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# AB 1708: Combating Sex Trafficking by Targeting Prostitution

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## **AB 1708: Combating Sex Trafficking by Targeting Prostitution**

*Hannah Kreuser\**

### *Code Sections Affected*

California Penal Code § 647 (amended)  
AB 1708 (Gonzalez); Vetoed.

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### I. INTRODUCTION

In 2015, researchers at the University of San Diego (USD) and Point Loma of Nazarene University released a portion of a three-year study on sex trafficking<sup>1</sup> in San Diego County.<sup>2</sup> Prior to this study, little empirical data on sex

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1. POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS, 5 (2013), *available at* <https://polarisproject.org/sites/default/files/2013-state-ratings-analysis.pdf> (last visited Aug. 2, 2016) (on file

trafficking existed despite its growing prominence in the media.<sup>3</sup> The study revealed several key findings and was “one of the largest, most comprehensive human trafficking case studies in the United States to date . . . .”<sup>4</sup>

First, the study showed that the underground sex economy in San Diego County is an \$810 million per year enterprise, second only to the county’s illegal drug industry.<sup>5</sup> This profit comes from transactions far and wide across the county, leaving no community untouched, and no one neighborhood to blame.<sup>6</sup>

Second, the study indicated that the average age of girls entering the sex slave industry was 16.1 years.<sup>7</sup> This estimate is rather conservative, however, it takes around three years of working in the industry before the victims are arrested or come to the attention of law enforcement; thus, the 16.1 year estimate is skewed.<sup>8</sup> Based on the study, age 15 is likely the average age of a child entering the realm of child commercial exploitation.<sup>9</sup> Additionally, most of the victims are United States citizens, typically from vulnerable populations, as opposed to victims trafficked in from other countries.<sup>10</sup>

Finally, results of the study show that of the first-time arrests for prostitution in San Diego County over the three-year study period, 42 percent included victims involved in sex trafficking.<sup>11</sup> Of the 302 adult first-time arrestees included in the study, almost half qualified as victims of sex trafficking under the federal definition but were often misidentified by law enforcement.<sup>12</sup>

Assemblymember Lorena Gonzalez introduced Assembly Bill 1708 (AB 1708) in response to the study by the USD and Point Loma of Nazarene

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with *The University of the Pacific Law Review*) (indicating that sex trafficking is a subcategory of human trafficking and defining sex trafficking as the use of “force, fraud, or coercion to compel another to engage in commercial sex acts, except where the individual is a minor, in which case force, fraud, or coercion need not be shown”) [hereinafter POLARIS PROJECT].

2. Ami Carpenter & Jamie Gates, *Human-Trafficking Study*, JOAN B. KROC SCHOOL OF PEACE STUDIES, UNIV. OF SAN DIEGO, <https://www.sandiego.edu/peacestudies/research-fieldwork/human-trafficking-study.php> (last visited Sept. 9, 2016) (on file with *The University of the Pacific Law Review*) (“The full study is currently embargoed by the National Institute of Justice (NIJ)”).

3. AMI CARPENTER & JAMIE GATES, *THE NATURE AND EXTENT OF GANG INVOLVEMENT IN SEX TRAFFICKING IN SAN DIEGO COUNTY*, FINAL REPORT SUBMITTED TO THE U.S. DEP’T OF JUSTICE 1 (2016), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/249857.pdf> (on file with *The University of the Pacific Law Review*).

4. Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2.

5. CARPENTER & GATES, *THE NATURE AND EXTENT OF GANG INVOLVEMENT IN SEX TRAFFICKING IN SAN DIEGO COUNTY*, *supra* note 3.

6. *Id.* at 10.

7. *Id.* at 1.

8. *Id.* at 11.

9. Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2.

10. *See e.g., id.* (“Significant CSEC recruitment is happening on high school and middle school campuses.”).

11. *Id.*

12. CARPENTER & GATES, *THE NATURE AND EXTENT OF GANG INVOLVEMENT IN SEX TRAFFICKING IN SAN DIEGO COUNTY*, *supra* note 3, at 9.

University, which highlighted the immense scope and problem of sex trafficking in her own backyard.<sup>13</sup> With the increasing attention brought to victims of sex trafficking in recent years, Assemblymember Gonzalez became motivated to find and utilize new avenues to tackle the issue.<sup>14</sup> As part of the human trafficking study, researchers at USD and Point Loma of Nazarene University put forth several policy recommendations to combat sex trafficking based on their findings, one of which appears to be the inspiration for AB 1708.<sup>15</sup> The study's policy recommendation increases the targeting of buyers through an expanded effort of apprehension and prosecution.<sup>16</sup>

## II. LEGAL BACKGROUND

Both the federal government and California have laws in place addressing sex trafficking and prostitution.<sup>17</sup> The federal government addresses sex trafficking in the Trafficking Persons Protected Act (TPPA).<sup>18</sup> Historically, the federal government addresses prostitution in the United States Code Annotated, 18 U.S.C.A. 2421.<sup>19</sup> However, Section 2421 only prohibits prostitution when it involves the transportation of a female across state lines; the determination of whether prostitution is legal within a state remains with the individual states.<sup>20</sup> California addresses both sex trafficking and prostitution in its Penal Code.<sup>21</sup> Section 236.1 of the California Penal code defines and criminalizes sex trafficking.<sup>22</sup> And in California Penal Code Section 647, California makes prostitution illegal.<sup>23</sup>

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13. Interview with Laurel Brodzinsky, Leg. Assistant for Assemblymember Lorena Gonzalez, Cal. Leg. (Aug. 3, 2016) (notes on file with *The University of the Pacific Law Review*) [hereinafter Interview with Laurel Brodzinsky].

14. *Id.*

15. Compare Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2., with AB 1708, 2016 Leg., 2015-2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted) (illustrating the similarity between one of the study's recommendations and the change proposed by AB 1708).

16. CARPENTER & GATES, *THE NATURE AND EXTENT OF GANG INVOLVEMENT IN SEX TRAFFICKING IN SAN DIEGO COUNTY*, *supra* note 3, at 14.

17. 18 U.S.C.A. § 2421 (West 2015); CAL. PEN. CODE §§ 236.1, 647 (West 2015).

18. Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Section 112 of Trafficking Victims Protection Act of 2000 and Subsequent Reauthorizing Provisions amending Chapter 77 of Title 18, United States Code*, 75 A.L.R. Fed.2d 467 (2013).

19. 18 U.S.C.A. § 2421 (West 2015).

20. *Id.*

21. CAL. PEN. CODE §§ 236.1, 647 (West 2015).

22. *Id.* at § 236.1.

23. *Id.* at § 647.

A. Federal Law

To combat human trafficking, specifically the sex trafficking of women and children, the United States passed the TPPA.<sup>24</sup> The TPPA defines and criminalizes sex trafficking as well as provides Section 1591, which specifically outlaws the sex trafficking of minors.<sup>25</sup> Additionally, the TPPA provides for mandatory restitution when the TPPA is violated, and prohibits benefiting from sex trafficking. More recently, enacted provisions have provided victims with a civil remedy and extended the United States' jurisdictional reach over offenders.<sup>26</sup> However, the TPPA is not a comprehensive law dealing with the wide range of offenses related to trafficking.<sup>27</sup> There are many issues that are not addressed by the TPPA.<sup>28</sup> Additionally, federal laws pertaining to offender punishment are typically applied leniently and inconsistently.<sup>29</sup>

The Mann Act made prostitution illegal at the federal level when it involved the transportation of a female across state lines for the purposes of immoral sexual conduct.<sup>30</sup> However, the individual states are otherwise responsible for the regulation and criminalization of prostitution.<sup>31</sup>

B. California Law

Currently, all 50 states criminalize human trafficking.<sup>32</sup> In 2005, however, California became one of only five states with such legislation by adding Section 236.1 to its Penal Code.<sup>33</sup> While California criminalizes human trafficking—including sex trafficking—and provides victims protection in terms of immigration penalties, the state fails to protect sex trafficking victims from prosecution for performing acts of prostitution.<sup>34</sup>

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24. Catalano, *supra* note 18 (The TPPA was codified in 2000 as 18 U.S.C.A. §§ 1589–1594).

25. 18 U.S.C.A. §§ 1589–91 (West 2015).

26. *Id.* at §§ § 1593A, 1595, 1596 (Section 1595 was enacted in 2003 and provided victims with a civil remedy against traffickers and § 1596 extended the federal government's reach to those American citizens and permanent resident aliens trafficking abroad as well as aliens on American soil).

27. Michelle Jeffs, *Punishing Pimps and Johns: Sex Trafficking and Utah's Laws*, 28 BYU J. PUB. L. 219, 231 (2013).

28. *Id.*

29. *Id.*

30. 18 U.S.C.A. § 2421(a) (West 2015) (18 U.S.C.A. § 2421(a) is also known as the Mann Act).

31. Jeffs, *supra* note 27, at 230.

32. *Wyoming Becomes 50th State to Outlaw Human Trafficking*, POLARIS PROJECT (Feb. 27, 2013) <https://polarisproject.org/news/press-releases/wyoming-becomes-50th-state-outlaw-human-trafficking> (on file with *The University of the Pacific Law Review*).

33. See Matthew Garber, *Chapter 240: Human Trafficking-Combating the Underground Slave Industry in California*, 37 MCGEORGE L. REV. 190, 193 (2006) (explaining that Chapter 240 was the first legislation).

34. *Id.* at 195; see also Emma Lord, *Stop Punishing the Victim: Why California Should Reform Its Current Prostitution Laws and Adopt the Swedish Approach to Combat Sex Trafficking*, 44 S.W. L. REV. 599, 608 (discussing the effects of the criminalization of prostitution, including California).

California is one of the 49 states, with the exception of Nevada, that criminalizes and classifies prostitution as a misdemeanor.<sup>35</sup> Section 647 of the California Penal Code was enacted in 1961 and criminalizes both those who solicit and those who engage in acts of prostitution, while maintaining special protections for minors.<sup>36</sup> Under the current version of California Penal Code Section 647, there is no distinction between the purchasers and sellers of sex.<sup>37</sup> Thus, Section 647 proscribes the same penalties for both purchasers and sellers.<sup>38</sup>

### III. AB 1708

AB 1708 would have amended Section 647 of the Penal Code, making several key changes to the existing law.<sup>39</sup> First, AB 1708 would have divided prostitution into three distinct forms.<sup>40</sup> Second, AB 1708 would have clarified that a violation of Section 647 would have required more than just a manifestation of acceptance.<sup>41</sup> Third, AB 1708 would have specified the punishment for purchasers of commercial sex<sup>42</sup> and clarified what constituted solicitation of a minor.<sup>43</sup> Finally, AB 1708 would have required an offender to serve a mandatory jail sentence for violation of Section 647.<sup>44</sup>

AB 1708 would have provided for the division and characterization of prostitution into three distinct forms.<sup>45</sup> Though different, each form would have attached to the “act of prostitution.”<sup>46</sup> An act of prostitution is defined as “any lewd act between persons for money or other consideration.”<sup>47</sup> The first form would have included defendants who agree to receive, actually receive, or solicit compensation in exchange for an act of prostitution.<sup>48</sup> The second form would have included defendants who agree to provide, actually provide, or solicit a person over 18 years of age to take compensation in exchange for an act of prostitution.<sup>49</sup> The third form would have included defendants who agree to

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35. Jeffs, *supra* note 27, at 230.

36. CAL. PEN. CODE §§ 836(i)(c), 647(b) (West 2015).

37. *Id.* at § 647(b).

38. *Id.*

39. ASSEMBLY FLOOR ANALYSIS OF AB 1708 at 1 (May 5, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*) (summarizing changes).

40. AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. CAL. PEN. CODE § 647(b) (West 2015).

47. *Id.*

48. AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

49. *Id.*

provide, or actually provide, compensation to a minor in exchange for an act of prostitution, irrespective of who initially made the solicitation.<sup>50</sup>

AB 1708 would have clarified that a manifestation of acceptance, or a solicitation, cannot constitute a violation of Section 647 unless additional acts in furtherance of the act of prostitution are present and completed within California.<sup>51</sup> As it stood, AB 1708 did not elaborate on what would constitute an act in furtherance of prostitution.<sup>52</sup>

Next, AB 1708 would have specified that the punishment for purchasers of commercial sex<sup>53</sup> is a 72-hour mandatory minimum term in custody.<sup>54</sup> Purchasers of commercial sex could also have been subject to a maximum six-month term in the county jail.<sup>55</sup> There could have been a fine imposed between \$250 and \$1,000 when the person solicited was at least 18 years of age.<sup>56</sup> Or, when the offender solicited a minor or a person posing as a minor, a fine between \$1,000 and \$10,000.<sup>57</sup> In all, AB 1708 would have punished the purchasers with a jail term and a fine of up to \$10,000.<sup>58</sup> The treasury of the county where the offense took place would have collected the fine.<sup>59</sup>

Additionally, AB 1708 would have clarified that solicitation of a minor occurs by soliciting a person under 18, or when the solicitation is of a person posing as a minor if the solicitor specifically intended to solicit a minor.<sup>60</sup> It would have also increased the mandatory minimum jail time from 48- to 72-hours for defendants who solicit minors.<sup>61</sup>

AB 1708 would have removed judicial discretion regarding the 72-hour mandatory minimum jail time component of the punishment.<sup>62</sup> Eligibility for release on probation, parole, work furlough, or any other release would have required the offender to serve 24- or 48-hours in a county jail for purchasing commercial sex from either an adult or a minor.<sup>63</sup>

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50. *Id.*

51. *Id.*

52. *Id.*

53. CAL. PEN. CODE § 236.1(h)(2) (West 2015) (defining a commercial sex act as “sexual conduct on account of which anything of value is given or received by any person”).

54. AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Finally, AB 1708 was contingent upon the passage and enactment of one or both Senate Bills (SB) 1129 and 1322.<sup>64</sup> The enactment of SB 1129 will eliminate the mandatory minimum sentencing requirement for second and third prostitution offenses.<sup>65</sup> The enactment of SB 1322 will eliminate the punishment of a minor for a commercial sex offense under Section 647.<sup>66</sup> Governor Brown signed SB 1322 on September 26, 2016, thus eliminating punishment for minors engaged in prostitution.<sup>67</sup> Governor Brown also signed SB 1129 on September 27, 2016, thereby eliminating the mandatory minimum sentencing for prohibited acts of prostitution.<sup>68</sup>

#### IV. ANALYSIS

AB 1708 aimed to reduce sex trafficking by targeting the demand for commercial sex<sup>69</sup>; a strategy recommended by researchers as a method to significantly decrease the prevalence of sex trafficking.<sup>70</sup> This demand continues to ensure the high profitability of the commercial sex industry that encompasses both prostitution and sex trafficking.<sup>71</sup> While the commercial sex industry continues to deliver such a high profit margin, it is unlikely the traffickers will move into other pursuits, thus reducing the instances of sex trafficking.<sup>72</sup> However, while garnering wide support, AB 1708 still maintained some opposition.<sup>73</sup> While setting up and running services for the victims of human trafficking is crucial, stopping sex trafficking from happening in the first place is essential.<sup>74</sup> That means targeting the demand side of the operation.<sup>75</sup>

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64. *Legislative Counsel's Digest*, AB 1708, 2016 Leg., 2015-2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

65. SENATE RULES COMMITTEE ANALYSIS OF AB 1129, at 1 (Aug. 19, 2016), available at [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160SB1129](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1129) (on file with *The University of the Pacific Law Review*).

66. SENATE RULES COMMITTEE ANALYSIS OF AB 1322, at 1 (Aug. 22, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160SB1322](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1322) (on file with *The University of the Pacific Law Review*).

67. CAL. PEN. CODE § 647 (enacted by 2016 Stat. Ch. 654).

68. CAL. PEN. CODE § 647 (enacted by 2016 Stat. Ch. 724).

69. Interview with Laurel Brodzinsky, *supra* note 13.

70. Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2.

71. Interview with Laurel Brodzinsky, *supra* note 13.

72. *Id.*

73. *Id.*

74. *Id.*

75. SENATE COMMITTEE ON PUBLIC SAFETY ANALYSIS OF AB 1708 at 1 (June 21, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).



A. *The Effect of AB 1708*

Recently, various legislators introduced a number of bills proposed to combat sex trafficking, but none were signed into law.<sup>76</sup> However, Assemblymember Gonzalez's bill was different.<sup>77</sup> It would have provided a unique and comprehensive solution to the complex problem of human sex trafficking by targeting the root of the issue, instead of only the symptoms.<sup>78</sup>

One of the key distinctions of AB 1708 was that it would have distinguished between buyers and sellers of sex, allowing each action to be treated and penalized differently.<sup>79</sup> This distinction is important as the research by SDU and Point Loma Nazarene University revealed that at least 42 percent of first-time prostitution arrestees are actually victims of sex trafficking.<sup>80</sup> Knowing that these arrestees are not selling sex by choice lends support to the effectiveness of targeting the supply side.<sup>81</sup> By differentiating between trafficking victims and those involved in prostitution by choice, AB 1708 would have allowed more protections for trafficking victims while creating a stronger deterrent for the purchasers.<sup>82</sup> By attacking the supply side of the equation and deterring the buyer, Assemblymember Gonzalez effectively proposed a solution to eliminate the unwanted business of sex trafficking.<sup>83</sup> Given the vast profitability of the sex trafficking industry, treating it as a business and eliminating the demand would have helped remove the problem.<sup>84</sup>

A second factor making this bill unique was that the penalties would have been less harsh than those in other bills.<sup>85</sup> By opting out of astronomically high fines, more offenders would have been able to afford the cost of the fine, thus feeling the effects of their actions.<sup>86</sup>

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76. Interview with Laurel Brodzinsky, *supra* note 13.

77. *Id.*

78. *Id.*

79. *Id.*

80. Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2.

81. See Lord, *supra* note 34, at 600 ("Traffickers and pimps frequently use physical and psychological tactics to create submission and a sense of hopelessness").

82. Assemblymember Gonzalez, *Human Trafficking Reform Legislation Passes Committee*, Press Release (2016), <http://asmdc.org/members/a80/news-room/press-releases/assemblywoman-gonzalez-human-trafficking-reform-legislation-passes-committee> (last visited July 30, 2016) (on file with *The University of the Pacific Law Review*).

83. See generally *id.* ("This is another important step forward to draw a clear distinction between purchasers of sex and victims of human trafficking, and demonstrate our commitment to penalizing those who drive demand for this crime.").

84. Lord, *supra* note 34, at 601.

85. Interview with Laurel Brodzinsky, *supra* note 13.

86. *Id.*

Generally, higher fines do not act as a greater deterrent to the offender.<sup>87</sup> In a series of experiments conducted in California, Virginia, and Israel, researchers examined how people responded to fines.<sup>88</sup> In Fairfax, Virginia, researchers examined traffic light violations by installing a traffic camera and instituting a \$50 fine for offenders.<sup>89</sup> A similar experiment was conducted in Oxnard California, where the only difference was a fine increase from \$104 to \$271 after several months of the study's initiation.<sup>90</sup> The third experiment in Israel also dealt with fines associated with red light violations, and the number of violations occurring at the initial fine of 400 shekels and a later increased fine of 1,000 shekels.<sup>91</sup> In aggregate, these experiments resulted in an initial drop in red light violations by about 50 percent in Virginia, California, and Israel and a further drop among specific drivers after the fine increase.<sup>92</sup> Overall, a maximal fine is not necessary to reap the benefit of a decreased number of offenders.<sup>93</sup>

Finally, the inclusion of mandatory minimum fines and jail time for johns<sup>94</sup> was meant to convey the message that "buying sex is a crime to be taken seriously."<sup>95</sup> Frequently under the current law, the justice system allows johns to get off with a simple citation or a weekend course in a "john school" where they listen to survivors of sex trafficking detail their experiences.<sup>96</sup> By proscribing consistent minimum mandatory sentences, AB 1708 sought to take an essential step to combat the demand for commercial sex.<sup>97</sup>

Punishments under AB 1708 would have required a mandatory jail sentence for johns between 24- and 72-hours based on the age of the victim.<sup>98</sup> This would have eliminated the judge's discretion in choosing jail time as part of the sentence, but would have allowed some leeway in when jail time is served.<sup>99</sup> Time spent in jail could have been scheduled around the defendant's work schedule to fall on days the defendant already had off and would have been based on the court's determination.<sup>100</sup> Like the fines associated with specific violations

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87. Don Weatherburn & Steve Moffat, *The Specific Deterrent Effect of Higher Fines on Drink-Driving Offenders*, 51 BRIT. J. CRIMINOLOGY 789, 790 (2011) (noting that only 6 of 19 studies of the deterrent effect of higher fines and drunk driving showed a noticeable reduction in offending).

88. Bar-Ilan, Avner and Bruce Sacerdote, *Response to Fines and Probabilities in a Natural Experiment*, 47 J. OF L. AND ECON. 1, 2 (2004).

89. *Id.* at 5.

90. *Id.* at 5–6.

91. *Id.* at 6.

92. *Id.* at 16, 20.

93. *Id.* at 21.

94. Jeffs, *supra* note 27, at 220 (describing a john as a purchaser of sex).

95. Interview with Laurel Brodzinsky, *supra* note 13.

96. *Id.*

97. *Id.*

98. AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

99. *Id.*

100. *Id.*

of Section 647, the mandatory jail confinement was intended to highlight the seriousness of the crime of buying sex.<sup>101</sup>

Overall, AB 1708 was structured to punish the true criminal in a commercial sex transaction, the purchaser of sex.<sup>102</sup>

*B. AB 1708 v. The Swedish Model*

To combat sex trafficking within its borders, Sweden adopted an approach in which the legislature legalized the selling of sex while, at the same time, making the purchase of sex illegal.<sup>103</sup> Sweden holds the view that prostitutes are victims and not criminals, and its approach embodies this by making the actions of the prostitute legal while ensuring that the actions of the sex purchaser, the real criminal, remain illegal.<sup>104</sup> By adopting this approach, Sweden places itself at the midpoint between two other competing approaches in combating sex trafficking—the United States’ and the Netherlands’.<sup>105</sup> Generally, the United States’ approach holds that both the selling and purchasing of sex are illegal, thus the best way to eliminate the problem is through enforcement.<sup>106</sup> The Netherlands’ approach was to legalize prostitution with the assumption that the problems associated with it would be eliminated by bringing the practice out of the shadows, allowing it to become a regulated industry.<sup>107</sup> Overall, Sweden continues to experience the greatest success of these three approaches, with a noticeable reduction in the instances of sex trafficking within the country.<sup>108</sup>

AB 1708 would not have gone as far as Sweden does in legalizing the actions of the sellers of sex but would have maintained the actions of the purchasers of sex as illegal.<sup>109</sup> However, it would have allowed for the distinction between buyers and sellers of sex and would have focused on the buyers of sex.<sup>110</sup> Like the Swedish approach, AB 1708 looked to defeat human sex trafficking by attacking the demand side of the issue, by treating the problem as more of a business issue than a criminal justice issue.<sup>111</sup> AB 1708 appeared to be a promising solution based on the success of Sweden’s approach to eliminating sex trafficking.<sup>112</sup>

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101. Interview with Laurel Brodzinsky, *supra* note 13.

102. *Id.*

103. Lord, *supra* note 34.

104. *Id.*

105. *Id.* at 610.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Compare id.*, with AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

110. Interview with Laurel Brodzinsky, *supra* note 13.

111. *Id.*

112. *See* Lord, *supra* note 34, at 611 (discussing the success of Sweden's approach).

*C. Arguments in Support of AB 1708*

From its introduction and journey through the legislature, AB 1708 received largely bipartisan support.<sup>113</sup> The bill unanimously passed the Public Safety Committees and Appropriations Committees in both the Assembly and Senate and passed the Assembly Floor with only one no vote.<sup>114</sup> Several organizations registered in support of this bill, including various district attorney's offices, school districts, and the State Coalition of Probation Organizations.<sup>115</sup>

AB 1708 would have aligned with the San Diego District Attorney's Office's strategy to combat sex trafficking.<sup>116</sup> As part of a sex trafficking task force, the San Diego District Attorney's Office supports ending sex trafficking through the "four Ps of prevention, protection, prosecution, and partnerships."<sup>117</sup> AB 1708 would have ultimately sought to prevent sex trafficking by targeting the demand for commercial sex by prosecuting the johns and punishing them to discourage repeat offenses.<sup>118</sup>

With their location in one of the hot spots for child sex trafficking, the Alameda County District Attorney's Office was another supporter of AB 1708.<sup>119</sup> The Alameda County District Attorney's Office views the children arrested for prostitution as victims and not criminals, whether or not they participated in commercial sex acts.<sup>120</sup> This view keeps with the spirit of AB 1708, which would have targeted the buyers of sex over the sellers of sex.<sup>121</sup>

While matching with the policies of various offices and enforcement agencies, AB 1708 would have offered an all-inclusive solution to the issue of

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113. Interview with Laurel Brodzinsky, *supra* note 13.

114. Votes, CALIFORNIA LEGISLATIVE INFORMATION, [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB1708) (last visited Jan 2, 2017) (on file with *The University of the Pacific Law Review*).

115. SENATE COMMITTEE ON PUBLIC SAFETY ANALYSIS OF AB 1708, at 1 (June 21, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).

116. Compare AB 1708, 2016 Leg., 2015-2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted), with Jesus Rodriguez, *Office of the District Attorney County of San Diego, District Attorney, US Attorney Join DOJ and other Law Enforcement Partners to Form Human Trafficking Task Force Task Force will Identify and Rescue Victims, Expand Prosecution*, OFFICE OF THE DISTRICT ATTORNEY COUNTY OF SAN DIEGO, 1-2 (Jan. 20, 2015), available at [http://www.sdcda.org/files/human trafficking task force news release 1-20-15.pdf](http://www.sdcda.org/files/human%20trafficking%20task%20force%20news%20release%201-20-15.pdf) (on file with *The University of the Pacific Law Review*).

117. Rodriguez, *supra* note 116.

118. Interview with Laurel Brodzinsky, *supra* note 13.

119. Bay City News Service, *Alameda County District Attorney kicks off campaign to combat child sex trafficking*, THE MERCURY NEWS (Jan. 10, 2014), available at [http://www.mercurynews.com/crime-courts/ci\\_24884797/alameda-county-district-attorney-kicks-off-campaign-combat](http://www.mercurynews.com/crime-courts/ci_24884797/alameda-county-district-attorney-kicks-off-campaign-combat) (on file with *The University of the Pacific Law Review*).

120. *Id.*

121. See AB 1708, 2016 Leg., 2015-2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

sex trafficking.<sup>122</sup> By getting to the root of the issue, AB 1708 would have gone further than previous attempts, which sought to solve the problem by merely increasing the criminal penalties.<sup>123</sup> Although AB 1708 would have dealt with criminal penalties, it would have done so in a creatively distinct way from previous attempts at human trafficking legislation.<sup>124</sup>

#### D. Arguments Against AB 1708

As with any complex piece of legislation, opponents of AB 1708 voiced arguments in opposition to it.<sup>125</sup> Those registered in opposition to AB 1708 included the American Civil Liberties Union of California (ACLU), the California Public Defenders Association, and California's State Sheriffs Association.<sup>126</sup> Opposition to AB 1708 came in the form of four main arguments, which included: (1) the establishment of minimum sentencing for johns, (2) the redistribution of the collected fine money within the county,<sup>127</sup> (3) the legislation's impact on jail and prison overcrowding,<sup>128</sup> and (4) the risk women will be put at due to increased enforcement.<sup>129</sup>

##### 1. Minimum Sentencing for Johns

The ACLU opposed AB 1708 because of the minimum sentences it would have established for johns.<sup>130</sup> First, the ACLU opposes minimum sentencing because it prohibits the judge from considering the individual circumstances or individual defendant in any given case.<sup>131</sup> The counterargument, however, is that the legislature—not judges—is better positioned to determine the societal interest in evaluating specific crimes and to set minimum sentences on the appropriate

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122. Interview with Laurel Brodzinsky, *supra* note 13.

123. *Id.*

124. *Id.*

125. *Id.*

126. SENATE COMMITTEE ON PUBLIC SAFETY ANALYSIS OF AB 1708, at 1 (June 21, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).

127. Interview with Laurel Brodzinsky, *supra* note 13.

128. SENATE COMMITTEE ON PUBLIC SAFETY ANALYSIS OF AB 1708 at 10 (June 21, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).

129. Jeremy B. White, *California ponders whether prostitutes are criminals or victims*, SACRAMENTO BEE (February 28, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article62833612.html> (last visited Jul 20, 2016) (on file with *The University of the Pacific Law Review*).

130. *Sentencing*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/criminal-law-reform/sentencing> (last visited Sept. 9, 2016) (on file with *The University of the Pacific Law Review*).

131. *Id.*

crimes.<sup>132</sup> Moreover, since minimum sentences are generally proscribed for hard-to-detect offenses, they ensure a punishment fitting the defendant's moral culpability.<sup>133</sup>

Second, minimum sentencing can produce unduly harsh punishments.<sup>134</sup> This argument focuses on the length of the sentence and not its mandatory nature.<sup>135</sup> Were a 30-day mandatory sentence for heroin possession or a one-year mandatory sentence for rape instituted, the argument would likely become that minimum sentencing is too lenient because of the reprehensible nature of the offenses.<sup>136</sup> Thus, the critical focus should be on the legislature's determination of sentence length and not minimum sentencing itself.<sup>137</sup>

Third, minimums in sentencing can lead to racial disparities, especially apparent in the minimum sentencing for drug offenses.<sup>138</sup> One of the purposes behind mandatory minimum sentencing is the elimination of disparities in sentencing, accomplished by linking the sentence to the crime instead of the person.<sup>139</sup> In seeking to eliminate the racial disparities by eliminating judicial discretion, minimum sentencing fails to take into account the effect of prosecutorial discretion and other institutional factors on sentencing.<sup>140</sup> For instance, charging decisions by the prosecutor impact which cases require mandatory minimum sentencing, and where disparate treatment exists for minorities at every level of the criminal justice system, racial disparities are exacerbated.<sup>141</sup> While the intention is good, in practice this may not appear to be the case; especially where the length of a sentence is long and mandated for a crime with varying degrees, such as drug possession.<sup>142</sup>

Finally, minimum sentences allow prosecutors to force plea deals, stripping defendants of their constitutional rights in the process of avoiding unnecessarily

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132. Evan Bernick & Paul Larkin, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUNDATION, 3, 4 (2014), <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms> (on file with *The University of the Pacific Law Review*).

133. *Id.* at 4.

134. AMERICAN CIVIL LIBERTIES UNION, *supra* note 130.

135. Bernick & Larkin, *supra* note 132, at 5.

136. *Id.*

137. *Id.* (explaining that critics are more concerned with sentence length, a determination made by the Legislature).

138. AMERICAN CIVIL LIBERTIES UNION, *supra* note 130.

139. Bernick & Larkin, *supra* note 132, at 3.

140. Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 757 (2012).

141. *Racial Disparities in Sentencing* submitted to the Inter-American Commission on Human Rights, AMERICAN CIVIL LIBERTIES UNION, 2 (2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) (on file with *The University of the Pacific Law Review*).

142. Bernick & Larkin, *supra* note 132, at 6.

harsh prison terms.<sup>143</sup> While minimum sentencing gives prosecutors greater leverage, it is necessary to remember that the legislature imposed the minimum sentencing; the prosecutor is merely applying it.<sup>144</sup> Given that the fines and jail time would have been relatively minor for a first time violation under amended Section 647, the grounds cited by the ACLU in opposition to minimum sentencing may be outweighed by the positive effect often seen with consistent minimum penalties.<sup>145</sup> Additionally, the passage of SB 1129 would eliminate the much higher mandatory minimum sentences for repeat offenders of Section 647.<sup>146</sup>

## 2. *The Redistribution of Fine Money*

Opponents can cite the collection and redistribution of AB 1708's proposed fine money as an issue on four main grounds.<sup>147</sup> First, due to the system's complexity, it is difficult to accurately distribute the collected fine.<sup>148</sup> Second, the collected fine is not distributed based on program need, which may result in specific county programs being either over- or under-funded.<sup>149</sup> Third, the formulation of the existing system makes it difficult for the Legislature to control how the collected fines are used.<sup>150</sup> Finally, accurate feedback on the collection and distribution of fines is lacking due to the system's complexity, preventing any real legislative oversight.<sup>151</sup>

In recommendations by California's Legislative Analyst's Office (LAO), one of the ways to address these issues is to eliminate all of the individual funds and deposit all of the fines and fees into the state's General Fund.<sup>152</sup> Depositing the fines and fees into the state's General Fund would allow for programs and funds to be annually funded based on need, and for a more comprehensive annual oversight to ensure the funded programs operate effectively.<sup>153</sup> This recommendation resolves most of the issues with California's current collection

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143. AMERICAN CIVIL LIBERTIES UNION, *supra* note 130.

144. Bernick & Larkin, *supra* note 132, at 3.

145. Interview with Laurel Brodzinsky, *supra* note 13.

146. SENATE RULES COMMITTEE ANALYSIS OF AB 1129, at 1 (Aug. 19, 2016), available at [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160SB1129](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1129) (on file with *The University of the Pacific Law Review*).

147. Mac Taylor, IMPROVING CALIFORNIA'S CRIMINAL FINE AND FEE SYSTEM IMPROVING CALIFORNIA'S CRIMINAL FINE AND FEE SYSTEM, 3 (2016), available at <http://www.lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf> (last visited Aug. 24, 2016) (on file with *The University of the Pacific Law Review*).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 20.

153. *Id.*

system.<sup>154</sup> The current flaws in California's collection system would not have applied to AB 1708's fines, however, because fines slated for victim restitution fall within an exception that would keep them separate.<sup>155</sup> This separation stems from specific legal restrictions placed on this type of fine, which makes California's current collection system appropriate for victim restitution.<sup>156</sup>

### *3. Prison and Jail Overcrowding*

Due to the environment of California's overcrowded prisons and jails, legislation dealing with imprisonment warrants special consideration.<sup>157</sup> The argument that this bill would have impacted the already overcrowded prison population was the wrong focus<sup>158</sup> since prostitution is a misdemeanor and any incarceration would have been served in the county jail.<sup>159</sup>

The mandatory minimum jail sentence of 24- to 72-hours would have had the potential to impact the jail.<sup>160</sup> However, the average number of convictions under Section 647 is about 2,000, and of those 2,000 convictions, not everyone would have required the mandatory minimum sentence.<sup>161</sup> Regardless, because of the short duration of the sentences and the fact that they would have been served in jails—not prisons—AB 1708 would not have had a negative impact on California's prison population.<sup>162</sup>

### *4. Increased Danger to Female Sex Workers*

The argument that targeting the buyers of sex puts these female sex workers at an even greater risk comes from Kristin DiAngelo, speaking on behalf of the Sex Workers Outreach Program in Sacramento.<sup>163</sup> DiAngelo explains that cracking down on the buyers forces these women even further into the shadows, subjecting them to greater hardships as they seek out food and shelter.<sup>164</sup> The

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154. *Id.*

155. *Id.*

156. *Id.*

157. SENATE COMMITTEE ON PUBLIC SAFETY ANALYSIS OF AB 1708, at 10 (June 21, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).

158. Interview with Laurel Brodzinsky, *supra* note 13.

159. CAL. PEN. CODE § 647(b) (West 2015).

160. SENATE APPROPRIATIONS COMMITTEE ANALYSIS OF AB 1708, at 3 (Aug. 1, 2016), available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1708) (on file with *The University of the Pacific Law Review*).

161. *Id.* at 4.

162. *Id.*

163. White, *supra* note 129.

164. *Id.*



basis of this argument stems from DiAngelo's perception that the state has not done enough to provide services for these victims to get them off of the streets.<sup>165</sup>

There are, state-funded programs for victims of sex trafficking, several of which became active on January 1, 2006, with the passage of Senate Bill 1569.<sup>166</sup> The Trafficking and Crime Victims Assistance Program (TCVAP) and the California Alliance to Combat Trafficking and Slavery (CA ACTS) Task Force were created by SB 1569 to both provide services for victims and compile data on ways to better serve victims.<sup>167</sup> California also provides victims of sex trafficking with financial assistance, educational and employment services, and immigration and citizenship services.<sup>168</sup> Additionally, the presumption is that victims of sex trafficking did not choose to become sex workers, thus this legislation will aid more victims in escaping that life instead of retreating to the shadows to continue.<sup>169</sup>

#### E. Other Pending Legislation

With the increased attention to sex trafficking, legislation proposed to help alleviate the problem is increasingly introduced.<sup>170</sup> At the time of this article, legislators introduced several bills relating to sex trafficking issues.<sup>171</sup> Assembly Bill 1731 would have established a statewide task force dedicated to combating human trafficking.<sup>172</sup> Assembly Bill 1675 would have created a diversion program for minors being tried for prostitution-related offenses, allowing a prostitution conviction to remain off of their record.<sup>173</sup> Finally, Assembly Bill 1762 would have allowed victims to use human trafficking as an affirmative defense where they were coerced into committing a non-violent crime.<sup>174</sup>

While each of these proposed bills relates to sex trafficking, they were not aimed at combatting the cause of sex trafficking.<sup>175</sup> Being able to target sex trafficking at its root and not just work on an individual symptom of the issue made AB 1708 unique.<sup>176</sup> AB 1708 would have provided a comprehensive

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165. *Id.*

166. Fact Sheet: Human Trafficking and Victim Assistance Programs, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES 1 (2016), available at [http://www.cdss.ca.gov/refugeeprograms/res/pdf/Factsheets/Trafficking\\_Fact\\_Sheet.pdf](http://www.cdss.ca.gov/refugeeprograms/res/pdf/Factsheets/Trafficking_Fact_Sheet.pdf) (on file with *The University of the Pacific Law Review*).

167. *Id.*

168. POLARIS PROJECT, *supra* note 1, at 41–43.

169. *See* Lord, *supra* note 34, at 610–11.

170. Interview with Laurel Brodzinsky, *supra* note 13.

171. *Id.*

172. AB 1708, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016 but not enacted).

173. *Id.*

174. *Id.*

175. Interview with Laurel Brodzinsky, *supra* note 13.

176. *Id.*

solution to the problem of human sex trafficking by targeting the purchasers of commercial sex and eliminating the demand side of the equation.<sup>177</sup>

*F. The Veto of AB 1708*

While AB 1708 made it onto the desk of Governor Brown on September 27, 2016, he vetoed the bill because the distinctions AB 1708 made between acts of prostitution were provided for by SB 420, which he signed into law.<sup>178</sup> Additionally, Governor Brown vetoed AB 1708 because it would have gone further than SB 420 by adding a mandatory minimum period of incarceration.<sup>179</sup> Governor Brown believed this mandatory sentence was unnecessary because existing law allows for adequate flexibility in punishing prostitution offenses.<sup>180</sup>

V. CONCLUSION

The USD and Point Loma of Nazarene University study links the issues that commonly surround sex trafficking and prostitution with first-time arrest rates.<sup>181</sup> This is critical because over half of all first-time arrestees for prostitution are, in fact, victims of sex trafficking.<sup>182</sup> Having read the study, Assemblymember Lorena Gonzalez introduced AB 1708 as an innovative solution to this complex problem with an eye to attack the demand side of the operation.<sup>183</sup>

Proponents of this bill believe that the best way to reduce the demand for commercial sex is by targeting the buyers of sex and subjecting them to consistent penalties as a means to underscore the seriousness of the crime.<sup>184</sup> But, opponents of AB 1708 voiced several arguments against this strategy.<sup>185</sup> Creating a separation between buyers and sellers of sex, as well as creating an all-inclusive solution to sex trafficking, is what made AB 1708 a unique piece of legislation with the potential to make a large impact in the world of sex trafficking.<sup>186</sup>

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177. *Id.*

178. *Id.*

179. *Id.* Status, CALIFORNIA LEGISLATIVE INFORMATION, available at [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201520160AB1708](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB1708) (last visited Jan 3, 2017) (on file with *The University of the Pacific Law Review*).

180. *Id.*

181. Carpenter & Gates, *Human-Trafficking Study*, *supra* note 2.

182. *Id.*

183. Interview with Laurel Brodzinsky, *supra* note 13.

184. *Id.*

185. See *supra* Part D (detailing the arguments against AB 1708).

186. Interview with Laurel Brodzinsky, *supra* note 13.