
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 776 **Hearing Date:** May 12, 2015
Author: Block
Version: April 6, 2015
Urgency: No **Fiscal:** No
Consultant: JM

Subject: *Disorderly Conduct: Prostitution*

HISTORY

Source: California Against Slavery

Prior Legislation: SB 1388 (Lieu) Ch. 714, Stats. 2014

Support: The A-21 Campaign; Project Concerned; Burning Bush Moments; Redeeming Love; California Police Chiefs Association; Rolling Hills Covenant Church; Mary Magdalene Project, Inc.; several individuals

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to 1) direct the sentencing court to impose a fine of between \$700 and \$2,000 upon a defendant convicted of a prostitution offense if the defendant offered to provide, agreed to provide or provided compensation in exchange for a lewd act from a person who was at least 18 years of age; and 2) provide that a portion of the fine shall be retained by the county and used to fund services to “victims of commercial sexual abuse.”

Existing law provides that any person who solicits, agrees to engage in, or engages in an act of prostitution is guilty of a misdemeanor.¹ This crime does not occur unless the person specifically intends to engage in an act of prostitution and some act is done in furtherance of agreed upon act. Prostitution includes any lewd act between persons for money or other consideration. (Pen. Code § 647, subd. (b).)

Existing law provides that any person who solicits another person to engage in any lewd or dissolute act in a public place is guilty of a misdemeanor. (Pen. Code § 647, subd. (a).)

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.

This bill provides that where the defendant is convicted of a prostitution offense and the person to whom the defendant paid or agreed to pay compensation was an adult, the defendant shall pay a fine of between \$700 and \$2,000, in addition to any other penalty or fine.

¹ Soliciting or engaging in an act of prostitution is a form of disorderly conduct. (Pen. Code § 647.)

This bill provides that an undetermined percentage of the fine shall be retained by the county of prosecution and used to fund housing, counseling, and other direct services and “exit programs” for victims of commercial sexual exploitation. The board of supervisors shall designate a fund for deposit of “moneys collected pursuant” to this special fine provision.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight 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 February of this year the administration reported that as “of February 11, 2015, 112,993 inmates were housed in the State’s 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity.”(Defendants’ February 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).

While significant gains have been made in reducing the prison population, the state now 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:

SB 776, increases the base fine for individuals convicted of soliciting prostitution. This measure requires a court to impose a fine of not less than \$700 and not more than \$2,000 on a defendant convicted of soliciting prostitution. SB 776 would also require counties to direct 75% of the collected fines to victim services, such as shelter, counseling, and exit programs for victims of commercial sexual exploitation and sexual abuse.

The commercial sex industry operates on supply and demand. While California criminalizes the solicitation of prostitution, buyers of sex continue to be arrested and prosecuted at a lower rate than exploited individuals. Little is done to curb demand. SB 776 would help address this deficiency. Current law sets the maximum fine at \$1000 and has no minimum. According to studies focused on sex buyers, the majority of purchasers would be deterred with increased fines .

SB 776 would deter demand of commercial sexual exploitation while also increasing resources and help for exploited victims.

2. Uncertain Interpretation and Application of this Bill - Penalty Assessments Issue

The bill provides that any defendant convicted of a prostitution offense in which the defendant was the party who offered to pay, agreed to pay, or paid compensation to an adult for a lewd act shall pay a fine of between \$700 and \$2,000, “in addition to any other fine or penalty imposed.” The base fine for a prostitution offense is a maximum of \$1,000. It is not clear how courts would interpret this “additional” fine. Courts could find that the fine would only be imposed after any base fine is imposed, as this is *an additional fine applicable in specified cases*. Other courts might find that the fine must be imposed regardless of whether the base fine is imposed. Courts that understood that the fine had to be imposed would treat this “additional fine” as if it were the base fine, with a mandatory minimum of \$700. In that case, no money would flow to all the entities that receive the numerous penalty assessments that are calculated as a percentage of the base fine, as discussed below.

Criminal fines are subject to “penalty assessments” that effectively quadruple the base fine. A defendant ordered to pay a fine of \$2,000, would actually pay approximately \$8,000. Penalty assessments are designated for specific purposes, according to an exceedingly complex formula. Unless specifically exempted from penalty assessments, all fines are subject to them. This bill provides that a set percentage of the proceeds of the fine defined by this bill shall be used for victim services. The bill does provide that the fine shall be imposed “notwithstanding any other law. However, it is not clear that the “notwithstanding” phrase exempts the fine from penalty assessments. If the fine is not exempt from penalty assessments, it is unclear if penalty assessments would apply to the entire fine, or just the 25% not retained by the county.

3. 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.

4. Effective Fines for Funding Services for Sexually Exploited Persons; Author's Proposal for a \$500 Fine, 75% of Which Would Fund Services

A moderate and certain fine would appear to be the most effective way to produce substantial amounts of money for services to victims of commercial sexual exploitation. The restitution fine - a minimum fine of \$300 for a felony and \$150 for a misdemeanor – provides substantial and steady funding for the Victims of Crime Program. It appears that total revenues of \$60 million are expected for 2015-2016 from restitution fines.² A \$200 minimum fine would require the defendant to actually pay \$800 with penalty assessments – similar to the amount of the \$750 special fine in the introduced version of the bill. The base fine – the amount of the fine stated in the penalty for the crime, not including penalty assessment – is paid to the county.

The author has proposed to amend the bill to require sex buyers in prostitution cases to pay a base fine of at least \$500, 75% of which would be designated for services in each county for commercially sexually exploited persons. The author has stated that a fine of at least \$500 appropriately addresses the harm caused by the demand for prostitution, provides more money for services and could deter potential prostitution customers. (Comment #7 concerns research that has found that penalty increases are not a deterrent to the commission of crimes.)

A fine of \$500 would require the defendant to pay at least \$2,150 fine – the base fine and mandatory penalty assessments on the base fine, and a restitution fine. Other fees and costs apply, including reimbursement to the county for court-appointed counsel. Large criminal fines may be difficult to collect, as collection could take years of effort and expense. The estimated amount of uncollected court ordered debt in 2011 was \$10.2 billion.³

² <http://www.ebudget.ca.gov/2015-16/pdf/GovernorsBudget/7500/7870.pdf>

³ <http://www.lao.ca.gov/reports/2014/criminal-justice/debt-collection/court-ordered-debt-collection-111014.pdf>

As noted in Comment # 5, the few demographic and economic studies of prostitution customers indicate that they come from a wide range of socio-economic backgrounds. It appears that persons with low incomes are more likely to seek out street-level prostitutes, and those are the persons most likely to be arrested.⁴ Without specific authority to reduce the fine, the court could, pursuant to Penal Code Section 1385, strike the entire fine provision if it found that the defendant could not pay the fine, including penalty assessments. In that case, no fine would be imposed at all. Authorizing the court to reduce the minimum amount in an unusual case in the interests of justice would make it more likely that a fine would actually be imposed and collected in such cases.

To address concerns that many defendants will be unable to pay a fine of over \$2,000, it is suggested that the court be granted authority to decline imposition of the full amount of the mandatory minimum fine in unusual circumstances in the interests of justice. As with numerous similar provisions in the Penal Code, the bill should also provide that the court shall state on the record the reason for not imposing the full minimum fine.

SHOULD THE BILL BE AMENDED TO REQUIRE SEX BUYERS IN PROSTITUTION CASES TO PAY A MINIMUM BASE FINE, 75% OF WHICH WOULD BE PLACED IN A FUND TO PROVIDE SERVICES FOR SEXUALLY EXPLOITED PERSONS?

SHOULD THE BILL BE AMENDED TO PROVIDE THAT THE SENTENCING COURT CAN DECLINE TO IMPOSE THE FULL MINIMUM FINE IN UNUSUAL CIRCUMSTANCES IN THE INTERESTS OF JUSTICE?

5. Limited Studies of the Demographics of Prostitution Customers

According to a John Jay College study, commercially sexually exploited homeless youth in New York often sought out customers, rather than being solicited by adults. Particularly in Manhattan, or through the Internet, CSEC (commercially sexually exploited children) sought older white customers who were perceived to have more money. (See Comment # 8) However, the range of customers was relatively wide.

A draft University of Chicago study by Steven Levitt and Sudhir Alladi Venkatesh (Freakonomics) considered street-level prostitution in certain Chicago neighborhoods, including a neighborhood where prostitution was controlled by pimps and a neighborhood where prostitutes were independent.⁵ 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 especially low.

Levitt found “many men making a few visits and a small number of men making very frequent visits.” He found 25 johns arrested twice and 2,969 johns who were arrested once. As in the Western Criminology Review study, Leavitt speculated 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.

⁴ <http://economics.uchicago.edu/pdf/Prostitution%205.pdf?q=venkatesh>

⁵ <http://economics.uchicago.edu/pdf/Prostitution%205.pdf?q=venkatesh>. Levitt noted that the data was preliminary and cautioned those who would cite the report, the study has been widely read and cited.

A 2008 review in the *Electronic Journal of Human Sexuality*⁶ of studies from cities across the country found wide variance in education, income and ethnicity among prostitution customers.

There have been two studies of the attitudes of sex buyers by Melissa Farley, Jacqueline Golding and others in Boston and London that were based on interviews with men who self-reported themselves as sex buyers. The sponsors and authors of the studies stated that they were advocates for ending or limiting commercial sex and argued that such activity was particularly harmful to women. The purpose of the studies was in large part to document harms caused by the demand for prostitution.

The Boston study included 101 men who stated that they had purchased sexual services and 100 who stated they had not done so. The authors had great difficulty recruiting men who had not purchased sex for the study.⁷ As the study participants were not a random sample of men, and as there could have been no confirmation of the men's sexual histories, the reports would appear to be of limited statistical significance in determining the number and characteristics of sex buyers. The authors matched the socio-economic, age and ethnic characteristics of the sex buyers and those who had not purchased sex. As the authors had great difficulty finding participants who did not buy sex, the characteristics of the men who reported never buying sex essentially determined the characteristics of the sex buyers. The Boston participants were chosen through advertisements on-line and in newspapers. They were paid \$45 to engage in a two-hour interview.

The London study only considered interviews of men who identified themselves as buyers of sex. The London participants "were invited to participate via advertisements in local newspapers. The advertisements listed a phone number, guaranteed anonymity, and stated that payment of £20 would be offered to cover the cost of transportation and as a token of appreciation for their time."⁸ The advertisements drew "hundreds" of telephone calls from men who wanted to participate in the study. The London study was sponsored by Eaves, "a feminist organization committed to working to curb demand for commercial sex acts, which increase sex trafficking and organized crime in general" and Prostitution Research & Education (PRE), "a U.S. non-governmental non-profit organization which has since 1995 researched and documented the harms resulting from prostitution and trafficking and explored alternatives to prostitution."

The studies concluded that prostitution customers come from a wide range of socio-economic and ethnic backgrounds. The sex buyers were described as having false beliefs about sex workers and had little empathy for the sex workers from whom they bought services.⁹ The Boston study reported that sex buyers were more criminally involved than those who did not buy sex. Given the difficulty the researchers had in finding men who had not bought sex, the significance in the differences between the two classes of participants could be limited.

The participants were asked what would deter them from buying sex. A wide range of penalties and consequences were identified. Most men opined that being listed as a sex offender would be the most significant deterrent, and also noted, for example, being publicly identified as a sex

⁶ <http://www.ejhs.org/volume11/brewer.htm>.

⁷ <http://www.newsweek.com/growing-demand-prostitution-68493>

⁸ https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sooline_vordoiguslikkus/Inimkaubandus_ja_prostitusioon/men_who_buy_sex.pdf

⁹ https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sooline_vordoiguslikkus/Inimkaubandus_ja_prostitusioon/men_who_buy_sex.pdf

buyer, a jail time sentence and high fines. It does not appear that any substantial number of participants had been convicted of a prostitution offense and punished. Consistent with the Chicago study of observed purchasers of sex, it did appear that most men had little fear of being arrested.

6. Recidivism Studies of Persons Convicted of Purchasing Sex – Effects of Special Programs

A study¹⁰ in 2002 in the *Western Criminology Review* of a now defunct first-offender program in Portland (SEEP) found very low recidivism rates for *all* prostitution arrestees, regardless of whether they were referred to SEEP and participated, 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 that an arrest, per se, could have deterred offenders, as the crime involves significant shame. The authors 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 cities around the country have adopted special first-offender prostitution diversion programs that educate men arrested for soliciting an act of prostitution about the harms caused by or attendant to the commercial sex trade. Initial reports of the effectiveness of the programs have been sharply criticized in peer-reviewed studies.¹¹ The study from the *Western Criminology Review* (noted above) found that recidivism rates attributable to the First Offender Prostitution Program 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.

7. Deterrence Issues – Little Support for the Deterrence Value of Specific Penalties, but Deterrence from the Certainty of Punishment

It is often argued that bills increasing penalties deter crime. The deterrent value of an increased penalty depends on 1) potential perpetrators knowing about the increased penalty, and 2) those persons deciding to avoid the penalty by not committing the crime to which the increased penalties apply. Criminologists generally accept the *general deterrence* of criminal statutes – the tendency of people to avoid doing acts that would subject them to criminal penalties. Criminologists have, however, long been skeptical of the value of special deterrence – deterring commission of a particular crime through the specific penalty for that crime.¹²

Research appears to clearly establish that *certainty* of punishment is a much more effective deterrent than the severity of punishment.¹³

Discussions of deterrence in research have noted that the theory of deterrence depends on potential criminals making rational decisions based on risk and reward. However, people who commit crimes often do not act rationally or wisely. For example, researchers have reported that half of all state prison inmates were under the influence of alcohol or drugs when they committed

¹⁰ <http://wcr.sonoma.edu/v3n2/monto.html>.

¹¹ <http://rightswork.org/wp-content/uploads/2012/09/John-Schools.Lovell.Jordan.7.12.pdf>.

¹² (<http://bjc.oxfordjournals.org/content/21/2/136.extract>)

¹³ <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>

their crimes.¹⁴ It is likely that many persons seeking to buy sexual services are intoxicated or under the influence of a drug when doing so.

8. Seattle Law Enforcement Assisted Diversion Program for Prostitution and Drug Offenders

The Seattle Police Department and other agencies and entities have implemented a program of Law Enforcement Assisted Diversion (LEAD). LEAD officers are authorized to take drug offenders and sellers of prostitution services – categories of offenders that may often overlap - directly to services and treatment. The process bypasses the court system, saving court resources and time.

The second evaluation of the program was recently released by the University of Washington. Short and long term recidivism is significantly lower for LEAD participants than for offenders in the court system¹⁵, with better results over the long term. LEAD programs could be one of the programs or efforts in helping street-level sex workers transition out of their plight. Without services to assist sex workers with underlying problems of drug abuse, lack of housing and exploitation, focusing prosecution efforts on sex purchasers will not likely produce optimum results.

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¹⁴ <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>, p.2

¹⁵ <http://leadkingcounty.org/lead-evaluation/>