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STELLA Y. CHOE
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AGENDA

9:00 a.m. – June 30, 2015
State Capitol, Room 126

PART III

SB 776 (Block)

Date of Hearing: June 30, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 776 (Block) – As Amended May 19, 2015

SUMMARY: Specifies a minimum fine upon offenders who engage in prostitution and directs that money to be spent on services for commercially exploited persons in the county in which they are collected. Specifically, **this bill:**

- 1) Specifies a fine imposed in prostitution cases, where the defendant offered money in exchange for a lewd act, shall be a fine of not less than \$500 (\$2,120 with assessments), and not more than \$2,000 (\$8,270 with assessments).
- 2) Includes an "ability to pay" provision for the fine and permits courts to depart downward from the minimum specified if the court determines that the defendant is unable to pay the fine, and the court shall impose a fine that the defendant is able to pay.
- 3) Requires that 75% of the moneys collected from that fine be retained by the county and used to fund shelter, counseling, and other direct services and exit programs for victims of commercial sexual exploitation and sexual abuse.

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:
 - a) Where the defendant is not more than three years older or three years younger than the minor, the offense is a misdemeanor;
 - b) 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 to \$10,000; or,
 - c) 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 to \$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:
 - a) 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.
 - b) 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 to \$10,000. (Pen. Code § 288, subd. (c)(1).)
- 7) Includes numerous crimes concerning sexual exploitation of minors for commercial purposes. These crimes include:
 - a) 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, subs. (a)-(b);
 - b) 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).);
 - c) 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.)
 - d) 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).)
- 15) Provides if the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment. (Pen. Code, §, 647, subd. (m).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 776 directly targets sex buyers by establishing a base fine of not less than \$500 and not more than \$2,000 upon conviction for soliciting prostitution. The measure directs 75% of the collected fines to counties to fund

shelters, counseling, and other services for victims of commercial sexual exploitation and sexual abuse.

"Demand for prostitution continues to drive sexual exploitation and the commercial sex industry. The most efficient approach in stopping this abuse is to focus on the sex buyers: When they stop buying, the entire system of degradation collapses.

"Current penalties for soliciting prostitution have done little or nothing to curtail the demand for sexual exploitation. Under current law, an individual convicted of soliciting prostitution is guilty of a misdemeanor with jail time of not more than 6 months in county jail, a fine of not more than \$1,000, or both. These penalties have not served as effective deterrents.

"The demand in the commercial sex industry is driven primarily by buyers. And while they are the driving force behind this heinous industry, they are arrested and prosecuted at a significantly lower rate than the exploited individual. According to the Attorney General, between 2003 and 2012, 124,140 prostitution arrests were made in California. Only one-third of those arrests were for solicitation; two-thirds of the arrests were prostituted females.

"A great unmet need exists for funding community-based agencies that provide services to sex trafficking victims and commercially sexually exploited persons. Counties are overwhelmed by the entire commercial sex industry which strains already scarce public safety resources. Very little funding is available for intervention and services for exploited victims at the local level.

"SB 776 will target the demand for sexual exploitation directly and provide essential resources to victims of these heinous crimes."

2) 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>>.)

- a) **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. 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 has a 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 (Pen. Code 653.22 subd. (a)); pimping (Pen. Code 266h); or, pandering (Pen. Code 266i). Most of these crimes are punished much more severely than the underlying prostitution offense, particularly the crimes of pimping, pandering, and procurement.

- b) **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.

- i) **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.
- ii) **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.]

- iii) **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%

- 3) **Sexual Acts with Minors Regardless of the Payment of Compensation Constitutes a Sex Crime:** 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. 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, or five, eight or 10 years if coercion is involved (Pen. Code § 288, subds. (a) & (b).) Soliciting an act of prostitution from a minor under the age of 14 could likely be prosecuted as attempted lewd conduct. The prison or jail term for an attempt is generally one-half the punishment for the completed crime. Where the defendant solicited or employed a minor who was 14 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.)

- 4) **Minimum Specified 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

specified fines have been generally disfavored as a form of punishment.

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 \$2,000 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:	\$ 2,000
Penal Code 1464 assessment:	\$ 2,000 (\$10 for every \$10)
Penal Code 1465.7 surcharge:	400 (20% surcharge)
Penal Code 1465.8 assessment:	40 (\$40 fee per offense)
Government Code 70372 assessment:	1,000 (\$5 for every \$10)
Government Code 70373 assessment:	30 (\$30 for felony or misd.)
Government Code 76000 assessment:	1,400 (\$7 for every \$10)
Government Code 76000.5 assessment:	400 (\$2 for every \$10)
Government Code 76104.6 assessment:	200 (\$1 for every \$10)
Government Code 76104.7 assessment:	800 (\$4 for every \$10)

Total Additional Fine with Assessments: \$ 8,270

Based on the same calculations, the total minimum fine of \$500 would be \$ 2,120

- 5) **Argument in Support:** According to the *San Diego District Attorney's Office*, "Our office sees first-hand the impact of prostitution in our community. We recognize there is not enough funding to address the needs of sex trafficking victims. We believe SB 776 will go a long ways to target this issue. Current penalties for soliciting prostitution have done little or nothing to curtail the demand for sexual exploitation. Under current law, an individual convicted of soliciting prostitution is guilty of a misdemeanor with jail time of not more than 6 months in the county jail, a fine of not more than \$1,000, or both.

"The demand in the commercial sex industry is driven primarily by buyers. And while they are the driving force behind this black-market industry, they are arrested and prosecuted at a significantly lower rate than the exploited individual. Between 2003 and 2012, nearly 125 thousand prostitution arrests were made in California. Only one-third of those arrests were for solicitation; two-thirds of the arrests were prostituted females.

"a great unmet need exists for funding community-based agencies that provide services to sex trafficking victims and commercially sexually exploited persons. Counties are overwhelmed by the entire commercial sex industry which strains already scarce public

safety resources. Very little funding is available for intervention and services for exploited victims at the local level."

- 6) **Argument in Opposition:** According to the *California Public Defenders Association*, "This bill will amend Penal Code section 647 to require a mandatory minimum \$500 fine for any adult convicted of solicitation of prostitution. The money would be used to fund shelters, counseling programs, and exit programs for victims of commercial sexual exploitation and abuse.

"Although clearly seeking a solution to a long standing problem, SB 776 is not likely to serve as a deterrent. More than doubling the mandatory minimum misdemeanor fine is not warranted. With the addition of the court costs which will double the base fine to \$1,000 and the maximum fine up to \$4,000. Human trafficking is a significant problem that deserves study and a comprehensive approach to addressing. Simply raising fines is unlikely to make a significant impact."

- 7) **Prior Legislation:** SB 1388 (Lieu), Statutes of 2014, Chapter 714, imposed fines for solicitation of a minor. Provisions that would have redefined the crime of prostitution, imposed a mandatory minimum jail sentence for a first-offense, and imposed mandatory minimum fines for prostitution were amended out of the bill in the Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

A21 Campaign
After Hours
Bridge Network
Burning Bush Moments
California Against Slavery
California District Attorneys Association
California Police Chiefs Association
California Statewide Law Enforcement Association
Care 18 LA
Domestic Violence Center of Santa Clara County
Free for Life
Generate Hope
Mary Magdalene Project
Miraculous Ones
Redeeming Love
San Diego District Attorney's Office
Saving Innocence
Soroptimist International of Vista, CA
Survivors for Solutions
Two Wings
World Impact

3 private individuals

Opposition

California Public Defenders Association

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