CHAPTER SEVEN
ATTEMPT, CONSPIRACY, AND SOLICITATION

Imagine you're a bank robber! You load up your weapons, steal a car, buy yourself a new ski mask, and map out the escape route. On the big day, you roll up to the bank parking lot as the clock strikes 9 a.m., rush up to the front door, giving it a tremendous yank so as to cause the most amount of attention and distraction as you enter… but the door is locked! You try again, and it refuses to budge. You press your face up to the glass and look in. No one is there! You frantically look around the parking lot. The lot is virtually empty! Then it dawns on you! The bank is closed! You picked a holiday to rob the bank! Suddenly you hear sirens and your hear sinks…you're busted at the scene. Would you have a viable defense since there was no way you could complete the robbery? This is the essence of what are referred to as *"inchoate"* or *incomplete* crimes.

They are often seen in the initial stages of a crime. If there are substantial steps toward a crime, there is culpability. Inchoate acts are those acts that occur at the very beginning of the preparation to commit a crime, and can only occur before the actual crime. These acts can include anticipatory, incipient, incomplete, or preliminary acts that imply an inclination, a desire or intent to commit a crime, even though the crime itself may be never completed.

Because of the social need to prevent crimes before they occur, the common law long ago established three (3) separate and distinct categories of inchoate crimes which include the crimes of ***attempt, conspiracy,*** and ***solicitation*****.** Incomplete crimes declare that individuals can be convicted and punished for an intent to commit a crime when accompanied by a significant step towards the commission of the offense. At this point, society is confident that the individual presents a threat and is justified in acting to protect one's self.

There are three generally recognized inchoate crimes:

1. **Attempt** which punishes an unsuccessful effort to commit a crime.
2. **Conspiracy** which punishes an agreement to commit a crime and an overt act in furtherance of this agreement.
3. **Solicitation** which punishes an effort to persuade another individual to commit a crime.

The conviction of an individual for an inchoate crime requires:

1. A specific intent or purpose to accomplish a criminal offense.
2. An act to carry-out the purpose. Notably an ***overt*** act, toward the commission of the crime. In criminal law, an overt act, such as buying a gun, by itself is innocent enough, but if it is part of the preparation and active furtherance of a crime, it may be considered part of the totality of the circumstances to demonstrate that it was a step toward the commission of a crime. An example would be if the defendant had said, *"I'm going to shoot you!* And then buys a gun shortly thereafter, and does attempt or does shoot the victim, the act of buying the gun, or buying bullets, etc., could be introduced as evidence of a defendant's intent to commit the crime.

ATTEMPTS

Attempt require a specific purpose or intent, to commit a crime. It includes a initial step (inchoate) or act towards the commission of the crime, and it includes some failure to actually commit the crime.

Objective vs. Subjective Test

The ***objective*** approach to criminal attempts requires that there is a proximate act in relation to the commission of the crime. The ***subjective*** test only requires an act that is sufficiently close to the completion of a crime to establish a criminal intent.

There must be a substantial step towards the commission of a crime. For example, in California law:

Penal Code 663
PC 663. Attempts to Commit Crimes
Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the Court, in its discretion, discharges the jury and directs such person to be tried for such crime.

PC 664. Attempts - Defined
Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts…

Inchoate offenses generally are punished less severely or by the same sentence as the criminal object of the attempt, conspiracy or solicitation.

PC 664. Attempts
(a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for ***one-half*** *the term of imprisonment prescribed upon a conviction of the offense attempted.*

However, if the crime attempted is willful, deliberate, and premeditated murder,… the person guilty of that attempt shall be punished by imprisonment in the state ***prison for life with the possibility of parole.*** *If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years.*

Note that in subsection PC 664, if the victim of the attempted murder is a peace officer, firefighter, or a custodial officer, and the person who commits the offense knows or should reasonably know that the victim is such a peace officer, firefighter, or custodial officer engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. This is because California statutes state that since it (the attempt) was a direct but ineffectual act with the specific intent to unlawfully kill another human being, and that the act harbored express malice aforethought (premeditation), the culpability is obvious.

Affirmative Defense – Abandonment or Renunciation

The affirmative defense of abandonment arises in those instances in which an individual commits an attempt and abandons his or her effort under circumstances manifesting a ***complete and voluntary renunciation*** of his or her criminal purpose. This renunciation must not result from extraneous or outside factors.

Factual vs. Legal Impossibility

Factual impossibility is not a defense to an attempt to commit a crime.

- **Factual impossibility** is when a person's intended end constitutes a crime, but she fails because of circumstances beyond her control.(e.g., the pocket is empty, or the gun is not loaded.) The law generally does not recognize this as a defense.
- **Inherent factual impossibility** is when the means chosen could not possibly cause the result. Question is whether the person will next choose a more effective means of committing the same act.
- **Hybrid legal impossibility** – The actor's goal is illegal, but commission of the offense is impossible due to a *factual* mistake by her regarding the *legal* status of some attendant circumstance relevant to her conduct. (e.g., offering a bribe to a juror who is not a juror, shooting at a corpse believing it to be alive, shooting at a tree stump believing it to be a human.) Most states have abolished this defense on the grounds that the actor's intent is plainly manifested. MPC abolishes it, stating that the actor is guilty of attempt if he engages in conduct that would constitute the crime "if the attendant circumstances were as he believes them to be."

Legal impossibility as well as inherent possibility constitute defenses.

- **Pure legal impossibility** – The person thinks she is committing a crime, but the conduct is not a crime at all. Includes when a statute has been repealed. (e.g., attempting to sell "bootleg" liquor after the repeal of Prohibition.) Although this is sometimes used as a defense, this is essentially the legality principle – we don't punish people for something that is not a crime, no matter how culpable or dangerous they are.

CONSPIRACY

A conspiracy requires two specific intents: first, the intent to agree; and, second, the intent to commit the target offense. (California - People v. Swain, supra, 12 Cal. 4th at pp. 599-600.)

The *mens rea* of conspiracy is an intent or purpose that the object of the conspiracy is achieved.

The *actus reus* of conspiracy consists of ***entering into an agreement to commit a crime***. The **Pinkerton rule** that an individual is guilty of ***all*** criminal acts committed by one of the conspirators in furtherance of the conspiracy, ***regardless of whether the individual aided or abetted or was even aware of the offense.*** An overt act in furtherance of the conspiracy is required. A conspiracy under the ***"Wharton rule"*** cannot arise between two parties in those instances that the voluntary participation of two parties is required to commit the crime. The ***Gebardi rule*** provides that an individual who is in a class of persons protected and not liable under a statute may not be liable for a conspiracy to violate the law.

California statutes regarding conspiracy include:

PC 182. Conspiracy Defined
(a) If ***two or more persons conspire****:*
(1) To commit ***any crime.***
(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.
(3) Falsely to move or maintain any suit, action, or proceeding.
(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.

(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:
When they conspire to commit any crime against the person of any official specified in paragraph (6) they are guilty of a felony and are punishable by imprisonment in the state prison for five, seven, or nine years.

When they conspire to ***commit any other felony,*** they shall be punishable in the same manner and to the same ***extent as is provided for the punishment of that felony***…

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done. Note: Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, ***the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.***

Other related statutes include:

PC 182.5. Participation in ***Criminal Street Gang****; Conspiracy to Commit a Felony*
Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, …with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, … and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony …

PC 183. Other Conspiracies not Criminally Punishable
No conspiracies, other than those enumerated in the preceding section, are punishable criminally.

Would the mere act of talking together about committing the "big score," be enough for a "conspiracy?" No, it takes more than just the agreement, and this is why the need for the "overt" act is a critical component of any conspiracy.

PC 184. Acts Effectuating Conspiracy
*No agreement amounts to a conspiracy, unless some act****, beside such agreement****, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done.*
Note that, *" Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense,* ***the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence****." (PC 182 (b))*

SOLICITATION

California does not have a "general" solicitation law. Solicitation is when there is either a written or verbal statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages or incites another to commit a specific crime with the purpose that the other person commit that specific crime. A solicitation is complete the moment the statement is made, it need not be communicated. In addition, the crime solicited need not be carried out.

Solicitation, in California law, refers to specific crimes where someone solicits another to commit very specific crimes. For example:

Penal Code Section 647
(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution.
As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

(c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

An unusual solicitation crime includes*:*

PC 276. Solicitation of Woman to Submit to or Procure Abortion –*Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to procure a miscarriage…except under existing law (Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code,*
This offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.

PC 646.5. Employment Solicitation to Obtain Authorization as Investigator
No person shall knowingly and directly solicit employment from any injured person or from any other person to obtain authorization on behalf of the injured person, as an investigator to investigate the accident or act which resulted in injury or death to such person or damage to the property of such person. Nothing in this section shall prohibit the soliciting of employment as an investigator from such injured person's attorney

PC 653f. Solicitation to Commit Felony

(a) Every person who, with the intent that the crime be committed, solicits another to offer, accept, or join in the offer or acceptance of a bribe, or to commit or join in the commission of: (Note Specific crimes)

- *Arson*
- *Assault with a deadly weapon*
- *Burglary*
- *Carjacking*
- *Extortion*
- *Forgery*
- *Grand theft*
- *Welfare and Institutions (Specific violations) Code*
- *Kidnapping*
- *Murder*
- *Perjury*
- *Rape*
- *Receiving stolen property*
- *Robbery*
- *Specific Sex offenses*
- *Specified narcotics violations*
- *Subornation of perjury*

Need for Corroborating Witnesses
An offense charged in violation of specific subsections (a)-(c)… shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances. An offense charged in violation of subdivision (d) or (e) shall be proven by the testimony of one witness and corroborating circumstances.

PC 653j. Solicitation of Minor to Commit Felony [Formerly 6531]

Every person 18 years of age or older who, in any voluntary manner, solicits, induces, encourages, or intimidates any minor with the intent that the minor shall commit specific felonies, Felony.

If the minor is 16 years of age or older at the time of the offense, this section shall only apply when the adult is at least five years older than the minor at the time the offense is committed.

Also, solicitation of certain crimes may be used as sentencing enhancements, such as:

PC 666.7. Sentence Enhancements. Solicitation, recruitment, or coercion, of a minor to actively participate in a criminal street gang.

ATTEMPTS

Imagine that you're a professional "cat" burglar, meaning you only target wealthy homeowners who are going to be gone at the time of your burglary. However, as you make your entry into the home, the alarm suddenly goes off, and you decide to abandon the effort. Are you still liable for a crime, even though you never made actual entry into the building?

The answer is, yes, of course you'd still be "liable." Why, because the law feels that you should be punished, even though you tried, you're still a danger to others and should be held accountable. It's also a deterrent to others who may see that you were sent to prison for the attempt.

Criminal attempts are comprised of three elements:

1. An intent or purpose to commit a crime
2. An act or acts towards the commission of the crime
3. A failure to commit the crime.

Factual vs. Legal Impossibility

Historically, a "legal" impossibility constituted a valid defense to the prosecution for a criminal attempt but a "factual" impossibility did not. Legal impossibility arises when an individual mistakenly believes that he or she is acting illegally. A factual impossibility is not a defense to an attempt to commit a crime. This is based on the fact that an offender should not be free from legal guilt who possesses a criminal intent and who takes steps to commit an offense. The factual circumstance that prevents an individual from actually completing the offense is referred to in some state statutes as an extraneous factor or an event outside of an individual's control.

ABANDONMENT

Imagine you and your crime partners are getting ready to commit a big caper. The more your co-conspirators discuss it, the more dangerous it sounds to you. You decide to leave the group and tell them that you are "out." A week later, they continue and commit the crime. Are you still liable? Most likely you wouldn't be. Keep in mind that you're going to have to convince the police and the prosecution that you should not be, since you voluntarily renounced your involvement, communicated it to them, and in good faith, abandoned your efforts in the case.

However, an individual who abandons an attempt to commit a crime solely based on the intervention of outside or ***extraneous forces*** does remain criminally liable. For example, had you continued with your crime partners and on the day of the crime, the police show up and you flee from the scene. Would this be an example of a legitimate case of "abandonment?" No, it would not. On the other hand, what about an individual who voluntarily abandons his or her criminal scheme after completing an attempt? Yes, in this case, such as when you told the group you were "out," it may be considered a good faith effort to abandon, or a legitimate renunciation of the crime.

Why does the law allow for this defense? It provides for a defendant to demonstrate:

- *Lack of purpose*. An individual who abandons a criminal enterprise lacks a firm commitment to complete the crime and should be permitted to avoid punishment.

- *Incentive to renounce crime*. The defense of abandonment provides an incentive for individuals to renounce their criminal conduct before completing the crime.

Review Questions
1. What's the difference between an *inchoate* and an *attempt* crime?
2. Compare the subjective and objective approaches to criminal attempts?
3. What's the difference between legal and factual impossibility to commit crimes?
4. Why is there a defense of abandonment for attempts?
5. How many people are required for a conspiracy in California law?

Web Resources

Bank Robbery

http://www.fbi.gov/
National Center for the Analysis of Violent Crime (NCAVC:
http://www.fbi.gov/hq/isd/cirg/ncavc.htm

http://www.fbi.gov/fbihistory.htm
http://www.fbi.gov/libref/historic/famcases/sutton/sutton.htm
http://www.crimelibrary.com/gangsters_outlaws/outlaws/dillinger/1.html
Canadian RCMP Violent Crimes:
http://www.rcmp-grc.gc.ca/viclas/viclas_e.htm
Bankers On-Line
http://www.bankersonline.com/security/robberypage.html
Western Independent Banker Article:
http://www.wib.org/wb_articles/crime_dec04/fbi_dec04.htm

Conspiracy
California Bureau of Investigation (CBI) provides expert investigative services to assist local, state and federal agencies in major criminal investigations across the state.
http://caag.state.ca.us/cbi/index.htm

Other resources:
http://en.wikipedia.org/wiki/Conspiracy_(crime)
http://www.answers.com/topic/conspiracy
http://caselaw.lp.findlaw.com/casecode/uscodes/18/parts/i/chapters/19/toc.html
http://www.usdoj.gov/atr/public/guidelines/209114.htm
http://www.caagconference.org/

Links to related Investigative Organizations:
http://www.fbi.gov/links.htm

Solicitation
http://en.wikipedia.org/wiki/Solicitation
http://www.answers.com/topic/solicitation

U.S. Codes
http://www.law.cornell.edu/uscode/
http://www.findlaw.com/casecode/
http://www.gpoaccess.gov/uscode/index.html
http://uscode.house.gov/

Case Study #1 : People v. Armigo (1995) , 61 Cal. App. 4th 1373

Discussion Question: Was there a “conspiracy” to commit murder? Do you think this case is sufficient to sustain a conspiracy? Why or why not?

In this San Diego (Oceanside) case from March of 1995, at about 2:30 a.m., Rodney Gay and his friends Nelson Quiles and Omar Johnson were making a purchase at a Seven-Eleven convenience store in Oceanside. The three men are black. Quiles was a member of the Deep Valley Crips, a local gang; and Johnson was associated with the same gang. While they were in the store, Armigo entered, asked for a "squeezy," and was told by a clerk the store did not have one. Before leaving, Armigo and Quiles "mad dogged" each other. (i.e., stared at each other in a threatening manner.)

Armigo went outside to a Honda parked at the store's gas pumps where Avila and another Hispanic man were standing. Armigo and Avila were documented members of Mesa Loco, a local Hispanic gang. The three conferred for a short time. As they did so, Gay and his companions walked out of the store. Armigo, Avila and the third man walked toward them. One of the Hispanic men yelled: "Hey, where you all from." Avila called out: "Fuck Crips. Fuck Crips. Fuck Deep Valley," and "Fuck D.V.C., D.V.C. Killer." Avila transferred a handgun from one pocket to another. Armigo opened a folding knife. Gay and his companions ran.

As Armigo and the third Hispanic man chased Gay, Avila returned to the car, got in and followed. When Armigo and the third man caught up to Gay, Armigo stabbed him repeatedly, shouting: "Fuck D.V.C. This is my turf. Fuck D.V.C." As Gay was being stabbed, Avila arrived in the car. Avila yelled: "Come on. Fuck that mother. Fuck him. Come on. Let's go. Let's go." When an onlooker yelled the police were coming, Armigo and his companion got into the car and departed. Gay suffered 16 stab wounds but survived.

The Mesa Loco gang fights black gangs over race and turf. The Seven-Eleven where the two groups met is territory disputed by the Mesa Locos and Crips. Violence can occur between gang members merely because they cross paths and no specific precipitating event or motivation is required.

On March 29, 1995, at approximately 11:20 a.m., Avila was seen by deputy sheriffs walking down the middle of a street in San Marcos. After being stopped, Avila ran but was eventually apprehended after a lengthy chase. A loaded handgun was found in his jacket, a baggie containing 23.4 grams of methamphetamine was found in his pocket as well $322 in various denominations.

The Defense argument was that Armigo was not a gang member and was at home at the time of the assault on Gay.

His companion, Avila, after his arrest, admitted being at the Seven-Eleven store in his Honda the night of the stabbing but denied any involvement in the crime.

Issue
Conspiracy to Commit Second Degree Murder

In *People v. Swain* (1996) 12 Cal. 4th 593 [49 Cal. Rptr. 2d 390, 909 P.2d 994], the court held there is no crime of conspiracy to commit *implied malice* second degree murder. Citing *Swain*, appellants argue they could not be convicted of conspiracy to commit second degree *express malice* murder since that crime does not exist.

The trial court instructed the jury it could return a verdict of either conspiracy to commit second

degree murder, based on express malice, i.e., the intent to kill, or conspiracy to commit first degree, deliberate and premeditated, murder. Both appellants were found guilty of conspiracy to commit second degree murder.

…We conclude the jury was properly instructed. The issue of whether there exists a crime of conspiracy to commit second degree murder was framed, but not decided, in *People v. Swain, supra,* 12 Cal. 4th 593. The issue in *Swain* was whether a conspiracy to commit murder could exist when the required finding of malice aforethought was based not on express malice, i.e., the intent to kill, but on implied malice, i.e., a killing resulting from an intentional act dangerous to human life done with knowledge of the danger to, and with conscious disregard for, human life. *(Id.* at pp. 600-602.) The court concluded no such specie of conspiracy exists.

Decision

In this case we conclude there exists a crime of conspiracy to commit express malice second degree murder. **...Armigo's** abstract of judgment is ordered amended to indicate his prison term for attempted murder, count two, is stayed pursuant to section 654. Avila's abstract of judgment is ordered amended pursuant to the same code section to indicate his prison term for being an accessory to murder is stayed. In all other respects, the judgments are affirmed.

Case Study #2: People v. Toledo (2001) , 26 Cal. 4th 221

Discussion Question:
Should the defendant have been convicted of an attempted criminal threat, without a statute specifically addressing that issue? Would that also be a “legal impossibility” defense issue?

Facts
This case arises out of a domestic dispute involving defendant Ryan Patrick Toledo, his wife (Joanne Ortega Toledo), and a neighbor (Marychelo Guerra). The evidence at trial, viewed in a light most favorable to the judgment, revealed the following events.

On the evening of January 9, 1998, when defendant picked up Joanne at work, an argument ensued over Joanne's speaking with her supervisor for 10 to 15 minutes when defendant was tired and wanted to return home immediately. The argument continued during the couple's drive home to their apartment. Once there, the dispute escalated. Among other things, defendant threw a telephone into a closet door, tossed a chair across a room, and punched a hole through a bedroom door, and Joanne told defendant that she did not care if he destroyed the apartment, and picked up a lamp and dropped it to the floor. Defendant told Joanne, "You know, death is going to become you tonight. I am going to kill you." Joanne responded that she did not care, in a manner that indicated she had given up hope, and walked away.

Soon thereafter, holding scissors over his shoulder, defendant approached Joanne. Joanne braced herself, and as defendant plunged the scissors toward her neck, she moved back. Defendant stopped the scissors inches from Joanne's skin, and said, "You don't want to die tonight, do you? You're not worth going to jail for." Defendant walked away, and Joanne then went to Marychelo's nearby apartment, crying, shaking, and appearing frightened.

Sometime later, Marychelo began to escort Joanne back to her own apartment. Defendant saw them and chased after Joanne, screaming as he went. Joanne and Marychelo ran back to Marychelo's apartment, and heard a bang, which later was discovered to have been caused by a clothes iron hitting a wall some distance away and shattering into pieces. Later that night, in statements made to an investigating officer, Joanne declared that she was afraid that the defendant was going to kill her. By contrast, when she testified at trial, Joanne denied that she had entertained any fear of the defendant on the evening in question.

As a result of the foregoing incident, defendant was charged in an amended three-count information with (1) criminal threat against Joanne (§ 422), (2) assault with a deadly weapon (scissors) against Joanne (§ 245), and (3) assault with a deadly weapon (a clothes iron) against Joanne and Marychelo (§ 245). The amended information also alleged, with regard to the criminal threat charge, that defendant personally had used a deadly or dangerous weapon (scissors) in the commission of that offense (§ 12022, subd. (b)(1)). In addition, the information charged that defendant had suffered a prior conviction for assault with a firearm as a basis for enhancement of sentence on the current offenses (§§ 667, subd. (a)(1), 1170.12, subds. (a)-(d)).

After the presentation of evidence at trial, the trial court instructed the jury, among other matters, on (1) the offense of criminal threat and the lesser included offense of attempted criminal threat, (2) personal use of a deadly or dangerous weapon, and (3) the crime of assault with a deadly weapon, and the lesser included offense of simple assault.

After deliberations, the jury returned verdicts finding that (1) defendant was not guilty of the crime of

criminal threat against Joanne, but was guilty of the crime of *attempted* criminal threat against her, and that he did not personally use a deadly or dangerous weapon in the form of scissors in the commission of that offense, (2) defendant was guilty of the crime of assault with a deadly weapon (PC 245) against Joanne involving the attack with scissors, and (3) defendant was not guilty of either the crime of assault with a deadly weapon or of simple assault (PC 240) against either Joanne or Marychelo with regard to the alleged incident involving the clothes iron. In a subsequent bifurcated proceeding, the trial court found that the assault with a deadly weapon offense against Joanne was a serious felony within the meaning of section 667, subdivision (a)(1), and that defendant had suffered a prior conviction for assault with a firearm that constituted both a serious and a violent felony.

After rejecting defendant's contention that his conviction of attempted criminal threat could not stand because there is no such crime in this state, the trial court entered judgment against defendant in accordance with the verdicts, sentencing defendant, in total, to a determinate term of imprisonment for 11 years.

Issue

The principal issue before us is whether there is a crime of attempted criminal threat in California. In analyzing this question, we look first to the statutory provision defining the crime of criminal threat, and then to the law relating to attempt.

As noted above, the crime of criminal threat is set forth in section 422. That statute provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety" is guilty of a crime, which is punishable alternatively as a misdemeanor or a felony.

To render our discussion of this lengthy provision more manageable, we believe it is helpful to divide the crime of criminal threat into five constituent elements that must be established to find that a defendant has committed this offense. In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat--which may be "made verbally, in writing, or by means of an electronic communication device"--was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances. (See generally *People v. Bolin* (1998) 18 Cal. 4th 297, 337-340 & fn. 13 [75 Cal. Rptr. 2d 412, 956 P.2d 374].)

Furthermore, it also is useful to note that the present version of section 422 was enacted after a former version of section 422 had been held unconstitutional by this court in *People v. Mirmirani* (1981) 30 Cal. 3d 375 [178 Cal. Rptr. 792, 636 P.2d 1130]. The former version of section 422 at issue in *Mirmirani*, which was designated the crime of *terrorist* threat, provided in pertinent part that "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to

another person, with intent to terrorize another or with reckless disregard of the risk of terrorizing another, and who thereby either . . . [c]auses another person reasonably to be in sustained fear for his or [her] or their immediate family's safety[,] . . . [c]auses the evacuation of a building, place of assembly, or facility used in public transportation[,] . . . [i]nterferes with essential public services[,] or . . . [o]therwise causes serious disruption of public activities, is guilty of a felony . . . ." (Former § 422, as added by Stats. 1977, ch. 1146, § 1, pp. 3684-3685.) A companion statute, former section 422.5, defined the term "terrorize" to mean "to create a climate of fear and intimidation by means of threats or violent action causing sustained fear for personal safety in order to achieve social or political goals." (Pen. Code, former § 422.5, as added by Stats. 1977, ch. 1146, § 1, p. 3685.)

In *People v. Mirmirani*, *supra*, 30 Cal. 3d 375, this court held former sections 422 and 422.5 of the Penal Code void for vagueness in violation of the due process clause of section 15 of article I of the California Constitution. (See *People v. Mirmirani*, *supra*, 30 Cal. 3d at pp. 378, 381-388 (plur. opn. of Bird, C. J.); *id*. at p. 388 (conc. opn. of Newman, J.).) Citing decisions including *Watts v. United States* (1969) 394 U.S. 705 [89 S. Ct. 1399, 22 L. Ed. 2d 664], and *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, the plurality opinion in *Mirmirani* stated that, "[a]lthough the Legislature may . . . penalize threats" without offense to the First Amendment to the United States Constitution, "even though they are pure speech, statutes which attempt to do so must be narrowly directed only to threats which truly pose a danger to society." (*People v. Mirmirani*, *supra*, 30 Cal. 3d at p. 388, fn. 10 (plur. opn. of Bird, C. J.).) The plurality opinion in *Mirmirani* further noted that the federal circuit court decision in *Kelner* held that a "threat can be penalized only if," in *Kelner's* words, the threat " 'on its face and in the circumstances in which it is made . . . is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . .' " (*People v. Mirmirani*, *supra*, 30 Cal. 3d at p. 388, fn. 10 (plur. opn. of Bird, C. J.), quoting *United States v. Kelner*, *supra*, 534 F.2d at p. 1027.)

We now turn to the law of criminal attempt. In general, under California law, "[a]n attempt to commit a crime is itself a crime and [is] subject to punishment that bears some relation to the completed offense." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 53, p. 262 (hereafter Witkin & Epstein.) Section 664 provides in this regard that "[e]very person who attempts to commit *any* crime, but fails, or is prevented or intercepted in its perpetration" (italics added), is punishable as set forth in that provision, ordinarily by imprisonment for one-half the term of imprisonment that would be imposed upon conviction of the completed offense.

Furthermore, as provided by section 21a, "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." AS PAST DECISIONS EXPLAIN: "One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime." (*People v. Camodeca* (1959) 52 Cal. 2d 142, 147 [338 P.2d 903].) When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime (2 LaFave & Scott, Substantive Criminal Law (1986) § 6.2(c)(1), p. 24), and performs an act that "go[es] beyond mere preparation . . . and . . . show[s] that the perpetrator is putting his or her plan into action" (*People v. Kipp* (1998) 18 Cal. 4th 349, 376 [75 Cal. Rptr. 2d 716, 956 P.2d 1169]), the defendant may be convicted of criminal attempt.

…Finally, not only is the crime of attempted criminal threat not unconstitutionally overbroad on its face, but it also is clear that this offense is not unconstitutional as applied to the facts of the present case. As the Court of Appeal observed, the jury in this case properly could have found that defendant's threat to Joanne--"You know, death is going to become you tonight. I am going to kill

you."--was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 and reasonably could have caused Joanne to be in sustained fear for her own safety. At the same time, however, the jury might have entertained a reasonable doubt--in view of Joanne's testimony at trial that she was not frightened by defendant's statements, and the circumstance that Joanne apparently had been willing to return to her apartment with Marychelo on the night in question--as to whether the threat *actually* caused Joanne to be in such fear. Thus, the jury evidently found defendant guilty only of attempted criminal threat rather than the completed crime of criminal threat, not because defendant's conduct fell short of that required by the criminal threat provision, but simply because defendant's threat happened not to have as frightening an impact upon Joanne as defendant in fact had intended. Under these circumstances, it is clear that defendant's conviction of attempted criminal threat was not based upon constitutionally protected speech.

Decision

For the reasons set forth above, the judgment of the Court of Appeal is affirmed.

Case Study #3: Pryor v. Municipal Court for L.A. Judicial Dist. (1979) , 25 Cal. 3d 238

Case Discussion: The defendant actively solicited an undercover police officer to engage in oral copulation, a crime in California if done in a public place. (PC 647 (a)) What was the court's rationale for their decision on that charge?

Facts
On May 1, 1976, defendant solicited an undercover police officer to perform an act of oral copulation. He was arrested; a search incident to that arrest revealed defendant's possession of less than one ounce of marijuana. Defendant was charged with violating Penal Code section 647, subdivision (a), by soliciting a lewd or dissolute act, and with violating Health and Safety Code section 11357, subdivision (b), by possession of less than one ounce of marijuana.

The defendant moved to suppress the introduction of the marijuana, contending that section 647, subdivision (a) was unconstitutional on the ground of vagueness, and hence that the search was not incident to a lawful arrest. When that motion was denied, defendant pled guilty to the marijuana charge. He subsequently appealed that conviction under Penal Code section 1538.5, but the appellate department affirmed the conviction.

The defendant proceeded to trial on the charge of soliciting a lewd or dissolute act, in violation of section 647, subdivision (a). At the trial, the officer testified that he parked his car a few feet from where the defendant was standing. Defendant came over, and after a brief conversation, suggested oral sex acts. Looking at a nearby parking lot, the defendant said, "We could probably sit and park in the parking lot." The officer suggested instead that they go to his home. The defendant agreed, entered the car, and was arrested.

Defendant's version of the incident differs only in that he denies making any statement about the parking lot, but maintains instead that the only situs discussed was the officer's home. Thus both defendant and the officer agree that defendant, while in a public place, solicited an act of oral sex; they disagree only whether defendant suggested the act itself occur in a public place.

Over defendant's objection, the trial court instructed the jury that oral copulation between males is "lewd or dissolute" as a matter of law. The court further instructed over objection that "If the solicitation occurred in a public place, it is immaterial that the lewd act was intended to occur in a private place." (CALJIC No. 16.401.) Despite these instructions, which virtually compelled the jury to find defendant guilty, the jury deadlocked and the court declared a mistrial.

Defendant then filed the instant petition for writs of prohibition and mandate with this court, raising various points in connection with the marijuana conviction and the pending retrial for solicitation of lewd or dissolute conduct. We issued an alternative writ of prohibition "limited to the proceedings in the municipal court related to retrial of the charge of violating section 647, subdivision (a) of the Penal Code . . . ." Thus no issue respecting the marijuana conviction is presently before this court.

Issue
With respect to the approaching retrial, defendant first seeks to prohibit the court from instructing the jury that public solicitation of an act to be performed in private is criminal and that oral copulation between males is lewd and dissolute as a matter of law. (2) Because the writ of prohibition does not lie to prevent merely anticipated error (see 5 Witkin, Cal. Procedure (2d ed. 1971) p. 3810 and cases there cited), defendant's objection to anticipated jury instructions states no basis for present relief. (3) Defendant's further contention that section 647, subdivision (a) is unconstitutionally vague, however, states a basis for issuance of prohibition since a court lacks jurisdiction to proceed to trial under a

facially unconstitutional statute. (Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 866, fn. 6 [94 Cal. Rptr. 777, 484 P.2d 945]; see In re Berry (1968) 68 Cal. 2d 137, 145 [65 Cal. Rptr. 273, 436 P.2d 273]; In re Cregler (1961) 56 Cal. 2d 308, 309 [14 Cal. Rptr. 289, 363 P.2d 305].)

Past decisions of the Court of Appeal and the appellate department of the superior court have held that section 647, subdivision (a), is not unconstitutionally vague. That issue, however, reached this court on only one prior occasion. In the case of *In re Giannini* (1968) 69 Cal. 2d 563 [72 Cal. Rptr. 655, 446 P.2d 535], a topless dancer was charged with violating section 647, subdivision (a). Reasoning that her dance was presumptively a communication protected by the First Amendment and that such communications lose protection only if they are "obscene," we equated the statutory term "lewd or dissolute" with obscenity. So interpreted, we stated that the vagueness objection to the statute was not tenable. (69 Cal. 2d at p. 571, fn. 4.)

Decision
Defendant Don Pryor seeks prohibition to bar his trial on a charge of violating Penal Code section 647, subdivision (a). This section declares that a person is guilty of disorderly conduct, a misdemeanor, "Who solicits anyone to engage in or who engages in *lewd or dissolute conduct* in any public place or in any place open to the public or exposed to public view." (Italics added.) **(1a)** We agree with defendant that the phrase "lewd or dissolute conduct" as construed by past decisions is unconstitutionally vague. If, however, we can reasonably construe the statute to conform with the mandate of specificity, we should not, and will not declare the enactment unconstitutional. Consequently, rejecting prior interpretations of this statute, we adopt a limited and specific construction consistent with the present function of section 647, subdivision (a), in the California penal statutes; we construe that section to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct. As so construed, section 647, subdivision (a), complies with constitutional standards; we therefore deny defendant's petition for writ of prohibition.

Answers to Review Questions
Chapter 7

1. What’s the difference between an *inchoate* and an *attempt* crime?
A. Inchoate crimes are found in the initial stages of a crime. If there are substantial steps toward a crime, there is culpability. Inchoate acts are those acts that occur at the very beginning of the preparation to commit a crime, and can only occur before the actual crime. These acts can include anticipatory, incipient, incomplete, or preliminary acts that imply an inclination, a desire or intent to commit a crime, even though the crime itself may be never completed. Attempts are actually crimes that are more advanced, may be actually “in-progress,” but for some reason, their completion is blocked through some external means.

2. Compare the subjective and objective approaches to criminal attempts?
*A. The **objective** approach to criminal attempts requires that there is a proximate act in relation to the commission of the crime. The **subjective** test only requires an act that is sufficiently close to the completion of a crime to establish a criminal intent.*

3. What’s the difference between legal and factual impossibility to commit crimes?
*A. **Factual impossibility** is when a person’s intended end constitutes a crime, but she fails because of circumstances beyond her control.(e.g., the pocket is empty, or the gun is not loaded.) The law generally does not recognize this as a defense. **Legal impossibility** –*

The person thinks she is committing a crime, but the conduct is not a crime at all. Includes when a statute has been repealed. (e.g., attempting to sell "bootleg" liquor after the repeal of Prohibition.) Although this is sometimes used as a defense, this is essentially the legality principle – we don't punish people for something that is not a crime, no matter how culpable or dangerous they are.

4. Why is there a defense of abandonment for attempts?
A. The affirmative defense of abandonment arises in those instances in which an individual commits an attempt and abandons his or her effort under circumstances manifesting a ***complete and voluntary renunciation*** *of his or her criminal purpose. This renunciation must not result from extraneous or outside factors. One can abandon an attempt prior to the event.*

5. How many people are required for a conspiracy in California law?
A. Two or more PC 182