CHALLENGING THE CRIMINALIZATION OF IMMATURE PRETEEN AND TEENAGE BEHAVIOR

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Scenarios:

A high school student throws an apple core at a wall. It accidentally strikes a teacher and causes her to lose consciousness. (Charged with assault by means for force likely to cause great bodily injury)

An 11-year-old throws a ball at playmate, accidentally breaking his arm. (Charged with battery causing serious bodily injury)

An eighth grade boy tickles a female classmate and sticks his hand up her shirt, touching her breast. She slaps him and he stops. (Charged with sexual battery)

A teenaged boy hugs a female co-worker in greeting and pats her on the rear end. She protests. (Charged with sexual battery)

A 13-year old boy hits a classmate in the back of the head when the teacher momentarily leaves the classroom, causing no lasting injury. (Charged with battery)

A middle school student burns some discarded cardboard inside a trash can located at her high school. (Charged with arson)

A high school students writes poems in which he describes himself as "dark, dangerous and evil", and states that he might be the next high school killer. He gives these poems to fellow students. (Charged with making criminal threats)

A high school student turns in a painting in which he portrays himself shooting an officer in the back of the head. (Charged with making a criminal threat.)

Two female high school students have repeated verbal altercations. One students tells the other that she is going to beat her up or kill her. (Charged with making criminal threats.)

Questions: In each case, why is the conduct being prosecuted as a "crime" in a Welfare and Institutions Code Section 602 juvenile delinquency proceedings? Why isn't the conduct punished informally by school officials, parents, or other responsible adults?

1)Attitudes towards juveniles in our society today (violence and sexuality)

2)High profile juvenile crime and school shooting cases

3)The increasing presence of police officers and security personnel on school campuses.

Arguing that Immature Preteen or Teen Behavior Was Improperly Prosecuted as Criminal Conduct:

1)Try and couple this with an argument that insufficient evidence supports an element (or elements) of the charged crime.
2)If the minor is under 14 at the time of the conduct, couple an improper prosecution argument with an assertion that the presumption of incapacity was not rebutted – the prosecution did not show by clear proof that the minor appreciated the wrongfulness of his act at the time he committed it. (See Penal Code section 26)
3)Of course, you will have a much better chance on appeal if trial counsel raised either of these arguments or specifically challenged the prosecution of the conduct in a juvenile criminal proceeding.

Questions: Should minors who engage in such immature behavior be subject to the sanctions and consequences of section 602 wardship? Do the imposition of these sanctions have the same effect on juveniles as they would on adults?

Supporting Case Law:

A disposition under section 602 "carries a stigma of criminal conduct". It is not justified if the minor is under 14 and did not appreciate the wrongfulness of his acts. Such cases would be better handled under Welfare and Institutions Code section 601. Section 601 allows the juvenile court to take jurisdiction over minors who habitually refuse to obey their parents or guardians, or are beyond their control.
In re Michael B. **(1975) 44 Cal. App. 3d 443, 446**

A declaration of section 602 wardship has severe consequences. When used inappropriately, these consequences can endanger both the child and society. Declaration of Section 602 wardship makes it more likely that the minor will end up in a restrictive out-of-home placement, including the California Youth Authority "where he will come into contact with many youths who are well versed in criminality". Moreover, the juvenile offender is classed as a "delinquent", a status involving only slightly less stigma than the term "criminal" applied to adults, and his juvenile records may haunt him into adulthood.
In re Gladys R. **(1970) 1 Cal. 3d 855, 864-67, see particularly, fn. 21**

Consider: When the offense alleged in the section 602 petition is a sexual crime, the minor will be labeled not only as a "delinquent", but also as a "sexual offender".

When there is insufficient evidence that the alleged crime has been committed, the juvenile court should not sustain a section 602 petition and declare wardship in order to redress a general social problem or send a message to the minor and his peers.

In re Gavin T. **(1998) 66 Cal. App. 4th 238 [First District, Division Five]**:
The minor was a 15-year old high school student. During the lunch period, he threw the remainder of an apple core toward a classroom wall some distance away. Usually, no one was in the classroom during lunch. However, on this day, a teacher was inside. The thrown apple sailed through a 12-inch gap in the partially closed classroom door and struck the teacher in the head. The teacher was knocked to the floor and lost consciousness for a few minutes.

A section 602 petition was filed in juvenile court alleging that the minor had committed an assault with a deadly weapon or by means of force likely to cause great bodily injury. At the conclusion of the contested jurisdictional hearing, the juvenile court found that minor did not intend to hit the teacher with the apple; he merely intended to see it splatter against the wall. Nevertheless, the juvenile court sustained the aggravated assault charge in order to "send a message" to appellant's classmates that his reckless act was wrong.

The Court of Appeal vacated the juvenile court's order with instructions to find the assault allegation untrue and dismiss the petition. The Court concluded that – as the juvenile court had found – the minor had lacked the intent to strike the teacher or the general intent to act in a manner inherently dangerous to human life. The Court also found that a half-eaten apple does not qualify as a deadly weapon. The minor's urge to watch the discarded apple core splatter against the wall "may have been juvenile and, therefore, rather appropriate to appellant's age", but it did not constitute the criminal intent necessary to sustain a charge of aggravated assault. Thus, the juvenile court was required by law to find the criminal assault allegation untrue.

Finally, the Court of Appeal addressed the impropriety of the minor's conduct being prosecuted as a criminal allegation: "The record does not clearly reveal why this relatively minor school disciplinary matter was elevated to the charge and trial of an aggravated felony assault proscribed by section 245". (*In re Gavin T., supra.*, at 240, fn. 1) It also criticized the juvenile court for sustaining a section 602 petition in order to send a message to high school students: "While the juvenile court's desire to send a message to appellant and his classmates that negligent or reckless behavior is not approved is not wholly inappropriate, we cannot sustain the judicial response it used to convey that message....[T]he courts should not ignore the law and find noncriminal behavior to be a felonious crime merely to send a message of disapproval for educational purposes." (*Id.* at 242.) Finally, the Court noted that this act of throwing an apple against a wall might

appropriately result in "a warning, reproval, or other discipline at school". However, it was not a felonious crime: As much as we disapprove of throwing apples, we disapprove even more of finding people guilty of crimes they did not commit.". (*Id*. at 242.)

***People v. Arnold* (1992) 6 Cal. App. 4th 18**

The defendant was a high school algebra teacher and wrestling coach. He was convicted of five felony counts and six misdemeanor counts arising from sexual conduct with two female high school students. The Court of Appeal reversed one count of sexual battery upon finding that the prosecution had failed to prove the required element of unlawful restraint. The student, who was infatuated with the teacher, had agreed to go running with him, although she anticipated that he might make sexual advances. She then walked over to him when he summoned her and participated willingly when he grabbed her by the buttocks, kissed her, and then reached under her shirt and touched her breasts. Only then did she push him away. He stopped. Applying established law, the Court held that these acts did not constitute "unlawful restraint".

The Court declined to uphold the charge in order to redress a social problem: "We are particularly sensitive to the fact that a minor student, infatuated with a teacher, can be susceptible to participating willingly in an activity that suddenly turns into inappropriate sexual conduct. The conduct of the teacher who takes advantage of such a student, even in the absence of 'unlawful restraint' is reprehensible". However, such conduct does not violate the sexual battery statute which "was not designed to address this type of situation; it is neither age nor relationship specific". (*People v. Arnold, supra*, at 29-30.)

EXPANDING THE REACH OF PENAL CODE SECTION 422: PROSECUTING JUVENILE EXPRESSIONS OF ANGER AND ANGST AS "CRIMINAL THREATS"

Penal Code section 422 proscribes and punishes "criminal threats" – willfully threatening to commit a crime which will result in death or great bodily injury to another person under specified circumstances.[1]

The prosecution must establish six elements to prove a violation of section 422: 1)that the defendant willfully threatened to commit a crime which -- if actually committed -- would result in death or substantial bodily injury to another person; 2)that the defendant made the threat specifically intending that it be taken seriously as a threat, even if he had no intent of actually carrying it out; 3)that the threat was contained in a statement made verbally, in writing, or by means of an electronic communication device (e.g. telephone or computer); 4)that the statement was a true threat – on its face and under the circumstances, it was so unequivocal, unconditional, immediate and specific, as to convey to the person threatened a gravity of purpose and the immediate prospect of execution; 5)that the threat actually caused the person threatened to be in sustained fear for his own safety or immediate family's safety; and 6)that this fear was reasonable under the circumstances. (See *People v. Toledo* (2001) 26 Cal. 4th 221, 227-28; CALJIC 9.94.)

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[1] In one long and convoluted sentence, the Penal Code defines this crime:

> "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 electronic communications 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 ast 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 safety or for his or her immediate family's safety."

Prior to 2000, this crime was denominated as "terrorist threats". The Legislature changed the title to "criminal threats", but did not alter the language of the statute. (See *People v. Toledo* (2001) 26 Cal. 4th 221.)

What if the defendant voices or writes a true threat intending it to be taken seriously, but the person threatened does not suffer the sustained fear that he reasonably could have felt under the circumstances? According to our state Supreme Court, that defendant is guilty of attempted criminal threat. (*People v. Toledo* (2001) 26 Cal. 4th at 230-34.) A defendant makes an attempted criminal threat when he engages in all the conduct which would support a conviction of section 422, but that crime is not completed because of some fortuity outside the defendant's control – i.e. a written threat is intercepted, or the victim does not suffer the sustained fear that a reasonable person would experience.

What if the person making the threat is a minor? Anyone who has ever been a teenager or raised one knows that many adolescents experience feeling of alienation, angst and anger. If we are lucky, they will express these feelings verbally or artistically (in poems, pictures or song lyrics) without resorting to behavior which harms themselves or others. And yet increasingly, the government is prosecuting teenagers' threats and angry expressions as "criminal threats" – violations of Penal Code section 422. Proponents of this approach might assert that we want to identify angry teenagers and subject them to the sanctions of the juvenile delinquency system before they "act out". But are such threats really precursors of violent behavior? And aren't there more constructive ways to intervene without subjecting angry teenagers to criminal prosecution and the stigma of "juvenile delinquency"?

In recent years, high school students have had their verbal outbursts, poems and paintings labeled as "criminal threats", and allegations that they violated Penal Code section 422 by these expressions have been sustained by the juvenile courts. In two published cases, the Courts of Appeal have reversed the lower courts' jurisdictional findings. (*In re Ricky T.* (2001) 87 Cal. App. 4th 1132 [minor's verbal threat to teacher]; *In re Ryan D.* (2002) 100 Cal. App. 4th 854 [painting depicting minor shooting police officer].) However, in several unpublished cases, the appellate courts have upheld criminal threat findings for verbal outbursts that questionably qualify as true threats. Finally, in another published case, the Sixth District Court of Appeal upheld the juvenile court's finding that the minor's dark poem qualified as a criminal threat.(*In re George T.* (2002) 102 Cal. App. 4th 1422.) The California Supreme Court granted review in *George T.* (S111780), and the scope of the "criminal threats" statute is pending before the high court.

***In re George T.* (2002) 102 Cal. App. 4th 1422 [Sixth District; this case cannot be cited pending California Supreme Court review]: Does dark poetry qualify as a criminal threat?**

The minor in this case was a high school student, who goes by the name of "Julius". On Friday afternoon, while sitting in his honor's English class (but not in response to a school assignment), Julius wrote a poem entitled "Dark Poetry: Faces". In this poem, Julius included the following language:

> "For I am Dark, Destructive, & Dangerous.
> I slap on my face of happiness but inside I am evil!!
> For I can be the next kid to bring guns to kill students at school.
> So Parents watch your children cuz I'm BACK!!"

Julius was new to the high school. On that Friday afternoon, he gave his poem, "Faces" to two female students, neither of whom he knew well. First, toward the end of English class, he moved to a seat close to Mary and handed her two poems. On top was a note that said: "These poems describe me and my feelings. Tell me if they describe you and your feelings." As he handed Mary the poems, Julius appeared serious; he was not laughing and he didn't say he was kidding. He asked Mary if the school had a poetry club. Mary read "Faces" while they were still in English class and became visibly upset. She handed the poem back to Julius, who put it away without saying anything. Mary found the poem personally threatening to her. She believed that Julius was threatening to kill her and other students at the high school. Mary remained frightened throughout the entire weekend and the following week. She was afraid to go to school. Mary e-mailed her regular English teacher, who had been absent from school on Friday. She relayed the contents of "Faces", and the teacher called the police.

On Friday afternoon, Julius had also handed the poem "Faces" to another student, Erin. Erin put the poem in her pocket and did not actually read it until the next Monday. When Erin read the poem, she was also very scared. She believed that her life and her friends' lives were in danger. Erin was still scared at the time of the jurisdictional hearing.

Julius was ultimately charged and prosecuted, in a Section 602 proceeding, for making "criminal threats" to Mary and Erin. Julius claimed that he was just kidding when he wrote the poem. He did not intend his imaginative writing to be taken as a threat. He wrote "Faces" because he was having a bad day. It was just a creative expression of negative feelings.

The juvenile court sustained the allegations that Julius had made criminal threats against

Mary and Erin. The Court of Appeal found sufficient evidence to support the lower court's finding that Julius had violated section 422. First, looking at the surrounding circumstances as well as the words of "Faces", the Court found that Julius made an actual threat to bring guns to school and shoot students, and that he specifically intended that his words be taken as a threat. They did not believe that he was just kidding or expressing feelings of teenaged angst. Second, the Court found there was sufficient evidence that this was a "true threat" – so unequivocal, unconditional, immediate and specific as to convey to Mary and Erin his gravity of purpose and the immediate prospect that the threat would be executed. (It did not matter that Julius had written "I can be the next kid" to bring guns to school and had not written "I will".) Finally, the Court found that both Mary and Erin experienced sustained fear for their personal safety as a result of reading "Faces" and that this fear was reasonable.

Justice Rushing dissented from the majority's opinion in *George T.* and wrote an interesting opinion which delineates some of the arguments likely to be made before the Supreme Court. Justice Rushing urged that Julius's poem "Faces" be considered in context. It was "dark poetry", not an actual threat: "The record is devoid of any evidence showing that the poem at issue her was either a threat on its face, or a threat under the circumstances in which it was made. And like much of the poetry written today in high schools and elsewhere, it was mere hyperbole". Justice Rushing opined that when Julius gave the poem to Mary and Erin, and also asked both girls if there was a poetry club at the school, he did not intend to make a threat. Rather, he wanted to make new friends based on a shared interest in poetry. This was a lonely boy, new to the school, who tried to reach out – however, inappropriately; he was not a gun-toting criminal. Next, Justice Rushing analyzed the language about bringing a gun to school and held that it did not qualify as an "unequivocal, unconditional, immediate or specific" threat, conveying a gravity of purpose. While acknowledging that Mary and Erin were actually scared by Julius's poem, Justice Rushing concluded that their sustained fear was not reasonable. Finally, Justice Rushing stated that school authorities were right to take Julius's poem seriously. However, they should have talked to him about his dark feelings and not turned him over to the police to be prosecuted for criminal threats.

***In re Ricky T.* (2001) 87 Cal. App. 4th 1132 [First District, Division Four]**

The Court of Appeal reversed the juvenile court's finding that the minor's verbal outburst to a teacher qualified as a "criminal threat" within the meaning of section 422. The minor, Ricky, was a 16-year-old high school student. Ricky left class to use the restroom. When he returned, the classroom door was locked. Ricky pounded angrily and when the teacher opened the door, it hit Ricky in the head. Ricky responded by cursing the teacher, stating either "I'm going to get you" or "I'm going to kick your ass". However, he made no

physical movements or gestures toward the teacher. The teacher felt threatened and sent Ricky to the office. He was suspended for five days, and thereafter prosecuted in a section 602 proceeding for making a criminal threat.

The Court of Appeal found that several elements of section 422 were not proven beyond a reasonable doubt. First, Ricky's angry utterance did not qualify as a true threat. The Court stressed that one must look beyond the words used ("I'm going to get you") and consider the surrounding circumstances. Ricky's words were vague and ambiguous. Also, considering he surrounding circumstances, there was no immediacy to the threat, no prospect of imminent execution, and no gravity of purpose as would be evidenced by accompanying conduct. Second, the Court found the teacher's fear was momentary and transitory, not the sustained fear required by statute.

The Court noted that the teacher's act of sending Ricky to the office for discipline was an appropriate response to the minor's utterance of "intemperate, disrespectful remarks to [the teacher] in the presence of a classroom full of students". However, the section 602 adjudication was not appropriate:

> "It is this court's opinion that section 422 was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. Appellant's statement was an emotional response to an accident rather than a death threat that induced sustained fear." Although what appellant did was wrong, we are hesitant to change this school confrontation between a student and a teacher to a terrorist threat. Students who misbehave should be taught a lesson, but not, as in this case, a penal one." (*In re Ricky T., supra.*, at 1141.)

***In re Ryan D.* (2002) 100 Cal. App. 4th 854 [Third District]**

The Third District Court of Appeal reversed the juvenile court's finding that the minor's violent painting was a criminal threat. The minor, Ryan, was cited by Officer MacPhail, a high school police officer, for possession of marijuana. One month later, Ryan turned in an art project for a his high school painting class. In his painting, Ryan showed a young person in a hooded sweatshirt discharging a handgun into the back of the head of a female police officer. She had blood on her hair, and pieces of her flesh and face were being blown off. The officer was wearing badge No. 67 (Officer MacPhail's badge number). The art teacher found the painting "disturbing", and she took it to a school administrator. The next day, the assistant principle confronted the minor about the painting. He admitted

that he was the shooter and that Officer MacPhail was the victim; he said he painted the picture because he was angry at MacPhail for citing him for possession for marijuana. Later that day, the painting was shown to MacPhail. It made her "uncomfortable", and she stayed away from school for a few days. Eventually, Ryan was prosecuted for making a criminal threat.

The Court of Appeal concluded that the painting was a "pictorial ranting" reflecting Ryan's anger at Officer MacPhail. But it did not qualify as a violation of section 422. First, it was not clear that the painting qualified as a statement made in writing. With its use of symbolism, caricature and make-believe, a painting – even a graphically violent painting – is necessarily ambiguous. Although the surrounding circumstances may resolve this ambiguity, a painting, standing alone, is not a criminal threat. Second, assuming the painting depicted a threat, the prosecution did not prove that Ryan intended to convey that threat to Officer MacPhail. Although, the defendant need not personally communicate the threat to the victim, he must intend that it be conveyed to the victim. Here, Ryan turned in his painting to the art teacher for class credit, a full month after MacPhail had cited him for marijuana possession. There was no showing that he specifically intended that it be shown to Officer MacPhail. Finally, looking at the painting on its face and examining the surrounding circumstances, any threat conveyed by the painting was no sufficiently unequivocal, unconditional, immediate and specific so as to convey a gravity purpose and an immediate prospect of execution.

The Court concluded that the art teacher was right to show the painting to school officials and that they were right to talk to Ryan about his artistic depiction of rage. However, the matter did not warrant criminal treatment:

> " We certainly find no fault with the school authorities and the police treating the matter seriously. The painting was a graphic, if mythical depiction of the brutal murder of Officer MacPhail. Without question, it was intemperate and demonstrated extremely poor judgment. But the criminal law does not, and cannot implement a zero-tolerance policy concerning the expressive depiction of violence." (*In re Ryan D.*, supra., at 865.)