

# Theorizing the Official Record of Inmate Ashley Smith: *Necropolitics, Exclusions, and Multiple Agencies*

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R E B E C C A B R O M W I C H \*

## ABSTRACT

This article presents findings from a critical discourse analysis (CDA) of public texts, revealing how sense was made of Ashley Smith in the official record, where she was configured as a carceral subject: an inmate. Smith's is a case fundamentally like those of many inmates. This can be better understood if a new language is deployed for theorizing these recurring deaths. Smith's death can be read not as an isolated system failure, but as a necropolitical success. CDA of this official story reveals that the Smith case is an extreme result of everyday brutality. It is not anomalous, but rather a predictable and recurring result, of a society and bureaucracies' gradual necropolitical exclusions. Drawing on theorizations about logics of exclusion from Giorgio Agamben and Achille Mbembe, the article argues that forms of governance in power and knowledge that allow some people, and in particular certain women and girls, to be categorized as *homo sacer*, neither alive nor dead, were actively involved in Ashley Smith's death both before and after her transfer to CSC custody. These forms of governance remain in operation with widely felt consequences in prisons, not just in Canada, but across neoliberal societies, and not just in prisons, but also in those societies in general. I argue that, on this analysis, the death of Inmate Smith speaks to a need for broad-based and fundamental change to operating logic deployed in the operation of the criminal justice and

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correctional systems, and in consequence, it is quite correct for reference to the Smith case to be situated in the Ministerial Mandate letter to Justice.

*Keywords:* Law, Feminist Legal Studies, Cultural Study of Law, Girls Studies.

## I. INTRODUCTION

“[T]hey don’t know what goes on in my head.”  
- September 2006 journal entry of Ashley Smith<sup>1</sup>

Ashley Smith died in Grand Valley Institution, a Federal Penitentiary located in Ontario, at age nineteen. Her 2007 death, by self-induced strangulation, drew public attention, partly because guards who did not intervene videotaped her last moments. Her death was also shocking because of her youth, her female gender, and the fact that she had never committed a serious criminal offence, yet died in prison. A 2013 inquest<sup>2</sup> into the cause of her death culminated in an unprecedented verdict of homicide. Never before had a Canadian inquest into the death of a prison inmate resulted in a homicide verdict when another inmate did not cause the death.

However, the bulk of the recommendations made in that inquest were categorically ignored or rejected in the Correctional Service of Canada (CSC)’s, 2014 response.<sup>3</sup> From a formal legal perspective, the Smith case is closed. Nonetheless, as matters warranting public scrutiny, questions about her case are unresolved and call out for attention, analysis, and action. The continued relevance of the Smith case was acknowledged in the 2015 mandate letter sent by Prime Minister Justin Trudeau to newly appointed

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<sup>1</sup> New Brunswick, Office of the Ombudsman & Child and Youth Advocate, *The Ashley Smith Report* (New Brunswick, June 2008) at 23 [NB Ombudsman] online: <<http://www.cyanb.ca/images/AshleySmith-e.pdf>>.

<sup>2</sup> Office of the Chief Coroner, “Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations”(Ontario: December 2013), online: <<http://www.chch.com/wp-content/uploads/2013/12/2013-1219-AshleySmithVerdict.pdf>>.

<sup>3</sup> Correctional Service Canada, *Response to the Coroner’s Inquest Touching the Death of Ashley Smith*, (Ottawa: Correctional Services Canada, 7 October 2014) online: <<http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>>.

Justice Minister Jody Wilson-Raybould.<sup>4</sup> This Mandate Letter assigned to the Department of Justice the mandate of addressing issues brought to light by the Smith case. Advocates for abolition of segregation in prisons have suggested that this mandate should properly be with Public Safety. Indeed, when the *Federal Government* tabled Bill C-56 an Act to amend the *Corrections and Conditional Release Act* and the *Abolition of Early Parole Act* on June 19, 2017, the Ashley Smith case was referenced in the legislative proposal from the Minister of Public Safety to limit the time inmates can spend in solitary confinement to 21 days, and eventually to 15. However, the implication of the arguments in this article is that the Prime Minister has it, at least partially, right. Curbing overuse of solitary confinement is a step in the right direction towards reducing abuses, and even torture, of prisoners in corrections custody. However, Ashley Smith's death in prison does not only reflect problems with the use of solitary confinement. It reflects far-reaching problems with the operating logics of the justice and correctional systems and calls for fundamental change to how we do justice.

The battleground for establishment of authoritative legal truths about Ashley Smith was not contained within a courtroom. The jury verdict in the Inquest does not include reasons for decision: it provides only recommendations. There is no single authoritative legal narrative of the Smith case, yet it takes place in an interaction of an abundance of law. It involves a set of complex interactions between statutes, regulations, directions, judicial, and administrative decisions. Contestation and construction of the meanings of the Smith case continue to take place in a multitude of legal spaces like courts, youth facilities, prisons, and Parliament, as well as in the public domain. Ashley Smith's case, for the purposes of this study, was delimited to consist of the set of public texts that purport to define truths about her incarceration and death and delimit the timeframe of the production of those truths, to the time during which she was publicly presented as a case to be resolved by the formal legal system. This period starts when she first appears in youth court in 2002 and ends

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<sup>4</sup> Office of the Prime Minister, "Minister of Justice and Attorney General of Canada Mandate Letter", by Rt. Hon. Justin Trudeau (Ottawa: Office of the Prime Minister, 2015) online: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

with the response of the Correctional Service of Canada to the Inquest verdict on December 11, 2014.<sup>5</sup>

In this article, I argue that the death of Inmate Smith is a case fundamentally like those of many inmates before, and after, hers, and not just female inmates. Building on my Ph.D. thesis and book,<sup>6</sup> I suggest a new language for theorizing these recurring deaths as part of the same phenomenon, and contend that this phenomenon speaks to a need for fundamental change to the operating logics of our correctional and criminal justice systems. The usual operation of the criminal justice and correctional systems is as monstrous bureaucracies through necropolitical logics of exclusion. The arguments put forward in this article are derived from analysis of critical discourse analysis (CDA) of certain figures of Ashley Smith that emerge in the Smith case. Those representations are looked at as technologies of governance. Dominant configurations of Ashley Smith - as a child, a mental patient and an inmate - make possible certain understandings of her case while they foreclose others.

This paper describes how the death of Inmate Smith can be read not as an isolated system failure, but a necropolitical success. It reports on a CDA that reveals that the Smith case is an extreme result of routine, everyday brutality. It is not anomalous, but rather a predictable result, of a society and bureaucracies' gradual necropolitical exclusions. Raced and gendered governmental systems of power and knowledge that allow people to be categorized as neither alive nor dead were actively involved in Ashley Smith's death both before and after her transfer to CSC custody. What is horrifying is not that any person in particular, or any group, planned to kill her. They almost certainly did not. Rather, systems of power in place brought about her death, have eluded accountability for it, and remain in place, making similar deaths in custody predictably likely to recur. I then contend, based on this analysis, that preventing prison homicides like that inflicted on Smith can be most effectively achieved not by addressing a small subset of offenders, however defined, but by broad-based justice and correctional system reform.

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<sup>5</sup> *Supra* note 3.

<sup>6</sup> Rebecca Bromwich, *Looking for Ashley: Re-Reading What the Smith Case Reveals About the Governance of Girls, Mothers and Families in Canada* (Bradford: Demeter Press, 2015) [Bromwich].

## II. THE STUDY

### A. The Case

This study took Ashley Smith's case as a particular "event" where conflicts, confluences, and tensions between existing ways of thinking and deployments of governmental power become visible.<sup>7</sup> It asked what combination of rules, power relationships, institutional accretions of power, and circumstances in seemingly unrelated fields gives rise to a particular outcome.<sup>8</sup> It probed of what general type various figures of Ashley Smith are constructed as a case. For the purposes of this research, the Ashley Smith "case" was defined much as Michel Foucault defined the "case" of Pierre Rivière,<sup>9</sup> I adopt the definition of "caseness" advanced by Lauren Berlant<sup>10</sup> a state in which the singular is both individual and marked as an exemplar.<sup>11</sup> The complex interplay of a large number of formal legal texts with the interpretive judgment of numerous system actors makes the Smith case an intersection of modes of governance and cultural practices within a variety of discourses: mental health, constitutional, correctional, legal, medico-legal, and youth criminal justice. Intersectional methodology, as described by Rebecca Johnson, as a method for unpacking the "intersection" of discourses and narratives that intersect to produce a legal case, was employed.<sup>12</sup>

In my study of the case, I inquired into questions about of what social problem or phenomenon Ashley Smith is a "case," and what governmental work is done by prevalent constructions of her as an exemplar. Elsewhere, I have written about figures of Smith as a child and a patient. This article analyzes how sense was made of Ashley Smith in the official record, where

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<sup>7</sup> Alan Hunt & Gary Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (Boulder, Colo: Pluto Press, 1994).

<sup>8</sup> *Ibid.*

<sup>9</sup> Michel Foucault, *I, Pierre Rivere, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide in the 19th Century*, translated by Frank Jellinek (Lincoln: University of Nebraska Press, 1975).

<sup>10</sup> Lauren Berlant, "On the Case" (2007) 33:4 *Critical Inquiry* 663 at 665 [Berlant].

<sup>11</sup> *Ibid.*, at 666.

<sup>12</sup> Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002) at 174.

she is configured as a carceral subject: an inmate.<sup>13</sup> The term “inmate” is deliberately used in this analysis in the face of the more commonly accepted term “offender” to trouble neat distinctions between subjects held involuntarily in mental health and corrections custody.

This study deploys the tool of CDA to make visible the implicit ideological content of articulations of Ashley Smith. Other important methodological tools on which I rely are the concepts of representation, figuration, and articulation. I work with the concept of figuration.<sup>14</sup> As explained by Claudia Castaneda, figuration is the process by which a representation is given a particular form: “a figure is the simultaneously material and semiotic product of certain [discursive] processes”.<sup>15</sup>

## B. Necropower and Exclusion

Concepts of necropower found in the work of Giorgio Agamben and Achille Mbembe, which are related notions to Foucault’s idea of biopower, are foundational to this research. In referring to the concept of “necropolitics,”<sup>16</sup> I am talking about a notion developed by Mbembe taken together with Giorgio Agamben, as a relationship between sovereign power and control over life and death. Mbembe adds to Foucault’s understandings of biopower and sovereignty the concept of necropower, which goes beyond merely “inscribing bodies within disciplinary apparatuses.”<sup>17</sup> Rather, in the era of necropower, weapons are deployed “in the interest of maximum destruction of persons and the creating of death-worlds, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead.”<sup>18</sup> These populations are not disciplined in the sense Foucault talks about with reference to biopower. A disciplined individual is sought to be transformed. An individual who is politically or socially dead is never meant to be re-

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<sup>13</sup> Bromwich, *supra* note 6.

<sup>14</sup> Teresa de Lauretis, *Figures of Resistance: Essays in Feminist Theory* (Chicago: University of Illinois Press, 2007) at 259.

<sup>15</sup> Claudia Castaneda, *Figurations: Child, Bodies, Worlds* (Durham: Duke University Press, 2002) at 3-4.

<sup>16</sup> See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) [Agamben].

<sup>17</sup> Achille Mbembe, “Necropolitics” (2003) 15:1 *Public Culture* 11 at 34 [Mbembe].

<sup>18</sup> *Ibid* at 40.

incorporated into the social and political community. They are excluded in order that the population can be managed.

Necropolitics as a theorization of this formulation of power is especially useful because it allows for understanding of certain subjects as occupying statuses that are neither fully living nor dead, and it offers an accounting for the power of the state to impose death and death-like status on subjects. Necropolitics encompasses the power of the state to impose a variety of forms of “death.” Necropower is the formation of power dominant in what Mbembe calls late modern colonial occupation: governmentality in “management of the multitudes.” While Mbembe does not speak directly about solitary confinement in correctional institutions, I would suggest that solitary confinement in all its forms and named by all of its euphemisms (e.g. “therapeutic quiet”, “administrative segregation”, and “suicide watch”) is such a death world. Relatedly, I also find useful the concept of “*homo sacer*” as developed by Agamben.<sup>19</sup> In his work, Agamben looks at the concept of “*homo sacer*”, a liminal being that exists *between* living and dying, people whose lives are easily forfeited, whose deaths are not *murder*. I find helpful Agamben’s discussion of the wolf and the ban. He looks at werewolves as those who are “banned” as ancient forms of excluded persons: “the man who has been banned from the city.”<sup>20</sup> Agamben identifies carceral inmates as, in some instances, members of the *homo sacer* category, or people who have been banned. Agamben sees the *homo sacer* as an exemplary figure that illumines the logic of exception. In my analysis of the several forms of death to which Ashley Smith is subject through her experiences of social exclusion, including incarceration, I build on Agamben’s concept of *homo sacer*, which I argue Smith becomes when she becomes a “terminal” inmate. I also argue that Smith exemplifies the extreme reduction of the logics to which members of western societies are subject.

Thus, necropolitics and the notion of the *homo sacer* provide an analytical framework to aid in understanding how the death of Ashley Smith happened in a series of stages. On this analysis, the day of her actual biological death is perhaps the least contingent, most pre-determined, and in many ways one of the less significant events, that contributed to her exclusion from political community. It was this exclusion that started in

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<sup>19</sup> Agamben, *supra* note 16.

<sup>20</sup> *Ibid* at 63.

motion the series of linked events that led to her incarceration and social, political, juridical, and biological deaths.

Further, it is also in part by building on this reasoning that I posit that, to understand the Smith case as a site of contending discourses, we must look beyond the final moments, or even months or years of her incarceration to the conditions of possibility that produced her as someone to become *homo sacer* before she was ever imprisoned. Also useful as a foundational assumption to this book is the theorization by Agamben that, in the logic of exclusion underlying the construct of the *homo sacer*, the political body and the physical body are inextricably linked: politics are at issue in the subjects' biological bodies.<sup>21</sup> This connection is of great importance in explaining what is at stake in the Smith case: the confinement and death of her biological body is inextricably linked to the silencing of her political voice and the voices of other adolescent girls.

### C. Research Design

This research involved critical discourse analysis (CDA) of all publicly available formal legal documents produced in reference to Ashley Smith's case. CDA is employed as a critical and interpretive methodology to reveal operations of power in places where familiar social, administrative, and political discourses mask or normalize it.<sup>22</sup> This is a study of figurations of Ashley Smith as girl as technologies of power that emerge in three discursive sites: formal legal documents, docu-dramas, and print media texts. I looked at how a set of systems and rationalities came together in manifold small ways to produce Ashley Smith's case. The study explores troubles and complicates what these figurations do as technologies of power.

Documents studied include reports from the New Brunswick Ombudsman,<sup>23</sup> by the Corrections Investigator for Canada<sup>24</sup> and the University of Toronto Faculty of Law's International Human Rights

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<sup>21</sup> *Ibid* at 105.

<sup>22</sup> Michael Shapiro, *Reading the Postmodern Polity: Political Theory as Textual Practice* (Minneapolis: University of Minnesota Press, 1992).

<sup>23</sup> NB Ombudsman, *supra* note 1.

<sup>24</sup> Canada, The Correctional Investigator, "Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women", Office of the Correctional Investigator (Ottawa: 30 September 2013) ["Risky Business"].



Program.<sup>25</sup> Also included are documents produced in relation to the inquests, judgments on motions in the inquests, as well as the full judgment in the 2013 inquest. Studied as well are a number of documents produced in the inquests and civil trial. All docudramas concerning Ashley Smith were also studied, with a focus on those that brought Ashley Smith's case into notoriety. These included CBC's *Out of Control* and *Behind the Wall* as well as a documentary on CBC's *The Current* in 2012 called "Ashley Smith and Mental Health in Canadian Prisons." Many print media articles about Ashley Smith's case from a range of print media outlets were studied. Sites included national articles of record, local media sources, and also more tabloid forms of journalism from across the political spectrum.

After my initial review of all (over 5000) media articles revealed that there were certain chronological turning points in the coverage, I focused where the number of articles spiked, which at times marked turning points in the case. I determined that three time periods are representative of shifts in the discourses around her case. These are the immediate media response to her death (October 2007-June 2008), media coverage of her first inquest (2010-2011) and of the second inquest as it wrapped up and was met with an institutional response (2013-2014). The discursive analysis involved the production of a running list of descriptors of Ashley Smith signaling the variety of figures of her circulating throughout the case. I coded for the following focal points in descriptions and definitions of Ashley Smith: mental illness, child, girl, woman, and inmate. I employed coding, using a colour scheme identifying how a text primarily configured or identified Smith. At bottom, this was a qualitative analysis, even though the coding produced quantitative metrics of how many documents characterized her as each. I discerned chronological trajectories in the growth, flourishing, and falling away of certain configurations of Ashley Smith as case or instance of a particular "type" of subject. The analysis that follows discusses patterns and trends in representations and figures of Ashley Smith that coalesced.

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<sup>25</sup> Elizabeth Bingham & Rebecca Sutton, *Cruel, Inhuman and Degrading? Canada's treatment of federally-sentenced women with mental health issues* (Toronto: International Human Rights Program, 2012).

## D. Findings

Ashley Smith's mother, Coralee Smith, is quoted in many sources, as saying, after the verdict was rendered in the second inquest: "now the whole story has been told."<sup>26</sup> This study does not reveal a new, truer story about Ashley Smith. I have conducted my research from an epistemological position that telling the "whole story" about Ashley Smith is not possible: all narratives are selective, incomplete, and necessarily partial.<sup>27</sup> I deconstruct different ways Ashley Smith's case has been told to unpack the ways in which meanings have been made, and governmental technologies have been crafted, articulated and deployed, out of Ashley Smith's life and death.

My study revealed three "types" of which Ashley Smith has usually been represented as a "case" or exemplar.<sup>28</sup> She has primarily been configured as an inmate, a child, and a patient. These figures are outcomes of microprocesses of governance in relation to micro-and macro power. They function as technologies of governmental power. It also revealed a significant silence. In the public talk about Ashley Smith, there is a conspicuous absence of discussion about Ashley Smith's agencies. CDA of the Smith case makes evident that the idea of Ashley Smith as an agent becomes increasingly impossible with each figuration of her that becomes widely accepted in the Smith case, with the final, most sympathetic rendering of her relying completely on her passivity.

In the discussion that follows, I present findings of my CDA of the "official story" of Ashley Smith, in which is foregrounded the configuration of Ashley Smith as a carceral subject.<sup>29</sup> My findings about the mental health and child figures of Ashley Smith are published elsewhere. I theorize the implications of what analysis of the official story about Inmate Smith reveals. I argue that, long before she physically died on October 19, 2007, as constructed in the discursive figure of Inmate Smith, Ashley Smith was

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<sup>26</sup> Angela Mulholland, "After Death Deemed Homicide, Ashley Smith Family Calls for New Criminal Investigation", *CTV News* (19 December 2013), online: <<http://www.ctvnews.ca/canada/after-death-deemed-homicide-ashley-smith-family-calls-for-new-criminal-investigation-1.1600083>>.

<sup>27</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

<sup>28</sup> Berlant, *supra* note 10 at 663-672.

<sup>29</sup> My other findings (about the other figures of Ashley Smith as girl that emerge in her case) are published in my book. See Bromwich, *supra* note 6.

configured as a *homo sacer*. Inmate Smith was constructed as a contingent being, dissolved into a banned person, a fetish object of the correctional system, socially and juridically dead, living in a state of “pure life” that rendered her biological death, if not inevitable, highly predictable and probable, and that the construction of inmates as *homo sacer* effected in no small part through solitary confinement, is a routine practice in Canada's correctional and criminal justice systems.

### III. INMATE SMITH

#### A. YP Smith – Incarcerated “Young Person”

Representations of Inmate Smith as a carceral subject emerge in 2003. On October 21, 2003, Ashley Smith is remanded to custody and begins her prolonged “experience within” the youth custodial apparatus.<sup>30</sup> Her incarceration is for violating her probationary conditions by throwing crab apples at a postal worker.<sup>31</sup> Smith's remand into custody formally reconfigures her as a carceral subject, a “Young Person” (YP) from April 2003 until October 2006. Despite having initially been sentenced to a short time in custody, she acquires further charges while serving the sentence, and then while serving that sentence, over and over again, remains “either a part-time or full-time” inmate at the NB youth prison for three years.<sup>32</sup>

Because the labeling system in the YCJA refers to all young people incarcerated through its machinations as “young persons”, YP Smith remains throughout this period officially genderless: official texts do not refer to her as a woman or girl. Nonetheless, her female embodiment presents complexities and expense not associated with male YPs.

YP Smith faces more than 800 incident reports during her time in youth custody at NBYC, and 50 more criminal charges.<sup>33</sup> In these incidents, YP Smith is frequently restrained and segregated. For example, not because this represents an exceptional day (it does not), on June 1, 2004, while segregated, YP Smith “smeared feces throughout her cell, covering the cell

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<sup>30</sup> NB Ombudsman, *supra* note 1.

<sup>31</sup> *Ibid* at 18.

<sup>32</sup> *Ibid* at 17.

<sup>33</sup> “Risky Business”, *supra* note 24; NB Ombudsman, *supra* note 1.

window which obstructed supervision checks.”<sup>34</sup> When staff are cleaning the cell, YP Smith “became non-compliant with staff and attempted to exit the cell, which lead to her being physically restrained by staff.”<sup>35</sup> Smith then proceeds to cover her window and the cell camera with torn cloth; she is then placed “in a body belt restraint” and subjected to a “pat search.”<sup>36</sup> Another example of restraint and segregation used occurs on June 26, 2004. While she is segregated, YP Smith refuses staff demands that she remove items she has placed over her cell window and camera.<sup>37</sup> In consequence, “staff were authorized to place Ashley in a restraint belt called the ‘WRAP’” and YP Smith remains immobilized in this state for “approximately 50 minutes.”<sup>38</sup>

Another example of the use of segregation and restraint against YP Smith is documented on March 1, 2005. The NBYC Superintendent authorizes staff to pepper spray Smith after she refuses their request “to leave the shower area and return to her cell.” YP Smith is then found “in possession of a piece of metal, possibly a razor blade”.<sup>39</sup> Once subdued, YP Smith is transferred to segregation “where the decontamination process (applying copious amounts of water to the eye area) was commenced.”<sup>40</sup> Yet another example is an incident reported on January 27, 2006 when YP Smith, not segregated at that moment “became extremely vocal towards staff; yelling names, and throwing items around in her cell.”<sup>41</sup> She then refuses to hand over utensils to correctional staff, stating she would only do so if she was transferred back into segregation. She also threatens to self-injure “or trash ... her cell if her requests were not met”.<sup>42</sup> YP Smith then self-injures and “began walking around in her cell naked.”<sup>43</sup> Management transfers YP Smith back to segregation.<sup>44</sup>

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<sup>34</sup> NB Ombudsman, *supra* note 1 at 21.

<sup>35</sup> *Ibid* at 21.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 22.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at 23.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 22.

<sup>42</sup> *Ibid* at 21.

<sup>43</sup> *Ibid* at 22.

<sup>44</sup> *Ibid.*

Walking around naked, refusing to return utensils, shouting loudly, covering a window with cloth, and refusing to get out of the shower are not behaviours that would lead adolescents in family homes to be arrested. Even smearing one's feces around one's room, while not socially acceptable and definitely unusual, is only *criminal* behaviour because Inmate Smith is already a carceral subject. Considered in the context of Smith's many complaints about not being provided with adequate sanitary supplies such as tampons and toilet paper, the feces incidents could re-read as acts of frustration, resistance or protest.<sup>45</sup> Looked at in the context of Primo Levi's analysis of how Auschwitz inmates endured petty cruelties that, taken together, stripped their humanity from them,<sup>46</sup> these actions can be re-read as reflections of a dehumanizing context rather than simply pathologized as evidence of Inmate Ashley's unmanageability.

The foregoing examples are unexceptional amongst the 800 plus incidents that take place at NBYC. The fact that YP Smith is already in custody is foundational to her disobedient and unruly conduct being defined as criminal in *all subsequent* incidents.

## B. Adult Inmate

Inmate Smith becomes a member of a large subset of inmates upon her transfer to adult custody when she turns 18. Once she becomes an adult carceral subject and transferred to CSC custody, Ashley Smith is officially labeled an "offender" or "Inmate Smith." The *Corrections and Conditional Release Act* (CCRA) is the statutory framework within which the CSC defines "inmate". Gradually, she becomes officially understood as a member of a much smaller subset of terminal inmates. The necropolitical process by which this reconstitution takes place begins quickly upon her labeling with a maximum security designation and assignment to solitary confinement. Finally, she becomes a member of an even smaller subset when bureaucratic dissolution of her bodily integrity and autonomy to a point where she exists as *homo sacer*, a contingent body in a death-world. In this trajectory, Inmate

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<sup>45</sup> Bromwich, *supra* note 6.

<sup>46</sup> Primo Levi, *Survival In Auschwitz: The Nazi Assault on Humanity* (New York: Simon and Schuster, 1996). Levi's analysis is relevant to considering the banality and burdensome weight of accumulating sanctions to which Ashley Smith was subject but it is important not to over-state parallels between imprisonment in Canada and Nazi concentration camps.

Smith's biological death is the final point on a long necropolitical journey of dehumanization that begins long before she is transferred to CSC custody.

For CSC's local and national bureaucracies, Inmate Smith's gender and embodiment make her an administrative headache from the beginning of her incarceration as an adult. She bears differentiating criteria that make her unusual for the type "inmate". Statistically, the usual or archetypal inmate in North America is a working class man. Ashley Smith's embodiment does not fit readily into this stereotype. Inmate Smith is a woman whereas most inmates are men, and she is younger than most inmates.

Because the YCJA is formally gender blind, YP Smith officially acquires a gender in discourse when she enters adult corrections and becomes a woman inmate. Gender is explicitly and overtly relevant to the conditions in which Inmate Smith is held; the everyday conditions in which she lives in CSC custody are fundamentally gendered. Different rules are applied to her than to male inmates as part of CSC's "women-centered approach." For example, surveillance and searches of her must be carried out in the presence of woman guards, which add an administrative burden not imposed by men. Criminologists have criticized the CSC's "woman centred" approach as based in a risk-based model that focuses on responsabilization and control.<sup>47</sup> Women inmates are tasked in this logic with "taking responsibility" for their "choices": in de-contextualized responses to their actions while inmates' conditions of incarceration are determined not with reference to their rehabilitative needs, but rather what will be least disruptive to the functioning of the institution.

This management model produces a disjuncture between colloquial understanding of maximum-security designation as a reflection of dangerousness and the basis for the institutional coding of maximum security. While it stands in for dangerousness in popular understanding, the official designation of "maximum security" may or may not mean violent, dangerous or at risk of escaping. It may just as likely mean an inmate is understood to self-harm or is designated by relevant corrections officials as mentally ill. Consequently, the gendered space of incarceration for women by CSC overlaps significantly with the death-space of solitary confinement.

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<sup>47</sup> See Kelly Hannah-Moffat, "Gridlock or Mutability: Reconsidering 'Gender' and Risk Assessment" (2009) 8:1 *Criminology & Public Policy* 209 at 221-229.

Woman inmates are confined to the death-world of solitary confinement for a wider range of reasons, and per capita at least as often, as are men.<sup>48</sup>

Shortly after becoming an adult Inmate in October 2006, Ashley Smith comes to be understood as an unusually unmanageable inmate. In the context of governance by a rationalized bureaucracy, unmanageability on the part of a subject is a major crisis for the system. While the Inmate Smith figure remains ubiquitous in official texts, it is clear from communications between CSC staff and management, as well as from the volume of texts produced about her that the system is struggling to maintain the representation of Inmate Smith as ordinary. A tension between the exceptional and ordinary, always endemic to bureaucracies, which works to transform the particular into a case of a general type, is clearly evident in the Smith case. The cumulative weight of Inmate Smith's record begins to guide discretionary decisions to pre-emptively limit her potential to cause problems for the institution. As noted above, Inmate Smith is labeled "high needs", is assigned a maximum-security designation and, largely pre-emptively, consigned to segregation status. During the Inmate Smith period, while official documents label and code her like many others, it is obvious from the volume of documents generated that containment of Inmate Smith is proving resource intensive. Incidents involving her are triggering requirements for production of thousands of reports by front line staff, which are then circulated to management. From May to October 2007, according to Sapers, Inmate Smith is mentioned in "hundreds" of daily CSC reports called "SITREPS," 22 of which mention repeated ligature-tying and self-harming incidents.<sup>49</sup>

### C. "Terminal" Inmate

By late 2006 or early 2007, in the theoretical framework of necropolitics, Inmate Smith can be understood as a "terminal" inmate; alternatively, on Agamben's formulation, she can be understood as banned or *homo sacer*. She has been dehumanized into someone who is, in many respects, socially and juridically already dead. Micro definitions that

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<sup>48</sup> See e.g. Joan Martel, "Telling the Story: A Study in the Segregation of Women Prisoners" (2001) 28:1 *Social Justice* 196. See also Kelly Hannah-Moffat, "Gendering Risk at What Cost: Negotiations of Gender and Risk in Canadian Women's Prisons" (2004) 14:2 *Feminism & Psychology* at 243.

<sup>49</sup> "Risky Business", *supra* note 24 at 20.

constitute her banal physicality and survival behaviours as well as her resistances as “incidents” and responses by guards as “uses of force” produce Inmate Smith’s status as a terminal inmate. There is a great deal of continuity between the youth and adult systems in respect of how the systems coded, made sense of, and responded to, Smith’s conduct. Just as YP Smith had accumulated hundreds of incident reports and criminal charges in youth custody, so did Inmate Smith attract hundreds of incident reports and scores of new charges. As before, records of these incidents rarely (if ever) reference her harming others but rather involve defiance, self-harm or general unruliness that would not be considered criminal if undertaken by an actor not already framed as a carceral subject. Over the 11.5 months Smith was held in the adult system, “[she] was involved in approximately 150 security incidents, many which revolved around her self-harming behaviours”, which consisted of “superficially cutting herself, head-banging or, most frequently, fashioning a ligature out of material and then tying it around her neck.”<sup>50</sup> The construction of her basic survival behaviours as new disciplinary incidents is a denial of Inmate Smith’s autonomous existence, and a relentless erosion of her bodily integrity.

A difference between the Inmate Smith and YP Smith periods is that the youth system, perhaps because it had the benefit of recourse to the “safety valve” of the ability to transfer Smith to adult custody, did not seem to struggle as much with how to contend with her. In contrast, the adult correctional system quite rapidly spun out: it is evident that the cumulative weight of disciplinary infractions incurred by Inmate Smith in adult CSC custody began to exhaust guards and the system itself. Mandatory compliance with general systemic rules by guards was producing a totalizing regime of surveillance and of containment. While reconfiguration of Inmate Smith as an adult took place at a discrete moment in October 2006, there was continuity in the totalizing paradigm of surveillance in which she was enmeshed through her time in youth corrections to her time as an adult inmate.

Official documents from the Inmate period of the Smith case show the day-to-day conditions in correctional institutions to contain messy enactments of struggles between local and systemic power hierarchies. During this period, it is evident in official texts that Ashley Smith is successfully frustrating attempts by front line staff and management to

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<sup>50</sup> Correctional Investigator of Canada, *A Preventable Death*, by Howard Sapers (20 June 2008) at 5 [*Preventable Death*].



manage her. There is also an institutional struggle between front line CSC guards, the management of particular institutions, and central CSC management about how to deal with Inmate Smith.

Clearly, Inmate Smith was exhausting system resources. In 11.5 months in Federal CSC Custody, Inmate Smith was moved 17 times amongst three federal penitentiaries, two treatment facilities, two external hospitals, and one provincial correctional facility. According to Sapers, “nine of the ...17 moves of Ms. Smith were institutional transfers that occurred across four of the five CSC regions. The majority of these institutional transfers occurred in order to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ms. Smith’s needs.”<sup>51</sup> The series of transfers between CSC and mental health institutions reveals a sequence of security-based attempts to exclude Inmate Smith from the jurisdictions and concerns of institutions. Further, it reveals messy interaction between, and overlap of, disjointed bureaucracies within CSC. It sheds light on the bureaucratic workings of local institutions in various regions of Canada as well as CSC’s centralized national management. Different units within CSC were evidently trying to divest themselves of the problems, costs, and exhaustion caused by this troublesome inmate.

The sheer geographic range of these transfers is in part produced because Inmate Smith is female and there are few facilities available for woman inmates. Her gender therefore is engaged in the processes that compound the effect of necropolitical actions that bring about her social death. Far from her home and family in Moncton, Inmate Smith becomes unrooted and banned, losing her social identity. At a practical level, these transfers result in the impracticality of Inmate Smith having any visitors, visitors who in turn could have acted as non-expert advocates on her behalf or witnesses to her struggles. More abstractly, they produce Inmate Smith as politically locationless, eroding her membership in any form of community. Indeed, they produce Ashley Smith for the bureaucratic CSC systems in which she is enmeshed, as a fetish object, unmoored from her index offence, origins, or identity outside of prison. These transfers can also be analytically understood as seventeen *unsuccessful* attempts by various entities within the correctional system to divest themselves and the system of the management woes Inmate Smith’s presence is causing.

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<sup>51</sup> “Risky Business”, *supra* note 24.

Under CSC's "woman-centred approach", as one of few woman inmates, Inmate Smith is inherently problematic and a drain on resources for CSC from the beginning of her incarceration. Women are vastly more expensive to hold in prison than men, and mundane aspects of their incarceration are made more bureaucratically complex by rules crafted to protect women from abuse. Inmate Smith's most banal physicality: her menstrual cycles, her need for female undergarments, her large physical size (itself discordant with the stereotypically diminutive stature expected of women) are challenging for CSC to address. Inmate Smith fits neither stereotypical expectations of inmates, nor of women, and is in consequence difficult for the prison system to manage as an "offender", and for a variety of actors to imagine as a "victim" or person to protect.

Definition, classification and coding of Inmate Smith involved many interpretive moments. Inmate Smith is assigned a Maximum Security designation. She is sub-categorized as a "high risk female inmate", or a "high risk female offender." The deployment of this categorization profoundly affects the manner in which she is governed. Descriptions of Inmate Smith sometimes refer generally to her lengthy record but more often to her riskiness; they rarely if ever mention the crimes for which she was originally incarcerated. Also left unstated, and unclear, is to whom or what she poses a risk. Codes and charges assigned to various "incidents" obscure the banal triviality of the acts involved. As was the case while she was in youth custody; examples of the trivial incidents giving rise to charges are legion. The accumulation of her charges in youth custody and incident reports in adult custody involved daily, moment-to-moment microprocesses of governance in the interpretations and discretionary behaviours by guards. Equally, the weight of these texts, once amassed in large numbers as a record, in turn shapes the discretion of guards, who seek to act pre-emptively to prevent Inmate Smith from breaching the security of the institutional population.

As in the YP Smith period, it is in application and invocation of a complex web of legislative, regulatory, and administrative details through official texts that the official story of Inmate Smith takes shape. The CCRA formally governs how CSC officials deal with "incidents" arising and "offences" committed, in prison. In principle, this Act is focused on managing risks posed by inmates to one another and to the broader community. What measures are necessary and proportionate depends on whether an inmate is considered by prison officials to be a safety threat to themselves or others, making risk management the Act's primary objective.

The risk rationality in which the CCRA was steeped at the time of the Smith case has been further entrenched in statutory drafting in the years since her death. In addition, section 87 of the CCRA requires that all decisions (including transfer decisions) taken by the Correctional Service consider the health status of an inmate.

Subordinate official texts, such as regulations, guidelines, directives, and “management models” guide how bureaucrats are to interpret and implement the legislative regimes set out in the statutory laws. These regulatory texts are meant to be interpreted and applied in a manner consistent with the statutes. Relevant regulatory texts include the Corrections and Conditional Release Regulations, as well as several CSC Commissioner’s Directives concerning “uses of force”, and SITREPS – Situation Reports, which are circulated to all managers throughout the organization. These SITREPS are of great importance to the case because, according to Sapers, Inmate Smith figured prominently almost daily.<sup>52</sup> Another key instance of official representation of Inmate Smith is that of “offender Ashley Smith” in the CSC Response to the Office of the Correctional Investigator’s Deaths in Custody Study.

Management of Inmate Smith, and other woman inmates, is done under CSC’s Situation Management Model (SMM). There is a textual gap between the categories available to assign to Ashley Smith and actual assignment of her to categories. Semantic indeterminacy is evident despite the felt boundness of guards by the formal legal tests in place. Even where guards feel they have no choice but to take particular actions in relation to Inmate Smith, it is they who “sign off” on the orders. Their discretion is involved. CSC officials in various levels of management positions as well as police and judges in a myriad of moments in incidents and charges in the Smith case exercise judgment. For example, the decision to transfer YP Smith to adult custody was a discretionary judicial determination. Charges for assaulting a peace officer were laid against Inmate Smith after altercations with guards when she refused to disrobe or leave a room were defined as “incidents” by interpretive judgment exercised by staff. Framing of her resistance to being brought to court to face charges on several occasions, as assaults on police officers and security incidents were also judgment calls. Finally, every time a judge found her guilty of new criminal

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<sup>52</sup> *Preventable Death*, *supra* note 50.

charges, the guilty finding and the sentence were both contingent on the judge's discretion within legal limits.

Solitary confinement cells in Canadian custodial facilities are given a variety of names, none of which refer to discipline or punishment of the inmate. The same geography of limited space (a small room with no windows and few items of furniture or amenities) is used to contain inmates in solitary confinement or segregation in Grand Valley Institution, in the Saskatoon Regional Psychiatric Centre, the Young Offenders Centre in New Brunswick, as well as all of the other institutions in which Ashley Smith was held in her time in custody. These small, locked rooms are referred to euphemistically as "administrative segregation," "observation cells", and "therapeutic quiet." All of these terms actually mean the same thing; to ensure security and management of risks, the same logic is applied and the same rooms, the same death spaces, are used to hold solitarily inmates who have been disruptive as are used for those on suicide watch.

While maximum security is understood colloquially to refer to a person's dangerousness, the determination by bureaucrats as to whether a subject should be labeled maximum-security is, according to the tests set out in applicable regulations, made in reference to the risks they pose. This determination is made pre-emptively. It need not refer to a past event. The decision whether to code an inmate "Maximum Security" involves a discretionary process. The stated aim of this classification is "to provide the safest and least restrictive environment possible." Federally sentenced female offenders are to be classified and housed in environments that are commensurate with their assigned security designation. Longstanding concerns have been repeatedly raised about the overuse of the maximum security designation and solitary confinement against woman inmates, and are identified in the 1996 Arbour Report as systemic "shortcomings... of the most serious nature."<sup>53</sup>

CDA reveals that both Inmate Smith's maximum security classification and her relegation to solitary confinement are official designations that are not what they seem. While they sound like references to dangerousness on her part, they actually reframe her "high needs" as institutional risks. CSC has acknowledged, but rejects, the critique that the 'maximum-security' designation is applied inequitably to women, over-estimating the risks they

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<sup>53</sup> Solicitor General Canada, *Commission of Inquiry into certain events at the Prison for Women in Kingston*, (Ottawa: Public Works and Government Services Canada, 1996) [*Commission of Inquiry*].

pose and imposing unnecessary restrictions. In response to this critique, a CSC study examined the question of gender differences in security classification by comparing maximum-security female to maximum-security male offenders.<sup>54</sup> This study did not find significant gender differences in the use of maximum security designations, but it did find that the assignment of risk could be assessed based on “suicide potential”, that woman inmates were more likely to have “high needs” and that “high needs” inmates were more likely to be understood as “high risk”, especially if they showed “suicide potential.”<sup>55</sup>

The logics of security and risk that lead to Inmate Smith’s designation as dangerous are self-confirming. System actors mobilize certain logics when exercising their discretionary judgment. CSC culture and policies produce certain discursive conventions. These texts are written in a particular language, referring to pre-existing policies and procedures, with specific forms of coding and risk assessment that are prescribed by CSC conventions. It is not just the formal legal texts but also the cultural practices of actors that constitute conditions of possibility at the meso-level of analysis. The controlling discursive paradigm of the SITREP reports about Inmate Smith is risk rationality that focuses on minimizing potential “bads” or harms by containing security threats posed by inmates. The paradox of Smith’s agency being contained within a frame of offending trapped her into deeper and deeper enmeshment in closer and closer regulation of her every move.

Solitary confinement, forced injections, thousands of daily reports of new incidents, and hundreds of frequent charges imposed on Inmate Smith by this time are not just a simple risk management strategy. They are more. Together, they construct what Agamben describes as the “ban”, a continuing and definite exclusion of the carceral subject from community, an exclusion even amongst the excluded: the removal of the carceral subject from bios (social existence) within the prison population and its relegation

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<sup>54</sup> Correctional Service Canada, “Maximum-security Female and Male Federal Offenders: A Comparison”, by Kelley Blanchette & Lawrence Motiuk, Catalogue No PS83-3/53E-PDF (Ottawa: Correctional Services Canada, March 1997) <online: [http://publications.gc.ca/collections/collection\\_2010/scc-csc/PS83-3-53-eng.pdf](http://publications.gc.ca/collections/collection_2010/scc-csc/PS83-3-53-eng.pdf)>.

<sup>55</sup> *Ibid.*

to zoe or “bare life.”<sup>56</sup> In keeping with its commitment to security through risk rationality, the CCRA specifically provides for solitary confinement.

Analysis of the video of Inmate Smith’s biological death reveals at the micro-level in the moment of her death how the judgment of front line staff was paralyzed by orders from management and ultimately by security logic. This footage, which CSC fought hard to suppress,<sup>57</sup> depicts the death of Inmate Smith while several front line guards stood watching. It is scrupulously recorded with a time signature running on the film; the video recording starts at 6:45 AM on October 19, 2007. Testimony at the inquest indicates that guards had gathered outside Smith’s cell for at least 10 minutes prior to starting the videotape.<sup>58</sup> When the film begins, Inmate Smith is lying in a small corner of floorspace in her solitary cell, between the bed and the wall. Smith is positioned face down, gasping for breath, from asphyxiation by the ligature she had tied around her neck. It is certain from the footage that at least four guards (and at times five in addition to the one holding the camera) are gathered, standing continuously at the door to Inmate Smith’s cell for at least 10 minutes with the camera rolling. What they ostensibly do not know is that they are watching her die. The guards’ surveillance and inaction continue even while the gasping stops and Inmate Smith’s face turns visibly blue. They do enter the cell several times but do not assist her or remove the ligature from her neck for at least 10 minutes.

Narrative comments by guards that accompany the video footage taken while Inmate Smith lies dying consist of impersonal, matter of fact comments directed to Ashley Smith such as “[i]t’s been long enough. You need to take that off” and, calmly, without emotion: “Ashley” and hushed reassurances to one another such as “we don’t have to do anything.”<sup>59</sup> These comments are easily comprehensible as guards’ enactments of the behaviours they have been instructed to display. Perhaps they are also reminders by the guards to themselves or for posterity of prior directives not to intervene made by the managers who are the expected audience of the

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<sup>56</sup> Agamben, *supra* note 16.

<sup>57</sup> In the series of motions discussed in the introduction to this article. See e.g. *Smith v Porter*, 2011 ONSC 2593, [2011] OJ No 1900; see also *Smith v Porter (Judicial Review)* 2011 ONSC 2844, 106 OR (3d) 254.

<sup>58</sup> CBC, “Behind the Wall” (12 November 2010), online: The Fifth Estate <<http://www.cbc.ca/fifth/episodes/2010-2011/behind-the-wall>> [CBC].

<sup>59</sup> *Ibid.*

video. The guards' attention to their audience calls attention to the subject position they occupy, a position not dissimilar to that of Inmate Smith. They are confined by a set of rules, closely surveilled but not assisted, by several higher levels of CSC management. This video, understood as a text produced under certain conditions with certain purposes is like a hall of mirrors. It presents an ominous enactment of a response to the question "who watches the watchers?"<sup>60</sup> and also to Coralee Smith's parting question aired at the end of the "Behind the Wall" documentary: "who gave that order [not to intervene]?" This reading of the video suggests that while an order was, in one sense, given by a particular bureaucrat, in turn, this bureaucrat was only one in a series of reflected images of authority that together make up a mirror maze where no agent is reachable, tangible or responsible.

Certainly, one individual, quite probably the Acting Warden, gave that order. However, it was given in the context of the widespread notoriety of Smith's case throughout the CSC management, and may very likely have been officially given by an authority figure who was not its originator. It is entirely plausible that a meeting of management lead to a consensus position ordering the official "orderer" to make the order. Alternatively, it is also plausible that the order resulted from informal pressure, or was a single actor's idea at a particular time. CSC has been manifestly resistant to releasing any records of what went on in this regard. The murky opaqueness of CSC's bureaucracies, and the apparent shady lack of co-ordination and accountability make the question of which individual functionary within it to blame unsolvable and its answer unsatisfactory. Certainly, there are actors who are more personally blameworthy than others for her death. However, my argument is that searching for them and finding someone to blame, or scapegoat, for that order, while it might be worthwhile, will not in itself produce change. Regardless of who actually gave the order, it was made not just possible but predictable in a rationalized bureaucracy and budget cycle guiding that bureaucrat as much as it did the guards, and anyone involved in the criminal and carceral institutions in which Inmate Smith was confined, by everyone and no one in particular.

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<sup>60</sup> "Who watches the watchers?" or "Who watches the watchmen" *Quis custodiet ipsos custodes?* is a Latin phrase generally first attributed to the Satires of Roman poet Juvenal (Satire VI, lines 347-8).

The tenor of the guards' comments changes about 12:00 minutes into the video when they enter into the cell a second time and begin CPR. One cries out that she is inadequately trained for the task, swearing and saying she has not had CPR training for 11 years. The institution is scrupulous about recording of all that transpires but not, has not, clearly, paid comparable attention to preparing staff to help in emergencies. Emergency workers arrive at 7:10 AM and take over chest compressions. The 25 minutes depicted in the video are a microcosm of what happened in Inmate Smith's carceral life every day: surveillance, inaction, no assistance, avoidance. By the time the recording stops, Inmate Smith is dead.<sup>61</sup>

#### **D. Inmate Smith and *Macro Power* – Power and Potential**

As a technology of power, the official Inmate Smith figuration legitimates means of governance focused almost exclusively on containment and security. Discursive work done by the figure obfuscates the underlying incidents giving rise to her “maximum security” designation and make invisible the escalating pattern of a series of minor infractions and are deployed to characterize Inmate Smith as risky. The response deemed most appropriate to Smith's conduct in the context of her construction as risky would consist of increased containment and isolation. When transferred to CSC custody, Inmate Smith was constructed as risky on the basis of her youth corrections file, meaning that the high risk Inmate Smith construction preceded all reports and charges made about her while she was in CSC custody. The cumulative effect of these legislative and regulatory categories was to produce a weight of institutional discourse that constructed Inmate Smith as a dangerous person in need of containment. Inmate Smith is a figure on which hundreds of further incident reports and charges laid in Corrections custody were based. Security protocols were enacted as responses to refusals to comply by a featureless/ blank inmate with no appreciation for her particularity. The figure of the dangerous inmate in need of containment for security reasons supports regimes of rigid enforcement of rules against such an excluded and unmanageable being.

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<sup>61</sup> Much has been said about the usefulness of this video to the Smith Inquest and to the publicization of her case. Although it was mandatorily produced by CSC, massive efforts were undertaken to suppress it. Video footage of Ashley Smith's death is similar in this way to other official representations of her: they bear numerous interpretations and articulations and their uses are not easily predictable.



While it emerges from, and is articulated in, official documents that reinforce the internal logic of the correctional system, the figure of Inmate Smith is not inevitably deployed in support of maintenance of the correctional system and institutional status quo. After the death of Ashley Smith, representations that coalesce into substantially the same figure of Inmate Smith are also prominent in critiques of the correctional system. For instance, Sapers critiques the “governance model for women’s corrections” in place in CSC by mobilizing the representation of Ashley Smith as an inmate. Sapers identifies problems which led to the death of Inmate Smith as “a preventable culmination of several individual and system failures within the Correctional Service of Canada. These failures are symptoms of serious problems previously identified within Canada’s Federal Correctional system and are not applicable only to Ms. Smith.”<sup>62</sup>

In this understanding, the Smith case is broadly relevant: what happens to Inmate Smith is a generalizable case of what might happen to any female inmate, and perhaps even any inmate, who becomes unmanageable in CSC’s “care and custody.” The patterns in treatment of offenders revealed by analysis of the Inmate Smith figure has the potential to confront clusters and structures of macro power and to question, and even refute, logics that Sapers has argued, both in advance of and in response to the inquest verdict, need to be changed. A March 2014 post on left-leaning independent news website Truth-out.org, for example, uses the Inmate Smith figure to bolster a claim that “solitary confinement becomes the perfect metaphor for the neo-liberal subject.”<sup>63</sup>

The figure of Inmate Smith raises questions about the necropolitical operations of interlocking logics of exclusion and risk in the juridical field in their production of the juridical exclusions and legal deaths of inmates. These questions are broadly relevant to public policy about criminal law, administration of correctional systems, and youth criminal justice systems in Canada.

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<sup>62</sup> *Preventable Death*, *supra* note 50.

<sup>63</sup> Stuart J Murray & Dave Holmes, “A New Form of Homicide in Canada’s Prisons: The Case of Ashley Smith”, *truth-out.org* (10 March 2014) online: <<http://www.truth-out.org/news/item/22321-a-new-form-of-homicide-in-canadas-prisons-the-case-of-ashley-smith>>.

## IV. INMATES IN THE CANADIAN PRISON CONTEXT

The figure of Inmate Smith can be deployed as a case that illustrates dangers of risk and security logic and reveals evils routinely perpetrated by a rationalized bureaucracy. While the Smith case has become uniquely celebrated, Ashley Smith's incarceration was, in many respects, not unusual. Inmate Smith is an exemplar of a type of which there are many. In 2012-2013 there were 41,049 offenders, both adults and youth, in custody on an average day.<sup>64</sup> Per capita, is a rate of 118 persons in custody per 100,000 people in Canada's general population.<sup>65</sup> With the growth in mandatory minimum sentences, and the overall inclination of the prior government to get "tough on crime," incarceration rates<sup>66</sup> (not crime rates) are at an all-time high in Canada. While Canada's change in Federal governments in 2015 may result ultimately in a change in circumstances, this change, while promised, in large part has not yet happened, and predictions made in recent years indicated that these numbers may be in the process of increasing.<sup>67</sup>

Deaths of woman inmates in prison in Canada are repetitive touchstones in a long history of inattention, a broad, consistent trend with recurring similarities. Necropolitical theorization provides new language for understanding what is consistent about the patterns in the mistreatment of these inmates, and provides a way to re-read these cases as exemplars of the same general phenomenon.

The necropolitical exclusion experienced by Inmate Smith in custody bears significant similarities to recurring incidents relating to women in Canada's prisons. Concerns about Ashley Smith's treatment echo longstanding criticisms about treatment of inmates, especially woman inmates, in this country. Events giving rise to the inquiry into the 1994 incidents at Kingston's Prison for Women are similar to details of the Smith

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<sup>64</sup> Statistics Canada, "Correctional service key indicators, 2012/2013", by Samuel Perreault (Ottawa: Statistics Canada, 2014).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Office of the Correctional Investigator of Canada, *A Three Year Review of Federal Inmate Suicides (2011-2014) Final Report*, (Ottawa: Office of Correctional Investigator, 10 September 2014) online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20140910-eng.aspx>>.

case.<sup>68</sup> Inmate Smith should be understood in the context of the culture of risk logics implicated in disregard of disruptive inmates, especially women.<sup>69</sup> This context is well-described in existing literatures. The long history of willful disregard for woman inmates in Canada is well-documented.<sup>70</sup> Concerns have been repeatedly raised about the overuse of the maximum security designation and solitary confinement against woman inmates. These concerns are identified in the 1996 Arbour Report as reflecting a culture of lawlessness in prisons manifested in systemic “shortcomings... of the most serious nature.”<sup>71</sup> Similar concerns are identified in the 2006 Human Rights Complaint by the Canadian Association of Elizabeth Fry Societies, which referenced a wide range of human rights abuses, including holding women in security conditions much more stringent than warranted and failing to meet women inmates’ basic health, cultural, and educational needs.<sup>72</sup> The willful neglect and disregard of woman inmates in Canada’s prisons is also exemplified by the cases of Marlene Moore,<sup>73</sup> Lisa Neve,<sup>74</sup> Julie Bilotta,<sup>75</sup> and Dorothy Proctor.<sup>76</sup>

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<sup>68</sup> *Commission of Inquiry*, *supra* note 53.

<sup>69</sup> Kelly Hannah-Moffat & Carolyn Yule, “Gaining Insight, Changing Attitudes and Managing ‘Risk’: Parole Release Decisions for Women Convicted of Violent Crimes” (2011) 13:2 *Punishment & Society* 149 [Hannah-Moffat & Yule].

<sup>70</sup> See Ellen Adelberg & Claudia Currie, eds, *Too Few to Count: Canadian Women in Conflict with the Law*, (Vancouver: Press Gang Publishers, 1987); Hannah-Moffat & Yule, *supra* note 69.

<sup>71</sup> *Commission Inquiry*, *supra* note 53 at 7.

<sup>72</sup> Sunny Marriner & Dawn Moore, “Women’s Imprisonment: How Getting Better is Getting Worse” in D Jones, ed, *Humane Prisons* (Oxford: Radcliffe, 2006).

<sup>73</sup> Marlene Moore was Canada’s first female offender declared a “dangerous offender.” She died by suicide in prison in 1988. For discussion see Anne Kershaw & Mary Lasovich, *Rock-a-bye Baby: A Death Behind Bars* (Toronto: Oxford University Press, 1991).

<sup>74</sup> Who was declared a dangerous offender in 1994 after committing a series of minor crimes, a designation later overturned on appeal. Matthew Yeagar, “Ideology and Dangerousness: The Case of Lisa Colleen Neve” (2000) 9:1 *Critical Criminology* 9.

<sup>75</sup> Julie Bilotta gave birth by a breech birth in an Ottawa solitary confinement prison cell in 2012. The baby later died. Andrew Seymour, “Woman Who Gave Birth at Ottawa Jail Files \$1.3M Lawsuit”, *Ottawa Citizen* (23 September 2014), online: <<http://ottawacitizen.com/news/local-news/woman-who-gave-birth-at-ottawa-jail-files-1-3m-lawsuit>>.

<sup>76</sup> Dorothy Proctor & Fred Rosen, *Chameleon: the lives of Dorothy Proctor* (Far Hills, NJ):

Further, while her gender is significant, aspects of Ashley Smith's death bear similarities to persistent patterns in prisons. Segregation of inmates in forms of isolation has a long history of overuse in inmates in both the United States and Canada.<sup>77</sup> Deaths of inmates in Corrections custody are not unexpected; suicide and failures to respond to medical emergencies have, since the opening of Canada's prisons, been leading causes of inmate death. A study of deaths in CSC custody between 2001 - 2005 found that the majority of these were ruled suicides by CSC and also, that inmates commit suicide at 8 times the rate of the general population. Failures to administer CPR regularly recur along with persistent delays in seeking and obtaining health care support. These patterns predate the Smith case and continue after it. Illustratively, between the time that Ashley Smith died and the first inquest into her death commenced, between 2007 and 2010, another 130 inmates died in Federal Custody.<sup>78</sup>

## V. CONCLUSION

There are many possible ways to tell stories about Ashley Smith, and each narrative that could be told would, as I have argued in this article, involve selective processes in its telling and silences that make it into fiction. This article has discussed how CDA of the Inmate Smith figure as deployed in the official record of Ashley Smith allows understanding to go beyond the narrow question of how she died in prison on October 19, 2007 to ask broader questions about how she *came to* die there. It reveals the ways in which Inmate Smith was configured as socially and political dead long before her biological death. Understanding Ashley Smith as a case of the general type "inmate" through analysis of the figure of Inmate Smith that coalesces from a variety of texts in the case opens up potential for her

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New Horizon Press, 1994). It is salient to the theorization presented in this article that treatment of woman prisoners is necropolitical that Dorothy Proctor repeatedly characterizes herself as a "throwaway".

<sup>77</sup> Lisa Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483.

<sup>78</sup> Office of the Correctional Investigator, "Final Assessment of the Correctional Service of Canada's Response to Deaths in Custody", (Ottawa: Office of Correctional Investigator, 8 September 2010) online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20100908-eng.aspx>>.

example to be deployed in public debates about the interlocking utilitarian rationalities of risk and the logic of exception.

Progressive politics have instrumentalized the figure of Inmate Smith in opposition to prolonged use of solitary confinement in prisons. I do not disagree with the need to change how solitary confinement is used. Indeed, one of the voices raised in this activism has been my own. However, violences and wrongs done to Ashley Smith by social and educational institutions,<sup>79</sup> mental health facilities and prisons, do not start and end with isolation: she was tasered; she was pepper sprayed; she was beaten; she was tortured by confinement for long periods of time in “restraints”; she was given forced injections; she was drugged against her will in ways not supported by any diagnosis; her human rights and needs for basic necessities were ignored; she was touched, beaten, confined, and denied clothing in ways that would have, anywhere but here in her carceral context, been understood as sexual assaults; her sexual agency and autonomy were effaced.

An analysis of Inmate Smith offers a haunting reply to Ashley Smith’s mother Coralee at the end of “Behind the Wall” when she asks, “who gave that order, Hana?”<sup>80</sup> in reference to the non-intervention order that absolved the front line CSC staff from criminal charges. CDA reveals not a single order that killed Ashley Smith but a series of thousands of actions, inactions, decisions, and orders by a large number of actors in the youth justice, probation, education, adult justice, youth, and adult correctional systems that led to Ashley Smith’s social, legal, and biological deaths. This does not absolve individual actors in the CSC bureaucracy from accountability. Rather, it situates their actions and inaction in a context of systems of power that implicate many others in Ashley Smith’s death. Indeed, as a technology of governance, the discursive figure of Inmate Smith has powerful potential to implicate – and incite action by – us all.

When Agamben’s concept of *homo sacer*, Mbembe’s formulation of necropolitics,<sup>81</sup> and Ong’s understanding of the carceral subject in solitary confinement as the archetypal neoliberal subject<sup>82</sup> are considered, the

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<sup>79</sup> Bromwich, *supra* note 6.

<sup>80</sup> CBC, *supra* note 58.

<sup>81</sup> Mbembe, *supra* note 17.

<sup>82</sup> Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Durham, NC: Duke University Press, 2006).

caseness of Inmate Smith opens up: it reveals her as a case of a type of which we are part. The inquest verdict of homicide in the Smith Case, rendered even after CSC counsel contended a homicide verdict was unavailable and unthinkable, is a marked break from the usual pattern of inquests yielding findings that responsabilize inmates for their own deaths documented by Sherene Razack.<sup>83</sup>

The homicide verdict opens up questions about who is responsible for the lives of inmates, and interrogates violences perpetrated by the state and state actors. The verdict's assertion that inmates *can* be killed in Corrections custody in circumstances for which CSC is blameworthy is broadly relevant if read as a rejection of an inmate's logic-of-exception status as juridically dead already. This inquest verdict could be construed as a rejection of the assumption that Smith was *homo sacer*, of the logic of exception, of governing through crime and camps, and a condemnation of the monstrosity of CSC's rationalized bureaucratic logic. As is suggested by the 2015 Ministerial Mandate letter, the figure of Inmate Smith may yet be effectively deployed to confront the operating logics of risk and exclusion; it may be used towards making it imaginable to write another ending to the story, where the mirrors of surveillance reflecting in on each other are shattered and the inmate - the one in carceral solitary confinement, and also the neoliberal subject in general - is (more) free.

By law, the focus of the inquest in the Smith case was limited to the 11 months she spent in federal custody. However, without absolving CSC for responsibility in her death, it is clear from this analysis that much of what went wrong in the Smith case reveals problems with how she got there. A series of social, political, and juridical exclusions that were effectively forms of death are as much a part of the story of what led to the homicide of Ashley Smith as is solitary confinement. CDA of constructions of Inmate Smith in Ashley Smith's case reveals problems within the justice and correctional system generally, and solitary confinement in particular, that have not yet been remedied, and will not be corrected by small tweaks to ways, in which a tiny subset of offenders, however defined, is dealt with. On this analysis, the Smith case speaks to not just a need for change to the treatment of a small subset of mentally ill/female/youthful offenders in a narrow range of exceptional circumstances but rather to revolutionary

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<sup>83</sup> Sherene Razack, *Dying From Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015).

change in how the correctional and the criminal justice systems in Canada are performed and conceived.

