
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 135 **Hearing Date:** July 2, 2019
Author: Cervantes
Version: December 5, 2018
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Sex Crimes: Communication with a Minor*

HISTORY

Source: Alameda County District Attorney

Prior Legislation: AB 1882 (Cervantes), 2018, vetoed
AB 371 (Cooley), 2017, held in the Senate Appropriations
AB 2327 (Cooley), 2016, held in the Senate Appropriations

Support: American Academy of Pediatrics-California; California Attorneys for Criminal Justice; California District Attorneys Association; California Family Resource Association; California Police Chiefs Association; California State Sheriffs' Association; Coalition to Abolish Slavery & Trafficking; Los Angeles County Sheriff's Department; Riverside Sheriffs' Association; San Diego District Attorney; Santa Barbara Women's Political Committee; The Child Abuse Prevention Center

Opposition: American Civil Liberties Union of California; California Public Defenders Association

Assembly Floor Vote: 75 - 1

PURPOSE

The purpose of this bill is to add human trafficking to the list of offenses for which it is a crime to contact or communicate with a minor for the purpose of committing specified crimes involving the minor.

Existing law provides that an attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. (Pen. Code, § 21a.)

Existing law provides that punishment for an attempt is for half the term of imprisonment prescribed for the offense attempted and a fine not exceeding half the largest fine which may be imposed for the offense attempted. (Pen. Code, § 664.)

Existing law states that a person is guilty of human trafficking if they cause, induce, or persuade a minor, or attempt to cause, induce, or persuade a minor, to engage in a commercial sex act, with the intent to violate specified commercial sex offenses. A person convicted of a violation of

this statute shall be punished by imprisonment in the state prison for five, eight, or 12 years and a fine not more than \$500,000. If the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, punishment shall be imprisonment in the state prison for 15 years to life and a fine not more than \$500,000. (Pen. Code, § 236.1 subd. (c).)

Existing law specifies that every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit any of the following offenses involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense. The offenses included in this section are listed as follows: (Pen. Code, §, 288.3, subd. (a).)

- 1) Kidnapping;
- 2) Kidnapping for ransom, reward, extortion, robbery, or rape;
- 3) Rape;
- 4) Rape by a foreign object;
- 5) Willful harm or injury to a child;
- 6) Sodomy;
- 7) Lewd and lascivious acts with a minor;
- 8) Oral copulation;
- 9) Harmful matter sent to minor;
- 10) Forcible sexual penetration; and
- 11) Child pornography.

Existing law defines “contacts or communicates with” as direct and indirect contact or communication personally or by use of an agent or agency, print medium, postal service, common carrier or communication common carrier, electronic communications system, telecommunications, wire, computer, or radio communications device or system. (Pen. Code, § 288.3 subd. (b).)

Existing law states that a person who arranges a meeting with a minor, for the purpose of engaging in lewd or lascivious behavior, shall be punished by a fine not exceeding \$5,000, imprisonment in a county jail not exceeding one year, or both. (Pen. Code, § 288.4.)

This bill adds human trafficking to the list of offenses for which it is a crime to contact or communicate with a minor for the purposes of committing a crime involving the minor.

COMMENTS

1. Need for This Bill

According to the author:

There is an increasing trend of human traffickers using the internet, especially social media, to lure potential victims. Under current law, it is felony human trafficking to cause or persuade a minor to engage in a commercial sex act. However, not all parts of a human trafficking ring engage in these specific acts as

part of their illicit activities. This loophole could allow the middlemen in human trafficking rings to avoid prosecution if they do not actually kidnap or rape a

minor themselves, but rather contact a minor for the intent of engaging in human trafficking. For instance, in August 2017, two teens were prevented from taking a flight from Sacramento to New York by a quick-thinking ticketing agent. An individual who contacted the teens over Instagram bought them one-way plane tickets, promising them modeling opportunities. Law enforcement believes the teens would have been made victims of human trafficking had they actually flown to New York. The actions of the individual who contacted the teens over Instagram may have been too attenuated to be prosecuted under existing law.

AB 135 would close this loophole by making it a felony to contact a minor with the intent to engage in human trafficking. This will help law enforcement combat the growing use of the internet by human traffickers, and provide them with the tools to attack all parts of a human trafficking ring, including the middlemen who contact minors using the internet.

2. Human Trafficking Generally

Human trafficking involves the recruitment, transportation or sale of people for forced labor. Through violence, threats and coercion, victims are forced to work in, among other things, the sex trade, domestic labor, factories, hotels and agriculture. According to the January 2005 United States Department of State's Human Smuggling and Trafficking Center report, "Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking", there is an estimated 600,000 to 800,000 men, women and children trafficked across international borders each year. Of these, approximately 80% are women and girls and up to 50% are minors. A recent report by the Human Rights Center at the University of California, Berkeley cited 57 cases of forced labor in California between 1998 and 2003, with over 500 victims. The report, "Freedom Denied", notes most of the victims in California were from Thailand, Mexico, and Russia and had been forced to work as prostitutes, domestic slaves, farm laborers or sweatshop employees. (University of California, Berkeley Human Rights Center, "Freedom Denied: Forced Labor in California" (February, 2005).) According to the author:

While the clandestine nature of human trafficking makes it enormously difficult to accurately track how many people are affected, the United States government estimates that about 17,000 to 20,000 women, men and children are trafficked into the United States each year, meaning there may be as many as 100,000 to 200,000 people in the United States working as modern slaves in homes, sweatshops, brothels, agricultural fields, construction projects and restaurants.

In 2012, Proposition 35 modified many provisions of California's human trafficking laws. The proposition increased criminal penalties for human trafficking, including prison sentences up to 15-years-to-life and fines up to \$1,500,000. Additionally, the proposition specified that the fines collected are to be used for victim services and law enforcement. Proposition 35 requires persons convicted of trafficking to register as sex offenders. Proposition 35 prohibits evidence from being used against a victim in court proceedings if that victim engaged in sexual conduct. Additionally, the proposition lowered the evidential requirements for showing of force in cases of minors.

a) Trafficking Victims Protection Act of 2000 (22 USC Sections 7101 *et seq.*).

In October 2000, the Trafficking Victims Protection Act of 2000 (TVPA) was enacted and is comprehensive, addressing the various ways of combating trafficking, including prevention, protection and prosecution. The prevention measures include the authorization of educational and public awareness programs. Protection and assistance for victims of trafficking include making housing, educational, health-care, job training and other federally funded social service programs available to assist victims in rebuilding their lives. Finally, the TVPA provides law enforcement with tools to strengthen the prosecution and punishment of traffickers, making human trafficking a federal crime.

b) Updates to California's Human Trafficking Laws in Relatively Recent Years.

In 2012, Californians voted to pass Proposition 35, which modified many provisions of California's already tough human trafficking laws. Specifically, Proposition 35 increased criminal penalties for human trafficking offenses, including prison sentences up to 15-years-to-life and fines up to \$1.5 million. The proposition specified that the fines collected are to be used for victim services and law enforcement. In criminal trials, the proposition prohibits the use of evidence that a person was involved in criminal sexual conduct (such as prostitution) to prosecute that person for that crime if the conduct was a result of being a victim of human trafficking, and makes evidence of sexual conduct by a victim of human trafficking inadmissible for the purposes of attacking the victim's credibility or character in court. The proposition lowered the evidentiary requirements for showing of force in cases of minors.

Proposition 35 also requires persons convicted of human trafficking to register as sex offenders and expanded registration requirements by requiring registered sex offenders to provide the names of their internet providers and identifiers, such as e-mail addresses, user names, and screen names, to local police or sheriff's departments. Immediately following the passage of Proposition 35, a District Court granted an order enjoining the implementation of the parts of the proposition that requires registered sex offenders to provide identifying information about their online accounts to local law enforcement agencies. On November 18, 2014, the Ninth Circuit Court affirmed the District Court's order granting the preliminary injunction, concluding that "Appellees are likely to succeed on the merits of their First Amendment challenge." (See *Doe v. Harris*, 2014 U.S. App. LEXIS 21808 (9th Cir. Nov. 18, 2014).)

Due to litigation, the provisions in Proposition 35 related to Internet identifiers have never gone into effect. Currently, these provisions are pending a permanent injunction because the court has declared them to violate the First Amendment of the United States Constitution and therefore cannot be enforced. (See Order Staying Case of April 7, 2015 and Scheduling Order of October 26, 2015, 12-cv-05713-THE, *Doe v. Harris*.)

In response to *Doe*, the SB 448 (Hueso), Chapter 772, Statutes of 2016, requires a person convicted of a felony on or after January 1, 2017, for which the person must register as a

sex offender, to register his or her Internet identifiers, as defined, to law enforcement if the person used the Internet to identify a victim, or to commit human trafficking or child pornography offenses; and authorizes law enforcement to use the information to investigate a sex crime, kidnapping or human trafficking, as specified.

3. Criminally Punishable Attempts

California permits prosecution for and punishes people for attempting to commit crimes that are not actually carried out. These crimes are articulated in California Penal Code Sections 21a & 664.

The basic elements required in order to prove that a person attempted a crime, and is punishable for that attempt, mandate that a prosecutor prove:

- 1) The defendant took a direct but ineffective step toward committing the underlying crime; and
- 2) The defendant intended to commit that underlying crime.

In sum, the defendant must have the intent to commit the crime, and take a direct step in the commission of the crime. A “direct step” under the law requires more than merely planning or preparing to commit the offense or obtaining or arranging for something needed to commit the crime. A direct step is a step that goes beyond planning or preparation and shows that a person is putting his or her plan into action, otherwise if the direct step were the mere panning of the crime, criminal attempt would simply be planning a crime.

A direct step indicates a definite and unambiguous intent to commit the crime. It is a direct movement towards committing the crime after preparations have been made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

If a person freely and voluntarily abandons his or her plans before taking a direct step, he or she would not be guilty of the attempted crime.

An attempted offense is a specific intent crime, even if the underlying crime requires only general intent. However, an attempt is not possible if the underlying crime can only be committed unintentionally. Thus a person could not be prosecuted for an attempted crime that did not require a specific intent to commit that crime, such as involuntary manslaughter (which does not require intent).

Generally, the punishment for an attempted crime is one half of the prison or jail term and/or one half of the fine that would be imposed if the crime had been completed. If the underlying crime is intentional murder, the defendant could be sentenced to life in prison with the possibility of parole on an attempted offense. For any other crimes where the maximum sentence is life in prison, the defendant can be sentenced to up to nine years in prison for attempting that offense.

Under California law the crime of human trafficking is punishable by imprisonment anywhere between 5 years to life imprisonment.

4. Need for This Bill

This bill appears to proscribe conduct already prohibited under existing law. Specifically, a person who contacts or attempts to contact a minor with the intent to commit human trafficking could be prosecuted under California's human trafficking law, or for an attempt to commit a one of the various sex offense statutes:

- a) **California's Human Trafficking Law:** Under California's human trafficking law, a person is guilty of human trafficking if they cause, induce, or persuade, or *attempt to cause, induce, or persuade*, a minor to engage in a commercial sex act with the intent to commit specified sex offenses including prostitution. (Pen. Code, § 236.1 subd. (c), emphasis added.) To be convicted of human trafficking, a person does not need to successfully complete the specified offense. "The mere intent to commit the prohibited act is enough...it is not necessary to commit the prohibited act offense to commit the trafficking offense." (*People v. Hicks* (2017) 17 Cal. App. 5th 496, 508.) Human trafficking is punishable imprisonment in the state prison for five, eight, or 12 years, or 15 year to life, and a fine not exceeding \$500,000. (*Ibid.*)
- b) **Attempted Sex Offenses Involving a Minor:** Various statutes provide punishment for commercial sex acts, including: kidnapping, kidnapping for ransom, reward, or extortion, or to commit robbery or rape, rape, unlawful sexual intercourse with a minor, rape by foreign object, acting in concert by force or violence, pimping, pandering, and prostitution, willful harm or injury to a child, sodomy, lewd or lascivious acts, oral copulation, sending obscene matter to a child, contact of a minor with intent to commit sexual offense, forcible acts of sexual penetration, distributing obscene matter depicting a minor, sexual exploitation of a child, and employing or using a minor to perform obscene acts.

Under existing law a person who fails to complete a crime may be convicted of an attempt. An attempt requires intent to commit a specific crime and a direct but ineffectual act taken towards the commission of the crime. (Pen. Code, § 21a.) Attempt is punishable by half of the term of imprisonment prescribed for the offense attempted. (Pen. Code, § 664.) A person who contacts or communicates, or attempts to contact or communicate, with a minor with the intent to commit a sex offense, including human trafficking, could be prosecuted with an attempt to commit the underlying offense.

5. Governor Brown's Veto of AB 1882 (Cervantes), 2018

In 2018, Governor Brown vetoed a nearly identical bill to this bill:

While well intentioned, this bill is not necessary. A myriad of statutes provide punishment for commercial sex acts, as well as using, paying or employing minors to commit commercial sex acts. Additionally, anyone who contacts or communicates-or attempts to contact or communicate-with a minor with the intent to commit a sex offense, including human trafficking, is liable to be prosecuted with an attempt to commit any number of felonies.

6. Argument in Support

According to the sponsor, the Alameda County District Attorney:

Existing law makes it a crime for a person to contact a minor with the intent to commit an offense involving that minor including child abuse, kidnapping and rape. However the law as currently written does not apply to minor victims of human trafficking who are 14 years old to 17 years old. AB 135 simply includes the minor who is a victim of human trafficking.

7. Argument in Opposition

According to the American Civil Liberties Union of California:

AB 135 would create a new crime for contacting or communicating with a minor, or attempting to communicate with a minor, with the intent to engage in human trafficking. However, a person who engages in this behavior can already be convicted of human trafficking if the underlying crime is actually carried out. A person can likewise be convicted of attempting to commit human trafficking if 1) the person had the specific intent to commit the crime; and 2) the person took a direct but ineffectual act done towards its commission. Contacting or communicating with a minor, a direct act done towards the commission of the crime, with the intent to commit human trafficking is already punishable as attempted human trafficking in most cases under existing law.

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