example, between individual blame and collective blame is a ‘false but necessary’ distinction used to justify punishment. The falsehood derives from creating an abstract legal concept; the necessity derives from the real existential desire for justice and giving closure to moral dilemmas created by wrongdoing. Yet, neither the contextualization nor particularization of blame resolves in a satisfactory way the outrage of a community to a crime. Individualizing blame performs a refusal of the relational character of agency; contextualizing blame effaces the offender’s agency. Thus, the ambiguity in modern selfhood also “translates into moral judgements on wrongdoing and a sense of justice” (Norrie 2005, 89). The moral judgement of a crime stages a wager between individualizing blame and contextualizing the actions of the offender through the personal history:

Thus, our initial reaction of anger and condemnation may be followed by a sense that the criminal was also a victim. In so doing, we move from the sense of the individual as an autonomous agent (the law’s view) to that of the person as a being-in-relation (ibid., 89).

The wager is too quickly resolved, favouring individual blame. Yet, this result has already been structured by the legal framework, for example, by the doctrine of intention. The explanation that contextualizes the decisions is proper to sociology or criminology; not the law. Concessions for contextualization exist in sentencing but not in the adjudication of legal guilt.

⁴⁷ Individual blame rests on the philosophy of punishment; culpability on a theory of law; and responsibility on a philosophy of the mind (Norrie 2000, 94).

We can see here more clearly the problem posed by ambivalence in the case of drug mules discussed in chapter II. The agency of women acting as drug mules can be seen as ambivalently located between familial, cultural and political security practices. Choices made, mainly to traffic drugs, can hardly be characterized purely through the framework of the law, the formula of either ‘you knew it was drugs and willed to carry out the prohibited act’, or ‘you did not.’⁴⁸ Fleetwood and Torres interviewed women who explained their “involvement in drug trafficking as an opportunity to ‘save’ a relationship troubled by a difficult economic situation, as well as an opportunity to provide a better future for their children” (Fleetwood and Torres 2010, 131). Neither the doctrine of intention, where one desires to bring about the consequence, nor the doctrine of knowledge, where one ‘blinds oneself to the truth,’ holds a space for the above narrative. Construed as motivation or as sentencing mitigation, important features which embody the subject, are ejected from the adjudication of the offence. Yet, the contradictory structure of the law of intention cannot suppress completely what was excluded. The judgement is ambivalent, performing a paradoxical negation/affirmation of justice.

i. Negotiating ambiguity, ambivalence and geopolitical temporalities

The law creates distinctions like ‘victims’ and ‘offenders, although Norrie’s analysis also shows these categories are ultimately unstable and negotiable because they are ‘false’ but also necessary (Norrie 2000, 47). They express struggles about values in communities subject to fragmentation and historical transformations (Norrie 2005, 105). Norrie illustrates this point through the struggle played out in the Nuremberg trials between the values held by fascism and post-war. On one hand, individual responsibility and guilt could not be denied, but “individuals shift between registers of self-accounting, so that it is socio-political contexts that fix responsibility” (ibid., 106). On the other hand, individuals’ own sense of responsibility moves

⁴⁸ The specific elements of the legislation governing importation/exportation offences will be discussed in detail in chapter VI.

across different “moral contexts of judgement” (ibid., 106): One day fulfilling the law under a fascist regime; the next day condemned by another legal regime and under moral scrutiny of two different political communities.

For example, we might one day be confronted by two opposite ideas about drug laws. In England and Wales, one of the first appeals was lodged after the entry in force of the Definitive Guidelines for Drug Offences (2012) suggested that the sentencing scheme should apply retrospectively because the previous regime was “fundamentally disproportionate” and unjust⁴⁹. The Court of Appeal (Criminal Division) rejected the application for the joint appeal, reasoning that since sentencing changed so much throughout time, shaped by Parliament’s responses to public perception, it would create chaos for the courts and would be unjust for the offender to have a higher sentence applied retrospectively.⁵⁰ In contrast, Ecuador have reformed and given effect to a new criminal code in 2014 which radically reduces the sentences for anyone carrying small quantities of drugs and is applied retrospectively. It also granted a mass pardon to 1,500 drug mules in 2009 through a resolution approved by the constitutional assembly of 2008. The ‘pardon’ was articulated in such a way that it would be compatible with international human rights obligations for prisoners (Metaal 2009).⁵¹ A central motor behind the new Ecuadorean criminal code is the shift in the conceptualization of drug mules as “victims exploited by drug cartels” and as persons but mostly women who “have no control over narco-trafficking but are persons who rent their bodies (. . .) as drug containers in exchange for (. . .) money who rent their bodies unrelated to the amount obtained by the sale of such substances”⁵² (ibid., 4).

⁴⁹ *R v Boakye & Ors* [2012] EWCA Crim 838 [10].

⁵⁰ ibid. [12]-[13].

⁵¹ The proposal referenced Resolutions 663C (XXIV) of the 31 of July 1957 and Resolution.2076 (LXII) of 13 of May 1977 of the Economic and Social Council (ECOSOC) about the Standard Minimum Rules for the Treatment of Prisoners, and “the recommendations expressed by the Inter American Court of Human Rights, in its 1997 Annual Report, which noted that the (anti-narcotic) legislation has caused undue harm to persons” (Metaal 2009, 4).

⁵² Translated citation in the article by Pien Metaal, originally from the Majority report by the Constitutional Assembly of the Republic of Ecuador. No page reference.

Recall also how research found that that drug mules' sense of self was defined relationally and while relative deprivation was part of the context (Fleetwood 2014), engaging in drug mule work was partly driven to prevent the end of the ideation of their identity as mothers. Narratives provided by women sentenced for drug mule work were not only shaped by their life experiences and personal biographies but also their material and geopolitical realities within the Ecuadorian prison, such as the 'war on drugs' (ibid). Those living in the overcrowded prisons of El Inca were aware of the impact from the exportation of the war on drugs to Ecuador. The available "webs of meaning and the kinds of female gender and subject position (victim or agent)" shaped, supported or limited their possibility to speak in the prison environment (ibid., 45). By this, Fleetwood refers to the active role by prisoners in collective strikes and protests, centred on the "collective identification with the drug mule" (ibid., 49), the particular trope of the feminized victim of poverty. Although this identification "did not reflect an objective kind of truth" it was embraced collectively as "an effectual identity necessary for protest" (ibid.). It exemplifies how the narratives make sense of one-self with others, in the broad sense of the term discussed with reference to embodiment' is highly temporal (Lloyd 2000) but also antithetical to the legal temporality which 'fixes' selfhood in the rational autonomous subject required to judge criminal responsibility.

Taking into consideration the above, we can observe how victim-offender categories are in a sense ambiguous and defined through the historical context and struggles in the community to define, re-define or contests those labels. In Norrie's view, the idea of responsibility as the duty to the law is solipsistic and excludes the relational constitution of responsibility. Comparing two different versions of judgement in Kant's thought, Norrie suggests the failure lies in an idea of responsibility based on duty to the law. He draws on Hannah Arendt's indictment of the Kantian categorical imperative. Kant's analytic philosophy

relied on logic and ‘identity thinking’⁵³, that is, the belief that reason presents so called ‘self-evident’ laws. The duty of the reasonable person is solipsistic because one needs only to agree with one’s own reason. Rational thought has to agree with itself (Norrie 2005; Arendt [1961] 2006) at the cost of excluding the relational self. Arendt does not dismiss Kantianism completely; only the categorical imperative. In contrast, Kant’s aesthetic judgment entails, in Norrie’s words, the ability to “think in the place of everybody else” (Norrie 2005, 108). Re-interpreting Kant through Arendt’s rendition, Norrie suggests:

...the role of the community and its relationship with the individual, far from the solipsist bar of the categorical imperative, identifies the place where judgement occurs, and which generates the complexity, ambivalence and ambiguity that has been sought here (ibid.)

If duty to the law is insufficient to express the relational space where the self makes decisions, then what is the reach of thinking in the place of others or ‘thinking in the place of others’? Offending could well be both thinking about oneself and thinking about one’s responsibility to others. But who are these ‘others’ one must think about? So far, this section has sought to trouble the legal subject of criminal law through the ambiguity situated in the criminal justice thinking that stresses individual responsibility at the expense of the relational constitution of subjectivity. Norrie emphasises the complicity between theories of legal thinking with an ontology of the legal being that is partial and ultimately, unjust (Norrie 2000, 69). Instead, he proposes a relational theory of responsibility. How would a relational theory of responsibility reconstitute concepts like blame, guilt or judgement?

To understand the conclusion he reaches, we must look at the third step of his critique, which involves re-establishing the dialectical relation in legal thinking about responsibility in

⁵³ Dialectical thought counters the arguments by analytic philosophy which is grounded on ‘self-evident principles’ such as the laws of identity, contradiction and excluded middle (Norrie 2000, 69).

legal judgement. Norrie “locates a ‘site’ of judgement that is both within the community and a means of bringing to bear judgement on individuals for whom guilt is a moral sentiment” (Norrie 2005, 108) . If we understood legal subjectivity relationally, the law would be able to locate blame *in between* the individual and society, as recognition of the co-extension of responsibility to the community (ibid.,153). A judgment retrieves “what is of moral value in Kantian individualism and [locates] its significance within a relational context” (Norrie 2000, 193). In other words, the judgement ought to express the “blaming relation” between the individual and the community (ibid., 89). The idea of “judgement and justice through law occupies a ‘space between’ the legal and the moral” (ibid., 77).

ii. Ambiguity and femininity: The unspoken debt to liminal motherhood

The idea of relational responsibility leads to the difficult questions about judging the criminal responsibility of women drug mules because it poses difficult questions for feminism. To what extent is blame relational? Does it extend to victims? Victim-blaming is a characteristic feature of rape discourse because female subjects are more often constructed relationally: understood as wives, mothers, girlfriends while the masculine subjectivity is more often than not presented without reference to his relations. Norrie would perhaps say that blaming only the victim would be missing the point, since it simply shows a reversal of the dichotomy or the false separations identified through the immanent critique. Clearly, Norrie’s analysis chimes with positions taken by feminist scholarship on relational autonomy (Mackenzie and Stoljar 2000) but at the same time, gender rarely constitutes a key category of analysis in Norrie’s research. Broadly defined, relational approaches to autonomy focus on the “intersubjective and social dimension of selfhood and identity” in order to understand their implications on autonomy, moral agency and political agency (ibid., 4).

Relational subjectivity and relational autonomy may not be an ideal panacea for

feminism for several reasons. Performing heteronormative gender roles, ritualized in socio-legal practices, may ground a sense of self. Yet, this archetype of motherhood affirms relational autonomy for women, while the strength of the practice of masculine autonomy affirmed as individualistic decision-making does not seem to diminish. As I will outline through the case analysis in chapter VI, the vulnerability of female mules is often presented through familial and romantic relationships. If ambiguity is the trope that signifies the relationality of subjectivity, the 'feminine' has been often coded as the paradigm of ambiguous subjectivity that 'gives birth' to the political community (Schott 2010a). In this sense, Robyn May Schott affirms ambiguity and ambivalence to push further critical approaches on gender, but need to be probed through the lens of sexual difference (Schott 2010b). She explains how stories about political genesis in various ideologies, from Marxism to Freudianism and existentialism, have been often posited as the generative bond between opposites: life and destruction, war and peace; revolution and institutionalization. One of the central features in the narratives of tragic 'crisis' is the idea of sacrifice, enacted through sexual violence. Analysing historical narratives of the rape of the women of the enemy as a practice of war in Ancient Greece, Judeo-Christian and Roman history, Schott questions what is at stake when a political community rests on sacrificial violence. Schott argues that sacrificial victims usually bear the mark of ambiguity. In other words, they are individuals whose political belonging is liminal, at the margins of the political community, such as women, slaves and animals. In all the stories, the "violation of a woman's body (...) becomes the transformative moment of the community" (ibid., 31) whether by ensuring life will continue in the political future of a new nation or by making impossible the resurgence of the vanquished community through her death.

Crucially, Schott argues that this form of political violence is enabled through the ideation and abjection of the ambiguity symbolized in the pregnant female body (ibid. 39). Ambiguity resides in the womb, the place where the relationship with life and death begins

(ibid), characterizing femininity as duplicity. Schott stresses that the “patterns of sacrificial thinking” harbour a logic where the political/social order and the human body mirror each other (ibid., 42). Women’s body takes that role, through the symbolic mark of maternal embodied ambiguity, while “sacrifice negotiates the ambivalent relation between death and birth, so that death becomes the origin of new birth” (ibid., 44). Victims of sacrifice restore the stability of a community in crisis or transition. In the historical narratives revised, the common characteristic of sacrificial victims is that they are “neither too foreign nor too familiar” (ibid., 35). Familiar victims, such as recognized members of the community, cannot be sacrificed because their death would be considered a loss; killing foreign victims would activate the cycle of revenge and conflict between different communities. In contrast, sacrificial victims cannot be mourned, possibly because of the ‘cannibalistic’ logic of mourning. One mourns the loss of an ‘other’ with whom one identifies (Deutscher 1999). The role of sacrificed subjects is to ‘pay back’ to the community or even become a surplus in the economy of sacrifice, which ensures the future of the nation through their death.

Through this perspective, my aim is not to fully discredit relational approaches to subjectivity and responsibility departing from ambiguity. But there is a limit to what they can offer to the problem of living in community’s proclivity to allocate relational subjectivity along gender and sexual lines. The rational juridical subject is coded through differential scripts framing feminine and masculine roles (Nedelsky 1990; Naffine 1997; Davies 2012). These frames are not simply descriptive but are productive: legal norms and regimes “have disciplinary effects on actual social relations by normatively re-inscribing certain patterns of sexed and gendered social behaviour” (Conaghan 2013a, 104). Legal norms punish or reward different expressions of motherhood and femininity (ibid.). In the case of drug mules, sentence-mitigation is available for offenders with dependents, but a woman who brought her children

in the criminal venture became a ‘serious aggravating feature’.⁵⁴ This is evident even in sentencing appeals by drug mules, where the courts protect the boundaries of the juridical person by favouring a reading of agency in the calculating rational subject.

Ambiguity defies the stability of those boundaries, including the self-defined boundaries of the law. Liberal theories of law represent it as an enterprise guided by consistency, rationality, and coherence in its ideas and practice. These norms ground the legitimacy of the law itself (Norrie 2001, 2005). Instead of describing law as if it were “a realm of homogenous concepts that are cut off from the outside world of morality and politics” through allegedly value-neutral legal concepts and argumentation techniques (Norrie 2001, 87), a theoretical approach that can “encapsulate an ambivalence in our assessment of the legal conception of justice” would expose the limits and strengths of the law (Norrie 2005, 76). While I agree with Norrie, my concern is that his affirmative approach to ambiguity and ambivalence does not reflect on the complicated relationship of masculinity frames with these tropes. A critical approach to criminal law would also unpick the relationship of masculinities with ambiguity and in that sense, with vulnerability, as I will explain in chapter V. For now, we need only look at the scene of ambiguity from the perspective of feminist scholarship and what it means for criminal justice.

4. Simone De Beauvoir’s critique of moral philosophy and punishment

In this section, I want to draw attention to an unlikely interlocutor in the field of criminal justice. Late engagements with Simone de Beauvoir’s work on ambiguity demonstrate the breadth of her method, encompassing themes that are not limited to gender and sexuality studies but also extend to broader questions of politics, moral philosophy, and ethics (Morgan 2008; Kruks 2012; Murphy 2012a). In particular, Beauvoir’s moral philosophy and recent

⁵⁴ *R v Watson (Geraldine Alethea)* [2013] EWCA Crim 182

interpretations of her work highlight the suppression of intersubjective relations in legal judgement, punishment, and moral responsibility. Through the trope of ambiguity, Beauvoir affirms the intersubjective constitution of the subject. Neither Beauvoir nor Norrie want to renounce autonomy and individual responsibility. However, both condemn individualistic ideologies. Of course, one must be cautious about drawing links between Norrie and Beauvoir's engagements with ambiguity as there are important differences in their respective approaches. Firstly, Beauvoir adds a gender dimension to ambiguity which allows her also to point to its limits without renouncing to its strengths, mainly the possibility for interpersonal and political relations that are moved by generosity rather than by a desire for possession and control. Secondly, Norrie's dialectic approach to law and history might be said to reify the foundational story of the Enlightenment, as if theories of reason and calculation spontaneously flowed from the thoughts of philosophers and politicians rather than being shaped by existing practices.⁵⁵

Revisiting the metaphors in the introduction, history for Beauvoir is more akin to 'living body' than a foundational 'corpse,'⁵⁶ shaped by her care of temporality and embodiment. Ann Genovese describes Beauvoir's work as a 'historiography,'⁵⁷ which is "'anti-foundational' because she is writing the self, not reclaiming or seeking essentially to explain the marginalized experience of others" (Genovese 2013, 50). The centrality of phenomenology in her thought could be accounted for Beauvoir's approach to history.⁵⁸ Rather than claiming a privileged position over women's experiences, Beauvoir states that her intention is "to merely translate

⁵⁵ Norrie addresses the critiques to his analysis in his 2001 monograph. Lacey considers his historical approach 'schematic' while Lindsey Farmer argues it is too analytic, which is not truly a historical account of the development of law (Norrie 2000).

⁵⁶ As noted by Genovese, Beauvoir herself considered that the historical past "cannot be considered as defining an eternal truth" (Genovese 2013, 50).

⁵⁷ By historiography, Genovese means the practice of writing history that offers 'a particular understanding of the relation between past and present that must always be reimagined, and relocated, as the exercise of its writing "presents a continuous act, permanent and identical with life itself, that must be renewed at every instant"' (ibid., 43). Beauvoir's approach is compatible with the critical legal tradition, which also deploys history "as empirical content to challenge law's doctrine as much as method to disrupt the idealised and politicised form of its subjects" (ibid., 42).

⁵⁸ Beauvoir finds that historical materialism was insufficient to explain women's oppression. She argues that Engels took for granted many facts requiring explanation, such as proprietary interests (Beauvoir 1974, 62).

[...] a situation that is showing itself to be historical precisely in that it is in the process of changing” (Beauvoir [1949] 2011, 750).⁵⁹ Ambiguity provides the gravitas to how she shapes her critique of history, politics and philosophy. She first used the term in *Ethics of Ambiguity* (1948), written in the context of post-war France. However, the leitmotif of ambiguity traverses the body of her work (Langer 2003; Deutscher 2008a; Kruks 2012; Murphy 2012a). Beauvoir uses ambiguity to approach the problem of individual freedom and how to conduct oneself in relation to others. In its core, ambiguity is described as a feature of existence enabled by the self-other relation, marked by our experience as objects for others and yet, with the desire to be subjects (Beauvoir [1948]1986). It is an ontological and epistemological problem:

As long as there have been men and they have lived, they have all felt this tragic ambiguity of their condition, but as long as there have been philosophers and they have thought, most of them have tried to mask it. They have striven to reduce mind to matter, or to reabsorb matter into mind, or to merge them within a single substance (ibid., 70).

The tragedy is the desire to flee from ambiguity because it instantiates an antinomy of action: to project oneself as pure consciousness (disembodied subjectivity) or to merge oneself into pure materiality (brute facticity of the body). In contrast, Beauvoir’s existential phenomenology presents a version of selfhood that is relational and intersubjective (Tidd 2001) because one comes into a world already constituted by others. An individual consciousness resists this interdependence out of anxiety or fear of becoming an object for others, instantiating relations of inequality such as the one described by Hegel in the lord-bondsman model (Hegel 1979). To be a subject, one must project oneself (intentionality) into the world to transcend the given conditions (Kruks 2012, 34). Thus, freedom emerges in action or in practical freedom.

⁵⁹ Cited by Genovese (Genovese 2013, 51). The translation by Constance Borde and Malovany-Chevalier includes parts originally not included in earlier English versions.

Unlike Sartre's 'ontological' freedom,⁶⁰ meaning that freedom is something inalienable because it is constitutive to our being, Beauvoirian scholars agree that she reworks freedom through the perspective of embodiment. Sartre's version of freedom affirms that we can always choose otherwise, even in the most extreme situations of existence. Thus, one must accept freedom responsibly or deny it in 'bad faith', which means in full consciousness of one's choice or declination of choice. In contrast, Beauvoir distinguishes "ontological freedom [*la liberte*]" from the 'practical freedom required in order to act in the world [*puissance*]' (Kruks 2012, 13). Her version of freedom is immersed in the contingencies of the world.

Instead, to assume the ambiguity of freedom "is to assert that its meaning is never fixed, that it must be constantly won" (Beauvoir [1948] 1986, 13), couched in the agonistic tension of political life (Kruks 2012, 7). The disclosure of being is akin to the desire for meaning to be concretized in actions. But we run against other people's projects which threaten the disclosure of our own projects. This means that the ambiguity of existence is also underpinned by the antinomy between ethics and politics. As Bergoffen remarks, subjectivity is political in so far as the subject "moves to impose meaning in the world; ethical as it acknowledges the mark of the other" (Bergoffen 2001, 188). Beauvoir's ambiguous subjectivity purports to separate but not destroy the bond between ethics and politics (ibid., 187). Yet, does an ethics of ambiguity achieve this purpose? Penelope Deutscher's deconstructive reading offers a critical account for understanding the nuances, limits, and traditions feeding Beauvoir's approach to ambiguity and how in performing its own failure, it reaffirms its 'utopian' possibilities.

i. Ambiguous conversions: A deconstructive reading of Simone De Beauvoir

Penelope Deutscher characterizes Beauvoir's method as the performance of conversions of ambiguity and resistance in her relationship with intellectual peers, or with other disciplines.

⁶⁰ Against the position of radical subjectivism, the body cannot be transcended (Kruks 2012, 34). It is "not a thing, it is a situation: it is our grasp on the world and the outline of our projects" (Beauvoir [1949] 2011, 46).

Her multiple “intellectual debts and affiliations” make it difficult to “recognize the mutual troubling of the theoretical languages” in her work⁶¹ (Deutscher 2008a, 12). For this reason, her work may be seen as vulnerable to theoretical clashes. Surely, these clashes are inevitable. Yet, Beauvoir’s intellectual approach is akin to the labour of knitting⁶²: the material itself can be pulled, unravelled, tightened, loosened, and brought together in different colours and threads into the fabric (ibid., 2008). Beauvoir enables the intersection between the thinkers she addresses, engaging the concepts she appropriates in an unlikely encounter. As Deutscher suggests:

Her work engages us with a concept’s incapacity or capacity to deal with a particular problem (notoriously in Beauvoir’s work, sex gender, and sexual difference but also race and age othering), or to cohabitate with a parallel explanatory model... (ibid., 14).

As an intellectual approach, ambiguity embodies an intensity, a force that performs “conceptual conversions [...] they may be better understood as points of theory intersection and transformation”⁶³ (ibid., 22). Beauvoir stages a distancing gesture away from the Hegelian concept of *synthesis*⁶⁴ and how it ‘fixes’ subjectivity in the achievement of an ideal process of progress (Beauvoir 1949, 9). Simultaneously, she converts the movement of history through the assumption of failure. For example, the self “assumes (*assume*) the inevitability with which she or he tends (*tender*) toward a being one can never be” (Deutscher 2008a, 27).

⁶¹ The list of intellectual interlocutors in Beauvoir’s texts include Hegel, Immanuel Kant, Karl Marx, Edmund Husserl, Maurice Merleau- Ponty, Emmanuel Levinas, Aristotle, Paul Bergson, Martin, Levi Strauss (Deutscher 2008a, 12–13) and Maurice Blanchot (Deutscher 2008a, 19).

⁶² Deutscher conveys this idea through the metaphor of the weaving: “She hooks threads which, once pulled either bring along (or link up) the fabric in which they are embedded, or, alternatively, unravel it. The analytic work accomplished by Beauvoir is effected either (as the case may be) with the capacity to thread to fruitfully bring along more of its fabric as the reader pulls at it, or in the unravelling capacity of her hooking” (Deutscher 2008a, 14).

⁶³ One cannot reduce Beauvoir’s analysis of ‘reciprocity’ to an evolving concept perfected in the last work published, in a sort of teleological reading of an author’s ideas. Instead, Deutscher comments how concepts underpinning values, like reciprocity, are subject to complex intersections that constantly need to be “challenged, reconsidered, and redefined in her work” (Deutscher 2008a, 22).

⁶⁴ Beauvoir notes how the Hegelian system provides a false comfort because it is only intellectual (Beauvoir [1948] 1986, 158).

Now, Beauvoir does not move far away from the existentialist approach to subjectivity, which is defined by ‘lack’ (Bergoffen 2010). In Sartre’s ontology, the subject has an original lack and a corresponding desire to be. Sartre associated the lack with the desire to appropriate and possess, to fill that emptiness in the subject. If the ontological tendency is to appropriate, Sartre’s argument implies possessiveness and appropriation persists in all circumstances regardless of political or social orientations (ibid.). Sartre shuts down the door to ethics, suggesting social relations are inevitably hostile and conflictual. Beauvoir performs her own conversion in the concept of subjectivity and relations with others. Yet, she does not equate the desire of disclosing being with appropriation and possession. While the ontological lack of being opens the possibility to the desire of possession and to conflict, Beauvoir associates the lack with far greater possibilities (Deutscher 2008a, 40).⁶⁵

In Deutscher’s view, Beauvoir’s view on the master and slave model for social relations is “not a modality of original desire, but rather an individuation of our ethical failure to respect the original lack and desire to disclose” (ibid., 40). This position is clearest in *The Second Sex*, where the possessive treatment of women reflects “an ethical failure in personal and political relations” (ibid.). Asymmetrical relations between women and men exist because patriarchal societies socialize men into freedom while women are confined to be the opposite, an object. The masculine desire is to abject his own immanence by projecting it onto women, as Beauvoir tells us “man’s revolt against his carnal condition is more general; he considers himself a fallen god: his curse is to have fallen from a luminous and orderly heaven into the chaotic obscurity of the mother’s womb” (Beauvoir [1949] 2011, 164).

Women, in Beauvoir’s view, also avoid their own ambiguity, accepting roles of objectification rather than assuming one’s freedom.⁶⁶ One could reframe Beauvoir into

⁶⁵ Deutscher addresses here the engagement of Gail Weiss with the notion of ambiguity in Beauvoir’s work.

⁶⁶ There is a revival of this debate implicit in the ‘twitter wars’ between the campaigns ‘Why I need feminism’ and the counter Anti-feminist campaigns ‘Women against Feminism’. The latter rejects being reduced to victims and reaffirms the good in heterosexual institutions but confuses the inability to assume responsibility for one’s

neoliberal readings of freedom and choice, or even victim-blaming. I think such readings are possible but also a dismissal of her overall project. For her, the ethical attitude is to reaffirm ambiguity in the disclosure of being, to face the tension in human existence. It is a fine line to balance but as Gail Weiss suggests, the desire to disclose being is ontological but not necessarily dependent on intentionality. Disclosure is both a passive and active process where the process is marked by the ambiguous relationship between desiring to disclose the world and desiring to be disclosed by it (Weiss 2012, 181). Bergoffen partially disagrees with this interpretation because intentionality itself is ambiguous, multiple and often contradictory⁶⁷ (Bergoffen 2001). Thus, intentionality is an ‘active passivity’ impinging on ethics and politics. By formulating alternative relations to sexuality where reciprocity and generosity are possible, Beauvoir presents an alternative to hostile social relations by “drawing a line between the political project of mastery that calls itself just and the political project of liberation that is just” (Bergoffen 2001, 190). Beauvoir drafts a framework where generosity also figures in the desire to disclose being, characteristic of the openness and relationality in erotic encounters. In this scenario, individuals mutually risk their vulnerability to the other. Deutscher shows scepticism in relation to the idealised erotic encounter, as the male sex has been historically and politically fashioned to be the possessor rather than the one who risks his vulnerability (Deutscher 2008a, 56).

There are other caveats to an ethics of ambiguity. Deutscher also questions its cogency as Beauvoir’s work “staged the tension between an ambivalent ethics and one that aspires to clarity” (Deutscher 2008a, 52). Beauvoir is surely committed to moral values like generosity

choices with feminist discourse on victimhood. As Deutscher comments, in the context of Beauvoir’s negative representation of old age, she ‘walks a fine line’ in her descriptions and negotiation of freedom and the lack of it (Deutscher 2003). Scholars note a more Sartrean vein (possibly not only Sartre’s work but as her moral essays show, the post-war context she addressed) in her early work yet moving towards concerns of gender and racial oppression, violence, and privilege.

⁶⁷ The desire for possession is also a negation of the disclosure of being. Beauvoir describes a typology of attitudes towards the desire to flee from ambiguity which express intentionality to transcend one’s given’s situation but at the cost of further self-objectification or objectification of others (Beauvoir [1949]1986).

or reciprocity, but the uncertainty and precariousness of ambiguity, constantly undermine these values.⁶⁸ Similarly, Ann V. Murphy argues that Beauvoir's affirmation of ambiguity marks a tension between care and violence that cannot offer a prescriptive ethics. While affirming incompleteness, vulnerability, ambiguity and tension, ambiguity makes it impossible to deny violence as a possible response (Murphy 2012a). Ambiguity and indeterminacy "inform the existentialist understanding of human action as permanently haunted by failure, as intention collides with world and actions come to adopt unexpected significance" (ibid.220). Beauvoirian ethics are ultimately paradoxical, staging the impossibility and possibility of their occurrence. Ambiguity performs both an adherence to ethics and calls this ethics into question⁶⁹ (Deutscher 2008a, 53). Reading failure and violence into an ethics of ambiguity is possible because being is 'empty,' as exemplified by the idea that one *becomes* a woman. Beauvoir's conversion of the Sartrean subject through Merleau-Ponty's phenomenology of the 'living body' allows her to rearticulate a social ontology where possession and appropriation are not the only forms of relation possible (Bergoffen 2001; Heinamaa 2003). Unlike Merleau-Ponty, Beauvoir surpasses him by locating embodiment in a social milieu where oppression, conflict, generosity and love cannot be discarded.⁷⁰

ii. *Legal responsibility: Phenomenological encounters with values*

Moral relativism has been a usual objection against existentialism or post-structuralism in so far as they have been understood as recipes for 'everything goes.' But I consider these

⁶⁸ Deutscher notes for example, that "if the definition she offers of 'reciprocity' suggests that it can never be calculated or certain (and thus, in a formal sense, never be reliably 'reciprocal'), we suppose that the ethics, similarly, can never be calculated or certain" (Deutscher 2008a, 52).

⁶⁹ Beauvoir *performs* in her own writing of *Second Sex* 'undermines the literary, and thus, constitutes an ambiguous exposure of the ambiguities of ethical sexual relations.

⁷⁰ Merleau Ponty's phenomenology, grounded on the living body, stresses the ambiguity of perception in all experiences, enabling "a strong ontological foundation for Beauvoir's subsequent discussion of the strikingly varied ways in which individuals actually contend or even fail to contend with this omnipresent ambiguity in their daily lives" (Weiss 2012, 178).

oversimplifications of existentialism as only a caricature of what they really propose. Actually, Sartre's version of individual responsibility has been seen as the opposite of popular views of relativism. The emphasis on overcoming bad faith stresses individual responsibility as an obligation, a view that arguably fits uncomfortably with neoliberal concepts of responsibility (Vetlesen 2009). The same criticism does not in my opinion apply to Beauvoir. Her moral and political philosophy reminds us of the inter-subjective grounds of responsibility, and may extend to Beauvoir's insights on abstract humanism⁷¹ or the abstract rational subject.⁷² For her, the "universal, absolute man exists nowhere" (Beauvoir [1949] 1986, 112); he is a fictive figure that is disconnected from others. Instead, the Kantian morality evades the ambiguity of freedom by attaching fixed values and meaning to rules; while societal moralities impose values upon individuals.⁷³ Phenomenological and existential approaches to crime, criminal responsibility and punishment offer other avenues for exploring moral questions without resorting to abstract values in order to justify legal responsibility.

For example, Thomas Giddens argues that notions of legal responsibility are premised on an idea of universality that is too dependent on the ideology of rationality. Existential dilemmas are reduced simplistically into right/wrong or guilty/not-guilty. It is a mechanization of law that cannot perform a "qualitative assessment" of criminal behaviour taking place in the context of "embodied action and experience" (Giddens 2013, 1). To counter mechanization, Giddens defends phenomenological indeterminacy as an approach that facilitates a continuous dialectic encounter between law and the uniqueness of each defendant's life-story, enabling also a transformation of the meaning attached to criminal responsibility (ibid.).

⁷¹ That is the tradition of philosophies and ethical perspectives that emphasize human agency.

⁷² This precept in Kantian moral philosophy is one of the strongest and most compelling rules upon which the legal theorists and moral philosophers addressed in this chapter seem to agree.

⁷³ Although Beauvoir used Kantian language of universality in the *Ethics of Ambiguity*, she changed her mind later on. William Wilkerson comments on Beauvoir's idea of universality which is different from the Kantian-type. He argues that Beauvoir posits an ethics that values autonomy but "defines humanity as a lack and explains both the origin of value and our inevitable failure to attain our proposed values" (Wilkerson 2012, 70).

Similarly, Mark Coeckelbergh proposes interpreting human action through Kierkegaard's existentialist notion of 'tragedy'. Action occurs in the plane of movement, "in-between" passivity and activity⁷⁴ (Coeckelbergh 2010, 237). The legal attribution of fault lacks 'moral imagination' because it relies on rigid formulae, artificially extracting criminal acts from the contexts in which they took place.⁷⁵ Criminal justice has lost its ability to find different *meanings* of criminal responsibility because it does not engage in a dialogue with the defendant's 'tragic' history. The relational character of a person's actions is limited by reductive and mechanistic understandings of accountability in criminal law (Coeckelbergh 2010).

From this view, the legislative and judicial task should not necessarily be undermined by rejecting transcendental universal values. Rejecting the blind application of values to actions does not necessarily mean approving a relativist or nihilistic position. Moreover, Beauvoir does not suggest we renounce all values. In Beauvoir's ethics, values - such as reciprocity, generosity, or love - have instead a heuristic function (Kruks 2012). Rather than function as absolute values, they are subject to political and historical negotiations. Love and generosity have little meaning if used to neglect one's subjectivity, such as occurs in the cultural script that designates women as incomplete subjects if they do not marry. In short, values do not have transcendental origin; their meanings are constantly made through an agonistic process, through political struggles and re-negotiations of what these values mean in each situation.

Take as an example the historical and anthropological analysis of the proto-criminal justice in Ancient Greece by Rene Foqué. He shows that the transition from divinely mandated retribution to a law-based justice emerged through an agonistic and dialogical re-negotiation

⁷⁴ He suggests there is no absolute passivity or absolute activity where cause and effect are categorically separated.

⁷⁵ Drawing on Anthony Duff's approach to criminal law, Coeckelbergh affirms the interpretative dimension of criminal responsibility. An offender must 'answer' to his crimes in order to restore a normative symbolic order. However, he disagrees on one crucial point with Duff, who thinks defendants must give an account of themselves without reference to the relational character of their actions (Coeckelbergh 2010).

of the community's value-orientations (Foqué 2008).⁷⁶ Legal discourse occupies a mediating and counterfactual role in the process of re-negotiating the values of a political community. Drawing on Hannah Arendt, Foqué suggests legal concepts have also counterfactual status that can only come into the world through *action* and *speech*. All legal concepts are susceptible to change and under-determination because they are temporal and agonistic expressions of legal relations. For example, the legal subject is not entirely a person in flesh; it functions as a counterfactual category that allows people to share “a procedural platform and a common language for dealing in a peaceful way with their mutual conflicts and with their cooperative deficits” (ibid., 220). However, the concept of the legal subject also has limited value as an empty transcendental juridical construction without being negotiated through dialogue and concretised in action (ibid., 227).

iii. The failure of punishment: revenge and calculation without ambiguity

One of the most interesting implications of ambiguity is how it unsettles the values ascribed to the theory and practice of punishment. Ambiguity mediates the effects of judgement and responsibility on embodied subjects and their situation. Beauvoir's essay, 'Eye for an Eye' (1946), seeks to make sense of the trial and execution of Robert Brasillach - a French intellectual who collaborated with the Germans by publishing a fascist newspaper. Kristiana Arp suggests this was not simply an occasion piece, but important in so far as Beauvoir alludes to ambiguity for the first time (Arp 2004). Beauvoir affirms the human condition is marked by the 'tragedy of ambiguity': the isolated subjective experience that nevertheless coexists 'at the heart of the world with other men' (Beauvoir [1946] 2004, 258). Punishment, in its different

⁷⁶ Foqué central claim is that values are “open textured value orientations which constantly require appropriate and culturally embodied appropriations” (Foqué 2008, 222). The ethical-legal order emerges from strong evaluations of our shared understanding of the world. Value orientations are formed by the process of adjusting the symbolic order of authority through a shared understanding achieved only by democratic dialogue. The symbolic order of authority does not derive its legitimacy from an extrinsic source because a democratic order requires it to be open.

expressions, delineates the borders of this intersubjective dilemma.

Beauvoir's inquiry rearticulates the implications of the desire for equivalence in the law of retaliation and "situates the phenomenology of revenge within the ambiguities of embodiment and the necessary failures of human action" (Kruks 2012, 161). Revenge, Beauvoir says, "retains a whiff of magic" because it "strives to satisfy some unknown dark god of symmetry" that "above all, corresponds to a profound human need" (Beauvoir [1946] 2004, 247). And yet, punishment is essentially asymmetrical, unlike struggle for survival. She wagers again, and suggests that "vengeance is not justified by realistic considerations" either (ibid.) because the one who is incapacitated can no longer do harm. "True" revenge emerges spontaneously and it is a "metaphysical" demand⁷⁷ (ibid.) which has "no goal outside of itself" (ibid., 248) and is moved by deep emotions, such as hatred. Private revenge becomes goal oriented, as it devolves into an endless spiral of injustice through false hatred and will to power. Even in the cases of "abominable" crimes where "man treats fellow men as objects" (ibid.) and reduces others to "mere panting flesh",⁷⁸ revenge does not bring the satisfaction one would hope for⁷⁹. Spontaneous revenge is preferable in the latter cases, because it reaches out to "the freedom of the evildoer" (ibid.). It is the kind of violence that can reverse the master-bondsman relationship, and thus, the victim's subjectivity is restored (Kruks 2012, 162). Yet, it could devolve into torture because punishment can never restore what was lost. Retributive punishment achieves only a temporal reversal by forcing the other to see his own 'tragic ambiguity' rather than appealing to his freedom; but without punishment, the offender might continue to act adversely upon others. Thus, revenge is contradictory, pursuing an impossible

⁷⁷ Later on, she explains what she means by a metaphysics basis for revenge. Since we are intersubjective beings seeking the recognition as subjects (not objects) of others, the affirmation of reciprocity is the "metaphysical basis of the idea of justice" which is what revenge tries to re-establish in the face of sovereign tyranny (Beauvoir [1946] 2004, 249).

⁷⁸ De Beauvoir reflected on this through the experience of the rape of Djamilia Boupacha in the Algerian War (Kruks 2012, 162).

⁷⁹ She wrote "...we said ourselves in an outburst of anger 'They will pay'. And our anger seemed to promise a joy so heavy that we could scarcely believe ourselves able to bear it. They have paid. They are going to pay. They pay each day. And the joy has not risen up in our hearts" (Beauvoir 2004, 246).

equation, which is why Beauvoir suggests it can never be satisfied “except in paperback novels” (ibid., 250)⁸⁰. After casting serious doubts about whether revenge can be grasped “in its spontaneity” (ibid, 247), Beauvoir suggests that this failure may accounts for the “elaborate forms” created by society to envelope the spontaneity required for revenge (ibid), including the law and criminal justice institutions.

Founded in the failure of grasping the spontaneity of revenge, institutional punishment is no less prone to repeating the failure because signification for punishment is drawn from the concept of universal rights. On the one hand, criminal courts can be likened to vigilantes because both justify avenging an injury of an anonymous universal ‘other’, while acting like a sovereign consciousness with the authority to make others pay for a crime. To sustain the authority of the law, trials perform “a comedy of words” whereby the whole process is “designed to endow the sentence with the greatest expressive power possible” (Beauvoir 2004, 252). Yet, retribution by third parties is “cut off from its base of passions” (ibid., 251). Legal punishment, though preferable over private revenge, becomes a ‘symbol’ of the state’s will to punish justified in the name of abstract social justice.

Beauvoir’s insights are profoundly shaped by her concern with temporality which creates a distance between the offender and the offence as well as the desire for revenge. The offender appearing in the trial is no longer the sovereign consciousness that acted as if was not bounded to others; but a fragile individual who is often punished for something other than the crime itself. Legal punishment always aims at something beyond itself, such as the abstract morality of a formalistic law or the political ends that characterize utilitarianism. Courts fail

⁸⁰ A privileged case of punishment would be one where the victims themselves take action against their perpetrators. She gives the example of concentration camp inmates who massacred their S.S. jailers. However, it is also impinged by failure because the situation of the jailers had changed. Kristiana Arp argues that Beauvoir, who did not sign the petition against Brasillach’s death penalty, should be judged against the context of the German invasion of France in the 1940s. In existential terms, she made a choice attuned with the exigencies of the situation (Arp 2004). There were people who chose otherwise, like the men and women who assisted the Germans rather than joining the Resistance. In the novel *The Blood of Others* (1948) Beauvoir fleshes out the moral dilemmas of her times and people around her in the novel’s characters: the failure of pacifism and the need to assume responsibility for the blood spilled to achieve political goals.

to address the singularity which reduces subjectivity into an “abstract symbol” of the values rejected by society. Moreover, the legitimacy of those who enforce punishment is questionable. The judge obeys commands of the law while popular revenge expresses passion and will but it risks becoming into tyranny and is prone to punishing innocents. Interestingly, the judge and the offender mirror each other’s ambiguity. Both represent the failure of “every attempt to compensate for this absolute event that is the crime” (Beauvoir [1946] 2004, 258).

Legal institutions punishing a crime can only grasp the “mirage of exteriority” (ibid., 255), that is, a story about a crime disconnected from the situation of offenders and victims. Neither retributive nor utilitarian punishment can grasp the interiority of a person because subjectivity is not something fixed, but constantly changing in the situation of the self with others. Recall how the concept of situation in existential phenomenology is defined by embodiment, a concept that is far more encompassing than personal biographies or circumstances. Beauvoir articulates this point more clearly in *The Second Sex*, where she asserts that embodiment is “not a thing, it is a situation: it is our grasp on the world and the outline of our projects” (Beauvoir [1949] 2011, 46). Embodiment includes the historical and political milieu but also temporality.

And what does that mean for punishment? Before we analyse the implications of introducing temporality to the analysis, I want to stress that crux of her argument is that the equivalence between crime and punishment is *far from* being equivalent. Abstract justice is haunted by failure because it “gives up linking the crime to the punishment” (Beauvoir 2004, 254), but none of the expressions of punishment analysed achieve the impossible aim of establishing a bond between offence and penalty. In conclusion, the essay stages the impossibility of equivalence at every stage of the analysis, *resisting* the compelling passion of revenge but also the alluring purity of abstract legal processes. Her reading compels us to

abandon and constantly question facile equivalences in penal discourses that offer the “serene recovery of a reasonable and just order” (ibid., 259).

iv. Punishment and vulnerable subjectivity: Failed equivalence

To bring the arguments home, let us recapitulate a few ideas. Punishment theories eliminate the ambiguity of the situation where individuals are sanctioned for an offence. Laws represent temporal values of a community and existential dilemmas about justice. However, the temporal dimension is lost in ideological or theoretical abstractions, reducing the substantial content of the law to a ‘mirage of exteriority’. We have discussed at length the disembodiment of the history of punishment, criminal law, and the legal subject. Ambiguity troubles the rigidity of concepts, laws, or norms, which are no longer temporally situated and shows how seemingly disconnected entities are relationally constituted. The refusal of ambiguity is equivalent to the refusal of the embodiment of subjectivity in favour of a disembodied rational legal subject, in as much as a disembodied criminal law. There are limits to what the trope of ambiguity can offer criminal justice. Norrie finds a space for ambiguity and ambivalence, but does not consider how ambiguity has been gendered. Patriarchal societies resist and abject the liminal, the woman who is not one, a view on femininity where motherhood ensures the political survival of a community. Another view worth signposting is how Norrie, like Derrida, adopts ambiguity to open up the narrow field of identity thinking yet fails to acknowledge ‘borrowing’ the generative metaphor of the maternal (Oliver 1995).

To understand both the disembodiment of the legal subject and of criminal law, we might need to look back at the injurable or vulnerable body, including ‘the body of the condemned’ as Foucault’s famously expressed (Foucault [1975] 1995). Pain was a great part of medieval punishment and yet, physical pain gradually ceased to be a form of punishment

(Shoemaker 2001)⁸¹. The humanist discourses of European Enlightenment appear to have displaced the regulation of behaviour to the soul rather than the body (Foucault 1995; Shoemaker 2001). Yet, what is the significance of pain in contemporary accounts of punishment? Have we effectively eliminated pain and if we haven't, why is it unrecognizable through our current schemes of intelligibility? Scholars have been often drawn to Friedrich Nietzsche's *On the Genealogy of Morals* (1887) to understand the metamorphosis of the subject of pain and what it has meant for criminal law, ethics, and punishment. A common interpretation is that pain gradually moved into the background of modern society's consciousness through a new form of thinking about causality. If one could foresee the causes of suffering, one could also control and limit them. The humanitarian project which sought to eradicate bodily suffering took foothold only once "causal thinking and consequential planning had taken root" (Shoemaker 2001, 23). Physical pain, in Foucault's analysis, accompanied punishment but did not define it. Yet, the body continued to be an intermediary for the new forms of punishment (ibid., 25).

Mariana Valverde agrees that the legal doctrinal principles of orthodox subjectivism⁸² were not born from a humanist moral philosophy. Instead, concepts like individual responsibility had "their inglorious roots in practices of indebtedness and debt recovery, including the physical pain inflicted on insolvent debtors"(Valverde 2005, 68). Commercial practices created the conditions under which people became accountable (ibid.). Thus, individual responsibility is actually a misleading term for a legal practice that was analogous to "right to contract" and rooted in the accountability expected in commerce (ibid.). The reasoning is that an operable political community rests on the expectation of predictable human

⁸¹ Nietzsche looks at the German word 'schuld' which translates into guilt and debt. The etymological roots of 'punishment' stretch into a wider network of meanings and linguistic sources. In Ancient Greek, *poina* meant punishment, particularly retribution

⁸² As Valverde points out, "Nietzsche would side-line all inquiries into criminal 'intent' or *mens rea*, because one thing he and Freud would agree on is that people never really know what they are doing" (Valverde 2005, 81).

behaviour. Promises would ensure the future of the community, for example, the promise to abide a contract. Yet, promises were not enough to guarantee safety, unless promises were backed up by memory. And how do we remember? Pain, according to Nietzsche, “was the most powerful aid to mnemonics”(Nietzsche [1887] 1989, 61). The infliction of pain prevents forgetting one’s debt. Memories of pain were burned into the will so that one would not will again (Butler 2014a). Yet, there is a paradox between memory and forgetfulness (Valverde 2005). If I remember the injury done by my neighbour and do not actively seek to forget, life between us might be impossible because I would seek revenge for it. Without forgetting political life could be paralyzed by resentment, an incessant cycle of revenge and violence to have our debts repaid. To make someone feel guilty was to make them internalize the blame through physical punishment:

With the help of such images and procedures people finally retained five or six “I will not’s” in the memory, and, so far as these precepts were concerned, they gave their word in order to live with the advantages of society—and it’s true! With the assistance of this sort of memory people finally came to ‘reason’! (Nietzsche [1887]1989, 64).

The legal subject of reason allegedly masters his destructive emotions by burning the memory of pain in guilt (Butler 2014a). Judith Butler expands on Nietzsche’s text through Jacques Derrida and Sigmund Freud, suggesting that the guilt is pain turned inwards: a form violence against one-self but also as a form extreme cruelty on behalf of the punisher (Butler 2009c). Before going into a few of the details of her reading, it is important to consider how liberal legalism forged the subject of promises through moral guilt (Valverde 2005, 70) rather than fostering an ethical stance which requires the affirmation of a “temporal, struggle, and fluctuating forms- not a transcendental judgement or rule of morality” (ibid.,82). Instead, the liberal subject was institutionalized in the social contract model, which established the “belief that the future and survival of the social/political establishment would be ensured through the

promise of its subject” (Valverde 2005, 75). Promising to repay debts ‘solved’ the problem of future’s uncertainty because one could calculate human behaviour. In other words, to mitigate one’s vulnerability, understood in its most literal sense, as the possibility of being injured.

Surprisingly, Shoemaker is not convinced that pain was simply pushed to the periphery of punishment through internalization of pain through guilt. Instead, he suggests that what has changed is our intelligibility of pain to the point that we are no longer able to register it. Surely, one feels the sensorial experience when one gets hurt or cut. That is not the kind of intelligibility Shoemaker is pointing out. Instead, he stresses how pain was intelligible and had a redeeming meaning for the medieval and ancient regime, while the modern episteme on pain sought to control, avoid and employ it as policy tool. In other words, what has changed *is the relation with pain*, something external to the subject and mastered by human agents (Shoemaker 2001). This relationship is crucial to understand also what kind of relationship has been fostered in contemporary law and politics towards the trope of vulnerability and what it means to stress vulnerability in the context of criminal law and drug trafficking offences carried out by women. Yet, even as the link between pain and punishment morphed, the bond remains hauntingly embedded in the penal equation, and has become an ‘indestructible idea’ (Butler 2014a) which, echoes how Beauvoir also characterised the formula of punishment as something that retained something of a whiff of magic.

The next section examines Judith Butler’s interpretation of Nietzsche’s debtor-creditor relation through Derrida’s lectures on the death penalty and Freud’s theory on cruelty. Her account is important because I think she is providing a reading of how there is an intensification of the debt towards society that offenders cannot ever really repay, and thus, something that increases the precarity of people who confront the criminal justice institutions. I interpret her reading as a critique of the unresolved tension between deterrence-retribution in the current expressions of power, which will be discussed in depth in chapter V. For now, my focus is

only on retributive-deterrence,⁸³ which in light of Butler's reading on punishment, appears as a style of punishment which increases the precarity of people because drug laws extend a debt on offenders they can never repay. In other words, the failure of the equivalence between punishment and crime is completely masked by the logic of securing the future through the management, pre-emption of risks, and punitive approaches to crime. In the brief reading presented here, I wish to highlight again the critical function of ambiguity and pointing out the ambivalence of socio-political life. This will be further expanded in chapter IV and V, where I explain what vulnerability means for subjectivity, politics, and justice. For now, we need only attend to the production of precarity⁸⁴ facilitated by the rationality of the debt in criminal law which has displaced pain and injurability from our frames of intelligibility. In short, masking injurability and displacing it to the offender's whose debt to society is incalculable and clearly exemplified in the judicial discourse on drug trafficking.

v. *Unlimited temporality of punishment*

Perhaps the 'magic' or indestructibility of the penal equation has to do more with the impossibility of ever paying a debt, the impossibility of the penal equation implicit in Beauvoir's account of the failure of punishment. Butler's analysis on punishment shows how, as "field of suffering is pervasively economised, and the contract becomes the salient model for human exchange" (Butler 2014a, 31), there was also a shift in the relation and conception between *punishment*, *subjectivation*, and political relations. Guilt, internalized in the psyche, became a perpetual payment and a debt never fully paid (Butler 2014a). In that sense, the

⁸³ Indeed, Butler explains how, in Nietzsche's Genealogy of Morals both deterrence and retributivism are underpinned by a kind of "cruelty – indeed, 'festive cruelty' [...] This is explicit in Bentham's reflections on punishment, but it can also be found operating in a more subtle fashion in Kant's categorical imperative, which, Nietzsche claimed, 'reeks of [*reicht nach*] cruelty'" (Butler 2014a, 31).

⁸⁴ Judith Butler uses both the term precarity and precariousness. Janell Watson explains how Butler "makes a careful distinction between "precariousness"—the corporeal vulnerability shared by all mortals including the privileged, and "precarity"—the particular vulnerability imposed on the poor, the disenfranchised, and those endangered by war or natural disaster" (Watson 2015). The main difference is that everyone is precariousness is an ontological condition while precarity is "distributed unequally" (Butler 2009a, xvii, xxv, 25).

subject punished in advance for the failure to calculate her actions. So while the debtor never really fulfils the contract, the “creditor is always punishing, and always enjoying that apparently infinite task” (ibid., 31). Reading through Freud’s theory of cruelty,⁸⁵ pleasure accompanies this infinite task of punishment. The whole engine of this economy of debts is never to become ‘whole’ again, to pay the life taken by the murder. Instead, the model of the social debt morphed into the prison institution “so that sentencing becomes a way of regulating, and extending, the time of debt” (ibid.). Sentencing for drug trafficking offences exemplifies the extension of debt, such as when judges’ state how drug supply causes a harm to others that is “incalculable” (BBC 2010). Considered a victimless crime, but at the same time, drug trafficking offences have attracted sentencing averages comparable to serious violent offences (Sentencing Advisory Panel 2009). This logic is not exclusive to drug offences, but according to Derrida, it is the underlying rationality of the enlightened humanitarianism which sought to eradicate violence on the body, inadvertently stretched the temporality of punishment through the repression of aggressive tendencies (Derrida 2014; Butler 2014a).

Still, violence, pain, and suffering were not eradicated from social and political life; what changes is the relationship to it as well as the methods and strategies to regulate it. The best example is how utilitarian punishment extends the cruelty of punishment through long prison sentences, which in the US, has affected a specific demographic, namely racial and ethnic minorities (Butler 2014a). However, deterrence does not offer a better solution to the problem of securing the safety of the social future by extending the time of punishment directly on the life of the condemned who can never repay such debt. An example of this is how generations of black men and women in the US have gone to prison through the ‘war on drugs’ (American Civil Liberties Union 2003). Returning to Butler’s analysis, she also explains how Derrida suggested that death penalty abolitionists were not moved by good intentions but by a

⁸⁵ Butler reviews *Civilization and its Discontents* (1930) and *Beyond the Pleasure Principle* (1922).

repressed aggression. Yet, Butler finds a problem with this analysis, namely that “Derrida’s dialectical inversion [...] relies on the [Freud’s] death drive, or its principal exponent, aggression, as the only motive operating in the scene” of punishment (Butler 2014a, 32).⁸⁶ In that way, Derrida posits the problem of violence as inevitable, a criticism which echoes Beauvoir made about Sartre’s ontology of the social subject. And in the context of criminal law, this translates into a law that cannot be anything but violent, even when it poses itself as benevolent as Enlightenment theories of punishment did. Although Butler does offer a set of possibilities in her reading, my aim here is only to highlight her affirmation of ambivalence, as a reminder that violence can be undercut although not wholly eliminated from the passionate relations that characterize political life:

There is no overcoming ambivalence in love, since we are always at risk of destroying what we are most attached to and vulnerable to being destroyed by those on whom we are most dependent (ibid., 32).

In other words, the death drive and the pleasure principle mark this ambivalence, or rather, can be directed into an agonistic struggle (ibid.) between two incompatible forces at work in punishment. Both motives, the wish for someone to live and to die, try to coexist despite their complete incompatibility. Read otherwise, these two forces represent in a way the failure of punishment which Beauvoir noted in an *Eye for and Eye*, the impossibility of the penal equation. Still, Butler goes beyond Beauvoir, by suggesting the relationship between aggression and protection of the social bonds must be posited beyond relations of contract which authorize incarceration as social management and the death penalty as a form of

⁸⁶ Butler reminds the reader about Derrida’s frankness on this issue. The problem with the diagnosis on cruelty is that it appears to be ‘original’, a pre-disposition that morality and abolitionist discourse could not erase by repressing it through guilt or benevolence. For Derrida, the benevolence of Beccaria or Bentham is worse than open cruelty because it is masked by rhetorical formulations which extend the time of punishment (Butler 2014a; Derrida 2014).

eliminating the ‘wretched bonds’ (Butler 2014b). Specifically, she redirects the attention to vulnerability. Drawing on the work by Melanie Klein, Butler argues that since “individuation is never complete, and dependency never really overcome, a broader ethical dilemma emerges: how not to destroy the other or others whom I need in order to live” (Klein 2011; Butler 2014a, 32). Although the prospect of dependency and vulnerability to others is both comforting and terrifying, the uncertainty in relation to violent futures cannot be overcome simply through the social contract and criminal law’s formulations which eliminate the ambivalence of social life. The more extreme version of the desire to overcome vulnerability (understood as relationality) is in the neoliberal logic that seeks to manage and control human action through a managerial approach to law, which in turn, reifies the vulnerability of both offenders and victims of crimes (Foqué 2008, 227). Guided by the logic of calculation, the criminal justice system fails to protect individuals against processes of *reification* and *disrespect* (ibid.) which he translates into a pervasive *precarity* (Butler 2006; Butler and Athanasiou 2013). Foqué suggests that if our criminal justice today has become characterized by a neoliberal governmentality, it is because the conceptual language of law has been infused by the *logic of the market* and *possessive individualism*. The agonistic space of value-formation foreclosed or “eclipsed”⁸⁷ the inter-subjective field of action and inter-personal responsibility because all choices “appear as being dominated by the systems theory view of control, management and predictability” (Foqué 2008, 222). So far, this chapter has laid the foundations to the critique of the legal subject, punishment in liberal theory through its relation with embodiment and particularly, the body in pain, which is the subject of the next chapter. The following chapters will return to the relationship between relationality and vulnerability; precarity and the forms of power already

⁸⁷ Eclipse phenomena present narratives of the world as naturalized orders. They form ideologies in the sense that the latter becomes the predominant world view.

hinted here through Butler's analysis; and to the potentialities of ambiguity to undercut and uphold the agonistic struggle against the violent effects implicit in the rationale of punishment.

5. Conclusion

This chapter has sought to explore the multiple implications of ambiguity in criminal law in order to relate embodiment with penal theories. The first section explained how the emergence of a focus on the internal states of mind of offenders occurred while revenge-based justice was allegedly sublimated by a civilizing approach to punishment that respected individual autonomy. Criminal legal doctrine based on universal principles has been more akin to a corpse as opposed to a historically situated and living-body of law. Norrie calls our attention to ambiguity and ambivalence in criminal law, first as an expression of the fault lines in the doctrine but ultimately to signal the abeyance of relationality. His approach offers a map to unsettle the disembodiment of modern criminal law, but Norrie does not address the male body implicit in the concept of legal personhood nor the symbol of the feminine in ambiguity. Although Beauvoir was conscious of embodiment, she did not take it as far as explaining the genesis of the legal subject. Instead, she moved ambiguity to its paradoxical limits, the possibility-impossibility of justice through punishment.

Beauvoir's account of embodied life calls our attention to the dilemmas of politics and ethics, but also the problems arising from the practices and ideas of punishment which deny ambiguity. Thus, the apparatuses of punishment (the ideas and practices that justify its application) 'flee' from ambiguity rather than accept it and struggle with the questions that arise from the impossibility of a perfect penal equation. The failure and pervasiveness of the penal equation⁸⁸ and its relation to the problem of living together are important threads that

⁸⁸ Beauvoir never references Nietzsche's *Genealogy of Morals*, but it is probable it was part of her philosophical formation at the Sorbonne.

relate the so-called modern punishment with its predecessors. But more importantly, the pull away from ambiguity is also a movement away from relationality and the interdependency in socio-political life.

IV. Vulnerability and Subjectivity: Law, Pain and Embodiment

1. Summary

This chapter explores the connections between vulnerability and the experience of pain to show how and why embodiment has been excluded from notions of subjectivity in law. By drawing on the critiques to the mind-body relation, the inquiry suggests that dualistic epistemologies bear structural similarities with the Cartesian (mis) reading of the body in pain. In other words, the reading suggested here suggests there is a positive valorization of reason and denial of embodiment (discussed in the last chapter with reference to legal personhood in criminal law) because of the relationship between consciousness and the body in pain. While addressing epistemological issues, this chapter extends the analysis to the political sphere, questioning how knowledge is deployed to mobilize the protection of wounded or woundable bodies. Following the approach on ambiguity crafted before, it suggests that there is both an ambiguity underpinning the political phenomenology of the body in pain. By showing the ambiguous relation between the body in pain and discourse (instead of radical duality), one of the aims is to show the limits when one speaks about the victimhood of others but also ethical dilemmas opened up by the need to respond to others. This is because the image of the wounded body, often equated with vulnerability (chapter I) is underpinned by the affective intensities fleshed out through a phenomenological analysis of pain. Mindful that vulnerability exposes relations of emotion and power, rather than atomised wounded/woundable bodies, my aim is not to equate vulnerability with the wounded bodies or bodies in pain. Instead, the objective is to point out that vulnerability is marked by the ambiguous relationship with the body in pain/wounded body: bodies are open to appropriation by others discourse but on simultaneously resist representation.

2. Law and the embodied enclosures against injuring

As explained in the last chapter, one of the dominant models of legal personhood underpinning criminal law has been the rational subject stripped of embodiment in order to become a socially and politically accountable actor. Seeking an alternative account for legal personhood, Martha A. Fineman (2008) proposes that subjectivity is defined by its universal vulnerability which etymologically points to states of ‘injurability’. Vulnerability denotes the *potential* of suffering pain where the body is exposed, opened by an injury or open to being injured. By reclaiming the fragility of the body, Fineman seeks to construct a fuller account of the legal person through the notion of vulnerability, one that does not rely on a disembodied ‘rights’ model. Instead, she adopts a broader definition which factors human vulnerability into environmental catastrophes, embodied propensity to injury and illness, as well as economic and institutional abandonment (Fineman 2008a, 9–10). I agree with Fineman’s gesture towards reclaiming “a more complex subject around which to build social policy and law” (ibid., 1). However, deploying the concept of vulnerability correlated to injurability, fragility, and suffering does not necessarily deliver the kind of state responsibility Fineman seeks to engender, as I will explain in more depth in this and the following chapter. Fineman’s account does not question how vulnerability responses to negative states of being require a critical inquiry. Starting from the phenomenology of pain and how it has shaped the ontology of the subject, this chapter traces the methods and techniques which serve to alienate, appropriate, or deny vulnerability. Like vulnerability, pain is part of the human condition, but it is differentially distributed, and open to political appropriation.

Now, let us examine the trope of the injury. From a legal perspective, a physical wound is simply defined as the breaking of the layers of the skin.⁸⁹ Of course, this conception, which

⁸⁹ *Moriarty v Brookes* [1834] EWHC Exch J79

can be found in sections 18-20 of the Offences against the Person Act 1861, offers both a limited definition for injurability. Moreover, such an apparent and immediate common sense definition of wounding is not as transparent as one might assume. In general, criminal law is given the task of limiting embodied vulnerability (Foqué 2008). More than just an arbiter of human relations, the law mediates the definitions and distinctions which prompt the recognition of injurability in the first place. Additionally, wounding and injury are not synonymous although they are metonymically related. Although the law is populated by injuries or, more commonly termed, ‘harms’ (from tort law to criminal law) neither injury nor harm is necessarily embodied or physical.⁹⁰ In general, the connection between the phenomenal and linguistic basis is assumed to be unproblematic⁹¹ but in fact, the delineation of a legal injury is highly dependent on social relations mediated by law. Whether a harm is self-evident or not is not depends on the social location of the injured party (Conaghan 2002, 322) because the concept of harm itself is a “product of social relations and the meanings they generate” (ibid.). Social relations significantly determine the meaning of harm or injury as well as its legal significance. Where an injury was previously invisible, the law can make it intelligible, recognizing the ‘wrongness’ of an intervention. For example, until fairly recently, marital rape was not a harm which the law recognised as such.⁹²

In the production of legal meanings, the body marks a limit upon access to others, although not categorically. As criminal law students learn early on, consent often serves to draw a line between the legality and illegality of bodily interventions. For example, socially sanctioned situations, such as boxing, surgery, and tattooing are legal so long as they are

⁹⁰ For example, in criminal law, harm is not limited to physical injuries, but can also encompass psychological trauma (for example, in the Offences against the Person Act 1861) or in rape, where the injury is the denial of sexual autonomy.

⁹¹ The study of harm is central to legal theory and has been the subject and basis of much legal scholarship. However, the connections with the phenomenology of pain seem to have been largely circumvented.

⁹² In England and Wales, the House of Lords determined in *R v R* [1992] 1 A.C. 599 that the lawfulness of marital rape was an unsustainable legal fiction.

consensual and do not reach a specific threshold of harm. In contrast, sadomasochistic practices, even when consensual, are not legal. The rejection of BDSM⁹³ in *Brown*⁹⁴ could be interpreted as a rejection of sexual desire expressed through physical violence. Yet, there is also an argument that the law defines what appropriate sexual desire should be. Male bodies have been construed in the law as if they were hermetically sealed from the intrusion of others (Naffine 1997) while female bodies have porous boundaries, open to male sexual desire and until 1991, presupposed through the contract of marriage.⁹⁵ Historically, marital rape exemptions made invisible the implicit violence or transgression to women's sense of self (Du Toit 2009), part of a consistent pattern whereby the criminal justice system has aided the reconstruction of harmful non-consensual heterosexual acts as 'just sex' (Conaghan & Russell 2014, 39).

The relations, intersections and roles performed by the law in regulating, punishing, allowing, or even inflicting injuring, are too vast to cover here. My aim is to take a step back, and uncover what is beneath these legal boundaries and enclosures.⁹⁶ We saw in the last chapter how embodiment has a somewhat troubled relation with reason, and yet, a feminist reassertions of the body may backlash in ways which do not enable or empower marginalised subjects. Before rethinking the boundaries of legal personhood through vulnerability or the possibility of being injured, I suggest that we first take a step back and examine the experience of pain – and its related modalities such as vulnerability, suffering, discomfort, alienation, dependence, and isolation, amongst others. Secondly, I want to consider how those affective expressions of vulnerability play out along the lines of gender norms, a task examined in the next chapter (V). The argument presented here lays the foundation for the next chapter, which proposes that

⁹³ BDSM stands for bondage, discipline and sado-masochism.

⁹⁴ *R. v Brown* [1994] 1 AC 212

⁹⁵ *R v R* (n 92)

⁹⁶ An enclosure is characterised by fences. English authorities enclosed common land throughout the 18th and 19th century, and turned it into private property. The terminology has been chosen carefully, hinting at the processes whereby possessive individualism (closed subject) coincides/intersects with the enclosure of lands.

vulnerability has been feminized and in that sense, one must question the sexual politics of injurability. The feminization of vulnerability operates along the lines of the body/mind dichotomy (Bergoffen 2003) inter alia perpetuating the belief that “women are somehow *more* biological, *more* corporeal, and *more* natural than men” (Grosz 1994, 14). The insidiousness of this epistemology is particularly apparent in legal discourses around women drug mules, whose subjectivity is re-constructed through narratives of motherhood, sexual partners, and sexualized bodies (chapter II). To understand the enclosures of the body along gendered lines and the abjection of embodied vulnerability in law, we must go back to the phenomenological basis of the mind/body dichotomy and how this model of subjectivity was shaped around a reading of the body in pain.

3. Descartes’ Error: Pain and subjectivity

Pain has been described in many ways: a neurochemical sensation with lasting implications and an intricate relation with the psychic dimension, expressed in the forms emotions and feelings of pain⁹⁷ (Damasio 1995). It has also been called an *affect* (Gregg and Seigworth 2010a),⁹⁸ a sensibility (Rua Wall 2008), an experience that morphs into grief, anxiety, violence or even a state of being effected by its powerful hold over one’s consciousness (Vetlesen 2009). Science has many approaches to pain. In neuropsychology, pain is considered a pre-cognitive response which spurs a ‘fight or flight’ action. Pain’s stimulation affects the psyche in such a way that it “alters cognitive processing in a manner that fits the state of fear” (Damasio 1995, 131). The body’s heart rate, breathing, and blood pressure increases, eliciting a demand on our

⁹⁷ Antonio Damasio differentiates between emotions and feelings (Damasio 1995). Emotions are direct sensory experience which have no mental representation whereas feelings do have a mental representation. They involve a feeling for someone, or a feeling about someone or something and this implies knowledge (Hacking 2004).

⁹⁸ Melissa Gregg and Gregory Seigworth argue that “affect, at its most anthropomorphic, is the name we give to those forces -visceral forces beneath, alongside, or generally other than conscious knowing, vital forces insisting beyond emotion - that can serve to drive us toward movement, toward thought and extension, that can likewise suspend us (as if in neutral) across a barely registering accretion of force-relations, or that can even leave us overwhelmed by the world's apparent intractability” (Gregg and Seigworth 2010b, 1).

psyche (ibid.). In phenomenological terminology, pain's demands are *telic*,⁹⁹ forcing consciousness to pay attention to the body (Leder 1990).

Rene Descartes is best known in the humanities and social sciences for the description of the reasonable subject who is radically distinct from the body he/she inhabits. He is also known in science for giving one of the first scientific explanations about the mechanism of pain. The *Meditations on First Philosophy*, first published in 1641, delves on both the biological mechanism and the experience of pain including the question of the reliability of the senses perceiving pain which he described as one of the most “intimate” experiences with the body (Descartes [1641] 1998, para. 77). Through the method of doubt, the meditation follows the trajectory from the subjective experience of pain, to the objective perspective of the anatomist. The purpose is to find truth and dispel errors. Pain appears in the conclusion of his Sixth Meditation. He describes pain as a disturbance that travels through a fibre network leading to the brain. Physics teaches him that the mind is affected and moved by the pain registered by the nerves. Moreover, it is a sign of the goodness in God, who bestows the body with the ability to note a problem and ensure one's survival. As he observes, the mechanism of pain “provokes the mind to do its utmost to move away from the cause of the pain, since it is seen as harmful” (Descartes 1998, para. 88). Yet, pain signals may be confused by the mind because the sensation radiates in other locations, making it difficult to locate anatomically its origin.

The basic elements of this explanatory model have not changed that much over time although much more is known today about the biochemistry of pain. While science today still explains pain sensations as registered by a complex network of nerves, Krashin et. al emphasise the distinction between nociception and pain. Nociception is the name given to the process of pain, when nociceptors are nerve cells that send signals to the brain (Krashin et al. 2014).

⁹⁹ *Telic* means to have a purpose or an end.

Nociceptors transduce a mechanical, thermal, and chemical signal, which means that they turn the physical data into a nerve signal (ibid.). Pain includes nociception, but it more broadly “a complex human experience... which can only be expressed in personal terms and involves sensory, psychological, and cognitive components” (ibid., 107). After a signal of injury is sent to higher systems in the brain, the process includes the creation of a “pain memory,” processed thereafter in the limbic system. The pain memory becomes the “foundation for an individual’s response to, and ability to cope with, pain in later life” (ibid., 110). The knowledge of the event of pain occurs through the combination of sensory/discriminatory and emotional pathways in the brain.¹⁰⁰ In other terms, the individual registers the event and includes additional information about location and intensity, how it feels, and the meaning of pain.

Although the molecular and neural basis of pain is a fascinating field, my point in laying out this explanation is to stress that although pain is a physiological process, medical studies agree that the boundaries between physical and psychic pain are not clear-cut (Bendelow and Williams 1995; Duncan 2000). The physiological basis is only part of the story of ‘the biology of suffering’ (Krashin et al. 2014). Emotional factors in the higher part of the neural system processing pain remain obscure to science, while biomedical treatment has been able to mitigate to a large extent ‘visible’ causes of pain, such as damaged tissues (ibid.). Moreover, in *Descartes’ Error* (1995), Antonio Damasio¹⁰¹ argues against Descartes idea that reason is a separate substance from the perspective of neurosciences. Damasio’s research on patients who had anosognosia, which is the inability to register pain and illness, led him to conclude that cognition *is* embodied and reason is emotional (Damasio 1995). People with anosognosia or

¹⁰⁰ The sensation/discrimination pathway corresponds to the thalamo-cortical, which carries information about the intensity and location of the stimuli, whereas the emotional transports the nociceptive signals (Krashin et al. 2014).

¹⁰¹ My engagement with Damasio’s work attempts to make no particular statement about whether he is viewed as being right or wrong. Engagement with his work by others working in the discipline of philosophy/and political philosophy include Samantha Frost’s *Lessons from a Materialist Thinker: Hobbesian Reflections on Ethics and Politics* (2008); and the edited collection of Daniel M. Gross, *The Secret History of Emotion: From Aristotle's Rhetoric to Modern Brain Science* (2008), including consideration of Damasio’s more positive view of Spinoza over Descartes, taken up by affect theory proponents (Bertelsen and Murphie 2010). For an interesting discussion, see also Ian Hacking’s book review “Minding the Brain”(Hacking 2004).

damage to the different sections of the brain that register feelings and emotions, showed disturbances in behaviour and decision-making that can hardly be described as ‘rational’. For example, anosognosia prevents people from registering emotions related to tragic news or even noticing that one is experiencing an illness. In their minds, their bodies functioned normally but they were also unable to plan, imagine a future or be concerned about others (Damasio 1995). Through neuropsychology, Damasio turns around the belief that good judgements should be emptied out of emotions because they impair reasoning. While grossly oversimplifying Damasio’s research,¹⁰² my aim at this point is to introduce the relationship of affects such as pain with embodied/disembodied ideations of subjectivity and the effects of Descartes’ famous *Meditations* on the rational subject mirrored in law. Crucially, Descartes’ conclusion that reason was disembodied was partly shaped by his inferences on pain which can themselves be questioned.

4. Pain as phenomenon: Cartesian ontologies of experience

Pain and emotional suffering are connected but not all pain causes suffering, just as not all emotional suffering is caused by physical pain (Leder 1990; Vetlesen 2009). Instead, the research points at the neurobiological connections between the physical and the emotional (Krashin et al. 2014, 119). The radical distinction between physical pain and emotional pain is an unsatisfactory duality challenged not only by the neuro-biological research described above, but also through philosophical analysis. Arne Johan Vetlesen argues through phenomenology,

¹⁰² For example, Ian Hacking tries to understand Damasio’s work, particularly how he portrays a person as a “‘nested triad’ of mind in brain, and brain in body’ set in the background of natural selections. Notably, the study of the ‘living brain’ in neuroscience is a phenomenon of the twentieth-century. Before then, the secrets of this organ could only be explored on “the walking wounded, impaired in life, and dissected in death” (Hacking 2004). Hacking suggests that Damasio is not giving a theory of emotions but repeats, one could say, Descartes’ error. Damasio is an anatomist, much like Descartes, who thinks in terms of body parts and evolutionary biology. So, Hacking argues, “when Damasio sees physiological evidence for a more recently evolved layer of the brain that is doing specific work, he wants a word for what is going on there. Hence his forced and artificial splitting of meanings of words such as emotion and feeling” (ibid.).

existential philosophy and object-relations theories, that pain is part of the human condition. Pain transcends the classical body-mind divide; it is experienced as a state of being, something that gives meaning to our being-in-the world (Vetlesen 2009). Thus, it would make little or no sense to explore pain and vulnerability from the illusory perspective of the self-bounded individual. Moreover, if vulnerability refers to the propensity to become injured while pain directs the attention to the experience of that injury, the boundaries between them are more tenuous than at first seems. Phenomenology opens up the possibility of understanding how pain and vulnerability are intricately implicated in each other, with both pointing at ways that meaning is ascribed to our relation with the world as embodied and relational subjects.

How does phenomenological, as opposed to biological, analysis help us understand pain and its connection to vulnerability? The phenomenological approach has been widely used in pain studies to draw information about the experience from interviews, narratives, and texts (Osborn and Smith 2006; Biro 2010) although, as a method, it is not without criticism because there is a danger of overgeneralizing on the basis of one's subjective standpoint could generalize other's experiences (Murphy 2012a). Phenomenology, crudely defined, is the study of structures of consciousness experienced from the first person perspective. One of the objectives of phenomenology as a philosophical method is to study 'lived experience' in contrast to controlled experience, such as studying the body or body parts in a laboratory. In short, phenomenology seeks to give an account of human beings which is different from that of the logical positivist sciences. Still, phenomenological approaches assert there are underlying structures of lived experience, that organize those experiences (Husserl 1983) but they do not consider phenomena to be 'out there,' as if separated from consciousness (Lavery 2003). Thus, Maurice Merleau-Ponty,¹⁰³ among the most influential twentieth century

¹⁰³ Feminist scholars have responded to Merleau-Ponty's attention to the centrality of embodiment in subjectivity. See the essay collection *Feminist Interpretations of Maurice Merleau-Ponty* (Olkowski and Weiss 2006), which maps the influence, appropriations, and critique in feminism. Luce Irigaray and Simone de Beauvoir criticized

phenomenologists, disagrees with the idea that a universal consciousness receives meanings attached to certain contents or objects (Merleau-Ponty 2002, 46) or that the body is an instrument by which to perceive the ‘external world,’ collecting data which the mind then processes. Instead, in the *Phenomenology of Perception*, Merleau-Ponty disrupts the assumption of the empirical and biological sciences that the scientific observer is detached from the world investigated (Merleau-Ponty [1945] 2002; Flynn 2011). A particular problem with this detached mode of thinking is that it does not take into account how apprehension occurs even before one gains consciousness of self: “I could not apprehend anything as existing, unless I, first of all, experience myself as existing in the act of apprehending it” (Merleau-Ponty 2002, ix).

Of course, there are variants in phenomenology. Reading Descartes’ *Meditations* through different perspectives in phenomenology, Drew Leder speculates that Descartes’ ‘error’ is not only that reason is embodied. What Leder contends is that Cartesian epistemology is a motivated misreading (Leder 1990, 133) of the mind-body relation. The misreading departs from affective states such as pain, illness, disease or fatigue, where the body is apprehended as a separate ‘thing’, as an object of reason. Leder suggests we become conscious of the body in the presence of perceptual “dys-appearance” (Leder 1990, 86). Dys-appearance refers to events when “the body is remembered particularly at times of error and limitation”, reflected in “the Cartesian epistemological distrust of the body” (ibid.). Explained otherwise, we don’t perceive the body until it appears to the fore of our consciousness during experiences like pain and illness.

In contrast, the perception of disembodiment is characteristic of healthy abled-bodies. When we are healthy, the body is in a way ‘silent’; it slips into the background of

him for his lack of attention to gender, even as he made embodiment central to his philosophical analysis (Salamon 2008).

consciousness, while thoughts appear as if they were not embodied. The subject of experience, who identifies herself as “I”,¹⁰⁴ thinks she can move towards the world through the senses. Thus, Leder argues that the knowledge is not the Cartesian ‘I think’ that transcends the body. Instead, the ‘I think’ parallels the body unencumbered by limitations, able to move and cast himself or herself into the world. However, the impression of absence of the body while we are healthy encourages a dualist reading because when pain appears, the body irrupts into consciousness, claiming one’s attention (Eccleston and Crombez 1999). Yet, the body does not appear as part of the ‘I’ but as an alienated entity (ibid). Embodiment comes back to the forefront of consciousness mediated by the body in pain.¹⁰⁵ However, it also appears to consciousness as a “more Other to the self, a force opposed to understanding and will” (ibid., 132–133).

Why is this so? At first sight, it seems paradoxical that although pain forces the mind to turn its attention to the body, consciousness *thematizes*¹⁰⁶ the body part that is hurting but also objectifies it. For example, instead of saying ‘I hurt,’ we usually say, ‘my foot hurts.’ Notice the difference between these assertions: The first one implies that that *I am* in pain because pain throws me into a state of being¹⁰⁷; the second hints at an experience of separation from that which we ‘possess’. Phrased otherwise, consciousness creates a distance from what

¹⁰⁴ Leder’s argument is based on the inability of the mind to think of itself. That means, that the brain is also enfolded in the body and it conceals its own processes to the perceiver. We cannot perceive our brain perceiving an experience. Despite criticism directed at Descartes’ influence on Continental philosophy, in particular his dualistic representation of the mind-body relation, Leder argues that Descartes engaged in a ‘proto-phenomenology’. His concept of the ‘distributed soul’ evinces the idea that cognition is embodied and memory is not only located in the brain, but potentially throughout the body (Leder 1990, 109).

¹⁰⁵ Leder draws on David Bakan’s thesis in *Disease, Pain and Sacrifice* (1971) that the telic demand of pain is both hermeneutical and pragmatic (ibid., 78). One seeks to give meaning to pain and to practically eliminate it from our experience. Elaine Scarry, who will be discussed later on, draws on the same idea to outline the basic structure of pain where the experience creates an emptiness to be given a meaning but paradoxically, also resists representation (Scarry 1994; Scarry 1985).

¹⁰⁶ Thematisation is a common term in the vocabulary of phenomenology. It refers to mental mapping and organization into themes.

¹⁰⁷ “Pain splinters me. I am cracked like glass. I taste salt, my own fear, can save nothing, am ground, degraded on my own fragments, abraded featureless... And am free of pain for a brief space. A fire-talented tongue will choose its truth” (Harwood 2011, 5).

hurts (body-part); and recognizes something possessed ¹⁰⁸ by the self, acknowledged in the affirmation ‘my foot hurts’.¹⁰⁹ First, I distance myself from the pain to avoid being engulfed by it, that is, to abject the feeling of pain: I reject *being pain* so I *have pain* instead. There is a contradiction: I realize I cannot live without *a body* but in the moment of pain, I cannot recognize this painful body since my ‘normal’ body is usually silent. This body in pain impinges on my desires, possibilities, and even on my future. So, pain is an interruption which demands “hermeneutic and practical strategies of repair” to continue living (Leder 1990, 133).

Descartes’ disproportionate attention to the *dysfunctional* body is Leder’s main point of critique. The mind-body dichotomy would be less of a problem if the Cartesian epistemology did not privilege the mind over the body. The Cartesian *cogito* established an onto-valuational dualism in which rationality is not only positively valued in comparison to the body, but is also thought of as a dis-embodied or disconnected from the body. Leder faults the Cartesian model for presenting these experiences of perceived embodiment and disembodiment¹¹⁰ as ontology (ibid., 115). Ontology, in the traditional sense, is the study that questions the nature of being, reality, and existence. This is obviously a vast subject and the literature is filled with disputes about the fundamental concepts animating ontology. However, Leder stresses that the negative bias observed in the experience of pain is not necessarily an ontological fact. Affects function as phenomenological vectors¹¹¹ in the “structure of experience that makes possible and

¹⁰⁸ One of the methods of abjection of pain includes stealing suffering from the victim one is attacking to one’s own predicament. To turn around the instinct of feeling the suffering of another, into my own suffering: See Elaine Scarry’s comment on Hannah Arendt’s *Eichmann in Jerusalem: A Report on the Banality of Evil* (1977) (Scarry 1985, 333).

¹⁰⁹ As it will become clearer through Scarry’s work, in extreme pain, the body can be given the sign of a weapon, the body in torture is turned into the weapon against ‘the self’.

¹¹⁰ Leder argues that Descartes thought bodily disturbances were unpleasant and prevented the search for truth. As much as his observations were rooted in experience, the Cartesian conclusions have been “misread into a reified ontology” (Leder 1990, 132).

¹¹¹ A phenomenological vector refers to the meaning and use that “makes possible or encourages the subject in certain practical or interpretative directions, while never mandating them as invariants” (Leder 1990, 150). Edmund Husserl’s phenomenological method sought to uncover the “constitution of experience” (ibid), including what is constant or necessary in experience and what is not. In that sense, Leder also seeks the ‘invariants’ in human experience. He suggests that the ‘ecstatic and recessive nature of the lived body’ or the ‘from-to’ logic of the senses remains as a constant across cultures and personal experiences (ibid.) The difference between Merleau-Ponty and Husserl is that the former minded empirical and psychological science (Carman 1999), but he did not

encourages the subject in certain practical or interpretative directions, while never mandating them as invariants” (ibid., 150). The vector encourages an outward-going direction as in the experience of passions or the healthy body; or, as in the case of pain or illness, the vector is inward-going. The horizon of the existence shrinks through the experience of pain because consciousness is forced to turn its attention inward. Intentionality and the perception of being able to move outside towards others breaks down in proportion to the intensity of pain or the limitations of an ill body. Crucially, the particular direction of the vector depends on and is reinforced by positive or negative feedback loops embodied in cultural practices, beliefs, etc. The lived body is constantly affecting and affected; the mutually engendering structures of experience “shape social practices, and social practices shape our sense of understanding of the body” (Leder 1990, 152).

Paying attention to the affective orientations of pain matters because the way it is experienced is not solely determined by our neurobiology. Pain is not experienced the same way by everyone because other factors come into play in the structure of experience, such as cultural practices and beliefs (Leder 1990; Bendelow and Williams 1995; Damasio 1995). If pain were really, as Albert Schweitzer said, “a more terrible lord of mankind than even death itself” (Schweitzer 1998, 92), the sense of powerlessness in its grip would have thwarted many of the practices developed to limit pain and suffering in our lives. However, Schweitzer’s characterization of pain expresses important aspects that play a part in the politicization of pain and vulnerability, particularly the power of pain and the perception of inevitability in how it presents itself as an autonomous force beyond control from one’s intentions, wills and desires (Vetlesen 2009, 56). I will clarify this point in reference to Elaine Scarry’s political phenomenology of pain at the end of this chapter.

try to make a science out of phenomenology as Husserl attempted to do through a ‘phenomenological reduction’ (Luft 2004).

For now, I want to hold sight of the *ambiguity* of pain implicit in Leder's analysis. The ambiguity lies in the meaning that pain has on each person's life. This does not mean one can choose to experience pain or other affects through a false voluntarism, as Sartre suggested (Leder 1990; Vetlesen 2009) or that it has as an absolute deterministic force acting upon bodies. Instead, Leder's phenomenological and biological pain studies reflect upon the complexity of pain and present it as an affective state without Schweitzer's totalizing tones. This is not to deny the impact of extreme pain; that it can be a totalizing, absorbing sovereign power over the ego.¹¹² Pain is not simply a neurophysical event or an intrusion upon consciousness even though it is perceived as such. If the living body is our entry and reference point to being in the world (Merleau-Ponty 2002; Heinamaa 2003), pain's forceful irruption cannot be expressed through a radical separation of somatic and psychic phenomena; nor individual and social. Instead, a phenomenological interpretation of the body in pain troubles the relationship between the public and private domains, elucidating how the body is not an isolated entity but thoroughly imbricated in a network of cultural practices, sedimented meanings, and habits which favour particular ways of experiencing the body. In short and recalling the discussion of embodiment in the last chapter, pain is embodied rather than just something that happens to the body.

Drawing upon the phenomenology of pain, one of my aims is to understand how consciousness relates to vulnerability. The suggestion elaborated here is that the alienated relation of vulnerability and selfhood is an effect of the responses aimed at eliminating pain and illness. Consider the telic demand elicited by pain: when we are ill or in pain, consciousness may be inclined towards healing. However, healing is often understood as a restoration of 'normality', or the norm of the healthy body which existed prior to the event of pain or illness

¹¹² Vetlesen describes the phenomenology of pain and the relation to will succinctly: "Pain possesses an utterly sovereign power, a sovereignty that marks the limit for my belief in my own power, my freedom and my right over everything in my life, over all its significance and meaning. Pain heaves the ego down from the pedestal" (Vetlesen 2009, 52).

(Mol 2003, 121–122). To return to normality, I need to map, to thematize and locate the source of my pain. Moreover, one of the effects of the abjection of negative affects is that Western philosophies have favoured a “disembodied direction” at the expense of shaming and repressing “embodied intelligence” (Leder 1990, 152).

This ‘ontological’ valuation of the mind-body impinges upon approaches to subjectivity which consider vulnerability as a pathology (Fineman 2008b), pertaining only to persons who are not ‘normal’ according to the standard of the reasonable, able-bodied person. For example, the category of ‘vulnerable adults’ in English and Welsh criminal laws¹¹³ describes people who have cognitive or physical disabilities, are dependent on others for care, and at risk of exploitation.¹¹⁴ The legal definition applies most commonly to medical and community care cases, expressed in regulatory regimes such as the provisions of the Mental Capacity Act of 2005 and establishing a ‘fixed’ or ‘intrinsic’ characteristic approach to vulnerability defined on the basis of the capacity to reason and consent. Yet, the High Court has also adopted another interpretation described as ‘situational vulnerability’ (Dunn et. al. 2008), which widens the network of protection to individuals who are not necessarily mentally incapacitated although it is also more intrusive because the courts apply a notion of ‘pre-emptive’ protection.¹¹⁵ Extending vulnerability to a situational category in law may make sense as a better account of an embodied and relational subjectivity, but it is not clear that it is conducive to justice. Still, it is an attempt to think differently about the vulnerable legal subject, who has been traditionally pitched into a model of either a body without rational capacities or

¹¹³ Several statutes incorporate guides for the protection of vulnerable adults. For example, the Codes of Practice of the Police and Criminal Evidence Act 1984 requires that vulnerable adults who are suspects of an offence to be accompanied by an ‘adequate adult’.

¹¹⁴ The Consultation Paper by the Law Commission “Who decides?” defined vulnerable adults as someone who is “over the age of 18 who is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of him/herself or unable to protect him/herself against significant harm or exploitation” (Lord Chancellor’s Department 1997).

¹¹⁵ According to Dunn et.al., the three cases decided by the High Court that extended the scope of vulnerability to prevent a situation where the individual’s freedom to choose would be constrained were *Re G* [2004] EWHC 2222 (Fam), *Re SK* (Proposed plaintiff) (an adult by way of her Litigation Friend) [2005] 2 FLR 230; and *Re SA* (vulnerable adult with capacity: marriage) [2006] 1 FLR 867.

a rational but disembodied subject. Before we explore more about the limitations to widening the scope of vulnerable subjectivity in law, the next section explores the ambiguity of subjectivity in an effort to unpack the mind-body duality.

5. Pain and subjectivity: Shadowing Descartes

Descartes' dualism is old stuff. The idea that I am a composite of two radically distinct substances, one which is essentially me, the soul/mind, and the other which is mine but not truly me, the body, can barely find a hearing amongst contemporary thinkers immersed in the continental traditions (Bergoffen 2010, 232).

Why should the Cartesian dualism matter at all for a project that explores the legal construction of drug mules? First, we could generally agree with Bergoffen that Descartes is 'old stuff' and that the rational legal person has been sufficiently questioned as the primary model of personhood in criminal law (Lacey 2001). Yet, the mind-body dualism arguably lingers in criminal legal doctrine (Naffine 1997) and persists in the gendered lines of embodied femininity/disembodied masculinity played out in the criminal courts. As discussed in the previous section, the phenomenology of pain underpins the mind-body binary, but also the separation of physical and psychic pain as two distinct phenomena (Vetlesen 2009). Although Descartes radically transformed how people thought and treated pain - from the spiritual perspective to a mechanism of the body (Krashin et al. 2014) - the effects of this idea unleashed other complications. What I find most significant is how Descartes offered a spin-off to the thematization of pain, by doubting the perceptions of pain citing the case of 'phantom-pain' or by confusing something that could cause pain for pleasure (Descartes 1996).

Doubt and alienation from embodiment have had a profound effect on theories of subjectivity and *political subjectivity*, which Kristine Krause and Katharina Shram define as

how people relate to governance and authority¹¹⁶ (Krause and Schramm 2011). I will illustrate the influence of the mind-body dualism on political subjectivity through Debra Bergoffen's analysis of the influence of Cartesian doubt and alienation on existential approaches to subjectivity. These modalities of relationality (abjection and alienation) will be important in chapter V, which suggest these modes of relation can be seen also in the sexual politics of vulnerability. But first, I will rehearse Judith Butler's re-engagement with Descartes, which suggests the body was never really disembodied and instead, the Cartesian Meditations can be read through the lens of ambiguity. This is because embodiment subsisted as a spectre of disembodiment (Butler 1997b). Moreover, her engagement with Descartes exposes the relationship between epistemic authority and the materiality of bodies.

6. Doubting and alienation from the body in pain

In the *Meditations*, Descartes 'realizes' that the senses are not as truthful as he thought. In sleep, one might be deceived by a dream; in madness, one might be deceived into believing that the product of the derangement is a reality. What the artist, madman, and dreamer have in common is that the things seen, whether fictional or true, are formed in consciousness. More explicitly, there are common elements in what is complex or composite, like numbers, qualities, colours, shapes. Perceptions cannot be trusted but cannot be completely jettisoned. Bergoffen explains how Descartes' Second Meditation restores embodied perceptions as a source of knowledge. Yet, bodily perceptions have already been invalidated at this point. Minds perceive essences; the body's perceptions are doubtful (Bergoffen 2010). The meditation continues through a process of discarding the truth in the experiences of the body. In the end,

¹¹⁶ Political subjectivity is closely related to belonging and citizenship. However, the authors find political subjectivity far more encompassing. Belonging denotes emotional attachments while citizenship is a limited juridical form of legal state-membership. Instead, political subjectivity is subtended by "the practices through which political subject-positions come into being. These entail practices of inclusion or exclusion... but also dimensions of longing and desire" (Krause and Schramm 2011, 119).

the only “I” that survives is the thinking self. The body appears irremediably alienated (including the body of others). The certainty of the thinking self (*cogito*) is clearly set in opposition to the body (*res extensa*). It is not necessary to rehearse in detail all the meditations. For now, the focus is only the Sixth Meditation, subtitled “The existence of real distinction between the mind and the body”. Here, Descartes observes that even the sensation of pain can be doubted because people have been said to have experienced pain in a limb which is no longer there.¹¹⁷ At the same time, pain and hunger may give the impression of absolute certainty as:

There is nothing that my own nature teaches me more vividly that I have a body that is ill-disposed when I feel pain, that needs food and drink when I suffer hunger or thirst, and the like. Therefore, I should not doubt that there is some truth in this (Descartes 1998, para. 80).

Whilst he considers how pain’s sensations show the interrelation between mind, spirit and body as a whole, Descartes realizes that perceptions are deceptive. Knowledge comes from reason alone because the body’s perceptions may fool us into doing something that is not good for us, like eating when it might actually harm us more. So, Descartes is performing a radical doubt of all he knows as truth, including experiences of pain. This point is important, and I will come back to it in discussing the ontological divide asserted by Hannah Arendt and Elaine Scarry, and the political implications.

At the same time, Descartes also concedes that pain and other sensations might have some foundation in truth.¹¹⁸ But the thinking/soul double is certainly more credible than embodiment (Bergoffen 2010). Moreover, Descartes certainty relies ultimately on an infinite,

¹¹⁷ The phantom limb phenomenon has been pondered extensively in philosophy. For Descartes, it was confirmation that the mind can perceive pain; whereas the body can deceive in some situations of danger, for example, confusing poison mixed in food with pleasure (Wee 2006).

¹¹⁸ Descartes thought: “For if this were not the case, then I, who am only a thinking thing, would not sense pain when the body is injured; rather, I would perceive the wound by means of the pure intellect, just as a sailor perceives by sight whether anything in his ship is broken” (Descartes 1998, para. 81)

perfect God, not on bodily perceptions. Humans are finite imperfect beings, yet reason is a faculty that allows them to discern truth and error. Thus, knowledge and memory are what prevent us from doing things that will harm us in the future.

Importantly, Bergoffen reminds us that “Descartes’ thesis is not simply that the body is not the self, but more complexly that the body claims to be the self and that we are lured by this claim away from ourselves” (Bergoffen 2010, 235).¹¹⁹ The radical doubt alienates us from ourselves. Existential phenomenology and psychoanalytic theories reproduce the alienation from subjectivity implicit in the Cartesian warning about how “perceptions which inscribe us as bodies have the power to lure us away from ourselves” (ibid., 236). In short, the duality between object-subject survives through the alienating doubt about what is registered by embodied knowledge. Take Sartre’s reasoning. For him, subjectivity is embodied. Yet, I perceive my own body as an object through other subjects but also perceive other subjects as objects. The ‘gaze’ of the other undermines my own subjectivity by feeling like an object for others. I can deny my own subjectivity too, and allow how others see me to have an effect also on how I see and treat myself. Bergoffen explains that Sartre’s suggestion is that if others can think of me as I do about them, then “my being as a perceivable body leaves me vulnerable to the exploitive, objectifying strategies of the other” (Bergoffen 2010, 236). When I deny the freedom of others in bad faith, I deny not only their subjectivity but also my own. Adding another layer to the analysis. Leder suggests that Sartre’s “corporal alienation does not come to be solely through the social confrontation but from within the body-for-me” (Leder 1990, 93). In short, alienation is not only how we come to perceive ourselves with others who ‘look’ at us, it comes also from our own confrontation with our embodied situation (ibid). Although

¹¹⁹ For example, Bergoffen paraphrases the moments in the *Meditations* leading to a conclusion about alienation: “I experience the presence of my body differently than the presence of other bodies. My body is mine. Other bodies are present to or with me. But this experience is not sufficient to establish my body as me. If I am to understand myself, I must break perception’s hold on me. Though mine, the body remains an-other” (Bergoffen 2010, 234).

alienation is inscribed in embodied subjectivity, Sartre casts doubt on how the objectification of the body occurs.

The shadow of subject-object duality is also cast in Simone de Beauvoir's *The Second Sex* (1949), where she questions how the male came to occupy the role of subject and the female as object. Yet, de Beauvoir begins to reverse the hierarchy of rationality as the defining characteristic of subjectivity. For her and Sartre, the body is also the condition for transcendence, a site of self-affirmation. At the same time, de Beauvoir locates more clearly the structures promoting alienation from embodiment in history and culture not in ontology (Bergoffen 2010, 239). Beauvoir's work suggests that even though the "body is/can be the alienation of subjectivity, the alienations of subjectivity are not attributable to its embodiment" (ibid. 239). One may become a woman, affirming and risking the body and "freely allowing oneself to become vulnerable..." (ibid. 238) and refuse the given world where women have been alienated from their own embodiment by social standards of femininity. Although Beauvoir works under the shadow of Descartes, she does so ambivalently. One can risk the body in violence, which involves risking the body through conquest, or through vulnerability in erotic love (Bergoffen 2010, 239). Finally, Bergoffen explores the Cartesian shadows in Jacques Lacan's psychoanalytic theory. Without going into too much detail, Lacan's contribution was that he reworked the subject-object dichotomy in relation to the body through the perspective of erotic desires rather than simply casting it as an epistemological issue (ibid.) as Sartre did. Objectification and alienation are not simply an error of perception but also a product of erotic desire. Lacan notes that the self is alienated from the self-image of one's own body, experienced in the 'mirror stage'.¹²⁰ The desire to be desired by others is imprinted in the imagined 'other', who is cast in the mirror. The subject internalizes the gaze of the other in

¹²⁰ According to this theory, the child is captivated by the sight of himself/herself in the mirror, and identifies with the reflection, adopting 'the imaged body' (Bergoffen 2010, 240).

the mirror. The additional layer in Lacan's theory is that the 'other' is not only the social 'other' but also an 'other' to oneself. Yet, Bergoffen stresses how Lacan's theory on the objectification of the body is an expression of the erotic "desire in the idea of the body" (ibid., 241), to be desired by others.¹²¹ In Bergoffen's analysis, Lacan is cast twice in the shadow of alienation. Taken together Beauvoir, Lacan and Sartre's contribution is that, while working under the legacy of Descartes, they also show how "the body is the other of the self only insofar as our experience of its objectivity is accepted in place of, or is allowed to repress, our experience of its existential presence" (ibid., 242-243). There are different modes of perception towards the body, and significantly, the body is the clue to the alienation of the subject (ibid., 243). To move away from Cartesian dualism, Bergoffen suggests, is to imagine different ways of relating to the body, and to stop denying the otherness of the body (ibid.).

7. Performative doubt about embodiment

So far, this chapter has suggested that the dualistic epistemology of Descartes has been driven by a misreading of the body in pain, reflected in the masculinist hierarchy of reason over the body. I previously explained how pain elicits the thematization of the body, which was refigured into doubt and alienation from embodied knowledge. Bergoffen's re-reading of Cartesianism suggests alienation, expressed in the mind-body binary, is more complex than the categories of 'disembodiment' and 'embodiment' imply. Existential and psychoanalytic analyses above unpick the deterministic notion of the body in the Cartesian legacy and introduce into the analysis the roles of sociality, gender and sexuality, to reconsider the embodied subjectivity. Feminist epistemologies have long sought to critique rationality and subject-object dualism because of its deleterious consequences on women, as discussed in

¹²¹ Bergoffen eloquently suggests that "if we could renounce the appeal of the image and undo the priority of sight, if the world were without mirrors, and if the other refused to reflect us, the body would not be the alienation of the subject" (ibid., 241).

chapter III. Women are not simply passive bodies, open to appropriative or violent practices enabled by laws and norms. However, does feminist epistemologies evade those appropriative practices?

This section questions if, by highlighting the body of the suffering and oppressed women, feminist discourses are not also participating in the reification of the mind-body dualism, and thus, re-inscribing a masculinist gender norm into feminist politics. The aim is to flesh out the problems arising from the dilemma of speaking about and for women drug mules as victims within a framework which marks a stark dualism between theory and empirical issues. I will introduce the issues through C.P. Snow's 'two-culture debate' between science and the humanities, which is also arguably also reflected in the debates in feminist theory. Ultimately, this section contests the binary by tracing the connection between language and materiality through Butler's performative interpretation of the Cartesian Meditations.

C.P. Snow, a British scientist and novelist, famously characterised the divide between sciences and the humanities as misunderstanding between "two-cultures" in a 1959 Cambridge lecture. In this lecture, Snow criticized the split in Western thought between the:

...literary intellectuals at one pole - at the other scientists, and as the most representative, the physical scientists. Between the two a gulf of incomprehension—sometimes (particularly among the young) hostility and dislike, but most of all lack of understanding (C. P. Snow 1959, 4).

Snow urges the English education system to close the gap between the two cultures, stressing the unproductive animosity and distrust between them. Whilst unpacking the virtues and limits of each culture, Snow strongly favours scientific and empirical research suggesting it has been undervalued by politicians. Still, he also condemns the specialisation drive in applied sciences but also the humanities' disconnection from practical issues. He argues that both have lead to

narrow-minded attitudes which ultimately neglect the disparities between the rich industrialized countries in the West and the poverty in the rest of the world.

Forty years later, American philosopher Martha Nussbaum replicates some aspects of Snow's critique of literary theory. In slight contrast to Snow's plight, she entrenches the divide between the 'two cultures', deepening the gulf between them by criticising the expansion of literary and discourse theory approaches to gender and sexuality. Reviewing Butler's work, Nussbaum characterises the performative approach as a dangerous influence on feminism because it can lead to political quietism (Nussbaum 1999). She argues that Butler's performativity approach reifies language and epistemology over materiality since it is more concerned with the symbolic rather than the "material side of life" (ibid., 43). The influence of literary studies on the American academy is an approach that "makes the flimsiest connections with the real situation of real women" (ibid., 38). Nussbaum argues that women cannot break free from oppression through "parodic performances" that "re-enact...the conditions of hunger, illiteracy, disenfranchisement, beating and rape" (ibid., 43). Parodic performance refers here to Butler's suggestion that the 'drag'¹²² is an example of the subversion of gender norms, which simultaneously exposes the fragility of gender heteronormativity norms (Shugart 2001). Still, Nussbaum's presumption begs the question, can feminism ever know the real lives of women, and what are the effects of claiming to have the truth over women's 'real' lives? While it is not hard to sympathize with Nussbaum's argument that feminism should enable social change, Elena Loizidou invites the readers to unpack Nussbaum's 'hostile critique' against Butler pursued in defence of the real women who are victims of patriarchal violence.

Analysing the method adopted by Nussbaum to make those claims, Loizidou suggests

¹²² Loizidou explains that the "performativity of the melancholic drag queen" is as "an allegory of the fantasies that stabilise gender"(Loizidou 2007, 37). The transgression is not made in a traditional sense because one is caught between fields of the norm. Nevertheless, the performativity of the drag queen "re-appropriates the 'exclusion'" (ibid. 38) and in doing so, there is a "potential for an alternative mode of power, namely one that exposes and resists the fantasmatic character of gender formation and identification" (ibid. 37).

there is a performance of authority at play. Nussbaums' method to disqualify Butler invokes authoritative texts and making claims of truth linked to scientific knowledge and empirical data (Loizidou 2007). Loizidou suggests this method is similar to the legal techniques of legal interpretation that valorise consistency, rationality, citation of authorities to support a given interpretation; a method that is similar to the sixteenth to seventeenth century common law jurisprudence (chapter III) (ibid. 160). By citing the victims' suffering, Nussbaum's text does not simply describe them in order to create a platform for justice, but she is actually using them to judge Butler and reconstitute the authority of law (ibid., 162). Thus, when Nussbaum appeals to the authority of empirical data not only to explain the real lives of women who are victims of rape, hunger and domestic abuse, but also claims to have better knowledge and, thus, more authority over deciding what is good for them.

In other words, Nussbaum's text reconstitutes the notion of justice *through* victims but that does not necessarily mean their claims are the focus. Recall that a similar issue was addressed in the last chapter, with reference to the sacrifice of liminal subjects who remain as abjects of the community. Drawing on Peter Goodrich's work, Loizidou argues that the victim becomes the sacrificial body on which law is founded, justified as the source for the existence and authority of the law. In short, women brandished as victims reconstitute legal authority but it is not clear if their situation of oppression or subjection is actually addressed. Should feminism abandon altogether the category of 'victim'? And if we do, what else would replace or point to relations of power and the violent practices which do subjugate women? What kind of vocabulary would we be able to use in order to point out the effect of economic dispossession; to the foreclosures of legal categories (such as 'offender', 'victim', criminal responsibility); or to the experiences of trafficking drugs across borders?

The main point I am drawing attention to is to unpick the position of the politician or the researcher, who seeks to speak on behalf of the women whose experiences are so

devastating that they cannot speak for themselves, as Nussbaum implies. Loizidou's critique chimes with the postcolonial critique of liberal feminist discourses that enable the colonization of victimhood by disciplining and shaping subjects into the acceptable contours of the knowledge producer. Despite the good intentions of knowledge-producers, speaking on behalf of others may reify the cultural and social norms that victimize the lives of others, such as women drug mules. The legal interpretation and translation of the situation of women and men acting as drug mules draws on normalized ideas about victimhood, as I will show through the case study in chapter VI. The problem with legal crusades aimed at saving or protecting victims is that they also determine one way or another who is an authentic victim (Agustín 2005; Davies and Davies 2010). At the same time, it is too easy to fall into the sceptical attitude by outright rejecting what is being signified by the victim trope. For example, in the process of writing this thesis I was once asked if the vulnerability arguments are a legal strategy rather than a 'real' issue. In that sense, it is a question that chimes Schemenauer's critique of how drug mules are viewed by law enforcement actors as duplicitous 'victims' or 'vamps' (Schemenauer 2012)? Further on, we will see how many of the sentencing appeals on behalf of drug mules' stress the stories of suffering behind the offence. The cases collected for the case story involve offenders' whose descriptions were often prefaced by the adjective of vulnerability, mostly stories populated by suffering bodies: the woman who is depressive and suicidal during her trial,¹²³ the veteran who sustained permanent injuries in Iraq,¹²⁴ the woman who has had a long history of abusive relationships and self-harm,¹²⁵ the young man who is responsible for a mother with multiple sclerosis,¹²⁶ or the woman who cannot take care of her children because she is bipolar and suffers from bouts of manic behaviour.¹²⁷ Gendered

¹²³ *R v. Morris (Eileen Veronica)* [2002] EWCA Crim 1160

¹²⁴ *R v. Twumasi (Samuel)* [2005] EWCA Crim 2223

¹²⁵ *R v. Kayode (Pauline)* [2002] EWCA Crim 340

¹²⁶ *R v. Leek (Malcom Trevor)* [2008] EWCA Crim 2533

¹²⁷ *R v. Henry (Nadine Chrystel)* [2014] EWCA Crim 980

victimhood also figures in the legal, political and academic discourse on women drug mules, as noted in chapter I, II and III. These descriptions of the offender's situation prior to trafficking drugs reiterate the fragility of the embodied subject in a legal space, such as the court. However, we cannot lose sight of how legal actors, from the judges to the solicitors, interpret, and translate these facts, seeking to accommodate them within the boundaries of what is intelligible to the law. The victim trope is more common in criminal law, and thus, one would think something that is more easily recognizable. However, it is uncommon when it is used to refer to offenders. This creates a tension. The question is how do vulnerability discourses mimesis victimhood or do they transgress the dichotomy of victim-offender.

This is where Fineman's critique of legal personhood is important. She identifies clearly how the law tends to reaffirm the healthy abled-body as a norm and to exclude the vulnerable body by pathologizing it (Fineman 2008a). She rightly points out how the narrow approach to legal personhood fails to accommodate complex overlapping and interlocking sources of vulnerability involving disadvantaged socio-economic backgrounds, gender norms, the encroachment of welfare, etc. In other words, the connection between victimhood and vulnerability discourses cannot be easily pushed aside; but there is something else nested in those discourses which demand our attention. Rather than figuring out whether the discourse on drug mules is portraying an 'authentic' or a 'strategic' vulnerability, it is more important to show and question the parameters which define one expression of vulnerability as real and the other as 'fake', illusory, or strategic. The connection between victimhood and vulnerability cannot be neglected but also approached cautiously in each context where either of these tropes are mobilized to advance social and political change. The former will be explained more in detail in chapter V. The main goal so far has been to show how the debate about authenticity brings to the surface questions about how authenticity is grounded, an issue which relates again to the tension in feminist studies between discursive constructivism and materialism

(Conaghan 2013b). For example, Butler herself introduces a reinterpretation to Descartes *Meditations* as a response to the criticisms that addressing bodies through discursive practices has made “bodies less than relevant”(Butler 1997a, 1).

To recapitulate the key point of the last sections, the Cartesian legacy expresses a mode of relation with the body defined by doubt and alienation. The departure point for her analysis begins with the passage of the *First Meditation* where the narrator asks: “But on what grounds could one deny that these hands and this entire body are mine?” (Descartes 1998, 18). Butler’s argument is that Descartes performs a radical doubt about the body that at the same time ‘invokes’ bodies through the act of writing. As Butler notes, the “hand that writes the doubt and the hand that is doubted...is at once the hand that is left behind as the writing emerges in, we might say, its dismembering effect” (Butler 1997a). So, instead of making the body disappear or even ‘dismembering’ the body from knowledge and language, “the body emerges in the very language that seeks to deny it” (ibid., 5). Thus, it is in language where we can find clues about how the epistemology of disembodiment requires embodiment but also appreciate the modes of relation to embodiment, such as abjection and alienation. The body’s history appears to be omitted from the *Meditation* because the meditator presents thinking as an unmediated process and the words of the text as an empty receptacle for thoughts about the body. Loizidou shows how, in Butler’s reading of Descartes, the body is in the background, through the act of writing. This means that the body does not disappear altogether because it is constantly brought back into the scene of knowledge, even when it is doubted and abjected¹²⁸ as being part of knowledge.

And yet, that body cannot be fully captured in the writing or in the text (Loizidou 2007). This paradox implies that knowledge frames whether and how we come to know the body, yet

¹²⁸ Analysing *Bodies that Matter* (1993), Loizidou explains how ‘abject beings’ do not appear yet as subjects. Instead, the subject is founded on the repudiation of the abject, and thus, remains ‘inside’ the subject (Loizidou 2007).

the body eludes the frames which seek to give an account of it. As Butler notes, “the language through which the body emerges helps to form and establish that body in its knowability, but the language that forms the body does not fully or exclusively form it” (Butler 1997a, 4). Thus, rather than presenting conclusively what the body is (or for that matter, what knowledge is), the Cartesian Meditation is “plagued” by referential ambiguity (ibid., 13). The senses, the imagination, the hallucination where the narrator cannot know if he is dreaming or is awake, are called forth in the text in order to doubt and dismiss them. At the same time, these dubitable scenes function as referential signposts for what is indubitable: God and reason.

The theological issues is not really what I take from the last quote. Instead, my intention is to stress the effect of figures of speech, such as tropes, metaphors, allegories, etc., which are invoked to deny the imprint of the body in order to sustain an epistemological goal, fail. We see then, how the uncertainty calls forth markers of certainty. In that sense, Butler argues that “the heuristic of doubt not only entails figuration, but works fundamentally through the figures that compromise its own epistemological aspirations” (ibid., 16). One way of looking at this argument is the method of doubt, aimed at suspending beliefs in order to find true knowledge, fails because the figures of speech characterised as uncertain (sleep, pain, dreaming, hallucinations) somehow bring back their opposites. That is, what is in the historical context of the author, absolutely certain. In other words, Descartes presents a universal reason that is not embodied in time, location, history, etc. Yet, as suggested by Loizidou, Butler’s deconstructive reading shows how “what is doubted returns to support the doubt” (Loizidou 2007, 145). Figures of speech introduce something outside of the fictional isolated reason, presented as an ungrounded ‘I’. Ultimately, neither the exclusion of figurality or materiality can be sustained. We see instead, as Loizidou suggests, how Butler offers a subversive reading which “exposes the ambiguity that resides in the meditation regarding the body” (ibid.,143). This ambiguity signposts the material and figural body, showing how they are both implicated

with each other but cannot be reduced into sameness because writing is an embodied practice that the text fails to erase. Far from making bodied 'less than relevant', this reading has important political implications because it ruptures and unsettles the "politics of security (that holds on to the totalisation of knowledge)" (ibid.,41) through a different kind of doubt. That is, a doubt that acknowledges it has not yet explained the relationship between the figural and the material, nor claims dominion over the knowledge of the body. In that sense, Loizidou reaffirms Butler's contribution to critical legal scholarship is the "relentless attachment to the material and figural existence of subjects who are and who cannot be victims" (ibid.,165). This is because Butler "...does not deny that those whose lives have been foreclosed by the universal laws are victims" (ibid.). One of the problems with the victim-category is that it precisely forecloses lives into a definition which prevents observers (such as academics) to actually see how people are resisting cultural and gender norms as well as laws in multiple ways. Practices of resistance expose the fallibility of universal claims through counter-normative practices (ibid) and are not necessarily channelled through the law. The methods used to research and interpret and the lives of others have everything to do with how and if they appear in the legal, political or academic fields of knowledge. Attending to the beaten, raped, and suffering bodies is not self-evident because the production of knowledge participates in the establishment of political and legal norms of recognition.

The reason why I have drawn out these discussions on the Cartesian legacy is not simply to rethink the idea of subjectivity beyond the mind-body duality. While this thesis seeks to reclaim vulnerability, it was difficult to do so without considering the relationship with the body. Foregrounding the body is not just about bringing back into the sight of knowledge the body itself, but most importantly, to understand what are the *modes of relations* with the body in our social and political milieu. Which modes of relations to the body are favoured while other discouraged, masked and shamed; how are these modes of relation with the body re-

inscribed through legal discourse and what are the possibilities of rejecting relations with the body which are not conducive to social justice. The analysis Cartesian legacy on knowledge shows the influence on disembodied subjectivity, characterised by being an intentional, rational, self-bounded, able-body (Nedelsky 1990; Naffine 2009) but also recall from chapter III how this particular version of legal personhood is coded as a masculine subject. The aim of critically analysing vulnerability through the phenomenology of pain is to trace the modes of relations with the passive body, culturally coded as a feminine body (Grosz 1994).

The dilemma addressed in this chapter mirrors what has already been signalled in Chapters II and III. Namely, once we do stress the phenomenological relevance of the body, how are the lives of women represented (after pointing out it is the excluded other from subjectivity, after pointing out how women have been marginalised because of the legal knowledge and practice that has figure them as objects, body bags, property, etc.)? Recall how Chapter II pointed out the dichotomy in the interpretations about drug mules, figured either as victims and offenders. Each category is underpinned by particular discourses which do not simply describe the subject of crime but also bring a particular frame for knowing the subject of crime. The frames used to interpret someone as a victim or as an offender are not politically neutral; and more importantly, already shape the practices of law enforcement (Schemenauer 2012). Chapter III questioned how bodies were made less than relevant in the doctrine of criminal law and unpacked penal theory to bring to the foreground the history and practices that subjectivized the rational legal person as a disembodied subject. This chapter has continued the task of unsettling this form of legal personhood, questioning the culturally reinforced alienation to the body and the positive valorization of rationality and disembodiment, through a phenomenological interpretation of the body in pain.

Overall, the preceding sections have carefully peeled away layers of knowledge, so that we might assess whether naming women drug mules through vulnerability (chapter II) could

advance or hinder aspirations to address justly their case in criminal law. Far from being only an intellectual debate, unpacking the mind-body relation has very concrete effects through the role of knowledge producers. Chapters I and II suggested how the iteration of drug mules as victims and offenders derived from specific frames or a combination of frames used in the different disciplines researching drug control. Thus, there is no unmediated account of a reality. Yet, drawing attention to the plurality of frames can be subject to the criticism of relativism. In contrast, Loizidou criticizes feminist approaches that re-affirming materiality through the trope of victimhood because the victim's materiality becomes only a form of citation that re-affirms the authority of an epistemological position as well as juridical authority.

Coming to a full circle, the next chapter returns to the phenomenology of the body in pain. It does so by following the trace of injurable bodies and the shadow of pain in politics, suggesting that the ambiguous relation between materiality and figurality mirrors the paradox in Beauvoir's ethics of ambiguity (chapter III). Ultimately, this means that vulnerability is ambiguous because it signals the potential for relations of care or violence, appropriation or social change. Unlike the previous sections, which addressed the relation between knowledge and bodies, the following section addresses the relation between bodies and discourse, further suggesting that literary approaches are not divorced from materiality.

8. A world of pain and the dispossession to language

The name of Elaine Scarry has become a multi-cited point of reference in pain studies. In *The Body in Pain: The Making and Unmaking of the World* (1985), the Harvard English Professor researched what might appear to be very dissimilar sources on the subject of pain: reports about torture, treatises on just war, the bible, Karl Marx's *Capital*, tort cases, and Plato's *Laws*. Through these readings, she explores the intricate relation between the inability to give a voice to pain with the 'political and perceptual complications' arising from this difficulty; and the

‘nature of both material and verbal expressibility or, more simply, the nature of human creation’ (Scarry 1985, 3). In short, she draws our attention to two activities: destruction and creation. Both activities have the body-in-pain as their driving force, and each activity grafts stories on the basis of pain’s radical negativity:

Physical pain has no voice, but when it at last finds a voice, it begins to tell a story, and the story that it tells is about the inseparability of these three subjects, their embeddedness in one another (ibid.)

Of course, if pain has no voice, is it then condemned to the obscurity of the body? If a person who is in extreme pain cannot move or speak, is she bound to suffer alone? On this point, I think Scarry implicitly addresses a problem posited by Hannah Arendt in *The Human Condition*¹²⁹ (1959). Arendt describes pain as “the most intense feeling we know of, intense to the point of blotting out all other experiences. ...is at the same time the most private and least communicable of all”(Arendt 1959, 50–51). Arendt then argues that the privacy of the body and its necessities, like hunger, thirst, and cold, remove persons from the sphere of politics. Her reasoning is simple: if we are concerned with providing these basic necessities there is hardly time left to engage in other activities, particularly political activities. Summarising Arendt’s view of what constitutes politics, Loizidou says:

Arendt’s political is also the effect of a plurality of people coming together in the world, acting and deciding. But, as we have already seen, she excludes the labouring body from this political. Instead, embodiment is an anathema, a restraint to the political. Accordingly, the polis is best served by maintaining a differentiation between the public and the private (Loizidou 2007, 137).

¹²⁹ Although there are multiple references to Arendt in Scarry’s text, there is only one specific references to *The Human Condition*, mainly Arendt’s discussion on labour. However, the argument on how the offender deflects the responsibility on the victim draws from Arendt’s *Eichman in Jerusalem* (Arendt 1963).

The way I interpret Arendt's view is that pain cannot be transformed into speech or action, two central conditions for political plurality. Instead, Arendt argues, pain "deprives us of our feeling for reality" (Arendt 1959, 51) which in turn, depends on being "recognizable," to the outer world of life' (ibid). In other words, there is an intricate bond between the subjective reality of pain and the recognition of that reality by others. Scarry elaborates a similar rendition of pain, showing how it appears to exert an ontological divide (Vetlesen 2009; Biro 2010) between my world which is filled by pain, and the world outside which cannot relate to my world. Pain drives a wedge, a perception that there is an "absolute split between one's sense of one's own reality and the reality of other persons" (Scarry 1985, 4). This utmost decentring and disfiguring experience is isolating because whatever the person suffering pain says, it is condemned to be a private and subjective experience.

i. The performance of power in torture: Speech and the artefacts of pain

Torture is the paradigmatic and extreme case where a person is forced to experience both social isolation and self-alienation because pain appears as that which is absolutely certain for the victim, but denied by the torturer. Torture also shows how extreme destruction and construction of the political world are two different effects which Scarry attributes to pain's radical subjectivity. However, she also shows how torture is not simply inflicting pain. It has a specific structure which drives a multi-layered wedge between my-self and my body, my-self and my world. The structure of torture alienates the self not only from the world 'outside' but also one's sense of belonging to oneself. In other words, it affects the subject as a whole, but a subject who is in great extent more than just a self-bounded composite of mind-body. The structure of torture takes the following form: it relies on the infliction of pain and the verbal act of the confession. Yet, contrary to the presupposition that pain is inflicted as a means to an end (i.e., the information, confession of guilt), pain is the end itself (Vetlesen 2009). This does

not mean the interrogation-confession is unnecessary in the structure of torture. Their function is performative, in the sense that is that which gives an appearance, something that provides the torturer with a moral justification. In other words, the interrogation make believe ‘as if’ the answers extracted through pain mattered. Yet, as Johan Vetlesen suggests, the confession diverts the attention to the “victim as the centre of the entire process, though not as victim but as player (himself responsible), as the party of those actions- to speak or to remain silent...”(Vetlesen 2009, 19). The confession, reads as a betrayal of the world once cherished by the victim, it signals simultaneously giving up that world and accepting that of the torturer. Crucially, the ‘trick of the torturer’ is to turn the victim’s body into the tool for pain “in the absolutization of the person as body quite simply...the ability to ‘have’ a world outside himself, outside of the body” (ibid., 21). This is what Scarry means by the process of ‘unmaking’ which is structurally mirrored by the process of making. Torture unmakes the world of the victim and in the process, makes the world of the torturer through the victim.

Apart from the confessional language, artefacts also play a crucial role in both the making and unmaking of the world. In torture, artefacts that used to be references of nourishment and care are turned into weapons. Take water-boarding as an example. The most elementary object that sustains life becomes a weapon to make someone feel as if they would lose life by drowning. Artefacts of care are turned inside out into objects that intensify pain. The effectiveness of torture derives from the combined effect of language and artefacts, both supporting the process where pain appears to empty out the content of one’s world while clearing the space for the one of the torturing regime. As Vetlesen explains, Scarry presents a zero-game between pain and power as well as the physical and the mental (Vetlesen 2009). I would add that in an antagonistic scenario, the roles are divided along the one who possesses language and the one who is reduced to a mere panting flesh because:

...the body of the prisoner become *a colossal body with no voice*¹³⁰ [to articulate a world with, a mental content] and the torturer *a colossal voice* [a voice composed of two voices, his own and the extorted one of the other person, in the form of confession and cracking up] *with no body*... (Scarry 1985, 57).

Thus, the structure of torture implies there is an appearance of an ontological divide, between victim and torturer, two radically opposed worlds, where one is embodied while the other is not. We see the emergence of a sovereign without a body, and thus invulnerable to injury. In contrast, the vulnerable recognizes herself only as a body. More importantly, the relationship with the body is severed. Better said, alienated from the body. Recall that the basic structure of the phenomenology of pain discussed in the first section involves a thematization, alienation, and abjection of the body-in-pain. My understanding, is that precisely the abjection of the body refers to the ego's attempt "to externalize, or make alien, the source of its suffering" (Covino 2004, 23).¹³¹ Altogether they show what Covino calls 'diagnostic objectification':

Diagnostic objectification, the means by which the sufferer brings pain into the external, and potentially curative, world of cause and effect, is also the means by which she psychologically makes pain alien (Covino 2004, 23).

The alienation is performed and reproduced in social relations, as told in Bergoffen's analysis of existentialism. From this perspective, we could also argue that the tortured body appears not only as an object but an artefact that intensifies pain. Yet, the effectiveness of torture's

¹³⁰ My emphasis.

¹³¹ Covino notes that Scarry adapts the work of David Bakan, an American psychologist who wrote *Disease, Pain and Sacrifice: Toward a Psychology of Suffering* (1968). Bakan proposes the idea of *telic decentralization*, which conceives the body and psyche to be driven towards integrity and specialization. For an interesting analysis of the biological basis from which Bakan derives the idea from molecules and transposed it the psychic realm, adapting it to Freud's trauma theory (Covino 2004). In the footnote commentary referring to Bakan, Scarry notes how "pain's aversiveness in some situations has a beneficent effect since it is the only thing that can make tolerable the otherwise intolerable separation of a human being from his limb and, possibly, a woman from her baby" (Scarry 1985, 333).

alienating effects shows more clearly how the body is not simply a ‘thing’. Although not precisely arguing what constitutes subjectivity, Scarry’s analysis of torture shows that corporeality is integral to a person’s sense of who they are and to the sense of belonging in the world. More importantly, she shows the mediating role of pain in political subjectivization.¹³²

ii. *The ambiguity of the body in pain: Non-referentiality and objectless of pain*

To understand how they are inseparable we need to attend to the relationship between speech and the body-in-pain. Scarry argues that the speech of the torturer, his ideology and what he represents, engulfs the voice of the victim, whose sense of self is reduced to a moan, a cry (Scarry 1985). Speech, thoughts, memories are destroyed by extreme pain, as Arendt’s quote suggests. Of course one can describe how pain radiates, pulsates, or stings, or locate the pain in an anatomical injury. A shout certainly communicates the intensity and unbearability of the experience. Yet, the body in pain resists representation (Scarry 1985; 1994). This resistance to representation in language is also what instantiates the labour of giving pain an objectified expression. The need to express pain is a response and a strategy to cope and relieve pain’s de-objectifying work, understood as the effect of pain to reduce speech into a crying and moaning:

A great deal, then, is at stake in the attempt to invent linguistic structures ... the human attempt to reverse the de-objectifying work of pain by forcing *pain itself* into avenues of objectification is a project laden with practical and ethical consequence (ibid.,6).

Scarry builds this argument noting how pain is ‘object-less’ (Vetlesen 2009) because it lacks intentionality. Intentionality can be defined as “the *aboutness* or *directedness* of mind (or states of mind) to things, objects, states of affairs, events” (Siewert 2011). And thus, Scarry suggests

¹³² Jacques Rancière offers a useful definition of the process subjectivization for the purposes of this chapter. He argues that subjectivization “the formation of a one that is not a self but is the relation of a self to an other” (Rancière 1992, 60). He characterizes the political subjectivization as the interval between voice and body rather than merger between them (identification). Scarry leads to a very different direction because she is actually showing political domination, characterised by the loss of a voice.

it also a way “to designate a relation between state and object”, but the object may or may not exist (Scarry 1985, 357). What this means is that the “sentience”¹³³ of pain “is not of or *for*¹³⁴ anything” and for that reason “it resists objectification in language” (ibid., 5). It also means that even when someone communicates their pain through the metaphor of ‘needles’ or ‘stabbing pain’, she is not really saying anything *about* pain but something *about* needles.¹³⁵ Let me illustrate these three points - the resistance to representation, the lack of intentionality and the objectifying/de-objectifying work of pain more clearly through Scarry’s analysis of the structure of war. Like the analysis of torture, she starts from a couple of simple questions. First, why does injuring appear necessary in wars? Secondly, what role does injuring and pain have in the ‘unmaking’ and ‘unmaking’ of nations? She suggests that wars and torture resemble each other structurally, because bodies and voice are their two basic components. However, the difference between them is that war is projected as a ‘contest’ to define winners and losers, whereas torture is the unilateral infliction of pain. Without rehearsing all the points in Scarry’s eloquent discussion, she suggests that what determines the victors or losers *is not* the sophistication of the killing technologies, which historically show an increasing ability to kill more people. Calculation is part of but does not define the end of a conflict. Instead, wars are equally determined by the relation between voice-pain, and pain’s resistance to representation in language. Pilled-up bodies, injured and exposed in the scene of war, have a ‘frightening’ ambiguity:

¹³³ Scarry differentiates pain as a state and sentience rather than an emotion or a feeling. She argues pain is exceptional because other ‘interior states of consciousness are regularly accompanied by objects in the external world, that we do not simply “have feelings” but have feelings for somebody or something, that love is love of JC, fear is fear of v, ambivalence is ambivalence about z’ (Scarry 1985, 5). Pain sentience ‘has no referential content. It is not of or for anything. It is precisely because it takes no object that it, more than any other phenomenon, resists objectification in language.

¹³⁴ My emphasis.

¹³⁵ One can use the weapon as a metaphor that allows us to show the attributes pain, though once it is carried over from the original referent (the injured body), the body can easily disappear from sight.

...[the wound] makes manifest the non-referential character of the dead body... [it is] a non-referentiality that rather than eliminating all referential activity instead gives it a frightening freedom or referential activity, ones whose direction is no longer limited and controlled by the original contexts of personhood or motive (ibid., 119).

Thus, the resistance to representation is what instantiates the facility with which the materiality of injured bodies are objectified. Scarry suggests that war is a contest where counterfactual projects 'lift' the material reality from dead bodies and appropriate it so that the 'fiction' of the nation's project can become a reality. We see here the colossal disembodied voice of a nation and the colossal mass of bodies without voice. Yet, unlike torture, war works through the logic of the contest. This means that exposed injured bodies are the material and visible expression that 'reality is up for grabs' in the contest of war, that reality, which I understood as the stability and assuredness of life, has become ambiguous. As the soldier's pain can no longer 'cling' to the human body the verbal constructions advanced to make sure political life continues, i.e. ideological or nationhood discourse, displace and efface the lives of wounded soldiers. In short, injuring involves a process whereby bodies in pain (voiceless) and the language of political power are implicated in the making of new political bodies through the effects of a materializing language. Consider how political discourse commonly uses the words 'rebuild' or 'reconstruct' a nation after a war or armed conflict.

The structure of pain in the context of war shows the resistance to representation of injured bodies, but also the de-objectifying and objectifying work of pain. I want to stress the point about the 'non-referentiality' of injuring. Drawing on Scarry's analysis, my suggestion is that the body in pain and most clearly, the injured body, can be understood as ambiguous. And thus, there is an ambivalence nested in this ambiguity. Explained otherwise, if the body in pain or injured is ambiguous, this 'frightening' non-referentiality becomes the opportunity for 'making' and 'unmaking' the world described in the structure of torture and war. Unlike

Arendt, who could not see how bodies appeared in the political sphere because their voice and action are destroyed by pain, Scarry draws our attention to the centrality of bodies and speech in the process of making political regimes. Also unlike Arendt's view that the body is relegated to the private, Scarry's account shows through pain this important point: just because pain is object-less and lacking intentionality does not mean it is condemned to exist in hiding. Granted, she does account for how there are situations or fields where pain more visible and in which ones is it invisible. For example, references to pain are ubiquitous in discourses where imagination is central (drama and literature) while it catastrophically absent of in the description of torture and war¹³⁶, a form of discourse that is extremely technical and reliant on euphemisms like 'targets', 'collateral damage', 'surgical strike'.

iii. The language of agency: Of weapons and metaphors

To be sure, what puzzles Scarry is not that we describe pain through linguistic metaphors; it is the fact that we *cannot* describe pain without the language of agency (Scarry 1985, 17). The common denominator between poetry lifting pain and giving it a public space and the political discourse appropriating the injured body of a soldier is that they are moments of suffering, where imagination and creation come forth,¹³⁷ a process where the desire to bring pain out of the invisibility of the body through language is not simply a matter of describing what we feel but a struggle to restore one's footing in life through imagination.¹³⁸ Thus, she suggests that the wish to eliminate pain and the imagination required to express pain are intricately related

¹³⁶ For example, Scarry notes how the torture is defined as 'intelligence-gathering' or how just-war theories completely elude naming injuring and pain as the central activity of war, thus masking its effects.

¹³⁷ Illan rua Wall attention on how Scarry links imagination and pain. While pain is objectless, imagination- the structural opposite of pain- is its own object (rua Wall 2008)

¹³⁸ Gwen Harwood's poem expresses the isolating experience of pain and the aim to lift it, through the right words to express it: "Pain splinters me. I am cracked like glass. I taste salt, my own fear, can save nothing, am ground, degraded on my own fragments, abraded featureless... And am free of pain for a brief space. A fire-talented tongue will choose its truth" (Harwood 2011, 5). She cleverly pictures the sensorial bifurcation of pain in metaphorical language. The path goes inwards when pain forces the self into the depths of the body. The intensity of pain causes her to feel as if it were fragmenting her sense of completeness of the self. However, she reaches outwards and acknowledges that pain can reveal its truth only through the mediation of 'a fire-talented tongue.'

through the ‘language of agency’ (ibid.). The language of agency implicates both injury and imagination. For example, imagining how the injury is caused by a weapon in order to describe pain. However, recall that the non-referentiality of the injury facilitates the appropriation by the weapon because the sign takes over the attributes of pain. Remember torture, where the body becomes the weapon of the regime; remember war, where the body materially substantiates the new regime. In torture, the human body is objectified into the attributes of pain. In war, the attributes of pain are more clearly “attached to a referent other than the human body” (ibid.,13). These two paradigmatic cases of injuring show how the attributes of pain are lifted and held in sight out of the obscurity of the body yet equally resistant to representation. My suggestion is that the resistance is precisely embedded in the metaphoric expression of pain.

Metaphors and other tropes are not mere vehicles of representations. Although metaphors for pain play a crucial role in the objectification of pain, by saying how the pain ‘burns like acid’ or ‘crushes my soul’, tropes do not express that pain is identical to the sensation imagined through a weapon, but rather, that the sentience of pains is “as if” (ibid., 15) it were caused by an acid (the weapon) that makes skin burn (the injury). Weapon and wound are two metaphors that ‘carry over’ what does not belong to them; they ‘lift’ the attributes of bodies’ materiality to substantiate counterfactual desires. For example, a doctor does not ask ‘what is your pain about?’ but rather ‘what does your pain feel like?’ To which the answer is usually a reference to an object imagined as causing the pain or an object that can eliminate this sensation (ibid., 365). The crucial point about pain metaphors is that they may give pain an objectified existence through the language of agency but they are not pain itself.¹³⁹

¹³⁹ Paul de Man argued that the role of metaphors in knowledge appears inevitable but also deceptive because they are “always on the move- more like quicksilver than like flowers or butterflies which one can at least pin down and insert in a neat taxonomy- but they can disappear altogether, or at least, appear to disappear”(De Man 1978, 16). Tropes do not only illustrate but also create knowledge. However, they can become naturalized, making invisible the cultural mediations involved, because of the force, the immediacy, and the ‘emptiness’ of pain.

Instead, body and languages for pain co-exist, signalling the referential fluidity of the injury and the stories created on their account.¹⁴⁰ In my view, the ambiguity of pain also implies that naming or substantiating pain is an agonistic or antagonistic political or even legal process.¹⁴¹ I read this in Scarry's reminder that the language of agency can have benign or sadistic purposes; yet, she also clarifies that this should not be interpreted as if one is implicated in the other. Instead, "the two uses [sadistic or benign] are not simply distinct but mutually exclusive; in fact we will see that one of the central tasks of civilization is to stabilize this most elementary sign" (ibid.,13). Surely, if the sign is described as uncertain that means it is synonymous to ambiguity. The stabilization of the sign is the site of struggle at times when the belief in the regime or other forms of authority begin to appear as fictions "the sheer material factualness of the human body will be borrowed to lend that cultural construct the aura of 'realness' and 'certainty'" (ibid., 14).

While relying on semiotic analysis, her approach can hardly be considered as a type of linguistic monism that reduces materiality into language. Instead, Scarry's "strange materialism", as Dimock describes it, shows the corporeal aspect of materialism, a unique and original approach which is often usually overlooked (Dimock 1996, n. 44). First, she heeds the ambiguity of the body and the ambivalent effects of the language of agency. Remember that the paradox of pain is that "its absolute claim for acknowledgment contributes to its being ultimately unacknowledged" (Scarry 1985, 61). In torture, the recognition is reversed through the performance of necessity of the confession, *as if* the answers extracted under duress mattered. In war, the recognition is reversed precisely through the wound (s) which "becomes a way of articulating and 'vivifying' (literally, investing with life) the idea of the strategic vulnerability of an armed forces..." (ibid.,71). In other words, in the discourse of power the

¹⁴⁰ As noted by Scarry, arguing about the constructed or fictitiousness of a story of injury is not a disavowal of the fact that actual bodies have been injured and used to make the stories alive.

¹⁴¹ She gives an eloquent reading of the agonistic process in court trials, while the events of war and torture are clearly structured antagonistically because only one can survive the struggle.

wound is ‘stolen’ away from the individuals injured in battle to vivify the body of the sovereign in both figural and material ways.¹⁴² The significance of these arguments lies in showing how political power masks its role in the production of pain and suffering by deflecting responsibility on the victims, but also masking pain completely. As Scarry explains: “Power is cautious. It bases itself in another's pain and prevents all recognition that there is ‘another’ by lopped circles that ensure its own solipsism” (ibid., 59). Yet, as mentioned before the trajectories that bodies in pain can take once objectified into language are ambivalent. The examples of torture and war are clearly what Scarry calls the ‘sadistic’ trajectory of pain, used and yet denied in order to substantiate power. She also reminds us we are also surrounded every day by the benign trajectories in material and figural representations of pain sustain life: how it brings the obscurity of pain and the apparent divide between self-others through poetry; the trial where an injury is shaped through law and evidence; the chair that gives relief to a tired body. There are no limits for the expressions of pain, whether it is through a poem, a human rights report, an ultrasound, or a painting.¹⁴³

9. Conclusion

This chapter traced the negative bias towards corporeal vulnerability through an exploration of the political phenomenology of pain. It suggested that interpretations of experiences of pain underpin the Cartesian reading where the mind-body are radically separate. The separation can be attributed to the thematization, alienation and abjection of the body during experiences of

¹⁴² The term ‘sovereign’ is not exactly Scarry’s words. Although she does refer to ‘sovereignty’, the reference is loosely made, without explicitly referring to discourses on ‘the sovereign’. In other words, my terminology already crosses over into the linguistic terrain of post-structuralist terminology. For example, in *Dispossession: The Performative of the Political* (2013), Athina Athanasiou and Judith Butler use the term sovereign to identify the ideology of individualism, as well as different forms of political power (i.e. imperial sovereignty, nation-state sovereignty)

¹⁴³ For example, Frida Kahlo is well known for representing her emotional and physical suffering in a canvas. After the visibility the injuries endured in a tram accident faded, a specialist diagnosed her many years after with ‘Munchausen disease’. In other words, doctors doubted her pain, despite knowledge of the injuries she had sustained, and accused of wanting the medical attention (Espino 2006)

pain and illness. These are strategies, although aimed at ‘solving’ the problem of the body in pain, have been (mis) read as ontology of embodied subjectivity. Approaches to subjectivity in existential phenomenology and post-structuralism unsettle the view that the alienated body-mind relationship by casting doubt on the naturalized objectification of the body. Alienation from embodiment is not ‘natural’ but grounded in social relations, gender norms and practices. The accounts discussed share in common the impulse to question and counter the way bodies are objectified, by pointing out the interdependence between the individual and the social, the figural and material, the body and language, the body in pain and the politics of injuring. The phenomenology of pain correlates to versions of subjectivity, but also to practices of power. Although in different ways, Scarry’s phenomenological analysis and Judith Butler’s performativity theory show how the relation between the language and the body, the figural and material, is ambiguous. In Scarry’s account, pain is rhetorically excluded from the political discourse that substantiates itself through bodies. Meanwhile Butler’s reading of Descartes shows how the body that stands in the background of the Cartesian *Meditations* is excluded from the account on the production knowledge. However, both Scarry and Butler show how knowledge and political power could not exist without the bodies excluded. Scarry’s account of pain points to a critical limit which is more explicitly articulated by Butler. In that sense, discourses appropriate the body in pain through the reference of victims to ground and justify their epistemic, political and legal authority. This tendency to possess the dispossessed to language might seem unavoidable and totalizing in the case of torture, but the referential ambiguity of the body in pain and the ambivalence of injurability also indicate it can be resisted and brought into existence in ways that re-politicizes the subject (gaining a voice). The question occupying the next chapter is: how does gender and sexuality frame political and legal responses to pain and injurability? My suggestion is that the political philosophy of injuring

and pain implicit in Scarry's work carries force in contemporary feminist and queer vulnerability scholarship by contesting the sexual politics of injurability.

V. The Sexual Politics of Vulnerability

1. Summary

So far, the thesis has examined the discourses in drug policy, criminal law, and feminist approaches to victimhood and offending in the context of crime, particularly drug trafficking. This chapter explores critical feminist and queer approaches to the sexual politics of vulnerability suggesting that if vulnerability is to be reclaimed for feminist causes, including the impact on women by a gendered criminal law and drug policy, the context where vulnerability claims are uttered must be examined. This is because certain aspects of the philosophical imaginary animating the concept of vulnerability may resonate with securitization rationalities in criminal law and drug trafficking discourse, such as the prevention of injuries and risks through the managerial control of future insecurity (chapter III). By showing the interface between the securitization rationality which identifies vulnerability and the gendered responses to the risk of injury and penetrability, this chapter suggests that the trope of injurability can lead to the political appropriations and disavowals of vulnerable bodies (Chapter IV) as well ‘wounded attachments’ (Brown 1995) that enable disempowering ‘protective’ interventions. Animated by the image of the wounded/woundable body, vulnerability discourses may resonate with the fear of being injured. The exposure to injury is rationalized through the neoliberal governmentality and the securitization against risky postcolonial subjects (identified as stereotypical drug traffickers) (chapter II) as a manageable problem to be controlled. In short, there are discourses, which will be shown as predominantly masculine, which frame vulnerability as a problem that can be eliminated by creating boundaries with others, such as building legal shields that shield exposed bodies against injury. Without abandoning the ethical and potential of the notion of vulnerability, the common thread in feminist/queer scholarship is that it critically exposes the abjection of *relationality* signified

by vulnerability. The abjection is an effort to protect the survival of a legal form, namely the legal person as a sovereign self-bounded (Nedelsky 1990), able-bodied person (Naffine 2009) and a clear gender identity. Rather than negating vulnerability, this chapter reaffirms its ethical and political potential. As suggested by Judith Butler, vulnerability is the social ontology of being. In that sense, more than being a definitional characteristic of identity, vulnerability marks the relationality of subjectivity which is inextricably bound to discourse and precedes the formation of the sovereign subject.

1. The dispossession to language and the tropic mediation of injurability

The last chapter stressed the symbolic and material relation between injured bodies and language. It suggested through the analysis on the phenomenology of pain and the tropological mediation of language that injured bodies resist representation. The resistance is both what enables the appropriation of the injured body in language but paradoxically, the resistance to representation is also what generates the language for the body in pain. In other words, the obscurity and privacy of the experience of pain only comes through into the public sphere through communicating the experience to others. The body is dispossessed to the stories conjuring, vivifying and giving substance to the pain and suffering of those whose voices have been diminished. Language fosters a political (public) space where pain can be expressed but may also mask how political power is substantiated through another's pain, masking and effacing the bodies cited in order to verify the authority of the sovereign, whether it is a new political regime or a knowledge-producer who speaks for others. One of the aims of chapter IV was to trouble the relationship between materiality and figurality through a critical analysis of the metaphor underpinning vulnerability (the wound), stressing the interdependence between images and figures of speech and formative effect on concepts and material practices (Lakoff and Johnson 1980; Murphy 2012a; Bourke 2012; Scarry 1985; Loizidou 2007; Butler 1997a).

While Scarry offers a convincing account on the genesis of materiality through the tropological¹⁴⁴ verification of the body in pain, her approach does not focus on how the existing structures of language already frame materiality in a specific way. In contrast, Butler's performativity method suggests there are already discourses framing and making injurable/injured bodies visible through existing schemes of intelligibility (Butler 1997b; Butler 2009a). Considering the latter, if the injured and open body is one of the constitutive metaphors embedded in the concept of vulnerability, how is the image interpreted through the frames on vulnerability in criminal law and drug importation offences in particular? Recall that the logic of the frame (chapter I) shapes what is within the boundaries of understanding (Schlag 1998, 74) and how reasoning is not solely an abstraction or an 'object' apprehended by consciousness. This view also chimes with Butler's performativity approach to injurability, where the encounter between the speaker and the one without a voice (considering how Scarry's structures the relation) is already mediated by norms and discourses accepted by a political community. And in that sense, one is inaugurated as subject who is intelligible within the norms, conventions, and practices of a community (Butler 1997b, 90). Stated briefly, the argument advanced in this section is that drug mules are already disposed to the categories of victims and offenders before they appear in the court. These two distinct frames (victim/offender) make the subjectivity of drug mules intelligible within the parameters of specific norms or discourses in criminal law and drug trafficking. That means that the lives of drug mules, prior to the offence and after the offence, somehow escape the narrator (legal, political, academic) because there are already frames at work (victim/offender) in the encounter. In that sense, drug mules are vulnerable or dispossessed to these categories and how the latter are shaped by the discourses underpinning criminal law and drug importation

¹⁴⁴ I use the term only to explain how body and materiality is mediated through tropes, understood as figures of speech such as metaphors, metonymies, allegories, etc.

offences. These discourses are, as suggested in chapter II and III, the securitization and neoliberal governmentality.

Although Butler and Scarry approach the relation between figurative language and materiality in very different ways¹⁴⁵ (chapter IV), both address the effects of ambiguity (particularly, the ambiguity of the body dispossessed to language). Of course, there are many differences between these authors because they draw different traditions and methodologies. That being said, the focus in this chapter is more on how what they have in common, namely a critical position on how words embody the affective intensity of pain and injury; an approach which unpicks the ethical and political dilemmas arising from the discourse on injured/injurable bodies. Their approach to the injurable/injured bodies encompasses a “politics of discomfort” (Loizidou 2008, 41). Although Loizidou’s quote only refers to Butler’s philosophical work, this ethos is a common thread in the interpretations offered in this thesis on Beauvoir’s critique through ambiguity, Scarry’s political phenomenology of the body in pain, and Butler’s analysis on the performativity approach to injury. Scarry identifies ambiguity in the injured body which is exposed to the ambivalent effects of the metaphors and discourses lifting the obscurity of pain. Butler addresses the question of injurability and its relationship to language, showing how we are already dispossessed to normative frames which make injury and pain intelligible and recognizable. In that way, my aim is to flesh out how the performative approach to vulnerability also shows the modes of resistance to subjugating modes of naming victimhood and criminality.

In *Excitable Speech: The Performative of the Political*, Butler problematizes the relationship between violence and language by reversing Scarry’s formulation that “tends to set violence and language in opposition” (Butler 1997b, 5). Instead of asking how violence

¹⁴⁵ Both have been influenced by JL Austin’s performative utterances (Scarry 1994; Butler 1997b) Judith Butler’s philosophical work has been characterised as post-modern or post-structuralist (Du Toit 2009). More broadly, her approach also fall within the umbrella term of critical theory.

destroys language, Butler asks if “language has within it its own possibilities for violence and for world-shattering?” (ibid.5). Although Butler agrees with Scarry’s account, she questions if language is not merely a tool to aid and abet torture, but how it can be seen to perform violence itself. As noted in a reference to Toni Morrison, language does not simply represent violence; it can be a form of violence by itself (ibid., 7). Thus, Butler reviews how and why language, or more specifically speech acts¹⁴⁶ are imagined to hurt or how they actually hurt and injure. In that sense, Butler troubles the *agency of language* (as opposed to Scarry’s focus on the *language of agency*)¹⁴⁷ by questioning how language has been deemed to *cause* injuries in some scenarios and other times it not. The difference being that in Scarry’s view agency is imported into language to vivify the wound in order to imagine how pain (the obscure experience which destroys language) is experienced. In contrast, Butler’s view implies that it is language which does things, such as wound a body. For example, anti-pornography laws, suggest that women’s bodies appear to be always receptive to the injury of the pornographic image and are premised on the assumption that pornography successfully demeans women every time it is published (ibid., 18-19). However, Butler also shows how the law fails to register the injury done through racist hate speech; or how a man may be even considered to be the perpetrator of an injury (or potentially), by the mere fact of stating his sexual orientation, as in the case of gay men in the military (ibid., 21). What is common to all those instances is how they imply there is an *agency in language* (ibid.,1); that by uttering a speech act, one immediately is vulnerable to the violence of a racist epithet, an offensive photography representing women as sexual objects, or dispossessed to the sexual desires of others. Let us pause briefly at the case of pornography. The message behind anti-pornography laws is that women are victims of the pornographic

¹⁴⁶ Generally speaking, speech act theory suggests that it speech is an act of communication (Bach 1998).There are many different types of speech acts identified in this area of study, some will be elaborated in this chapter.

¹⁴⁷ Recall the language of agency in Scarry’s work (chapter IV), refers to the act of giving pain a way out of the obscurity of the body through the metaphor imagined as causing the pain (usually invoked through the image of a weapon, or something that will lift the pain away (the x-ray showing the damaged tissue).

image because it reproduces the patriarchal norm which objectifies women's bodies (ibid., 66). Without minimising the offensiveness of speech acts like pornography, Butler questions the presumptions that injurious speech acts always have the intended effect.

Looking into these instances of linguistic violence, Butler troubles the agency of language drawing on gender performativity¹⁴⁸ and the power of subjectification through an injurious speech act (Carline 2011). For example, there are schemes which make a drug mules' experience intelligible through the identity of the feminised victim. However, by saying she is a victim, one is not only describing but simultaneously subjectifying her existence in a particular way and articulated through a convention (norms of femininity). In other words, the identity is "produced through the 'performance' of 'gendered scripts'" (ibid., 62). Implicit in *Excitable Speech*, we find how Butler's approach to subjectivity is grounded on the idea of a primary linguistic vulnerability (Butler 1997b):

There is no way to protect against that primary vulnerability and susceptibility to the call of recognition that solicits existence, to that primary dependency on a language we never made in order to acquire a tentative ontological status (ibid., 26)

What that means for subject formation is that "there is no pre-discursive I, but rather the subject is brought into being through discourse" (Carline 2011, 62). In other words, when the injurious speech and the effect (subjectification) are characterised as immediate and inevitable by the fact of being uttered, "the account of the injury of hate speech forecloses the possibility of a critical response to that injury [because] the account confirms the totalizing effects of such an

¹⁴⁸ Loizidou shows how Butler radically reworks the notion of performative utterances in Austin and Jacques Derrida's response to Austin: Austin considered the performative as statements that always do what they say, also known as felicitous statements. Derrida framed the concept of performativity as 'infelicitous' or statements that always fail to do what they say (Loizidou 2007). The problem is that both present an approach to performative utterances that do not consider how they are also practices embedded in history and culture (ibid., 35). Here, Butler includes Foucault's attention to the history of practices.

injury” (Butler 1997b, 18). Drawing on JL Austin’s notion of performative statements,¹⁴⁹ Butler explains how the injury would be a ‘felicitous’ or successful performance where the “saying is itself the doing, and that they are one another simultaneously” (ibid. 16). An injurious speech act would be felicitous if every instance would successfully injure and produce victims. Similarly, the power of derogatory names would be always felicitous if they did in fact turn, for example, a drug mule into a victim or a criminal (chapter II). So when the judge says ‘I sentence you’, this is a felicitous illocution, the utterance is apparently successful in condemning someone to a form of punishment. The utterance carries the force of the convention, instilled through historical practices of punishment.

Most significantly, Butler’s performativity does not subjectify the victim/criminal in isolation because the utterance cannot be set outside the boundaries of conventions and historical practices (Loizidou 2007, 35). For example, if one looks at the genealogy of the term (victim/offender), one can appreciate how the “performative provisionally succeeds” because it is an action that “echoes prior actions, and *accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices*” (Butler 1997b, 51). The authority of the speaker (the judge) is ‘citational,’ because the utterance of a term is a repetition of a convention, a norm, or a rule, but it can be also a reformulation of those things (ibid., 87). Citationality shows how the authority of the speaker (who has the authority to speak and whose utterance is considered to be true) has no origins, for example, in a transcendental norm. Instead, one can conceive authority as the sediment of speech acts. In that sense, there also is no one who is particularly authoritative or endowed with the authority over speech, because “neither the one that is being named nor the one that names are independent of the performative utterance” (Loizidou 2007, 42). Explained otherwise, the authority to condemn and punish is

¹⁴⁹ Kent Bach explains how Austin identified “three distinct levels of action beyond the act of utterance itself” (Bach 1998). The locutionary is “the act *of* saying something”; the illocutionary is “what one does *in* saying it”, and the perlocutionary is “what one does *by* saying it” (ibid.).

created at the moment of the utterance citing the conventions on how to relate linguistically with offenders. This means also that authority of the judge citing the authoritative text of the law is fragile, because the receiver of the utterance can resist the label, and thus also the authority who is doing the naming (ibid.). Considering the above, when a judge calls a drug mule a “merchant of death” (chapter II) or a woman “highly vulnerable and open to manipulation and suggestion,”¹⁵⁰ the label does not say anything about the person’s life. Instead, it is calling forth, through the act of naming, a set of historical practices and conventions on how to frame women as passive open bodies or the hyper-masculine agent of crime in drug trafficking discourses (chapter II).

Now, we must be wary against the totalization of subjectivity through these labels. Recall how Butler and Scarry show how, even if one is dispossessed to language, there is also resistance because the relation between materiality and figurality is marked by the ambiguity of bodies and the ambivalence of the discourse which brings bodies into political existence. In Scarry’s work, the dispossession to language is inherent in the process of naming pain. Far from being simple or direct, “the elementary act of naming this most interior of events [pain] entails an immediate mental somersault out of the body into the external social circumstances that can be pictured as having caused the hurt” (Scarry 1985, 16). To give pain an objectified state, requires ‘somersaults’ which are ambivalent because the objectification through language may take benign shapes (the poetry that brings pain into the public sphere) or destructive ways which further hide the bodies substantiating the political discourse which legitimizes an authoritative speech (chapter IV). In the Butlerian framework, one is disposed to the norms uttered and cited through a term that has oppressive effects *but language cannot be wholly totalised* by a political discourse, legal categories determining a norm on personhood, or by pornographic images subjectifying women as sexualised bodies. Although speech acts do

¹⁵⁰ *R v. Anderson (Edirs May)* [2006] EWCA Crim 1508 [5].

reproduce oppressive norms that shape and subjectify women drug mules as a victim of the mythical traffickers or as masculinized offenders who pose a threat to the rule of law, a speech act may also fail to reiterate a norm. In short, despite the apparent totalization of experience through a term which has both accumulated and dissimulated its power to injure, Butler's performativity and Scarry's analysis show the fault-lines of totalizing discourses.

In the contemporary approaches to vulnerability, Adriana Cavarero also suggests the language for vulnerability has been totalized by the language of political violence. In *Horrorism: Naming Contemporary Violence* (2009), Cavarero is concerned about the lack of words to express a particular form of contemporary violence: the violence against the vulnerable. Instead of exposing the effects of violence, Cavarero argues that the language for political violence in Western culture is masking it. One of the reasons for the impoverished language of violence is because the discourse has been tainted by a model of consensual struggle, such as war, notably a masculine model of violence where equal parties fight each other (Cavarero 2009).¹⁵¹ In other words, the political language for violence cannot designate asymmetrical violence. Cavarero endeavours to name the pain of those whose voices have been annulled by the kind of violence that erases the singularity and dignity of a person. The impetus behind Cavarero's work on vulnerability is to emphasise the urgency of giving a name to forms of violence that are 'covered' up.

Butler's latest work on vulnerability also notes how populations experience states of indefinite precarity which are obscured/masked by the rhetoric of terrorism and securitization (Butler 2009a). Moreover, this discourse is too prevalent. So while we might be exposed to an intensified rhetoric of violence, this discourse effaces and masks its own violent effects on others. One example is how the discourses on vulnerability intensified after the terrorist attacks

¹⁵¹ Violence is framed by cultures of war understood as the symmetrical and reciprocal infliction of injuring. It is a 'narrow' understanding of war marked by 'heroic' struggles and the performance of invincibility even when struck by the other (Cavarero 2009, 11). In short, the invulnerability of the masculine body is practiced through battle and the "fantasy of being immune to harm" (Bergoffen 2013, 117).

of 9-11, but it was also co-opted by the state's securitization practices which engendered more violence (Butler and Athanasiou 2013). In this context of heightened fear to the risk of being injured, the political community does not register the violation of rights or even death of suspected terrorists (or drug traffickers) as lives to be 'grieved' (Butler 2009a). Although Butler's diagnosis would appear to say that the discourse on terrorism and securitization have appropriated (totalized) the language of vulnerability, her analysis of Guantanamo shows otherwise. Despite the torture and isolation of the prisoners, photos of the torture and poetry composed by prisoners broke out from the confined and controlled space of the cells, setting in play a new chain of events in which other actors intervene and condemn the obscurity harnessed to eliminate the public visibility of those lives (ibid., 10). Thus, naming and giving a space for vulnerability matters. Even the leaked pictures of the female torturer in Abu Ghraib in 2004 show that the discourse of the torturer is beyond his/her control, engendering alternative spaces for contestation (ibid.).

Recall that Butler's earlier work also illustrated how reiterating speech acts that injure, even in an effort to eliminate them through legal institutions, may serve to sediment those discourses even more (Butler 1997b). In the case of drug mules, the representation of vulnerability as victimized bodies has been part of the legal discourse on drug mules in the appellate courts since *Aramah*¹⁵² and *Faluade*.¹⁵³ My question is, what are the effects of these reiterations and citations of vulnerability in the context of the discourses underpinning drug trafficking discussed in chapter II, namely securitisation and neoliberal governmentality? Do these claims push back the norm of the juridical person of criminal law (chapter II and III); do they introduce a new form of judging the responsibility of criminal offenders, or re-instate vulnerability within the normative parameters of feminized victimhood? Finally, do these

¹⁵² [1983] 76 Cr. App. R. 190

¹⁵³ [1989] 11 Cr. App. R. (S.) 156

claims of vulnerability advance or limit individual and social justice for women and men doing drug mule work? By incorporating feminist and queer approaches to vulnerability, the next section suggests that the framework of ambiguity offers a way to navigate and unpack the political effects of naming women drug mules as vulnerable offenders. Again, by holding sight of the ambiguity as a critical approach, the overall effort in this chapter is to flesh out the sexual politics of vulnerability and what is at stake when vulnerability is animated by the imaginary of violence to the body.

2. Animating wounds: Violence, identity, and the work of the image

What has been argued so far, by weaving together the analysis on pain and injury, is how the concept of vulnerability is complicated by its reference to the wound. This image that incites a view into what is normally obscure to our consciousness, the interior of our body, stripped off from the protective continuity of the skin. This image of the flesh without the cover of the skin, a sense of exposure to the world, animates the concept of vulnerability (Turner 2006, 28). In that regard, the exposed body may appear as an invitation to watch a future possibility: our own possible encounter with wounding. How is that image received? What kinds of responses does it elicit?¹⁵⁴

In *Violence and the Philosophical Imaginary* (2012), Murphy analyses vulnerability in feminist theory, charting the transition from identity politics to the current iterations, including Butler and Cavarero's account. Probing the limits of deploying the motif of violence in continental philosophy, she argues there is risk of naturalizing the relationship between the imaginary of violence in vulnerability and the discourse deployed to eliminate violence. For example, the critique of sexual violence has arguably been violent in itself, producing and

¹⁵⁴ For example, Butler shows how calling oneself a homosexual man was understood by the US military as an injurious act, a threat whereby sexuality is conflated not only with doing the sexual act but also a 'contagious act' that would dissemble the normative boundaries of male heterosexuality (Butler 1997b). The same statement would not operate the same in another context, for example, a social protest.

reproducing victimhood as an identity (Murphy 2012a). Further, she argues that identity politics has been complicit in domesticating and naturalizing modes of framing in which some markers of identity are rendered more visible than others. Cognizant of how mobilizing the visibility of certain identity markers like race, gender or sexuality may entail participation in a kind of politics of recognition, she agrees that “images of violence inform every elaboration of identity” (ibid., 46). The challenge emerges in discourses which render violence “as an unavoidable and requisite moment in both the genesis and recognition of identity” (ibid., 46). In that sense, demands for social change confront two intertwining dilemmas: to mobilize solidarity showing how the past has constituted a subject through practices of discrimination, negation, and subjection, but also how that same discourse against violence subjectifies a person, a group, a nation. Stated differently, Murphy’s questions if a ‘wounded’ identity hamper the mobilization of solidarity without also disciplining and domesticating that identity. Rather than addressing past histories and practices of violence, vulnerability, if it is understood within the frame of sexual, racial, ethnic or national identity, risks reifying what Wendy Brown calls ‘wounded attachments’ (Brown 1995). For Brown, the politicized identity “makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics; it can hold out no future—for itself or others—that triumphs over this pain” (ibid., 74). In other words, wounded attachments rallied around identity may simply reinforce the same status of powerlessness¹⁵⁵ (Bell 1999, 41). Drawing on the notion of *ressentiment*¹⁵⁶ formulated by

¹⁵⁵ In a dialogue on Brown’s work and how it echoes vulnerability and issues of dispossession, Butler clarifies that the implication of Brown’s argument is not against identity per se and certainly not about contesting oppression, but it focused on inscribing injury in identity in order to make a claim (Butler and Athanasiou 2013, 87). The issue is not that the identity is wrong or improper; the concern is with the norms that regulate identity claims through a bind with the injury that defines them. Thus, Athanasiou remarks that the ‘production of embodied subjects’ is shaped ‘inside the normalizing and traumatizing constraints of discourse and power’ (ibid., 134).

¹⁵⁶ Brown argues that liberalism itself promotes resentful subjects through the ideal of self-reliance and self-made capacities. Yet, this model is bound to failure, promoting two responses to this failure, which Nietzsche identifies with suffering: one must either find ‘a reason within itself (which redoubles the failure) or a site of external blame upon which to avenge its hurt and redistribute its pain’ (Brown, 1995, 67). In other words, Brown argues, there is a tension between liberal individualism and social egalitarianism (as discussed by Norrie), ‘a paradox which produces failure turned to recrimination by the subordinated, and guilt turned to resentment by the “successful”’

Friedrich Nietzsche, Brown argues that in the context of contemporary liberal politics, mobilizing wounded attachments achieves three things:

...it produces an affect (rage, righteousness) that overwhelms the hurt; it produces a culprit responsible for the hurt; and it produces a site of revenge to displace the hurt (a place to inflict hurt as the sufferer has been hurt). Together these operations both ameliorate (in Nietzsche's term, "anaesthetize") and externalize what is otherwise "unendurable (Brown 1995, 68).

In other words, Brown cautions against enclosing pain within the boundaries of a political identity and then seeking to project that suffering outwards in the form of blame and revenge. However, Murphy also recognizes that jettisoning identity and recognition does not eliminate the dilemmas posed by violence¹⁵⁷. Instead, unpacking the imaginaries associated with vulnerability, including the imaginary of violence, is meant to revise the work of metaphors and their effects.¹⁵⁸ Critical engagements on vulnerability interrogate how "the imaginary animates and replicates sexist normative expectations" (Murphy 2012a, 47) but also do not renounce to the aspiration of imagining vulnerability otherwise. First of all, what are the effects of animating women's visibility through the image of vulnerability? What might be the effects of deploying vulnerability in order to demand recognition that women working as drug mules are less culpable? When the discourse of vulnerability in the courts present the vulnerable drug mules as suffering bodies, the effect has not been the recognition of a mutual relation between the legal addressor and addressee. Instead, chapter VI will show how one of the effects is the

(Brown, 1995, 67). The tension arising from promoting freedom and selfishness and the premise of equality sustain the process of *ressentiment* in all subjects of liberal politics, not only the ones who are left out from the structures of privilege.

¹⁵⁷ Attention to the tropes of violence deployed extends to those who are abjected, those who are too visible and subject to discrimination as a result, and "those whose persistent misrecognition or non-recognition render them ineligible for the attribution of moral worth and even the most basic of human rights" (Murphy 2012a, 46).

¹⁵⁸ The critique matters, not only to deconstruct the metaphor impinged in the concept of vulnerability. In other words, Murphy's project addresses a range of discourses where violence animates theory, such as post-structuralism, phenomenology, post-colonialism, feminism and queer theories.

singularization of vulnerability to the post-colonial victimized mother. Clearly, vulnerability cannot be considered as something particular to feminine identity (or other identities). The challenge for a feminist critique of the masculine model of legal personhood is how to incorporate the recognition about the invisibility of women's injuries (histories of oppression, subjugation, and discrimination) before the law, without immortalizing it as a fixed identity characteristic. One cannot disavow those histories. Most importantly, and I think this is the crux of the matter, is how even if those histories of oppression are fleshed out in the name of victim or vulnerable subjects, is how vulnerability marks the irremediable relation between self and others (Murray 2000; Butler 2012b, 41).

Much of the thesis has been drawing attention to the injured/injurable body, but it cannot be emphasized enough that the vulnerability has been considered as the relation between self and others. Linguistic vulnerability emerges in the "scene of address" (Murray 2000; Butler 2014b). As I understand it, the scene of address is the mutually vulnerable encounter between addressor and addressee. In that sense, the figure of authority that is fragile because both addressor and addressee are dispossessed to language. Butler's account of this scene of address shows the ambivalence in the dispossession to language, given over to caring or violent practices, but also ambiguous because the self is not yet defined by either:

The self that I am yet to be (at the point where grammar does not yet permit an 'I') is at the outset enthralled, even if to a scene of violence, an abandonment, a destitution, a mechanism of life support, since it is, for better or worse, the support without which I cannot be, upon which my very being depends, which my very being, fundamentally and with an irreducible ambiguity, is (Butler 2005, 81).

However, when vulnerability is singled out as a characteristic of identity, there is already a logic of exclusion which disavows this ambiguity and turns it into a form of violence. My argument throughout this chapter is that naming the vulnerability is received within a discourse

or a field of knowledge which has its own norms, conventions and rationalizations about how to respond to the tropes within vulnerability (injury, injurability, and pain). The next sections chart the political effects of the image underpinning vulnerability to give a sense of the contexts in which it is named and put to work. What I want to illustrate is where and how vulnerability has been understood a ‘problem’ of the human body which can be controlled and managed through the strategies and knowledge.

3. Mitigating vulnerability: The resilience approach to injurability

The common denominator of vulnerability approaches in sociology and politics is the body. In fact, the body is at the centre of most of these intellectual approaches spanning across a wide spectrum of disciplines. The sheer ubiquity of the concept shows a notable investment in the body as well as the institutional, political, social, geographical, ecological and existential situation of the body. I will give a brief overview of the ubiquity of vulnerability across the humanities, social sciences, and biological sciences to illustrate how knowledge is implicated in the management and control of vulnerability, understood as the exposure of the body to injury. Highlighting these discourses raises the two themes presented in the earlier discussion on pain: first, the mind-body dualism; and second, the strategies deployed to abject vulnerability through knowledge and technology. Eventually, I will narrow down the focus to what it is said about vulnerability in gender and sexuality studies, law, ethics and discourses of responsibility.

The fragility of embodiment has not been thought about in a vacuum. However, Descartes engaged in his anatomical studies in the isolated environment of the dissection table not the living body (Leder 1990). The lungs became an object of study, visible as objects but at the expense of losing depth in the analysis of the experience of breathing (ibid). Leder suggests that Descartes’ anatomical study of the body also had ethical implications, as the

“figure of the third-person corpse” supplanted “other ways of approaching embodiment” (ibid., 146). Without a doubt anatomy and medicine, have been geared toward ensuring life. Yet, the price of keeping death at bay included de-subjectification¹⁵⁹ and de-vitalization, analogized with machine (ibid.).¹⁶⁰ Joanna Bourke’s history of pain makes a similar point but with regards to anaesthesia. Before the nineteenth century the language of pain was framed by militaristic or religious discourses; they were the reference points for explaining the body in pain, even when the cause for that pain was not an injury of war. For example, pain was like ‘a divine rod’ or as Bourke notes, these discourses were “extolled to put on the armour of battle” in the face of the ‘retribution’ of germs (Bourke 2012, 2421).

Meanwhile, without the medical technology we have today to make visible the inner confines of the body, doctors relied on patients’ subjective accounts of pain. The development of analgesics furthered the perspectival shift in relation to the body in pain and thus changed how doctors related to the body. With analgesics, doctors could ‘take their time’ cutting and exploring and finding the physiological cause, a damaged organ, tissue, etc. (ibid.). In short, anaesthetics reproduced the conditions of the dissecting table where corpses are studied. In addition, the development of microbiology, chemistry, among other forms of knowledge allowed “physicians to bypass patient narratives in their search for an ‘objective diagnosis’” encouraging a focus more on “the disease than the patient, on ‘cases’ rather than ‘suffering people’” (ibid.2421).

The reliance on technology and anaesthesia also demoted the role of patients’ pain narratives; they were discouraged as they “became ‘noise’, serving little diagnostic or healing

¹⁵⁹ Leder argues that the dangerous mortal body “has been desubjectified, devitalized...the corporeal threat is as far as possible, subdued” (Leder 1990, 148).

¹⁶⁰ In the *Passions of the Soul* (1649), Descartes said: “And let us judge that the body of a living man differs from that of a dead man just as does a watch or other automaton (that is, a machine that moves by itself) when it is wound up and contains in itself the corporeal principle of those movements for which it is designed, along with all that is required for its action, differs from the same watch or other machine when it is broken and the principle of its movement ceases to act”(Descartes 2000, para. 330–331).

purposes” (ibid.). Annemarie Mol’s auto-ethnography of arteriosclerosis also notes how, during surgery, doctors treat the body as an object to be repaired but the singularity or subjectivity of the patient recedes into the background until the task is completed (Mol 2003). Still, Mol’s main point is that the body emerges and disappears as an object in different situations “with the practices in which they are manipulated. And since the object of manipulation tends to differ from one practice to another, reality multiplies” (ibid., 5). In other words, Mol argues that bodies are shaped or treated as objects through different techniques and thus, there is no constant ontology but rather multiple ontologies of the body¹⁶¹.

And what if the desire to keep pain and illness at bay, supported by a perspectival shift and scientific technology, is replicated and echoed in other areas of our life? What if these structures of experience have been replicated elsewhere? Scoping other disciplines, mainly philosophy and psychology, Vetlesen notices a general tendency to think that vulnerability can be regulated, managed, and distributed so as to minimize the potential of its occurrence (Vetlesen 2009). On a larger scale, anxiety about mortality and the imperative to control and bring about the submission of nature is a recurrent concern in vulnerability literature stemming from scientific disciplines like economics, environmental studies and geography. For example, vulnerability has been described as ‘risk’, ‘exposure’ and ‘shocks’ (Alwang et. al 2001). Ecology sciences note how humans have needed to develop “exosomatic instruments”¹⁶² (Georgescu-Roegen 1993, 98) to control and manage the environment. Inter-disciplinary geography accounts provide a more nuanced account of vulnerability (Hogan and Marandola 2005). Hans-George Bohle and Michael J. Bohle argue that vulnerability is increasingly

¹⁶¹ Mol argues against the traditional understanding of ontology as the knowledge of being as a constant, essential, or else. Instead, she argues that “ontology is not given in the order of things, but that, instead, ontologies are brought into being, sustained, or allowed to wither away in common, day-to-day, socio-material practices” (Mol 2003, 6).

¹⁶² This term is used in ecological economics, a concept developed by Alfred Lotke to describe things, or instruments external to the body which end up being integrated into embodied life, for example, houses, clothes, work instruments, etc. In economic terminology it is synonymous with capital instruments; or in philosophical anthropology, the instruments (political) to protect people from their own biological vulnerability (Turner 2007, 688).

conceptualized as a 'space' interconnected to political-economic causes, networks of social relations and vulnerable groups (Bohle and Watts 1993).

Rather than being conceptualized as a single space, vulnerability zones are configured as 'peripheral regions' dependent on the core (Philo 2005). Exploitation in these zones is more likely because the core "drains surpluses and resources away from the periphery" (Watts and Bohle 1993, 56). Notably, Philo stresses the historical dimensions of vulnerability. This resonates with other approaches that emphasize how "instances of vulnerability" cannot be understood without recalling the histories from which they emerge, for example, post-colonial history (Philo 2005, 445). There is an urge to conceptualize 'spatialities' of vulnerability (Findlay 2005), entangled with "histories and geographies of events that illuminate the stark realities of vulnerability in certain parts of the world and not others" (Philo 2005, 445). While these approaches incorporate the social and historical dimensions of natural disasters, vulnerability is also defined in primarily negative terms. Neil Adger defines vulnerability as "susceptibility to harm from exposure to stresses associated with environmental and social change and from the absence of capacity to adapt" (Adger 2006, 268). In this sense, the aim is to build the resilience of individuals and populations to withstand the risk to environmental shocks, conceived also in terms of man-made, human interaction with and exploitation of nature.

The purpose of charting these different approaches to vulnerability is not simply to show how different it has been incorporated and developed across disciplines, from international political economy to interdisciplinary ecology studies. While these approaches address the "consequences of complex interdependence" in the context of globalization (Kirby 2006), advancing the idea that vulnerability ought to be mitigated re-instates the view implicit in the history of medicine illustrated at the beginning of this chapter. Like pain, vulnerability, is conceived as a problem to be managed and controlled through strategies and techniques such

the separation from the suffering body through anesthetics. This perspective alters the relation with the body in pain, marking distance and separation, and the belief that the problem of pain has been ‘solved’. Remember that my aim is not to define vulnerability as the injured body in isolation, but stress what kinds of relations we have with these bodies.

4. Resilience and vulnerability in legal theory: Naturalizing risk

This section explores two regular references in legal studies in vulnerability which implicitly and explicitly borrow terminology and insights from interdisciplinary studies related above. Legal approaches that incorporate the notion of interdependence from the vulnerability studies described above also critique the lack of attention to interdependence in liberal approaches to legal subjectivity. However, their underlying message is that vulnerability is a problem that can be solved and mitigated through a stronger state or through the accumulation of ‘assets’ to make people less vulnerable (rua Wall 2008). Ultimately, these approaches to vulnerability do not break from the securitisation logic of the state and neoliberal governmentality. First, I will illustrate how Martha Fineman’s approach to vulnerability which relies on the idea of resilience developed by Peadar Kirby (2006). In Kirby’s view, resilience is a way to adapt and mitigate vulnerability through the accumulation of ‘assets’ (Fineman 2011; 2013). The second approach is the one presented by Bryan S. Turner’s sociology of vulnerability and human rights, whose formulation of vulnerability reproduces the securitisation logic.

As mentioned already in preceding chapters, Fineman’s approach incorporates a feminist approach while recasting vulnerability as a universal constant which is basically intrinsic to the human condition (Fineman 2008a). The vulnerability thesis she develops departs from a critique of identity politics, which has promoted antagonism instead of solidarity, instigated by the requirements of the doctrine of equality. For Fineman, this doctrine has had limited success in addressing injustice, and is mainly circumscribed within discrimination

claims which are onerous to make in practice as they rely upon an assertion of group membership defined around an identity to demonstrate a long history of discrimination. One could argue that the limitations of identity politics addressed by Fineman are an explicit dimension of intersectionality scholarship since the 1980s. Subjectivity can hardly be constituted by only sex or gender or race. Thus, intersectionality approaches underscore the notion that subjectivity is “constituted by mutually reinforcing vectors” (Nash 2012, 2) and the ‘multidimensionality’ of the lived experiences of marginalized subjects (Crenshaw 1989, 139). However, Fineman insists that the focus on discrimination claims deviates attention away from the responsibilities of the state to promote social justice. In the US context, discrimination is safely nestled ‘within the rhetoric of individual responsibility and autonomy’ justice (Fineman 2010, 255). Basic social safety goods, like housing, education and health care are excluded from the ambit of constitutional rights, while references to human rights are decried by the US Supreme Court as ‘foreign fads’. Fineman relates her frustration with this landscape and admits that her first articulations of the “vulnerable subject began as a stealthily disguised human rights discourse, fashioned for an American audience” (ibid, 256). Over the years, she has refined the vulnerability thesis, describing it as a heuristic and a description of the human condition.

Let us examine these points more closely. Fineman argues that as a heuristic, the acknowledgement of our mutual vulnerability and dependence forces a reflexive examination of biases embedded in socio-legal and cultural practices (Fineman 2013). In developing the concept of vulnerability, she clearly rejects the limited scope of the term in public health studies, where the term is used as a synonym for marginality based on racial/ethnic background, poverty, or lack of health insurance (Fineman 2008b, 8). In an argument which resonates with Cavarero and Butler’s reasons for addressing vulnerability, Fineman suggests the need to reclaim vulnerability without the negative association it has had to dependency, victimhood,

and pathology. Instead, she reaffirms the condition of dependency and vulnerability as simultaneously natural and socially produced. Vulnerability, she argues, can be mitigated through resources streamlined through a ‘responsive state’; and yet, vulnerability can never be eliminated. To do so, would be akin to denying our humanity. Moreover, institutions and relationships fostered throughout a person’s life should properly foster resilience (ibid. 22). Encountering the ‘right opportunities’ is not a matter of chance or voluntarism, but rather of fostering “the means and mechanisms whereby individuals accumulate the resilience or resources that they need to confront the social, material, and practical implications of vulnerability”(Fineman 2013, 19).

A central focus of Fineman’s critique is the liberal subject of law. She argues that the assumptions underpinning the legal subject fail to represent the complexity and ‘messiness’ of the human condition. Vulnerability repairs the eschewed subjectivity represented by the rational disembodied person of liberal social contract theories. This legal construct perpetuates inequality through the uneven distribution of social goods (Fineman 2010). Implicit in her notion of vulnerability is a critique of reliance on an ‘impoverished’ ideal of autonomy and freedom that paradoxically “has resulted in a diminishing of options and autonomy for many as our society has become more and more unequal” (ibid., 258). Fineman refrains from exploring equality of opportunities from a perspective of autonomy because, she argues, it wrongly circumscribes the analysis to “interactions, motivations, and characteristics of individuals” (ibid, 259), instead of the networks of relations that foster autonomy. Cognizant of the implications of jettisoning autonomy for the feminist project, Fineman re-situates autonomy as a collective obligation instantiated by the condition of vulnerability. In other words, fostering autonomy is a responsibility “for the needs of others” (ibid, 260), a duty of the state but also a mutual “reciprocity inherent in being a member of society [...] everyone has a role to play in ensuring the greater good” (ibid., 261).

As explained above, the vulnerability thesis proposed by Fineman shares the impetus of re-imagining vulnerability otherwise, mainly by expunging the negative associations that demonize individuals – “stigmatized as dependent and failures” (ibid, 259) - and reclaiming vulnerability to further social justice claims. In so doing she maintains the feminist critique of the public/private dichotomy, seen as a border that perpetuates women’s subjection. There are three salient critiques on the underlying message in Fineman’s formulation of vulnerability: First, with the way vulnerability is deployed without attending to the productivity of the metaphor of wounding; second, with how she tries to save autonomy by constituting it as an obligation of reciprocity binding all members of society and how this idea works out in the context of crime control (Munro and Scoular 2012) Thirdly, that in order to mitigate vulnerability, there must be an accumulation of assets (physical, human, social, ecological and existential).

Let us unpack the first point. While the idea of vulnerability might be built upon the commonality of the human body (Turner. 2006, 63), Fineman, and, as will be shown shortly also Turner, turn to the image of the injurable body. Perhaps the image of the wound is not the problem itself but how the wound calls for a particular rationalities and discourses on how to prevent, protect, and counter injurability. In that sense, Illan rua Wall argues that Fineman and Turner offer conservative approaches with regards to vulnerability. Of course, no one wants to feel insecure. That is not necessarily where the argument is going. Rather, what needs to be constantly probed are the assumptions from which one starts but also how and what is proposed as a solution. The focal point is the nexus between vulnerability-insecurity and how binding these two concepts performs in the different contexts where they are put to work. I would not say that Fineman is saying that we should be afraid of nature. Yet, there is an implicit desire to close the body, to protect it from decay, illness, and disabilities. Thus, while trying to reclaim an acceptance for marginal subjects, it could be said that the fear and risk impinging upon the

injurible subject demands again its closure, a return to the normal healthy body by invoking the concept of resilience.

Secondly, the concept of resilience evokes the rationalities of security. For example, Julian Reid criticizes the proliferation of resilience in social and political studies because there are still substantial differences between the aims of academic disciplines. While “sustainable development deploys ecological reason to argue for the need to secure the life of the biosphere, neoliberalism prescribes economy as the very means of that security” (Reid 2013, 353). Reid argues that transplanting the notion of resilience into the context of neoliberal politics does not contest its premises but rather sustains them (ibid). For example, the liberal economics have appropriated concepts from nature that create a facade of inevitability in the economic sphere (Connolly 2013; Harcourt 2011). Although development studies and neoliberalism are distinct, they come together through the “rationalities of securities” implicit in the concept of resilience (Reid 2013). The effect is that when vulnerability is inserted in the context of criminal law and securitisation discourses, there might be a tendency to pre-empt criminal behaviour and criminalize individuals who do not behave responsibly towards the vulnerability of others (Ramsay 2008; Munro and Scoular 2012). This is because vulnerability appears as a thing that can be managed and controlled through knowledge (recall the discussion on actuarial risk management in chapter II). Thirdly, rua Wall strongly objects to Fineman’s view on rights as assets to be accumulated throughout one’s life-time in order to develop resilience to vulnerability because it frames human rights through the lens of the market.¹⁶³

The other account of vulnerability influential in legal studies has been Bryan Turner’s sociological analysis in *Vulnerability and Human Rights* (2006), which links together the different perspectives on vulnerability in politics, law, and sociology. He argues that while

¹⁶³ Rather than breaking from neoliberalism’s effects and the individualistic legal person, Fineman’s approach to vulnerability re-affirms possessive individualism precisely through the idea of ‘accumulation’ of rights conceived as assets and positing a relation “between the social and economic, where human rights form part of the profit and loss table which stems ultimately from our exposure to the market” (rua Wall 2008, n. 54)

technological and medical progress have visibly reduced biological vulnerability since the seventeenth century, technology has also transformed how embodied vulnerability is understood (Turner 2006). Against cultural relativism, Turner grounds his theory of vulnerability in suffering and pain, conceived as a negative yet universal experience:

Human beings experience pain and humiliation because they are vulnerable. While humans may not share a common culture, they are bound together by the risks and perturbations that arise from their vulnerability. Because we have a common ontological condition as vulnerable, intelligent beings, human happiness is diverse, but misery is common and uniform (ibid., 9).

For Turner, vulnerability today is more a question of social and economic rights, and of reducing *institutional precariousness*. He does not address vulnerability in terms of embodiment (Gear 2010a). Instead, he argues biological vulnerability has been surpassed through science. This account implies a teleological history of scientific progress tied to political and legal institutions. Turner uncritically reproduces an important belief or aspiration subtending social contract theories in seventeenth century Europe, that is, that political and legal institutions are at the service of controlling and rationalizing nature. Drawing on Boaventura de Sousa Santos' critique of law, Anna Gear stresses how the liberal legal order of emerged in the backdrop of a scientific revolution. Hobbes especially espoused a belief in "the potential of science to create a rational social order" (Gear 2010a, 72) and ensure self-preservation through the law rather than the violence characteristic of the 'state of nature'. While stressing the relevance of Turner's project by revitalising the centrality of bodies in human rights theories, Gear notes that his conceptualisation of vulnerability is too close Hobbes' social contract (ibid., 133). This is because Turner elevates the biologically vulnerable body through the language of ontology. More importantly, he characterised the vulnerability as an "ontological insecurity" (Turner 2006, 9) premised on an incomplete biological body

which needs to be shielded through a juridical ‘canopy’, namely the rule of law and human rights law:

...legal institutions are fundamental in providing some degree of security in this precarious environment...Human rights can be seen as a component of this protective juridical shield. Indeed, the social canopy is constructed of both rites [sacred institutions] and rights [legal devices of security] (Turner 2006, 29).

Again, rua Wall strongly rejects Turner’s exposition, calling it “conservative in the literal sense” because the social institutions referred by Turner are same ones protecting privilege and allowing “aggressive imperial war around the world [and] the same institutions which institute racism domestically and internationally” (rua Wall 2008, 67). Human rights signpost suffering claims but have been also used to mobilize a militaristic humanitarianism, characterized as rationalities which seek to abject and solve the ‘problem’ of pain (ibid). The version of human rights in Turner’s account already directs a movement *away from vulnerability* “away from pain and suffering, so that we do not have to consider them” (ibid. 67). Drawing on the arguments in chapter IV and V, we could see this as a version of human rights law that anaesthetises and helps us to forget pain and vulnerability.

Both Turner and Fineman suggest that state institutions are also vulnerable. Yet, rua Wall argues that attributing the language of vulnerability to social and political institutions confuses the distinction between institutions and actual living beings. Indeed, as Scarry’s analyses of torture and war show, fictitious states appropriate the vulnerable body to substantiate their own claims to life. For example, Turner argues how ‘failed states’ lack the institutional ability to deliver protection (Turner 2006, 33). Although his argument does not deny that the strong state can also increase people’s vulnerability, the discourse traffics the image of the injurable sovereign state that needs to engage in a balancing act between weakness

and strength. Whilst Turner's account acknowledges the problem of strong sovereign powers, his account also transfers a modality of vulnerability *synonymous with 'weakness' or passivity* into the state or state institutions. Indeed, this is a very conservative account because it suggests that the solution is empowering and 'strengthening' these institutions to ensure political survival but also a disregard to the mutual relation of vulnerability between the political actors (people and state). In that sense, Turner's approach to vulnerability does not break away from the Hobbesian liberalism but rather reproduces it through the desire to flee from ambiguity which Beauvoir identifies in Western thought (chapter III). Butler situates a similar point more clearly in the context of subjectification and violence. She suggests that the subjectification of the sovereign falsely emerges in the moment of fleeing from its injurability, as if by reproducing violence against another, he would emerge as an agent and get rid of the passivity of vulnerability (Butler 2014b).¹⁶⁴ The next sections suggest how this dynamic, the fear of being injured and responding through the activity of violence, has been sustained through a logic of gender difference. For now, the main point in this section is how vulnerability can be conceived only along the lines of a passive and objectified injured/injurable body. Transferred to the idea of the state, the vulnerable (passive) sovereign, is deemed to require more 'strength' against threats opening the possibility to regain agency through violence. Ultimately, Turner's version of insecure vulnerability which works to justify the apparatus of security and the rule of law. In order to keep insecurity at bay, a theory of rights based on self-preservation is invoked that is ultimately unsatisfactory because rights are made highly dependent on a powerful sovereign (Gear 2010a).

Recall that in the context of drug control, security theories present drug trafficking as a threat to state security and the security of citizens (Herschinger 2010; Crick 2012). However,

¹⁶⁴ In a 2014 presentation, Butler argued 'there is a conceit or fantasy at work in the state of vulnerability that seeks to flee, and that desire turn into the reproduction of violence, where 'this "I" in destroying suddenly becomes pure action, finally rid of passivity and injurability' (Butler 2014b)

critics note that the adoption of some form of militarized police forces or even the military to counter drug trafficking increases the insecurity of citizens (Kushlick 2011) while it ‘strengthens’ only some institutions of the state, such as the police and the military (Carlsen 2012)¹⁶⁵. For example, respect for human rights and due process in Mexico’s ‘war on drugs’ have been side-lined when processing offenders or there is even direct participation of the state representatives in extra-judicial killings and enforced disappearances (Carlsen 2012; Human Rights Watch 2013; Gallahue 2011b). Danny Kushlick argues that the irony in the securitization of drugs is that it “has itself created one of the greatest threats to international security” (Kushlick 2011). One example is how the rhetoric of war bolsters securitisation measures, including the militarization of the police function (Corva 2009). The insecurity, which is an effect of securitisation, is unequally distributed across regions, increasing the precariousness of populations already dispossessed to socio-economic rights (Del Olmo 1990; Corva 2009; Sudbury 2010; Fransiska et.al., 2011). Dominique Corva argues that the “extension and exportation of the police state to the postcolonial world” (Corva 2009, 165) occurred through a complex dynamic where countries would receive developing aid assistance only if they also imported the US bellicose approach to combatting drug trafficking and production. The unequal distribution of violence across regions has been shaped through the international control system which partitions the “global space into spaces of production and distribution” (ibid., 165). This is just another way of saying that the effects of the globalized war on drugs is very different in the countries considered as the places where the heroin and cocaine originate (drawn along the lines of third world countries in the South) from the countries where they are distributed and consumed.

To conclude, this section suggested that invoking or putting passive, incomplete,

¹⁶⁵ Militarization of the police understood broadly as the use of a military ideology in policing (Hill and Berger 2009).

injurable bodies at the centre of an approach to vulnerability also brings back the objectifying approach implicit in the seventeenth century scientific project. In other words, bodies become objects and vulnerability becomes a condition which must be overcome, mastered and controlled through knowledge and ‘technologies’. As noted by Robyn May Schott “one of the fundamental features of the project of modernity is the attempt to master and control the natural world and our bodies as part of nature” (Schott 2010b, 18).¹⁶⁶ Similarly, Vetlesen shows, in the context of philosophy, that the strategies and techniques produced to control, resist, transcend or eliminate pain from experience can also lead to unwanted effects (Vetlesen 2009). Yes, the impulse to solve the problem of pain is the problem itself because pain appears as a ‘problem’ to be solved (rua Wall 2008); but the intentions may misfire and fail to achieve the desired result. Pain instantiates what Emad calls the “metaphysico-technological reaction to pain” (Parvis 1982, 355) whereby pain becomes something that can be precisely calculated and contained through technologies. In that sense, laws have been figured as technologies or instrumental ‘artefacts’ (Scarry 1985). What is meant in this analysis is not to reject outright the technologies used to heal the body when it is injured and in pain, but simply that they are underpinned by a perspective (and most crucially) a modality of relation with the body *as an object*.

To be clear, the purpose of drawing out the links between the sciences and legal accounts of vulnerability has not been to keep tight boundaries between social sciences, humanities or interdisciplinary empirical sciences, as this project is itself interdisciplinary. Trans-disciplinary approaches to vulnerability represent an important effort in troubling the boundaries between the categories of human, other-human, animal, and inhuman (Neal 2013;

¹⁶⁶ Schott draws her critique from Bauman’s sociology of death and dying, as well as from the different ‘strategies’ devised by societies to cope with the prospect of mortality, including experiences associated with it, such as illness. Bauman also maps out the history of the philosophy of death in Western epistemologies across modernity and post-modernity and the differences between these two historical periods (Bauman 1992).

Stanescu 2012; Grear 2013; Barad 2012)¹⁶⁷. However, the example of the incorporation of science into social contract theories of the seventeenth and eighteenth century (Grear 2010a; Santos 1990) warrants caution and functions as a reminder that the relationship between criminal law and the empirical sciences is not necessarily always benign (Harcourt 2003; Harcourt 2011), as discussed in chapter II. Empirical sciences are used as references of authority, truth claims, or as frames for thinking about an issue differently. However, it is important to remember that, as Susantha Goonatilake and Sandra Harding remind us, we cannot forget there are hierarchies at work in science and also a plurality of approaches to scientific endeavours (Goonatilake 1998; Harding 2008).

5. Confronting the sexual politics of injurability

Drawing on the discussion of the last section, the following sections elaborate how feminist scholarship unpicks the trope of injurability animating social contract theories and its effects on women. It is undeniable that there is an extensive body of work on social contract theory in feminist scholarship which considers its differential impact on women (Naffine 1997; Lacey 1998b; Shapiro 2009; Sample 2002; Pateman 1988), which also makes it hard to address all of the concerns feminists have raised about social contract theory. I will focus on the points that concern us particularly: First, an understanding of autonomy which is conceptually dependent on the idea of physical integrity (Naffine 2009); and second, a notion of physical integrity which tends to be premised on a gendered conception of harm.

Let us come back to the image of the wound. Corporeal harm is only really acknowledged when it involves a visible injury (Bergoffen 2003), the literal image of woundable body, making it difficult if not impossible for other types of corporeal harm, for

¹⁶⁷ For example, Karan Barad looks into the quantum mechanics of electrons ‘touching’ to trouble the binary of inside/outside, inclusion/exclusion, mattering/not-mattering. She argues for an ethics that ruptures indifference and which can arise once we face the ‘inhuman’ understood as the indeterminacy of mattering and non-mattering (Barad 2012).

example the harm of rape, to enter the legal or political realm (Naffine 1997; Cornell 1995; Du Toit 2009). While gendered injurability is quite a complex and extensive subject, this section compares two critical readings of feminine/masculine injurability, where pain, injurability and sovereignty are put to work in order to express differential and antagonistic representations of vulnerability. The first reading is Louise Du Toit's *Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (2009), where the author constructs an argument about the political impossibility of recognizing the harm of rape, drawing on Scarry's articulation of the structure of torture. In the second reading I want to consider *Parables of Revenge and Masculinity in Clint Eastwood's Mystic River* (2005) where Berkowitz and Drucilla Cornell analyse the homophobic anxiety underpinning masculine vulnerability. In both contexts, my interest is in understanding how gender and sexuality frame the female body as penetrable and the male body as impenetrable and how that relates to concepts of vulnerability.¹⁶⁸

Returning to what was said at the beginning of this chapter, images of violence animate contemporary feminist, postcolonial, queer, literary and political theory (Murphy 2012a). While any discussion or theory of corporeal vulnerability cannot, and should not, elude the question of violence and the recognition of legal harms, Murphy warns against rhetoric and imaginaries of violence that “symptomize and attempt to mask philosophy’s problematic relationship to the body, and crucially, to its own body proper” (ibid., 16). As inevitable as it might seem, the investment of theory in certain tropes, the effects of the proliferation of images, allegories and metaphors of violence should be kept in check, against their naturalisation. In feminist theory, this means questioning how and what are the effects of thinking that there is a ‘natural’ aesthetic or phenomenal analogy between the wound and the vagina, highlighting this

¹⁶⁸ As argued by Butler, vulnerability is feared when associated with passive and exposed bodies whereas in violent struggle the masculine fantasy retains agency even as the body is pierced and injured (Butler 2006; Butler 2014b).

site as the 'natural' open wound of the female body. Susan Brownmiller is well known for arguing that men have a 'structural capacity to rape' while women's vulnerability originates from her sex, an 'anatomical fiat' that mandated women's natural role as prey (Brownmiller 1993, 4). Although this view has been largely discredited as an essentialist perspective on the bodies of women and men (Atmore 1999), it is also seen as expressing something about the cultural assumptions which mediate our perceptions of biological female bodies.

Moving beyond Brownmiller's spectre of Descartes imprinted in mechanistic bodies, Cornell's sophisticated analysis presents another version of the 'wound of femininity' grounded in Lacanian psychoanalysis and philosophy. She suggests that the wound of femininity is an alienation from subjectivity: the "ripping of one's sex and sexual persona with power and creativity"(Cornell 1995, 7). The wound is a 'cut' between the subjective and objective selves where women find it difficult to become individuated and live their full personhood. Through this frame, Cornell argues that women's sexual subjectivity is systematically undermined by sexual violence. Rape is not simply an injury to the psyche, a view that would fit with the Cartesian split. Instead, rape is an injury to women's sense of self (Du Toit 2007, 64–65). Importantly, Cornell points to the conditions where women can become subjects and express their own desires. However, those conditions are generally not present in the symbolic order, because the masculine 'other' never reflects back women's subjectivity and throws "women back onto their sexual(ized) bodies understood as the antithesis of (the ideal of) full and unified personhood" (ibid., 54). Thus, Du Toit suggests in her reading of Cornell that rape is an 'impossibility': because the conditions for women's selfhood are not part of the symbolic order and because rape is, first and foremost, an injury to women's sense of self, the harm of rape is neither visible nor intelligible; under these conditions, it becomes impossible to recognise the true harm of rape.

One of Du Toit's central claims is that social contract and property models framing sexual autonomy and inviolability misconstrue the harm of rape. The poverty of these models is not only that they misconstrue the damage of rape, but also prevent the possibility of even realizing that rape has occurred. Rape laws today, Du Toit argues, have transferred ownership of the body from men to women themselves. However, this approach marks continuities between pre-modern and modern laws that frame female sexuality through the lens of possessive capitalism. Again, we find the Cartesian shadow at work, implicit in John Locke's property model. In the Lockean view, "the self depends on a Cartesian split between live spirit and dead matter, between mental, true self and material, inessential body" (ibid., 40). Subjectivity, located in the mind, is essentially impenetrable because it is the body that is penetrated. Rape is construed as the illegal use of the body, without the consent of the person. In this view, rape is akin to entering and using land without permission or a contracted agreement between the parties. Rather than being seen as an injury to subjectivity, rape is seen as stealing property for a brief time because the subject is "fundamentally separate from one's body and its attributes, including its sexual ones" (ibid., 41). The current model of property ownership also opens the door to judging victims as irresponsible 'owners' of their body, for example, if they are seen as sexually promiscuous.

In sum, Du Toit suggests that the problem of rape is rather a problem of misrecognizing women's sexual subjectivity, consistently marginalized and made ultimately impossible through a patriarchal symbolic background. The notion of subjectivity she advances builds on psychoanalytic and phenomenological models of the self that emphasize "the constitutive relations between body, self, world and other" (ibid., 65) She favours these philosophical perspectives over postmodern notions of subjectivity, particularly deconstructive approaches,

where feminine identities are idealized as fragmented vis-à-vis the stable male subject.¹⁶⁹ To advance notions of feminine subjectivity as ambiguous and unstable fits neatly into existing patriarchal paradigms of sociality, and thus, “renews, sustains and maintains the production of the male ethos or social order” (ibid.,109). Instead of the Lacanian inspired ‘open-ended’ subject, Du Toit argues that the harm of rape has to be thought in terms of the specificity of feminine subjectivity. The symbolic culture has been unable to understand the “wound of femininity...as an injury that obtains its particular perniciousness from a wounded (feminine) subjectivity that is symbolically construed as the antithesis to full personhood” (ibid., 54). In other words, the feminine self is constantly alienated from her subjectivity through models of femininity construing her as an object for others.

My interest in Du Toit’s work is in how she analogizes Scarry’s phenomenology of torture with the phenomenology of rape, although she might be overgeneralising the open-endedness of embodied subjectivity in post-structuralism.¹⁷⁰ Du Toit is able to draw these links by invoking Hegel’s master-bondsman model to emphasise the interdependence of subjectivity and the role of recognition. She argues that the master-bondsman model underlines the way “unequal relations and relations of *domination* have an effect on *ontology*, or on how we inhabit the world” (ibid., 68). The problem of domination emerges from the desire of self-consciousness to preserve his life but in pure abstraction (ibid., 71), without a body that can be injured. In Hegel’s words, pure abstraction is the negation of the “objective mode of self-

¹⁶⁹ Kelly Oliver similarly criticizes the deconstructive turn for representing women as ambivalent. Even when the aim of deconstruction has been to erode hierarchies of sexual difference embedded into subjectivity dualism, Derrida reduced all sexual difference to ‘undecidability’ (Oliver 1995). Derrida’s use of the female body as a metaphor for the concept of ‘undecidability’ appropriates the feminine “...by turning the female body into just so many metaphors, metaphors that no longer have anything to do with that body, the deconstructive philosopher can safely distance himself from the female body and maintain its mastery over it” (ibid., 110). The female body is used to introduce the possibility of difference in his deconstructive theory, but women remain excluded as authors.

¹⁷⁰ Yvette Russell argues that Du Toit’s critique of post-structuralism is limited and without sufficient attention to the work of philosophers like Judith Butler, who has “made a career out of theorising the body, and interrogating the space occupied by bodies (including, arguably, those of rape victims) that subvert and problematise performative gender norms” (Russell 2010, 103).

consciousness... that it is not attached to any specific existence, not to the individuality common to existence as such, that it is not attached to life” (Hegel 1979, 113). In short, recognition is tied to the denial of embodiment and mortality as a way to “circumvent the risk of non-recognition by another free consciousness”(Du Toit 2009, 71).

Now, recall the structure of torture in chapter IV, where the absence of recognition to the victim’s pain is essential in the performance of the torture. The denial of the victim’s pain, amplifies the ontological divide facilitated by pain’s telic orientations (inward). For Du Toit, there is a similar antagonism between victim and rapist. This relation has been vastly misconstrued through social contract models presupposing equality between the parties and implicitly exchanging goods or property. Instead, she characterizes the rapist’s relation with the victim as a “dramatically unequal contest for ontological domination”(ibid., 87). The rapist builds a world for himself by forcing the victim to experience herself as a thing, as “his sense of self and of his (place in the) world are affirmed, extended and expanded” (ibid.). Like the victim of torture in Scarry’s account, Du Toit argues that the victim is forced to affirm the world of the offender. The world of the torturer is not simply built in opposition to the victim’s world, but requires the victim’s participation in the denial of her own world. In short, we see the structural similarity with Scarry’s argument about the deflection of moral blame away from the torturer to the victim, where the woman is made responsible for the betrayal to herself. *She* has participated in her own objectification. *She* is to blame for accepting the world of the torturer (where women are sexual objects of self-extension). Clearly, for such a spectacle to be needed, for the regime to be affirmed, it must be that is highly contestable in the first place (ibid.,88).The phallic power is a power produced through dialectic where the woman’s subjectivity is almost completely annulled. It is not an ‘original’ power. This point is curious because it comes very close to Butler’s critique of sovereign power (Loizidou 2007), which will be explained further in this chapter.

What I wish to draw attention to is how the language of agency is implicit in the process where a victim is made complicit in the offence. Du Toit's makes an analogy between the phallus as the weapon that carries out the injury but also how the body of the woman becomes the weapon against 'herself'. As the torturer/rapist amplifies *his* colossal voice, understood as pure intention and will, he distances himself from the colossal body of the victim of sexual violence (Du Toit 2009, 91). Crucially, Du Toit analogizes the model of torture to the Cartesian duality. The effect of rape is the duality in the Cartesian subject, where the woman becomes a body without a voice and the man a voice without a body. Coming full circle, we find the phenomenology of pain discussed in chapter III, played out along gendered relations of violence. Du Toit offers a harrowing account of rape that resembles the experience of torture. In short, rape robs women's voice, and this model of physical and symbolic violence is reproduced in the social order.

While I agree for the most part with Du Toit, my own interpretation of pain and how it is implicated in the onto-epistemology of subjectivity is slightly different. Recall key points in the previous chapters. First, Leder's suggestion that the split between body/mind is a (mis)reading of the body in pain but it is *not* a phenomenological invariant. In that sense, embodied pain is imbricated in social space, although this point does intersect with Du Toit's analysis of masculinism. However, recall also how violence causing pain destroys speech but paradoxically, pain is also the most pressing experience that moves us towards speech. They are related but do not collapse into each other because pain resists representation. This argument can be supplemented by Loizidou's suggestion that figurality and the materiality of bodies cannot wholly collapse into each other (Loizidou 2007). In short, and drawing on the spaces of ambiguity charted throughout this thesis, my reading of subjectivity does not consider post-structuralism as a dispersal of femininity and reiteration of the inability for a feminine subjectivity. Instead, ambiguity is precisely a space to resist the totalization of discourse which

seeks to annul women's voice through the objectifying violence of rape. Moreover, the ideal of the invulnerable man who objectifies others through violence responds to a desire to flee from the ambiguity of embodiment historically and culturally symbolised by 'monstrous' vulnerable bodies.

6. Anxious masculinities: Controlling ambiguity through borders and limits to the body

Now, we have reviewed an account of how sexual subjugation involves the loss of the subjective world and the acceptance of the other person's world, where I am forced to participate in my objectification. In the next reading, I want to explore the other side of the dialectic of sexual violence, mainly, the anxiety of the male subject of becoming an object. Berkowitz and Cornell's exploration of the masculine desire for invulnerability echoes some of the points about masculine self-extension through female subjection. As Du Toit argues, the phallic power is ultimately vulnerable, to the point that it uses the spectacle of violence on the female subject to substantiate a disembodied power. This is an invulnerable power that fears its own death; concretely, the fear of annihilation of the masculine stems from an envy of maternal power:

Envious of women's maternal power, men both turn away from the maternal body, denying their own birth, and they choose death as their own proper domain. Men claim death as their domain of power: they can risk and defy death through adventures and war, and if they succumb to it, they are 'immortalised' in heroic tales; they are valued because they 'control' death by deliberately risking or choosing it (Du Toit 2009, 205).

In contrast, Roby May Schott argues Western culture has sexually coded through femininity (Schott 2010a, 5). Instead of associating the powers of reproduction in the maternal, femininity has been associated with taking life rather than giving life. Such an argument seems

counterintuitive to the representation of women through the capabilities of reproductive bodies. Yet, Schott notes that it is precisely in the trope of motherhood where ambivalence is instantiated because the pregnant female body symbolizes the disruption of order through its lack of respect for borders, positions and roles (Schott 2010b). In other words, the womb is the place where mortal life begins. However, the trace of creation in femininity does not disappear entirely from the philosophical imaginary; it is only repressed or given a negative value (Irigaray 1993; Oliver 1995).

Through a genealogy of the notion of monstrosity in Western epistemological conceptions of motherhood, Margrit Shildrick suggests that the abjection of femininity and motherhood are located in ambivalence not in an absolute negativity. Further, the anxiety is not towards death per se, but the inability to stop the time towards death. The pregnant body becomes the projection of this fear towards the ‘excess’ of embodiment. Shildrick’s invitation to think vulnerability otherwise also resorts to phenomenology to critique the mind-body dichotomy supplemented by a deconstructive analysis (Shildrick 2002). This genealogy starts with Aristotle, who viewed the birth of women as a monstrosity, in comparison to the male morphology. Further, Shildrick explains how women’s bodies have been deemed to be ‘improper’ (ibid., 12) because they cannot contain the excesses of embodiment (ibid., 31). This representation of female bodies persisted in scientific discourses in seventeenth century France, where women’s emotions, particularly their compassion towards criminals who were publicly executed, were presented as explanations of infant deformities. Nicolas Malebranche, a Cartesian interlocutor, argued that pregnant women were unable to hold a subject-object distance (ibid.). Women’s inability to master their emotions was contrasted with impenetrability of the rational mind.

What is interesting here is how Shildrick re-appropriates the concept of monstrosity and deploys it as a mirror that reflects back the vulnerability of the idealised masculine sovereign

self. Shildrick suggests that the fear of vulnerability - implicit in the excessive materiality of the pregnant body- signifies the permanent changes experienced during life. Pregnancy's characteristic 'excess' corporeality signifies a reminder of the inability to contain the inner bodily boundaries, revealing how embodied life is "not vulnerable to external threat, but actively and visible deformed from within" (Shildrick 2002, 31). The 'unstoppable corpus' is changed as much as it is transformed from without by others; a reminder of the impossibility of the impermeable sovereign self. The ambiguity in the constant change of embodiment marks the impossibility of individualism conceived as a coherent self (Schott 2010b). Schott and Shildrick's accounts of motherhood are substantially influenced by Julia Kristeva's psychoanalytic concept of abjection. Abjection refers to "the condition prior to being, and hence prior to differentiation and individuation, a condition that reminds the individual that its existence is under threat" (Kristeva 1982, 9). Prior to the formation of the subject, the lack of differentiation from the mother incites horror and disgust in the infant because of its dependence on the mother. Kristeva stresses that the separation of the semiotic bond between mother and child is not natural but a cultural schema of the paternal symbolic order. Other accounts also underline the ambiguity that subtends the scene of vulnerability (Bergoffen 2001; Bergoffen 2003; Cavarero 2009; Schott 2010b; Murphy 2012a; Murphy 2012b). The fear of being engulfed by the mother symbolizes the anxiety towards the lack of proper borders visible in the pregnant body. To what extent does this scene, where the impossibility of individuation is perceived with horror, resonate with the anxiety of the penetrability of the male body and the state of actual and potential vulnerability which elicit a need to protect oneself through 'shields'? More importantly, these scenes of embodied vulnerability also imply exposure and threat, eliciting a response of control and which is projected onto the feminine, as the one who is to blame for men's mortality. And it is to that effect, that violence underpins the idealization of "the fantasy of man who makes himself out of nothing and who is therefore purely

masculine” (Easthope 1992, 20). This is structurally similar to the lord-bondsman model discussed earlier. This fantasy is subtended by the fear of castration which symbolizes the masculine “inability to control the world” (Berkowitz and Cornell 2005, 330). The anxiety towards male rape forces upon the masculine a confrontation with his femininity (identified as sexual penetrability). For the masculine sovereign, the realization he is also penetrable and reducible to an object poses a threat to “his masculine fantasy of control, mastery, and even kingship” (ibid, 330). Experiences of trauma destabilize the desired security, reminding the subject about his finite life and fragile embodiment. The sovereign seeks to forget the fragility of embodiment through violence. Berkowitz and Cornell suggest that underneath the desire for domination there is a denial of the given world, which seeks to escape “the finite and limited nature of his humanity” in a “desperate struggle to understand and master a universe gone mad” (ibid., 317). Remember that in the mind-body duality (chapter V), the body appears as an alienated object. Then, recall that this perception of the body, in combination to the strategies and scientific knowledge of the body, supports the idea that one can manage, control and overcome the injury/injurability of the body. However, the overcoming of injurability is often done through the mechanisms of blame and revenge, a response to the loss of the sense of self in an experience of trauma where violence appears as a possibility for regaining agency.

Exploring the links between trauma and revenge, they suggest there are three fundamental responses to trauma. One is the loss of speech which they describe as the *‘collapse’ of the self*; second, the refusal to admit one's own vulnerability through *revelry*; and third, *the acceptance of finitude*. The first one is simply engulfed by the melancholia of losing oneself, unable to relate any longer to the world outside; the second, seeks to *deny the trauma through revenge*, and the third, *accept the limits of sovereignty* and recover the self- lost by the denial of subjectivity in the violent act against him - in a different way. In short, the subject accepts his own vulnerability. The significance of this analysis is that Berkowitz and Cornell

give an account of social relations that pluralizes the responses to trauma underpinning the dialectic of sexual violence. Moreover, this also points to alternative modes of legal justice and power different from revenge. Comparing the ‘law of justice’ with ‘revenge as justice’, they suggest, revenge as justice is historically a right given by God which cannot be justified by utilitarianism and deontology. Echoing Beauvoir’s analysis of revenge, Berkowitz and Cornell assert that revenge can be read as a transcendental act because one acts *as if* one is God by taking life (ibid.). In contrast, the law of justice is the one that transforms melancholia resulting from the decentring effect of trauma through the “acknowledgement of vulnerability and love” (ibid., 328).

To conclude, this section charted the sexual politics of vulnerability, exploring the gendering of the vulnerable (injurable) body. The gendering of vulnerability is an effect from organizing agency and passivity through gender differences. Notably, the model of gender difference, which attributes agency to the self-bounded man and unboundedness to women, is underpinned by the anxiety to the lack of boundaries because they signal the passing of time and ultimately death. Thus, coding vulnerability as a feature of femininity is a way in which the masculine deals with his mortality but also a strategy through which he can renew himself as a sovereign through acts of violence (such as rape). This strategy is not only a way to exclude the feminine subject by objectifying her, but also way of fleeing from his own injurability by channelling the affective excesses (anxiety and trauma) onto others. Chapter VI, which examines the case law, finds a similar rationality at play in how the court interprets vulnerability vis-à-vis the rational legal person.

7. Reclaiming vulnerability otherwise: Agonistic dispossession

This chapter returns to the modes of relation towards vulnerability. If vulnerability discourses are going to have an effect on the lives of drug mules, the criminal law must be open to the question (not the problem) of pain. Let me explain what I mean by this. The views expressed throughout this thesis has been inspired by Butler's encouragement to think about how to *stay responsive to the equal claim of the other for shelter when we are afflicted by pain* (Butler 2009a).¹⁷¹ While Butler is explicitly asking if non-violence is possible in political life, I think this question is equally relevant to criminal law and legal theory. Thus, is there a possibility for a criminal law that does not respond violently to vulnerability (its own and that of others), through strategies of denial and abjection, retribution, control, and securitization against injury? Will criminal law be forever haunted by the two extremes scenarios of failure explicated in Beauvoir's essay on punishment: the tyrant¹⁷² (sovereign consciousness) and the formal law (calculation and formality)? Is there a possibility to articulate a law of justice- such as the one envisioned by Cornell and Berkowitz- that transforms revenge and melancholia into vulnerability and love?

As noted before, Cornell and Berkowitz suggest that it is possible, if one breaks from the responses to trauma which transform pain into revenge and self-destruction. I also think it is possible if we recall that vulnerability is not only about pain and injurability, but about the relations of power and affect which constitute social subjectivity. Vulnerability can be reclaimed to make demands for social justice, but we must also attend to its ambivalence. This

¹⁷¹ Although Butler has been working for a while on issues related to injury, pain and vulnerability (Butler 1993; Butler 1997b; Butler 2006), the critical question is most succinctly expressed in *Frames of War*: "All this is just another way of saying that it is most difficult when in a state of pain to stay responsive to the equal claim of the other for shelter, for conditions of livability and grievability" (Butler 2009a, 184)

¹⁷² The vigilante or the masses claiming revenge can turn into the tyrant, while the way Beauvoir thinks of courts and official tribunals is that they "claim to take refuge behind the an objectivity that is the worst part of the Kantian heritage". She never uses the word bureaucrat though it is clear she is criticizing in *Eye for an Eye*, the emptiness of legal formalism: how the "lawyer's summations unrolled with all the pomp of a comic drama" and "only the accused belonged to that world of flesh where bullets can kill" (Beauvoir [1946] 2004, 254)

section shows how Butler understands this challenge through political agonism rather than antagonistic violence. To clarify, *agonism* is a political perspective where there is a positive relation of struggle between adversaries. In contrast, *antagonism* characterizes a struggle of life and death between enemies (Worsham and Olson 1998).¹⁷³

The abject subject is at the centre of Butler's articulation of an agonistic politics. Let me recapitulate a few key points made so far in relation to the rational legal subject of criminal law and its relation to 'abject' subjectivity. Remember that chapter III showed how theories of punishment are underpinned by histories of violence allegedly sublimated by the social contract and the reasonable person of criminal law. Norrie called our attention to ambiguity of selfhood and the ambivalence in criminal law, first as an expression of the fault lines in legal doctrine but ultimately signalling the abeyance of relationality. Getting rid of embodiment in one of the versions of legal personhood enables a false and idealised version of sovereignty, created at the expense of femininity, demoted to pure a passive sexualized body to be appropriated. This alignment of sexual difference is rather a fantasy that cannot be sustained unless the performance is re-enacted through the systematic reiteration of subjugation, as suggested in a way in my reading of Cornell and Du Toit. However, the feminine is not wholly absent from the symbolic sphere. For Du Toit, the engulfment is almost complete, because she follows the torture model of sexual sociality where women cannot speak their desires because they live as broken subjects.

In contrast, a performative reading of injurability, would suggest that the subjugation of the feminine is ambiguous because there is a failure to engulf on into the other. In other words, if vulnerability is identified with the feminine, she cannot be willed away and remains constitutive of the masculine sovereign, even in the form of abjection. The sovereign subject

¹⁷³ Chantal Mouffe used the concept of agonism to radicalize democratic politics, and thus counter the foreclosure of discourse under neoconservative and neoliberal politics (Worsham and Olson 1998).

cannot will away his interdependence to ‘abject beings’ because he is founded on the repudiation of the other (Butler 1993). As Elena Loizidou explains, “the ‘abject’ is not outside the ‘subject’ but is rather part of its foundation; that which is refuted or disavowed in order for a subject identification to be formed” (Loizidou 2007, 36). In other words, the dialectic of self-other identity is undercut by the impossibility of ever being a fully unified, self-bounded, sovereign whose existence is not dependent on others. That being said, the abject being is both inside-outside is not a privileged position at all. Thus, Butler’s position on abject beings shows the “limits of gender performativity” but also the way in which “embodiment can be reconfigured through these limits” (ibid., 36). The latter point is most important, because it means ‘abject beings’ can also “resignify the abjection” into “defiance and legitimacy” (Butler 1993, xxviii).

The fact that abjects can resignify the abjection and defy the legitimacy of their subjection is possible because we are all ontologically ‘dispossessed’. In *Precarious Life: The Power of Mourning and Violence*, Butler refers to dispossession as a state of being “beside oneself” or “not at one with oneself” (Butler 2006, 28). In short, being exists prior to the formation of identity and intentionality. For example, affective states reveal our affectability to others, but she also affirms affects are equally relationally constituted. This means affects shape the structure of interpretation while structuring interpretation (Butler 2009a, 11). Affects both “precede and exceed our deliberate and bounded selfhood” (Butler and Athanasiou 2013, 4) because embodiment is ‘ec-static’¹⁷⁴ which she describes as “literally, to be outside oneself [...] to be transported beyond oneself by a passion, but also to be beside oneself with rage or grief” (Butler 2006, 24).

What this means is that Butler’s reading of dispossession and vulnerability is not given

¹⁷⁴ The term ‘ecstatic’ has been more concretely used by Martin Heidegger who argued that the essence of being resides in language. However, language does not fully capture the essence of being because “coming into the world coincides with its coming into language” (Loizidou 2007, 69).

only to the meaning of pain, grief but also passion and love. Dispossession could be read as ambiguous and ambivalent: ambiguous because the meaning is open, unassured in the moment of dispossession; ambivalent in the sense that it implies a struggle, where the ecstatic self is set in motion by rage or love. She explains how she chooses this term in contrast to relationality to signify the ambivalence of the latter:

Despite my affinity for the term relationality, we may need other language to approach the issue that concerns us, a way of thinking about how we are not only constituted by our relations but also dispossessed by them as well (ibid.24).

For example, remember how chapter IV stressed how pain is an affect shaped by norms of interpretation that are linguistic, social and historical. The pain from cancer is not equally experienced by a person who is sheltered and taken care of by a health care system and surrounded by loved ones, than by the one who is stressed about whether he can or cannot pay for chemotherapy (Satija et al. 2014). Other affects can dispossess us or support our well-being in different ways. Consider also how women's rage has not been shamed as an unsuitable feminine affect in Western cultures, but political articulations against sexism also converge in states of common rage (Butler and Athanasiou 2013). However, the affective intensities of pain and rage also must be renounced at some point, to let them collapse before they morph into the exponential reproduction of violence (Butler 2014b). The main point I am drawing attention to is how the notion of a sovereign subject rejects his affectability, and instead, affects are managed controlled, in order to ground oneself into a bounded space, such as identity or any other fixed subjectivity. To ground the self, when it is beyond oneself and thus, lose himself. The political and legal norms 'devalue' passionate affects, framing them through gendered readings of emotions, such as the hysteric woman (Lacey 1998b; Summers-Bremner 1998; Butler and Athanasiou 2013) which limits and regulates the appearance of women in

legal and political spaces.

More than anything, Butler's notion of dispossession as a way to show how vulnerability is a relation, as a "way of being for another or by virtue of another" (Butler 2006). The abjection of interdependence happens because we are interdependent and dispossessed to others. We are irremediably exposed to the effect of normative frames which seek to manage and control interdependence producing an alienation of political life.¹⁷⁵ We are dispossessed to the different modalities of power (Loizidou 2007; Butler and Athanasiou 2013), including the frames that particularize the value of some lives while obscure and mask the precariousness of other lives (Butler 2009a). Liberal legalism allegedly 'solved' the problem of injury through the calculable and moral subject (the legal subject of crime). However this version of legal personhood has been followed by other forms of violence because he is idealized as a possessor of a body and also possess other bodies. The politics of possessive individualism is intimately related to securitisation and neoliberal capitalism affecting disproportionately countries where the war on drugs is being waged against (Corva 2008). Reviewing the politics of terrorism (Butler 2006), neo-colonialism and neoliberal capitalism (Butler and Athanasiou 2013), Butler and Athina Athanasiou argue that the epistemological frame of possession distributes precariousness by delimiting possession and property. In that sense, possessive individualism could only be possible through the disavowal of our common interdependence (ibid).¹⁷⁶ In this context, violence also takes the shape of exploitation, land appropriation, racism, and borders against migration, among other contemporary events. Gender and sexuality converge with practices of dispossession. They are historically bound to practices of subjugation in Western capitalism, particularly the idea of 'owning a body' and the modes of relations enabled by

¹⁷⁵Athanasiou suggests that dispossession is akin to the Marxist concept of alienation 'which works on two levels: laboring subjects are deprived of the ability to have control over their life, but they are also denied the consciousness of their subjugation as they are interpellated as subjects of inalienable freedom' (Butler and Athanasiou 2013, 6).

¹⁷⁶ This form of dispossession 'depends upon a disavowal of more primary social, dependent, and relational modes of existence' (Butler and Athanasiou 2013, 9).

contract to dispose of the body. As already discussed before, women have been historically dispossessed as the bodies for others, as the meaning of 'woman' has been constructed relationally. In contrast, the masculine subject is self-bounded but one who accumulates possessions, including other persons, while the feminine subject is constituted by her relations.

In sum, dispossession marks "the limits of self-sufficiency and that establishes us as relational and interdependent beings" (Butler and Athanasiou 2013, 3) but it also signals how subjectivity has been demarcated, regulating and distributing vulnerability differentially along gendered relations of violence (ibid., 1). Crucially, the masculine fantasy of bodily wholeness underpins the 'sovereign's' response to vulnerability which at the same time instantiates the regulation of others. Vulnerability (understood as relationality) is abjected through the securitisation of the sovereign. It shores itself up, seeks to reconstitute its imagined wholeness, but only at the price of denying its own vulnerability, its dependency, its exposure, where it exploits those very features in others, thereby making those features "other to" itself (Butler 2006, 41). Thus, in dealing with collective vulnerability to violence, populations may tacitly accept the authority of an 'extra-legal sovereign' who ensures security at the expense of abject beings. For example, how the invasion of Afghanistan was deployed through a blatant appropriation of feminist concerns for the condition of women under the Taliban regime whilst prisoners were sent to Guantanamo (ibid.)

These are forms of dealing with vulnerability through antagonistic violence, where the sovereign fends off his vulnerability to maintain clear limits of gender identity, signified in both the boundaries to the body and borders in his land. It is an expression of power which threatens to totalise the expressions of life and also dramatically fail to support life (Loizidou 2007, 47). For example, when securitization or neoliberalism engulf the meaning of the life of people who traffic drugs, those lives are already abjected because the room for contesting the discourses is severely diminished by discourses that frame drug trafficking as an evil to

humanity (chapter II). Although Butler acknowledges this totalising effect of power on dispossessed bodies, she offers an ‘agonistic’ version of vulnerability (Loizidou 2007; Murphy 2012b).¹⁷⁷ Remember that language cannot be wholly totalised by the political discourse, legal categories, or by images which foreclose the possibilities of speaking about drug mules in ways other than the victimized, passive, sexualised bodies or threatening masculinised offenders. Recall also that Butler suggests vulnerability can give way to “non-violent responses to injury” (ibid., 44). This is because the ambivalence of vulnerability is grounded in agonistic rather than antagonistic politics. The next section outlines what an agonistic perspective on vulnerability means for the law and the representation of drug mules’ lives which have been apparently totalized by the securitization and neoliberal discourses on drug control (chapter II).

8. Translating struggles: The role of the law

How should we understand what the law does in the first place and how does it respond or when vulnerability appears onto the political or legal scene? At first sight, Butler’s *ouvre* shows contradictory conceptualisations of law (Loizidou 2007). On one hand, Butler has suggested that when law penalizes injurious speech, like hate speech, we lose the possibility to speak against normative frames like sexism or racism (Butler 1997b). This happens because the law translates injuries into its own norms which delimit what counts or doesn’t count as a legal harm, or even who counts as a legal person (Butler and Athanasiou 2013). A similar point can be made in relation to vulnerability discourse in criminal law. For example, the vulnerability of drug mules has been described by the CA in multiple ways yet with convergent meanings: as an ‘inadequacy,’¹⁷⁸ which has its roots in financial desperation; as persons with disabilities,

¹⁷⁷ The sources are mainly found in *Precarious Life: The Powers of Mourning and Violence* (2004); *Frames of War: When is Life Grievable* (2009); *Dispossession: The Performative in the Political* (2013); and a number of other essays and articles published on the subject. I also rely on Elena Loizidou’s dialogue and analysis of Butler’s work on ethics and politics.

¹⁷⁸ *R v Attuh-Benson (Irene Cynthia)* [2004] EWCA Crim 3032 [22].

weak will and morals; a group of disadvantaged offenders, especially from ‘underdeveloped countries’ who are exploited by drug criminals.¹⁷⁹ In short, the juridical orients and delimits an interpretation of vulnerability along the lines of immorality and post-colonial victimhood.

On the other hand, Butler also criticizes the law for becoming impotent to sovereign power, for example when the law subjugates to the executive power and disavows its own norms, such as upholding the right to fair trials for terrorism suspects (Loizidou 2007; Butler 2006). Reid argues that Butler’s analysis of the sovereign chimes with Hobbes liberal state, but such a critique is misplaced (Schippers 2014). Thus, an important clarification must be made at this point, which is why Butler’s analysis of the vulnerable sovereign is different from Turner’s transferral of the ‘ontological insecurity’ onto the vulnerable state. Butler argues that political entities are “not the same as individual psyches, but both can be described as ‘subjects,’ albeit of different orders” (Butler 2006, 41). As Loizidou stresses, Butler is not explicitly concerned with upholding the rule of law to protect people from vulnerability, particularly because she is aware how this concept has been instrumentalized to legitimise state authority. When the law is more preoccupied with ensuring its own preservation, it “ends up contributing to the destruction of life” (Loizidou 2007, 110).

Although Butler does not deny the sovereign still exists and seeks to become radically invulnerable, she offers a performative account of sovereign power. As Loizidou suggests, Butler re-works two central versions of biopolitics through performativity.¹⁸⁰ The term biopolitics¹⁸¹ was coined by Michel Foucault in the first volume of *The History of Sexuality* where he addressed the complex tradition of disciplinary practices of the body (Foucault [1976] 1990). The term was further expanded in two lectures exploring the “genealogy of the modern

¹⁷⁹ *R v Boakye & Ors* [2012] EWCA Crim 838 [H4].

¹⁸⁰ One is Giorgio Agamben’s articulation of the sovereign power which governs life and death through exclusions (Agamben 1998) and Foucault’s approach to biopower and governmentality (Foucault 1978).

¹⁸¹ In his lectures from 1978, Foucault described the biopolitical rationality as the knowledges and techniques that “treat the ‘population’ as a set of coexisting living beings with particular biological and pathological features” (Foucault 1978, 474).

state” (Foucault 1978, 452). Adriana Esteves explains how Foucault identified “three types of power in European history: sovereign power, disciplinary power, and biopower, with these three historical types of power overlapping rather than replacing each other” (Esteves 2014, 76). These overlapping forms of power¹⁸²co-exist in time; although the governmentality scholarship has interpreted the rise of disciplinary power as an overcoming sovereign power (Corva 2009). Without going into the details of the prolific governmentality studies, the only thing that needs to be stressed for the analysis on the case of drug mules is the idea of the “governmentalization of the state” understood as the process that “has turned the justice State—the sovereign state ruled by law— into the managerial state” (Esteves 2014, 76). Recall that chapter II outlined these different forms of power in drug control (managerialism strategies in criminal justice, securitisation in the juridical sources of international drug control and the war on drugs, and neoliberal disciplinary power shaping subjects as economical actors).

Now, Butler offers instead a version of political power in the context of terrorism characterized “petty sovereigns” (Butler 2004, 56). Explained otherwise, the managerial administrative regulations in the governmentalized state “abound, reigning in the midst of bureaucratic army institutions mobilized by aims and tactics of power they do not inaugurate or fully control” (ibid.). Even though they have no power in the sense of a sovereign power, they can perform as sovereigns by making “unilateral decisions, accountable to no law and without any legitimate authority” (ibid). Sovereign power justifies authority to govern life and death, deciding which life *counts* as a life worth mourning and which cannot be grieved, and thus, so can also be killed: excluded, and marginalized from political life (Butler and Athanasiou 2013). It is important to stress also that the conception of ‘life’ or ‘death’ is not always literal although closely related. Citing Orlando Patterson (1982), Butler understands

¹⁸² Specifically, biopower is the modification to “sovereign’s right to let live and make die” by “inverting the relationship” (Esteves 2014, 76). Disciplinary power focuses on “individual bodies (anatomo-politics)” while biopower deploys different technologies to manage and control the “processes specific to life itself, such as birth, death, reproduction, migration, and disease... as a means of population control” (ibid.76).

‘social death’ as being outside, symbolically and practically, the relational sphere of “being-in-common,” where one’s biological persistence continues outside of the schemas of intelligibility that make it possible to recognize vulnerability or the precariousness of every life (Schipper 2014, 40).¹⁸³

Bringing the arguments home, sovereign governmentality appears to be totalize the discourse of vulnerability, by appropriating it and figuring itself as that whose survival is in peril, the totalization is impossible. In short, the sovereign cannot appropriate vulnerability and deploy it as a justification for violence against others without encountering resistance.¹⁸⁴ This is because there are “multiple sites for sovereign governmentality” which make people’s lives extremely precarious, Loizidou argues that there “multiple sites for resistance” (Loizidou 2007, 114). Stated otherwise, sovereign governmentality cannot fully totalize life, because sovereign power is performative. It has no original authority; it arises in practices and speech acts, and thus fragile because the sovereign’s subjectivity is dependent on a respondent who accept this authority. For example, drug mules reject the label of criminal through modes of resistance which we are not intelligible within the framework of victims-offenders. I will explain more about this in the following chapters. For now, my aim is only to focus on the role of the law vis-à-vis the sovereign governmentality in drug regulation.

Read through the lens of performativity, Loizidou suggests that we understand law not “as a category that exists in itself but, rather, our understanding of it comes through its relation to various modalities of power and the practices of such modalities” (ibid., 14). In other words, the role of the law is not necessarily an instrument to politics. Instead, she argues that role of

¹⁸³ Butler is working an idea of sociality that is not based on identity or recognition but with anonymity and affectability. The influence of Levinas’ critique of ethics that is bound to epistemology before ontology is clear. We are already thrown into a world not of choosing, bound to others whom we don’t know or might never know and yet they sustain our life. It is not only our immediate contacts, for example, our family. Our daily nourishment is sustained by the labour of workers across geographical boundaries who we will never know but with whom we have a relation nonetheless (Butler 2006).

¹⁸⁴ Again, what I have in mind here is the ambivalence of pain arising from the referential ambiguity of the injured body. See chapter IV.

the law is constituted through its relation between politics and ethics, which I construe crudely as the struggles about what is a good life and how to achieve a good life when there are contested versions of what that means.

So what is the role of the law, conceived through its position between ethics and politics? Its role, as Loizidou suggests, is to translate “competing meanings of life and humanness” (Loizidou 2007, 126). Recalling the discussion in chapter III, the rational legal person of criminal law is an example of how the law has failed to mediate and translate competing and counter-factual claims,¹⁸⁵ including ‘competing’ versions of universality (ibid.). Its responsibility is to vitalize life; not to totalize life, for example, in the form of empty formulations like the rational legal person or the discourse of international drug control which characterises people in the drug trade as ‘evil.’ Whilst one could say that the failure is in drug control law and the drug war rhetoric, we must not forget the how legal theory and legal institutions of the modern European states influenced by the Enlightenment philosophy became complicit with an ontology of the legal subjectivity that is partial and unjust because it has catered to the preservation of the legal institution and the authority of the privileged members of society (Norrie 2000). When drug mules’ lives are framed through the existential rhetoric on drugs acts judged through the parameters of criminal responsibility of individualized subjects, the law is notoriously failing to act as translator of ethical and political claims about how drug controls are really affecting people in other regions of the globe which bear the brunt of global economic policies and stalling the distribution of drugs.

Moreover, if the law is to fulfil this role as a translator, it cannot be consumed with concerns about its own survival (Loizidou 2007, 90). In that sense, remember how the structure

¹⁸⁵ One might suggest that human rights can offer a possibility of resistance, one that grants recognition of harms done directly by an authority (negative obligations) or by the lack of protection (positive duties)¹⁸⁵. Yet, the language of ‘rights’ reaffirms the logic of individual possessiveness (Butler and Athanasiou 2013, 157). Unbinding the frames of possession requires collective resistance and solidarity more than individual rights claims.

of criminal law, including its rules and norms, has been founded on an incomplete notion of the subject (Norrie 2001). When the rational legal subject is challenged by the presence of subjects who show its artificiality, the whole edifice is also challenged because the law misconstrues its existence and identity through the notion of an invulnerable sovereign subjectivity. That includes translating who is to be recognised as a legal person or a vulnerable offender. The next chapter shows how this role is not being fulfilled. Whilst the law is relational, it has lost that relational character because drug regulation has devolved into an instrument for neoliberal governmentality and sovereign securitisation. Recall that chapter II showed how drug control, particularly drug trafficking, is underpinned by these intertwining modalities of power. The first one aims to regulate and normalize the sphere of the economic behaviour by making drugs illegal, while the second excludes and let's drug trafficking suspects experience a 'social death' through epithet's naming them as evil offenders whose debt to society is incalculable. Sentencing is equally shaped by these rationalities. The sentencing guidelines are underpinned by the neoliberal *doxa* of quantification (Fleetwood 2011) and harsh sentencing terms (Green 1998). These two rationalities are condensed and best exemplified in the epithets used to describe serious drug importation offenders, as 'merchants of death' who are 'greedy' and bring 'incalculable' death and destruction to communities. This last presumption, about the potential suffering of communities, is drawn from the quantities seized, calculated on the scale of the operation. There are operations which have an 'industrial scale' (Kent Online 2015) because the culprits traffic tons of drugs over long periods of time. However, this story about drug trafficking is rehearsed in the judgements, a citation that does not have a fundament in the actual drugs seized by a drug mule but repeated to characterize the level of seriousness in the crime. The next chapter examines how criminal law could be seen as having failed to translate the different levels of responsibility of drug importation offenders. Moreover, it will show how couriers and mules alike have been characterised as being

offenders motivated by ‘greed’ who import harmful drugs into a nation. The courier takes both the trope of the economic actor who transgresses the rules of drug regulation and the legitimate labour market as well as the malicious immoral actor. While neoliberal and sovereign governmentality framing drug regulation already describe and name the general category of drug couriers (both mules and professional couriers) convicted in England, vulnerability narratives have been put forward as a counter-narrative, as a contestation, to these simplified yet dominant approaches to drug policy and law.

9. Conclusion

This chapter examined vulnerability approaches which fail to address the ambiguity impinging vulnerability and the ambivalent responses that it can elicit. In so doing, this chapter brought together disparate disciplines together into the analysis, with the aim of showing how there is a continuity between the objectification of the body in pain and the rationalities that seek to manage, mitigate, and control embodied vulnerability. Viewed as something to be abjected and kept at bay, vulnerability appears as something that is not really part of our lives. The concept of vulnerability can indeed further our understanding about how the law operates and as a way to contest the limits of the legal subject of rights. However, vulnerability claims are not made or received in a discursive vacuum. They are enunciated through and received by a particular discourse (scientific, political, and legal) which translate the trope of injurability into their own rationalities and frames of intelligibility, as I illustrated through this interdisciplinary analysis. Whilst giving an interdisciplinary account, the running thread in the chapter was the topic of security. When vulnerability is postulated as a kind of ontological insecurity, the image of the woundable body might elicit responses aimed at ‘shielding’ against actual or potential risks. In order to reclaim vulnerability otherwise, as Murphy suggests, there must be a critical engagement with the imaginaries of injurability and violence that could replicate “sexist

normative expectations” (Murphy 2012a, 47). Ambiguity, deployed again as a critical concept, shows how the image of the wound animating the concept of vulnerability leads to caring or violence (ibid.). This does not mean that naming vulnerability is pointless, and it should not be understood that articulating these concerns encourages defeatism or nihilism. Quite the contrary, feminist approaches to vulnerability provide a critique of violence by mapping the masculinist anxiety to the ambiguity of vulnerability. This is best represented symbolically by the maternal body, which the masculinist logic abjects because it lacks bodily borders. Thus, in order to express social justice aspirations through the idea of vulnerability, there must be revitalisation of the frames through which we recognize it. Stated differently, to show how vulnerability is not a characteristic of specific identities or an ontological insecurity. Both of these views fix the meaning vulnerability in unproductive ways. In the case of identity, a history of oppression becomes something that defines a subject. In the case of vulnerability as ontological insecurity, the prospect of injuring is a constant, a permanent possibility of violence. Eventually, the aim is to probe the frames for recognising vulnerability and show how these frames might open the door to practices that subject people to unwanted forms of violence, possession and abjection. However, recognising vulnerability is not only an epistemological issue, but also political. Any discourse which totalizes the meaning of whose lives are worth or not protecting is already a discourse which abjects vulnerability. Thus, an agonistic approach to vulnerability involves negotiating the plurality of views on what it means, for example, for women drug mules. When the law deploys frames that monopolise the meaning and appearance of life, such as the legal subject of criminal law or the sovereign governmentality in drug regulation, the political survival of the people who live and act against these norms is at risk. Heeding to Loizidou’s arguments, I agree that role of the law should be to translate different projects aspiring for justice. This includes challenging the totalization of the disembodied rational (male) legal subject (chapter III and V) as the paradigm for

subjectivity and norms on criminal responsibility, but also the victimized drug mule. The next chapter shows how the ambivalence of drug importation offenders (chapter II) is engulfed into the either-or frameworks of criminal law, where *couriers* represent lives intelligible only through the predominant frameworks (immoral trafficker-illicit profiteer) while *drug mules* become intelligible through the trope of the vulnerable victimized mother.

VI. The ‘exceptional’ drug offender in English Courts:

(Mis) readings of vulnerability and criminal responsibility

1. Summary

This chapter traces the narratives around the vulnerability and criminal responsibility of drug mules in the English courts focusing primarily on the period from 2000 to 2014. Through discourse analysis, the case study traces the evolution of the feminization of vulnerability and its eventual equation with postcolonial victimhood. It suggests that, rather than being invisible, vulnerability as victimhood has been central to the construction of the female drug mule in the courts. Mapping the representation of feminine subjectivity through references to vulnerability, I argue that the courts have narrowed and limited the interpretation of vulnerability to the subaltern female that endures exceptional suffering. The cases can be interpreted as examples of how ambiguity is either appropriated or disavowed by the law to conform to the norm of the rational calculating legal person. The chapter concludes by suggesting that the effect of the judgements is to shape women (and men) within the parameters of agential masculinity or feminine victimhood, confirming the operation of ‘either-or-frameworks’ in criminal law (Norrie 2000). By protecting the borders of legal personhood, the criminal courts also patrol the maintenance of the two-sex model implicit in legal personhood (chapter I and III).

2. The general legal framework: Customs and Excise Management Act of 1971

This section draws on the relevant legal framework governing drug importation offences and the relevant provisions of the Misuse of Drugs Act of 1971 (MDA) and the Customs and Excise Management Act of 1979 (CEMA). The offence of fraudulent evasion of a prohibition under CEMA s.170 (2) was the most common charged offence in the case study. I focus on the peculiarity of this offence, which is meant to accommodate different scenarios of drug

importation where there are multiple actors involved and in different jurisdictions. Then, I consider the applicability of general and particular defences to this offence, noting how the standards of the offence make it difficult to contest criminal responsibility. First, however, we need to look at the aim of CEMA, its interaction with the MDA, and the legal authority in charge of enforcing these statutes. CEMA creates a number of offences against the exportation or importation of prohibited goods into British territory but not specifically drugs. Instead an offence under the CEMA can be read in light of other statutes, including the MDA.

The MDA 1971 generally defines the lawful and unlawful activities relating to the controlled substances regulated in its schedules.¹⁸⁶ It is unlawful to import/export (s.3), produce/supply (s.4), possess (s.5) controlled substances; cultivate cannabis (s.6); among other offences. Other sections relevant to drug trafficking situations in the MDA include s.20 which defines as unlawful assistance in or inducement of the commission of a corresponding offence abroad.

Drugs are classified in the MDA according to their level of harm, which is assessed on a number of factors, including physical, moral, and socio-economic harm (Fortson 2005). Parliament holds the legislative power to classify controlled substances but consults the Advisory Council, a scientific agency created under the MDA, on how best to schedule them. In this context, there are a number of factors that determine the level of harm of a drug such as balancing its medical utility against its potential harm¹⁸⁷. The MDA is the primary statute

¹⁸⁶ Schedule 1 through 4 regulates licit and illicit activities regarding substances listed in each schedule. The first schedule comprises substances deemed to have no medical or scientific purpose, like LSD, cannabis, or psilocin. Such assessments have been contested by scientific research, including by the former head of the Advisory Council, Professor David Nutt. Similarly, the Parliament Scientific and Technology Committee issued in 1998 a number of recommendations to explore the medical utility of cannabis and cannabidiols in the treatment of pain, multiple sclerosis, among other conditions.

¹⁸⁷ Class A drugs, such as heroin and cocaine are considered to be most harmful and carry higher sentences. Opiate-derivatives fall within this category too, but they are also regulated for medical purposes, mainly pain treatment. Under the MDA, the government determines who can legally produce, possess, handle, import, etc. substances under regulation (ibid). Cannabis falls within Class B, although it has been moved to Class C in the past. Accordingly, Class A carries higher sentences, explained further down in this section. Assessment of the harm is perhaps the most debated element of drug offences and crucial in making certain activities related to controlled substances unlawful. Even where the government authorizes the medical benefits of certain drugs, its

regulating activities related to controlled substances in the United Kingdom, and restricts the importation/exportation of drugs in s. 3. However, the elements of the offence are described in CEMA s. 170 (2) (b).

To understand importation/exportation offences we must look at the situation of the UK with respect to the global drug market. The UK is not a substantial drug producing or exporting country. Rudi Fortson, one of the leading legal scholars on drug offences and a primary reference from which the description and analysis in this section is drawn, notes that geographical and transportation networks make the UK an international commercial hub where a number of aerial and nautical routes converge (Fortson 2005). Its commercial routes overlap with drug trafficking routes, even if not all the drugs that enter the British territory are distributed here. As a signatory of international drug treaties (discussed in chapter II), Britain is responsible for stopping the flow of substances into its own territory and preventing them from being exported to other countries (ibid). As noted in chapter II, the UK Border Force's stated aim is both to secure the border and promote "national prosperity by facilitating the legitimate movement of individuals and goods, whilst preventing those that would cause harm from entering the UK" (Border Force 2014). The logic behind giving the BF the power to arrest drug importation suspects is that organized crime uses or pays migrants to smuggle drugs (Home Office 2013). Part XII of the CEMA, endows Border Force (BF) personnel designated as customs officers with the responsibility to search for illicit goods entering the territory concealed in packages, cargo, or carried by a person, where there are reasonable grounds, while the power to detain suspects of an offence under CEMA is laid out in s.138. There are a number of offences under CEMA which are punishable with imprisonment although the cases selected

main aim is to regulate their use by determining the authorities who can dispense them. For example, under Schedule 4, it is illicit to possess 'minor tranquilizers' without a prescription. Similarly, appeal cases lodged by people justifying the use of cannabis on the basis of suffering conditions like multiple sclerosis or chronic pain have failed because they are not legitimated by the MDA to self-medicate.

for the case study mainly involve charges under s.170 (2) and to a lesser extent s.170 (1)¹⁸⁸.

Section 170 (2) establishes that:

without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion;

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or

(c) of any provision of the Customs and Excise Acts 1979 applicable to the goods,

He shall be guilty of an offence under this section and may be [arrested].

Regarding s.170 offences, Fortson comments that because of their complexity they have “become something of a judicial nightmare particularly in the last few years” (Fortson 2005, 70). In general terms, the offence under s. 170(2) has two essential elements: the *actus reus* which is the *fraudulent evasion or attempt of evasion* of a prohibited good; and the *mens rea*, which is *being knowingly concerned* with the evasion or attempt of evasion. The offence is wide in scope for many reasons. It was meant to “catch individuals who were not party to the original smuggling operation” (ibid.,72). Assuming that trafficking or smuggling operations require a ‘team of participants to secure the distribution of smuggled goods and prevent their confiscation by law enforcement officers’, the statute casts a “particularly wide net” (ibid., 68) to catch individuals who were involved at every stage of the trafficking route. Fortson argues

¹⁸⁸ The main difference between s. 170(1) and s.170 (2) is the mental state required. Subsection 1 is concerned with *intention* to evade a prohibition; subsection 2 requires merely *knowledge* that one was part of the evasion to an importation of a controlled substance.

the wide net is cast through a conception of ‘evasion’ as a *continuing act*,¹⁸⁹ which facilitates ‘catching’ the actions of every participant potentially involved in the importation/exportation: from the one who packs the drugs, to those that carry, receive and harbour them.¹⁹⁰ Thus, an evasion has been interpreted by the courts as including any acts done before or after the importation/exportation. It is for this reason that acts performed outside a jurisdiction leading to an importation within fall inside the scope of s.170 (2). For example, in *Wall*¹⁹¹ the CA accepted that handling packages concealing cannabis in Afghanistan which later arrived in the UK constituted ‘steps taken to bring about the fraudulent evasion’.

Importation offences give rise to difficult questions concerning the limits of causation¹⁹² where multiple people are involved in the operation. Prosecutors would confront a prosecutorial challenge if every person taking part of the trafficking operation were deemed to break the chain of causation. But then the option has been to cast the net of causation widely, as Fortson observes. For example, the organiser of a drug run abroad does not carry the importation, but by casting the net of evasion widely, he/she could still be prosecuted. Without considering causation as a continuing act, organizers could not be charged, and the offence would only affect the last person in the chain, such as mules and couriers. The continuing evasion doctrine also poses difficult questions about the liability of persons who engage in drug mule work and then change their mind; or at what point she/he has begun the evasion. The case of *Jakeman* (1983)¹⁹³ illustrates how the law frames involvement, making ‘backing out’

¹⁸⁹ In *R v Neal* [1984] 3 All ER 156, CA, the court reiterated the interpretation guidance from the case *R v Watts, R v Stack* (1979) 70 Cr App R 187 and affirmed that the meaning of evasion was wider than the term ‘importation’. The reasoning was based on the fictive scenario where different people were involved in moving and harbouring drugs with the aim of carrying them into the country. However, strictly speaking only one person, for example the sailor, physically imports them. Evasion then means everyone involved in setting the importation in motion.

¹⁹⁰ In *R v Caippara* [1988] Crim. L. R. 172, D received an unsolicited package intercepted by customs, which they knew about and yet he hid it from the authorities in a warehouse, fulfilling the requirements of the offence. Also, in *Neal* (n 189), the applicant concealed the drugs *after* they had been imported. For evasions that begin *before* the defendant’s involvement, see *R v Wall* [1974] 2 All ER 245 2. In *Wall*, the appellant handled cannabis packages in Afghanistan which were subsequently sent to the UK.

¹⁹¹ *Wall* (n 190).

¹⁹² Understood in general terms as the causal link between the unlawful conduct and the result.

¹⁹³ *R v Jakeman* (1983) 76 Cr. App. R. 223

(chapter II) futile. Recruited in Ghana and persuaded to carry about 21 kg of cannabis in return for £500, Jakeman changed her mind in Paris, and abandoned the suitcase containing cannabis. French baggage officials thought she had lost the baggage and sent it to London, her final destination, where it was intercepted by customs. The question arising in this scenario was whether the acts of the airport personnel broke the chain of causation but also if it could still be said she had the *mens rea* at the time the airplane carrying the suitcase touched British ground. In short, the question also involved the contemporaneity principle, which means the mental state and the conduct have to coincide at the same time. The CA decided that Ms. Jakeman's intention to fraudulently evade a prohibition began when she agreed to smuggle the drugs and took the steps to complete the offence (for example, handling the luggage, taking it to the plane). As Wood J said:

...If a guilty mind at the time of importation is an essential, the man recruited to collect the package which has already arrived and which he knows contains prohibited drugs commits no offence. What matters is the state of mind at the time the relevant acts are done, i.e. at the time the defendant is concerned in bringing about the importation.¹⁹⁴

While the prosecution had to prove there was an actual importation, it is not necessary to show that the defendant physically imported the item or took steps to bring about the importation. In the conjoined appeals to the HL of *Latif and Shahzad* (1996),¹⁹⁵ Lord Steyn further clarified a general point on causation applicable to this area of law. He stated that the chain of causation

¹⁹⁴ *ibid.*

¹⁹⁵ In *R v. Latif and Shazad* [1996] 1 All ER 353, 366 it was held that proving an evasion requires actual importation of the prohibited goods; which is not necessary in an attempted evasion, clarifying the differences between the full offence of evasion and an attempt. The case involved two undercover customs officers (B) and one law enforcement agent in Pakistan (H) who persuaded Shazad (S) who had expressed his desire to import 20 kilograms of heroin to England to H. The Pakistani law enforcement agent (H) organized the contact with B, who posed as a British 'pilot' who would transport the drugs and persuaded S to come to the UK to take charge of the delivery. Upon his arrival in England, he was arrested but the drugs were never really imported. The consignment was seized and substituted for a food product, a procedure commonly known as a 'clean delivery'. Technical complications would arise if clean delivery took place prior to the importation in the jurisdiction where the individual is tried.

could be broken only when “the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility.”¹⁹⁶ In short, the airport personnel in Jakeman’s case were innocent agents because they did not know they were part of an evasion and their act could not therefore have been free or deliberate. The only way to refute liability for her actions would have been if someone had stolen the bag, knowing that it had drugs and stole them for their own advantage (Fortson 2005, 83).

3. The guilty mind of s.170 (2) (b): Knowledge and intent

The guilty state of mind (or mens rea) for this offence includes *knowledge* and *intention* to fraudulently evade a prohibited importation/exportation. As Fortson notes, the leading case for interpreting the state of mind of for purposes of s.170 (2) (b) is actually the pre-CEMA case of *Hussain*.¹⁹⁷ The case involved Hussain and two other crew members travelling in a motor vessel from Spain to Liverpool, where the customs officer discovered packages full of cannabis resin under the bulkhead panel. Hussain said he had been threatened with death if he declared the illicit goods. Nonetheless, he was found guilty and his case appealed on the basis of an alleged misdirection to the jury on the meaning of ‘knowledge.’ The CA rejected the appeal and elaborated the meaning of ‘knowledge’ which contains three essential elements, all of which have to be proven by the prosecution beyond reasonable doubt: knowledge that the goods were subject to a prohibition; b) knowledge that the acts were meant to evade a prohibition; knowledge that prohibition will be evaded fraudulently. Widgery LJ explained that:

...the word knowingly...is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. If, therefore, the accused knows that

¹⁹⁶ *ibid.*, 364a.

¹⁹⁷ [1969] 2 All ER 1117

what is afoot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify conviction, even if he does not know what kind of goods are being imported.¹⁹⁸

Although it might seem to be a convoluted clarification of how knowledge is applied, subsequent cases have ratified that knowledge does not have to be specific. In other words, there must be evidence that the defendant knew about the prohibition¹⁹⁹ and that it was to be evaded fraudulently. Knowledge is defined in *Warner v Metropolitan Police Commissioner*²⁰⁰ as “wilfully shutting one’s eyes to the truth,”²⁰¹ while fraudulently now means “a dishonest intention” to evade the prohibition.²⁰² The tripartite direction in *Hussain* has been ratified in subsequent cases,²⁰³ but also questioned in *Hennessy*.²⁰⁴ In this case, the CA did not consider that specific knowledge of the type of prohibition was not necessary. Hennessy believed he carried pornography, which he knew was an item subject to a prohibition. But he did not know that, in fact, what was concealed in the car was actually cannabis. The appeal was denied, and accordingly, a harsh approach that sweepingly homogenizes all kinds of prohibited items was applied. This position was upheld more recently in *Forbes*,²⁰⁵ where Lord Hope defended the direction, noting that it would be very damaging if prosecutors had to prove the defendant knew the precise prohibition (whether it was drugs or pornography) or even worse, if it was a class

¹⁹⁸ *ibid.* [1119]

¹⁹⁹ *R v Suurmeijer* [1991] Cr. L.R. 773 considered that the mere fact of accompanying someone who is carrying out an evasion is not enough to prove knowledge. In this case, a passenger (S) was in the car driven by (H). Customs found that there was cannabis concealed in the petrol tank, but there was not enough evidence to show that S knew about the drugs.

²⁰⁰ [1969] 2 A.C. 256

²⁰¹ Although this case involved a case of possession, which is not a requirement in s.170 (2)(b), it is the general direction of knowledge. Fortson argues that it is mostly a question of evidence rather than substantive law (Fortson 2005, 102).

²⁰² *Attorney General’s Reference* (No. 1 of 1981) [1982] Q. B 848.

²⁰³ See *R v Taaffe* [1984] A.C. 539; *R v Shivpuri* [1987] A.C. 1; and more recently *R v Forbes* [2000] 1 W.L.R. 428, H.L.

²⁰⁴ [1978] 68 Cr. App. R. 419

²⁰⁵ *Forbes* (n 203).

B or class C substance (Fortson 2005, 95).²⁰⁶

Fortson explains that ‘defences’ for s.170 (2) (b) basically refer to the absence of the mental elements. There is a possibility that the defendant had a mistaken belief as to law or a mistaken belief as to whether the goods were not prohibited (ibid., 1971). In the first case, the suspect has mistakenly believing that the goods were not prohibited by law (for example, where one genuinely believes that importing cannabis is not prohibited). In the second case, a person mistakenly believes that the goods imported were prohibited when in fact, they are not (for example, believing that importing chocolate is prohibited). The availability of these defences shows that an importation offences is not an *absolute liability* offence because proving the guilty mind, formed by intention and knowledge, is an essential ingredient of the offence²⁰⁷. Yet, knowledge is arguably subjective,²⁰⁸ meaning that it is based on the facts as the defendant believed them to be. Drug mules often claim to the court they did not know what they carried, specifically, if they carried a class A or class C drug. Others claim they did not know at all the type of product they’d smuggle. Of course, there are problems with this assessment of responsibility. As Fleetwood’s research shows, drug mules often do not have control over the packaging (Fleetwood 2014) and do not know for certain if what they would carry are drugs or another prohibited commodity (Green 1998).

Finally, the other element required is the *dishonest intention* to take part in the operation which the defendant knows is aimed at evading a prohibition. Being reckless or negligent will

²⁰⁶ Recall that importing a Class A drug is punished more severely than a Class C or B drug. This created a problem when the HL decided in the case of *R v. Courtie* [1984] A.C. 463 that if an offence creates different penalties, then it creates separate offences. The impact of *Courtie* for s.170 offences was reviewed in *Taaffe* (n 203); *R v. Shivpuri* [1987] A.C.1 and *R v. Ellis* (1987) 84 Cr. App. R. 235. The impact and resolution by the courts, as Fortson suggests, is that where goods are subject to different prohibitions they should also be attracting penalties. In other words, class A, B and C are essentially different offences because the penalties are very different. If the prosecution were required to prove the corresponding *mens rea*, then Hennessy and Hussain would be wrong (Fortson 2005, 97). As it stands, they are both still good law.

²⁰⁷ *Forbes* (n 203).

²⁰⁸ The court ratified *Taaffe* (n 203), where it was ‘also accepted that for the purpose of section 170 (2) of the 1979 Act a defendant must be judged on the facts as he believed them to be, such matter being an integral part of the inquiry as to whether he was knowingly concerned in a fraudulent evasion of a prohibition on importation’ [8].

not suffice for a conviction, according to the direction in *Panyani (No. 2)*.²⁰⁹ In this case, two men were arrested in British territorial waters with cannabis resin on board their yacht. They argued that they did not have the intention to evade the laws of Britain, but of Holland. The CA held that they could not be guilty because intention to dishonestly evade a prohibition requires specific intent. While this case stresses intention essential to an evasion, Fortson argues it is not clear whether the prosecution has to prove that each person in the operation was acting with the intention to dishonestly evade the law.²¹⁰ This dilemma points again to the issue of how the law deals with offences where there are multiple people involved, some of whom might be even carrying out somebody else's dishonest intention.

In short, the way that CEMA has been worded, and interpreted with the intention of casting a broad net, disregards individual culpability. It is still unclear whether the offence requires only that a person *knows* of the operation, even if they did not agree, intend or desire it to happen because the House of Lords – now Supreme Court - has not settled a definitive interpretation of who has to have dishonest intention, suggesting that all the prosecution needs to prove is that the accused knew an evasion was going to happen even if the intention to fraudulently evade the prohibition belonged to someone else (Fortson 2005, 80). It is not hard to see how this approach widens the scope of liability greatly.

4. Excusatory defences: Duress and coercion

Coercion is often referenced in s. 170 offences but only as a mitigation factor. A defence of duress²¹¹ can be undermined if the accused knew she was getting involved with people who

²⁰⁹ *Panyani* (No.2) [1989] 1 W.L.R. 187

²¹⁰ For example, the question in *Latif* (n 195) was whether an undercover law enforcement agent would have the intention to evade the law when in fact the intention was somebody else's. It could be argued though that this is a problem of separating motivation from intention.

²¹¹ In the leading case of duress, *R. v. Hasan* [2005] UKHL 22, the HL defined duress as a defence which does not negate the absence of an essential ingredient of the offence, but excuses the offender's liability because of pressure exerted to do an offence against one's will. It is a concession to human frailty and a subjectivist recognition that one should not be liable for acting, albeit breaking the law, to "prevent catastrophic consequences to those whom they are attached or feel responsible" (Simester and Sullivan 2003, 665).

were likely to subject her to threats of violence, such as presumed offenders.²¹² The defence of duress can only succeed where there was an imminent or almost imminent²¹³ threat of death or physical harm²¹⁴ against oneself or a third party. Blackmail, financial pressure,²¹⁵ or a threat of false imprisonment²¹⁶ will not suffice. It seems that due to a perceived increase in the use of this defence in drug offence situations,²¹⁷ the courts' response has been to further narrow its applicability. Baroness Hale did not agree to this narrow approach to duress as affirmed in *Hussain*.²¹⁸ She argued that the courts are more interested in denying the defence than considering the dilemmas vulnerable people confront through their relations with violent people and lack of access to protection by state agencies (Simester and Sullivan 2003, 668). Immediacy of the threat is often linked to unavoidability (ibid.). If the defendant had opportunities to make the threat known to the police, then the defence fails.²¹⁹ The law judges the threat from a subjective perspective, that is, on the facts as the defendant knew them. Yet the propensity to cave in to the threat is assessed from the circumstances of a "sober person of reasonable firmness;"²²⁰ a guidance which is sometimes criticised because it requires people to act heroically especially when coerced to commit serious offences.²²¹ The only characteristics allowed into the consideration of 'reasonable firmness' are sex and age, although pregnancy has been included also. Personality traits such as shyness, vulnerability (understood as being suggestible due to cognitive disabilities) are not attributes of the

²¹² *ibid.*

²¹³ *Hasan* (n 211).

²¹⁴ *R. v. Baker* [1997] Crim LR 497 (CA).

²¹⁵ *R. v. Valderrama-Vega* [1985] Crim. LR 220 (CA).

²¹⁶ *R. v. Steane* [1947] KB 997, 1005. Obiter accepted false imprisonment of duress, but unlikely now due to narrow requirement of physical harm.

²¹⁷ *Hasan* (n 211).

²¹⁸ [1999] Crim LR 570.

²¹⁹ *R. v. Hudson* [1971] 2 QB. See also (Simester and Sullivan 2003).

²²⁰ *R. v. Graham* [1982] 1 All ER, 801, 806.

²²¹ In *R. v. Abbott* [1976] 3 All ER 140,152, the House of Lords did not mention per se as 'serious offences' but the 'more dreadful the circumstances of the [crime]', the more resistance required from the person coerced [I'm not sure what point you are making here – badly expressed].

“reasonable/ordinary person.”²²² Another requirement for duress is that the person exerting the threat actually nominates the crime to be done by the victim of duress.²²³

Finally, the defence of duress will fail if the victim voluntarily exposed herself to the risk of compulsion through the association with a criminal organization or gang.²²⁴ Where the person claiming duress was ‘associated’²²⁵ and thought the person was violent, legal duress cannot be claimed because the necessity to use the defence was self-induced. Prior to the introduction of the sentencing guidelines for drug offences in 2012, Lady Hale had suggested that although the pressure placed upon drug mules comes very close to the defence of duress, the House of Lords “has drawn this very tightly, excluding anyone who voluntarily associates with criminals and ought to have foreseen the risk of being subject to compulsion by threats” (Hale 2005b). She did not intend to say women should not be punished, but that sentencing should play a substantial role to prevent injustice.

5. Case study: Sentencing practices for drug mules in England and Wales

This section analyses the discourses on the vulnerability of drug mules in the Court of Appeal (Criminal Division), building on the theoretical discussions throughout this thesis. The analysis has two main points of reference. First, the guideline judgment on the vulnerability of drug mules in *Aramah*²²⁶ and *Faluade*²²⁷ in the 1980s and the new Definitive Guidelines of 2012 (DG). I will explain briefly how the history of the DG and justify the significance of researching sentencing appeals, the criteria adopted to select the cases for the case study, and the methodology employed to analyse the cases.

²²² *R v. Bowen* [1996] 4 All ER 837, 844 (CA)

²²³ In *R. v. Cole* [1994] Cr. LR 582 the appellant was threatened with violence unless he paid a debt, and robbed a bank. The appeal was rejected because he was not implicitly or explicitly told to commit the particular offence.

²²⁴ *R v. Sharp* [1987] 3 WLR 1

²²⁵ Simester and Sullivan note the wide scope ‘association’ could have (Simester and Sullivan 2003). Notably, this leads to harsh results such as situations where women are not even involved in a joint enterprise with a partner, but considered guilty by association.

²²⁶ [1983] 76 Cr. App. R. 190

²²⁷ [1989] 11 Cr. App. R. (S.) 156

i. Examining case law and the Definitive Guidelines for Drug Offences

As mentioned in chapter II, deterrence restricted the possibility consider the vulnerability of offenders for sentencing purposes. By 2009, the Sentencing Advisory Panel (SAP) carried out a consultation on sentencing for drug offences, and concluded that deterrence was “ineffective and potentially unjust, especially in respect of minor offenders such as ‘drug mules’” (Loveless 2012b). The SAP’s proposals were forwarded to the Sentencing Guidelines Council, which became the Sentencing Council in 2010. The latter produced another draft guideline, which incorporated the SAP’s proposal to give more weight to the principle of proportionality, but did not change the severity in the sentences for drug offences (ibid.). In other words, the aim of the SC was to maintain the severity of the punishment; except for lesser offenders, such as drug “mules” (Sentencing Council 2011b; Loveless 2012b). The Definitive Guidelines for Drug Offences (hereafter DG) approved the SC’s of keeping the general severity intact, but balance it out against the individual culpability of the offender.

The following sections analyse the CA’s interpretation of how to apply the new guidelines. In the case of importation offences, the courts must determine first the offence category (step 1). The DG sets out a list of characteristics that could indicate the role of the offender, subdivided into three categories: lesser, significant and leading. The second component which judges must weigh in step 1 is the category of the harm, which is subdivided into four categories according to the quantity and type of drug imported (see Appendix I, Table 2). After determining the category, the court decides the corresponding starting point and category range (step 2 in the DG-see Appendix I, Table 3 and 4). As explained in the DG, the starting point “applies to all offenders irrespective of plea and previous convictions” (Sentencing Council 2012, 5). At this point, the sentencer must also weigh in the non-exhaustive list of aggravating and mitigating factors within the category range applicable to the type of drug involved (class A, B or C) (Appendix I, Table 4). However, the DG also states

that departures from the sentencing range are possible if the offender has a leading role. After determining the sentence range, the courts should adjust the starting point if the offender cooperates with the authorities (step 3); pleads guilty at the earliest opportunity (step 4); if there other sentences being served (step 5); confiscation and ancillary orders (step 6); and the court must provide the reasons for the sentence imposed (step 7); and time in remand (step 8) (Appendix I, Table I).

The analysis presented in the case study focuses particularly on step 1 and 2, namely how the courts determine the role of the offender with reference to the characteristics listed for the lesser and significant role. In the Professional Consultation, the SC identified drug mules as offenders who would fit to the “subordinate” category (now known as “lesser”) while professional couriers would fit to the “significant” category. It also expected that once they DG were in place, drug mules could end up receiving lower sentences than “those given under current sentencing practice” (Sentencing Council 2011b, 32). Considering these two categories, now represented by mules and couriers, the case study explores how vulnerability is deployed in sentencing appeals in order to identify an offender as a drug mule or as a drug courier. The DG do not give a specific definition of vulnerability, so in that sense, another task involves mapping how vulnerability has been articulated in the CA. One of the reasons of looking at case law on the vulnerability of drug mules decided before the 2012 is because the DG is informed by previous sentencing practices. The guidelines sought to codify existing case law and judges interpret the new guidelines in light of existing sentencing practice (ibid.).

Additionally, recall the discussion in chapter V, where vulnerability is suggested as a metonymic albeit ambiguous concept. Particularly, I am interested in tracking the assignation to offenders of characteristics normally associated with vulnerability-as-victimhood. My second aim is to find out which facts of the case are used to support the disambiguation of the roles of ambivalent drug importation offenders; in particular, the extent to which vulnerability

discourses, in their different expressions, support this disambiguation. Finally, I want to analyse how gender and subjectivity are articulated with reference to vulnerability and to assess the extent to which this articulation exhibit similarities with the gendered models of legal personhood explored in chapter III, IV and IV.

Concretely, the analysis draws on CA discourses on vulnerability and how they relate to the judicial interpretation of drug mules. This context presents some obvious challenges. First, there is a clear practical and ideological challenge because the term “mule” carries assumptions about gender, nationality and agency (Fleetwood 2014, 7). The term “courier” has been the most consistently used term in the courts, and indeed, prior to 2012, it tended to be used as a synonym for “mules”. The DG represent, apparently, a radical break with this practice. However, the pressure to distinguish the roles of importation offenders precedes the DG, through the appeals against the sentencing practices in place since the 1980s and the SAP’s consultation in 2009. The SC incorporated some of the SAP’s advice, including paying more attention to the proportionality principle (Sentencing Council 2011b), which is reflected in the DG inclusion of the culpability of the offender in step 1 (Appendix I). Thus, while my search focused mainly on 2000-2014, there will inevitably be reference to leading cases prior to 2000.

It is worth noting that a search based only on the term ‘vulnerable’ or ‘vulnerability’ returned only a handful of results. This led me to do multiple-searches cross-referencing the terms ‘courier’ and ‘mule’ with ‘mother’, ‘children’ and ‘father’, ‘vulnerability’ and ‘mercy’ in order to identify cases which would enable me to query how gender shaped the legal discourse. The term ‘mercy’ was an unlikely term to use in the search but it became necessary after reading the cases which made reference to vulnerability, which will be explained in the case study. A more detailed exposition of the research design and selection of cases appears in Appendix II of this thesis.

ii. Sentencing appeals and the criminal process.

The following case study focuses on appellate sentencing judgements. There are number of reasons why I explore this stage in the criminal justice process. Firstly, the aim is to analyse the interpretation of the 2012 Sentencing Guidelines drug trafficking offences. The case study examines whether there was a significant change in the sentencing appeals discourses after the SG came into force by mapping the distinction between drug mules and drug couriers. Vulnerability discourses shape the distinction between drug mules and couriers. There are two stages where we can find vulnerability discourses: 1) the sentencing and 2) the sentencing appeal. These discourses are mediated by different legal actors (the Crown prosecution, counsel for the appellant, and the probation officer, through the pre-sentencing report). So technically, in the absence of a trial, the judges may often rely on the information given by a probation officer's pre-sentencing report to determine the punishment of the drug importer. Some cases show that the judge relies heavily on the pre-sentencing report. However, pre-sentencing reports (hereafter PSR) are not available in every case before passing a sentence and in those cases, judges rely on the information from the trial (where there was one). Pre-sentencing reports have been increasingly used since the 1960s²²⁸ and s.156 of the Criminal Justice Act 2003 now requires the production of a PSR before imposing a custodial or community sentence. Ashworth reports there is often a judicial reluctance to use pre-sentence reports because they are written in social work jargon; judges may even criticize probation officers for taking information provided by the defendant at face value. Other criticisms include also the selectivity of the information collected by the probation officers (Ashworth 2010, 379). However, Cyrus Tata praises PSRs for their vital role in restoring a sense of individuality and dignity to offenders which is lost in abstract legal jargon. Moreover, he suggests that the

²²⁸ The meaning of a pre-sentence report is governed by s.158 of the Criminal Justice Act 2003.

process of producing the reports facilitates the production of guilty plea (Tata 2010).²²⁹ The compilation of PSRs in cases of female offenders has been endorsed by the *Corston Report* and incorporated by the Sentencing Advisory Panel's *Overarching Principles of Sentencing* (2008), where it recommended that PSRs should always be available in cases involving female offenders (Ashworth 2010, 248); however, they are not mandatory under the DG (Loveless 2012b). I also want to stress how PSRs are not unmediated accounts because they translate and frame an offenders' stories according to a particular format and professional language.²³⁰

Another reason to focus on appellate judgments is because a substantial number of the cases examined by the CA (Criminal Division) are sentencing appeals, lodged because the Crown Court or Magistrate Court might not have inadequately calculated the punishment. The CA also reviews points of law or procedural issues. As mentioned before, a large bulk of the work of the CA addresses appeals to sentences. For example, the CA received 4,706 applications to appeal sentences (for all offences) and 1,410 applications to appeal conviction between 2013- 2014. Significantly, 74 per cent and 85 per cent were refused by a single judge (Courts and Tribunal Judiciary 2014). In limited cases, a case may raise questions about the constitutionality of a decision or points of law of general interest made by one of the lower courts²³¹ may be further examined UK Supreme Court.²³²

The last reason why the case study focuses on sentencing appeals is because it is the court where individual stories are more easily allowed without the restrictions of the paradigm

²²⁹ Tata argues that PSRs give back a voice to offenders, and justify what would be otherwise a dubious form of doing justice. Guilty pleas by themselves could be seen as a partial justice practice but PSRs complement them through the voice of the offenders (Tata 2010). I am not entirely sure I agree with this praise. PSRs are governed by different norms. Surely, the account of the offender is more central, but also the voice of the probation officer who translates these accounts. In other words, PSRs are not unmediated narratives by the offenders themselves.

²³⁰ The National Standards for the Management of Offenders (2007) outlines the form and contents of pre-sentence reports. Normally, these reports should be balanced and accurate; give an account on the risk of harm posed by the offender and possibility of reoffending; and information from the victim of the offence (Ashworth 2010, 380).

²³¹ The appeals to the Supreme Court with regards to the Criminal Division of the Court of Appeal are regulated by sections 33 and 34 of the Criminal Appeal Act 1968 and sections 1 and 2 of the Administration of Justice Act 1960.

²³² Before the judicial reform, appeals from the CA were handled by the House of Lords.

of the rational legal subject. Recall the critique in chapter II, on how sentencing has been used as the stage in the process which ‘corrects’ and accommodates individual injustice claims left out of the adjudication of legal guilt drawn tightly through the conventions of individual responsibility (Norrie 2001). Rather than being irrelevant for the questions posed by the law (the legal responsibility of the offender), the personal circumstances of the appellant become again relevant, particularly in determining the mitigating and aggravating circumstances of the offence. Both the sentencing and appeal stage are even more important considering the particularities of drug importation offences. Recall importation offences cast a wide net, disregarding the role of each person as long as it can be shown they were part of the enterprise to evade a prohibition with dishonest intention and knowledge that it would be carried about. This means, as far as I understand it, that there are very few options to contest legal guilt (recall *Jakeman*²³³). Thus, it is not surprising at all that a majority of the cases selected were adjudicated through a guilty plea (See Appendix II, Table 1). As mentioned before, the appellants’ roles are determined for sentencing purposes. What this means, particularly for this case study, is that there are many actors involved in the construction of vulnerability. In each stage of the process (sentencing and appeal), the actors involved offer different opinions on the role (culpability) of the drug importer, thus they shape what vulnerability should mean. This leads to the next point which is a clarification of the methodology used to analyse the cases.

iii. Methodology: (Mis) reading facts and frames of interpretation

It would not be surprising to say that the facts about drug mules’ personal and familial circumstances are shaped by the judicial discourse. However, are these facts also instrumental in shaping gendered models of legal personhood and responsibility? And considering the discussions in the last chapters, is vulnerability intelligible to the sentencing courts and how

²³³ *Jakeman* [1983] (n 193)

does it become intelligible (after it was masked by the juridical subject of reason)? I approach these questions, through different methods of reading a judgment. First, I draw on Allison Young's idea on how facts presented in the appeal are constructed in order "to have an effect upon the interpretation of legal rules" (Young 1997, 130). Secondly, I draw on Elena Loizidou's critique of reading a judgement as a text which has a hidden 'truth' to be uncovered by the jurist.

First let me explain Young's method of reading a judgment. By focusing on the effects of the facts, Allison Young reverses the order of the traditional judicial interpretation which assumes that the principles of criminal law shape the outcome of the case. Instead, Young explores how certain facts are used to support normative characterisations of femininity, while these characterisations also shape the legal principle. She shows this through a re-reading of the appeals of Sarah Thornton²³⁴ and Kiranyit Ahluwalia,²³⁵ two leading cases on conjugal homicide. Without rehearsing all the details of the cases, both Thornton and Ahluwalia were tried for homicide after killing their abusive husbands. Instead of focusing on the legal principles of the partial defences to murder contested in the appeals, Young signposts the locations in the text where the facts supported not only a normative and counter-normative expressions of femininity. In the case of Thornton, the facts of the case were interpreted as transgressions to an ideal of femininity. That ideal was embodied by Ahluwalia: whose subjectivity in the judgment appears as a passive, sacrificing mother and daughter who was 'forced' by her culture to marry an abusive man. In contrast, cues to the sequence of events in Thornton's case show a wilful woman who is to blame for her victimization: she knew the man had problems drinking, she taunted him, she threatened him in a message drawn with lipstick in a mirror (Young 1997). While Ahluwalia also challenged the patriarchal rule by killing her

²³⁴ *R v Thornton* [1992] 1 All ER 306.

²³⁵ *R v Ahluwalia* [1992] 4 All ER 889.

husband, the event which put her at the margins of the community, her victimization allowed a return, but only as a victim. Young suggests the facts of the cases, like the image of the docile wife who endured an abusive marriage, are used to support the paradigm of “authentic femininity” represented by Ahluwalia’s victimhood, as a way to bring her back the social community. Thornton, on the other hand, is an ambivalent offender, shown through the facts as a woman who ‘masquerades’ victimhood. Young concludes that female offenders who perform a fake victimhood are “compelled to remain in the margins, a border figure whose experiences are discounted and dismissed by the court”(ibid., 150). The subjectivity of ambivalent offenders is a “mimesis without reality,” and thus, they are shunned for their betrayal of femininity (ibid., 149).

Drawing on this dynamic of inclusion/exclusion of femininity in the judgements, the case study analyses how court narratives disambiguate the ambivalent female offender, that is the one who ‘masquerades’ her victimhood. In that sense, the case analysis examines in detail which facts of the case are linked to notions of vulnerability based on an idealized feminine victim (chapter II and IV), and which facts are used to compare and exclude women deemed to be masquerading vulnerability (Schemenauer 2012). Recall that in the discussion in chapter III, I suggested there is a limited space for ambiguity in criminal law because it is structured into ‘either-or’ frameworks, such as guilt-or-innocence. Taking these points together, my contention is as follows: when presented with an ambivalent offender, such as the ‘victim-agent’ drug mule, the rationality of the law pushes towards disambiguation. So what supports the efforts of disambiguation?

Here we need to consider different ways to approach a legal text and analyse the discourses on the vulnerability of drug mules. On the one hand, there is a tradition which seeks to find the ‘true’ meaning of a text (Loizidou 2007). This is common in legislative interpretation where judges look for the true intentions of a statute or of words uttered in a

judgement. Rather than looking for the ‘true’ meaning of utterances (ibid., 9) by charting the citational practices in the text, my aim is to explore the effects of the language performed. Performative theory accounts for the “active role played by both language and bodies in reconstructing the past and refiguring the future” (ibid., 20). Translated into court practices, by retelling a story of the criminal event one is not simply narrating the ‘truth’ of an event located in the past. Instead, the courts’ discourses are actively shaping, gendering, and rendering criminal subjects legible or illegible in relation to the rules of the law and legal categories. However, I have also argued throughout the thesis that ambiguity cannot be wholly eliminated (from the legal subject, from the body in pain, from punishment). In particular, recall how Norrie suggested that the judgement is trying to solve “what is essentially irresolute” namely “the judgement of individual responsibility in the particular case (Norrie 2005, 100). Drawing together the performativity of the citational practices and the impossibility of closing off the question of individual responsibility, I read the judgement’s through its productive ambiguity. Stated otherwise, sentencing proceedings introduce the stories of the offenders (through mitigating/aggravating factors and the culpability of the offender), and thus, could be read as contestations to the legal person who is not endowed with characteristics other than reason. Moreover, sentencing appeals restage contestations over punishment decisions in a public space, in contrast to the obscurity of behind-the-doors justice of guilty pleas. Guilty pleas formally silences the defendant, but the appeal opens up a space for contestation, to speak out against the norms of the rational legal person and its accompanying version of individual responsibility.

To sum up, the analysis highlights the facts, which are citational practices that have an effect on disambiguating subjectivity. These citational practices draw on conventions about femininity as well as masculinity, which intersect with other interrelated themes, specifically: a) economic circumstances and financial motivations; and b) personal characteristics framed

through gender norms. These themes reflect the discussion in chapter II, where I suggested that the vulnerability of drug mules has been constructed with reference to tropes of the financially motivated drug trafficker and the feminized drug mule. The analysis of the case law is organized in the following way. First, it presents the two leading cases which elaborate upon how the guidelines should be interpreted and applied. Then, it develops the thematization of vulnerability through economic circumstances and personal characteristics. Finally, it presents a conclusion on the effects of these narratives in differentiating couriers from mules.

6. Dispelling myths about the new guidelines: Defining “true” roles and uncovering role-playing

Soon after the guidelines were published (in February 2012), the CA dealt with two important appeals dealing with their interpretation and applicability: First, the conjoined application of *Boakye and Others*²³⁶ and then the *Attorney General’s Reference (No. 15, 16 & 17 of 2012)*²³⁷. In *Boakye and Others*, the CA set itself the task of showing how roles should be considered in the future although there were two specific grounds for the application. First, the Court were required to consider if the guidelines were retrospectively applicable; and second, if the guidelines did apply, it was necessary to determine whether or not the sentences were too high because the roles of the applicants were inaccurately assessed. Without going into too many details, the CA decided that the new guidelines could not be applied retrospectively. On the second issue, it noted that none of the appellants could be afforded the ‘drug mule’ label, and were instead ‘drug couriers.’ In contrast to the pre-sentencing guidelines, where mule and couriers were synonymous, the significance of this decision is that the CA clearly distinguished the characteristics applicable to mules and to couriers. As I will suggest throughout the analysis of the cases the characteristics of the mule and the courier, both in the DG of 2012 and the case

²³⁶ [2012] EWCA Crim 838 (CA)

²³⁷ (Lewis and Others) [2012] EWCA Crim 1414 (CA)

law interpretation by the CA, are drawn along the lines of gender. The courier represents the legal person of criminal law (chapter III) while the mule is identified through feminized version of vulnerability.

Let us examine first the facts reviewed by the CA and the points highlighted in the judgment of why none of the applicants could be considered a drug mule. The application involved six applicants sentenced between 2008 and 2011 for importing varying quantities of Class A drugs. First, Shireen Jagne, aged 44, imported 7.35kg of cocaine. She was tried and sentenced to 12 years in custody. To decide whether the sentencing judge had reached the appropriate sentence and if the appellants could fit into the lesser role category, the CA reviewed the decision of the Crown court. Hughes' LJ, the CA judge, explained how the sentencing judge noted that Jagne "was by no means a vulnerable third-world citizen."²³⁸ On appeal Hughes L.J added that her story had been "less than persuasive" and "wholly unreliable"²³⁹ and described her as a London resident who presented a fake story about going to Gambia for birth-conception traditional remedies. Next, the judgment refers to Ifeoma Nwude, 37, who imported the equivalent of 1.84 kg of cocaine and pleaded not guilty, but lost the case and was sentenced to 12 years in prison. According to the CA she did not fit the lesser role category. Nwude, a Belgian-Nigerian citizen, had told the authorities she got stranded in Cameroon and offered to carry drugs to France, where she continued the journey to England on the Eurostar train. The CA noted that her role was most likely significant because the evidence presented at her trial was that she knew the people involved in the operation, made the travel arrangements herself, and was closely involved at every step of the process. In the case of Rebekah Alleyne, 23, she was also found guilty by jury trial and given a 10 year sentence after importing 3.81kg of cocaine. She was a UK citizen who went to the Caribbean

²³⁸ *Boakye and Others* (n 235) [43].

²³⁹ *Ibid* [44].

for a week's holiday and upon her return, customs officers discovered drugs professionally concealed in rum bottles. Retelling the finding of the Crown judge, Hughes LJ said:

He reached the conclusion that the applicant was to be distinguished from the kind of courier in whose case it could sometimes be understood what drove them to act as they had, especially if they came from a very poor background. The applicant did not. She had plenty of money. She had no need to commit the offence. She had chosen to do so. The only imaginable reason was greed.²⁴⁰

Then we have the case of Christiana Boakye, 49, who imported almost 4 kg of cocaine and pleaded guilty promptly. She was sentenced to eight years' imprisonment although in her case, Hughes LJ implied that he could not ascertain if she had a significant role because there was "no evidence of exploitation or coercion."²⁴¹ Reviewing the case of Sbida Nasri, the Lord Justice accepted that pressure had an effect on her and more likely so because her friend "remained in Brazil and thus no doubt under the influence of the people for whom she had been working."²⁴² Nasri, 23, imported about 2 kg of cocaine and also pleaded guilty. Her sentence was set at seven years and three months imprisonment. Nasri is described in the narrative as a French citizen with a good job who thought she would be taking computers to Brazil as a favour to a friend. Once in Brazil, the narrative stresses how she was influenced by "strong-minded people"²⁴³ who pressured her to keep to the deal they had in mind. Finally, Donna Latchman, 34 and from Guyana, imported 1 kg of a Class A drug. She pleaded guilty to the importation charges and was sentenced to five years in custody. Hughes L.J stated the sentencing judge had been willing to accept that she acted out of financial desperation even though the expected

²⁴⁰ *ibid* (n 235) [42].

²⁴¹ Specifically, Hughes LJ said: "In the case of the applicant Boakye there was no evidence of coercion or exploitation. Indeed, it is not asserted, and never has been, precisely what her role was. Were the facts of such a case to recur, the offender's role could only be decided upon if she chose to give information" *ibid* (n 235) [44].

²⁴² *ibid* [45].

²⁴³ *ibid*

reward was not ‘modest’. She was promised £ 3000 which, the reader is told, she would have used to open a shop. Despite this, or precisely because of this information, Hughes L.J. noted that if a fuller investigation had been carried out, Nasri could have been considered for the lesser role category.²⁴⁴

To understand the reasoning applied, we must stop and examine what and how the CA understands the terms courier and mule. From the outset, Hughes LJ said that all the applicants attracted the description of “‘courier’ in the sense that they were all dealt with on the basis that the drugs they carried belonged to others.”²⁴⁵ However, he added, not all couriers are the same because their culpability is likely to vary. Crucially, the distinction is drawn between exploited or willing couriers, as he noted “there are those who are exploited or oppressed by others, and there are those who engage voluntarily in the couriership of drugs, are in it for the money and have the freedom to make the decision.”²⁴⁶ To make this distinction, Hughes LJ cites the Professional Consultation Paper of 2011 which set out that one of the goals of the new guidelines was to distinguish ‘professional couriers’ from ‘drug mules’ (Sentencing Council 2011b, 32).²⁴⁷ Now, he also insisted that determining whether someone was a courier or a mule was *not* a legal test. They were both “classes of offenders who attracted the category of ‘couriers’”²⁴⁸ on the basis of carrying drugs for someone else, but their culpability varied, meaning that couriers could even be found to have a leading role.

In the cases studied for this project, discussions as to whether someone was a ‘mule’ or a ‘courier’ were absent in a majority of cases before the publication of the guidelines. However, the guidance judgement in *Boakye and Others* explicitly differentiates ‘drug mules’ from

²⁴⁴ *ibid* [46].

²⁴⁵ *ibid* (n 235) [3].

²⁴⁶ *ibid* [3].

²⁴⁷ *ibid* [34].

²⁴⁸ *ibid* [37].

‘wordly-wise couriers’ through the characteristics listed in Step 1 of the DG. A mule is to be understood by the courts as:

A third-world offender exploited by others [who] will be likely to be assessed by the judge as having a lesser role: see the expressions ‘performs a limited function under direction’, ‘engaged by pressure, coercion, intimidation’ and ‘involvement through naivety, exploitation.’²⁴⁹

In contrast, the other type of courier is someone:

who knows what he (or she) is doing, and does it as a matter of free choice for the money, is likely to be assessed as having a significant role: see the expressions ‘motivated by financial or other advantage, whether or not operating alone’ and sometimes ‘some awareness and understanding of the scale of operation.’²⁵⁰

From this lens, none of the appellants were deemed fit to be considered as a ‘mule’ which was linked squarely to characteristics listed in the lesser role category (See Appendix I, Table II). Thus, we see the differentiation exercise in the guidance judgement where Alleyne had “to be distinguished from the kind of courier in whose case it could sometimes be understood what drove them to act as they did, especially if they came from a very poor background.”²⁵¹ Instead, she had ‘plenty of money’ and the drugs were professionally concealed during her holiday trip to St. Lucia. Without clear references to financial desperation, coercion or exploitation, the roles of Boakye, Nasri and Latchman were unclear and the judge refuses to categorise them as mules. For example, Nasri’s story clearly mentioned how her journey began wilfully to pay for liposuction but ended with her being threatened by the organizers during a drug run; Latchman did appear to be in a situation of ‘financial desperation’ but the court reasoned she would not

²⁴⁹ *ibid* [35].

²⁵⁰ *ibid* [36].

²⁵¹ *ibid* [42].

have been financially desperate if she had successfully imported the drugs. At the same time, it emphatically distinguishes Nwude, Alleyne, and Jagne as offenders who had a significant role. In the assessment of whether Jagne fits the lesser category, Hughes LJ affirms she was “by no means a vulnerable third-world citizen”.²⁵²

Now, we need to read the judgement above with the other key appeal lodged in the aftermath of the entry into force of the DG: *Attorney General’s Reference (No. 15, 16 & 17 of 2012)*.²⁵³ In this case, the Solicitor General asked the CA to revise unduly low sentences given to three men involved in the importation of 100 kg of heroin and 6 kg of cocaine. Specifically, the Solicitor General asked the CA to clarify the 2012 guidelines and “‘dispel a few myths’ about its impact on the level of sentences for drugs offences.”²⁵⁴ The most important ‘myth’ was that the guidelines were not intended to sweepingly reduce sentencing for drug importation offences.²⁵⁵ Following the DG and *Boakye and Others*, the CA emphasised that sentencing practice was meant to remain consistent with current levels, *except in the case of drug mules*.²⁵⁶ The crux of the dispute in this case was whether the trial judge had departed from the low sentencing range. I will only review the role of Lewis because the dispute was whether his role was rightly assessed.

David Lewis was the driver of a lorry in which drugs were concealed. He had significant debts. He was sentenced to 9 years for heroin importation and 6 for cocaine importation because the judge considered him to be a “courier.” The CA considered that the trial judge had erred in giving Lewis a sentencing range accorded to someone fitting the lesser role category. Recounting the facts of the trial, Hallett LJ explained that the sentencing judge had been persuaded to believe Lewis had a lesser role,²⁵⁷ possibly because he did not show all of the

²⁵² *ibid* [43].

²⁵³ *Lewis and Others* (n 236).

²⁵⁴ *ibid* [1].

²⁵⁵ *ibid* [2].

²⁵⁶ *ibid* [3].

²⁵⁷ *ibid* [40].

characteristics attributed to a significant role. In the same paragraph, she recalls how the prosecution argued that Lewis was a “courier and must have had some awareness and understanding of the scale of the operation.”²⁵⁸ For this reason, Hallett LJ said: “he was motivated by financial advantage and most definitely not in the category of a ‘drugs mule’”²⁵⁹. Contesting the appeal, Lewis’s counsel argued that the guidelines *could not allow a departure* from the sentencing ranges given, when the appellant has a lesser role. Meanwhile, the counsel for one of the co-appellants emphasised that the guidelines “shifted from deterrence and heavy reliance on the quantity of the drug to a focus on the role of the offender and the seizure of assets.”²⁶⁰ The primary conundrum presented by the cases concerned how to sentence people who had lesser or significant roles, like mules and couriers, who participated in massive importations. However, this raised the related issue of how if deterrence was still the rationale for sentencing, it should be balanced with proportionality.

Delivering the judgment, which increased the sentences for all three appellants, Hallett LJ clarifies how to apply the guidelines and the steps to determine the sentence. She states that the guidelines should not be given a strict construction and that judges “should be astute not to place offenders in a lower category than appropriate.”²⁶¹ First, she recalls how the determination of the offence category (Step 1), includes factoring the twin pillars of sentencing: *harm and culpability*. Harm is based on the quantity and type of drug that could have reached the public had the offender not been detained. Culpability is assessed on the basis of the role undertaken. Taken together they reflect the seriousness of the offence and should be reflected in the sentence. Continuing her commentary, Hallett LJ characterizes calculation of the harm as “at the heart”²⁶² of sentencing for drug offences. Indeed, after reviewing the facts of the case,

²⁵⁸ *ibid* [38].

²⁵⁹ *ibid* [38].

²⁶⁰ *ibid* [45].

²⁶¹ *ibid* [11].

²⁶² *ibid* [7].

she concludes that quantity, purity and value of the drugs told “their own story”²⁶³ about scale of the operation.²⁶⁴ Where the importation involves quantities significantly higher than Category 1, it should be considered as a ‘massive’ importation and carry sentences of 20 years or above depending on the role of the offender. On this point, the court clarified another misunderstanding of the guidelines: The hierarchy of roles in the DG is “essentially the same” as the military ranks used before, such as ‘foot-soldiers’, ‘lieutenants; or ‘generals.’²⁶⁵ Hallett LJ further cautioned judges to be careful about determining roles, to consider how they may overlap; she also reminds her judicial brethren that the ‘non-exhaustive’ list of characteristics should not be given a strict meaning:

The categories do not provide some kind of straightjacket into which every case must be squeezed. Few offences and few offenders will match exactly the categories provided. Once offence or one offender may straddle a number of categories...The judge must do his or her best to reach a fair assessment of the overall offending, namely culpability and harm, before proceeding to the next stage (step 2).²⁶⁶

After determining the starting point, the judge must reach a sentence within the category range but can depart from the category range if the mitigating or aggravating factors justify it. In this sense, someone with a leading role could have a higher sentence but someone at the lower end could also have a high sentence if the quantity merits the departure. Qualifying the purpose of the guideline Hallett LJ states that “sentencing of ‘drug mules’ apart,”²⁶⁷ the guidelines provided no dramatic shift from sentencing practices. Instead, the CA agreed in this case with Hughes LJ who said in *Boakye and Others* that the DG provided “a modified and clarified

²⁶³ *ibid* [66].

²⁶⁴ According to the Guidelines, purity is relevant only in Step 2, where the judge determines the sentencing range and starting point for the offence.

²⁶⁵ *ibid* [8].

²⁶⁶ *ibid* [12].

²⁶⁷ *ibid* [19].

method of reasoning...in line with existing practice.”²⁶⁸ In other words, the guidelines were meant to codify, rather than change sentencing practice.

The following section explores the pre-existing practices in the sentencing of mules-couriers (indistinct prior to 2012), thematised through economic references. Before turning to the case law, it is important to clarify as well that the mule/courier distinction did not exist officially in legal discourse until after the 2012 DG. Since tracing the evolution of these terms is part of the project, I will identify how was originally used in the legal text by means of quotation marks. Most of the cases analysed taking place before 2012 refer to “courier or mule”²⁶⁹ as synonymous terms. For example, in *B* (2005), Justice Owen described the term mule as “a convenient and well understood shorthand for the role of courier of drugs.”²⁷⁰ Recall also that I am not looking for the ‘true’ meaning intended by the judge when making a reference to ‘mules’ or ‘courier’. These terms are not uttered in isolation but rather with reference to the financial situation of the offender and translated by the legal narrative. Finally, the following discussion does not describe all 60 cases selected for the case study, but selects vignettes to highlight examples of predominant themes. Also, I should caution that the following reading of the cases between 2000 and pre-2012 guidelines is not organized in a chronological order because my point was to organize them thematically.

i. Give me the money! Financial desperation and greedy holiday makers

Recall how the new guideline categories draw a difference in roles where there is evidence of exploitation and financial reward, a difference reaffirmed in the reading of *Boakye and Others* and inscribed in the distinction between courier and mule. Does exploitation refer to agency over the process of labour or is it the absence of minimal financial reward? For example,

²⁶⁸ *ibid* [3].

²⁶⁹ *Attorney General’s Reference (No.21 of 2006) (Fahd El Aziz Abada)* [2006] EWCA Crim 1182B (2005); *R v. B* [2005] EWCA Crim 2449

²⁷⁰ *ibid* [7].

Fleetwood argues that drug mule work is organized in such a way that mules have limited control over their work and cannot back out after agreeing to carry drugs (Fleetwood 2014, 180). Although research on drug mule work focuses on the labour dynamics (Harris 2010; EMCDDA 2012; Fleetwood 2014), I will show how legal interpretation differs significantly. For example, evidence of financial stability is translated in the judgements as evidence for financial motivation. Yet, evidence of poverty also has been used as evidence of being motivated by profit. One of the caveats of the DG is that there is no guidance on how to assess and distinguish ‘financial reward’ and ‘exploitation’. Instead, we are left to assume it must be read in light of the existing sentencing practices.

Prior to the DG, legal discourses also framed the offence through the financial situation of the offender. These iterations reproduce the discursive frame of drug trafficking as a market in which actors seek to make a profit. From that point of view, the court infers a higher role when the offender has control over the means to carry the drugs or of transportation methods: For example where there is evidence of booking flight tickets by themselves,²⁷¹ using sophisticated method to conceal the drugs,²⁷² and finding their own customers.²⁷³ Also, a good financial situation prior to the offence has also been translated into being motivated by greed.²⁷⁴

On the other hand, the appellant’s financial situation has also been used to try to challenge that someone was courier-mule or to ascertain she/he was a courier-mule in order to mitigate the sentence. For example, Amanda Richardson was arrested upon arriving from Jamaica with a carry-on bag containing 13 kg of cannabis and was sentenced to 18 months in

²⁷¹ *R v Quinn & Ors* [2009] EWCA Crim 1097; *R v. Morgan (James Augustus) and Evelyn (Sadhana)* (CA, 4 April 2000)

²⁷² *R. v. Chika (Daniel Ikechuwka)* [2008] EWCA Crim 742. This case was included in this case study although it did not fit the criteria for the selection of cases because it is an appeal against conviction, rather than appeal against sentence.

²⁷³ The offence was a possession with intent to supply, though the judge commented how Groves “was more than a courier, serious though a drugs courier’s offence is”. See *R. v. Groves (Deborah Joyce)* [2004] EWCA Crim 2204 [9].

²⁷⁴ *R v. Richardson (Amanda)* [2003] EWCA Crim 65. This case also was not included in the final count because it was an appeal against conviction, although included in the analysis because it illustrates the problems of how financial stability was used to deny the presumption that the offender is a drug mule.

prison. She appealed against both the conviction and the sentence. Her defence argued in the trial that she would not have risked her freedom and jeopardised her studies for a ‘courier’s fees’. Summing up, the judge “directed the jury that the applicant had plenty of funds legitimately saved in her own account to cover the cost of this holiday, that she liked holidays and habitually took them and was entitled to do so...”²⁷⁵ Yet, despite her ‘excellent’ character, the CA rejected the application for leave to appeal because the ‘good character’ of the courier was irrelevant in the mitigation according to the *Aramah* guidelines (as discussed in chapter II). Recall that these guidelines were the first for drug offences and established, against the general practice in sentencing, that good character and vulnerability, could not count for much mitigation in drug offences.

However, dire economic circumstances were hardly the only reference in mule and courier discourses. In some cases, it was hard to de-couple economic need with other extenuating personal circumstances or characteristics, such as illness or cognitive disability, responsibility for relatives with ill health, and geographical origin. For example, in *Kyermateng*,²⁷⁶ the judgment states how the appellant had incurred a debt of £5000 and been threatened if he did not pay it back.²⁷⁷ In delivering the judgment, Brian Medley J draws attention to Sam Asare Kyermateng’s mature age, poor health, including diabetes, hypertension and arthritis, as well as a letter he wrote to the court, pleading that the sentence take into account the impact his imprisonment would have on his wife and children in Ghana. Kyermateng had been sentenced to seven years and a half in custody after being convicted of importing 697gr of cocaine concealed in his stomach. The appeal was dismissed because the appellate court considered the mitigation had been already factored in his sentence.

The case of *Hull*²⁷⁸ tells of a Jamaican man doing occasional construction work but

²⁷⁵ *R v. Watson (Geraldine Alethea)* [2003] EWCA Crim 65 [9].

²⁷⁶ *R v Kyermateng (Sam Asare)* (CA, 3 February 2000).

²⁷⁷ *ibid* [6].

²⁷⁸ *R v. Hull (William Gordon)* [2001] EWCA Crim 1292

who did not have a stable income. Reading the judgment, Mackay J said that the appellant was “living from hand to mouth, struggling to support his elderly and infirm father of 75 who is dependent on him, and to pay the school fees of a teenage son who lives with his mother in Kingston”.²⁷⁹ In sum, his economic situation “reveal[s] a very typical example of drug importation by the use of a courier, from an economically deprived background”²⁸⁰. He is also described as having a ‘vulnerable personality,’²⁸¹ based on the details provided in the PSR describing him as an ‘uneducated, unsophisticated, rural man’, who was almost illiterate and of “low intellect.”²⁸² In *Beckford*,²⁸³ a financial debt also sets the background of the offender. Her counsel in the appeal submitted that she was “a mere mule...carrying the drugs but without any further involvement.”²⁸⁴ Indeed, the CA adds how the ‘good character’ and a history of debts were “sadly...features which are commonly found in cases of this kind.”²⁸⁵ In contrast, in *Akyeah*,²⁸⁶ we find a differentiation between types of couriers. The case involved a business woman who imported food and exported shoes from Ghana, convicted to 23 years in prison and deportation for carrying around 39 kg of a Class A drug. At her trial, the defence argued that she was asked by her sister to carry a present for someone. The appellate court re-stated the sentencing judge’s comments:

You are an intelligent woman who had a business which was an ideal cover for such importation, and you decided to take the risk, having made ten visits to this country in 12 months and having not been searched. I cannot regard you...as a poor, impoverished courier with suffering children and no money, because you are not that sort of person-

²⁷⁹ *ibid* [4].

²⁸⁰ *ibid* [3].

²⁸¹ *ibid* [5].

²⁸² *ibid*.

²⁸³ *R v. Beckford (Yvonne Joy)* [2003] EWCA Crim 368

²⁸⁴ *ibid* [4].

²⁸⁵ *ibid* [5].

²⁸⁶ *R v. Akyeah (Christiana)*[2003] EWCA Crim 1988

you had funds, you had a home, you had money in the bank- for the reasons which not before me but one can only assume are greed.²⁸⁷

Although I am presenting isolated references to the financial situation of the offenders, the majority of cases show a more ambivalent depiction in the legal narrative, poised between financial desperation and financial ‘greed’ as the motivation. For example, Akyeah is also described in the text as an unemployed housekeeper who had plenty of money in her account. She was, the prosecution argued, a “trusted courier”.²⁸⁸ *The issue explored is how the ambivalence tips in favour of reading a higher level of culpability rather than lower. While the facts may support the claim about her role as a professional courier, the effort in this chapter is to see how those facts are iterated through gender norms.*

ii. Detached femininity: The selfish drug courier-mule and the self-less carer

At this point, we might ask if gender norms disambiguate the ambivalence of the appellant, for example, as in the case of the poor house-keeper/trusted courier in *Akyeah*.²⁸⁹ In some cases, femininity acts as a signifier that re-directs the financial situation into a reading of selfish or selfless financial motivations. Consider how in *Akyeah*, the judge recalls how she has no suffering children. This remark is significant considering how the drug mule seems to be identified only as a mother with caring responsibility. As discussed in chapter II, women drug mules who are single or without children fall outside the scope of the term. Similarly, Katie Hall²⁹⁰ is depicted as a ‘detached’ 22-year-old woman who went for easy money and a holiday. She was sentenced to 12 months for importing cannabis from Jamaica with her co-accused, Carole Lewis. The basis of the appeal was also on the disparity of the sentence between them. Recounting the facts, mostly with reference to the PSR, the CA stated that they had justified the trip to Jamaica as a prize won in a magazine contest. Yet, Clark L.J cites the remarks by

²⁸⁷ *ibid* [6].

²⁸⁸ *ibid* [9].

²⁸⁹ *ibid*.

²⁹⁰ *R v. Hall* [2001] EWCA Crim 310

Holland J, the sentencing judge who had told Hall: “you have a lot of growing up to do and that is apparent from getting involved in this...” while Lewis’ submission was an “obvious cock-and-bull story which they [the jury] quickly rejected.”²⁹¹

Holland J added that judges have to “harden their hearts” and “make it quite clear that this is a very serious offence.”²⁹² Read otherwise, judges must keep their affective boundaries intact and make sure that what survives is legal authority. Without going through all the facts re-stated by the CA,²⁹³ Clark LJ highlights also passages from the PSR to determine if the sentencing judge had assessed rightly the sentence. For example, he stops at the characterization of Hall by the probation officer, who said she discussed the facts of the offence “in a detached matter-of-fact way;”²⁹⁴ also, the remarks that she was not a drug user and had no pressing financial need. Taken together, these descriptions, which would otherwise be considered as evidence of ‘good character,’ were actually read as intention to make easy money and get a free holiday. Similarly Hall showed a “readiness to participate, lack of forethought and [her] limited understanding of the wider consequence of drug importation for others was worrying.”²⁹⁵ As the legal narrative continues, it stresses how Hall got in with wrong crowd even though she had been in a stable relationship up until the offence. The probation officer even “sensed an arrogant belief that she would not get caught and held to account.”²⁹⁶ Rejecting the appeal, Clark LJ said “it is clear from the pre-sentence report that she was motivated as the prime mover by greed.”²⁹⁷ All is left in the text is a detached woman who became derailed, augmented by her lack of care for others, in pursuit of easy money. However,

²⁹¹ *ibid* [7]. Reproducing these comments, the CA suggested they showed how the sentencing judge felt he had given a very lenient sentence to both offenders.

²⁹² *ibid* [6].

²⁹³ Lewis eventually confessed the trip had been organized for them and were given £1000 pounds each for holiday clothes and travel expense. Upon their return, they were promised £5000 for the drug run. Lewis and Hall had been approached by an unspecified acquaintance to do the drug run making it look as if they were having a holiday.

²⁹⁴ *ibid* [11].

²⁹⁵ *ibid*

²⁹⁶ *ibid* [14].

²⁹⁷ *ibid* [22].

the court also notes how Hall was used by ‘ruthless people.’²⁹⁸ Contradicting the ‘arrogant belief’ in getting away scot-free, the appeal judge recalls that the PSR also recorded how she felt anxious before the trip into the UK:

The appellant realised the chances of avoiding detection at Manchester were really small but at that stage felt that she had no option but to continue. Her travel documents and passport had been taken from her on arrival. When she expressed her concern about the suitcases, she felt intimidated and threatened.²⁹⁹

We also learn how Hall found out she was pregnant upon her arrest. Thus, the judge delivering the judgement said the court had sympathy with her situation as a mother in prison but it could not allow the appeal. Her appeal was rejected on the basis that the sentencing judge had already been lenient by giving her a 15 month sentence for the offence: the importation of 6.5 kg of cannabis.

The case of Cynthia Attuh-Benson is significant in many ways because the court iterated more clearly who could be a vulnerable offender and referred to it throughout the whole analysis. Attuh-Benson, who was pregnant at the time of her arrest and gave birth in prison, was convicted to 10 years in custody and recommended deportation for importing less than one kg of cocaine. She refused to plead guilty and said in the trial that her nephew had given her the suitcase to be delivered to a friend in London. However, the text of the appeals highlights that she did not organize the travel arrangements and possibly not her visa application either. Reviewing the facts of the case, Hallett LJ said:

When she agreed to take part in this enterprise both she and her husband were in employment. Her husband told Mr Darlington that he was in receipt of a good income.

She had the benefit, therefore, of a stable family unit. She was not in the *category of a*

²⁹⁸ *ibid* [7].

²⁹⁹ *ibid* [10].

*vulnerable or inadequate person*³⁰⁰ who was driven to commit this offence by hardship.³⁰¹

The significance and outcome of the case will be discussed later on. For now, what matters is to trace how financial stability is read as greed and financial desperation as need. Also, the fact that she was married and had a stable family lurks in the judicial rejection of claims that she was vulnerable. If we read *Hall* and *Attuh-Benson* together, there seems to be an underlying assumption that vulnerable drug mule are exclusively single mothers who are financially desperate for their children, as noted in Akyeah's case. This assumption is in line with the literature outlined in chapter II and the problems of generalizing the motivations of mules and couriers. Although Hall had a partner when she was arrested, she is read as a detached single woman whose intentions were selfish. On the other hand, Attuh-Benson has a 'stable' family life, a background fact that makes it unthinkable to consider her as vulnerable or 'inadequate'. We also see in this case how, in the logic of the law, vulnerability is akin to a pathology. And not only that, since the law also takes the role of defining whether the claim is authentic or not.

iii. Masculinity, truth-telling and caring responsibilities

As mentioned before, personal characteristics and the existence of dependants accompany the recognition of the role of the mule, where gender roles appear to be significant to explain the financial motivations of the offender. How do masculinities frame the narratives of financial motivations? In contrast to the above, the CA rejected the assertion that the appellants in *Senesie* (2005)³⁰² and *Ormirston* (2005)³⁰³ were 'mules or couriers'. Although Senesie was unemployed and lived on state benefits, the prosecution presented what is called 'life-style'

³⁰⁰ My emphasis.

³⁰¹ *R v Attuh-Benson (Irene Cynthia)* [2004] EWCA Crim 3032 [22].

³⁰² *R v. Senesie (Jack Ezemie)* [2005] EWCA Crim 2047

³⁰³ *R v. Ormirston (Mark)* [2005] EWCA Crim 2602

evidence. That is, there was evidence that he had taken many flights before the one in which he was arrested. In contrast to the unemployed male, narratives of the good hard worker were common in some cases of male offenders. In the second case, Mark Ormirston had gone on holiday to Grenada and originally said he did carry the 1.6 kg of cocaine under duress but then pleaded guilty. The CA took note of how he was a “hard working young man of previous good character and from a respectable family.”³⁰⁴ Similarly, the passages of the PSR cited in the appeal of Stewart Taylor³⁰⁵ describe him as a hard worker who had fallen in debt; that he was an occasional cocaine user and that he is described as a man with a caring nature and high standards at work in letters sent to the court by his friends. In Taylor’s case, the appeal was allowed and his sentence for importing 561 g of cocaine reduced from 8 to 6 years. Ormirston’s sentence was reduced from 7 to 6 years but the CA stated that good character cannot be significant for mitigation since “drug traffickers often tempt vulnerable people to act as couriers, often impoverished people of previous good character, with heavy financial obligations, from third world countries.”³⁰⁶

However, male offenders with caring responsibilities are often acknowledged as mules prior to the 2012 DG. The case of *Abada El Aziz*³⁰⁷ shows a similar recognition of the role of drug mules through reference to the financial responsibilities of a young man. *Abada El Aziz* was convicted for importing 1.24 kg of cocaine, and sentenced to 3 years in custody in a young offenders’ institution. In his case, his personal circumstances took centre-stage in the text of the appeal. Recounting the facts, the text explains that this 18 year old British citizen, had been detained by airport customs officers. At first, he gave customs officers a convoluted story about why he had gone to Brazil. But then, he broke down and decided to tell a very detailed account of how he became a ‘courier:’ he was approached by a man with whom he played football, who

³⁰⁴ *ibid* [10].

³⁰⁵ *R v. Taylor (Stewart)* [2003] EWCA Crim 14

³⁰⁶ *Ormirston* (n 302) [10].

³⁰⁷ (*Fahd El Aziz Abada*) (n 268).

offered him £5000 to go on a holiday and bring back a package. We are told that he owed money and was caring for his mother, who suffered from multiple sclerosis. The CA agreed with the Abada's counsel submission that it was a "rare case"³⁰⁸ meriting a degree of mercy because:

Unlike many of those convicted of this kind of crime, his immediate focus is not himself. He writes: 'I have let down my parents and feel ashamed as they have brought me up to be a law-abiding citizen. I worry that I have caused them many sleepless nights and that the unnecessary stress may cause my mother's condition (multiple sclerosis) to deteriorate further.'³⁰⁹

Thus the sentencing judge took all his personal circumstances³¹⁰ into account: caring for his ill and divorced mother, a cousin suffering mental illness, and two siblings. We are reminded by the appellate narrative that he had tried to find work but it conflicted with the need to stay at home and take care of his family. Additionally, the narrative states that the sentencing judge took into account the candid and detailed explanation when the defendant confessed his guilt. In fact, LJ remarked how the sentencing judge had been impressed by his being straightforward about his crime, albeit a reflection of his naiveté.³¹¹ The narrative of the appeal also notes that Abada never felt threatened. In fact, when he felt he could not follow through, he negotiated with his contact in Sao Paulo to postpone the flight. While the CA acknowledged that there "is true mitigation"³¹² based on his personal circumstances, the sentencer had made a mistake in the range and given an unduly lenient sentence; it was increased from three to five years.

Summing up the decision, the CA remarked how "the problem with this type of case is

³⁰⁸ *ibid* [16].

³⁰⁹ *ibid*.

³¹⁰ There is something completely apolitical in the way that caring responsibilities of this man become 'personal' rather than public. It is a perfect example of the critique of Fineman of the lack of state responsiveness and how individuals are left to fend for themselves in difficult health/welfare situations.

³¹¹ (*Fahd El Aziz Abada*) (n 268) [14].

³¹² *ibid* [18].

simply addressed. So very often the couriers have a tragic story to tell”.³¹³ LJ added that personal tragedy does not supersede the protection of the community. Giving the example of a grandmother who imports drugs “in order to pay an operation for a severely disabled child”, he argues that such a defendant could not be easily granted mitigation because of the potential “disaster” caused by drugs.³¹⁴ Read otherwise, the law must protect the vulnerable from the vulnerable. Although, we may ask how the category of ‘personal circumstances’ in criminal courts exerts a questionable division between the private and public sphere, often criticised in feminist legal scholarship. At the same time, we might wonder if the sentencing judge appraisal for Abada has to do with gendered frames of truth-telling and valour. In contrast to the apparently duplicitous female drug mule: adjectives like “direct” and “straightforward”³¹⁵ sprinkle the narrative of male offenders. Consider the contrast between the characterisation of Abada’s selfless confession with Hall’s ‘matter-of-fact’ story-telling to the probation officer (section above) which was read as being as a ‘detached’ woman.

Another example, although also presenting a peculiar aspect of reading the narratives through gender, is the case of John Frederick Noble.³¹⁶ The appeal cites a passage recounting the moment he was detained after returning from a trip to Jamaica. Noble said “hand on heart, I will tell you what happened” and then, as the legal narrator recalls, proceeded to be “perfectly frank” to the authorities.³¹⁷ The judge recounts how he had fallen in love with Sylvia Blench, a prostitute who became involved in drug trafficking “when she was in a vulnerable situation”.³¹⁸ The vulnerable situation, which we are told includes her work as a prostitute and debts incurred with others, allowed her to be “exploited”.³¹⁹ John and Sylvia lived together and

³¹³ *ibid* [22].

³¹⁴ *ibid*.

³¹⁵ *ibid* [18].

³¹⁶ *R v. Noble (John Frederick)* [2001] EWCA Crim 685

³¹⁷ *ibid* [6].

³¹⁸ *ibid* [8].

³¹⁹ *ibid*.

when she went to Jamaica with the purpose of doing a drug run, he went after her. In the words of the judge, he did his “best to bring her home” and for that reason, his motivation was not financial gain but “the affection for Ms. Blench.”³²⁰ Thus, the court decided Noble had had a subsidiary role in the offence and his sentence was reduced from 4 and a half years in prison to 3 and a half. Could we read here a form of identification of the law with the male-protector who protect vulnerable women?

iv. Merciful exceptions: Finding uniqueness in economic vulnerability

I want to draw attention to how the CA often describes stories of ‘courier-mules’ as ‘tragic’ but also ‘usual’, ‘common-place’ or even ‘typical.’³²¹ Recall how the judgement in *Abada*’s case draws a difference between the tragic-but-usual through a reference to the ‘uniqueness’ of his situation. The drive to differentiate the usual from the unique is not fortuitous. It arguably derives from *Faluade*.³²² I suggested in chapter II that *Faluade* was a response to the guidance in *Aramah*³²³ where vulnerability is described with reference to a) ‘good character;’ and b) people with physical disabilities and weak will. This guidance sought to close the door for mules to use personal characteristics/circumstances as mitigation arguments since Lord Lane suggested that those features were the reason why they were recruited in the first place. This reasoning was supported by the logic of deterrence but in *Faluade*, the CA granted there will be cases where it could “act with mercy.”³²⁴

The story of Olyinka Madupeula Faluade, as told in her appeal, states the following facts. We are told she is a Nigerian citizen, who was sentenced to four and a half years in custody after she was found with 95 packages containing 210 gr. of heroin concealed in her

³²⁰ *ibid* [7].

³²¹ *R. v Quarcoo (Angela)* [2010] EWCA Crim 1236; *R v. Hull (William Gordon)* [2001] EWCA Crim 1292 B; *R. v Broderick (Michelle)* [1994] Crim. L.R. 139

³²² *Faluade* (n 227).

³²³ *Aramah* (n 226).

³²⁴ *Faluade* (n 227).

body. We are also reminded that she had given contradictory information throughout her interviews with the authorities. Finally, Faluade accepted her guilt but in her defence, she said she did not know the type of drug she was carrying. The narrative states that she accepted £2000 which the court speculated was intended to help her children's clothes business. Pondering if the sentence had been excessive, the court examined her personal circumstances.³²⁵ Yet, it decided that although her health condition was serious it was treatable in prison. Moreover, the court could not heed the pleading letters sent to the court by relatives and members of her community:

She is, it is said, badly needed at home. Her family is without her. We have seen various letters from a Minister or Ministers of religion from the church or churches which she attends in Nigeria. They are quite touching. But they cannot serve to affect the judgement of this Court, which must be utterly dispassionate in such matters as this.³²⁶

Just as in Hall's case, the court re-affirms its role as a dispassionate arbiter and the need to focus on the offence and potential harm of drugs. However, Faluade also opened the door to claim sentence reductions based on pleas for mercy. Although the CA did not formally consider the precedent of Faluade on Attuh-Benson's case, it did invoke the doctrine on mercy. Recall that Attuh-Benson was not recognized as a vulnerable offender because "she was an educated woman, employed, and living in a 'stable family unit.'"³²⁷ Her counsel had suggested in the appeal that a drug mule would "often be an uneducated and vulnerable person, susceptible to pressure and ill-informed about the approach adopted by the British courts to cases of drugs importation."³²⁸ Drug mules were "expendable" and usually told "what to carry and how to behave."³²⁹

³²⁵ "This lady has a large family in Nigeria. She is unfortunately a sick woman. She is having treatment for active rheumatoid arthritis in prison. Her condition in that respect is quite severe" *ibid*, 3.

³²⁶ *ibid*.

³²⁷ *ibid*.

³²⁸ *Attuh-Benson* (n 300) [12].

³²⁹ *ibid* [14].

Whilst stressing the personal characteristics of mules-couriers, Attuh Benson's counsel also argued that high sentences for drug importation were not only disproportionate to the role of couriers-mules but also had severe impact on the families of offenders and their communities. Indeed, the vulnerability of her family, who lived in Ghana, was central in her appeal. After she had been detained and convicted, one of her children fell ill, and her husband lost his job as the caring responsibilities fell on him. Additionally, he had received death threats by the people behind the drugs-run. We are told in the narrative that her counsellor submitted copious reports about how orphaned children in Africa are at a higher risk of contracting AIDS and of human trafficking; and also how the absence of welfare and social security, represented a risk to children without parents. Urging the CA to reconsider sentencing policy, Attuh-Benson's counsel argued that these matters were not envisaged in *Aramah's* guidelines on the vulnerability of drug mules. Moreover, sentencing policy "was ineffective" because it "penalises the vulnerable and puts unnecessary pressure on the already overcrowded prison system in the United Kingdom."³³⁰

The argument on behalf of Attuh Benson's children is supported through the international framework protecting the rights of the child, stressing the vulnerability of orphaned children in Ghana. Of course, they were not orphaned, but could have been had something happened to their father as the narrative notes how he had also been subject to threats. Although the appeal was about Attuh-Benson as an individual, her subjectivity could not be disassociated from her children, and the judgement affirmed that. We could read also a form of relational expression of vulnerability; yet the vulnerability of her children took centre stage since the claim of vulnerability-as-financial-desperation and caring responsibilities prior to the offence failed,³³¹ Still, her sentence was reduced from ten to eight years because the court

³³⁰ *ibid* [12].

³³¹ *Akyeah* (n 100).

granted her mercy. While admitting the ‘uniqueness’ of the family’s case, the court laid out the general position towards drug offenders:

When a parent, be it mother or father, commits an offence as serious as this, there is, quite simply, no alternative. Drug addiction is a blight on society and causes untold misery throughout the world. The courts of this country and elsewhere have no choice, in our judgment, but to impose substantial sentences upon those who willingly involve themselves in what has rightly been referred to as an evil trade.³³²

Instead, Hallett LJ took into account Attuh-Benson’s ‘particular difficulties’, mainly her medically recognised depression which the CA concluded resulted from the separation from her children and concern for their well-being. The judge commends how the appellant is described as a model prisoner because she goes out of her way to help others despite her own problems.³³³ Through mercy, she was pulled out of the margins of the selfish female criminal into the bounds of the norm of the selfless caring mother and friend. Thus, the court was “satisfied that, as an act of mercy, some modest reduction in the sentence passed upon her is possible...To that extent and that extent alone this appeal succeeds.”³³⁴ In contrast, the ruling in Attuh-Benson was not applied to *Quarcoo*. Angela Quarcoo was also a Ghanain woman, who brought 9 kg of cocaine into the UK. A mother of two young children and carer of her elderly mother, she was denied the mercy granted to Attuh-Benson, because the court did not consider her personal circumstances as serious. While taking into account the vulnerability of the children, Aikens LJ stated the court considered that the personal “circumstances of this appellant's are commonplace.”³³⁵

Drawing on these cases, my first suggestion is that the ‘mercy’ reasoning underpins the

³³² *Attuh-Benson* (n 300) [18].

³³³ *ibid* [24].

³³⁴ *ibid* [25].

³³⁵ *Quarcoo* (n 320) [26].

eventual distinction between mule and couriers based not only on ‘exceptional’ economic vulnerability as implied in *Abada*, but also the suffering body of the post-colonial female subject, in *Attuh-Benson*. The suffering female body of Attuh-Benson is cited through what the court interpreted as melancholia for the loss of her children which she ‘had to live with’ as a consequence of her actions.³³⁶ This construction failed however, in *Quarcoo*, pushing the legal recognition of vulnerability further into the margins. Secondly, the legal recourse to mercy, allows the law to ‘give in’ to the compassion which it cannot ‘feel’ as it must ‘harden its heart’ against the vulnerability of the offender in order to maintain objectivity. The next section elaborates how the drug mule is iterated with reference to the suffering female body and the relational feminine subjectivity.

v. *The vulnerable female drug mule: Embodiment, relationships and suffering*

The last section looked at how women drug mules are emphasised in the narratives as relational subjects with caring responsibilities. This section explores how references to mules in the cases also builds on their romantic relationships³³⁷ and also how frail embodiment figures in the narratives. The question, as in the section above, is whether and how gender frames notions of embodiment and subjectivity of female offenders. Two clarifications are needed. Although the cases discussed above also show cases where men are considered as mules driven by financial-caring responsibilities, references to parenthood were less common for men than women. In fact, caring responsibilities were seldom mentioned in cases of men. Another gap in the research is that data on relationship status (single mother, in partnership, extended family) and caring responsibilities could not be collected consistently. The availability of this information

³³⁶ *Attuh-Benson* (n 300).

³³⁷ See *R. v Henry (Nadine Chrystel)* [2014] EWCA Crim 980; *Quarcoo* (n 320); *Quinn* (n 270); *Attuh-Benson* (n 115); *R v. Basoah (Rose)* [2004] EWCA Crim 1045; *R v. Purperhart (Danielle Miligent)* [2003] EWCA Crim 3827; *Akyeah* (n 285); *R. v Morris (Eileen Veronica)* [2002] EWCA Crim 1160; *Attorney General's Reference (No.14 of 2002)* [2003] 1 Cr. App. R. (S.) 17 ; *Hall* (n 289).

depended on whether the appellate court referred to it through the PSR, the arguments for the appellant, or by reference to the trial or sentencing remarks.

That being said, frail embodiment and caring responsibilities were often paired together in the reconstruction of the subjectivity of the appellants prior to and after the 2012 DG. In *Basoah*,³³⁸ the appeal stresses how Rose, a Belgian resident of Ghanaian origin, was the sole carer of six children working as a seamstress after becoming a widow. She had been sentenced to 12 years after a trial by jury for importing 1.43 kg of cocaine. Citing the summary of the trial, Justice Elias said “obviously” the jury had not believed her story about being asked by a friend to deliver a hold-all to a friend in London. Instead, she had misrepresented herself as a genuine business woman, as her story had been she traded goods of African origin.³³⁹ After rehearsing the submissions on behalf of Rose, mainly her maternal responsibilities and good character, Elias J recognized her situation as ‘distressing’ but was bound by *Aramah*, which justified the court’s “view that harsh deterrent sentences must be visited on those who help to promote this evil trade.”³⁴⁰ Thus, her appeal was rejected. Danielle Milligent Purperhart’s personal circumstances were dismissed for similar reasons.³⁴¹ The 25-year old Dutch woman was convicted for carrying less than a kilo of heroin strapped under her armpits. Her counsel laid bare the complexity of her life: she had been raised by her grandparents in Surinam, though her grandmother had lost her sight after a stroke, which required the grand-daughter to take more caring responsibilities at the age of 11, including helping her mother with the care of her younger siblings from an early age; she was the daughter of an abusive father, who had actually used her as a child drug courier. Further on, the Recorder of Middlesbrough explains that she had had two significant relationships, one with a man involved in dealing drugs and the other, with a good and intelligent man who left her, a sad and ‘aimless’ young woman:

³³⁸ *Basoah* (n 336).

³³⁹ *ibid* [3].

³⁴⁰ *ibid* [7]

³⁴¹ *Purperhart* (n 336)

Then her life was aimless and symptoms arose affecting her eyes. She had got a job at a postal sorting office, but lost it due to her inability to read addresses. In short it transpired she has severe defects in both of her eyes and was informed that if she did not undertake an expensive regime of treatment her eyesight would deteriorate and like her grandmother go blind herself.³⁴²

The reason for the drug run was to finance eye surgery, an intervention which her counsel suggested would allow her to go to college. The CA concluded that even if the circumstances of the appellant had been considered by the sentencing judge, the sentence was right³⁴³. Even though her counsel tried to argue that in view of the substantial quantity of hard drugs imported, “behind this woman there must be those of evil determination”³⁴⁴ her culpability was incontestable. A similar reading can be seen in *Graham*,³⁴⁵ where her counsel emphasised Graham’s situation as a foreign woman with an alcohol addiction, struggling with financial difficulties after a divorce from an abusive man. The appeal was dismissed because she “had gone into the arrangement with her eyes wide open...educated and intelligent woman...no remorse whatsoever”.³⁴⁶ Here, her fragility is intensified with reference to her addiction to alcohol but also her relationship to an abusive man.

In contrast, the narrative of Pauline Kayode’s case is framed in the appeal through her romantic relationships and poor health. She is shown as a dependent woman, who had been with abusive partners, had learning disabilities, and a history of suicide attempts and self-harm. The CA granted the appeal on the basis of mercy and reduced the sentence from 11 to 9 years.³⁴⁷ We can see a slightly different in the narrative of Ahmed Amal Mohammed and Selina Marsha

³⁴² *ibid* [7].

³⁴³ *ibid* [11]

³⁴⁴ *Ibid* [10].

³⁴⁵ [2011] EWCA Crim 1905

³⁴⁶ *ibid* [3].

³⁴⁷ *R v. Kayode (Pauline)* [2002] EWCA Crim 340

James' appeal,³⁴⁸ where the PSR described Ahmed as a naïve and vulnerable woman in her twenties. Her probation officer also expressed concern about her ability to cope with prison and the CA took note of a letter vouching for her academic achievements. James, also in her twenties, was described as a naïve woman and a mother of two children who was unaware of the seriousness of the offence. Yet, both had pleaded guilty to importing almost 500 gr of a Class A drug concealed in their vaginas. We are told through the PSR that James had been motivated to do the offence in return for the money but also that she had been anxious about her unplanned pregnancy and mourning the death of her mother. The appeal was also based on the different roles each one had. Ahmed's counsellors argued she had been recruited by James, while the latter's counsel argued she had been acting on the instructions of two men. The appeal succeeded to a degree on account of the lack of clarity in the reasons for the 7-year sentence given by the sentencing judge.

References to vulnerability, naiveté and bodily vulnerability were not always accepted as mitigation. For example, in the request for leave to appeal of Karoline Egwenu³⁴⁹ the court's reading of the PSR was contrasted with her criminal record. She was recognised as a vulnerable courier due to her "limited intellectual capacity" which made her "vulnerable to being taken advantage of".³⁵⁰ Yet, Judge Richard Brown rejected her appeal because "vulnerability carries little weight in the absence of a guilty plea" and while her "disability and infirmity rendered her a suitable carrier" it did "not count for much in a case of importation."³⁵¹

The role of medical testimonies cannot be underestimated in the citational practices constructing the feminized vulnerability of the appellant. For example, Attuh-Benson's 'clinical depression' vouched for her suffering in prison. In *Anderson*,³⁵² the psychologist's

³⁴⁸ *R v. Ahmed (Amal Mohammed)* [2004] EWCA Crim 1335

³⁴⁹ *R v. Egwenu (Karoline Nkeiruka)* [2004] EWCA Crim 1896

³⁵⁰ *ibid* [6].

³⁵¹ *ibid*.

³⁵² *R v. Anderson (Edris May)* [2006] EWCA Crim 1508.

report also carried significant weight in the recognition of vulnerability as a personal characteristic. This report described Anderson as a woman of “low intelligence, dependent on others, highly vulnerable and open to manipulation and suggestion.”³⁵³ Yet, this case shows a peculiar feature of how the courts have applied the ruling in Attuh Benson’s judgement. Whilst recognising her psychological issues, the CA stated the appellant “did not have the mitigation available for the particular category of courier to which Attuh-Benson applied, namely women from overseas with young children having to serve a long sentence away from home”.³⁵⁴ The appeal was allowed, partly because the CA considered that, in cases like hers, deterrent sentences would have no effect because she “was of such low intelligence and was so easily led.”³⁵⁵

vi. *Reducing coercion to naiveté*

In chapter II, I explained how coercion figured as an explanation for the involvement of women and men in the drug trade. The purpose of coercion references in the sentencing appeals prior to the DG of 2012³⁵⁶ was to provide “extraneous mitigation purporting to explain the background of the offence.”³⁵⁷ The DG has included it as one of the characteristics indicative of a lesser role. Whilst vulnerability and debt-acquisition were sometimes cited as reasons for the threats against drug mules, this section elaborates upon how coercion is framed through a feminized iteration of naiveté. For example Selina Martin,³⁵⁸ a 22 year-old French citizen, told officers her son had been kidnapped and threatened with violence if she did not smuggle drugs from France to the UK. Further, the probation officer also reported that she believed she would

³⁵³ *ibid* [5].

³⁵⁴ *ibid*.

³⁵⁵ *ibid* [6].

³⁵⁶ Another potential problem, although this is speculation, would be cross-border investigation limitations. Yet, the cases in this study did not mention specifically that limitation.

³⁵⁷ *R v. Broderick* [1994] 15 Crim. App R (S) 476, 3.

³⁵⁸ *R v. Martin (Selina)* [2006] EWCA Crim 1035.

be carrying cannabis not cocaine, but realised her mistake once the 3 kg of cocaine was being strapped to her body by an unknown man. However, the decision to mitigate the sentence leaned on Selina's age, a factor which was used to explain the story of coercion and mistaken belief. Judge J paraphrased the remarks by the sentencing judge, who took into account how her age made her a naïve person "likely to fall in with unscrupulous drug dealers".³⁵⁹ And while the sentencing judge could feel some compassion for the young mother, the fact that she was a mother should have made her realise the danger of drugs. Moreover, as the quote by the sentencing judge, cited by Judge J, the drugs were not only going to harm other people's children's but also her own: "You are putting your child in the way of a threat by helping to circulate a drug like cocaine to which young people are going become addicted and bring ruin on themselves."³⁶⁰ Thus, Judge J explained, "despite the compassion he felt, the court had to be severe."³⁶¹ In the end, her appeal was allowed but because the CA considered the sentencing judge had correctly reflected the effect of the guilty plea under s. 144 of the Criminal Justice Act 2003 in the sentence.

A rather different rationality frames the decision in *Quinn and Others*.³⁶² The four appellants,³⁶³ three women between the age of 19-26 and a 41 year-old man, travelled together on a cruise to the West Indies. They were caught in Southampton with an aggregate amount of 20 kg of cocaine strapped around their bodies. The CA retold the following facts from the trial: The Crown Court had accepted they were vulnerable "couriers" because of their age and circumstances, mainly caring responsibilities who were acting for others. Yet, the CA characterised the trip as an elaborate ploy to traffic drugs into England. The basis of the appeal was that the sentencing judge did not follow *Aranguren's* guideline (chapter II), on vulnerable

³⁵⁹ *ibid* [9].

³⁶⁰ *ibid* [10].

³⁶¹ *ibid* [11].

³⁶² *Quinn and Others* (n 270).

³⁶³ The three women included Natalie Quinn, who was 26, Camille Dupee was 19, and Briony Dyce who was 25. The only man was Calvyn Hilton, aged 41.

drug mules. Yet, Justice Holroyde stressed that the court was very aware of the role the defendants had as “couriers”, understood as:

...persons of good character and persons who by reason of age, financial situation or personal circumstances are vulnerable to a greater or lesser degree. That being the case, and for that reason, there is a limit to how much weight a sentencing court can give to personal mitigation in a case such as this.³⁶⁴

Similar to *Hall* and *Martin*, the CA took into account their remorse and good character and how they accepted that they could have rejected the offer or withdrawn from the operation. However, Justice Holroyde said that whilst there was sympathy in relation to how “each of them became apprehensive or fearful of the possible consequences of trying to pull out once they had become involved,”³⁶⁵ had they had succeeded, they would have brought large quantities of drugs “capable of ruining many lives.”³⁶⁶ The appeal was allowed, on the basis that the guilty plea had not been fully factored into the starting point as the sentences had been high considering their role as “couriers.”

There are other cases where coercion has been referenced and constructed around the notion of naiveté. The case of *B*³⁶⁷ presented a more pressing scenario of violence where a drug mule was tortured by a man who had offered to repay a debt in return for her carrying out a drug run. Although it is not clear how she got involved, the appellant had already contracted a debt with man called Vincent Powell, and confessed she had successfully imported 300 gr of cocaine in 2002. Upon her return from a family trip to Jamaica in 2003, Powell waited for her at her home, where he tortured and threatened to kill her for six hours in front of her daughter. After the incident, she went to the police and confessed her previous involvement as a mule,

³⁶⁴ *Quinn and Ors* (n 270) [7].

³⁶⁵ *ibid* [7].

³⁶⁶ *ibid* [6].

³⁶⁷ *B* (n 268).

for which she was convicted to 30 months in custody on account of the defendant's 'courageous' testimony against Powell and the low quantity of the drugs imported. In her appeal, her counsel argued that she ought to have a lower sentence, considering she was a naïve offender; that her incarceration would have a negative impact on her daughter; and that she would not have been convicted if it had not been for her confession.

Whilst taking into consideration the mitigating factors, the CA said that the most powerful mitigation had been "the plea and the fact that the only evidence against the applicant was her own confession volunteered to the police in the circumstances we have described."³⁶⁸ The CA noted that the 30-months sentence was already much lower than the normal range (between 4 ½ to 7 years). Rejecting the appeal, on account that the sentence was already very lenient, the CA stated the sentence was far less than that usually given to drug mules and it could not lower it further because she had a previous conviction for an importation offence. Further, the sentence had to reaffirm the deterrent principle in *Aramah*, that is, prevent unscrupulous dealers like Powell from recruiting more drug mules.³⁶⁹ What is common in these narratives is how coercion claims are side-lined in the judgement. Rather than considering the real effect of subjective or objective perceptions of coercion on the drug mules if they back out of the enterprise, the narrative draws more on the personal characteristics of the appellants or the right application of the law. We could see these instances also as a dismissal of a different kind of vulnerability during the process of travel, as noted in chapter I.

vii. *The exceptional vulnerability of drug mules after 2012*

To conclude this section, I will review the effect of the two leading cases on the interpretation of the 2012 DG discussed at the beginning of the case study analysis. My suggestion is that the DG also reflects the shifting perception that drug mules are driven by poverty and caring responsibilities while the emphasis on the culpability or role is overshadowed by the drive to

³⁶⁸ *ibid* [8].

³⁶⁹ *ibid* [10].

maintain deterrence as a sentencing policy for drug offences. The case of *Jaramillo and Others*³⁷⁰ involved three Spanish women and one man. Their counsel argued they were “naïve and exploited” due to their “dire financial circumstances.”³⁷¹

Reviewing the personal circumstances, Felix Abello is described as man who had been working since he was 14 but made redundant from his permanent job two years previously. His unemployment benefits ceased but he had no means to support himself and his widowed mother. The psychological report also noted that he had “borderline” intellectual functioning and was a very “passive and naïve, eager to please, and avoid of confrontation.”³⁷² In addition, he had an expensive cocaine habit. Secondly, Ana Isabel Palacios Exposito, 27, was a single mother of a seven-year boy and responsible for the care of her partially blind mother. She had also worked since she was a teenager and was unemployed since the economic crisis in Spain. The CA judge explains that the defendant had managed to make a living through sex work but left it because she had been exposed to violent customers and because this line of work caused her to feel fear and shame.³⁷³ Her circumstances drew her to accept the drug run and the promised payment of 7000 euros. Johana Solis Jaramillo, 19, was also a single mother who had left school at 15, and also described as being in a difficult financial situation. Finally, we are told a few facts about Estefania Pardo-Puertolas, 18, who had no fixed home because her family travelled from place to place. There was little information about her life situation. The CA was ready to accept all the defendants had performed a lesser role but the quantity of drugs imported was above category 1, requiring sentences of 20 years and above. Citing the precedent from *A-G (No.15-17 of 2012)*,³⁷⁴ Pitchford LJ recalls that appellants imported ‘massive’ quantities of Class A drugs. Each of them had imported about 16 to 25 kilos of Class A drugs in their

³⁷⁰ [2012] EWCA Crim 2101

³⁷¹ *ibid* [18].

³⁷² *ibid* [20].

³⁷³ *ibid* [22].

³⁷⁴ *Lewis and Others* (n 268).

suitcase, undoubtedly for commercial purposes.³⁷⁵ Thus, while recognising their roles as “couriers” the CA:

...did not intend to diminish in any way the force of the sentencing judge's observations that the court's primary function is to mark the pernicious nature of this trade in Class A drugs, even among those who carry the drugs for those much further up the chain of command.³⁷⁶

The appeals against the high starting point were allowed but reading the distinction between courier and mule in *Boakye & Others*, Pitchford LJ stated that “they do not fall particularly easily within the group to which Hughes LJ was there describing”³⁷⁷ as “mules”. Instead, Pitchford LJ said that the defendants “voluntarily journeyed to the Dominican Republic knowing they would become Class A drug couriers for substantial sums of money” and accepted the risk of being intimidated.³⁷⁸ To the court, they were willing offenders who had assumed the risks³⁷⁹ rather than offenders “exploited or oppressed by others.”³⁸⁰ While their counsel submitted they had no second thoughts about deciding to commit the offence, once in the journey they had been “under the control of the organisers, men with guns.”³⁸¹ Although not recognized as “mules”, the appeal was allowed and their starting points were considered to be too high. The CA gave credit to the guilty plea and all mitigating factors. Yet, the sentencing range departed from category 1 because it was a massive importation.

A similar rationale was applied to the case of *Henry*³⁸² although the iteration of feminised fragility is accentuated through the defendant’s failed relationship with men, failed

³⁷⁵ Since they travelled together in pairs, the quantity assessed for the sentence was the sum of the consignment found. Amello and Palacios, were responsible for importing 42.81 kilos of cocaine worth £ 7.8 million. Jaramillo and Puertolas carried together 33.89 kilos of cocaine with a street value of £5.29 million.

³⁷⁶ *Jaramillo and Others* (n 369) [25].

³⁷⁷ *ibid* [27].

³⁷⁸ *ibid*.

³⁷⁹ Sum promised only to one of the offenders.

³⁸⁰ *Jaramillo and Others* (n 369) [3].

³⁸¹ *ibid* [8].

³⁸² [2014] EWCA Crim 980F (33)

motherhood and mental health problems. When detained, she told officers that she had gone to Trinidad for a funeral but eventually pleaded guilty and confessed she had been approached by a man in a bar in London who offered her £5000 and a ‘holiday.’ Henry was a beautician who wanted to set up her own business. After reviewing the pre-sentencing report, which detailed her history of depression, bipolarity and obsessive compulsive disorder, domestic abuse since the age of 14, and caring responsibilities for her six children (all minors), the sentencing judge decided she had played a significant role. She was sentenced to three years and four months for importing almost two kg of cocaine hidden in her brassiere. In the absence of duress, the court concluded she “had engaged in the conduct voluntarily. She was in it for the money” and the “judge did not accept that her naivety and exploitation made it a lesser role.”³⁸³

However, Henry’s counsel made an important point that is at the crux of the distinction between mules and couriers stating: If “every courier is likely to be motivated by financial advantage” then it is likely they would “fulfil that particular indicator under the guideline of a ‘significant’ role. But not every courier plays a ‘significant’ role.”³⁸⁴ This argument was dismissed because the sentencing judge was fully entitled to conclude the defendant had a significant role from her own submission, mainly that she suspected she would be carrying drugs. Henry’s suspicions showed to the judge that she went ahead with the offence “heedless of her children”³⁸⁵ whilst fooling her mother into taking care of them. The court concluded this was “not a case of a gullible defendant who was already abroad being asked to carry a package at short notice as a ‘drugs mule’ and doing so on impulse”.³⁸⁶ Instead, she was motivated by financial gain and “despite her mental health difficulties, has only herself to blame for the

³⁸³ *ibid* [9].

³⁸⁴ *ibid* [10].

³⁸⁵ *ibid* [11].

³⁸⁶ *ibid* [11].

damage that this greed has caused and will cause to herself and her children. It was her choice.³⁸⁷ Henry's appeal against sentence disputed on the basis of her role was rejected.

7. Conclusion: Merciful exclusions of vulnerability

To conclude, the analysis presented shows how vulnerability has been pushed to the margins of the law because the CA characterized as an exceptional circumstance for few offenders could qualify. The effect of limiting the drug mule category to exceptionally vulnerable offenders who deserve the mercy of the law has been implicit since the 1980s but has evolved through case law and the DG. Starting from *Aramah* in the 1980s (discussed in chapter II), punctuated by *Attuh-Benson*,³⁸⁸ *AG-Ref. (No 21 of 2006)*,³⁸⁹ *Boakye & Others*³⁹⁰ and *AG-Ref. (No.15-17 of 2012)*,³⁹¹ the category of mule has been further narrowed as a 'very special category' of offender. Although the inclusion of the non-exhaustive list of roles and mitigating factors would suggest otherwise, the narrative in post-2012 cases show a reluctance to recognise offenders as mules. This does not mean that a sentencing reduction is denied by the court. That is not the case always, as shown in *Jaramillo and Others*.³⁹² In the end, even though the CA did not recognise them as drug mules, their appeal succeeded. In other words, aim of the appeal (the reduction of the sentence) can be achieved without a formal recognition that someone is vulnerable, a recognition implicit in the term mule. Still, what the analysis does suggest is that the term mule appears through the convergence of two schema of vulnerability: economic precariousness and gender norms. The citational practices rehearsed normative models for women's subjectivity, stressing their caring responsibilities, sexual partnerships, and medicalization of their lives. Embodiment lurks throughout these references but usually

³⁸⁷ *ibid* [16].

³⁸⁸ *Attuh Benson* (n 300).

³⁸⁹ *Fahd El Aziz Abada* (n 268).

³⁹⁰ *Boakye and Others* (n 235)

³⁹¹ *Lewis and Others* (n 236)

³⁹² *Jaramillo and Others* (369).

through the voice of the vulnerable body, the one that is not rational, bounded, intentional, and able to move through the world undisturbed. The pressure thus is to interpret vulnerability as a personal characteristic or circumstance, isolated from the social and political context of the appellant. Although the court's mercy has been sought to relieve the harsh effects of a drug sentencing policy which has placed greater stress on harm and deterrence over proportionality, the CA seems to push back and limit the availability of vulnerability. The effect is that vulnerability is recognised as an 'exception' rather than constitutive of subjectivity. Recall how *Attuh-Benson* was not recognised as a vulnerable or 'inadequate' offender, and yet, became the model for the understanding of 'mules' as suffering postcolonial mothers which *Quarcoo*³⁹³ did not satisfy.

The analysis of the cases here explored if and how stories representing aspects of vulnerability (relationality, dependence, embodiment, gender, precarity) were marginalized or accepted within different norms, but particularly gender and legal norms. By legal norm I do not suggest only sentencing law, but there were a number of norms implicit in the cases shown. For example, the rational legal person and how the law defines individual responsibility as the person who calculates risks or the one who should have known the immorality of her/his acts, mainly bringing drugs that would harm the community. Perhaps almost imperceptible in *Attuh-Benson*'s case, we see the challenge to the conflicts underpinning drug policy, how it affected couriers-mules and their families. However, the legal frame translated those conflicts in the way that it can at the sentencing stage: that is, personalising the tensions through personal circumstances, such as *Attuh-Benson*'s depression. The question of the possible injustice of high sentences for drug offences was postponed, as the CA noted it did not have the authority to change sentencing guidelines. The new DG were thought to shift away the disproportionality of sentencing dragged along since *Aramah*'s guidelines. However, the CA dispelled those

³⁹³ *Quarcoo* (n 320).

‘myths’ in *AG-Ref (No 15-17 of 2012)*.³⁹⁴ In doing so, the CA also reaffirmed its attachment to deterrence, particularly in cases of massive quantities.

Yet, I have suggested the ‘exceptionality’ of the mule category was already building up since *Faluade*,³⁹⁵ *Attuh-Benson*³⁹⁶ and *AG-Ref. (No 21 of 2006)*.³⁹⁷ In my view, iterations of the ‘vulnerable offender’ as a relational subject, threaten the norm of the self-bounded rational person of criminal law. Thus, it only prevails as a narrowed-down version, in the shape of vulnerability-as-exception. The dispossession of the appellants in *Jaramillo & Others*, to the economic crisis in Spain, the lack of welfare protection, etc., was closed off, because the CA focused on the financial reward as a definitive characteristic of the drug courier in contrast to the drug mule. Prior to the DG, the offenders did not appear in the text as duplicitous couriers-or-mules. However, there were other forms of duplicity emerging in the judgement, where the ambiguity of the role was eliminated through a *gendered* re-recitation of the facts and a *gendering* of the appellants actions, motivations and character. Like now, the task of the court is to take away the cover of the masquerading (ambiguous) victimized offender.

Now, in contrast to Young’s suggestion that the woman victim is brought back from the margins to the centre, I will suggest that the doctrine of legal mercy, granted only to the authentic vulnerable drug mule is actually a way to abject vulnerability in order to reify the rule of the invulnerable legal subject. Recall the discussion of sovereign governmentality and the law in Chapter V. My suggestion is that there is an analogous performance where the law exercises its authority through exceptional ‘acts of mercy.’ There are various examples of legal acts of mercy such as ‘illegal’ immigrants being granted residence; or the commutation of death sentences; or permitting abortions in exceptional cases where prohibition is the norm (Deutscher 2008b). Penelope Deutscher suggests that across time and jurisdictions, the law has

³⁹⁴ *Lewis and Others* (n 236).

³⁹⁵ *Faluade* (n 227)

³⁹⁶ *Attuh-Benson* (n 300).

³⁹⁷ (*Fahd El Aziz Abada*) (n 268).

created exceptions to the *general prohibition* of abortion. These exceptions function as a form of biopolitical regulation over women's bodies, that is, where the permission to abort becomes the rule in the regulation of women's reproductive potentials (Deutscher 2008b). The regulation is directly linked to the intensification of feminine bodies as frail and vulnerable. Without, that intensification, the body is simply a 'normal' body:

...states of exception institute the fragility and centrality of bodies—reproductive no less than incarcerated. Whether the exception seems to protect while concurrently stressing the vulnerability of women's reproductive autonomy, or whether it seems to defend a state while weakening civil liberties, bodies are being intensified, weakened, and invested with their possible exposure to violence (ibid., 62).

The exposure of the frail and vulnerable body of the pregnant woman works to suspend the criminalization of abortion or restrictions to abortion laws, through the sovereign mercy.³⁹⁸ However, the effect of the exception is to re-confirm the rule: the illegality of the act of abortion. Unlike other formulations of biopolitical exceptions (Agamben 1998) where the sovereign suspends the death sentence, legally sanctioned abortions suspend the law to allow the death of the foetus, for example, where an illness threatens the life of the mother. To decide is to perform a wager between the foetus' right to life and the mother's right to life. However, Deutscher suggests that the norm is to regard the mother as a potential threat to the life of the foetus; hence the prohibition of abortion. In contrast, the foetus is as a norm, the one is who is utterly vulnerable to the mother. The state's exertion of control over the mother's reproductive potential is also the normal state of affairs, which is thwarted by women's 'self-interest':

³⁹⁸ As a brief note on context, a majority of countries in Latin America, Africa, and the Middle East criminalize abortion. In Europe, Ireland has a general ban, while the UK allows abortions for reasons related to health. For an interactive map on the state of abortion law worldwide see: (Centre for Reproductive Rights 2015).

The woman legally forbidden to have an abortion is sometimes figured as a potentially murderous competing sovereign whose self-interest would thwart the intervening motivations of the state concerned with the threshold life in question (Deutscher 2008b, 66).

Hence, under this structure of vulnerability-invulnerability, the roles between mother-foetus need to be reversed in order to be granted mercy. The effect is not entirely benign, since the suspension of the norm is confirmed by the exception. Deutscher concludes that the law paradoxically grants a dispensation from “its own harshest version, such that the exemption both suspends and reconfirms the harshest rule” (ibid., 65). Again I should reiterate that questions of life and death are not limited e literally to abortion or death sentences. Rather, as noted at the end of chapter V, invocations of life and death also refer to how subjectivity appears in the legal and political sphere, whether a person is symbolically and practically relegated outside of the relational sphere of ‘being-in-common’ because they do not comply with the ideation of the legal subject under the social contract.

Of course, offenders whose sentences are reduced through legal mercy are biologically alive, but their persistence continues outside of the schemas of intelligibility that make it impossible to recognize vulnerability or the precariousness of every life (Schippers 2014, 40) by the law. Instead, the dynamic of mercy and exceptionality, as illustrated by Deutscher, limits the appearance of women’s vulnerability to the absolute victim. Only then, she will not threaten the norm of the sovereign patriarch. In contrast to Young’s analysis, the vulnerable female is not simply accepted back into the community as the absolute victim, while the ambivalent female is excluded. The relationship is more complex. Both the ambivalent offender and the absolute victim are excluded in order to sustain the boundaries of the rational legal subject of crime. Consider how, in Deutscher’s reading, the legal recognition of fragility and the vulnerable body is only given as an exception to the norm. Thus, the victim is both inside and

outside. We could read her occasional acceptance, as the victim, only in utilitarian terms for the law, in other words, to maintain its authority to define the boundaries of legal personhood as well as gender norms.

In conclusion, the analysis of the cases shows a reluctance to recognize the ambiguity of vulnerability and the precarity of the offenders' situations prior to and during the commission of the offence, as well as their vulnerability in relation to the law. As Janet Loveless notes, "with the exception of drug mules, there was no explicit recognition by the SC in any of its reports of the severe impact imprisonment has upon drug offending women more generally, or their families, as a type of punishment" (Loveless 2012, 8). This point is crucial because it leaves drug laws and sentencing practices politically unaccountable. Recall how Attuh-Benson's counsel made a very clear challenge to sentencing policy for drug offenders. That tension was resolved through the exceptional mercy granted on account of her vulnerable-frail personal circumstances. Drug policies and laws arguably affect more people than solely mules but it is also undeniable that they are also blamed and affected by drug laws in a particularly punitive way. Significantly, the analysis shows how the legal schema of intelligibility reduces vulnerability into a very narrow idea: the identity of the post-colonial mother who is poor, uneducated, passive, and exploited and naïve.

Although the sentencing stage is not bound by the rigid conventions of legal guilt, sentencing judges still have to determine the culpability of the convicted drug offender through attention to the role and harm. Sentencing decisions are, after all, the culmination of the process and where the courts express the community's condemnation of the crime. Recalling the discussion on punishment and the future of a community at the end of chapter III, this stage has been the one that ensures the memorialization of the wrong and the future of the community, through the assurances of the disembodied person of liberal subject of law (Valverde 2005; Butler 2014a). Explained otherwise, my suggestion is that the sentencing

decisions evince an effort to maintain the borders of that model of legal personhood. Instead of dealing with the conflicts and contradictions in how the law addresses legal subjects, the rational legal subject is safeguarded from the conflicts underpinning drug offences.

The case of drug mules unveil the failure of that project, throwing the law into doubt about the legitimacy of its principles. The cases presented in the chapter show how the ambiguous vulnerability of men and women cannot be accommodated into the parameters of the legal subject, re-drafted through the simplistic representation of victim/offender along gender lines. If ambiguous vulnerability- understood as the relational sphere of 'being-in-common'- cannot be accommodated into the schemes of intelligibility of the law (the 'either-or' frameworks) it does not mean that it disappears. Instead, vulnerability is displaced outside or incorporated. Vulnerability is moved outside legal normativity (a departure from the guidelines at the discretion of the judge) through legal mercy or effaced by confirming the norm of the wilful offender motivated by greed (the legal subject of criminal law). At the same time, while I have stressed that vulnerability reminds us of the social ontology of subjectivity, the repeated iteration of women relationality selectively limits and distributes vulnerability along lines of gender difference.

VII. Conclusions

1. The promise of vulnerability

This project has examined what is at stake in the articulation of drug mules-couriers as vulnerable offenders and its effects on sentencing law in England and Wales through a philosophical inquiry. Since 1983, sentencing law has recognised that some drug importation offenders could be characterised as ‘vulnerable’ based on their disadvantaged economic situation and suggestibility with regard to ‘making a quick profit’, either because of their circumstances or personal characteristics vis-à-vis the standard of the rational calculating subject of criminal law. This reference to vulnerability fleshes out a contradiction in criminal law where people are judged as disembodied legal persons yet they are relational embodied subjects acting in a particular context. At the same time, this contradiction is also interpreted as an ambivalence because mules-couriers are recognised through the legal frames either as victims or offenders. I have endeavoured to show how these terms are underpinned by a discursive apparatus which is shaped by gender norms. The gender-blindness in the *Aramah* guidelines has arguably been countered through an intensification and expansion of vulnerability discourses beyond the characteristics of age and ‘suggestibility’ for a ‘quick profit’. Vulnerability iterations, inside and outside the courts, point to caring responsibilities, general hardship, and circumstances that, far from being ‘personal’, exposing the gendered and unequal distributions of vulnerability and political dispossession. As the universality of the disembodied legal person subjectivity is constantly challenged through vulnerability discourses, the latter also produces conflicting results that reposition and impose a gendered discourse on drug mules through the invocation of accepted parameters of femininity and masculinity. As the case study shows, legal discourse participates in the organisation and

distribution of vulnerability, by guarding the boundaries of the disembodied rational legal person.

Beyond just stating that the law draws the boundaries of the legal subject and excludes embodied subjectivity, the contribution of this thesis is that it asks why and how vulnerability has become gendered in scholarly, legal and political discourses, and the effects of gendering vulnerability in these fields. Rather than adopting vulnerability as a characteristic of identity, which would have restricted the parameters of the inquiry, I deploy vulnerability as a critical concept that fleshes out embodied and gendered subjectivity in order to question legal personhood, criminal responsibility theories, punishment theories, and the sexual politics of injury. Ambiguity and ambivalence are two concepts closely interrelated to vulnerability approaches in feminist and queer theory, and as I have suggested, these concepts open up the possibility of articulating a critical ontology of vulnerability. Through this perspective, the thesis scrutinises the limits of criminal law through critical encounters with vulnerability in order to unpack the ambivalence of drug mules. I argue that the category of drug mules is often met with suspicion, as a performance of 'fake' feminine victimhood which the law must unveil, exposing the woman who 'acts' like a man and is thus worthy of punishment. I have sought to trace the mechanisms of abjection against the ambivalence of drug mules' through the concept of ambiguity in order to expose the practices of domination and control deployed through criminal law and drug control.

To be sure, the ambivalence is an effect of the discourses on the feminized vulnerable subject and hyper-masculine acquisitive drug offender implicit in the mule-courier categories incorporated by the Definitive Guidelines for Drug Offences (2012). Chapter II articulated this idea through an analysis of international and domestic drug policy, while introducing sentencing law governing importation offences. Excavating the assumptions and frameworks behind the legal procedure of the drug trafficking offender, the chapter suggests that drug

policy rhetoric is shaped by two distinct but interrelated rationalities. First, there is the neoliberal rationality which frames drug offenders as profit-oriented actors who bypass legitimate sites of profit-making such as labour markets. The second is the securitisation model iterated through the existential threats of drugs as an ‘evil’ to humankind. I suggest that both rationalities operate implicitly in domestic drug laws in England and Wales. The securitization model underpins sentencing laws for drug trafficking while the neoliberal logic underpins the institutional organization of border management practices. While drug trafficking discourses are reiterated through an articulation of suitable ‘enemies’, this process also articulates ‘suitable’ victims. Both victims and offenders orient the normative responses to international drug trafficking. The victim implicit in securitization discourses is both the community at risk of consuming drugs and the nation-state. There are competing vulnerabilities impinging upon drug control, drawn along lines of identity (global, national, racial, gender), and the securitisation practices and techniques used to exclude or colonise victimisation. Discourses on vulnerability in the CA appear only through a gendered version of victimhood, constructed via the references to the exploitable, third-world mother and those with caring responsibilities. Yet, postcolonial and feminist criminology shows how victimhood tropes animate practices of racial profiling and legitimate protective interventions that colonize the “fields of victimization and represent them as part of the territory of penalty” (Biko Agozino 2008, xi).

Without being ready to jettison what vulnerability-as-victimhood signifies, namely the bodies upon which discourse inscribes, chapter III asks how those self-same bodies appear or disappear in criminal legal theory and practice. This entails an inquiry into the limits and contradictions of the rational legal person, individual responsibility, judgement and punishment. Confronting failure in criminal legal practices and the penal equation, the chapter points to the challenges and promises of ‘relationality,’ highlighting in the process the unequal distribution of attributions of relationality along lines of heterosexual gender difference. This

induces me to pause, and, before embracing relationality, to inquire, through Beauvoir's interventions on ambiguity, into why relationality has been disavowed and what gender has to do with the abjection of interdependence at the epistemological, political, legal, and ethical levels. In this context I suggest that criminal law and punishment are geared towards eliminating ambiguity in social life through the calculable legal person. Although not directly addressing law per se, philosophers of ambiguity and ambivalence like Beauvoir and Butler invite us to think about the possibility of a non-violent criminal law; one which does not in fleeing from the ambiguity of living with other 'incalculable' beings through the "terrible satisfactions" of violence (Butler 2014b). Whilst ambiguity and ambivalence are a provocation to for ethical life, they do not prescribe norms for it (Murphy 2012a; 2012b). In short, they call for non-violence in criminal law but cannot list or define the norms for achieving ethical life. At the same time, Deutscher and Murphy heed the limits of the ethics of ambiguity, because it marks simultaneously promises and failures.

Building on the logic of abjection to embodiment and interdependence in social life, chapter IV examines the connection between bodies and vulnerability. It begins by linking these two concepts through the etymology of vulnerability: injury which is defined as something 'against' or not 'right' in law. However, here I encounter another puzzle. Why has criminal law often failed to recognise injuries to and harms suffered by women? Historically, the legal recognition of rape as well as injuries to other persons or groups not identical to the white male, have been inhibited or distorted by the dominant influence of patriarchal social attitudes. Considering how often feminist scholarship has highlighted the identification of masculinity with able bodies and transcendental reason (Beauvoir 1986; Grosz 1994; Naffine 1997; Du Toit 2009), I extended the analysis of the body in pain to encompass a gender perspective. I explore how the desire to flee from ambiguity as carnal beings has been organised along gender lines, where masculinity abjects its own embodiment (Schott 2010b). Extending

further the politics of separate spheres, this chapter seeks to unsettle the onto-epistemologies of duality through the phenomenology of pain and its relation to speech and language. It suggests that the ambivalence of ‘making’ and ‘unmaking’ marks the limits of political domination. Overall, this chapter shows how the onto-epistemology of the Cartesian subject alienated from embodiment has been replicated in closed off notions of vulnerability which preclude recognition of ambiguity and ambivalence. The notion of vulnerability deployed in some of the discourses explored in this thesis (namely criminal law and drug control) reinscribes the problematic language/materiality distinction while discourses of ambiguity and ambivalence present a conceptual opportunity to trouble this distinction.

Building on the idea of how sex and gender help to demarcate legal enclosures of injurability, chapter V analyses how feminist and queer scholarship articulate a critical attitude to political appropriations and disavowals of pain and injury whilst simultaneously troubling ‘wounded attachments’ (Brown 1995) that reaffirm disempowering ‘protective’ interventions. This chapter explores the sexual politics of vulnerability suggesting that if vulnerability is to be reclaimed for feminist legal theory and causes, such as the impact of criminal law and drug policy on drug mules, the context where vulnerability claims are uttered must be examined. This is because certain aspects of the philosophical imaginary animating the concept of vulnerability may resonate with securitization rationalities in criminal law and drug trafficking discourse, which aim to prevent injuries and risks through the managerial control of future insecurity (chapter III). However, I do not believe we should renounce to the promises of vulnerability. Instead, naming and renaming vulnerability vitalizes the debate on how some lives are made invisible by the allegedly universal subject of law. The purpose of this critique was not to delegitimise vulnerability but identify its limits through a gender analysis. This chapter unpacks the references and histories associated with vulnerability, including the imaginary of violence, with a view to revising the work that metaphors of experience do and

their effects.³⁹⁹ Through this lens, I analyse how vulnerability carries over and mobilises the imaginary of risk into the sciences, legal theory, political theory, and human rights discourse. Following the trace of gender in bodies, chapter V unpacks the gendered ideation and gendering effects of vulnerability associated with risk and injurability which call forth the conceit of mastery and control over uncertainty.

Rather than jettison vulnerability altogether, feminist and queer scholars have present a “critical ontology of vulnerability” (Murphy 2012, 63) that is attentive to the ambiguity and ambivalence of embodied vulnerability. By re-appropriating the ambiguity and ambivalence of critique that marks the limits of possessive practices to dispossession, these approaches to vulnerability represent a ‘provocation’ towards responsibility (ibid.) where the distinctions of ethics and politics are sustained but their relation is not dissolved (Bergoffen 2001; Loizidou 2007). At its core, vulnerability marks the dispossession of care and violence (Murphy, 2012) grounded on the social ontology of subjectivity (Butler 2006; 2009a; 2012a). Showing how the maternal body is a reminder of “the self as unstable, insecure or unstable, vulnerable” because of the “potential (of) dependency and loss of morphological boundaries” (Schott 2010b, 46) serves as a reminder of our mutual interdependence which the phallic power disavows. Contrary to the norm of self-bounded and able-bodies, the maternal body exposes the impossibility of individualism conceived as a coherent and independent self (ibid.). At the same time, my project leaves unresolved the idea of the feminine and the maternal. For example, Kelly Oliver argues these two have been conflated in Western culture. The problem with lack of distinction is that ‘femininity’ and ‘woman’ are only recognised through the reproductive powers of maternity. Drawing on Kristeva’s work, Oliver explains how abjection is reproduced

³⁹⁹ The critique matters not only to deconstruct the metaphor impinged in the concept of vulnerability. In other words, Murphy’s project addresses a range of discourses where violence animates theory, such as post-structuralism, phenomenology, post-colonialism, feminism and queer theories.

in the cultural sphere. The feminine woman and the maternal “have been reduced to reproduction only” and thus “they have all been excluded from culture as that abject which challenges the border between culture and nature” (Oliver 1995, 135).

Whether it is possible to ascertain a feminine subjectivity distinct from the maternal, or to re-configure the relationship with the maternal, has been beyond the scope of this thesis. My concern has been to follow through the ‘powers of abjection’ and confront these impulses of abjection and desires to ‘flee from ambiguity’ in order to discover alternative narratives of pain and vulnerability, even when it appears futile. In that sense, chapter IV my analysis on the sexual politics of vulnerability was meant to unsettle the power of sovereign governmentality. The aim was to argue, through Loizidou’s analysis, that criminal law is not condemned to being an instrument of political power but also has a role to play in society as a translator of competing notions of legal personhood. But that requires a reconfiguration of the identity of criminal law itself, what it is and how it can function. As Loizidou and Norrie argue, the law is not an institution isolated either from political power or ethical aspirations of socio-political community. Criminal law is then relational and ambivalent. In that sense, vulnerability discourses provoke the criminal law to *respond* and *translate* competing claims about what is an offence. These claims are not uniform because there is a plurality of views on how to deal, for example, with drug trafficking. However, criminal law has failed to translate and respond to the precarity of people to the war and how it affects people differently. Instead, my analysis shows that the logic embedded in criminal law is more likely to respond with violence, and increase the precarity of drug mules and, for that matter their families too. That being said, I have only sketched the contours of a non-violent criminal law. Many would argue that criminal justice *cannot not* respond to injuries and harms through some form of ‘punishment and thus, escape the spectre of pain. However, if its work is meant to translate competing claims of vulnerability in society, criminal law cannot elude the ambiguity of its authority. As William

Connolly argues, modern authority has to deal with the prospect of the absence of transcendental rules and norms that would justify its role. He also advocates an “ethic of ambiguity” without which “any attempt to restore traditional authority and virtue... eventually degenerates into an authoritarian effort to impose a unified image of the good on those who resist it” (Connolly 1987, 135).

This crucial task, of holding a space for ambiguity, has been complicated by the proximity of criminal law to political power and a lack of reflexivity about the temporality of experiences, values and norms. I showed how drug control framework shows its deep and intricate relationship to sovereign governmentality. The ambiguity of vulnerable bodies and the ambivalence in which competing vulnerability claims are received in politics involves a public debate and struggle to re-define the injurability or harm of drugs, which is arguably long overdue. This is not a point I discuss directly, that is, whether drug trafficking should or not be criminalised. The main point to which I seek to draw attention is how the goal of order and crime control is sustained at the cost of masking and distributing vulnerability unequally, understood also as the isolation and dispossession of others who fail to respond to claims for better life conditions. Thus, Martha Fineman and Butler remind us that the state has been unresponsive to these claims.

Finally, chapter VI sets out to examine sentencing cases involving drug mules through the theoretical approach developed above, adapted to deliver a close analysis of sentencing appeals decisions. The chapter asks why sentencing appeal narratives perform an ambivalence articulated through victim-offender references. The ambivalence presents an *aporia* within the criminal law, an impasse that is carried over from the adjudication process. Recall how importation offences cast a wide net, both through the *mens rea* and *actus reus*, to adjudicate the actions of everyone who participates in the trafficking chain. Also, remember that actors are judged through the lens of the rational calculating person of criminal law. Hence, personal

circumstances and characteristics do not matter in law until the sentencing decision. Finally, recall also how the majority of offences are not even decided through trial by juries but by guilty pleas. Guilty pleas effectively silence the lives of couriers-mules in the adjudication of crime; thus, it is unsurprising that personal characteristics and circumstances take a centre stage in the sentencing appeals.

Building on the critique in chapter III, I suggest that the *aporia* or uncertainty signified by the ambivalent victim-offender narratives in sentencing appeals reflects several unresolved conflicts. It reflects: the isolation of individual responsibility through the quasi-disembodied legal person in criminal law (chapter II and III); the dispossession of subjectivity and abjection of embodiment and re-assignment as a characteristic of non-male subjects (chapter IV and V); the tensions in drug control (laws, policies and implementation) which grounds its authority on the vulnerable (children) in order to punish other vulnerable (marginalised) individuals and groups (chapter II). This technique has long authorised deterrence policies justified through the intensification of the community's vulnerability against the 'existential threat' of drugs (Barrett 2010; Lines, Barrett, and Gallahue 2010; Crick 2012). Yet, recall that deterrence is underpinned also by a vengeful and anxious stance of securitisation in relation to the vulnerability of the sovereign.

Instead of solving the contradictions and unjust practices of criminal law and drug control, I suggest that the puzzlement of ambivalence (or contradiction) appears to be 'solved' through a disambiguation technique drawing on gender norms simultaneously translated through legal norms. The analysis highlights a number of key themes which emerge from judicial efforts to expose (or interrogate) the vulnerability of drug mules: financial distress, appeals to relational feminine subjectivity or exploited feminine naiveté, and attaching significance non-able bodies (marked by physical illness or cognitive disabilities). On the first theme, the case study shows how both men and women have been exposed as vulnerable

subjects through financial and caring responsibilities for other vulnerable ones (ill mothers, wives, children, siblings and parents). Economic narratives frame good masculinity through the trope of the ‘hard worker’ contrasted with the drug traffickers who make ‘easy money’ by trading in ‘misery.’

Ambivalent gender performances are disambiguated through the imaginaries of authentic femininity against ‘fake femininity’, or woman acting in a masculine way (Young 1997). Good femininity is iterated through the image of the economically precarious third world mother or the naïve exploitable young woman. Articulations of ‘authentic’ vulnerability are generally contrasted with constructs such as the selfish and detached woman; the ‘fake’ business woman, women who feign economic desperation; or the careless mother who performs as the vulnerable mother by involving her children in the trafficking of drugs. Yet, judgement narratives show how the concept of responsibility ingrained in the bounded legal person is kept intact while vulnerability can only be recognised as something ‘exceptional’. The conclusion thus suggests that vulnerability is a ‘merciful exception’ with those most meriting exceptional mercy including the postcolonial suffering mother. This discourse of exceptionality limits the appearance of vulnerable lives and only recognises the vulnerable as absolute victims.

Finally, adapting Young’s idea of the exclusion of unruly femininity, I conclude that the law’s mercy towards the victimized drug mule still marginalizes her but also reconstitutes the norm of the legal person through her. Heeding the positions of the marginal and the appropriation of victims’ bodies throughout the thesis shows that the merciful exception is not the norm. Hence, the inside/outside status of the victimised drug mule confirms the norm of the courier as the ‘financially’ motivated offender who profits from the vulnerability of the community through the distribution of drugs. The narrowing down of vulnerability as an ‘exceptional’ category thus exemplifies how law translates vulnerability into its own schemas

of intelligibility. Although there are several overlapping frames (drug control, legal doctrine, sentencing law and gender norms), my reading of the cases broadly shows the abjection of vulnerability narratives. Judges repeatedly affirmed that they could not be affected by the typicality of mules-couriers stories. Instead, the textual appearance of such stories in the judgment demonstrates how the boundaries of the rational legal person are held and illustrates the jurisprudential interpretation techniques that clarify and disambiguate ambivalent subjects and their responsibilities into clear judgements that sustain and shape categories of typical offenders versus atypical victims. While vulnerability narratives contextualize male and female drug mules-couriers pathways to crime, they also unveil the failure of the criminal law to act as a translator between ethical concerns and political power. Rather, they exposed how, in the case of drug offences, the law performs the two overlapping modalities of power – understood as the neoliberal rationality of control-managerialism overlapping with securitisation against vulnerability - discussed throughout the thesis. In other words, my analysis shows that the criminal courts operate through a logic of sovereign governmentality which, focused on its own vulnerability (and sustaining the appearance of the self-bounded rational law), is concerned with the penal governance of risky subjects.

2. The limits of vulnerable resistance: Why this analysis matters

By pointing out the different iterations of vulnerability, the overall aim has been to map the onto-epistemology of vulnerability, understood as the “intertwined study of the practices of knowing and being” which are thoroughly material practices (Barad 2007, 379). Contrary to the assumptions embedded in the dichotomous Cartesian subject which posit discourse, language, and knowledge as immaterial, as simply abstractions without a relation to the material, I suggest throughout this thesis the interdependence of knowledge, practices, and

embodiment through a revision of historical practices of punishment, the phenomenology of pain and performative practices of political power.

At another level, I suggest that vulnerability is an affective intensity, moving and being moved by our corporeal embodiment. While I focus on the affective intensity of pain, vulnerability is not marked only by pain, though this remains an important aspect. I note the propensity of vulnerability to depart from the image of injurability and the effects of deploying the imaginary of violence. Through that perspective, I have sought to unhinge the *affect* from the *effects* of pain and injury. This effort is instantiated by my concern to reproduce and reiterate vulnerability in the modality of victimhood as absolute dispossession to pain's destructive powers over speech that totalise subjectivity without room for speaking back, individually or collectively to this performance of power. By approaching pain or violence through different methodologies and examples, I point out how Scarry, Du Toit, Butler and Loizidou, show how totalizing forms of power over discourse *are contestable and fragile*. They all emphasise the 'spectacle' which supports torture. Indeed, the recurrence of violence shows the tenuous reality of political patriarchal powers. Butler articulates a sophisticated account of the relationship between invulnerability and vulnerability (chapter V). Whilst sovereign masculinities abject vulnerability through a violence that perpetuates the fantasy of invulnerability, the fact that violence is used evinces instead how fragile such sovereignty is. However, this fantasy materializes in the violence that reproduces itself, through the temporal extension of pain and deterrence/ retribution as noted in chapter III.

By marking the potentials and limits of the vulnerability, my claim is that advancing vulnerability claims in criminal justice institutions alone cannot offer justice for drug mules because there are also deeper contradictions in criminal law that have not been dealt with. In other words, my aim is to stress the limits of criminal law in receiving vulnerability claims. Still, I suggest vulnerability pushes the limits of modern criminal, evincing its failures. Once

we take note of those failures, the challenge is to relationize criminal law by locating it in its socio-political context. This involves inevitably an inquiry on the validity, authority, and interaction with drug control policies and the general doctrine of criminal law- including the limited version of universality and equality in legal theory and practice.

I suggest that a way forward is to confront and encounter the ambiguity of vulnerability through a revision of the power of abjection (Kristeva 1982) implicit in the relationship with corporeality, in particular the body in pain. Recall that chapter IV explained how Arendt characterizes pain as the most intimate experience which cannot transcend into the political sphere because it destroys speech and action. Without those two activities, pain is condemned to the private sphere of the individual. Thus, body is completely apolitical for Arendt because when one is consumed in covering these necessities, one cannot participate in political life. And in that sense, the law would appear unable to respond to the stories of precarity appearing before the CA. Of course, such a conclusion seems to foreclose the possibility related political or ethically with vulnerability. Yet, I signpost how the phenomenology of pain does not necessarily lead to the alienation of the self. Alienation is an orientation inscribed already in a context that favours certain interpretations of the body in pain. Culturally and socially, Western societies have geared towards containing pain, and interpreted the relationship with the body in pain or illness as a problem to be solved with knowledge and technological artefacts (Leder 1990; Vetlesen 2009; rua Wall 2008). My contribution to feminist and critical legal studies is to show how pain and injurability, are not condemned to the isolation of the private sphere (represented by the bounded body) because there are others who participate by responding, denying, minimizing, healing, and caring for that pulsating pain that threatens to engulf every corner of our being in the world. A more just criminal law would not further these mechanisms of abjection, and for that matter violence, through fraught theories of criminal responsibility and punishment which extend the debt of drug mules towards society indefinitely. In that way,

this thesis provides, through a feminist and critical legal theory perspective, a critique on the symbiotic operation between legal doctrine and drug trafficking laws. Contrary to other approaches which focus on drug laws and policy, I show the complicity of criminal law in perpetuating the precarity of drug mules. Through feminist and queer theory, this project explains how attending to the body is a crucial political and ethical gesture, which the criminal law has long repressed. At the same time, challenge for feminist approaches to relating with the life of women who act as drug mules is not fix these lives into the identity of the victimized woman, because it another way of masking and limiting the potential of vulnerability as concept that contests the conditions and relations that shape subjectivity.

In that sense, Butler shows a way forward, showing how vulnerability (and pain) is not condemned to the privacy of the body as Arendt proposed. While she has been significantly influenced by Arendt (Loizidou 2007; Butler 2011; Butler 2012a), Butler reworks the place of the body in politics in a way that ultimately keeps the political space open to vulnerability by re-interpreting the relationship of the body with the private/public spheres. When embodied subjects appear in the public scene, exposing the vulnerability and violence of the existing economic practices, they are “with Arendt and against Arendt” (Butler 2012c, 113). The ‘against’ revolves around Arendt’s separation of the body from the political; and ‘for,’ because Arendt reconfigures the idea of the space of political representation that is not simply in a parliament or other formal political venue (ibid). Instead, Butler suggests that the political space is created through plural action and encounters with vulnerable bodies. For this reason, I think that exposing vulnerability in the courts is a political gesture, one that shows the disavowal and abandonment facilitated by drug control policies but also economic policies (Corva 2009). In other words, the struggle of vulnerable bodies in politics is to expose the disavowals of the elemental needs of the body: the lack of care evidenced by receding health protection; the denial of people’s socio-economic rights; the neglect of the elderly who are

abandoned by the state because of fraught pension systems and welfare cuts; the absence of caring for people who lose their jobs and struggle with other circumstances in their lives. Some of these stories were partially presented in the cases drawn in chapter VI. But they are incomplete because they do not show the failure of other areas of the law (human rights, public law, labour law) that converge into the criminal cases (Young 1997).

If the space of the court is ambivalent, negotiating the ethical and the political, we might have to think more about the material configuration of politics and the distribution of vulnerability. I argue there are also limits in naming vulnerability, in other words, it is also an ambivalent gesture, because it can also mask the practices of dispossession and possession even further. Yet, performativity also allows for holding a view on how addressees do often resist the names they are given, and by doing so, they also resist the authority of the addressor (Loizidou 2007). The re-appearance of vulnerable bodies and their persistence in the streets, protesting, and challenging the legal and political configurations that render them precarious, is not as victims but as agents demanding an end to the political conditions which do not recognise their vulnerability (Butler 2012c, 113). The re-appearance of vulnerability in the criminal courts cannot be read in a similar way though as in a social protest. This is because the dilemma for drug mules in the post-DG landscape, is similar to Butler's argument that precarious lives face a paradox because they need to "appeal to the very state from which they needed protection" (Butler 2009a, 26). But we cannot remain oblivious to the refusals and acts of resistance by drug mules to counter the stories already provided by the law (victim/offender). While Loizidou recognises that resistance "does not dismantle the whole socio-symbolic strata or the conditions that enable subject formation" it is still a "gesture towards different aspirations of life and the possibility of their materialisation" (Loizidou 2007, 90). Resistance to injurious forms of address requires a space to be able to reject them. If those spaces are foreclosed, the power to injure is masked in other ways, a way to kill "the subject both literally

and metaphorically” (ibid., 41). For example, when a judge defines someone as a drug mule or a courier, the name cites a convention in sentencing law, reiterated throughout legal practices, such as precedent interpretation. Yet, the label should not be considered as totalizing. If the court has failed to act as a translator, or arbiter of competing claims of vulnerability, drug offenders themselves re-appropriate victim-offender tropes, such as the prison protests in *El Inca* prison in Peru where the “collective identification with the drug mule” provided a “collective adoption of an effectual identity necessary for protest” (Fleetwood 2014, 49). Thus drug mules show how they are not passive victims or evil offender. They become agentic subjects by re-appropriating the label of drug mules or by resisting to be named as an evil drug offender. For example, Attuh Benson refused to accept her guilt for trafficking drugs (as discussed in chapter VI).⁴⁰⁰ Of course, Hallett LJ reprimanded her for that refusal. However, if she had not refused the label as a criminal; her story of precarity (her situation as a foreign offender; the effects of harsh sentencing policies on her family in Uganda) would have been silenced by a guilty plea or a jury or judge who sees vulnerability as a masquerade. Similarly, there are other cases in which drug mules affirmed duress and refused to accept guilt, which arguably exasperated judges.⁴⁰¹ Without Attuh-Benson’s refusal to accept her guilt, her story would have been further obscured by the legal norms that appraise those who confess, their intentions for offending, as seen in the narratives valorising male offenders’ straightforwardness.

In that sense, I do not think articulations of vulnerability-as-victimhood should be rejected altogether because vulnerability carries a relevant signifier of precarious life conditions in which states are often implicated. If the ‘victim’ trope is the only expression of vulnerability which is intelligible in criminal law, its potential should not be wholly disavowed.

⁴⁰⁰ *R v Attuh-Benson (Irene Cynthia)* [2004] EWCA Crim 3032, para 22.

⁴⁰¹ *R v White (Patrick Emanuel)* [2003] EWCA Crim 344

Yet, I have also argued for the need to pay critical attention to discourses of vulnerability as victimhood in order to identify when victimhood has become appropriated or transmogrified into a ‘wounded attachment’ that reifies the conditions of victimhood (as for example, when the mule trope becomes a drug enforcement profile). The struggle for academics, legal actors, civil society, and those all invested in speaking for drug mules is against the reification of meaning and for the pluralisation of narratives contesting monolithic stereotypes of ‘mothers with suffering children’ from the ‘third world’. By pluralising the narratives of vulnerability and exposing the local and global conditions of precariousness, we might one day recognise the artificiality of the categories in sentencing law such as ‘personal circumstances’ or ‘individual responsibility’. If vulnerability is relational, the personal is also political and what is missing in criminal law is an understanding and a space for the ambiguity of interdependence.

Appendix I

Definitive Guidelines for Drug Offences 2012

Sentencing guidelines for the offence of fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled

Misuse of Drugs Act 1971 (section 3) and Customs and Excise Management Act 1979 (section 170(2))

Table 1.

Step 1	Determining the offence category
Step 2	Starting point and category range
Step 3	Consider any factors which indicate a reduction, such as assistance to the prosecution
Step 4	Reduction for guilty pleas
Step 5	Totality principle
Step 6	Confiscation and ancillary orders
Step 7	Reasons for sentence
Step 8	Consideration for time in remand

Table 2.

Step 1. Determining category of the offence

Culpability of the offender (role)	Category of harm
<p>Leading role:</p> <ul style="list-style-type: none"> • directing or organising buying and selling on a commercial scale; • substantial links to, and influence on, others in a chain; • close links to original source; • expectation of substantial financial gain; • uses business as cover; • abuses a position of trust or responsibility 	<p>Category 1</p> <ul style="list-style-type: none"> • heroin, cocaine – 5kg; • ecstasy – 10,000 tablets; • LSD – 250,000 squares; • amphetamine – 20kg; • cannabis – 200kg; • ketamine – 5kg.
<p>Significant role:</p> <ul style="list-style-type: none"> • operational or management function within a chain; • involves others in the operation whether by pressure, influence, intimidation or reward; • motivated by financial or other advantage, whether or not operating alone; • some awareness and understanding of scale of operation. 	<p>Category 2</p> <ul style="list-style-type: none"> • heroin, cocaine – 1kg; • ecstasy – 2,000 tablets; • LSD – 25,000 squares; • amphetamine – 4kg; • cannabis – 40kg; • ketamine – 1kg.
<p>Lesser role:</p> <ul style="list-style-type: none"> • performs a limited function under direction; • engaged by pressure, coercion, intimidation; • involvement through naivety/exploitation; • no influence on those above in a chain; • very little, if any, awareness or understanding of the scale of operation; • if own operation, solely for own use (considering reasonableness of account in all the circumstances). 	<p>Category 3</p> <ul style="list-style-type: none"> • heroin, cocaine – 150g; • ecstasy – 300 tablets; • LSD – 2,500 squares; • amphetamine – 750g; • cannabis – 6kg; • ketamine – 150g. <p>Category 4</p> <ul style="list-style-type: none"> • heroin, cocaine – 5g; • ecstasy – 20 tablets; • LSD – 170 squares; • amphetamine – 20g; • cannabis – 100g; • ketamine – 5g

Step 2. Starting point and category range

Table 3.

After deciding the category, the court finds corresponding starting point within category ranges set out below. Starting points are the same, regardless of the plea or previous convictions. Afterwards, there is a further adjustment considering mitigating and aggravating factors.⁴⁰²

CLASS A	Leading role	Significant role	Lesser role
Category 1	Starting point 14 years' custody	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 12 – 16 years' custody	Category range 9 – 12 years' custody	Category range 6 – 9 years' custody
Category 2	Starting point 11 custody Category range 9 – 13 years' custody	Starting point 8 years Category range 6 years 6 months' to 10 years' custody	Starting point 6 years Category range 5-7 years
	Category 3	Starting point 8 years 6 months' custody Category range 6 years 6 months' – 10 years' custody	Starting point 6 years Category range 5-7 years in custody

CLASS B	Leading role	Significant role	Lesser role
Category 1	Starting point 8 years custody	Starting point 5 years and 6 months custody	Starting point 4 years custody
	Category range 7 – 10 years' custody	Category range 5-7 years' custody	Category range 2 years 6 months- years' custody 5 years custody
Category 2	Starting point 6 years custody Category range 4 years 6 months' – 8 years' custody	Starting point 4 years custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years custody Category range 18 months' – 3 years' custody
	Category 3	Starting point 4 years Category range 2 years 6 months' – 5 years' custody	Starting point 2 years Category range 18 months' – 3 years' custody Category

⁴⁰² Category 4 (for all 3 classes): “Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent. Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges above” (Sentencing Council 2012, 6–7).

CLASS C	Leading role	Significant role	Lesser role
Category 1	Starting point 5 years	Starting point 3 years	Starting point 18 months
	Category range 4 – 8 years' custody Starting	Category range 2 – 5 years' custody	Category range 1 – 3 years' custody
Category 2	Starting point 3 years 6 months in custody Category range 2- 5 years in custody	Starting point 18 months in custody Category range 1- 3 years in custody	Starting point 26 weeks in custody Category range- 12 weeks-18 months in custody
Category 3	Starting point 18 months in custody Category range 1-3 years in custody	Starting point 26 weeks in custody Category range 12 weeks-18 months in custody	Starting point High level community order Category range Medium community level order- 12 weeks in custody.

Table 4.

Non-exhaustive list of additional facts providing the context of the offence and factors relating to the offender. Combination of these factors should result in upward or downward adjustment of the starting point relevant. The Sentencing Council notes how “in some cases, having considered these factors, it may be appropriate to move outside the identified category range” (Definitive Guidelines 2012, 7).

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<p>Statutory aggravating factors:</p> <ul style="list-style-type: none"> • Previous convictions, having regard to: a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since conviction (a third drug trafficking conviction sets off different sentence) • Offender used or permitted a person under 18 to deliver a controlled drug to a third person • Offence committed on bail 	<ul style="list-style-type: none"> • Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances • Isolated incident • Low purity • No previous convictions or no relevant or recent convictions • Offender’s vulnerability was exploited • Remorse • Good character and/or exemplary conduct • Determination and/or demonstration of steps having been taken to address addiction or offending behaviour • Serious medical conditions requiring urgent, intensive or long-term treatment • Age and/or lack of maturity where it affects the responsibility of the offender • Mental disorder or learning disability • Sole or primary carer for dependent relatives
<p>Other aggravating factors:</p> <ul style="list-style-type: none"> • Sophisticated nature of concealment and/or attempts to avoid detection • Attempts to conceal or dispose of evidence, where not charged separately • Exposure of others to more than usual danger, for example drugs cut with harmful substances • Presence of weapon, where not charged separately • High purity • Failure to comply with current court orders • Offence committed on licence 	

Appendix II

Criteria for selection of cases included in the analysis

The case law collected in the case study section was collected from two different databases: Westlaw and Casetrack. Case track is a specialist database containing over 80 000 full judgment transcripts from the Court of Appeal and the High Court collected from 1996 until date. Case transcripts and judgements are provided by Smith Bernal reporting, the office source of the Court of Appeal and Administrative Court transcripts. Westlaw is comparably a richer database because it includes cases reported in the Incorporated Council of Law Reporting Law reports and the Criminal Appeal Reports, as well as access to unreported cases from 1865 onwards. The ICLR is the authorised publisher for the Law Reports for the Superior and Appellate Courts of England and Wales and the Criminal Appeal Reports series, which is the specialized series published by Sweet and Maxwell. Of the thousands of cases heard every year, not all are reported and published in law reports. In 2001, the UK courts introduced a neutral citation system for all judgements decided in the Supreme Court, High Court and both the criminal and civil division of the Court of Appeal.

The majority of the cases selected were reported through their neutral citation (EWCA Crim) or the Criminal Appeal Reports series (Cr. App. R.). A small number were transcripts of unreported cases collected in *Casetrack*. The analysis took into account cases which have a binding effect on future decisions, but also explored how they were applied to the cases that conformed to the search criteria. The overarching search criteria were references to ‘drug courier’ and ‘drug mule’ in cases presented to Court of Appeal (Criminal Division) from 2000-2014. Further filters were introduced to the search to narrow down the analysis according to the theoretical framework explored in this thesis.

The first search included an open search in *Casetrack* for cases that included the word

‘drug courier’ and another one with the key word ‘drug mule’. From the total number of entries, I then selected only those involving an appeal against sentence or leave to appeal. Some cases overlapped with those found in the search in Westlaw but others. The limitations searching in this database were significant, particularly because it did not allow including search terms within the initial search term and it did not have the option to include only cases from the Criminal Division. The first criteria to select a case were the *type of offence*; second, the *grounds for appeal*. Thus, from the 17 cases appearing in the search on drug mules and 58 cases, I discarded cases which did not have the following characteristics: 1) were not appeals against sentence or applications to leave to appeal; 2) were not offences under s.170 (2) of the CEMA; 3) cases involving conspiracies *which did not have a relevant discussion on vulnerability*. In the end, 8 cases were selected from the ‘drug mule’ search and 21 cases from the ‘drug courier’ search (See table 1). Thus, the total cases collected from this database were 29 cases including men and women.

A second search was done in Westlaw with the same criteria. In this search, I applied the same filter using the term ‘drug courier’ which gave 857 crime cases. I then applied another filter to find out those who were convicted for fraudulent evasion of a prohibition (drug courier + fraudulent evasion of a prohibition). This filter indicated 141 cases. Subsequently, I applied other variables criteria, looking for specific references to the following keywords: ‘mule’, ‘vulnerable’, ‘exploitation’, ‘mercy’ and family status of the appellants included in the narrative, mainly ‘mother’ and ‘father’. All cases including those references were read carefully so as to select the cases included in the analysis. References to ‘mother,’ ‘father,’ and ‘children’ in the narrative were often irrelevant because it did not point to caring responsibilities or dependants. Instead, they were references to the narration of events. There might be a gap for cases where the offenders did not have dependents but were actually dependent on others. Some cases showed how offenders with disabilities, mental illnesses or

young offenders did not have caring responsibilities but instead, depended on others for their wellbeing or were financially dependent on others. There are gaps as well in the data collected where such details were not included in the transcript of the appeal.

Another gap was that there were different results according not only to the keyword, but also when the key word was in plural or singular (for example 'couriers' or 'mules'). The limitation from applying filters in Westlaw is that it is obviously sensitive to specific key terms. In total, I selected 54 cases from the results in this database. An additional open search for the term 'drug mule' in Westlaw showed cases that did not appear by searching 'drug courier +fraudulent evasion of a prohibition + mule' but it also resulted in a greater number of cases: 54 results. The problem of including the type of offence in the key word search was that important authoritative cases did not appear anymore in the search result (especially *Boake & Ors* (2012) but it also increased the number of cases that were not under s.170 (2). Moreover, few cases that appeared in Casetrack matched to the ones in Westlaw under the term of 'drug mule.'

Despite applying different search criteria, some cases overlapped and thus, appeared more than twice. The results of total cases (after merging the results of the two database search) are shown in the tables annexed here. To get a good sense of the case as a whole, I collected legal data and facts about the case: 1) type of offence, 2) grounds for appeal or leave for appeal; 3) if the appellant pleaded guilty or if convicted after a trial; 4) defences; 5) sentence; 6) quantity and type of drug imported and 7) method of importation (whether in a suitcase, swallowed, strapped around body, clothes or other garments, vehicle). I then included also, where available, information on the appellant: 1) sex; 2) age; 3) dependents; 4) health conditions (illness, disability, mental health condition); 5) unemployment or precarious work. This list is non-conclusive but rather depended in the narrative of the appeal. The source for these narratives varied but in appeals to sentences, the CA often referred back to the pre-

sentence reports (where available) produced to determine the sentence in the first instance court. The meaning of pre-sentence report is outlined in section 158 of the Criminal Justice Act 2003:

(1) In this Part "pre-sentence report" means a report which:

(a) with a view to assisting the court in determining the most suitable method of dealing with an offender, is made or submitted by an appropriate officer, and

(b) contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State.

These reports are produced by probation officers and it is meant to give an assessment on the nature and seriousness of the offence (CPS, 2014). The PSR is shared with the prosecutor and the legal representative of the offender. Probation officers work for the National Probation Service, which is a statutory criminal justice service entitled to supervise high-risk offenders released into the community. In other cases, the narratives about the facts related by the prosecution, defence, and the judge. The appellants are quoted directly in just a few cases.

The gaps in the search and the information provided in the sentencing appeal do not allow me to establish firm quantitative conclusions at this point. Furthermore, that was not the intention of the case study. My aim has been to find out how specific key concepts in the theoretical framework appeared and were deployed in the appeals. Bearing in mind the legal rules, e.g. the binding effect of authoritative cases, the analysis explored how appellants were recognized as a 'drug mule' or as 'drug courier' through reference of gender, economic circumstances, exploitation, vulnerability, and caring responsibilities.

To be clear, the majority of the cases selected did not discuss whether the appellant could be said to have a leading role. Thus, the analysis of the cases chosen show a struggle to determine whether the appellant would be afforded a lesser or significant role. Finally, I do not

wish say that personal stories or circumstances are absent in defences, trials, or else. However, the life-story of defendants seem to be shaped and translated into the objectives of the relevant proceeding. What I mean by this is that, as I was selecting the cases, it became evident how appeals to points of law, evidence, or confiscation orders often focused on the interpretation and application of a legal rule where the appellant’s characteristics and story was marginal. Thus, I focused on appeals to sentencing rather than appeals on points of law or confiscation orders. After applying all the filters in the case selection, I ended up with a total of 59 cases. When looking at the numbers below, it is important to remember that some cases included more than one appellant.

Table I.

Guilty pleas	45
Contested trial	18
Unknown or unclear from appeal (not mentioned in appeal)	2
Total	65

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