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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 1708                      **Hearing Date:** June 21, 2016  
**Author:** Gonzalez  
**Version:** June 15, 2016  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** JM

**Subject:** *Disorderly Conduct: Prostitution*

## HISTORY

**Source:** Author

**Prior Legislation:** SB 776 (Block) 2015, held in Assembly Public Safety  
SB 420 (Huff) 2015, held in Assembly Public Safety  
SB 982 (Huff) – Held in Senate Appropriations, 2014  
SB 1388 (Lieu) – Ch. 714, Stats. 2014  
SB 244 (Liu) 2013 – 2014 died in the Assembly

**Support:** Alameda County District Attorney; California District Attorneys Association;  
Grossmont Union High School District; Peace Officers Research Association of  
California (PORAC); San Diego County; San Diego County District Attorney;  
San Diego School Police Officers Association; State Coalition of Probation  
Organizations (SCOPO)

**Opposition:** American Civil Liberties Union of California; California Public Defenders  
Association; California State Sheriffs' Association

**Assembly Floor Vote:** 75 - 1

## PURPOSE

*The purposes of this bill are 1) to recast the crime of prostitution into three parts, one applicable to the person who agreed to receive, or received compensation in exchange for a sexual act, one applicable to the person who paid, or agreed to pay compensation, one applicable to the person who paid, or agreed to pay compensation to a minor; 2) to impose a mandatory minimum sentenced term of 72 hours in jail and a set fine of \$1,000 for persons convicted of purchasing commercial sex; 3) to provide that if the defendant knew or should have known that the other party was a minor, or the defendant intended to purchase sex from a minor, the \$1,000 fine is the minimum fine, with a maximum of \$10,000; 4) to direct that the fine proceeds be deposited with the county to fund services for human trafficking victims; 5) to require any person convicted of providing compensation, or agreeing to provide compensation for a sexual act to serve at least a continuous 24 hours in jail before being eligible for release on any basis – 48 hours if the defendant intended to engage in prostitution with a minor, or knew or should have known the other party was a minor; 6) to require defendants granted probation to serve a continuous 24 or 48 hours in jail as a condition of probation; 7) to*

***impose a one-year sentence enhancement for human trafficking or abduction of a minor for prostitution, if the crime occurred on or within 1,000 feet of a school.***

*Existing law* provides that any person who deprives or violates the personal liberty of another is guilty of human trafficking if the person specifically intends one of the following: 1) to effect or maintain a specified felony commercial sex or prostitution-related offense; 2) commit extortion; 3) specified child pornography offenses or 4) obtain forced labor or services. (Pen. Code § 236.1, subd. (a)-(b).)

*Existing law* provides that human trafficking of a minor does not include an element of deprivation of the victim's liberty. Trafficking of a minor is committed through inducing, persuading or causing a minor to engage commercial sex acts, child pornography or extortion, or attempting to do so. It is punishable as follows:

- 5, 8 or 12 years in prison and a fine of up to \$500,000.
- 15-years-to-life and a fine of up to \$500,000 if the offense involved force, threats, coercion, fraud or deceit, as specified. (Pen. Code § 236.1, subd. (c).)

*Existing law* includes these special rules applicable to human trafficking of a minor:

- Whether the defendant caused, induced or persuaded a minor to engage in a commercial sex act depends on the totality of circumstances, including the relationship between the victim and the defendant.
- Mistake of fact as to the age of the victim is not a defense.
- Consent by a minor to an act underlying a human trafficking charge is not a defense. (Pen. Code § 236.1, subd. (d)-(f))

*Existing law* provides for the following enhancements and special fines in human trafficking cases:

- The court may impose on the defendant an additional fine of up to \$1,000,000. (Pen. Code § 236.4, subd. (a).)
- A defendant who inflicts great bodily injury on the victim of human trafficking shall be punished by a consecutive prison term enhancement of 5, 7, or 10 years. (Pen. Code § 236.4, subd. (b).)
- A defendant shall receive a consecutive prison enhancement term of 5 years for each prior human trafficking conviction.

*Existing law* provides that taking a minor from her or his parents or guardian for purposes of prostitution is a felony punishable by a prison term of 16 months, two years, or three years and a fine of up to \$2,000. The offense can be committed through inducements, not abduction alone. (Pen. Code § 267.)

*Existing law* provides that prostitution involves any lewd act between persons for money or other consideration. (Pen. Code § 647, subd. (b); CALCRIM 1154)

*Existing decisional law* defines a lewd act as “touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of

sexual arousal or gratification.” (CALCRIM 1154, citing *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256; See, *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, pp. 431–433.)

*Existing law* provides that any person who solicits, agrees to engage in, or engages in an act of prostitution is guilty of a misdemeanor. The crime includes an element that the defendant specifically intended to engage in an act of prostitution and some act was done in furtherance of the agreed upon act. (Pen. Code § 647, subd. (b).)

*Existing law* provides that where any person is convicted for a second prostitution offense, the person shall serve a sentence of at least 45 days, no part of which can be suspended or reduced by the court regardless of whether or not the court grants probation. (Pen. Code § 647, subd. (k).)

*Existing law* provides that where any person is convicted for a third prostitution offense, the person shall serve a sentence of at least 90 days, no part of which can be suspended or reduced by the court regardless of whether or not the court grants probation. (Pen. Code § 647, subd. (k).)

*Existing law* provides that where a defendant is convicted of a prostitution offense in which the defendant sought to procure or procured the "sexual services of a prostitute who was a minor," the following shall apply:

- a) The defendant shall, in addition to any other fine or penalty, be ordered to pay up to \$25,000; and
- b) Upon appropriation by the Legislature, the proceeds of the fine shall "be available to fund programs and services for commercially sexually exploited minors in the counties" of conviction. (Pen. Code §§ 261.9 and 647, subd. (b).)

*This bill* defines and divides the crime of prostitution into three separate forms:

- a) The defendant agreed to receive compensation, received compensation, or solicited compensation in exchange for a lewd act;
- b) The defendant provided compensation, agreed to provide compensation, or solicited an adult to accept compensation in exchange for a lewd act; and
- c) The defendant provided compensation, or agreed to provide compensation, to a minor in exchange for a lewd act, regardless of which party made the initial solicitation.

*This bill* specifies that a defendant, who purchased or agreed to purchase commercial sex, is guilty of a misdemeanor, punishable as follows:

- a) A mandatory minimum 72 hours in county jail;
- b) Up to 6 months in the county jail; and
- c) A fine not exceeding \$1,000, to be deposited in the treasury of the county in which the offense occurred and used by the county to fund services for victims of human trafficking;
- d) A convicted defendant is not eligible for release upon completion of sentence on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 24 hours in a county jail;
- e) A defendant granted probation must serve a term of 24 continuous hours in jail as a condition or of probation.

*This bill* specifies that if a defendant who purchased or agreed to purchase commercial sex knew or should have known that the provider of the commercial sex act was a minor, or specifically intended to obtain such services from a minor, the misdemeanor is punishable as follows:

- a) A term of up to one year in a county jail;
- b) A mandatory minimum term of 72 hours; and
- c) A fine of at least \$1,000 (with a maximum of \$10,000) to be deposited in the treasury of the county in which the offense occurred and used by the county to fund services for victims of human trafficking;
- d) A convicted defendant is not eligible for release upon completion of sentence on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 48 hours in a county jail;
- e) A defendant granted probation must serve a term of 48 continuous hours in jail as a condition of probation.

*This bill* provides that where the defendant purchased, or agreed to purchase commercial sex and the defendant knew or should have known that the person to be compensated is a minor, or where the defendant specifically intended to purchase sex from a minor, the penalties are as follows must impose a sentence of at least 72 hours in jail; and a defendant must serve a minimum of 48 continuous hours in jail before release on parole, on work furlough or work release, or on any other basis.

*This bill* grants the court discretion to allow a defendant to serve the required 48 continuous hours in jail so as to not interfere with his work schedule. If 48 continuous hours of custody would interfere the defendant's work schedule, the court can allow the defendant to serve that time when he is not working.

*This bill* specifies that the fine for solicitation of a minor shall be deposited in the treasury of the county in which the offense occurred and used by the county to fund services for victims of human trafficking.

*This bill* provides that persons who are convicted of human trafficking of a minor, or taking a minor from his or her parents or guardian for purposes of prostitution, or within 1,000 feet of a school shall be subject to a one-year state prison enhancement.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

Traditionally, law enforcement has tackled prostitution by arresting the women and girls on the street, while “pimps” and “johns” have been the least likely offenders in the commercial sex trade to face jail time. This neglects the fact that many of these criminalized “prostitutes” are actually victims of sex trafficking, punishing the victim with possible jail time and making it more difficult to go back to school or find work, while leaving their exploiters without any incentive to stop their profitable trafficking.

In San Diego County, a recent joint study by researchers at University of San Diego and Point Loma Nazarene University found that 42 percent of first-time

prostitution arrests are in fact cases involving sex trafficking, and that the average age of entry into child commercial sexual exploitation was 15 years old. Recently, strides have been made to recognize these sex trafficking victims as such, particularly in the case of children. However, a strong demand for the industry still exists, contributing to more and more vulnerable youth being exploited. Evidence of this can be seen as recently as the Super Bowl, in which hundreds were arrested for attempting to purchase sex.

There is currently no comprehensive statewide solution to combat commercial sexual exploitation of children and to assist those children. We are having the necessary conversations about the appropriate services these victims need- from mental health services, to job training, to stable housing. However, we also have to recognize that in order to stop this exploitation from happening in the first place, we need to combat the demand for commercial sex which incentivizes trafficking to happen.

Commercial sex trafficking remains a lucrative business for many, with a high demand leading to more and more youth being exploited. Furthermore, traffickers continue to prey on children at or near their schools to recruit them and traffic them to purchasers, making these spaces that should be a safe place for youth dangerous with few consequences to themselves.

AB 1708 would help tackle the problem of commercial sexual exploitation by taking a hard stance against those contributing to the demand for sex trafficking and those making schools an unsafe place for children by trafficking at or near them. We need to make sure that the negative consequences fall on the true criminals, not the victims.

## **2. Sexual Acts with Minors – Regardless of the Payment of Compensation – Constitutes a Sex Crime**

This bill would separately define prostitution in which the person who provides, or agreed to provide, sexual services is a minor. Sexual conduct with a minor constitutes a felony in most instances, regardless of whether anything of value was offered or exchanged for the sexual acts. If the minor involved in commercial sex was under the age of 14, the defendant has committed the felony of lewd conduct, with a prison term of three, six or eight years, or five, eight or 10 years if coercion is involved (Pen. Code § 288, subs. (a)-(b).) Soliciting an act of prostitution from a minor under the age of 14 could likely be prosecuted as attempted lewd conduct. The prison or jail term for an attempt is generally one-half the punishment for the completed crime. Where the defendant solicited or employed a minor who was 14 or 15 years old, and the defendant was at least 10 years older than the minor, the defendant has committed an alternate felony-misdemeanor.

Any defined sex act – sodomy, sexual penetration, oral copulation or sexual intercourse – with a minor is a crime. The penalties depend on the relative ages of the defendant and the minor and whether the crime involved some form of force, coercion or improper advantage. A defendant charged with a prostitution-related offense involving a minor could also be charged and convicted of a sex crime in the same case. Generally, because the defined sex crime and the sexual commerce offense would involve a single transaction or act, the defendant could only be punished for one offense – the offense carrying the greatest penalty. (Pen. Code § 654.)

## DO MOST PROSTITUTION INCIDENTS IN WHICH AN ADULT SOUGHT TO PURCHASE SEX FROM A MINOR CONSTITUTE ATTEMPTED OR COMPLETED SEX CRIMES?

If this bill is enacted, a defendant could argue that if he engaged in acts of prostitution with a minor, he should only be charged for that offense, not with a sex crime against a minor. That is because a maxim of statutory construction holds that where a defendant's conduct can be prosecuted under a general law and a law that more specifically describes the defendant's conduct, the Legislature intended that the more specific statute apply. That is especially true where the specific law is enacted after the more general law, as the Legislature would be presumed to have known about the general law at the time the specific law was passed. To preclude such an argument, it is recommended that the bill be amended to include a "savings clause" stating that this bill does not preclude prosecution under any other provision of law.

## SHOULD THE BILL BE AMENDED TO STATE THAT THIS BILL DOES NOT PRECLUDE PROSECUTION UNDER ANY OTHER PROVISION OF LAW?

### **3. A Defendant Required to Serve a Minimum Jail Term as a Condition of Probation may Refuse Probation**

It appears that this bill would require a person convicted of agreeing to provide, or providing compensation in exchange for a sexual act to serve 24 continuous hours in jail. The bill also provides that a person who is not granted probation, or who refuses probation, and who is then sentenced to a term of at least 72 hours in jail would be eligible for release on work furlough, work release or some other basis after 24 hours. Many, if not most, county jails are crowded, particularly in urban areas. A defendant who is convicted of a prostitution offense and sentenced to serve 72 hours in jail in a county with crowded jail conditions could well serve no more than the continuous 24 hours in jail. As such, it is unlikely that a prostitution defendant would agree to probation, as he would serve the same jail term as a sentenced inmate. Even where a sentenced inmate would actually serves up to 72 hours in jail, he may well elect to serve that sentence and avoid probation supervision. This may be particularly likely where a defendant can serve his sentence on days when he is not working.

A defendant who is not on probation cannot be monitored by the probation department or the court. A defendant who is not on probation cannot be ordered to engage in rehabilitative or restorative justice programs. If the odds of getting caught committing such a crime is low, and that may be likely, such a person could remain a significant source of demand for prostitution.

### **4. Application of the Fine Provisions**

The bill provides that the proceeds of a fine imposed on a defendant who was convicted of seeking or obtaining commercial sex from a minor, or who intended to obtain commercial sex from a minor, shall be deposited with the county to fund services for human trafficking victims. It is not clear how the fine would be applied. That is, is the fine exempt from penalty assessments? Generally, every criminal fine is subject to penalty assessments unless the section defining the fine specifically exempts it from penalty assessments. If this fine is not exempt from penalty assessment, is the intent of

the author that the \$1,000 to \$10,000 base fine be used for human trafficking services, not any other local program or expense?

**5. Mandatory Penalty Assessments Effectively Quadruple a Criminal Fine**

Penalty assessments and fees must be assessed on the base fine for a crime. Assuming a defendant was fined \$1,000 as the fine for a criminal offense, the following penalty assessments would be imposed pursuant to the Penal Code and the California Government Code:

Base Fine:	\$ 1,000
Pen. Code § 1464 state penalty on fines:	\$1,000 (\$10 for every \$10)
Pen. Code § 1465.7 state surcharge:	\$ 200 (20% surcharge)
Pen. Code § 1465.8 court operation assessment:	\$40
Gov. Code § 70372 court construction penalty:	\$500 (\$5 for every \$10)
Gov. Code § 70373 assessment:	\$30
Gov. Code § 76000 penalty:	\$700 (\$7 for every \$10)
Gov. § 76000.5 EMS penalty:	\$200 (\$2 for every \$10)
Gov. § Code § 76104.6 DNA fund penalty:	\$100 (\$1 for every \$10)
Gov. § Code § 76104.7 addt'l DNA fund penalty:	\$400 (\$4 for every \$10)
 Total Fine with Assessments:	 \$4,170

It should be noted that this figure does not include restitution, a mandatory restitution fine, and that other fines and fees, such as the jail booking fee, attorney fees, OR release fees, probation department fees, may also be applicable.

**6. Limited Distribution of Fines into the Victim Witness Fund for Sex Trafficking Victims**

The value of special fines to fund services for sexually exploited persons – particularly juveniles – appears to be quite limited. A negligible amount of income – \$20,000 in 2013-14 is generated from surplus money investments and penalties on specific felony convictions.

The Victim Witness Assistance Fund is largely funded by a small portion of the penalty assessments imposed on each criminal fine. Local victim-witness assistance programs also receive federal Victims of Crime Act and Violence Against Women Act funding. In 2013-14, the fund was projected to have a negative balance of \$83,000. In 2014-15, the fund was projected to have a balance (reserve) of \$5.8 million due to a \$10.1 million General Fund loan repayment from 2011. The fund balance for 2015-2016 is projected to be approximately \$900,000, arguably not a substantial sum in light of the need for assistance to victims. Each county designates an agency to operate a victim witness assistance program. The district attorney is the designated agency in all but seven counties (three in probation departments and one in a county sheriff’s office).

There appears to be a great unmet need for funding community-based agencies that provide services to sex trafficking victims and commercially sexually exploited persons. The fund created by this bill could raise funds that individual counties could disburse to address specific problems in their areas.

## **7. Study of Homeless Young People Engaged in Survival-Sex Prostitution in New York City**

A 2008 John Jay College study<sup>1</sup> of commercially, sexually exploited homeless youth in New York city found that these young people often sought out customers and found customers for each other. As many young men and boys were engaged in survival sex as young women and girls in the study. (This finding is consistent with a 2004 study published by US DOJ.) Sexually exploited youth sought older white customers who were perceived to have more money, although the actual range of customers was relatively wide. A 2012 New Yorker article reported that these young people in lived in harsh conditions and risked becoming “lifers” on the street. Programs and services for them were scarce and typically short-term.<sup>2</sup>

## **8. Limited Studies of the Demographics of Prostitution Customers**

A draft University of Chicago study by Steven Levitt and Sudhir Alladi Venkatesh (Freakonomics) examined street-level prostitution in certain Chicago neighborhoods known for prostitution, including a neighborhood where prostitution was controlled by pimps and a neighborhood where prostitutes were independent. Levitt estimated that there were 1,200 acts of prostitution per arrest, indicating that even street-level prostitution customers generally need not fear arrest. The Chicago study noted that more upscale prostitution occurred over the Internet and through escort services, where the likelihood of arrest was low. Freakonomics publications later noted that the cost of prostitution had declined in recent decades, likely indicating that customers were spread across economic classes.

Levitt found “many men making a few visits and a small number of men making very frequent visits.” He found that 25 johns were arrested twice and 2,969 johns were arrested once. As in the Western Criminology Review study discussed in Comment # 6, Leavitt concluded that some men may have learned from one arrest how to avoid another. However, some johns may have been arrested multiple times because they were not good at distinguishing between an actual prostitute and a police decoy.

A 2008 review in the Electronic Journal of Human Sexuality of studies from cities across the country found wide variance in education, income and ethnicity among prostitution customers. There were some regional differences, such as lower levels of education in Indianapolis, marginally higher income in Portland, Oregon.

## **9. Recidivism Studies on Persons Convicted of Purchasing Sex – Effects of Special Programs**

A study in 2002 in the Western Criminology Review of a now defunct first-offender program in Portland, Oregon (SEEP) found very low recidivism rates for all prostitution arrestees, regardless of whether they participated in SEEP, were referred to SEEP but did not attend, or were not referred to the program. The study considered only a two-year period and a relatively small number of offenders. The researchers inferred from the data that an arrest, per se, could have deterred offenders, as prostitution offenses involve

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<sup>1</sup> <https://www.ncjrs.gov/pdffiles1/nij/grants/225083.pdf>, pp 48-49., 32-102.

<sup>2</sup> <http://www.newyorker.com/magazine/2012/12/10/netherland>

significant shame. The authors, however, also questioned if the offenders continued to solicit prostitutes but simply learned how to avoid arrest. They could not say whether the education from the SEEP program would have led the participants to avoid prostitution for a substantial time in the future.

A number of other cities adopted special first-offender prostitution diversion programs that educate “johns” about the harms caused by or attendant to the commercial sex trade. The San Francisco program – First Offender Prostitution Program (FOPP) – was one of the first of these programs. The program required men arrested for the first time for a prostitution offense to attend a one-day course of the harms caused or exacerbated by the demand for prostitution. Men who completed the course were diverted out of the criminal justice system. A report on the San Francisco FOPP conducted by Abt Associates concluded that program was well run and effective. The claims of a sharp drop in recidivism in the Abt report have been harshly criticized and questioned. One study by researchers from DePaul University and American University found methodological flaws in the Abt report. The study from the Western Criminology Review (noted above) found that recidivism rates attributable to FOPP programs are difficult to measure, as johns arrested for prostitution offenses can easily learn how to avoid arrest. Further, the increasing shift of prostitution to the Internet makes it difficult to measure recidivism.

DOES RESEARCH INDICATE THAT AN ARREST, PER SE, MAY BE A SUBSTANTIAL DETERRENT FOR MEN WHO SOLICIT PROSTITUTES?

IS THERE DATA ABOUT THE EFFECT OF MANDATORY MINIMUM PENALTIES IN EXISTING LAW FOR REPEAT PROSTITUTION OFFENDERS?

## **10. Jail Space is a Limited Commodity**

This bill requires minimum jail terms for defendants sentenced for prostitution offenses and requires 24 or 48 jail terms as a condition of probation in such cases. County jails in California, especially in urban areas, have been chronically overcrowded for some time.

Realignment required many defendants to serve their felony sentences in jail, thereby straining already crowded jails. Proposition 47 made many drug possession and specified theft crimes misdemeanors, easing some of the pressure. Nevertheless, it has been reported that many Prop. 47 inmates do not spend significant portions of their misdemeanor sentences because there is not enough room in the jails. Judges in drug courts and cases arising under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36) have argued that defendants are refusing to accept probation and treatment because they are likely to serve only a small portion of any misdemeanor drug possession sentence.

This bill requires minimum terms in prostitution cases, essentially creating a legislative priority for incarcerating these defendants over others where jail space is limited. The relatively short mandatory minimum terms can be a burden to jails because it can take many hours to process a defendant into jail and then out. Deputies who operate jail would need to expend significant resources to process the cases covered by this bill.

### **11. Enhancement for Human Trafficking, or Taking a Minor from his or her Parents, for Prostitution on the Grounds of, or within 1,000 feet of a School**

The basic human trafficking law was enacted by AB 22 (Lieber) Ch. 240, Stats. 2005. AB 22 provided that the essence of human trafficking is the deprivation of the victim's liberty in order to place the person in sexual commerce or obtain labor. The human trafficking law was amended by Proposition 35 in 2012. The initiative greatly increased penalties, set special procedures and rules of evidence and eliminated the element of deprivation of liberty if the victim is a minor. The penalties established by the initiative are especially comprehensive and arguably cover the full range of circumstances in human trafficking. Human trafficking of minors can be done through inducements, persuasion and the like. The use of coercion, fraud, force or duress against a minor does, however, subjects as defendant to especially severe penalties, including life terms.

This bill would direct the court to impose a sentence enhancement of one year if the defendant has been convicted of human trafficking and the crime occurred on the grounds of a school, or within 1,000 feet of a school. The enhancement also applies to taking a minor from his or her parents for purposes of prostitution (§ 267), a felony with a determinate term sentence of 16 months, two years or three years. It appears, however, that many, if not most, cases of taking a minor for prostitution could be charged as human trafficking, as Section 267 is specifically included as a target offense in human trafficking.

Human trafficking of a minor includes a relatively long list of crimes involving commercial sex, including prostitution and child pornography. If the minor is brought into such activities through "force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person," the penalty is a term of 15-years-to-life in prison and a fine of up to \$500,000. With *mandatory* penalty assessments, a fine of \$500,000 is actually a fine of over \$2,000,000. It is hard to imagine that a trafficker could lure a minor into commercial sex trade without at least deceit or fraud. That is, if the trafficker misrepresented what the minor would be doing or the conditions under which they would be done, that would clearly appear to be fraud and deceit.

It would appear that if very severe felony penalties would not deter a potential human trafficker, an additional year in prison would be of little consequence. Further, many, if not all, cases where a minor under the age of 14 is abducted for purposes of prostitution would constitute kidnapping for purposes of engaging in sexual conduct. That form of kidnapping is punishable by a prison term of 5, 8 or 11 years if the minor is under the age of 14. Kidnapping per se - taking a person by force or fear - is punishable by a prison term of 3, 5 or 8 years. (Pen. Code §§ 207-208.) If kidnapping for a sex offense increases the danger of harm to a victim beyond that inherent in the offense, it is punishable by a life term.

The punishment for human trafficking of a minor, when the crime does not involve some sort of deceit, coercion or force, is still relatively severe - 5, 8 or 12 years and a fine of up to \$500,000 (again over \$2,000,000 with mandatory penalty assessments). If this bill is enacted, the prison term could perhaps be 13 years instead of 12 in a determinate sentence. For a life term, the defendant would be eligible for parole in 16 years, not 15. Again, it is doubtful that a possible additional year in prison would change a perpetrator's decision to engage in human trafficking of a minor in light of the severe existing penalties.

California sentencing law is so complex that an enhancement for committing human trafficking on or near a school may not necessarily result in additional punishment. In some cases, imposition of the enhancement could result in a lower penalty. The imposition of the prison term for a crime and enhancements attached to that term require the court to make a series of inter-related decision. The process becomes particularly elaborate when the defendant was convicted of multiple crimes and numerous enhancements apply.

For this bill, the most important sentencing rule is the prohibition on “dual use of facts” - the use of one fact to impose more than one punishment. A close reading of many enhancements would reveal that they could also be used as factors in aggravation of the base term - the stated penalty “triad.” The sentencing triad for the less egregious form of human trafficking of a minor is 5, 8 or 12 years.

## **12. Vetoes of Related or Similar Bills**

Governor Brown has recently vetoed bills that included what were essentially crimes and penalties that are largely redundant of existing law. Last session (2013-2014), the governor vetoed SB 473 (Block), which proposed to add human trafficking to the gang laws. (Any crime committed for the benefit of a gang is punished by an enhancement or a life term. SB 473 would have added human trafficking to a list of crimes establish the existence of a gang, per se. Prosecutors seldom have any trouble proving the existence of a gang under existing law.) Similar observations can be made about this bill that were made about SB 473 Governor Brown stated:

I am returning Senate Bill 473 without my signature.

Under current law, human trafficking convictions impose substantial punishment, up to 20 years for sex trafficking offenses and 15 years-to-life for certain crimes involving children. These sentences are more than three times the punishment that existed two years ago. SB 473 would add yet another set of enhancements, the third in nine years. No evidence has been presented to support these new penalties

-- END --