
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 371 **Hearing Date:** June 20, 2017
Author: Cooley
Version: February 9, 2017
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Sex Crimes: Communication with a Minor*

HISTORY

Source: Alameda County District Attorney, City of Oakland

Prior Legislation: AB 2327 (Cooley), 2016, failed Senate Appropriations

Support: Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Narcotic Officers Association; California State PTA; California Police Chiefs Association; California State Sheriffs' Association; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs' Association; San Diego District Attorney's Office

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association; California Right to Life Committee

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to add human trafficking to the list of offenses for which it is a crime to communicate with a minor for purposes of committing, or attempt commit the underlying offense.

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).)

- Kidnapping;
- Kidnapping for ransom, reward, extortion, robbery, or rape;
- Rape;
- Rape by a foreign object;

- Willful harm or injury to a child;
- Sodomy;
- Lewd and lascivious acts with a minor;
- Oral copulation;
- Harmful matter sent to minor;
- Forcible sexual penetration; and
- Child pornography.

Existing law provides that the punishment for the offense of contacting or communicating with a minor is the same as an attempt to commit the crime. (Pen. Code, §, 288.3, subd. (a).)

Existing law provides that the punishment for an attempt to commit a crime is generally one half the sentence of the completed crime. (Pen. Code, § 664.)

Existing law specifies that "contacts or communicates with" shall include direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system. (Pen. Code, §, 288.3, subd. (b).)

Existing law provides that a person convicted of a violation of contacting or communicating with a minor who has previously been convicted of a violation the same offense shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. (Pen. Code, §, 288.3, subd. (c).)

Existing law provides that a person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of (specified prostitution offenses, child pornography offenses, or extortion) is guilty of human trafficking. (Pen. Code, §, 236.1, subd. (c).) The offenses are punishable as follows:

- Five, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000).
- Fifteen years to life and a fine of not more than five hundred thousand dollars (\$500,000) when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person.

This bill adds human trafficking to the list of offenses that punishes 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 listed 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.

COMMENTS

1. Need for This Bill

According to the author:

Human trafficking is a profitable criminal industry. Unlike selling drugs, buying and selling human beings is a crime that can repeat itself multiple times. It is estimated that every year approximately 500,000 American youth are at-risk for being sold for sex in the United States. Traffickers and exploiters who prey on children know no boundaries; they are near schools, shopping malls, parks, foster homes, and online. Child trafficking criminals are making use of online resources, using technology to target their audience more efficiently. AB 371 helps law enforcement target traffickers more efficiently and effectively for their participation in this industry.

2. Contacting a Minor to Commit a Felony

California law prohibits a person from contacting a minor to commit specified felony offenses against the minor. Under California Penal Code § 288.3, it is a crime to contact, communicate with, or attempt to contact or communicate with a person who you know or reasonably should know is a minor to commit a variety of crimes ranging from kidnapping to various sexual offenses. The purpose of Penal Code § 288.3 is to prevent adults from communicating with minors for the purpose of committing a serious sexual (or kidnapping) crime against the minor. This bill would add human trafficking to the list of offenses covered by this statute. Human trafficking is an offense which is closely related to the offense of kidnapping because it involves the loss of personal liberty. Additionally human sex trafficking is closely related to the sex crimes listed in Penal Code § 288.3.

3. 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. 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.

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, 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.

4. Penal Code § 236.1 Punishes Offenders who Cause, Induce, or Persuade

Under California Penal Code § 236.1, subd. (c), current California law punishes an offender who “causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor...to engage in a commercial sex act with the intent to effect or maintain a violation of [specified prostitution, child porn offenses, or extortion] is guilty of human trafficking.” This offense is punished under California law with punishments ranging between 5 years to life in state prison and fines of up to \$500,000.

Opponents to this legislation argue that the elements of Penal Code § 236.1, subd. (c), which were added to the Penal Code by Proposition 35 in 2012 are already sufficient punishment for the conduct covered by this bill. However, the provisions of this bill merely require contact with the minor with the “intent to commit” rather than the element contained in Penal Code § 236.1, subd. (c) which requires that the offender “cause, induce, or persuade, or attempt to cause, induce, or persuade.”

The sponsor argues that the existing law targets pimps and the suppliers on the commercial side of sex trafficking. They argue that this bill is necessary to go after the purchasers of commercial sex.

5. Argument in Support

According to the Los Angeles Professional Peace Officers Association:

Human trafficking is modern day slavery and involves the use of force, fraud, or coercion to exploit a person for labor or commercial sex. It is a worldwide problem and the United States is one of the highest end-points for human traffickers. Estimates indicate that California is one of the nation's top four destinations.

Existing law makes it a crime to contact or communicate with a minor with the intent to commit several child sexual assault related crimes such as child pornography, child abuse, and child sexual assault. This bill adds sexual contact with a minor victim of human trafficking. There is a growing use of the internet to lure children into a destructive, assaultive situation where the sexual exploitation and sexual assault can occur. This bill protects children from those who lure children for the perpetrators' own sexual gratification.

6. Argument in Opposition

California Attorneys for Criminal Justice:

This bill, while certainly well-intentioned, creates a new crime that only re-characterizes criminal behavior that is already prescribed. The author's introduction to AB 371 states that the bill would “make it a crime to contact or communicate with a minor, or attempt to contact or communicate with a minor, as specified, with the intent to commit human trafficking of the minor.” That

behavior is already a crime. It is covered by Penal Code section 236.1, subdivision (c), and existing attempt law.

Frankly, the law AB 371 seeks to amend, Penal Code section 288.3, added by voter initiative, is largely duplicative of existing attempt law to begin with. “It requires the act of contacting or communicating with a minor or an attempt to do so coupled with the specific intent to commit an enumerated sex crime. (*People v. Keister* (2011) 198 Cal.App.4th 442, 450.) That is merely a restatement of attempt law: “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.” (Penal Code § 21a.) Penal Code sections 21a and 664 already set forth a comprehensive scheme for charging/punishing attempts to commit crimes, including crimes like human trafficking.

Adding Penal Code section 236.1, subdivision (c), to the list of enumerated sex crimes set forth in Penal Code section 288.3 is doubly redundant. Section 236.1 subdivision (c) provides that: “[a] person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [specified acts] is guilty of human trafficking.” In other words, an *attempt* to induce a minor to engage in a commercial sex act is itself a substantive crime of human trafficking. This bill purports to criminalize attempts to communicate with a minor with the in a commercial sex act.

If a prosecutor can credibly allege that a defendant has attempted to contact a minor with the intent to induce the minor to engage in a commercial sex act, the prosecutor can simply charge the defendant with a violation of Section 236.1, subdivision (c). The defendant’s (failed or thwarted) attempt to contact or communicate with a minor, ostensibly the focus of AB 371, is a direct but ineffectual act done toward the commission of the crime of human trafficking.

Even the punishment is the same. This bill specifies that the penalty for an attempt to contact a minor with the intent to commit an offense specified in subdivision (c) of Section 263.1 “*shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.*”

Last year, Assemblyman Cooley authored an almost identical bill, AB 2327. Several similar bills that have sought to create new crimes resulted in a veto by the Governor. The Governor’s 2015 veto message appended to several bills creating new crimes is just as applicable to this bill: “*Each of these bills creates a new crime – usually by finding a novel way to characterize and criminalize conduct that is already proscribed. This multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.*”

Over the last several decades, California’s criminal code has grown to more than 5,000 separate provisions, covering almost every conceivable form of human behavior. During the same period, our jail and prison populations have exploded.

Before we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective. (https://www.gov.ca.gov/docs/AB_849_Veto_Message.pdf)

The goal of preventing human trafficking of minors is admirable. But creating new crimes that cover behavior that is already criminalized does nothing to further that goal. Existing attempt law, including the attempt provision codified in Section 236.1, already proscribes the behavior that is the subject of this bill, and punishes it harshly, with sentences ranging from five years to 15-to-life. To better combat human trafficking, law enforcement should be directed to better utilize resources investigating the human trafficking laws that are already on the books. Simply passing yet another human trafficking law may feel like a satisfying solution, and may generate good headlines, but it will not effectively address the issue.

For these reasons, CACJ respectfully opposes AB 371.

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