



Intensifying the Incarceration of the Vulnerable Legal Subject: Correctional Treatment of Ashley Smith as a Source of Legal Norms

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Abstract

Ashley Smith lived and died at a confluence of legal sanctions and correctional policy, norms, decisions, and indifference. This article approaches her incarceration primarily through a particular articulation of legal pluralism. Martha-Marie Kleinhans and Roderick A. Macdonald argue legal subjects should be understood as *creating* law in relationship with laws/norms. The Correctional Service of Canada (CSC) treated Smith as an excluded legal subject through practices of isolation, but the correctional norms evolving in relationship with her resultant distress simultaneously indicate CSC treated Smith as if she were effectively a law-producer, capable of changing policy. However, treating her as a source of norm-creation assumes equality/power Smith did not have. The story leading to Smith's death in custody illustrates two primary themes regarding the production of law/norms. First, the legal subject within a critical legal pluralism should be widened to encompass those who act within/against (and are acted upon by) legal/normative systems characterized by extreme power disparities. Drawing on Martha Fineman's vulnerability analysis, I argue such legal subjects should be understood/treated as vulnerable, implicating an enlarged role for institutions. Second, I follow the broad dictates of a critical legal pluralism to demonstrate how the reciprocally constitutive (though unequal) relationship between the legal subject and legal/normative orders manifested in Smith's incarceration and attendant changes to correctional norms.

Keywords: law/norm production, Ashley Smith, legal pluralism, vulnerability analysis, exclusionary power of law, legal subjects

Résumé

Cet article aborde l'incarcération d'Ashley Smith à travers le prisme du pluralisme juridique de Martha-Marie Kleinhans et de Roderick A. Macdonald. Selon eux, les sujets de droit créent eux-mêmes le droit dans le cadre d'une relation droit-norme. En l'isolant, le SCC a traité Ashley Smith comme un sujet de droit exclu; toutefois,

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les normes changeant en réponse à la détresse de la détenue montrent que le SCC a traité Ashley Smith comme si elle était un agent créateur de droit, apte à changer les politiques. La traiter comme si elle était en mesure de créer la norme présume une forme d'égalité, voire un pouvoir dont Ashley Smith ne disposait évidemment pas. Cette affaire illustre deux thèmes en lien avec la création du droit et de la norme. D'une part, le sujet de droit au sein d'un « pluralisme juridique critique » devrait être élargi pour comprendre ceux qui évoluent au sein des systèmes juridiques et normatifs et qui les subissent, notamment en cas d'extrême disparité de pouvoir. D'après l'analyse de la vulnérabilité de Martha Fineman, de tels sujets de droit devraient être envisagés et traités comme étant vulnérables, ce qui présume une responsabilité institutionnelle. D'autre part, un « pluralisme juridique critique » permet de démontrer les changements subis par la relation réciproque, quoiqu'inéquitable, entre le sujet de droit et les ordres juridique et normatif entourant l'incarcération d'Ashley Smith et la norme correctionnelle qui en découle.

Mots clés : création du droit et des normes, Ashley Smith, pluralisme juridique, analyse de la vulnérabilité, pouvoir d'exclusion du droit, sujets de droit

Introduction: What is Law for Whom?

The study of law often surrounds the question “what is law?,”¹ in which the implicated legal subject is conceived in terms of independence and autonomy.² However, this framework lacks the nuance and reflexivity necessary for contexts wherein the practice of law both involves extensive reliance on norms and also intersects with vulnerable people in manifestly oppressive ways—such as in prisons, where incarcerated legal subjects are thrust deep into the force of law in terms of its control, yet are vulnerable to remaining simultaneously cast outside it through their institutional treatment and the lack of external oversight. In such contexts, the theoretical framework should be reformulated to ask “what is law *for whom?*,” regarding the relationship between the development of institutional legal norms and legal subjects uniquely constrained through their institutional location (their status and environment), in terms of the power imbalance embedded in this relationship of governance.

I examine the legal subject in relation to the legal/normative orders she operates within, with a view to understanding how law and its institutions frame the treatment of its subjects and how law and its administrators characterize these subjects, including the indirect effects of the enactment of law via the implementation of legal sanctions. The incarceration of Ashley Smith permits an exploration of this dynamic, as she lived and died at a cruel confluence of legal sanctions, correctional policy, norms, juridical decisions, and the indifference of the socio-legal world. Moreover, certain ways through which correctional authorities responded to Smith's attempts to cope with her incarceration suggest her expressions of distress effectively contributed to the production of related law/norms. However, this vector of norm creation does not represent a form of reciprocal relationship; the intrinsic vast power disparity points to the need for correctional authorities to have understood and treated

¹ See e.g. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 68.

² Margaret Davies, *Asking the Law Question* (Sydney: Thomson Lawbook Company, 2008), 330.

Smith in a manner guided by her vulnerability. The below discussion is primarily theoretical in nature in its approach to the character of the legal subject and the related production of correctional law/norms, with the underlying intention to emphasize the inherent power differential and to suggest the reconceptualization of this legal subject as a vulnerable figure needing support within correctional law/practice. Ultimately, making vulnerability central to how the prisoner as a legal subject is conceived creates possibilities for correctional reform based on human needs.

My objectives are to situate the development of correctional norms that structured Smith's incarceration within a theoretical framework about the relationship between the legal subject and legal/normative system(s) governing her, and also, given how Smith suffered from the experience of prison, to suggest how the Correctional Service of Canada (CSC) should have treated her as a legal subject needing care for her vulnerability, instead of administering her incarceration around norms of exclusion. A particular articulation of legal pluralism guides and informs my examination of the unequal relationship between certain legal subjects and the generation of normative orders with reference to Smith. First, I suggest such legal subjects must be reconceived and expanded to encompass vulnerability. Moving to discuss how legal subjects and legal/normative orders are reciprocally constitutive, I examine how Smith responded to the experience of incarceration—notably, the dominant correctional norm of isolation. Finally, I turn to how correctional norms and policies were recast and redeployed in response to Smith's self-harming and resistant behaviours, in an effort to spotlight institutional failings.

Much as Kevin Walby finds no “mutual exclusivity between laws and norms,”³ “legal” and “normative” orders are conflated throughout this article given that both combine to regulate conduct. This blurring between laws and norms is even more pronounced in the correctional context, where legislation and correctional policy govern alongside one another, and where many decisions are discretionary and often without external, independent oversight. My point of departure is that “law on the books and the law in action are mutually constitutive and hence less easily distinguishable.”⁴ In Smith's case, law on the books was widely disregarded in serious and harmful ways, and law in action (via norms, practices, and policy) developed in a reciprocal though asymmetrical relationship with Smith's externalized struggles engendered by incarceration. This dynamic says something about how the correctional system constructed Smith as a legal subject; I argue she should have been differently understood and treated in ways prioritizing her well-being.

Theoretical Framework: The Exclusionary Power of Law and the Vulnerability of its Subjects

For those marginalized, law may be divisive and unresponsive; for criminalized persons, law may be further alienating and oppressive. As Margaret Davies writes, law itself is “intrinsically exclusionary”⁵—however, its boundaries carry different

³ Kevin Walby, “Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism,” *Social & Legal Studies* 16 no. 4 (2007): 552.

⁴ Austin Sarat et al., “The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction,” in *Crossing Boundaries: Traditions and Transformations in Law and Society Research*, ed. Austin Sarat et al. (Evanston: Northwestern University Press, 1998), 4.

meaning depending on those confronted by it.⁶ Prison may be seen as “the ultimate system of boundaries,”⁷ as a closed space of exclusion. Duff identifies “there is an excluder as well as an excluded,”⁸ expanding the frame beyond the pains/disadvantages experienced by the excluded into the “roles and responsibilities” of the body having power to impose restrictions and denials of access.⁹ The following discussion is informed by the relationship between the “excluder” (CSC) and the “excluded” (Ashley Smith) in their interdependent, though grossly disproportionate, production of law/policy. To examine this interdependence, I draw from a certain articulation of legal pluralism to highlight the inherent power imbalance in this dynamic creation of law and to highlight institutional responsibility in Smith’s death.

Peter Fitzpatrick describes law as formed in relation to that which it casts outside itself, in that law has the power to exclude and defines itself against the excluded.¹⁰ Legal institutions (here, corrections) can produce law/norms in conjunction with those they constitute as legal subject(s), which emphasizes the profound power differential inherent in this interchange. Smith’s experience of incarceration was suffused by exclusion and perilous isolation. These elements extended beyond the requirements of her actual sentence as ordered, but were ostensibly sanctioned through law and operated through the correctional legal order and institutional norms. Anne Griffiths writes “state law is acted upon by other normative orders.”¹¹ Further, normative orders shape legal subjects through institutional administration of the law, and legal subjects indirectly shape normative orders. This relationship remains unequal given institutionalized power asymmetry. For Smith, this dynamic severely exacerbated her mental health distress.¹²

Griffiths describes how some articulations of legal pluralism have strived to push the study of law past the structure of law and toward the ways people experience disempowerment and exclusions enabled through law.¹³ Because Ashley Smith was a legal subject whose relationship with legal/normative orders was deeply fraught, Kleinhans and Macdonald’s approach to legal pluralism is instructive. They suggest what they term “[a] *critical* legal pluralism”, which “investigates

⁵ Davies, *Asking the Law Question*, 14.

⁶ *Ibid.*, 25.

⁷ Gene Combs and Jill Freedman, “Relationships, Not Boundaries,” *Theoretical Medicine* 23 (2002): 215.

⁸ R. A. Duff, “Inclusion, Exclusion and the Criminal Law,” *Policy Futures in Education* 1, no. 4 (2003): 700.

⁹ *Ibid.*

¹⁰ Peter Fitzpatrick, “Missing Possibility: Socialization, Culture, and Consciousness,” in *Crossing Boundaries: Traditions and Transformations in Law and Society Research*, ed. Austin Sarat et al. (Evanston: Northwestern University Press, 1998), 197.

¹¹ Anne Griffiths, “Legal Pluralism,” in *An Introduction to Law and Social Theory*, ed. Reza Banakar and Max Travers (Oxford: Hart Publishing, 2002), 303.

¹² See generally, Jennifer M. Kilty, “Examining the ‘Psy-Carceral Complex’ in the Death of Ashley Smith,” in *Criminalizing Women: Gender and (In)justice in Neo-Liberal Times*, 2nd ed., ed. Gillian Balfour and Elizabeth Comack (Winnipeg: Fernwood Publishing, 2014), 236; and Rebecca Jaremko Bromwich, *Looking for Ashley: Re-reading What the Smith Case Reveals about the Governance of Girls, Mothers and Families in Canada* (Bradford: Demeter Press, 2015).

¹³ Griffiths, “Legal Pluralism,” 294.

how narrating subjects treat law¹⁴ within the mutually constitutive relationship between legal subjects and legal/normative orders.

Focusing on the exclusionary power of law and the role of the excluded legal subject in the production of the norms/policy functioning as law opens space for alternate understandings of that subject. The correctional system treated Smith as an excluded legal subject where she should have been differently constructed as a legal subject needing and entitled to care, support, and social inclusion. Fineman argues that the “‘vulnerable subject’ must replace the autonomous and independent subject asserted in the liberal tradition,”¹⁵ offering a valuable theoretical lens for reconceptualizing Smith as a legal subject. For Fineman, the vulnerability model encompasses inevitable shifts in our various human needs over time, connected not to a static individual identity but to ways in which “systems of power and privilege” combine to produce inequalities.¹⁶ She suggests “[t]he vulnerable subject embodies the fact that humans experience a wide range of differing and interdependent abilities over a lifetime.”¹⁷ In this manner, the vulnerable legal subject is not located in opposition to a power-bearing legal subject, but inheres in all of us to fluctuating extents given variable experiences, social positioning, and connections among intervening systems and institutions of power. That is, I understand the vulnerable legal subject to both subsist in all of us to differing and contextually dependent degrees, and to manifest in some of us in a more acute, pronounced manner where those vulnerabilities become inflamed due to intersectional oppressions and confrontations that operate at systemic and structural levels.

As vulnerability encompasses a component of humanity we all inexorably share, Fineman contends this must be placed and kept “at the heart of our concept of social and state responsibility.”¹⁸ She declares “the ultimate objective of a vulnerability analysis is to argue that the state must be more responsive to and responsible for vulnerability.”¹⁹ Ashley Smith, a profoundly vulnerable prisoner, should have been treated as a vulnerable legal subject, thereby shifting scrutiny and accountability onto the legal/correctional system and prompting different, more humane institutional actions and responses. Fineman articulates a vulnerability model should also be extended to how we characterize institutions themselves, as “they may fail” due to both internal and external factors and frailties.²⁰ Moreover, as institutions are themselves flawed and fallible, they “cannot eradicate, and sometimes exacerbate, our individual vulnerability.”²¹ For Smith, the correctional system was vulnerable in that its internal norms and policies, already

¹⁴ Martha-Marie Kleinhans and Roderick A. Macdonald, “What is a Critical Legal Pluralism?” *Canadian Journal of Law and Society* 12 (1997): 46.

¹⁵ Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” in *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory*, ed. Martha Albertson Fineman (New York: Routledge, 2011), 161.

¹⁶ *Ibid.*, 171.

¹⁷ *Ibid.*, 168.

¹⁸ *Ibid.*, 166.

¹⁹ *Ibid.*, 169.

²⁰ *Ibid.*

²¹ *Ibid.*

isolation-based, were susceptible to modification in a manner that profoundly intensified Smith's vulnerabilities.²²

Expanding the Legal Subject to Encompass Vulnerability

Kleinbans and Macdonald indicate the dominant tendency in legal pluralism is to transpose questions of legal analysis onto various normative orders, including looking at the rules, institutions, and processes involved,²³ which fails to ask how legal subjects understand their relation to governing orders and whether they are acting within or against those orders.²⁴ As noted above, they propose "[a] critical legal pluralism" to provide space for examining "how narrating subjects treat law."²⁵ In terms of the productive power of the legal subject, this turn to the relationship between the legal subject and relevant legal orders is instructive, although the notion of the "narrating subject" should be problematized and expanded through a "vulnerability analysis." Marginalized and vulnerable legal subjects lack resources and power to consider themselves as narrating legal subjects, and/or to be externally regarded as such.

Hart's discussion of "internal" and "external" views on law provides a preliminary touchstone against which to situate the problem of who constitutes a narrating legal subject. This framework provides a starting place because it implicates the standard, doctrinal conception of the liberal legal subject²⁶ and its relationship to/within governing legal order(s), and because it permits an analysis of power and vulnerability in response, to then reconceptualize this subject. Hart suggests the "internal" point of view is held by "a member of the group which accepts and uses [the rules] as guides," and the "external" point of view operates for "an observer who does not himself accept [the rules]."²⁷ He describes a kind of detachment in the "external point of view," as people with this perspective can acknowledge how the rules bind others, but feel themselves dissociated until they anticipate consequences for failing to comply. Hart notes the tension between the two points of view,²⁸ explaining both must coexist within any legal theory.

In his positioning of people that maintain an "external" point of view, for example by their "reject[ing] the rules,"²⁹ Hart conveys that these legal subjects *choose* to occupy a social place wherein they feel distanced. Davies challenges that "Hart's level of analysis is confined to the rational and independent individual who

²² Kilty argues that with reference to evaluating the "moral performance" of a prison through consideration of its "regime fairness," among other variables, Ashley Smith's "correctional management clearly operated through discourses and practices built upon an ethos of security and punishment that left her feeling unsafe and increasingly distressed." See Kilty, "Examining the 'Psy-Carceral Complex,'" 247. See also Bromwich, *Looking for Ashley*.

²³ Kleinbans and Macdonald, "Critical Legal Pluralism," 33.

²⁴ *Ibid.*, 36.

²⁵ *Ibid.*, 46.

²⁶ Davies, *Asking the Law Question*, 330.

²⁷ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 89.

²⁸ *Ibid.*, 91. For a discussion of how, for many people who are marginalized, Hart's "internal" and "external" views engage "a complicated negotiation within multiple contexts, social codes, and legal systems of inclusion and exclusion," see Davies, *Asking the Law Question*, 18.

²⁹ Hart, *The Concept of Law*, 89.

simply situates *himself* either inside or outside,³⁰ without recognizing the ways people are intersectionally located, including where “the rules exclude us from the beginning.”³¹ Similarly, Hart’s “internal” and “external” points of view both operate for people having a certain amount of power and social standing, such that marginalized/vulnerable people like Smith do not fit within either categorization. Hart distinguishes that people who take up the “external” view “attend to”³² the rules where punishment is anticipated—but for some vulnerable people, their choices are so constrained because of various systemic and structural barriers that attention to the risk of punishment is superseded by struggling to navigate day-to-day life with limited supports. Moreover, as Davies articulates, those “often excluded from the benefits and protection of the law, are not ordinarily excluded from its criminal implications,” but are even more closely surveilled.³³

Much as it is uncertain where vulnerable people fit into legal theory for Hart, it is unclear whether they are typically included within the idea of narrating legal subjects. Kleinhans and Macdonald comment that within their articulation of legal pluralism, “[l]egal subjects are ‘law inventing’ and not merely ‘law abiding.’”³⁴ Immediately, this formulation may not be adequate to encompass criminalized persons; the words “not *merely*” qualifying “‘law abiding’”³⁵ implies this legal subject *is* law abiding, in addition to being “‘law inventing.’”³⁶ This conception of the legal subject may be too restrictive to meaningfully incorporate experiences of marginalized/criminalized legal subjects. While Kleinhans and Macdonald seek to underscore the “multiplicity of identities,”³⁷ the “multiplicity of selves”³⁸ *within* the legal subject with respect to her varied relationships with the different legal/normative orders in which she participates, this formulation may not sufficiently allow for similar multiplicity *among* legal subjects who occupy different social positions. For Smith, punishment was so inevitable and forceful it seems she experienced it less as a sanction and more as a signifier of her worthlessness in the eyes of correctional officials.

Smith may be understood as having been prevented from being a narrating legal subject given that she was isolated and relatively powerless. Equally, Smith may be characterized as a narrating legal subject if her self-harm and other disruptiveness are understood as acts of resistance and thereby forms of narration, her voice against the system that oppressed her. As Jennifer M. Kilty argues, “self-injury, however harmful, may represent an attempt to resist the power of the prison and to demonstrate personal agency.”³⁹ It is helpful to consider this duality further to unpack how Smith may be understood as a legal subject, and how this

³⁰ Davies, *Asking the Law Question*, 15.

³¹ *Ibid.*, 16.

³² *Ibid.*

³³ *Ibid.*

³⁴ Kleinhans and Macdonald, “Critical Legal Pluralism,” 39.

³⁵ *Ibid.*, [emphasis added].

³⁶ *Ibid.*

³⁷ *Ibid.*, 40.

³⁸ *Ibid.*, 42.

³⁹ Jennifer M. Kilty, “Under the Barred Umbrella: Is There Room for a Women-Centered Self-Injury Policy in Canadian Corrections,” *Criminology & Public Policy* 5, no. 1 (2006): 165.

subjectivity may be theoretically expanded to redirect the focus onto institutional responsibility for her well-being.

Kleinhans and Macdonald write that a critical legal pluralism is oriented toward the “citizen-subjects” of legal and normative orders, and foregrounds “the role of these subjects in *generating* normativity,”⁴⁰ elaborating “[i]t gives legal subjects access to and responsibility toward law.”⁴¹ When Kleinhans and Macdonald refer to the lacuna in legal pluralism filled by a critical legal pluralism by centring its analysis on narrating legal subjects and how they treat law,⁴² it appears they intend “narrating” to signify the reciprocal relationship between normative (and legal) orders and their subjects. Before directly discussing the substance of this relationship, the first query concerns *who* constitutes the legal subject that Kleinhans and Macdonald regard as generating normativity.

For Kleinhans and Macdonald, a critical legal pluralism asks “[w]hat do legal subjects see in any given normative order?”⁴³ For the purposes of this discussion, that framework should be slightly altered to read “how do legal subjects experience a given normative order, in terms of power dynamics?”. More broadly, the degree of inclusiveness contained within the notion of “narrating legal subjects” seems unclear. For example, while Kleinhans and Macdonald indicate a critical legal pluralism provides legal subjects “access to and responsibility toward”⁴⁴ law, Smith’s relationship to the various legal/normative orders of the multiple prisons in which she was incarcerated cannot be described as one of “access” and “responsibility.”

Instead, Smith’s relationship to legal/normative orders was characterized by exclusion and lack of access. Her institutional resistances through self-harm and other behaviours that challenged institutional order were systematically disregarded. Similarly, Smith’s institutional resistances did not readily signify “responsibility toward”⁴⁵ law. Responsibility is generally associated with accountability, although it might signify causality (X being responsible for Y, by bringing about Y or otherwise producing Y in some causal manner). Smith’s institutional resistances should not be understood with reference to a formulation of responsibility denoting accountability because these behaviours were derived from distress, notably related to incarceration itself. If Smith was a legal subject who could be understood as having “responsibility toward”⁴⁶ law, this is more plausible where “responsibility” refers to a causal relation. That is, Smith’s challenges to institutional order(s) could be described as engaged in a causal relationship with those orders (in the reciprocal sense that Kleinhans and Macdonald describe the relation between narrating legal subjects and the orders in which they exist/participate). The relationship between Smith and institutional norm-formation (the reciprocal

⁴⁰ Kleinhans and Macdonald, “Critical Legal Pluralism,” 38.

⁴¹ *Ibid.*, 39.

⁴² *Ibid.*, 46.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 39.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

relationship between her presentation of disorder⁴⁷ and the formation of correctional policy/normative orders) follows in the next section. For now, Kleinmans and Macdonald's understanding of "narrating legal subjects" should be widened to encompass Smith as a legal subject within correctional legal/normative orders.

Davies contends that underlying much of "substantive law" and "the idea of law itself" is the notion that the traditional liberal legal subject is "independent," "rational," and "autonomous."⁴⁸ However, particularly for Smith and other marginalized legal subjects whose relationship with legal and normative orders is complex and fraught (a shifting status), the ways in which their individual and collective agency are constrained must be imported into a modified concept of the legal subject. Fineman's vulnerability analysis permits the contention that Smith, whose experience was saturated with exclusions, should be understood as a vulnerable legal subject. As Smith may have effectively participated in the production of the law/norms controlling her, but either inadvertently or from a position of relative powerlessness, the correctional institution (itself vulnerable, with its own frailties) becomes the object of scrutiny⁴⁹ and accountability. This structural lens facilitates arguments for a reconstructed state "more responsive to that subject,"⁵⁰ with increased and broadened responsibility for her vulnerability, and an enlarged consciousness of the ways in which it and its institutions exacerbate her vulnerability.

In the next section, I draw from Kleinmans and Macdonald's work to argue that normative orders do not pre-exist their subjects but are instead reflexively formed. Given the needs and relative powerlessness of the vulnerable legal subject, the concept that legal subjects and normative orders are mutually, although unequally, constitutive is disturbingly evident in Smith's experience in the correctional system.

The Vulnerable Legal Subject in Reaction to Normative Orders: Smith's Distressed Responses to the Experience of Incarceration

Referencing the interrelationship between laws and norms, Walby writes that "[m]odes of social ordering (be they legal or normative) make people able to be acted upon."⁵¹ At the broadest level, Smith's legal categorization as a prisoner enabled her to be acted upon by correctional legal/normative ordering systems, immediately importing a power dynamic as "prisoner status inherently denotes powerlessness."⁵² The New Brunswick Ombudsman and Child and Youth Advocate reported "the dominant reason Ashley Smith spent such a lengthy period of time in prison is that she was sentenced to serve time in a secure custody facility in the

⁴⁷ I intend "disorder" here to refer to various of Smith's challenging behaviours (including self-harm and antagonism/assaults toward correctional staff), although it could also refer to her mental health struggles.

⁴⁸ Davies, *Asking the Law Question*, 330.

⁴⁹ Fineman, "Vulnerable Subject," 173.

⁵⁰ *Ibid.*

⁵¹ Walby, "Post-Sovereignist Understanding of Law," 552.

⁵² Ashley G. Blackburn et al., "When Boundaries are Broken: Inmate Perceptions of Correctional Staff Boundary Violations," *Deviant Behavior* 32, no. 4 (2011): 353.

first place. One could conclude that Ashley became a young *punishable* offender in prison.”⁵³

Smith’s institutional maladjustment and distress in prison exacerbated her mental health struggles. The United Nations Office on Drugs and Crime reports “research is unanimous in underlining the particularly detrimental effects of prison on women,”⁵⁴ and women prisoners “with mental health care needs are at particular risk of abuse, self-harm and deteriorating mental well-being in prisons”—moreover, even “[w]omen without any mental health problems prior to imprisonment may develop a range of mental disabilities in prisons.”⁵⁵ Kilty explains that where self-harming women prisoners are moved into segregation (where the isolation often triggers further self-harm), “[s]elf-injury, in this case, is misunderstood and misconstrued as a threat to the security of others as well as to the institution,” and this dynamic becomes cyclical.⁵⁶ The ways in which Smith’s pain manifested (including self-harm) resulted in CSC treating her as an institutional risk and thereby as punishable, using increasingly securitized strategies (e.g., segregation, institutional transfers, physical and chemical restraints, and uses of force). Through this interplay between her internal/exteriorized turmoil and the modes of control CSC used to manage her, Smith’s self-injurious and disruptive behaviour amplified alongside increasingly punitive treatment by CSC; as a result, case-specific correctional norms developed.

The Correctional Investigator reported Smith “adjusted poorly to federal incarceration.”⁵⁷ It can equally be said that federal incarceration adjusted poorly to, or failed to accommodate, Smith. The New Brunswick Ombudsman and Child and Youth Advocate concluded that incarcerated youth may not have the emotional capacity to comprehend institutional rules.⁵⁸ This disconnect renders it critical to examine the experience of such vulnerable legal subjects. Moreover, Sue McAndrew and Tony Warne explain “health-care professionals should not expect those who use self-harming behaviour to accept social...norms.”⁵⁹ Kilty suggests

⁵³ New Brunswick Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report of the New Brunswick Ombudsman and Child and Youth Advocate on the Services Provided to a Youth Involved in the Youth Criminal Justice System* by Bernard Richard (Fredericton: Office of the Ombudsman & Child and Youth Advocate, June 2008), <http://www.cyanb.ca/images/AshleySmith-e.pdf>. at 47 [emphasis in original].

⁵⁴ United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment: 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)*, *Criminal Justice Handbook Series* (New York: United Nations, 2014) (Prepared by: Tomris Atabay), UNODC https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf. at 4.

⁵⁵ United Nations Office on Drugs and Crime, *Handbook on Prisoners with special needs*, *Criminal Justice Handbook Series* (New York: United Nations, 2009) (Prepared by: Tomris Atabay), UNODC https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf. at 13.

⁵⁶ Kilty, “Under the Barred Umbrella,” 169.

⁵⁷ Correctional Investigator of Canada, *A Preventable Death* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 20 June 2008), The Office of the Correctional Investigator <http://www.oci-bec.gc.ca/cnt/rprt/pdf/oth-aut/oth-aut20080620-eng.pdf>, at 5.

⁵⁸ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 37.

⁵⁹ Sue McAndrew and Tony Warne, “Cutting Across Boundaries: A Case Study using Feminist Praxis to Understand the Meanings of Self-Harm,” *International Journal of Mental Health Nursing* 14 (2005): 178.

that through her treatment in prison, “Smith clearly understood her construction as dangerous and risky and she responded in kind by resisting institutional orders that she believed were unfair and disrespectful, or that made her feel unsafe.”⁶⁰ Smith’s self-injurious behaviour may be interpreted as a direct reaction to institutional rules and norms (and the overall conditions of her confinement), and as her self-harm was so flagrant and continual, those institutional rules and norms were bolstered in response—a dynamic that only exacerbated Smith’s distress.⁶¹

People are intensely social creatures and our relationships are critical to healthy functioning, happiness, and survival. The loss of meaningful relationships with others can be devastating and painfully compounded through isolation—experiences which were thoroughgoing for Smith. David Sibley and Bettina van Hoven write that the role of the organization of spatiality in prison is an important consideration in “assessing the significance of the disciplinary regime as an influence on prisoners’ behaviour.”⁶² The degree of control and oppressiveness is apparent in descriptions of Smith’s various cells. For more than two-thirds of her time in youth custody, Smith was kept in segregation, where she lived confined for twenty-three hours a day, “alone in a 9 by 6 foot cell, 7.5 feet high.”⁶³ This falls within the United Nations Special Rapporteur’s definition of solitary confinement.⁶⁴ The Special Rapporteur calls for an international abolition of this practice for periods greater than fifteen continuous days because this “constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances,”⁶⁵ and a complete prohibition for youth and prisoners with mental disabilities.⁶⁶ While in segregation, the only window Smith had was in the cell door looking back into the prison. This is profoundly unsettling and would have magnified her sense of exclusion. This restrictive environment was replayed in Smith’s experience of incarceration in adult institutions, with continued endless segregation in a dim segregation cell, deprived of stimulation, and only having human contact with staff through her door food slot.⁶⁷

Smith was confined indefinitely in segregation.⁶⁸ The effects of extended segregation have been documented to include producing negative thoughts,

⁶⁰ Kilty, “Examining the ‘Psy-Carceral Complex,’” 248.

⁶¹ See also *ibid.* at 245 and generally.

⁶² David Sibley and Bettina van Hoven, “The Contamination of Personal Space: Boundary Construction in a Prison Environment,” *Area* 41, no. 2 (2009): 200.

⁶³ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 41.

⁶⁴ Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, *Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, GA Res 65/205, UNGAOR, 66th Sess, UN Doc A/66/268, (2011), online: General Assembly of the United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>, at 9.

⁶⁵ *Ibid.*, 21.

⁶⁶ *Ibid.*, 23. The jury from the coroner’s inquest into Smith’s death also recommends this ban on indefinite solitary confinement, further recommending any isolation exceeding 15 days be prohibited for women prisoners: Ontario, Office of the Chief Coroner, *Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations*, (Toronto: Queen’s Printer for Ontario, 2013) (Coroner: Dr. John Carlisle), Canadian Association of Elizabeth Fry Societies (CAEFS) <http://www.caefs.ca/wp-content/uploads/2014/01/A.S.-Inquest-Jury-Verdict-and-Recommendations1.pdf>, at numbers 27 and 28.

⁶⁷ Correctional Investigator, *Preventable Death*, 7.

⁶⁸ *Ibid.*, 5; NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 42.

insomnia, anxiety, panic, withdrawal, cognitive impairment, a sense of loss of control, aggressiveness and anger, hopelessness, depression, the anticipation of emotional breakdown, self-harm, and suicidal thoughts/behaviour.⁶⁹ The Correctional Investigator reports CSC was aware that Smith's experience of confinement in youth custody produced the deterioration of her mental health and general well-being.⁷⁰ Despite this knowledge, CSC kept Smith on administrative segregation status when her sentence was converted to an adult sentence,⁷¹ and without complying with the regional review process required by law and policy.⁷²

This further iteration of the correctional norms backing Smith's segregation again failed to recognize her needs and simply replicated exclusionary patterns. Zygmunt Bauman writes that imprisonment means "protracted, perhaps permanent exclusion."⁷³ For Smith, her exclusion permeated all aspects of her confined existence, to which she responded through self-harm. Due to her self-harm, Smith came into continual and volatile conflict with institutional norms/policy, which caused the boundary between her sentence (the enactment of a legal order) and its lived punitiveness to blur in troubling ways. While Michael Jackson contends that people "come to prison *as* punishment and not *for* punishment,"⁷⁴ Smith's status as a vulnerable legal subject can be understood as translating into her having come to prison *for* punishment, an outcome that is not part of her judicially imposed sentence. As the New Brunswick Ombudsman and Child and Youth Advocate described, Smith utterly lost hope in an under-resourced, ill-equipped correctional system that failed to support her.⁷⁵

Smith did engage in acts of resistance—sometimes passive, sometimes assaultive, including dismantling items within her cell, spitting on CSC staff, hiding objects to cut ligatures, and spreading feces or other coverings on her cell window and the observation camera.⁷⁶ Conceptualizing prisoners as "active agent[s],"⁷⁷ Sibley and van Hoven suggest in dormitory-style institutions, prisoners often strive to construct their own spaces as a form of psychological self-protection.⁷⁸ Similarly, though in her heavily surveilled and severely restricted prison cells and regimes, Smith's exercises of institutional resistance should be understood within the vulnerability framework of her distress in response to her confinement, isolation, and feelings of powerlessness.

⁶⁹ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 42.

⁷⁰ Correctional Investigator, *Preventable Death*, 6, 7.

⁷¹ *Ibid.*, 28.

⁷² *Ibid.*, 10.

⁷³ Zygmunt Bauman, "Social Issues of Law and Order," *British Journal of Criminology* 40, no. 2 (2000): 217. Permanent exclusion indicates the sometimes insurmountable challenges former prisoners encounter following completion of their sentences while trying to reintegrate into the society that already cast them out. Crudely, Smith's permanent exclusion was her ultimate death in custody.

⁷⁴ Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002), 480.

⁷⁵ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 59.

⁷⁶ Canada, Union of Canadian Correctional Officers, *A Rush to Judgment: A Report on the Death in Custody of Ashley Smith, an Inmate at Grand Valley Institution for Women* (October 2008), UCCO <http://www.cclanaudiere.csn.qc.ca/Documents/UCCO-SACC/Ontario/documents/ARushToJudgment/Full%20Report%20-%20A%20Rush%20to%20Judgment.pdf>. at 7.

⁷⁷ Sibley and van Hoven, "Contamination of Personal Space," 199.

⁷⁸ *Ibid.*, 202–203.

Smith's self-harm was typically expressed through tying ligatures around her neck, superficial cutting, and banging her head on her cell.⁷⁹ McAndrew and Warne explain for some, self-injury can be a response to feelings of powerlessness, a way to communicate frustration,⁸⁰ the internalization of anger, and/or the product of a desire to feel pain or see it expressed on their bodies, like an "affirmation of the self," to remind themselves "they are a real person."⁸¹ The Correctional Investigator reported an independent psychologist who reviewed Smith's treatment in prison interpreted her self-harm as an attempt to reach out and compel CSC staff into her cell "in order to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her prolonged isolation."⁸² As Kim Pate writes, "[i]s it any wonder she started to harm herself?"⁸³ In Smith's own words from a journal entry she wrote just before her transfer to the adult correctional system:

[i]t can't be any worse then [sic] living a life like mine... When I used 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. It's no longer a joke. It kind of scares [sic] to think that they might catch me before it's done and then I will be a vegetable for the rest of my life.⁸⁴

The Union of Canadian Correctional Officers reported that correctional officer Blaine Phibbs (who was present when Smith died) tried to engage with Smith to deter her from choking herself the day before her death, but that Smith responded she knew what she was doing, because "[y]ou will always come in."⁸⁵ It is reasonable to infer Smith died not by intentional suicide, but by another instance of her self-injurious behaviour that went without intervention.

The New Brunswick Ombudsman and Child and Youth Advocate found it "very disturbing" that correctional authorities made such paltry efforts to understand the roots of Smith's self-injurious behaviour.⁸⁶ There seem to be fissures between frontline staff and management on this and related issues. The report by the Union of Canadian Correctional Officers about Smith's death noted that in 2005 the Union developed recommendations to CSC management, including alerting management that many prisoners with mental illness suffer particularly painfully from isolation, and that segregation of high-risk women prisoners responds only to security concerns and fails to support the women's individualized needs.⁸⁷ The disjuncture in governing power between management and frontline employees within CSC becomes apparent below with reference to how institutional norms were formed in conjunction with Smith's behaviours. While Smith's

⁷⁹ Correctional Investigator, *Preventable Death*, 14.

⁸⁰ McAndrew and Warne, "Cutting Across Boundaries," 176.

⁸¹ *Ibid.*, 178.

⁸² Correctional Investigator, *Preventable Death*, 7.

⁸³ Kim Pate, "The Death of Ashley Smith: Prisons Can't Handle the Mentally Ill," *The Globe and Mail*, November 3, 2010, <http://www.theglobeandmail.com/commentary/the-death-of-ashley-smith-prisons-cant-handle-the-mentally-ill/article1216011/>.

⁸⁴ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 23.

⁸⁵ Union of Canadian Correctional Officers, *A Rush to Judgment*, 34.

⁸⁶ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 35.

⁸⁷ Union of Canadian Correctional Officers, *A Rush to Judgment*, 16.

continuous segregation and correctional use of force against her were troubling and problematic, CSC frontline workers did make some efforts to connect with her. One officer at Grand Valley Institution noted recognizing Smith needed social interaction and desired that kind of connection.⁸⁸ The Union also reported multiple correctional workers “went to great lengths” to engage with Smith positively, “despite a constant threat to their personal safety.”⁸⁹

Despite efforts by various correctional staff to interact with Smith on a human, caring level, her overarching experience of incarceration remained that of extreme isolation, repeated disruption through inter-institutional transfers, and general distress. The role of correctional staff was not to provide therapy, but to control and contain Smith.⁹⁰ Her experience of exclusion through confinement, sensory deprivation (everything was removed from her cell, down to floor tiling), and desolation exacerbated her mental health problems and in turn her self-harm. As Pate explains, institutional security concerns always trump prisoner mental health problems.⁹¹

Hope A. Olson indicates “[d]ifferent orders of sorting have different results.”⁹² When this idea that structure, categorization, and the determination of parameters of problems dictates correlative outcomes is applied to the prison context, the order of sorting is that security is the priority, and prisoner needs are subsidiary. While David Garland writes “institutions are never fully explicable purely in terms of their ‘purposes,’”⁹³ s. 3.1 of the *Corrections and Conditional Release Act*⁹⁴ (CCRA) provides “[t]he protection of society is the paramount consideration for the Service in the corrections process.”⁹⁵ It is helpful to examine “what the law is doing, as process, as verb, instead of as a fixed set of rules, ... as noun.”⁹⁶ To this end, given the ways in which Smith (as a vulnerable legal subject) responded to correctional norms (such as through self-harm), the next section explores how correctional norms were in turn shaped in response to Smith’s behaviours to further illustrate the reciprocal, albeit asymmetrical, nature of the relationship between normative orders and vulnerable legal subjects.

Changing Correctional Norms/Policies in Response to Smith’s Challenging Behaviours

Regarding attention to prisoner actions instead of examining the experience of incarceration often engendering such disruptions, Pate asks “why do we only

⁸⁸ Ibid., 9.

⁸⁹ Ibid., 7.

⁹⁰ The Fifth Estate, “Behind the Wall,” Season 36: Episode 8 (November 12, 2010), online: CBC <http://www.cbc.ca/player/play/2675576109>.

⁹¹ The Fifth Estate, “Interview: Kim Pate” (26 November 2010), CBC <http://www.cbc.ca/player/play/1668359368>.

⁹² Hope A. Olson, “How We Construct Subjects: A Feminist Analysis,” *Library Trends* 56, no. 2 (2007): 527.

⁹³ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Oxford University Press, 1990), 19.

⁹⁴ *Corrections and Conditional Release Act*, SC 1992, c 20.

⁹⁵ Ibid., s. 3.1.

⁹⁶ Walby, “Post-Sovereignist Understanding of Law,” 568.

look at the behaviour and not at the environment they're in that's creating that situation?"⁹⁷ A critical legal pluralism challenges us to examine this interrelationship. The New Brunswick Ombudsman and Child and Youth Advocate wrote that youth "who commit *punishable acts*" must be supported and protected by provincial authorities instead of being treated as "*forcibly punishable*."⁹⁸ However, the boundary between "punishable acts" and a "punishable legal subject" blurs, particularly where correctional policy/practices geared toward prisoners with mental health struggles like Smith are filtered through a punitive lens instead of a disability or treatment-oriented lens. Smith's behaviour in prison was constructed as an institutional threat to be dealt with through exclusion, instead of with reference to her human needs for accommodation and positive human contact.⁹⁹

The institutionalized selection of the principal lens is significant. As Kleinhans and Macdonald write, "[d]ominant narratives will, in the end—either directly through the imposition of brute force dressed up in the guise of State officials, or indirectly through the ideology of legitimated State power—be imposed."¹⁰⁰ For Smith, the dominant correctional narrative was one of punishment and that Smith was a threat to herself and to institutional security and had to be dealt with accordingly. Exemplifying Kleinhans and Macdonald's discussion of the reciprocal relationship between the legal subject and the formation of normative orders, it is evident that Smith's response to confinement and isolation contributed to the shaping of correctional norms during her incarceration. Equally, however, the power differential between Smith and correctional authorities produced a situation in which the interrelationship between her as a vulnerable legal subject and the creation of institutional norms was imbalanced, such that the dominant punishment narrative prevailed. In terms of the reciprocal relationship between legal subjects and normative orders, Smith's self-injurious behaviour and institutional disruptions contributed to the shaping of correctional norms in several ways. Predominantly, Smith's actions contoured correctional norms related to segregation, transfers, and general policies around staff (non-)interaction with her.

The above discussion presents some of Smith's reactions to incarceration generally and segregation particularly, but there is a further, simultaneous, inverse relationship in which CSC's use of segregation and institutional transfers was changed in response to Smith and her actions as a vulnerable legal subject in confinement. Correctional legislation and related internal correctional policy directives require CSC to review all cases in which prisoners are under administrative segregation status at set intervals, after five days of segregation, thirty days, and sixty days.¹⁰¹ These intervals contemplate much longer periods than those recommended as permissible by the UN Special Rapporteur and the coroner's jury.

⁹⁷ The Fifth Estate, "Interview: Kim Pate."

⁹⁸ NB Ombudsman and Child and Youth Advocate, *Ashley Smith: A Report*, 8.

⁹⁹ Observing that "[w]ithout trust or humane care, Smith's distress increased while her feelings of safety and perceptions of regime fairness decreased," Kilty argues that the correctional focus on and prioritization of institutional security-based methods signals "the prison's failed moral performance." See Kilty, "Examining the 'Psy-Carceral Complex,'" 249.

¹⁰⁰ Kleinhans and Macdonald, "Critical Legal Pluralism," 43.

¹⁰¹ *Corrections and Conditional Release Regulations*, SOR/92-620, s. 22.

The Correctional Investigator found CSC violated law and policy through Smith's continuous segregation without regional reviews,¹⁰² effectively restarting the "segregation clock" with every transfer¹⁰³ to circumvent these reviews.¹⁰⁴ This also contravened correctional policy precluding the transfer of self-harming/suicidal prisoners to a non-treatment facility without approval of a psychologist.¹⁰⁵ Additionally, CSC must consider prisoner health before making decisions regarding transfers and segregation as required by the *CCRA*,¹⁰⁶ which was not followed.¹⁰⁷ CSC's practices ultimately solidified the institutional norm that segregation (and the transfers facilitating continued segregation) was the appropriate mode of dealing with Smith's self-harm and disruptiveness.

While segregation and institutional transfers should be separate processes grounded in separate rationales, the boundary demarcating the two dissolved in Smith's incarceration, so that her needs were repeatedly superseded by institutional security concerns. Of the seventeen transfers Smith was subjected to in federal custody, which corroded her trust in the system, most had "little or nothing" to do with Smith's needs and were instead the product of administrative concerns.¹⁰⁸ The Correctional Investigator found this volume of transfers impeded CSC's ability to respond to Smith's "very real human and mental health needs."¹⁰⁹

Kleinhans and Macdonald suggest analyses of legal discourses must include "an account of the participants themselves as to what it is that they do when entering that discourse and why."¹¹⁰ CSC frontline staff become significant here, as participants in the legal discourse surrounding Smith's life and death in custody. From the perspective of CSC frontline staff, the Union of Canadian Correctional Officers reported there was constant uncertainty about correctional policy vis-à-vis Smith. The Union points to "unclear directions" about how to manage Smith and that the working environment was challenging for staff confronted by "repeated assaultive behaviour, coupled with the ever-present threat of disciplinary action from distant management."¹¹¹ One officer recounted "[w]e weren't prepared at all... There was no plan to deal with her. There was no clear direction on what to do."¹¹² As early as 1996, Justice Arbour wrote that within CSC culture, "even if the law is known, there is a general perception that it can always be departed from for a valid reasons [sic], and that, in any event compliance with prisoners' rights is not a priority."¹¹³

¹⁰² See Correctional Investigator, *Preventable Death*, 10, 28.

¹⁰³ *Ibid.*, 10.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, 14.

¹⁰⁶ *Corrections and Conditional Release Act*, s. 87(a).

¹⁰⁷ Correctional Investigator, *Preventable Death*, 14.

¹⁰⁸ *Ibid.*, 5.

¹⁰⁹ *Ibid.*, 29 [emphasis in original].

¹¹⁰ Kleinhans and Macdonald, "Critical Legal Pluralism," 75.

¹¹¹ Union of Canadian Correctional Officers, *A Rush to Judgment*, 20.

¹¹² *Ibid.*, 22.

¹¹³ Canada, Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Commissioner: Arbour J.) (Ottawa: Public Works and Government Services Canada, 1996), Justice Behind the Walls http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm, at 2.3.3.3.

Justice Arbour's contention reveals a fissure between management and front-line staff, which reached the boiling point with respect to Smith's challenging behaviours and directly influenced the shift of correctional policy/norms. The situation that ultimately created the conditions in which Smith died was the "wait and see" approach.¹¹⁴ In August 2007, during one of her many institutional transfers, Smith was incarcerated at Nova Institution for Women where the correctional approach to her self-harm changed. Instead of immediately removing ligatures to stop Smith from harming herself, CSC staff began permitting her to retain them.¹¹⁵ The Correctional Investigator attributed this change to staff exhaustion and dependence on securitized strategies.¹¹⁶ Despite Smith's longstanding history of self-injurious behaviour, this altered correctional approach persisted after her next transfer to Grand Valley Institution.

This new correctional approach began to solidify into a more definitive norm, with explicit direction from management for CSC frontline staff to evaluate Smith's self-harm on an ongoing basis, to hold off while determining the point at which to intervene when she tied ligatures around her neck. The Correctional Investigator reported that on at least one occasion management disciplined frontline staff after they intervened "too early," and in other instances frontline staff concluded intervention was necessary but management ordered them not to intervene, including one especially flagrant action where a manager physically obstructed a frontline staff member from attending to Smith when she seemed in distress.¹¹⁷ The Union reported senior management "implemented and enforced the policy" that frontline staff were not to intervene when Smith was self-harming unless she stopped breathing,¹¹⁸ a borderline that cannot be safely overseen, especially at a distance. Management even conducted a training session to ensure this policy "was carried out as directed,"¹¹⁹ although the Union claimed management failed to provide necessary healthcare training or to hire 24-hour healthcare professionals, such that frontline staff lacked training about when Smith was in greatest danger. Recalling Justice Arbour's finding that within CSC culture, "[t]he Rule of Law is absent, although rules are everywhere,"¹²⁰ the Union stated "a rigorous adherence to contradictory policies could sometimes trigger dizziness and disorientation."¹²¹

In an environment where correctional laws and policies pertaining to segregation and transfers were not adhered to, management direction conflicted with staff perceptions, staff training was insufficient, correctional norms changed and were inconsistent, and a general understanding of the rules was murky, Smith's vulnerabilities were dramatically heightened. The interrelationship between her problems coping with the painful isolation inherent in her continuous segregation and the reciprocal reshaping of correctional norms that further isolated her reveals a

¹¹⁴ Correctional Investigator, *Preventable Death*, 16.

¹¹⁵ *Ibid.*, 15.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, 16 [emphasis in original].

¹¹⁸ Union of Canadian Correctional Officers, *A Rush to Judgment*, 39.

¹¹⁹ *Ibid.*

¹²⁰ Commission of Inquiry, *Report* (Arbour J.), 3.1.2.

¹²¹ Union of Canadian Correctional Officers, *A Rush to Judgment*, 30.

dialectical process that spiraled out of control. This process brings the mutual constitution¹²² of legal subjects and normative orders into devastating relief.

Conclusion: Reorienting the Focus to Centre on the Needs of the Vulnerable Legal Subject

CSC treated Ashley Smith as an excluded legal subject through practices of isolation, but the correctional norms/practices evolving in relationship with her resultant distress simultaneously indicate that CSC *also* treated Smith as if she were effectively a law-producer, capable of changing policy. However, treating her as a source of norm-creation assumes a kind of equality, standing, and power that Smith did not have within the system that broke her and in which she died. As such, Fineman's vulnerability analysis offers a valuable lens to suggest Smith should have been understood and treated as a vulnerable legal subject.

Altogether, the tragic story leading to Smith's death in custody illustrates two primary themes regarding the production of law/norms, to be considered toward guiding correctional practice and reform. First, the legal subject within a critical legal pluralism as formulated by Kleinhans and Macdonald should be widened to encompass those who act within/against and are acted upon by legal/normative systems characterized by extreme power disparities. Such legal subjects should be understood as vulnerable, implicating an enlarged role for responsive institutions to support and care for that vulnerability—and reflexively so, such that those institutions mitigate their own role in intensifying or engendering further vulnerability. Second, following the broad dictates of a critical legal pluralism, the reciprocally constitutive relationship between the vulnerable legal subject and legal/normative orders actually manifested in Smith's experience of incarceration and the attendant changes to correctional norms.

Issues related to boundaries and exclusion underlie this discussion because as David Delaney writes, "prisons are not simply where punishment happens and the presence of law is not expressed merely in the serving out of a sentence."¹²³ For Smith, prison was where punishment was reformulated against her expressions of distress and law was felt and recast at every stage, through transfers and her near-continuous, insufficiently reviewed segregation. Smith's incarceration was underwritten by law and simultaneously manifested in ways exceeding law.

The selection of how to define problems and where to orient the frame around a given socio-legal issue involves a critical positioning. In Smith's case, her needs for human contact and mental health treatment became peripheral, largely supplanted by security concerns and administrative issues. Had CSC redefined and centred the problem around the roots of her self-injurious behaviour and institutional disruptiveness, around her own human needs, perhaps Smith would be alive today. The Correctional Investigator wrote: "I firmly believe that Ms. Smith's death was preventable."¹²⁴ Her death would likely have been more readily avoidable if

¹²² Kleinhans and Macdonald, "Critical Legal Pluralism," 62.

¹²³ David Delaney, "Beyond the Word: Law as a Thing of This World," in *Law and Geography*, ed. Jane Holder and Carolyn Harrison (Oxford: Oxford University Press, 2003), 73.

¹²⁴ Correctional Investigator, *Preventable Death*, 24.

she were treated as a young woman needing support, care, stability, stimulation, and treatment, rather than isolation and oppression.

As Fitzpatrick comments, the nature of constructionism permits that “the construction could be otherwise.”¹²⁵ Applying a vulnerability analysis, as suggested by Fineman, offers another way to reconstruct how we think about legal subjects within complex systems. Garland writes “institutions and their regimes are not unshakable nor beyond challenge, particularly where they fail to serve needs.”¹²⁶ A greater focus on the vulnerabilities of those excluded through law may assist in redirecting responsibility onto the institutions performing the exclusions, assisting in necessary institutional reconfigurations. It is productive to engage in a stronger turn toward an ethics of connectedness and humanity, and greater inclusiveness about the experiences of marginalized, vulnerable people entwined in the criminal justice system, with a view to the responsibilities of the system toward them. As Elizabeth Sheehy explains, using social inclusion to promote state accountability requires “the participation of the excluded.”¹²⁷ To a limited extent, the coroner’s jury recommendations perhaps contemplate something of an enlarged legal subject connected to vulnerability by specifically citing the prisoner herself should be engaged in decision-making about how the system should respond to her needs.¹²⁸

Correctional policies surrounding segregation, transfer, self-harm, and the “wait and see”¹²⁹ procedure all implicate boundary-focused, security-driven practices, displacing other (legally and morally obligatory) discourses about humanity and Smith’s material, emotional, and mental health needs. For Smith, law and related norms were isolating, oppressive, and ultimately deadly. Had her humanity and well-being guided correctional decision-making, this need not have been the case.

In terms of the change-making power of the coroner’s inquest, there is often subsequent failure to produce real and sustained change at a systemic level.¹³⁰ Some of this failure may be attributed to how institutional structures, practices, and priorities become fortified and deeply entrenched, making substantive change difficult. Prisons specifically have long demonstrated imperviousness to true reform. Kelly Hannah-Moffat reveals prisons to be “flexible institutions” with the capacity to “accommodate a variety of competing and sometimes contradictory rationalities.”¹³¹ Moreover, Shoshana Pollack notes “tinkering with prisons to make them less egregious bolsters their legitimacy as a social institution.”¹³²

¹²⁵ Fitzpatrick, “Missing Possibility,” 191.

¹²⁶ Garland, *Punishment and Modern Society*, 4.

¹²⁷ Elizabeth Sheehy, “Advancing Social Inclusion: The Implications for Criminal Law and Policy,” *Canadian Journal of Criminology and Criminal Justice* 46, no. 1 (2004): 76.

¹²⁸ For example, recommendation 19 states, “decision-making with respect to the clinical management and interventions of inmates with mental health issues are made by clinicians *in consultation with the inmate*, rather than by security management and staff.” Chief Coroner, *Inquest: Jury Verdict and Recommendations*, 5 [emphasis added].

¹²⁹ Correctional Investigator, *Preventable Death*, 16.

¹³⁰ See e.g., Gary Edmond et al., “Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) in Four Adversarial Jurisdictions,” *University of Denver Criminal Law Review* 3 (Spring 2013): 98.

¹³¹ Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001), 5.

¹³² Shoshana Pollack, “You Can’t Have it Both Ways: Punishment and Treatment of Imprisoned Women,” *Journal of Progressive Human Services* 20, no. 2 (2009): 126.

These concerns about how challenges to the prison system still function to further reify that system open the space for developing alternative strategies. Conceptualizing the correctional system through a vulnerability analysis per Fineman—including understanding its institutions as vulnerable,¹³³ susceptible to amplifying prisoner vulnerabilities—centres the accountability of the system itself, and compels us to reimagine other means through which the state can and should treat its subjects. There are alternative, non-punitive ways for our society and criminal justice system to process, respond to, and care for vulnerable people who, like Smith, flail within and rail against legal/normative orders. Perhaps institutionalized failures are intractable and destined to recur until vulnerable people are truly foregrounded, humanized, and empowered.

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¹³³ Fineman, “Vulnerable Subject,” 169.