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Citation:

Tracy Agyemang, Reconceptualizing Child Sexual Exploitation as a Bias Crime under the Protect Act, 12 Cardozo J.L. & Gender 937 (2006)

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Thu Feb 7 21:38:10 2019

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RECONCEPTUALIZING CHILD SEXUAL EXPLOITATION AS A BIAS CRIME UNDER THE PROTECT ACT

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At sunset in San Jose, Costa Rica [sic] the day for Lilliana is just beginning. She leaves to work at 6:00 pm, wearing a short skirt, a little blouse, high heels, and a tired glance. Tonight Lilliana will sell her body to any bidder, whoever pays by her services, she has different tariffs, if oral sex, she charges 5000 colonos, about 15 dollars, if complete sex, as she call [sic] it, 15,000 colonos, less than 50 dollars. She sees approach [sic] luxurious cars to her corner, full with men wearing neckties, foreigners with dollars who walk in search of her innocence. Lilliana must work because in her house mamma is waiting for her, a woman with other four [sic] children who depends on Lilliana's money to survive. She works from 6:00 pm to 2:00 am, after this she and her little friends play in the streets, make jokes and eat anything that keep [sic] hunger away, because she is just 11 years old.¹

I. INTRODUCTION

In September 2003, prosecutors charged Michael Lewis Clark, a Seattle man, for allegedly traveling to Cambodia to engage in sexual acts with two Cambodian boys, ages ten and thirteen.² Clark was first arrested in Cambodia in June 2003.³ Clark was extradited to the United States in early September 2003, where he was arrested.⁴ Investigators learned that Clark spent a significant amount of time in Phnom Penh over the past five years, sexually exploiting boys between the ages of ten and eighteen.⁵ It is estimated that Clark may have molested as many as fifty

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¹ Trafficking in Persons Report (June 2005), available at <http://www.state.gov/documents/organization/47255.pdf>.

² Mike Carter, *Indictment of State Man Part of Fight against Child Sex Trade*, SEATTLE TIMES, Sept. 25, 2003, at B4.

³ *Id.*

⁴ *Id.*

⁵ *Id.* In April 2003, Congress passed and President George W. Bush signed into law the Prosecuting Remedies and Tools against Exploitation of Children Today Act, Pub. L. No. 108-121, 117 Stat. 650 (codified as amended at 18 U.S.C. § 2423 (2000)) [hereinafter PROTECT Act].

children.⁶ According to the U.S. Attorney's Office in Seattle, Clark was the first person charged under the sex tourism provisions of the PROTECT Act.⁷ On June 25, 2004, Clark was sentenced to 97 months in jail.⁸

The second indictment under the PROTECT Act occurred when Federal prosecutors in Los Angeles, California charged eighty-five-year-old John Seljan with attempted travel with intent to engage in illicit sexual conduct with minors.⁹ Seljan was apparently preparing to travel to the Philippines to sexually exploit two young girls, ages nine and twelve. He was arrested at the Los Angeles International Airport after customs officials discovered his luggage filled with "pornographic materials—some apparently involving children—sex aids, 100 pounds of chocolate and candy and thousands of dollars in U.S. and Philippine currency."¹⁰ Officials first suspected Seljan after a routine inspection of overseas mail revealed correspondence from Seljan suggesting his intent to engage in sexual acts with the two girls.¹¹ Seljan is scheduled to be sentenced March 7, 2005. He faces a maximum sentence of 270 years in prison.¹²

The third indictment under the PROTECT Act occurred on November 20, 2003. Gary Evans Jackson, a fifty-six-year-old man from Bainbridge Island, Washington, allegedly met three boys in Phnom Penh, Cambodia, and paid them \$20 for sexual acts.¹³ All three boys were under the age of sixteen. Jackson allegedly took digital photos of his activities with the boys, some of which he loaded onto computers at a Phnom Penh internet café, which sparked an investigation of the café by a U.S. government agent, leading to Jackson's arrest.¹⁴

On February 27, 2004, following a year-long investigation by New York State Attorney General, Elliot Spitzer, the owner/operators of Big Apple Tours, Norman Barabash and Douglas Allen, were indicted by a grand jury for promoting prostitution.¹⁵ This criminal indictment follows a previously unprecedented civil case against Big Apple Oriental Tours initiated by Elliot Spitzer, leading to a temporary restraining order against Big Apple Tours in July 2003, which severely restricted the company from organizing or advertising any future tours and

⁶ *Id.*

⁷ *Id.*

⁸ U.S. Department of State, Embassy of the U.S., Japan, *United States Getting Tougher on Child Sex Tourism*, at <http://tokyo.usembassy.gov/e/tp-20041126-20.html> (last visited Mar. 10, 2005) [hereinafter *Getting Tougher on Tourism*].

⁹ *RP Bound American Charged with "Sex Tourism"*, PHILIPPINE STAR, Oct 17, 2003.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Getting Tougher on Tourism*, *supra* note 8.

¹³ Paul Shukovsky, *Man Indicted in Tourism in Sex Case*, SEATTLE POST-INTELLIGENCER, Nov. 21, 2003, at B2.

¹⁴ *Id.*

¹⁵ Equality Now, *Sex Tourism: Big Apple Oriental Operators Indicted for Promoting Prostitution*, WOMEN'S ACTION 12.2 UPDATE (Mar. 2004), available at http://www.equalitynow.org/english/actions/action_1202_en.html (last visited Mar. 10, 2005) [hereinafter WOMEN'S ACTION 12.2 UPDATE].

effectively disabled their website.¹⁶ The men could face up to seven years in prison.¹⁷

These accounts illustrate prototypical child sexual exploitation offenses—sexual crimes committed against children because of the child’s vulnerability. There are primary and interrelated forms of commercial exploitation of children that include prostitution, pornography, trafficking for sexual purposes, early marriages and child sex tourism.¹⁸ “Sexual exploitation of children in any form is a fundamental violation of children’s rights”.¹⁹ It “constitutes a form of coercion and violence against children, amount[ing] to forced labor and a contemporary form of slavery” and involves sexual abuse by an adult and payment to the child or procurer of facilitator.²⁰

Child prostitution, sex tourism, and trafficking for sexual purposes—the focus of this Note—are fueled by poverty, sexism, and prejudice. These factors, collectively known as “push principles,”²¹ combine to create a situation of unequal bargaining power and vulnerability. This vulnerability aids to facilitate procurers, facilitators and perpetrators in successful victimization of children. In developing countries or countries with economies in transition, conditions of poverty are aggravated for women and their children because of their traditionally lower economic status in these countries. This inequality can lead women to accompany traffickers and become prostitutes, and/or lead to forced prostitution of their children.²² “Poverty results in illiteracy, desperate need, and limited employment opportunities, leaving parents easy prey to procurement agents who scour the villages in search of young children.”²³ When examined in relation to the push principles, child exploitation exposes itself as a bias crime under the discriminatory selection model of bias crime law.

Exact figures of the number of tourists who travel for the purpose of engaging in sex with minors are not easily calculable. However, arrest/detention records of popular travel destinations in Southeast Asia and Latin America suggest

¹⁶ *Id.*

¹⁷ Nelson Alcantara, *Govt’s Take Tougher Stance On Illegal Sex Trade, Recognize Role Of Education*, ECPAT INTERNATIONAL TURBO NEWS (Apr. 6, 2004), available at http://www.ecpat.net/eng/ECPAT_news/turbonews1.htm (last visited Mar. 10, 2005).

¹⁸ ECPAT International, *Frequently Asked Questions about Child Sexual Exploitation: What is Commercial Sexual Exploitation of Children?*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005) [hereinafter *What is Commercial Sexual Exploitation of Children*].

¹⁹ *Id.*

²⁰ *Id.*

²¹ MAJ-LIS VOSS, *THE COMMERCIAL EXPLOITATION OF CHILDREN: AN OVERVIEW* 4 (1999). “Push principles” are the primary factors that driving children toward sexual exploitation especially prostitution. *Id.*

²² ECPAT International, *Frequently Asked Questions About Child Sexual Exploitation: What makes children vulnerable?*, at <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005).

²³ Margerette A. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 *FORDHAM INT’L L.J.* 1852, 1869 (1995).

a significant U.S presence.²⁴ As a result of more stringent U.S. laws criminalizing sex with minors, perpetrators travel to indulge in their insidious desires taking advantage of ineffective law enforcement in developing countries to escape prosecution.

The United States has enacted progressively more stringent laws over the past decade to combat the problem of child sexual exploitation. The Violent Crime Control Law Enforcement Act of 1994 which included a provision known as the Child Sexual Abuse Prevention Act was the beginning of laws that would create the criminal offense of traveling abroad for the purpose of engaging in sex with a minor.²⁵ The most recent legislation addressing the crime, the PROTECT Act, continued the trend of expanding the application of the law.²⁶

While the U.S.'s legislative efforts to acknowledge the need for, and expand the scope of, laws that prosecute those who victimize children are significant, the laws fail to address the actual nature of the crime. In order to afford more comprehensive legislation and greater deterrence the PROTECT Act must recognize that child sexual exploitation is a bias crime. By elevating child sexual exploitation to a bias crime the law will expressly recognize that child sexual exploitation is "a particularly visible and violent form of discrimination"²⁷ and would address the psychological trauma of the victims. The effect would be to charge perpetrators with greater moral blameworthiness because they have done greater harm thereby justifying enhanced punishment of the crime.

By elevating the offense to a crime motivated by class, and therefore a violation of basic human rights, Congress would be obliged to create a private right of action. Further, because bias crimes are usually more publicized than other crimes, perpetrators will be disgraced in the media thereby serving to deter potential aggressors who will inevitably seek to avoid public ridicule.

Part II of this Note discusses three specific forms of child sexual exploitation: 1) sex trafficking; 2) child prostitution; and 3) sex tourism; and addresses the history and scope of the practices in the two regions where the practices are most prevalent: Southeast Asia and Latin America. Part III defines sex trafficking, sex tourism and child prostitution and introduces the interrelation of these acts. Part IV examines the social and cultural factors—such as poverty, orphaning, intra-cultural discrimination, irresponsible sexual ideology, racism, sexism, and poor community law enforcement—that make children vulnerable to sexual exploitation. Part V examines the adequacy of legal responses to child sexual exploitation and the plausibility of integrating push principles to redefine the offense as a bias crime.

²⁴ Thomas Sancton, *Crimes Against Children: Preying on the Young all over the World, Boys and Girls are Abused in Vicious Sex Trade Now Abetted by Computer Networks*, TIME INT'L, Sept. 2, 1996, at 22.

²⁵ 18 U.S.C. § 2423(b) (2000).

²⁶ See discussion *infra* Part V.A.

²⁷ Allison Marston Danner, *Bias Crimes and Crimes against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 450 (2002).

Part VI examines the practical effects of reconceptualization by testing the proposition.

II. BACKGROUND: THE DEVELOPMENT OF SEX TRAFFICKING, CHILD PROSTITUTION, AND SEX TOURISM IN DEVELOPING NATIONS.

A. The origins of Child Sexual Exploitation

The rapid growth of the sex industry, the spread of sexual tourism of citizens of the so called developed world, combined with the often devastating effects of globalization, the politics of structural adjustment, the lack of basic social policies and economic opportunities, the force of a patriarchal culture, and lack of acknowledgement of and respect for the rights of children and youth, have created conditions in which the commercial sexual exploitation of children and youth have become a growing phenomenon.²⁸

In December 2000, Newsweek magazine reported that the international sex trade is the fastest growing criminal enterprise in the world, and is now surpassed only by the international gun and drug trades.²⁹ According to the United Nations Office on Drugs and Crime, the most common type of exploitation faced by trafficking victims is sexual exploitation.³⁰ A report by the United Nations in 1996 estimated that a total of one million children were sexually exploited in Asia alone.³¹ Trafficking in Southeast Asia accounts for approximately one-third of the world-wide trade in both women and children,³² with Southeast Asia accounting for the highest number of child prostitutes in the world.³³ Latin America, however, is considered the new desirable location of sex tourism and other forms of child sexual exploitation. Costa Rica, in particular, is represented on sex tourism websites as “Thailand in the backyard”³⁴ of the United States, and leads are given to places where one can get a prostituted child cheaply.

The trend reveals that representative perpetrators are usually from industrialized nations, such as the United States, Australia, Germany, the U.K.,

²⁸ Kathy J. Steinman, *Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists*, 13 HASTINGS WOMEN'S L.J. 53, 55-56.

²⁹ Helen Fisher, *The Sex Slave Trade: Biological Imperatives, Cultural Trends, and the Coming Empowerment of Women*, 13 HASTINGS WOMEN'S L.J. 21, 22 (2002) (quoting D. France, *Slavery's New Face*, NEWSWEEK, Dec. 18, 2000, at 60).

³⁰ Karen D. Breckenridge, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM. L. & POL'Y J. 405, 408 (2004).

³¹ *Id.* at 406.

³² *Id.* at 408. See also Jeremy Lovel, *One Million Children Trafficked Each Year* - UNICEF, REUTERS, Jul. 29, 2003, available at http://www.ecpat.net/eng/Ecpat_inter/IRC/newsdesk_articles.asp?SCID=1115.

³³ JEREMY SEABROOK, *TRAVELS IN THE SKIN TRADE: TOURISM AND THE SEX INDUSTRY* 150-51 (2d ed. 2001).

³⁴ ECPAT International, *Frequently Asked Questions About Child Sexual Exploitation: Child Sex Tourism*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005) [hereinafter *Child Sex Tourism*].

France and Japan,³⁵ preying on victims living in impoverished countries in Southeast Asia and Latin America. These "consumer countries"³⁶ are the home-base of numerous perpetrators who take advantage of the limited resources, corruption, and/or apathy of developing nations to victimize children. Because of their more affluent status, they are able to "seduce" these children with gifts and influence.

B. Southeast Asia

Various factors have contributed to the development and growth of child sex exploitation in Southeast Asia. Foreign investment, in the form of military installations and economic development, has been a significant factor in the growth of Southeast Asia's child-sex tourism.³⁷ In the late 1960s, during the Vietnam War, the sex industry grew rapidly. "Brothels and bars, often staffed with underage prostitutes, emerged in large numbers after thousands of U.S. servicemen were stationed in the Philippines, Taiwan, and Thailand."³⁸

The rapid development of prostitution in Thailand is often linked to military bases stationed in Thailand during the Indochina War.³⁹ The economic policy of the Thai government also served to bolster Thailand's sex industry.⁴⁰ In hopes that the spending of wealthy visitors would stimulate the economy, Thailand was influenced to supplement its exports with tourism.⁴¹ Most likely, the government was unaware that the economic incentives behind increased tourism would be accompanied by the sex industry.⁴² However, poverty resulting from the depletion of natural resources exacerbated by population pressures and rapid modernization caused growth in the number of prostitutes, including child prostitutes. As the economic opportunities in the countryside decreased, the demand for more prostitutes in the cities' sex industry increased, demonstrating a correlation as well as a causal connection.⁴³ As families were broken down due to the economic strain, many children were left homeless and vulnerable to sexual exploitation.⁴⁴

³⁵ *Id.*

³⁶ The term "consumer countries" is used to refer to foreign countries which have contributed to the growth of the child sex industry through sex tourism. See Charles Wallace, *Widening the War in Child Sex: Weak Local Enforcement has Helped South Asia's Vice Trade Flourish. Now the U.S. and Other Consumer Countries are Joining the Battle to Keep Men from Seeking Young Prostitutes Overseas*, L.A. TIMES, July 13, 1994, at A1.

³⁷ Breckenridge, *supra* note 30, at 409.

³⁸ *Id.*

³⁹ THANH-DAM TRUONG, *SEX MONEY & MORALITY: PROSTITUTION AND TOURISM IN SOUTHEAST ASIA* 99 (1990).

⁴⁰ Aaron Sachs, *The Last Commodity, Child Prostitution in the Developing World*, WORLD WATCH, July/Aug. 1994, at 24, 28.

⁴¹ Vickie F. Li, *Child Sex Tourism to Thailand: The Role of the United States as a Consumer Country*, 4 PAC. RIM L. & POL'Y J. 505, 505 (1995).

⁴² Sachs, *supra* note 40, at 28.

⁴³ See Li, *supra* note 41, at 509 ("These children then become easy victims to pimps and procurement agents.").

⁴⁴ *See Id.*

"Today, foreign investment in Southeast Asia, spurred by recent economic policies, attracts an increasing number of foreign tourists to the region."⁴⁵ No doubt as a result of Southeast Asia's economic growth in the past four decades, prostitution in the region has become a billion dollar-a-year industry. "As of 1998, an estimated two to fourteen percent of the . . . gross domestic product of Indonesia, Malaysia, the Philippines and Thailand is attributable to sex tourism."⁴⁶ As in the case of Thailand, while these countries may desire a strict policy against sex tourism, the practice has become a vital part of their economies. A city councilman in Angeles, Philippines stated, "[w]e hate the fact that our survival depends on these young girls, but cannot do anything. It's an economic reality."⁴⁷

C. Latin America

During the 1980s, Central America went through economic and socio-political crises.⁴⁸ "The origins of the crisis can be found in both the internal and external factors. Conflict among political, ideological and economic interests hastened the fragility of . . . multiethnic societies."⁴⁹ As a result, many countries in the region found themselves in the midst of bloody civil wars and social unrest.⁵⁰ The turmoil caused somewhat of a mass exodus from Central America and is described as a "forced migration with strong political overtones."⁵¹ As the exodus continued through the 1990s, the reason for the trend shifted. The motivation was no longer war and strife, but the spread of poverty and violence.⁵² Families were forced to explore and create new strategies for survival because of the social and economic conditions. Sadly, these new strategies included the exploitation of their own children.

The increased enforcement of child exploitation laws in Asia triggered the increase of sex tourists' incursion into a new arena.⁵³ Moreover, the passing of Megan's Laws⁵⁴ in the U.S. has forced persons desiring sex with children to seek alternative regions for their illegal acts.⁵⁵ Central and South America have become the most recent "playground" for sexual predators seeking children as their prey.⁵⁶

⁴⁵ Breckenridge, *supra* note 32, at 409-410.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Steinman, *supra* note 28, at 59.

⁴⁹ *Id.* (quoting Ana de Lara Ruiz, *Commercial Sexual Exploitation of children from a Central American Perspective*, available at <http://www.casa-alianza.org/EN/human-rights/sexual-exploit/docs/9805audiencia.shtml>).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Steinman, *supra* note 28, at 53.

⁵⁴ Megan's Laws require convicted sex offenders to register as an offender with their local police station. Rocio Rodriguez Garcia, *The Sexual Exploitation of Minors in Latin America and the Caribbean*, available at <http://www.casa-alianza.org/EN/human-rights/sexual-exploit/docs/991021.shtml>.

⁵⁵ Steinman, *supra* note 28, at 53.

⁵⁶ *Id.*

The proximity of the United States to Latin America is an undoubted contributor to the popularity of Latin America as a destination of choice for exploiters, “[a]n average of 750 direct flights leave from Miami International Airport for destinations throughout [Latin America].”⁵⁷

III. WHAT ARE SEX TRAFFICKING, SEX TOURISM AND CHILD PROSTITUTION AND HOW ARE THEY INTERRELATED?

Four parties are typically involved in the sexual exploitation of children: 1) perpetrators; 2) procurers; 3) facilitators; and 4) the victim or child.⁵⁸ The perpetrator, or “john,” is usually male,⁵⁹ most likely in this context from either Europe or North America;⁶⁰ however women are also known to be involved.⁶¹ Sometimes, male and female offenders travel as a couple to avoid discovery.⁶² While it is true “[t]here is no single profile of a child sex tourist,”⁶³ and “[c]hild sex tourists come from all areas of the world,”⁶⁴ an in depth examination reveals some common characteristics of offenders. Research reveals that consumer countries are mostly industrialized nations with a majority of white-male citizens.⁶⁵ Although these perpetrators “span all social classes and occupation” the majority are white and male, “most likely from Europe or North America.”⁶⁶

Procurers or pimps are the individuals who extend the services, capital, and resources that make sexual trafficking of children both a feasible and lucrative industry.⁶⁷ Procurers exploit the bleak economic condition and poverty of many of the children and their families by persuading the children to enter into their employ.⁶⁸ Some of the procurers are former child prostitutes, who “climbed the ranks” of the industry.⁶⁹

⁵⁷ *Id.* at 60.

⁵⁸ Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP L. REV. 397, 401 (1996).

⁵⁹ Jonathan Todres, *Prosecuting Sex Tour Operators in U. S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 2-3 (1999) (quoting WTO Statement on the Prevention of Organized Sex Tourism, General Assembly of the World Tourism Congress, 11th Sess., G.A. Res. A/RES/338(XI) (Oct. 17, 1995)).

⁶⁰ ECPAT, *U.S. Law against Child Sexual Abuse*, available at <http://www.dreamwater.net/ecpatusa/crimebill.html>.

⁶¹ *Captive Daughters, About Child Sex Tourism*, <http://www.captivedaughters.org/ByandAboutCD/CDdocuments/factsheet3.htm> (last visited Mar. 10, 2005) [hereinafter *About Child Sex Tourism*].

⁶² *Id.*

⁶³ Breckenridge, *supra* note 32, at 411.

⁶⁴ *Id.*

⁶⁵ *Id.* “[R]eform advocates suggest that a large percentage [of sex tourists] are from the United States and Australia.” *Id.*

⁶⁶ Steinman, *supra* note 28, at 60.

⁶⁷ Berkman, *supra* note 58, at 400.

⁶⁸ *Id.*

⁶⁹ Steinman, *supra* note 28, at 62. Maritza, a procurer and facilitator for Tony “Max” Castillo, a wealthy brothel owner in Costa Rica, detailed the Castillo operation and her role within the organization to undercover ABC reporters:

Social and cultural dynamics in both the host and consumer countries sustain and perpetuate child prostitution and sex tourism. In host countries, conditions of poverty resulting from economic crisis and sexism entrenched in intra-cultural morale create a population of children left vulnerable to sexual exploitation. In consumer countries prejudice and apathy enable perpetrators to take advantage of this vulnerable population of children.

A. Child Prostitution

Sex tourism, child trafficking, and sexual slavery are all linked to the longstanding issue of child prostitution. Even though the international community has outlawed this form of prostitution since the early 20th century,⁷⁰ the phenomenon is still spreading. Child prostitution reached the peak of its popularity in the late 50's when foreigners, mostly from rich industrialized countries, addicted to sexual intercourse with young boys and girls under the age of fourteen, discovered a "market" in Asia where law enforcement was less stringent and costs of sexual services were cheap. In Sri Lanka and Thailand, for instance, children could be bought for a few cents for the night, the week, or the whole length of the business/pleasure trip.⁷¹

In delineating what actually constitutes child prostitution, the definition of the word "child" presents a complex issue.⁷² Article 1 of the United Nations Convention on the Rights of the Child, refers to "child" as a person less than 18 years of age.⁷³ However, if national laws recognize a younger age of majority, the definition does not apply.⁷⁴ The problem is further aggravated by the fact that many countries fail to register the births of children or to provide documents of registration. Where no documentation of registration is available to reflect the

A notorious pimp, Tony "Max" Castillo . . . ran a lucrative brothel with teenage girls for 18 years . . . Castillo and his American wife, Sharon, built the thriving business in one of their San Jose homes. They flew an American flag above the property as a sign post for clients . . .

Maritza says she was recruited by Sharon Castillo to work in the brothel when she was a teenager. She was lured by the promise of good money and protection. The girls lived in the house, where tyrannical Tony would lord over them, inspect their bodies and "train" them to pleasure customers . . .

Maritza worked as a prostitute for Castillo for 10 years. When Tony was incarcerated and Sharon became a fugitive, Maritza became the business' principal agent. In a way, she had climbed the ranks of the business. Now, she was the one doing the recruiting, finding young girls to bring into the life. "The Castillos," she said, "had been very good to her."

Steinman, *supra* note 28, at 62.

⁷⁰ In 1924, the Fifth Assembly of the League of Nation adopted the five-point declaration of children's rights, known as the Declaration of Geneva.

⁷¹ Karene Jullien, *The Recent International Efforts To End Commercial Sexual Exploitation of Children*, DEN. J. INT. L. & POL'Y 579 (Fall 2003).

⁷² *End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes International, Frequently Asked Questions About Child Sexual Exploitation: Who is a Child?*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005) [hereinafter *Who is a Child?*].

⁷³ *Id.*

⁷⁴ *Id.*

actual age of a child, fake identification cards can “easily reclassify a child as an adult.”⁷⁵

Where the reclassification is ineffective, perpetrators may chose early marriage as a means to gain sexual access to young girls.⁷⁶ Early marriage is also referred to as forced marriage⁷⁷ and is arguably another form of child prostitution. Where poverty is acute, as with other forms of child sexual exploitation, early marriage is a form of child prostitution that becomes a perceived necessity.⁷⁸ It is viewed as a strategy for economic survival. For example in the Egypt, young girls are married off to much older men from the oil rich Middle Eastern countries via “brokers.”⁷⁹ Commonly shortly after puberty, female adolescents may be forced into this union.⁸⁰ Others voluntarily enter a union but are not intellectually or socially mature enough to make an informed decision.⁸¹ In other cases, the child does not have the right to choose and the consent is made by a third party on the child’s behalf.⁸²

The intention to engage in child prostitution is most apparent when the marriage is not intended to be a permanent union. In Iran, short term marriage contracts known as a Siquehs, make it possible to enter into “temporary marriages.”⁸³ This type of marriage further facilitates the opportunity to circumvent the illegal act of child prostitution.⁸⁴

Even more insidious methods used to lure young girls into prostitution abroad are promises of marriage or false marriages. Young girls may be lured to a foreign country with promises of marriage to wealthy men, only to find their aspirations dashed when they find themselves sold to a brothel owner.⁸⁵

B. Sex Trafficking

Trafficking in persons encompasses both forced labor and forced prostitution or sexual services.⁸⁶ Trafficking is defined as all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international borders; through force, coercion, fraud, or deception; to

⁷⁵ *Id.*

⁷⁶ *End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes International, Frequently Asked Questions About Child Sexual Exploitation: Early Marriage*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005) [hereinafter *Early Marriage*].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Who is a Child?*, *supra* note 72.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Frame Work*, 16 BERKELEY WOMEN’S L.J. 29 (2001). Although trafficking encompasses both forced labored labor as well, this Note focus on the sexual aspect of trafficking and sex tourism.

place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution, or sexual services.⁸⁷ The United States moved beyond this definition when a legal definition of trafficking in persons was created under the Victims of Trafficking and Violence Protection Act of 2000. The Act sets forth the crime of sex trafficking as “trafficking in which a commercial sex act⁸⁸ is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age . . .”⁸⁹ A similar definition appears in the PROTECT Act.⁹⁰

At times, to execute the deception, traffickers often use sham employment contracts and false visas to mislead the families of young girls about the type of work they will undertake.⁹¹ Some traffickers will even marry their victims as a ruse of recruitment⁹² or to protect themselves and their victims from prosecution for illegal immigration and illegal sex.⁹³

In order to control trafficked girls, traffickers often subject their victims to debt bondage, a slavery-like practice banned under customary international law, and defined as:

[T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.⁹⁴

⁸⁷ *Id.*

⁸⁸ TVPA, Pub. L. No. 106-386, § 103(3), 114 Stat. at 1469 (defining a commercial sex act as “any sex act on account of which anything of value is given to or received by any person”).

⁸⁹ TVPA, Pub. L. No. 106-386, § 103(8), 114 Stat. at 1470. The statute goes on to define the forced labor provision of the law. *See also* TVPA, Pub. L. No. 106-386, §103(9), 114 Stat. at 1470 (defining “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”).

⁹⁰ *Id.*

⁹¹ Women from Central and Eastern European countries have found themselves forced into prostitution abroad, despite their having signed contracts for waitressing, child care, or domestic labor. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, U.N. ESCOR, Commission on Human Rights, 53d Sess., Provisional Agenda Item 9(a), at 19, U.N. Doc. E/CN.4/1997/47 (1997) [hereinafter *Report of the Special Rapporteur on Violence Against Women*]. This Note uses the term “forced labor/slavery-like practices” to connote the wide range of coercive working and living conditions to which women can be subjected, including, among other practices, forced domestic labor, factory labor, forced marriages, and false adoptions. *Id.*

⁹² Traffickers will use marriage offers to lure girls away from their homes and will sometimes even participate in an actual wedding ceremony. Human Rights Watch recounts the exploits of a trafficker who had trafficked nine girls by marrying them. Upon bringing each of them to Bombay, he would abandon the girl in a crowd. The trafficker’s accomplice would approach the girl and offer to help her find her husband and, instead, lead her to a brothel. Human Rights Watch, *Global Report On Women’s Human Rights*, at 232-33 (1995) [hereinafter *Global Report*].

⁹³ For example, Bengali traffickers marry their victims in order to protect themselves from being prosecuted under Islamic hudud laws in their trafficking of women to Pakistan. In spite of these efforts, Special Rapporteur Radhika Coomaraswamy reports, thousands of Bangladeshi women and children have been detained in Pakistan under these laws, charged with illegal entry and for having “illegitimate sex.” *Report of the Special Rapporteur on Violence Against Women, supra* note 91, at 21.

⁹⁴ *Global Report, supra* note 92, at 200-01 (quoting Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sec. I, Art. I (1957)).

The debt may consist of the amount paid to the family or the trafficker, transport costs, protection money paid to police and other officials, and advances for the young victim's living expenses.⁹⁵ Moreover, the amount paid to the girl's family or to the trafficker may be doubled to include interest.⁹⁶ In order to prevent them from escaping before they pay their debts in full, traffickers often forcibly detain the girls in apartments, factories, homes, or brothels.⁹⁷ In addition to the pressure of debt payment, the girls may feel compelled to support their families by sending them whatever earnings they do receive.⁹⁸ In situations in which the family has been complicit in her sale, her male relatives sometimes make periodic trips to the brothel to collect the girl's earnings.⁹⁹ Typically unaware of how much the brothel owner paid for them, girls trafficked into prostitution may be kept in debt bondage for a longer amount of time than necessary to reimburse the brothel owner.¹⁰⁰

Trafficking victims who manage to escape from debt bondage may be subject to deportation, a process which threatens to be as corrupt and abusive as other aspects of the victims' ordeal.¹⁰¹ For instance, in Thailand, the deportation of Burmese women often involves further extortion and sexual abuse by Thai officials exploiting their fear of Burmese authorities.¹⁰² For Burmese girls trafficked into Thailand, return to Burma often results in criminal liability for having left the country illegally or having engaged in prostitution.¹⁰³ A victim might therefore be

⁹⁵ See Asia Watch And The Women's Rights Project, *A Modern Form Of Slavery: Trafficking Of Burmese Women And Girls Into Brothels In Thailand*, at 45-46 (1993) [hereinafter *Asia Watch Thailand Report*].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Global Report*, *supra* note 92, at 248.

⁹⁹ *Id.* at 247-48 (NST).

¹⁰⁰ See Human Rights Watch/Asia, *Rape For Profit: Trafficking Of Nepali Girls And Women To India's Brothels* 17 (1995) [hereinafter *Asia Watch India Report*] (recounting the case of "Maya" who never knew how much her pimp paid for her and who knew a fellow brothel inmate who had worked for thirteen years without ever managing to pay off her debt); see also *Asia Watch Thailand Report*, *supra* note 95, at 54-59; *Global Report*, *supra* note 92, at 239.

¹⁰¹ See *Asia Watch Thailand Report*, *supra* note 95.

¹⁰² See *Id.* at 6. The report recounts the situation of two girls who had returned to prostitution in Thailand after safely returning to their native villages. One believed that, since she had lost her virginity anyway, she might as well earn money for her family. The other girl felt that the shame of being known in her village as a former prostitute was too great, and went back into prostitution in order to help her family. See *Id.* at 47. The report notes that these cases are instructive

because they indicate the impact of brothels on the girls' self-image. Both [women] decided that since they had lost their virginity anyway, there was no point in staying at home; they might as well return to Thailand and try to make more money. Their return to prostitution was voluntary only in the sense that they saw their first experience as having rendered them unfit for anything else.

See *Id.* at 74; see also *Asia Watch India Report*, *supra* note 100, at 50-51. The report recounts the description provided by a female police officer in Bombay of how most Nepalese women she encountered in brothel raids did not wish to return to Nepal. The reasons they gave were that they felt violated and "spoiled" and therefore social pariahs; they believed they would never be free to leave for reasons of crushing "debt" to their madams or because they feared violent reprisals; they had nothing to return to; they feared the contempt and rejection of family members; they had no resources, either to make a new life for themselves or to placate their families.

¹⁰³ See *Asia Watch Thailand Report*, *supra* note 95, at 7.

coerced into having sex with a Thai official in exchange for her safe return to Bangkok, or she might be lured into more brothel work by the offers of numerous brothel agents at the border.¹⁰⁴

Many young girls in developing countries are fervent in their desire to immigrate to industrialized countries to build better lives for themselves and their future children.¹⁰⁵ However, these countries have restrictions on immigration, creating “a situation that enables profiteers to trap victims by offering illegal avenues of entry.”¹⁰⁶ A common trafficking scenario involves a victim who is falsely promised a legitimate job then forced or coerced into performing sex acts.¹⁰⁷

“Interest driven by poverty and consumerism . . . distort[] society’s perception of the sexual exploitation of children. As a financially rewarding vocation, prostitution represents an opportunity for social mobility. One daughter’s earnings make it possible for an entire family to survive.”¹⁰⁸ In addition to economic factors, the low social and political status of women also creates a prime target for traffickers. Fifty-percent of persons trafficked into the United States, for instance, are trafficked for sexual exploitation.¹⁰⁹ Young girls are the primary demographic trafficked into the sex industry in the United States which includes, in addition to other forms of sexual exploitation, stripping and prostitution.¹¹⁰

C. Sex Tourism

While, tourism is not the cause of child exploitation, it does provide easy access to vulnerable children. International tourism provides an answer to economic growth and development to many governments around the world.¹¹¹ Children and young people are encouraged to migrate to tourist areas as tourism begins to overtake traditional sources of employment.¹¹² These young people seek employment in tourist areas in the hope that they can earn an income for themselves and their families:¹¹³ “Tourism also brings consumerism to many parts of the world previously denied access to luxury commodities and services. The

¹⁰⁴ *See Id.*

¹⁰⁵ Fisher, *supra* note 29, at 22.

¹⁰⁶ *Id.*

¹⁰⁷ Hyland, *supra* note 86, at 33-34. *See generally* Global Survival Network, *Crime & Servitude: An Expose of the Traffic in Women for Prostitution from Newly Independent States* 14 (1997) (describing the Global Survival Network’s undercover efforts to expose false employment agencies that offer jobs through newspaper ads but then force women into prostitution).

¹⁰⁸ Li, *supra* note 41, at 511.

¹⁰⁹ International People Trafficking: Hearings Before the Near Eastern and South-Asian Affairs Sub-comm. of the Senate Foreign Relations Comm., 106th Cong. (Feb. 22, 2000), *available at* LEXIS, Federal News Service.

¹¹⁰ *Id.*

¹¹¹ Captive Daughters, *Recommendations for the Elimination of Trafficking to & Within the United States*, *available at* <http://www.captivedaughters.org/cdrecommendations.htm> (last visited Mar. 10, 2005) [hereinafter Captive Daughters Recommendations].

¹¹² *Id.*

¹¹³ *Id.*

lure of this easy money has caused many young people . . . to trade their bodies in exchange for T-shirts, walkmans, bikes and even air tickets out of the country.”¹¹⁴

To facilitate sex tourism, sex tour travel agents publish brochures and guides that specifically cater to sex tourists.¹¹⁵ The brochures emphasize the youth of prostitutes at these advertised destinations.¹¹⁶ “Sex tour operators in the U.S. often market their access to child prostitutes using euphemistic language such as ‘fresh young ladies’ and ‘beautiful, unspoiled girls.’”¹¹⁷ In 1999, there were over twenty-five businesses in the United States that offered and arranged sex tours.¹¹⁸ A tour agency will usually advertise a trip to an Asian country, which may include transportation, airfare and hotel room. In addition each sex tourist has the opportunity to “select your companion upon arrival” with the added choice to “select a different companion at any time during [the] stay.”¹¹⁹ “One U.S.-based tour operator promises customers that they ‘will never sleep alone on this tour,’ and that they could potentially have sex with a different girl every day, ‘two if you can handle it.’”¹²⁰

Tour agencies facilitate their trips in similar ways. The sex tourist is picked up at the airport by car or bus to take him to the destination city where he is met by a representative of the agency.¹²¹ This representative accompanies him to numerous bars in the foreign city.¹²² The sex tourist is able to select a girl from among those in the bars and the tour agency representative negotiates the cost of prostitution with her pimp.¹²³

Although sex tour operators encourage and enable a group of customers who might not have the impudence on their own to seek out women and children for sexual exploitation, a number of abusers are independent travelers, on vacation or traveling for business purposes.¹²⁴ It is believed that, every year, over one million children enter the world’s sex trade.¹²⁵ Victims are both boys and girls, but most

¹¹⁴ *About Child Sex Tourism*, *supra* note 61.

¹¹⁵ *Child Sex Tourism*, *supra* note 34.

¹¹⁶ *Id.*

¹¹⁷ WOMEN’S ACTION 12.2 UPDATE, *supra* note 15.

¹¹⁸ *Child Sex Tourism*, *supra* note 34.

Small-scale travel operators, very often one-man-shows, arrange sex travels and indicate resorts where prostitution is available. They arrange . . . 24 hr companion or with hotels known to tolerate or actively promote prostitution. Customers can choose child escorts from catalogue pictures. Apart from that, the broader tourist industry at least provides the vehicle for movements of sex tourists. Travel arrangements of the vast majority of sex tourists are organised [sic] by reputable travel agents and package tour operators, sex tourists are all transported by ‘ordinary’ airlines. Sex tourism by implication is big business for large corporations as well as small travel companies.

Id.

¹¹⁹ WOMEN’S ACTION 12.2 UPDATE, *supra* note 15.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ WOMEN’S ACTION 12.2 UPDATE, *supra* note 15.

¹²⁵ *Id.*

are girls between ten and eighteen years of age.¹²⁶ However, researchers believe that the age of victims is decreasing, “and sexual exploitation of children as young as six has been documented.”¹²⁷

IV. WHAT MAKES CHILDREN VULNERABLE?

The substandard socioeconomic status of women and children worldwide creates a class particularly vulnerable to sexual exploitation. Factors such as poverty, illiteracy, economic crises, and regional and civil conflicts all have a disproportionate effect on women and children and, combined with low social status, make them more vulnerable to sexual exploitation.¹²⁸

A. Poverty

The primary reason why children become vulnerable to child sexual exploitation is poverty.¹²⁹ Most major cities in the United States, as well as Western Europe and Japan, have trafficking victims from China, Korea, Mexico, Russia, Jamaica, Haiti, India, and Nepal.¹³⁰ Young girls from impoverished families in Bangladesh, Nepal, and Burma might agree to accompany the traffickers—or are sometimes sold by their families to traffickers—with the belief that there will be opportunity to earn money for the family through employment as maids, cooks, or in other jobs requiring few skills.¹³¹

What these young girls and their families do not realize, however, is that the young daughter could be subject to forced prostitution, domestic or sweatshop labor under slavery-like conditions, or forced marriages.

B. Orphaning

Another contributing factor to a child’s vulnerability is armed conflict, which separates children from their families and sometimes leaves these children as orphans.¹³² Children left unaccompanied are especially vulnerable, and at risk for

¹²⁶ *Id.*

¹²⁷ *Who is a Child?*, *supra* note 72.

¹²⁸ Amy O’Neill Richard, *International Trafficking in Women to the United States, Contemporary Manifestation of Slavery and Organized Crime 1* (Nov. 1999), available at <http://www.cia.gov/csi/monograph/women/trafficking.pdf> (calling trafficking in persons a “modern day form of slavery”).

¹²⁹ *What makes children vulnerable?*, *supra* note 22.

¹³⁰ *Id.*

¹³¹ See *Asia Watch Thailand Report*, *supra* note 95 at 46. The report notes, however, that four out of the thirty women and girls (who had set out on their own) interviewed by Human Rights Watch knew when they left home that they would be involved in some form of prostitution. Human Rights Watch recounts a “pathbreaking study” of Burmese women in Thai brothels written by Hnin Hnin Pyne, who classified different means of entry into prostitution: voluntary, bonded, and involuntary: Voluntary indicates that the woman, prostitute-to-be, approaches the owner/manager of a sex establishment herself; bonded implies the involvement of parents or guardians, who receive money from an agent or owner for giving away their daughter; and involuntary conveys the use of deception and coercion of the women by an agent or owner/manager. *Id.*

¹³² *Id.*

sexual abuse and exploitation. Street children, found in most cities in Central and South America, often prostitute themselves to survive. Also, discrimination based on ethnicity sometimes results in denial of full citizenship. This limits the child's access to education and fair employment leaving them vulnerable to sexual exploitation.¹³³

C. Irresponsible Sexual Ideology

The culture of the host country is an influential factor in the heightened demand for prostituted children. The interest in child sex has been perpetuated in part by a "mythicization of virginity"¹³⁴ and the general acceptance of prostitution in the host country's culture. For example, a cultural belief that sexual intercourse with a virgin will bring longevity or increased sexual energy or the "mythicization of virginity . . . revolves around notions of a child's youth and purity . . ." ¹³⁵ This notion has led to a misunderstanding about the transmission of AIDS which rests on the idea that there is less danger of contracting HIV from sex with a child than sex with an adult,¹³⁶ a notion that is dangerously wrong.¹³⁷ Children are not only at greater risk of being infected with HIV from sexual contact with the virus but are more likely to unknowingly infect others. Most sexually exploited children not only lack information about HIV/AIDS and access to health care, but also the ability to take, or have their exploiters take, precautions to prevent the spread of HIV.¹³⁸ The fact that child prostitutes are more likely to carry HIV is to be expected considering that studies indicate child prostitutes serve between two and thirty clients per week, which can be extrapolated to be between one hundred and fifteen hundred clients per year.¹³⁹

An additional factor is the intra-cultural sexism of host countries manifested by accepted promiscuity for men. Where promiscuity among men is culturally acceptable, prostitution is generally accepted, which becomes an influential factor that heightens the demand for prostituted children.¹⁴⁰ Men around the world

¹³³ In Kosovo, traffickers kidnapped girls from refugee camps and sold them into prostitution in Italy. Carol J. Williams, *Traders in People Prey on Refugees Stuck in Albania*, L.A. TIMES, May 24, 1999, available at 1999 WL 2161518 (reporting that young women are disappearing after being visited by men with rifles). In 2004, the Tsumani in Asia caused the incidence of trafficking to drastically increase. Free the Slaves, <http://www.freetheslaves.net>.

¹³⁴ Sachs, *supra* note 42, at 24, 27.

¹³⁵ Li, *supra* note 41, at 510.

¹³⁶ *Id.*

¹³⁷ *Id.*

Experts believe that child prostitutes are actually more likely to carry the HIV virus than adults . . . In fact children are more susceptible to the HIV infection due to their underdeveloped bodies. During sexual intercourse children's tissues are easily torn which dramatically increases the likelihood of HIV passing into their blood stream.

Id.

¹³⁸ Li, *supra* note 41, at 510.

¹³⁹ *Id.*

¹⁴⁰ See Li, *supra* note 41, at 510.

regularly frequent local brothels.¹⁴¹ As the sex industry in these local areas flourish, men in consumer countries gain a travel destination; the brothels become the destination of choice for sex tourists.¹⁴² Male clients, especially those from consumer nations, who presumably have more money to spend toward the realization of sexual fantasies, keep the trafficking system functioning and lucrative. In an economically impoverished country, prostitution becomes “favorably regarded as a profitable form of employment.”¹⁴³

While this despicable practice is admonished by the laws and popular culture of the consumer nations, the sexually promiscuous behaviors of men are condoned as a “natural taste for sexual variety,”¹⁴⁴ while the exploitation of women is excused because of a supposed “genetic[] predispos[ition]”¹⁴⁵ of women to succumb to the exploitation.

D. Poor Community Support and Ineffective Law Enforcement

For women who manage to escape forced prostitution, the social stigma attached to their former prostitution activities threatens to create a vicious cycle in which these women believe they have no alternative but to return to prostitution. After leaving the brothel, these women may be sick and unable to work.¹⁴⁶ Shunned by their families and native communities, these women may resign themselves to a life of prostitution as their only available means of survival.¹⁴⁷ To the extent that these women feel they can return to their native villages, they often do so not as victims returning home with hopes of establishing a new life, but as recruiters in search of girls, either to take their places and thus secure their own release from bondage, or to establish their own brothels.¹⁴⁸ Being particularly well-positioned to identify potential trafficking victims due to their familiarity with the local girls and families, these women—themselves victims of trafficking and forced prostitution—ironically, may be in the best position to perpetuate these practices.¹⁴⁹ A lack of effective legal mechanisms that either encourage victims to report abuses and/or provide the remedies and support that they need to rebuild their lives, fuels this cycle and threatens the re-victimization of these women.¹⁵⁰

In cultures where children are taught that the foremost value is deference and fidelity, “children remain in prostitution out of loyalty and obedience, in spite of

¹⁴¹ Fisher, *supra* note 29.

¹⁴² *Id.*

¹⁴³ Li, *supra* note 41, at 510.

¹⁴⁴ Fisher, *supra* note 29.

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* note 102 and accompanying text.

¹⁴⁷ Some women who have managed to earn enough money may be accepted into their communities and may even marry. However, diseases contracted in the brothels often leave the women sterile, and the marriages rarely last longer than the money the women bring into the marriages. See *Global Report*, *supra* note 92, at 231 & n.68.

¹⁴⁸ See *id.* at 231, 239.

¹⁴⁹ *Asia Watch Thailand Report*, *supra* note 95.

¹⁵⁰ *Id.*

being sold by their families . . . [f]amilial obligation often overwhelms any negative feelings about working in prostitution.”¹⁵¹ These emotional ties hinder and complicate possible prosecution of the parents for the sale of their children.

E. Intra-cultural Discrimination

Discrimination related to differences in ethnicity is also a catalyst for child sexual exploitation. For instance, a report by Save the Children Canada, revealed that while the aboriginal youth make up only 3 to 5% of Canada’s general population, they account for the majority of workers in the sex industry. The report attributes the numerical disparity to racism, poverty, and limited access to education within the aboriginal culture.¹⁵² Another example of this disparity is illustrated by the disproportionate number of children in Northern Thailand, known as “hilltribe” children identified as one of the groups most at risk for entering the sex trade.¹⁵³ Their unique vulnerability is thought to result primarily from the Thai government’s denial of citizenship to these children, limiting their access to education and fair employment.¹⁵⁴

Perpetrators from consumer countries use sexist and racist ideology to delude themselves into believing that their practices are justified.¹⁵⁵ For instance, they use the image of the sexually-uninhibited/sexually-liberated or “hot-Latin” stereotype of Latin Americans to excuse their behavior.¹⁵⁶ Their ignorance about cultural norms and morals also aid in rationalizing their behavior. These perpetrators assuage their guilt by maintaining false perceptions of women and children in developing nations. For example, the idea that there is no stigma attached to prostitution because “girls in these countries are portrayed as grown up and sexually experienced at 14”¹⁵⁷ Sex tourists have racist attitudes which cause them to be blind to the harm they cause.¹⁵⁸

Many of these perpetrators “hold strong views about the inferiority of people other than their own [and] have no scruples about exploiting other persons as long as they consider them to be inferior.”¹⁵⁹ These strong racist attitudes serve as blinders toward the harm that is actually caused and the social stigma attached to sexual promiscuity in these developing nations.¹⁶⁰ In fact, the social stigma these girls will carry is usually even harsher than these men care to fathom because of the stronger religiosity that is often found in developing nations. Further, perpetrators rely on the availability of children in these developing countries. Indicative of this

¹⁵¹ Li, *supra* note 41, at 511.

¹⁵² *What makes children vulnerable?*, *supra* note 22.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Steinman, *supra* note 28, at 61.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 62.

¹⁶⁰ Steinman, *supra* note 28, at 62.

is the “fact that most organized international child abuse occurs in developing countries . . . child sex offenders exploit the economic hardships that many families endure.”¹⁶¹

V. DETERRENCE AND PREVENTION

A. Current Legal Responses are Inadequate in Deterring Child Sexual Exploitation

In enforcing laws against trafficking, a common response to dealing with persons smuggled into the country is deportation; however, trafficking victims require protection from immediate deportation.¹⁶² Repatriation can have the effect of further traumatizing a child who has been trafficked.¹⁶³ These children are often expressly treated as criminals. “They are considered in breach of the law in those countries that criminalize prostitution and, they are considered to be in breach of immigration laws for having entered the country illegally.”¹⁶⁴ Even where they are not expressly treated as criminals, children may be subjected to “rehabilitation” which in many countries is effectual imprisonment.¹⁶⁵ Further, once these children return to their countries of origin they are punished again by the laws of their own countries for immigrating illegally.¹⁶⁶

Laws against sex tourism have not had greater success than their trafficking counterparts. Beginning a decade ago, countries such as Australia and the United States passed laws in an attempt to combat child-sex tourism. Over the past decade, the laws of both countries have had limited success.¹⁶⁷ Actual prosecutions have revealed stunning trends in the sex tourism industry. Dollar figures ranging in the billions¹⁶⁸ reflect the victimization of hundreds of thousands of children.¹⁶⁹ Australia confronts a similar reality with its own citizens who constitute a large majority of sex tourists.

It is paramount to combat the problem in the sphere of deterrence. The weakest proposed strategy is to re-conceptualize child sexual exploitation as “degrading treatment.” This conceptualization would serve to further deter

¹⁶¹ *About Child Sex Tourism*, *supra* note 61.

¹⁶² Breckenridge, *supra* note 32, at 405.

¹⁶³ ECPAT International, *Frequently Asked Questions About Child Sexual Exploitation: Trafficking in Children*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 2, 2006).

¹⁶⁴ *Id.*

¹⁶⁵ ECPAT International, *Frequently Asked Questions About Child Sexual Exploitation: What Are The Impacts On Children?*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 2, 2006)[hereinafter *What Are The Impacts On Children?*].

¹⁶⁶ Susan Tiefenbrun, *Women as Workers: Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161, 166 (2002).

¹⁶⁷ Breckenridge, *supra* note 32, at 405.

¹⁶⁸ Some reports indicate that Thai prostitution alone generates \$1.8 to \$2.2 billion per year. Kim Gooi, *Thailand's Sex Industry Booms with the Economy*, DEUTSCHE PRESSE-AGENTUR, Dec. 18, 1996. Other persons estimate the number to be as high as \$20 billion per year. *Asian Children Facing Threat of Trafficking and Sexual Abuse*, AGENCE FR.-PRESSE, Apr. 18, 1997.

¹⁶⁹ Breckenridge, *supra* note 32, at 405. See also Charles P. Wallace, *Widening the War on Child Sex*, L.A. TIMES, July 13, 1994, at A1.

perpetrators by making their acts violations of Article 7 of the International Rights Convention on Civil and Political Rights, Articles 34 and 35 of the United States Convention of the Rights of the Child, Article 3 of the European Convention on Human Rights, and Article 5 of the American Convention on Human Rights, and therefore they are subject to stricter penalties. Proponents of this change argue that it would be useful by lending an international framework to non-governmental children's rights organizations through which they can more effectively pursue their agenda.¹⁷⁰

However, while this model may serve as a possible deterrent, the enforcement capabilities of the United Nations and international protocols in general are severely limited. "Unfortunately the committees lack any authority . . . which seems to relegate its operation to passive capacity."¹⁷¹ Therefore the potential for deterrence through this particular strategy may be overstated. Further, despite the efforts of these conventions to crack down on child sexual exploitation, the number of children falling victim to this crime increase each year.¹⁷²

A stronger attempt to combat the problem directly is evident in the attempts by consumer countries to take local, individualized legal action against child sexual exploitation. Countries such as the United States, Australia and Sweden have enacted laws to prosecute citizens for sexual offenses committed against children abroad.¹⁷³ However, while these laws demonstrate a progressive attitude towards curbing sexual exploitation of children, their actual legal effect seems minimal. Prosecution of sex offenders is rare.

In the United States, attempts to apprehend and prosecute persons who travel with the intent to engage in child sexual exploitation have been largely ineffective. The first child-sex tourism law was adopted by the United States in 1994.¹⁷⁴ In the ensuing decade the federal government successfully prosecuted only two individuals.¹⁷⁵ Because of the unexpectedly low number of convictions under the 1994 act, legislators sought to expand its scope.

In 2003, U.S. lawmakers made another legislative attempt to curb child sexual exploitation committed by U.S. citizens abroad. In enacting the PROTECT Act, legislators sought to "close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are . . . using to their

¹⁷⁰ Berkman, *supra* note 58, at 408.

¹⁷¹ *Id.*

¹⁷² Berkman, *supra* note 58, at 408. According to the United Nations Statistics, about 10,000,000 Third World Children are involved in prostitution. According to the international organization Terre des Hommes, an additional one million children enter the industry each year.

¹⁷³ Breckenridge, *supra* note 32, at 416.

¹⁷⁴ Child Sexual Abuse Prevention Act, Pub. L. No 103-322 § 160001(g), 108 Stat. 2037.

¹⁷⁵ See *United States v. Hersch*, 297 F.3d. 1233 (11th Cir. 2002). Michael Hersch, a college professor, traveled to multiple third world countries where he offered poverty-stricken boys small amounts of money, clothing and gifts in exchange for sexual acts. While in Thailand on business he also intended to make videotapes of Thai children engaged in sexually explicit conduct. See also *United States v. Bredmus*, 234 F. Supp 2d. 639 (N.D. Tex. 2002).

advantage in order to avoid prosecution.”¹⁷⁶ The PROTECT Act preserves the ability to prosecute based on the intent of the accused under the 1994 act, however there is no requirement that the defendant intend to commit the act before leaving the United States. It expands the 1994 Act by criminalizing two additional categories of sex tourism. First the PROTECT Act enables the prosecution of persons who engage in “illicit sexual conduct in foreign places.”¹⁷⁷ Further, it subjects operators of sex tours (facilitators) to criminal prosecution.¹⁷⁸ The PROTECT Act provides for prosecution of any individual who, “for commercial advantage or private financial gain, arranges, induces, procures or facilitates travel” for others to engage in sexual conduct with minors.¹⁷⁹ In addition to these provisions the PROTECT Act increased the penalties to thirty years imprisonment for convicted sex tourists and criminalizing persons or organizations that engage in sex tours.¹⁸⁰

Since its adoption in 2003, prosecutors have successfully invoked the child sex tourism prong of the PROTECT Act on several occasions.¹⁸¹ Even more encouraging, prosecution of child sex related organizations under the PROTECT Act are also increasing.¹⁸² While the number of arrests and prosecutions following the adoption of the PROTECT is encouraging, the law must be examined for potential improvements in effecting its purported purpose of deterrence. The expansion of the intent requirement under the PROTECT Act has been lauded as a provision that achieves broader application. However, the intent requirement, as it presently exists in child exploitation enforcement, has historically proven ineffective. The ability to prosecute child sex offenders based on intent existed for ten years prior to the enactment of the PROTECT Act but resulted in only two convictions.¹⁸³ Therefore “[t]his particular provision . . . has thus already been tested and does not appear to result in a notable increase in the number of convictions,”¹⁸⁴ therefore may not be a significant enough to make the “meaningful dent in the numbers of Americans who travel abroad for the purpose of engaging in sex with minors”¹⁸⁵ it was intended to make.

While it is encouraging that the PROTECT Act takes the first step to address the child-sex tourism, the law fails to address the far greater problems leading to child sex-tourism, the push principles of racism, sexism and poverty. In order to be

¹⁷⁶ H.R. Rep. No.107-525, Sec. 2 (2002).

¹⁷⁷ 18 U.S.C. § 2423 (c).

¹⁷⁸ *Id.* at § 2423(d).

¹⁷⁹ *Id.* The terms “arranges, induces, procures” and “facilitates” are not defined in the statute. The language seems to lend itself to not only sex tour agencies but also many other situations that “facilitate” the travel of another for the purpose of sexual exploitation of children.

¹⁸⁰ Pub. L. No. 108-21, 117 Stat. 650.

¹⁸¹ Carter, *supra* note 2; *RP Bound American Charged with “Sex Tourism”*, *supra* note 9; Paul Shukasky, *Man Indicted in Tourism in Sex Case*, SEATTLE POST-INTELLIGENCER, Nov. 21, 2003, at B2.

¹⁸² WOMEN’S ACTION 12.2 UPDATE, *supra* note 15.

¹⁸³ See Introduction *supra* Part I.

¹⁸⁴ Breckenridge, *supra* note 32, at 424.

¹⁸⁵ *Id.* at 453.

more successful the law must address the roots of the problem. At the root of the problem are push principles, primarily socio-cultural considerations. However, there is a general skepticism toward the ability of the law to address socio-cultural factors in enforcement:¹⁸⁶

In the end, a solution that stretches beyond criminal penalties to treat the roots of the problem is likely to be the most successful. The law can never address the economic disparity between, on the one hand, the United States and Australia and, on the other hand, developing countries where economic conditions can be so poor as to cause poverty-stricken families to sell their children into prostitution. Nor does the law recognize that foreign investment, in the form of military installations or tourism dollars, often can contribute to the industry. The law cannot address the fact that global trafficking of children, often influenced by ethnic and gender discrimination, forces girls from particular tribes to work as prostitutes.¹⁸⁷

B. Increasing Penalties by Incorporating a New Model Redefining Culpability in Sexual Exploitation of Children

Traditionally, criminal law concerns itself with mens rea (the reason for which one acts; the conscious intent) in assessing culpability.¹⁸⁸ The PROTECT Act follows this tradition by preserving the ability to prosecute based on intent and by expanding the law by eliminating the requirement that the defendant intended to commit the act before or upon leaving the United States. In bias crimes, culpability can be seen as flowing from the perpetrator's decision to harm individuals who are members of groups that are particularly vulnerable due to their status in a particular community.¹⁸⁹ When analyzed closely, child sexual exploitation reveals itself as the quintessential bias crime. Reconceptualization of child sexual exploitation as a crime of bias would serve to address the root of this very complex problem by creating a rational basis for further increasing penalties, thereby becoming a greater deterrence tool.

1. Alternative Models of Bias Crime

The states have developed three approaches to define the defendant's state of mind in committing bias crime.¹⁹⁰ One approach, defined as the "racial animus" model, requires the crime to have been motivated by bias, hatred or bigotry.¹⁹¹ Another approach requires that the defendant committed the crime "because of" or

¹⁸⁶ See Steinman, *supra* note 28, at 56; Breckenridge, *supra* note 32, at 438; Li, *supra* note 41, at 542; see generally *What is Commercial Sexual Exploitation of Children*, *supra* note 18.

¹⁸⁷ Breckenridge, *supra* note 32, at 437-38.

¹⁸⁸ Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 200, 251 (2004).

¹⁸⁹ Danner, *supra* note 27, at 392.

¹⁹⁰ Karl Menninger II, *Hate Crimes and Liability for Bias-Motivated Acts*, 57 AM. JUR. PROOF OF FACTS 3D. 1, 13 (2002).

¹⁹¹ *Id.*

“by reason of” the person’s characteristics.¹⁹² The third approach is the “discriminatory selection” model, in which the defendant selects the victim because of certain characteristics.¹⁹³ The discriminatory selection model proposes that the perpetrator’s culpability can only be understood by reviewing both the social context in which the perpetrator acts and his understanding of that context.¹⁹⁴ Within the discriminatory selection model of bias crime, a perpetrator will be found guilty of a bias crime if he intentionally selects a victim who is a member of a group subject to discrimination in the community, and if he is at least reckless as to that selection.¹⁹⁵

This Note proposes a reconceptualization of the PROTECT Act’s intent requirement which would further broaden the definition of intent to include “discriminatory selection” of the victim as a factor for intent. Incorporating this model into the intent requirement of the PROTECT Act would upgrade child sexual exploitation to a bias crime by definition, thereby addressing the root of the problem while resulting in more stringent penalties and effectively creating a greater deterrence tool.

This proposition is not radical, as evidenced by the nature of bias crime in United States law. Bias crimes¹⁹⁶ can be broadly described as crimes in which the victim is selected because of the actual or perceived race, color, religion, disability, sexual orientation, or national origin of that victim.¹⁹⁷ The offense is characterized by the intentional selection of a victim based on the offender’s bias or prejudice relating to an actual or perceived status characteristic of the victim.¹⁹⁸ Bias crimes are broadly viewed as one of the most insidious acts of violence by one person against another motivated by prejudice and intolerance.¹⁹⁹

Although, the constitutionality of bias crime has been a contentious issue, the Supreme Court has recently clarified that most bias crime statutes pass constitutional muster. The Supreme Court concluded in *Wisconsin v. Mitchell*²⁰⁰

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Danner, *supra* note 27, at 392.

¹⁹⁵ Danner, *supra* note 27, at 392.

¹⁹⁶ “There are a variety of names for these crimes: ‘ethnic intimidation,’ ‘intimidation based on bigotry or bias,’ ‘civil rights intimidation,’ ‘intimidation,’ ‘malicious harassment,’ ‘malicious intimidation or harassment,’ ‘interference with exercise of civil rights,’ ‘prohibiting violations of an individual’s civil rights,’ ‘discrimination in public places,’ and ‘hate crimes.’” Menninger, *supra* note 190, at 12. I will use the term “bias crime” as it more accurately reflects the specific offense as it relates to child sexual exploitation.

¹⁹⁷ Sullaway, *supra* note 188, at 250.

¹⁹⁸ Brian Levin & Steven Bennett Weisburd, “On the Basis of Sex”: Recognizing Gender Based Bias Crimes, 5 STAN. L. & POL’Y REV. 21, 22 (1994).

¹⁹⁹ See Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 363 (1991); JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 128 (1998); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29, 30 (1992).

²⁰⁰ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

that bias crime penalty enhancements legitimately address a more harmful type of conduct that results from a particularly depraved motive.²⁰¹

2. Child Sexual Exploitation Fits Into the FBI Model of a Bias Crime

The FBI provides guidelines to assist in determining whether a crime is a bias crime. The guidelines include two important criteria: 1) the offender and victim must belong to different groups, and 2) there must be a series of related incidents.²⁰² As discussed,²⁰³ the perpetrators and victims of child sexual exploitation crimes are most often from different groups. The most apparent distinction between the perpetrator and victim is age, but the differences are also social, economic and cultural. The perpetrators are usually men from industrialized countries such as those in Europe or North America, while the child victims are from developing countries.²⁰⁴

Child sexual exploitation meets and exceeds the second FBI criterion of “a series of related acts.” Though the figures worldwide are difficult to ascertain,²⁰⁵ most organizations agree that the commercial exploitation of children occurs at an alarming rate. With figures exceeding one million in Asia alone²⁰⁶ and evidence that the crime “has become a significant social problem in Africa and Latin America . . . and [is] . . . on the rise in Eastern Europe,”²⁰⁷ the crime qualifies as “a series” which is “related” by the commonality of the general modus operandi of traffickers and sex tourists.²⁰⁸ In other words the individual perpetrator need not commit several of these crimes; rather, it is sufficient that he commits his offense in the same general manner as other perpetrators toward the same group of victims for the same reasons.

3. Increased Penalties for Child Sexual Exploitation adheres to the General Justification for Increased Penalties in Bias Crimes

Although the FBI’s guidelines are useful, a more complete set of criteria would more accurately define when particular criminal conduct constitutes a “bias crime.” Merely examining the interaction between the direct perpetrator of a bias crime and his immediate victim fails to capture the full dynamic of the perpetrator’s

²⁰¹ Levin & Weisburd, *supra* note 198, at 23.

²⁰² Uniform Crime Reporting Section, Federal Bureau Of Investigation (FBI), U.S. Dep’t Of Justice, FBI, Hate Crime Data Collection Guidelines 2-3.

²⁰³ See *supra* Part IV.D.

²⁰⁴ Since the guidelines apply American citizens they are, by definition, foreigners when traveling to Asia or Latin America and therefore belong to a different ethnic group than the victim.

²⁰⁵ ECPAT International, *Frequently Asked Questions about Child Sexual Exploitation: How Many Children are Victims?*, <http://www.ecpat.net/eng/csec/faq/FAQ.pdf> (last visited Mar. 10, 2005).

²⁰⁶ R. Barri Flowers, *The Sex Trade Industry’s Worldwide Exploitation of Children*, 575 *Annals* 147, 149 (2001).

²⁰⁷ Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 *J. CRIM. L. & CRIMINOLOGY* 415, 420 (2004).

²⁰⁸ See *supra* Part III.B & C.

culpability.²⁰⁹ Bias crimes occur against a complex social backdrop that informs the commission of the crime, its likely effects, and the actor's associated culpability.²¹⁰ The culpability associated with bias crimes should be seen as flowing from the perpetrator's decision to harm individuals who are members of groups that experience discrimination in the perpetrator's community.²¹¹

The best justification for increasing the punishment of child exploitation by redefining it as a bias crime conforms with the best justification for increased punishment of bias crimes in general. The strongest justification offered for the increased punishment associated with bias crimes derives from social science research indicating that bias crimes inflict greater harms than crimes not motivated by bias.²¹² Psychologists have found that "victims of hate crimes undergo higher levels of psychological distress, including post-traumatic stress disorder, depression and anger, than victims of other crimes."²¹³ This phenomenon derives from the victims' conviction that they have been targeted because of their identity, and at risk of, yet powerless to prevent, future attacks because they cannot change their identity.²¹⁴ Furthermore, bias crimes inflict harm on indirect victims of the attack: members of the immediate victim's group who fear that they "may be next."²¹⁵ Therefore, I propose that a proper test of whether greater punishment of child sex offenders conforms to the justification for greater punishment of bias crimes in general in a bipartite test: 1) bias crimes must have detrimental psychological

²⁰⁹ Danner, *supra* note 27, at 392.

²¹⁰ Danner, *supra* note 27, at 392.

²¹¹ *Id.* The term "community" may be ambiguous in this context, it raises question about whether the local community dynamic of the victim will alter the culpability of the offender. For instance if a child lives in a community where he is not aware of any discrimination or vulnerability then perhaps the perpetrator cannot be characterized as choosing to harm a victim that experiences discrimination. However, the community referred to is that of the perpetrator not the victim. The perpetrator's culpability can only be understood by reviewing both the social context in which the perpetrator acts and his understanding of that context. In other words if a perpetrator lives in the U.S. and in the U.S. people generally understand that children in developing countries are poor, and subject to disparate opportunities as compared to their peers in industrialized countries, then the perpetrator is culpable for choosing to victimize children subject to discrimination. A perpetrator should be found culpable for contributing to this discrimination—and hence guilty of a bias crime—if he intentionally selects a victim who is a member of a group subject to discrimination in the community, and if he is at least reckless as to that selection.

²¹² *Id.* at 394.

²¹³ Jeannine Mjoseth, *Psychologists Call for Assault on Hate Crimes*, 29 AM. PSYCHOL. ASSN. MONITOR ON PSYCHOL., Jan. 1998, at 25. The strongest support for this argument derives from experiments involving hate crimes based on sexual orientation. See, e.g., Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization among Lesbian, Gay, and Bisexual Adults*, 67 J. OF CONSULTING & CLINICAL PSYCHOL. 945, 945 (1999). The extent to which the data demonstrating increased harm in the context of bias crimes based on sexual orientation applies to other forms of bias crime, including crimes based on race and religion, remains unclear. *Id.* at 951. The claim that bias crimes result in greater harms to the victim is disputed by some studies. See Donald P. Green et al., *Hate Crime: An Emergent Research Agenda*, 27 ANN. REV. OF SOC. 479, 492-93 (2001) (describing difficulties in studies and stating "in general, it is difficult to draw rigorous comparisons between hate crimes and corresponding conventional crimes").

²¹⁴ Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 115 (1997) (citing studies).

²¹⁵ Kellina M. Craig, *Retaliation, Fear, or Rage: An Investigation of African American and White Reactions to Racist Hate Crimes*, 14 J. OF INTERPERSONAL VIOLENCE 138, 141 (1999).

effects on the individual victim as well as indirect victims; and 2) must be motivated by bias.

The psychological impact of sexual exploitation in child victims easily meets the first criteria of this two prong test. Commercial exploitation has been shown to result in “serious and life threatening consequences for the physical psychological, spiritual, and moral and social development of the children.”²¹⁶ Psychological impacts of sexual exploitation on children include feelings of shame, guilt, and low self-esteem. Researchers report that children who are subjected to inappropriate sexual attention experience acute psychological harm, often resulting in symptoms such as depression and post traumatic stress disorder.²¹⁷ “Some children do not believe that they are worthy of rescue.”²¹⁸ Others deal with their victimization by attempting to create a different reality in order to mentally escape.²¹⁹ Some children suffer from nightmares, sleeplessness, hopelessness, and depression, “akin to the feelings of victims of torture.”²²⁰ In general, “commercial sexual exploitation seriously compromises a child’s right to enjoy childhood and lead a productive, rewarding, and productive life.”²²¹

A primary reason for the victimization of these children is their fate of being born poor in developing countries and therefore especially vulnerable. Furthermore, harm extends to indirect victims—other children in the community, a fact that is readily observable by other children in the community who will inevitably fear suffering the same fate as their sexually exploited peers.

Determining whether child sexual exploitation is a crime motivated by bias is the more difficult prong of the test to analyze. In order to more readily identify the crime of child sexual exploitation as a crime motivated by bias it must be examined under the “discriminatory selection” model of bias crime. The discriminatory selection model of bias crime defines bias crime in terms of the perpetrator’s discriminatory selection of his victim.²²² Under this model it is irrelevant why the offender selected his victim on the basis of race or group; it is sufficient that the

²¹⁶ *What are the Impacts on Children?*, *supra* note 165.

²¹⁷ Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 424 (2004).

²¹⁸ *What Are the Impacts on Children?*, *supra* note 165.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Danner, *supra* note 27, at 401-02.

Alternatively, the racial animus model of bias crimes defines crimes on the basis of the perpetrator’s animus for the racial or ethnic group of the victim and the centrality of this animus in the perpetrator’s motivation for committing the crime. Of the two models, the racial animus model has been more widely accepted by scholars. In large part, this is because the discriminatory selection model has been seen as incompatible with the wrongdoing-culpability framework, precisely because it lacks a meaningful account of culpability.

Id. Danner expresses her preference for this model because “discriminatory selection provides a more accurate and convincing account of bias crimes, and it does so in a manner that avoids prompting constitutional concerns over the possible infringement of the First Amendment.” *Id.*

offender did so. In other words, if the perpetrator selected his victim based on group identity there will be no examination of his motive for doing so.²²³

The general motives of persons who travel in order to have sex with children are closely related to the general motive for committing bias crimes:

Perpetrators do not necessarily choose particular victims on the basis of bias but instead may do so because of the other societal influences. While these influences themselves rest fundamentally on bias, they do not necessarily find expression in conscious bias on the part of the perpetrator. They do, however, help determine the perpetrator's choice of victim. For this reason, discriminatory selection best captures the basis for increased culpability²²⁴

Although important in understanding the reasons for increased punishment for bias crimes in general, the discriminatory selection model renders the individual victim's reaction, or even the community's reaction, non-determinative of when a bias crime has occurred.²²⁵ Rather, the determinative factor is whether or not the perpetrator consciously selected a victim who is a member of a group that experiences discrimination and is therefore more vulnerable.²²⁶ The perpetrator's conscious decision to risk causing this kind of harm to a potentially large group of victims makes him more culpable.²²⁷

Analyzing child sexual exploitation within the discriminatory selection model reveals it as the quintessential bias crime. The child victim's reaction becomes subordinate to the perpetrator's conscious choice of victims who are especially vulnerable—children living in developing countries. It does not matter if the perpetrator is actually a racist, a sexist or a classist; all that matters is that he chose his victim because of his victim's particular vulnerability. Therefore, there is no requirement of proof of animus or that the perpetrator knowingly chose his victim due to the victim's lack of protection in a discriminatory community. All that is required is that he was at least reckless, in other words "risk[ing] causing this kind of harm to a potentially large group of victims."²²⁸ This is the lowest level of culpability under the Model Penal Code.

If the perpetrator is reckless as to the discrimination faced by the group and selects that person in part because of his membership in that group, then the perpetrator has committed a bias crime, no matter what his personal feelings about that person or that group. The perpetrator's act underscores

²²³ Danner, *supra* note 27, at 401-02. I have chosen the discriminatory selection model because "it provides a more accurate and convincing account of bias crimes." *Id.* Further it "potentially includes a wider class of perpetrators" *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 417.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Danner, *supra* note 27, at 417 (emphasis added).

and reinforces discrimination against that group, thus magnifying the harm engendered by his crime and his corresponding culpability.²²⁹

This analysis helps sharpen the focus of existing child exploitation statutes by addressing the crime of child sexual exploitation as a bias crime and addressing the culpability of those who transgress them. Bias crime perpetrators, like child sex perpetrators violate the equality ideal. Not because they necessarily act out of animus towards the group of which their victim is a member but because of a “bully mentality”²³⁰ that preys on and victimizes the weak. A more precise understanding of bias crimes statutes in general reveals that these statutes protect against harm to groups already vulnerable because of existing discrimination. Statutes which prohibit child sexual exploitation enacted by the United States seek to have the same effect as bias crime statutes—protecting a vulnerable class, specifically children. By reconceptualizing child sexual exploitation into this model, the culpability of the perpetrator is not founded in his speculative animus toward poor children. Rather his culpability will lie in his reckless selection of poor children living in developing nations; children who are especially vulnerable due to the desperation of poverty, substandard educational opportunity, or poor local law enforcement.

I use the standard of recklessness because requiring actual knowledge of the conditions that make children in the third world more vulnerable is overly onerous. To require the prosecutor to prove that the perpetrator knows that his victims are especially vulnerable would likely render statutes aimed at protecting children from exploitation unused and unusable. The solution I propose to this dilemma is to require proof that the perpetrator is conscious of the background conditions in which he acts but relax the relevant mens rea from actual knowledge to recklessness. Under the Model Penal Code and many statutory schemes, recklessness is the default mental state.²³¹ “Because recklessness requires conscious awareness on the part of the perpetrator, it contains sufficient guarantees that the perpetrator be minimally culpable with regard to the extra harm he risks

²²⁹ *Id.* at 427.

²³⁰ *Id.* at 417.

The school bully chooses a weak and unpopular victim, not just because his victim will be unlikely to defend himself, but also because other students will be unlikely to come to the victim's aid. The school bully's action both harms his immediate victim, may make other scrawny and awkward classmates fearful, and also signals to the other children that it is acceptable to bully the weak members of the group. Like adults, children are more likely to behave aggressively after they have seen someone else engage in similar behavior. The school bully's decision to target his particular victim is rightly seen as more culpable because of his willingness to risk the harm of occasioning future occurrences of acts against his victim or similar victims. It is the conscious targeting of the member of a group likely to be victimized by others, rather than the offender's personal animus, that makes his action more culpable.

Id.

²³¹ MODEL PENAL CODE § 2.02(3) comment 4 at 243 (Proposed Official Draft 1962) (“No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability . . .”).

through his action.”²³² Therefore, although perpetrator who has actual knowledge of the specific socioeconomic factors faced by the third world children would clearly be more culpable than a perpetrator who was only reckless as to that fact, the standard I set out provides a minimum level of culpability which, with its broader scope, provides utility to the law.

C. Increasing Penalties by Creating a Private Right of Action

“My objective is to give the woman every opportunity under the law to seek redress, not only criminally, but civilly. I want to raise the consciousness of this country that women’s civil rights—their right to be left alone—is in jeopardy.”²³³ This statement can easily be applied to the jeopardy of children’s civil rights worldwide.

Criminal prosecutions are one legal response to bias crimes. They address society’s demand for punishment of those persons who commit acts based on hate or prejudice against another’s characteristics. In doing so, they restore society’s sense of moral order and justice. However, criminal actions do not compensate the victims of bias crime for physical and psychological injuries or property damage they sustained. To provide for that, several states that have bias crimes statutes also have statutes allowing for civil lawsuits based on actions motivated by bias or prejudice towards a person’s characteristics.²³⁴

The actions subject to a civil suit vary among the states. Some states provide for a suit explicitly based on that state’s bias crime statutes.²³⁵ Some states allow civil actions for some bias crime laws but not others.²³⁶ One state allows civil suits for the crimes for which the penalty can be enhanced if the perpetrator was

²³² See *id.*

²³³ Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 231 (1993). Senator Biden made this statement in support of legislation which would allow women to bring civil actions for offenses committed against them because of their gender. This particular remark accompanied his acknowledgment that the bill could make rape a federal offense in cases where the victim was attacked because of the victim’s sex.

²³⁴ See ARK. CODE ANN. § 16-123-106 (1993); CAL. CIV. CODE § 52 (2006); COLO. REV. STAT. ANN. § 13-21-106.5 (1991); CONN. GEN. STAT. ANN. § 52-571C (2004); D.C. CODE ANN. § 22-4004 (2006); FLA. STAT. ANN. § 775.085(2) (2005); 720 ILLINOIS COMPILED STATUTES 5/12-7.2(C) (2005); IOWA CODE ANN. § 729A.5(2005); KY. REV. STAT. ANN. § 346.055 (2005); LA. REV. STAT. ANN. § 9:2799.2 (2005); MASS. GEN. LAWS ANN. CH. 266, § 127B (2005); MINN. STAT. ANN. § 611A.79; MO ANN STAT § 537.523; N.J. STAT. ANN. § 2A:53A-21 (1991); NEV. REV. STAT. § 41.690 (2004); N.C. GEN. STAT. § 99D-1(B) (1991); OHIO REV. CODE ANN. § 2307.70 (2006); 21 OKLAHOMA STATUTES § 850(D) (2002); OR. REV. STAT. § 30.190 (2003); PA. CONS. STAT. ANN. tit. 42, § 8309 (2005); R.I. GEN. LAWS § 9-1-35(2006); S.D. CODIFIED LAWS § 22-19B-3 (2006); TENN. CODE ANN. § 4-21-701 (2005); VT. STAT. ANN., tit. 13, § 1457(2006); VA. CODE ANN. § 8.01-42.1 (2005); WASH. REV. CODE ANN. § 9A.36.083 (2006); WIS. STAT. ANN. § 895.75 (2005).

²³⁵ See COLO. REV. STAT. ANN. § 13-21-106.5 (1991); CONN. GEN. STAT. ANN. § 52-571C (2004); FLA. STAT. ANN. § 775.085 (2005); 720 ILL. REV. STAT 5/12-7.1(C) (2005); IOWA CODE ANN. § 729A.5 (2005); KY. REV. STAT. ANN. § 346.055 (2005); MASS. GEN. LAWS ANN. ch.266, § 127B (2005); MO ANN STAT § 537.523 (2006); N.J. STAT. ANN. § 2A:53A-21 (1991); N.C. GEN. STAT. § 99D-1(B) (1991); OHIO REV. CODE ANN. § 2307.70 (2006); 21 OKL. STAT. § 850(D) (2002); OR. REV. STAT. § 30.190 (2003); PA. CONS. STAT. ANN. TIT. 42, § 8309 (2005); S.D. CODIFIED LAWS § 22-19B-3 (2006); VT. STAT. ANN., tit. 13, § 1457 (2006); WIS. STAT. ANN. § 895.75 (2005).

²³⁶ See LA. REV. STAT. ANN. § 9:2799.2 (2005); TENN. CODE ANN. § 4-21-701 (2005).

motivated by the victim's characteristics and for other crimes if the perpetrator was motivated by the victim's characteristics.²³⁷ Other states allow suits for acts of intimidation or harassment based on certain characteristics, without reference to the criminal law.²³⁸

All state laws allow the victim of the act to bring suit. Some states explicitly limit recovery to the victim.²³⁹ Other states allow recovery to anyone who suffers injury or property damage "arising out" or "as the result of" a bias-motivated act,²⁴⁰ which could mean someone who was not the intended victim of the act, but who suffered harm as an indirect victim. In addition to the right of action by private citizens, some states allow the state attorney general or local prosecutor to obtain injunctive relief in certain circumstances involving bias-motivated acts.²⁴¹

If child sexual exploitation is reconceptualized as a bias crime, Congress could incorporate state bias crime statutes as models for the PROTECT Act. Congress would then be obliged to create a private right of action for child victims and their non-complicit parents. Also there could be a civil action for indirect victims, such as the victim's peers and family. Further, the government would be able to attain injunctive relief to prevent sex tour operators or traffickers engaged in business that is actually a cover for the illegal activities from continuing to engage in business as usual.

VI. CONCLUSION

Grounding discussions in the foundational principles that render children vulnerable, this Article has aimed to redirect the traditional analysis of child sexual exploitation toward an approach more attuned to the socio-cultural factors and normative implications of laws that fail to address the root of the child sexual exploitation problem. This Note has attempted to demonstrate how the failure of legislative attempts to combat sexual exploitation in children attests to the need for a reconceptualization of the problem and a reformulation of the strategies necessary to combat these practices. Efforts to redefine trafficking further require challenging

²³⁷ See NEV. REV. STAT. § 41.690 (2004).

²³⁸ See CAL. CIV. CODE § 52 (2005); D.C. CODE ANN. § 22-4004 (2006); MINN. STAT. ANN. § 611A.79 (2005); R.I. GEN. LAWS § 9-1-35 (2006); VA. CODE ANN. § 8.01-42.1 (2005).

²³⁹ See ARK. CODE ANN. § 16-123-106; CAL. CIV. CODE § 52 (2005); FLA. STAT. ANN. § 775.085(2005); IDAHO CODE § 18-7093(b); NEV. REV. STAT. § 41.690 (2004); R.I. GEN. LAWS § 9-1-35 (2006); S.D. CODIFIED LAWS § 22-19B-3 (2006); TENN. CODE ANN. § 4-21-701 (2005); VA. CODE ANN. § 8.01-42.1(2005).

²⁴⁰ See CONN. GEN. STAT. ANN. § 52-571c (2004); D.C. CODE ANN. § 22-4004 (2006); 720 ILL. COMP. STAT. 5/12-7.1(c) (2005); IOWA CODE ANN. § 729A.5 (2005); KY. REV. STAT. ANN. § 346.055 (2005); MASS. GEN. LAWS ANN. ch. 266, § 127B (2005); MICH. COMP. LAWS ANN. § 750.147b(3); MINN. STAT. ANN. § 611A.79 (2005); MO. ANN. STAT. § 537.523 (2006); OHIO REV. CODE ANN. § 2307.70 (2006); OR. REV. STAT. § 30.190 (2003); PA. CONS. STAT. ANN. tit. 42, § 8309 (2005); VT. STAT. ANN. tit. 13, § 1457 (2006); WIS. STAT. ANN. § 895.75 (2005).

²⁴¹ See CAL. CIV. CODE § 52(c), 52.1(a) (2005); MASS. GEN. STAT. ANN. ch. 12, § 11L (2005); MINN. STAT. ANN. § 307.082 (2005); N.J. STAT. ANN. § 2A:53A-21(c) (2005); OR. REV. STAT. § 30.200 (2003); 42 PA. CONS. STAT. ANN. § 8309(b) (2005).

previous assumptions and rationales behind existing child sexual exploitation legislation.

While the PROTECT Act is a meaningful mechanism with which to combat the problem of child sexual exploitation, it can only be effective if underlying social and cultural dynamics are incorporated into the enforcement. Subjecting the issue of child sexual exploitation to a more contextualized examination thus demonstrates that the capacity the PROTECT Act to defend children turns on its ability to respond to the complexities of the full range of circumstances that characterize the experiences faced by children victimized by sexual exploitation. Addressing problems entrenched in the socio-economic structure demands that we think “outside the box” in search of a new model. The discriminatory selection model of bias crime lends an effective means to recognize the social, economic, and cultural factors which sustain the practice and which in turn provides a rationale basis for increased penalties for perpetrators of the crime, thereby creating a more effective deterrence tool.

