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Urquiza Haas, Nayeli (2017) Vulnerability discourses and drug mule-work: Approaches in sentencing and non-prosecution/non-punishment norms, *The Howard Journal of Criminal Justice*, Vol 56, No 3. September 2017 DOI: 10.1111/hojo.12217

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**Abstract:** This article analyses the meaning of vulnerability in discourses about drug mules and couriers at a national and international level, particularly the cases of Costa Rica and England and Wales. Drawing on policies, legislative reforms and court cases, it examines how vulnerability mobilised claims for more proportionality in sentencing practices for drug offences. Vulnerability discourses also underpin claims that drug mules are trafficked persons whose culpability should be extinguished, or at least, diminished. Yet, this article suggests vulnerability discourses can also reinforce neoliberal governance mechanisms rather than expose and critique the ways in which gender and racial histories of oppression intersect with the international drug control system, contributing to the precarity of drug mule work.

**Keywords:** death penalty; drug mules; gender; human trafficking; sentencing; vulnerability

### **Introduction: Vulnerability and Gender in Drug-Trafficking Offences**

Women who traffic drugs, or so-called ‘drug mules’, are often described as vulnerable offenders by legal, policy, and academic discourses. Concern for the increasing numbers of low-level drug offenders, including drug mules, imprisoned across Latin America, has been reflected in various reports and resolutions drafted by international and regional intergovernmental organisations such as the United Nations and the Organisation of American

States (Inter-American Drug Abuse Control Commission 2011; UN Commission on Narcotic Drugs 2011). Critics blame international drug control for the high levels of incarceration of vulnerable populations. Drug suppliers are incentivised by a highly-lucrative market valued at USD \$300 billion per year (UN Office on Drugs and Crime 2005), in which drug mules are ‘hired’ to transport drugs across international borders, usually for a fixed fee. Research across jurisdictions describes them as under-employed, semi-employed, single parents with caring responsibilities, indigenous and black women, and/or with a precarious legal status (Del Olmo 1990; Giacomello 2013; Huling 1996). However, convicted drug mules have historically received high sentences despite their limited role in the drug trade.

Although drug mules are described as vulnerable individuals or persons belonging to marginalised groups, the concept of vulnerability itself is a vague and ubiquitous term in legal discourse (Peroni and Timmer 2013), complicated by social practices around gender. Recent legal developments regarding drug mules on sentencing and defences exemplify the intersection of vulnerability and gender discourses. England and Wales and Costa Rica have refined and reformed sentencing procedures for drug offenders who carry drugs for others, signalling a turn away from deterrent policies adopted in the 1980s. Meanwhile, isolated cases of vulnerable drug offenders have surfaced in recent times, testing the theory that some drug mules are trafficked persons who would have access to the ‘emerging norm’ on non-prosecution/non-punishment.

The first section of this article maps the academic discourses on gender and vulnerability in the context of drug mule work and explains the different approaches to vulnerability in the literature. The second section examines the legal developments in Costa Rica and England and Wales regarding drug mules, and the ways in which vulnerability is articulated in these legal changes are mapped. My suggestion is that there are two divergent interpretations underpinning the legal discourses on drug mules. On the one hand, the legal discourse reinforces the position

of drug mules as victims of organised crime by those who take advantage of their precarious socio-economic circumstances. On the other hand, they are also considered as drug mules who could not 'manage' their personal circumstances. The article shows how certain discursive strategies import the logic which legal, policy, and academic discourses on drug mules may try to contest, and avoid potential discursive confluences of vulnerability and neoliberal forms of governance. In order to improve the application of the concept of vulnerability with regards to drug mules, this article adopts, instead, the concept of precarity as a framework which contrasts the individualisation of vulnerability in criminal justice practices with regards to drug mules.

### **Drug Mules and Gender**

Contrary to perceptions of the stereotypes of female drug mules, 70% of detected traffickers who move drugs across international borders are men (UN Commission on Narcotic Drugs 2011). But information on gender/sex of traffickers is not consistently collected (Fleetwood and Haas 2011) and 'trafficking' has a very wide meaning (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) 2003, 2012; Gottwald 2006). Without a common definition for the variety of roles carried out by people in the international drug trade, it is hard to say how many drug mules are women, and how many are currently in prison. At the same time, women have been disproportionately represented in prisons for drug offences across many countries and regions (Bewley-Taylor, Hallam and Allen 2009). In Costa Rica, female drug offenders represented about 75% of the prison population in 2011. In the UK, fewer women have been imprisoned for drug offences in the last ten years (Women's Breakout 2017). In 2016, female drug offenders represented 11% of all female prisoners. Yet, many women are imprisoned trying to get money for drugs (66% of female prisoners compared with 38% of male prisoners) (Prison Reform Trust 2016). Researchers have attributed the spike in the prison population through the 1980s to the 2000s to drug offences. After the introduction of draconian drug sentencing schemes, US prisons registered an almost 900% spike of incarcerated women

between 1986 and 1999 (American Civil Liberties Union 2005). Latin American countries also registered a dramatic increase in women imprisoned for drug offences between 2000 and 2013: Brazil (334%); Argentina (113%); and Costa Rica (225%) (Boiteux 2015, pp.1–10). Researchers emphasise that women involved in the drug trade tend to come from socio-economically deprived backgrounds and have low levels of education (Diaz-Cotto 2005; Huling 1996); and/or are head of households with caring responsibilities for family members or children; and/or may come from ethnic minorities (Boiteux 2015), or have experienced domestic, or sexual, violence (Bowater 2012). Others argue that race-based inequality and geopolitical power dynamics increase the visibility of foreign women, suggesting that the policing gaze focuses more on the ‘typical’ drug mule from the Global South or racial minorities, such as Latinas, Asian, indigenous or black women (Schemenauer 2012; Sudbury 2005).

The term ‘drug mule’ opens up a practical problem when researching databases and textual archives, as well as an ideological challenge (Fleetwood 2014). A ‘keyword’ search on ‘drug mules’ does not produce a large set of results if one compares it with the cognate term ‘drug courier’, a term more commonly used in policy documents because of its arguable neutrality. The term ‘courier’ is a noun but it also describes an action.<sup>1</sup> Also, the word ‘mule’ and ‘courier’ are unofficial categories, which judges used to consider to be synonymous. For example, Justice Owen described the term mule as ‘a convenient and well understood shorthand for the role of courier of drugs’, in *R v. B* ([2005] EWCA Crim. 2449 [7]). The emerging distinction between mules and couriers probably arose out of the increasing concern about how to reduce the expanding female prison population, namely by correcting the disproportionate sentences handed out to offenders who have a limited role in drug trafficking. In the 1990s, a Working Group of the US Sentencing Commission published a report reviewing the application of mitigating role factors in sentencing guidelines for drug offences. Based on the method of

smuggling, the Working Group distinguished offenders based on role, such as mule/courier. A mule transported drugs on, or inside, herself (swallowed or on the body, hair, breasts, suitcase etc.), and in contrast, couriers carried drugs in a vehicle or other equipment (Tobin 1998; US Sentencing Commission 1992).

Similar distinctions are presented in the contemporary European context, where a survey conducted by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) showed that the majority of stakeholders consider couriers as an overarching category subdivided into two subtypes for sentencing purposes: (i) 'professional couriers' who organise drug importation themselves; and (ii) 'mules' who import drugs for others. The difference between them is the 'level of organisation and commercial interest in the transportation of a drug . . . ' (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) 2012, p.3). Another feature identified in the responses given by legal practitioners, academics, and representatives of the criminal justice system was that drug mules are paid a fixed fee, wage, or reduction of debts, while professional couriers usually receive a percentage. Respondents agreed that the role of drug mules is limited and short, since it ends once the drugs have been delivered (European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) 2012, p.23). Practitioners in England and Wales do not agree with the use of the term 'mule' because it has pejorative connotations. However, the definition arguably captures the precariousness of labourers contracted for work in the illicit global drug economy, akin to a criminalised 'gig' economy. Feminist criminologists purposefully have adopted the term 'mule' because it reflects the colonial and neocolonial histories shaping the lives of drug mules from the Global South. Tracy Huling (1996) characterised drug mule work as 'cheap and expendable labour' (p.57), while Julia Sudbury (2005) argued that women are agents whose participation in the drug trade cannot be reduced to the image of the passive victim. For Sudbury, the criminalisation of women drug mules is part of a punitive drug control that targets dispossessed

black and foreign women and feeds the increasingly privatised prison system. In other words, drug mule work is also precarious because women are differentially exposed to border control surveillance on account of being poor, foreign, women as per the profile of the drug mule (Schemenauer 2012). Although this explanation cannot be generalised to all countries and regions, the literature implies that the image of the mule is a composite which expresses the continuity between the colonial histories in Latin America, the Caribbean and Africa, and the neocolonial economic policies affecting these regions today. As a beast of burden, the mule metaphor evokes both the expendability of their labour and limited protection of socio-economic rights. This expendability of precarious labour in the drug trade exposes men and women to the risk of exploitation in different ways. For women, scholars argue that the patriarchal, cultural and social traditions reinforce the division of labour along gender differences and normalise women's roles as care labourers. Some women's access to full-time jobs is further limited according to institutional racism where indigenous, black, and other minorities, have taken up 'flexible' domestic/care work for middle-class families (Eisenstein 2009). Based on the Venezuelan context, Rosa Del Olmo (1990) argued that women do unregulated work, but this type of work also blurs the line between licit and illicit work, paving the way to drug mule work. Extending this argument to explain the exposure of drug mules to exploitation in the unregulated and illicit domain of the drug trade, I draw on Maggie Lee's (2011) notion that people working in precarious labour are exposed to 'a continuum of abuse' which blurs the lines between exploitative and non-exploitative work in mainstream economic sectors. In short, drug mule work occurs in the context of an unregulated and unprotected precarious labour that increases the risk of exploitation of socially- and economically-marginalised women and men.

Drug mule work, which Jennifer Fleetwood (2014) defines as taking drugs across borders without having control or choice in the process, takes place in the context of complex gender

dynamics prior to, and in the process of, the trafficking of drugs. Border controls administer the free flow of goods along commercial routes as well as police the entry of illicit drugs, irregular migrants, and trafficked persons. Instead of eliminating the incentive to trade illicit drugs, people smuggling, and others, borders create the conditions in which transnational crime can thrive (Sharma 2005, p.89). Representing women as victims of organised crime nevertheless obscures the links between the global inequalities enabled by neoliberal capitalism and the structures that secure the unequal distribution of wealth (Sharma 2005). The following section argues that drug mules' exposure to vulnerability is enabled by gender inequalities exposing women to precarious labour and its intersection with the criminalisation of the black market of narcotic and psychotropic substances.

### **Vulnerability and Precarity**

Vulnerability has been associated with socially-marginalised groups where race, ethnicity, nationality, legal status, gender, disability, and age, make people more susceptible to physical or emotional harms, or who may be at risk of abuse or neglect (Oxford English Dictionary 2016). Legal and policy discourses associate women's vulnerability with experiences of domestic abuse or sexual violence. Previous experiences of gender-based violence are cited in the criminal justice context to refer to vulnerable female offenders, and act as a background explanation of the offending event (ChesneyLind and Faith 2000; Corston 2007).

Vulnerability has a specific function in the vocabulary of social justice but its metonymic fluidity and malleability raises some concerns. Vanessa Munro and Jane Scoular (2012) criticised the conflation between vulnerability as an appeal for social justice and vulnerability as a trope associated with risk. They argued that the encroachment of the state's social protections has been substituted by neoliberal governance mechanisms. Criminal justice systems deploy vulnerability as a way to govern 'potential risk-takers', understood as



individuals who do not manage their disadvantaged lives ‘responsibly’ and are thus blamed for their own dispossession. Vulnerability discourses also transmogrify into more intensive policing of UK borders aimed at ‘protecting’ and identifying trafficking victims, who are understood by authorities as individuals at risk of being exploited by organised crime. To reduce the risk among these groups, public policy discourse has deployed risk-prevention and ‘resilience-building’ strategies. For example, in the UK context, the work of local social care and criminal justice authorities has been linked more closely, because 75% of all adult prisoners suffer from a mental health condition and/or substance misuse. This strategy, implemented by the Ministry of Justice, promotes ‘early intervention’ community-level mechanisms to divert women from prisons. The Corston Report, commissioned after the suicide of six women in prison, intended to dissociate vulnerability from the notion of ‘inability to cope’ with complex life problems. As explained in the review, Baroness Corston rejected the terms of reference given by the Home Office, which sought to identify ‘particularly vulnerable’ women because this term sustained ‘the perception of the public, staff and the women themselves that they are second-class citizens, undeserving of care and compassion and treatment as individual people and impervious to change’ (Corston 2007, p.15). Instead, Corston redefined vulnerability as an external and contingent factor which fell into three categories: domestic circumstances (child-care issues, domestic violence); personal circumstances (mental illness, drug misuse, eating disorders, low self-esteem); and socio-economic factors (poverty, unemployment, solitude). Since these situations represented pathways into crime, governmental strategies should help women ‘develop resilience, life skills and emotional literacy’ (Corston 2007, p.15).

Resilience has been central to Martha Fineman’s vulnerability thesis, where she introduced this concept into legal theory. She has argued that the role of institutions is to enhance the ‘social production of resilience’, understood as the set of relations and the accumulation of resources which allow people to reduce, or contain, people’s vulnerability. People become vulnerable

when the social and state institutions limit an individual's ability to accumulate an equitable distribution of 'assets', such as being unemployed, or, by eliminating unions that improve the labour conditions of the workforce (Fineman 2008). The core of her argument is meant to bypass traditional anti-discrimination litigation and equality models which compartmentalise identities, as well as the norm that ideates legal subjects as autonomous and individualistic actors. To her, liberalism has failed to capture the interdependency and corporeal vulnerability which characterises the human condition. Yet, critics say her project reasserts the neoliberal ideology which she purportedly aimed to contest. This is because she has characterised rights as 'assets' to be accumulated and by interpreting vulnerability as a negative condition which needs to be managed and controlled (rua Wall 2008). Thus, resilience-based strategies justify and solidify the neoliberal governance of risk critiqued by Munro and Scoular.

In view of the limitations of vulnerability discourses and gender-specific analyses of drug mules which simplify them into being agents or victims, this article adopts the concept of precarity to analyse the intersection of vulnerability and drug mule work in recent legal developments in the UK and Costa Rica. The neologism of precarity and precariousness are interconnected terms in Judith Butler's work. For her, precariousness is the primary corporeal vulnerability which is common to all mortal beings and denotes the interdependence of all species. There is a differential vulnerability to precarity which has been enabled by cultural, legal, and political structures (Butler 2006; Butler and Athanasiou 2013). An example in law is the concept of legal personality. This has been a mechanism that induces precarity by conferring or precluding the recognition of legal personality and the rights associated with it. Recognition is, however, distributed across geopolitical and nationality lines, historical racial structures, and gender differences. Consider how the subject of law has been shaped around the figure of the European capitalist male entrepreneur who sought independence from the monarchic system of government throughout the 18th and 19th Centuries (Gear 2010).

Meanwhile, women's legal status was attached to those of the male parent or spouse; they were not formally recognised. Other identities, black and indigenous groups have also been historically misrecognised as legal persons. Without recognition, these lives become unlivable and thus exposed to the violence produced by local and global political and economic systems (Butler 2006). However, these forms of exclusion have not been banished, but persist in new forms which shape subjects through social and legal practices. In the context of drug control in the US, Angela Davis and Michelle Alexander have illustrated this point well. They have argued that the war on drugs is a new iteration of racial oppression rooted in slavery and passing through racial segregation and mass incarceration of blacks and postcolonial subjects (Alexander 2012; Davis 2003).

### **Legal Developments in Sentencing Drug Mules**

In examining the recent developments regarding sentencing and criminal procedure for female drug mules, my aim is to map the articulation of vulnerability and identify features which resonate with the critique on vulnerability as an extension of neoliberal governance examined in the last sections. It also probes the persistence of precarity co-produced by punitive approaches to drug control, which in sentencing and criminal procedure decisions is expressed in the categorisation of drug smuggling as a serious offence. To do so, I compare and analyse the discourses on the vulnerability of women who have carried out drug mule work in the context of sentencing reform in Costa Rica, the new guidelines for drug offences in England and Wales, and what Gerry et al. (2016) have called the 'emerging norm of non-prosecution' for vulnerable drug offenders (p.2).

In England and Wales, the 2012 Definitive Guidelines for Drug Offences sought to refine sentencing practices for all drug offences, including those which involve drug mules (Sentencing Council 2012). In contrast, Costa Rica reformed Article 77 of the Narcotics and

Psychotropic Substances Law (Law 8204)<sup>2</sup> to address specifically the case of women who smuggle drugs into prisons. Both countries stated that one of the aims of these changes was to ensure consistency and/or fairer sentences in the punishment of drug offenders who carry out minor roles within the drug trade. Clearly, the most significant differences between both approaches is how Costa Rican courts included gender-specificity to sentencing practices while the sentencing guidelines were couched in gender-neutral terms. When it comes to the vulnerability of drug offenders who carry drugs for others, both countries also depart from a basic assumption, namely that they enter the drug trade because of economic necessity. However, in England and Wales vulnerability is understood also as the exploitation of a person's naiveté.

The legal reform in Costa Rica reduced permissible sentences of 8–20 years to 3–8 years, but it is limited to vulnerable female prison drug smugglers, known as *burreras* (which means 'donkey' in Spanish). If the offender is a vulnerable woman, according to the subparagraph added to Article 77, judges can order a non-custodial sentence. The English and Welsh sentencing guideline applies to all drug-related offences but it did not specify if similar supply offences committed by vulnerable women would receive a similar community sentence. All it established is a wide range of sentences for supply offences or possession with intent to supply, ranging from community sentences up to nine-year custodial sentences.

As mentioned earlier, Costa Rica's law is gender-specific and focuses on women's vulnerabilities associated with caring responsibilities complicated by poverty. Non-custodial options could be ordered if defendants have the characteristics included in the subparagraph to Article 77 bis: (i) poor female offenders; (ii) is in charge of a vulnerable household; (iii) takes care of an elderly person, or a person with a disability; or (iv) if the woman is herself an elder in a situation of vulnerability (Asamblea Legislativa de la Republica de Costa Rica 2017; Library of Congress 2016). To justify the legality of the bill's gender-specific approach, the

drafters cited Costa Rica's international obligations flowing from the Convention to Eliminate All Forms of Discrimination against Women (1984); the Inter-American Convention to Prevent, Sanction, and Eradicate Violence against Women (1995). They also argued that a 2004 decision from the Constitutional Chamber (no. 832-98) supported the gender-specific approach and it would not breach the right to equality in the Constitution because it was possible 'to recognise differences between people and groups of people, to provide different juridical consequences to each one of them' (Asamblea Legislativa de la Republica de Costa Rica 2011, p.11). The judiciary had clarified in that decision that Article 33 gave room to introduce policies and laws which enable differential treatment as long as they are not arbitrary and unreasonable. In terms of vulnerability, Bill no. 17980 suggested that it was caused by generalised socio-economic disadvantages, fuelled by cultural structures that affect women disproportionately. It emphasised women's role as emotional and material caregivers, taught to help others 'without considering their own interests and the adverse consequences of their actions' (Asamblea Legislativa de la Republica de Costa Rica 2011, p.24). Crucially, the drafters also said that gender inequality arose from multiple intersecting factors, including the failure of the government to deliver basic needs which would prevent poor women's involvement in the drug trade.

In contrast with Costa Rica, drug mules had a more prominent role in the consultations leading up to the Definitive Guidelines for Drug Offences in England and Wales.<sup>3</sup> Instead of reducing sentences for a specific group or changing minimum and maximum terms, the guideline's aim was to refine sentencing rationale for all drug offences. Furthermore, the guidelines were issued by the Sentencing Council (SC), an independent body and non-departmental body under the Ministry of Justice, after a public consultation. In preparation for the Definitive Guidelines, the Sentencing Council drew on a series of reports by its predecessors that criticised the futility of deterrent sentences on drug mules and reaffirmed the importance of factoring the offender's

role in the sentence. With regards to drug importation offences, the guidelines distance themselves from the hard-line approach in the guideline judgment in *R v. Aramah* ([1983] 76 Cr.App.R. 190), which created a sentencing range of 4–14 years in prison for Class A drug importation offences, increased later to life imprisonment (Green 1998). *Aramah* is an important case because it excluded vulnerability and the offender's good character as a mitigating factor in the sentence. Although the House of Lords recognised that some offenders are vulnerable – which was understood as the effect that old age and immaturity had on the defendant's will and willingness to accept the offer for a quick profit – the Lord Chief Justice warned judges against reducing sentences based on misplaced 'sympathy'. Instead, the guideline judgment adopted deterrence as a method for protecting the vulnerable from being recruited (*R v. Aramah* ([1983] 76 Cr.App.R. 190 (3))).

Thirty years after *Aramah*, the new guideline arguably extended the scope of vulnerability. Although the guideline is gender neutral, there are elements in the sentencing procedure which parallel the gender-specific list of characteristics in Costa Rica's law. One of the key features of the new guideline is that it factors culpability (role) and mitigating factors previously excluded under *Aramah*. For example, the culpability of drug-importation offenders is now based on their role (categorised as subordinate, significant, or leading) and the 'category of harm' associated with the offence based on the type of substance, as listed in the schedules to the Misuse of Drugs Act 1971, and the weight of the drug seizure. After determining the category of the offence, the sentencing judge should identify the corresponding starting point and category range. The starting point is determined before considering the accused's plea and prior offences. Then the judge will weigh the aggravating and mitigating factors within the category range. Although it may look like a mechanical exercise without much room for discretion, the guidelines state that it is possible to depart from the sentencing ranges if the offender has a leading role which merits a higher sentence.

The Sentencing Council also speculated that drug mules would most likely have characteristics attributed to the 'subordinate' category (or 'lesser'). For example, the 'involvement through naïveté and exploitation' and 'exploitation' of the offender's 'vulnerability' (Sentencing Council 2011) is indicative of a lesser role. It also envisioned drug mules receiving lower sentences than 'those given under current sentencing practice' (Sentencing Council 2011, p.32) since the courts would now have to factor in the role. In contrast, professional couriers fit the 'significant' category. This distinction was tested in the first appeal to sentencing after the guidelines came into force. Interpreting the guidelines, Hughes LJ described drug mules as a 'third world offender exploited by others' (R v. Boakye and Ors ([2012] EWCA Crim. 838 [35])). In contrast, a courier was a 'worldly-wise' offender who trafficked drugs 'as a matter of free choice for the money' (R v. Boakye and Ors ([2012] EWCA Crim. 838 [36])). The distinction between mules and couriers, although informal, is based on the distinction between roles and the non-exhaustive list of mitigating factors in the guidelines.

Preliminary sentencing trends show a reduction in the average sentence length for drug mules after the Definitive Guidelines (Fleetwood, Radcliffe and Stevens 2015). Yet, drug mules who import larger quantities than the threshold might still get high sentences and will be considered professional couriers if they imported or attempted to import quantities above five kilos, as shown in R v. Jaramillo & Ors ([2012] EWCA Crim. 2101). Here, the Court of Appeal did not accept the argument that they had had a subordinate role. Although the five Spanish appellants (one male and four females) were recognised as naïve and exploited persons who were in dire financial circumstances, they were all part of a conspiracy and had imported 'massive' quantities of Class A drugs (16 to 25 kilos of Class A drugs altogether). Inferring role through quantity, as the Court did, contradicts research which shows that drug mules are more likely to carry more drugs than professional couriers because they often have no control over what, and how much, is put in their suitcases (Fleetwood 2011). Another problem with the Court's

interpretation in this case is that it assumed that drug mules are not motivated by profit, contrary to the judiciary's acceptance that mules are poor offenders driven by economic need. Drug mule work can be remunerated, or done to repay debts. Some mules might not necessarily be in debt or impoverished. It seems that a distinction is made as to whether the drug mule suffers from economic hardship, and in doing the drug mule run she will not make a profit but simply cover basic needs.

Coming back to the critique on vulnerability alluded to earlier, there are several cases where, even though clearly fitting the characteristics attributed to vulnerable women, mules are judged as couriers because they are responsible for their own lack of 'management skills'. For example, in *R v. Henry (Nadine Chrystel)* ([2014] EWCA Crim. 980), the appellant was a beautician detained on her way back from Trinidad with two kilos of cocaine in her brassiere. She had originally denied the charges but eventually pleaded guilty, confessing that she had been offered a holiday and £5,000 and a trip by a man in a London bar. The Court of Appeal reviewed the pre-sentence report which stated several mental health conditions, that she was a victim of abuse, and was a single mother of six children. Without clear evidence that she had been forced, the court concluded that 'She was in it for the money', rather than a naïve and exploited offender. The sentencing judge concluded that she had had a significant role, and sentenced her to three years in prison. In the appeal, the courts considered the petition to reduce the sentence since she, arguably, fulfilled some of the criteria for the 'lesser' role (involvement through naïveté or exploitation) and the mitigating factors, such as being the sole carer of the household and having multiple serious mental health conditions. Instead, the appellate court affirmed that the sentencing judge was fully entitled to decide that she had had a significant role in the trafficking operation because she had suspected she would be carrying drugs, and carried out the offence without regard for her children. Motivated by financial gain and 'despite her mental health difficulties' the Court said she had 'only herself to blame for the damage that



this greed has caused and will cause to herself and her children. It was her choice' (R v. Henry (Nadine Chrystel) ([2014] EWCA Crim. 980 [16])). Based on the comments in the judgment, it seems as if the Court judged her more harshly because she was a mother who mismanaged her freedom to do otherwise.

An alternative approach has emerged slowly in isolated cases involving vulnerable offenders, in which vulnerability in the context of the drug trade intersects with the legal framework of human trafficking. In R v. L., H.V.N., T.H.N., and T. v. R ([2013] EWCA Crim. 991), the Court of Appeal quashed a conviction of three young adults charged with drug offences (production and cultivation) because they were trafficked persons. A recent study on the punishment of trafficking victims in England and Wales identified two potential trafficked persons out of twelve women imprisoned for drug importation (Hales and Gelsthorpe 2012) There is also an ongoing case in which the Indonesian courts have momentarily suspended the death sentence of Mary Jane Veloso, a Filipino domestic worker, because there was reason to believe she was a victim of human trafficking deceived into doing drug mule work (Gerry et al. 2016). When a trafficked person is accused of a crime, the courts must consider carefully whether or not prosecution is in the public's interest, while considering the trafficked person's rights, even if she/he does not have a defence of duress (Crown Prosecution Service 2011; Hales and Gelsthorpe 2012). Although 'abuse of vulnerability' is a concept that underpins the non-prosecution and non-punishment norms under international human trafficking mechanisms, it is a term which has no equivalent in international law (UN Office on Drugs and Crime 2013).

In the human trafficking context, the term 'vulnerability' has many of the same meanings as it does in the sentencing field. However the term is ambiguous in both contexts. Technically, the term 'abuse of the vulnerability' is a constitutive element of the crime of human trafficking, as defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational

Organized Crime. According to Article 3 of the Protocol, a trafficking offence requires an action ('recruitment, transportation, transfer, harbouring or receipt of persons'); the means that make possible the action ('threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'); and the purpose for the action, which is exploitation (which includes 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs').

Because of the lack of clarity about what abuse of vulnerability means, the UN issued a paper mapping the two general approaches taken by the parties to the convention. First, it is understood as a 'susceptibility to trafficking' produced by a set of factors like gender, poverty, etc. The second, which is suggested as being closer to the letter of the Protocol, is the 'abuse of vulnerability as a means by which trafficking is perpetrated' (UN Office on Drugs and Crime 2013). One term is obviously broader than the other, whereby one registers vulnerability in the structure, a view which is closer to the concept of precarity. Meanwhile, the other term seeks a closer causal link between the trafficker's criminal acts to attribute responsibility. However, in the absence of contextual characteristics, it might be deduced that he/she was not a trafficked person.<sup>4</sup> In short, abuse of a position of vulnerability can be read in a narrow sense, where it is more akin to duress or coercion (no choice but to submit to exploitation); or as an open-ended list of characteristics that make a person susceptible to being taken advantage of for the purpose of exploitation.

Although the case of the Vietnamese minors shows how the non-punishment principle has been applied in the English courts, it is yet to be seen if it would be applicable for more serious offences under national or international law, such as murder or drug offences (Derencinovic 2014; Piotrowicz 2015). Production and cultivation of cannabis does not necessarily trigger

public interest in prosecution, but supply and import of drugs like cocaine or heroin are considered serious offences (Crown Prosecution Service 2016). Based on the judgment in *R v. L., H.V.N., T.H.N., and T. v. R* ([2013] EWCA Crim. 991), it seems likely that drug mules' culpability could be diminished if the offence was directly resulting from the situation of being a trafficked person. But it is hard to predict the impact of this case on other scenarios, considering that the assessment of vulnerability was centred on the young age of the drug offenders.

### **Conclusion**

This article suggested that appealing to a person's vulnerability might not be a straightforward route to justice for drug mules, or other groups identified as vulnerable by crime prevention policies which seek to reduce the vulnerability of the community to crime. Vulnerability discourses have played a crucial role in justifying reforms to sentencing practices translated into fairer and more proportionate sentences. However, the appellate cases in this article suggest that vulnerability might not always yield the desired results because it is prone to being interpreted as an individual failure to manage responsibly one's precarious economic situation. Although sentencing changes in both Costa Rica and England and Wales acknowledge drug mules' structural disadvantages, the justification for the reform in Costa Rica was more solidly grounded on acknowledging the gender-based precarity of women who carry drugs for others. Although Costa Rica's approach is limited to a specific group of offenders (*burreras*) and an exact comparison with the case of drug importers is not possible in this article, the justification for reform was more comprehensive in its approach to promoting social justice for women, as well as being stronger in its critique of drug laws and using the penal system to address social issues. Thus, its approach addressed the elements underpinning the vulnerability of these offenders to precarity. To correct this vulnerability, reform was grounded on the recognition of women's right to gender-specific policy and legal approaches and recognition of how drug

control has a differential impact on women. In contrast, the guidelines for sentencing practices in England and Wales were more ambiguous, in the sense that quantity considerations and the motivation for the offence are more likely to be read as indicators of individualised, selfish actors who are unable to take care of themselves, and act without concern for those in their care. In this sense, this interpretation aligned more closely with the critique of vulnerability and resilience in the context of criminal justice, whereby dispossessed men and women bear the burden of managing responsibly their self-care as well as the care of others. In the end, the guidelines disregarded drug mules' expendability in the drug trade. Based on Fleetwood's research, which explained that drug mules cannot control how much and the type of drug carried, one could read drug mules' disposability in the trafficking schemes involving large quantities aimed at maximising profit, regardless of the consequences on the carriers. Finally, although the disposability of drug mules has been more explicit in the cases located at the intersection of trafficking and drug mule work, the legal framework shows that drug mule work may not be recognised yet as exploitative unless it was carried out as a direct consequence of being trafficked. The terminology on the abuse of vulnerability in the context of human trafficking is too ambiguous to conclude whether or not it could shape alternative interpretations for drug mule work. Finally, one could see the non-prosecution/non-punishment norm to be more limited in its approach to the precarity of drug mule work for two reasons.

First, it is not clear if it will lead to anything other than a reduced sentence, since drug trafficking is considered a serious offence. Second, there is a risk that abuse of vulnerability could be interpreted more along the lines of the defences of duress rather than the complex context of precarity which exposed the trafficked person to the crime in the first place, without destroying her entire agency. In the context of the neoliberal dismantling of social justice institutions, drug mules' vulnerability to precarity could be better understood as the product of the intersection between drug control, gendered division of labour, and recognition of rights.

Precarity is a form of violence which is discrete; and yet, it shapes the background of the recruitment and incarceration of women and men performing drug mule work.

## Notes

1 A courier could be a noun or a verb. Documents from the United Nations often 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 are used for drug smuggling.

2 Law 8204 outlines the crimes and corresponding penalties for the cultivation, production, supply, and import/export of narcotic and psychotropic substances.

3 Since the 1980s, sentencing in England and Wales has been created by the judiciary. The Lord Chief Justice laid down guideline judgments which the lower court had to follow. By 1994, the Crime and Disorder Act 1998 instituted the Sentencing Advisory Panel, a professional body empowered to carry, draft, and propose new guidelines to be approved by the Court of Appeal. These guidelines 'would inform the issuing of guideline judgements' (Sentencing Council 2014). The Criminal Justice Act 2003 underpins this new phase in English sentencing: first, it created the Sentencing Guidelines Council (SGC) in 2004. The Sentencing Council (SC) was created in 2010, after the merger of the SGC and the Sentencing Advisory Panel.

4 The European Convention against Trafficking reproduces the definition of the UN Trafficking Protocol, and its Commentary describes 'abuse of a position of vulnerability' as a 'state of hardship in which a human being is impelled to accept being exploited'. In contrast, the EU Trafficking Directive 2011/36/EU draws on the Interpretative Notes of the UN Trafficking Protocol which defines a 'position of vulnerability' as 'a situation in which the

person concerned has no real or acceptable alternative but to submit to the abuse involved' (UN Office on Drugs and Crime 2013).

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