
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 2327 **Hearing Date:** June 28, 2016
Author: Cooley
Version: March 28, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Contacting or Communicating With a Minor*

HISTORY

Source: Alameda County District Attorney's Office

Prior Legislation: Proposition 83, November 2006 General Election

Support: Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California Narcotic Officers Association; California District Attorneys Association; California State Sheriffs' Association; Los Angeles Police Protective League; Los Angeles Professional Peace Officers Association; Peace Officers Research Association of California; Riverside Sheriffs Association

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice

Assembly Floor Vote: 80 - 0

PURPOSE

This bill adds human trafficking to the list of target crimes in the offense of contacting or communicating with a minor for the purposes of committing a further, specified crime.

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).)

- a) Kidnapping;
- b) Kidnapping for ransom, reward, extortion, robbery, or rape;
- c) Rape;
- d) Sexual penetration other than rape or sodomy;
- e) Willful harm or injury to a child;
- f) Sodomy;
- g) Lewd and lascivious acts with a minor;

- h) Oral copulation;
- i) Harmful matter sent to minor;
- j) Forcible sexual penetration; and
- k) 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).) California criminal law dictates that the punishment for attempt 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).)

This bill expands the crime of communicating with a minor with the intent to commit specified sexual offenses with the minor to include attempting to contact or communicating with a minor with the intent to commit human trafficking.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

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

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

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

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

Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted.)

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

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

COMMENTS

1. Need for This Bill

According to the author:

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 2327 helps law enforcement target traffickers and 'Johns' more efficiently for their participation in this industry.

2. Rejections of Challenges to Penal Code Section 288.3 – Communicating with a Minor with the Intent to Commit a Sex Crime - in the Courts

There are few published appellate decisions considering the crime amended by this bill, although there have been a number of unpublished opinions. The unpublished opinions generally upheld convictions, but unpublished cases cannot be cited as authority on appeal or in a trial court in other cases.

In one published case, the Court of Appeal rejected arguments that the court should have instructed the jury on an allegedly lesser-included offense, that the statute violated the constitutional right to travel, was vague and denied equal protection of the law. Finally, the

court rejected an argument that the initiative in which the statute was defined violated the California single subject rule. (*People v. Keister* (2011) 198 Cal.App.4th 442.)

Another case -- *People v. Shapiro*, previously at 228 Cal.App.4th 157 – was granted review by the California Supreme Court, but review was later dismissed and the appellate opinion depublished. His petition for certiorari in the United States Supreme Court was denied. The defendant in Shapiro had communicated over the Internet with a 16-year-old girl in Indiana. The defendant pretended to be only a few years older than the victim. He eventually convinced her to engage in explicit activity during their Internet conversation. The defendant argued that he could not be convicted because the victim was not a minor under Indiana law, where the age of consent is 16. He also argued that he could not have actually induced or caused her to engage in sexual penetration from thousands of miles away in Southern California. Shapiro's convictions have thus been allowed to stand.

3. California Human Trafficking Laws Generally

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

Proposition 35 provided for prison sentences up to 15-years-to-life and fines up to \$1.5 million for human trafficking involving minors. 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 restrict 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.) A bill to address the decisions of the federal courts – SB 448 (Hueso) is pending in Assembly Public Safety.

4. Federal Law - Trafficking Victims Protection Act of 2000

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. (22 USC Sections 7101 et seq.)

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.

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