Date of Hearing: June 24, 2014

Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Tom Ammiano, Chair

ABPCA Bill Id: SB 1388 (LieuAuthor:) – As Amended: Ver: May 20, 2014

SUMMARY: Redefines the crime of prostitution, imposes a mandatory minimum jail sentence for a first-offense, and imposes mandatory minimum fines as specified. Specifically, this bill:

1. Redefines prostitution crimes by replacing the term "prostitution" with the term "commercial sex" and separates as crimes the following:

	1. The purchase or agreeing to purchase sex; and,
	2. Agreeing to provide or providing sex.
2. Requires that all persons who are granted probation for purchasing or agreeing to purchase a commercial sexual act must serve a continuous jail term of at least 48 hours and pay a minimum mandatory fine of not less than $1,000 ($4,170 with penalties and assessments), and up to $50,000 ($205,070).

	1. Specifies the court may not waive the requirement that a defendant – whether granted probation or not – serve at least 48 hours of continuous confinement.
	2. Provides that fines collected from a person who has been convicted of purchasing or offering to purchase a commercial sex act shall be deposited in the Victim-Witness Assistance Fund to fund grants to “local programs.” Fifty percent of each fine shall be granted to public agencies and nonprofit corporations providing exit or recovery services to persons exploited through commercial sex. Fifty percent of the fines shall be granted to law enforcement and prosecution agencies in the jurisdiction of the crime “to fund programs to prevent sex purchasing.”
3. Creates an additional minimum mandatory fine of $1,000 ($4,170) and up to $10,000 ($41,070), in addition to any other fines imposed, for any person who agrees to purchase a commercial sex act with a minor.
4. Specifies an additional minimum mandatory fine of $5,000 ($20,570), in addition to an existing fine of up to $5,000 ($20,570) for placing a minor into prostitution, or furnishing a minor to another person for sexual conduct.

EXISTING LAW:

1. Defines “unlawful sexual intercourse” as an act of sexual intercourse accomplished with a person under the age of 18 years, when no other aggravating elements – such as force or duress – are present. (Pen. Code § 261.5, subd. (a).)
2. Provides the following penalties for unlawful sexual intercourse:

	1. Where the defendant is not more than three years older or three years younger than the minor, the offense is a misdemeanor;
	2. Where the defendant is more than three years older than the minor, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to $1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up $10,000; or,
	3. Where the defendant is at least 21 years of age and the minor is under the age of 16, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to $1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up $10,000. (Pen. Code § 261.5, subd (b)-(d).)
3. Provides that in the absence of aggravating elements each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor is punishable as follows:

	1. Where the defendant is over 21 and the minor under 16 years of age, the offense is a felony, with a prison term of 16 months, 2 years or 3 years.
	2. In other cases sodomy with a minor is a wobbler, with a felony prison term of 16 months, 2 years or 3 years. (Pen. Code §§ 286, subd. (b), 288a, subd. (b), 289, subd. (h).)
4. Provides that where each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor who is under 14 and the perpetrator is more than 10 years older than the minor, the offense is a felony, punishable by a prison term of 3, 6 or 8 years. (Pen. Code §§ 286, subd. (c)(1), 288a, subd. (c)(1), 289, subd. (j).)
5. Provides that any person who engages in lewd conduct – any sexually motivated touching or a defined sex act – with a child under the age of 14 is guilty of a felony, punishable by a prison term of 3, 6 or 8 years. Where the offense involves force or coercion, the prison term is 5, 8 or 10 years. (Pen. Code § 288, subd. (b).)
6. Provides that where any person who engages in lewd conduct with a child who is 14 or 15 years old, and the person is at least 10 years older than the child, the person is guilty of an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to $1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up $10,000. (Pen. Code § 288, subd. (c)(1).)
7. Includes numerous crimes concerning sexual exploitation of minors for commercial purposes. These crimes include:

	1. Pimping: Deriving income from the earnings of a prostitute, deriving income from a place of prostitution, or receiving compensation for soliciting a prostitute. Where the victim is a minor under the age of 16, the crime is punishable by a prison term of three, six or eight years. (Pen. Code § 266h, subds. (a)-(b);
	2. Pandering: Procuring another for prostitution, inducing another to become a prostitute, procuring another person to be placed in a house of prostitution, persuading a person to remain in a house of prostitution, procuring another for prostitution by fraud, duress or abuse of authority, and commercial exchange for procurement. (Pen. Code § 266i, subd. (a).);
	3. Procurement: Transporting or providing a child under 16 to another person for purposes of any lewd or lascivious act. The crime is punishable by a prison term of three, six, or eight years, and by a fine not to exceed $15,000. (Pen. Code § 266j.)
	4. Taking a minor from her or his parents or guardian for purposes of prostitution. This is a felony punishable by a prison term of 16 months, two years, or three years and a fine of up to $2,000. (Pen. Code § 267.); and,
8. Provides that where a person is convicted of pimping or pandering involving a minor the court may order the defendant to pay an additional fine of up to $5,000. In setting the fine, the court shall consider the seriousness and circumstances of the offense, the illicit gain realized by the defendant and the harm suffered by the victim. The proceeds of this fine shall be deposited in the Victim-Witness Assistance Fund and made available to fund programs for prevention of child sexual abuse and treatment of victims. (Pen. Code § 266k, subd. (a).)
9. Provides that where a defendant is convicted of taking a minor under the age 16 from his or her parents to provide to others for prostitution (Pen. Code § 267) or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (Pen. Code § 266j), the court may impose an additional fine of up to $20,000. (Pen. Code § 266k, subd. (b).)
10. Provides that where a defendant is convicted under the Penal Code of taking a minor (under the age of 18) from his or her parents for purposes of prostitution (Pen. Code § 267), or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (266j), the court, if it decides to impose a specified additional fine, the fine must be no less than $5,000, but no more than $20,000. (Pen. Code § 266k, subd. (b).)
11. Provides that any person who solicits, agrees to engage in, or engages in an act of prostitution is guilty of a misdemeanor. The 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).)
12. Provides that if the defendant agreed to engage in an act of prostitution, the person soliciting the act of prostitution need not specifically intend to engage in an act or prostitution. (Pen. Code § 647, subd. (b).)
13. Provides that where any person is convicted of 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).)
14. 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).)

FISCAL EFFECT: Unknown

COMMENTS:

1. Author's Statement: According to the author, “This bi-partisan measure seeks to shift the paradigm away from prosecuting victims to prosecuting Johns and those who pimp out sex workers. By increasing penalties and including incarceration time for men and women who violate a human’s right to free will, it is my hope that increased punishment and harsher repercussions will deter this odious and criminal behavior. The country and the world need to know that California’s children are not for sale.”
2. Mandatory Minimum Jail Sentence for First-Offense Prostitution Offenses: Adults who procure the services of adult prostitutes will face minimum mandatory jail time of 48 hours for a first-offense of misdemeanor prostitution. The court will have no discretion in deciding whether or not to sentence a defendant to jail. Courts are generally in the best position to determine the whether the facts and circumstances of a particular case merit jail time. This bill would remove that discretion from judges. "Johns" who engage in misdemeanor prostitution offenses will take up valuable jail space that could be used to house offenders who commit violent offenses. The mandatory jail time applies to all persons who solicit a prostitute, not merely those who solicit a human trafficking victim.
3. Graduated Sanctions Already Exist for Recidivist Johns: For a first offense conviction of prostitution the defendant faces up to 180 days in jail. If a defendant has one prior conviction of prostitution he or she must receive a county jail sentence of not less than 45 days. If the defendant has two or more prior convictions, the minimum sentence is 90 days in the county jail. This bill would require 48 hours of custody for a first offense.
4. Prostitution and Human Trafficking, Though Related, are not Always the Same Thing: A growing number of policy discussions are equating prostitution offenses with human trafficking offenses. There is no doubt that the crimes are related, however, they are not the same crime. A number of proposals seek to treat all prostitution offenses more severely because of the grave threat and nature of human trafficking. Human trafficking is a very serious crime, involving forced servitude, with very serious penalties. Most prostitution offenses between a person who is soliciting a prostitute and the prostitute themselves are misdemeanor crimes, which are unrelated to human trafficking. Additionally, pimps and panderers generally are treated more severely by the law, with much more serious consequences than the prostitute or the "john." Unlike the crimes of pimping and pandering, human trafficking is a crime that generally involves some form of force or coercion.

California has existing strict laws for the treatment of pimps and panderers, as well as human traffickers. However, those crimes are not the same and should not be treated the same. Furthermore, not every person who solicits a prostitute is engaged in the crime of human trafficking. In fact, the vast majority are not purchasing a commercial sex act with a person who is being forced to engage in the activity through the auspices of human trafficking. Categorizing all "johns" as human traffickers, or all pimps and panderers as human traffickers, is unproductive in setting criminal justice policy. Blurring the lines between the less severe crimes related to prostitution, and the more severe crimes related to human trafficking, weakens the severity of human trafficking offenses. For instance, this committee has approved bills to add human trafficking to the list of serious felonies. However, if we continue to expand the definition of human trafficking to include more minor prostitution-related offenses the committee would have to re-evaluate in the future whether it would still consider human trafficking a serious felony.

According to the Polaris Project, "Human trafficking is a form of modern-day slavery where people profit from the control and exploitation of others.  As defined under U.S. federal law, victims of human trafficking include children involved in the sex trade, adults age 18 or over who are coerced or deceived into commercial sex acts, and anyone forced into different forms of 'labor or services,' such as domestic workers held in a home, or farm-workers forced to labor against their will.  The factors that each of these situations have in common are elements of force, fraud, or coercion that are used to control people."  (<<http://www.polarisproject.org/human-trafficking/overview>>.)

Pimping under California law means receiving compensation from the solicitation of a known prostitute.  (Pen. Code, § 266h.)  Whereas pandering means procuring another person for the purpose of prostitution by intentionally encouraging or persuading that person to become or continue being a prostitute.  (Pen. Code, § 266i.)  Oftentimes, pimps use mental, emotional, and physical abuse to keep their prostitutes generating money.  Consequently, there has been a paradigm shift where pimping and pandering is now viewed as possible human trafficking.

This new approach has been criticized by some because it blurs the line between human trafficking and prostitution.  Sex workers say it discounts their ability to willingly work in the sex industry.  (See *Nevada Movement Draws the Line on Human Trafficking* by Tom Ragan, Las Vegas Review Journal, May 26, 2013, < <http://www.reviewjournal.com/news/las-vegas/nevada-movement-draws-line-human-trafficking>>.)

* 1. Prostitution Generally: The basic crime of prostitution is a misdemeanor offense. (Pen. Code § 647(b).) Prostitution can be generally defined as "soliciting or agreeing to engage in a lewd act between persons for money or other consideration." Lewd acts include 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 of either person.

To implicate a person for prostitution themselves, the prosecutor must prove that the defendant "solicited" or "agreed" to "engage" in prostitution. A person agrees to engage in prostitution when the person accepts an offer to commit prostitution with specific intent to accept the offer, whether or not the offerer has the same intent.

For the crime of "soliciting a prostitute" the prosecutors must prove that the defendant requested that another person engage in an act of prostitution, and that the defendant intended to engage in an act of prostitution with the other person, and the other person received the communication containing the request. The defendant must do something more than just agree to engage in prostitution. The defendant must do some act in furtherance of the agreement to be convicted. Words alone may be sufficient to prove the act in furtherance of the agreement to commit prostitution

Violation of [Pen.](http://www.sexcrimesattorney909.com/prostitution-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self) Code § 647(b) is a misdemeanor. For a first offense conviction of prostitution the defendant faces up to 180 days in jail. If a defendant has one prior conviction of prostitution he or she must receive a county jail sentence of not less than 45 days. If the defendant has two or more prior convictions, the minimum sentence is 90 days in the county jail.

In addition to the punishment described above, if the defendant is conviction of prostitution, he or she faces fines, probation, possible professional licensing restrictions or revocations, possible immigration consequences, possible asset forfeiture, and possible driving license restrictions.

Closely associated crimes to prostitution include: abduction of a minor for prostitution (Pen. Code 267); seduction for prostitution (Pen. Code 266); keeping a house of prostitution (Pen. Code 315); leasing a house for prostitution (Pen. Code 318); sending a minor to a house of prostitution (Pen. Code 273e); taking a person against that person's will for prostitution (Pen. Code 266a); compelling a person to live in an illicit relationship (Pen. Code 266b); placing or leaving one's wife in a house of prostitution (Pen. Code 266g); [loitering for prostitution](http://www.sexcrimesattorney909.com/prostitution-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self) ([Pen. Code 653.22 subd. (a)](http://www.sexcrimesattorney909.com/prostitution-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self)); [pimping](http://www.sexcrimesattorney909.com/pimping-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self) [( Pen. Code 266h)](http://www.sexcrimesattorney909.com/pimping-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self); or, [pandering](http://www.sexcrimesattorney909.com/Pandering-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self) [( Pen. Code 266i)](http://www.sexcrimesattorney909.com/Pandering-Criminal-Defense-Attorney.html%22%20%5Ct%20%22_self). Most of these crimes are punished much more severely than the underlying prostitution offense, particularly the crimes of pimping, pandering, and procurement.

* 1. 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, Californians voted to pass Proposition 35, which modified many provisions of California's already tough 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 that victim engaged in sexual conduct from being used against victims in court proceedings. Additionally, the proposition lowered the evidential requirements for showing of force in cases of minors.

* + 1. 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.
		2. Recent Update to Human Trafficking Laws: 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. After passage of Proposition 35, plaintiffs American Civil Liberties Union and Electronic Frontier Foundation filed a law suit claiming that these provisions unconstitutionally restricts the First Amendment rights of registered sex offenders in the states. A United States District Court judge granted a preliminary injunction prohibiting the implementation or enforcement of Proposition 35's provisions that require registered sex offenders to provide certain information concerning their Internet use to law enforcement. [*Doe v. Harris* (N.D. Cal., Jan. 11, 2013, No. C12-5713) 2013 LEXIS 5428.]
		3. California Attorney General's Report on Human Trafficking: The California Attorney General’s Human Trafficking in California 2012 report stated that human trafficking investigations and prosecutions have become more comprehensive and organized. There are nine human trafficking task forces in California, composed of local, state and federal law enforcement and prosecutors.

Data on human trafficking has improved, although the data still does not reflect the actual extent and range of human trafficking. Data from 2010 through 2012 collected by the California task forces are set out in the following chart:

 California Human Trafficking Task Forces Data 2010-2012

|  |  |
| --- | --- |
| Investigations | 2,552 |
| Victims Identified | 1,277 |
| Arrests Made | 1,798 |

 Trafficking by Category

|  |  |
| --- | --- |
| Sex Trafficking | 56% |
| Labor Trafficking | 23% |
| Unclassified or Insufficient Information | 21% |

1. Incentive to Refuse Probation for Defendants Convicted of Offering to Purchase of Purchasing Commercial Sex: This bill provides that where a person convicted of agreeing to purchase or purchasing a commercial sex act is granted probation, the defendant must serve a continuous jail term of at least 48 hours and pay a fine of between $1,000 and $50,000. The sentencing court cannot decline to impose the jail term. A person convicted of such a crime who is not granted probation must serve a continuous jail term of at least 48 hours, but there is no requirement that the defendant pay a fine. If the court imposes a fine, the maximum fine is $1,000, the default maximum misdemeanor fine.

Arguably, subjecting only persons granted probation for purchasing or agreeing to purchase a commercial sex act to a mandatory fine of between $1,000 and $50,000 creates a very strong incentive for defendants to refuse probation. A defendant who refused probation would serve his jail term and face no more than a $1,000 fine. A defendant who refuses probation would not receive supervision after serving his jail term and could not have his punishment modified, unlike a probationer. The court has essentially no authority over a person who refuses probation and has suffered whatever punishment the court imposes. Additionally, any treatment offered by probation would not be provided to an offender.

1. Minimum Mandatory Fines Remove Judicial Discretion and are Subject to Penalties and Assessments: Judges are in the best position to determine the appropriate sentence in a particular case. The judge presiding over a particular case is an independent arbiter of the facts and circumstances presented. The Legislature should pause before removing this discretion from judges, and tie their hands in particular matters. For this reason, minimum mandatory fines have been generally disfavored as a form of punishment.

This bill imposes a number of "additional" fines on top of an existing base fine. Specifically, this bill does the following:

* 1. Requires that all persons who are granted probation for purchasing or agreeing to purchase a commercial sexual act (regardless of the age of the person solicited) must serve a continuous jail term of at least 48 hours and pay a minimum mandatory fine of not less than $1,000, and up to $50,000;
	2. Creates an additional minimum mandatory fine of $1,000 and up to $10,000, in addition to any other fines imposed, for any person who agrees to purchase a commercial sex act with a minor; and,
	3. Specifies an additional minimum mandatory fine of $5,000 in addition to an existing fine of up to $5,000 for placing a minor into prostitution, or furnishing a minor to another person for sexual conduct. Under existing law, the court can already issue a fine of up to $20,000.

Setting the penalty, or range of penalties, for a crime is an inherently legislative function. The Legislature does have the power to require a minimum term or other specific sentence. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) Sentencing, however, is solely a judicial power. (*People v. Tenorio* (1970) 3 Cal.3d 89, 90-93; *People v. Superior Court (Fellman)* (1976) 59 Cal.App.3d 270, 275.) California law effectively directs judges to impose an individualized sentence that fits the crime and the defendant’s background, attitude, and record. (Cal. Rules of Court, rules 4.401-4.425.) This bill limits judicial discretion and requires a minimum fine of $500 to be imposed in each case, regardless of the facts of the case and the defendant's record.

Also, there are penalty assessments and fees assessed on the base fine for a crime. Assuming a defendant was fined $50,000 for engaging in prostitution as the maximum fine, the following penalty assessments would be imposed pursuant to the Penal Code and the California Government Code:

Base Fine: $ 50,000

Penal Code 1464 assessment: $ 50,000 ($10 for every $10)

Penal Code 1465.7 surcharge: 10,000 (20% surcharge)

Penal Code 1465.8 assessment: 40 ($40 fee per offense)

Government Code 70372 assessment: 25,000 ($5 for every $10)

Government Code 70373 assessment: 30 ($30 for felony or misd.)

Government Code 76000 assessment: 35,000 ($7 for every $10)

Government Code 76000.5 assessment: 10,000 ($2 for every $10)

Government Code 76104.6 assessment: 5,000 ($1 for every $10)

Government Code 76104.7 assessment: 20,000 ($4 for every $10)

Total Additional Fine with Assessments: **$ 205,070.00**

*Under this legislation an individual, who solicits a prostitute, could be fined over $200,000.00 for consensual sexual activity between two adults.*

1. Double Punishment: This bill seeks to impose a number of second punishments for single acts. The bill is imposing a number of "additional" fines on top of existing criminal fines related to commercial sex acts with minors. For one of the fines, the bill seeks to divert the additional funds to law enforcement and victim services. The bill is imposing an additional fine on top of the existing punishment. As a public policy, the Legislature imposes a distinct fine for each distinct criminal act. As outlined above, each fine is subject to individual penalties and assessments. An offender suffering two fines for one act would pay many of the assessments twice for one act.
2. Fine Distribution to Law Enforcement Creates a Potential Conflict of Interest: The payment of criminal fines or fees to a law enforcement entity or for direct law enforcement purposes raises issues of an improper bounty – an incentive for law enforcement agencies to pursue investigations based on financial interest, rather than public safety. These concerns may be heightened when government budgets are strained.

Further, designating that criminal fines be paid to a particular kind of law enforcement program could set a precedent under which other law enforcement entities could press to receive the proceeds of criminal fines. Investigations of many crimes – murders, sexual assaults, financial crimes, construction fraud and worker’s compensation fraud – may be as costly and complicated as commercial sex crimes. For example, the Contractors’ State License Board uses stings to catch unlicensed contractors. If criminal fines are used to fund decoy programs in which law enforcement personnel pretend to be commercial sex workers, law enforcement officers and prosecutors who handle other complex cases could well demand that fines be used to support their operations.

To avoid creation of an incentive for law enforcement to pursue certain crimes for financial purposes, not solely law enforcement purposes, and to avoid a precedent for funding law enforcement through criminal fines, it is suggested that the bill could be amended to deposit special fines in commercial sex cases into victim services.

In this bill, another concern is that the law *enforcement* funding is designated for *prevention* programs. As the name states, law enforcement entities enforce the criminal law by arresting subjects and collecting evidence for the prosecutor. Law enforcement agencies conduct prostitution “stings” in which a law enforcement decoy pretends to be a prostitute in order to arrest a person for solicitation of prostitution. While this can be said to prevent a prostitution offense on the night of arrest, it cannot be determined if the arrested person would seek out prostitutes at a later time. Further, the person might learn from the arrest how to avoid decoys and arrests on other occasions. Further, law enforcement entities generally do not have programs to turn prostitutes away from sexual commerce and toward different employment and social contacts and conducting stings to arrest sex purchasers would not directly affect sex workers.

1. Recidivism Rates for Persons Arrested for Soliciting Prostitution are Low: A study 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 from the data that an arrest, per se, could have deterred offenders, as prostitution offenses involve 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 a 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. The San Francisco program – First Offender Prostitution Program (FOPP) – was one of the first of these programs. The program requires 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 complete the course are 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 program educated participants about the risk of harm to prostitution customers, such as robbery, reinforcement of sexually compulsive behaviors and sexually transmitted diseases (STDs). The course also examined the negative consequences for prostitutes, such as drug abuse, STDs and other health problems, criminal convictions, exploitation by pimps, rape and other violence and harm to the community. The Abt report found a sharp drop in recidivism attributable to the program.

The claims of a sharp drop in recidivism in the Abt report have been 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.

1. No Knowledge Requirement: There is no requirement that an offender who solicits a minor know that the person engaged in prostitution is a minor. (Pen. Code § 236.1 subd. (f).)
2. Sexual Contact with Minors is Already Heavily Punished by Other Crimes: 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. Arguably, the exchange of money could be an aggravating factor in the underlying sex crime, as it could be seen as an improper attempt to normalize the behavior or coerce the victim. If the minor involved in commercial sex of 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. (Pen. Code § 288, subd. (a).) The crime is punishable by a term of 5, 8 or 10 years if the defendant used force, threats, duress or coercion. Solicitation of an act of prostitution from a minor under the age of 14 could likely be prosecuted as attempted lewd conduct – the intention to commit the crime and a direct step towards its commission. The prison or jail term of an attempt is generally one-half the punishment for the completed crime. Where the defendant solicited or employed a minor who was14 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.)

1. Argument in Support: According to the Junior Leagues of California, "eliminating human trafficking and slavery in all its forms and educating the community at large is a key focus area of the Junior Leagues of California and its member leagues.

"Human trafficking is considered to be one of the fastest growing criminal industries. Each year, human traffickers generate billions of dollars in profits by victimizing millions of people around the world. According to the Polaris Project, 41% of sex trafficking and 20% of labor trafficking cases referenced U.S. citizens as victims. Women were referenced as victims in 85% of sex trafficking cases and men are referenced in 40% of labor trafficking. In addition, more than 100,000 children are estimated to be sex trafficked in the United States annually."

1. Argument in Opposition: According to the California Public Defenders Association, "SB 1388 proposes to amend section 266k(b) to require additional fines from $5,000 to $20,000 for individuals convicted of procuring a minor under the age of 16 for prostitution (Penal Code Section 266j) or taking a minor under 18 years of age without the legal guardian’s permission for purposes of prostitution (Penal Code Section 267). Under existing law, procuring a minor under 16 has a maximum fine of $15,000 and taking a minor without the legal guardian’s permission has a maximum fine of $2,000. Under existing Penal Code Section 266k(b), the court may impose an additional maximum fine of $20,0000. However, there is no minimum additional fine.

"SB 1388 proposes to amend Penal Code Section 647(b) to clarify the language of agreeing to purchase or perform commercial sex acts. It also provides for mandatory 48 hour minimum jail sentence and if probation is granted, a minimum fine of $1,000 and a maximum fine of $50,000 for purchasers of commercial sex acts. It would also provide an additional fine of a minimum of $1,000 and a maximum of $10,000 if the victim prostitute was a minor. Under existing law, the maximum fine for a misdemeanor is $1,000.

"The funds collected go variously to the Victim Witness Fund to disburse to local nonprofits, the county’s general fund for collecting the fines, law enforcement and prosecution agencies in the local jurisdiction and a new state Commercial Sexual Exploitation of Children Services Fund.

"We object to these massive fine increases. A potential fifty (50) fold increased fine for a misdemeanor violation of solicitation for prostitution is unjust and counterproductive.

"Although it is a worthy goal to end the sexual exploitation of minors most of whom come from impoverished or abusive families, it should not be funded by impoverishing other families and children. Doing so merely replicates the cycle of poverty and abuse.

"The individuals charged under California’s human trafficking and prostitution statutes are not human trafficking kingpins or madams. They are for the most part individuals with no organized crime ties.

"Individuals who are convicted of misdemeanor violations of Penal Code Section 647(b) are already subject to a mandatory restitution fine up to $1,000 and restitution to any victims.

"The restitution fund fines are subject to penalty assessments. Penalty assessments have proliferated wildly over the past few decades, to the point where a typical total fine is now triple or quadruple the base fine. An inevitable side effect of these ballooning fines is that fewer and fewer criminal defendants can afford to pay them. Three quarters of misdemeanor defendants and 90% of felony defendants are indigent, as indicated by the fact they are represented by public defenders or other appointed counsel. When defendants cannot pay the fine it is unconstitutional to imprison them for their poverty, so the fine goes uncollected and measures such as this are virtually dead letters. In other cases defendants who are already sentenced to jail, but can't afford the monetary portion of their sentence will simply opt to convert the fine to additional jail time, which results in more cost to the government rather than more money in their coffers.

"Since counties now routinely send the unpaid balance of these fines and fees to the State Controller for collection, it is almost impossible for many individuals who now have a conviction to get back on their feet and support themselves and their families.

"These proposed increased fines on top of all the fines and fees detailed above is bad public policy. By making it even more difficult for convicted misdemeanants and felons to become law abiding citizens, it will endanger the public."

1. Related Legislation: AB 1791 (Maienschein), increases the penalty for solicitation of prostitution when the person being solicited is a minor from six months in the county jail to one year in the county jail. Was amended in Assembly Public Safety Committee to remove provisions which imposed felony penalties and lifetime registration on persons who solicit a minor for prostitution. AB 1791 has been referred to Senate Public Safety.
2. Prior Legislation:

	1. AB 90 (Swanson) , statutes of 2011, Ch. 457, included, within the definition of criminal profiteering activity, any crime in which the perpetrator induces, encourages, or persuades, or causes through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, a person under 18 years of age to engage in a commercial sex act, and specifies that the proceeds shall be deposited in a Victim-Witness Fund, as specified.
	2. AB 17 (Swanson), statutes of 2010, Ch. 211, added abduction or procurement for prostitution to the criminal profiteering asset forfeiture law; provided that the court may impose a fine of up to $20,000, in addition to any other fines and penalties, where the defendant has been convicted of abduction of a minor for purposes of prostitution or procurement of a minor under the age of 16 for lewd conduct; and provided that 50 percent of the additional fine shall be deposited in the Victim-Witness Assistance Fund for purposes of grants to community-based organizations that serve minor victims of human trafficking.
	3. AB 22 (Lieber), Chapter 240, Statutes of 2005, created the California Trafficking Victims Protection Act, which established civil and criminal penalties for human trafficking and allowed for forfeiture of assets derived from human trafficking. In addition, the Act required law enforcement agencies to provide Law Enforcement Agency Endorsement to trafficking victims, providing trafficking victims with protection from deportation and created the Human Trafficking Task Force.

REGISTERED SUPPORT / OPPOSITION:

Support

A21 Campaign

Alameda County District Attorney

American Academy of Pediatrics

American Federation of State, County and Municipal Employees

Association for Los Angeles County Deputy Sheriffs

Association for the Recovery of Children

Bridge Network

California Catholic Conference

California Fraternal Order of Police

California Narcotic Officers' Association

California Police Chiefs Association

California State Sheriffs' Association

California Statewide Law Enforcement Association

City of Long Beach

City of Los Angeles

City of Vista

Christians Against Slavery

Church State Council

Community Against Sexual Harm

Community Overcoming Relationship Abuse

Concerned Women for America

County of Los Angeles

Domestic Violence Center

First United Methodist Church of Escondido

Freedom from Exploitation

Gems Uncovered

Generate Hope

Grandma's House of Hope

Guadalupe Art Program

Joyful Child Foundation

Journey Community Church

Junior Leagues of California

Junior Leagues of Orange County

Laura's House

Long Beach Peace Officers Association

Los Angeles Professional Peace Officers Association

Los Angeles Police Protective League

Mary Magdalene Project

MISSSEY

New Directions for Women

Peace Officer Research Association of California

Red Window Project

Riverside Sheriffs' Association

Sacramento County Deputy Sheriffs Association

Safety Corridor Coalition

Soroptimist International of Vista

Soroptimists Together Against Trafficking

Surviving Parents Coalition

Survivors for Solutions

United Nations Association, San Diego Chapter

Urban Counties Caucus

Without Permission

Opposition

California Attorneys for Criminal Justice

California Public Defenders Association

Erotic Service Providers Union

Transgender Law Center

US PROStitutes Collective

1 Private Citizen

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