

The Protection of Children Involved in Prostitution

Act:

Case Study and Field Analysis

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ABSTRACT

The Protection of Children Involved in Prostitution (PCHIP) Act, which was passed in Alberta in 1999 and subject to immediate constitutional challenge, demonstrates the relationships between the fields of politics and law, and between youth criminal justice and child welfare legislation. The Act allowed authorities to apprehend and detain a youth engaged, or at risk of becoming engaged in prostitution for five to forty-seven days in a protective safe house. Though the PCHIP Act was passed as child welfare legislation, the punitive nature of the detainment led some to argue that the PCHIP Act was actually youth criminal justice legislation. This blurry boundary between child welfare and youth justice has negative consequences for particular groups of youth. In this case, Aboriginal female youth are disproportionately detained at protective safe houses. This research applies concepts from Pierre Bourdieu and other theorists to critically analyze the PCHIP Act as a case study. By drawing on various types of data, including the PCHIP Act, legislative debates, court transcripts, newspaper articles, government reports, and academic literature, two areas of inquiry are addressed. The first issue is the relationships and boundaries between the fields of politics and law, and between child welfare and youth criminal justice legislation. Secondly, this thesis attempts to explain why Aboriginal females are disproportionately confined by the PCHIP Act. This research concludes that the fields of politics and law constantly interact with each other, and the boundaries between child welfare and youth criminal justice are vulnerable to the outcomes of these conflict-ridden exchanges. These struggles, compounded by historical factors, have negative consequences for female Aboriginal youth in particular.

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CHAPTER ONE

INTRODUCTION

My thesis investigates the relationships between the fields of politics and law, and between child welfare and youth criminal justice legislation. The nature of these relationships becomes apparent through an exploration of the Protection of Children Involved in Prostitution (PCHIP) Act, which was passed as child welfare legislation by the Alberta legislature in 1999. The Act allows police and social workers to apprehend and confine a youth involved, or suspected of being involved, in prostitution. Youth are detained in a protective safe house, where they are provided with food, shelter, and educational programs. A disproportionate number of Aboriginal female youth have been detained under the PCHIP Act (Koshan, 2003)¹.

The legality of the Act was contested from the very beginning in the form of a constitutional challenge. A debate emerged among academics, lawyers, judges, and politicians over whether the Act was child welfare legislation or criminal legislation. The implications of this debate are significant, because criminal law comes under the jurisdiction of federal power. If it were found that the PCHIP Act fell under the category of criminal law, it would be invalid because provinces do not have the power to legislate such law.

The debate over the true essence of the PCHIP Act underlines the shifting boundaries between the fields of youth criminal justice and child welfare: it is difficult to state exactly where one field ends and the other begins. Furthermore, the ensuing juridico-political conflicts that aimed to provide a solution to the problems raised by the Act points to an even larger issue: the relationship between law and politics.

It is important to note that the PCHIP Act was amended on October 1, 2007. The amendments were preceded by a news release on March 12, 2007, which stated that MLA Heather Forsyth had proposed changes to the Act (Government of Alberta News Release, March 12, 2007). One such amendment was changing the name of the Act to the Protection of Sexually Exploited Children Act (PSECA)². Also, the amendments include an appeal process, which was lacking in the PCHIP Act. The maximum confinement period remains unchanged under the PSECA.

This thesis was motivated by my experiences in Edmonton, Alberta as a staff member at the Yellowhead Youth Centre (YYC) secure care cottages from 2004 to 2005. Youth who were viewed to be ‘a danger to themselves or others’ in order to be confined in secure care, which turned out to be quite a vague condition. The cottages were locked, and I got the impression that the difference between the confinement at the secure care cottages and actual jail was probably small. During my employment, the number of youth being confined under secure care began to dwindle, and then YYC was given the PCHIP contract. One of the cottages was designated as a protective safe house for youth confined under the PCHIP Act.

Staff at the secure care cottage was warned that these new PCHIP kids were going to be really rough and violent. We were given special supplies to deal with these dangerous youth. For instance, we were given special gloves which were impenetrable to knives, to protect the staff from stabbing. As the youth started to be brought in, we realized that they were the same youth we saw over at the secure care cottage. So it was the same youth being confined, only they were now being confined under a different legislation.

After YYC was given this contract for the PCHIP youth, I became interested in knowing exactly why these kids were being confined, and what this legislation looked like. From a staff viewpoint, the major task was to keep the youth in line- to make sure they got up on time, ate on time, did their chores, and stuck to the schedule, and to punish accordingly if there were deviations from acceptable behaviour. When I looked into the actual legislation, a discrepancy became apparent between rhetoric and reality. On paper, the PCHIP Act was about protecting vulnerable youth. However, in reality, we were simply locking up these youth.

I detected a preoccupation with race during my employment at the protective safe house. Staff was required to keep statistics on the race of each youth. Whenever a new girl was brought in to the safe house, we checked off the racial origin of the youth from a list of possible races. It was unknown, to me at least, why this information was important, who was interested in this information, or how this information was to be used. This issue, along with the discrepancy discussed above, led to the research questions addressed in the thesis. I do not claim that my observations of the protective safe house, the youth who were detained there, or the staff who worked there are conclusive or irrefutable. However, I will include these observations throughout the thesis where relevant.

1.1 RESEARCH OBJECTIVES

The effect of politics on law, and conversely, the effect of law on politics are addressed in this thesis. I take the term ‘politics’ to include individual legislators and politicians, who bring their own power and interests into interactions with other actors in various fields.

The term also has a wider, more structural meaning, in the form of political parties or governments. Powerful political parties draw on ideological interests to dictate how populations are governed. By the term 'law,' I mean the institution of courts, and the hierarchies contained within these courts, as well as categories of law including child welfare law and youth criminal justice law. I contend that the dynamic relationship *between* the social fields of law and politics affects interactions *within* the fields themselves. In the legal field, political matters incite boundary struggles between child welfare and youth criminal justice legislation.

My first research question is: What is the nature of the relationship between law and politics, and between child welfare and youth criminal justice legislation? I utilize the PCHIP Act as a case study to investigate these relationships. Moreover, the boundary disputes outlined above have consequences for the types of youth impacted by the Act. In the case of the PCHIP Act, Aboriginal females have been detained at a disproportionate rate. This concern leads to my second research question, which asks: Why are Aboriginal female youth confined by the Act much more than other groups of youth? To address this very complicated query, I investigate historical factors, as well as features of the PCHIP Act itself which have resulted in unequal treatment against this group.

These research questions are addressed primarily through an application of Pierre Bourdieu's conceptual framework of 'field' and 'habitus.' Bourdieu's concepts are complemented by several other theorists, including Michel Foucault and Mariana Valverde. Their theoretical insights are applied to various sources of primary and secondary data, including textual sources, 'written reasons' provided by judges,

legislative debates, government documents, and a 'Notice of Confinement' document. By utilizing Bourdieu's methodological and theoretical approach, I aim to develop an analytical and critical understanding of the PCHIP Act, and of the relationship between politics and law.

1.2 THEORETICAL CONTEXTUALIZATION

The PCHIP Act is an example of legal intervention mandated by the state. This type of intervention emerged as part of the welfare state in Post-World-War-Two Canada. Interventionist law can be located within a debate between two opposing streams of thought within the sociology of law. The law is characterized either as being *voluntas regin* (the law is affected by politics), or as directed by its own *ratio* (law is shaped only by its internal rationality) (Zamboni, 2006). Stated differently, it is either "law is politics" or "either law or politics" (Zamboni 2006: 03).

'Legal Liberalism' or 'legal positivism' represents the latter view; law is autonomous from politics. According to this view, law is formal, neutral, and dispassionate. The formal nature of the law is based on the premise that the existing body of law is consistent and complete. The answer to any legal matter can be answered simply by locating the appropriate rule. Since we all abide by the same body of law, legal outcomes are logical, consistent, and just. The neutrality of the law rests on the use of neutral language, and the assumption that laws are not based on any particular moral viewpoint. Legal Liberalism propounds a distinct boundary between law and other fields. Thus, legal matters and reasoning are seen as separate from political or ethical objectives. This positivist orientation denies any connection between historical events and

subsequent legislation (Bakan et al. 2003: 56). The concept of the rule of law is the most basic tenet of this viewpoint, which assumes that a single set of laws should be applied equally to all citizens, and that the judiciary is independent from the executive branch of government (Waddams: 1992).

Legal Liberalism/positivism remains the dominant viewpoint in the practice of law today (Aylward: 1999; Cotterrell: 1984). For example, American sociologist Donald Black uses a positivist methodology in his research on law, by observing and measuring correlations between the 'behaviour of law' and other social phenomena (Cotterrell, 1984: 14). Another example of positivist legal theory comes from Hans Kelsen (1970), who argues that law and politics are two autonomous phenomena (Zamboni, 2006)³.

Legal Liberalism is aligned with Weber's conception of 'positivist law' or 'formal justice.' According to Weber, positivist law is based on four premises. First, every legal decision consists in the application of an abstract rule of law to a concrete situation. Second, the process of making a legal decision is dictated by 'legal logic.' Third, there are no gaps in the rules of positivist law, and finally, every social action can be categorized as obeying law, violating law, or applying the rule of law (Rheinstein, 1966). Nevertheless, Weber provided an early critique to positivist law in *Economy and Society* (1925). He points out an "insoluble conflict between the formal and substantive principles of justice" (1925: 893)⁴. Though the abstract nature of formal justice allows individuals to manipulate the legal system like a "technically rational machine" (thereby increasing human freedom), the abstract nature functions to impinge on substantive justice (thereby decreasing human freedom) (1925: 811 and 813). He states, "Formal justice and the 'freedom' which it guarantees are indeed rejected by all groups

ideologically interested in substantive justice" (1925: 813). Only substantive rationality privileges ethical action and conformity to a moral good, which allows those who possess it to comprehensively rationalize reality (Kalberg, 1980). The intrusion on substantive justice leads to a situation of substantive irrationality, which amounts to the suppression of individual values and needs (Feldman, 1991: 230).

The interests of specific groups regarding formal justice differ according to their relative economic power, according to Weber. He states:

Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency (1925: 812)

Thus, economic power and law are linked⁵. Law has a "strong influence" on economics, and conversely, "economic interests are among the strongest factors in the creation of law" (Weber, 1925: 665 and 334).

Weber's critique on positivist law shaped the legal realist movement, which emerged in the first half of the twentieth century⁶. For example, proponents of legal realism such as Karl Llewellyn (1962) and Arthur Corbin (1952) have argued that the legal and political fields have boundaries that cross and overlap 'to some extent,' causing a "partial rigidity of the law" (Zamboni, 2006: 310). Realists attempted to break out of the dichotomy of either 'law is politics' or 'law or politics,' by incorporating aspect of both sides of the debate. Zamboni (2006) contends, for example, that law is simultaneously pulled toward and away from the field of politics within the context of the welfare state. Realists perceive the law as "neither totally outside of nor completely embedded into the political mass, but as intersecting the political world" (Zamboni, 2006: 298). However,

concurrent to the decline of the welfare state, the law as is increasingly becoming a tool for politicians. Instances of judicial activism evidence this, particularly when judges attempt to 'stretch' the law to implement values which political actors sense are lacking among the public. Ferejohn (2002) has noted this trend, arguing that the field of politics has been 'judicialized' since World War II in the United States.

In the late 1970s, a group of radical legal scholars began to attack the assumptions of Legal Liberalism, giving rise to Critical Legal Studies (CLS) (Aylward, 1999). Claiming roots in legal realism, this group challenged various tenets of Legal Liberalism, including the rule of law, formalism, and neutrality. For example, Cotterrell maintains that positivist law ignores the role of values as a component of law, and argues that law is both "fact and value" (1984: 11 and 15). CLS theorists contend that the rule of law is used by the powerful to oppress less powerful members of society, maintaining the status quo. They contended that the rule of law is impossible; a mere myth. The CLS movement also rejects the assumption that law is separate from politics or ethics. They argue that powerful members in society, such as judges, can and do impose their political and moral objectives on the rest of society (MacDonald, 2002: 25). Before the passing of the Charter in 1982, CLS proponents critiqued the failure of the state to guarantee rights other than individual rights, and argued for the elimination of rights altogether (MacDonald, 2002: 31). This was a highly contentious argument, which would ultimately alienate groups (such as feminist or minority organizations) which otherwise had much in common with CLS. Some have argued that CLS is plagued by the same 'white privilege' it claims to critique (MacDonald, 2002: 32).

Along with CLS, feminist jurisprudence emerged in the 1970s, joining in the critique of legal liberalism (Haney, 2000). Though differences exist within feminist jurisprudence (for example, there are competing accounts of the legal system's representation of gender), feminist jurisprudence is based on a common premise:

(W)omen are systemically and systematically oppressed in the patriarchal order, and [...] this oppression carries over to the formulation of law, the interpretation of law, and the ways in which women come to use (or not use) the legal system (MacDonald, 2002: 32).

Haney (2000) has suggested that the concept of 'loosely coupled systems' captures the current status of the state. She states, "in the last decade, tighter links seem to be forming among state apparatuses; transformations in one state appear to feed off of and inform changes in other spheres" (Haney, 2000: 660). In particular, links between the criminal justice and welfare systems have supported this position. This orientation has been adopted by McCorkel (2004), who investigated patterns of influence and coordination between welfare and criminal justice in the American context⁷.

Critical Race Theory (CRT) emerged out of CLS in the mid 1980s as scholars of colour challenged some of the assumptions of CLS (MacDonald, 2002: 36). While these scholars shared the CLS scepticism about law's neutrality, they argued that CLS largely ignored the realities of people of colour (Aylward, 1999: 26). Thus, they felt alienated from CLS discourse. CRT recognizes that law is both a product of, and promoter of racism. However, CRT does not dismiss the possibility using law as a tool for social change. CRT theorists also critiqued CLS for being too idealistic and unnecessarily pessimistic about the value of law, especially regarding rights.

Critical Race Feminism (CRF) is the most recent development in the CLS trajectory. Critical Race Feminist theorists recognize both CLS and CRT as sources of

the CRF movement (Aylward, 1999). This movement broke off from mainstream feminism, arguing that feminism has overlooked the experiences of women of colour. CRF emphasizes the ‘intersectionality’ of race and gender in oppression, not simply one or the other⁸. Some mainstream feminist concepts, such as the conception of the family unit as patriarchal and oppressive, were insulting to Black feminists, as the family was seen by many Black women as a refuge from racism in the rest of society (MacDonald, 2002: 38).

Legal realism, feminist jurisprudence, CLS, CRT, and CRF have all proposed that a relationship exists between politics and law, but differ in the degree or nature of influence afforded to the former over the latter. Bourdieu has contributed to this debate, as shown by recent research within these camps which utilize his orientation⁹. Bourdieu has re-conceptualized the original debate (‘law is politics’ versus ‘law or politics’) by identifying two antagonistic ideologies in theories of law. The instrumentalist position views law as a direct reflection of existing power relationships, as dictated by dominant groups (parallel to the ‘law is politics’ position). In contrast, the formalist viewpoint conceives of the law as an autonomous, independent, closed system; unaffected by other fields (comparable to the ‘law or politics’ position) (Bourdieu, 1987a). Similar to the legal realists, Bourdieu seeks to find a middle ground between these two extremes. He contends that both positions ignore the existence of a social universe which he calls the juridical field. To understand the 'social significance of the law,' we must analyze law within the context of the juridical field, which is "*relatively* independent of external determinations and pressures" (Bourdieu, 1987a: 816, emphasis added).

Similarities have been pointed out between Bourdieu's orientation regarding boundaries and the position taken by Niklas Luhmann¹⁰. According to Valverde, both theorists provide an answer to the same question: the question of the boundaries of law (2006: 591)¹¹. Luhmann argues that the law possesses "greater or lesser degrees of autonomy or closure in relation to the extra-legal world" by suggesting that the law's unique system of communication constitutes its autonomy (van Krieken, 2004: 4). He contends that law should be viewed as an "autopoietic or *self-reproducing* system of meaning and communication rather than as a set of institutional forms, structures or practices" (2004: 4, italics original). The law is self-referencing in that

(e)verything the legal system appears to be made up of – existing legal doctrine, particular patterns of professional training, a certain structure to the institutional framework of law – is in reality created by the legal system itself, and not by anything outside the legal system (2004: 5).

Van Krieken adds that the autopoietic nature of the law is analogous to a "building which makes its own bricks" (2004: 5). The circularity inherent in autopoietic systems "produce regularities that regulate themselves" (Teubner, 1989: 736).

Like Bourdieu, Luhmann conceives of the social world as composed of innumerable systems, although Bourdieu would refer to these systems as fields¹². Despite this similarity, the two theorists disagree over the *level* of autonomy afforded to these fields/systems. For instance, Bourdieu argues that no field can be properly analyzed without accounting for the influence of economic and/or political power over that field. Luhmann, in contrast, sees the juridical and political systems as autonomous from each other¹³. According to van Krieken, Luhmann argues that "the system of politics and economics might be seen as being autonomous from law as law is from them" (van Krieken, 2004: 5-6). Though Luhmann holds that the legal system is also

“cognitively open,” this openness is never overpowered by its “normative closure” (van Krieken, 2004: 9). The problem created from this conception arises when interconnectedness between *epistemes* becomes obvious. Luhmann’s theory does not easily allow one to account for communication across *epistemes*.

The case of the PCHIP Act demonstrates an instance where politics and government had much influence over the legal field, which demonstrates interaction across field (or *episteme*) boundaries. The very drafting of such legislation, along with the events surrounding the constitutional challenge, reveal that the boundary between the legal and political fields was anything but ‘closed.’ Bourdieu’s approach, which views the law as possessing some degree of autonomy from external fields, but at the same time very much structured according to power relations emanating from the field of power, is clearly more suitable for the current research.

Another important difference between Luhmann and Bourdieu are their accounts of action within the field/system. Luhmann characterizes systems as internally cohesive. The legal system “observes itself not as a system [...] but as a collection of texts referring to each other” (Luhmann, 1995: 287). This arrangement results in a cohesive and consistent (if redundant) legal system, based on an emphasis on *stare decisis*, or precedent. Bourdieu, in contrast, views the legal field as a site of constant struggle rather than stable cohesiveness. He states, “The field is the locus of relations of force-and not only of meaning-and of struggles aimed at transforming it, and therefore of endless change” (Bourdieu and Wacquant, 1992: 103). Even if fields appear to be coherent from the outside, this stability itself is the product of conflict and competition (1992: 103-4).

This is a crucial difference between Luhmann's and Bourdieu's perspectives with consideration of the present research. The debates over the initial drafting of the PCHIP Act, along with the conflict acted out in courtroom and political settings over the constitutionality issue, require a theoretical perspective which can account for competition and struggle within and across field boundaries. Since Bourdieu's theory can account for these struggles, while Luhmann's cannot, the former is a better choice for the analysis of the PCHIP Act.

1.3 CHAPTER SUMMARIES AND DATA SELECTION

In the next chapter, the theoretical and methodological orientation utilized in this thesis is outlined. Concepts coming from Pierre Bourdieu are of primary importance, including 'field,' 'habitus,' and 'capital.' These concepts are supplemented by ideas of Michel Foucault, David Garland, and Marianna Valverde. The operationalization of these concepts is explained.

Chapter three engages in a historical analysis of the fields of child welfare and youth justice, spanning England and Canada. Responses which predate the PCHIP Act are addressed and contextualized, framed by Bourdieu's theoretical concepts of field and habitus. The fields of child welfare and youth criminal justice are described, in particular, how they emerged and developed, along with an account of the habitus within these fields over different time periods. For this analysis, various textual sources which document the history of these fields in Canada and England are drawn upon.

Chapter four engages in the debate over the value of the PCHIP Act. On one side of the debate, Alberta government reports, newspaper articles, and one academic article

argue (or assume) that the PCHIP Act is beneficial to the youth who become confined under it. This position is countered by a relatively small group of academics who contend that the PCHIP Act merely criminalizes youth who are already marginalized. Further, the latter group raises suspicions over the overrepresentation of Aboriginal girls in protective safe houses, a topic which is not seriously addressed by the former group. The chapter ends with a critical examination of the PCHIP Act both as an isolated document, as well as within the context of other legislation relevant to the problem of youth prostitution. Through this analysis, the practical reality of the PCHIP Act becomes apparent, which contributes to the initial debate.

Chapter five is composed of a field analysis of the relationship between law and politics, and between child welfare and youth criminal justice legislation. In this analysis, positions in the fields of child welfare, youth criminal justice, and politics are identified, and the relationships between these positions are explored. The constitutional challenge provides the occasion to examine these relationships between and within fields. In this chapter, the first research question is addressed, which asks what the relationship is between the fields of politics and law, and how the PCHIP Act fit into this relationship between fields. To investigate this question, data such as legal documents and written reasons pertaining to the challenge are used which demonstrate the political posturing which occurred in response to legal manoeuvres.

Chapter six explores the second research question, which asks why particular types of youth (Aboriginal females) are regularly confined by the Act, while other youth are not considered appropriate candidates for detainment. Bourdieu's concept of habitus is used to frame this discussion, as well as several of Valverde's insights, especially

pertaining to the regulation of Aboriginal peoples in Canada. Several sources of textual data, such as a 'Notice of Child' document, and the PCHIP Act itself are utilized.

In chapter seven, the thesis is concluded by reviewing the findings, and by placing these findings within the larger neo-liberal context. Implications of the passing of the PCHIP Act are stated, and several recommendations are put forth with regard to policy pertaining to youth prostitution.

CHAPTER TWO

THEORETICAL AND METHODOLOGICAL ORIENTATION

To reach my objective to develop an analytical perspective through which to view the PCHIP Act, a discussion of theoretical and methodological orientations is necessary. This orientation is informed primarily by Bourdieu, in particular, concepts such as field, habitus, capital, and symbolic violence, as they pertain to the fields of politics and law. These concepts have been utilized and/or critiqued by other researchers, who have enriched or modified them. I attempt to synthesize various aspects of Foucault's and Bourdieu's theories, with the aim of laying a foundation for the analysis contained in remaining chapters.

The methodology employed in the research for this thesis consists of the application of theoretical concepts to a particular case study, in this case the PCHIP Act. I discuss the operationalization of these theoretical concepts at the end of the chapter by providing a diagram which clarifies the expected relationships between the fields of interest here.

2.1 MUTUAL POSSESSION

Bourdieu has described the link between two of his key concepts – field and habitus – as a relationship of mutual possession, as they function only in relation to each other (Bourdieu and Wacquant, 1992: 20). Through field and habitus, Bourdieu attempts to characterize human social practice without falling into dichotomies he considers false,

such as subject/object, freedom/determinism and individual/structure. Field and habitus allow for a conception of human activity which accounts for both its stable nature, yet also the constant potential of spontaneous action.

Bourdieu conceives of social fields as a “plurality of worlds” (1990b: 21). The social world is composed of semi-autonomous fields, all with their own logics, and all generating among actors a belief of what is at stake in the field, reflecting a shared ‘doxa’ (Bourdieu and Wacquant, 1992: 98). The logic of the juridical field is characterized by a particular juridical language, which absorbs elements which are foreign to it by rendering them impersonal and neutral (Bourdieu, 1987a: 819). This logic has two effects, according to Bourdieu. First, the “neutralization effect” is created by the law’s usage of “passive and impersonal constructions.” Second, the “universalization effect” is accomplished through the use of

constative verbs in the present and past third person singular, emphasizing expression of the factual [...] the use of indefinites and of the intemporal present [...] designed to express the generality or omnitemporality of the rule of law [...] and the recourse to fixed formulas and locutions, which give little room for any individual variation (Bourdieu, 1987a: 820).

According to Bourdieu, the boundaries of fields are imprecise, shifting, and permeable¹⁴. Boundaries between fields are the subject of dispute and struggle between agents in the fields. In consideration of the fields of politics and law, agents include an assortment of political figures, lawyers and judges which can be seen as situated in both fields (Ferejohn, 2002). Fields are defined by the stakes which are at risk. For example, in the juridical field, the ultimate stake is *control of the right to determine law* (Bourdieu, 1987a: 816). Whoever ‘wins’ this right also gains the right to control the interpretation of legal texts (1987a: 818). Legal professionals are constantly struggling with those outside

the legal field in an attempt to coerce acceptance for their conception of law's relation to the rest of the social world (Terdiman, 1987: 809). For Bourdieu, the task of the social scientist is to "describe a *state* (long-lasting or temporary) of these struggles and therefore of the frontier delimiting the territory held by the competing agents" (Bourdieu, 1983: 324).

To Bourdieu (1987a), the law must be conceived as a juridical field which is *relatively* autonomous from other fields¹⁵. This autonomy is based on a number of features of the juridical field:

The very fact that legal judgment arises from careful consideration of a closed body of doctrine and rules does establish a real independence from the everyday normative assessment of justice and fairness, and the function of mobilising legal rules in relation to particular concrete situations...inherently gives enormous discretion to the juridical field (judges) as to *how* those rules are to be mobilized (properly questionable only by other lawyers), which is also in turn a basis for autonomy (van Krieken, 2004: 15).

The discretion afforded to judges has a paradoxical effect: the discretion needs to be disguised in order to maintain that the law is autonomous. The inherent arbitrariness of their discretion is made invisible, leading to the belief that the law is neutral; immune to the effects of other fields (Van Krieken, 2004: 15).

According to Bourdieu's theory, the field of power is the most important out of all fields, as the hierarchy of power relationships structures all the other fields. Actors who possess power are able to transfer this power into other social fields – for instance, a businessman or a lawyer can convert professional prestige into other institutional domains. In contrast, actors who do not possess power are less successful in transferring power from one field to another. For instance, highly regarded artists cannot readily convert their prestige in the field of art to other fields (Calhoun et al., 2002: 264).

Each field draws on a particular ‘habitus,’ defined broadly as a “system of dispositions” and a “generative principle of responses more or less adapted to the demands of a certain field” (Bourdieu, 1990b: 77 and 91)¹⁶. Kraus characterizes habitus as:

(A)n ensemble of schemata of perception, thinking, feeling, evaluating, speaking, and acting that structures all the expressive, verbal, and practical manifestations and utterances of a person (1993: 169).

The effect of the habitus is that agents who are equipped with it will behave in a certain way in certain circumstances. However, the habitus does not dictate all action, as though all action followed strict rules or laws. To achieve success, actors must be able to improvise action depending on the struggles in the field.

Legal *habitus*, reflecting “deep structures of legal perception, judgment and behaviour” is characterized by “social, economic, psychological and linguistic practices” (van Krieken, 2004: 15). The presence of this *habitus* causes predictability in court decisions, as judges refer to and share a common set of ideas about legal versus illegal behaviour. The cohesiveness of the habitus strengthens, and is strengthened by, the hierarchy within the juridical field. Though this hierarchy causes and is caused by constant competition, this competition is complementary as well as hostile (Bourdieu, 1987a: 820-23).

Entry into the juridical field is conditional on the possession of the proper habitus. According to Bourdieu, requirements for an ‘entry ticket’ into the legal field include a “minimal mastery” of legal texts and “modes of thinking,” which result in the production of a “specific form of judgement” based on a body of rules (1987a: 820). Linguistic competence is also a necessary pre-requisite. Even if one is in the middle of legal

proceedings, one cannot participate effectively without possessing this (1987a: 828). The possession or lack of such linguistic competence is absolutely essential to the power differences between those who can participate and those who cannot.

History is the foundation of habitus. Bourdieu states: “The *habitus* – embodied history, internalized as a second nature and so forgotten as history – is the active presence of the whole past of which it is the product (1990a: 56). The encounter between habitus and field is also an encounter between ‘objectified’ and ‘incorporated’ history; field representing the former and habitus the latter (1990a: 66). The importance of history in the development of field and habitus relates to Bourdieu’s imperative to include historical analysis in sociological research. He refers to the division between history and sociology as “disastrous” (Bourdieu and Wacquant, 1992: 90). Thus, the law should be considered a part of history; not above or outside of history.

It is helpful to draw upon Bourdieu’s ‘game’ analogy to clarify what is meant by the “almost miraculous encounter” between field and habitus (Bourdieu, 1990a: 66). In a game, a set of people take part in an activity which has rules. Though people do not always follow the rules exactly, the activity generally follows certain regularities. The most successful players demonstrate a ‘feel for the game.’ These players, at every moment, do whatever action the game requires. This assumes a pre-existing capacity for invention and adaptation. Successful players do not mechanically obey the rules of the game; this would hamper their ability to adapt to an infinite number of circumstances or possibilities. However, this freedom to improvise is constrained by the limits of the game. As Bourdieu states, “in a game you can’t do just anything and get away with it” (1990b: 64).

Thus, social action is free in the sense that actors can employ a multitude of ‘moves’ to ‘play the game,’ yet action is at the same time constrained by the field.

Bourdieu states,

“Nothing is simultaneously freer and more constrained than the action of the good player [...] The habitus, as society written into the body, into the biological individual, enables the infinite number of acts of the game – written into the game as possibilities and objective demands – to be produced; the constraints and demands of the game, although they are not restricted to a code of rules, *impose themselves* on those people – and those people alone – who, because they have a feel for the game, a feel, that is, for the immanent necessity of the game, are prepared to perceive them and carry them out” (Bourdieu, 1990b: 63).

The most successful people in a given field demonstrate their ‘feel for the game’ by utilizing various forms of capital to gain power. Though their actions appear to be rational, they are not based on reason (1990b: 11). The actions demonstrate “intentionality without intention” or “cognition without consciousness” (1990b: 11-12). Bourdieu points out that behaviour can be directed toward certain ends without actors being conscious of these ends. The notion of habitus is used to account for this paradox (1990b: 9-10). He states,

[M]y whole effort aims at explaining, via the notion of habitus for instance, how it is that behaviour (economic or other) takes the form of sequences that are objectively guided toward a certain end, without necessarily being the product either of a conscious strategy or of a mechanical determination. Agents to some extent *fall into* the practice that is theirs rather than freely choosing it or being impelled into it by mechanical constraints. If this is how it is, it’s because the habitus, a system of predispositions acquired through a relationship to a certain field, becomes effective and operative when it encounters the conditions of its effectiveness (Bourdieu, 1990b: 90).

‘Game playing’ in social fields inevitably involves the shifting of power relations as actors attempt to gain power and prestige. Some actors, endowed with a better ‘feel for the game’ than others, accumulate power. Power tends to accumulate in certain

fields, in the fields of politics and law for instance. This power allows certain actors, or groups of actors, to continuously dis-empower already disadvantaged groups.

2.2 RELATIONSHIPS WITHIN FIELDS

Actors in the field compete by employing various types of capital, defined by Bourdieu as:

(A)ccumulated labor (in its materialized form or its ‘incorporated,’ embodied, form) which, when appropriated on a private, i.e., exclusive, basis by agents or groups of agents, enables them to appropriate social energy in the form of reified or living labor (Bourdieu, 1986: 241).

Economic, cultural, and social capital are the “*three fundamental species*” of capital, but subtypes exist under each (Bourdieu and Wacquant, 1992: 119, italics original)¹⁷.

To Bourdieu, economic capital is dominant over the other types (Bourdieu, 1990b: 93)¹⁸.

Within the juridical field, capital is based on the possession of technical competence to properly analyze and interpret a corpus of texts (Bourdieu, 1987a: 817). Educational capital is stressed, as this allows one to obtain professional qualifications. The strengths of different types of capital are largely determined by the position of the legal field vis-à-vis the field of politics. Individuals in the field can act in ways to increase their capital. They can attempt to change the relative value of their dominant capital, or try to discredit capital held by others (Bourdieu and Wacquant, 1992: 99).

Each type of capital can be transformed by symbolic capital, which is:

(T)he form that one or another of these species takes when it is grasped through categories of perception that *recognize* its specific logic, or, if you prefer, misrecognize the arbitrariness of its possessions and accumulation (Bourdieu and Wacquant, 1992: 119).

By imposing categories of perception onto the viewer, the “act of observing and recognizing symbolic capital transforms the latter into economic or cultural capital” (Cicourel, 1993: 101). This process reproduces and reinforces “power structures which define the organization of social space” (Cicourel, 1993: 101).

Positions in the field form relationships of domination, subordination or equivalence to each other according to the access they afford to the types of capital which are at stake in the field (Jenkins, 1992: 85). The hierarchy of different types of capital varies according to field (Bourdieu and Wacquant, 1992: 98). Thus, the ‘trump cards’ in one field may be ineffective in another field. This nature of capital rests on the very dependence of capital on field. As Bourdieu and Wacquant state,

(T)he value of a species of capital [...] hinges on the existence of a game, of a field in which this competency can be employed; a species of capital is what is efficacious in a given field, both as a weapon and as a stake of struggle, that which allows its possessors to wield a power, an influence, and thus to *exist* (1992: 98, italics original).

With regard to the hierarchy of capital in the legal field, Calhoun et al. point out that participants who differ in field position (for example, a small town lawyer versus a Supreme Court Justice) employ different strategies to gain capital (2002: 262).

Hierarchies exist among judges, among lawyers, and between judges and lawyers.

Schisms also exist between theorists and practitioners of law (Bourdieu, 1987a: 821).

This complex division of labour (established without conscious planning) results from many contentious instances of position-taking (Bourdieu, 1987a: 817-18, Calhoun et al. 2002: 262).

The positions of actors in the legal field parallel the clients these actors serve. Legal actors with relatively less power tend to represent people who are disempowered,

while powerful actors tend to represent powerful clients (Bourdieu, 1987a: 827). He states:

Those who occupy inferior positions in the field (as for example in social welfare law) tend to work with a clientele composed of social inferiors who thereby increase the inferiority of these positions. Thus, their subversive efforts have less chance of overturning the power relations within the field than they do of contributing to the adaptation of the juridical corpus and, thereby, to the perpetuation of the structure of the field itself (1987a: 850).

The consequence of this representation is that choices made in the legal realm are unlikely to disadvantage dominant forces. The interests of dominant legal actors are generally shared by dominant political or economic actors (Bourdieu, 1987a: 842).

Bourdieu's concept of symbolic violence refers to the injustice that arises when one powerful group exercises their power to 'name' or 'label' another group¹⁹. A key feature of symbolic violence is that it is not seen as violence. Symbolic violence is censored, euphemized, and misrecognized violence (Bourdieu, 1990a: 126). Though force is fully exercised, symbolic violence is not seen as a force. The law can legitimize disguised force, gaining approval and acceptance, by appealing to reason or morality (1990b: 85). Gender domination is, to Bourdieu, the "paradigmatic form of symbolic violence" (Bourdieu and Wacquant, 1992: 170). This type of domination is so deeply imbedded that it needs virtually no justification. The 'male order' appears to be self-evident and universal, taken for granted (1992: 171).

According to Bourdieu, symbolic violence occurs when powerful actors collectively decide that overt violence is unacceptable in a particular case. The choice to use symbolic violence also depends on the state of the power relations between the two groups, and the ethicality of the group who has more power (Bourdieu, 1990a: 127). He states:

So long as overt violence [...] is collectively disapproved of and is liable to provoke either a violent riposte or the flight of the victim – that is, in both cases, for lack of any legal recourse, the destruction of the very relationship that was to be exploited – symbolic violence, gentle, invisible violence, unrecognized as such, chosen as much as undergone, [...] presents itself as the most economical mode of domination because it best corresponds to the economy of the system (Bourdieu, 1990a: 127).

Thus, the harder it is to exercise direct domination, and the more that people disapprove of this type of power, the more likely that gentle, symbolic domination will be used (Bourdieu, 1990a: 128).

Bourdieu recognizes law as the “realization *par excellence*” of symbolic violence (1990b: 84), stating that “law is the quintessential form of symbolic power of naming that creates the things names, and creates social groups in particular” (1987a: 838). Creating law through legislation involves a codification of actions which were previously governed by the “practical sense of the habitus” (Cronin, 1996: 68). Codification

goes hand in glove with discipline and with the normalization of practices [...] Codification minimizes ambiguity and vagueness, in particular in interactions [...] when different systems of dispositions are involved, there appears the possibility of an accident, a collision or a conflict...Codification is of capital importance because it ensures a basic level of communication (Bourdieu, 1990b: 80).

Codification is a process of rationalization which “gives rise to new forms of symbolic power” (Cronin, 1996: 68).

Symbolic violence allows powerful actors to impose their conceptualizations onto other actors with less power. These relatively powerless actors have little choice but to accept them (Terdiman, 1987: 812). For example, decisions made by judges create truth about the people involved. The legal clients have no choice but to accept the judge’s decision. Although they may be able to appeal, they eventually will have to concede to a judgment, as it is against the law to do otherwise (Bourdieu, 1987a: 838). According to

Bourdieu, this form of authorized speech coming from judges is “performative,” as things are created by the very act of naming them (Bourdieu, 1987a: 838). The ability of the court to create simply by naming is based on the power the legal realm possesses.

An important feature of symbolic violence is that those who are dominated by it are complicit in their domination. Bourdieu argues that the success of symbolic acts of naming depend on the degree to which those who are ‘named’ share the opinion of those who have the power to name (Bourdieu, 1987a: 839). If those who are ‘named’ in the process of symbolic violence are not complicit, the ‘naming’ will not be successful. The source of this unconscious complicity is that symbolic violence can only effectively name what is *already* developing. Bourdieu states:

(T)he will to transform the world by transforming the words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions, can only succeed if the resulting prophecies, or creative evocations, are also, at least in part, well-founded *pre-*visions, anticipatory descriptions. These visions only call forth what they proclaim – whether new practices, new mores or especially new social groupings – because they announce what is in the process of developing. They are not so much the midwives as the recording secretaries of history (Bourdieu, 1987a: 839-40).

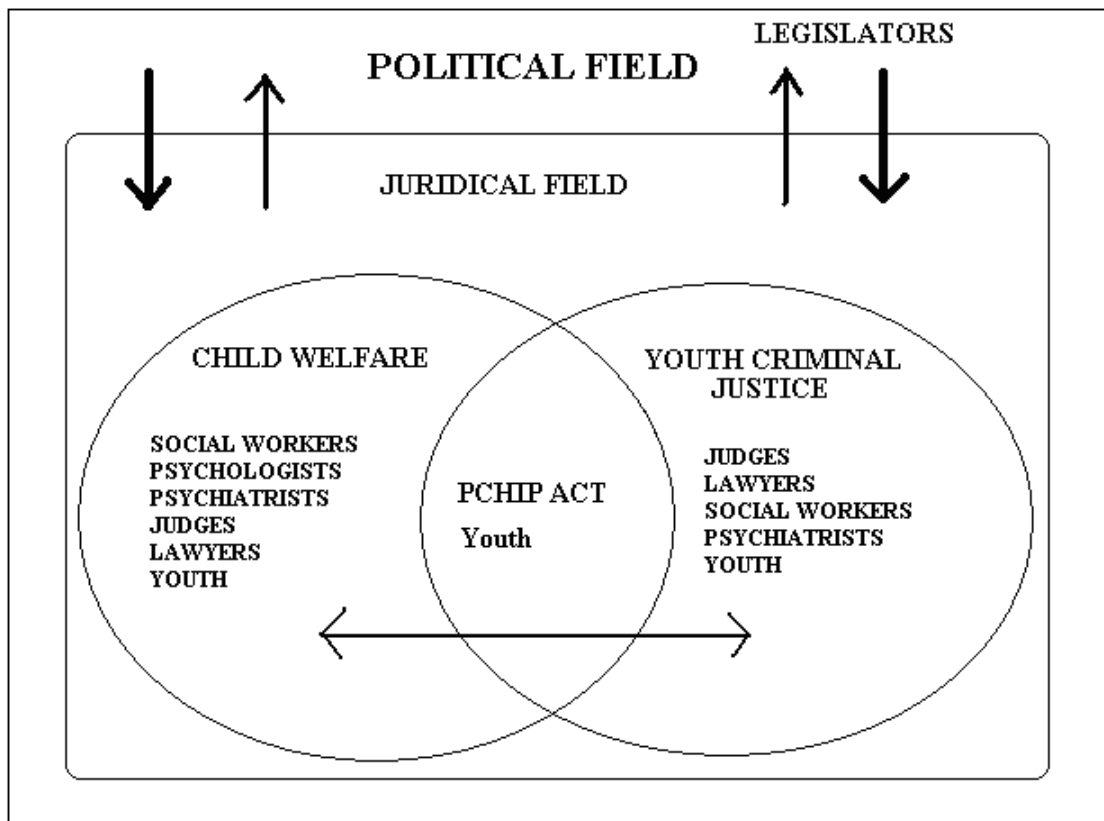
The law can only remain effective as long as the inherent arbitrariness remains unrecognized. The public must believe in the neutrality and autonomy of the law for symbolic violence to perpetuate (Bourdieu, 1987a: 844).

Bourdieu argues that symbolic violence can be revealed and ‘held in check’ by becoming aware of the arbitrariness of the power held by dominant groups. This deprives the dominant of their symbolic strength by “sweeping away misrecognition” (Bourdieu, 1990a: 303 note 18).

2.3 APPLICATION OF CONCEPTS

Diagram 2.1 illustrates the fields of interest in this thesis. The field of law, or the juridical field, which surrounds the two subfields of child welfare and youth justice, is enclosed within the larger field of power or politics. The bold arrows starting in the political field and entering the juridical represents the influence of the former over the latter. Legislators in the political field make decisions which affect the juridical field. Power also flows in the other direction, but to a lesser extent. Power also flows in the other direction, but to a lesser extent.

Diagram 2.1: Child Welfare and Youth Criminal Justice as Sub-fields of the Juridical, which is enclosed within the Political Field



Take note of the overlapping of boundaries and positions in the youth criminal justice and child welfare fields. This overlap demonstrates the common features of both fields, for instance, the presence of lawyers seems to be a necessity in both fields as child welfare becomes increasingly ‘legalized.’ The PCHIP Act occupies a section of overlap between the two fields to demonstrate that this legislation incorporates aspects of both fields. The arrow across the PCHIP section illustrates the transference of ideas, rhetoric, and ultimately habitus between the two fields.

This thesis investigates the relationships pictured in diagram 2.1. In my research, I apply Bourdieu’s concept of ‘field’ to the realms of politics, law, and youth criminal justice and child welfare. Drawing from Bourdieu, I will conceive of these fields as semi-autonomous ‘worlds,’ each with their own logic. His observation that the boundaries of these fields are imprecise, shifting, and permeable is especially important. Following Bourdieu’s imperative regarding the task of the social scientist, I will describe the state of struggles within and between these fields, thereby distinguishing and characterizing the boundary between them.

In my research, ‘habitus’ is used to describe the specific language and logic used by actors in the field, and to analyze the action in and across fields. Drawing on the ‘game’ analogy, one could conceive of the fields of politics, law, youth criminal justice and child welfare as games in which players employ various strategies to gain power over others. For instance, actors involved in the legal realm (an assortment of judges and lawyers) battle one another by overturning judgements of ‘lesser’ players, and making statements about each other marked by a discourse and logic that is particular to the legal field.

My analysis of the fields and positions included in diagram 2.1 will be supported by various sources of textual data in Chapters four through six. In Chapter four I analyze several academic articles, a 2004 Alberta government report, and newspaper articles to outline the debate between proponents and detractors of the Act. This is directly related to the boundaries illustrated in diagram 2.1, as proponents of the Act assume that the PCHIP Act belongs within the realm of child welfare, while critics argue that the Act is actually criminal justice legislation.

My contribution to this debate is two-fold. First, I compare sections of the Criminal Code of Canada and the Child, Youth, and Family Enhancement Act to the PCHIP Act, in particular sections six and nine. The purpose of this analysis is to investigate whether the implementation of the PCHIP Act added anything new to already existing provisions, thereby laying the foundation to comment on the influence of the juridical and political fields on the PCHIP Act in Chapter five. My second contribution is a dissection of section 3 of the PCHIP Act, which outlines three responses available to authorities upon the apprehension of a youth suspected of involvement in prostitution. This analysis contributes to the debate between proponents and detractors of the Act.

Chapter five examines the constitutional challenge to the PCHIP Act, thereby delineating the struggles between the juridical and political fields pictured in diagram 2.1. Further, this examination illuminates the affect of these struggles on the child welfare and youth criminal justice sub-fields. Several sources of textual data inform this analysis. In particular, I draw upon written reasons provided by judges in three court cases, the Canadian Charter of Rights and Freedoms, newspaper articles, and the PCHIP Act and its amendments.

Chapter six focuses on the youth confined under the PCHIP Act, shown in diagram 2.1 as occupying a place in which boundaries overlap. This chapter contends that the boundary disputes described in Chapters four and five have particular consequences for female Aboriginal youth. In addressing this problem, I draw on various sources of data, including scholarly articles, section three of the PCHIP Act, and a ‘Notice to Child’ document which was served to a youth confined under the PCHIP Act.

Before I move on to these empirical chapters, it is first necessary to recognize that the state of struggles among and within fields is always the result of past struggles. According to Bourdieu, one cannot grasp the structure and dynamics of a field, as well as its relationship to power, without historical analysis: “all sociology should be historical and all history sociological” (Bourdieu and Wacquant, 1992: 90). In consideration of this imperative, the next chapter provides a historical analysis of the fields which are of interest in this thesis. In particular, I focus on the development of the fields of child welfare and youth criminal justice.

CHAPTER THREE

THEORETICAL ANALYSIS OF HISTORICAL SOCIAL FIELDS IN ENGLAND AND CANADA

[U]nless a hand is stretched out to save the children, they will sink into still lower depths of society. Mary Carpenter, (1968) [1851]: 68.

We're saving kids and that's the important thing.
Heather Forsyth (2000)

The similarities between these two statements demonstrate the stable nature of the relationships characterizing the social field from the early 1800s to present. Though these remarks are separated by over a century, the common theme of 'child-saving' is evident in each.

This chapter describes the social field in which responses to youth delinquency are located by investigating successive historical periods in England and Canada. Since the latter was a colony of the former, legislation, discourse, and habitus regarding youth delinquency have been shared to some extent across these two countries. Bourdieu states,

It is necessary to write a structural history which finds in each state of the structure both the product of previous struggles to transform or conserve the structure, and, through the contradictions, tensions and power relations that constitute the structure, the source of its subsequent transformations (1990b: 42).

The following analysis demonstrates the inseparable nature between the social field and history from which it arose, by connecting the PCHIP Act to the continuum of responses to youth prostitution which have historically incorporated both justice and welfare ideals. In addition to these ideals, beliefs and attitudes regarding geographic

location and the innate criminality of the poor and racialized have shaped our responses to youth deviancy. As such, the historical trajectory of these attitudes, along with legal responses to youth prostitution, is presented and theoretically analyzed below.

3.1 ENGLISH INFLUENCES

Childhood was not seen as a time of special needs in the early 1800s in England. As such, legislation aimed exclusively at vulnerable or problematic children did not yet exist in England or in Canada. Young offenders received the same punishments as adults for criminal offences, including prostitution (May, 2002 and Bittle 2002a)²⁰. Several reformers protested such treatment, arguing that it was degrading and harsh. Rather than physical punishment, these commentators recommended the more humane approach of short prison terms for juveniles (May, 2002).

Despite the benevolent intentions of these reformers, the result of their efforts increased the criminalization of youth. In fact, Foucault argues that the primary function of criminal justice reform movements was to make the punishment of illegalities a “regular function” (Foucault, 1995: 82). Indeed, English reforms led to large numbers of children being confined in correctional facilities for petty offences such as vagrancy under the Vagrancy Act of 1824 (Shore, 2002: 161). This period in England was characterized by a willingness to prosecute juveniles and send them to prison (Shore, 2002: 163).

The punishment of illegality disproportionately fell onto the lower classes. This is evidenced by the Metropolitan Police Act of 1829, which criminalized individuals who were idle, disorderly, and/or loitering, as well as those who could not give a satisfactory

account of themselves (Magarey, 2002: 117). Another English Act passed in 1839 extended the categories of ‘arrestable’ people to include those:

in unlicensed theatres, bear pits, at cock fights, dog fights, or badger-baiting; to people in gaming houses; and to people found in a thoroughfare or public place flying a kite, playing any game ‘to the annoyance of the inhabitants or passengers,’ or making a slide in the ice or snow (Magarey, 2002: 118).

These prohibitions particularly targeted the leisurely activities of the poor class, and made London street-children vulnerable to arrest (Magarey, 2002: 118). Foucault reminds us that the lower classes were attached to these emerging illegalities (Foucault, 1995: 83). He states,

(C)rime is not a potentiality that interests or passions have inscribed in the hearts of all men, but that it is almost exclusively committed by a certain social class; that criminals, who were once to be met with in every social class, now emerged ‘almost all from the bottom rank of the social order’ (1995: 275).

Reformers often made blatant reference to the influence of class on delinquency. For instance, Mary Carpenter (considered the ‘doyen’ of child savers) stated “we have to view the child, not only in his individual position, but in relation to the class among which he is placed, and above which we desire to raise him” (1968 [1851]: 77).

Reformers linked class-based assumptions of criminality to beliefs about geography and environment. In the mid 1800s, concern over housing arose, as filthy dwellings were viewed as an indication of crime (Rush, 2002: 146). English Metropolitan Police magistrate Gilbert A’Beckett reported,

I found the dwellings of the poor very much overcrowded, rendering it quite impossible that anything like morality or decency could be observed among the inmates, and leading, no doubt, to indiscriminate connection, bringing into existence a class of unfortunate children likely to prove very fertile sources of crime (as quoted in Rush, 2002: 147).

The assumed connection of poverty to these immoral dwellings is obvious, and gives rise to the notion of “class-bound delinquency” (Rush, 2002: 147). In Canada, slum conditions and overcrowded housing were often blamed for causing delinquency (Sangster, 2002: 30-37).

3.2 THE DISCOVERY OF YOUTH DELINQUENCY

A new lexicon emerged to capture the ideological linkages of youth delinquency, class and race (Shore, 2002). The ‘invention’ or ‘discovery’ of the term ‘youth delinquent’ occurred in the mid 1800s in England, and was arguably one of the crowning achievements of the reforming sentiment in the early decades of the nineteenth century (Rush, 2002 138). This term was “legislated into existence” through a flurry of legislation aimed to target these youth (Magarey, 2002: 120)²¹. The Juvenile Offenders Act of 1847 marked the first English legislative response to youth delinquency, though other policies indirectly relating to youth delinquency were already in force (for example, the Vagrancy Act of 1824) (Shore, 2002: 161). These reforms provided recognition that juvenile delinquents were a separate category from adult offenders.

Romantic and Evangelical notions of childhood were fused to “produce an image of the ‘innocent’ child, who needed to be given [...] protection, guidance, love, and discipline” (Hendrick, 2002: 29). At the heart of these legislative Acts were the ‘care and protection’ clauses (Hendrick, 2002: 29). Images of rescuing neglected and delinquent children also emerged, following the assumption that youth were dependent and vulnerable (Clarke: 2002: 127 and 131, see also McLaren 1986: 133). A strong emphasis on morality was also evident, encompassing moral discipline, moral management and

moral government (Rush, 2002: 141 and McLaren, 1986: 129-132). These themes emerged as part of a broad 'childsaving' reform movement, whose proponents viewed 'wayward' youth as requiring support and guidance rather than punishment (Winterdyk, 1996: 2)²².

'Childsaving' and the associated moral reformation were of utmost concern in the reform and industrial schools of the era, which had replaced penal incarceration for youth by the 1860s in England (Shore, 2002: 168). Canada followed suit in 1879 by taking legislative steps to create industrial schools (McLaren, 1986: 133). Whereas prisons served to punish through incapacitation, reformatories were to function as "moral hospitals," with the aim of providing training for victims of neglect (May, 2002: 111, see also McLaren 1986). It was hoped that reformatory and industrial schools would help youth offenders forget their old vices and become useful (working) members of society (Clarke, 2002: 129). The overall aim was to instil new habits, dispositions, and behaviours in children from the lower classes, according to middle-class standards of morality (see Rush, 2002: 151 and McLaren 1986: 137).

Reformatory and industrial schools housed not only juvenile delinquents, but also children who were in need of 'care and protection,' which included orphans, children of criminals, and homeless youth (May, 2002: 98 and Carrigan 1991: 214). As the end of the 1800s approached, the differences between reformatories and industrial schools had essentially disappeared, resulting in poor children receiving the same treatment as criminal youth (Shore, 2002: 168).

The control of female sexuality was a key aim of the reformatory movement, though generally females were less likely than males to be labelled 'delinquent' (Shore,

2002: 168). Female youth were imprisoned most often on the grounds of prostitution and sexual immorality, which included association with men deemed ‘undesirable’ (Carrigan, 1991: 220).

Female youth offenders were often deemed more incorrigible and ‘evil’ than their male counterparts²³. Though young girls were viewed as passive and requiring protection, they were also seen as potentially dangerous to middle-class norms regarding female sexuality and domesticity (Hudson, 2002: 297). Young female offenders were viewed as hardened, corrupt women, due to their sexual knowledge while still in a physically immature state (Shore, 2002: 165). Even girls who were victims of sexual abuse were placed in industrial schools, as they were ‘tainted’ by sexual knowledge (Shore, 2002: 168). Class and ethnicity were additional factors in determining delinquency among young females. In particular, it was working class and black girls who were vulnerable to state intervention in England (Hudson, 2002: 297).

3.3 THE CANADIAN CONTEXT

In Canada, legislative developments increased the vulnerability of Aboriginal women to state intervention. The British North America (BNA) Act was passed in 1867, which granted power to the federal government to make laws governing Indians and their lands. In 1876, the Indian Act was passed. This Act was composed of assimilationist and integrationist policies, with the aim of turning Indians into ‘ordinary citizens’ (Walmsley, 2005: 8).

A key part of the assimilationist strategy was the implementation of residential schools by the federal government, which Aboriginal children were legally required to

attend²⁴. The policy behind these schools was to “civilize, Christianize, and socialize Aboriginal children to work in the wage economy,” which would be accomplished by erasing their Aboriginal identity (Royal Commission Report on Aboriginal Peoples (RCAP), 1996). The assumption behind these schools was that all Aboriginal children were born criminals, or at the very least, ‘wild’ or ‘animal-like’ (Monture-Angus, 1995: 92). Residential schools combined educational and childcare aims, yet were modelled after punitive industrial schools for juvenile delinquents in the United States (Sinclair, 1991: 9). Indeed, the parallels between residential and industrial schools are striking²⁵. For instance, both involved rigid schedules and the forced silence of residents/inmates. Generations of children were separated from their families, their languages were suppressed, and attempts were made to resocialize the youth with European norms (RCAP, 1996). These measures amounted to nothing less than cultural genocide (Schissel and Wotherspoon, 2003: 35). Residential schools traumatized children and youth, and produced individuals who were unable to function in either Aboriginal or Euro-Canadian cultures (2003: 40).

The passing of the Indian Act was followed by several criminal law amendments in England and Canada. Within a habitus dominated by ‘moral fervour’ and ‘white slavery hysteria’²⁶, England passed the Criminal Law Amendment Act in 1885, which targeted exploiters of prostitutes. Canadian politicians produced similar bills scarcely a year after. By 1892, the Canadian federal government passed a series of laws to the Criminal Code which aimed at protecting young women and children from those who would recruit them into prostitution. Besides the influence of English legislation, these changes were also prompted by morally-toned concerns of religious groups (Bittle,

2002a). The Women's Christian Temperance Union, the Young Women's Christian Association, and national protestant church bodies battled a number of 'social evils,' including prostitution and liquor (McLaren, 1986: 141). An emphasis on the morality and protection of vulnerable women and youth formed an important part of the habitus during this period (see Sangster, 2002: 14, and McLaren 1986: 140).

The rhetoric of protection was far removed from the practical applications of the new laws, however. Laws that criminalized prostitution continued to be enforced, and female prostitutes continued to be punished rather than male purchasers (Bittle, 2002a: 4, McLaren 1986: 142). Protectionist discourse hid the punitive realities of these laws. Many youth served lengthy prison sentences, ostensibly for the purposes of their own protection. Similar to the circumstances in England, class and race strongly influenced which youth were incarcerated. It was mainly working class and immigrant youth who were apprehended (Bittle, 2002a: 4).

The prevailing protectionist rhetoric framed other Canadian legislative developments, such as the establishment of Children's Aid Societies in the 1890s, and the passing of the Children's Protection Act in 1893. These developments granted the Societies legal power to remove neglected and abandoned children from their homes (Bala, 1991:2). Child protection legislation was later enacted in each province, and has remained within provincial jurisdiction to date. The field of child welfare had been born.

The field of youth criminal justice was born soon after, with the passing of the Juvenile Delinquency Act (JDA) in Canada in 1908. The JDA, as criminal law, was federal in scope. An emphasis on treatment, welfare and rehabilitation dominated discussions on youth delinquency, as well as protectionist and child-saving rhetoric

carried over from the previous century. Two concepts originating in British law were of critical importance in the framing of the JDA. The principle of *doli capax* was adopted, along with *parens patriae* (referring to the responsibility of the state to assume parental responsibility over a child) (Sangster, 2002: 14-15). Legislative developments in the United States also impacted the passing of the JDA (Trepanier: 1999)²⁷.

Under the JDA, promiscuous girls who had not broken the law could be incarcerated for their own protection, for the purpose of moral re-education (Sangster, 2002: 3). Status offences, that is, offences relating to morality or character, criminalized children *in danger* of becoming criminal. Promiscuity, incorrigibility, and running away from home were status offences for which youth could be detained. Compared with their male counterparts, a large proportion of delinquency charges against girls resulted from these status offences regarding 'boy trouble' (Sangster, 2002: 75). These charges were mediated by race and class. If the parents of the girl were deemed upstanding and respectable, their daughter was less likely to be sent to training school. In cases of promiscuity, the respectability of the male fundamentally determined the guilt or innocence of the female. Engaging in 'sexual immorality' with 'undesirable' men (men who were older, in conflict with the law, or of a different racial background than the girl) increased the odds that the female would be sent away (Sangster, 2002: 83-5).

Certain ethnicities and social classes were assumed to be in greater need of protection than other groups (Sangster, 2002: 3). In particular, state 'benevolence' was directed at the 'dangerous classes,' which included working class and Aboriginal girls. By providing protection to these groups, it was assumed that they would develop into moral adults (Sangster, 2002: 32). The strongest theme attached to girls' delinquency

was sexual immorality, which included prostitution, promiscuity, and having illegitimate pregnancies (Sangster, 2002). This preoccupation with sexual purity was epitomized by a 1924 amendment which made it possible for girls to be guilty of ‘sexual immorality or any similar form of vice’ (Sangster, 2002: 71). This amendment gave judges more power to punish girls’ sexual behaviour.

Though the JDA was passed as criminal justice legislation, youth guilty of sexual immorality (including prostitution or promiscuity) could be detained for an indefinite period of time by *child welfare* jurisdictions (Bagley et al, 1991: 126). In fact, child welfare agencies had considerable responsibility for delinquent youth right up until the 1960s (Bala, 1991: 3). Conversely, youth who were neglected or abused, or seen as *likely* to break a law, could be detained under the JDA, since the JDA’s mandate included children ‘in need of guidance and supervision’ (Sangster, 2002: 5 and 19). The boundary between child welfare and criminal justice signified a jurisdictional issue between the federal and provincial governments – though the JDA fell under the criminal code (which was federal), it also involved child welfare aspects which were under provincial jurisdiction. Similar to the case in England, the boundaries between the fields of child welfare and youth criminal justice appear indistinct during this period²⁸.

In addition to the permeability between child welfare and justice, relationships with other fields increased starting in the 1930s. There was a growing symbiosis between social services, educational institutions, and the criminal justice system, along with the emergence of the modern ‘expert’ (Sangster, 2002: 17)²⁹. Those trained in medicine, social sciences and social work helped judges to define what was criminal, delinquent and immoral (Sangster, 2002: 19). Other experts included police, Children’s Aid Society

workers, and probation officers, psychologists and psychiatrists, and organizations such as Big Sisters (Sangster, 2002: 20-1). During and after World War II, psychiatrists in particular became extremely influential in determining delinquency and normality³⁰. Psychiatric advice often promoted ideals which concurred with patriarchal, white, middle class values (Sangter, 2002: 21).

Unfortunately, psychiatric and medical knowledge during the 1940s and 1950s tended to ignore issues of sexual abuse and incest. At best, the dominant medical discourse downplayed these issues (Sangster, 2002: 125). These were seen as uncommon, and occurring primarily among the lower class. It was assumed that incest victims were complicit in their abuse, especially if the female were deemed promiscuous. Girls who were victims of sexual abuse were often sent to training schools to receive moral training to overcome their 'contamination' (Sangster, 2002: 87-8).

In 1951, Section 88 was added to the Indian Act, which authorized the extension of child welfare services to Aboriginal children (Sinclair et al., 1991: 183)³¹. Prior to 1951, Aboriginal children who were seen to be in need of protection were "apprehended by Indian agents and were either placed with another family on the reserve or sent to residential schools" (Sinclair et al., 1991: 183).

Welfare services began to be provided to Aboriginal families by 1952. Apprehension and removal of Aboriginal children from their families and reserves was legalized by a 1955 policy, and by the late 1950s, Aboriginal children were overrepresented in the child welfare system (Walmsley, 2005: 2). The trend toward removing Aboriginal children from their families would later become to be known as the

“sixties scoop” (Walmsley, 2005: 21, see also McEvoy and Daniluk 1995). One social worker remarks:

Provincial social workers would, quite literally, scoop children from reserves on the slightest pretext, because they believed that what they were doing was in the best interests of the child...they felt that the apprehension of Indian children from reserves would save them from the effects of crushing poverty, unsanitary health conditions, poor housing, and malnutrition (Johnston, 1983: 23).

Powerful protectionist rhetoric justified state intervention into Aboriginal families. To ‘protect’ these children, many were placed in non-Aboriginal foster homes, care facilities, or were adopted by non-Aboriginal families wherever they could be found (Walmsley, 2005 and Sinclair et al, 1991)³². Child welfare functioned to remove Aboriginal children and youth from their cultural identity and heritage (Monture, 1989: 3, see also Sinclair et al., 1991: 171).

Aboriginal youth became overrepresented in training schools after 1951, mirroring the trend that was occurring in child welfare (Sangster, 2002: 7). Social workers believed that Aboriginal girls would be saved from sexual immorality through moral surveillance (Sangster, 2002: 150). Similar to working-class white girls, sexual promiscuity was the major reason that Aboriginal girls were sent to training schools. However, decisions to incarcerate Aboriginal girls also resulted from racist beliefs about their ‘inferior’ culture and ‘primitiveness’ which were not factors in determining delinquency among white youth (Sangster, 2002: 156).

By the mid-1960s, critiques were emerging against reform and training schools. The legal community, politicians, and reform groups such as the Elizabeth Fry Society pressured the (provincial) government of Ontario to revise rationales for incarcerating girls. In response to this pressure, the charge of ‘incurability’ was removed as a

justification for federal incarceration (Sangster, 2002: 173). This charge was transferred to provincial responsibility, effectively narrowing the jurisdiction of the JDA.

Besides the issue of incorrigibility, children's rights issues were raised. It was argued that youth delinquents should be extended the same rights that incarcerated adults had, such as the right to counsel, to appeal, to not be detained unnecessarily, and to have a clear charge against them (Sangster, 2002: 173). It was decided that these rights would be safeguarded by requiring judges to hear children's evidence and to provide a written record of the reasons for training school placements (Sangster, 2002: 141).

The late 1970s and early 1980s were marked by a 'discovery' of child sexual abuse (Bala, 1991: 3-4). This development was paralleled by a concern over youth prostitution. Since the mid 1980s especially, an 'explosion' of interest and research has occurred pertaining to incest and child sexual abuse (McEvoy and Daniluk, 1995: 1). Understandings of sexual abuse had changed, perhaps due to feminist writing and politics (Sangster, 2002: 88 and Bagley et al., 1991: 110). A greater willingness to address women's sexual abuse as contributing to their problems with the law became evident (for example, see Comack 1996 and McEvoy and Daniluk 1995).

3.4 LAW AND ORDER

The 1980s signified a fundamental shift in the habitus of the social field. While the ideals of rehabilitation and treatment had previously shaped responses to youth delinquency (at least rhetorically, if not in practice), a 'law-and-order' or 'crime-control' model became dominant by the 1980s, in England, Canada and the United States (see Carlen: 1988, Edwards: 1987, Garland: 1996 and 2001, and Wacquant: 2001). Sangster

notes that it is remarkable how quickly the ideals of the earlier juvenile justice system evaporated (2002: 177). One indicator of this shift was the infiltration of the legal system into the child welfare realm. Child welfare became increasingly ‘legalized,’ that is, dependent on lawyers and judges to decide upon child welfare issues, during the 1980s. Legal advice became important in formulating policies and procedures to avoid illegal practices (Blishen, 1991: 195). The legalization of child welfare has caused lawyers to replace laypersons in child protection cases, as well as the increased frequency of representation of all parties involved, including children and parents (Felstiner et al., 1991: 312).

Two important pieces of legislation were passed in the wake of the increasing legalization of the child welfare field. As part of the repatriation of the constitution, the Canadian Charter of Rights and Freedoms was passed in 1982. This granted constitutionally-guaranteed individual rights. This had important implications for both child welfare and justice practices, as constitutional challenges against legislation became possible. The courts would be given a new role in overseeing the legality of government action (Bakan et al., 2003: 7). It appeared that the previous disregard for young offenders’ rights under the JDA would be remedied by the Charter.

Following the passing of the Charter, the Young Offenders Act (YOA) came into effect in 1984, replacing the JDA. The YOA can be seen as the focal point of the law-and-order campaign (Schissel, 2006: 9). The ideals which governed the JDA, including protection, treatment, and child-saving, was replaced by an ideology which emphasized punitive responses and blaming children (Sangster, 2002: 11).

The YOA paid tribute to the individual rights espoused by the Charter, by affording to youth the same rights held by adults in legal matters and proceeding. For example, the YOA ensured that accused youth received legal representation in court and were informed of their rights (Schissel, 2006: 9). Due process and youth accountability for their crimes were also emphasized (Sangster, 2002: 177). The YOA was also supposed to ensure that, as much as possible, young offenders were to be “directed away from the formal legal process and toward alternative measures, including community-based programs of reparation and mediation” (Schissel, 2006: 10). The arbitrary detention of young females who were suspected of engaging, or likely engaging, in prostitution was officially ended with the passing of the YOA (Bagley et al., 1991: 126). Status offences were removed altogether, which was seen as progressive (Sangster, 2002: 177). However, some argue that the removal of status offences such as immorality has merely caused the re-labelling of these offences as sexual offences under the New Criminal Code, or as medical problems which require mandatory institutionalization. Thus, girls’ sexuality was still targeted by regulation, while similar behaviour was overlooked in the case of their male counterparts.

The same year that the YOA came into effect, the Report of the Committee on Sexual Offences Against Children and Youth (aka ‘The Badgley Report’) was published. The purpose of this committee was to investigate the prevalence of sexual offences against children and youth in Canada, as well as juvenile prostitution and the exploitation of youth in pornography (Badgley et al, 1984: 3). This Report was novel in that it considered youth prostitution within the context of child sexual abuse (Bagley et al., 1991: 117)³³. The Report was instrumental in changing societal response to youth

prostitution. It recognized that criminal justice responses to youth prostitution had been ineffective, so the issue was reframed as a child welfare issue.

The Badgley report invoked contradictory ideologies in some of its recommendations. For example, with regard to recommendation 45, committee members refer to the ‘tragic plight’ of youth prostitutes, and opine that social initiatives are preferable to legal initiatives. However, they go on to recommend that criminal sanctions against youth prostitutes were necessary because this group does not seek out these social initiatives (see Badgley et al., 1984: 94-5)³⁴. The homelessness of these youth further justified their criminalization; the committee members argued that it was necessary to save ‘street-kids’ from themselves by imposing treatment (Lowman, 1991: 300).

The Badgley committee did attempt to target clients of prostitutes by recommending amendments to the Criminal Code which would punish clients of youth prostitutes. Bill C-15 was introduced in 1988 in response to this recommendation. The Bill included provisions that criminalized the sexual procurement of youth, ostensibly making it easier for police to arrest pimps and johns. However, these provisions were difficult for police to enforce, since they required the offender to be caught in the act (Bittle, 2002a: 11). Consequently, only a handful of charges were ever laid against those who procured youth prostitutes (Lowman, 1991: 301).

The Badgley report had brought attention to two competing images of youth prostitution: the young offender who deserves criminal sanctions versus the young victim who needs help. Recommendations put forth in the 1990s demonstrate that the latter conceptualization would dictate official policy. Bittle states:

By the mid 1990s, a policy shift had occurred whereby young prostitutes were no longer conceptualized as “deviants” or “criminals” in need of punishment.

Instead, youth prostitution was viewed as a form of sexual abuse, and therefore young prostitutes were victims who need protection (2002a: 12).

Though youth prostitutes as young offenders disappeared from official rhetoric coming from the government, this ideology would continue to affect how legislation was carried out in practice.

In 1992, a Working Group was created to examine “legislation, policy and practices concerning prostitution-related activities and bring forward recommendations to address problems posed by prostitution” (Bittle, 2002a: 11). Youth involvement in prostitution was designated as a primary issue of concern. A final report was released in 1998, and included several recommendations specific to youth prostitution. It was advised that youth involved in prostitution should be seen as needing assistance, not as young offenders. Additionally, it was recommended that interdisciplinary protocols should be developed, involving child welfare and the police as first responses and the criminal justice system as a last resort. The Working Group also recommended that alternative measures be developed to deal with the issue, and that improved services be provided to youth involved (or at risk to be involved) in prostitution. While all these recommendations are important to the later implementation of the PCHIP Act, the shift in philosophy from conceptualizing youth prostitutes as victims rather than offenders is particularly important.

This ‘new’ philosophical paradigm (reminiscent of protectionist rhetoric which had long been a feature of discussions of youth prostitution) was taken up the Task Force on Children Involved in Prostitution, formed in Alberta in May 1996. The Task Force was chaired by Heather Forsyth, who was then a backbencher MLA in Ralph Klein’s government. Members of the Calgary and Edmonton Police Services, Child Welfare, and

the Young Offender's Branch of Alberta Justice were also on the Task Force. Absent from the Task Force were Aboriginal and women's groups (Koshan, 2003: 216 footnote 33). The Task Force was initiated partly because of the death of a child who had been sexually exploited (Alberta Children's Services, 2004: 1). The Task Force report states,

The Task Force believes these children [young prostitutes] should be seen as victims of abuse. The children, if not abused while at home, are certainly victims of sexual abuse when they are used by either a pimp or a john. It is within this philosophical framework that the Task Force formed its recommendations (Task Force on Children Involved in Prostitution, 1997: 3).

The characterization of youth prostitutes as victims of *sexual abuse* is of fundamental importance. Though it was not novel to conceive of these youth as victims generally, it was new to refer to their exploitation as sexual abuse specifically. Since their exploitation was framed this way, it became impossible to view these children as anything other than victims – certainly they could not be young offenders and sexual abuse victims simultaneously.

Important recommendations from the Task Force included the need for “collaborative case management” and the creation of a “Children Involved in Prostitution Act” (Bittle, 2002a: 13). According to the Task Force, the Act would provide legislative support for a continuum of services for children involved in prostitution. Services would be provided for both those who wished to leave and those who did not wish to leave prostitution. Additionally, penalties for pimps and johns would be contemplated (Bittle, 2002a: 13).

3.5 CONCLUSION

The PCHIP Act was passed within a social field which has drawn upon a habitus continuously created over a historical process. Though the habitus, over time, remained stable in some aspects, new components were incorporated while others diminished. Discourses regarding protection and ‘child saving’ have remained central in policies aimed at youth delinquency since the late 1800s, especially in measures targeting youth prostitution. As the passing of the PCHIP demonstrates, the ideology that youth are vulnerable and need protection has remained extremely influential in current policy. However, the counter-dialogue that youth prostitutes are offenders still remains, for in practice, the PCHIP Act functions to criminalize youth by confining them.

Thus, the PCHIP Act manages to fulfill two opposing ideologies in the habitus. The idea that youth prostitutes are victims is maintained, since these youth are called ‘sexual abuse victims’ and measures to address this are couched in protectionist rhetoric (for example, the term ‘protective safehouse’). However, the counter-discourse that these youth are offenders is also perpetuated, as the detainment of these youth in protective safehouses can be considered disciplinary.

Along with these dual ideologies, concerns over geography (slum areas), poverty and race have long framed responses to youth deviance and child prostitution specifically. The PCHIP Act has embodied these issues by disproportionately detaining homeless Aboriginal females.

This effect of the PCHIP Act has not gone unnoticed. After it was passed, a scholarly debate developed over the nature, effectiveness, and ethicality of the PCHIP Act. The disproportionate detention of Aboriginal females was problematized by several

authors. However, government reports supported the Act, with several newspaper articles following suit. A critical analysis of the PCHIP Act is necessary to assess this debate. It is to such an analysis that we now turn.

CHAPTER FOUR

CRITICAL EVALUATION OF THE PCHIP ACT

The passing of the PCHIP Act was followed by a debate in academic literature, public reports, and newspaper articles. Reports and press releases put out by the Alberta Government, newspaper articles, and some scholarly articles argued that the PCHIP Act was necessary and ethical. Examples of this side of the debate include the Alberta Children's Services 2004 report *Protection of Children Involved in Prostitution: Protective Safe House Review* and Grover (2002)³⁵. The stances and arguments presented in these articles were countered by other research, including Busby et al. (2002), Koshan (2003) and Kinsley and Mark (2000), who contend that the Act is ineffective in providing alternatives to youth involved in prostitution, and functioned to criminalize already marginalized groups.

My contribution to this debate is a comparison between the provisions allowed under the PCHIP Act and those allowed under the Criminal Code and the Child, Youth, and Family Enhancement Act. This comparison demonstrates the fundamental redundancy of the PCHIP Act, thereby contributing to critical research pertaining to the PCHIP Act.

4.1 CURRENT DEBATE

The Alberta Children's Services 2004 report and Grover (2002) both argue that the Act is underutilized. Specifically, Grover (2002) criticizes the PCHIP Act on grounds that street kids besides those involved in prostitution are not also 'protected' under the Act.

She states:

[The PCHIP Act] is completely silent as to the governmental responsibilities to safeguard the “best interests” of other classes of street youth. It is particularly curious that the PCHIP Act is so narrowly focused on children involved in prostitution, rather than upon ensuring the safety and security of any child found on the street; whether involved in prostitution or not. One cannot help but wonder if the notion of children engaged in prostitution more readily disturbs the conscience of the dominant society; perhaps more readily conjuring up notions of exploitation than is the case for the image of a drug abusing teen not involved in prostitution. *However, it should be emphasized that all children on the street are vulnerable and inevitably will be exploited on the street, sexually and/or otherwise, as they most often have already been prior to their arrival there.* The PCHIP Act thus can be said to be underinclusive to the extent that it does not seek to remove all children from the street and return them to their guardians, if the latter can provide them a safe and secure environment, or to find an alternative such placement where the former is not possible (Grover, 2002: 322, italics original).

This passage reveals that Grover takes for granted that the PCHIP Act is beneficial for those youth who are detained under it. However, she presents no evidence that supports this assumption. Further, it is telling that she assumes that all children confined under the PCHIP Act are in fact homeless. As I argue later, the PCHIP Act is structured to disproportionately incarcerate homeless youth. The fact that Grover *starts* from this assumption demonstrates a tacit acceptance that the PCHIP Act is *meant* to target homeless youth, though this goal is nowhere officially stated in the Act itself.

Grover makes several debatable claims in the article. For instance, she contends that children detained under PCHIP should automatically be given child welfare Status, so that their ‘treatment’ can be lengthened, thus fulfilling Charter obligations to these vulnerable young people (Grover, 2002: 317). However, there are several problems with this claim. First, Grover is apparently unaware that virtually all children detained under PCHIP already have child welfare status, a fact confirmed by the Alberta government (Alberta Children’s Services, 2004: 24). Second, Grover incorrectly assumes that assigning child welfare status to children confined under PCHIP will facilitate their

treatment. In my experience as a front-line group home worker at a so-called ‘treatment’ facility for children with child welfare status, I have seen no proof that the assignment of child welfare status facilitates meaningful ‘treatment.’ On the contrary, I can attest that such residences operated under child welfare (such as ‘treatment group homes,’ or other institutions) may do more harm to children than good (see Walmsley, 2005: 87 and 119; Monture-Angus, 1989). Further, children with a history of prostitution, real or perceived, may not be welcome at group homes, and are considered “not a good match” at such institutions (Alberta Children’s Services, 2004: 29). Third, Grover ignores the fact that 19 percent of the children held at the ‘protective safehouses’ under PCHIP go AWOL (absent without leave) immediately upon release, making child welfare status and placements completely irrelevant (Alberta Children’s Services, 2004: 49).

Some of these oversights can also be found in the Alberta Children’s Services 2004 report. Though this report addresses the monetary efficacy of the Act, it ignores other crucial issues, such as the ethicality of detaining youth who are not convicted of any crime. The report criticizes others who have questioned the ethicality of the Act, stating “Critics of PCHIP have focused on the ethics, not the efficacy, of confining children as a means to facilitate protection” (Alberta Children’s Services, 2004: Major research findings), as though the ethicality of the Act is self-evident.

Similar to Grover (2002), the Alberta government criticizes the Act by stating that it does not go ‘far enough.’ Citing the decrease of apprehensions as a problem, the authors³⁶ argue that the PCHIP Act may be missing parts of the target population (Alberta Children’s Services, 2004: extent of use and reach of the PCHIP initiative). The report states:

Male children, children involved in underground prostitution through the internet, and those who may be engaged in non-traditional forms of prostitution such as “survival sex,” were all mentioned by stakeholders and staff as groups that may not be fully reached by the initiative at present. Police and child protection workers may not be using PCHIP legislation for apprehensions in suitable cases to the extent as they could, or to the extent that they have in the past (Alberta Children’s Services, 2004: extent of use and reach of the PCHIP initiative).

The document presents decreasing apprehensions as proof that not enough youth are being targeted, though one could question their logic – why aren’t the decreasing apprehension numbers considered proof that the PCHIP program is working? Since the program has been in place since 1999, fewer apprehensions would evidence the effectiveness of the program. It is as though even the Alberta government does not believe that the PCHIP Act will decrease the numbers of youth prostitutes in the province. The government does not offer evidence that there are child prostitutes that are not being reached, other than a “feeling” that this is the case (Alberta Children’s Services, 2004: 31). Among other reasons, they cite ‘negative attitudes about confining children’ as causing the low number of apprehensions, as though these attitudes are naturally incorrect or invalid.

The Alberta government report especially emphasizes the cost effectiveness of the ‘protective safe houses’ throughout. They state,

The major barrier to increased cost effectiveness for the protective safe houses was felt to be the relatively low level of apprehensions, and the consequent under-utilization of staff and low occupancy rates. Occupancy rates for the fiscal year 2002-2003 were 55% for the Edmonton protective safe house, and 20% for the Calgary facility. Only 4 PCHIP client days were recorded for the Lethbridge protective safe house for that year (Alberta Children’s Services, 2004: cost effectiveness of the Protective Safe Houses).

Increasing the number of apprehensions was a major recommendation for the report. In particular, the report advises that children on First Nations reserves may represent a

source of increased apprehensions, as “stakeholders were concerned that involvement in prostitution for children on Aboriginal reserves was perhaps not being sufficiently addressed” (Alberta Children’s Services, 2004: 32).

In addition to criticizing the low level of apprehensions and resulting cost ineffectiveness, the report argues that periods of confinement are too short. The report states, “even 26-day confinement periods were not necessarily long enough to facilitate significant changes in a client’s life” (Alberta Children’s Services, 2004: 33). This argument rests on the unproven assumption that any length of confinement helps youth to exit prostitution.

The report provides a list of services offered at the protective safe houses. In Edmonton, services include (but are not limited to) addictions treatment, equestrian training, and cultural awareness. However, the quality (or existence) of these services is suspect. For instance, the addictions treatment largely consisted of having the youth watch movies about drug or alcohol abuse. While this was probably not detrimental to the youth, the high frequency of drug addiction among the youth (particularly to crystal meth) requires services beyond merely watching movies. Services promoting cultural awareness were similarly lacking. The inclusion of ‘equestrian training’ on this list of services is puzzling, as I did not see a horse nor gymkhana on the grounds surrounding the safe house.

Rather than rehabilitative services, the treatment offered at the Edmonton safe house was primarily regulatory in nature. Adherence to the daily schedule was the paramount concern, rather than providing protective or rehabilitative services. This schedule dictated virtually all activity over the course of a day. The youth were expected

to get up at a certain time, no earlier and no later. During my employment as a front-line worker, I encountered a girl who liked to get up earlier than the rest of the girls, so she could shower first. Front-line staff problematized this behaviour, as it did not quite adhere to the schedule. One morning, on her way to the shower, staff engaged her in a battle of wills which escalated into the physical restraint of the girl. She was forced into the ‘time-out’ room³⁷, where she remained until she calmed down. Clearly, this exemplifies the disciplinary nature of the PHCIP Act – adherence to the schedule takes priority over everything else, including the emotional and physical safety of the youth.

Another observation which exemplifies the nature of the Act occurred overnight during an intake procedure with a newly-arrived youth. When the youth arrived and saw that the doors were being locked behind her, she reacted by throwing her shoes at a staff member and becoming extremely agitated. She was deemed to be ‘a threat to herself or others,’ and was placed in the time-out room. After she had calmed down, she submitted to the intake procedure and was sent off to her room. As she was a new resident, the bed was not made (in fact, the bed was leaning up against the wall). As it was very late at night and the girl was clearly exhausted, I helped her make the bed. After finishing this task, I was reprimanded by my supervisor for aiding the girl. The supervisor argued that we needed to ‘get tough’ and ‘crack down’ on these girls as soon as they arrived, since they needed to know who was in charge. This attitude is completely at odds with the attitude staff are ‘supposed’ to have toward the girls – officially, the PCHIP Act views the youth as victims of sexual assault who require protection (See Protection of Children Involved in Prostitution Act, Preamble). Clearly, there is a discrepancy between official rhetoric and attitudes encouraged among the staff.

Although both Grover's (2002) article and the report released by Alberta Children's Services appear to be critical of the Act, neither is critical of the essence of the Act itself – the confinement of youth who have not been convicted of any crime. Documents such as these limit public debate pertaining to the Act – rather than framing the debate around the legality or the ethicality of the Act, smaller, insignificant debates are formed which presume that the larger issue has been resolved (that the PCHIP Act is ethical and legal). The narrowness of the debate over the Act is demonstrated by several newspaper articles I will discuss next.

The article "Review faults Alberta's child prostitution program" highlights the finding that apprehensions are too low, and many of the target population is being missed, such as "natives on reserves" (Edmonton Journal, 2005: A14). The article includes various quotes from supporters of the Act, including Kourch Chan, who manages the outreach program "Crossroads," which has supported the Act since it was passed in 1999. He states "the presence of children on the street has decreased because of this act" (Edmonton Journal, 2005: A14). In the same article, then-Children Services Minister Heather Forsyth stated, "we're saving kids and that's the most important thing" (Edmonton Journal, 2005: A14), though neither she or Chan offer any evidence to support their statements.

On February 23, 2005, the article "Flaws in child prostitution program" also emphasized the low number of apprehensions (Edmonton Journal, 2005: A18). The article further comments on the lack of follow-up measures which could provide evidence that the program is working (Edmonton Journal, 2005: A18). The newspaper article calls the Alberta government report a "good, critical assessment of a controversial and

groundbreaking effort” (Edmonton Journal, 2005: A18). A similar article appeared in Yahoo News Canada on February 24, 2005. “Report finds weakness in Alberta’s landmark child prostitution program” comments on the low number of apprehensions and repeats the recommendations put forth in the Alberta government report.

The overall problem with these newspaper articles is that they remain within the debate boundaries set out by the Alberta government report – the articles do not challenge the validity or legality of the Act itself; they merely echo concerns voiced in the report which presume that the Act is valid. Another problem is the media’s focus on Aboriginal youth – the newspaper accounts repeat the ‘finding’ that Aboriginal youth on reserves are not sufficiently benefiting from the Act. This may lead readers to stereotype Aboriginal youth as being involved, or at-risk of becoming involved, in prostitution.

Busby et al. (2002), Kingsley and Mark (2000) and Koshan (2003) represent important challenges to the ethicality of the PCHIP Act, in contrast to the articles assessed above. Busby et al. (2002), titled “Examination of Innovative Programming for Children and Youth Involved in Prostitution,” was undertaken by a number of academics³⁸. Unlike the 2004 report released by the Alberta Government, Busby et al. (2002) included interviews of 45 women who had been involved in prostitution, all who had entered the sex trade before the age of 18.

The interviewees generally spoke negatively about child welfare agencies, instead favouring agencies which “were perceived to be less coercive, more flexible and that allowed youth to have greater input into programming” (Busby et al. 2002: 7-8)³⁹. This sentiment was also found among the youth prostitutes interviewed by Kingsley and Mark, who found that youth require safe and non-judgemental centres staffed by those who used

to be involved in the sex trade (2000: 63). Additionally, the provision of basic hygiene was mentioned by the respondents in Busby et al.'s (2002) study. One woman stated that "providing a safe place where prostituted girls could sleep, shower and wash their clothes would give them 'some dignity'" (2002: 9-10). Meal routines followed at secure treatment centres were identified as problematic by some interviewees; more flexibility in this schedule would be of benefit (2002: 10).

The respondents in Busby et al. (2002) were critical of the PCHIP Act because they thought it would push prostitution 'underground' (leading to 'bad stuff' happening because it is less visible), and retaliation from pimps for being away from work due to the confinement period (Busby et al., 2002: 14). Though few respondents reported utilizing agencies to exit prostitution, those who did use agencies were more likely to use voluntary services. Busby et al. report:

The majority of women who had been apprehended under child welfare legislation were very supportive of voluntary services and suspicious of mandated services (2002: 17).

A majority of the women interviewed supported programs run by staff that actually had experience living on the street (2002: 18).

Busby et al. point out that the services which are most likely to be approached and utilized by youth prostitutes (voluntary services which focus on harm reduction and advocacy) are less likely to retain funding than programs which focus on apprehension and confinement, such as the PCHIP Act (2002: 18). They suggest that the federal government promote secure funding of the former type, fund studies to demonstrate the effectiveness of these services, and provide more shelters and safe homes for street youth (2002: 18). Kingsely and Mark suggest similar provisions, with a particular emphasis on

youth sex trade workers having an active role in “creating and running drop-in centres” and “creating, developing, and delivering specific programs for commercially sexually exploited Aboriginal youth” (2000: 74).

According to Koshan (2003) the PCHIP Act adopts a “radically different approach” than what is advocated by Busby (2002) and Kingsley and Mark (2000).

Taking a critical stance toward PCHIP, Koshan directly challenges the targeting of specific types of youth. She states:

Any legislation which targets a social group that is disproportionately female, racialized, and poor should be seen as suspect in equality terms—in fact, it can be characterized as state action that directly discriminates against members of these groups (2003: 235).

Koshan further argues that a number of “harmful consequences” are perpetuated against youth prostitutes under the PCHIP Act, such as the “criminalization and stereotyping of women and other marginalized groups” (2003: 218). What were previously viewed as ‘bad choices’ made by youth (who they associate with, where they ‘hang out,’ and what they wear) are essentially made criminal by the PCHIP Act, since these choices may lead to confinement (2003: 223). She argues,

(T)he effect of the legislation is to impose coercive measures, along with their attendant harms, on females, Aboriginal, and other racialized youth, and those who are disadvantaged by social and economic conditions (2003: 235).

Critiques of the PCHIP Act and ‘secure treatment’ are not limited to academic literature. The British Columbia organization ‘Justice for Girls’ argues that forced confinement does not work⁴⁰. It states,

Rather than detaining sexually exploited youth women, there needs to be a greater focus and determination toward charging, convicting and containing pimps and johns under the *Criminal Code*” (Justice For Girls, 2008).

Similarly, the Declaration and Agenda for Action put forth by the ‘Out from the Shadows’ summit⁴¹ submits the following recommendation for legislative action: “Our laws must protect us as sexually exploited children and youth and no longer punish us as criminals” (International Centre to Combat Exploitation of Children, 1998).

The two sides of the debate have divergent views on the essence of the PCHIP Act. The key question seems to be: is the PCHIP Act protective or punitive? The next section critically analyzes the PCHIP Act by comparing the provisions offered under the Act to provisions under the Criminal Code and the Child, Youth and Family Enhancement Act. I also critique the PCHIP Act itself by dissecting particular sections of the Act.

4.2 CRITICAL ANALYSIS OF THE PCHIP ACT

Supporters of the PCHIP Act contend that the law protects children from prostitution by punishing those who exploit them. If this is true, then the penalties for ‘pimps’ and ‘johns’ outlined in the PCHIP Act should be ‘on par’ with penalties for sexual offences listed in the Criminal Code. The following investigates whether this is the case by a brief comparison between the certain sections of the PCHIP Act and the Criminal Code.

Following this, the PCHIP Act is compared to the Child, Youth and Family Enhancement Act to see if it is as innovative as its proponents contend.

The Criminal Code contains numerous sections aimed at punishing people who facilitate youth prostitution. Section 212(1) prohibits procuring, or attempting to procure anyone for prostitution, with a maximum penalty of ten years imprisonment. Section 212(2) states that living on the avails of a prostitute *who is under the age of 18* is liable to

a minimum of two years, and maximum of fourteen years imprisonment. Further, Section 212 (2.1) creates the offence of aggravated procuring. It states that those who live on the avails of an underage (under 18) prostitute, and compels the person to engage in prostitution, and/or threatens or attempts to use violence, intimidation or coercion to force a person in prostitution, is liable for an imprisonment term between five to fourteen years. Other relevant sections include those classified as ‘Sexual Offences,’ such as Sections 151 (sexual interference)⁴², 152 (invitation to sexual touching)⁴³, 153 (sexual exploitation)⁴⁴, and 170 (parent or guardian procuring sexual activity)⁴⁵. This lengthy list of offences demonstrates that a plethora of legislation aimed at sexual exploiters existed *before* the PCHIP Act was passed⁴⁶.

Compare the offences listed above to Section 9 of the PCHIP Act, which states that any person who causes a child to be in need of protection, or interferes with a director or police officer attempting to enforce the Act, is guilty of an offence and is liable to pay a maximum fine of \$25 000 and/or spend up to *two* years in prison (Protection of Children Involved in Prostitution Act, Section 9). This startling discrepancy in penalties demonstrates that the PCHIP Act actually affords *less* consideration and protection to these victims of sexual abuse than comparable offences under the Criminal Code. Apparently, sexually abusing a youth prostitute is not as ‘bad’ as sexually abusing a girl who is *not* a prostitute, if the respective punishments for these offences are an indication. Perhaps just as unsettling as this discrepancy is the fact that Section 9 is rarely used to punish exploiters of youth prostitutes. In 2003, Koshan found that no convictions had been reported under this section (2003: 222). Janis Tarchuk, current minister of Alberta Children’s Services, has confirmed that this section has “not

been used as regular practice” (personal communication, Nov. 2007). Apparently, police have continued to use existing legislation under the Criminal Code to deal with exploiters, if at all. This shows that Section 9 of the PCHIP Act is impotent in reality, as it seems to exist only on paper.

Like Section 9, Section 6 of the PCHIP Act is targeted at ‘pimps.’ Section 6 allows the director of the protective safehouse, the youth, or the youth’s guardian to apply for a restraining order against anyone who has abused her or caused her to become involved in prostitution (Protection of Children Involved in Prostitution Act, Section 6). However, this option is open to individuals beyond the PCHIP Act. For example, Section 30 of the Child, Youth, and Family Enhancement Act allows authorities to obtain restraining orders against a person who is “likely to physically or emotionally injure or sexually abuse the child or has encouraged or is likely to encourage the child to engage in prostitution” (Enhancement Act Policy Manual, 2007: 301). There is clearly an overlap between these provisions. Like Section 9, this section of the PCHIP Act exists only on paper. As of July 31, 2001, Section 6 had not been used (Koshan, 2003: 222). Tarchuk confirmed that requests for restraining orders were rare, stating “often protective services alone provide for the safety needs of the child thereby decreasing the need for a Restraining Order” (personal communication, Nov. 2007).

The discrepancies and redundancy evident in Sections 6 and 9 demonstrate a gap between the stated intentions and practical reality of the Act. According to a 2004 Alberta Children’s Services document, the PCHIP Act is based on several principles, one being the idea that perpetrators of child sexual abuse (including ‘johns’ and ‘pimps’) must be held legally responsible for their actions (2004: 5). Because Sections 6 and 9

have not been used, and merely re-state already existing legislation, it is rational to conclude that the PCHIP Act is not essentially about punishing ‘pimps’ or ‘johns,’ contrary to its stated objectives⁴⁷. Rather, the PCHIP Act is essentially about the confinement and regulation of youth prostitutes (see Koshan, 2003).

The essence of the PCHIP Act is revealed when we consider that the confinement of youth prostitutes is only one of three options available to authorities upon apprehending a youth (see Protection of Children Involved in Prostitution Act, Section 3). The first option listed is to return the child to their guardian or to a responsible adult. However, if a child does not have a guardian, this option is simply not available to them. This negatively affects youth who are involved in the child welfare system, as these youth may not have parents or any adults who care for them. The second option is to release the child, if the following two conditions are filled: the child is 16 years or older, and the child is “capable of providing for the child’s own needs and safety” (PCHIP Act, Section 3.1.b(iii)). This condition is puzzling, for the child may be capable of providing for their own monetary needs specifically by engaging in prostitution. Perhaps this option exists for authorities who believe that the youth is beyond help (too entrenched), or for youth who do not fit in with the authorities’ stereotype of which youth *should* be detained. The third option is to confine the child in a protective safehouse. The wide variety in options available to authorities demonstrates the arbitrariness of the Act. Some youth are detained for engaging in prostitution, while others are left on the streets, and others are simply returned to their parents. This discrepancy in responses is difficult to justify, considering that the liberty and freedom of these youth are at stake.

To properly characterize the PCHIP Act, one must also consider the ‘secure services’ offered under the Child, Youth and Family Enhancement Act. This Act states that any child can be issued a ‘secure services certificate’ if they are “in a condition presenting an immediate danger to the child or others,” “if it is necessary to confine the child in order to stabilize and assess the child,” and “less intrusive measures are not adequate to sufficiently reduce the danger” (Child, Youth and Family Enhancement Act, 2007: Section 43.1(d-f)). Under this section, a child can be confined in a locked facility from 3 to 20 days. The rather broad mandate of section 43 would surely include youth who are involved in prostitution⁴⁸. Since the option of secure services was available to authorities prior to the passing of the PCHIP Act, it is unclear what the PCHIP Act added to existing legislation.

4.3 CONCLUSION

The secure services provision of the Child, Youth and Family Enhancement Act, along with the long list of relevant Criminal Code sections demonstrates the redundancy of the PCHIP Act. The non-use of some sections, coupled with the over-use of the confinement option for youth, betray the essence of the PCHIP Act. In reality, this legislation functions to detain and regulate youth prostitutes, not protect them. This over-confinement of youth is a manifestation of the attitudes shared among agents in the fields of child welfare and youth criminal justice. Those with the power to decide how a youth suspected of prostitution should be handled are likely to favour a disciplinary rather than voluntary option.

My critical position vis-à-vis the PCHIP Act is shared by Busby et al. (2002) and Koshan (2003). Though these authors have made important contributions to our understanding of the PCHIP Act, additional investigation into the PCHIP Act is warranted to understand how and why the PCHIP Act was passed, and how it operates. The application of Bourdieu's concepts of field and habitus to the PCHIP Act allows one to address these issues within the context of the juridical field. It is to this analysis we now turn.

CHAPTER FIVE

LAW AND POLITICS: AN ANALYSIS OF THE JURIDICAL AND POLITICAL FIELDS

[W]e must take into account the totality of objective relations between the juridical field and the field of power and, through it, the whole social field. The means, the ends, and the specific effects particular to juridical action are defined within this universe of relations. Bourdieu (1987a: 841, original italics).

As discussed in Chapter 1, the juridical field⁴⁹ is Bourdieu's alternative to two antagonistic ideologies in theories of law: the instrumentalist position which views law as a direct reflection of existing power relationships, as dictated by dominant groups, and the formalist viewpoint which conceives of the law as an autonomous, independent, closed system, unaffected by other fields (Bourdieu, 1987a). Bourdieu contends that both positions ignore the existence of a social universe, the juridical field, "disciplinarily and professionally defined" and an "area of socially patterned activity or practice" (Terdiman, 1987: 805). To understand the 'social significance of the law,' we must analyze law within the context of the juridical field, which is "*relatively* independent of external determinations and pressures" (Bourdieu, 1987a: 816, emphasis added). At the same time, Bourdieu hastens to add that the juridical field is less autonomous than other fields (see endnote 3, Chapter 2, page 10).

In this chapter Bourdieu's theoretical and methodological insights are utilized in order to investigate the relationship between politics and law and to provide an understanding of the PCHIP Act that goes beyond simple functional explanations. The relationship between politics and law is addressed by examining the constitutional challenge to the PCHIP Act which occurred in November of 1999. In doing so, the

degree of external political determinations on the juridical field is addressed. Further, the position of the juridical field vis-à-vis the field of politics and power is analyzed. An assessment of the external determinations and the competition within the legal field for the right to determine law is constructed (see Wacquant, 1989: 40). Moreover, the extent to which the relationship between the fields of power and law informs the relationship between child welfare and youth criminal justice legislation is investigated.

This chapter delves into Constitutional law. As such, it is necessary to outline constitutional norms which inform cases. In Canada, constitutional law deals with problems of intergovernmental relations, for instance, issues which arise between the federal and provincial levels of power regarding legislation. According to Waddams (1992), the Supreme Court of Canada is the final arbiter of powers held by the federal and provincial levels of government. As a federal state, governmental power in Canada is divided between central and provincial authorities. As such, every individual is subject to both provincial and federal laws (Hogg, 2005). These two sources of authority occasionally overlap. Where this occurs, the federal power prevails (Hogg, 2005).

The designation of criminal law under federal jurisdiction occurred after much debate over the terms for a united Canada during the drafting of the Constitution. It was decided that the federal government would be responsible for criminal law and 'Peace, Order, and Good Government' (the POGG powers). (Bakan et al., 2003: 81). Some authority over criminal matters has been transferred from federal to provincial jurisdiction.

The pith and substance of a particular legislative Act must be determined in cases where it is charged that the Act is ultra vires.⁵⁰ Pith and substance is a legal doctrine in

Canadian constitutional interpretation used to determine under which head of power a given piece of legislation falls. A pith and substance analysis discovers the purpose of the law and the practical effects of the law. Practical effects include unanticipated effects arising from discriminatory enforcement and imperfect administration (Magnet, 2002). Legislation which appears valid may be found invalid if “its essential object and effect is to deal with some matter beyond the jurisdiction of the enacting Legislature” (Strayer, 1983: 63). If a piece of legislation is found to be unconstitutional, legislators can subject this finding to ‘judicial review.’ Judicial review gives power to courts to decide “whether action taken by a governmental body or legal actor [...] is or is not in compliance with our Constitution, and, if they find that it is not, to declare it to be unconstitutional” (Bakan et al., 2003: 29).

Some may contend that the events surrounding the constitutional challenge can be explained simply through reference to these constitutional norms. However, this perspective, which represents a normative or formal approach to the law, ignores the critical element of power in these exchanges (see Chapter 1). For instance, judges who perform judicial reviews are supposed to be isolated from political influence. However, these judges are not representative of the general population. As Hogg notes, “they are recruited exclusively from the small class of successful, middle-aged lawyers” (2005: 131). Bakan adds:

(J)udges, because of their education, socialization, and the processes through which they are appointed, tend to stay within the bounds of conservative discourses, about work, family, sexuality, race, and other social phenomena, when deciding Charter cases (1997: 5).

Further, choices about constitutionality made by judges cannot be wholly explained by precedent. According to Hogg (2005), even if courts appear to operate according to ‘a

strict and complete legalism,' outside forces influence decisions. For example, laissez faire economic theories affected the decisions of Canadian courts in striking down legislation (intended to relieve farmers from debt) enacted by Western provinces during the 1930s depression (Hogg: 2005). The effect of political motivations on the passing of the PCHIP Act will be shown to be another example of outside forces influencing legislation.

Bourdieu et al. argues that juridical writings “take their full meaning not only as theoretical contributions to the knowledge of the state but also as political strategies aimed at imposing a particular vision of the state” (1994: 3). Thus, to access the ‘full meaning’ of judges’ written reasons analyzed below, the power struggle between the legal and political fields must be taken into account.

The power struggle was heightened in 1982 with the passing of the Charter. As stated in Chapter three, the passing of the Charter had important implications for both child welfare and justice practices, as constitutional challenges against legislation became possible. Specifically, courts would be given a new role in overseeing the legality of government action (Bakan et al., 2003: 7). Denying government the power to do something it wants to do brings courts into the scope of political controversy (Hogg, 2005), which was not as much of an issue prior to the passing of the Charter.

This task is approached by an ‘outsider’ of the legal field. Bakan (1997) argues for the legitimacy of this approach. Drawing on Weber, he argues that the ‘internal’ perspective is deficient as it allows only for normative inquiries regarding the legal system. As such, knowledge generated about law from this approach is detached from economic factors (Bakan, 1997: 5). Understanding the law fully requires analysis from a

standpoint beyond the legal system (1997: 5). He notes “internal legal thought is rigorous, [...] but it implicitly defends a method that presumes, rather than questions, law’s autonomy from politics and society” (Bakan, 1997: 6).

5.1 CONSTITUTIONAL CHALLENGE

The passing of the PCHIP Act in February, 1999 was followed by a constitutional challenge which was heard by Judge Karen Jordan on November 15, 1999, and continued on April 6, 2000. The challenge regarded the detention of two seventeen year old Calgary girls, who were detained on September 13, 1999. While looking for stolen property, police entered a residence which was dirty and unkempt. According to hearsay evidence, drug paraphernalia, mattresses, and condoms were strewn about (Alberta (Director of Child Welfare) v. K.B., ABQB, 2000, paragraph 9). The officers deemed the residence a ‘trick pad,’ apprehended the girls, and placed them at a ‘protective safehouse.’ Two days after the apprehension, the girls were brought before the Provincial Court of Alberta for the ‘show cause’ hearing. During this hearing, the defence counsel (Harry Van Harten and Bina S. Border) issued notice that they would seek application investigating the constitutional validity of the Act.

The girls’ lawyers argued that the PCHIP Act violated sections 7⁵¹, 8⁵², 9⁵³, 10(b)⁵⁴ and 10(c)⁵⁵ of the Canadian Charter of Rights and Freedoms. Counsel for the youth also argued that the pith and substance of the PCHIP Act was criminal legislation. Thus, it was contended that the Act was ultra vires the Province of Alberta. On July 28, 2000, Judge Jordan ruled that the PCHIP Act contradicted sections 7, 8, and 9 of the Charter. Further, she found that none of these violations were saved by section 1, which

“guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (Canadian Charter of Rights and Freedoms, Section 1).

According to Judge Jordan, section 7 of the Charter was violated because many children who are detained under the legislation are not given the opportunity to challenge the allegations made against them, resulting in a deprivation of their liberty. Section 8 was violated because the Act provided for warrantless searches which are not subject to judicial examination, and section 9 was contradicted because children are subject to apprehension and confinement without the opportunity to have this action judicially scrutinized (*Alberta v K.B.*, 2000 ABPC, paragraphs 5, 7, and 8). Jordan noted the lack of procedural steps:

The procedure in the Act is not fair...It is the lack of a procedural system which would allow each and every one of the children to appear before a judge, with the assistance of counsel, to participate in an adversarial process where they can challenge the Director’s evidence and present their own evidence (*Alberta v. K. B.*, 2000 ABPC 113, paragraphs 56 and 57).

Besides ruling on the constitutionality of the Act, Judge Jordan investigated whether the Act was ultra vires the legislature of Alberta. It was charged, by counsel for the applicants, that the pith and substance of the legislation was criminal, and therefore not within the legislative domain of the Provincial Parliament. Judge Jordan stated:

In order to determine the pith and substance of any particular legislative provision it is necessary to examine that provision in its overall legislative context and to identify the dominant or most important characteristic of the challenged law (*Alberta v. K.B.*, 2000 ABPC 113, paragraph 24).

Judge Jordan disagreed with the applicant’s counsel that the Act was a “colorable attempt to legislate in the field of criminal law” (*Alberta v. K.B.*, 2000 ABPC 113, paragraph 25).

She argued that the apprehension and detention of children under the PCHIP Act did not automatically mean that the Act invaded the domain of criminal law, stating:

If the only reason for trying to eradicate this activity were moral, it would follow that legislation directed at this purpose would be criminal law... There are, however, valid reasons for trying to eliminate prostitution in which children are involved which are not based in morality. Prostitution is a dangerous enterprise; female participants, whether children or adult, are subject to serious harm and even death at the hands of both pimps and johns. Alcoholism and drug addiction are widespread within the trade. The risk of sexually transmitted disease is so high as to be a significant public health risk (*Alberta v. K.B.*, 2000 ABPC).

This position completely ignores and sidesteps the history of prostitution legislation, which was *overtly* about morality (see Chapter 3). Further, as argued in Chapter 4, the dominant feature of the PCHIP Act is *not* the protection of children. If this Act were truly designed to protect children from danger, then the sections of the PCHIP Act meant to punish those who exploit youth prostitutes would be utilized at least as often as the sections which allow the youths' detention.

Judge Jordan made several questionable comparisons when characterizing the PCHIP Act. For instance, she equates the confinement of youth prostitutes for their own protection from sexual abuse to the apprehension of youth who are being abused by their parents. This equation implies that the confinement of youth in protective safehouses is 'on par' with how other abused youth are treated, and so the PCHIP Act is within the realm of child welfare legislation. However, she ignores the fact that youth abused by their parents *are not* detained, while youth sexually abused through prostitution *are* detained. Thus, these situations are not at all comparable⁵⁶. Despite these problems, Jordan stated:

I am satisfied that the pith and substance of the Protection of Children Involved in Prostitution Act is the protection of children from the sexual abuse and other risks

inherent in the sex trade. It does not invade the domain of the criminal law (Alberta v. K.B., 2000 ABPC 113, paragraph 41).

As I argued above, the ‘pith and substance’ of the Act is not the protection of the children. Jordan’s decision regarding pith and substance was based on a reading of the PCHIP Act itself, as well as testimony given by Sharon Heron, a member of the Task Force on Children Involved in Prostitution which recommended the PCHIP Act. The PCHIP Act states that the aim of the legislation is to protect children involved in prostitution, and contains sections which permit the punishment of exploiters. However, the fact that the sections pertaining to pimps are not used did not enter into her reasoning. This illustrates a problem with sections which exist only on paper, and also testifies to the power inherent in codified law. Though Sections 6 and 9 are rarely enforced, they are, nonetheless, powerful rhetorical devices which function to make the Act appear protective. The result of this codification is that the PCHIP Act can defensibly be conceived as child welfare legislation.

The reliance on Heron’s testimony points to another problem. Heron was a member of the Task Force which recommended the creation of the PCHIP Act. Not surprisingly, Heron testified that the PCHIP Act was based on principles such as: “children involved in prostitution are victims of sexual abuse and require support, not punishment” (Alberta (Director of Child Welfare) v. K.B., 2000 ABQB, paragraph 46). This is exactly the position expected of a Task Force member. Had other positions been represented, for example, those of youth detained under the Act, or front line workers at the safe houses, the pith and substance of the Act may have been determined to be something other than protection.

The type of evidence heard during the case above is the responsibility of the crown and the lawyers for the youth, not the judge. Because it is difficult to bring forth an argument that a law is discriminatory on the grounds of *both* gender and race, the possible violation of Section 15⁵⁷ of the *Charter* was not considered. Koshan (2003) has probed into this issue further, by assessing the three stages of the test for equality right claims, which are stated in *Law v. Canada* (Minister of Employment and Immigration (1999))⁵⁸. The first stage, ‘differential treatment,’ particularly demonstrates the hurdles in successfully bringing forth such a challenge under Section 15⁵⁹.

‘Differential treatment’ involves a comparative inquiry, “in which the claimant’s treatment under the law must be assessed with reference to other groups” (Koshan, 2003: 234). Though the state has chosen to subject youth involved in prostitution to protective confinement through the PCHIP Act, other youth who might be in need of protection for reasons other than prostitution, for instance, homeless youth and/or those with addictions, are not confined. Further, the PCHIP Act disproportionately affects young women and Aboriginal youth (Koshan, 2003). Thus, the effect of the legislation is to impose coercive measures onto females, Aboriginals, and those who are socially and economically marginalized (Koshan, 2003).

Despite these obvious effects, there are boundaries in overcoming this first stage of the test. In particular, there is the “difficulty in identifying the intersections of the multiple grounds of discrimination at play” (Koshan, 2003: 239). Koshan notes,

[I]f a young Aboriginal girl from a background of poverty were to challenge the PCHIP, it would be important to recognize the impact of forced confinement in terms of her age, race, gender, poverty, and the intersection of these grounds (2003: 237).

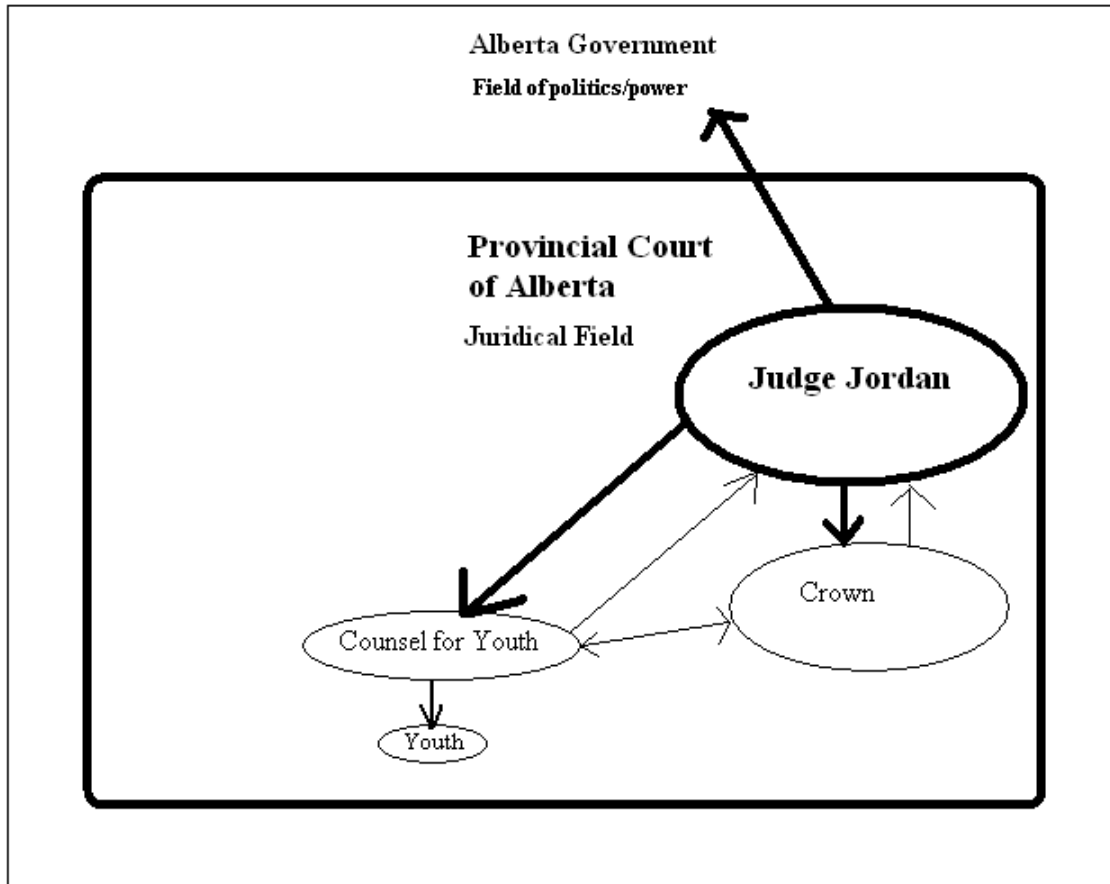
These multiple grounds for discrimination (gender, age, race, and poverty) need to be addressed together, rather than separately, for a meaningful analysis to occur.

Unfortunately, the courts are not always willing to look at inequalities in an intersectional way.

Jordan's position about the pith and substance reveals the juridical field's power to 'name' things. Bourdieu states, "Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular" (1987a: 838). All legal actors, including lawyers and judges, share in this power of naming. Those with first-hand knowledge of youth prostitution, for instance, the youth prostitutes themselves, have no power whatsoever in naming. These performative utterances are, to Bourdieu, 'magical acts' which succeed simply by virtue of belonging to the juridical field (1987a: 838).

Diagram 5.1 provides a pictorial account of the positions taken in this stage of the constitutional challenge. The Provincial Court of Alberta, comprising the juridical field, is within the field of politics or power. However, the bold outline of the juridical field indicates the relative power held by the juridical field at this stage. The dominant player is Judge Jordan, who challenges the political field by deeming the PCHIP Act unconstitutional. Though the youths' counsel does attempt to gain some power by putting forth arguments, their power is relatively less than the power returned by Judge Jordan. Notice that the youth are subject to the power of their counsel, and also indirectly to Judge Jordan's power.

Diagram 5.1 Stage One of Constitutional Challenge



5.2 POLITICAL RESPONSE

The saga of the constitutional challenge does not end here, however. Judge Jordan's ruling was immediately met with substantial resistance and outright defiance from the political field. In a display of contempt, the Alberta government continued to enforce the PCHIP Act, though it had been ruled unconstitutional (Koshan, 2003: 228). Premier Ralph Klein threatened to override the decision by invoking section 33 of the Charter, the 'notwithstanding clause'⁶⁰. Heather Forsyth, the Calgary MLA who spearheaded the Act, responded to Jordan's ruling in the following statement: "They should take the Charter of

Rights and shove it. I am absolutely sick” (Slobodian and Harris, *The Calgary Herald*, July 30, 2000, as cited in Koshan, 2003: 228).

Despite political pressure, judges upheld Jordan’s ruling. In one case involving a youth who was apprehended from “an area of Calgary known for prostitution,” Judge Nancy A. Flatters ruled that the youth could not be detained under the PCHIP Act, as it had been found to be unconstitutional (*Alberta (Director of Child Welfare) v. S.P.*, 2000 ABPC 133, paragraph 6). The youth was instead detained under an Apprehension Order under the Child Welfare Act. Flatters noted:

The assessment and treatment remedies available to the Director for a child such as S.P. under the Child Welfare Act are more comprehensive and of longer duration than those available under the PCHIP Act (*Alberta (Director of Child Welfare) v. S.P.*, 2000 ABPC 133, paragraph 14).

Because of Judge Jordan’s ruling, 11 youth were apprehended under the ‘secure services’ provision of the Child Welfare Act rather than the PCHIP Act. This relates to a point made in Chapter 4 – even without the PCHIP Act, authorities have the legislated power to apprehend and detain youth deemed to be in need of protection.

The Alberta government challenged Judge Jordan’s ruling by subjecting it to judicial review. The judicial review was carried out by Justice John Rooke⁶¹ of the Alberta Court of Queen’s Bench on December 21, 2000. Judge Rooke argued that Judge Jordan had exceeded her jurisdiction by ruling on matters that were not before her. He stated that section 8 ‘Everyone has the right to be secure against unreasonable search or seizure’ did not arise on the facts, since the police were voluntarily let into the apartment where the girls were found (*Alberta (Director of Child Welfare) v. K.B.*, ABQB, 2000: paragraph 29). Further, Judge Rooke contended that Judge Jordan, a Provincial Court judge, did not have the power to deem legislation unconstitutional. He stated:

[T]he Provincial Court is limited to interpreting or applying the law necessary to deal with the issues before it, and cannot grant a formal declaration of invalidity, which is a remedy exercisable only by a superior court (*Alberta (Director of Child Welfare) v. K.B.*, ABQB, 2000: paragraph 33).

With regard to section 7 (Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice), Rooke agreed that the two girls were deprived of their liberty. However, he was unconvinced that this deprivation of liberty was not in accordance with fundamental justice (as required by Section 7 of the *Charter*). He stated that a careful balancing of the rights of the individual and the interests of society was necessary with respect to a Section 7 challenge. Rooke decided that children's right to protection took priority over their right to liberty (*Alberta (Director of Child Welfare) v. K.B.*, 2000 ABQB, paragraph 69). Rooke states, "In the case under consideration, state action was undertaken to protect children from these parasites – pimps and "johns" – who abuse and exploit these children" (*Alberta (Director of Child Welfare) v. K.B.*, 2000: paragraph 80). Similar to Judge Jordan, the fact that the sections which protect children from the 'parasites' are rarely used does not enter into his reasoning.

He disagreed with Jordan's ruling that the PCHIP Act violated Section 9 of the Charter, which states: "Everyone has the right not to be arbitrarily detained or imprisoned" (Canadian Charter of Rights and Freedoms, Section 9). Judge Jordan argued that this section was contradicted because children are subject to apprehension and confinement without the opportunity to have this action judicially scrutinized. Judge Rooke disagreed, arguing that "apprehension and confinement, without prior judicial authorization, pursuant to the PCHIP Act does not constitute arbitrary detention" (*Alberta (Director of Child Welfare) v. K.B.*, 2000 ABQB, paragraph 91).

Rooke further disagreed with Judge Jordan's comparison between the PCHIP and the Criminal Code, quoting an earlier case which states:

[T]he state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the criminal context [...]. These distinctions should make courts reluctant to import procedural protections developed in the criminal context into the child protection context (*Alberta (Director of Child Welfare) v. K.B.*, 2000 ABQB, paragraph 56).

In this contention, Rooke attempts to distinguish the boundary between fields. He holds that the PCHIP Act is valid child welfare legislation - apprehension occurs within child welfare for the purposes of protection, and procedures from the criminal justice system should not be applicable to the PCHIP Act. It is interesting that Judge Rooke essentially agreed with Judge Jordan – she also concluded that the PCHIP Act was valid child welfare legislation.

Judge Rooke's overturning of Judge Jordan's ruling demonstrates the competition within the hierarchical legal field for the right to determine law. Rooke's superior position in the juridical field, which allowed him to overturn Judge Jordan's ruling, is related to the position of the juridical field within the larger field of power or politics. Rooke's review was overtly politically motivated, since it is only the political field which can demand such a review⁶². Harry Van Harten, counsel for the youth in *Alberta v. K. B.* (2000), speculates that the judicial review was a "publicity fix" to maintain favourable media coverage regarding PCHIP (personal communication, Jan. 24, 2008).

Judge Rooke's position was supported by Dave Hancock, the Justice Minister. Commenting on Judge Jordan's recommendation that all youth confined under the PCHIP Act should have a mandatory review, he stated: "In our view, that takes it way too far towards a parallel with criminal legislation. This is not criminal legislation, this is

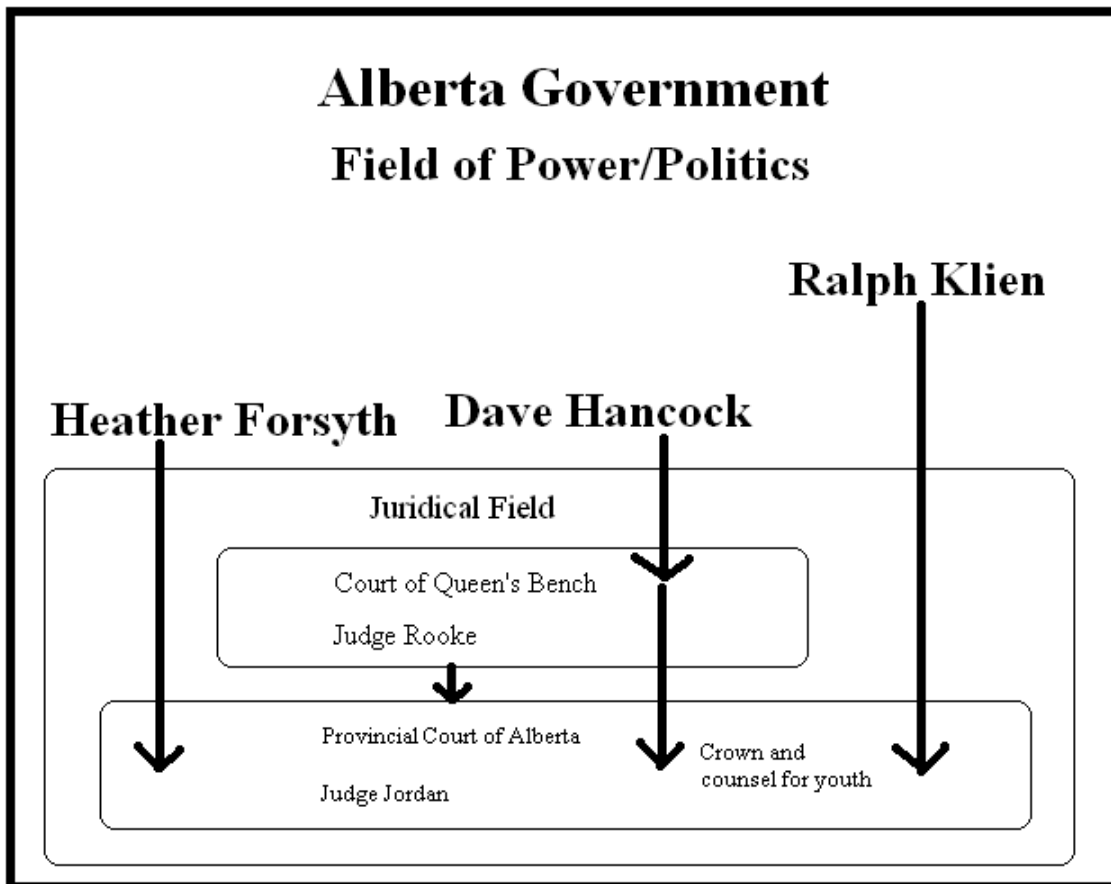
child welfare legislation” (Calgary Herald, November 22, 2000). Hancock’s support of Rooke’s ruling evidences the confluence of the field of politics/power and the field of law. Forsyth also commented on Rooke’s finding, stating “I was always confident that this Act would be upheld constitutionally [...] I never stopped believing in this legislation, and now, we have the court’s endorsement” (The Alberta Teacher’s Association, 2000).

The production of legislation can be seen as a means of accumulating capital. The creation of the PCHIP Act, for instance, benefited Forsyth politically. She gained a reputation for championing children and youth issues, especially child prostitutes. The same month that the legislature introduced initial amendments in 2000, Forsyth was appointed Solicitor General of Alberta. In 2002, she was named a Canadian hero by *Readers Digest* magazine “as a result of her work with children” (Legislative Assembly of Alberta: Biography for Mrs. Heather Forsyth). In addition, she was bestowed the Blackfoot name ‘Aahsoikinnah-kaiki,’ which translates as ‘healing woman’ (Legislative Assembly of Alberta: Biography for Mrs. Heather Forsyth). She was appointed the Minister of Children’s Services in November of 2004, passing legislation such as the Drug Endangered Children Act while Minister. Forsyth seems to be quite entrepreneurial in introducing legislation.

Diagram 5.2 pictures the relations of power which became apparent immediately after the Constitutional challenge. Compared to Diagram 5.1, the power wielded by the field of politics is much more substantial in this phase of the ‘game.’ Powerful political players such as Ralph Klein, Dave Hancock and Heather Forsyth display their power

through statements made about Jordan’s ruling, and through their subjection of her ruling to judicial review.

Diagram 5.2 Stage Two of Constitutional Challenge



The posturing displayed by the players below shows that power was essentially at stake in these interactions. The power of the Provincial Court was demonstrated through Judge Jordan’s ruling, but this power was contested by the political field when they imposed the judicial review. The review demonstrates the struggle between the political and legal fields for the right to determine law. The legitimacy of the Alberta government was restored when Rooke overturned Jordan’s ruling. However, this was not a complete

restoration, as the Alberta Government amended the PCHIP Act on March 18, 2001. In fact, it was amended before Rooke submitted his ruling. The decision to amend the PCHIP Act demonstrates Bourdieu's contention that holders of political authority never establish a *complete* monopoly over other fields, including the juridical (Bourdieu, 1989: 22).

The PCHIP Act was made even more punitive through the amendments. Though procedural details were improved to fulfill obligations to the Charter, confinement periods were lengthened greatly. While the confinement period was 3 days before the challenge, it was extended to 5 days after the amendments were tabled (The Protection of Children Involved in Prostitution Amendment Act, 2000). Furthermore, the amendments allowed child welfare authorities to apply for a maximum of two confinement periods of 21 days each (Protection of Children Involved in Prostitution Amendment Act, 2000). Thus, the amendments extended the maximum incarceration period from 3 days to 47 days. A news release put out by the Government of Alberta on November 21, 2000 rationalizes this extension of confinement periods in the following:

This additional time will enable social workers to stabilize the child, help the child break the cycle of abuse and begin the recovery process in a safe and secure environment (Government of Alberta, 2000).

Noticeably absent in this political/legal struggle are the young girls incarcerated under the Act, though their protection is repeatedly referred to. The absence of the youths' position is due to their lack of juridical capital and habitus, in particular their inability to converse in legal discourse. Though the youth are, in a sense, in the middle of the 'game,' they are unqualified to participate due to their 'outsider' vision of the case. The exclusion of the youths' point of view is also due to their inferior status in the regulated universe of the

juridical field. In order to engage in the highly rationalized and regulated struggles in the legal field, a high degree of judicial competence is required. According to Bourdieu, those who do not possess this entrance requirement must submit to the ‘power of form,’ defined as symbolic violence perpetrated by those who are able to ‘put the law on their side’ by virtue of their proper judicial manners (for instance, judges and lawyers) (Bourdieu, 1987a: 849-50).

How can the lengthening of the confinement period be explained? Bourdieu reminds us that legal battles actually function to share the labour of symbolic domination (1987a: 823). Despite the apparently antagonistic positions between Judge Rooke and Judge Jordan, the similarities in their positions must not be overlooked. Recall that neither Rooke nor Jordan contended that the pith and substance of the PCHIP Act was anything other than protection (although Jordan did make some statements which compromised this position). This assumption framed both of their rulings, though this similarity was obscured by disagreements over Charter violations.

The constitutional challenge and the review had two important functions. First, these legal manoeuvres tacitly supported the view that the PCHIP Act is essentially about the protection of youth prostitutes. Second, the complete lack of debate over the possibility of a section 15(1) violation demonstrates that the over-incarceration of Aboriginal girls in the ‘protective safehouses’ was not worthy of notice. These two outcomes gave the Alberta government the ‘go-ahead’ to lengthen confinement periods because both courts agreed that the confinement was protective, and the over-incarceration of Aboriginal girls was a non-issue.

5.3 CONCLUSION

At the beginning of the chapter, I indicated that I would investigate the degree of political influence on law. By looking at the events which surrounded the constitutional challenge to the PCHIP Act, I conclude that the influence of the political field on the juridical field is substantial. As demonstrated by the outcome of the constitutional challenge, the political field retaliates when actors in the juridical field make decisions which undermine the authority of politics. After the PCHIP Act had been ruled unconstitutional within the legal field, politicians demanded a judicial review and displayed scorn for the decision (for instance, Forsyth postured through comments recorded in newspaper articles).

The antagonisms between law and politics determine hierarchies within the juridical field. Judge Jordan, who emerged as a powerful figure by striking down the PCHIP Act, was reprimanded when her decision was overturned by Rooke, a move which was motivated and sanctioned by the political field. The stake in this conflict between the fields of law and politics is the right to determine law. Those that emerge at the top of the hierarchy, for instance, Rooke, are bestowed the power to ‘name’ things. Rooke ultimately was given the power to decide if the PCHIP Act was youth criminal justice law or child welfare law, and he decided to ‘name’ the PCHIP Act child welfare law. Thus, conflicts between the fields of politics and law determine the hierarchy of power in the legal field, which in turn dictate boundary disputes between the fields of youth criminal justice and child welfare. However, the relative autonomy of the law must be taken into account. The events surrounding the constitutional challenge show that the political field does not have complete power over the juridical field. Though Judge

Jordan's ruling was overturned, the Government of Alberta did amend the Act to satisfy constitutional requirements.

These conflicts between and within fields have consequences for particular types of youth. Since the 1960s, Aboriginal youth have come into contact with the fields of child welfare and youth criminal justice at a disproportionate rate (see Chapter 3). Regarding the PCHIP Act, it is female Aboriginal youth who have been particularly targeted. In the next chapter, I utilize theoretical insights from Valverde and Bourdieu to investigate why and how the PCHIP Act has functioned to detain Aboriginal girls.

CHAPTER SIX

HABITUS, COMMON KNOWLEDGE AND THE REGULATION OF GENDER AND RACE

It would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognize that it was made for the few and that it was brought to bear upon others. Foucault (1995: 276).

Though the text of the Protection of Children Involved in Prostitution Act appears to be neutral regarding gender and race, these factors clearly influence which youth are confined in the protective safehouses. A 2004 Alberta Children's Services report reveals that clients are overwhelmingly female and Aboriginal. Only 13 male youth had been apprehended between 2001 and 2003, compared to 192 female apprehensions in the same time period (Alberta Children's Services, 2004: 24). The same report indicates that a 'high percentage' of the clients were Aboriginal, though exact numbers are not presented. Koshan found that approximately 30 percent of youth incarcerated are of Aboriginal heritage (2003: 222)⁶³.

In this chapter Bourdieu's concept of habitus is used to address the overrepresentation of Aboriginal girls in the protective safe houses. Through this exercise, the nature of the habitus of the present social field is revealed. The second section traces the impact of historical factors on Aboriginal overrepresentation in sex trade. This section is informed by academic articles and a re-examination of Section 3 of the PCHIP Act. The last section draws on a 'Notice of Confinement' document to show how gender and race are regulated through the regulation of spaces.

6.1 HABITUS AND COMMON KNOWLEDGE

The habitus of the current social field, from which legislation targeting youth prostitution originates, is influenced by racist and sexist assumptions and concrete inequalities⁶⁴.

These assumptions take the form of ‘common knowledge,’ which has always had a role in the regulation of prostitution. To investigate the role of gender and race on the PCHIP Act, I first provide a theoretical background to frame these issues.

In *Masculine Domination* (2001),⁶⁵ Bourdieu references the gender-based patterns of behaviour among the Kabyle peoples of Algeria. He points out differences between men and women regarding posture, gestures and movements (Bourdieu, 1990a: 70). Men are straight, firm, upright and direct. Women, in contrast, walk with a stoop, direct their gaze downward, and avoid swinging their hips. They are to ensure that their hair remains covered. “Modesty, restraint, reserve” characterize the “well brought up woman” (1990a: 70, see also Bourdieu 2001: 27-8). It is possible to misconstrue Bourdieu’s argument as an ‘orientalist’ argument that reinforces western stereotypes as far as gender relations are concerned, even though Bourdieu would not agree with such an interpretation.⁶⁶

These gender roles have implications beyond merely physical appearance, for “words that refer to body posture evoke virtue and states of mind” (1990a: 70). Indeed, the body is a dimension of the habitus itself:

The body believes in what it plays at: it weeps if it mimes grief. It does not represent what it performs, it does not memorize the past, it *enacts* the past, bringing it back to life. What is ‘learned by the body’ is not something that one has, like knowledge that can be brandished, but something that one is...the body is thus constantly mingled with the knowledge it reproduces, and this knowledge never has the objectivity it derived from objectification in writing and the consequent freedom with respect to the body (1990a: 73).

Thus, bodies are a fundamental expression of historical structures. As Fowler observes,

(T)he social constructions of masculinity and femininity are actually *written on the body* in the form of facial masks over emotion or controls, bodily stances, gaits, postures...the straight man versus the crooked woman, the masculine direct gaze versus the female downward gaze (1999: 480).

The sexual division of labour becomes an enduring structure in our social world, the “basis of the *di-vision* of the world, the most solidly established of all collective – that is, objective – illusions” (Bourdieu, 1990a: 146). The division of labour is perpetuated as agents are assigned dispositions, practices and properties which are consistent with the “principles of di-vision” (1990a: 146). Bourdieu states:

These principles, arising from social reality, contribute to the very reality of the social order by realizing themselves in bodies, in the form of dispositions which, produced by the classifications, give the appearance of a collective foundation to classificatory judgments, such as women’s inclination towards ‘humble and easy’ tasks or flexible, submissive thinking (1990a: 146).

Thus, the division of labour between the sexes becomes the “foundation of the vision of the world, of the way of understanding the world and mentally structuring it” (Krais, 1993: 159). Fowler concurs, stating: “the habitus possesses a primordial *sexual* dimension” (1999: 480).

The sexual division of labour is naturalized because it is based on the division of sexual labour, including the sex act and reproduction. Thus, this division has a biological foundation (Krais, 1993: 161). The division of labour becomes embodied in the “habits of the body...The body cannot be thought of if not as ‘male’ or ‘female’” (1993: 161). Krais states: “(T)he division of labour between the genders is not only as deeply rooted in the social agent as is possible; it also seems to refer to nothing but ‘nature’” (1993: 161). The domination of males is “*naturalized* in the form of a profound biologization” (Fowler, 1999: 479). Because it is so deeply rooted, gender identity is a profoundly important part of an agent’s habitus. The ‘natural’ appearance of the gendered division

of labour obscures the domination of men over women inherent in this division.

Bourdieu remarks: “the most intolerable conditions of existence can so often appear acceptable and even natural” (1998: 1).

The legal regulation of Aboriginal females is affected by forms of habitus, which are based on these deeply-rooted beliefs about gender. Moreover, habitus, as a system of dispositions, includes also assumptions about Aboriginal criminality, deviance, self-esteem, hyper-sexuality, propensity of drug and alcohol abuse, and their need for state intervention/protection. The Federal government’s regulation of Aboriginal people historically demonstrates this habitus. A recent addition to this set of assumptions is the classification of youth prostitutes as victims, not offenders. Victim discourse came out of the numerous initiatives, including the Badgely and Fraser reports, as well as recent Task Forces and Working Groups (see Chapter 3). The eventual passing of the Act into law marked an important shift in the political habitus; youth prostitutes were now officially (legally) recognized as victims of sexual abuse first and foremost. The victim ideology has also been accepted by recent scholarly articles. For example, Kingsley and Mark, state that “we must also help the wider community understand that commercial sexual exploitation is not a lifestyle choice – it is child abuse” (2000: 4).

This habitus is not bound to the Alberta political scene. In England, the *Safeguarding Children* report also assumes that youth prostitutes are victims and not offenders. Joanna Phoenix (2002b) argues:

The key terms deployed within the document (i.e. ‘children’, ‘sex’, ‘coercion’, ‘voluntarism’, ‘exploitation’, and most importantly, ‘prostitution’) are little more than the ‘common sense’ elements of a discourse of children as victims (2002b: 76).

Drawing on interviews of police, social service workers, and voluntary organization workers, Phoenix found that there was:

Near universal acceptance amongst social services, voluntary organizations and the police that youth prostitution is child (sexual) abuse. Interestingly, many of the interviewees struggled to articulate exactly why this might be, treating the claim to be self-evidently true (2002b: 78-9).

Thus, the conception of child prostitutes as victims seems to have become firmly established in the habitus of those who create legislation aimed at youth prostitution⁶⁷.

Though it may seem enlightened, benevolent, or at worst harmless to conceive of these youth as victims, the ‘common knowledge’ that these youth are victims justifies punitive measures ostensibly aimed at helping them. The motto becomes ‘help at any cost,’ which justifies protective confinement.

Assumptions about Aboriginal peoples and vice have long framed legislation targeted at that particular group. In her analysis of Canadian liquor laws, Valverde found that Ontario liquor inspectors often employed racial assumptions in determining whether an Aboriginal person was drunk (2003: 175). The liquor inspectors’ statements, recorded in 2000, reveal their racialized assumptions:

“Irishmen can get drunk but they become wild and friendly, not in a bad way like the Indians.”

“Indians and halfbreeds can’t handle their liquor. They go wild. I used to dread dealing with them” (2003: 175).

Valverde argues that “determinations of drunkenness are mediated by prior beliefs about ethnicity, occupation, class, and gender” (2003: 176).

This ‘common knowledge’ also framed legislation prohibiting the selling or giving of alcohol to Aboriginal peoples up until the 1951 under the Indian Act. As Valverde notes, “the susceptibility of Indians to drunkenness was ‘obvious;’” there was

no need for judges at the time to explain why this protectionist measure was necessary (2003: 196). In court cases where the drunkenness of the Aboriginal was debated, Valverde (2002: 203) notes one case where the lawyer opined that Indians always walked as though they were drunk, even if sober. The judge agreed, stating:

We do know, I think, that Indians – I have seen them at Kamsack [the town] very often – are not particularly upright or soldierly in their bearing unless they have had military service. They are inclined to slouch along (*Richards n. Cote* [1962] 40 W. W. R. 340 at 344, as cited in Valverde, 2003: 203).

A parallel can be drawn to the PCHIP Act – indeed, the perceived “weakness of the will” of Aboriginal peoples continues to shape legal thought today (Valverde, 2003: 196). Currently, there is a ‘commonsense’ view that the youth who ‘benefit’ by the Act are Aboriginal female; the demographic ‘Aboriginal female’ is connected to prostitution. This equation, characteristic of the habitus, is unjustified yet seems to operate uncontested. Similar to the case of alcoholism and Aboriginals, the old colonial assumption that Aboriginal peoples are morally weak and vulnerable to vices seems to be the unspoken assumption underpinning the PCHIP Act, so ‘commonsense’ that the vast overrepresentation of Aboriginal females in the safe houses is unnoticed. Bourdieu states: “[T]hrough habitus, we have a world of common sense, a world that seems self-evident” (1989: 19).

The 2004 Alberta Children’s Services report employs common knowledge regarding Aboriginal people in its assessment of the protective safe houses. The report acknowledges that a “high percentage of clients of the Edmonton protective safehouse was of Aboriginal background,” yet argue that “involvement in prostitution for children on Aboriginal reserves was perhaps not being sufficiently addressed” and “the programs may be missing some sub-groups: [...] those on Aboriginal reserves, for example”

(Alberta Children's Services, 2004: 25, 32 and 57). The report offers no evidence that Aboriginal youths are being 'missed' by the legislation, other than a 'feeling' held by stakeholders that this is the case. I argue that these stakeholders are drawing on a common knowledge that Aboriginal female youth are more given to the vice of sexual immorality than their non-Aboriginal female counterparts. Though it is nowhere stated in the Act that the target population are Aboriginal females, their over-detainment reveals the common knowledge that their need for confinement is self-evident; unquestioned.

The current dominant habitus is at odds with the habitus embodied by Aboriginal female youth. Their habitus is revealed in Kingsley and Mark (2000), who held interviews and consultations with Aboriginal 'experiential' youth⁶⁸. For example, a female youth from Saskatoon stated:

I grew up...in an abusive home. My Mom gave up on me when I was 13, and I started fixing. I was constantly being moved from foster home to foster home, and I nobody to talk to about anything. I was never stable; half my foster parents were assholes, especially emergency foster care. I didn't really know much about it, just [what] I had heard from my friends. The money part of it [the sex trade] was in my hands for maybe 15 minutes. I'd get it and go straight to the dealers (as cited in Kingsley and Mark, 2000: 18).

This quote incorporates several aspects of the habitus of Aboriginal females involved in the sex trade, including the presence of physical abuse, alcohol and drug use, and involvement in the child welfare system. When working in the protective safe house in Edmonton, I witnessed the extent of drug addiction among the youth. The overwhelming majority had addictions issues, many to crystal meth.

The prevalence of violence is especially significant. Monture-Angus states:

It is likely that Aboriginal women experience violence in their lives with greater frequency than any other collective of women in Canadian society. Only one form of this violence is physical. Frequently, Aboriginal women are battered, raped, and sexually violated from the time we are only children. [...] Many

Aboriginal women move from the violence of our childhoods – which is often an experience of the violence our mothers survived layered over the violence we ourselves have survived – to violent relationships with men, including both rape *and* battering. Violence is not just a mere incident in the lives of Aboriginal women. Violence does not just span a given number of years. It *is* our lives. And it is in our histories. For most Aboriginal women, violence has not been escapable. [...] Racism and colonialism are psychological violence with the same effects as overt physical violence (Monture-Angus, 1995: 170).

Racism and violence (physical and sexual) profoundly shape the habitus of these Aboriginal girls. McEvoy and Daniluk found that sexual abuse was a ‘serious problem within native communities,’ with female children being victimized at greater numbers than male children (1995: 2). Interviews held with Aboriginal women revealed that, as a result of their abuse histories, they felt ‘flawed’ in three ways: as abuse survivors, as women, and as natives (1995: 4). Taunts such as “fat squaw” and “dirty Indian” were internalized by the women, causing them to feel as though they had no intrinsic worth as Aboriginal women (1995: 5).

Stereotypes held by front-line workers affected the treatment of the youth confined at the protective safe house in Edmonton, which became apparent to me during my time as a front-line worker. There is one particular conversation with a white male co-worker which particularly reveals these stereotypes. The conversation followed a meeting, during which we were informed that the system of night-time checks had been changed slightly. Starting at 11:00 pm, the girls are checked by staff, who aim a flashlight into their rooms and confirm that the girl is alive and monitor their movement periodically throughout the night. Before the aforementioned meeting, either male or female staff could perform these night checks. However, it was decided that only female staff should perform the checks, as there was concern that the girls may not be comfortable with a man entering their room during the night. This decision was met with

scorn. One stated to me that the girls must be pretty comfortable around men, since they were prostitutes.

Aboriginal youth consulted by Kingsley and Mark reported that white peoples' stereotypes of Aboriginal peoples left them feeling "worthless and undeserving of help" (2000: 24). Kingsley and Mark argue: "Being told all of your life that you are inferior because of the colour of your skin shapes your thoughts, your actions, and your sense of self-worth" (2000: 24). Acoose argues that a "misconstrued notion of self" is an important factor in Aboriginal women's drug use and involvement in the sex trade (2007: 7). She states:

When a woman is continually told she is not worthy, stupid, useless, and nothing but a whore or that being raped is her fault, at some point in time she will begin to believe that she is nothing (2007: 7).

This internalization certainly does not suggest that the outcomes of violence are Aboriginal women's fault. The work of Acoose (2007) and Kingsley and Mark (2000), among others, show how structural and systemic violence have marginalized Aboriginal women, forcing them to operate within the confines of this violence.

According to Bourdieu, domination presupposes a doxic order, which is shared by both the dominated and the dominants (Krais, 2006 and 1993). The internalization by Aboriginal girls of the racist and sexist taunts above indicates that they come to accept these labels. This complicity indicates that symbolic violence is being exercised. Bourdieu states that even disadvantaged individuals tend to perceive the world as natural and accept their circumstances (1989: 18).

I must point out that the girls confined under the PCHIP Act largely do not agree with others' conception of their behaviour, nor do they comply readily with the structure

at the protective safe houses. This shows that the doxic order referred to above is never complete or absolute. I have seen countless exchanges between staff and the youth which can be conceived as a “plurality of resistances” (Foucault, 1990: 95-6). For instance, the youth sometimes deny that they are involved in prostitution (which may be true in some cases), or may refuse to talk about their involvement. This behaviour, labelled as ‘difficult’ by staff, demonstrates the refusal of some youth to accept the doxic order. Further, the fact that many youth go AWOL immediately upon release from the protective safe house shows that the structure imposed at the safe house (via the strict schedule and rules) largely fails to transform the youth into disciplined, docile bodies.

6.2 ABORIGINAL OVERREPRESENTATION IN THE SEX TRADE

By holding consultations with sexually exploited Aboriginal youth across Canada, Kingsley and Mark (2000) found a number of important factors regarding Aboriginal overrepresentation in the sex trade. These factors include fragmentation of culture, lack of higher education and job opportunities, poverty, abuse (physical, sexual and emotional), lack of role models and elders, substance abuse issues, homelessness, overrepresentation in the justice system, racism, gender issues, and low self-esteem (2000: 12). Busby et al. found many of the same factors, listing childhood abuse, overrepresentation of girls on the street, substance abuse, race issues, and poverty as particularly important (2002: 2).

Kingsley and Mark (2000) discuss colonialism, poverty and unemployment, abuse history, homelessness, gender, and race as particularly important factors. Regarding colonialism, they state:

The negative impact of European colonialism on Native peoples and their cultures has been a decisive factor in creating and maintaining barriers of social, economic, and political inequality...Aboriginal youth are often the direct recipients of the pain of racism, residential schooling, forced adoption, and cultural fragmentation (2000: 11).

Clearly, Aboriginal youth involved in the sex trade stems in part from colonialist events which occurred hundreds of years ago. The ramifications for Aboriginal youth are demonstrated in their overrepresentation in the sex trade. Razack (2000) reminds us that Aboriginal peoples inhabit a state of colonialism which has remained as direct and coercive as it was two centuries ago, as evidenced by their high rate of suicides.

Economic factors including unemployment and poverty are structural factors that have affected Aboriginal involvement in the sex trade. Kingsley and Mark argue that unemployment “forces youths into sex trade work” (2000: 14). When one considers that “Aboriginal peoples are the most socio-economically disadvantaged group in Canada” (Kingsley and Mark, 2000: 22), this is a predictable outcome.

Abuse history is another important factor to consider when investigating Aboriginal overrepresentation in the sex trade. Kingsley and Mark argue that histories of abuse are the main predictor of youth entering the sex trade (2000: 53). Further, they argue that abuse suffered by Aboriginal children is contextually different from abuse directed at non-Aboriginal children. They state:

Isolation, extreme poverty, economic and social deprivation, high rates of alcoholism, substance abuse and domestic violence, as well as racism, differentially construct the experiences and consequences of abuse on Aboriginal youth (2000: 53).

While non-Aboriginal children also face abusive circumstances, they are less likely to face all of the factors listed above, and further, they do not encounter racism in addition to their abuse.

The high frequency of homelessness among the Aboriginal population is another important consideration when investigating their overrepresentation in the sex trade. For example, Kingsley and Mark (2000) argue that the “Downtown Eastside of Vancouver” and the “West side of Winnipeg” are overrepresented by Aboriginal peoples. These areas attract vulnerable Aboriginal youth searching for a way to survive (2000: 20). According to Kingsley and Mark, running away from home is a main predictor of involvement in the sex trade. Though these youth may had not planned on working the in sex trade, they may have been forced out of an intolerable home environment (Kingsley and Mark, 2000: 34).

6.3 STRUCTURAL ISSUES WITH THE PCHIP ACT

The structure of the PCHIP Act functions to confine Aboriginal females at a disproportionate rate. As outlined in chapter four, there are three options open to police upon the apprehension of a youth suspected of being involved in prostitution. These options lead to the consequence of Aboriginal girls being detained at greater numbers than their non-Aboriginal girls, or males of any race.

Recall that the first option is to “return the child to the custody of the child’s guardian or to an adult who in the opinion of the director is a responsible adult who has care and control of the child” (Protection of Children Involved in Prostitution Act, Section 3 (1) b (i), 1999), in other words, bring the youth home to a parent or guardian. Obviously, this option is not open for homeless youth, since they are without a home or guardian. This is also not an option for youth who have run away from child welfare placements. Because Aboriginal youth are overrepresented among the homeless

population (see Kingsley and Mark, 2000: 20), as well as in the child welfare system, they are more likely to end up in a protective safehouse than white youth.

The second option available to authorities who apprehend youth under PCHIP is relevant to the impact of gender on incarceration in the ‘protective safe houses.’ Section 3 (1) b (iii) provides for the release of the child, “if the child has attained the age of 16 years and in the opinion of the director the child is capable of providing for the child’s own needs and safety” (Protection of Children Involved in Prostitution Act 1999). In Chapter four, it is pointed out that this provision seems to allow the kind of activity the Act ostensibly attempts to suppress- prostitution. However, there is a second problem with this section. According to common gender stereotypes, males are better able to take care of themselves on the street. Females, the ‘gentler sex,’ require protection from the vulgarities of the street. This stereotype helps to explain the overrepresentation of females held at the ‘protective safehouses.’

Taken together, these two options are key to the over-confinement of Aboriginal females in the ‘protective safehouses.’ By virtue of their overrepresentation on the streets (a manifestation of factors including racism, poverty, and abuse histories), as well as their ‘vulnerable’ gender, they fit into our ‘common knowledge’ assumptions about which youth should be confined.

My contention above is supported by findings of other research. Joanna Phoenix (2002b) found that the ‘common knowledge’ (or habitus) held by police and voluntary organization workers about male versus female youth prostitution directed different responses for male versus female youths. One voluntary organization worker stated that the issues faced by male and female youth prostitutes differ. For males, prostitution was

linked to issues of sexuality, while female prostitution involved vulnerability (Voluntary organization worker, as cited in Phoenix, 2002b: 82). A police officer drew a boundary between male and female youth prostitutes according to the perceived level of violence associated with the work. The officer states:

For the girls, there is a significant amount of violence all around them, whereas for the men, that kind of fabric of violence around them doesn't seem to be there, they're just isolated and even when they're working together. [pause] I mean it's poverty driven in the same way for the girls and boys, but the girls are more vulnerable. It's more risky for them (Police, as cited in Phoenix, 2002b: 82).

The statements made by the police officer and voluntary organization worker reveal that common knowledges regarding male and female sexuality, vulnerability to violence, and risk frame justifications for policy. Because girls are seen as more vulnerable and more 'risky' than males, their protective confinement is justified.

I add that the racism in Canadian society is evident of a habitus which supports and reinforces these beliefs. The 'common knowledge' held by legislators (politicians, judges, lawyers, etc.), criminal justice workers (police and prison guards), and social service providers (social workers, front line workers in 'care' facilities) shapes and perpetuates these racist beliefs, and also the sexist beliefs briefly discussed above. I will address these aspects more fully in the next section.

6.4 REGULATION OF GENDER AND RACE

The regulation of space is also a regulation of gender and race roles. In his analysis of the Kabyle peoples of Algeria, Bourdieu draws a distinction between male and female space. Men occupy the "assembly place, the market or the fields," while women occupy the "house and the garden" (1990a: 76). It is assumed that certain parts of cities are not

proper places for young females, and the entering of male space is indicative of gender role defiance.

Sherene Razack (2000) has investigated issues surrounding race, space and the law. In her analysis of the murder of Pamela George,⁶⁹ she argues that the grave injustice committed against this Aboriginal woman was diminished through beliefs about space and the Aboriginal body. As George worked occasionally as a prostitute, it was assumed that she belonged to a space in which violence is a regular feature. In this case, this geographical space denotes the slum area of Regina, known as the Stroll, which police describe as a world of drugs and prostitution. The assumption that George belonged to this space, along with the assumption that her body was routinely violated, downplayed the seriousness of her assault and murder (Razack, 2000). In other words, no one could be held accountable for her death, since she was of the Stroll, Aboriginal, and engaging in prostitution (Razack, 2000). In the trial process, race and gender issues were deliberately excluded as evidence, as these would contaminate the “pure processes of law” (Razack, 2000: 128).

The regulation of prostitution has historically also been the regulation of gender and race, and the PCHIP Act is not an exception. Hunt, in his research on early twentieth century vice commissions and social surveys, concluded that these reports should be “read as discourses about the regulation of heterosocial space” (2002: 2). Heterosocial space refers to

the shifting and changing sites where young women and men come into contact and where transactions with potentially sexual dimensions may arise or which others may define in sexualized terms (Hunt, 2002: 2).

Hunt argues that space has a temporal dimension in addition to the spatial. The same city street corner may be more charged heterosocially in the dark than in the daylight.

Attempting to govern heterosocial contact was the major aim of American vice reports and Canadian social surveys during the early twentieth century (Hunt, 2002: 1).

Like these early vice reports, the PCHIP Act attempts to coerce ‘appropriate’ gender and race roles through the regulation of space. This is evidenced by the following document, a ‘Notice to Child’ which is given to the youth upon their detention in a protective safe house. This particular ‘Notice to Child’ document was served to a female Aboriginal youth:

You have been confined in a protective safe house because you were engaging or attempting to engage in prostitution. A director authorized your confinement because: You associate with known pimps and prostitutes and identify your boyfriend as [boyfriend’s name] who is known to PChIP as a pimp and recruiter of under-age prostitutes as well as a drug dealer. You have a chronic history of AWOL behaviour, leaving your placement and returning at early morning hours in cabs or vans. You choose to hang around the Clareview area where [boyfriend] lives and state you like this area as you enjoy hanging around with “Lebs” and “Blacks” because they are, according to you, “hot and tough.” You are believed to be engaging in prostitution at this time (Alberta Children’s Services, Notice to Child Document).

The first two sentences of these documents are always the same, and the remainder informs the girl why she is being confined. Notice that there is no direct evidence that this girl was actually engaging in prostitution. There was no witness who saw prostitution occurring. The reasons for confinement given above include the girl’s association with certain men and her occupation of various spaces (the Clareview area, cabs, vans, and unspecified areas beyond the home). The lack of any concrete evidence implies that the reputation of the girl is likely a factor, though this is not explicitly stated.

Hunt notes that the regulation of prostitution has often targeted behaviour which is seen as inappropriate for women, even if this behaviour does not include prostitution specifically. Simply being at the wrong place at the wrong time may warrant suspicion, such as being on the streets late at night (Hunt, 2002: 5). These temporal and spatial dimensions clearly play a role with consideration of the youth who received the notice above. The charge of ‘chronic history of AWOL behaviour’ sends the message that this girl consistently defies the appropriate ‘place’ for young girls, which is safe at home under domestic surveillance. Furthermore, she returns home in the early morning, which implies that she has been out all night. What is implied here is a connection between being away from home at night and immoral sexual activity. The accusation that the girl associates with ‘known pimps’ hearkens back to vice commission reports, which viewed “female familiarity with casual male acquaintances as tantamount to occasional prostitution” (Hunt, 2002: 17).

The document contains the assumption that riding around in cabs and vans is indicative of illicit sexual activity. Hunt notes that the automobile has aroused concern among moral reformers since their invention, as they allowed couples to escape the immediate scrutiny of surveillance, both official and unofficial (2002: 23). Finally, the girl’s choice to ‘hang around the Clareview area,’ and her admission that she likes this area, are apparently punishable. According to Razack, the geography of cities demarcates respectable ‘white’ areas from racialized slum areas where all that is not respectable is contained (2000: 97). Though ‘hanging out in the Clareview area’ has nothing to do with prostitution per se, it is implied that this defiance of ‘appropriate’

gender behaviour must indicate that she is involved in prostitution, or 'at-risk' of becoming involved.

In her research on adolescent 'troublesome girls,' Hudson (2002) found that certain areas of cities were viewed by police as 'criminogenic.' These areas were characterized by a high Afro-Caribbean population. Hudson suggests that "the level of police (and possibly social work) control may increase according to the social composition and 'reputation' of the neighbourhood" (Hudson, 2002: 301). The Clareview area in Edmonton is also considered a 'criminogenic' site. Simply being in this area may result in detention, as the 'Notice to Child' document demonstrates.

The culpability of the female is supported by racialized assumptions about the males with whom she is keeping company. It is assumed that it is inappropriate for the girl to 'hang around Lebs and Blacks,' and her interaction with them puts her at risk of victimization. The ethnicity of the males is apparently important in determining that the girl was 'engaging or attempting to engage in prostitution,' or else it would not be mentioned in the document. Consider the ineffectiveness of these statements if the 'Lebs and Blacks' were replaced with 'whites.' The document would then read: 'you enjoy hanging around with "whites" because they are, according to you, "hot and tough." You are believed to be engaging in prostitution at this time.' There is clearly an assumed connection between non-white races and sexual immorality which guides authorities' decisions on which girls 'require protection.'

Hudson (2002) came to a similar conclusion regarding racist stereotypes and police and welfare practices. Hudson reports the views of one social worker, who commented on a white adolescent female client who had run away from home: "People

think that as she had got black boyfriend, she must be promiscuous, she must be on the game, or she is being used” (Hudson, 2002: 301). Hudson argues that people associate black men with ‘unrespectable’ sexuality, and thus, interventions aimed at preventing girls’ association with these men are viewed as legitimate (2002: 301).

Though the reputation of the girl is not explicitly addressed in the Notice of Confinement document, it is *implied* through other statements, such as her AWOL history and interactions with certain types of men. The reputation of the girl is often used as evidence of sexual promiscuity. Hudson (2002) found that a girl’s sexual reputation was often a determining factor of services received from welfare providers. She found that social workers admitted that their decisions were based on what other people (in particular, the police and parents) said about the girl, and once an opinion had been formed, the label of ‘promiscuity’ was easily applied (2002: 300). Once applied, this label proved hard to shed. One social worker stated: “Once (she) had developed a ‘reputation’ (for sexual activity), it became very easy to say that she was actually involved in prostitution” (Hudson, 2002: 300). Hudson recommends that welfare professionals need to seek out actual evidence of girls’ risky behaviour, rather than relying on the reputation of the girl held by police and families (Hudson, 2002: 302).

6.5 CONCLUSION

The disproportionate confinement of Aboriginal females by the PCHIP Act is a manifestation of a habitus which contains elements of sexism and racism. The history of Aboriginal peoples, along with the structure of the PCHIP Act and the regulation of gender and race coincide to over-confine Aboriginal girls in protective safe houses. The

recent reconceptualization of youth prostitutes as victims needs to be challenged if the justification of protective confinement is to be delegitimized. Hudson states:

A fundamental prerequisite of any attempt to grapple with the complex task of evolving alternative policies for girls in trouble (criminal or otherwise) is to eradicate the victimology which underpins the *status quo* (2002 305).

CHAPTER SEVEN

REVIEW OF FINDINGS AND CONCLUDING STATEMENTS

By utilizing Bourdieu's methodological and theoretical insights, this thesis provides a framework appropriate for the investigation of the PCHIP Act. The concepts of field and habitus allow for an understanding of the PCHIP Act which illuminates the dynamic relationships within and across different social fields including law and politics.

In the introductory chapter, I posed the following question: What is the nature of the relationship between law and politics, and between child welfare and youth criminal justice legislation? By utilizing the PCHIP Act as a case study, I have illuminated these relationships. The relationship between law and politics is complex. The constitutional challenge demonstrated that the law is autonomous in some instances. For example, when Judge Jordan was determining the pith and substance of the PCHIP Act, she considered only sources which would confirm what the Act itself purported. This shows the inherent self-referential nature of the law, which contributes to its autonomy. However, it is not totally autonomous from politics. On the contrary, the political field enacted vengeance onto the juridical field when the latter produced a decision which was contrary to political desires. Ultimately though, these two fields acted in concordance with each other in a number of aspects. There was agreement between these fields pertaining the pith and substance of PCHIP, for instance. The PCHIP case shows that law is partially autonomous from politics, yet there is considerable uniformity and agreement between these two fields, even as they appear to be conflicting.

The conflicts between law and politics, as demonstrated in the events surrounding the constitutional challenge, dictate the hierarchy of power within the legal field. Those legal actors bestowed with power are able to dictate boundary disputes in other fields, for instance, the fields of child welfare and youth criminal justice legislation. The debate over the pith and substance of PCHIP was the key struggle between the fields of child welfare and youth justice legislation. Legal actors quickly dismissed notions that the detainment of youth, in and of itself, meant that the PCHIP Act was criminal legislation. Legal actors concluded that this confinement was indeed protective, and thus squarely within the realm of child welfare legislation. However, this ignores the practical reality of the Act. The fact that an Act which functions to confine youth can be classified as child welfare legislation testifies to the blurry boundaries between these fields.

Young Aboriginal females are particularly affected in this case. My second research question is: Why are Aboriginal female youth confined by the Act much more than other groups of youth? This is an extremely complicated question, one which surely merits additional research. Historical factors are of utmost importance. The imposition of residential schools and the control of Aboriginal peoples by law since European colonization have created a habitus both among the youth who are confined under PCHIP, and those who have the power to legislate such Acts. Attitudes of judges, lawyers, and politicians seem to be in tacit agreement over which types of youth 'should' be confined by the Act, as evidenced by the Alberta government efficacy report, the structure of the PCHIP Act itself, and by the complete refusal of legal actors to view the over-confinement of Aboriginal girls as a legal issue.

7.1 IMPLICATIONS

The Protection of Children Involved in Prostitution Act was created and justified within an era characterized by neo-liberal policies and ideology. Part of neo-liberalism is the privatization and dismantling of the welfare state, with business interests increasingly dictating public policy. These outcomes have had particularly devastating consequences for marginalized youth (Schissel, 2006). Numbers of homeless and disenfranchised youth have visibly increased, in part as a by-product of privatization (Martin, 2002: 356). Recent legislation attempts to 'clean up' the 'social junk' resulting from these outcomes (Pratt, 1999: 149). Welfare reforms in Alberta have decreased assistance to youth who leave their family home, leaving few options available for basic survival.

The ineffectiveness of the PCHIP Act to actually help youth prostitutes, coupled with its impotence in punishing exploiters, reveal that a 'planned obsolescence'⁷⁰ is foundational to the PCHIP Act. Recall that the 2004 report by Alberta Children's Services attributes decreasing apprehensions as evidence that Aboriginal youth are not being sufficiently targeted, rather than evidence that the Act is fulfilling its objective in reducing youth prostitution. Even the Alberta government does not infer that the PCHIP Act is decreasing the number of youth prostitutes. This planned obsolescence functions to fuel the public's demand for more legislation. Apparently, the remedy for ineffective law is more ineffective law. This ambivalence toward actual outcomes of legislation is reflected in constitutional law more generally. As Judge Jordan states, "there is no requirement in Canadian constitutional law that legislation be perfect, or even that it be demonstrably effective" (Alberta v. K.B., ABPC, paragraph 38).

The passing and strengthening of the PCHIP Act has been a watershed for other legislation aimed at ‘protecting’ youth through incarceration. For instance, legislators made reference to the PCHIP Act during recent debates in the Alberta legislature over the Protection of Children Abusing Drugs Act (PCHAD)⁷¹, introduced by Red Deer backbench MLA Mary Ann Jablonski and the Drug-endangered Children Act (DECA)⁷², introduced by Forsyth.

Specifically, the constitutional issues with PCHIP were brought up to suggest that provisions be made in the PCHAD legislation to avoid Charter violations (Alberta Legislative Assembly, March 21, 2005). Additionally, some legislators recalled that the PCHIP Act did not add anything new to the already existing legislation, and argued that the PCHAD and the DECA were similarly unnecessary. Legislators noted, “all the powers that are needed to apprehend children if they are in danger, in fact, exist now. So the purpose of this bill is unclear” and “this to me has the same veneer of window dressing, of grandstanding” (Alberta Legislative Assembly, March 9 and 22, 2006). Harry Van Harten, counsel for the youth in Alberta (Director of Child Welfare) v. K. B. (2000), had discussed this overlap in provisions with Jablonski. However, his comments fell on deaf ears (personal communication, Jan. 24, 2008).

Though several MLAs argue and vote against such ‘protectionist’ legislation described above, the Alberta government has continued to pass such Bills into law. For example, the Protection of Children Abusing Drugs Act was passed on July 1, 2006, despite the assertions made by detractors. This demonstrates that the Alberta government’s prerogative to ‘appear to be doing something’ consistently prevails over arguments that already existing legislation is sufficient. Another recent trend pointed out

by legislators is the increase of reactionary, interventionist laws (Alberta Legislative Assembly, March 9, 2006)⁷³. Though these Acts are unsuccessful in actually protecting children, they are “flashed around as proof that somehow the government is doing something” (Alberta Legislative Assembly, March 22, 2006). One legislator noted,

[T]his government is particularly reluctant to have intervention into a number of other areas [...] and those are things like environmental protection laws or laws about restricting business, for example. There are certain areas where this government just will not go, yet I’ve noticed over the years that there’s a willingness, almost an eagerness for the state, in this case the provincial government, to intervene into people’s homes. This causes me great concern (Alberta Legislative Assembly, March 9, 2006).

The reluctance of the government to intervene with business, yet a simultaneous eagerness to intervene into the home and emphasis on punitiveness is indicative of the current neo-liberal environment in Alberta.

In Chapter 5, I argued that the accumulation of capital motivated Forsyth to create legislation. However, empirical evidence would lend support to this stance. A systematic treatment of the field positions identified in this thesis would enrich our understanding of the dynamic relationships in the legal and political fields. Interviews with various actors, including youth confined in protective safe houses, staff who work at such facilities, social workers, police officers, judges and lawyers, as well as politicians involved in the legislative process are necessary to build a fuller empirical understanding of these fields. The lack of such analysis is a limitation of this thesis. However, such future research would benefit from the theoretical framework and critical analysis this thesis provides.

7.2 TOWARD BETTER POLICY

Critiquing the PCHIP Act and similar types of discriminatory legislation is unavoidably political. Following Bourdieu's contention that "social science necessarily takes sides in political struggles" (1975: 101), I would like to put forth practical recommendations for future legislation which attempts to address the problem of youth prostitution.

- Any legislation aimed at youth prostitution must be voluntary and offered by non-government organizations (NGOs). Youth who have experienced the sex trade, as well as adults who used to be involved have told us that these types of organizations are much more likely to be utilized by youth prostitutes than state mandated services offered through child welfare (see Kingsley and Mark, 2000 and Busby et al., 2002). Attempts to *force* youth to exit the trade should be abandoned. Notwithstanding the ethical problems with coercive confinement, I have seen little to no evidence that this method is even effective (or cost effective) in helping youth exit prostitution (see Alberta Children's Services, 2004).
- The voluntary services offered by NGOs recommended above require staff who have personally experienced the sex trade. As reported by Kingsley and Mark (2000), these youth prefer staff who have experienced prostitution, simply because they have 'been there.' These youth would respond much more positively to this staff member than to a staff member who has no idea what their life is like. No amount of reading or research qualifies someone to work as a front-line staff with these youth. Acoose notes "there is a world out there that many people will never understand no matter how many books they read or how many University degrees they have" (2007: 3).

These recommendations are targeted at a very practical, though somewhat superficial level. The problem is not that these recommendations have not previously been published. On the contrary, Kingsley and Mark (2000), Busby et al. (2002) and Koshan (2003) make similar suggestions. The larger issue is the refusal of legislators (or others with the power to create services for youth prostitutes) to seriously consider these recommendations and implement them. In light of this rejection, I contend that any legislation which attempts to deal with a problem which plagues a marginalized group requires the participation of this marginalized group. Aboriginal groups were *not* consulted in the legislative process which introduced the PCHIP Act. Had their views been contributed, the Act may have been more suitable to the needs of Aboriginal youth. Currently, there is a mismatch between their stated needs (see Kingsley and Mark, 2000) and the punitive nature of secure facilities such as PCHIP protective safehouses.

On a theoretical level, Bourdieu reminds us that the act of recognizing symbolic violence negates its ability to function. It is far too simplistic and naive to contend that merely identifying the PCHIP Act as an example of symbolic violence will lead to its repeal. However, critically analyzing the PCHIP Act does contribute to debate, which at the very least destabilizes symbolic violence. Because these critical analyses do exist, it becomes irresponsible for governments to ignore them. For instance, the 2004 Alberta Children's Services report does at least address critiques of the PCHIP Act, albeit in a cursory way.

In 1978, British Columbia passed the Heroin Treatment Act, one of the first mandatory treatment initiatives in Canada (Canadian Centre on Substance Abuse, 2006).

This Act allowed for the confinement of narcotic-addicted individuals for their own health. It was struck down as unconstitutional in 1979, but this was overturned by the Supreme Court. The Supreme Court of British Columbia found that the Act aimed to protect the health of individuals addicted to narcotics, as opposed to the punishment of these individuals (Sorochan, 2004: 9). However, amidst controversy, the Act was repealed in 1990. This reminds us that public opinion and protest do have the potential for changing law.

NOTES

¹ Two issues require clarification. First, the term ‘Aboriginal’ includes many diverse groups, such as North American Indian, Metis, Inuit, persons who fit into more than one of these categories, as well as persons who do not identify themselves as Aboriginal yet are registered Indians. Also, the category ‘North American Indian’ refers to many diverse populations, including Cree, Dene, Blackfoot, Mohawk, as well as many other groups. Unfortunately, information specific to these different groups with regard to the PCHIP Act was unavailable. As such, I have employed a rather imprecise definition of the term ‘Aboriginal.’ Second, I must demonstrate that the confinement of this group under the PCHIP Act is indeed disproportionate. As of 2006, the Aboriginal population in Alberta was 188,365, and the total population was 3,256,360 (Statistics Canada, 2006). This means that 17.29% of the population in Alberta was considered Aboriginal in 2006. Koshan (2003) found that approximately 30% of the youth confined under the PCHIP Act were Aboriginal. The disparity between these two percentages demonstrates that Aboriginal youth have been confined under the PCHIP Act at a rate disproportionate to their population.

² Harry Van Harten, Calgary lawyer who was involved in the constitutional challenge to the PCHIP Act, has speculated that this name change was spurred by a widening of the definition of prostitution. As the child sex trade was driven off the streets, it became more difficult to apprehend and confine youth prostitutes. To counter decreasing numbers in the protective safe houses, it became necessary to confine youth who were not part of the street sex trade. Van Harten explains: “If you fed and sheltered me and I slept with you, then I was a prostitute. That’s a stretch by any plain language analysis (and probably the real reason for the name change)” (Personal communication, Jan. 24, 2008, original parentheses).

³ Kelson would not deny that politics does affect law somewhat. However, he would argue that political values would have to be transformed into legal categories before entering the legal field, in contrast to realists, who would contend that political values directly enter the legal field, directly influencing legal matters (Zamboni, 2006). Bourdieu parallels Kelson’s methodology to Saussure’s, and faults both on account that they ignore historical, psychological, geographic, and social considerations (Bourdieu, 1987a: 814).

⁴ This conflict between conceptions of justice stems from a conflict between formal and substantive rationalities. Kalberg states “Formal rationalities have stood in the most direct antagonism to many substantive rationalities” (1980: 1157). See Kalberg (1980) for information and analysis on Weber’s types of rationalities.

⁵ See Feldman (1991) for an interpretation of Weber’s account of the causal relationship between law and the economy.

⁶ Legal realism was also influenced by the Marxist tradition (MacDonald, 2002).

⁷ For examples of research in feminist jurisprudence and criminology, see Boyd (1997), Carlen (2002), Cossman and Fudge (2002), Chunn and Gavigan (2004), Comack (1996), Gilligan (1982), Hannah-Moffat (2000, 2001, 2002 and 2004), Kline (1997), MacKinnon (1989), Martin (2002), Monture-Angus (1995), Phoenix (2002a and 2002b), Smart (1990), Snider (2003a and 2003b) and Valverde (1996, 1998, 1999, 2003, 2005 and 2006).

⁸ For an example, see Monture-Angus, who states “if I am the object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as a Mohawk and as woman” (1995: 177-8, see also 2002). See McClintock (1995) for an account of the intersection of gender, race and class pertaining to British imperialism in Africa, and Collins (1999), who applies the concept of intersectionality to gender, race, and scientific knowledge.

⁹ For instance, the following feminist research critiques and utilize Bourdieu: Adkins and Skeggs (2004), Fowler (1999 and 2003), Kraus (1993 and 2006), Lovell (2000), McNay (1999) and White (1998).

¹⁰ See van Krieken (2004) and (2006) for examples of research which attempt to synthesize these two theorists, and see Nelken (2006) for a critique of these attempts.

¹¹ Valverde (2006) is critical of the “boundary-mapping exercises” in which both Bourdieu and Luhmann engage. She asks, “Is the question of the place, location, and borders of ‘law’ necessarily the most useful and important one that can be asked?” (2006: 591-2).

¹² Bourdieu himself has commented on this similarity, stating “one could easily retranslate the concepts of ‘self-referentiality’ [...] by what I put under the notion of autonomy” (Bourdieu and Wacquant, 1992: 103).

¹³ Bourdieu has argued that Luhmann’s work has presented formalist theory under a new name (systems theory) (Bourdieu, 1987a: 816).

² For an example of the permeability of boundaries between fields, see Wacquant, who argues that the ghetto and the prison have increasingly become more alike, forging a “deadly symbiosis” (2001: 95). See also Garland, who contends that institutions of crime control and criminal justice form a network with other institutions including the legal and welfare systems and the labour market (2001: 5).

¹⁵ Bourdieu notes that the juridical field is less autonomous than other fields, such as the artistic, literary, or scientific fields. This is due to the juridical field’s “determinant role it plays in social reproduction” (1987a: 850).

¹⁶ The concept of habitus did not originate with Bourdieu; he identifies habitus as an “old Aristotelian and Thomist concept that [he] completely rethought” (Bourdieu, 1990b: 10).

¹⁷ Economic capital is defined as that which is “immediately and directly convertible into money” (Bourdieu, 1986: 243). Social capital is the manifestation of powerful social networks in which an individual is embedded; it is based on resources arising from “connections or group membership,” and is strongly correlated with symbolic capital (Bourdieu, 1987b: 3-4). Cultural capital, or ‘informational capital,’ has three subtypes: embodied, objectified, and institutionalized (Bourdieu and Wacquant, 1992: 119). Educational credentials are a form of embodied cultural capital (Calhoun, 1993: 70).

¹⁸ Bourdieu explains: “the particular ‘power’ of economic capital could spring from the fact that it permits an economy of economic calculation, an economy of economy, that it is, of rational management, of the labour of preservation and transmission – that it is, in other terms, easier to manage rationally (this can be seen in the case of its realization, money), and to predict (which means it goes hand in glove with calculation and with mathematical science)” (Bourdieu, 1990b: 93).

¹⁹ See Wood (2005) for an account of symbolic violence within the context of crime policies which are named for particular victims of crime, for example, Megan’s Law in the United States.

²⁰ In England, the principle of *doli capax*, or, the capacity of doing ill, mediated punishments given to youth. Children under the age of seven were presumed incapable of criminal intent, and youth between seven and fourteen were also presumed innocent unless they possessed the capacity to distinguish between good and evil. Youth over fourteen were considered fully responsible (May, 2002: 99).

²¹ The Juvenile Offenders Act was passed in 1847 (see Shore, 2002: 159), which was followed by the Reformatory Schools (Youthful Offenders) Act in 1854 and the Reformatory Schools Act in 1857 (see Rush, 2002: 139), 1861, and 1866 (see Hendrick, 2002: 23).

²² For an account of the child-saving movement in the United States, see Platt (1969).

²³ This assumption continues today. See Schissel (2006: 87-90) for an account of public panic over girls’ criminality.

²⁴ The policy of assimilation of Aboriginal peoples through education was not abandoned by the federal government until 1973 (Monture-Angus, 1995: 93). However, a ‘missionary’ approach to the education of Aboriginal students still exists today (Monture-Angus, 1995: 96-121).

²⁵ According to Foucault, these similarities across institutions are evidence of the emergence of ‘disciplinary society.’ He remarks, “Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?” (1995: 228).

²⁶ “White slavery’ fears had long existed in Britain before this law was passed in 1885. In the eighteenth and nineteenth centuries, it was commonly believed that innocent young English girls were being abducted and forced into brothels, located in England and beyond. Canadian politicians were less convinced that such an international trade existed, but the concern over ‘white slavery’ did hold some weight nonetheless, notably among the national temperance movement, women’s rights groups, and church organizations. Contrary to the Canada, the concern over ‘white slavery’ in the United States was substantial, and culminated in the White Slave Traffic Act in 1910 (see McLaren, 1986, Wahab, 2002 and Hunt, 2002).

²⁷ William L. Scott, a founding member of the Ottawa Children’s Aid Society, attended a conference in 1906 in Philadelphia. At the conference, he became interested in setting up a juvenile court and probation system, as these were being developed in the United States (Trepanier, 1999). Shortly after the conference, Scott prepared a draft bill which borrowed from legislation which had been passed in Illinois and Colorado (Trepanier, 1999).

²⁸ In England, any child found begging, or interacting with thieves and/or prostitutes, or whose parents were deemed inappropriate, could be sent to an industrial school or reformatory (Clarke, 2002: 131). The conflation between neglected children and delinquent children was further solidified in 1927, when a Home Office Departmental Committee on the Treatment of Young Offenders argued that there was little difference between the neglected and delinquent child. Whether the child was brought before the court because of wandering, or because he had committed a crime was a 'mere accident.' (Clarke, 2002: 131).

²⁹ Simultaneous to this trend was the decline of eugenic and hereditary theories of delinquency. See Boritch (1997) for a brief account of the eugenics movement and prostitution in Canada.

³⁰ This close relationship between law and psychiatry continues today. See Luther and Mela (2006).

³¹ Section 88 authorized the application of provincial laws (including those related to Child welfare) to Indians, including those living on reserve (Hogg, 2005: 615). There are five exceptions to this rule, which are 'singling out,' 'Indianness,' 'paramountcy,' 'Natural Resources Agreements,' and 'section 35.' See Hogg (2005: 609-15) for details on these exceptions.

³² It is important to note that Aboriginal groups resisted to the removal of children from their families. For instance, the Spallumcheen Indian Band in British Columbia took control of child welfare services on their territory after seventy-five out of approximately one hundred fifty-five children were removed from their community between 1962 and 1966 (Walmsley, 2005: 24, see also Monture, 1989: 9). Full control over child welfare matters were obtained in 1981.

³³ While this renaming of youth prostitution as sexual abuse may appear enlightened, Phoenix (2002a) points out that "the social and material uniqueness of being a young person involved in prostitution is obscured in favour of a construction of them as victims of child abuse" (Phoenix, 2002a: 364).

³⁴ This recommendation was immediately challenged by the 1985 Fraser Report. Based on an analysis of existing research, Fraser and his colleagues argued that criminalization would be unlikely to help youth prostitutes (Bagley, 1991: 123, see also Bittle, 2002a: 7)

³⁵ Sonja Grover is an associate professor in the Faculty of Education at Lakehead University in Thunder Bay, Ontario, Canada. She has published extensively in the area of children's rights and the children's liberation movement. See <http://groverbooks.net/Publication%20List.htm> for her publication list.

³⁶ Specific authors are not identified in the document.

³⁷ The 'time-out' room is a tiny room which locks from the outside. A small one-way window allows the staff to observe the youth, without allowing the youth to see the staff. Youth were held in the time-out room if they were judged by staff to be in danger of hurting themselves or others (this proved to be a very vague condition, as youth who were simply upset or displaying disruptive behaviour were regularly confined in the time-out room).

³⁸ Contributors include Karen Busby, Dr. Pamela Downe, Kelly Gorkoff, Kendra Nixon, Dr. Leslie Tutty, and Dr. E. Jane Ursel. The 2002 publication was phase two of a larger report titled, "Violence Prevention and the Girl Child." This initiative started in March 1998, when the Alliance of Five Research Centres on Violence (AFRCV) received a grant from Status of Women Canada (SWC) to undertake research to develop a national action plan on violence prevention for female children (The Alliance of Five Research Centres on Violence, 1999: 3).

³⁹ A few interviewees stated that secure treatment facilities were helpful. One woman stated that these facilities assisted in 'scaring them straight' (Busby et al., 2002: 7-8).

⁴⁰ This non-profit organization "promotes freedom from violence, social justice and equality for teenage girls who live in poverty" (Justice For Girls, 2008). Justice for Girls recognizes that racist child welfare practices and colonialism of Aboriginal communities have caused a large percentage of Aboriginal teenage girls to live on the streets in British Columbia (Justice For Girls, 2008).

⁴¹ This summit occurred in Victoria, British Columbia, on March 12, 1998. 55 delegates with experience as sexually exploited children and youth presented the Declaration to participating governments, international non-governmental organizations and delegates without histories of sexual exploitation (International Centre to Combat Exploitation of Children, 1998).

⁴² Section 151 punishes: Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years (Criminal Code, Section 151).

⁴³ Invitation to sexual touching is described by Section 152 as: Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites,

counsels or incites and the body of the person under the age of fourteen years (Criminal Code, Section 152).

⁴⁴ Section 153 is as follows: 1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person (Criminal Code, Section 153).

⁴⁵ Section 170 makes liable: Every parent or guardian of a person under the age of eighteen years who procures the person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian (Criminal Code, Section 170).

⁴⁶ Whether these laws are used appropriately or effectively is another issue entirely. I am simply pointing out that legislation pertinent to youth prostitution already existed before PCHIP was passed. Clearly, the existence of youth prostitution prior to the passing of PCHIP was not due to a lack of legislation.

⁴⁷ This discrepancy in punishments between male and female participants in prostitution has a long history in Canada. Female prostitutes have been targeted by discriminatory legislation and unequal law enforcement since the earliest laws surrounding prostitution (see Bittle, 2002b: 324 and Koshan 2003).

⁴⁸ This was pointed out during legislative debates by MLA Dianne Martin (see Koshan 2003) and by Harry Van Harten, a Calgary lawyer who participated in the constitutional challenge to PCHIP (See Chapter 5). According to Van Harten, discussions with the Alberta Government prior to the passing of PCHIP regarding this overlap in provisions “fell on deaf ears” (personal communication, Jan 23, 2008). Van Harten points out, “when you put sex and children on the front page, politicians can’t be seen [to] be non-supportive of a remedy” (personal communication, Jan 23, 2008). Anecdotally, I can attest that a fair amount of client transference occurred between the protective safehouse and the secure unit. Many of the female residents of the protective safehouse had been periodically incarcerated at the secure unit as well. Indeed, both classifications of youth received the same sort of ‘treatment’ anyway, regardless of the legislation under which they were confined.

⁴⁹ For an account of the historical development of the juridical field, see Bourdieu et al. (1994).

⁵⁰ Ultra Vires is a Latin phrase that literally means “beyond the power.” It is “unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law” (Black’s Law Dictionary, 2004: 1558).

⁵¹ Section 7 is as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (*Canadian Charter of Rights and Freedoms*, 1982: Section 7).

⁵² Section 8 is as follows: “Everyone has the right to be secure against unreasonable search or seizure” (*Canadian Charter of Rights and Freedoms*, 1982: Section 8).

⁵³ Section 9 is as follows: “Everyone has the right not to be arbitrarily detained or imprisoned” (*Canadian Charter of Rights and Freedoms*, 1982: Section 9).

⁵⁴ Section 10(b) is as follows: “Everyone has the right on arrest or detention b) to retain and instruct counsel without delay and to be informed of that right” (*Canadian Charter of Rights and Freedoms*, 1982: Section 10(b)).

⁵⁵ Section 10(c) is as follows: “Everyone has the right on arrest or detention (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful” (*Canadian Charter of Rights and Freedoms*, 1982: Section 10(c)).

⁵⁶ Harry Van Harten, counsel for the youth, has commented on this comparison. He states, “[The PCHIP Act] involved the physical liberty of children and was, therefore, a completely different situation” (personal communication, Jan 23, 2008).

⁵⁷ Section 15 of the *Charter of Rights and Freedoms* is as follows: “(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (*Canadian Charter of Rights and Freedoms*, 1982: Section 15 (1) and (2)).

⁵⁸ In *Law v. Canada*, a 30-year old woman was denied survivor's benefits under the Canadian Pension Plan. She appealed to the Minister of National Health and Welfare and then to the Pension Plan Review Tribunal, arguing that she was being discriminated against on the basis of her age (*Law v Canada* (Minister of Employment and Immigration) 1999). Her appeal was dismissed, but it resulted in a set of guidelines applicable to equality rights claims pertaining to Section 15 of the *Charter*.

⁵⁹ Stages Two and Three of the *Law* test are 'Enumerated/Analogous Grounds' and 'Discrimination' respectively (*Law v Canada* (Minister of Employment and Immigration) 1999). See Koshan (2003) for an analysis of these stages vis-à-vis the PCHIP Act.

⁶⁰ Section 33 (1) and (2) of the *Charter of Rights and Freedoms* is as follows: "33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration" (*Canadian Charter of Rights and Freedoms*, 1982: Section 33 (1) and (2)). In other words, if a province passes legislation that will discriminate against someone, the province can avoid a constitutional challenge by stating that the legislation is exempt from Section 15 (Monture-Angus, 1995: 144).

⁶¹ During a recent sexual assault case in Calgary, Judge Rooke made several misogynist comments, calling the female victim "naïve" and "stupid," and stating that "it's the stupid people who need protection" (*The Curvature: a feminist perspective on politics and culture*, Dec 13, 2007). One wonders if he has a similar opinion of youth 'protected' under the PCHIP Act.

⁶² Furthermore, Bakan argues that Charter adjudication is political because it requires judges to decide how power should be exercised (1997: 143).

⁶³ The overrepresentation of Aboriginal youth in protective safe houses is consistent with the overrepresentation of Aboriginal youth in custody. Latimer and Foss (2004) found that in Alberta, 36% of youth in custody were Aboriginal, compared to 64% non-Aboriginal. Compared to other provinces, the rate of incarceration in Alberta was low. In Saskatchewan, for instance, fully 88% of youth in custody were Aboriginal at the time of the study (Latimer and Foss, 2004).

⁶⁴ I do not contend that the habitus is totally racist and sexist. The habitus is composed of elements beyond assumptions regarding race and sex.

⁶⁵ Commenting on the article that preceded the book, Fowler states "Bourdieu has helped to bring questions of women's subjectivity from the margins into the center, while strengthening his own theory of practice in the process" (1999: 478). However, other feminists have not been as accepting of Bourdieu's book. Some sociologists argued that the "living conditions, practices, views, and struggles of women today are not reflected at all in Bourdieu's text, which instead paints the picture of a gender order so completely doxic and closed that it seems almost totalitarian" (Krais, 2006: 122). The central critique of the book was that Bourdieu had produced a work which was itself a document of masculine domination (Krais, 2006).

⁶⁶ Reflecting on his work in Algeria, Bourdieu rejects classifications such as 'orientalism,' and 'ethnology.' He points out that his work in this period 'de-exoticed' the exotic. He also emphasizes the implications of his work among the Kabyles which forces the European researchers to discover in themselves and their societies the same "cognitive-practical principles of the masculine view of the world" (Bourdieu, 2008: 23). He outlines the methodological principles under which research on the 'other' should be undertaken: "It is possible and legitimate to speak of others only at the price of double historization, of both the object and the subject of knowledge. This means that the scientist must put himself in the frame in order to exclude the frame, *he has to work to know himself to be in a position to know the other*; all progress in knowledge of the object is a progress in knowledge of the subject of knowledge and vice versa" (Bourdieu, 2008: 23-4, emphasis added).

⁶⁷ The emergent field of 'victim policy' has been noted by Garland (2001: 121).

⁶⁸ Kingsley and Mark (2000) define 'experiential youth' as "any youth who are, or have been, involved in commercial sexual exploitation" (3). They declare that the term 'child or youth prostitute' cannot be used, as these youth are sexually exploited and reference to them must reflect this fact (2000: 77). I have not used the term 'experiential youth' as I believe it to be vague and euphemistic. Further, the use of such terms, which reflect the recent renaming of these youth as abuse victims and not offenders, has led to the justification of the incarceration of these youth. This is an unexpected outcome of this renaming – Kingsley and Mark declare that laws must protect sexually exploited children and youth, as opposed to

punishing them like criminals (2000: 77), which is the opposite of what the PCHIP Act does. My use of the term ‘youth prostitute’ is consistent with other articles, including Bittle (2002a) and (2002b), Busby et al. (2002) and Koshan (2003).

⁶⁹ Pamela George was an Aboriginal woman who was murdered near Regina, Saskatchewan on April 17, 1995. On the evening of the murder, she was working as a prostitute and was picked up by two white men who killed her. The men were sentenced to six and a half years, as twenty months had already been served prior to the sentencing.

⁷⁰ This phrase belongs to Martin (2002).

⁷¹ The PCHAD Act allows parents or guardians of drug-addicted youth to have their child confined for up to five days in a protective safe house for detoxification (Protection of Children Abusing Drugs Act, Alberta Government).

⁷² The DECA, proclaimed in force on November 1, 2006, allows for the apprehension of youth (under the age of 18) who are exposed to drug manufacturing or trafficking via their guardians (Drug-Endangered Children Act, Alberta Government). Apprehended children can be held for a maximum of two days. As such children would also fall under the jurisdiction of the Child, Youth and Family Enhancement Act, the need for such legislation is unclear (See Child, Youth and Family Enhancement Act, Sections 2 and 3).

⁷³ See Filler (2001) for an analysis of reactionary rhetoric which legitimized the passing of Megan’s Law in the United States during the mid 1990s.

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