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SPECIFIC INTENT MADE MORE SPECIFIC: A CLARIFICATION OF THE LAW OF ATTEMPTED MURDER IN ILLINOIS —*PEOPLE V. HARRIS*

The essence of the crime of attempted murder is a specific intent to take life.[1] This concept has undergone a subtle but significant change in Illinois law. In a recent decision, the Illinois Supreme Court has sought to define the precise mental element necessary to sustain a conviction of attempted murder. In *People v. Harris*,[2] the court held that "to convict for attempted murder nothing less than a criminal intent to kill must be shown."[3] The significance of this seemingly straightforward holding can be better appreciated in light of prior Illinois decisions, many of which have sanctioned attempted murder charges based on something less than intent to cause death.[4]

This Note will analyze the court's treatment of the sections of the Illinois Criminal Code which define attempt and murder.[5] In particular, the opinion will be discussed in light of prior conflicting case law. The Note will then evaluate the court's reasons for adopting a position it had explicitly rejected

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1. *See, e.g.*, People v. Muir, 67 Ill. 2d 86, 91, 365 N.E. 2d 332, 335 (1977); People v. Coolidge, 26 Ill. 2d 533, 536, 187 N.E.2d 694, 696 (1963); People v. Shields, 6 Ill. 2d 200, 205, 127 N.E.2d 440, 443 (1955); People v. Bashic, 306 Ill. 341, 344, 137 N.E. 809, 811 (1922). Some of these cases involve the crime of assault with intent to murder, the pre-1961 Criminal Code equivalent of attepted murder. *Compare* ILL. REV. STAT. ch. 38, §§ 58-9 (1957) *with* ILL. REV. STAT. ch. 38, §§ 8-4, 9-1 (1977). Though there is a distinction between the two offenses—an attempt may or may not involve an assault—both the old offense and its modern counterpart require specific intent to kill.

2. 72 Ill. 2d 16, 377 N.E.2d 28 (1978).

3. *Id.* at 27, 377 N.E.2d at 33.

4. For example, in People v. Payton, 2 Ill. App. 3d 693, 276 N.E.2d 775 (5th Dist. 1971), a conviction of attempted murder was affirmed despite the defendant's protest that the indictment was fatally defective for failure to allege his shooting was "knowingly committed with intent to cause death or great bodily harm." *Id.* at 694, 276 N.E.2d at 776. The court stated that the defendant, who shot at a man ostensibly to scare him, showed "a total disregard of human life" such as to justify conviction. *Id.* at 697, 276 N.E.2d at 778. The court found a "presumptive intent" to commit murder. *Id.*, *citing* People v. Coolidge, 26 Ill. 2d 533, 187 N.E.2d 694 (1963).

See also People v. Taylor, 56 Ill. App. 2d 170, 205 N.E.2d 807 (1st Dist. 1965). The defendant in that case was acquitted of attempted murder but convicted of aggravated battery on the same facts (shooting a girl at a party). The court affirmed, noting that aggravated battery required a lesser mental state than attempted murder. Then, in apparent contradiction of its earlier statement that specific intent was the essence of attempted murder, the court observed: "Yet willful and wanton conduct such as appears when one man fires several shots at another with no apparent reason would seem to supply an adequate basis for a verdict of guilty of attempted murder *even though no specific intent were shown.*" 56 Ill. App. 2d at 173, 205 N.E.2d 808-09 (emphasis added).

5. ILL. REV. STAT. ch. 38, §§ 8-4, 9-1 (1977). *See* notes 14 & 16 *infra*.

in another recent opinion.[6] Finally, the probable effect of the decision on future cases involving attempted murder will be considered.

THE REQUIREMENT OF INTENT

Generally, the offense of attempt requires an intent to commit a particular offense and some act, other than mere preparation, toward commission of that offense.[7] Illinois cases virtually always have *recited* that specific intent[8] to kill or murder is an essential element of the crime of attempted murder. The *Harris* requirement of a "criminal intent to kill" is, apparently, a different label for the same concept. While the court did not expressly define "criminal intent," it is probable the court meant "conscious objective or purpose" rather than the less culpable mental states of knowledge or recklessness.[9]

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6. *See* text accompanying notes 34-40 *infra*.

7. In Illinois the *actus reus* of an attempt is "any act which constitutes a substantial step toward the commission of that offense." ILL. REV. STAT. ch. 38, § 8-4 (1977).

As the focus of this Note is on the intent requirement of attempted murder, a discussion of acts constituting a "substantial step" will not be considered herein. For a survey of what constitutes a sufficient overt act for attempted murder *see* Annot., 54 A.L.R.3d 612 (1974), which contains cases from various jurisdictions, including Illinois. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 59 (1972), [hereinafter cited as LAFAVE & SCOTT], for a discussion of the principles of attempt liability. *See also* Enker, *Mens Rea and Criminal Attempt*, 1977 A.B.F. RES. J. 845; Marlin, *Attempts and the Criminal Law: Three Problems*, 8 OTTOWA L. REV. 518 (1976); Smith, *Two Problems in Criminal Attempt*, 70 HARV. 422 (1957); Smith, *Two Problems in Criminal Attempts Reexamined—I*, 1962 CRIM. L.R. 135.

8. "Specific intent" rather than "general intent" is required for a criminal attempt. The distinction between the two terms has varied, causing considerable confusion in the law. General intent has been defined as "[an] intention, purpose, or design, either without specific plan or particular object, or without reference to such plan or object." BLACK'S LAW DICTIONARY 947 (rev. 4th ed. 1968). According to LAFAVE & SCOTT, *supra* note 7, at 202, "the most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." In effect, this means that while a murder may be committed without an actual intention to kill, an attempted murder cannot be, since the *purpose* of the attempt is to cause the particular result proscribed by the crime of murder. *See* Thacker v. Commonwealth, 134 Va. 767, 114 S.E. 504 (1922). *Accord*, People v. Snyder, 15 Cal. 2d 706, 104 P.2d 639 (1940). *Cf.* People v. Hood, 1 Cal. 3d 444, 82 Cal. Rptr. 618, 462 P.2d 370 (1969) (assault defined as an attempt to commit a violent act held to be a general intent crime). *See generally* Thompson & Gagne, *The Confusing Law of Criminal Intent in New Mexico*, 5 NEW MEX. L. REV. 63 (1974), for an excellent discussion of the problems involved in defining criminal intent.

9. The statutory definition of intent provides that "[a] person intends . . . to accomplish a result or engage in conduct . . . when his *conscious objective or purpose* is to accomplish that result or engage in that conduct." ILL. REV. STAT. ch. 38, § 4-4 (1977) (emphasis added). *See also* ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1972) (Committe Comments at 10) which state in reference to the murder statute, subsection (1); " 'Intends' is used as defined in section 4-4: 'his conscious objective or purpose is to accomplish that result, death or great bodily harm.' This is the actual intent, resulting from a rational choice of action . . . ."

Compare the definition of knowledge: "A person knows . . . [t]he result of his conduct, described by the statute defining the offense, when he is *consciously aware* that such result is

Initially, the court's holding may seem to merely restate the obvious. A close look at Illinois case law, however, reveals that the courts often have treated the specific intent requirement in a way which obscures the real meaning of the requisite mental element involved in attempted murder. For example, many Illinois opinions stated that specific intent can be "inferred from the character of the assault, the use of a deadly weapon or other circumstances."[10] Usually that language was followed by the assertion that "wanton and reckless disregard of human life" may be the equivalent of intent.[11] To complete the analysis, the following was mechanically recited:

> Since every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act, it follows that if one willfully does an act the direct and natural tendency of which is to destroy another's life, the natural and irresistible conclusion, in the absence of qualifying facts, is that the destruction of such other person's life was intended.[12]

These concepts may be appropriate in a case in which death has actually resulted, since general intent is all that is required for murder.[13] It is questionable, however, to use this approach to explain the mental element required for attempted murder. The effect of the constant reiteration of such

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practically certain to be caused by his conduct." ILL. REV. STAT. ch 38, § 4-5(b) (1977) (emphasis added).

Intending to kill (conscious purpose) and knowing to a practical certainty that one's acts will cause death (conscious awareness) are "substantially equivalent as to culpabiltiy." ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1972) (Committee Comments at 10) Thus, either of the above two mental states suffice for the first subsection of the murder statute. *See* note 14 *infra*. However, the second subsection of the murder statute, § 9-1(a)(2), knowing one's acts create a *strong probability* of death or great bodily harm is distinguishable from knowing one's acts *will* cause death of great bodily harm. The difference lies in the lesser degree of danger in the second situation. As a practical matter, this difference will be reflected in the penalties. Committee Comments, *supra*.

From the above discussion of mental states applicable to the murder statute the inference may be drawn that "conscious purpose" is subjective intent and "conscious awareness" is objective intent. *See* notes 50 and 55 *infra*. As stated in the Committee Comments, *supra*, the two mental states are equivalent. Though the *Harris* court did not further define criminal intent to kill, it is probable that either "subjective intent" or "objective intent" will satisfy the *mens rea* of attempted murder. This mental state, however, should be distinguished from "[knowing one's] acts create a strong probability of death" under § 9-1(a)(2).

10. *E.g.*, People v. Koshiol, 45 Ill. 2d 573, 578, 262 N.E.2d 446, 449 (1970); People v. Coolidge, 26 Ill. 2d 533, 536, 187 N.E.2d 694, 696 (1963); People v. Smith, 71 Ill. App. 2d 446, 454, 219 N.E.2d 82, 87 (1st Dist. 1966). *See also* Annot, 54 A.L.R. 3d 612, 629 (1974).

11. *See, e.g.*, People v. Coolidge, 26 Ill. 2d 533, 537, 187 N.E.2d 694, 697 (1963).

12. *Id. Coolidge* is only one of the large number of cases which repeat this language. For a collection of Illinois cases which allow inferred or presumed intent to support a finding of specific intent for attempted murder, *see* Annot., 54 A.L.R 2d 612, 629 (1974). The presumption language was used as recently as the supreme court's decision in People v. Muir, 67 Ill. 2d 86, 365 N.E.2d 332 (1977), overruled in part by the instant case. *See* note 50 and accompanying text *infra*.

13. *See* note 8 *supra* and note 51 *infra*.

language in Illinois opinions has been the dilution of the intent requirement of attempted murder.

Much of the resulting confusion has been caused by the statutory definition of murder.[14] Since attempt is an inchoate offense, it must be analyzed in terms of the principal crime to which it relates. The murder statute allows different mental states to suffice for a conviction of murder.[15] The question, then, becomes: which of these mental states are permissible when the crime is an attempt[16] to commit murder? It is this question that the court in *Harris* finally settled.

THE HARRIS DECISION

In a consolidated appeal[17] the court invalidated attempted murder jury instructions which did not require a criminal intent to kill.[18] At the trial level in both cases, *People v. Harris* and *People v. Shields*, the defendants were charged with attempted murder. The issue common to both appeals was the propriety of instructions[19] based on the statutory definition of mur-

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14. ILL. REV. STAT. ch. 38, § 9-1(a) (1977) defines murder:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

15. ILLINOIS PATTERN INSTRUCTIONS—Criminal § 7.01 (1968) is adapted from ILL. REV. STAT. ch. 38, § 9-1(a) and lists four subsections for use in a murder instruction, which may be paraphrased as follows:

> (1) intent to kill or do great bodily harm, or
> (2) knowlege that one's acts will cause death, or
> (3) knowledge that one's acts create a strong probability of death or great bodily harm, or
> (4) an attempt to commit or a commission of a forcible felony.

Subsections (1) and (2) are based on § 9-1(a)(1). Subsections (3) and (4) correspond to § 9-1(a)(2) and § 9-1(a)(3), respectively.

16. ILL. REV. STAT. ch. 38, § 8-1(a) (1977) defines attempt:

> A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

17. People v. Harris, 43 Ill. App. 3d 1074, 364 N.E.2d 122 (4th Dist. 1977) (order under Supreme Court Rule 23); People v. Shields, 54 Ill. App. 3d 1020, 370 N.E.2d 654 (3d Dist. 1977).

18. 72 Ill. 2d 16, 27, 377 N.E.2d 28, 33 (1978).

19. 72 Ill. 2d at 18, 377 N.E.2d at 29. While the sufficiency of the indictments was not directly in issue in *Harris*, the rationale of requiring jury instructions to charge intent to kill applies with equal force to indictments. Also, the court implicitly approves the application of its holding to attempted murder indictments by reference to a previous case in which the court "correctly held that *both* the indictment and the instructions were defective in that they permitted the jury to find the defendant guilty of attempted murder if concluded that the defendant

der. In *Shields*,[20] one of the challenged instructions incorporated Section 9-1(a)(2) of the Illinois murder statute, which provides that a person commits murder "if, in performing the acts which cause the death, he knows that such acts create a strong probability of death or great bodily harm."[21] In *Harris*,[22] one of the instructions was based on Section 9-1(a)(1), which provides

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knew that his acts created a strong probability of great bodily harm to another person even if the evidence did not show that the defendant had acted with an intent to kill." 72 Ill. 2d at 26, 377 N.E.2d at 33, *referring to* People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977) (emphasis added). Throughout this Note, therefore, references to indictments are assumed to be included in the court's reasoning with respect to jury instructions.

20. Shields was indicted for aggravated battery and attempted murder because of a shooting which took place after a fight between the defendant and his neighbor. Apparently, what had begun as a social visit developed into a brawl. The neighbor, highly intoxicated, caused a commotion in the defendant's apartment and damaged a table. Finally, his mother and sister were able to remove him from the defendant's apartment. Shortly thereafter, the defendant took his rifle over to the neighbor's apartment and threatened the man. At some point, the defendant's rifle discharged, injuring the neighbor's mother.

At the trial, the jury was instructed on the elements of attempted murder and aggravated battery. The jury found the defendant guilty on both counts. The court entered a judgment solely on the attempted murder charge because in Illinois, aggravated battery is an "included offense" of the crime of attempted murder. Included offenses are ones which are "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the crime charged." ILL. REV. STAT. ch. 38, § 2-9 (1977). A defendant cannot be sentenced on both offenses arising out of the same facts, because the lesser crime is considered to merge into the greater crime.

21. 72 Ill. 2d at 22, 377 N.E.2d at 31. The *Shields* instructions defining the offense of attempted murder were drafted as follows,

> A person commits the crime of attempt who, with intent to commit murder, does any act which constitutes a substantial step toward the commission of the crime of murder . . . .

ILLINOIS PATTERN INSTRUCTIONS—Criminal § 6.05 (1968) (general attempt instruction).

To sustain the charge of attempt, the State must prove the following propositions:

> (1) That the defendant performed an act which constituted a substantial step toward the commission of the crime of murder; and
>
> (2) That the defendant did so with the intent to commit the crime of murder.

ILLINOIS PATTERN INSTRUCTIONS—Criminal § 6.07 (1968) ("issue" instruction).

> A person commits the crime of murder who kills an individual if, in performing the acts which cause the death, he knows that such acts create a strong probability of death or great bodily harm to that individual.

ILLINOIS PATTERN INSTRUCTIONS—Criminal § 7.01 (1968) (alternative subsection 3) *See* note 15 *supra*. Use of pattern instructions in Illinois is required whenever applicable unless the court determines that an instruction does not accurately state the law. ILL. REV. STAT. ch. 110A, § 451 (1977).

22. In the lower court Harris was charged with attempting to murder a woman during a quarrel in which he accused her of infidelity. The shooting occurred when the woman tried to escape from the defendant in her automobile, after a prolonged argument. The defendant had a gun and evidently shot at the automobile as it drove away. Although there were no eye witnesses to the occurrence, police testified at the trial that they found the defendant near the scene of the incident. They also found a bullet fragment on the back seat of the car. On these facts the defendant was convicted of attempted murder.

that a person commits murder "if, in performing the acts which cause the death, he either intends to kill or do great bodily harm." The supreme court found that both instructions were susceptible to the interpretation by a jury that a person could be found guilty of attempted murder even if he did not actually intend to cause death.[23] The instructions, therefore, were deemed erroneous.

CONTRADICTORY OPINIONS

Three times in less than twelve months the Illinois Supreme Court confronted the same issue:[24] whether any mental state other than actual intent to kill may be set out in indictments or instructions pertaining to an attempted murder prosecution. By deciding that issue in the negative the court resolved a troublesome question of law and attained a fair and logical result. Much uncertainty had been created by the supreme court's prior inconsistent opinions[25] and the contradictory decisions of some of the state's appellate courts.[26]

The *Harris* court realized that the chief problem concerning the instructions in both appeals was that the offense of attempted murder was defined in the exact terms of the murder statute.[27] An instruction giving the statutory definition of attempt coupled with one giving the statutory definition of murder would seem to define exactly the crime of attempted murder.[28] However, since Section 9-1(a) contains alternative definitions, some of which will sustain a murder conviction absent an actual intention to kill, the court found it erroneous to base indictments or instructions on Section 9-1(a) in its entirety.[29] To illustrate this point the court cited *People v. Viser*,[30] a deci-

23. 72 Ill. 2d at 27, 377 N.E.2d at 33.

24. The other supreme court cases involving this issue are People v. Muir, 67 Ill. 2d 86, 365 N.E.2d 332 (1977), and People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977). *See* text and accompanying notes 34-45 *infra*.

25. *Compare* People v. Muir, 67 Ill. 2d 568, 343 N.E.2d 903 (1977) *and* People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 446 (1970) *with* People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977) *and* People v. Viser, 62 Ill. 2d 568, 343 N.E.2d 903 (1975).

26. *Compare* People v. Payton, 2 Ill. App. 3d 693, 276 N.E.2d 775 (5th Dist. 1971) *and* People v. Taylor, 56 Ill. App. 2d 170, 205 N.E.2d 807 (1st Dist. 1965) *with* People v. Trinkle, 40 Ill. App. 3d 730, 353 N.E.2d 18 (4th Dist. 1976), *aff'd* 68 Ill. 2d 198, 369 N.E.2d 888 (1977) *and* People v. Muir, 38 Ill. App. 3d 1051, 349 N.E.2d 423 (2d Dist. 1976), *rev'd*, 67 Ill. 2d 86, 365 N.E.2d 332 (1977). *See also* Doherty, *The Strange Fate of Two Men Named David: The Need for Symmetry in the Criminal Law*, 66 ILL. B.J. 518 (1978), which traces the irregular routes of *Trinkle* and *Muir* through the appellate and supreme courts.

27. 72 Ill. 2d at 23, 24, 377 N.E.2d at 31. *See* notes 14 & 15 *supra*.

28. *See* note 21 *supra*.

29. 72 Ill. 2d at 24, 377 N.E.2d at 31. The court cited People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 447 (1970), for the proposition that "in a trial for attempted murder it is not error to give an instruction defining the elements of murder." 72 Ill. 2d at 24, 377 N.E.2d at 31. Of course, it would not make sense to instruct a jury on attempt in the abstract without reference to the specific offense attempted. The point the court is making is that in attempted murder cases the literal language of the murder statute cannot be used *in toto*.

30. 62 Ill. 2d 568, 343 N.E.2d 903 (1975).

sion in which the court had recognized that an attempted murder charge could not be based on Section 9-1(a)(3) of the murder statute, which defines felony murder.[31] The *Viser* court struck down the felony murder instruction because "attempt requires 'an intent to commit a specific offense'. . . while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result."[32]

The supreme court had a chance to extend the *Viser* rationale to instructions based on Section 9-1(a)(2)[33] in *People v. Muir*.[34] The defendant, Muir, had been convicted of attempted murder for firing a gun at a police officer.[35] The appellate court reversed Muir's conviction on grounds that the indictment and instructions were erroneous, as they required only a showing that the defendant had acted with knowledge of the probability of death or great bodily harm rather than actual intent to kill.[36] The supreme court, however, reversed the appellate court and held that the instruction was proper. The court went on to state that specific intent to kill could be inferred from the circumstances of the defendant's actions since everyone is presumed to intend the probable consequences of his voluntary acts.[37] It then concluded that "the law in this area is well established in this State."[38]

Four months after the *Muir* pronouncement the supreme court, in *People v. Trinkle*,[39] held that the mental state of knowing that one's actions created a strong probability of great bodily harm was insufficient to sustain an attempted murder conviction. The court thus abruptly changed its position, without mentioning the contrary holding and rationale of *Muir*.[40]

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31. "A person who kills an individual . . . commits murder if, in performing the acts which cause the death . . . he is attempting or committing a forcible felony . . . . ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1977).

32. People v. Viser, 62 Ill. 2d 568, 581, 343 N.E.2d 903, 910 (1975).

33. *See* note 21 *supra*. The *Muir* instructions were the same as those set forth in *Shields*.

34. 67 Ill. 2d 86, 365 N.E.2d 332 (1977).

35. The gun failed to discharge but the evidence showed that two cartridges were jammed in the barrel. 67 Ill. 2d at 89-90, 365 N.E.2d at 334.

36. People v. Muir, 38 Ill. App. 3d 1051, 1057-58, 349 N.E.2d 423, 429-30 (2d Dist. 1976).

37. People v. Muir, 67 Ill. 2d 86, 92, 365 N.E.2d 332, 335 (1977) (two justices dissenting). The appellate court's opinion was adopted by Supreme Court Justices Moran and Goldenhersh as their dissent from the majority opinion. *Id.* at 96, 365 N.E.2d at 335. Compare Justice Ryan's dissenting opinion in *Harris*, note 52 *infra*.

38. 67 Ill. 2d at 91, 365 N.E.2d at 335.

39. 68 Ill. 2d 198, 369 N.E.2d 888 (1977).

40. The *Trinkle* court's failure to mention *Muir's* holding is inexplicable, especially in view of the short period of time separating the two decisions. It should be noted, however, that the fact situations in the two cases were quite different. In *Muir*, the defendant pointed a gun directly at a police officer and pulled the trigger. In *Trinkle*, a drunken man shot at a building and inadvertently hit a man standing behind the door of the building. It is possible that the indictment and instructions in *Muir* were upheld in part because the defendant's intent to kill the policeman seemed highly likely; therefore, there would be less danger that a jury might find the defendant guilty without an intent to kill.

The *Harris* holding is actually an affirmation and extension of the *Trinkle* opinion. In *Trinkle*, the defendant was refused further service at a tavern after drinking there all day. Threatening to "shoot or blow up the bar," he left, bought a gun and returned to the street outside of the tavern. There he shot at the building and injured a customer who, unknown to Trinkle, had been standing behind the door. The trial court found the defendant guilty of attempted murder. On appeal, the court reduced the offense from attempted murder to aggravated battery.[41] The court held that since specific intent to kill was necessary to support the conviction of attempted murder, inclusion of the words "great bodily harm" in the indictment and jury instructions created an impermissible inference that the jury could find Trinkle guilty of attempted murder solely for inflicting great bodily harm.[42] Since the effect of such an instruction would be to permit an attempted murder conviction to be based on proof of the same elements as aggravated battery,[43] a lesser offense requiring a less culpable mental state, the appellate court concluded that the indictment and instructions were fatally defective.[44] The supreme court agreed.[45]

The decision in *Harris* follows logically from *Trinkle*. In fact, it appears to be mandated by the *Trinkle* holding. Regarding the consolidated appeals before it, the court found the instructions in *People v. Shields* to be identical to the defective instruction in *Trinkle*.[46] As the jury instruction approved in *Muir* was also the same, the court expressly overruled that part of the *Muir* holding which upheld the indictment and instructions based on Section 9-1(a)(2).[47] By extension, the court struck down the instruction involved in

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41. ILL. REV. STAT. ch. 110A § 615(b)(3) (1977) gives courts of review the power, in limited situations, to reduce the degree of an offense.

42. People v. Trinkle, 40 Ill. App. 3d 730, 353 N.E.2d 18 (4th Dist. 1976), *aff'd*, 68 Ill. 2d 198, 369 N.E.2d 888 (1977). The appellate court in *Trinkle* found the evidence against the defendant insufficient to support a conviction of attempted murder because his acts were directed against property and not against a person. Since a man was injured by the shooting, the proper charge to be placed against the defendant was aggravated battery, which does not require the intent to kill. *See* note 43 *infra*.

43. ILL. REV. STAT. ch. 38, § 12-4(a) (1977) defines aggravated battery: "A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery . . . .

A person who, in committing a battery uses a deadly weapon . . . commits aggravated battery."

44. 40 Ill. App. 3d at 734, 353 N.E.2d at 22.

45. People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977). By requiring the indictment and instructions to charge a specific intent to commit the specific offense (to kill), the court primarily sought to keep distinct the crimes of aggravated battery and attempted murder. The possibility that a defendant could be convicted of attempted murder for committing aggravated battery concerned the court largely because of the difference in penalties for the two crimes. The greater severity of the attempted murder penalty, according to the court, "puts in focus the materiality of the mental state of the accused." *Id.* at 202, 369 N.E.2d at 890. *See* notes 56-64 and accompanying text *infra*.

46. 72 Ill. 2d at 27, 377 N.E.2d at 33. *See* note 21 *supra*.

47. 72 Ill. 2d at 27, 377 N.E.2d at 33.

People v. Harris, which was based on Section 9-1(a)(1).[48] Thus, as a result of the *Harris* holding, the use of attempted murder indictments and jury instructions containing the words "or cause great bodily harm" will henceforth constitute reversible error.

ANALYSIS

Because the Illinois Supreme Court adopted a new rule of law in *Harris*, it should have given a more complete discussion of previous cases. No mention was made of the many opinions in which the courts recited the incantation that "every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act . . . ."[49] Especially in need of consideration was the *Muir* court's express rejection of those authorities which criticize the use of the presumed intent language in the context of proving specific intent.[50] Instead of offering a thoughtful evaluation of its change in viewpoint, the court cited a passage from a criminal law treatise[51] to support its decision. The court's failure to explain its switch in

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48. Because of the magnitude of potential harm caused by the erroneous instruction, the court rejected the State's argument that Harris' failure to renew his objection in his post-trial motion operated as a waiver of his rights. 72 Ill. 2d at 28, 377 N.E.2d at 33, 34. The court invoked the "plain error" doctrine, stating that "substantial defects (regarding jury instructions) are not waived by a failure to make objections thereto if the interests of justice require." *Id.* *See* ILL. REV. STAT. ch. 110A, § 451(c) (1977).

49. *See* note 12 and accompanying text *supra*.

50. *E.g.*, LAFAVE & SCOTT, *supra* note 7, at 203; R. PERKINS, CRIMINAL LAW, ch. 6 at 575 (2d ed. 1969). *See* State v. Lanahan, 12 Ariz. App. 446, 471 P. 2d 748 (1970); People v. Snyder, 15 Cal. 2d 706, 104 P.2d 639 (1940); Thacker v. Commonwealth, 134 Va. 767, 114 S.E. 504 (1922).

Apparently, the *Muir* court advocated an objective standard to infer intent from the dangerousness of the defendant's actions as opposed to one based on the defendant's conscious purpose to cause death. While a jury might well infer the intent to commit murder from either standard, it would seem preferable for a court to omit any reference to legal preferences or presumptions and let the jury decide on the basis of all the evidence. *See* notes 54 and 55 *infra*.

51. The court stated that:

> [o]bservations of LaFave & Scott (*Criminal Law* sec. 59, at 428-29 (1972)) are representative of authority that it is not sufficient to prove attempted murder to show that the accused intended to cause serious bodily harm. "Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if A, B, and C have each taken the life of another, A acting with intent to kill, B with an intent to do serious bodily harm, and C with a reckless disregard of human life, all three are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only A is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm or that he acted in reckless disregard for human life. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)."

72 Ill. 2d at 27, 28, 377 N.E.2d at 33.

position loses importance, however, because the logic of the new rule is readily apparent.[52]

Of greater significance, perhaps, is the fact that the court did not promulgate guidelines regarding the acts or circumstances which may give rise to an inference of an accused's intent to kill. The court did not repeat the once seemingly axiomatic words that "specific intent can be inferred from the character of the assault, the use of a deadly weapon and other circumstances."[53] Whether or not this omission was deliberate, it was probably salutory. Had the court set out guidelines to determine intent, future attempted murder decisions might elevate those suggestions to the status of presumptions, a possibility well-illustrated by the number of cases using the presumed intent language.[54] By refusing to elaborate on which factors

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52. *But see* the dissent in People v. Harris, 72 Ill. 2d 16, 29-35, 377 N.E.2d 28, 34-37 (1978) (Ryan, J., dissenting in part). As the author of the *Muir* decision, Justice Ryan sought to clarify his earlier opinion. According to him, the indictments and instructions in *Muir* and *Trinkle* were distinguishable and therefore not inconsistent. Basically, his point was that instructions must be read together as a series and, if on the whole, they fairly state the law, the instructions are sufficient. In *Muir*, he stated, the issue instruction to the jury included the requirement that the State prove beyond a reasonable doubt that the defendant acted with intent to commit murder *in addition to* the instruction based on § 9-1(a)(2), which used the "knowledge of great bodily harm" language to describe the defendant's criminal actions. *Trinkle*, on the other hand, involved an issue instruction framed in such a way that the State need only prove the defendant acted with knowledge that his acts created a strong probability of death or great bodily harm, without the reference to "intent to murder." The fact that the instructions in both cases went on to define murder in the terms of § 9-1(a)(2) did not alter Justice Ryan's defense of the validity of the *Muir* holding, even though he agreed with the majority in *Harris* that the great bodily harm language should be excised from the *Harris* instruction based on § 9-1(a)(1). Ryan's argument is unduly confusing and technical, compared with the much simpler solution of the majority to require intent to kill only.

A reading of earlier cases indicates that, traditionally, indictments and instructions have not been challenged on the basis of the statutory construction of the offense of attempted murder. Instead, appeals in attempted murder cases have been based on grounds such as insufficiency of the evidence, *see, e.g.*, People v. Henry 3 Ill. App. 3d 235, 278 N.E.2d 547 (1st Dist. 1971) (evidence held insufficient to establish defendant's "wanton and reckless disregard" for human life from which intent to kill could be inferred), or failure of the indictment to adequately allege the particular acts constituting the charge, *see, e.g.*, People v. Mass, 31 Ill. App. 3d 759, 334 N.E.2d 452 (2d Dist. 1975) (information charging the defendant with "intent to kill and murder" held sufficient to inform defendant of the charges against him).

53. *See* text accompanying note 10 *supra*.

54. *See* notes 10-12 and accompanying text *supra*. The term "presumption" may be misleading as used in the cited cases. A true presumption has procedural effects, requiring an accused to produce evidence to rebut the presumption. It is likely that the language that one is "presumed to intend the natural consequences of his acts" is actually a permissible inference for the fact-finder. LAFAVE & SCOTT, *supra* note 9, at 203.

It is doubtful that a true presumption of intent in attempted murder cases would be constitutionally valid. *See* State v. Odom, 83 Wash. 2d 541, 520 P.2d 152 (1974), *cert. den.* 419 U.S. 1013 (1974), in which the Supreme Court of Washington struck down a statutory presumption that a defendant's possession of an unlicensed pistol was prima facie evidence of intent to commit a violent crime. The court held the statute to be unconstitutional since it deprived the defendant of the presumption of innocence.

may properly be used to infer a criminal intent to kill, then, the court allows for case-by-case jury determination of the existence of intent to kill.[55] This in turn reaffirms the proper balance of roles between the judge as the interpreter of the law and the jury as finder of fact.

Most importantly, *Harris* clarifies a formerly confused area of the criminal law in Illinois by limiting attempted murder jury instructions to intent to kill. This is fair to defendants and imposes no major additional burden upon prosecutors. Theoretically, at least, attempted murder will be sharply distinguished from lesser included offenses[56] such as aggravated battery,[57] aggravated assault[58] or reckless conduct.[59] As discussed above, if a conviction for attempted murder could be sustained on grounds that the defendant acted with the intent to cause great bodily harm or with knowledge that his actions would probably cause such harm, there would be no practical distinction between attempted murder and aggravated battery.

Clearly, the legislature did not intend the commingling of separate offenses.[60] In fact, one of the purposes of the drafters of the Criminal Code

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Regarding the propriety of presumptive language in a jury instruction, the supreme court of Wyoming held that such language had the effect of precluding a jury from finding guilt beyond a reasonable doubt. Steubgen v. State, 548 P.2d 870 (Wyo. 1976). *But cf.* State v. McCarter, 36 Wis. 2d 608, 153 N.W.2d 527 (1967) (Wisconsin rule applicable in all criminal cases, including those in which specific intent is an element of the offense, is that "all sane men are presumed to intend . . ."). *See generally* Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

55. The court's failure to elaborate on what constitutes permissible inferences of criminal intent to kill, however, may give rise to the question of whether objective or subjective criteria should be used. *See* note 50 *supra*. Though the distinction between the two standards is not clear, generally the objective viewpoint looks to the dangerousness of the actor's conduct and other circumstances while the subjective viewpoint focuses on the actor's state of mind. *See generally* MODEL PENAL CODE 501.3, Comment (Tent. Draft No. 10, 1960).

It seems that the distinction between the two standards is artificial and irrelevant to a large extent, as under either standard the jury will have to infer intent from the actor's conduct and other circumstances. By focusing on the purpose or disposition of the actor, however, courts may avoid diluting the attempt law by eliminating the presumed intent language.

56. *See* ILL. REV. STAT. ch. 38, § 2-9 (1977).

57. A person commits aggravated battery who "intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement . . ." ILL. REV. STAT. ch. 38, § 12-4 (1977). Aggravated battery is a Class 3 felony. *Id. See also* note 64 *infra*.

58. "A person commits an assault . . . he engages in conduct which places another in reasonable apprehension of receiving a battery." ILL. REV. STAT. ch. 38, § 12-1(a) (1977).

"A person commits an aggravated assault, when, in committing an assault, he: (1) Uses a deadly weapon . . ." ILL. REV. STAT. ch. 38, § 12-2 (1977). Aggravated assault is a Class A misdemeanor. *Id. See also* note 64 *infra*.

59. "A person who causes bodily harm to or endangers the bodily safety of an individual . . . by any means, commits reckless conduct if he performs recklessly the acts which cause the harm . . ." ILL. REV. STAT. ch. 38, § 12-5(a) (1977). Reckless conduct is a Class A misdemeanor. *Id. See also* note 64 *infra*.

60. The appellate court in *Muir* recognized this. *See* People v. Muir, 38 Ill. App. 3d 1051, 1057, 349 N.E.2d 423, 429 (1976).

of 1961 was to eliminate overlapping and inconsistent criminal provisions.[61] Limiting the mental state for attempted murder to intent to kill is consonant with this legislative policy. In addition to revising the categories of substantive offenses the legislature re-drafted sentencing provisions[62] to coordinate the seriousness of the crime with the severity of the sanction.[63] The *Harris* holding vindicates this legislative scheme by ensuring that a person accused of attempted murder will not be given the harsher attempted murder penalty if the evidence fairly shows him guilty only of a lesser offense.[64]

From the prosecutor's perspective, however, *Harris* may be viewed as an obstacle to obtaining penalties commensurate to the gravity of criminal conduct in some situations. The facts of *Harris* provide an example.[65] The basis of the attempted murder charge against Harris was that he had shot at a woman as she drove away from him, following a quarrel. There were no witnesses to the occurrence. Aside from the woman's testimony, the only evidence offered was policy testimony that a bullet had been found in the back seat of the woman's car and that the glass in the rear window was broken. Also, police stated that the defendant was arrested near the scene of the incident.

Because the supreme court remanded the case, Harris has been granted a new trial.[66] The jury in that trial, of course, will be instructed on the ele-

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61. *See* ILL. ANN. STAT. ch. 38, § 12-1 (Smith-Hurd 1972) (Committee Comments at 502). Prior to the enactment of the Criminal Code of 1961, attempts were mixed with assaults, with batteries and with aggravated batteries. Accordingly, "this indiscriminate mixture tended to blend and confuse the traditional, and often times desirable distinctions between those offenses." *Id.*

62. *See* ILL. REV. STAT. ch. 38, §§ 1005-1-1–1005-9-1 (1977).

63. *See* ILL. REV. STAT. ch. 38, § 1001-1-2 (1977). *See also* Pusateri & Scott, *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62 (1972), which states that the purpose of classifying offenses into graded categories for sentencing purposes is to create an ordered system of offenses by seriousness and to simplify the sentencing choices of judges. *Id.* at 69. The ultimate purpose of the Code is to eliminate disparity of sentencing and to produce more even-handed justice. *Id.* Recent amendments to the Code of Corrections have added Class X, a new classification of felonies. *See* ILL. REV. STAT. ch. 38, § 1005-5-1 (Supp. 1977).

64. There are substantial differences in the penalties prescribed for attempted murder and aggravated battery, aggravated assault and reckless conduct. The maximum sentence for attempted murder is that of a Class X felony. ILL. REV. STAT. ch. 38, § 8-4(c)(1) (Supp. 1977). Class X felonies are punishable by a prison term of not less than six years and not more than 30 years. ILL. REV. STAT. ch. 38, § 1005-8-1(3) (Supp. 1977). Aggravated battery, a Class 3 felony, carries a 2-5 year sentence. ILL. REV. STAT. ch. 38, § 1005-8-1(6) (Supp. 1977). Aggravated assault and reckless conduct are Class A misdemeanors, which carry a one year maximum term of imprisonment. Note that felony prison terms may be extended beyond the sentences provided in § 1005-8-1 when aggravating factors are present. ILL. REV. STAT. ch. 38, § 1005-8-2 (Supp. 1977). There is no comparable provision regarding misdemeanor sentences. Thus, conceivably, the attempted murder (Class X felony) sentence could be raised to a term of 30-60 years. *Id.*

65. People v. Harris, 48 Ill. App. 3d 1074, 370 N.E.2d 315 (4th Dist. 1977) (order under Supreme Court Rule 23). There is no reported opinion of the appellate court, so the facts given in the text are taken from the supreme court's opinion in People v. Harris, 72 Ill. 2d 16, 377 N.E.2d 28 (1978).

66. 72 Ill. 2d at 28, 377 N.E.2d at 34.

ments of attempted murder without the great bodily harm language. The prosecutor may fear that the evidence against Harris is insufficient to prove actual intent to kill. Moreover, since the woman was not injured, aggravated battery is inapplicable. Initially, it may appear that the only other charges which may be brought against the defendant are aggravated assault or reckless conduct, both of which are misdemeanors.[67] Yet, Harris' conduct certainly created a grave risk of harm. The prosecutor then, may perceive a gap in the continuum of criminal conduct and appropriate sanctions.

One solution may be to use the flexibility of the Criminal Code's Section 8-4 and charge *attempted aggravated battery*.[68] This offense differs from aggravated assault in that the victim need not be placed in apprehension of a battery.[69] Instead, the emphasis is on the perpetrator's conduct and mental state.

The potential sanctions for attempted aggravated battery are greater than those for aggravated assault.[70] This charge would be available to fill the gap between attempted murder and aggravated assault or reckless conduct. Of course, the attempted aggravated battery conviction could be sustained only if the circumstances were such that a jury could reasonably infer that the defendant had a "criminal intent" to cause an aggravated battery.

As a practical matter, it is unlikely that the number of convictions for attempted murder will decrease greatly. To be sure, in some cases, prosecutors may wish to seek indictments for attempted aggravated battery rather than attempted murder. In cases involving extreme fact patterns,[71]

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67. *See* notes 58, 59 and 64 *supra*.

68. There appears to be no barrier to charging such an offense. In fact, there is a suggestion of legislative approval to such an offense:

"It is the intent of sections 8-4 (Attempt) and 12-1 (Assault) to identify attempted batteries as attempts, governed by the same rules that govern all attempts, and conduct which . . . places another in reasonable apprehension of receiving a battery as an assault." ILL. ANN. STAT. ch. 38, § 12-1 (Smith-Hurd 1972) (Committee Comments at 503).

69. Compare notes 57 and 58 *supra*.

70. *See* note 64 *supra*. Sentences for aggravated assault are limited to one year by the classification of the offense as a misdemeanor. Under the sentencing provisions of the attempt statute, it is clear that a sentence for attempted aggravated battery cannot exceed that of a Class 4 felony which carries a three year maximum. *See* ILL. REV. STAT. ch. 38, § 8-4(c)(5); § 12-4(d); § 1005-8-1 (Supp. 1977). It appears that a prosecutor may seek imposition of a harsher term than those set out in other code provisions, if aggravating factors are present. ILL. REV. STAT. ch. 38, § 1005-5-3.2 (Supp. 1977). Under the facts surrounding Harris' conduct, the prosecutor may invoke § 1005-5-3.2(1) which recognizes as an aggravating factor the fact that "the defendant's conduct caused or threatened serious harm." This factor would raise Harris' sentence (on an attempted aggravated battery conviction) from 1-3 years to 5-10 years. *See* ILL. REV. STAT. ch. 38, § 1005-8-2(5) (Supp. 1977).

71. If, for example, the actor's purpose were to demolish a building and, *knowing* and believing that persons in the building would be killed in the explosion, the actor nonetheless detonated a bomb, there would be an attempt to kill even though it was no part of the actor's purpose—i.e., he did not consciously desire—that the building's inhabitant's should be killed. MODEL PENAL CODE 501.3, Comment (Tent. Draft No. 10 1960).

however, it is probable that the fact finder will be able to infer the intent necessary to sustain an attempted murder conviction. In close cases, involving a high degree of uncertainty and conflicting testimony,[72] the jurors will now be given unambiguous instructions upon which to base their decision.

CONCLUSION

Besides redefining the mental state required to sustain a conviction of attempted murder, *Harris* promotes clarity of analysis by eliminating the presumed intent language which has cluttered so many opinions in the attempted murder area. Prosecutors are now on notice that nothing less than carefully drafted indictments and instructions requiring intent to kill will withstand judicial review. Most importantly, criminal defendants accused of attempted murder will be afforded greater protection of the law.

Nancy Lea Barrett

In such a case as the above hypothetical, it is likely that a jury would find the defendant had an intent to kill, despite his argument that he only wished to destroy the building. Note, however, that the conduct described above should not be called a "reckless disregard of human life" in the attempt situation, to avoid the presumed intent problem. *See* notes 11-12 and accompanying text *supra*.

72. The facts of *Shields* and *Harris* appear to fall into this category. *Cf.* People v. White, 7 Ill. App. 3d 1074, 288 N.E.2d 705 (1st Dist. 1975). (This case involved a shooting incident in which the defendant was charged with attempted murder and aggravated battery. The significant fact in the defendant's acquittal of the attempted murder charge was that, although he was a Viet Nam veteran with expertise as a sharpshooter, he inflicted only non-fatal wounds on the victim (i.e., in the foot) despite firing at close range).