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The semiotic fractures of vulnerable bodies: Resistance to the gendering of legal subjects

By Nayeli Urquiza-Haas

Abstract

While the turn to vulnerability in law responds to a recurrent critique by feminist scholars on the disembodiment of legal personhood, this article suggests that the mobilization of vulnerability in the criminal courts does not necessarily offer female drug mules a direct path to justice. Through an analysis of sentencing appeals of female drug mules in England and Wales, this article presents a feminist critique of the *dispositif* of the person and its relation to vulnerability. Discourses on drug mules' vulnerability mobilise the trope of the colonial victim in need of protection, which is often translated into legal mercy. But mercy is rather an expression of biopower which inscribes not only fragility onto the bodies of drug mules by figuring them as exemplar paradigms of colonial subjectivity, but also reinvigorates the *dispositif* of gender implicit in the legal person. In this set-up, it would appear as if law and politics totalise the registers of life, in this case the contours of vulnerable body. The article suggests we must revisit the image of the wounded body in order to carve out a space for resistance. Drawing on Elaine Scarry and Judith Butler, it suggests vulnerable bodies are marked by a semiotic openness, which renders them subject to appropriation but also able to signify the precarity produced by the law through their resistance to representation.

Keywords: Vulnerability; feminism; biopolitics; sentencing; drug mules; pain; legal mercy

[There is] no need to hear your voice, when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you, I write myself anew. I am still author, authority. I am still [the] colonizer, the speaking subject, and you are now at the center of my talk [1, 343].

1. Introduction: Drug mules, vulnerability and femininity

In the film *Maria Full of Grace* [2], the main character is a teenage Colombian woman who is offered drug mule work to relieve her economic woes. The movie begins by showing Maria as the sole breadwinner of her family - composed of her mother, sister and nephew - working in an exploitative floriculture factory in rural Colombia. While at work, she is overcome by nausea while peeling off rose thorns. Right after the manager turns down her request for a bathroom break, she throws up on the roses, splashing the manager's shoes. In a display of authority,

her manager forces her to wash the roses and make up for the work lost as quickly as possible. Humiliated and angry, Maria quits. This incident sets the tone for Maria's character: she is no gentle rose and will not let anyone turn her into a victim. She pricks and fights back, defies her mother and sister's bitter recriminations for acting irresponsibly and refuses to marry her macho boyfriend, convinced she is better alone than in a loveless marriage. Pregnant, facing single parenthood, unemployment and the responsibility to sustain her family, she leaves for Bogotá to find work as a house-maid. On the way there, she encounters a handsome young man, a recent acquaintance who convinces her to traffic drugs across international borders.

The legal reconstruction of women, whose sentencing transcripts I consider in this paper, bear some resemblance to Maria's story, however, the nuances in the cinematic script are drastically simplified into the dichotomy of victims and offenders. If Maria had been arrested and tried in England, the fact she was pregnant, female, and used by drug traffickers would have been translated by the legal narrative into a question of whether she was a vulnerable offender and if so, she deserves the mercy of the court. In contrast to the movie character, the legal script effaces the character's complexity and reduces her into the archetype of the victimised female drug mule. The 2012 Definitive Guidelines for sentencing drug offenders in England and Wales, couched in gender-neutral terms, presupposes that both women and men may be categorised as 'drug mules.' However, the analysis on sentencing appeals presented in the first part of this paper suggests that the drug mule category is intertwined with the feminization of vulnerability[3], articulated through the distinction between (masculinised) willing drug couriers who seek profit and (feminised) drug mules who are pressured into the drug trade. In other words, vulnerability is culturally coded along the lines of sexual difference, whereby legal discourse represents the lived experiences of female bodies in stark contrast with the paradigm of the non-porous and disembodied legal person [4, 5].

Such feminization of vulnerability is clear in the film, where Maria's gendered body defines her identity and actions. Maria's pregnancy is central to the character's arch and it is the event which sets in motion her rebellion against her employer, family and boyfriend. She decided to be a single-mother, but she also needed money to support her family. Her pregnancy is factually and symbolically central to her story. Even though Maria's body does not yet show she is pregnant (she is in the first trimester), the maternal body is evoked by the fact she is carrying drugs in her abdominal cavity. In that sense, her womb could be figured as a space where life is emerging out but also where deadly cocaine pellets are concealed.¹ The cinematic narrative fleshes out an

¹ While it is commonly assumed drug mules are vulnerable because they swallow drugs - an act carrying the risk of death - drug mules' vulnerability is more complex and arguably arises from the limited control they have over the process of trafficking drugs across international borders for others. For example, someone else prepares

uncommon register of corporeal vulnerability: a metaphorically ambivalent body that envelopes unborn life but also represents a threat to the life of the community. After all, she is carrying an illicit substance which has been described over the last forty years by the global drug control discourse as an ‘evil’ that endangers public health [6]. Maria’s body entangles other contradictory discursive registers about what is licit and illicit. As mentioned before, the maternal body loaded with drugs signifies both life and death, but it also invokes different narratives of conception. On one hand, her ‘drug pregnancy’ is immaculate. On the other, her human pregnancy is the result of pre-marital sexual relations. These multiple meanings converge in Maria’s pregnant body, showing how the title of the film is incredibly fitting: Maria [is] full of grace.²

Despite Maria’s ‘fullness’, understood as a story open to multiple interpretations, the law reduces vulnerable drug mules to the rigid category of victims. Inspired by critical interventions in feminist legal scholarship that critique the trope of the ‘injured’ body of colonial female subjects as it is mobilised to bring about legal reform [7], the first section in this article analyses how vulnerability discourses are mobilised to obtain the courts’ mercy and depart from sentencing guidelines. I argue that this strategy risks marginalising women even more, as the court’s mercy is granted only to exceptionally vulnerable offenders. The second section analyzes vulnerability discourses through the lens of biopolitics, scrutinising the relation between the trope of the vulnerable body and the concept of the legal person. I suggest that the articulation of vulnerable bodies, may be part and parcel of the fractures arising as an effect of the legal person [8], interpreted here as a juridical technique of subjugation/subjectification that mirrors the hierarchical social ordering of gender. This suggests societal gender binaries, such as disembodied masculinity and embodied femininity, are mirrored in the distinction between vulnerable feminised drug mules and masculinised profit-seeking drug couriers. Finally, building on the critique of vulnerability, the third section acknowledges the limits of this concept but also its appeal. Instead of getting rid of it altogether, this section argues that the biopolitical register in the sentencing of drug mules, here represented in the power of vulnerability to subjectify/subjugate the figure of the victimised body, is not as totalising as it seems. Drawing on a performative semiotics of the wounded body, it suggests that vulnerable embodiment itself resists law’s eclipsing effect on life.

their suitcases preventing them from knowing if someone planted something in their bags or, if they accepted carrying drugs, the quantity and type of substance and quantity [62].

² As it will become clear later, rather than representing the traditional image of the Virgin Mary, Maria could also be seen to represent a hysterical woman who rebels against the impossibility of symbolising herself and her own desires. For an eloquent feminist analysis of the Virgin Mary, see Eluned Summers-Bremmers, where she argues that the subversive character of the hysteric in Kristeva’s poetic vision of *Stabat Mater*, is that it confronts readers with the ‘maternal body at the point where it is effaced by language’ [64, p.187].

2. Gendering by exceptionality: Inscribing vulnerability on women drug mules

Even though vulnerability figures heavily in the appeals to mitigate sentences for drug importation offenders, particularly women, the meaning given by the courts to the word is quite different from the academic legal discourse. Legal approaches to vulnerability describe it as a normative and a heuristic trope, that both shows the limits of and recalibrates the idea that legal persons are mere artifices who do not bleed or feel pain or hunger [9]. In this way, the discourse of vulnerability exposes the exclusion of the material/corporeal in the notion of the universal rational legal person. By contrast, the meaning ascribed to vulnerability in the sentencing of drug mules originally referred only to a characteristic or circumstance that made offenders more likely to accept an offer to traffic drugs. In *R. v Aramah* [10], the first guideline judgment on vulnerable drug importation offenders, Lane LCJ describes drug “couriers” (not drug mules), as “students and sick and elderly people [who] are used as couriers for two reasons: first of all, they are vulnerable to suggestion and vulnerable to the offer of quick profit...” [10, p.193]. However, vulnerability is not enough to afford offenders who traffic Class A drugs (such as heroin or cocaine) any mitigation because they are viewed as vital cogs in the drug trade and reduced sentences would not deter drug traffickers from taking advantage of these people. As a result, the House of Lords drastically limited the effect of vulnerability claims on sentencing. Having deterrence as a primary rationale for punishment, together with the limitation on submitting for consideration the personal characteristics or circumstances of the defendant, translated into disproportionate sentences for people who had a limited role in the offence [11].

In 2012, a new sentencing guideline for drug offences came into effect to increase consistency and proportionality in sentencing, particularly in the case of drug mules. According to the Sentencing Council, “the so called drug ‘mules’” would benefit most from the new guidelines focus on the role of the offender, which “may result in a downward shift in sentences for these types of offenders” [12, p. 4-5]. Shortly after, the Court of Appeal clarified the guidelines offered “a modified and clarified method of reasoning” that is “is expected to produce sentences broadly in line with existing practice” [13, p. 4]. Despite attempts to clarify existing sentencing rationale, recent appellate decisions show a tension between existing practice, which is partly represented by more than forty years applying the *Aramah* guidelines, and the Sentencing Council’s suggestion that sentences could be lower for drug mules. This tension is most evident in *Lewis and Ors* [13]. In this case, the Solicitor General requested the Court of Appeal revise unduly low sentences given to three men involved in the importation of 100 kg of heroin and six kg of cocaine. Specifically, the Solicitor General asked the Court to clarify the 2012 guidelines and “‘dispel a few myths’ about its impact on the level of sentences for drugs offences” [13, p. 3]. The most important ‘myth’ was that the guidelines were not intended to introduce a wholesale reduction in sentencing for

drug importation offences. Following the guidelines and *R. v Boakye and Ors* [14], the court emphasised that sentencing practice was meant to remain consistent with current levels, *except in the case of drug mules*[14, p. 3].

What is most significant about these two cases is they both draw on a semi-formal distinction between drug mules and couriers that did not exist before.³ However, the judicial reasoning behind this distinction was already shaped by existing practices where legal mercy was invoked to reduce the sentence of drug mules. The 2012 Drug Offences Definitive Guidelines (hereafter DG), do not use the terms ‘drug mules’ or ‘drug couriers’; instead, these roles are represented by the categories of ‘subordinate’ and ‘significant’ roles. Following key words in the DG, Hughes LJ concluded that drug mules were people “who have been exploited by serious drugs criminals and persuaded to carry drugs often for very small reward.”[14, p. 4]. By contrast, the drug courier was an informal definition which referred to a “worldly-wise offender who trafficked drugs as a matter of free choice for the money”[14, p.10]. But this distinction between mules and couriers is unrealistic as profit and pressure are not mutually exclusive [15]. Nevertheless, the court drew these distinctions referring to indicators listed in the DG such as involvement through ‘naiveté and exploitation’, ‘performs a limited function under direction’, ‘engaged by pressure, coercion, intimidation’ [16]. What is not so clear is how the Court of Appeal concluded that a drug “mule” is “a third-world offender exploited by others” [14, p. 10]. Proportionally speaking, foreign female offenders represented 46 per cent of the women sentenced for drug importation offences in 2012 [17]. But the ‘third-world offender’ characterisation is arguably a neo-colonial trope that harks back to sentencing cases prior to the sentencing guidelines.

The characteristics attributed to foreign female drug mules can be traced back to the 1980s case of *R.v Faluade* [18] and the 2004 case of *R.v Attuh-Benson*[19]. In the case of the former, Faluade was a Nigerian citizen who owned a children’s clothing business and was sentenced to four and a half years in custody after being caught carrying 95 packages of heroin concealed in her body. The judgment reminds the reader that she gave the border authorities a contradictory story about her trip but eventually accepted her guilt, and confessed she was offered £2000 to carry out a drug run. In her defence, she said she did not know the type of drug inside the pellets. Despite pleading letters from relatives and members of her community and evidence of a health condition she suffered, the sentence stood. Yet, to loosen the strict effects of the *Aramah* guidelines on vulnerable offenders, the Court conceded in *Faluade* that courts could depart from the guidelines if the case merited mercy. As stated by Watkins LJ “there are certain cases in which this Court can, in suitable circumstances, act with mercy” but “once a person

³ The Court of Appeal in *Lewis and Ors* actually stated that the new roles (subordinate or lesser, significant, and leading) mirror old names used prior to the guidelines, described by Hallet LJ as “generals, lieutenants and foot-soldiers” [13, p.5].

knowingly acts as a courier bringing heroin into this country there is seldom, if ever, room for mercy”[18, p. 2].

Despite the reluctance to formally grant mercy to drug mules on account of their vulnerability, judges do note how stories about vulnerable drug mules - understood generally as poor and disabled, with caring responsibilities, histories of mental illness and/or victims of violence - are too common in drug importation offences [20]. When confronted with these open and fragile bodies, judges seem to resist the affective or sympathetic impulses because *Aramah* eliminated the possibility to draw upon a person’s good character or vulnerability. As Holland J stated, judges must “harden their hearts” [21, p.2] to these tragic stories. *Aramah* is that shield which allows judges to harden their hearts against any markers of vulnerability, while *Faluade* loosens the rigidity of heart to some extent. If vulnerable drug mules are already perceived as being all-too-common, who could ever fit into this category?

Almost twenty years later, another case complicated the scope of the application of mercy. In *R.v Attuh-Benson*, a Ghanaian pregnant mother was puzzlingly included and excluded from the formula outlined in *Faluade*, which stated that if a person knowingly smuggle drugs, there is limited room for mercy. At first, the court rejected the argument that she was vulnerable because of circumstances or characteristics prior to the offence, noting that “she was an educated woman, employed, and living in a ‘stable family unit’” [19, p.4]. In other words, she was not vulnerable because she was not a poor, unemployed, uneducated, single mother. But the court did give her a modest reduction as an act of mercy for two reasons: First, because she had been diagnosed with depression as a consequence from being away separated from her children and, she was a model prisoner. Although the sentence was considered to be right and in the court’s view she “was not in the category of a vulnerable or inadequate person who was driven to commit this offence by hardship” [19, p.4] the court granted a small sentence reduction “given this appellant’s particular difficulties” [19, p. 5]. As a suffering mother and selfless caring friend, Attuh-Benson conformed to the norms of appropriate female behaviour, thus convincing the court she deserved mercy.

What the cases related so far have in common is that they show how the court reduced drug mules’ subjectivity to the subaltern female who have to perform a passivity associated with expected gender roles. If these women do not conform to the ideal form of the victim, whether an extremely poor mother or a depressed repentant mother from the ‘third world’, they are judged as selfish and financially motivated offenders who were careless about spreading the ‘evil’ of drug addiction [19–22].

Far from being a compassionate or protective endeavour, the humanist undertones in the description of drug mules from *Aramah* to *Boakye*, show that disciplining neo-colonial subjects through the metaphor of injured bodies is central to advance Western identities and political projects which deny women’s voice and their

opportunity to represent themselves. As Chandra Talpade Mohanty argues, the humanist and scientific impulse of Western actors fails to acknowledge local specificities and historical processes, producing instead a generalizable 'poor mother' in their attempt to 'protect' women [23]. This trope risks reducing female drug mules to an unspeakable subaltern subject boxed into the categories made by legal, academic, and political actors [24]. It is not my intention to dismiss the relevance of proportionality in sentencing and its overall role in criminal law. What I do argue is that if drug mules become an emblem for 'suffering bodies' [25], the victory of actually carving out a definition by which they can be identified will be utterly pyrrhic because it is based on a limited notion of vulnerability. That is, as an exception to the rule. In this case, the rule is the paradigm of the legal person, understood as the rational, disembodied, profit-oriented subject of capitalism, which mirrors the traits of the professional drug courier. The trajectory of legal mercy presented here suggests the courts displace vulnerability to the margins of the law. This means vulnerability is not a characteristic of the legal person. Instead, it is limited here to those women who can represent an absolutely passive injured femininity. As I will argue throughout this article, the distinction between mules and couriers actively inscribes the traditional gender division underpinning the juridical subject of criminal law and its intersection with subaltern subjectivities. The next section explains how vulnerability and sovereign 'compassion' affirm the heterosexist matrix of the legal person which subjects and subjectifies, albeit through 'compassionate' techniques of power.

3. Gender and the *dispositif* of the person

Coming back to the link between mercy and vulnerability highlighted in the previous section, Penelope Deutscher outlines a similar dynamic in abortion laws, where the vulnerable body of the pregnant woman calls forth the mercy of the 'compassionate' sovereign. By intensifying the vulnerability of the pregnant body, one is able to suspend the law that usually criminalises and/or restricts abortion to allow the mother to kill the foetus [26]. Deutscher argues that abortion legislation is fairly similar in that the possibility to terminate a pregnancy is posited as an exception to the rule. For example, one can abort in many countries if the foetus endangers the life of the mother. A merciful exception suspends the sanction against women who break the law that forbids abortions by reversing the roles between mother and foetus through the intensification of the mother's bodily fragility. But these exceptions, mobilised by pleading the sovereign's mercy, reassert the biopolitical regulation of women's bodies and their reproductive capacity.

Bearing in mind Giorgio Agamben's reminder that the state of exception is not only a 'technique of government' but actually what comes to constitute the paradigm of juridical order [27], Deutscher argues that the constant confirmation of abortion's illegality through its exceptionality reasserts the state's investment in the

regulation of women's reproductive life. It is important to stress that the logic of exceptionality in abortion laws is underpinned by a misconceived fear of the mother, figured through sovereign logic as a potential challenger to masculine rule over the power to kill or let live. The biopolitization of maternal bodies through abortion laws affirm their value in terms of the nation's reproductive future [26]. But this is only one expression of biopolitical rhetoric that figures the female body as "vitality capable of variations on reproduction (rational, governed, regulated, restricted, enhanced, stimulated, problematised, medically enhanced, resisted, rejected, and so on)" [28, p. 223-224]. Thus, Deutscher identifies both a sovereign and disciplinary biopower [26]. Sovereign biopower is expressed by grounding of authority in the decision to kill or let live, whereas disciplinary power turns the law into a managerial apparatus that shapes and manages life. Despite their different ends, life is the common object of both modes of governance. Scholars differ about whether these powers overlap in time or if disciplinary power overcame sovereign power [29, 30], while others suggest disciplinary and sovereign biopower is distributed differentially across neo-colonial geographies whereby life is affirmed in rich countries while those in the periphery are left to die [31]. There is an obvious connection between vulnerability and biopolitical governance. Vulnerability is at the crossroads of life and death, where it signals an inability to meet basic human needs such as having food, a shelter, or being free from violence. Coming back to the example of abortion, Deutscher stresses how the weakened and fragile body is also imagined as injurable. The state's investment in the protection of the fetus also means that the mother is falsely figured as threat to the community's biological continuity [26]. It is no coincidence that the spectre of violence haunts vulnerability discourses, considering its etymological roots lie in the image of the *vulnus* (wound). Because the latter is mostly associated with negative situations where embodied life is susceptible to injury, those who are deemed vulnerable are subject to the control and management of the state [32]. That vulnerability discourses enable the governance of subjects should warrant a careful interrogation of how they may reify the very same structures of power that they ought to be contesting. Posited as a risk, vulnerability introduces the spectre of existential anxiety which institutions seek to regulate, forecast, manage, and distribute any potential harm so as to minimise its occurrence [33]. For example, the criminal justice system legitimises pre-emptive interventions because it associates vulnerability with potential harms [34]. On one hand, it is not hard to see that foregrounding vulnerable bodies in legal and social discourse demands a constant reflection about the type of political projects that lie behind the moral impetus to 'save' a woman's lives. At the same time, I wonder if it is possible to mobilise social and legal action without making any allusion to vulnerable bodies and whether something essential is lost when we try to completely efface them.

On that regard, feminist studies offer important insights on the complicated relation between law, bodies

and the feminine, including the vulnerable body. Some feminists have embraced vulnerability while others are more sceptic about its promises because it is seen as yet another iteration of the oldest formula in women's history whereby the feminine subject is transmogrified to a passive and objectified reproductive body with no voice. Even though liberalism promised greater inclusion, Joanne Conaghan reminds us that the principle of equality formally ignored the exclusion of the feminine and relocated characteristics of identity, such as sex-gender, outside of the sphere of law, while legal personhood was conceptualised by "ignoring gender rather than acknowledging gender" [35, p. 132]. Despite the best attempts to exclude gender from legal personhood, gender remains in the background and in the foreground. This means femininity appears in law only through figures of speech⁴- this could be in the subtext of a case, a legal text, a judgment, etc. She argues legal concepts are articulated through gender differences, making them rhetorically dependant on feminine symbols. And, even though gender differences are constitutive of the grammar of law, there is no recognition of their interdependence. As a result, women's relationship to law is best characterised as a partial absence of feminine subjectivity, relegated to the margins of law [36], while the figure of the feminine body is predominantly articulated as an object of property which exists only in its relationship to men. For example, criminal law articulates womanhood as a 'body-bag' shaped as a vessel for the male phallus or a commodity to capture or appropriate [37].

At this point it is worth recalling that the legal person gradually developed out of the intersection between Christian and Roman law [38]. At its core, it manifested an impossible unity between various dichotomies, whether the divine and the human, or as an artifice of the law foregrounding the perishable human body [8]. This dichotomous structure was arguably reproduced by a variety of legal and political thinkers during the early modern period [39]. Most importantly, the dichotomy was projected onto the separation between legal personhood and specifically sexed feminine bodies. As Thomas Lacquer explains, scientific and political rhetoric posited the feminine gender as being identical to biologically differentiated bodies with specific sexual organs. The so called 'two-sex model' that emerged in 16th-18th century Europe [40] responded to cultural ideas about gender, yet projected it onto the body as a truth inherent in nature; a belief legitimated through scientific rhetoric about anatomical sex. This model differed from the onto-epistemological framework operative during antiquity and medieval times, which only conceived the existence of one sex, meaning that women's bodies were simply considered as extensions or defective versions of the masculine anatomy. Transposing Lacquer's analysis to law, Conaghan argues that sex/gender became oppositional to the legal order and architecture [35], which had now

⁴ Common law jurists have described law as a beautiful flirty woman, 'patient housewife', an old shrew, or an erratic careless woman [35].

placed the image of the rational, autonomous, disembodied person of law at its foundation. Likewise, the two-sex model mirrored the mind-body dualisms and mechanistic cartographies of the body cemented throughout time by the Cartesian tradition, which also found some resonance in the doctrine of separate spheres developed by contemporary social contract theories. The latter conflated the sexed body with vulnerability, situating vulnerability within the sphere of the private. For example, theorists like Hobbes and Locke associated vulnerability with the sexualised/maternal bodies, deemed to be inherently weak and subject to the conquest by the opposite sex[35]. This incommensurability between sexed/gendered bodies translated into a radical inequality grounded on the inferiority of the female body, excluding women from securing any civil rights or property rights[41]. Without legal personhood, women were not the subjects of rights but remained subjected to men's laws.

As my analysis of compassionate sovereignty suggested, discourses of vulnerability foreground the concrete fragility of the body. This strategy is a logical step towards closing the gap in the antinomy of legal personhood. Current efforts to challenge the historical exclusion of vulnerability in law include its articulation as a new ethical foundation for law and justice. This new organising trope on the human subject is deemed able to unbind the attachment to traditional notions of legal personhood and correct the problems with formal equality [42]. But other feminists are hesitant about bridging the chasm between corporeality/personhood by reversing the order of the mind/body hierarchy [43]. It is possible that the problem is not so much the artificial character of legal personhood, but the hierarchical ordering of gender through the disembodiment/embodiment dichotomy. Without questioning this hierarchical ordering, the relation between the vulnerable body and the abstract legal person appears as yet another iteration or inscription of the chasm that characterises the metaphysical-moral and political-judicial tradition in which the person functions as apparatus of subjection and subjectification [8]. Hence, a simple reversal of the components of a dyad may lead to endless repetitions of the apparatus, or as is characterised by Goodrich and Parsley, an 'optical apparatus' or 'cipher' of endless binary relations of exclusion that reaffirm the hold of the *dispositif* [8, 39] (i.e. the universal/particular, masculine/feminine, citizen/non-citizen). Scientific, legal and political knowledge converge in the *dispositif* through which hegemonic social orders (capitalist, patriarchal, sexist, racist, etc.), are secured [44]. This means the institution of legal personhood reproduces heteronormativity through the rhetoric that differentiates sexed bodies. Situated within that matrix, compassionate sovereignty is another way in which the dyad is reproduced, in response to the invocation of the vulnerable body. But the legal rationality holds the vulnerable body in abeyance to personhood, recognised only as an exception to the reasonable, abled-body (masculine) person. This framework is what Parsley labels the

‘juridical technics’ that bind subjects to the caesura and the relation [8], meaning that personhood establishes a relation of exclusion that is nevertheless bound to law. Thus, vulnerability is constitutive of the feminine body while the legal person comes into being through the figure of the vulnerable feminine body. The paradoxical inside/outside space of the margin inaugurates the legal person but it also violently effaces the feminine. In short, vulnerable feminised bodies are excluded yet attached to the dominion of law through a relation of opposition to juridical personhood.

So far, this article has explored the difficulties arising from the biopolitical hold of law over life through the trope of personhood and its relation to gender and vulnerability. The following sections identify the fractures inherent in the relation between vulnerable bodies and juridical discourses, drawing first on Judith Butler’s approach to vulnerability complemented by Elaine Scarry’s performative semiotics of wounded bodies. Together, they offer critical views on how bodies figured as vulnerable resist representation and thus, a resistance to law’s dominion over life.

4. Vulnerability and precariousness: Delimiting the sign of violence

As discussed above, deploying vulnerability is a challenging task for feminist projects that demands awareness of vulnerability as a governing mechanism. One of the dilemmas faced in the course of speaking and denouncing the violence of oppressive and discriminatory structures is that in so doing, there is a risk of reproducing the sign of violence that one wishes to contest. This gesture might reproduce endlessly, meaning that in repeating the image of violence to describe what happens to historically oppressed groups we actually reaffirm their marginality through the sign of the injury. Aware of this impossible bind, Ann V. Murphy suggests that we also need to devise strategies that undercut the sign of violence implicit in the concept of vulnerability. This is because the word *vulnus* does not simply conjure up in the mind an innocent cut or injury to the skin; it is charged with imaginaries of violence which vulnerability discourses (academic, legal, political) may re-deploy uncritically without attending to its effects. Still, if we censor vulnerability, we may also partake in its invisibility and deny that such injuries exist and they need to be spoken and represented in a social and political sphere. At the same time, if vulnerability is overwhelmingly haunted by the image of violence, there will be limited room to carve out alternative meanings [45]. Herein lies the totalising effect of vulnerability: it appears as an existential need to safeguard and preserve life. This pressing need also seems to foreclose and limit attempts to pluralise the semantic field of vulnerability. Faced with such a daunting diagnosis, Murphy suggests it is necessary to imagine vulnerability otherwise, to develop a critical ontology of vulnerability that takes seriously the potential for violence but holds it in abeyance [45].

Before venturing into the process of imagining vulnerability otherwise, it is important to stress the need to hold in sight the productivity of the image of the wound underpinning the concept of vulnerability and its representation in law, where the bounded legal subject is frequently constructed in opposition to the fragile or vulnerable body. Otherwise, those attempting to speak 'for' vulnerable people may succumb to reproducing and concealing its effects, namely by abjecting vulnerability as an exception. Returning to Murphy's critique, the legal person could be seen as that which totalises vulnerability by appropriating the sign of the wound in order to justify the need to protect itself against potential future injuries. It is not by accident that legal personhood is conceived as a bounded individual entity, or as a 'shield' to immunise itself against unwanted intrusions. Gender arguably also orients responses to injurability [46], including the belief that erecting borders or immunising oneself against the prospect of violence [47] is a benign way to pre-emptively counter-act the potential of injury. Expanding this analysis to the state, Judith Butler suggests that when a government, institution, etc. figures itself through the same opposition- between vulnerable and invulnerable- the latter will be more preoccupied with ensuring its own preservation yet it also "ends up contributing to the destruction of life" [48, p.110]. In short, violence is exponentially reiterated because of the predisposition to strategise pre-emptive attacks against the overwhelming prospect of future injuries.

It is my view that Butler holds in abeyance the spectre of violence that looms over vulnerability introducing the cognate concepts of precarity and precariousness. Although related, these are two distinct concepts that shed light on the logic of sovereign invulnerability discussed by unpacking and organise the metonymic substitutions of vulnerability. In other words, these concepts delimit analytically the relation of vulnerability with openness, dependence, desire, affect, as well as to violence, risk and injury. To be more precise, precariousness is understood as modality of being that represents a common dispossession to others rather than an attribute of proper beings [49]. Explained otherwise, human and non-human beings are constitutively bound to each prior to any expression of agency, consent, contracts, definitions, or borders [46]. This dispossession is often registered by the affective excesses of passion, rage, love, pain, etc., which in turn render the notion of 'self' a fiction of liberal individualism. However, when vulnerability is singled out as a characteristic of identity, there is already a process of exclusion which disavows this ambiguity and displaces it onto the 'Other,' propitiating indefinite states of precarity [50]. The latter concept embodies the gendered orientations to injurability that also enable the unequal distribution of violence through juridical techniques perpetuating a "fantasy of being immune to harm" [51, p. 318]. To perpetuate this fantasy, violence is mobilised to abject the uncertainty of precariousness, understood as a dispossession to others that cannot be defined in advance. So in animating women's visibility through the image

of vulnerability, the effects can be the opposite as those intended (protecting), because the imaginaries of violence carried over by vulnerability discourse replicates sexist normative expectations [52]. Following Murphy, the main idea proposed here is that vulnerability has been often conflated with both precarity and precariousness. The utility of the concept of precarity is that it detaches the sign of violence from precariousness. Indeed, our embodied social life should not be totalised by the sign violence; otherwise it succumbs to the political and legal regulatory regimes that seek to protect itself and its citizens through practices of immunization. These practices produce in turn precarity, understood as the indefinite repetition of the sign of violence [52].

5. Drug war precarity and the criminal justice system

I have explained how precarity is a form of governing through violence, or in Butler's own words "the politically induced condition in which certain populations suffer from failing social and economic networks . . . becoming differentially exposed to injury, violence, and death" [53, p. 25]. Precarity operates through historical structures of racism, sexism, and colonialism, which produce 'ungrievable lives'. This means that some lives are forced to live a social death, symbolically and later on, literally. A sign of social death is found in the institutional, political and social abandonment which, by way of their invisibility, makes life unlivable for some groups or populations [53, 54]. Their pain, injuries and deaths, are invisible and unspeakable, and as such, not counted as losses to be mourned. Butler's account implies that social death is being enabled by the totalisation of the discourse of vulnerability, which is appropriated by sovereign and disciplinary governmentalities that figure themselves as those whose survival is in peril. An example of this is clear in transnational crime governance, where governments articulate organised crime as a threat to the rule of law and the survival of the State. Similarly, the 'war on drugs' is articulated in international drug control instruments as a quest for security against an 'evil' worse than any other form of international crime [6]. Needless to say, this reasoning devalues the lives of people coded as drug criminals. When killed through summary executions or tortured by militarised police forces or even military forces, their deaths are barely registered as lives to be mourned. Countless reports and academic commentaries denounce how principles in criminal and human rights are undermined by the war on drugs [55]. Unfair trials, corporal punishment, capital punishment, exploitation, over-incarceration and arbitrary detention, environmental degradation, and endemic discrimination, represent only a fraction of the state-sanctioned practices that violate international human rights law people associated with illicit drug markets [55].⁵ In this context, rallying around the trope of the 'exceptionally' vulnerable woman obscures the precarity produced by these punitive laws and

⁵ In the UK, black and Asian minorities are disproportionately targeted for stop and search regarding drugs and more likely to receive a custodial sentence in comparison to white offenders [64, 65].

policies.⁶

What stands out in the analysis of contemporary scene is that precarity is delivered not only by traditional public security actors, like police or the military. Instead, precarity is administered by ‘petty sovereigns’, such as bureaucrats, experts, and other actors who operate within the state of exception [54]. Whilst Butler specifically alludes to the case of terrorism suspects detained in extraterritorial prison [54], a subtle analogy can be found in the power of probation officers have over way people are shaped and recognised either as drug mules or as couriers. Pre-sentence reports produced by probation officers rewrite the biography of a convicted offender through specific parameters, sometimes medicalising or moralising deviance. The judiciary is often reluctant to use pre-sentence reports because they are laden with social-work jargon; because they selectively collect information; or take information at face value [56]. At the same time, the gradual erosion of jury trials for the sake of expedience, combined with reliance of guilty pleas in drug offences, forces the judiciary to rely on these reports. Courts and probation service co-construct the vulnerable drug mule, despite their differences. In the end, the voice of drug mules is silenced through the various translations performed by both of these actors, whose reasoning is framed by the dominant organising categories in their profession (moral, legal, medical, etc.). The point is that sentencing judges do not overwhelmingly define vulnerability. Advocates and criminal defence lawyers have exposed the general precarization through drug laws, thus introducing different stories about vulnerability in the court, or better said, stories of precarity. For example, Attuh-Benson’s counsel argued that punitive sentences to drug offences have a negative effect on drug mules and their families and many of them come from countries that lack social protection necessary to cope with the loss of a family member. Harsh sentences for drug offences were not only disproportionate to the individual, but also an infringement to the rights of children in international human rights law [19].

One could say that in the end, these arguments were defeated. After all, as explained before, the applicant was reduced to an exceptionally vulnerable drug mule. The power of subjection and subjectification is evident in how she was reduced to a melancholic mother from the ‘third world’ who deserved the court’s compassion. Yet, I want to propose here another way of understanding the multiple discourses of vulnerability converging in the criminal courts. To subject and subjectify drug mules, juridical speech relies on performative practices and speech acts [48]. When Attuh-Benson refused the guilty plea in her trial, she refused to identify with the category of ‘evil drug trafficker’, a name constructed and cemented over the years through the drug war rhetoric [57]. Her refusal

⁶ Human rights violations in countries and regions with harsh drug laws and militarised police functions mobilised to uphold these laws are rampant, affecting not only presumed drug offenders but putting the general population at risk of civil and human rights violations too [65–68].

opened up in turn an opportunity to contest the logic of exceptionality in previous case law. Recall that the court had foreclosed the inclusion of personal characteristic or circumstances as a mitigating factors that only a few exceptional people could appeal to. This left Attuh-Benson's counsel with no other option but to challenge the Aramah guidelines as a whole, condemning it for its punitive effects as it increased people's precarity. In short, the court's monopoly over the meaning of vulnerability was also contested, thus proliferating alternative meanings and sites for resistance. At the same time, the criminal justice system discourages any such acts of heroism. Refusing to plead guilty gives one a right to stand trial but it also carries a risk of receiving a higher sentence. Until there is a radical revision of drug laws, the courts are bound to repeat mechanically and protect the image of vulnerability as exceptional fragility. Explained differently, Attuh-Benson refused to speak the discourse of law and her silence was a brief interval that paused the representation machine whilst opening the door to new representations. Even if that is the case, the question that continues to haunt this paper is whether resistance to representation, compassionate or not, is possible at all. The next section elaborates on the paradox of representation elaborated by Elaine Scarry's semiotic analysis of injured bodies. Based on these insights, I argue that vulnerable bodies cannot be completely subjected to the gaze of the witness.

6. Resisting the witness: Semiotic fractures of the flesh

As noted before, vulnerability carries over not only the image of a wound but it brings with it also a dense imaginary of violence whenever it is used to describe drug mules, we could also characterise appellate courts as witnesses of rhetorically wounded bodies. Surely, judges and probationary officers are not exposed to literal open bodies. Instead, as Jennifer Balangee's proposes, the act of 'witnessing' involves anyone who sees- even if it is through metaphors, metonymies, allegories and other tropes - the spectacle of rhetorically wounded bodies - be it a victim, a perpetrator, a bystander or simply an audience reading a text. Drawing attention to the rhetorically wounded bodies splattering Greek tragedies or Roman martyrological poetry, Balangee suggests that these texts emphasise "visual representation, utilising language to create or describe visual spectacles, merging the linguistic and the imagistic"[58, p.3]. Said otherwise, courts are spectators of figurative representations of vulnerability presented either in legal or non-legal texts (a probation report, first instance judgments, etc.).

And yet, recall that bearing witness to all the different figures of speech substituting for wounded bodies is not a dispassionate activity. Rhetorically wounded bodies elicit an affective response, just like Sophocles' Oedipus shocks readers when he tears his eyes out. Judges might not be so different. The affective impact of vulnerable lives on judges, in their capacity as witnesses, is quite evident in the exhortation to 'harden their hearts' to these overwhelmingly repetitive stories of vulnerable drug mules. Witnessing the body in pain reminds us of

that experience too. But this reminder can be quite unbearable, as shown by Elaine Scarry's analysis of the experience of pain and its relation to language. Extreme pain destroys speech and unravels the mental constructs of the world in which we inhabit, sometimes re-shaping benign objects into weapons [59]. To explain what pain feels like, we use metaphors of potentially injuring objects. For example, we say a stomach ache 'feels like a needles'. However, in the throes of extreme pain, language is most difficult to articulate. Instead, one shouts in agony or grimaces. This experience, which is most real and acute for the one who is in pain, is nevertheless so obscure and private that it can be doubted by an observer. Without being able to show what is most real to others, the one in pain is further alienated from the social world.

According to Scarry, this ontological divide between witness and the person in pain is underpinned by the body's resistance to representation [60]. Paradoxically, this resistance to representation of the body in pain is also what instantiates the labour of giving pain an objective expression which allows someone "to cope and relieve pain's de-objectifying work" [59, p. 6]. As Scarry succinctly explains, "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" [59, p. 6]. Giving pain a voice is monumental struggle against its resistance to representation. To reverse pain's power of destruction by forcing it into an objectified state, whether it is in language or a material referent, carries many practical and ethical dilemmas. Even though pain's radical negativity lies at the basis of human destruction, it is also the basis of creation by virtue of the fragile relation between sentience, body and voice. Metaphors materialise sentience in the world. As noted before, one describes pain through the metaphor of an agential object, a description that is mediated by our imagination. Yet, the metaphor does not substitute the experience at all. The metaphor describes pain 'as if' it was caused by needles; but pain's origins might have nothing to do with needles. Witnesses may also use metaphors and other tropes to speak about other people's pain and injuries. This point is even more important where political violence is at the root of extreme wounding and pain, such as in the case of torture and war. In her semiotic analysis of injured bodies at war, Scarry illustrates how counterfactual political projects of opposing factions appropriate and substantiate their reality through the exposed injured bodies. This is partly because injured bodies have a 'frightening' fluidity where:

[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 [59, p. 119].

These exposed and injured bodies are the material and visible expression that ‘reality is up for grabs’ in the contest of war, and the verbal constructions of politics displace and efface the lives of wounded soldiers. This ‘state of exception’ could well echo the distinction between juridical and biological life in biopolitics. Yet, Scarry is pointing out the problems of how the political appropriation⁷ of the materiality of bodies creates an appearance of reality. This means a political entity, a nation or a new political regime, is somewhat fictitious. The fiction lies in how it is built on counterfactual projects that lift the material reality from dead bodies and appropriate it, giving the appearance of a coherent bounded unit called a ‘nation-state’, a sovereign ruler, or even a court of law. In Scarry’s analysis, the figure of the sovereign becomes a colossal disembodied voice, vivified both figuratively and materially but masked by its role in the proliferation of vulnerable bodies. Euphemisms like ‘targets’ and ‘collateral damage’ contribute to the erasure and appropriation of a colossal mass of bodies without voice. These metaphors represent an eclipse phenomena, meaning narratives of the world as naturalised orders [61], where the production and wounded body is itself obscured, totalised by the voice of the sovereign which presents itself as if it had no origin. Power in this view is neither independent nor capable of self-authorship. On the contrary, makes believe as if it was the sole author of its own coming into being. Evidently, “power is cautious” because “it bases itself in another’s pain and prevents all recognition that there is ‘another’ by lopped circles that ensure its own solipsism” [59, p. 59]. In short, I see this as the process where the witness’ discourse not only effaces vulnerable bodies but it ‘steals’ the material concreteness of injured bodies to substantiate and legitimise itself as an authoritative voice.

Although the witness seems to efface completely the vulnerable body, total monopoly overrepresentation is theoretically impossible if we bear in mind how the resistance to representation operates. Rather than totalising the meaning of vulnerability through the fixed categories of victims or offenders, vulnerable bodies resist representation. On one hand, representation is inevitable because pain has to have a referent, even if it is only completely metaphorical. Voice-body and sentience are connected because of the resistance to representation but this resistance simultaneously exposes the limits of these connections. In that sense, the referential openness of the wounded body could be seen as a figure of potentiality, an un-decidability that registers the potential for care or violence in the encounter[45] between witness and injured/injurable bodies. The act of naming someone as vulnerable or not involves a political struggle to stabilise the image of the *vulnus* (wound) which can only be

⁷ Scarry describes in the following quote the confrontation between the witness and wounded body and the transformation elicited by its semantic ambiguity, which in this case, points to the question of belonging when the whole body is so radically altered to the point it becomes a wound: “Does this dead boy’s body “belong” to his side, the side “for which” he died, or does it “belong” to the side “for which” someone killed him, the side that “took” him?” [59, p. 119].

countered by pluralising the meaning of vulnerability as it was done in the appeal of Attuh-Benson. In my reading, compassionate appropriations of vulnerability cannot be said to be caring in so far they obscure the precarity produced by punitive control drug control regimes. But I also insist that the resistance to representation represents a small fracture in the apparatuses of precarity.⁸ If bodies resist representation, it is also possible to undercut the inertia of the image of violence underpinning vulnerability by heeding the semantic openness of the wounded body. The openness of the wounded body is both subject to the appropriating gaze and the grammar of the witness but also open to practices of care. Perhaps what we need to think more carefully is how care is delivered and what shape it should take in order to really provide the necessary reprieve for vulnerable drug mules. On that regard, Scarry's 'strange materialism' not only provides a sophisticated approach to the relationship between figurality and materiality but gestures towards a notion of care that must have tangible effects supporting bodies in pain.⁹

7. Conclusion

This article has offered a critique of how appellate courts have appropriated vulnerability discourses into their own schema of intelligibility. As a witness to vulnerable 'open' bodies, the law performs as a sovereign that effaces wounded bodies and uses them to constitute itself all the while it projects vulnerability onto the feminine, thus re-inscribing the abject position of the feminine within the legal order. In that sense, the discourse on drug mules considered through sentencing appeals goes beyond a critique of the reductive appraisal of drug mules as victims or offenders. Instead, it shows how vulnerable subjects are both constructed in opposition to the bounded, rational, legal person and remain constitutive of it. This *dispositif* is not infallible: the image that underpins the concept of vulnerability (wound) shows that it is possible to resist the representation of life through the figure of the person. By exposing the limits to appropriation, this article fleshed out unexplored modes of defiance and resistance to the subjectification/subjugation of politics over life in the context of drug control. It suggested the subjugation/subjectification of drug mules is never complete because of the semiotic fractures of embodied life that resist the paradigm of the legal person and the exceptional victim. This resistance to representation open up

⁸ Indeed, the role of metaphors in bringing into light or relegating to obscurity the lives of injurable bodies finds a parallel in Gilles Deleuze's exposition of the *dispositif*, generally translated as a 'social apparatus'. The latter distributes the "visible and the invisible, giving birth to objects which are dependent on it for their existence, and causing them to disappear" [69, p. 160]. Among other things, Foucault concerned with tracing the 'lines of sedimentation but also the lines of "fracture"' [69, p. 159] understood also as force vectors generating creative thresholds.

⁹ So many of the objects of our world are created to relief the body in pain by replicating the body's structure: a chair relieves an aching body as it mimetises the spine, a house provides relief from cold mimetising the skin, etc. [59].

spaces to pluralise the semantic field of vulnerability and expose the precarity produced by law and its complicity with drug prohibition.

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Lecturer, Kent Law School, University of Kent, CT2 7NZ, United Kingdom. Email: nh253@kent.ac.uk. This article is partly based on the doctoral research titled ‘Drug mules and the limits of criminal law from the perspective of gender and vulnerability’ (2015), which was funded by Kent Law School’s research scholarship (2010-2013). Emilie Cloatre, Carolina Y. Furusho, Jennifer Fleetwood, Arturo Sanchez Garcia, Thomas Giddens, and Yvette Russell deserve special gratitude for reading and giving extremely poignant comments to the earlier versions of this article.

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