

Re: Reading Ashley Smith:

*Critically Unpacking Government by Discursive Figures of Ashley as Girl Produced in the Smith
Case*

By

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Abstract

In this dissertation, I explore how Ashley Smith has become socially understood as a “case.” I perform a critical discourse analysis of figures of Ashley Smith as technologies of governance. I argue that the Smith case ought not to be read as a case of anomalous system failure but as an extreme, but foreseeable, result of the routine and everyday brutality of a society and bureaucracies’ necropolitical security apparatus. I map a chronological trajectory in which the “official story” of Inmate Smith gives way through the process of celebrityization and sacralization of “Child Ashley” to a widely accepted understanding of Ashley Smith as a mislocated mental health subject: “Patient Smith.” This analysis reveals that seeming progressive turn to understanding her as a victim of a failed system of mental health leaves intact, and even reinforces, logics and systems of gender, security, risk, race thinking and exclusion that make her death and the death of other prisoners predictable. I demonstrate how the logics of risk, mental health and legal discourses in the juridical field intersected with discourses of the girl in ways that made alternative readings and Ashley Smith’s own narration of her story illegible and unwritable. Further, I argue that certain operating logics predetermine the labeling of properly constituted adolescent girls’ noncompliance as madness and adolescent boys’ noncompliance as criminality. This analysis further calls into question the foundations of the statistical discrepancy between criminal charge rates for adolescent boys and girls. This dissertation seeks to intervene in these intersecting governmental logics that write “girls in trouble with the law” in particularly damaging ways.

Acknowledgements

Acknowledgements

Writing is a conversation with life.

-Julia Cameron *The Artist's Way*

I dedicate this dissertation to the ghosts who were with me as I wrote it. First, to my much missed friend Deb Shelly because, and she would smile to read this, friendship is magic. She was my longtime colleague in the law, friend in life, and partner in what she called “intellectual fierceness”. Had she not passed away while I was writing this dissertation, Deb would have made good on her offer to read it. She would have understood it and no doubt had some excellent criticisms of it. I also dedicate this to Mary Jo Frug and Ardeth Wood, feminist academics I wish I had met and whose work is missed by the world. Also, I dedicate this to the adolescent girl I once was, whose ghostly presence was with me throughout this work.

And, of course, finally, and most importantly, I dedicate this dissertation to Ashley Smith.

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Finally, I think it is important politically and pedagogically to direct an anonymous nod to all the folks who said I wouldn't finish high school and couldn't write a PhD dissertation. In addition to those who supported and believed in me, it is also those who did not that I have to thank for revitalizing my rebellious spirit and inciting anger I could alchemize into this work. Thinking of all of those who are not as well-supported, well-resourced and lucky as me, I feel I should mention you. May this work be taken as evidence that many people can do what they have been told they are not capable of doing, and what the statistical odds are ostensibly against them doing, and may it encourage others to speak, read, and write.

This is what you shall do: Love the earth and sun and the animals, despise riches, give alms to every one that asks, stand up for the stupid and crazy, devote your income and labor to others, hate tyrants, argue not concerning God, have patience and indulgence toward the people, take off your hat to nothing known or unknown or to any man or number of men, go freely with powerful uneducated persons and with the young and with the mothers of families, read these leaves in the open air every season of every year of your life, re examine all you have been told at school or church or in any book, dismiss whatever insults your own soul, and your very flesh shall be a great poem.

- *Preface to Leaves of Grass*: - Walt Whitman, 1855

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List of Acronyms

ADHD	Attention Deficit Hyperactive Disorder
BPD	Borderline Personality Disorder
CAEFS	Canadian Association of Elizabeth Fry Societies
CBC	Canadian Broadcasting Corporation
CCRA	Corrections and Conditional Release Act
CDA	Critical Discourse Analysis
FASD	Fetal Alcohol Spectrum Disorder
CSC	Corrections Canada
GVI	Grand Valley Institution
JDA	Juvenile Delinquents Act
MHA	Mental Health Act (Ontario)
NB	New Brunswick
NBYC	New Brunswick Youth Centre
RCMP	Royal Canadian Mounted Police
SITREPS	CSC Situation Reports, circulated throughout its administration
SMM	CSC Situation Management Model for Woman Offenders
WRAP	Restraint device used by CSC to entirely immobilize inmates
YCJA	Youth Criminal Justice Act
YP	Young Person (subject to processes of youth criminal justice regime)

I. The Project

“We still have Ashleys, we still have Ashleys being treated in the same tortuous, horrendous ways that Ashley was treated.”

- Coralee Smith, mother of Ashley Smith¹

"There's really no such thing as the 'voiceless.' There are only the deliberately silenced, or the preferably unheard"

- Arundhati Roy²

“eyes that fix you in a formulated phrase/ when I am pinned and wriggling on your wall/ then how should I begin?”

- T.S. Eliot³

“And you, what are you looking for?... I had the dream again. I was looking for something. I was at school, running through the hallways, my heart pounding, tearing up and down the stairs, looking for it: “I can't find the *meaning*; have you seen it?” I asked a group of people by the lockers outside my homeroom, who stared at me blankly. Woke up in a cold sweat.”

- Journal of Rebecca Jaremko, March 10, 1993

I.1 Telling Stories

Once upon a time, many years ago, I bought a typewriter. It became one of very few things I owned. I also owned a field hockey stick because I played on my high school team. That, my clothes, my winter coat and my journals, were about all I had put on or stuffed into plastic

¹ “Teen Ashley Smith Inquest Begins Today” MSN News(14 January 2013)

² Speech on accepting the Sydney Peace Prize, 2004.

³ “The Love Song of J. Alfred Prufrock” 1920.

garbage bags and carried off. I hadn't remembered to take a toothbrush but by then I had bought one. It was winter in Calgary, -30, cold enough to take your breath away, so cold there was no point in crying because tears would just freeze on my face. I had ridden the C-Train to Value Village, about an hour's trip each way, and walked several blocks through blowing dry prairie snow carrying that small black ancient typewriter back to the train. It cost all of my money: \$15. I bought it and then I stole food.

I had a plan. I bought a typewriter so I could tell my story. I wanted to tell a story about my interactions with health, child welfare, education, family and criminal legal systems and how angry I was about them, how disappointed I was in everyone. In a dark rented basement room, hunched over that typewriter with my field hockey stick near me for protection against any possible intruders, clothes folded on the floor as I had no hangers, at sixteen I promised to write. I clacked away, hammering out the first pages that I promised myself would be a transformative story about what it was like to be limited, restrained and oppressed as an adolescent girl in Canada. It was slow going. Every time I typed an "a" I had to pull the key back up.

There are a lot of years between the writing of this dissertation and that promise. I have tried to fulfill it in a number of ways. I became a lawyer to large extent to remedy what I experienced and perceived as injustice. I did criminal defense work and represented young mothers in child protection and domestic violence proceedings. Now, I do law reform work, attempting to make changes to the formal discourses of legislative and regulatory provisions. When I did my LL.M., I was actively involved (in a very junior capacity) in advocacy accepted in the crafting of Canada's *Youth Criminal Justice Act* (YCJA) in 2001.

I have a lot for which to be very grateful. I have a lot to be happy about. Many of the legislative changes I sought to include in the YCJA have been made. Now, ironically, I am, to a

very large extent, someone else: not an adolescent girl but the lawyer mother of three girls (and a boy) soon to enter adolescence. I can't really write the story I wanted to tell. I have the pages I wrote, somewhere. I don't know what became of that typewriter.

I am worried in light of recent cases and in particular the case of an adolescent girl who died in adult prison in 2007 named Ashley Smith, that the law reform work in which I have been engaged is not getting to the heart of the problems I experienced. Feminist legal theorists have contended that hegemonic discourses in late modern liberalism define and socialize adolescent young women as something less than we are: they move us from an experience of ourselves as agents to a relegation in a particular space defined by our relationships with men. I wonder how contemporary discursive figurations of the girl, how we talk about adolescent young women, continue to affect the agencies of variously situated adolescent young women in their experiences with criminal and quasi-criminal legality. Restlessly, I wonder how the conditions of possibility for young people in Canada could be transformed; I feel a sense of growing urgency as time passes; how might changes be effected before my own children enter adolescence?

Maybe I shouldn't be quite so literal in remembering my plan. Maybe the central question for me to consider is my longing, the longing that led me with my last few dollars to go to Value Village on the C- Train and walk those long cold blocks carrying the black typewriter back, enjoying seeing in my breath like smoke over it - a confirmation of my existence - my hands burning from the cold despite the gloves over them. More than anything else maybe what I felt was a desire to speak, to talk back, to have a role in authoring my own story, not just on paper but to actively, agentially, find and make meanings in, be involved in constructing and narrating my own life.

1.2 Defining the Project

“We now ask you to speak for Ashley”

-Dr. John Carlisle, Coroner for Ontario, Charge to the Jury in the Inquest of Ashley Smith, December 2, 2013⁴

Maya Angelou, in *I Know Why the Caged Bird Sings*, wrote that “there is no greater agony than bearing an untold story inside you.”⁵ Probably because, many years ago, when I was an adolescent girl, I myself was in a great deal of trouble with various systems, I was upset but unsurprised to learn that it was as a result of minor disciplinary infractions that she was found to have committed while in prison that Ashley Smith accumulated hundreds of criminal charges. However, what really struck me about Ashley Smith’s case is one fact in particular: shortly before her 2007 death at age nineteen in solitary confinement in Grand Valley Prison, guards took away her access to paper and a pen.⁶ Because she was thus divested of her ability to otherwise tell her story, I wondered upon finding this out whether it could be that Ashley Smith subsequently used self-harm, at least sometimes and partially, *meaningfully*, either as a form of communication or form of political resistance or both. I am troubled by the question of what Ashley Smith’s own story about her case might have been had she been accorded an opportunity to tell it, and what she might have contributed to authoring in dialogue with other systems, agents and forces in constructing her life had she been able to live it.

⁴ Perkel, Colin, “We Now Ask You to Speak for Ashley” *The Canadian Press* (2 December 2013)

<http://www.brandonsun.com/national/breaking-news/presiding-coroner-set-to-charge-ashley-smith-jury-as-inquest-draws-to-close--234035691.html?thx=y>

⁵ New York: Random House, 1969.

⁶ This is reported in various sources, including testimony at her inquest by Kim Pate, who, on behalf of the Elizabeth Fry Society, had to take a dictation of Ashley Smith’s grievance about her treatment. On September 24, 2007, Ashley was permitted nothing in her cell except her gown: see e.g. “Ashley Smith Looked Hopeless and Dejected, Inquest Hears” *Toronto Star* (October 15, 2013)

http://www.thestar.com/news/canada/2013/10/15/ashley_smith_looked_hopeless_and_dejected_inquest_hears.html This disciplinary confiscation of Ashley’s writing implements is nowhere denied and is also documented in the 2008 Report of the New Brunswick Ombudsman.

In this dissertation, I inquire into the questions of what Ashley Smith is a “case,” and what governmental work is done by prevalent constructions of her as an exemplar. The very first of the recommendations of jury in the verdict in the Inquest into the death of Ashley Smith is that her death be reviewed by Corrections Canada (CSC) management and staff and used as a “case study.”⁷ However, not a lot of energy is being expended on *asking*, not assuming, what exactly Ashley Smith is a “case” of. It doesn’t seem that the question of what Ashley might have wanted, let alone wanted to say, is particularly bothersome, or even thinkable, for experts engaged in writing, arguing, commenting or otherwise speaking of Ashley Smith as her inquest progresses. Also given very little consideration are ways in which being a particular type of “girl” might have been relevant to how she was governed, disciplined and punished. In a variety of interlinked social sites, figurations of Ashley Smith have become symbols and representations invoked, articulated and deployed to suit various agendas. Almost without exception, she is pathologized while various forms of expertise retrench their power and individuals working in the justice and correctional systems are condemned.

There is very little attention paid in explanations of Ashley's case to constructions of the girl and to gender. This study looks critically at why and how is there is such a dearth of interest in to what extent and in what ways it mattered that Ashley Smith was a specifically embodied as a particular female adolescent in corrections custody. Also missing from arguments in, policy analyses of, as well as media narratives about her case is an accounting for Ashley Smith’s agencies. This study looks at how and posits analyses as to why she is not being portrayed as a meaning-maker. I look at why and how it is that very few texts studied say much at all about what meanings Ashley Smith was agentially engaged in making through her actions..

⁷ *Smith (Re)*, 2013 CanLII 92762 (ON OCCO) *Inquest Touching the Death of Ashley Smith*, December 2013, Recommendation #1.

I cannot reasonably or realistically offer a dissertation project that tells “the” “true” story of Ashley Smith. Were I to try to tell Ashley’s story, I would just create another representation of her that would be problematic in many of the ways existing representations are problematic. Ashley Smith’s internal self will be forever unknown and unknowable. Rather, what I can know and examine and what readers can understand better through this project is a history, a genealogy of her representation within her case. I look at when and how certain representations of Ashley Smith are constructed and certain figurations emerge while others, which are supportable and plausible, do not.⁸ In this dissertation, I conduct a critical discourse analysis that unpacks what stories were told about Ashley, what stories are still being told about her, and how these stories engage discourses of the girl. I look critically at how Ashley Smith’s case is constructed, what Ashley Smith is represented as a “case” of, and at what alternative imaginings of Ashley Smith’s case are possible. Each figure of Ashley Smith analyzed in this dissertation enacts power in discourse and is deployed in the construction of the Smith case as a *case of a* particular sort of social problem. I refer to Ashley Smith by first and last name throughout to avoid adopting one or another of these constructions (if I called her “Smith”, there would be an implicit erasure of her female gender; if I called her “Ashley”, it would presuppose a relationship I do not have with her. I do not know her. We are not on a first name basis. Further, calling her by her first name entails an implicit adoption of the child construction, in addition to its assumption of familiarity). Multiple stories are told about Ashley Smith. I seek to critically examine these tellings.

1.3 Commonly Accepted Facts of the Smith Case

⁸ The paradox of my embeddedness in discourse and time means that representation by the middle aged author of this dissertation would be problematic and not liberatory in telling the “true” story of the adolescent agency that I call *mine*.

The Ashley Smith case is a site where discourses and forms of expertise intersect, collide and otherwise meet. In this case, power is negotiated at a variety of levels: between agents in spaces designated as correctional facilities, between discourses, and, at the macro level, between interlocking systems of power. In the discursive formations generated by the texts that comprise the Smith case, a variety of representations of Ashley Smith overlap, oppose one another, collide and compete for dominance. Imaginings of Ashley Smith can be analyzed as producing certain figures of Ashley Smith. These figures construct what Lauren Berlant has referred to as “caseness”⁹ of Ashley Smith. Berlant argues that a “case” is more than an example: it is “an object to bear the weight of an explanation worthy of attending to and taking a lesson from.”¹⁰ These configurations set her out as a normative exemplar of a particular type and, in so doing, they define social problems, call for particular treatment, militate for particular remedies and thereby do governmental work.

Below, without claiming these “facts” to be “true”, I summarize a standard narrative of what have come to be the commonly accepted and widely understood facts of the Smith case. In the rest of this dissertation, I look closely at the assumptions and truth claims in this widely accepted narrative, paying close attention to the assumptions on which the claims are based and to the sources to which the truth claims are attributed.¹¹

Ashley Smith was a middle class Canadian white girl who died from self-strangulation in prison on October 19, 2007 at age 19. She died while several prison guards watched and

⁹Berlant, Lauren “On the Case” (2007) 33 *Critical Inquiry* 4 pp. 663-672.

¹⁰ Berlant, *ibid* at p. 666.

¹¹See generally, Vincent and Zlomistic “Excerpt: The Life and Death of Ashley Smith” *The Toronto Star* (15 December 2013); CBC Timeline: The Life and Death of Ashley Smith”CBC: The Fifth Estate <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>; Unusually, Wikipedia is also of interest as a reference here because it provides precisely what I mean to summarize in this section, that being the widely accepted (but not necessarily plausible, supportable, evidence-based or verifiable) story of Ashley Smith: http://en.wikipedia.org/wiki/Ashley_Smith_inquest Another important site where the commonly accepted narrative of the story of the life and death of Ashley Smith can be found is the CBC’s Timeline of events on the Fifth Estate website: <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

videotaped her last moments. Ashley Smith was born January 29, 1988, in New Brunswick. She was adopted when she was 5 days old. It is widely accepted that she had a normal childhood in Moncton, New Brunswick.

However, immediately upon passing into adolescence, Ashley started to get into trouble with various authorities and questions began to be raised about her mental health. At age 13 or 14, her parents report that they saw distinct behavioural changes in her. By age 15 she had been before juvenile court 14 times for various minor offences such as trespassing and causing a disturbance. In March 2002, Smith was assessed by a psychologist who found no evidence of mental illness. However, her behavioural problems continued and she was suspended from school numerous times in the fall of 2002. In March 2003, after a series of court appearances, Ashley was admitted to a mental health centre for assessment. She was diagnosed with various mental conditions, including “ADHD, learning disorder, borderline personality disorder and narcissistic personality traits.” Ashley was discharged early from the Centre for unruly and disruptive behaviour.

Ashley Smith was first incarcerated as a “youth” at age 15 in 2003. Smith was initially sent to “custody” for a single offence: throwing apples at a postal carrier. There is no indication that anyone was injured by the apples but the target was an agent of the state, so the apple-throwing incident was taken very seriously. Ashley had been in trouble for similarly minor things before, like disobeying teachers and stealing a CD. Her initial sentence for throwing the apples was to one month in custody. However, she ended up in solitary confinement for what corrections officers determined to be disruptive behaviour on her part on her first day in custody. While the original sentence was a short one, as a result of the accumulation of hundreds of

further convictions against her arising from disciplinary incidents that took place while she was in youth prison, she remained in custody.

In January 2006, Ashley Smith turned 18. On the same day, a motion was made under the YCJA by the state to transfer her to an adult facility. Ashley retained a lawyer to fight the transfer, but was unsuccessful. On October 5, Ashley was transferred to adult prison. Ashley spent most of her time there in segregation; she was tasered twice and pepper-sprayed. After being transferred to adult custody, Ashley was transferred a total of 17 times between 8 institutions over a period of 11 months. She was under the care of a series of psychiatrists, several of whom prescribed psychotropic drugs for her. She was sometimes given these drugs by force. Smith was also periodically given an opportunity to speak with a series of psychologists, but only through the food slot in her cell. It is now widely understood that Ashley Smith had very serious issues with mental illness that were never properly assessed and went untreated.

Although she was initially sentenced to one month in prison, Ashley was involved in more than 800 reported “incidents” while in custody. She was also charged for new offences as a result of situations that arose while she was in “open custody” foster homes. Corrections officers also documented at least 150 attempts by Ashley to physically harm herself, some of which were treated as disciplinary infractions. She was never released. She was held in prison on a series of accumulating charges for four years. In prison, Smith was tasered, pepper-sprayed, drugged, subjected to countless cavity searches, and, most importantly, held in solitary confinement for months on end. For long periods of this time in solitary, she was not given soap, deodorant, adequate sanitary supplies, clean underwear and was prohibited from having writing material or paper.

Many of the disciplinary incidents involving Ashley Smith were dealt with by corrections officers laying criminal charges. As a result, Ashley was convicted of hundreds of offences, the sentences for which together resulted in her continuous period in custody over about four years. Eleven months of that period was spent in adult prison. Ashley spent the majority of this time in segregation cells (called “quiet rooms”) for 23 hours a day. Ashley For long periods of this time in solitary, she was not given soap, deodorant, adequate sanitary supplies or clean underwear and was prohibited from having writing material or paper.

During her time in adult prison, Ashley Smith died.

In 2011, Ashley Smith’s family filed a “wrongful death” lawsuit against Corrections Canada for \$11 million. The suit was settled confidentially in May of 2011 for an undisclosed amount. The warden of the prison where she died was fired (but later quietly re-hired). Ashley’s death has been the subject of two inquests, or investigations, by the coroner in Ontario. The first was complex and involved many legal challenges as well as a change of coroner before being it finally ended as a mistrial in September 2011. A new inquest into Ashley Smith's death began in September 2012 and concluded in December 2013 with a surprise verdict of homicide. In response to this verdict, government actors and social reformers have been looking at how the mentally ill, and in particular mentally ill women, can be better addressed by the prison system, and at how to limit use of solitary confinement in prisons. CSC released a report in December of 2014 that essentially claimed it had already addressed the concerns raised by the recommendations of the Smith inquest. In this report, CSC rejected the recommendation that they place limits on the use of solitary confinement and rejected the further inquest recommendation that their management be independently overseen.

1.4 Structure and Demonstrated Claims of the Dissertation

My dissertation explores governmental work done by the construction of figures of Ashley Smith as a “case” of three types: an inmate, a child and a patient. It analyzes how configurations of power relations are maintained, retrenched or challenged by these figures. It critically evaluates what is gained, and what is lost, in discursive processes through which Ashley Smith is turned into an exemplar of different social problems. In Chapter 2, I review literatures in existing academic works with which this research is in conversation, and situate this research in the context of existing work in governmentality studies, feminist legal studies, girls studies and policy literature. Then, in Chapter 3, I explicate the theoretical foundations of the project, the methodology employed in the research and the specific methods and research design used. From those foundational elements, I move on to the analytical chapters of the dissertation. In Chapter 4, I look at discursive figures of Ashley Smith that foreground her status as a carceral subject or inmate. Then, in Chapter 5, I look at figures of Ashley Smith that give pre-eminence to her status as a “child”. The last analytical chapter concerns what have come to be the commonly accepted discursive figures of Ashley Smith: these representations foreground her mental health as the most significant aspect of her beingness and treat her as a “patient.” In the final chapter, I then present my conclusions from this discourse analysis. I summarize the research and my analysis and make claims in relation to the analysis.

In this dissertation, I demonstrate how the three dominant constructions of Ashley Smith in the Smith case - as inmate, child and mentally ill person - allow for certain understandings of her case while they make opaque, unimaginable and unthinkable others. My central claims are first, that the death of Ashley Smith can be understood as a predictable outcome of intersecting logics of risk and security in

necropolitical¹² governmental processes that continue to affect adolescent young women in particular and more broadly endanger us all. The theoretical understanding of necropolitics posits certain subjects as occupying statuses that are neither fully living nor dead, Necropolitics provides 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 motion the series of linked events that led to her incarceration and social, political, juridical and biological deaths. Second, I argue that, while powerfully explanatory of the momentum produced towards her death, bureaucratically administered necropolitical action in itself does not fully explain why it was Ashley Smith in particular who died, nor does it explain how Smith's social death came to be overcome by her biological death. The social, juridical and biological deaths of Ashley Smith begin with girlhood, and more specifically with discourses of the girl that make an agentic, disobedient, willful girl an unthinkable subject but can imagine a girl martyr. Her embodiment and identity performance make her a misfit, one who falls outside the boundaries of social categories of good, normal or socially desirable "girl" produced in discursive systems of gender and 'girlhood.' It is her unthinkableability within the confines of a narrow understanding of the good and proper girl that produced her social death and marked her for juridical exclusion. And, once her agency is finally extinguished, it is as a passive, deceased subject that she becomes thinkable within the category of girl. Once she is thinkable as a girl, her socially dead status is repudiated, but at the cost of her existence as a meaning-making, world-creating agent. Third, I claim that the figurations of Ashley

¹² As will be discussed later in this dissertation, I am referring to the concept of "necropolitics" as developed by Mbembe and Agamben, as a relationship between sovereign power and control over life and death. See Agamben, Giorgio. *Homo sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen: Stanford: Stanford University Press, 1998. Print.

Smith that prevail in the case that bears her name continue to re-inscribe the narrow boundaries of the categories of female gender and girlhood in ways that leave Ashley Smith's agencies illegible: in none of these constructions does Ashley's voice get heard nor does her expressive, creative or political agency get taken seriously. Fourth, I claim that the dominant narratives of Smith, which all deny her agency, are operating on other young women. I claim that the illegibility of Ashley Smith's agencies in dominant narratives of the Smith case functions as a technology of governance that serves to maintain the invisibility of, and even further obscure, the agencies and voices of adolescent young women from the formal discourses of law. Fifth, I claim liberal reform activism has been implicated in the necropolitical processes that successfully effected Ashley Smith's social, juridical and biological deaths. Activists have participated in configuring Ashley Smith in ways that make her fit within widely accepted discourses of who can be a noble and therefore noticeable victim. These configurations reinforce the narrow, profoundly racist and classist, confines of those discourses, confirming the monstrosity of those who cannot easily fit within available categories of girlhood, and sustaining the illegibility of adolescent girls' agencies. Finally, I contend that the discursive processes that transform Ashley Smith into a mental patient once she becomes recuperatively represented as a "good" girl raise serious questions about the statistical discrepancy between the putative criminal offending rates of adolescent girls and boys: I posit that pathologizing of properly constituted or "good" adolescent girls' resistances as mental illness may follow almost inevitably from widely accepted cultural constructions of the feminine and of mental illness. This suggests that behavioural differences relating to resistance and criminality between adolescents may well be significantly less predictable or regular along binary gender lines than has been assumed. I contend that statistical differences between boys' and girls' criminal offending rates may reflect not that they *are* different but that they are governed differently. In other words, it matters very much that Ashley Smith is a girl

Chapter 2

The Project in Conversation: *Literature Review*

I devised and conducted this research and wrote this dissertation in the context of, and in conversation with, writing from a variety of academic fields and knowledge communities. It was in reading and building on these existing works that I was able to define a discursive space where asking different critical questions about Ashley Smith's case is possible. In conducting this research I have considered: academic writing about Smith and similar recent cases; critical theorizations of "girls" as particular representations; research about social constructions of the child, adolescent girls, and gender; scholarship about criminal and quasi-criminal policy and legal regimes affecting adolescent young women; and, feminist legal theory.

2.1 The Smith Case and Similar Recent Cases

The parameters of the research undertaken in this dissertation were designed to fill gaps in, and address problems with, academic writing being generated about the Ashley Smith case to date, as of December 2014. Legal scholarship about the Smith case has, to this point, not engaged closely with the assumed truths in its established facts. University of Ottawa law professor, Jena McGill, was an early contributor to feminist legal scholarship about the case in 2008. McGill's analysis of the case is highly problematic because it assumes, without reference to any data, that Ashley Smith was an aboriginal woman, and this assumption is integral to her analysis of the case as an instance of Canada's maltreatment of First Nations populations.¹³ More than simply being incorrect about Smith's aboriginal heritage, the reading of her as a First Nations individual in this paper underscores the problematic slipperiness of Ashley Smith's racialization. University of Toronto law professors Elizabeth Bingham and Rebecca Sutton in

¹³ McGill, Jena, "An Institutional Suicide Machine: Discrimination Against Federally Sentenced Aboriginal Women in Canada" *Race/Ethnicity: Global Contexts* 2:1 Autumn 2008 <http://muse.jhu.edu/journals/rac/summary/v002/2.1.mcgill.html>

2012 presented an analysis of the Smith case as an instance of Canada's failure to properly address the needs of the mentally ill in the correctional context.¹⁴ Like McGill's, this analysis is problematic in that it rests on unproven and highly troubling assumptions about Ashley Smith. The problem with this work is its unexamined assumption that Smith had a stable mental illness that pre-existed her time in prison and caused her problems there.

Jessica Ring has published a more useful critical analysis of media portrayals of mental illness in the Smith case.¹⁵ Ring's paper concludes with a suggestion that alternative imaginings of Smith's conduct as evidence of something other than stable mental illness would be useful, identifying a gap in existing research that cries out for just the sort of more in-depth critical research conducted in the current dissertation. Similarly, a December, 2014 Op/Ed piece by Carleton Legal Studies Professor Dawn Moore offered a contextualized critique of the CSC response to the inquest recommendations. Moore linked the Smith case to general, systematic problems in CSC, going beyond solitary confinement and mental health beds to the governing logics the subject women and aboriginal people to higher levels of scrutiny. This opinion piece suggests the usefulness of a study like that undertaken in my dissertation, one that looks at the bureaucratic and discursive logics active in the construction of the Smith case.¹⁶

In addition to the analyses by Ring and Moore, non-legal critical scholarship about analogous recent spectacular cases is useful to consider. There is a growing body of writing about Smith's case in medical and psychological academic discourses. However, all of the academic writing that has currently been published about Ashley Smith relates to research conducted before the inquest decision was rendered and, in consequence, does not address the entirety of the legal and governmental case. Advocates for women

¹⁴ Bingham, Elizabeth and Rebecca Sutton. "Cruel, inhuman and degrading? Canada's treatment of federally-sentenced women with mental health issues." (2012) University of Toronto, Faculty of Law, International Human Rights Program.

¹⁵ Ring, Jessica. "Incorrigible While Incarcerated: Critically Analyzing Mainstream Canadian News Depictions of Ashley Smith" CJSC Vol. 3 - Issue 1 No. 1 – Spring / printemps 2014

¹⁶ Moore, Dawn " Ashley Smith Response a Missed Chance to Right Decades of Wrong" *The Globe and Mail* (12 December 2014.)

prisoners¹⁷ have cited Smith's case as a demonstration of the inadequacy of applying "gender-neutral legislation" to women.¹⁸ This writing is necessary and helpful in drawing attention to the implicit maleness of the law but it is also limited in that it does not present a specific analysis of the intersection of age and gender with respect to treatment of *girls*.¹⁹

While there will no doubt be more critical scholarship produced about the Smith case, including writing that addresses the inquest decision, the circumstances of Smith's case do not lend themselves to traditional legal scholarship. They present little data to study: as far as the common law doctrine of *stare decisis* is concerned, her case is invisible and largely irrelevant. There will never be caselaw that can be studied doctrinally that documents or explains the accretion of hundreds of little decisions that together led to Smith's death. Nor will there ever be a judgment in the tort lawsuit for her wrongful death.²⁰ Now that the inquest is completed, there is a decision in the inquest in her case that legal scholars may study.²¹ However, since inquest decisions are non-binding on courts and make recommendations only, the decision in the inquest is unlikely to advance legal doctrine in a way that legal academics deem worthy of study, and even if it does advance legal doctrine, it will be in respect of the sorts of questions that can be asked at an inquest, an issue that is quite tangential to the particularities of Ashley Smith's embodiment and death. Also, this inquest decision was made by a jury selecting from a checklist of recommendations, which means there are no written reasons for the decision or a narrative of judicially accepted facts to unpack. In any case, the inquest is about what happened only in the last few months of her time in (adult) custody,

¹⁷ In the Smith case, such advocates include most notably Kim Pate, Executive Director of the Elizabeth Fry Society

¹⁸ Pate, Kim in Malloch, Margaret and McIvor, Gill. *Women, Punishment and Social Justice*. New York: Routledge, 2013.

¹⁹ One non-academic analysis of Ashley Smith's case that bears mentioning comes from her mother. Coralee Smith's statements about what happened to her daughter are not academically theorized but are broadly consistent with the findings of this dissertation. Ashley's mother Coralee said that Ashley "was not suicidal until she faced an ever growing series of sentences for misbehaviour inside prison walls, sentences that she eventually realized (perhaps correctly) would never end. Canada East News Service. "Ashley Smith was Destroyed by Prison System: Mother" (5 February 2012) <http://www.journalpioneer.com/News/Local/2012-02-05/article-2886595/Ashley-Smith-was-destroyed-by-prison-system%3A-mother/1>

²⁰ That was settled, reportedly for millions of dollars. The settlement is sealed. The family had sued for \$11 million; the amount of the settlement is not disclosed. See e.g. Seglins, Dave, "Ashley Smith Family Settles \$11 million suit" (4 May 2011). CBC News: <http://www.cbc.ca/news/canada/ashley-smith-family-settles-11m-suit-1.1003660>

²¹ This decision was released December 13, 2013.

with a focus on the last days. It is therefore likely that analysis of Ashley Smith's case using traditional legal research methodology is not going to ask important questions or reveal significant dimensions of her situation. Many of the myriad little decisions affecting her that took place outside of the public space of a courtroom will not be scrutinized under formal legal analysis.

In non-legal academic literature in the social sciences, there is currently little analysis where Smith's case is concerned. However, this gap is likely to be transitory. I am unlikely to be alone in thinking that her case is one that governmentality analysis is well situated to fill. As noted, her case has been studied in at least one (Ring's) master's thesis in concert with other cases about women in Canadian prisons as an instance for how recommendations for reform to those prisons identified decades ago by the Arbour Commission were never implemented.²² Further, University of Toronto criminologist Kelly Hannah-Moffat, who testified at Ashley Smith's inquest in October 2013, is virtually certain to produce academic writing either directly about, or relevant to the case. Certainly, a number of works already published by Hannah-Moffat are relevant to the analysis of risk and security logics as they operate in Canadian carceral institutions.²³

Academic literature about analogous spectacular cases concerning adolescent female accuseds has been highly relevant to this project. Works of this kind include academic writing about the death of BC teen Reena Virk and the numerous prosecutions of Kelly Ellard for it.²⁴ Writing about the prosecution and

²² See Ferrari, Jacqueline. "Federal Female Incarceration in Canada: What Happened to Empowerment?" (2011) Queens University Master's Thesis http://qspace.library.queensu.ca/bitstream/1974/6352/3/Ferrari_Jacqueline_201104_MA.pdf

²³ See e.g. Hannah-Moffat, Kelly "Gaining insight, changing attitudes and managing 'risk': Parole release decisions for women convicted of violent crimes". (2011). *Punishment & Society*, 13(2), p.149-175; Hannah-Moffat, Kelly "Gendering risk at what cost: Negotiations of gender and risk in Canadian women's prisons". (2004) *Feminism & Psychology*, 14(2), 243-249; Hannah-Moffat, Kelly "Losing ground: Gendered knowledges, parole risk, & responsibility". (2004) *Social Politics*, 11(3), 363-385.

Hannah-Moffat, Kelly, "Pandora's box: Risk/need and gender-responsive Corrections". *Criminology & Public Policy*, (2006) 5(1), 183-192.

²⁴ There is a lengthy procedural history to the prosecution of Kelly Ellard which is detailed in the final 2009 decision on her case rendered by the Supreme Court of Canada *R. v. Ellard*, 2009 SCC 27 (CanLII). Reena Virk's murder has become the subject of a popular novel, Rebecca Godfrey, *Under the Bridge* (Toronto: Harper Collins, 2005) and Hollywood has purchased the movie rights.

sentencing of Melissa Todorovic²⁵ and the prosecution, sentencing and parole proceedings in relation to Jasmine Richardson is also relevant.²⁶ Smith's case is different from these other spectacular criminal cases dealing with adolescent female accuseds. Typically, spectacular "bad girl" cases are framed as "sexy". Ashley's case is not. Salacious media narratives in these spectacular cases paint a dominant picture of a villainous girl who is "mean" and "nasty." There are other "nasty girls" constructed in other contexts,²⁷ but these notable Canadian cases are constructed in media sites as fantastic tales of hypersexual nasty girl super villains.

By saying that Smith's case is not sexy by typical spectacular "nasty girl" case standards, I do not mean to imply that sexuality is not relevant to its theorization. As will be discussed later in this dissertation, Smith's sexuality is *conspicuously* absent. It is erased.

How feminist and critical thinkers have intervened in the case of Reena Virk has been very salient to my current research. Sociologists Mithili Ravija and Sheila Batacharya in their co-edited book *Reena Virk: Critical Perspectives on a Canadian Murder*²⁸ use a feminist anti-racist critical framework to explore perspectives left out of mainstream media and policy discourse about Virk's case. These authors unpack how Virk's murder is portrayed in media reports and legal decisions in a way that erases Virk's race and social class.²⁹ Also useful is a critical exploration of what features of her embodiment and social location made the accused Kelly Ellard into a "saveable" white girl. Ravija, Yiwani and Batacharya's work

²⁵ *R. v. Todorovic* 2009 CarswellOnt 4353 (SCJ) For media coverage, see especially Maria Jimenez, "The Last Days of Stephanie Rengel" *Toronto Life* (December 2009) online: <http://www.torontolife.com/features/last-days-stefanie-rengel/?pageno=1> Toronto Life

²⁶ For discussion see *R. v. Steinke*, 2008 ABQB 201 This is a decision on the change of venue application; it is in the name of the co-accused but refers also to Richardson and references media coverage/ statements. There is also a brief decision on the publication ban in her case: *R. v. JR* 2010 ABQB 38 CanLII

²⁷ E.g. the "masculinized" Nasty Girl, the nasty black girl.

²⁸ Ravija, Mithili and Batacharya, Sheila. *Reena Virk: Critical Perspectives on a Canadian Murder*. Toronto: Canadian Scholars' Press, 2010. Print.

²⁹ Yasmin Jiwani's article "The Erasure of Race: The Story of Reena Virk"²⁹ in this book is particularly useful for the way it critically unpacks the erasure of Virk's South Asian race, social class and other contextual facts (including the fact that almost all of the teens involved in the swarming death of Virk were in the care of the state through child protective social services on the night she died) using feminist criticism Ravija, Mithili and Batacharya, Sheila. *Reena Virk: Critical Perspectives on a Canadian Murder*. Toronto: Canadian Scholars' Press, 2010. Print

presents recent, critical feminist, intersectional analysis of a case involving adolescent female accuseds in Canada and much of the social context analysis they provide is highly useful to my research.

According to all of the quantitative studies available, paradigmatic spectacular “bad girl” cases tend to be, statistically speaking, unusual cases. The *usual* pop culture fodder in relation to adolescent female offending tends to be the more statistically *unusual* subject matter. This makes Ashley Smith’s case even more important to study. Smith’s case is anomalous because it breaks with this frame, and in so doing belies the contention made in mainstream policy writing that media coverage is always simplistically exploitative. Rather than simplistically exploiting her case as salacious, media have been the site of construction of Smith’s case as a social problem calling out for some sort of response. Here, it was the mainstream media who broke the story about Ashley’s death and who have been instrumental in calling for an inquiry, the inquest, a CSC response to the inquest, and changes to correctional practices.

I reviewed expert literature in medicine and psychology that characterizes the Smith case as a tragic instance where matters better dealt with in the mental health system were dealt with in the criminal justice system.³⁰ This literature is consistent with contentions made by psychiatrists and psychologists testifying in Smith’s case that what Ashley needed was better access to mental health care.³¹ This literature accepts as a condition of possibility that there is a choice between *either* mental health “care” for individuals *or* punishment in the correctional system. It presents strong criticisms of the treatment of Smith by Corrections and is self-interested in expanding the hegemony of psychological expert discourses over social apparatuses of governmentality by demanding more mental health beds. These analyses are

³⁰ MacDonald, Noni et al. “The Crime of Mental Illness”. *CMAJ* September 21, 2010 vol. 182 no. 13 First published May 31, 2010, doi: 10.1503/cmaj.100405: Ashley Smith is cited as a key instance of “People with difficult but potentially manageable medical conditions — such as chronic schizophrenia, depression, or mood and anxiety disorders, made worse by abuse, neglect or ignorance — who have no support systems can act out in ways society deems unacceptable and even come to be viewed as criminal.”

³¹ See e.g. The Canadian Press. “Few Treatment Options for Mentally Ill Female Prisoners: Ashley Smith Inquest Hears” (8 April 2013) <http://www.theglobeandmail.com/news/national/few-treatment-options-for-mentally-ill-female-prisoners-ashley-smith-inquest-hears/article10859598/>

remarkably unreflexive and uncritical of the treatment mental health patients receive in psychiatric care, which is a striking, considering (as will be discussed) that many cavity searches, forced injections, beatings and other instances of mistreatment that Ashley received were authorized by mental health legislation or happened while she was in psychiatric care. My governmentality analysis will contribute a different understanding of governance by the mental health, child welfare and correctional systems as systems that, rather than being alternatives to one another, interlock and mutually constitute both the offender and the responses to her.

I also looked at scholarship that contends Smith's behaviours match characteristic *effects* of spending time in solitary confinement. Psychologists and psychiatrists are unreflexive about the rationality that leads prisoners to be held in solitary confinement³² but they are putting forth a developing consensus that the experience of prolonged solitary confinement *causes* the behaviours for which Smith was being punished by means of solitary confinement.³³ Put more simply, some psychologists, as well as the Canadian Civil Liberties Association,³⁴ are saying that she was caught up in a cycle of being further punished for exhibiting symptoms resulting from her punishment. This contention grounds social activism.³⁵

2.2 Girls Studies

Especially because primary texts (reports, decisions, official CSC documents) in Ashley Smith's case, like the policy literature that will be discussed below, treat the categories of "woman" and "girl" as static, homogenous and largely self-evident, considering research and writing that critically

³² Grassian, Stuart; Friedman, Nancy "Effects of sensory deprivation in psychiatric seclusion and solitary confinement. International Journal of Law and Psychiatry, Vol 8(1), 1986, 49-65. doi: [10.1016/0160-2527\(86\)90083-X](https://doi.org/10.1016/0160-2527(86)90083-X)

³³ Juan Mendez – UN Rapporteur on Solitary Confinement has urged a ban on solitary confinement for prisoners with mental health issues. See e.g. Zlomislic, Diana. "UN Urges Canada to Ban Solitary Confinement for Mentally Ill Prisoners" (2 June 2012) <http://www.hsicc.on.ca/Uploads/20120602%20UN%20urges%20Canada%20to%20ban%20solitary%20confinement%20for%20mentally%20ill%20prisoners%20-%20Toronto%20Star.pdf> See also Grassian, Stuart; Friedman, Nancy "Effects of sensory deprivation in psychiatric seclusion and solitary confinement. International Journal of Law and Psychiatry, Vol 8(1), 1986, 49-65. doi: [10.1016/0160-2527\(86\)90083-X](https://doi.org/10.1016/0160-2527(86)90083-X)

³⁴ The Canadian Civil Liberties Association had status as a party at the Ashley Smith inquest. The CCLA's submissions focused on the use of solitary confinement and the need for stronger oversight and accountability of federal prisons.

³⁵ "Annual Report of the Correctional Investigator 2012" <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20112012-eng.aspx>

interrogates and troubles the category of girl has been important to my research. Critical writing with foundations in non-essentialist and intersectional theoretical frameworks about social constructions of ideal and non-ideal types of girl contributed a foundation for understanding in what ways might Smith have been unable to conform to, unwilling to accede to, invisible to, or unthinkable within, these ideal types. This scholarship is useful to my dissertation research in that it helped me trouble the monolithic category of girl and get beneath the girl/boy binary, complicating oversimplistic assumptions that typically characterize policy discourse as it relates to youth criminal justice.

While I am focused especially on the girl subject, writing that critically interrogates the social constructions of the child and of childhood for all subjects regardless of gender has also been relevant to my work in helping me to understand dimensions of the intersection between social location, age and gender that produces the girl child. I found useful, relevant writing from the field of childhood studies that historicizes and situates in broader processes of colonialism, social class and race the constructions of childhood and capacity. For example Mary Jane, Kehily's book *Understanding Childhood: An Introduction to Some Key Themes and Issues*³⁶ provides a useful overview of this field. Anthony Platt's *The Child Savers* is also useful in historicizing the social constructions of juvenile delinquency and "child saving" in early twentieth century North America.³⁷ These texts help establish and explore the ways in which the social identities of "child", "juvenile" and "delinquent" exist as always already gendered, raced and classed. Further, while it is not specifically about children, Ruth Frankenburg's work towards elucidating the dimensions of the discursively empty social category of "whiteness" as it intersects with femininity is useful in helping unpack how the social category of "child" is raced.³⁸

³⁶ *An Introduction to Childhood Studies* London: McGraw-Hill, 2004. <https://www.mcgraw-hill.co.uk/openup/chapters/0335212689.pdf>

³⁷ Platt, Anthony ed. *The Child Savers: The Invention of Delinquency* New Jersey: Rutgers, 2009.

³⁸ Frankenburg, Ruth *White Women: Race Matters* New York: Routledge, 2004. See also Bernstein, Robin *Racial Innocence* New York: New York University Press, 2011. Print.

As a field of critical studies, girls studies starts from cultural studies and critical theoretical foundations and troubles the category of girl. While it is neither monolithic nor unitary, taken as a whole, girls studies literature looks at how social power relations and knowledge about girls have shaped what “girl” means as an idea, discourse and cultural figure. It also explores sites of production of discourse, and in particular performativity and social construction in respect of childhood, adolescence and gender. It looks at deployment of the idea of “adolescent girl” as related to concepts of masculinity, femininity, womanhood, manhood and childhood as well as in relation to other discourses, including legal, mental health, educational, capitalism and colonialism.³⁹ Scholars explore prevalent interlocking constructions of girl and of goodness or moral virtue, specifically in respect of dominant western discourses of ideal femininity, hetero-normative sexuality and the ways in which adolescent young women’s agency is constrained by constructions of sexual morality.

Girls studies has developed as a field in academic literature since the 1990s.⁴⁰ Eline Lipkin defines the field⁴¹ as made up of inquiries into how girls are shaped by popular culture and “how the stamp of girl is impressed upon them”.⁴² Anita Harris describes the field as a body of “feminist work about and with young women”⁴³ that seeks to explore issues relating to young women “standing at the corner of feminism and neoliberalism.”⁴⁴ It seeks to inquire into “dimensions of girls’ power, cultures and identities in the twenty-first century. In addition to focusing on the “girl,” this writing is also thematically unified by a

³⁹ See for example Crowley, Una and Kitchin, Rob (2008) Producing ‘decent girls’: governmentality and the moral geographies of sexual conduct in Ireland (1922–1937). *Gender, Place and Culture*, 15 (4). pp. 355-372.

⁴⁰ Lipkin traces the development of Girls Studies to the “The Riot Grrls”, an underground feminist punk rock movement that sought to create communications media “that speak to US” (US being girls), according to Belzer, Hillary. “Words + Guitars: The Riot Grrrl Movement and Third-Wave Feminism”. *Communication, Culture & Technology Program*. Georgetown University. However, it is important to note that, although some writers in the girls’ studies field themselves locate their origins in the Riot Grrls movement and the 1990s there is in the work of Carol Gilligan in developmental psychology (Gilligan, Carol. *In a Different Voice* (Cambridge, Mass: Harvard University Press, 1982). and also Naomi Woolf among others a growing interest in the specificity of girls’ experiences as distinct from those of women and of boys before that time.

⁴¹ Lipkin, Eline. *Girls Studies*. California: Seal Press, 2009

⁴² at viii

⁴³ Harris Anita *All About the Girl: Culture, Power, and Identity*, New York: Routledge, 2004 at xix.

⁴⁴ Harris, *ibid* at (at xviii)

sense that feminist research should take seriously a number of constructs and practices formerly dismissed as commonplace, unimportant and trivial.⁴⁵ Jennifer Baumgartner and Amy Richards argue that embracing and interrogating the identity and study of the girl “signals a rupture” between the second and third waves of feminism.⁴⁶

Critical writing in the field seeks to unpack the assumed monolithic categories of childhood and of girl as distinct from woman. Harris’ *All About the Girl: Culture, Power, and Identity*⁴⁷ is of particular relevance to my study because it reviews other works in the field. Jiwani, Steenbergen and Mitchell’s collection, *Girlhood: Redefining the Limits*,⁴⁸ also provides a comprehensive review of the social constructivist girls studies literature. These books, as well as the writing of Valerie Walkerdine in particular,⁴⁹ link young women’s agency and choices with popular expectations about young femininity, and in particular consider construction of girls’ identities at intersections of racialization, class and gender.

Analyses of gender as performance and discourse are developed in this field as they pertain specifically to girls.⁵⁰ This literature critically analyses how women and girls actively perform actions and discipline, even surgically alter, their bodies, to conform to what a “good” girl should do and be. Girls studies scholarship looks at how gender takes work to perform and achieve. It looks at how that work is socially mandatory: required and enforced. The disciplining of gender links technologies of the self with technologies of governance. This work provides a starting point for a critique of the assumed pre-existing mental infirmity of Ashley Smith. For instance, sociologist Christie Barron looks at how figurations of the

⁴⁵ I share the view of girls studies scholars that the rise of girls studies injected into the dour rejection of all things considered demeaningly childish and “girlie” and a distinct anti-sex puritanism endemic to much writing in the second wave of feminism, a bit of joy and fun

⁴⁶ Harris, *ibid* at xxiv

⁴⁷ Harris, Anita *All About the Girl: Culture, Power, and Identity*, New York: Routledge, 2004

⁴⁸ Montreal: Black Rose Books, 2006. Print.

⁴⁹ Walkerdine, Valerie, *Growing up Girl: Psychosocial Explorations of Gender and Class* (London: Palgrave, 2001)

⁵⁰ “an active style of living one’s body in the world” Judith Butler. “Variations on Sex and Gender: Beauvoir, Witting, and Foucault.” in: *Praxis International*. January 5, 1986, No. 4, pp. 505-516. (English).

criminalized, nasty and risky girl emerge: she points out that figures of the bad/nasty/risky girl are constructed not just through legal discourse, but also through expert discourse.⁵¹

Girls studies explores how constructs of the girl are socially located. The identity of girl has excluded some people entirely while it has been forcibly imposed upon others; differently situated girls have intersectional identities that are constructed differently. Studies of particular figurations of the girl show how these constructs emerge at particular historical times in specific locations and are enmeshed in broader processes like colonialism and racism. Critical analyses of various historical figurations of the demonized “other” girl support and enrich an understanding of how the nasty girl figure emerging from recent spectacular cases is raced, classed and exclusionary. Ways dimensions of race and social class were written in to girls’ virtue are made clear in Strange and Loo’s analysis of the entanglement of white nation building in Canada’s 19th century with technologies of the self, especially moral regulation, for white girls.⁵²

Critical scholarship from the field of girls studies also helped me understand some depth beneath the flattened image offered in the figure of the shadowy criminalized girl of quantitative social science discourses. It contributes to a more nuanced understanding of the histories of various constructions of the vilified girl as well as analyses of how girls exercise agencies in contexts of oppressive constraints. Girls studies supports an intersectional understanding that the Canadian public knows (and cares) about the conditions of Smith’s incarceration precisely *because* of her putative race and social class. This understanding helps address questions of why media texts have raised questions about Smith’s death in texts that configure her as a victim when the more paradigmatic media portrayal of adolescent female offending is assumed to be more salacious and less activist. I also build on the strand in girls’ studies

⁵¹ Barron, *Rehabilitation in the Age of Risk* at 9.

⁵² Strange, Carolyn & Tina Loo. *Making Good: Law and Moral Regulation in Canada, 1867-1939* Toronto: University of Toronto Press, 1997. Print.

writing about the missing discourse of girls' agency, including sexual agency, to theorize the present-absence of Smith's sexuality and subjectivity.

While not falling exclusively within the field of girls studies, feminist critiques of discourses of mental health in respect of how these discourses affect women and girls was also helpful to my work. In considering the configuration of Ashley Smith as a mental patient, I drew on feminist critiques of mental health discourses, and the borderline personality disorder diagnosis in particular in this analysis, especially the work of Gillian Proctor,⁵³ Mary Bosworth,⁵⁴ Jane Ussher,⁵⁵ Phyllis Chesler,⁵⁶ Janet Wirth-Cauchon and Jessica Ring.⁵⁷ Relatedly, writing that theorizes pervasive representations of adolescent girls' mental illness has informed this work. Writing by Phillip Edwards,⁵⁸ David Leverenz⁵⁹ and especially Elaine Showalter⁶⁰ has informed my analysis of how the diagnosed madness of Ashley Smith intersects with discourses of the madwoman circulating in popular culture.

2.3 Governmentality, Security, Risk and the “Criminalized Girl”

Qualitative and quantitative research and theorization about adolescent girls and the juridical field was useful to me in contextualizing Ashley Smith's struggles in the juridical field with reference to her gender. Historically, women and girls were understudied by criminologists and their particular circumstances were neglected in policy discourse. However, feminist researchers have, since the middle of the twentieth century, developed a literature about adolescent girls, gender and youth criminal justice law.

⁵³ Proctor, Gillian. 'Disordered Boundaries? A Critique of Borderline Personality Disorder' published by psychminded.co.uk and available on 23.8.09 at <http://www.psychminded.co.uk/news/news2007/June07/borderline001.htm>

⁵⁴ Bosworth, Mary. "Confining femininity: A history of gender, power and imprisonment". (2000). *Theoretical Criminology*, 4(3), 265-284.

⁵⁵ Ussher, Jane. *Women's Madness: Misogyny or Mental Illness?* Amherst: University of Massachusetts Press, 1991.

⁵⁶ Chesler, Phyllis. *Women and Madness* (N.Y.: Palgrave Macmillan, rev'd & updated ed., 1st ed., 2005).

⁵⁷ Wirth-Cauchon, Janet. *Women and Borderline Personality Disorder: Symptoms and Stories USA*: Rutgers University Press, 2003.

See also, Ring, Jessica. "Incorrigible While Incarcerated: Critically Analyzing Mainstream Canadian News Depictions of Ashley Smith" *CJSC Vol. 3 - Issue 1 No. 1 – Spring / printemps 2014*

⁵⁸ Edwards, Phillip, ed. *Hamlet, Prince of Denmark*. New Cambridge Shakespeare ser. Cambridge: Cambridge University Press, 1985.

⁵⁹ Leverenz, David. "The Woman in Hamlet" (1978) *4 Signs* 2, pp. 291-308.

⁶⁰ Elaine Showalter, 'Representing Ophelia: Women, Madness and the Responsibilities of Feminist Criticism' in Patricia Parker and Geoffrey Hartman (eds.), *Shakespeare and the Question of Theory* (London, 1985), 77-94.

An important early text in this vein is Ellen Adelberg and Claudia Currie's aptly titled book, *Too Few to Count: Canadian Women in Conflict with the Law*.⁶¹ A variety of different kinds of research and writing have developed about adolescent girls, gender and youth criminal justice law since.

"Expert" writing now constructs empirical data sets and derives from them theorizations about criminalized adolescent girls. These quantitative studies of adolescent girls in the juridical field are both useful and problematic. Statistics paint a different picture of the criminalized girl from that stereotypically constructed in media sites. Academic and policy experts use numbers to paint a shadowy picture of a 14-15 year old, the dominant trait of whom is victimization. She is most likely racialized, probably aboriginal, and impoverished with serious and complex challenges in her family circumstances. She has likely survived abuse - in particular sexual abuse - and has a history of involvement with the child "protection" system, which was probably the milieu (in the form of some sort of group home or foster care facility) where she was charged. From this discourse of the criminalized girl, a figure emerges that emphasizes the context of her victimhood by varied social circumstances, including violence.

Investigations of differences between male and female offending behaviour and constructions of statistical data sets about these differences provide context for this study. Doob and Spratt⁶² present a detailed analysis of recent statistics from the US and Canada about offending and incarceration rates. They statistically debunk the common assumption that adolescent young women are changing and becoming more violent. Another significant work in this vein is Ann Worrall's *Girl Violence: Myths and Realities*.⁶³ Empirical studies of rates of charging, sentencing and incarceration of adolescent girls also compare situations before and after legal regimes changed. Doob, Spratt and Worrall's work provides insight into the ways that law reform *can* influence material conditions in the juridical field when laws changed. After

⁶¹ Adelberg, Ellen & Claudia Currie, eds. *Too Few to Count: Canadian Women in Conflict with the Law*. Vancouver: Press Gang Publishers, 1987. Print.

⁶² Spratt, Jane and Doob, Anthony. *Justice for Girls?* Chicago: University of Chicago Press, 2009. Print.

⁶³ Worrall, Anne, *Girls' Violence: Myths and Realities*. New York: SUNY Press, 2004. Print.

the *Youth Criminal Justice Act*⁶⁴ came into force, their research indicates that disproportionate incarceration of girls for “administration of justice offences” (such as failure to appear in court) was significantly reduced.⁶⁵

With some relatively recent exceptions, much of the literature about the criminalization of girls is in large part problematic for two reasons. First, it generally assumes the existence of a monolithic category of “girl” without considering how it is constituted. Second, it defines the category “girl” in binary opposition to the category “boy” as “not-boy”, which provides little insight into analysis about what “girl” might actually mean and who those labeled girls might be. However, with the caveat that these statistics are problematic because they are invariably produced in comparison to the “normal” adolescent offender, the boy, and this binary prevents full exploration of the conditions of diversely situated girls from being undertaken, they do provide context for this research.

Statistical data sets consistently show that those identified as adolescent girls are less likely to offend than are boys, and that, when they do offend, they commit far less serious crimes on the whole than boys do. Their offending rates peak at earlier ages.⁶⁶ They tend to be criminalized for different kinds of offences; girls are generally charged for non-violent offences or as accessories to crimes where male accuseds are ringleaders. In addition to characteristically doing different things, girls reflected in offending statistics are differently situated than boys. The girls tend much more strongly to hail from economically and socially marginal populations.⁶⁷ In addition to marginality, victimization by violence, including but not limited to, sexual violence is a common characteristic of adolescent young women who become criminalized: statistically, the single biggest predictor of female offending behaviour is abuse of the girl

⁶⁴ SC 2002 c 1

⁶⁵ See Doob and Sprott, *ibid*.

⁶⁶ See e.g. Bala, *ibid* and Sprott, Jane and Doob, Anthony. *Justice for Girls?* Chicago: University of Chicago Press, 2009. Print.

⁶⁷ Sprott, Jane and Doob, *ibid*.

and especially child sexual abuse.⁶⁸ While these studies are limited in historical depth because of inattention to girls and women in previous studies, available numbers consistently show that girls' patterns of behaviour have not changed over the past several decades but are rather now being documented differently by the justice system. For example, abolition of or reduction in the use of status offences is leading police to charge girls for offences for which no charges would have historically been laid, which is to a minor extent skewing offending rate statistics.⁶⁹

Empirical research consistently shows although they may be less quickly dealt with formally for minor infractions, once formally charged, girls receive harsher treatment in youth criminal justice systems than do boys. This matches a discrepancy in Canadian statistics in which girls self-report committing minor, non-violent crimes at rates more comparable to the rates at which boys self-report minor crimes than their relative charge rates would suggest.⁷⁰ Certainly Carol Smart and Ngaire Naffine, feminist criminologists and feminist legal studies scholars, have found this to be the case historically in jurisdictions as varied as Australia, the United States, the United Kingdom and Canada.⁷¹ Kathleen Daly and Lisa Maher⁷² look at this differential treatment in the United States. Karen Heimer's more recent symbolic interactionist research looks at ways in which girls and boys are subjected to different forms and degrees of social control.⁷³ The harsh redress women have faced for crimes under Canadian criminal law has been

⁶⁸ *ibid*

⁶⁹ Feld, Barry, "Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data" (2009) 55 *Crime & Delinquency* 2, pps. 241-265.

⁷⁰ Savoie, J. 2007. "Youth self-reported delinquency, Toronto — 2006," *Juristat* 27(6). Ottawa, ON: Statistics Canada.

⁷¹ Smart, Carole. *Women, Crime and Criminology: A Feminist Critique*. Routledge: London, 1980. Carol Smart has more recently advocated that feminists completely disengage with the formal law. See also Tamra Myers' look at this in the context of the Canadian Juvenile Justice Courts of the 20th century: "Women and Kids in the Court: Feminist History and Anthony Platt's The Child Savers," in Anthony Platt, *The Child Savers: The Invention of Delinquency* (New Brunswick, NJ: Rutgers University Press, 2009), 213-224.

⁷² Daly, Kathleen and Maher, Lisa eds. *Criminology at the Crossroads: Feminist Readings in Crime and Justice*. New York: Oxford University Press, 1998. Print.

⁷³ Heimer, Karen, "Gender, Interaction, and Delinquency: Testing a Theory of Differential Social Control" (1996) 59 *Social Psychol Q* 39.

well explored, particularly by Wayne Renke in the context of Canada's "dangerous offender" designation and how it has been used differently in relation to women than men.⁷⁴

One area of unresolved debate in this research concerns to what extent changes in formal laws determine or even affect the way girls are treated in the criminal justice system. Criminologists Carol Smart and Barry Smart, writing in 1978, advocated that researchers shift their focus away from the doctrinal law of legislation and judgments. They argued that "the limited effectiveness of recent legislation serves to reveal the extent to which the primary sources of women's oppression are outside or even beyond judicial influence."⁷⁵ However, Doob and Sprott,⁷⁶ use statistics to argue that recent legislative changes have mattered a great deal. Their work documents how, after the abolition of status offences, administration of justice offences⁷⁷ that demarcate resistance to authority came to be disproportionately laid against girls as compared to boys.

Statistical pictures of the criminalized girl contribute one lens on adolescent girls' experiences with the criminal and quasi-criminal justice systems in Canada. This lens, as noted, is imperfect because it is inherently limited by what it tests for⁷⁸ and also always mediated by how crimes are defined and by reporting rates. Rates of reported crime do not fully describe criminal offending behavior, and rates of reported victimization almost certainly under-represent actual experiences. Also, while statistical records are kept in the United States and some other jurisdictions that demographically situate persons charged and incarcerated on the basis of race, in Canada no statistical data is kept about the race of adolescents accused,

⁷⁴ Renke, Wayne. "Case Comment: Lisa Neve, Dangerous Offender", Case Comment (1995) 33 *Alta L. Rev* 650.

⁷⁵ "that is to say may rest within or arise from, prevailing material conditions, cultural values, customs and social practices, such as the differential socialization of male and female children" Smart, Carole and Smart, Barry. *Women, Sexuality and Social Control*. New York and London: Routledge, 1978 at 1. While this text, like many adolescent texts about adolescent offending, does offer some level of social constructivist analysis of girls' behaviour and responses to it, it is problematic in that it rests in a boy/girl binary and doesn't go further to critically unpack either category or take seriously in its analysis the differences between the experiences of differently situated boys and girls

⁷⁶ *Ibid*

⁷⁷ such as failures to appear in court and disciplinary infractions

⁷⁸ i.e. difference from boys

convicted or sentenced in the criminal and quasi-criminal systems except for documentation of aboriginal status. Further, when the factual similarities between detentions by child protection systems, mental health treatment and criminal sentences are considered, it is problematic that statistics document the criminal justice system separately from detentions in facilities run nominally under these other forms of governance. Relatedly, empirical expert quantitative analyses of offending by girls relative to boys rarely if ever unpack the complexity of the diversity of embodied circumstances that are experienced by girls. Finally, as noted, quantitative studies almost never trouble the category of “girl,” which is a particularly obvious limitation because the ages of who constitutes a “girl” and a woman are different under the legislative regimes of every country as well as having changed over time from the operation of the JDA⁷⁹ to the YOA⁸⁰ in Canada.

Quantitative research confirms that gender is relevant to the way that adolescents enter, experience, and are treated in, the juridical field. As discussed, this discourse has its gaps and limits. Other than showing she is *not* a typical boy, these numbers do little else to fill in the features of the criminalized girl. She remains a shadowy figure because she is not analyzed for her own sake but comparatively.

Research that makes the conditions of victimization by violence experienced by girls visible is important background to my project. I have mentioned the writing of Batacharya and Jiwani and others about Reena Virk’s case.⁸¹ Jiwani has also provided a literature review that explores levels of violence against girls in Canada.⁸² Criminologist Meda Chesney-Lind’s work helps unpack how the social circumstances of adolescent girls are made invisible in criminal proceedings involving them.⁸³ Chesney-

⁷⁹ the ages that counted as adolescence varied in different provincial and territorial jurisdictions under the JDA, and were different for boys and girls in Alberta. The upper age for adolescence was usually 16.

⁸⁰ Under the YOA and YCJA, a “young person” or adolescent, is aged from their 12th to the 18th birthday, unless they have done something for which the legislation allows or requires them to be treated as an adult.

⁸¹ *ibid*

⁸² Jiwani, Yasmin, *Violence against Marginalized Girls: A Review of the Current Literature* Vancouver: Freda, 1998. Print.

⁸³ Chesney-Lind, Meda & Martha Eliason. “From invisible to incorrigible: The demonization of marginalized women and girls,” (2006) 2 *Crime Media Culture* 1.

Lind has also explored ways in which peer-to-peer relational aggression and “bullying” are far from the most significant problems adolescent young women face.⁸⁴

As noted, in reaction to popular discourses perceived to vilify girls, feminist academic writing tends to deliberately emphasize girls’ roles as victims. In doing so, it often problematically neglects the ways in which girls actively participate in living their lives. Besides depicting her as an extremely marginal and victimized “not-boy”, discourses of the criminalized girl do not devote attention to the varied experiences and agencies of those girls. Statistical documentation of charge rates and social circumstances of girls entering the criminal and quasi-criminal systems provides only indirect evidence of girls’ behaviour. Analysis of the way girls’ cases are processed provides a lens into how they are treated by the system and provides a basis to compare and contrast their treatment from one another and from the treatment received by variously situated boys. Writing that seeks to analyze and theorize the multiple dimensions of girls’ identities and how differently situated girls receive different treatment is crucial to an intersectional analysis that appreciates the complexity and instability of identity.

Qualitative research explores in detail how historical criminal and quasi-criminal governance enforces gender performativity and sexualizes both punishment and criminality. Intersectional analyses of the differential treatment of adolescents by criminal and quasi-criminal systems crucially contribute depth to my analysis. While early feminist criminological literature was limited in that it treated girls as a unified social category, there has developed significant literature that contains intersectional analysis about which adolescent young women get constructed as dangerous and for what reasons. “Squaws”, “dirty girls”, “incorrigible girls”, “sexually immoral girls”, “modern girls”, “nasty black girls”, “masculinized girls”,

⁸⁴ Chesney-Lind, Meda & Katherine Irwin. *Beyond Bad Girls. Gender, Violence and Hype* New York: Routledge, 2008. Print.; Chesney-Lind, Meda & Nikki Jones. *Fighting for Girls: New Perspectives on Gender and Violence* Albany: SUNY Press, 2010. Print.

“risky girls”, “impure girls” and witches all take shape on these analyses as figurations of the girl as demonized other.⁸⁵

Faith and Jiwani⁸⁶ generally, and with reference to Reena Virk’s death specifically, look at how race and racism affect how adolescent girls get treated by the criminal legal system, be they victims or accused. Worrall’s theorization of changing constructions of the “female juvenile delinquent” critically analyzes who, and what behaviours, are criminalized when adolescent young women are concerned.⁸⁷ Research by Mesley and others into the over-representation of, and marginalization within discourses of, the criminal and quasi-criminal systems of aboriginal women and girls provides an intersectional understanding of the different ways in which diversely situated adolescent girls have been constructed as dangerous.⁸⁸

Behaviours for which adolescent young women are criminally sanctioned have been different depending upon their social location. However, across these differences, there are some similarities in what behavior has been considered to warrant the laying of criminal charges against a girl. Acts by girls that have been met with charges in response have usually been either acts of sexual agency not considered criminal for adults or, more recently, offences where girls challenge or flout authority, under the YOA, including administrative offences. Sexual agency and perceived persistent resistance to authority seem to be the usual grounds for particularly harsh sanctions against girls. Strange and Loo⁸⁹ contribute an understanding of how regulation of adolescent girls’ sexuality, reproduction and gender performance by

⁸⁵ See e.g. Strange, Carolyn & Tina Loo. *Making Good: Law and Moral Regulation in Canada, 1867-1939* Toronto: University of Toronto Press, 1997. Print.; Valverde, Mariana *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925*. Toronto: McClelland & Stewart, 1991. Print.; Backhouse, Constance. *Carnal Crimes: Sexual Assault and the Law in Canada 1900-1975* Toronto: Osgoode Society, 2008. Print.; Sangster, Joan. *Girl Trouble: Female Delinquency in English Canada*. Toronto: Between the Lines, 2002. Print.

⁸⁶ in “The Social Construction of “Dangerous” Girls and Women” Jiwani, Yasmin, Steenbergen, Candis and Mitchell, Claudia, eds. *Girlhood: Redefining the Limits*. Toronto: Black Rose Books, 2006. Print. pp. 155-173.

⁸⁷ Worrall, Ann “Governing Bad Girls: Changing Constructions of Female Juvenile Delinquency” Bridgeman, Jo and Monk, Daniel, eds., *Feminist Perspectives on Child Law* (London: Routledge, 2000). pp. 151- 169.

⁸⁸ Wesley, Mandy. “Marginalized: The Aboriginal Women’s Experience in Federal Corrections” *Corrections Canada* (2012). <http://www.publicsafety.gc.ca>.

⁸⁹ Strange, Carolyn & Tina Loo. *Making Good: Law and Moral Regulation in Canada, 1867-1939* Toronto: University of Toronto Press, 1997. Print.

criminal and quasi-criminal systems in Canada was enmeshed with broader, racist and colonial historical projects of white nation building, and Valverde⁹⁰ similarly looks at criminal and quasi criminal control over adolescent girls as a historically situated aspect of moral regulation crucial to the white settlement and domestication of the West. The notion of female delinquency as well as the consequences governance frameworks imposed for it were historically sexualized, as a number of scholars demonstrate, including Constance Backhouse,⁹¹ Tamara Myers⁹² and Joan Sangster.⁹³ These works describe cases taking place in past regimes of criminal law where adolescent girls were incarcerated, punished, beaten and sexually violated in a series of acts strikingly similar to those undergone by Ashley Smith.

Chesney-Lind, as well as Myers and Naffine, show that criminal and quasi-criminal law were used historically as means of enforcing disciplines of gender performativity. Female compliance to authority, subordination to males, domesticity and the channeling of girls' sexual and reproductive labour into accepted roles were all practices in which various quasi criminal and criminal regimes in many jurisdictions have been engaged.⁹⁴ Lara Karaian theorizes sexual expression and the rise of criminal sanction and censorship for de-authorizing some adolescent girls' sexual agencies and others' sexual exploitability, as is discussed in more detail in Chapter 3.⁹⁵

Feminist critical writing also explores how, for girls, there has historically been no bright line between restrictions constructed and justified in discourses of protection, medical treatment and mental health, and punishment by means of criminal sanctions. Barron and Lacombe illustrate how expert

⁹⁰ Valverde, Mariana *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925*. Toronto: McClelland & Stewart, 1991. Print.

⁹¹ Backhouse, Constance. *Carnal Crimes: Sexual Assault and the Law in Canada 1900-1975*. Toronto : Osgoode Society, 2008. Print.

⁹² Myers, Tamara. *Caught: Montreal's Modern Girls and the Law, 1869-1945*. Toronto: University of Toronto Press, 2006.

⁹³ Sangster, Joan. *Girl Trouble: Female Delinquency in English Canada*. Toronto: Between the Lines, 2002. Print.

⁹⁴ Chesney-Lind, Meda, "Girls Crime and a Woman's Place: Toward a Feminist Model of Female Delinquency" (1989) 35 *Crime & Delinquency* January 1, 5-29.

⁹⁵ Karaian, Lara, "Lolita Speaks: Sexting, Teenage Girls and the Law" (2012) 8 *Crime Media Culture* 1.

discourse continues to construct the dangerousness of girls.⁹⁶ They write that it is: “experts who construct the identity of the unruly girl, and establish her as a real concern for panic.”⁹⁷ Karen Busby has explored the connections between punishment and protection of adolescent girls with reference to “protective confinement” statutes now being used across Canada to effectively incarcerate adolescent girls who are suspected of being involved in sex work.⁹⁸ The Vancouver-based NGO “Justice For Girls” has also critiqued this protective confinement regime.⁹⁹ Historical and persisting links between criminalization, medicalization, protective custody and mental health treatment for adolescent girls trouble the assumption ubiquitous in reports about Ashley Smith’s case that the mental health system is separate, apart, alternative, and preferable to the criminal justice and corrections context.

I also looked at theorizations about the criminality of adolescent girls. One of the influential “expert” texts that sought to theorize female criminality was Freda Adler’s *Sisters in Crime: The Rise of the New Female Criminal*.¹⁰⁰ Adler hypothesized that feminism would lead to a “masculinization” of girls, who would become comparably violent to boys and men. While this hypothesis is not supported by the empirical data discussed above, in contemporary popular culture, this masculinization is generally accepted. The discursive figuration of the changed, more masculine, nasty girl, was circulating before Adler’s work was published. Attribution of the idea of the “liberation hypothesis” to Adler or to journalist Patricia Pearson’s book *When She Was Bad*¹⁰¹ is problematic. As Barron and Lacombe point out, “the dominant idea throughout most of the 20th century was that females who offend are rejecting their

⁹⁶ Barron, Christie and Lacombe, Dany, “Moral Panic and the Nasty Girl.” (2008) 42 Canadian Review of Sociology 1, 51-69.

⁹⁷ at 55. Barron and Lacombe locate the anxiety about which the moral panic over girl violence erupts as: Girl power, the source of social anxieties, is the real nasty here; the moral panic over the statistically insignificant Nasty Girl is a projection of a desire to retrieve a patriarchal social order characterized by gender conformity.” p. 65

⁹⁸ Busby, Karen. “The Protective Confinement of Girls Involved in Prostitution. Potential Problems of Current Regimes” in Kelly Gorkoff

and Jane Runner, eds, *Being Heard: The Experiences of Young Women in Prostitution* Blackpoint, NS: Fernwood, 2003. Print.

⁹⁹ Dean, Amber Richelle, *Locking Them Up to Keep Them Safe*. Vancouver: Justice for Girls, 2005. Print.
100 New York: McGraw-Hill, 1975. Print.

¹⁰¹ Pearson, Patricia. *When She Was Bad: Violent Women and the Myth of Innocence*. Canada: Random House, 1997. Print.

feminine role and are emulating their male counterpart.”¹⁰² As discussed in Chapter 3, anti-essentialist feminist theorists have critically unpacked how misconduct, offending and unruliness by girls is seen in mainstream discourses of femininity as *unnatural*. Popular culture naturalizes, tacitly condones and even romanticizes offending by boys: getting into trouble is understood as a rite of passage in achieving masculinity.¹⁰³ Conversely, as has been argued by Smart, Daly¹⁰⁴ and Naffine among others, criminal offending by adolescent girls is seen as un-natural and treated extremely seriously; girls are not expected to push boundaries.¹⁰⁵

Many theoretical understandings of adolescent girls contend that systems have been resistant to criminalizing those who fit into available identities of the normative or “nice” girl. There is research statistically showing an apparent historical lenience to girls under juvenile justice law, or at least a reluctance to deal with certain girls in the public sphere.¹⁰⁶ This is reinforced by the discrepancy between girls’ rates of self-reporting criminal behavior¹⁰⁷ and charge rates for girls that seem artificially low.¹⁰⁸ However, as Naffine found, as soon as a determination is made that a particular girl does not fit into normative figurations of the good girl, she is treated harshly indeed.¹⁰⁹

Despite this research, girls remain marginal to mainstream policy discourse. Criminologists, like Gloria Geller, have long pointed out that adolescent girls are not given serious consideration in mainstream policy discourse or advocacy for law reform about youth criminal justice.¹¹⁰ Mainstream policy writing’s engagement with feminist critical literature appears to have reached an apex at the turn of the 21st century

¹⁰² at 56

¹⁰³ See e.g. Messerschmidt, James. *Masculinities and Crime: Critique and Reconceptualization of Theory*. New York: Rowan & Littlefield Publishers, 1993. Print.

¹⁰⁴ Daly, Kathleen and Meda Chesney-Lind, “Feminism and Criminology” (1988) 5 *Justice Quarterly* 497-538.

¹⁰⁵ See e.g. Naffine, Ngaire, *Female Crime: The Construction of Women in Criminology*. Winchester, Mass: Allen and Unwin, 1987. Print.; Smart, Carole. *Women, Crime and Criminology: A Feminist Critique*. Routledge: London, 1980. Print.

¹⁰⁶ See generally Worrall *ibid*.

¹⁰⁷ in comparison to that of boys for minor crimes

¹⁰⁸ Savoie, J. 2007. "Youth self-reported delinquency, Toronto — 2006," *Juristat* 27(6). Ottawa, ON: Statistics Canada.

¹⁰⁹ Naffine, *ibid*.

¹¹⁰ Geller, Gloria, “Young Women in Conflict With the Law.” In *Too Few to Count: Canadian Women in Conflict with the Law*. E. Adelberg and C. Currie (eds.). (Vancouver: Press Gang Publishers, 1987) at 113-26.

in Canada. Then, it appears feminist writers had lively engagement with policy scholars about reforms to youth criminal justice law,¹¹¹ even if that discussion was marginal to policy debates. As is discussed below, however, by the time of the Nunn report in 2006 and the amendments to youth criminal justice law it precipitated, the consequences of law reform to adolescent girls were sidelined in, if not totally absent from, policy discussion.

Scholarship that theorizes the gendered social construction of deviance¹¹² also provided useful background to consider in the analysis of Ashley Smith as girl performed in this dissertation. Angela McRobbie and Sarah Thornton have applied critical analysis to contemporary multi-media contexts.¹¹³ Some of this theorization centres around the adolescent young offender,¹¹⁴ who is expressly or implicitly male.¹¹⁵ Tim Newburn and James Messerschmidt¹¹⁶ theorize relationships between discourses of masculinity and adolescent male offending behaviour. Here, adolescent offending, including especially “roughness” and “toughness,” is critically unpacked as socially condoned as part of the achievement of masculinities. Mark Totten has applied analysis of discourses of masculinity to study how violence against girls by marginal adolescent boys can form part of their assertion of masculinity.¹¹⁷ This literature critically deconstructs discourses of masculinity and provides analysis of gender performativity, achievement of gendered identities and coercive maintenance of gender in a binary two-gender system.

¹¹¹ Boyle, Christine et al. “The Criminalization of Young Women: An Editors’ Forum” (2002) 14:2 CJWL at 389-428. See also Reitsma-Street, Marge, “Justice for Canadian girls: A 1990s Update.” (1999) 41 *Canadian Journal of Criminology and Criminal Justice* 3, 335-64.

¹¹² E.g. Goode, Erich and Ben-Yahuda, Nachmann, *Moral Panics; The Social Construction of Deviance*. Oxford, UK: Blackwell Publishing, 2009. Print.

¹¹³ McRobbie, Angela and Thornton, Sarah, “Rethinking ‘Moral Panic’ for Multi-Mediated Social Worlds” (1995) 46 *British Journal of Sociology* 4 at 559-574.

¹¹⁴ Newburn, Tim and Stanko, Elizabeth, eds. *Just Boys Doing Business? Men, Masculinities and Crime*. New York: Routledge, 1994. Print.; Messerschmidt, James. *Masculinities and Crime: Critique and Reconceptualization of Theory*. New York: Rowan & Littlefield Publishers, 1993. Print.

¹¹⁵ See e.g. Cohen, Albert, *Delinquent Boys: The Culture of the Gang*. Glencoe, Illinois: Free Press, 1955. Print.

¹¹⁶ Messerschmidt, James. *Masculinities and Crime: Critique and Reconceptualization of Theory*. New York: Rowan & Littlefield Publishers, 1993. Print.

¹¹⁷ Totten, Mark. “Girlfriend Abuse as a Form of Masculinity Construction Among Violent, Marginal Male Youth” (2003) 6 *Men and Masculinities* 1, 70-92.

Policy writing about adolescent offenders tends to draw on and reproduce a figuration of a saveable white boy. It is generally sympathetic to the economic and social circumstances of male adolescent offenders and explores relationships among young men in “gangs.” Stanley Cohen and Stuart Hall’s groundbreaking work on “moral panic” is based on studies of male youth gangs in the UK.¹¹⁸ The functioning of adolescent sexual offenders as “monstrous others” in the context of a moral panic model has been studied by John Douard.¹¹⁹ Some of the writing that develops the moral panic theorization of adolescent offending is polarized. It characterizes adolescents as “misguided children” in the face of an assumed or perceived onslaught. The work of Bernard Schissel is emblematic of this perspective.¹²⁰ Schissel theorizes the adolescent offender as other, particularly in light of changing racial demographics in Canada. As Bala has documented, a rise in anti-youth sentiment has corresponded to aging white populations and increased proportions of ethnically diverse and racialized adolescents.¹²¹

2.4 Policy Scholarship

My prior LL.M. studies and work as a lawyer provided me with a good deal of familiarity with a large body of policy writing about the youth criminal justice regime in Canada. It contributed to my analytical mapping of the juridical field in which adolescent young women in Canada find themselves. This literature demonstrates widely held understandings about the relationships between adolescent young women and legality. There are gaps in this literature where girls are concerned that I intend this project to fill. Policy scholarship about adolescent girls in Canada includes promotional and apologetic literature about the current regime from official sources,¹²² academic textbooks and articles that explain the

¹¹⁸ Hall, Stuart et al. “Policing the Crisis: Mugging, the State and Law and Order” in Toni Picard and Phil Goldman, eds, *Dimensions of Criminal Law*. Toronto: Emond Montgomery, 1992. Print.

¹¹⁹ Douard, John, “Sex Offender as Scapegoat: The Monstrous Other Within” (2009), 53 *NYL Sch L Rev* 31.

¹²⁰ Schissel, Bernard, *Blaming Children: Youth Crime, Moral Panics and the Politics of Hate*. Halifax: Fernwood Publishing, 1997. Print.

¹²¹ See e.g. Bala, Nicholas, “Canadian Youth Justice in Context” *Youth Criminal Justice Law: 3d ed.* Toronto: Irwin Law, 2013. Print. pps. 710-741.

¹²² Like the Department of Justice

legislation and formal, reported legal decisions under it targeted for an audience of people working in the justice and correctional systems as well as adolescents themselves and literature that criticizes the current legislative regime. There is significant overlap between who writes this policy literature and who contributed to the crafting of the *YCJA*. Legal scholar Nicholas Bala and criminologist Sanjeev Anand are pre-eminent in this field. Their work is encyclopedic in its explication of formal details of the legal and policy regime set out under the *YCJA*.¹²³ They offer gentle critiques of the current regime and are influential within it.

In general, feminism has a ghostly existence in this literature as the work tends to assume an egalitarian, enlightened post-feminist present tense where inequalities faced by girls did exist, but in a less evolved past. Accordingly, this literature does not deny discrimination and oppression against girls took place in the past but treats this injustice as irrelevant to, and certainly not produced by, current conditions. It assumes a postfeminist present tense where gender equality has been realized. It assumes the formal legal and discursive separation of *just* punishment from *protective* “child saving” has a concrete reality.

Canadian academics writing about youth justice policy tend to describe the treatment of adolescents by the criminal and quasi-criminal systems in a grand narrative of historical progress.¹²⁴ Grounding their thinking in rights discourse, they are critical of the way adolescents were not differentiated from adults under the law until the 19th century. Indeed, it is in expert discourses, and especially developmental psychology (on which these policy writers heavily rely) that the category of adolescent is constructed. These academics also criticize the consequences, but laud the intentions, of the “child savers” movements of the early 20th century and the *Juvenile Delinquents Act (JDA)*¹²⁵ that came into force in 1908. They lament that the JDA did not allow for sufficient legal protections for adolescents’ rights and generally insist

¹²³ See most recently Bala, Nicholas and Anand, Sanjeev. *Youth Criminal Justice Law*. 3d. Ed. Toronto: Irwin Law, 2012 at 9.

¹²⁴ Including Doob, Bala, Anand and Davis-Barron.

¹²⁵ RSC 1908 cJ-3

that, since 1982, legality has been a fair space where the rights of adolescents are protected in Canada. Progress, they argue, marches onward, and they contend in general that, since the 2003 coming into force of the YCJA, legality has become a supportive and even nurturing space for adolescents in Canada. The dominant narrative is that the system is fairer than it ever was before. And it is a dominant understanding that the law is contained in books and legality takes place in courtrooms.

These academics also tend to vilify media and assert the legitimacy of statistical data as a reflection of reality. This policy literature is expressly intended to counteract what it claims is a misapprehension in popular culture: the argument is that adolescents are popularly *misunderstood* as increasingly dangerous and relies heavily on the quantitative studies discussed above to refute this. In general, it understands statistical data sets as *the* truth and portrays popular understandings of adolescent offending as misapprehensions it seeks to correct. While understandable given the conditions of possibility in which policy discourse is constructed as a genre, the portrayal of media and popular discourse in policy writing is problematic in that it tends to present media discourse as monolithic, unitary and unsophisticated in a self-serving way that is not consistent with what has happened, for example, in Ashley Smith's case.

It is difficult to draw a bright line between policy writing by academics and legal documents. For example, the Nunn Commission Report,¹²⁶ released shortly before Ashley Smith's death in custody, is a legal document but it also contributes to policy discourse in the manner of an academic work. It makes recommendations that can be treated doctrinally by courts and legislators as persuasive (not binding) in the same manner as academic texts. The recommendations of the Nunn Commission have in turn been written in to the YCJA.¹²⁷ This report is typical and reconstitutive of the preponderance of Canadian policy discourse about adolescents: the white male adolescent is the normative young offender about whom

¹²⁶ "Spiralling Out of Control: Lessons Learned From A Boy in Trouble" Report of the Nunn Commission (December 2006) http://www.gov.ns.ca/just/nunn_commission/docs/Report_Nunn_Final.pdf

¹²⁷ For a legislative summary of the portions of C-10 that affect youth criminal justice law see: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c10-09&Parl=41&Ses=1

analysis is offered and for whom policy is made. The Report only cursorily looks at whether the system is equally inadequate in respect of its treatment of differently situated offenders. It makes no mention of gender disparities in treatment of offenders.¹²⁸ While the report makes a passing nod to the fact that adolescent girls and boys are different populations, it sets forth no analysis of whether these populations have different needs or are treated differently. Also conspicuously absent from the report is an analysis of race and, in particular, aboriginality.¹²⁹

Policy literature about adolescent young women and criminal as well as quasi-criminal regulation is also problematic because it treats the child welfare, mental health and criminal systems separately. Prior to 1984, the Canadian youth justice system was not neatly separated from child protection regimes.¹³⁰ The YOA ideologically separated criminal responses to offending behaviour by adolescents from child welfare responses. Two legal regimes were created, which policy writing looks at separately. This is problematic because there is ongoing connection and overlap between systems. Child welfare protective responses can be *effectively* carceral.¹³¹ There is fluidity and overlap between which adolescents are “in care” and which are criminalized (especially with a frequent trajectory of youths “in care” into the criminal justice system) and the measures taken against them for protective reasons and mental health reasons are often effectively the same. Also because of this regime separation, the child welfare, mental health and criminal justice systems operate administratively separately from one another; consequently, lack of communication

¹²⁸ In fairness, there is one sentence, however, about different charge rates for girls and boys on page 162 of the report.

¹²⁹ This is particularly glaring given the disproportionate overincarceration of aboriginal people, and especially aboriginal young women and girls, across Canada. See Elizabeth Fry Society Fact Sheets “Aboriginal Women”: “In 2004-2005, Aboriginal women made up 30% of the women in federal prisons. In provincial jails and detention centres in Saskatchewan, women compose 87% of the female prison population, 83% in Manitoba, 54% in Alberta, and 29% in British Columbia.” <http://www.caefs.ca/wp-content/uploads/2013/04/Aboriginal-Women.pdf>

¹³⁰ The Juvenile Delinquents Act S.C. 1908 contemplated that all criminally accused adolescents were “misguided children” in need of protection. It allowed for dispositions that resulted in the holding of adolescents for things as vague as “sexual immorality” and it was commonplace for adolescents subject to JDA sentences and others who were being cared for by the child protection system to be held together. For discussion see e.g. Bala, Nicholas and Anand, Sanjeev. *Youth Criminal Justice Law*. 3d. Ed. Toronto: Irwin Law, 2012 at 9.

¹³¹ e.g. closed group homes

between systems is endemic. However, while the discourses of these systems are often mutually unintelligible (relying on different definitions of the subject, divergent solutions and mechanisms), the practical circumstances of adolescent accuseds and offenders, *especially* girls, given their disproportionate social marginality and overlapping involvements with health and child welfare systems, often involve enmeshment simultaneously with all of these systems.

2.5 Feminist Legal Studies

Writing from feminist legal theory has helped me move beyond my prior acceptance of certain widely accepted “truths” of existing YCJA policy writing by contributing to my project an understanding of law as connected to other institutional and political processes, and a discourse that assumes implicitly male, white, middle class subjects. It also contributes to an understanding of the relationship between law reform and lived experiences as well as to theorization of legal cases as sites for contestation of power and competing meanings and discourses. Feminist legal theory looks critically at the operation of discourses of gender in legal sense-making, theorizes how legal systems and actors are gendered and play a part in the process of gendering and offers insight into how legal relations are understood in gendered terms.

Feminist engagement with the law contains debates about whether it should be woman-centred or anti-essentialist and the extent to which political aims should affect research projects. Theorization of the relationships between gender, sexuality and the legibility of women’s voices to legal discourses from a critical perspective has been undertaken by feminist legal theorists like Ngaire Naffine,¹³² Joanne Conaghan,¹³³ Denise Rheume¹³⁴ and Nancy Dowd and Michelle Jacobs¹³⁵ among others.¹³⁶ In general,

¹³² Naffine, Ngaire. “In Praise of Legal Feminism” (2002) 22 *Legal Stud.* 71.

¹³³ Conaghan, Joanne, “Gender Sexuality and the Law: The Making of a Field” *Feminist Legal Studies* 2009 at 303-307.

¹³⁴ Réaume, Denise, “What’s Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women’s Exclusion from Law” (1996) *Legal Theory* 2, 265-299.

¹³⁵ Dowd, Nancy and Jacobs, Michelle eds. *Feminist Legal Theory: An Anti-Essentialist Reader*, New York: New York Univ Press, 2003. Print.

¹³⁶ See e.g. Levit, Nancy and Verchick, Robert, *Feminist Legal Theory: A Primer*. New York: New York University Press 2006.

feminist legal theorists, have analyzed and theorized ways in which women and girls have been excluded from the law. As Conaghan writes, feminist legal theorists regard law as implicated in social processes, rather than acting neutrally and apart from political and institutional discourses. I find helpful Conaghan's understanding of "the collusion of law in a patriarchal social order,"¹³⁷ and view of law as playing an active part in what she terms "the production of gender relations and subjectivities, as well as the production, dissemination and legitimation of a broader, gendered social order... law is a gendering practice."¹³⁸ Feminist legal theorists have thus contributed theory that explores ways in which legal doctrine is *not* determinative as well as the continued significance of what laws do say to what happens to people, and even to the constitution of people themselves as subjects.

Ideas from feminist legal theorists about how gender makes available certain subjectivities, and hence certain dominant discursive figurations, that lend themselves to the exclusion of certain subjects. Feminist legal theory raises questions about the race and gender of Agamben's *homo sacer* figure. Jennifer Nedelsky, in her work reconceptualizing autonomy as relational, has explored how the law, written *by* a particular, socially located, classed and raced group of white men *for* subjects implicitly assumed also to be men, is ill equipped to deal with the embodied diversity of the human beings subject to the law.¹³⁹ Like Nedelsky, Regina Graycar,¹⁴⁰ Vanessa Munro¹⁴¹ and others have critiqued the assumed implicit maleness of the legal subject that is made manifest in law and policy discourse. Critical race theorists like Kimberle Crenshaw and bell hooks have enhanced the depth of this analysis as they critique the

¹³⁷ Conaghan, Joanne, *Law and Gender* Oxford: Oxford University Press, 2013. Print.

¹³⁸ *Ibid* at 104.

¹³⁹ Nedelsky, Jennifer. "Embodied Diversity and the Challenges to Law" (1997) 42(1) *McGill LJ* 91.

¹⁴⁰ Graycar, Regina and Morgan, Jenny *The Hidden Gender of Law*. Sydney, Australia: The Federation Press, 1990. Print.

¹⁴¹ Chapter: 141 Munro, Vanessa, "Legal Feminism and Foucault: A Critique of the Expulsion of Law" (2001) 28 *Journal of Law and Society* 4, 546–567.

assumed race and socioeconomic status of legal subjects as middle class and white.¹⁴² Post-colonial feminist legal scholarship that specifically engages with settler colonialism in Canada also informed my analysis. I found the work of Sherene Razack especially helpful towards understanding the spatializing of colonial violence against aboriginal people and the conceptualization of aboriginal people as socially dead and how that informs the treatment of the deaths of aboriginal people in police or corrections custody.¹⁴³ Razack critically unpacks structures of mainstream thinking endemic to Canada as a white settler society transforming into a neoliberal empire. Razack looks at racialized power in its classed and gendered dimensions.¹⁴⁴ She critically explores violent, racist, colonial processes and structures that undermine liberal Canadian national mythology of law as dispassionate, fair and just. Razack argues that “ colonialism “turns the native into a thing” violence against which and the exploitation of which is legitimate¹⁴⁵. Thobani has set out similarly valuable analyses looking at the Canadian context.¹⁴⁶

Of particular relevance to this dissertation are studies that document conspicuous absences from discourse of consideration of the agencies of those identified as girls. These include the discussion by Fine of “the missing discourse of girls’ desire”.¹⁴⁷ More recently, Tolman has argued that a discourse of

¹⁴² See e.g. hooks, bell. *Yearning: Race, Gender, and Cultural Politics*. Boston: South End Press, 1990. Print; see also Crenshaw, Kimberle. “Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour”(1993) 43 *Stanford Law Review* 1241-1299.

Razack, Sherene “It Happened More Than Once: Freezing Deaths in Saskatchewan” (2014) 26 *CJWL* 1; Razack, Sherene; Malinda Smith and Sunera Thobani, eds. 2010. *States of Race: Critical Race Feminism for the 21st Century*. Toronto: Between the Lines, 2010; Razack, Sherene, “ Timely Deaths: Medicalizing the Deaths of Aboriginal People in Police Custody” (2013) 9 *Law, Culture and the Humanities* 2 pp. 352-374. ¹⁴³

¹⁴⁴ Razack and Smith, Malinda eds. *States of Race: Critical Race Feminism for the 21st Century* Toronto: Between the Lines, 2010.

¹⁴⁵ Razack, *ibid* at p. 38

¹⁴⁶ See Thobani, Sunera, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* Toronto: University of Toronto Press, 2007.

¹⁴⁷ Fine, Michelle. ““Sexuality, Schooling and Adolescent Females: The Missing Discourse of Desire.”(1988) 58 *Harvard Educational Review* 1 . Michelle Fine argues that sexuality is presented in educational institutions in such a way as to present adolescent females as sexual victims, never sexual agents. Fine argues that, in the late modern educational paradigm of US schools, a girls is “educated primarily as the potential victim of male sexuality and represents no subject in her own right.” (at 30) In schools, Fine found that sexuality was managed as violence, as victimization, and as individual morality. In contrast, Fine contends that “the naming of desire, pleasure, or sexual entitlement, particularly for females, barely exists in the formal agenda of public schooling on sexuality.” (at 33)

adolescent young women's inequality remains absent from mainstream discourses of the girl.¹⁴⁸ I draw upon the theorization of agency by Karaian, who links the concept of agency generally with sexual agency. Karaian's work looks critically at how contemporary discourses around "selfies" and "sexting" and more broadly mainstream discussions of adolescent sexuality constitute teenage girls' unintelligibility as sexual subjects. Karaian provides insight into the cultural and legal disavowal of girls' narratives about digital sexual expression. Karaian concludes that their construction as "girls" undermines the ability of teenage females identified as girls to challenge a normative sexual order in which they are often disciplined and blamed for sexual victimization they endure.

I have also drawn on feminist legal theory in working towards an understanding of the unresolved questions of the relationship of changes in written law to changes to experiences of and constraints on subjects in the juridical field, and in particular Ashley Smith as a subject in the juridical field. In this regard, I drew on ideas of feminist legal theorist Nicola Lacey on feminist law reform and about tensions between the public and private, affective and rational, dimensions of life when law is considered.¹⁴⁹ Carol Smart's work that challenges the inherent liberalism of law reform initiatives has contributed to my thinking significantly. In particular, Smart's analysis of the "uneven operation of law" involves a contention that law has different components that are distinct enough that law reform in one area may not affect the operation of law in another.¹⁵⁰ Rosemary Coombe's work about agency in the juridical field is important to the foundational understanding of the functioning of discourses of law within the legal field

¹⁴⁸ Tolman, Deborah, "Female Adolescents, Sexual Empowerment and Desire: A Missing Discourse of Gender Inequity"
¹⁴⁹ Lacey, Nicola. "Unspeakable Subjects: Impossible Rights: Sexuality, Integrity and Criminal Law" in *Unspeakable Subjects* Oxford: Hart, 1998. Print. pp. 98-125, at pp. 100-101. In the context of a study of the relationship between sexed bodies and sexual offences, she has written that there has been an "optimistic" reformist literature in the legal sphere: "it was as if the powerful forces which shaped male and female, gay and straight sexualities would simply fall away once the power of the law was invoked. At best, this seemed implausible. At worst, it threatened some unpromising reforms, and the construction of some dubious political alliances."

¹⁵⁰ Smart, Carol, *Law, Crime and Sexuality* London: Thousand Oaks Sage, 1995. See especially Chapter 9.

that is presented in this dissertation.¹⁵¹ I enjoy and am grateful for the insightful and inspiring example of analysis of legal cases as intersections or sites for the contestation of meanings, power and discourses, including discourses of gender Rebecca Johnson provides in her work on the *Symes* case.¹⁵² Like Johnson did with the *Symes* case, I have worked in this dissertation to unpack and distill out different discourses, voices and perspectives present within legal and media texts in relation to Ashley Smith's case. My focus is not precisely the same as Johnson's as my primary interest is not in the contestation of meanings within court proceedings but the overall construction of government and meanings both within and outside of sites of production of formal legal discourses.

¹⁵¹ Coombe, Coombe, Rosemary, "Room For Manoeuver: Towards a Theory of Practice in Critical Legal Studies" 1989 American Bar Foundation Review Symposium Essay online:

http://rcoombe.artmob.ca/wpcontent/uploads/2011/03/Coombe_Room_for_Manoeuver.pdf

Coombe, characterizes the "subjective/ structural" divide between law-as-written and law-as-lived as a binary that must be transcended. Coombe looks at how subjective experience is actually mediated by the structures we create as a society.

¹⁵² Johnson, Rebecca *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law*. Vancouver: UBC Press, 2002. Print.

Chapter 3

3.1 Theories and Methods: *This Case Study*

In this research and my thinking generally, I rely on theoretical foundations found in social constructivist ideas about discourse, power, governmentality and necropolitics as well as agency and related non-essentialist feminist theories about the social construction and performance of gender. I thus assume that it is through discursive processes involving power relations that social agents constitute knowledge, situations, social roles, identities, and their relationships with other social agents. Gender and government are both understood as such discursive processes. Law is understood as socially embedded in broader practices of governance of bodies, relationships and states. In this Chapter, I outline the theoretical foundations from which the inquiry conducted in this research begins. Then, I discuss the epistemological methodology of critical discourse analysis employed in this study. Finally, I more specifically and pragmatically outline the methods of research used as well as some limitations of, and challenges posed by, those methods.

3.1.a *Defining the Case*

Certain boundaries of what might be considered the “Smith Case” are easily defined in the formal doctrinal discourse of the common law if the “case” is understood as the inquest decision or the settled civil claim. These boundaries are not self-evident when Ashley Smith’s incarceration and death are considered from the theoretical foundations of this dissertation. Theoretical foundations in social constructivism and governmentality studies complicate questions of where her case begins and ends, and make it less immediately obvious what texts do or do not form part of her case. There has, and will be, only one definitive legal decision issued: the inquest verdict rendered on December 19, 2013. However, numerous texts, including formal legal texts, written texts and visual texts are significant to how different actors engage in making meanings of her life and death that reflect, produce and otherwise engage

governance. In this dissertation, I work from an understanding of the Smith case as a unit of inquiry in the social sciences that constitutes an enactment of governmental power. I am relying on the definition of “caseness” advanced by Lauren Berlant.¹⁵³ “Caseness” is a state in which the singular is both individual and marked as an exemplar: “the case can incite an opening, an altered way of feeling things out, of falling out of line.”¹⁵⁴ Berlant contends that a “case” is what an event can become. She writes:

Usually, when an event happens there are no outcomes; it fades into the ordinary pulsations of living on undramatically, perhaps in memory, without being memorable. When an event occurs out of which a case is constructed, it represents a situation in which people are compelled to take its history, seek out precedent, write its narratives, adjudicate claims about it, make a judgment, and file it somewhere: a sick body, a traffic accident, a phenomenon, instance, or detail that captures the interpretive eye.¹⁵⁵

The “caseness” of a narrative, actor or situation frames how it can be used by activists. 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. I rely on Rosemary Coombe’s theorization of the relationship between the narrative structure of legal discourse and the subjective consciousness of agents.¹⁵⁶ As is the case with other discourses, legal discourse is constitutive of actors and they have agency within this constructive process. Legal subjectivities are constituted, using narratives, in social realities. Social actors are not fully cognizant of this relationship and are aware of it to different degrees. I also draw on the suggestion modeled by Johnson that legal cases can be studied as sites of “intersection and competition of numerous discourses, each asserting the primacy

¹⁵³ “On the Case” (2007) 33 *Critical Inquiry* 4 pp. 663-672.

¹⁵⁴ *Ibid* at p. 666.

¹⁵⁵ *Ibid* at 670

¹⁵⁶ Coombe, *ibid*, at 92.

of its vision.”¹⁵⁷ Looked at this way, they are stories filled with bad things that happen but which may lack any single discernable “bad guy”: stories of multiple villainies which are not about easily blamed individual villains, but which have some distinct narrative threads.

For the purposes of this research, I define the Ashley Smith “case” much as Michel Foucault defined the “case” of Pierre Rivière in his attempt to reconstruct discursive confrontations and battles, and rediscover the operation of those discourses in the relations of power and knowledge.¹⁵⁸

Foucault understood the Pierre Rivière matter as a “dossier” or:

a case, an affair, an event that provided the intersection of discourses different in origin... all of them speak, or appear to be speaking, of one and the same thing: at any rate the burden of these discourses is the affair on June 3. But in their totality and their variety they form neither a composite work nor an exemplary text, but rather a strange confrontation, a contest, a power relation, a battle among discourses and through discourse. And yet, it cannot simply be described as a single battle; for several separate combats were being fought out at the same time and intersected each other.¹⁵⁹

Thus, for the purposes of this dissertation, the boundaries of what constitutes the Smith case are delineated in this research itself. I am studying the Ashley Smith case as a social case as embodied in the public talk about Ashley Smith, which is neither the expert Smith case, where she is used as an exemplar for liberal activist apparatus, nor precisely the bureaucratic Smith case as officially resolved by the December 2014 CSC response to the inquest verdict adopt the theoretical understanding of Charles Ragin and Howard Becker¹⁶⁰ that the delimitations of cases are constructed during the course of research by researchers. The Smith case as understood in this study is not therefore limited to the inquest decision or to

¹⁵⁷ Johnson, Rebecca *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law*. Vancouver: UBC Press, 2002. Print. (at xiii)

¹⁵⁸ Foucault, Michel. *I, Pierre Rivière, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide in the 19th Century*. Trans. Jellinek, Frank. Lincoln: University of Nebraska Press, 1975. at xi

¹⁵⁹ Foucault, Michel *ibid*, at p. x.

¹⁶⁰ Ragin, Charles and Becker, Howard *What is a Case?* London, Cambridge University Press, 1992.

the series of formal legal decisions made about Ashley Smith but rather includes a wide variety of texts that are sources of government in addition to that judgment. It therefore includes texts found in the sites of news media, docu-dramas, reports and legislative debates. I define Ashley Smith's case for the purposes of this study as 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 for the purpose of this case analysis to the time during which she was publicly presented as a case to be resolved by the formal legal system. This is a period that starts when she first appears in youth court and ends with the response of the Correctional Service of Canada to the Inquest verdict, at which point no further official response to Ashley Smith's life or death was required by law. The Smith case is therefore delimited chronologically as taking place between 2002 and the release of the Correctional Service of Canada (CSC)'s response to the recommendations made in the Smith inquest on December 11, 2014.¹⁶¹

3.1.b *Power and Representation in Discourse*

The thinking about discourses of "girl" that this dissertation develops is based in a social constructivist epistemological frame in which discourse is the principal tool used by social communities in constructing social reality. This research starts from an epistemological assumption that, while "the real" world actually exists, our understandings of the world are always based on human imaginations. Our definitions of phenomena are always constructed, or built, by our imaginations in social interaction. It is accepted there is, as Ludwig Wittgenstein postulated, no knowledge of the real that precedes cultural constructions¹⁶² and, as Richard Rorty theorized, there is no way for actors to objectively perceive the real

¹⁶¹ The Response of Corrections Canada to the Smith Inquest was released on December 11, 2014. Corrections Canada "Response to the Coroner's Inquest Touching the Death of Ashley Smith" (December 2014) <http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>

¹⁶² For discussion see e.g. Trigg, R. (1991). Wittgenstein and Social Science. In A. P. Griffiths (Ed.), *Wittgenstein Centenary Essays Royal Institute of Philosophy Supplement*, Vol. 28. Cambridge: Cambridge University Press

unmediated by language.¹⁶³ Put another way, social groups construct knowledge intersubjectively together, collaboratively creating shared meanings and building or constructing social facts in the procedure of this collaboration. As Donna Haraway suggests in her “Cyborg Manifesto”: “social reality is lived social relations, our most important political construction, and a world-changing fiction.”¹⁶⁴

Discourses are systems of shared meanings through which we explain and define our world and our experiences to ourselves. The constructed nature of discourse and the fact that it mediates our understandings of the real can make it hard to distinguish what is inevitable, or unchangeable from what is contingent, or possible to change. This is the starting point from which I examine how legal, expert and educational definitions of the “norm”, of what is “normal” for a girl confine some adolescent young women while completely excluding others. Discourses, as understood in this theoretical framework, are regularized ways – systems- of speaking and thinking about the world.¹⁶⁵ These systems are the social procedures that organize power and knowledge, thereby creating social facts. I work from Foucault’s definition of discourse. Through discourse, power relations produce the subjects who speak. Put another way, this dissertation understands discourse as a set of social “conditions of possibility”.¹⁶⁶ These are the social, cultural and historical conditions, rules and structures under which particular statements become understood as true or false.¹⁶⁷ The way we *describe* and *define* reality, while it makes possible an understanding of reality, at the same time narrows our understanding of reality and, even, produces *us* insofar as we understand ourselves and each other.

In describing and defining phenomena in the real, discourses contain constructed *representations* of those phenomena. Representations are powerful socially constructed images formed using implicit pre-

¹⁶³ Rorty, Richard, *Philosophy and the Mirror of Nature*. Princeton: Princeton University Press, 1979.

¹⁶⁴ Haraway, Donna "A Cyborg Manifesto Science, Technology, and Socialist-Feminism in the Late Twentieth Century," in *Simians, Cyborgs and Women: The Reinvention of Nature (New York; Routledge, 1991)*, at 149.

¹⁶⁵ Mills, Sara, *Discourse* Toronto: Routledge, 1997. Print.

¹⁶⁶ Foucault, Michel. *The Archaeology of Knowledge*. Tr. A. M. Sheridan Smith. London: Tavistock, 1972. p. 193.

¹⁶⁷ Mills, Sara, *ibid*, at 6.

existing, widely-accepted cultural “truths.” I rely upon constructionist theory of representation set forth by Stuart Hall¹⁶⁸ that relies in turn upon Foucault’s study of discourse not primarily as language but as a system of representation.¹⁶⁹ I accept Hall’s formulation that the process of representation itself constitutes the world it represents. The discourses that are dominant in a culture provide a map that gives meaning to the real – these representations do not simply reflect the real. They constitute a “world changing fiction.” Representations not only are *not* the real, they do not even derive their value or power, as Edward Said argues from analyzing textual representations of the Orient, from being *realistic*.¹⁷⁰ Representations are powerful for their ability to define phenomena and to have those definitions accepted, not for being verifiable in some objectively empirical sense.

I also find helpful Hall’s notion of articulation. Speakers and the texts writers produce employ means of articulation when they try to force objects into categories and to unite, understand and act as a group. Articulation (or articulated combinations of parts) in discourse is what produces identities, structures and alliances.¹⁷¹ Articulation involves complex structures and it silences certain statements and obscures differences in order to produce unities.

A generative, bottom up understanding of power is foundational to this research. I rely on Foucault's formulation of discursive power as generative and diffuse. In this understanding, power relations can be likened to a strategic game.¹⁷² Rather than being dictated by a sovereign from the top down, power is dispersed in society, related to knowledge, and productive rather than repressive. As such, in his understanding of discourse Foucault makes a direct link between knowledge and power: power produces

¹⁶⁸ Hall, Stuart. "The Work of Representation." *Representation: Cultural Representations and Signifying Practices*. London: Sage, 1997. 1-74. This theoretical understanding of representation has also been supported and developed by later writers. See e.g. Bond & A. Gilliam, eds., *Social Construction of the Past: Representation as Power*. London: Routledge, 1994. Print.

¹⁶⁹ See e.g. Foucault, Michel. *The Archaeology of Knowledge* Translated by Smith, A.M.S. New York: Pantheon Books, 1972.

¹⁷⁰ Said, Edward. *Orientalism*. USA: Vintage, 1984.

¹⁷¹ Hall, Stuart, Morley, D., & Chen, K.-H. *Stuart Hall: Critical Dialogues in Cultural Studies*. London: Routledge, 1996.

¹⁷² Burchell, Graham, Gordon, Colin and Miller, Peter. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press, 1991.

knowledge.¹⁷³ Power produces what is socially understood to be reality, objects and rituals of truth. Power is “mundanely productive... not spectacularly conspiratorial.”¹⁷⁴ Power relations involve struggles between discourses for pre-eminence in defining the real. I accept the Foucauldian understanding that power is “multiple, relational, heterogeneous and pervasive.”¹⁷⁵

When discourses define “the real,” they make certain things *unsayable* and constitute subjects’ identities. I agree with Judith Butler’s understanding that discourses, in giving actors names, provide us a way in which to exist. Thus constitutive of the real, discourses have power in the face of which actors are vulnerable and only within which our social existence is possible.¹⁷⁶ Discourses limit options by defining them. Discursive constructions - the way things in “the real” are described and defined in systems of power and knowledge - bring about certain events in reality by shaping the conditions of possibility for what can happen in social interactions. For instance, a set of conditions of possibility are defined by various discourses or constructs of the “girl.” These discourses are always being generated in social interaction, and each interaction has potential to shape and reshape how phenomena (like girls) are defined. Discourse is what configures the dimensions of the “stamp” of “girl” that is impressed upon adolescent young women.¹⁷⁷ These conditions are constantly contested; there is no grand plan and while power is not evenly dispersed but clustered in particular locations, there is no conspiratorial junta of designers. Power is diffuse; discourses collide. Discursive social maps and the processes of mapping are always in flux and they are messy.

This approach accepts that in mainstream discourse, terms are often defined in binary opposition. The binary definition of the norm by opposites requires the construction of monsters for the constitution of the

¹⁷³ Hunt and Wickham, *ibid*, at 12.

¹⁷⁴ *Ibid* at 81

¹⁷⁵ at 14.

¹⁷⁶ For discussion, see Butler, Judith. *Excitable Speech: A Politics of the Performative*. Routledge, London: 1997. Since we are formed by language, Butler comments that “it insults us with its prior power.”

¹⁷⁷ Lipkin, Eline. *Girls Studies*. California: Seal Press, 2009

norm. “Abnormals”, such as mean/ nasty/ unruly/ modern girls, are binary opposites against which the norm of nice/proper girl is defined. As such, the traits defined as aberrant by opposites are constitutive of the norm. Foucault, in *Madness and Civilization*, discusses what he characterizes as an intimate relationship between rationality in the public sphere and the exclusion of certain categories of people as “mad;”¹⁷⁸ rationality needs madness for its self-definition. When looking at relationships between discipline and constructs of normalcy, Foucault develops an understanding of the discursive uses of *abnormals*, which are a certain type of monsters. He argues that abnormals are used in the construction of normality and are invoked in processes of government to delimit what constitutes the normal and define it by opposites.¹⁷⁹ Abnormals are figures structured by the broader social category of *monsters*.¹⁸⁰ Monsters are seen as the effect of a simultaneous breach of both law and nature.¹⁸¹ Abnormals are monsters whose monstrosity is not visible but behavioural and internalized. By being assumed to breach the “proper” order of both nature and law by failing to enact feminine passivity while breaching legal and social rules, aberrant “girls” are the other against which the norm can be defined.

3.1.c *Narratives*

I am working from an understanding of narrative that is built on social constructivist narrative theory. The term narrative is used in a variety of ways within diverse disciplines. Often it is synonymous with story. I am working with an understanding of narrative as one rhetorical mode of writing or speaking. It is a mode that engages with, relies upon and the study of which can reveal, pre-existing discourses in relation to phenomena (like “girls”), as technologies. These technologies invoke, reconstruct and can alter, existing

¹⁷⁸ that is, not capable of rational thought

¹⁷⁹ Foucault, Michel. *Abnormal: Lectures at the College de France 1974-75* Trans. by Burchell, Graham. Picador: New York, 1999. See especially Chapter 3 – 22 January 1975.

¹⁸⁰ Haraway builds on Foucault’s understanding of monsters as follows: “ Monsters have always defined the limits of community in Western imaginations... on the natural and supernatural, medical and legal, portents and diseases — all crucial to establishing modern identity.” Haraway, *ibid*. This is a bit different from Stuart Hall’s “moral panic” framework where folk devils are considered to be the ill against which society must protect itself to assuage its anxieties, but it’s a related and complementary understanding.

¹⁸¹ Sharpe, Andrew *Foucault’s Monsters and the Power of Law* New York: Routledge, 2010. Print. p. 3.

interactive, social and cultural practices and identities.¹⁸² Narrative is a genre of text that has a plot, characters, a beginning, middle, and an end. It contains symbolic meanings that are encoded consciously or subconsciously, by its author.¹⁸³ I also work from understandings that narratives are crucial to the construction and performance of legality and that legal narratives are also cultural narratives. Stories that engage pre-existing cultural discourses define cases in law as well as shaping people's understandings of legality. Narratives are a key technology by which law is communicated, adjudicative acts are justified, and their principles are explained.¹⁸⁴ Like Emma Cunliffe's study of the prosecutions of Kathleen Folbigg, I work from an understanding that narratives have governmental effects.¹⁸⁵ They function as technologies of government, including as a technology of the self. I also understand that narratives of crime stories play a crucial role in differentiating the criminal from the non-criminal.¹⁸⁶ This dissertation starts from an assumption that narrative accounts give readers access to processes of identity construction by subjects and communities. Telling a story is a way of speaking to someone else about one's self, but it is also speech about the teller's identity as well as the teller's social context and the widely accepted assumptions and discourses circulating in that context.¹⁸⁷ I also understand that, as Reissman suggests, researchers should be cautious about interpreting any account of events or of oneself, any story, as the "truth". Reissman emphasizes that "we cannot give voice, but we do hear voices that we record and interpret."¹⁸⁸ On the

¹⁸² For discussion of discourse and narrative, see e.g. Bamberg, Michael. "Narrative Discourse and Identities" https://www.clarku.edu/~mbamberg/Papers/Narrative_Discourse_and_Identities.pdf

¹⁸³ Bhabha, Homi (ed.) *Nation and Narration*. London: Routledge, 1990.

¹⁸⁴ Moran, Leslie J. "Legal Studies after the Cultural Turn: A Case Study of Judicial Research." (2012) S. Roseneil and S. Frosh (eds.). *Social Research after the Cultural Turn*. Basingstoke: Palgrave Macmillan, pp.s. 124-143.

¹⁸⁵ Cunliffe, Emma, "(This is Not a) Story: Using Court Records to Explore Judicial Narratives in R v Kathleen Folbigg" (2007) 27 *Aus Fem L J* 71 at 94.

¹⁸⁶ I rely here on Todd Herzog's insights from his studies of detective stories. Herzog, Todd. "Crime Stories: Criminal, Society and the Modernist Case History." *Representations* (2002) Vol. 80: 34-61.

Herzog looks at the role that the case history plays in distinguishing what and who are criminal from what is non-criminal. He looks at the literary genre of the criminal case history/ detective story. Herzog looks at how, in various processes, narrative is one of the primary techniques by which the criminal and the noncriminal are distinguished.

¹⁸⁷ For discussion see e.g. Chatman, Seymour. *Story and Discourse*. Ithaca: Cornell UP, 1978. Print.; see also Genette, Gerard. *Narrative Discourse*. Trans. by Jane E. Lewin. Ithaca: Cornell UP, 1980. Print. See also Josselson R, Lieblich A, eds. *Interpreting Experience. The Narrative Study of Lives*, Vol. 3, pp. 153-173, London, Sage. Print.

¹⁸⁸ Reissman C. *Narrative Analysis*. London: Sage, 1993. Print.

basis of this epistemological assumption, I do not seek in this dissertation to tell “the” “true” story of Ashley Smith. Were I to try to do so, I would just create another representation of her that would be problematic in many of the ways existing representations are problematic. Ashley Smith’s internality will be forever unknown and unknowable. Rather, what can be known, examined and understood better through this book is a narrative of how she is represented by different actors, following different narrative structures, in the case bearing her name.. This is a meta-text in that I am seeking to write a story about the stories told, a narrative about narratives.

3.1.d *Governmentality: Risk, Security and Necropolitics*

This study looks at what Ashley Smith’s case can reveal about how the modern state is deployed as a matrix of bureaucratic power, in particular when the governed are identified as adolescent girls. Research was conducted into how the conduct of Smith’s conduct was operationalized, how power circulates in the contemporary Canadian state, and how discourses of the state, virtue and binary gender hierarchies are governmentalized. In particular, the mobilization of government by a rationalized bureaucratic system is examined. In this study, I build upon the work of Neil Gerlach and Sheryl Hamilton in their critical theorization of the amorality and even immorality of “monstrous bureaucracy” in the rationalized neoliberal deployment of the power of the state.¹⁸⁹

I work from Dean’s understanding that the concept of governmentality provides “a language and a framework for linking questions of government, authority and politics and questions of identity, self and person”.¹⁹⁰ Regimes and practices of governmentality are reinforced and shaped by various forms of knowledge. Expert discourses of medicine, psychology, social work and law have power in defining representations of the real. Regimes of practices are dependent upon these expert forms of knowledge.

¹⁸⁹ Hamilton, Sheryl and Gerlach, Neil “ It Won’t Always Be Wrong: Morality and Monsters in Legal Rational Authority” (2010) *Law, Culture and the Humanities* 6(3) 394–419 at 396

¹⁹⁰ Dean, Mitchell. *ibid* at 13.

The concern of governmentality studies is with the government “of human conduct in all contexts”.¹⁹¹ The concept of governmentality in this sense relies on Foucault’s analysis of modern government grounded in his theories of discursive power.¹⁹² However, Foucault’s governmentality studies were an unfinished project of his later career. It is later theorists who developed the theorization of governmentality that underpins this dissertation. As Graham Burchell, Colin Gordon and Peter Miller describe them, governmentality studies look at a “dimension of historical existence which Foucault did most to try to describe.”¹⁹³ I adopt the definition used by Mitchell Dean,¹⁹⁴ Colin Gordon, Graham Burchell and others elaborating the work of Foucault: “government rationality” and “governmentality” are synonyms.¹⁹⁵ Government can be thought of broadly as the “conduct of conduct.”¹⁹⁶ Thus governmentality involves particular mentalities, arts and regimes of government that have emerged since early modern Europe.¹⁹⁷ Government involves regulation by various systems and leaders including processes of government as in the sense “conduct oneself.” As Walters writes, sites of governance are spaces where technologies of power and technologies of the self intersect.¹⁹⁸

Foucault’s “pastoral” concept of government links everyday subjectivities and practices in local sites with governing. Governmentality studies are not about “strategic relations” between equals/ peers or about states of absolute domination. When government is discussed, it is not just in terms of war and struggle but also of the arts and techniques to deliberately shape subjects’ behaviour according to particular sets of

¹⁹¹ Dean, Mitchell *Governmentality: Power and Rule in Modern Society*. Thousand Oaks California: SAGE, 1999 at 4.

¹⁹² See e.g. Foucault, Michel. “Technologies of the Self (A seminar with Michel Foucault at the University of Vermont, October 1982), in: L. H. Martin, H. Gutman, P. H. Hutton (eds.), *Technologies of the Self. A seminar with Michel Foucault*, Amherst: University of Massachusetts Press, 1982.

¹⁹³ Burchell, Graham, Gordon, Colin and Miller, Peter. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press, 1991 at ix.

¹⁹⁴ Dean, Mitchell. *Governmentality: Power and Rule in Modern Society*. Thousand Oaks California: SAGE, 1999.

¹⁹⁵ Burchell, Graham, Gordon, Colin and Miller, Peter. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press, 1991

¹⁹⁶ Graham, Gordon, Colin and Miller, Peter. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press, 1991.

¹⁹⁷ *Ibid* at 2

¹⁹⁸ Walters, *ibid*, at 15.

norms.¹⁹⁹ The place of convergence between techniques of the self and techniques of domination or discipline is governmentality. It is not located in any one regime of law but in interactions that happen in all kinds of mundane as well as grand circumstances: power and relations of power circulate everywhere and converge at particular locations at certain events.

As such, the state of government is not a thing but a practice.²⁰⁰ The notion of governmentality is related to the conceptual theorization developed by Ewick and Silbey²⁰¹ of legality, as those meanings, sources of authority, and cultural practices that are in some sense legal even if that are not approved or acknowledged by official legal doctrine. In this understanding, law is not separate from but enmeshed within broader social discourses and processes. Rather, law and society are mutually constitutive; law is not an external force to which society is subject, but represents a dynamic set of codes, practices, categories and deliberations that both shape and are shaped by broader social, political, and economic logics, contexts and relations.

Government that takes place in mundane sites in opaque ways can be at least as significant as the practices of government in a grander, formal or legislative sense. Law is socially and culturally embedded. Studies about governmentality such as the one undertaken here look at the cultural force of the power embedded in discourse and how that power applies in the criminal justice and correctional systems as well as to people in general, whose actions and identities are constrained by reference to the power of law. Foucault talks about the importance of “microprocesses” or pastoral power.²⁰² Later theorists have developed the idea that these microprocesses and the shepherding processes by which they are deployed

¹⁹⁹ Dean, Mitchell. *Governmentality: Power and Rule in Modern Society*. Thousand Oaks California: SAGE, 1999 at 10.

²⁰⁰ Foucault, Michel. *Sécurité, territoire, population*. Cours au Collège de France, 1977-1978. Paris: Gallimard Seuil (2004). pp. 294, 282.

²⁰¹ Ewick, Patricia, and Susan Silbey, Susan. *The Common Place of Law Stories from Everyday Life*. Chicago: University of Chicago Press, 1998.

²⁰² See e.g. Foucault, Michel. “Governmentality” trans. Rosi Braidotti and revised by Colin Gordon, in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality*, pp. 87–104. Chicago, IL: University of Chicago Press, 1991.

constitute governmentality. By this, Foucault means the mundane, everyday minor decisions most legal scholarship, for example, doesn't consider. Microprocesses constitute operations of power: those in my study would include specific, day-to-day decisions and actions of individual corrections officers, psychologists and educators in administering routinized sanctions. Governmentality studies try to track power in its many forms: its techniques, its strategies and technologies.²⁰³

This dissertation examines “how, where and with what effect law is produced in and through commonplace social interactions [we can ask]. . . . How do our social roles and statuses, our relationships, our obligations, prerogatives, and responsibilities, our identities, and our behaviors bear the imprint of law?”²⁰⁴ Put another way, in this dissertation, I study ways in which people's interactions reflect and reproduce the cultural power of law in a wide variety of contexts, like schools and homes and hospitals and media.

In considering the cultural power of law, I work from Aihwa Ong's understanding of neoliberalism as “a new relationship between government and knowledge through which governing activities are recast as non-political and non-ideological problems that need technical solutions... neoliberalism as exception is introduced where market driven calculations are...[used] in the management of populations and the administration of special spaces.”²⁰⁵ Neoliberalism is understood to be term that refers to governmental approaches that involve radical de-regulation of markets as well as reductions in government spending, privatizations of formerly public utilities and free trade. I rely on risk and security theory in my understanding of the governmental logics engaged in neoliberalism. According to Ulrich Beck and Anthony Giddens as well as others, in a “risk society” the dominant understanding is that risks need to be contained through scientific, systematized and ultimately actuarial forms of governance. Richard Ericson

²⁰³ Hunt and Wickham, *ibid*, at 45.

²⁰⁴ *Common Place of Law*, *ibid* at 20. See also generally Sarat, Austin. “. . . The Law Is All Over”: Power, Resistance, and the Legal Consciousness of the Welfare Poor. *Yale Journal of Law and the Humanities* 2 (1990) pp. 343–79.

²⁰⁵ Ong, *ibid* at p.3.

and Kevin Haggerty, in their book *Policing the Risk Society* argue that one key defining feature of the risk society is the use of actuarial knowledge of risk to define and manage danger. These authors link increased bureaucratization of policing and increased surveillance to demands for quantification in assessment of risk. They claim: “in risk society, governance is directed at the provision of security... [defined as] a situation in which dangers are minimized.” Risk logic involves the framing of government as a scientific project, the de-politicization of governmental decisions, and the removal of moral questions from determinations about what should be done in particular cases. Results are sought to be optimized, risks are sought to be mitigated and responsibility for the existence and control of undesirable behaviour is displaced onto the citizen. Criminologists such as Hannah-Moffatt theorize that with the flawed logic of risk rationality there is a diffusion of responsibility. In this logic, no one is accountable for results just for responses to particular specific orders, directives or rules. Obedience is a paramount virtue over all others in an inmate, and in guards, and the key considerations in governance of carceral settings need to be risk and containment.

Security governance, as theorized by Foucault and developed by subsequent governmentality theorists, involves the production of sovereign power through management of populations as “crowds” whereby security is constitutive of the understood freedom of the population and “crowd control” becomes a pervasive goal of the state and populations in this way are treated as “de-democratized, governable social units.” Crowds are understood as perpetually both threatened and threatening, and they cannot really function as political subjects. Security of the population is managed in this governmental logic pre-emptively through precautions taken to prevent risks from materializing.

In risk, as in security, logics, the calculus to be undertaken is between trust and a socially accepted level of risk. This drives the production of “inexhaustibly detailed and continuous risk management knowledge.” Ericson and Haggerty quote Beck for the proposition that risk society is steeped in “negative

logic” in its primary concern with the distribution of “bads” or dangers. Probabilistic thinking and risk technologies operate “in tandem” with foreboding. In this logical system, the “least risky” or “least bad” outcome is optimal. Goods are not sought; rather, bads are sought to be contained. Probability calculations are employed to “tame chance” while they cannot eliminate it. Risk calculi are used to eliminate uncertainties and are future oriented, bringing probability calculations about future possibilities into the present. Risk logic helps produce regularity and control. Concepts of risk are, according to Ericson and Haggerty, displacing constructions of normality and deviance in managing populations.

Risk discourse is largely unconcerned with individual morality; it can be seen as promoting a systemic or scientific macro-morality: a utilitarian calculus of the greatest good for the greatest number. Actuarial risk calculations seek to produce containment and elimination of risks to maximize the security of society as a whole. This risk based logic interlocks with the logic of exception that is discussed below. Rigakos and Hadden contend the actuarial logics of risk can be traced to 17th century capitalism and are a product of bourgeois thinking while earlier theorists had characterized risk-based governance as more recent in origin as a late modern invention not based in a particular class. In either case, risk governance is widely understood as prominent feature of late modern governance. The “rational” administrative, organizational and governmental logics of risk are dominant in the early 21st century. Looked at in the context of risk society theorizations, the risk-based prison is a Benthamite panopticon. In the logic of risk, the inmate is imagined as a subject that is “panoptically transparent, manageable and contained.” Risk governance fosters development of what is sought to be a science of the state. Power is predicated on the classification of agents by certain categorizations, like the coding inmates are assigned in CSC custody. Risk society logic is associated with institutionalization of governance: “institutionalization moves authorship away from the individual. Rather than improvising, people do what the institutional script prescribes. Institutionalization is a process of circumscribing human agency and creating routine

enactments.” The logic of risk has previously been theorized to be dominant in CSC’s bureaucracy, and in particular in its management of woman offenders, especially in the work of Hannah-Moffatt.

Security governance as theorized by Foucault²⁰⁶ and developed by subsequent governmentality theorists involves the production of sovereign power through management of populations as “crowds” whereby security is constitutive of the understood freedom of the population and “crowd control” becomes a pervasive goal of the state and populations in this way are treated as “de-democratized, governable social units.”²⁰⁷ Security of the population is managed in this governmental logic pre-emptively through precautions taken to prevent risks from materializing.

I find the concepts of biopower²⁰⁸ developed from Foucault’s analysis of the subjugation of bodies and populations, useful to the analysis of the consolidation of sovereign power through the use of discipline and incarceration of subjects. Risk logic can be understood to function as a form of biopower by classifying populations. Production of truth claims through the dominant discourse of risk not only shapes how we think and act, it also legitimizes strategies that are applied to overcome undesirable social phenomena, submerging or preventing questions about the motives underlying these claims. Further, production of truths through the discourse of risk can also mask oppressive outcomes risk calculations may have on actors excluded or excepted from the norm as undesirable or risky as well as how populations come to be constituted as populations. By “governing through crime”, neoliberal western societies have constructed inmates as an enemy “race”. The logic of exception permits various inmates in a variety of camps to be expelled from political community. The “war on crime” and linked construction of culture of fear produce criminals who become inmates, both of which are an enemy other to be contained. Jonathan

²⁰⁶ As discussed in his lecture: *Security, Territory, Population* (1977/78)

²⁰⁷ Wichum, Ricky “ Security as Dispositif: Michel Foucault in the Field of Security” (2013)15 *Foucault Studies* pps. 164 – 171. At 165.

²⁰⁸ I understand biopolitics in much the same way as Michel Foucault: as state power over the bodies of subjects as well as over the nation. Foucault, Michel (1997). *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*. New York, NY: St. Martin's Press. p. 242. Drawing on Foucault, I understand biopower to refer to techniques of governance for the discipline and subjugation of bodies and populations. Foucault, Michel. *The History of Sexuality* Vol 1 p. 140 (1976)

Simon notes that, in the US context as of the late 20th century, there is a racial “skewing” of burgeoning prison populations whereby “for the first time since slavery, a definable group of Americans lives on a more or less permanent basis in a state of non-freedom.”

Simon argues that the strategy in the US of “governing through crime” has produced a “major reorientation of governance” around risk and fear of crime. The racialization of inmates has a dual aspect. They are in many cases people whose embodiment is already racialized: in Canada, they are disproportionately aboriginal and in the US, they are disproportionately African-American. Further, even where they do not hail from racialized groups, once incarcerated, inmates become understood as a subhuman race.

While I find Foucault’s notion of biopower useful, it is more specifically on related concepts of necropower found in the work of Giorgio Agamben and Achille Mbembe that I base a good deal of my theorizing in this dissertation. I find the theoretical framework of necropolitics especially useful because it allows for understanding of certain subjects as occupying statuses that are neither fully living nor dead, Necropolitics provides 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 motion the series of linked events that led to her incarceration and social, political, juridical and biological deaths. Mbembe adds to Foucault’s understandings of biopower and sovereignty the concept of necropower, which goes beyond merely “inscribing bodies within disciplinary apparatuses.”²⁰⁹ 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

²⁰⁹ Mbembe, *ibid* at 34.

upon them the status of living dead.”²¹⁰ These populations are not disciplined in the sense Foucault talks about with reference to biopower. They are excluded; they are managed. Necropower is the formation of power dominant in what Mbembe calls late modern colonial occupation: governmentality in “management of the multitudes.” While Mbembe doesn’t 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” to name a few) is such a death world.

I accept the argument that has been advanced by Giorgio Agamben, Carl Schmitt and Aihwa Ong²¹¹ that the state of exception is at the heart of neoliberalism: the fundamental idea is that the state can do anything in the interests of governance, without limits, through the invocation of the state of exception. What Razack identifies as “camps” governed by the logic of exception are various. They are “distinguished by a legally authorized suspension of law and the creation of communities of people without the right to have rights.... Camps are places where the rules of the world cease to apply.”²¹² Razack relies for this proposition on the writing of Giorgio Agamben, who theorizes “the camp as the biopolitical paradigm of the modern.”²¹³ Relatedly, I also find useful the concept of “*homo sacer*” as developed by Agamben.²¹⁴ 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 forfeit, whose deaths are not *murder*. I find helpful Agamben’s discussion of the wolf and the ban. He looks at werewolves those who are “banned” as ancient forms of excluded persons: “the man who has been banned from the city”²¹⁵ Agamben identifies carceral inmates as, in some instances, members of the *homo sacer* category, or people who have been banned.

²¹⁰ Mbembe, *ibid*, at 40.

²¹¹ Ong, Aihwa *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* Durham NC: Duke University Press, 2006.

²¹² Razack, *ibid* at p. 7.

²¹³ Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford: Stanford University Press, 1998

²¹⁴ Agamben, *ibid*.

²¹⁵ Agamben, *ibid* at 63.

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.

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 dissertation 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.²¹⁶ 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.

According to Razack, states of exception operate in a variety of carceral regimes. Razack builds on Agamben's assertion that the camp has become the rule and our culture is traditionally defined by a logic of exception.²¹⁷ Razack argues that it the proliferation of "camps" is a central defining characteristic of the contemporary western "empire" and that the culture of exception core to neoliberalism underpins the eviction of increasing numbers of people from political community.²¹⁸ Robert Ferguson's very recent critique of mass incarceration in the United States also develops the critique of the logic of exception that

²¹⁶ Agamben, *ibid*, at 105. See also Agamben's discussion of "The Werewolf and the Monster."

²¹⁷ Razack, Sherene. *Casting Out: The Eviction of Muslims from Western Law and Politics*. Toronto: University of Toronto Press.

²¹⁸ Razack, *ibid*.

is introduced by Mbembe.²¹⁹ According to Ferguson, the dominant governmental approach in USA is increasingly to lock people away in an attempt to solve social problems. Ferguson critically interrogates what the correctional system is doing and looks at psychological aspects of the enjoyment of and derivation of power from, punishment. Further, Ferguson elaborates on Mbembe's logic of exclusion: the logic of exception that allows a community to dismiss challenging people who have complex needs and problems that defy easy solution has no obvious stopping point and is consequently very dangerous. In this logic of leaving certain people behind, it is predictable that the community tends to dismiss all problems and to, rather than interrogate conditions that create misfortune, accept misfortune as a natural state of being for those defined or pathologized in various ways as unfortunate.

This dissertation does not confine its analysis of governmentality to questions about formal law. Starting from an understanding of governance as culturally embedded, it engages in cultural study of law. Cultural studies of law look at legality in popular culture. Stuart Hall is an early leading thinker in respect of cultural studies of law. Hall examined the social life of law's images and talked about the "rhetorical power of film to affect legal consciousness."²²⁰ As cultural legal studies scholar Austin Sarat describes the cultural studies of law – his project is to 1) treat popular itself as a kind of legal text and 2) address the question of whether and how law-in-media affects subjectivity: does law-in-media "open up new possibilities for understanding will, action and responsibility?"²²¹

In this theoretical understanding, media is a site for production of governance. Media do not simply "get the law wrong." What media reports do in discourse is not a question of translation. Media actually participate in the creation of the juridical field. This dissertation, as does Desmond Manderson, takes media and other forms of popular culture seriously as sources of law. In his chapter, "Trust Us Justice –

²¹⁹ Ferguson, Robert. *An Anatomy of American Punishment*. Boston: Harvard University Press, 2014.

²²⁰ From Sarat, *ibid* at 5.

²²¹ Sarat, at 6

Popular Culture and the Law,”²²² Manderson contends that popular culture “has adopted traditional forms... [it] emerges as a powerful conservative force with its own concepts of law and justice, its own practices and its own memories... [it is] *a source of law*, a record and memory of subterranean practices that have not lost their power to constitute legal actions and ideas.”²²³ Manderson studies what he sees as law *in media*. He sees media as providing – a “site of resistance to formal law... the effort to preserve or resuscitate an alternative reality.”²²⁴ Government and the juridical field as understood in this way is not found only in legislation and courtrooms but also in the news, in movies, in television dramas, in crime fiction and in social media postings. Legality is everywhere and yet its location is not permanently fixed. In particular moments, power acts in particular situations.

In addition to media discourses, expert discourses are also productive of governmentality. It would be difficult to overestimate the significance of expert discourses in late modern governance. Foucault himself drew clear lines linking discipline in the sense of governance and constraint and *the disciplines*. In this dissertation, I start from the theoretical position that the med/psy-discourses exist “on the underside of law” and naturalize the legal power to punish while they legalize the technical power to discipline. Foucault called this the “great carceral continuum”²²⁵ consisting of disciplinary practices that act on the body and on the soul. Hunt and Wickham cite Foucault for the argument that “law comes to be colonized by the new disciplines being invaded by practices of observation and training” and contend that “this is readily evident in contemporary juvenile justice.”²²⁶ The “paradox of modernity” is that law then seeks to control or recode the disciplines in the form of law.²²⁷

²²² from Sarat, Austin *Imagining Legality: Where Law Meets Popular Culture* (Tuscaloosa: The University of Alabama Press, 2011).

²²³ From Sarat, *ibid.*, at 7

²²⁴ Sarat, Austin, *ibid.*

²²⁵ Hunt and Wickham, *ibid.*, at 46

²²⁶ Hunt and Wickham, *ibid.*, at 47.

²²⁷ Hunt and Wickham, *ibid.*, at 48

3.1.e *Agency*

As understood in this research, the concept of governmentality relies upon individual actors having agencies. While Foucault's understandings of discipline and power have been criticized as over-deterministic, subsequent theorists have developed the governmentality framework to account for the possibilities of human creativity and the radical indeterminacy of the moment. Critiques of governmentality scholarship or certainly of Foucault often focused on his failure to account for creative agency on the part of actors. For example, Dean makes clear that the subject governed is an *actor* and therefore the actor is to some degree "a loci of freedom."²²⁸ For instance, interpersonally powerful agents are capable of developing "local status".²²⁹ This is Thornborrow's term for actors who are particularly skilled at negotiating interactions and at performances of social identity like gender in ways that allow them to accrue power despite an otherwise low social position.

I understand agents not as passive recipients of predetermined discourses and systems but as interpreting social actors who engage in creative work. They agentially reconstruct discursive practices that set out the juridical field of social practice whether or not they do so consciously. I rely on formulations of agency as an actor's role in *doing power*. For this understanding of agency, I am relying on theorizations of agency in becoming subject as developed by Kym MacLaren, Angela Failer and Alexis Shotwell as they write about self-creation in oppressive circumstances and especially Catriona Mackenzie.²³⁰ For the purposes of this dissertation, I work from a definition of agency as "the temporarily constructed engagement by actors of different structural environments which, through the interplay of

²²⁸ Dean, Mitchell. *Governmentality: Power and Rule in Modern Society*. Thousand Oaks California: SAGE, 1999 at 13.

²²⁹ Thornborrow, Joanna. *Power Talk: Language and Interaction in Institutional Discourse*. London: Harlow, 2002.

²³⁰ all of whose papers on the subject are chapters in the book Campbell, Sue, Meynell, Letitia and Sherwin, Susan. *Embodiment and Agency*. Pennsylvania: The Pennsylvania State University Press, 2009. Print.

habit, imagination, and judgment, both reproduces and transforms those structures in interactive response to the problems posed by changing historical situations.”²³¹

Agency can be understood as an agent’s capacity to act creatively, deliberately and reflexively. However, the freedom of agents to act takes place within contexts. Just as they cannot *know* the real unmediated by discourse, agents cannot *act* except as embedded in discourse. Their self-awareness is constructed in discourse and they remake discourses intersubjectively. Because actors are material, they exist prior to discourse, but subjects do *not* exist prior to discourse. Subjects’ reflexive awareness of their power to act is necessarily constrained by their self-understanding.

This capacity to act does not exist in the context of a Cartesian mind/ body dualism and conflicts with liberal theories about the individual. As feminist theorists have developed specifically with reference to the effects of gendering on subjectivity, I draw on an understanding that agency is *embodied*.²³² Differently situated actors’ agencies are constrained in different ways. Various situated girls have their self-awareness and freedom limited in different ways from more privileged actors especially adult white men, whose masculinity is constructed in such a way as to accord them a great deal of relative social power. In a variety of ways, to varying degrees, many adolescent girls are embodied as agents engaged in navigating the terrain of dominant scripts that place them in a double-bind, or no-win position. The naturalized identity of girl is not single-stranded. Rather, it is intersectional with other aspects of social identity. Differently situated girls experience situations differently. Discourses of the girl are specific manifestations of certain patterns in patriarchal power relations at particular times. This theoretical foundation allows for troubling of monolithic category of girl and the production of analysis that gets beneath the girl/boy binary. No one is ever just a “girl” without some sort of qualifier. Every actor occupies other social locations,

²³¹ Emirbayer, M., and Mische, A. (1998). What is agency? *American Journal of Sociology*, 103, 962-1023 at 970.

²³² For discussion of agency as embodied, see e.g. Campbell, Sue, Meynell, Letitia and Sherwin, Susan. *Embodied Agency*. USA: Pennsylvania State University Press, 2009. Print.

including their racialization, sexual identity, social class and religious or ethnic heritage, all of which are constitutive of what is meant by girl. Indeed, middle class socioeconomic status and racialized whiteness are always already constitutive of the “girl” when the figuration is invoked without qualifiers.²³³

At the same time, the capacities that allow someone to amass local status potentially threaten existing systemic hierarchies.

Just as I accept critiques of Foucault’s over deterministic (early) views of agency,²³⁴ I accept that his work left a gap in that it did not sufficiently account for systems and institutional power. Foucault underestimated or neglected the role of law in regulation and the normative content of legal rules.²³⁵ In this study, I draw on later theorists who understand law as socially embedded but see its content as highly relevant. Notably among them, Hunt and Wickham criticize Foucault for equating the law with pre-modern forms of power. Foucault fails to consider laws applying to the mundane: “everyday” law.²³⁶ I draw on Coombe²³⁷ for a theoretical formulation of agency in the context of legal systems and structures that allows for a simultaneous analysis of both “big” and “little” power.²³⁸ This dissertation applies theoretical governmentality question asked by Hunt, Wickham and Walters in reference to legal studies of a particular

²³³ The implicit blankness of “girl” without a qualifier (like “black” “aboriginal” or “third world”) actually refers to a particular (white) racialization and (middle class) social location understood to be the norm.

²³⁴ It is notable, however, that Foucault’s own views of agency grew less deterministic later in his career. It may also be that critiques of his thinking being overdeterministic are based on a misapprehension of his work, at least in part. Foucault disputed the possibility of a single, grand resistance, but he did write that there are points where resistance is possible all over the power grid. Foucault, Michel, *The History of Sexuality. Volume 1*, Translated from the French by Robert Hurley, New York: Vintage Books, 1990 (originally published in French: Foucault, Michel, *La Volonté de savoir*, Paris: Gallimard, 1976). at 95-96.

²³⁵ Alan Hunt and Gary Wickham: “pose the question of law and government as always a dilemma, the dilemma of government and freedom. Government is not opposed to freedom, just as freedom has never been the mere absence of government. Rather, government and freedom pose a dilemma in that they presuppose the other while at the same time they threaten or challenge the other... rights cannot guarantee freedom but freedom cannot be achieved without rights Hunt and Wickham, *ibid* at 71.

²³⁶ Hunt and Wickham at 60.

²³⁷ Coombe, Rosemary. “Room for Manoeuvre: Towards a Theory of Practice in Critical Legal Studies” (1989) 14 *Law and Social Inquiry* 1, 69-121.

²³⁸ Coombe proposes a “theory of practice” to “reintroduce [study of] agency and practice into disciplines that have been preoccupied with systems and structures , *ibid* at 71.

event: I ask how law is implicated within social relations, neither assuming the power of law nor its ineffectiveness.

As understood in this study, the state is not privileged as the central site of governance but it is still an important locus of power. The discursive content of formal law is relevant in interaction with other forms of governance. The ideas of neoliberal politics and hierarchical binary gender relations are institutional rationalities mobilized in governance. I adopt Coombe's claim that systems and structures and agency and practices *all matter* to call for "critical empiricism" in legal scholarship. There are links between the subjective consciousness of actors and the structure of legal discourse; the error of liberalism is in assuming a complete and autonomous subject that exists prior to discourse. Coombe's theory of practice allows for understanding of what she terms the "pervasive structurality of experience without denying human agency and creativity".²³⁹

The written language of law has an objective reality because actors within systems feel bounded by it and it has a materiality because actors performing adherence to it create barriers for actors who violate it. It is the socially constructed realities that come to surround law and not legal language itself that limit the possibilities of interpretation.²⁴⁰ So, it is the "particular conditions of a historically specific interpreting community"²⁴¹ that shape governance in the juridical field. Those interpreting conventions undergo ongoing transformations and are produced in enactment and re-enactment. The written language of the law is important as a tool manipulated by its users. It can be turned by historically oppressed groups on their historical oppressors with success.²⁴²

²³⁹Coombe, Rosemary. "Room for Manoeuver: Towards a Theory of Practice in Critical Legal Studies" (1989) 14 *Law and Social Inquiry* 1, 69-121 at 83

²⁴⁰ Coombe, *ibid* at 108

²⁴¹ *ibid*

²⁴² Coombe, *ibid* at 94-95.

My understanding of narratives is linked to the understanding of agency from which I work. I rely on Butler's theorization of narrative agency as articulated in *Giving an Account of Myself*.²⁴³ Because our agencies are always already shaped within the constraints of contexts that are continuously engaged in shaping them, one's narrations of oneself are always partial. Narrations are always interrupted by the existence before one comes into being of the conditions of possibility one inhabits. Multiple narratives of one's self, and, specifically here, of the Ashley Smith case are possible and all accounts are always fiction, however, narration is necessary because: "only the narrated self can be intelligible, survivable."²⁴⁴ As Butler puts it:

"I" does not mean we cannot narrate it; it only means that at the moment when we narrate we become speculative philosophers or fiction writers....prehistory interrupts the story I have to give of myself, makes every account of myself partial and failed, and constitutes, in a way, my failure to be fully accountable for my actions, my final "irresponsibility," one for which I may be forgiven only because I could not do otherwise. This not being able to do otherwise is our common predicament.²⁴⁵

Thus, this dissertation looks at narratives produced in Ashley Smith's case as constituted stories involving power. In doing so, it contributes to the field of critical inquiry that looks at the operation of law as governance.²⁴⁶ In this understanding, power is understood as a process. Social hierarchies and structures continue to be real because they are continuously re-enacted and reconstructed. In consequence, each social interaction, each moment, is both inside discourse and still filled with possibilities. The possibilities an agent can realize are limited by their consciousness which is in turn interrupted before it begins by the existence of their subjectivity within pre-existing discursive frames.

²⁴³ USA: Fordham University Press, 2005.

²⁴⁴ *Ibid* at pps. 34,-35

²⁴⁵ in *Giving and Account of Oneself*, *ibid* at 78.

²⁴⁶ Hunt and Wickham, *ibid*.

3.1.f *Feminist Theory*

Gender is an important dimension in the matrix of power that constrains the actions and consciousness of actors. My understanding of the agencies of girls as they are governed is complicated by theoretical insights feminist theorists have had into the role played by discourses of gender in producing peculiar difficulties faced by marginalized agents when they act. As discussed above with reference to agency in general, I understand that girls in part know themselves in dominant discourses through definitions set forth by adults, usually adult males, who seek to define their reality.²⁴⁷ As critically unpacked in literary theorists Sandra Gilbert and Susan Gubar's *Madwoman in the Attic*, masculinist discourses (like fiction written by men, or the narratives in criminal cases) tend to imprison female actors in binary narrative structures that accord them subject positions of "angel" or "demon."²⁴⁸

It is particularly difficult for actors identified as girls to exercise their agencies where they are tasked with navigating the juridical field. Girls navigating governance frameworks are exercising agencies in ways that are complicated by blankness and silences around the particularities of their experience, as is discussed in more detail in Chapter 2. As feminist legal theorists like Naffine,²⁴⁹ Conaghan,²⁵⁰ Dowd, Jacobs,²⁵¹ and Rheume²⁵² have posited, there are manifold and complex ways in which women and girls have been excluded from participating actively in legal processes and in the formation and application of law.²⁵³ When adolescent females act in juridical space, they are acting in a space that is defined by and for middle class adult white men. They are strangers in this space: representation and articulation of their presence

²⁴⁷ For discussion on this point see e.g. Luce Irigaray's critique of theory as masculinist and explanation of how woman is defined as a "lack" in masculinist discourses. Irigaray, Luce *This Sex Which is Not One*. New York: Cornell University Press, 1977. Print.

²⁴⁸ Gilbert, Sandra and Gubar, Susan, *Madwoman in the Attic*. USA: Yale University Press, 1979. Print.

²⁴⁹ Naffine, Ngaire. "In Praise of Legal Feminism" (2002) 22 *Legal Stud.* 71.

²⁵⁰ Conaghan, Joanne, "Gender Sexuality and the Law: The Making of a Field" *Feminist Legal Studies* 2009 at 303-307.

²⁵¹ Dowd, Nancy and Jacobs, Michelle eds. *Feminist Legal Theory: An Anti-Essentialist Reader*, New York: New York Univ Press, 2003. Print.

²⁵² See e.g. Levit, Nancy and Verchick, Robert, *Feminist Legal Theory: A Primer*. New York: New York University Press 2006.

²⁵³ Réaume, Denise, "What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law" (1996) *Legal Theory* 2, 265-299.

and action is difficult in the ways that representation of and by subaltern ethnic groups, as is discussed by Spivak,²⁵⁴ presents problems. Further, this dissertation builds on theoretical foundations laid by Karaian and Fine, among other feminist and girls' studies theorists, who have analyzed silences around girls' agencies in other contexts.

These understandings of gendered agencies and the social roles of formal law in turn rely upon non-essential, social constructivist understandings of gender. Relying on a social constructivist epistemology, I start from non-essentialist, constructivist theories of gender and identity. An important starting assumption is that social power relations and knowledge about girls produced in interlocking discourses have shaped what "girl" means as an idea, discourse and cultural figure²⁵⁵. In starting from this assumption, I draw on the work of feminist discourse theorists, especially Jana Sawicki²⁵⁶ and well as Haraway and Butler.

I understand that the self, in being constituted in discourse, is not an extension of an inner essence or a particular (male/female) sexual body. I rely on Butler generally and Haraway's "Cyborg Manifesto" to deconstruct the notion of the integrated, stable, authentic female identity. There is a close relationship between social discipline and the body. This dissertation builds on the understanding that the disciplinary power of the discourse of femininity on the female body of adolescent young women circulates, fixing at particular moments at particular events or intersections.²⁵⁷ Government as understood by governmentality theorists is actively engaged in constructing gender. Representations of the girl contain and re-inscribe existing cultural power relations. The notion of girl is socially constructed in different ways, some of which

²⁵⁴ Spivak, Gayatri, "Can the Subaltern Speak?" in Cary Nelson and Lawrence Grossberg eds. *Marxism and the Interpretation of Culture*. Chicago: University of Illinois Press, 1988. Print. See also Spivak, Gayatri Chakravorty. *The Post-Colonial Critic: Interviews, Strategies, Dialogues*. Ed. Sarah Harasym. New York: Routledge, 1990. Print.

—"Can the Subaltern Speak." *Marxism and the Interpretation of Culture*. C. Nelson and L. Grossberg, eds. Basingstoke: Macmillan Education, 1988. 271-313. Print.

²⁵⁵ For discussion of the process by which I understand "girl" to be constituted as a representation, see e.g. Little, Nicole and Hoskins, Marie "It's an Acceptable Identity:" Constructing "Girl" at the Intersections of Health, Media and Meaning-making" (2004) *Child and Youth Services* 2, pp. 75-93.

²⁵⁶ Sawicki, Jana. *Disciplining Foucault: Feminism, Power and the Body*. New York: Routledge, 1991. Print.

²⁵⁷ Bartky, Sandra. 'Foucault, Femininity, and the Modernization of Patriarchal Power' in Diamond, Irene and Quinby, Lee (eds.) *Feminism and Foucault: Reflections of Resistance*. Northeastern University Press: Boston, 1988.

are dominant or hegemonic and those constructions have material consequences for adolescent females who are or are not identified as girls.

Gender as a discourse is naturalized and both produces and restricts an agent's mode of being. The discursively produced identities of girls involve and invoke the body. Subjects labeled as – or seeking to be identified as – girls, actively perform actions and discipline their bodies,²⁵⁸ to conform to what a “good” girl should do and be. Behaviours and other aspects of conduct together produce certain characteristics that are in turn taken as evidence of a naturalized female essence and a difference between men and women that is binary. While the feminine is regarded as the more ‘natural’ gender,²⁵⁹ being successfully feminine requires artifice. I accept Butler's theorization of gender and even sexed bodies unstable identifiers, as “imprinted.”²⁶⁰ Masculinity and femininity are disciplines of the body requiring socially mandatory *work* for their production. Gendering is therefore a powerful and pervasive method of social control.²⁶¹

Multiple and overlapping identities of “girl” are naturalized, gendered representations produced and articulated in discourse. Discourses of the girl reflect and re-inscribe certain power relations. Discourses of the girl are naturalized so that “girlhood” shapes an agent's mode of being in particular ways. Those agents who are unsuccessful in performing femininity - or refuse to do so - are seen as un-natural. In the western neoliberal cultural mainstream, while the construct “girl” is discursively constructed as *inferior* to “man” and “boy,” girls are also *threatening*. Feminist discourse theorists posit that as a result of their construction in opposition to the normative: “boys”, “girls” are perpetually in need of containment and control. As a result, adolescent young women/ girls become subjects as they are *subjected* to particular disciplinary techniques and receive a great deal of disciplinary attention.

²⁵⁸ Even surgically altering their bodies

²⁵⁹ as women are seen as linked more than men to biological aspects of their embodiment

²⁶⁰ See also Joan Riviere, who posits that there is no naturally feminine authentic self, that womanliness is always masquerade. Riviere, Joan. “Womanliness as Masquerade” *Journal of Psychoanalysis* 10 (1929) pp. 303-313.

²⁶¹ For discussion see e.g. Balsamo, Anne-Marie. *Technologies of the Gendered Body: Reading Cyborg Women*. London: Duke University Press, 1996. Print.

The performance of feminine gender by adolescent young women has broad social significance. It is important for social reproduction that adolescent young women play along with ascribed nurturing roles. “Proper” mothering and constrained sexuality are important pre-requisites for hierarchies to be reproduced. Failures or refusals of certain adolescent young women to perform their gender acceptably and/ or traditionally within prescribed parameters, are seen as threats to social order.

Processes of production in interlocking discursive sites shape and continue to shape what identities are available to adolescent young women and in what ways. As girls’ studies researcher Catherine Driscoll points out in her study of “feminine adolescence in popular culture,”²⁶² the construct of girl is produced in a number of intersecting locations. Schools, hospitals, courtrooms, prisons, mental health therapy contexts, and homes are spaces where individual identities and discourses of the girl inter-weave. Representations of the girl are involved in the deployment of government by the modern state.

3.2 Methods

I work with intersectional methodology as described by Johnson²⁶³ to analyze interlocking regimes of oppression that are active in late modern Canada by looking at how they *intersect* in an event in which a problem is constructed to be governed. Configurations of Ashley in the Smith case are analyzed for what they reveal about how the governmental problem of which her death is an instance, is constructed. More specifically, this dissertation critically unpacks dominant discourses about the girl and about Smith in the juridical field (including legal, media and expert sites) and how the interlocking logics of governmental frameworks rendered the possibility of Smith's political subjectivity, including her agency and in particular, her female sexual agency problematic and even unwritable and unknowable.

262 Driscoll, Catherine. *Girls: Feminine Adolescence in Popular Culture and Cultural Theory*. New York: Columbia University Press, 2002. Print.

263 Johnson, Rebecca. *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law*. Vancouver: UBC Press, 2002. Print.

This dissertation attempts to understand socially produced meanings of Ashley Smith as “girl”. It takes Ashley Smith’s case as a particular “event” where conflicts, confluences and tensions between existing ways of become visible.²⁶⁴ It asks what combination of rules, what power relationships, what institutional accretions of power and what circumstances in seemingly unrelated fields gives rise to a particular outcome.²⁶⁵ And, it inquires into what Berlant calls the “caseness”²⁶⁶ of Ashley Smith, asking of what general type various figures of Ashley Smith are constructed as a case. This is a social constructivist study that deploys the tool of critical discourse analysis to make visible the implicit ideological content of articulations in discourses of Ashley Smith. Other important methodological tools on which I rely are the concepts of representation, figuration, articulation and the tool of critical discourse analysis as an analytical exercise. In this dissertation, I work with the concept of figuration.²⁶⁷ 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”.²⁶⁸ A figuration is “a specific configuration of knowledges, practices and power.”²⁶⁹ Accordingly, I qualitatively study texts from media sources and official legal texts to determine what figurations of Ashley Smith as girl emerge in these cultural domains.

This dissertation looks at complex sets of conditions interacting. Critical discourse analysis is employed as a critical and interpretive methodology to reveal operations of power in places where familiar social, administrative and political discourses tend to mask or normalize it.²⁷⁰ It is a way of studying the contingencies and past events that produce constructs thought to be immutable and inevitable in the present

²⁶⁴ Hunt and Wickham, *ibid*, at 21

²⁶⁵ Hunt, Alan and Wickham, Gary. *Foucault and the Law: Towards a Sociology of Law as Governance*. Canada: Pluto Press, 1994. at 7.

²⁶⁶ Berlant, *ibid*

²⁶⁷ And on the work of Teresa de Lauretis in developing this concept: see especially De Lauretis, Teresa. *Figures of Resistance: Essays in Feminist Theory*. USA: Teresa de Lauretis, 2007.

²⁶⁸ Castaneda, Claudia *Figurations: Child, Bodies, Worlds* USA: Duke University Press, 2002. Print. at 3 – 4.

²⁶⁹ Castaneda, Claudia *Figurations: Child, Bodies, Worlds* USA: Duke University Press, 2002. Print. at 3 – 4

²⁷⁰ Shapiro, Michael. *Reading the PostModern Polity: Political Theory as Textual Practice*. Minneapolis: 1992. Print. at 1.

–at how conditions of possibility develop that show the sometimes discontinuous and chaotic becoming of the present. Thus, the dissertation studies 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.

What this methodological orientation can reveal is insight into how a set of systems and rationalities came together in manifold small ways to produce Ashley Smith’s case. It creates an account of local production of governance in specific sites. It examines and diagnoses specific conditions enabling the maintenance of certain power structures of legitimacy and authority. This study looks at figures of Smith as “girl” that emerge in texts produced in her case as technologies of power. I adopt Foucault’s understanding of technologies of power as “technologies ... which determine the conduct of individuals and submit them to certain ends or domination, an objectivizing of the subject.”²⁷¹ It explores, troubles and complicates what these figurations do as technologies of power. My analysis develops knowledge about systems of power and specifically exposes the operations of power in the Smith case where familiar discourses obfuscate them.²⁷² I look for the governmental *work* in relation to organizing social power being done by and through the related figurations of Ashley Smith and of the girl that emerge in her case.

I use critical discourse analysis to look at how Smith is described and how existing social structures of governance are articulated through those descriptions. Texts from each of these sites were qualitatively analyzed for thematic commonalities in figurations of Smith and of dominant and counter discourses of girls in each site. This includes study of included images because images are understood in this CDA epistemological framework to be texts: cultural productions and not transparent recordings. This analysis involves critical assessment of whether and to what extent the figurations of Ashley Smith in these different sites overlap and intersect. Texts are also read for their silences.

²⁷¹ Foucault, Michel, “Lectures at Vermont University in October 1982”, in *Technologies of the Self*. Boston: University of Massachusetts Press, 1988. Print. pp. 16-49

²⁷² Shapiro, Michael. *Reading the Postmodern Polity: Political Theory as Textual Practice*. Minneapolis: 1992. Print.

Critical Discourse Analysis (CDA) is a methodological framework for conducting research into how discourses function as instruments of power and control. CDA looks at social structures and processes involved in text production. It is an analytical way to make visible relationships of causality that are otherwise opaque and to see links between texts and broader social and cultural power relations and discursive processes.²⁷³ CDA makes visible interlocking webs of domination, power, discrimination, and control that exist in language.²⁷⁴ It is a framework for looking at discourse as tool in the social construction of reality.²⁷⁵ CDA relies on a basic assumption that there is a dialectical or mutually constitutive relationship between events and the discursive context in which they are embedded.²⁷⁶ CDA looks at the production of reality that is performed by discourses and at how ideologies and existing relations of power are presented in and maintained by discursive sites studied. I draw on major contributions to the development of CDA by Norman Fairclough, who developed methodological tools for looking at discourse as a social practice that contributes to the maintenance and reproduction of existing social practices.²⁷⁷

I conduct a qualitative critical discourse analysis of the ways in which Ashley Smith is represented and analyze the figurations of her and of the “girl” that emerge in three discursive sites involved in her case. I seek to discern in texts the "dialogical struggle (or struggles) as reflected in the privileging of a particular discourse and the marginalization of others."²⁷⁸ The focus of this analysis is on how power is connected to meanings and how discursive constructions of an event produce a social reality that is taken for granted. I would like to make visible the taken-for-granted assumptions about “girls” that are opaquely

²⁷³ Fairclough, Norman. *Critical Discourse Analysis: The Critical Study of Language*. Harlow, UK: Longman, 1995. Print.

²⁷⁴ Wodak Ruth. "The discourse-historical approach", Chapter, pp.63-94, in Wodak: R. and Meyer, M. (2001), *Methods of Critical Discourse Analysis*, London: Sage, 2001. Print.

²⁷⁵ For discussion see e.g. Van Leeuwen, T. and Jewitt, C. *Handbook of Visual Analysis*. London: Sage Publications, 2001.

²⁷⁶ For discussion see e.g. Phillips, N. and Hardy, C. *Discourse Analysis. Investigating Processes of Social Construction*. Thousand Oaks, CA: Sage Publications, 2002. and De Cillia, R. , Reisigl, M. and Wodak, R. "The discursive construction of national identities"(1999) *Discourse & Society*, Vol. 10 (2), pp.149-173.157

²⁷⁷ See e.g. Fairclough, Norman. *Language and Power*. New York: Longman, 1989. ; Fairclough, Norman *Discourse Analysis*. Cambridge, UK: Polity Press, 1990; and Fairclough, Norman *Discourse and Social Change*. Cambridge, UK: Polity Press, 1992.

²⁷⁸ Phillips, N. and Hardy, C.(2002), *Discourse Analysis. Investigating Processes of Social Construction*. Thousand Oaks, CA: Sage Publications. at 25.

present in discourses about Smith's case, and to specifically diagnose how these discourses obscure from view and divert attention away from her agency.

I look at what texts studied exclude, what they include, what available facts or data they take to be relevant and what inferences are drawn. I look at the texts in respect of what possibilities and potential meanings they make visible and which possible stories they ignore, dismiss or obscure. I engage in micro-analysis of language used, specifically in reference to descriptions of Smith as "girl" and at how language is deployed to constitute and re-constitute the strategic purposes and semantic themes of the text. I look at the treatment of expert discourses and at who is privileged to speak. The cohesion and coherence of the texts produced about Ashley are studied to reveal their implicit logics. I identify dimensions constituting discourse, looking at semantic, linguistic and the strategic dimensions of the texts studied. I study how micro-elements of texts link to macro discourses. Messages in the text are studied for their cues to existing social relations, specifically locating, identifying and making visible in the texts cues to existing discourses of what is constitutive of a "good" or "normal" girl.

3.3 Research Design

First, I looked at all publicly available formal legal documents produced in reference to Ashley Smith's case. These include several reports from various bodies, including the New Brunswick Ombudsman,²⁷⁹ several by the Corrections Investigator for Canada²⁸⁰ and the University of Toronto Faculty of Law's International Human Rights Program.²⁸¹ I also examined documents produced in relation to the inquests. I obtained the judgments on motions in the inquests as well as the full judgment in the 2013 inquest from CanLii. I also obtained a number of documents produced in the inquests and civil trial from

²⁷⁹ New Brunswick Ombudsman and Child and Youth Advocate "The Ashley Smith Report" (2008)

<http://www.gnb.ca/0073/PDF/AshleySmith-e.pdf>

²⁸⁰ 2008 report of the Correctional Investigator Howard Sapers <http://www.gnb.ca/0073/PDF/AshleySmith-e.pdf> See also <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20090911a-eng.pdf>

²⁸¹ Mundhane, Renu, "Cruel, Inhuman and Degrading? Canada's Treatment of Federally-Sentenced Women with Mental Health Issues," University of Toronto International Human Rights Program (2012)

the website of Smith family lawyer Julian Falconer.²⁸² One significant document, of course, was the December 2013 inquest decision. I also read decisions and court orders issued in relation to a series of motions made by CSC and a group of health professionals seeking to keep documents and witnesses out of the inquest testimony. I obtained these documents using CanLii as well as Google searches in addition to browsing Federal governmental websites of CSC, the website of the office of the Correctional Investigator and the site of the “Falconers” law firm, which represented Ashley Smith’s family in the inquest and civil suit in relation to the Smith case. A list of these key documents is provided after the Table of Contents at page 7 of this dissertation. Second, I looked at all docudramas concerning Ashley Smith. I focused on those brought Ashley Smith’s case into widespread 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.” Third, I looked at a large number of print media articles about Ashley Smith’s case. I looked at many articles from a range of print media outlets in each time period. I looked at national papers of record, local media sources and also more tabloid forms of journalism from across the political spectrum. Media sources I drew from included the *Toronto Star*, the *National Post* and the *Globe and Mail*, CTV News, Sun Media network papers as well as local papers in Smith’s home region (New Brunswick) and the community (Kitchener) in which her death took place.

In addition to doing multiple searches on the Google news search engine, I did several searches on the news database Factiva, looking at newspapers (Date range from October 2007 – January 2014). This search yielded over 5000 news stories. A series of attempts were made to first recover all available documents, to find all of the “talk” about the Ashley Smith case in the genres described. Because her case was ongoing for seven years with regular, daily coverage in print media across Canada, I determined it would be unwieldy to study in detail all articles available. However, as a preliminary study, I did spend

²⁸² <http://www.falconers.ca/settled.htm#AshleySmithInquest>

several weeks reading through all of the articles I found on these searches. To make the research more manageable, after a preliminary review, I removed duplicates and focused new search queries on certain time periods. After my initial review of all articles revealed that there were certain chronological turning points in the coverage, I focused primarily on times where the number of articles spiked, and which marked turning points in the case. Based on my preliminary research, I determined that three distinct 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).

For all of the texts studied, I undertook a preliminary read-through or viewing to get a gestalt sense of the variety of figures of Ashley Smith circulating throughout the case. Then, after this preliminary review, I re-read the documents and coded for the following focal points in descriptions and definitions of Ashley Smith: mental illness, child, girl, woman and inmate. I used a colour scheme whereby I highlighted references to Smith as a particular “type” of figure. For example, I used the colour orange to highlight representations of Smith in the text that foregrounded her carceral status. Also, by way of example, I used blue highlighter to code representations of her that foregrounded mental illness. From this coding and my qualitative analysis of the documents, 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 analytical chapters that follow discuss the patterns and trends in those representations and the figures of Ashley Smith that coalesced.

3.4 Notes and Limitations

Three aspects of the Ashley Smith case should be noted as having posed methodological challenges for me in undertaking this study. First, a large number of texts by or about Ashley Smith that are referred to in various other texts about that case are not publicly available. These include many records of discretionary

decisions and reports produced official sites in relation to the case. They also include self-expressive materials reportedly in Ashley Smith's youth court and youth corrections files, such as her journals. Various stakeholders in the Smith case ostensibly have these documents, and are keeping them from being released for a variety of reasons that align with their interests in outcome of the case. However, while this would pose significant methodological challenges for certain studies of the Smith case, it is inherently unproblematic within the research design of this dissertation, because what I am studying is the case defined as a matter of public discourse. The project is to read the public texts against the grain, not to find new, previously-withheld documents. I am studying the public talk about Ashley Smith; this is a critique of public discourse, not just of bureaucracy. Consequently, the subject of study is inherently defined by what is publicly available. Second, simultaneously yet quite conversely, there are an abundance of public texts that have been produced in official and media sites about the case. In consequence, I had to spend months reviewing thousands of documents in order to put together my analysis, and even so it would not be practicable to exhaustively itemize each and every text produced.

Third, it was not just the volume of texts but their content that had to be managed in my research. Of course, my own particular social history and positionality leave me vulnerable to being emotionally disturbed by the subject matter. Because of my past experiences as an adolescent, I was acutely conscious throughout this research of the dangers of over-identifying with the deceased subject and I strove to do her case justice by ensuring that her voice was not subsumed within my own narratives. Further, because of my current social position as a law reform lawyer and activist, I was concerned throughout this research about how to navigate change movements with integrity. Even so, the subject matter of the Smith case would be challenging for any researcher. The task of watching and re-watching video footage of a young woman being confined, injected, restrained and ultimately dying was exhausting. So too, using the pause feature on the media player to ensure I had the various time signatures noted as I reviewed the video footage of her death

repeatedly, was grueling, as was poring over the hundreds of incidents and many reports. Consequently, my research took longer than I had anticipated. I had to take breaks. I had to go outside.

Chapter 4

Inmate Smith: *Necropolitical Success*

“He’s in prison now, being punished: and the trial doesn’t even begin till next Wednesday: and of course the crime comes last of all.”

‘Suppose he never commits the crime?’ said Alice.

‘That would be all the better, wouldn’t it?’ the Queen said...

Alice felt there was no denying that. ‘Of course it would be all the better,’ she said: ‘but it wouldn’t be all the better his being punished.’

‘You’re wrong there, at any rate,’ said the Queen. ‘Were you ever punished?’

‘Only for faults,’ said Alice.

‘And you were all the better for it, I know!’ the Queen said triumphantly.

‘Yes, but then I had done the things I was punished for,’ said Alice: ‘that makes all the difference.’

‘But if you hadn’t done them,’ the Queen said, ‘that would have been better still; better, and better, and better!’ Her voice went higher with each ‘better’, till it got quite to a squeak at last. Alice was just beginning to say ‘There’s a mistake somewhere —’”

-Lewis Carroll, “Wool and Water” *Through the Looking-Glass and What Alice Found There* (1871)

4.1 Introduction

Ursula K. LeGuin’s 1974 short story “The Ones Who Walk Away from Omelas,” according to American law professor Robert A. Ferguson,²⁸³ can be read as a philosophical parable about a bargain offered to a society by interlocking utilitarian logics of exception, security and risk. The logic of exception has been theorized by Aihwa Ong as being central to neoliberalism.²⁸⁴ In this logic, through use of exceptional spaces, including prisons, populations governed by neoliberal technologies are dependent upon the existence of other populations excepted from those technologies. LeGuin’s story is a tale of a Utopian city that relies for its people’s safety and contentment upon the confinement of a child in a locked room. The story asks whether the suffering of one person can be justified if it enables the contentment of many. It also implicitly raises the question of to what extent there may be

²⁸³ “The Ones Who Walk Away from the Omelas” is available in PDF format at the following link: <http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.omelas.pdf> This story is referred to in Robert Ferguson’s *Inferno*. Ferguson, Robert *Inferno: An Anatomy of American Punishment* (USA: Harvard University Press, 2014)

²⁸⁴ Ong, Aihwa, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*. USA: Duke University Press, 2006.

flawed assumptions beneath the logic that the happiness of the people in general relies upon the suffering of the one incarcerated child. I excerpt it below at length.

In a basement under one of the beautiful public buildings of Omelas, or perhaps in the cellar of one of its spacious private homes, there is a room. It has one locked door, and no window. A little light seeps in dustily between cracks in the boards, secondhand from a cobwebbed window somewhere across the cellar. In one corner of the little room a couple of mops, with stiff, clotted, foul-smelling heads stand near a rusty bucket. The floor is dirt, a little damp to the touch, as cellar dirt usually is. The room is about three paces long and two wide: a mere broom closet or disused tool room. In the room a child is sitting. It could be a boy or a girl. It looks about six, but actually is nearly ten. It is feeble-minded. Perhaps it was born defective, or perhaps it has become imbecile through fear, malnutrition, and neglect....

The door is always locked; and nobody ever comes, except that sometimes--the child has no understanding of time or interval--sometimes the door rattles terribly and opens, and a person, or several people, are there. One of them may come in and kick the child to make it stand up. The others never come close, but peer in at it with frightened, disgusted eyes. The food bowl and the water jug are hastily filled, the door is locked, and the eyes disappear. The people at the door never say anything, but the child, who has not always lived in the tool room, and can remember sunlight and its mother's voice, sometimes speaks.

...They all know it is there, all the people of Omelas. Some of them have come to see it, others are content merely to know it is there. They all know that it has to be there. Some of them understand why, and some do not, but they all understand that their happiness, the beauty of their city, the tenderness of their friendships, the health of their children, the wisdom of their scholars, the skill of their makers, even the abundance of their harvest and the kindly weathers of their skies, depend wholly on this child's abominable misery.

... At times one of the adolescent girls or boys who go to see the child does not go home to weep or rage, does not, in fact, go home at all. Sometimes also a man or woman much older falls silent for a day or two, and then leaves home. These people go out into the street, and walk down the street alone. They keep walking, and walk straight out of the city of Omelas, through the beautiful gates. They keep walking across the farmlands of Omelas. Each one goes alone, youth or girl, man or woman. Night falls; the traveler must pass down village streets, between the houses with yellow-lit windows, and on out into the darkness of the fields. Each alone, they go west or north, towards the mountains. They go on. They leave Omelas, they walk ahead into the darkness, and they do not come back. The place they go towards is a place even less imaginable to most of us than the city of happiness. I cannot describe it at all. It is possible that it does not exist. But they seem to know where they are going, the ones who walk away from Omelas.

In this chapter, I conduct a critical discourse analysis of representations comprising the official story about Inmate Smith.²⁸⁵ It will be argued that the CSC bureaucracies received in Inmate Smith an unmanageable inmate already rendered socially dead by her prolonged period in youth custody and transfer to adult corrections. Forms of governance that are raced and gendered ideologies of others that allow some 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 here is not that any one person in particular or any group at CSC calculated a plan to kill her: they almost certainly did not. Rather, systems of power in place brought about her administrative death, and those systems have eluded scrutiny and accountability for it.

There is not just one Inmate Smith: overlapping, in some ways contradictory and messy, but nonetheless analytically similar figures that foreground Ashley Smith's status as a carceral subject emerge from texts produced in a range of official sites. These sites include various bureaucratic locations found locally within correctional institutions as well as at CSC's regional and national offices. The official story about Inmate Smith and the way she was governed by the state reveal the operation of interlocking processes where logics of risk and security become totalizing. These logics overwhelm other possibilities for action in the patterns of negotiations between formal legal rules and system actors' agency in criminal justice and correctional systems.²⁸⁶ Critical analysis of the Inmate Smith figure reveals the Smith case as an instance where interlocking logics of security and risk are operationalized in a rationalized bureaucracy that not only depoliticizes but also, as Hamilton and Gerlach have previously argued, amoralizes governance. The CSC apparatus of governance is shown to be a monstrous bureaucracy which, like other rationalized neoliberal structures of governance "are

²⁸⁵ In this chapter, I refer to Ashley Smith as Inmate Smith when I am describing or relating this official story. I refer to her as Ashley Smith when I am discussing her "caseness".

²⁸⁶ For discussion, see the overview of Rosemary Combe's theorization about the juridical field in Chapter 3 as well as Coombe, Rosemary, "Tenth Anniversary Symposium: New Direction: Critical Cultural Legal Studies" (1998) 10 *Yale J.L. & Human.* 463 at p. 10

inefficient, amoral, and even immoral, more concerned with maintaining procedure than with producing just outcomes.²⁸⁷

4.2 Three Configurations

Three distinct figures of Smith as a carceral subject emerge into dominance in official documents produced by various bureaucratic systems and agents, including CSC, at certain chronological periods in the case. First, Ashley Smith is configured as a youth with complex needs when she is at odds with the educational system and before the New Brunswick youth courts. Once she is placed in youth custody,²⁸⁸ representations of Smith transform into depictions of “YP” (Young Person) Smith the official term for youths held in custody facilities. This construction shifts once again when Ashley Smith is transferred to adult custody.²⁸⁹ After this transfer, she is officially represented as an “offender” or “inmate.”²⁹⁰

Period 1: A Challenging Youth with Complex Needs

The first official legal texts produced about Ashley Smith’s life represent her as a “challenging youth with complex needs.”²⁹¹ These texts are produced by police, education officials and probation officers as she enters her teenage years in reference to allegations about her disruptive behaviours at school.²⁹² The reference to her as a challenging youth is also found in official texts made retrospectively, written after her death and gazing backwards to the time of her youth in New Brunswick. In these texts, although those interacting with her in the community and the juridical field would have understood her as female, because the youth system in Canada is gender “blind,” Ashley

²⁸⁷ Hamilton, Sheryl and Gerlach, Neil “It Won’t Always Be Wrong: Morality and Monsters in Legal Rational Authority” (2010) *Law, Culture and the Humanities* 6(3) 394–419 at 396

²⁸⁸ which was when Smith received her first significant closed-custody prison sentence according to Richard, 2008.

²⁸⁹ It is on her 18th birthday, July 29, 2006 that the application to transfer Smith to the adult system is filed (Richard, 2008).

²⁹⁰ “A Rush to Judgement”: see especially pps. 21-31. In these texts, Ashley Smith is defined as “this offender”, “a problematic inmate” “I/M Smith” and a “high risk inmate.”

²⁹¹ Richard, 2008

²⁹² These first charges result in a sentence of probation.

Smith is officially configured without a gender. It is in March 2002, shortly after Ashley Smith turns 14, that she receives her first youth sentence. This sentence is handed down for her involvement in several minor offences that are not specified in the report of the New Brunswick Ombudsman.²⁹³ She is sentenced to a one-year term of probation and enrolled in an Intensive Support Program. By December 2002, Ashley Smith's enrollment in public school is terminated and she is transferred to the alternative system. During this period, Smith is banned from Moncton city transit, runs up her family's long distance bill upwards of \$1,000 per month, is considered by officials to have had little positive interaction with fellow youth, and is suspended for 4 weeks from alternative school.²⁹⁴

Challenging Youth Smith is characterized at one point during this period as a young person with mental health issues. In early 2003, when she has just turned 15, she is sent for a psychiatric assessment. However, it is determined that Smith poses a risk to security at New Brunswick's Pierre Caissie Treatment Centre and she is thrown out early.²⁹⁵ She was discharged "since she was seriously disrupting the assessments of the other youths."²⁹⁶ During her stay, Smith receives "psychological, psychiatric and educational assessments"²⁹⁷ and is variously diagnosed with personality disorders.²⁹⁸ She is recommended for individualized counseling in the community by a psychological expert and to take "follow-up" medication.²⁹⁹ This discharge seems, at first blush, counter-intuitive: what the rationale for the discharge says is that Ashley Smith is too troublesome to stay in a mental health facility. According to Correctional Investigator Howard Sapers, this discharge is a critical missed

²⁹³ Richard, 2008

²⁹⁴ *ibid*

²⁹⁵ on March 30, 2003. She had completed 27 days of her recommended 34-day assessment.

²⁹⁶ *ibid* p. 16

²⁹⁷ *ibid* p.17

²⁹⁸ CBC "The Life and Death of Ashley Smith" Timeline <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith> These include "a learning disorder, ADHD, borderline personality disorder and narcissistic personality traits

²⁹⁹ *ibid*

opportunity.³⁰⁰ I argue that this discharge is an event that signals a logic of exclusion at work in necropolitical processes in the mental health system. Ashley Smith is excluded from treatment for stated utilitarian reasons connected with the general security and management of the Pierre Caissie facility and not relating to her health and functioning.

Period 2: YP Smith

On October 21, 2003 Ashley Smith is remanded to custody and begins her prolonged “experience within” the youth custodial apparatus.³⁰¹ Her incarceration is for violating her probationary conditions by throwing crab apples at a postal worker.³⁰² Smith’s remand into custody formally reconfigures her as a carceral subject, a “Young Person” (YP). This stage lasts from April 2003 until October 2006. Despite having initially been sentenced to a short period of time in custody, she remains “either a part-time or full-time” prisoner at the NB youth prison for three years.³⁰³ 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. Although her female embodiment presents complexities and expense not associated with male YPs, in formal official texts, she is not described as having a gender.

The *Youth Criminal Justice Act*³⁰⁴ sets out the generally understood conditions of possibility under which Ashley Smith was charged, tried, convicted, sentenced and held in custody until she turned 18. The stated purposes of the *YCJA* are complex but purport to be centred on the rights and

³⁰⁰ Sapers, 2008.

³⁰¹ *ibid* p.18

³⁰² This is not disputed in the various documents detailing Inmate Smith’s history of incarceration. For reference, see Richard, 2008.

³⁰³ Richard, 2008, p.17).

³⁰⁴ SC 2002 C.1

well-being of youth.³⁰⁵ However, while it is generally accepted that the *YCJA* governs adolescents in Canada, it is also subordinate regulations, administrative rules and practices shaping the conditions of possibility under which YP Smith was defined, disciplined, punished and contained.³⁰⁶ Once she becomes a YP, formal legal and institutional conditions of possibility interact agencies of actors in those systems to produce the denotation of Inmate Smith as risky. This first sentence puts in motion the sequence of charges for disciplinary offences that ultimately lead to Smith's death. It is the designation of her as YP Smith that underlies her punishability by means of criminal sanction for a series of administration of justice offences relating to her non-compliance with rules while in custody. Very little - if any - of what Ashley Smith was subsequently charged or otherwise sanctioned for doing would be considered criminal conduct were it not committed by someone already constituted as a carceral subject.

YP Smith faces more than 800 incident reports during her time in youth custody at NBYC, and 50 more criminal charges.³⁰⁷ In these incidents, YP Smith is frequently restrained and segregated. For example, on June 1, 2004, while segregated, YP Smith "smeared feces throughout her cell, covering the cell window which obstructed supervision checks."³⁰⁸ When staff are cleaning the cell, YP Smith

³⁰⁵ according to its Preamble and its Declaration of Principle in s. 3. Also, The *UN Convention on the Rights of the Child* is referenced in the preamble to the *YCJA*. The *YCJA* is supposed to guide decision makers in handing down "meaningful consequences" to adolescent offenders, as well as reducing what was considered to be Canada's over-reliance on incarceration for youth. Decision makers in the juridical field are admonished by this law to consider the underlying reasons for criminal offending by youth are addressed in order to ensure appropriate intervention is provided and adolescents in custody are reintegrated into their communities upon release

³⁰⁶ Throughout this period, and throughout her life, Ashley Smith was a subject to whom the meso-level apparatus of protections afforded by the *Canadian Charter of Rights and Freedoms* applied. Of particular relevance, procedural rights are afforded, cruel and unusual punishment is prohibited There are other procedural rights accorded by the *Charter* that are relevant to the many legal proceedings that took place during the Smith case, including the right to counsel (s.10(b)) and the right not to be arbitrarily searched (s.9) or detained (s. 11) as well as the right to counsel in legal proceedings concerning him or her. Further, Section 12 prohibits "[c]ruel and unusual treatment or punishment" of prisoners, and deprivations of liberty except in accordance with law are prohibited by the *Charter*: Relatedly, Constitutional supremacy means that these rights trump any actor or administrative system, and that officials cannot act arbitrarily or without legal justification

³⁰⁷ According to Sapers (2008) Smith incurs 50 criminal charges while in the NBYC. Richard counts "upwards of eight hundred documented incidents" involving sanction of YP Smith for negative behaviours during the over three year period she was in the youth system (Richard, 2008, p.19).

³⁰⁸ Richard, 2008, p.21.

“became non-compliant with staff and attempted to exit the cell, which lead to her being physically restrained by staff.”³⁰⁹ 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.” 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. 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.”³¹⁰ Still 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”³¹¹ Once subdued, YP Smith is transferred to segregation “where the decontamination process (applying copious amounts of water to the eye area) was commenced.”³¹² Yet another example is presented by 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”³¹³ 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”³¹⁴ YP Smith then self-injures and “began walking around in her cell naked.”³¹⁵ Management transfers YP Smith back to segregation.³¹⁶

³⁰⁹ *ibid.*

³¹⁰ *ibid* p.22

³¹¹ *ibid*, p.23.

³¹² *ibid* p.23.

³¹³ *ibid*, p.22.

³¹⁴ *ibid*, p.22.

³¹⁵ *ibid*, p.22

³¹⁶ The examples above are illustrative only; this is not an exhaustive list.

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 certainly 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 be re-read as acts of frustration, resistance or protest.³¹⁷ 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,³¹⁸ these actions can be re-read as reflections of a dehumanizing context rather than simply pathologized as evidence of Inmate Ashley's unmanageability.

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. In an escalating pattern, YP Smith on several occasions accumulates three or four new charges in a day. She does so without ever physically hurting anyone but herself. YP Smith accumulates "upwards of eight hundred" documented incident reports" and 501 institutional charges "over a three year span."³¹⁹ Disciplinary infractions are translated by NBYC staff into criminal charges in accordance with their operating policy framework. In turn, these charges lead to new convictions for YP Smith on every available occasion. It was the New Brunswick Ombudsman who concluded that it was YP Smith's official status as an inmate that was a necessary condition precedent to her further criminalization: "One could conclude that Ashley became a punishable young offender in

³¹⁷ which will be discussed in more detail later in this chapter

³¹⁸ Levi, Primo *Survival In Auschwitz: The Nazi Assault on Humanity* New York: Simon and Schuster, 1996. Levi's analysis of life and death in an extermination camp is useful to consider when contemplating the banality and burdensome weight of accumulating sanctions to which Ashley Smith was subject but it is important not to over-state parallels between the forms of imprisonment currently occurring in Canada and Nazi concentration camps.

³¹⁹ *ibid* p. 19.

prison.”³²⁰ Indeed, it was through YP Smith’s status as a carceral subject that she became a punishable subject legitimately subjected to discretionary discipline and punishment. It was in turn through this discretionary discipline that YP Smith’s punishment became exponential and serial: each act became a serial act, taking on a different, and ever more serious consequentiality because it was in a series of unrelenting resistant acts.

For example, consider two largely typical “days in the life” in the official record of YP Smith during this period. On April 28, 2003, YP Smith is involved in 4 “incidents” that stem from charges in relation to other incidents. These incidents involve her not-complying with orders to co-operate with being transported to and from court to face other charges. Two reports document YP Smith’s refusal to abide by the Sheriff’s requests. The third concerns her refusal to be strip searched upon returning from court. The day’s fourth incident relates to her being “overheard telling another youth that she was going to inflict self-harm with an earring.”³²¹ Consider this other “day in the life” two and a half years later. On September 28, 2005, YP Smith accumulates three incident reports. One report does not specify how, but indicates she refuses to comply with orders and becomes aggressive towards staff. The other two reports are about YP Smith’s self-injury.³²² Notice how official responses to YP Smith are virtually identical on both occasions. The official response to YP Smith’s conduct is not adjusted to her needs or adapted over time. It remains unreflexively ineffective.

In large part because the Smith Inquest dealt only with her time in custody as an adult, there is little detail about her youth court record available to review. What is most readily

³²⁰ *ibid* p. 47.

³²¹ *ibid* p.19

³²² *ibid*

available³²³ are statistics. Interestingly, despite being assumed to be pathologically resistant, YP Smith offers little resistance within the processes made available by the court. YP Smith pleads guilty to the administration of justice offences with which she is charged 90.07% of the time. She pleads not guilty 9.93% of the time. She appeals verdicts 11.43% of the time. This means that YP Smith rarely contests new charges against her. Even when she does not plead guilty, this is to no avail. Her pleas of “not guilty” result in no acquittals. She is found guilty of every charge she faces.³²⁴ YP Smith’s court record does not evidence much engagement on her part with processes of the justice system, or meaningful consideration by the justice system of what remedial measures might encourage or support changes in her behavior. Obviously, if the goal of the incident reports, charges and behavioural management strategies was to change YP Smith’s behaviour, they failed. However, it is not obvious that this was the goal.³²⁵

It is also in prison, and by virtue of the starting condition of possibility that YP Smith is a carceral subject that Ashley Smith becomes a punishable *adult* offender. On January 29, 2006, Smith turns 18. On this day, she is segregated in solitary confinement at NBYC. The passing of this birthday gives the justice system new power over her future: as of this date, any future convictions entered against her will be dealt with by means of an adult sentence.³²⁶

Even so, the wheels of the legal system grind slowly. Even after she turns 18 and a transfer application is made, YP Smith’s charges and incident reports keep piling up in youth custody until they reach a climactic end in October of 2006. On October 19, YP Smith refuses to comply

³²³ from the New Brunswick Ombudsman’s review of her youth record

³²⁴ *ibid* pp. 46-47.

³²⁵ This disconnect is underscored by the problematic location of the officially impartial courthouse where Smith acquired most of her convictions: it was located on the grounds of the NBYC. This location and the abundance of convictions problematize the claimed neutrality of the court processes as between the CSC and the offender.

³²⁶ Sapers, 2008.

with a strip search. Eight correctional staff are sent in to restrain her while a nurse cuts her clothing off with scissors.³²⁷ Two days later,³²⁸ YP Smith is tasered for not complying with orders to get off her bed, where she is standing while holding “two cups filled with an unidentifiable liquid substance.”³²⁹ Three days later,³³⁰ YP Smith is again tasered and this time also pepper sprayed after “allegedly refusing to back away from her cell door.”³³¹ On the same day, YP Smith is sentenced for still other charges accumulated while in youth custody. This sentence is to an “additional 348 days of custodial time added to the already existing 1,455 days.”³³² A judicial determination is made that Smith should be transferred to adult custody to serve this sentence. Since the sentence exceeds 2 years, YP Smith is transferred to the federal adult correctional system. This transfer can be understood a necropolitical action that substantially contributes to bringing about Ashley Smith’s juridical death. By means of this determination, she was excepted from protected statuses of “child” or “youth” and excluded from the rehabilitation-focused principles of the *YCJA*. This period of youth incarceration, and the transfer determination fall outside of the defined scope of the inquest inquiries. Yet it is during this period that the momentum of accumulating youth charges produces Ashley Smith’s “rep”, her relegation to an adult penitentiary. Ultimately, the conduct of her conduct, the arts of government employed, in the YP Smith period produce her as a terminal inmate who would be understood by Agamben as *homo sacer*, a subject outside of society, living in a state of “bare life” (zoe) outside of the law, whose death would not be murder.³³³ Before YP Smith is ever

³²⁷ Richard, 2008.

³²⁸ on October 21 2006

³²⁹ *ibid* p.28.

³³⁰ October 24 2006

³³¹ *ibid* p.53.

³³² *ibid* p.29.

³³³ Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford: Stanford University Press, 1998.

placed into CSC custody, the careening runaway train of the incidents and charges in her case seems to foreshadow her biological death.³³⁴

C. Period 3: Inmate Smith

The third distinct period in the official story of Ashley Smith's case relates her configuration as an adult inmate in federal Corrections (CSC) custody. This period itself has a chronological trajectory from October 2006 – October 2007 that moves from her incarceration as an adult towards consolidating the juridical death, and ultimately bringing about the biological death, of Inmate Smith. The Inmate Smith period can thus itself be subdivided into three periods. These periods are not chronologically discrete: they overlap but are marked by points of analytical significance along a continuous trajectory of increasingly rigorous and effective necropolitical exclusion of Ashley Smith. Inmate Smith starts by being a member of a large subset of inmates upon her transfer. 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 Smith's biological death is the final point on a long necropolitical journey of dehumanization.

³³⁴ For discussion see e.g. Bala, Nicholas. *The Development of Canada's Youth Criminal Justice Law*. In K. Campbell (Ed.) *Understanding Youth Justice in Canada*. Toronto: Pearson Education Canada, 2005. Under the former youth justice regime³³⁴, Canada received criticism on the international stage for being the world leader amongst industrialized western nations in per capita incarceration rates of its youth. This pattern was intended to be corrected by the *YCJA* and statistics say that the legal regime change has had an effect in reduced Canada's "over-reliance" on incarceration for adolescents. From a utilitarian perspective, legislative change has led to Canada locking up statistically fewer adolescents. However, perhaps this does not get to the root of the concerns raised internationally about Canada's excessive reliance on youth incarceration: the official story of YP Smith brings to light the continued reliance of our nation's systems of governance on an expensive, non-rehabilitative, approach to unruly young people: confinement and containment

The figure of Inmate Smith dominates in CSC texts where forms of expertise that claim knowledge of the best, least risky security protocols are privileged. The “truths” of formal legal discourse, such as a criminal record and correctional designations such as an offender’s coding or designation, are deferred to in these texts. The figure of Inmate Smith is also prominent in media texts dating from prior to CBC’s release of its “Out of Control” docu-drama,³³⁵ and especially the early media reports emerging out of the story of the front line CSC security staff being charged with negligence in relation to her death.³³⁶ In media sites, including reports of her death in 2007 and 2008, the inmate figure also dominates. There, Ashley Smith is largely referred to as a “dead inmate.” She is represented in various ways that are consistent with journalistic conventions of identifying actors by age and geographic “home”. She is described as being from Grand Valley institution and hailing from New Brunswick.³³⁷ In media texts in this period, Inmate Smith is peripheral to a narrative about prosecution of guards accused in her case that generally characterizes this prosecution as unjust. As an illustrative example, consider the following: “Smith, who was pronounced dead in hospital, had been serving a six-year, one-month sentence for offences committed as a young offender and began serving her sentence on Oct. 17, 2003. She would have been eligible for release in November.”³³⁸

3.(a) Adult Carceral Subject

³³⁵ This documentary will be discussed in detail in Chapter 5.

³³⁶ See e.g. Canadian Press “Fourth Prison Employee Charged in Connection with Death of NB Woman” (1 November 2007); Also see reference to the “19-year-old New Brunswick woman” “New Brunswick Guards Accused of Negligence Back in Court in March” CBC News (6 February 2008).

³³⁷ See e.g. “Prison Employee Charged in Connection with Death of N.B. Inmate” Canadian Press November 2007. “19 year old inmate Ashley Smith of Moncton, N.B.”

³³⁸ Canadian Press “Fourth Prison Employee Charged in Connection with Death of NB Woman” (1 November 2007).

Once she becomes an adult carceral subject and transferred to CSC custody, Ashley Smith is officially labeled an “offender” or an “Inmate Smith.”³³⁹ The *Corrections and Conditional Release Act* (CCRA),³⁴⁰ is the statutory framework within which the CSC defines “inmate” at s.1:

“inmate” means

- (a) a person who is in a penitentiary pursuant to
- (i) a sentence, committal or transfer to penitentiary

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.³⁴¹ She bears certain differentiating criteria that make her unusual for the type “inmate”. Statistically, the usual or archetypal inmate in North America is a working class man.³⁴² 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.

Inmate Smith and her troubling attributes are a cumbersome burden on the daily grind of the prison apparatus. Because the YCJA is formally gender blind, YP Smith officially acquires a gender 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

³³⁹ For example, the official label attached to Ashley Smith in correctional documents reported in the “Rush to Judgment” report is “Inmate Smith” e.g. at p. 34.

³⁴⁰ SC 1992, C.20

³⁴¹ Detailed discussion of how Inmate Smith was exhausting managers and front line guards can be found in the Union of Canadian Corrections Officers’ “A Rush to Judgment” report (200*) which is looked at in detail in Chapter 5. <http://www.ucco-sacc.csn.qc.ca/Documents/UCCO-SACC/Ontario/documents/ARushToJudgment/Full%20Report%20-%20A%20Rush%20to%20Judgment.pdf>

³⁴² See e.g. Dauvergne, Mia “Adult Correctional Statistics 2010 -2011” *Juristat* <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.pdf> (11 October 2012)

than to male prisoners as part of CSC's "women-centered-approach."³⁴³ For example, surveillance and searches of her must be carried out in the presence of woman guards, which adds an administrative burden not imposed by men. Many criminologists have criticized the CSC's "woman centred" approach as based in a risk-based model that focuses on responsabilization and control.³⁴⁴ 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 the colloquial understanding of a 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. Woman prisoners are confined to the death-world of solitary confinement for a wider range of reasons, and per capita more often, than are men.

Under this "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.

³⁴³This was created in response to concerns regarding the treatment of women prisoners, notably including the unjust use of solitary confinement as detailed in the 1996 Arbour report Arbour Report, *ibid*

³⁴⁴See especially the work of Kelly Hannah-Moffat, for example Hannah-Moffat, Kelly, "Pandora's box: Risk/need and gender-responsive Corrections." (2006) *Criminology & Public Policy*, 5(1), 183-192.

Women are vastly more expensive to hold in prison than men³⁴⁵ and mundane aspects of their incarceration are made more bureaucratically complex by rules crafted to protect women from abuse.³⁴⁶ Inmate Smith's most banal physicality: her menstrual cycles, her need for female undergarments, her large physical size that is discordant with the stereotypically diminutive stature expected of women, are challenging for CSC to address. This complexity is amplified at the macro-level because security logic is inherently gendered as a masculinist discourse of patriarchal protection.³⁴⁷ 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."³⁴⁸ 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 during this period. The accumulation of her charges in youth custody and the hundreds of incident reports in adult

³⁴⁵ In 2010-2011, according to Canada's Ministry of Public Safety, it cost \$214,614 to house a woman inmate (on average: a maximum security woman inmate would cost far more) and \$95,034 for the average male inmate.

<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2012-ccrs/index-eng.aspx#b3>

³⁴⁶ rules that require female guards to be present when they are searched, for example

³⁴⁷ For discussion of how security logic is masculinist see Part V of Buss, Doris, Joanne Lebert, Blair Rutherford, Donna Sharkey, and Obi Aginam, eds. *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts*. London: Routledge, 2014

³⁴⁸ Correctional Service Union Press Release after Ashley Smith inquest December 20, 2013 <http://www.ucco-sacc.csn.qc.ca/ScriptorWeb/scripto.asp?resultat=888634P&lastPage=>.

custody involved daily, moment-to-moment microprocesses of governance in the interpretations and discretionary behaviours of guards. Equally, the weight of these texts, once amassed in large numbers as a record, in turn shape 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*³⁴⁹ is formal legislation governing 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.³⁵⁰ What are considered to be necessary and proportionate measures 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.³⁵¹ 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.³⁵² 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

³⁴⁹ SC 1992, C.20

³⁵⁰ For instance, s. 4 (c) of the *CCRA* states that when administering an offender’s sentence: the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act.

³⁵¹ An enumerated list of disciplinary offences as well as the procedure for CSC’s Formal Disciplinary Process is found in s. 40 of the *CCRA*.

³⁵² Any doubt as to whether risk management was the primary factor to be considered in interpretation of the *CCRA* was cleared up by a 2012 amendment, which added s. 3.1 to the law. This section provides that: The protection of society is the paramount consideration for the Service in the corrections process.

Release Regulations,³⁵³ as well as several CSC Commissioner’s Directives concerning “uses of force;” and SITREPS – Situation Reports,³⁵⁴ 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.³⁵⁵ 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 to be done in accordance with CSC’s *Situation Management Model* (SMM). There is a textual gap between the categories available to assign to Ashley Smith and the assignment of her to those 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. Judgment is exercised by CSC officials in various levels of management positions as well as police and judges in a myriad of moments in the hundreds of incidents and charges in the Smith case. 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 charges, the

³⁵³ SOR/92-620

³⁵⁴ the Correctional Investigator’s Report: A Preventable Death and the CSC National Board of Investigation into the Death of an Offender at Grand Valley Institution For Women Sapers, Howard, “A Preventable Death” (2008) <http://www.oci-bec.gc.ca/cnt/rpt/pdf/orth-aut/orth-aut20080620-eng.pdf>

³⁵⁵ *ibid*

guilty finding and the sentence were both contingent on the judge's discretion within limits imposed by law.

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.³⁵⁶ 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.

I argue that the solitary confinement imposed on Inmate Smith by this time constitutes more than just a simple risk management strategy. It is more. It is 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 to *zoe* or "bare life."³⁵⁷ In keeping with its commitment to security through risk rationality, the CCRA specifically provides for solitary

³⁵⁶ In general, Inmate Smith's treatment in custody was not justified in the language of discipline. Government in the Foucauldian sense is not an art concerned with the conduct of her conduct by imprinting technologies of the self onto her. Rather, Inmate Smith was simply immobilized and contained. Words and images are used that maximize sterility of interventions by staff in the context of the custody of Inmate Smith.

³⁵⁷ Agamben, *ibid.*

confinement. The Act authorizes “administrative segregation” for security reasons.³⁵⁸ The notion is that segregation, or solitary confinement, is to be used if an inmate jeopardizes security. Administrative segregation is *not* defined as punitive in formal legal texts or in official statements of CSC. To quote a CSC spokesperson, administrative segregation is “not a form of punishment,” but rather a means “to help ensure the safety of all inmates, staff and visitors.”³⁵⁹ It is to be used only when “there is no reasonable alternative and for the shortest period of time necessary.”³⁶⁰ Administrative segregation is defined as a security measure in adult corrections and the equivalent, “therapeutic quiet”, is a security measure in youth corrections.

Inmates are coded with respect to being “maximum”, “medium” or “minimum” security. They are coded pursuant to regulations to the *CCRA*. Solitary confinement cells in Canadian custodial facilities are given a variety of names, none of which refer to discipline or punishment of the prisoner. 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 for solitary confinement of prisoners 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 inmates who have been disruptive as are used for those on suicide watch.

³⁵⁸ *Corrections and Conditional Release Act* SC 1992 C. 20. See especially s. 31 “administrative segregation”

³⁵⁹ CBC News “Solitary Confinement a Growing Issue in Canada, US Prisons” CBC News (8 September 2013) <http://www.cbc.ca/news/canada/solitary-confinement-a-growing-issue-in-canadian-u-s-prisons-1.1699487>

³⁶⁰ *ibid*

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 to themselves as well as others. This determination is made pre-emptively and does not necessarily refer to a past event. The decision whether to code an inmate "Maximum Security" is a determination based on a CSC Institutional classification system that 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.³⁶¹ Longstanding concerns have been repeatedly raised about the overuse of the maximum security designation and solitary confinement against woman prisoners, and are identified in the 1996 Arbour Report as systemic "shortcomings... of the most serious nature."³⁶²

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.³⁶³ CSC has acknowledged, but rejects, the critique that the 'maximum-security' designation is applied inequitably to women, over-estimating the risks they 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. This study did not find significant gender differences in the

³⁶¹ For discussion see e.g. Luciani, F., Motiuk, L.L., & Nafekh, M. "An Operational Review of the Custody Rating Scale: Reliability, Validity, and Practical Utility". (1996). Research Report #R-47. Ottawa: Correctional Service Canada.

³⁶² Commission of Inquiry into certain events at the Prison for Women in Kingston, 1996

³⁶³ see e.g. Hannah-Moffat, Kelly "Gaining insight, changing attitudes and managing 'risk': Parole release decisions for women convicted of violent crimes". (2011). *Punishment & Society*, 13(2), p.149-175;

use of maximum security designations, but it did find that the assignment of risk could be assessed based on “suicide potential”, that woman prisoners 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.”³⁶⁴

As a technology of power, the Inmate Smith figuration legitimates the 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.³⁶⁵ 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

³⁶⁴ Blanchette, Kelley and Motiuk, Lawrence CSC Research Branch, “Maximum-security Female and Male Federal Offenders : A Comparison” 1997 http://www.csc-scc.gc.ca/research/092/r53e_e.pdf

³⁶⁵ Inmate Smith incurred 70 further criminal charges as a result of disciplinary infractions she committed while in youth custody. The vast majority of the incidents giving rise to these further charges (e.g. refusal to return a hair brush) would not have been considered criminal had the conduct involved been committed by a non-inmate. For discussion see e.g. Sapers, Howard. “A Legacy of Missed Opportunities: *The Case of Ashley Smith*” <http://www.oci-bec.gc.ca/cnt/comm/sp-all/sp-all20111123-eng.aspx>

excluded and unmanageable being.

While it emerges from, and is articulated in, official documents in ways 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.³⁶⁶ 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”³⁶⁷

In this understanding, the caseness of 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 woman offenders revealed by analysis of the Inmate Smith figure has the potential to confront clusters and structures of macro power and to question, if not even perhaps refute, logics that Sapers has argued, both in advance of and in response to the inquest verdict, need to be changed.³⁶⁸ 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

³⁶⁶ Sapers, *ibid*

³⁶⁷ Sapers, 2008, p. 4

³⁶⁸ Howard Sapers, “Ashley Smith: Verdict a chance to rethink how prisoners with mental illness are dealt” with quoted in the *Toronto Star* (19 December 2013)

perfect metaphor for the neo-liberal subject.”³⁶⁹ Further, use of the Inmate Smith figure, for example, is now being sought to be made of this figuration in the Glen Wareham case.³⁷⁰ This is a case of a male inmate who died in CSC custody in which the deceased’s family members are suing Corrections for wrongful death, citing Inmate Smith’s case as fundamentally similar to that of Wareham. Similarly, the Inmate Smith figure has been used to call into question the suicide of Edward Snowshoe, who, in 2010 at age 24, died by suicide in CSC custody at Edmonton Institution, a maximum-security federal prison, after spending 162 days in segregation.³⁷¹

3(b) Terminal Inmate: Homo Sacer

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,

³⁶⁹ <http://www.truth-out.org/news/item/22321-a-new-form-of-homicide-in-canadas-prisons-the-case-of-ashley-smith>

³⁷⁰ The family of Glen Wareham, a 28 year old male inmate who died in CSC custody in 2010, has launched a \$10 million lawsuit for his wrongful death, relying upon the Ashley Smith settlement implicitly and in media reports as precedent. See, for discussion: Stone, Laura” Family of Dead Inmate Suing Corrections Canada for \$10 million” *Global News* (4 July 2013) <http://globalnews.ca/news/692403/family-of-dead-inmate-suing-corrections-canada-for-10-million/>. Notably, Wareham’s family also cites his mental health problems, as will be discussed later.

³⁷¹ See e.g. “Edward Snowshoe Spent 162 Days in Segregation Before Suicide” CBC News (11 July 2014) <http://www.cbc.ca/news/canada/north/edward-snowshoe-spent-162-days-in-segregation-before-suicide-1.2703542>

consigned to segregation status. During the Inmate Smith period, while official documents label and code her as an inmate like many others, it is obvious from the volume of documents being generated that containment of Inmate Smith is proving tremendously resource intensive. Incidents involving her are triggering requirements for the production of hundreds and even 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.³⁷²

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 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.³⁷³ 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 criminal charges. As before, records of these incidents rarely if ever reference her harming others but rather tended to 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 or inmate. Over the 11.5 months Smith was held in the adult

³⁷² Sapers, 2008.

³⁷³ While the adult correctional system is formally “separate and apart”³⁷³ from the youth system and transfer of YP Smith did change her circumstances in removing her from a facility containing other young people to adult facilities, other aspects of her conditions of incarceration are strikingly similar in the adult and youth systems.

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.”³⁷⁴ 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 the hundreds of disciplinary infractions incurred by Inmate Smith in adult CSC custody within weeks 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. This regime was incredibly resource intensive, expensive and exhausting. 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 manage her. There is also clearly an institutional struggle between front line CSC guards, the management of particular institutions and central CSC management about how to deal with Inmate Smith.

³⁷⁴ Sapers, 2008.

Concerns are raised by CSC management about failures on the part of guards to formalize their interventions, and on the part of local managers for excessively formalizing their responses. For example, the “Rush to Judgment” report depicts certain local-level managers at various institutions as “cowboys” dismissive of the institutional rules and safety protocols,³⁷⁵ who were intervening by disciplining Inmate Smith antagonistically and inappropriately often. On December 13, 2006, when Inmate Smith was housed at Nova Institution, front line staff were informed that the institution’s Warden and Deputy Warden had been called in to conference calls with CSC national headquarters to discuss high numbers of Uses of Force (UOF) involving Ashley Smith.³⁷⁶ Sapers notes in “A Preventable Death” that CSC breached its own rules concerning how to house and contain inmates in the Smith case insofar as: “ the use of institutional transfers; the use of administrative segregation; interventions involving the use of force; the provision of health and mental health services; and, staff responses to medical emergencies.”³⁷⁷

Guards were asked, when dealing with Inmate Smith to observe a protocol of “keep[ing] the communication ‘matter-of-fact’.”³⁷⁸ Guards were censured for being too emotionally engaged in communication with Inmate Smith, both for being too sympathetic and too angry. The bureaucratic admonition to remove emotionality from guards’ interactions with Smith is a struggle; admonitions from official sources continue to intervene. It is not once but repeatedly that guards are asked to “remove the personal” and “remove warmth³⁷⁹” when dealing with Inmate Smith. This enforced impersonalization, descriptions and coding of Inmate Smith slipped

³⁷⁵ See especially section beginning at p. 27

³⁷⁶ Rush to Judgment; p. 20.

³⁷⁷ Sapers, 2008 “Introduction” at para 11

³⁷⁸ “A Rush to Judgment” at p. 18

³⁷⁹ In an email sent to CSC managers eight days before Ashley Smith’s death, Grand Valley acting warden Cindy Berry criticized the guards for “not removing warmth” from their interactions with Inmate Smith.

into dehumanization. In addition to the instruction that guards act “matter of fact” in response to her self-harm, a directive was later issued to the effect that guards were not to intervene unless she stopped breathing. Acting Grand Valley Warden Cindy Berry testified at the Smith inquest that a directive had been issued to guards to stay outside of her cell unless she was in “medical distress.”³⁸⁰

Clearly, a concerted programmatic effort was undertaken by CSC management to ensure that front line guards and local-level managers would perform as uncritical functionaries when implementing directives and rules. Some criminologists have argued that correctional staff unconsciously adopt the risk rationale integral to the logic of the correctional system.³⁸¹ This would imply that staff are not aware, let alone critical, of the operating logics they are tasked with following. However, the ongoing and persistent conflict between front line staff and central management in the Smith case calls into question to what extent adoption of this thinking is unconscious or complete. It appears that many guards were well aware, critical of, and resistant to, the systemic logics they were required to implement. The ongoing and persistent conflict between front line staff and central management in the Smith case calls into question to what extent adoption of this thinking is unconscious or complete: the non-compliance of the front line staff with management directives on multiple occasions indicates that the system is much messier and agents within the system harder to manage than this contention of unconscious adoption would suggest.³⁸²

³⁸⁰ CTV News “Warden Didn’t Know of Guards’ Confusion About Entering Cell” (September 30, 2013)

<http://www.ctvnews.ca/canada/ashley-smith-inquest-warden-didn-t-know-of-guard-s-confusion-about-entering-cell-1.1476269>

³⁸¹ Hannah-Moffatt, Kelly, *ibid.*

³⁸² For a discussion of the messy, amoral and even immoral functioning of rationalized bureaucracies in this manner see Gerlach, Neil, Hamilton, Sheryl, Sullivan, Rebecca and Walton, Priscilla. *Becoming Biosubjects: Bodies. Systems. Technologies* Canada: University of Toronto Press, 2011

Evidence of the difficulties presented to staff and various levels of management by the task of containing Inmate Smith is presented in an email to front line staff from low-level management sent in November, 2006:³⁸³

all staff that have dealt with Ashley should be recognized for their efforts in dealing with a very difficult offender. It is very draining both emotionally and physically to deal with this type of offender. All staff did a terrific job in maintaining a safe and secure environment in less than desirable conditions. Well done.³⁸⁴

The dispassionate official records about Inmate Smith conflict with the understandings of Inmate Smith present in the oral culture of the front line guards. Amongst these actors, Inmate Smith was spectacularly notorious. Even when she was first transferred to CSC custody³⁸⁵ Inmate Smith was preceded by her reputation,³⁸⁶ which together with her designation as “maximum security,” marked her immediately as a difficult inmate. In “Behind the Wall” Ashley Smith is referred to as having come to Saskatoon with a “rep” amongst guards as “the most difficult female inmate in the system.”³⁸⁷ Reference to Inmate Smith’s “reputation” amongst front line CSC guards is found later in descriptions the “A Rush to Judgment” report in excerpts from official CSC communications.³⁸⁸

While texts about Inmate Smith produced in official corrections Canada sites meticulously document her days in scrupulous adherence to various policies, violations of Ashley Smith’s rights were at the same time, as Sapers notes, “routine”. These are documented

³⁸³ <http://www.ucco-sacc.csn.qc.ca/Documents/UCCO-SACC/National/documents/Issues/GVI/Full%20Report%20-%20A%20Rush%20to%20Judgment.pdf>

³⁸⁴ emphasis added

³⁸⁵ Rush to Judgment

³⁸⁶ Rush to Judgment Report – “the most difficult inmate in the system”

³⁸⁷ “Behind the Wall” the Fifth Estate, CBC News 2010 <http://www.cbc.ca/fifth/episodes/2010-2011/behind-the-wall>

³⁸⁸ the institution “never had an inmate so problematic as [inmate Smith] in the 10 year history of this institution.” Rush To Judgment Report at p. 39.

as “use of force” incidents and Sapers also makes numerous allegations that things like forced injections with anti-psychotic drugs³⁸⁹ (In all the documents I have reviewed, I have not seen a single one in which an expert has diagnosed Ashley Smith as psychotic), body cavity searches and failures to appropriately report uses of force were also routine.³⁹⁰

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.”³⁹¹ 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 a variety of institutions. Further, it reveals the often messy interaction and overlap of disjointed bureaucracies within CSC: 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, banned,

³⁸⁹ See Report of Psychiatrist Paul Beau dry on Ashley Smith’s treatment at Quebec’s Joliette Institution April 109 2010 <http://www.falconers.ca/documents/CorrectionalInvestigatorsPsychiatristsReviewofforcedInjectionsApril192010.pdf> ³⁹⁰ Than Hate “Officials Tailored Use of Force Reports” *The Globe and Mail* (10 March 2009).

³⁹¹ Sapers, “A Preventable Death” at 5

losing her social identity in being unmoored from community. At a practical level, these transfers result in the impracticability 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 sort of 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. What follows is a list of the specific transfers of Inmate Smith:³⁹²

1. Oct. 31, 2006 - Dec. 18, 2006 Nova Institution for Women, Truro, Nova Scotia(Dec.19, 2006 -en route to Regional Psychiatric Centre, stopover at Joliette Institution, Joliette, Quebec)
2. Dec. 20, 2006 - Apr. 12, 2007 Regional Psychiatric Centre, Prairies, Saskatoon, Saskatchewan
3. Apr. 13, 2006 - May 10, 2007 L'Institut Philippe-Pinel de Montreal, Montreal
4. May 10, 2007 - Jun. 2, 2007 Grand Valley Institution for Women, Kitchener, Ontario
5. Jun. 7, 2007 - Jun. 11, 2007 Grand River Hospital, Kitchener, Ontario
6. Jun. 11, 2007 - Jun. 18, 2007 St. Thomas Psychiatric Hospital, St. Thomas, Ontario
7. Jun. 19, 2007 - Jun. 26, 2007 Grand Valley Institution for Women, Kitchener, Ontario
8. Jun. 26, 2007 Grand River Hospital, Kitchener, Ontario

³⁹² For a good interactive infographic see "Ashley Smith's See-Canada-Tour" Canadian Press: <http://cponline.thecanadianpress.com/graphics/2013/ashley-smith/index.html>

9. Jun. 27, 2007 - Jul. 26, 2007 Joliette Institution, Joliette, Quebec
10. Jul. 26, 2007 - Aug. 24, 2007 Nova Institution for Women, Truro, Nova Scotia
11. Aug. 24, 2007- Aug. 27, 2007 Central Nova Correctional Facility, Dartmouth, Nova Scotia
12. Aug. 27, 2007 - Aug. 31, 2007 Nova Institution for Women, Truro, Nova Scotia
13. Aug. 31, 2007 - Sep. 6, 2007 Grand Valley Institution for Women
14. Sep. 6, 2007 Grand River Hospital, Kitchener, Ontario
15. Sep. 6, 2007 - Sep. 21, 2007 Grand Valley Institution for Women
16. Sep. 21, 2007 Grand River Hospital, Kitchener, Ontario
17. Sep. 21, 2007 - Oct. 19, 2007 Grand Valley Institution for Women, Kitchener, Ontario

Dispersal of responsibility for Inmate Smith does discursive work in permitting and legitimizing the way in which she was dealt with in Corrections Custody. While Sapers does not theorize the construction of Inmate Smith, he does make the observation in his 2008 “A Preventable Death” report that “nobody seems to have taken charge of Ms. Smith’s case at the correctional service despite the ongoing awareness of senior staff that Ms. Smith required special care and that the efforts that had been made were inadequate and ineffective.”³⁹³ This disengagement is understandable when considered in the context of the relentless series of reprimands front line staff contended with when they did engage with Inmate Smith. It was in their interests to participate in a pattern of avoidance. Guards faced censure, termination of employment and even arrest if they did not comply with the bureaucratic rules imposed on them. Beneath the depersonalization deliberately effected in the CSC texts about Inmate Smith is a

³⁹³ Sapers, *ibid*, p.19.

rationalized bureaucratic logic that involves dispersal of responsibility for this troublesome inmate. In official texts, it is evident that Inmate Smith is a problem for the system but she is no one's problem in particular. Further, Inmate Smith is a problem to remove, or, failing that, to contain, not to solve. This dispersal of responsibility across the institutions and across time through use of coding supports the institutional transfers to which Inmate Smith was made subject.

(c) Juridical Death and Bodily Contingency

After hundreds of incidents in which Inmate Smith is determined by CSC guards and management to be extraordinarily difficult and burdensome for CSC bureaucracy, representations of Inmate Smith gradually transform from a figure of a terminal inmate likely to become juridically dead to a figure of a contingent subject whose bodily autonomy is completely compromised and who inhabits a "death world" of perpetual segregation. In this death world, she exists in the view of CSC's bureaucracies, as a biological being who is socially and juridically dead already. Inmate Smith has by spring 2007 become so closely surveilled that her movements are tabulated and restricted even at the most banal levels, with her daily bodily functions being recorded and her use of toilet paper rationed. As was the YP Smith figure, during her incarceration in CSC custody, the figure of Inmate Smith is mobilized as a tool for containing, excluding, dehumanizing and establishing Ashley Smith's status as socially dead. Once Inmate Smith is confined to solitary on a longterm basis, she is the subject of unbearable scrutiny. The lights are never turned off. She is bathed in dim fluorescent light and under the view of cameras 24 hours a day with no human contact except through her meal slot. As the CSC Guards' union

says in the “A Rush to Judgment Report” Inmate Smith “was constantly accumulating data.”³⁹⁴ Every action she undertakes leads to her further enmeshment in surveillance and containment. Her daily bodily behaviours become the obsession of the state. Bureaucratic exhaustion creates ridiculous amplification of the work of the state at an exponential level.

Even Inmate Smith’s simplest bodily acts lead to her being written up and accumulating data. She is considered disruptive when asking for a tampon, asking for pen and paper, asking for a blanket, eating, refusing to eat, taking medication, refusing medication, disrobing, refusing to disrobe, asking for toilet paper, and refusing to use toilet paper. Miniscule agentic acts, such as asking for a tampon, which could be read many different ways, are not seen as basic survival behaviours but rather as acts of defiance - and maybe her very survival is defiance - that bring down institutional responses: “uses of force” and forced injections. Acts in which Inmate Smith harms herself result in her being placed on “24 hour suicide watch”, which in turn only escalates the level of surveillance to which she is subject. Isolation and surveillance, as before, do not ease but exacerbate, Inmate Smith’s problematic conduct. In this period, Inmate Smith’s self-harm, including especially ligature tying self-strangulation, escalates, with front line staff having routinely to “to forcefully remove ligatures from her neck sometimes as many as six or seven times a day.”³⁹⁵ For months, Inmate Smith makes multiple attempts at self-strangulation and, for months, she is prevented from biologically dying by the interventions of guards.

However, in the midst of all of this extremely detailed scrutiny of her bodily functions, there is no reference to any masturbatory or otherwise sexual behavior by Inmate Smith. Given that she was young, alone and ostensibly very bored, and in light of the fact that one of the things

³⁹⁴ at p. 10.

³⁹⁵ “Rush to Judgment” at p. 8.

for which she had been received as “challenging” as a teen had been her consumption of questionable online materials for a fee (the nature of these websites has not been disclosed³⁹⁶) it would be surprising if she did not masturbate during all of her years in solitary confinement. The absence of any reference to sexual behavior on her part, and the insistence³⁹⁷ that her self-strangulation was not auto-erotic are conspicuous. Perhaps she simply did not masturbate. However, it is not clear whether she in fact did not masturbate, whether guards decided to, for reasons of discretion, decline to mention masturbation on her part, or whether references to it have somehow been removed from the record. In the context of such detailed attention to the minute details of Inmate Smith’s physicality, the silence of official records about her sexual behaviour and sexuality seems to call out for some kind of explanation. Perhaps the stereotypical construction of “girls” as without sexual desire prevented those surveilling Inmate Smith from recognizing auto-eroticism in her acts. Perhaps because Inmate Smith’s physicality did not correspond to prevailing stereotypes about what is sexually appealing in a young woman, surveillance of her movements lacked a voyeuristic appeal and the possibility of her sexual agency was overlooked. Or perhaps front line guards, who appear to have cared about her, discretely turned their gaze away from her most intimate acts and refrained from documenting them, which, if it did happen, would have been an agentic and resistant act on their parts. This analysis cannot conclusively determine whether any of these explanations is correct. In any case, the official story of Inmate Smith renders Ashley Smith’s limited range of sexual agency invisible.

³⁹⁶ On the CBC Timeline, it is stated, for example: “Ashley starts running high monthly long distance charges, ranging from \$200 to \$1,600 per month. She would spend a lot of time on the Internet, looking at inappropriate material” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

³⁹⁷ In Dr. Margo Rivera’s report, *ibid*

Similarly, the repeated strip and cavity searches to which Inmate Smith was made subject in custody are nowhere characterized as sexual assaults notwithstanding the fact that there are very specific (and heteronormative) regulatory limitations³⁹⁸ on who can perform strip searches, the existence of which confirm the obviously intimate, sexual dimensions of the touching involved. Because she would have been socially, and administratively, received as gendered, sexed and with sexuality, it seems strange, and strangely deliberate, that there is no official recognition of Inmate Smith's sexuality. What is clear from all of this, is that there is a concerted programmatic effort in the official texts about Inmate Smith to "unsee" - and thereby deny - her existence as a sexual being.

Inmate Smith is transferred away from Saskatoon's Regional Psychiatric Centre to the Pinel Institution in April 2007. When the time Ashley Smith spent as a carceral subject is looked at in the context of its totality, it seems entirely inappropriate to focus on a brief period at the end of it in ascertaining what killed her: from 2003 to 2007, a gradual progression into dissolution of her autonomy takes place. The dissolution of Inmate Smith into a contingent body takes place as security and risk logics driving decisions about how to manage Inmate Smith exhaust themselves and system resources wear thin. The series of transfers has not worked. Management takes further steps to rid itself of the problems posed by Inmate Smith: directives are made to guards to limit their engagement with her. The reconfiguration of Inmate Smith into a contingent being has clearly coalesced, by the time at some point in 2007 that the following direction to guards is ordered by the Acting Warden. Front line staff are ordered not to intervene, nor even to enter her

³⁹⁸ Per Commissioner's Directive 566-7, "16. Notwithstanding [subsection 49\(4\)](#) of the CCRA, a male staff member will, under no circumstances, even in an emergency, conduct or witness the [strip search](#) of a female inmate, but will contain the situation until such time that female staff members arrive to conduct and witness the strip search." http://www.csc-scc.gc.ca/text/ply/cdshtm/566-7-cd-eng.shtml#E_Body_Cavity_Search

solitary confinement cell, unless she stops breathing.³⁹⁹

The way CSC was seeking to manage Inmate Smith by this point was untenable within the liberal rights-framework limits imposed by formal law. While the rule of law framework, and the CSC managers acting as custodians of it, obsessively required Inmate Smith as well as front line staff to “comply” with its imposed rules and directives, CSC Management did not follow its own rules in the management of Inmate Smith. She was held in segregation for longer periods than permitted by law. CSC violated its segregation policy⁴⁰⁰ and failed to conduct 60-day mandatory regional segregation reviews of Inmate Smith’s status.⁴⁰¹ Her complaints, to which CSC management were legally obligated to respond, were not addressed in a timely fashion. The series of transfers violated her *Charter* rights. While it invoked formal legal texts when convenient, CSC management ignored them when it was not.

A programmatic effort undertaken by the CSC bureaucracy to limit Inmate Smith’s contact with front line staff had the effect of limiting possibilities for her expressions of agency. With no contacts with family, staff or treating mental health professionals except through a meal slot, Inmate Smith could not express agency by inciting conflicts with front line staff or patterning other interactions with them. Nor is it realistic to argue that, at this point, she could have derived much benefit from therapeutic or otherwise assistive interventions offered to her through a meal slot. In the context of the non-intervention order directed to guards, Ashley Smith was limited in her options for agentic expression to surrendering into passivity or continuing to enact resistance via self-harm that produced a stoppage in her breathing. In this way, it can be argued that

³⁹⁹ as cited previously: “they were frequently disciplined for making that call -- at Berry's behest -- even in cases where Smith's face had turned purple and she struggled for breath” <http://www.ctvnews.ca/canada/ashley-smith-inquest-warden-didn-t-know-of-guard-s-confusion-about-entering-cell-1.1476269#ixzz34G18ZTLc>

⁴⁰⁰ Commissioner Directive 709

⁴⁰¹ *ibid*

institutional logics operating in the CSC bureaucracy as well as bureaucracies in youth courts, youth corrections, and even schools led to concerns about high costs, extra work and possible sanctions in relation to failure to those costs and that work combined with the self-generating momentum and self-fulfilling inevitability of surveillance regimes, produced Inmate Smith as a contingent body, a *homo sacer* figure. These logics drew actors within a variety of systems into institutional and management processes from which they could, but largely didn't, deviate. In these processes, Ashley Smith as a person became farther and farther removed from consideration and Inmate Smith as a figuration of a difficult inmate became more and more confined in a space between alive and dead.

Dissolution of Inmate Smith into a contingent body in the official story about her is never seamless; there is a struggle that takes place in the institution on a daily basis in which her dehumanization is not invariably confirmed and re-enacted. While the overwhelming trend of institutional decisions about Inmate Smith was towards taking necropolitical action, systems and actors did not function monolithically. The Inmate Smith figure helps reveal multiple agencies, tensions between official discourse and actors, and resistances and struggles in the system. Where bureaucratic discretion was exercised in the assignment of coding and official definitions to Inmate Smith's behaviours, some guards evidently disagreed with strategies for dealing with Inmate Smith imposed by management. These guards resisted, and disobeyed, the official plans for how she should be addressed. Once Inmate Smith died, these same front line guards were sanctioned, fired and scapegoated. The close reading of discourses circulating in the Smith case undertaken here reveals that, in failing to respond adequately to the medical emergency on

October 19, 2007 in which Inmate Smith died,⁴⁰² guards were not “bad apples”⁴⁰³ engaged in rogue conduct. Their inaction is one strand in a complex and many stranded web of decisions excluding Smith from community, education, medical treatment, and even the broader prison population.

CSC Guards’ Union lawyer Howard Rubel presented evidence at the Smith inquest that several front line guards were disciplined because they entered Smith's cell. For example on January 24, 2013, a front line correctional officer who cut a ligature from Smith’s neck on an occasion prior to October 19, 2007, testified at the Inquest that he was reprimanded for so doing. Acting Warden Berry acknowledged at the Smith inquest that guards were disciplined for entering Smith’s cell even in instances where her face was purple and she was gasping for breath.⁴⁰⁴ Rubel contended in closing submissions at the Smith Inquest that guards, despite their failure to remove the ligature and prevent her death, even disobeyed the non-intervention order in Smith’s videotaped last moments by entering her cell when she was still breathing.⁴⁰⁵

Inmate Smith officially complained many times about her treatment in custody. According to Sapers, Ashley filed grievances at Nova Institution. She asserted that: “Excessive force was used against her- She wasn’t permitted writing paper or writing instruments. She wasn’t permitted sufficient toilet paper for hygiene purposes. She was not permitted soap in her cell, was only given finger foods, and was only given a small piece of deodorant on her finger at a time. While menstruating she was not permitted underwear or sufficient sanitary products to

⁴⁰² Sapers’ language, 2008 p. 3.

⁴⁰³ Razack, *infra*

⁴⁰⁴ Quote, *ibid*: “they were frequently disciplined for making that call -- at Berry's behest -- even in cases where Smith's face had turned purple and she struggled for breath” <http://www.ctvnews.ca/canada/ashley-smith-inquest-warden-didn-t-know-of-guard-s-confusion-about-entering-cell-1.1476269#ixzz34G18ZTLc>

⁴⁰⁵ “Final Submissions Continue in the Ashley Smith Case” *The Canadian Press* (November 26, 2013) <http://www.macleans.ca/news/canada/final-submissions-continue-at-inquest-into-prison-death-of-ashley-smith/>

meet her hygiene needs. In August 2007, during the first month after Inmate Smith is transferred to Grand Valley Institution for Women, she submits seven complaints about what she alleges to be unjust segregation and undue treatment. CSC denies all seven of these complaints.⁴⁰⁶

Nonetheless, in September 2007, Inmate Smith makes one last attempt to engage with system rules in order to seek fairer treatment by putting one final “complaint in the sealed envelope and placing it in the receptacle located on her unit.”⁴⁰⁷ It is in the middle of December, 2007, two months following its submission, that CSC Management opens Smith’s sealed complaint.⁴⁰⁸ By then of course Inmate Smith is dead.

Critical discourse analysis of official texts about Inmate Smith from this period reveals extreme absurdities of bureaucratic governance of this “unmanageable” carceral subject. The stifling nature of the institutional context and definitional apparatus in which she was embedded ultimately assign consequences for Inmate Smith’s every action, even the most banal. Incredibly, several levels of bureaucratic management and even the Government of Canada become concerned with the bodily functions of Inmate Smith; the most mundane aspects of her beingness become elevated to being the business of the state. Texts from this period reveal the entangled ridiculousness of a contemporary bureaucratic apparatus. The imperative to take total control of the carceral subject makes everything she does relevant. The operationalization of this system of control becomes farcical while the bodily autonomy of the carceral subject is removed. Once Inmate Smith is held in solitary confinement, understood to be “high needs” and gained a “reputation” for being unmanageable, data accumulates whenever she acts, even when she engaged in the most basic survival behaviours, such as “noncompliance” with a strip search and

⁴⁰⁶ Sapers, 2008

⁴⁰⁷ Sapers, 2008.

⁴⁰⁸ Sapers, 2008

asking for feminine hygiene products. In the context of the bureaucratic entanglement in which Inmate Smith was enmeshed at this point, her death is not only a predictable outcome but the sole likely result: it is highly unlikely this situation could have reasonably ended other than with her death.

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,⁴⁰⁹ 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.⁴¹⁰ When the film begins, Inmate Smith is lying in a small corner of floor space 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

⁴⁰⁹ As discussed later in this chapter.

⁴¹⁰ "Ashley Smith Jurors Watch Video Showing Her Death" (22 January 2013) CBC News <http://www.cbc.ca/news/canada/ashley-smith-jurors-watch-video-showing-her-death-1.1364650>

“It’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.”⁴¹¹ 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 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?”⁴¹² 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. 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.

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

⁴¹¹ “Behind the Wall” *ibid*

⁴¹² “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), which is literally translated as “Who will guard the guards themselves?” The question is also often associated with the philosophy of Plato.

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 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 dead⁴¹³.

The gears of CSC systems do not cease to grind in their paradigmatic patterns after Inmate Smith's death. The 2014 response of CSC to the Smith inquest rejected most of the recommendations of the jury, including rejection of the admonition to place limits on the use of solitary confinement and the rejection of the suggested creation of external oversight of CSC management. This report was made in generalities and did not specifically enumerate the particular inquest recommendations being addressed⁴¹⁴. The response of CSC to Sapers' 2008 Report on the death of Ashley Smith had taken the form of a checklist. Sapers complained this response was cursory and not comprehensive. His key concern raised was that "recommendations that go to the very core of accountability and governance within federal corrections – e.g. oversight of women's corrections at the national level, external monitoring of segregation, expert chairing by an independent mental health professional of national boards of investigations involving suicides and incidents of self-injury – continue to be rejected or supported only "in part" by the Correctional Service."⁴¹⁵ From the perspective of critical

⁴¹³ 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.

⁴¹⁴ Corrections Canada "Response to the Coroner's Inquest Touching the Death of Ashley Smith" (December 2014) <http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>

⁴¹⁵ Office of the Correctional Investigator (OCI) Initial Assessment of the Correctional Service of Canada's (CSC) Response to the

discourse analysis, it is not a minor detail that the response took the form of a spreadsheet and that its contents claim the production of the spreadsheet itself was a significant step towards responding to concerns arising from Inmate Smith's death: "The posting of this document is an important step in publicly sharing the initiatives that the Service is pursuing to address the issues identified in the Office of the Correctional Investigator study on deaths in custody."⁴¹⁶ Further, responses that deal with improvements to its infrastructure are clearly non-sequiturs that fit the CSC's own pre-existing agenda to bolster its funding and facilities.⁴¹⁷ CSC suggests that the issues identified in Sapers' report could be partially resolved by improvements to their surveillance technologies and facilities and proposes, as a solution, construction projects that could be undertaken to facilitate for guards and management better surveillance of cells.

4.3 What is Lost

In the configuration of the beingness of Ashley Smith into the figure of Inmate Smith, certain aspects of her embodiment, history and particularity are privileged while others are made invisible, even lost. As discussed, in the recounting and deployment of her official "record" and her "maximum security" designation, the minor and mundane underlying factual circumstances of the incidents that gave rise to the incarceration of Ashley Smith are minimized. A view of the rapid trajectory of a teenaged actor from throwing apples at a postal worker and stealing a CD into solitary confinement in an adult prison is artificially obscured by the official description of her charges in her criminal and correctional records. Contextual contribution of corrections

OCI's *Deaths in Custody Study, A Preventable Death* (Report into the Death of Ashley Smith) and the CSC National Board of Investigation into the Death of an Offender at Grand Valley Institution for Women <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20090911ia-eng.pdf>

⁴¹⁶ *ibid*

⁴¹⁷ For example: "CSC is pursuing funding to implement short and long-term strategies developed to address the specific service, support, and accommodation needs of women offenders with mental health and behavioural needs." (Rec. 1 OCI, Rec. 1 CSC) <http://www.csc-scc.gc.ca/005/007/rocidcs/grid3-eng.shtml>

procedures to Ashley Smith's record by corrections' systems is lost; after she is transferred to adult custody, her youth is made invisible and her mental health concerns are not part of the official record. Finally, the carceral context foundational to and productive of Ashley Smith's escalating pattern of offences officials is erased.

The Inmate Smith figure fits well with narratives about unruly inmates having to be managed by a bureaucratic system that assesses risk and manages security. It bolsters the credibility of expertise in management of such a system, both by scientific analysis and knowledge of rules that apply in its operations. The existence of such unruly, incorrigible, risky and unmanageable actors accords easily with narratives that affirm the legitimacy of a robust carceral apparatus and applaud the work of corrections officers and systems. The truth claims it enables about Inmate Smith are self-confirming. The system is legitimated by reports of her unruliness. Broadly, the structure of carceral exclusion and logic of exception are confirmed to be necessary by her conduct while confined. The Inmate Smith figure has effects in producing a need to neutralize, and punish, Ashley Smith. It makes possible the transformation of a failure to return a hairbrush into a criminal mischief charge and self-harm incidents into assaults. It transforms mundane, even banal bodily functions, into the business of the state. The snowballing series of charges keeps Correctional facilities in business; the NYBC onsite court turns short-term carceral subjects into long-term and repeat carceral subjects.

As constructed in official texts produced during her life, Inmate Smith is a figure who is responsabilized for her "bad choices" yet is not seen as a world-creating actor; her resistances are read as misbehaviours that constitute non-compliance. These behaviours are understood as deliberate but never thought to *make sense*. In a 2006 "Management and Reintegration Plan for Ashley Smith", a psychological expert author, speaking to mental health criteria for capacity,

states “she [Ashley Smith] is capable of engaging in purposeful behaviour...Ms. Smith is aware of the behaviours in which she engages and is able to apprehend the probable consequences of her actions.”⁴¹⁸

In official discourse, Inmate Smith is an actor who “makes bad choices” but her actions are not meaningful. It is significant that the figure of Inmate Smith is understood to have *some* agency; she can be disobedient and obedient. While the figuration of Inmate Smith makes unthinkable or at least irrelevant certain aspects of Ashley Smith’s agency, the agentic potential Inmate Smith is considered to have is in a “choice” whether to “comply” with authority. The accepted official psychological assessment of Inmate Smith was that she was a noncompliant subject “intent on playing games.”⁴¹⁹ A 2003 report made by a psychiatrist at Restigouche Hospital sets the stage for and sums up this construction of Inmate Smith’s agency “Ms. Smith clearly understands her responsibilities and their consequences and can control her actions when she chooses to.”⁴²⁰

Further, the bureaucratic admonition to blindly follow structured rules and to prefer the lesser risks of inaction over the risks of action interrupts the judgment of and confines the subjectivity of the guards much as it does Ashley Smith. Inmate Smith resists the logic of compliance as a governmental technology of the self and in her resistance is confined by it too, trapped in a cycle of ever-increasing sanctions for rule-breaking, while the same logic traps the guards into watching her die. In failing to account for agency as other than non-compliance or compliance, this binary logic allows for no subject positions between rule follower and rule breaker and no interactions that are not hierarchical.

⁴¹⁸ As cited in the “Rush to Judgment” report at p. 19.

⁴¹⁹ Perkel, Colin, “Prison psychiatrist testifies Ashley Smith a ‘large tyrannical child’” *The Canadian Press* 25 March 2014

⁴²⁰ See e.g. “Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

The dispersal of responsibility that led to Inmate Smith's death is constructed in the rationalized economy of a bureaucratic hall of mirrors. Docudrama footage of obscured faces of guards failing to intervene as Inmate Smith lies dying, as well as in the masked faces of several unidentified, interchangeable, guards saying "you will comply" to her in an earlier incident provide images of the dehumanized reflected "faces" in the carceral funhouse. Front line guards are under constant surveillance in much the same manner as the inmates. The failure of guards to act in Inmate Smith's dying moments is only a final re-enactment of a routine process in which guards' judgment is overridden and paralyzed by fear of discipline from management, overall security is paramount and each inmate is inconsequential. Her death is a positive outcome from a budgetary perspective for CSC and mental health systems. It resolves management problems she posed to, and alleviates burdens imposed by the costs of that management on, bureaucratic systems of governance.

The agentic potential of CSC guards in choosing to follow or resist orders is lost in their security-based reasoning and the logic of risk governance. Routinized coding and defining of Inmate Smith as unmanageable and noncompliant prescribes certain solutions that involve blindly following rules. It is by following this logic under surveillance that all are led into the trap of accumulating charges in which Inmate Smith was caught, and also into a discursive trap in which those guarding her and even those managing the guards were caught. If the ultimate value is in following rules, guards, wardens and managers equally cannot⁴²¹ let their human judgment override them in seeking more creative ways to address her or even by intervening to save her life. What is lost in the monstrous bureaucratic⁴²² relations between inmates, guards

⁴²¹ or, if they can, they *do* not.

⁴²² For the concept of "monstrous bureaucracy", I am drawing on the work of Hamilton and Gerlach (2010), *ibid*, especially at p. 406.

and management is not just Ashley Smith's world-creating agency. The dangers of these logics also threaten guards', wardens' and CSC managers' agentic potential. Ultimately, the Omelan bargain we have been persuaded to agree to by notions of security and the broader good menaces us all.

4.4 The Inquests

While it never completely disappears, the Inmate Smith figuration has become dissonant with the understandings of Ashley Smith that have emerged and become widely held since her death. The "official story" about her death that emerges within routinized documents produced by CSC is no longer commonly believed. The trajectory of the development of the Ashley Smith case is not consistent with the portrayal of the interaction between purportedly sensationalist media and rights-driven, emancipatory, dispassionate legal processes claimed by mainstream policy literature.⁴²³ Inmate Smith, in life, was relegated to obscurity, to confinement with her complaints about her treatment ignored and none of her convictions newsworthy or noteworthy in the legal system. While her conduct in life produced, and was in turn structured by, a routinized, formal official response, her event of her death becomes a case that provokes a very different sort of official and social response. This altered response does not come first from official sources. It is not policy investigation or legal advocacy but investigative journalism that ruptures the trajectory of the case and draws critiques of the way Inmate Smith died into the public consciousness. Even before Inmate Smith becomes celebritized, it is journalistic agents who raise questions about guards failing to intervene in the event of Inmate Smith's death and

⁴²³ as discussed in the literature review

move the story into widespread disrepute. Before 2010, in these media reports, the case is framed as one of rogue bad actors in the correctional being fired and criminally charged.⁴²⁴

Public attention is drawn to the Smith case as investigative journalists begin to inquire into what made possible a young person's journey from incarceration for throwing apples and stealing a CD to death in solitary confinement over the course of four years. This journey drives the investigative energy of the media. In 2010, the release of CBC two docudramas⁴²⁵ and a revelation in media reports of a finding in Dr. Margo Rivera's report about Ashley Smith's death that it "is unlikely that Inmate Smith committed suicide"⁴²⁶ are pivotal moments where the Inmate Smith figure loses its traction as an explanatory frame. It is with reconfiguration of Ashley Smith from a blank inmate into *somebody's* middle class white child in the CBC Docudrama "Out of Control", as will be discussed in the next chapter, that the Smith case starts attracting a high degree of public scrutiny.

The conditions of possibility of the Smith inquest combined with strategic decisions on the part of CSC counsel also contributed to transformations in widespread understandings of the case. Ironically, CSC's tactical decision to fight relentlessly to keep investigative scrutiny away from its management and practices also contributed to popular rejection of the Inmate Smith figure. The ways in which meaning was officially made of Ashley Smith's behaviours were to a large extent deliberately hidden from scrutiny after her death. CSC responses to allegations that they had breached their own institutional policies in keeping Inmate Smith in solitary confinement for prolonged periods were consistently met with retrenchments of systemic

⁴²⁴ For an illustrative example see "Ont. Prison Workers Fired Over N.B. Inmate's Death" CBC News (17 January 2008)

⁴²⁵ "Out of Control" (2010) *ibid* and "Behind the Wall" (2010) *ibid*

⁴²⁶ see e.g. Makin, Kirk "Ashley Smith's Death Was An Accident, Not Suicide: Expert Report" *The Globe and Mail* (29 October 2010).

defenses: in its response to Sapers' concerns about Inmate Smith's death, CSC⁴²⁷ refused to acknowledge its failure to uphold its own segregation policy. In the first inquest, at the behest of CSC Counsel, presiding coroner Dr. Bonita Porter refused to look at the data accumulated by CSC in the nine months preceding Ashley Smith's death. This decision was quashed by the Ontario Divisional Court on Judicial Review.⁴²⁸ Dr. Porter stepped down and a new inquest was convened with Dr. John Carlisle presiding.

In the second inquest, counsel for CSC made a series of motions that were an aggressive legal tactic to deal with the crisis presented for its systems by the Smith case. Counsel used the inherently legalistic tool of motions to entrench a tactical position that what transpired with Inmate Smith in CSC custody was ordinary, routine and normal and therefore not worthy of scrutiny. Motions were made to keep sealed Smith's psychiatric and medical records detailing her forced restraints and medications administered to her while incarcerated sealed; motions were made to keep the videos depicting Smith's death out of the inquest evidence⁴²⁹ and to keep the public from viewing them.⁴³⁰ Motions were made by her treating physicians in facilities outside of Ontario to keep those medical records out of the proceeding, allegedly for (convenient) jurisdictional reasons. The summons to witness of CSC Commissioner Don Head was sought to be quashed.⁴³¹ All of these motions were ultimately unsuccessful, but they did present expensive and time-consuming barriers to getting official "data" about Inmate Smith into evidence. The motions not only did not work: the plan to normalize CSC's treatment of Inmate

⁴²⁷ 2009

⁴²⁸ *Smith v. Porter (Judicial Review)* 2011 ONSC 2844.

⁴²⁹ *Smith v Porter* 2011 ONSC 2593

⁴³⁰ Judgment of Dr. Carlisle on the motion concerning the sealing order:
<http://www.falconers.ca/documents/RulingonSealingOrderandSubmissions.Oct232012.pdf>

⁴³¹ To view the CSC-produced documents in which this was sought see:
<http://www.falconers.ca/documents/AnticipatedevidenceofDonHead.pdf>

Smith and shield their systems from scrutiny backfired. These heavy-handed legal tactics contributed strongly to the tainting of the Inmate Smith figure, to widespread awareness of the facts of the case, and to public dissonance with the narratives presented by CSC about her death.

Resistance by CSC to the fact-finding project of the inquest was no doubt expected to be more effective. The meso level apparatus of an inquest⁴³² has limited power. The Ontario *Coroner's Act*⁴³³ structured the inquiry that took place after Ashley Smith died. This *Act* sets up inquests as blended medical and legal processes, legal in their form but presided over by a medical doctor,⁴³⁴ for officially determining what caused deaths, including when prisoners die in custody.⁴³⁵ The Ashley Smith inquest is significant doctrinally to the interpretation of this legislation in that it has opened up questions about what is the proper scope for the inquiry that takes place in a coroner's inquest. The Smith inquest involved significantly more testimony and a wider chronological scope of inquiry than inmate inquests generally do. There was also conflict in the course of the inquest over the extent to which the Ontario coroner could access records produced by medical professionals working with CSC outside of Ontario. Nonetheless, the jurisdiction of the inquest was to look at how and why Inmate Smith died, not how inmates are treated by CSC generally.

The inquest verdict is comprised of jurors' determination as to the cause of death combined with recommendations. An inquest decision does not provide a narrative of what took place or insight into the internality of the deceased. While provocative and arguably supportive of a broader interpretation of the role of coroner's inquests, the unprecedented homicide

⁴³² Here as defined in the *Coroners' Act* RSO 1990 C. C-37

⁴³³ RSO 100 C.37

⁴³⁴ sets out the jurisdiction for inquests in s. 16

⁴³⁵ s. 10 of the Act requires at (4)

verdict⁴³⁶ in the Smith inquest has no direct material effect in formal legal arenas. No actor or institution is sentenced, charged, fined or sanctioned by it. The verdict neither binds the state to take action to remedy nor to undertake a general inquiry into CSC practices, whether in relation to women offenders or generally. In fact, the government has declined to do either. Equally, the inquest verdict does not promise to bring about social change or changes to CSC practices⁴³⁷ although CSC settled an \$11 million civil suit, brought by Ashley Smith's family members, for an undisclosed but certainly substantial amount and estimates indicate CSC spent in excess of \$5 million on the preparation and presentation of the inquest case, CSC management has signaled it intends to spend little money or energy on institutional change.⁴³⁸

Yet, the verdict of homicide is important. It challenges what are assumed to be the parameters of possibility of what inquests can do. No prior inquest into the death of a prisoner in Canada yielded a verdict of homicide that impugned someone or something other than another prisoner as being at fault for the death. The inquest had a different outcome than even advocates for the Smith family imagined possible. In materials filed for the CSC motion to quash the summons of its Director,⁴³⁹ the respondent counsel for the Smith family *conceded* that the verdicts available to the inquest jury were not determined, suicide or accident. Homicide was not mentioned. The homicide verdict is a bold, unprecedented re-assertion of Ashley Smith's citizenship, of her membership in *bios*, or political community, a refutation of her status as *homo sacer*.

⁴³⁶ No prior inquests about the deaths of prison inmates in Canada have resulted in a homicide verdict unless another prisoner is the one considered responsible for the death.

⁴³⁷ October 16, 2013

⁴³⁸ The recommendations in the inquest judgment in respect of systemic change to CSC operations are largely reiterative of recommendations made in other inquests and in repeated reports by Sapers. CSC Commissioner Don Head told the inquest jury not to "bother making costly recommendations" in testimony at the proceedings. See Stone, Laura. "CSC Spent Over \$5 million on Ashley Smith Inquest" *Global News* (22 January 2014) <http://globalnews.ca/news/1097960/csc-spent-at-least-5-million-on-ashley-smith-inquest/>

⁴³⁹ <http://www.falconers.ca/documents/FactumFinalApr1511.pdf> At paragraph 39 of Factum of the Respondents/ Appellants

4.5 Inmate Smith and Macro-Power

Representations coalescing into the figure of Inmate Smith can be understood as microprocesses of governance. They engage in the enactment and reconstitution of power relations in discursive, conventional and institutional sites. The figure does governmental and discursive work in legitimating certain kinds of interventions and bolstering the credibility and authority of certain types of expertise. CSC management claims that the responsibility for its violations of its own policies and meso-level operating constraints fell on Inmate Smith's bad choices, as well as on failures of front line staff. It has embraced framings of Inmate Smith as an unusually seriously mentally ill person, all of which displace responsibility away from their systems and preserve the existing carceral regime. Nonetheless, the figure is a technology of governmental power that is not always used in the same way, and sometimes has been articulated by liberal and other reformers in ways that are potentially emancipatory.

At the macro-level of analysis, official configurations of Ashley Smith that focus on her carceral status both reflect and have potential to confront modalities of governance. The figure of Inmate Smith can reveal exclusionary practices in government of adolescents, imprisonment, and solitary confinement, and help in deciphering and confirming problems with underlying governmental logics at work in contemporary practices of imprisonment. The figure of YP Smith can be used as technology to refute commonly accepted core claims about the youth criminal justice system that are fundamentally inconsistent with the official understandings of Ashley Smith as an inmate. Representations of YP Smith in official documents seriously undermine widely accepted and commonly understood claims about the nature of the youth criminal justice system. The individualized approach claimed to be undertaken in the *YCJA* is not consistent with the governance to which Ashley Smith was subject. Sanctions for her actions

were endlessly repeated despite being obviously counterproductive in changing her behaviours. There is nowhere evidence of a serious inquiry into what interventions or techniques of governance might help her to become a contributing member of society upon release. Rehabilitation and eventual reintegration of Inmate Smith into society are nowhere referenced and it is not evident that they were contemplated. YP Smith is constructed as dangerous and requiring forms of containment that limit her interactions with other people, including guards and mental health personnel. What upset, angered or otherwise motivated YP Smith, which would have to be considered in order for sanctions to be “meaningful,” is not considered in official texts.

The prison is not a space of lawlessness, but rather a messy space where the power of a variety of formal legal discourses is deployed alongside other technologies. Management, system agents and even Inmate Smith in her filing of complaints as interpreting social actors invoke and manipulate the formal discourses of the law. Formal legal discourse influences what happens to Ashley Smith, but does not simplistically determine how she is treated. Consider the transfer application. In that instance, the formal law about under whose jurisdiction an 18 year old inmate falls is rigidly followed. However, throughout the case, a wide range of other legal rules are disregarded and ignored where they are inconvenient to, or inconsistent with, what bureaucrats seek to do. Rules about reviewing inmate’s status are deflected by series of transfers enabling CSC to keep her in solitary confinement; timely responses are not given to grievances; forced injections are administered.⁴⁴⁰ Guards clearly felt bound by orders and rules even to the

⁴⁴⁰ See “A Preventable Death” 2.1.3. “The Failure of CSC’s Offender Complaints and Grievance System” <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx>

extent that this sense of obligation paralyzed them into non-intervention at the time of Ashley Smith's death.

Carceral bureaucracies ignored legal limits imposed upon them in many instances where formally accorded legal rights were overwhelmed by the logic of exception.. Management of YP Smith by youth corrections in New Brunswick and then of Inmate Smith by CSC consistently violated her rights and operated in violation of statutory laws, guidelines and procedures even while it took place in an abundance of legalism. She was tasered, pepper-sprayed, beaten, forcibly injected with psychotropic drugs when she wasn't psychotic, and held in solitary confinement for extended periods without proper reviews. Inmate Smith's *Charter* rights to security of the person, liberty, to be free from unreasonable search and not to be unlawfully detained were violated; her right to have her grievances heard and responded to was violated;

The operation of biopower in the form of necropolitics in the bureaucratic management of Inmate Smith as a carceral subject reveals the fundamentally compromised bodily integrity of the "contingent body" of a carceral subject and the fundamental immorality in a liberal rights framework of the bureaucratic management of the banal details of Inmate Smith's life, which forecloses any possibility of her bodily autonomy.⁴⁴¹ The death of an exceptionally unmanageable, inconveniently female, unusually large, inmate is a predictable, expected and economically even desirable outcome of interlocking risk rationality, security-focused governance and the neoliberal logic of exception in the rationality of necropolitics.

The "individual and system failures" described by Sapers in the Smith case can thus be re-read not as anomalous but predictable outcomes of application of the totalizing logics of risk

⁴⁴¹ For a discussion of the problematic consequences of bureaucratic management of banal aspects of human bodily functions and the contemporary destabilization of the understanding of the human body as a single unit see e.g. Gerlach, Neil, Hamilton, Sheryl, Sullivan, Rebecca and Walton, Priscilla. *Becoming Biosubjects: Bodies. Systems. Technologies* Canada: University of Toronto Press, 2011.

and security through a bureaucratic apparatus.⁴⁴² Configuring Ashley Smith as a “maximum security” and “difficult” inmate allowed CSC to domesticate, categorize, statistically report and tabulate her conduct. In this configuration, an single inmate’s death is a “bad” to be weighed against other “bads”, and in a utilitarian risk calculus, is too easily rationalized as an acceptable loss.

However, because Inmate Smith’s death mandatorily triggers an institutional response, it does interrupt the grinding of bureaucratic processes. It publicly reveals tensions and chinks in a messy and disjointed system. While it resolves immediate management problems for systems, it also opens up a forum for contestation of official definitions of Inmate Smith and official narratives of what took place. After her death became publicly known, the figure of Inmate Smith became increasingly articulated by parties seeking to effect broad systemic change. For example, the figure of Inmate Smith has been mobilized by progressive advocates seeking to reduce and even eliminate use of solitary confinement in Canadian prisons.⁴⁴³

The denial of CSC’s obstructive motions, the expansion of the scope of the inquest and the ultimate verdict of homicide in the Smith Inquest also show the radical contingency of the present and the power of the intervention of interpreting human actors. Uses to which the video footage and other constant surveillance were put in those proceedings, in media texts and in ongoing debates are not closed or simply determined by the uses for which they were produced. CSC’s December 2014 response to the inquest, on this analysis, is entirely predictable and consistent with its institutional functioning throughout the case. Key recommendations are rejected and the bulk of the rest are claimed to have been addressed. The system retrenches itself:

⁴⁴² Rigakos, George S. "Risk Society and Actuarial Criminology: Prospects for a Critical Discourse." *Canadian journal of criminology* 41.2 (1999): 137-150.

⁴⁴³ Consider for example the 2013 CBC “Ideas” documentary on Solitary Confinement <http://www.cbc.ca/news/canada/solitary-confinement-a-growing-issue-in-canadian-u-s-prisons-1.1699487>

oversight is rejected. Because of the engagement of the media and public in the construction of legality, this response does not have to be taken as a final resolution to the case.

Chapter 5

Child Ashley: *Recuperation*

5.1 Introduction

My person was hideous and my stature gigantic. What did this mean? Who was I? What was I? Whence did I come? What was my destination? These questions continually recurred.

- Mary Shelley, *Frankenstein* (1818)⁴⁴⁴

Mary Shelley's *Frankenstein* is a story about an intelligent, oversized and impetuous “youngster” whose parentage and bearing are not “normal”, who does not fit within the normative paradigm of what it means to be a child and who becomes despondent, violent and self-destructive after being excluded and rejected from membership in human community. Shelley's creature struggles for approval and acceptance but is understood as a monster. Once excluded, the creature becomes violent. Shelley's story tracks the difficulties on the part of a misfit monster who is unimaginable within the category of child of experiencing rejection, isolation and dissonance.

There are many parallels between the figure of Child Ashley and Mary Shelley's classic Romantic monster. In this chapter, as I did in the preceding chapter with reference to Inmate Smith, I look a figure of Ashley Smith that coalesces from a number of texts in the case. This chapter focuses on figures of Ashley Smith that foreground and privilege the aspect of her being a “child”. I look at variations on how Ashley Smith was configured as a child at different points in the Smith case, and by whom. First, she was seen as a misfit, risky child, and specifically a risky girl,⁴⁴⁵ then, at least by CSC guards, as someone childlike “gaming” the system and finally,

⁴⁴⁴ Chapter 15 page 5 http://www.pagebypagebooks.com/Mary_Wollstonecraft_Shelley/Frankenstein/Chapter_15_p1.html

⁴⁴⁵ I use the term Risky girl with reference back to Christie Barron's *Rehabilitation in the Age of Risk* as discussed in Chapter 2.

only after her death was she seen as a properly, normally constituted, “good” girl subject or child victim. In this chapter, I look at how Ashley Smith’s dissonance with, and inability to fit within, the classed, raced and gendered categories of child (and girl) bring about her social death long before she finally biologically dies in CSC custody. I argue that Ashley Smith’s monstrosity within culturally accepted discourses of the girl and child contributes significantly to her exclusion from political community and necropolitical actions taken in the juridical field. In looking to answer questions about who and what killed Ashley Smith, we should direct our attention to confining gender codes and racialized thinking which provide the exclusionary logic that constructs Ashley Smith as monstrous and marks her for incarceration from the category of child. In this chapter, I focus on what brought about her social exclusion, which preceded and in large part precipitated her juridical and biological deaths.

Figures of Child Ashley that emerge in the Smith case function as technologies of governmental power in strategically intentional as well as unintended ways. I argue that articulations of “Child Ashley” by progressive reform efforts as deployed “on behalf of Ashley” potentially undermine their own ostensibly recuperative and emancipatory political purposes. They re-inscribe white supremacist, confining boundaries of discourses of gender and childhood on which they draw. It is those same boundaries that marked Ashley Smith for exclusion, incarceration and ultimately death.

Looked at in this way, the Smith case is a case of an adolescent young woman governed by very repressive discourses of gender, childhood and whiteness. The Normal Child Ashley figure leaves unchallenged the masculinist angels-and-demons narratives of the law. It is a governmental technology articulated by a variety of actors and institutions in discourse in the construction of the Smith case as a particular sort of social problem, a problem of mislocation in

which the wrong person (an innocent middle class white girl) has been mistakenly placed in a venue properly constructed to confine and contain more stereotypically abnormal (aboriginal, working class, male) prisoners.

The figure of Child Ashley as a “normal” child victim lost in the system was a powerful discursive technology articulated at certain critical points in the Smith case to effect the celebrityization of Ashley Smith and strategically draw public attention to her death. In this chapter, I look at the deployment of words and images in constructing the Child Ashley figure. I track the emergence and flourishing of the figure and note its gradual relegation to less prominence than the Patient Smith figure. I look critically at the sites in which the figure appears. Further, I analyze pre-existing cultural and formal legal discourses of the child with which this figure intersects and at constellations of macropower with which it is engaged. I argue that Ashley Smith’s biological death is the most predetermined event in the Smith case: it is the social deaths effected by her unthinkability within the category “girl child”⁴⁴⁶ that exclude her from political and human community and the juridical death that contains her away in solitary that are more significant: her biological death is an almost inevitable after thought. To prevent similar deaths in custody, I therefore contend that change must be made to the confining discourses of gender and childhood.

5.2 Trajectory: Sites, Emergence and Flourishing

There are three overlapping but distinct constructions of Ashley Smith as a child over the course of her case. First, during her life, she is understood as a risky child. Then, following her death, she is reconfigured in some texts as a like a child “playing games”. The configurations of

⁴⁴⁶ The UN Beijing Conference in 1995, and many UN texts since, have referred to the “girl child” as a particular social category of individuals needing protection. See e.g. Un Report of the Foruth World Conference on Women, 1995 <http://beijing20.unwomen.org/~media/Field%20Office%20Beijing%20Plus/Attachments/BeijingDeclarationAndPlatformForAction-en.pdf#page=114>

the risky and gaming child are mutually confirming and supportive. It is the third reconfiguration, Ashley Smith as “normal” child, that effects a rupture in representations of her. By this, she is transformed dramatically from an abnormal girl into a proper, normal, noble girl victim. This transformed representation of Ashley Smith dominates texts generated in the Smith case for a brief time in 2010, and has significant governmental effect. It is ultimately superseded by the representation of her as a mental patient.

It is Normal Child Ashley that emerges as the pre-eminent figure of Ashley in the Smith case around early 2010, at the time of the “Out of Control” CBC Docudrama.⁴⁴⁷ This docudrama signals a pivotal moment of rupture in the case where the official configuration of Ashley Smith as Inmate Smith- the figure that has supported the official narratives told by various authoritative sources in the bureaucratic apparatus since her incarceration began- loses its legitimacy in the public imagination. The Child Ashley figure is originally constituted in this docudrama as well as in certain news articles from early 2010 until the conclusion of the inquest in 2013. The Child Ashley figure is replaced by Patient Smith in the media by at least early 2011. However, throughout the remainder of the case, the Child Ashley figure circulates in certain texts and statements of lawyers, social advocates, Ashley Smith and the Smith family, including her mother Coralee Smith. This Child Ashley figure produces other figures, especially family members, for Ashley. The Child Ashley figure is often found in texts explicitly or implicitly crafted by agents and groups who understand themselves to “speak for” or advocate on behalf of Ashley Smith. In these texts, Child Ashley is a figure articulated to mobilize public and official sympathies on Ashley Smith’s behalf. Although it is clearly eclipsed in dominance by the figure of Patient Smith by the beginning of the second inquest, throughout the remainder of the Smith

⁴⁴⁷ The Fifth Estate, Season 35 – Aired January 8, 2010.

case, the child construction stays present. Indeed, as will be discussed in Chapter 6, configuration of Ashley Smith as a child is in many ways not only compatible, but complementary with construction of her as a vulnerable, valuable person with mental health problems.

5.3 Ashley the Improper and Risky Girl

At the time of her death, Ashley Smith was not, in formal legal discourse, a child. As discussed in Chapter 4, immediately upon turning 18, Ashley Smith was divested, through a formal legal process (a transfer hearing), of the status of being a youth or child at law. This resulted in her removal from youth custody to the federal penitentiaries administered by CSC. While “child” has particular social meanings, it also has overlapping and somewhat conflicting meanings in formal legal discourses. Under various provincial and territorial laws in Canada, for the purposes of child protection, a child is defined as someone under the age of majority; where Ashley Smith grew up, in New Brunswick, child protection legislation defines a child as “someone actually or apparently under the age of majority,” namely 18 years of age.⁴⁴⁸ However, under Canadian domestic law, for the purposes of criminal liability, under the YCJA, a child “means a person who is or, in the absence of evidence to the contrary, appears to be less than twelve years old.”⁴⁴⁹ For criminal purposes, children under the age of 12 are individuals who cannot incur criminal liability. At international law, under the *United Nations Convention on the Rights of the Child*, however, a “child” is defined as someone 17 years or under. For the period during which Ashley Smith was in conflict with the criminal law, she was considered to be a “young person” (between 12 and 17 inclusive). As discussed in the previous chapter, a formal legal construct, “young person” is a genderless figuration the from the YCJA and other

⁴⁴⁸ Family Services Act, SNB 1980, c F-2.2, s. 1

⁴⁴⁹ *Youth Criminal Justice Act* SC 2002 c.1, s. 2.

youth-related legislation which seeps into broader public discourse. Smith, at age 19, imprisoned in high security adult penitentiaries, did not fall officially within the status of child under any legal definition available.

Despite her official status at the time of her death as an Adult Offender or Inmate, throughout her engagement with the prison industrial complex, system actors at different levels of the CSC bureaucracy, New Brunswick child protection system and mental health professionals all made sense of Ashley Smith as a risky “child” in various ways. Variations on the figure of Child Ashley are present as a subordinate construction of her to the official Inmate configuration in texts and statements produced throughout her case. At the front-line level, prison guards generally appear to have unofficially understood her as a child and had varying degrees of comfort with that.

However, before she turned 18, before Ashley Smith became a carceral subject (thus during the “challenging youth with complex needs” period discussed in Chapter 4), the educational and child protection systems of New Brunswick did accept that Ashley Smith was a legal child and more specifically they read Ashley Smith as an *abnormal*, risky girl. She was labeled a “bully” and her initial exclusions from school were attributed at least in part to “bullying behaviour.”⁴⁵⁰ During her life, psych professionals who she consulted and was referred to did not understand Ashley Smith as primarily a person with mental illness, as will be discussed in Chapter 5, but as a tyrannical child, a child with behaviour problems. The tyrannical child is someone not properly constituted as a child, but who nevertheless acts in some ways like one. It is an *overgrown* child who is impossible to manage or control through the usual means and needs to be restrained through control and confinement.

⁴⁵⁰ Richard, 2008 at 17.

Throughout her life, albeit with some exceptions, Ashley Smith was generally understood as a “normal” youth by psy-experts in the sense that she was read as not legitimately in need of mental health care. According to her mother Coralee Smith’s testimony at the Smith inquest, Ashley Smith was understood by psy-experts prior to her incarceration as an immature, but not mentally ill, teenager. Coralee Smith told the inquest jury that Ashley saw a psychiatrist who decided Ashley was “just a normal teenager” ... “I’m too fat and I have acne,” was Ashley’s take on the session, according to Coralee Smith’s testimony.⁴⁵¹

That the phrase “large, tyrannical child” repeats in the testimony of mental health professionals treating Ashley Smith is not a coincidence. It is a diagnosis. Psychiatrist Dr. Jeffrey Penn’s notes brought forward in testimony in the second inquest read: “This young woman is essentially a large tyrannical child who can’t tolerate limits, feels estranged and isolated from peers, unloved, unliked, and often hopeless.”⁴⁵² This label of Smith as a “large, tyrannical child” also appears in testimony from psychologist Dr. Allister Webster from the second inquest, who, referencing Penn’s notes, called Smith: “a large, tyrannical child who can’t tolerate limits.”⁴⁵³ As Penn said in testimony at the second inquest, “tyrannical child” is a reference to “what a psychiatrist named Dr. Avner Barcai had decades earlier described as the “fearful-tyrannical child.”⁴⁵⁴ These classifications limit her belonging within the category “child”. According to psychiatrist Dr. Avner Barcai who coined the term, the “tyrannical child” is a type of personality-disordered *adult* subject who believes irrationally in his or her own omnipotence, has fantasies of power and has lived with caregivers incapable of

⁴⁵¹ Perkel, Colin, “Ashley Smith’s Mom Talks about Happy Childhood, Troubled Teens” *The Canadian Press* (20 February 2013).

⁴⁵² Perkel, Colin, “Prison psychiatrist testifies Ashley Smith a ‘large tyrannical child’” *The Canadian Press* 25 March 2014

⁴⁵³ <http://www.680news.com/2013/03/04/ashley-smith-could-have-been-treated-with-more-time-psychologist/>

⁴⁵⁴ Blatchford, Christie. “Impact of Ashley Smith’s Identity Issues Is and Remains a Giant Black Box” *National Post* (25 March 2013).

setting limits on him or her.⁴⁵⁵ The labeling of Smith as a “tyrannical child” in this construction is actually not easily reconcilable with her young age. It disqualifies her from childhood. A “tyrannical child” it is a diagnosis devised to be applied to an adult improperly acting like a child, not for a youth who is misbehaving.

The offending child or masturbating child and madman are two of what Michel Foucault understands as “monsters.” According to Foucault, the monster operates as a master category for defining and justifying contemporary forms of exclusion, erasure, surveillance and control.⁴⁵⁶ The “tyrannical child” who is defined by his or her inability or unwillingness to accept authority and be maturely or “appropriately” adaptively compliant can be understood as an abnormal within the category of monster as theorized by Foucault. However, it is not a monstrous *child*. It is a monstrous adult acting improperly *like* a child. It is someone who, for some reason, does not deserve the protective label of child, someone acting irresponsibly and immaturely without being entitled to the excuse for doing so of being a child. Labeling Ashley Smith as a “tyrannical child” by psy-experts does constitutive work in claiming from the authority of scientific objectivity that Ashley Smith is a thoroughly unlikeable subject undeserving of help or attention. As an unmanageable subject not worthy of experts’ time, Smith is by default consigned by psy-experts to solitary confinement while she is in CSC custody. Thus, through representation of Ashley Smith in expert discourse, she is constituted as irredeemably socially dead and legitimately the subject of juridical exclusion as a terminal carceral subject.

⁴⁵⁵ Barcai A, Rosenthal MK. Fears and Tyranny: Observations on the Tyrannical Child. *Arch Gen Psychiatry*. 1974;30(3):392-395.

⁴⁵⁶ For discussion, see theories chapter of this dissertation as well as Sharpe, Andrew *Foucault's Monsters and the Challenge of Law* New York: Routledge, 2010.

5.4 Ashley the Game-Playing Child

A variant on the Child Ashley figure that is found in texts and statements produced by CSC actors is the “game-playing” child. Psychologist Dr. Allister Webster said of Ashley Smith in testimony at the second inquest that there was a “power struggle” between Ashley Smith and CSC staff and calls this struggle “the game...She expected that CSC would always be the adult and come in and help.”⁴⁵⁷ In the “Rush to Judgment” report put forward by the Correctional guards’ union, Ashley Smith is represented as a “likeable” “needy”, “social” and “playful” child. In this text, she is represented as interactive with guards, and manipulative within those interactions. This Report was put forward in 2008 by the union in a context of “pending criminal charges against three correctional officers, and the constant threat of reprisals by CSC”⁴⁵⁸ in defense of those among its members who had disciplined by their employer and criminally charged with negligence in relation to Ashley Smith’s death. The Report’s explicit purpose was to “set the record straight” about her death and to propel “senior management to assume its proper share of responsibility for this incident.”⁴⁵⁹

The chief characterization in the “Rush to Judgment” report of Ashley Smith is as a “child” playing a “game” - “the choking game.” To quote an anonymous guard cited in the report: “The thing with kids in care is that sometimes the only physical contact kids get is when they cause trouble. This girl was also bored out of her mind. She was constantly accumulating data. Yet you couldn’t let her out... she would inevitably create an incident.”⁴⁶⁰ Representations of Ashley Smith as like a child “playing games” bolster the expertise of prison guards and fit

⁴⁵⁷ The Canadian Press and Allison Jones “Ashley Smith Could Have Been Treated With More Time: Psychologist” *The Canadian Press* (4 March 2013).

⁴⁵⁸ Rush to Judgment at p. 5

⁴⁵⁹ *ibid*

⁴⁶⁰ “Rush to Judgment” at p. 9

well with the idea that she is being “cared for” in a manner that is discordant with mainstream understandings of what is meant by imprisonment.

It is significant that it is primarily front line guards who perceived Ashley Smith as game-playing. Calling her resistances “games” is a compassionate, dismissive and paternalistic, way of characterizing them as something less sinister or intentional than manipulations or defiances. On the other hand, while it is compassionate, it allows Ashley Smith something other than willfulness. Her resistances are understood as not politically rational or rebellious in this formulation. Interestingly, it does acknowledge her resistances as agentic in a partial, limited way. The construction of Ashley’s interactions with guards as “games” is a representation of her interactions with systems and actors in the correctional system as dialogic, or at least proto-dialogic. While Ashley Smith was, as inmates generally are, upon her incarceration, socially dead in the context of the broader society, she had a social existence within the prison. She was not dead to the front line staff who, like the prisoners themselves, spend their everyday lives present within the prison, even though they do not inhabit the prison full time. The euphemistic “game” language being used by guards to describe a power struggle between themselves and an inmate appears to be not just for her benefit but for theirs as well. It is evident that these guards understand themselves to be “good guys” and think of themselves as helpers to the inmates they supervise. “The funny thing is that I liked Ashley,” said one correctional officer as reported in the “Rush to Judgment” report. “She had her good qualities. She was funny. When she was choking herself I was heartbroken. I asked her, ‘Why now?’ and told her I would treat her the way she treated me. She seemed to respect that. In reality, this girl was living in a cell in which all the floor tiles were removed, all the light fixtures were gone, and the sprinkler had been

covered.”⁴⁶¹ While guards may have indeed been, or had self-interested reasons to portray themselves as, empathetic with Ashley Smith and to characterize their relationship to her as one of care, the representations of Ashley Smith constructed in guards’ testimonies and statements do not seem merely superficially compassionate. To all indications, many guards genuinely felt compassionate, friendly and even attached to Inmate Smith. It is also reasonable to surmise that the human feelings between guards and inmate were reciprocal and largely mutual, that Ashley Smith liked some of them and did not like others.

In this Game-Playing Child configuration, Ashley Smith is not entirely passive or unagentic. Rather, her agency is understood in terms that see her using the system and its actors to meet her needs, including a need for attention and amusement. In that reading, her actions were not malicious, or ‘bad’, but intentional, calculated, and a rational response to the situation in which she found herself. While this construction of Ashley Smith’s agency is not as ‘bad’ it is however also not conceived of as meaningful, not to be taken seriously, not political, and not mature or “adult”. A power struggle between front line guards, the bureaucratic rules of management and Ashley Smith is transformed into something lighter: a game. Another reference from the “Rush to Judgment Report” is illustrative: “This correctional officer understood that Smith wanted staff to enter the cell. “She would say, ‘I want to fight. I want to play with you guys.’ But I never had to go in that cell. I had her under control. She said to me ‘I don’t like it when you’re working here. I like to make you angry, but I can’t.’ She was like a little kid.”⁴⁶²

While the figure of “game-playing” Child Ashley is deployed in ways that contrast with understandings of her as ‘bad’, it is simultaneously used ways that undermine the seriousness

⁴⁶¹ “Rush to Judgment” at 8

⁴⁶² at 9

and political nature of Inmate Smith's predicament in custody. Discursive work is involved in making the conduct in which she engaged at the end of her life seem less urgent and serious and obscures the reality that the stakes to this "game" involved her life or death. Game metaphors ("the choking game") used to describe her resistances obfuscate the serious nature of the life-and-death struggle for existence in which Inmate Smith was engaged and gloss over the injuries she was incurring. Problematically, this configuration obfuscates ways in which management, guards and others tasked with her care, such as psychiatrists, abused the rules in relation to her. This figure is, in many instances, articulated on behalf of those tasked with dealing with Inmate Smith at the front line level, and is articulated as a technology to recast the relationship between prisoner and front line CSC staff to be one of caring and nurturing contact.

This "game-playing child" figure fits with narratives of care, supports arguments that the guards were highly skilled professionals doing their best in a challenging environment, and bolsters the union's claim that a relationship of care exists between guards and inmates in CSC facilities. Vincent and Zlomistic reference CSC "belief that Ashley was playing "a game" with prison guards, enjoying the attention that came with them continually running into her segregation cell."⁴⁶³ Games are dialogic, challenging and may be productive of enjoyment or fulfillment by people engaged in them – at least on the part of the winners. They are situations in which all players agentially participate. The configuration of Child Ashley as a "game-playing child" supports the construction of Ashley Smith's relationship with her guards as one of care and is a defense against allegations of their inhumane treatment of her. The use of these game metaphors reveals differences between Ashley Smith's relationships with guards and with CSC management. It also reveals insights into the complex human-ness of social interaction and

⁴⁶³ at 29

relationships sought to be managed in a carceral setting. While it is jarring and perverse from the perspective of an actor located in mainstream society, outside of the prison industrial complex, to see this relationship as one of care, it is important to note that this is how the guards understand themselves. It is evident from the “Rush to Judgment” report, from the video footage from Ashley Smith’s April transfer to Pinel from Saskatoon Regional Psychiatric Centre to Pinel⁴⁶⁴ and from the tearful testimonies of front line guards at the inquest that human feelings of affection, anger, friendship and a surrogate sense of family existed in the relationships between Inmate Smith and front line guards.

Further, there are other implications to power in the deployment of game metaphors in relation to Ashley Smith. In neoliberal societies, “games” and “sports” are socially acceptable contexts in which play can get rough and people can get hurt without recrimination. Calling Ashley Smith’s interactions with guards a “game” goes a long ways towards explaining away her injuries and “time outs” in solitary confinement as legitimate. Also, games are a rule-bound activity. The notion that Ashley Smith and the front line CSC guards were engaged in a game implies that they were operating on the basis of some shared set of rules and indeed suggests that guards were in control of a situation they clearly were having difficulty managing. Games have winners and losers. The assertion by guards that they were engaged in a game with Ashley Smith implies that the guards and Ashley Smith were employing strategy and intentionality. Games also involve chance. Their outcomes are not predetermined. The guards’ use of gaming metaphors, while it supports the suggestion that they were ultimately in control of Ashley Smith, reveals that gaining such control was a daily struggle and was not a foregone conclusion.

⁴⁶⁴ To view the video, follow the following link:
http://www.thestar.com/news/2013/12/19/ashley_smith_s_candid_conversation_with_guard.html

Finally, the game metaphor also bolsters the legitimacy of the guards' role and supports the implication that it is ultimately they, not management or psy-experts who have the crucial expertise as to how to deal with prisoners and manage prisons.

The assertion of care and friendship between guards and prisoners that the Game-Playing Child figure of Ashley Smith asserts is not entirely disingenuous. The figure reveals how the messy complexities of human relationships in all their personalized ugliness and beauty are difficult for CSC's bureaucracy to contain and manage by rationalized, impersonal means. Indeed, the "game-playing child" figure bolsters a narrative structure in which it can be understood that not *just* Ashley Smith but also front line prison guards are victimized by their subject positions as low-level functionaries in relation to the prison industrial apparatus. The "Rush to Judgment" characterizes Ashley Smith as one of many victims in the case, including front line CSC officers:

in addition to Ashley Smith, there are many other victims in this story. The people who worked diligently to save her life, despite management impediments, are being made to bear the consequences of her death. The Union of Canadian Correctional Officers will never accept this rank injustice.⁴⁶⁵

5.5 Recuperation: Ashley the Normal Child

As of early 2010, in many media texts, Child Ashley is configured as a "normal" girl with normal implicitly - and explicitly at times - standing in for white, middle class and properly feminine. Normal Child Ashley is someone who was, as Jiwani argued was the understanding of Kelly Ellard, not to be dismissed as inevitably destined for prison and other forms of exclusion

⁴⁶⁵ "Rush to Judgment" at p. 41

but rather someone who, prior to incarceration, was a “saveable white girl”.⁴⁶⁶ The figure of Child Ashley is often represented as normal or average case of a type of Canadian middle class white child. In being paradigmatically normal, the figure of Normal Child Ashley reveals widely accepted assumptions about what constitutes middle class whiteness and fills in the form of what is often understood to be an empty category. There are about 5,000,000 children under age 14 in Canada, about 40% of whom could be considered “middle class.”⁴⁶⁷ In the Normal Child Ashley figuration, great discursive effort is expended to reconfigure hers from a case of a blank and dangerous run-of-the-mill inmate into an innocent, victimized, middle class child who did not belong in prison, from one of *them*, into one of *our* children. The recuperative reconstitution of Ashley Smith as a normal middle class girl is made possible by her biological death: her resistant agency is no longer troubling that categorization by resisting it. A normal child is configured as a social category in opposition to a properly constituted inmate. In this configuration, Ashley Smith is not, however, recast as one of *us*. This important distinction is explored in more detail below.

The preponderant representation of Ashley Smith in the CBC’s “Out of Control” docudrama is as a normal child from a normal, or good, home: even a suburban princess. The normalcy of Child Ashley is established in large part by emphasis is placed on her “normal childhood”. The assertion of the normalcy of this childhood has become the dominant understanding of her early life to the extent that the Wikipedia article about the Ashley Smith inquest opens its biographical segment by saying “Ashley Smith had a normal childhood in

⁴⁶⁶ Jiwani, Yasmin, ‘Erasing Race: The Story of Reena Virk’ in Ravija, Mythili and Batacharya, Sheila *Reena Virk: Critical Perspectives on a Canadian Murder* Toronto: Canadian Scholars’ Press, 2010. pps. 82-122.

⁴⁶⁷ <http://www12.statcan.ca/census-recensement/2011/as-sa/98-311-x/2011001/fig/fig1-eng.cfm>

Moncton.”⁴⁶⁸ On the online CBC Timeline of the Ashley Smith case, the text states: “Ashley had a normal childhood. She liked camping at the beach, kayaking, and riding her bike.”⁴⁶⁹

Emphasis is placed on the assertion that Ashley Smith’s normal childhood happened in the context of a normal family. It is this normalcy that implicitly underpins the reconfiguration of Ashley Smith as a good girl, an adolescent who is not bad but *troubled*. The narrative begins by characterizing Ashley Smith as “a troubled little girl who cried for help.” Early in the docudrama, the scene takes viewer through a look at the “nice, neat home” of Coralee and Ashley Smith. Narrator Hana Gartner says in voice over “the story begins not where you think it would be begin, but in a nice, neat home with parents who really care.” Ashley Smith’s mother Coralee Smith is quoted: “we are talking about a child.” The staging of the “Out of Control” documentary shows at length an image of flowers in a windowbox outside what is ostensibly her family home and refers to “the child [Coralee] wants to remember”. It goes on to describe Ashley Smith as a child who “still played with dolls” and spends time interviewing Coralee in her daughter’s room, which she calls a “grown up room”, but the cinematic gaze is cast tightly not on the room as it stands but on a box of dolls that have been placed in storage in a closet. Gartner, the director of the docudrama then calls the room “a child’s room.” The camera pans Ashley Smith’s room including the dolls in it, making reference to the dolls while her mother says “people said she was not a girly girly girl, but she had dolls... she was a princess.” The “Out of Control” docudrama’s narration goes on to say “she was barely a teenager” and to characterize, in passing, Ashley Smith’s conduct as “teenage defiance.”

⁴⁶⁸ http://en.wikipedia.org/wiki/Ashley_Smith_inquest

⁴⁶⁹ Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

Similarly, *Toronto Star* reporters Donovan Vincent and Diana Zlomistic represent Ashley Smith as a “middle class kid”⁴⁷⁰ in their 2013 e-book *The Life and Death of Ashley Smith*.⁴⁷¹ This is another important text in constructing the normal Child Ashley figure. The text puts less emphasis on the paradigmatic normalcy of Ashley Smith’s family than does the “Out of Control” docudrama. However, this text emphasizes Child Ashley’s normalcy as someone going through a “natural” developmental stage. For example, the text states as follows “ Ashley... was going through the natural transformations of adolescence.”⁴⁷² Also, like the “Out of Control” docudrama, this book foregrounds representations of Ashley Smith as a very young child. Photographs included in the text of the book are baby photos,⁴⁷³ a picture of Child Ashley doing the dishes while wearing a frilly apron at age 4,⁴⁷⁴ and school pictures of her aged 14 and younger. There is one photo of her at 15 holding a basketball and standing beside her dog “at the family home.”⁴⁷⁵ This photograph diverges from the rest because it features Child Ashley in a less stereotypically feminine pose, wearing less stereotypically female clothing, and it is one that, quite unusually amongst the portrayals of Ashley Smith in photographs circulating in the media, reveals her tall stature and strong appearance. While this visual text does not emphasize her femininity, it does stress the normalcy of her social location in what appears to be a middle class suburb, doing what “normal” middle class kids do.

Media texts in which the normal child figure dominates seem intent on assigning fathers to Child Ashley. According to Vincent and Zlomistic:, prison guard Gaetan Desrochers

⁴⁷⁰ Zlomistic Ashley Smith book cite

⁴⁷¹ (2013) available at stardispatches.com

⁴⁷² At p. 2

⁴⁷³ At p. 7

⁴⁷⁴ At p. 9

⁴⁷⁵ at p. 12

developed “a kind of father-daughter relationship” with Ashley.⁴⁷⁶ Journalist Hana Gartner in her narration of the CBC “Out of Control” documentary misidentifies Coralee Smith’s “family friend” Herb Gorber as Ashley’s “father” and does not refer to the fact of her adoption. This has complex consequences. On the one hand, this misidentification simplifies the narrative about Ashley Smith’s family life. At the same time, it confirms Child Ashley’s home life as “normal” and provides a benign, caring, white patriarchal authority figure by whom she is claimed as a legitimate child. However, this misidentification also produces something for other media sources to expose as scandalous and provides the foundation for later stories that critique the credibility of the putative normalcy of Ashley Smith’s family, and, by implication, of her.

Descriptions of Child Ashley in the *The Life and Death of Ashley Smith* e-book represent her as feminine, angelic - or at least harmless- and white. She is described as “the brown eyed, milky skinned cherub... snuggled under a handmade pink flannel quilt.”⁴⁷⁷ Emphasis is placed in this text on her young age at first incarceration. To quote from the Vincent and Zlomistic book a phrase that also became a news headline and a shared rhetorical device: “she packed for jail like a kid going to camp.”⁴⁷⁸ In this book, Ashley Smith’s friend from her time at NBYC, Jessica Fair, is quoted by Vincent and Zlomistic as saying “she was a baby at heart. She was never a violent person.”⁴⁷⁹

Of course, I am not suggesting that Ashley Smith was not young when she first entered prison; she was. It is significant however, that the years she spent in prison are erased in this configuration. She did become a legal adult, even if she did so in custody. Child Ashley is being represented as someone even younger than she was.

⁴⁷⁶ at 27

⁴⁷⁷ at p. 7

⁴⁷⁸ At p. 13

⁴⁷⁹ Vincent and Zlomistic at p. 15

Other media texts where the normal Child Ashley figure is constructed similarly foreground innocence, childishness, compliance and femininity, as in this 2013 *Toronto Sun* article:

The proud mother painted Ashley as a happy homebody who adored quilts, the colour red, riding her bike and playing with her sister's kids....“You never saw that girl without a smile on her face. Most of her life was smiling and happy,” insisted Smith. “At home, Ashley was a mom's girl. It was always, ‘Yes, Mom.’”⁴⁸⁰

As with the misidentification of Herb Gorber as Ashley Smith's father, this romanticized portrayal of Child Ashley as uniformly compliant and always smiling both supports the contention that the official construction of Inmate Smith was out of step with reality and, at the same time, by overstating its narrative of Ashley Smith's normalcy, provides a basis for the Child Ashley configuration to be “exposed” or refuted. This construction of quilt-loving, smiling and happy Child Ashley is favourable to a (literally) incredible extent that is completely discordant with any official text about her authored during her life. This portrayal sets the stage for investigative journalism to expose its overstatement as fallacious.

In the “Behind the Wall” docudrama, produced somewhat later than “Out of Control” (in November 2010), while the child Ashley figure does not prevail, it is present, and typically set up through opposition to the Inmate Smith figure in official discourse. The Child Ashley figure is used in opposition to the figure of the “most difficult inmate in the system.” Nurse Bracken, interviewed in the docudrama, calls Ashley Smith a “little girl.” In this same docudrama, Coralee Smith characterizes Ashley Smith as a “child victim” and is quoted as saying that

⁴⁸⁰ “Ashley Smith Mother Tells of Daughter's Two Sides” *Toronto Sun* (20 February 2013) <http://www.torontosun.com/2013/02/20/ashley-smiths-mother-takes-stand-at-inquest>

Ashley Smith “could be anyone’s child.”⁴⁸¹ Of course, by “anyone’s child” the contention here is not actually that Child Ashley could be *anybody’s* child but that she could be the child of someone who matters, of a white, middle class, socially significant, viewer of the docudrama, a child of someone like Nurse Bracken herself, university educated, middle class and white.

In addition to media texts, the Child Ashley figure circulates in texts generated by people purporting to be advocates for Ashley Smith throughout her case, by lawyers for the Smith family as well as agents of progressive politics such as advocates for woman prisoners (notably the Elizabeth Fry Society) and advocates for children’s rights. Advocate and Executive Director of the Canadian Association of Elizabeth Fry Societies, an advocacy group for women in prison, Kim Pate says of Ashley Smith: “She looked far younger than her 19 years.”⁴⁸² Pate also repeatedly made statements that are engaged in the constitution of the Normal Child Ashley figure, saying for example, “She was quite typical of an adolescent. A bit feisty.”⁴⁸³ Other advocates from the same organization made similar claims. For instance, Vincent and Zlomistic report that “Ashley was an immature 19 year old” according to Elizabeth Fry lawyer Breese Davies.⁴⁸⁴ Similarly, lawyer Richard Macklin, making submissions for Ontario’s Child and Youth Advocate said “Ashley Smith was a child... Ashley Smith was a child...It was the security focus that led to her undoing” at the inquest.⁴⁸⁵

We are invited through the docudramas to position ourselves as parents or family member to Ashley Smith. She is “just a kid”. Viewers are not invited in to understanding of Ashley Smith as a possible alternative self in another possible world:. She is not configured as a

⁴⁸¹ “Behind the Wall” *ibid*

⁴⁸² Kevin Newman Live **cite**

⁴⁸³ “Isolation for Dejected Teen Called Illegal”MSN News (15 October 2013)

⁴⁸⁴ At p. 25

⁴⁸⁵ see “Ashley Smith Inquest: Secretive Prisons Need Monitoring” *The Canadian Press* (26 November 2013)

valuable, complex actor in her own right. Rather, her value is relational. She is a good mother's child, Coralee's child. Ashley Smith is not the protagonist in texts where the Child Ashley figure dominates. She is peripheral to the main action, which is a story about adults who care for Ashley and want answers about what happened to her.

While the Child Ashley figure raises public sympathy for the Smith family, it simultaneously claims her and forecloses the possibility of identification with Ashley Smith. She is always and inevitably someone's daughter, sister, niece or granddaughter. Counsel retained by and advocates speaking "for" Ashley Smith and the Smith family controlled the narrative of what is claimed to be Ashley Smith's voice and directed attention away from the conflict between Ashley Smith, her adoptive mother, and her other family members, that contributed to her placement in foster care before she was incarcerated. This construction never asks the viewer to consider the possibility of asking the question "what if *you* were Ashley Smith?" The Child Ashley figure does not ask us to identify with her (as one of us) but to own her, or control her (as ours). The Child Ashley figure shifts the social problem defined by the Smith case from management of an inmate to (parental) control of recalcitrance.

5.6 Troubling the "Normal Child"

Assertions of Ashley Smith's social class, family status and whiteness are closely bound up with posthumous recuperation of her as a "normal", in the sense of normative, asexual or sexually virtuous, and good, child. The taken-for-granted social category of *normal* child can be troubled as always already gendered, classed and raced. Yasmin Jiwani recently explored the profound extent to which the "normal" and "saveable" girl in contemporary mainstream Canada

is raced as white.⁴⁸⁶ Research and theorization from the disciplinary field of child studies provides historical context for the social category of childhood.⁴⁸⁷ The protected category of “child” is a fairly recent invention – a protected and disciplined category to which not everyone has access. Special protection and particular parental and social investment have not always, across cultures and time, been accorded to children. Rather, the notion that children warranted concerted attention, protection and discipline became popular in the European west in the Romantic period, in the 18th and 19th centuries.⁴⁸⁸ Thus, the social category of child, and widely understood assumptions about what constitutes normalcy for children can be located in history and in more specifically in particular configurations of social relations circulating in the 18th century in Europe that include racial as well as overlapping gender hierarchies.

The social category of child is not only located in history but also in particular configurations of social relations. “Normally”, the social category of child is configured as “one who does not belong in prison” in opposition to the implicit spectre of someone who does deserve to be incarcerated, a proper inmate. While the figure of Normal Child Ashley in some ways brings her closer to being understood as belonging to a particular white middle class community, it does not render imaginable her existence as a social participant, an intentional, political actor or a maker of meanings. To the contrary, Normal Child Ashley has less agency than does Inmate Smith: Inmate Smith can choose one pole on a binary disciplinary set of oppositions. She can obey or disobey by making “good” and “bad” choices. However, the

⁴⁸⁶ Yasmin Jiwani’s article “The Erasure of Race: The Story of Reena Virk” in is particularly useful for the way it critically unpacks the erasure of Virk’s South Asian race, social class and other contextual facts (using feminist criticism

⁴⁸⁷ For a good overview of child studies literature, see e.g. Kehily, Mary Jane, “Understanding Childhood: An Introduction to Some Key Themes and Issues” *An Introduction to Childhood Studies* London: McGraw-Hill, 2004. <https://www.mcgraw-hill.co.uk/openup/chapters/0335212689.pdf>

⁴⁸⁸ Archer, D. 1985. "Social deviance." In G. Lindzey & E. Aronson (Eds.), *Handbook of social psychology* (3rd ed., Vol. 2). New York: Random House.

Normal Child Ashley figure invites media consumers presumed to be middle class, white, aging to pity and care for Child Ashley precisely because she cannot *help* what she does. Child Ashley has no meaningful agency.

The social category of child can be historicized in a politics of rescue. The “Child Savers” movement of the early 20th century coincides with what has been called the “first wave” of feminism. Speaking *for* children is integral to the encroachment of middle class white women into participation in rationality, as advocates in the juridical field and in political space.⁴⁸⁹ There are continuities of rescue politics woven in with construction of the category of normal child in the age of risk. Discourses of the child victim figure very prominently in the current neoconservative agenda of governing through crime.⁴⁹⁰ The current Canadian Federal government’s “tough-on-crime” approach to criminal legislation is justified frequently in terms of protecting children and saving child victims.⁴⁹¹

Not all historical configurations of the child as a social category have been particularly benign. Treatment justified in the language of protection towards such childlike near-persons has often been limiting: a the designation of childhood or child-like-ness has been used as a metaphor to signify groups of persons who are not fully persons under the law, who are not citizen-subjects.⁴⁹² Further, childlike persons who are unable to fully attain the status have a prominent place in the constellation of different abnormal monsters on which the norm is

⁴⁸⁹ For discussion, see e.g. Myers, Tamara “Women and Kids in the Court: Feminist History and Anthony Platt's 'The Child Savers'” in Platt, Anthony ed. *The Child Savers: The Invention of Delinquency* New Jersey: Rutgers, 2009.

⁴⁹⁰ For discussion see e.g. Best, Joel. *Threatened Children: Rhetoric and Concern About Child Victims*. Chicago: University of Chicago Press, 1990.

⁴⁹¹ For example, The Protecting Children From Online Predators Act, Bill C-30, was originally entitled the Lawful Access Act and, under the guise of “protecting child victims”, would have granted the Federal government sweeping powers to surveil the electronic communications of Canadians without a warrant. Public Safety Minister Vic Toews said in Hansard that Canadians could either “either stand with us or with the child pornographers” during a 2013 debate. The Bill was withdrawn by the Prime Minister, who cited widespread opposition to the proposed legislation, but a new Bill, C-13, currently before Parliament, will bring in many of C-30’s proposals. For the full text of the Bill see

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5380965&File=4>

⁴⁹² Hamilton, Sheryl, *Impersonations: Troubling the Person in Law and Culture* Toronto: University of Toronto Press, 2009.

created. The status of child has been one to which colonized peoples have been relegated and slaves were consigned. The Canadian residential school system for aboriginal people was justified on the basis that the native people were “like children” and needed guidance on how to become civilized.⁴⁹³ The perpetually-adolescent terminology of “girl” was historically used disparagingly to refer to women. The childlike nature of women is bound up closely with the construction of childhood as a social category in Romantic thought. Rousseau, despite advocating for education for girls, felt that women are always childlike.⁴⁹⁴ Further, it is not just women but all of the social groups who were disenfranchised in North American colonial history including aboriginals, African-American slaves, and women have simultaneously been referred to as “like children” where paternalism is a metaphor for the husband-wife and owner-slave relationships.⁴⁹⁵

In the Normal Child Ashley figure, Ashley Smith is understood as not just a child but a little girl who cried out for help. The social category of child intersects with gender to produce “girl” as a social category that is itself historically contingent, enmeshed in existing social relations and always already classed, sexualized and raced. Across cultures and time, and even messily overlapping at any particular place and time, there circulate numerous discourses of the girl. Discourses of the girl are always in flux as technologies of government deployed as technologies of the self. As configurations of social relations and processes of construction of gender, power and sexuality shift over time, so too do understandings of what girls are and have to be. Catherine Driscoll’s attempt at a genealogy of girlhood is particularly useful in

⁴⁹³ For discussion see e.g. Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back*. Chapter 10, "Residential Schools." Ottawa: Supply and Services Canada, 1996.

⁴⁹⁴ Kelly, Christoper and Grace, Eve., eds. *Rousseau on Women, Love and Family* USA: Dartmouth College Press, 2009 at p. xiv.

⁴⁹⁵ For discussion see e.g. *An Archaeology of Colonial Identity: Power and Material Culture in the Dvavs Valley, South Africa* USA: Springer, 2006 at p. 128.

illustrating the historical contingency of the boundaries of the category girl. She tracks the category of girl in western societies through the twentieth century as a signifier of “malleable identity” and as “a publicly pre-eminent image of desirability”.⁴⁹⁶ Anita Harris, in her book *All About the Girl*, looks at ways in which the category of “girl” is “slippery and problematic”⁴⁹⁷ and at the diversity of the experiences of those identified as girls. She writes that “there is no universal, one-dimensional girl about whom we can know.”⁴⁹⁸

As discussed in Chapter 2, writing in the field of girls studies has theorized relations between girlhood, power, agency and resistance and has contributed to an understanding that agency is articulated and evidenced within the context of “the logic of the production of gender, the body and sexual, racial and cultural (etc.) differences.”⁴⁹⁹ Girls Studies theorists provide insight into contemporary late modern “truths” that circulate widely about those identified as girls. Discourses of girl also reflect cultural anxieties because girls, like other children and youth, but even more so because of their potential to become now not only mothers but also capitalist workers, are persons on whom cultural reproduction and capitalist production - *the future* - depends.

Angela McRobbie,⁵⁰⁰ Marnina Gonick⁵⁰¹ and other girls studies theorists have analyzed how the formerly widely accepted construct of the good and proper virtuous girl has been largely supplanted in late modern western democracies by new tropes of “girl power” and victimhood,

⁴⁹⁶ Driscoll, Catherine, *Girls: Feminine Adolescence in Popular Culture and Cultural Theory* New York: Columbia University Press, 2002 at p. 2

⁴⁹⁷ New York: Routledge, 2004 at p. xx.

⁴⁹⁸ *ibid* at xxiv.

⁴⁹⁹ Gonick, Marnina, Renold, Emma, Ringrose, Jessica and Weems, Lisa “Rethinking Agency and Resistance: What Comes After Girl Power” (2009) *Girlhood Studies* 2009 at p. 6.

⁵⁰⁰ McRobbie, Angela *The Aftermath of Feminism: Gender, Culture and Social Change* *cite*

⁵⁰¹ Gonick, Marnina, Renold, Emma, Ringrose, Jessica and Weems, Lisa “Rethinking Agency and Resistance: What Comes After Girl Power” (2009) *Girlhood Studies* 2009.

by mandatory sexiness⁵⁰² and assertiveness alongside vulnerability that produces a double-bind. These discourses are not politically neutral. As Gonick and her co-authors have written, “discourses of agency and resistance are continually commodified by the capitalist machine.”⁵⁰³ According to Olivia Koffman and Rosalind Gill, “technologies of sexiness” have largely replaced “virtue” and “purity” as what girls are required to display in the heterosexual marketplace.⁵⁰⁴ McRobbie has critically unpacked how a contemporary era of commodified acceptance of ‘girl power’ produces a dominant narrative of girls’ “successes” that renders continuing inequalities largely invisible and relies on a neoliberal logic of individualized responsabilization and the notion of rational “choice” as being the explanation for girls’ negative experiences.⁵⁰⁵ Where the prevalent stereotypical representation of the neoliberal girl subject is as powerful and sexy, as in the discourse of girl power, the “unsuccessful” girl is unthinkable, or at least exceptional. Inequalities she faces are made invisible. This discourse contributes to marginalization, exception and exclusion of “failed” girls, failure which is in turn attributed to their own individual negative choices.

Late modern discourses of girl power and their promise to those identified as girls that “you can be and do anything” are particularly problematic for working class girls whose socioeconomic circumstances limits their educational and career opportunities. The discourse of girl power obfuscates this inequality. Further, widely assumed and accepted discourses of girl power and vulnerability implicitly rely on taken-for-granted assumptions about which girls *count*

⁵⁰² Gonick et al at p. 2.

⁵⁰³ Gonick, Marnina, Renold, Emma, Ringrose, Jessica and Weems, Lisa “Rethinking Agency and Resistance: What Comes After Girl Power” (2009) *Girlhood Studies* 2009 at p. 4.

⁵⁰⁴ Koffman, O. and Gill, R.. “The revolution will be led by a 12-year-old girl!: girl power and global biopolitics” (2013). *Feminist Review*, 105(1), 83-102

⁵⁰⁵ McRobbie, 2008, *ibid*.

as future bearers. Racialized and otherwise marginalized girls, as Yasmin Jiwani has argued in her study of the Reena Virk case and elsewhere, do not.⁵⁰⁶

Considering this theorization from girls studies of the construct of “girl power” relying on totalizing risk logic provides insight into how, in life, Ashley Smith was responsabilized by correctional and legal bureaucracies for “bad choices” and received as a risky and failed girl whose failures were produced by “bad choices”, although these are not the same “bad choices” involving defiance of correctional authorities that are explored in Chapter 4. Rather, Ashley Smith fails in the discourse of girl power by failing to adjust to her adolescent development by navigating her teen years successfully. She fails by (being fed and) eating unhealthy foods that have too many calories for her to be mandatorily sufficiently thin. She fails (or refuses) to perform her sexuality as heteronormatively “sexy” to males. She fails (or refuses) to do well in school and succeed socially by becoming popular with peers and teachers. These failures are understood as her fault in a reasoning process that serves to remove empathy from the way she is received by community members, educational professionals and psy-experts. Similarly, Gonick’s theorization also provides insight into how the Child Ashley figure intersects with pre-existing broadly accepted truths prevalent at the time of the Ashley Smith case in that it tries to situate Ashley Smith as a middle class noble victim, an Ophelia in need of rescue. This Child Ashley victim figure re-inscribes passivity as normative. In the Child Ashley configuration, Ashley Smith is *unagentic*, stripped of ‘girl power’ as much as she is divested of an Inmate’s ability to make “bad choices.”

⁵⁰⁶ See Jiwani, Yasmin “Erasing Race: The Story of Reena Virk” Jiwani has critically interrogated why media representations of the Virk case failed to look at the racial dimensions of what about the social category of girl Virk couldn’t “fit into”.

5.7 Discursive Work – Fitting Ashley Smith In

Inevitably, the configuration of a being into a particular discursive figure involves the production of representations that foreground certain aspects of that being while they de-emphasize, obscure and make invisible others. A great deal of discursive work is required, by means of framing by selective description and omissions, to fit Ashley Smith into the taken-for-granted dimensions of the social category of the properly constituted normal little girl. At the time of her death, 19 year old Ashley Smith was not chronologically a child under any commonly accepted definition of the term. Further, as discussed below, she was not self-evidently middle class in socioeconomic status, her home was not obviously paradigmatically normative, she is adopted, and her racialization is slippery and problematic. The backstory of Ashley Smith's childhood is framed in texts where Normal Child Ashley is constructed with obvious omissions that evidence a significant effort being made to make Ashley Smith seem as normal, average and middle class as possible. Child Ashley, a normal middle class white child, reveals how significant socioeconomic status and race are to attainment of the social category of normal child, and it fits well with paradigmatic narratives about good victims and positions the public and the inquest jury as essentially patriarchal rescuers.

The “normalcy” of Ashley Smith's childhood is an assertion that it takes specific discursive work to maintain. The emphasis placed on the “niceness” of her house and normalcy (middle class socioeconomic status) of her family are based on a selective treatment of that facts that is difficult to maintain. The index offence for which she was incarcerated was, as noted, throwing apples at a postal worker. She claimed to do so because she was angry at delays her

neighbours were experiencing while waiting for welfare cheques.⁵⁰⁷ Looked at closely, this is a story that interestingly establishes both that she had welfare recipients as neighbours and was aware of the details of social assistance payments. “Middle class” children of the suburbs do not generally have an awareness of these matters nor do they live next to people on welfare. In fact Ashley Smith did not live in the suburbs. The family home was “downtown.”⁵⁰⁸

Ashley Smith’s family history is not the paradigmatically normal North American - two-parent, suburban, heteronormative, middle class ideal. There are very different ways available to tell the story of her early life than to say it was “normal.” There were several disruptions in her early childhood including moves and changes to her parents’ marital statuses. Ashley was adopted at three days of age by Coralee and her then-husband. This husband was not the father of Coralee’s older biological daughter but rather a man to whom Coralee had been married for two years at the time of the adoption. Ashley Smith then experienced her adoptive parents’ divorce at an early age. After their divorce, she experienced her childhood as an adopted child of a single mother a generation older than most mothers.⁵⁰⁹ While her experiences in a disrupted and complex home environment may not be statistically unusual for Canada’s young people - Ashley Smith was one of 22% of Canada’s children who live in a single parent household⁵¹⁰ - they do not reflect the prevailing social norm. In “A Rush To Judgment”, the CSC union stated “some officers who dealt with her extensively at GVI feel that Ashley Smith had suffered emotional trauma in her home life that led her to act out, though this is unclear. The report indicates that

⁵⁰⁷ See e.g. CBC Timeline: “The life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁵⁰⁸ See e.g. Vincent and Zlomistic “Ashley Smith Death a Homicide: Jury Rules” (19 December 2013) : the home was in “downtown Moncton” <http://www.thestar.com/news/canada/2013/12/19/ashley-smith-inquest-death-a-homicide-jury-rules.html>

⁵⁰⁹ 40 at the time of the adoption

⁵¹⁰ <http://www.statcan.gc.ca/daily-quotidien/140429/dq140429c-eng.htm>

she alluded to uncertainty regarding the real identity of her biological parents.”⁵¹¹ This claim suggests the possibility of blaming her family, and most significantly, her adoptive mother, for Ashley Smith’s problems. Additionally, or perhaps alternatively, this might mean that officials had access to information from Ashley Smith that complicated an understanding of her “normal” home life.

Ashley Smith’s family tree is complicated and may be overlapping. Coralee also had a 19 year old daughter at the time of the adoption, whose father was also not the adoptive father of Ashley. The adoptive father, Harold, never maintained contact with Ashley after he and her adoptive mother Coralee split up. Ashley Smith’s mother began a relationship with self-described “family friend” Herb Gorber at some point during Ashley’s childhood. While he was her mother’s partner at the time of the Smith case, Herb Gorber was never the adoptive father of Ashley. Gorber had what appears to have been a generally warm relationship with Ashley but did not stand in the place of a parent to her.⁵¹² Ashley Smith’s older adoptive sister was a pregnant teen during Ashley Smith’s childhood. One of Ashley Smith’s sister’s children was two years older than Ashley and “had his own troubles with the law”, spending time at NBYC himself.⁵¹³ Instead of being snugly nestled in a pleasant Norman Rockwell-painted home, Ashley was in and out of foster care, faced criminal charges for failing to return home at night (running away) in breach of probation and was living in at least three foster homes before being finally

⁵¹¹ A Rush to Judgment at at 7

⁵¹² All According to Coralee Smith’s testimony at the second Smith inquest, See e.g. Perkel, Colin, “Ashley Smith’s Mother Talks About Happy Childhood, Troubled Teens” *The Canadian Press* (20 February 2013).

⁵¹³ Psychologist: Ashley Smith’s Mother Won’t Discuss Girl’s Parentage *The Canadian Press* (15 April 2013)

incarcerated.⁵¹⁴ She had a slightly older cousin in prison. She was experiencing a great deal of conflict with her adoptive mother and other family members as of at least 2003.⁵¹⁵

Conflict between adolescent Ashley Smith and her adoptive mother is made invisible in narrative supported by the Normal Child Ashley figure. However, intergenerational conflict would have been entirely predictable and expected in the context of Canadian society as a child emerged into adolescence. Family conflict appears not only to have been likely but even to have been more pronounced than usual in her case. Ashley Smith, throughout her adolescence, experienced high levels of conflict with her mother. Coralee has said that the conflict was due in large part to Ashley's accumulation of huge bills for surfing "inappropriate" websites. The content of these websites has never been made public. They were websites that cost money. Some have speculated there was pornography involved; others have suggested these were chat rooms. According to Richard, "She would also spend a lot of time on the internet, chatting with others or accessing inappropriate and highly questionable material."⁵¹⁶ During this period, Ashley Smith was also in conflict with her mother for running up the phone bill making what Coralee Smith contended at the inquest were "crank" calls.⁵¹⁷ At the time of the second inquest and after, and in the wrongful death suit, Ashley Smith's interests are seen as the same as those of Coralee Smith. There is no space imagined to differentiate her individual voice or agency from the views of her mother in the reporting of these proceedings. Ashley Smith's agency is generally unthinkable in the "normal child" figuration. This configuration obfuscates ways in which Ashley Smith was a world-creating, agentic, rights-bearing, political actor who held

⁵¹⁴ In 2003, Ashley Smith was placed in three different foster homes, which, according to reports, were all unsuccessful due to Smith's unruly behaviour (Richard, 2008).

⁵¹⁵ For discussion see Timeline: The Fifth Estate: <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁵¹⁶ Richard, 2008.

⁵¹⁷ Mandel, Michelle, "Ashley Smith Mother tells Inquest of Daughter's Two Sides" – *Toronto Sun* (20 February 2013) <http://www.torontosun.com/2013/02/20/ashley-smiths-mother-takes-stand-at-inquest>

opinions, who spoke, who acted out, and who made complaints. Ironically, Ashley Smith's agency is erased more profoundly in the "benevolent" texts that purport to speak for her than in those texts that are intended to defend those considered at fault for her death.

When Coralee Smith testified at the second inquest, very few questions were asked of her. Multiple lawyers simply rose to offer her condolences; a "consensus had been reached amongst counsel" that questions about Ashley Smith's family life, including her biological family, weren't relevant.⁵¹⁸ This consensus to make Ashley Smith's biological parentage illegible to the legal gaze did not stop the social gaze from looking into it, however.

No one, not even perhaps Coralee Smith, knows who Ashley Smith's biological parents were. Coralee Smith's claimed during the inquest that Ashley had been the subject of a public adoption. Confronted by a question about who Ashley's biological mother was, Coralee contended she did not hide her daughter's biological parentage and that it was unknown.⁵¹⁹ Other commentators have suggested however, that the identity of the birth parents of Ashley Smith is something sinister Coralee Smith knows and is keeping secret.⁵²⁰ These suggestions are bound up with narratives that seek to responsabilize Ashley Smith's family for her incarceration and death and are a means to make Ashley Smith's death in custody into a personal, rather than a social, problem. According to her psychologist at the Saskatoon Regional Psychiatric Centre, Cindy Presse: "Smith believed her sister -- 19 years older than her -- was really her biological mother, and Coralee Smith was in fact her grandmother. She also believed

⁵¹⁸Blatchford, Christie. "Ashley Smith – And Jurors Blocked About the Mystery of Who Ashley Smith's Real Family Was" National Post (12 February 2014) <http://fullcomment.nationalpost.com/2013/02/21/christie-blatchford-ashley-smith-and-jurors-blocked-from-answers-about-mystery-of-who-her-real-family-was/> "lawyer after lawyer rising to solemnly offer condolences to Ms. Smith, but most not asking a single question"

⁵¹⁹ By her account, Coralee told Ashley "when you're a bit older we'll go to a registry in P.E.I. and we'll find out stuff for you." Vincent, Donovan. "Ashley Smith Inquest: Coralee Smith Says Adult Jail Changed Her Daughter." *Toronto Star* 20 February 2013).

⁵²⁰ See testimony of Cindy Presse, note 24.

her sister's son -- two years older than Smith and with his own troubles with the law -- was really her brother.”⁵²¹ According to testimony of two front line guards who dealt with Ashley Smith in the days before her death, Ashley Smith claimed that “she had a brother who was in jail” and that “her brother taught her how to tie up.”⁵²² The existence of an older cousin/ brother to Ashley Smith who got into trouble with, and was “known to” the same authorities, who apparently bore a striking resemblance to her⁵²³ and who served time at the same youth custodial facilities, was apparently in jail at the time of the 2013 inquest, but has not *died* in prison is a fascinating, little explored detail in the case.⁵²⁴ One wonders in what situations this older brother/ cousin, with whom she was “very close”⁵²⁵ was present and in what ways their relationship contributed to Ashley Smith’s growing problems as a youth. The presence of this cousin raises questions about to what extent the two relatives were engaged in similar activities and in criminal activity together, or to what extent this boy’s presence in Ashley Smith’s life may have been helpful to her. Perhaps his incarceration precipitated her feelings of alienation and contributed to her resistant behaviours. One wonders also to what extent each received similar or different treatment for the same sorts of conduct.

It is also quite interesting that Coralee Smith, when interviewed about the apple-throwing incident said, “Ashley wasn’t alone. There were other kids with her.”⁵²⁶ Ashley Smith has been portrayed as a pathologically resistant, solitary, even lonely individual. The storyline of Ashley Smith’s adolescence in the mainstream media and in the docudramas has implied a small family

⁵²¹ Psychologist: Ashley Smith Mother Won’t Discuss Girl’s Parentage *The Canadian Press* (15 April 2013)

⁵²² Blatchford, Christie, “Ashley Smith – and Jurors – Blocked From Answers About Mystery of Who Her Real Family Was” *National Post* (21 February 2013).

⁵²³ *ibid*

⁵²⁴ It’s like discovering Shakespeare really *did* have a sister named Lilith. What would be interesting to learn more about would be the nature of his charges, the consequences they brought, and where he is now. I would predict based on the analyses of feminist criminologists, that he did more serious crimes and was met with less harsh sanction.

⁵²⁵ Vicent

⁵²⁶ Out of Control, *ibid*

and a solitary childhood, not a large extended family living at close quarters with two adolescent family members simultaneously in and out of jail.

It is the configuration of Child Ashley as “normal” that makes all of this intrigue around Ashley Smith’s birth family – and the commitment to non-disclosure of their identities by counsel and even by Dr. Carlisle— relevant to the media and public in the Smith case. While presiding over the inquest, Carlisle said to an inquiring juror who sought to ask about the identity of Ashley Smith’s birth parents “we must not ask Coralee what the fact of that matter is”⁵²⁷ Queries by media commentators⁵²⁸ about Ashley Smith’s birth family hint at a parentage quite abnormal, something *risky*, something that could derail the normal family storyline and responsabilize something other than CSC, imply that Ashley Smith belonged in the geographical space of the excluded, and destabilize the Child Ashley figure. The biological parentage of Ashley Smith was deemed not relevant in the formal legal context of the inquest proceedings and is not relevant to narratives that fit with the Inmate Smith construction discussed in the prior chapter. Rather, her birth is *made* relevant in the public square of the media coverage of the Smith Inquest by the insistence of progressive politics on the normal childhood storyline. Indeed, it is insistence on the Normal Child Ashley configuration that makes advocacy on behalf of Ashley Smith fragile and vulnerable: the notion that her treatment and death in prison were unjust is always potentially de-stabilized by suggestions that she was not the noble victim she is made out to be.

Despite the general acceptance of the truth that Ashley Smith was a “white kid”, on the basis of the information presented in the texts that make up her case, there is a slippery and

⁵²⁷ Blatchford

⁵²⁸ especially Blatchford, *ibid.*

illusory quality to Ashley Smith's racialization as white. As noted, her biological parentage is unknown. She had relatively pale skin, dark eyes and dark hair. It would be reasonable to suggest that she may have had aboriginal heritage given statistics about children making up a high percentage of children in care across Canada, including children made available for adoptions⁵²⁹ and on the basis of her physical genotypical presentation: the identity of Ashley Smith's birth parents has never been disclosed, and this was in fact a piece of information it caused her a great deal of difficulty not to know.⁵³⁰ Indeed, as discussed in Chapter 2, there is a rather strange 2008 peer reviewed article by Jena McGill which acknowledges CAEFS executive director Kim Pate's assistance as supervisor of the project. This paper not only identifies Ashley Smith as an aboriginal woman but treats her death as an illustrative case of the discrimination against aboriginal women in Canada.⁵³¹ My point here is that Ashley Smith could easily have "passed" for either aboriginal or white and that it was not inevitable that her case became constructed as one about a middle class white girl. I don't mean to suggest that there is an authenticity to "race" but rather that her "whiteness" is neither self-evident nor necessarily genetic and is not even a stable construction throughout the case. What is widely accepted as true at the end of the second inquest is that she had a passably middle class white adoptive mother, bore no obvious characteristics signifying she was obviously *not*-white and had no recognized aboriginal status.

⁵²⁹ As of 2011, almost half (48.1%) of children in Canada aged 14 and under in foster care were Aboriginal children. Almost 4% of Aboriginal children were foster children compared to 0.3% of non-Aboriginal children. Statistics Canada National Household Survey 2011 Aboriginal peoples and language, Catalogue no. 99-011-X2011003

⁵³⁰ According to Saskatoon Regional Psychiatric Centre psychologist, Dr. Cindy Presse

⁵³¹ McGill, Jena, "An Institutional Suicide Machine: Discrimination Against Federally Sentenced Aboriginal Women in Canada" *Race/Ethnicity: Global Contexts* 2:1 Autumn 2008 <http://muse.jhu.edu/journals/rac/summary/v002/2.1.mcgill.html> This paper is strange given that Pate has subsequently been such an active participant in the construction of the Child Ashley figure, and even in defining the Patient Smith figure with her first-hand testimony and claims to "know" Ashley Smith. Could it be that, in 2008, Pate couldn't recollect enough about Ashley Smith to remember whether or not she was aboriginal? Could it be that she WAS aboriginal and this is somehow being deliberately hidden to sustain the narrative of Child Ashley as a middle class white "good girl"? Or could it be that this is an illustrative example of how progressive advocates, in constructing figures of Ashley in the Smith case, are not very attentive to or interested in her particularity? It is not possible to know which of these is the case; perhaps some combination of these possibilities is reflective of what happened here.

What is most important to this analysis is the insistence on her “middle class” background and the insistence on her whiteness alongside the easy assumption about her aboriginality in an early academic intervention. This whiteness squarely places the discursive configuration of Ashley Smith as a child of “ours” in need of rescue.

This politics of rescue can be seen as consistent with a good deal of feminist advocacy in favour of “saving” women and children over a long period of time. This underlying philosophical assertion on the part of women working as advocates for prisoners and also, in the context of the all-woman jury constituted in the second inquest represents likely at least in part conscious strategy to empower jurors not to be over-awed by the risk-based actuarial talk of CSC management. It is also not likely that it was accidental or unconscious that media and advocates for the Smith family framed the case in ways that fit Ashley Smith into the noble victim role in paradigmatic binary angels/demons scripts of the criminal law.⁵³²

Narratives that invoke the social category of child privilege the expertise of mothers, and not just any mothers: with the ideological construct of the good mother. Motherhood theorists like Andrea O’Reilly have tracked the figure of the “good mother” as a construct that celebrates only white, middle class mothers who stay at home as valuable.⁵³³ These narratives also invite the court to take on a patriarchal role, and invite the state to play the historical role it had under the JDA as having *parens patriae* jurisdiction. While the construction of the abnormal “tyrannical child” in expert discourse is deeply imbricated in mother-blaming and relies on an assumption of dysfunctional parenting, the discursive configuration of Normal Child Ashley relies heavily upon the presence of a middle class mother who is not drug addicted, not

⁵³² See Irigaray, Luce *This Sex Which Is Not One*, 1977 (Eng. trans. 1985)

⁵³³ For discussion, see e.g. O’Reilly, Andrea *Feminist Mothering* Albany: SUNY Press, 2008.

criminalized and sufficiently articulate as well as being appropriately socially positioned to participate in public debate. The question of the identity of Ashley Smith's birth parents is pushed aside in this construction, often quite deliberately. In other instances, some reference is made to the importance Ashley Smith apparently placed on wanting to know the identity of her birth mother. According to the Vincent and Zlomistic book: "it was a question that hung over the entire inquest: Ashley was deeply distressed, even resentful, that she didn't know the identities of her biological parents."⁵³⁴

For a variety of quite defensible stated reasons, questions about Ashley's biological parentage were not admissible at the inquest: they were determined to be irrelevant.⁵³⁵ The legal gaze cast by the inquest decided to make the biological question of Ashley Smith's genetic parentage illegible. Ironically, it is the logic of the normal child construction that makes Ashley Smith's biological parentage relevant. It was strategically central to this configuration of Child Ashley as a noble victim that she had a "good" mother and that this parentage be unquestioned. Equally, in neoliberal logics of responsabilization, the foregrounding of Ashley Smith's (putatively middle class, white) family in the interests of legitimating her as a member of Canadian society to be included in political community, the family becomes another entity onto which CSC and public opinion on the case can shuffle blame for her biological death. Focus on exposing this family for its abnormalities, or on responsabilizing it for purportedly failing to get Ashley the "help" she needed is enabled by the emergence of the Normal Child Ashley configuration in its reliance on this family structure.

⁵³⁴ Vincent and Zlomistic e-book at 34.

⁵³⁵ Although the importance of Ashley Smith's biological parentage to her sense of self was asserted by psychologist Cindy Presse in testimony see Vincent, Donovan "Questions Resurface About Ashley Smith's Birth Mother" *Toronto Star* (15 April 2013).

The positioning of Coralee Smith in a narrative where both she and Ashley Smith are cast as noble victims is made clear in the more emotionally manipulative, tabloid-style news media reports, for example, this Sun article:

[It was] Coralee Smith's turn to speak of her beloved daughter as she bravely took the stand at the inquest into Ashley's senseless death.

Despite battling serious heart disease, the 65-year-old grandmother had made this long-awaited trip from Moncton to pursue her long quest for answers: Why had her troubled child been bounced from prison to prison around the country like some serial murderer?⁵³⁶

In testimony at the inquest, Coralee Smith herself said she had “held off” telling Ashley Smith the identity of her birth parents because she felt the girl was “too young.”⁵³⁷ Assuming the public adoption story to be correct, Ashley Smith, adopted in infancy, and back in foster care by age 13, could easily be made sense of not as a “normal” child but as a “system kid.” If Ashley Smith is reconfigured as a child abandoned to state care from start to finish, she bears interesting similarity with Reena Virk, whose parents have been widely profiled but who was in state care along with almost all of her attackers on the night she was murdered. Insistence on the clean narrative of a normative upbringing and “good” middle class mother for Ashley Smith provides progressive politics useful tropes to manipulate public sympathies but also shields the state from investigation of its responsibility for this youth-in-care and of the connections between the child welfare and youth criminal justice systems. But for the reliance on configuration of Ashley Smith as a “normal” child from a “normal” home, the crisis for the little-girl-lost narrative

⁵³⁶ “Ashley Smith Mother Tells of Daughter's Two Sides” Toronto Sun (20 February 2013) <http://www.torontosun.com/2013/02/20/ashley-smiths-mother-takes-stand-at-inquest>

⁵³⁷ Perkel, Colin, “Ashley Smith's Mother Speaks to Inquest: Most of Her Life She Was Smiling and Happy” *The Canadian Press* (20 February 2013).

presented by the allegations about her adoption would be easily addressed by what Coralee Smith said in a media interview in response to the adoption question “We are her family. We are not perfect. But we will never accept that Ashley should have been treated in this manner.”⁵³⁸

5.8 Obesity and Social Exclusion - “One Size Does Not Fit All”

The report of the New Brunswick Ombudsman in the Ashley Smith case contains the following quote in reference to the imperative to change measures taken to deal with “challenging youth with complex needs,” which is how the ombudsman characterizes pre-incarceration Ashley Smith: “one size does not fit all.”⁵³⁹ The Normal Child Ashley figure supports narratives that direct attention away from Ashley Smith’s difficulties fitting in to the social categories of girl and child. Despite her ostensible “whiteness” in life, Ashley Smith could not socially accomplish a fit within the overlapping categories of “child” or of “little girl.” She could not attain performance of those roles as a properly constituted gendered and aged subject.

Although they work to accomplish this, the docudramas and media texts in which the figure of Child Ashley dominates do not (and perhaps cannot) completely reconfigure Child Ashley away from aspects of Ashley Smith’s beingness that marked her for exclusion from the overlapping and interlocking categories “child” and “girl”. In the construction of the figure of Child Ashley, aspects of her embodiment that rendered the identity of child difficult for her to access (her large size, her aggressiveness, her violence and her apparent sexuality) are de-emphasized. Images that depict her do not show her standing at full height; they zoom in on her face. They show her in pigtails. Early childhood photos of her are shown frequently instead of more recent photographs that present her as a full-grown adult, albeit a young one. Cropping is

⁵³⁸ Perkel, Colin, “My Skin is All Loose: Ashley Smith Told Mother In Final Visit” *The Globe and Mail* 21 February 2013) <http://www.theglobeandmail.com/news/national/my-skin-is-all-loose-ashley-smith-told-mother-in-final-visit/article8957193/>

⁵³⁹ Richard, 2008 cite

used in photos presented in mainstream media that cuts out much of the skin on her neck and chin, making her look slimmer and smaller than she would have presented to people who met her in person.

As discussed above, in the prevailing discourses of the girl circulating at the time of the Ashley Smith case, middle class girls are mandatorily successful, somehow simultaneously vulnerable and heteronormatively stereotypically sexually available in their interactions and body presentation. While this category presents impossible and conflicting requirements to subjects identified as adolescent females, it is accessible to some more than others. It was not attainable in life for Ashley Smith, who did not fit easily into the commonly accepted boundaries of the social category of the girl. As discussed, she was too tall; she was obese or overweight; she had acne; she was physically aggressive on occasion; to all indications she appears to have been an avid consumer of pornographic materials; she was a *failed* girl and an unsympathetic accused in a neoliberal context where either success or victimhood is necessary for attainment of adolescent girlhood. In the neoliberal risk logic of responsabilization, her failure was her fault, produced by her bad choices: the boundaries of the social category of girl marked her for exclusion and social death. However, in dying, Ashley Smith becomes a victim and gains, through this victimization and the passivity effected by her inability to speak back and resist, access to the social category of “good” or “normal” girl at last.

The following discussion will explore how, in short, Ashley Smith’s beingness is to a great extent unthinkable within the category of girl and child. At the time of her death, Ashley Smith was 19, meaning she was not legally a “child” under the formal discourses of international law, child protection or domestic criminal law. Understood officially as a young female adult, she was a problematic subject for legal discourse. Further, she did not fit easily within discourses

of the girl child. She was large in a society where fat is shameful and diminutive stature is prized in “little” girls.; she was assertive and oppositional in a culture where girls have been traditionally understood as compliant; she racked up huge bills on “chat” lines and websites that may well have been pornographic in a culture where girls are stereotypically traditionally understood as without sexual desire. In the following discussion, I look at how her unthinkability within the social categories of girl and child marked her for this exclusion before and during her time as a carceral subject.

It is clear that Ashley Smith’s large stature was an aspect of her embodiment that contributed to rendering her unmanageable within, invisible to, or unthinkable within, the discursive ideal type of white child or white girl. She was also tall, measuring at least 5’8” at age 15. In the “Rush to Judgment” report put forward by the Corrections Union, she is referred to at times as a “kid” or “child” but elsewhere as “the 245 pound woman.”⁵⁴⁰ She was at least this large. In later reports, for example the Vincent and Zlomistic book *The Life and Death of Ashley Smith* discussed in more detail below, she is described as follows: “Ashley was five foot eight and weighed 260 pounds.”⁵⁴¹ Ashley Smith’s size is never described in “feminine” terms as softness or plumpness. Her size certainly led front line CSC staff to admittedly perceive her differently from a smaller woman: they felt threatened by her. As one correctional officer said in “Rush to Judgment”, “when I looked at all the incidents she had been involved in and her size – she weighed 245 pounds – I thought, ‘That girl could do some damage to me.’”⁵⁴²

Fatness intersects with race, class and gender in socially locating people, especially adolescent girls. Obesity marks children and adolescent girls for stigma and exclusion. Cornell

⁵⁴⁰ Rush to Judgment at p. 2

⁵⁴¹ Vincent and Zlomistic at p. 16

⁵⁴² Interview with unnamed Correctional Officer, “Rush to Judgment” at p. 8.

nutrition scientists Donna Maurer and Jeffrey Sobal, in their co-edited volume about social management of obesity and thinness look at how thinness is “widely valued and rewarded in contemporary postindustrial societies”⁵⁴³ and that the flip side of this social value placed on thinness is a stigmatization and medicalization of obesity. They argue that “weight-stigmatized individuals” face a variety of negative social responses.⁵⁴⁴ Douglas Dehrer and Gerald Hughes, contributors to the Maurer and Sobal book, contend further that obesity is a “spoiled identity” through which “ individuals suffer both externally from negative stereotypes and internally from negative self-concepts.”

Amy Erdman Farrell, in her book, *Fat Shame: Stigma and the Fat Body in American Culture*⁵⁴⁵ critically interrogates the cultural and economic apparatuses that support the social mandate for thinness, looking at historical fat denigration and contemporary fat stigma. Her analysis of historical and contemporary representations of thinness reveals connotation of fatness that are attributed not just to the excess weight but to the fat person, who is perceived in a totalizing way to be corrupted by his or her fatness and seen as “lazy, gluttonous, immoral, greedy, stupid, uncontrolled and lacking in willpower.”⁵⁴⁶ Fat is a devalued and stigmatized identity that has been found to correlate with lower levels of college acceptance, lower levels of peer acceptance as well as depression.⁵⁴⁷ Among others, Jana Evans Braziel and Kathleen LeBesco⁵⁴⁸ have theorized the female fat body as transgressive and abject in postindustrial societies, fat female bodies as invisible or stigmatized in the representations prevalent in

⁵⁴³ Maurer, Donna and Sobal, Jeffrey, *Interpreting Weight: The Social Management of Fatness and Thinness* New York: Walter De Gruyter, 1999 at p. 3.

⁵⁴⁴ *Ibid.*, at p. 7.

⁵⁴⁵ Farrell, Amy Erdman, *Fatshame: Stigma and the Fat Body in American Culture* New York: New York University Press, 2011.

⁵⁴⁶ At p. 4.

⁵⁴⁷ *Ibid.*, at 12.

⁵⁴⁸ Evans Braziel, Jana and LeBesco, Kathleen *Bodies Out of Bounds: Fat Bodies and Transgression* Berkely: University of California Press, 2001.

mainstream culture. As Le'a Kent writes in her contribution to the Braziel and LeBesco anthology, "fat bodies, and women's fat bodies in particular, are represented as monstrous and a kind of abject: that which must be expelled to make all other representations and functions, even life itself, possible.... Abjection is characterized by revulsion, fear of contamination... a repeated expulsion that marks the self's borders."⁵⁴⁹ This is consistent with the disembodiment of Ashley Smith in the vast majority of photographic texts depicting her alongside texts that present the Child Ashley construction: Smith had to be disembodied to be recuperated as the Normal Child.

According to Statistics Canada, eating disorders such as anorexia and bulimia affect adolescent girls ten times as often as they affect boys and produce disordered eating in tens of thousands of young girls every year.⁵⁵⁰ Adolescents diagnosed with eating disorders have an "intense fear of becoming obese."⁵⁵¹ Eating disorders are individually pathologized in the mainstream as mental disorders, but, seen in this context, eating disorders on the part of adolescent girls are not *just* individual pathologies but also reflect a rational response within a neoliberal logic of exclusion whereby these girls are in jeopardy of not just social but also, as is suggested by the Ashley Smith case, perhaps penal consequences should they fail to achieve the socially sanctioned level of thinness. The prevalence of eating disorders amongst adolescent girls in postindustrial societies is pathologized as mental illness on their part but it is also evidence of the power of the compulsory social requirement that girls be thin to be socially valued. Whether or not Ashley Smith had an eating disorder, her "fatness" made her not fit easily within the category of girl and marked her for exclusion from community.

⁵⁴⁹ Kent, Le'a "Fighting Abjection" *ibid*, at 135.

⁵⁵⁰ <http://www.statcan.gc.ca/pub/82-619-m/2012004/sections/sectiond-eng.htm>

⁵⁵¹ *ibid*

Obesity is prevalent in women's prisons. However, while fatness on the part of woman prisoners is often understood as their individualized failure, recent research into the body size of woman prisoners shows that obesity exists as a social relation in a loop of confirming logic in carceral settings of the late modern west, especially where women are concerned. Correlating especially with an inability to exercise, obesity rates for incarcerated women are significantly higher than those rates for the general population on average. According to a 2014 Oxford University health study of prisoners across 15 countries, female prisoners were⁵⁵² more likely to be obese than the general female population. These findings associate this high prevalence of obesity with provision of female prisoners with a diet designed to suit the caloric needs of males.⁵⁵³ Significantly here, one of the requests Ashley Smith formally made to CSC management was that healthier snacks should be provided to inmates. She wanted fresh fruit and vegetables to replace muffins. The request was denied.⁵⁵⁴ Fatness on the part of Ashley Smith and other woman prisoners increases in a vicious circle. There is a double bind process by which the abjection, shaming and cultural construction of the fat body as uncivilized is exacerbated by a high calorie prison diet and lack of exercise making female inmates unthinkable subjects to be excluded from political community. It is unlikely that obesity was irrelevant to social and juridical necropolitical actions taken against Ashley Smith. One of the concerns raised about Ashley Smith's treatment in CSC custody by Coralee Smith was that she was undergoing rapid changes to her weight, both through gain and, finally, rapid weight loss.⁵⁵⁵

⁵⁵² around 18% with some jurisdictional variation and especially pronounced in high income countries)

⁵⁵³ http://www.eurekalert.org/pub_releases/2012-04/l-fpm041712.php Dr. Katharine Herbert, Department of Public Health, University of Oxford, UK

⁵⁵⁴ Vincent and Zlomistic "Excerpt: The Life and Death of Ashley Smith" *The Toronto Star* (15 December 2013)

http://www.thestar.com/news/canada/2013/12/15/excerpt_the_life_and_death_of_ashley_smith.html

⁵⁵⁵ Perkel, Colin, "My Skin is All Loose: Ashley Smith Told Mother In Final Visit" *The Globe and Mail* 21 February 2013)

<http://www.theglobeandmail.com/news/national/my-skin-is-all-loose-ashley-smith-told-mother-in-final-visit/article8957193/>

Because gender differences and subjectivity are made and remade in the family, the school, the media, popular culture and formal legal discourses, in the recuperative discursive reconfiguration of Ashley Smith into Normal Child Ashley, the boundaries of the (white, middle class, successful, heteronormatively sexy) normal girl are re-inscribed, as is the assumed truth of the unagentic passivity of subjects identified as adolescent females. Configuration and articulation of Ashley Smith as a child relies upon and even bolsters the same logic that produces her monstrosity and even likely her criminalization. This logic makes the large, strong, occasionally violent youth Ashley Smith *unthinkable*. It effaces her sexuality. It contributes to her exception from political community and from a stable, socially-endorsed identity. In consequence, she is pathologized for her size and other perceived failures, which are judged as failures of femininity without an appreciation for how contextual factors limit her available “choices”.

5.9 Child Ashley and the Logic of Exclusion

The prior discussion has shown the abundance of creative discursive work necessary to normalize Ashley Smith posthumously in the Normal Child Ashley configuration. I have unpacked ways in which she was, in life, configured by experts, CSC and other corrections officials and bureaucrats in the educational and child protection systems as a monstrous girl not thinkable within the category of child. I turn now to a discussion that locates the discursive normalization of Ashley Smith in the construction of the Normal Child Ashley figure in systems of macropower.

The social problem defined by the discourse of Normal Child Ashley is mistreatment and maltreatment of Coralee Smith’s child, a child who could be “our” child, a cherubic, and feminine, white child: it is the mislocation of white, middle class girl in the correctional milieu

that presents a problem to be solved in the “Out of Control” docudrama. This figure is located historically and economically in capitalist and post-colonial discourses of class and race. The effort expended upon the assertion that Ashley Smith was *normal* implicitly relies on racialized logics and colonial settler geographies of exclusion. It is a logic that builds on colonial understandings of aboriginal and racialized individuals as abnormal Others who are not full participants in the nation’s statehood and accepts the correctional system unmodified as a place for those abnormals.

Razack looks critically at how a Canadian city and court’s “capacity to dehumanize” murdered aboriginal woman Pamela George “came from their understanding of her as the gendered racial Other whose degradation confirmed their own identities as white... entitled to the land and to the full benefits of citizenship.”⁵⁵⁶ The Normal Child Ashley figure has a spatiality. It is discursively constructed as situated and belonging within what Razack has called the “racial/spatial economies of the colonial city” from which aboriginal people (and racialized others) are excluded.⁵⁵⁷ This configuration of Child Ashley locates her as a figure belonging in the (white, clean, middle class) suburbs. In so doing, the figure of Normal Child Ashley takes Ashley Smith out of the category of persons implicitly assumed to belong in prison, the space of the carceral other, and into a place of belonging in white middle class communities of agents. Also, as Razack, Smith and Thobani have argued, neoliberalism’s attachment to an imagined individualism devoid of a racial, ethnic or gendered self and the collective produces imaginaries which “make clear that ‘outsider groups’ and the ‘barbarians’ are always shaped by racial and

⁵⁵⁶ Razack, Sherene *Race, Space, Law: Unmapping a White Settler Society* Toronto: Between the Lines 2002at p. 126

⁵⁵⁷ Razack, Sherene “It Happened More Than Once: Freezing Deaths in Saskatchewan” (2014) 26 CJWL 1

gendered markers”⁵⁵⁸ These authors contend that the raced, classed and gendered division between insiders and outsiders shapes the governance of individual freedom for those considered properly constituted subjects and the “social death,” through exclusion, or as Razack terms it “waste disposal” of the outsider others.⁵⁵⁹ Further, Razack has also contended that, in mainstream Canadian society in general and the juridical field in particular, the aboriginal body is “seen as already dead”, which makes the deaths of aboriginal people in prison rather than events worth investigating, to be expected: “the only thing we can expect of a disappearing race.”⁵⁶⁰

As Jiwani and others have pointed out, there is a statistically demonstrable disproportionate vulnerability of racialized women and girls in Canada to violence while mainstream portrayals of Canadian society, largely make race invisible.⁵⁶¹ Looking at the deployment of the figure of Child Ashley in negotiations with systems of macro-power, it is clear that systems including colonialism and neoliberalism are engaged in what Hannah Arendt called race thinking.⁵⁶² As discussed above, white normativity is implicitly referenced in the use of the child Ashley figure to contend that Ashley Smith is one of *us*, not one of *those people* who are properly to be excluded as inmates. Arendt theorized that ideas about race, notions of racial and cultural superiority, and the right of ‘superior races’ to territorial expansion were themes that

⁵⁵⁸ Razack, Sherene; Malinda Smith and Sunera Thobani, eds. 2010. *States of Race: Critical Race Feminism for the 21st Century*. Toronto: Between the Lines, 2010 at p. xvii.

⁵⁵⁹ *Ibid.*, at p. 90. See also Razack, Sherene “It Happened More Than Once: Freezing Deaths in Saskatchewan” (2014) 26 *CJWL* 1

⁵⁶⁰ Razack, Sherene, “Timely Deaths: Medicalizing the Deaths of Aboriginal People in Police Custody” (2013) 9 *Law, Culture and the Humanities* 2 pp. 352-374.

⁵⁶¹ see for discussion Jiwani, Yasmin, “Erasing Race: The Story of Reena Virk” *Canadian Women’s Studies* Also see Jiwani, Yasmin *Discourses of Denial: Mediations of Race, Gender and Violence*. UBC Press: Vancouver, 2006.

⁵⁶² Arendt, Hannah, “Race Thinking Before Racism” (1944) *The Review of Politics* 6, pp. 36-73.

unified members of communities in white settler colonies [like Canada] in much the same way that they galvanized the fascist ideologies of early twentieth century Europe.⁵⁶³

The problematic racist logic behind the Child Ashley construction can be articulated simply as follows: Ashley Smith was *not* the most dangerous inmate in the correctional system. Ashley Smith was a little girl. This line of reasoning is problematic because it accepts unquestioned assumptions about the category “girls”, about “inmates” and about the correctional system, all of which are need to be troubled. In the Child Ashley figuration much of her attributes are personalized where they could be understood politically. The Normal Child Ashley figure acquires value relationally: she becomes worthy of consideration in reflection of her relationship to others who *count*. In doing so, it invokes discourses of normalcy and childhood built on heteronormativity/ colonialism/ white supremacy.

Race thinking as introduced as a concept by Arendt and explored by Razack, is not the outsider logic of a few “bad apple” bigots but is a mainstream view. Its logic can be:

captured in the phrase: they are not like us and also necessarily in the idea that ‘they’ must be killed so that ‘we’ can live, race thinking becomes embedded in law and bureaucracy so that the suspension of rights appears not as a violence but as the law itself. Violence against the racialized Other comes to be understood as necessary in order for civilization to flourish, something the state must do to preserve itself.”⁵⁶⁴

In the logic of race thinking, Others, like aboriginal and racialized people, are the proper subjects of incarceration in correctional contexts as well as immigration detention and other camp settings. To quote Razack, race thinking exists in the “ the denial of a common bond of

⁵⁶³ Arendt, Hannah. “Race-Thinking Before Racism”.(1944) *The Review of Politics*, 6, pp 36-73.

⁵⁶⁴ Razack, Razack, Sherene. 2008. *Casting Out: The Eviction of Muslims from Western Law and Politics*. Toronto: University of Toronto Press.at 9.

humanity between people of European descent and those who are not” is not a relic of a settler past but “remains a defining feature of the world order... this ‘colour-lined’ world is increasingly one governed by the logic of exception and the camps of abandoned or ‘rightless’ people it creates. The camp, created as a state of exception, is a place where, paradoxically, the law has determined that the rule of law does not apply. Since there is no common bond of humanity between the camp’s *inmates* and those outside, there is no common law. For those marked as outside humanity, law reserves the space of exception.”⁵⁶⁵ Referencing Étienne Balibar, Razack looks at the logic of exclusion with reference to gender and the camp contends that those who are “other” including by reason of sexual difference can be excluded under the racism of empire if they are perceived as a threat to the nation.⁵⁶⁶

When the Normal Child Ashley figure is considered critically in the context of Razack, Thobani as well as Jiwani’s analyses of racism in Canada and Hannah Arendt’s concept of race thinking it becomes clear that part of the governmental work done by the discursive figure of Normal Child Ashley, a white, middle class girl, is in re-inscribing and amplifying the legitimacy of the “colour line” and affirming settler geographies in which white people belong in protected spaces while aboriginal and racialized others are excepted, “waste” to be disposed of, denizens of camps to be excluded: socially dead. By invoking the logic that disproportionately values white, middle class children to provide for Ashley Smith a sacrificial aura and re-cast Ashley Smith as a legitimate participant in political community who is not properly excluded, it re-inscribes the logic that some subjects *are* properly subject to the logic of exception. Further, Razack suggests

⁵⁶⁵ Razack, *Casting out* at 6.

⁵⁶⁶ Razack, *ibid* at 16.

that “some Western feminists participate in empire through the politics of rescue.”⁵⁶⁷ She, in this instance, is referring to the politics of the veil/ unveiling, taking the position that “gender operates as a kind of technology of empire enabling the West to make the case for its own modernity”⁵⁶⁸ and that “men claim the universal for themselves through confining women outside of it as non-rational subjects, so the Western woman requires the culturally different body to make her own claim of universality.”⁵⁶⁹ I would argue that this contention applies to “child saving” politics woven in to the construction of the linked and overlapping social categories of the saveable “girl victim” and “child victim.” Like the “veiled woman”, girl child victims, of which generalizable type Normal Child Ashley is a case, are re-inscribed by these politics of rescue and victimhood as voiceless, apolitical, unagentic subjects.

⁵⁶⁷ Razack, *ibid*, at 17.

⁵⁶⁸ At p. 18

⁵⁶⁹ at p. 86.

Chapter 6

Patient Smith: *From Problem Inmate to Mental Patient- Pathologization, Assimilation,*

Domestication

*There are things in that paper which nobody knows but me, or ever will.
Behind that outside pattern the dim shapes get clearer every day.
It is always the same shape, only very numerous.
And it is like a woman stooping down and creeping about behind that pattern.*

- “The Yellow Wallpaper”, Charlotte Perkins Gillman (1892)⁵⁷⁰

6.1 Introduction

The story “The Yellow Wallpaper” is a first person narrative tale of a young woman’s journey into madness. Gillman’s protagonist is driven into desperation by a course of treatment that involves a prolonged period of solitary confinement in locked room enforced not by correctional apparatus but as remedy for a diagnosed crisis with her mental health. At the end of the story, the protagonist has a psychotic break. The story supports different readings but one that is particularly relevant here is that it is a tale of descent into self-harm: arguably, the yellow wallpaper she tears away is not on the walls but is the narrator’s skin. This story has been taken as a feminist text that expresses the ways in which women’s agencies have been made invisible, unthinkable and silenced by the discourses of mental health and which provides insight into relationships between oppression, communication, and self-harm. It is useful to consider in the context of my analysis of the discursive figure of Patient Smith that emerges in the Smith case because it problematizes a woman’s descent into mental illness in the context of governance by mental health discourse within which her agency is illegible.

⁵⁷⁰ Gilman, Charlotte Perkins. “The Yellow Wall-Paper.” In Ward, Candace, ed. *Great Short Stories by American Women*. pp. 73-88. New York: Dover, 1996.

In this chapter I conduct a critical discourse analysis of a figure of Ashley Smith that, while present throughout the Smith case in a variety of texts, only becomes dominant at a later stage in the case. The figuration of Patient Smith is of course not one monolithic figure but a set of overlapping, multiple figures of her as a mentally ill woman or girl. I analyze them together because they are constructions of Ashley Smith that foreground mental illness as her primary defining feature.

In this chapter I analyze configurations of Ashley Smith that of Patient Smith, where her mental health, and eventually, madness, is foregrounded as the most significant aspect of her identity, in which sense is made of her as properly understood as a mental patient. I look at three variations on the figuration of Patient Smith. First, I analyze figures of Ashley Smith as a troublesome but cognitively normal teen with behavioural problems, which form the dominant understanding of her as a mental health subject from the beginning of her experiences with the juridical field in 2002 until well into her incarceration. In 2006, after Ashley Smith is transferred to CSC custody, some legitimacy is accorded the notion that she has mental health issues and the construction of the figure shifts: Ashley the Inmate-Patient figure appears in a growing number of discursive sites, especially in official texts. After Ashley Smith's death, sense is made of her using mental health discourses that produce a different configuration, that of Patient Smith. This becomes the figure of Ashley Smith that ultimately dominates the overwhelming weight of texts produce from late 2010 until the end of the Smith case in 2014 and has the effect of redirecting public and juridical attention away from the systems and procedures of CSC in general in favour of a narrow and specific focus on the treatment of what are characterized as a very few "complex" "high needs" "severely mentally ill" woman offenders.

Throughout the duration of the Smith case from the time of her first conflicts with actors and systems in the juridical field in 2002, differing figures of Ashley Smith have competed for dominance. In the first chronological period, spanning from the time of her first interactions with the juridical field

until her transfer to adult corrections custody in 2006, Smith is regarded as an illegitimate patient. During her period in adult CSC custody, once she almost immediately becomes problematic as an inmate for CSC to manage, this figuration transforms into an understanding of her as Ashley the Inmate-Patient, a figure that is primarily defined by its status as a carceral subject and whose “behaviours” are individualized and pathologized. During this period, from 2006-2007, CSC enlists the assistance of mental health expertise and technologies in managing this carceral subject. It is only after Ashley Smith dies, and after the recuperative figuration of Child Ashley becomes the most frequently articulated, widely accepted and even assumed, representation of her in media texts about the Smith case that, in late 2010, with the release of the “Behind the Wall” documentary and the release of Margo Rivera’s psychiatric report that this configuration transmutes and the recuperative figure of Patient Smith as a sympathetic victim becomes the dominant construction of her in the case, inviting in a slightly different apparatus of power and knowledge in the form of the mental health system instead of corrections.

As mentioned earlier, the conditions of possibility laying the groundwork for the figure Patient Smith figure are present throughout her case. As discussed in Chapter 4, Ashley Smith was placed in a mental health institution before she was ever incarcerated. Certain conditions of possibility appear to have been present that would have made her plausibly constructible as a mental patient throughout her contact with legal and correctional systems. For example, in the NB Ombudsman Report, Smith is at one point characterized as one instance of a type of “youth suffering from mental illness and severe behaviour disorders.”⁵⁷¹

By the end of 2010, the Child Ashley figure lost its dominance to a new configuration of Ashley Smith that was not contradictory to, but mutually supportive of, and derived from, the Child Ashley

⁵⁷¹ Richard, 2008; see also CBC News “New Brunswick Ombudsman Report on Teen’s Death in Ontario Prison” (9 June 2008)

figuration. The dominant representation of Ashley Smith transforms into a mental patient. This new configuration of Ashley Smith had stabilized in media portrayals by 2013 and the end of the second inquest in December of that year. Howard Sapers' 2013 "Risky Business" report⁵⁷² played an important part in solidifying the figure of Patient Smith as the "final word" on Ashley Smith at the time of the inquest decision in December 2013. What appears to be the ultimate overriding understanding of Smith is as a case of a type of whom there are perhaps six to thirty, a case of a very seriously mentally ill woman offender in Canada. This is the figure of Ashley Smith presented equally in more progressive and more conservative media sources. In these sites, media texts invoke the language of angels and demons when describing Ashley Smith as a mentally ill woman and bestow on this figure of Patient Smith a sacral aura. For example, CTV's "Kevin Newman Live" special aired on December 19, 2013, the day the inquest verdict was rendered. In it, Ashley Smith is described by both the narrator Kevin Newman and guest interviewee *Toronto Star* journalist, Diana Zlomistic, as mentally ill and infantile: "diagnosed with ADHD and a personality disorder... a child crying for help."⁵⁷³ In May of 2013, *National Post* columnist Christie Blatchford described Ashley Smith as suffering "from a severe antisocial personality disorder with florid borderline features... it was a hellish mental illness."⁵⁷⁴ Also, in December 2013, after the inquest verdict was rendered, Blatchford articulated the figure of Patient Smith as not just a case but the *ultimate* case of a mentally ill girl victim mislocated in prison as follows:

⁵⁷² Sapers, Howard "Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women" *Office of the Correctional Investigator* September 2013 <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20130930-eng.pdf>

⁵⁷³ CTV.ca <http://knlive.ctvnews.ca/ashley-smith-a-child-at-heart-failed-by-the-system-1.1601567>

⁵⁷⁴ Blatchford, Christie "Ashley Smith's Mental Disorder Led to Hellish Encounters Between Teenager and Staff" *National Post* (9 May 2013) <http://fullcomment.nationalpost.com/2013/05/09/christie-blatchford-ashley-smiths-mental-disorder-led-to-hellish-encounters-been-teenager-and-staff/>

Generally, the mentally ill in this country, but specifically the mentally ill who are in prison, and in particular young, severely mentally ill women behind bars, have suffered for too long. Poor Ashley, with her sweet smile and clever charm, and that unrelenting sickness that had her strangling herself multiple times a day, was the penultimate [sic] embodiment of all that can go wrong.⁵⁷⁵

As is the case with the other figurations discussed in this dissertation, there is not one tidily bounded and universally acknowledged figure of Patient Smith. Messy and overlapping figures collide, conflict to some degree, and collect together in the form of a set of representations similar enough to one another to be treated as a singular discursive formulation. All of the configurations of Ashley Smith discussed in this chapter foreground mental illness as the primary social problem identified by the Smith case and the primary social problem defining her.

On the whole, Patient Smith is defined as one of a very small subset of a particular type of exceptionally high risk inmates. Specific words deployed to define Patient Smith include a “mentally ill inmate”, “one of a very few seriously self-harming female inmates”, a “troubled teen with mental health issues” one of a “handful of mentally disordered women offenders,”⁵⁷⁶ and one of “about 20 to 40 women in prison on any given day who cut or bite themselves, head bang, ingest objects or self-asphyxiate.”⁵⁷⁷ Similarly, Patient Smith is also defined as “a mentally troubled teen who had a history of acting out, and who, her inquest has heard, had a compulsive habit of self-harming.”⁵⁷⁸

⁵⁷⁵ Blatchford, Christie, “Bold Ashley Smith Jurors Seek Shake Up of Correctional Services and Wake Up of Canadian Public” *National Post* (19 December 2013). <http://fullcomment.nationalpost.com/2013/12/19/christie-blatchford-bold-ashley-smith-jurors-see-shake-up-of-correctional-services-and-wake-up-of-canadian-public/>

⁵⁷⁶ Sapers *Risky Business* 2013 <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20130930-eng.pdf>

⁵⁷⁷ Vincent, Donovan “Ashley Smith Inquest: What Should We Do About Other Self-harming Female Inmates?” *The Toronto Star* (19 December 2013).

⁵⁷⁸ Vincent, Donovan, “Solitary Confinement Harmful to Inmates: Lawyers Argue” *Toronto Star* (12 April 2013) http://www.thestar.com/news/insight/2013/04/12/solitary_confinement_harmful_to_inmates_lawyers_argue.html

While there is an official and doctrinal separation between the correctional and mental health systems of governance for both adolescent and adult subjects in Canada, there are ways in which the two systems overlap. While, as will be discussed below, many articulations of Patient Smith in mainstream media sites uncritically portray the mental health system as separate from the correctional system, a review of the discursive figure of Ashley the Inmate-Patient shows that this is not accurate. The *CCRA*⁵⁷⁹ sets for an obligation on the part of CSC and youth corrections to provide health, including mental health, treatment.⁵⁸⁰ Human rights legislation as well as the *Charter* further reinforce the rights of prisoners to health treatment, including mental health treatment.⁵⁸¹ There is a large institutional machinery in the CSC system where psy-experts work either as employees or contractors for CSC, provincial or youth corrections.⁵⁸² The bureaucracy of CSC's mental health machinery is itself complex: under it psychologists and psychiatrists have split but overlapping jurisdiction to address the mental health needs of inmates and are administered by different managers.⁵⁸³ Significant percentages of inmates regularly receive mental health treatment, including psychotherapy as well as psychotropic medications.⁵⁸⁴

6.2 Nuisance

During most of her life, Ashley Smith was not widely regarded by officials in justice, mental health, child protection or educational systems as a subject legitimately in need of mental health treatment. Rather, she was represented as a nuisance to mental health professionals and institutions.

⁵⁷⁹ *ibi*

⁵⁸⁰ pursuant to ss. 86 and 87

⁵⁸¹ See *Canadian Human Rights Act*, 1976-77, c. 33, s. 1.

⁵⁸² For a discussion of what mental health services are made available in CSC penitentiaries see e.g. Service, John "Under Warrant: A Review of the Implementation of the Correctional Service of Canada's 'Mental Health Strategy'(2010) <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20100923-eng.aspx#TOC6A>

⁵⁸³ *ibi*

⁵⁸⁴ See e.g. Brink, J.H., Doherty, D., & Boer, A. (2001). Mental disorder in federal offenders: A Canadian prevalence study. *International Journal of Law and Psychiatry* 2, 330- 356. doi:10.1016/S0160-2527(01)00071-1.

She was understood as a troublesome, badly behaved and vexing but mentally *healthy* adolescent subject. The paradigmatic statement of the quite consistent way in which her capacity was regarded by mental health professionals throughout her case is summed up in the following quote from a psychiatrist at Restigouche hospital in 2003: “Ms Smith clearly understands her responsibilities and their consequences and can control her actions when she chooses to.”⁵⁸⁵ The prevailing construction of Ashley Smith in texts produced by mental health officials (psychiatrists etc.) before she died is as a carceral subject: these texts provide mental health modifiers to a subject primarily identified as an inmate. This construction is consistent with a narrative that Ashley Smith made choices motivated by rebelliousness and demonstrated in doing so a type of unruly agency. Smith did not attract the incapacitating mental health diagnoses now assigned to her until a late stage and even when the diagnoses were applied, priorities in response were security, not treatment.

As discussed in Chapter 5, before she was incarcerated, Ashley Smith was determined by psy-experts to have behavioural problems, but not “real” mental illness. Mental health professionals on numerous occasions simply did not see her behaviours as evidencing legitimate mental health issues.⁵⁸⁶ According to her mother’s testimony at the Smith inquest, Ashley Smith was understood by psy-experts prior to her incarceration as an immature, but not a mentally ill teenager. Coralee Smith told the inquest jury that Ashley saw a psychiatrist who decided Ashley was “just a normal teenager ... I’m too fat and I have acne,” is what Ashley Smith said about the session.⁵⁸⁷ In 2002, an unnamed psychologist is reported to have found that Ashley Smith had “non-learning verbal difficulties”⁵⁸⁸ that might be connected to “neurological deficits.” In 2003, at the Pierre Caissie Centre, she is found to

⁵⁸⁵ Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁵⁸⁶ E.g. As discussed earlier, because of her disruptive behavior, Ashley Smith was discharged early from the Pierre Cassia Centre in New Brunswick while a youth in 2003.

⁵⁸⁷ Perkel, Colin, “Ashley Smith’s Mom Talks about Happy Childhood, Troubled Teens” *The Canadian Press* (20 February 2013).

⁵⁸⁸ Fifth Estate Timeline “The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

have “a learning disorder, ADHD, and borderline personality disorder and narcissistic personality traits.”⁵⁸⁹ At sentencing in Miramachi Youth Court, she is determined to have “anger management problems.”⁵⁹⁰ Recall also that, once in prison, Ashley Smith is constituted by psy-experts as a “child.” Psychiatrist Dr. Jeffrey Penn’s notes that were brought forward in testimony in the second inquest in the Smith case stated: “This young woman is essentially a large tyrannical child who can’t tolerate limits, feels estranged and isolated from peers, unloved, unliked, and often hopeless.” This label of Smith as a “large, tyrannical child” also appears in testimony from psychologist Dr. Allister Webster, as discussed in Chapter 5, who referenced Penn’s notes and adopted the label As previously explored, this is a diagnosis relating to disordered behaviour, not to treatable mental illness.

While a mental health diagnosis suggests a logic of care, it was a risk logic that governed treatment decisions about Ashley Smith in the mental health system. Notably, mental health facilities refused to accept Ashley Smith as a patient repeatedly over the course of her life, whether by rejecting her or discharging her early, not on the basis of a logic of caring for what might be her interests but on the basis of calculations made in a logic of risk as to what might cost money for or expose facilities to disruption. Recall from Chapter 4 that, before she was ever incarcerated, on March 30, 2003, 15 year old Ashley Smith was discharged from a mental institution (New Brunswick’s Pierre Caissie Treatment Centre) after having only completed 27 days of her recommended 34-day assessment. Her stay was discontinued when it was determined by management that Smith posed a security risk to the handling of the rest of the population at the Centre. Smith was discharged because she was a nuisance “since she was seriously disrupting the assessments of the other youths.”⁵⁹¹ During her stay, Smith

⁵⁸⁹ *ibid*

⁵⁹⁰ Richard, 2008.

⁵⁹¹ *ibid* p. 16

received “psychological, psychiatric and educational assessments”⁵⁹² Smith was recommended to have individualized counseling in the community by a psychological expert (although this was not specifically arranged by the institution) and to take “follow-up” medication.⁵⁹³

The discharge of Ashley Smith from the Caissie Centre was not an aberrant event but rather only one in a series of early releases and rejections of her as a patient by several mental health institutions over the course of her case. As discussed in Chapter 4, she was removed from Saskatoon’s Psychiatric centre “for her safety” after being assaulted by staff there. She was subsequently discharged from Pinel Institute in Montreal before an assessment could be completed. In 2007, Ashley Smith was then sent to, and discharged rapidly from, St. Thomas Psychiatric Hospital in Ontario, before an assessment of her was completed.⁵⁹⁴ The administration at the St. Thomas hospital found her too ill to treat. Further, CBC’s “The Fifth Estate” makes an unattributed claim that “three days before her death Ashley asked to go to a psychiatric hospital. She told correctional staff that she would take medication and stop choking herself. There were no beds available at the hospital.”⁵⁹⁵ These rejections have been framed in many texts where Patient Smith dominates as a reflection of a need for more infrastructure and resources in the mental health system but they are also comprehensible as necropolitical actions excluding Ashley Smith from treatment on the basis of risk logic. Seen this way, the mental health system can be understood as excluding Inmate Smith because of the risks she poses to their general populations and burdens she would place on their resources, and suggests the complicity of decision-makers within those institutions in decisions that produced Inmate Smith as an inhabitant of a death world, a *homo sacer*.

⁵⁹² *ibid* p.17

⁵⁹³ *ibid*

⁵⁹⁴ This placement lasted from June 11-18, 2007. See Sapers, 2008.

⁵⁹⁵ Fifth Estate Timeline; The Life and Death of Ashley Smith <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

It is evident from this pattern of exclusions, rejections and early discharges from mental health treatment that the general security and smooth functioning of the mental institutions was prioritized over the mental health needs of Ashley Smith. Energy was not expended on treatment of Ashley Smith during her life. To the contrary, what appears evident is the operation of risk logic and exception in a series of exclusions of her from mental health treatment opportunities. Security and risk logics were mobilized even when alternative care-based approaches were evidently recognized as suggesting other potential courses of action. Ashley Smith was represented as the bringer of disruption; as a nuisance. Indeed, I would argue that the pattern of actions taken to exclude Ashley Smith from mental health systems mirrors and interlocks with the series of transfers, abuses and segregation as necropolitical actions undertaken against Inmate Smith by the legal and correctional systems. This is consistent with the theorization now widely put forward in critical criminological literature. As criminologists Kilty and Hannah-Moffatt have argued, when risk discourse emerged into dominance in late modern western societies, it did not replace the psy discourses.⁵⁹⁶ As discussed in Chapter 2, Christie Barron has applied this analysis to the specific context of governing adolescent girls in correctional facilities.⁵⁹⁷ It is argued by these scholars that psy-discourses are deployed in conjunction with risk discourses to pathologize resistant behavior or responses to inequalities as individual dysfunction. Arguably, the psy-discourses and risk logic have fused and risk logic is now pervasive not just in correctional settings but also in mental health institutions.

In light of this fusion of the discourses of exclusion, security, mental health and risk, had Inmate Smith been understood as a psychiatric patient from the beginning of her interactions with the interlocking governmental apparatus of the neoliberal state, it is not clear that she would have ended up

⁵⁹⁶ See e.g. Hannah-Moffatt, Kelly and Shaw, M., eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (pp. 82-93). Halifax: Fernwood Publishing, 2000. See also Kilty, J. M. (2008). *Resisting Confined Identities: Women's Strategies of Coping In Prison*. Unpublished Doctoral Dissertation. Burnaby BC: Simon Fraser University.

⁵⁹⁷ Barron, Christie. *Governing Girls: Rehabilitation in the Age of Risk* Nova Scotia: Fernwood, 2011.

in conditions materially different from those she faced in CSC custody. Like prison inmates, subjects held in secure psychiatric facilities are often held in solitary confinement (albeit by a different names including “seclusion” and “therapeutic quiet”) and are found to have committed suicide at high rates.⁵⁹⁸ Mental illness is characterized by the Canadian Mental Health Association as “the second leading cause of premature death in Canada”.⁵⁹⁹

6.3 Inmate- Patient

Early in 2006, the Ashley the Inmate-Patient figures starts to emerge in official texts; the notion that Inmate Smith has some sort of mental health abnormality starts creeping into the official story about Ashley Smith once she is transferred to CSC custody. Once Inmate Smith is transferred to adult custody, she does attract a wide-ranging series of mental health diagnoses. Even so, mental health experts consulted to deal with Ashley Smith during her life generally continued to produce documents in which the dominant construction of her is as an inmate.⁶⁰⁰ Expressing uncertainty as to how to manage the risks presented by Inmate Smith, CSC management moves her twice to mental health facilities. In January 2007, Inmate Smith is transferred to the CSC Prairie Regional Centre in Saskatoon in order “to obtain a clear diagnosis, and to develop and implement a specialized treatment plan.”⁶⁰¹ However, the treatment to which Inmate Smith is subject in this mental health facility that doubles as a jail is at least as problematic as that she faced in prior CSC placements. When technically housed in psychiatric facilities, Inmate-Patient Smith was frequently kept in “seclusion”, the

⁵⁹⁸ For a general discussion of high rates of suicide in secure mental health facilities see e.g. Gordon, Harvey, “Suicide in secure psychiatric facilities” (2002) *Advances in Psychiatric Treatment* 8: 408-417

⁵⁹⁹CMHA, “Fast Facts About Mental Illness” http://www.cmha.ca/media/fast-facts-about-mental-illness/#.U_OeBPldVPM

⁶⁰⁰ See e.g. testimony of Dr. Allister Webster, Nova Institution psychologist at Ashley Smith inquest: “We needed to consider her behaviour as a result of choice *as opposed to* mental illness” As reported in Vincent, Donovan “Ashley Smith not psychotic, psychologist testifies at inquest” *Toronto Star* (4 March 2013).

⁶⁰¹ Sapers, 2008.

institutional term for solitary confinement.⁶⁰² While in mental health care in March 2007, Inmate Smith is assaulted by correctional Staff at the CSC Prairie Regional Centre.⁶⁰³ In April 2007, following assaults by correctional staff, Smith is voluntarily transferred out of CSC Prairie Regional Centre “for her own personal safety”⁶⁰⁴ and into Institut Phillippe-Pinel de Montreal for treatment.⁶⁰⁵ However, this new placement is discontinued after only two weeks.⁶⁰⁶

Assessments were ordered and made, but Inmate-Patient Smith was assessed for how best to be coded in the institutions’ bureaucratic languages of risk and security. These assessments were conducted in accordance with an institutional logic to which care is not comprehensible and risk and security are the paramount considerations. Dr. Penn based his influential “large, tyrannical child” diagnosis on 35 minutes he had spent interviewing Ashley Smith through the food slot of her segregation cell while she was in Nova Institution. Four days later, he met with her again, communicating once more through the food slot. It is notable that, on this analysis, “craves stimulation” is defined as her pathology. There is no reference made to the *lack* of stimulation with which Inmate Smith was contending at the time of the diagnosis. Similarly, Penn noted that Inmate Smith “is hopeless” without any reference to the fact that her situation, to an outside observer, *was* pretty hopeless. This is one example of a pattern of pathologization and decontextualization prevalent in texts generated by mental health professionals who met with Ashley Smith during her period of incarceration. Also significant, and apparently typical of many reports about Ashley Smith authored by psy-experts during her incarceration, is the confident certainty with which Penn asserts the

⁶⁰² For example, Smith spent her entire time at St. Thomas psychiatric hospital in “seclusion” according to testimony of forensic psychiatrist Dr. Sam Swaminath. As quoted in Blatchford, Christie, “Prison system forced to pick up the pieces with the mentally ill” *National Post* (6 May 2013).

⁶⁰³ Richard, 2008.

⁶⁰⁴ Sapers, 2008

⁶⁰⁵ Sapers, 2008.

⁶⁰⁶ This transfer takes place on May 10, 2007, Richard 2008.

correctness of his diagnosis notwithstanding the difficult and limited circumstances under which the information on which it was based was derived

When the diagnoses were made, priorities in response were overwhelmingly security-focused. It is a much-repeated statement in the Smith case that Ashley Smith “never received a comprehensive psychological assessment.” However, Inmate-Patient Smith was psychologically and psychiatrically “assessed” multiple times. Inmate-Patient Smith was assessed at St. Thomas psychiatric hospital by Dr. Sam Swaminath, a forensic psychiatrist, who gave testimony at the inquest that the priority was not treatment of her diagnosed mental illness but security and containment: “First and foremost, the issue was to keep her safe and try to contain her.”⁶⁰⁷ Similarly, in the days leading up to her death, according to testimony at the inquest, Inmate Smith was “assessed” several times by SCS psychologist Dr. Cynthia Lanigan: on October 9, 10, 12 and 16th, Inmate Smith was given psychological assessments.⁶⁰⁸ These assessments were security-based calculations of risk: evaluations of the likelihood that Inmate Smith would seek to commit suicide, not of what might help her. It is widely understood that Canada’s mental health and correctional systems are separate and discrete entities. The formal criminal law sets up a binary split between what are understood as two separate systems.⁶⁰⁹ Definitions of mental disorder and capacity and frame inquiries in criminal proceedings that responsabilize actors with capacity and consign them to corrections custody while they completely de-responsibilize actors found not to be “criminally responsible by means of mental disorder”⁶¹⁰ or not

⁶⁰⁷ As quoted in Blatchford, Christie, “Prison system forced to pick up the pieces with the mentally ill” *National Post* (6 May 2013).

⁶⁰⁸ For discussion, see e.g. Vincent, Donovan, Ashley Smith inquest: Teen talked about suicide, psychologist testifies “ *The Toronto Star* (24 June 2014)

http://www.thestar.com/news/canada/2013/06/24/ashley_smith_inquest_teen_talked_about_suicide_psychologist_testifies.html

⁶⁰⁹ To see the operation of this binary test see the leading case *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 1999 CanLII 694 (S.C.C.) at para 31

⁶¹⁰ S. 16 *Criminal Code*

“fit to stand trial.”⁶¹¹ There is no “middle ground” in these determinations: the inquiry is binary and results in an either/or determination as to sanity, or capacity for criminal fault (*mens rea*).⁶¹²

Under earlier formal regimes set up to deal with problematic behaviour by adolescents in Canada, an exception was made to this binary mental health/criminal law split. The *Juvenile Delinquents’ Act*, in force until 1984, dealt with adolescents in a hybrid system where adolescents found to have committed criminal or quasi-criminal acts could be labeled with a “status” of delinquent and incarcerated in “training schools” for indeterminate periods.⁶¹³ Abuses of, and problems with, this “benevolent” approach to government of adolescents were sought to be remedied when new rights-based legislation was ushered in.⁶¹⁴ It is out of recognition for problems with the past approach that the *YCJA* specifically prohibits the use of carceral sanctions (custody) for reasons in the “best interests” of the child such as mental health treatment.⁶¹⁵

It is not only in the youth system that custodial mental health treatments have been seen to be problematic. Where a finding of guilt in the criminal system results in a determinate sentence, a committal to mental health custody is much more open-ended, could be permanent, does not have to be proportionate or even referential to the relative seriousness of the offence, and is subject only to periodic reviews. Indeed, a committal to mental health custody does not require a preliminary court order or hearing.⁶¹⁶ In short, many have argued that the mental health system has more Draconian

⁶¹¹ S. 2 *Criminal Code*

⁶¹² Eaves, D., Ogloff, R.P. and R. Roesch, eds. *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives*, (Burnaby, BC: Mental Health, Law and Policy Institute, 2000)

⁶¹³ See discussion in Chapter 2.

⁶¹⁴ As discussed, the YOA, in 1984, separated protective from punitive responses

⁶¹⁵ s. 39

⁶¹⁶ Section 17 of Ontario’s MHA provides police with authority to take a person to for examination by a physician, where it would be “dangerous” to proceed to obtain a Form 2. In other words, police may apprehend a person and take him or her to a mental health facility for committal at a psychiatrist’s order, without prior Form or order, if the circumstances set out in section 17 are met. Other provinces and territories in Canada have analogous provisions.

power, exercisable in less transparent ways, to exclude subjects from political community than does the criminal/correctional one.⁶¹⁷

An important formal legal text that sets out conditions of possibility shaping the Smith case is Ontario's provincial *Mental Health Act (MHA)*.⁶¹⁸ This is the provincial law that applies to the mental health assessment and treatment Inmate Smith underwent while at Grand Valley. The mental health legislation of other provinces applies in respect of her time held in other jurisdictions (e.g. Saskatchewan and Nova Scotia.) The MHA defines the jurisdiction for interventions to be undertaken that affect adolescents on the basis of mental health. The MHA also authorizes detentions for reasons of risk and provides jurisdiction for strip and body cavity searches such as those to which Inmate Smith was subject.⁶¹⁹ Significantly, also, s. 25 of the MHA authorizes the use of restraints against mental patients, including chemical restraints (such as psychotropic drugs).

There is significant overlap between subjects identified as criminal and those labeled as having a mental illness, particularly where women inmates are concerned. Large percentages of prison inmates have received diagnoses of mental illness, either before or after being incarcerated.⁶²⁰ This overlap is especially pronounced when the inmates considered are gendered female. More than twice as high a percentage of female than male inmates (30% / 11%) have mental illness diagnoses when admitted to CSC custody.⁶²¹ The percentage of inmates receiving mental health diagnoses and treatment has changed over time. Mental illness is now generally sought to be treated in the community; this has

⁶¹⁷ For discussion see e.g. Morrow, Marina et al. *Women's Health in Canada: Critical Perspectives on Theory and Policy*. Toronto: University of Toronto Press, 2007.

⁶¹⁸ RSO 1990 c. M. 7

⁶¹⁹ Form 1 of the *Ontario Mental Health Act* RSO 1990 c. M.7 allows for psychiatric assessments to include body cavity searches: [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetAttachDocs/014-6427-41~1/\\$File/6427-41_.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetAttachDocs/014-6427-41~1/$File/6427-41_.pdf)

⁶²⁰ Correctional Service of Canada. (2009). Quick Facts: Mental Health Strategy. Ottawa:

Author. Retrieved online December 31, 2009 from <http://www.csc-scc.gc.ca/text/pblct/qf/11-eng.shtml>

⁶²¹ Precise estimates vary but there is a consensus in the literature that women entering prison are much more likely than men to be diagnosed with mental illness. See e.g. Brink, J.H., Doherty, D., & Boer, A. "Mental disorder in federal offenders: A Canadian prevalence study" (2001). 2 *International Journal of Law and Psychiatry* 330-356.

resulted since the 1960s in a de-institutionalization of people diagnosed with mental illness by the mental health system. However, there is a corresponding increase in numbers of people with mental illness being admitted to prison.⁶²² A growing body of research shows that the same population being de-institutionalized by the mental health system is being *re*-institutionalized in the prison system. A 2013 report referring to US statistics put forward by *Mother Jones* provides a schematic that shows how, where numbers of prison inmates have gone up over the past 20 years or so, numbers of persons held in mental institutions have decreased by roughly the same percentages.⁶²³

A connection between de-institutionalization of the mentally ill in the mid-twentieth century and disproportionate homelessness and incarceration of the same populations of mentally ill individuals has also been demonstrated in Canada. A recent study by the Mental Health Commission of Canada tracks negative consequences to populations diagnosed as mentally ill of the closure of over 80% of mental health beds across Canada since the 1970s. What the study argues has followed is increased homelessness, a decreased life expectancy and the emergence of “jails and prisons” as “the new institutional setting” for those identified as mentally ill.⁶²⁴ At the macro-level, de-funding of mental health institutional care and “tough on crime” agendas in contemporary neoliberal nation states and especially Canada under the Harper government are increasing numbers of prison populations; counter-discourses are being deployed to seek to intervene in these general trends.⁶²⁵ Indeed, the de-institutionalization of Ashley Smith as a psychiatric patient through her release from the Pierre Caissie

⁶²² For discussion see e.g. Wasylenki D. “The paradigm shift from institution to community”. In: Rae-Grant Q, editor. *Psychiatry in Canada: 50 Years*. Ottawa: Canadian Psychiatric Association; 2001.

⁶²³ <http://www.motherjones.com/mojo/2013/04/map-states-cut-treatment-for-mentally-ill> See “Locked Up But Where” chart
⁶²⁴ Mental Health Commission of Canada, “Turning the Key: Assessing Housing and Related Supports for Persons with Mental Illness: http://www.mentalhealthcommission.ca/English/system/files/private/PrimaryCare_Turning_the_Key_Full_ENG_0.pdf

⁶²⁵ For a statistical study of these trends see e.g. Davis S. “Assessing the ‘criminalization’ of the mentally ill in Canada”. (1992) *Can J Psychiatry* 37;pp.s 532–38.

Centre and her re-incarceration as a carceral subject in the correctional system mirror in microcosm these broad social trends.

At the same time, organizationally, different discrete bureaucratic apparati exist: while there are mental health experts at work in the Federal correctional system, there is also an overlapping mental health system administered at the provincial level. Between these two systems, at a different level of power, corrections and mental health authorities are trying to shift responsibility and blame for mental health issues of inmates on to one another. It was not just tactical decisions by CSC counsel at the inquest or media attention that contributed to the demise of the dominance of the Inmate Smith figure. Aspects of meso-level formal legal apparati that shaped the conditions of possibility in which the case came to prominence also contributed to the dominant reconfiguration of Ashley Smith from an Inmate into a Patient. Once the Smith case became infamous, it became in the interests of Federal politicians to characterize it as a case not of a problem with (Federal) corrections but with (Provincial) mental health. The division of powers set forth under Canada's *Constitution Act, 1867* divides various powers between levels of government, a division that politically incentivizes a shell game where actors from different levels of governments recast problems as in each other's jurisdiction. Health, including mental health, falls in provincial jurisdiction (under s. 92) while the criminal justice power is Federal (under s. 91). As a result, the Federal government is responsible for inmates in penitentiaries (serving adult sentences of two years or more) and provincial and territorial governments are responsible for dealing with inmates serving shorter sentences as well as youth in custody.⁶²⁶

Patient Smith is configured during her life as pathological and exceptional and her mental health is framed generally as a cause of her problems in the juridical field and not as an effect of her

⁶²⁶ The first Canadian assertion of Federal jurisdiction over penitentiaries took place with the *Penitentiary Act, 1868*

treatment there. An illustrative example of this is presented by the core psychopathic element of BPD that a patient “lacks a sense of self.”⁶²⁷

It is unclear why treating mental health professionals assumed Smith could have consolidated and maintained a “sense of self” under the circumstances and did not read negotiations of subjectivity into the resistances she was “doing”. Indeed, this interpretation completely ignores the complicity of CSC’s bureaucracy in her alleged lack or loss of a sense of self, makes invisible the burden placed on Ashley Smith’s sense of self by CSC management’s unrelenting disciplinary actions against her, While the resistant behaviours of Patient Smith are read under this diagnosis as reflecting a lack of a sense of self, quite the same sorts of resistant behaviours by men in prison have been read in other contexts as negotiations of subjectivity men engage in to *retain* their masculinity and *foster* a sense of self when they are incarcerated and their freedom is limited to less than that accorded a young child.⁶²⁸ Further, adolescent girls are held widely in popular psychology to be in the process of developing a sense of themselves, and literature about developmental psychology and gender now largely contends that developing a “healthy” sense of self is particularly difficult for “normal” adolescent girls.⁶²⁹ Given that Ashley Smith was a longterm inmate in solitary confinement since age 15 and had been subjected to social and juridical necropolitical actions which in effect *eliminated* her social and political selves from existence in human community before she reached adulthood and received this diagnosis. Further, traumatic experiences are being increasingly linked with the diagnosis

⁶²⁷ For discussion see e.g. Winston, Anthony P. “Recent Developments in Borderline Personality Disorder” (2000) 6 *Advances in Psychiatric Treatment* 211-217.

⁶²⁸ For an interesting analysis of male prisoners’ resistance as masculinity and self assertion see Ugelvik, Thomas. *Power and Resistance in Prison: Doing Time, Doing Freedom* New York: Palgrave MacMillan, 2014.

⁶²⁹ See e.g. Sandler, Sarah *Opbelia Speaks: Adolescent Girls Write About Their Search for Self* Harper Perennial: New York, 1999 – a collection of essays by teenage girls.

of BPD by cultural studies theorists as well as psychologists and psychiatrists.⁶³⁰ The traumatic experiences of abuse Ashley Smith experienced while an inmate are strikingly absent from the testimony and texts of all but one mental health professional who treated Inmate-Patient Smith.⁶³¹ The contention that Patient Smith lacks a “sense of self” obscures the institutional course of action not altogether unlike what Primo Levi describes in Auschwitz as a logic of the camp calculated to bring about “the demolition of a man.”⁶³² It is remarkably unreflexive on the part of those labeling Ashley Smith with the BPD disorder not to comment on this context.

Reframing by government of the Smith case as not one of an Inmate but properly a Patient is analogous at the meso level to the microprocesses that took place in the seventeen transfers she underwent while in CSC custody: passing the case along to be someone else’s problem. At the inquest, St. Joseph’s Health Care, operator of St. Thomas psychiatric hospital, where Ashley Smith spent nine days shortly before her death, was represented by counsel. Counsel for the hospital, after the inquest verdict, is quoted as saying: “The hospital... foresaw that there would be an issue in this inquest over whether responsibility for women inmates suffering with complex mental disorders should be the responsibility of the federal corrections system or the provincial mental health sector.”⁶³³

The Federal government is able to protect its own practices from scrutiny by casting the issues raised as mental health problems. When, on October 25, 2012, in the House of Commons Hansard, Vic Toews, then Minister of Public Safety and Corrections was questioned by the MP Judy Foote of Opposition Liberals as to why the Ashley Smith inquest was being “obstructed”⁶³⁴ Toews responded

⁶³⁰ *Ibid* – Also, the DSM V, http://www.psi.uba.ar/academica/carrerasdegrado/psicologia/sitios_catedras/practicas_profesionales/820_clinica_tr_personalidad_psicosis/material/dsm.pdf

⁶³¹ The exception is Dr. Eljdupovic, see below.

⁶³² Levi, Primo *Survival In Auschwitz: The Nazi Assault on Humanity* New York: Simon and Schuster, 1996.

⁶³³ “St. Thomas Hospital Couldn’t Help Smith: INQUEST: Federally-Operated Treatment Centres for Mentally Ill Women Inmates Recommended” *St. Thomas Times- Journal* (21 December 2013)

⁶³⁴ House of Commons Hansard November 2, 2012 http://publications.gc.ca/collections/collection_2012/parl/X3-411-175-eng.pdf

that the Smith case was about the “need for mental health care to be dealt with by our provinces.” This can be seen as an evasion of responsibility for the Smith case by the Federal government not dissimilar to the series of transfers between institutions she underwent while in CSC custody. This statement functioned both to pass blame for her death from the Federal to the Provincial government and to bolster the structures and systems of the prison industrial complex by sidestepping criticism. Similarly, when Prime Minister Stephen Harper, also in 2012, told media he was “horrified” by the CSC surveillance tapes and decried the conduct of CSC in the Smith case,⁶³⁵ this statement drew focus onto the problematic aspects of CSC management and away from any links that might be drawn between the treatment of inmates and his government’s “tough on crime” agenda and its characteristically exclusionary regime of governance through crime.

However, while there are different bureaucracies in the federal and provincial mental health and correctional systems, the mental health treatment Ashley Smith received while incarcerated reveals, rather than the operation of two separate systems of power and knowledge in mental health and incarceration, an enmeshment of the two. Certainly, the systems use different technical languages and invoke different formal legal texts, and are at times mutually unintelligible. However, the overlapping processes of the mental health and correctional systems in the Smith case present as a messy, tense, intertwining with the two discursive systems functioning together.

Ashley Smith was transferred not just between CSC facilities but was rather shuttled between mental health and correctional placements. She was placed in mental health facilities managed by various provinces (Quebec, New Brunswick and Ontario) as well as in mental health facilities administrated by CSC in addition to CSC prisons and New Brunswick youth correctional facilities.

⁶³⁵ See e.g. “Harper Horrified by Smith Surveillance Tapes” *CTV News* (12 November 2012)

Management of her in mental health facilities and at the direction of certain mental health experts appears to have been at least as problematic as her treatment by CSC management.

Just as critical discourse analysis of the figure of Inmate Smith reveals messiness and the radical contingencies of guards' agencies so does analyzing the figure of Patient Smith reveal resistances, messiness and muddiness in the mental health field. There is not one monolithic or unitary mental health diagnosis or approach taken to Patient Smith. In contrast to the high degree of certainty of Dr. Penn evidently felt in his diagnosis given the given context of his brief session with Inmate-Patient Smith, psychologist Dr. Gordana Eldjupovic, who treated Ashley Smith briefly at Grand Valley Institution stands out. Dr. Eldjupovic's testimony at the inquest evidences resistance on her part against the CSC regime: "I don't think I ever received training to provide therapy through a food slot." Eldjupovic's characterization of Smith is less confident and less simplistic than that of many other treating professionals. Anomalously, in inquest testimony, she contextualized Smith's behaviours in her experiences while incarcerated. Eldjupovic said Smith sometimes "showed tremendous joy and happiness anyone having to spend so much time in segregation would not do well. It's important to find things the person likes to do." Eldjupovic's testimony stands out as resistant and, in the face of a CSC regime that employed her and also sought to silence the inquest inquiries, brave.⁶³⁶

The figuration of Ashley the Inmate-Patient intersects with pre-existing discourses of mental illness when she is assigned various mental health diagnoses. Ashley Smith was never, at any point during her experience within the juridical field and mental health systems, determined to be psychotic, or out of touch with reality. Rather, she was diagnosed with a variety of personality disorders. Ashley the Inmate-Patient is diagnosed with "antisocial personality disorder with borderline traits" while at the

⁶³⁶ Sense of Panic Surrounded Ashley Smith: Grand Valley Psychologist Testifies at Inquest" *CBC News* (18 June 2013).

Institute Philippe-Pinel in 2007.⁶³⁷ As Saskatoon Regional Psychiatric Centre, she is diagnosed with “borderline personality disorder.”⁶³⁸ Personality disorders are diagnosed based on divergences from the norm.⁶³⁹ The term “personality disorder” in mental health discourse stands in the place of longstanding behavioural abnormality.⁶⁴⁰ What would be described in the official discourse of CSC as persistent “bad choices” would be characterized in mental health discourse as the persistent “maladaptive behaviours” signaling a personality disorder. People with personality disorders are not defined as incapacitated: they are able to make plans and take action purposefully. They are not confused nor have they had a “psychotic break” from reality (unless they have a simultaneous disorder additional to a personality disorder). Rather, they have persistent habitual behaviours not generally found to be socially acceptable.⁶⁴¹

The Ashley the Inmate-Patient figure, as it emerges from official expert mental health discourse in texts and inquest testimony, is not unagentic. Rather, the agency of this figure is constructed in a very similar way to that of Inmate Smith, albeit using different terms. Where Inmate Smith is capable of compliance or non-compliance and can make good or bad choices, in expert discourse, Ashley the Inmate-Patient has the capacity to comply with therapeutic directions and choose to “adapt” her persistent maladaptive behaviours to conform to societal expectations and be more pro-social. While Inmate-Patient Smith’s agency is de-politicized, understood as having no *meaning*, and hindered by the external constraint of her habitual maladaptive functioning, it is she and she alone who

⁶³⁷ Report of Dr. Beaudry

<http://www.falconers.ca/documents/CorrectionalInvestigatorsPsychiatristsReviewofForcedInjectionsApril192010.pdf>

⁶³⁸ *Ibid.*, <http://www.falconers.ca/documents/CorrectionalInvestigatorsPsychiatristsReviewofForcedInjectionsApril192010.pdf>

⁶³⁹ Nervenarzt. “Prevalence of psychiatric disorders, psychopathology, and the need for treatment in female and male prisoners”. 2006 *Jul*; 77(7):830-41.

⁶⁴⁰ As defined in the DSM-IV, a personality disorder is an enduring pattern of behaviour that deviates markedly from cultural expectations, is pervasive, has its onset in adolescence or early adulthood, is stable over time, and leads to distress or impaired functioning.

⁶⁴¹ American Psychiatric Association (2013). *Diagnostic and Statistical Manual of Mental Disorders* (Fifth ed.). Arlington, VA: American Psychiatric Publishing, pp. 646–649.

is understood as capable of overcoming those habits, and it is only once she starts to co-operate with treatment that mental health professionals may be able to support her in changing.⁶⁴²

However, during her time in corrections custody, Ashley Smith actively resisted being characterized as a patient. She persistently refused medical and mental health assessments and treatment.⁶⁴³ Because she refused treatment, she was “certified” four times under Ontario’s Mental Health Act and four times under Saskatchewan’s legislation in the same year, 2006.⁶⁴⁴ This certification gave mental health authorities the power to give her medication by force. She maintained claims that she was not mentally ill; indeed her repeated assertion of this claim is referenced in several instances as *evidence* of her mental illness.⁶⁴⁵ With mental health authorities’ authorization, although not in accordance with formal regulations as to how this authorization should be procured, Ashley Smith was, while in restraints, administered forced injections of psychotropic drugs on July 22, 23 and 26, 2007 at Joliette Institution.⁶⁴⁶ The rationale given for the use of these restraints was security of staff and other inmates: mental health “treatment” was thus invoked for security reasons.

One of the mental health labels put on Ashley the Inmate-Patient that seems to stick better than some others is that of “borderline personality disorder” (BPD). Indeed, towards the end of her life in prison, diagnoses coalesce around BPD. This is not unproblematic. BPD is a thoroughly unscientific, historically gendered and stigmatizing diagnosis.⁶⁴⁷ A diagnosis of BPD seems to, but doesn’t *really*, distinguish Ashley the Inmate-Patient from other carceral subjects. Many, if not most, prisoners are diagnosed or diagnosable with BPD. According to a report by 57 independent monitoring boards of

⁶⁴² See e.g. inquest testimony of Dr. Renée Fugère, psychiatrist at Institut Philippe-Pinel de Montréal

⁶⁴³ See e.g. Sapers 2008 at paragraph 20.

⁶⁴⁴ *ibid*

⁶⁴⁵ Dr. Renée Fugère, psychiatrist at the Institut Philippe-Pinel de Montréal, referenced Ashley Smith’s refusal of treatment as evidence of her “antisocial personality disorder” in her inquest testimony.

⁶⁴⁶ Report of Dr. Paul Beaudry

<http://www.falconers.ca/documents/CorrectionalInvestigatorsPsychiatristsReviewofForcedInjectionsApril192010.pdf>

⁶⁴⁷ See e.g. Zlotnick C, Clarke JG, Friedmann PD, Roberts MB, Sacks S, Melnick G *Behav Sci Law*. 2008; 26(4):403-12. See also von Schönfeld CE, Schneider F, Schröder T, Widmann B, Botthof U, Driessen M

prisons in the United Kingdom (UK), 90 percent of inmates have at least one diagnosable mental disorder. 25-50% of prisoners studied were diagnosed as having BPD with women more likely to be so diagnosed.⁶⁴⁸

As Foucault has theorized and as research by feminist scholars has previously shown, mental health discourses serve as technologies of government that depoliticize and decontextualize the acts and other responses of actors, and in particular women.⁶⁴⁹ Feminist criminologists have critically scrutinized ways in which mental health diagnoses are consistently assigned to women who resist authority in carceral settings.⁶⁵⁰ More specifically, personality disorder diagnoses are slippery and problematic labels of abnormality.⁶⁵¹ Borderline Personality disorder in particular has been the subject of a great deal of feminist critique.⁶⁵² At least 75% of those diagnosed BPD are female.⁶⁵³ BPD has been criticized by feminist researchers as pathologizing technologies that depoliticize certain behaviours and remove them from, or make invisible, the oppressive context in which they emerge.⁶⁵⁴ A diagnosis of BPD has been criticized for making invisible experiences by girls and women of trauma and sexual abuse.⁶⁵⁵ Proctor calls BPD “the latest example of a historical tendency to explain away as “madness” the strategies some women use to survive oppression and abuse.”⁶⁵⁶ BPD is diagnosed based on a patient’s observed behavioral pathologies and not with reference to the context in which

⁶⁴⁸ See e.g. Zlotnick, C. et al. :Gender differences in comorbid disorders among offenders in prison substance abuse treatment programs.” (2008)26 *Behav Sci Law*. 4, pps. 403-12.

⁶⁴⁹ Ussher, Jane *Women’s Madness: Misogyny or Mental Illness?* Amherst: University of Massachusetts Press, 1991.

⁶⁵⁰ Smart, Carol. *Women, Crime and Criminology: A Feminist Critique* London: Keegan, 1976.,

⁶⁵¹ For discussion of the overlap of punishment and protection in the history of the imprisonment of women see e.g. Bosworth, Mary. “Confining femininity: A history of gender, power and imprisonment”. (2000). *Theoretical Criminology*, 4(3), 265-284. See especially p. 270.

⁶⁵² For discussion see e.g. Wirth-Cauchon, Janet. *Women and Borderline Personality Disorder: Symptoms and Stories* USA: Rutgers University Press, 2003. See also, Ring, Jessica. “Incorrigible While Incarcerated: Critically Analyzing Mainstream Canadian News Depictions of Ashley Smith” *CJSC Vol. 3 - Issue 1 No. 1 – Spring / printemps 2014*

⁶⁵³ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)

⁶⁵⁴ Rosenfield, S. (1982). Sex Roles and Societal Reactions to Mental Illness: The Labeling of “Deviant” Deviance. *Journal of Health and Social Behavior*, 23(1), 18-24.-- (2012). Triple Jeopardy? Mental health and the intersection of gender, race, and class. *Social Science & Medicine*, 74(11), 1791-1801.

⁶⁵⁵ See Proctor.Gillian. 'Disordered Boundaries? A Critique of Borderline Personality Disorder' published by psychminded.co.uk and available on 23.8.09 at <http://www.psychminded.co.uk/news/news2007/June07/borderline001.htm>

⁶⁵⁶ E.g. Gillian Proctor, in ‘BPD: mental illness or misogyny?’ (Therapy Today, March 2010)” ‘

these behaviours have arisen. Acts often associated with BPD might alternatively be understood to reflect adaptations to experiences of powerlessness.⁶⁵⁷ Proctor contends that the diagnosis of BPD “pathologises and stigmatises women who struggle to survive experiences of abuse and oppression”⁶⁵⁸ Similarly, Clare Shaw, among others, has argued that BPD is diagnosed relative to an assumed normal that is based on stereotypes of feminine behaviour as passive and non-resistant.⁶⁵⁹ Proctor writes:

The diagnosis of BPD is located within gendered structures of power and processes of understanding. This can be understood simplistically in terms of a dual approach

1. Labeled mad: Women are labeled ‘mad’ when they don’t conform to society’s norms.

This approach argues that the concept of ‘madness’— rather than describing disease entities—is an idea which has been created by society to exclude and stigmatize people who refuse to behave as society expects they should

2. Driven mad: Women are driven mad by their lot in this society. This approach looks at how women cope with life in a society in which they are less likely than men to have access to money, status, power and other resources, and are more likely to experience sexual abuse and violence.⁶⁶⁰

In addition to being problematic as a diagnosis, much like the Correctional “maximum security” designation, the mental health diagnosis of BPD does not mean what it is widely taken-for-granted that it means. A diagnosis of BPD may sound to a person without psy-expertise like it has a nuanced and specific meaning. However, Proctor disparages BPD as a “catch-all label

⁶⁵⁷ Proctor at p. 115.

⁶⁵⁸ *Ibid*, at p. 1.

⁶⁵⁹ Shaw, Clare ‘Women at the Margins: me, Borderline Personality Disorder and Women at the Margins’ *Annual Review of Critical Psychiatry*

⁶⁶⁰ Proctor, *ibid* at p. 112:

applied to ‘difficult patients.’⁶⁶¹ BPD may simply stand in for saying a subject has committed acts of self-harm. Acts of self-harm, are, according to Proctor, often definitively diagnostic of BPD; seen in this light, the diagnosis adds nothing to what is said in official CSC sites that Inmate Smith is a carceral subject who has committed self-harm while in prison. It is not at all clear that the BPD diagnosis is based on or reveals more than the uncontested fact that Ashley Smith, especially after long periods in segregation, self-harmed.

BPD and other personality disorders with which Ashley the Inmate-Patient was diagnosed such as Oppositional-Defiant disorder are discourses that psy-experts claim an expertise in defining and diagnosing but not really in treating or curing. Psy-experts have developed few, if any, treatment resources to match these labels.⁶⁶²

Analysis of the Ashley the Inmate-Patient figure reveals the entanglement of the criminal, correctional and mental health systems as overlapping and often unified governmental apparatus. The commonly assumed understanding of mental health system as separate from corrections obscures the connections between different forms of governance and the ways in which mental health powers and treatments are used in necropolitical exclusions and punishment. Further, it sheds light on the messiness of the diagnostic apparatus to which Ashley the Inmate-Patient was subject and the problematic nature of the certainty of many mental health experts who dealt with her as to particular diagnoses. Close scrutiny of the Ashley the Inmate-Patient figure raises questions about the enmeshment of Canada’s correctional and mental health systems in mutually supportive systems of governmentality as well as about the legitimacy of mental health expertise. So, Ashley the Inmate-Patient figure has potential to be articulated as a technology of resistance

⁶⁶¹ Proctor, *ibid* at 117.

⁶⁶² Proctor, *ibid* at 116.

against uncritical, simplistic retrenchments of the governmental apparatus of mental health discourses and systems.

6.4 Patient Smith – A Sympathetic Victim

Immediately after the death of Ashley Smith, the configuration of her as a mental patient and victim of both her disease and the correctional system is present in a number of progressive and liberal texts and in political debate. The Patient Smith figure dominates from early on in the Smith case in texts produced by feminist and other progressive advocates in the Smith case. For example, Kitchener-area Liberal MP Karen Redman, raising Smith's death in question period, refers, without referencing any specifics of her condition or any authority to back up the assertion of her mental illness, to Smith as a "mentally unstable teenager"⁶⁶³ In a local New Brunswick paper, Smith is referred to as a "mentally ill Moncton Teenager."⁶⁶⁴ Executive Director of the Elizabeth Fry Society (CAEFS), Kim Pate, has frequently articulated the Patient Smith construction since well before it became dominant in the case. Pate is quoted as referencing "inmates like Smith who are dealing with mental health issues."⁶⁶⁵ As early as 2007, Pate is quoted as defining Smith as one of many "women in the justice system who have severe mental health issues."⁶⁶⁶ The configuration remains stable in mainstream media texts until at least the time of the inquest decision. For example, during the inquest Pate in 2013 is quoted as characterizing Smith as one instance of a type of "the mentally ill."⁶⁶⁷ It is not clear on what basis Pate makes this assertion, although she elsewhere references her first person experiences

⁶⁶³ as reported in Link, Rob, "Chained and Bound: Ashley Smith was Kept Shackled in Prison: New Information Reveals" St. John Telegraph-Journal 2007 (November 24, 2007)

⁶⁶⁴ *ibid*

⁶⁶⁵ CBC News "Changes Needed in Correctional System: Prisoners' Rights Activist" (16 November 2007) <http://www.cbc.ca/news/canada/new-brunswick/changes-needed-in-criminal-justice-system-prisoners-rights-activist-1.673788>

⁶⁶⁶ "New Brunswick Ombudsman Investigates Death in Ontario Prison" CBC News (29 October 2007).

⁶⁶⁷ "Teen Ashley Smith Inquest Begins Today" MSN News(14 January 2013)

meeting with Ashley Smith as evidence of the validity of her views on what Smith was like. Further, the assertion fits with a pre-existing agenda of the Canadian Association of Elizabeth Fry Societies, an advocacy organization of which she is executive director, articulated to the United Nations and elsewhere at least as early as 2005, to establish more and better mental health services for women across Canada.⁶⁶⁸

It is also, at a minimum, perplexing that the McGill paper previously discussed in the Child Ashley chapter, which was a project supervised by Kim Pate, identifies Ashley Smith in 2008 as an aboriginal woman when Pate was, at least since 2009, one of the chief engineers of the narrative that Ashley Smith was a middle class white girl.⁶⁶⁹ This is not helpful to the credibility of this advocacy, or to the general cause of reducing aboriginal over-incarceration, and, in light of the multimillion dollar settlement yielded in the civil settlement of the Smith family's suit with CSC, and the donation of a significant chunk of those monies to CAEFS, it is troubling indeed. However, perhaps she and other CAEFS advocates can be most fairly understood not as misrepresenting Ashley Smith but as colonizing her experiences in the service of their predefined social agendas. Configuration of Patient Smith has its roots as a counter-discourse articulated by reformers speaking back against the official story about Inmate Smith and apparently seizing upon a selective telling of Ashley Smith's story to advance their pre-existing agendas, agendas which closely match those of the nineteenth century "child savers"; it is not until three years after her death that Patient Smith becomes the dominant configuration of Ashley Smith more generally. According to Jessica Ring's quantitative analysis of mental health labels in mainstream media reporting of the Smith case:

⁶⁶⁸ CAEFS' 2005 submission to the United Nations is available at the following link: <http://www.caefs.ca/wp-content/uploads/2013/04/april05.pdf>

⁶⁶⁹ McGill, "Canada's Suicide Machine" *ibid.*

liberal and centrist news articles on Ashley Smith dispute her ‘prisoner’ label by maintaining a dichotomous relationship between Ashley and ‘other’ prisoners. In this dichotomy, ‘offender first’ language is considered acceptable for incarcerated individuals who are not mentally ill. Offender first language emphasizes the ‘offender’ label over any other characteristic of the individual—the primary identity ascribed to the person is that of ‘offender’.⁶⁷⁰

By late 2010, the dominant configuration of Ashley Smith in the Smith case is no longer as an inmate or child but as a mislocated mental patient. As discussed by Ring in use of “topic models” of mainstream media depictions of Ashley Smith,⁶⁷¹ by 2010, “Smith is typically presented as mentally ill” in mainstream media sites. Two texts appear to have been critical in effecting the metamorphosis of the configuration and the emergence of Patient Smith as the dominant configuration in the Smith case: the “Behind the Walls” documentary portrayed Smith’s time at Saskatoon’s Regional Psychiatric Centre and the release by *Globe and Mail* reporter Kirk Makin among others of excerpts from psychologist Dr. Margo Rivera’s internal CSC report together appear to have brought the discursive pattern to a tipping point. Dr. Rivera found that: “I consider it highly likely that Ashley Smith's death was not a suicide, but rather an accident, and that no one intended Ashley Smith to die - least of all Ashley Smith herself.”⁶⁷²

By 2012, the Patient Smith figure has clearly eclipsed other figurations of Ashley Smith in mainstream media sites. A significant text that assures this is the November 12, 2012 episode

⁶⁷⁰ Ring, “Incorrigible While Incarcerated: Topic Modeling Mainstream Canadian News Depictions of Ashley Smith” Carleton University Master’s Thesis 2013 <https://curve.carleton.ca/system/files/theses/27484.pdf> at p. 87.

⁶⁷¹ Ring, Jessica “Incorrigible While Incarcerated: Topic Modeling Mainstream Canadian News Depictions of Ashley Smith” Carleton University Master’s Thesis 2013 <https://curve.carleton.ca/system/files/theses/27484.pdf>

⁶⁷² See e.g. Makin, Kirk “Ashley Smith’s Death Was an Accident, not Suicide” *The Globe and Mail* (29 October 2010).

of CBC's "The Current" entitled "Ashley Smith and Mental Health in Canada's Prisons."⁶⁷³

This episode airs the day before the second inquest in the Smith case commences. In this episode, Ashley Smith is described by narrator Anna Maria Tremonte as "a troubled 19 year old." Prisoner advocates Lee Chapelle and Kim Pate are interviewed, as is Candice Bergen, parliamentary secretary to the Minister of Public Health. In the segment, the question explored is: "whether the mentally ill get the support they need in Canada's prisons - and whether prison is really the best place for them." An assumed starting premise of the question at issue is that Ashley Smith is an instance of the type Patient whose mental health issues have been dealt with erroneously by authorities and who has been mislocated in prison rather than in a mental institution.

With the 2013 release of Sapers' "Risky Business" report, the "caseness" of Patient Smith is further solidified with her being a representative case of a type of which there are very few.⁶⁷⁴ The "Risky Business" report, and the preponderance of subsequent texts in media sites about the Smith case, focused on "chronic self-injury among federally sentenced women" of whom Sapers estimates there are 37 at the time the report is released, and of whom there is a further subset of 8 "most high risk and chronic self-injurious women in the federally sentenced women population."⁶⁷⁵ Reconfiguring the "caseness" of Ashley Smith away from being one of 40,000 inmates and into being one of 8 – 12, or perhaps 32-37 seriously mentally ill self-harming female inmates re-frames her from being an ordinary inmate to being an extraordinary one. The figure of Patient Smith turns Smith into a case to be mobilized within specific pre-existing change discourses, specifically in relation to increased funding for mental health treatment.

⁶⁷³ <http://www.cbc.ca/thecurrent/episode/2012/11/12/ashley-smith-case-mental-health-in-canadian-prisons/>

⁶⁷⁴ Recall the discussion of "caseness" per Lauren Berlant in Chapter 3. Berlant, Lauren "On the Case" (2007) 33 *Critical Inquiry* 4 pp. 663-672.

⁶⁷⁵ Sapers, *ibid*'at p. 5.

Patient Smith is a “chronic self-injury case.”⁶⁷⁶ This construction is convenient for CSC because it makes Ashley Smith, not their bureaucracy, the problem. Because she has come to be understood as so aberrant and monstrous, on this understanding, conclusions to be drawn about, and actions called for by, the Smith case, are no longer broadly relevant in the public square to debates about CSC policy, the administration of justice in relation to youths and neoliberal governance through crime.

The verdict in the inquest released on December 19, 2013 is detailed, nuanced and complex; it sets forth 104 recommendations.⁶⁷⁷ However, overwhelmingly, the public has not made sense of the Smith case through the full text of that decision. Rather, it is the construction of the case in media and political sites that is definitive of how popular meanings are made of the Smith case. The overwhelming preponderance of texts about the verdict in these sites simplify it into single theme, a narrative structure that centres around the correctional system’s failure to treat the mental illness of Patient Smith. Their use of solitary confinement in the course of this failure is a sub-theme within this.

Representations of Patient Smith are not, by and large, stigmatizing or disparaging: the configuration is framed benevolently in the preponderance of sources. Certain visual texts embedded in the docudramas about Ashley Smith and also in the videos shown at the second inquest then disseminated in mainstream media sources have become pivotal in coalescing the Patient Smith figure. One key visual text in this respect is the video, released after CSC was ordered to unseal it in 2012, of an RCMP officer using duct tape to restrain Ashley Smith while she was being flown away from Saskatchewan Regional Psychiatric Centre to Pinel Psychiatric

⁶⁷⁶ Sapers, Howard, “Backgrounder: Chronic Self Injury among Federally Sentenced Women” <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20130930info-eng.aspx>

⁶⁷⁷ *Inquest Touching the Death of Ashley Smith: Verdict and Recommendations* (19 December 2013)

Centre in Quebec on April 19, 2007. After Smith began to visibly “fidget” and disobeyed an order to keep both of her hands on the armrests of her airplane seat, the video depicts CSC guards shackling Smith, and covering her with “spit hoods.” The plane’s co-pilot, RCMP Cpl. Stephane Pilon then secures her hands with duct tape. In an oft-reported exchange that has become a moment in which the figure as victim of mental illness and mislocation in prison is rendered coherent and crystallized, Pilon and Smith speak briefly as follows:

"Don't bite me," he says.

"I'm not," Smith responds.

"It'll get worse if you do."

"How can it get worse?"

"I'll duct-tape your face."⁶⁷⁸

Pilon testified at the inquest that Smith had undone her seatbelt, but this is not readily verifiable by the video footage. This videotaped visual text is excerpted in hundreds of media sources, generally embedded in written text in print media or, on video news, with a voice over that, as counsel for the Smith family did at the inquest, defines Ashley Smith as mentally ill and refers to the footage as a reflection of Corrections’ lack of appropriate mental health tools to deal with her. Falconer’s summing up of the video in the inquest testimony has been powerfully influential over interpretations of the film: “This is how CSC does business in transferring a victim.”⁶⁷⁹

⁶⁷⁸ This video has been referenced in scores of mainstream media articles and, for example, is quoted by CTV news: <http://www.ctvnews.ca/canada/i-ll-duct-tape-your-face-rcmp-pilot-defends-actions-at-ashley-smith-inquest-1.1242964#ixzz3FOPesIP1> Another segment of the video is posted online by CBC at: <http://www.cbc.ca/news/canada/videos-show-dehumanizing-treatment-of-teen-ashley-smith-1.1203668>

⁶⁷⁹ See e.g. Perkel, Colin “‘I’ll duct tape your face,’ Ashley Smith was warned in troubling video shown to inquest” *Canadian Press* (31 October 2012)

Another important visual text in the Smith case in forging the Patient Smith figure and lending it coherence is image of her being forcibly injected with psychotropic drugs on July 22, 2007. In this visual text, also released in 2012, in a dimly lit cell, Ashley Smith is surrounded by CSC guards in riot gear and medical personnel (apparently nurses) in haz-mat suits. The image is particularly invasive in that her legs are visible underneath a prison-issue smock and various media outlets have obscured or censored this portion of the representation.⁶⁸⁰ The glaring visibility of Smith's most intimate physicality is jarring. Her sexed and sexualized body is both invasively revealed and crudely effaced by the image, both invaded and covered up. While this image has become paradigmatic as a visual used in mainstream news media sites where Smith is represented as mentally ill, this is in some respects counter-intuitive: a re-reading of the text as an image of a lucid, sexed and sexual, agentic adult being mandatorily forced to receive mental health treatment, or even sexually assaulted, is also plausible.

By the time of the release of the inquest verdict in December 2013, the victimized figure of Patient Smith dominates official as well as media sites. The inquest verdict in its opening paragraph characterizes Ashley Smith as “an identified mentally ill, high risk, high needs inmate.”⁶⁸¹ An opinion piece by Christie Blatchford puts forward a particularly effusive version of this configuration, one that demonstrates the mutual support offered by the Child and Patient figures to one another as follows:

Young, severely mentally ill women behind bars have suffered for too long... Poor Ashley, with her sweet smile and clever charm, and that unrelenting sickness that had her

⁶⁸⁰ See e.g. CBC News “Videos Show Inhumane Treatment of Teen Ashley Smith” (31 October 2012) <http://www.cbc.ca/news/canada/videos-show-dehumanizing-treatment-of-teen-ashley-smith-1.1203668>

⁶⁸¹ Paragraph 1 – *An Inquest Touching the Death of Ashley Smith* (19 December 2014).

strangling herself several times a day was the penultimate embodiment of all that can go wrong... [with] someone so ill and vulnerable.⁶⁸²

Significantly, counsel and witnesses engaged in defending the conduct of CSC in the Smith case also accept the figure of Patient Smith at least by the time of the start of the second inquest. Don Head, commissioner of Correctional Service of Canada, in testimony at the inquest, conceded both that CSC has “gaps” in meeting mental health needs, indicated that CSC would be agreeable to surrendering all prisoners with serious mental illness to provincial mental health systems, and agreed that the Smith inquest was about “how the criminal justice system as a whole deals with mental health issues.”⁶⁸³ This testimony was made at the same time that Head contended the system had already corrected problems with staff training and management made evident by Inmate Smith’s death and that the jury should “not bother to make expensive recommendations.”⁶⁸⁴

By the end of the Smith case, the dominant figure of Ashley Smith has shifted from being someone who - it was *obvious* to mental health professionals - did not have mental illness to someone who is understood to *obviously* have stable, identifiable, perhaps genetic, mental illness before she was incarcerated. Oddly, although Ashley Smith entered the juridical field as someone understood as “normal” and died in CSC custody as someone determined to be problematically mentally ill, in the recuperative discourse of Patient Smith, mental illness is seen not as produced by her treatment in CSC custody but rather as a pre-existing, stable feature of her essential being. Claims about how Smith was understood at various points are rewritten by

⁶⁸² Blatchford, Christie. “Bold Ashley Smith jurors seek shake up of Correctional Services and wake up of Canadian public” *The National Post* (19 December 2013).

⁶⁸³ See e.g. Perkel, Colin” “Don’t bother with costly recommendations, prison official tells Ashley Smith inquest jurors” *The Globe and Mail* (16 October 2013).

⁶⁸⁴ *ibid*

this diagnostic paradigm to a point where the public is unlikely to remember earlier figures of Ashley Smith. A clearer figure of Patient Smith is in a process of being written in to more ambiguous earlier narratives about the Smith case. Interlocutors are actively working to produce a historical narrative that consistently portrays the Smith case as from start to finish an instance of mental health as a social problem. For example, sometime in early 2014, a line was added to the CBC Fifth Estate timeline about Ashley Smith as follows:

October 16, 2009 - The fifth estate has learned that three days before her death Ashley asked to go to a psychiatric hospital. She told correctional staff that she would take medication and stop choking herself. There were no beds available at the hospital.⁶⁸⁵

This claim is not attributed or referenced to any document. Further, it was evidently added in haste – there is a clerical error as to the year, which should read 2007, not 2009. This addition to the timeline text exemplifies the retrospective reinterpretation of history involved in the transformation of the influential figure of Ashley in the Smith case into Patient Smith.

While psy-experts who actually met Ashley Smith during her life repeatedly declined to label her as mentally ill, or excluded her from the social category of patient, after 2010, a myriad of texts are produced in which her mental illness is a taken-for-granted received truth. It is only from a distance and after her death that she becomes definitively understood as primarily defined by mental illness. An interesting editorial published in 2014, authored by a psy-expert who neither treated nor ever met her, claims confidently that Ashley Smith's behaviour derived from Fetal Alcohol Spectrum Disorder (FASD). The opinion piece comments on how no one at any point during Smith's life appears to have considered this possibility. The opinion piece contends

⁶⁸⁵ <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith> As it reads when visited October 2, 2014.

that: “Smith presented as a fairly classic case of the [FASD] disorder in a young girl.”⁶⁸⁶ It is of course unknowable whether and to what extent Ashley Smith had mental health issues that pre-existed her incarceration. However, it is fascinating that the documents I reviewed do not indicate that anyone who actually met her thought she was severely mentally ill, at least until a very late stage in her period of incarceration. What is significant and knowable on this analysis is the rupture between how systems made sense of her during her life and how, at the end of the Smith case, experts and systems now define and understand her.

6.5 Caseness

The figuration of Patient Smith arises at least in part as a strategic trope constructed and invoked for social justice aims. The patient figure is used as a “case” in support of three main social “causes”. First, it is invoked in support of increased mental health funding. Second, it is invoked by advocates seeking to reduce CSC’s reliance on solitary confinement as a management measure. Third, it is deployed by liberal feminist advocates in support of the general de-carceration of woman subjects. These deployments of Patient Ashley as a strategic trope raise questions about when and in what ways it is helpful, and in what ways it might be problematic, to mobilize a narrative known to be simplistic in order to advance what is understood to be a broader good.

Reducing or eliminating the reliance on solitary confinement in prison systems in Canada and internationally is a social cause with global popularity.⁶⁸⁷ There are numerous texts that instrumentalize figures of Inmate- Patient Smith or Inmate Smith in service of this political cause, criticizing longterm use of segregation in prisons. For instance, according to Sapers,

⁶⁸⁶ Cunningham, Mary “Many Are to Blame” *The Record* (14 January 2014) <http://www.therecord.com/opinion-story/4305353-smith-inquest-missed-a-key-element/>

⁶⁸⁷ E.g. On October 8, 2011, UN Special Rapporteur on torture Juan E. Méndez told the General Assembly’s third committee that the use of longterm solitary confinement should be eliminated from the world’s prisons.

“[t]here is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care”⁶⁸⁸ Another example of this is presented by a September 2013 CBC Radio “Ideas” docudrama discussion instrumentalized Patient Smith as a case study to initiate a broader discussion about “the longterm effects of administrative segregation.”⁶⁸⁹ While it does not delve into Ashley Smith’s mental health, and in fact makes no conclusions as to whether she had an “illness”, legal academic Alexandra Campbell’s 2012 LL.M. thesis “A Place Apart: The Harm of Solitary Confinement”⁶⁹⁰ similarly instrumentalizes Ashley Smith’s case towards progressive politics seeking a decreased reliance by corrections on solitary confinement. “

Overwhelmingly, the portrayal of Ashley Smith’s mental illness is as a pre-existing condition precedent to her treatment in corrections’ custody, as a stable reality that CSC had to manage and deal with, and health officials were tasked to treat. Sapers’ 2013 “Risky Business” report, a key text in solidifying the discursive figuration of Patient Smith, studies only women who were diagnosed with a mental disorder prior to their incarceration. As Coralee Smith and Kim Pate note in an article by Donovan Vincent of the *Toronto Star*,⁶⁹¹ Ashley Smith was not.

Particularly in light of feminist critiques of the diagnoses with which she was labeled as well as the shaky basis for the diagnoses, it is plausible to view Ashley Smith’s behaviours not as reflections of individual pathology but as predictable responses to abuse, powerlessness and protracted periods of solitary confinement experienced by a subject. Very little has been said that explores the possibility that Patient Smith was produced by the necropolitical juridical exclusions

⁶⁸⁸ Sapers, 2008

⁶⁸⁹ Story, Brett and Desson, Craig “ Solitary Confinement a Growing Issue In Canada, US Prisons” *CBC Ideas* (8 December 2013) <http://www.cbc.ca/news/canada/solitary-confinement-a-growing-issue-in-canadian-u-s-prisons-1.1699487>

⁶⁹⁰ Campbell, Alexandra (2012)

https://tspace.library.utoronto.ca/bitstream/1807/33351/7/Campbell_Alexandra_P_201211_LLM_thesis.pdf

⁶⁹¹ Vincent, *ibid* 12 April 2013

of Ashley Smith. Expert reports and testimony in the inquest reasonably and plausibly support either a contention that Ashley Smith was not diagnosed with a mental disorder before going in to prison because she didn't have one, *or* that her condition was under-diagnosed, *or* treatment was underfunded, *or* some combination of all of these things. The information available is inconclusive at best. In consequence, the persistent articulations of Patient Smith by progressive advocates reveal more about the modality of persuasion regularly employed by agents of civil society in the contemporary political moment in Canada. In the context of governance through crime, progressive advocates are incentivized, however perversely, to cast those on whose behalf they purport to speak, as passive "victims". The tactical decision to do so reflects dominant discursive patterns in political rhetoric about protecting victims and victims' rights, but it is not clear that it addresses the potential on the part of a highly educated Canadian political community to understand appreciate complexities and nuances in situations they are tasked with understanding.

While the figure of Ashley the Inmate-Patient as constructed in expert discourse has a particular kind of agency, the recuperative figure of Patient Smith has none. The implicit assumptions about Ashley Smith's mental health in this recuperative construction are not consistent with the details of the personality disorders with which she was diagnosed. As discussed previously, these disorders are not understood in expert discourse to render a subject incapacitated, confused or infantile. However, it is precisely through a popular understanding of mental illness that assumes it brings about the conditions for her lack of agency, her *incapacity*, that "poor, vulnerable Ashley" gains entry into the status of a properly constituted "good victim". For example, in the Donovan and Zlomistic book, Ashley's mental illness is opposed in a binary

way to “purposeful” in an all or nothing construction, with mental illness configured as an absolute refutation of the contention that Smith acted with intentionality:

A key question that arose during the inquest was whether Ashley was mentally ill or whether her behaviour was “purposeful.” Breese Davies, a lawyer at the inquest who acted on behalf of the Canadian Association of Elizabeth Fry Societies, an advocacy group for women offenders, argued that Ashley was clearly mentally unwell and needed therapeutic treatment.⁶⁹²

The figure of Patient Smith thus configured completely forecloses the idea that Ashley Smith acted with some level of (albeit imperfect and not sovereign) purposefulness, intentionality, political subjectivity and agency. It shifts public focus away from the practical impossibility of Ashley Smith’s attempts to articulate and perform agency, from her attainment of adult personhood and coalescence of a self.

Representations of Patient Smith are configured with implicit reference to, and in the context of pre-existing discursive figures. Looking at these figures, feminist scholars since the 1970s have developed a literature that criticizes mainstream western cultural associations between the concepts of femininity and madness.⁶⁹³ Notable among these literary figures is Shakespeare’s Ophelia. The character of Ophelia is perhaps the most influential figure in the neoliberal west of an adolescent young woman descending into madness. As discussed in the literature review, Ophelia figures prominently in popular psychological literature about adolescent girls.⁶⁹⁴ The discursive figure of Ophelia is an archetype of noble victimhood while it is also, in contemporary literary theory, understood to signify the illegibility of women’s and

⁶⁹² see Vincent and Zlomistic, *ibid* p. 24

⁶⁹³ For an overview of feminist critiques of mainstream constructions of mental illness see e.g. Ballou, Mary and Brown, Laura *Rethinking Mental Health and Disorder* New York: Guildford Press, 2002.

⁶⁹⁴ See e.g. Pipher, Mary. *Reviving Ophelia*. New York: Random House, 1994.

girls' agencies in patriarchal discourse. In Shakespeare's *Hamlet*,⁶⁹⁵ Ophelia is found dead by drowning, from either an accident or suicide. According to contemporary literary theorists and popular psychology about adolescent girls, dead Ophelia is an archetype of innocent victimhood and female madness, and of how we conflate accident and "suicide".

Literary theorists have argued the Ophelia signals the illegibility of the agencies of women and girls in the public discourses of politics and law. As Elaine Showalter has argued, in dominant patriarchal discourses in literature and mental health, madness is *equated* with femininity.⁶⁹⁶ David Leverenz⁶⁹⁷ argues that Ophelia's madness and suicide represent the unknowability of woman in male discourses about rationality: "in [Ophelia's] madness, she has no voice of her own."⁶⁹⁸ Thus, Ophelia's madness and suicide in contemporary literary theory confirm the banishment of the female and the illegibility of women's agencies as other than madness. Relatedly, Gilbert and Gubar have argued that "the madwoman" is textual archetype in literature produced by men of woman as madness or madness as woman. These authors track the association of creative and sexual expression by women with madness.⁶⁹⁹ Similarly, feminist theorist Luce Irigaray has theorized masculinist narratives in literature as well as psy- and legal discourse as confining women's realities in imprisoning male narrative structures.⁷⁰⁰

I would argue that the discursive reconfiguration of Inmate Smith into the Patient Smith (made possible by the Child Ashley figure) is a governmental technology that, together with the Child Ashley figure, fits Ashley Smith into the pre-existing discourse of the noble, innocent girl

⁶⁹⁵ See e.g. Edwards, Phillip, ed. *Hamlet, Prince of Denmark*. New Cambridge Shakespeare ser. Cambridge: Cambridge University Press, 1985.

⁶⁹⁶ Elaine Showalter, 'Representing Ophelia: Women, Madness and the Responsibilities of Feminist Criticism' in Patricia Parker and Geoffrey Hartman (eds.), *Shakespeare and the Question of Theory* (London, 1985), 77-94.

⁶⁹⁷ Leverenz, David "The Woman in Hamlet" (1978) 4 *Signs* 2, pp. 291-308 .

⁶⁹⁸ Leverenz, David "The Woman in Hamlet", *ibid* at p. 301.

⁶⁹⁹ Gilbert, Sandra and Gubar, Susan *The Madwoman in the Attic*. New York and London: Yale University Press, 1979.

⁷⁰⁰ See e.g. Whitford, Margaret, ed. *The Irigaray Reader*. Cambridge: Basil Blackwell, 1991

victim. In doing so, the now-dominant recuperative Patient Smith figure intersects with pre-existing meso-level discursive structures in which deviance, agency in women and girls is unreadable as resistance and pathologized as madness. This is highly troubling in the context of a history of the exclusion and containment of women through institutionalization that has never begun and ended with prisons. Thinking back to Gillman's "Yellow Wallpaper" story, read intertextually with Ashley Smith's case, Gillman's "Creeping women" can be understood as embodied agents subject to governance and the paper as the official discourse of the mental health field. Similarly, on a feminist reading, Ophelia represents adolescent young women's illegibility to the law: Ophelia has nothing to say in the public discourse of the law. These subjects identified as female are pathologized as insane until the treatment for that pathology - in both the "Yellow Wallpaper" story and in the Smith case, among other things, longterm solitary confinement - actually does drive them mad. Significantly, in Gillman's story solitary confinement is imposed on the narrator not in name as a carceral measure but as a mental health treatment but is, in effect, a carceral sentence.

These longstanding literary theory and feminist social science critiques of social constructions of mental illness in general and BPD in particular call into question the uncritical adoption by purportedly feminist advocates of the received expert diagnosis that Ashley Smith was mentally ill in a way that was stable, static and independent of her context. Phyllis Chesler has made significant contribution to problematizing the imaginations of mental illness as masculinist.⁷⁰¹ In the context of these theorizations from literary and feminist theoretical literatures about the close association between woman and madness in western cultural discourse, the diagnosis of BPD assigned to Inmate- Patient Smith takes on a political aspect.

⁷⁰¹ Chesler, Phyllis *Women and Madness* (N.Y.: Palgrave Macmillan, rev'd & updated ed., 1st ed., 2005).

Dr. Renée Fugère of the Philippe-Pinel Institute gave testimony at the inquest to the effect that Ashley Smith's BPD was not likely to be permanent, but rather would most likely resolve around the time when she ceased to be a young woman: "Personality disorders tend to become less florid with age, and by the time a woman is 40, she may be relatively mellow."⁷⁰² Seen in the light of feminist and Foucauldian criticism of governmentality through the discourses of mental health,⁷⁰³ the prognosis that Ashley Smith's condition is likely to improve once she reaches middle age becomes nothing short of darkly comic. Considered in the light of theorizations of discursive equivalencies between young woman and madness, the assertion that Ashley Smith's condition would have likely resolved by the time she hit menopause are troubling indeed: under a critical feminist reading, with the BPD diagnosis, in effect, Ashley Smith has been diagnosed with being a young woman who has been abused and disempowered, or, even more simply, on a critical literary reading, with nothing more than being a young woman.

The figure of Patient Smith fits well with narratives about mislocation of a mental patient in correctional space: the implicit assertion is that "if only" Ashley Smith had received mental health treatment she could have been "helped". It is not correct to say that the mental health system had no involvement with Ashley Smith. Critical discourse analysis of the figure of Ashley the Inmate-Patient shows the messy enmeshment of the mental health, correctional and criminal systems with one another. Barron⁷⁰⁴ has provided insight into this enmeshment. It is also not obvious that the mental health system is equipped to "help" people diagnosed with BPD.

⁷⁰² Blatchford, Christie, "Christie Blatchford: Ashley Smith's personality disorder chaotic but 'not permanent,' psychiatrist testifies" *The National Post* (2 May 2013).

⁷⁰³ See of course Foucault, Michel, *Madness and Civilization: A History of Insanity in the Age of Reason* available online at <https://libcom.org/files/Michel%20Foucault%20-%20Madness%20and%20Civilization.pdf>

⁷⁰⁴ Barron, Christie. *Governing Girls: Rehabilitation in the Age of Risk*. Canada: Fernwood, 2007.

The Patient Smith figure does not just make Ashley Smith legible but also has the governmental function of assigning accountability and blame. The work of this figure is primarily in the responsabilization it effects. Mental health as a social problem is foregrounded by the Patient Smith figuration while other concerns are obscured. When the critical gaze of investigative journalism and the public eye is focused on how a small, defined subset of very mentally ill female offenders is dealt with, the systematic apparatus of the correctional system eludes scrutiny. The Patient Smith figure is fueled in large part by its power to shift blame. It reframes the social problem identified by the Smith case to fit available solutions and exculpate political leaders and correctional institutions as well as their bureaucracies from responsibility for her death.

With the rise to pre-eminence of the Patient Smith configuration, certain aspects of Ashley Smith's life, behaviour and experiences are made visible while others are not. The manifold instances in which Ashley Smith acted purposefully and legibly (including her scores of quite coherent grievances filed with CSC management) are ignored. Her agency is delegitimized: the benevolent construction incapacitates her agency. The detailed and nuanced set of 104 recommendations made by the inquest verdict, most of which do not specifically refer to mental illness, is simplified into a public understanding that the social problem defined by the Smith case was *simply* failure to fund mental health.

The dominance of the Patient Smith figuration is convenient for, and welcomed by, CSC management in that it shifts attention away from what the CSC Guards' Union in the "A Rush To Judgment" Report call a "catastrophically dysfunctional management culture."⁷⁰⁵ Indeed, with the reconfiguration of Inmate Smith into Child Ashley and then into Patient Smith, focus of

⁷⁰⁵ At p. 5

criticisms referencing the Smith case in texts produced in institutional, political and media sites has shifted away from systemic change to the prison industrial complex and the logics of macropower. Notably, CSC management has adopted and even embraced the discursive reconfiguration of Ashley Smith as a mental patient and not an ordinary inmate. Upon the release of the verdict of homicide in the second inquest, a spokesperson for Public Safety Canada, on behalf of CSC released the following statement:

We will carefully review the recommendations to determine what further actions should be taken to meet the mental health needs of offenders so that tragedies such as this one does not happen again... Since Ashley's death, several actions have already been taken to improve the way offenders with mental health needs are managed.⁷⁰⁶

Notably, in this statement, CSC both accepts the figuration of Patient Smith and simultaneously claims that the issues raised by this figure have already been addressed. The acceptance of Patient Smith is with her configured in a way that supports the infrastructures of the prison industrial complex: such patients are incredibly hard to handle according to the narratives that fit well with this figure, and it is the expertise of CSC management working in tandem with mental health professionals that is supported by this claim while the existence of proper facilities for their housing and care is legitimated. Of particular note, the most concrete measure taken to date by government to address the recommendations of the Smith inquest is a provincial Ontario “pilot project” where two new mental “health beds” reserved for women have been opened at a facility in Brockville, Ontario.⁷⁰⁷

⁷⁰⁶ Carlson, Kathryn Blaze, “Mother 'elated' as Ashley Smith's jail death is ruled a homicide” *The Globe and Mail* (19 December 2013).

⁷⁰⁷ Carlson, Kathryn Blaze, “Ashley Smith inquiry spurs federal pilot project, draws criticism” *The Globe and Mail* (1 May 2014) <http://www.theglobeandmail.com/news/politics/critics-pan-federal-response-to-ashley-smith-inquest/article18370530/>

Like the name “therapeutic quiet” for solitary confinement in the youth system previously discussed, the figure of the “bed” in the mental health context is euphemistic. Although these proposed facilities are termed “beds” as they will be small, secure rooms for solitary confinement of prisoners, possessing a geography quite similar to solitary confinement cells or existing mental health “quiet rooms”. Advocates for the Smith family have disparaged this project as “insulting”⁷⁰⁸ and insufficient to address the recommendations of the Smith inquest. However, those advocates are complicit in producing this result by enabling the distraction made available by actively promoting the dominance of the figure of Patient Smith. Thus, the figuration of Ashley the Patient has been absorbed by the systems of politics and legal power in the juridical field as an aberration that has already been solved by small scale tinkering around the edges of CSC systems and an undisclosed amount of compensation to her family.

The figure of Ashley Smith as properly configured as a Patient fits well with progressive politics that seek to ameliorate the conditions of increasing use of solitary confinement in prisons, increasing rates of incarceration in lieu of mental health treatment and general growth of the prison industrial complex. It is unsurprising, therefore, that this figure has been mobilized by several communities of activists in their change discourses. In addition to the advocates for woman prisoners discussed in Chapter 5, left-leaning politicians and mental health experts have articulated the figure to criticize under-funding of mental health treatment and to draw attention to problems faced by mentally ill women in prison.

Liberal politicians have articulated and deployed Patient Smith in their critiques of the current government for governing through crime. The NB Ombudsman was quoted as saying in the “Behind the Wall” docudrama, “we are using the prison system as a de facto mental health

⁷⁰⁸ *ibid*

facility.”⁷⁰⁹ As leader of the official opposition in parliament, Interim Liberal Leader Bob Rae in 2012 called for a public inquiry into the Ashley Smith case as an instance of “the general inability of the prison system to cope with mentally ill offenders,” a call which was also supported by the NDP.⁷¹⁰ Similarly, in a 2012 press release, Senator Bob Runciman articulates the Patient Smith figure as a “worst case scenario” instance of a mentally ill person being inappropriately placed in prison and as evidence for “the need for action” so that “outside mental health treatment can be sought for mentally ill offenders.”⁷¹¹ However, as articulated by CSC officials, government actors and even Prime Minister Stephen Harper, the figure of Patient Smith has been deployed as a governmental technology that bolsters the integrity of the status quo in the correctional and criminal justice systems: these political defenders of the status quo have been able to rely on her exceptionally acute mental illness to differentiate her from prisoners in general and to refute the notion that her case reveals problems with the correctional system in overall. It is discomfiting how tidily configurations of Patient Smith as an innocent victim of her mental disorder in liberal and progressive sites, including texts put forward by those purporting to be her advocates, coincide with configurations of Patient Smith as a “poor girl” in more right-wing publications and acceptance by CSC of the figure.

Mental health experts have eagerly deployed Patient Smith to advance pre-existing (and self-interested) arguments about the need for more health funding. For example, the recuperative Patient Smith figuration is invoked by psychiatrist Dr. Sandy Simpson, chief of forensic psychiatry at Toronto’s Centre for Addiction and Mental Health to support the construction of

⁷⁰⁹ “Behind the Wall”. *Ibid.*

⁷¹⁰ “Liberals call for Ashley Smith prison-death public inquiry”. *CBC News*. (8 November 2012). <http://www.cbc.ca/news/politics/liberals-call-for-ashley-smith-prison-death-public-inquiry-1.1227900>

⁷¹¹ Press release, Bob Runciman: “Quit Stalling on Mental Health Treatment” (14 December 2012) <http://www.bobrunciman.com/index.cfm?ID=70&ViewItem=Yes&IDIn=132&ShowText=No>

her case as social problem relating to inadequate mental health funding and inadequate attention to mental health in formal policy making. Simpson states:

The distressing images of the last moments of Ashley Smith’s life convey a stark message about the struggles that correctional officers have in caring for people with serious mental illness. This much-needed inquest will undoubtedly provide the public, politicians and the health and corrections sectors with much to reflect on, and much that must be improved...

There is a small group of inmates who are more seriously unwell and not manageable by health and correctional staff in prison. Some of these persons need to be in a psychiatric hospital bed. Such access is very limited....It follows from this that we need sophisticated mental health services in prisons... here is much work occurring to address these shortcomings and start filling the gaps in mental health provision to prison inmates.⁷¹²

Canadian Mental Health Association Executive Director Steve Lurie also invokes the Lurie writes in a December 19, 2013 letter to the Toronto Star: that the Ashley Smith case reveals “treatment gaps in the community that led to her incarceration for throwing crab apples. Only one in three adults and one in six children with serious mental health problems are able to access appropriate prevention and treatment services in the community. Mental health spending has been declining as a share of health care spending for over thirty years. Unless we address this deficit, Ashley Smith’s death will be the canary in the coal mine that we continue to ignore.”⁷¹³ In a 2012 publication from the University of Toronto, Elizabeth Bingham and Rebecca Sutton of the Faculty of Law similarly refer to the Smith

⁷¹² Simpson, Sandy “Lessons from the Ashley Smith Inquest” *Toronto Star* (26 January 2013)
http://www.thestar.com/opinion/editorialopinion/2013/01/26/lessons_from_the_ashley_smith_inquest.html

⁷¹³ Lurie, Steve, “Re: Ashley Smith’s Cry for Help Must be Heeded” (19 December 2014)
http://www.thestar.com/opinion/letters_to_the_editors/2013/12/22/justice_at_long_last_for_ashley_smith.html

case as an example of how Canada needs to change the way it deals “federally sentenced women with mental health issues.”⁷¹⁴

The seriously-mentally-ill-self-harming-woman-in-prison is treated on this analysis as what Foucault would describe as a particular, unusual, genre of abnormal. On Andrew Sharpe’s analysis of the logics of “monsterization” which determine ‘who is legible as a human?’ and ‘who counts as a human?’,⁷¹⁵ the figuration of Patient Smith functions as a governmental technology in re-inscribing discursive structures in which woman inmates, and women, do not count. These are structures in which women’s voices are not credible in judicial proceedings, not believed by police when they make reports of domestic violence or sexual assaults and not heard around the boardroom table or in political debates. The Patient Smith figure is outstandingly virulent in no small part because it fits into spaces made by pre-existing critiques of the treatment of the mentally ill and into facile interpretations of women’s agencies as madness that have a great deal of historical depth. Further, the figure of Patient Smith invites into action and empowers the pre-existing apparati of systems of power and knowledge and bureaucratic apparatus of the mental health system. Thus, in re-inscribing the Patient Smith figure through their advocacy, I would argue, progressive reformers are also complicit in the re-inscription of the illegibility of the agencies of girls and women in the juridical field and in public discourse and the retrenchment of the figure of the monstrous madwoman.

From the perspective of a governmentality analysis, the putative opposition of the discourses of justice and mental health is problematic: mental health apparati are deployed in similar manners to govern the conduct of subjects that also involve reliance on risk logic and the logic of exception. An

⁷¹⁴ Bingham, Elizabeth and Rebecca Sutton. 2012. Cruel, inhuman and degrading? Canada’s treatment of federally-sentenced women with mental health issues. University of Toronto, Faculty of Law, International Human Rights Program. <http://media.thestar.topscms.com/acrobat/ba/55/3c47d5da4a599c0f879c56ebe3e6.pdf>

⁷¹⁵ Sharpe, Andrew. *Foucault’s Monsters and the Challenge of Law*, Abingdon: Routledge , 2010

implicit and problematic “solution” to the defined social problem of mislocation of mentally ill persons in correctional facilities would be retrenchment and re-establishment of the prior regime of increased institutionalization of subjects on the basis of mental health diagnoses; institutionalization and exclusion of subjects diagnosed as mentally ill has a troubling history. Further, in the context of adolescents in particular, the history of subjects identified as adolescent females being institutionalized for benevolent/ treatment-related reasons is problematic indeed. A great deal of effort towards law reform and social change was undertaken since the mid-twentieth century⁷¹⁶ to formalize and make visible the grounds for institutionalization of adolescents, and adolescent girls in particular. Uncritical acceptance of mental health diagnoses of woman prisoners on the part of feminist advocates is problematic because it fits well with older patriarchal narratives about women lacking capacity and rationality and needing to be cared for by the benevolent ministrations of mental health services.

The mobilization of Patient Smith in furtherance of better funding for mental health relies on unexamined implicit problematic binary logics: it implies an acceptance that the criminal justice and mental health systems are separate, except as a condition of possibility that a noncompliant subject should be dealt with either in the criminal justice system or in the (opposed) mental health system; it assumes that, if the correctional system is bad, the opposed mental health system is the alternative, and therefore good. This logic misses ways in which the criminal and mental health systems were very much enmeshed and operating in linked and duplicative risk and exclusion frameworks in the Smith case and it also assumes fallaciously that a criticism of the correctional system is or should be implicitly an endorsement of the mental health system.⁷¹⁷

⁷¹⁶ For discussion see e.g. Carrigan, Owen. *Juvenile Delinquency in Canada: a History*. Concord, Ontario: Irwin Publishing, 1998.

⁷¹⁷ For a useful historical discussion about problematic aspects of the mental health system see e.g. Porter, Roy *Madmen: A Social History of Madhouses, Mad-Doctors & Lunatics* (Ill. ed. [originally published 1987] ed.). Stroud: Tempus2006.

Critical scrutiny of the Patient Smith figure allows readers to diagnose problems with interlocking legal, mental health and social systems. Through mutually supportive discursive constructions of Child Ashley and Patient Smith those purporting to be her advocates gain legitimacy; it is in removing her distinct voice and agencies that her behaviour can be explained completely and Ashley Smith can be tidily “spoken for”. Additionally, it is in reconfiguration as a noble victim that the death of one of a wildly unpopular type of subject- carceral subjects or prisoners – that progressive advocates no doubt think Ashley Smith can become more sympathetic to a neoconservative regime that fixates on the rights of “victims” to justify governance through crime. In mobilizing Patient Smith as a technology, advocates are invoking a modality of representations (“victims”) that is efficacious in the contemporary political moment. However, they are trafficking in a genre of representations with a highly problematic impact. The strategic decision to present Ashley Smith as a vulnerable, noble, child-like victim has an ironic result: Ashley Smith’s agency is erased more profoundly in the “benevolent” texts that purport to speak her interests on her behalf than in those texts intended to defend those individuals, institutions and structures accused of being at fault for her death. While the figure of Patient Smith has been instrumentalized as a governmental technology militating towards ameliorating the conditions of female carceral subjects held in prisons (by making their *criminality* unthinkable), it is also a technology that simultaneously insists upon her inability to make decisions, such as the choices to comply with rules or end her life, which remove the possibility of her participation in political community had she not died, and thereby her role as an equal citizen (by making her *agencies* unthinkable).

Chapter 7

Conclusion: *Multiple Agencies*

“They don’t know what goes on in my head”

- September 2006 journal entry of Ashley Smith⁷¹⁸

—

...You see us as you want to see us...in the simplest terms, in the most convenient definitions. But what we found out is that each one of us is a brain...an athlete...a basket case...a princess...and a criminal.

-Sincerely yours, the Breakfast Club.⁷¹⁹

7.1 Summary: Producing Ashleys

Ashley Smith’s mother, Coralee Smith, is quoted in many sources on December 19, 2013, as saying, after the verdict was rendered in the second inquest: “now the whole story has been told.”⁷²⁰ Starting from theoretical foundations in social constructivist feminist analysis, I have conducted this research from an epistemological position that telling the “whole story” about Ashley Smith is not possible: all narratives are selective, incomplete and necessarily partial.⁷²¹ In consequence, this dissertation has not sought to tell a different, singular, “truer”, story of the Smith case. Rather, I have conducted a critical discourse analysis to deconstruct the different ways the narrative of Ashley Smith’s case has been told, 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. Much as I wish it could provide a venue for Ashley Smith to

⁷¹⁸ NB Ombudsman’s Report, Richard at p. 23

⁷¹⁹ “The Breakfast Club”, 1985

⁷²⁰ See e.g. Mulholland, Angela, “After death deemed homicide, Ashley Smith family calls for new criminal investigation” *CTV News* (19 December 2013). <http://www.ctvnews.ca/canada/after-death-deemed-homicide-ashley-smith-family-calls-for-new-criminal-investigation-1.1600083#ixzz3BQosdLWR>

⁷²¹ For discussion see Chapter 3 and also Butler, Judith. *Gender Trouble: Feminism and the subversion of identity*. New York: Routledge, 1990.

speaking, this dissertation can reveal nothing certain about what she wanted, thought or felt. However, the analysis presented has revealed patterns in discourse present in, and re-inscribed by the Smith case.

I have presented a critical discourse analysis of three types of which Ashley Smith has been represented as a case: inmate, child and patient. These figures are understood as outcomes of microprocesses of governance in relation to micro-and macro power. The analytical questions addressed in this analysis touch on how these figures work as technologies of power. The dominant interpretation of the Smith case is, as stated in paragraph 1 of the inquest decision, a “system failure.”⁷²² I offer quite a different interpretation. My analysis has shown that dissonance with and inability to fit within the categories of child and girl contributed to Ashley Smith’s social death while the correctional and mental health systems together ensured her juridical and biological deaths. My theoretical assertion is that the Smith case is read most accurately not as a case of anomalous or abnormal system failure but one of routine necropolitical success, a story about how Canada’s prison industrial complex successfully rid itself of a resource-drain in the spectre of an incredibly troublesome inmate. The critical discourse analysis conducted in this dissertation has revealed that the domestication of the inquest verdict by the dominant configuration of Ashley Smith as properly understood as a tragically victimized mental patient leaves intact, and even reinforces, dominant logics and systems of gender, risk, race thinking and exclusion in power and knowledge that make it predictable that similar deaths in prison will recur.

This dissertation has examined the conspicuous absence of discourses of Ashley Smith’s agencies as well as examining figurations of her and of the girl in that make up the corpus of the

⁷²² *An Inquest Touching on the Death of Ashley Smith, ibid*

Smith case. It has tracked how the very 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. Even a hint of agency on her part would crumble the widely accepted figure of Patient Smith. The removal of agency from Ashley Smith is thus intimately bound up in necropolitical logic and action. This research has shown how the logics of risk, mental health and legal discourses in the juridical field intersected with discourses of the girl in ways that made alternative plausible readings and Ashley Smith's own writing of her story unintelligible and unwritable. In this dissertation, I have worked to puncture the sacral aura given to Ashley Smith by liberal reform advocacy and to show the death of Ashley Smith not to be an exceptional or aberrant event but an instance of the day to day brutal logics of gender, race and necropolitics acting as usual. My hope for this project is that it can intervene in those logics to help make alternative endings possible and to make steps towards supporting the agencies of adolescent girls in having active roles in shaping and living their lives.

As Coralee Smith said in a December 14 press conference where she protested the inaction and lack of response to the Smith inquest by CSC:

This is not just an Ashley story. This is the story about how our prisoners are being treated –mistreated I should say. The dire conditions that they're living under. Something has to take place. We have to do something.⁷²³

Understanding Ashley Smith as a case of a the general type “inmate” through analysis of the figure of Inmate Smith that coalesces from a variety of texts in the Smith case opens up

⁷²³ Stone, Laura. “Nobody’s listening’: Almost a year later, feds yet to respond to Ashley Smith inquest” *Global News* (10 December 2014)

potential for her example to be deployed in public debates about the interlocking utilitarian rationalities of risk and the logic of exception. These logics are specifically evident in the enactment and amendment of the *YCJA*, which in “reserv[ing] its most serious interventions for the most serious offenders,”⁷²⁴ struck what, in LeGuin’s terms, could be understood as an Omelan bargain to allow harsh punishment for a few adolescents in order to reduce Canada’s much maligned over-reliance on incarcerating adolescents under its precursor, the *YOA*. Again, for the good of the many, to reduce risks calculated to be faced by the population “protection of the public” was in 2012 amendments⁷²⁵ made into the single top priority of the *YCJA*, at the expense of principles in the legislation that showed concern about accused and convicted adolescents. In this analysis, Smith can be seen as *homo sacer*, and thus as an exemplar of totalitarian logics of exclusion and exception that, as Agamben argues, are pervasive below the surface in western democracies.⁷²⁶ An analysis of Ashley Smith as an inmate also offers a haunting reply to the Ashley Smith’s mother Coralee at the end of “Behind the Wall” when she asks, “who gave that order, Hana?”⁷²⁷ in reference to the non-intervention order that absolved the front line CSC staff from criminal charges in Ashley Smith’s death. As I have shown here, there was not one single order that killed Ashley Smith but rather, over a period of years, a series of actions, inactions, decisions and orders by a large number of people that led to Ashley Smith’s social, legal and biological deaths. In the Omelas, all who know of the flawed exclusionary, carceral foundation of the society, all who know of the locked room and the child, are

⁷²⁴ Department of Justice Canada “The Youth Criminal Justice Act Summary and Background” <http://www.justice.gc.ca/eng/cj-ij/yj-ij/ycja-lsipa/back-hist.html>

⁷²⁵ By means of Bill C-10, as discussed in Chapter 2.

⁷²⁶ Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford: Stanford University Press, 1998.

⁷²⁷ “Behind the Wall”

responsible for them. As a technology of governance, the discursive figure of Inmate Smith has powerful potential to implicate – and ideally incite action by - us all.

Through this critical discourse analysis, the figure of Inmate Smith has raised 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. Concerns about Ashley Smith's treatment echo longstanding criticisms about treatment of prisoners, especially woman prisoners, in this country. Events giving rise to the inquiry into 1994 incidents at Kingston's Prison for Women are similar to details of the Smith case.⁷²⁸ Further, aspects of Ashley Smith's death bear similarities to persistent patterns found across the prison industrial complex. Deaths of prisoners in Corrections custody are not unexpected; suicide and failures to respond to medical emergencies have, since the opening of Canada's first prisons, been leading causes of prisoner death.⁷²⁹ A study of deaths in CSC custody that occurred between 2001 – 2005 found that the majority of these were ruled suicides by CSC and also found that inmates commit suicide at 8 times the rate of people in the general population. Failures to administer CPR are found to regularly recur along with persistent delays in seeking and obtaining health care support."⁷³⁰ These patterns predate the Smith case and continue, unaltered, 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

⁷²⁸ This Commission of Inquiry was convened and reported in 1994 after an incident involving solitary confinement and strip searching of woman inmates at Kingston's Prison for Women

http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm

⁷²⁹ For discussion see e.g. "Office of the Correctional Investigator: Deaths in Custody" <http://www.oci-bec.gc.ca/cnt/priorities-priorites/deaths-deces-eng.aspx>

⁷³⁰ Gabor, Thomas, 'Deaths in Custody: Final Report Submitted to the Correctional Investigator' February 2007. <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20070228-eng.aspx>

Federal Custody.⁷³¹

Analysis of the figure of Child Ashley has revealed how race thinking and mandatory gender performativity set up the conditions of possibility for social exclusion of certain persons who do not “fit” within pre-existing social categories of “girl” and “child.” More specifically, critical discourse analysis of the Child Ashley figure has revealed the great extent to which the pre-existing overlapping categories of the “normal”, “saveable” and “good” girl are defined with reference to middle class socioeconomic status, smiling agreeability, a socially acceptable mother, white racial purity, diminutive size and performances of gender signaling culturally-condoned levels of heteronormative sexual availability. The exclusion of certain subjects by the boundaries of these categories lays the foundation for the disproportionate legal exclusion and juridical deaths of certain types of embodied subjects as carceral inmates. Subjects like Ashley Smith, who do not “fit” the normal child category by virtue of being obese, resistant, tall, working-class or poor, racialized, ambiguously raced or aboriginal, refuse or fail to fit within culturally accepted tropes of the saveable girl and are in consequence vulnerable to being excluded from citizenship and political community in ways that make their incarceration and even biological death readily possible.

Finally, analysis of the figure of Ashley the Patient has shown how the Smith case is engaged in the bolstering and re-inscription of the illegibility of girls and women in the narratives of the juridical field. In the Patient Smith configuration, the diverse instances in which Ashley Smith acted purposefully and legibly (including her scores of quite coherent grievances filed with CSC management) are ignored. Her agency is de-legitimized and incapacitated.

⁷³¹ Correctional Investigator, Final Report on Ashley Smith Case (2010) at 4.

Critical scrutiny of the construction of Smith as a mental patient has revealed the potency and uses of the Patient Smith figure in service of the governmental function of assigning accountability and blame. I have looked at how the work of this figure is in responsabilization and blame shifting. Mental health as a social problem is foregrounded by the Patient Smith figuration while other concerns are obscured. Most significantly, in narratives supported by the Patient Smith figure, the systematic apparatus of the correctional systems (both youth and adult) escape criticism. It shifts attention away from political leaders, bureaucratic managers and correctional institutions as well as their bureaucracies as having responsibility for her death.

I conclude that, in several interlocking ways, the Smith case is not an aberration but reflective of broad systems of thought endemic to patriarchal neoliberalism, and, in its resolution, representations of Ashley Smith as a Child and as a Patient are implicated and complicit in processes that are producing and will produce the same conditions of possibility that lead to Ashley Smith's social, juridical and biological deaths.

This dissertation has explored what has been gained and what has been lost in discursive processes in which Ashley Smith is turned into an inmate, social problem, a celebritized victim and a "cause". I have looked at three dominant configurations of Ashley Smith over the progression of the Smith case: the official configuration of her as Inmate Smith, the celebritization of her as Child Ashley and the recuperation of her in official discourses as Ashley the patient. The three dominant constructions of Ashley Smith in the Smith case: as inmate, child and mentally ill person, allow for the opening up of certain understandings of her case while, as discussed in the foregoing chapters, they distract from, foreclose and make unthinkable others. The preceding chapters have looked at three figures of Ashley Smith that emerge as dominant constructions at various sites and temporal points in her case. I have looked critically at how, in

none of these constructions does Ashley's voice get heard nor does her political agency get taken seriously.

I have also looked at how progressive politics has been implicated in the necropolitical processes that successfully effected Ashley Smith's social, juridical and biological deaths. Configuration of Ashley Smith in ways that make her fit within widely accepted discourses of who can be a noble and therefore noticeable victim has been embraced by progressive politics but I contend this only serves to bolster and reinforce the narrow confines of those discourses and confirm her monstrosity. As Margaret Atwood wrote in her essay: "If You Can't Say Something Nice, Don't Say Anything At All":⁷³²

Women are not Woman. They come in all shapes, sizes, colours, classes, ages and degrees of moral rectitude. They don't all behave, think or feel the same way any more than they all take size eight. All of them are real. Some of them are awful. To deny them this is to deny them their humanity and to restrict their area of moral choice to the size of a teacup. To define women as by nature better than men is to ape the Victorians"⁷³³ ... "There are many strong voices; there are many *kinds* of strong voices. ... does it make sense to silence women in the name of Woman?"⁷³⁴

In the preceding chapters, I have looked at how Ashley Smith has been configured in different ways in the Smith Case that compete with the construction of her as an Inmate. It is not my argument that those other constructions are irrelevant, but rather that they are problematic, that they have dangerous potential to act as distractions from critiques of our carceral configuration of political community, and that they are potentially relevant to understanding the particular

⁷³² Shields, Carol and Anderson, Marjorie, eds. *Dropped Threads: What We Aren't Told* (Toronto: Random House Canada, 2001)

⁷³³ at pp. 144-145.

⁷³⁴ *Ibid* at p. 148

circumstances and life histories of *all* inmates. Put another way, all inmates have particularities; in losing the figure of Inmate Ashley, texts that are generated later in her case may also lose their potency as social critiques with broad relevance.

The figure of Inmate Smith is a powerful tool that has been deployed in public debates about the exercise of macro-power. Considering the “caseness” of Inmate Smith is significant to contemplating the deployment of the representation of Inmate Smith and its possible uses in relation to macro-power. While, on the one hand, representing Ashley Smith as one case of a type of which there are many in Canada can diminish her significance in de-emphasizing her particularity in her lifetime and the construction of her as an inmate contributed to the individual and system failures identified by the Correctional Investigator that led to her death, this construction is double-edged. As a case of a common type, Inmate Smith can be taken as representative of a large class or group of people: this makes rulings about the death of this inmate potentially powerful as governmental tools that are relevant to and can be referenced in arguments/ initiatives to effect broad, system-wide change in Corrections practice in Canada. Further, on this analysis, it is politically disempowering that the inmate construction of Ashley Smith has to a large extent been eclipsed in dominance – or at least diluted- by the mental health-linked construction of Ashley Smith as one of a much smaller subset that I study in Chapter 6. It is therefore unsurprising that critiques of Canada’s criminal justice and correctional systems, such as that proffered by CBC’s October 2014 docudrama “ State of Incarceration” make no mention of the Smith case in reference to problems with neoliberal governance through crime.⁷³⁵

Ironically, in the texts studied, the figure of Ashley Smith that emerges in articulations of her by those who purportedly speak *for* her – notably her family’s lawyer Julian Falconer and

⁷³⁵October 9, 2014 <http://www.cbc.ca/doczone/episodes/new-season-state-of-incarceration>

representatives of the Elizabeth Fry Society, is the *least* agentic. This is consistent with Irigaray and Foucault's concern that an uncritical, singular attempt to resist oppressive systems on behalf of an oppressed group – and in particular as Irigaray considers it, to simplistically liberate women, reconstructs and reconstitutes the conditions of possibility that re-entrench their muteness in formal discourses like law. Consider, as Irigaray wrote in *This Sex Which is Not One*:

But if their [i.e. feminist movements] aim were simply to reverse the order of things, even supposing this to be possible, history would repeat itself in the long run, would revert to sameness: to phallograticism. It would leave room neither for women's sexuality, nor for women's imaginary, nor for women's language to take (their) place.⁷³⁶

The critical discourse analysis presented in this dissertation bears upon the broader theoretical questions of whether, to what extent, and in what ways the agencies of diversely situated subjects, and in particular the agencies of subjects identified as women and girls, are speakable and knowable in formal legal texts and proceedings as well as other public discourses. On this analysis, I have argued that the dominant constructions of Ashley Smith in the Smith case ultimately serve to reinforce and re-inscribe confining conditions of possibility for adolescent young women that render subjects identified as members of that category not less, but actually more, marginalized, silenced and likely to receive the same sanctions and be excluded in substantially the same manner as Ashley Smith.

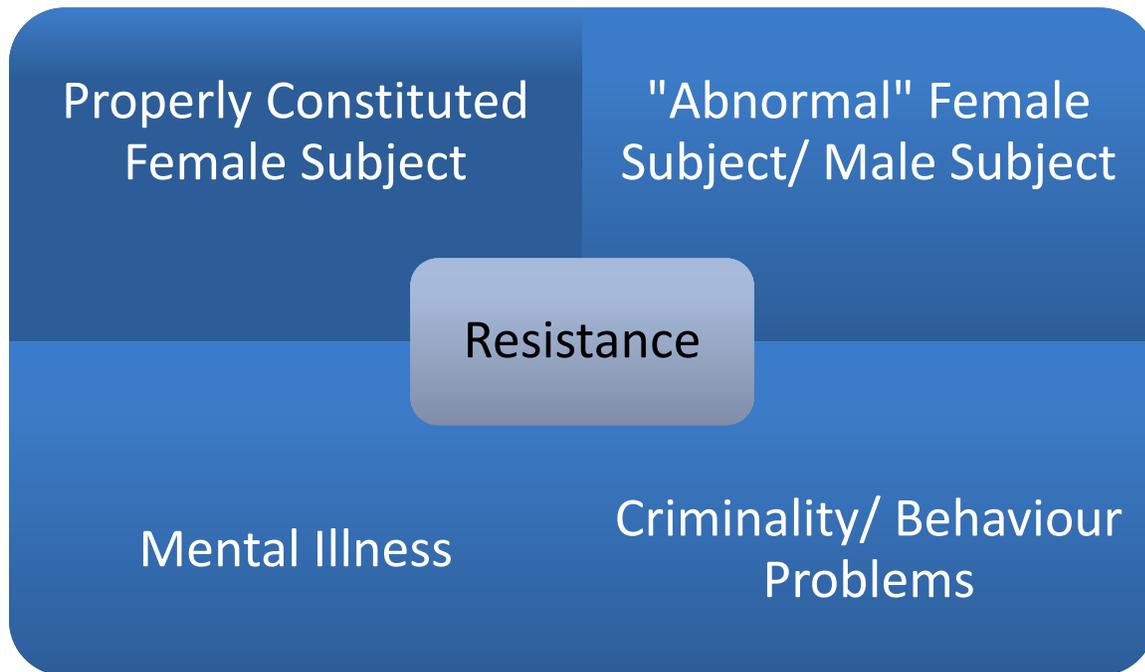
Recalling Foucault's notion of the "great carceral continuum," it becomes obvious that government of women, including compulsory enforcement of gender performativity through confinement, incarceration and exclusion, has never been just about prison. This dissertation has

⁷³⁶ Irigaray, *This Sex Which Is Not One*, *ibid* p. 33.

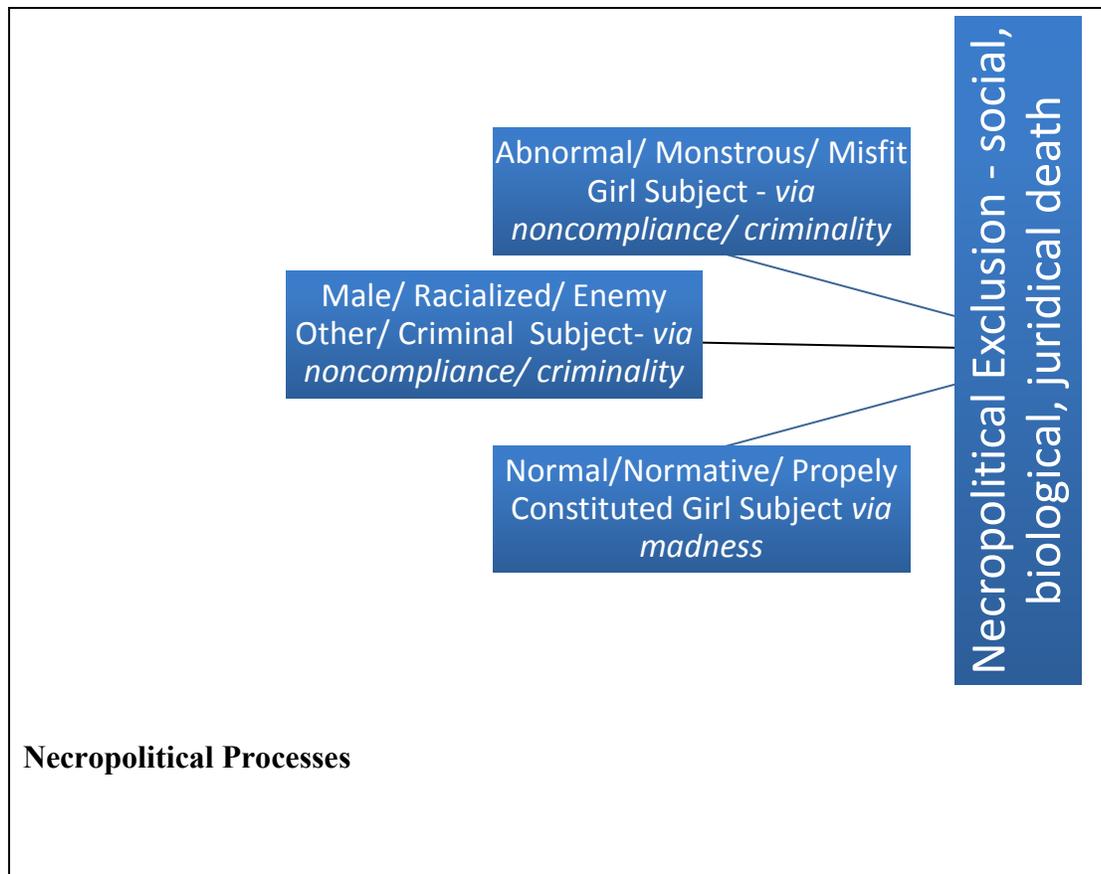
explored how the ultimate acceptance in the Smith case of Ashley Smith as “one of a very few mentally ill women in prison” leaves certain taken-for-granted assumptions unquestioned: prison structures, management and existence are unquestioned and mental illness is accepted as defined in mental health discourse. Further, the boundaries of problematically defined categories of girl and woman are untroubled. This dissertation has looked at how all of those categories: prisons, mental illness, and woman, become problematic on a critical discourse analysis of figures of Ashley Smith that emerge in the Smith case. The analytical chapters in this dissertation have looked at how certain configurations of Ashley Smith in the Smith case open up certain possibilities while they foreclose others.

This critical discourse analysis has revealed a temporal trajectory in the Smith case in the dominance of discursive figures of Ashley Smith from abnormal/risky girl through to inmate to properly constituted/good girl-child-victim to mental patient. It is only after the child construction becomes dominant through the recuperative reconstitution of Ashley Smith in media and advocacy sites into a properly constituted girl subject that her non-compliance is re-read as madness. This raises broad theoretical questions about how the resistances and agencies of particularly situated subjects are made legible. The critical discourse analysis undertaken in this dissertation suggests it is necessarily *through* the reconstitution of Ashley Smith as a “normal” child that she can be understood as a patient. From this trajectory, it appears that the noncompliance/deviance/ agentic resistance of an *abnormal*/ risky girl subject is in the dominant logic of contemporary western masculinist thought systems as criminality while the resistances/ noncompliances/ agencies of properly constituted girls are by default and perhaps inevitably more often read as madness. This discursive logic also goes a long way towards suggesting an explanation for why it is the most marginal girls and women who are criminalized: in this logic,

by *definition* those girls who are claimed and located under the protection of patriarchal structures as daughters and sisters, will not be easily understood as criminal. This is consistent with theoretical predictions from the work of Luce Irigaray and David Leverenz from feminist and literary theory.⁷³⁷



⁷³⁷ As discussed earlier in this dissertation. See Leverenz, David. "The Woman in *Hamlet*: An Interpersonal View." *Signs* 4.2 (1978):291-308. See also Irigaray, Luce *The Sex Which is Not One* New York: Cornell University Press, 1985.



Looked at in the context of the historical pathologization of women for madness discussed in this dissertation, the discursive journey from Inmate Smith to Child Ashley to Ashley the Patient, and the malleability of her case into being definitive of social problems relating to corrections and mental health, while unusual in becoming taken up as a social “cause”, does not seem unique in other aspects.. The logic that predetermines the labeling of properly constituted adolescent girls’ noncompliance as madness and the labeling adolescent boys’ noncompliance as criminality calls into question the statistical discrepancy between criminal charge rates for adolescent boys and girls. As feminist criminologists have identified, the disproportionately low number of girls criminalized relative to boys is a fact calling for explanation. Interestingly, there are disproportionately *more* girls treated through mental health means than boys. The discourse analysis undertaken in this dissertation reveals gendered logic

as to how resistance is labeled in the Smith case that suggests those numbers might actually roughly *match*. It would be logical to predict that the behaviours of subjects identified as adolescents girls and boys are far less different than generally assumed. Rather, the difference between female and male offending rates may be explainable in large part by differently situated subjects being understood, approached and *labeled* differently. This contention would be powerfully explanatory of the discrepancies between girls' and boys' roughly comparable self-reporting rates in respect of committing crimes and official crime statistics.⁷³⁸ It may be that the apparent gender difference in offending rates are not reflections of essential sex differences or actual gender performativity but rather explainable, in whole or in part, by prevailing logics in discourse. This suggestion warrants more study. Useful future research could be undertaken to inquire into the specific acts for which adolescent girls and boys are criminalized or diagnosed with mental illness.

7.2 Looking for Ashley's Agencies: *Alternative Imaginings*

*I can understand how you'd be so confused
I don't envy you
I'm a little bit of everything
All rolled into one
I'm a bitch, I'm a lover, I'm a child, I'm a mother
I'm a sinner, I'm a saint, I do not feel ashamed
I'm your hell, I'm your dream, I'm nothing in between
You know you wouldn't want it any other way
So take me as I am.*

- Alanis Morissette – “I'm A Bitch I'm A Lover”⁷³⁹ Lyrics
At the beginning of the second inquest into the death of Ashley Smith, presiding coroner Dr.

John Carlisle opened with the following statement:

⁷³⁸ Savoie, J. 2007. "Youth self-reported delinquency, Toronto, 2006". *Juristat*. Vol. 27, no. 6. Statistics Canada Catalogue no. [85-002-X](#). Ottawa. (Accessed December 10, 2010).

⁷³⁹ This song appears on Morissette's 1997 Album "Blurring the Edges". The song was written by Meredith Brooks and Shelley Peiken.

We cannot now reverse the course of history as it unfolded, but we can learn from the circumstances of this death, and try ... to implement measures to prevent future tragedies ... What matters now is the sincerity and success of our efforts to make from [the past] something that can benefit the future.

I have argued that the death of Ashley Smith and the domestication of the incident into a narrative about mental illness can be read not as a system failure but a necropolitical success story that reinforces the strength of patriarchal social categories and the prison industrial complex. I have looked at how all of the dominant configurations of Ashley Smith - as a child, a mental patient and an inmate foreclose the “world making possibilities” of her acts of resistance.. I would like to address the question of the extent to which the illegibility of Ashley Smith’s agency is inevitable. Are there only three things women can be: compliant subjects, children or madwomen? Is there no space for agentic constructions of women in public debate? Is the angels-and-demons, masculinist narrative of the law inevitable? Could re-reading Ashley Smith’s acts as moments of agency produce different stories? What if we didn’t start from a predefined construction of Ashley Smith; what if the case of Ashley Smith was permitted to be unresolved and the accepted discursive figure of Ashley Smith that ultimately emerged from texts about it was simultaneously a victim and agent, whose internal being is largely unknowable and very complicated?

While I accept that Ashley Smith’s agency is read as madness in the current dominant construction of the case, I refuse to accept that the illegibility of Ashley Smith’s subjectivity to

legal and more generally public discourse is *inevitable*. Like Sandra Gilbert and Susan Gubar⁷⁴⁰ when they suggest that the fact that the preponderance of the English literary canon is masculinist does not prevent the existence of other narrative perspectives alternative to the dominant hetero-male narrative structure, I think that the public discourses of the law and politics have been, to a great extent still are, but need not necessarily *remain*, masculinist. As Ewick and Silbey wrote “individual acts of resistance become consequential as they are transformed into stories.”⁷⁴¹

As discussed in Chapter 3, narratives matter a great deal to how legality is constructed and to how people are governed. Telling stories about Ashley Smith that recognize or even celebrate reversals and exposures of power has implications for power; different stories can change not just how we see the world but the socially constituted world itself. The unprecedented homicide verdict constitutes a refusal on the part of the jurors to do what is generally done. Rather than resolving the inquiry into of the cause of Ashley Smith’s death, this verdict raises questions. A finding of “not determined” would have concluded for all time that the mysteries of Ashley Smith’s life and death were unsolvable and unknowable but this verdict provides for the possibility that it could be know, that more questions should be asked.

By way of conclusion, in the following discussion, I take up Dr. Carlisle’s challenge and suggest ways that the Ashley Smith case could be re-imagined to produce conditions of possibility that would make prison deaths like hers less likely to recur in the future. The necropolitical actions that assured her social, juridical and biological deaths would be made less predictable by making space in the public imaginary for the world-making potential of the voices

⁷⁴⁰ Gilbert, Sandra and Gubar, Susan, *The Madwoman in the Attic*, *ibid*.

⁷⁴¹ Ewick, Patricia and Silbey, Susan “Narrating Social Structures”

and agencies of girls in general and of incarcerated subjects in particular, in especially those identified as female. Removing the sacral aura accorded Ashley Smith by framings of her as a noble victim, rather than doing violence to her beingness, instead of brutalizing her humanity and flattening her complexity by rendering her into new figures, in the following discussion I look at moments of agency by Ashley Smith discernable throughout the case that reveal possibilities for the complexities of her agencies to be legible, for her existence as a social participant and as an agentic actor whose world-creating potential renders her a maker of meanings, and opens up possibilities for those meanings to be read and understood.

Ashley Smith, in the Child and Patient figurations, which are mutually supportive, has been discursively configured fit into angels and demons narratives as a *noble victim*. The following is a discussion of agentic moments in the Ashley Smith case that might, instead of fitting Ashley Smith into their paradigmatic structures, be reinterpreted in ways that disrupt the structures of these victim/ villain narratives and open up a space for her life and death to be re-read in stories with that provide opportunities for effecting social change at the micro level. It is hoped that this dissertation will contribute to opening up new possibilities for adolescent young women to be understood as meaning makers and participants in the agentic world-creating subjectivity in the juridical field of politics and law.

Pieces of what has been said about Ashley Smith can be re-read in ways that interrupt the flow of prevailing narratives of the Smith case. Instances in which Ashley Smith acts in ways that can be read as expressive, creative, rebellious, heroic, political or athletic show ways in which she was, in the limiting context of how agency exists as always already partial, limited and complicated multiple and overlapping forms of oppression, involved in the authoring of her own life story. These incidents emerge and disappear in the texts that make up the Smith case like

flashes on the landscape, almost never making it into the popular and official narratives told in various sites about her life. The weight of the oppressive situation in which she was enmeshed is not easily unburdened by these moments of possibility, but moments in which agentic openings are revealed do emerge from a variety of texts. For example, a glimpse of alternative possibilities for making sense of Ashley Smith is offered by the segment of video of her in flight transfer to Pinel institution from Saskatoon Regional Mental Health Centre in 2007⁷⁴² in which she laughs and jokes with the guards, and inquires about whether their seating positions are comfortable without a hint of sarcasm or facetiousness as well as stating that her incarceration was for stealing the CD of “Who Let the Dogs Out”. In this video, Smith converses politely, and from it at least one piece of new information about her is gleaned: we at least know about a song she liked, we at least are invited into consideration of the notion that she liked some things and disliked others, in short, that she held opinions. This is the same flight on which Inmate Smith is later duct taped to her chair by the RCMP co-pilot, and it is the video of her subsequent abuse by CSC guards that has figured prominently in the inquest.

None of the dominant discursive constructions or prominent figures of Ashley Smith in the Smith case invite the interpreting subject into identification *with* her - these alternative possible figures of Ashley open up the possibilities of readers and interpreters more readily asking themselves not “what if I were Ashley’s mother, sister, brother or father” but rather the more urgent question: what if *I* were Ashley Smith? Identification with her subjectivity could lead readers and interpreters to the inference: what happened to Ashley Smith could happen to *me*. Looking at the Smith case for agentic openings within oppressive structures has the potential

⁷⁴² To view the video, follow the following link:
http://www.thestar.com/news/2013/12/19/ashley_smith_s_candid_conversation_with_guardes.html

in turn to reveal ways in which Ashley Smith, never free, was not unagentic but rather had moments where she expressed rebellious, political and expressive agencies.

Study of agentic openings in the Smith case allows for development towards theorization of a less naïve notion of how actors experience agencies, including carceral agencies and feminine agencies, operating always already in oppression, while being consumed by oppression and dissolved by oppressive processes.⁷⁴³ This conclusion will, I hope, open up the possibility of interrogating her case as a “case study” not in the governance to which a subhuman enemy population of inmates are subject, the lack of treatment, abuse and neglect to which a small subgroup of the “worst of the worst” mentally ill offenders are subject or even to which our children, current or putative, could be subject, but a case study that reveals logics and arts of governance to which we are *all* subjected.

a. Rebellious Agency

Numerous incidents in the Smith case can be re-read in ways that see her actions as volitional and agentic by deliberately flouting the will of a variety of official agents of various systems. There is a broad consensus in social science research that youthful rebellion is a “normal” and necessary, even desirable, developmental stage on an adolescent’s journey to adulthood.⁷⁴⁴ I think it is facile and oversimplistic to suggest that Ashley Smith could be properly categorized within the emerging figure in psy-discourses of the “spirited child,”⁷⁴⁵ but I do think it might be appropriate to suggest that she could be understood as less ill than *wilful*. Widely held

⁷⁴³ Alexis Shotwell, for example, has made attempts to theorize the complexities of agencies and gender normativities that is helpful towards deepening understanding of gender performance and normativity. See e.g. Shotwell, Alexis “Open Normativities: Gender, Disability and Collective Cultural Change” (2012) *Signs* 37:4 http://alexisshotwell.com/research_files/Signs%20preprint.pdf

⁷⁴⁴ See e.g. Caissy, Gail *Early Adolescence: Understanding the 10 – 15 Year Old* USA: Perseus Publishing, 1994.

⁷⁴⁵ It is beyond the scope of this dissertation to really explore this contention, but I would suggest that the figure of the “Spirited Child” is problematic in many of the same ways as earlier figurations of the child (such as “delinquent” or “incorrigible” child). This figure reveals how discourses of the girl and of the child are always in flux, and that they adapt in response to critiques in ways that can be dangerously insidious. For an example of this figure, see Kurcinka, Mary Sheedy *Raising Your Spirited Child: A Guide for Parents Whose Child is More Intense, Perceptive, Sensitive, Persistent, Energetic*. USA: Harper Collins, 1991. Print.

assumptions about adolescent rebellion have been critiqued by feminist scholars as masculinist,⁷⁴⁶ a theorization which raises questions about how much of Ashley Smith's challenging behaviour would have been received and understood as rebellious and thereby "normal" and not pathological had she been identified as male. Psychologists have contended that rebellion has a positive side in adolescent identity formation, and should be *channeled* instead of contained.⁷⁴⁷ Indeed, mainstream popular psychology takes a consensus position that attempts to contain rebellion in adolescence are likely to be counter-productive to fostering pro-social behaviours in teens.⁷⁴⁸

There are many actions and statements attributed to Ashley Smith that could be easily re-read as rebellious. The Wikipedia page about Ashley Smith's case, and the dominant narrative about her imprisonment, is that the long series of incarcerations that ultimately led to her death was started by the incident where she threw apples at a postal worker. Significantly, this narrative presents the apples incident as a single event and downplays the series of incidents and charges for which Ashley Smith was coming into conflict with authorities in education and legal systems starting in 2001 and leading up to her incarceration in 2003.⁷⁴⁹ For instance, she was placed on probation in 2002 for making harassing phone calls, assaulting passersby on Moncton streets, haranguing fellow bus passengers and hassling municipal bus drivers. Further, there is another incident, on December 29, 2003, where on the CBC timeline it is indicated that Ashley Smith "waived a knife on main street" (sic) and refused to give it to police."⁷⁵⁰ Once she was

⁷⁴⁶ For discussion see e.g. Reynolds, Simon and Press, Jay. *The Sex Revolts: Gender, Rebellion and Rock n Roll* UK: Serpent's Tail, 1996. See also Byrnes, J.P., Miller, D.C., & Schafer, W.D. (1999). "Gender differences in risk taking: A metaanalysis". *Psychological Bulletin*, 125, 367–383.

⁷⁴⁷ For example see e.g. the discussion of "healthy rebellion" in Nowinski, Joseph *The Identity Trap: Saving Teens From Themselves* New York: Amacon, 2007 beginning at p. 85.

⁷⁴⁸ *ibid*

⁷⁴⁹ The escalating series of incidents that led to Smith's first incarceration is detailed in Richard, 2008.

⁷⁵⁰ CBC Timeline: The Life and Death of Ashley Smith" <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

incarcerated, as has been discussed, Ashley Smith disobeyed guards in at least 800 incidents while at the New Brunswick Youth Centre, and over 160 while in CSC custody. As noted in Chapter 3, in several instances she did plead not guilty and even appeal guilty findings against her. In the Patient Smith configuration of Smith, this conduct is seen as compulsive: an alternative formulation is that these actions were, while not coldly calculated, understandably volitional and agentic behaviour, while unusually persistent in its repetitiveness, in the context of her age, this conduct could be read as “normal” and expectable from a rebellious teen. Consider Smith’s remark to guards in 2006: “If that was the taser, I’m going to do everything I can to get it every day.”⁷⁵¹ It is very plausible to re-read this as defiance.

Ashley Smith herself in journal entries claimed to be “messing” with guards while in prison. For example, she wrote: “When I use to try to hang myself I was just messing around trying to make them care and pay attention. Now it’s different. I want them to fuck off and leave me alone.”⁷⁵² What guards in the “Rush to Judgment” report characterized as a “game”⁷⁵³ is easily reframed as the sort of challenge to their authority and an assertion of agency by Smith frequently referenced in popular psychology texts as to be expected from rebellious youths. Indeed, the constancy and stamina of Ashley Smith’s micro-movements to “mess with” various systems can be seen as itself a modality of her rebellious agency.

Male adolescents perceived as rebellious are often culture heroes, and figure prominently in popular music as well as films.⁷⁵⁴ However, recently, popular texts produced in fictional and cinematic sites have represented rebellious girls who commit violent acts as heroic. Notable

⁷⁵¹ “Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁷⁵² Ashley Smith journal entry (September 4, 2006) New Brunswick Youth Centre: Referred to in CBC Blog “Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁷⁵³ “A Rush to Judgment” report *ibid*

⁷⁵⁴ Examples are wide-ranging, from James Dean in “Rebel Without a Cause” to Eminem in “8 Mile”.

among these are girl heroes in recent youth novels made into Hollywood films such as Katniss Everdeen in “The Hunger Games”⁷⁵⁵ and Tris (Beatrice) in “Divergent.”⁷⁵⁶ Similarly, the runaway success of the book and film “The Girl With the Dragon Tattoo” provides Lisbeth Salandar, an example of a rebellious, at times violent young woman who is ultimately heroic, albeit not a teen.⁷⁵⁷ Thus, contemporary western neoliberal mainstream culture provides discourses of agentic, rebellious, meaningfully violent, sympathetic actions by girls. The prevalence of girl heroes in popular culture may also signal an openness that was not previously present in the cultural mainstream to reading girls’ agencies as something other than madness.

Readings of Ashley Smith’s actions as rebellious are very occasionally present in texts produced in the Smith case. For example, one 2009 *Toronto Star* article directly challenges the commonly accepted label of Ashley Smith as mentally ill. In the article, journalist Rosie DiManno describes Ashley Smith as being not mentally ill but “incorrigible while incarcerated” and argues that it was because Inmate Smith’s resistant attitude was judged by authorities to be one that “needed crushing” that she was met with punitive responses in prison. DiManno describes Ashley Smith not as a victim but as a complex woman, a violent, combative, challenging “iconoclast ” who “never did surrender.”⁷⁵⁸

Admittedly, with the benefit of hindsight, I would argue that progressive advocates for prisoners’ rights and for the Smith radically underestimated the complexities of agency that the inquest jury and the Canadian public were able to understand. In contemporary late modern

⁷⁵⁵ Katniss was originally a character in a novel - Collins, Suzanne *The Hunger Games* USA: Scholastic, 2008. The book was made into a highly successful 2012 Hollywood film as well as a 2013 sequel “Catching Fire.”

⁷⁵⁶ Roth, Veronica. *Divergent* USA: Harper Collins, 2011. Made into a Hollywood film in 2014.

⁷⁵⁷ “The Girl with the Dragon Tattoo” was made into a Hollywood film in 2011. The film is based on Steig Larsson’s books, especially Larsson, Steig *The Girl with the Dragon Tattoo* UK: MacLehose Press, 2008.

⁷⁵⁸ DiManno, Rosie “Troubled Teen Beaten Down By System” *Toronto Star* (9 March 2009, A.2. Notably, by 2013, Rosie DiManno had herself changed her mind about Ashley Smith and wrote that “she may indeed have been mentally ill” DiManno, Rosie, “DiManno: Saving Ashley Smith a regular occurrence for guards, who faced discipline for helping” *The Toronto Star* (24 January 2013).

North America, notwithstanding the victim/ villain rhetoric of neoconservative government through crime agendas, where there is an African American US President, the Premier of Ontario is a lesbian woman and the fictional girl-hero characters discussed above enjoy great popularity, there does seem to be discursive space for advocates to suggest that prisoners who die, including women, and women in general, are complex. The stakes in the strategic wager played by advocates for Smith to present her as a simplistic and ostensibly sympathetic noble victim are high indeed: not just Ashley Smith but all adolescent girls who express rebellious agencies on their developmental paths to adulthood are re-inscribed as madwomen by the naïve assumptions about “normal” girls strengthened by the Child Ashley figure. Further, in order for women to participate in the processes of law and government, whether in their own cases or as advocates in cases relating to others, their voices must be heard and trusted. Simplistic re-inscription of victim narratives about Ashley Smith contributes to girls’ and women’s ongoing illegibility and inaudibility of their voices, in the public square and to the law.

b. Political Agency

Further afield of “innocent victimhood” than the popular psychological notion of “adolescent rebellion” lies another way to re-read Ashley Smith’s actions as meaningful. There are a number of incidents and statements made by Ashley Smith in the texts that make up the Smith case that provide material where her conduct and speech acts can be re-interpreted as political statements. As discussed, the offence of assault for which Ashley Smith is often understood to have been originally incarcerated in the series of escalating incidents that ultimately led to her death was throwing apples at a postal worker: in the CBC timeline, the allegation is made that Ashley Smith did so for political reasons: “She was told that the postal worker deliberately delivered the welfare cheques

late.”⁷⁵⁹ If this assertion is accepted, then Smith can be re-read to have been resisting not individuals but systems and configurations of power. Read this way, Smith can be seen to have acted, from beginning to end, not simply to resist or flout the will of particular adults, but in a programmatic and consistent way to quite deliberately throw a monkey-wrench into *systems* of power. This would have been both creatively agentic and political behaviour.

Ashley Smith engaged in public debate to an extent unusual for a teenager, and especially unusual for someone held in youth custody. On November 2, 2005, a letter to the editor authored by her was published in the Moncton *Times and Transcript*. Ashley Smith’s letter read as follows:

Dear Editor: I’m writing this letter because I believe the community should know. I’m currently at the New Brunswick Youth Centre serving a rather long sentence for petty crimes. When the judge sentenced me, the community went way to go! One less troublemaker on the streets. Do they not realize this place makes youth worse not better? Since I have been here, I’ve become a more angry person. I have learned way more about how to commit crimes and not get caught....⁷⁶⁰

Further, as I have noted, Ashley Smith filed many grievances while in CSC custody. Notably, these grievances were not just about her own conditions but were often about treatment of offenders in general, such as the distribution of healthy foods, such as fruits instead of muffins for snacks.⁷⁶¹

⁷⁵⁹ (incident of October, 2003) “Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

⁷⁶⁰ As cited in “Ashley Smith youth jail file lists punishments and appeals for help” *Hamilton Spectator* (26 January 2013).

⁷⁶¹ Sapers, 2008.

Some psychological researchers have offered a perspective on adolescent aggression and rebelliousness that it is not just an indicator of a “normal” trajectory in emotional development towards adulthood but also a signal that an adolescent has potential to be a leader, whether socially or politically. As has been suggested by certain researchers: “bullying is power.”⁷⁶² This suggestion certainly accords with Foucauldian notions of power in relationships and interactions: Ashley Smith’s resistances to authority are capable of being read as political. Read as intentional, political action, Ashley Smith’s unmanageability in prison can be understood as itself a success story: it could be seen as a triumph of will.

While I of course cannot argue that this is conclusively provable, it is alternatively plausible that even Ashley Smith’s death could be read not as compulsive, irrational behaviour symptomatic of severe mental illness but rather as a communicative act, a meaningful act, a political act. While, since about 2010, as discussed, psy-expert opinion (from Dr. Margo Rivera) that Ashley Smith’s death was not intentional has controlled the narrative of how she died, her death was initially understood to be a suicide. Rather than acting impulsively or without volition in self-harming, it is arguable that Ashley Smith quite deliberately did end her life. It is alternatively plausible that, faced with silence and non-response to her grievances, Ashley Smith knew that her predicament of endlessly escalating charges was attracting no outside attention, and that her prison term was likely to be endless. Her death could be read as a communicative act of political resistance, a suicide calculated to bring down the institutional response in the form of an inquest and the public scrutiny in the form of media attention that it in fact did. Read this way, her death could have been a suicide that was *also* simultaneously a homicide that was

⁷⁶² Vaillancourt T, Hymel S, McDougall P. “Bullying is power: Implications for school-based intervention strategies”. In: Zins JE, Elias MJ, Maher CA, editors. *Bullying, Victimization, and Peer Harassment: A Handbook of Prevention and Intervention*. New York, NY, USA: Haworth Press; 2007. pp. 317–337

also simultaneously a political statement. Looked at in the theoretical framework of necropolitics, this could be understood as a series of deaths: social and juridical homicides that were completed by means of biological suicide. The “cause of death” question asked at an inquest require jurors to decide *between* causes of death and therefore do not permit responses that understand complex, messy, interactions of agencies and institutions.

c. Expressive Agency

Even while on probation, in foster care and in prison, Ashley Smith expressed herself in a wide variety of creative ways. As has been discussed, by all accounts, Ashley Smith was a large person. There are references in texts to her enjoyment of physical activities such as canoeing and basketball; she had her own kayak.⁷⁶³ These reports hint at the possibility that Ashley Smith had at least moderate athletic potential, or at least enjoyed her physicality. However, at no point is her physicality ever characterized in a positive light: at no point is her body characterized as powerful with a constructive connotation accorded to that term and there is no evidence that anyone sought to provide her with means by which she could channel her physical size and strength into something constructive. It is almost unimaginable that a large boy with significant physical strength and size hailing from a middle-class background wouldn't have been channeled into some sort of athleticism – football, hockey, something to work with his muscles and get his aggression out. Interestingly, the inquest verdict contains recommendations that suggest at least the jurors thought of this possibility: they suggested that former carceral subjects should be involved in the design of programming for inmates.

It is also evident from the Smith case that Ashley Smith enjoyed expressing herself artistically, through writing a journal, writing poetry and drawing pictures. Notice that,

⁷⁶³ Vincent, Donovan and Zlomistic, Diana *The Life and Death of Ashley Smith*, *ibid.*

apparently, Ashley Smith complained about the writing paper and writing instruments after the concerns about force and before mentioning basic necessities like soap, toilet paper and even food.⁷⁶⁴ Perhaps, as guards suspected, she wanted to use a pen to self-harm. However, it might be that she also or alternatively wanted to use the pen to write.

7.3 The Locked Room

There are many possible ways to tell stories about Ashley Smith, and each narrative that could be told would, as Butler has theorized and this dissertation has shown, involve selective processes in its telling and silences that make it into fiction. Rather than posit a “truer” story about the Smith case, or an alternative rendering of her as some other sort of figure than those now on offer, this discussion has tried to show how material exists in the texts that constitute the case that could allow for her agency to be understood as engaged in the narration of her life and construction of her case in a variety of ways. I have gone beyond the question of how she died in prison on October 19, 2007 to ask broader questions about how she came to die there. In the Smith case, as discussed above it is clear that progressive politics early on either consciously or unconsciously accepted the starting premise that complex, agentic young women are unthinkable subjects. In fact it is those who purport to be Ashley Smith’s advocates who are most deeply implicated in foreclosing the possibility of her being understood as an agentic, world-creating, meaning-making subject.

Progressive politics have instrumentalized the figure of Inmate Smith in opposition to prolonged use of solitary confinement in prisons. Advocates have also instrumentalized the

⁷⁶⁴ For example in July 2006 Ashley Smith filed grievances at Nova. She grieved that: “Excessive force was used against her; She wasn’t permitted writing paper or writing instruments; She wasn’t permitted sufficient toilet paper for hygiene purposes; She was not permitted soap in her cell, was only given finger foods, and was only given a small piece of deodorant on her finger at a time; While menstruating she was not permitted underwear or sufficient sanitary products to meet her hygiene needs.” “Timeline: The Life and Death of Ashley Smith” <http://www.cbc.ca/fifth/blog/the-life-and-death-of-ashley-smith>

Patient Smith figure in service of causes in relation to increasing the funding for mental health services. However, violences and wrongs done to Ashley Smith by social institutions and the prison industrial complex do not start and end with solitary confinement: she was tasered; she was pepper sprayed; she was beaten; she was tortured by confinement for long periods of time in “restraints” resembling medieval torture devices found in dungeons; she was given forced injections; she was drugged against her will and 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 her in her carceral context, been understood as sexual assaults; her sexual agency and autonomy were effaced; her agency was enlisted against her to bring about her own death. Further, accepting uncritically that Ashley Smith was self-evidently, stably, “mentally ill” depoliticizes the highly problematic pathologization of women’s agencies that is endemic to our culture and retrenches psy-discourses that have historically been implicated in rendering women’s agencies illegible to the law and in the public square. Prevalent instrumentalizations of Ashley Smith are not as powerful as they could be: a different appreciation of the complexities of Ashley Smith’s agency has potential to cut even closer to the heart of the prison industrial complex by providing a case that illustrates the dangerousness of its risk and security logic and the evils that are routinely perpetrated by a rationalized bureaucracy.

The Smith case is a revealing instance illustrating several contemporary tensions and discomforts: with mandatory gender norms, race thinking, the gendered social construction of mental illness, and the intersecting logics of necropolitics and exclusion. endemic to Corrections – arguable that the mental health remedies advocated wouldn’t have helped Ashley Smith, don’t get to the heart of her diagnosis. Working with instances of agentic action by Ashley Smith,

perhaps the inquest verdict of homicide in the Ashley Smith case might provide technology that could be deployed in efforts to seek another possible course of action alternative to accepting the conditions of possibility understood by Omelans in LeGuin's story: of complicity in the logic of exception through membership in the society of or of walking away from the Omelas.

While the Smith case has become uniquely celebrated, in Canada's carceral systems, there is not just one child in a locked room. Ashley Smith's incarceration was, in many respects, not unusual. When she was a living carceral subject, Smith was a "case" of one amongst a type ("inmate") of which there are many. According to Statistics Canada, in 2012-2013 there were 41,049 offenders, both adults and youth, in custody on an average day. Per capita, this number translates into a rate of 118 persons in custody per 100,000 people in Canada's general population.⁷⁶⁵ With recent changes to criminal legislation in Canada, such as the growth in mandatory minimum sentences, and the overall inclination of the current government to get "tough on crime", incarceration rates⁷⁶⁶ (although not crime rates) are at an all-time high in Canada; predictions generally indicate that these numbers will at least remain stable for the foreseeable future and may in fact be in the process of increasing.⁷⁶⁷

When Agamben's concept of homo sacer and Ong's understanding of the carceral subject in solitary confinement as the archetypal neoliberal subject⁷⁶⁸ are considered, the caseness of Inmate Smith opens up: maybe she is 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

⁷⁶⁵ Corrections Canada Key Indicators 2012-2013 <http://www.statcan.gc.ca/pub/85-002-x/2014001/article/14007-eng.htm>

⁷⁶⁶ A growing number of incarcerated persons have not been convicted but are being held in "remand." They are waiting for sentencing on a variety of charges. While they have not been found guilty of an offence, persons on remand are carceral subjects subject to the rules and regulations of the correctional facility in which they are held, the breach of which can result in further charges.

⁷⁶⁷ For discussion see June 2013 Report of the Correctional Investigator as Tabled in the House of Commons: <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx>

⁷⁶⁸ Ong, Aihwa. 2006. *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*. Durham, NC: Duke University Press.

was unavailable and unthinkable, opens up questions about who is responsible for the lives of inmates. The verdict's assertion that inmates *can* be killed in Corrections custody in circumstances for which CSC is blameworthy can be considered broadly relevant if read as a rejection an Inmate's logic-of-exception status as juridically dead already. Politically, 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. The figure of Inmate Smith might 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 Le Guin's story where the mirrors of surveillance reflecting in on each other are shattered and the prisoner – the one in carceral solitary confinement and also the neoliberal subject in general - is (more) free.

7.4. Denouement

I had the dream again. Since moving here to this lovely red brick rented house far away from my homes and histories to start law school, I have been having the dream. I wake up thinking I hear a girl's voice calling for help; it seemed real. I actually went outside in the pre-dawn grey light this morning looking for her, for the girl I heard shouting. And I think maybe there wasn't anyone at all, that it was the dream, that although I am comfortable and warm in bed with my law school books spread out on the desk in front of my window, the girl desperately wandering out on the street calling for help is still also me.

-October, 2000 – Kingston, Ontario: Journal of Rebecca Jaremko

Doris Lessing, *The Golden Notebook* wrote that “this is the way to deal with the problem of subjectivity... there [is] no way of *not* being intensely subjective... nothing is personal in the sense that it is uniquely one's own. Writing about oneself, one is writing about others, since your

problems, pains, pleasure emotions –and your extraordinary, remarkable ideas, can't be yours alone.”⁷⁶⁹ The converse is also true: when we write about others we are also writing ourselves.

Ursula K. LeGuin's story about the Omelas referenced in Chapter 4 also bears a psychoanalytic reading that is relevant to my research. As discussed, the child in the locked room can be understood as the carceral subject of neoliberal exclusion and it can also be understood as much like Gilbert and Gubar's madwoman in the attic,⁷⁷⁰ the agentic potential of the selves we foreclose by living within certain dominant discursive frames. It is beyond the scope of this dissertation to explore in detail but important to consider how technologies of the logic of exclusion imbricated in neoliberal governance impact our expressions, performances and understandings of ourselves.

Writing about Ashley Smith in this dissertation has been peculiar for me. I empathize with Ashley Smith easily, and perhaps over-identify with her too readily; she was not me. I cannot know what went on in her mind and it would be misleading for me to assume I do based on my own subjectivity; like everyone else, I cannot speak for Ashley. However, from beginning to end, in no small part because of my life experiences in all sorts of trouble in the juridical field as an adolescent girl, I see Inmate Smith as a possible self in another, nearby and entirely plausible, possible world. A ghostly presence with whom I have been contending throughout my research and writing of this dissertation is a figure of an imaginable alternative Ashley, twenty years down the road from her death: me.

This dissertation emerges in no small part out of my own experiences as an adolescent girl who had to make difficult decisions and act in the moment. *Unlike* Ashley Smith, at certain

⁷⁶⁹ Lessing, Doris *The Golden Notebook* London: Grafton Books, 1972 at p.13

⁷⁷⁰ Gilbert, Sandra and Gubar, Susan, *ibid.*

critical junctures, I did not enact resistance; I complied in order to survive. I consciously shed strategic tears; I consciously performed femininity. I was not so physically excluded from the norm. In consequence, as do so many of us, I survived to be integrated into the broader society. It is analytically important for me to be reflexive; when I am speaking about Ashley, I am always already coming from a place where I am speaking about me, even if that is understood in the limited methodological sense that the analysis of the Smith case is the space through which I, as author of this dissertation, speak. I like what Foucault said about writing, as follows:

I don't feel that it is necessary to know exactly what I am. The main interest in life and work is to become someone else that you were not in the beginning. If you knew when you began a book what you would say at the end, do you think that you would have the courage to write it? What is true for writing and for a love relationship is true also for life. The game is worthwhile insofar as we don't know what will be the end.⁷⁷¹

Albeit not in a simplistic, tidy way, the experience of writing this dissertation has been transformative. The underlying hope I have worked from in researching towards and writing this dissertation stems from the empowering notion consistent with Foucauldian discourse analysis: a painting, a poem, even academic writing is a technology that can rupture the socially constructed world and it can change us in that process. Put another way, I have been working from a notion similar to that developed by Sarah Lefanu in her study of feminist science fiction *In the Chinks of the World Machine*, that the goals of creating a space for women and breaking down binaries between masculinity and femininity are not irreconcilable. Rather, like her, I am seeking to work towards a discursive moment when those “ancient dualities’ have been interrogated and revealed

⁷⁷¹ Foucault, Michel. Truth, Power, Self: An Interview with Michel Foucault (25 October 1982)

as 'specific, limited phenomena' [and] women can take responsibility as subjects, and as readers."⁷⁷² It is in no small part my own agency I have been working to make legible in legal discourse; I have been working to use my creative agency to write myself, and other subjects like and unlike myself, arriving later in time, into a set of normativities that are more open and allow us to be more free.

Identification with the deceased subject of the case has its advantages and pitfalls. There are major methodological problems with over-identification when what I am seeking to do is provide an emancipatory space for someone else's agency. I must be wary of the violence I can do to a deceased subject by turning her life into a narcissistic project. In particular, in writing this dissertation I have had to struggle to be aware of the dangers in *over* identifying with Ashley Smith and doing injustice to her life and death by making it into a story about me. In writing this dissertation, I am aware that I began by looking to redeem myself, to find peace, to narrate both my story and hers into a happy ending, and that I carried with me a preconceived figure of Ashley Smith. I am aware that the writing of this was fraught with danger of colonizing Ashley Smith with my own identity.

However, I am alive to and always reconfiguring my objectives: at the start of undertaking this research and writing, I did not know where I would be at this journey's end. As it turns out, there is a twist ending to this narrative that surprises the author; this is not my narrative of redemption. By way of literary analogy, in *Jane Eyre*⁷⁷³ it is the incendiary power of Charlotte Bronte's wandering madwoman that reconfigures the structure of Thornfield Hall and the gender relations between her and Mr. Rochester into a more livable formation. Ashley's mother Coralee

⁷⁷² Lefanu, Sarah, *In the Chinks of the World Machine* US; The Women's Press, 1988 at p. 182.

⁷⁷³ London: Smith, Elder and Co., 1847.

Smith is often quoted for the statement, after the inquest verdict that "now Ashley is at peace."⁷⁷⁴ This claim that a resolution has been reached, a sealed civil settlement and the (proposed) opening of two new mental health beds present a tidy, and perhaps kind, Hollywood, happily-ever-after ending to the dominant narrative arc of the celebritized Smith case.⁷⁷⁵ However, the central argument in this dissertation is that it is just too neat, too simple, to end the story there. Ashley Smith died in prison at age 19. She most emphatically did *not* live happily ever after. Nothing I can write can change that. I have argued that it would be helpful for rendering girls' agencies legible and challenging logics in macropower in ways that could provide conditions of possibility that allow more freedom for "other Ashleys" that late modern Canada remains haunted in advocacy and public debate by the mystery of what Ashley Smith meant and what was lost by her death. I want this dissertation to leave readers reflecting on the oppressive world of systems in which Ashley Smith was enmeshed and the world-creating potential of Ashley Smith's micro moments of agency. Thinking of Judith Butler, I have argued that Ashley Smith's case can be re-read if the reader troubles the distinction between words and actions.⁷⁷⁶ The speech act always has potential for a non-ordinary meaning: why not the physical act? It is my argument that we have much insight to gain into not just her death but also into the government of our own lives from reading Ashley Smith's voice into her resistant actions, by seeing them as micro movements towards toppling the bureaucratic apparatus in which she was trapped, and towards wedging open the world machine.

⁷⁷⁴ See e.g. Taber, Jane. "Ashley Smith is finally 'at peace,' mother says after homicide ruling" *The Globe and Mail* (19 December 2013).

⁷⁷⁵ Interestingly, however, the opening of even these new beds and the response of Public Safety Canada to the inquest recommendations has been put "on hold" indefinitely and will take place "in due course" according to a statement made on behalf of the Minister of Public Safety for Canada in September 2014. See e.g. Stone, Laura "Tories Won't Say When They'll Respond to Ashley Smith Inquest Recommendations" *Global News* (3 September 2014).

⁷⁷⁶ Butler, *Giving an Account of Myself*, *ibid* at p. 11

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