

CHILD SEX TOURISM LEGISLATION UNDER THE PROTECT ACT: DOES IT REALLY PROTECT?

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INTRODUCTION

The sexual exploitation of children for economic purposes is among the worst forms of human rights abuses. In the underworld of child sexual exploitation, sex tourists live out deviant fantasies while claiming to be on an exploration abroad.¹ As a result of these actions, children are raped, sodomized, abused, and denied their basic rights. They are not permitted or are not able to attend school or receive basic health care or nutrition, and they are denied the safety and security of a decent childhood. These children are exposed to sexually transmitted diseases, including the deadly HIV. Many of these young people lose their lives, but they all lose their childhood.

The United States Department of State estimates that throughout the world one million children are forced into prostitution each year,² 100,000 of whom are exploited in the

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¹ See Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 207 (2001). Sex tourists often believe that while on holiday outside the United States, they can “shed civilization’s constraints’ and be free from the standards of behavior imposed” in their own countries. *Id.* The tourists do not feel constrained by the scorn and contempt of neighbors and friends that they would otherwise experience at home. *Id.*

² See Press Release, U.S. DEPT OF STATE, The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (Dec. 24, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/16216.htm>. The government does note that it is unaware of the actual numbers of children that are exploited in the commercial sex trade because most of the criminal activity is hidden. *Id.* However, in 2003 “the C.I.A. estimated that between 18,000 and 20,000 people are trafficked annually into the United States.” Peter Landesman, *The Girls Next Door*, NY TIMES, Jan. 25, 2004, § 6 (Magazine), at 30. The government has not conducted studies to determine what percentage are victims of sex trafficking. *See id.*

United States.³ These numbers are staggering, especially when one considers the international efforts aimed at combating the sexual abuse of children. Nevertheless, human trafficking is on the rise and “[i]n many instances, drug traffickers have switched to trafficking human beings because it is more lucrative and there’s less chance of getting caught.”⁴ The goal of this Note is to analyze and critique the provisions of the Prosecuting Remedies and Tools Against the Exploitation of Children Today Act of 2003,⁵ (the “PROTECT Act”), which strengthened the existing legislation by making it illegal to engage in child sex tourism, and the United States Immigration and Customs Enforcement’s “Operation Predator” program.⁶ A further goal will be to compare these efforts to Australian, German, Japanese, and Swedish child sex tourism legislation.

Part I of this Note provides an overview of the problem of child sex tourism and its impact on the child victim. Part II examines the evolution of United States child sex tourism legislation, focusing on the amendments adopted as part of the PROTECT Act,⁷ and Part III discusses the advantages of a

³ News Action Alert, UNITED NATIONS ASS’N OF THE U.S., Senate Gives Advice and Consent to Optional Protocols to the Convention on the Rights of the Child, (June 22, 2002) (on file with the St. John’s Law Review).

⁴ Amarillo Globe-News Online, *Brief: Bill Would Criminalize Trafficking in Humans*, at http://www.amarillo.com/stories/021303/tex_billwould.shtml (Feb. 13, 2003). This statement is attributed to Texas State Representative Lon Burnam. *Id.* Burnam proposed legislation to criminalize human trafficking at the state level. *Id.*

⁵ 18 U.S.C. § 2423 (Supp. 2004). This Note will focus mainly on § 2423 (c) through (g) as these provisions were added to provide for extraterritorial jurisdiction as well as prosecution of those involved in the travel and tourism industry.

⁶ Operation Predator is a comprehensive initiative designed to protect children “from foreign national pedophiles, human traffickers, international sex tourists, and other predatory criminals.” U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Fact Sheet: Operation Predator*, available at <http://www.whitehouse.gov/news/releases/2004/07/20040707-10.html> (July 7, 2004).

⁷ In relevant part, the statute provides that:

(b) Travel with intent to engage in illicit sexual conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined

(c) Engaging in illicit sexual conduct in foreign places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined

(d) Ancillary Offenses.—Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or

comparative perspective by which aspects of the United States approach of combating child sex tourism are measured against their respective counterparts in the Australian, German, Japanese, and Swedish systems. Part IV of this Note analyzes the lessons learned from the comparisons undertaken in Part III and attempts to establish benchmarks of effective legislation. Finally, Part V explains that legislation must be coupled with international collaboration and support in order to apprehend and prosecute child sex tourists. Without such unity of purpose and action among the states, efforts to thwart the problem of child sex tourism will be far less successful than if sure unity were to be achieved.

I. OVERVIEW OF CHILD SEX TOURISM

Although there are many forms of sexual exploitation of children,⁸ this Note will focus only on the issues common to children engaged in prostitution for sex tourists. In doing so, it will focus largely on legislation and policies of the United States. However, in order to understand the global situation more comprehensively, this Note will highlight the legislation and mechanisms employed by several other “sending”⁹ states that are attempting to fight child sex tourism.¹⁰

facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined

18 U.S.C. § 2423(b)—(d).

⁸ For example, such forms include child pornography and other forms of sexual misconduct by adults toward children.

⁹ The countries that generally send tourists are referred to as “sending countries,” while the states that provide the locale for child-sex tourism are called “destination” or “receiving countries.” This terminology will be referenced throughout this Note. For a discussion on the notion of sending and receiving countries, see Daniel Edelson, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 *FORDHAM INT’L L.J.* 483, 485 (2001) (indicating that “[s]ending countries include the United States, Japan, Australia, and many European countries” and that the receiving countries include “Cambodia, Fiji, the Philippines, Sri Lanka, Thailand, Vietnam, several African countries, and countries in Central and South America”) (footnote omitted).

¹⁰ It is important to note that when a destination state enacts and uses legislation against child-sex tourism, the sex tourists simply “shift their focuses to countries that protect children less rigorously.” *Id.* at 485–86. This indicates the need for international cooperation and support since eradication of child sexual exploitation will not be possible until every state establishes and follows strong policies against sex tourism.

A. *What Is Child Sex Tourism?*

To understand child sex tourism, particularly in the context of different cultural standards, it is important first to consider definitional issues. According to the Convention on the Rights of the Child (the "CRC"),¹¹ a child includes anyone younger than eighteen years of age.¹² In spite of this declaration, most states have not incorporated this standard into their national legislation.¹³ The age of consent differs in the child sex tourism legislation of various states and, in some cases, even leads to fatal results.¹⁴

¹¹ The CRC is "an internationally recognized agreement between nations which establishes a comprehensive set of goals for individual nations to achieve on behalf of their children." AMNESTY INT'L, *Children's Rights: Convention on the Rights of the Child—Frequently Asked Questions*, at http://www.amnestyusa.org/children/crn_faq.html (last visited May 17, 2005). At the current time, 191 countries have ratified the CRC. Only the United States and Somalia have failed to ratify the convention. Somalia cannot ratify the treaty as it has no recognized government; however, Australia ratified the CRC in 1990, Germany in 1992, Japan in 1994, and Switzerland in 1997. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *Status of Ratification of the Convention on the Rights of the Child*, at <http://www.ohchr.org/english/law/crc-ratify.htm> (last visited May 16, 2005). This is important because it indicates that the sexual exploitation of children is not limited to only those sexual predators who travel abroad. For example, raids of several businesses in the Fort Worth, Texas area resulted in federal agents taking custody of "more than 20 young Honduran women and girls as young as 12 who . . . were working as prostitutes against their will." See NBC5i.com, *Officials Charge Alleged Sex-Slavery Ring Leaders*, available at <http://www.nbc5i.com/news/1486587/detail.html> (May 30, 2002).

¹² See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex 2, Supp. No. 49, at 33, U.N. Doc. A/45/49 (2001), reprinted in 40 I.L.M. 335 [hereinafter Protocol] ("Child" shall mean any person under eighteen years of age."). The U.S. signed the protocols on July 5, 2000 but did not ratify the protocols until December 23, 2002. Obviously, any child that is involved in sexual slavery is a victim. These youngsters are not only targets of pedophiles, but they are also victims of other sex tourists. These individuals often believe that having sex with children, rather than adults, will prevent them from catching a sexually transmitted disease. See Heather C. Giordanella, *Status of § 2423(b): Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries*, 12 TEMP. INT'L & COMP. L.J. 133, 135 (1998). Some "young women," as young as five years old, are used by the industry. In reality, these young girls are actually more susceptible to diseases since their bodies are not yet physically mature. *Id.* & n.16.

¹³ See *infra* Part III.A.2 (describing the various ages of consent). It is understandable that different ages of consent are recognized in different states, as cultures and customs vary throughout the world. Yet, it is also vital that states recognize the need to establish uniform ages of consent related to sex tourism, a need that is especially true in the U.S. and other developed states.

¹⁴ See *infra* Part III.A.3 (noting that such fatal results include the failure to

The protocols to the Convention define “trafficking” to include exploitation of children through prostitution.¹⁵ “Child sex tourism” is defined as “the commercial sexual exploitation of children by persons who travel from their own country to another usually less developed country to engage in sexual acts with children.”¹⁶ Sex tourists are both men and women,¹⁷ and they come from all socio-economic backgrounds.¹⁸ The industry has grown in recent years despite efforts to eradicate child sexual exploitation,¹⁹ in part because sex tourists attempt to convince

prosecute sex tourists because of age of consent barriers).

¹⁵ The actual language of the protocol states in relevant part:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs

Protocol, *supra* note 12, at Art. 3(a).

¹⁶ ECPAT International, *Frequently Asked Questions About CSEC*, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp> (last visited May 18, 2005). The World Tourism Organization defines “organized sex tourism as ‘trips organized from within the tourism sector, or from outside this sector but using its structures and networks, with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination.’” Ofelia Calcetas-Santos, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, U.N. ESCOR, Comm. on Human Rights, 57th Sess., at ¶ 84, U.N. Doc. E/CN.4/2001/78 (2001).

¹⁷ See JEREMY SEABROOK, NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION 125 (2000) (finding that most sex tourists are men, but that women are sometimes involved and “occasionally abet, give succour and even encourage abuse” often because they see the child as a potential source of income).

¹⁸ See ECPAT International, *supra* note 16, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp>. However, it should be noted that the typical sex tourist is a white, middle-class to upper-middle-class man. Many sex tourists feel that their behavior is completely acceptable, and some even believe “that they are helping the child by providing some money.” *Id.* It is these perceptions of cultural inferiority that allow sex tourism to flourish. See Kathy J. Steinman, Note, *Sex Tourism and the Child: Latin America’s and the United States’ Failure to Prosecute Sex Tourists*, 13 HASTINGS WOMEN’S L.J. 53, 62 (2002) (asserting that “racist attitudes of sex tourists cause them to be blind to the harm they cause”). The offenders range from “unskilled low-income workers to the extremely affluent.” SEABROOK, *supra* note 17, at 104.

¹⁹ While there are no concrete statistics on the number of sex tourists who are from the United States, Carol Smolenski, director of ECPAT-USA, recently stated that “surveys indicate that about a quarter of the sex tourists in the world are from the United States.” Telephone Interview with Carol Smolenski, Director, ECPAT

themselves that they have done nothing wrong.²⁰ They tell themselves that these cultures are more free and less sexually inhibited.²¹ Sex tourists also enjoy the privacy of committing these acts free from the social constraints of their home countries.²² Many have even “persuade[d] themselves that in another country, normal social and moral restraints can be discarded, along with the belief that one will not be held responsible for his behavior.”²³ Still others claim that they are helping these children financially. For example, a sixty-five-year-old retired schoolteacher from Orlando, Florida, traveling throughout Latin America, stated that he was “helping [the young girls] financially.”²⁴ He further noted that “[i]f they don’t have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I’ve never paid more than \$20 to these young women, and that allows them to eat for a week.”²⁵

B. Psychological and Physical Effects and Rehabilitation

The psychological impacts upon the victim are hard to measure. However, many of them suffer from a myriad of both emotional and physical problems. These children are victimized and must endure violence, forcing them to live in constant fear. This fear grips the children as they are terrified of their next client, the physical abuse inflicted by the sex-ring leader,²⁶ and possible apprehension by the police.²⁷ Some of the children

USA (Oct. 6, 2003). Smolenski explained that the figure, while not precise, was taken from several countries’ police reports indicating the number of apprehended sex tourists. *Id.* From those lists, ECPAT determined the percentage of Americans. Each time it was approximately twenty-five percent. *Id.*

²⁰ See Steinman, *supra* note 18, at 61–62 (indicating that many of these sex tourists rationalize their behavior by noting that there is no stigma attached to sex tourism in these countries).

²¹ See *id.* at 61.

²² See *id.* at 62.

²³ *Id.* (quoting Captive Daughters, *Comprehending Child Sex Tourism*, at <http://www.captive Daughters.org/ByandAboutCD/CDdocuments/cdfactsheet3.htm#CAPTIVE%20DAUGHTERS> (last visited May 17, 2005)).

²⁴ *Id.* at 61 (quoting an anonymous perpetrator of sex tourism).

²⁵ *Id.*

²⁶ In fact, many children are beaten and starved if they do not earn enough money. See Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT’L & COMP. L. REV. 397, 402–03 (1996).

²⁷ *Id.* at 402 (noting that the children suffer from depression and feelings of hopelessness).

believe that the sexual abuse is their fault or “that their pimp is really their boyfriend who loves them.”²⁸ Others are simply looking for the love and affection of a family circle.²⁹ Many child prostitutes feel stigmatized and exhibit feelings of betrayal, and still “[o]thers suffer from nightmares, sleeplessness, hopelessness and depression—akin to the feelings exhibited in victims of torture.”³⁰ In order to cope with these feelings and their desperate situation, many children turn to drugs³¹ while others commit suicide in order to escape.³²

Physically, children who are victims of sex tourism suffer from many life-threatening illnesses, since many child prostitutes must serve “three customers a day, six or seven days a week, every week of the year.”³³ Venereal diseases are common, and the number of children infected with HIV is increasing.³⁴ This is because the “mucosal lining of the child’s vagina, anus, and rectum are thin and disposed to rupture, especially because sex acts upon the immature body of a child often involve some tearing of the tissue.”³⁵ Such tears allow for the introduction of the virus into the child’s bloodstream.³⁶ Many

²⁸ ECPAT International, *supra* note 16, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp>.

²⁹ EVA J. KLAIN, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 7 (1999), available at http://www.missingkids.com/en_US/publications/NC73.pdf.

³⁰ ECPAT International, *supra* note 16, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp>.

³¹ See Berkman, *supra* note 26, at 403 (noting that this dangerous and hard lifestyle leads many children to drugs).

³² The desperate situation of these children is illustrated by a quote by Poppy, a child prostitute: “I found myself dancing at a club at the age of 11 . . . I have had different kinds of customers, foreigners and Filipinos. I tried suicide but it didn’t work so I turned to drugs. I want to die before my next birthday.” See University of California Santa Barbara’s SexInfo, *Sex Tourism*, at <http://www.soc.ucsb.edu/sexinfo/?article=violence&refid=018> (last visited May 17, 2005).

³³ See Berkman, *supra* note 26, at 402.

³⁴ See *id.* There is also the mistaken belief among some cultures that having sex with a virgin will cure HIV. See University of California Santa Barbara’s SexInfo, *supra* note 32 (stating that “[t]here also exists a distorted belief in some Asian and African countries that having sex with a virgin will cure HIV”).

³⁵ Margaret A. Healy, Note, *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, 1871–72 (1995) (discussing fear of sexually transmitted diseases as one of the “factors fueling” the sex tourists’ demand for child partners).

³⁶ *Id.*

young females also face pregnancy, which only compounds their desperate situation.³⁷ Coupled with these physical problems, the children are often poorly fed, lack adequate shelter, and, as a result, suffer from diseases such as malnutrition and tuberculosis.³⁸

Children who are victims of sexual abuse face other unique health-compromising problems aside from physical ailments. Many child prostitutes suffer from psychological disorders, including depression, in part because they are deprived of their childhood when forced into prostitution.³⁹ They are not allowed to go to school, socialize, or play—all of which are activities necessary to helping them develop into creative and productive members of their community. Rehabilitation is therefore important, yet difficult. It is often mistakenly seen as merely returning the child to his or her own state; however, many times this is not a viable option since the community members and the child may have a difficult time returning to their former roles.⁴⁰ Unfortunately, the difficulties and disappointments of returning home lead many children to return to the sex industry. In order to prevent this cycle, ECPAT International,⁴¹ a non-governmental organization aimed at preventing child sexual exploitation, developed the following indicators to measure success: (1) “the child is no longer taken advantage of financially;” (2) “the child has more control in power relationships;” (3) “the child has a higher opinion of him/herself;” (4) “the child is . . . subject to [fewer] physical ailments or has access to medical care;” (5) “the child is aware of and insisting on birth control, and ways of protecting him/herself from sexually transmitted diseases;” (6) “the child has a reduced dependency on substances;” and (7) “the

³⁷ See KLAIN, *supra* note 29, at 7. These young women could be forced to have an improper and unsafe abortion, or they could be forced to endure a pregnancy without medical assistance.

³⁸ See Berkman, *supra* note 26, at 402.

³⁹ See KLAIN, *supra* note 29, at 8 (describing the situation for many child prostitutes).

⁴⁰ See ECPAT International, *supra* note 16, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp> (explaining that the experience frequently makes it difficult for the child to return to his or her “child” role since they have been partaking in a *very* adult activity).

⁴¹ ECPAT stands for End Child Prostitution in Asian Tourism. While the group was originally formed to end sex tourism in Thailand, the organization has expanded throughout the world. See ECPAT International, *The History of ECPAT*, at http://www.ecpat.net/eng/Ecpat_network/history.asp (last visited May 17, 2005).

child has plans and a clear goal to leave CSEC.”⁴²

These indicators provide a framework for medical personnel and social workers who are involved in the rehabilitation of child victims to understand the circumstances that help a child feel more confident and proud. Thus, giving these children the tools that they need to develop self-confidence may be one way to keep them from returning to prostitution.

C. Reasons for the Growth of the Child Sex Tourism Industry

Sex tourism is not a recent phenomenon.⁴³ However, in the past few decades, the industry has grown dramatically; “there is no hemisphere, continent, or region unaffected by the child-sex trade,”⁴⁴ and it is difficult to measure the exact number of children affected by sex tourism and the exact number of sex tourists.⁴⁵ Estimates vary greatly, and numbers that are given are often unsubstantiated or inflated—or deflated, as the case may be—to advance a particular argument or goal. Nevertheless, there is little dispute that the industry is growing and that the ages of the victims are decreasing.⁴⁶ Some of the reasons for this growth include poverty,⁴⁷ the growth of

⁴² ECPAT International, *supra* note 16, at <http://www.ecpat.net/eng/CSEC/faq/faq3.asp> (noting that ECPAT developed these indicators because other rehabilitation programs were unsuccessful).

⁴³ See Giordanella, *supra* note 12, at 136. The 1904 International Agreement on Suppression of White Slave Traffic was the first effort by the international community to prevent such crimes against women and children. *Id.* at 137. In 1949, the agreement was amended to prohibit the immoral seduction of children, even if consensual. *Id.* While child sexual exploitation was mentioned in subsequent international agreements, the discussion was only peripheral. It was not until 1989 that the international community began to recognize that preventing the sexual exploitation of children would require a direct and comprehensive international approach.

⁴⁴ KLAIN, *supra* note 29, at 32.

⁴⁵ See, e.g., Press Release, U.S. DEPT OF STATE, The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (Dec. 24, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/16216.htm>.

⁴⁶ See Steinman, *supra* note 18, at 64. Consider Lilliana, who works the streets of San Jose, Costa Rica in order to help her mother and four siblings survive. *Id.* at 63–64. Lilliana charges approximately fifteen dollars for oral sex and a bit less than fifty dollars for intercourse. Lilliana is eleven years old. *Id.*

⁴⁷ Many times, parents, especially those in rural communities, will sell their children or allow them to leave their homes because those running the brothels have convinced them that their children will be performing legitimate jobs in the cities. See Berkman, *supra* note 26, at 401.

consumerism,⁴⁸ and an increase in travel opportunities and internet access.⁴⁹

1. Poverty

Many poorer countries have encouraged the growth of their tourism industry in order to generate revenue while turning a blind eye to the problems generated by the sex tourists. These “corrupt politicians, police, armed forces and civil servants . . . receive bribes, demand sexual favors [of the children] and are themselves customers or owners of brothels.”⁵⁰ Poverty appears to be the main reason that children enter the sex trade: they are poor, illiterate, lack the protection of a structured family,⁵¹ and, because they are in a desperate search for employment, become “easy prey to procurement agents who scour the villages in search of young children.”⁵² Poverty also leads some parents to encourage—or even force—their children to prostitute themselves in order to help the family survive.⁵³

2. Growth of Consumerism

One of the downsides of globalization is the growth of consumerism. This development has led to a sudden influx of Western goods being introduced into societies where they were

⁴⁸ Unfortunately, rising consumerism has led some young people to sell themselves in exchange for Western goods. Other young people, however, are forced to sell themselves in order to obtain food and other basic necessities. See Steinman, *supra* note 18, at 57.

⁴⁹ Many claim that there has been an increase in travel because airfare is more affordable and it is easier to travel abroad. The world is becoming more globalized, and as a result of this “increased interaction across national boundaries by economic, political and other actors,” it has become all the more challenging for any one state “to regulate or address certain public policy issues.” Dr. Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 DICK. J. INT'L L. 493, 498–99 (2000). Thus, as the importance of the travel and tourism industry continues to grow, so will the effects of child-sex tourism unless states engage in collaboration and knowledge sharing.

⁵⁰ Steinman, *supra* note 18, at 65 (quoting MAJ-LIS VOSS, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: AN OVERVIEW* 9 (1999)).

⁵¹ See Tammy Quintanilla, Social Watch, *Globalization of Sex Trade*, at <http://www.socialwatch.org/en/informesTematicos/40.html> (1997).

⁵² Steinman, *supra* note 18, at 56–57 (quoting Healy, *supra* note 35, at 1869) (discussing the push factors of child prostitution and child-sex tourism); see also Nancy Beyer, Note, *The Sex Tourism Industry Spreads to Costa Rica and Honduras: Are These Countries Doing Enough To Protect Their Children from Sexual Exploitation?*, 29 GA. J. INT'L & COMP. L. 301, 306–08 (2001).

⁵³ See Steinman, *supra* note 18, at 57.

not previously available. With the introduction of these consumer goods, the desire among the people to have these items has skyrocketed. Children, interested in obtaining foreign goods, are attracted to the sex industry because of its economic potential and because it does not require any special skills—just their bodies.⁵⁴ Some parents will even “sell their children into prostitution so that they may obtain ‘modern comforts and luxury items,’”⁵⁵ and children will work the streets in order to get a tee shirt or CD player. Although tourism is not the sole cause of the sexual exploitation of minors, “it does provide easy access to vulnerable children”⁵⁶ who recognize the opportunities that these foreign tourists present.

3. Increase in Travel Opportunities and Internet Access

Growth in the tourism industry, coupled with the increased availability of the internet, has indirectly led to the growth of child-sex tourism. As Francisco Santos Calderón, Vice President of the Republic of Colombia, stated in his address at the “Pathbreaking Strategies in the Global Fight Against Sex Trafficking” conference, “the globalization of the economy has also brought about the globalization of crime.”⁵⁷ The emergence of this interconnectedness makes it especially imperative that governments and international organizations join together to stop these crimes. Through the internet, sex tourists can communicate and learn about “special” hotel accommodations and sex tour options.⁵⁸ The increase in the number of individuals traveling to exotic and far-off destinations has also led to increased numbers of child sex tourists. This is especially true of situation abusers: individuals who did not leave *intending*⁵⁹ to engage in such acts, but get caught up in the atmosphere and freedom of their destinations. Adding to the problem is the fact

⁵⁴ See Quintanilla, *supra* note 51, at <http://www.socialwatch.org/en/informes/Tematicos/40.html> (1997).

⁵⁵ Steinman, *supra* note 18, at 57 (quoting Healy, *supra* note 35, at 1870).

⁵⁶ Quintanilla, *supra* note 51, at <http://www.socialwatch.org/en/informes/Tematicos/40.html> (1997).

⁵⁷ Press Release, U.S. DEPT OF STATE, Pathbreaking Strategies in the Global Fight Against Sex Tourism: Conference Recommendations (Feb. 20, 2003), available at <http://state.gov/g/tip/rls/rpt/20834.htm>.

⁵⁸ See Steinman, *supra* note 18, at 59.

⁵⁹ See discussion *infra* Part II.A (discussing the intent requirement that was necessary under previous versions of the U.S. child-sex tourism statutes).

that law enforcement officials lack the proper training to deal with sex tourists as well as the victims.⁶⁰ This, coupled with their own poverty, leads many police and other government officials to accept bribes from sex tourists.

In an effort to confront the problem of child sex tourism, the United States and other developed states have begun either to extend or enact legislation aimed at ending child sexual abuse. In a 2002 House Report attached to United States legislation aimed at preventing child sex tourism, Congress acknowledged that because many poor countries are under economic pressure to develop their tourism industries, they will “often turn a blind eye toward this devastating problem because of the income it produces.”⁶¹ Thus, as a result, “[c]hildren around the world have become trapped and exploited by the sex tourism industry.”⁶² Therefore, legislation is an essential component to “curbing the activities of child-abusers who go to poor countries”⁶³ to exploit children as well as the starting point in attempting to assess the various strengths and weaknesses of government enactments.

II. EVOLUTION OF UNITED STATES CHILD SEX TOURISM LEGISLATION

A. *Mann Act*

The Mann Act, or White Slave Traffic Act,⁶⁴ penalized those who “knowingly transport[ed] any individual in interstate or foreign commerce . . . with [the] intent that such individual engage in prostitution, or in any sexual activity for which [an individual could] be charged with a criminal offense.”⁶⁵ The Act remained the only United States legislation to deal with such trafficking until Congress amended the Act in 1986. Those amendments aimed “to criminalize the transport of any person under the age of eighteen either between states or abroad with the intent that the minor engage in sexual activity.”⁶⁶ This

⁶⁰ See Steinman, *supra* note 18, at 65–66.

⁶¹ H.R. REP. NO.107-525, at 2 (2002).

⁶² *Id.*

⁶³ SEABROOK, *supra* note 17, at xiv.

⁶⁴ See White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2000)).

⁶⁵ *Id.* § 2. The Mann Act was intended to prevent prostitution and the transport of women over state borders for sexual purposes. *Id.* § 1.

⁶⁶ Healy, *supra* note 35, at 1905. The U.S. government had the power to enact

amendment proved ineffective because of the intent requirement, and the law was again altered with the passage of the Child Abuse Prevention Act of 1994 (the “1994 Act”).⁶⁷ This legislation expanded the protection provided under the Mann Act by making it a criminal offense for a person to travel in interstate commerce with the intent to engage in illicit sexual conduct with a child.⁶⁸ The major flaw in the 1994 Act was again rooted in the intent requirement because the act forced prosecutors to prove that the offender had the requisite “intent to travel for the purpose of engaging in such acts.”⁶⁹ Despite the hurdle of the intent requirement, several American sex tourists were brought to justice under the 1994 Act.⁷⁰ Related to the issue of sex tourism,

such legislation because, under the Commerce Clause, Congress may regulate both interstate and foreign commerce. *Id.* n.379.

⁶⁷ See Child Abuse Prevention Act of 1994, 18 U.S.C. § 2423 (1994).

⁶⁸ Section 2423 states in relevant part:

A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person . . . shall be fined under this title.

Id.

⁶⁹ Healy, *supra* note 35, at 1906.

⁷⁰ An example is Nicholas Bredimus, a wealthy Dallas businessman who traveled to Thailand and proceeded to sexually abuse several young boys in his hotel room. See Press Release, U.S. DEP’T OF JUSTICE, Coppel Businessman Pleads Guilty to Foreign Travel To Commit Sexual Abuse of Children (Aug. 29, 2002), available at http://www.usdoj.gov/usao/txn/PressRel02/bredimus_ple_pr.html. The press release indicated that Bredimus admitted that he had “videotaped himself engaged in sexually explicit conduct with a thirteen-year-old Thai boy . . . and took digital images of the boy” posing in a sexually explicit manner. *Id.* The young victims told investigators that Bredimus had paid them to allow him to take nude photographs of them while he performed sexual acts on the boys. See *United States v. Bredimus*, 234 F. Supp. 2d 639, 641 (N.D. Tex. 2002). Bredimus was brought to justice because of the successful collaboration of Thai and American officials. Due to this cooperation, Bredimus was indicted in 2002. See Press Release, U.S. DEP’T OF JUSTICE, Coppel Businessman Indicted for Foreign Travel To Commit Sexual Abuse of Children (Apr. 22, 2002), available at http://www.usdoj.gov/usao/txn/PressRel02/bredimus_ind_pr.html.

In deciding the case, the district court refuted all of Bredimus’s arguments that challenged the constitutionality of § 2423. The court found that extraterritorial legislation did not burden interstate commerce by noting that “Congress’s authority to regulate foreign [commerce] is extremely broad, being even broader than its power to regulate interstate commerce.” *Bredimus*, 234 F. Supp. 2d at 643. On this issue, the court also noted that Congress had the authority “to keep the channels of interstate commerce free from immoral or injurious uses.” *Id.* at 644 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917))). As to Bredimus’s argument that § 2423

in October of 2000, Congress passed the Trafficking Victims Protection Act which was aimed at trafficking for the purposes of sexual activities or forced labor. The goal of the Act was to "provid[e] numerous benefits to victims of a severe form of trafficking."⁷¹ The Act is important because it demonstrates that the United States acknowledges the need to help victims of trafficking, such as child prostitutes.

B. The Sex Tourism Prohibition Improvement Act of 2002

Under the Sex Tourism Prohibition Improvement Act of 2002 (the "2002 Act"), Congress revised the 1994 Act in an effort to address a number of key problems. The major changes included removing the intent requirement as well as criminalizing the actions of sex tour operators.⁷² In citing the need for such legislation, the House noted that "child-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing."⁷³ The report also found that "ineffective law enforcement, lack of resources, corruption, and generally immature legal systems"⁷⁴ have allowed sex tourists to escape prosecution.⁷⁵ Congress further noted that due to such circumstances, the United States should step in and prosecute the individuals in a United States court of law.⁷⁶ In discussing the legislation, Congressman Jeff Flake of Arizona noted that

infringed upon his right to travel, the court stated that, although the Supreme Court has long recognized the right to travel, that right "does not encompass traveling for illicit purposes." *Id.* (citing *Hoke v. United States*, 227 U.S. 308, 320-23 (1913)). Finally, as to extraterritorial application of the statute, the court noted that, while generally a statute is presumed to apply only within the United States, this presumption may be trumped "if the nature of the law permits it and congressional intent is clear." *Id.* at 647. In this case, the court concluded that to reject the extraterritorial application of the statute would greatly limit its scope and usefulness. *Id.* at 649.

⁷¹ The Protection Project, *Program of Services for Victims of Trafficking: Overview*, at http://www.protectionproject.org/training/about_overview.htm (last visited May 17, 2005).

⁷² This is accomplished "by prohibiting persons from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct." H.R. REP. NO. 107-525, at 2 (2002).

⁷³ *Id.* at 2-3 (discussing the background and need for child-sex tourism legislation).

⁷⁴ *Id.* This legislation closed many of the loopholes that allowed U.S. sex tourists to evade prosecution. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

child sex tourism was a serious problem and that closing the intent loophole, and thereby removing that hurdle to prosecution, was key to stopping sex tourists.⁷⁷ Representative Flake also stated that, as a result of the amendments, sex tourists now will “not only [have] to worry about their conscience, but they [will] have to worry now about the Federal Government coming after them.”⁷⁸

C. Prosecuting Remedies and Tools Against the Exploitation of Children Today Act of 2003

Most recently, on April 30, 2003, President George W. Bush signed into law the Prosecuting Remedies and Tools Against the Exploitation of Children Today Act of 2003 (the “PROTECT Act”)⁷⁹ which further strengthened the existing law by increasing the maximum potential incarceration time from fifteen to thirty years.⁸⁰ As it had with the 2002 Act, Congress again provided that any individual involved in attempting to organize or participate in sex tourism would be held criminally responsible,⁸¹ and most importantly, it did not require that prosecutors prove intent, the requirement that had most often crippled the government’s case.⁸² Coupled with the PROTECT Act, Congress also established Operation Predator, which brought together a wide range of federal government officials and law enforcement agents to target Americans and resident aliens who sexually exploit children—including through child pornography—in the United States and abroad.⁸³

D. Operation Predator

Operation Predator is a joint initiative between the United States Immigration and Customs Enforcement and the Department of Homeland Security. This coordination has allowed the government to launch a unified campaign against

⁷⁷ *Id.* at 12–13.

⁷⁸ *Id.* at 13.

⁷⁹ 18 U.S.C. § 2423 (Supp. 2004).

⁸⁰ *See id.* § 2423(a)–(d). This is the major difference between the 2002 Act and the PROTECT Act. The other changes were present in the 2002 Act.

⁸¹ *See id.* § 2423(d).

⁸² *See id.* § 2423(c).

⁸³ Press Release, U.S. DEPT OF HOMELAND SEC., Fact Sheet: Operation Predator (July 9, 2003), available at <http://www.dhs.gov/dhspublic/display?content=1067>.

child sexual predators, and, more importantly, it has increased the chances that those who travel or smuggle children for the purpose of prostitution will be investigated and penalized.⁸⁴ Among the program's many efforts to identify, investigate, and remove child predators from America's streets are the development of a national child victim identification system and new intelligence capabilities for targeting sexual predators.⁸⁵

Operation Predator further allows for partnering with foreign governments in overt and covert child pornography and child sex tourism investigations.⁸⁶ In fact, such an investigation led to a forty-four month sentence for a permanent resident alien from the Dominican Republic.⁸⁷ The individual, Rafael Ruiz, took part in a scheme that involved smuggling young girls from Mexico to the United States for the purpose of prostitution.⁸⁸ Ruiz lured the girls to America promising them a better life.⁸⁹ In reality, he often forced them to perform acts of prostitution.⁹⁰ Another Operation Predator investigation led to the indictment of Stefan Irving on three counts by a New York Grand Jury.⁹¹ Irving was charged with traveling to Mexico for the purpose of

⁸⁴ See President George W. Bush, President Bush Addresses United Nations General Assembly (Sept. 23, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/print/20030923-4.html>. In his address before the United Nations General Assembly, Bush declared sex trafficking as "a special evil," a multi-billion-dollar "underground of brutality and lonely fear," a global scourge alongside the AIDS epidemic." Landesman, *supra* note 2, at 32. The President further avowed that "those who create these victims and profit from their suffering must be severely punished" and that "those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery." *Id.*

⁸⁵ See U.S. DEP'T OF HOMELAND SEC., *supra* note 83, available at <http://www.dhs.gov/dhspublic/display?content=1067>.

⁸⁶ See *id.*

⁸⁷ See Press Release, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE Investigation Leads to 44-Month Sentence for Individual in International Sex Trafficking Case (Sept. 17, 2003), available at <http://www.ice.gov/graphics/news/newsreleases/articles/sentenced091703.htm>. Ruiz was convicted under § 2423(e), which deals with attempt and conspiracy. Under § 2423(e), "[w]hoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection." 18 U.S.C. § 2423(e).

⁸⁸ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 87, available at <http://www.dhs.gov/dhspublic/display?content=1067>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See U.S. DEP'T OF HOMELAND SEC., *supra* note 83, available at <http://www.ice.gov/graphics/news/newsreleases/articles/OperationPredatorRel070903.pdf> (discussing some recent actions aimed at protecting children).

engaging in sexual contact with a child and for receiving and possessing child pornography.⁹²

III. THE VALUE OF A COMPARATIVE PERSPECTIVE

Comparative law is an approach that explores the similarities and differences in the national laws of two or more different legal systems.⁹³ It allows for the comparison of “entire legal systems in order to acquire a better understanding thereof, or provide information, and insight into, the operation of the system’s institutions or the systems themselves.”⁹⁴ Comparative law also allows one to consider his or her own laws in a different light⁹⁵ and examine how “different societies address comparable issues.”⁹⁶ As the world becomes more and more interconnected, comparative law gives scholars the chance to analyze the necessary components of a particular law, consider amendments to make each law stronger,⁹⁷ and provide model legislation for other states.⁹⁸

In order to assess the evolution of the United States legislation, it is necessary to compare it to the statutes that have been enacted in other states. Such an assessment will provide a better frame of reference for determining which elements of the United States law are effective and which should be amended.

A. *Five Key Categories of Comparison*

This section provides a foundation for the comparison of § 2423 of the PROTECT Act to other states’ laws. The discussion of the laws focuses only on those sections which deal with child sex tourism and will be compared across five key categories: (1) whether the legislation contains an extraterritoriality component; (2) whether the age of consent conforms with the CRC;⁹⁹ (3) whether there is a double criminality requirement; (4)

⁹² *Id.*

⁹³ PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 9 (2d ed. 1999).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Ku & Borgen, *supra* note 49, at 512 (quoting Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT’L L. 57, 71 (1998)).

⁹⁷ See DE CRUZ, *supra* note 93, at 9.

⁹⁸ See Ku & Borgen, *supra* note 49, at 511.

⁹⁹ See AMNESTY INT’L, *supra* note 11, at Part 1, Art. 1 (defining children as those who are younger than eighteen years old).

whether there are provisions built into the statute to provide for special testifying conditions for child witnesses; and (5) whether various incarceration periods and/or fines serve as an adequate deterrent to sex tourists.

1. Extraterritoriality

Territorial sovereignty recognizes that a state has jurisdiction “in both criminal and civil matters over persons and property within its territorial limits.”¹⁰⁰ Nevertheless, when an offense is committed abroad, the state in which the individual is taken into custody may be required—because of extradition treaties or agreements—to return the individual to the country in which the criminal act took place.¹⁰¹ Without such agreements, states often prefer to prosecute these individuals in national courts even though the crime was committed abroad.¹⁰² Recently, even states that ordinarily comply with extradition have begun to pass legislation “permitting them to try offenders under extraterritorial jurisdiction for sexual offences against minors abroad.”¹⁰³ Thus, extraterritoriality can be seen as the jurisdictional element that allows for prosecution of citizens for crimes committed outside of one’s country.¹⁰⁴ According to the Restatement Third of the Foreign Relations Law of the United States, the standard for extraterritorial jurisdiction¹⁰⁵ must be

¹⁰⁰ SEABROOK, *supra* note 17, at 4 (discussing extraterritorial legislation and its relationship to international law).

¹⁰¹ *See id.* This Note provides a cursory examination of the interrelationship between child-sex tourism legislation and extradition treaties, as that topic should be reserved for future discussion. Nevertheless, it is important to recognize that the relationship exists.

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ The United States has chosen not to impose an obligation of double criminality, which would require that child-sex tourism be illegal in both the United States and the location of the conduct. Instead, the PROTECT Act extends U.S. criminal laws “against nationals whose acts were committed in places lacking an effective criminal justice system.” ILIAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW* 152 & n.69 (2d ed. 2003) (noting that the Hellenic Criminal Code, Article 5 also extends its laws against its nationals who commit acts in other States where the criminal justice system is inadequate). The English have also followed suit with the U.K. Sexual Offences (Conspiracy and Incitement) Act (SOA) 1996. *Id.* This law demonstrates that the British are “willing to bring within their jurisdiction offences which, on account of socio-economic reasons in developing countries, would not be prosecuted there.” *Id.*

¹⁰⁵ In *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 799 (1993), the Supreme Court stated that in order to determine if the exercise of jurisdiction is

predicated upon some domestic “effect” or harm.¹⁰⁶

A key component to creating effective child sex tourism legislation, especially from the viewpoint of the sending countries, is to incorporate extraterritorial jurisdiction into the legislation. Without this component, states would lack the ability to prosecute nationals for crimes committed abroad because, in most cases, states could not create jurisdiction.¹⁰⁷

There are a number of theoretical foundations on which jurisdiction may be based. These include: the protective principle,¹⁰⁸ the nationality principle,¹⁰⁹ the passive personality

proper, it is necessary to determine if “there is . . . a true conflict between domestic and foreign law.” *Id.* This decision is contrary to the “effects test” set forth in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). The “effects test” held that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” *Id.*; see also *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611–12, 615 (9th Cir. 1976) (applying the “effects test”).

¹⁰⁶ According to the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 402:

Subject to § 403, a state has jurisdiction to prescribe law with respect to:

- (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

¹⁰⁷ The amendments, in addition to remedying the extraterritoriality issue, also remedied the proof of intent problem which had also been a major road block to effectively prosecuting American child-sex tourists; however, the 2002 Act as well as the PROTECT Act remedied the proof of intent problem.

¹⁰⁸ See Matthew Goode, *The Tortured Tale of Criminal Jurisdiction*, 21 MELB. U. L. REV. 411, 413 (1997) (indicating that *the protective principle* gives the forum jurisdiction “in relation to any conduct engaged in by any person anywhere which is contrary to the forum’s criminal law and which threatens the peace, security or good government of the forum”). This principle was born during the nationalistic periods which produced the French and American revolutions. *Id.*

¹⁰⁹ See *id.* Under the *nationality principle*, the “forum has jurisdiction in relation to any conduct engaged in anywhere which is contrary to local law and which is alleged to have been committed by a national of the forum.” *Id.* While “the granting of nationality is considered a matter of domestic law, its application and recognition in international fora is premised on principles of international law.” BANTEKAS & NASH., *supra* note 104, at 151 (footnotes omitted). The nationality principle, also

principle,¹¹⁰ the universality principle,¹¹¹ and the territorial principle.¹¹² The nationality principle is the theory upon which the United States legislation is based; it is the “hook” which is used by the government to increase the likelihood of prosecution of American citizens and resident aliens for sexual acts committed on children while abroad. This jurisdiction is expressly provided in § 2423¹¹³ due in part to the fact that earlier drafts of the law would have made it difficult for prosecutors to bring charges against offenders since it was necessary to prove intent.¹¹⁴ Australia, Germany, Japan, and Sweden root their extraterritorial criminal jurisdiction in one of these principles or

referred to as the active personality principle, is generally found in civil law jurisdictions, but it is also recognized in some common law states. *Id.* For example, in England, the nationality principle pertains to a limited number of offenses, including treason, bigamy, and “conspiring or inciting sexual offences against children.” *Id.*

¹¹⁰ See BANTEKAS & NASH., *supra* note 104, at 152–54. The *passive personality principle* grants jurisdiction based on the nationality of the victim, rather than the defendant. *Id.* at 153. Rarely used, the passive personality principle is justified because it takes into consideration “each country’s interest in protecting the welfare of its nationals abroad.” *Id.*

¹¹¹ See *id.* at 156 (explaining that the *universality principle* gives jurisdiction without requiring more than that the offender is in the territory). Traditionally, this principle is used to grant jurisdiction over offenses considered to be of a particularly atrocious character and which are committed in an area not subject to the law of any one state. See *id.* Genocide and piracy are classic examples. *Id.* at 156–57, 160.

¹¹² Under territorial jurisdiction, a state’s jurisdiction is derived from the location of the defendant’s acts; thus, a state may “punish individuals who commit crimes within its borders.” WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 216 (4th ed. 2003). Territorial jurisdiction is divided into subjective and objective territorial jurisdiction. The subjective territorial jurisdiction allows for the “exercise of jurisdiction in the state where a crime is commenced” while objective territorial jurisdiction “gives jurisdiction to the state in which the crime has been completed and has effect—the forum of injury.” REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 110 (4th ed. 2002).

¹¹³ However, for cases where the extraterritorial jurisdiction is not expressly provided by statute, courts may apply the test elicited in *United States v. Bowman*, 260 U.S. 94, 97–98 (1922) (finding jurisdiction based on the nature of the offense and its impact on the government, where the defendants, outside of the United States, attempted to defraud a corporation in which the United States was a stockholder).

¹¹⁴ The extraterritoriality component of the PROTECT Act represents a significant change. Even in President William Jefferson Clinton’s message to the Senate analyzing the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the U.S. position was much different. For example, the President noted that only “*some* federal laws provide for the assertion of jurisdiction over U.S. nationals for covered offenses committed outside the United States.” Protocols to the Convention on the Rights of the Child, July 5, 2000, art. 4(2), S. TREATY DOC. NO. 106-37, 20 (2000), *available at* 2000 U.S.T. LEXIS 94, *62–63 (emphasis added).

a combination thereof.

2. Age of Consent

The age of consent varies greatly among states. The CRC defines a child, but it does not specify the age of sexual consent in the document. The Committee on the Rights of the Child (the “Committee”) has stated that eighteen is the preferred age of consent for protecting children from sexual exploitation.¹¹⁵ The sexual exploitation distinction is critical because the goal is not to include young people engaging in consensual sexual relations, but rather to ensure prosecution of sex tourists and others who take advantage of legislative loopholes. The Committee and others in the international community note that the age (eighteen) refers to situations where children are victims of child prostitution, pornography, and sexual trafficking.¹¹⁶ Yet, even though this standard has been articulated, few states have complied. This has led to confusion and a lack of clarity among states, and made it difficult to prosecute sex tourists.

3. Double Criminality

In order to deal with the differing ages of consent, it is essential that countries with double criminality requirements remove that component of their legislation. Double criminality requires that “the crime committed abroad must be considered an offence in *both* countries.”¹¹⁷ For example, take A, a citizen of Country X, where double criminality is a component of its child sex tourism legislation. If A sexually abuses a child in Country Y, A cannot be prosecuted in Country X, unless the act is a crime in Country Y. Thus, in child sex tourism cases, double criminality proves to be an impediment to prosecution. If states are unwilling to amend the age of consent for reasons relating to culture, then double criminality components must be removed from child sex tourism legislation so as to improve its efficacy.

¹¹⁵ See INT’L BUREAU FOR CHILDREN’S RIGHTS, INTERNATIONAL DIMENSIONS OF THE SEXUAL EXPLOITATION OF CHILDREN 18 (n.d.), available at <http://www.ibcr.org/globalreport.pdf>.

¹¹⁶ *Id.*

¹¹⁷ SEABROOK, *supra* note 17, at 5 (emphasis added) (examining the impediments to prosecuting sex tourists under extraterritorial legislation).

4. Victim Testimony

Child protection statutes should have provisions that make testimony easier on the child, especially since the child often does not speak the language or understand the complexities of the foreign legal system. Psychologists have found that testifying in courtrooms is difficult for children, and thus closed-circuit television testimony is very important because it does not force the child to face his or her abuser. Also, in the courtroom situation, there are language barriers causing many children to misunderstand their role in the trial process.¹¹⁸ Therefore, when children are placed into this unfamiliar situation, they often feel that it is better not to speak at all.¹¹⁹ It is important that states recognize this problem and afford greater protection in their statutes so that testimony is "facilitated with the least disruption to [the child victims'] lives and rehabilitation."¹²⁰

5. Length of Incarceration

All sentences against child sex tourists must be severe enough to serve as true deterrents of such behavior. Minimal sentences or fines alone are not enough to deter sex tourists. Real and significant incarceration periods, as well as fines, must be incorporated into statutes. Once these elements are integrated, state judicial systems must be willing to impose such sentences. Merely establishing a threatening maximum standard is not effective unless potential offenders are convinced that, if caught, such a sentence will actually be imposed.

B. A Brief Overview of Australian, German, Japanese, and Swedish Child Sex Tourism Laws

1. Australia

Enacted by the Australian Parliament in 1994, the Child Sex Tourism Act amended the Crimes Act of 1914.¹²¹ The changes in the Act allow the Australian government to prosecute Australian

¹¹⁸ Sandra Shrimpton et al., *The Child Witness and Legal Reforms in Australia*, in *INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN'S TESTIMONY: PSYCHOLOGICAL RESEARCH AND LAW* 132, 135-36 (Bette L. Bottoms & Gail S. Goodman eds., 1996).

¹¹⁹ *See id.* at 136.

¹²⁰ KLAIN, *supra* note 29, at 46.

¹²¹ *See* INT'L BUREAU FOR CHILDREN'S RIGHTS, *supra* note 115, at 68.

child sex offenders who commit the acts overseas.¹²² This is an important change because “[b]efore the introduction of this new legislation, if an offence was committed overseas and not punished whilst in the country, Australian law officials were powerless.”¹²³ In order to create a concrete and feasible deterrent to overseas sexual exploitation of children by Australians, the Act established jurisdiction over “an Australian citizen, a resident of Australia, a body corporate incorporated by or under a law of the Commonwealth, State or Territory, or any other body corporate that carries on its activities principally in Australia”¹²⁴ who commits a sexual act on a child under the age of sixteen at the time of the offense.¹²⁵ The Act has been a success with several Australians facing prosecution under it.¹²⁶

Further, the Child Sex Tourism Act’s amendments allow for the prosecution of individuals who “encourage, advertise, benefit from, or assist a person to travel in order to sexually exploit minors.”¹²⁷ Another important component to the legislation is the allowance of video link testimony to be established between the child and the Australian courts.¹²⁸ This provision was added because the Australian government realized the emotional strain that this type of testimony could put upon a child, particularly because child victims “are likely to retract their allegations for a number of reasons, including fear of retribution, intimidation,

¹²² *Id.*

¹²³ Electronic References, *Child Sex Tourism Bill in Australia*, at <http://www.electronicreferences.com/view.php/Law/2490.htm> (last visited May 18, 2005). There is no double criminality requirement for prosecution because the government believes that the primary responsibility for protecting children from sexual exploitation rests with the country in which the event occurred. See INT’L BUREAU FOR CHILDREN’S RIGHTS, *supra* note 115, at 69.

¹²⁴ INT’L BUREAU FOR CHILDREN’S RIGHTS, *supra* note 115, at 69.

¹²⁵ *Id.*

¹²⁶ Press Release, Child Wise, Baptist Church Missionary Receives 8 Years Jail for Child Sex Tourism Convictions, (May 23, 2003), *available at* <http://www.childwise.net/media-releases.php> (discussing a recent conviction under Australia’s statute).

¹²⁷ KLAIN, *supra* note 29, at 46.

¹²⁸ *See id.* Such a video link also makes it easier on the child victim because he or she is not forced to endure the trip and the legal process. *Id.*; *see also* Fiona David, AUSTRALIAN INST. OF CRIMINOLOGY, *Child Sex Tourism*, 156 TRENDS & ISSUES IN CRIME & CRIM. JUST., June 2000, at 3, *available at* <http://www.aic.gov.au/publications/tandi/ti156.pdf> (noting that video link testimony is important for child-sex abuse victims as they often “have little or no understanding of what they are going through or why”). Moreover, testifying is also very difficult for these children as they are forced to recount their stories in front of strangers. *Id.*

and the desire for privacy.”¹²⁹

In conjunction with the foregoing legislation, the Australian government established Child Wise,¹³⁰ a program which focuses on catching Australian child sex tourists. The Child Wise program has developed “Child Wise Tourism” to provide tourism training programs.¹³¹ This program recognizes that informational materials alone are not enough and demonstrates that Australia realizes child sex tourism is a delicate topic in some communities that requires not only discussion, but also industry and government support.¹³² Moreover, Child Wise Tourism “introduces the prevention of child sex tourism as a local as well as international tourism industry issue.”¹³³ It also “connects the tourism industry to [the] community and specifically child welfare organisations to promote corporate-community partnerships in combating child sex tourism.”¹³⁴

Also developed by Child Wise is the educational program “Travel with Care.” The program, sponsored by the government’s National Crime Prevention Program,¹³⁵ is directed at increasing awareness of the Australia Child Sex Tourism Law.¹³⁶ Travel with Care works “with the travel and tourism industry to re-evaluate and ascertain the current understanding of how the Australian Child Sex Tourism law relates to the industry.”¹³⁷ It also produced an educational video, a travel and tourism industry information kit,¹³⁸ and a “Travel with Care” leaflet.¹³⁹ The leaflet is distributed in airports, travel agencies, travel

¹²⁹ David, *supra* note 128, at 3.

¹³⁰ The project was “developed to provide training and assistance to the [tourism industry and to tourism educators] in destinations where child-sex tourism exists or is emerging.” Child Wise, *Preventing Child Sex Tourism*, at <http://www.childwise.net/preventing-child-sex-tourism.php> (last visited May 18, 2005).

¹³¹ *See id.* (developing training programs to provide practical information to the travel and tourism industries).

¹³² *See id.* (indicating that programs have been created in Thailand, Cambodia, Indonesia, and the Philippines).

¹³³ *See id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.* The information kit explains the 1994 Child Sex Tourism Act and how it relates to travel agents. *Id.*

¹³⁹ *See id.* (noting that the leaflet explains the Australian law and its implications to all travelers).

medical centers, passports offices, embassies, and visa offices.¹⁴⁰ Most importantly, through the Child Wise program, “Tourism Training Australia” was developed. This training program requires that all tour operators complete the mandatory child sex tourism component before finishing their studies.¹⁴¹

2. Germany

In 1993, the German government enacted a law that provides for up to ten years’ imprisonment for any German citizen caught engaging in a sexual act with a child under the age of fourteen, regardless of where the act takes place.¹⁴² The obvious policy behind this law was to deter German citizens from traveling abroad to engage in sexual acts with children.¹⁴³ Like the United States law, there is no double criminality requirement;¹⁴⁴ however, the law does contain a five-year statute of limitations.¹⁴⁵ The law has been successful, and it was applauded in the 1998 UNICEF report for having the largest number of prosecutions.¹⁴⁶ However, the reach of the German extraterritorial laws only extends to German citizens who reside in Germany,¹⁴⁷ exemplifying the nationality principle of jurisdiction. In conjunction with its child sex tourism legislation, Germany has also established a hotline in local police departments to facilitate reports of child sexual abuse.¹⁴⁸

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *See* KLAIN, *supra* note 29, at 43.

¹⁴³ *See* Berkman, *supra* note 26, at 414. The German law was amended in 1998 to deal with child pornography via the internet. *See* SEABROOK, *supra* note 17, at 25.

¹⁴⁴ *See* Berkman, *supra* note 26, at 414.

¹⁴⁵ INT’L BUREAU FOR CHILDREN’S RIGHTS, *supra* note 115, at Annex I (Extraterritorial Legislation Against the Sexual Exploitation of Children), available at http://www.ibcr.org/cgi-bin/tribunal_processor.pl?document=global9. The law mandates the five-year statute of limitations for “sexual abuse of charges; sexual abuse of persons unable to put up resistance; encouraging sexual acts by minors and sexual abuse of young persons.” *Id.* (citations omitted). The limitation period is extended to ten years for the sexual abuse of a child and twenty years for sexual coercion and rape. *Id.* The statute of limitations is tolled for these crimes until the victim reaches the age of eighteen. *Id.*

¹⁴⁶ *See id.* Convictions include a sentence of four years for seventeen incidents involving twenty-five Thai children, and a “one year and three months’ imprisonment for several deeds in Czech Republic involving two Czech girls aged 10 and 14.” *Id.*

¹⁴⁷ *See* Berkman, *supra* note 26, at 415.

¹⁴⁸ WORLD TOURISM ORG., *Emergency Hotlines*, at http://www.world-tourism.org/protect_children/emergency.html (last visited May 18, 2005).

Further, an in-flight video was produced by Terre des Hommes, a German child rights organization, the European Commission, and the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.¹⁴⁹ The video “is addressed to all long-distance flight tourists and aims to point out the problem of sexual exploitation of children in tourism.”¹⁵⁰

3. Japan

The Japanese penal code provides for extraterritorial jurisdiction over selected criminal acts “including rape, indecent assault, and statutory rape”¹⁵¹ and, like the United States and German laws, it does not contain a double criminality requirement. The criminal code, as originally drafted, did not provide protection for boys,¹⁵² required that the victim file a complaint within six months of the crime, and set the age of consent at thirteen.¹⁵³ These limitations severely restricted the ability of the Japanese authorities to investigate crimes committed by Japanese sex tourists.

In 1999, after complaints that the Japanese penal code contained “inappropriate obstacles to prosecuting child sex tourists,”¹⁵⁴ Japan’s parliament unanimously¹⁵⁵ enacted the Law

¹⁴⁹ WORLD TOURISM ORG., *In-Flight Video “Toys” Against Child Prostitution in Tourism*, at http://www.world-tourism.org/protect_children/movie/lufthansa.htm (last visited May 18, 2005) (noting that “Lufthansa, Alitalia, Air Europa, Olympic Airways, Sabena and the German charter airline LTU” have all agreed to show the video free of charge). Austrian Airlines has also been showing passengers heading to selected destinations a similar video. The video discusses the “socio-ethical responsibilities vis-à-vis all humans, and in particular children.” WORLD TOURISM ORG., *Austrian Airlines In-Flight Video Against the Sexual Exploitation of Children Through “Sex-Tourism,”* at http://www.world-tourism.org/protect_children/fr/movie/austrian_airlines.htm (last visited May 18, 2005); see also WORLD TOURISM ORG., *Air France Video Against Child Sex Tourism*, at http://www.world-tourism.org/protect_children/movie/air_france.htm (last visited May 18, 2005) (indicating that the video is particularly aimed at situational sex tourists). The message of the video, which is in both French and English, is that harming a child is wrong no matter where the act is committed. *Id.* Most importantly, there is no copyright, so other airlines may use the tape on flights without incurring the costs of production or other fees that would normally be attached. *Id.*

¹⁵⁰ WORLD TOURISM ORG., *In-Flight Video “Toys” Against Child Prostitution in Tourism*, at http://www.world-tourism.org/protect_children/movie/lufthansa.htm (last visited May 18, 2005).

¹⁵¹ Edelson, *supra* note 9, at 518.

¹⁵² See *id.* at 518–19.

¹⁵³ See *id.* at 519.

¹⁵⁴ *Id.*

¹⁵⁵ BBC News, *World: Asia-Pacific Clampdown on Child Sex*, at <http://>

for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children.¹⁵⁶ The law is a giant step in the right direction; for example, Article 2 defines a child “for purposes of child prostitution and child pornography, as *anyone* under eighteen years old.”¹⁵⁷ Article 10 specifically provides for extraterritoriality,¹⁵⁸ and furthermore, the law no longer requires that the victim file a complaint.¹⁵⁹ The law also prevents the Japanese travel industry from organizing sex tours abroad.¹⁶⁰ In addition, anyone caught in the “act of performing sexual intercourse or an act for the purpose of satisfying one’s sexual curiosity with a child”¹⁶¹ in return for remuneration given, or promised to be given, to “the child,” anyone who “acts as an intermediary in sexual relations with the child,” or anyone who acts as the “protector of the child”¹⁶² will be punished with “three years of imprisonment with labor or a fine.”¹⁶³ The government hopes that the legislation will improve Japan’s image.¹⁶⁴ The government realized that it must begin to punish what was previously regarded as legal and that such a change must come

news.bbc.co.uk/1/hi/world/asia-pacific/347172.stm (May 18, 1999), (noting that all five-hundred members of Japan’s lower house voted for the law).

¹⁵⁶ Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children (1999), *available at* <http://www.moj.go.jp/ENGLISH/CRAB/law01.html>.

¹⁵⁷ Edelson, *supra* note 9, at 520–21 (emphasis added). Thus, the law provides protection for boys as well as girls. However, the law does not address the “possession of pornography . . . leaving untouched the titillating magazines and adult comics read openly [in Japan], many with explicit pictures of young-looking girls.” Doug Struck, *Image-Conscious Japan Targets Child Sex Trade: Law Seeks Change in Public’s Actions, Attitude*, WASH. POST, Jan. 27, 2000, *available at* <http://www.preda.org/archives/research/st/r00020201.html>.

¹⁵⁸ Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children, art. 10, *supra* note 156, *available at* <http://www.moj.go.jp/ENGLISH/CRAB/law01.html>.

¹⁵⁹ See Edelson, *supra* note 9, at 520.

¹⁶⁰ See BBC News, *supra* note 155 (forcing the industry to take responsibility); see also The Future Group, *Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children*, at http://www.thefuturegroup.org/youwillbecaught/law_Japan.html (last visited May 18, 2005).

¹⁶¹ The Future Group, *supra* note 160 (citation omitted).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Even the largest daily newspaper, Yomiuri Shimbun, is actively involved in these efforts. It stopped accepting advertising from two weekly magazines, even though “[t]he leering ads, with suggestive models and bluntly sexual language, had been regular and lucrative advertisements for the daily newspaper.” Struck, *supra* note 157.

from the Japanese public.¹⁶⁵ The government noted the following:

The objective of this law [was] to “protect the rights of children by prescribing punishment for acts related to child prostitution and pornography, and by establishing measures including the giving of appropriate protection to children who have suffered physically and/or mentally from the said acts, in light of the fact that sexual exploitation and sexual abuse of children seriously infringe upon the human rights of children.”¹⁶⁶

In September 2003, the crackdown led to the first arrest of a sex tourist for acts committed while outside of Japan.¹⁶⁷

4. Sweden

The Swedish penal code provides that “a Swedish citizen who has committed a crime outside of Sweden is liable under Swedish law and in a Swedish court.”¹⁶⁸ This law extends to other Nordic citizens living in Sweden, to foreigners and aliens domiciled in Sweden, and to aliens who became Swedish citizens after the crime was committed.¹⁶⁹ Chapter 6 of the Swedish code addresses sex crimes and contains provisions which specifically encompass sexual activity involving children.¹⁷⁰ It provides that engaging in sexual intercourse with a child under fifteen years of age¹⁷¹ carries with it a possible prison sentence of four to ten years.¹⁷² For sexual activities other than intercourse, the statute provides for a one-year period of incarceration.¹⁷³ These sections of the penal code give the Swedish authorities “a basis upon which to prosecute its nationals for engaging in child prostitution . . . while abroad.”¹⁷⁴ The Swedish Penal Code 2:2 § 1 paragraph 7 states that “dual criminality is required for all

¹⁶⁵ *See id.*

¹⁶⁶ The Future Group, *supra* note 160.

¹⁶⁷ *See Man Held Over Naked Minor Photos*, THE JAPAN TIMES, Sept. 6, 2003, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030906a8.htm>. The man ran tours for Japanese sex tourists transporting them from Phnom Penh to the prostitution district on the outskirts of the city. *Id.*

¹⁶⁸ Healy, *supra* note 35, at 1892.

¹⁶⁹ *See* KLAIN, *supra* note 29, at 44.

¹⁷⁰ *See* Berkman, *supra* note 26, at 410.

¹⁷¹ *See* KLAIN, *supra* note 29, at 44.

¹⁷² *See id.*

¹⁷³ Berkman, *supra* note 26, at 410.

¹⁷⁴ *Id.*

extraterritorial legislation”¹⁷⁵ and also imposes a statute of limitations.¹⁷⁶ There are exceptions to the double criminality requirement. Certain crimes, regarded as “heinous crimes” can be brought to justice under the Swedish statute despite the double criminality requirement.¹⁷⁷ The idea is that “some crimes are regarded as heinous crimes and should under any circumstances be brought to justice.”¹⁷⁸ However, the Code provision only applies when the “victim has been exposed to cruelty, serious violence or disease or that the victim is specifically young at age.”¹⁷⁹

Even though the law does not include a provision aimed at sex tour operators, the vast majority of Swedish tour operators, including Star Tour and Scandinavian Leisure Group, have adopted the “Code of Conduct Against Child Sex Tourism”¹⁸⁰ (the “Code”). Adoption of the Code obligates travel agencies, tour operators, and hotels to adopt an ethical policy concerning child sex tourism.¹⁸¹ The Code necessitates that personnel in both the home and destination country be trained, and it expects that a clause be inserted into contracts with tourism industry suppliers that “proclaims a common repudiation of child sex.”¹⁸² The Code also requires that information be provided to travelers “through catalogs, brochures, in-flight spots, ticket-slips, and web sites.”¹⁸³

C. A Comparison of Child Sex Tourism Laws

1. Extraterritoriality Component

Each of these laws contains an extraterritoriality component which is fundamental to any successful law addressing child sex

¹⁷⁵ INT’L BUREAU FOR CHILDREN’S RIGHTS, *supra* note 115, at 105.

¹⁷⁶ The statute is tolled until the child turns fifteen years of age. *See id.*

¹⁷⁷ Susanna Weibull, *Child Prostitution and Sex Tourism: Brazil—Sweden* 50 (2003) (unpublished graduate thesis, University of Lund) (on file with author).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See Impact of the Asian Economic Crisis on Child Prostitution*, ECPAT INT’L NEWSLETTERS, (ECPAT Int’l, Bangkok, Thailand), May 1, 1999, available at http://www.ecpat.net/eng/Ecpat_inter/IRC/newsletters.asp?letterID=21.

¹⁸¹ *See Weibull, supra* note 177, at 46 (indicating that “about 40 tour operators, covering some 98% of the Swedish market and 75% of the Scandinavian market have adopted the ‘Code of Conduct’”).

¹⁸² *Id.*

¹⁸³ *Id.*

tourism.¹⁸⁴ The central importance of extraterritoriality cannot be overemphasized, as without it, child sex tourism legislation lacks any real command. Nevertheless, the way in which the extraterritoriality element was established differs among the states. For example, the United States, Australia, and Japan enacted legislation pertaining solely to child sex tourism and containing extraterritoriality as a component. Alternatively, Germany and Sweden have extraterritorial components embedded within their penal codes. Moreover, while Germany acknowledges extraterritoriality as a general principle in its penal code, specific provisions were “legislated to facilitate prosecutions” of child sex tourists.¹⁸⁵

Another difference among the respective extraterritoriality components is the theoretical justification for each. Australia based its statute on its constitutional external affairs power “which enables Australia to legislate with respect to matters physically external to Australia.”¹⁸⁶ This power can be likened, for instance, to the protective principle, since Australia is attempting to protect overall notions of international peace and security. The German statute applies both the passive-personality and nationality principles to justify its extraterritorial legislation over both German nationals and foreigners.¹⁸⁷ Sweden, like Germany, looks to the nationality of the offender, but the Swedish law also mixes the territoriality and personality principles because it prosecutes the offenses of “both Swedish nationals and aliens residing in [Sweden] or passing through [Sweden].”¹⁸⁸ The Japanese legislation appears to be rooted in the nationality principle because it provides specific application to Japanese nationals and legal entities. Article 11 of the Japanese statute holds that “where a representative of a legal entity or a proxy, employee or any other servant of a legal entity or of a natural person has committed [the sexual abuse of a child], the legal entity or natural person shall, in addition to the punishment imposed upon the offender, be punished.”¹⁸⁹

¹⁸⁴ See *supra* Part III.A.1–4.

¹⁸⁵ SEABROOK, *supra* note 17, at 6.

¹⁸⁶ INT'L BUREAU FOR CHILDREN'S RIGHTS, *supra* note 115, at 68.

¹⁸⁷ See *id.* at 86.

¹⁸⁸ See *id.* at 104.

¹⁸⁹ *Id.* at 95 (quoting Article 11 of the Japanese statute).

2. Age of Consent

The only countries in this comparison to conform to international standards regarding age of consent when drafting legislation are Japan and the United States.¹⁹⁰ Both states changed the age of consent to eighteen years, the age called for by the CRC and draft protocols. Australia established the age of consent at sixteen years.¹⁹¹ Germany and Sweden have provided protection only for victims who are younger than fifteen years,¹⁹² thereby making the age of consent a full three years below international standards.¹⁹³ These age of consent discrepancies among states provide tour operators and sex tourists with the opportunity to maneuver around the extraterritoriality components of child sex tourism statutes. It is recognized that the age of sexual maturity is generally younger in developing countries and therefore hinders prosecutions in those states that have double criminality components.¹⁹⁴ While it is important to develop policies to combat child prostitution, it is also critical that states develop legislation that takes into account their unique cultures and beliefs, as well as economic and political differences. Such understanding makes abolishing double criminality components in child sex tourism legislation even more vital.

3. Requirement of Double Criminality

The only state which is discussed in this Note to require that the act be a crime in the country in which it is committed is Sweden.¹⁹⁵ This requirement is a barrier to bringing child sex tourists to justice in Sweden—and similar states not addressed herein—since it demands that the action be a crime both in the home state and in the state in which the abuse was committed.¹⁹⁶ Consequently, if a Swedish citizen commits sexual abuse on a child in a state which does not yet have legislation regarding

¹⁹⁰ See Edelson, *supra* note 9, at 520 (indicating that the age of consent is eighteen years); 18 U.S.C. § 2423.

¹⁹¹ See Child Sex Tourism Act, 1994, § 50BC(1)(a) (Austl.).

¹⁹² See *supra* notes 134 and 162.

¹⁹³ See AMNESTY INT'L, *supra* note 11, available at http://www.amnestyusa.org/children/crn_faq.html.

¹⁹⁴ See INT'L BUREAU FOR CHILDREN'S RIGHTS, *supra* note 115, at 18–19.

¹⁹⁵ See SEABROOK, *supra* note 17, at 102.

¹⁹⁶ See *supra* note 108 and accompanying text (defining and providing an example of double criminality).

child sex tourism, the individual may not be prosecuted in Sweden. In 1998, the Swedish Parliamentary Committee on Sexual Crimes proposed the removal of the double criminality requirement “for serious sexual crimes committed abroad against persons below 18 years old;”¹⁹⁷ however, this proposal has not yet been adopted. It is necessary that Sweden remove the provision from its penal code and follow other states in order to give its extraterritoriality component full weight and to better protect children from sexual abuse.

4. Victim Testimony

Australia, the United States, and Sweden have established special testimony provisions for child witnesses.¹⁹⁸ The Australian law—the strongest of the three—specifically provides for closed-circuit television testimony in its child sex tourism legislation¹⁹⁹ in order “to reduce the stress on child witnesses by removing them from direct physical confrontation with the defendant.”²⁰⁰ While there is no specific mention of child testimony in the PROTECT Act, the Supreme Court stated in *Maryland v. Craig*²⁰¹ that allowing a child sexual abuse victim to testify by closed-circuit television—so as to reduce any trauma the child may experience by testifying in the defendant’s presence—did not violate the defendant’s Sixth Amendment right

¹⁹⁷ Weibull, *supra* note 177, at 51.

¹⁹⁸ See *infra* note 199 (quoting Child Sex Tourism Act, 1994, § 50EA (Austl.)).

¹⁹⁹ Section 50EA of the Australian statute states in relevant part that:

In a proceeding for an offence against this Part, the court may direct that a witness give evidence by video link if:

- (a) the witness will give the evidence from outside Australia; and
- (b) the witness is not a defendant in the proceeding; and
- (c) the facilities required by section 50EC are available or can reasonably be made available; and
- (d) the court is satisfied that attendance of the witness at the court to give the evidence would:
 - i. cause unreasonable expense or inconvenience; or
 - ii. cause the witness psychological harm or unreasonable distress; or
 - iii. cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced;and

- (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link.

Child Sex Tourism Act, 1994, § 50EA (Austl.).

²⁰⁰ Shrimpton, *supra* note 118, at 140.

²⁰¹ 497 U.S. 836 (1990).

to confront the accuser.²⁰² Further, 18 U.S.C. § 3509(b) also provides for various alternatives including “live, in-court testimony when it is determined that a child cannot or should not testify for various reasons.”²⁰³ The Swedish law allows the child’s video-recorded testimony—taken in the home country—to be introduced into court.²⁰⁴ However, under Swedish law, children under sixteen years of age are not considered as sworn witnesses. Therefore, an abused child may give testimony as a plaintiff, but not under oath.²⁰⁵ The German courts and German law enforcement are testing video technology as a means to protect children.²⁰⁶ The Japanese statutes do not contain specific provisions for child witnesses which may make the uncomfortable situation of testifying even more frightening.

5. Length of Incarceration

Of the states discussed, the United States statute contains the most severe incarceration penalties. Amended in April 2003, the United States PROTECT Act provides that an individual may be imprisoned for up to thirty years for acts committed at home or abroad.²⁰⁷ In fact, Carol Smolenski, head of ECPAT-USA, stated that when she is asked about the most significant changes to the United States statute, she says that “now you can be sentenced to 30 years.”²⁰⁸ In contrast to the harsh potential punishments in the United States, the Australian law only provides for a prison term of up to twelve years, while incarceration under the German code is only up to ten years. Under Sweden’s statute, the maximum incarceration period is also ten years. The Japanese statute is by far the most lenient; offenders may be punished with no more than a three-year prison sentence *or* a fine of up to one million yen. In November 2004, John W. Seljan, eighty-six years old, was convicted of “six counts related to molesting children, including the rapes of two girls

²⁰² *Id.* at 855.

²⁰³ Protocols to the Convention on the Rights of the Child, *supra* note 114, at 23.

²⁰⁴ See INT’L BUREAU FOR CHILDREN’S RIGHTS, *supra* note 115, at 44.

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ See 18 U.S.C. § 2423(b-d) (Supp. 2004). The punishment also includes those prosecuted for ancillary offenses, such as tour operators. The 2003 amendment changed the incarceration period from fifteen to thirty years. 18 U.S.C. § 2423 (Supp. 2004) (Historical and Statutory Notes).

²⁰⁸ *See supra* note 19 (noting author’s telephone interview with Smolenski).

younger than 12, possession of child pornography and attempting to travel overseas with the intent to engage in illicit sexual conduct.”²⁰⁹ He faces a prison sentence of more than two-hundred years as result of the amendments to the PROTECT Act. In addition to Mr. Seljan, nine other men have been prosecuted under the Act.²¹⁰

In this respect, the United States amendments should serve as a model that other states can follow to enact severe penalties to deter their nationals from committing sexual acts against children.²¹¹ Sex tourists must know that penalties will be consistent and harsh, even for first time offenders. Perhaps even a system of strict liability²¹² should be established, thereby making incarceration mandatory for every child sex tourist that is caught. Fines, as are provided for under the Japanese code, are unrealistic since their deterring effect is most likely minimal; however, the concept of assessing fines could be beneficial if coupled with prison sentences, particularly toward those who engage in such activities with a profit motive, such as tour operators. Such fines could be used to compensate the victims and to assist them in obtaining medical and psychiatric care they require. With the current statute in effect, United States judges must now sentence individuals with severe penalties and send the message to sex tourists that the United States government and the American people will not tolerate such behavior.

IV. LESSONS LEARNED

The above comparison sheds light on the need for each state to ensure that child sex tourism legislation is effective. It also illustrates the need for states to commit their resources

²⁰⁹ Nick Madigan, *Man, 86, Convicted Under New Law Against Americans Who Go Abroad to Molest Minors*, N.Y. TIMES, Nov. 20, 2004, at A12. Seljan admitted to taking “at least three trips a year to Southeast Asia for 20 years.” *Id.* He claimed that his trips were “to ‘educate’ small children, some not yet 10 years old, sexually.” *Id.*

²¹⁰ *Id.* The first, Michael L. Clark, seventy, of Seattle, was arrested in Phnom Penh, Cambodia, “and accused of having sex with two boys, 10 and 13.” *Id.* Clark pleaded guilty and was sentenced to 8 years and one month in prison. *Id.*

²¹¹ Penalties imposing one to two year sentences are apparently not enough of a deterrent to stop sex tourists from committing such acts, since the industry is growing. Thus, longer, more rigidly enforced sentences must be imposed.

²¹² Under a system imposing strict liability, there would be no defenses available to the offender. It would not matter that he or she was mistaken as to the age of the child.

wholeheartedly in order to stop child sex tourism. Fragmented efforts must be coordinated so that states can first recognize their own shortcomings, realize the strength of other states' legislation, and begin to address the holes in their respective legislation.

The United States has incorporated many of the above provisions into the PROTECT Act: the Act has an extraterritoriality component,²¹³ does not require double criminality, and provides for a potential prison sentence of up to thirty years.²¹⁴ Still, the statute has its weaknesses. For example, even though the Supreme Court has spoken on the matter of child testimony in sexual abuse cases,²¹⁵ the PROTECT Act does not have a specific provision addressing victim testimony. Amending the statute to include an express provision such as the one in the Australian statute would ensure that child victims are treated with the necessary care.²¹⁶ Child-friendly procedures are necessary, especially if the young victim is forced to travel abroad to take part in the trial of the sex tourists. States must therefore make an effort to protect child sexual abuse victims from the adversarial process.²¹⁷

However, this process requires more than allowing the child to give video testimony. It includes training law enforcement to recognize the unique fragility of these victims and to develop proper questioning techniques which will help to make the children feel more comfortable and better able to recount their stories accurately. Likewise, incorporating special provisions for child testimony should be a priority for all sex tourism legislation, as these children need to be protected, especially after suffering sexual abuse. Wherever possible, child victims should be spared the torment of having to testify at trial, and instead, police should work together to gather evidence and courts should, where applicable, be amenable to accepting it.²¹⁸

Furthermore, creating a minimum incarceration period of

²¹³ See 18 U.S.C. § 2423(b)–(c) (Supp. 2004) (providing for prosecution even if the act was not committed in the United States).

²¹⁴ See *supra* note 207 (noting the recent amendments changing the potential incarceration from fifteen to thirty years).

²¹⁵ See *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

²¹⁶ See *supra* note 199 (indicating the circumstance under which the child testimony provision may be invoked).

²¹⁷ See SEABROOK, *supra* note 17, at 116.

²¹⁸ See *id.*

sufficiently long duration is also important to deterring sex tourists. Establishing a clear policy that sex tourists will not be merely slapped on the wrist and given community service or probation will not only give the PROTECT Act more teeth, but it will also hopefully deter Americans from traveling abroad to abuse children sexually. The United States must couple the incarceration with fines and create a victims' compensation provision in order to ensure that criteria are developed to guarantee payment of such fines and to direct these funds properly to the victims.²¹⁹ Such money is necessary to help rehabilitate the victims so that they may live healthy, happy, and productive lives.

In addition to amending legislation, the United States should fully integrate Operation Predator into its fight against sex tourism. In doing so, the United States may look to Australia's Child Wise programs. Child Wise, like Operation Predator, aims at catching sexual deviants; however, Child Wise is more focused on mobilizing the efforts of the Australian tourism industry, private sector, and media.²²⁰ Operation Predator needs to support similar efforts, but it must be done in a way that will focus on preventing the exploitation of children and providing assistance to those who have been abused. Instead of sensationalizing the issue in the media, Operation Predator and other programs designed to stop the sexual abuse of children must focus attention and efforts on developing "integrated and coherent approaches"²²¹ to stopping sex tourists. Another possibility for improvement is to encourage more members of the American tourism industry to follow the lead of the Swedish travel industry and adopt the Code of Conduct.²²² Such a commitment may even prompt United States-based airlines to

²¹⁹ See *id.* at 105–06. For example, the money could be used to help the victims obtain necessary medical and psychological care.

²²⁰ See *supra* Part III.B and accompanying notes.

²²¹ See SECOND WORLD CONGRESS AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN, UNICEF, TAKING STOCK: PROGRESS IN EUROPE AND CENTRAL ASIA SINCE THE FIRST WORLD CONGRESS AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (STOCKHOLM 1996) (2001), available at <http://www.unicef.org/events/yokohama/summary-csec-europe-centralasia.html>.

²²² See *supra* notes 168–69 and accompanying text. Carlson Companies Inc., owners of several hotel chains throughout the United States and other countries, signed the Code of Conduct in April 2004. Press Release, UNICEF, Launch of "Code of Conduct" for Travel Industry to Protect Children from Sex Tourism (Apr. 24, 2004), available at www.unicef.org/media/media_20445.html.

begin showing informational videos on flights to destination countries.²²³

V. BEYOND DOMESTIC CHILD SEX TOURISM LEGISLATION

While the development of legislation is the first step toward ending child sex tourism, such legislation is less effective without collaboration among states. In order to stop this senseless abuse of children, states must recognize that adherence to international agreements is important. This would include working to develop and promote extradition agreements and arrangements to “ensure that a person who exploits a child for sexual purposes abroad is prosecuted in one or the other country.”²²⁴ States must also be careful not to develop cumbersome policies that lead to delays in prosecution.²²⁵ Rather, law enforcement agencies with more resources and capacity should extend assistance and training to states in need. In particular, this should include the sharing of investigative and expert knowledge on techniques to detect sexual offenses against children and to apprehend foreigners. Other training should include efforts to help police and other officials recognize that these children are not criminals, but rather victims.²²⁶ Such collaboration should also include a “network of contacts for the gathering of evidence”²²⁷ as well “monitoring mechanisms for the effective imposition of sanctions.”²²⁸ States must also ensure that their advocates and judges are educated with respect to their countries’ child sex tourism and extraterritoriality legislation.²²⁹ Finally, states need to promote specialization at all levels.²³⁰

²²³ Many European airlines have already begun showing these videos. *See, e.g., supra* note 149.

²²⁴ KLAIN, *supra* note 29, at 47.

²²⁵ *See* SEABROOK, *supra* note 17, at 106.

²²⁶ *See id.* at 105 (discussing the fact that, in some states, the children are treated as criminals). In Sri Lanka, children are sometimes prosecuted under harsh anti-homosexual laws. *Id.*

²²⁷ KLAIN, *supra* note 29, at 47.

²²⁸ *Id.*

²²⁹ *See* SEABROOK, *supra* note 17, at 118 (recommending that states encourage enhanced expertise regarding extraterritorial jurisdiction).

²³⁰ Such specialization should be encouraged whenever possible. This would include developing special police forces to deal with finding and apprehending sex tourists as well as more detailed programs akin to Operation Predator. Yet, the author recognizes that such programs are costly to develop and maintain. Nevertheless, these types of programs could also be major steps in reducing—and eventually eradicating—child-sex tourism, especially in host countries.

There are a number of examples where collaboration among states has had the desired effect. The Australian government has entered into a Memorandum of Understanding with the Philippines to facilitate information sharing between the two states regarding child sexual exploitation.²³¹ The United States has also cooperated with foreign governments and police to arrest and prosecute child sex tourists. A successful example of international cooperation occurred in 2001. The investigation, named "Operation Blue Orchid," was aimed at a Russian child pornography website. The one-year investigation began when the Moscow Police sought the assistance of United States government and law enforcement officials working in Russia.²³² This joint United States-Russian investigation led to the prosecution of Glenn Martikean.²³³ Martikean, an Indiana man, molested children between the ages of ten and fourteen years,²³⁴ many of whom were video-taped and forced to take part in sex and painful sadomasochistic activity.²³⁵ These tapes were sold to American customers at approximately \$200 to \$300 per tape.²³⁶ Without the collaboration of the United States and Russian efforts, the prosecution would have been nearly impossible.

CONCLUSION

Child sex tourism must be stopped. The global community cannot stand back and watch innocent and vulnerable children be abused in order to increase a developing state's economy. Many countries have taken affirmative steps in the right direction, but more must be done, including taking measures to

²³¹ KLAIN, *supra* note 29, at 47.

²³² See Press Release, U.S. CUSTOMS SERV., U.S. DEP'T OF STATE, U.S. Customs Service, Russian Police Take Down Global Child Pornography Web Site (Mar. 26, 2001), available at <http://usinfo.org/usia/usinfo.state.gov/topical/global/ecom/01032602.htm>.

²³³ See Lori Enos, *Russian Web Site Selling Child Porn Shut Down*, E-COMMERCE TIMES, Mar. 27, 2001, at <http://www.ecommercetimes.com/story/8483.html>; see also *Russian Police Take Down Global Pornography Web Site*, *supra* note 234 (noting that U.S. officials later learned that while they were searching Martikean's home, he was in Russia attempting to have sex with a child).

²³⁴ U.S. CUSTOMS SERV., *supra* note 232. The film producers actively solicited the children, most of whom were from a town called Novokuybishevsk, located approximately 560 miles from Moscow. *Id.* The victims were mostly young boys who were either homeless or from troubled families. *Id.*

²³⁵ See *id.* (noting that the boys are "visibly crying" in the videos).

²³⁶ See *id.* (finding that the distributors records indicated that the videos were shipped worldwide; however, a majority were sent to the United States).

dismantle the imbalances of power that creates the child sex tourism structure in the first place. This industry is demand based, and in order to stop it, it is necessary to deter its consumers. To do this, nations must learn from one another and work together to draft effective legislation that can address all issues surrounding child sexual exploitation.

In addition to improving legislation and training law enforcement officials, it is also imperative that states acknowledge the reasons why these children are forced into these situations, such as poverty and lack of opportunity, and work toward improving such situations. International efforts are ineffective unless they focus on the root of the problem. Child sexual exploitation is not something new, but it is something that must be eradicated so that the children will no longer suffer such great injustices.